

Focus on purpose – What Does a World-Leading Framework of Charities Law Look Like?

Charities
LAW REFORM
AOTEAROA NEW ZEALAND

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by S Barker



by Sue Barker (LLB(Hons)(First class)/BCA/CA)
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Persons referred to in this report may or may not be aligned with its contents, for which the author takes sole responsibility.



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Glossary

9/11	the terrorist attacks against the United States carried out on 11 September 2001
ACCS	Advisory Committee on the Charitable Sector (Canada)
ACNC	Australian Charities and Not-for-profits Commission
AML/CFT	anti-money laundering and countering financing of terrorism
Aotearoa	a Māori name for New Zealand, understood to translate broadly to “the land of the long white cloud”
aroha	love ¹
atawhai	kindness, generosity
ATO	Australian Tax Office
CCEW	Charity Commission for England and Wales
CCNI	Charity Commission for Northern Ireland
Charities Act	Charities Act 2005 (NZ)
Charities Board	the Charities Registration Board Te Rātā Atawhai
Charities Services	the Department of Internal Affairs – Charities Services Ngā Ratonga Kaupapa Atawhai
CIC	Community Interest Company
CIO	Charitable Incorporated Organisation
CLANZ	the Charity Law Association of Australia and New Zealand
Companies Act	Companies Act 1993 (NZ)
CPC	the Communist Party of China
CRA	Canada Revenue Agency
CRA	An Rialálaí Carthanas The Charities Regulatory Authority (Ireland)
CRG	Core Reference Group for the Department of Internal Affairs’ review of the Charities Act
DIA	Te Tari Taiwhenua the Department of Internal Affairs
draft Bill	a draft Bill to amend and restate the Charities Act 2005 was prepared as part of the research in 2020 and circulated for review and comment

1 Translations of Māori words are taken from John C Moorfield *Te Aka Māori Dictionary* 2003 - 2022: maoridictionary.co.nz/.

election forum	election forum held on 10 June 2020 in advance of the October 2020 general election, with the support of the Todd Foundation, and in collaboration with Hui E! Community Aotearoa, Trust Democracy and ComVoices. Representatives from six political parties took part
FATF	Financial Action Task Force
Fellowship	the 2019 International Research Fellowship Te Karahipi Rangahau ā Taiao
FINZ	Fundraising Institute of New Zealand Incorporated Matatika Mātauranga Kaitautoko (CC55344) ²
flaxroots	similar to “grassroots” but with a more inclusive New Zealand flavour
GTPP	the generic tax policy process
hapū	a kinship group, clan, or subtribe – a section of a large kinship group and the primary political unit in traditional Māori society. Hapū consist of a number of whānau sharing descent from a common ancestor, usually being named after the ancestor, but sometimes from an important event in the group’s history. A number of related hapū usually share adjacent territories forming a looser tribal federation (iwi)
HMRC	Her Majesty’s Revenue and Customs, the United Kingdom tax authority
Incorporated Societies Act	Incorporated Societies Act 1908 (NZ)
IRD	the Inland Revenue Department Te Tari Taake
IRS	the Internal Revenue Service (US)
iwi	extended kinship group or tribe, often referring to a large group of people descended from a common ancestor and associated with a distinct territory
kaitiakitanga	guardianship, stewardship, trusteeship, trustee
kaupapa	topic, policy, matter for discussion, plan, purpose, scheme, proposal, agenda, subject, programme, theme, issue, initiative
koha	gift, present, offering, donation, contribution - especially one maintaining social relationships and has connotations of reciprocity
kōrero	speech, discussion
kotahitanga	unity, togetherness, solidarity, collective action
Law Commission	Te Aka Matua o te Ture - Law Commission
Law Foundation	New Zealand Law Foundation Te Manatū a Ture o Aotearoa
mahi	work (the type of work you might “put your back into”)

2 www.finz.org.nz/.

mahi aroha	a Māori term that perhaps most closely aligns to the concept of voluntary work
mahi tahi	“tahi” is the Māori word for “one”: mahi tahi therefore translates broadly to working together, collaboration, co-operation, teamwork
mana	prestige, status, charisma
manaakitanga	the process of showing respect, generosity and care for others
Māori	the indigenous population of Aotearoa New Zealand
mauri	life force, vital essence
MBIE	Ministry of Business, Innovation and Employment Hīkina Whakatutuki
NCVO	National Council of Voluntary Organisations, the umbrella body for the voluntary and community sector in England
New Zealand Māori Council	see below under “Te Kaunihera Māori o Aotearoa”
NFP	not-for-profit organisation
NGO	non-government organisation
OECD	Organisation for Economic Cooperation and Development
OSCR	Office of the Scottish Charity Regulator
PFRA	Public Fundraising Regulatory Association Incorporated ³
PNZ	Philanthropy New Zealand Tōpūtanga Tuku Aroha o Aotearoa ⁴
pou tokomanawa	the centre pole holding the ridge pole of a meeting house
preamble	the preamble to the Statute of Charitable Uses Act 1601 (43 Eliz I c4), otherwise known as the Statute of Elizabeth
PSGE	post-settlement governance entity
rangatiratanga	sovereignty, self-determination, autonomy, self-management
Sector Group	A group of approximately 25 representatives from the charitable sector which meets with Charities Services from time to time ⁵
SORP	Statement of Recommended Practice (<i>Accounting and Reporting by Charities: Statement of Recommended Practice applicable to charities preparing their accounts in accordance with the Financial Reporting Standard applicable in the UK and Republic of Ireland (FRS 102)</i>) (broadly the financial reporting standards for charities in England and Wales, Scotland and Northern Ireland) ⁶

3 [<www.pfra.org.nz/>](http://www.pfra.org.nz/).

4 [<philanthropy.org.nz/>](http://philanthropy.org.nz/).

5 See Charities Services *Charities Sector Group*: [<www.charities.govt.nz/charities-in-new-zealand/charities-sector-group/>](http://www.charities.govt.nz/charities-in-new-zealand/charities-sector-group/).

6 A copy of which can be found here: [<www.charitycorp.org/download-a-full-sorp/>](http://www.charitycorp.org/download-a-full-sorp/).

submissions	unless otherwise stated, references to submissions are to submissions made in respect of the Department of Internal Affairs' review of the Charities Act 2005. Submissions closed in May 2019 and were uploaded to DIA's website, ⁷ along with a summary of submissions prepared by DIA, in December 2019 ⁸
taiohi	youth
tamariki	children
te reo	literally "the language" but normally used to refer to the Māori language
tangata whenua	people of the land - a term used to describe Māori people
Tax Working Group or TWG	Tax Working Group Te Awheawhe Tāke
Te Ao Māori	a Māori world view
Te Kaunihera Māori o Aotearoa (the New Zealand Māori Council)	a unique, national, pan-Māori advocacy and leadership body, established under the Māori Community Development Act 1962
Te Wai Pounamu	the South Island of Aotearoa New Zealand
Te Tiriti o Waitangi (the Treaty of Waitangi)	New Zealand's founding document: a Treaty signed on 6 February 1840 between the British Crown and Māori
tikanga	tikanga derives from the Māori word "tika", meaning "correct". Tikanga therefore refers to the correct way of doing things, protocol, or "the customary system of values and practices that develop over time and are deeply embedded in the social context"
Trusts Act	Trusts Act 2019 (NZ)
UBIT	unrelated business income tax
US	the United States of America
utu	reciprocity
wairua	spirit, soul
Waitangi Tribunal	An ongoing commission of inquiry established by the Treaty of Waitangi Act 1975 to hear Māori grievances against the Crown concerning breaches of the Treaty of Waitangi.
whānau (pronounced "far-noh")	extended family, family group
whanaungatanga	kinship, sense of family connection - a relationship through shared experiences and working together which provides people with a sense of belonging
XRB	External Reporting Board Te Kāwai Ārahi Pūrongo Mōwaho
zānanga	a play on the Māori word "wānanga", meaning an educational seminar, referring to a wānanga held over zoom
zui (pronounced "zoo-ee")	a play on the Māori word "hui", meaning meeting, referring to a hui held over zoom

⁷ The submissions can be found here: www.dia.govt.nz/Charities-Act-Submissions.

⁸ See Te Tari Taiwhenua Internal Affairs *Modernising the Charities Act 2005 - Summary of submissions* December 2019: www.dia.govt.nz/charitiesact#Summary-of-submissions.

Summary of Recommendations

This report makes the following recommendations:

Recommendation 1.0	That the government's review of the Charities Act 2005 is transferred to Te Aka Matua o te Ture – the Law Commission for an independent first principles review taking into account the wider legal framework applicable to charities.
Recommendation 1.1	That the independent first principles review recommended in recommendation 1.0 include a review of the contracting arrangements for government services for charities and other not-for-profit entities, taking into account the findings of the Australian Productivity Commission in its 2010 <i>Contribution of the Not-for-profit Sector</i> report.
Recommendation 2.1	That the New Zealand charities law framework is reorientated to ensure a focus on charities' <i>purposes</i> . To this end, that the charities legislation articulates one simple overarching fiduciary duty, applicable to all registered charities irrespective of underlying legal structure, and to all involved in governing them, to act in good faith to further the entity's stated charitable purposes in accordance with its rules.
Recommendation 2.2	That New Zealand charities legislation specifically requires all persons performing functions or exercising powers under it to do so in a manner that recognises and respects the principles of Te Tiriti o Waitangi.
Recommendation 3.1	That the statutory definition of charitable purpose is reviewed, with a view to expanding the statutory "heads" of charity along the lines undertaken by Australia, England and Wales, Northern Ireland, Ireland, and Scotland, and recommended in Canada.
Recommendation 3.2	That the legislation set out the test to be applied in determining whether a purpose is charitable.
Recommendation 3.3	That the legislation clarify that the charitable purpose test applies to an entity's purposes, as ascertained under normal rules of construction of its constituting document, not to activities and not to the entity itself.
Recommendation 4.1	That the legislation clarify that a charity may carry out advocacy activities in furtherance of its stated charitable purposes, with only three restrictions: (i) Those contained in the general law. (ii) Those contained in the charity's constituting document. (iii) Otherwise, charities may not be partisan: that is, charities may not engage in activities promoting or opposing a political party, elected official, or candidate for political office.

Recommendation 4.2	That the legislation clarify that potential fiscal consequences of registration are not relevant to the question of whether a purpose is charitable.
Recommendation 4.3	That, as part of the independent first principles charities law review recommended in recommendation 1.0, consideration be given to implementing legislation similar to the Not-for-profit Sector Freedom to Advocate Act 2013 (Cth) in Australia, to respect the independence of charities by specifically prohibiting government contracts from including clauses that prevent or restrict charities from commenting on, advocating support for or opposing changes to law, policy or practice.
Recommendation 5.1	That Charities Services' approach, set out in its October 2017 ICE Foundation case report, which includes requiring a social enterprise to demonstrate viability at the outset as a precondition to charitable registration, is discontinued and eligibility for registration is instead assessed according to normal principles.
Recommendation 5.2	That a public awareness campaign is conducted to restore public confidence that running a business/carrying out social enterprise is a legitimate and important activity for charities.
Recommendation 5.3	That, as part of the public awareness-raising campaign recommended in recommendation 5.2, awareness is also raised of the non-distribution constraint and the destination of funds test: charities running businesses do not have a competitive advantage over their for-profit counterparts and there is no basis to remove their income tax exemption. Charities running businesses are in fact social enterprises and their work should be enabled rather than inhibited.
Recommendation 5.4	That, as part of the independent first principles charities law review recommended in recommendation 1.0, the issue of whether imputation credits should be refundable to registered charities is comprehensively assessed, taking into account the comprehensive transparency and accountability requirements to which registered charities are now subject, and the benefits that would accrue from removing a significant barrier to the investment of philanthropic funds in New Zealand companies.
Recommendation 6.1	That charities' access to a de novo oral hearing of evidence is reinstated.
Recommendation 6.2	That, to ameliorate current significant delays in making registration decisions (sometimes extending to several years), the charities' legislation specifically allow a registered charity, or an applicant for registration, to treat their registration as having been denied if a decision has not been made within 6 months, thereby allowing the matter to progress to an independent judicial authority for determination on the basis of a full oral hearing of evidence.

Recommendation 6.3	That charities are given the <i>option</i> of appealing decisions made under the Charities Act to either the Taxation Review Authority or the High Court at their choice, as was the case prior to the Charities Act, remains the case under tax legislation, and is also the case in other jurisdictions.
Recommendation 6.4	That the jurisdiction of the Taxation Review Authority to hear appeals under the Charities Act is further extended to hear appeals under other legislation applicable to charities, such as the new Incorporated Societies Act, the Charitable Trusts Act 1957, and the Trusts Act 2019.
Recommendation 6.5	That the timeframe for appealing decisions under the Charities Act is extended to 60 days, in line with Australia.
Recommendation 6.6	That the legislation clarifies that charities remain able to appeal substantively, to an independent judicial body, <i>all</i> decisions made under the Charities Act. If, following an open consultation process, any specific decisions are identified as genuinely not amenable to appeal, these should be specifically carved out by statute (following the approach taken in s 249 of the Incorporated Societies Act 2022).
Recommendation 7.1	That the agency responsible for administering charities legislation is restructured as an independent Crown entity that reports directly to Parliament.
Recommendation 7.2	That, while access to registration turns on the definition of charitable purpose, the agency responsible for administering charities legislation has and continuously develops deep expertise in trust law.
Recommendation 7.3	That a Māori Advisory Committee is established to assist the agency responsible for administering charities legislation to give effect to the principles of Te Tiriti o Waitangi and tikanga principles.
Recommendation 7.4	That the issue of how best to ensure the charitable sector has representative and adequately funded pan-charity policy capacity, and meaningful input into policy development, is specifically consulted upon as part of the independent first principles review recommended in recommendation 1.0.
Recommendation 7.5	That a “home in government” is created for the charitable sector, separate from the agency responsible for administering the Charities Act, and centrally located, for example within the Department of Prime Minister and Cabinet.
Recommendation 8.1	That use of the term “regulator” is discontinued in a charities law context, and the term “registrar” used instead.

Recommendation 8.2	<p>That the purpose of the Charities Act is clarified as being “to enable and support a diverse, robust, vibrant, independent, innovative, and sustainable charitable sector, in recognition of the direct and indirect benefits such a charitable sector provides in a free and democratic society” (based on the second object of the Australian legislation adapted for the New Zealand context).</p> <p>That the current purpose to promote public trust and confidence in the charitable sector (section 3(a)) is returned to a <i>function</i> of the agency responsible for administering the Charities Act.</p> <p>That the current purpose to encourage and promote the effective use of charitable resources (section 3(b)) is repealed.</p>
Recommendation 8.3	That the legislation explicitly preserves recourse to equitable principles in a charities law context, in a similar manner to that provided for trusts more generally by the Trusts Act 2019.
Recommendation 8.4	That the legislation explicitly provides for recourse to tikanga principles in a charities law context, where appropriate.
Recommendation 8.5	That the legislation uses the term “registered charity” instead of the term “charitable entity”.
Recommendation 8.6	That the legislation uses the term “responsible person” instead of the term “officer”, and that the substance of the definition clearly limits its scope to members of the charity’s governing body (extended to include the directors of a corporate trustee).
Recommendation 8.7	That the definition of “serious wrongdoing” is reworked to better support the overarching legal duty of every registered charity, and every responsible person of a registered charity, to act in good faith to further the charity’s stated charitable purposes in accordance with its rules.
Recommendation 8.8	That the legislation does not preclude the promotion of amateur sport from being a charitable purpose in its own right in appropriate circumstances (an outcome which is currently precluded by section 5(2A) of the Charities Act 2005).
Recommendation 8.9	That the legislation does not incorporate the words “for example, advocacy” within the ancillary purpose rule (currently contained in section 5(3) of the Charities Act 2005).
Recommendation 8.10	That the description of an ancillary purpose (currently contained in section 5(4) of the Charities Act 2005) does not include references to “incidental” and “independent” purposes, in order to ensure consistency with the underlying common law in New Zealand and to reduce the scope for subjectivity.

Recommendation 8.11	That the legislation clarify the reasons for which regard is to be had to a charity's activities (s 18(3) of the Charities Act 2005).
Recommendation 8.12	That, as part of the independent first principles review recommended in recommendation 1.0, a comprehensive data project is undertaken to analyse what improvements could be made to the contents of the charities register, and how better use could be made of charities register information.
Recommendation 8.13	That a public awareness campaign is conducted to raise awareness, within the public and government, of the existence, purpose and benefits of the charities register.
Recommendation 8.14	That the ability for charities to seek binding rulings from Inland Revenue is retained but that, in the interests of transparency, binding rulings relating to charitable registration are disclosed on the charities register, to help people understand why some charities are registered when similar charities are not.
Recommendation 8.15	That section 20(2)(a) of the Charities Act, which relates to now-repealed gift duty, is removed as otiose.
Recommendation 8.16	That sections 44 - 49 of the Charities Act 2005, which enable affiliated or closely related entities to be treated as a single entity for the purposes of charitable registration, are removed as they have been superseded by the financial reporting rules for charities introduced from 2015.
Recommendation 8.17	That, as part of the independent first principles review recommended in recommendation 1.0, the financial reporting requirements for charities are comprehensively reviewed, incorporating multi-disciplinary expertise, including in standard-setting, accounting, auditing, information technology, data, tikanga, trust law, as well as coalface experience of charities, to ensure a balance is struck between visibility and accountability on the one hand, and not undermining small charities' ability to deliver on their charitable purposes on the other.
Recommendation 8.18	That the review of the financial reporting requirements recommended in recommendation 8.17 include the design of an online financial reporting tool for charities that would reduce duplication and facilitate data collection.
Recommendation 8.19	That the review of the financial reporting requirements recommended in recommendation 8.17 consider the extent to which annual information provided by charities could also be widely used by government agencies and other funders in a "report once, use often" framework.
Recommendation 8.20	That the review of the financial reporting requirements recommended in recommendation 8.17 looks beyond outputs and outcomes to ways to identify, measure and report on the <i>impact</i> generated by charities, taking into account international research and development in this area.

Recommendation 8.21	That the review of the financial reporting requirements recommended in recommendation 8.17 includes analysis of the concept of fund accounting, as that concept is dealt with in the SORP (FRS 102 (<i>Accounting and Reporting by Charities: Statement of Recommended Practice applicable to charities preparing their accounts in accordance with the Financial Reporting Standard applicable in the UK and Republic of Ireland</i>)).
Recommendation 8.22	That the timeframe for notifying changes under section 40 of the Charities Act 2005 is amended to 20 working days for consistency with other applicable legislation, to encourage a practice of notifying changes to all applicable registrars as part of the process by which they are made and to improve the accuracy of the charities register.
Recommendation 8.23	That, as part of the independent first principles review recommended in recommendation 1.0, consideration is given to other measures that would improve compliance with the important duty to notify changes, which is currently widely observed in the breach. Suggestions include potential technological improvements, raising awareness of the importance of complying with the duty, setting key performance indicators for the Charities Registrar, and potentially establishing a Charitable Incorporated Organisation structure (which would eliminate the need for dual registration).
Recommendation 8.24	That section 39 of the Charities Act, which currently requires only telephone and internet collectors to disclose a charity's registration number on request, is extended to all types of fundraising carried out by or on behalf of a registered charity.
Recommendation 8.25	That the Charities Act articulates a new duty, requiring every registered charity, and every fundraiser acting on behalf of a registered charity, to adhere to professional fundraising standards when carrying out a "fundraising activity" (widely defined to include any activity seeking to raise funds, such as requesting funds, canvassing for subscriptions, selling raffle or lottery tickets, selling tickets to a fundraising event, selling merchandise, and appealing for grants, donations, or sponsorship).
Recommendation 8.26	That the current system of self-regulation of fundraising provided by the Fundraising Institute of New Zealand and the Public Fundraising Regulatory Association is better supported, including by provision of reliable, untagged, core operational funding to allow them to focus on maintaining and strengthening fundraising standards in New Zealand.
Recommendation 8.27	That the charities law framework articulates a broad high-level duty on responsible persons of registered charities to disclose and manage perceived or actual conflicts of interest.

Recommendation 8.28	That, in the interests of transparency and accountability, the agency responsible for administering charities' legislation is required to publish its own procedures for managing actual or perceived conflicts of interest.
Recommendation 8.29	That, as part of the independent first principles review recommended in recommendation 1.0, section 43 of the Charities Act, which currently provides Charities Services with a unilateral and apparently unappealable power to exempt charities from compliance with a wide range of statutory provisions, is subject to a comprehensive review as to its continuing appropriateness.
Recommendation 8.30	That whatever agency is responsible for administering charities' legislation is required to prepare a statement of intent, at least every three years, and to make a draft statement of intent available for public consultation before finalising.
Recommendation 8.31	That in order to improve transparency and accountability of decision-making, the agency responsible for administering charities' legislation is required to prepare its own annual report, and that certain information is specifically required to be included within it, such as the numbers of applications for registration that have been voluntarily withdrawn, the numbers of entities that have been deregistered, and the reasons why.
Recommendation 8.32	That refinements are made to the requirement to hold an annual meeting in order to strengthen its utility as an accountability mechanism.
Recommendation 8.33	That test case litigation funding is made available to develop the law in matters of public interest.
Recommendation 8.34	That the question of whether persons other than the person directly affected by a decision should have standing to bring an appeal is considered as part of the independent first principles review recommended in recommendation 1.0.
Recommendation 8.35	That sections 54 and 55 of the Charities Act, which relate to the power to issue and publish warning notices, are repealed and replaced with a specific power to enter into compliance agreements.
Recommendation 8.36	That, in the absence of a rationale for its retention, section 75 of the Charities Act, which provides that there is no duty or obligation on the Charities Registration Board or Charities Services to supervise the affairs of or exercise any powers in respect of any person, is removed.
Recommendation 8.37	That no further piecemeal amendments are made to legislation affecting charities pending the independent first principles review of the charities law framework recommended in recommendation 1.0 above.

Recommendation 8.38	That the circumstances in which the public interest test (currently set out in section 35(1) of the Charities Act) might protect a charity from deregistration are clarified and made publicly available.
Recommendation 8.39	That the legislation makes clear the exercise of any power to ban persons from being officers or responsible people of a registered charity cannot be exercised in the absence of an order of a court.
Recommendation 8.40	That the government co-designs with the charitable sector a civil society strategy, along the lines adopted in the United Kingdom and proposed in Australia, articulating a vision for maximising the potential of the charitable sector, and the wider civil society in which it sits, to deliver benefits for Aotearoa New Zealand.
Recommendation 8.41	That the legislation requires a post-implementation review after five years, following the model of Australia, England and Wales, and Ireland.
Recommendation 8.42	That section 72A of the Charities Act is repealed, and the power to prescribe forms and other requirements is returned to regulations.
Recommendation 8.43	That section 32E(1A) of the Tax Administration Act 1994 is amended so that all registered charities are automatically included on the RWT exemption register, not just those structured as charitable trusts.
Recommendation 8.44	That any guidance issued by Charities Services (or whatever agency is responsible for administering the Charities Act) is required to follow a public consultation process, similar to the Generic Tax Policy Process, before being finalised.
Recommendation 8.45	That the criteria for inclusion on schedule 32 of the Income Tax Act 2007 ("overseas donee status") are revisited to better support charities working to tackle pressing global challenges such as climate change, biosecurity, pandemic risk, global safety and stability, and the like.



Executive Summary

In response to the question “What does a world-leading framework of charities law look like?” for New Zealand, chapter 9 of this report sets out a draft Bill that would amend and restate the Charities Act 2005. Commentary to the draft Bill is contained in chapter 8, and chapters 1 to 7 provide the basis on which the various recommendations have been made.

No executive summary has otherwise been prepared for this report. The issues requiring consideration in designing a world-leading framework of charities law are interconnected, and their impact far-reaching: attempts to distil complex issues into easily digestible soundbites do charities a disservice, and contribute to their wider societal impacts being overlooked. Over-simplification also risks potential misinterpretation due to lack of context and loss of nuance.¹ We invite you to read the report in its entirety and look forward to future discussions related to its content.

1 LN Tink and BC Kingsley *Transforming the Non-Profit Community in Edmonton: Phase 1 – identifying myths, trends and areas for change* (Edmonton Chamber of Voluntary Organisations: Edmonton AB, 2021): ecvo.ca/wp-content/uploads/2021/05/ECVO-Transformation-FINAL-highres.pdf at 3.

Introduction and Methodology

"Civil society is essential to building a strong society and economy and I believe that all of us, regardless of political persuasion, should passionately, explicitly and unashamedly support people getting involved in their community, coming together in clubs, groups and societies. Starting charities, social enterprises or community businesses. Doing things for the wider public benefit, not simply private gain. We know that a better future is about more than growing the economy. In a famous speech of more than 45 years ago, Robert Kennedy said that GDP 'does not allow for the health of our children, the quality of their education, or the joy of their play. It measures neither our wisdom nor our learning; neither our compassion nor our devotion to our country; it measures everything, in short, except that which makes life worthwhile.' For many, the answer instead lies in civil society. It is charity and volunteering that allow them to find identity, meaning and purpose, a sense of autonomy, pride and utility. It is often how we find balance in our lives, pursue our passions, or fight for change. And for society at large, it is often how we build stronger communities, give people a say in what happens to them. It is how we provide services that people depend upon, develop new ways of doing things, and nurture the people who will lead our future ... In short, civil society is about creating a better future for all. The world is changed by charity"

Sir Stuart Etherington, former chief executive, National Council of Voluntary Organisations (the umbrella body for the voluntary and community sector in England) 8 January 2019¹

Charities law reform can be contentious: it can provoke strong views that are passionately held and often diametrically opposed.

Much contention arises due to differing conceptions of the greater good (always debates to be welcomed). However, much contention also arises because fundamental concepts of charity and its role in and contribution to society are not well understood. While New Zealand, like many other jurisdictions, inherited the concept of "charitable purpose" from the United Kingdom, it did not necessarily inherit the rich social and cultural context in which the concept developed:² the fundamental principles of charity and philanthropy are deeply ingrained in British culture;³ by contrast, New Zealand cannot necessarily rely on deep traditional public awareness of and support for charity, which in turn weakens the political context necessary for much-needed charities law reform to take place.

A resulting lack of imperative to attend to the legal infrastructure needed for charities to thrive can, in turn, create a downward spiral: if barriers preventing charities from reaching their potential are not removed, their ability to demonstrate their value may be undermined, further undermining their status in society, and thereby further weakening the political context needed for much-needed reform to take place. In the absence of a circuit-breaker (ideally one that does not involve a scandal provoking kneejerk, reactionary responses), the downward spiral can continue, to the point where some may question why we even have charities at all (a point New Zealand appears in danger of reaching).

The 2019 International Research Fellowship Te Karahipi Rangahau ā Taiao ("**the Fellowship**"), granted by New Zealand Law Foundation Te Manatū a Ture o Aotearoa ("**the Law Foundation**"), is dedicated to the question "what does a world-leading framework of charities law look like?". The support of the Law Foundation in granting the Fellowship is deeply appreciated, not least for its affirmation that the charitable sector matters, and it is worth taking the time to try to get the legal framework for charities right.

1 S Etherington "Brexit, Then, What? It's Time For Civil Society to Shape Our Future", 8 January 2019: blogs.ncvo.org.uk/2019/01/08/brexit-then-what-its-time-for-civil-society-to-shape-our-future/.

2 Similar concerns have arisen in Canada. See Ontario Law Reform Commission *Report on the Law of Charities* (Toronto, 1996) at 36, 3, 21 - 23.

3 See Lord Hodgson of Astley Abbotts *Trusted and Independent: Giving charity back to charities – Review of the Charities Act July 2012*: assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/79275/Charities-Act-Review-2006-report-Hodgson.pdf at [1.2].

Background

The Fellowship formally began in March 2020, against a backdrop of a review of the Charities Act 2005 ("**the Charities Act**") being carried out by Te Tari Taiwhenua the Department of Internal Affairs ("**DIA**"). Given the impact of this backdrop on the methodology for this research, key aspects are set out below for reference.

Briefly, by way of background, the Charities Act in New Zealand has had a turbulent history: the original Charities Bill that was introduced into Parliament in 2004 had been more than 20 years in gestation, but was nevertheless widely regarded as fundamentally flawed; it was almost completely rewritten at Select Committee stage in response to hundreds of submissions, with further substantial changes made by Supplementary Order Paper before being passed, under urgency, through all final stages on one day (12 April 2005).

Concerns about "fast law" not making good law were assuaged at the time by then Finance Minister, the late Hon Sir Dr Michael Cullen, indicating that the Charities Act would be subject to a full first principles post-implementation review. During the intervening 18 years, the Charities Act has been subject to a series of piecemeal amendments, generally made by Statutes Amendment Bill and rushed through under urgency with little or no consultation. However, a first principles post-implementation review is still awaited.

The manifesto of the New Zealand Labour Party policy for the 2017 general election included a commitment to "prioritise the long-promised review of the Charities Act ... beginning with a first principles review of the legislation, including examining, updating and widening rather than narrowing, the definition of charitable purpose".⁴ While the DIA did commence a review of the Charities Act in May 2018, the terms of reference for the review fall well short of this commitment.⁵

The agency responsible for administering the Charities Act in New Zealand is a business unit within DIA known as Charities Services Ngā Ratonga Kaupapa Atawhai ("**Charities Services**"). A few months prior to the 2017 election, during Hon Alfred Ngaro's tenure as Minister for the Community and Voluntary Sector, Charities Services convened a "Sector User Group", subsequently renamed the "Sector Group",⁶ intended to be a biannual meeting where "key members of the charities sector will be invited to tell us about their experiences and the issues and challenges they face".⁷

Draft terms of reference for the Government's review of the Charities Act were circulated to the Sector Group in January and February 2018. With funding support from Seed the Change | He Kākano Hāpai,⁸ the Sector Group responded to the terms of reference, collectively and democratically, raising concerns about the proposed nature, scope and timing of the review, and requesting that the commitment to a first principles review be honoured. However, the terms of reference finalised in May 2018 were substantively unchanged from the version the Sector Group had said it could not support.

Some changes were made. For example, a Core Reference Group ("**CRG**") was included, allowing some opportunity for sector input into decision-making for the review.⁹

The CRG was established in August 2018 comprising six people: three (including the writer) elected by the Sector Group, and three appointed by DIA.¹⁰

4 New Zealand Labour Party *Community and Voluntary Sector Manifesto 2017* at 5.

5 Department of Internal Affairs *Terms of reference to review the Charities Act 2005* May 2018: [www.dia.govt.nz/vwluResources/CharitiesReviewTOR/\\$file/CharitiesReviewTOR.pdf](http://www.dia.govt.nz/vwluResources/CharitiesReviewTOR/$file/CharitiesReviewTOR.pdf) at 3.

6 www.charities.govt.nz/charities-in-new-zealand/charities-sector-group/.

7 Charities Services, letter of invitation to the writer, 30 March 2017.

8 *Submission* of Seed the Change | He Kākano Hāpai at 1. I would like to extend sincere thanks to Seed the Change | He Kākano Hāpai and Hui E! Community Aotearoa for this support.

9 Internal Affairs Charities Act review: questions and answers: [www.dia.govt.nz/vwluResources/CharitiesReview-FAQ-PDF/\\$file/Q-and-A-240518.pdf](http://www.dia.govt.nz/vwluResources/CharitiesReview-FAQ-PDF/$file/Q-and-A-240518.pdf) at 2.

10 [www.dia.govt.nz/vwluResources/CharitiesReview-FAQ-PDF/\\$file/Q-and-A-240518.pdf](http://www.dia.govt.nz/vwluResources/CharitiesReview-FAQ-PDF/$file/Q-and-A-240518.pdf) and [www.dia.govt.nz/vwluResources/CharitiesReview-FAQ-PDF/\\$file/Q-and-A-240518.pdf](http://www.dia.govt.nz/vwluResources/CharitiesReview-FAQ-PDF/$file/Q-and-A-240518.pdf).

The timeframe was also extended: the review, including legislation, was originally scheduled to be completed within one Parliamentary term (that is, before the 2020 general election), a timeframe which would have required all policy work to be completed within only a few months, with limited consultation scheduled to take place over the 2018-2019 Christmas period.

Despite these changes, concern about the terms of reference led 12 philanthropic funders¹¹ to gather resources to provide funding to two CRG members (Dave Henderson and myself) to help ensure community input into the review.¹²

The funding enabled us to do a number of things. We began with a presentation in Wellington, seeking feedback on the issues as we saw them, followed by similar sessions in Christchurch and Auckland, and another in Wellington for the ComVoices network, during October and November 2018.¹³ We received a lot of feedback, and it was clear that significant concerns were shared by many.

Together with support from Seed the Change | He Kākano Hāpai and Hui E! Community Aotearoa, the funding also helped us to provide substantive comments on drafts of the DIA's discussion document for the review, and draft issues papers, forwarded to CRG members in August and October 2018.¹⁴

The DIA's discussion document was released in February 2019,¹⁵ although for the most part it did not reflect our comments.

However, with the support of the new Minister for the Community and Voluntary Sector, Hon Peeni Henare, we worked with DIA to significantly increase the number of community consultation meetings DIA were planning to hold (initially just five); the funding was instrumental in enabling us to attend, speak and listen at (between us) all 27 consultation meetings for the review held around the country during March and April 2019.¹⁶ Our aim was to provide an alternative perspective to government on the review and encourage charities to make a submission. Feedback from this work included the following:

If we didn't hear what you had to say on the road trips to regions with dia, we wouldn't have been fully informed. Thank you for providing a platform for us to share our voices by way of submissions

We were also ultimately able to attend all but one of the five separate consultation meetings held with Māori.¹⁷

The funding enabled us to prepare an alternative discussion document (or issues paper, as we described it) which we referred to at the community consultation meetings and circulated to anyone who requested it.

11 I would like to extend sincere thanks to the Todd Foundation, Foundation North Te Kaitiaki Pūtea o Tāmaki o Tai Tokerau, the DV Bryant Trust, The Gift Trust, Trust Waikato Te Puna o Waikato, Eastern and Central Community Trust, BayTrust, Eastern Bay Energy Trust, Whanganui Community Foundation, Otago Community Trust, and Community Trust South Te Pou Aratiki Pounamu o Murihiku and fundholder the Bishop's Action Foundation, as well as to Michelle Wanwimolruk for her coordination expertise.

12 See the [submission](#) of the Todd Foundation at 1 - 2.

13 [Submission](#) of Dave Henderson at 1 - 2. I would also like to extend sincere thanks to Grant Thornton New Zealand, RSM Hayes Audit and Parry Field Lawyers, who very kindly provided venues for these initial consultation meetings.

14 Although the CRG was given an opportunity to comment on drafts of the DIA's discussion document, for the most part the CRG's comments were not reflected in the final version.

15 See Te Tari Taiwhenua Internal Affairs *Modernising the Charities Act 2005: Discussion Document* February 2019: <[www.dia.govt.nz/diawebsite.nsf/Files/Charities-Modernising-the-Charities-Act-Discussion-Document-April2019/\\$file/Charities-Modernising-the-Charities-Act-Discussion-Document-April2019.pdf](http://www.dia.govt.nz/diawebsite.nsf/Files/Charities-Modernising-the-Charities-Act-Discussion-Document-April2019/$file/Charities-Modernising-the-Charities-Act-Discussion-Document-April2019.pdf)>.

16 Internal Affairs Public consultation 2019: <www.dia.govt.nz/charitiesact#Consult>.

17 We were originally specifically excluded from these meetings. At one community consultation meeting, a kaumātua (Māori elder) asked whether we were planning to attend the consultation meeting with Māori planned for the same venue later that day. When informed that we had been specifically not invited, the kaumātua stood up at the community consultation meeting and publicly complained that such exclusion breached the right to equal participation guaranteed by the Treaty of Waitangi. As a result, we were able to attend the consultation meeting with Māori planned for later that day, although Dave Henderson did not attend in protest at our inability to speak.

With the pro bono support of Strategic Grants, we also carried out independent research to feed into the review. Over 660 responses to the survey were received, the results of which were released in May 2019 and form part of the research on which this report is based.¹⁸

Submissions to the Government's review closed in May 2019, and were uploaded to DIA's website in December 2019, together with a high-level summary prepared by DIA.¹⁹

The submissions were limited by the attenuated nature of the terms of reference, which flowed through into the narrow range of questions on which the DIA's discussion document sought responses.²⁰ Even so, the submissions are a rich source of information about how the current framework of charities law is working and, helpfully, a number of submitters did not limit their comments to the questions asked by DIA.

In preparing this report, we have reviewed every one of the 363 submissions made to the Government's review of the Charities Act and drawn on all of the above feedback and work.

Methodology

As touched on above, the New Zealand Law Foundation 2019 International Research Fellowship is dedicated to the question: "what does a world-leading framework of charities law look like?", drawing on learnings from five comparable jurisdictions: Australia, Canada, England and Wales, Ireland and the United States of America. Specifically, the terms of the Fellowship are as follows:

... to undertake research into the charities law frameworks of jurisdictions comparable to New Zealand, as well as to critically examine how the current regime is working in New Zealand, with a view to providing an independent perspective on what a world-leading framework of charity law might look like. You will then feed this information into the Government's current review process, to assist with the development of law reform in this important area.

During early March 2020, prior to formally commencing the Fellowship, I was honoured to have the opportunity to attend the University of Western Australia in Perth as a visiting fellow and participate in a roundtable workshop on the *Regulation and Self-Regulation of Charities and Philanthropy* at the Institute of Advanced Studies. I would like to extend sincere thanks to Associate Professor Dr Ian Murray, Deputy Head of School – Research, Law School, as well as to Professor David Gilchrist, Dr Fiona McGaughey, Thomas Emery and fellow visiting fellow, Mark Sidel, Doyle-Bascom Professor of Law and Public Affairs, University of Wisconsin-Madison, for their generous hosting, hospitality and sharing of insights and knowledge. I feel particularly lucky to have had the opportunity to visit, as I returned to New Zealand only a few days before New Zealand went into its first "lockdown" due to COVID-19. Other visiting fellowships, including as a Sutherland Fellow at the University College Dublin Sutherland School of Law in Ireland and others that were in the process of being finalised, were not able to take place due to the pandemic. However, I am grateful that technology enabled me to interview people from around the world nevertheless, and hope that it might nevertheless be possible to visit at some point in the future.

18 See Strategic Grants *Independent Community Consultation To Inform The Review Of The Charities Act (2005) Survey Report* 22 May 2019: www.strategicgrants.co.nz/wp-content/uploads/2020/11/NZ-Community-Consultation-Survey-Report-220519.pdf.

19 Te Tari Taiwhenua Internal Affairs *Modernising the Charities Act 2005 - Summary of submissions* December 2019.

20 See, for example, the [submission](#) of Piers Davies at 2: "[the submission template] is very prescriptive and too detailed. It appears to be leading submitters to concentrate and respond on what the DIA thinks is important rather than cover what the individual charities are concerned about".

Draft Bill

On commencing the Fellowship in March 2020, the first task undertaken was to draft a Bill that would amend and restate the Charities Act 2005. The idea was to put the learnings from all of the above processes into a tangible form as a reference point, and then subject that thinking to challenge over the course of the research. Tessa Vincent joined me in March 2020 for a year as a part-time research assistant/lawyer,²¹ and between us we circulated the draft Bill for consultation to over 160 people, selected on the basis of anyone who asked to see it and some we specifically sought out to ask if they might be happy to review and comment. The feedback we received was insightful and invaluable in making changes to the draft Bill as the research progressed.²² An updated draft Bill incorporating feedback received is included in chapter 9 of this report.

Zānanga zui

In April 2020, we reached out to the Honourable Justice Joe Williams KNZM, the first Māori person to be appointed to the Supreme Court of New Zealand, following a speech he had given to the 2019 Charity Law conference entitled “*Pemsel* in the Pacific”.²³ Our specific research question was how best to infuse tikanga principles into New Zealand charities law. Sir Joe very kindly brought together a team of tikanga experts over two zoom meetings (or “zānanga zui”) held during lockdown in May 2020.²⁴

Key messages taken away from this consultation include that tikanga is an organic concept that needs to be defined through evidence of the way it operates in particular communities; it is dangerous to attempt to define the content by statute as doing so risks killing the tikanga: what needs to be protected is the *essence* of tikanga principles. It is also important to express the *process* by which the content of tikanga is determined and changed.

I was left with the impression that, in these respects, the concept of tikanga has much in common with the equitable “living tree” concept of charitable purpose.

The updated draft Bill included with this report endeavours to reflect the zānanga zui consultation faithfully.

21 Tessa went on to study a Masters in Public Policy at The University of Oxford.

22 I am very grateful to everyone who engaged with this part of the process and would like to express particular thanks to: Tai Ahu, core member of the Māori Liaison Committee of Te Aka Matua o te Ture – the Law Commission; Dianne Armstrong, former Philanthropy Manager, Arthritis New Zealand; Carol Barron, National Coordinator, Methodist Alliance Nga Purapura Weteriana; Amy Beliveau, Senior Policy and Research Adviser, Family Planning New Zealand; Michelle Berriman, Executive Director, Fundraising Institute of New Zealand; Rosalie Sheehy Cates, Senior Advisor, Philanthropy Northwest/The Giving Practice; Johanna Cogle, Member, Graduate Women North Shore Branch Incorporated; Professor Carolyn Cordery, Professor in Charity Accounting and Accountability, Aston University, Birmingham; Jim Datson FFINZ, Project Director, Project Periscope Ltd; Kenneth Dibble, Board Member and former Chief Legal Adviser and Legal Director, Charity Commission for England and Wales; Andrew Ecclestone, former Senior Investigator Official Information Practice Investigations in the Office of the Ombudsman; Richard Fries, former Chief Commissioner of the Charity Commission for England and Wales; Trevor Garrett, former Chief Executive of the Charities Commission; Laird Hunter QC, Barrister (Canada); Professor Matthew Harding, University of Melbourne Law School; Peter McKenzie QC, Barrister; Raina Ng, former Law Clerk at CharitiesLaw; Dr Kerry O’Halloran, Adjunct Professor, Australian Centre for Philanthropy and Nonprofit Studies, QUT; Stephen Parker, Treasurer, Community Waitakere; Hilary Pearson, Sector Co-Chair, Advisory Committee on the Charitable Sector (Canada); Andrew Purkis OBE, former Board Member of the Charity Commission for England and Wales; Krystian Seibert, former adviser to the former Assistant Treasurer during 2012 and 2013, and closely involved with the establishment of the Australian Charities and Not-for-profits Commission; Professor Jeroen van der Heijden, Chair of Regulatory Practice at Victoria University of Wellington, New Zealand (School of Government); and Ta’ase Vaoga, Co-Chair, ActionStation.

23 The speech was given at the Charity Law Association of Australia and New Zealand (“**CLAAANZ**”) 2019 New Zealand Conference *Future prospects for charity law, accounting and regulation*, held in Wellington on 11 April 2019, hosted by CLAAANZ and Chartered Accountants Australia and New Zealand and supported by DIA Charities Services: claaanz.org.au/events-nzconf2019. Justice Joe Williams very kindly provided a transcript of his [speech](http://www.charitylawassociation.org.au/pdf/2019%20NZ%20conference/Pemsel%20in%20the%20Pacific%20Justice%20Williams%20Presentation%20to%20CLAAANZ%20Conference%20April%202019.pdf), which can be found here: www.charitylawassociation.org.au/pdf/2019%20NZ%20conference/Pemsel%20in%20the%20Pacific%20Justice%20Williams%20Presentation%20to%20CLAAANZ%20Conference%20April%202019.pdf.

24 I would like to express particular thanks to Sir Justice Joe Williams for his support of this work, and the tikanga experts: Judge Damian Stone, Gwendoline Keel, Peata Williams, Maia Wiakaira, Tai Ahu, Horiana Irwin-Easthope, Keri Wanoa, Tania Williams Blyth and Jamie Ferguson.

Co-design sprint workshops

From feedback on the draft Bill, it was clear that agency structure, that is the structure of the agency(s) responsible for administering charities legislation, was a key theme.

In September 2020, the Centre for Social Impact had launched their “Sprinting for Good” report, aiming to “support and inspire [teams] to find innovative ways to work collaboratively to solve complex social good problems” through co-design.²⁵

Co-design “sprints” provide an effective and inclusive way for a diverse group of people with a range of skills and experiences to come together to collectively problem-solve and create solutions.²⁶

Although it was to some extent a “leap of faith” as to how the co-design sprint process might translate to the specific questions we were researching, on 26 and 27 November 2020, we held a co-design sprint workshop, facilitated by Mele Wendt MNZM from the Centre for Social Impact, focused on the question “what is the best structure for the agency(s) that administer charities’ legislation in Aotearoa New Zealand?”. The workshop also looked at how to strengthen the not-for-profit sector voice in its interactions with government.²⁷

Twelve sprint participants plus 15 challengers attended, all with a broad range of experience in the for-purpose sector, including within charities, umbrella bodies, academia, the legal and accounting professions, government (including a former Government Minister), and others. All were sent a package of information prior to the workshop, including a “challenge statement”.²⁸

On the first day of the workshop, participants began by discussing five personas involved with the charitable sector, including a registration analyst from DIA, a volunteer, and the chief executive of a large charity, with the aim of viewing challenges and long-term aspirations within the legal framework from a variety of perspectives.

Sprint participants were then split into different groups to discuss necessary features of the structure for the agency(s) administering charities’ legislation in Aotearoa New Zealand. Each group designed an A3 image of their ideal structure.

The various groups then reconvened to present their ideal structure to the others, explaining key components such as a registration body or a body representing the sector. Together, commonalities were drawn out, following which the sprint participants collectively co-designed their preferred structure to present to challengers.

One sprint participant was then selected to present the co-designed ideal structure to 15 challengers who attended later that day by zoom. The role of the challengers is to ask probing questions of the proposal, which they did.

Having reflected on the challengers’ questions overnight, the sprint participants met by zoom the following day to continue discussion. Utilising “breakout rooms” to consider challenger questions, the participants then reconvened to deliberate and collectively land on a final ideal structure to administer charities’ legislation. A report was prepared summarising the process and outcome and circulated amongst attendees for comment before being finalised.²⁹

25 Centre for Social Impact (a Foundation North initiative) in collaboration with the Community Governance Steering Group *Sprinting for Good: using co-design to collaborate for social impact* September 2020: www.centreforsocialimpact.org.nz/knowledge-base/building-community-governance-capability-and-capacity at 4.

26 Centre for Social Impact (a Foundation North initiative) in collaboration with the Community Governance Steering Group *Sprinting for Good: using co-design to collaborate for social impact* September 2020: www.centreforsocialimpact.org.nz/knowledge-base/building-community-governance-capability-and-capacity at 37.

27 The invitation to participate can be found here: events.humanitix.com/strengthening-the-for-purpose-sector.

28 The challenge statement for the workshop can be found by scrolling down at the following link: www.charitieslawreform.nz/workshops.

29 The final report from the workshop can be found by scrolling down at the following link: www.charitieslawreform.nz/workshops. Funding for the workshop was provided privately by myself.

The co-design sprint process exceeded expectations. Despite starting with a range of diverse views as to what the ideal agency structure for New Zealand charities' legislation might look like, the level of consensus ultimately able to be reached was remarkable. I highly recommend the co-design sprint process for developing policy in this area.

The draft Bill attached to this report has been updated to reflect the outcome of this workshop.

As part of the post-workshop evaluation, attendees were asked, if funding became available to carry out further co-design sprints on issues related to charities law reform, what topics they might like to see covered. Responses resoundingly identified the definition of charitable purpose; other issues included the purpose of the legislation, appeals, and the wider legal framework for charities and other not-for-profit organisations.

Buoyed by the success of the first workshop, and with the support of the Charity Law Association of Australia and New Zealand,³⁰ we held a second co-design sprint workshop on 11-12 March 2021,³¹ focused on "what should be the definition of charitable purpose in contemporary Aotearoa New Zealand?". The workshop was held at Te Papa Tongarewa The Museum of New Zealand,³² and was again facilitated by Mele Wendt MNZM from the Centre for Social Impact.³³

Seventeen sprint participants plus 20 challengers from three jurisdictions (New Zealand, Canada and Australia) attended (some by zoom), all with a broad range of experience in the for-purpose sector, including with charities, umbrella bodies, students, academics, standard-setters, the legal and accounting professions and others. Again, all were sent a package of information prior to the workshop, including a "challenge statement".³⁴

While the second workshop followed a similar process to that followed for the first workshop, for a while it appeared that consensus might not be reached; it was genuinely remarkable that consensus was able to be achieved by the end of the two days.

The draft Bill attached to this report has been updated to reflect the outcome of this workshop also.³⁵

Consultation interviews

In addition to specific consultation on the draft Bill, Tessa and I conducted consultation interviews with over 145 people, either in person or by zoom, including: 70 from New Zealand; 37 from Australia; 11 from Canada; 11 from England and Wales; 3 from Ireland; 10 from the United States of America; and 4 from other jurisdictions (Scotland, Uganda and Latin America). We strove to obtain as broad a range of perspectives as possible, including from charities of all sizes and types, Māori, government agencies, advisers, politicians, former politicians, lawyers, legal counsel, accountants, standard-setters, philanthropists, academics and others with an interest in the charitable sector. I would like to express deep gratitude to all who so generously gave their time and shared their insights and expertise with us.

30 I would like to express sincere thanks to the Charity Law Association of Australia and New Zealand, whose assistance with funding for the venue, catering and IT support made the workshop possible. By way of disclaimer, I am a director of the Charity Law Association and recused myself from decision-making on this issue.

31 The invitation to the second workshop can be found [here](#).

32 www.tepapa.govt.nz/.

33 Centre for Social Impact, a Foundation North Initiative: www.centreforsocialimpact.org.nz/.

34 The challenge statement for the second workshop can be found by scrolling down at the following link: www.charitieslawreform.nz/workshops.

35 The final report for the second workshop can be found by scrolling down at the following link: www.charitieslawreform.nz/workshops.

I also accepted every invitation to speak³⁶ or write³⁷ about the research that was presented.

In addition, on 10 June 2020, in advance of the general election held in October 2020 and with the support of the Todd Foundation, we collaborated with Hui E! Community Aotearoa, Trust Democracy and ComVoices to co-host an election forum. Politicians from six political parties took part: Hon Poto Williams (Minister for the Community and Voluntary Sector, Labour); Jan Logie (Parliamentary Under-Secretary – Justice, Green); Hon Tracey Martin (Minister of Internal Affairs, Children, Seniors and Associate Minister of Education, New Zealand First); Hon Alfred Ngaro (National Party Spokesperson for the Community and Voluntary Sector, Disability Issues, Pacific Peoples and Children); Brooke van Velden (ACT Party candidate for Wellington Central); and Geoff Simmons (Leader of The Opportunities Party (TOP)). The level of common ground across the political spectrum was remarkable, raising the distinct possibility of cross-party support for charities law reform. I was grateful for the opportunity to pose a specific question about the research. The event was attended by over 100 people and has since had 239 views on YouTube. A summary of the forum, including a link to a recording of the event, can be found [here](#).³⁸

Workshops on purpose-based governance

During July and August 2021, I collaborated with Dr Rosemary Teele Langford of the University of Melbourne and Dr Ian Murray of the University of Western Australia to conduct a series of three workshops, with charities law specialists from New Zealand and around the common law world, focusing on the topic of “purpose-based governance” (or what does it mean to act in the “best interests” of an entity that is defined by a purpose). The workshops were attended by a total of 18 people: four from New Zealand; eight from Australia; two each from Canada and the United States; and five from England and Wales. The feedback from the workshops was very insightful and influential in developing the proposals in this report.

Discussion

It is clear from the research that, in the context of charities law frameworks, all comparable jurisdictions are grappling with similar issues. There may even be a tendency towards international harmonisation, as administrators of charities law frameworks from around the common law world regularly meet and share learnings.

However, while international cooperation is to be encouraged, in a charities law context it should be approached with an awareness of its both positive and negative potential. Certainly, many issues addressed by charities, such as global health and climate change, respect no borders and require international solutions. However, one jurisdiction adopting

36 Including for Hui E! Community Aotearoa on 17 March 2021 at a panel on the topic of *Charities law reform – why it matters*: www.youtube.com/watch?v=WYylgE0ylnM; Community Networks Wellington at their July 2021 network meeting: www.cnw.org.nz/meeting-links-of-interest.html which led to a meeting with the Minister of Finance (a copy of the follow-up letter for which can be found here: www.not-for-profit.org.nz/charities-act-review-update/); Australian and New Zealand Third Sector Research on 15 September 2021 on *Reform of NZ Charity Regulation*: www.anztsr.org.au/third-sector-review-author-talk/; Charity Law Association of Australia and New Zealand on 4 November 2020 on *Charities Law Reform*: www.charitylawassociation.org.au/events-nzconf2020; Legalwise on 21 September 2021 *Update on the review of the Charities Act*: legalwiseseminars.com.au/nz/course-2/?eventtemplate=1880-not-for-profit-and-charities-forum-governance-financial-reporting-tax&event=7402 and on 21 July 2020 *Charities: navigating the road to recovery and beyond*; University of Otago LAWS 486 *Charity law/not-for-profit law* summer course and The University of Auckland LLM course LAWGENRL 715 *Law of Not-for-profits*.

37 Including for Transparency International *What does a world-leading framework of charities law look like?* 9 December 2021: www.transparency.org.nz/blog/what-does-a-world-leading-framework-of-charities-law-look-like; Austaxpolicy *Do businesses run by charities have a competitive advantage*, 17 November 2021: www.austaxpolicy.com/do-businesses-run-by-charities-have-a-competitive-advantage/; Alliance Magazine *What does a world-leading framework of charities law look like?* 9 February 2021: www.alliancemagazine.org/blog/what-does-a-world-leading-framework-of-charities-law-look-like; and S Barker “Charity regulation in New Zealand: history and where to now?” (2020) 26(2) *Third Sector Review* 28: search.informit.org/doi/10.3316/informit.626142384787005.

38 See: www.huie.org.nz/wp-content/uploads/Webinar-Summary-%E2%80%93-Educating-political-parties-to-help-the-community-sector.pdf.

restrictive measures in relation to charities may encourage other jurisdictions to follow suit, potentially creating a “race to the bottom” scenario of increasingly restrictive measures.

While much about the world is changing, it is important to be wary of adopting measures developed in other jurisdictions in often markedly different social, historical, legal, political, and even geographical contexts. Clarity about the *objective* of a charities law framework is necessary to guard against the dangers of “we-too”-ism for its own sake.

In addition, New Zealand is a small, unicameral, non-federal, Treaty-based and increasingly bijural nation, often described as the “social laboratory of the world”;³⁹ New Zealand has traditionally had a strong culture of volunteering, a “do-it-yourself” mindset forged by geographical isolation, and high levels of social capital. The question addressed by this research is what a world-leading framework of charities law might look like for *Aotearoa New Zealand*, taking into account learnings from other jurisdictions.

Recommendations

On some matters addressed in this report, there is sufficient material available to be able to make clear recommendations. On others, it is clear that further research and consultation is required.

That said, further piecemeal reform entailing alterations to isolated aspects of an interconnected system is unwise: any proposals for charities law reform must proceed as a whole, and then only with caution and after substantial further consultation. While perfection may not be a realistic goal, consultation is essential to ensure a new framework can achieve its objectives, have broad support and avoid unintended consequences. Further specific consultation with Māori is essential.⁴⁰

Our key recommendation is that the government’s review of the Charities Act is transferred to Te Aka Matua o te Ture – the Law Commission, for an independent (and ideally multi-disciplinary), first principles review taking into account the wider legal framework applicable to charities, including the Charitable Trusts Act 1957, the Trusts Act 2019, and the Incorporated Societies Act 2022. At the very least, any review of the legal framework for charities must extend to issues of concern for the charitable sector, including the definition of charitable purpose, advocacy, agency structure, the wider legal framework, and government contracting. If the Law Commission is not available, we note that other jurisdictions have adopted the independent panel model.⁴¹

We trust that this report might contribute to such a review, in the interests of developing a world-leading framework of charities law for Aotearoa New Zealand that helps charities to maximise their contribution to our society and can stand the test of time.

Recommendation 1.0:

That the government’s review of the Charities Act 2005 is transferred to Te Aka Matua o te Ture – the Law Commission for an independent first principles review taking into account the wider legal framework applicable to charities.

39 Te Ara the Encyclopaedia of New Zealand ‘Social laboratory of the world’, 1890-1920: teara.govt.nz/en/visitors-opinions-about-new-zealand/page-3.

40 This point was made strongly by Te Whakakitenga o Waikato Incorporated, on behalf of the Waikato-Tainui iwi, endorsed by the Waikato Raupatu Lands Trust and Group and Waikato-Tainui marae in their [submission](#) to the DIA’s review: “The review process is too rushed and further consultation is required, including specific consultation with Māori, in relation to any proposed changes to the Act ... The current survey-like Discussion Document and consultation process followed only by the Parliamentary Select Committee process in relation to amendment legislation would be completely inadequate ... A proposed changes/options for change paper, and/or a consultation draft of proposed amendment legislation, should be issued for this purpose. These steps would allow for genuine and meaningful consultation with Māori, and with other participants and stakeholders, regarding changes to the Act”.

41 In Australia, see P McClure AO, G Hammond OAM, S McCluskey, Dr M Turnour *Strengthening for purpose: Australian Charities and Not-for-profits Commission – Legislative Review 2018* 31 May 2018: treasury.gov.au/sites/default/files/2019-03/p2018-t318031.pdf. In Northern Ireland, see Dr O Breen, Rev Dr L Carroll, N Lavery *Independent Review of Charity Regulation Northern Ireland* January 2022: www.communities-ni.gov.uk/publications/independent-review-charity-regulation. England and Wales appointed an individual. See Lord Hodgson of Astley Abbotts *Trusted and Independent: Giving charity back to charities – Review of the Charities Act* July 2012.



Chapter 1 – Landscape

“It is hoped that the information gathered through the reporting and monitoring system to be introduced, as well as observation of other jurisdictions, will contribute to an informed debate on the wider issues, and to reform that will assist the sector in its vital role within New Zealand society”

*Report by the Working Party on Registration, Reporting and Monitoring of Charities
28 February 2002 at 30*

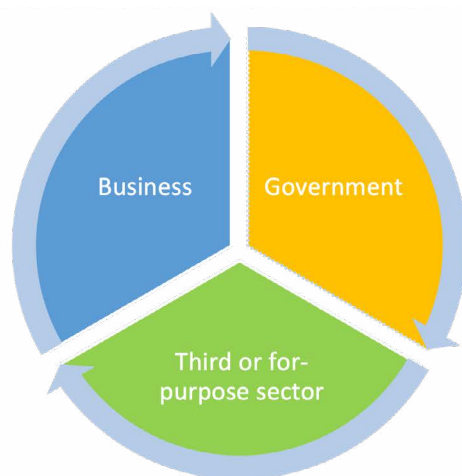
As many contributors to this research have noted, it is important to be clear about the objective of a charities law framework. Before doing so, however, it is necessary to be clear about its subject: charities and the charitable sector. As discussed above, neither appear to be widely understood in New Zealand, which creates a significant headwind to charities’ ability to achieve their potential for our society.

This chapter looks at the nature, composition and significance of the charitable sector, after first considering where the charitable sector “sits” in the wider context. We then look at why the charitable sector is so often overlooked.

Broader context

Many Western commentators describe society as having three distinct but mutually dependent sectors (with family occupying the space in between):¹ the economy (business), the polity (government), and a “third” sector, as illustrated by diagram 1.0.

Diagram 1.0:



The charitable sector sits within the “third”, or “for purpose”, sector: the group of organisations engaging in private, voluntary activities in pursuit of public purposes outside the formal apparatus of the state.² However, a contributing factor to the current lack of understanding of the charitable sector may be the lack of agreement on what the wider sector might be called. Box 1.1 discusses some of the terminology used.

1 M McGregor-Lowndes “An Overview of the Not-for-Profit Sector” in M Harding (ed) *Research Handbook on Not-for-Profit Law* (Edward Elgar, 2018) 131 at 131, 151, referring to Lester Salamon “The Rise of the Nonprofit Sector” (1994) 73(4) *Foreign Affairs* 109; R Atkinson “A primer on the Neo-Classical Republic Theory of the Nonprofit Sector (and the other three sectors too)” in M Harding (ed) *Research Handbook on Not-for-profit law* (Edward Elgar, 2018) 48; M Turnour “Beyond charity: outlines of a jurisprudence for civil society” (Doctoral thesis, Queensland University of Technology, 2009).

2 According to recent research, the for-purpose sector in New Zealand has annual income of approximately \$24 billion, compared to the business sector’s annual corporate pre-tax profits of approximately \$85 billion, and government’s annual spending of around \$110 billion: JB Were *2021 New Zealand Cause Report* September 2021 at 7.

Box 1.1 – terminology used to describe the wider sector:

A commonly used term for the wider sector is the **non-profit sector**, a term developed in the United States in the 1960s;³ however, some argue this term is a misnomer, as organisations within the sector are able to make a profit, they are just not for profit.

A response is to use the term **not-for-profit sector**, understood to be the official term in Australia.⁴ However, both terms are criticised for defining the sector by what it is not. Similar criticisms arise when using the term **non-governmental organisations** (or NGOs), an expression developed by the United Nations after the Second World War, and often used in the context of organisations that operate internationally.⁵

Such criticisms have led to use of the term **“for-purpose”** sector: by definition, entities in the wider third sector are operating for a purpose rather than for profit. However, operating for a purpose is not necessarily limited to entities within this sector, and therefore may not appropriately delineate the third sector from the for-profit and government sectors. In addition, feedback indicates the concept of “for-purpose” may not resonate well within Māoridom. In Te Ao Māori, koha is an expression of manaakitanga which is practised in conjunction with utu. Utu sets a code of conduct which ensures that the behaviour of participants is fair, respectful, and transparent.⁶ For many Māori, mahi aroha carried out for the benefit of whānau, hapū and iwi, in accordance with principles of tikanga and reciprocity, is seen as an essential part of fulfilling cultural obligations to the wider collective, for maintaining mana and rangatiratanga, and may also be central to one’s conception of self.⁷

Similar criticisms of not resonating well within Māoridom apply to the term **community and voluntary sector**, arguably the official term for the third sector in New Zealand given the relevant Minister’s title as the Minister for the Community and Voluntary Sector.⁸

In response, the term **“tangata whenua community and voluntary sector”** has been used. However, this term has not received universal acceptance, perhaps because of its length.

Another term often used is **“civil society”**, which became popular in the 1980s in the context of non-state movements defying authoritarian regimes, particularly in central and

- 3 See Australian Productivity Commission *Contribution of the Not-for-Profit Sector* 11 February 2010: www.pc.gov.au/inquiries/completed/not-for-profit/report at 4: “The terms ‘third sector’ and ‘non-profit sector’ have their roots in the 1969 Tax Reform Act in the United States. Economists invited to consider the effect of this Act on philanthropy identified the primary institutions of society as the State and the market, so the defining question was whether nongovernment organisations distributed their profits to owners or to outsiders, and whether the organisations were formal, voluntary and independent ... It is this relatively ‘economic’ perspective that underpins the Johns Hopkins University Comparative Civil Society Project, where the defining characteristic of a NFP is that it does not distribute profits to members. Other features of NFPs are a formal governance structure, independence from government, autonomy in decision-making and voluntary participation by members”. See also M McGregor-Lowndes “An Overview of the Not-for-Profit Sector” in M Harding (ed) *Research Handbook on Not-for-Profit Law* (Edward Elgar, 2018) 131 at 131, 136, referring to PD Hall *Investing the Nonprofit Sector and other Essays on Philanthropy, Voluntarism and Nonprofit Organisations* (John Hopkins University Press 1992).
- 4 In 2001, an Australian government inquiry recommended standard use of the term “not-for-profit” in Commonwealth legislation, because it “more closely describes the entity’s aim as not being the generation and distribution of profit”: Ian Sheppard, Robert Fitzgerald and David Gonski Report of the *Inquiry into the Definition of Charities and Related Organisations* (The Treasury, 2001) 93, referred to in M McGregor-Lowndes “An Overview of the Not-for-Profit Sector” in M Harding (ed) *Research Handbook on Not-for-Profit Law* (Edward Elgar, 2018) 131 at 136.
- 5 M McGregor-Lowndes “An Overview of the Not-for-Profit Sector” in M Harding (ed) *Research Handbook on Not-for-Profit Law* (Edward Elgar, 2018) 131 at 136.
- 6 Tax Working Group Future of Tax: Interim Report, 20 September 2018: taxworkinggroup.govt.nz/resources/future-tax-interim-report.html at 119, [2].
- 7 Conversation with the Māori Advisory Committee of Philanthropy New Zealand Te Kāhui Pūmanawa, 6 August 2020. See also Katherine Peet and John Peet “Stolen from future generations? The need to move to a political economy of generosity” ANZTSR Conference, Unitec, Auckland, 27 - 29 November 2002.
- 8 The term “voluntary sector” is a common descriptor in the United Kingdom. See M McGregor-Lowndes “An Overview of the Not-for-Profit Sector” in M Harding (ed) *Research Handbook on Not-for-Profit Law* (Edward Elgar, 2018) 131 at 136.

eastern Europe and Latin America. What exactly constitutes civil society is not agreed,⁹ however, the Organisation for Economic Co-operation and Development (“**OECD**”) describes it as referring to “uncoerced human association or interaction by which individuals implement individual or collective action to address shared needs, ideas, interests, values, faith, and beliefs that they have identified in common, as well as the formal, semi- or non-formal forms of associations and the individuals involved in them”.¹⁰ “Civil society organisations” in turn include all “not-for-profit, non-state, non-partisan, non-violent and self-governing organisations outside of the family in which people come together to pursue shared needs, ideas, interests, values, faith and beliefs, including formal, legally registered organisations as well as informal associations without legal status but with a structure and activities”.¹¹

The term “civil society” can be contrasted with the term “**third sector**”, which was developed in the early 1970s.¹² The term “third sector” is often criticised for implying a hierarchy, discouraging a conception of each of the three sectors as equally important.¹³ It is also criticised for potentially conceptualising the sector in a limited way. For example, the policy of the Communist Party of China (“**CPC**”) is understood to be “more third sector and less civil society”,¹⁴ based on a view of the sector as purely service-oriented. Under this conception, the sector’s role is limited to either taking over social services from government or contracting with government to provide services. Following introduction of the Charity Law of the People’s Republic of China in 2016 (“**the Charity Law**”), the social services charitable sector has grown very rapidly in China, encouraged by a significant increase in state investment and contributions. However, these successes have come at a cost: democratic principles such as freedom of speech or association are significantly restricted, and the Charity Law is understood to be used as a tool for suppression of not-for-profit advocacy.¹⁵ This is currently a global trend, often couched in terms of “efficiency”; however, limiting the sector in such a way would undermine its effectiveness, and conflict with fundamental principles of a liberal democracy such as New Zealand, as discussed further below.

Other terms used to describe the wider sector include “**social sector**”, “**social economy**”,¹⁶ and “**public benefit sector**”, the latter encompassing those organisations

9 See the discussion in Australian Productivity Commission [Contribution of the Not-for-Profit Sector](#) 11 February 2010 at 3.

10 The Australian Productivity Commission defines civil society as the “arena of uncoerced collective action around shared interests, purposes and values. In theory, its institutional forms are distinct from those of the state, family and market, though in practice, the boundaries between the state, civil society, family and market are often complex, blurred and negotiated”: Australian Productivity Commission [Contribution of the Not-for-Profit Sector](#) 11 February 2010 at xv.

11 See Organisation for Economic Co-operation and Development, Development Co-operation Directorate, Development Assistance Committee *Recommendation on Enabling Civil Society in Development Cooperation and Humanitarian Assistance* DCD/DAC(2021)29 22 June 2021: [www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DCD/DAC\(2021\)29&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DCD/DAC(2021)29&docLanguage=En).

12 Amitai Etzioni, a sociologist who established the communitarian movement, used it in the context of a new way of delivering social services other than through government; Theodore Levitt drew attention to the power of groups outside business and government to change social conditions. See M McGregor-Lowndes “An Overview of the Not-for-Profit Sector” in M Harding (ed) *Research Handbook on Not-for-Profit Law* (Edward Elgar, 2018) 131 at 135.

13 LN Tink and BC Kingsley [Transforming the Non-Profit Community in Edmonton: Phase 1 – identifying myths, trends and areas for change](#) (Edmonton Chamber of Voluntary Organisations: Edmonton AB, 2021) at 27.

14 Interview with Mark Sidel, Doyle-Bascom Professor of Law and Public Affairs, University of Wisconsin-Madison (14 January 2021).

15 This trend has been described as government exploiting community associations for community service delivery while restricting their role in broader civil society. See M McGregor-Lowndes “An Overview of the Not-for-Profit Sector” in M Harding (ed) *Research Handbook on Not-for-Profit Law* (Edward Elgar, 2018) 131 at 131, 138, 148 - 149.

16 Australian Productivity [Commission Contribution of the Not-for-Profit Sector](#) 11 February 2010 at xxv, 3; Impact Initiative *A Roadmap for Impact* April 2021: www.theimpactinitiative.org.nz/publications/roadmap-for-impact at 25; K Mahlab AM *Why don’t changemakers in the social sector get the recognition they deserve?* ProBono Australia 28 October 2021: probonoaustralia.com.au/news/2021/10/why-dont-changemakers-in-the-social-sector-get-the-recognition-they-deserve/

that “operate for the public good”.¹⁷ However, as with the term “for purpose sector”, operating socially or for the public benefit is not necessarily limited to entities within this sector, and therefore may not appropriately delineate it from the for-profit and government sectors.

The lack of agreement on what to call the wider sector is arguably a reflection of the diversity of the sector itself, and therefore something to be celebrated and embraced rather than resolved: while the sector can appear “messy” and “inefficient”, in reality this can be one of its strengths.¹⁸

Whatever the wider sector might be called, its key defining characteristic is that entities within it are subject to the non-distribution constraint.

The non-distribution constraint

The “non-distribution constraint” is a term coined in the 1980s by Henry Hansmann who described the concept as follows:¹⁹

A nonprofit organisation is, in essence, an organisation that is barred from distributing its net earnings, if any, to individuals who exercise control over it, such as members, officers, directors, or trustees ... It should be noted that a nonprofit is not barred from earning a profit. Many nonprofits in fact consistently show an annual accounting surplus. It is only the distribution of these profits that is prohibited. Net earnings, if any, must be retained and devoted in their entirety to financing further production of the services that the organisation was formed to provide.

In other words, the defining feature of entities in this sector is that they are prohibited, by their constituting document and/or governing legislation, from distributing profits or surplus income to any owner, shareholder, controller, officer holder, employee, member, or any other individual:²⁰ that is, the sector is comprised of “not-for-profit” entities.

17 Report of the Special Senate Committee on the Charitable Sector *Catalyst for Change: A Roadmap to a Stronger Charitable Sector* June 2019: [18 See Australian Productivity Commission *Contribution of the Not-for-Profit Sector* 11 February 2010 at 19: “the importance of process can make NFPs appear messy and inefficient to outsiders, and even to some of the insiders. However, process can be central to the ability of a NFP to garner resources and deliver activities effectively. On the cost side, more participatory and inclusive processes can reduce the volume and/or quality of outputs by absorbing resources and slowing down delivery. This is observed in activity development and implementation that requires more one-on-one service delivery, time and resources to support participation in decision making and greater individualisation of the service. Yet, on the benefit side, it may be these processes that give NFPs an advantage in trustworthiness or network governance that make them more effective, especially in the delivery of some human services. While a trade-off between production efficiency and quality is not unique to the NFP sector, NFPs often place a relatively higher weight on quality. In some cases quality, including quality of process, is strongly linked to effectiveness of the activity, but in other cases the ‘doing’ can take precedence over the ‘achieving’. Where these processes are central to the governance of the organisation and part of the value it provides to its volunteers and members, processes should be seen as essential outputs for the sustainability of the NFP.”](https://sencanada.ca/en/info-page/parl-42-1/cssb-catalyst-for-change/#:~:text=Catalyst%20for%20Change%3A%20A%20Roadmap%20to%20a%20Stronger%20Charitable%20Sector&text=The%20committee%20held%20extensive%20consultations,better%20support%20their%20important%20work> at 118. See also Australian Productivity Commission <i>Contribution of the Not-for-Profit Sector</i> 11 February 2010 at 3, referring to public benefit organisations and communal enterprise in Germany.</p>
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19 H Hansmann “The Role of Nonprofit Enterprise” (1980) 89(5) Yale LJ 835 - 902 at 838.

20 See R Atkinson “Theories of the Federal Income Tax Exemption for Charities: Thesis, Antithesis and Synthesis” (1997) 27 Stetson Law Review 395 at 416, 418; Australia’s Future Tax System Review Final Report 2 May 2010 (the Henry Review), Pt 2 Vol 1 at 205: [Chapter 1 – Landscape | 40](https://treasury.gov.au/review/the-australias-future-tax-system-review/final-report>.”</p>
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The non-distribution constraint may be conceptualised in other ways, such as:

- a. A “**destination of funds test**”: not-for-profit entities must be constituted to distribute their surpluses exclusively to further their purposes rather than the private profit of any individual;²¹ in other words, all funds of a not-for-profit entity must ultimately be destined for the entity’s *purpose*.²²
- b. A **prohibition on private pecuniary profit**: although fair value may be paid for goods and services actually rendered, no funds of a not-for-profit entity may be applied to the private pecuniary profit of any individual;²³ in other words, owners or stewards of a not-for-profit entity are prevented from personally enjoying any profits.

These three principles (the non-distribution constraint, the prohibition on private pecuniary profit, and the destination of funds test) are arguably all different ways of saying the same thing: those concerned with a not-for-profit entity can have confidence that its funds will be used only to further the entity’s purpose, both during the life of the entity and on its winding up.

In this way, the non-distribution constraint clearly delineates the not-for-profit sector from the business sector:²⁴ entities that are not subject to the non-distribution constraint do not form part of the not-for-profit/third sector, even if they have adopted a public benefit purpose, because for-profit entities, by definition, can never provide certainty that all funds will always be destined for the public benefit purpose (as opposed to the private pecuniary profit of an individual).

Understanding the existence and impact of the non-distribution constraint is critical to any discussion regarding charities running businesses, as discussed further below in chapter 5 (*Social enterprise and competitive advantage*).

A subset of the broader sector

Whatever the wider not-for-profit/third sector might be called, the charitable sector is a subset of it: the charitable sector is comprised of charities, that is, entities that are registered, or entitled to be registered, under the Charities Act 2005 (“**the Charities Act**”). In order to be a charity, one must first be a not-for-profit entity²⁵ (that is, subject to the non-distribution constraint). However, not all not-for-profit entities will be charities: the charitable sector is comprised only of those not-for-profit entities whose purposes meet the legal definition of “charitable”.

The distinction between the charitable sector and the other two sectors might be summarised as follows:

- i. business sector: *private* organisations operating for *private* purposes;
- ii. government sector: *public* organisations operating for *public* purposes; and
- iii. charitable sector: *private* organisations operating for *public* purposes.

21 M McGregor-Lowndes “An Overview of the Not-for-Profit Sector” in M Harding (ed) *Research Handbook on Not-for-Profit Law* (Edward Elgar, 2018) 131 at 132-133, referring to H Hansmann “The Role of Nonprofit Enterprise” (1980) 89 Yale LJ 835, among others.

22 For charities, once funds or other assets are impressed with charitable purpose, they must be forever destined for charitable purposes, including on winding up. See *Trustees of the Auckland Medical Aid Trust v CIR* [1979] 1 NZLR 382 (SC) at 387; *Commissioner of Inland Revenue v Carey’s (Petone and Miramar) Ltd* [1963] NZLR 450; *Calder Construction Co Ltd v Commissioner of Inland Revenue* [1963] NZLR 921; and *Commissioner of Inland Revenue v NTN Bearing-Saeco (NZ) Ltd* (1986) 8 NZTC 5,039.

23 It is important to note that incidental private benefits do not prevent a purpose from being charitable: *Latimer v Commissioner of Inland Revenue* [2004] 3 NZLR 157 (PC) at [35] - [36], as discussed further below in ch 3 (*The definition of charitable purpose*).

24 M McGregor-Lowndes “An Overview of the Not-for-Profit Sector” in M Harding (ed) *Research Handbook on Not-for-Profit Law* (Edward Elgar, 2018) 131 at 133; R Atkinson “Theories of the Federal Income Tax Exemption for Charities: Thesis, Antithesis and Synthesis” (1997) 27 Stetson Law Review 395 at 419 n 74.

25 In Australia, this requirement has been codified in paragraph (a) of the definition of “charity” in Charities Act 2013 (Cth) s 5. In New Zealand, Charities Act s 13(1)(b)(ii) requires that a society or institution may not be “carried on for the private pecuniary profit of any individual”. For charitable trusts, the requirement in Charities Act s 13(1)(a) that income be derived in trust for charitable purposes “itself excludes any element of private pecuniary profit” (*Trustees of the Auckland Medical Aid Trust v CIR* [1979] 1 NZLR 382 (SC) at 398).

The nature of the charitable sector in New Zealand

At the time of writing, New Zealand has 28,183 registered charities,²⁶ representing approximately 20% of the wider not-for-profit sector.²⁷ In New Zealand, charitable registration is voluntary: an unregistered charity is still able to call itself a charity and seek funds from the public.²⁸ However, charitable registration is the gateway to a number of privileges, including:

- i. **Tax privileges:** the two key tax privileges for charities seen across all comparable jurisdictions are what New Zealand refers to as “donee status”²⁹ (that is, the ability for donors to a donee organisation to claim a tax credit or a tax deduction for their donation) and an exemption from income tax. In New Zealand, all income of registered charities is exempt from income tax, although business income must meet additional requirements (principally relating to control and jurisdiction) in order to qualify for exemption.³⁰ Tax privileges in New Zealand are increasingly being restricted to registered charities only.³¹
- ii. **Other privileges:** requirements may be relaxed for registered charities in other legal contexts, such as in the context of overseas investment.³²
- iii. **Funding:** many philanthropic funders, and many government agencies engaging contractors, require an entity to be registered as a charity as a condition of receiving funding.
- iv. **Other support:** registration may encourage corporates and other businesses to provide discounted goods or services.
- v. **Credibility:** registered charitable status can give an air of credibility and respectability, which can be critical in attracting volunteer and other support.

Tax privileges are often perceived as the “principal” advantage of charitable registration,³³ however, this perception requires critical examination: many charities do not earn much “income” after expenses that would otherwise be subject to tax, and/or do not receive large amounts of donations that would otherwise be eligible for tax credits or deductions. In practice, the more significant driver for seeking charitable registration is often funding: an ability to access philanthropic or government funding may be critical to an entity’s survival and therefore its ability to carry out its work.

Composition

Charities are unusual in that they are defined by their purposes rather than by their underlying legal structure. Entities of a variety of legal forms may be charities, provided they are subject to the non-distribution constraint and their purposes are charitable. Currently, there is no legal structure in New Zealand designed specifically for charities, meaning that the legal structures available for charities are the same as for any other legal person: in other words, charities must “make do” with legal structures fashioned largely for other purposes, such as for family property holding (trusts) or commercial endeavour (companies).³⁴

26 See the landing page of Charities Services’ website: www.charities.govt.nz/.

27 JB Were *2021 New Zealand Cause Report* September 2021 at 4.

28 Charities Bill 2004 (108-1) [explanatory note](#) at 1; Charities Services Ngā Ratonga Kaupapa Atawhai 2020/2021 Annual Review: charities.govt.nz/assets/Annual-Review-Report-2021-ed.pdf at 10.

29 Income Tax Act 2007 ss DB 41, DV 12, subpt LD.

30 Income Tax Act 2007 ss CW 41, CW 42.

31 See, for example, ss CW 42(1)(aa), LD 3(3), both of which apply from 1 April 2020. For a fuller discussion of the tax privileges for charities, see *The Law and Practice of Charities in New Zealand* S Barker, M Gousmett and K Lord (LexisNexis, Wellington, 2013) ch 3.

32 Overseas Investment Regulations 2005 reg 60 provides that a transaction will not require consent if it will result in the acquisition of an interest in residential land by certain registered charities.

33 See, for example, *Re Greenpeace of New Zealand Inc* [2015] 1 NZLR 169 (SC) at [1].

34 *The Law and Practice of Charities in New Zealand*, S Barker, M Gousmett and K Lord (LexisNexis, Wellington, 2013) at [6.10] - [6.11], referring to P Luxton *The Law of Charities* (Oxford University Press, 2001) at 17.

Most charities in New Zealand are structured as charitable trusts, as indicated in box 1.2:³⁵

Box 1.2 – composition of entities in the charitable sector:

Act of incorporation	Proportion of registered charities
Charitable Trusts Act 1957	38%
Incorporated Societies Act 1908	25%
Companies Act 1993	3.5%
Total:	66.5%

The remainder may be incorporated under specific legislation,³⁶ or are trusts or societies operating on an unincorporated basis. Reflecting the “spontaneity for which the sector is so highly valued”,³⁷ it is common for charities to begin life as a group of people gathering together informally for a shared purpose. However, the risks and uncertainties inherent in operating on an unincorporated basis are significant.

For charitable registration purposes, the Charities Act helpfully creates a statutory fiction by deeming an “entity” to mean “any society, institution, or trustees of a trust” (that is, whether incorporated or not).³⁸ Despite this, however, an unincorporated body of persons is not a *legal* entity in itself, meaning that it cannot own anything, or enter into contracts, in its own name. Instead, it must do so through a potentially-fluctuating group of individual members, who are also exposed to significant risks of personal liability for the society’s debts and liabilities, and for civil wrongs (particularly negligence) committed on its behalf. Once an unincorporated body starts to acquire property or enter into contracts, some form of incorporation is likely to be advisable.³⁹

Charitable trusts

For the trustees of charitable trusts, one option for incorporation is to incorporate as a board under the Charitable Trusts Act 1957 (“**the Charitable Trusts Act**”): this mechanism creates a body corporate with perpetual succession and a degree of limited liability,⁴⁰ allowing contracts to be entered into, and property to be owned, in the name of the body corporate (the “board”), rather than the individual trustees, without the need to incorporate and administer a separate corporate trustee.⁴¹

All other things being equal, it would normally be advantageous for the trustees of a charitable trust to incorporate as a board under the Charitable Trusts Act; however, legal advice should always be sought in any individual case.

35 Source: Te Tari Taiwhenua Internal Affairs [Modernising the Charities Act 2005: Discussion Document](#) February 2019 at 24. It should be noted that entities incorporated under the Charitable Trusts Act 1957 may be structured as either a charitable trust or a charitable society, as discussed further below.

36 Such as the Agricultural and Pastoral Societies Act 1908. Other charities may be incorporated under bespoke legislation. For example, the Girl Guides Association New Zealand Incorporated (CC22069) is incorporated under the Girl Guides Association (New Zealand Branch) Incorporation Act 1942, the Board of the Winston Churchill Memorial Trust (CC20454) is incorporated under the Winston Churchill Memorial Trust Act 1965, the Arts Centre of Christchurch Trust Board (CC21247) is incorporated under the Arts Centre of Christchurch Trust Act 2015, the Board of the Waitangi National Trust (CC31198) is incorporated under the Waitangi National Trust Board Act 1932, and the Tauranga Moana Maori Trust Board (CC41031) is incorporated under the Tauranga Maori Trust Board Act 1981.

37 Ontario Law Reform Commission *Report on the Law of Charities* (Toronto, 1996) at 338.

38 Charities Act 2005 s 4(1).

39 M von Dadelszen *Law of Societies* (3ed) (LexisNexis, 2013) at [2.5.1].

40 Charitable Trusts Act 1957 ss 7, 13.

41 Another option utilised by a number of charitable trusts is a trustee company, defined under Trustee Companies Act 1967 s 2 to mean any of the following companies: Trustees Executors Ltd, AMP Perpetual Trustee Company NZ Ltd, PGG Trust Ltd, New Zealand Permanent Trustees Ltd, and The New Zealand Guardian Trust Company Ltd.

Once incorporated, the trust board will be listed on the register of charitable trusts maintained by the New Zealand Companies Office,⁴² which is a separate register from the register of charities maintained by the Department of Internal Affairs (“**DIA**”) under the Charities Act. Under the Charitable Trusts Act, the trust board will be required to notify certain changes to the Registrar of Incorporated Societies (who also administers the register of entities incorporated under the Charitable Trusts Act).⁴³ However, as discussed further below, the fact that there is no requirement to file annual financial information under the Charitable Trusts Act formed part of the original impetus for the Charities Act 2005, as charitable trusts were seen as “uniquely free from supervision”.⁴⁴

A key distinguishing feature of charitable trusts relates to decision-making: control of the trust fund lies in the hands of the trustees, whose obligation is to honour the terms of the trust. While some trust deeds may provide for trustees to establish a “membership” of supporters, trusts are not about membership participation, nor are they about democratic decision-making across a membership base: the trustees of a charitable trust are not accountable to individuals no matter how committed those individuals may be to the ideals of the trust.⁴⁵

The autocratic nature of decision-making is a key point of distinction between charitable trusts and incorporated societies, the second most common form of charity in New Zealand.

Incorporated societies

In contrast to charitable trusts, incorporated societies are membership organisations: incorporated societies are inherently democratic organisations that are ultimately run by their members.⁴⁶ The primary means by which members hold an incorporated society to account is through general meetings: the ability of members of an incorporated society to call a general meeting has been described as a “superior right” and a “safeguard to members” against a committee that is “out of step with the membership”.⁴⁷

In New Zealand, unincorporated societies wishing to incorporate currently have a range of options, the two main ones being incorporation as an incorporated society under the Incorporated Societies Act 1908 (“**the Incorporated Societies Act**”) or as a charitable society under the Charitable Trusts Act.⁴⁸

When the Incorporated Societies Act was enacted in 1908 it was regarded as world-leading and innovative: it has enabled the creation of a rich tapestry of community organisations in New Zealand ranging from local chess clubs through to the New Zealand Rugby Football Union, that have collectively contributed significantly to our cultural and social capital.⁴⁹ However, the 114 years since its enactment have inevitably thrown up the need for some revision of it and, following a review process which had commenced in 2010, the Incorporated Societies Act 2022 repeals and replaces the 1908 Act with a modern governance framework.

Most societies incorporate under the Incorporated Societies Act,⁵⁰ however, there are understood to be approximately 7,000 societies incorporated under the Charitable Trusts Act. The register of entities incorporated under the Charitable Trusts Act does not distinguish between incorporated charitable trust boards and the incorporated boards of

42 New Zealand Companies Office Searching the charitable trusts register:

ct-register.companiesoffice.govt.nz/help-centre/searching-the-charitable-trusts-register/.

43 Charitable Trusts Act 1957 ss 6, 23.

44 Property Law and Equity Reform Committee *Report on the Charitable Trusts Act 1957* (Wellington, February 1979) at 2.

45 M von Dadelszen *Law of Societies* 3ed (LexisNexis, 2013) at [6.2.5].

46 Te Aka Matua o te Ture - New Zealand Law Commission *A New Act for Incorporated Societies* (NZLC R129, 2013): www.lawcom.govt.nz/sites/default/files/projectAvailableFormats/NZLC%20R129.pdf at [1.23], [9.1].

47 M von Dadelszen *Law of Societies* 3ed (LexisNexis, 2013) at [6.2.3].

48 See Charitable Trusts Act 1957 s 8.

49 Te Aka Matua o te Ture - New Zealand Law Commission *A New Act for Incorporated Societies* (NZLC R129, 2013) at 3.

50 Incorporated Societies Bill 15-2 (select committee report) at 1: there are approximately 24,000 societies incorporated under the Incorporated Societies Act 1908.

charitable *societies*, referring to all boards incorporated under the Charitable Trusts Act as “charitable trusts”. This has led to some confusion in practice, with some (particularly older) charitable societies operating as charitable trusts and vice versa. However, the differences between societies and trusts are fundamental: entities that are not certain of their underlying legal structure should seek legal advice.

The Incorporated Societies Act 2022 removes the option of incorporating a charitable society under the Charitable Trusts Act:⁵¹ existing charitable societies have a choice of transitioning to the new incorporated societies’ legislation, or continuing under the Charitable Trusts Act indefinitely. However, new societies will incorporate under the new Incorporated Societies’ legislation once it comes into force. The ability of trustees of a charitable trust to incorporate under the Charitable Trusts Act will continue.

A key distinction between incorporated societies and companies is that members of the former do not have an ownership interest. This factor, known as the “financial gain prohibition”,⁵² is what sets incorporated societies apart from companies (where shareholders do have an ownership interest from which they might have a right to receive dividends or participate in the distribution of assets on winding up).

While incorporated societies and charitable trusts are the two most common structures adopted by charities in New Zealand, it does not appear to be widely known that companies incorporated under the Companies Act 1993 may be charities also.

Charitable companies

There is nothing inherent in the limited liability company model that requires companies to be run for profit or to provide a return to their shareholders. Companies can register as charities in New Zealand provided they adopt a constitution that articulates charitable purposes and a non-distribution constraint (ensuring that company funds are limited to furthering charitable purposes, including on winding up).

There are two main ways to achieve this: either the constitution will require that only charities may be shareholders or, if non-charities may be shareholders, the constitution must prohibit distributions to such shareholders.⁵³

Beyond charities law requirements such as these, a key advantage of the company model is its flexibility. The Companies Act provides a broad framework but through the mechanism of the company’s constitution, and underlying shareholder agreements, it is possible to design almost any sort of structure accommodating various different concerns and interests within a company vehicle.

The company form is also well-understood in the for-profit and government spheres, making it a useful form of incorporation for community groups to provide services under contract for central or local government. However, charities structured as companies face a degree of stigma in practice, which can create barriers to accessing other types of funding and other support. The Law Commission noted wariness amongst community groups of utilising the flexibility of the company model: “Moreover, it was clear that many societies do not see themselves as engaged in the same sphere of activity as companies”.⁵⁴

51 Incorporated Societies Act 2022 s 261.

52 The financial gain prohibition is reflected in the Incorporated Societies Act 2022 ss 3(a), 3(d)(iv), 8(1), 22 - 24, 26(1)(l), 27, 77, 143 - 149, 210(e), 216.

53 Charities Services discusses these requirements on their website *Charitable purpose and your rules*: www.charities.govt.nz/ready-to-register/need-to-know-to-register/charitable-purpose-and-your-rules/.

54 Te Aka Matua o te Ture - New Zealand Law Commission *A New Act for Incorporated Societies* (NZLC R129, 2013) at [2.9].

It would be helpful to raise awareness that such stigma is not warranted, as can be seen from the widespread use of the corporate form by charities in comparable jurisdictions.⁵⁵

Dual registration

Charities wishing to incorporate generally gain their legal status from the Companies Office (for example under the Charitable Trusts Act, the Incorporated Societies Act or the Companies Act). They can then, if they wish, take an extra step of seeking charitable registration under the Charities Act. As such, there is a dual registration system, whereby charities that are both incorporated and registered will generally have a notification obligation to two government agencies (although the notification requirements of the incorporating Acts vary). Many charities that are both incorporated and registered seem unaware of, or frustrated by, the dual notification obligation, as discussed further below in chapter 8 (*Commentary on the draft Bill*).

A number of jurisdictions have addressed the dual registration issue by allowing charities to incorporate under charities legislation itself: the issue of “charitable incorporated organisations” is also discussed below in chapter 8.

Entity size

New Zealand divides its charitable sector into four tiers, based on size measured as a function of expenditure, as set out in box 1.3:⁵⁶

Box 1.3 – charitable sector tiers:

Tier	Tier size threshold
1	Annual expenses over \$30 million (or has public accountability)
2	Annual expenses between \$2 million and \$30 million
3	Annual expenses less than or equal to \$2 million
4	Annual operating payments less than \$140,000 ⁵⁷

55 In Canada, the corporation had replaced the trust as the preferred vehicle for charities by the 1970s: see Ontario Law Reform Commission *Report on the Law of Charities* (Toronto, 1996) at 4, 161, 270. In the United States, “the corporation is king. This dates from the aftermath of the revolution, when antagonism to all things British included the legal doctrine of the charitable trust ... Although the legal form of a charitable trust is available, it is not widely used for NFP enterprises. Unincorporated associations are more common ...”: M McGregor-Lowndes “An Overview of the Not-for-Profit Sector” in M Harding (ed) *Research Handbook on Not-for-Profit Law* (Edward Elgar, 2018) 131. In Australia, England and Wales and Ireland, the company limited by guarantee is a common vehicle chosen for charity (see, for example, OB Breen and PA Smith *Law of Charities in Ireland* (Bloomsbury, 2019) at [7.04], [7.15]). By contrast, the ability to incorporate a company by way of guarantee was abolished in New Zealand by the Companies Act 1993 (which also abolished the concepts of articles and memoranda of association and replaced them with a default but idiosyncratically-modifiable statutory constitution). The rationale was that the effect of limitation by guarantee could be achieved by limiting shareholder liability to a specified amount in the company’s constitution: accordingly, a separate classification was not considered necessary (see Te Aka Matua o te Ture - New Zealand Law Commission [A New Act for Incorporated Societies](#) (NZLC R129, 2013) at [2.8]).

56 See Charities Act 2005 ss 41 - 42D and External Reporting Board *Standard A1 Application of the Accounting Standards Framework*: www.xrb.govt.nz/standards/accounting-standards/not-for-profit-standards/standards-list/xrb-a1/. A threshold is reached in respect of an accounting period if, in each of the two preceding accounting periods of the entity, the total operating expenditure of the entity and all entities it controls (if any) equals or exceeds the threshold (see s 42D).

57 The threshold for tier 4 increased from \$125,000 to \$140,000 from 1 January 2022: Financial Reporting (Inflation Adjustments) Regulations 2021 cls 2, 5.

New Zealand is unusual in measuring size as a function of expenditure, as most comparable jurisdictions measure size as a function of *income*.⁵⁸ Expenditure was chosen in New Zealand as it was considered more reflective of underlying activity than revenue;⁵⁹ an expenditure approach also protects charities from fluctuations in tier due to, for example, one-off large bequests. Our research indicates that measuring size as a function of revenue can also cause difficulty in practice in terms of determining what items should be included. There is no compelling reason for New Zealand to change its use of expenditure as the basis for measuring size, despite international trends.

Financial reporting

All comparable charities law frameworks require registered charities to comply with some level of annual reporting. In New Zealand, every registered charity is required to file an annual return, accompanied by financial statements prepared in accordance with financial reporting standards issued by the External Reporting Board ("**XRB**"). This information is then made publicly available on the charities register.⁶⁰

The applicable financial reporting standards for registered charities in New Zealand have been designed specifically for New Zealand not-for-profit entities and accommodate different sizes of entity through the tiered system: charities in tiers 1 and 2 apply the full suite of reporting standards (with some reduced disclosure requirements for tier 2),⁶¹ while charities in tiers 3 and 4 are able to report using much simplified bespoke standards (including on a cash basis for tier 4).⁶²

From the financial information now available, it can be seen that most charities in New Zealand are small: as set out in box 1.4, almost 95% of registered charities are eligible to report under tiers 3 and 4; however, a very small number of very large charities account for more than half of the charitable sector's expenditure.⁶³

Box 1.4 – breakdown of expenditure by tier:

Tier	Percentage of number of charities	Percentage of total annual sector expenditure
Tier 1 (over \$30 million)	Less than 1% of all registered charities	51%
Tier 2 (\$2 - \$30 million)	5.7%	29%
Tier 3 (\$125,000 ⁶⁴ - \$2 million)	35.6%	11%
Tier 4 (under \$125,000)	58%	9%

58 For example, in Australia, size is determined as a function of annual revenue (see Australian Charities and Not-for-profits Commission *Charity size*: <www.acnc.gov.au/tools/topic-guides/charity-size>). In the United Kingdom, the Statement of Recommended Practice (SORP) for charities defines smaller charities as those having a gross income of £500,000 (UK) or 500,000 euros (Republic of Ireland) or less in the reporting period (see FRS 102 at [1.9]: <charitiessorp.org/media/647945/charities-sorp-frs102-2019a.pdf>. See also Dr O Breen, Rev Dr L Carroll, N Lavery *Independent Review of Charity Regulation Northern Ireland* January 2022 at 126 table 6.2).

59 See Charities Standards Review Board *Discussion Document - Proposed Application of Accounting and Assurance Standards under the Proposed New Statutory Framework for Financial Reporting* September 2009: <www.xrb.govt.nz/standards/accounting-standards/accounting-standards-framework/history/> at 7.

60 See Charities Act 2005 ss 41(2), 42A.

61 The suite of [tier 1 and 2 standards](http://www.xrb.govt.nz/standards/accounting-standards/not-for-profit-standards/tier-1-and-2/) can be found here: <www.xrb.govt.nz/standards/accounting-standards/not-for-profit-standards/tier-1-and-2/>.

62 The standard for tier 3 is [Public Benefit Entity Simple Format Reporting – Accrual \(Not-for-profit\)](http://www.xrb.govt.nz/standards/accounting-standards/not-for-profit-standards/tier-3/) or PBE SFR – A (NFP): <www.xrb.govt.nz/standards/accounting-standards/not-for-profit-standards/tier-3/>. The standard for tier 4 is [Public Benefit Entity Simple Format Reporting – Cash \(Not-for-profit\)](http://www.xrb.govt.nz/standards/accounting-standards/not-for-profit-standards/tier-4/) or PBE SFR – C (NFP): <www.xrb.govt.nz/standards/accounting-standards/not-for-profit-standards/tier-4/>.

63 Source: Te Tari Taiwhenua Internal Affairs *Modernising the Charities Act 2005: Discussion Document* February 2019 at 10. See also Charities Services Ngā Ratonga Kaupapa Atawhai *2020/2021 Annual Review* at 15.

64 As discussed above, the threshold for tier 4 increased from \$125,000 to \$140,000 from 1 January 2022. See Financial Reporting (Inflation Adjustments) Regulations 2021 cls 2, 5.

Importantly, the applicable financial reporting standards for registered charities in New Zealand include a requirement to present both financial and non-financial information: “service performance reporting” is intended to give charities an opportunity to “tell their story” in non-financial terms, based around two elements: (a) **outcomes** (what the entity is seeking to achieve in terms of its impact on society); and (b) **outputs** (the goods or services that the entity delivered during the year: what it did). The main difference between “outcomes” and the entity’s purpose as stated in its constituting document is that the latter is usually stated in broad or general terms and applies over the life of the entity, whereas outcomes are intended to be more specific and focused on what the entity is seeking to achieve over the short to medium-term.⁶⁵

From 1 January 2022, the requirement to prepare a service performance report applies to all registered charities in New Zealand, irrespective of size.⁶⁶ The relationship between service performance reporting and impact reporting is discussed further below in chapter 8.

In designing a framework of charities law for Aotearoa New Zealand, the impact of the financial reporting requirements must be borne in mind: New Zealand has arguably the most comprehensive set of transparency and accountability requirements for registered charities in the world. A summary of comparative financial reporting requirements is set out in Appendix A (*Financial reporting – comparative summary*).

Distinguishing characteristics

Importance of purpose

The charitable sector is enormously diverse, in mission, location, mahi, size, structure, funding, the communities they represent, and approaches to governance and management. It is a mistake to conceptualise the charitable sector as a homogenous group.⁶⁷ Despite this diversity, however, charities and other not-for-profit entities do have a number of characteristics that distinguish them from other forms of agency, including in terms of what motivates their decision-making, their structure, sources of finance, and workforce. For example:⁶⁸

- Charities and other not-for-profit entities are “all about purpose”:⁶⁹ unlike the for-profit sector, performance relative to *mission*, rather than financial returns, is the primary measure of success.
- Commitment to purpose underpins support for their activities: fidelity to their declared mission is crucial because it is the inducement for citizens and the business sector to dedicate their time and other resources to sustaining not-for-profit organisations.

Purpose also provides charities with an ability to leverage, often referred to as the “multiplier effect”.⁷⁰ An example is the NEXT Foundation, a charitable trust undertaking long-term pest eradication work, which receives government funding, but is also able to attract private donations that would not have been available to a government-

⁶⁵ Tier 3 standard at [A41].

⁶⁶ See s 4 of the tier 3 and 4 standards (*Statement of Service Performance*). [Public Benefit Entity Financial Reporting Standard 48 Service Performance Reporting \(PBE FRS 48\)](#) extends the requirement to tier 1 and 2 charities from 1 January 2022.

⁶⁷ For discussions of the dangers of making generalisations about charities see Andrew Purkis *Why is it so difficult to say anything sensible about charities?* 18 May 2020: www.civilsociety.co.uk/voices/andrew-purkis-why-is-it-so-difficult-to-say-anything-sensible-about-charities.html and Richard Hawkes’ *unconvincing blog* 23 August 2021: andrewpurkis.wordpress.com/2021/08/23/richard-hawkes-unconvincing-blog/.

⁶⁸ Australian Productivity Commission *Contribution of the Not-for-Profit Sector* 11 February 2010 at 13, 17, 345.

⁶⁹ Robert Fitzgerald AM, then Principal Commissioner of the Productivity Commission, *The Productivity Commission’s Report on the Not-for-Profit Sector 10 years on*, hosted by Queensland University of Technology and the Australian Centre for Philanthropy and Nonprofit Studies on 15 December 2020: www.youtube.com/watch?v=bi3F-aspQig.

⁷⁰ See, for example, M Di Mento *Mackenzie Scott’s No-Strings Giving Reverberates Way Beyond the Direct Beneficiaries* *The Chronicle of Philanthropy* 1 June 2021: www.philanthropy.com/article/mackenzie-scotts-no-strings-giving-reverberates-way-beyond-the-direct-beneficiaries.

controlled vehicle.⁷¹ Charitable status also allows the Foundation to harness the passion of volunteers for environmental restoration, creating a whole that may be significantly “more than the sum of the parts”.⁷²

Independence of the charitable sector

The independence of the charitable sector is often described as its hallmark: charities enable people to come together in furtherance of a shared purpose, free from the dictates of the median voter or profit-seeking private shareholders.

Charities’ independence from government enables them to take risks, experiment, innovate, and reach into communities, in ways that government cannot.⁷³ Philanthropic capital has been described as the “venture capital of social development”, generating new activities or stimulating new directions whose impact goes far beyond their original cost.⁷⁴ Charities are also untethered to electoral cycles, potentially enabling them to address issues on a longer-term basis than governments.

The diversity of the charitable sector allows for authentic expressions of pluralism, democratisation,⁷⁵ and localism, as people come together to address issues *they* see arising in their community (which issues may not yet be on the radar of government). As noted by the Impact Initiative, many solutions are needed to the complex and connected challenges Aotearoa New Zealand faces: the housing crisis, the mental health crisis, the climate crisis, inequality and poverty are not challenges that government alone can solve.⁷⁶ A key theme of the June 2020 election forum was recognition that communities know best what communities need.⁷⁷

In other words, government is not and should not be the sole arbiter of the public interest in a liberal democracy,⁷⁸ as noted by the Ontario Law Reform Commission in its 1996 report:⁷⁹

... Government should not and cannot be the sole agency of the maximisation of social welfare in a liberal democracy ... Governments are constrained by norms of universality and equality to act categorically. In large societies the delivery of social welfare benefits or subsidies for the arts, education, or health care and the like, requires the bureaucratisation of decision-making so that all discretionary distributions are in compliance with these fundamental norms. These constraints mean that governments cannot be creative, flexible, or particularistic in the provision of social welfare. In a society with a heterogeneous population with widely varying values, the government’s performance in the provision of social welfare would be decidedly lacklustre from the point of view of the vast majority of its citizens. The voluntary provision of goods would permit more pluralism (less dictatorship) in the determination of public values, and the ways in which publicly valued things, like education, are provided. Moreover, this alternative method of provision would permit more daring innovations or experimentations than governments might be willing to engage in, since widespread disagreement about the provision of some things may be based only on whether it is worthwhile subsidising it out of the consolidated revenue fund, as opposed to whether the thing itself is of public benefit.

71 Interview with Devon McLean QSM, Environmental Adviser, NEXT Foundation (3 September 2020): www.nextfoundation.org.nz/about-us/.

72 [Submission](#) of Neil Walbran at 3.

73 See *Report to the Minister of Finance and the Minister of Social Welfare by the Working Party on Charities and Sporting Bodies* (Treasury, Wellington, November 1989) at 85: “[a]nother role of the charities sector which has grown up since the government took on the role of providing many social services is to be the risk takers the public sector cannot be in the provision of basic social services. The strength of the charitable sector is that it is capable of taking on new forms and entering new areas as need is met elsewhere”.

74 See *Report to the Minister of Finance and the Minister of Social Welfare by the Working Party on Charities and Sporting Bodies* (Treasury, Wellington, November 1989) at 87, referring to M Liffman, 1987/88.

75 See *Report to the Minister of Finance and the Minister of Social Welfare by the Working Party on Charities and Sporting Bodies* (Treasury, Wellington, November 1989) at 85.

76 Impact Initiative [A Roadmap for Impact](#) April 2021 at 8.

77 See www.huie.org.nz/wp-content/uploads/Webinar-Summary-%E2%80%93-Educating-political-parties-to-help-the-community-sector.pdf.

78 See R Atkinson “A primer on the Neo-Classical Republic Theory of the Nonprofit Sector (and the other three sectors too)” in M Harding (ed) *Research Handbook on Not-for-profit law* (Edward Elgar, 2018) 48 at 75, referring to J Simon, H Dale and LB Chisholm “The Federal Tax Treatment of Charitable Organisations” in Walter Powell and Richard Steinberg (eds) *The Nonprofit Sector* (Yale University Press 2006) 267 at 279: a robust, independent and pluralistic charitable sector allows some judgments about what constitutes the public interest to be made without “committing all such determinations to the majoritarian processes of government”.

79 Ontario Law Reform Commission *Report on the Law of Charities* (Toronto, 1996) at 244.

Charities can also be the “eyes, ears and conscience” of society;⁸⁰ their independence underscores their important role in holding government to account, as noted by the National Council of Voluntary Organisations in 2001:⁸¹

... perhaps part of the basic value of legal charity lies in the fact that it is not at the mercy of the dominant political agenda or the whim of fashion in public policy. This means charities can challenge the dominant orthodoxy, pilot and show the value of different approaches, and seek to educate or even sometimes change public opinion. This is not to argue that charities do not have a great deal to contribute to the Government’s policy agenda, they obviously do. Around a quarter of charities seek, for example, to address poverty. Some support self-help groups. Others run extensive volunteering programmes. Most trustees are unpaid. However, the fact that they contribute to achieving government policy objectives is incidental.

The independence of charities has been critical in many important societal changes that have been achieved over the centuries. For example:

- i. The preamble to the Statute of Charitable Uses Act 1601 (43 Eliz I c4) (“**the Preamble**”), often referred to as the “touchstone” of the definition of charitable purpose, provided a list of purposes considered charitable at the time.⁸² Among this list, “the marriage of poor maids” is the object “most cited with derision by activists rejecting the Preamble’s relevance to a contemporary definition of charity”.⁸³ However, as noted by Bromley,⁸⁴ the inclusion of this object within the Preamble in fact demonstrates the charitable sector has always had an important function of advocating for changes to laws and government policies. At the time, statute law⁸⁵ authorised “appointed officials” to compel any unmarried woman between the age of 12 and 40 to work as a servant “for such wages and in such reasonable sort and manner as the appointed officials shall think meet”. Any unmarried woman who refused to comply was to be committed to ward “until she be bounden to serve as aforesaid”. None of these punitive provisions applied to women who were married. In addition, the *Poor Law of 1601* authorised officials to bind any poor “woman child” to be an apprentice until she reached the age of 21, or until “the time of her marriage”. Consequently, it was considered charitable to facilitate the marriage of a poor maid to relieve her of these onerous conditions. A change in the laws that discriminated against unmarried women would have removed, and ultimately did remove, the need for this to be a charitable object.
- ii. In 1797, William Wilberforce helped found the Society for Effecting the Abolition of the Slave Trade, otherwise known as the Anti-Slavery Society, whose work was instrumental in the ultimate abolition of the slave trade by the Slavery Abolition Act of 1833.⁸⁶

80 House of Lords Select Committee on Charities *Report of Session 2016–17 - Stronger charities for a stronger society* HL Paper 133: publications.parliament.uk/pa/ld201617/ldselect/ldchar/133/133.pdf at 3, 99, 116.

81 National Council of Voluntary Organisations *For the public benefit? A consultation document on charity law reform 2001*: www.ncvo.org.uk/images/documents/policy_and_research/charity_law_and_regulation/public_benefit_report.pdf at [4.1.4].

82 The list is set out in modern terms in *Travis Trust v Charities Commission* (2009) 24 NZTC 23,273 (HC) at [18].

83 B Bromley “1601 Preamble: The State’s Agenda for Charity” (2002) 7 *Charity Law and Practice Review* 177 at 187, referring to *Building on Strength: Improving Governance and Accountability in Canada’s Voluntary Sector*, Report by The Panel on Accountability and Governance in the Voluntary Sector, 8 February 1999 at 52.

84 B Bromley “1601 Preamble: The State’s Agenda for Charity” (2002) 7 *Charity Law and Practice Review* 177 at 187.

85 *An Act Touching Divers Orders for Artificers, Labourers, Servants of Husbandry and Apprentices*, 5 Elizabeth I, c.4, enacted in 1563.

86 The Slavery Abolition Act 1833. See Kós P, Court of Appeal of New Zealand “Murky Waters, Muddled Thinking: Charities and Politics” Opening Address to the Charity Law Association of Australia and New Zealand Conference, 4 November 2020: www.courtsofnz.govt.nz/assets/speechpapers/Murky-Waters-Muddled-Thinking-Charities-and-Politics.pdf at [29] and www.britannica.com/biography/William-Wilberforce.

- iii. In 1893, New Zealand became the first self-governing country in the world to give women the vote, a milestone achieved through the efforts of suffrage campaigners led by Kate Sheppard, who subsequently became the first President of the National Council of Women of New Zealand Incorporated (CC49050).⁸⁷
- iv. Many social reforms legislated for in New Zealand have been achieved through the efforts of charities.⁸⁸ Many submitters to the DIA's review of the Charities Act referred to important societal issues charities work to address, such as:⁸⁹ housing policies and reduction of social isolation; suicide reduction; resources for people with disabilities; maritime safety and search and rescue; alleviating poverty and widening health gaps; mental health and addiction; child health; protecting the environment; protecting local wildlife and outstanding landscapes; paid parental leave; banning smoking in cars when children are in the vehicle; requiring children under seven to be in an appropriate car seat; protecting against cruelty to animals; international humanitarian issues including resettlement of former refugees, and so many others.

Such work often requires speaking out against existing government policy or process, underscoring the importance of charities' independence from government.

87 National Council of Women of New Zealand Te Kaunihera o Wahine Aotearoa *Where we came from*: www.ncwnz.org.nz/what-we-do/where-we-came-from/ and nzhistory.govt.nz/politics/womens-suffrage: "New Zealand's world leadership in women's suffrage became a central part of our image as a trail-blazing 'social laboratory'".

88 [Submission](#) of Oxfam New Zealand at 8 - 9: "[t]he majority of social progress legislated by our NZ lawmakers over the decades has been proposed, encouraged and promoted by NZ charities. Charities, where the trustees/staff would not gain financially, share a commitment to a charitable purpose that progresses a better and more just world for all – eg women's suffrage, same-sex marriage and Zero Carbon bill. This provides a significant public interest value for New Zealand ... Our society needs a diverse and credible pool of policy ideas and research upon which to debate and agree the best steps towards greater community wellbeing for all, both here and across the world. Charities add valuable and trusted voice to the perspectives of academics, government policy analysts and the vested interests of the private sector".

89 See the [submissions](#) of New Zealand Red Cross Incorporated; the Council for International Development: "[a] key aspect of New Zealand's progress in addressing societal issues has been due to the involvement of NGOs and charities progressing their charitable purposes through highly credible research and evidence-based advocacy activities"; Greenpeace of New Zealand Incorporated (now Greenpeace Aotearoa): "the reality is that many purposes that the majority of people would recognize as charitable involve complex and contestable issues. These issues are also the ones that are likely to affect the greatest number of people. A legal framework that allows an organization whose purposes involve advocating for the beautification of a particular suburb to be a charity [see Charities Registration Board Decision 2017-1 Clevedon Village Trust 10 May 2017: www.charities.govt.nz/charities-in-new-zealand/legal-decisions/view-the-decisions/view/clevedon-village-trust] but not one that focuses on larger global issues is no longer fit for purpose ... many charitable organisations are well placed to propose policy or law changes because of their particular expertise, and practical experience with a particular issue"; SociaLink Tauranga Moana: "[m]ost charities do not set out to be public policy advocates. Usually, they set up a service or programme to help provide for a need they see, for example, providing meals, blankets, or other support to the homeless, or safe houses for women and children experiencing violence, or providing community gardens or activities and support for older people living on their own and so on. At some point they may decide more needs to be done, such as trying to find safe accommodation for the homeless people they serve. Moving into this arena means coming up against structural and policy barriers that make it difficult to put in place safe sustainable housing for the poorest people. They realise they cannot make a difference systematically through service delivery alone. As a consequence they may become advocates for particular housing policies or for more policy focus on reducing social isolation. This action is not for personal or organisational gain, but to better serve their social purpose. Without taking such action, it is difficult to contribute to needed social change"; New Zealand College of Public Health Medicine; Royal New Zealand Coastguard Incorporated; Royal New Zealand Plunket Trust; Creative New Zealand (endorsed by a further 17 organisations); the Royal New Zealand Ballet; SAFE for Animals; Save the Otago Peninsula Incorporated Society; Tairāwhiti Environment Centre Inc; New Zealand Family Planning; Platform Charitable Trust; Youthline Central South Island; and UpsideDowns Education Trust.

Important societal changes are seldom non-controversial: changes can be challenging to some, including vested interests,⁹⁰ leaving charities vulnerable to individuals and groups challenging their charitable status precisely for the purpose of attempting to undermine their effectiveness.⁹¹ Ultimately, decisions regarding laws in New Zealand are made by a democratically-elected Parliament, but charities play an important role in raising public (and government) awareness of issues, providing an independent voice and valuable flax-roots knowledge in the development of social policy. Charities also provide balance to the ability of the most economically powerful to dominate and shape policy, in the interests of enabling a just and equitable society where all people can flourish.⁹²

In considering the optimal legal framework for charities, it is critical to understand the importance of protecting their independence (and therefore the independence of those making decisions about them). This factor was emphasised in the review of charities' legislation carried out in England and Wales:⁹³

... both Government and charities themselves must guard against allowing charities to inadvertently fall under the influence of the State, or the sector will lose that which makes it distinctive and valuable to begin with ...

... the independence of the sector must remain paramount. Although it is part of the existing common law that charities must be, and be seen to be, free from the influence of Government or any other group, no more formal protection of that status exists. The sector

90 See, for example, the [submission](#) of The Gama Foundation at 2: "[i]t is essential that [charities] should be able to advocate for action to try to prevent or reduce the problems which they have been established to deal with. Businesses, farmers and the organisations they belong to have no restrictions on the tax deductible advocacy work they can do. They use paid lobbyists, political party donations and other means to get what they want. This has resulted in a huge increase in inequality, child poverty, unaffordable housing, gambling, alcohol availability, contaminated rivers etc. The charities which struggle to deal with these problems have few resources compared to those of vested interests. Charities should be able to use their relatively limited funds to advocate for change. One example of what has happened is how lakes, rivers and streams have become increasingly contaminated over the past 20 years. Despite warnings by scientists and those concerned about the environment, the advocacy activities of Federated Farmers, Dairying New Zealand, Irrigation New Zealand and other farming organisations have resulted in no action being taken until recently. That action is too little too late and charitable organisations which advocate for clean rivers and drinking water have not been able to make much progress ... It is unacceptable that businesses and farmers have been able to use their money and influence to get rules introduced which prevent charitable organisations from freely speaking out on behalf of the community, the environment and future generations."

91 Examples in the United Kingdom include the National Trust (which produced a report addressing histories of colonialism and slavery): www.nationaltrust.org.uk/features/addressing-the-histories-of-slavery-and-colonialism-at-the-national-trust; Barnados (which issued a blogpost on white privilege and inequality): www.theguardian.com/world/2021/aug/04/barnados-blogpost-on-white-privilege-did-not-breach-charity-laws; and the Runnymede Trust (which engaged with a government report on racial disparities): www.civilsociety.co.uk/news/commission-clears-runnymede-trust-after-conservative-mps-complained-about-its-work.html). In each case, complaints to the Charity Commission for England and Wales followed, none of which were upheld, see www.gov.uk/government/news/charity-commission-finds-national-trust-did-not-breach-charity-law; www.civilsociety.co.uk/news/charity-commission-clears-barnados-over-white-privilege-blog.html and www.gov.uk/government/news/charity-commission-concludes-compliance-case-involving-the-runnymede-trust. However, subsequent allegations were made that politicians were attempting to "weaponise" the Charity Commission by filing complaints against charities they disagreed with. See A Ricketts *Conservative MPs call for government to stop charities 'promulgating weird, woke ideas'* Third Sector 21 April 2021; N Parveen and A Mohdin *Tory MPs demand inquiry into equality thinktank over race report criticism* The Guardian 20 April 2021; and S Vibert, Interim Chief Executive, National Council of Voluntary Organisations *What we think the Culture Secretary got wrong about charities* 14 September 2021: "[w]e must all reject the notion that charities in receipt of funding – whether that's from the government, the National Lottery, or any other funder – should stay silent on issues that are pertinent to their mission. To do so would be to compromise the very independence that characterizes the role of charities ... The Charity Commission plays a vital role in supporting our thriving voluntary sector ... Like the charities it oversees, the Commission must be above party politics. Its strength is as a neutral arbiter, showing no fear or favour ... it is not for the government or Commission to tell trustees what is best for their charity or those they serve". See also S Brechenmacher *Civil Society under Assault: Repression and Responses in Russia, Egypt, and Ethiopia* 18 May 2017: some governments may "purposefully sow divisions between apolitical and politically oriented organizations and selectively disburse rewards to co-opt civic actors and promote pro-government mobilization".

92 See, for example, the [submissions](#) of Literacy Aotearoa Incorporated at 2 – 5; the Methodist Alliance; and Seed the Change | He Kākano Hāpai.

93 Lord Hodgson of Astley Abbots *Trusted and Independent: Giving charity back to charities – Review of the Charities Act* July 2012 at [3.15], [4.21].

must continue to be seen as more than an outlier to local or national government. How independence can best be promoted and safeguarded must be an important feature of any debate on the future of the sector.

The need to respect and protect the independence of charities was a key theme of submissions to the DIA's review of the Charities Act.⁹⁴

Significance of the sector

Designing a charities law framework requires an understanding of not only the role of the charitable sector in society but also its significance.

Even by traditional measures, the charitable sector in New Zealand is significant, with \$67.85 billion of total assets under management, and a total annual income exceeding \$21 billion⁹⁵ (broadly equivalent to that of Fonterra),⁹⁶ representing 6.2% of

94 See, for example, the [submissions](#) of Te Whakakitenga o Waikato Incorporated, on behalf of the Waikato-Tainui iwi, endorsed by, the Waikato Raupatu Lands Trust and Group and Waikato-Tainui marae: "the autonomy and independence of charities must be respected, and this is particularly important for Māori charities, including Waikato Tainui charities, exercising rangatiratanga, mana whakahaere and stewardship over whenua and other taonga and assets for the long term benefit of their iwi and hapuu"; Age Concern New Zealand; Andy Morgan; Angela McMorran; Alzheimers New Zealand; Arthritis New Zealand; Barnados: "Advocacy undertaken by independent charitable organisations forms a vital part of civil society in a democracy. Ensuring a range of perspectives and voices on issues of public interest is an important part of a thriving democratic society"; New Zealand Law Society: "Recognition of the sector's independence, diversity and capacity for innovation: The charitable sector should be independent, diverse, and have the freedom and flexibility to innovate in advancing a range of charitable purposes for the benefit of the public"; Citizens' Advice Bureau: "It is widely acknowledged that the independence of civil society organisations from government is critical to both their function and their efficacy in carrying out their role"; FinCap (National Building Financial Capability Charitable Trust): "A robust, vibrant, independent and innovative charitable sector is an essential part of our country's economy and social fabric"; Barry Coates, Sustainable Initiatives Aotearoa; Cancer Society; Canterbury and New Zealand Business Association; Catherine Low; Central Lakes Trust; Christian Education Trust; Community Housing Aotearoa; Community Networks Aotearoa; Community Waikato; Community Waitakere; Coromandel Independent Living Trust; CPA Australia; Creative New Zealand (endorsed by a further 17 organisations); Dave Henderson; Diederick Meenken; Don McKenzie CNZM, OBE; DV Bryant Trust; English Language Partners New Zealand Trust; Epilepsy Waikato Charitable Trust; Friends of Arataki and Waitakere Regional Parkland Inc; Grace Presbyterian Church of New Zealand; Greenpeace of New Zealand Incorporated (now Greenpeace Aotearoa); Habitat for Humanity New Zealand; Habitat for Humanity Greater Auckland Ltd; Hamilton Christmas Charitable Trust; Hawke's Bay Community Law Centre; InterChurch Bureau; Jackie St John; Jaram Lallu; Joanne Harland; John Welford; Jon Horne; Kapiti Retirement Trust; Kensington Swan; Kotare Trust; LEAD; Lisa Abrams; Literacy Aotearoa Charitable Trust; Liz Davies; Mac Jordan; Make-A-Wish Foundation of New Zealand Trust; Marine Reach Charitable Trust; Methodist Alliance; Methodist Church of New Zealand Te Haahi Weteriana O Aotearoa; Motueka Family Service Centre; Multiple Sclerosis New Zealand Inc; National Assistance Fund; National Council of Women of New Zealand Inc; Neil Walbran; Network Waitangi Otautahi Inc; New Zealand Council of Christian Social Services; New Zealand Council of Victim Support Groups Incorporated; New Zealand Disability Support Network; New Zealand Family Planning; New Zealand Red Cross Inc; Northland Urban Rural Mission; NZ Navigator Trust; Oxfam New Zealand; Organisation B; Parihimanihi Marae; Perpetual Guardian; Philanthropy New Zealand; Pirongia Te Aroaro o Kahu Restoration Society Incorporated; Platform; Professor Carolyn Cordery; Public Trust; Rape and Abuse Support Centre Southland Inc; Roger Eynon; Ross Beever Memorial Mycological Trust; Royal Forest & Bird Protection Society of New Zealand Inc; Royal New Zealand Coastguard Incorporated; Royal New Zealand Plunket Trust; RSM: "For the sector to survive and thrive into the future so that we maintain a strong cohesive social, community and environmental fabric in New Zealand the sector does need to be robust, vibrant, independent and constantly innovating"; Royal New Zealand Ballet; Save the Children New Zealand; Save the Otago Peninsula Inc; Scott Moran; Seed the Change | He Kākano Hāpai; Social Service Providers Aotearoa; SocialLink Tauranga Moana; SPCA; Sport Waitakere; Te Pūtahitanga o Te Waipounamu; The Fred Hollows Foundation NZ; The Girl Guides Association New Zealand Incorporated; The Methodist Church of New Zealand Te Haahi Weteriana O Aotearoa Auckland Fiji Methodist Parish (Tabacakacaka); The Ozanam House Trust; The Presbyterian Church of Aotearoa New Zealand; The Salvation Army Group; The Tindall Foundation; The United Fire Brigade Association; The UpsideDowns Education Trust; Tiri Porter; Titirangi Baptist Church; Todd Foundation; Toy Library Federation of New Zealand; Trinity Lands Ltd; Tristan Katz; Trust Democracy; Volunteering Hawkes Bay; Volunteering New Zealand; Water Safety New Zealand; Wayne Francis Charitable Trust, WEL Energy Trust; Weleda Charitable Trust; Wellington Youth Orchestra Inc; Youth with a Mission Queenstown Lakes Charitable trust (Tāhuna ki te Ao Charitable Trust); Youthlaw Aotearoa Inc; Youthline Central South Island; YWCA of Aotearoa NZ, YWCA Whangarei, YWCA Auckland and YWCA Hamilton, Boards and Managers; and Zoe Williams.

95 Charities Services Ngā Ratonga Kaupapa Atawhai [2020/2021 Annual Review](#) at 18.

96 Statista *Sales revenue of Fonterra Co-operative Group Limited from financial year 2015 to 2021*: www.statista.com/statistics/1101756/new-zealand-fonterra-sales-revenue/.

New Zealand's gross domestic product.⁹⁷ More than 145,000 people work full-time in the charitable sector, accounting for approximately 5% of the New Zealand workforce.⁹⁸ An additional approximately 90,000 people work in the sector part-time.⁹⁹ Many New Zealand charities have no paid staff,¹⁰⁰ but are supported by more than 217,000 volunteers who contribute some 1.7 million hours of volunteering every week.¹⁰¹

However, the sector's contribution is even more significant when the wider benefits it confers, such as social capital, social cohesion, societal trust and community wellbeing, are taken into account.¹⁰² The charitable sector provides vital "glue" that holds society together.¹⁰³

In February 2010, in its highly influential research report on *The Contribution of the Not-for-profit Sector*, the Australian Productivity Commission articulated important "externalities" or "spillovers" that not-for-profit entities generate:¹⁰⁴

NFP activities may generate benefits that go beyond the recipients of services and the direct impacts of their outcomes. For example, involving families and the local community in the delivery of disability services can generate broader community benefits (spillovers), such as greater understanding and acceptance of all people with disabilities thereby enhancing social inclusion. Smaller community-based bodies can play an especially important role in generating community connections and strengthening civil society.

Importantly, the report also articulated ways by which such intangible impacts could be *measured*. The Australian Productivity Commission report had a profound impact in Australia in terms of shaping perceptions about the sector's size and significance and what it "really does contribute to the Australian community".¹⁰⁵

The lack of similar empirical research in New Zealand creates the risk that policy and legislative decisions may be made without a sufficient evidence base or a sufficient understanding of the wider "meta-benefits" that charities provide. Proceeding without such an empirical understanding at the forefront in turn risks unintended consequences, including damage to New Zealand's social capital and culture of volunteering.¹⁰⁶ Once such a situation is created, the experience of other countries is that it can be many decades before sufficient political will can be mustered to remediate, and even then, without an overarching understanding or strategy, proposed solutions can be piecemeal and ad hoc, leading to potential further unintended consequences and damage.

Such a result would be particularly unfortunate – even devastating – as New Zealand deals with the disruptive effects of COVID-19, many of which will continue to reverberate long after the pandemic has abated.

97 Calculated as 21.19/340: www.stats.govt.nz/indicators/gross-domestic-product-gdp.

98 Charities Services Ngā Ratonga Kaupapa Atawhai [2020/2021 Annual Review](#) at 17, 19. Note that this figure is markedly higher than the 93,000 reported in February 2019: Te Tari Taiwhenua Internal Affairs [Modernising the Charities Act 2005: Discussion Document](#) February 2019 at 9.

99 Te Tari Taiwhenua Internal Affairs [Modernising the Charities Act 2005: Discussion Document](#) Feb 2019 at 9.

100 Te Tari Taiwhenua Internal Affairs [Modernising the Charities Act 2005: Discussion Document](#) Feb 2019 at 9.

101 Charities Services Ngā Ratonga Kaupapa Atawhai [2020/2021 Annual Review](#) at 19. Note that this figure is markedly lower than the 230,000 reported in February 2019: Te Tari Taiwhenua Internal Affairs [Modernising the Charities Act 2005: Discussion Document](#) February 2019 at 9.

102 See Australian Productivity Commission [Contribution of the Not-for-Profit Sector](#) 11 February 2010, and Robert Fitzgerald AM, then Principal Commissioner of the Productivity Commission, *The Productivity Commission's Report on the Not-for-Profit Sector 10 years on*, hosted by Queensland University of Technology and the Australian Centre for Philanthropy and Nonprofit Studies on 15 December 2020: www.youtube.com/watch?v=bi3F-aspQig.

103 Report of the Community and Voluntary Sector Working Party April 2001 *Communities and Government – Potential for Partnership Whakatōpū Whakaaro* at 6.

104 Australian Productivity Commission [Contribution of the Not-for-Profit Sector](#) 11 February 2010 at 31, xxix.

105 See Robert Fitzgerald AM, former Principal Commissioner of the Productivity Commission *The Productivity Commission's Report on the Not-for-Profit Sector 10 years on*, hosted by Queensland University of Technology and the Australian Centre for Philanthropy and Nonprofit Studies on 15 December 2020: www.youtube.com/watch?v=bi3F-aspQig.

106 We risk "losing so much that so many do not even know we have": email correspondence with Michelle Berriman, Executive Director, Fundraising Institute of New Zealand, 29 October 2021.

Recent examples of opportunities lost because the charitable sector and the benefits it provides are poorly understood include the following:

- i. During 2021, the New Zealand government initiated a national dialogue to **bolster social cohesion** in New Zealand,¹⁰⁷ as recommended by the Ko tō tātou kāinga tēnei *Royal Commission of Inquiry into the terrorist attack on Christchurch masjidain on 15 March 2019*.¹⁰⁸ The consultation material does not mention the contribution charities might make and the work is being led by the Minister in her capacity as Associate Minister for Social Development and Employment rather than in her capacity as Minister for the Community and Voluntary Sector.
- ii. The **Trusts Act 2019** came into force on 30 January 2021, after almost 20 years' gestation including a series of reports prepared by Te Aka Matua o te Ture - the Law Commission.¹⁰⁹ Recognising the vastness and complexity of the subject, the Law Commission had originally divided its Trusts Law project into three stages. The Trusts Act is the culmination of stage 1, which focused on the Trustee Act 1956 and trust law generally.¹¹⁰ The new legislation focuses primarily on family trusts; however, it applies by definition to all trusts that have been intentionally established,¹¹¹ meaning that it applies to every registered charity in New Zealand that is structured as a charitable trust (the most common form of charity in New Zealand). There were originally intended to be two further reviews of areas of trust law to complete the Law Commission's full suite of work on the law of trusts: stage 2 would have been a "charitable and purpose trusts" review, focusing on charitable trusts and the Charitable Trusts Act 1957.¹¹² However, that plan seems to have been abandoned as the Law Commission's website describes the project status of the Law of Trusts review as "closed".¹¹³ Accordingly, trust law issues relating to charitable trusts remain unresolved.¹¹⁴
- iii. In its 2019 report on New Zealand's welfare system *Wakamana Tangata – Restoring Dignity to Social Security in New Zealand*,¹¹⁵ the **Welfare Expert Advisory Group Kia Piki Ake** noted the role of DIA in supporting community organisations but

107 Ministry of Social Development Te Manatū Whakahiato Ora *Social cohesion for everyone in New Zealand* 25 June to 31 October 2021: <social-cohesion.citizenspace.com/social-cohesion/public-consultation/>.

108 Ko tō tātou kāinga tēnei *Royal Commission of Inquiry into the terrorist attack on Christchurch masjidain on 15 March 2019*, presented to the Governor-General on 26 November 2020, ch 5 *Recommendations to improve social cohesion and New Zealand's response to our increasingly diverse population*: <christchurchattack.royalcommission.nz/> at [5.1.4], [5.2.8] and recommendations 28, 29.

109 See Te Aka Matua o te Ture - New Zealand Law Commission *Law of Trusts – Project Overview*: <www.lawcom.govt.nz/our-projects/law-trusts/>.

110 Te Aka Matua o te Ture - New Zealand Law Commission *Review of the Law of Trusts: A Trusts Act for New Zealand* (NZLC R130, 2013): <www.lawcom.govt.nz/sites/default/files/projectAvailableFormats/NZLC%20R130.pdf> at [1.15], [2.5].

111 Trusts Act 2019 ss 12, 15.

112 Te Aka Matua o te Ture - New Zealand Law Commission *Review of the Law of Trusts: A Trusts Act for New Zealand* (NZLC R130, 2013) at [4], [1.1].

113 Te Aka Matua o te Ture - New Zealand Law Commission *Law of Trusts – Project Overview*.

114 Such issues include how to unlock the balance sheets of philanthropy, along the lines provided for in the Charities (Protection and Social Investment) Act 2016 (UK), and how the rule against excessive accumulations applies to charities given s 18 of the new Act (see Te Aka Matua o te Ture - New Zealand Law Commission *Review of the Law of Trusts: A Trusts Act for New Zealand* (NZLC R130, 2013) at [17.15] - [17.18]). Section 67(2)(a) of the Trusts Act 2019 also precludes a philanthropic trust from delegating decision-making in relation to distributions, creating practical difficulties for large philanthropic trusts distributing many small grants that may collectively total millions of dollars per annum. There are also myriad issues relating to the Charitable Trusts Act 1957. For example, there is uncertainty as to whether the trustees of a charitable trust, that have incorporated as a board under the Charitable Trusts Act, remain "trustees" or are more correctly referred to as "members" of the Board. This issue has implications, for example, for the application of the legal duties of trustees set out in ss 21 – 38 of the Trusts Act 2019. Such issues would be helpfully clarified as part of the independent first principles review recommended above in recommendation 1.0.

115 Welfare Expert Advisory Group *Kia Piki Ake Wakamana Tangata – Restoring Dignity to Social Security in New Zealand* dated February 2019 and released in May 2019: <www.weag.govt.nz/weag-report/whakamana-tangata/>.

- considered this to be “limited to distributing Lotto funds, maintaining infrastructure for Community Organisation Grants Scheme distributions and developing regionally-based capability”.¹¹⁶ The report did not mention the DIA’s role in administering the Charities Act, or identify the review of the Charities Act in the list of reviews that “could usefully consider how circumstances could be improved for people on low incomes or receiving support from the welfare system”.¹¹⁷
- iv. The terms of reference for the Tax Working Group Te Awheawhe Tāke (“**the Tax Working Group**”), created by the New Zealand Government in late 2017, were entirely silent on the topic of charities.¹¹⁸ Nevertheless, charities were considered at one Tax Working Group meeting: the background paper prepared for the July 2018 meeting focused on what officials described as the two “most important tax policy matters for not-for-profits”, private foundations and business income, concluding that “accumulations” were an “underlying issue for both”.¹¹⁹ There does not appear to have been any consultation with the charitable sector in the preparation of this background paper, or in the selection of these two issues as “key”. At its July 2018 meeting, the Tax Working Group made four decisions relating to charities, relating to: business activities, accumulations, GST, and deregistration tax.¹²⁰ These decisions flowed through to the Group’s interim and final reports,¹²¹ and the tax policy work programme;¹²² however, perhaps reflecting the fact that issues relating to charities had received little more than one hour’s deliberation during the entire tenure of the Group,¹²³ issues relating to charities were identified as “matters requiring further work” and “kicked for touch” to the review of the Charities Act.¹²⁴ In February 2020, following release of the Tax Working Group’s reports, business activities of charities and accumulation of funds were then elevated to two of three issues to be fast-tracked as part of the review of the Charities Act, ahead of key issues of concern for the charitable sector, such as advocacy, appeals and agency structure.¹²⁵

116 Welfare Expert Advisory Group Kia Piki Ake [Wakamana Tangata – Restoring Dignity to Social Security in New Zealand](#) February 2019 at 159.

117 Welfare Expert Advisory Group Kia Piki Ake [Wakamana Tangata – Restoring Dignity to Social Security in New Zealand](#) February 2019 at 162: “[s]everal bodies, reviews and other changes are under way or are about to start that could usefully consider how circumstances could be improved for people on low incomes or receiving support from the welfare system including the: • Education Funding System Review; • Future of Work Ministerial Group; • Fair Pay Agreement Working Group; • Review of New Zealand Health and Disability System; • Just Transitions Unit in the Ministry of Business, Innovation and Employment; • Ministry of Housing and Urban Development; • Tax Working Group; • Te Uepū Hāpai i te Ora (the Safe and Effective Justice Advisory Group); • Reform of Vocational Education”.

118 Minister of Finance *Terms of Reference: Tax Working Group* 23 November 2017: [<taxworkinggroup.govt.nz/resources/terms-reference-tax-working-group>](#).

119 Inland Revenue and the Treasury for the Tax Working Group, 6 July 2018, *Charities and the not-for-profit sector: Background Paper for Session 13 of the Tax Working Group*: [<taxworkinggroup.govt.nz/resources/twg-bg-3996875-charities-and-the-not-for-profit-sector.html>](#) at [69] and [9] and coversheet.

120 Secretariat for the Tax Working Group, 6 July 2018 *Minutes*: [<taxworkinggroup.govt.nz/sites/default/files/2018-09/twg-bg-3981824-minutes-06-july-2018.pdf>](#) at 4 - 5.

121 Tax Working Group *Future of Tax: Interim Report*, 20 September 2018 at [78] - [85]. Tax Working Group *Future of Tax: Final Report* 21 February 2019: [<taxworkinggroup.govt.nz/resources/future-tax-final-report.html>](#) at [78] - [85].

122 Inland Revenue Department *Government tax policy work programme 2019-20* 8 August 2019: [<taxpolicy.ird.govt.nz/work-programme/government-tax-policy-work-programme-2020-21#charities>](#)

123 The agenda for the July 2018 Tax Working Group meeting reveals that 1¼ hours were to be allocated to a discussion about charities (including consideration of a proposal from a scholarship winner to implement a “charity credit account” prior to removing the income tax exemptions for charities altogether). See Secretariat for the Tax Working Group, 6 July 2018 *Agenda*: [<taxworkinggroup.govt.nz/sites/default/files/2018-09/twg-bg-3977566-agenda-06-july-2018.pdf>](#) at 1.

124 Tax Working Group *Future of Tax: Interim Report* 20 September 2018 at 23; Tax Working Group *Future of Tax: Final Report* 21 February 2019 at 12 - 13, 103 - 104.

125 See the discussion in S Barker “[Charity regulation in New Zealand: history and where to now?](#)” (2020) 26(2) Third Sector Review 28.

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- v. There is then the tortuous history of the Charities Act itself. After almost two decades, the promise of a full, first-principles post-implementation review has still not been honoured, a theme which featured prominently in the submissions to the current review being undertaken by the DIA.¹²⁶ Worse, the DIA's review has now been telescoped into just five issues,¹²⁷ most of which are not of concern to the charitable sector, and there is a very real risk that it may act perversely to preclude the sector's real problems from being addressed.

Why is the sector so often overlooked?

In considering the optimal legal framework for charities, it is important to consider why the charitable sector, and the wider sector in which it sits, are so often overlooked.

Salamon described the civil society sector as "the invisible subcontinent on the social landscape of most countries, poorly understood by policymakers and the public at large, often encumbered by legal limitations, and inadequately utilised as a mechanism for addressing public problems".¹²⁸

In that sense, New Zealand is not unique. However, it is important to be cognisant of the forces contributing to neglect of the charitable sector in New Zealand, such as:

- i. a lack of understanding of the importance of protecting the **independence** of the charitable sector, undermining that which makes it distinctive and valuable to begin with, as discussed above;
- ii. a lack of understanding of the **wider benefits** charities provide, perhaps exacerbated by the absence of a clear means of measuring intangible "impacts", risking such benefits and impacts being overlooked;
- iii. the inadvertent removal of charities' access to a **trier of fact**, stymying their ability to demonstrate that their purposes operate for the public benefit and are charitable, as discussed further below in chapter 6 (*Appeals*);
- iv. the impacts of neoliberalism, in particular its impact on the **government contracting** framework implemented since the 1980s;
- v. a **"tax expenditure" tax policy analysis**, which leads to charities being seen as a "fiscal cost" (something to be reduced);
- vi. narratives about there being "too many charities";
- vii. the impact of the terrorist attacks on 11 September 2001 ("**9/11**") and the ensuing international anti-money laundering and countering financing of terrorism ("**AML/CFT**") framework; and
- viii. issues relating to current **agency structure**, particularly in terms of accountability and independence.

The first three of these forces are considered elsewhere in this report. The remainder of this chapter looks at the remaining five forces in more detail.

126 Te Tari Taiwhenua Internal Affairs *Modernising the Charities Act 2005 - Summary of submissions* December 2019 at 10: "Calls for a comprehensive first principles review: Nearly all submitters asked for the scope of the review to be widened".

127 Te Tari Taiwhenua Department of Internal Affairs *Modernising the Charities Act 2005*: www.dia.govt.nz/charitiesact#Resuming-work: "The initial topics to be advanced ... are: reporting requirements for small charities; charities' business and accumulation activities; investigating potential improvements to the appeals mechanism; matters relating to the regulator; and duties of officers of charities".

128 Megan Haddock Salamon *Crafted Lenses to Better See Civil Society – Will we Wear Them?* Nonprofit Quarterly 5 October 2021: nonprofitquarterly.org/salamon-crafted-lenses-to-better-see-civil-society-will-we-wear-them/?mc_cid=8f07978388&mc_eid=7c71b4ef5b referring to Dr Lester M Salamon, described as "one of the world's most prolific and influential scholars of nonprofit organisations".

Government contracting

From the 1980s, a significant structural shift occurred: governments in New Zealand, and other Anglophone countries such as Australia, Canada, the United States and the United Kingdom,¹²⁹ responded to economic decline by adopting neoclassical economic policies, otherwise known as “neoliberalism” or “New Public Management” (broadly, free-market fundamentalism), in an effort to reduce costs.¹³⁰ As part of this process, governments moved away from long-term, core-funding of community organisations to a greater reliance on market mechanisms, such as competitive tendering and a contracting culture, outsourcing public service delivery to not-for-profit entities (including charities) through short-term, project-based funding.¹³¹

The move to a market-based approach created an inherent tension: contracted agencies, which had previously relied on their “relative autonomy” to provide “personalised and responsive services”, were required instead to deliver “standardised, equitable and accountable” services in line with the “requirements and responsibilities of government”.¹³² Exacerbating the inherent tension is the sheer number of not-for-profit entities that have become increasingly, if not entirely, dependent on government funding.¹³³

As the Australian Productivity Commission has noted, the distinctive characteristics of charities and other not-for-profits give them a comparative advantage in delivering human services:¹³⁴

- not-for-profit entities are seen as more flexible and adaptable to client needs,¹³⁵ with the ability to package government-funded services with other services and therefore add value through their broader activities;¹³⁶
- not-for-profit entities also give value for money, and are seen as more efficient and cost-effective in delivering services than government;¹³⁷ and
- not-for-profit entities may also be closer to communities and better able to understand their needs and expectations.¹³⁸

The Australian Productivity Commission was careful to note that the move to government “purchase of service” contracting has not been entirely negative: the discipline of competition has been the catalyst for many improvements and has strengthened incentives for innovation.¹³⁹ However, the long-term trend towards purchasing services through performance-based contracts, and the increasing reliance of not-for-profit entities on government funding, can pose significant challenges for community organisations in ways that have the potential to undermine their comparative advantage.

129 Australian Productivity Commission [Contribution of the Not-for-Profit Sector](#) 11 February 2010 at 303.

130 Michael Cullen *Labour saving – a memoir* (Allen&Unwin, Auckland, 2021) at 48 – 55.

131 LN Tink and BC Kingsley [Transforming the Non-Profit Community in Edmonton: Phase 1 – identifying myths, trends and areas for change](#) (Edmonton Chamber of Voluntary Organisations: Edmonton AB, 2021) at 9.

132 Australian Productivity Commission [Contribution of the Not-for-Profit Sector](#) 11 February 2010 at 304, referring to the submission of Sector Connect Inc.

133 Australian Productivity Commission [Contribution of the Not-for-Profit Sector](#) 11 February 2010 at 302.

134 Australian Productivity Commission [Contribution of the Not-for-Profit Sector](#) 11 February 2010 at 305.

135 See also *Report to the Minister of Finance and the Minister of Social Welfare by the Working Party on Charities and Sporting Bodies* (Treasury, Wellington, November 1989) at 85: “[a]nother function of the charitable sector is to counteract the bureaucratic costs, delays and inflexibility which often characterize the public sector”.

136 Australian Productivity Commission [Contribution of the Not-for-Profit Sector](#) 11 February 2010 at 325.

137 See also *Report to the Minister of Finance and the Minister of Social Welfare by the Working Party on Charities and Sporting Bodies* (Treasury, Wellington, November 1989) at 85: “[e]mpirical work indicates that often donations to non-profit organisations are a more efficient means of funding the supply of public goods than through the public sector” (referring to E Brown 1987).

138 Australian Productivity Commission [Contribution of the Not-for-Profit Sector](#) 11 February 2010 at D9 - D10.

139 Australian Productivity Commission [Contribution of the Not-for-Profit Sector](#) 11 February 2010 at 314.

There are at least 11 reasons why that may be the case:¹⁴⁰

- i. mission drift;
- ii. “delivery arm of government” perception;
- iii. isomorphism;
- iv. creating a climate of competition rather than collaboration;
- v. failure to recognise wider benefits;
- vi. diminution of the advocacy role of charities;
- vii. stifling of innovation;
- viii. focus on process rather than impact;
- ix. asymmetry of power;
- x. underfunding; and
- xi. the impact of short-term contracts.

It is important to understand the impact of these factors on charities and other not-for-profit entities.

Mission drift

Purchase of service contracting may encourage “mission drift”, by gradually transforming an organisation’s effort away from its original core mission or purpose, and its traditional culture premised upon social justice,¹⁴¹ in order to secure competitive, performance-based government contracts. In a competitive environment, mission drift can become a normalised part of organisational survival,¹⁴² resulting in an erosion of trust which can, in turn, undermine stakeholder participation and affect the ability of not-for-profit entities to attract donations and volunteers from the community and business sectors.¹⁴³

“Delivery arm of government” perception

Government contracting can also create a perception, both within government and in the community, that charities and other not-for-profit entities are merely an (underfunded) service-delivery arm of government.¹⁴⁴ Charities without a government contract become “invisible”.¹⁴⁵ The boundary between charities and government becomes blurred.¹⁴⁶

Isomorphism

Government contracting and reliance on government funding can lead community-based organisations to take on the practices, characteristics and behaviours of the government departments and agencies with which they engage (isomorphism). Adopting more centralised and bureaucratic structures, or “corporatising”,¹⁴⁷ can undermine charities’ reach into the community and community participation in decision-making processes. It also risks turning charities and other not-for-profit entities into “pale imitations” of government or business, further eroding trust.¹⁴⁸

140 Australian Productivity Commission [Contribution of the Not-for-Profit Sector](#) 11 February 2010 at 305.

141 Australian Productivity Commission [Contribution of the Not-for-Profit Sector](#) 11 February 2010 at 297, 306, J3, the latter referring to the submissions of the Public Interest Advocacy Centre, the Social Justice and Social Change Research Centre and Whitlam Institute.

142 LN Tink and BC Kingsley [Transforming the Non-Profit Community in Edmonton: Phase 1 – identifying myths, trends and areas for change](#) (Edmonton Chamber of Voluntary Organisations: Edmonton AB, 2021) at 22.

143 Australian Productivity Commission [Contribution of the Not-for-Profit Sector](#) 11 February 2010 at 307.

144 Australian Productivity Commission [Contribution of the Not-for-Profit Sector](#) 11 February 2010 at 76, 307, 310.

145 For example, Budget 2021 (*Wellbeing Budget 2021: Securing our Recovery*) 20 May 2021: www.treasury.govt.nz/publications/wellbeing-budget/wellbeing-budget-2021-securing-our-recovery does not mention the word “charity” or “not-for-profit”, but outlines additional funding to be provided to some “non-government organizations” providing service delivery (see 83, 90).

146 For a helpful discussion, see Andrew Purkis’ blog [Why is it so difficult to say anything sensible about charities?](#) 18 May 2020.

147 See Russell Marks *The silence of the lambs – the corporatization of the largest charities and NGOs has had alarming effects* *The Monthly*, November 2021: www.themonthly.com.au/issue/2021/november/1635685200/russell-marks/silence-lambs#mtr.

148 Australian Productivity Commission [Contribution of the Not-for-Profit Sector](#) 11 February 2010 at 309, J3, J4, the latter referring to the submissions of the NSW Meals on Wheels Association Inc and Community Child Care Cooperative Ltd (NSW).

Climate of competition

Government contracting and competitive tendering can undermine the cohesiveness of the sector, fostering a climate of competition at the expense of socially beneficial collaboration:¹⁴⁹ rather than building cooperative networks and working towards social justice, organisations are increasingly forced to compete with one another,¹⁵⁰ undermining the sector's effectiveness and ability to target intersecting harms.¹⁵¹ It also reduces the likelihood of organisations coming together to make strategic decisions related to the sector as a whole.¹⁵²

Failure to recognise wider benefits

Government tendering, contracting and reporting requirements may not adequately take account of the wider or indirect benefits that charities and other not-for-profit entities may be able to offer, contributing to such wider benefits being overlooked. To address this factor, the Australian Productivity Commission recommended that Australian governments explicitly recognise any indirect or wider benefits providers may be able to generate in determining value for money when contracting for services (recommendation 12.3).

Diminution of the advocacy role of charities

Purchase of service contracting can intrude unnecessarily into the broader operation and activities of charities and other not-for-profit entities, which can make it difficult for them to remain responsive and flexible to community needs.¹⁵³ The link between government funding and loss of independence of the sector has been well-recognised:¹⁵⁴ for example, charities and other not-for-profits make an important contribution to the democratic process by providing a voice to the marginalised and disadvantaged; government contracting may undermine this traditional advocacy role, either explicitly by contract, or implicitly by perception.¹⁵⁵ Such pressures may cause a "non-profit advocacy chill",¹⁵⁶ where not-for-profit entities swap their activism and advocacy for "service delivery" on government terms.¹⁵⁷

To address this factor, the Australian Productivity Commission recommended that Australian governments "respect the independence of funded organisations" when funding service provision or making grants, and not impose "conditions associated with the general operations of the funded organisation beyond those essential to ensure the delivery of agreed funding outcomes" (recommendation 11.3).¹⁵⁸

149 Australian Productivity Commission [Contribution of the Not-for-Profit Sector](#) 11 February 2010 at J4, J5.

150 "A lingering survival of the fittest culture pits non-profits against one another in the endless hunt for funding": www.theglobeandmail.com/business/careers/leadership/article-do-you-work-in-a-non-profit-news-the-time-to-convince-your-directors/>, April 2021.

151 LN Tink and BC Kingsley [Transforming the Non-Profit Community in Edmonton: Phase 1 – identifying myths, trends and areas for change](#) (Edmonton Chamber of Voluntary Organisations: Edmonton AB, 2021) at 10, 21.

152 LN Tink and BC Kingsley [Transforming the Non-Profit Community in Edmonton: Phase 1 – identifying myths, trends and areas for change](#) (Edmonton Chamber of Voluntary Organisations: Edmonton AB, 2021) at 22. See also Australian Productivity Commission [Contribution of the Not-for-Profit Sector](#) 11 February 2010 at J3, quoting from the Sydney Morning Herald: "having non-profit groups engaging in cutthroat competition has produced some poor – not to mention perverse – results".

153 Australian Productivity Commission [Contribution of the Not-for-Profit Sector](#) 11 February 2010 at J4.

154 Australian Productivity Commission [Contribution of the Not-for-Profit Sector](#) 11 February 2010 at 24.

155 Australian Productivity Commission [Contribution of the Not-for-Profit Sector](#) 11 February 2010 at 306, J14.

156 M McGregor-Lowndes and B Wyatt (eds) *Regulating Charities: the Inside Story* (Routledge, New York, 2017) at 282. See also LN Tink and BC Kingsley [Transforming the Non-Profit Community in Edmonton: Phase 1 – identifying myths, trends and areas for change](#) (Edmonton Chamber of Voluntary Organisations: Edmonton AB, 2021) at 10. See also 17: "Despite the desire of many non-profits to remain outside the realm of politics, ... there is no such thing as an apolitical non-profit organization. If an organization provides temporary housing and does not fight for permanent housing, or institutionalizes emergency food and does not advocate for living wages, it reinforces the notion that it is normal for a society to (re) distribute its resources in such a way that some people will inevitably be homeless or not have enough to eat. And while this form of service provision is technically outside the political sphere, it does not mean the work is apolitical. Choosing to focus on the provision of services while avoiding strategic discussions about distributive justice is a political statement of its own".

157 See Russell Marks [The silence of the lambs – the corporatization of the largest charities and NGOs has had alarming effects](#) The Monthly, November 2021.

158 Australian Productivity Commission [Contribution of the Not-for-Profit Sector](#) 11 February 2010 at 296.

Following this recommendation, the Australian Federal Government enacted the **Not-for-profit Sector Freedom to Advocate Act 2013 (Cth)**, discussed further below in chapter 4 (*Advocacy*).

Stifling of innovation

Over recent decades, governments have come under increasing pressure from the community to eliminate risk. This pressure has, in turn, led to a proliferation of government regulation. The Australian Productivity Commission considered that, to the extent that a degree of risk aversion in the public service manifests in more demanding contractual and reporting obligations for government contracts, it may partly reflect the influence of this wider social trend.¹⁵⁹ However, over-prescribing the processes by which outcomes are to be achieved can stifle innovation, due to too great an “abundance of caution, too narrow a vision, or too much fear of public criticism”.¹⁶⁰

Subsuming the voluntary sector within the public service agenda can also expose not-for-profit entities to the risks associated with the “changing preferences and concerns of the median voter”,¹⁶¹ and risks damaging an “important mechanism for change, renewal and innovation in society”.¹⁶²

Focus on process rather than impact

Contracts and service agreements may narrow and ossify the relationship between government and providers around tendering, contractual and reporting requirements.¹⁶³

While the community may rightly expect a high level of accountability from government for the use of public funds,¹⁶⁴ purchase of service contracting can lead to a focus on process, and on creating outputs or metrics that can be easily monitored or measured, rather than on what matters: creating sustained positive outcomes and impact.¹⁶⁵

The associated costs of discharging accountability processes may also impose a significant compliance burden on the administrative capacity of not-for-profit entities, weakening their connections with the communities they serve, without necessarily resulting in improved service delivery outcomes for clients.¹⁶⁶

Asymmetry of power

Government contracting arrangements formalise a relationship between government and not-for-profit entities that is epitomised by an asymmetry of power: such power imbalance can make collaboration more difficult, and “undoubtedly weakens some of the natural checks and balances on the quality of decision making [which] underscores the importance of the quality of government contracting practices”.¹⁶⁷

Some of these difficulties may be inherent in purchase of service contracting as a model, others may be a function of the way it is being applied. In that regard, the Australian Productivity Commission noted that inadequate contracting processes – such as inappropriately short-term contracts, underfunding, and increased micro-management – also challenge entities’ ability to respond flexibly as needs changed or opportunities arose.¹⁶⁸

159 Australian Productivity Commission [Contribution of the Not-for-Profit Sector](#) 11 February 2010 at 336.

160 Australian Productivity Commission [Contribution of the Not-for-Profit Sector](#) 11 February 2010 at 306.

161 Australian Productivity Commission [Contribution of the Not-for-Profit Sector](#) 11 February 2010 at 307.

162 Australian Productivity Commission [Contribution of the Not-for-Profit Sector](#) 11 February 2010 at 241, referring to Leat (2007 p1).

163 Australian Productivity Commission [Contribution of the Not-for-Profit Sector](#) 11 February 2010 at 341.

164 Australian Productivity Commission [Contribution of the Not-for-Profit Sector](#) 11 February 2010 at 385, 310.

165 Australian Productivity Commission [Contribution of the Not-for-Profit Sector](#) 11 February 2010 at 35.

166 Australian Productivity Commission [Contribution of the Not-for-Profit Sector](#) 11 February 2010 at 308.

167 Australian Productivity Commission [Contribution of the Not-for-Profit Sector](#) 11 February 2010 at 206, 303, 342.

168 Australian Productivity Commission [Contribution of the Not-for-Profit Sector](#) 11 February 2010 at xxiv.

Underfunding

The move away from core funding to purchase of service contracting was accompanied in many jurisdictions, including New Zealand, by a trend toward the government making a “contribution” to the cost of providing a service rather than fully funding it.¹⁶⁹

Research commissioned by Social Service Providers Aotearoa in August 2019 found that the New Zealand Government funds providers for less than 2/3 of the actual costs of delivering the services they are contracted to provide. The total underfunding is estimated to be at least \$630 million annually.¹⁷⁰ Many of these underfunded services are essential.¹⁷¹

Underfunding of this nature forces those with government contracts to over-deliver on the services and programmes they are funded to provide.¹⁷² It also requires community entities to subsidise service costs from other revenue sources, when alternative sources of funding, such as fundraising and access to in kind pro bono resources, may be limited, and increasing fees and charges to address funding shortfalls may limit service access.¹⁷³ More fundamentally, partial government funding and the associated cumulative effects of underinvestment undermines the capacity and viability of community service providers, making it difficult for not-for-profit entities to plan and invest in developing their capabilities, pay competitive wages to attract and retain staff, and move beyond

169 Australian Productivity Commission *Contribution of the Not-for-Profit Sector* 11 February 2010 at 302.

170 Martin Jenkins *Social service system: the funding gap and how to bridge it* Research funded jointly by social service providers and philanthropic organisations August 2019: sspa.org.nz/images/Social_Service_System_-_The_Funding_Gap_and_How_to_Bridge_It_-_FULL_REPORT_FINAL.pdf at 6.

171 See, for example, the [submissions](#) of Royal New Zealand Coastguard Incorporated: “the charity saving lives at sea, which receives 12.5% of its funding from government, raising all of the remaining 87.5% from boaties and other individual supporters, corporate sponsors and funding bodies”; Royal New Zealand Plunket Trust: “Plunket like other charities faces increasing challenges sourcing sustainable funding and volunteers to carry out their work. Operating costs particularly employee expenses continue to rise. Plunket has not received an increase in Government funding for a number of years. Competition within the charitable sector for other sources of funding such as philanthropy and grants is strong”; The United Fire Brigade Association: “The work undertaken by New Zealand’s volunteer firefighters is ... conservatively valued at \$529 million. This number needs to be put in context. Replacing the volunteer force with a paid equivalent and picking up the employee costs in the 2013 NZFS Annual Report but excluding those that relate to volunteers gives an all up cost equivalent of \$87,083 per paid firefighter. This would amount to approximately \$1 billion per annum to replicate the volunteer fire fighters on a remuneration basis alone ... this does not take into account the very large capital cost that would be required to transform the volunteer stations into stations fit to house on-duty paid firefighters who need more extensive facilities to allow for the 2 day, 2 night shift rosters that paid firefighters currently experience”; Northland Community Foundation: “[o]ne key challenge facing the charities sector is enabling sustainable solutions to be achieved through funding rather than one of a continuing dependence. The approach for funding would be to find appropriate solutions to enable the outcomes that are being sought rather than a focus on internal systems within a predetermined format”; and Water Safety New Zealand: “... in the water safety sector the current financial viability of the sector is increasingly questioned ... many charities rely on revenue that is at risk and volatile each year, which makes strategic, future focused decision making and implementation difficult to achieve ... the focus on ‘buying specific outputs’ does not take into account a more holistic view of the organisation’s viability and function”; The Salvation Army Group: “[t]he Salvation Army has consistently called for more fairness and investigation of contracting arrangements with the Government. We hold several contracts for services which are hugely important for our service to the community. But these contracts can also be very challenging in terms of reporting, monitoring, innovation, evaluation and agreeing on fair contract amounts. We have tried to contribute to different reviews around these issues like the Productivity Commission’s work on more effective social services. But we have not seen any real change in these contracting arrangements or the often silo-mentality of Government departments since this work. We are passionate about our Christian mission and the social services we provide. But the stagnation and even decline in government funding in some social service provision areas indeed makes our work extremely difficult ... There is an ongoing and serious challenge for Christian charities to maintain their Christian mission and worldview, particularly if Government contracting and the dangers of funding capture mean that Christian charities are welcomed when contracting for services, but they cannot share openly why they do this work and what drives them”; and Surf Life Saving New Zealand Inc. See also Andrew Purkis *Are charitable services essential?* 16 April 2020: andrewpurkis.wordpress.com/2020/04/16/are-charitable-services-essential/.

172 JB Were *2021 New Zealand Cause Report* September 2021 at 18.

173 Australian Productivity Commission *Contribution of the Not-for-Profit Sector* 11 February 2010 at 288, 302.

a subsistence existence.¹⁷⁴ Partial funding can also reduce the ability of not-for-profit entities to raise capital, as well as their scope to innovate.

Similar issues arise in Canada, as noted by the Special Senate Committee on the Charitable Sector:¹⁷⁵

Funding for the overall operation of charitable and non-profit organizations, described as “core funding” was historically in the form of grants until the 1990s; at that time, funding shifted to “contributions,” which are not only less stable, but rarely adequately cover the costs of even administering the projects being funded. Witnesses emphasized to the committee the challenge for these organizations of covering the costs of administering these agreements while delivering their services; as a result, they said, organizations have few or no resources to support their volunteers, pay staff a living wage, train and support their board members, find and take opportunities for collaboration with other organizations, update their technology, or to develop and implement more innovative services to their members and clients.

The Special Senate Committee recommended the Government of Canada “require departments and agencies to compensate full administrative costs associated with delivering the services being funded in transfers to charitable and non-profit organisations” (recommendation 10).

In Australia, the Australian Productivity Commission similarly observed an attitude within some government departments that not-for-profit entities are a “cheap” way of ensuring certain services are provided. Describing such an attitude as “corrosive to the underlying relationship between government and NFPs and [undermining of] the sustainability of service delivery”,¹⁷⁶ the Australian Productivity Commission recommended that, in contracting services or other funding of external organisations, Australian governments should:¹⁷⁷

- determine and transparently articulate whether they are fully funding particular services or only making a contribution and, if so, the extent of that contribution;
- fully fund those services they would otherwise provide directly; and
- consider the long-term viability of the organisations delivering services on behalf of the government and comprehensively account for all costs, including market wages, a relevant share of overheads (including staff training and the annualised cost of capital used in the service, allowing for depreciation), the cost of taking on and managing risk (including the relevant share of insurance and legal costs), costs associated with activity-related monitoring, reporting and evaluation, the cost of reaching required standards, and an appropriate share of the costs of meeting other regulatory requirements, such as for public liability insurance or related to privacy legislation.¹⁷⁸

Over-prescription and micro-management

Government contracting arrangements may sometimes allocate funding through rigorous reporting mechanisms and scrutiny, using accountability and reporting requirements to exert control over not-for-profit entities.¹⁷⁹

Excessive “red tape” can prevent not-for-profit entities from delivering the best outcomes for the community because of the diversion of staff and other resources to managing the

174 Australian Productivity Commission [Contribution of the Not-for-Profit Sector](#) 11 February 2010 at xxxii, xxxvi, LIX, 286, 289; Report of the Special Senate Committee on the Charitable Sector [Catalyst for Change: A Roadmap to a Stronger Charitable Sector](#) June 2019 at 34.

175 Report of the Special Senate Committee on the Charitable Sector [Catalyst for Change: A Roadmap to a Stronger Charitable Sector](#) June 2019 at 45. The Government of Canada supported this recommendation. See Hon D LeBouthillier, Minister for National Revenue *Government Response to the Report of the Special Senate Committee on the Charitable Sector* 20 March 2021: www.ratnaomidvar.ca/government-response-to-the-report-of-the-special-senate-committee-on-the-charitable-sector/ at 6.

176 Australian Productivity Commission [Contribution of the Not-for-Profit Sector](#) 11 February 2010 at 384.

177 Australian Productivity Commission [Contribution of the Not-for-Profit Sector](#) 11 February 2010 at LIX, 284 and recommendation 11.1.

178 Australian Productivity Commission [Contribution of the Not-for-Profit Sector](#) 11 February 2010 at 284.

179 Australian Productivity Commission [Contribution of the Not-for-Profit Sector](#) 11 February 2010 at 325.

resulting administrative burden.¹⁸⁰ Time spent engaging in often unsuccessful tendering processes can drain time and resources, diverting attention away from other projects, the broader picture and “away from their general rationale of social justice, in their struggle to fulfil the obligations with too little money in too short a timeframe”.¹⁸¹

Micro-management through contracting arrangements is seen as symptomatic of a relationship that has become “unnecessarily adversarial and lacking in trust”.¹⁸²

In addition, micro-management reduces the ability of not-for-profit entities to draw on local knowledge and expertise and to respond to changing conditions and client needs. This can weaken connections with the communities they serve, potentially undermining their reach into communities and community participation in decision-making. It can also weaken their mission and sense of identity. In this way, micro-management can erode the comparative advantage of not-for-profit entities as they respond by moving towards greater differentiation and separation of stakeholder roles within their organisation and adopting more bureaucratic and less flexible structures.¹⁸³

The Australian Productivity Commission queried whether there may be scope to reduce the compliance burden by relying on existing external regulatory frameworks rather than including additional reporting mechanisms in service agreements and contracts (a “report once, use often” framework).¹⁸⁴ In New Zealand, the Working Party on Registration, Reporting, and Monitoring of Charities also considered that making information publicly available on the charities register should “reduce the requirement on charities to supply information to a range of funders and government agencies”.¹⁸⁵ Twenty years on, there remains considerable scope for this potential to be fulfilled. The concept of “report once, use often” is discussed further below in chapter 8.

Short-term contracts

The Australian Productivity Commission recommended that the length of service agreements and contracts should reflect the length of the period required to achieve agreed outcomes, rather than having arbitrary or standard contract periods (recommendation 12.5).

Excessively short-term contracts can create uncertainty and undermine the capacity of the sector and its ability to attract and retain staff.¹⁸⁶ Difficulties in retaining trained staff on a long-term basis can ultimately lead to disruption of services and inconsistencies in service delivery.¹⁸⁷

As noted by the Special Senate Committee on the Charitable Sector in Canada:¹⁸⁸

Federal contribution agreements with charitable and non-profit organizations can be for periods as short as one year. While these short-term contribution agreements rarely cover administrative costs, the committee was told that they perversely contribute to increased demands for administration, for annual application processes and results reporting, even for projects that are not completed within a short time frame. Similarly, while the newer arrangements between federal departments and agencies with charitable and non-profit organizations have called for increased results reporting, ‘loss of core funding has actually diminished the capacity of recipient organizations in this sector to fulfil the new accountability requirements of the government.’ ...

180 Australian Productivity Commission [Contribution of the Not-for-Profit Sector](#) 11 February 2010 at J12.

181 Australian Productivity Commission [Contribution of the Not-for-Profit Sector](#) 11 February 2010 at 313, referring to the submission of Sector Connect Inc.

182 Australian Productivity Commission [Contribution of the Not-for-Profit Sector](#) 11 February 2010 at 381, J13 - J14.

183 Australian Productivity Commission [Contribution of the Not-for-Profit Sector](#) 11 February 2010 at 307.

184 Australian Productivity Commission [Contribution of the Not-for-Profit Sector](#) 11 February 2010 at 87, J11 - J12, recommendation 6.6.

185 *Report by the Working Party on Registration, Reporting and Monitoring of Charities* 28 February 2002 at 15.

186 Australian Productivity Commission [Contribution of the Not-for-Profit Sector](#) 11 February 2010 at LIX.

187 *He Waka Roimata Transforming Our Criminal Justice System* First report of Te Uepū Hāpai i te Ora – Safe and Effective Justice Advisory Group, 2019: <www.justice.govt.nz/assets/Documents/Publications/he-waka-roimata.pdf> at 58.

188 Report of the Special Senate Committee on the Charitable Sector [Catalyst for Change: A Roadmap to a Stronger Charitable Sector](#) June 2019 at 45, 47, 48.

The committee also heard that the short-term nature of government funding to the charitable and non-profit sector makes sector employment equally short-term, with little job security ...

In addition, witnesses told the committee that these short-term funding arrangements are an obstacle to innovation in charitable and non-profit organizations: '[c]harities and non-profits want to spend more time testing out new ideas to meet their missions than on burdensome applications and reporting processes, and they want longer-term funding arrangements that recognize the time and resources required for innovation to occur and its benefits to be realized.'

In New Zealand, a large portion of charitable sector income derives from government contracts and grants.¹⁸⁹ Although "contracting arrangements for government services" was specifically excluded from the scope of the DIA review,¹⁹⁰ submitters commented on the issue nevertheless.¹⁹¹

The experience of one submitter:¹⁹²

The competitive funding model we have now doesn't encourage real dialogue within communities and grassroots input into these changes, or any cohesion for rural and isolated communities. What we're witnessing instead is the repositioning among existing providers and institutions, as they jockey to secure more funding or to hold on to what they have. But it's more than a funding issue. When we try to participate, we're asked who we represent. For those of us who stick our heads above the parapet to ask for better, or to be heard, there's an onslaught of patch protection and subtle bullying. This is what happens when you have people competing for scraps. It's just more in your face in largely Māori rural communities that are still reeling from ongoing inequality and Crown injustices under the Treaty settlements framework. Will 2020 bring more of the same? Our communities have all the markers for high-suicide risk. Like Nero fiddling while Rome burns, we struggle with competitive behaviour from funded services, as well as being volunteers who deal with the everyday realities of those at risk — including the volunteers. God forbid that we should have our own stress, grief and trauma to deal with as well. As last year ended, I made wishes rather than resolutions. I wish I didn't have an expanding list of people to pray for. I wish I knew how I could make a difference. I wish we could restore the mauri of our whānau and communities.

All of these factors risk undermining the capacity and independence of charities and ultimately their effectiveness and their status in the community. The government contracting environment for charities and other not-for-profit entities in New Zealand urgently requires review.

189 M McGregor-Lowndes and B Wyatt (eds) *Regulating Charities: the Inside Story* (Routledge, 2017) at 183.

190 Department of Internal Affairs *Terms of reference to review the Charities Act 2005* May 2018 at 3.

191 See, for example, the [submissions](#) of Community Waikato: "[w]e would encourage the Government to address the problems with the funding/contracting models (such as single year contracting, contracts not being signed off prior to the expected start dates, partial funding for service and non-adjustment of contract remuneration when costs to deliver the services increase)"; Network Waitangi Otautahi Inc: "[m]any [Third Sector Organisations] struggle with the neoliberal approach associated with that politics of self-interest where the market approach to social planning dominates. This has brought degrees of corporatisation and managerialism to the Sector and made it difficult to proceed to organise as collectives where decisions are made according to specified ideals ... So called 'Governance' standards can further exacerbate a situation where many functional organisations lose their essence by requirements to jump through particular hoops"; Project Periscope Ltd: "[c]urrent sector make-up is sufficiently competitive these days that it is reasonable to conclude that there are levels of cannibalisation occurring which renders established Charities at risk from the behaviour of competing Charities that come into existence. A proportion of the blame for this lies in the creation of the competitive contracting environment that currently exists. Notwithstanding the reason, this is hardly conducive to what the public of New Zealand expects (and often believes to be the character and achievements) of the sector"; Bridget Frame: "Government contracts should reflect the actual cost to provide the service"; Linda Webb: "[t]o create opportunities to work in partnership / collaborate with like organisations rather than be struggling and possibly seeing each other as competitors e.g. share office, administrative functions"; Braemar Charitable Trust; Kapiti Youth Support One Stop Shop Trust; Lake Taupo Hospice Trust Inc; Linda Kaye; New Zealand Council of Victim Support Groups Incorporated; Roberta Budvietas; SPCA; Seed the Change | He Kākano Hāpai; Socialink Tauranga Moana; and Southern Group Training Trust.

192 Lorene Royal of Rawene and Districts Community Development Inc, speaking outside the formal [submission](#) process (see Lorene Royal *Our communities are broken*, 2 February 2020: e-tangata.co.nz/reflections/our-communities-are-broken/). See also *He Waka Roimata Transforming Our Criminal Justice System* First report of Te Uepū Hāpai i te Ora – Safe and Effective Justice Advisory Group, 2019: www.justice.govt.nz/assets/Documents/Publications/he-waka-roimata.pdf at 58.

Recommendation 1.1:

That the independent first principles review recommended in recommendation 1.0 include a review of the contracting arrangements for government services for charities and other not-for-profit entities, taking into account the findings of the Australian Productivity Commission in its 2010 Contribution of the Not-for-profit Sector report.

A “tax expenditure analysis”

In its 2018 and 2019 reports, the Tax Working Group conceptualised the tax privileges for charities as tax “concessions” and concluded that the charitable sector’s use of “what would otherwise be tax revenue” should be periodically reviewed to “verify that intended social outcomes are being achieved”.¹⁹³

These statements reflect what is known as a “tax expenditure analysis”, a framework that requires critical examination in the context of charities law reform due to its influence on those advising those making decisions about charities.

The tax expenditure analysis can be traced back to the work of Harvard Law Professor and United States Treasury Assistant Secretary (Tax Policy), Stanley Surrey, in the late 1960s/early 1970s.¹⁹⁴ a tax expenditure analysis conceptualises some (albeit not all) of the tax privileges for charities as a “subsidy”, and recasts the revenue said to be “foregone” from such “subsidy” as a direct tax expenditure by government; the analysis is then used as a means of estimating the “cost” of such tax expenditure, so that it can be assessed against alternative policy options, such as a system of direct grants.¹⁹⁵

Following its genesis in the United States, the tax expenditure analysis was formally adopted by Treasuries around the world, including in Australia,¹⁹⁶ Canada¹⁹⁷ and Aotearoa New Zealand.¹⁹⁸

However, the tax expenditure analysis contributes materially to charities being misunderstood, undervalued, and therefore overlooked.

193 Tax Working Group *Future of Tax: Final Report* 21 February 2019 at 21 (recommendation 78), 103 – 104, [40], [42] – [44]. See also Inland Revenue Department *Tax and charities, a government discussion document on taxation issues relating to charities and non-profit bodies* June 2001: taxpolicy.ird.govt.nz/publications/2001/2001-dd-charities at [2.7]: “[s]ubsidising charities enables governments to further their social objectives, including by means of increasing support to disadvantaged members of society. One of the reasons governments provide subsidies to the private sector rather than simply increasing state provision is that it can result in a better targeting of resources. The donations people make to a charity provide an effective indicator of the extra goods and services people feel are needed. Subsidising charities also ensures that those members of society who do not donate to charities but who nevertheless benefit indirectly from charities are contributing through their general tax payments”.

194 See SS Surrey *Pathways to Tax Reform: the Concept of Tax Expenditures* (Cambridge, Mass: Harvard University Press, 1973); “The Tax Expenditure Concept and the Budget Reform of 1974” (1976) 17 Boston College Law Review 679 – 736. The concept had also been raised earlier: “[i]n 1863, Gladstone, as Chancellor of the Exchequer, attacked all tax-exempt status of charities in a speech in Parliament as a concealed and unregulated tax subsidy, in perpetuity, for large well-endowed charities” (Ontario Law Reform Commission *Report on the Law of Charities* (Toronto, 1996) at 327, 246 n 83); in *National Anti-Vivisection Society v Inland Revenue Commissioners* [1948] AC 31 (HL) at 52 Lord Wright described the exemption from income tax as amounting to “receiving a subsidy from the State”.

195 In 1987, the tax expenditure analysis appears to have influenced then Minister of Finance, Hon Roger Douglas, in his proposal to impose a “flat tax”, including on the income of charities, and to support charities instead through a system of direct funding by Government. The proposal did not proceed, as discussed further below in ch 7. In 1989, the issue was again considered, but rejected, by the Working Party on Charities and Sporting Bodies who concluded that direct grants do not provide an incentive for individuals to give; demoralise organisations and make them accountable to Government rather than their supporters; and overly centralise the source of the charitable sector’s financial support: *Report to the Minister of Finance and the Minister of Social Welfare by the Working Party on Charities and Sporting Bodies* (Treasury, Wellington, November 1989) at 7, 28, 30, 49, 52.

196 Parliament of Australia *Tax expenditures*: www.aph.gov.au/About_Parliament/ParliamentaryDepartments/Parliamentary_Library/pubs/BriefingBook45p/TaxExpenditures.

197 Government of Canada *Report on Federal Tax Expenditures – Concepts, Estimates and Evaluations 2021: part 3*: www.canada.ca/en/department-finance/services/publications/federal-tax-expenditures/2021/part-3.html#List-of-Tax-Expenditures.

198 Te Tai Ōhanga The Treasury *2021 Tax Expenditure Statement*: www.treasury.govt.nz/publications/tax-expenditure/2021-tax-expenditure-statement.

For example, from information now available from the charities register, it can be seen that registered charities earn approximately \$21 billion of income annually.¹⁹⁹ Most of this income is not currently subject to income tax due to the income tax exemptions available to registered charities.²⁰⁰ A tax expenditure analysis might indicate that approximately \$6 billion additional tax revenue might become available to government were the charitable income tax exemptions to be removed.²⁰¹

However, such a conclusion would be inherently flawed for a number of reasons.

Firstly, not all of the “income” of charities is income that would be subject to tax in the absence of a tax exemption in any event. For example, “donations” may not reach the threshold of being “income under ordinary concepts”;²⁰² a factual case-by-case assessment may be required imposing additional administrative and compliance costs.

Secondly, to the extent that income would be taxable in the absence of an exemption, charities would be entitled to deduct expenses incurred in deriving that income.²⁰³

According to information available from the charities register, registered charities incurred approximately \$20 billion of expenses in earning their \$21 billion of income.²⁰⁴ Even putting aside the additional administrative and compliance costs that would be incurred in determining which of these expenses might be deductible for tax purposes,²⁰⁵ the potential additional tax revenue would be significantly reduced accordingly, potentially to zero or, to the extent that total deductions might exceed gross income for tax purposes, even lower.

Thirdly, a tax expenditure analysis can provide only a rough estimate of cost.²⁰⁶ For example, it is not possible to know how charities would behave in the absence of the tax exemption: some charities earning business income may simply close down their businesses, thereby precluding the generation of additional tax revenue while also reducing funds available to devote to their charitable purposes. To the extent that services provided by charities are reduced or not carried out as a result of a loss of tax exemption, government may have to make up the shortfall, thereby increasing government’s costs potentially beyond the amount that would otherwise have been “spent” on the exemption. Amplifying this factor are research indications that charities carry out services more efficiently than government,²⁰⁷ meaning that the cost to government of making up the shortfall may be more than it would have cost charities to provide the same services, resulting in a potentially significantly worse outcome overall from a cost perspective than simply keeping the tax exemptions in place.

More fundamentally, a tax expenditure analysis structurally ignores the benefits provided by charities which, as discussed above, may be intangible and difficult to measure but are nevertheless critically important: in fact, they arguably represent the very reason tax privileges are provided for charities in the first place. Ignoring such benefits perversely leads to charities being perceived and regulated as if they are a “tax loophole”, or a

199 Charities Services Ngā Ratonga Kaupapa Atawhai [2020/2021 Annual Review](#) at 18, as discussed above.

200 The income tax exemptions are contained in Income Tax Act 2007 ss CW 41, CW 42. As discussed above, business income of registered charities will be subject to income tax if the control and jurisdiction requirements of s CW 42 are not met.

201 Assuming for the purposes of analysis, a blanket tax rate of 28% (the current tax rate for companies, which are widely defined to include most bodies corporate: see Income Tax Act 2007 s YA 1, sch 1 cl 2).

202 Income Tax Act 2007 s CA 1(2).

203 Income Tax Act 2007 s DA 1.

204 Charities Services Ngā Ratonga Kaupapa Atawhai [2020/2021 Annual Review](#) at 18.

205 For example, the general permission in s DA 1 of the Income Tax Act 2007 broadly allows deductions for expenditure incurred in deriving assessable income. While distributions made by charities in furtherance of their charitable purposes are classed as expenditure for financial reporting purposes, it is not clear that they would meet the criteria for deductibility under tax legislation, an outcome which would perversely disincentivise charities from doing precisely what they are set up to do.

206 See Ann O’Connell *Taxation and the not-for-profit sector globally* in M Harding (ed) *Research Handbook on Not-for-Profit Law* (Edward Elgar, 2018) 388 at 397.

207 See, for example, R Atkinson “Theories of the Federal Income Tax Exemption for Charities: Thesis, Antithesis and Synthesis” (1997) 27 *Stetson Law Review* 395 at 403.

“fiscal cost”,²⁰⁸ and therefore something to be reduced: such perceptions mischaracterise charities and undermine their status in society perniciously.

Further, uncritical acceptance of a tax expenditure analysis ignores a significant debate:²⁰⁹ the tax expenditure analysis *assumes* that taxing charities is a normal part of the “benchmark” structure for tax calculation purposes, and that tax privileges for charities are a *departure* from that benchmark and therefore a “concession”.

The alternative view is that tax privileges for charities are merely a proper measure of the tax base. Tax systems are generally designed to tax individuals and businesses on their personal gain, which results in a misfit for entities such as charities where personal gain is prohibited:²¹⁰ although there is no universal agreement on the ideal tax “benchmark” (which may be contestable and subject to political compromise), there is remarkable consistency around comparable jurisdictions in providing tax privileges for charities.²¹¹

On this view, charities are *outside* the normal tax base, and therefore their tax privileges should not be considered a “concession” or a “subsidy”.²¹²

An example might illustrate. While for-profit companies are subject to tax on their business income, the tax system permits expenses to be deducted in arriving at the amount on which tax is imposed.²¹³ These deductions reduce the amount of tax payable, but they are not conceptualised as “concessions” or “subsidies”, and companies are not considered to be “using what would otherwise be tax revenue”: instead, allowing deductions for company expenses is simply considered a proper measure of the tax base (a proper adjustment in arriving at the “benchmark”).

Similar arguments apply to the tax privileges for charities, which are arguably merely a proper adjustment to the tax base, and no more a concession, or a “loophole”, than companies’ ability to deduct expenses.

Uncritical acceptance of a tax expenditure analysis also leads to a perception that charitable funds are somehow government funds, over which government will feel entitled to exercise control, for example by limiting the “subsidy” to those charities

208 JE Tyler III Book Review: Myles McGregor-Lowndes and Bob Wyatt (eds), *Regulating Charities: the Inside Story*, New York: Routledge (2017) 9(1) Nonprofit Policy Forum 5. papers.ssrn.com/sol3/papers.cfm?abstract_id=3142335 at 3.

209 See, for example, E Brody “Of Sovereignty and Subsidy: Conceptualizing the Charity Tax Exemption” (1998) 23 *Journal of Corporation Law* 585; M McGregor-Lowndes, M Turnour, E Turnour “Not for profit income tax exemption: is there a hole in the bucket, dear Henry?” (2011) 26 *Australian Tax Forum* 601-631; R Colinvault “Rationale and Changing the Charitable Deduction” (2013) 138 *Tax Notes* 1453; N Brooks “The Role of the Voluntary Sector in a Modern Welfare State” in J Phillips, B Chapman and D Stevens (eds) *Between State and Market: Essays on Charities Law and Policy in Canada* (Montreal & Kingston: McGill-Queen’s University Press, 2001) 166 at 171; DG Duff “Tax Treatment of Charitable Contributions in a Personal Income Tax: Lessons from Theory and Canadian Experience” in M Harding, A O’Connell & M Stewart (eds) *Not-for-Profit Law: Theoretical and Comparative Perspectives* (Cambridge University Press, 2014) 199; R Atkinson “Theories of the Federal Income Tax Exemption for Charities: Thesis, Antithesis and Synthesis” (1997) 27 *Stetson Law Review* 395 at 402 - 426; Australian Productivity Commission [Contribution of the Not-for-Profit Sector](#) 11 February 2010 at E5 - E7; BI Bittker and GK Rahdert *The exemption of Nonprofit Organisations from the Federal Income Taxation* 85 *Yale LJ* (1976) 299.

210 By virtue of the non-distribution constraint, as discussed above.

211 As discussed above. See also, for example, Industry Commission *Charitable organisations in Australia - Report No 45* 16 June 1995 at 292.

212 See R Atkinson “Theories of the Federal Income Tax Exemption for Charities: Thesis, Antithesis and Synthesis” (1997) 27 *Stetson Law Review* 395 at 431 n 110, 432: “It is a useful, but dangerous, shorthand to describe the tax exemption as a subsidy. It is ... more properly understood, and defended, as an exclusion from the tax base ... Congress is not ‘giving’ such organisations any ‘benefits’; the exemption (or deduction) is not a ‘loophole’, a ‘preference’ or a ‘subsidy’ – it certainly is not an ‘indirect appropriation’. Rather, the various Internal Revenue Code provisions comprising the tax exemption system exist basically as a reflection of the affirmative policy of American government to not inhibit by taxation the beneficial activities of qualified exempt organisations acting in community and other public interests ... the charitable exemption reflects not only a desire to promote the helping of others, but also a healthy agnosticism about how that help can best be given, a willingness on the part of the majority to promote minority conceptions of the good of others ... helping others our way will cost ... But whether we assume those costs will depend, ultimately, on what kind of society we want to live in”.

213 Income Tax Act 2007 flowchart B2.

furthering government objectives. Such perceptions are incompatible with the status of charities as private, independent, self-governing organisations: as discussed above, independence is the hallmark of charities and a key element of what makes them “distinctive and valuable to begin with”.²¹⁴ Perceptions that charitable funds are somehow government funds blur the boundary between the charitable and government sectors, and contribute materially to charities being misunderstood, undervalued, and therefore overlooked.

The Canadian experience provides insights into the practical impact of a tax expenditure analysis on charities, and is important to understand as Canadian jurisprudence has profoundly influenced administration of charities’ legislation in New Zealand since the Charities Act was enacted in 2005.²¹⁵

The Canadian experience

Prior to 1975, charities law in Canada was focused on preserving and promoting the charitable sector for its own sake, rather than on policing the tax privileges available to charitable organisations.²¹⁶ However, the issue of a “Green Paper” by the Department of Finance in 1975 resulted in a change of paradigm, described by the Ontario Law Reform Commission as follows:²¹⁷

For the first time, federal tax policy was explicitly formulated in the rhetoric of the tax expenditure theorists: the government’s ultimate objective was to deploy the tax subsidy [sic] to the maximum benefit of Canadians. In the logic of this view, if perhaps not entirely in the conviction of the government, charitable dollars were considered government dollars.

Since the reform proposals contained in the [1975] Green Paper, if implemented, would have constituted a *substantial increase in the regulatory control* of the federal government over the sector, and since there was *very little solid empirical information*, the proposals were expressed tentatively ... Many observers ... nonetheless were sceptical of its motives, critical of its design, and very quick and acute in their reactions against the proposals ...

Generally, the sector’s reaction has been to balk at the aggressiveness of some of the federal government’s proposals on the basis that they were either *too complex for the vast majority of charities* or that they were *far too onerous to correct minor, infrequent, and often only perceived, abuses*.

The whole process since the institution of the registration regime in 1967 has shaped the sector’s perspective on the role of government in the charity sector profoundly. Still, a decade after the 1981 to 1984 reform process, there is a *great deal of scepticism* and even fear about the motives of government regulation. For the most part, the presence of government is felt as antagonistic, counterproductive, and unduly burdensome.

The Ontario Law Reform Commission concluded as follows:²¹⁸

The [legal framework for charities] should not be based exclusively or even largely on the general premise that charities are doing the work of government and, therefore, that the exemption, the deduction, and the credit are in some sense state subsidies and/or state incentives. The tax expenditure analysis, in our view, does not do justice to the diversity of the sector; it does not apply to a very substantial number of charities, and even with respect to the ones for which it seems plausible, it often serves merely to undermine the sector’s own self-understanding. Few people in the sector think or feel that they are doing the government’s work, and many would be mildly offended if the government insisted they were ...

In our view, the best general premise for [state] involvement in the charity sector is that the sector is a third order of organisation in society, one whose principal characteristic is that the people who work in it are motivated predominantly by altruistic purposes. The role of the state, on this view, is to facilitate charitable activity and to protect the sector from ... fraud and abuse.

214 Lord Hodgson of Astley Abbotts [*Trusted and Independent: Giving charity back to charities – Review of the Charities Act*](#) July 2012 at [3.15].

215 As discussed further below in ch 4.

216 Ontario Law Reform Commission *Report on the Law of Charities* (Toronto, 1996) at 254, 261, 262.

217 Ontario Law Reform Commission *Report on the Law of Charities* (Toronto, 1996) at 272 - 273, 285, referring initially to Canada, Department of Finance *The Tax Treatment of Charities* (discussion paper) (Ottawa: June 1975) (referred to herein as the 1975 Green Paper) (emphasis added).

218 Ontario Law Reform Commission *Report on the Law of Charities* (Toronto, 1996) at 333 - 334.

Despite these comments, the Canadian experience of legislation relating to charities over the past several decades appears to have been characterised by an overemphasis on controlling the extent of a perceived “tax expenditure” through a classic tax regulatory approach of tax audits accompanied by intricate and specific rules. Not only has this approach been harmful to charities,²¹⁹ it has led to a climate whereby:²²⁰

[t]hose that would do harm [become] increasingly adept at finding new ways to inflict it, which means government must continually amend the rules to fight new risks. And so it continues in a never-ending loop with the rules becoming ever more complex and the regulation of charities ever more removed from the day to day good works that charities perform.

The Canadian charities law system differs from New Zealand in that it is administered by its tax authority (the Charities Directorate of the Canada Revenue Agency) through tax legislation. New Zealand removed administration of its charities law system from its tax authority, Inland Revenue, following passage of the Charities Act in 2005.

For all these reasons, New Zealand’s reliance on Canadian charities law jurisprudence, and a tax expenditure analysis more generally, require critical examination, as discussed further below in chapter 4.

Are there “too many charities” in New Zealand?

The intersection of government contracting challenges with a tax expenditure analysis hegemony has contributed to strong perceptions that there are “too many charities” in New Zealand.

Such perceptions are not limited to New Zealand: for example, similar issues have arisen in Australia,²²¹ Canada,²²² England and Wales,²²³ Ireland,²²⁴ and the United States.²²⁵

However, New Zealand faces particular difficulty due to a comparative analysis of the nature set out in box 1.5:

219 See Ontario Law Reform Commission *Report on the Law of Charities* (Toronto, 1996) at 270: “... this preoccupation with tax privileges and policing tax privileges was probably harmful”.

220 T de March, former director-general of the Charities Directorate in Canada, in M McGregor-Lowndes and B Wyatt (eds) *Regulating Charities: the Inside Story* (Routledge, New York, 2017) at 273.

221 Australian Charities and Not-for-profits Commission *Are there too many charities in Australia?* <www.acnc.gov.au/for-public/understanding-charities/are-there-too-many-charities-australia>.

222 M Blumberg “Do we have too many registered charities in Canada?” 6 December 2008 <www.canadiancharitylaw.ca/blog/do_we_have_too_many_registered_charities_in_canada/>.

223 The Guardian “Too many cooks?” 8 November 2000: <www.theguardian.com/society/2000/nov/08/guardiansocietysupplement5>.

224 D Ó Corrbuí “Are there far too many charities?” 10 August 2017: <www.linkedin.com/pulse/far-too-many-charities-diarmaid-%C3%B3-corrbu%C3%AD/>.

225 P Lamb “Are there too many charities in America?” 24 September 2009: <www.csmonitor.com/Commentary/Opinion/2009/0924/p09s02-coop.html>.

Box 1.5 – comparative numbers of charities:²²⁶

Country	Population (indicative)	Number of charities (approx)	Number of people per charity (approx)
China	1,448,823,725 ²²⁷	7,169 ²²⁸	20,210
Singapore	5,929,663 ²²⁹	2,321 ²³⁰	2,555
Hong Kong	7,481,800 ²³¹	9,526 ²³²	785
Canada	38,314,305 ²³³	85,838 ²³⁴	446
Ireland	5,033,647 ²³⁵	11,426 ²³⁶	441
Australia	26,014,578 ²³⁷	60,124 ²³⁸	433
England and Wales	59,720,000 ²³⁹	170,383 ²⁴⁰	351
USA	334,337,844 ²⁴¹	1,080,000 ²⁴²	310
Northern Ireland	1,896,000 ²⁴³	6,600 ²⁴⁴	290
Scotland	5,466,000 ²⁴⁵	25,407 ²⁴⁶	215
New Zealand	4,889,864 ²⁴⁷	28,183 ²⁴⁸	174

226 Figures are indicative only.

227 Source: worldometer [China Population](http://www.worldometers.info/world-population/china-population/) <www.worldometers.info/world-population/china-population/> as at 15 March 2022.

228 Source: Z Mingxin *China has 7,169 registered charity organisations, 172 mln volunteers* Ecns.cn 16 October 2020: <www.ecns.cn/news/2020-10-16/detail-ihazqys6709029.shtml>.

229 Source: worldometer [Singapore Population](http://www.worldometers.info/world-population/singapore-population/) as at 15 March 2022: <www.worldometers.info/world-population/singapore-population/>.

230 Source: Ministry of Culture, Community and Youth [Commissioner of Charities Annual Report 2020](http://www.charities.govt.nz/Commissioner-of-Charities-Annual-Report-2020) October 2021 at 10.

231 Source: Data Commons Place Explorer [Hong Kong](http://datacommons.org/place/country/HKG?category=Demographics): <datacommons.org/place/country/HKG?category=Demographics> as at 2020.

232 Source: R Yeo and C Leung *Groups that endanger national security to lose charities status, tax exemptions, Hong Kong's financial services chief warns* South China Morning Post 13 September 2021: <www.scmp.com/news/hong-kong/politics/article/3148543/groups-endanger-national-security-lose-charities-status-tax>, calculated as 9,033 tax-exempt charitable institutions plus 493 charitable trusts recognised by the Inland Revenue Department, as at 30 June 2021.

233 Source: worldometer [Canada Population](http://www.worldometers.info/world-population/canada-population/): <www.worldometers.info/world-population/canada-population/> as at 16 March 2022.

234 Source: Canada Revenue Agency [Report on the Charities Program 2020 to 2021](http://www.cra-arc.gc.ca/charities/Report-on-the-Charities-Program-2020-to-2021):

235 Source: worldometer [Ireland Population](http://www.worldometers.info/world-population/ireland-population/): <www.worldometers.info/world-population/ireland-population/> as at 16 March 2022.

236 Source: An Rialálaí Carthanas [Annual Report 2020](http://www.charitiesregulator.ie/media/2211/final-charities-regulator-annual-report-2020.pdf): <www.charitiesregulator.ie/media/2211/final-charities-regulator-annual-report-2020.pdf> at 13 n **, as at the end of 2020.

237 Source: worldometer [Australia Population](http://www.worldometers.info/world-population/australia-population/): <www.worldometers.info/world-population/australia-population/> as at 16 March 2022.

238 Source: Australian Charities and Not-for-profits Commission: <www.acnc.gov.au/> as at 16 March 2022.

239 Source: Office for National Statistics [Population estimates for the UK, England and Wales, Scotland and Northern Ireland: mid-2020](http://www.ons.gov.uk/peoplepopulationandcommunity/populationandmigration/populationestimates/bulletins/annualmidyearpopulationestimates/mid2020): <www.ons.gov.uk/peoplepopulationandcommunity/populationandmigration/populationestimates/bulletins/annualmidyearpopulationestimates/mid2020> table 2 (England: 56,550,000 plus Wales: 3,170,000).

240 Source: statista [Number of charities in England and Wales from 2000 to 2022](http://www.statista.com/statistics/283464/number-of-uk-charities-in-england-and-wales/): <www.statista.com/statistics/283464/number-of-uk-charities-in-england-and-wales/> as of March 2022.

241 Source: worldometer [United States Population](http://www.worldometers.info/world-population/us-population/): <www.worldometers.info/world-population/us-population/> as at 16 March 2022.

242 Source: National Center for Charitable Statistics [The nonprofit sector in brief 2019](http://nccs.urban.org/publication/nonprofit-sector-brief-2019#finances): <nccs.urban.org/publication/nonprofit-sector-brief-2019#finances> "Public Charities: Number" June 2020, as at 2016.

243 Source: Office for National Statistics [Population estimates for the UK, England and Wales, Scotland and Northern Ireland: mid-2020](http://www.ons.gov.uk/peoplepopulationandcommunity/populationandmigration/populationestimates/bulletins/annualmidyearpopulationestimates/mid2020): table 2.

244 Source: Charity Commission for Northern Ireland [Charity essentials](http://www.charitycommissionni.org.uk/charity-essentials/charities-act-update/the-register-of-charities-and-potential-for-a-charity-registration-threshold/): <www.charitycommissionni.org.uk/charity-essentials/charities-act-update/the-register-of-charities-and-potential-for-a-charity-registration-threshold/>, as at the start of 2022. However, a further 2,432 charities established in Northern Ireland, and 523 charities established outside Northern Ireland ("section 167 institutions"), are presently awaiting call forward by the Charity Commission to apply for registration: Dr O Breen, Rev Dr L Carroll, N Lavery [Independent Review of Charity Regulation Northern Ireland](http://www.independent.ie/news/ireland/charity-regulation-northern-ireland) January 2022 at 93. Adding these figures to the 6,600 currently registered would bring the total number to 9,555, reducing the number of people per charity to 198.

245 Source: Office for National Statistics [Population estimates for the UK, England and Wales, Scotland and Northern Ireland: mid-2020](http://www.ons.gov.uk/peoplepopulationandcommunity/populationandmigration/populationestimates/bulletins/annualmidyearpopulationestimates/mid2020): table 2.

246 Source: Office of the Scottish Charity Regulator: <www.oscr.org.uk/>.

247 Source: worldometer [New Zealand Population](http://www.worldometers.info/world-population/new-zealand-population/): <www.worldometers.info/world-population/new-zealand-population/> as at 16 March 2022.

248 Source: Charities Services Ngā Ratonga Kaupapa Atawhai: <www.charities.govt.nz/> as at 16 March 2022.

According to this graph, New Zealand has fewer people per charity than other countries. Graphs of this nature are used to make arguments that New Zealand has “more charities per capita than any comparable country”, with such arguments often accompanied by claims that charities are “proliferating” unduly in New Zealand, that the 37 Charities Services’ staff are “spread too thin”,²⁴⁹ and that the current charity registration process should “challenge applicants to substantiate they are not replicating services”.²⁵⁰

However, the figures do not tell the whole story.

For example, as discussed in Appendix A, certain categories of charity in England and Wales are not required to register:²⁵¹ as at 1 July 2012, 190,800 charities were not registered (10,000 exempt charities, 100,000 excepted charities, 80,000 small charities plus an additional 800 charitable industrial and provident societies).²⁵² Adding these charities to the 170,383 registered charities recorded in the above table,²⁵³ the figure for England and Wales would reduce to **165**, well below New Zealand’s figure of 173. On this basis alone, it is not accurate to state that New Zealand has more charities per capita than any comparable country. Other countries also make exceptions for different types of charities,²⁵⁴ in contrast to New Zealand where every charity that wishes to avail itself of the privileges of registered charitable status is required to register.

Further, the number of registered charities in New Zealand has remained reasonably stable at around 27,000 since the charities register first became fully operational in mid-2008. This figure itself is 10,000 less than the 37,000 originally predicted.²⁵⁵ Upward pressure occurred following the introduction of the new financial reporting rules for registered charities from 1 April 2015, when a number of national charities encouraged their local and/or regional branches to register independently for financial reporting reasons, causing several hundred new registrations without any specific increase in the overall number of charities.

The number of new registrations is also tempered by the number of deregistrations, which in New Zealand has been controversially high,²⁵⁶ (particularly given that

249 Comments made by Maria Robertson, Deputy Chief Executive, Kāwai ki te Iwi, Service, Delivery and Operations, Department of Internal Affairs Te Tari Taiwhenua, to Charities Services’ Annual Meeting, 29 October 2021: charities.govt.nz/news-and-events/past-events/2021-charities-services-annual-meeting/. See also OB Breen “Redefining the measure of success: a historical and comparative look at charity regulation” in M Harding (ed) *Research Handbook on Not-for-Profit Law* (Edward Elgar, 2018) 549 at 556 – 557.

250 JB Were 2021 *New Zealand Cause Report* September 2021 at 8.

251 Charities Act 2011 (UK) s 30(2).

252 Lord Hodgson of Astley Abbotts *Trusted and Independent: Giving charity back to charities – Review of the Charities Act* July 2012 at [3.21], [5.39].

253 Bearing in mind that the figures are indicative only.

254 For example, while s 508(a) of the United States’ Internal Revenue Code provides that charities cannot claim charitable exempt status under s 501(c)(3) status unless they apply in advance to the Internal Revenue Service, s 508(c) excepts from this application process churches, conventions or associations of churches, and their integrated auxiliaries (for constitutional reasons), as well as very small non-private foundations (those with annual gross revenues under \$5,000).

255 See Charities Bill 2004 (108-1) (1R) NZPD 616 (30 March 2004) at 12,108 per Richard Worth (National) and Hon Richard Prebble (ACT).

256 See Inland Revenue Department and the Treasury *Clarifying the tax consequences for deregistered charities – an officials’ issues paper* 23 August 2013: taxpolicy.ird.govt.nz/consultation/2013/clarifying-tax-consequences-deregistered-charities/ at [4.14]. As at November 2012, 3,902 charities had been deregistered, many for reasons such as “non-charitable purposes”, “did not meet registration requirements”, and “did not produce evidence of charitable purposes”, that appear to be different ways of saying “changes in jurisprudential interpretation of the definition of charitable purpose”. At the time of writing, almost a decade later, there have been many thousands more. See Legalwise “Significant issues with Review of Charities Act 2005” 10 January 2019: legalwiseseminars.com.au/nz/insights/significant-issues-with-review-of-charities-act-2005/.

New Zealand charities did not “rollover” initially and had to individually register from February 2007 in the transition to the new regime).²⁵⁷

Perceptions that there are “too many charities” may be interpreted by those administering the Charities Act as pressure to interpret the definition of charitable purpose narrowly, in order to restrict the overall number of registered charities. However, such an approach would be problematic in a number of respects. For example, in a country such as New Zealand that is governed by the rule of law, it is important that all charities that meet the legal requirements for registration are able to register.

Further, unduly restricting the ability of charities to register would challenge New Zealand’s international and constitutional obligations with respect to freedom of association.²⁵⁸ As discussed above, many funders (rightly or wrongly) require registration as a condition of funding, rendering those charities unable to register often unable to access the funding needed to survive. Undue restrictions on freedom of association would also risk a “slippery slope”; as the United Nations Special Rapporteur has noted, legislation allowing discretion to deny charitable registration can be “repurposed” to:²⁵⁹

... target individuals and groups that express dissenting views or advocate for unpopular causes by imposing onerous establishment or operating requirements ostensibly to ensure they are not engaged in terrorist activity; subjecting these groups to unwarranted surveillance, to harassment, intimidation and criminalisation of their activities; and in general, creating a chilling and hostile environment for the promotion of a thriving and vibrant civil society.

More fundamentally, the number of charities is a sign of a healthy democracy, as noted by the Australian Productivity Commission:²⁶⁰

Sector-wide, inclusive and participatory processes reflect and contribute to social capital – the relationships, understandings and social conventions that form an important part of the mediating environment that shapes economic and social opportunities. NFP advocacy, education of citizens, enabling of engagement in civic processes, and the creation of opportunities for connections work together to form a healthy civil society. Consequently, the extent of NFP activity is often taken as an indicator of the health of society.

New Zealand has consistently scored well in The Legatum Prosperity Index for its high levels of social capital, ranking eighth in the world in 2021 (a drop from first in the world in 2016).²⁶¹ New Zealand also consistently scores highly on the Transparency International Corruptions Perception Index, ranking first equal in the world in 2021

257 New Zealand and Northern Ireland appear to have been unusual in this respect. As noted in Dr O Breen, Rev Dr L Carroll, N Lavery *Independent Review of Charity Regulation Northern Ireland* January 2022 at 111, in most comparable jurisdictions (including Ireland, Scotland and Australia), the creation of a charity register “was achieved by the pre-population of the registers at the date of establishment with all charities then enjoying charitable tax exemption such that only newly established charities or charities not previously enjoying charitable tax exemption were obliged to come forward and apply for registration. Such registers obviously lacked the up-to-date quality and accuracy of the clean register approach favoured by NI and New Zealand and they required (and continue to require) rolling reviews to ‘weed out’ dormant or ineligible charities, but they did benefit from a relative completeness from day one which the Charity Commission has still to achieve in NI”. A pre-population approach would have been hampered in New Zealand by its “self-assessment” tax regime, which meant there was no complete list of charities accessing the charitable income tax exemptions prior to the establishment of the charities register. See M McGregor-Lowndes and B Wyatt (eds) *Regulating Charities: the Inside Story* (Routledge, New York, 2017) at 184.

258 See New Zealand Bill of Rights Act 1990 s 17. It would also reflect badly on New Zealand in global indices. See, for example, the Global Philanthropy Index, research undertaken by the Lilly Family School of Philanthropy at Indiana University: globalindices.iupui.edu/.

259 M Kiai, Special Rapporteur on the rights to freedom of peaceful assembly and of association *Kiai to Financial Crime Body: Foster civil society as a partner, not an enemy, in the fight against terrorism* 18 April 2016: freeassembly.net/news/fatf-recommendation-8/.

260 See the Australian Productivity Commission *Contribution of the Not-for-Profit Sector* 11 February 2010 at 17, referring to Putnam, Leonardi and Nannetti 1993, PC 2003 and not-for-profit entities generally.

261 The Legatum Prosperity Index, 2021: www.prosperity.com/rankings and 2016: www.prosperity.com/about/resources.

(although with a drop in score since 2012).²⁶² As noted by Daniel Eriksson, Chief Executive Officer of the Transparency International Secretariat:²⁶³

In authoritarian contexts where control rests with a few, social movements are the last remaining check on power. It is the collective power held by ordinary people from all walks of life that will ultimately deliver accountability.

The contribution of charities to these scorings is critical, oppugning calls to reduce their number.

In addition, there is no “magic number” of charities. As noted by Susan Pascoe AM, former Commissioner of the Australian Charities and Not-for-profits Commission, consideration of the number of charities requires consideration of the value of diversity of size, mission and location of charities:²⁶⁴

Smaller charities have considerable strengths: many are rooted or embedded in their local areas, and play a key role in building and nurturing social networks. They also boost local social capital by building local capacity and developing links both within particular communities and between them and other networks and bodies, and are considered uniquely well-placed to engage directly with those who are hardest to reach.

A related important factor is choice: the wider the range of options, the more likely an appropriate service will be available for a particular problem or situation.²⁶⁵ For example, the fact that there may be a large number of cancer charities overall matters little to a person in a particular location affected by a particular type of cancer seeking and gaining benefit from local support. Consumer choice also serves as a means of “quality control”: people will choose the service they see as most responsive to their needs.²⁶⁶

A push for charities to “merge” also risks criticism of “commercial sector thinking clumsily transposed onto the voluntary sector”.²⁶⁷ The objective of any charity is to further its charitable purpose in the most effective (even if not the most “efficient”) way.²⁶⁸ Opportunities to reduce duplication and to collaborate with others, of course, should

262 Transparency International *Corruption Perceptions Index*:

www.transparency.org/en/cpi/2021/index/nzl.

263 Transparency International *Corruption Perceptions Index 2021*:

images.transparencycdn.org/images/CPI2021_Report_EN-web.pdf at 5.

264 Susan Pascoe AM “Are there too many charities in Australia?” HuffPost Australia, 14 July 2016:

www.huffpost.com/archive/au/entry/are-there-too-many-charities-in-australia_b_9247624 referring to research carried out by the Institute for Public Policy Research in the UK *Too small to fail: How small and medium-sized charities are adapting to change and challenges*.

265 See, for example, the [submission](#) of Youthline Central South Island: “We acknowledge the benefits and necessities of a diversity of Charities catering for specific populations. Some youth populations are best serviced by small targeted independent charities, such as those dealing with gender diversity. We note the general government Ministry’s preoccupation with questioning this ‘duplication’, and drive for amalgamation, which can become counter-productive in the real world. For example, we have 30 secondary schools in Christchurch, and it would be counter-productive to combine them into one big school. More efficient, but would cost the students a sense of belonging that they would get from a 900 pupil school”.

266 Industry Commission *Charitable organisations in Australia - Report no 45* 16 June 1995 at 43 - 44, referring to the submission of The Development Disability Council of Western Australia.

267 Rebecca Cooney “The merger mystery: why joining forces may not be the answer to Covid-19”

ThirdSector, February 2021: [www.thirdsector.co.uk/merger-mystery-why-joining-forces-may-not-answer-covid-19/management/article/1704647?bulletin=thirdsectorweekly&utm_medium=EMAIL&utm_campaign=eNews%20Bulletin&utm_source=20210205&utm_content=Third%20Sector%20Weekly%20\(27\)::www_thirdsector_co_uk_art_19&email_hash](http://www.thirdsector.co.uk/merger-mystery-why-joining-forces-may-not-answer-covid-19/management/article/1704647?bulletin=thirdsectorweekly&utm_medium=EMAIL&utm_campaign=eNews%20Bulletin&utm_source=20210205&utm_content=Third%20Sector%20Weekly%20(27)::www_thirdsector_co_uk_art_19&email_hash). Merger is not always appropriate. See Vu Le “Stop expecting nonprofits to merge. It’s annoying” 15 February 2021: nonprofitaf.com/2021/02/stop-expecting-nonprofits-to-merge-its-annoying/; and Lord Hodgson of Astley Abbots *Trusted and Independent: Giving charity back to charities – Review of the Charities Act* July 2012 at [4.25.2]: “... the processes underpinning merger, formal collaboration and winding up are complex and time-consuming”.

268 A for-profit sector focus on “efficiency” may not translate well to a not-for-profit context: charities and other not-for-profit entities are required by law to focus on their purposes. If efficiency becomes an end in itself, or is pursued at the expense of effectiveness, it may be counterproductive or even unlawful. See D Gilchrist and P Knight “There are more useful questions to ask than whether Australia has ‘too many’ charities” *The Conversation*, 27 March 2017: theconversation.com/there-are-more-useful-questions-to-ask-than-whether-australia-has-too-many-charities-73056.

always be considered; for example, there may be scope to share back-office functions,²⁶⁹ and perhaps setting up an account with a donor-advised fund may be preferable to creating a new charity in the first place.²⁷⁰ But such decisions are for charities and those establishing and governing them to make, not government; and such decisions must be made in the best interests of charitable purposes, not to further an arbitrary objective to “rationalise” the sector.²⁷¹

As noted by the Ontario Law Reform Commission, it is also important to examine the sources of the calls to reduce the number of charities:²⁷²

Older, more traditional charities might advocate strict rules on admission to the status and privileges of charity in order to reduce the competition, from newer charities, for scarce donor funds. Local charities might seek to exclude outsiders for similar reasons.

To the extent that calls for a reduction in the number of charities derive from those adversely affected by a scarcity mentality created by a competitive contracting environment, a better solution would be to address the issue at the level of cause, rather than symptom (see recommendation 1.1 above). There is considerable scope to improve the overall funding environment for charities, and although some work is understood to be underway in that regard,²⁷³ more is needed.

Such work would be materially assisted by improvements in the overall legal framework for charities. Arguments that government agency staff are “spread too thin” may in fact merely highlight that a “heavy-handed” approach to administration of the Charities Act is not warranted, and that the trust-based approach that predominated so successfully in response to the COVID-19 pandemic would be more productive. This point is discussed further below.

Perceptions that there are “too many charities” in New Zealand are arguably reflections of a sector that is misunderstood and undervalued. Research indicates that perceptions of “too many charities” themselves undermine public trust and confidence in charities,²⁷⁴ contributing to a downward spiral, and weakening the political context necessary for much-needed charities law reform to take place.

269 See, for example, Advisory Committee on the Charitable Sector *Report #3 – Towards a federal regulatory environment that enables and strengthens the charitable and non-profit sector* July 2021: <www.canada.ca/en/revenue-agency/programs/about-canada-revenue-agency-cra/corporate-reports-information/advisory-committee-charitable-sector/report-advisory-committee-charitable-sector-july-2021.html> at “Medium-term issues and barriers”: “[c]harities serving vulnerable populations are focused on reducing overall operating costs, particularly among smaller charities; aligning reporting forms to current standards; and ultimately increasing resources available to support their purpose. Based on consultation feedback, there is interest in taking advantage of the cost-effectiveness of shared platforms across the sector. We are aware some membership/umbrella organizations, as well as larger entities, already have shared platforms in place, such as insurance, pension, and benefit plans, purchasing, IT, and back-office services. In some cases, confusion around whether offering these services to other charities constitutes operating a business has limited their expansion”.

270 A related option is fundholding, as offered by Alanna Irving and the Open Collective NZ. See: <opencollective.com/ocnz>.

271 Rationalisation should not be conflated with churn. As noted by the Australian Productivity Commission *Contribution of the Not-for-Profit Sector* 11 February 2010 at 228: “[a] dynamic sector is able to adapt to changes in government funding, attract new donors and volunteers, and have NFP organisations come and go as demands and opportunities dictate. As existing NFPs may face problems reallocating resources if this is seen to be moving away from their original community purpose ... This suggests that sustainability for the sector means allowing NFPs to dissolve”.

272 Ontario Law Reform Commission *Report on the Law of Charities* (Toronto, 1996) at 18.

273 At Charities Services’ Annual Meeting on 29 October 2021, Maria Robertson, Deputy Chief Executive, commented that the Department of Internal Affairs is supporting the Minister to improve the approach to grants and funding: the DIA oversees approximately \$650 million of grants and funding through class 4 gambling activities, lotteries profits, the community organisation grants scheme and a number of other smaller funds. This funding is separate from funding from contracts for service delivery, and also from funding from philanthropic trusts and foundations and private donations. At the time of writing, progress is expected in relation to work to improve the DIA funding landscape “in the next 6 - 12 months”.

274 Fundraising Institute of New Zealand Matatika Mātauranga Kaitautoko *Charities through the covid lens – NZ public research findings* December 2020, referring to G Coopey and F McPhee: a perception of “too many charities” is a negative driver of trust.

Anti-money laundering and countering financing of terrorism

Another factor contributing to neglect of charities is the impact of the terrorist attacks in the United States on 11 September 2001 (“**9/11**”) and the ensuing international anti-money laundering and countering financing of terrorism framework.

Within the New Zealand charitable sector, it is not widely known that the Charities Act was a response to 9/11.²⁷⁵

Following 9/11, the Financial Action Task Force (“**FATF**”), the global money laundering and terrorist financing watchdog,²⁷⁶ issued a series of eight Special Recommendations to deal with terrorist financing.²⁷⁷ With respect to not-for-profit organisations, and perhaps reflecting concern that one of the terrorist pilots had been funded through a United States-based not-for-profit organisation,²⁷⁸ Recommendation 8 included the following comments:²⁷⁹

Countries should review the adequacy of their laws and regulations that relate to entities that can be abused for the financing of terrorism. *Non-profit organisations are particularly vulnerable*, and countries should ensure that they *cannot be misused*:

- a. By terrorist organisations posing as legitimate entities;
- b. To exploit legitimate entities as conduits for terrorist financing, including for the purpose of escaping asset-freezing measures; and
- c. To conceal or obscure the clandestine diversion of funds intended for legitimate purposes to terrorist organisations.

FATF’s interpretive note to Recommendation 8 added that:²⁸⁰

The ongoing international campaign against terrorist financing has unfortunately demonstrated ... that terrorists and terrorist organisations *exploit the NPO sector* to raise and move funds, provide logistical support, encourage terrorist recruitment, or otherwise support terrorist organisations and operations ...

NPOs may be vulnerable to abuse by terrorists for a variety of reasons. NPOs enjoy the public trust, have access to considerable sources of funds, and are often cash-intensive. Furthermore, some NPOs have a global presence that provides a framework for national and international operations and financial transactions, often within or near those areas that are most exposed to terrorist activity. Depending on the legal form of the NPO and the country, NPOs may be subject to little or no governmental oversight (for example, registration, record keeping, reporting and monitoring), or few formalities may be required for their creation (for example, there may be no skills or starting capital required, no background checks necessary for employees). *Terrorist organisations have taken advantage of these characteristics of NPOs to infiltrate the sector and misuse NPO funds and operations to cover for, or support, terrorist activity.*

Following Recommendation 8, there was a “wave”²⁸¹ of charities legislation around the world, including in Australia,²⁸² China,²⁸³ England and Wales,²⁸⁴ Ireland,²⁸⁵ the Isle of

275 M McGregor-Lowndes and B Wyatt (eds) *Regulating Charities: the Inside Story* (Routledge, 2017) at 266.

276 Financial Action Task Force *Who we are*: <www.fatf-gafi.org/about/>.

277 Financial Action Task Force *History of the FATF*: <www.fatf-gafi.org/about/historyofthefatf/>.

278 Submission of Dave Henderson to the Economic Development, Science and Innovation Committee on the Incorporated Societies Bill 15-1, May 2021.

279 Emphasis added. FATF Recommendation 8 has since been updated to reflect “the need to protect the legitimate activities” of Non-profit organisations and no longer includes this wording: *Combating the abuse of non-profit organisations* (Recommendation 8) June 2015 at 4: <www.fatf-gafi.org/media/fatf/documents/reports/BPP-combating-abuse-non-profit-organisations.pdf>.

280 Emphasis added. The Interpretive Note to Recommendation 8 has since been revised: <www.fatf-gafi.org/publications/fatfrecommendations/documents/public-consultation-npo-inr8.html>.

281 The notion of “regulatory waves” is taken from O Breen, A Dunn and M Sidel (eds) *Regulatory Waves: Comparative perspectives on state regulation and self-regulation policies in the nonprofit sector* (Cambridge University Press, 2017).

282 Australian Charities and Not-for-profits Commission Act 2012 (Cth) and the Charities Act 2013 (Cth).

283 On 16 March 2016, the National People’s Congress of the People’s Republic of China passed the country’s first Charity Law.

284 The Charities Act 2006 (UK) was subsequently amended by the Charities Act 2011 (UK).

285 The Charities Act 2009 (Ireland) was brought into force by the Charities Act Establishment Order, SI No 456 of 2014.

Man,²⁸⁶ Jamaica,²⁸⁷ Jersey,²⁸⁸ New Zealand,²⁸⁹ Northern Ireland,²⁹⁰ Pakistan,²⁹¹ Scotland,²⁹² Singapore,²⁹³ Uganda,²⁹⁴ and Zambia.²⁹⁵ While a direct link between this legislation and FATF Recommendation 8 is not clear in all cases, in the case of New Zealand and Ireland, pressure from the United Nations Security Council following 9/11 led to specific legislation for charities.²⁹⁶ The explanatory note to New Zealand's original Charities Bill, introduced into Parliament on 23 March 2004, included the following comments:²⁹⁷

The Bill provides that a charity does not qualify for registration if it has been designated as a terrorist entity or an associated entity under the Terrorism Suppression Act 2002 or convicted of an offence under sections 7 to 13D of that Act. The Bill's policy approach in this area is based on New Zealand's obligations under the *Financial Action Task Force Special Eight Terrorist Financing Recommendations* and is part of an ongoing wider whole-of-government process that is bringing New Zealand's regulation of the not-for-profit sector into line with international best practice. This Bill constitutes the start of this process and only deals with a small part of the not-for-profit sector.

However, FATF Recommendation 8 was controversial; its effect was to cast suspicion on the entire not-for-profit sector, despite an absence of evidence suggesting the non-profit sector was in any way more likely to be exploited by terrorist elements than the for-profit sector. Recommendation 8 led to blunt, sector-wide increases in restrictions, which badly damaged the relationship and levels of trust between governments and civil society. It also spawned a counter-terrorism narrative that led to crackdowns on dissent and a shrinking space for civil society around the world,²⁹⁸ as noted by McGregor-Lowndes and Wyatt:²⁹⁹

The evidence of terrorists using or duping charities ... varies. Given the consequences, ... it remains ... important ... for the charity sector to mitigate excessively burdensome and heavy-handed regulatory interference. FATF ... has addressed the issue in a blunt fashion with little regard for the disruption of legitimate charitable activities or effectiveness of the regulatory tools used. Non-democratic nations have relished the opportunity to use its broad and uncompromising principles to stifle dissenting civil society organisations in their own domestic spheres. Other jurisdictions have simply been disproportionate in their response, in arguably symbolic public gestures, to have politicians seen to be doing something.

In the result, the first decade of the 21st century witnessed an explosion of counter-terrorism measures that prioritised security at the expense of norms relating to civic and personal freedoms.³⁰⁰ A generation of young people, many of whom may be unaware

286 The Isle of Man Charities Registration and Regulation Act 2019.

287 The Charities Act 2013 (Jamaica).

288 The Charities (Jersey) Law 2014 was enacted on 1 May 2018.

289 Charities Act 2005 (NZ).

290 The Charities Act (Northern Ireland) 2008, as amended by the Charities Act (Northern Ireland) 2013.

291 The Sindh Charities Registration and Regulation Act 2019 (Pakistan).

292 Charities and Trustee Investment (Scotland) Act 2005.

293 The Charities Act 2007 (Singapore) increased the registration and regulation responsibilities of the Commissioner of Charities (SCOC) transferring it from the Ministry of Finance to the Ministry of Community Development, Youth and Sport. The Act also established the Charity Council to operate in parallel with SCOC and promote self-regulation (OB Breen "Redefining the measure of success: a historical and comparative look at charity regulation" in M Harding (ed) *Research Handbook on Not-for-Profit Law* (Edward Elgar, 2018) 549 at 549).

294 The Non-Governmental Organisations Act 2016 (Uganda).

295 The Non-Governmental Organisations' Act 2009 (Zambia).

296 Interview with Dr Oonagh Breen, Professor of Law at the Sutherland School of Law, University College Dublin (3 December 2020). However, as noted by McGregor-Lowndes and Wyatt, FATF obligations "was not the reason that occupied the attention of the sector or the public discourse. The narrative ... was that [the sector] sought a competent government agency to proactively defend against "rogues" that would affect trust and confidence in the sector": M McGregor-Lowndes and B Wyatt (eds) *Regulating Charities: the Inside Story* (Routledge, New York, 2017) at 266.

297 Charities Bill 2004 (108-1) [explanatory note](#) at 2 (emphasis added).

298 *Kiai to Financial Crime Body: Foster civil society as a partner, not an enemy, in the fight against terrorism*, Vienna, 18 April 2016: [<freeassembly.net/news/fatf-recommendation-8/>](https://freeassembly.net/news/fatf-recommendation-8/).

299 M McGregor-Lowndes and B Wyatt (eds) *Regulating Charities: the Inside Story* (Routledge, 2017) at 276.

300 LC Bollinger and A Callamard (eds) *Regardless of Frontiers – Global freedom of expression in a troubled world* (Columbia University Press, 2021) at 13.

of the impact of the Holocaust³⁰¹ or the international covenants that followed it,³⁰² have grown up in an environment of increasing erosion of fundamental human rights,³⁰³ to the point where they may even question whether important freedoms, such as of expression, assembly and association, truly matter.³⁰⁴ Perceptions of charities as purely service delivery arms of government, combined with other barriers discussed above to charities fulfilling their role as the “eyes, ears and conscience” of society, create a vacuum ripe for authoritarianism to backfill.

Symptoms rather than causes

A related issue is that the United States-led post-9/11 efforts were largely concerned with the use of coercive action to address violent *symptoms* of terrorism, rather than focusing on its *causes*. The measures adopted internationally were influenced by neoliberalism, and focused on activities and measurable inputs and outputs, rather than on outcomes and impact, as noted by Dr Ron Pol:³⁰⁵

... the clamor for simplistic “quick fix” solutions obscures fundamental problems with the system itself, repeatedly prolonging systemic failure – like a perpetual motion machine constantly generating *more standards, more regulations, more compliance, more cost, yet no material, demonstrable impact on money laundering, serious profit-motivated crime, or terrorism*, forever.

The overall impact on democracy of these measures has been profoundly negative.³⁰⁶ The number of democracies backsliding into authoritarianism has doubled in the past decade (exacerbated by restrictive measures adopted in response to the pandemic).³⁰⁷ According to the 2021 CIVICUS monitor, 90% of the world’s population is now living in countries rated as closed, repressed or obstructed.³⁰⁸ American social psychologist Professor Jonathan Haidt argues this century is becoming a contest between open societies (West) and a closed society (China).³⁰⁹ All of these factors impact on charities legislation and its administration, which have become increasingly restrictive in the face of increasing authoritarianism around the world: civil society is operating in an increasingly hostile environment.

301 Research indicates that 30% of young people in Australia have little or no knowledge of the Holocaust: L Antenor [Survey reveals a quarter of Australians has little to no knowledge of the Holocaust](#) Third Sector 27 January 2022. A similar situation is likely to exist in New Zealand.

302 Such as the [Universal Declaration of Human Rights](#) GA Res 217A, A/Res/217 (1948) and the [International Covenant on Civil and Political Rights](#) 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976).

303 A Guterres, United Nations Secretary-General, press release *Basic Freedoms under Assault, Secretary-General tells Human Rights Council, Launching Call to Revive Respect for Dignity, Equality amid Rising Tensions* 24 February 2020: [<www.un.org/press/en/2020/sgsm19985.doc.htm>](#).

304 At the time of writing, Russia is invading Ukraine, demonstrating in unmitigated terms that the freedoms of democracy are hard won, and the potential consequences of allowing them to be eroded: “the price of peace is eternal vigilance”.

305 Dr R Pol “The Paradox papers: when the ‘solutions’ to Panama, Paradise and Pandora papers prevent better anti-crime outcomes” 7 October 2021: [<www.effectiveaml.org/the-paradox-papers/>](#) (emphasis added). Dr Pol adds: “Egregious abuse should continue to be exposed, but the anti-money laundering regime no longer needs to be a negative sum game ... It is time to step off the treadmill and examine its design. Early modelling reveals the prospect of a substantial, demonstrable impact on serious crime and terrorism, with less harm, less regulatory risk, and less compliance cost, not more”.

306 P Mishra “Terrorists didn’t change the world, we did” Washington Post, 19 September 2021: [<www.bloomberg.com/opinion/articles/2021-09-18/al-qaeda-didn-t-change-the-west-its-defenders-did>](#): “[m]uch of our bleak world today, where once-celebrated democracies such as the United Kingdom, India and Israel are dominated by far-right personalities and movements, and Russia and China seem condemned to authoritarian rule, was also forged in the days after 9/11, when the global war on terror endowed violence and brutality with unprecedented global sanction...though terrorists brought down the Twin Towers on 9/11, the older and sturdier edifices of democratic institutions were devastated by those sworn to protect them”.

307 T Spirlet *European democracies must ‘revitalize’ amid authoritarian rise: Report* Politico 22 November 2021: [<www.politico.eu/article/european-democracies-must-revitalize-amid-authoritarian-rise-report/>](#).

308 CIVICUS Monitor (2021) National Civic Space Ratings: [<findings2021.monitor.civicus.org/rating-changes.html>](#).

309 J Haidt, Professor of Ethical Leadership at New York University Stern School of Business, 24 October 2021: [<www.rnz.co.nz/national/programmes/sunday/audio/2018817669/jonathan-haidt-social-media-model-is-breaking-the-world>](#).

However, as noted by Geddis and Patman,³¹⁰ the better way to protect against increasing extremism is to bolster the bonds of community and democracy: social cohesion is critical to preventing the development of harmful radicalising ideologies, to strengthening resilience to the narratives of hate and division, and thus to preventing downstream violent extremism.³¹¹ It is often said that, much like a virus, disinformation spreads through susceptible hosts: democratic principles such as social tolerance, trust and the rule of law act as a vaccine to the hateful and racist ideologies that are dedicated to destabilising democratic principles and destroying such norms.³¹²

Following a revision of Recommendation 8 in 2015, the United Nations Special Rapporteur called on FATF to improve its cooperation with civil society and consider its valuable contribution to the fight against terrorism, noting that “civil society’s contribution to finding solutions, though often overlooked and underutilised, is indispensable”.³¹³

It is ironic that the charitable sector should face being overlooked or shrunk at a time when charities are “never more needed”.³¹⁴

In designing a charities law framework, consideration must be given to protecting charities’ important role in a liberal democracy, and the need to uphold liberal democratic values of social tolerance, freedom of expression, freedom of association, and the rule of law.³¹⁵

Agency structure

Another factor impacting on the status of the charitable sector in New Zealand relates to agency structure, a key theme of submissions to the DIA’s review of the Charities Act, as discussed further below in chapter 7 (*Agency structure*).

By way of summary, the 2012 disestablishment of the Charities Commission (an autonomous Crown entity), and transfer of its functions to Charities Services and the three-person Charities Registration Board, has undermined the independence of charities, and therefore their status in society, in a number of ways. A key issue is that the Charities Registration Board, a structure specifically created to provide reassurance to charities that the function of determining eligibility for registration would remain independent from government,³¹⁶ is not sufficiently distanced from Charities Services (a business unit within a government department (DIA)) to be able to perform the independent check on government decision-making that was originally intended.³¹⁷

An exacerbating factor is the lack of meaningful accountability mechanisms under the restructured arrangements: if, as discussed in chapter 3, undue deference was paid to Canadian jurisprudence to the exclusion of key New Zealand cases, or if the definition of charitable purpose was otherwise interpreted too narrowly or subjectively, or if charities’

310 A Geddis and RG Patman “The potential dangers of pre-emptive anti-terrorist legislation” *Stuff.co.nz* (online ed, 10 September 2021): <www.stuff.co.nz/opinion/126341013/the-potential-dangers-of-preemptive-antiterrorist-legislation>.

311 As noted by Ko tō tātou kāinga tēnei *Royal Commission of Inquiry into the terrorist attack on Christchurch masjidain on 15 March 2019* at [5.1].

312 C Suarez “A cult of democracy – toward a pluralistic politics” *Nonprofit Quarterly*, 7 January 2021: democracy must be “held more dear than fear or hatred of difference”.

313 M Kiai, United Nations Special Rapporteur on the rights to freedom of peaceful assembly and of association, written statement to FATF, 18 April 2016: <charityandsecurity.org/financial-action-task-force/kiai_statement_fatf_april2016/>.

314 See #NeverMoreNeeded campaign: <nmmn.org.uk/>: “In the face of coronavirus, charities are #NeverMoreNeeded – for the essential support they provide in crisis and beyond, and how they shape our society for the better”.

315 See The Foreign Policy Centre *Global Britain for a Global World: examining the importance of open societies to the UK’s force for good ambitions* 19 October 2021: <fpc.org.uk/publications/global-britain-for-an-open-world/>: “The number of democracies globally has continued to decline ... Grassroots energy to forge a more inclusive version of UK democracy has the potential to help rebuild trust between government and citizens”.

316 See, for example, Crown Entities Reform Bill (333-2) (select committee report) 30 March 2012 at 4 – 5.

317 Registration decisions are ostensibly made by the Charities Registration Board under s 8 of the Charities Act 2005. However, in practice, most decisions are made by Charities Services under delegation from the Board (s 9). Charities Services also provides secretarial and administrative support to the Board to the point that, as discussed further below in ch 7.

eligibility for registration was assessed against criteria that do not have the force of law, there is very little at a practical level that charities in New Zealand can do about it. Even if an individual charity was able to mount sufficient funds to appeal a decision under s 59 of the Charities Act, the appeal mechanism is currently perceived to unduly favour the decision-maker, as discussed further below in chapter 6 (*Appeals*).

Relevant in this context is that the DIA is a large department with a broad range of roles, including in relation to gambling, censorship, countering violent extremism, government recordkeeping, unsolicited electronic messages, anti-money laundering, private security personnel and private investigators.³¹⁸ In relation to charities, DIA's role is not limited to determining whether charities can access or remain on the charities register, but also extends to funding: the DIA currently oversees approximately \$650 million of grants and other funding.³¹⁹ A large number of charities, including a number of members of Sector Group,³²⁰ receive funding from the DIA, a factor which may compromise their ability to raise legitimate concerns for fear of jeopardising not only their registration, but also their funding.³²¹ Charities in New Zealand currently risk being lauded not for the good work they do, but for the politeness of their consent to their own demise.³²²

Another issue is the lack of mechanisms by which charities might have meaningful input into policy development, alongside the policy advice provided by DIA. As discussed further below, the period since the Charities Act was passed in 2005 has been characterised by a series of piecemeal amendments, generally made by Statutes Amendment Bill and rushed through under urgency with little or no consultation. Statutes Amendment Bills are a particular type of omnibus bill intended for minor, technical, non-controversial and non-substantive amendments only. However, many of the changes made to the Charities Act in this way have been both substantive and controversial, and have contributed to the slow-moving change of paradigm discussed further below in chapter 2.

The net result is a narrow, restrictive approach to administering the Charities Act that, in itself, engenders a lack of trust in charities. It should be noted that, after many millions of dollars so far spent in administering the Charities Act, public trust and confidence in charities has in fact declined since the first survey was undertaken in 2008, as discussed below in chapter 8.

All of these factors contribute to charities being overlooked and undervalued, and require consideration in determining the objective of a charities law framework, a point to which we turn next.

318 See Te Tari Taiwhenua Department of Internal Affairs 2021 Annual Report Pūrongo Ā Tau: [<annualreport2021.dia.govt.nz/>](https://annualreport2021.dia.govt.nz/).

319 Maria Robertson, Deputy Chief Executive of Kāwai ki te Iwi, Service, Delivery and Operations, Department of Internal Affairs, comments to Charities Services' Annual Meeting, 29 October 2021 during the Q&A Session: [<charities.govt.nz/news-and-events/past-events/2021-charities-services-annual-meeting/>](https://charities.govt.nz/news-and-events/past-events/2021-charities-services-annual-meeting/).

320 [<www.charities.govt.nz/charities-in-new-zealand/charities-sector-group/>](https://www.charities.govt.nz/charities-in-new-zealand/charities-sector-group/).

321 A concern noted by the *Report by the Working Party on Registration, Reporting and Monitoring of Charities* 28 February 2002 at 11.

322 A Bland *A message to Big Charity: stop grovelling and stand up for yourself* The Guardian 2 September 2015: www.theguardian.com/commentisfree/2015/sep/02/big-charity-stand-up-charities. This sentiment was expressed in a fundraising context but arguably applies equally to the broader legal framework for charities.



Chapter 2 – Philosophy of Regulation: Focus on Purpose

“Government sees a future where the state performs its role as a facilitator of a strong civil society based on respectful relationships between government and community, voluntary and iwi/Māori organisations”

Rt Hon Helen Clark, Prime Minister, and Hon Steve Maharey, Minister Responsible for the Community and Voluntary Sector, Statement of Government Intentions for an Improved Community-Government Relationship, December 2001

Conceptually, a charities law framework is very simple: it consists of a charities register, administered by a registrar, and on which charities are required to disclose certain information. Difficulties have arisen in New Zealand in determining which entities may access the register, what information they are required to disclose, and the status of the registrar. In resolving these issues, and in considering what is, or should be, the objective of a charities law framework, two key choices present themselves:

- i. On the one hand, charities legislation is conceived by some as tax legislation, aimed principally at restricting eligibility for tax privileges. This conception is strongly, if subliminally, influenced by a tax expenditure analysis and currently appears to prevail amongst decision-makers in New Zealand, despite the fact that the Charities Act itself makes no mention of tax,¹ and the function of determining charitable status was specifically *removed* from the tax authority (the Inland Revenue Department or “**IRD**”) when the Charities Act was passed in 2005.
- ii. The other hand is illustrated, for example, by the Australian Productivity Commission, which described its 2010 recommendations as having a “clear end point”:²

... providing the sector with legal and regulatory framework and capabilities to *optimise their contribution to improving community wellbeing*. This contribution is not limited to delivering services but *goes to the heart of civil society*, including the sector’s role as a voice for those who are marginalised and disadvantaged.

The Commission noted that successful implementation of its recommendations would require governments and not-for-profit entities to “develop a better understanding of each other and stronger trust”, requiring cultural change on both sides, including a preparedness to let go of some unhelpful misconceptions.³

Similarly in Canada, an Advisory Committee on the Charitable Sector (“**ACCS**”) was established in 2019 with the objective of creating a regulatory environment that “enables and strengthens” the charitable sector:⁴ the ACCS’s first report, released in January 2021, highlighted that a well-functioning framework is “fundamental to the sector’s sustainability and to its effectiveness”, noting “wide and longstanding agreement” that the framework in Canada needs to be reviewed and updated.⁵

1 Other than in the context of sharing information with the Inland Revenue Department for the purposes of *its own* administration of tax legislation: Charities Act s 30.

2 Australian Productivity Commission [Contribution of the Not-for-Profit Sector](#) 11 February 2010 at 368 (emphasis added).

3 Australian Productivity Commission [Contribution of the Not-for-Profit Sector](#) 11 February 2010 at 367.

4 Advisory Committee on the Charitable Sector *Report #2 - Towards a federal regulatory environment that enables and strengthens the charitable sector* April 2021: www.canada.ca/en/revenue-agency/programs/about-canada-revenue-agency-cra/corporate-reports-information/advisory-committee-charitable-sector/report-advisory-committee-charitable-sector-april-2021.html.

5 Advisory Committee on the Charitable Sector *Report #1 - Towards a federal regulatory environment that enables and strengthens the charitable and nonprofit sector* January 2021: www.canada.ca/en/revenue-agency/programs/about-canada-revenue-agency-cra/corporate-reports-information/advisory-committee-charitable-sector/report-advisory-committee-charitable-sector-february-2021.html “introduction”.

Clash of paradigms

The distinction between these two choices reflects an underlying “clash of paradigms”,⁶ the recognition and resolution of which is inextricably intertwined with determining the objective of a charities law framework. The clash of paradigms has a number of other dimensions, including those illustrated by the following seven examples:

- i. **Public or private:** as discussed above in chapter 1, charities law emanates from trust law. In trust law, three certainties are required in order to create a trust: certainty of intention, certainty of subject matter and certainty of object (beneficiaries).⁷ From their inception, charities were an adaptation of the private law institution of the trust, allowing the third certainty of beneficiaries to be substituted for charitable purposes: in other words, charitable trusts are an exception to the general rule that a purpose trust is invalid, with the exception permitted only where a trust’s purposes meet the definition of “charitable”.⁸ The charitable trust has been described as a “remarkable achievement”:⁹

The trust has in fact preserved, in a shape suited to modern legal and political ideas, the mediaeval power to create groups; and these groups, because autonomous and yet subject to the law, have had a share in imparting a sound political instinct to the greater part of the nation.

When a settlor creates a charitable trust, charities law privileges the settlor’s project by allowing the charitable trust not only to exist, but to exist into perpetuity, on the basis that charitable purposes inherently benefit the public. In this way, charities can be seen as inherently *private* organisations, albeit for public purposes, as discussed above in chapter 1. However, as Chan writes, there is a “rich and disputatious literature” as to whether charities should be perceived as primarily creatures of private law or public law.¹⁰ This dimension of the underlying clash of paradigms has fundamental implications for the design of a charities law framework: if charities are perceived as primarily creatures of public law, the impulse would be *public-leaning*, that is to regulate more intensively as government seeks co-optation of charitable resources; however, if charities are perceived as primarily creatures of private law, the impulse would be *private-leaning*, that is to regulate lightly so as to protect charity autonomy and maximise the freedom and personality of the individual.

6 The distinction was encapsulated in M McGregor-Lowndes and B Wyatt (eds) *Regulating Charities: the Inside Story* (Routledge, New York, 2017) at 271: “[Initially, the Charity Commission for England and Wales] was not a regulator in the contemporary sense. Further, regulation was not a concept that featured in the early English reform reports. Charity was perceived as essentially an independent activity of private individuals that were free to experiment with solutions to wicked social issues. It was not a government or public function. [Richard Fries] explains the purpose of tax concessions as ‘encouragement for such activities’, whereas currently they may be perceived more in the nature of grants, for which the state wishes a public benefit return. At the time, there was concern that public funding was making charities increasingly dependent on government, thus challenging their independence. This appears to presage the current inescapable public commentary that charities are now public organisations, with public accountabilities, subsidized by tax concessions, delivering contracted public services on behalf of government agencies, and open to market competition. This is despite the fact that in all jurisdictions, the vast bulk of charities do not receive significant government funding or contracts”.

7 As set out now in Trusts Act 2019 s 15(1)(b).

8 As noted by the Supreme Court of Canada in *Vancouver Society of Immigrant and Visible Minority Women v Minister of National Revenue* [1999] 1 SCR 10 at [144].

9 Te Aka Matua o te Ture - New Zealand Law Commission *Review of trust law in New Zealand: introductory issues paper* (NZLC, IP19, 2010): <www.lawcom.govt.nz/sites/default/files/projectAvailableFormats/NZLC%20IP19.pdf> at [2.29], referring to Holdsworth *History of English Law* (Methuen & Co Ltd, London, 1903) vol IV at 479 - 480.

10 See K Chan *The public-private nature of charity law* (Bloomsbury, 2016) ch 1.

- ii. **Ex post or ex ante:** another dimension of the underlying clash of paradigms is the distinction between “ex post” and “ex ante” regulation, a distinction described by Decker and Harding in the following terms:¹¹

The question of when a regulator should intervene to control for the potential undesirable effects of conduct is a general one. Broadly, there are two possibilities: the regulator might intervene before conduct with potentially undesirable effects occurs (ie, by proscribing or prescribing particular conduct, or setting rules as to who can engage in particular activities) or the regulator might intervene after particular conduct has occurred and deem it undesirable. This choice is sometimes referred to in policy discourse as one between ex ante and ex post approaches to regulation.

Broadly, “ex post” regulation takes a light-touch, standards-based approach, dealing with issues as they arise, with the threat of regulatory intervention considered to create appropriate incentives for entities to engage in desirable conduct. By contrast, “ex ante” regulation takes a more heavy-handed approach, aiming to deal with issues *before* they arise through the imposition of prescriptive rules. As Decker and Harding write, there has been a general shift in charities law frameworks around the world from “ex post” to “ex ante” regulation;¹² however, as the experience in England and Wales since the passage of the Charities Act 2006 (UK) demonstrates, attempts to impose ex ante regulation on the charitable sector can be a fraught exercise. An ex ante approach requires attempting to establish in advance the parameters of desirable conduct, a process which can be futile in settings where there is considerable diversity of conduct and where detailed assessment is required to determine whether or not a specific form of conduct is consistent with a policy objective;¹³ a prescriptive “ex ante” approach can also lead to undesirable behavioural changes, by forcing charities to focus their strategic and operational efforts on satisfying the dictates of potentially ill-suited rules, which can perversely distract them from their underlying charitable purposes.¹⁴ The decision as to whether a charities law framework should adopt an “ex ante” or an “ex post” approach is inextricably linked with determining the framework’s overall objective.

- iii. **Purposes versus activities:** as discussed above in chapter 1, charities are a unique legal construct in that they are defined by their *purposes* rather than by their underlying legal structure. As the Supreme Court of Canada has noted, charities law derives from trust law, where the focus is on charitable purposes rather than “charitable activities”:¹⁵

... the character of an activity is at best ambiguous; for example, writing a letter to solicit donations for a dance school might well be considered charitable, but the very same activity might lose its charitable character if the donations were to go to a group disseminating hate literature. In other words, it is really the purpose in furtherance of which an activity is carried out, and not the character of the activity itself, that determines whether or not it is of a charitable nature.

There is, in fact, no such thing as a “charitable activity” in isolation:¹⁶ once an entity’s purposes are determined to be charitable, the focus of the underlying common law is on ensuring the entity’s activities further *those charitable purposes*.

11 C Decker and M Harding “Three challenges in charity regulation: the case of England and Wales” in M Harding, A O’Connell & M Stewart (eds) *Not-for-Profit Law: Theoretical and Comparative Perspectives* (Cambridge University Press, 2014) 314 at 315.

12 C Decker and M Harding “Three challenges in charity regulation: the case of England and Wales” in M Harding, A O’Connell & M Stewart (eds) *Not-for-Profit Law: Theoretical and Comparative Perspectives* (Cambridge University Press, 2014) 314.

13 See C Decker and M Harding “Three challenges in charity regulation: the case of England and Wales” in M Harding, A O’Connell & M Stewart (eds) *Not-for-Profit Law: Theoretical and Comparative Perspectives* (Cambridge University Press, 2014) 314 at 315 - 316, 319.

14 C Decker and M Harding “Three challenges in charity regulation: the case of England and Wales” in M Harding, A O’Connell & M Stewart (eds) *Not-for-Profit Law: Theoretical and Comparative Perspectives* (Cambridge University Press, 2014) 314 at 321, 325, 326, 329.

15 See *Vancouver Society of Immigrant and Visible Minority Women v Minister of National Revenue* [1999] 1 SCR 10 at [152], [144].

16 See, for example, the discussion in S Barker “The myth of charitable activities” [2014] NZLJ 304.

The common law of charities otherwise says very little about charities' activities.¹⁷ By contrast, a tax expenditure analysis cuts across these principles by encouraging a *focus* on charities' activities, as governments seek to exercise control over what individual charities might say and do.¹⁸ Such a focus might manifest in attempts to create "bright-line", "ex ante" rules, such as "how much" of a particular activity a charity is able to carry out and/or in what circumstances. A focus on activities might also lead to a practice of "inferring" unstated purposes from activities routinely, without respect for the legal arrangements actually entered into (that is, in the absence of sham).¹⁹ Conflating the distinction between purposes and activities in this way imports inherent subjectivity and uncertainty into the analysis of whether any particular charity is or remains eligible for registration, as discussed further below in chapters 3 and 4. It also results in a disconnect in the administration of a charities law regime, as the axis of the legal framework is fundamentally shifted from one based on purposes to one based on activities. Granular assessments of activities, carried out in isolation, without reference to the purposes in furtherance of which they are carried out, combined with a practical inability for charities to hold Charities Services accountable for its decision-making under the current arrangements,²⁰ are the key mechanisms by which the underlying paradigm has been slowly changed in New Zealand, as discussed further below.

- iv. **Common law versus equity:** another dimension of the underlying clash of paradigms relates to the distinction between common law and equity. In enacting the Charities Act 2005, Parliament made a decision to use the definition of charitable purpose as the gateway to certain privileges, including tax privileges.²¹ The definition of charitable purpose is an equitable concept, "rooted in the practices of England's equitable and ecclesiastical courts".²² The law of equity is a system based on principles,²³ in contrast to the common law which is largely based on rules. In the United States and Canada, charities law is administered through the tax system by the federal tax authority, an agency tasked with maximising revenue without general equity powers:²⁴ tax law in particular is a rules-based creature of statute.²⁵ Using an equitable concept as the cornerstone of such a regulatory regime risks equitable principles being crowded out: our research indicates that equitable principles have all but disappeared from Canadian charities law.²⁶ Even where the charities function has been removed from the tax authority, as is the

17 As noted in Report of the Special Senate Committee on the Charitable Sector *Catalyst for Change: A Roadmap to a Stronger Charitable Sector* June 2019 at 82.

18 P Broder "Report of the Senate Special Committee on the Charitable Sector – A response" (2020) The Philanthropist Journal: thephilanthropist.ca/2020/06/7910/>.

19 The High Court of Australia has recently re-emphasised the requirement to give primacy to the actual legal arrangements entered into in a contractual context. See *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* [2022] HCA 1 (9 February 2022) at [43], [55], [58] - [60] and *ZG Operations Australia Pty Ltd v Jamsek* [2022] HCA 2 (9 February 2022). For a discussion regarding the current routine practice of "inferring purposes from activities" in New Zealand, see S Barker "Unresolved issues in New Zealand charities law" [2021] NZLJ 49.

20 As discussed above in ch 7, although registration decisions are ostensibly made by the Charities Registration Board, in practice, registration decisions are largely made by Charities Services without sufficient independent oversight.

21 The income tax exemption for charities currently contained in Income Tax Act 2007 s CW 41 (*Charities: non-business income*) (formerly Income Tax Act 2004 s CW 34, Income Tax Act 1994 s CB 4(1)(c), and Income Tax Act 1976 s 61(25)) turns on the definition of charitable purpose contained in s YA 1 (and its predecessors including Income Tax Act 1976 s 2): "charitable purpose includes every charitable purpose, whether it relates to the relief of poverty, the advancement of education or religion, or any other matter beneficial to the community ...". From 1 July 2008, charities had to be registered under the Charities Act in order to qualify for the exemption (s CW 41(2), (5)).

22 K Chan *The public-private nature of charity law* (Bloomsbury, 2016) at 1.

23 H Brandts-Giesen *Need for genuine trust expertise has never been greater* 943 LawTalk 16 September 2020.

24 M McGregor-Lowndes and B Wyatt (eds) *Regulating Charities: the Inside Story* (Routledge, New York, 2017) at 83, per Marcus Owens.

25 Interview with Laird Hunter QC (4 February 2021); interview with Dr Kathryn Chan, Assistant Professor of Law, University of Victoria (4 February 2021).

26 Interview with Dr Kathryn Chan, Assistant Professor of Law, University of Victoria (4 February 2021).

case in New Zealand, a regulatory regime may still inherently incline to a quest for “certainty” by attempting to superimpose “ex ante” bright-line rules over a nuanced, subtle, principles-based and fact-specific area of law. The result is an incongruity that the President of the Court of Appeal might describe as the common law “making a hash of equity”.²⁷ In designing a charities law framework, it is important to ensure the framework does not damage or distort the very concept on which it is based.

- v. **Narrow or wide definition:** as discussed below in chapter 3, there are two common but differing conceptions of charitable purpose; a perennial debate in charities law is whether the definition of charitable purpose should be interpreted narrowly (essentially limited to handouts to the poor) or widely (in support of human flourishing). A wider interpretation supports innovation as well as measures that “prevent”, rather than merely “relieve”, as discussed below in the *Social enterprise* and *Advocacy* chapters. By contrast, an interpretation that is too narrow can unduly limit charities, undermining their effectiveness and contributing to a downward spiral. The definition of charitable purpose derives from equity and has been developed by the common law over centuries: during that time, its breadth has ebbed and flowed, often differently in different jurisdictions. In this respect, it is important to ensure the charities law framework supports the development of the common law, to support the ability of the definition of charitable purpose to keep pace with changes in society (as discussed further below in chapter 6 (*Appeals*)). More fundamentally, whether the definition of charitable purpose is to be interpreted narrowly or widely acutely reflects the underlying clash of paradigms and is a critical factor to be taken into account in determining the objective of a charities law framework.
- vi. **Direct or indirect benefits:** a key factor in whether the definition of charitable purpose should be interpreted narrowly or widely is the issue of what benefits may be taken into account; in determining whether a purpose is charitable, does one look solely to the immediate, direct benefits provided, or can one look to the wider, indirect benefits? Wider benefits may be intangible and inherently more difficult to measure, but a failure to take them into account emasculates charities by taking into account only half the picture. It also contributes to the potential for charities to be perceived and regulated as a “fiscal cost”, as the offsetting wider benefits are simply overlooked. Unintended consequences of changes hastily made during the passage of the original Charities Bill through Parliament have led to the current appeals mechanism placing structural barriers in the way of taking into account the wider, indirect benefits provided by charities, as discussed further below in chapter 6. This factor has contributed significantly to the slow-moving change in underlying paradigm in New Zealand, as discussed further below.
- vii. **Deficits-based or strengths-based:** the debate on the charitable sector in the United States has “always been polarised between those suspicious of the philanthropic motives of wealthy benefactors and those who regard the sector as a vitally important segment of a democratic society”; Canada in turn appears to have inherited this polarisation “without sufficient critical distance”.²⁸ By contrast, and perhaps reflecting that a culture of elite philanthropy is more a United States’ phenomenon than an antipodean one, the compliance strategy initially adopted by the Australian Charities and Not-for-profits Commission was based on an assumption that charities are acting honestly and giving them opportunities for self-correction.²⁹ As the Australian Productivity Commission has noted,³⁰ giving in

27 Kós P, opening address to the Charity Law Association of Australia and New Zealand Conference “[Murky Waters, Muddled Thinking: Charities and Politics](#)” 4 November 2020 at [33] - [35].

28 Ontario Law Reform Commission *Report on the Law of Charities* (Toronto, 1996) at 54: “[t]his polarization has surfaced frequently in the Canadian debate on the sector to an extent ... not justified by the facts nor grounded in our indigenous political culture”.

29 M McGregor-Lowndes and B Wyatt (eds) *Regulating Charities: the Inside Story* (Routledge, 2017) at 274.

30 Australian Productivity Commission [Contribution of the Not-for-Profit Sector](#) 11 February 2010 at G10, referring to Liffman, 2007 at 4, G20.

America is “public, planned and unapologetically connected with personal identity” whereas domestic and household giving in Australia “reflects our history of apparent unease about extravagant wealth, our sense of privacy about personal convictions, and our expectations of a significant role for government in the provision of ... basic services”. The latter observations likely equally apply in New Zealand, and highlight another key dimension of the underlying clash of paradigms: should a charities law framework adopt a “deficit model” focussed on restricting the outliers (the minority that may have nefarious intent), or should it adopt a facilitative “strengths-based model” focused on creating an enabling framework for the vast majority of charities that are genuinely trying to do the right things, and taking action only where there is misconduct?³¹ As Lord Hodgson noted,³² tougher regulation risks creating an unnecessary burden for legitimate charities, but which bogus ones would continue to ignore, as determined individuals will always seek to circumvent or ignore any legislative requirements. As discussed above in chapter 1, public trust and confidence in charities derives from their purpose: it does not derive from regulation. To the contrary, over-regulation aimed at the lowest common denominator can diminish trust and confidence in charities by creating suspicion that such “regulation” must be needed, when that may not, in fact, be the case.³³ In designing a framework of charities law, it must be borne in mind that regulation cannot be an end in itself: care must be taken not to create regulation for regulation’s sake.

Broadly, all of these manifestations of the underlying clash of paradigms crystallise into one key underlying question: should the objective of a charities law framework be to *restrict* charities or to *enable* their work? In other words, might there be reason to invest in a legal framework that values and supports charities for their own sake? Ultimately, the question goes to the heart of the type of society we want to live in,³⁴ as discussed further below.

Discussion

At the time of writing, New Zealand appears poised³⁵ to follow a similar route to that adopted by Canada last century, namely: a proposed substantial increase in regulatory control of charities’ activities, on the basis of very little (if any) solid empirical foundation, to address perceived but not necessarily substantiated “potential” issues, in respect of which an over-stretched charitable sector, disproportionately dependent on government funding, will be inveigled into acquiescence on the pretext of “saving the charitable sector from itself”.³⁶

The Canadian experience indicates the result will be a spiral of ever-increasing regulatory prescription, as an increasing array of exceptions are needed to soften blunt rules that inherently fail to accommodate the diversity of human endeavour, all of which will create

31 K Seibert *So What Does the Second Object of the ACNC Act Mean?* ProBono Australia 19 February 2019: <probonoaustralia.com.au/news/2019/02/second-object-acnc-act-mean/>.

32 Lord Hodgson of Astley Abbotts *Trusted and Independent: Giving charity back to charities – Review of the Charities Act* July 2012 at [8.56].

33 This was a point made by the Todd Foundation in their [submission](#): “... knowledge that charities are registered and regulated drives only 12% of people’s trust and confidence in the sector, and ... knowing there was an organisation that had oversight of charities did not, in itself, increase confidence. Combined these results suggest that the Act (and its implementation) has not been effective in achieving its own stated purposes. This is disappointing given the significant amount of public and community sector resource (money and time) invested in charities registration. The above research may indicate that increasing transparency does not always increase trust. It can have the opposite effect by making people suspicious of something they weren’t suspicious of before”. See also the [submissions](#) of Northland Community Foundation; and Surf Life Saving New Zealand Inc.

34 See R Atkinson “Theories of the Federal Income Tax Exemption for Charities: Thesis, Antithesis and Synthesis” (1997) 27 *Stetson Law Review* 395 at 432.

35 Te Tari Taiwhenua Department of Internal Affairs *Resuming work to modernise the Charities Act 2005* 26 October 2021: <www.dia.govt.nz/charitiesact>.

36 B Bromley “1601 Preamble: The State’s Agenda for Charity” (2002) 7 *Charity Law and Practice Review* 177: “[i]t is also certain that when Parliament restricts the independence of the charitable sector, it will do so under the guise of saving the sector from itself”.

unnecessary complexity and risk enlivening a “culture of regulatory gaming”.³⁷ The increasing compliance and administration costs will divert charities’ already-stretched resources away from their charitable purposes, without necessarily achieving any improvement in outcomes for charities and those they work to benefit. In other words, further barriers will be placed in the way of charitable work, and charities’ important role in society will be further undermined at a time when they are never more needed.

As John Tyler notes,³⁸ “at what cost?” is a question that requires thorough consideration in the context of any charities law reform, particularly in a country such as New Zealand which has an overarching wellbeing framework,³⁹ and a government focus on bolstering social cohesion.⁴⁰

As the Australian Productivity Commission noted in the context of government contracts, practices that undermine not-for-profit entities and their relationship with government are ultimately unsustainable. The Commission recommended a reorientation to a focus on purpose:⁴¹

... the suggested changes ... have the potential to ease some of the tension between a market-based approach to the procurement and funding of human services and the characteristics and motivations of community organisations. Specifically, they should help ensure that government engagement with NFPs is more strongly outcome focused rather than process driven, and does not unnecessarily intrude into the broader operation and activities of these organisations. This recognises that *fidelity to their declared mission is crucial to the survival of NFPs because it is the inducement for citizens and the business sector to dedicate their time and other resources to sustaining these organisations*. While to a large extent this is a matter for NFPs themselves to manage, governments should ensure their engagement with community organisations *does not unduly undermine the mission of these organisations*, their reach into the community or impede community participation in decision-making processes. As a package, the recommendations seek to optimise the contribution of NFPs to the delivery of human services.

These sentiments apply equally to the design of the legal framework for charities more generally.

Similarly, in Canada, the ACCS recommends a change of approach to focus on the purposes, rather than the activities, of charities, and to work towards a regulatory environment that “enables and strengthens the charitable and nonprofit sector”.⁴²

Commentators in other jurisdictions have also noted the importance of a broader focus on purpose rather than simply on tax. For example, in Ireland:⁴³

At its core, what constitutes a charitable purpose should be a political expression of the values that we, as a society, wish to foster on behalf of the community as a whole in the interests of pluralism as much as altruism. *The tax reliefs that flow from such recognition should be a by-product of this understanding and not the raison d’être for its grant or its rejection*. In practice, the implementation of such a perspective can be difficult given the predominant, if understandable, tendency of government to view the concept of charitable purpose through the lens of short-term political goals and current fiscal constraints.

37 C Decker and M Harding “Three challenges in charity regulation: the case of England and Wales” in M Harding, A O’Connell and M Stewart (eds) *Not-for-Profit Law: Theoretical and Comparative Perspectives* (Cambridge University Press, 2014) 314 at 329, 325.

38 JE Tyler III [Book Review: Myles McGregor-Lowndes and Bob Wyatt \(eds\), Regulating Charities: the Inside Story](#), New York: Routledge (2017) 9(1) Nonprofit Policy Forum 5 at 3.

39 Te Tai Ōhanga The Treasury *Measuring wellbeing: the LSF Dashboard*: www.treasury.govt.nz/information-and-services/nz-economy/higher-living-standards/measuring-wellbeing-lsf-dashboard.

40 New Zealand Government press release *Social cohesion programme to address incitement of hatred and discrimination* 25 June 2021: www.beehive.govt.nz/release/social-cohesion-programme-address-incitement-hatred-and-discrimination.

41 Australian Productivity Commission *Contribution of the Not-for-Profit Sector* 11 February 2010 at 343, 345 (emphasis added).

42 Advisory Committee on the Charitable Sector *Report #3 – Towards a federal regulatory environment that enables and strengthens the charitable and non-profit sector* July 2021 “Next steps” and cover page.

43 OB Breen *Holding the line: regulatory challenges in Ireland and England when business and charity collide* in M McGregor-Lowndes and K O’Halloran (eds) “Modernising Charity Law – Recent Developments and Future Directions” (Edward Elgar, Cheltenham, UK, 2010) 136 at 157 (emphasis added).

And in England and Wales:⁴⁴

It seems to me that whether a jurisdiction starts from very basic regulatory controls or a desire to completely revamp the regulatory framework for charities, or even to build or improve an existing regulatory framework, there are some key political and constitutional issues which are needed to underscore the scope and value of an NGO economy (of which charities comprise a significant element). I would say these are:

- *recognition of the role and value of NGOs by the State*
- the rights and freedoms of individuals to associate and form organisations for voluntary, social welfare, charitable, philanthropic and religious purposes
- the need to encourage citizen altruism through volunteering and financial giving
- State support for NGO bodies in the form of fiscal or other immunities or benefits
- *creation and development and recognition of an NGO sector*
- benefits of an NGO sector in terms of economic, social value, and *the need for the self-determination, protection* and support of minorities and those whom the State might otherwise support being in social (poverty, health, educational) need.

It seems to me that all this points up the need for States to recognise the value, contribution and development of a civil society through a thriving NGO sector. To treat it as a sector in its own right rather than aspects of other sectors and their regulation, justifying a holistic and homogenous and effective regulatory framework.

What should such a framework look like? ...

- it should generally be directed to promoting public trust and confidence in the NGO/charity sector
- *for the purpose of creating a healthy sector in terms of maximising social and economic contribution to society and the support of and development of civil society and individual communities* (however structured)
- it should be set and positioned in a way which maximises social engagement through volunteering and financial giving and advocacy and confers transparency and accountability and compliance

...

Given the advantages the status of charity confers, the public must be able to understand who they are, what charities do and how they contribute to the above ends.

And in Northern Ireland:⁴⁵

The purpose of the ... framework established by the Charities Act (NI) 2008...is to enable registered charities to better carry out their charitable missions to the greater benefit of society ...

The distinctive and widely recognised contribution of charities to the public good leads, in principle, to a sector which deserves to be valued, nurtured, protected and encouraged by all parts of society ...

The ... predominant objective [of the Charity Commission for Northern Ireland] is to proactively enable the vast majority of charities to deliver on their charitable purposes ... The Commission needs to change its approach to regulation to a more responsive and enabling one that finds expression in its engagement with charities ... Providing the kind of support that allows the sector to do what it can for itself is critical, for example via an easily navigated website that provides less complex guides and face to face or person to person contact when required ... the Panel is seeking to make recommendations that will result in a highly visible, present and engaged Commission that is openly and energetically positive about charities and that provides tools to support charities and opportunities to collaborate for good compliance

44 Email correspondence from Kenneth Dibble, independent legal adviser and consultant on charity and NGO law and regulation, both within the United Kingdom and internationally, current legal board member of Charity Commission for England and Wales, former Chief Legal Adviser and Legal Director at the Commission and Director of its International Programme, 22 December 2020 (emphasis added).

45 Dr O Breen, Rev Dr L Carroll, N Lavery [*Independent Review of Charity Regulation Northern Ireland*](#) January 2022 at 66, 123, 86 - 87.

In a similar vein, the Open Government Partnership recommends an increased focus on civic space as civic freedoms continue to decline globally:⁴⁶

The freedoms of expression, association and assembly are critical to the achievement of open government by allowing citizens to actively engage with the government and hold decision-makers accountable. Countries and local jurisdictions that commit to protecting these freedoms reap the benefits of higher levels of citizen engagement and stronger civil society organisations ...

The following recommendations summarise key actions for OGP members to implement:

- Limit legal restrictions on practices of civil society organisations, particularly for those working on sensitive issues.
- Ensure civil society organisations face low barriers to entry by making registration processes accessible, fair and transparent.
- Promote mechanisms for organisations to access funding and resources to ensure better long-term planning and sustainability.
- Allow civil society organisations to self-regulate using accepted and sector-endorsed reporting and accountability mechanisms.

The Law Commission emphasised the importance of an enabling environment in the context of their review of the law of incorporated societies:⁴⁷

The United Nations' International Classification of Non-profit Organisations has defined non-profits as sharing the following characteristics:

- *Organised*: that is, they have some structure and regularity to their operations, whether or not they are formally constituted or legally registered. This definition embraces informal (ie, non-registered) groups as well as formally registered ones.
- *Private*: that is, *they are not part of the apparatus of the state*, even though they may receive substantial support from governmental sources.
- *Not profit-distributing*: that is, they are not primarily commercial in purpose and do not distribute profits to a set of directors, stockholders, or managers. Non-profit organisations can generate surpluses in the course of their operations, but any such surpluses must be reinvested in the objectives of the organisation. This criterion serves as a proxy for the "public purpose" criterion used in some definitions of non-profit, but it does so without having to specify in advance and for all countries what valid "public purposes" are.
- *Self-governing*: that is, they have their own mechanisms for internal governance, are able to cease operations on their own authority, and are fundamentally in control of their own affairs.
- *Non-compulsory*: that is, membership or participation in them is not legally required or otherwise a condition of citizenship.

Non-governmental and community based organisations are enormously important and government should be facilitating a context within which community-based initiatives can become more *effective*. A vibrant, established, and pluralistic civil society is an essential ingredient of democracy. This requires an *enabling* environment – that is, an economic, political, cultural and legal environment which enables citizens to achieve social development.

We have begun this project with the assumption the public itself must take responsibility for which non-profit organisations they support and how they do so. The legislation, on the other hand, should aim to create a climate of good governance, organisational credibility and *informed choices with as little state interference as possible*. Bodies that are incorporated under a new Incorporated Societies Act should, in our view, share the following characteristics, facilitated by the legislation:

- they should be established for a public purpose or for the (non-financial) benefit of their members;
- they should be *private and independent*;
- they should be *self-governing*; and
- in general, their income and profits should not be channelled to members, trustees or anybody else except as reasonable compensation for services rendered.

46 Open Government Partnership *Civic Space Fact Sheet*:

www.opengovpartnership.org/wp-content/uploads/2021/11/Civic-Space-Fact-Sheet.pdf.

47 Te Aka Matua o te Ture - New Zealand Law Commission Issues Paper 24 *Reforming the Incorporated Societies Act 1908* (NZLC IP 24, 2011): www.lawcom.govt.nz/sites/default/files/projectAvailableFormats/NZLC%20IP24.pdf at [1.10] - [1.11] (emphasis added, footnotes omitted).

These principles have been enshrined in s 3(d)(iii) of the Incorporated Societies Act 2022 (emphasis added):

The purposes of this Act are to – ...

(d) recognise the principles that – ...

- (iii) societies are *private bodies* that should be *self-governing* in accordance with their constitutions, any bylaws, and their own tikanga, kawa, culture, and practice, and should be *free from inappropriate Government interference*

As discussed above in chapter 1, charities are a subset of the wider not-for-profit sector: these principles accordingly apply equally to charities.

However, a tax expenditure analysis cuts across these principles. As the United States Supreme Court has noted, tax exemptions for charities play an important role in encouraging diverse, indeed often sharply conflicting, activities and viewpoints, and provide an “indispensable means of limiting the influence of governmental orthodoxy on important areas of community life”.⁴⁸ The fact that charities receive tax privileges does not turn their funds into government funds: the tax privileges are intended to support the work of charities, and should not require them to forfeit their independence, or cede control over their day-to-day operational decision-making to align with government objectives, any more than it does for any other person receiving tax privileges (such as for-profit companies, as discussed in chapter 1). Just as the tax authority does not tell taxpayers how to run their businesses, the policy settings should similarly not interfere unduly with the day-to-day operational decisions of charities.

Instead, conceiving the tax privileges for charities as merely a proper adjustment of the tax base, as discussed above in chapter 1, allows charities to be recognised as independent, self-governing entities, best positioned to determine for themselves (within the parameters of their constituting document and the general law) how best to spend their own charitable funds in furtherance of their own charitable purposes (which must, by definition, operate for the public benefit, as discussed below in chapter 3). On this conception, tax privileges for charities are an investment in an overall *system* that allows people to manifest liberal democratic values of diversity, pluralism and freedom of association in pursuit of public benefit: the fact that some individual activities might not be selected by the government of the day for “subsidisation” in isolation is therefore tolerable, as governments are constrained by the dictates of the median voter; some overbreadth is merely the price we pay for an overall system that is an important manifestation of liberal democratic values of diversity, pluralism and tolerance, and contributes significantly to social cohesion, social capital and wellbeing.⁴⁹

On the basis of all of the above, the objective of a charities law framework should not be the rationing of tax privileges: the costs of a restrictive “ex ante” approach, both in terms of direct compliance and administration costs as well as indirect impacts on New Zealand’s social capital and culture of volunteering, are likely to far exceed any benefits; adopting a restrictive approach is unlikely to maximise the benefits charities provide to society and may in fact cause more harm than good. Our research clearly indicates that the objective of a charities law framework should be to *enable* the work of charities.

Focus on purpose

We therefore recommend that the clash of paradigms is resolved in accordance with principle: charities are private, self-governing organisations,⁵⁰ whose important role in society requires that their independence from government is respected and protected;⁵¹

48 *Bob Jones University v US* 461 US 574 (1983) at 609 per Powell J (concurring).

49 MP Fleischer “Subsidising Charity Liberally” in M Harding (ed) *Research Handbook on Not-for-Profit Law* (Edward Elgar, 2018) 418 at 433.

50 This principle is reflected in the title of the September 2002 Cabinet Office Strategy Unit report *Private Action, Public Benefit – A review of Charities and the Wider Not-for-profit Sector*: efc.issuelab.org/resource/private-action-public-benefit-a-review-of-charities-and-the-wider-non-profit-sector-strategy-unit-report-september-2002.html.

51 JE Tyler III [Book Review: Myles McGregor-Lowndes and Bob Wyatt \(eds\), Regulating Charities: the Inside Story](#), New York: Routledge (2017) 9(1) Nonprofit Policy Forum 5 at 3.

interpretations of the definition of charitable purpose must respect its equitable underpinnings, and structurally take account of the wider, indirect, intangible benefits that charities provide. The focus of the legal framework should be on enabling and maximising strengths, rather than deficits, and facilitate the high trust approach that was employed in initial responses to COVID-19 with such success. The charities law framework must facilitate, rather than frustrate, the work of charities.⁵²

To these ends, we recommend that the New Zealand charities law framework is reorientated to ensure a focus on charities' purposes. As discussed above in chapter 1, purpose is the key underlying driver of trust and confidence in charities. Restoring a focus on purpose would inherently respect the independence and autonomy of charities by holding people involved with charities to the charitable purposes that *they have signed up to*. A focus on purpose would ask, not whether any particular activity is "charitable" (a concept that does not make sense in charities law terms, as discussed further below in chapters 3 and 4) or "how much" of any particular activity is acceptable, but whether any particular activity is carried out in good faith in furtherance of the charity's stated charitable purposes.

Shifting emphasis back to purposes would restore proper focus on the charities law framework being a "mechanism for promoting an open-ended, dynamic and evolving concept of legal charity".⁵³ A focus on purpose would provide a principles-based approach that is clear and easy to understand, providing clear, simple boundaries that allow the vast bulk of charities that are good actors to further their stated charitable purposes as they see fit without undue government interference. At the same time, it would allow for flexibility, innovation and self-determination: communities know best what communities need.

Such a focus on purpose would also provide clarity of mandate for the government agency, and clear limits for regulatory intervention, without requiring blanket granular assessments that risk excessive regulation and stifling voluntary effort.

Such an approach represents a resort to underlying principle and, as such, is nothing new: as Dr Oonagh Breen points out, there is "nothing new under the sun" in the area of charities law.⁵⁴ However, in the face of increasing authoritarianism around the world, creating an enabling framework for charities, and boldly upholding liberal democratic values of social tolerance and the rule of law,⁵⁵ would in itself be world-leading.

We expand on some of these principles below.

Purpose rather than public benefit

Importantly, the focus of a charities law framework should be on *purpose*, rather than *public benefit*. As discussed further below in chapter 3, in order for a charity to be accepted for registration, its purposes must have been accepted as charitable. In order to be accepted as charitable, those purposes must, by definition, meet the public benefit test: the purposes of a charity that has been accepted for registration therefore operate for the public benefit *by definition*. By supporting and encouraging a focus on purpose, the legal framework would therefore inherently support the provision of benefits to the public, albeit indirectly.

By contrast, a legal framework that bypasses purpose and focuses on the provision of public benefit *directly*, while perhaps having immediate superficial appeal, on closer inspection can in fact be counterproductive.

52 See *National Council of Women of New Zealand Inc v Charities Registration Board* [2015] 3 NZLR 72 (HC) at [53]: "[t]he Act is to be applied to facilitate charitable works, not frustrate them".

53 P Broder "[Report of the Senate Special Committee on the Charitable Sector – A response](#)" (2020) The Philanthropist Journal.

54 OB Breen "Redefining the measure of success: a historical and comparative look at charity regulation" in M Harding (ed) *Research Handbook on Not-for-Profit Law* (Edward Elgar, 2018) 549 at 549 referring to *Ecclesiastes* (New American Standard Bible) 1:9.

55 See The Foreign Policy Centre *Global Britain for a Global World: examining the importance of open societies to the UK's force for good ambitions* 19 October 2021: fpc.org.uk/publications/global-britain-for-an-open-world/: "[t]he number of democracies globally has continued to decline ... Grassroots energy to forge a more inclusive version of UK democracy has the potential to help rebuild trust between government and citizens".

For example, in England and Wales, significant changes were made in the Charities Act 2006 (UK) intended to focus on “public benefit”,⁵⁶ including a requirement for charities to report annually on the main activities undertaken to further their charitable purposes for the public benefit (“the public benefit statement”).⁵⁷ While proceeding from a clearly understandable rationale,⁵⁸ in practical implementation, the changes have been described as “unusually tumultuous”.⁵⁹

One issue is that a focus on public benefit paradoxically risks distracting charities from their underlying purpose:⁶⁰ for example, if a charity needs to carry out a simple but necessary task, such as changing a light bulb so that staff can see to do their work, it is not necessarily immediately clear how this activity can be justified as being for the “public benefit”. The ensuing lack of certainty potentially creates an unhelpful paralysis: in some circumstances, searching for public benefit at the level of individual activities can be likened to searching for a mythical pot of gold at the end of a rainbow.

However, although the public benefit may be elusive, the activities in question may be critical to furthering the charity’s purpose. Decision-making within a charity is therefore simplified considerably if charity decision-makers (who are often are volunteers operating in their spare time) are able to simply ask whether the activity in question furthers the charity’s charitable *purposes*. It is axiomatic that everything a charity does must further its charitable purpose. Of course the lightbulb must be changed so that people can see to do the very work the charity is set up to do. Benefit to the public will ultimately follow by virtue of the charitable purposes being furthered; importantly, such benefit to the public need not be immediate, tangible or even measurable,⁶¹ subtleties that can become lost if “public benefit” becomes the focus of decision-making. While it may seem counterintuitive that public benefit may be best furthered by not focusing directly on it, the key point is that public benefit is inherent in charitable purpose.

A focus on purpose therefore does not detract from the importance of public benefit; rather, it simplifies decision-making, not only for those involved with charities, but also for those charged with administering and enforcing the Charities Act. A focus on purpose also realigns the legal framework with the underlying common law: as discussed above in chapter 1, charities are all about their purposes, and a framework of charities law that recognises and builds on that axiom will maximise the efforts of all involved much better than one that tries to cut across it.

Purpose rather than public interest

The focus of a charities law framework should also be on *purpose* rather than public *interest*. Those administering charities’ legislation are not representative of the public interest, nor necessarily well-equipped to determine what the public interest is.⁶² As noted by the United States Supreme Court, determining the scope of social policy is a

56 See, for example, Charities Act 2011 (UK) ss 4, 14(2), 17 and Lord Hodgson of Astley Abbotts *Trusted and Independent: Giving charity back to charities – Review of the Charities Act* July 2012 at [4.8].

57 The Charities (Accounts and Reports) Regulations 2008 (UK) SI2008/629 reg 40.

58 See the discussion in National Council of Voluntary Organisations *For the public benefit? A consultation document on charity law reform* January 2001.

59 C Decker and M Harding “Three challenges in charity regulation: the case of England and Wales” in M Harding, A O’Connell and M Stewart (eds) *Not-for-Profit Law: Theoretical and Comparative Perspectives* (Cambridge University Press, 2014) 314 at 314. Compliance with the public benefit statement requirement is also understood to be very low. See Lord Hodgson of Astley Abbotts *Trusted and Independent: Giving charity back to charities – Review of the Charities Act* July 2012 at [4.9], [4.11].

60 C Decker and M Harding “Three challenges in charity regulation: the case of England and Wales” in M Harding, A O’Connell & M Stewart (eds) *Not-for-Profit Law: Theoretical and Comparative Perspectives* (Cambridge University Press, 2014) 314 at 326, 329.

61 Donald Poirier *Charity Law in New Zealand* (Department of Internal Affairs, June 2013): <www.charities.govt.nz/assets/Uploads/Resources/Charity-Law-in-New-Zealand.pdf> at [4.1.1.3].

62 See, for example, A Purkis *Charities and the Charity Commission: is a re-set underway?* 1 February 2021: <andrewpurkis.wordpress.com/2021/02/01/charities-and-the-charity-commission-is-a-re-set-underway/> and R Cooney *History is complicated – and charities have never been an ‘antidote to politics’* ThirdSector: <www.thirdsector.co.uk/history-complicated-%E2%80%93-93-charities-antidote-politics/communications/article/1713582>.

legislative rather than an administrative matter, that should not fall to agencies tasked with administering or applying the law:⁶³ doing so risks resort to “lazy generalisations of populism”.⁶⁴

Purposes rather than activities

It is also axiomatic that the focus of a charities law framework should be on *purposes* rather than *activities*. As discussed above, the distinction between purposes and activities is a key dimension of the underlying clash between enabling or restrictive paradigms. While charities have a long history of finding ways to pursue their work and vision in challenging circumstances, it is critical, in terms of maximising charities’ ability to provide benefits for society, that the role of activities within a charities law framework is properly understood.⁶⁵

The National Council of Voluntary Organisations (“**NCVO**”) described the role of activities in the following terms:⁶⁶

... the charitable status of an organisation, and hence its entitlement to charitable tax reliefs, does not directly depend on how much it achieves. It depends on what it sets out to do, its charitable objects. It is easy, however, to exaggerate this contrast. As soon as an organisation is established as a charity, the law requires that it actually does that and only that which it was set up to do. If the organisation’s activities do not in fact further its purposes then, in time, its activities must change to conform to the law. So while the law does not specify exactly what the activities in question must be, or exactly which outcomes they must have, it does specify that they must in general be worthwhile activities with worthwhile outcomes, with their worth being judged by their contribution to the objects that the law judges charitable.

The NCVO specifically rejected an activities-based approach on the following basis:⁶⁷

Would it be better, the Government might ask, for the law to decide which activities are worth subsidising according to what they actually achieve? To this, there are at least four responses. One is that charitable tax reliefs are not subsidies. Since there is no distributed profit, but only reinvestment in the worthwhile objectives, there is nothing there to tax. The second is that the monitoring and enforcement costs involved in tracking the usefulness of charitable activities, together with the costs of lost goodwill and enthusiasm from the monitored organisations and their workers, will eat dramatically into any savings which may be made by withdrawal of tax reliefs from underachieving organisations. Thirdly, we may anyway doubt whether the law, or the Government, is always best placed to decide which activities are useful or which outcomes are desirable. And fourth, it is in any case a mistake to think that all the worth in charitable activities can be understood in terms of the outcomes of those activities as opposed to their intrinsic value as expressions of public moral concern ...

When the 1992 Charities Act was discussed in the Lords it was mooted that an activities test was needed. The argument made against this was that such a test would be too difficult both to define and to apply in practice. It is easy to understand why this argument might have been made – imagine the difficulty of defining a beneficial activities test that could encompass the diversity of the charitable sector’s work. It was suggested by some of those submitting evidence that a more obvious concern with what organisations do and achieve would promote public confidence in charities. However, as the term “more obvious concern” indicates, the law already allows an emphasis on activities and outcomes. Consideration is given to whether the pursuit of the particular purposes of the organisation will benefit the public. Organisations are not granted charitable status if it is believed either that their objects will do harm or that they will not achieve benefit. The proposed activities of the organisation are assessed on application to ensure that they are in accord with the organisation’s objects. Further, if charities act outside their objects or fail to pursue them with proper care they are acting in breach of trust and trustees are personally liable for any funds that have been lost or misapplied.

63 *Bob Jones University v US* 461 US 574 (1983) at 611 per Powell J (concurring).

64 A Purkis *The Charity Commission and Populist Attacks on British Institutions* 26 January 2021: andrewpurkis.wordpress.com/2021/01/26/the-charity-commission-and-populist-attacks-on-british-institutions/.

65 Australian Productivity Commission *Contribution of the Not-for-Profit Sector* 11 February 2010 at 316, referring to the submission of Sector Connect Inc.

66 National Council of Voluntary Organisations *For the public benefit? A consultation document on charity law reform* January 2001 at [2.5.7].

67 National Council of Voluntary Organisations *For the public benefit? A consultation document on charity law reform* January 2001 at [2.5.8], [3.2.2].

These arguments apply equally in a New Zealand context. As Parachin and Murray have noted,⁶⁸ a focus on activities in a purpose-based area of law creates a “square peg, round hole” problem; for example, it leads to a regulatory focus on quantitative measures of activities (such as “how much” advocacy or “how much” business activity a charity can undertake) that are “confusing, costly to quantify and track, and do not address the substantive issue of ensuring charities are operating for recognised charitable purposes”,⁶⁹ as discussed further below.

An activities-based approach also assumes that government knows better than charities how to further their charitable purposes, which can stifle or demoralise voluntary effort.

Fundamentally, an activities-based approach reflects the wrong paradigm. As Laird Hunter QC has noted, “doing good shouldn’t be so hard”.⁷⁰

Accountability rather than “regulation”

Related to the issue of reorienting the charities law framework to focus on purpose is clarifying that the legal framework is about *accountability*, not “regulation”.⁷¹

Charities are already subject to a high degree of regulation, whether it be through criminal law, tax law, anti-money laundering legislation, health and safety legislation, financial legislation, legislation relating to the safety and wellbeing of children, and the like. It is not clear that charities require another level of heavy-handed “regulation” by means of the Charities Act, simply because they are charities.

The Ontario Law Reform Commission argued that it would be a mistake for government to lose sight of the core values that motivate charitable endeavour by adopting a regulatory approach that is too heavily reliant on command and sanction as opposed to mutual respect and persuasion.⁷² The recent review of the charities’ framework in Northern Ireland expressed a similar sentiment, noting the importance of developing a framework that recognises the goodwill and willingness of most charities to comply:⁷³

The sheer scope and differentiation of the [charitable] sector provides immeasurable public benefit and the presences of charities are, therefore, one of the abiding markers of a healthy society. The very diversity of the sector, which is so valued, makes regulation more challenging in that one size will not fit all and appreciation of this fact by both the legislator and the regulator is critical to a nuanced and proportionate regulatory regime.

Richard Fries, Chief Commissioner of the Charity Commission for England and Wales from 1992 - 1999, argues that a Charities Act regime is not about “regulation”: it is not about central planning or interfering with the soul of charity. To the contrary, the balance of a charities law framework should lean towards accountability, not regulation.⁷⁴

Regulatory accountability comprises a duty to report on a body’s fulfilment of its purposes and makes it subject to regulatory intervention. This is inappropriate for charities, which must be free to determine how to seek to fulfil their (public benefit) purposes. The core of the accountability which charities owe in respect of their status is transparency: they must be open about their activities in seeking to fulfil their public benefit purpose.

The core function of the Commission is to provide a framework for this accountability. This underpins: the maintenance of a register of charities through which they are open and

68 A Parachin “Regulating Charitable Activities through the Requirement for Charitable Purposes: Square Peg Meets Round Hole” in J Picton and J Sigafoos (eds) *Debates in Charity Law* (Hart, 2020) 129 at 129; I Murray “How Do We Regulate Activities within a Charity Law Framework Focussed on Purposes?” (2020) 26(2) Third Sector Review 65.

69 *Report of the Consultation Panel on the Political Activities of Charities* 31 March 2017: www.canada.ca/en/revenue-agency/services/charities-giving/charities/about-charities-directorate/political-activities-consultation/consultation-panel-report-2016-2017.html at 17.

70 Interview with Laird Hunter QC, Edmonton, Canada (4 February 2021).

71 An argument made by Richard Fries, Chief Commissioner of the Charity Commission for England and Wales from 1992 - 1999, at a meeting of the co-authors of M McGregor-Lowndes and B Wyatt (eds) *Regulating Charities: the Inside Story* (Routledge, New York, 2017) in Banff, Canada, November 2015.

72 Ontario Law Reform Commission *Report on the Law of Charities* (Toronto, 1996) at 333 - 334.

73 Dr O Breen, Rev Dr L Carroll, N Lavery *Independent Review of Charity Regulation Northern Ireland* January 2022 at 63, 22.

74 Paper prepared by R Fries entitled *New Zealand Charity Law Framework: Notes*, December 2020. See also M McGregor-Lowndes and B Wyatt (eds) *Regulating Charities: the Inside Story* (Routledge, 2017) at 271.

accessible to the public: a framework of public reporting on charities' activities, governance and financial management.

New Zealand differs to most comparable jurisdictions in that the impetus to introduce charity-specific legislation was not a reaction to a sector scandal demanding a political response.⁷⁵ In Australia also, any hint of the sector needing reform due to falling short of expected levels of conduct was fiercely challenged by sector leaders.⁷⁶ To the contrary, the charitable sector in both jurisdictions sought a competent government agency to proactively defend against "rogues" that would affect trust and confidence in the sector.⁷⁷ The mechanism to do this was by implementing a charities register, providing a means for charities to demonstrate to stakeholders and the public that they were worthy of support, and a means for rogue charities to be "weeded out" so that the public could have trust and confidence in those that remained.

In other words, the "mischief" the Charities Act sought to address was a lack of information, a clear deficiency of the pre-Charities Act regime.⁷⁸ This factor does not appear to be well understood, but is critically important to the design of the charities law framework.

Importance of information

Prior to the Charities Act 2005, there was no requirement, nor any formal process, for registering charities. Even IRD did not have a complete list of entities claiming the charitable income tax exemptions, because the New Zealand tax system operates on a self-assessment basis, which made it possible to access the charitable income tax exemptions without the government having knowledge of this.⁷⁹

The reporting requirements for charities were also minimal under the pre-Charities Act regime. Although IRD could require charities to furnish an income tax return on request under s 58 of the Tax Administration Act 1994, this power was rarely used, and charities were not generally required to file income tax returns. Charities structured as incorporated societies were required to file an annual financial statement with the Registrar of Incorporated Societies under s 23 of the Incorporated Societies Act 1908, setting out basic financial data. However, no accounting standards governed this reporting and a wide variety of practices were used. Charities structured as charitable trusts were not required to file any annual financial statement at all, as discussed above in chapter 1.

The lack of registration and reporting meant there was also very little monitoring of whether charities continued to pursue the charitable purposes for which they were established over time.⁸⁰ Complaints about charities could be made to the Attorney-General, who has power under s 58 of the Charitable Trusts Act to inquire into the management and administration of any charity. The Attorney-General, or a member of

75 M McGregor-Lowndes and B Wyatt (eds) *Regulating Charities: the Inside Story* (Routledge, 2017) at 266.

76 M McGregor-Lowndes and B Wyatt (eds) *Regulating Charities: the Inside Story* (Routledge, 2017) at 267.

77 M McGregor-Lowndes and B Wyatt (eds) *Regulating Charities: the Inside Story* (Routledge, 2017) at 266.

78 Property Law and Equity Reform Committee *Report on the Charitable Trusts Act 1957* (Wellington, February 1979) at 2: charitable trusts in particular were considered "uniquely free from supervision"; *Report to the Minister of Finance and the Minister of Social Welfare by the Working Party on Charities and Sporting Bodies* (Treasury, Wellington, November 1989) (the Sir Spencer Russell report) at iv - v, 10, 21, 63, 67; *Report by the Working Party on Registration, Reporting and Monitoring of Charities* 28 February 2002 at 21 - 22; Inland Revenue Department [Tax and charities, a government discussion document on taxation issues relating to charities and non-profit bodies](#) June 2001, foreword and [1.3], [2.6], [4.1], [7.2] - [7.8], [8.8], [8.15], [8.19], [8.23], [12.5].

79 Inland Revenue Department [Tax and charities, a government discussion document on taxation issues relating to charities and non-profit bodies](#) June 2001 at [6.2], [6.3], [7.1] - [7.4], [8.3].

80 Inland Revenue Department Operational Statement OS 06/02 *Interaction of tax and charities rules, covering tax exemption and donee status* (December 2006): www.taxtechnical.ird.govt.nz/en/operational-statements/os-0602-interaction-of-tax-and-charities-rules-covering-tax-exemption-and-donee-status-dec-2006- at [2] - [4]; Inland Revenue Department [Tax and charities, a government discussion document on taxation issues relating to charities and non-profit bodies](#) June 2001 at [2.12] - [2.13].

the public, can also commence proceedings to enforce a charitable trust, or to have a scheme formulated, under s 60 of the Charitable Trusts Act.⁸¹

However, in practice, these mechanisms were not proving effective, because neither the Attorney-General nor members of the public had any means of obtaining information about the operation of existing trusts, or indeed any means of ensuring knowledge of their existence. As a result, these powers were rarely used:⁸²

... by the time a complaint is laid with the Attorney-General ... all the evidence has gone, all the money has gone, and it is far, far too late.⁸³

IRD has wide powers to monitor charitable organisations using its audit powers, as part of its administration of the tax legislation generally.⁸⁴ However, this process too had its limitations:⁸⁵

... the Commissioner of Inland Revenue's role is to ensure that income not entitled to an exemption is taxed. The role is not about ensuring that the charitable sector is generally accountable to the public. Holding the officers of a charitable organisation to account for an organisation's administration expenses, for example, is well beyond the ambit of the Commissioner's current responsibilities. It is also not the role of the Registrar of Incorporated Societies.

Further, at that stage, the definition of charitable purpose in the income tax legislation referred only to entities "established" for charitable purposes,⁸⁶ which caused IRD to doubt its ability to challenge the tax exemption of an entity established for, but no longer pursuing, charitable purposes.⁸⁷ As the Privy Council noted:⁸⁸

In New Zealand (unlike the United Kingdom) the relevant tax exemption does not depend on income actually being applied for the intended charitable purposes. Any alleged deviation from the terms of the Trust would be a matter for the Attorney-General ...

Instead, if IRD considered the funds of a charitable body were being applied for other than charitable purposes, the statutory mechanism was for IRD to inform the Minister of Revenue under s 89 of the Tax Administration Act.⁸⁹

It is not clear to what extent s 89 was ever used.

Even if IRD did have power to remove an income tax exemption in any particular case, the absence of obligatory reporting requirements meant there was generally no information available to IRD on which it could make a decision to conduct an audit: there was "no means by which the government can measure the cost of the income tax exemption, nor monitor the nature or activities of those entities benefiting from it".⁹⁰ Charitable trusts in particular were considered to be "uniquely free from supervision".⁹¹

The lack of registration, reporting and monitoring of charities meant the public had "no protection against charities in New Zealand": anyone could seek to raise funds for

81 See Charitable Trusts Act 1957 s 60; *Morgan v Wellington City Corporation* [1975] 1 NZLR 416 (CA); *Mendelssohn v Centrepont Community Growth Trust* [1999] 2 NZLR 88 (CA); Inland Revenue Department [Tax and charities, a government discussion document on taxation issues relating to charities and non-profit bodies](#) June 2001 at [6.7]; and N Kelly, C Kelly and G Kelly Garrow and Kelly *Law of Trusts and Trustees* 6ed (Wellington, LexisNexis, 2005) at [12.40.4].

82 Charities Bill 2R (12 April 2005) 625 NZPD 19,946 – 19,948 per Rodney Hide (ACT).

83 Charities Bill 2R (12 April 2005) 625 NZPD 19,952 per Dail Jones (NZ First).

84 Charities Bill 2R (12 April 2005) 625 NZPD 19,942 per Judith Collins (National).

85 Charities Bill 3R (12 April 2005) 625 NZPD 19,973 per Hon Judith Tizard, Associate Minister of Commerce.

86 See, for example, Income Tax Act 1994 s CB 4(1)(c), prior to its amendment by the Taxation (Annual Rates, Maori Organisations, Taxpayer Compliance and Miscellaneous Provisions) Act 2003 s 7(1).

87 Inland Revenue Department [Tax and charities, a government discussion document on taxation issues relating to charities and non-profit bodies](#) June 2001 at [4.4].

88 *Latimer v Commissioner of Inland Revenue* [2004] 3 NZLR 157 (PC) at [20].

89 *Dick v Commissioner of Inland Revenue* [2003] 1 NZLR 741 (HC) at [51] and Inland Revenue Department [Tax and charities, a government discussion document on taxation issues relating to charities and non-profit bodies](#) June 2001 at [6.6].

90 Inland Revenue Department [Tax and charities, a government discussion document on taxation issues relating to charities and non-profit bodies](#) June 2001 at Pt III.

91 Property Law and Equity Reform Committee *Report on the Charitable Trusts Act 1957* (Wellington, February 1979) at 2.

“almost any appeal one cares to name”; the ordinary citizen had no means of finding out the legitimacy of the appeal, or what happened to the funds raised.⁹²

As a result, the integrity and reputation of the entire charitable sector was vulnerable to the inevitable presence of a small number of rogue charities: it was difficult for the public to know whether any particular charity was worthy of its trust and confidence.⁹³ By the time the original Charities Bill was introduced into Parliament in 2004, there was overwhelming support within the charitable sector for a Charities Commission to be established to address this concern.⁹⁴

Registration, reporting and monitoring

In 2005, the Charities Act addressed these issues by implementing a registration, reporting and monitoring regime, principally by means of a charities register administered by a Charities Commission. A decade later, in 2015, new financial reporting rules were introduced, requiring every registered charity to prepare financial statements in accordance with External Reporting Board standards, and make this information publicly available on the charities register. As discussed above, charities in New Zealand are now arguably subject to the most comprehensive set of transparency and accountability requirements for charities in the world.⁹⁵

A key strength is that the disclosure regime in New Zealand applies to all registered charities, without exception. Should the tax authority have concerns about any registered charity's claim to a tax privilege, it now has access to the information needed to ascertain whether to investigate further. Should there be fraud or money laundering concerns, information is similarly now available to the relevant authorities. Charities' many stakeholders, including donors, philanthropic funders, government funders, volunteers, employees, members, clients, suppliers, other supporters, the media, and the public generally, now have access to a forum for accountability, enabling the “scrutiny of 1,000 eyes”,⁹⁶ and an informed basis for raising questions and/or deciding for themselves whether any particular charity is worthy of support.

The agency responsible for administering the Charities Act also has an informed basis on which to “ask questions”,⁹⁷ and to proactively defend against “rogues” that would affect trust and confidence in the charitable sector as a whole. In this respect, the definition of “serious wrongdoing” is a key axis of the regime, as discussed further below.

The New Zealand regime is accordingly preventative in an “ex post” way, rather than reactive in an “ex ante” way. There is no evidence to suggest that charities in New Zealand need to be “regulated” further by means of a Charities Act imposing heavy restrictions on charities' activities.

To the contrary, the quid pro quo for registered charitable status is the requirement to make comprehensive financial and non-financial information publicly available by means of the charities register. A clear theme of submissions to the DIA's review of the Charities Act was that charities make considerable effort and incur significant cost in producing

92 Property Law and Equity Reform Committee *Report on the Charitable Trusts Act 1957* (Wellington, February 1979) at 7.

93 Charities Bill 3R (12 April 2005) 625 NZPD 19,980 per Jill Pettis (Labour).

94 Charities Bill 3R and In Committee (12 April 2005) 625 NZPD 19,982 per Gordon Copeland (United Future) and 19,967 per Hon Judith Tizard, Minister of Consumer Affairs.

95 As discussed in ch 1 and Appendix A.

96 This was a phrase used by a number of submitters to the Department of Internal Affairs' review of the Charities Act. See, for example, the [submissions](#) of LEAD: “The original intention was that the purpose of an oversight regime was to ‘weed out’ ‘bad’ charities (those that engage in fraud, tax avoidance, money laundering etc.) in order to maintain confidence in the vast majority of legitimate charities, who should be allowed to go about fulfilling their charitable duties as they see fit. Beyond ‘serious wrong doing’ (as defined in Section 4 of the Act), we should be relying on the disinfectant power of ‘sunshine’ - an ‘accountability of a thousand eyes’ that comes with the disclosure of information by the registered charities and its exposure to public scrutiny. In this way all stakeholders may determine which charities they wish to support, and which they do not. We do not need more top-down, centralised control by a government agency determining which charities are and are not worthy of public support”; Methodist Church of New Zealand Te Haahi Weteriana O Aotearoa; and Network Waitangi Otautahi Inc.

97 See Inland Revenue Department [Tax and charities, a government discussion document on taxation issues relating to charities and non-profit bodies](#) June 2001 at [9.8], and the discussion below in ch 5.

this information. Rather than searching elsewhere for ill-fitting solutions to dubitable problems, imposing deadweight compliance and administration costs that only make it more difficult for charities to carry out their work, a much simpler and cost-effective way forward would be to simply use the information that is now available.

In considering what a world-leading framework of charities law might look like, it is important to resist current trends toward increasing “regulation” and/or regulation for its own sake. Fundamentally, a charities law framework is a relatively simple regime, requiring administration of a charities register that provides charities with a forum for accountability, and a means for demonstrating to anyone concerned that they are worthy of support. In other words, a world-leading framework of charities law is about *accountability*, not regulation.⁹⁸

Framing the duty

The question then becomes *how* a charities law framework focused on accountability rather than regulation might restore a focus on purpose.

Importantly, those involved with charities already have legal duties to comply with their constituting document and to act in the best interests of the charity⁹⁹ (otherwise known as the fiduciary duties of obedience and loyalty respectively).¹⁰⁰

Despite these clear legal duties, we are regularly approached in practice by people concerned that someone involved with a charity is not complying with the charity’s constituting document (often in relation to the sale of a much-loved building), or is otherwise breaching fiduciary duties of obedience or loyalty; in this context, we are routinely told that the person has approached Charities Services for assistance but they refused to become involved on the basis that it is “not their role”. In our experience, this approach does not promote public trust and confidence in either charities or Charities Services.

The fact that the duties of obedience and loyalty are not being enforced under the current Charities Act regime in New Zealand may perhaps be an example of equitable principles being “crowded out” of a regulatory regime. However, acting in breach of a fiduciary duty *prima facie* constitutes an “unlawful” use of the funds or resources of a charity, and therefore potentially “serious wrongdoing” as that term is currently defined in s 4 of the Charities Act (which in turn is grounds for deregistration under s 32(1)(e)).

In other words, Charities Services do already have a clear legal basis within the framework of the Charities Act by which to enforce the equitable duties of obedience and loyalty. The reasons for the current lacuna are therefore not clear.

In practice, when something goes wrong within a charity it is often because one or more people involved with the charity have lost sight of the charity’s purpose, or are otherwise acting or proposing to act in breach of the charity’s constituting document. Enforcing the fiduciary duty to comply with a charity’s constituting document is important in terms of enforcing the non-distribution constraint, and therefore protecting against non-incidental private benefit. The lack of enforcement of the fiduciary duties may therefore be a contributing factor to current difficulties in interpretation of what constitutes a disqualifying private benefit, as discussed further below.

98 It is accepted that the concept of “regulation” is very wide, and even within an accountability framework, actions such as enforcing a fiduciary duty and otherwise taking action against “serious wrongdoing” would likely fall within the concept of “regulation”. As is often the case in charities law, there is not necessarily a bright line demarcating the two concepts. However, the shorthand expression “accountability, not regulation” is intended to convey the idea that such regulation is a backstop, rather than the centrepiece of the legal framework.

99 Under Trusts Act 2019 ss 24 - 26, trustees of charitable trusts have legal duties to act in good faith to further the charitable purposes of the trust in accordance with the terms of the trust. Similarly, under Incorporated Societies Act 2022 ss 54, 56, officers of incorporated societies must act in good faith in what the officer believes to be the best interests of the society (and must not act in contravention of the society’s constitution). These incorporated society provisions are taken from from Companies Act 1993 ss 131, 134 which require the director of a company to act in good faith in what the director believes to be the best interests of the company (and must not act in contravention of the company’s constitution).

100 See M von Dadelszen *Governance propriety for not-for-profits* NZLawyer, 19 October 2012 at 13.

Enforcing the fiduciary duty to comply with a charity's constituting document is also important in terms of buttressing the duty of loyalty, as a charity's charitable purposes must be set out in its constituting document. Enforcing the duty of loyalty to purpose is important as purpose is charities' point of difference, their protection against morphing into pale imitations of either government or business: fidelity to a charity's stated purposes is critical in protecting against mission drift and building the trust that enables charities to provide their unique value to society. In other words, a legal framework that supports and encourages fidelity to purpose would inherently promote public trust and confidence in charities.

Articulating the duty

A focus on purpose could be restored, and the charities law framework considerably simplified, clarified, and strengthened, by articulating in the legislation one simple fiduciary duty, applicable to all registered charities irrespective of their underlying legal structure,¹⁰¹ and to all involved in governing them, to act in good faith to further the entity's stated charitable purposes in accordance with its rules. In a New Zealand context, the duty might be formulated as follows:¹⁰²

Every registered charity, and every responsible person¹⁰³ of a registered charity, has a duty to act in good faith to further the stated charitable purposes of the entity in accordance with its rules.

It can be seen that such a duty focuses on *purposes* rather than the best interests of the *entity*. There is considerable support for the proposition that acting in the "best interests" of an entity that exists to pursue purposes is synonymous with acting in the best interests of, or to further, those purposes.¹⁰⁴ The distinction is important as the purposes of a charity and the best interests of the charity might conflict. For example, where the purposes of a charity have been satisfied, it may no longer be necessary or useful for the charity to continue to exist. Acting in the best interests of the *entity* would encourage continuation of the charity despite the fact that the purpose has been satisfied; however, fidelity to *purpose* would make it clear that purpose is the overarching paradigm, and the charity should close, even if closure would not necessarily be in the best interests of the charity as an entity in itself.

The underlying concept is that the "interests" of a purpose-based entity are in fact its purposes.

In addition, our research indicates that "purposes" are not usefully thought of as having "interests" themselves: "interests" is a concept that relates to wellbeing, and therefore does not translate well to purposes. On that basis, and following the model of s 26(b) of the Trusts Act 2019, the duty has been articulated as one to *further* the purpose rather than to act in the best interests of the purpose (although this formulation would not necessarily preclude use of the following shorthand expression in practice: "all decisions must be made in the best interests of the charity's purposes").

101 A common overarching duty that applies to all registered charities irrespective of their underlying legal structure is important as the underlying fiduciary duty of loyalty in the law applicable to different types of legal structures may be expressed legally in different ways with potentially different outcomes.

102 This formulation has been developed for the New Zealand context following the international consultation workshops on purpose-based governance held in June and July 2021 in conjunction with Dr Ian Murray and Dr Rosemary Langford. It draws heavily from Trusts Act 2019 ss 24, 26 as they apply to charitable trusts.

103 As discussed further below in ch 8, we recommend that the term "officer" in the Charities Act is replaced with the term "responsible person": an "officer" of a registered charity in practice may not be an "officer" as that term is defined in the Charities Act, and the inconsistency is causing confusion.

104 See, for example, Companies Act 2006 (UK) s 172(2) which provides that a director of a company that has purposes other than the benefit of its members must act in the way the director considers, in good faith, would be most likely to achieve those purposes. See also the decision of the United Kingdom Supreme Court in *Lehtimäki & Ors v Cooper* [2021] 1 All ER 809 (UKSC) at [50], [90], [200] where the fiduciary duty of single-minded loyalty in a charitable company was held to be owed not to the charity but to furthering the purposes of the charity. See also R Teele Langford *Purpose-based governance: a new paradigm* UNSW LJ 954; and I Murray and R Langford "The Best Interests Duty and Corporate Charities - The Pursuit of Purpose" (2021) 15 *Journal of Equity* 92.

Our research also indicates, on balance, that charities should not be held to a standard of what would “best” further their charitable purposes, as this would risk substitution of their decision with a decision that another decision-maker, not necessarily apprised of all relevant matters, thinks would further the purpose *better*. There are likely to be many ways of furthering a charity’s purpose. The standard is one of good faith: if the decision-maker considers in good faith that a particular decision or activity would further the stated charitable purposes of the entity in accordance with its rules, the minimum threshold is met, and the onus would fall to those who allege otherwise, as discussed further below.

The updated draft Bill included in chapter 9 of this report incorporates the above duty for consultation.

Recommendation 2.1:

That the New Zealand charities law framework is reorientated to ensure a focus on charities’ purposes.

To this end, that the charities legislation articulates one simple overarching fiduciary duty, applicable to all registered charities irrespective of underlying legal structure, and to all involved in governing them, to act in good faith to further the entity’s stated charitable purposes in accordance with its rules.

Application to activities

It is important to note that a refocus on purpose does not ignore charities’ activities; it asks a different question. Rather than trying to regulate charities’ legitimate activities by asking “how much” of a particular activity was acceptable, or whether an activity meets complicated, subjective rules that are costly to comply with and administer, the question with respect to any activity (whether it be advocacy, running a business, accumulating funds, or whatever it might be) would simply be whether the charity or its responsible people can demonstrate that the decision to undertake the activity was made in good faith in furtherance of the charity’s stated charitable purposes (and otherwise in accordance with the charity’s rules and the general law).

If this minimum threshold can be satisfied, the onus would then fall to the agency responsible for administering the Charities Act, on an exceptions basis, to demonstrate that the decision was or could *not* have been so made, if the agency wanted to take further action.¹⁰⁵ The idea is that the legal framework would set out clear consequences for breach of the fiduciary duty, with the ultimate sanction being deregistration for serious wrongdoing.

In other words, the Charities Act monitoring function would have two clear goals, namely using the comprehensive information now made available by means of the charities register to ensure that charities and those involved with them are indeed:

- i. acting in furtherance of their stated charitable purposes in accordance with their rules, and are not engaged in “mission drift” (a clear aim articulated in reports that preceded the Charities Act); and
- ii. not otherwise engaged in serious wrongdoing.

Clarifying the mandate in this way would enable significant administration, compliance and resource cost savings to be made, and pave the way for an enabling, “light-touch”, cost-effective regulatory framework that would encourage charities to thrive without compromising necessary safeguards.

¹⁰⁵ This approach is consistent with conceptualisation of the fiduciary duty of loyalty as a *subjective* duty: as noted by the United Kingdom Supreme Court in *Lehtimäki & Ors v Cooper* [2021] 1 All ER 809 (UKSC) at [100], it is for the decision-maker to reach a decision in good faith, and provided they do not do so improperly or unreasonably, the court will not seek to intervene or hold them liable if their view turns out to have been wrong in fact.

Of course, such an approach would rely on strong governance:¹⁰⁶ in this regard, we strongly support the considerable work that is already underway in New Zealand on supporting charities' governance, following launch of a National Community Governance Strategy in August 2020.¹⁰⁷ We also strongly support funding that allows charities to invest in necessary infrastructure, such as staff training.

As discussed further below in chapter 6 (*Appeals*), it is also critical to reinstate charities' access to a trier of fact, to provide charities with a fair opportunity to demonstrate that their purposes do indeed operate for the public benefit as a question of fact.

Beyond these broad general principles, if there is any particular type of activity that charities should be prohibited from engaging in, purely by virtue of their status as charities, such activities need to be identified in advance and articulated in legislation.¹⁰⁸ As the Special Senate Committee on the Charitable Sector in Canada noted, this needs to be done "surgically",¹⁰⁹ in the interests of ensuring certainty and predictability in the law.

Only one particular activity immediately presents itself as requiring proscription in a charities law context: as discussed below in chapter 4 (*Advocacy*), there is remarkable consensus around the common law world that charities can be "political", but they cannot be partisan, in the sense of promoting or opposing a particular political party, elected official, or candidate for political office.¹¹⁰

Beyond partisan political activity, issues relating to charities' activities can be more than adequately dealt with by means of enforcing the above fiduciary duty, and otherwise by means of the general law, using the information now available by means of the charities register. Activities that reach the level of "serious wrongdoing" should constitute grounds for deregistration, but there is no evidential basis for the creation of a separate police force just for charities.

We note in passing that a focus on purpose would also obviate the need to make arbitrary distinctions differentiating charities based on the particular activities they might undertake. For example, to separate charities into classes of "funders" or "doers" is to create a false dichotomy: all charities must by definition further charitable purposes, whether by funding, doing, or any permutation or combination of the two.¹¹¹ Restoring a focus on purpose obviates such unnecessary complexity, while also respecting and enabling the diversity and independence of charities.

106 Australian Productivity Commission *Contribution of the Not-for-Profit Sector* 11 February 2010 at 272, 273 (referring to the submission of the Australian Scholarship Foundation): governance and leadership capacity are the critical difference in creating effective charities.

107 See <communitygovernance.org.nz/>. A series of co-design workshops are taking place over March – May 2022 to design Aotearoa's first *Good Governance Code* for community organisations.

108 Recommendation 33 of the Special Senate Committee on the Charitable Sector was that the government of Canada consider "which activities registered charities should not be allowed to carry out and proscribe them through precisely defined statutory prohibitions" (Report of the Special Senate Committee on the Charitable Sector *Catalyst for Change: A Roadmap to a Stronger Charitable Sector* June 2019 recommendation 33).

109 See A Parachin "Regulating Charitable Activities through the Requirement for Charitable Purposes: Square Peg Meets Round Hole" in J Picton and J Sigafoos (eds) *Debates in Charity Law* (Hart, 2020) 129 at 152 - 153.

110 Noting that s 11(b) of the Charities Act 2013 (Cth) defines a "disqualifying purpose" to include the purpose of promoting or opposing a political party or a candidate for political office. In other words, in Australia, the proscription occurs at the level of purpose, rather than activity.

111 As noted in Canada in Report of the Special Senate Committee on the Charitable Sector *Catalyst for change: A Roadmap to a Stronger Charitable Sector* June 2019 at 83: "Witnesses informed the committee that the distinction between charities and foundations was originally developed to distinguish between the 'doers' and the 'funders'. However, according to Professor Parachin, the provisions create a false dichotomy: 'We have two fundamentals, charitable foundations, which need to be established and operated for charitable purposes; and charitable organizations, which have to devote their resources to charitable activities. That sounds like two distinct things, but given the way that the common law characterizes activities with reference to their purposes, it actually turns out there are two distinct ways of saying the same thing'."

Te Ao Māori

As noted by a number of submitters,¹¹² Te Tiriti o Waitangi the Treaty of Waitangi should be integral to the charities law framework of Aotearoa New Zealand. To this end, we recommend the opening provisions of the Charities Act include a separate provision along the following lines to make this clear:

All persons performing functions or exercising powers under this Act must do so in a manner that recognises and respects the principles of Te Tiriti o Waitangi (the Treaty of Waitangi).

Tikanga principles must also be recognised, as discussed further below in chapters 7 (*Agency Structure*) and 8 (*Commentary to the draft Bill*).

Importantly, a focus on purpose would allow mana Motuhake, tino rangatiratanga, or self-determination for all charities, Māori or non-Māori, allowing them to realise their potential, empower local communities, and work towards creating a healthy, resilient, inclusive, thriving Aotearoa for all, without undue government interference. In other words, to “let 1000 flowers bloom”, in its true sense,¹¹³ potentially manifesting the “ambicultural” approach put forward by the late Dr Manuka Henare.¹¹⁴

Recommendation 2.2

That New Zealand charities legislation specifically requires all persons performing functions or exercising powers under it to do so in a manner that recognises and respects the principles of Te Tiriti o Waitangi.

112 See, for example, the [submissions](#) of Community Waikato; Creative New Zealand (endorsed by a further 17 organisations); Hawke’s Bay Community Law Centre; Literacy Aotearoa Inc; Merv Ransom; Methodist Alliance; Methodist Church of New Zealand Te Haahi Weteriana O Aotearoa; Organisation A; Organisation C; Parihimanihi Marae; Parry Field Lawyers; Public Trust; Rawene and Districts Community and Development Inc (Lorene Royal); Seumas Fantham; Socialink Tauranga Moana; Te Hunga Rōia Māori o Aotearoa, the Māori Law Society; Te Pūtahitanga o Te Waipounamu; Te Rūnanga o Ngāi Tahu; Te Whakakitenga o Waikato Incorporated, on behalf of the Waikato-Tainui iwi, endorsed by the Waikato Raupatu Lands Trust and Group and Waikato-Tainui marae; The New Zealand Law Society; The Salvation Army Group; Todd Foundation; Volunteering New Zealand; and Whaiora Whanui Trust.

113 Rather than in the sense used by Mao Zedong:

www.thegreatcoursesdaily.com/maos-twisted-version-of-freedom-of-expression/. Interview with Sarah Vibert, Interim Chief Executive, National Council of Voluntary Organisations (21 January 2021).

114 Dr Mānuka Henare “Reconsidering the Māori economy as an Economy of Mana”, keynote presentation at the Philanthropy Summit, 16 April 2015: www.youtube.com/watch?v=5plyfMtA8nk.

Philosophy of regulation – other principles

Our approach to drafting the updated draft Bill included in chapter 9 of this report also draws on the following principles:

- i. simplicity;
- ii. independence; and
- iii. purpose.

Simplicity

While the influence of neoliberalism may have encouraged some charities to corporatise, the vast bulk of charities in New Zealand are small. Small charities are important, especially where they serve a local community or seek to address a specific need: indeed, “smaller organisations may well be better placed to meet certain social needs than larger organisations”.¹¹⁵

Most small charities are run by volunteers, often in their spare time. While the charitable sector in Aotearoa New Zealand employs approximately 5% of the country’s workforce, it relies heavily on 217,000 volunteers who contribute their time and effort willingly for community well-being.¹¹⁶ The importance of volunteers is illustrated, for example, by the submission of STAGE Inc:¹¹⁷

... as an organisation, we operate entirely by voluntary effort. We are a community art gallery whose doors are open 6 days per week; we change our exhibitions monthly; we are registered for GST and we have a turnover of less than \$50k pa; we meet our legislative commitments. On average, our people contribute ~ 4000 hours pa of voluntary effort, which is done willingly because we are passionate in the organisation’s continued presence in the community ... In NZ, we rely heavily on volunteers to operate so many activities and by making it harder (or less simple), it will simply cause organisations operated by volunteers to downsize or close and as a result, our society will no longer benefit. Our request is simply to keep it simple ... Focus on the organisations who are not meeting compliance requirements, who are operating fraudulently and who are acting without transparency.

A clear theme of submissions relates to under-resourcing in the charitable sector, with charities routinely striving to do more with less. In principle, the charities law framework should encourage charities’ limited resources to be focused on furthering their charitable purposes directly, and not unduly diverted into legal and related advice by requiring compliance with complex, ill-suited and ever-changing regulations. Importantly, it should not “scare” volunteers and their accompanying goodwill away.¹¹⁸

In designing the legal framework, the emphasis should be on simplicity rather than complexity wherever possible.

Importantly, lack of resourcing should not be equated with lack of capability: the charitable sector has almost \$70 billion of assets under management and multiple stakeholders all managed under high levels of transparency and accountability. The need

115 Australian Productivity Commission [Contribution of the Not-for-Profit Sector](#) 11 February 2010 at 229.

116 Figures taken from Charities Services Ngā Ratonga Kaupapa Atawhai [2020/2021 Annual Review](#) at 19.

117 [Submission](#) of STAGE Inc at 1.

118 [Submissions](#) of YWCA Christchurch at 1 - 2: “[w]e have found the reporting requirements onerous but manageable ... We are ... conscious that our charitable work is not wholly captured by reporting facts and figures. The number of nights people stay in our accommodation does not tell our whole story. We are not opposed to governance requirements. A responsible and well-run charitable sector is beneficial for all. Our major concern is with clarity and consistency. We ask that any governance requirements be drafted consistently with those imposed in the upcoming Trusts Bill and incorporated societies law reform. We want to be transparent. We want to be honest about how we run our organisation. We have nothing to hide. However, we are concerned that any additional onerousness or confusion in reporting requirements will take our focus away from the work we do. It is important that requirements are as clear and straightforward as possible. We are fortunate to have both a lawyer and an accountant on our Board who can parse the requirements, but that has not always been the case, nor might it be in future”: Richard Alsop at 2; Keith Swift at 1; and Youth Search and Rescue Trust NZ at 6.

for regulatory simplicity relates to optimising limited charitable resources, and is also a clear theme from other jurisdictions.¹¹⁹

Another clear theme of submissions is that the current approach in New Zealand inhibits innovation.¹²⁰ A key benefit of reorienting the legal framework to focus on purpose, and on accountability rather than regulation, is that it creates a much simpler framework for all concerned, while also providing charities with the flexibility they need to innovate and adapt in response to rapid changes.¹²¹

Independence

As discussed above, the independence of charities is critical: both government and charities themselves must guard against allowing charities to inadvertently fall under the influence of the State, or the sector will lose “that which makes it distinctive and valuable to begin with”.¹²²

It follows that the independence of the agency responsible for administering charities’ legislation is similarly critical and must be similarly protected. It is essential that the scope of charity is determined independently of the government of the day:¹²³

The framework of institutional security and advantages, together with responsibilities, which charities enjoy should be available to public-spirited citizens and groups on their initiative and not be confined or constrained by the conception of the public interest to which the government of the day seeks to give effect to its policies.

Purpose of the legislation

Decision-making under the Charities Act would also be assisted by the stated purposes of the legislation clearly articulating its objective, as discussed further below in chapter 8.

The draft Bill included in chapter 9 of this report is intended to implement the above philosophy and principles. The remaining chapters expand on these principles, in the hope of contributing to an informed discussion as to what a world-leading framework of charities law might look like for Aotearoa New Zealand.

119 For example, see Australian Productivity Commission [Contribution of the Not-for-Profit Sector](#) 11 February 2010 at 163: “[t]he system is complex, inequitable and costly to administer”. In Canada, see [Report of the Consultation Panel on the Political Activities of Charities](#) 31 March 2017 at [E(iv)]: “[l]egislation and policy should strive for simplicity and clarity”; Advisory Committee on the Charitable Sector [Report #3 - Towards a federal regulatory environment that enables and strengthens the charitable sector](#) July 2021: “[a] third theme [from consultation] was the lack of expertise and resources within the charitable sector to understand and interpret CRA guidance and policy decisions with certainty and confidence”; Ontario Law Reform Commission [Report on the Law of Charities](#) (Toronto, 1996) at 5, 84, 165 (referring to the need for regulatory simplicity due to limited economic and human capacity to respond to a sophisticated or complex regulatory regime).

120 See, for example, the [submissions](#) of The Ākina Foundation at 6: “... what is meant by private gain is not well understood leading to overly conservative approaches by advisors as well as having a chilling effect on officers of charities ... organisations want to diversify and innovate but do not for fear of losing their charitable status in the process”; Te Pūtahitanga o Te Waipounamu at 11: “[c]harities are often uncertain as to whether their activity would be considered to fit within the charitable purpose and as a result, decide to not carry out activities that would be of benefit to the public”; ComVoices at 1: “[w]e feel that the Act as currently interpreted and administered is inhibiting our ability to maximise benefits to society”; and The Methodist Church of New Zealand Te Haahi Weteriana O Aotearoa at 5: “[t]he charitable sector can help with almost every aspect of what the Government wants to achieve; housing, education, health, poverty reduction, closing the wealth gap, protecting the environment, wellbeing, etc. Parliament will be well aware of the Church’s involvement in helping the less privileged in society since the Church was founded in New Zealand. It continues to undertake God’s work to help support local communities which is a central goal to the Government’s duty to its citizens. However, currently, the framework of charity law, and the way it is being administered, is ‘getting in the way’ of some charities’ ability to do that and therefore to meet the needs in local communities”.

121 See the [submission](#) of Chartered Accountants Australia and New Zealand at 1, 2.

122 Lord Hodgson of Astley Abbotts [Trusted and Independent: Giving charity back to charities – Review of the Charities Act](#) July 2012 at [3.15].

123 R Fries, Chief Commissioner of the Charity Commission for England and Wales from 1992 - 1999 [The status of the Charity Commission under the 2006 Act](#) unpublished paper, March 2012 at 1.



Chapter 3 – The Definition of Charitable Purpose

“... unnecessary burdens on [charities] act like barnacles on a boat, causing a drag when all should be plain sailing”

Lord Hodgson of Astley Abbot, who chaired the 2012 review of the Charities Act in England and Wales¹

The definition of charitable purpose is the gateway to charitable registration, and as such is critical to a charities law framework. Although the definition of charitable purpose was specifically excluded from the scope of the Department of Internal Affairs’ (“DIA’s”) review of the Charities Act,² the need to review the definition was a clear theme of submissions. This chapter looks at how the definition of charitable purpose has been interpreted in New Zealand before and after the Charities Act was passed in 2005, and recommends reform to ensure the definition is able to keep pace with changes in New Zealand society.

Narrow or wide interpretation

As discussed above in chapter 2, there are two common but differing conceptions of charitable purpose:³

- i. one is narrow, focused on “assuaging need”, or the relief of the distress or suffering of others: “the relief of any form of necessity, destitution or helplessness which excites ... compassion or sympathy ... and so appeals to ... benevolence for relief”;⁴
- ii. the other is wider, focused on human flourishing, including in areas such as the sciences, philosophy, the arts, sports, education and religion.⁵

Dictionary definitions of “charity” focus on the former, a traditional eleemosynary focus on “handouts to the poor”, which is often described as the “popular” conception of charity.⁶

However, since at least 1891 the legal concept of charity has been acknowledged as much wider. As noted by Lord Macnaghten in *Commissioners for Special Purposes of the Income Tax v Pemsel* (“**Pemsel**”) at 583:⁷

... How far then, it may be asked, does the popular meaning of the word “charity” correspond with its legal meaning? “Charity” in its legal sense comprises four principal divisions: trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any

1 Law Commission (UK) *Charity Law: Technical Issues in Charity Law*:

<www.lawcom.gov.uk/project/charity-law-technical-issues-in-charity-law/>.

2 Department of Internal Affairs *Terms of reference to review the Charities Act 2005* May 2018 at 2, 3.

3 See National Council of Voluntary Organisations *For the public benefit? A consultation document on charity law reform* January 2001 at [3.6.1]; Ontario Law Reform Commission *Report on the Law of Charities* (Toronto, 1996) at 228, 145 - 147; and Hilary Pearson “The deep importance of language in philanthropy” 5 October 2021: <hpearson.ca/the-deep-importance-of-language-in-philanthropy/>.

4 *Commissioners for Special Purposes of the Income Tax v Pemsel* [1891] AC 531 (HL) at 572.

5 Ontario Law Reform Commission *Report on the Law of Charities* (Toronto, 1996) at 146, 188, recognising that economic deprivation in and of itself is one of the main impediments to human flourishing.

6 *Commissioners for Special Purposes of the Income Tax v Pemsel* [1891] AC 531 (HL) at 572. See also *Re Greenpeace of New Zealand Inc* [2015] 1 NZLR 169 (SC) at [23]; *Re Queenstown Lakes Community Housing Trust* [2011] 3 NZLR 502 (HC) at [32]: “The first head referred to in *Pemsel*’s case [the relief of poverty] is the closest of the four heads to the ordinary, non-technical meaning of charity”.

7 *Commissioners for Special Purposes of the Income Tax v Pemsel* [1891] AC 531 (HL) at 583. See also *Re Greenpeace of New Zealand Inc* [2015] 1 NZLR 169 (SC) at [22] - [23]; *Re Queenstown Lakes Community Housing Trust* [2011] 3 NZLR 502 (HC) at [28] - [29], [38]; *Liberty Trust v Charities Commission* [2011] 3 NZLR 68 (HC) at [52]; *Travis Trust v Charities Commission* (2009) 24 NZTC 23,273 (HC) at [18] - [29]; *Family First New Zealand v Attorney-General* [2020] NZCA 366 at [63], [67]; *The Plumbers, Gasfitters and Drainlayers Board v Charities Registration Board* [2013] NZHC 1986 at [19]; and Ontario Law Reform Commission *Report on the Law of Charities* (Toronto, 1996) at 172.

of the preceding heads. The trusts last referred to are not the less charitable in the eye of the law, because incidentally they benefit the rich as well as the poor, as indeed, every charity that deserves the name must do either directly or indirectly ...

The four principal divisions referred to in *Pemsel* are often described as the four “heads” of charity: they find statutory expression in New Zealand in the definition of charitable purpose that has long been set out in income tax legislation,⁸ and was then imported into s 5(1) of the Charities Act.

As discussed above in chapter 2, whether the definition of charitable purpose is to be interpreted narrowly or widely acutely reflects the underlying clash of paradigms, and has important implications for the design of a charities law framework.

Since the Charities Act was passed in 2005 (and even more so since the Charities Commission was disestablished in 2012), the definition of charitable purpose has been interpreted very narrowly in New Zealand; this phenomenon raises an important question as to whether, and if so, how, such narrow interpretations can be reconciled with pre-existing case law that interpreted the definition very widely.

Answering this question requires an understanding of seminal pre-existing case law, such as the trilogy of *Latimer* cases: *Latimer v Commissioner of Inland Revenue* [2002] 1 NZLR 535 (HC) (“**Latimer HC**”); *Latimer v Commissioner of Inland Revenue* [2002] 3 NZLR 195 (CA) (“**Latimer CA**”) and *Latimer v Commissioner of Inland Revenue* [2004] 3 NZLR 157 (PC) (“**Latimer PC**”). The *Latimer* cases have their genesis in the unique Treaty-based history of Aotearoa New Zealand: the complex underlying factual matrix of the cases is not fully disclosed in the decisions themselves, which may perhaps have contributed to the cases being overlooked. An understanding of the principles of Te Tiriti o Waitangi – the Treaty of Waitangi, as well as the respective roles of the Waitangi Tribunal and the New Zealand Māori Council, is necessary to an understanding of the cases and their significance: to that end, some of the historical background to the litigation is set out for reference in Appendix B (*Historical background to the Latimer litigation*). Against that background, given the importance of the *Latimer* cases to New Zealand charities law, and in the interests of contributing to an informed discussion of how the definition of charitable purpose should be interpreted in New Zealand, the specific factual matrix of the *Latimer* cases itself is discussed in some detail next.

The *Latimer* litigation

The question in the *Latimer* litigation was whether the income of the Crown Forestry Rental Trust Ngā Kaitiaki Rēti Ngahere Karauna (“**the Trust**”) was exempt from tax.

The Crown Forestry Rental Trust

The Trust was established by deed of trust dated 30 April 1990 (“**the Trust Deed**”). Its settlors were the Ministers of Finance and State-Owned Enterprises, acting pursuant to s 34 of the Crown Forest Assets Act 1989.

The Trust Deed provides for the Trust to have six trustees: three appointed by the Crown, and three appointed on behalf of Māori by the New Zealand Māori Council and the Federation of Māori Authorities. One of the trustees was Sir Graham Stanley Latimer, then a farmer of Paparoa, and Chair of Te Kaunihera Māori o Aotearoa (the New Zealand Māori Council) (hence the name of the *Latimer* trilogy of cases).

As discussed in more detail in Appendix B, the Trust was a negotiated solution between the Crown and Māori to enable the Crown to sell its existing tree crop, growing on Crown forestry land, to third party commercial purchasers, without prejudicing the Crown’s ability to return the underlying land to Māori in accordance with a Waitangi Tribunal recommendation.

8 The definition is currently set out in Income Tax Act 2007 s YA 1, the predecessors of which include Income Tax Act 1976 s 2: “charitable purpose includes every charitable purpose, whether it relates to the relief of poverty, the advancement of education or religion, or any other matter beneficial to the community ...”.

Briefly, the general structure of the Trust is that the purchasers of the trees pay **licence fees** to the Crown for the use of the land, which fees are income in the hands of the Crown. The Crown then promptly passes these funds over to the trustees of the Trust, in whose hands the licence fees (also referred to as “rental proceeds”) are deemed to be **capital** of the Trust.

This capital is held by the Trust until the Waitangi Tribunal recommends whether the Crown or Māori should be confirmed as owner of the land on which the trees were growing. The Trust has no power to deal with the capital of the Trust in any other way. In other words, the essential role of the Trust in relation to its capital is that of a stakeholder awaiting instruction from an outside party (the Waitangi Tribunal) as to the action it must take in relation to that capital. This was referred to as the “**stakeholder purpose**” of the Trust.

In the meantime, the Trust invests the capital, and the interest income from the investments is made available, at the trustees’ discretion, to assist Māori in the preparation, presentation and negotiation of claims to the Waitangi Tribunal involving licensed land. This was referred to as the “**assistance purpose**” of the Trust.

When the tribunal makes a recommendation determining Treaty claims in respect of a particular piece of licensed land, the ownership of the land by either the Crown or Māori claimants is confirmed. In the case of a successful claim, the land is transferred to Māori ownership, together with an amount equal to all past rental payments for the land. If the claim is not successful, the land and accumulated rental proceeds are paid to the Crown.

Once the confirmed beneficiaries of all licensed land have been identified, and all capital of the Trust paid to those confirmed beneficiaries, the Trust Deed provides for the Trust to be wound up. Any surplus income, after payment of expenses or to fund claimants, remaining on winding up is to be paid to the Crown, free from the trust. This was referred to as the “**holdover to the Crown**”.

The income of the Trust was substantial: its gross annual investment income for the period at issue in the case (1994-1996) was in the order of NZ\$18 million per annum (equivalent to approximately \$34 million per annum in 2022 dollars).⁹

However, as was common at the time, tax had unfortunately not been considered in coming to the overall arrangement. A few years later, the Inland Revenue Department (“**IRD**”) investigated the Trust, and concluded that its income was liable to tax.

Income tax exemption

In response, the Trust argued that its purposes were charitable, and that its income was therefore exempt from tax under s 61(25) of the Income Tax Act 1976 (a predecessor to s CW 41 of the Income Tax Act 2007). At the time, s 61(25) was in the following terms (emphasis added):

61. Incomes wholly exempt from tax

The following incomes shall be exempt from tax:

...

(25) Income ... *derived by trustees in trust for charitable purposes* or derived by any *society or institution established exclusively for charitable purposes* and not carried on for the private pecuniary profit of any individual:

As can be seen, s 61(25) makes a distinction between trusts on the one hand and societies and institutions on the other, a feature of the income tax legislation since 1916: for trusts, the drafter (Sir John Salmond) had chosen to focus on the purposes for which the income was derived, rather than the purposes for which the trust was established, a significant distinction which has been maintained in the legislation to the present day.¹⁰

The Court of Appeal considered that, in making this distinction, the legislature may have been recognising that trusts are very different from societies, both in their structures and their purposes: for example, separation of interests (choses) in capital and income is a

⁹ CPI Inflation Calculator: www.in2013dollars.com/us/inflation/1994?amount=18000000.

¹⁰ See Income Tax Act 2007 s CW 41(1)(a), (b), Charities Act 2005 s 13(1)(a), (b), and *Latimer v Commissioner of Inland Revenue* [2002] 3 NZLR 195 (CA) at [24].

feature of the law of trusts.¹¹ The Privy Council considered the difference in wording could be explained by the fact that societies may be established for purposes which are only partly charitable, and they normally hold their property beneficially and not in trust.¹²

The difference in wording became significant in relation to the stakeholder purpose, as discussed further below.

Ascertaining purpose

In order to determine whether the income of the Trust was derived “in trust for charitable purposes”, and therefore exempt from income tax, it was first necessary to ascertain what the Trust’s purposes *are*. The question of how to ascertain a charity’s purposes has been a point of considerable contention in decisions made under the Charities Act.¹³

In the *Latimer* cases, the courts were clear that ascertaining purpose was a matter of construction of the constituting document; in undertaking that exercise, a question arose as to whether, and if so how far, one could look *beyond* the terms of the Trust Deed to extrinsic material.

The Trust submitted that, while the Trust Deed was the primary reference point for ascertaining purpose, it would also be appropriate to refer to the Crown Forest Assets Act 1989, under which the Trust Deed was entered into.¹⁴ The Commissioner of Inland Revenue disagreed, arguing that the terms of the Trust Deed were clear, and there was no need to look further, or to inquire into the Trust’s activities, in order to ascertain its purpose.¹⁵

The Court of Appeal considered the important factor to be the terms of the Trust Deed, as opposed to the parties’ expectations,¹⁶ but that, *in this case*, it was not only permissible but required to consider the full legislative background, including the statutes and documents referred to in the Trust Deed (discussed further in Appendix B): otherwise, the Trust Deed itself and its purposes “cannot ... be properly understood”.¹⁷

The Privy Council considered the issue ultimately turned on the construction of the relevant statutory provision and of the Trust Deed, noting that:¹⁸

Whether or not the purposes of the trust are charitable depends on the *legal effect of the language the settlor has used*. The question is not: what was the settlor’s purpose in establishing the trust? But: *what are the purposes for which trust money may be applied?*

Having undertaken this process of construction, the respective courts reached different conclusions, both as to the purposes of the Trust and as to whether those purposes were charitable. As can be seen from table 3.1, of the nine judicial minds that considered the issue, five found that the Trust’s income was derived in trust for charitable purposes (and therefore exempt), but four did not, for two very different reasons:

11 *Latimer v Commissioner of Inland Revenue* [2002] 3 NZLR 195 (CA) at [22].

12 *Latimer v Commissioner of Inland Revenue* [2004] 3 NZLR 157 (PC) at [30].

13 See, for example, the discussion in S Barker “Unresolved issues in New Zealand charities law” [2021] NZLJ 49.

14 *Latimer v Commissioner of Inland Revenue* [2002] 1 NZLR 535 (HC) at [31].

15 *Latimer v Commissioner of Inland Revenue* [2002] 3 NZLR 195 (CA) at [33].

16 *Latimer v Commissioner of Inland Revenue* [2004] 3 NZLR 157 (PC) at [27].

17 *Latimer v Commissioner of Inland Revenue* [2002] 3 NZLR 195 (CA) at [36].

18 *Latimer v Commissioner of Inland Revenue* [2004] 3 NZLR 157 (PC) at [1], [29] (emphasis added).

Table 3.1 – summary of the <i>Latimer</i> decisions:			
	High Court (O'Regan J)	Court of Appeal (Richardson P, Gault and Blanchard JJ)	Privy Council (Lord Nicholls of Birkenhead, Lord Millett, Lord Walker of Gestingthorpe, Sir Martin Nourse, Sir Kenneth Keith)
Stakeholder purpose	Separate purpose – not charitable, not ancillary	Not relevant – income tax exemption relates to income, not capital	Not relevant – income tax exemption relates to income, not capital
Assistance purpose	Charitable	Charitable	This point not in issue on appeal
Holdover to the Crown	Irrelevant	Non-charitable purpose	Quistclose trust
Result:	Not exempt	Not exempt	Exempt

As the *Latimer* cases demonstrate, the question of what constitutes a charitable purpose may strike different minds differently. It may also strike the same mind differently at different times.

In the result (as indicated by the bolding in rows 3 and 5 of table 3.1), the decisions turned on the stakeholder purpose and the holdover to the Crown:

- i. **Stakeholder purpose:** the High Court considered the stakeholder purpose was not charitable as, if the Crown was confirmed as the beneficiary of any of the licensed lands, the purpose would involve payment of funds to the Crown (and therefore could not be limited to charitable purposes). While this finding determined the case at the High Court level, both the Court of Appeal and the Privy Council considered the stakeholder purpose to be irrelevant: the stakeholder purpose related to the *capital* of the Trust whereas, as discussed above, the income tax exemption for trusts relates to *income*, not capital. The Privy Council agreed with the Court of Appeal that it was sufficient that the Trust's *income* was applicable for exclusively charitable purposes; whether the Trust was *established* for exclusively charitable purposes was irrelevant.
- ii. **Holdover to the Crown:** while the High Court considered the holdover to the Crown to be irrelevant, the Court of Appeal found it to be a purpose in itself, and one that was not charitable, as any surplus funds on winding up were to be paid to the Crown. While this finding determined the case at the Court of Appeal level, the Privy Council overturned the Court of Appeal on this point, finding that the holdover to the Crown was a "Quistclose Trust":¹⁹

... the critical feature of the present case is that the ultimate trust is in favour of the Crown. Their Lordships cannot accept the Trustees' contention that the Crown is itself a charity, or that it holds all its funds to be applied exclusively for charitable purposes. If either were true there would be no need to exempt the Crown from income tax. But like other public authorities (which have their own exemption) its money is applicable and is applied for numerous non-charitable purposes. It is true that these are public purposes rather than private purposes; but this means only that the Government of the day considers it expedient to make public funds available for such purposes ... *All charitable purposes (with well-known exceptions) are public purposes; but not all public purposes are charitable purposes ...*

The trust deed is an elaborate mechanism which serves much the same purpose as a Quistclose trust: see *Barclays Bank Ltd v Quistclose Investments Ltd* [1970] AC 567 ... *It allows the Crown to make its funds available for a specified purpose and, insofar*

¹⁹ *Latimer v Commissioner of Inland Revenue* [2004] 3 NZLR 157 (PC) at [37] - [43] (emphasis added).

as not required for that purpose, to remain throughout its own property: see General Communications Ltd v Development Finance Corporation of New Zealand Ltd [1990] 3 NZLR 406. The only difference is that in the present case a resulting trust in favour of the settlor is express; whereas it is more usually implied.

What the Crown settled in the present case, ie the forest rentals, was tax-exempt income. This constitutes the capital of the Trust. Insofar as the forest rentals are not otherwise applicable, they remain beneficially the property of the Crown. The income of the Trust consists of the income derived by the Trustees by investing the forest rentals. Insofar as such income is needed for the purpose of assisting [Māori] to prosecute their claims, it is to be devoted to charitable purposes and so exempt from tax; and insofar as it is not applied for such purposes, it remains beneficially the tax-exempt income of the Crown. In their Lordships' opinion it never comes within the scope of the tax at all ...

To succeed in his claim to tax, the Commissioner must show that the income in question is not the income of the Crown, which is exempt, but the income of some other party not being a charity. He cannot do this.

As a result of the Privy Council's finding that the holdover to the Crown did not preclude the Trust's income from being derived in trust for charitable purposes, the income of the Crown Forestry Rental Trust was ultimately held, after a process that had lasted many years, to be exempt from income tax.

The decisions in the *Latimer* cases turned on the stakeholder purpose and the holdover to the Crown, which are very fact-specific and quite unique to the particular circumstances of the Trust.

The core significance of the *Latimer* cases in New Zealand charities law terms relates to the Trust's other purpose of assisting Māori to bring claims before the Waitangi Tribunal: the significance relates not only to the finding by both the High Court and the Court of Appeal that the assistance purpose was charitable (this point not in issue on appeal to the Privy Council), but also to the process by which the two courts reached that conclusion. Both aspects have radical implications for the way the definition of charitable purpose is currently being interpreted in New Zealand.

The test for whether a purpose is charitable

As discussed above, the statutory definition of the term "charitable purpose" in New Zealand refers inclusively to the four well-known "*Pemsel* heads" of charity. At the time of the *Latimer* litigation, s 2 of the Income Tax Act 1976 defined the term "charitable purpose" as follows:²⁰

'Charitable purpose' includes every charitable purpose, whether it relates to the relief of poverty, the advancement of education or religion, or any other matter beneficial to the community.

The issue in the *Latimer* litigation concerned the fourth head (other matters beneficial to the community).²¹

Having ascertained the Trust's purpose as a matter of construction, the Court of Appeal set out a 2-step test for determining whether the purpose was charitable, as follows:²²

- i. is the purpose for the **public benefit**; and if so,
- ii. is the purpose charitable in the sense of coming within the **spirit and intendment** of the preamble to the Statute of Charitable Uses Act 1601 (43 Eliz I c4) (otherwise known as the "Statute of Elizabeth") ("**the Preamble**")?

20 This definition has since been replicated in Income Tax Act 2007 s YA 1 (a successor to the Income Tax Act 1976) and Charities Act s 5(1).

21 *Latimer v Commissioner of Inland Revenue* [2002] 1 NZLR 535 (HC) at [81] and *Latimer v Commissioner of Inland Revenue* [2002] 3 NZLR 195 (CA) at [31].

22 *Latimer v Commissioner of Inland Revenue* [2002] 3 NZLR 195 (CA) at [32]. See also *Travis Trust v Charities Commission* (2009) 24 NZTC 23,273 (HC) at [29], and *The Plumbers, Gasfitters and Drainlayers Board v Charities Registration Board* [2013] NZHC 1986 at [20] - [22].

The question of what test is to be applied in determining whether a purpose is charitable has been another point of considerable contention in decisions made under the Charities Act.²³

The public benefit test

The first limb of the 2-step test set down by the Court of Appeal in *Latimer* is known as the “public benefit test”; the public benefit test is not directly referred to in the statutory definitions of charitable purpose in New Zealand, but is imported as a key element of the charitable purposes test through the medium of the common law.²⁴

The public benefit test itself comprises two parts: it asks, firstly, whether the purpose is beneficial to the community (the “**benefit**” limb), and secondly whether the class of persons eligible to benefit constitutes the public, or a sufficient section of the public (the “**public**” limb).²⁵

In New Zealand law, purposes for the relief of poverty, the advancement of education and the advancement of religion are *presumed* to meet the public benefit test unless the contrary is shown.²⁶ Under the fourth head, public benefit is not presumed: the question whether a purpose will or may operate for the public benefit “is to be answered by the Court by forming an opinion on the evidence before it”.²⁷ Public benefit has been described as having an elusive quality, not always open to sound reason, but “often plainly recognised when it exists”.²⁸

The spirit and intendment test

Satisfying the public benefit test is a necessary condition for a purpose to be regarded as charitable, but it is not sufficient on its own:²⁹ in order to be regarded as charitable, a purpose must also satisfy the second step, the “spirit and intendment” test.³⁰ As Lord Bramwell noted in *Pemsel* “certainly every benevolent purpose is not charitable”.³¹ in what has been described as a “deft circumlocution of legal logic”, the object of looking to the spirit and intendment of the Preamble is to assist in dividing between those purposes that are both beneficial and charitable, and those that are beneficial but not charitable.³²

23 See, for example, the discussion in S Barker “Unresolved issues in New Zealand charities law - the charitable purpose test” [2021] NZLJ 130.

24 *Latimer v Commissioner of Inland Revenue* [2004] 3 NZLR 157 (PC) at [29] - [53].

25 *Travis Trust v Charities Commission* (2009) 24 NZTC 23,273 (HC) at [54], referring to *New Zealand Society of Accountants v Commissioner of Inland Revenue* [1986] 1 NZLR 147 (CA) at 152. See also *The Commissioner of Taxation v The Triton Foundation* [2005] FCA 1319 at [21] - [22], and *Tasmanian Electronic Commerce Centre Pty Ltd v Commissioner of Taxation* [2005] FCA 439 at 50, referred to with approval in *Re Queenstown Lakes Community Housing Trust* [2011] 3 NZLR 502 (HC) at [63] - [67], and *Re Education New Zealand Trust* (2010) 24 NZTC 24,354 (HC) at [25].

26 *Re Greenpeace of New Zealand Inc* [2015] 1 NZLR 169 (SC) at [27] n 57; *Re Education New Zealand Trust* (2010) 24 NZTC 24,354 (HC) at [24]; *Re New Zealand Computer Society* (2011) 25 NZTC 20-033 (HC) at [13]; *Liberty Trust v Charities Commission* [2011] 3 NZLR 68 (HC) at [99] - [100]; *Re Queenstown Lakes Community Housing Trust* [2011] 3 NZLR 502 (HC) at [32], [38]; *Re Family First New Zealand* (2015) 4 NZTR 25-014 at [21]; *Re The Foundation for Anti-Aging Research* (2016) 23 PRNZ 726 (HC) at [16]; *Family First New Zealand v Attorney-General* [2020] NZCA 366 at [91]. In this respect, New Zealand law differs from the law in England and Wales, where s 4(2) of the Charities Act 2011 (UK) has removed any presumption of public benefit by statute and the Tribunal in *The Independent Schools Council v Charity Commission for England and Wales & Ors* [2012] 1 All ER 127 at [68] - [71] cast doubt as to whether there had in fact been a pre-existing presumption of public benefit in English and Welsh common law.

27 See *Molloy v Commissioner of Inland Revenue* [1981] 1 NZLR 688 (CA) at 695 citing Russell J in *Re Hummeltenberg* [1923] 1 Ch 237 at 242; *Re New Zealand Computer Society* (2011) 25 NZTC 20-033 (HC) at [13]; *McGovern v Attorney-General* [1982] 1 Ch 321 at 333; *Scottish Burial Reform and Cremation Society Ltd v Glasgow Corporation* [1968] AC 138 at 156 per Lord Wilberforce. See also *Family First New Zealand v Attorney-General* [2020] NZCA 366 at [93].

28 *Strathalbyn Show Jumping Club Inc v Mayes & Ors* [2001] SASC 73 per Bleby J at [97], cited with approval in *Travis Trust v Charities Commission* (2009) 24 NZTC 23,273 (HC) at [55].

29 *Vancouver Society of Immigrant and Visible Minority Women v Minister of National Revenue* [1999] 1 SCR 10 at 69 per Gonthier J (dissenting) and at 125 per Iacobucci J.

30 *Travis Trust v Charities Commission* (2009) 24 NZTC 23,273 (HC) at [20]. See also *Re Queenstown Lakes Community Housing Trust* [2011] 3 NZLR 502 (HC) at [48]: “[t]he somewhat circular requirement that to be charitable, a purpose must be beneficial in a way which the law regards as charitable, reflects and restates the requirement that the purpose must be within the spirit and intendment of the preamble”.

31 *Commissioners for Special Purposes of the Income Tax v Pemsel* [1891] AC 531 (HL) at 565.

32 *Travis Trust v Charities Commission* (2009) 24 NZTC 23,273 (HC) at [20].

The first three heads of charity can be accepted as meeting the spirit and intendment test by virtue of their inclusion in the statute. With respect to the fourth head, the High Court and the Court of Appeal used two approaches to analyse this question:

- i. The first is by reference to the Preamble, either directly or by analogy: a purpose falls within the spirit and intendment of the Preamble if it is, or is analogous to, one of the purposes enumerated in the Preamble, or a purpose that has previously been found to be within the spirit and intendment of the Preamble. This is known as the “**analogy test**” or the “analogy upon analogy” approach. In the 130+ years since *Pemsel*, there has been a steady encrustation of new analogous charitable categories through this means, developments that have been evolutionary, rather than revolutionary.³³
- ii. The second approach is to treat a purpose which meets the public benefit test as *presumptively* charitable unless there is a good reason to conclude otherwise, an approach known as the “**presumption of charity**”. It is important to note that the presumption of charity is distinct from and should not be conflated with the presumption of public benefit for the first three “heads” of charity, discussed above, which relates to the *first* step of the 2-step test.³⁴ The presumption of charity relates to the second step of the 2-step test, and is perhaps more accurately termed a “presumption of meeting the spirit and intendment test” (which is only half of the test for whether a purpose is charitable).

For current purposes, the test set down by the Court of Appeal in *Latimer* CA for whether a purpose is charitable in New Zealand might be summarised in tabular form as follows (table 3.2):

Table 3.2 – summary of the 2-step test for whether a purpose is charitable:		
Purpose (ascertained as a matter of construction of the constituting document)	1. Public benefit test: does the purpose operate for the benefit of the public? [Note: there is a <i>presumption of public benefit</i> for the first three heads of charity]	Benefit limb: is the purpose beneficial to the community?
		Public limb: does the class of persons eligible to benefit constitute the public or a sufficient section of the public?
	2. Spirit and intendment test: does the purpose fall within the spirit and intendment of the preamble? [Note: the first three heads of charity can be accepted as meeting this test]	By analogy: the spirit and intendment test can be satisfied by demonstrating that the purpose is analogous to a purpose set out in the preamble, or to a purpose previously found to be charitable.
		By presumption of charity: even in the absence of analogy, a purpose that is beneficial to the public or of public utility is presumed to fall within the spirit and intendment of the preamble in the absence of any ground for holding otherwise.

It is important to note that the test applies to *purposes*: it does not apply to activities nor to the organisation itself.³⁵

In addition, the fact that the modern law of charities has its origins in the Preamble does “not mean that the law of charities is fixed in the seventeenth or nineteenth centuries”:³⁶ the link to the Preamble is helpful for retaining the “essence” of charity, and distinguishing those purposes that are for the public benefit but are not charitable.

33 *Travis Trust v Charities Commission* (2009) 24 NZTC 23,273 (HC) at [20].

34 Compare *Re Family First New Zealand* (2015) 4 NZTR 25-014 at [21] n 10.

35 See the discussion in S Barker “Unresolved issues in New Zealand charities law” [2021] NZLJ 49.

36 *Re Queenstown Lakes Community Housing Trust* [2011] 3 NZLR 502 (HC) at [29].

However, the “magic” of the test for whether a purpose is charitable is its inherent capacity for flexibility in response to differing factual situations; through the mechanism of the common law, the definition of charitable purpose is able to evolve, like a “living tree”,³⁷ in response to changing social circumstances; it is also capable of allowing for the steady development of a “more unique New Zealand legal culture”,³⁸ all of which as evidenced by the *Latimer* cases.

A key mechanism by which the common law is able to perform this role is through the presumption of charity. However, the status of the presumption of charity has been another point of considerable contention in New Zealand charities law.³⁹

The presumption of charity

Whether or not the presumption of charity should be recognised is another dimension of the underlying clash of paradigms discussed above in chapter 2.

A current difficulty in this regard is that a tax expenditure analysis has been assumed, rather than analysed.⁴⁰ In addition, the presumption of charity has been equated with a “single test of public benefit”,⁴¹ a radical option put forward by counsel for the intervener in *Vancouver Society of Immigrant and Visible Minority Women v Minister of National Revenue* [1999] 1 SCR 10 (“**Vancouver Society**”)⁴² in an effort to soften the “unduly restrictive” interpretation of the definition of charitable purpose taken in Canadian jurisprudence.⁴³ However, the two concepts are distinct: the presumption of charity is not a single test of public benefit; to the contrary, as discussed above, the presumption of charity is one of two alternative methods of satisfying the *second* limb of the 2-step test (the spirit and intent test). Both the public benefit test and the spirit and intent test must be satisfied in order for a purpose to be regarded as “charitable”: in other words, to say that an organisation’s purposes are “charitable” by definition means that those purposes operate for the benefit of the public (as both limbs of the 2-step test must be met). There may be many reasons why a purpose that does meet the public benefit test may not meet the spirit and intent test (such as the purposes of a government entity, or a political party, as discussed further below).

The presumption of charity is discussed in more detail below. For current purposes, it should be noted that the status of the presumption in New Zealand law was one of four key issues raised in the *Latimer* litigation as to whether the assistance purpose of the Crown Forestry Rental Trust was charitable.

The issues

The Commissioner of Inland Revenue took issue with the assistance purpose on all four aspects of the charitable purpose test:

- i. **The benefit limb:** the Commissioner argued the assistance purpose did not operate for the wider benefit of the public, but for the direct private benefit of the Māori claimants (despite the fact that there is no concept of private ownership of land in Māori culture). Any benefits to the public were argued to be “too nebulous and remote”.
- ii. **The public limb:** the Commissioner also argued the class of persons eligible to benefit from the assistance purpose was too narrow to constitute the public or a

37 Donald Poirier *Charity Law in New Zealand* (Department of Internal Affairs, June 2013) at [3.1.3].

38 *Travis Trust v Charities Commission* (2009) 24 NZTC 23,273 (HC) at [45], [47], [52]. See also *Re Queenstown Lakes Community Housing Trust* [2011] 3 NZLR 502 (HC) at [40]; *Re Greenpeace of New Zealand Inc* [2013] 1 NZLR 339 (CA) at [66] - [67].

39 See, for example, the discussion in S Barker “The presumption of charity post-Greenpeace” [2015] NZLJ 116; and S Barker “The presumption of charity” [2012] NZLJ 295.

40 See, for example, *Re Greenpeace of New Zealand Inc* [2015] 1 NZLR 169 (SC) at [30]: “The method of analogy to objects already held to be charitable is also the safer policy since charitable status has significant fiscal consequences”. See also S Barker and G Collett “Fiscal consequences” NZLJ [2016] 102.

41 *Re Greenpeace of New Zealand Inc* [2015] 1 NZLR 169 (SC) at [24] - [25], [27], [29] - [30], [113].

42 *Vancouver Society of Immigrant and Visible Minority Women v Minister of National Revenue* [1999] 1 SCR 10 at 29, 113.

43 *Vancouver Society of Immigrant and Visible Minority Women v Minister of National Revenue* [1999] 1 SCR 10 at 168, 196 - 198, 200.

section of it, as the Māori claimants in respect of any piece of licensed land will, by definition, be “related by blood”.

- iii. **The analogy test:** the Commissioner argued the assistance purpose had no analogy to any recognised charitable purpose.
- iv. **The presumption of charity:** finally, the Commissioner argued that the presumption of charity should not be applied in New Zealand law.

The Commissioner’s approach also reflects an underlying, if unstated, tax expenditure analysis that epitomises the underlying clash of paradigms.

It is important to note that the Commissioner was not successful on any of these four issues.

It is also important to be cognisant of the critical role played by evidence in the *Latimer* litigation, as discussed further below.

The High Court decision

The High Court hearing was held over three days in June 2001, a significant length of time in comparison to cases decided under the Charities Act (which are generally heard over one day or less).

The public benefit test

Counsel for the Crown Forestry Rental Trust introduced his argument that the assistance purpose met the public benefit test with three broad propositions:⁴⁴

- i. There is no need for any proof of public benefit if “the facts speak for themselves”, referring to the phrase used by Lord Wilberforce in *Scottish Burial Reform and Cremation Society Ltd v Glasgow Corporation* (1968) AC 138 (“**Scottish Burial Reform**”).⁴⁵ In many classes of case, the existence of public benefit will be readily assumed and, in some cases, a purpose may be “so manifestly beneficial to the public” that it would be “absurd to call evidence on this point”.⁴⁶ The Court of Appeal decision in *Commissioner of Inland Revenue v Medical Council of New Zealand*⁴⁷ (“**Medical Council**”) exemplifies this approach – the Court of Appeal found the purposes of the Medical Council to be charitable, and therefore for the public benefit, even though there was no direct evidence before the court that a benefit to the public arose from the maintenance of a Register of Medical Practitioners.⁴⁸
- ii. Parliament’s involvement in, or regulation of, an activity may provide a guide as to whether the promotion of an activity is for a public benefit – again the *Scottish Burial Reform* case illustrates this.⁴⁹
- iii. On rare occasions, direct evidence of benefit to the public may be required.⁵⁰

The Trust argued that the first of these propositions was all that was needed to establish public benefit in this case, and relied on the second and third propositions only to strengthen its case.⁵¹

In relation to the second proposition, the Trust acknowledged that Parliamentary involvement does not inexorably lead to a conclusion of public benefit, but submitted that such an inference was rightly drawn here:⁵² the Trust pointed to a number of ways in which Parliament had been involved in the resolution and redressing of Treaty grievances,

⁴⁴ *Latimer v Commissioner of Inland Revenue* [2002] 1 NZLR 535 (HC) at [83].

⁴⁵ *Scottish Burial Reform and Cremation Society Ltd v Glasgow Corporation* (1968) AC 138 at 156.

⁴⁶ See *McGovern v Attorney-General* [1982] 1 Ch 321 at 333, *Molloy v Commissioner of Inland Revenue* [1981] 1 NZLR 688 (CA) at 695 and *Scottish Burial Reform and Cremation Society Ltd v Glasgow Corporation* [1968] AC 138 at 156 per Lord Wilberforce.

⁴⁷ *Commissioner of Inland Revenue v Medical Council of New Zealand* [1997] 2 NZLR 297 (CA).

⁴⁸ See *Latimer v Commissioner of Inland Revenue* [2002] 1 NZLR 535 (HC) at [83] referring to *Commissioner of Inland Revenue v Medical Council of New Zealand* [1997] 2 NZLR 297 (CA).

⁴⁹ *Scottish Burial Reform and Cremation Society Ltd v Glasgow Corporation* [1968] AC 138 at 150; *Latimer v Commissioner of Inland Revenue* [2002] 1 NZLR 535 (HC) at [83]; *Auckland Medical Aid Trust v CIR* [1979] 1 NZLR 382 at 386.

⁵⁰ See *Latimer v Commissioner of Inland Revenue* [2002] 1 NZLR 535 (HC) at [83].

⁵¹ *Latimer v Commissioner of Inland Revenue* [2002] 1 NZLR 535 (HC) at [84].

⁵² *Latimer v Commissioner of Inland Revenue* [2002] 1 NZLR 535 (HC) at [85] - [88].

including establishing the Waitangi Tribunal under the Treaty of Waitangi Act 1975, various pieces of legislation mandating individual settlements,⁵³ the recognition of Treaty principles in numerous Acts of Parliament,⁵⁴ and the Crown Forest Assets Act 1989 itself. The Trust argued this legislation demonstrated the common perception of successive Governments that the principles of the Treaty are of core constitutional significance and to which the Crown has a positive obligation to adhere. It can therefore be inferred from this legislative involvement that adherence to the Treaty and correction of past breaches of its principles are public benefits.

In terms of direct evidence, the Trust referred to:⁵⁵

- i. Evidence given by the Director of the Waitangi Tribunal, Mr Love, and confirmed by an experienced practitioner, Mr Dawson, that the activities of the Trust contribute materially to the operations of the tribunal.
- ii. Numerous Government publications demonstrating Government recognition of the benefits of resolving Treaty grievances, including in Parliamentary debates on legislation giving effect to Treaty settlements, and in reports of the Waitangi Tribunal.
- iii. Evidence given by Hon David Caygill, former Minister of Finance and a signatory to the Trust Deed, indicating the significance the Crown attributed at that time to the correcting of historical grievances and advancing race relations.

The Trust argued that, giving due consideration to this direct evidence, the Parliamentary influence and the self-evident benefits, the assistance purpose met the public benefit test.

Counsel for the Commissioner accepted there were benefits to the public from:

- i. the Crown honouring its Treaty obligations and settling historical grievances;
- ii. the operations of the Waitangi Tribunal as a facilitator of such settlements;
- iii. the promotion of racial harmony; and
- iv. the provision of a mechanism for the resolution of historical grievances through a constitutional process,

but argued the assistance purpose could not be *linked* to those public benefits.⁵⁶ The Commissioner relied heavily on the Court of Appeal decision in *New Zealand Society of Accountants v Commissioner of Inland Revenue*⁵⁷ ("**Society of Accountants**"), where the benefit which arose from the fidelity funds of the New Zealand Law Society and the New Zealand Society of Accountants (as it was then) was held to be for those having claims on those funds, rather the public generally.

The Trust disagreed, arguing that its role in providing assistance to the defined class of Māori claimants is an integral part of the achievement of the identified public benefit: the Trust provides the resources which allow Māori to pursue their claims and negotiate settlements with the Crown, without which the achievement of the public benefit would not be possible. In support of this argument, the Trust pointed to the evidence of Mr Love that the operations of the Trust, in providing the resources necessary for high quality research to be undertaken on behalf of the claimants, was a large contributor to the successes of the tribunal. Similarly, a number of witnesses deposed that the benefit of providing a forum for resolution of disputes would be insufficient if the parties seeking access to the tribunal were unable, through lack of financial resources, to pursue their claims (particularly where that lack is, at least in part, referable to the very grievances for which recourse to the tribunal is sought).

53 Such as the Waikato Raupatu Claims Settlement Act 1995 and the Ngai Tahu Claims Settlement Act 1997.

54 Including the Conservation Act 1987 s 4, the Crown Minerals Act 1991 s 4, the Resource Management Act 1991 s 8, the Historic Places Act 1993 s 115(2), the State-Owned Enterprises Act 1986 (s 9) and the Treaty of Waitangi Act itself.

55 *Latimer v Commissioner of Inland Revenue* [2002] 1 NZLR 535 (HC) at [89] - [90].

56 *Latimer v Commissioner of Inland Revenue* [2002] 1 NZLR 535 (HC) at [91].

57 *New Zealand Society of Accountants v Commissioner of Inland Revenue* [1986] 1 NZLR 147 (CA).

The Trust also pointed to the benefits derived by all members of the community by a robust and effective Treaty settlement process, a view held by successive Governments as illustrated by the evidence. The Trust pointed out that benefits such as the repair of spires, organs, bells, clocks, stained glass windows or monuments in a church, the provision of botanical gardens or observatories, the provision of musical instruments for a town band, the protection of animals including homes for lost dogs or forsaken cats and the maintenance of regimental offices, libraries and other similar objects, have all been held to confer benefits to the public of a charitable character.

In a finding which has important implications for the direct/indirect benefit dimension of the underlying clash of paradigms, the High Court considered the Commissioner's position, including the reliance placed on the *Society of Accountants*' case, failed to recognise the broader public benefit: the High Court held that, *on the evidence*, the process of Treaty settlements is for the benefit of the New Zealand public generally and that the assistance purpose is aimed at achieving that wider public benefit. The court agreed the wider indirect public benefit was not nebulous or remote, and that the benefit limb of the public benefit test was satisfied.⁵⁸

With respect to the public limb of the public benefit test, the High Court rejected the Commissioner's argument that the potential beneficiaries of the Trust could not constitute a sufficient section of the public, holding that the benefits of the Trust's assistance purpose flowed to the public, not just to a category of Māori claimants.⁵⁹ In a finding which also has important implications for the direct/indirect benefit dimension of the underlying clash of paradigms, the High Court specifically accepted that public benefit can be achieved by means of assistance to individuals (or in this case claimant groups).⁶⁰

The High Court also accepted, on the evidence, that the potential Māori claimants would constitute a section of the public in any event, as potential claimants included some 300,000 Māori, approximately 70,000 of whom had already benefited through Crown forest licensed land being vested in groups to which they are affiliated.⁶¹ In this respect, the High Court differed from the cases of *Oppenheim v Tobacco Securities Trust Co Ltd*⁶² ("**Oppenheim**") and *Re Compton, Powell v Compton*⁶³ ("**Compton**") (which hold that classes of persons defined by reference to a personal, employment or contractual relationship cannot constitute a sufficient section of the public to satisfy the public limb of the public benefit test).⁶⁴ This approach to the *Oppenheim* and *Compton* tests was subsequently codified,⁶⁵ as discussed further below in chapter 8 (the "**blood ties exception**").

On the basis of the above, the High Court held that the public limb of the public benefit test was also satisfied.⁶⁶

58 *Latimer v Commissioner of Inland Revenue* [2002] 1 NZLR 535 (HC) at [95], [100], [101], [112].

59 *Latimer v Commissioner of Inland Revenue* [2002] 1 NZLR 535 (HC) at [101].

60 *Latimer v Commissioner of Inland Revenue* [2002] 1 NZLR 535 (HC) at [65]. Compare *Re Queenstown Lakes Community Housing Trust* [2011] 3 NZLR 502 (HC) at [68].

61 *Latimer v Commissioner of Inland Revenue* [2002] 1 NZLR 535 (HC) at [117] - [118], [128] - [131], [122] citing *Educational Fees Protection Society Inc v Commissioner of Inland Revenue* (1991) 13 NZTC 8,203 at 8,211: "Following the comments of Lord Cross in *Dingle v Turner* the distinction between personal and impersonal relationships may no longer be totally acceptable as a test and the decision in *Oppenheim's* case may no longer represent unquestioned law ... The nature of the charitable purpose may itself be a factor in determining whether or not the requirement of public benefit has been met". In the *Educational Fees Protection Society* case, Gallen J found that a society which operated a scheme to ensure that the education of a child at a school entering into an agreement with the society could continue unaffected by the death of a parent. Gallen J found that the purpose of the Trust was to ensure that the education of the children was not interrupted by the loss of a parent, that this was charitable (being for the advancement of education), and that it was directed to the public benefit even though the parents in the school may also have gained an advantage.

62 *Oppenheim v Tobacco Securities Trust Co Ltd* [1971] AC 297.

63 *Re Compton, Powell v Compton* [1945] 1 All ER 198.

64 *Latimer v Commissioner of Inland Revenue* [2002] 1 NZLR 535 (HC) at [130].

65 See what is now paragraph (a) of the definition of "charitable purpose" in Income Tax Act 2007 s YA 1, and Charities Act 2005 s 5(2)(a).

66 *Latimer v Commissioner of Inland Revenue* [2002] 1 NZLR 535 (HC) at [100] - [102].

The spirit and intendment test

With respect to the “spirit and intendment” step of the charitable purpose test, the High Court followed the approach of the majority of the Court of Appeal in *Medical Council* in recognising the presumption of charity, holding that a purpose which is beneficial to the public is *prima facie* charitable unless there is a reason put forward for holding that it is not: no such reasons were advanced by the Commissioner and, accordingly, the assistance purpose was held to be charitable.⁶⁷

In case he was wrong in applying the presumption of charity, O’Regan J of the High Court also found the purpose to be within the spirit and intendment of the Preamble *by analogy*: the assistance purpose was found to be broadly analogous to cases “for the benefit of Australian Aborigines”, for the benefit of returned soldiers, the promotion of racial harmony, the preservation of public order, mental and moral improvement, and the promotion of equality.⁶⁸

Accordingly, all four of the Commissioner’s objections to the charity of the assistance purpose were rejected and the purpose was found to be charitable.

Despite the Trust’s success on this point, however, the Trust did not succeed in the High Court overall: the High Court found in favour of the Commissioner on the basis of the stakeholder purpose, as discussed above in table 3.1. The Trust appealed the finding in relation to the stakeholder purpose, and the Commissioner cross-appealed the finding that the assistance purpose was charitable.

The Court of Appeal decision

The Court of Appeal hearing was held over three days in April and May 2002.

The public benefit test

The Court of Appeal considered,⁶⁹ *on the evidence*, that what is involved in the preparation of a case before the Waitangi Tribunal, and the intended product of the assistance to claimants, is **high-quality historical research**, the results of which will better enable the tribunal to assess the historical record of what happened to the tribal group claimants: on that basis, the research funded by the Trust was a means of finally determining the truth about grievances long held by a significant section of New Zealand society (up to nearly 10% of the population) for the benefit of all members of New Zealand society; without such research being properly conducted the tribunal’s findings might not be seen as having a sound basis, and therefore might not be accepted by either Crown or Māori or by the general public. Settlements might therefore not be achieved or might not be regarded as truly full and final. If research is not properly conducted then, whether or not the parties purport to reach a settlement, grievances would likely continue, leading to social ferment at a future time. The public benefit in a successful resolution of the claims was therefore very considerable, and the historical research conducted with the funding provided by the Trust was an essential element in that resolution.

On that basis, the Court of Appeal held there was a large public benefit in the assistance purpose through which, it is hoped, comprehensive and lasting settlements can be achieved.⁷⁰

In another finding which has important implications for the direct/indirect benefit dimension of the underlying clash of paradigms, the Court of Appeal acknowledged there is also a benefit to the claimant groups in having their research funded, but considered they themselves are a section of the public.⁷¹ It did not matter that some members of the claimant groups may not be “in need”: as the Court of Appeal noted, purposes under the fourth head may incidentally “benefit the rich as well as the poor” *either directly or indirectly*.⁷²

67 *Latimer v Commissioner of Inland Revenue* [2002] 1 NZLR 535 (HC) at [104] - [106].

68 *Latimer v Commissioner of Inland Revenue* [2002] 1 NZLR 535 (HC) at [107] - [109].

69 *Latimer v Commissioner of Inland Revenue* [2002] 3 NZLR 195 (CA) at [37].

70 *Latimer v Commissioner of Inland Revenue* [2002] 3 NZLR 195 (CA) at [37].

71 *Latimer v Commissioner of Inland Revenue* [2002] 3 NZLR 195 (CA) at [38].

72 *Latimer v Commissioner of Inland Revenue* [2002] 3 NZLR 195 (CA) at [31], [41].

The Court of Appeal also acknowledged there is a relationship of common descent for each claimant group but also differed from the approach taken in *Oppenheim* and *Compton* in finding that this did not prevent the public limb of the public benefit test from being met.⁷³

On the basis of the above, the assistance purpose was found to satisfy the public benefit test.

The spirit and intendment test

With respect to the spirit and intendment test, the Commissioner argued the High Court had been wrong to adopt the presumption of charity, arguing that McKay J in the *Medical Council* case had discussed it but had actually proceeded by reference to analogy.⁷⁴

Given the difficulties currently being experienced in relation to the status of the presumption of charity in New Zealand law, the approach taken by the Court of Appeal to this question warrants close consideration.

In the *Medical Council* case, McKay J had referred with approval to the following passage from Halsbury's Laws of England:⁷⁵

Not all such purposes are charitable; to be so the purposes must fall within the 'spirit and intendment' of the preamble to the Statute of Elizabeth 1. Historically, in order to find whether a particular purpose came within that spirit and intendment, the courts sought to find an analogy with purposes mentioned in the preamble itself, or with purposes previously held to be within its spirit and intendment. It now appears that, even in the absence of such analogy, objects beneficial to the public, or of public utility, are prima facie within the spirit and intendment of the preamble and, in the absence of any ground for holding that they are outside its spirit and intendment, are therefore charitable in law.

Thomas J also adopted the passage from Halsbury's, which he said:⁷⁶

... makes it clear that, even if the objective is not analogous with purposes falling 'within the spirit and intendment of the preamble' to the Statute of Elizabeth I, objects beneficial to the public, or of public utility, are prima facie within that spirit and intendment and, in the absence of any ground for holding that they are outside its spirit and intendment, are therefore charitable in law.

Keith J agreed with the reasons given by McKay and Thomas JJ.⁷⁷ Richardson and Gault JJ dissented, referring to Somers J's obiter comments in *Society of Accountants*⁷⁸ expressing a desire to hear further argument on the point before assenting to a presumption of charity. In other words, the *Medical Council* case provides reasonably clear majority Court of Appeal recognition of a presumption of charity in New Zealand law.⁷⁹

However, given the Commissioner's arguments, the Court of Appeal in *Latimer CA* found it unnecessary to reach a view on whether, "as might appear", all of the majority in the *Medical Council* case had adopted the presumption of charity; instead, the Court of Appeal simply affirmed the comments of McKay J that, in applying the spirit and

73 *Latimer v Commissioner of Inland Revenue* [2002] 3 NZLR 195 (CA) at [38].

74 *Latimer v Commissioner of Inland Revenue* [2002] 3 NZLR 195 (CA) at [33].

75 *Commissioner of Inland Revenue v Medical Council of New Zealand* [1997] 2 NZLR 297 (CA) at 310, referring to Halsbury's Laws of England, vol 5(2) (4 ed) at [37] (emphasis added).

76 *Commissioner of Inland Revenue v Medical Council of New Zealand* [1997] 2 NZLR 297 (CA) at 321.

77 *Commissioner of Inland Revenue v Medical Council of New Zealand* [1997] 2 NZLR 297 (CA) at 321 - 322.

78 *New Zealand Society of Accountants v Commissioner of Inland Revenue* [1986] 1 NZLR 147 (CA) at 157.

79 The passage from Halsbury's has also been adopted in a number of New Zealand cases. See, for example, *Morgan v Wellington City Corporation* [1975] 1 NZLR 416 (CA) at 419 - 420; *Auckland Medical Aid Trust v Commissioner of Inland Revenue* [1979] 1 NZLR 382 (SC) at 388; and *Re Collier (Deceased)* [1998] 1 NZLR 81 (HC) at 95. See also *Latimer v Commissioner of Inland Revenue* [2002] 1 NZLR 535 (HC) at [106]; and *Latimer v Commissioner of Inland Revenue* [2002] 3 NZLR 195 (CA) at [13], [36] and [39] - [41]. The passage is also supported by a number of English cases, including *Incorporated Council of Law Reporting for England and Wales v Attorney-General* [1972] Ch 73 (CA) at 88, 95, 104; *Scottish Burial Reform and Cremation Society Ltd v Glasgow Corporation* (1968) AC 138 at 147; and *Inland Revenue Commissioners v McMullen* [1979] 1 All ER 588 (reversed but without discussing this point, [1981] AC 1 (HL)). See also the discussion in S Barker "The presumption of charity" [2012] NZLJ 295.

intendment of the Preamble, it is “important to be guided by principle rather than by a detailed analysis of decisions on particular cases”.⁸⁰

The Court of Appeal also held that, on the evidence, the historical research carried out was likely to fulfil an educational role, and there was “some analogy” with trusts for the benefit of aboriginal people and returned servicepeople.⁸¹

On this basis, the assistance purpose was found to satisfy the spirit and intendment test:⁸²

We have no doubt that in this case the public benefit which we have described is, in the context of New Zealand society at this time, of a charitable character. The assistance purpose of providing the Waitangi Tribunal with additional material which will help it produce more informed recommendations, leading in turn to the settlement of long standing disputes between Maori and the Crown is of that character. It is directed towards racial harmony in New Zealand for the general benefit of the community.

The Court of Appeal also held the assistance purpose was not political,⁸³ an important finding with significant implications for arguments often made that New Zealand law observed a strict political purposes exclusion, as the Treaty settlement process was highly controversial at the time and always, without exception, leads to an Act of Parliament to settle the wrongs.⁸⁴

In other words, in what appears to be a combination of the analogy approach and the presumption of charity, and on the basis of evidence that was thoroughly tested by means of a first instance oral hearing of evidence, the courts developed an entirely new category of charitable purpose in New Zealand: the pursuit of racial harmony and social cohesion.⁸⁵

Despite the Trust’s success on this point, however, the Trust did not succeed in the Court of Appeal overall: the Court of Appeal found in favour of the Commissioner on the basis of the holdover to the Crown, as discussed above in table 3.1. The Trust appealed the finding in relation to the holdover to the Crown to the Privy Council;⁸⁶ while the Commissioner did not appeal the finding that the assistance purpose was charitable, the Commissioner did cross-appeal the finding in relation to the stakeholder purpose (that a trust did not need to be *established* for charitable purposes in order to be eligible for the exemption).

The Privy Council decision

In dismissing the Commissioner’s cross-appeal, and concluding that the Trust’s income was indeed exempt from tax, the Privy Council made some important general statements of principle:⁸⁷

It is of the essence of a charitable trust that it is a trust for the promotion or advancement of social purposes rather than a trust for individual beneficiaries. *Of course, individuals may benefit from the application of trust moneys, but they are not, as individuals, the beneficiaries of the trust and may not enforce its terms.* If the purposes of the trust are charitable, they may be enforced by the Attorney-General; if they are not charitable then, with certain anomalous exceptions, they are not enforceable and the trust is not valid ...

80 *Latimer v Commissioner of Inland Revenue* [2002] 3 NZLR 195 (CA) at [39], referring to *Commissioner of Inland Revenue v Medical Council of New Zealand* [1997] 2 NZLR 297 (CA) at 314.

81 *Latimer v Commissioner of Inland Revenue* [2002] 3 NZLR 195 (CA) at [41].

82 *Latimer v Commissioner of Inland Revenue* [2002] 3 NZLR 195 (CA) at [40].

83 *Latimer v Commissioner of Inland Revenue* [2002] 3 NZLR 195 (CA) at [40].

84 As noted by Williams J (as he was then) speaking extra-curially, at the *Charitable purpose forum*, hosted by the Charities Commission (as it was then) in Wellington, 17-18 April 2012.

85 *Travis Trust v Charities Commission* (2009) 24 NZTC 23,273 (HC) at [46] - [47].

86 Appeals to the Privy Council were ended with the passing of the Supreme Court Act 2003 and the establishment of the Supreme Court of New Zealand as New Zealand’s highest appellate court. However, under the transitional provision of s 52 of the Supreme Court Act, the 2002 decision of the Court of Appeal in the *Latimer* litigation was appealed to the Privy Council rather than the Supreme Court.

87 *Latimer v Commissioner of Inland Revenue* [2004] 3 NZLR 157 (PC) at [29], [30], [32], [34] - [36] (emphasis added).

A charity may take the form of a corporation, an unincorporated society or a trust. Section 61(25) draws a distinction, to which the Court of Appeal rightly attached significance, between a society or other institution on the one hand and a trust on the other. ... Their Lordships agree with the Court of Appeal that, *in order to qualify for exemption from tax, it is not necessary that a trust, as distinct from a society or institution, be established for charitable purposes; it is sufficient that the trust funds are applicable for charitable purposes. That requires them to be applicable for exclusively charitable purposes, for to qualify as a charitable trust its purposes must be exclusively charitable ...*

A trust may ... authorise the trustees to apply the trust income for a number of different purposes. In such a case, the trust is not a valid charitable trust unless every purpose is wholly charitable. *Where the trustees are authorised to apply trust money for a range of charitable and non-charitable purposes, it cannot be said with certainty of any particular sum that it will be applied to charitable purposes: it may be applied to non-charitable purposes.* Thus a trust “for charitable or benevolent purposes” is not charitable ...

Trustees of a charitable trust may be authorised to charge their own fees and expenses to the trust without causing the loss of the trust’s charitable status. *It cannot be said to be a purpose of the trust to enable the trustees to charge fees and expenses; such expenditure may be justified only if it helps to further the trust’s charitable purpose, and may accordingly be classified as ancillary to that purpose.*

Again, some trusts for charitable purpose *cannot help but confer incidental benefits on individuals; they do not thereby lose their charitable status ...*

The distinction is between *ends, means and consequences*. The ends must be exclusively charitable. But if the non-charitable benefits are merely the *means or the incidental consequences* of carrying out the charitable purposes and are not ends in themselves, charitable status is not lost.

These comments of New Zealand’s highest court have not been overturned, either by Parliament or by the Supreme Court of New Zealand. Accordingly, they represent the current law of New Zealand. If New Zealand is to deviate from these long-standing fundamental principles, it is important that the reason for any such deviation is explained.

Significance of the *Latimer* decisions

The trilogy of *Latimer* cases is significant in New Zealand charities law for many reasons, including the following:

- i. clear Privy Council and Court of Appeal authority that ascertaining an entity’s purpose(s) is a matter of construction of its constituting document;
- ii. clear Court of Appeal authority for a 2-step test to be applied in determining whether a purpose is charitable;
- iii. clear Court of Appeal and High Court authority for the proposition that wider, indirect public benefits are taken into account in assessing whether a purpose is charitable;
- iv. clear Privy Council, Court of Appeal and High Court authority for the proposition that public benefit can be achieved by means of assistance to individuals;⁸⁸
- v. clear Court of Appeal authority that New Zealand charities law did not observe a strict political purposes exclusion prior to the Charities Act; and
- vi. clear Privy Council authority that the distinction in charities law is between ends, means and consequences: the ends must be exclusively charitable, but if non-charitable benefits are merely the means or incidental consequences of carrying out the charitable purposes and are not ends in themselves, charitable status is not lost. In other words, the common law focuses on *purposes*, and incidental private benefits in furtherance of charitable purpose are not necessarily inconsistent with charitable status.

⁸⁸ *Latimer v Commissioner of Inland Revenue* [2004] 3 NZLR 157 (PC) at [35]; *Latimer v Commissioner of Inland Revenue* [2002] 3 NZLR 195 (CA) at [35]-[38]; *Latimer v Commissioner of Inland Revenue* [2002] 1 NZLR 535 (HC) at [65]. Compare *Re Queenstown Lakes Community Housing Trust* [2011] 3 NZLR 502 (HC) at [68].

The *Latimer* cases are also significant for demonstrating the breadth and flexibility of the common law and its ability to “perambulate”: correctly interpreted, the concept of charitable purpose is wide and is not confined to the fulfilling of a particular need, tangibly;⁸⁹ correctly interpreted, the definition of charitable purpose is not restricted to a narrow, colonial, Anglo-Saxon concept inspired by class. To the contrary, correctly interpreted, the definition of charitable purpose is wide, and capable of encompassing what the late Dr Mānuka Henare might describe as an “ambicultural” approach.⁹⁰

The *Latimer* decisions also demonstrate acutely that the ability to call oral evidence, and have it properly tested by means of a first instance judicial trier of fact according to established rules of evidence, is critical, particularly in the context of ascertaining purpose and demonstrating public benefit. The evidential platform that was laid in the High Court over a 3-day oral hearing was pivotal to the conclusions ultimately reached. As discussed further below in chapter 6 (*Appeals*), charities’ ability to call and test evidence, in appealing decisions under the Charities Act, was inadvertently removed due to changes hastily made by the Select Committee considering the original Charities Bill in 2004. The unintended consequences of this change cannot be overstated: were an issue similar to that considered in the *Latimer* litigation to arise today, it is unlikely that a novel purpose such as the assistance purpose of the Crown Forestry Rental Trust would be found to be charitable, as discussed further below.

Subsequent interpretations of the definition of charitable purpose

As can be seen from the *Latimer* cases, charities law in New Zealand prior to the Charities Act 2005 was effectively administered by its tax authority, IRD, an agency tasked with maximising revenue for the New Zealand Government.⁹¹

In 2001, before the Court of Appeal decision in *Latimer CA* but following a series of other high profile losses in the Court of Appeal (specifically, the *Medical Council* and *Commissioner of Inland Revenue v New Zealand Council for Law Reporting* cases),⁹² IRD expressed concern that the definition of charitable purpose may have become too wide, and the charitable income tax exemptions “too widely available”.⁹³ The issue of charities running businesses potentially having a competitive advantage over their for-profit competitors was specifically referred to in this context.⁹⁴

However, IRD noted that these may have been problems of perception only, as there was no charities register at that time, meaning that the government had very little information about the extent to which charities were accessing income tax exemption.⁹⁵

The 2001 discussion document

Nevertheless, in its June 2001 *Tax and charities* discussion document (“the 2001 discussion document”),⁹⁶ IRD applied a “tax expenditure analysis” framework, and put forward three options for changing the definition of charitable purpose so that the “fiscal privileges” accorded to charities would be limited to those charitable purposes that “[accorded] with society’s current objectives”.⁹⁷

89 Kós P, opening address to the Charity Law Association of Australia and New Zealand Conference “[Murky Waters, Muddled Thinking: Charities and Politics](#)” 4 November 2020 at [33]. Compare *Re Greenpeace of New Zealand Inc* [2015] 1 NZLR 169 (SC) at [114].

90 Dr Mānuka Henare “Reconsidering the Māori economy as an Economy of Mana”, keynote presentation at the Philanthropy New Zealand Summit, 16 April 2015: www.youtube.com/watch?v=5plyfMtA8nk.

91 Tax Administration Act 1994 s 6A(2).

92 *Commissioner of Inland Revenue v New Zealand Council for Law Reporting* [1981] 1 NZLR 682 (CA).

93 See Inland Revenue Department [Tax and charities, a government discussion document on taxation issues relating to charities and non-profit bodies](#) June 2001 at [2.4], [3.8], [4.1] - [4.2], [5.1]. In some respects, however, Inland Revenue’s interpretation of the definition was considered to be too narrow, particularly in relation to sport and advocacy: Charities Bill 2004 (108-2) ([select committee report](#)) 17 December 2004 at 3.

94 Inland Revenue Department [Tax and charities, a government discussion document on taxation issues relating to charities and non-profit bodies](#) June 2001 at [4.2].

95 Inland Revenue Department [Tax and charities, a government discussion document on taxation issues relating to charities and non-profit bodies](#) June 2001 at [4.1].

96 Inland Revenue Department [Tax and charities, a government discussion document on taxation issues relating to charities and non-profit bodies](#) June 2001.

97 Inland Revenue Department [Tax and charities, a government discussion document on taxation issues relating to charities and non-profit bodies](#) June 2001 at [4.3].

IRD's three options for changing the definition of charitable purpose can be summarised as "deeming", "replacing" and "limiting" the definition.⁹⁸

Deeming

Option one would have maintained the current definition of charitable purpose, but restricted income tax exemption to *registered* charities only. The tax legislation would also have been amended to require an entity not only to be *established* for charitable purposes, but also to continue to carry out those charitable purposes for as long as it claims the tax exemption.⁹⁹

A variation of this option would have allowed the government (by Order in Council on the recommendation of the Minister of Finance) to override any registration and deregister a charity: "[t]his would be in keeping with recognising the tax exemption as an *expenditure decision by the government* and would allow the government to target those entities *undertaking activities that it wishes or does not wish to support*".¹⁰⁰

IRD considered allowing the government to "deem" a particular entity not to be charitable would allow "decisions about government resources to be made in a manner consistent with evolving views on what constitutes a charitable purpose".¹⁰¹

Replacing

Option two would have replaced the current definition of charitable purpose with a new, general definition, along the following lines:¹⁰²

A charitable purpose means a humanitarian purpose that, when viewed objectively, makes a direct positive contribution to the wellbeing of society as a whole.

IRD's stated reason for adopting such an approach was to "move away from existing case law", which it considered had expanded to such an extent that it is "now too easy to become a charity".¹⁰³

Again, a specific approval would be required,¹⁰⁴ assisted by detailed guidelines set by Order in Council and therefore "more readily varied over time as public perception of what is a charitable purpose changes".¹⁰⁵

This option would also have enabled the government to override any registration and deregister a charity, again on the basis of targeting only those entities undertaking activities that government wishes to support.¹⁰⁶

Limiting

Option three would have limited the definition of charitable purpose to its "popular" meaning of alleviating hardship and providing aid and assistance to the suffering and the needy;¹⁰⁷ however, IRD acknowledged that doing so would exclude a significant number of entities that the public has long acknowledged to be charitable (including schools, universities and churches, except to the extent they were providing for the relief

98 Inland Revenue Department [Tax and charities, a government discussion document on taxation issues relating to charities and non-profit bodies](#) June 2001, ch 5.

99 Inland Revenue Department [Tax and charities, a government discussion document on taxation issues relating to charities and non-profit bodies](#) June 2001 at [5.3] - [5.4].

100 Inland Revenue Department [Tax and charities, a government discussion document on taxation issues relating to charities and non-profit bodies](#) June 2001 at [5.5] (emphasis added).

101 Inland Revenue Department [Tax and charities, a government discussion document on taxation issues relating to charities and non-profit bodies](#) June 2001 at [5.7].

102 Inland Revenue Department [Tax and charities, a government discussion document on taxation issues relating to charities and non-profit bodies](#) June 2001 at [5.9] - [5.10].

103 Inland Revenue Department [Tax and charities, a government discussion document on taxation issues relating to charities and non-profit bodies](#) June 2001 at [5.11].

104 Inland Revenue Department [Tax and charities, a government discussion document on taxation issues relating to charities and non-profit bodies](#) June 2001 at [5.9], [5.13].

105 Inland Revenue Department [Tax and charities, a government discussion document on taxation issues relating to charities and non-profit bodies](#) June 2001 at [5.12].

106 Inland Revenue Department [Tax and charities, a government discussion document on taxation issues relating to charities and non-profit bodies](#) June 2001 at [5.15].

107 Inland Revenue Department [Tax and charities, a government discussion document on taxation issues relating to charities and non-profit bodies](#) June 2001 at [5.16], [5.19].

of poverty), meaning less money for those particular purposes “which by and large the community continues to support”.¹⁰⁸ IRD considered these disadvantages were significant and did not progress option three.¹⁰⁹

The Charities Act

Some argue that such a tax expenditure analysis, that would restrict registered charitable status only to those charities undertaking activities that *government* wishes to support, found expression in the Charities Bill as originally introduced, based on the following comments in the explanatory note:¹¹⁰

Currently, there is no process for the registration of charities and there is no consistent, useful collection of information about the activities or funding sources of charities. Consequently, the Government has agreed to establish a Charities Commission (the Commission) to register and monitor charitable entities ... *to ensure that those entities receiving tax relief continue to carry out charitable purposes and provide a clear public benefit.*

However, these comments do not clearly reflect a tax expenditure analysis. For example, “public benefit” is not necessarily synonymous with government objectives, as discussed above in chapter 1. Further, even if these comments did reflect a tax expenditure analysis, the original Charities Bill was widely regarded as fundamentally flawed and was almost completely rewritten at Select Committee stage in response to hundreds of submissions;¹¹¹ this factor undermines the extent to which the explanatory note can be relied on as indicative of Parliament’s intention as reflected in the legislation that was ultimately passed.

It is also important to note that the Select Committee considering the original Charities Bill made it very clear that the definition of charitable purpose was not being changed:¹¹²

The majority is concerned that amending this definition would be interpreted by the Courts as an attempt to widen or narrow the scope of charitable purposes, or change the law in this area, which was not the intent of the bill.

The courts have since confirmed that the Charities Act did not alter the definition of charitable purpose.¹¹³ Accordingly, the definition of charitable purpose that IRD acknowledged was very wide should have survived the passing of the Charities Act.

Experience in practice

It is therefore surprising that the definition of charitable purpose has been interpreted so narrowly since the Charities Act was passed into law in 2005 (and particularly since the Charities Commission was disestablished in 2012), to the point that many worthy charities have been prevented from accessing registration. As discussed above, an inability to access registration can have significant implications, not least because it can render an organisation unable to access the funding needed to survive.

Difficulties with current interpretations were highlighted acutely in submissions to the DIA’s review of the Charities Act (despite the definition of charitable purpose being specifically outside scope, as discussed above). The material contained in submissions is invaluable and merits close consideration, not least for its insights into how current interpretations are impacting in practice (see box 3.3):

108 Inland Revenue Department [Tax and charities, a government discussion document on taxation issues relating to charities and non-profit bodies](#) June 2001 at [5.19].

109 Inland Revenue Department [Tax and charities, a government discussion document on taxation issues relating to charities and non-profit bodies](#) June 2001 at [5.20].

110 Charities Bill 2004 (108-1) (23 March 2004) [explanatory note](#) at 1 (emphasis added).

111 Charities Bill 2004 (108-2) ([select committee report](#)) at 21; Charities Bill 2R (12 April 2005) 625 NZPD 19,944 per Georgina Beyer, Labour.

112 Charities Bill 2004 (108-2) ([select committee report](#)) at 3.

113 *Re Greenpeace of New Zealand Incorporated* [2015] 3 NZLR 72 (SC) at [16] - [17]; *Foundation for Anti-Aging Research v Charities Registration Board* [2015] NZCA 449 at [10]; *Re Education New Zealand Trust* (2010) 24 NZTC 24,354 (HC) at [13]; *Re The Grand Lodge of Antient Free and Accepted Masons in New Zealand* [2011] 1 NZLR 277 (HC) at [8]; *Re Draco Foundation (NZ) Charitable Trust* (2011) 25 NZTC 20-032 (HC) at [11]; *Re Greenpeace New Zealand Incorporated* [2011] 2 NZLR 815 (HC) at [36] - [40]; *Re Greenpeace of New Zealand Inc* [2013] 1 NZLR 339 (CA) at [42]; *Re The Foundation for Anti-Aging Research* (2016) 23 PRNZ 726 (HC) at [15]; *Family First New Zealand v Attorney-General* [2020] NZCA 366 at [67].

Box 3.3 – summary of submissions on the definition of charitable purpose:

Te Pūtahitanga o Te Waipounamu:

While there are challenges with ... Charities Services' narrow interpretation of the word "charitable", which has undermined the sustainability of several charities, addressing the issues inherent in the definitional question would make more sense than dismantling the Commission which is what has occurred with the core functions moved to Internal Affairs. The charities sector has a key concern with the Charities Services and its interpretation of the definition of charity and many entities have been deregistered. The solution would be to review the definition and interpretation of the word 'charity' in the Charities Act 2005

Venture Taranaki Trust:

The Charities Commission and the courts have adopted a narrow interpretation of the current definition of "charitable purpose", excluding economic development activities from its scope.

We note that prior to the Act coming into force, economic development agencies that were structured as charitable trusts or incorporated societies received charitable status from an income tax perspective. This changed following the introduction of the Act as charities that wished to retain or gain income tax exempt status were required to register with the newly established Charities Commission.

Several economic development agencies (including Venture Taranaki) applied to the Charities Commission for charitable status and were turned down on the basis that their activities were not wholly or mainly "charitable" according to the definition in the Act.

Venture Taranaki strongly believes that its purposes and activities are charitable in nature, providing benefit to its local community. Our focus is to contribute to a strong and resilient regional economy that enables meaningful choices and opportunities for our people, enhancing their wellbeing and that of the community. We cannot see any rational or reasonable argument to exclude economic development from being recognised as charitable for the purposes of the Act.

As a not-for-profit organisation funded by local and central government agencies, there can be only one reason for our existence and this is to benefit our community. As development agencies around the country work for the benefit of their communities and the enhance the wellbeing of their people, the health of the national economy is supported and this has positive impacts for the entire country.

Impact of this interpretation

Venture Taranaki is entirely funded by public entities (local and central government agencies). The current interpretation of charitable purpose means that we are liable to pay income tax on any surplus that we hold at the end of the financial year. This creates an anomalous situation where we are taxed on funds (generated from rates and central government taxes themselves) provided to us to deliver public good services in our region.

This situation is well-illustrated by the example of Provincial Growth Fund (PGF) projects. We have been fortunate to receive PGF funding for some projects. The funding received is based on the exact costs of delivering the projects. There may be occasions when the funding for a particular project is not entirely expended by the end of the financial year as the project spans two financial years. We would then be liable to pay income tax on the funding we hold for that project, purely due to timing issues. The cost of delivering the project remains the same but the funding available for it does not due to tax liabilities – this is a nonsense.

Government regional development priorities

The current Government have clearly stated their intention to support regional development throughout New Zealand. This intention would be supported by recognition that the purposes and activities of regional development agencies benefit their communities and are for the public benefit. We note that the IRD have recognised this in the case of Development West Coast and remain unclear why this recognition has not been extended in an equitable and transparent manner to other regional and metropolitan development agencies. Venture Taranaki believes that economic and regional development throughout the country would be promoted by extending charitable status to regional development agencies.

This should be done in an open and democratic manner through the Parliamentary process, clarifying the situation for all.

Seed the Change | He Kākano Hāpai:

Having recently registered as a charity, and wanting to support initiatives that are going to make a positive impact for today and in the future we found our Trust Deed to be constrained by needing to fit into a charitable definition that is based on legislation that was passed in a societal context vastly different to the one that we are in today. Supporting other entities seeking charitable registration we note they are experiencing similar restrictions, and not responsive to meet the needs that “for purpose” organisations, that is organisations that are seeking to manifest an equitable, sustainable and regenerative future – charitable for future generations. It is our opinion that the current charitable purpose is based on a deficit-based approach. We agree with Ākina’s point that this has several problematic consequences, including:

- perpetuating a dichotomy of the helpers and the helped, which inherently undermines the agency of those being helped and excludes them from also being ‘helpers’ in their own communities;
- dis-incentivising charities from doing more than just reacting to problems. Once the deficit is ‘fixed’, the role of the charity is complete and the communities that were receiving help (and importantly, often without being empowered to help themselves) are then left to fend for themselves; and
- charities needing to use different language when communicating with communities (strengths-based language) than the language used to describe their charitable purposes (deficit-based language). This reduces transparency and accountability and adds complexity to the governance of charities ...

Seed the Change | He Kākano Hāpai actively supports and works towards delivering outcomes towards the United Nations Sustainable Development Goals. This requires partnership, a future focused, strengths-based, trans-national approach for many issues.

We also consider a first principles review would promote conversation on how can the sector be empowered, and promote the work it’s doing. How can we increase its potential and the impact to beneficiaries, and future generations? In our experience most charities, social enterprises, community organisations and government agencies are already using strength-based approaches and strength-based language. The current Act does not reflect this. The review of the Charities Act provides an opportunity to formally recognise and encourage a strength-based approach for charities (including in the statement of charitable purposes). This starts with a translational piece, whereby Charities Services is able to recognise strength-based language, how it fits within the existing heads of charity and provide guidance for charities on how to interpret the heads of charity and how to use a strength-based approach to generate public benefit.

FinCap (National Building Financial Capability Charitable Trust):

[t]he submission by the Akina Foundation to this review makes a very valid point about the importance of taking a strengths-based approach. The charitable purpose of the relief of poverty is a deficit-based approach. Poverty remains a persistent issue in our society. However, many people don’t view themselves as being in poverty. One of the challenges for financial capability and budgeting services is that we are seen to be a charitable cause. Because of that many people that could be accessing our services do not because of the stigma attached to charity and social services. Many people could avoid poverty if they had knowledge and support in times of financial hardship. If we were to achieve a society free of poverty there would still be a need to support people to build their financial capability. Budgeting services have been encouraged by the Ministry of Society Development to shift towards a strengths-based approach. This involved a five-year co-design process where the conceptual frameworks for financial capability and financial mentoring were developed. There is a disconnect between the direction towards a strengths-based approach that the social services and charitable sector are taking and the deficit language in the relief of poverty charitable purpose

Steiner Education Development Foundation:

We think the scope of the review is too limited. It needs to include a review of the definition of “charitable purpose” as is under active consideration overseas. Being educational, we are fairly secure under the Act as it is now but we think the basic definition is arcane and should be brought up to date. We work with associates who have decided not to become charities because of uncertainties around this and the arbitrary restrictions it sometimes imposes even though what they do is charitable from any common sensical point of view. Although it is not our focus, we think, for example, that environmental issues should be clearly included within the meaning of charitable purpose

Central Lakes Trust:

[s]ome entities, eg Alexandra Blossom Festival that are perceived as community charitable events cannot afford to fight a declined registration and need to clearly understand where they do not comply for registration

Federated Farmers of New Zealand:

There are some charitable entities that are associated with Federated Farmers, which have accumulated substantial assets over many years. Most often this appears to be as a result of assets that have been built up over perhaps decades by various Federated Farmers entities (including some of the Federated Farmers provinces) being transferred into separate and distinct charitable entities, with the aim of protecting the assets and using the income derived from those assets to provide for the advancement of farming generally. It has become of concern to Federated Farmers that, in some instances, the use of the funds that have been derived from those assets, for what seems to Federated Farmers to be the purpose of advancing farming generally, has been challenged as not being for a charitable purpose. Yet, in some instances, the funds being used were being used for precisely the same purposes as funds that were used by other charitable entities, whose activities have not appeared to come under challenge

Joanne Harland:

There are several areas of the Act that are not being reviewed that I believe are in urgent need of reform, particularly the outdated heads of charity section. It is particularly disappointing that the heads of charity uses entirely deficit language – implying that charities come in and ‘fix’ things for individuals and communities in need. This is direct conflict to the strengths-based language used in the community development and social impact space. I would like to see the language of the Act changed to encourage the whole sector to use a strength-based approach to public benefit ... The current regime frustrates rather than supports the sector

Jon Horne:

[t]his is an important sector – crucial to this country’s economy and society ... restricting the definition of charitable purpose discourages innovation and will cause the concept of charity to become increasingly anachronistic

Lindsay Jeffs of Carbon Neutral NZ Trust, Canterbury Community Business Trust, Hauraki Gulf Conservation Trust, NZ Community Economic Development Trust, and Waiheke Community Housing Trust:

Modernising the Charities Act without considering the definition of “charitable purpose” and relying on court judgements that are rooted in twentieth century and earlier thinking will stultify the sector and prevent much needed innovation. The sector will be unable to play a significant role in addressing the major concerns of the twenty-first century such as climate change, biodiversity loss, ocean acidification, sea-level rise, toxic chemicals, clean water crisis, affordable housing, income inequality to name a few. These issues require the input of not only business and government but the community and the charitable and not-for-profit sector ...

Threat of deregistration plus the conservative approach of the Courts in this area. For example, recent decisions in the areas of community housing illustrate this fear. There is a general understanding that housing, and in particular affordable housing, is an issue in New Zealand particularly in areas such as Auckland and Queenstown. Also, it is understood that if people are not adequately housed then there are additional health and social costs to the nation. Yet the Courts have been unwilling to consider new approaches to this issue such as co-housing or equity shares as charitable ...

The Board’s decision on the “Kiwis Against Seabed Mining Society” does not appear to take into account the generally accepted scientific position that all sea bed mining has detrimental effects on the environment and that these detrimental effects would impact on future generations. New charitable purposes must be accepted if the legislation is to remain relevant and fit for purpose ...

The section on advocacy fails to mention that most charities start as advocacy bodies as their purpose is to improve people’s health, education or welfare or the environment. For example, an entity who wishes to see improved access for children suffering physical or mental health issues frequently starts as a small group of people advocating for change in government policy. Over time people donate to the cause, philanthropic entities accept the people’s

concerns and provide grant funding. Later the government may establish policy and funding. Such pathways can be seen in education, human rights, penal reform, domestic violence and animal welfare.

Methodist Alliance:

[w]hanaungatanga, manaakitanga and kaitiakitanga are the values that underpin the mahi tahi and the mahi aroha in charities. An expanded definition of charity that incorporates tikanga Māori concepts would ensure a charities framework that reflects our unique culture and strengths

Sustainable Initiatives Fund Trust:

Being dedicated to providing grants to organisations undertaking sustainability and environmental focused projects, we sometimes have difficulty in being sure we are within the generally accepted definition of charitable purpose. This has made us decline some applicants whose purpose would be charitable under any reasonable interpretation of the term. We think this needs better definition which will only come from a more comprehensive review, one focused on the development of charitable purpose rather than its restriction

Te Hunga Rōia Māori o Aotearoa, the Māori Law Society:

We consider that the narrow definition of charitable purpose poses particular issues around what Māori charities can do and as a result has limited the activities Māori charities (and iwi settlement entities in particular) can undertake. For example, housing initiatives, language revitalisation including kapa haka, health initiatives including sport and exercise initiatives, and economic development programmes (discussed in more detail below) are considered necessary to address particular needs of Māori communities, however, aspects of these initiatives do not fall neatly within the current definition of “charitable purpose”. As such, Māori charities are restricted in the development of its various programmes to ensure they meet its charitable status.

The Discussion Document states that the review of the Act is an opportunity to assess how well the Act supports the aspirations of Māori communities, and enables the Crown to fulfil its obligations as a Treaty partner. Such an assessment requires a consideration of the entire charities regime and therefore should include the definition of charitable purpose. The myriad of case law, as well as entities like the Law Commission, have identified the need to assess the definition of charitable purpose. In particular, the Law Commission, as part of its review of the Charitable Trusts Act 1957, stated that the whole field of charities law would benefit from a reform project. As part of this review, the Commission identified the definition of charitable purpose as a key issue for consideration.

We consider that the exclusion from the review of the definition of charitable purpose is problematic as it is fundamental to the charities regime and particularly for iwi settlement organisations and therefore essential for answering the question of what is and what is not working for Māori.

Te Whakakitenga o Waikato Incorporated, on behalf of the Waikato-Tainui iwi, endorsed by the Waikato Raupatu Lands Trust and Group and Waikato-Tainui marae:

The Act cannot be truly “modernised”, and Te Ao Māori cannot be properly integrated into the Act, without reviewing the current, outdated “charitable purposes” definition that is built upon old English law. A modern definition of the “charitable purposes” concept (or a new concept altogether) would be able to take into account and incorporate te ao and tikanga Māori and relevant Māori concepts, including rangatiratanga, aroha, whanaungatanga, manaakitanga and kaitiakitanga...A wider, holistic review, including a review of the outdated “charitable purposes” definition, would also address any concerns that PSGEs and other Māori charities have in relation to the “charitable purposes” definition limiting the activities that they undertake for the benefit of their iwi and hapuu. From Waikato-Tainui’s perspective, however, even under the current, outdated “charitable purposes” definition there is broad scope for PSGEs and other Māori charities to undertake a wide range of activities and initiatives for the benefit of their iwi and hapuu, as a means of redressing and recovering from the economic, political, social and cultural deprivations suffered by such iwi and hapuu as a result of raupatu and other Tiriti breaches. This is a long-term process and it will require many generations for Waikato-Tainui to substantively restore the welfare, economy and development potential of our iwi.

The Tindall Foundation:

We further agree with Ākina that the alternative is to approach defining charitable purpose through a strengths-based approach: leveraging the strengths of an individual or community to generate positive social change and supporting those people and communities to thrive toward the goal of being in a position to help others thereby causing a chain reaction of positive change. Rather than seeing people as problems to be fixed, it sees them as having value and being agents of their own change – ie offering people a hand-up not a hand-out.

See also the submissions of Age Concern (Tauranga); Age Concern New Zealand Inc; Barnados New Zealand; Barry Coates, Sustainable Initiatives Aotearoa; Blind Foundation; Bowel Cancer New Zealand; Braemar Charitable Trust; Bridget Frame; Cancer Society of New Zealand; Ced Simpson and Valerie Williams; Centre for Social Impact; Chapman Tripp; Child Matters; Community Foundations of New Zealand; Community Housing Aotearoa; David Boswell; EY Law; Individual D; Jackie St John; John Welford; JR McKenzie Trust; Kensington Swan; Kent Beasley; LEAD; Lucy Burt; Make A Wish Foundation of New Zealand Trust; The Methodist Church of New Zealand Te Haahi Weteriana O Aotearoa Auckland Fiji Methodist Parish (Tabacakacaka); Momentum Waikato Te Puaawaitanga o Waikato; Multiple Sclerosis New Zealand Inc; Nelson Tasman Community Transport Trust; New Zealand Law Society; Philanthropy New Zealand; Pirongia Te Aroaro o Kahu Restoration Society Inc; Ross Beever Memorial Mycological Trust; Professor Carolyn Cordery; RSM NZ; Social Service Providers Aotearoa; Stopping Violence Services (Christchurch); The Ākina Foundation; The Presbyterian Church of Aotearoa New Zealand; The Salvation Army Group; The Todd Foundation; Volunteering New Zealand; Whaiora Whanui Trust; and Youthline Central South Island.

It is also important to take note of the following submission from Don McKenzie CNZM, OBE (emphasis added):

This submission relates to the disability sector, that is 24% of the New Zealand population (1.1 million people), according to the 2013 census, ... a vulnerable and disparate group who benefit hugely from the ethic of charity giving. ...

As recipients of charity we users are all grateful for the community's generous largesse and indeed, couldn't do without it. However, the reality is that we would rather not have to be so reliant on donations in order to access ordinary public services readily available to the average citizen. We would rather be included in the ordinary course of social planning, rather than be excluded from it and added in as an afterthought. Yet, *society is the better* for seeing essential needs and working to offset inequality, while *preserving the personal worth of recipients. That personal worth is to preserve, as far as possible, beneficiaries becoming equal partners in shaping their own destiny.* The vulnerability of disabled people can be compounded in the eyes of the public by painting a picture of dependency, inferiority and being seen as 'needing fixing' by others. This is added to by a structural domination of a fundraising provider of services for beneficiaries who, as recipients are to remain grateful, silent, compliant and subservient. The Act's current focus on financial performance shows how much services cost. However, figures say little about how funds raised by providers actually improve community benefit, willingness to work with others, indications of what they truly stand for, their governance culture, how recipients are portrayed and what beneficiaries say about services and supports, and *how lives are changed. Working with people on the margins isn't easy but it is worth getting right.* ...

The object is for charity giving, to not only to help in a passive sense, but also to build capability and self-efficacy, an active process. The power of peer support and mentoring by like-minded people cannot be over-stated. *The traditional 'top down', 'command and control' corporate management style of governance doesn't 'cut it' in this human impact milieu.* ...

The credibility of the charity sector is likely to be increasingly challenged in a fast-changing world of competing values, mixed messages and the number of needy causes. Donors, recipients and society will go on demanding greater scrutiny and better value for money. The donating public are entitled to clear statements of the 400 year old purposes of charity, clear adherence to those purposes and an assessment of those statements against outcomes that are backed by clear evidence of value to society. *The enduring ideals from the 1601 Statute of Elizabeth implies voluntary giving in return for public benefit. Nothing should corrupt this principle. The ethic translates human values into a caring society.* Voluntary giving by the public is about bettering society. The ethic recognises that No one is immune from natural misfortunes and hardship. ...

With respect to disability, not only is it enough for agencies to meet the immediate needs of clients but there is also a need to *equip clients to direct their own affairs in accordance with selfdetermination. There's truth in the old adage of giving a fishing line as well as fish*

... Evidence from the census points to disabled people being generally conservative, lacking in educational opportunities, under employed and often not well equipped to take full charge of their lives like the majority of the population. The development of the 2016 to 2026 New Zealand Disability Strategy and New Zealand's adoption of the United Nations Convention on the Promotion and Protection of Rights of Persons with Disabilities (UNCRPD), testifies to the gains yet to be made for disabled New Zealanders. The artificial and unnecessary separation of service providers – largely the fundraisers and financial controllers, from the consumers they serve, *can engender a sense of subservience in recipients that can get in the way of an equal partnership, erode self-image and the development of a 'can do' attitude.*

I've learned that there is much wisdom, desire for self-help and capacity for leadership among recipients of charity. Recipients want to better themselves, be constructive and retain the dignity of self-effectiveness on their own terms. The recognition of these potentials within recipients varies widely and is often masked by confounding factors mentioned above. *The challenge for modernisation of charity law and its implementation is to grow these capacities among recipients to the mutual benefit of the community by regulating or managing for quality outcomes that are measurable and tangible.* Donors, recipients and society deserve nothing less.

Fundraising depends on a perceived need and/or dependency. A power imbalance often exists between provider and consumer, notwithstanding that funds are raised in the name of consumers. Agencies hold the financial whip hand and are supported by a corporate culture. Service users don't have the same opportunities to grow their collective wisdom and to learn from each other.

Largely, disabled New Zealanders are a disparate group. They are generally poor and poorly connected. They don't stand a chance up against professional governmental and non-profit establishments. *Ways have yet to be found to raise the consumer perspective born of lived experience in order to mitigate structural disadvantages.* Wherever practicable, there's a need to begin transitioning from reliance on charity to making rights real, consistent with the expectations of ordinary citizens.

In 2018, the United Nations Committee on the Rights of Persons with Disabilities issued new legal guidance on the UNCRPD that upholds the rights of persons with disabilities to participate and be involved in all issues relating to them. They said: "When persons with disabilities are properly consulted, this leads to laws, policies and programmes that contribute to more inclusive societies and environments." Thus, redressing structural imbalance is practical policy.

These submissions acutely highlight the benefits of a strengths-based approach, and indicate the breadth of charitable work that charities are currently being prevented from carrying out due to an overly-narrow interpretation of the definition of charitable purpose.¹¹⁴ Social housing is a particular area of difficulty, as illustrated by the case study in box 3.4:

Box 3.4 – social housing case study:

In *Re Queenstown Lakes Community Housing Trust* [2011] 3 NZLR 502 (HC) ("**Queenstown Lakes**"), the purpose of the Queenstown Lakes Community Housing Trust ("**the Trust**"), as expressed in its trust deed, was to "provide housing ... for households that ... will contribute to the social, cultural, economic and environmental wellbeing" of those living within the Queenstown area, at a cost within their means. The Trust was an initiative arising out of a community study undertaken by the Queenstown Lakes District Council ("**the Council**"): housing affordability was having such a negative impact that the Queenstown community was having difficulty attracting and retaining key workers vital to its functioning and operation. Queenstown is a tourist town not unlike Aspen in Colorado; work needed to service the tourist industry, such as making coffees and cleaning toilets, often does not pay sufficiently well for workers to be able to afford to live in the expensive Queenstown area. Commuting half an hour by car (assuming the worker had access to a car) from either Cromwell (on the other side of the Shotover Gorge) or Kingston (at the southern tip of Lake Wakatipu) was not considered a realistic option for those working often unsociable hours on often low wages. Public transport was also unlikely to be realistically available at such times.

¹¹⁴ See also Justice Sir Joe Williams KNZM "[Pemsel in the Pacific](#)", speech delivered at the *Future Prospects for Charities Law* Conference held in Wellington on 11 April 2019.

More fundamentally, requiring essential workers to live outside Queenstown would not provide a meaningful solution for the community: in order to protect against an Aspen-style “hollowing out” of Queenstown, the social, cultural, economic, and environmental wellbeing of those living in the Queenstown area required that skilled and energetic adults, including young families with children, be attracted to live in and be part of the community, to protect against loss of vibrancy and diversity and the adverse consequences of being unable to maintain a strong and stable workforce. In other words, the Trust was formed by the Council as an independent, not-for-profit, community-owned organisation to provide affordable housing for the workers Queenstown needed to function effectively. It seems intuitively clear that the Council was not seeking to assist people into housing out of the goodness of its heart: the true purpose of the Trust seems clearly to benefit the community, rather than to benefit individual households per se.

Following its formation in 2007, the Trust was registered as a charity with the Charities Commission in January 2008. The Charities Act fully came into force a few months’ later on 1 July 2008,¹¹⁵ meaning that the Trust would have been among the first charities in New Zealand to be registered.

However, following a review, the Trust was controversially deregistered in 2010, on the basis that assisting people to buy housing resulted in private benefits to individuals – the wider benefit to the community being apparently disregarded.¹¹⁶

The Trust appealed to the High Court under s 59 of the Charities Act, but the High Court upheld the decision of the Charities Commission.¹¹⁷ (In early decisions under the Charities Act, the courts appear to have deferred to the Charities Commission as the “specialist body”, rather than embracing their role as the source of the common law definition of charitable purpose).¹¹⁸ In particular, the High Court held that “public benefit which is capable of being charitable will not generally be charitable if the public benefit is achieved by means of assistance to individuals”.¹¹⁹ It is not clear how this finding can be reconciled with the earlier findings of the Privy Council and Court of Appeal in *Latimer* that incidental private benefits are not inconsistent with public benefit,¹²⁰ as the *Latimer* decisions are not mentioned in the judgment.

The impact of the *Queenstown Lakes*’ case has been significant.

The Government did not agree with the decision, describing it as “arbitrary”,¹²¹ but had no clear mechanism of appeal so instead allocated \$6 million of taxpayers’ money to pay the Trust’s income tax liability that arose as a result of the deregistration.¹²²

Then, in November 2013, the Government introduced legislation to “work around” the decision by creating a new category of entity (community housing entities) which would have its own specific income tax exemption (Income Tax Act 2007, s CW 42B).¹²³ Given that the New Zealand tax environment is based on a principle of “broad base, low rate”, the significance of this step should not be underestimated, underscoring the value the Government placed on the Trust’s work.

However, drafting this work-around became a matter of considerable difficulty, requiring amendment both by select committee and through Supplementary Order Paper before being passed into law in June 2014.¹²⁴

115 The charities register opened in February 2007. The provisions requiring charitable registration as a prerequisite to income tax exemption came into force on 1 July 2008: [Charities Act Commencement Order 2006](#) cl 4.

116 Charities Commission Decision D2010-12 *Queenstown Lakes Community Housing Trust* 18 August 2010: [<www.charities.govt.nz/charities-in-new-zealand/legal-decisions/view-the-decisions/view/queenstown-lakes-community-housing-trust>](#).

117 *Re Queenstown Lakes Community Housing Trust* [2011] 3 NZLR 502 (HC).

118 See the discussion in S Barker “Canterbury Development case” [2010] NZLJ 248.

119 *Re Queenstown Lakes Community Housing Trust* [2011] 3 NZLR 502 (HC) at [68].

120 *Latimer v Commissioner of Inland Revenue* [2002] 3 NZLR 195 (CA) at [35] - [40]; *Latimer v Commissioner of Inland Revenue* [2004] 3 NZLR 157 (PC) at [35] - [36].

121 Michael Fox “Housing charity hit by tax bill” *Stuff.co.nz* (online ed, 28 May 2015): [<www.stuff.co.nz/national/10093399/Housing-charity-hit-by-tax-bill>](#).

122 Michael Fox “Housing charity hit by tax bill” *Stuff.co.nz* (online ed, 28 May 2015).

123 Taxation (Annual Rates, Employee Allowances, and Remedial Matters) Bill 176-1.

124 [Taxation \(Annual Rates, Employee Allowances, and Remedial Matters\) Act 2014](#).

However, before the exemption could be brought into force, eligibility status needed to be specified by regulation: the complexity inherent in formulating the underlying qualifying criteria caused such delay that further remedial legislation was required.

This was introduced in February 2015 and took the form of a bill to defer application of s HR 12 of the Income Tax Act 2007 (the new “deregistration tax”, which broadly requires a deregistered charity to divest itself of its assets within 12 months of deregistration or pay tax on the balance).

Application of the deregistration tax was deferred for charities whose purposes or activities were “predominantly the provision of housing”,¹²⁵ in order to give more time for Charities Services (which had by then replaced the Charities Commission) to complete a review of the charitable status of every housing charity in New Zealand in light of the *Queenstown Lakes*’ decision.¹²⁶ This review saw some 3,000 housing charities subjected to months of unhelpful uncertainty and cost, distracting them from their work in the midst of a housing crisis.¹²⁷

Further significant investment of Parliamentary and officials’ time was then required to rework the provisions entirely and rush the reworked provisions into legislation: in November 2015, following more than 12 months’ work by officials from the Ministry of Business, Innovation and Employment, Treasury and IRD, then Minister of Revenue, Hon Todd McLay, introduced a Supplementary Order Paper proposing further substantive amendments to the community housing provisions.¹²⁸ The accompanying regulatory impact statement noted that “although this approach will provide much needed certainty for potentially affected providers, there will be no opportunity to consult formally on the proposed changes”.

The Bill finally passed into law on 24 February 2016, over eight years after the Trust was originally registered.

Yet, despite all of this effort to “workaround” the *Queenstown Lakes*’ decision, these measures did not fix the problem: a specific income tax exemption, while welcome, is unfortunately a “second-best” option, as without registered charitable status, housing charities are generally unable to access the philanthropic funding they need to fulfil their charitable purposes (highlighting how fiscal privileges are often overstated as a driver of registration). The writer is not aware of any charity, other than the Trust, that has made use of the new exemption. Instead, housing charities are forced to artificially curtail their efforts to help people into affordable housing under the fourth head, especially home ownership which provides a permanent pathway out of poverty, for fear of putting their charitable registration at risk. This unhelpful chilling effect is occurring at a time when New Zealand shockingly has working families living in cars.¹²⁹

As the *Latimer* decision illustrates, the Government’s considerable efforts to “work around” the *Queenstown Lakes*’ decision are arguably clear indicators of the public benefit of the Trust’s work. Yet, its 2015 reapplication for charitable registration was again declined, on the basis that its purpose was simply to help people into home ownership.¹³⁰ In reaching this conclusion, the wider public benefits of affordable housing, including the social cohesion that flows from security of tenure, again appear to have

125 Income Tax Act 2007 s HR 12; Taxation (Annual Rates for 2015–16, Research and Development, and Remedial Matters) Bill 2015 cl 264.

126 Inland Revenue, Commentary on the Taxation (Annual Rates for 2015–16, Research and Development, and Remedial Matters) Bill, February 2015 at 63.

127 P Jackson “Waiting game for He Korowai” *The New Zealand Herald* (online ed), 29 September 2015.

128 Income Tax Act 2007, new sch 34 replaced s 225D of the Income Tax Act 2007 by supplementary order paper in November 2015.

129 RNZ “Emergency housing: \$1m-a-day spend a ‘disgrace’ – National” 9 March 2021:

www.rnz.co.nz/news/national/438001/emergency-housing-1m-a-day-spend-a-disgrace-national;

RNZ “It’s time for New Zealand to wake up to its poverty problem” 2 February 2020: www.rnz.co.nz/national/programmes/sunday/audio/2018732364/it-s-time-for-new-zealand-to-wake-up-to-its-poverty-problem.

130 Charities Registration Board Decision 2015-3 *Queenstown Lakes Community Housing Trust* 2 November 2015 at 3: www.charities.govt.nz/charities-in-new-zealand/legal-decisions/view-the-decisions/view/queenstown-lakes-community-housing-trust-3.

been overlooked. Instead, in what Hon Justice Kós might describe as “making a hash of equity”,¹³¹ a “bright line” test is applied that defers to direct benefits, and dismisses wider benefits as “too remote”.¹³²

The social housing saga highlights the difficulties inherent in trying to fix problems at the level of symptom, rather than cause: had the definition of charitable purpose been interpreted so as to properly acknowledge the wider public benefits of the Trust’s work, as was clearly required by pre-Charities Act Court of Appeal authority,¹³³ the Trust would not have been deregistered, Charities Services’ review of social housing charities would not have been undertaken, enormous amounts of taxpayer and charitable funds would not have been wasted, and arbitrary barriers would not now be being placed in the way of charities helping people into affordable housing, just when it is needed most.

The problem is acute and its implications far-reaching. Overly-narrow interpretations undermine charities by creating a perception of charitable purpose as an old-fashioned, paternalistic, colonial, Victorian concept of handouts to the poor, perpetuating a deficits-based, capitalist distinction between “haves” and “have-nots” that contributes to charities being seen as symptoms of the problem rather than integral to the solution.¹³⁴ All of this undermines public trust and confidence in charities, and damages New Zealand’s culture of volunteering, social capital, and the wellbeing of New Zealanders.

Interpreting the definition of charitable purpose too narrowly is also costly: the government is currently spending millions of dollars in areas where narrow interpretations are preventing charities from doing their work, including in areas such as sport and public interest journalism.¹³⁵

The impact is particularly noticeable for charities operating internationally, which often face difficulty in gaining registration in New Zealand despite having the equivalent of registration around the world.¹³⁶

Importantly, the problem is not inherent in the definition of charitable purpose itself: the problem is the way the definition is currently being *interpreted*.¹³⁷ All of the above difficulties could have been obviated by simply interpreting the definition of charitable purpose in accordance with the law as set down by the High Court, Court of Appeal and Privy Council in the *Latimer* cases.

131 Kós P, opening address to the Charity Law Association of Australia and New Zealand Conference “[Murky Waters, Muddled Thinking: Charities and Politics](#)” 4 November 2020 at [33].

132 Charities Registration Board Decision 2015-3 [Queenstown Lakes Community Housing Trust](#) 2 November 2015 at 16, 21, 31, 59.

133 See, for example, *Latimer v Commissioner of Inland Revenue* [2002] 3 NZLR 195 (CA); *Commissioner of Inland Revenue v New Zealand Council of Law Reporting* [1981] 1 NZLR 682 (CA); *Commissioner of Inland Revenue v Medical Council of New Zealand* [1997] 2 NZLR 297 (CA).

134 An indication of the need to reclaim the word “charity” and restore it to its true breadth can be found in T Osunrinde *Rethinking concept of online giveaways*, Punch, 21 June 2020, referring to A Waytz, Assistant Professor of Management and Organisations at the Kellogg School of Management at Northwestern University: [<punchng.com/rethinking-concept-of-online-giveaways/>](#): “[w]hen people are on the receiving end of help, they tend to prefer something called agentic aid, which allows them to choose how to respond, yet people often prefer the opposite – paternalistic policies – when helping others ... However, charity to the poor may create a vicious, unintended poverty cycle if not contextually executed. Experts believe that charity only exacerbates the challenge of inequality and polarises participants on both ends of the charity quotient as privileged and unprivileged; the former class has a surplus and can aggregate resources to provide food and drive around to give it out while the latter category is trapped at home, unable to trade but have to rely on other people”. Properly defined, “charity” is not the preserve of the independently wealthy.

135 See RNZ “Government announces \$265m sports support package” 17 May 2020: [<www.rnz.co.nz/news/sport/416838/govt-announces-265m-sports-support-package>](#); “HSPNZ to pour \$131 million into national sporting bodies over next three years” *Stuff.co.nz* (online ed, 17 December 2021); [www.stuff.co.nz/sport/300479861/hpsnz-to-pour-131-million-into-national-sporting-bodies-over-next-three-years](#); Hamish McNeilly and Catherine Harris “Govt injects \$55m more into public interest journalism” *Stuff.co.nz* (online ed, 12 February 2021): [<www.stuff.co.nz/business/124222560/govt-injects-55m-more-into-public-interest-journalism>](#) and S Barker “[Charity regulation in New Zealand: history and where to now?](#)” (2020) 26(2) Third Sector Review 28.

136 A case in point is Greenpeace, which is discussed further below in ch 4.

137 As noted in the *Second Report by the Working Party on Registration, Reporting and Monitoring of Charities* 31 May 2002 at 2 - 3, 29: “[t]hese same concerns have at times been expressed from within the community and voluntary sector itself”.

As the *Latimer* cases demonstrate, there is no legal requirement in New Zealand for the definition of charitable purpose to be interpreted so narrowly: correctly interpreted, the concept of charity is wide, capable of focusing on strengths, rather than deficits, and addressing causes as well as symptoms, “prevention” rather than merely “relief”, including by advocating for social change. Prevention is infinitely better than cure, as the Australian Productivity Commission has noted,¹³⁸ and generally costs far less, even if its impact is more difficult to measure. Correctly interpreted, the concept of charity is capable of embracing charities as key incubators of innovative solutions to intractable problems, devolving decision-making to those closest to the problem and reaching into areas that government cannot. As discussed above in chapter 1, charities have a proud history of catalysing much-needed social change, and are an important builder of social capital, a “glue” that holds societies together. New Zealand saw first-hand during lockdown how important the charitable sector is in responding to issues such as COVID-19. Correctly interpreted, the definition of charitable purpose can embrace economic development, innovative social housing solutions, public interest journalism, the promotion of ethical tourism, hand-ups rather than hand-outs.

By contrast, an interpretation that is too narrow unduly limits charities, undermining their effectiveness and contributing to a downward spiral. In the face of so many intractable challenges, including rising levels of inequality and catastrophic climate change, it simply makes no sense to unduly restrict charities in this way.

Slow-moving change of paradigm

All of this raises the question of how and why the definition of charitable purpose has come to be interpreted so narrowly in New Zealand?

The answer to the “why” lies in the underlying clash of paradigms: an uncritical acceptance of a tax expenditure analysis has led to charities being perceived and regulated as if they are a “fiscal cost”; this in turn has resulted in a restrictive approach whereby Charities Services, consciously or otherwise, seeks to restrict the fiscal privileges of charities to those it considers government would want to support. Such a decision has been reached without mandate: the Charities Act makes no mention of restricting tax privileges, and the pre-existing definition of charitable purpose, that even the tax authority has acknowledged was very wide, was purposefully not changed by the passing of the Charities Act, as discussed above.

In terms of *how* the definition of charitable purpose came to be interpreted so narrowly, despite clear New Zealand Court of Appeal and Privy Council authority to the contrary, our research indicates a number of contributing factors:

- i. The *Latimer* cases have, for the most part, been overlooked: decisions interpreting the definition of charitable purpose narrowly have been made inconsistently with important New Zealand cases of high authority, often without any reference to that prior authority, as discussed herein.
- ii. Instead, heavy and often selective reliance has been placed on case law from other jurisdictions (particularly Canada, which is acknowledged to interpret the definition of charitable purpose very narrowly), without due regard for the very different statutory framework on which such case law is based.¹³⁹

138 Australian Productivity Commission [Contribution of the Not-for-Profit Sector](#) 11 February 2010 at 19, F2, F4.

139 See, for example, *Re The Foundation for Anti-Aging Research* (2016) 23 PRNZ 726 (HC) at [66](d), referring to *Amateur Youth Soccer Association v Canada (Revenue Agency)* 2007 287 DLR (4th) 4 (SCC), which had been footnoted by the Charities Registration Board as authority for the proposition that the Courts are very sceptical about the “appropriateness of defining the purpose of a trust by reference to alleged downstream benefits”, without reference to the different statutory framework. However, the statutory reference in Canadian tax law to “charitable activities” has caused the definition of charitable purpose in Canadian jurisprudence to become distorted, as discussed further below in ch 4 (*Advocacy*).

- iii. Charities' purposes are ascertained, not by means of construction of their constituting document as the law requires, but by a process of "inferring" purposes from activities routinely, without respect for the legal arrangements actually entered into (that is, in the absence of sham).¹⁴⁰ This approach effectively shifts the legal axis from one based on purposes to one based on activities; it also imports inherent subjectivity and uncertainty into the assessment of whether a charity is eligible for registration, in what Turnour might describe as a "Humpty Dumpty" approach: "a word means just what I choose it to mean – neither more nor less";¹⁴¹ in other words, a charity's purposes will be found to be whatever Charities Services tells them they are. Such an approach undermines the independence of charities, and makes it very difficult for them to remain in compliance as they never have certainty as to what purposes might be "inferred" from day to day. How this approach can be reconciled with underlying legal duties to comply with a charity's constituting document has never been explained.¹⁴²
- iv. Legal dicta that effectively affirms the correct underlying paradigm is simply reworked to reflect a different paradigm, raising concerning questions regarding the rule of law.¹⁴³
- v. The test for determining whether a purpose is charitable is reworked by conflating the two limbs of the test.¹⁴⁴
- vi. The test for charitable purpose is applied to activities or to the entity itself, rather than to the entity's purposes.¹⁴⁵
- vii. The public benefit test is reworked by treating wider indirect public benefits (such as those which were determinative in the *Latimer* cases) as automatically "too nebulous or remote" simply by virtue of being indirect. A corollary is that any private benefit is treated as disqualifying, even if, as was the case in *Latimer*, it is merely the means by which the wider public benefit is achieved.
- viii. The presumption of charitability is dismissed outright, without critical analysis of its utility or current legal status.

140 The High Court of Australia has recently re-emphasised the requirement to give primacy to the actual legal arrangements entered into in a contractual context. See *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* [2022] HCA 1 (9 February 2022) at [43], [55], [58] - [60] and *ZG Operations Australia Pty Ltd v Jamsek* [2022] HCA 2 (9 February 2022).

141 M Turnour "Beyond charity: outlines of a jurisprudence for civil society" (Doctoral thesis, Queensland University of Technology, 2009) at 38, referring to L Carroll *Through the Looking Glass and what Alice Found There* (1899) 123 cited in *Liversidge v Anderson* [1942] AC 206, 244 - 245 (Lord Atkin).

142 See, for example, Trusts Act 2019 s 24; Companies Act 1993 s 134; Incorporated Societies Act 2022 s 56.

143 See, for example, the reworking of the test set down by Ellis J in *Re The Foundation for Anti-Aging Research* (2016) 23 PRNZ 726 (HC), discussed below in ch 4 (Advocacy).

144 Charities Services and the Charities Registration Board state that "[a] purpose is charitable if it advances a public benefit in a way that is analogous to cases that have previously been held to be charitable". (Charities Services *Te Rātā Atawhai, the Charities Registration Board's statement on Family First Court of Appeal decision* 27 August 2020: www.charities.govt.nz/news-and-events/hot-topics/te-rata-atawhai-the-charities-registration-boards-statement-on-family-first-court-of-appeal-decision/). However, as discussed above, the analogy test applies to purposes, not public benefit: public benefit simply has to be proved as a question of fact; it does not have to be analogous to anything.

145 As discussed further below.

- ix. Alternatively, the test for determining whether a purpose is charitable is simply abandoned altogether.¹⁴⁶
- x. Incremental changes are implemented through the issuing of “guidance”, developed with little or no consultation and then applied as if having force of law.¹⁴⁷
- xi. Access to justice issues render the vast bulk of New Zealand charities with little or no practicable means of holding Charities Services accountable for its decision-making, as discussed further below in chapters 6 and 7.
- xii. All of these factors are exacerbated by the inadvertent removal of charities’ ability to access an oral hearing of evidence, which is having the unintended consequence of eviscerating the public benefit test in New Zealand, and stymying the ability of the common law to “purify itself”.¹⁴⁸ In addition, some courts appear to have deferred to the government agency as the “expert body” rather than embracing their role as the source of the law on the definition of charitable purpose.¹⁴⁹
- xiii. More broadly, charities are operating in an environment which undermines their ability to advocate for themselves, either individually or collectively.¹⁵⁰

146 See, for example, Charities Services Advocacy / Taunakitanga: charities.govt.nz/ready-to-register/need-to-know-to-register/charitable-purpose/advocacy-for-causes/: “To assess if your organisation’s advocacy is charitable, we consider: 1. Your organisation’s overall mission or goal; 2. How your organisation aims to achieve its goal; 3. The practical steps your organisation carries out to achieve its goal”. However, advocacy is an activity rather than a purpose; s 13 of the Charities Act requires purposes to be charitable, not activities. Most charities engage in advocacy, resulting in considerable uncertainty as to what test is to be applied in what circumstances. The approach appears to reflect a misreading of *Re Greenpeace of New Zealand Inc* [2015] 1 NZLR 169 (SC) at [76] where the Supreme Court stated that “assessment of whether advocacy or promotion of a cause or law reform is a charitable purpose depends on consideration of the end that is advocated, the means promoted to achieve that end and the manner in which the cause is promoted”. However, as the High Court subsequently noted, the Supreme Court was not intending to “wreak some fundamental change in approach or a move away from the fundamental ‘purposes’ focus of the charities inquiry”: *Re The Foundation for Anti-Aging Research* (2016) 23 PRNZ 726 (HC) at [86]. As currently applied, the “ends, means and manner” test would turn centuries of case law on its head by conflating the distinction between purposes and activities, and requiring “means” or activities to be assessed for “charitability” in isolation, without reference to a purpose. How the test relates to the comments of the Privy Council in *Latimer v Commissioner of Inland Revenue* [2004] 3 NZLR 157 (PC) at [36] that the distinction is between ends, means and consequences has never been explained. How the test relates to the 2-step test set down by the Court of Appeal in *Latimer CA* has also never been explained. See the discussion in S Barker “Unresolved issues in New Zealand charities law” [2021] NZLJ 49; S Barker “Unresolved issues in New Zealand charities law - the charitable purpose test” [2021] NZLJ 130; and M Harding and D Halliday (eds) *Charity law: exploring the concept of public benefit* (Routledge) (forthcoming).

147 For example, see Charities Services’ Case Report *International Centre for Entrepreneurship Foundation (ICE Foundation)* 24 October 2017: www.charities.govt.nz/charities-in-new-zealand/legal-decisions/view-the-decisions/view/international-centre-for-entrepreneurship-foundation-ice-foundation in which Charities Services concludes, at 3, that charities seeking to raise funds through business activities must: (a) show that the business is capable of making a profit to go to charitable purposes; and (b) show that the charity does not provide any resources to the trading body at less than market rates. These requirements impose a “gloss” on the destination of funds test and can be particularly difficult for start-up enterprises structured as charities to meet. There is no legal basis for these requirements, yet charities in New Zealand are being denied access to registration on the basis of them.

148 As discussed further below in ch 6.

149 See the discussion in S Barker “Canterbury Development case” [2010] NZLJ 248 at 251.

150 As demonstrated, for example, by the open letter from Community Waikato He piko he kaainga, received by email dated 6 October 2021 at 1: “Our sector is invariably under resourced and time poor, with much of our work utilising volunteers. We very rarely have additional funds or time to undertake the research necessary to advocate for ourselves. You may find the sector quiet on these kinds of issues, and that is not for a lack of interest, but a lack of untagged resourcing and expertise to be able to adequately gather the information to do this kind of advocacy justice ... We are particularly proud of the role played by the community sector during the stresses of the Covid outbreak, though recognition, funding and attention has been minimal. The sector has been working tirelessly to address both practical matters and the underlying issues of inequality which have underpinned many of the problems caused by covid and its associated lockdowns ... With a history of just ‘getting on with the job’, these organisations have been too busy ‘at the coalface’ to put efforts into raising the profile of their own difficulties ... we implore the Government to support the social fabric and safety net provided by community organisations working daily to address issues of inequity”.

The net result has been a slow-moving change of regulatory paradigm: the gains made by the charitable sector during the Select Committee stage of the original Charities Bill have been slowly eroded; the current position is effectively the “deeming” approach that was put forward by IRD in 2001 but comprehensively rejected by Parliament in 2004.¹⁵¹

The resulting muddle has been described as “complex, highly subjective and therefore unworkable”:¹⁵² there are now several inconsistent or conflicting legal decisions in New Zealand charities law causing considerable difficulty in practice. Reform is required.

Barriers to reform

Despite these difficulties, the hegemony of the tax expenditure analysis acts as a barrier to the definition of charitable purpose being addressed.

For example, as discussed above, the terms of reference for the DIA’s review of the Charities Act that were finalised in May 2018 specifically excluded the definition of charitable purpose from scope,¹⁵³ despite representations from the Sector Group asking that Labour Party policy for the 2017 election - to examine, update and widen, rather than narrow, the definition of charitable purpose - be honoured. From material received under the Official Information Act 1982, it is clear the decision to exclude the definition of charitable purpose was made on the advice of DIA officials to a new Minister.¹⁵⁴

In addition, Treasury and IRD officials advised the Tax Working Group as follows in July 2018:¹⁵⁵

Past governments and Ministers have been reluctant to review the definition of “charitable purpose” in the Charities Act 2005 owing to the *potential controversy* and concerns that it would lead to a *wider definition of “charitable purpose”*, which would represent a *greater fiscal cost* in terms of *tax concessions*. We note that the definition of charitable purpose is out of scope for the current review of the Charities Act 2005.

Such reluctance is surprising given the absence of empirical evidence that interpreting the definition of charitable purpose in accordance with pre-Charities Act authority would indeed have an overall negative fiscal effect. In other words, a tax expenditure analysis is assumed, but not analysed. When all factors are taken into account, such as the direct and indirect benefits provided by charities, the net result of allowing the definition of charitable purpose to be interpreted correctly may in fact be fiscally positive. A number of comparable jurisdictions have reviewed their definitions of charitable purpose in recent years without any apparent undue fiscal consequences, as discussed further below.

Recommendations for reform

On the basis of the principles discussed in chapter 2, we recommend that current difficulties being experienced in relation to the definition of charitable purpose in New Zealand are addressed by three key legislative changes:

- i. Reviewing the statutory definition of charitable purpose, with a view to expanding the statutory “heads” of charity along the lines undertaken by Australia, England and Wales, Northern Ireland, Ireland, and Scotland, and recommended in Canada.
- ii. Setting out the tests to be applied in determining whether a purpose is charitable in legislation.
- iii. Clarifying to *what* those tests are to be applied.

151 See the discussion in S Barker “Advocacy by charities: what is the question?” (2020) 6 Canadian Journal of Comparative and Contemporary Law 1: www.cjcl.ca/wp-content/uploads/2020/11/1-Barker.pdf at 21 - 52.

152 Krystian Seibert “Could the Charities Act 2013 pose a problem for advocacy charities?” ProBono Australia, 18 December 2018: probonoaustralia.com.au/news/2018/12/charities-act-2013-pose-problem-advocacy-charities/.

153 Department of Internal Affairs [Terms of reference to review the Charities Act 2005](#) May 2018 at 3.

154 See the discussion in S Barker “[Charity regulation in New Zealand: history and where to now?](#)” (2020) 26(2) Third Sector Review 28.

155 Inland Revenue and the Treasury for the Tax Working Group [Charities and the not-for-profit sector: Background Paper for Session 13 of the Tax Working Group](#) 6 July 2018 at [21] (emphasis added).

Such changes should be viewed in combination with other recommended measures, such as:

- iv. re-establishing a “focus on purpose” throughout the Charities Act regime, including by articulating one overarching fiduciary duty, as discussed above (recommendation 2.1);
- v. clearly reflecting within the stated purposes of the Charities Act that the underlying clash of paradigms is resolved in favour of accountability, rather than regulation; in other words, the framework is intended to be enabling, rather than restrictive, as discussed further below in chapter 8 (*Commentary to the draft Bill*);
- vi. reinstating charities’ access to a trier of fact, to ensure the legal framework supports the development of the common law and the ability of the definition of charitable purpose to keep pace with changes in society: if the concept of charitable purpose is to continue to be defined by reference to the common law, it is critical that the mechanisms of the common law, such as the ability to call and test evidence, are available to charities as they are for any other person in New Zealand, as discussed further below in chapter 6 (*Appeals*);
- vii. establishing a Māori Advisory Committee to provide an expert process by which New Zealand might develop an “ambicultural” approach in its charities law, as discussed further below in chapter 7 (*Agency Structure*); and
- viii. expressly preserving the equitable principles inherent in charities law, in a manner similar to that enshrined in s 5(8)(b) of the Trusts Act 2019, as discussed further below in chapter 8.

The first three of these recommended changes are discussed in more detail below.

Expanding the statutory heads

As noted by the Ontario Law Reform Commission, the law does not attempt, and has never attempted, to “define” charity: it merely provides a method for identifying charitable purposes.¹⁵⁶ In referring to the four *Pemsel* heads, the New Zealand statutory definitions Zealand merely codify the common law,¹⁵⁷ and are “descriptive rather than definitive”.¹⁵⁸

Since the range of objects that can be charitable is so incredibly diverse, any statutory definition more specific than the *Pemsel* test is likely to be so blunt an approach as to be “fraught with difficulty”, and put at risk “the flexibility of the present law which is both its greatest strength and its most valuable feature”.¹⁵⁹ As can be seen from the *Latimer* cases, a general definition (combined with access to a first instance oral hearing of evidence) gives courts sufficient scope to make sound decisions on a case by case basis using the common law methodology.

In 2001, the 400th anniversary of the Statute of Elizabeth in 2001 coincided with nearly all countries using that definition initiating reviews to examine whether the definition was still appropriate.¹⁶⁰ As a result, a number of jurisdictions chose to strike a balance between certainty and flexibility by adopting a “*Pemsel* plus” approach (that is, an expansion of the four *Pemsel* heads).

It is instructive to consider the approach taken by comparable jurisdictions in assessing whether New Zealand should similarly expand its statutory heads of charity.

¹⁵⁶ Ontario Law Reform Commission *Report on the Law of Charities* (Toronto, 1996) at 174.

¹⁵⁷ *Travis Trust v Charities Commission* (2009) 24 NZTC 23,273 (HC) at [22].

¹⁵⁸ *New Zealand Society of Accountants v Commissioner of Inland Revenue* [1986] 1 NZLR 147 (CA) at 148, cited in *Commissioner of Inland Revenue v Medical Council of New Zealand* [1997] 2 NZLR 297 (CA) per McKay J.

¹⁵⁹ Ontario Law Reform Commission *Report on the Law of Charities* (Toronto, 1996) at 227, 164, the latter referring to *Charities: A Framework for the Future* (Cmdn 694, 1989) (otherwise known as the UK 1989 White Paper) at 7 - 9.

¹⁶⁰ Australian Productivity Commission [Contribution of the Not-for-Profit Sector](#) 11 February 2010 at F1.

Australia

Australia was the first “cab off the rank”:¹⁶¹ on 18 September 2000, then Prime Minister Hon John Howard OM AC announced an independent inquiry into definitional issues relating to charitable and other not-for-profit organisations,¹⁶² to ensure the legislative and administrative framework is “appropriate to the modern social and economic environment”.¹⁶³ Reporting in June 2001, the Inquiry into the Definition of Charities and Related Organisations made 27 recommendations, including:¹⁶⁴

- i. adopting the term “not-for-profit” in place of the term “non-profit” for the purposes of defining a charity;
- ii. requiring the activities of a charity to further, or be in aid of, its charitable purpose or purposes;
- iii. removing any requirement that charitable purposes fall either within the “spirit and intendment” of the Preamble to the Statute of Elizabeth or be analogous to one or more of its purposes;
- iv. setting out in legislation the principles enabling charitable purposes to be identified;
- v. enacting a statutory definition of “charitable purpose” (effectively a statutory expansion of the *Pemsel* heads, in a manner that was “remarkably similar to reforms subsequently implemented in England and Wales, Scotland, Ireland and Northern Ireland”);¹⁶⁵
- vi. prohibiting charities from having purposes, or undertaking activities, that promote a political party or a candidate for political office; and
- vii. establishing an independent administrative body for charities and related entities (which recommendation was subsequently implemented by the Australian Charities and Not-for-profits Commission Act 2012 (Cth)).

The 2001 Inquiry also recognised the need to include “prevention” (for example, prevention of disease or prevention of poverty) rather than merely “relief” as a legitimate charitable goal.¹⁶⁶

After considering the inquiry report, the Federal Treasurer released a draft Bill in 2003 which proposed to divide the traditional four heads of charity into seven heads, following the spirit of the inquiry’s recommendations. The Government subsequently enacted the Extension of Charitable Purpose Act 2004 (Cth).¹⁶⁷ Then, some 9 years later, substantive further change was made with the enactment of the Charities Act 2013 (Cth), which defines “charitable purpose” by reference to 12 “heads”, including:¹⁶⁸

- i. purposes of advancing education and religion;¹⁶⁹
- ii. purposes of advancing health and social or public welfare (which appear to have replaced the first head, the relief of poverty);¹⁷⁰
- iii. purposes to advance culture and heritage, prevent or relieve the suffering of animals, and advance the natural environment;¹⁷¹
- iv. purposes to promote or protect human rights, promote reconciliation, mutual respect and tolerance, and advance the security or safety of Australians;¹⁷²

161 Australian Productivity Commission *Contribution of the Not-for-Profit Sector* 11 February 2010 at F1.

162 Australian Government *Charities Definition Inquiry*: <treasury.gov.au/review/charities-definition-inquiry>.

163 Australian Productivity Commission *Contribution of the Not-for-Profit Sector* 11 February 2010 at 164, F2.

164 Hon I Sheppard AO QC, R Fitzgerald AM and D Gonski *Report of the Inquiry into the Definition of Charities and Related Organisations* 28 June 2001 at 13 - 18, recommendations 1, 5, 11, 12, 13, 17 and 25 respectively.

165 Australian Productivity Commission *Contribution of the Not-for-Profit Sector* 11 February 2010 at F1.

166 Australian Productivity Commission *Contribution of the Not-for-Profit Sector* 11 February 2010 at F2.

167 Australian Productivity Commission *Contribution of the Not-for-Profit Sector* 11 February 2010 at F2.

168 Charities Act 2013 (Cth) s 12(1). Further elaboration of some of the purposes is provided in ss 14 - 17.

169 Charities Act 2013 (Cth) s 12(1)(b), (d).

170 Charities Act 2013 (Cth) s 12(1)(a), (c). Section 14 further defines the purpose of advancing health to include the purpose of *preventing* and relieving sickness, disease or human suffering. The purpose of advancing social welfare is further defined in s 15.

171 Charities Act 2013 (Cth) ss 12(1)(e), (i), (j), 16.

172 Charities Act 2013 (Cth) s 12(1)(f), (g), (h).

- v. a catch-all provision, which refers to “any other purpose beneficial to the general public that may reasonably be regarded as analogous to, or within the spirit of” any of the listed purposes;¹⁷³ and
- vi. an advocacy provision, which specifically includes as charitable a purpose of “promoting or opposing a change to any matter established by law, policy or practice” of domestic or foreign government, if promoting the change is “in furtherance or in aid of” (or if the change being opposed is in opposition to, or in hindrance of) a charitable purpose.¹⁷⁴

Section 5 of the Charities Act 2013 also makes it clear that charities must be subject to the non-distribution constraint.¹⁷⁵

The Australian legislation is unique among comparable jurisdictions for setting out the *process* for determining whether a purpose meets the public benefit test.¹⁷⁶ As part of that process, the Australian statute also specifically requires regard to be had to both tangible and intangible benefits, as well as possible detriments.¹⁷⁷

In addition, certain purposes in Australia are statutorily *presumed* to meet the public benefit test, including purposes of:¹⁷⁸ *preventing* and relieving sickness, disease or human suffering; advancing education; relieving the poverty, distress or disadvantage of individuals or families; caring for and supporting the aged or individuals with disabilities; and advancing religion. Open and non-discriminatory self-help groups, and closed or contemplative religious orders regularly undertaking prayerful intervention at the request of members of the general public, are not required to meet the public benefit test.¹⁷⁹ Purposes of relieving the necessitous circumstances of one or more individuals who are in Australia are not required to meet the “public” limb of the public benefit test.¹⁸⁰

A schedule summarising the comparative statutory definitions of charitable purpose is set out in Appendix C (*Comparative summary of definitions of charitable purpose*).

England and Wales

In England and Wales, the process of charities law reform began with the publication of a report by the National Council of Voluntary Organisations in 2001, ultimately culminating in the Charities Act 2006 (UK),¹⁸¹ subsequently replaced by the Charities Act 2011 (UK).

Section 3(1) of the Charities Act 2011 (UK) defines “charitable purpose” by reference to 13 “heads”, including:¹⁸²

- i. purposes to *prevent or relieve* poverty, to advance health (including by *preventing or relieving* sickness, disease or human suffering), to save lives, and to relieve those in need because of youth, age, ill-health, disability, financial hardship or other disadvantage;¹⁸³
- ii. purposes to advance education and religion (with “religion” defined to include religions which involve belief in more than one god, and religions which do not involve belief in a god);¹⁸⁴
- iii. purposes to advance the arts, culture, heritage or science, animal welfare, and environmental protection or improvement;¹⁸⁵

¹⁷³ Charities Act 2013 (Cth) s 12(1)(k).

¹⁷⁴ Charities Act 2013 (Cth) s 12(1)(l).

¹⁷⁵ Charities Act 2013 (Cth) s 5, definition of “charity”, paragraph (a), which provides that a charity must be a “not-for-profit entity”.

¹⁷⁶ Charities Act 2013 (Cth) s 6.

¹⁷⁷ Charities Act 2013 (Cth) s 6(2).

¹⁷⁸ Charities Act 2013 (Cth) s 7.

¹⁷⁹ Charities Act 2013 (Cth) s 10.

¹⁸⁰ Charities Act 2013 (Cth) s 8.

¹⁸¹ Australian Productivity Commission [Contribution of the Not-for-Profit Sector](#) 11 February 2010 at F3, referring to National Council of Voluntary Organisations [For the public benefit? A consultation document on charity law reform](#) January 2001.

¹⁸² Charities Act 2011 (UK) s 3(1), (2).

¹⁸³ Charities Act 2011 (UK) s 3(1)(a), (d), (j), (2)(b).

¹⁸⁴ Charities Act 2011 (UK) s 3(1)(b), (c), 2(a).

¹⁸⁵ Charities Act 2011 (UK) s 3(1)(f), (i), (k).

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- iv. purposes to advance citizenship or community development (including rural or urban regeneration and the promotion of civic responsibility, volunteering, the voluntary sector and the effectiveness or efficiency of charities);¹⁸⁶
 - v. purposes to advance amateur sport (with “sport” defined to mean “sports *or games* which promote health by involving physical *or mental* skill or exertion”);¹⁸⁷
 - vi. purposes to advance human rights, conflict resolution or reconciliation, promote religious or racial harmony or equality and diversity, and promote the efficiency of the armed forces, police and rescue services;¹⁸⁸ and
 - vii. a catch-all provision, which refers to any other purpose “that may reasonably be regarded as analogous to, *or within the spirit of*” either a listed purpose or any other purpose which has previously been recognised as charitable.¹⁸⁹

This “*Pemsel*-plus” approach does not represent an extension of the law, but merely lists purposes that have gained judicial recognition over time.¹⁹⁰

The English and Welsh statute makes clear that, to be charitable, a purpose must not only fall within the expanded list of statutory heads (including the “catch-all”), but also meet the public benefit test (referred to as the “public benefit requirement”).¹⁹¹ However, any presumption of public benefit has been specifically removed by statute.¹⁹²

The Charities Act 2011 (UK) is notable for its recognition of the need to include *prevention* rather than merely relief as a legitimate charitable goal, particularly in respect of poverty and health:¹⁹³ in other words, charitable effort can and should be directed to addressing causes as well as symptoms. The Act is also notable for providing a statutory definition of religion that includes express reference to polytheistic religions and religions that do not involve belief in a god, as well as for its recognition that the advancement of amateur sport, and the advancement of the arts, culture or heritage, are charitable purposes.

Following the lead set by England and Wales, each of the other United Kingdom jurisdictions also reset a common baseline for charities law in the post-2001 period,¹⁹⁴ committing to much the same set of “*Pemsel*-plus” charitable purposes (plus a “catch-all” provision to retain and extend the common law approach).

186 Charities Act 2011 (UK) s 3(1)(e), (2)(c).

187 Charities Act 2011 (UK) s 3(2)(d).

188 Charities Act 2011 (UK) s 3(1)(h), (l).

189 Charities Act 2011 (UK) s 3(1)(m).

190 *Family First New Zealand v Attorney-General* [2020] NZCA 366 at [71]. See also Australian Productivity Commission [Contribution of the Not-for-Profit Sector](#) 11 February 2010 at F5, noting that there may be a possible exception with respect to amateur sport. However, there is legal authority for the proposition that the promotion of amateur sport is charitable in its own right. See, for example, *Re Chapman* (HC, Napier, CP89/97, 17 October 1989), where it was held that a purpose of “public recreation” was charitable; s 61A of the Charitable Trusts Act 1957, under which it is deemed “for all purposes” to be, and “always to have been”, charitable to provide facilities for recreation or other leisure-time occupation, if the facilities are provided in the interests of social welfare; the Canadian decision of *Re Laidlaw Foundation* 13 DLR (4th) 491, which held that an organisation having the main object of promoting amateur athletic sport involving the pursuit of physical fitness was *prima facie* charitable as an organisation beneficial to the community; *Inland Revenue Commissioners v McMullen* [1980] 1 All ER 884, in which the House of Lords held that a trust to improve sporting facilities available to students was charitable as it fell within the charitable purpose of the advancement of education; and *Re Mariette* [1915] 2 Ch 284, in which the improvement of sporting facilities at a school was considered to be consistent with an act of educational charity. Compare *Re Nottage* [1895] 2 Ch 649 and *AYSA Amateur Youth Soccer Association v Canada Revenue Agency* [2007] 3 SCR 217, 2007 SCC 42.

191 Charities Act 2011 (UK) ss 2, 4.

192 Charities Act 2011 (UK) s 4(2).

193 Australian Productivity Commission [Contribution of the Not-for-Profit Sector](#) 11 February 2010 at F4.

194 Australian Productivity Commission [Contribution of the Not-for-Profit Sector](#) 11 February 2010 at F4.

Northern Ireland

Section 2(2) of the Charities Act (Northern Ireland) 2008 defines “charitable purpose” by reference to 12 “heads”, including a “catch-all” provision.¹⁹⁵ The Northern Irish “*Pemsel-plus*” definition is identical to that set out in England and Wales, with only three exceptions:¹⁹⁶

- i. Northern Ireland does not include within its statutory list of charitable purposes a purpose to promote the efficiency of the armed forces, police, fire and rescue, or ambulance services.¹⁹⁷
- ii. However, Northern Ireland does extend the purpose of advancing “human rights, conflict resolution or reconciliation or the promotion of religious or racial harmony or equality and diversity” to include “the advancement of peace and good community relations”.¹⁹⁸
- iii. Northern Ireland extends the definition of “religion” to include “any analogous philosophical belief” (whether or not involving a belief in a god).¹⁹⁹

The Northern Irish legislation is also notable for its recognition of the need to include *prevention* as a legitimate charitable goal, and for including the promotion of amateur sport as a charitable purpose in its own right.

As in England and Wales, the statute in Northern Ireland makes clear that, to be charitable, a purpose must not only fall within the expanded list of statutory “heads” (including the “catch-all”), but also meet the public benefit test (referred to as the “public benefit requirement”).²⁰⁰ Any presumption of public benefit has also been removed by statute in Northern Ireland.²⁰¹

Scotland

Section 7(2) of the Charities and Trustee Investment (Scotland) Act 2005 similarly applies a “*Pemsel plus*” approach by defining “charitable purpose” by reference to 16 “heads”, including a “catch-all” provision.²⁰² The Scottish definition has a number of differences from the England and Welsh definition, such as:²⁰³

- i. the purposes of advancing health and the saving of lives are treated separately;²⁰⁴
- ii. a purpose of advancing any philosophical belief (whether or not involving belief in a god) is considered analogous to a religious purpose rather than a religious purpose in itself;²⁰⁵
- iii. rather than advancing amateur sport, the Scottish statute refers to a purpose of advancing “public participation in sport”; it also defines “sport” more narrowly as sport which involves physical skill and exertion only (that is, without reference to “games” or to “mental” skill or exertion);²⁰⁶
- iv. purposes to advance human rights, conflict resolution or reconciliation, promote of religious or racial harmony, and promote of equality and diversity are treated separately;²⁰⁷

¹⁹⁵ Charities Act (Northern Ireland) 2008 s 2(2), (3). The “catch-all” provision is contained in s 2(2)(l), (4).

¹⁹⁶ Charities Act (Northern Ireland) 2008 s 2(2), (3).

¹⁹⁷ Compare Charities Act 2011 (UK) s 3(1)(l).

¹⁹⁸ Charities Act (Northern Ireland) 2008 s 2(2)(h), (3)(e).

¹⁹⁹ Charities Act (Northern Ireland) 2008 s 2(3)(a)(ii). Compare Charities Act 2011 (UK) s 3(3)(a)(ii).

²⁰⁰ Charities Act (Northern Ireland) 2008 ss 2(1) and 3.

²⁰¹ Charities Act (Northern Ireland) 2008 s 3(2).

²⁰² Charities and Trustee Investment (Scotland) Act 2005 s 7(2)(p).

²⁰³ Charities and Trustee Investment (Scotland) Act 2005 s 7(2), (3).

²⁰⁴ The “advancement of health” is further defined in s 7(3)(a) to include the *prevention* or relief of sickness, disease or human suffering. The relief of those in need is further defined in s 7(3)(e) to include relief given by the provision of accommodation or care to the persons mentioned in paragraph (n).

²⁰⁵ Charities and Trustee Investment (Scotland) Act 2005 s 7(2)(c), (3)(f). Compare Charities Act 2011 (UK) s 3(1)(c), (2)(a)(ii).

²⁰⁶ Charities and Trustee Investment (Scotland) Act 2005 s 7(2)(h), (3)(c). Compare Charities Act 2011 (UK) s 3(1)(g), (2)(d).

²⁰⁷ Charities and Trustee Investment (Scotland) Act 2005 s 7(2)(j), (k), (l). Compare Charities Act 2011 (UK) s 3(1)(h)).

- v. purposes to provide recreational facilities in the interests of social welfare are included within the statutory definition of charitable purpose rather than being dealt with separately;²⁰⁸ and
- vi. the “catch-all” provision refers only to purposes that are “analogous”, rather than purposes that are “within the spirit of” an already-recognised charitable purpose.²⁰⁹

As in England and Wales and Northern Ireland, the Scottish statute makes clear that, to be charitable, a purpose must not only fall within the expanded list of statutory “heads” (including the “catch-all”), but also meet the public benefit test.²¹⁰ Any presumption of public benefit has also been removed by statute in Scotland.²¹¹

However, in an approach closer to Australia than its United Kingdom counterparts, Scotland sets out in statute some factors to which regard must be had in assessing public benefit, including a comparison of benefits and “disbenefits”.²¹² It also expressly provides that a body does not meet the charity test if:²¹³

- i. its constitution does not articulate a non-distribution constraint;²¹⁴ or
- ii. its constitution expressly permits a Minister to direct or otherwise control its activities.²¹⁵

As with the other United Kingdom jurisdictions, the Charities and Trustee Investment (Scotland) Act 2005 is notable for its acknowledgement that charitable purposes can accommodate prevention as well as relief as a legitimate charitable goal. The Scottish statute is also notable for its inclusion of the promotion of public participation in sport as a charitable purpose in its own right, rather than merely as a means of advancing another charitable purpose.

The process of extending the statutory heads of charity in Northern Ireland and Scotland was accompanied by other reforms, including removing responsibility for determining charitable status from the tax-collecting agency to a new independent lead government agency,²¹⁶ establishing a Charity Appeals Tribunal,²¹⁷ a register of charities, adjustments to the traditional roles of the courts and the Attorney-General, and initiatives to encourage voluntarism and philanthropy,²¹⁸ as discussed further below.

Ireland

Section 3(1) of the Charities Act 2009 (Ireland) defines charitable purpose by reference to the four *Pemsel* heads (with the first head expanded to include the *prevention* or relief of poverty or economic hardship). Section 3(11) then similarly applies a “*Pemsel* plus” approach by expanding the fourth head (purposes of benefit to the community) to include an additional 12 “heads”.²¹⁹ The expanded list does not represent an extension of the law, but was intended to represent the existing law of charities in Ireland.²²⁰

208 Charities and Trustee Investment (Scotland) Act 2005 s 7(2)(i), (3)(d). Compare Charities Act 2011 (UK) s 5.
209 Charities and Trustee Investment (Scotland) Act 2005 s 7(2)(p). Compare Charities Act 2011 (UK) s 3(1)(g), (2)(d).

210 Charities and Trustee Investment (Scotland) Act 2005 ss 7(1)(b), 8.

211 Charities and Trustee Investment (Scotland) Act 2005 s 8(1).

212 Charities and Trustee Investment (Scotland) Act 2005 s 8(2). Compare Charities Act 2013 (Cth) s 6(2), (3).

213 Charities and Trustee Investment (Scotland) Act 2005 s 7(4).

214 Specifically, if its constitution “allows it to distribute or otherwise apply any of its property (on being wound up or at any other time) for a purpose which is not a charitable purpose”: s 7(4)(a). Compare Charities Act 2013 (Cth) s 5(a).

215 Compare Charities Act 2013 (Cth) ss 4, 5(d), which preclude a “government entity” from being a charity in Australia. Note that, under Charities and Trustee Investment (Scotland) Act 2005 s 7(5), the Scottish Ministers may by order disapply either or both of the first two categories to any body or type of body specified in the order.

216 The Charity Commission for Northern Ireland and the Office of the Scottish Charity Regulator.

217 The Charity Tribunal for Northern Ireland, the Scottish Charity Appeals Panel, in addition to the Charities Appeal Tribunal already established in England and Wales, are intended to provide “a cheap and swift alternative to the courts system for reviewing regulatory decisions”: Australian Productivity Commission [Contribution of the Not-for-Profit Sector](#) 11 February 2010 at F5.

218 Australian Productivity Commission [Contribution of the Not-for-Profit Sector](#) 11 February 2010 at F4, F2.

219 Charities Act 2009 (Ireland) s 3(1), (11).

220 OB Breen and PA Smith *Law of Charities in Ireland* (Bloomsbury, 2019) at [1.04].

The total of 16 statutory heads of charity in Ireland follow a broadly similar pattern to that of the above jurisdictions, with some notable exceptions, such as the following:

- i. Of the jurisdictions considered, Ireland is the only jurisdiction to have excluded human rights from its statutory list of charitable purposes, resulting in concerns that the advancement of animal rights can be charitable in Ireland, but not human rights.²²¹
- ii. Of the jurisdictions considered, only Ireland and Australia have not included advancing amateur sport, or public participation in sport, within their statutory list of charitable purposes.²²²
- iii. The advancement of religion in Ireland specifically excludes gifts for the benefit of a cult.²²³

As in all of the above jurisdictions, the statute in Ireland makes clear that a purpose is not charitable unless it meets the public benefit test.²²⁴ However, unlike the United Kingdom jurisdictions, Ireland has not specifically removed any presumption of public benefit. Instead, and perhaps reflecting Ireland's strong religious heritage, the Irish statute simply provides that gifts for the advancement of religion are presumed to be of public benefit;²²⁵ in addition, the agency responsible for administering the Charities Act in Ireland (the Charities Regulatory Authority) may not make a determination that a gift for the advancement of religion is not of public benefit without the consent of the Attorney-General.²²⁶

Ireland also mirrors Australia and Scotland by providing some statutory guidance as to when the public benefit test might be met.²²⁷ However, the Irish provisions differ in that they do not refer to wider intangible benefits or to potential harms or "disbenefits".

The Irish statute also clarifies that charities must be subject to the non-distribution constraint.²²⁸

Canada

Canada has neither a statutory definition of charitable purpose nor a strong record of developing the legal definition of charity by common law.²²⁹ Reporting in June 2019, the Special Senate Committee on the Charitable Sector recommended a review of the common law meaning of charity to determine whether Canada should follow the approach of other jurisdictions and enact legislation to broaden the legal meaning of charity.²³⁰

On 1 April 2021, the Government of Canada accepted this recommendation, advising that it will ask the Advisory Committee on the Charitable Sector to review the common law meaning of charity and that it will consider any recommendations arising from such review.²³¹ At the time of writing, there has been an intervening federal election in

221 OB Breen and PA Smith *Law of Charities in Ireland* (Bloomsbury, 2019) at [1.74].

222 Interview with Dr Oonagh Breen, Professor of Law at the Sutherland School of Law, University College Dublin (3 December 2020): "Ireland also left out sport on the basis that the Revenue considered sport could be dealt with under different tax provisions, but there should have been an interesting conversation about it".

223 Charities Act 2009 (Ireland) s 3(10).

224 Charities Act 2009 (Ireland) s 3(2).

225 Charities Act 2009 (Ireland) s 3(4).

226 Charities Act 2009 (Ireland) s 3(4), (5). Section 3(9) provides that there shall be no appeal from such a determination of the Authority.

227 Charities Act 2009 (Ireland) s 3(3), (7), (8). Interestingly, although s 3(2) provides that a purpose is not charitable unless it is of public benefit, s 3(3), (7), (8) refer to situations where a "gift" rather than a purpose is of public benefit.

228 Charities Act 2009 (Ireland) s 2(1), definition of "charitable organisation".

229 Report of the Special Senate Committee on the Charitable Sector [Catalyst for Change: A Roadmap to a Stronger Charitable Sector](#) June 2019 at 73.

230 Report of the Special Senate Committee on the Charitable Sector [Catalyst for Change: A Roadmap to a Stronger Charitable Sector](#) June 2019 at 77 - 78, recommendation 25. A similar recommendation had been made two years earlier in the [Report of the Consultation Panel on the Political Activities of Charities](#) 31 March 2017 recommendation 4: "[m]odernise the legislative framework governing the charitable sector (ITA) to ensure a focus on charitable purposes rather than activities and adopt an inclusive list of acceptable charitable purposes to reflect current social and environmental issues and approaches".

231 Hon D LeBouthillier, Minister for National Revenue [Government Response to the Report of the Special Senate Committee on the Charitable Sector](#) 30 March 2021 at 11-12.

September 2021, and of course a continuing pandemic, but no further updates of which the writer is aware as to progress with this work.

New Zealand

We have considered whether New Zealand should abandon the “heads” of charity approach altogether and simply regard all purposes for the public benefit as charitable. However, while we favour retaining the presumption of charity (as discussed further below), we do not favour moving to a single test of public benefit. In our view, the “spirit and intent” test is helpful in terms of retaining the link to the essence of charity, and for clarifying that not all purposes of public benefit are necessarily charitable: public benefit is necessary, but not sufficient, in order for a purpose to be considered charitable.

Instead, we recommend that New Zealand review its definition of charitable purpose with a view to expanding the statutory “heads”. Our research indicates that, on the whole, an approach of expanding the statutory heads of charity has been helpful in practice.²³² Such an approach was also unanimously favoured by attendees of the co-design sprint workshop held in March 2021:²³³ despite the diversity of attendees, there was consensus that the current arrangements in New Zealand are not fit for purpose, and that the gateway to registration needs to be inclusive and enabling (“permissible unless prohibited”, rather than “prohibited unless permissible”).²³⁴ Attendees collectively identified and agreed on the following key features for the definition of charitable purpose in contemporary Aotearoa New Zealand (table 3.4):

Table 3.4 – outcomes from co-design sprint workshop on the definition of charitable purpose:

- 1. The “heads” of charity in s 5(1) of the Charities Act 2005 need to be expanded. The following list was agreed on:**
 - The prevention or relief of poverty or hardship;
 - The protection and progress of Te Tiriti o Waitangi rights and responsibilities;
 - The advancement of education;
 - The advancement of faith;
 - The advancement of amateur sport;
 - The advancement of arts, culture, heritage or science;

232 Interview with Bridgid Cowling, Special Counsel, Arnold Bloch Leibler (7 December 2020): “[e]xpanding the statutory heads with more modern, well-articulated heads of charity has worked: it is more user-friendly, modernizes the definition, and provides a clearer understanding of what is charitable”; Interview with Lloyd Hitoshi Mayer, Professor of Law, University of Notre Dame Law School (15 January 2021): “[i]t can be helpful to have a longer statutory list – an increased set of hooks to hang things on – but there must be a catch-all at the end, because we don’t want to have to revise the statute every time something new crops up (because we won’t)”; Interview with Kenneth Dibble, legal board member of the Charity Commission for England and Wales, and former Chief Legal Adviser and Legal Director at the Commission and Director of its International Programme (14 January 2021): “[t]he justification for moving away from the common law four heads of charity [in England and Wales] was they no longer represented, in the public and legal mind, the definition of charity ... Together with a residual category comprising other purposes which had been accepted as charitable and a capacity to develop the law further by way of analogy, this approach has been welcomed”; Interview with Steven Kent, Policy Manager, Office of the Scottish Charity Regulator (19 November 2020): “[i]n practice, the expansion of the heads of charity has been helpful ... Part of the difficulty with the old 4th head of charity was that it left plenty of room for interpretation ... To safeguard against ossification there is a degree of future-proofing in the legislation in that there is a 16th purpose: ‘anything else deemed to be analogous’. That gives OSCR the power to recognize new charitable purposes ... We’ve had very little cause to use that extra provision which is an indication that the legislation pretty much has it right”; Interview with Dr Oonagh Breen, Professor of Law at the Sutherland School of Law, University College Dublin (3 December 2020): “[t]here are pros and cons with expanding the statutory heads of charity. On the pro side, it becomes more transparent as to what the heads of charity are ... In the absence of evolution through common law it makes sense to leap-frog with a statutory definition and to recognize what today is a charitable purpose, just as Elizabeth I did in 1601. On the con side, who decides what’s on the list?”.

233 The March 2021 co-design sprint workshop was focused on the question “What should be the definition of charitable purpose in contemporary Aotearoa New Zealand?”. The challenge statement and report from the sprint workshop can be found by scrolling down here: www.charitieslawreform.nz/workshops.

234 This phrase is taken from a comment made by Laird Hunter QC, Edmonton, Canada (4 February 2021).

- Environmental protection or improvement;
- The advancement of health or wellbeing;
- The advancement of human rights, citizenship or community development; and
- Any other purpose beneficial to the community.

The need for the legislation to be “principles-based” and not too prescriptive was identified. It was agreed that the list should be in primary legislation, and not in underlying regulations or a schedule.

Further guidance will be necessary. However, there must be a clear process by which any guidance around the definition of charitable purpose is subject to sector and public consultation before being finalised.

2. Presumption of public benefit:

In addition to falling within one of the above categories, purposes must also meet the “public benefit” test in order to be considered charitable. The above purposes would be *presumed* to be for the public benefit, with the exception of the final “catch-all” (any other purpose beneficial to the community), where public benefit would not be presumed.

Further discussion is needed around when a purpose might:

- fall within the “catch-all” (currently referred to as the “spirit and intendment test”); and
- meet the public benefit test.

Unlike other jurisdictions, New Zealand does not currently set out the test(s) in the legislation. The sprint participants generally agreed that setting out the test(s) in legislation would be helpful.

3. The statute should specifically refer to the “non-distribution constraint” as a prerequisite for charitable registration:

The distinction between charities running social enterprises, and for-profit entities running social enterprises, is that charities are subject to the **non-distribution constraint**: that is, while charities can make profits, and pay arm’s length market value rates for goods and services rendered, they may not distribute surplus profits to owners or managers. Instead, charities must retain or reinvest their profits.

Australia, Ireland and Scotland have set this requirement out in their legislation. The sprint participants agreed that New Zealand should do the same.

4. If the advancement of amateur sport is accepted as a “head” of charity, s 5(2A) of the Charities Act should be repealed:

Other countries (England and Wales, Scotland and Northern Ireland) specifically recognise the advancement of amateur sport as a charitable purpose in their statutes. As set out above, the sprint participants agreed that New Zealand should do the same.

“Sport” should be defined to mean sports or games which involve physical or mental skill or exertion.

Section 5(2A) of the New Zealand Charities Act (inserted by Statutes Amendment Bill in 2012) provides that “the promotion of amateur sport may be a charitable purpose if it is the means by which a charitable purpose ... is pursued”. This provision would be superseded by the recognition of the advancement of amateur sport as a charitable purpose in its own right, and the sprint participants agreed that s 5(2A) should therefore be repealed.

FURTHER DISCUSSION

The following points were identified as requiring further discussion:

- A key aspect of the definition of charitable purpose relates to the test to be applied, in particular the public benefit test, and whether we should retain the reference to the **spirit and intendment of the preamble** to the Statute of Charitable Uses 1601 (43 Eliz 1 c4). There were differing views as to whether the reference to the preamble was useful or necessary. The workshop did not focus specifically on the tests to be applied in determining whether a purpose is charitable: more discussion about the test(s) to be applied is needed.
- It was acknowledged that the definition of charitable purpose does not exist in isolation. It is essential to clarify what exactly we are wanting this legislation to do. Also relevant in this context are the outcomes of workshop #1, where the need for an

independent decision-maker under the Charities Act was identified, as well as the need for a better appeal system, that is more accessible and that enables oral hearings of evidence.

- While the **primacy of purposes** in assessing whether an entity qualifies for registered charitable status was acknowledged, the relevance of activities, as well as the monitoring role of the registration body, requires further clarification/discussion.

In terms of the expanded list of statutory heads, the following areas may need further consideration:

- Does the above list adequately cater for **public infrastructure**?
- Should the list specifically refer to **technology**?
- Does it need to refer to the promotion of **civic responsibility, volunteering and the voluntary sector** (as is currently the case in England and Wales, Scotland and Northern Ireland)? Is this adequately covered by the “human rights, citizenship and community development” head?
- Should the reference to the promotion of amateur sport include a reference to “**recreation**” (the advancement of amateur sport and recreation)?

Consultation questions: ...

- More work and consultation are needed from a Te Ao Mori perspective how can we make this an ambicultural²³⁵ journey?
- Should the tests (the public benefit test and the spirit and intendment test) be set out in legislation? In particular, should New Zealand retain the reference to the spirit and intendment of the 1601 preamble:
 - Does it constrain us to anachronistic colonialist interpretations?
 - Or is it what in fact preserves the essence and “magic” of charity?
- Should the **non-distribution constraint** be set out in legislation?
- What other thoughts/comments/suggestions do you have?

Achieving consensus as to the precise list of purposes to be set out in an expanded list of statutory “heads” is likely to be difficult; however, such difficulty is not fatal: as discussed above, the law does not attempt to “define” charity, it merely provides a method for identifying charitable purposes. Provided the statutory definition maintains the “catch-all” provision (“other purposes beneficial to the community”), all purposes currently recognised as charitable under the common law can remain so recognised (if they meet the general tests), and flexibility can be retained for continuing development of the law.

The updated draft Bill included in chapter 9 of this report is intended to bring all of the above points together into suggested drafting for consideration.

The advancement of religion

Whether the advancement of religion should be retained as a charitable purpose has been raised as a particular issue both in submissions to the DIA’s review and as part of our research. The four key objections to its continuation appear to be:

- i. New Zealand is increasingly secular, undermining the original rationale for the advancement of religion’s inclusion as a charitable purpose.
- ii. Religious charities are running businesses that do not pay tax.
- iii. Religions may cause harm, for example through practices of shunning, disfellowshipping or the like.
- iv. How do we protect against giving charitable registration to “sham” religions?

On these bases, some argue that the “advancement of religion” should be removed as a specific “head” of charity, and religious charities should seek charitable status under another “head” such as relief of poverty or advancement of education.

However, none of these arguments is persuasive.

The issue of charities running businesses is discussed further below in chapter 5 (*Social enterprise and competitive advantage*).

²³⁵ Kōrero by Dr Mānuka Henare “Reconsidering the Māori economy as an Economy of Mana”, keynote presentation at the Philanthropy Summit, 16 April 2015: www.youtube.com/watch?v=5plyfMtA8nk.

In addition, while New Zealand may or may not be increasingly secular, religion clearly continues to play an important part in many New Zealanders' lives, quite apart from any other charitable purposes that might be coincidentally furthered.

The advancement of religion has traditionally been regarded as charitable because "the law has found a public benefit in the promotion of religion as an influence upon human conduct".²³⁶ However, that the advancement of religion does pose difficulty as a "head" of charity is acknowledged.

Defining what constitutes a "religion" for the purposes of charities law can be highly contentious. Generally, belief or faith in a supreme being and worship of that being is accepted as being religion:²³⁷ if religious beliefs are genuinely held, the "truth or falsity of religions is not the business of courts".²³⁸ As noted by the High Court:²³⁹

Some limit is placed on how far this category will extend by the organisation needing to satisfy the Charities Commission [as it was then] and the courts that they ascribe to a 'religion' (as that may be defined by the courts) and that the activity they engage in is part of that religion and done for the purpose of advancing that religion ... the category is also limited by the requirement that the advancement of religion have a public, rather than a private, benefit and that it not be contrary to public policy. However, beyond those general points, where the bounds of this head of charity are properly drawn is not necessarily clear.

In terms of "advancing" religion, the courts have held that methods of preaching and extending a gospel or a faith alter and develop with the changing years: practical outworkings of faith are accepted as advancing religion, which need not be confined to church services, the building of churches and the like.²⁴⁰

Once the analysis has accepted the matter in issue as a "religion", the question then becomes whether the advancement of that religion meets the charitable purpose test, in particular the public benefit test. The effect of religion can be difficult to define and measure and "is usually of a very personal nature".²⁴¹ This factor underscores the importance of the presumption of public benefit in the context of advancing religion,²⁴² reflecting the courts' reluctance to enter into questions concerning the comparative worth of different religions (and also the view that religion itself commonly generates benefit to the public):²⁴³ the court does not intrude into matters of faith except where they are contrary to public policy (such as where a religion encourages dangerous risk-taking behaviour, for example).²⁴⁴ However, the presumption can be rebutted, for example if there is evidence that the purpose is "subversive of all morality, or it is a new belief system, or if there has been public concern expressed about the organisation carrying out the particular purpose, or if it is focused too narrowly on its adherents".²⁴⁵ In such cases, the public benefit must be shown positively on the evidence.²⁴⁶

236 *Liberty Trust v Charities Commission* [2011] 3 NZLR 68 (HC) at [53], referring to *Roman Catholic Archbishop of Melbourne v Lawlor* (1934) 51 CLR 1 (HCA) at 33.

237 *Liberty Trust v Charities Commission* [2011] 3 NZLR 68 (HC) at [57].

238 *Liberty Trust v Charities Commission* [2011] 3 NZLR 68 (HC) at [97] referring to *Gino Dal Pont Charity Law in Australia and New Zealand* (Oxford University Press, Oxford, 2000) at 150 and the references cited therein.

239 *Liberty Trust v Charities Commission* [2011] 3 NZLR 68 (HC) at [55].

240 *Liberty Trust v Charities Commission* [2011] 3 NZLR 68 (HC) at [98], referring to *Roman Catholic Archbishop of Melbourne v Lawlor* (1934) 51 CLR 1 (HCA) at 16 - 17.

241 *Liberty Trust v Charities Commission* [2011] 3 NZLR 68 (HC) at [54].

242 *Re Greenpeace of New Zealand Inc* [2015] 1 NZLR 169 (SC) at [27] n 57; *Re The Foundation for Anti-Aging Research* (2016) 23 PRNZ 726 (HC) per Ellis J at [16]; *Re Family First New Zealand* (2015) NZTR 25-014 at [21]; *Re Education New Zealand Trust* (2010) 24 NZTC 24,354 (HC) at [24]; *Re New Zealand Computer Society Inc* (2011) NZTC 20,023 (HC) at [13]; *Re Queenstown Lakes Community Housing Trust* [2011] 3 NZLR 502 (HC) at [32]; *Liberty Trust v Charities Commission* [2011] 3 NZLR 68 (HC) at [99].

243 *Liberty Trust v Charities Commission* [2011] 3 NZLR 68 (HC) at [99], referring to *Gino Dal Pont Charity Law in Australia and New Zealand* (Oxford University Press, Oxford, 2000) at 166. When the presumption of public benefit was statutorily removed in England and Wales by the Charities Act 2006 (UK), it was presented in the media as mostly an issue about fee-paying schools, but in fact most concern centred around religious charities: interview with Andrew Purkis OBE (7 July 2020).

244 *Liberty Trust v Charities Commission* [2011] 3 NZLR 68 (HC) at [100], [102].

245 *Liberty Trust v Charities Commission* [2011] 3 NZLR 68 (HC) at [100].

246 *Liberty Trust v Charities Commission* [2011] 3 NZLR 68 (HC) at [100].

Benefits must also be weighed against any detriments, as has been statutorily provided for in Australia,²⁴⁷ and Scotland,²⁴⁸ reflecting the underlying common law, for example in England and Wales,²⁴⁹ and as set out in guidance in Canada.²⁵⁰ In other words, any harm caused within a religion can be addressed on a case-by-case basis through the public benefit test, or otherwise by means of the general law (such as criminal law in the case of sexual abuse, or hate speech laws).²⁵¹ The process of addressing harm is assisted by the comprehensive information now available by means of the charities register, which may provide the information necessary to disclose misconduct, or to rebut the presumption of public benefit in a specific case. In other words, harm caused within a specific charity can be addressed specifically without requiring removal of the advancement of religion as a head of charity generally.

Protecting against “sham” religions is a definitional issue,²⁵² underscored by the need to uphold freedom of religion enshrined in s 13 of the New Zealand Bill of Rights Act 1990 and in New Zealand’s international treaty obligations.²⁵³ If a religious belief is sincerely held, liberal democratic values of pluralism and diversity would encourage tolerance, even if the practices associated with the religious belief are not easily understood by external observers. Given the high levels of transparency and accountability required by New Zealand-registered charities, it is highly unlikely a genuinely sham religion would remain on the charities register for long.

The National Council of Voluntary Organisations’ consideration of the issue of religion in a charities law context in 2001 is particularly apposite:²⁵⁴

When we were collecting evidence for this review a significant number of the submissions commented on the relationship between advancing religion and public benefit. It is often argued that many religious organisations could potentially fall under other charitable heads because, for example, they are engaged in social welfare activity and/or they are maintaining buildings which are of historic interest. *But this misses the point.* Worship is the primary purpose of many of these organisations and if this is no longer deemed charitable this would surely call into question their charitable status. One important distinction made in the current treatment of religious organisations is whether worship is public or private. Contemplative orders have had applications for charitable status turned down on the basis that there is no public aspect to their worship.

247 Charities Act 2013 (Cth) s 6(2).

248 Charities and Trustee Investment (Scotland) Act 2005 s 8(2)(a)(ii).

249 See, for example, Charity Commission for England and Wales *Case Report: Preston Down Trust* 15 February 2016: <assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/846858/preston_down_trust_case_report_withdrawn.pdf>.

250 Stop the abuse and pain.ca *Charity, religion and the law*: <stoptheabuseandpain.ca/2a-the-law-charity-and-religion/>.

251 As Harding notes, a culture of religious diversity is a public good, enjoyed necessarily by everyone irrespective of whether or not they are religious; however, extreme cases of “shunning” and the preaching of intolerance or hatred may give the state good reason to “exercise coercive power against and even suppress religious practices that conflict with autonomy”: M Harding *Charity law and the liberal state* (Cambridge University Press, 2014) at 155, 157. Another way of looking at the latter point may be that such circumstances give grounds to rebut the presumption of public benefit, such that the religious purposes may fail the public benefit test and therefore not be charitable.

252 See P Ridge “[When is the advancement of religion not a charitable purpose?](#)” (2020) 6 CJCL 360.

253 See, for example, article 18 of the *Universal Declaration of Human Rights* GA Res 217A, A/Res/217 (1948), and article 18 of the *International Covenant on Civil and Political Rights* 999 UNTS 171 (which New Zealand ratified in 1978):

“1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

3. Freedom to manifest one’s religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.”

254 National Council of Voluntary Organisations [For the public benefit? A consultation document on charity law reform](#) January 2001 at [4.3.5] - [4.3.7] (emphasis added).

During our consultations some people argued that in a largely secular society charitable status for religion was anachronistic. It was also suggested that the charitable status of religious organisations could be questioned on the basis that little in the way of tangible benefit flowed from their work, or at least benefit as tangible as the other heads. However, supporters of the charitable status of religious organisations argued that the *purpose benefited the public because at its best it embodied attitudes and virtues that should both be preserved and promoted. These values and attitudes, including a generous attitude towards others and a desire to relieve suffering, can be seen as the source of charity.* Religious organisations established the tradition of charity in this country and elsewhere and it remains the case today that those active in any religion are more likely than others to donate money or time. Some suggested that it is precisely because of secularisation and our consequent lack of conviction about the content of moral education that religious organisations have become a more important source of guidance and succour:

‘We would argue that even a church with a small congregation does provide spiritual and moral support and leadership to a society in which increasingly the traditional family and community structures and values are breaking down.’
(voluntary organisation submitting written evidence, 1998)

Earlier in this chapter we explained that we believed that public benefit should be assessed on the basis of intangible as well as tangible benefits. We accept the argument that charity should therefore encompass attempts to address spiritual as well as material poverty. In our view implementation of our main proposal does not threaten the charitable status of religious organisations as such. *Organisations promoting religion should continue to be charitable, other things being equal, on the basis that they provide an opportunity for the expression of belief and for spiritual and moral development which has the potential to benefit the public.* Of course in each case the question will be whether the object is indeed to the public benefit, to which the question of public accessibility to facilities for worship or the support offered will continue to be relevant.

We do not recommend removing the advancement of religion as a “head” of charity. Much important work is carried out for the benefit of the public in New Zealand precisely because it is an outworking of religious faith. It is notable that all jurisdictions that have reviewed their statutory definitions of charitable purpose have retained the advancement of religion as a “head” of charity.

However, as discussed above, an outcome of the co-design workshop was whether some concerns might be able to be addressed by replacing “the advancement of religion” with “the advancement of faith”. Such a bold departure from established wording increases the risk that the statute would be interpreted in an unexpected way. However, such a risk can be inherent in established wording also. We have incorporated this wording in the draft Bill included in chapter 9 of this report, but acknowledge that “freedom of religion” is enshrined in legislation and international treaties:²⁵⁵ we recommend that further consultation is undertaken on this point, as part of a process of discussing and debating what should be the definition of charitable purpose in contemporary Aotearoa New Zealand.

Recommendation 3.1:

That the statutory definition of charitable purpose is comprehensively and independently reviewed, with a view to expanding the statutory “heads” of charity along the lines undertaken by Australia, England and Wales, Northern Ireland, Ireland, and Scotland, and recommended in Canada.

²⁵⁵ See, for example, New Zealand Bill of Rights Act 1990 s 13, referring to “freedom of thought, conscience, and religion”, and Human Rights Act 1993 ss 21, 28, 39, which specifically refer to “religion”.

Setting out the test in legislation

In addition to expanding the statutory “heads”, we strongly recommend that New Zealand follow the approach of other jurisdictions and set out in legislation the test to be applied in determining whether a purpose is charitable.

Subtle changes to the legal tests have been a key factor in the slow-moving change in regulatory paradigm in New Zealand, as discussed above. Setting out in legislation the test for determining whether a purpose is charitable would reduce the scope for discretion and subjectivity, and clarify the questions to be asked in determining whether an entity is eligible for registration providing for better certainty and predictability in the law.

As discussed above, the Court of Appeal in *Latimer* CA set out a 2-step test for determining whether a purpose is charitable in New Zealand.²⁵⁶ This test itself reflected long-standing common law, such as the unanimous 1968 decision of the House of Lords in *Scottish Burial Reform*.²⁵⁷

The Supreme Court in *Re Greenpeace of New Zealand Inc* [2015] 1 NZLR 169 (SC) did not dispense with this 2-step test. In fact, despite at times using a short-hand expression that might appear to conflate the two steps of the test,²⁵⁸ the Supreme Court was at pains to emphasise that both limbs of the test must be satisfied.²⁵⁹

We recommend this test be set out in legislation. We also recommend the legislation clarify that the test applies to an entity’s purposes as ascertained under normal rules of construction of its constituting document: the test does not apply to activities, nor to the entity itself. The draft Bill included in chapter 9 of this report includes some suggested drafting to these ends for consideration.

In clarifying the legal test, two particular issues arise in the context of the spirit and intendment test: the reference to the Preamble and the status of the presumption of charity.

The reference to the Preamble

The second limb of the test, the requirement that a purpose be within the “spirit and intendment” of the Preamble, is often criticised as anachronistic; it has been abandoned in other jurisdictions:

- i. In Australia, the requirement was abandoned once a statutory definition of charity was introduced by the Charities Act 2013 (Cth): the preamble to the Charities Act 2013 specifically notes that “[u]ntil now, the meaning of charity in Commonwealth law has largely been that of the common law, based on the preamble to the Statute of Charitable Uses 1601”.²⁶⁰
- ii. In England and Wales, the Charities Act 2011 (UK) specifically states that any reference to a charity within the meaning of the Charitable Uses Act 1601 or the preamble to it “is to continue to be construed as a reference to a charity as defined by section 1(1)”.²⁶¹
- iii. Neither Northern Ireland nor Scotland refer to the Preamble in their respective pieces of charities legislation.²⁶²

In these cases, the requirement to fall within the “spirit and intendment” of the Preamble has effectively been replaced by a requirement to fall within one of the expanded

²⁵⁶ *Latimer v Commissioner of Inland Revenue* [2002] 3 NZLR 195 (CA) at [32].

²⁵⁷ *Scottish Burial Reform and Cremation Society Ltd v Glasgow Corporation* [1968] AC 138 (HL) (cited with approval in *Re Greenpeace of New Zealand Inc* [2015] 1 NZLR 169 (SC) at [21] and [23]) at 146 - 147, 151 - 152, 154).

²⁵⁸ See, for example, *Re Greenpeace of New Zealand Inc* [2015] 1 NZLR 169 (SC) at [3], [73], [114].

²⁵⁹ *Re Greenpeace of New Zealand Inc* [2015] 1 NZLR 169 (SC) at [27], [29], [30], [113].

²⁶⁰ Charities Act 2013 (Cth), preamble (emphasis added). See also M Harding “What is the point of charity law?” in *Private law: key encounters with public law* K Barker and D Jensen (eds) (Cambridge University Press, 2013) at 150.

²⁶¹ Charities Act 2011 (UK) sch 7 (*Consequential Amendments*), pt 1 (*General Amendments*), cl 1 (*References to the Charitable Uses Act 1601 (c 4)*).

²⁶² Charities Act 2009 (Ireland); Charities Act (Northern Ireland) 2008 (as amended by the Charities Act (Northern Ireland) 2013); Charities and Trustee Investment (Scotland) Act 2005.

statutory “heads” of charitable purpose. For new purposes, falling within the “catch-all provision” (“other purposes beneficial to the community”) requires being analogous to or “within the spirit of” either one of those expanded statutory heads or another purpose that has previously been recognised as charitable.²⁶³

However, as at the date of writing, the requirement to fall within the spirit and intendment of the Preamble remains part of the common law of New Zealand.

The question is whether New Zealand should retain this requirement, or remove it as other jurisdictions have done.

Arguably, as can be clearly seen from the *Latimer* litigation discussed above, the requirement to fall within the spirit and intendment of the Preamble does not constrain New Zealand charities law jurisprudence to Victorian or Elizabethan times.²⁶⁴ Arguably, its inherent flexibility and ability to adapt to changing circumstances has been demonstrated by its enduring longevity over 400 years. It is not the requirement to fall within the spirit and intendment of the Preamble that is causing difficulty with the definition of charitable purpose in New Zealand, but rather the choice of underlying regulatory paradigm, influenced by a tax expenditure analysis that causes charities to be viewed as “fiscal costs” limited to “assuaging need” or doing the work of government. This problem has been materially exacerbated by the current difficulties charities are experiencing in holding Charities Services and the Charities Registration Board accountable for their decision-making under the Charities Act (as discussed further below in chapters 6 and 7).

Paradoxically, removing the requirement to fall within the spirit and intendment of the Preamble may not resolve current issues of anachronism. To the contrary, retaining the equitable requirement to fall within the spirit and intendment of the Preamble is arguably important in preserving the link to the “essence” of charity. The key issue, in our view, is reinstating access to a trier of fact so that the common law might have the tools needed to work as intended.

In the draft Bill, we have suggested retaining the link to the Preamble. However, we accept that such a proposal is easily dismissed and may not survive a consultation process. The important point, however, is that such a consultation process is undertaken, and a fully informed decision is ultimately made.

The presumption of charity

We also strongly recommend that the status of the presumption of charity in New Zealand law is comprehensively considered and clarified.

The High Court in *Latimer* HC acknowledged that New Zealand law diverges from Australian law in recognising a presumption of charity.²⁶⁵ The presumption is not recognised in England and Wales.²⁶⁶ However, the presumption of charity was well-

263 See Charities Act 2013 (Cth) s 12(1)(k); Charities Act 2011 (UK) s 3(1)(m); Charities Act (Northern Ireland) 2008 s 2(2)(l), (4). However, Scotland does not include the “or the spirit of” wording and proceeds by analogy only: Charities and Trustee Investment (Scotland) Act 2005 s 7(2)(p). Ireland simply refers to “any other purpose that is of benefit to the community”: Charities Act 2009 (Ireland) s 3(1)(d), which presumably retains reference to the spirit and intendment of the Preamble by means of the common law.

264 As noted by the High Court in *Re Queenstown Lakes Community Housing Trust* [2011] 3 NZLR 502 (HC) at [29]: “[t]he fact that the modern law of charities has its origins in the preamble to the Statute of Elizabeth 1, and that its current formulation is that in *Pemsel’s* case, does not mean that the law of charities is fixed in the seventeenth or nineteenth centuries. The list of purposes in the Statute of Elizabeth 1 is not a definitive list. The test which has been applied is whether a particular purpose can fairly be said to be within the spirit and intendment of the preamble.”

265 *Latimer v Commissioner of Inland Revenue* [2002] 1 NZLR 535 (HC) at [105] - [106]. In this regard, the writer respectfully submits that the comments of the Court of Appeal in *Re Greenpeace of New Zealand Inc* [2013] 1 NZLR 339 (CA) at [43] are an accurate summary of the New Zealand legal test. See also *The Plumbers, Gasfitters and Drainlayers Board v Charities Registration Board* [2013] NZHC 1986 at [22], [35], [56].

266 *Helena Partnerships Ltd (formerly Helena Housing Ltd) v The Commissioners for Her Majesty’s Revenue and Customs* [2012] EWCA Civ 56 at [62].

established in New Zealand law prior to the Charities Act,²⁶⁷ and appears to have been instrumental in finding the assistance purpose charitable in the *Latimer HC* and *Latimer CA* cases, despite there being no direct analogy.²⁶⁸

The advantage of the presumption of charity is that it retains the link to the essence of charity without the need for strained analogies: it appears to have derived, at least to some extent, from a recognition that the analogy approach has its limitations.

For example, the issue in *Incorporated Council of Law Reporting for England and Wales v Attorney-General*²⁶⁹ was whether a purpose of publishing reliable law reports was charitable under the fourth head (other purposes beneficial to the community). While the purpose was clearly beneficial to the public, a suitable analogy was not readily available. Sachs LJ nevertheless found the purpose to be charitable, referring to the “artificiality” of the analogy approach:²⁷⁰

... I do not propose to consider the instant case on the basis of analogies. The analogies or “stepping stones” approach was rightly conceded on behalf of the Attorney-General not to be essential: its *artificiality* has been demonstrated in the course of the consideration of the numerous authorities put before us...no useful purpose can be served by citation of specific authorities.

In describing the analogy approach as a “potential source of distortion” in charities law, Parachin makes the following comments:²⁷¹

The difficulty is that analogies on their own provide but an ‘imperfect guide’. PC Hemphill illustrates the point as follows:

One can say that an egg is analogous to a football by reason of its shape. One can also say that an egg is analogous to baking powder by reason of its capacity to make cakes rise. One should, however, be a little wary of saying that baking powder is analogous to a football because they both share an attribute with an egg.

In a similar vein, N Brooks observes that ‘courts often find themselves three or four analogies removed from the preamble’ and that ‘far-fetched analogy drawing could be multiplied one-hundred fold’.

Parachin points to *Vancouver Regional FreeNet Association v MNR*²⁷² as an example of “analogical reasoning gone wrong”:²⁷³

This case concluded that the provision of free access to the internet – the information superhighway – was charitable on the basis of (among other things) a strained analogy to the repair of highways, a charitable purpose enumerated in the preamble ... With respect, the charitableness (or lack thereof) of the purposes under review in *Vancouver Regional FreeNet* has absolutely nothing to do with the charitableness of repairing public highways.

In expressing a preference for the analogy approach, the New Zealand Supreme Court cast doubt on the presumption of charity.²⁷⁴ However, in doing so, the Supreme Court appears to have equated the presumption of charity with the “single test of public benefit” put forward by counsel for the intervener in the *Vancouver Society*

267 See, for example, *Morgan v Wellington City Corporation* [1975] 1 NZLR 416 (CA), 419 - 420; *Auckland Medical Aid Trust v Commissioner of Inland Revenue* [1979] 1 NZLR 382 (SC), 388; and Inland Revenue Department *Tax and charities, a government discussion document on taxation issues relating to charities and non-profit bodies* June 2001 at [3.17].

268 *Latimer v Commissioner of Inland Revenue* [2002] 3 NZLR 195 (CA) at [33] - [40]; *Re Greenpeace of New Zealand Inc* [2015] 1 NZLR 169 (SC) at [70]. Compare *Re Greenpeace of New Zealand Inc* [2015] 1 NZLR 169 (SC) at [25].

269 *Incorporated Council of Law Reporting for England and Wales v Attorney-General* [1972] Ch 73 (CA).

270 *Incorporated Council of Law Reporting for England and Wales v Attorney-General* [1972] Ch 73 (CA) at 94 - 95 (emphasis added).

271 A Parachin “Common Misconceptions of the Common Law of Charity”, paper presented at the *Defining, Taxing and Regulating Not-for-Profits in the 21st Century Conference* (Melbourne, 19-20 July 2012) at 5.

272 *Vancouver Regional FreeNet Association v Minister of National Revenue* [1996] 3 FC 80.

273 A Parachin “Common Misconceptions of the Common Law of Charity”, paper presented at the *Defining, Taxing and Regulating Not-for-Profits in the 21st Century Conference* (Melbourne, July 2012) at 6 (footnotes omitted).

274 *Re Greenpeace of New Zealand Inc* [2015] 1 NZLR 169 (SC) at [24] - [30].

case, when that is not the case, as discussed above.²⁷⁵ In addition, the presumption can of course be rebutted:²⁷⁶ there may be myriad “good reasons”, such as public policy reasons, why a purpose of acknowledged public benefit would nevertheless fail to fall within the spirit and intendment of the Preamble. It is quite possible for a purpose that has satisfied the public benefit test *not* to be found to be charitable.

Of course, after four centuries, there are now so many analogies that, as the Supreme Court notes, there may be little difference in result between presuming charity from recognised public benefit or proceeding by analogy.²⁷⁷ However, the presumption may be helpful where an analogy may be strained, as demonstrated by the *Latimer* case discussed above: New Zealand cases have generally applied *both* the presumption of charity and the analogy test, using one as a cross check against the other.²⁷⁸ Continuing to recognise the presumption of charity does not necessitate an “abandonment” of the analogy test.²⁷⁹

In the context of the evolving nature of charity, recognising a presumption of charity has also been described as “more intellectually honest” than proceeding solely by analogy and “based on sound policy”.²⁸⁰ It assists with resolving the underlying paradigm in favour of an enabling framework by giving expression to the principle of “permissible unless prohibited” rather than “prohibited unless permissible”,²⁸¹ which is more encouraging of charitable work and voluntary effort. Continuing to recognise the presumption of charity would also assist with removing artificial barriers to charities’ work, and in so doing would be significantly more cost-effective, in terms of compliance, administration and litigation costs, and would allow significantly more benefits to flow to the public, than the current approach; recognising a presumption of charity would also assist with allowing issues to be addressed at the level of cause, rather than symptom, and would help to “rid us of old-style philanthropy, and bring in a culture of investment”.²⁸²

The reasons given to date for casting doubt on the presumption of charity require critical examination. The presumption of charity is an important equitable principle that should not be dismissed lightly. At the very least, any decision regarding its current status should be made only after comprehensive review and on the basis of a full understanding of its history, operation and value.

Recommendation 3.2:

That the legislation set out the test to be applied in determining whether a purpose is charitable.

275 *Vancouver Society of Immigrant and Visible Minority Women v Minister of National Revenue* [1999] 1 SCR 10 at 168, 196-198 and 200. Compare *Re Greenpeace of New Zealand Inc* [2015] 1 NZLR 169 (SC) at [24] - [25], [27], [29] - [30], [113].

276 The Supreme Court appears to limit rebuttal of the presumption to contrariety to analogous cases (*Re Greenpeace of New Zealand Inc* [2015] 1 NZLR 169 (SC) at [25], [31]), but it is not clear that potential rebuttal should be so limited.

277 As noted in *Re Greenpeace of New Zealand Inc* [2015] 1 NZLR 169 (SC) at [27], [31].

278 *Latimer v Commissioner of Inland Revenue* [2002] 1 NZLR 535 (HC) at [104] - [109]; *Latimer v Commissioner of Inland Revenue* [2002] 3 NZLR 195 (CA) at [13], [39] - [41]; *Commissioner of Inland Revenue v Medical Council of New Zealand* [1997] 2 NZLR 297 (CA); *Re Greenpeace of New Zealand Inc* [2013] 1 NZLR 339 (CA) at [72].

279 *Re Greenpeace of New Zealand Inc* [2015] 1 NZLR 169 (SC) at [30].

280 *Re Collier (Deceased)* [1998] 1 NZLR 81 (HC) at 95.

281 Interview with Laird Hunter QC, counsel for the intervener in the *Vancouver* case (4 February 2021).

282 G Peacock “The Charity Commission must move away from old models” ThirdSector, 23 February 2021: <www.thirdsector.co.uk/geraldine-peacock-charity-commission-move-away-old-models/governance/article/1708092>.

Clarifying to what the tests are to be applied

Section 13 of the Charities Act reflects the clear common law position that the charitable purpose test applies to purposes, not to activities and not to the organisation itself. Despite this, considerable uncertainty has crept into the law since the Charities Act was passed in 2005.²⁸³ We recommend the legislation clarify both how an entity's purposes are to be ascertained, and that the charitable purposes test applies to *those purposes*, as discussed further below in chapter 8.

Recommendation 3.3:

That the legislation clarify that the charitable purpose test applies to an entity's purposes, as ascertained under normal rules of construction of its constituting document, not to activities and not to the entity itself.

²⁸³ For example, in *Re Draco Foundation (NZ) Charitable Trust* (2011) 25 NZTC 20-032 (HC) at [12], the High Court set out the following test for an entity to be registered as a charity: "Thus to be registered as a charity Draco must satisfy this Court that: (a) it has a purpose of a charitable character; (b) it [sic] must be for the benefit of the public; and (c) it [sic] must be exclusively charitable". This test was then applied in the subsequent Charities Act case (*Re New Zealand Computer Society* (2011) 25 NZTC 20-033 (HC) at [9]). However, this test does not reflect the essential requirements for registration set out in s 13 of the Charities Act, which requires an entity's *purposes* to be exclusively charitable; the public benefit test applies to the purpose, not to the entity. The common law test as set out in *Latimer* is not mentioned in either judgment. In the month following the latter decision, the questions to be addressed were described in *Re Queenstown Lakes Community Housing Trust* [2011] 3 NZLR 502 (HC) at [51] as follows: "(a) Do these perceived benefits [to the wider community from assisting key people into housing] fall within the scope of - any other matter beneficial to the community? and (b) Are those benefits achieved in such a way as to be beneficial in a way that the law regards as charitable?". However, it is the purpose that must fall within the fourth head (any other matter beneficial to the community), rather than the "benefits". Whether the purpose operates for the benefit of the public is a question of fact to be determined on the evidence. The second aspect of the test is interpreted as requiring that the *means* by which the claimed benefit is achieved be a "charitable means" (at [71]). However, the "charitable" test applies to purposes: it does not apply to activities; there is no requirement in the Charities Act for "means" to be charitable. The decisions in *Latimer* (which turned on wider indirect public benefits being achieved by means of assistance to individuals, at [68], [75]) are not mentioned in the judgment.



Chapter 4 – Advocacy

“The historical path of the law of charities is strewn with the great controversies of the past ... the advocates of causes involving intense moral issues ought not per se to be considered to be acting in a manner harmful to the public. There must be at least two sides to such controversies. The cases show that when the Courts take sides injustice may be the result.”

Auckland Medical Aid Trust v Commissioner of Inland Revenue [1979] 1 NZLR 382 (SC) at 397 per Chilwell J

If humanity stands on the precipice of a change in world order,¹ perhaps one of the most important things that could be done, to uphold liberal democratic values in the face of the forces of autocracy, is to enact an enabling legal framework for charities that boldly upholds and protects their independence. The “front line” in this regard is the treatment of charities’ advocacy, including their ability to raise public awareness, and promote or oppose changes to law or government policy or practice.²

The experience of comparable jurisdictions demonstrates that, even within an enabling framework, maintaining charities’ ability to advocate for their charitable purposes without undue government interference requires “eternal vigilance”. However, it also demonstrates that New Zealand is currently an outlier internationally in its approach to this issue.

This chapter looks at the impact of New Zealand’s unusual approach to the issue of advocacy by charities. It then compares the approach taken by comparable jurisdictions, including critically examining the heavy reliance that has been placed on Canadian case law in New Zealand, before recommending reform.

New Zealand’s current approach

The impact of New Zealand’s current approach to the issue of advocacy by charities is perhaps best highlighted by two case studies: those of Greenpeace Aotearoa Incorporated (formerly Greenpeace of New Zealand Incorporated) (“**Greenpeace**”) and Family First New Zealand (“**Family First**”), which are discussed in some detail next.

Case study 4.1 – Greenpeace

Greenpeace is a well-known environmental charity that first applied for charitable registration in New Zealand on **19 June 2008**.³

Six months later, on 29 January 2009, the Charities Commission (as it was then) (“**the Commission**”), sent Greenpeace a notice advising that its application for registration might be declined. Two reasons were given:

- i. Greenpeace’s constitution limited the distribution of surplus assets on winding up to a non-profit entity with “similar” purposes. Given that Greenpeace’s purposes were considered charitable, a precise restriction to charitable purposes might not have

1 See, for example, RNZ “Fight against Russia’s Ukraine war is a ‘new battle for freedom’ – Biden” 27 March 2022: www.rnz.co.nz/news/world/464063/fight-against-russia-s-ukraine-war-is-a-new-battle-for-freedom-biden. Suggestions that the Russian invasion of Ukraine is intended as a forerunner underscore the significance for liberal democracies globally of the strength of the Ukrainian resistance. Issues of this nature also highlight that charities law does not exist in isolation and underscore the importance of multi-disciplinary input into the independent review recommended in recommendation 1.0.

2 By way of example of the existential challenges faced by charities in autocratic regimes, International Memorial, one of Russia’s oldest human rights groups working to recover the memory of the millions of innocent people executed, imprisoned or persecuted in the Soviet era, was ordered to close in December 2021, (only 2 months prior to Russia’s invasion of Ukraine) in a decision condemned as a “tragic attempt to suppress freedom of expression and erase history”. See S Rainsford “Russian court orders oldest civil rights group Memorial to shut” BBC News, 28 December 2021: www.bbc.com/news/world-europe-59808624.

3 *Greenpeace of New Zealand Incorporated v Charities Registration Board* [2010] NZHC 2993 at [6].

- ii. been considered necessary. However, the Commission was concerned that similar purposes might not necessarily be themselves charitable, and recommended the constitution be amended to make clear that ultimate distribution on winding up could be to charitable purposes only.
- iii. Greenpeace's constitution also did not contain a clause preventing private pecuniary profit. As Greenpeace was incorporated under the Incorporated Societies Act 1908, such a clause might also not have been considered necessary given that incorporated societies are by definition not-for-profit entities.⁴ Nevertheless, the Commission recommended that Greenpeace amend its constitution to include a specific prohibition on private pecuniary profit as well.

Under the processes set down by its constitution, Greenpeace made these amendments to the Commission's satisfaction, by **24 September 2009**.⁵ This date turned out to be significant, as discussed further below.

The legal framework

Despite these amendments, the Commission continued to consider Greenpeace's application and, on 14 December 2009, sent Greenpeace a second notice, again advising that its application for registration might be declined.

Because Greenpeace is structured as an incorporated society, the "essential requirements" for registration are set out in s 13(1)(b) of the Charities Act 2005 ("**the Charities Act**") which requires that the society is established and maintained "exclusively" for charitable purposes and is not carried on for the private pecuniary profit of any individual. In addition, s 13(1) requires the society to have a name that complies with s 15, and all its officers to be qualified under s 16.

Greenpeace met all of these requirements. However, the Commission's second notice indicated that Greenpeace's application might be declined on the basis of its *activities*.⁶ Section 18(3) of the Charities Act requires activities to be considered as part of an application for registration; however, significant difficulty has been caused in New Zealand because s 18(3) does not specify the criteria against which activities are to be assessed. As discussed further below, New Zealand legislation differs from Canadian legislation in that it focuses on purposes: no provision in the Charities Act requires activities to be "charitable".⁷ Despite this, the New Zealand position appears to have migrated to the Canadian position through administrative practice, as discussed further below.

Ancillary purposes

The requirement in s 13(1) of the Charities Act for purposes to be "exclusively" charitable in s 13(1) of the Charities Act "does not mean what at first sight it might be thought to mean":⁸ if an entity's purposes include a non-charitable purpose that is merely "ancillary" or subordinate to a charitable purpose, the entity's purposes may still be considered "exclusively" charitable.⁹ This principle, known as the "**ancillary purpose rule**", was given statutory effect by subss 5(3) and (4) of the Charities Act, which were inserted into the original Charities Bill at Select Committee stage in 2004; submitters had

4 See the prohibition on pecuniary gain contained in Incorporated Societies Act 1908 ss 4, 5, 20 and the prohibition on financial gain in Incorporated Societies Act 2022 ss 3(a), 3(d)(iv), 8(1), 22 - 24, 26(1)(l), 27, 77, 143 - 149, 210(e), 216.

5 Charities Commission Decision D2010-7 Greenpeace of New Zealand Incorporated 15 April 2010: www.charities.govt.nz/charities-in-new-zealand/legal-decisions/view-the-decisions/view/greenpeace-of-new-zealand at [7]; *Greenpeace of New Zealand Incorporated v Charities Registration Board* [2010] NZHC 2993 at [6], [13] - [14].

6 Charities Commission Decision D2010-7 *Greenpeace of New Zealand Incorporated* 15 April 2010 at [7], [8].

7 See *Re The Foundation for Anti-Aging Research* (2016) 23 PRNZ 726 (HC) at [86]: "It seems unlikely that the enactment of s 18(3) was intended materially to change this position ... It is certainly not an indication that the Act was intended to wreak some fundamental change in approach or a move away from the fundamental "purposes" focus of the charities inquiry. See also the discussion in S Barker "The myth of charitable activities" [2014] NZLJ 304.

8 *Institution of Professional Engineers New Zealand Inc v Commissioner of Inland Revenue* [1992] 1 NZLR 570 (HC) at 573. See also *Latimer v Commissioner of Inland Revenue* [2002] 1 NZLR 535 (HC) at [67] - [74].

9 *Latimer v Commissioner of Inland Revenue* [2002] 1 NZLR 535 (HC) at [70].

expressed considerable concern that the new Charities Act might be used as a method of political control of the voluntary sector, for example, by preventing prevent charities from advocating for their charitable purposes.¹⁰ The experience of CORSO Incorporated (“**CORSO**”) was no doubt a factor in this concern and requires consideration in this context.

The CORSO example

Former Prime Minister, the late Right Honourable Rob Muldoon, had controversially stripped CORSO of its government funding, and its inclusion in what is now sch 32 of the Income Tax Act 2007 (which provides for “overseas donee status”), in retaliation for its opposition to the 1981 Springbok rugby team’s tour of New Zealand.¹¹ The basis for CORSO’s opposition to the tour was protest against the South African regime of apartheid, a system of racial segregation that has since been officially dismantled, an outcome to which international protests no doubt contributed. In New Zealand, protests against the 1981 Springbok tour caused division in society, as many take great pride in the international status of New Zealand’s All Blacks rugby team and considered that “sport and politics should not mix”. The former Prime Minister was in the latter camp, and although the legal basis for his actions was never tested in a court of law, they had the practical effect of eviscerating a once-strong charity.¹²

Against that backdrop, the Select Committee considering the original Charities Bill made the following comments in response to submitters’ concerns about advocacy:¹³

... in the majority’s view there is no cause for concern. The common law has established that organisations must have main purposes that are exclusively charitable, but they are permitted to have non-charitable secondary purposes, provided that those secondary purposes are legitimate ways to achieve the main charitable purpose. While a charity cannot have advocacy as its main purpose, it can have another charitable purpose as its main purpose, and *then engage in appropriate advocacy as a secondary purpose to achieve its main charitable purpose*. Given the level of concern raised by submitters concerning this issue, the majority does consider that it may be valuable if the legislation includes a provision codifying the common law regarding secondary purposes, in order to ensure clarity on this issue. The majority therefore recommends amending the bill to clarify that an entity with non-charitable secondary purposes undertaken in support of a main charitable purpose will be allowed to register with the Commission, and to confirm that advocacy may be one such non-charitable secondary purpose.

It is not clear that New Zealand law did in fact proscribe a charity from having “advocacy as its main purpose”, as discussed above in chapter 3.¹⁴ Nevertheless, the words “for example, advocacy” were inserted into s 5(3) to give charities comfort that their ability to advocate in furtherance of their charitable purposes would not be affected by the new Charities Act regime.¹⁵

This legislative measure intended to help charities ultimately had precisely the opposite effect in practice, as discussed further below.

The original decline decision

Following receipt of further information provided by Greenpeace, the Commission formally declined Greenpeace’s application for charitable registration on 15 April 2010.¹⁶

10 Charities Bill [1R](#) (30 March 2004) 616 NZPD 12,108 per Sue Bradford (Green) and Charities Bill [2R](#) (12 April 2005) 625 NZPD 19,940 per Judith Tizard (Labour), Bill Gudgeon (NZ First) and Sue Bradford (Green).

11 See Charities Bill [3R](#) (12 April 2005) 625 NZPD 19,940 per Jill Pettis (Labour).

12 See the discussion in M McGregor-Lowndes and B Wyatt (eds) *Regulating Charities: the Inside Story* (Routledge, New York, 2017) at 192.

13 Charities Bill 2004 (108-2) ([select committee report](#)) at 4 (emphasis added).

14 Referring to the finding of the Court of Appeal in *Latimer v Commissioner of Inland Revenue* [2002] 3 NZLR 195 (CA) at [40] that the purpose of assisting Māori to bring claims before the Waitangi Tribunal was charitable, and not political, despite the fact that the Treaty settlement process was highly controversial at the time and always, without exception, leads to an Act of Parliament to settle the wrongs.

15 See the discussion in *Re Greenpeace of New Zealand Inc* [2015] 1 NZLR 169 (SC) at [48] - [58].

16 Charities Commission Decision D2010-7 [Greenpeace of New Zealand Incorporated](#) 15 April 2010.

In doing so, the Commission accepted that Greenpeace's purposes for the protection of the environment and the advancement of education were charitable.¹⁷ The issue related to cls 2.2 and 2.7 of Greenpeace's constitution, which were in the following terms:¹⁸

The Objects of the Society are to: ...

2.2 Promote the protection and preservation of nature and the *environment*, including the oceans, lakes, rivers and other waters, the land and the air and flora and fauna everywhere and including but not limited to the promotion of conservation, *disarmament and peace*

...

2.7 Promote the adoption of *legislation, policies*, rules, regulations and plans which further the objects of the Society and support the enforcement or implementation *through political or judicial processes*, as necessary

At the time, the Commission had taken a view that a strict "political purposes exclusion" applied in New Zealand law.¹⁹ In ascertaining Greenpeace's purposes, the Commission had also taken an approach of parsing Greenpeace's overriding purpose of protecting the environment into separate components which were then treated as separate purposes.²⁰

Applying a strict "political purposes exclusion", but focusing on Greenpeace's activities rather than its purposes, the Commission considered the "promotion of disarmament" in cl 2.2 would be undertaken in a "political" manner, because achieving international disarmament would require countries with nuclear weapons programmes to change their laws or policies.²¹

The Commission also considered that peace would not be promoted in a solely educational manner.

Accordingly, on the basis of Greenpeace's activities, cl 2.2 was considered to give rise to two separate purposes that were considered to be "political" and therefore not charitable.²²

In addition, in an apparent conflation of the distinction between purposes and activities, the Commission considered that the *activities* carried out under cl 2.7 would give rise to an independent *purpose* that would be similarly political and not charitable. Further, even if such a purpose was considered ancillary, the Commission considered that activities might be carried out under it in furtherance of the purposes to promote disarmament and peace, which the Commission had found not to be charitable.²³ Accordingly, cl 2.7 was also considered disqualifying under a political purposes exclusion.

Finally, on the basis of information on Greenpeace's website, the Commission considered that Greenpeace was involved in non-violent direct action that "may" involve illegal activities such as trespassing: again, in an apparent conflation of the distinction between purposes and activities, the Commission considered that illegal *activities* would not provide a public benefit (despite the fact that the public benefit test applies to purposes, rather than activities, as discussed above in chapter 3).²⁴

17 Charities Commission Decision D2010-7 [Greenpeace of New Zealand Incorporated](#) 15 April 2010 at [34].

18 Charities Commission Decision D2010-7 [Greenpeace of New Zealand Incorporated](#) 15 April 2010 at [6] (emphasis added).

19 Charities Commission Decision D2010-7 [Greenpeace of New Zealand Incorporated](#) 15 April 2010 at [17] - [19].

20 Charities Commission Decision D2010-7 [Greenpeace of New Zealand Incorporated](#) 15 April 2010 at [34] - [50]. Compare *Commissioner of Inland Revenue v Medical Council of New Zealand* [1997] 2 NZLR 297 (CA) at 318, where the majority of the Court of Appeal held that "[i]n all cases, the correct approach is to stand back ... and ask what is the *true purpose* for which the body in question has been established" (emphasis added).

21 Charities Commission Decision D2010-7 [Greenpeace of New Zealand Incorporated](#) 15 April 2010 at [42] - [49].

22 Charities Commission Decision D2010-7 [Greenpeace of New Zealand Incorporated](#) 15 April 2010 at [49], [50], [73]. The issue of whether these purposes might be ancillary to Greenpeace's purpose of protecting the environment does not appear to have been considered.

23 Charities Commission Decision D2010-7 [Greenpeace of New Zealand Incorporated](#) 15 April 2010 at [55], [59], [60].

24 Charities Commission Decision D2010-7 [Greenpeace of New Zealand Incorporated](#) 15 April 2010 at [64].

On the basis of all of the above, the Commission found that Greenpeace was not “established and maintained exclusively for charitable purposes” and declined its application for charitable registration.

Greenpeace appealed the decision to the High Court under s 59 of the Charities Act, which appeal was heard on 11 November 2010.

The Aid/Watch decision

On 1 December 2010, after the hearing but before the High Court had issued its decision, an important decision was made in Australia.

In *Aid/Watch Inc v Commissioner of Taxation* (“**Aid/Watch**”),²⁵ a majority of the High Court of Australia (Australia’s highest court) found that an organisation concerned with promoting the effectiveness of foreign aid was correctly endorsed as a “charitable institution” for the purposes of certain tax privileges available to charities in Australia: the majority held there was no “political purpose exclusion” in Australian law, and that the generation by lawful means of public debate concerning the efficiency of foreign aid directed to the relief of poverty is itself a purpose beneficial to the community within the fourth head of charity.²⁶

In submissions subsequently made to the Supreme Court of New Zealand, the Charity Law Association of Australia and New Zealand analysed the *Aid/Watch* decision in the following terms:²⁷

... the notion that non-ancillary political advocacy purposes might generate public benefit because the conduct of political advocacy makes an important contribution to liberal and democratic government is one that has resonance in all liberal democracies *irrespective of their particular constitutional arrangements*. Indeed, political philosophers and constitutional scholars have argued powerfully and in general terms for the recognition of the public benefit of a culture of free political expression to any liberal democracy.

On 15 February 2011, the *Aid/Watch* decision was considered by the New Zealand High Court in *Re Draco Foundation* (NZ) Charitable Trust (“**Draco**”),²⁸ where Ronald Young J declined to follow *Aid/Watch* in part because it was “reliant upon Australian constitutional principles not applicable in New Zealand”.²⁹ Although the decision in *Draco* has been the subject of subsequent criticism,³⁰ it nevertheless appears to have influenced the High Court decision in *Greenpeace*.

First tranche of litigation

High Court

Shortly following the *Draco* decision, on 15 May 2011, Heath J of the New Zealand High Court upheld the Charities Commission’s decision to decline Greenpeace’s application for registration, “albeit with a degree of reluctance”:³¹

In modern times, there is much to be said for the majority judgment in *Aid/Watch*. Unlike Ronald Young J, I have no real concerns that the political system in Australia ought to bring about a different conclusion, having regard to our mixed member proportional system of parliamentary election, our reliance on select committees to enable policy to be properly debated and the existence of ss 13 and 14 of the New Zealand Bill of Rights Act 1990, dealing respectively with freedom of thought, conscience and religion, and freedom of expression. I leave that question open for consideration, in an appropriate case, by the Court of Appeal or the Supreme Court. Having said that, I should not be taken as necessarily suggesting that the result of the present appeal would be different if the majority judgment in *Aid/Watch* were applied.

25 *Aid/Watch Inc v Commissioner of Taxation* [2010] HCA 42.

26 *Aid/Watch Inc v Commissioner of Taxation* [2010] HCA 42 at [47] - [49].

27 Charity Law Association of Australia and New Zealand (intervener), submissions to the Supreme Court of New Zealand in the matter of *Attorney-General v Family First New Zealand* 9 June 2021: claanz.org.au/pdf/Submissions/CLAANZ%20Submissions%20Supreme%20Court%209%20June%202021.pdf at [34] (emphasis added, footnotes omitted). The writer is a director of CLAANZ.

28 *Re Draco Foundation* (NZ) Charitable Trust (2011) 25 NZTC 20-032 (HC).

29 *Re Draco Foundation* (NZ) Charitable Trust (2011) 25 NZTC 20-032 (HC) at [56] - [60].

30 See, for example, S Barker “[Advocacy by charities: what is the question?](#)” (2020) 6 CJCL 1 at 37 - 39 arguing that the decision in *Draco* must be viewed as a “rogue” decision.

31 *Re Greenpeace* [of] *New Zealand Inc* [2011] 2 NZLR 815 (HC) at [59].

It is important to note that neither of the High Court decisions in *Draco* or *Greenpeace* mentioned the Court of Appeal decision of *Latimer CA*.³²

Greenpeace appealed to the Court of Appeal.

Court of Appeal

Delivering its decision on 16 November 2012, the Court of Appeal noted that the vast majority of Greenpeace's purposes were accepted as charitable,³³ and that the impugned clauses of Greenpeace's constitution were proposed to be amended: the reference to "disarmament" in cl 2.2 was to be replaced with a reference to "nuclear disarmament and the elimination of all weapons of mass destruction", and cl 2.7 was to be amended to make its ancillary status clearer.³⁴

The Court of Appeal considered the proposed amendments to cl 2.2 would remove any element of political contention, and the resulting clause would articulate purposes that were self-evidently for the public benefit;³⁵ in addition, the proposed amendments to cl 2.7 should answer the concerns of the Commission and the High Court about its ancillary status.³⁶ However, perhaps because Greenpeace had not been able to access an oral hearing of evidence (a key issue as discussed further below in chapter 6 (*Appeals*)), the Court of Appeal considered it did not have sufficient evidence to determine Greenpeace's eligibility for registration definitively, and referred the matter back to the Commission (who by this time had been disestablished and its functions transferred to the Department of Internal Affairs – Charities Services Ngā Ratonga Kaupapa Atawhai ("**Charities Services**") and the Charities Registration Board Te Rātā Atawhai ("**the Board**")) for reconsideration in light of its judgment.³⁷

The Court of Appeal had effectively allowed Greenpeace's appeal. However, in doing so, the Court of Appeal found the words "for example, advocacy" in s 5(3) of the Charities Act had effectively codified a "political purposes exclusion" in New Zealand law.³⁸ Greenpeace appealed this finding to the Supreme Court of New Zealand.

Supreme Court

The Supreme Court hearing was held on 1 August 2013.

A year later, on 6 August 2014, the Supreme Court handed down its decision, allowing Greenpeace's appeal: the majority in *Re Greenpeace of New Zealand Inc* [2015] 1 NZLR 169 (SC) ("**Greenpeace SC**") held that s 5(3) of the Charities Act did not enact a political purposes exclusion, and a political purpose exclusion should not be applied in New Zealand law:³⁹

... political and charitable purposes are not mutually exclusive in all cases; a blanket exclusion is unnecessary and distracts from the underlying inquiry whether a purpose is of public benefit ...

However, the majority did not affirm the majority decision of the High Court of Australia in *Aid/Watch*, preferring instead the minority judgment of Kiefel J.⁴⁰ Again, perhaps because Greenpeace had not been able to access an oral hearing of evidence at first instance, the Supreme Court considered it did not have sufficient evidence to determine Greenpeace's eligibility for registration definitively, and referred the matter back to the Board for reconsideration in light of its judgment:⁴¹

Although it may be doubtful on the material before the Court that charitable purpose can be established, it is inappropriate for such assessment to be undertaken as a matter of first and last impression in this Court.

32 *Latimer v Commissioner of Inland Revenue* [2002] 3 NZLR 195 (CA).

33 *Re Greenpeace of New Zealand Inc* [2013] 1 NZLR 339 (CA) at [8], [16].

34 *Re Greenpeace of New Zealand Inc* [2013] 1 NZLR 339 (CA) at [9] - [10].

35 *Re Greenpeace of New Zealand Inc* [2013] 1 NZLR 339 (CA) at [76] - [82].

36 *Re Greenpeace of New Zealand Inc* [2013] 1 NZLR 339 (CA) at [83] - [91].

37 *Re Greenpeace of New Zealand Inc* [2013] 1 NZLR 339 (CA) at [92], [96] - [100].

38 *Re Greenpeace of New Zealand Inc* [2013] 1 NZLR 339 (CA) at [45].

39 *Re Greenpeace of New Zealand Inc* [2015] 1 NZLR 169 (SC) at [3].

40 *Re Greenpeace of New Zealand Inc* [2015] 1 NZLR 169 (SC) at [73] - [74].

41 *Re Greenpeace of New Zealand Inc* [2015] 1 NZLR 169 (SC) at [104]; see also [87], [111] - [112].

The finding of the Supreme Court that a political purposes exclusion did not apply in New Zealand law was welcomed by charities.

In practice, however, the Supreme Court decision has been interpreted to impose even stricter restrictions on charities' ability to advocate than would have been the case under a strict political purposes exclusion.⁴² Such interpretations primarily derive from the following two passages:⁴³

Advancement of causes will often, perhaps most often, be non-charitable and:⁴⁴

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

The difficulty with the first passage is that, conceptually, every charitable purpose is a "cause". Because those involved with charities have fiduciary duties to act in furtherance of, and therefore "advance", their charitable purposes (as discussed above in chapter 2), the passage can be interpreted as implying that *all* charitable purposes will have difficulty meeting the threshold for registration, effectively at the discretion of the decision-maker. Issues with the "advancement of causes" passage are discussed further below.

The difficulty with the second passage is that it has been interpreted as requiring "means and manner" (that is, a charity's *activities*) to be "charitable". How such an interpretation can be reconciled with the following comments of the Privy Council in *Latimer* PC has never been explained:⁴⁵

The ends must be exclusively charitable. But if the non-charitable benefits are merely the means or the incidental consequences of carrying out the charitable purposes and are not ends in themselves or the incidental consequences of carrying out the charitable purposes and are not ends in themselves, charitable status is not lost.

In addition, using a process of interpretation of these two passages to impose strict restrictions on charities' ability to advocate on the basis of their activities would radically cut across the fundamentally purposes-based nature of the charities inquiry. Such a result would be surprising given that the Supreme Court specifically eschewed any "radical change".⁴⁶

In 2016, such difficulties of interpretation⁴⁷ were helpfully clarified by the High Court in *Re The Foundation for Anti-Aging Research* ("**Foundation for Anti-Aging Research**" or "**FAAR and FRSSH**"),⁴⁸ where Ellis J made it clear the Supreme Court was not intending to "wreak some fundamental change in approach or a move away from the fundamental "purposes" focus on the charities inquiry".⁴⁹ This finding, together with the finding of the Supreme Court that there is no political purposes exclusion in New Zealand law, should have settled the pre-existing position that charities are able to engage in advocacy activities in furtherance of their stated charitable purposes. However, the *Foundation for Anti-Aging Research* decision was not interpreted in its terms, as discussed further below.

42 See, for example, Charities Registration Board Decision 2018-1 *Greenpeace of New Zealand Incorporated* 21 March 2018: <www.charities.govt.nz/charities-in-new-zealand/legal-decisions/view-the-decisions/view/greenpeace-of-new-zealand-incorporated-2> at [50], [76], where Greenpeace's purposes for the protection of the environment and the advancement of education were found no longer to be charitable, despite their having been accepted as charitable throughout the litigation.

43 *Re Greenpeace of New Zealand Inc* [2015] 1 NZLR 169 (SC) at [73].

44 *Re Greenpeace of New Zealand Inc* [2015] 1 NZLR 169 (SC) at [76] (emphasis added).

45 *Latimer v Commissioner of Inland Revenue* [2004] 3 NZLR 157 (PC) at [36]. Although these comments were made in the context of fees and expenses, they were expressed as statements of general principle and apply more broadly.

46 *Re Greenpeace of New Zealand Inc* [2015] 1 NZLR 169 (SC) at [29]. See also the discussion in S Barker "Advocacy by charities: what is the question?" (2020) 6 CJCL 1 at 48 - 50.

47 *Greenpeace of New Zealand Incorporated v Charities Registration Board* [2020] NZHC 1999 at [47].

48 *Re The Foundation for Anti-Aging Research and The Foundation for Reversal of Solid State Hypothermia* (2016) 23 PRNZ 726 (HC) at [66], [82] - [89].

49 *Re The Foundation for Anti-Aging Research* (2016) 23 PRNZ 726 (HC) at [86].

Second decline decision

Following the Supreme Court decision, in April 2015, Greenpeace advised Charities Services that it wished to continue with its original application for registration, rather than making a new application, a step which had a particular practical significance, as discussed further below.

By July 2017, almost three years after the Supreme Court decision and following significant exchanges of correspondence,⁵⁰ Greenpeace advised Charities Services that it would not be making further submissions: it was evidently apparent to Greenpeace that Charities Services was taking a different view on how the Supreme Court's decision was to be applied and there was no utility in further submissions at that stage.⁵¹

On 21 March 2018, almost four years after the Supreme Court decision, and almost a decade after Greenpeace had first applied for registration, the Charities Registration Board issued its decision.

Surprisingly, the Board again declined Greenpeace's application:⁵² the Board found that Greenpeace's purposes for the protection of the environment and the advancement of education were no longer charitable, despite their having been accepted as charitable throughout the litigation.⁵³ Instead, the Board considered Greenpeace was advocating its "own particular views" on various environmental issues that it considered "cannot be determined to be for the public benefit".⁵⁴ The Board also "inferred" from Greenpeace's non-violent direct action activities that Greenpeace had an "illegal purpose".⁵⁵

Greenpeace appealed again, arguing that the Board had misinterpreted and misapplied the test for determining charitable purpose.

Unusually, the Board's decision had been signed by a member of the Board, rather than its Chair, highlighting a potential conflict of interest:⁵⁶ Greenpeace also brought concurrent judicial review proceedings, seeking that the Board's decision be set aside for apparent bias and related procedural impropriety.⁵⁷

Second tranche of litigation

Involvement of the Attorney-General

At some point in 2018/early 2019, the Attorney-General of New Zealand sought leave to be joined to the *Greenpeace* proceedings in his capacity as protector of charities. In New Zealand, as in other comparable jurisdictions, the Attorney-General has a long-established role as *parens patriae*, the protector or guardian of charities: it has always been recognised as the duty of the law officers of the Crown to "intervene for the purpose of protecting charities".⁵⁸

Application for consolidation

Having been joined as a party, the Attorney-General then took a procedural point by applying for Greenpeace's appeal and judicial review proceeding to be heard together.

50 Charities Registration Board Decision 2018-1 [Greenpeace of New Zealand Incorporated](#) 21 March 2018 at [6] - [8], [21] - [22], [24], referring to Charities Services' letters dated 21 April 2015, 8 May 2015, 18 December 2015, 28 September 2016, 9 August 2017, 9 February 2018 and 22 February 2018, and correspondence from Greenpeace dated 9 July 2015, 17 July 2015, 3 February 2016, 2 May 2016, 31 July 2017 and 27 September 2017.

51 *Greenpeace of New Zealand Incorporated v Charities Registration Board* [2020] NZHC 1999 at [54] n 65.

52 Charities Registration Board Decision 2018-1 [Greenpeace of New Zealand Incorporated](#) 21 March 2018.

53 Charities Registration Board Decision 2018-1 [Greenpeace of New Zealand Incorporated](#) 21 March 2018 at [50], [76]. See also *Greenpeace of New Zealand Incorporated v Charities Registration Board* [2020] NZHC 1999 at [100].

54 Charities Registration Board Decision 2018-1 [Greenpeace of New Zealand Incorporated](#) 21 March 2018 at [2(a)], [2(b)], [35], [43], [82].

55 Charities Registration Board Decision 2018-1 [Greenpeace of New Zealand Incorporated](#) 21 March 2018 at [2(c)], [90], [98].

56 As discussed in *Greenpeace of New Zealand Incorporated v Charities Registration Board* [2020] NZHC 1999 at [164] - [173].

57 *Greenpeace of New Zealand Incorporated v Charities Registration Board* [2019] NZHC 929 at [1], [7], [9].

58 *National Council of Women of New Zealand Inc v Charities Registration Board* (2014) 26 NZTC 21075 (HC) at [32] - [36], referring to the comments of the Privy Council in *Wallis v Solicitor-General for New Zealand* (1903) NZPCC 23 at 181 - 182; see also *Kaikoura County v Boyd* [1949] NZLR 233 (SC and CA) at 262.

Greenpeace opposed the application, arguing that consolidation would compromise its appeal: it was very difficult to challenge the fact-gathering exercise conducted by the Board, for example by suggesting the appeal court consider information other than that considered by the Board because, notwithstanding the right of general appeal to the court, the Board effectively sets the parameters for ultimate argument due to the absence of an oral hearing of evidence.⁵⁹

Delivering its decision on 17 May 2019, the High Court acknowledged a “respectable argument” that the judicial review should be heard first in order to decide whether the application needs to be completely reheard by the Board;⁶⁰ however, the High Court granted the Attorney-General’s application, primarily on the basis of resource efficiency and cost effectiveness.⁶¹

Greenpeace’s second substantive appeal and application for judicial review were then heard together in the High Court before Mallon J on 2 - 3 December 2019.

High Court decision

On 10 August 2020, more than 12 years after Greenpeace had originally applied for registration, Mallon J delivered her momentous decision that Greenpeace was entitled to, and should now, be registered as a charity.⁶²

In reaching this conclusion, her Honour expertly navigated a series of complex and conflicting decisions to conclude that Greenpeace has charitable purposes to protect the environment and advance education.⁶³ In concluding that the Board had erred in finding otherwise, her Honour noted that:⁶⁴

Protecting the environment will often come at the cost of competing interests, but advocating for its protection, in opposition to competing interests, is no less in the public benefit because of that. The Supreme Court cannot have meant that the nature of the advocacy will be disqualifying if an organisation advocates for environmental protection of a kind for which there will be opposition ... the public benefit comes from raising awareness of the environmental issues at stake and thereby assisting to ensure that the public’s interest in protecting the environment is part of the decision-making process. Without that advocacy, the environmental interests may be unknown or given insufficient attention as against the private interests of the applicant for the permit. The advocacy in this example is not undertaken to confer a private advantage and something of value to the public is achieved.

The reference in cl 2.2 of Greenpeace’s constitution to promoting “nuclear disarmament and eliminating weapons of mass destruction”, which had been the cause of so much difficulty over the preceding decade, was effectively put to one side by finding that any such purposes were ancillary to Greenpeace’s purposes of protecting the environment and advancing education (which had now been re-confirmed as charitable).⁶⁵

With respect to Greenpeace’s non-violent direct action activities intended to draw attention to activities that are harmful to the environment, her Honour noted that civil disobedience may sometimes be of public benefit, and was therefore not necessarily inconsistent with registered charitable status:⁶⁶ her Honour considered an “illegal purpose” could not be inferred from sporadic breaches of the law at the low end of seriousness in the exercise of rights to freedom of expression and freedom of thought, conscience and belief that make up a very small subset of Greenpeace’s otherwise lawful

59 *Greenpeace of New Zealand Incorporated v Charities Registration Board* [2019] NZHC 929 at [13].

60 *Greenpeace of New Zealand Incorporated v Charities Registration Board* [2019] NZHC 929 at [15].

61 *Greenpeace of New Zealand Incorporated v Charities Registration Board* [2019] NZHC 929 at [21].

62 *Greenpeace of New Zealand Incorporated v Charities Registration Board* [2020] NZHC 1999 at [13].

See, for example, the discussion in M McGregor-Lowndes and F Hannah, ACPNS Legal Case Notes Services: 2020-109 *Greenpeace of New Zealand Inc v Charities Registration Board* 23 August 2020: eprints.qut.edu.au/203344/8/2020_109_Greenpeace_of_New_Zealand_Inc_v_Charities_Registration_Board_2020_NZHC_1999.pdf.

63 *Greenpeace of New Zealand Incorporated v Charities Registration Board* [2020] NZHC 1999 at [101], [117].

64 *Greenpeace of New Zealand Incorporated v Charities Registration Board* [2020] NZHC 1999 at [85] – [86].

65 *Greenpeace of New Zealand Incorporated v Charities Registration Board* [2020] NZHC 1999 at [125], [128].

66 *Greenpeace of New Zealand Incorporated v Charities Registration Board* [2020] NZHC 1999 at [139].

activities.⁶⁷ However, her Honour cautioned that if Greenpeace engaged in unlawful non-violent direct action activities in a “more sustained or serious way”, Greenpeace’s registered charitable status may be put at risk.⁶⁸

These findings on the substantive appeal effectively cured the issue in the judicial review proceeding, in respect of which no formal order was made.⁶⁹

However, even though Greenpeace’s application for charitable registration had finally been approved, the matter was not at an end.

Backdating registration

In holding that Greenpeace was entitled to be registered, her Honour did not make an order as to the date from which such registration should be effective, instead setting a timeframe for determination of the issue “in the interests of having this long process for Greenpeace NZ resolved sooner rather than later”.⁷⁰

The Charities Act allows registration to be backdated to the date of a “properly-completed application”,⁷¹ thus allowing an entity not to be disadvantaged by the time it takes the Board to make a decision on an application for registration.⁷² Highlighting the significance of its 2015 decision to continue with its original application, rather than commencing a new one, Greenpeace argued that its registration should be backdated to the date of its *original* application (19 June 2008).

However, the Attorney-General took another procedural point, arguing that Greenpeace’s application could not be considered “properly completed” until 24 September 2009 (the date by which Greenpeace had amended its constitution to address the Charities Commission’s original concerns about winding up and private pecuniary profit).

Mallon J rejected the Attorney-General’s argument, noting that the changes Greenpeace made to its rules in 2009 were in the nature of “for the avoidance of doubt” amendments that merely provided “greater certainty”, but did not prevent the original application from being “properly completed”.⁷³ Mallon J ordered Greenpeace’s application to be backdated to 30 June 2008.⁷⁴

On 12 November 2020, Greenpeace was then finally entered onto the charities register, over three months after the second High Court decision and almost 12 ½ years after it had originally applied for registration.

The Sector Group

The *Greenpeace* decision prompted a rethinking of Charities Services’ and the Board’s approach to the issue of advocacy by charities. At the Sector Group meeting on 24 September 2020, Charities Services advised there “will need to be a change of position” following the decision. However, highlighting the unusual bipartite decision-making structure created when the Charities Commission was disestablished in 2012, Charities Services advised that the *Board* was reviewing its approach in light of the decision, and that Charities Services was “in the Board’s hands” but will inform the sector “about the changes in the law relating to advocacy ... once direction is received from the Board”.⁷⁵ There is a degree of incongruity about these statements as, in practice,

67 *Greenpeace of New Zealand Incorporated v Charities Registration Board* [2020] NZHC 1999 at [142].

68 *Greenpeace of New Zealand Incorporated v Charities Registration Board* [2020] NZHC 1999 at [143] – [144].

69 *Greenpeace of New Zealand Incorporated v Charities Registration Board* [2020] NZHC 1999 at [178].

70 *Greenpeace of New Zealand Incorporated v Charities Registration Board* [2020] NZHC 1999 at [177].

71 Charities Act 2005 s 20(2)(b).

72 *Greenpeace of New Zealand Incorporated v Charities Registration Board* [2020] NZHC 1999 at [10].

73 *Greenpeace of New Zealand Incorporated v Charities Registration Board* [2020] NZHC 1999 at [15] – [17].

74 The reason for the date of 30 June 2008, rather than 19 June 2008, was not made clear, but may be related to the fact that the tax provisions, requiring charities to be registered in order to access the charitable income tax exemptions, came into force on 1 July 2008 (see [Charities Act Commencement Order 2006](#) cl 4).

75 Report of the Sector Group 24 September 2020 meeting: www.charities.govt.nz/charities-in-new-zealand/charities-sector-group/ at 5. See also Charities Services’ October 2020 newsletter: www.charities.govt.nz/news-and-events/newsletters/. Note that while the Board technically makes registration decisions, in practice most decisions are made by or on the advice of Charities Services.

decisions under the Charities Act are in fact driven by Charities Services, as discussed further below.⁷⁶

Nevertheless, the Sector Group asked to be consulted as part of the review of the approach; Charities Services said they would convey this request to the Board.

At the meeting, Charities Services also advised they were “doing their best to get in touch” with about 20 recent applicants for registration, and about 450 other entities, that were potentially affected by the *Greenpeace* decision. While these numbers are high, it is important to note they are likely only the “tip of the iceberg”, as many other charities will not have applied for registration at all, or withdrawn their application when it became apparent it would not be accepted, or voluntarily deregistered to pre-empt a forced deregistration, or limited their advocacy for fear of losing registration. There is unlikely to be a formal record of all the charities affected by Charities Services’ and the Board’s impugned interpretations of the law regarding advocacy by charities.

The Board met with five representatives of the Sector Group a few weeks’ later, on 1 December 2020. Prior to the meeting, the Sector Group collectively and unanimously made the following written submission:⁷⁷

We suggest that the law in New Zealand regarding the issue of advocacy by charities is in fact *very simple*. The approach to assessing advocacy by charities turns on two fundamental questions:

- i. Are the entity’s *stated purposes* charitable?
- ii. If so, are the activities (including advocacy) carried out in the best interests of the *identified stated charitable purposes*? If they are, then there is no difficulty.

This is a relatively simple approach that is clear and easily understood. *It is also in line with other comparable countries, such as Australia and Canada*, which is very helpful in an environment where charities are operating increasingly internationally. Of course, New Zealand charities must continue to comply with the general law regarding advocacy, including copyright, defamation law, electoral law, etc. Charities also have a duty to comply with their constituting document.

Despite these representations, nothing further was heard until Charities Services’ website was updated on 4 February 2021, revealing that the new approach had been cast in the following terms:⁷⁸

Advocacy is charitable when it is clearly connected to your organisation’s charitable purpose ...

Your organisation’s advocacy can be charitable even if other charities, organisations or people have competing views or interests ...

To assess if your organisation’s *advocacy is charitable*, we consider:

- Your organisation’s overall mission or goal
- How your organisation aims to achieve its goal
- The practical steps your organisation carries out to achieve its goal.

76 As one submitter put it, “[i]t is a case of don’t ask Daddy, go ask Mummy instead”: [submission](#) of Individual C at 8.

77 Letter dated 27 November 2020 from the Sector Group to the Charities Registration Board, assented to by all then members of the Sector Group: Aaron Davy, Council for International Development; Brenda Pilott, Social Service Providers Aotearoa; Chris Glaudel, Community Housing Aotearoa; Craig Fisher, Chartered Accountants Australia and New Zealand/RSM/Fred Hollows Foundation; Dave Henderson, Trust Democracy; Dianne Armstrong, ComVoices; Emma Wethey, Philanthropy New Zealand; Helga Wientjes, Cancer Society of New Zealand; Juliet Chevalier-Watts, University of Waikato; Marion Blake, Platform Trust; Michelle Berriman, Fundraising Institute of New Zealand; Michelle Kitney, Volunteering New Zealand; Peter Bain, Salvation Army; Peter van Hout, Methodist Church of New Zealand; Rachel Jaquiere, Interchurch Bureau; Robyn Scott, JR McKenzie Trust; Rochelle Stewart-Allen, Hui E! Community Aotearoa; Sai Lealea, Wellington Pacific Leaders Forum; Sarah Doherty, NZ Navigator Trust; Steven Moe, Parry Field Lawyers; Theresa Nimatora, Taeamanino Trust; Valerie Williams, Todd Foundation, and the writer (emphasis added, footnotes omitted).

78 Charities Services *Updated advocacy guidance published* <www.charities.govt.nz/news-and-events/hot-topics/updated-advocacy-guidance-published/> (emphasis added). In its February 2021 newsletter, Charities Services stated that “[i]t will now be more straightforward for organisations that advocate for charitable goals to meet registration requirements”: <createsend.com/t/j-61D3F644C490C2AB2540EF23F30FEDED>.

In other words, while the approach had been tweaked, it had not been fundamentally changed: Charities Services continues to impose a separate, activities-focused, “ends, means and manner” approach whenever advocacy is involved, without reference to the orthodox legal test set out in *Latimer* (which was not displaced by the Supreme Court in *Greenpeace SC*); the “ends, means and manner” approach enables Charities Services to shift the underlying paradigm from one focused on purposes to one focused on activities, which leads in practice to even stricter restrictions on charities’ advocacy than those imposed under the political purposes exclusion that was specifically rejected by the Supreme Court.

The *Greenpeace* case study is extraordinary because Greenpeace’s purpose, the protection of the environment, was acknowledged to be a charitable purpose from the outset:⁷⁹ there was no question that all of Greenpeace’s activities were carried out in good faith in furtherance of that stated charitable purpose in accordance with its rules; in other words, had the principles from the *Latimer* decisions been applied from the outset, twelve years of uncertainty and cost, for both charity and taxpayer, could have been avoided. The *Greenpeace* case study is significant for highlighting how difficult it is for charities to challenge rogue interpretations under the Charities Act as currently structured: Greenpeace was fortunate to have had the benefit of considerable pro bono support, but most charities could not withstand a sustained 12-year challenge to their eligibility for registration, and would instead have been “burned off” by the process. It is also important to note in this context that, even if a charity does manage to mount an appeal and is ultimately successful, Charities Services may nevertheless find a way to interpret the result so as to persist with its paradigm: the lack of meaningful accountability mechanisms under the current Charities Act framework is a key issue in terms of both access to justice and the rule of law, as discussed further below.

Of course, there are many who disagree with Greenpeace’s positions on the environment; however, as the Supreme Court has noted, controversy in itself cannot preclude charitable status:⁸⁰ to render charities ineligible for registration simply because some disagree with their advocacy work is to invite demands for a review of a charity’s registration status whenever it takes a position others do not like. Given the importance of registered charitable status to many charities’ funding, such a review may create an existential crisis for the charity, in turn creating pressure for it to stop its advocacy work, potentially at a critical time for the issue being advocated. Allowing controversy to determine charitable status therefore risks skewing public policy debates on important issues, such as potentially catastrophic climate change, in favour of vested, monied interests.

A clear theme of submissions to the DIA’s review of the Charities Act is that Charities Services’ approach to the issue of advocacy by charities is having an unhelpful chilling effect, leading to an unhealthy silence as charities eschew their traditional role in advocating for social change for fear of losing their registered charitable status.

Since the August 2020 *Greenpeace* decision, some charities working to protect the environment have been able to register;⁸¹ in addition, Nelson Grey Power Association Incorporated has been able to gain registration, despite a previous decision declining

79 Charities Commission Decision D2010-7 [Greenpeace of New Zealand Incorporated](#) 15 April 2010 at [34] referring to *Re Centrepont Community Growth Trust* [2000] 2 NZLR 325.

80 *Re Greenpeace of New Zealand Inc* [2015] 1 NZLR 169 (SC) at [75].

81 Memorandum dated 16 October 2020 from Charities Services to the Charities Registration Board regarding Friends of Pakiri Breach Incorporated and Save Foulden Maar Incorporated received under the Official Information Act 1982. Both charities are now registered with retrospective effect (CC58351 and CC58352 respectively).

its application.⁸² While these developments are welcome, there remains considerable difficulty with Charities Services' "ends, means and manner" approach.⁸³

For example, the complexity of the approach is problematic.⁸⁴ As one submitter put it, "[i]f you need to be a lawyer to understand it, it is too complex".⁸⁵

There is also considerable uncertainty as to *when* the "ends, means, and manner" test will be applied in place of the traditional tests for whether a purpose is charitable.

There is also considerable uncertainty as to *what* the test is to be applied: the approach of assessing "means and manner" leads to an overemphasis on activities, in isolation, without reference to the purposes in furtherance of which they are carried out. The ensuing conflation of the distinction between purposes and activities cuts across the fundamental purposes nature of the charities inquiry, and imports inherent subjectivity into the analysis of whether any particular charity is eligible for registration. The net result is to encourage regulatory over-reach, while undermining the independence of charities and, ultimately, liberal democracy itself.

The difficulties being experienced are further illustrated by the *Family First* case study: Greenpeace is by no means an isolated case.

Case study 4.2 – Family First

Family First New Zealand ("**Family First**") is a charitable trust established by deed of trust dated 26 March 2006.⁸⁶ Its stated purposes include to "promote and advance research and policy supporting marriage and family as foundational to a strong and enduring society".⁸⁷

Family First's original application for registration under the Charities Act was accepted on 21 March 2007,⁸⁸ making it one of the first charities in New Zealand to register.⁸⁹

In March 2010, the Charities Commission concluded a review into Family First's eligibility for registration and advised that Family First continued to be qualified.⁹⁰

Two years later, on 26 July 2012, the Marriage (Definition of Marriage) Amendment Bill ("**the Same Sex Marriage Bill**") was introduced into Parliament,⁹¹ proposing to amend the Marriage Act 1955 to ensure that "all people, regardless of sex, sexual orientation or gender opportunity will have the opportunity to marry if they so choose".⁹² The

82 The original decision to decline registration was made on the basis of an "independent purpose to advocate particular views on any issue affecting older people that does not advance a public benefit in a way previously accepted as charitable". See Charities Registration Board Decision 2020-1 [Nelson Grey Power Association Incorporated](#) 21 May 2020: www.charities.govt.nz/assets/Uploads/Nelson-Grey-Power-decision-paper.pdf at [3]. This decision was subsequently reversed on 10 September 2021 with information about the reversal released on 12 October 2021. See Charities Services *Hot topics – Board statement on Nelson Grey Power Association Incorporated* 12 October 2021: www.charities.govt.nz/news-and-events/hot-topics/board-statement-on-nelson-grey-power-incorporated/?fbclid=IwAROM--y1nalyrY4ixxBcfw9Fe_wVXZAJ1GCWIZ2ePH3jGYaFYMex5KL7y50 and Charities Services *Nelson Grey Power Association Incorporated* 12 October 2021: www.charities.govt.nz/charities-in-new-zealand/legal-decisions/view-the-decisions/view/nelson-grey-power-association-incorporated?fbclid=IwAR1QpdsHwKVLOg0YqjtPTCdkFAQJgO94EyQXsASeiyD9a91FPnRDtr69F2g. The difference in result appears to turn solely on changes in jurisprudential interpretation of the definition of charitable purpose.

83 And may change following the decision of the Supreme Court in the *Family First* litigation, which at the time of writing is awaited.

84 Charities Services has acknowledged that the "ends, means and manner" approach is complex and presents difficulties of application (a point made by the High Court in *Re Greenpeace of New Zealand Inc* [2015] 1 NZLR 169 (SC) at [76]). See Charities Services' Memorandum to the Board dated 18 November 2020 (provided under the Official Information Act 1982) at [11], [24], [26], [130].

85 [Submission](#) of K'Aute Pasifika Trust at 2.

86 Charities Registration Board Decision D2013-1 *Family First New Zealand* 15 April 2013: www.charities.govt.nz/charities-in-new-zealand/legal-decisions/view-the-decisions/view/family-first-new-zealand at [6].

87 Family First [trust deed](#), as disclosed on the charities register (CC10094), cl 4(a).

88 Charities Registration Board Decision D2013-1 *Family First New Zealand* 15 April 2013 at [9].

89 The charities register opened on 1 February 2007: [Charities Act Commencement Order 2006](#) cl 3.

90 *Re Family First New Zealand* (2015) NZTR 25-014 at [6] - [7].

91 [Marriage \(Definition of Marriage\) Amendment Bill 2012](#) (39-1).

92 New Zealand Parliament Pāremata Aotearoa [Marriage \(Definition of Marriage\) Amendment Bill](#) (39-1).

Bill received its first reading on 29 August 2012 and was referred to the Government Administration Select Committee.

Introduction of the Bill catalysed a robust debate in New Zealand regarding the institution of marriage: the Select Committee received 21,533 submissions (of which 18,635 were template: 10,487 in favour of the Bill and 8,148 against).⁹³

Family First partnered with other organisations to oppose the Bill, publishing and distributing print resources to “help strengthen the resolve of those wanting to maintain the current definition of marriage”.⁹⁴ On 28 August 2012, Bob McCoskrie, a trustee of Family First, presented a petition signed by 48,041 people, requesting that Parliament maintain the definition of marriage in law as between one man and one woman.⁹⁵

Two weeks’ later, on 11 September 2012, Charities Services issued Family First with a notice of intention to deregister, on the ground that Family First had a “main non-charitable purpose of advocating and promoting a view that is a political purpose outside the scope of charity”.⁹⁶ Family First had the opportunity to make submissions.

First deregistration decision

In the meantime, the Select Committee delivered its report on the Same Sex Marriage Bill on 27 February 2013, recommending that it be passed with some amendments. In other words, the Committee did not accept the view held by Family First as put forward by the petition.⁹⁷

A few weeks’ later, on 15 April 2013, the Charities Registration Board formally decided to deregister Family First, on the basis that its main purpose is to promote “points of view about family life, the promotion of which is a political purpose because the points of view do not have a public benefit that is self-evident as a matter of law”.⁹⁸ The Board also considered it was “in the public interest”, under s 35 of the Charities Act, that Family First be removed from the register.⁹⁹

The Same Sex Marriage Bill passed into law a few days’ later on 19 April 2013.¹⁰⁰

First tranche of litigation

Family First appealed the Board’s decision to deregister it to the High Court under s 59 of the Charities Act. However, the appeal was deferred by agreement pending the decision of the Supreme Court decision in *Greenpeace SC*, discussed above. In the meantime, the High Court made an interim order under s 60 of the Charities Act that allowed Family First to remain on the charities register pending the outcome of its appeal.¹⁰¹

As discussed above, the Supreme Court handed down its decision on 6 August 2014, allowing Greenpeace’s appeal, and holding that a political purposes exclusion should not be applied in New Zealand. Family First’s appeal was then brought forward, with the hearing held on 22 June 2015.

93 Marriage (Definition of Marriage) Amendment Bill 2012 (39-2) ([select committee report](#)) at 2, 6.

94 Charities Registration Board Decision D2013-1 [Family First New Zealand](#) 15 April 2013 at [52] n 57.

95 New Zealand Parliament Pāremata Aotearoa *Petition of Bob McCoskrie on behalf of Protect Marriage* 28 August 2012: www.parliament.nz/en/pb/petitions/document/50DBHOH_PET3127_1/petition-of-bob-mccoskrie-on-behalf-of-protect-marriage; Marriage (Definition of Marriage) Amendment Bill 39-2 (select committee report) at 7 - 8.

96 *Re Family First New Zealand* (2015) 4 NZTR 25-014 at [9]; Charities Registration Board Decision D2013-1 [Family First New Zealand](#) 15 April 2013 at [11].

97 The petition subsequently reached more than 70,000 signatures and was presented again: familyfirst.org.nz/2013/01/21/72000-signatures-for-marriage-to-be-presented-to-mps/.

98 Charities Registration Board Decision D2013-1 [Family First New Zealand](#) 15 April 2013 at [1].

99 Charities Registration Board Decision D2013-1 [Family First New Zealand](#) 15 April 2013 at [1], referring to s 35(1) of the Charities Act.

100 Marriage (Definition of Marriage) Amendment Act 2013.

101 *Re Family First New Zealand* (2015) 4 NZTR 25-014 at [13], [14].

Eight days later, on 30 June 2015, the High Court allowed Family First's appeal:¹⁰²

The Charities Board's fundamental position that Family First's political objectives could never be charitable cannot be reconciled with the approach taken by the majority of the Supreme Court in *Greenpeace*. The Charities Board's decision was based upon a fundamental legal proposition that has subsequently been found to be incorrect. The Charities Board's view that political purposes could not be charitable underpinned its decision. In view of the Supreme Court's explanation that political purposes are not irreconcilable with charitable purposes, it is appropriate for the Charities Board to reconsider the position of Family First in light of the Supreme Court's judgment.

In reaching this conclusion, the High Court made the following comments:¹⁰³

... I believe there is force to the submissions of Mr McKenzie QC, counsel for Family First. He argued that Family First's purposes of advocating its conception of the traditional family is analogous to organisations that have advocated for the "mental and moral improvement" of society.

In recognising the strength of Mr McKenzie's submission, I am not suggesting the Charities Board must accept Family First's purposes are for the benefit of the public when it reconsiders Family First's case.

I am saying, however, that the analogical analysis which the Charities Board must undertake should be informed by examining whether Family First's activities are objectively directed at promoting the moral improvement of society. This exercise should not be conflated with a subjective assessment of the merits of Family First's views. Members of the Charities Board may personally disagree with the views of Family First, but at the same time recognise there is a legitimate analogy between its role and those organisations that have been recognised as charities. Such an approach would be consistent with the obligation on members of the Charities Board to act with honesty, integrity and good faith.

Perhaps because the High Court had not had the benefit of an evidential platform laid by an oral hearing of evidence, the High Court referred the matter back to the Board for reconsideration in light of its judgment.¹⁰⁴

It is important to bear in mind that Family First's purposes had been accepted as charitable by virtue of its initial registration; they were then confirmed as charitable following a review in 2010: the decision to deregister Family First rested primarily on its *activities*, reflecting a key dimension of the underlying clash of paradigms, as discussed above in chapter 2.¹⁰⁵

On 30 September 2016, the distinction between purposes and activities was helpfully clarified by the High Court in *Foundation for Anti-Aging Research*,¹⁰⁶ a decision which merits close examination as it has significant implications for the way the Charities Act is currently being interpreted:

The Foundation for Anti-Aging Research litigation

The *Foundation for Anti-Aging Research* litigation concerned two charitable trusts that had unsuccessfully applied for charitable registration. The applications had been lodged in 2011 but declined in 2013, following which the trusts sought specialist legal advice.¹⁰⁷ In the High Court, Ellis J overturned the decisions of the Charities Registration Board and ordered both trusts to be registered as charities,¹⁰⁸ concluding that the trusts' purposes of funding research into cryonics were charitable as for the advancement of education (scientific research) (a finding reached on the basis of comprehensive affidavit evidence, including expert evidence, provided to the Board).¹⁰⁹

102 *Re Family First New Zealand* (2015) NZTR 25-014 at [84] (footnote omitted).

103 *Re Family First New Zealand* (2015) NZTR 25-014 at [87] - [89] (footnote omitted).

104 *Re Family First New Zealand* (2015) 4 NZTR 25-014 at [2], [102].

105 Section 13 of the Charities Act requires purposes to be charitable as an essential condition of registration.

Sections 18(3) and 50 require activities to be considered, but they do not specify to what end. Unlike Canada (for example, the definition of "charitable activities" in s 149.1(1) of the Income Tax Act 1985 RSC c 1 (5th Supp)), there is no requirement in the New Zealand Charities Act that activities be "charitable".

106 *Re The Foundation for Anti-Aging Research* (2016) 23 PRNZ 726 (HC).

107 *Re The Foundation for Anti-Aging Research* (2016) 23 PRNZ 726 (HC) at [21]. The writer was a counsel in the case.

108 *Re The Foundation for Anti-Aging Research* (2016) 23 PRNZ 726 (HC) at [98].

109 *Re The Foundation for Anti-Aging Research* (2016) 23 PRNZ 726 (HC) at [58] - [62], [65] - [67].

Ellis J also overturned the Board's factual finding that the purposes of the Foundation for Anti-Aging Research ("FAAR") included funding cryonics.¹¹⁰ Although not strictly necessary to do so (as her Honour had already found the trusts eligible for registration), her Honour made the following important observations regarding the distinction between purposes and activities in the context of s 18(3) of the Charities Act (the provision which requires Charities Services to "have regard" to activities as part of the process of considering whether an entity is eligible for registration):¹¹¹

[84] Prior to the enactment of the [Charities] Act, the relevance of an entity's activities when determining charitable status was summarised in this way in *Institution of Professional Engineers New Zealand Inc v Commissioner of Inland Revenue* [[1992] 1 NZLR 570 (HC) at 572]:

It is clearly established that when one is considering the purpose or purposes for which an institution is established one must look first to its *founding documents*. In *NZ Society of Accountants and NZ Law Society v Commissioner of Inland Revenue* ... Richardson J said:

The ascertainment of the purposes for which a statutory body is established is essentially a matter of *construction of the relevant constituting legislation*.

The same applies to bodies established by non-legislative means. In *Royal College of Surgeons v National Provincial Bank Ltd* ... Lord Normand said that the decision in that case depended primarily on the *construction of the constituent documents* of the Royal College and particularly the charter granted by King George III in 1800.

To the same effect is the decision of the Court of Appeal in *Molloy v Commissioner of Inland Revenue* ... but with the important additional proposition that where the constituting documents *do not indicate with clarity* the main or dominant objects of the body, reference may be made not only to the objects expressed therein but also to the activities of the body in question ... In this respect reference can also be made to the speech of Lord Reid in the *Royal College of Surgeons* case ... where His Lordship said:

If there were anything to show that the affairs of the college had been so conducted that the advancement of the interests of its members had become one of its main purposes, it may be that this would disentitle the college from pleading that it is a charity, but I do not find anything of that kind.

His Lordship was therefore very clearly of the view that the actual operations of the body concerned were material and the focus of the Court is not inevitably confined to the founding documents.

[85] Thus an entity's activities were regarded as *relevant only to the extent that the entity's constituent documents were unclear as to its purpose* or where there was evidence of activities by an entity that *displaced or belied its stated charitable purpose*.

[86] *It seems unlikely that the enactment of s 18(3) was intended materially to change this position. In Re Greenpeace the Supreme Court said (at [14]) no more than that s 18(3) "makes clear" that the purposes of an entity "may be inferred from the activities it undertakes". That seems wholly consistent with the dicta I have set out above. It is certainly not an indication that the Act was intended to wreak some fundamental change in approach or a move away from the fundamental "purposes" nature of the charities inquiry.*

[87] As I think *Re Greenpeace* itself makes clear the *critical question* is whether an applicant's activities are *sufficiently connected* with the relevant charitable purpose, not whether the activity itself is charitable

In other words, Ellis J clarified that an entity's activities are relevant in ascertaining an entity's purposes only to the extent that the entity's constituting documents are unclear as to its purposes, or where there is evidence of activities by an entity that displaced or belied its stated charitable purposes; importantly, neither s 18(3) nor the decision of the Supreme Court in *Greenpeace SC* had displaced that orthodox position.¹¹²

110 *Re The Foundation for Anti-Aging Research* (2016) 23 PRNZ 726 (HC) at [80].

111 *Re The Foundation for Anti-Aging Research* (2016) 23 PRNZ 726 (HC) at [84] - [87] (emphasis added, footnotes either omitted or incorporated).

112 For a fuller discussion about the extent to which it is permissible to resort to extrinsic material in ascertaining purposes, see S Barker "Unresolved issues in New Zealand charities law" [2021] NZLJ 49.

Her Honour then set out the proper approach to be taken to activities under s 18(3):¹¹³

... the proper analysis would have been to begin by asking whether FAAR's *stated purposes* are charitable or not. If they are clearly not, then that is the end of the inquiry. If they are (or if the stated purposes are unclear), then the chief executive or the Board needed to consider what information it has about FAAR's present and proposed *activities* (and to consider requesting such information). Then, the question is *whether those activities are consistent with or supportive of the identified charitable purpose. If they are, then there is no difficulty ...*

This extract is significant: under this test, Family First clearly remained eligible for registration, as all of its advocacy work had been carried out in furtherance of its stated purposes which had already been found to be charitable.¹¹⁴ However, as at the date of writing, Charities Services and the Board have never applied the *Foundation for Anti-Aging Research* decision in its terms, as discussed further below.

Second deregistration decision

On 21 August 2017, two years following the High Court decision in *Family First* and almost a year following the decision in *Foundation for Anti-Aging Research*, the Board issued its second decision.

Surprisingly, the Board again decided to deregister Family First, on the basis of the following test:¹¹⁵

Following the three-step process of Ellis J in FAAR and FRSSH, the Board has considered:

- whether Family First's stated purposes are *capable of being* charitable
- whether Family First's activities are consistent with or supportive of a charitable purpose
- if Family First's *activities* are found not to be charitable, whether they can be said to be merely ancillary to an identified charitable purpose.

This wording has been adopted in every publicly-available decision made under the Charities Act since the *Foundation for Anti-Aging Research* decision was handed down.¹¹⁶

However, this wording is a reworking of the test set down by Ellis J:

1. The first step in Ellis J's reasoning was to ask whether the *stated purposes are charitable* or not. By contrast, Charities Services and the Board interpolate an additional qualification that the stated purposes be "capable of being charitable" (rather than *actually* charitable as Ellis J held). Referring to "capability" rather than

¹¹³ *Re The Foundation for Anti-Aging Research* (2016) 23 PRNZ 726 (HC) at [88] (emphasis added).

¹¹⁴ The *Foundation for Anti-Aging Research* decision was subsequently cited with approval in England and Wales. See *Graham Hipkiss v The Charity Commission for England and Wales* (2018) First-Tier Tribunal (Charity) CA/2017/0014: charity.decisions.tribunals.gov.uk/.

¹¹⁵ Charities Registration Board Decision 2017-1 *Family First New Zealand* 21 August 2017: www.charities.govt.nz/charities-in-new-zealand/legal-decisions/view-the-decisions/view/family-first-of-new-zealand-incorporated at [5] (emphasis added); *Re Family First New Zealand* [2018] NZHC 2273 at [4].

¹¹⁶ See, for example, Charities Registration Board Decision 2022-1 *New Zealand Entrepreneurs Rescue* (NZER) 9 February 2022 at [14]; Charities Registration Board Decision 2021-1 *The Self-Sovereignty Faith* 22 October 2021 at [10]; Charities Registration Board Decision 2019-4 *Football Otago Youth Development Academy Trust* 12 September 2019 at [5]; Charities Registration Board Decision 2019-3 *Scoop Foundation for Public Interest Journalism* 15 July 2019 at [3]; Charities Registration Board Decision 2019-2 *Shooters Lottery Incorporated* 14 June 2019 at [5]; Charities Registration Board Decision 2019-1 *Better Public Media Trust* 24 April 2019 at [5]; Charities Registration Board Decision 2018-4 *TLF Charitable Trust* 9 July 2018 at [4]; Charities Registration Board Decision 2018-1 *Greenpeace of New Zealand Incorporated* 21 March 2018 at [10]; Charities Registration Board Decision 2017-2 *Digital Democracy Limited* 11 October 2017 at [3]; and Charities Registration Board Decision 2017-1 *Family First New Zealand* 21 August 2017 at [5]. See also Charities Services' memorandum to the Charities Registration Board dated 18 November 2020 (received under the Official Information Act 1982) at [81] - [84], in which Charities Services recommends the above approach continue to be applied.

See Charities Services *Te Rātā Atawhai, the Charities Registration Board's statement on Family First Court of Appeal decision* 27 August 2020: "[a] purpose is charitable if it advances a public benefit in a way that is analogous to cases that have previously been held to be charitable". However, such a test conflates the two limbs of the test for charitable purpose: as discussed above in ch 3, the analogy test applies to *purposes*, not public benefit. Public benefit simply has to be proved as a question of fact, and does not have to be analogous to anything.

actuality puts a gloss on Ellis J's test that opens the door for Charities Services and the Board to look at activities in isolation, independently of the purposes in furtherance of which they are carried out. Such an approach conflates the distinction between purposes and activities, contrary to the very point Ellis J was seeking to address. It also imports inherent complexity and subjectivity into the analysis, as discussed above.

2. The second step in Ellis J's reasoning was then to ask whether the activities are consistent with or supportive of *those stated* charitable purposes: if they are then there is no difficulty. This reasoning reflects the orthodox approach that those involved with charities are held to the charitable purposes *that they have signed up to*, an approach supported by underlying fiduciary duties to comply with the charity's constituting document.¹¹⁷ Charities Services' and the Board's reworking of this test to require activities to be supportive of "a" charitable purpose (rather than the stated charitable purposes as Ellis J held) results, in practice, in a micro-analysis of each individual activity to see if it can be retro-fitted back to any charitable purpose, without any apparent connection to the constituting document. In other words, activities are assessed in isolation from their purposes, effectively as if they were themselves purposes, again contrary to the very point Ellis J was seeking to address.¹¹⁸

The result is an entirely different test to the one set down by the High Court that reflects an entirely different paradigm: the subjective, activities-based approach applied by Charities Services and the Board embodies the restrictive, "regulatory-control" side of the underlying clash of paradigms, in contrast to the principles-based and purposes-based approach set down by the High Court.

The reworking of the test is significant because it leads to materially different results. In material obtained under the Official Information Act 1982, Charities Services justify their reworking of the test on the basis that it allows them to be "more lenient";¹¹⁹ however, in reality, the reworked approach allows Charities Services and the Board to be more *subjective* and therefore arbitrarily selective about which organisations are able to gain or maintain registration. The result is effectively the "deeming" approach that was put forward by Inland Revenue prior to the Charities Act but comprehensively rejected by Parliament in 2004 (as discussed above in chapter 3).¹²⁰

Such reworking of legal tests, combined with the lack of accountability mechanisms under the Charities Act as currently structured, raise fundamental questions regarding the rule of law: as noted by the High Court in *Christiansen v The Director-General of Health*,¹²¹ a person with a legal power must exercise that power within the parameters set by the law. To apply a gloss to a statutory test or to ask themselves the wrong question constitutes an error of law; it is unlawful to blindly follow a policy if that policy is not reflective of the actual legal position.

Nevertheless, the Charities Registration Board applied this approach to reach its second decision to deregister Family First, on the basis that Family First has a purpose "to promote its own particular views about marriage and the traditional family" and that its "pursuit of those activities do not qualify as being for the public benefit ...".¹²²

As with Greenpeace, there are many who do not agree with Family First's positions, including on same-sex marriage. Even amongst such persons, however, the decision to deregister Family First, for engaging in the democratic process in furtherance of its charitable purposes, caused shock waves that extended beyond the jurisdictional boundaries of New Zealand.

117 Trusts Act 2019 ss 24, 26; Companies Act 1993 ss 131, 134; Incorporated Societies Act 2022 ss 54, 56.

118 For a fuller discussion, see S Barker "Unresolved issues in New Zealand charities law" [2021] NZLJ 49.

119 Report from Charities Services to the Charities Registration Board dated 31 July 2019 (received under the Official Information Act 1982) at [22].

120 As discussed above in ch 3.

121 *Christiansen v The Director-General of Health* [2020] NZHC 887 at [44] - [48], [67].

122 Charities Registration Board Decision 2017-1 [Family First New Zealand](#) 21 August 2017 at [2] (emphasis added).

Impact of the decision in Australia

On 15 November 2017, a few months' following the Board's decision, Australia introduced its own "Same Sex Marriage" Bill into Parliament: the Marriage Amendment (Definition and Religious Freedoms) Bill 2017 proposed to amend the Marriage Act 1961 to "remove the restrictions that limit marriage in Australia to the union of a man and a woman".¹²³

Following the experience of Family First in New Zealand, many Australian faith-based charities expressed concern that their continued registered charitable status may be at risk if they advocate for a traditional view of marriage.¹²⁴ In response, seven days' later on 22 November 2017, the Australian Government appointed an Expert Panel to undertake a "Religious Freedom Review", to examine whether Australian law adequately protects the human right to freedom of religion.¹²⁵

The Marriage Amendment (Definition and Religious Freedoms) Bill was then passed into law on 8 December 2017.¹²⁶

The Expert Panel issued its report on 18 May 2018 recommending, among other things, that Australian federal charities legislation (the Charities Act 2013 (Cth)) be amended to clarify that advocacy of a "traditional" view of marriage would not, of itself, amount to a "disqualifying purpose" ("**recommendation 4**").¹²⁷ The case of Family First in New Zealand was specifically referred to in the report.¹²⁸

Second tranche of litigation

In the meantime, Family First had appealed the Board's second deregistration decision to the High Court within the 20-working day period provided by s 59 of the Charities Act; the hearing took place over two days in April and May 2018 (approximately five years to the day since the Board's original deregistration decision).

On 16 July 2018, after the hearing of Family First's appeal but before judgment was issued, the Ontario Superior Court of Justice issued a significant decision: in *Canada Without Poverty v Attorney-General of Canada* ("**Canada Without Poverty**"),¹²⁹ EM Morgan J held that the restrictions imposed on the advocacy work of a registered charity in Canada infringed its right to freedom of expression in a manner that could not be justified in a free a democratic society.¹³⁰ The decision is discussed in more detail below.

123 Parliament of Australia *Marriage Amendment (Definitions and Religious Freedoms) Bill 2017*: <www.aph.gov.au/Parliamentary_Business/Bills_Legislation/bd/bd1718a/18bd054>.

124 See Australian Government *Expert Panel Report: Religious Freedom Review* 18 May 2018: <www.ag.gov.au/rights-and-protections/publications/expert-panel-report-religious-freedom-review> at [1.187] - [1.190].

125 Australian Government *Expert Panel Report: Religious Freedom Review* 18 May 2018.

126 *The Marriage Amendment (Definition and Religious Freedoms) Act 2017* (Cth).

127 Australian Government *Expert Panel Report: Religious Freedom Review* 18 May 2018 at [1.200] and recommendation 4.

128 Australian Government *Expert Panel Report: Religious Freedom Review* 18 May 2018 at [1.189].

129 *Canada Without Poverty v Attorney-General of Canada* 2018 ONSC 4147.

130 *Canada Without Poverty v Attorney-General of Canada* 2018 ONSC 4147 at [49]-[66].

Up to this point, Charities Services and the Board had been heavily influenced by the restrictive approach taken to the issue of advocacy by charities in Canada.¹³¹ Given the relevance of the *Canada Without Poverty* decision to *Family First's* appeal, it is surprising that the decision does not appear to have been brought to the attention of the High Court: no mention is made of the decision in the 31 August 2018 judgment of Simon France J dismissing *Family First's* appeal.¹³² Instead, his Honour held that *Family First's* "primary activity is advocacy for a specific viewpoint" which could not be "regarded as in the public benefit".¹³³ In this respect, the decision appears to proceed on an assumption that the public benefit test applies to activities rather than purposes.

Family First appealed to the Court of Appeal.

Developments in Australia

Meanwhile, on 13 December 2018, the Australian federal Government issued its response to the Report of the Expert Panel on the Religious Freedom Review.¹³⁴

Noting the complexity involved in balancing rights to freedom from discrimination with rights to freedom of religion,¹³⁵ the Australian Government expressed its commitment to "finding a way forward that cuts through the political debates about whether some rights are more important than others".¹³⁶ In relation to charities, the Government accepted the Expert Panel's recommendation 4 and proposed to amend s 11 of the Charities Act 2013 (Cth) to clarify that advocacy of a "traditional" view of marriage would not, of itself, amount to a disqualifying purpose.¹³⁷ In so doing, the Government noted that mere advocacy of a position contrary to government policy would not meet the threshold of a disqualifying purpose under Australian law; indeed, Australian legislation makes clear that advocating a change to law or policy in furtherance of another charitable purpose may itself be a charitable purpose, as discussed further below.¹³⁸ Nevertheless, the amendment was proposed "for the avoidance of all doubt".¹³⁹

131 See, for example, Charities Registration Board Decision D2013-1 *Family First New Zealand* 15 April 2013 at [6] (referring to *Travel Just v Canada (Revenue Agency)* 2006 FCA 343 as authority for the proposition that "the downstream benefits of an entity's activities do not serve to characterize the purpose of the entity"); at [26] (referring to *Guaranty Trust Company of Canada v Minister of National Revenue* [1967] SCR 133 as authority for the proposition that s 13 of the Charities Act 2005 (NZ) focuses on the purposes for which an entity is at present established); at [36], [66], [85] (referring to *Human Life International in Canada Inc v Minister of National Revenue* [1998] 3 FC (202) ("**Human Life**"), *News to You Canada v Minister of National Revenue* [2011] FC 340 ("**News to You**") and *Re Positive Action Against Pornography v Minister of National Revenue* 49 D.L.R. (4th), 74 (HEU) ("**Positive Action**") in support of recognition of a political purposes exclusion); at [38], [67] (referring to *Human Life, Action by Christians for Abolition of Torture v The Queen in Right of Canada* [2002] 225 DLR 4th 99 (FC) ("**Action by Christians**"), *Positive Action, Alliance for Life v Minister of National Revenue* [1999] 3 FCR 504 ("**Alliance for Life**") and *Challenge Team v Revenue Canada* [2000] 2 CTC 352 as authority for the proposition that a purpose to promote a point of view, or an attitude of mind, is a proscribed political purpose); at [62] and [67] (referring to the approach to education adopted in *Vancouver Society of Immigrant and Visible Minority Women v Minister of National Revenue* [1999] 1 SCR 10); at [63] (referring to *Positive Action and News to You*); and at [83] (referring to *Alliance for Life*). See also *Re Family First New Zealand* (2015) 4 NZTR 25-014 at [56], referring to the Board's citing of *Action by Christians* as authority for the proposition that a "propaganda purpose" is a proscribed political purpose.

132 *Re Family First New Zealand* [2018] NZHC 2273 at [74].

133 *Re Family First New Zealand* [2018] NZHC 2273 at [48], [68].

134 Prime Minister of Australia Media release: Government response to *Religious Freedom Review* 13 December 2018: <www.pm.gov.au/media/government-response-religious-freedom-review>.

135 Australian Government *Australian Government response to the Religious Freedom Review* 13 December 2018: <www.ag.gov.au/rights-and-protections/publications/australian-government-response-religious-freedom-review> at 6.

136 Prime Minister of Australia *Media release: Government response to Religious Freedom Review* 13 December 2018.

137 Australian Government *Australian Government response to the Religious Freedom Review* 13 December 2018 at 9.

138 See Charities Act 2013 (Cth) ss 11, 12(1)(l).

139 Australian Government *Australian Government response to the Religious Freedom Review* 13 December 2018 at 10.

Following re-election in May 2019,¹⁴⁰ the Australian Government issued two exposure draft Bills in August and December 2019 respectively.¹⁴¹ With respect to recommendation 4, the exposure drafts proposed to insert a new s 11(2) into the Charities Act 2013 (Cth) in the following form:¹⁴²

To avoid doubt, the purpose of engaging in, or promoting, activities that support a view of marriage as a union of a man and a woman to the exclusions of all others, voluntarily entered into for life, is not, of itself, a *disqualifying purpose*.

Some 6,000 submissions were received,¹⁴³ not all of which were convinced the proposed amendment was necessary.¹⁴⁴ For example, the Law Council of Australia strongly recommended the proposed amendment not be made:¹⁴⁵

It is difficult to understand, if clarification is needed, why clarification is required only for this issue. This amendment has arisen from a moment in time where the Same Sex Marriage Bill was being debated at the same time a court case was decided in New Zealand which resulted in some unfounded concerns by faith-based charities in Australia. This 'knee jerk' reaction to insert a provision so specific to the issue, does not make good legislation for the short or long term.

Perhaps due to the intervening global pandemic, the Government's response to the submissions was delayed. However, two years later, on 23 November 2021, the Australian Government introduced the Human Rights Legislation Amendment Bill 2021 into Parliament.¹⁴⁶ The Bill proposes to take a different approach, by adding a new s 19 to the Charities Act 2013 (Cth) to provide that "otherwise charitable entities that engage in lawful activities promoting a traditional view of marriage are undertaking those activities for the public benefit and not contrary to public policy".¹⁴⁷

In releasing its report on the Bill on 4 February 2022, the Senate Committee noted differing views regarding the proposed amendment:¹⁴⁸

... other submitters raised concerns about this amendment, including that the amendment is unnecessary. The Australian Human Rights Commission noted previous advice from the Commissioner of Taxation and the Acting Commissioner of the Australian Charities and Not-for-Profit Commission that the amendments were *not necessary* to protect the status of religious charities. It also noted that it has been four years since same-sex marriage became lawful *'and the Commission is not aware of any suggestion that a charity has been at risk of losing its charitable status as a result of advocating for a "traditional" view of marriage'*.

140 Introducing the legislation was a pre-election commitment. See Australian Government, Department of the Prime Minister and Cabinet *Legislation proposed for introduction in the 2019 winter/spring sittings*: <www.pmc.gov.au/sites/default/files/publications/2019-winter-spring-public-list.pdf>; Australian Government *Australian Government response to the Religious Freedom Review* 13 December 2018 at 5.

141 Australian Government *Religious Discrimination Bills: First Exposure Drafts Consultation*: <www.ag.gov.au/rights-and-protections/consultations/religious-freedom-bills-first-exposure-drafts>.

142 Second Exposure Draft of the Human Rights Amendment (Freedom of Religion) Bill ([explanatory notes](#)) at [36] - [38] (emphasis added).

143 Australian Government *Religious Discrimination Bills – First Exposure Drafts Consultation*.

144 There is nothing to indicate that any charity in Australia has been put at risk of losing its charitable status as a result of advocating for a "traditional" view of marriage since the Marriage Amendment (Definition and Religious Freedoms) Act 2017 passed into law on 8 December 2017.

145 Law Council of Australia *Submission to the Attorney-General's Department* 3 October 2019: <www.ag.gov.au/sites/default/files/2020-05/Law%20Council%20of%20Australia.pdf> at [333], 60 - 65.

146 Australian Government *Religious Discrimination Bills 2021* 23 November 2021.

147 Parliament of Australia *Human Rights Amendment Bill 2021*, summary. Clause 3 and sch 1 propose to add a new s 19 to the Charities Act 2013 (Cth) in the following terms:

"19 Entities that advance, express or support a traditional view of marriage

In determining whether an entity that: (a) engages in or promotes activities advancing, expressing or supporting a view of marriage as a union of a man and woman to the exclusion of all others, voluntarily entered into for life; or (b) encourages others to engage in or promote activities that advance, express or support such a view; is a *charity*, the entity's engagement in, or promotion of, such activities is to be presumed, conclusively, to be for the public benefit and not contrary to public policy".

148 Parliamentary Joint Committee on Human Rights *Inquiry report Religious Discrimination Bill 2021 and related bills* 4 February 2022 at [4.57] - [4.62] (emphasis added, footnotes omitted).

At the time of writing, progress on the Bill appears to have stalled, perhaps pending another federal election likely to take place in May 2022.¹⁴⁹

In the meantime, on 22 and 23 October 2019, Family First's appeal was heard by the Court of Appeal.

The Court of Appeal decision

On 27 August 2020, just over two weeks after the High Court had delivered its momentous decision in *Greenpeace*, the Court of Appeal delivered allowed Family First's appeal by a majority of 2:1.¹⁵⁰

The Court of Appeal's decision might be analysed in terms of the underlying clash of paradigms. For example, the majority reaffirmed the primacy of purpose, and the importance of distinguishing between purposes and activities:¹⁵¹

Charitable status depends principally on purposes, not activities. In principle, this can be seen as accepting that the "bounds" of a trust are determined by the settlor. If the trustees of a charitable trust act outside its charitable purposes, they may be in breach of their legal duties. But that should not necessarily involve the settlor's charitable purpose and gift failing.

The majority found the High Court and the Board had placed too much weight on Family First's perceived activities and "failed to undertake a detailed analysis of the objects of the trust deed or construe their true meaning".¹⁵² The majority agreed with Family First that the emphasis should be on Family First's predominant purpose of "stimulating a public debate and participating in public discourse on important social issues relevant to families",¹⁵³ rather than conducting a "micro-analysis of sub-purposes or particular research papers".¹⁵⁴

The majority considered few would argue that an overall objective of supporting, in a selfless way, the role and importance of families and marriage was self-evidently beneficial in an "analogously charitable sense, as a public good".¹⁵⁵

On the basis of the evidence,¹⁵⁶ the majority found that Family First's activities were aligned and consistent with its purposes,¹⁵⁷ and that it was entitled to remain registered:¹⁵⁸ whether or not the law changes advocated by Family First are in tension with human rights law, proposing and enacting legislative amendments is not unlawful.¹⁵⁹

Accordingly, the Court of Appeal set aside the Board's decision to deregister Family First and issued a declaration that Family First was entitled to be registered.¹⁶⁰

However, that was not the end of the matter.

Appeal by the Attorney-General

A few hours following the Sector Group meeting held on 24 September 2020, it was announced that the Attorney-General had sought leave to appeal the Court of Appeal decision to the New Zealand Supreme Court.¹⁶¹

149 See, for example, J Butler "What's happened to the religious discrimination bill – and where to next?" The Guardian 10 February 2022: www.theguardian.com/australia-news/2022/feb/10/whats-happened-to-the-religious-discrimination-bill-and-where-to-next.

150 *Family First New Zealand v Attorney-General* [2020] NZCA 366.

151 *Family First New Zealand v Attorney-General* [2020] NZCA 366 at [87].

152 *Family First New Zealand v Attorney-General* [2020] NZCA 366 at [121].

153 *Family First New Zealand v Attorney-General* [2020] NZCA 366 at [116], [109].

154 *Family First New Zealand v Attorney-General* [2020] NZCA 366 at [116].

155 *Family First New Zealand v Attorney-General* [2020] NZCA 366 at [138].

156 And perhaps reflecting the absence of an oral hearing of evidence at first instance, considerable further evidence was permitted to be filed in the Court of Appeal: *Family First New Zealand v Attorney-General* [2020] NZCA 366 at [56] - [57].

157 *Family First New Zealand v Attorney-General* [2020] NZCA 366 at [113].

158 *Family First New Zealand v Attorney-General* [2020] NZCA 366 at [152] - [154], [168], [174] - [176].

159 *Family First New Zealand v Attorney-General* [2020] NZCA 366 at [180].

160 *Family First New Zealand v Attorney-General* [2020] NZCA 366 at [A] - [C].

161 This announcement was recorded on Charities Services' website the following day:

www.charities.govt.nz/news-and-events/hot-topics/update-from-te-rata-atawhai-the-charities-registration-board-on-the-family-first-court-of-appeal-decision/.

Until recently, the Attorney-General of New Zealand has not become involved in cases under the Charities Act, despite requests by charities for the Attorney-General to do so. For example, in *National Council of Women*, Clifford J accepted the charity's application that the Attorney-General be served with notice of the proceedings, noting that:¹⁶²

... the regime introduced by the Charities Act remains a reasonably new one which has given rise to a degree of contention between charities and regulatory authority. The Charities Act itself is silent on the role, if any, of the Attorney-General. This, apparently, is in distinction to the equivalent legislation in the United Kingdom.

A similar application was successfully made in the *Foundation for Anti-Aging Research* litigation.¹⁶³ However, in both cases, the Attorney-General took no steps.

On that basis, the intervention of the Attorney-General in the *Family First* litigation would be seen as a welcome development.

However, a procedural issue arises in this context.

Limitations on the Board's involvement

It is important to note that charities' jurisprudence in New Zealand prior to the Charities Act generally arose in the context of disputes with the Commissioner of Inland Revenue: as can be seen from the *Latimer* litigation discussed above, such disputes took their legal shape as objections or challenges under the Inland Revenue statutes, with the Commissioner taking the role of an *active protagonist*.¹⁶⁴ By contrast, under the Charities Act, the decision-maker (the Charities Registration Board) is not a "party" to the appeal of its own decision: while the Board may be represented and heard, the Board may not be named as a respondent and may not take an active role in the appeal; instead, the Board is confined to a passive role as a contradictor;¹⁶⁵ as a non-party, it also follows that the Board is not able to appeal, even if it does not agree with the High Court decision.¹⁶⁶

These restrictions are unintended consequences arising from changes hastily made by Select Committee, during the passage of the original Charities Bill through Parliament, by which charities' ability to access an oral hearing of evidence at first instance was inadvertently removed, as discussed further below.¹⁶⁷

Importantly, however, none of these restrictions apply to the Attorney-General.

As can be seen from both the Greenpeace and the Family First case studies, a practice has developed in recent times whereby the Attorney-General will seek leave to be joined to a Charities Act appeal in the Attorney-General's capacity as "protector of charities":¹⁶⁸ the charity's consent will normally be sought to the Attorney-General's involvement, perhaps in return for an agreement that both parties will not seek a costs award;¹⁶⁹ the Attorney-General will then appear as the "effective contradictor", with the Board abiding the decision of the court.¹⁷⁰ Under this approach, the Crown's legal representation will generally remain unchanged, although it appears the Attorney-General will no longer be instructed by Charities Services or the Board.¹⁷¹

162 *National Council of Women of New Zealand Inc v Charities Registration Board* (2014) 26 NZTC 21075 (HC) at [35]. The writer was counsel in the case.

163 *Foundation for Anti-Aging Research v Charities Registration Board* [2014] NZHC 1153 at [70] - [73].

164 *Re The Foundation for Anti-Aging Research* (2016) 23 PRNZ 726 (HC) at [13].

165 *Re The Foundation for Anti-Aging Research* (2016) 23 PRNZ 726 (HC) at [38] - [48]; *Foundation for Anti-Aging Research v Charities Registration Board* [2014] NZHC 1153 at [46] - [47].

166 *Better Public Media Trust v Attorney-General* [2020] NZHC 350 at [36] - [37].

167 See also *Foundation for Anti-Aging Research v Charities Registration Board* [2015] NZCA 449 at [44] - [47].

168 See, for example, *Greenpeace of New Zealand Incorporated v Charities Registration Board* [2019] NZHC 929 at [1] - [2]; *Better Public Media Trust v Attorney-General* [2020] NZHC 350; and *Family First New Zealand v Attorney-General* [2020] NZCA 366 at [4]. In *The Foundation for Anti-Aging Research* (2016) 23 PRNZ 726 (HC), Ellis J stated at [40]: "if there are wider public interest issues raised by an appeal, it may be that the preferable course would be for the Attorney-General (in his role as protector of charities) to be joined and to participate".

169 See *Better Public Media Trust v Attorney-General* [2020] NZCA 290 at [16].

170 *Greenpeace of New Zealand Incorporated v Charities Registration Board* [2019] NZHC 929 at [1].

171 Conversation with Natasha Weight, General Manager, Charities Services (5 August 2021).

The net procedural effect of the Attorney-General's intervention is that the Crown, represented by the same legal counsel, is now able to take an active role in the litigation, and to appeal if unhappy with the court's decision.

An alternative approach would be to address the procedural issues arising from the Board's status as a non-party at the level of cause: by reinstating charities' access to a first instance oral hearing of evidence, the Board would then itself be a party, able to take the role of an active protagonist, and appeal an adverse decision, as was the case prior to the Charities Act. The difficulty with addressing such issues at the level of symptom is the potential impact on the *parens patriae* role of the Attorney-General: the objectives of the Attorney-General as "protector of charities" are not necessarily aligned with those of the Board as decision-maker under the Charities Act; there is concern regarding the extent to which the Attorney-General's intervention relates to the *parens patriae* role of protecting charities as opposed to working around limitations on the Crown's active involvement under the Charities Act as currently structured.

The concern is exacerbated by the number and nature of procedural issues being taken by the Attorney-General, as illustrated further by the Better Public Media Trust example.

Better Public Media Trust – procedural issues

Briefly, in April 2019, the Charities Registration Board declined Better Public Media Trust's application for charitable registration, on the basis of its advocacy work for public service media.¹⁷² It should be noted that comparable jurisdictions have gone to some lengths to support public interest journalism through their charities law frameworks in recognition of the critical importance of public interest journalism in a liberal democracy.¹⁷³

However, perhaps reflecting the disadvantage caused to charities in New Zealand by the inadvertent removal of their ability to access an oral hearing of evidence (discussed further below in chapter 6), the High Court controversially declined Better Public Media Trust's appeal in March 2020,¹⁷⁴ and Better Public Media Trust appealed to the Court of Appeal.

Under the Court of Appeal rules, those appealing to the Court of Appeal are generally required to pay security for costs,¹⁷⁵ which were originally set at \$7,060 (a very large amount for a new charity trying to challenge an adverse registration decision). Better Public Media Trust applied for a dispensation from the requirement to pay security for costs on the grounds of impecuniosity;¹⁷⁶ however, in July 2020, the Attorney-General opposed the Trust's application on the basis that its appeal was "not of significant public interest" and the Trust is "not advancing any genuine public interest" in pursuing the appeal; the Attorney-General also argued the law engaged by the appeal (that is, the law of advocacy by charities) is "settled".¹⁷⁷

172 Charities Registration Board Decision 2019-1 *Better Public Media Trust* 24 April 2019: <www.charities.govt.nz/charities-in-new-zealand/legal-decisions/view-the-decisions/view/better-public-media-trust>.

173 For example, the Charity Commission for England and Wales recognised the Public Interest News Foundation as a charity in September 2020: <www.gov.uk/government/publications/charity-registration-decision-public-interest-news-foundation/charity-registration-decision-public-interest-news-foundation>. Canada is acknowledged to have a very narrow interpretation of the definition of charitable purpose. However, in recognition of the need for Canadians to have access to informed, reliable journalism, and the difficulties in that regard created by changes in technology and the way that Canadians consume news, the 2019 Federal Budget introduced three tax measures to support Canadian journalism organisations producing original news: <www.canada.ca/en/revenue-agency/services/charities-giving/charities/about-charities-directorate/report-on-charities-program/report-charities-program-2018-2020.html#toc11>. Since then, the Canadian income tax legislation has been amended to create a new category of qualified donee for registered journalism organizations ("RJO") (paragraph (b.1) of the definition of "qualified donee" in s 149.1(1) of the Income Tax Act (RSC 1985 c1 (5th Supp))). As at the date of writing, six organisations have been recognised as RJOs: <www.canada.ca/en/revenue-agency/services/charities-giving/other-organizations-that-issue-donation-receipts-qualified-donees/other-qualified-donees-listings/list-registered-journalism-organizations.html>. Like charities, RJOs are tax exempt and able to issue official tax receipts for donations and many consider RJOs should simply be recognised as charities. See, for example, ACPNS Quarterly Case Notes – June - September 2020: <eprints.qut.edu.au/205695/8/ACPNS_Quarterly_Case_Notes_Third_Quarter_2020_v4_MML_edit.pdf> at 2.

174 *Better Public Media Trust v Attorney-General* [2020] NZHC 350 (2 March 2020).

175 Court of Appeal (Civil) Rules 2005 r 35.

176 *Better Public Media Trust v Attorney-General* [2020] NZCA 290 at [7].

177 *Better Public Media Trust v Attorney-General* [2020] NZCA 290 at [11].

These arguments are surprising and contrast sharply with arguments made by the Attorney-General only a few weeks' later that decisions relating to charitable status potentially affect a large number of entities, have "significant fiscal consequences", and are therefore matters of "general or public importance".¹⁷⁸

Further, as can be seen from the decisions of the High Court and Court of Appeal the following month in August 2020 overturning decisions of the Board, it is drawing a long bow to say that the Crown's interpretation of the law of advocacy by charities in New Zealand is settled.

In the result, the Attorney-General's arguments were rejected and Better Public Media Trust was not required to pay security for costs.¹⁷⁹

However, justice is found in the "interstices of procedure":¹⁸⁰ in challenging registration decisions under the Charities Act that may have important implications for their ongoing survival, charities are necessarily expending scarce charitable resources; questions arise as to how such strident taking of procedural points is consistent with the Attorney-General's role as the "protector" of charities or with the liberal, equitable approach normally taken to charities litigation.¹⁸¹

Official Information Act information

As discussed above, following the August 2020 decisions in *Greenpeace* and *Family First*, Charities Services advised the Sector Group that the Board would review its approach to the issue of advocacy by charities. In that context, Charities Services provided comprehensive advice to the Board, which advice was later obtained under the Official Information Act 1982. In a memorandum dated 18 November 2020, Charities Services advised the Board as follows:¹⁸²

There is a risk that the Supreme Court decision on *Family First* may require a *change* in the recommended approach. We could mitigate this risk by placing organisations that are registered under the recommended approach on a *monitoring list*, to be reviewed later if the law changes materially.

In other words, while some organisations advocating for environmental issues have been able to register under the revised approach, as discussed above, their ongoing registration is not assured.

The Attorney-General's application for leave to appeal the *Family First* Court of Appeal decision was granted the following month on 18 December 2020,¹⁸³ following which the Charity Law Association of Australia and New Zealand was granted leave to intervene.¹⁸⁴ The appeal was heard by the Supreme Court on 24 - 25 June 2021 and, as at the date of writing, a decision is awaited.

Better Public Media Trust's appeal to the Court of Appeal has been stayed pending the decision of the Supreme Court in *Family First*.

178 These arguments were made by the Attorney-General in the 24 September 2020 notice of application for leave to appeal the Court of Appeal's decision in *Family First* to the Supreme Court at [3] - [7].

179 *Better Public Media Trust v Attorney-General* [2020] NZCA 290 at [19].

180 Sir HS Maine *Dissertations on early law and customs* (Spottiswoode, London, 1891) at 389:

"[s]o great is the ascendancy of the Law of Actions in the infancy of Courts of Justice, that substantive law has at first the look of being gradually secreted in the interstices of procedure; and the early lawyer can only see the law through the envelope of its technical forms":

books.google.co.nz/books?id=NEIUAAAAYAAJ&printsec=frontcover&source=gbs_ge_summary_r&redir_esc=y&hl=en#v=onepage&q=interstices&f=false.

181 See, for example, *Lehtimäki & Ors v Cooper* [2021] 1 All ER 809 (UKSC) at [53] - [72].

182 Charities Services' Memorandum to the Board dated 18 November 2020 (received under the Official Information Act 1982) at [134] (emphasis added).

183 *Attorney-General v Family First New Zealand* SC 79/2020 [2020] NZSC 151.

184 The writer is a director of the Charity Law Association of Australia and New Zealand ("CLAANZ"). As the intervener, CLAANZ has no point of view on the actual merits of the case: *Attorney-General v Family First New Zealand* [2021] NZSC Trans 9 at 193. CLAANZ intervened in furtherance of its charitable purpose to improve the administration of charities by contributing to the development of reform and improvement of charities law, see cl 6(b) of its constitution which can be found on the ACNC charities register: www.acnc.gov.au/charity/278f3e21cd1c4d330b333e7c777756a1#financials-documents.

The Family First case study is remarkable because Family First's purposes had been accepted as charitable by virtue of its original registration in 2007, a conclusion that was confirmed following a review in 2010; there has not been any suggestion that any of Family First's activities of raising public awareness and engaging in the democratic process were in breach of the general law (such as laws relating to discrimination or hate speech), in breach of its own trust deed or otherwise not carried out in furtherance of its charitable purposes; in other words, had the principles from the *Latimer* decisions been applied from the outset, almost a decade of uncertainty and cost (in another protracted process that is still not at an end) could have been avoided.

The Family First case study is also remarkable for the impact it has had in Australia: even though charities in Australia would be unlikely to face deregistration for advocating a traditional view of marriage through democratic processes, the Australian government has introduced a Bill into Parliament proposing to put the matter beyond doubt (and has directly referenced the experience of Family First in New Zealand in doing so).

Of course, there are many who disagree with Family First's positions: issues such as same-sex marriage provoke strong views that are passionately held and often diametrically opposed. However, as discussed above, controversy is not determinative of a charity's eligibility for registration. Society is unlikely to agree unanimously with every position taken by every charity. When charities law decision-makers take sides, injustice can result.¹⁸⁵ More fundamentally, to restrict the advocacy work of some charities based on a subjective majoritarian assessment of their views risks is a pathway to authoritarianism. As former United States' President Barack Obama has noted:¹⁸⁶

... in a diverse society, efforts to restrict speech can quickly become a tool to silence critics and oppress minorities ... the strongest weapon against hateful speech is not repression; it is more speech

Rather than expending considerable resources attempting to deregister Family First, a better approach, in a liberal democracy based on fundamental principles of tolerance and diversity, would be to recognise that charities law is not required to resolve these debates. Hammond J put it this way:¹⁸⁷

I have to say I have considerable sympathy for the viewpoint which holds that a Court does not have to enter into the debate at all; hence the inability of the Court to resolve the merits is irrelevant. Rather, the function of the Court ought to be to sieve out debates which are for improper purposes; and to then leave the public debate to lie where it falls, in the public arena.

In other words, the underlying paradigm should be resolved in favour of purposes, rather than activities, fiduciary duties holding charities to their stated charitable purposes, and the transparency and accountability provided by the charities register and the financial reporting rules. The draft Bill included in chapter 9 of this report is intended to implement this approach.

The approach of comparable jurisdictions

In reaching these conclusions, we have carefully considered the approach taken to the issue of advocacy by charities in comparable jurisdictions.

Canadian case law, in particular, has had a significant influence on current interpretations in New Zealand. In an effort to understand to what extent it has been appropriate for New Zealand to place such heavy reliance on Canadian charities law jurisprudence, the law of advocacy by charities in Canada is discussed in some detail next.

185 *Auckland Medical Aid Trust v Commissioner of Inland Revenue* [1979] 1 NZLR 382 (SC) at 397 (Chilwell J).

186 The White House Remarks by the President to the UN General Assembly 25 September 2012:

obamawhitehouse.archives.gov/the-press-office/2012/09/25/remarks-president-un-general-assembly.

187 *Re Collier* [1998] 1 NZLR 81 (HC) at 90 which were cited with approval by the majority in *Family First New Zealand v Attorney-General* [2020] NZCA 366 at [114].

Canada

A helpful discussion of the history of Canada's charities law is contained, for example, in the 1996 report of the Ontario Law Reform Commission on the Law of Charities,¹⁸⁸ and the 2017 Report of the Consultation Panel on the Political Activities of Charities.¹⁸⁹ As can be seen from the following summary, the issue of advocacy by charities has been a central theme in Canada for more than four decades.¹⁹⁰

History

Unlike Australia, Ireland and the United Kingdom, Canada's system of charities law is administered through tax law: federal tax legislation governing charitable organisations has been in place in Canada since 1917.

The principal objective of Canada's first income tax Act, the War Charities Act 1917, was to encourage the efficient operation of legitimate war charities.¹⁹¹ At this time and for the following half-century, Canadian charities law was focused on encouraging private philanthropy to assist the Government in responding to two world wars and the Great Depression: in other words, the underlying paradigm was an enabling one focused on preserving and promoting the charitable sector for its own sake, rather than a restrictive one focused on policing the tax privileges available to charitable organisations.¹⁹²

In 1950, the income tax legislation was amended to make a distinction between charities that "fund" and charities that "do": on the basis of anecdotal evidence (mostly American) that foundations were subject to abuse, the legislation was amended to distinguish foundations from "charitable organisations".¹⁹³

A "charitable organisation" was conceived as an "active" or "operational" charity, and would be eligible for tax exempt status only if "all" its resources were "devoted to charitable activities carried on by the organisation itself".¹⁹⁴

As discussed above, the common law of charities law focuses on purposes, rather than activities. The insertion in 1950 of a statutory reference to "charitable activities" has been the source of considerable difficulty:¹⁹⁵ it has been described as "ill-conceived",¹⁹⁶ a "major problem",¹⁹⁷ a "mistake",¹⁹⁸ and an "overused and misunderstood" phrase that has created "considerable uncertainty";¹⁹⁹ it has also been described as perpetuating "unnecessary confusion" about the distinction between purposes and activities that "plagues much of the discourse" surrounding charities in Canada,²⁰⁰ with "more than a few instances where a court has been led astray".²⁰¹

188 Ontario Law Reform Commission *Report on the Law of Charities* (Toronto, 1996), chs 1, 2, 10.

189 [Report of the Consultation Panel on the Political Activities of Charities](#) 31 March 2017, section A – Background and History.

190 M McGregor-Lowndes and B Wyatt (eds) *Regulating Charities: the Inside Story* (Routledge, 2017) at 280.

191 The Income War Tax Act 1917 7-8 Geo 5 c 28 (Can): Ontario Law Reform Commission *Report on the Law of Charities* (Toronto, 1996) at 34, 251, 258.

192 Ontario Law Reform Commission *Report on the Law of Charities* (Toronto, 1996) at 254, 261, 262.

193 Ontario Law Reform Commission *Report on the Law of Charities* (Toronto, 1996) at 261, 262, 272.

194 An Act to amend the Income Tax Act, SC 1950 c40: Ontario Law Reform Commission *Report on the Law of Charities* (Toronto, 1996) at 259 - 260.

195 P Broder "Report of the Senate Special Committee on the Charitable Sector – A response" (2020) The Philanthropist Journal.

196 Report of the Special Senate Committee on the Charitable Sector [Catalyst for Change: A Roadmap to a Stronger Charitable Sector](#) June 2019 at 95, referring to the evidence of Professor A Parachin; and Advisory Committee on the Charitable Sector [Report #1 – Towards a federal regulatory environment that enables and strengthens the charitable and nonprofit sector](#) January 2021 "Examining the regulatory approach to charitable purposes and activities".

197 [Report of the Consultation Panel on the Political Activities of Charities](#) 31 March 2017, section A – Background and History.

198 Ontario Law Reform Commission *Report on the Law of Charities* (Toronto, 1996) at 336.

199 Report of the Special Senate Committee on the Charitable Sector [Catalyst for Change: A Roadmap to a Stronger Charitable Sector](#) June 2019 at 88.

200 Report of the Special Senate Committee on the Charitable Sector [Catalyst for Change: A Roadmap to a Stronger Charitable Sector](#) June 2019 at 88.

201 Ontario Law Reform Commission *Report on the Law of Charities* (Toronto, 1996) at 336.

It has also led in practice to a “sustained emphasis on activities at the expense of purposes”.²⁰²

Despite these criticisms, the reference to “charitable activities” remains in the Canadian legislation to this day.²⁰³

In 1967, the federal system developed considerable sophistication when a centralised registration and reporting system was put into place.²⁰⁴ However, developments in 1975 catalysed a change in underlying paradigm.

The 1975 Green Paper

In 1975, the Department of Finance published a Green Paper (“**the 1975 Green Paper**”)²⁰⁵ looking into a number of issues concerning the tax treatment of charities.²⁰⁶ While acknowledging the Government’s appreciation for the contribution of the charitable sector, the 1975 Green Paper argued that, with over 35,000 charities receiving over \$500 million in donations, and with the 15 largest charities having assets in excess of \$700 million, the tax privileges for charities were a “major public expense”:²⁰⁷

Every dollar of tax relief represents a cost to the Canadian taxpayer. The government therefore believes that it is appropriate that the rules of taxation ensure that the people of Canada obtain maximum benefit from the charities.

This claim did not pass without dissent; from a paradigm perspective, the Ontario Law Reform Commission noted this was the first time that federal tax policy had been explicitly formulated in the rhetoric of the tax expenditure theorists:²⁰⁸

... the government’s ultimate objective was to *deploy* the tax *subsidy* to the *maximum benefit* of Canadians. In the logic of this view, if perhaps not entirely in the conviction of the government, *charitable dollars were considered government dollars*.

The reform proposals contained in the 1975 Green Paper were a response to perceived abuses of family foundations, based on vigorous arguments that had been expressed by American writers and politicians in the late 1960s:²⁰⁹

It has become evident in recent years that a few taxpayers have been abusing the opportunity to establish private charities. The most common abuse has been in arranging investments and expenses to ensure that the charity has little income and pays out a relatively small sum annually in comparison to its capital. This may be done by having the charity invest in low-yield debt or equity of the donor’s business, by renting premises from the donor at high rent, by paying family members high salaries for relatively little work, or by lending money to family members at low rates of interest.

Aside from non-arm’s length transactions with related parties such as these (which would likely have breached fiduciary duties owed by the relevant trustees or directors),²¹⁰ another perceived abuse was the use of family foundations to retain control of a family business while avoiding the tax consequences of intergenerational wealth transfers:²¹¹ shares in the family business could be gifted to the foundation over time; dividends could be declared on non-voting preferred shares owned by family members leaving very little or no income to accrue to the charitable trust; and there would be no capital gains tax on the equity interest owned by the charity.²¹²

202 Report of the Special Senate Committee on the Charitable Sector *Catalyst for Change: A Roadmap to a Stronger Charitable Sector* June 2019 at 82.

203 See, for example, paragraph (a.1) of the definition of “charitable organization” in s 149.1(1) of the Income Tax Act 1985 RSC c 1 (5th Supp).

204 Ontario Law Reform Commission *Report on the Law of Charities* (Toronto, 1996) at 34.

205 Canada, Department of Finance, *The Tax Treatment of Charities* (Discussion Paper) Ottawa: June 1975 (the Green Paper).

206 Ontario Law Reform Commission *Report on the Law of Charities* (Toronto, 1996) at 271.

207 Ontario Law Reform Commission *Report on the Law of Charities* (Toronto, 1996) at 271, referring to the Green Paper at 5.

208 Ontario Law Reform Commission *Report on the Law of Charities* (Toronto, 1996) at 271 n 119, 272 (emphasis added).

209 Ontario Law Reform Commission *Report on the Law of Charities* (Toronto, 1996) at 273, referring to the Green Paper at 9.

210 Ontario Law Reform Commission *Report on the Law of Charities* (Toronto, 1996) at 272 n 127.

211 Ontario Law Reform Commission *Report on the Law of Charities* (Toronto, 1996) at 273.

212 Ontario Law Reform Commission *Report on the Law of Charities* (Toronto, 1996) at 274.

Again, as in 1950, there was only anecdotal evidence, mostly American, to support these claims of abuse. However, using as a model the American reforms of 1969, which had severely curtailed the activities of “private foundations” in the United States, the 1975 Green Paper proposed a number of measures designed to “remedy” such perceived abuses in Canada.²¹³

It should be noted that at the time, and in sharp contrast to the current position in New Zealand, there was a lack of public accountability of registered charities in Canada: the annual information returns and annual tax returns of registered charities, if indeed filed, were confidential (reflecting their placement in tax legislation subject to tax secrecy provisions). The 1975 Green Paper argued the “tax concessions” granted to charities were “so large they entitle the public to know with some precision about the activities of the charity” and recommended every registered charity be required to file an annual public information return containing information on income and expenses.²¹⁴

Overall, the 1975 Green Paper proposals would have substantially increased the federal government’s regulatory control over the charitable sector on the basis of very little solid empirical information.²¹⁵ The charitable sector balked at the aggressiveness of some of the proposals, arguing they were too complex for the vast majority of charities, or “far too onerous to correct minor, infrequent, and often only perceived, abuses”.²¹⁶

However, the 1975 Green Paper set the tone for what was to follow: as indicated by a number of factors, the Canadian Government’s attitude towards the charitable sector was becoming less benign, driven by a “deepening of the tax expenditure bias” that ultimately led to a change in paradigm.²¹⁷

The first of these factors was an ill-fated circular on “political activity”.

The 1978 Circular

In 1978, the Department of National Revenue (a predecessor to the Canada Revenue Agency) released its first policy on the topic of advocacy by charities.²¹⁸

In Information Circular 78-3 (“**the 1978 Circular**”), the Department reasoned that the requirement in the income tax legislation for charities to devote all of their resources to “charitable activities” meant that charities could not devote *any* resources to “political activities”, which the 1978 Circular defined as meaning any activity aimed at influencing government policy (although exception was made for charities making representation directly to government).²¹⁹

This reasoning is a direct consequence of the statutory reference to “charitable activities” in the income tax legislation and is based on an interpretation of the underlying common law that “political activities” could not be “charitable activities”.

However, while the underlying common law proscribes political *purposes*, it does not proscribe political activities.

Canada does not have a statutory definition of “charitable purpose”, meaning that what constitutes a charitable purpose in Canada falls to be determined by the underlying common law (principally by reference to the four “*Pemsel*” heads: the relief of poverty, the advancement of education or religion, and any other matter beneficial to the community).²²⁰ Canada has adopted the British line of common law authority on the

213 Ontario Law Reform Commission *Report on the Law of Charities* (Toronto, 1996) at 272 - 274.

214 Ontario Law Reform Commission *Report on the Law of Charities* (Toronto, 1996) at 275, referring to the Green Paper.

215 Ontario Law Reform Commission *Report on the Law of Charities* (Toronto, 1996) at 272.

216 Ontario Law Reform Commission *Report on the Law of Charities* (Toronto, 1996) at 285.

217 Ontario Law Reform Commission *Report on the Law of Charities* (Toronto, 1996) at 277.

218 [Report of the Consultation Panel on the Political Activities of Charities](#) 31 March 2017, section A – Background and History.

219 Ontario Law Reform Commission *Report on the Law of Charities* (Toronto, 1996) at 277 n 139; [Report of the Consultation Panel on the Political Activities of Charities](#) 31 March 2017, section A – Background and History.

220 *Native Communications Society of British Columbia v Minister of National Revenue* [1986] 3 FC 471 at 478 - 479.

political purposes doctrine,²²¹ including the following comments of Lord Parker in the seminal 1917 case of the English House of Lords in *Bowman v Secular Society Ltd* ("**Bowman**"):²²²

The abolition of religious tests, the disestablishment of the Church, the secularisation of education, the alteration of the law touching religion or marriage, or the observation of the Sabbath, are purely political objects. *Equity has always refused to recognise such objects as charitable ... a trust for the attainment of political objects has always been held invalid*, not because it is illegal, for everyone is at liberty to advocate or promote by any means a change in the law, but *because the Court has no means of judging whether a proposed change in the law will or will not be for the public benefit*, and therefore cannot say that a gift to secure the change is a charitable gift ...

Canada has also adopted the 1982 decision in *McGovern v Attorney-General* ("**McGovern**")²²³ in which the Amnesty International Trust was denied charitable registration for its human rights work.

It should be noted that the political purposes doctrine articulated by these cases has been much criticised: as the Supreme Court of New Zealand has noted, there is "surprisingly little authority" for the finding that equity has "always" regarded such objects as inherently non-charitable,²²⁴ and the argument that the courts have no means of judging whether a proposed change in the law will be for the public benefit has also been described as a "judicial cop out".²²⁵ The doctrine of political purposes has since been specifically rejected in both Australia²²⁶ and New Zealand.²²⁷ In addition, the Charities Act 2011 (UK) has now clarified that the advancement of human rights is a charitable purpose,²²⁸ and the Amnesty International Charity is now registered as a charity in England and Wales.²²⁹

Slade J in *McGovern* also made it clear that the political purposes doctrine relates to purposes, rather than activities:²³⁰

Trusts for political purposes ... include, inter alia, trusts of which a *direct and principal purpose* is either:

- (i) to further the interests of a particular political party; or
- (ii) to procure changes in the law of this country; or
- (iii) to procure changes in the law of a foreign country; or
- (iv) to procure a reversal of government policy or of particularly decisions of governmental authorities in this country; or
- (v) to procure a reversal of government policy or of particular decisions of governmental authorities in a foreign country.

This categorisation is not intended to be an exhaustive one, but I think it will suffice for the purposes of this judgment; I would further emphasise that it is directed to trusts of which the purposes are political. As will appear later, the mere fact that trustees may be at liberty to employ political means in furthering the non-political purposes of a trust does not necessarily render it non-charitable.

221 See, for example, *Positive Action Against Pornography v Minister of National Revenue* [1988] 2 FC 340 (CA) at [14].

222 *Bowman v Secular Society Ltd* [1917] AC 406 (HL) at 442 (emphasis added).

223 *McGovern v Attorney-General* [1982] 1 Ch 321.

224 *Re Greenpeace of New Zealand Inc* [2015] 1 NZLR 169 (SC) at [59].

225 *Attorney General for NSW v The NSW Henry George Foundation Ltd* [2002] NSWSC 1128 at [63].

226 *Aid/Watch Inc v Commissioner of Taxation* [2010] HCA 42 at [48].

227 *Re Greenpeace of New Zealand Inc* [2015] 1 NZLR 169 (SC) at [3].

228 Charities Act 2011 (UK) s 3(1)(h).

229 Registration number 294230: <register-of-charities.charitycommission.gov.uk/charity-search/-/charity-details/294230>, which describes the activities of Amnesty International Charity in the following terms: "promotion of human rights throughout the world, including by: monitoring abuses, assisting the victims of such abuses and eliminating infringements; research into human rights issues and providing technical advice; contributing to the sound administration of human rights law; raising awareness of, and promoting public support for, human rights issues; and international advocacy of human rights". Section 3(1)(h) of the Charities Act 2011 (UK) specifically recognises the advancement of human rights as a charitable purpose.

230 *McGovern v Attorney-General* [1982] 1 Ch 321 at 340 (emphasis added).

In other words, even under a strict “political purposes doctrine”, charities are not precluded from engaging in advocacy *activities* in furtherance of their charitable purposes.

It is difficult to reconcile the statutory reference in Canada to “charitable activities” with the underlying common law (where an activity only takes its character from the purpose in furtherance of which it is carried out, as discussed above).²³¹ It is possible to interpret the reference to “charitable activities” as simply referring to any activities undertaken in furtherance of a charity’s charitable purposes. However, on this interpretation, there is no distinction between “charitable activities” and “political activities”, as all activities must be carried out in furtherance of a charity’s charitable purposes.

The restriction on “political activities” in the 1978 Circular was therefore confusing: it was criticised as an “unnecessary and incorrect” extension of the statute and case law,²³² and an “attempt to stop charities from carrying out actions that might embarrass the government”.²³³ The Minister of National Revenue ultimately felt obliged to withdraw the 1978 Circular in the face of very severe criticism from the sector.²³⁴

Nevertheless, the withdrawal of the 1978 Circular did not prevent the Department from clamping down on what it perceived to be “political activities” of charities: letters threatening revocation of registered status were sent to a number of organisations, including Oxfam Canada.²³⁵

Between 1978 and 1985, charities protested in large numbers against the very restrictive interpretations of charities’ ability to engage in “political activities”, complaining that regulatory overreach hindered and “chilled” charities’ efforts to advocate on behalf of the communities they served.²³⁶ Ultimately, the level of concern and uncertainty caused the Government to initiate a consultation process which, in turn, led to legislative change.²³⁷

Section 149.1(6.2)

In 1986, the Canadian income tax legislation was amended to insert s 149.1(6.2) in the following terms (emphasis added):²³⁸

(6.2) For the purposes of the definition of “charitable organisation” in subsection 149.1(1), where an organisation devotes *substantially all* of its resources to *charitable activities* carried on by it and

- (a) it devotes part of its resources to *political activities*,
- (b) those political activities are ancillary and incidental to its charitable activities, and
- (c) those political activities do not include the direct or indirect support of, or opposition to, any political party or candidate for public office,

the organisation shall be considered to be devoting that part of its resources to charitable activities carried on by it.

In other words, where an organisation devoted “substantially all” its resources to “charitable activities”, and part of its resources to “political activities”, the organisation could still be considered to be devoting “all” of its resources to charitable activities if those political activities were merely “ancillary and incidental” to its charitable activities and not partisan.

231 See the discussion in ch 2, referring to the decision of the Supreme Court of Canada in *Vancouver Society of Immigrant and Visible Minority Women v Minister of National Revenue* [1999] 1 SCR 10 at [152].

232 [Report of the Consultation Panel on the Political Activities of Charities](#) 31 March 2017, section A – Background and History.

233 [Report of the Consultation Panel on the Political Activities of Charities](#) 31 March 2017, section A – Background and History.

234 Ontario Law Reform Commission *Report on the Law of Charities* (Toronto, 1996) at 277.

235 Ontario Law Reform Commission *Report on the Law of Charities* (Toronto, 1996) at 277 n 139.

236 K Chan “[Constitutionalising the Registered Charity Regime: reflections on Canada Without Poverty](#)” (2020) 6 CJCL 151 at 159.

237 [Report of the Consultation Panel on the Political Activities of Charities](#) 31 March 2017, section A – Background and History.

238 *An Act to Amend the Income Tax Act and related statutes and to amend the Canada Pension Plan, the Unemployment Insurance Act, 1971, the Financial Administration Act and the Petroleum and Gas Revenue Act*, SC 1986, c 6, s 85(2).

Section 149.1(6.2) was intended to be a relieving measure,²³⁹ ostensibly allowing charities to carry out a limited amount of non-partisan “political activities” in support of their charitable purposes.²⁴⁰

However, in practice, the provision was inherently problematic. While some saw the provision as confirming that any activity carried out in furtherance of a charitable purpose was a “charitable activity”,²⁴¹ what constituted “political activities” was not defined, and the assumption inherent in the legislation that a distinction could be made between “charitable activities” and “political activities” created confusion.

The provision was also problematic for importing the “ancillary purpose rule” (which, as discussed above, allows non-charitable purposes not to preclude “exclusively” charitable purposes provided the former are “ancillary” to the latter, as reflected in s 5(3) and (4) of the Charities Act 2005 (NZ)). In applying the ancillary purposes rule to activities rather than purposes, the legislative provision created unhelpful confusion.²⁴² The provision also unhelpfully mixed concepts by incorporating the word “incidental” (normally used in the context of “incidental” private benefits) into the ancillary purpose rule.²⁴³ More fundamentally, the provision maintained the focus on “charitable activities”, which cuts across the fundamental purposes nature of the charities inquiry, creating “fertile ground for arbitrary application of the rules”.²⁴⁴

Section 149.1(6.2) was heavily criticised: commentators decried the provision’s inconsistency with the underlying common law, and its failure to define clearly what was “political” and what was not.²⁴⁵

We have noticed a consistent theme of measures intended to assist charities often having precisely the opposite effect in practice. An example is s 149.1(6.2), which was interpreted in administrative practice as imposing a *limit* on what charities could do:²⁴⁶ the Canada Revenue Agency (“**CRA**”) interpreted the “substantially all” wording to mean “more than 90%”, meaning that no more than 10% of a charity’s resources could be devoted to (non-partisan) “political activities”, in what became known as the “10% rule”.²⁴⁷

For the purpose of administering the 10% rule, CRA divided the concept of “political activities” into two general types: “direct” political activity was considered to involve presenting information and views directly to government, while “indirect” political activity was considered to involve public advocacy, or efforts to influence public opinion on

239 P Broder “[Report of the Senate Special Committee on the Charitable Sector – A response](#)” (2020) The Philanthropist Journal; K Chan “[Constitutionalising the Registered Charity Regime: reflections on Canada Without Poverty](#)” (2020) 6 CJCL 151 at 160.

240 Ontario Law Reform Commission *Report on the Law of Charities* (Toronto, 1996) at 284; Report of the Special Senate Committee on the Charitable Sector *Catalyst for Change: A Roadmap to a Stronger Charitable Sector* June 2019 at 84.

241 *Report of the Consultation Panel on the Political Activities of Charities* 31 March 2017, section A – Background and History; Ontario Law Reform Commission *Report on the Law of Charities* (Toronto, 1996) at 284.

242 Despite the clear wording of Charities Act s5(3) and (4), this conflation of the distinction between purposes and activities in the context of the ancillary purpose rule is now also occurring in New Zealand charities law. See, for example, *Re The Grand Lodge of Antient Free and Accepted Masons in New Zealand* [2011] 1 NZLR 277 (HC) at [49]: “There is little discussion on what is an ancillary activity ...”.

243 See *Latimer v Commissioner of Inland Revenue* [2004] 3 NZLR 157 (PC) at [33] - [36]. This wording has also found its way into s 5(4) of the Charities Act 2005 (NZ) and paragraph (b)(ii) of the definition of “charity” in s 5 of the Charities Act 2013 (Cth). However, it would be helpful for a distinction to be made between “ancillary purposes” and “incidental private benefits”.

244 Submission of the *Pemsel Case Foundation* to the Consultation Panel on the Political Activities of Charities, referred to in the *Report of the Consultation Panel on the Political Activities of Charities* 31 March 2017, section A – Background and History.

245 K Chan “[Constitutionalising the Registered Charity Regime: reflections on Canada Without Poverty](#)” (2020) 6 CJCL 151 at 161 - 162, referring to Parachin and Singer.

246 *Report of the Consultation Panel on the Political Activities of Charities* 31 March 2017, section A – Background and History; Ontario Law Reform Commission *Report on the Law of Charities* (Toronto, 1996) at 284.

247 *Canada Without Poverty v Attorney-General of Canada* 2018 ONSC 4147 at [6]; K Chan “[Constitutionalising the Registered Charity Regime: reflections on Canada Without Poverty](#)” (2020) 6 CJCL 151 at 161.

matters of public policy. Direct political activity was deemed “charitable activity” and thus subject to no limits under s 149.1(6.2) (provided it was connected to the organisation’s charitable purposes); indirect political activity, however, was treated as “political activity” subject to the 10% rule.²⁴⁸

The legal basis for the distinction is not clear and the rule was confusing and difficult to apply in practice; the 10% limit was also criticised as “arbitrary”.²⁴⁹

In response to the call for clearer guidelines, CRA issued another information circular in 1987 to further explain how the new legislation might affect charities.²⁵⁰ However, confusion remained,²⁵¹ and was exacerbated by a series of court cases that followed. Two particular cases of difficulty were:

- i. *Positive Action Against Pornography v Minister of National Revenue* (“**Positive Action Against Pornography**”);²⁵² and
- ii. *Human Life International in Canada Inc v Minister of National Revenue* (“**Human Life International**”).²⁵³

These cases merit close consideration as they have both been applied in New Zealand by Charities Services and the Board;²⁵⁴ *Positive Action Against Pornography* was also followed by the High Court in *Draco* (albeit described as a decision of the Canadian Supreme Court rather than the Federal Court of Appeal),²⁵⁵ and *Human Life International* has been cited by the Court of Appeal,²⁵⁶ and the Supreme Court.²⁵⁷

The decision of the Supreme Court of Canada in *Vancouver Society of Immigrant and Visible Minority Women v Minister of National Revenue* (“**Vancouver Society**”)²⁵⁸ is also important to consider, as discussed further below.

Positive Action Against Pornography

Positive Action Against Pornography (“**PAAP**”) applied for registration as a “charitable organisation”, arguing that the public stands to benefit from informed discussion and debate on the subject of pornography and its associated depictions of violence and degradation; any legislative change it advocated for was argued to be in harmony with what the Canadian public and the courts perceive as pornographic.

However, in a 1988 decision, Stone J held PAAP ineligible for registration, on the basis that the presentation to the public of selected items of information and opinion on the subject of pornography “cannot be regarded as educational in the sense understood by this branch of the law”.²⁵⁹ The court also held that, in seeking to “sway public opinion in supporting of minimising and possibility eliminating pornography from our society”, PAAP was seeking “legislative change of its own liking”: its purposes were therefore considered to be “political” and not charitable under the fourth head either.²⁶⁰

It should be noted that the categories of political purpose set out by Slade J in *McGovern* do not extend to a prohibition on “seeking to sway public opinion” or “public awareness-

248 K Chan “[Constitutionalising the Registered Charity Regime: reflections on Canada Without Poverty](#)” (2020) 6 CJCL 151 at 160 - 161.

249 Ontario Law Reform Commission *Report on the Law of Charities* (Toronto, 1996) at 300.

250 Ontario Law Reform Commission *Report on the Law of Charities* (Toronto, 1996) at 300 - 301, referring to Information Circular 87-1 *Registered Charities’ Ancillary and Incidental Political Activities*; [Report of the Consultation Panel on the Political Activities of Charities](#) 31 March 2017, section A – Background and History.

251 [Report of the Consultation Panel on the Political Activities of Charities](#) 31 March 2017, section A – Background and History.

252 *Positive Action Against Pornography v Minister of National Revenue* [1988] 2 FC 340 (CA).

253 *Human Life International in Canada Inc v Minister of National Revenue* [1998] 3 FC 202 (FCA).

254 See, for example, Charities Registration Board Decision 2013-5 [Sustain our Sounds Incorporated](#) 15 April 2013 at [30] n 40; and Charities Registration Board Decision 2013-3 [Eyre Community Environmental Safety Society Incorporated](#) 15 April 2013 at [27] n 38.

255 *Re Draco Foundation (NZ) Charitable Trust* (2011) 25 NZTC 20,032 (HC) at [42].

256 *Re Greenpeace of New Zealand Inc* [2013] 1 NZLR 339 (CA) at [59], [63].

257 *Re Greenpeace of New Zealand Inc* [2015] 1 NZLR 169 (SC) at [63].

258 *Vancouver Society of Immigrant & Visible Minority Women v Minister of National Revenue* [1999] 1 SCR 10.

259 *Positive Action Against Pornography v Minister of National Revenue* [1988] 2 FC 340 (CA) at [9].

260 *Positive Action Against Pornography v Minister of National Revenue* [1988] 2 FC 340 (CA) at [6], [14].

raising". Despite this, the court said, in a footnote, that it "appears" the concept of political purpose "also extends to espousal of a political cause or aspiration".²⁶¹ This finding may have been based on the CRA's restrictive approach to "indirect political activity", discussed above; however, it is surprising that a more detailed analysis of this point was not undertaken before making such a significant extension to the common law. The impact of such an extension on charities' freedom of expression was not referred to in the judgment.

The court also referred to s 149.1(6.2), but held the provision of "no assistance" as the organisation's "purposes and activities" were not "ancillary and incidental" but "primarily of a political nature and therefore non-charitable".²⁶²

The wider, indirect public benefit inherent in advocating for peaceful orderly change in a participatory democracy was also not referred to in the judgment.

Human Life International

Human Life International in Canada Inc ("**HLIC**") was a registered charitable organisation with aims and objects to "protect the unborn, elderly and handicapped, to promote true Christian family values, to encourage chastity, and to teach natural family planning" through the conduct of lectures, seminars and conferences and the publication of a variety of literature advocating its points of view.²⁶³

The Minister of National Revenue revoked HLIC's registration on the grounds that it was not devoting "substantially all" of its resources to "charitable activity".

HLIC challenged the finding that activities "designed essentially to sway public opinion on a controversial social issue" were political and not charitable, and argued that any "political" activities it carries out were only "incidental" to its charitable objects and activities and therefore within the savings provision of s 149.1(6.2). HLIC also argued that denying registration to an organisation that engages in the dissemination of information and opinions would deny freedom of expression as guaranteed by paragraph 2(b) of the Canadian Charter of Rights and Freedoms ("**the Charter**")²⁶⁴ (broadly equivalent to s 14 of the New Zealand Bill of Rights Act 1990).

However, in 1998, the Minister's decision was upheld by the Federal Court of Appeal: although acknowledging an absence of precise jurisprudence that activities designed to sway public opinion on a controversial social issue were political and not charitable, Strayer JA cited *Positive Action Against Pornography* to hold that such advocacy "can never be determined by a court to be for a purpose beneficial to the community".²⁶⁵

The *Human Life International* case might be therefore be considered to have extended the *McGovern* categories of "political purpose" in Canadian law to include a category of "public awareness-raising", a finding which has, in turn, influenced New Zealand jurisprudence.

The Supreme Court of New Zealand cited *Human Life International* in support of its proposition that there is no distinction between general promotion of views within society and advocacy of law change (including through modern participatory democratic processes),²⁶⁶ potentially similarly extending the *McGovern* categories. However, key distinguishing features of the cases, such as statutory references to "charitable activities" and "political activities" (which have no equivalent in New Zealand), or the nature of the hearing on appeal, are not analysed.

The nature of the hearing on appeal is an important consideration. As is currently the case in New Zealand (but not in other comparable jurisdictions), charities in Canada challenging a registration decision are unable to access an oral hearing of evidence.

261 *Positive Action Against Pornography v Minister of National Revenue* [1988] 2 FC 340 (CA) at [14] n 1.

262 *Positive Action Against Pornography v Minister of National Revenue* [1988] 2 FC 340 (CA) at [16].

263 *Human Life International in Canada Inc v Minister of National Revenue* [1998] 3 FC 202 (FCA) at [3].

264 *Human Life International in Canada Inc v Minister of National Revenue* [1998] 3 FC 202 (FCA) at [21]; Constitution Act 1982 Pt 1 sch B, Canada Act 1982, c 11 (UK) RSC 1985, Appendix II No 44).

265 *Human Life International in Canada Inc v Minister of National Revenue* [1998] 3 FC 202 (FCA) at [29].

266 *Re Greenpeace of New Zealand Inc* [2015] 1 NZLR 169 (SC) at [63].

Instead, as Strayer JA noted, the record on appeal consists of a “multitude of documents put in by the agreement of the parties”, requiring the court to “review the relevant questions of law and fact without the benefit of any findings of fact by a trial court and indeed without the benefit of any sworn evidence”.²⁶⁷ The impact of this factor is critical, as discussed further below in chapter 6 (*Appeals*).

With respect to HLIC’s Charter argument based on freedom of expression, the Federal Court of Appeal applied a “tax expenditure analysis” to hold as follows:²⁶⁸

... the basic premise of the appellant is untenable. Essentially its argument is that a denial of tax exemption to those wishing to advocate certain opinions is a denial of freedom of expression on this basis. On this premise it would be equally arguable that anyone who wishes the psychic satisfaction of having his personal views pressed on his fellow citizens is constitutionally entitled to a tax credit for any money he [sic] contributes for this purpose. The appellant is in no way restricted by the Income Tax Act from disseminating any views or opinions whatever. The guarantee of freedom of expression in paragraph 2(b) of the Charter is not a guarantee of public funding through tax exemptions for the propagation of opinions no matter how good or sincerely held ... I do not believe that the system of tax exemption for charities is relevant to freedom of expression in the circumstances of this case

In reaching these findings, the court asserts, but does not analyse, the proposition that registration as a charity should be equated with a “guarantee of public funding” (that is, a subsidy). In other words, a tax expenditure analysis is assumed without critical analysis. It should be noted that when charities’ eligibility for registration, and their rights to freedom of expression, are decoupled from a tax expenditure analysis, different conclusions are reached, as discussed further below in the context of the *Canada Without Poverty* case.

Vancouver Society of Immigrant and Visible Minority Women

The 1999 decision of the Supreme Court of Canada in *Vancouver Society* was the first time the Supreme Court of Canada had considered the application of the law of charity in Canada in more than 25 years.²⁶⁹

Although the applicant society was ultimately unsuccessful in its application for charitable registration, the Supreme Court of Canada set out some important statements of general principle regarding the distinction between purposes and activities, including the following:²⁷⁰

In the law of charity, the courts’ primary concern is to determine whether the purposes being pursued are charitable. It is these purposes which are essential, not the activities engaged in, although the activities must, of course, bear a coherent relationship to the purposes sought to be achieved ... A common source of confusion in this area is that judges and commentators alike often conflate the concept of “charitable purposes” and “charitable activities”. The former is a long-established concept in the common law of charitable trusts. The latter is a much more recent innovation: it is contained in the ITA, but has no history in the common law ...

A critical difference between purposes and activities is that purposes may be defined in the abstract as being either charitable or not, but the same cannot be said about activities. That is, one may determine whether an activity is charitable only by reference to a previously identified charitable purpose(s) the activity is supposed to advance. The question then becomes one of determining whether the activity has the effect of furthering the purpose or not ... In determining whether an organization should be registered as a charitable organization, we must, as my colleague Iacobucci J indicates, look not only to the purposes for which it was originally instituted, but also to what the organization actually does, that is, its activities. But we must begin by examining the organization’s purposes, and only then consider whether its activities are sufficiently related to those purposes.

... Purposes are the ends to be achieved: activities are the means by which to accomplish those ends. Purposes must be evaluated substantively. Activities are assessed by determining the degree to which they actually are instrumental in achieving the organisation’s goals. ...

267 *Human Life International in Canada Inc v Minister of National Revenue* [1998] 3 FC 202 (FCA) at [1].

268 *Human Life International in Canada Inc v Minister of National Revenue* [1998] 3 FC 202 (FCA) at [35].

269 *Alliance for Life v Minister of National Revenue* [1999] 3 FC 504.

270 *Vancouver Society of Immigrant and Visible Minority Women v Minister of National Revenue* [1999] 1 SCR 10 at [52] - [59] per Gonthier J (dissenting) (emphasis in original).

I consider the key questions to be: (a) are the organization's purposes charitable? and (b) are the activities the organization engages in sufficiently related to its purposes to be considered to be furthering them. I would therefore reformulate my colleague's [Iacobucci J's] first proposition into two parts: (a) an organization must be constituted exclusively for charitable purposes; and (b) its activities must be substantially connected to, and in furtherance of, those purposes. So, when Iacobucci J. states, at para. 160, that "[i]n the end, while it is true that at least some of the Society's purposes contemplate charitable activities, it cannot be said that they restrict the Society to charitable activities alone", this strikes me as a roundabout way of contending that either (a) not all of the Society's purposes are charitable; or (b) even if the Society's purposes are charitable, not all of its activities are sufficiently connected to its purposes. ...

Marceau J.A. was surely right to hold that the courts must scrutinize the activities of a would-be charitable organization, and that the courts should not confine their gaze to the applicant's constituting document. But that proposition does not displace my earlier observation that the courts must evaluate the charitable nature of activities by reference to their degree of relationship with the charitable purposes which they purport to advance. Marceau J.A. himself recognised that the evaluation must be an objective one ... the degree of connection between the activity and the charitable purpose which it furthers must be the primary consideration in the determination as to whether an activity is charitable.

Despite the language of the ITA, at least one prominent commentator strongly doubts whether such a thing as a "charitable activity" can be said to exist at all: see M.C. Cullity, "The Myth of Charitable Activities" (1990) 10 *Est. & Tr. J.* 7. That is, activities cannot be characterised as charitable or non-charitable in the abstract, but only by reference to the purposes which they further ...

In the writer's respectful view, the above jurisprudence accurately reflects the law that applies in New Zealand, and explains why s 18(3) of the Charities Act requires regard to be had to activities in assessing whether an entity is eligible for charitable registration: activities are not assessed for the purpose of determining whether they are "charitable"; instead, beyond limited reference to extrinsic material where a constituting document is unclear or where activities belie the stated purposes, regard is had to activities to assess whether they are consistent with or supportive of the entity's stated charitable purposes. If they are there is no difficulty.²⁷¹

However, the approach in Canada has had to diverge from the above common law position due to the references to "charitable activities" and "political activities" that have been enshrined in legislation. It is important to understand the significance of this factor: the introduction of "activities" concepts into the statutory regime has been described as "among the most difficult ideas to grapple with"²⁷² and an "inherent weakness" in the Canadian system that has given rise to almost 40 years of confusion, consultation, clarification and concern;²⁷³ it has led to an overemphasis on controlling the tax expenditure,²⁷⁴ achieved through an "arbitrary application of the rules"²⁷⁵ including by parsing an organisation's operations into artificial component parts, and branding them as entirely unacceptable based solely on one of those parts²⁷⁶ (an issue that is now also causing difficulty in New Zealand, as discussed above in the *Greenpeace* case study).

It is important to note that the New Zealand legislation contains no such references: s 18(3) requires regard to be had to activities, but at no point are activities required to

271 *Re The Foundation for Anti-Aging Research* (2016) 23 PRNZ 726 (HC) at [82] - [88].

272 P Broder "[Report of the Senate Special Committee on the Charitable Sector – A response](#)" (2020) The Philanthropist Journal.

273 [Report of the Consultation Panel on the Political Activities of Charities](#) 31 March 2017, section A – History; and *Vancouver Society of Immigrant and Visible Minority Women v Minister of National Revenue* [1999] 1 SCR 10 at [152].

274 P Broder "[Report of the Senate Special Committee on the Charitable Sector – A response](#)" (2020) The Philanthropist Journal.

275 Submission of the *Pemsel* Case Foundation to the Consultation Panel on the Political Activities of Charities, referred to in the [Report of the Consultation Panel on the Political Activities of Charities](#) 31 March 2017, section A – Background and History.

276 Submission of the *Pemsel* Case Foundation to the Consultation Panel on the Political Activities of Charities, referred to in the [Report of the Consultation Panel on the Political Activities of Charities](#) 31 March 2017, section A – Background and History.

be characterised as “charitable” or “political”; instead, the New Zealand legislation follows the common law approach of requiring *purposes* to be charitable (s 13), with activities then assessed to determine whether they further those charitable purposes, as discussed above.

In assessing whether Canadian case law should be followed in New Zealand, it is important that factors such as the limited nature of the hearing on a charities’ registration appeal in Canada, the statutory references in Canadian tax legislation to charitable and political activities (which have no equivalent in New Zealand), and the impact of an underlying tax expenditure analysis, are all taken into account.

It should also be noted that the statutory basis on which cases such as *Positive Action Against Pornography* and *Human Life International* were decided has since been changed: in other words, Canada has now abandoned the original approach that so heavily influenced New Zealand interpretations, as discussed further below.

The 2003 Policy Statement

Despite the clarification about the distinction between purposes and activities provided by the Supreme Court of Canada in *Vancouver Society*, charities in Canada continued to express uncertainty about the limits imposed on what they could say.²⁷⁷ To address these concerns, in 2003, the CRA issued Policy Statement CPS-022 *Political Activities* (“**the 2003 Policy Statement**”).

The 2003 Policy Statement continued the interpretation of the words “substantially all” in s 149.1(6.2) (the 10% rule), and required charities to monitor and provide quantitative reporting to demonstrate compliance with it. However, this approach did not alleviate the underlying confusion:²⁷⁸

One strong message that emerged from feedback was that the lack of clarity, whether with the rules or their application, means some charities view political activities as too risky to carry out and engage in self-censorship. Without knowing the exact parameters within which they can operate, and given the penalty laid out in the Act for even an accidental breach of the rules may be deregistration, many charities make a rational choice to avoid or limit the risk. Further, the financial and human resources costs of tracking the use of internal resources for political activities (including the need to obtain legal counsel to ensure that rules are not breached) acts as an additional barrier to participation.

In other words, the lack of clarity and confusion was discouraging charities from participating in public debate, and dampening an “enormous amount of expertise and knowledge”, as charities chose not to engage in advocacy for fear of loss of charitable status.²⁷⁹

The Political Activities Audits

Difficulties were exacerbated when, in 2012, the Conservative federal government allocated several million dollars to the CRA to undertake a programme of “Political Activities Audits”.

Against a backdrop of a number of environmental and indigenous charities that were actively opposing an extensive oil pipeline project, the stated objective of the Political Activities Audits programme was to determine if charities were in compliance with the

²⁷⁷ [Report of the Consultation Panel on the Political Activities of Charities](#) 31 March 2017, section A – History.

²⁷⁸ [Report of the Consultation Panel on the Political Activities of Charities](#) 31 March 2017, section A – History and section D – Carrying out political activities.

²⁷⁹ See Report of the Special Senate Committee on the Charitable Sector [Catalyst for Change: A Roadmap to a Stronger Charitable Sector](#) June 2019 at 84, referring to the evidence of Professor Susan Phillips. See also Ontario Law Reform Commission *Report on the Law of Charities* (Toronto, 1996) at 335: “[I]n our view, the general qualitative standards in these areas are poorly formulated or poorly understood, and the quantitative standards are inappropriate ...”; and 362: “... although the current regime uses the technique of a quantitative rule – the “ten percent of resources” rule as well as the restrictions imposed by the disbursement quotas – this regime is too difficult to apply to be of much use or assurance to charities. Moreover, this quantitative standard is obligatory, not optional, so it applies in some cases to restrict ancillary or political activities [sic] that should be permitted”.

10% rule set out in the 2003 Policy Statement.²⁸⁰ Of the sixty charities selected for audit, many raised concerns that the selections were politically motivated, as the programme appeared to be targeting charities critical of the government's policies.²⁸¹

Whether or not there was political interference in the regulatory functions of CRA, the perception of harassment was damaging, and created a climate of fear and mistrust (exacerbated by the lack of transparency due to tax secrecy provisions).²⁸² The audits were expensive and stressful for charities, with one organisation reportedly spending some \$200,000 on legal fees to deal with a federal audit followed by a warning of loss of charitable status.²⁸³ The net result was a pervasive "advocacy chill" as charities (and donors) self-censored.²⁸⁴

By 2017, 49 charities had been audited, nine of which had their registrations revoked (or intentions to revoke were issued), two had registrations annulled, and one voluntarily revoked its registration.²⁸⁵ However, because CRA often preferred to pursue other, non-"political" violations for deregistrations, and due to the limited nature of the hearing available to charities challenging a registration decision under income tax legislation, a case by which to put the 10% rule to the test did not immediately present itself.²⁸⁶

The Consultation Panel on the Political Activities of Charities

The Political Activities Audits became an election issue. In 2015, the opposition Liberal party campaigned successfully on an election promise of "ending the political harassment of charities".²⁸⁷

In November 2015, newly-elected Prime Minister, Rt Hon Justin Trudeau, issued a mandate letter to the new Minister of National Revenue, asking her to prioritise allowing charities to "do their work on behalf of Canadians free from political harassment" with an understanding that charities "make an important contribution to public debate and public policy".²⁸⁸ The promise of possible reform was welcomed by the charitable sector.²⁸⁹

The new Government initially moved quickly. The March 2016 Federal Budget announced that a consultation process would be undertaken to "clarify the rules governing the political activities of charities".²⁹⁰ A few months later, in September 2016, the Minister of National Revenue established a Consultation Panel on the Political Activities of Charities

280 K Chan "[Constitutionalising the Registered Charity Regime: reflections on Canada Without Poverty](#)" (2020) 6 CJCCL 151 at 162; [Report of the Consultation Panel on the Political Activities of Charities](#) 31 March 2017 "History"; M McGregor-Lowndes and B Wyatt (eds) *Regulating Charities: the Inside Story* (Routledge, New York, 2017) at 280; B Wyatt "It Should Have Been So Simple: The Regulation of Charities in Canada" in SD Phillips and B Wyatt (eds) *Intersections and Innovations: Change for Canada's Voluntary and Nonprofit Sector* (Edmonton, AB, Canada: Muttart Foundation, 2021) ch 4 at 6: muttart.org/wp-content/uploads/2021/09/Chapter-4-Regulation_of_Charities.pdf, and D Beeby "[Ottawa drops appeal in political activity case, ending charities' 7-year audit nightmare](#)" 31 January 2019.

281 D Beeby "[Ottawa drops appeal in political activity case, ending charities' 7-year audit nightmare](#)" 31 January 2019; M Rabson "[Feds allow charities to engage in political, but not partisan, activity](#)" National Post 16 August 2018; B Wyatt "It Should Have Been So Simple: The Regulation of Charities in Canada" in SD Phillips and B Wyatt (eds) *Intersections and Innovations: Change for Canada's Voluntary and Nonprofit Sector* (Edmonton, AB, Canada: Muttart Foundation, 2021) ch 4 at 6.

282 [Report of the Consultation Panel on the Political Activities of Charities](#) 31 March 2017, recommendation 2 – rationale and C Linnitt "[Trudeau instructs Minister of National Revenue to free charities from political harassment](#)" The Narwhal 18 November 2015.

283 M Rabson "[Feds allow charities to engage in political, but not partisan, activity](#)" National Post 16 August 2018.

284 [Report of the Consultation Panel on the Political Activities of Charities](#) 31 March 2017, Executive Summary and recommendation 2 – rationale; and D Beeby "CRA loses Court challenge to its political-activity audits of charities" 17 July 2018: www.cbc.ca/news/politics/charity-political-audits-cra-lebouthillier-farha-poverty-environmental-gray-liberal-1.4750295.

285 B Wyatt "It Should Have Been So Simple: The Regulation of Charities in Canada" in SD Phillips and B Wyatt (eds) *Intersections and Innovations: Change for Canada's Voluntary and Nonprofit Sector* (Edmonton, AB, Canada: Muttart Foundation, 2021) ch 4 at 6.

286 M McGregor-Lowndes and B Wyatt (eds) *Regulating Charities: the Inside Story* (Routledge, 2017) at 280.

287 D Beeby "[Political activity audits of charities suspended by Liberals](#)" CBC News 4 May 2017.

288 Office of the Prime Minister [Minister of National Revenue Mandate Letter](#) 12 November 2015.

289 M McGregor-Lowndes and B Wyatt (eds) *Regulating Charities: the Inside Story* (Routledge, 2017) at 281.

290 Government of Canada [Budget 2016 - Growing the Middle Class](#) 22 March 2016 at 206: www.budget.gc.ca/2016/docs/plan/toc-tdm-en.html.

("the Consultation Panel") to provide recommendations using feedback from the consultation.²⁹¹ Nearly 20,000 submissions were received.²⁹²

The findings of the Consultation Panel are significant. Reporting in March 2017, the Consultation Panel described the legislative framework for charities in Canada as "outdated", "overly restrictive", "antiquated, subjective, arbitrary and confusing" and "denying Canadians the right to have their voices heard through the charities they support".²⁹³

The Consultation Panel emphasised the need for a legal framework that *enables* and maximises the contributions of charities, and respects and encourages their participation in public policy dialogue and development. Noting that "[d]iscrepancies have arisen between the common law governing charities and the manner in which charities' activities are regulated",²⁹⁴ the Panel made four recommendations designed to "break the cycle of ambiguity, confusion and uncertainty". Two related to interim administrative changes and two focused on longer term legislative change, namely:

- i. Noting that terminology lies at the root of much of the confusion and uncertainty being experienced, the Consultation Panel recommended that the income tax legislation be amended by deleting any reference to non-partisan "political activities" to explicitly allow charities to fully engage, without limitation, in non-partisan public policy dialogue and development, provided it is subordinate to and furthers their charitable purposes (recommendation 3).
- ii. The Consultation Panel also recommended that the legislative framework governing charities be modernised to "ensure a focus on charitable purposes rather than activities" and to adopt an inclusive list of acceptable charitable purposes to reflect current social and environmental issues and approaches (recommendation 4).

Implementing these recommendations will "improve the quality of public policy dialogue and development in Canada, while reducing administrative complexity and cost" for both the sector and government.²⁹⁵

Two months' later, in May 2017, the Government welcomed the Panel's report, recognising the key role that charities play in Canadian society and the vast experience they bring to public debate and the formulation of public policy.²⁹⁶ The Minister of Revenue took an immediate first step of suspending the Political Activities Audit program.

However, there was then silence for more than year as to how the Liberal Government would respond to the Panel's recommendations.²⁹⁷

Canada Without Poverty

Momentum for change intensified when, in July 2018, the Ontario Superior Court of Justice handed down its ruling in *Canada Without Poverty*,²⁹⁸ a significant and influential decision with important implications for New Zealand.

291 [Report of the Consultation Panel on the Political Activities of Charities](#) 31 March 2017, Background; and Report of the Special Senate Committee on the Charitable Sector [Catalyst for Change: A Roadmap to a Stronger Charitable Sector](#) June 2019 at 85.

292 [Report of the Consultation Panel on the Political Activities of Charities](#) 31 March 2017 "Consultation Process".

293 [Report of the Consultation Panel on the Political Activities of Charities](#) 31 March 2017 "Executive Summary", referring to the submission from West Coast Environmental Law.

294 [Report of the Consultation Panel on the Political Activities of Charities](#) 31 March 2017 "F: Recommendations and Rationale", referring to the submission of Imagine Canada.

295 [Report of the Consultation Panel on the Political Activities of Charities](#) 31 March 2017 "Executive Summary".

296 <www.canada.ca/en/revenue-agency/news/2017/05/minister-lebouthillierwelcomesthepanelreportonthepublicconsultat.html>.

297 D Beeby "CRA loses Court challenge to its political-activity audits of charities" 17 July 2018.

298 *Canada Without Poverty v Attorney-General of Canada* 2018 ONSC 4147. See Report of the Special Senate Committee on the Charitable Sector [Catalyst for Change: A Roadmap to a Stronger Charitable Sector](#) June 2019 at 85. See also P Broder "Report of the Senate Special Committee on the Charitable Sector – A response" (2020) *The Philanthropist Journal*: "[a]lthough the political activities reform is now in place, it is worth remarking that it took a successful court challenge to the old ITA provisions under the Canadian Charter of Rights and Freedoms ... to prompt it".

Canada Without Poverty (“**CWP**”) is an established and well-respected poverty-relief charity in Canada.²⁹⁹

CWP’s primary means of achieving an end to poverty is by engaging in public advocacy for policy and attitudinal change.³⁰⁰ To that end, CWP embraced the *Copenhagen Declaration on Social Development* (the “**Copenhagen Declaration**”),³⁰¹ a global framework that recognises poverty can lead to a lack of participation in civil, social and cultural life, and strives for the full civic engagement of people living in poverty: “[e]mpowerment requires the full participation of people in the formulation, implementation and evaluation of decisions determining the functioning and wellbeing of our societies”.³⁰²

In other words, CWP’s purpose is to relieve poverty by sharing “ideas rather than nutrition”.³⁰³ This wording is important as the CRA considers registered charities may *relieve* poverty but not *prevent* it:³⁰⁴

Although charities can be established to relieve poverty, they cannot be established to prevent poverty. Preventing poverty implies that the beneficiaries are not experiencing poverty, a requirement for beneficiaries under the relief of poverty category. However, charities can have activities that have the **effect** of preventing poverty. Such activities typically advance purposes in one or more of the other charitable categories where the beneficiaries **are not** restricted to those that are poor (the advancement of education, the advancement of religion, or other purposes beneficial to the community).

This is a very narrow approach that can be contrasted with the approach taken in most comparable jurisdictions, where both the relief and the prevention of poverty have been recognised as charitable purposes by legislation (as discussed above in chapter 3).

The Copenhagen Declaration was followed by a Canadian Parliamentary Committee, which similarly recommended “a broad understanding of poverty and social exclusion to address the root causes of these problems”; the committee also spoke of instilling a “shift in perspective” so that poverty reduction is pursued by means of “co-engagement and consultations with community organisations and poverty constituencies”. In reliance on these and other studies, CWP placed its resources and efforts behind civic engagement and public dialogue, with a view to bringing about legislative and policy change for the effective relief of poverty.³⁰⁵ In other words, most of CWP’s activities were “public forms of expression”, representing its efforts to “engage its constituency in democratic processes” in the manner recognised, by both the Copenhagen Declaration and the Parliamentary Committee, as “essential to the effective relief of poverty”.³⁰⁶

The CRA audited CWP as part of its “Political Activities Audit” programme. On 9 January 2015, the CRA concluded that “virtually all” of CWP’s activities, including even contemplating whether activities were “political” or not, constituted impermissible “political activities”;³⁰⁷ on that basis, the CRA considered CWP was in breach of the 10% rule and should therefore be deregistered.³⁰⁸

A case by which to put the 10% rule to the test had now presented itself.

In response, and aware of the limited nature of the hearing available to charities under a registration appeal under income tax legislation, CWP did not wait for CRA to make a formal deregistration decision; instead, CWP issued a “pre-emptive strike” by challenging CRA’s 10% rule on constitutional grounds. CWP argued that:³⁰⁹

299 K Chan “[Constitutionalising the Registered Charity Regime: reflections on Canada Without Poverty](#)” (2020) 6 at 170.

300 *Canada Without Poverty v Attorney-General of Canada* 2018 ONSC 4147 at [12].

301 United Nations World Summit for Social Development *Copenhagen Declaration on Social Development* 14 March 1995, A/CONF 166/9 (1995).

302 *Canada Without Poverty v Attorney-General of Canada* 2018 ONSC 4147 at [12] - [16].

303 *Canada Without Poverty v Attorney-General of Canada* 2018 ONSC 4147 at [13].

304 Government of Canada *Relief of poverty and charitable registration* CG-029 27 November 2020: www.canada.ca/en/revenue-agency/services/charities-giving/charities/policies-guidance/charitable-registration-relief-poverty.html (emphasis in original).

305 *Canada Without Poverty v Attorney-General of Canada* 2018 ONSC 4147 at [16] - [18], [21], [41].

306 *Canada Without Poverty v Attorney-General of Canada* 2018 ONSC 4147 at [20], [40].

307 *Canada Without Poverty v Attorney-General of Canada* 2018 ONSC 4147 at [19], [22].

308 D Beeby “[CRA loses Court challenge to its political-activity audits of charities](#)” 17 July 2018.

309 *Canada Without Poverty v Attorney-General of Canada* 2018 ONSC 4147 at [8], [9], [18], [23].

- i. public advocacy for policy change is fundamental to its charitable purpose of poverty relief, which cannot be achieved without this component;
- ii. section 149.1(6.2) is overly broad, confusing, complicated to define and track, and is premised on an incoherent distinction between permitted “charitable activities” and prohibited “political activities”;
- iii. there is no valid distinction between political expression and charitable activities: with the exception of partisan political involvement (which was accepted as impermissible), all activities aimed at fulfilling an organisation’s charitable purposes are “charitable activities”; and
- iv. CRA’s 10% rule interpreting the “substantially all” requirement in s 149.1(6.2), as applied to public policy advocacy by registered charities, infringes freedom of expression under s 2(b) of the Charter.

As CWP subsequently told the Senate Committee:³¹⁰

We argued the restrictions on non-partisan political activities restricted our ability to engage with our members and the public in pursuing our charitable purpose of relieving poverty. We argued the provisions stifled the voices of people living in poverty to share their experiences, identify the causes of poverty and publicize recommendations for necessary changes to laws, policies and programs to relieve poverty ... unlike old models of almshouses and soup kitchens, CWP’s work to relieve poverty by sharing ideas, achieving attitudinal changes and engaging in public policy dialogue was necessary for the achievement of our purpose.

In response, the Attorney-General of Canada sought to apply a tax expenditure analysis, arguing that charitable status under the income tax legislation “is” a tax benefit, which is “economically the same as a government subsidy”; citing *Human Life International*, the Attorney-General rejected the notion that “a denial of tax exemption to those wishing to advocate certain opinions is a denial of freedom of expression”, and argued that CWP has a right to free speech “but not to subsidised speech”.³¹¹ On the basis that freedom of expression “prohibits gags but does not compel the distribution of megaphones”, the Attorney-General argued registered charitable status is a “megaphone” and its deprivation does not amount to a “gag”.³¹² In constitutional law terms, the Attorney-General characterised CWP’s claim as a “positive rights” claim that did not fit within the structure of Charter rights.³¹³

However, EM Morgan J of the Ontario Superior Court of Justice disagreed.

EM Morgan J noted that CWP could not pursue its charitable purpose (using methodology that is recognised as necessary by Parliament itself) while restricting its politically expressive activity to 10% of its resources: in effect, the language of s 149.1(6.2) and CRA’s interpretation of it made CWP’s charitable purpose “untenable”.³¹⁴ Importantly, CWP had given uncontroverted affidavit evidence that its viability depended on its registered charitable status, without which it would not be able to pursue its charitable purposes.³¹⁵ EM Morgan J found the charity registration platform created by the income tax legislation exists to support charitable works, and that CRA’s enforcement of s 149.1(6.2), in burdening free expression “seriously impairs those works”, concluding as follows:³¹⁶

The Applicant, a registered charity, has a *right to effective freedom of expression* – ie the ability to engage in unimpaired public policy advocacy toward its charitable purpose. The burden imposed by the impugned section of the ITA and by the policy measure adopted by CRA in administering that section *runs counter to that right*.

The Applicant is therefore in a position that is akin to that of the agricultural workers in *Dunmore*. The shortcomings of a legislative regime undermine or burden the exercise of a

310 Report of the Special Senate Committee on the Charitable Sector *Catalyst for Change: A Roadmap to a Stronger Charitable Sector* June 2019 at 85.

311 *Canada Without Poverty v Attorney-General of Canada* 2018 ONSC 4147 at [31].

312 *Canada Without Poverty v Attorney-General of Canada* 2018 ONSC 4147 at [32] - [33] referring to *Haig v The Queen* [1993] 2 SCR 995 at 1035.

313 *Canada Without Poverty v Attorney-General of Canada* 2018 ONSC 4147 at [32].

314 *Canada Without Poverty v Attorney-General of Canada* 2018 ONSC 4147 at [42].

315 *Canada Without Poverty v Attorney-General of Canada* 2018 ONSC 4147 at [32], [39], [43].

316 *Canada Without Poverty v Attorney-General of Canada* 2018 ONSC 4147 at [43], [46] - [48] (emphasis added).

Charter right. This burden prevents or impairs the right holder from taking advantage of a state-supplied platform that it could otherwise freely access were it not for its insistence on exercising that right. *The Applicant's right to freedom of expression under s 2(b) of the Charter is thereby infringed.*

Having found that s 149.1(6.2), and CRA's interpretation of it, infringed CWP's right to freedom of expression, the burden then fell to the Attorney-General to establish that such infringement is reasonable and justified in a free and democratic society.³¹⁷ Given the fundamental importance of freedom of expression, EM Morgan J noted it should only be restricted in the clearest of circumstances, where it was necessary to do so, did not go too far, and enhanced more than harmed the democratic process.³¹⁸

EM Morgan J rejected the arguments of the Attorney-General in this regard. After referring to the findings of the Consultation Panel,³¹⁹ the objective of s 149.1(6.2) was found to be to limit political expression – that is, to keep it to a small percentage of the organisation's time, effort and resources – and that such limitation was “apparently pursued for its own sake”:³²⁰

The legislative purpose appears to be to minimise the very activity that the government supposedly wants to foster – a registered charity's ability to participate in public policy dialogue where these activities advance its charitable purpose ...

The government generally, and the Attorney-General in this case, approach the issue as though the need to limit the political expression of charitable organisations in this way is self-evident. It is not; indeed, it is self-evidently not.

On that basis, EM Morgan J found the 10% rule was an unjustified infringement on freedom of expression:³²¹

As long as the advocacy is done in pursuit of the overall charitable purpose – for the Applicant, the relief of poverty – such “political activities” are charitable activities.

Accordingly, an organisation such as the Applicant can spend “substantially all” of its resources on non-partisan public policy advocacy or communications aimed at changing hearts and minds with respect to poverty and its causes and remedies ... and still be spending “substantially all” of its time on charitable activities as required by s 149.1(6.2).

Consequently, s 149.1(6.2)(a) and (b) were declared to have no force and effect (while the prohibition on partisan political activities in s 149.1(6.2)(c) was not disturbed).³²²

The CWP decision was welcomed by the charitable sector and, importantly, prompted the Government to act:³²³ the following month, the Canadian Government announced it would change the law to implement recommendation 3 of the Consultation Panel's recommendations (to explicitly allow charities to fully engage, without limitation, in non-partisan public policy dialogue and development that furthers their charitable purposes).³²⁴

Negative and positive rights' claims

However, while the CWP decision was momentous, it has been criticised for not explicitly applying the negative rights/positive rights framework articulated by the Supreme Court of Canada in its s 2(b) jurisprudence:³²⁵

317 *Canada Without Poverty v Attorney-General of Canada* 2018 ONSC 4147 at [49].

318 *Canada Without Poverty v Attorney-General of Canada* 2018 ONSC 4147 at [28] - [29], [52], referring to *BC Freedom of Information and Privacy Association v Attorney General of British Columbia* [2017] 1 SCR 93 at [16] and *Edmonton Journal v Alberta* [1989] 2 SCR 1326 at 1336.

319 *Canada Without Poverty v Attorney-General of Canada* 2018 ONSC 4147 at [25] - [27], [61].

320 *Canada Without Poverty v Attorney-General of Canada* 2018 ONSC 4147 at [57] - [62].

321 *Canada Without Poverty v Attorney-General of Canada* 2018 ONSC 4147 at [62] - [69], [70].

322 *Canada Without Poverty v Attorney-General of Canada* 2018 ONSC 4147 at [72].

323 M Rabson “[Feds allow charities to engage in political, but not partisan, activity](#)” National Post 16 August 2018; D Beeby “[CRA loses Court challenge to its political-activity audits of charities](#)” 17 July 2018; Global News “[Government drops appeal, clearing the way for charities to engage in political activity](#)” 1 February 2019.

324 Canada Revenue Agency [Statement by the Minister of National Revenue and the Minister of Finance on the Government's commitment to clarifying the rules governing the political activities of charities](#) 15 August 2018.

325 K Chan “[Constitutionalising the Registered Charity Regime: reflections on Canada Without Poverty](#)” (2020) 6 CJCL 151 at 173 - 174 (footnotes omitted).

The Court has defined a 'negative' freedom of expression claim as a claim to 'freedom from government legislation or action suppressing an expressive activity in which people would otherwise be free to engage, without any need for any government support or enablement'. A positive rights claim, on the other hand, is a claim 'that government must legislate or otherwise act to support or enable an expressive activity'.

The Supreme Court of Canada has historically taken a generous approach to negative section 2(b) claims ... [but] has taken a less generous approach to positive rights claims. In particular, the Court has held that section 2(b) does not generally impose a positive obligation 'to facilitate expression by providing individuals with a particular *means* of expression'. A long line of 'statutory platform' cases establish that where the government chooses to establish a specific means or statutory platform for expression, it is generally under no constitutional obligation to extend that platform to everyone.

The Supreme Court of Canada has been reluctant to recognise positive rights under any branch of section 2. However, the case law leaves open the possibility that in 'exceptional' cases, positive government action may be required in order to make a fundamental freedom meaningful.

While distinguishing between negative and positive rights claims is not necessarily straightforward,³²⁶ the Canadian Government expressed concern about the possible implications of the decision:³²⁷

Those concerns could include whether the case would mean the government must provide charitable status to any group that requests it without limits, and whether there is a constitutional right to charitable status

The Government was also concerned that the court applied a test for religious freedom, rather than for freedom of expression.³²⁸

On these bases, the Canadian Government announced that it would appeal the *Canada Without Poverty* decision; however, it then subsequently announced that the appeal would be dropped:³²⁹

After losing the case, the Liberal government eventually agreed to rewrite the Income Tax Act to accommodate Justice Morgan's ruling – but paradoxically announced Aug 15 it was appealing the case because of an alleged error of law in the judgment.

Anne Ellefsen-Gauthier, spokesperson for National Revenue Minister Diane LeBouthillier, told CBC News the government still believes Morgan made an error in law by applying a test for religious freedom rather than for freedom of expression.

But after consulting with the charity sector last fall and reviewing higher court rulings, the government has decided not to fight the Ontario case because little would be gained by the effort.

'Higher courts have already been pretty clear on the different test that needs to be applied to freedom of expression,' said Ellefsen-Gauthier. 'We're dropping the appeal.'

As a result, a "7-year audit nightmare" for CWP was brought to an end.³³⁰

The decision in *Canada Without Poverty* has been described as having accomplished in one bold superior court action what 40 years of charity law reform advocacy could not;³³¹ it has been hailed as a "huge victory for democracy in Canada", and likely to have a "positive effect not only in Canada, but worldwide".³³²

326 K Chan "[Constitutionalising the Registered Charity Regime: reflections on *Canada Without Poverty*](#)" (2020) 6 CJCL 151 at 176.

327 M Rabson "[Feds allow charities to engage in political, but not partisan, activity](#)" National Post 16 August 2018. See also D Beeby "[Ottawa drops appeal in political activity case, ending charities' 7-year audit nightmare](#)" 31 January 2019.

328 D Beeby "[Ottawa drops appeal in political activity case, ending charities' 7-year audit nightmare](#)" 31 January 2019.

329 D Beeby "[Ottawa drops appeal in political activity case, ending charities' 7-year audit nightmare](#)" 31 January 2019; Government of Canada *Government response to the Report of the Consultation Panel on the Political Activities of Charities* 7 March 2019: <www.canada.ca/en/revenue-agency/services/charities-giving/charities/whats-new/government-response-report-consultation-panel-political-activities.html>.

330 D Beeby "[Ottawa drops appeal in political activity case, ending charities' 7-year audit nightmare](#)" 31 January 2019.

331 K Chan "[Constitutionalising the Registered Charity Regime: reflections on *Canada Without Poverty*](#)" (2020) 6 CJCL 151 at 189.

332 D Beeby "[Ottawa drops appeal in political activity case, ending charities' 7-year audit nightmare](#)" 31 January 2019.

Implications of the decision for New Zealand are discussed further below.

Legislative change

Finally, on 29 October 2018, the Canadian federal government introduced Bill C-86, proposing to revise the rules relating to the “non-partisan political activities of charities”.³³³ The Bill passed into law on 13 December 2018,³³⁴ making the following amendments to Canadian income tax legislation:³³⁵

- (i) The requirement for charitable organisations to devote all their resources to “charitable activities carried on by the organization itself” has not changed, but a new definition of “charitable activities” has been inserted:

charitable activities includes public policy dialogue and development activities carried on in furtherance of a charitable purpose;

- (ii) In turn, a new definition of “public policy dialogue and development activities” has been inserted into s 149.1:

Public policy activities

(10.1) Subject to subsections (6.1) and (6.2), public policy dialogue and development activities carried on by an organization, corporation or trust *in support of its stated purposes shall be considered to be carried on in furtherance of those purposes* and not for any other purpose.

- (iii) Paragraphs (a) and (b) of s 149.1(6.2) have been deleted, removing the “substantially all” limitation (and therefore the 10% rule), and the concept of “political activities” from the legislation.
- (iv) Importantly, the partisan prohibition formerly contained in s 149.1(6.2)(c) has not been removed and is now in the following terms:

Charitable purposes

(6.2) For the purposes of the definition charitable organization in subsection (1), an organization that devotes *any part of its resources to the direct or indirect support of, or opposition to, any political party or candidate for public office* shall not be considered to be constituted and operated exclusively for charitable purposes

By these amendments, the federal Government implemented the Consultation Panel’s recommendation 3:³³⁶ registered charities in Canada are now expressly able to carry on unlimited advocacy (public policy dialogue and development) activities in support of their stated charitable purposes, provided they do not support or oppose a political party or a candidate for public office.³³⁷

In January 2019 (updated in November 2020), the CRA issued guidance providing the following indications as to how it would interpret the new rules:³³⁸

A charity is free to advocate for retaining, opposing, or changing any law, policy, or decision of government in furtherance of its *stated* charitable purpose

...

The CRA considers PPDDAs [public policy dialogue and development activities] to include:

Providing information – charities may provide information to their supporters or the general public related to their charitable purposes (*including the conduct of public awareness*

333 Parliament of Canada [Budget Implementation Act 2018 No 2 SC 2018](#) summary [(m)]:

334 Bill C-86, [Budget Implementation Act](#), No 2, 1st Sess, 42nd Parl, 2018.

335 Parliament of Canada [Bill C-86](#) (Royal Assent) 13 December 2018 (emphasis added).

336 Namely that the Income Tax Act be amended by deleting any reference to non-partisan political activities to explicitly allow charities to fully engage without limitation in non-partisan public policy dialogue and development, provided that it is subordinate to and furthers their charitable purposes (recommendation 3): www.canada.ca/en/revenue-agency/services/charities-giving/charities/about-charities-directorate/political-activities-consultation/consultation-panel-report-2016-2017.html.

337 Report of the Special Senate Committee on the Charitable Sector [Catalyst for Change: A Roadmap to a Stronger Charitable Sector](#) June 2019 at 86.

338 Government of Canada *Public policy dialogue and development activities by charities* 21 January 2019 (revised 27 November 2020): www.canada.ca/en/revenue-agency/services/charities-giving/charities/policies-guidance/public-policy-dialogue-development-activities.html (italicising added, bolding in original).

campaigns) in order to inform or persuade the public in regard to public policy. Such information must be truthful, accurate, and not misleading.

...

Disseminating opinions – charities may express opinions on matters related to their charitable purposes when participating in the development of public policy, as long as they draw on research or evidence, and they are not contrary to hate speech laws or other legitimate restrictions on freedom of expression.

...

Mobilising others – charities may call on supporters or the general public to contact elected officials, public officials, political parties, and candidates of all parties to express their support for, or opposition to, a particular law, policy or decision of any level of government in Canada or a foreign country.

Representations – charities may make representations in writing or verbally to elected officials, public officials, political parties, and candidates, and appear at parliamentary committees, to bring their views to the public policy development process, and may release such materials publicly ...

Providing forums and convening discussions – charities may invite competing candidates and political representatives to speak at the same event, or may request written submissions for publication, to discuss public policy issues that relate to the charity's purposes.

Communicating on social media – charities may express their views, and offer an opportunity for others to express their views, in regard to public policy, on social media or elsewhere. If the social media site or platform allows it, charities must remove any comments made on their site or platform that they should know are false or misleading.

A question now arises as to whether the findings in *Positive Action Against Pornography* and *Human Life International*, that the *McGovern* categories of proscribed political purpose should be extended to include "public awareness-raising" or "attempts to sway public opinion", remain good law in Canada.³³⁹

The new legislation makes the rules regarding charities' advocacy in Canada significantly more straightforward, creating "much less work for lawyers".³⁴⁰ Although there is disappointment that the reference to "charitable activities" has been retained,³⁴¹ fears that the changes would allow the entry as charities of "lobbying groups whose sole purpose is to advocate for a specific cause"³⁴² have not been borne out:³⁴³ as predicted by the Consultation Panel, the common law contains adequate protections by requiring a registered charity's purposes to be exclusively charitable, and by requiring all activities, including advocacy, to be carried out in furtherance of those stated charitable purposes.³⁴⁴

These changes have brought the law in Canada into line with that of all comparable jurisdictions,³⁴⁵ with the notable exception of New Zealand, as discussed further below.

339 This was a controversial extension. As noted by Hammond J in *Re Collier* [1998] 1 NZLR 81 (HC) at 90: "[t]he third category of prohibited 'political' purpose trusts are those for the perpetual advocacy of a particular point of view, or 'propaganda' trusts as they are sometimes pejoratively termed ... This, too, has to be a contentious category".

340 Interview with Terrance Carter, Managing Partner, Carters Professional Corporation (28 January 2021).

341 Report of the Special Senate Committee on the Charitable Sector *Catalyst for Change: A Roadmap to a Stronger Charitable Sector* June 2019 at 88, referring to the submission of Cooper (Canadian Bar Association).

342 *Report of the Consultation Panel on the Political Activities of Charities* 31 March 2017, recommendation 3, rationale.

343 Interview with Terrance Carter, Managing Partner, Carters Professional Corporation (28 January 2021).

344 *Report of the Consultation Panel on the Political Activities of Charities* 31 March 2017, recommendation 3, rationale.

345 Given the experience over the previous 40 years, the Special Senate Committee on the Charitable Sector recommended that the Government of Canada monitor the impact of the new rules through regular statutory review: Report of the Special Senate Committee on the Charitable Sector *Catalyst for Change: A Roadmap to a Stronger Charitable Sector* June 2019 at 88.

Australia

As discussed above, in 2010, the High Court of Australia held there was no general doctrine in Australia that excludes “political objects” from charitable purposes and has the scope indicated in England by *McGovern*.³⁴⁶ Following this decision, the Charities Act 2013 (Cth) was enacted, including s 12(1)(l) which provides as follows:

- (1) In any Act:
- charitable purpose** means any of the following:
- ...
- (l) the purpose of promoting or opposing a change to any matter established by law, policy or practice in the Commonwealth, a State, a Territory or another country, if:
- (i) in the case of promoting a change – the change is in furtherance or in aid of one or more of the purposes mentioned in paragraphs (a)-(k); or
- (ii) in the case of opposing a change – the change is in opposition to, or in hindrance of, one or more of the purposes mentioned in those paragraphs.

In other words, Australia has clarified by statute that there is no political purposes exclusion in Australian law.

The same year, Australia also enacted the Not-for-profit Sector Freedom to Advocate Act 2013 (Cth). As discussed above in chapter 1, the Australian Productivity Commission was concerned that government agencies contracting with not-for-profit entities may sometimes exert undue influence, for example by exercising government control over activities unrelated to the purpose of the funded activity.³⁴⁷ The Commission considered that, where such influence or control is exerted by government in order to limit advocacy and other activities of not-for-profit entities, it is likely to be “wasteful of public funds, and may also distort the best endeavours of community organisations”.³⁴⁸ Accordingly, the Commission recommended Australian governments making grants or funding service provision should “respect the independence of funded organisations and not impose conditions associated with the general operations of the funded organisation, beyond those essential to ensure the delivery of agreed funding outcomes”.³⁴⁹

This recommendation was implemented by means of the Not-for-profit Sector Freedom to Advocate Act: described as an Act to “prohibit Commonwealth agreements from restricting or preventing not-for-profit entities from commenting on, advocating support for or opposing changes to Commonwealth law, policy or practice”,³⁵⁰ this legislation effectively prohibits government agencies from inserting “gag” clauses into contracts with not-for-profit entities.³⁵¹

Australia leads the common law world in having enacted these provisions.

In addition, while charities in Australia are able to be “political”, the Australian federal government has legislated to make it clear that charities may not be “partisan”. This has been implemented by s 5 of the Charities Act 2013 (Cth), which defines “charity” to mean an entity (emphasis added):

346 *Aid/Watch Inc v Commissioner of Taxation* [2010] HCA 42 at [48].

347 Australian Productivity Commission [Contribution of the Not-for-Profit Sector](#) 11 February 2010 at 293.

348 Australian Productivity Commission [Contribution of the Not-for-Profit Sector](#) 11 February 2010 at 296.

349 Australian Productivity Commission [Contribution of the Not-for-Profit Sector](#) 11 February 2010, recommendation 11.3.

350 [Not-for-profit Sector Freedom to Advocate Act 2013](#) (Cth) (long title).

351 Sections 4 and 5 prohibit a government agency from including any requirement that “restricts or prevents a not-for profit entity (including staff of the not-for-profit entity) from commenting on, advocating support for or opposing a change to any matter established by law, policy or practice of the Commonwealth” in federal government contracts.

- (a) that is a not-for-profit entity;
- (b) all of the purposes of which are:
 - (i) charitable purposes (see Part 3) that are for the public benefit (see Division 2 of this Part); or
 - (ii) purposes that are incidental or ancillary to, and in furtherance or in aid of, purposes of the entity covered by subparagraph (i); and

Note 1: In determining the purposes of the entity, have regard to the entity's governing rules, its activities and any other relevant matter.

Note 2: The requirement in subparagraph (b)(i) that a purpose be for the public benefit does not apply to certain entities (see section 10).
- (c) none of the purposes of which are **disqualifying purposes** (see Division 3); and
- (d) that is not an individual, **a political party** or a government entity.

A disqualifying purpose is further defined in section 11 to mean (emphasis added):

- (a) the purpose of engaging in, or promoting, activities that are unlawful or contrary to public policy; or
- Example: Public policy includes the rule of law, the constitutional system of government of the Commonwealth, the safety of the general public and national security.
- Note: Activities are not contrary to public policy merely because they are contrary to government policy.
- (b) the **purpose** of promoting or opposing a **political party or a candidate for political office**.
- Example: Paragraph (b) does not apply to the purpose of distributing information, or advancing debate, about the policies of political parties or candidates for political office (such as by assessing, critiquing, comparing or ranking those policies).
- Note: The purpose of promoting or opposing a change to any matter established by law, policy or practice in the Commonwealth, a State, a Territory or another country may be a charitable purpose (see paragraph (l) of the definition of **charitable purpose** in subsection 12(1)).

In other words, while Canada proscribes partisan political *activity*,³⁵² Australia proscribes partisan political *purposes*.³⁵³ Even so, both jurisdictions make it clear that charities may advance debate about the policies of political parties,³⁵⁴ or invite competing candidates to speak at the same event to discuss public policy issues that relate to the charity's purposes.³⁵⁵

Otherwise, subject to their constituting documents, the general law and the "partisan prohibition", charities in Australia are not legally prevented from advocating in furtherance of their stated charitable purposes.

Despite the permissive statutory framework, there have been many attempts in Australia to limit charities' advocacy,³⁵⁶ highlighting both the number of levers that government can pull,³⁵⁷ and that protecting the independence of charities and their ability to advocate for their charitable purposes requires eternal vigilance.

352 Income Tax Act, RSC 1985, c 1 (5th Supp) s 149.1(6.1), (6.2).

353 Charities Act 2013 (Cth) s 11(b).

354 Charities Act 2013 (Cth) s 11(b) (example).

355 Government of Canada [Public policy dialogue and development activities by charities](#) 21 January 2019 (revised 27 November 2020).

356 See the "Hands off our charities" campaigns: hooc.org.au/. See also: theconversation.com/are-charities-being-silenced-why-a-new-law-is-alarming-activists-and-could-scuttle-their-election-campaigns-173056.

357 M McGregor-Lowndes and B Wyatt (eds) *Regulating Charities: the Inside Story* (Routledge, New York, 2017) at 279: "[a]n informed public debate involving government, charities and others is one mark of a liberal democratic system. If there is a jostle, governments have both soft and coercive power to bring to bear on charities. Charities are not powerless in the contest. They use their trusted brand in the forum of public opinion, extensive networks, expertise, thwarting government administrative decisions through litigation, and sheer dogged determination that cannot be shaken in any contest. Governments have used their influence on charity tax status to bring charities to heel, and this has played out in a number of ways ... – from a dog-whistle tactic to scare risk-averse volunteer charity officers, to a legislative amendment removing tax concessions. Our sense is that some charities and governments are resorting increasingly to blunt influence levers, such as creating their own captive charities, and character attacks in the popular press."

Scotland

Scotland similarly maintains a statutory boundary between “political” and “partisan” in s 7(4) of the Charities and Trustee Investment (Scotland) Act 2005,³⁵⁸ which provides that a body does not meet the charity test if (emphasis added):

- (a) its constitution allows it to distribute or otherwise apply any of its property (on being wound up or at any other time) for a purpose which is not a charitable purpose,
- (b) its constitution expressly permits the Scottish Ministers or a Minister of the Crown to direct or otherwise control its activities, or
- (c) it is, or one of its purposes is to advance, *a political party*

The Scottish Statute does not otherwise discuss charities’ ability to advocate for their charitable purposes. However, in 2015, the Office of the Scottish Charity Regulator (“OSCR”) issued guidance on “party political purposes” that makes the following comments:³⁵⁹

Even if an organisation appears to have charitable purposes and provide public benefit, it cannot be a charity if:

- it is a political party, or
- one of its purposes is to advance a political party.

This does not stop charities campaigning, lobbying or taking part in other political activity, as long as:

- this activity *advances their charitable purposes*
- the charity’s governing document does not prohibit this kind of activity
- the activity is not advancing a particular political party
- the charity trustees are acting *in the charity’s interests*, and with due care and diligence.

Campaigning, for example to change the law or the public of public bodies, can be a charity’s *main activity* as long as it is advancing its charitable purposes and political campaigning does not become a purpose in itself.

OSCR expanded on this guidance in March 2021 as follows:³⁶⁰

Our position is that charities can campaign on political issues to advance their charitable purposes, including during electoral periods, as long as the requirements of charity law, and where necessary electoral law, are met.

Political campaigning – for example, taking a position for or against a change in policy or legislation – *is a legitimate way for many charities to achieve what they were set up for, their charitable purposes ...*

This means that Scottish charities can have purposes and carry out activities that seek to:

- Influence government both central and local.
- Respond to, promote, oppose, or support legislation.
- Petition and otherwise seek to change public policy.
- Support a policy advocated by a political party (but not the party itself).

Charities can distribute information or engage in debate about the policies of political parties or candidates, where these activities are ways of achieving their charitable purposes.

While charities may choose to engage in political debate, trustees must make sure that this activity *is in pursuit of the charitable purposes*; and bear in mind the charity trustee duties to *act in the best interests of the charity*. ...

If you are campaigning with non-charities, you must make sure they do not compromise your charity’s independence by being associated with any political parties or politicians. You should think carefully about any campaigning with non-charities ... *and how you can justify the activity as advancing your purposes*.

³⁵⁸ And also between charities and the business and government sectors.

³⁵⁹ Office of the Scottish Charity Regulator *Party political purposes* 20 August 2015:

www.oscr.org.uk/guidance-and-forms/meeting-the-charity-test-guidance/party-political-purposes/ (emphasis added).

³⁶⁰ Office of the Scottish Charity Regulator *Campaigning on political issues FAQs* 6 July 2017 (updated 2 March 2021): www.oscr.org.uk/guidance-and-forms/managing-a-charity-guidance/campaigning-on-political-issues-faqs/ (emphasis added).

...

Any activity a charity carries out should be in support of their charitable purposes and engaging with political parties and politicians is no different. The main point for charities to bear in mind is that they must be *independent of, and seen to be independent of party politics*. This applies to political parties and politicians anywhere in the world.

...

If you are organising hustings the general rule is to invite all the candidates unless there is a clear and objective reason not to.

In other words, subject to their constituting documents, the general law (including electoral law and lobbying legislation) and the partisan prohibition, charities in Scotland are not legally prevented from advocating in furtherance of their stated charitable purposes.

England and Wales

As the jurisdiction from which seminal cases such as *Bowman, National Anti-Vivisection Society v Inland Revenue Commissioners* ("**National Anti-Vivisection Society**"),³⁶¹ and *McGovern* have emanated, it is not that England and Wales does maintain a political purposes exclusion (in contrast to the legal position in Australia and New Zealand).

However, the English policy path has followed a pattern of incremental relaxation of the political purposes guidance.³⁶² Current guidance from the Charity Commission for England and Wales ("**CCEW**") is permissive, allowing charities to be political with a small "p" if they are in pursuit of their charitable purposes.³⁶³

CCEW's guidance makes the following key points:³⁶⁴

- legal requirement: to be a charity an organisation must be established for charitable purposes only, which are for the public benefit. An organisation will not be charitable if its purposes are political.
- campaigning and political activity can be *legitimate and valuable activities for charities to undertake*.
- legal requirement: however, political campaigning, or political activity, as defined in this guidance, must be undertaken by a charity *only in the context of supporting the delivery of its charitable purposes*. Unlike other forms of campaigning, it must not be the continuing and sole activity of the charity ...
- there may be situations where carrying out political activity is the best way for trustees to support the charity's purposes. A charity may choose to focus most, or all, of its resources on political activity for a period. The key issue for charity trustees is the need to ensure that this activity is not, and does not, become the reason for the charity's existence.
- charities can campaign for a change in the law, policy or decisions ... where such change would support the charity's purposes. Charities can also campaign to ensure that existing laws are observed.
- legal requirement: however, a charity cannot exist for a political purpose, which is *any purpose directed at furthering the interests of any political party, or securing or opposing a change in the law, policy or decisions* either in this country or abroad.
- legal requirement: in the political arena, a charity must stress its independence and ensure that any involvement it has with political parties is *balanced*. A charity must not give support or funding to a political party, nor to a candidate or politician.

361 *National Anti-Vivisection Society v Inland Revenue Commissioners* [1948] AC 31 (HL).

362 M McGregor-Lowndes and B Wyatt (eds) *Regulating Charities: the Inside Story* (Routledge, 2017) at 280.

363 R Cooney "History is complicated – and charities have never been an 'antidote to politics'" ThirdSector 22 April 2021: <www.thirdsector.co.uk/history-complicated-%E2%80%93-363-charities-antidote-politics/communications/article/1713582>, referring to comments of John Picton, University of Liverpool; P Butler "Commission chief tells charities not to be 'captured' for politics" The Guardian 4 February 2021: <www.theguardian.com/society/2021/feb/04/commission-chief-tells-charities-not-to-be-captured-for-politics>, referring to comments of Andrew Purkis OBE.

364 Charity Commission for England and Wales *Campaigning and political activity guidance for charities* 1 March 2008: <www.gov.uk/government/publications/speaking-out-guidance-on-campaigning-and-political-activity-by-charities-cc9/speaking-out-guidance-on-campaigning-and-political-activity-by-charities> at [1.1] (emphasis added).

- *a charity may give its support to specific policies advocated by political parties if it would help achieve its charitable purposes.* However, trustees must not allow the charity to be used as a vehicle for the expression of the political views of any individual trustee or staff member (in this context the Charity Commission means personal or party political views).
- legal requirement: as with any decision they make, when considering campaigning and political activity charity trustees must carefully weigh up the possible benefits against the costs and risks in deciding whether the campaign is likely to be an effective way of furthering or supporting the charity's purposes.
- legal requirement: when campaigning, charity trustees must comply not only with charity law, but other civil and criminal laws that may apply. Where applicable they should also comply with the Code of the Advertising Standards Authority.
- a charity can campaign using *emotive or controversial* material, where this is lawful and justifiable in the context of the campaign. Such material must be factually accurate and have a legitimate evidence base ...

CCEW defines "campaigning" as "awareness-raising and ... efforts to educate or involve the public by mobilising their support on a particular issue, or to influence or change public attitudes". In other words, England and Wales does not extend the *McGovern* categories to public awareness-raising. Instead, CCEW defines "political activity" as any activity which involves "trying to secure support for, or oppose, a change in the law or in the policy or decisions of central government, local authorities or other public bodies, whether in this country or abroad". CCEW also makes it clear that "supporting a political party is not an acceptable form of political activity for a charity".³⁶⁵

Further clarification is provided as follows:³⁶⁶

Engagement in campaigning is a means by which many charities work to further their purposes, and many charities also engage in political activity in support of those purposes.

So long as a charity is engaging in campaigning or political activity *solely in order to further or support its charitable purposes*, and there is a reasonable likelihood of it being effective, it may carry out campaigning and political activity, as set out in this guidance. The activities it undertakes must be a legitimate and reasonable way for the trustees to further those purposes, and must never be party political.

A charity can make public comment on social, economic and political issues if these relate to its purpose, or the way in which the charity is able to carry out its work.

These principles lie behind all of this guidance. Whilst there is *no limit* on the extent to which charities can engage in campaigning in furtherance of their charitable purposes, political activity can only be a means of supporting or contributing to the achievement of those purposes, although it may be a significant contribution. Hence, political activity cannot be the only way in which a charity pursues its charitable purposes ...

To summarise, subject to their constituting documents, the general law and the partisan prohibition, charities in England and Wales are not legally prevented from advocating in furtherance of their stated charitable purposes. In fact, they are encouraged to do so.³⁶⁷

³⁶⁵ Charity Commission for England and Wales [Campaigning and political activity guidance for charities](#) 1 March 2008 at [2.4].

³⁶⁶ Charity Commission for England and Wales [Campaigning and political activity guidance for charities](#) 1 March 2008 at [3.1] (emphasis added).

³⁶⁷ Charity Commission for England and Wales [Campaigning and political activity guidance for charities](#) 1 March 2008 at [3]: "... charities are free to campaign and ... they can expect the commission's support if they decide to do so"; at [3.7]: "Political activity, including campaigning for a change in the law, is an entirely legitimate activity and can be an effective means of supporting a charitable purpose".

Northern Ireland

Like England and Wales, Northern Ireland recognises a common law political purposes exclusion.³⁶⁸ In May 2019, the Charity Commission for Northern Ireland (“CCNI”) issued guidance explaining the exclusion as follows:³⁶⁹

There is an important distinction between political purposes and political activities. The purposes of a charity are what it is established to achieve. The activities are how it will go about achieving those purposes. A charity cannot be established for a political purpose, but a ... charity can engage in political activity or campaigning where there is a reasonable expectation that doing so will help to advance its charitable purposes.

Like England and Wales, Northern Ireland defines a “political purpose” to mean any purpose aimed at furthering the interests of a political party, securing or opposing a change in the law, or securing or opposing a change in the policies of government or any public body, whether in Northern Ireland or abroad.³⁷⁰ In other words, Northern Ireland does not extend the *McGovern* categories to public awareness-raising. Instead, “campaigning” is defined to mean “awareness-raising and ... efforts to educate or involve the public by mobilising their support on a particular issue, or to influence or change public attitudes”, and “political activity” is defined as an activity by a charity “which is aimed at advancing its charitable purposes by securing or opposing a change in the law or in the policies of government or another public body”.³⁷¹ A charity in Northern Ireland can carry out political activity or campaigning, provided:³⁷²

- the activity is solely in support of its charitable purposes
- the activity is not prohibited in its governing document
- it remains independent and does not align itself with a particular political party
- it is in the charity’s interests and the trustees are acting with due care.

With respect to the partisan prohibition, Northern Ireland takes the following approach:³⁷³

A guiding principle of charity law is that charities must remain independent of party politics. This is the case at all times, not just in the run up to an election ...

The key principle under charity law is that, while a charity can attempt to raise awareness and influence public opinion in relation to a particular policy, provided it furthers their purposes, it must never engage in party political activity and must not encourage the electorate to vote for one party or another...

Charities must not support or oppose a political party and must not donate funds to political parties.

In other words, subject to their constituting documents, the general law and the partisan prohibition, charities in Northern Ireland are not legally prevented from advocating in furtherance of their stated charitable purposes.

368 See Charity Commission for Northern Ireland *Charities and politics - Guidance for charities in Northern Ireland on political purposes, political activity and campaigning* May 2019: <www.charitycommissionni.org.uk/media/1149/20190530-ccni-eg036-political-activity-and-campaigning-guidance-for-charities-v20-for-publicationdocx.pdf> at 4.

369 Charity Commission for Northern Ireland *Charities and politics - Guidance for charities in Northern Ireland on political purposes, political activity and campaigning* May 2019 at sections 3.1, 4.1.

370 Charity Commission for Northern Ireland *Charities and politics - Guidance for charities in Northern Ireland on political purposes, political activity and campaigning* May 2019 at [3.1].

371 Charity Commission for Northern Ireland *Charities and politics - Guidance for charities in Northern Ireland on political purposes, political activity and campaigning* May 2019 at [4.2].

372 Charity Commission for Northern Ireland *Charities and politics - Guidance for charities in Northern Ireland on political purposes, political activity and campaigning* May 2019 at [4.3].

373 Charity Commission for Northern Ireland *Charities and politics - Guidance for charities in Northern Ireland on political purposes, political activity and campaigning* May 2019 at [5.1], [5.1.1], [5.1.3].

Ireland

Ireland also maintains a statutory “partisan prohibition” by means of s 2(1) of the Charities Act 2009 (Ireland), which lists the following as excluded from the definition of “charitable organisation”:³⁷⁴

- (a) a *political* party, or a body that promotes a political party or candidate,
- (b) a body that promotes a *political cause*, *unless the promotion of that cause relates directly to the advancement of the charitable purposes of the body*,
- (c) an approved body of persons within the meaning of section 235 of the Taxes Consolidation Act 1997 [which relates to the income tax exemption for approved sporting bodies],
- (d) a trade union or a representative body of employers,
- (e) a chamber of commerce,
- (f) a body that promotes purposes that are –
 - (i) unlawful.
 - (ii) contrary to public morality,
 - (iii) contrary to public policy,
 - (iv) in support of terrorism or terrorist activities, whether in the State or outside the State, or
 - (v) for the benefit of an organisation, membership of which is unlawful.

The Irish statute is otherwise silent on “political” purposes or activities. However, guidance issued by An Rialálaí Carthanais The Charities Regulatory Authority (“**CRA**”) indicates that, like England and Wales (but unlike Australia and New Zealand), Ireland maintains a “political purposes exclusion” in its law.³⁷⁵ Beyond the partisan prohibition, an organisation will be considered to have a political purpose (that is not a charitable purpose) if the organisation is “set up exclusively to promote a political cause such as bringing about a change in the law or policies of the Government or other public bodies”.

However, in Ireland, a charity may engage in activities to promote a political “cause” provided that the promotion of the political cause:³⁷⁶

- relates directly to the advancement of its charitable purpose;
- does not promote a political party or candidate;
- is not contrary to the charity’s governing document.

The use of charitable funds and resources by a charity for the purpose of engaging in activities to promote a political cause is only permissible “if it can be shown that the activity is directly advancing or supporting the charitable purpose of the charity”; a charity risks losing its charitable status if it seeks to promote a political “cause” that does not directly advance its charitable purpose.³⁷⁷

Otherwise, as the CRA acknowledges, engaging in activities to promote a political “cause” that is of direct relevance to the charitable purpose of a charity can be an “important means by which a charity can achieve its charitable purpose”: such activities may include “supporting the adoption of particular policies, seeking to influence central and local government and campaigning for the purpose of advocating changes to a law or policy”.³⁷⁸

In other words, subject to their constituting documents, the general law and the partisan prohibition, charities in Ireland are not legally prevented from advocating in furtherance of their stated charitable purposes.

³⁷⁴ Definition of “excluded body” in s 2(1) of the Charities Act 2009 (Ireland) (emphasis added).

³⁷⁵ An Rialálaí Carthanais Charities Regulator *Guidance on Charities and the Promotion of Political Causes* September 2021: <www.charitiesregulator.ie/media/2272/guidance-on-charities-and-the-promotion-of-political-causes.pdf>.

³⁷⁶ An Rialálaí Carthanais Charities Regulator *Guidance on Charities and the Promotion of Political Causes* September 2021 at 6.

³⁷⁷ An Rialálaí Carthanais Charities Regulator *Guidance on Charities and the Promotion of Political Causes* September 2021 at 5, 6.

³⁷⁸ An Rialálaí Carthanais Charities Regulator *Guidance on Charities and the Promotion of Political Causes* September 2021 at 4.

United States

The position in the United States is different.

Section 501(a) of the United States internal revenue code provides an exemption from income tax for organisations described in s 501(c).

Section 501(c)(3) includes the following within the list of organisations exempt under subs (a) (emphasis added):

Corporations, and any community chest, fund, or foundation, *organized and operated exclusively* for religious, *charitable*, scientific, testing for public safety, literary, or educational purposes, or to foster national or international *amateur sports* competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, *no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation (except as otherwise provided in subsection (h))*, and which does not *participate in, or intervene in* (including the publishing or distributing of statements), *any political campaign on behalf of (or in opposition to) any candidate for public office.*

In other words, like all jurisdictions discussed above, the United States maintains a partisan prohibition and, like Canada, Australia, and Scotland, the United States has enshrined this prohibition in its statute. However, the United States has taken an extra step of including a statutory prohibition on charities engaging in “substantial” activities carrying on “propaganda” or otherwise attempting to influence legislation. This high-level prohibition is qualified by very prescriptive rules set out in subs (h).

The rules that apply in the United States require examination because “Super PACs” or “political action committees” are often pointed to as demonstrating the need for increasing restrictions on charities in New Zealand.

Section 501(h) of the United States internal revenue code is entitled “Expenditures by public charities to influence legislation” and is set out in box 4.3 for reference (with underlining added):

Box 4.3 – s 501(h) - Expenditures by public charities to influence legislation

(1) GENERAL RULE In the case of an organization to which this subsection applies, exemption from taxation under subsection (a) shall be denied because a substantial part of the activities of such organization consists of carrying on propaganda, or otherwise attempting, to influence legislation, but only if such organization normally—

(A) makes lobbying expenditures in excess of the lobbying ceiling amount for such organization for each taxable year, or

(B) makes grass roots expenditures in excess of the grass roots ceiling amount for such organization for each taxable year.

(2) DEFINITIONS For purposes of this subsection—

(A) Lobbying expenditures

The term “lobbying expenditures” means expenditures for the purpose of influencing legislation (as defined in section 4911(d)).

(B) Lobbying ceiling amount

The lobbying ceiling amount for any organization for any taxable year is 150 percent of the lobbying nontaxable amount for such organization for such taxable year, determined under section 4911.

(C) Grass roots expenditures

The term “grass roots expenditures” means expenditures for the purpose of influencing legislation (as defined in section 4911(d) without regard to paragraph (1)(B) thereof).

(D) Grass roots ceiling amount

The grass roots ceiling amount for any organization for any taxable year is 150 percent of the grass roots nontaxable amount for such organization for such taxable year, determined under section 4911.

(3) ORGANIZATIONS TO WHICH THIS SUBSECTION APPLIES This subsection shall apply to any organization which has elected (in such manner and at such time as the Secretary may prescribe) to have the provisions of this subsection apply to such organization and which, for the taxable year which includes the date the election is made, is described in subsection (c)(3) and—

(A) is described in paragraph (4), and

(B) is not a disqualified organization under paragraph (5).

(4) ORGANIZATIONS PERMITTED TO ELECT TO HAVE THIS SUBSECTION APPLY An organization is described in this paragraph if it is described in—

(A) section 170(b)(1)(A)(ii) (relating to educational institutions),

(B) section 170(b)(1)(A)(iii) (relating to hospitals and medical research organizations),

(C) section 170(b)(1)(A)(iv) (relating to organizations supporting government schools),

(D) section 170(b)(1)(A)(vi) (relating to organizations publicly supported by charitable contributions),

(E) section 170(b)(1)(A)(ix) (relating to agricultural research organizations),

(F) section 509(a)(2) (relating to organizations publicly supported by admissions, sales, etc), or

(G) section 509(a)(3) (relating to organizations supporting certain types of public charities) except that for purposes of this subparagraph, section 509(a)(3) shall be applied without regard to the last sentence of section 509(a).

(5) DISQUALIFIED ORGANIZATIONS For purposes of paragraph (3) an organization is a disqualified organization if it is—

(A) described in section 170(b)(1)(A)(i) (relating to churches),

(B) an integrated auxiliary of a church or of a convention or association of churches, or

(C) a member of an affiliated group of organizations (within the meaning of section 4911(f)(2)) if one or more members of such group is described in subparagraph (A) or (B).

(6) YEARS FOR WHICH ELECTION IS EFFECTIVE An election by an organization under this subsection shall be effective for all taxable years of such organization which—

(A) end after the date the election is made, and

(B) begin before the date the election is revoked by such organization (under regulations prescribed by the Secretary).

(7) NO EFFECT ON CERTAIN ORGANIZATIONS With respect to any organization for a taxable year for which—

(A) such organization is a disqualified organization (within the meaning of paragraph (5)), or

(B) an election under this subsection is not in effect for such organization, nothing in this subsection or in section 4911 shall be construed to affect the interpretation of the phrase, “no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation,” under subsection (c)(3).

(8) AFFILIATED ORGANIZATIONS

For rules regarding affiliated organizations, see section 4911(f).

The consequence for exceeding the statutory limits on “propaganda” or other attempts to influence legislation are set out in section 4911, which imposes an excise tax on charities for “excess expenditures to influence legislation”. Section 4911 is set out in box 4.4 for reference (with underlining added):

Box 4.4 – s 4911

(a) TAX IMPOSED

(1) IN GENERAL

There is hereby imposed on the excess lobbying expenditures of any organization to which this section applies a tax equal to 25 percent of the amount of the excess lobbying expenditures for the taxable year.

(2) ORGANIZATIONS TO WHICH THIS SECTION APPLIES

This section applies to any organization with respect to which an election under section 501(h) (relating to lobbying expenditures by public charities) is in effect for the taxable year.

(b) EXCESS LOBBYING EXPENDITURES For purposes of this section, the term “excess lobbying expenditures” means, for a taxable year, the greater of—

- (1) the amount by which the lobbying expenditures made by the organization during the taxable year exceed the lobbying nontaxable amount for such organization for such taxable year, or
- (2) the amount by which the grass roots expenditures made by the organization during the taxable year exceed the grass roots nontaxable amount for such organization for such taxable year.

(c) DEFINITIONS For purposes of this section—

(1) LOBBYING EXPENDITURES

The term “lobbying expenditures” means expenditures for the purpose of influencing legislation (as defined in subsection (d)).

(2) LOBBYING NONTAXABLE AMOUNT

The lobbying nontaxable amount for any organization for any taxable year is the lesser of (A) \$1,000,000 or (B) the amount determined under the following table:

If the exempt purpose expenditures are—	The lobbying nontaxable amount is—
Not over \$500,000	20% of the exempt purpose expenditures.
Over \$500,000 but not over \$1,000,000	\$100,000, plus 15% of the excess of the exempt purpose expenditures over \$500,000.
Over \$1,000,000 but not over \$1,500,000	\$175,000 plus 10% of the excess of the exempt purpose expenditures over \$1,000,000.
Over \$1,500,000	\$225,000 plus 5% of the excess of the exempt purpose expenditures over \$1,500,000.

(3) GRASS ROOTS EXPENDITURES

The term “grass roots expenditures” means expenditures for the purpose of influencing legislation (as defined in subsection (d) without regard to paragraph (1)(B) thereof).

(4) GRASS ROOTS NONTAXABLE AMOUNT

The grass roots nontaxable amount for any organization for any taxable year is 25 percent of the lobbying nontaxable amount (determined under paragraph (2)) for such organization for such taxable year.

(d) INFLUENCING LEGISLATION

(1) GENERAL RULE Except as otherwise provided in paragraph (2), for purposes of this section, the term “influencing legislation” means—

- (A) any attempt to influence any legislation through an attempt to affect the opinions of the general public or any segment thereof, and
- (B) any attempt to influence any legislation through communication with any member or employee of a legislative body, or with any government official or employee who may participate in the formulation of the legislation.

(2) EXCEPTIONS For purposes of this section, the term “influencing legislation”, with respect to an organization, does not include—

- (A)** making available the results of nonpartisan analysis, study, or research;
- (B)** providing of technical advice or assistance (where such advice would otherwise constitute the influencing of legislation) to a governmental body or to a committee or other subdivision thereof in response to a written request by such body or subdivision, as the case may be;
- (C)** appearances before, or communications to, any legislative body with respect to a possible decision of such body which might affect the existence of the organization, its powers and duties, tax-exempt status, or the deduction of contributions to the organization;
- (D)** communications between the organization and its bona fide members with respect to legislation or proposed legislation of direct interest to the organization and such members, other than communications described in paragraph (3); and
- (E)** any communication with a governmental official or employee, other than—
 - (i)** a communication with a member or employee of a legislative body (where such communication would otherwise constitute the influencing of legislation), or
 - (ii)** a communication the principal purpose of which is to influence legislation.

(3) COMMUNICATIONS WITH MEMBERS

- (A)** A communication between an organization and any bona fide member of such organization to directly encourage such member to communicate as provided in paragraph (1)(B) shall be treated as a communication described in paragraph (1)(B).
- (B)** A communication between an organization and any bona fide member of such organization to directly encourage such member to urge persons other than members to communicate as provided in either subparagraph (A) or subparagraph (B) of paragraph (1) shall be treated as a communication described in paragraph (1)(A).

(e) OTHER DEFINITIONS AND SPECIAL RULES For purposes of this section—

(1) EXEMPT PURPOSE EXPENDITURES

(A) In general

The term “exempt purpose expenditures” means, with respect to any organization for any taxable year, the total of the amounts paid or incurred by such organization to accomplish purposes described in section 170(c)(2)(B) (relating to religious, charitable, educational, etc., purposes).

(B) Certain amounts included The term “exempt purpose expenditures” includes—

- (i)** administrative expenses paid or incurred for purposes described in section 170(c)(2)(B), and
- (ii)** amounts paid or incurred for the purpose of influencing legislation (whether or not for purposes described in section 170(c)(2)(B)).

(C) Certain amounts excluded The term “exempt purpose expenditures” does not include amounts paid or incurred to or for—

- (i)** a separate fundraising unit of such organization, or
- (ii)** one or more other organizations, if such amounts are paid or incurred primarily for fundraising.

(2) LEGISLATION

The term “legislation” includes action with respect to Acts, bills, resolutions, or similar items by the Congress, any State legislature, any local council, or similar governing body, or by the public in a referendum, initiative, constitutional amendment, or similar procedure.

(3) ACTION

The term “action” is limited to the introduction, amendment, enactment, defeat, or repeal of Acts, bills, resolutions, or similar items.

(4) DEPRECIATION, ETC., TREATED AS EXPENDITURES

In computing expenditures paid or incurred for the purpose of influencing legislation (within the meaning of subsection (b)(1) or (b)(2)) or exempt purpose expenditures (as defined in paragraph (1)), amounts properly chargeable to capital account shall not be taken into account. There shall be taken into account a reasonable allowance for exhaustion, wear and tear, obsolescence, or amortization. Such allowance shall be computed only on the basis of the straight-line method of depreciation. For purposes of this section, a determination of whether an amount is properly chargeable to capital account shall be made on the basis of the principles that apply under subtitle A to amounts which are paid or incurred in a trade or business.

(f) AFFILIATED ORGANIZATIONS

(1) IN GENERAL Except as otherwise provided in paragraph (4), if for a taxable year two or more organizations described in section 501(c)(3) are members of an affiliated group of organizations as defined in paragraph (2), and an election under section 501(h) is effective for at least one such organization for such year, then—

(A) the determination as to whether excess lobbying expenditures have been made and the determination as to whether the expenditure limits of section 501(h)(1) have been exceeded shall be made as though such affiliated group is one organization,

(B) if such group has excess lobbying expenditures, each such organization as to which an election under section 501(h) is effective for such year shall be treated as an organization which has excess lobbying expenditures in an amount which equals such organization’s proportionate share of such group’s excess lobbying expenditures,

(C) if the expenditure limits of section 501(h)(1) are exceeded, each such organization as to which an election under section 501(h) is effective for such year shall be treated as an organization which is not described in section 501(c)(3) by reason of the application of 501(h), and

(D) subparagraphs (C) and (D) of subsection (d)(2), paragraph (3) or subsection (d), and clause (i) of subsection (e)(1)(C) shall be applied as if such affiliated group were one organization.

(2) DEFINITION OF AFFILIATION For purposes of paragraph (1), two organizations are members of an affiliated group of organizations but only if—

(A) the governing instrument of one such organization requires it to be bound by decisions of the other organization on legislative issues, or

(B) the governing board of one such organization includes persons who—

(i) are specifically designated representatives of another such organization or are members of the governing board, officers, or paid executive staff members of such other organization, and

(ii) by aggregating their votes, have sufficient voting power to cause or prevent action on legislative issues by the first such organization.

(3) DIFFERENT TAXABLE YEARS

If members of an affiliated group of organizations have different taxable years, their expenditures shall be computed for purposes of this section in a manner to be prescribed by regulations promulgated by the Secretary.

(4) LIMITED CONTROL If two or more organizations are members of an affiliated group of organizations (as defined in paragraph (2) without regard to subparagraph (B) thereof), no two members of such affiliated group are affiliated (as defined in paragraph (2) without regard to subparagraph (A) thereof), and the governing instrument of no such organization requires it to be bound by decisions of any of the other such organizations on legislative issues other than as to action with respect to Acts, bills, resolutions, or similar items by the Congress, then—

(A) in the case of any organization whose decisions bind one or more members of such affiliated group, directly or indirectly, the determination as to whether such organization has paid or incurred excess lobbying expenditures and the determination as to whether such organization has exceeded the expenditure limits of section 501(h)(1) shall be made as though such organization has paid or incurred those amounts paid or incurred by such members of such affiliated group to influence legislation with respect to Acts, bills, resolutions, or similar items by the Congress, and

(B) in the case of any organization to which subparagraph (A) does not apply, but which is a member of such affiliated group, the determination as to whether such organization has paid or incurred excess lobbying expenditures and the determination as to whether such organization has exceeded the expenditure limits of section 501(h)(1) shall be made as though such organization is not a member of such affiliated group.

In other words, the United States has, by legislation, extended the *McGovern* categories of “political purpose exclusion” to include attempts to influence legislation “through an attempt to affect the opinions of the general public”. The United States has crafted a graduated system for addressing excess expenditures through a comprehensive set of rules, covering such things as affiliated organisations and a reasonable allowance for depreciation: in other words, the default regulatory mechanism is to punish the charity for influencing legislation, not by proscribing the activity but by taxing it (even if that step curtails the ability of the organisation to carry out its charitable mission or perhaps even drives the entity to bankruptcy).³⁷⁹

From the perspective of considering what a world-leading framework of charities law might look like for New Zealand, two key observations about the United States’ position might be made.

The first is that the comprehensive set of rules described above have arisen in a very different historical, social, political, cultural and legal context to that of a small country like New Zealand. As discussed above in chapter 2, giving in America is “public, planned and unapologetically connected with personal identity” and takes place within a strong culture of elite philanthropy; the level of prescription that can be seen in the above rules requires an industry of professional advisers and may encourage a “culture of regulatory gaming”. Imposing such rules in New Zealand would require scarce charitable resources to be diverted to compliance and administration costs.

The second is that, if the intention of the rules was to prevent charities from influencing legislation, they may not be having their intended effect.

As McGregor-Lowndes and Wyatt write, political figures in the United States openly use high-profile charities and foundations to affect their political fortunes indirectly, and a mixture of exacting tax laws, and organisations with a healthy risk appetite for pushing the boundaries, requires patrolling by an effective regulator.³⁸⁰

As is the case in Canada, charities law in the United States is primarily administered through federal tax law. However, the United States tax authority, the Internal Revenue Service (“**IRS**”), has faced a number of challenges in recent years. For example, it was criticised by Republicans for having allegedly targeted conservative “tea-party” charities between 2010 - 2012, largely because their names suggested they would be political opponents of the Obama administration and the Democratic party. Whether or not the allegations were founded, they led to months of congressional hearings, official investigations and damning news coverage.³⁸¹ The public and political ructions

379 M McGregor-Lowndes and B Wyatt (eds) *Regulating Charities: the Inside Story* (Routledge, New York, 2017) at 83 per Marcus Owens.

380 M McGregor-Lowndes and B Wyatt (eds) *Regulating Charities: the Inside Story* (Routledge, New York, 2017) at 282 - 283.

381 See, for example, <www.washingtonpost.com/lifestyle/style/four-years-later-the-irs-tea-party-scandal-looks-very-different-it-may-not-even-be-a-scandal/2017/10/05/4e90c7ec-a9f7-11e7-850e-2bdd1236be5d_story.html>.

led to large-scale IRS staff changes and reduced funding.³⁸² The abruptness of the changes suggest that careful and systematic consideration of the changes and possible alternatives had not been undertaken.³⁸³ A failed attempt to provide revised regulations has left the area largely unregulated.³⁸⁴

However, to the extent that difficulties experienced in the United States relating to “Super PACs” or “political action committees” arise from under-resourcing and the existence of a potential regulatory vacuum, they may be a United States-specific problem; as such, they do not provide a compelling basis for imposing increased restrictions in New Zealand.³⁸⁵ As discussed above, the legislative changes recently made in Canada have not resulted in the entry as charities of lobbying groups whose “sole purpose is to advocate for a specific case”: the common law contains adequate protections by requiring a registered charity’s purposes to be exclusively charitable, and by requiring all activities, including advocacy, to be carried out in furtherance of those stated charitable purposes.

Discussion

Ends, means and manner

As can be seen from the above discussion, New Zealand is an international outlier in applying an “ends, means and manner” framework to charities’ advocacy.

In some circumstances, there may be good reasons for New Zealand to chart its own path. For example, New Zealand’s unique Treaty-based history provides the foundation for New Zealand to develop its own unique “Lex Aotearoa” to the benefit of all New Zealanders. However, it is not clear that there is any aspect peculiar to New Zealand’s situation that requires its charities to be so uniquely restricted in their advocacy work. As noted by the Law Commission in the context of their review of the law of trusts:³⁸⁶

2.43 The approach taken in this review is that trust law should reflect the unique features of the New Zealand trust context. However, because New Zealand is a small nation with relatively limited trusts jurisprudence, it is important for New Zealand law not to move too far out of line with internationally accepted trust law principles. Departure from the law in comparable jurisdictions should occur only where it is *justifiable based on the New Zealand context*, and then only with *caution*. Accordingly, in general the recommendations are consistent with recent reforms and accepted approaches in comparable common law jurisdictions, particularly England and Wales, Scotland, Ireland, Canada and Hong Kong.

2.44 There are certain areas in which our recommendations have gone slightly further than or departed from the positions of some jurisdictions, such as in setting out in statute the range of trustees’ duties and characteristics of an express trust, and in retaining a maximum duration period for trusts. However, these instances are *rare* and either do not alter the substantive law or offer only incremental changes that are appropriate for New Zealand trust law.

The “ends, means and manner” framework applied to charities’ advocacy in New Zealand is not mandated by legislation, and has arisen as a result of interpretations of case law. It is problematic for a number of reasons, not least because it allows a government department to exercise a statutory power of decision, as to whether any particular charity is eligible to access registration, with almost complete subjectivity; in so doing, it structurally undermines the independence of charities, as no charity can have certainty under the approach as to whether any particular piece of advocacy work will cause it to lose its registration (even if carried out in good faith in furtherance of its stated charitable purposes). As can be seen from the history of Canadian advocacy law discussed above,

382 M McGregor-Lowndes and B Wyatt (eds) *Regulating Charities: the Inside Story* (Routledge, New York, 2017) at 282 - 283.

383 M McGregor-Lowndes and B Wyatt (eds) *Regulating Charities: the Inside Story* (Routledge, New York, 2017) at 95 per Marcus Owens.

384 M McGregor-Lowndes and B Wyatt (eds) *Regulating Charities: the Inside Story* (Routledge, New York, 2017) at 282 - 283.

385 Interview with Mark Sidel, Doyle-Bascom Professor of Law and Public Affairs, University of Wisconsin-Madison (14 January 2021).

386 Te Aka Matua o te Ture - New Zealand Law Commission [Review of the Law of Trusts: A Trusts Act for New Zealand](#) (NZLC R130, 2013) at [2.43] - [2.44] (emphasis added, footnotes omitted).

and is also clear from submissions to the DIA's review of the Charities Act, the result of such uncertainty is an unhealthy silencing of charities as they quite rationally assess the risk of advocating to be too high. In this way, charities' effectiveness in a liberal democracy is undermined.

The subjectivity inherent in the "ends, means and manner" approach precludes certainty and predictability, and has resulted in a legal muddle of inconsistent decisions and outcomes that undermines the rule of law.

The case studies discussed above shed light on how the ends, means and manner framework has come to be applied in New Zealand:

- i. There has been a heavy reliance on Canadian case law, which has itself been strongly influenced by three key factors: an underlying tax expenditure analysis; a constrained appeal mechanism; and statutory references to "charitable activities" and "political activities" that have no equivalents in New Zealand. Before the 2018 law changes, these factors caused the distinction between purposes and activities to become conflated in Canadian jurisprudence: such conflation has then been imported into decision-making in New Zealand without critical examination of the different context in which it arose in Canada, or the fact that Canada has since made legislative change to correct it.
- ii. References in the Supreme Court decision in *Greenpeace SC*, such as to "the advancement of causes" and to "ends, means and manner", have been interpreted so as to allow the underlying paradigm in New Zealand to be slowly changed from one based on purposes to one based on activities. Important New Zealand jurisprudence, such as the *Foundation for Anti-Aging Research* case that clearly held the Supreme Court decision should not be so interpreted, has been overlooked or reworked to reflect a different underlying paradigm.
- iii. Most fundamentally, the current mechanisms by which charities might hold Charities Services and the Charities Registration Board accountable for their decision-making and "guidance" are not proving sufficient to ensure such interpretations are subject to sufficient critical examination.

Introducing a separate "ends, means and manner" test for "advocacy", applied at the level of activity, has been unhelpful, unnecessary and the source of much complexity, subjectivity and uncertainty. We strongly recommend that the New Zealand charities' legislation confirm its jurisprudential foundations by restoring a focus on purpose, as discussed above in chapter 2.

In the context of advocacy, charities law recognises a fundamental principle that charities may be "political", provided they are not "partisan". As can be seen from the discussion above, all comparable jurisdictions, even those that do recognise a political purposes exclusion, allow charities to undertake advocacy activity, provided it is in furtherance of their stated charitable purposes and not partisan.

We recommend the New Zealand legislation clarify that there are only three restrictions on the advocacy of charities:

- i. Those contained in the general law restricting advocacy (such as laws relating to copyright, electoral matters, defamation, hate speech, secrecy, confidentiality, incitements to violence, obscenity, misleading and deceptive conduct, and the like), which apply to charities just as they do to any other citizen.
- ii. Those contained in the charity's constituting document, including its stated charitable purposes, the non-distribution constraint, and any other restrictions on the charity's advocacy that the constituting document may contain.
- iii. Otherwise, charities may not be partisan: that is, they may not engage in activities promoting or opposing a political party, an elected official or a candidate for political office.

This approach is an application of recommendation 2.1 above: provided a charity's advocacy activities are carried out in good faith in furtherance of its stated charitable purposes, and otherwise in accordance with its rules and the general law, there is

no difficulty. The additional qualification in the advocacy context is the long-standing common law partisan prohibition, which protects against political parties qualifying for registration as charities;³⁸⁷ we recommend the partisan prohibition is set out in legislation for clarity. Importantly, the partisan prohibition does not preclude charities from evaluating the policies of political parties in a neutral, non-partisan way in furtherance of their charitable purposes, as discussed further below in chapter 8.

These rules are simple, clear and easy to understand; they remove the subjectivity, complexity and uncertainty inherent in an “ends, means and manner” approach and bring New Zealand into alignment with fundamental charities law principles expressed in all comparable jurisdictions. They would also restore New Zealand charities law to the pre-Charities Act position.

Charities should be able to advocate law change and attempt to sway public opinion on important social issues: that is a critical part of their role, as discussed above in chapter 1. These rules respect the independence of charities and their rights to freedom of expression, thereby upholding liberal democratic values of tolerance, diversity and pluralism, and supporting charities to flourish as builders of social capital, agents of social change, and a means of providing a voice to those who may otherwise not have one. Such factors would enhance public trust and confidence in charities, while also providing democratic balance to vested monied interests.

Combined with other measures recommended in this report, such as setting out the test for whether a purpose is charitable in legislation, these rules protect charities against undue state interference and allow them to advocate in furtherance of their stated charitable purposes without fear of losing their registered charitable status.

There will likely always be difficulties at the margins, highlighting the importance of restoring charities’ access to a first instance oral hearing of evidence. However, as the experience of Canada demonstrates, the balance of protecting the independence of charities on the one hand, and safeguarding the privileges of charitable status on the other, can be adequately struck by means of the discipline of exclusively charitable purposes, and fiduciary duties ensuring activities are only carried out in furtherance of the stated charitable purposes. New Zealand has the additional important protection of the comprehensive transparency and accountability provided by means of the financial and non-financial information that all registered charities are required to publicly disclose on the charities register.

Recommendation 4.1:

That the legislation clarify a charity may carry out advocacy activities in furtherance of its stated charitable purposes, with only three restrictions:

- (i) Those contained in the general law.**
- (ii) Those contained in the charity’s constituting document.**
- (iii) Otherwise, charities may not be “partisan”: that is, charities may not engage in activities promoting or opposing a political party, elected official, or candidate for political office.**

The draft Bill included in chapter 9 of this report is intended to implement the above recommendation as a starting point for consultation.

³⁸⁷ Contrary to the arguments of counsel for the Charities Registration Board in *Re Greenpeace of New Zealand Inc* [2013] 1 NZLR 339 (CA) at [24](a).

Freedom of expression

Another dimension of the issue of advocacy by charities relates to whether denying charitable registration to a charity, on the basis of its advocacy work, constitutes a breach of its right to freedom of expression under s 14 of the New Zealand Bill of Rights Act 1990.³⁸⁸

While this issue has been touched on, it has not been substantively addressed in New Zealand charities law to date.³⁸⁹

Prior to the enactment of the Charities Act 2005, Hammond J had noted that:³⁹⁰

... we do, after all, live in an age which enjoys the supposed benefits of s 13 (freedom of thought, conscience, and religion), and s 14 (freedom of expression), of the New Zealand Bill of Rights Act 1990. Should not the benefits be real in all respects, including the law of charities?

In 2011, Heath J raised the question of s 14, but left open the question of its implications for consideration in an appropriate case by the Court of Appeal or the Supreme Court.³⁹¹

In considering this issue in New Zealand, it is important to consider the implications of the *Canada Without Poverty* decision, bearing in mind that the three difficulties identified with the heavy reliance placed in New Zealand on Canadian charities law jurisprudence are not at issue in this case:

- i. *Canada Without Poverty* was a constitutional law case, and so was not subject to the limitations inherent in the constrained mechanism available for charities' registration appeals under Canadian tax legislation.
- ii. The *Canada Without Poverty* decision found the specific limitations imposed by the statutory reference in Canadian income tax legislation to "political activities" could not be justified in a free and democratic society (and ultimately led to its removal).
- iii. The decision was not based on a tax expenditure analysis.

To the contrary, the *Canada Without Poverty* decision is based on paragraph 2(b) of the Canadian Charter of Rights and Freedoms which, as discussed above, is broadly equivalent to s 14 of the New Zealand Bill of Rights Act 1990. The decision accordingly merits close examination in a New Zealand context.

As discussed above, the *Canada Without Poverty* decision was criticised for not explicitly approaching the question at issue through the lens of a "negative rights' claim" or a

388 As noted by J Calderwood Norton in "Charities and freedom of expression" [2019] NZLJ 174 at 174, the New Zealand Bill of Rights Act 1990 applies to legal, as well as natural, persons "so far as practicable" (s 29), such that there is no reason to suggest charities with legal personhood do not hold a right to freedom of expression. With respect to unincorporated but registered charities, a question arises as to whether their status as an "entity" under s 4 of the Charities Act 2005, and the requirements involved in seeking and maintaining registration (such as a requirement for a set of "rules"), might enable a right to freedom of expression to be extended, in preference to creating an arguably arbitrary distinction. It would be helpful to clarify whether the right to freedom of expression extends to all registered charities, whether incorporated or not.

389 In *Re Greenpeace of New Zealand Inc* [2013] 1 NZLR 339 (CA) at [58] - [59], the Court of Appeal referred to the freedoms protected by the New Zealand Bill of Rights Act, but deferred to a tax expenditure analysis on the basis of the Canadian cases of *Vancouver Society of Immigrant and Visible Minority Women v Minister of National Revenue* [1999] 1 SCR 10 and *Human Life International*. These paragraphs were successfully appealed by Greenpeace to the Supreme Court, who referred to the Bill of Rights Act 1990 in the context of the promotion of human rights generally (at [71]) in support of its finding that there is no political purposes exclusion in New Zealand law. This reference was in turn cited by the Court of Appeal in *Family First New Zealand v Attorney-General* [2020] NZCA 366 at [72]; *Greenpeace of New Zealand Incorporated v Charities Registration Board* [2020] NZHC 2993 at [37]; and *Re Family First New Zealand* [2018] NZHC 2273 at [14]. The High Court in *Greenpeace of New Zealand Incorporated v Charities Registration Board* [2020] NZHC 1999 helpfully referred to s 14 at [139], [142] in support of its findings that Greenpeace did not have an "illegal purpose" and civil disobedience can sometimes be for the public benefit. In 2020, the issue of whether deregistering a charity would infringe its right to freedom of expression was raised in *Family First New Zealand v Attorney-General* [2020] NZCA 366 at [181] but the Court did not address the issue substantively. At the time of writing, the decision is subject to appeal to the Supreme Court.

390 *Re Collier* [1998] 1 NZLR 81 (HC) at 90.

391 *Re Greenpeace [of] New Zealand Inc* [2011] 2 NZLR 815 (HC) at [59].

“positive rights’ claim”. At the risk of oversimplification, a negative rights’ approach would ask whether denying registration to a charity on the basis of its advocacy work constitutes undue state interference with a charity’s right to freedom of expression; by contrast, a positive rights’ approach would ask whether the state has a positive obligation to support a charity’s right to freedom of expression by making charitable registration available.

In essence, the distinction between negative and positive rights’ claims acutely reflects the underlying clash of paradigms: if charities are conceived as independent, self-governing organisations (and recognised as often reliant on charitable registration in order to access funding and therefore to survive, as was the case with CWP), denying charitable registration on the basis of an arbitrary assessment of a charity’s “views” can clearly be seen as constituting undue state interference, and therefore a breach of the charity’s rights to freedom of expression; if, on the other hand, a tax expenditure analysis is assumed, the tax privileges for charities are conceived as government “subsidies” over which government would have considerable latitude to disperse as it sees fit.

A tax expenditure analysis leads almost inexorably to a conclusion that a charity’s right to freedom of expression is not relevant,³⁹² on the basis that government should be free to choose how it spends “its” funds. As can be seen from the discussion and case studies above, such an interpretation renders charities inherently vulnerable to a decision-maker

392 See, for example, *Alliance for Life v Minister of National Revenue* [1999] 3 FC 504 at [26]: “... in the Canadian context the activities of a registered charity are, in effect, subsidized out of the public purse in that donations are deductible for income tax purposes”, a conclusion which is asserted rather than analysed, and led almost inexorably to a finding that revocation of registration did not breach the charity’s right to freedom of expression. In the United States see, for example, *Regan v Taxation Without Representation* (1983) 461 US 540 at 544: “[b]oth tax exemptions and tax deductibility are a form of subsidy that is administered through the tax system. A tax exemption has much the same effect as a cash grant to the organization of the amount of tax it would have to pay on its income. Deductible contributions are similar to cash grants of the amount of a portion of the individual’s contributions” noting by footnote that in stating that exemptions and deductions are like cash subsidies “we of course do not mean to assert that they are in all respects identical”. This assumption of comparability between tax privileges and cash grants led to an inevitable rejection of Taxation Without Representation’s claim that its attempt to influence legislation should not deprive it of eligibility for tax exempt status (at 548 – 551, 552 – 554). However, the assumption that tax privileges should be viewed as subsidies on the basis of similarity to cash grants is asserted but not further analysed. In New Zealand, a proposal in 1987 to replace charities’ tax privileges with a system of cash grants was strongly opposed as a threat to the independence of charities and ultimately rejected (as discussed above in ch 1 in the context of the 1987 “flat tax” proposal). In addition, in 2010, the Australian Productivity Commission noted a number of important distinctions between tax privileges and a system of direct grants, including the impact on:

(i) **pluralism**: “Direct grants rely on the government identifying charitable causes most in need of immediate support. However, individuals are arguably more adept at identifying such charitable causes (Krever 1991). That is, pluralism in the allocation of public funds to charities may result in a more optimal allocation of funding for charities relative to that under a system of direct government grants (Cordes 1999). Indirect support mechanisms facilitate pluralism as they allow taxpayers to direct a certain proportion of their tax dollars to their chosen charity”. Tax privileges can also be used to “support private donations to politically sensitive causes that provide a public benefit (Saez 2004)”.

(ii) **leverage**, or inducing a higher level of individual giving: “[i]n this case, it may be a more efficient form of funding from the view point of the government. In particular, if the increase in charitable donations promoted by indirect funding exceeds the cost to the government (in forgone tax revenue), then the indirect support mechanism is said to be ‘treasury efficient’. That is, for a given level of government expenditure, indirect funding can result in a greater flow of funds to charities compared to direct government grants.”

(iii) **social cohesion**: tax privileges “may encourage greater engagement between individuals and NFPs and reinforce socially desirable behaviour. Further, some studies suggest that a positive relationship exists between cash donations and volunteering. If this is the case, ‘... financial incentives that encourage gifts of cash may also help charities expand and deepen their pool of volunteers in a way that direct government grants to charities will not’ (Cordes 1999, p 3)” (Australian Productivity Commission [Contribution of the Not-for-Profit Sector](#) 11 February 2010 at G15). In other words, treating charities’ tax privileges as a “subsidy” on the basis of a comparison with cash grants effectively proceeds from an inherent underlying assumption about the role of charities in society: given charities’ important role in holding government to account, and therefore the importance of their independence from government, and given the significant consequences for charities that follow from an assumption that the tax privileges are a “subsidy” (most notably denial of registered charitable status on the basis of their advocacy work, with significant consequent implications for democracy), the comparison should not be simply assumed. Deeper analysis is required than has been brought to bear to date.

taking exception, on a subjective basis, to a particular “view” the charity might espouse, culminating in the decision-maker denying registration to the charity which may impact its very survival.³⁹³ Such an approach undermines the independence of charities and liberal democracy itself.

In the face of the current tax expenditure analysis hegemony, some argue for a middle ground that would make a distinction between denying registration to an applicant for registration, on the one hand, and deregistering an existing charity, on the other: the argument is that, while denying registration might be characterised as merely withholding a “subsidy”, deregistering a charity on the basis of its advocacy work would constitute taking coercive steps to silence a charity and would therefore breach its rights to freedom of expression.³⁹⁴

While the impetus to secure at least some substance to the right to freedom of expression for charities is understood and respected, the difficulty with this approach is that it relies on a distinction that arguably does not have a difference: the test for whether a charity is eligible for registration turns on whether the charity’s purposes are charitable;³⁹⁵ the definition of charitable purpose does not change depending on where a charity is in the registration/deregistration process. While there is no “right” to registered charitable status, charities do have a right to have their eligibility for registered charitable status determined according to law.

The writer would respectfully argue for an approach that asks whether the tax privileges for charities are in fact correctly characterised as a “subsidy” in the first place (that is, to approach the question from the level of first principles by asking whether a tax expenditure analysis is *appropriately* assumed). When this process is undertaken, it becomes clear that charitable funds are not government funds, as discussed above in chapter 1; when the tax privileges for charities are conceived as merely a proper adjustment to the tax base, and an investment in an overall system that makes a significant contribution to pluralism and social cohesion, it becomes clear that the receipt of tax privileges should not inexorably require charities to forfeit their rights to freedom of expression. Doing so places charities, and those they represent, at a significant disadvantage compared to for-profit companies, which also receive tax privileges (including the ability to deduct lobbying and other expenses) yet can advocate in the public policy arena without such restriction.³⁹⁶ In other words, failing to recognise charities’ independence and their rights to freedom of expression undermines democratic values by effectively skewing public policy debates in favour of vested monied interests.³⁹⁷

If the tax privileges for charities are not correctly characterised as “subsidies”, then charities’ expression is not correctly characterised as “subsidised expression”, and arguments about “megaphones” and “muzzles” can be seen as missing the point.

The *Canada Without Poverty* case refreshingly demonstrates how a freedom of expression analysis might proceed once decoupled from an uncritical acceptance of a tax expenditure framework: denying registration purely on the basis of a charity’s advocacy work, carried out in good faith in furtherance of its charitable purposes, can and indeed does constitute undue “state interference” and a threat to the independence of charities; the onus then falls to Charities Services, the Charities Registration Board, and/or the Attorney-General to justify how such an infringement of a charity’s right to freedom of expression can be justified in a free and democratic society,³⁹⁸ as opposed to simply being

393 Noting that s HR 12 of the Income Tax Act 2007 (NZ) broadly requires a deregistered charity in New Zealand to divest itself of all its assets within 12 months or pay tax on the balance.

394 See J Calderwood Norton “Charities and freedom of expression” [2019] NZLJ 174 at 176: “Harding has noted that the United States has traditionally distinguished between ‘the state withhold[ing] subsidies on the one hand and taking coercive steps to silence charities on the other’ (*Charity Law and the Liberal State* (CUP, 2014) at 186).”

395 Charities Act 2005 s 13.

396 [Report of the Consultation Panel on the Political Activities of Charities](#) 31 March 2017, recommendation 1 - rationale.

397 See the discussion in S Barker “[Advocacy by charities: what is the question?](#)” (2020) 6 CJCL 1 at 55 - 57.

398 S Barker “[Advocacy by charities: what is the question?](#)” (2020) 6 CJCL 1 at 54 - 55.

imposed “for its own sake”.

The short point is that the implications of denial of registered charitable status for charities’ freedom of expression have not been fully considered in New Zealand jurisprudence to date.³⁹⁹ When that process does occur, it is to be hoped that the implications of the *Canada Without Poverty* decision are taken into account.

Fiscal consequences

A related issue is whether the potential fiscal consequences of registration are relevant to the question of whether a purpose is charitable.

As can be seen from the discussion above in chapter 3, the test for whether a purpose is charitable turns on two questions: whether the purpose operates for the public benefit as a question of fact, and whether the purpose can be found to fall within a recognised “head” of charity. From the perspective of first principle, it can be seen that potential fiscal consequences do not form part of the test for whether a purpose is charitable, which is perhaps understandable, given that the “touchstone” of charitable purpose, the Statute of Elizabeth 1601, predates the introduction of income tax by more than a century.⁴⁰⁰

However, in what is arguably another dimension of the underlying clash of paradigms, potential fiscal consequences are being referred to in New Zealand in the context of determining whether a charity is eligible for registration.⁴⁰¹ Doing so causes the concept of charitable purpose to become distorted; it also contributes to the slow-moving change in underlying paradigm, and potentially undermines the very object of providing tax privileges to charities in the first place.

Our reasons for this view are as follows:

Like many jurisdictions, the New Zealand Parliament has chosen to use the equitable concept of charitable purpose as the gateway for charitable registration. However, in doing so, Parliament has not taken measures to protect that equitable concept from the pressures of a tax expenditure analysis (a key aspect of a restrictive paradigm).

While a tax expenditure analysis can be useful in terms of roughly estimating the “cost” of the tax privileges for charities, it can also have a devastating effect: as discussed above, it structurally ignores the wider benefits provided by charities, and thereby encourages a limited conception of charities as “fiscal costs”; extending this limited conception into the interpretation of the definition of charitable purpose itself, and repurposing the definition as a tool for rationing tax privileges, risks distorting, and damaging, the very concept on which the legal framework is based.

The need to protect the definition of charitable purpose against such pressures was referred to by McKenzie J in *Re Queenstown Lakes Community Housing Trust*, albeit not in those terms:⁴⁰²

[77] I conclude by venturing some remarks on the two main consequences of the decision whether an entity is entitled to registration as a charity. These were adverted to by Lord Cross of Chelsea in *Dingle v Turner* [[1972] AC 601 (HL) at 624-625]. The first is that, as

399 In 2020, the High Court in *Better Public Media Trust v Attorney-General* [2020] NZHC 350 held at [80] (referring to *Mendelssohn v Attorney General* [1999] 2 NZLR 268 (CA)) that the rights recognised in the Bill of Rights Act affirm that persons should be free from state interference, but do not import positive obligations on the state (broadly reflecting the negative rights/positive rights distinction). However, an underlying tax expenditure analysis again appears to have been assumed rather than analysed. At the time of writing, the decision is subject to appeal to the Court of Appeal.

400 Charities were first granted tax-exempt status by the Income Tax Act 1799 (UK), almost two centuries’ later than the Statute of Elizabeth 1601: see Ontario Law Reform Commission *Report on the Law of Charities* (Toronto, 1996) at 327 and M Gousmett “[The Charitable Purposes Exemption from Income Tax: Pitt to Pemsel 1798- 1891](#)” (PhD Thesis, University of Canterbury, 2009) at 4.

401 See, for example, *Re Greenpeace of New Zealand Inc* [2015] 1 NZLR 169 (SC) at [30] referring to charitable status having “significant fiscal consequences”. See also the arguments made by the Attorney-General in support of the 24 September 2020 notice of application for leave to appeal to the Supreme Court, discussed above in the Family First case study.

402 *Re Queenstown Lakes Community Housing Trust* [2011] 3 NZLR 502 (HC) at [77] - [78] (emphasis added).

a general rule and with limited quite particular exceptions, a “purpose” trust will not be valid unless the purpose is charitable, so as to enjoy the immunity from the rules against perpetuity and uncertainty which would otherwise apply to render such trusts invalid. Lord Cross observed that if this was all, there would be no reason for the Courts not to look favourably on the claim of any “purpose” trust to be considered as a charity. But he noted that that was not all. Charities enjoy taxation advantages. He noted that it was *unfortunate that the recognition of any trust as charitable should automatically attract fiscal privileges, since the question whether there is a public benefit sufficient to constitute a charity and the question whether there is a public benefit sufficient to justify taxation privileges are really two quite different purposes.*

[78] ... it is to be noted that *three of their Lordships expressly disassociated themselves from that part of Lord Cross’ speech. They doubted the relevance of taxation consequences in deciding whether a trust is charitable.* For my part, I observe that Parliament has, in s 5 of the Act, seen fit to adopt the common law definition of charitable purpose. To the extent that Parliament has *elsewhere legislated so that taxation consequences are determined by reference to charitable status, those consequences must follow the application of the common law principles which govern charitable status. The taxation consequences should not play a part in the application of those common law principles.*

In other words, an uncritical acceptance of a tax expenditure analysis risks allowing the tax “tail” to wag the charities law “dog” by allowing potential “fiscal consequences” of charitable registration to be taken into account as a factor in determining eligibility for registration. Doing so arguably “confuses the measure with the outcome”;⁴⁰³ it also encourages the imposition of subjective, arbitrary restrictions on charities’ advocacy for its own sake and at considerable unjustified cost, as highlighted by the Greenpeace and Family First case studies discussed above.

We recommend the legislation makes it clear that the potential fiscal consequences of registration are not relevant to the question of whether a purpose is charitable.⁴⁰⁴ They are also irrelevant to the question of whether a purpose is precluded from being charitable on the basis of being “political” (in circumstances where a political purposes exclusion is observed) or an “advancement of a cause” (where it is not). As the Supreme Court has noted,⁴⁰⁵ whether a purpose is “political” is simply one facet of the public benefit test;⁴⁰⁶ in other words, the issue is not “fiscal consequences” but “public benefit”.⁴⁰⁷ A better approach is to put fiscal consequences to one side, and reinstate charities’ access to an oral hearing of evidence, as discussed further below in chapter 6, so that courts are provided again with the tools needed to determine whether a purpose meets the public benefit test on the facts of any particular case.

Recommendation 4.2:

That the legislation clarify that potential fiscal consequences of registration are not relevant to the question of whether a purpose is charitable.

Clause 16 of the draft Bill included with this report is intended to implement recommendation 4.2.

403 To paraphrase the words of Lord Denning MR in *Strick (Inspector of Taxes) v Regent Oil Co Ltd* [1964] 1 WLR 1166, 1175.

404 See, for example, *The Independent Schools Council v Charity Commission for England and Wales & Ors* [2012] 1 All ER 127 at [260]: “... the political issue is not really about whether private schools should be charities as understood in legal terms but whether they should have the benefit of the fiscal advantages which Parliament has seen right to grant to charities. It is for Parliament to grapple with this issue. It is quite separate from the issues which have dogged the many committees which have, over the years, addressed reform of charity law but have never been able to come up with a definition of charity of more use than the concept which has developed through case law”.

405 *Re Greenpeace of New Zealand Inc* [2015] 1 NZLR 169 (SC) at [72].

406 Arguably this has always been the case, including for cases such as *Molloy*, as demonstrated by the *Latimer* case discussed in ch 3.

407 See, for example, *The Independent Schools Council v Charity Commission for England and Wales & Ors* [2012] 1 All ER 127 at [175] – [176]: “The fact that fiscal privileges are given underlines the need for genuine public benefit”.

Government contracting

As can be seen from submissions to the DIA's review of the Charities Act, the government contracting environment is presenting significant challenges to charities' ability to advocate.⁴⁰⁸

Given the importance of charities' advocacy role in a democracy, we recommend that New Zealand implement legislation similar to that adopted in Australia, specifically prohibiting government contracts from including "gag" clauses that "prevent or restrict not-for-profit entities from commenting on, advocating support for or opposing changes to law, policy or practice".⁴⁰⁹

Recommendation 4.3:

That, as part of the independent first principles charities law review recommended in recommendation 1.0, consideration be given to implementing legislation similar to the Not-for-profit Sector Freedom to Advocate Act 2013 (Cth) in Australia, to respect the independence of charities by specifically prohibiting government contracts from including clauses that prevent or restrict charities from commenting on, advocating support for or opposing changes to law, policy or practice.

Advancement of "causes"

The recommendations contained in this report would address concerns about the second passage of difficulty discussed above in the Greenpeace case study, namely the reference in *Greenpeace SC* to the "advancement of causes" most often being non-charitable.⁴¹⁰

However, for completeness, an alternative interpretation of the passage, that does not contribute to a change in underlying paradigm, should be noted.

As discussed above, England and Wales recognise a political purposes exclusion, meaning that charities in England and Wales cannot have a "political purpose"; by contrast, the Supreme Court has made it clear that New Zealand does not recognise a political purposes exclusion, meaning that charities in New Zealand can have a political purpose if that purpose meets the test for whether a purpose is charitable (including the public benefit test).⁴¹¹

It may be difficult for a political purpose to meet the test for whether a purpose is charitable, which arguably explains the reference to the "advancement of causes" most often being non-charitable: although the "causes" terminology is difficult to reconcile with the "charitable purpose" focus of the underlying common law, arguably the Supreme Court was referring to the rare situation where a charity's *advocacy* has reached the level of a *purpose*. Our reasons for this view are as follows:

408 See, for example, the [submissions](#) of Community Waikato: "[i]n our experience, charities with government contracts are more likely to be reluctant to engage in advocacy. This is directly related to the terms of their contracts, the likelihood of termination of the contracts or loss of future contracts and the associated loss of funding"; Johanna Cogle: "[m]any large charities also receive Government funding alongside their charitable donations from the general public. Many of these also have had a long standing role of 'advocacy' as part of their role and experience in their charitable work. Some of this advocacy also includes raising questions and concerns in regard to the activities and decisions of Government or their agents. It is completely unacceptable ... that this advocacy role which makes governments or its agents 'uncomfortable' should then at a later stage place the continued use of funding for specific purposes at risk. It is the view of the writer that where Government funds are provided that these are clearly designed to fulfil particular roles and that the entitlement of advocacy is retained and does not place future funding at risk"; Stopping Violence Services [in answer to the questions, Are you aware of charities that are reluctant to advocate for changes to law and policy that would further their charitable purposes? Why are they reluctant to do so?]: "Yes – lack of resources, manpower, funds and possible loss of Government contracts"; and Tairāwhiti Environment Centre Inc: "[p]otential opposition to government policy could threaten a charity's funding source eg for Tairāwhiti Environment Centre advocating for reinstatement of the railway line between Napier and Gisborne (which could be good for the environment) was in opposition to the previous (National) government's policy, and the main funding source is from the Ministry for the Environment".

409 Not-for-profit Sector Freedom to Advocate Act 2013 (Cth) (long title).

410 *Re Greenpeace of New Zealand Inc* [2015] 1 NZLR 169 (SC) at [73].

411 *Re Greenpeace of New Zealand Inc* [2015] 1 NZLR 169 (SC) at [3].

Importantly, advocacy is an activity: conceptually, it is very rare for advocacy to constitute a “purpose” in itself. In jurisdictions that do recognise a political purpose exclusion, a purpose that falls into one of the four *McGovern* categories (such as advocating for legislative change) precludes charitable registration (as was the case in *National Anti-Vivisection Society*).⁴¹² Even so, however, if the charity advocates legislative change merely as a *means* towards achieving its charitable purpose (rather than as a non-ancillary purpose in itself) it will not fall foul of a political *purpose* exclusion (as the exclusion relates to purposes, not activities, as discussed above in relation to *McGovern*).

In addition, while not all jurisdictions recognise the controversial extension of the *McGovern* categories to “raising public awareness”, even for those that do, a political *purpose* exclusion would only preclude registration where such activity had reached the level of a purpose (and one that was more than merely ancillary). Generally, charities raise public awareness in *furtherance* of their charitable purposes, rather than for its own sake as a purpose in itself, meaning that most public awareness raising would not fall foul of a political *purpose* exclusion either.

Accordingly, it can be seen that advocacy is only proscribed by a political purposes exclusion when it has reached the level of a purpose in itself. Such situations are likely to be rare.

The Supreme Court’s reference to the “advancement of causes” being most often non-charitable is arguably a reference to such rare purposes.⁴¹³ The Supreme Court made it clear that New Zealand does not recognise a blanket political purpose exclusion: the question as to whether such a purpose is charitable in New Zealand is therefore not precluded *ab initio* (as it would be in jurisdictions like England and Wales that do recognise a political purposes exclusion); instead, whether such a purpose is charitable falls to be determined under general principles, including the public benefit test.⁴¹⁴ As discussed above in chapter 3, before such tests can be applied, the advocacy must first be a purpose.

While it would be rare for advocacy to constitute a purpose, and may indeed be rare for such a purpose to be found to be charitable, in the absence of a political purposes exclusion such an outcome is *possible*. It would be a radical change to fundamental charities law principles to extrapolate the Supreme Court’s reference to “advancement of causes” more widely, such as to require a charity’s “means” of advocating to be “charitable”.⁴¹⁵

If humanity stands on the precipice of a change in world order, it has never been more important to uphold liberal democratic values in the face of the forces of autocracy: in doing so, it is important that interpretations that enable a slow-moving change in underlying paradigm are not accepted without critical examination.

412 Noting that the Amnesty International Charity is now registered as a charity in England and Wales, as discussed above.

413 See the discussion in S Barker “[Advocacy by charities: what is the question?](#)” (2020) 6 CJCL 1.

414 *Re Greenpeace of New Zealand Inc* [2015] 1 NZLR 169 (SC) at [72].

415 Arguably, there is no distinction between “means” and “manner” outside of the unique 3-layered purpose at issue in the *Greenpeace* litigation (where the protection of the environment was being promoted through the promotion of peace, through the promotion of nuclear disarmament and the elimination of weapons of mass destruction). See *Latimer v Commissioner of Inland Revenue* [2004] 3 NZLR 157 (PC) at [36]: the distinction is between ends, means and consequences.



Photo by [Hannah Grace](#) on [Upsplash](#)

Chapter 5 – Social Enterprise and Competitive Advantage

“... we need to [reimagine capitalism] Clearly the model that’s being pursued across the world now is dividing societies: some are getting obscenely rich and others are going to the food kitchens and that’s a dangerous position for a society [we need] to articulate a different vision of tomorrow, a better one ... that’s inclusive”

Rt Hon Jim Bolger ONZ, former Prime Minister of New Zealand¹

There is now irrefutable evidence that humanity is living beyond its planetary means: the need to transition to a lower carbon economy has become imperative if we are to mitigate the effects of potentially catastrophic climate change. Interconnected effects of biodiversity loss combined with rising inequality are increasing the risk of pandemics with significant consequential impact, including on social cohesion and democracy as is being witnessed around the world.

In considering how an intelligent species could have reached a point of threatening its very existence, many point the finger at the doctrine of shareholder primacy, arguing that humanity lost its way when it became acceptable for companies to maximise the profits of shareholders at the expense of people and the planet.

There are many nuances to this argument, including whether shareholder primacy ever was mandated by New Zealand law, and therefore whether a move to “stakeholder capitalism” is in any way new or merely a refocus on first principles.² Analysis of this issue is beyond the scope of this report.

The short point for current purposes is that the scale of the challenges humanity collectively faces is too great for governments to tackle alone.

Social enterprise is recognised internationally as an integral part of a just transition to a more equitable, sustainable economy: social enterprise is experiencing “astonishing growth”, a world-wide trend with start-up activity particularly significant;³ former British Prime Minister, Gordon Brown HonFRSE, argues there is “no route to the future that does not have social enterprise at its centre”.⁴

In New Zealand, the Minister for the Community and Voluntary Sector has acknowledged the importance of social enterprise:⁵

Social enterprises are businesses that are changing the world for the better. They are businesses whose primary purpose is to make a meaningful social or environmental impact.

1 TVNZ Q&A, J Tame interview with former Prime Minister Jim Bolger, 27 November 2021:

www.youtube.com/watch?v=yx0QRwuapY4, referring to *Reimagining Capitalism: How business can save the world*, by Harvard professor Rebecca M Henderson (Penguin, Random House UK, 2020).

2 Such issues may arise in the context of the Companies (Directors Duties) Amendment Bill 75-1 (at the time of writing before Parliament and awaiting its first reading), which proposes to amend s 131 of the Companies Act 1993 (Duty of directors to act in good faith and in best interests of company) to add a new subs (4) in the following terms: “To avoid doubt, a director of a company may, when determining the best interests of the company, take into account recognised environmental, social and governance factors, such as: (a) recognising the principles of the Treaty of Waitangi (Te Tiriti o Waitangi): (b) reducing adverse environmental impacts: (c) upholding high standards of ethical behaviour: (d) following fair and equitable employment practices: (e) recognising the interests of the wider community”. In England and Wales, the Better Business Act campaign aims to amend s 172 of the Companies Act 2006 (UK) to ensure that all businesses are legally responsible for benefiting workers, customers, communities and the environment while delivering profit. See Better Business Act: betterbusinessact.org/about/#thestory campaign overview.

3 A Patton “[UK State of Social Enterprise Survey reveals mental health is mission no. 1](#)” Pioneers Post 13 October 2021. This trend may explain why “DIA has observed an increase in start-up businesses registering as charities”: Tax Working Group *Future of Tax: Interim Report* 20 September 2018 at 120.

4 L Joffe “[Ex-PM Gordon Brown: ‘There is no route to the future that does not have social enterprise at its centre’](#)” Pioneers Post 27 November 2020.

5 Impact Initiative [A Roadmap for Impact](#) April 2021 at 5 - 6.

Our Government recognises the unique value and powerful potential of the social enterprise sector.

Our Government is focused on tackling the long-term challenges facing our nation and putting in place what we need to make Aotearoa New Zealand a fairer, more cohesive society that truly values diversity.

These are values and aims that I know are shared by social enterprises across the country. Like our Government, social enterprises are also committed to creating a more equal, inclusive, and sustainable Aotearoa New Zealand.

Complex social and environmental challenges cannot be solved by government alone. Social enterprises provide private sector solutions to address public problems, such as poor mental health, inequality, and waste management. Their work is not easy, but it is important.

Our communities already experience some increased wellbeing and prosperity from the work of social enterprises. The Government has long recognised that these benefits can be amplified by encouraging the social enterprise sector to grow.

The Social Enterprise Sector Development Programme, also known as The Impact Initiative, was a partnership between Government and the Ākina Foundation. As a result of the programme's three years of research, delivery and engagement, we have identified how a flourishing social enterprise sector can be supported.

Given the economic challenges posed by the Covid-19 pandemic, it is now even more vital to increase social enterprise activity. This report recommends specific, strong, and significant actions that will create the necessary conditions for social enterprise growth.

By adopting and embedding these recommendations, we can lead the world by example, and help bring about a future where generating positive social and environmental outcomes lies at the heart of every Aotearoa New Zealand business.

In other words, the New Zealand Government has recognised the importance of creating an enabling framework for social enterprises.

This chapter is in two parts: the first part considers the extent to which the current framework of charities law supports and enables social enterprise, and discusses how some of the reforms recommended in this report might alleviate some significant current barriers to charities' social enterprise work.

The second part focuses on concern that has been raised for some time regarding whether charities running businesses have a "competitive advantage" over their for-profit counterparts. A number of measures have recently been suggested in New Zealand to address such concern: the second part considers whether such a competitive advantage does in fact exist, and also whether measures proposed to address it will support or hinder the expressed desire to enable social enterprise.

Part 1 – social enterprise

What is "social enterprise"?

Issues of terminology often arise in the context of charities law, as discussed above in chapter 1, with the term "social enterprise" no exception.

It is important to be clear what is meant by the term "social enterprise", as it has no official definition in New Zealand,⁶ and many other terms are used to describe it (or something like it).⁷ For the purposes of this report, the term "social enterprise" is used to refer to the *process* of using business models or "trade" to create positive social outcomes or impacts. The term "social" is used in a wide sense in this context to refer to social, environmental, and cultural outcomes.

6 By contrast, in England and Wales, Income Tax Act 2007 (UK) s 257J(2) defines the term "social enterprise" (for the purpose of income tax relief for social investments) by reference to types of entities carrying it out: community interest companies, community benefit societies, charities, accredited social impact contractors, and other prescribed bodies.

7 Such as impact enterprises, community enterprises, pakihi whai kaupapa (businesses that follow purpose), etcetera. See Ākina Foundation *The Road Ahead for Social Enterprises* 29 April 2021: <www.akina.org.nz/news/road-ahead-for-social-enterprise?mc_cid=07314da982&mc_eid=9d6a845867>.

In other words, social enterprise is an *activity* that is agnostic as to structure: social enterprise can be carried out by for-profit companies, as well as by entities structured as charities. When the term “social enterprise” is used to describe an *entity*, it arguably refers to any entity, whether for-profit or not-for-profit, that is carrying out the *activity* of using business models to create positive social outcomes.

Charities running businesses are therefore, by definition, social enterprises: any use of business methods by a charity must, by definition, be carried out in furtherance of its charitable purposes; a charity’s business activity is therefore, by definition, being used to create positive social outcomes.

Advantages of charities as a vehicle for social enterprise

Charities, in fact, have a number of natural advantages over for-profit companies when it comes to carrying out social enterprise:

- i. **Purpose is “baked into the DNA” of charities:** registered charities exist within an ecosystem that supports their devotion to their charitable purposes, even if they use business means to achieve them. A registered charity must, by definition, have a constituting document that sets out its charitable purposes; those governing the charity must, by law, act only to further those charitable purposes;⁸ even if the purposes set out in the constituting document are able to be changed, the changed purposes must continue to be exclusively charitable if the charity wishes to remain a charity and maintain its charitable registration. Charitable purposes are required to be furthered not only during the life of the entity, but also on its “death”: even if the charity is wound up or deregistered, funds must continue to be devoted to charitable purposes.⁹ In other words, once funds are impressed with charitable purpose, they must be forever destined for charitable purposes. Charities therefore have a reliable “mission lock”, as well as a recognised identity: these factors build trust and confidence in those engaging with the charity that funds generated by the social enterprise activity will be devoted to furthering the stated positive social outcomes.
- ii. **The non-distribution constraint:** as discussed above in chapter 1, charities are by definition not-for-profit entities, meaning their constituting document must also articulate a non-distribution constraint (that is, a prohibition on distributing surplus or any private pecuniary profit to any individual). Those governing the charity must, by law, comply with the constituting document,¹⁰ including these restrictions. This factor provides further trust and confidence that the funds generated by the social enterprise activity will be devoted to furthering the positive social outcomes, and not taken for the private pecuniary profit of any individual. In other words, those engaging with the charity can have confidence that decisions will be based on what is best for the charitable purposes, rather than for the private profit of individuals.
- iii. **The financial reporting rules:** unlike many for-profit companies, registered charities are subject to comprehensive transparency and accountability disclosure requirements under Charities Act, including a requirement to provide a service performance report articulating in non-financial terms how the entity is working towards its broader aims and objectives;¹¹ this information, together with comprehensive financial information, is required to be made publicly available on

8 The fiduciary duty of loyalty is set out, for example, in Trusts Act 2019 ss 24, 26; Companies Act 1993 ss 131, 134; Incorporated Societies Act 2022 ss 54, 56, as discussed above in ch 2.

9 See Charities Services *Charitable purpose and your rules*: <www.charities.govt.nz/ready-to-register/need-to-know-to-register/charitable-purpose-and-your-rules/>. If a registered charity’s constituting document allows the charity to be wound up, the winding up clause must require all surplus assets, after payment of liabilities and the expenses of winding up, to be distributed to charitable purposes in order to be eligible for registration. This requirement is buttressed by the “deregistration tax” contained in s HR 12 of the Income Tax Act 2007, which is designed to ensure assets of a charity that is deregistered can only be used for charitable purposes.

10 The fiduciary duty of obedience is set out, for example, in Trusts Act 2019 s 24; Companies Act 1993 s 134; Incorporated Societies Act 2022 s 56.

11 For tier 1 and 2 charities, see [PBE FRS 48 Service Performance Reporting](#) at [IN 2]; for tier 3 and 4 charities, see the [tier 3 standard](#) at [A8(b)] and the [tier 4 standard](#) at [A8(b)].

the charities register on an annual basis if the charity wishes to remain registered.¹² In other words, registered charities are subject to built-in accountability mechanisms to ensure the funds generated by the social enterprise activity are being used to further the stated positive social outcomes. These mechanisms protect against “green-washing”, and further provide trust and confidence.

While it is common for charities to be overlooked,¹³ particularly in the face of something perceived as “new and shiny”,¹⁴ it is important to understand that supporting charities’ ability to run businesses is a critical part of creating an enabling framework for social enterprise in New Zealand.

Social enterprise is not “new”

It is also important to understand that the concept of social enterprise is not “new”. To the contrary, values-led, future-facing, community-driven business, that takes a decentralised approach to production and consumption of goods and services utilising local resources and knowledge,¹⁵ is as old as time. An early illustration of business as a force for good is the Rochdale Pioneers of 1844;¹⁶ even before then, a long history of economic cooperation among all peoples, especially early African societies and First Nations, can be seen.¹⁷ In Aotearoa New Zealand, kaupapa Māori businesses have customarily operated with long-term horizons involving respect for living in harmony with the land, all the while managing multiple stakeholders and objectives, guided by tikanga values such as kotahitanga (togetherness), kaitiakitanga (stewardship over resources) and manaakitanga (care and support).¹⁸

Arguably, capitalism has always combined doing good with doing well, and the idea of shareholder primacy (in the sense of maximising profits at the expense of people and the planet), which has resulted in such widespread inequality and environmental degradation, is nothing more than a neoliberal aberration.¹⁹ The key point for current purposes is that businesses run by charities are not implicated in the shareholder primacy/stakeholder capitalism debate: shareholder primacy cannot be the driver for businesses run by charities, as charities are structurally required to operate for *purpose*, rather than for *profit*, further highlighting the benefits to be gained by supporting charities’ business/social enterprise activity.

12 Failure to file annual returns for two consecutive years may lead to the charity being deregistered. See Charities Services *Annual returns*: www.charities.govt.nz/ready-to-register/benefits-and-obligations-of-registered-charities/annual-returns/.

13 As discussed above in ch 1.

14 Interview with Professor Dana Brakman Reiser, Centennial Professor of Law at Brooklyn Law School, and co-author of *Social Enterprise Law – Trust, public benefit and capital markets*, D Brakman Reiser and SA Dean (Oxford University Press, 2017) (14 January 2021), in the context of Public Benefit Corporations: “People get excited about a new tool and forget about the value of the old tool that is charities that can do similar things and is more reliable in terms of its public-regarding nature”.

15 M Curtin “SEWF Message to COP26” Social Enterprise World Forum April 2021: sewfonline.com/sewf-message-to-cop26/.

16 International Cooperative Alliance *The Rochdale Pioneers*: www.ica.coop/en/rochdale-pioneers.

17 JG Nembhard “Racial Equity in Co-ops: 6 key challenges and how to meet them” NonProfit Quarterly 21 October 2020: nonprofitquarterly.org/racial-equity-in-co-ops-6-key-challenges-and-how-to-meet-them/?mc_cid=493b1be838&mc_eid=7c71b4ef5b.

18 JR McKenzie Trust “How does Māori business intersect with the principles of social enterprise?” www.jrmckenzie.org.nz/stories/how-does-maori-business-intersect-with-the-principles-of-social-enterprise. Acknowledging that conflating Māori entrepreneurship with social entrepreneurship risks privileging the Pākehā worldview over the Māori and losing sight of the differences. See, for example, N Shephard “Giving it up for Aotearoa: The future of philanthropy” NBR 3 May 2021: www.nbr.co.nz/opinion/nbr-list-new-focus-profit-and-purpose?utm_medium=email&utm_source=NBR%20Today.

19 The idea of shareholder primacy is often said to have originated in an article written by economist Milton Friedman in the New York Times in 1970 but, perhaps with the confluence of neoliberalism in the 1980s, his argument may have been misinterpreted. Other factors at play, such as the impact of loss of connection through globalisation and scale, are also at play. For example, Haidt argues that when capitalism was based in companies that were based in a town, local norms acted as social constraints on unhealthy excesses. See RNZ “Jonathan Haidt: Social media model is ‘breaking the world’” 24 October 2021: www.rnz.co.nz/national/programmes/sunday/audio/2018817669/jonathan-haidt-social-media-model-is-breaking-the-world. As discussed above, analysis of the shareholder primacy/stakeholder capitalism issue is beyond the scope of this report.

Importance of social enterprise for charities

Charities in New Zealand have long used business models to further their charitable purposes, with many submissions to the Department of Internal Affairs' ("DIA's") review of the Charities Act highlighting the importance of their continuing ability to do so. While a study of all 363 submissions to DIA's review would contribute significantly to a more nuanced debate on the issue of charities running businesses, it is hoped that the selection set out in box 5.1 might contribute to contextualising the debate:

Box 5.1 – sample of submissions regarding charities' use of business/social enterprise activity to further their charitable purposes in New Zealand:

Submission of Retirement Villages Association:²⁰

The Retirement Villages Association of New Zealand (the RVA) is a voluntary industry association that represents the interests of registered retirement village owners, developers and managers throughout New Zealand. The RVA's members include listed companies, private companies, and charitable and community-based organisations, which operate 370 villages with 31,000 units, and which are home to around 40,000 older New Zealanders. This is around 13% of the country's +75 population.

The RVA itself is an Incorporated Society so this submission is made on behalf of our 66 registered retirement villages that are also operated by religious and welfare organisations and are registered charities in their own right (referred to in this submission as "not-for-profit villages"). These villages consist of 3,676 villas and apartments, which are home to 4,780 older New Zealanders. The villages are also spread across the country, often in rural locations where they represent the only age-appropriate housing options for older people.

The Registrar of Retirement Villages lists 89 registered villages as not-for-profit. Those that are not RVA members are generally small local villages run by a community trust or a local church. There are around 300 units in total in this sector that are outside the RVA's membership.

Most of the not-for-profit villages are also co-located with residential aged care facilities, thereby providing a continuum of care. For the purposes of this submission "villages" includes residential aged care facilities.

... The majority of registered retirement villages (approximately 88% by unit number) operate in the commercial for-profit sector. As all commercial enterprises must, their focus is on providing a return for their shareholders while operating their villages as efficiently as possible for the benefit of their residents. As a result, some activities such as providing rental and social housing, drop-in day care centres for older people, employing social workers, and other initiatives that are not directly aligned with their commercial objectives generally fall to the not-for-profit sector to provide. As an example, 50 villages provide rental accommodation across New Zealand. Of these 33, or 66%, are in the not-for-profit sector.

... The [not-for-profit retirement village] sector sees a clear future in continuing to provide social housing and related charitable activities. We know that at least 20% of people aged over 65 do not own property (2013 census) and therefore access to a conventional retirement village is going to be difficult because they will need to pay a capital sum that they do not have. This means that the not-for-profit villages will need to be nimble to respond with appropriate business models to changes in older peoples' circumstances as society moves away from the dominance of property ownership.

One member observed "If a review of the Act were to alter the financial benefits of operating a trust, we would be forced to take a more commercial approach to our activities. Affordable housing is clearly an issue today, so I believe it should be emphasised in the submission."

As a result, the regulatory model for charities needs to be transparent, robust and similarly flexible to encourage innovative responses to social demands for housing.

Obligations of charities

As noted above, not-for-profit villages exist to provide social housing and other age-related services that are funded out of their trading surpluses in their village activities. This is achieved at the expense of higher returns from their more conventional village activities.

A few examples from member villages follow, which could be repeated dozens of times across New Zealand:

²⁰ [Submission](#) of Retirement Villages Association May 2019 at 1 - 4.

- a. A member decided to forgo a development surplus of \$1.7 million in one development so they could provide 10% of the units as rental accommodation.
- b. A member spends \$236,000 annually on short-term respite services so family caregivers are able to take a short break. This sum is the difference between income and expenditure on these services and is funded from the organisation's general reserves. Over a five year period the net cost of this service totals just under \$1 million.
- c. A member makes grants of \$1 million annually to assist in the provision of social housing to alleviate loneliness and social isolation, provide hardship support and fund research in a large metropolitan area.
- d. A member operates a network of community drop-in centres reaching some 800 people per week across several districts at an annual net cost of \$234,000.
- e. An operator in a small centre offers [Licence to occupy] units at below market value to ensure that housing is affordable for their community.

Benefits of a charitable registration

There are four principal benefits not-for-profit retirement villages get from registration as a charity:

- a. The ability to direct funds to charitable purposes without needing to satisfy shareholders' returns;
- b. The tax-exempt status allows more funds to be directed to charitable purposes;
- c. There is an ability to offer a greater choice of villages to intending residents, especially those who are looking for a values-based provider;
- d. A charities registration provides credibility to the village for both intending residents and the local community which supports the facility.

... Retirement villages are provided to communities on a self-sustaining model, funded via the sales of Occupation Rights Agreements (ORAs) to residents and regular cost-recovery periodic charges for village overheads. They do not compete for the public's discretionary dollar through street appeals. Operators also rely on this internal income generation and approved borrowing and are unable to access shareholder equity. As a result, they can be at a disadvantage with their commercial competitors in maintaining attractive, modern villages. Commercial villages have an extensive range of funding and equity choices to support their expansion and make returns to their shareholders.

Retirement village disclosure statements and annual accounts are transparent about the source and application of funds for all registered villages. Funds are accumulated via fair value property gains (also unrealised gains) rather than cash accumulated through the village operation. As noted above, these funds are then available for the organisation's charitable purposes but also to ensure the villages remain attractive for prospective residents.

Villages are long-term assets (for example, Selwyn Village has been in existence for 65 years, Masonic Villages for more than 50 years) and therefore we oppose a mandatory distribution of funds. Villages require substantial reserves for property management and development such as expanding existing villages and building new ones. 11 existing charitable villages are expanding their offering with new units or apartments, and a further five not-for-profit new villages are listed as being in development.

Finally in this section, we would like to stress that, for the most part, not-for-profit boards are made up of local volunteers who want to use their skills to return something to their community. Apart from attendance fees and out of pocket costs, they are not remunerated and certainly not in the same category as professional directors on commercial village boards.

Submission of Cornwall Park Trust Board:²¹

Cornwall Park is located approximately 7 km from the Auckland Central business District. Its area is 193 hectares. It operates at no cost to local or central government; it is completely funded by the Cornwall Park Trust Board, a private charity. It operates on land gifted by Sir John Logan Campbell in 1901. It is visited by more than four million people each year. It is perceived by most Aucklanders who know it as a priceless treasure amongst Auckland's Parks which could not today be replicated. It is a true "jewel in the Crown" and includes:

²¹ [Submission](#) of The Cornwall Park Trust Board *Submissions on Discussion Paper on Modernising the Charities Act 2005* prepared by DLA Piper 2 April 2019 at 2 – 11 (footnotes omitted, emphasis in original).

- Tranquil, beautiful, parklands.
- Unique flora and fauna.
- Farmlands – a unique feature of an urban park.
- Heritage and history – Acacia cottage, an Information Centre, archaeological sites, historic stone structures and monuments.
- Areas for sport – five sports clubs in five sporting codes.
- Areas for family recreation and socialising.
- A café, a bistro restaurant and a creamery for refreshment.
- Availability for special events such as weddings.

See www.cornwallpark.co.nz.

The Trust Board organises many free events in the park from a summer music series to Garden Walks to children's events. It organises walks guided by experts in their field covering archaeological, botanic, geological and heritage subjects.

As the intensification of Auckland residential property proceeds, the amenity value of the park to the people of Auckland and New Zealand increases exponentially. This was Sir John's vision – a park in a rural setting and spaces for recreation and sport while keeping intact the earthworks of the ancient pa of the tangata Māori whom Campbell sought to honour.

... The Trust Board is a long established charity with particular features. It operates Cornwall Park, around and on the slopes of Maungakiekie, for the benefit of the people of New Zealand. This is its core and sole charitable purpose and is the central requirement of the trusts under which it owns the park land.

The primary source of its funding is leasing and renting land which it owns adjacent to the park. This land was gifted to it by Sir John Logan Campbell as an endowment to fund the park (the "endowment land") ...

[Sir John Logan Campbell] was an extremely prominent member of the Auckland community – in particular the business community – through the 19th century. Campbell and his business partner Brown purchased the Mount Prospect estate in 1853. They renamed it One Tree Hill and in 1873 when the partnership was dissolved, Campbell became sole owner of the One Tree Hill Estate. The land was farmed at the time of purchase and Campbell continued to farm it though he did not live at the site, rather employing a farm manager. Campbell originally intended to build a large home within the current park grounds; this never eventuated, but formal plantings for a carriageway in the 1870s are a feature of the park.

Campbell had always considered gifting the park for the perpetual use and enjoyment of the people of Auckland and New Zealand. He organised his finances to achieve this, with considerable effort and personal sacrifice (he had been adversely affected by the New Zealand banking crisis of the 1890s). He was determined to hand over the park free of debt and sold "every available asset" (his words) to clear debt. He cleared all mortgages over the park land before passing it to the trust.

On the occasion of a Royal Visit in 1901, and as Mayor of Auckland, Campbell pre-empted his will and handed the title deed to the Park to the Duke and Duchess of Cornwall and York. From that time the affairs of the park have been in the hands of trustees, and later the Trust Board. The original trustees were hand-picked by Campbell.

With the initial gifting the park inherited plantings from the farming landscape as well as major plantings that Campbell had established. However an overall plan was needed and young landscape architect Austin Strong was recommended by Chief Justice Sir Robert Stout. Strong had been a schoolboy in New Zealand and had studied landscape architecture in the United States. He drew on the precedent of Golden Gate Park in San Francisco for the form of Cornwall Park. The parks share broad areas of open spaces, massed plantings concentrating on trees, sweeping driveways and facilities for visitors.

In August 1903 the Park was formally opened from the front steps of Huia Lodge, now the Information Centre for the Park. Over the last 100 years the Park has been planted and set out following Campbell's aims and objectives as well as the broad spectrum of Strong's design.

There remained the question of how to fund a park intended to be available to the people of Auckland and New Zealand in perpetuity. As well as providing some initial funding, Sir John Logan Campbell did this by gifting a significant area of land adjacent to the park lands as "endowment land" which could be used to generate income to fund the park. The "endowment land" is held and administered under a 1908 trust deed which entitles the trustees to lease or rent the land.

Through the 1920s to the 1950s the then trustees subdivided the endowment land and leased it for development as residential sections on "Glasgow leases" which are perpetually renewable and subject to a rent review every 21 years based on 5% of the value of the property less the value of the improvements.

The endowment land also includes a significant portion of the land upon which St Cuthbert's College is located, and the land upon which the Auckland Showgrounds operate. Ground rent is paid to the Trust Board by the College and by the Shows Board.

The Trust Board also has income from an investment portfolio which has been built up over the years. This remains, however, very much the minor contributor to the funding of the operation of the park compared with the income from leasing and renting endowment land.

The Trust Board also gains some income from the operation of a café, and a restaurant/kiosk within the park.

Finally, the Trust Board gains some income from livestock operations associated with the park; it was Sir John's vision of the park that it would provide an opportunity for town dwellers to experience and gain some understanding of agricultural life. The livestock in the park provide a unique dimension to what is essentially now an inner city park.

The Trust Board and the park operations have never been funded by either local or central government. Cornwall Park is thus made available to the people of Auckland and New Zealand at no public cost.

A further feature worth noting is that the endowment land forms a "protective fringe" around the park. Many endowment land properties back onto the park, making them highly attractive and most desirable. The Trust Board's ownership, and the terms of the leases, gives it an ability to (reasonably) control the nature of development on the endowment land properties to ensure that they do not detract from the amenity of the park.

We have outlined the history of the park in this way to demonstrate the intimate relationship between the endowment land, which is the basis of the Trust Board's business of leasing and residential rental activities, and the park land/the trusts upon which the park land is held ...

The Trust Board members have always been persons with significant commercial, professional or public sector experience and qualifications ... Trust Board members receive no remuneration - the trust deeds do not allow this. Actual expenses they incur may be reimbursed ...

The [DIA's] discussion paper observes that charities may run "unrelated businesses", where the service or product does not directly contribute to a charitable purpose (eg food and drink retailers, hotels). The example *par excellence* is the Sanitarium group companies, but there are many other examples ... The discussion paper suggests that the Act should enable charities to raise funds to support their work, while providing certainty that charities are only undertaking business activities to further charitable purposes and that no individual is profiting. No details are given of how it is suggested this might be achieved ...

The Trust Board's main source of income is from ground rents on the endowment lands. Residential rentals are also generated from some endowment land properties. The endowment lands are held subject to the main trusts of the 1901 trust deed, with the modifications in the 1908 trust deed allowing development, leasing and renting of the endowment lands for the purpose of generating income to support the part. It could be argued that this use of the endowment land property is not as such "contributing to a charitable purpose" in the way envisaged by the Discussion Paper ... it is possible that any future legislation resulting [from] this review might define "unrelated business activity" in such a way as to catch all of the ground rent leasing and residential rentals currently in place over endowment land. This would impose an additional burden to no good purpose ...

Accumulation of funds and assets and transparency in this regard

The discussion paper notes that some charities may accumulate considerable funds (or other assets) over many years for good reasons, such as managing and growing a charity's assets for current and future generations. In other cases, a charity may accumulate funds over many years with no clear rationale ... The discussion paper notes that holding accumulated funds without clear explanation may cause public concern that a charity is not using its funds for charitable purposes.

The Trust Board does not see this as likely to affect it. The trust deeds do not require or provide for distributing funds or making grants for charitable purposes, so no requirement to distribute a portion of funds arises. While the Trust Board does have accumulated funds, these have been

progressively accumulated and invested for the purpose of diversifying the sources of income for developing, operating and maintaining the park ... it holds a range of trustee investments for the purpose of diversifying the sources of income required to support the park.

Submission of Society of Mary New Zealand Te Rōpū o Meri, Aotearoa (Society of Mary):²²

DIA Discussion Question: What should be the registration requirements for unrelated businesses?

The Society of Mary's preference is to respond to this question, and to the general review, by discussing a real example of the nature of charities owning business in New Zealand. This stems from our practical evidence.

Our view is that it is best to contribute to the review by providing a concise history of the Society of Mary's ownership of its charitable company (Marist Holdings (Greenmeadows) Ltd) that is located in the Hawkes Bay. This is the entity therefore that generates business income in New Zealand.

The Society of Mary is a faith-based charity with various legal entities that are registered in New Zealand. The Society of Mary General (New Zealand) Trust owns 100% of Marist Holdings (Greenmeadows) Ltd.

The Society's ownership of this business in Hawkes Bay is essentially a matter of history rather than an initially planned investment strategy. The focal point, until 1992, was the education of priests and students at the Greenmeadows Seminary; the winery business was an adjunct to that.

In the mid-1990s, when the Society determined that the education and training of priests was better placed in Auckland, the initial impetus was towards disposal of the then Trust's assets on the basis that they were superfluous to the Society's needs. However, it became clear that the assets had considerable potential to grow an earnings-based business and for capital appreciation that would be of great benefit to assist with the advancement of the Society of Mary's charitable purposes in New Zealand.

This presented a unique opportunity to set up a charitable company that could have a clear commercial focus and at the same time retain the essence, underlying values and philosophy of the Society of Mary. Accountability was important to the Society and to the Company Board; so, performance measures and targets were agreed. Two measures were adopted – net surplus as a percentage of Total Assets employed, and net-surplus as a percentage of average shareholders' funds. (These are measures that could apply to unrelated businesses).

The company has now reached a point where it can be confident of producing a consistent annual profit sufficient to enable it to meet a commercial dividend that assists the cash requirements of the Society of Mary's charitable activities in New Zealand. The company is now a substantial and vibrant entity, significantly better off than it was at its inception and well able to sustain a solid and steady cash flow and increasing capital value that will contribute to charitable works in New Zealand for many years ahead.

One of the key reasons behind initially choosing the company structure was the need to separate the commercial and religious, educational & spiritual charitable activities of the Society of Mary; each of which require different governance structures to operate best. Experience has shown that this has worked extremely well. Rather than consider itself as the owner/operator of a smorgasbord of historical assets, the Society of Mary is able to consider itself as the owner of shares in a strong and vibrant commercial company capably managed and governed by people with business experience and that are sympathetic to the Society of Mary's charitable ideals.

This practical example provides for the separate registration of the business as a charitable entity together with the separate registration of the charitable owning entity. This information is publicly available ...

A company's dividend distribution policy should always be overridden by the requirements to preserve prudent financial management and compliance with statutory solvency requirements ...

It should be apparent that Directors have sufficient experience and/or qualifications to direct a company operation. Directors with sufficient experience will understand the notion of "managing risk" and will not lead to charitable funds being put at risk ...

²² [Submission](#) of Society of Mary New Zealand Te Rōpū o Meri, Aotearoa *Modernising the Charities Act 2005 Submission – Business* 28 May 2019 at 1 - 4 (emphasis in original).

It has long been perplexing to read people criticising charitable companies for generating profits commercially. We presume that the criticism stems primarily from the perception that the “tax advantage” that the charitable company is given by the government improves the ease of operating a charitable company. Some “for profit” companies complain that this gives charitable companies an unfair advantage ie not having to pay tax on the company profits.

Conversely, it does mean that the government does not have to return 33.3% to donors who gift monies to the charity. The Society of Mary is not a charity that asks the general public for donations, though some few do donate to the Society. It does attract some bequests and some donations for its “missions” overseas. In general, we are a charity that produces our income from investments and charitable companies.

A charitable company produces tax through the employees in and through the PAYE tax system. It also pays GST on the goods and services it uses. The charity owning the company could invest its money in shares even out of the country and that would result in less criticism of the charity but no taxation benefit to the country and no employment of NZ citizens.

It seems to the Society of Mary that it is better to operate a charitable company as a way of employing New Zealanders and of generating income rather than using its money simply as an investment, perhaps in a foreign company or in foreign shares. People talk about others donating their hard earned money and time, for us the money earned is not donated but generated by our company and our investments. People talk about our “tax free status” but we also could request money from individuals who could ask [for] one third of their donation back from the government.

Charitable companies produce employment and indirect tax dollars. We did not set up a company to achieve a taxation advantage but the money produced is used for the charitable purposes of the Society of Mary.

Submission of Youthline Central South Island:²³

Youthline Central South Island supports taiohi across the top half of the Te Wai Pounamu, from Waitaki to Tasman Districts. We support young people’s development. We provide a 24/7 helpline, digital mentoring, leadership, and training for young people.

We are a volunteer led charity (with 70 volunteers), and a small support staff. We encourage our young volunteers to be involved in, and lead our communities.

Our volunteers answer a helpline at all hours, with 11% of our callers are attempting to end their lives. We provide free skill training, positive social media messaging, and mentoring for young people to help prevent suicide ...

Long term sustainability by social enterprise

Charities cannot have the impact necessary to make real change in our society if they are required to maintain a subsistence existence each year. The uncertainty that this type of financial management provides often leads to short-term of behaviours, strategic thinking and action. In this environment there is little incentive or opportunity to fund innovation or growth. Short term thinking and action also often result in less impact. As a result, there is a need for charities to consider long-term financial sustainability.

It would therefore appear logical that charities should be able to save for future initiatives and not ... be required to deplete reserves through spending or distribution each year.

Reducing the risk of not being able to operate in the event of funding cuts also drives many prudent charities to put aside some funds as a financial buffer.

Youthline CSI plans to run a café as a social enterprise and training centre for young people. This would supplement our income, as it does in our Auckland centres. It needs proper capitalisation to succeed. We consider this part of a longer term plan to participate in the Christchurch Youth Hub, another key initiative that requires financial preparation to realise long term benefit for the community.

We support transparency initiatives

We have seen a few examples of charities with very large asset bases where there appears to be a ridiculously small proportion of funds applied or distributed for charitable purposes. And with no explanation. Unfortunately this type of behaviour can taint the work of the vast majority of charities that commit themselves to trying to maximise their impact on achieving good for the wider society.

²³ [Submission](#) of Youthline Central South Island (undated but submitted for a 31 May 2019 deadline) at 1, 3 – 4 (emphasis in original).

Obligation to manage reserves

Our view is that governance standards, particularly after the upcoming trusts and incorporated societies law reform are passed, should contain sufficient obligations on charities to manage reserves activity without additional reporting legislative change.

A charity does [have] legitimate reasons for building reserves, especially for purchasing a permanent owned building to house us. We also hold that [it is] best management practice to hold three to six months operating costs in reserve

Submission of Lake Taupo Hospice Trust:²⁴

The Lake Taupo Hospice Trust Incorporated is an Incorporated Society and a Registered Charity, established on the 8th July 1986. The Trustees consist of a representative from Taupo Friends of Hospice, Taupo Hospice Volunteers, Lakes DHB, General Medical Practitioners, Ngati Tuwharetoa and 4 Community appointees. Lake Taupo Hospice is a centre of excellence, providing specialist palliative care to those with life limiting illness ... We work in partnership with our communities and other health service providers so that our patients may live every moment and die well supported with dignity.

Hospice is a philosophy of care which extends beyond the physical needs of a person to their emotional, social and spiritual needs and those of their family. At Lake Taupo Hospice we provide all our community nursing and volunteer services completely free of charge.

Anyone who is dying has the opportunity to celebrate their life with the help of our hospice ... And hospice care doesn't stop when a patient dies, we continue to care and help those loved ones left behind.

Lake Taupo Hospice cares for our patients and their families and friends both before and after a death irrespective of their social status, financial circumstances, age, gender or religion ...

What are the key challenges facing the charities sector over the next ten years?

1. The key challenge is obtaining sustainable funding in a demographic where people have less disposable income.
2. There is a perception that charities are doing work that the government should be doing. Therefore, if they are not funded, then the government would be obliged to fill the gap as part of the social contract.
3. The provision of labour by volunteers is sustainable in the boomer generation but there are growing concerns that future generations will not necessarily have the same level of commitment.
4. Technological changes will impact charities as much as everyone else but there is little resourcing available for development in this area ...

What are the key opportunities facing the charities sector over the next ten years?

1. Technology will provide a whole new way of charitable giving and provision of services. Charities provide ideal testing grounds for new technology as they can easily be extrapolated into the business model.
2. Demand for charitable services is growing.

What is the role of government in achieving this vision?

The government needs to support the work being done, financially where possible and by not over-regulating ...

Charities that accumulate funds to provide a sustainable income source for the provision of community services by that charity should not have an arbitrary requirement for distribution ...

What should be the registration requirements for unrelated businesses?

This is a difficult area to comment on as the permutations of the business and charity relationship are endless. The first point is: what is an unrelated business? In our view, a charity and any business activity it operates should be defined as being in an acceptable and related business relationship if the net profits from the business are wholly applied/paid to/ for the charitable purposes of the charity. In other words, a business is not unrelated because it operates in a different sector than the activities of the charity itself – the required element of relationship is acquired through what the profits of the business are applied to or for, not through the activities of each ...

²⁴ [Submission](#) of Lake Taupo Hospice Trust *Submission on the Modernising the Charities Act 2005 Discussion Document* 23 May 2019 at 1, 3, 7, 15.

In our case, we run op shops based on charitable donations and volunteer labour (with a few paid staff) and the net profits of those op shops provide 26% of our income for use in meeting our expenses related to the charitable purpose of providing free palliative care for all patients in our service. Moreover, because of the limitations on availability of the charitable dollar, we are also looking at additional enterprise options to support our cause as we realise the risk that reliance on charity funding is to the provision of these services and further hinderances to this would be undesirable.

The greatest concern for us would be if there were tax implications to operating our business or future enterprises. There is an argument for taxation and the use of paid staff to create a level playing field with private commercial enterprises who are operating for business reasons however, this can be balanced against the fact that the charitable business is providing revenue to a service that effectively is meeting part of the social contract that the government has with its citizens in terms of welfare. Effectively, this just creates a direct route from the charitable business to community service without any unnecessary and compliance costly governmental intervention by way of taxation and redistribution ...

Submission of the Royal New Zealand Plunket Trust:²⁵

The Royal New Zealand Plunket Trust has been serving New Zealand Families / whānau and their communities for over 110 years. During this time, Plunket through the work of its people has made significant contributions to the health and wellbeing of New Zealand tamariki and their whānau. Plunket employs 1,100 people and has around 1,788 volunteers.

Plunket is a Tier 1 charity and is one of the top 10 health charities by income in New Zealand ...

The charities sector is important to New Zealand society. Charities like Plunket support some of our most vulnerable citizens. The contribution of charities is also important to Government. Society works better with a strong and sustainable charities sector and the review of the Act should support a sustainable charities sector ...

Financial reserves are important for the sustainability of the charitable sector

... Charities need to be free to decide how they use their assets to support their charitable purpose and be able to hold long and short term reserves across financial years.

Business activities of charities

Business activities that generate income for charities should be encouraged to improve sustainability. Plunket supports charities having business activities (and enjoying the associated tax status) as long as the income from the activity is applied to the charitable purposes of the organisation.

All charities need sustainable sources of finance to carry out their work. Plunket like other charities faces increasing challenges sourcing sustainable funding and volunteers to carry out their work. Operating costs particularly employee expenses continue to rise.

Plunket has not received an increase in Government funding for a number of years. Competition within the charitable sector for other sources of funding such as philanthropy and grants is strong.

The purpose and objectives of some charities can also limit their source of funding available to charities. So business activities need to be maintained and protected as a source of funding for charities.

We support continuation of the current position in New Zealand that irrespective of the type or structure of the business activities, they are permitted to operate within the charitable status of the charity (and enjoy the associated tax exempt status) as long as the income from the activity is applied to the charitable purposes of the organisation.

It is not the Charities Services role to manage the business risk of charities.

Governance standards in subsidiary companies and the new officer duties soon to be introduced under the Trusts Bill and the Incorporated Societies Bill will provide the framework, obligations and remedies to deal with the management and accountability of risk ...

RECOMMENDATION: • The Act should enable charities to raise funds to support their work, while providing certainty that charities are only undertaking business activities to further their charitable purposes, this could include social enterprises ...

25 [Submission](#) of the Royal New Zealand Plunket Trust *Submission to the Department of Internal Affairs on Modernising the Charities Act 2005 discussion document* 14 April 2019 at 2 – 5 (emphasis in original).

Submission of Oxfam New Zealand:²⁶

Oxfam is an international development organisation, established in 1990 as a charitable trust. It is an independent New Zealand registered charity. Our Charitable Objects include:

- a. The relief of poverty, distress and suffering in any part of the world irrespective of national or ethnic origin, race, sex, creed, political system, religion or colour. And:
- f. To promote changes in policy, laws, and institutions only to the extent that they are ancillary to the purpose to relieve poverty, alleviate distress, and reduce suffering ...

The Charities Register has significantly improved the registered charitable sector's financial accountability and transparency. It has provided a base line mechanism for New Zealanders to investigate NZ registered charities financial structure and performance ...

What should be the registration requirements for unrelated businesses?

The question is not how the funds are raised (i.e. selling a service that is not connected to the purpose) but how the funds that are raised are applied to the charities purpose.

The more charities need to adapt and change to the increasing costs of compliance and operating a best practice business the more they need to look to hybrid models where different income streams help diversify risk and build sustainability. A social enterprise, such as raising related or unrelated business income within a charitable entity is not new. For example – YMCA's gyms and hostels, Blind Foundation's commercial rental income. In fact, prior to the 1940s most charities needed to have a business arm that raised a profit to be viable, as government contracts did not exist and fundraising from the public was limited.

In effect – making a 'surplus' through a business (related or unrelated) provided it is then applied to the charitable purpose, should not be any different from raising net funds from a direct mail appeal to supporters. The key being that governance and staff do not gain any financial or personal benefit from the net business income and it is applied to the charitable purpose ...

What, if any, restrictions (such as the 'significant risk' test in England and Wales) should exist on the level of risk for charities undertaking business activities?

The problem this change is attempting to fix needs to be made clearly identified.

Is it an attempt to protect the donors if a charities business activity makes the charity go into liquidation? It is not clear why charities undertaking a business require a higher bar for 'managing risk' then charities that 'just' fundraise. Fundraising poses as many potential risks for failure and loss as do commercial ventures.

Or is it protecting the charitable purpose? If yes, then why is the business activity considered a greater risk than the charity's core operations/activities? What risk protection mechanism is there to prevent a charity going under which does not have a business activity – currently there is nothing to protect the donors' contributions.

Submission of New Zealand Red Cross Inc (Red Cross):²⁷

The Red Cross' mission is to improve the lives of vulnerable people by mobilising the power of humanity and enhancing community resilience. Its strategic priorities are disaster management and community resilience, refugee services for refugees and other vulnerable people, and national and international programmes.

Formed in 1915, the Red Cross became an official national society in 1932. Since its formation, it has become part of the fabric of New Zealand's humanitarian services, from providing first aid to disaster relief to reuniting separated families ...

While the application of all funds generated by an unrelated business toward a charity's purpose is a given, Red Cross is of the view that charities function best in an environment that allows them to raise funds in a flexible way and in a similar framework to that enjoyed by the private sector.

26 [Submission](#) of Oxfam New Zealand *Submission – Modernising the Charities Act 2005* 31 May 2019 at 1 – 2, 6.

27 [Submission](#) of New Zealand Red Cross Inc *Modernising the Charities Act – a submission on the Discussion Document* (undated but submitted for a 31 May 2019 deadline) at 1 – 2.

There would be increased compliance costs and a reduction in the contribution of the charitable sector to New Zealand if either:

13.1 a risk assessment of business activities were to be introduced; or

13.2 a different accounting or tax treatment was applied to some existing charitable business activities.

The Red Cross' business activities are central in its ability to operate as a charity and achieve its charitable purpose. As an example, Red Cross operates over 50 Red Cross opportunity shops across New Zealand, all of which are set up for the purpose of making a surplus to assist in achieving its charitable purpose. Red Cross also provide first aid training services, the surplus funds of which may be applied in different areas of the organisation.

Red Cross does not consider that it is the Charities Office's role to manage the business risk of charities. Existing governance standards and the new officer duties soon to be introduced under the Trusts Bill and the Incorporated Societies law reform provide the framework, obligations and remedies to deal with the management and accountability of risk.

Submission of The Salvation Army New Zealand, Fiji, Tonga and Samoa:²⁸

The Salvation Army is an international Christian church and social services organisation that has worked in New Zealand for over one hundred and thirty years. The Army provides a wide-range of practical social, community and Christian faith-based services, particularly for those who are suffering, facing injustice or those who have been forgotten and marginalised by mainstream society. We are passionately committed to our communities as we aim to fulfil our mission. We have over 90 Community Ministry centres and Churches (Corps) across the nation, serving local families and communities. This service covers numerous Christian spiritual and social (addictions, social housing, prisoner reintegration, foodbanks, social work, community finance, financial mentoring and budgeting and many more) services across the nation. We are passionately committed to our communities as we aim to fulfil our mission of caring for people, transforming lives and reforming society by God's power.

This submission has been prepared by the Social Policy and Parliamentary Unit of The Salvation Army. This Unit works towards the eradication of poverty by encouraging policies and practices that strengthen the social framework of New Zealand. ...

[it] is important to ensure that modernising the Act and sector do not come at the expense of the goodwill and community heart behind most if not all charitable work ...

The Salvation Army is supported by the Family Store Second Hand stores we operate around the country. These stores help supplement funding for our core church and social services. We would be hesitant to support any move for increased reporting requirements as outlined above. Yet we are also keen to ensure that our processes remain legal, transparent and fair. Any changes to the business aspects of the sector would affect us greatly. There might be a case for reporting back in some form on business subsidiaries. But we submit that this review does not have enough information or context about what these options could actually look like in reality. We believe more investigation is needed about the possible scenarios and options. Suffice it to say that The Salvation Army would, if required, move to fulfil any additional business-centred reporting if required to ensure we are a fair and committed actor in civil society.

Submission of the Kapiti Retirement Trust:²⁹

The Kapiti Retirement Trust (KRT) has been operating as a not-for-profit, community based Trust in Kapiti for the past 60 years. Thanks to the development over this period of a large and desirable retirement village in the heart of Paraparaumu, the Trust, using surpluses from village operations, has been able to expand our package of care facilities available to elders. At its core, KRT operates an aged care hospital which includes a dedicated secure dementia wing. Over the past decade KRT has opened to the community a 12 person day respite unit and developed a dedicated block respite, end-of-life care wing. This currently holds the contract for *all* five dedicated respite beds in the C&CDHB region and is unique in that users are able to book periods of stay up to six months in advance. With Kapiti not having a permanent bed hospice, our end-of-life family suite also offers a local alternative for those not able to cope with end-of-life care being delivered at home. We are currently in the process of building another such suite.

28 [Submission](#) of The Salvation Army New Zealand, Fiji, Tonga and Samoa *Modernising the Charities Act 2005* (undated but submitted for a 31 May 2019 deadline) at 3, 6, 12 (footnotes omitted).

29 [Submission](#) of the Kapiti Retirement Trust *Review of the Charities Act 2005* 7 May 2019 at 1 – 6, 13 (emphasis in original)

All of the Trust's care services run annually at a significant loss which cumulatively, over the past five years, exceeds \$3m. Without having available the surpluses arising from operating our retirement village as a business unit, these services would cease to exist. We believe that removal of some/all of these services would put unacceptable strains on not only our local health services but also those of our regional hospital and hospice.

As such, the voluntary Board of Trustees of KRT and management have some very serious concerns about proposals being made in the above review which we believe have the potential to adversely affect what we do ...

Business operations – the treatment of some charities running businesses to support their charitable purpose has been potentially unfair. While our retirement village business is within the objects of the Trust (the provision of accommodation to the elderly) it is very profitable and accordingly raises potential future risk that this may be deemed a taxable undertaking as opposed to a charitable one. Furthermore, if the Trust expands its operations to provide further income sources to support its charitable purpose, these options may be limited by Charities Services' interpretations ...

What are the key challenges facing the charities sector over the next ten years?

... Survival will be the key challenge for many charities. With so many competing charities and with the use of technology enabling emotional giving to such a wide range of competing causes ranging from overseas social needs, to environmental causes to spontaneous 'give a little' appeals, the pool for limited funds has never been larger but with discretionary funds for so many being limited – including NZ demographics with larger numbers of elderly, many of whom will be reliant on just a state funded pension to meet living costs. Couple with this an increasing regime of often complex and expensive compliance requirements eg meeting health & safety requirements, local body regulations, building regulations ...

What is the role of government in achieving this vision?

Creating an equitable, inclusive and 'community-friendly' social environment within which the establishment and continuation of charities can thrive ...

Would you remove or change any part of the vision or policy principles?

Policy Principles – need to be 'nimble' to respond rapidly to changes in how charities can carry out their purpose without this becoming a cumbersome, resource-hungry activity. Principles need to be robust and provide certainty for the future ...

Are there any additional purposes you think should be added to section 3?

To support and foster the ability of emerging charities which reflect new and innovative interests and thinking in our community to thrive and grow.

Why did your organisation register as a charity?

Back in the 1950s the Kapiti Retirement Trust was established by members of the community as a way of meeting a known need to provide care services locally to the elderly. The Trust structure was seen as being the most appropriate. Public perception being the worthiness of being a registered charitable trust and the tax benefits allowed for more funds from the business side of operating a retirement village to go into the meeting of the Trust's registered charitable purpose, providing care services. Our Trust essentially belongs to our community rather than to a corporate or being a private entity. That it can't just be sold off, wound up or profits distributed to individuals gives all those involved a greater sense of security and certainty.

What benefits does your charity experience from being registered under the Act?

Again public confidence in registration as a charitable trust. Commonly stated satisfaction of residents in our retirement village – giving back. Their funds going to a charitable purpose not shareholders of a public company ...

Should certain kinds of charities be required to distribute a certain portion of their funds each year, like in Australia?

No. Charities will often work over a number of years to raise funds to build a new building to provide [for] their charitable purpose. Also, usually in the formative years, more work is undertaken to raise funds and place the charity in a financial position to then provide for their charitable purpose. Additionally in our case, as we have a large property portfolio to further our purpose of providing accommodation for the elderly a large portion of our accumulated funds arises from unrealised revaluation of these assets and not in liquid funds that are available

for charitable purposes. In the above circumstances, an arbitrary requirement to distribute a portion of a charities accumulated funds will work counter to the long term goals of the charity...

What should be the registration requirements for unrelated businesses?

Registration requirements should be similar as for a charity recognising that there may be a delay from start up to profitability ...

What, if any, restrictions (such as the 'significant risk' test in England and Wales) should exist on the level of risk for charities undertaking business activities?

Current law and restrictions of officers provides sufficient control over risk.

What should be the requirements of charities to manage conflicts of interest when undertaking business activities?

These should be consistent with the management of conflicting interests [in] any other business.

Submission of Save the Children New Zealand:³⁰

Save the Children has 100 years' experience as an international charity organisation, and of these, 72 years here in New Zealand, to bring about lasting change to improve the lives of children and their families all over the world ...

We recommend that charities retain the ability to establish and operate independent businesses to raise funds for their charitable purposes.

Through the establishment and operation of a business, charities can legitimately raise funds, whilst meeting the needs of consumers through products or services and use profits for social or environmental good. Fears about tax benefits or potential fraudulent practice need to be critically examined: they should not overshadow the good that is and can be done through independent businesses.

The imposition of restrictions to the establishment and operation of businesses may serve to limit or stifle innovation, such as social enterprise, that is required to progress and sustain a successful future for the charitable sector. Social enterprise applies commercial strategies to maximise improvements in financial, social and environmental wellbeing. Our world is changing at a rapid pace and it is difficult to predict what the future holds, social enterprise has a key role in working toward this future. It is not without some degree of risk, but the governance boards of charities are ultimately responsible for the effective management of the funds raised. As these responsibilities already exist, we do not support another layer of compliance imposed by Charities Services that has serious potential to limit and or stifle innovation in raising funds.

Submission of Southern Group Training Trust:³¹

Southern Group Training Trust operates as a group training company to enable it to encourage and enable more people to become involved in apprenticeships training by making it easier to do so.

As a registered charity we have found that our clients understand and have trust and confidence in our service provision as demonstrated by their continued involvement with us and continued use and support of our services. We have the capability and capacity to deliver effective educational and employment services and have played a successful role in addressing the skill shortages in the trades within our sphere of influence, primarily the Otago Southland region. We also advocate for trade training through apprenticeships by raising the profile and the benefits of apprenticeship training.

The nature of our work as a group training company which promotes trade training through apprenticeships; recruiting, screening and shortlisting apprentice candidates, and employing apprentices does not need to be any more transparent than it currently is as much of our information is commercially sensitive. We compete with labour hire companies to employ people, with the key difference being that we employ them as apprentices which leads to them becoming fully qualified, highly sought after trades people in full time employment.

Our clients who are members of the public hold us directly to account for the services we provide them. We offer them the opportunity to contract suitable apprentices from us while enabling them, the host company, to focus on what they do best. Our clients range from small

30 [Submission](#) of Save the Children New Zealand *Charities Act (2005) Review Submission* (undated but submitted for a 31 May 2019 deadline) at 2, 8 (footnotes omitted, emphasis in original).

31 [Submission](#) of Southern Group Training Trust *Modernising the Charities Act* (undated but submitted for a 31 May 2019 deadline) at 1 - 4.

partnerships to large multinational companies all of whom see benefit in utilising our services. We regularly undertake satisfaction surveys of both our apprentices and host companies and almost without fail achieve an 80% or better satisfaction rating ...

We do not receive donations or such like from the general public and operate solely within New Zealand for the benefit of New Zealanders.

We are primarily funded by our clients who pay us for the group training services we provide, with a secondary income stream historically from the Tertiary Education Commission for the provision of apprenticeship services on their behalf. Again, they have rigorous checks and balances in place which we have met or exceeded on a regular basis.

We have opted to be a Tier Two reporting charity as we strive to be in this financial categorisation and believe it to be good business practice to report to the more exacting standards. We employ an accounting company to prepare our annual accounts and have them audited annually by another independent accounting company. This audit requirement is both costly and time consuming and, while a testament to our financial and business best practice accountability, must remain cost effective. Placing onerous obligations on charities such as ours benefits no one and has the ability to impede the effectiveness of our existing service provision.

As a registered charitable trust our clients and apprentices know that we are working in their best interest and not as a money making initiative. We operate on a cost recovery basis only with a small reserves account to cover wages and expenses during any unexpected eventuality, e.g. pandemic, earthquake, etc. It is important that we operate sustainably as our commitment to our apprentices is usually for a four year training period. Through providing a cost effective service we are able to encourage and enable more companies to become involved in training apprentices and through the group training model minimise the risk to the company in employing people in what is often their first ever job ...

Why did your organisation register as a charity?

- To emphasise that the work we do is for the benefit of our community and for New Zealand as a whole, and is not a money making venture.
- That there is no personal financial benefit to any of those involved.

What benefits does your charity experience from being registered under the Act?

- Exemptions from income tax
- Creditability as a not for profit
- The fee waiver by the New Zealand Police in vetting our staff and apprentice employees. The re-assurance this vetting procedure provides can be the difference between confidently recommending an apprentice candidate to a client
- Having the apprentice(s) able to work in schools, hospitals, aged care facilities, etc ...

The Act should enable rather than disable the good work of the charities sector.

Submission of the Medical Assurance Society (MAS):³²

MAS was established as a co-operative society in 1921 by a group of doctors to provide insurance to its members. MAS continues to operate as a mutual (MAS is owned by its customers, who are called "Members", rather than independent shareholders) and has since diversified its financial services offerings to Members to include general insurance (house, car contents), life and disability insurance, retirement savings, KiwiSaver, lending referral services and financial advice.

MAS has since expanded its membership from doctors to a broader professional market, including other health professionals (dentists, vets), accountants, engineers, lawyers, and their families. At time of writing, MAS has over 33,000 Members.

MAS has applied to Charities Services for charitable status

In recent years MAS and its Members have increasingly been asking how MAS can contribute more to New Zealand society. This led to MAS putting a proposal to a meeting of its Members in August 2018:

- For MAS to apply for charitable status, and establish a charitable trust with the charitable purposes of health promotion, education and research for the benefit of all New Zealanders. This charitable purpose acknowledges the foundation and origin of the MAS Group's establishment by health professionals.

³² [Submission](#) of the Medical Assurance Society (MAS) *Submission on the Charities Act 2005 review* (undated but submitted for a 31 May 2019 deadline) at 1 - 5 (footnotes omitted, emphasis in original).

- For the MAS Charitable Trust to receive funds primarily from distributions from the MAS Group businesses.
- For the MAS Charitable Trust to pass on those funds to independent organisations and causes to carry out health promotion, education and research activities.

Members voted in favour of this proposal, with a majority of 88 percent voting in favour. Importantly, in voting for this charitable proposal, Members gave up their right to receive distributions from the MAS Group, so that, if charitable status is approved by Charities Services, distributions from the MAS Group could only be made to the newly established MAS Charitable Trust.

We also note, if approved, that MAS estimates it would be able to target annual distributions of approximately \$2 million per annum to charitable causes in health promotion, education and research. In our view, this charitable proposal, and charitable status, is the best way for MAS to make a significant and targeted contribution to New Zealand through the charitable sector.

Our submission on accumulation of funds

As a licensed insurance business, MAS must retain considerable assets to maintain its financial strength and solvency. This is a requirement of the Insurance (Prudential Supervision) Act 2010 and the regulator appointed to supervise insurers' financial strength and solvency under that Act, the Reserve Bank of New Zealand.

Retaining assets is critical to running a prudent insurance business. It helps to ensure that the interests of MAS' policyholders are protected. If, for example, another high-impact, low probability event (for example, another event like the Canterbury Earthquake Sequence) causing widespread loss and damage, and resulting claims, the insurer will have enough assets to meet its obligations in relation to those claims ...

We strongly oppose a minimum spend requirement. Organisations like MAS cannot legally or sensibly disburse a fixed amount or percentage of funds per year ... Even for organisations without legal or regulatory requirements to hold minimum amounts of capital, it would be undesirable to risk exposing such an organisation to otherwise avoidable financial distress in a scenario where the organisation has a bad year or two.

A minimum spend requirement would, in effect, prevent insurance businesses from viably operating as charities. In our view, this would be a poor outcome for New Zealanders because:

1. It would mean the Charities Act would have the unintended consequence of banning particular types of businesses from operating as charities.
2. It would prevent significant funds from being passed on to the charitable sector (in MAS's case, approximately \$2 million per annum to the health research, promotion, or education sector) ...

Our submission on charities that operate businesses

We strongly support the continued ability for a charity to undertake business activities that are unrelated to its charitable purpose, provided that income from those business activities is ultimately applied to the charitable purpose, as per the current Act and case law.

We submit that improved governance and reporting standards, which lead to greater transparency about the charities' unrelated business operations, can address the issues outlined in the discussion document.

MAS' core business activity is to provide financial products and services to Members. MAS has chosen to contribute the surpluses from the Group's business activities because our Members, both health and non-health professionals, want MAS to make a significant contribution to the health of New Zealanders. MAS' financial services business would only contribute to the Group's charitable purposes of health research, promotion and education, in that surpluses from MAS' business would be distributed out of the MAS Group to the MAS Charitable Trust. We understand this would make MAS' business activities "unrelated" to MAS' proposed charitable purpose, based on the description of unrelated business in the discussion document.

MAS Group entities are for the most part registered companies and licensed financial services providers. This means MAS directors and officers are already subject to a range of highly regulated governance duties and reporting requirements, including under the Companies Act 1993, Financial Markets Conduct Act 2013, and Insurance (Prudential Supervision) Act 2010. We are therefore comfortable with the suggestion that increased governance and reporting standards could apply for charities to address concerns about charities' business operations.

The governance and reporting standards discussed in the discussion document would bring charities closer into line with the standards MAS must meet under other enactments. We also agree that the requirements of the different legislative regimes should align as much as possible.

We note the possibility for tension for charities that are companies, between the directors' duty to act in the best interests of the company, and the duty to advance and not harm the company's charitable purposes. However, as the charity's governing document will state the charitable objects of the company, that directors should find it apparent that acting in the best interests of the company must encompass acting in manner that furthers, or at the very least does not conflict with, the company's charitable purposes. We think appropriate guidance from regulators such as Charities Services can also help organisations navigate difficult decisions which involv[e] seemingly conflicting duties.

We note the Department's concern about the operations of unrelated business that pose a significant risk that funds are deflected away from the charitable purpose. We make three points in relation to this risk.

First, we note that the risk of an organisation deflecting funds from its charitable purpose is a risk that is agnostic of whether the organisation's business activities are "related" or "unrelated" to its charitable purpose. The discussion document refers to a health charity operating a health clinic as example of a charity that is operating a related business (and therefore not apparently within the scope of the Department's concern[]). However, our view would be that there is a risk that hypothetical health charity could make imprudent investments in its clinic, thereby putting funds at risk and reducing the benefits received by the charitable purpose.

Second, we agree with the concern about charities investing in their businesses in ways that clearly subsidise the business' activities rather than growing distributions to the charitable purpose and charitable causes. Current Charities Services requirements help to mitigate this concern by requiring such investment to be at reasonable market rates. As above, we submit this should be a question that applies equally to charities that operate related businesses, as well as unrelated businesses. Increased transparency and reporting for charities around strategy for accumulating and distributing assets, combined with ongoing monitoring of charities by Charities Services, can help further mitigate concerns in this area.

Third, we are unsure whether the Department considers that running an insurance business could pose a "significant risk" to charitable assets. Having assets to distribute to charitable purposes in the first place is, in MAS' case, entirely contingent on the sustainability of the underlying insurance business. If the business becomes insolvent, the assets would not be able to be distributed to charitable purposes. However, as noted above, complying with relevant insurance prudential legislation to run a financially strong and solvent insurance business should ensure that those assets are highly unlikely to be lost, ensuring surpluses can continue to be distributed to the charitable purpose. More generally, as we note above, if a charity is reliant on an unrelated business, then that business needs to be able to invest in its business activities in order to be sustainable.

The bigger issue, in our view, is the counterfactual: if charities are banned from operating unrelated businesses, that will reduce the total pool of funds available to be distributed to charity, to the detriment of the sector.

We submit that no restrictions should exist for charities undertaking business activities. A better first step would be for minimum governance and reporting standards to be introduced and for compliance guidance to be provided, so that charities can make better, more transparent decisions about the risks relating to their business activities, and to ensure that accountability exists for the key decisionmakers in those businesses to make appropriate distributions to charitable purposes.

In summary, the ability to use business means/social enterprise is clearly critical for charities, whether as a means of furthering their charitable purposes directly (a "related" business), or as a means of raising funds for their charitable purposes (an "unrelated" business).

In terms of underlying legal principle, charities law is agnostic as to how charities raise their funds (subject of course to the general law and to the terms of each charity's constituting document): all activities of a charity must be carried out in furtherance of the charity's stated charitable purposes and all funds, however raised, must always be destined for those charitable purposes (the "**destination of funds**" test, discussed above in chapter 1).

In the face of increasing costs, increasing pressures on volunteers and revenue streams, yet increasing demands for service, an ideal legal framework would support and enable charities' ability to run businesses to raise funds for their charitable purposes, to help them diversify their income streams, reduce dependency on government funding and donations, and encourage self-sustainability.

As currently interpreted, the legal framework in New Zealand does not do this, and instead acts as a barrier to charities undertaking business/social enterprise activity in a number of ways.

Current barriers

Current barriers fall into three broad categories:

- i. **Capability:** in order to reduce the "risk" of venture failure, Charities Services currently applies an administrative rule requiring charities to demonstrate, to Charities Services' satisfaction, that their business is "capable" of making a profit. Such a rule has no legal basis, does not apply to social enterprises structured as for-profit companies, and can be particularly difficult for a start-up social enterprise to meet.
- ii. **Private benefit:** as discussed above in chapters 2 and 3, it is possible to interpret the definition of charitable purpose narrowly or widely. A narrow interpretation can be imposed in a number of ways, including through expanding the concept of what constitutes a disqualifying "private benefit". Interpreting the concept of "private benefit" too widely precludes much legitimate activity that, perhaps paradoxically, would be of benefit to the public.
- iii. **Mission drift:** Charities Services applies a distinction between charitable purpose and business activity.³³ If a charity's "focus" becomes the business activity, a purpose may be "inferred" and the charity threatened with deregistration on the basis that its purposes are no longer exclusively charitable. However, such an approach creates a false dichotomy that cuts across the destination of funds test: the uncertainty and subjectivity inherent in the approach also create an unhelpful "chilling effect" that again precludes much legitimate activity.

The net effect is that many charities do not undertake legitimate social enterprise activity for fear of losing their registered charitable status, many funders do not provide much-needed funding to charities undertaking legitimate social enterprise work for fear of losing their own registered charitable status, and much important, innovative work is stifled as a result.

While there is considerable overlap between these barriers, they are discussed individually for the purposes of analysis next.

Capability of making a profit

Under the destination of funds test, the legal position in New Zealand is that charities may operate a business, whether related or unrelated to their charitable purposes, and with no limit on size, so long as any profit is *ultimately* destined for charitable purposes.³⁴

It is axiomatic that all funds of a charity must, ultimately, be destined for charitable purposes, by definition: a charity seeking Charities Act registration must have a constituting document setting out its charitable purposes, and restricting all funds of the charity to furthering those charitable purposes at all times, even on winding up, as discussed above.

33 Charities Services *Myth busting: when charities can run businesses* 24 February 2021: www.charities.govt.nz/news-and-events/blog/myth-busting-when-charities-can-run-businesses/: charities have to "show their focus is their charitable purpose and not the business activity".

34 For authority for the destination of funds test in New Zealand law, see *Auckland Medical Aid Trust v Commissioner of Inland Revenue* [1979] 1 NZLR 382 at 387; *Commissioner of Inland Revenue v Carey's (Petone and Miramar) Ltd* [1963] NZLR 450; *Calder Construction Co Ltd v Commissioner of Inland Revenue* [1963] NZLR 921; *Commissioner of Inland Revenue v NTN Bearing-Saeco (NZ) Ltd* (1986) 8 NZTC 5,039.

The “destination of funds” principle is reflected in the income tax exemptions for charities: all income of a registered charity is exempt from income tax in New Zealand, regardless of its source.³⁵ That said, however, a distinction is made between “passive income” (such as interest, dividends and royalties) and “business income” for the purpose of imposing a number of additional requirements on the latter: specifically, the business income of charities is not exempt in New Zealand if any person with some control over the business is able to direct or divert, to their own advantage, an amount derived from the business (“**the control provisions**”); if the entity carrying out the business is (with limited exception) a “council-controlled organisation”; or to the extent that the charity carries out its purposes outside New Zealand.³⁶

For completeness, it might be noted that the destination of funds principle is not reflected in the context of fringe benefit tax (“**FBT**”): while charities are not normally required to pay FBT (a tax on in-kind benefits provided by employers to their employees), FBT will apply where a charity provides fringe benefits to an employee in the context of business activity that it is “outside” the charity’s charitable purposes.³⁷ That is, New Zealand departs from the destination of funds principle to impose FBT in the context of an “unrelated business”.³⁸ There is otherwise no “unrelated business income tax” in New Zealand.

Despite the “destination of funds” legal principle, however, Charities Services applies a different approach in considering eligibility for charitable registration.³⁹

The basis for this approach appears to derive from the 2010 decision of Ronald Young J of the Wellington High Court in *Canterbury Development Corporation & Ors v Charities Commission* (“**Canterbury Development**”)⁴⁰ (Ronald Young J was also the jurist who delivered the decision in *Draco*,⁴¹ in which the New Zealand High Court declined to follow the High Court of Australia decision in *Aid/Watch*,⁴² as discussed above in chapter 4).

Canterbury Development

Briefly, the Canterbury Development Corporation (“**CDC**”) provided support and development to exporting businesses in the Canterbury region, in turn providing wider public benefits to the Canterbury region (and ultimately to New Zealand more generally) through the generation of jobs and the improvement of general economic capability and wellbeing. Although CDC had been informally accepted as a charity by the Inland Revenue Department (“**IRD**”) for several decades, his Honour upheld the decision of the Charities Commission (as it was then) to decline charitable registration.⁴³ In so doing, his Honour referred to two Australian cases clearly holding that “economic development” is a charitable purpose: *Tasmanian Electronic Commerce Centre Pty Ltd v Federal Commissioner of Taxation* (“**TECC**”),⁴⁴ regarding the provision of assistance to business and industry, and *Commissioner of Taxation v Triton Foundation* (“**Triton**”),⁴⁵ regarding the promotion of a culture of innovation and entrepreneurship by assisting innovators to commercialise their ideas. However, his Honour dismissed this Australian authority on the basis of a difference in “perspective”:⁴⁶ whereas the Australian cases had emphasised the wider indirect public benefits, his Honour instead emphasised the *direct* private benefits in the form of assistance to individual businesses.⁴⁷

35 Income Tax Act 2007 ss CW 41, CW 42.

36 Income Tax Act 2007 s CW 42.

37 An exception is also made for short-term charge facilities. See Income Tax Act 2007 s CX 25.

38 These feature of the income tax legislation has a difficult history. See the discussion in *The Law and Practice of Charities in New Zealand*, S Barker, M Gousmett and K Lord (LexisNexis, Wellington, 2013) at [3.878] – [3.921].

39 The approach is set out in Charities Services Case Report [International Centre for Entrepreneurship Foundation \(CC27546\)](#) 24 October 2017 at 3.

40 *Canterbury Development Corporation & Ors v Charities Commission* [2010] 2 NZLR 707 (HC).

41 *Re Draco Foundation (NZ) Charitable Trust* (2011) 25 NZTC 20-032 (HC) at [56] – [60].

42 *Aid/Watch Inc v Commissioner of Taxation* [2010] HCA 42.

43 *Canterbury Development Corporation & Ors v Charities Commission* [2010] 2 NZLR 707 (HC).

44 *Tasmanian Electronic Commerce Centre Pty Ltd v Federal Commissioner of Taxation* [2005] FCA 439.

45 *Commissioner of Taxation v Triton Foundation* [2005] FCA 1319.

46 *Canterbury Development Corporation & Ors v Charities Commission* [2010] 2 NZLR 707 (HC) at [65].

47 *Canterbury Development Corporation & Ors v Charities Commission* [2010] 2 NZLR 707 (HC) at [67].

His Honour also controversially held that “[s]ave for advancement of religion all charitable purpose can be seen as meeting a need”;⁴⁸ however, his Honour did not cite any authority in support of this proposition, and did not explain how it can be reconciled with the many cases holding purposes such as promotion of the arts to be charitable despite the fact that they focus on human flourishing rather than “assuaging need”.

In other words, a narrow underlying paradigm was assumed, rather than analysed.

The *Canterbury Development* case acutely demonstrates how the current Charities Act framework structurally encourages such an assumption:⁴⁹ the inadvertent removal of charities’ ability to access a first instance oral hearing of evidence renders charities unable to call and test evidence of the wider indirect public benefits generated by their charitable purposes; this factor negatively impacts their ability to demonstrate, as a question of fact, that any direct private benefits are outweighed by, and therefore merely incidental to, those wider indirect public benefits; as a result, the framework structurally encourages such wider public benefits to be discounted or overlooked, reinforcing the assumption of a narrow paradigm.

The difficulty with such an assumption is that it does not allow the limitations of a narrow paradigm to be evaluated: to limit charities to “assuaging need” undermines public trust and confidence in charities by consigning them to an anachronistic, deficits-based paradigm of providing “handouts” rather than “hand ups” thereby perpetuating capitalist distinctions between “haves” and “have nots”. Such an assumption is difficult to reconcile with pre-Charities Act case law which, as discussed above in chapter 3, does not so limit the concept of charity: pre-Charities Act case law in New Zealand was capable of recognising wider, indirect public benefits, thereby enabling charities to be seen as integral to strengths-based solutions rather than merely symptoms of the problem. It is significant that, in assuming a narrow paradigm, the *Canterbury Development* judgment does not mention important pre-Charities Act cases, such as the decisions of the Court of Appeal and Privy Council in *Latimer*.⁵⁰

The decision in *Canterbury Development* has been heavily criticised,⁵¹ not least for its inconsistency with prior higher authority.⁵²

The ICE Foundation case report

Despite the difficulties with the *Canterbury Development* decision, it was applied by the Charities Commission a few weeks’ later in its decisions to deregister two charitable companies: ICE Funds Ltd,⁵³ and the Icehouse Ltd⁵⁴ (together, “**the Icehouse companies**”). The Icehouse companies were focussed on providing educational and financial support to innovative start-up and small-to-medium enterprises, in the interests of supporting talent. As discussed above, the Government has recognised the importance of encouraging innovation in the interests of New Zealand’s wellbeing and prosperity; it has also recognised the gap in the provision of capital and expertise for early-stage companies with high-growth potential.⁵⁵

48 *Canterbury Development Corporation & Ors v Charities Commission* [2010] 2 NZLR 707 (HC) at [42]. In this regard, the High Court accepted the Commission’s argument (at [8]).

49 As discussed further below in ch 6.

50 *Latimer v Commissioner of Inland Revenue* [2002] 3 NZLR 195 (CA) and *Latimer v Commissioner of Inland Revenue* [2004] 3 NZLR 157 (PC).

51 See, for example, S Barker “Canterbury Development case” [2010] NZLJ 248.

52 *Latimer v Commissioner of Inland Revenue* [2002] 3 NZLR 195 (CA), and see also a line of cases holding that “economic development” is a charitable purpose: *Re Tennant* [1996] 2 NZLR 633, regarding the promotion of the dairy industry in the Waikato; *Crystal Palace Trustees v Minister of Town and Country Planning* [1950] 2 All ER 857, regarding the promotion of industry or commerce generally; *Commissioners of Inland Revenue v Yorkshire Agricultural Society* [1928] 1 KB 611, regarding the promotion of the industry of agriculture (cited with approval in *Waitemata County v CIR* [1971] NZLR 151).

53 Charities Commission Decision D2010-10 *ICE Funds Ltd* 18 August 2010: www.charities.govt.nz/charities-in-new-zealand/legal-decisions/view-the-decisions/view/ice-funds-ltd.

54 Charities Commission Decision D2010-10 *The Icehouse Ltd* 18 August 2010: www.charities.govt.nz/charities-in-new-zealand/legal-decisions/view-the-decisions/view/the-icehouse-ltd.

55 Charities Commission Decision D2010-10 *ICE Funds Ltd* 18 August 2010 at [13]; Charities Commission Decision D2010-10 *The Icehouse Ltd* 18 August 2010 at [12].

However, in both cases, the Commission cited *Canterbury Development* in concluding that the companies “were not providing services *essential* to a region or assisting an area that is under any particular *disadvantage*”:⁵⁶ the Commission focused on the direct private benefits to individual businesses rather than the wider indirect public benefits to New Zealand as a whole.⁵⁷

In deregistering the two charities, the Commission also referred to s 35(1) of the Charities Act, which provides that the Charities Commission (now the Charities Registration Board) must not deregister a charity unless satisfied it is in the “public interest” to do so. This provision might have afforded an opportunity to “stand back” and consider the issue from a “common sense” perspective; the discretionary power to deregister was intended to be used only in “extreme” circumstances,⁵⁸ as noted by then Minister of Consumer Affairs on the passage of the original Charities Bill through Parliament:⁵⁹

... the deregistration power is discretionary—it is not obligatory. I would expect the Charities Commission to go through a range of choices and discussions with any charity before that charity is deregistered, but the commission should have the power, if it is clear that *fraudulent behaviour is systemic in a charity, to deregister that charity quite quickly.*

In the case of the Icehouse companies, there was no suggestion that either company had done anything “wrong”: both were acting in good faith in accordance with their constitutions in the best interests of their stated purposes (purposes that the *Triton* and *TECC* cases, discussed above, would indicate were clearly charitable). The companies faced deregistration on the basis of a change in jurisprudential interpretation of the definition of charitable purpose triggered by a High Court decision that has since been heavily criticised, not least because both of its key findings (relating to “assuaging need” and a refusal to recognise wider indirect public benefits) are inconsistent with prior higher authority. Deregistration would arguably be a disproportionate sanction that would undermine public trust and confidence in the two companies, both of which were clearly providing value to the community. It would not have been difficult to reach a conclusion that it was not in the public interest to deregister the two companies.

However, both the Charities Commission and Charities Services/the Charities Registration Board have consistently held that “public trust and confidence in registered charitable entities would be eroded if entities that did not meet the essential requirements for registration remained on the register”.⁶⁰ The question of whether such an interpretation renders s 35(1) otiose is discussed further below in chapter 8.

On this basis, the Icehouse companies were both deregistered in August 2010.

It should be noted that, at the time, there was no deregistration tax in force: if the deregistrations had taken place a few years’ later, s HR 12 of the Income Tax Act 2007 would have required both companies to divest themselves of all their assets within 12 months of deregistration or pay tax on the balance, significantly exacerbating the sanction imposed on charities that had done nothing “wrong”.⁶¹

However, the matter did not end there. The deregistration of the two Icehouse companies raised issues for their shareholder, the International Centre for Entrepreneurship Foundation (“**the ICE Foundation**”), itself a registered charity. Following the

56 Charities Commission Decision D2010-10 [ICE Funds Ltd](#) 18 August 2010 at [55]; Charities Commission Decision D2010-10 [The Icehouse Ltd](#) 18 August 2010 at [61] (emphasis added).

57 Charities Commission Decision D2010-10 [ICE Funds Ltd](#) 18 August 2010 at [67], [73] - [78]; Charities Commission Decision D2010-10 [The Icehouse Ltd](#) 18 August 2010 at [73], [79] - [83].

58 Charities Bill 2004 (108-2) ([select committee report](#)) at 8.

59 Charities Bill [In Committee](#) (12 April 2005) 625 NZPD 19,940 per Hon Judith Tizard (Minister of Consumer Affairs) (emphasis added).

60 Charities Commission Decision D2010-10 [ICE Funds Ltd](#) 18 August 2010 at [86] - [87]; Charities Commission Decision D2010-10 [The Icehouse Ltd](#) 18 August 2010 at [90] - [91].

61 Section HR 12 contains a number of exceptions and is discussed further below in ch 8.

deregistrations, Charities Services (the successor to the Charities Commission) undertook a “charitable purpose review” to assess whether the ICE Foundation “remained eligible for registration”. Referring to a significant debt the ICE Foundation had inherited from the set-up of one of the companies (Icehouse Ltd), Charities Services justified its review on the following basis:⁶²

We had concerns that the ICE Foundation was being run, at least in part, for the benefit of the Icehouse Limited because of the significant debt, and the ownership relationship. We were concerned that a group that had been removed from the register could be being propped up by a charity by using its resources and capital.

The action Charities Services took

We met with the ICE Foundation and the Icehouse Companies to understand how the Icehouse Companies were structured, to ensure that they were supporting the ICE Foundation and not the other way round.

The ICE Foundation and the Icehouse Companies provided evidence that the companies could be expected to generate sufficient profits to provide substantial financial support and non-financial support for the charitable purposes of the ICE Foundation over a reasonable time.

The ICE Foundation and Icehouse Companies also agreed to policies that clearly stated how the Icehouse Companies would be operated for the benefit of the ICE Foundation at an arms-length basis.

The Charities Registration Board reviewed the information provided by the charity and Icehouse Companies, and was satisfied that the ICE Foundation remained qualified for registration.

As a result of this review, in October 2017, Charities Services issued the following “lesson” for other charities:⁶³

Charities that seek to raise funds through business activities need to clearly distinguish their business *activities* from their charitable *purposes*. They must also:

- a. Show that the business is *capable of making a profit to go to charitable purposes*; and
- b. Show that the charity does not provide *any* resources to the trading body at less than market rates.

Charities Services has never cited any legal authority for these findings, other than to imply they have a basis in the “destination of funds test”.⁶⁴ However, these findings cut across the destination of funds test: there is no case of which we are aware interpreting the destination of funds test to impose these additional requirements. The net result is that the approach appears to have no legal basis whatsoever.⁶⁵

Impact in practice

Charities Services’ October 2017 findings may have arisen out of a desire to help the ICE Foundation remain registered following the deregistration of its subsidiary Icehouse companies. Nevertheless, the effect of the findings in practice has been to prevent many

62 Charities Services Case Report [International Centre for Entrepreneurship Foundation \(CC27546\)](#) 24 October 2017 at 2.

63 Charities Services Case Report [International Centre for Entrepreneurship Foundation \(CC27546\)](#) 24 October 2017 at 3 (emphasis added).

64 See, for example, Te Tari Taiwhenua Internal Affairs [Modernising the Charities Act 2005: Discussion Document](#) February 2019 at 43, where, after referring to the destination of funds test at 42, the registration approach to unrelated business is described as having “derived from the Act and case law”, without referring to any specific authority for the approach.

65 Core Reference Group members reviewing drafts of the Department of Internal Affairs’ February 2019 discussion document repeatedly asked that the specific authority for this approach be included. The fact that no such authority has been included despite such repeated requests provides further indication that no such authority exists.

charities from carrying out much-needed innovative social enterprise work, a point noted by many submitters to the DIA's review of the Charities Act.⁶⁶

For example, the Central Lakes Trust, a registered charitable trust that distributes up to \$9 million per year to a variety of projects in the Central Otago/Southern Lakes area, made the following points:⁶⁷

Registered charities should be able to operate businesses so long as funds raised are destined for charitable purposes (as per the current law) ...

[The ICE Foundation findings] limits the ability to raise funds for charitable purposes or become self-sustaining ... This also raises interesting issues in the future where Trusts may wish to go into social impact investments such as housing – loans at less than the market rate to assist sectors of our community into housing with a lower than normal rate of return (could be seen as competitive advantage or providing resources at less than market rate) but achieving a social good outcome for the wider community. This could effectively be a business decision for the Trust but with social outcomes and benefits resulting from such an investment or decision. The Act (or the compliance monitoring) needs to be flexible enough to account for these alternative types of investment in the future.

Stopping Violence Services made the following point:⁶⁸

... Charities seem to shut down unprofitable business activities. However when setting up an activity the first year's costs of starting up may be considerably more than the costs in following years and allowance should be made for this, otherwise the initial work will have been wasted.

A similar point was made by Parry Field Lawyers:⁶⁹

The challenge presented for Charities is where will they receive money? In our view they will increasingly turn to social enterprise endeavours to fund what they do – and in setting up social enterprises also seek to be the change they want to see (eg through who they employ or what is produced). Therefore, the regulation of charities needs to consider this important aspect and make it easier for charities to set up social enterprises without imposing additional barriers that a "normal" start-up would not be subject to (eg needing to prove viability at the outset – innovation should be encouraged not squashed).

And by the UpsideDowns Education Trust:⁷⁰

While I understand the logic behind requiring an unrelated business to demonstrate their ability to generate profit, the practical result of this requirement is likely to be that new unrelated businesses would struggle to register. I would suggest that this requirement be relaxed ...

I would argue that running a business in order to support the work of a charity is akin to any other fundraising method.

66 In addition to the submissions set out, see also the [submissions](#) of Community Housing Aotearoa at 4: "The approach of [Charities Services] to the expressly permitted ability under New Zealand law of charities to run businesses to raise funds for their charitable purposes is a concern to our members. We believe that Charities Services has created rules to control a perceived problem which is not documented by evidence ... We and some of our members do operate businesses with the intent of raising funds in support of our charitable purpose(s). We do not agree [that Charities Services' rules] advance the interests of charities. [Charities Services] should only require there be no private pecuniary gain and all profits need to flow through to the parent charity"; Merv Ransom at 12; SPCA at [5.3] - [5.5]: "SPCA contends that it is not the role of Charities Services to manage charities' business risk. With a limited number of potential donors to charities, and the increasing level of competition between charities to raise public donations, charities need to have the ability to diversify income streams, including through the establishment of both related and unrelated businesses. It is vital that such businesses have the opportunity to reinvest into the growth and development of that business while also channelling profits towards charitable purpose. For this reason, SPCA contends that [the test Charities Services has developed by means of the ICE Foundation case] should not be applied to charities; either those already registered or those seeking registration"; Sport Waitakere at 4-5: "Charities should be encouraged and supported to raise their own funds for their charitable purpose. The ability for charities to run businesses must be supported and protected and we believe governance standards provide the framework to deal with the management and accountability of risk".

67 [Submission](#) of Central Lakes Trust *Submission – Charities Act Review* 30 May 2019 at 2.

68 [Submission](#) of Stopping Violence Services (undated but submitted for a 31 May 2019 deadline) at 13.

69 [Submission](#) of Parry Field Lawyers *Submission on Modernising the Charities Act 2005* 31 May 2019 at 3.

70 [Submission](#) of UpsideDowns Education Trust (undated but submitted for a 31 May 2019 deadline) at 17 - 18.

There is a cost associated with any fundraising method. For example, holding a fundraising dinner involves expenditure on food, drink, venue, marketing, and staff or volunteer time to organise; having a PayWave donation box costs \$23 per month per box, plus 15c per transaction; employing someone to apply for grants, run events, engage corporate sponsors etc costs in wages or salary. It is virtually impossible to fundraise without any kind of associated expenditure, certainly not to the level required of Tiers 1-3 charities.

If a charity decides that running an unrelated business is a means of fundraising that would work for them then, as with any other means of fundraising, the decision whether to do that and how much risk to take on relating to that is up to them. Charities are having to make hard decisions about how to best use their funds for the good of the charity all the time. Unrelated businesses are no exception and should not be treated as such. A charity should have the ability to decide for themselves how best to use their existing resources to fundraise.

Personally, as a donor, I would welcome the use of my donations for creating a self-sustaining fundraising model that diversifies a charity's income stream in order to reduce their dependence on donations. This is as much a part of fulfilling their charitable purpose as anything else in my view.

In highlighting that the approach has no legal basis, EY Law also made the point that Charities Services is not well placed to determine whether a business is "capable" of making a profit:⁷¹

[The destination of funds] test is appropriate for New Zealand and should not be changed to align with the stricter regimes present in other jurisdictions. New Zealand charities need to be resourceful in how they raise funds to further their purposes. Government has limited resources to support the charities sector through grants and, as generous as we are, New Zealanders can only donate a finite proportion of our disposable income. New Zealand has a small population making large funding drives difficult. Relying on income from investment portfolios has its own risks. For these reasons, the ability of New Zealand charities to generate income through their own resourcefulness and operation of business ventures is vital to their sustainability.

While acknowledging the test noted above, the Charities Services opts to use a different approach [the ICE Foundation approach] ... This subjective approach adopted by Charities Services may have resulted in organisations that meet the legal requirements for registration being declined registration or being deregistered. This ultimately hampers charitable activity in New Zealand.

Forming an opinion on whether a new business is capable of making a profit is an exercise fraught with difficulty. Further there is a risk of inconsistent decisions, as conclusions can vary widely depending on who is making the assessment and their own understanding of the environment in which the business will operate. It is unlikely that Charities Services will be better placed than the charity concerned to assess the viability of businesses across a wide range of industries and environments. Likewise, Charities Services may not be in a good position to assess whether a charity provides resources to trading bodies at or below market rates. Assessments of this kind must also drain Charities Services resources, as they are time-consuming to complete if done to a sufficiently high standard.

We therefore submit that the appropriate registration requirements for unrelated businesses should be based on the approach adopted by the New Zealand courts rather than the approach developed and adopted by Charities Services.

We similarly advise against adopting an approach based on a list of factors for Charities Services to consider when assessing an application for registration of an organisation that seeks to raise funds through business activities. Such factors would necessarily contain a subjective element.

... A model founded on robust initial registration review by Charities Services of the organisations seeking registration, could lead to an initial presumption that the charity will see to use its business to maximise profit generation to support the stated charitable purposes ... It can take time to develop a profitable business ...

It is not Charities Services' role to manage the business risk of charities – just as it should not assess the viability of businesses and market rates for goods and services.

71 [Submission](#) of EY Law *Modernising the Charities Act 2005* 7 June 2019 at 12 - 14.

This is a role that should be self-regulated by charities and their subsidiaries internally as is required of them under the laws underpinning their legal structure ... The proposed Trusts Bill and Incorporated Societies Bill both provide a more elaborate framework to deal with the management and accountability of risk ... the law applicable to trustees and company directors already imposes fiduciary obligations and sanctions against unjustified risk taking. There are already sufficient safeguards against charities taking unjustified risks with donated funds.

Others noted a disconnect between Charities Services' approach and government's recognition of the need to create an enabling framework for social enterprise:⁷²

A significant area where the terms of reference for the review are too narrow and fail to include key issues is the disconnect between this review and the growth of social enterprise. The Government is encouraging charities to diversify their income and be less reliant on government funding, but Charities Services have created rules in relation to social enterprises that make it significantly harder to establish an income-generating business – harder even than it is for private for-profit enterprise.

The actions of Charities Services are contradictory to government policy within Aotearoa, but they also contrast with the strong policy and material support being given to the development of social enterprise in jurisdictions such as the UK. For guidance on how that could be addressed here, the recent Akina Foundation report on social enterprise proposes a way forward. Its recommendations must be taken on board as part of the changes that will happen as a result of this Review.

A similar point was made by Momentum Waikato Te Puaawaitanga o Waikato:⁷³

There appears to be a disconnect between the Charities Act review and any policy settings and outcome sought by differing government departments. There is no consideration within the review on how suggested changes might impact (negatively or positively) on the Charities sectors ability to enable the outcomes sought for the governments Wellbeing Budget and Living Standards framework.

There appears no overview of how charities contribute to the delivery of Govt priorities and the role charities can play in enabling these objectives eg affordable and emergency housing provision, reduction in child poverty, and other recommendations stemming from other government directed work such as the Welfare Expert Advisory Group Panel.

The review is absent a discussion on how to engage and increase corporate philanthropy with greater incentives (ie tax credits, etc) or partnering to achieve the outcomes noted above.

Similarly the Review's focus on the business activities of charities seems at odds with the drive for social enterprise and government's investment into social enterprise and impact investing given the development of and government's investment into the Akina Foundation and similar regional economic development agency initiatives and indeed some of the activities stemming from the Regional Provincial Growth Fund which are driven through social enterprise agencies.

There appears a conflict between the Reviews focus on restricting business activity of charities when the social enterprise and impact investing model is a very real and modern approach to achieving wellbeing outcomes

Te Whakakitenga o Waikato Incorporated (Waikato-Tainui) drew attention to the link between this issue and the work of the Tax Working Group:⁷⁴

... existing notification of change and annual return obligations under the Act, coupled with [Charities Services'] inquiry powers and other applicable regulation, are already onerous enough and sufficient. This applies equally in relation to charities involved in business, including so-called 'unrelated' business, which is a legitimate and important means for charities to generate increased and sustainable revenue for the advancement

72 [Submission](#) of Dave Henderson *Submission on the review of the Charities Act 2005* (undated but submitted for a 31 May 2019 deadline) at 3. See also the [submission](#) of JR McKenzie Trust *Submission on the review of the Charities Act 2005* at 2 - 3.

73 [Submission](#) of Momentum Waikato Community Foundation Te Puaawaitanga o Waikato *Review of the Charities Act 2005* at 1.

74 [Submission](#) of Te Whakakitenga o Waikato Incorporated, on behalf of the Waikato-Tainui iwi, endorsed by the Waikato Raupatu Lands Trust and Group and Waikato-Tainui marae *Submission on the Charities Act review: modernising the Charities Act 2005* Pt 2 at [17(k)-(n)]. The Tax Working Group Te Awheawhe Take is discussed above in ch 1 and further below.

of their charitable purposes. In addition, there does not need to be an unnecessary layer of regulation in relation to the level of investment or business risk that can [be] taken by charities when they are already subject to governance standards and obligations under other laws (as well as under their rules).

Again, this is particularly important for Waikato-Tainui charities (and other Maaori charities) as we prudently look to use appropriate assets to provide a robust economic base and generate sustainable revenue streams that will enable us to progressively redress the economic, political, social and cultural deprivations suffered by our iwi as a result of raupatu and other Tiriti breaches. Waikato-Tainui charities involved in business are already covered by existing reporting requirements under the Act and subject to appropriate governance standards and obligations, and they do not need to be further regulated in relation to their investment and business decisions. To the contrary, we must retain the freedom and flexibility to determine how best to use our assets to serve our iwi.

Waikato-Tainui also notes that although tax concessions linked to registration under the Act are excluded from the review, the business section of the Discussion Document indicates that this review is at risk of being used as a 'back door' way of attacking the current exemption of charities' 'unrelated' business income from income tax. As noted in our recent submission to the Tax Working Group, the tax framework for charities, including the income tax exemptions for both non-business and business income (including 'unrelated' business income), is appropriate and should not be changed.

The current tax-exempt treatment of both non-business and business income enhances Waikato-Tainui charities' ability to carry out their work for the benefit of our iwi, offsets constraints in relation to accessing capital, and avoids the complexity and inefficiency that would be created by having different treatments for different income streams.

Conceptually, Charities Services' "ICE Foundation" approach attempts to create a "bright line" between business activities and charitable purposes. However, there is no such line, resulting in a false dichotomy based on a conflation of the distinction between purposes and activities, as discussed further below.

The ICE Foundation approach also attempts to create "bright line" rules requiring charities to show their businesses are "capable of making a profit" and do not provide "any" resources to the trading body at less than market rates.

The impulse to create "bright line" rules reflects the "ex post or ex ante" dimension of the underlying clash of paradigms: as discussed above in chapter 2, an "ex ante" approach attempts to establish in advance the parameters of desirable conduct, which sits uneasily with an equitable area of law that requires flexibility to cater for a wide diversity of situations.⁷⁵ As noted in the submission of EY Law, discussed above, Charities Services is not well placed to determine whether a business is "capable" of making a profit across a wide range of industries and environments, and attempts to do so to a sufficiently high standard will be time-consuming and therefore likely to drain Charities Services' resources.

Further, a requirement to demonstrate business viability at the outset can be particularly difficult for a start-up social enterprise to meet: imposing this requirement as a precondition of charitable registration therefore distorts decision-making in favour of a for-profit company structure, where no such requirement is imposed, even though charities have a number of distinct advantages for carrying out social enterprise activity as discussed above. It can take time to develop a profitable business; a requirement to demonstrate, to Charities Services' satisfaction, that a start-up business is "capable" of making a profit encourages a spread of bureaucratic risk aversion that in turn undermines one of charities' key strengths: their ability to experiment and innovate, independently, free from the dictates of the median voter or profit-seeking private shareholders.

Imposing a requirement that the charity provide no resources at other than market rates to a subsidiary entity carrying on a business to raise funds for the charity's charitable purposes may also have unhelpful unintended consequences. It may sometimes be

⁷⁵ See C Decker and M Harding "Three challenges in charity regulation: the case of England and Wales" in M Harding, A O'Connell & M Stewart (eds) *Not-for-Profit Law: Theoretical and Comparative Perspectives* (Cambridge University Press, 2014) 314 at 315 - 316, 319.

essential, in the best interests of a charity's charitable purposes, to provide support to an activity it is undertaking, with business activity no exception: supporting a charitable business that is itself subject to a non-distribution constraint is not synonymous with providing private pecuniary profit to an individual. To preclude a charity from supporting its business by means of a blanket ex ante rule that provides no scope for nuanced or contextual decision-making may preclude the very outcome the rule purports to promote. The point is that charities are best placed to make these decisions for themselves, supported by fiduciary duties to act in the best interests of their stated charitable purposes (the duty of loyalty) and to comply with their constituting document and the general law (the duty of obedience).

It is not Charities Services' role to manage the business risk of charities, as many submitters have noted.⁷⁶ It is regulatory over-reach to substitute charities' decision-making in this way.

The ICE Foundation approach imposes an unnecessary and unhelpful "gloss" on the destination of funds test that is at odds with both the underlying case law and Government's stated policy of encouraging social enterprise activity.

Discussion

In a country governed by the rule of law, charities that meet all the legal requirements for registration should be able to register.⁷⁷

The ICE Foundation approach has no legal basis, raising the question as to why it continues to be applied to deny registration to charities that meet all the *legal* requirements for registration.

The answer is that a small start-up social enterprise that has just been denied registration is unlikely to have sufficient resources to mount an appeal against the Crown in the High Court under the charities law framework as currently structured;⁷⁸ even if the social enterprise did manage to muster sufficient resources to appeal, the current appeal process is strongly perceived to unfairly favour the Crown, as discussed further below in chapter 6. The net effect is that the approach continues to be applied with impunity because charities have no practical means of holding Charities Services' accountable for its decisions. The position is particularly acute given the urgency of issues such as climate change which demand that such barriers not be placed in the way of charities' social enterprise activity.

There have been suggestions that the review of the Charities Act may be used as a vehicle to codify the ICE Foundation approach, to provide it with an underlying legal footing that it currently does not have: although the definition of charitable purpose is currently outside scope for the DIA's review of the Charities Act, the terms of reference for the review include "the extent to which businesses that solely raise funds for registered charities can register under the Act".⁷⁹

We strongly recommend that the ICE Foundation approach is not codified and is instead discontinued.

A significantly more effective and less costly approach to assessing eligibility for registration would be to clarify first principles, as discussed further below.

76 See, for example, the [submissions](#) of New Zealand Red Cross Incorporated; EY Law; Methodist Church of New Zealand Te Haahi Weteriana O Aotearoa; Royal New Zealand Plunket Trust; Council for International Development; Scott Moran; SPCA; and Auckland North Community and Development.

77 As recently noted by the High Court in *Christiansen v The Director-General of Health* [2020] NZHC 887 at [44] - [48], [67], a person with a legal power must exercise that power within the parameters set by the law. To apply a gloss to a statutory test or to ask themselves the wrong question constitutes an error of law. It is unlawful to blindly follow a policy if that policy is not reflective of the actual legal position.

78 The process for challenging registration decisions under the current legal framework is for an individual charity to bring an appeal in the High Court under s 59 of the Charities Act, as discussed further below in ch 6.

79 Department of Internal Affairs [Terms of reference to review the Charities Act 2005](#) May 2018 at 2 - 3.

Recommendation 5.1:

That Charities Services' approach, set out in its October 2017 ICE Foundation case report, which includes requiring a social enterprise to demonstrate viability at the outset as a precondition to charitable registration, is discontinued and eligibility for registration is instead assessed according to normal principles.

We also recommend that guidance, on how the Charities Act is to be interpreted, is required to follow a public consultation process before being issued, as discussed further below in chapters 7 and 8.

Private benefit

Another barrier to charities undertaking social enterprise activity in New Zealand is the approach taken to "private benefits" and conflicts of interest.

As discussed above in chapter 1, charities law contains built-in protections against private pecuniary profit: charities must by definition be not-for-profit entities, which means their constituting document must articulate a non-distribution constraint (otherwise described as a "prohibition on private pecuniary profit"). The Charities Act reflects this prohibition by explicitly precluding societies and institutions from being "carried on for the private pecuniary profit of any individual".⁸⁰ Trusts are implicitly subject to the same prohibition, as the requirement that income is derived in trust for charitable purposes "itself excludes any element of private pecuniary profit";⁸¹ in other words, if a trust's purposes are found to be charitable, then by definition it cannot be carried on for the private pecuniary profit of any individual.

In other words, once an entity's purposes have been accepted as charitable (which, by definition means they are "exclusively" charitable, subject to the ancillary purposes rule in s 5(3) and (4) of the Charities Act), no individual can derive a private pecuniary profit from the charity *lawfully*.

Accordingly, to say that private pecuniary profit has been made from a registered charity is to say that those governing the charity are *prima facie* in breach of their fiduciary duty to comply with the terms of the constituting document (Charities Services will not permit a charity to be registered unless its constituting document expressly precludes private pecuniary profit).⁸²

These charities law protections are supported by the "control provisions" of the business income tax exemption: any inappropriate diversion of amounts from a charitable business for private benefit will cause the business income to lose its exemption from income tax.⁸³ While the income tax exemptions are administered by IRD rather than Charities Services, the legislation makes provision for information to be shared between the two organisations for the purposes of exercising their powers and performing their functions.⁸⁴

However, it is critical to note that the prohibition on private pecuniary profit does not preclude private benefit altogether: *incidental* private benefits do not prevent a purpose from being charitable. Direct private benefits are not disqualifying if they are outweighed by wider indirect public benefits, as discussed above in chapters 1 and 3;⁸⁵ indirect private benefits are also not necessarily inconsistent with charitable status, as the courts have noted:⁸⁶

⁸⁰ See Charities Act 2005 s 13(1)(b)(ii).

⁸¹ See Charities Act 2005 s 13(1)(a) and *Trustees of the Auckland Medical Aid Trust v Commissioner of Inland Revenue* [1979] 1 NZLR 382 (SC) at 398 (Chilwell J).

⁸² See Charities Services *Charitable purpose and your rules*:

www.charities.govt.nz/ready-to-register/need-to-know-to-register/charitable-purpose-and-your-rules/.

⁸³ Income Tax Act 2007 s CW 42. As noted by submitters: see, for example, the [submission](#) of the New Zealand Law Society at 8 – 9.

⁸⁴ See Charities Act 2005 s 30; Tax Administration Act 1994 sch 7 cl 27.

⁸⁵ See also *Latimer v Commissioner of Inland Revenue* [2004] 3 NZLR 157 (PC) at [35] – [36] and *New Zealand Society of Accountants v Commissioner of Inland Revenue* [1986] 1 NZLR 147 (CA) at 152.

⁸⁶ *Trustees of the Auckland Medical Aid Trust v Commissioner of Inland Revenue* [1979] 1 NZLR 382 (SC) at 398 (emphasis added).

This exclusion [against private pecuniary profit] does not mean that individuals may not benefit *indirectly* through the operations of a trust. Those who have commercial dealings with a trust or who are *employed* by it may benefit in a broad sense ... To lose its charitable status the trust must have as one of its *objects* the benefit of individuals with surplus income and/or capital being applied for their benefit.

In practice, however, Charities Services interprets the concept of “private benefit” differently, finding almost any private benefit to be disqualifying.

Charities Services’ approach

Charities Services describes its approach as follows:⁸⁷

It is a key element of charities law that a charity must provide benefits to the public, and *not to private individuals or groups*. This is particularly important when charities fundraise through profit-making activities, support for-profit businesses or pay individuals for services.

A registered charity can carry out **profit-making activities**, as long as all of the profits created are used to further charitable purposes and are not used to further the private financial interest of individuals or other non-charitable organisations (known as ‘private benefits’). When a profit is made, payments or dividends must not be distributed to shareholders, as this would create private benefits which are not considered ancillary or incidental. The only exception is when the shareholders are themselves registered charities or the shareholders hold the money on trust for charitable purposes, which needs to be specified in the charity’s rules. Any profit created by a registered charity can only be used to further charitable purposes.

For example:

- If a foundation owns all of the shares in a charitable company, the company can make profits and distribute dividends to the foundation.

When a charity is providing **support to for-profit businesses**, charities need to be careful to weigh up any benefits to individual businesses with the public benefit they are seeking to achieve.

For example:

- Providing a ramp to a business to assist them to support those with disabilities will usually be charitable, even though this may support the for-profit business ...

When a charity **pays for goods or services**, payments should be reasonable and based on ‘arms-length market rates’ or be lower than market rates. Arms-length means they must be made as if they were between two unrelated individuals. The activities must also be to further their charitable purposes and not to benefit the individuals concerned. When making decisions in this area, the officers of the charity should be aware of conflicts of interest.

Charities Services elaborates on this approach as follows:⁸⁸

When a charity allows its funds to be used for the private benefit of individuals, the first question we’ll ask is whether it’s reasonable and at ‘arms-length’. As mentioned in our previous posts, paying related people and businesses market rates (or below market rates) for goods and services may be fine if the decision is made *independently* and for the best interests of the charity.

However, if there’s evidence that those benefits aren’t reasonable or are not at ‘arms-length’, this may be considered serious wrongdoing. If officers have influenced decisions where they or related parties benefited, it could mean they’ve used the charity’s funds ‘unlawfully’ because it’ll likely be a breach of their duties under the law or their rules document.

For example: a trust may run a small shop to help raise money for a scholarship fund ... If the two trustees decide to work at the shop, and decide to pay each other very high wages, we would probably see this as an unlawful use of the funds of the trust. As trustees have a duty to make decisions for the best interests of the Trust, we might consider the decision to pay the trustees breaches that duty, which means they used the Trust’s funds unlawfully.

87 Charities Services *Public benefit and charitable purpose*: www.charities.govt.nz/ready-to-register/need-to-know-to-register/charitable-purpose/public-benefit-and-charitable-purpose/ (italicising added, bolding in original).

88 Charities Services *Conflicts of interest and the consequences when they lead to private benefit*: www.charities.govt.nz/news-and-events/blog/conflicts-of-interest-and-the-consequences-when-they-lead-to-private-benefit/ (italicising added, bolding in original).

It may **also** mean a charity is set up for an *independent purpose to provide private benefits*, in which case they would not qualify for registration.

For example: if a Company's directors set up a charitable society so they can borrow money off that society at lower than market rates, we'd see that as an independent purpose to support that Company. It would **also** likely be serious wrongdoing.

Where this has led to losses for the charity, this may also constitute "gross mismanagement".

For example: if trustees decide to invest in their own Company, and that Company fails but the trustees decide to continue to invest, hoping for a turn around, if the conduct results in significant losses for the charity, as well as being an "unlawful use of the funds" and "an independent purpose to provide private benefit", it can also be gross mismanagement.

An example of where this occurred is in the decision of the Charities Registration Board on the Southern Cross Charitable Trust. In that case, a pattern of conflicts in decision making led to private benefits for companies related to the decision maker.

Deregistration is not the only option for Charities Services in these situations. If the issue is a one-off, or action by a single officer that isn't supported by the other officers, the Board wouldn't usually see a public interest in removing the charity.

The application of this approach is causing significant difficulty in practice, as noted by many submissions to the DIA's review of the Charities Act. For example, the Ākina Foundation made the following comments:⁸⁹

In practice, the rule against individuals receiving private gain overshadows the framework for charitable organisations to have sustainable business models to fund their activities. This review needs to clarify that trading / potentially generating profit / identifying as a social enterprise does not preclude registering as a charity as long as there are adequate protections against private benefit. To do so, the Government needs to build understanding in the sector, the [government agency] and the wider industry that trading for profit can occur without individuals accumulating private gain and is a sustainable model for growing impact ... Recognising that this social enterprise model is a growing part of the charities sector and is a sustainable and scalable approach to delivering impact, Charities Services should accept, and encourage, charities wanting to trade for impact and income using one legal entity.

... The rules regarding conflicts of interest stem from the prohibition on individuals receiving private gain from charitable entities, however, what is meant by private gain is not well understood leading to overly conservative approaches by advisers as well as having a chilling effect on officers of charities. This review should clarify what is private gain (including how it relates to salaries or contracts for goods and services), to prevent the inefficient operation, and use of funds by, charities that results from the misunderstanding of the rules around conflicts.

Similar sentiment was expressed by the Royal New Zealand Plunket Trust:⁹⁰

The absolute restriction on the distribution of private pecuniary profit by charities creates a barrier to charities developing social enterprises that align with their charitable purpose but benefit individuals.

As a registered charity Plunket can carry out profit-making activities, as long as all of the profits created are used to further charitable purposes and are not used to further the private financial interests of individuals (known as 'private benefits').

For example, Plunket objectives relate to improving the health and wellbeing of tamariki and their whānau, which are significantly influenced by social and economic detriments of health such as poverty, and housing. If Plunket wanted to deliver a service to a group of families with young children that directly improved their financial or housing situation, this could be interpreted as creating a private pecuniary profit that would result in denial or loss of our charitable status.

89 [Submission](#) of The Ākina Foundation (undated but submitted for a 31 May 2019 deadline) at 5 - 6. See also the [submission](#) of Joanne Harland (undated but submitted for a 31 May 2019 deadline) at 14: "Clarity is the key here. Charities should be able to innovate and explore sustainable business or social enterprise options to support their charitable purpose without fear of losing their charitable status. The Charities Act needs to clearly state what private gain is, so charities can manage conflicts of interest with confidence".

90 [Submission](#) of the Royal New Zealand Plunket Trust 14 April 2019 at 5.

John Robinson made the following comments:⁹¹

I am aware that there is criticism of the Sector – concern about income tax exemption that charities have. This may be general or directed at particular charities, such as those conducting solely business enterprises – although as registered charities the stakeholders are not able to benefit from dividends or return of capital.

Some see this as a way for businesses to gain a competitive advantage over competitors but I am not aware of any evidence of this.

The charitable sector is able to benefit from these enterprises so I have no particular concern about providing wealth to the Sector in this way.

The Paper points out that there are 'often good reasons' for charities accumulating funds – it cites three examples. There are others, possibly many others. Accumulating capital is a common business strategy.

... The fundamental basis of a Charit[y's] acceptance for registration is that individuals cannot benefit from the operation of the charity. It follows that 'at the end of the day' the value of a charity must ultimately be used for charitable purposes.

Unless there are clear reasons for the Charities Board to intervene, such as fraud, noncompliance with the Act in other ways, or there are breaches of the law, once a charity is registered it should be able to set its own policy in this regard, without external interference.

I am not aware that there is wide 'public concern' about this issue ...

I believe the successive governments recognise the importance of the Sector in terms of delivering social benefits on a cost effective basis and reducing the demand on facilities and services provided by the Government. It seems likely that Treasury has sought to quantify this benefit, but the Discussion Paper does not provide any data.

The fact that the Sector provides an opportunity for 230,000 people to volunteer their services in charitable causes should be a cause of celebration. It provides these people with a sense of achievement in participating in worthwhile contribution to communities. It is a social benefit in its own right.

It seems doubtful that any other sector of New Zealand society is able to provide the opportunity for so many people to volunteer their services in this way and for the 'public good'.

It points to the fact that the sector must be retained and encouraged to grow in the national interest.

I am aware that there is disquiet in some circles that the Charitable Sector is exempt from Income Tax, and that it is a matter that, at the least, requires more stringent controls on the Sector.

However this overlooks the fact that within the Sector, income and assets of Charities cannot accumulate for private gain in the way that other tax paying enterprises can and do.

I do believe charities should not be over-whelmed with unnecessary regulation. On the other hand the sector should respond with information about its activities in a timely manner.

I was shocked to learn that only 50% of charities file annual returns 'on time'. I can understand there are times when some charities 'fall down' in these obligations for valid reasons but 50% is a very high figure.

The report did not mention or give possible reasons for such a low compliance percentage.

I can understand too that with only 38 Charities Services staff the task of monitoring annual reports in any detail for around 27,000 charities is an 'impossible' task. ...

So understandably the system relies heavily on voluntary compliance.

Discussion

The difficulties currently being experienced in relation to the concept of "private benefit" acutely reflect the underlying clash of paradigms, and arise as a matter of interpretation, rather than any legal requirement of the Charities Act or case law. As discussed above, charities law does not preclude *all* private benefit. Current interpretations of what constitutes a disqualifying private benefit have extended too far, preventing much legitimate charitable work that does indeed benefit the public.

91 [Submission](#) of John Robinson (undated but submitted for a 31 May 2019 deadline) at 7 - 8, 20.

Much current difficulty stems from the finding of the High Court in *Canterbury Development* (discussed above) that, outside of purposes for the relief of poverty, charitable purpose cannot be furthered by providing benefits to individuals;⁹² this finding appears to have influenced the High Court in *Queenstown Lakes Community Housing Trust* ("**Queenstown Lakes**") where the following comments were made:⁹³

Any ... form of public benefit which is capable of being charitable will not generally be charitable if the public benefit is achieved by means of assistance provided to individuals.

However, as discussed above in chapter 3, the Court of Appeal and Privy Council decisions in *Latimer* provide clear authority for the proposition that charitable purpose can indeed be furthered by means of providing assistance to individuals, and doing so is not limited to purposes for the relief of poverty;⁹⁴ it is not clear how the findings of the High Court in *Canterbury Development* or *Queenstown Lakes* can be reconciled with this prior higher authority, as the *Latimer* decisions are not mentioned in either judgment.

The approach of finding direct private benefits to individuals to be inherently disqualifying unless "assuaging need" is problematic, because it limits charities to focusing on "relief" rather than "prevention", thereby forcing them to wait until people have "fallen off a cliff" before being able to help them.⁹⁵ The approach precludes recognition of the fact that significant public benefits can be and often are achieved through a collection of private benefits, as discussed in box 3.4 above (the social housing case study): in other words, private benefits may sometimes be *the point*, the way the charitable purpose is furthered; private benefit is not necessarily something to be eliminated at all costs. As noted by the Court of Appeal in *Hester v Commissioner of Inland Revenue*,⁹⁶ "any application of funds by a charitable trust is likely to be for the private pecuniary profit of someone".

When the definition of charitable purpose is interpreted in accordance with the *Latimer* decisions, it becomes clear that Plunket, for example, is able to deliver services to families with young children that directly improve their financial or housing situation, if it considers in good faith that to do so is in the best interests of its stated charitable purposes. Given the many challenges currently being faced, and the recognition that government cannot address these challenges on its own, New Zealand is not well served by preventing charities from furthering their charitable purposes in this way. It is important that any uncertainty regarding the conflict between the decisions in *Canterbury Development* and *Queenstown Lakes* and prior higher authority is resolved, as discussed further below in chapters 6 and 8.

In addition, social entrepreneurs with innovative ideas should not be precluded from charitable registration simply because they need to be remunerated for their work in the charity but cannot practically find a way, particularly during the start-up phase, of making such a decision "independently": the legal framework should not discourage efforts to contribute to the public weal simply by virtue of the need to earn a living, otherwise the concept of charity would be entrenched as a preserve of the independently wealthy. What constitutes a market rate is not an exact science, and provided the entrepreneur can demonstrate that any decision regarding salary has been made in good faith in the best interests of the charity's charitable purposes, they should not be automatically precluded from receiving or paying reasonable compensation for goods or services rendered by an overly-strict interpretation of conflict of interest rules.

Conflicts of interest are common in a small country like New Zealand, and requiring them to be eliminated altogether can be unrealistic and overly burdensome, as the Law

92 *Canterbury Development Corporation v Charities Commission* [2010] 2 NZLR 707 (HC) at [65] - [67].

93 *Re Queenstown Lakes Community Housing Trust* [2011] 3 NZLR 502 (HC) at [68].

94 *Latimer v Commissioner of Inland Revenue* [2004] 3 NZLR 157 (PC) at [35] - [36]; *Latimer v Commissioner of Inland Revenue* [2002] 3 NZLR 195 (CA) at [35] - [40]; *Latimer v Commissioner of Inland Revenue* [2002] 1 NZLR 535 (HC) at [65], as discussed above in ch 3.

95 Conversation with Tai Ahu, member of Te Aka Matua o te Ture - The New Zealand Law Commission, Māori Liaison Committee, May 2020: <www.lawcom.govt.nz/engaging-m%C4%81ori>.

96 *Hester v Commissioner of Inland Revenue* [2005] 2 NZLR 172 (CA) at 181.

Commission has noted.⁹⁷ Further, as the UpsideDowns Education Trust noted, it may also not be in the best interests of charitable purposes:⁹⁸

... most charities have members of the governance team that are directly affected by the operations of the charity, and often this is appropriate. For example, at UpsideDowns, we are parent-led, choosing to have more than 50% of our Trust Board at any one time made up of parents of children with Down syndrome who we support. By definition, this means that they benefit from the activities of the charity, but rather than a conflict of interest, this is a necessary structural arrangement which allows us to operate in the best interests of our whanau. These kinds of situations must be taken into account when considering this issue.

Community Housing Aotearoa commented on the need to *manage* rather than eliminate conflicts of interest:⁹⁹

We do not consider setting restrictions on the level of risk for charities undertaking business activities is an appropriate role for [Charities Services]. There are already legal obligations on most charity officers regarding their duties which address this. Duplication of oversight is best avoided. We support robust conflict of interest disclosure requirements and feel the current requirements are sufficient. How to manage conflicts is a governance responsibility of charities

Under the financial reporting rules, registered charities are required to report on “related party transactions”,¹⁰⁰ and make this information publicly available on an annual basis by means of the charities register.¹⁰¹ Sunlight is the best disinfectant: were a charity to make a decision to pay one of its responsible people a salary in return for services rendered,¹⁰² such information would be required to be disclosed on the charities register, providing anyone interested in the charity with the means to decide for themselves whether the charity was worthy of their support.

Conflicts of interest are discussed further below in chapter 8 (recommendation 8.27).

The approach currently taken to issues of private benefit and conflicts of interest is creating an unnecessary barrier to much important social enterprise work. It is not necessary to change the underlying paradigm of charities law or take an overly expansive approach to the concept of private benefit to have effective oversight of charities’ activities: charities law contains in-built protections against unacceptable private pecuniary profit while also allowing flexibility to cater for the wide variety of ways in which public benefit might be furthered, as discussed further below.

Mission drift

In the context of charities running businesses, Charities Services applies a rule that the business activity may not be a “focus”,¹⁰³ the implication being that a charity for whom business has become a “focus” would face deregistration as no longer having exclusively charitable purposes.

There are many difficulties with this approach, not least the subjectivity and uncertainty inherent in determining when business activity might have crossed that line.¹⁰⁴ More fundamentally, it is not clear that charities law recognises such a line at all, as noted by the High Court of Australia (Australia’s highest Court) in 2008 in *Commissioner of Taxation of Australia v Word Investments Ltd* (“**Word Investments**”).¹⁰⁵

97 See Te Aka Matua o te Ture - New Zealand Law Commission *A New Act for Incorporated Societies* (NZLC R129, 2013) at [6.33].

98 [Submission](#) of UpsideDowns Education Trust (undated but submitted for a 31 May 2019 deadline) at 18.

99 [Submission](#) of Community Housing Aotearoa at 4.

100 For tier 1 and 2 charities, see PBE IPSAS 20 *Related Party Disclosures*: www.xrb.govt.nz/accounting-standards/not-for-profit/pbe-ipsas-20/; for tier 3 charities, see [PBE SFR-A \(NFP\)](#) at [A202] – [A207]. For tier 4 charities, see [PBE SFR-C \(NFP\)](#) at s 7 *Notes to the Performance Report – Related Party Transactions*.

101 See Charities Act 2005 ss 41(2), 42A.

102 Subject of course to the terms of its constituting document.

103 Charities Services *Myth busting: when charities can run businesses* 24 February 2021.

104 The difficulties were described by the Charity Commissioners as follows in 1980: “Drawing the line between the charity which is really raising funds and furthering its activities by trading and what is in substance a trading institution wearing a charitable mantel is not easy: each case must be considered on its own facts”. See Ontario Law Reform Commission *Report on the Law of Charities* (Toronto, 1996) at 329, referring to the *Report of the Charity Commissions* 1980 at 7.

105 *Commissioner of Taxation of Australia v Word Investments Ltd* [2008] HCA 55.

Word Investments

Briefly, *Word Investments* concerned a Christian charity ("**Wycliffe**") that ran a funeral business (Word Investments Ltd ("**Word**")) to raise funds for its Christian activities. Although Word's stated purposes were clearly charitable as for the advancement of religion, the Commissioner of Taxation rejected Word's application for exemption from income tax on the basis that it was "commercial" and therefore not a "charitable institution":¹⁰⁶

The Commissioner submitted that the main object of Word was not religious but was "to engage in investment and trading activities for the purpose of raising funds for Wycliffe and other similar organisations". The Commissioner submitted that the "basic function" of Word was to conduct businesses, and the making of profits and the distribution of them to charitable institutions like Wycliffe were merely incidental to the conducting of businesses.

However, the High Court of Australia disagreed:¹⁰⁷

It is therefore necessary to reject the Commissioner's arguments so far as they submitted that Word had a "commercial *object* of profit from the conduct of its business" which was "*an end in itself*" and was not merely incidental or ancillary to Word's religious purposes. Word endeavoured to make a profit, *but only in aid of its charitable purposes*. To point to the goal of profit and isolate it as the relevant purpose is to create a *false dichotomy* between characterisation of an institution as commercial and characterisation of it as charitable.

Accordingly, the fact that Word focused on business activities was not an impediment to its characterisation as "charitable": all funds of a charity must be spent in furtherance of its stated charitable purposes.¹⁰⁸ In other words, the *Word Investments* decision of the High Court of Australia is a reasonably straight-forward application of the destination of funds test, a principle which applies in New Zealand law also, as discussed above.¹⁰⁹

Inferring purposes from activities

The Supreme Court of New Zealand did not refer to the *Word Investments* decision in expressing a view in 2014 that a charity's purposes may be "inferred" from its activities:¹¹⁰ the expression has led to uncertainty as to whether the Supreme Court was intending to change the law in New Zealand to enable (even *require*) a charity's purposes to be inferred from its activities without reference to the charity's constituting document.

In 2016, the uncertainty was helpfully clarified by Ellis J in *Foundation for Anti-Aging Research*, who pointed out that a charity's purposes are ascertained by a process of construction of its constituting document, and the Supreme Court's expression was "certainly not an indication that the Act was intended to wreak some fundamental change in approach".¹¹¹

Despite this, a practice has developed whereby Charities Services will "infer" purposes routinely, without apparent reference to a charity's constituting document, in what Turnour might describe as a "Humpty Dumpty" approach.¹¹² The practice of deregistering charities for whom business has become a "focus" is an example of this approach.

However, the practice is problematic because, in principle, a finding that a purpose has been "inferred" from activities should be as rare as a finding that a charity's constituting document is a sham: it effectively means that a charity is not acting in furtherance of its stated charitable purposes but is instead acting in furtherance of another, non-stated

106 *Commissioner of Taxation of Australia v Word Investments Ltd* [2008] HCA 55 at [13].

107 *Commissioner of Taxation of Australia v Word Investments Ltd* [2008] HCA 55 at [24] (emphasis added).

108 *Commissioner of Taxation of Australia v Word Investments Ltd* [2008] HCA 55 at [43] - [44].

109 See, for example, *Auckland Medical Aid Trust v Commissioner of Inland Revenue* [1979] 1 NZLR 382 at 387; *Commissioner of Inland Revenue v Carey's (Petone and Miramar) Ltd* [1963] NZLR 450; *Calder Construction Co Ltd v Commissioner of Inland Revenue* [1963] NZLR 921; *Commissioner of Inland Revenue v NTN Bearing-Saeco (NZ) Ltd* (1986) 8 NZTC 5,039.

110 *Re Greenpeace of New Zealand Inc* [2015] 1 NZLR 169 (SC) at [14].

111 *Re The Foundation for Anti-Aging Research* (2016) 23 PRNZ 726 (HC) at [83] - [86], as discussed in ch 4.

112 M Turnour "Beyond charity: outlines of a jurisprudence for civil society" (Doctoral thesis, Queensland University of Technology, 2009) at 38, referring to L Carroll *Through the Looking Glass and what Alice Found There* (1899) 123 cited in *Liversidge v Anderson* [1942] AC 206, 244-5 (Lord Atkin).

purpose, in *prima facie* breach of fiduciary duty.¹¹³ As discussed above in chapter 3, the process of “inferring” purposes from activities is one of the mechanisms that has been used to effect a slow-moving change in underlying paradigm in New Zealand.

In a social enterprise context, the practice of inferring a disqualifying purpose if business activity has become a “focus” discourages innovation due to the subjectivity and uncertainty inherent in the approach: a purpose may be inferred at any stage, even from a reasonably isolated activity, and then found “independent” and non-charitable, with the charity’s registration then threatened as a result. Given the importance of registration to the survival of many charities, those responsible for governing charities, many of whom are volunteers, will quite rationally choose not to take the risk: the result is an unhelpful chilling effect, preventing much charitable social enterprise work of benefit to the public being undertaken.

Such an approach fails to recognise that if a trust is found to have a non-charitable purpose, by definition the trust fails. It also fails to recognise that a business may sometimes need to be a charity’s “focus” if the business is indeed to raise funds for the charity’s charitable purpose. Focusing on the business is not necessarily mutually exclusive with focusing on the charitable purposes, as the High Court of Australia has noted: it may in fact be the best way of furthering charitable purposes at a particular point in time.

Some businesses will fail. However, failure of a business does not inexorably mean that decisions to “focus” on it were not made in good faith in the best interests of the charity’s charitable purposes. As noted by the National Council for Voluntary Organisations:¹¹⁴

... we need some public space for ‘heroic failures’ and taking educated risks, otherwise we will limit people’s capacity to be ambitious and to attempt to achieve difficult or long-term goals. It is in the nature of innovation that some projects are risky and may not achieve the outcomes their promoters expect, particularly in the short term

The following comments of the New Zealand Law Society are apposite:¹¹⁵

Charities become involved in [business] activities to advance their charitable purposes, in particular by generating income for their purposes, and it is important to avoid unduly hampering their freedom and flexibility to exercise judgment in this regard (which is already subject to governance requirements under general trust, company and society law and specific tax and other legislative requirements, as applicable, as well as their own governing documents). Registered charities are also already subject to annual financial reporting requirements, and their business activities can be reviewed by the [government agency] and by other authorities if required.

Business activities as a means of advancing charitable ends: Charities’ involvement in business (like advocacy ...) is an area where the distinction between a charity’s purposes/ends and the activities/means to advance or achieve those ends is important and needs to be maintained. As noted earlier in the submission, improvements could be made to the “charitable purpose” and registration decision-making provisions under the Charities Act to recognise and maintain this distinction.

Attempting to restrict charities’ business activities through a process of “inferring purposes” when business has become a “focus” is an exercise fraught with difficulty, subjectivity and uncertainty that is acting as an unnecessary barrier to much legitimate social enterprise activity. A better, more principled and more practical approach would be simply to enforce the fiduciary duties, as discussed further below.

Discussion

The issue of charities undertaking business/social enterprise activity provides an opportunity to examine how a number of the recommendations contained in this report might be applied in practice.

113 See, for example, Trusts Act 2019 s 24; Companies Act 1993 s 134; Incorporated Societies Act 2022 s 56.

114 National Council of Voluntary Organisations [For the public benefit? A consultation document on charity law reform](#) January 2001 at [3.2.3].

115 [Submission](#) of the New Zealand Law Society at 8 - 9.

Based on the discussion above in chapters 2 – 4, we recommend that applicants for charitable registration continue to be subject to a robust initial registration process, following three key steps:

- i. What are the applicant entity's purposes?
- ii. Are those purposes exclusively charitable?
- iii. Are all of the entity's activities carried out in good faith in furtherance of those stated charitable purposes (and do not otherwise constitute serious wrongdoing)?

It should be noted that these questions would represent a clarification rather than a departure from current law.

Robust initial registration process

Question 1: What are the entity's purposes?

As discussed above in chapter 3, the key determinant of whether an entity is eligible for registration is whether their *purposes* are exclusively charitable.¹¹⁶ Assessing this requirement requires first determining what an entity's purposes *are*.

Clause 11 of draft Bill contained in chapter 9 of this report is intended to implement the clarification provided by the High Court in *Foundation for Anti-Aging Research*, that an entity's purposes are ascertained as a matter of construction of the entity's constituting document (recommendation 3.3).¹¹⁷ The process of construction is one of "interpretation, not creation":¹¹⁸ as discussed further below in chapter 8, activities are relevant in this context only to the extent that the entity's constituting document is unclear as to its purposes, or where there is evidence of activities by an entity that displace or belie its stated charitable purposes.¹¹⁹

If an entity genuinely has an independent purpose to provide private benefit, it is not a charity and will not be eligible to register in the first place.

Question 2: Are the entity's purposes exclusively charitable?

Having ascertained the entity's purposes, the question then is whether those purposes are exclusively charitable. We strongly recommend that the test for whether a purpose is charitable is set out in legislation (recommendation 3.2) to restore a focus on purpose and reduce the scope for subjectivity and discretion. We also recommend clarification of the ancillary purpose rule in s 5(3) and (4) of the Charities Act to improve certainty as to when an entity's purposes will be considered "exclusively" charitable (recommendation 8.10).

Given the equitable origins of the definition of charitable purpose, we also recommend the Charities Act follow the model of the Trusts Act 2019 in legislatively clarifying the relationship between the statute and underlying equitable principles:¹²⁰ cls 5(c), 7 and 8 of the draft Bill included in chapter 9 of this report are intended to make clear that the definition of charitable purpose is interpreted against its history of nuance, flexibility and principle, as discussed further below in chapter 8 (recommendation 8.3).

There will likely always be difficulties at the margins, and it is critical that charities' access to an oral hearing of evidence is restored to ensure a robust means of testing any adverse findings (such as whether any direct private benefits of a charitable purpose are in fact outweighed by indirect public benefits) and to allow the common law to develop on the basis of a properly-contested evidential platform, as discussed further below in chapter 6 (recommendation 6.1). A fair process that affords natural justice to charities would do much to alleviate current concerns.

116 Charities Act 2005 s 13.

117 *Re The Foundation for Anti-Aging Research* (2016) 23 PRNZ 726 (HC) at [82] - [88].

118 See, for example, *Inglis v Dunedin Diocesan Trust* [2011] NZAR 1 (HC) at [29] - [32] per Baragwanath J; *Public Trust v Cancer Society of New Zealand Incorporated* [2020] NZHC 615 (23 March 2020) at [11], per Churchman J.

119 For a fuller discussion about the extent to which it is permissible to resort to extrinsic material in ascertaining purposes, see S Barker "Unresolved issues in New Zealand charities law" [2021] NZLJ 49.

120 See, for example, Trusts Act 2019 ss 4, 5, 7, 8.

Question 3: Are the entity's activities carried out in good faith in furtherance of the entity's stated charitable purposes?

It is also important to clarify to *what* the charitable purpose test is to be applied: much difficulty has arisen in this context by s 18(3) of the Charities Act, which requires regard to be had to activities as part of an application for registration but does not specify what regard is to be had to activities *for*. The lacuna has been filled in practice by conflating the distinction between purposes and activities and requiring activities to be "charitable": however, a concept of "charitable activities" is an oxymoron in charities law terms, and applying the charitable purposes test, including its public benefit test, at the level of individual activities is highly problematic in practice, as discussed above in chapters 3 and 4.

Clause 18 of draft Bill contained in chapter 9 of this report is intended to implement the clarification provided by the High Court in *Foundation for Anti-Aging Research* that activities are regarded to assess whether they are consistent with or supportive of the entity's stated charitable purposes (recommendation 8.11).¹²¹ The suggested drafting is intended to clarify that the "charitable" test applies to purposes, not activities: activities are considered primarily to assess that they further the stated charitable purposes and will not otherwise constitute serious wrongdoing, not to assess whether the activities are "charitable". Under the destination of funds test, charities are free to further their charitable purposes as they see fit without undue government interference (subject always to the terms of the entity's constituting document and the general law).

In the context of business/social enterprise activity, the test therefore is not whether a business is "capable of making a profit", a question Charities Services may not be qualified to answer in any event, but whether the business activity will be carried out in good faith in furtherance of the stated charitable purposes. A business that is genuinely incapable of making a profit could potentially provide an indication that the good faith test is not met; however, such questions require nuanced assessment on the facts of each individual case, rather than a blanket "capability" rule.

Clause 18(3) of the draft Bill included in chapter 9 of this report is intended as a "belts and braces" measure, to specify clearly that charities may utilise commercial means to further their stated charitable purposes, and support social enterprise (even if the recipient entity is not itself a registered charity), subject always to the overriding fiduciary duties of loyalty and obedience. However, although such clarification would directly address a number of the current barriers to social enterprise, the more general measures recommended in this report are intended to achieve the same result indirectly. We are conscious that legislative measures intended to support charities can and often do have precisely the opposite effect in practice, and welcome consultation on this aspect of the drafting in particular.

Enforce the fiduciary duties

A robust initial registration process is intended to ensure that only genuine not-for-profit entities with exclusively charitable purposes are able to register; it is important to note in this context that, unlike many other jurisdictions, every registered charity in New Zealand has already been individually vetted, as discussed above in chapter 1.¹²²

Once an entity has been accepted for registration, the focus of the charities law framework should then be on whether the charity is continuing to further its *stated* charitable purposes (and otherwise complying with its constituting document and the general law, and not engaging in "serious wrongdoing").

A charity that has been accepted for registration and that is complying with its constituting document cannot provide "private pecuniary profit" by definition: by enforcing the fiduciary duties of obedience to the constituting document and loyalty to the charitable purposes, the legal framework would therefore utilise charities law's built-in protections against unacceptable private pecuniary profit in a clear and simple way,

¹²¹ *Re The Foundation for Anti-Aging Research* (2016) 23 PRNZ 726 (HC) at [82] - [88].

¹²² Such as Ireland, Scotland and Australia. See Dr O Breen, Rev Dr L Carroll, N Lavery [Independent Review of Charity Regulation Northern Ireland](#) January 2022 at 111.

without resort to complex “ex ante” rules that cut across the underlying law and are expensive to comply with and administer.

To that end, as discussed above in chapter 2, we recommend the charities legislation articulates one simple overarching fiduciary duty, applicable to all registered charities regardless of their underlying legal structure, and to all involved in governing them, to act in good faith to further the entity’s stated charitable purposes in accordance with its rules (recommendation 2.1).

As many submitters have noted, the fiduciary duties already exist, and for some legal structures have been articulated in statute.¹²³ The purpose of articulating an overarching duty in charities’ legislation would not be to duplicate the duties that already exist in the underlying law, but to provide a clear framework by which the fiduciary duties of loyalty and obedience might be enforced with respect to all registered charities, however structured.

Such an approach would have many advantages: it is simple and easily understood, providing certainty within clear parameters, while also providing inherent flexibility to cater for the wide variety of ways in which public benefit might be furthered; it provides a clear basis for oversight of charities’ activities while also respecting the independent, private nature of charities, and the equitable origins of charities law; it would therefore protect against harmful regulation that risks inhibiting innovation and stifling or demoralising voluntary effort; the net result would be to allow charities to further their stated charitable purposes with significantly greater confidence and mana than is currently the case.

Fundamentally, the approach would restore a focus on purpose, not only for charities themselves, but also for the agency responsible for administering the Charities Act.

Application to social enterprise activity

Applying an approach of enforcing the fiduciary duties would remove many of the barriers currently being experienced to charities’ business/social enterprise activity in New Zealand.

It is important to understand that business activity is not inherently nefarious, nor inherently inconsistent with charitable purposes. If a charity can demonstrate that its business/social enterprise activity has been carried out in good faith in furtherance of its stated charitable purposes, and otherwise in accordance with its constituting document, in principle there is no difficulty.

For example, enforcing the fiduciary duties protects against “mission drift”: a charity that is adhering to its constituting document cannot have a purpose to provide private benefit, by definition; if a charity has deviated from its stated charitable purposes into furthering an independent purpose of private benefit, there is prima face a breach of fiduciary duty and therefore a clear basis for intervention. However, the question is not whether a business has become a “focus” (as it will inevitably need to be a focus from time to time if the business is to successfully raise funds for the charity’s charitable purposes); instead, the question is whether the charity can demonstrate that all decisions were made in good faith in furtherance of its stated charitable purposes (and otherwise in accordance with its constituting document).

Enforcing the fiduciary duties also provides inherent protection against private pecuniary profit. The fiduciary duties of loyalty and obedience support the destination of funds test by requiring compliance with the non-distribution constraint and the prohibition on private pecuniary profit. Cases where private benefit is inconsistent with charitable status, such as self-dealing or distributing profit to those responsible for governing the charity, can be more than adequately dealt with by enforcing the duty to comply with the constituting document: no one can make a private pecuniary profit from a charity *lawfully*.

¹²³ See Trusts Act 2019 ss 21 - 38; Companies Act 1993 ss 131 - 138B; Incorporated Societies Act 2022 ss 54 - 61.

However, it is very important to distinguish private pecuniary profit from incidental private benefits: not all private benefits are beyond the pale; some private benefits are beneficial, even the point, and do not of themselves “necessarily affect or negate the charitable status of an organisation”.¹²⁴ For example, charities should not be prevented from providing affordable housing, in circumstances other than relief of poverty, if the private benefit provided to recipients merely represents the means by which the charitable purpose is furthered, as discussed above in chapter 3.

There may well be many different ways in which a charity’s purposes might be furthered: provided decisions are made in good faith, with adequate consideration given to all relevant matters, the decision as to how the charitable purposes are to be furthered in any particular case is for the governors of a charity to make. This includes the decision as to whether the business should be carried out through a separate entity or by the charity itself.

Some businesses will fail. However, learning from failures is an important part of the innovation process: there must be space for “heroic failures”, as discussed above.

Financial reporting rules

The fiduciary duties are supported in New Zealand by the comprehensive information now made available by means of the Charities Act. The transparency and accountability disclosure requirements of the financial reporting rules include requirements to report on material “related party transactions”, as discussed above, and to prepare service performance reports articulating in non-financial terms what a charity is trying to achieve and how,¹²⁵ in addition to comprehensive financial information. All such information is required to be made publicly available on an annual basis by means of the charities register.¹²⁶

Such comprehensive information supports not only “questions from the monitoring authority”,¹²⁷ but also the “scrutiny of 1000 eyes” (or what Breen might describe as a “triumvirate of security”).¹²⁸

Charities are put to considerable expense and effort to produce the requisite information: instead of imposing blanket deadweight costs by means of complex, ill-fitting and unnecessary rules that only act as a barrier to legitimate social enterprise activity, the legal framework for charities should make use of the comprehensive information that is now available.

As discussed above, it is vital to facilitate rather than frustrate social enterprise work.

Raise public awareness

All of the above measures would be materially assisted by raising awareness and restoring public confidence that running businesses/carrying out social enterprise is a legitimate and encouraged activity for charities.

As noted by the Advisory Committee on the Charitable Sector in Canada:¹²⁹

Given the importance of earned income to the charitable sector, and *how other parts of the federal Government are encouraging social enterprise via charities and non-profits* (eg Employment and Social Development Canada (ESDC) and its \$755 million Social Finance Fund), the CRA [Canada Revenue Agency] *should acknowledge that this is a legitimate and even encouraged activity*, and clarify that [its] guidance is intended to help charities successfully navigate the regulatory regime.

124 OB Breen and PA Smith *Law of Charities in Ireland* (Bloomsbury, 2019) at [10.12] - [10.13].

125 For tier 1 and 2 charities, see [PBE FRS 48 Service Performance Reporting](#) at [IN 2]. For tier 3 charities, see [tier 3 standard](#) at [A8(b)]; for tier 4 charities, see [tier 4 standard](#) at [A8(b)].

126 Under s 25 of the Charities Act, information can be withheld from the charities register, but such exceptions are very rarely made. See Charities Services *Restricting information from the register* 29 October 2019: www.charities.govt.nz/news-and-events/blog/restricting-information-from-the-register/ and Appendix A.

127 As one submitter put it, a “please explain” ([submission](#) of Graduate Women North Shore Charitable Trust).

128 Interview with Dr Oonagh Breen Professor of Law at the Sutherland School of Law, University College Dublin (3 December 2020).

129 Advisory Committee on the Charitable Sector [Report #3 – Towards a federal regulatory environment that enables and strengthens the charitable and non-profit sector](#) July 2021 “Purposes and Activities Working Group – Earned Income by Charities” (emphasis added).

Charities Services' status as a government department appears to constrain its ability to speak out in support of the charitable sector in such ways, underscoring the importance of the independence of the agency responsible for administering the Charities Act, as discussed further below in chapter 7.

Recommendation 5.2:

That a public awareness campaign is conducted to restore public confidence that running a business/carrying out social enterprise is a legitimate and important activity for charities.

Governance standards

For completeness, we note that In its February 2019 discussion document,¹³⁰ DIA consulted on whether New Zealand should adopt governance standards along the lines adopted in Australia. Regulations in Australia ("the ACNC Regulations") set out six "governance standards" that every Australian registered charity must meet, which might be summarised as follows:¹³¹

- i. **Governance standard 1: purpose and not-for-profit nature**¹³²
Australian registered charities must be able to demonstrate their not-for-profit nature and give the public confidence that they are acting to further their purposes. Charities must provide information about their purposes to the public (for example, by having a copy of their rules on the charities register).
- ii. **Governance standard 2: accountability to members**¹³³
Australian registered charities that have members must take reasonable steps to be accountable to their members and provide them with adequate opportunity to raise concerns about how the charity is governed. If the charity's governing rules include appropriate accountability mechanisms, compliance with those rules would demonstrate compliance with governance standard 2.¹³⁴
- iii. **Governance standard 3: compliance with Australian laws**¹³⁵
Australian registered charities must not commit a serious offence (such as fraud) under any Australian law or breach a law that may result in a civil penalty of 60 penalty units or more.
The 2018 review of the Australian charities' legislation recommended that governance standard 3 be repealed, as registered charities must comply with all applicable laws.¹³⁶
Despite this, in February 2021,¹³⁷ the Australian Treasury released an exposure draft detailing proposed changes to expand the scope of Governance Standard 3, so that charities might be deregistered if they, for example, do an act that "may be dealt with" as a summary offence. The proposed changes were very controversial and were ultimately disallowed by the Australian Senate in November 2021.¹³⁸
- iv. **Governance standard 4: suitability of responsible persons**¹³⁹
Australian registered charities must take reasonable steps to ensure that their board members are not disqualified and to remove board members who do not meet these requirements.

130 Te Tari Taiwhenua Internal Affairs [Modernising the Charities Act 2005: Discussion Document](#) February 2019 at 22 - 23, 42 - 45.

131 [Australian Charities and Not-for-profits Commission Regulations 2013](#) subdivision 45B.

132 Australian Charities and Not-for-profits Commission Regulation 2013 s 45.5 (*Governance standard 1*).

133 Australian Charities and Not-for-profits Commission Regulation 2013 s 45.10 (*Governance standard 2*).

134 Australian Charities and Not-for-profits Commission Regulation 2013 s 45.10 (*Governance standard 2*) n 3.

135 Australian Charities and Not-for-profits Commission Regulation 2013 s 45.15 (*Governance standard 3*).

136 P McClure AO, G Hammond OAM, S McCluskey, Dr M Turnour [Strengthening for purpose: Australian Charities and Not-for-profits Commission – Legislative Review 2018](#) 31 May 2018 at 47.

137 Australian Government [Exposure Draft Australian Charities and Not-for-profits Commission Amendment \(2021 Measures No. 2\) Regulations 2021](#).

138 See, for example, M Coggan "Senate backs charities in disallowing proposed ACNC changes" ProBono Australia 26 November 2021: probonoaustralia.com.au/news/2021/11/senate-backs-charities-in-disallowing-proposed-acnc-changes/.

139 Australian Charities and Not-for-profits Commission Regulation 2013 s 45.20 (*Governance standard 4*).

v. **Governance standard 5: duties of responsible persons**¹⁴⁰

Australian registered charities must take reasonable steps to ensure that their board members know, understand and carry out the fiduciary duties set out in the standard (including acting with reasonable care and diligence, acting in good faith in the registered charity's best interests and to further its purposes, not misusing their position, disclosing conflicts of interest, and ensuring that the charity's financial affairs are managed responsibly).

vi. **Governance standard 6: maintaining and enhancing public trust and confidence in the Australian not-for-profit sector**¹⁴¹

Australian registered charities must take reasonable steps to join the National Redress Scheme for Institutional Child Sexual Abuse, established in response to the Royal Commission into Institutional Responses to Child Sexual Abuse, if the charity is identified as being involved in such abuse.

The formulation of the ACNC governance standards requires the *registered charity* to take reasonable steps to ensure that its board members are subject to and comply with these duties: *responsible persons* are not individually subject to any duties under the ACNC Regulations, although similar duties may apply in underlying statute or common law and principles of equity.¹⁴²

A submitter to the DIA's review ("Individual E", understood to be an Associate Professor of Law at a prestigious Australian university) articulated the reason for this as follows:¹⁴³

A major determinant of the way in which entities – whether charitable or otherwise – are regulated in Australia is our constitutional framework. In basic terms the Australian constitution vests certain powers in the Commonwealth and certain powers in the states. This makes uniform regulation in some areas complex. For example, it took many years before a uniform system of regulating companies was implemented in Australia. The way this was achieved was a referral of power from the states and territories to the Commonwealth government. This referral has to be renewed periodically. There has been no such referral as concerns charitable entities. This means that such entities are governed by a complex web of different laws – some Commonwealth and some state, as well as by the common law. *It also means that the legislative jurisdiction of the Commonwealth government is limited ...* In order to enable a *federal* charities regulator to have jurisdiction over, and power to regulate, charitable entities (and to reduce some regulatory duplication) the *governance standards* were enacted. It is notable that these standards require the *registered charitable entity, rather than the individuals who govern and run the entity*, to take reasonable steps to ensure that its responsible persons (such as directors) are subject to, and comply with, these duties. Responsible persons themselves are not individually subject to any duties under the Act or Regulation (but may be subject to duties under legislation or the common law) ...

The governance standards have, however, had problematic interaction with the other layers of regulation. Academic reviews, particularly of governance standard 5, show that it gives rise to inconsistencies, incoherence, gaps in coverage and problematic interaction with other legislation. For example, many of the duties in the Corporations Act 2001 (Cth) have been "turned off" for directors of charitable companies. A particular gap relates to misappropriation of charitable assets. The interaction between governance standard 5 and state and territory incorporations legislation is complex and problematic. A greater issue is that the duties are imposed on the charitable entity rather than on individual office bearers. This increases the risk that individuals will not perform their duties with sufficient care and responsibility since the obligation is not imposed on them.

On the other hand anecdotal evidence from not-for-profit law practitioners suggests that the governance standards are not particularly problematic in practice.

A key problem is the complexity of the resultant system, caused by the multiple layers of regulation. The ACNC Review Panel stated [at 47]:

140 Australian Charities and Not-for-profits Commission Regulation 2013 s 45.25 (*Governance standard 5*).

141 Australian Charities and Not-for-profits Commission Regulation 2013 s 45.30 (*Governance standard 6*), inserted by the Australian Charities and Not-for-profits Commission Amendment (2021 Measures No 3) Regulations 2021.

142 P McClure AO, G Hammond OAM, S McCluskey, Dr M Turnour [Strengthening for purpose: Australian Charities and Not-for-profits Commission – Legislative Review 2018](#) 31 May 2018 at 45.

143 [Submission](#) of Individual E (emphasis added, footnotes omitted).

The Panel heard that the current system of different governance requirements is complex and confusing. It is unreasonable to expect volunteer directors working in the sector to understand and comply with multiple jurisdictional and sometimes inconsistent governance requirements. While there are common themes across the competing governance requirements, such as the duties to act honestly and avoid conflicts, the expression of those duties differs between them and imposes an unacceptable level of red tape.

Having core standards for all charitable entities and their officers is a sensible idea. In this sense, the governance standards themselves are not problematic. The overall system, however, is. Unfortunately, the introduction of the governance standards has resulted in increased complexity due to the Australian constitutional framework. As mentioned, the governance standards are necessary in order to give the ACNC regulatory power.

New Zealand does not have the same constitutional issues and could therefore consider the introduction of governance standards. In doing so, however, careful scrutiny would need to be given to the potential interaction between such standards and other legislation such as the Companies Act, the Trusts Act, and the Incorporated Societies Act. It is important that duties be imposed on individuals as well as entities in order to ensure accountability.

Another important issue is to determine what the exact purpose of such governance standards would be. Will they be used by a charities regulator to regulate charitable entities? The standards could alternatively be intended as guidance on how charities and the people who govern them should conduct the charity or as guidance on which principles Charities Services will look to in conducting investigations. It is important to make the intended effect and operation of such standards clear and, if they are not to operate in the same way as their Australian counterparts, perhaps to name them differently and to make sure that there is clear explanation of their function and application.

In conclusion, before framing and enacting governance standards, it will be imperative to determine what role these standards will play and what interaction they will have with other laws and regulations. The Australian experience highlights the importance of clarity in relation to these aspects.

While consistently acknowledging the importance of good governance, submitters to the DIA's review of the Charities Act expressed considerable concern about imposing an additional statutory and regulatory layer of governance standards above the existing duties that already exist in common law and statute.¹⁴⁴ As an alternative to statutory prescription, many proposed awareness-raising through voluntary governance guidelines,

¹⁴⁴ See, for example, the [submissions](#) of Abuse and Rape Crisis Support Manawatu Incorporated; Alzheimers New Zealand; Amala Wrightson, Auckland Zen Centre, New Zealand Buddhist Council; Angela McMorran; Auckland North Community and Development; Barry Coates, Sustainable Initiatives Aotearoa; Bishop's Action Foundation; the Blind Foundation; Bowel Cancer New Zealand; Cancer Society; Ced Simpson and Valerie Williams; Centre for Social Impact; Chartered Accountants Australia and New Zealand; Christ for Every Nation Trust; Christchurch Community Accounting; Community Housing Aotearoa; Community Networks Aotearoa; Community Waikato; Creative New Zealand (endorsed by a further 17 organisations); David Boswell; Devonport Methodist Church; Diane Robinson; Diederick Meenken; Dr Rowena Sinclair; Geoff Pownall; Girls' Brigade New Zealand; Grace Presbyterian Church of New Zealand; Graduate Women North Shore Charitable Trust; Graeme Stockdale; Graham Burger; Grey Power Otago Inc; Habitat for Humanity New Zealand; Habitat for Humanity Greater Auckland Ltd; Hawke's Bay Community Law Centre; Heather Pennycook; I Got Your Back Pack; IHC Foundation; IHC New Zealand; Individual E; Institute of Directors; Jackie St John; Jacob Ploeg; John Robinson; Kensington Swan; Lake Taupo Hospice Trust Inc; LEAD; Lloyd Brewerton; Manukau Christian Charitable Trust; Massey University Foundation; Methodist Alliance; Methodist Church of New Zealand Te Haahi Weteriana O Aotearoa; Motueka Family Service Centre; Multiple Sclerosis New Zealand Inc; Neighbourhood Support New Zealand Inc; Neil Walbran; Network Waitangi Otautahi Inc; New Zealand Association Resource Centre Trust; New Zealand Breastfeeding Alliance; New Zealand Council of Victim Support Groups Incorporated; New Zealand Family Planning; New Zealand Law Society; New Zealand Mathematical Society Incorporated; New Zealand Red Cross Inc; Northland Community Foundation; Organisation A; Organisation C; Oxfam New Zealand; Parihimanhi Marae; Peter Hays; Peter Sharpe; Piers Davies; Platform; Professor Carolyn Cordery; Renewal Trust Inc; Roberta Budvietas; Royal New Zealand Coastguard Incorporated; RSM; Royal New Zealand Plunket Trust; Scott Moran; Southern Group Training Trust; St Anselm's Union Church; St Pauls Lutheran Church; Summit Road Society Incorporated; Surf Life Saving New Zealand Inc; Te Hunga Rōia Māori o Aotearoa; Te Rūnanga o Ngāi Tahu; Te Whakakitenga o Waikato Incorporated, on behalf of the Waikato-Tainui iwi, endorsed by the Waikato Raupatu Lands Trust and Group and Waikato-Tainui marae; The Girl Guides Association New Zealand Incorporated; Thomas E Stazyk; the Todd Foundation; Tom Brady; Toy Library Federation of New Zealand; Trevor Goudie; Trust Democracy; University of Auckland Foundation; Volunteering New Zealand; W R Phillips; Wellington Youth Orchestra Inc; Whaiora Whanui Trust; Whangarei A&P Society; Whenua Iti Trust Board; YWCA Christchurch; and YWCA of Aotearoa NZ, YWCA Whangarei, YWCA Auckland and YWCA Hamilton, Boards and Managers.

along the lines of governance codes that exist in other jurisdictions.¹⁴⁵ As discussed above in chapter 2, considerable work is already underway in New Zealand to support charities' governance.¹⁴⁶

For these reasons, and given New Zealand's different constitutional, Treaty-based framework, we do not support the adoption of Australian-style governance standards into New Zealand charities legislation. Instead, we recommend that the New Zealand charities law framework articulate one simple overarching fiduciary duty, as discussed above in chapter 2.

Part 2 - Competitive advantage

Another significant barrier to charities undertaking social enterprise activity is a widely-held perception that charities running businesses have a "competitive advantage" over their for-profit counterparts. At the time of writing, this perception is leading to calls for major structural changes to the tax treatment of charities in New Zealand.

For example, the Tax Working Group ("**TWG**") referred to perceptions of competitive advantage in its final report, and concluded the underlying issue was the extent to which charitable businesses were *accumulating* surpluses rather than *distributing* or applying them for the benefit of charitable purposes:¹⁴⁷

If a charitable business is regularly distributing funds to its head charity, or providing services connected with its charitable purposes, it will not accumulate capital faster than a taxpaying business.

The question, then, is whether the broader policy settings for charities are encouraging appropriate levels of distribution.

This conclusion appears to be based on an assumption that a charity accumulating funds is not applying them for the benefit of charitable purposes, an assumption that requires critical examination as discussed further below. This conclusion also addresses a competitive advantage the existence of which is assumed rather than analysed.

The TWG noted that other countries, such as Canada, have introduced regimes where all registered charities are subject to minimum distribution requirements.¹⁴⁸ Following the TWG report, charities' "business and accumulation activities" were elevated to two of the top three issues to be fast-tracked as part of the review of the Charities Act.¹⁴⁹ The term "social enterprise" is not mentioned in the Tax Working Group reports,¹⁵⁰ and social enterprise has been excluded from the scope of the Charities Act review.¹⁵¹

Another example is the Organisation for Economic Co-operation and Development's Tax and Policy Studies 2020 *Taxation and Philanthropy* report ("**OECD report**"), which considered income tax exemptions for the commercial income of philanthropic entities

145 See, for example, the [submission](https://www.charitygovernancecode.org/en/front-page) of the Institute of Directors referring to the voluntary Charity Governance Code in England and Wales: www.charitygovernancecode.org/en/front-page, the voluntary Scottish Governance Code for the Third Sector: [www.goodgovernance.scot/governance-code/](https://goodgovernance.scot/governance-code/), and the mandatory Charities Governance Code in Ireland: www.charitiesregulator.ie/media/1609/charities-governance-code.pdf?cf_chl_jschl_tk=x2LI.7BvpTXFez7paivZOgB2X8D0TgbTeunVzbN8wPI-1640126808-0-gaNycGzNCJE.

146 See, for example, communitygovernance.org.nz/. A series of co-design workshops are taking place over March – May 2022 to design Aotearoa's first Good Governance Code for community organisations.

147 Tax Working Group *Future of Tax: Final Report* 21 February 2019 at 102 - 103.

148 Tax Working Group *Future of Tax: Final Report* 21 February 2019 at 103 - 104.

149 As discussed above in ch 1, the Government's review of the Charities Act was telescoped into just three issues in February 2020 (the other issue being the reporting requirements for small charities). In April 2021, the review was extended to five issues: reporting requirements for small charities; charities' business and accumulation activities; investigating potential improvements to the appeals mechanism; matters relating to the government agency; and duties of officers of charities. See Te Tari Taiwhenua *Modernising the Charities Act* 26 October 2021: www.dia.govt.nz/charitiesact. See also the discussion in S Barker "Charity regulation in New Zealand: history and where to now?" (2020) 26(2) Third Sector Review 28.

150 Even though it was raised in TWG submissions. See Inland Revenue and the Treasury for the Tax Working Group *Charities and the not-for-profit sector: Background Paper for Session 13 of the Tax Working Group* 6 July 2018 at 29.

151 As noted by Parry Field Lawyers in their 31 May 2019 [submission](#) at [5].

give rise to “competitive neutrality concerns” that require the “attention of policy makers”. The OECD report concluded as follows:¹⁵²

... countries should *reassess the merits* of providing tax exemptions for the commercial income of philanthropic entities, at least insofar as this income is *unrelated* to the entity’s worthy purpose. In undertaking such a reassessment, countries will need to consider the added *complexities* associated with distinguishing between taxable (ie unrelated commercial income) and exempt income and weigh the additional compliance and administrative costs *against the pursuit of competitive neutrality*.

The OECD Tax Policy Studies Unit recommends that countries tax the unrelated business income of charities, pointing out that, of 40 countries studied, only New Zealand, Australia and Malta currently exempt *all* commercial income of charities from tax.¹⁵³ However, in making this recommendation, the OECD report assumes but does not analyse the existence of a competitive advantage. The term “social enterprise” is also not mentioned in the OECD report.

Before making major structural changes to the current tax treatment of charities in New Zealand, it is important that the underlying premise, that businesses run by charities have a competitive advantage over their for-profit counterparts, is analysed rather than assumed: successive reviews have found that no such competitive advantage exists.

Prior reviews

Canada

In Canada, the Special Senate Committee on the Charitable Sector made the following comments in its June 2019 report:¹⁵⁴

An argument commonly advanced in opposition to the destination of funds test is that it would give charities an unfair advantage in the marketplace. However, *this view has been refuted by a number of sector stakeholders*. According to a recent Imagine Canada report, legal academics and economists who have studied competition between for-profit businesses and NPOs generally agree that “unfair competition in the form of predatory pricing or predatory market expansion *is simply not a serious policy concern*”. Indeed, Imagine Canada contends that for-profit businesses are growing more rapidly than charities in key markets to the extent that charities “may even face extinction in a number of important areas”.

The Advisory Committee on the Charitable Sector expressed a similar sentiment in its July 2021 report:¹⁵⁵

... framing earned income by charities as synonymous with the work of the private sector sets up a *false and incomplete narrative*. Organisations in our sector are defined by a public/charitable purpose and their ability to meet their purpose should be fully supported.

Similar sentiments have been expressed in Australia.

152 OECD Tax Policy Studies *Taxation and Philanthropy* (2020) 27 (OECD Publishing, Paris):

www.oecd-ilibrary.org/taxation/taxation-and-philanthropy_df434a77-en at 3, 9, 19, 134 and ch 6 (emphasis added). However, the existence of a competitive advantage was assumed rather analysed. See 23, 128: “A concern regarding exemption of commercial income of philanthropy entities is that this may [sic] create an unfair competitive advantage for philanthropic entities over for-profit businesses”; at 31: “A competitive advantage may [sic] result from tax concessions that apply to the income, inputs, or outputs of philanthropic entities, including when they operate businesses. In this context, it is argued that philanthropic entities can undercut the competition”; and at 134: “If there are no restrictions on the commercial activities a philanthropic entity can engage in and the income from those activities is fully tax exempt, it may [sic] give rise to competitive neutrality and revenue loss concerns. To avoid such concerns, the report identifies a number of policy options ... The competitive neutrality concerns associated with exempting the commercial income of philanthropic entities gives rise to an important issue that requires the attention of policy makers”.

153 OECD Tax Policy Studies *Taxation and Philanthropy* (2020) 27 (OECD Publishing, Paris) at 58.

154 Report of the Special Senate Committee on the Charitable Sector *Catalyst for Change: A Roadmap to a Stronger Charitable Sector* June 2019 at 88 - 92 (emphasis added). The Government of Canada supported this recommendation. See Hon D LeBouthillier, Minister for National Revenue *Government Response to the Report of the Special Senate Committee on the Charitable Sector* 30 March 2021 at 16-17.

155 Advisory Committee on the Charitable Sector *Report #3 – Towards a federal regulatory environment that enables and strengthens the charitable and non-profit sector* July 2021 “Purposes and Activities Working Group – Earned Income by Charities” and cover page (emphasis added).

Australia

The 1995 Australia Industry Commission review

In 1995, the Industry Commission of Australia concluded that the income tax exemption for the business activities of "Community Social Welfare Organisations" ("**CSWOs**") had few adverse consequences:¹⁵⁶

Income tax exemption does not compromise competitive neutrality between organisations. All organisations which, regardless of their taxation status, aim to maximise their surplus (profit) are *unaffected* in their business decisions by their tax or tax-exempt status.

CSWO commercial activities do have certain advantages over for-profit firms, such as better cash flows. However, *for-profits also have certain advantages over CSWO commercial organisations. These include easier access to capital – both equity and debt, and the ability to personally benefit from profits.* The overall situation is unclear.

In reaching this conclusion, the Australian Industry Commission noted two aspects to the "competitive advantage" argument, one related to pricing and one related to expansion:¹⁵⁷

Inquiry participants made considerable comment on the effect of tax exemptions and concessions on the business activities of CSWOs.

It was put to the Commission that favourable tax treatment may give CSWOs an advantage over tax paying competitors. It was said that these advantages are relevant for all commercial activities of CSWOs – both where they are engaging in *unrelated* business (for example, sales of furniture or Christmas cards) in order to raise funds for their core welfare services, or where the activity is the *core* objective (for example, nursing home care). Some participants argued that the advantage is a hindrance to for-profit competitors for a number of reasons including:

- CSWOs are able to cut prices to consumers below those which for-profit firms can sustain; and
- CSWOs are able to *expand their operations more rapidly than their for-profit counterparts because they can use their tax free surplus to fund such expansion.*

The pricing/expansion taxonomy is important, as discussed further below.

The Commission considered that making a distinction between "related" and "unrelated" businesses was difficult and most likely not sensible:¹⁵⁸

CSWOs compete against for-profit firms in business activities unrelated to the main purpose of the CSWO, as well as core activities such as nursing homes.

The *unrelated* activities attempt to raise funds to support the core activity of the organisation. CSWOs are involved in a wide range of activities that are not directly related to their core objectives. Examples include general insurance, financial services, worm farms, recycled clothing, packaging, sheet metal products and sales of Christmas puddings. CSWOs compete against other tax paying firms but are exempt from paying tax on any profits made.

Core activities include nursing homes, hostels, medical aids and appliances and services in the health care industry. Tax paying firms are increasingly competing in these markets, many of which were previously the sole domain of CSWOs.

Even though any competitive advantage and resulting resource effects are relevant to both core and unrelated activities, many of the suggested solutions to the perceived problems have tended to focus only on the unrelated activities ...

In order to treat unrelated activities differently, it would be necessary to *distinguish* them from the core activities of a CSWO. This poses a number of difficulties. For example, is a workshop employing disabled or unemployed staff providing valuable training or selling furniture? Similarly, is an opportunity shop selling second hand clothes for funds or providing affordable clothing to those in need? It is often difficult to judge whether those activities are

156 Industry Commission *Charitable organisations in Australia - Report no 45* 16 June 1995 at K5 - K6 (emphasis added, footnotes omitted).

157 Industry Commission *Charitable organisations in Australia - Report no 45* 16 June 1995 at 309 (emphasis added).

158 Industry Commission *Charitable organisations in Australia - Report no 45* 16 June 1995 at 309 - 310 (emphasis added).

directly meeting the principal objective of the CSWO or whether they are attempting to raise funds to support other charitable purposes.

Even if it were always possible to separate out the core and unrelated activities of CSWOs, *it is unclear whether there would be any benefits from doing so*. The competitive advantage given to CSWOs may be *less* of a problem in unrelated activities than in core activities. Some unrelated activities are not tax favoured activities. For example, goods purchased for re-sale are excluded from sales tax exemptions. This reduces the ability of that organisation to take resources away from other commercial retailers. Similarly, land tax, in some States, is also payable if the land is used for commercial purposes. These taxes minimise the commercial advantage of unrelated activities of CSWOs.

There is *limited information* about the extent to which CSWOs engage in unrelated business activities, and hence, little information on the problems and inefficiencies that result. It is clear that, if inefficiencies do arise because of some of the tax exemptions, *they are just as likely to arise in core areas as they are in the unrelated areas*.

The general conclusion that can be drawn is that it is not sensible to look only at unrelated business income activities. The problem is a wider one that should be analysed, not by looking at whether the CSWO's activity is related or not, but at whether the activity is competing with other firms.

With respect to income tax exemption, the Australian Industry Commission concluded the competitive advantage argument did not stand up to scrutiny in relation to either related or unrelated businesses:¹⁵⁹

It has been claimed that the exemption from tax on any profits made by CSWOs allows them to offer a more competitive product than organisations which are liable for income tax ...

Income tax, however, is an after-profit tax imposed on revenue after costs have been taken into account. Being an after-profits tax, an exemption from it should not affect the behaviour of an organisation when deciding how to set its prices and how to minimise its costs. *This result holds whether the CSWO is engaged in unrelated business income or whether the activity is the CSWO's core objective*.

For a CSWO in unrelated commercial activities, such as a plant nursery, the objective would be to make a surplus so as to have more funds available to pursue its charitable objective. The plant nursery would be attempting to minimise its costs and sell the plants at the market determined price. The result should be that a surplus (profit) is earned that can be used in service delivery. If income tax exempt status were withdrawn, this would lower the funds that would be available for the CSWO's charitable purpose. But it would not alter the decision made by the CSWO about how much to produce, what its costs should be (assuming no input tax exemptions), and how it should price goods on the market against competitors.

Nevertheless, taxation of profit, in itself, introduces distortions because it makes use of particular conventions in order to establish the tax base ... However, this difference is likely to be small and therefore unlikely to affect the relative positions of income tax exempt and other organisations.

Therefore, the exemption from income tax should not greatly affect the incentives of a CSWO engaged in unrelated business activities.

The argument that CSWOs will undercut their competitors *does not stand up to scrutiny*. The reason why CSWOs enter into many market ventures is to use their profit to finance their charitable operations. For instance, where a CSWO is operating a plant nursery which is unrelated to its core activities, it will be attempting to provide the most funds it can to its charitable purpose. Hence, it has as much incentive to maximise profits as do for-profit firms. There is no reason why it should permanently give that surplus away to the purchasers of plants by lowering its prices.

In the core activities of a CSWO, the imposition of a tax on profits should not affect the organisation's behaviour. A hostel, for example, may decide that it is not a business and is not interested in competing with other hostel providers. It may decide that it has the objective of providing affordable accommodation to its clients. In this instance, the CSWO would choose *not* to earn a surplus, or alternatively, to use its potential surplus to offer cheap accommodation to its clients. For an organisation that chooses to offer services in a way that does not earn it a profit, its behaviour would be unaffected whether or not it is exempt from income tax ...

¹⁵⁹ Industry Commission *Charitable organisations in Australia - Report no 45* 16 June 1995 at 311 - 313 (emphasis added).

CSWOs do enjoy some benefits from the income tax exemption, namely *better cash flows* (see Appendix K). However, there are *some important, potentially offsetting, differences* between income tax-exempt firms and for-profit firms. For-profits have a number of *offsetting advantages including the capacity to borrow, the ability to benefit personally from profits, and the ability to expand using market-based instruments such as share issues*. Overall, the income tax exemption does not appear to represent a critical advantage to CSWOs over for-profit competitors.

The Commission expanded on these points in Appendix K, highlighting that any potential competitive advantage may in fact be more likely to arise in *related* businesses than *unrelated* ones, but that any such advantage is not affected by the income tax exemption.¹⁶⁰

Community social welfare organisations (CSWOs), either through their core activities or unrelated activities, often compete with for-profit organisations in various markets ...

The income tax exemption for CSWOs means that, for a given before tax surplus, those organisations have a higher after tax surplus (profit) than their non-exempt competitors. It is this difference which gives rise to the allegation that income tax exempt CSWOs can engage in price cutting ... *This view can, however, be refuted in a number of ways*. First, income tax (and exemption from the tax) may not change the behaviour of an organisation in a competitive market. The output and price decisions made by income tax exempt CSWOs in order to maximise their surplus before tax will continue to maximise their surplus after an income tax is imposed. Organisations liable for income tax will not attempt to earn a larger surplus because they have to pay tax – if they were able to earn more they would already be doing so.

However, it is recognised that economic profit (or surplus as described above) and profit measured for accounting purposes are not identical. To the extent that organisations are able to take steps to reduce their accounting profit, and thereby minimise their taxation payments for a given level of economic profit, they will do so. However, this difference is likely to be small and will not affect the relative position of differently taxed organisations. Freebairn argues that because of those differences in economic and accounting profit, the decisions made by organisations may be affected:

In reality, business income tax systems are not comprehensive base systems with no distortions. For example, distortions stem from systems of accelerated depreciation, investment allowances, and the combination of inflation and historical accounting measures of interest, depreciation and stock valuations. These distortions result in different tax wedges between different decision choice options ...

Where a CSWO is providing a core service its aim is not to earn a surplus at all. Instead it aims to provide the best possible service to those who use it. If the CSWO were engaging in an unrelated business, the organisation would wish to maximise the surplus so as to pass on the most funds to the core charitable activity. In order to maximise its surplus, the CSWO will act in the same rational way as a firm liable to income tax.

It would also be irrational for CSWOs to use their tax exemptions to undercut for-profit competitors. If, for example, price cutting were profitable and could increase market share, for-profits would also be price-cutting. In a competitive market, price cutting would be ineffective. CSWOs, if they are spread throughout the economy, would have a negligible effect on the market price. Price cutting would mean that the CSWOs are giving away income to consumers. It would also mean that there are other investments in which CSWOs could be making a greater return on their investments. *It is the behaviour of CSWOs which may represent "unfair competition" not the taxation advantage itself. For example, some CSWOs may indeed give away all, or part of their potential surplus to consumers by selling at discounted prices. Examples include second hand clothing shops or some fitness centres. Giving away their surplus may be part of the purpose of the organisation and the imposition of an income tax would not change their behaviour ...*

It has also been argued that tax exempt firms will use their exemption to grow more quickly than their for-profit counterparts because their tax-free earnings can be ploughed back into the business. Rose-Ackerman (1982) argued against this argument, claiming that it *presupposes an inefficient capital market*:

160 Industry Commission *Charitable organisations in Australia - Report no 45* 16 June 1995 at K1 - K4 (emphasis added, footnotes omitted).

The more efficiently the capital market operates, the less important are retained earnings. If, however, lenders have difficulty evaluating a firm's investments, the firm may prefer to exploit internal sources of funds, and firms with high levels of retained earnings have an advantage.

In other words, the Australian Industry Commission considered that charities did not have a competitive advantage over their for-profit counterparts, in terms of either pricing or expansion.

The Commission also noted that non-refundability of imputation credits has a distorting effect on the investment decisions of CSWOs, and is therefore relevant to the "competitive advantage" analysis.¹⁶¹ This point is discussed further below.

The 2010 Australian Productivity Commission review

Over a decade later, in 2009, the Australian Productivity Commission was asked to examine "the extent to which tax exemptions accessed by the commercial operations of not-for-profit organisations may affect the competitive neutrality of the market".¹⁶² Submissions received by the Commission on the issue were split between those (generally NFPs) arguing for retention of the existing tax privileges and those (generally for-profit organisations) arguing for the tax privileges to be removed.¹⁶³

Reporting in 2010, the Commission concluded that income tax exemptions are "not significantly distortionary" as not-for-profit entities ("**NFPs**") have an incentive to "maximise the returns on their commercial activities that they then put towards achieving their community purpose".¹⁶⁴

In reaching this conclusion, the Commission noted the importance of competition and competitive neutrality:¹⁶⁵

It has been well established that exposing firms to greater competition and increased openness has sharpened incentives to reduce costs and innovate ... Competitive neutrality is a key aspect in promoting strong competition by removing distortions that inhibit the flow of resources to their most efficient use.

The competitive neutrality principle is that sellers of goods and services should compete on a level playing field; that is, one provider should not receive an advantage over another due to government regulation, subsidies or tax concessions.

Competitive neutrality removes artificial advantages and allows businesses to compete on a basis that offers the best cost and quality combinations to customers. This is likely to result in more effective competition and more efficient outcomes.

Concerns about competitive neutrality are most likely to arise in an environment where one or more competitors receive significant government benefits – direct or indirect – not available to other competitors.

Governments provide direct and indirect assistance to many businesses, for example tax concessions for research and development, industry adjustment grants, and restrictions on the number of taxi plate licences. Some of these advantages are well justified in terms of public confidence, or enhanced activity that also benefits others (externalities). Indeed, when the Government purchases goods and services from the private sector, it could be seen to favour one provider over another – this is why the Commonwealth's core principle for Government procurement is value for money ...

In addition to concerns about the effect on competition, non-neutral tax treatment can compromise three key principles of optimal tax systems: efficiency, equity and simplicity:

- Efficiency can be compromised whenever decisions about resource allocation are driven by tax considerations ... rather than market signals of opportunity cost.
- Equity can be compromised whenever providers of similar or identical goods and services are treated differently by the tax system.
- Simplicity can be compromised whenever the tax system mandates special treatment of selected taxpayers.

161 Industry Commission *Charitable organisations in Australia - Report no 45* 16 June 1995 at 318.

162 Australian Productivity Commission [Contribution of the Not-for-Profit Sector](#) 11 February 2010 at v, terms of reference, xxxv.

163 Australian Productivity Commission [Contribution of the Not-for-Profit Sector](#) 11 February 2010 at 200.

164 Australian Productivity Commission [Contribution of the Not-for-Profit Sector](#) 11 February 2010 at 197.

165 Australian Productivity Commission [Contribution of the Not-for-Profit Sector](#) 11 February 2010 at 198 (references omitted).

Importantly, the Commission also noted that a *range* of potential competitive neutrality scenarios exist:¹⁶⁶

The great majority of NFPs operate outside the market. These NFPs provide services – some community-wide, some member-based – that are not normally provided by businesses. This includes the provision of charitable services which are not funded by government or the private sector except through donations. There are few competitive neutrality concerns for these parts of the NFP sector except in relation to differential access to concessions (as discussed in chapter 7).

Some NFPs conduct commercial activities in direct competition with for-profit providers of goods and services. The remainder operate in areas in between; that is, providing services in areas that are currently of little interest to for-profit business and/or services to members that differ from those that for-profit businesses might provide. Thus there is a range of potential competitive neutrality scenarios: from clear areas where tax concessions and other government subsidies do not have competitive neutrality implications to those where the subsidies have a potentially significant effect on competition. This latter category may include organisations competing for government services.

However, there are justifications for providing advantages to NFPs as follows, which the Commission summarised as follows:¹⁶⁷

Stakeholders have posited two justifications for providing advantage to NFPs:

- NFPs may face *disadvantages* relative to for-profit businesses, and concessions assist to offset these disadvantages. The main disadvantages cited are *difficulties accessing capital* and lack of size and scale, where economies of scale and scope may not be fully exploited. *While there is some merit in the first point* (chapter 7), many NFPs do not take advantage of opportunities to grow, preferring small scale, local connections and control (chapter 2). In any case, many of these perceived disadvantages are not exclusive to NFPs and are shared by small businesses.
- The policy motivation for providing concessions is the additional public benefit (spillovers) provided by an NFP's activities – such concessions vary according to the status of the NFP (chapter 7). Where NFPs compete with for-profit businesses, such concessions are only justified if they deliver spillovers commensurate with the effective subsidy provided less any costs imposed by the loss of competition. In addition, the government should have decided that the spillovers constitute a valid area for a subsidy.

Once government has decided to provide subsidies to NFPs, the form of the subsidy – whether tax concession, direct grant or something else – will affect the cost to the taxpayer and the distortions it introduces. The provision of input tax concessions ... is likely to be an ad hoc, arbitrary, non-transparent, and imprecise method of providing subsidies.

The conclusion of the Australian Productivity Commission that income tax exemption does not result in a competitive advantage for charities is particularly significant because it was reached *despite* analysing the question from the perspective of a tax expenditure analysis (where the tax privileges for charities are conceptualised as "concessions" or "subsidies"):¹⁶⁸

Income tax exemptions are unlikely to violate competitive neutrality

Most NFPs are exempt from income tax. The [1995] Industry Commission ... concluded that such exemptions were unlikely to provide an unfair advantage to NFPs. Whether or not there is an income tax exemption, the output and pricing decisions to maximise a surplus (or profit) are the same. Thus the income tax exemption does not distort decisions such as how many people to employ, what price to charge and so forth, as long as tax is a fixed share of profit.

Put another way, the objective of a for-profit business is to maximise profit by either (or both) increasing revenue or cutting expenditure. For a given profit, the tax on the profit – income tax – does not affect the decision to maximise profit (although a sufficiently high income tax could make the business unviable). This applies similarly to income tax exempt

166 Australian Productivity Commission [Contribution of the Not-for-Profit Sector](#) 11 February 2010 at 201 - 202.

167 Australian Productivity Commission [Contribution of the Not-for-Profit Sector](#) 11 February 2010 at 202 (emphasis added).

168 Australian Productivity Commission [Contribution of the Not-for-Profit Sector](#) 11 February 2010 at 203 - 205 (emphasis added, references omitted).

NFPs, which seek to maximise their output for a given cost.

There is one potential hitch to this analysis, however: there is a different treatment in tax law of accounting profit (and profit as assessed by the Tax Office) to economic surplus. To the extent that for-profit organisations seek to minimise their accounting profit – that is, pay less tax – for a given level of economic surplus, there could potentially be a different allocation of resources by an NFP compared with a for-profit for an identical activity. The 1995 report posited that such effects would be insignificant. In view of more recent changes to accounting standards (including the adoption of International Financial Reporting Standards), which have as their aim to more closely align accounting and economic measures of surplus, *it is likely that the differences have narrowed further ...*

Overall, income tax exemptions for NFPs are *unlikely* to significantly distort resource allocation ...

The Commission also acknowledged that tax privileges are important to NFPs, and that concerns regarding their removal were valid.¹⁶⁹

As part of its review, the Australian Productivity Commission undertook a specific case study on social housing, looking at the challenges the community housing sector in Australia might face as it transitioned towards a larger role in the provision of affordable housing. The following observations made in Appendix I of its report regarding the need for community housing organisations (“**CHOs**”) to be innovative and entrepreneurial are particularly relevant to New Zealand given its current housing crisis:¹⁷⁰

While a regulatory framework has the potential to deliver many benefits, poorly designed regulation has the potential to impose costs on CHOs which offset the benefits of the regulation ... A stated reason for the government’s preference for community housing is the sector’s *flexibility* in their ability to deliver specialised services to tenants and flexibility in financing arrangements. A regulatory framework which forces standardisation on organisations may therefore *undermine the very feature which the government seeks to utilise ...*

Consistency of government funding and policy is seen as essential for long-term planning by the sector, and to help attract private investment ... While the focus in government policy is on risk management as it relates to CHOs, the private sector has expressed the view that policy risks are equally important in assessing risk in the sector. Private sector partners seek *certainty with respect to the continuing availability of tax benefits*, the adequacy of rent and continuing support for the growth and stability of the industry since they need to be able to accurately assess risk and discount premiums ... For example, *CHOs are concerned that they may risk losing the tax concessions afforded to NFPs when they engage in entrepreneurial activities*. This is despite the community benefit from activities such as developing mixed private-community properties where some dwellings are sold to the private market for profits which are then used to subsidise the tenants of the community dwellings ... This issue was raised in the survey conducted by Gilmour and Bourke (2008), where growth providers saw their ability to borrow from banks impeded by the uncertainty over the consistency of government policies and funding ...

Despite this drive for increased involvement by CHOs, there are concerns about a number of issues relating to the development of the sector and the role the sector may play in the provision of social housing.

In terms of factors external to CHOs, and notwithstanding strategic planning in some jurisdictions ..., there remain concerns in the sector about what it sees as a *lack of a clear and consistent government vision for the sector* and accompanying regulatory framework, and funding uncertainty. In particular, there does not appear to be a consistent view of the roles of the public and community housing sectors, and the relationship between them. Whether the community housing sector plays a complementary or alternative role to social housing has implications for how the sector is funded (should social housing and community housing compete for funds?), and how tenants are allocated to housing (should CHOs have choice of tenants, even where public and community housing waiting lists are combined?). Different jurisdictions have different visions for the role that community housing will play in relation to social housing.

169 Australian Productivity Commission [Contribution of the Not-for-Profit Sector](#) 11 February 2010 at 209.

170 Australian Productivity Commission [Contribution of the Not-for-Profit Sector](#) 11 February 2010 at I31 - I32, I38 - I39, I44 (emphasis added, references omitted).

The rescoping of a regulatory framework ... and the decision by the Australian Government to remove \$750 million in funding for the Social Housing Initiative in September 2009, which CHOs perceived as 'punishment' for being efficient, demonstrate the *regulatory and funding uncertainty* faced by CHOs. This uncertainty is seen by some as impeding their ability to access private finance.

In terms of factors internal to CHOs, the rapid movement to a more entrepreneurial business model has created *tensions between the social and commercial goals of CHOs*, and concern about skill deficiencies and mismatches. The above assessment points to the *value in clear policy objectives about the role and value of CHO provision*; careful assessment of risk and the risk management options; transparency about all sources of funding; and robust evaluation.

The relevance of these factors to New Zealand is underscored by the number of community housing providers that are structured as registered charities: the current legal framework in New Zealand places significant barriers in the way of such housing providers assisting people into affordable housing, as discussed in box 3.4 above (the social housing case study). As discussed above in Part 1 of this chapter, such barriers derive largely from an overly-expansive conception of what constitutes a disqualifying private benefit and a general refusal to acknowledge wider public benefits, such as the social cohesion that flows from security of tenure. Placing further restrictions on charities' ability to run businesses would impose further barriers in this regard.

The 2010 Henry Review

Contemporaneous to the Australian Productivity Commission review, a review of Australia's tax system commenced in 2009 ("**the Henry Review**").¹⁷¹ One of the principles underlying Henry Review was that tax privileges for NFP organisations should not undermine competitive neutrality where NFP organisations operate in commercial markets.¹⁷²

In its May 2010 report, the Henry review concluded that NFP tax privileges do not generally violate the principle of competitive neutrality:¹⁷³

Categories of NFP organisations that currently receive income tax or GST concessions should retain these concessions. NFP organisations should be permitted to apply their income tax concessions to their commercial activities.

The Henry Review also noted that permitting NFP organisations to undertake commercial activities freely reflects the principles of the *Word Investments* decision and would "reduce costs associated with education, assistance, advice, disputes and litigation".¹⁷⁴

Following the Henry Review, the Australian Government announced in 2011 that it would tax the retained income of NFP trading operations; however, this policy was withdrawn in 2014 without having been implemented.¹⁷⁵

New Zealand

The 1998 Committee of Tax Experts

In New Zealand, the 1998 Committee of Tax Experts expressed concern about competitive advantage and recommended a review of the tax treatment of charities' unrelated business income. In doing so, however, the existence of a competitive

171 DR K Henry AC, G Smith, Dr J Harmer, H Ridout, Professor J Piggott *Australia's Future Tax System Final Report* 2 May 2020: <treasury.gov.au/review/the-australias-future-tax-system-review/final-report>.

172 DR K Henry AC, G Smith, Dr J Harmer, H Ridout, Professor J Piggott *Australia's future tax system – Report to the Treasury: Part 2 – Detailed analysis* December 2009, Pt 2 vol 1 at 206.

173 DR K Henry AC, G Smith, Dr J Harmer, H Ridout, Professor J Piggott *Australia's future tax system – Report to the Treasurer: Part 2 – Detailed analysis* December 2009, Pt 2 vol 1 at 209, 210 and recommendation 42.

174 DR K Henry AC, G Smith, Dr J Harmer, H Ridout, Professor J Piggott *Australia's future tax system – Report to the Treasurer: Part 2 – Detailed analysis* December 2009 at 212.

175 Inland Revenue and the Treasury for the Tax Working Group *Charities and the not-for-profit sector: Background Paper for Session 13 of the Tax Working Group* 6 July 2018 at 19.

advantage was asserted, rather than analysed, apparently based on the approach taken in the United States:¹⁷⁶

Business income derived by charities is exempt from tax ... However, some charities may engage in business activities *unrelated* to the charitable purpose for which they are provided a tax exemption. *This exemption gives charities a competitive advantage over taxpaying business competitors.*

The committee recommends that the government should review the tax treatment of charities and other tax-exempt entities that engage in commercial activities unrelated to their purposes. *No reason exists in principle why business income, unrelated to the core purpose, should not be taxed.* An unrelated business could include the operation of a manufacturing business, but it would not include such business operations as hospitals, where the business of the charity is central to its purpose, unlike business operations used to fund other charitable activities.

Contributions, investment income, and income earned from occasional fund-raising activities, even if they are commercial activities should not be affected. The proposal should apply only to continuous and regular commercial activities that are not related to the charitable or exempt purpose of an entity. [Footnote: the boundary between what income is taxable and what income remains exempt would need to be carefully drawn to provide certainty and to achieve the policy objective of the reform. In principle, the committee envisages the boundary being drawn between active business income that is unrelated to the exempt purpose of an entity and other income]

The committee notes that the United States taxes “unrelated business income” of exempt organisations. *The government may wish to refer to the relevant United States legislation in designing rules for New Zealand.*

The United States’ unrelated business income tax is discussed further below.

Following the Committee’s recommendation, a review of the tax treatment of charities took place in New Zealand, but reached a different conclusion.¹⁷⁷

The 2001 Tax and Charities Review

In its June 2001 *Tax and charities* discussion document (“**the 2001 discussion document**”), IRD concluded that the business income tax exemption for charities did not result in a competitive advantage: “an income tax-exempt entity cannot rationally afford to lower its profit margins on a trading activity, as alternative forms of investment would then become relatively more attractive”; on this basis, a charity will charge the same price as its competitors, with the tax exemption merely translating to higher profits, and therefore higher potential distributions to the relevant charitable purpose.¹⁷⁸

IRD noted that a large-scale tax-exempt entity could try to use its “deeper pockets” to eliminate competitors by temporarily lowering its prices but concluded there is “no real evidence to suggest that this is occurring”.¹⁷⁹

IRD also noted concerns that the benefit of tax-free gains might be captured by individuals involved in the trading operation, but rightly put these concerns to one side:¹⁸⁰ as discussed above, not only would extracting such benefits be inherently inconsistent with charitable purpose, and a breach of fiduciary duty, they would render the charity ineligible for the business income tax exemption under the “control” provisions of what is now s CW 42.¹⁸¹

176 Rt Hon Sir I McKay, T Molloy QC, Professor J Prebble, J Waugh *Report to the Treasurer and Minister of Finance by a Committee of Experts on Tax Compliance* December 1998: <taxpolicy.ird.govt.nz/-/media/project/ir/tp/publications/1998/1998-other-tax-compliance/1998-other-tax-compliance-pdf.pdf?modified=20200910101954&modified=20200910101954> at 81, 84 - 85 (emphasis added).

177 Inland Revenue Department *Tax and charities, a government discussion document on taxation issues relating to charities and non-profit bodies* June 2001.

178 Inland Revenue Department *Tax and charities, a government discussion document on taxation issues relating to charities and non-profit bodies* June 2001 at [9.2] - [9.4].

179 Inland Revenue Department *Tax and charities, a government discussion document on taxation issues relating to charities and non-profit bodies* June 2001 at [9.5].

180 Inland Revenue Department *Tax and charities, a government discussion document on taxation issues relating to charities and non-profit bodies* June 2001 at [9.7].

181 Income Tax Act 2007 s CW 42(1)(c), (5) - (9).

Instead, IRD concluded that the real competitive advantage charitable businesses have over their for-profit competitors would be if a charity *accumulated* its tax-free profits back into the capital structure of its trading activities, thereby enabling it to “grow a business faster by accumulating pre-tax funds”.¹⁸² In other words, IRD accepted there was no competitive advantage in terms of *pricing* but considered there was a competitive advantage in terms of *expansion*.

Conceptually, the same argument applies to other forms of income earned by charities, and IRD sought feedback on whether any rules to target the accumulation of tax-free profits should apply to investment as well as trading activity “given that accumulation problems might also arise with passive investment activities”.¹⁸³

However, the proposition that the income tax exemption for charities enabled them to grow a business “faster” than their for-profit counterparts was asserted, rather than analysed: in reaching this conclusion, IRD did not refer to the 1995 findings of the Australia Industry Commission, discussed above, that the income tax exemption does not give rise to a competitive *advantage* in terms of expansion but merely *offsets* disadvantages charities face in relation to their ability to access sufficient capital to expand to an optimal size.

This factor is important. The non-distribution constraint limits charities’ ability to expand using market-based instruments such as the issue of shares, as charities are unable to pay returns to private investors like a for-profit entity can: charities are legally prevented from providing individuals with the ability to benefit personally from profits. Access to debt capital is also limited as charities often fail conventional lending criteria: income (for example from donations) may be inherently uncertain, depriving charities of a stable revenue stream to service the debt; charities with government contracts may have contract periods shorter than the debt service period which may cause particular uncertainty over ability to pay. Charities also have no “owner” to put their personal assets at risk, depriving many charities of suitable assets for collateral, creating further potential difficulties for accessing conventional loan finance. In addition, government funding may not be available for capital development as priorities have shifted towards delivery of services; the use of philanthropic capital on a loan basis to charities is similarly not widespread.

In other words, far from providing charities with a competitive “advantage” or the ability to “grow a business faster”, the ability to accumulate pre-tax funds merely *offsets* significant disadvantages charities face in their ability to access capital.¹⁸⁴ The 1995 Australian Industry Commission found that charities do not have a competitive advantage in terms of either pricing or expansion.

Nevertheless, having assumed that a competitive advantage arises in terms of expansion, IRD then put forward a number of proposals for addressing it.

IRD’s preferred proposal was for the trading operations of charities to be subject to tax in the same way as other businesses, but with an unlimited deduction for distributions made to the relevant charitable purposes.¹⁸⁵

Importantly, however, IRD considered this proposal “might not be necessary” if accumulations were *monitored*:¹⁸⁶

Because the competitive advantage arises only from the ability to grow a business faster by accumulating pre-tax funds, this proposal might not be necessary if accumulations were

182 Inland Revenue Department [Tax and charities, a government discussion document on taxation issues relating to charities and non-profit bodies](#) June 2001 at [9.6], [9.8].

183 Inland Revenue Department [Tax and charities, a government discussion document on taxation issues relating to charities and non-profit bodies](#) June 2001 at 45.

184 See also the discussion in Austaxpolicy: Tax and Transfer Policy Blog [Do Businesses Run by Charities Have a Competitive Advantage?](#) 17 November 2021.

185 Inland Revenue Department [Tax and charities, a government discussion document on taxation issues relating to charities and non-profit bodies](#) June 2001 at [9.8].

186 Inland Revenue Department [Tax and charities, a government discussion document on taxation issues relating to charities and non-profit bodies](#) June 2001 at [9.8] (emphasis added).

monitored. As noted earlier in the discussion on reporting requirements, although there need not be specific limits on accumulations, the accumulation of funds could lead to *questions from the monitoring authority* as to why this was happening

The 2001 discussion document predated the establishment of the Charities Commission (now Charities Services) under the Charities Act 2005 and the comprehensive financial reporting rules for charities introduced from 2015. At the time of the 2001 discussion document, there was no process for monitoring whether entities were pursuing their stated charitable purposes, other than random IRD audits and the general inquiry powers of the Attorney-General,¹⁸⁷ both of which were hampered by a systemic lack of information about charities.¹⁸⁸

As discussed above in chapter 2, lack of information about charities was one of the key issues the Charities Act regime was intended to address.¹⁸⁹ IRD did not progress the recommendation about monitoring in the 2001 discussion document, most likely because it preceded these reforms.

Instead, IRD recommended that charities' *undistributed* trading operation surpluses be prevented from accessing tax exemption (that is, by taxing *accumulations* or retained earnings).¹⁹⁰

IRD noted that such a rule could be circumvented by distributing and then immediately reinvesting funds, but considered that such an action would "show up in the accounts of the charity" which could "raise questions as to whether the charity was as a matter of fact pursuing its charitable objectives".¹⁹¹

IRD also recommended a turnover threshold, to allow small-scale trading activities to remain untaxed, and sought feedback on what threshold might be appropriate.¹⁹² Feedback was also sought on whether an alternative approach of "limits on accumulations of profits of businesses run by charities" would be preferable.¹⁹³

As at the date of writing, IRD's recommendations in the 2001 discussion document have not been implemented. Section DB 41 has been inserted into the income tax legislation, from 1 April 2008, to allow companies an unlimited deduction (up to the level of their net income) for donations made to charities and other "donee organisations":¹⁹⁴ this "lifting of the cap on donee status" was intended to "encourage philanthropy" and "remove tax barriers to even more generous contributions to charities"¹⁹⁵ (sentiments that remain important).

In addition, the Charities Act has ushered in a reporting, registration and monitoring regime that provides comprehensive information about charities: charities in New

187 Charitable Trusts Act 1957 ss 58, 60.

188 Inland Revenue Department [Tax and charities, a government discussion document on taxation issues relating to charities and non-profit bodies](#) June 2001 at [7.4] - [7.8].

189 Property Law and Equity Reform Committee *Report on the Charitable Trusts Act 1957* (Wellington, February 1979) at 2: charitable trusts in particular were considered "uniquely free from supervision"; *Report to the Minister of Finance and the Minister of Social Welfare by the Working Party on Charities and Sporting Bodies* (Treasury, Wellington, November 1989) at iv - v, 10, 21, 63, 67; *Report by the Working Party on Registration, Reporting and Monitoring of Charities* 28 February 2002 at 21 - 22; Inland Revenue Department [Tax and charities, a government discussion document on taxation issues relating to charities and non-profit bodies](#) June 2001, foreword and [1.3], [2.6], [4.1], [7.2] - [7.8], [8.8], [8.15], [8.19], [8.23], [12.5].

190 Inland Revenue Department [Tax and charities, a government discussion document on taxation issues relating to charities and non-profit bodies](#) June 2001 at [9.8].

191 Inland Revenue Department [Tax and charities, a government discussion document on taxation issues relating to charities and non-profit bodies](#) June 2001 at [9.9].

192 Inland Revenue Department [Tax and charities, a government discussion document on taxation issues relating to charities and non-profit bodies](#) June 2001 at [9.10], 45.

193 Inland Revenue Department [Tax and charities, a government discussion document on taxation issues relating to charities and non-profit bodies](#) June 2001 at 45.

194 As defined in s LD 3(2) of the Income Tax Act 2007.

195 Inland Revenue Department *Tax incentives for giving to charities and other non-profit organisations* October 2006: <taxpolicy.ird.govt.nz/-/media/project/ir/tp/publications/2006/2006-dd-charitable-giving/2006-dd-charitable-giving-pdf.pdf?modified=20200910095345&modified=20200910095345> at [1.5], 15; and Taxation (Annual Rates, Business Taxation, KiwiSaver, and Remedial Matters) Bill 2007 explanatory note at 2.

Zealand are now arguably subject to the most comprehensive set of transparency and accountability requirements for charities in the world.¹⁹⁶

From 1 April 2020, the entity carrying on the charitable business must also be independently registered under the Charities Act in order for the exemption to apply.¹⁹⁷

Otherwise, the proposal to tax the *accumulations* of charities (by removing the income tax exemption for their business income and replacing it with a deduction for *distributions* to the charitable purpose) has not been implemented. As at the date of writing, New Zealand, like Australia, applies a “destination of funds” test: charities’ business profits are exempt from income tax precisely because all profits are, by definition, ultimately destined for charitable purposes.¹⁹⁸

The Tax Working Group

Sixteen years later, the issue of whether charities have a competitive advantage arose again when a newly-elected Labour-led government convened the Tax Working Group Te Awheawhe Tāke in November 2017. Chaired by Hon Sir Michael Cullen, who had been Minister of Finance during the passage of the original Charities Bill through Parliament, the TWG was tasked with providing recommendations that would improve “the structure, fairness, and balance” of the New Zealand tax system. Specifically, the TWG was tasked with considering whether New Zealand should introduce a capital gains tax.¹⁹⁹

As discussed above in chapter 1, the terms of reference for the TWG were silent on the issue of charities.²⁰⁰ Nevertheless, charities were considered at one meeting of the TWG; for the July 2018 TWG meeting, officials prepared a background paper focused on charities and other not-for-profit entities (“**the background paper**”), which discussed some “particular issues” described as “prominent either in the public mind or for the sector”:²⁰¹

One of these is the tax exemption that applies to business income earned by charities. Concerns are often expressed that the exemption provides an unfair competitive advantage to charitable businesses at the expense of taxpaying for-profit businesses. The impact of the perceived unfairness as reported in the media and by constituents is claimed to outweigh the wider public good that charitable businesses provide through funding charitable purposes.

Officials noted that recent reviews, such as the 2001 discussion document and the Henry Review, have not supported this perceived unfairness:²⁰²

In principle, the tax concession does not impart a competitive advantage because a trading operation owned by a charity faces the same incentives as a commercial entity when it comes to setting its prices. Its tax-exempt status alone should not lead to undercutting of rivals.

Officials also noted that the principle of competitive neutrality would support active and passive income being taxed at the same rate for any particular taxpayer: there is therefore a case for exempting the active business income of charities if their passive income is exempt.²⁰³

Nevertheless, the question as to whether charities’ business income should continue to be tax-exempt was described in the background paper as one of the “most important tax policy matters for not-for-profits” and “the most common charity-related theme addressed by submitters” to the TWG.²⁰⁴

196 As discussed in ch 1 and Appendix A.

197 Section CW 42(1)(aa) of the Income Tax Act 2007. Note, charities in New Zealand are not legally required to separate business activities into a separate legal entity.

198 Subject, of course, to the requirements in Income Tax Act 2007 s CW 42, such as the control provisions and the requirement for charitable registration.

199 Minister of Finance [Terms of Reference: Tax Working Group](#) 23 November 2017.

200 Minister of Finance [Terms of Reference: Tax Working Group](#) 23 November 2017.

201 Inland Revenue and the Treasury for the Tax Working Group [Charities and the not-for-profit sector: Background Paper for Session 13 of the Tax Working Group](#) 6 July 2018 at 5 (see also [53] at 16).

202 Inland Revenue and the Treasury for the Tax Working Group [Charities and the not-for-profit sector: Background Paper for Session 13 of the Tax Working Group](#) 6 July 2018 at 5, 17 - 18.

203 Inland Revenue and the Treasury for the Tax Working Group [Charities and the not-for-profit sector: Background Paper for Session 13 of the Tax Working Group](#) 6 July 2018 at 2 (coversheet).

204 Inland Revenue and the Treasury for the Tax Working Group [Charities and the not-for-profit sector: Background Paper for Session 13 of the Tax Working Group](#) 6 July 2018 at 16, 19.

Only 11 submissions were made to the TWG on the topic, perhaps reflecting a perception that the work of the TWG was focused on a capital gains tax rather than the tax treatment of charities. Of these 11 submissions, seven were in favour of removing the exemption, and four were not, with the latter pointing to matters such as:²⁰⁵

- i. the lack of evidence of competitive advantage;
- ii. the flow-on benefits to society from charities running businesses, such as the provision of employment opportunities;
- iii. the fact that business operations provide greater cashflow certainty, reducing charities' reliance on annual funding rounds (a point of particular importance in a climate of increasing costs, increasing demand for services, but increasing difficulty in obtaining funding, as noted in the extractions from submissions set out above in Part 1);
- iv. the fact that the income tax exemption offsets the disadvantages that charities face in accessing capital (as discussed above); and
- v. the need for flexibility for charities to make their own decisions about the prudent retention of capital, particularly if the business is in a sector which experiences years of volatile profitability.

Those in favour of removing the charitable income tax exemption for businesses argued that charitable businesses should rely on s DB 41 to receive a tax deduction for amounts distributed to charities instead of having a tax exemption themselves.²⁰⁶ One submitter provided a detailed alternative proposal for taxing charities' business income, involving the implementation of a "charity credit account", as a precursor to removing tax exemptions for charities altogether.²⁰⁷

Officials' background paper did not discuss the findings of the 1995 Australian Industry Commission report that the income tax exemption does not provide charities with a competitive advantage in terms of expansion (or enable them to "grow a business faster" by accumulating funds tax-free), but merely offsets significant disadvantages that charities face in terms of accessing capital.²⁰⁸

Instead, as with the OECD report, a competitive advantage in terms of expansion appears to have been simply *assumed*: the finding of the TWG that the "real question" in relation to competitive advantage was whether charities are distributing funds for charitable purpose (that is, whether there is "excess accumulation") reflects this assumption and appears to have been based on very little deliberation.²⁰⁹ Instead, according to the minutes of the July 2018 meeting, most of the TWG's discussion relating to charities centred around private foundations. In that respect, the background paper had made the following comments:²¹⁰

Under current New Zealand law, individuals are able to establish private charitable foundations, or indeed any charitable organisation that meets the donee organisation definition, and receive the same donation tax credit and gift deductions as they would if they donated to an arm's-length donee organisation. Since the donation tax credit and gifting caps were raised in 2009, the amounts of these donor tax concessions have become significant.

Further, private foundations and their equivalents are not required to have arm's length boards. The settlors are able to benefit from their foundations investing funds into businesses the settlors' control, or that are controlled by their associates, *sometimes on non-market terms*. This includes funds for which donation tax credits or gift deductions have been

205 Inland Revenue and the Treasury for the Tax Working Group [Charities and the not-for-profit sector: Background Paper for Session 13 of the Tax Working Group](#) 6 July 2018 at 29 - 30.

206 It should be noted that s DB 41 only provides a deduction for entities structured as companies. Section DV 12 provides a similar deduction for Māori authorities. However, this deduction may not assist where a charity has a different legal structure, and/or has not separated its business into a separate entity.

207 Inland Revenue and the Treasury for the Tax Working Group [Charities and the not-for-profit sector: Background Paper for Session 13 of the Tax Working Group](#) 6 July 2018 at 30.

208 Inland Revenue and the Treasury for the Tax Working Group [Charities and the not-for-profit sector: Background Paper for Session 13 of the Tax Working Group](#) 6 July 2018 at 5.

209 Secretariat for the Tax Working Group [Minutes](#) 6 July 2018 at 4 - 5.

210 Inland Revenue and the Treasury for the Tax Working Group [Charities and the not-for-profit sector: Background Paper for Session 13 of the Tax Working Group](#) 6 July 2018 at 15, 5 - 6 (emphasis added).

claimed. It is also possible under current law for there to be minimal use of foundation funds for charitable purposes, with no particular distributions policy or rationale for accumulation except a desire for the fund to be self-sustaining in future or for foundation distributions to occur years after donation tax relief has been obtained.

DIA Charities Services monitors whether there are conflicts of interest and whether charity returns from investments made with related parties are at arm's length. In some cases, this can involve declining the registration of groups or removing charities from the register where there is information suggesting private benefit to trustees or related parties. However, in practice these issues can be difficult to identify and difficult to resolve. Over the most recent two years (2016 and 2017) DIA reported that they deregistered two charities due to no longer meeting charitable purpose requirements of registration, deregistered two charities for serious wrongdoing, issued three warnings, and their compliance activity resulted in four voluntary deregistrations.

To address their concern that individuals could donate large sums to a foundation, receive a tax refund, then "circle it around through entities to re-invest into the individual's business",²¹¹ officials suggested it may be "useful to explore" whether the New Zealand tax system would benefit from a distinction between privately-controlled foundations and other charitable organisations, referring to specific rules "as occurs overseas" which ensure that there are "reasonable distribution requirements and restrictions on the extent of investments in related-party businesses".²¹² The minimum annual distribution requirements imposed on private ancillary funds in Australia and the rules for private foundations in Canada were specifically mentioned.²¹³

However, in making these suggestions, officials made no mention of the non-distribution constraint or the prospect of addressing concern about excessive accumulation or unacceptable private benefit through simply enforcing fiduciary duties; similarly, no mention is made of the impact of the new financial reporting rules for registered charities and how these may support the "questions from the monitoring authority" option put forward in the 2001 discussion document;²¹⁴ the importance of creating an enabling environment for social enterprise also appears to have been overlooked.

The essence of officials' concerns regarding private foundations and charities' businesses appears to have crystallised in the "Educare" example, which merits close consideration for the potential impact it appears to be having on policy analysis.

The Educare example involved the sale of a large childcare business undertaking to a charity (the Wright Family Foundation).²¹⁵ The charitable purposes of the Wright Family Foundation include to advance the education and wellbeing of children, young people and their families.²¹⁶ The childcare business had been independently valued at \$332 million and, as the charity had no start-up funds of its own, the sale of the shares in the business was effected by loan, to be repaid interest-free at the rate of \$20 million per year. As the sale did not include the physical childcare centres themselves, ongoing arm's length rental payments are made by the charity back to the vendor as owner of the underlying property. While the provision of childcare is itself charitable as for the advancement of education (that is, the childcare business is arguably a "related business"), distributions to independent charities of approximately \$2.5 million per annum are also made.

211 Secretariat for the Tax Working Group [Minutes](#) 6 July 2018 at 5.

212 Inland Revenue and the Treasury for the Tax Working Group [Charities and the not-for-profit sector: Background Paper for Session 13 of the Tax Working Group](#) 6 July 2018 at 16.

213 Inland Revenue and the Treasury for the Tax Working Group [Charities and the not-for-profit sector: Background Paper for Session 13 of the Tax Working Group](#) 6 July 2018 at 15 - 16.

214 The rules came into force from 1 April 2015, meaning that annual returns were starting to be filed under the new rules from 30 September 2016, six months after balance date (Charities Act, s 41(1)) but only a few months before officials' July 2018 report.

215 See M Nippert *Kidicorp's metamorphosis to Best Start Educare raises tax questions* 11 July 2020: www.nzherald.co.nz/business/kidicorps-metamorphosis-to-best-start-educare-raises-tax-questions/BB7ASNZMMJU46KRTQ2EFQ43WQE/?c_id=3&objectid=12346028.

216 The charity's rules can be found on the charities register: [Wright Family Foundation \(CC50870\)](#).

In principle, the sale is remarkable only by the size of the figures involved: there is no legal impediment to a charity purchasing a successful business through which to carry out its charitable purposes. As New Zealand does not have a capital gains tax, the sale of the business was unlikely to have attracted income tax no matter who the purchaser.²¹⁷ Now that the business is owned by a charity, the non-distribution constraint precludes anyone making a private pecuniary profit from the business: all funds must be ultimately destined for charitable purposes into perpetuity, as discussed above. However, paying market value for goods and services rendered does not constitute disqualifying private pecuniary benefit and is not inconsistent with charitable status: there is therefore no legal impediment to an independently-valued purchase price being paid in instalments, or rental payments calculated on an arm's length basis being paid to a related party. Again, the sale is remarkable only by the size of the figures involved. The Educare example reflects a "tall poppy" but it is not clear that it requires a policy response.

Nevertheless, the essence of the Educare example (together with an underlying tax expenditure analysis as discussed above in chapter 1) appears to have influenced the TWG. The minutes of the July 2018 meeting record that four decisions were made in relation to charities:²¹⁸

The charities section in the interim report should be framed as follows:

- *Accumulations and that the default setting should be distribution.* Need to factor in the need for some charities to make large calls on crises. Also potentially different approach when capital did not receive a tax benefit going into the charity – e.g. Treaty settlements (note: Hinerangi to think about accumulation by Māori authorities);
- Deregistration – need to make the rules more robust;
- *Private foundations – need to require distributions* particularly when the capital has received a tax benefit going in; and
- GST – should charities be getting GST back? (note: Hinerangi to think about impacts for marae).

These conclusions then flowed through directly into the TWG's interim report, issued in September 2018,²¹⁹ and its final report, issued in February 2019;²²⁰ however, perhaps reflecting the fact that issues relating to charities had received little more than one hour's deliberation during the entire tenure of the TWG,²²¹ issues relating to charities were identified as "matters requiring further work".²²²

The four issues were then placed on the August 2019 tax policy work programme.²²³ However, they have not been replicated on the updated 2021 - 22 tax policy work programme:²²⁴ instead, issues relating to the business activities of charities and accumulation of funds appear to have been "kicked for touch" to the review of the Charities Act, as discussed above.²²⁵

217 New Zealand does make some inroads into a capital gains tax by treating some sales of capital property as being on revenue account for tax purposes. See, for example, subpart CB of the Income Tax Act 2007 (*Income from business or trade-like activities*).

218 Secretariat for the Tax Working Group *Minutes* 6 July 2018 at 5 (emphasis added).

219 Tax Working Group *Future of Tax: Interim Report* 20 September 2018 at 23.

220 Tax Working Group *Future of Tax: Final Report* 21 February 2019 at 103 - 104.

221 The agenda for the July 2018 meeting reveals that reveals that 1¼ hours were to be allocated to a discussion about charities (including consideration of a proposal from a scholarship winner to implement a "charity credit account" prior to removing the income tax exemptions for charities altogether). See Secretariat for the Tax Working Group, 6 July 2018 *Agenda*: <taxworkinggroup.govt.nz/sites/default/files/2018-09/twg-bg-3977566-agenda-06-july-2018.pdf> at 1.

222 Tax Working Group *Future of Tax: Interim Report* 20 September 2018 at 23; Tax Working Group *Future of Tax: Final Report* 21 February 2019 at 12 - 13, 103 - 104.

223 Inland Revenue Department *Government tax policy work programme 2019-20* 8 August 2019.

224 The Inland Revenue Department *Government tax policy work programme: 2021-22*: <taxpolicy.ird.govt.nz/en/work-programme> merely refers to the "charities review" as an item in a list of "non-discretionary other agency work" that "may have tax consequences".

225 In February 2020, business activities and accumulation of funds were elevated to two of three issues to be fast-tracked as part of the review of the Charities Act. In April 2021, the issues addressed were extended to five issues: reporting requirements for small charities; charities' business and accumulation activities; investigating potential improvements to the appeals mechanism; matters relating to the government agency; and duties of officers of charities. See Te Tari Taiwhenua *Modernising the Charities Act* 26 October 2021: <www.dia.govt.nz/charitiesact>. See also the discussion in S Barker "Charity regulation in New Zealand: history and where to now?" (2020) 26(2) Third Sector Review 28.

In summary, when the issue is analysed rather than assumed, charities running businesses are found *not* to have a competitive advantage over their for-profit counterparts in terms of either pricing or expansion. The above analysis does not reveal any compelling basis for wholesale reform of the current treatment of charities' business and accumulation activities.

The case for reform is further weakened when the detail of the approaches taken in comparable jurisdictions is considered in their context, as discussed next.

Approach of comparable jurisdictions

Across jurisdictions, there are divergent approaches to dealing with charities' commercial activities, as OECD report noted:²²⁶ some countries, such as Canada, restrict the commercial activities an entity can engage in; others treat all income as taxable but allow a deduction for distributions towards the worthy purpose; others, such as the United States, treat "unrelated" business income as taxable, often above a certain threshold.²²⁷

The OECD report noted that the approach of exempting income from related businesses but taxing *unrelated* business income, is a "common approach" but not without difficulty:²²⁸

... the *definitions* of related and unrelated commercial income *vary widely* across countries and such tax rules often result in *significant complexity*.

Other approaches are less complex, but may not fully exclude unrelated income from the preferential tax treatment. One approach is to only exempt income generated from commercial activities where it is *reinvested* towards the entity's worthy purpose in a timely fashion. To facilitate some *flexibility* on behalf of the entities, such a policy could potentially be subject to an *exception or allowance for the creation of small reserves* that may be necessary to support the ongoing pursuit or expansion of the philanthropic entity's activities that are directly connected to its worthy purpose. Another approach may be to limit the size of the expansion through a *threshold* beyond which income from commercial activities is taxed.

These approaches can be contrasted with the "destination of funds" approach adopted by Australia and New Zealand, and by the United States until the introduction of the unrelated business income tax ("**UBIT**").²²⁹

United States

In the United States, the unrelated business income of tax-exempt organisations has been subject to a separate tax since 1950.²³⁰ The principal justification for introducing a UBIT at the time was fear of "unfair competition" from not-for-profit entities carrying on businesses unrelated to their purposes.²³¹ A key example given was the operation of a business called Mueller Macaroni by New York University Law School.²³²

The UBIT in the United States is a creature of statute. Briefly, as discussed above in chapter 4, s 501(c)(3) of the United States' internal revenue code provides an exemption from income tax for (emphasis added):

226 OECD Tax Policy Studies [Taxation and Philanthropy](#) (2020) 27 (OECD Publishing, Paris) at 42, 58, 129; see also 3, 9, 19, ch 6.

227 OECD Tax Policy Studies [Taxation and Philanthropy](#) (2020) 27 (OECD Publishing, Paris) at 58 - 62.

228 OECD Tax Policy Studies [Taxation and Philanthropy](#) (2020) 27 (OECD Publishing, Paris) at 42, 129, 134 (emphasis added).

229 OECD Tax Policy Studies [Taxation and Philanthropy](#) (2020) 27 (OECD Publishing, Paris) at 31.

230 Ontario Law Reform Commission *Report on the Law of Charities* (Toronto, 1996) at 313, 321.

231 M McGregor-Lowndes, M Turnour, E Turnour *Not for profit income tax exemption: is there a hole in the bucket, dear Henry?* 26 Australian Tax Forum 601 at 624, referring to JG Simon, H Dale and L Chisolm, 'The Federal Tax Treatment of Charitable Organizations' in WW Powell and R Steinberg (eds) *The Nonprofit Sector: A Research Handbook* (Yale University Press, 2ed, 2006) 267. See also Ontario Law Reform Commission *Report on the Law of Charities* (Toronto, 1996) at 321; OECD Tax Policy Studies [Taxation and Philanthropy](#) (2020) 27 (OECD Publishing, Paris) at 31.

232 M McGregor-Lowndes, M Turnour, E Turnour *Not for profit income tax exemption: is there a hole in the bucket, dear Henry?* 26 Australian Tax Forum 601 at 624 n 101; OECD Tax Policy Studies [Taxation and Philanthropy](#) (2020) 27 (OECD Publishing, Paris) at 31 referring to Brody and Cordes, 2001.

Corporations, and any community chest, fund, or foundation, *organized and operated exclusively* for religious, *charitable*, scientific, testing for public safety, literary, or educational purposes ... no part of the net earnings of which inures to the benefit of any private shareholder or individual ...

This provision is interpreted as permitting exempt organisations to undertake commercial activities provided the primary purpose of the organisation remains its exempt purpose (on its face, a “destination of funds” test).²³³ However, in a modification of the destination of funds test and in what the High Court of Australia might describe as a “false dichotomy”,²³⁴ if the unrelated business activities and income constitute a large proportion of total non-profit activity (such as Mueller Macaroni), or become a “primary purpose” of the organisation, the organisation’s exempt status may be withdrawn.²³⁵

In addition, s 511 of the United States internal revenue code imposes tax on the “unrelated business taxable income” of exempt organisations at ordinary corporate (or trust) tax rates. Section 511 is very long and complex: it is set out in Appendix D for reference, not so much for its content, but rather as an indication of what New Zealand might expect if it were to follow a similar line.

The UBIT is imposed on “unrelated business taxable income” which is in turn defined in s 512. Passive income (such as dividends, interest payments, royalties and rents) is specifically excluded from the definition.²³⁶

The UBIT applies to commercial activities “unrelated” to the organisation’s charitable purpose. The approach taken is to define an “unrelated trade or business” very broadly in s 513, and then carve out certain activities from the definition, such as: business activities performed without compensation; business activities carried on primarily for the convenience of members, students, patients, officers or employees; business activities related to the sale of donated merchandise; the conduct of certain kinds of public entertainment; bingo games; and certain hospital services.²³⁷

Sections 512 and 513 are also set out in Appendix D, again not so much for their content as for an indication of the UBIT’s inherent complexity.

Section 514 deals with “unrelated debt-financed income”, and sets out complex rules requiring the inclusion, in the income on which UBIT is imposed, of rent received from certain “debt-financed property”: this provision is intended to prevent the use of sale and leaseback arrangements involving exempt organisations to “launder” otherwise taxable income as deductible rental expenses paid to the purchasing tax exempt organisation.²³⁸

There is also specific provision for “feeder” organisations: section 502 provides that an organisation operated for the “primary purpose of carrying on a trade or business for profit” is not exempt merely on the ground that all of its profits are payable to an exempt organisation. However, there are exceptions to this rule provided by s 502(b), which defines the term “trade or business” to exclude (emphasis added):

- (1) the deriving of rents which would be excluded under section 512(b)(3), if section 512 applied to the organisation
- (2) any trade or business in which *substantially all* the work in carrying on such trade or business is performed for the organisation *without compensation*, or
- (3) any trade or business which is the selling of merchandise, *substantially all* of which has been received by the organisation as *gifts or contributions*.

The short point is that the UBIT rules in the United States are very complex. In principle, their intention is not to prevent charities from running unrelated businesses, but to remove the tax exemption, and therefore the perceived competitive advantage, from doing so.²³⁹

233 Ontario Law Reform Commission *Report on the Law of Charities* (Toronto, 1996) at 318.

234 *Commissioner of Taxation of Australia v Word Investments Ltd* [2008] HCA 55 at [24].

235 Ontario Law Reform Commission *Report on the Law of Charities* (Toronto, 1996) at 321; Industry Commission *Charitable organisations in Australia - Report no 45* 16 June 1995, Box K1 at K4 - K5.

236 See Appendix D: s 512(b).

237 See Appendix D: s 513(a)(1), (a)(2), (a)(3), (d), (f), and (e) respectively.

238 Ontario Law Reform Commission *Report on the Law of Charities* (Toronto, 1996) at 322.

239 Ontario Law Reform Commission *Report on the Law of Charities* (Toronto, 1996) at 226.

However, the rules do act as a significant barrier to charities raising funds for their charitable purposes, which may help explain why social enterprise did not originate in charities in the United States.²⁴⁰ It may also help explain the proliferation of alternative legal structures for social enterprise in the United States, including the low profit limited liability company (or “L3C”), the benefit corporation, the social purpose corporation and the benefit limited liability company.²⁴¹ Such alternative legal structures have been described as “first generation” solutions to the “trust deficit” problem that inhibits the flow of capital to social enterprises structured as for-profit companies,²⁴² highlighting the advantages charities have over for-profit entities as a vehicle for social enterprise, as discussed above in Part 1.

New Zealand currently has no such alternative legal structures in place, and therefore has an opportunity to proceed straight to “second generation” solutions for encouraging capital to flow to social enterprises.²⁴³ In that context, and while no structure is perfect, it should be recognised that charities have a number of advantages over for-profit entities as a structure for carrying out social enterprise, as discussed above, calling into question the rationale for placing barriers in the way of charities running businesses in New Zealand.

The United States UBIT rules also generate some anomalous results, as illustrated by the “art museum shop” example:²⁴⁴

A NFP art museum with a shop would have to ensure ‘[e]ach line of merchandise must be considered separately to determine if sales are related to the exempt purpose’, so a shirt with a print of an art work held by the museum (related) would be taxed differently from a shirt with a print of an art work held outside the museum (unrelated). Where facilities and staff are used for both related and unrelated purposes, both income and expenses must be allocated, which can be difficult to determine, verify and regulate. One United States commentator, Thomas Kelley, believes that this confusion is because what ‘appears simple in the regulation has become muddled in the execution’ by the IRS. The implication of his argument, is that if the IRS had followed simple processes, similar to that adopted by the High Court of Australia [in *Word Investments*], the law would not have deteriorated to an ‘unprincipled, unpredictable test that amounts to an examination of whether the organisation ‘smell[s] like’ a charity to whomever is inquiring’.

In addition to issues of complexity and anomalous results, the United States UBIT rules are also understood to be ineffective in generating revenue:²⁴⁵ most UBIT returns in fact report net losses.²⁴⁶

240 Interview with Lloyd Hitoshi Mayer, Professor of Law, University of Notre Dame Law School (15 January 2021): “Charities know there is a line, so they take 3 steps back from it. Sophisticated charities can walk closer to the line but most don’t want to deal with it”.

241 See New York University Grunin Centre for Law and Social Entrepreneurship *Mapping the State of Social Enterprise and the Law 2018–2019*: <socentlawtracker.org/wp-content/uploads/2019/05/Grunin-Teppler-Report_5_30_B.pdf> at 4.

242 See D Brakman Reiser and SA Dean *Social Enterprise Law – Trust, public benefit and capital markets* (Oxford University Press, 2017).

243 Including innovative financing mechanisms, as discussed in D Brakman Reiser and SA Dean *Social Enterprise Law – Trust, public benefit and capital markets* (Oxford University Press, 2017).

244 M McGregor-Lowndes, M Turnour, E Turnour *Not for profit income tax exemption: is there a hole in the bucket, dear Henry?* 26 Australian Tax Forum 601 at 626, referring to Internal Revenue Service Guidance *Tax on Unrelated Business Income of Exempt Organizations* (Publication 598 (03/2010), United States Department of the Treasury, March 2010) and T Kelley *Rediscovering Vulgar Charity: A Historical Analysis of America’s Tangled Nonprofit Law* (2005) 73 Fordham Law Review 2437, 2475 and the citations therein.

245 OECD Tax Policy Studies *Taxation and Philanthropy* (2020) 27 (OECD Publishing, Paris) at 31.

246 OB Breen *Holding the line: regulatory challenges in Ireland and England when business and charity collide* in M McGregor-Lowndes and K O’Halloran (eds) “Modernising Charity Law – Recent Developments and Future Directions” (Edward Elgar, Cheltenham, UK, 2010) 136 at 155.

Despite these difficulties, the rules appear to have influenced the approach taken in Canada.²⁴⁷

Canada

As discussed above in chapter 4, 1950 was a watershed year in Canadian charities law.

In 1950, the Canadian income tax legislation was amended to make a distinction between charities that “fund” and charities that “do”: a “charitable organisation” was conceived as an “active” or “operational” charity, and was eligible for tax-exempt status if “all” its resources were “devoted to charitable activities carried on by the organisation itself”.²⁴⁸ As discussed above, the “ill-conceived” reference to “charitable activities” remains in the Canadian legislation to this day.²⁴⁹

A much more stringent regime was put in place for “funding” charities (charitable trusts and charitable corporations). For example, neither was permitted to “carry on any business”:²⁵⁰ the basis for this restriction is understood to be that some foundations had been operating businesses and accumulating business income with the intention of distributing the income to their “proprietors” on dissolution.²⁵¹ It is important to note that such action would not be legally possible in New Zealand: distributing charitable funds to proprietors on dissolution is clearly inconsistent with registered charitable status (in particular the non-distribution constraint and the prohibition on private pecuniary profit) and most likely also the “control” provisions of the business income tax exemption in s CW 42. However, an alternative option of enforcing the fiduciary duties on a case-by-case basis may not have been considered available in Canada at the time: the placement of the general framework for charities within tax legislation potentially impedes resort to equitable remedies, as discussed above in chapter 2; in addition, tax secrecy provisions meant there was a general lack of information about charities, as discussed above in chapter 4. In the result, a blanket statutory restriction on foundations running businesses, along with a rudimentary “disbursement quota” regime to encourage distribution rather than accumulation, were imposed, both of which form the basis for the current rules in Canada.²⁵²

A subsequent recommendation to tax the business income of charitable organisations was not implemented: in 1967, some years after the UBIT had been introduced in the United States, the Royal Commission on Taxation in Canada (“**the Carter Commission**”) recommended reform of the Canadian federal income tax laws,²⁵³ with respect to the business income of charitable organisations, the Carter Commission concluded that income tax exemption “could well be regarded” as a competitive advantage, and recommended it be removed (with an exclusion for “a certain minimum amount of income from occasional sales, for example bazaars and rummage sales, and from small

247 Ontario Law Reform Commission *Report on the Law of Charities* (Toronto, 1996) at 326: “Although the statutory and regulatory regime under the United States tax law is considerably more detailed than the analogous Canadian regime, the systems are surprisingly similar in basic design and policy. In part, this is because the 1976 reforms in Canada were inspired by the *Tax Reform Act of 1969*”. See also 54: “the debate on the sector in the United States has always been polarized between those suspicious of the philanthropic motives of wealthy private benefactors and those who regard the sector as a vitally important part of democratic society. This polarisation has surfaced frequently in the Canadian debate on the sector to an extent, we would suggest, not justified by the facts nor grounded in our indigenous political culture. This is because we have tended to accept, without sufficient critical distance, many of the presuppositions of the vast American literature that has arisen out of these two reports [of the 1969 Peterson Commission and the 1975 Filer Commission]”.

248 An Act to amend the Income Tax Act, SC 1950 c1 40: Ontario Law Reform Commission *Report on the Law of Charities* (Toronto, 1996) at 259 - 260.

249 Section 149.1(1) Income Tax Act (RSC 1985 c1 (5th Supp)), definition of “charitable organisation” at [(a.1)]; report of the Special Senate Committee on the Charitable Sector [Catalyst for Change: A Roadmap to a Stronger Charitable Sector](#) June 2019 at 95, referring to the evidence of Professor A Parachin.

250 Ontario Law Reform Commission *Report on the Law of Charities* (Toronto, 1996) at 259 - 261, referring to s 57(1)(eb)(i) and (ec)(i) of the Income Tax Act SC 1947-48.

251 Ontario Law Reform Commission *Report on the Law of Charities* (Toronto, 1996) at 261.

252 Ontario Law Reform Commission *Report on the Law of Charities* (Toronto, 1996) at 261.

253 Canada *Report of the Royal Commission on Taxation* (Ottawa, 1966) Commissioner K le M Carter.

sales operations such as gift shops” on the basis of administrative convenience).²⁵⁴ However, the discussion of the tax treatment of charitable organisations in the Carter Commission report was criticised as falling “well below the standard of analysis set in the Report as a whole”;²⁵⁵ the recommendation to tax the business income of charitable organisations was not implemented.²⁵⁶

Commentary in Canada in the early 1970s referred to concerns being expressed in the United States regarding “secret” operations of large family-controlled foundations and their suspected abuses of the tax privileges.²⁵⁷

The “tax expenditure” rhetoric of the American tax economists was deployed in Canada to explain that these organisations, in particular, owed much more in the way of public accountability than they were currently inclined or required to give. The anxiety caused by these apparent deficiencies in the regulatory regime was heightened by the lack of statistical data on the sector in Canada.

As discussed above in chapter 4, perceived abuses of family foundations were a key preoccupation of the “Green Paper” published by the Canadian Department of Finance in 1975:²⁵⁸

... nearly all the specific recommendations for reform were, at least in part, motivated by a fear that wealthy families were manipulating the charity tax laws for their private advantage. On this issue, the Green Paper’s arguments were a reflection of nearly identical arguments expressed much more vigorously by American writers and politicians in the late 1960s. The American effort had led to the enactment of the *Tax Reform Act of 1969*, which severely curtailed the activities of “private foundations” in the United States. Those reforms served as a model for the 1975-76 reforms in Canada.

Foundations were perceived to be abusing the tax privileges of charities in a number of ways: for example, family members acting as officers of the foundation might be overcompensated, or the foundation might lend money to a family business at non-arm’s length concessional rates.²⁵⁹ It is important to note that, to the extent that such activities cannot be justified as being in the best interests of the charity’s charitable purposes and otherwise in accordance with its constituting document (including the non-distribution constraint and the prohibition on private pecuniary profit), prima facie they constitute a breach of fiduciary duty: as such, they could not lawfully occur in New Zealand under current settings (and notably they are not issues that arise in the Educare example, discussed above).

Another perceived abuse was the use of family foundations to retain control of the family business while avoiding the tax consequences of intergenerational wealth transfers. Although charitable trusts and charitable corporations were prohibited from carrying on a business, the rules did not necessarily prohibit their ownership of a controlling interest in a corporation through which the business was carried out:²⁶⁰

A trust could be established, with the family members as trustees, and the controlling interest in the business corporation gifted to the trust over time. Dividends could be declared on the non-voting preferred shares owned only by family members and very little or no income would accrue to the charitable trust. As a result, very little would have to be spent on charitable activities to comply with the ninety percent disbursement rule. Control of the

254 Ontario Law Reform Commission *Report on the Law of Charities* (Toronto, 1996) at 266, referring to Canada *Report of the Royal Commission on Taxation* (Ottawa, 1966) Commissioner K le M Carter at 129 - 134.

255 Ontario Law Reform Commission *Report on the Law of Charities* (Toronto, 1996) at 265, referring to RM Bird and MW Bucovetsky *Canadian Tax Reform and Private Philanthropy* (Toronto: Canadian Tax Foundation, 1976) at 20.

256 Ontario Law Reform Commission *Report on the Law of Charities* (Toronto, 1996) at 267.

257 Ontario Law Reform Commission *Report on the Law of Charities* (Toronto, 1996) at 270, referring to JH Myers *United States Federal Tax Treatment of Charities and Contributions and Bequests to them*, in Report of Proceedings of the 27 Tax Conference (Toronto: Canadian Tax Foundation, 1975) 385, and V Peters and F Zaid *The Present and Proposed Taxation of Non-Profit Organisations* (1971) 9 Osgoode Hall LJ 359.

258 Ontario Law Reform Commission *Report on the Law of Charities* (Toronto, 1996) at 273 (footnotes omitted) and 271, referring to Canada, Department of Finance, *The Tax Treatment of Charities* (Discussion Paper) Ottawa: June 1975 (“the Green Paper”).

259 Ontario Law Reform Commission *Report on the Law of Charities* (Toronto, 1996) at 274.

260 Ontario Law Reform Commission *Report on the Law of Charities* (Toronto, 1996) at 274.

family business corporation would, however, remain in the members of the family through their position as trustees of the foundation. Also, there would be no capital gains tax on the equity interest owned by the charitable trust.

However, such concerns again have little relevance in New Zealand, where there is no capital gains tax, intergenerational wealth transfer tax, or minimum distribution requirements to be “avoided” and, in contrast to the position in Canada at the time, very high requirements for transparency and accountability, providing ample information through which to enforce fiduciary duties.

Nevertheless, the 1975 Green Paper contained a number of proposals to remedy these perceived abuses, including a proposal for a new tripartite classification of charities: charitable organisations, public foundations, and private foundations. Private foundations were subject to an even stricter regulatory regime including a very high “disbursement quota” (up to 90% of income); they were also prohibited from carrying on a business of any sort, related or unrelated (although ownership of equity in a corporation did not count as carrying on a “business”).²⁶¹

With respect to charitable organisations, it had become obvious that many needed to carry out business activities and accumulate funds in order to survive and fulfil their charitable purposes. The 1975 Green Paper proposed to clarify that charitable organisations and public foundations were able to carry on “related” businesses (considered something of a “housekeeping” measure, since an absolute prohibition had long been recognised as unrealistic and was not enforced), with warranted accumulations permitted at the Minister’s discretion.²⁶² The Green Paper also recommended that every registered charity file an annual public information return, disclosing information about their income and expenditure.²⁶³

These recommendations were broadly enacted in 1976:²⁶⁴ charitable organisations and public foundations were permitted to operate related businesses (but were prohibited from operating unrelated business), while private foundations were not permitted to run a business of any kind. The Minister was given a power to permit charities to accumulate wealth, and a new public information disclosure regime was established.

However, the changes were criticised for having been written into the income tax legislation “in accordance with the worst traditions of draughtsmanship that Canadians have come to expect from the Income Tax Act”.²⁶⁵

The 1976 changes are reflected in current Canadian income tax legislation:²⁶⁶

- (i) A “charitable organisation” is defined as an organisation “constituted and operated” exclusively for charitable purposes, all the resources of which are devoted to “charitable activities” carried on by itself.
- (ii) A charitable organisation is considered to be devoting its resources to charitable activities carried on by it *to the extent that* it carries on a “related business”.
- (iii) A “related business” is defined to *include* a business that is unrelated to the purposes of the charity if “substantially all” persons employed by the charity in the carrying on of that business are not remunerated for that employment. This provision enables public foundations and charitable organisations to operate gift shops, run bingos, sell Christmas cards, or carry on any other such enterprises *provided the staff are mostly volunteers*

261 Ontario Law Reform Commission *Report on the Law of Charities* (Toronto, 1996) at 274.

262 Regularising the previous administrative practice of turning a blind eye to warranted accumulations.

263 Ontario Law Reform Commission *Report on the Law of Charities* (Toronto, 1996) at 275.

264 Ontario Law Reform Commission *Report on the Law of Charities* (Toronto, 1996) at 276 - 277, referring to SC 1976-77 c4.

265 Ontario Law Reform Commission *Report on the Law of Charities* (Toronto, 1996) at 277.

266 Income Tax Act (RSC 1985 c1 (5th Supp)) ss 149.1(1), (6), (2)(a), (3)(a), (4)(a), 168. See also Ontario Law Reform Commission *Report on the Law of Charities* (Toronto, 1996) at 293.

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- (iv) A charitable organisation or public foundation may be deregistered for carrying on a business that is not a “related business”. A private foundation may be deregistered if it carries on “any business”.²⁶⁷

In this respect, the Canadian rules differ from the United States rules which impose a tax on unrelated business profits rather than precluding the activity altogether.

In addition to the rules relating to businesses, the Canadian income tax legislation also obliges all registered charities to meet certain minimum distribution requirements, the aim of which is to ensure that the resources of registered charities “are in fact devoted to charity, and therefore, that registered charities deserve their tax-exempt status and right to issue tax receipts”; however, as noted by the Ontario Law Reform Commission, there are other ways to accomplish this objective, including through supervision and the enforcement of more general standards (such as the fiduciary duties, as discussed further below).²⁶⁸

In addition, the distinction between related and unrelated business has been criticised as being “poorly defined at the margins” and the source of difficulty in case law:²⁶⁹ some early cases interpreted the concept of “related business” as coterminous with a destination of funds test (meaning that a business is “related” if all of its funds are ultimately applied to the charitable purposes), but more recent cases have not.²⁷⁰

The Canada Revenue Agency (“**CRA**”) considers a “related business” to be one which is either substantially run by volunteers, or one which is both “linked” and “subordinate” to a charity’s purpose, arguing that “running a business cannot become a purpose in its own right”, and a related business may only receive a “minor amount” of the charity’s attention and resources.²⁷¹ This approach bears a striking similarity to the approach adopted by Charities Services in New Zealand that a business may not become a “focus”.

However, there are difficulties with these requirements, not least the creation of a “false dichotomy” between what is commercial and what is charitable, as noted by the High Court of Australia and discussed above. As discussed above in chapter 4, the statutory references to “charitable activities” have been a key source of underlying difficulty in Canada.²⁷²

In addition, with respect to the legislative feature that an “unrelated business” can be deemed a “related business” if it is “substantially run” (interpreted by CRA to mean at least 90%) by volunteers, the Advisory Committee on the Charitable Sector made the following comments:²⁷³

... using “volunteer-run” as a measure to deem a business to be a “related business” is often gender-biased, can encourage labour exploitation and possibly mission-drift by the charity ... the issue [demonstrates] how out of date the current related business framework has become ... we heard from many charities that this framework has become quite outdated, both limiting what charities can do, and also holding entrenched patterns in place that need to change.

267 Any type of foundation may also face deregistration if it acquires control of a corporation (ss 149.1(3)(c) and (4)(c), the latter referring to a “divestment obligation percentage”).

268 Ontario Law Reform Commission *Report on the Law of Charities* (Toronto, 1996) at 289.

269 Ontario Law Reform Commission *Report on the Law of Charities* (Toronto, 1996) at 293.

270 See the discussion in Ontario Law Reform Commission *Report on the Law of Charities* (Toronto, 1996) at 293 - 297.

271 Canada Revenue Agency *Policy Statement CPS-019 What is a related business?* (effective date, March 2003): <www.canada.ca/en/revenue-agency/services/charities-giving/charities/policies-guidance/policy-statement-019-what-a-related-business.html>.

272 Section 149.1. See also P Broder “[Report of the Senate Special Committee on the Charitable Sector – A response](#)” (2020) *The Philanthropist Journal*; Report of the Special Senate Committee on the Charitable Sector *Catalyst for Change: A Roadmap to a Stronger Charitable Sector* June 2019 at 88.

273 Advisory Committee on the Charitable Sector *Report #3 – Towards a federal regulatory environment that enables and strengthens the charitable and non-profit sector* July 2021 “Purposes and Activities Working Group – Earned Income by Charities” and cover page.

Broder argues that the rules regarding charities running businesses in Canada are “unduly strict”, inhibit self-funding, and “thwart innovation”.²⁷⁴

In June 2019, the Special Senate Committee on the Charitable Sector recommended a return to a clear destination of funds test, along the lines adopted in Australia:²⁷⁵

Charities [in Canada] are restricted as to the forms of business-like activities they may undertake to generate revenue for use in charitable activities. The rules surrounding permissible activities are *complex* and have evolved over the years. Legal interpretation of the current case law and CRA policy holds that, to be permissible, “*business activity must ... play a clearly minor role, in terms of both resources and attention, in comparison to the charity’s charitable purpose*”.

These provisions are widely held to be *outdated*:

When the current provisions of the Income Tax Act were written more than a half-century ago, charities operated primarily on the basis of receiving donations from individuals and corporations. According to some of those who were involved in drafting the existing rules related to business activities by charities, those provisions were meant to cover things like hospital auxiliaries running gift shops. They certainly did not foresee situations where charities would be landlords or even developers, when they would operate state-of-the-art fitness facilities or provide endorsements for a fee.

Witnesses, including Brian Emmett (Imagine Canada), argued that reform is sorely needed, particularly in light of the context in which charities operate. By his estimate, Canada’s social deficit gap will stand at approximately \$26 billion in 2026, placing increasing pressure on charities. In order to meet growing demand, witnesses, including Mr Emmett, told the committee that charities will need to explore every funding opportunity available to them. In Mr Emmett’s view, a declining donor base, coupled with challenges in accessing government funding, means that earned income is the only option that offers “any prospect of long-term growth”

Proposed solutions

Many witnesses argued that adopting a “destination of funds” test is key to helping charities raise much needed revenue. As one witness observed:

It’s time to permit a charity to carry on any type of revenue-generating activity so long as the proceeds are used to further its charitable purpose. This would mean the focus would be on the use to which the funds are put, not on how it raises the money.

Witnesses ... noted that the destination of funds test had been successfully adopted in Australia, following a High Court decision in the *Word Investments* case. For his part, Gordon Floyd argued that Canada should follow the example of other common law jurisdictions and allow charities to earn revenue “that can help fund their vital core costs” ...

Venture failure

Witnesses recognised the risk inherent in business, acknowledging that some charities’ business ventures would fail. However, while recognising not all charities would have the expertise to undertake revenue generating activities, witnesses maintained that charities, in consultation with their professional advisers, should be free to make this decision for themselves ...

Overall, although recognising that difficulties could arise with the implementation of a destination of funds test, witnesses believed that these challenges are not insurmountable. In terms of strategies to mitigate any negative effects, the Muttart Foundation suggested that the CRA should develop “additional guidance” in consultation with charities ... Ms Manwaring noted that ... technological change has delivered opportunities for revenue generation that have not yet been contemplated by the current administrative guidance on permissible related business.

The committee is acutely sensitive to the need to explore innovative means of ensuring adequate funding for the sector, while simultaneously protecting against undue risk. The committee also understands the need for clear guidance to help charities confidently navigate the rules with which they must comply.

274 P Broder “[Report of the Senate Special Committee on the Charitable Sector – A response](#)” (2020) The Philanthropist Journal.

275 Report of the Special Senate Committee on the Charitable Sector [Catalyst for Change: A Roadmap to a Stronger Charitable Sector](#) June 2019 at 88 - 92 (emphasis added).

On the basis of the above, the Senate committee made the following specific recommendations in the context of charities running businesses:²⁷⁶

Recommendation 28 – that the Government of Canada direct the Canada Revenue Agency to develop and implement a pilot project to assess the viability of granting registered charities greater latitude in undertaking revenue-generating activities (provided the proceeds are used to further charitable purposes) through the implementation of a “destination of funds” test.

Recommendation 29 – that the Government of Canada direct the Canada Revenue Agency to update policy statement CPS-019 (what is a related business) to provide greater clarity on permissible revenue generation activities for registered charities, particularly with regard to revenue generating opportunities arising from new technologies.

In March 2021, the Government of Canada responded supporting recommendation 29, but not recommendation 28:²⁷⁷

Under the ITA [Income Tax Act], charities have the ability to carry on a wide variety of revenue-generating activities. In terms of occasional and periodic fundraising activities and events (ie, activities which do not rise to the level of a business) there are few restrictions placed on these types of activities. In terms of business activities (generally meaning activities that are regular, continuous and designed to earn a profit), the ITA allows charities to carry on businesses that relate to the furtherance of their charitable purposes. *In this respect, related businesses include a range of activities involving the charities charging for, or being paid, to deliver goods or services that fulfil their charitable mandate. This includes charities that charge admissions to museums and theatres or that operate health, wellness and athletics centres, as well as those that provide training courses or run tuition based schools.* In addition, the concept of related business encompasses a range of complementary business activities that, while not involving the direct delivery of services, are nonetheless necessary for the fulfilment of the purpose (eg parking lots and cafeterias at hospitals) or which naturally flow from a particular activity (eg where the charity sells property created in a sheltered workshop). When a charity runs a related business, any revenue received from such activities is completely exempted from income tax.

In practice, it is largely only businesses that have little or no connection to a charity’s purposes that do not qualify as a related business, and even then, only when these are run by paid staff: as volunteer-run businesses are deemed to be related businesses under the ITA. Where a charity seeks to operate an unrelated business, it can establish a separate, taxable corporation to carry on the business and donate the profits back to the charity (and paying a very low rate of tax as a result of the Charitable Donation Tax Deduction)

That said, the Government supports Recommendation 29 which calls on the Government to update policy statement CPS-019 (What is a related business) to provide greater clarity on permissible revenue generation activities for registered charities. The CRA is reviewing its policy statement CPS-019, What is a related business, to provide greater clarity on permissible revenue generation activities for registered charities, particularly with regard to revenue generating opportunities arising from new technologies. In this regard, the CRA will work with sector representatives and consider any recommendations brought forward.

The underlying assumption, that charities running businesses have a competitive advantage over their for-profit counterparts, was challenged by the Advisory Committee on the Charitable Sector in its July 2021 report:²⁷⁸

The ACCS believes [the words highlighted in the above extract] to be an inaccurate statement about the current state of the law. A suggestion that fees from charitable programs (such as tuition fees) are related business income only increases the *confusion and concern of the sector*. Charging a fee for a charitable programme has been a long-standing acceptable practice. Improved guidance products would highlight the fact that such revenue streams are not related business income ...

There is widespread interest from many charities in an approach that focuses on the uses and not the sources of funds for charitable purpose. The solution suggested by some

276 Report of the Special Senate Committee on the Charitable Sector [Catalyst for Change: A Roadmap to a Stronger Charitable Sector](#) June 2019 at 92.

277 Hon D LeBouthillier, Minister for National Revenue [Government Response to the Report of the Special Senate Committee on the Charitable Sector](#) 30 March 2021 at 16 - 17 (emphasis added).

278 Advisory Committee on the Charitable Sector [Report #3 – Towards a federal regulatory environment that enables and strengthens the charitable and non-profit sector](#) July 2021 “Purposes and Activities Working Group – Earned Income by Charities” (emphasis added).

in the sector is to apply a “*destination of funds*” test (in other words, an approach that enables charities to earn revenues from business-type activities as long as those revenues are dedicated to charitable purposes). However, in its response to the Special Senate Committee’s report recommendation to pilot a “destination of funds” test, the Government indicated that it does not intend to “develop and implement a pilot project to assess the viability of granting registered charities greater latitude in undertaking revenue-generating activities (provided the proceeds are used to further charitable purposes)”. We understand that the Government’s hesitation rests on 3 factors:

- i. the requirement that the ITA is administered as written (eg a pilot project would require temporary or partial suspension of the Act and that is not legally possible);
- ii. the assertion that charities already have sufficient flexibility within the ITA to earn income to support their activities; and
- iii. a concern that a destination of funds test would allow tax-exempt charities to *unfairly compete* with tax paying businesses.

While we acknowledge that this approach may indicate a significant policy shift, we argue that major societal shifts that are underway, and exacerbated by the pandemic, call for thinking outside the traditional framework. We know that regulatory sandbox pilots have happened in other areas of the government. We also know from our consultations that charities do not believe there is flexibility within the current framework. Finally, *framing earned income by charities as synonymous with the work of the private sector sets up a false and incomplete narrative*. For-profit entities do not have a charitable purpose. Organisations in our sector are defined by a public/charitable purpose and their ability to meet their purpose should be fully supported. The [Purposes and Activities Working Group] suggests that we continue consultations to better understand the implications of this fundamental change to the income-earning regime governing charities, and to provide further recommendations to the Minister of National Revenue.

The Advisory Committee strongly recommended a more supportive environment for charities conducting business activities.²⁷⁹

The charitable sector continues to experience stress around the growing gap between demand for their services and the resources available to meet their purpose. Many charities are afraid that the gap will not be met through more fundraising and government grants. As a result, more and more charities are looking at ways to earn income through commercial activities to help them raise the resources needed. While the pandemic is exacerbating the funding gap faced by many charities, interest in earned income as a possible solution *is not a new phenomenon. As the second largest source of funding for the sector, it is already well established*. The spike in interest on this topic among charities is noteworthy, and one we’ve seen before (eg Imagine Canada published an extensive survey of earned income activities of charities following the *2008/09 financial crisis*, which also brought the subject to the fore) ...

Given the importance of earned income to the charitable sector, and *how other parts of the federal Government are encouraging social enterprise via charities and non-profits* (eg Employment and Social Development Canada (ESDC) and its \$755 million Social Finance Fund), the CRA *should acknowledge that this is a legitimate and even encouraged activity*, and clarify that [its] guidance is intended to help charities successfully navigate the regulatory regime ...

Charities have embraced earned income as a strategy to generate resources to use in addressing their purpose, and the ITA recognises and supports this reality. However, there is a broadly held view that the current regulatory and legislative regime *more effectively inhibits this work than enables it*. Our consultations and deliberations focused on the need for *a more supportive environment for earned income activities of charities* ...

It is recommended that the CRA work to create a more supportive environment for earned income of charities by:

6. Revising and clarifying guidance on the various ways charities can earn income, including eliminating the current “linked and subordinate” test for related business.

279 Advisory Committee on the Charitable Sector [Report #3 – Towards a federal regulatory environment that enables and strengthens the charitable and non-profit sector](#) July 2021 “Purposes and Activities Working Group – Earned Income by Charities” (emphasis added).

7. Coordinating with other federal departments (notably ESDC, GAC and Heritage Canada) ... to develop a shared vision of how an enabling environment for earned income by charities can further the purposes of the sector.

As the Senate Committee noted:²⁸⁰

... the culture of giving and volunteerism is a core value in Canada. This shared value is a thread of fixity running through the fabric of our nation, knitting communities together. While strong, this thread is not unbreakable. Demographic change, financial constraints, red tape, outdated rules and a lack of recognition combine to stifle the sector and jeopardise the spirit of giving and volunteerism that we hold so dear. The sector stands ready to weave a brighter future for our nation; it behoves the federal government to ensure that it receives the support it needs to do so.

In other words, the rules regarding charities' business activities in Canada are seen as inhibiting rather than enabling social enterprise. New Zealand should exercise considerable caution before importing complex rules designed in a different jurisdiction in a different time, particularly when that jurisdiction is itself looking to remove them.

England and Wales

England and Wales take a different but broadly analogous approach to that taken in the North American tax-based jurisdictions.

The approach taken in the United Kingdom (the "UK") is based on a concept of "trade", rather than "commercial" or "business" activities.

"Trading" in England and Wales generally involves the provision of goods or services to customers on a commercial basis;²⁸¹ although some sales of goods or services may not be regarded as "trade";²⁸² guidance from the tax authority, Her Majesty's Revenue and Customs ("HMRC"), indicates that "[s]imply because a venture is a one-off or occasional does not mean that it will not be trading for tax purposes":²⁸³

Whether an activity is, or is not, trading depends on the facts in each case. When it is not clear it will be necessary for HMRC to look at all the circumstances surrounding the activity ... When deciding whether an activity amounts to trading it is not relevant that the profits are intended to be used for charitable purposes.

The distinction matters, because profits from "trading" by charities are, in principle, subject to tax unless specifically exempted.²⁸⁴ An intention to use profits for charitable purposes will not prevent those profits from being liable to tax;²⁸⁵ in other words, there is no "destination of funds" test applicable to exempt the unrelated business income of charitable organisations in the UK.²⁸⁶

The UK tax legislation divides trading undertaken by charities into two forms: charitable trading and non-charitable trading.²⁸⁷

Charitable trading exists where the trade is exercised in the course of the actual carrying out of a *primary purpose* of the charity, or the work in connection with the trade is *mainly*

280 Report of the Special Senate Committee on the Charitable Sector *Catalyst for Change: A Roadmap to a Stronger Charitable Sector* June 2019 at 127.

281 HM Revenue and Customs *Annex iv: trading and business activities – basic principles* updated 4 May 2021: <www.gov.uk/government/publications/charities-detailed-guidance-notes/annex-iv-trading-and-business-activities-basic-principles> at [2].

282 The Charity Commission for England and Wales indicates that the following activities are not generally regarded as "trading": the sale or letting of goods donated to a charity for the purpose of sale or letting; the sale of investments; the sale of assets which the charity uses, or has used, for its charitable purposes; the letting of land and buildings where no services are provided to the user (Charity Commission for England and Wales *CC35 – Trustees, trading and tax: how charities may lawfully trade* February 2016: <assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/869136/CC35_PDF_v2.pdf> at [3.1], [3.3], [3.10].

283 HM Revenue and Customs *Annex iv: trading and business activities – basic principles* 4 May 2021 at [2].

284 Charity Commission for England and Wales *CC35 – Trustees, trading and tax: how charities may lawfully trade* February 2016 at [3.1].

285 OB Breen and PA Smith *Law of Charities in Ireland* (Bloomsbury, 2019) at [10.24].

286 Ontario Law Reform Commission *Report on the Law of Charities* (Toronto, 1996) at 329.

287 This distinction is made for the purposes of direct tax, but not for the purposes of value-added tax (VAT). See HM Revenue and Customs *Annex iv: trading and business activities – basic principles* 4 May 2021 at [1], [4].

carried out by the *beneficiaries* of the charity.²⁸⁸ Profits of a “charitable trade” are exempt from tax.²⁸⁹

In other words, while the North American jurisdictions make a distinction between “related” and “unrelated” business activity, the UK makes a broadly analogous distinction between “primary purpose trading” and “non-primary purpose trading”.²⁹⁰

Profits made by a charity from trade that is exercised in the course of the actual carrying out of a “primary purpose” of the charity (such as tuition fees charged by charitable schools or universities, admission fees charged for exhibitions by art galleries or museums with charitable status, a religious charity selling bibles, a charitable clinic charging patients or selling medicines, or the provision of serviced residential accommodation by a charitable residential care home in return for payment) is considered “primary purpose trading” and is *prima facie* exempt from tax.²⁹¹

Work carried out by beneficiaries of a charity may constitute primary purpose trading, inherently (that is, whether it relates to a primary purpose of the charity or not):²⁹² for example, profits from trade such as the sale of goods manufactured by the beneficiaries of a disability charity, a farm operated by students of an agricultural college, a restaurant operated by students as part of a catering course at a further education college, may qualify for exemption as relating to the primary purpose of the charity;²⁹³ however, even for trading that is not related to the charitable purpose (that is, “non-primary purpose” trading), the profit may still qualify for exemption where the work is carried out “mainly” by beneficiaries of the charity.²⁹⁴

“Charitable trading” comprises primary purpose trading and trading mainly carried out by beneficiaries:²⁹⁵ profits arising from charitable trading are exempt from tax, provided they are applied solely to the purposes of the charity.²⁹⁶

HMRC states that it will advise charities whether, in its opinion, a particular activity is within the definition of primary purpose trading.²⁹⁷ HMRC takes a broad interpretation of what constitutes the primary purpose of a charity in this regard, to include within the tax exemption trading activities that are considered “ancillary” to the carrying out of the

288 For charitable companies, see Corporation Tax Act 2010 (UK) s 479(1); for charitable trusts, see Income Tax Act 2007 (UK) s 525(1).

289 For charitable companies, see Corporation Tax Act 2010 (UK) s 478; for charitable trusts, see Income Tax Act 2007 (UK) s 524.

290 The concept of “primary purpose” trading is introduced by Corporation Tax Act 2010 (UK) s 479(1)(a); Income Tax Act 2007 (UK) s 525(1)(a).

291 HM Revenue and Customs [Annex iv: trading and business activities – basic principles](#) 4 May 2021 at [4], [6]. See also OB Breen *Holding the line: regulatory challenges in Ireland and England when business and charity collide* in M McGregor-Lowndes and K O’Halloran (eds) “Modernising Charity Law – Recent Developments and Future Directions” (Edward Elgar, Cheltenham, UK, 2010) 136 at 142.

292 Corporation Tax Act 2010 (UK) s 479(1)(b); Income Tax Act 2007 (UK) s 525(1)(b).

293 HM Revenue and Customs [Annex iv: trading and business activities – basic principles](#) 4 May 2021 at [10]; Charity Commission for England and Wales [CC35 – Trustees, trading and tax: how charities may lawfully trade](#) February 2016 at [3.6]; OB Breen *Holding the line: regulatory challenges in Ireland and England when business and charity collide* in M McGregor-Lowndes and K O’Halloran (eds) “Modernising Charity Law – Recent Developments and Future Directions” (Edward Elgar, Cheltenham, UK, 2010) 136 at 142 - 143.

294 HM Revenue and Customs [Annex iv: trading and business activities – basic principles](#) 4 May 2021 at [4(b)], [11]; OB Breen *Holding the line: regulatory challenges in Ireland and England when business and charity collide* in M McGregor-Lowndes and K O’Halloran (eds) “Modernising Charity Law – Recent Developments and Future Directions” (Edward Elgar, Cheltenham, UK, 2010) 136 at 142.

295 HM Revenue and Customs [Annex iv: trading and business activities – basic principles](#) 4 May 2021 at [4].

296 Section 478(3) Corporation Tax Act 2010 (UK); Income Tax Act 2007 (UK) s 524(1), (4); HM Revenue and Customs [Annex iv: trading and business activities – basic principles](#) 4 May 2021 at [4], [5]; Charity Commission for England and Wales [CC35 – Trustees, trading and tax: how charities may lawfully trade](#) February 2016 at [3.6].

297 Charity Commission for England and Wales [CC35 – Trustees, trading and tax: how charities may lawfully trade](#) February 2016 at [3.6]: “In the case of any doubt or difficulty, trustees may need to consult their own professional advisers as well”.

primary purpose.²⁹⁸ Examples of trading that qualifies as primary purpose because it is “ancillary” to the carrying out of a primary purpose include:²⁹⁹

- sale of relevant goods or provision of services, for the benefit of students by a school or college (text books, for example)
- provision of a crèche for the children of students by a school or college in return for payment
- sale of food and drink in a cafeteria to visitors to exhibits by an art gallery or museum (although sale to the general public, as opposed to exhibition visitors, is non-primary purpose trading)
- sale of food and drink in a restaurant or bar to members of the audience by a theatre (although sale to the general public, as opposed to the audience, is non-primary purpose trading)
- sale by able-bodied staff of items produced by the disabled in a disabled workshop
- sale of confectionery, toiletries and flowers to patients and their visitors by a hospital

The level of annual turnover may have a bearing on whether the trading is considered “ancillary”, but there is no specific level of annual turnover beyond which trading will definitely not be regarded as ancillary.³⁰⁰ In other words, a principled rather than a mathematical approach is applied.³⁰¹

Any other type of trading that does not fall within the above but is nevertheless undertaken to raise funds for charitable purposes is referred to for tax law purposes as “non-charitable trading”.³⁰² This concept does not equate exactly with the concept of “non-primary purpose trading”, as ancillary non-primary purpose trading may be considered charitable trading.³⁰³

Non-charitable trading is broadly equivalent to the North American concept of “unrelated business income”, and covers a wide spectrum of activities, from selling promotional goods in a charity gift shop to running side-line businesses like funeral services.³⁰⁴ The profit from “non-charitable trading” is taxable, regardless of whether it is used for the purposes of the charity, unless it is exempt under the “small-trading exemption”.

The “small-trading” exemption applies where:³⁰⁵

- (i) the non-charitable trading turnover falls below the charity’s small scale annual turnover limit (which is £8,000, unless the turnover is greater than £8,000 in which case the limit is 25% of the charity’s total incoming resources for the tax year (including donations and grants, whether taxable or not, but excluding capital receipts) up to a maximum of £80,000);³⁰⁶

298 OB Breen *Holding the line: regulatory challenges in Ireland and England when business and charity collide* in M McGregor-Lowndes and K O'Halloran (eds) “Modernising Charity Law – Recent Developments and Future Directions” (Edward Elgar, Cheltenham, UK, 2010) 136 at 142.

299 HM Revenue and Customs [Annex iv: trading and business activities – basic principles](#) 4 May 2021 at [7].

300 Charity Commission for England and Wales [CC35 – Trustees, trading and tax: how charities may lawfully trade](#) February 2016 at [3.7].

301 OB Breen *Holding the line: regulatory challenges in Ireland and England when business and charity collide* in M McGregor-Lowndes and K O'Halloran (eds) “Modernising Charity Law – Recent Developments and Future Directions” (Edward Elgar, Cheltenham, UK, 2010) 136 at 143.

302 HM Revenue and Customs [Annex iv: trading and business activities – basic principles](#) 4 May 2021 at [4].

303 Charity Commission for England and Wales [CC35 – Trustees, trading and tax: how charities may lawfully trade](#) February 2016 at [3.8].

304 OB Breen *Holding the line: regulatory challenges in Ireland and England when business and charity collide* in M McGregor-Lowndes and K O'Halloran (eds) “Modernising Charity Law – Recent Developments and Future Directions” (Edward Elgar, Cheltenham, UK, 2010) 136 at 139; HM Revenue and Customs [Annex iv: trading and business activities – basic principles](#) 4 May 2021 at [4].

305 Corporation Tax Act 2010 (UK) ss 480(1), (2), (4), (5), 482; Income Tax Act 2007 (UK) ss 526(1), (2), (4), (5), 528, HM Revenue and Customs [Annex iv: trading and business activities – basic principles](#) 4 May 2021 at [5], [14] – [16]; Charity Commission for England and Wales [CC35 – Trustees, trading and tax: how charities may lawfully trade](#) February 2016 at [3.12].

306 Corporation Tax Act 2010 (UK) s 480(5); Income Tax Act 2007 (UK) s 528(6); HM Revenue and Customs [Annex iv: trading and business activities – basic principles](#) 4 May 2021 at [15].

- (ii) if the charity's total turnover exceeds the annual turnover limit, the charity had a reasonable expectation that it would *not* do so;³⁰⁷ and
- (iii) profits are used solely for the purposes of the charity.³⁰⁸

Where the trading is all charitable or all non-charitable, the tax treatment is fairly straightforward. However, for some charities, an activity may involve both charitable and non-charitable trading. For example, a charity providing a public art gallery may run a shop selling a range of goods, some connected with furthering the charity's primary purpose (such as books relating to the exhibition, or copies of the charity's paintings) and some not so connected (such as promotional pens, mugs and tea towels).³⁰⁹ Other examples include:³¹⁰

- the letting of serviced accommodation for students in term-time (primary purpose), and for tourists out of term (non-primary purpose), by a school or college
- the sale of food and drink in a theatre restaurant or bar both to members of the audience (beneficiaries of the charity – ancillary) and the general public (non-beneficiaries – not ancillary)
- the operation of a café by a "relief of the disabled" charity where only 50% of the staff are disabled (beneficiaries) and the other 50% are not charitable beneficiaries

Another example is where non-primary purpose work is carried out partly but not *mainly* by beneficiaries only,³¹¹ or where a shop run by a charity whose aim is to enhance the skills of disabled people sells books donated for sale (not trading), toys made by disabled people (primary purpose trading), and bought-in soft toys (non-primary purpose trading whose only purpose is to raise funds).³¹²

In such cases, the charitable (primary purpose) and non-charitable (non-primary purpose) parts of the trade are deemed by statute to be two entirely separate trades: the profit from the non-charitable trading remains taxable unless exempt under the small-trading exemption. The income and expenditure is apportioned between the taxable and non-taxable trades on a reasonable basis.³¹³ HMRC advises that charities should "ensure they have accounting systems that permit the identification of charitable and non-charitable trading, and the proper allocation of receipts and expenses to each";³¹⁴ this will likely require identifying each individual piece of work done, classifying it as charitable or non-charitable in the accounting system, and allocating costs, including indirect costs such as overheads, accordingly.³¹⁵

The tax rules for charities running businesses in England and Wales contain some other inherent complexities. For example, there can be adverse tax consequences for a charity if it has transactions with a "substantial donor".³¹⁶ In addition, if a charity incurs losses in non-primary purpose trading, the trustees may be liable for breach of trust if the loss was incurred irresponsibly.³¹⁷ From a tax perspective, the charity's tax exemptions on other income may be at risk, although a trading loss resulting in "non-charitable expenditure" may be able to be set-off against the amount that would otherwise be chargeable to tax,

307 Corporation Tax Act 2010 (UK) s 482(1)(b); Income Tax Act 2007 (UK) s 528(1)(b).

308 Corporation Tax Act 2010 (UK) s 482(6); Income Tax Act 2007 (UK) s 526(5).

309 Charity Commission for England and Wales [CC35 – Trustees, trading and tax: how charities may lawfully trade](#) February 2016 at [3.9].

310 HM Revenue and Customs [Annex iv: trading and business activities – basic principles](#) 4 May 2021 at [8].

311 HM Revenue and Customs [Annex iv: trading and business activities – basic principles](#) 4 May 2021 at [11].

312 Charity Commission for England and Wales [CC35 – Trustees, trading and tax: how charities may lawfully trade](#) February 2016 at [3.10].

313 Corporation Tax Act 2010 (UK) s 479(2)-(4); Income Tax Act 2007 (UK) s 525(2) - (4); HM Revenue and Customs [Annex iv: trading and business activities – basic principles](#) 4 May 2021 at [8], [11], [38]; Charity Commission for England and Wales [CC35 – Trustees, trading and tax: how charities may lawfully trade](#) February 2016 at [3.9].

314 HM Revenue and Customs [Annex iv: trading and business activities – basic principles](#) 4 May 2021 at [8], [37].

315 HM Revenue and Customs [Annex iv: trading and business activities – basic principles](#) 4 May 2021 at [37] - [38].

316 HM Revenue and Customs [Annex iv: trading and business activities – basic principles](#) 4 May 2021 at [39].

317 Charity Commission for England and Wales [CC35 – Trustees, trading and tax: how charities may lawfully trade](#) February 2016 at [3.14].

with a “self-cancelling” effect.³¹⁸ In this regard, it is necessary to apply a “commerciality test”, to ascertain whether the trading was on a commercial basis, with a reasonable expectation of gain (for corporation tax) or with a view to the realisation of profit (for charitable trusts liable to income tax). Even if the taxable trade was not “commercial”, the loss may still be allowable if the trade was part of a larger commercial undertaking. However, whether or not a trading loss is allowable can be difficult to ascertain and will depend on the circumstances of each case.³¹⁹ HMRC advises that charities “may wish to obtain professional advice”.³²⁰ Losses unable to be set off may be able to be carried forward.³²¹

The “significant risk” test

Importantly, the issue of charities running business in England and Wales is not solely governed by tax law. Charities law, administered by the Charity Commission for England and Wales (“**CCEW**”) also applies.

In this regard, CCEW considers that charities may engage in business activities to raise funds for their charitable purposes (that is, non-primary purpose trading), only where no “significant risk” is involved: the “significant risk” to be avoided is that the turnover may be insufficient to meet the costs of carrying on the trade and the difference has to be financed out of the assets of the charity. CCEW considers a number of factors in determining whether a risk is “significant”, including: the size of the charity, the nature of the business, the expected outgoings, turnover projections, and the sensitivity of business profitability to the ups and downs of the market. In general, CCEW considers that a lottery or trading qualifying for the small-scale exemption may be considered not to involve significant risk.³²²

If charities wish to carry on non-primary purpose trading involving “significant risk”, CCEW requires that they do so through a trading subsidiary, even if the profits would be tax exempt if the trading were carried on by the charity itself.³²³ A trading subsidiary is a company, owned and controlled by one or more charities, set up in order to trade, and usually having a purpose to generate income for its parent charity.³²⁴ The profits from a trade carried on by a trading subsidiary do not qualify for tax exemption and are liable to corporation tax in the usual way, but trading subsidiaries may be able to reduce or eliminate their tax liability by making donations to their parent charity as “Gift Aid”.³²⁵ This mechanism provides an incentive for a trading subsidiary not to meet its funding needs out of retained profits, as those retained profits will be liable for corporation tax. A trading subsidiary’s needs for funding will therefore normally be met out of share capital and/or loan capital normally provided by the parent charity. In this regard, CCEW makes the following comments:³²⁶

This provision has to be justifiable as an investment of the charity’s assets ... Parent charities must not provide support to trading subsidiaries on terms which involve a greater or lesser element of gift. For example:

- a parent charity must not make donations to the trading subsidiary, in cash or in kind, whether by purchasing stock for the subsidiary, and donating that stock to the trading subsidiary, or otherwise;

318 HM Revenue and Customs [Annex iv: trading and business activities – basic principles](#) 4 May 2021 at [41].

319 HM Revenue and Customs [Annex iv: trading and business activities – basic principles](#) 4 May 2021 at [42] - [44].

320 HM Revenue and Customs [Annex iv: trading and business activities – basic principles](#) 4 May 2021 at [44].

321 HM Revenue and Customs [Annex iv: trading and business activities – basic principles](#) 4 May 2021 at [44].

322 Charity Commission for England and Wales [CC35 – Trustees, trading and tax: how charities may lawfully trade](#) February 2016 at [3.8], [3.11], [3.12].

323 Charity Commission for England and Wales [CC35 – Trustees, trading and tax: how charities may lawfully trade](#) February 2016 at [3.8], [4.1]; HM Revenue and Customs [Annex iv: trading and business activities – basic principles](#) 4 May 2021 at [34].

324 Charity Commission for England and Wales [CC35 – Trustees, trading and tax: how charities may lawfully trade](#) February 2016 at [4.1].

325 Charity Commission for England and Wales [CC35 – Trustees, trading and tax: how charities may lawfully trade](#) February 2016 at [4.1], [4.3] - [4.7]; HM Revenue and Customs [Annex iv: trading and business activities – basic principles](#) 4 May 2021 at [45].

326 Charity Commission for England and Wales [CC35 – Trustees, trading and tax: how charities may lawfully trade](#) February 2016 at [4.6].

- a parent charity must not settle the debts of a trading subsidiary;
- a charity must, if allowing the use of its staff, buildings or equipment by a trading subsidiary, make fair charges for those uses.

In the context of financial viability, CCEW makes the following comments:³²⁷

A trading subsidiary should become financially viable as soon as possible. It is therefore important to have a business plan in place that clearly identifies the point at which trading is expected to be profitable and to assess progress against the business plan. Where financial viability is not anticipated within 2 years of operation, careful consideration should be given to the appropriateness of undertaking the planned trading activity.

In all decisions relating to the subsidiary, the interests of the charity are paramount: if a charity's trustees keep a failing trading subsidiary going at the charity's expense, they may be personally liable for consequential losses to the charity.³²⁸

As noted by Breen, trading subsidiaries can be costly to set up and maintain for charities. They require separate administrative structures, and when charity trustees sit on their boards, conflict of interest issues may arise.³²⁹

In 2019, the DIA specifically consulted on whether New Zealand should introduce a similar "significant risk" test:³³⁰

Providing support to a business may be a good use of charitable funds, if the business has the potential to provide sustainable income for the charity. However, if the business is not successful, it may deflect the charity's funds away from its charitable purpose. If the business closes, the charity may not get back the funds it used to support the business, particularly if the business has borrowed money or has other creditors (see example C). Members of the public who donate to charities expect donations to go to charitable purposes. If too many charities take on too much business risk, this could ultimately start to erode public trust and confidence in the charities sector.

Example C: Charitable funds lost through business activities

The Southern Cross Charitable Trust was deregistered as a charity for gross mismanagement and advancing a noncharitable purpose to provide private benefit to related parties.

The Trust was formed in 1993 with purposes to provide education and support youth-at-risk and was registered under the Act in 2008. Previously, the Trust had set up and provided substantial funds for the Kiwi Can programme.

The Trust raised funds by charging interest on loans to building projects. For each project, the Trust established a trust and a company, each run by one of the trustees. The Trust established a total of 45 trusts and companies in this manner.

Huge amounts of money went through the Trust, with very little applied to charitable purposes. Between 2005 and 2010, the Trust received an estimated \$30 million from the building projects. Around \$25 million of this was loaned back to related entities.

During the time it was registered, the Trust provided \$11,392 in donations to registered charities.

Approximately \$34.5 million remained outstanding in loans and unpaid interest at the time of deregistration.

In England and Wales, charities are not permitted to run businesses where there is significant risk to charitable assets. However, *introducing a significant risk test in New Zealand could make it more difficult for some charities to raise funds.*

327 Charity Commission for England and Wales [CC35 – Trustees, trading and tax: how charities may lawfully trade](#) February 2016 at [4.1].

328 Charity Commission for England and Wales [CC35 – Trustees, trading and tax: how charities may lawfully trade](#) February 2016 at [4.16]; OB Breen *Holding the line: regulatory challenges in Ireland and England when business and charity collide* in M McGregor-Lowndes and K O'Halloran (eds) "Modernising Charity Law – Recent Developments and Future Directions" (Edward Elgar, Cheltenham, UK, 2010) 136 at 150; Charity Commission for England and Wales [CC35 – Trustees, trading and tax: how charities may lawfully trade](#) February 2016 at [2], [4.8].

329 OB Breen *Holding the line: regulatory challenges in Ireland and England when business and charity collide* in M McGregor-Lowndes and K O'Halloran (eds) "Modernising Charity Law – Recent Developments and Future Directions" (Edward Elgar, Cheltenham, UK, 2010) 136 at 150.

330 Te Tari Taiwhenua Internal Affairs [Modernising the Charities Act 2005: Discussion Document](#) February 2019 at 44 - 45 (emphasis added).

As discussed above, *most charity officers will already be bound by other duties under the law depending on the charity's legal structure*. However, governance standards, discussed in the chapter on the Obligations of charities, are another way to mitigate the potential risk to charitable funds. Standards could include guidance for charities when making decisions on business activities.

This guidance could also respond to wider concerns of charities and investment. In particular, concerns about charities that wish to invest in social enterprises that provide lower rates of return than other investment options.

In response to a specific consultation question as to what, if any, restrictions (such as the “significant risk” test in England and Wales) should exist on the level of risk for charities undertaking business activities, many submitters responded that it is not Charities Services’ role to manage the business risk of charities, as discussed above.³³¹

The rules regarding charities running businesses in England and Wales are clearly very complex, perhaps reflecting cultural and historical factors present in England and Wales that may not be so prevalent in New Zealand. As with the United States and Canada, the rules in England and Wales appear to have been based on a perception that charities running businesses have a competitive advantage over their for-profit counterparts.³³²

Compared to ordinary commercial companies, charities enjoy *considerable advantages in the tax treatment they receive* in relation to trading and trading profits. For example, in terms of VAT, certain sales and purchases are exempt or zero-rated. In terms of direct tax, there are a number of benefits – for example:

- a charity’s trading profits are, in certain circumstances, exempt from tax; this includes profits from primary purpose trading, and profits made from lotteries and from certain types of fund raising event – exemption is subject to conditions relating to the application of the profits received by the charity
- income received by a charity from the sale of goods that have been donated to it is not generally regarded as trading profits and is not taxable.

However, again, the proposition that the tax privileges for charities provides a competitive advantage is asserted rather than analysed; when the disadvantages faced by charities, such as in relation to their ability to access capital, are taken into account, it is not clear that any such competitive advantage exists, certainly not one that would justify the introduction of such complex rules into New Zealand.

The complexity of the rules in England and Wales may also have been a factor in the creation of an additional organisational option in the form of a “Community Interest Company” or “CIC” in 2004.³³³ A CIC might be considered a halfway house between a fully commercial enterprise and a charity: although it does not enjoy charitable tax exemption, it does not suffer from the constraints imposed on charities relating to commercial activities;³³⁴ however, it does have a number of statutory constraints, such as an asset lock and a dividend cap, which appear to have resulted in a lower take-up than expected.³³⁵

Were New Zealand to impose similar restraints on the business activities of charities, similar measures may be needed in New Zealand also, further compounding the complexity.

331 See, for example, the [submissions](#) of New Zealand Red Cross Incorporated; EY Law; Methodist Church of New Zealand Te Haahi Weteriana O Aotearoa; Royal New Zealand Plunket Trust; Council for International Development; Scott Moran; SPCA; and Auckland North Community and Development.

332 Charity Commission for England and Wales [CC35 – Trustees, trading and tax: how charities may lawfully trade](#) February 2016 at [2] (emphasis added).

333 Companies (Audit, Investigations and Community Enterprise) Act 2004 (UK) Pt 2.

334 OB Breen *Holding the line: regulatory challenges in Ireland and England when business and charity collide* in M McGregor-Lowndes and K O’Halloran (eds) “Modernising Charity Law – Recent Developments and Future Directions” (Edward Elgar, Cheltenham, UK, 2010) 136 at 151.

335 OB Breen *Holding the line: regulatory challenges in Ireland and England when business and charity collide* in M McGregor-Lowndes and K O’Halloran (eds) “Modernising Charity Law – Recent Developments and Future Directions” (Edward Elgar, Cheltenham, UK, 2010) 136 at 151 - 152.

Ireland

Ireland follows a similar approach to that taken in England and Wales in basing its approach on the concept of “trade”, rather than “commercial” or “business” activities, with “trade” defined to *include*:³³⁶

... every trade, manufacture, adventure or concern in the nature of trade

This definition is considered less clear than the HMRC approach of considering “trading” to generally involve the provision of goods or services to customers on a commercial basis.³³⁷ Again, the distinction matters, because charities’ profits from “trading” are, in principle, subject to tax unless specifically exempted.³³⁸ An intention to use profits for charitable purposes will not prevent those profits from being liable to tax:³³⁹ as with England and Wales, there is no “destination of funds” test applicable to exempt the unrelated business income of charitable organisations in Ireland.

Ireland does not formally make a distinction between “charitable trading” and “non-charitable trading”, relying instead solely on an underlying distinction between “primary purpose trading” and “non-primary purpose trading”.

The “profits of a trade carried on by any charity” are exempt from tax in Ireland if the trade is exercised in the course of the actual carrying out of a *primary purpose* of the charity, or the work in connection with the trade is *mainly* carried out by the *beneficiaries* of the charity (and the profits are applied solely to the purposes of the charity).³⁴⁰

What constitutes profit made by a charity from trade that is “exercised in the course of the actual carrying out of a primary purpose of the charity” in Ireland is interpreted in a similar manner to the concept of primary purpose trading in England and Wales.³⁴¹ Profit from primary purpose trading is *prima facie* exempt from tax in Ireland, provided the profits are applied solely to the purposes of the charity;³⁴² however, an exception is made for the profits of a trade of farming carried on by a charity, which are not required to be applied solely for charitable purposes.³⁴³

In addition, as in England and Wales, work carried out by beneficiaries of a charity may constitute primary purpose trading in itself; profit from trading that is unrelated to the charitable purpose (that is, “non-primary purpose” trading) may still qualify for exemption where the work is carried out “mainly” by beneficiaries of the charity.³⁴⁴

There is limited guidance in Ireland as to what might be required to satisfy the “mainly” criterion, and in practice it is assessed by the Irish tax authority, the Revenue Commissioners (“**Revenue**”), on a case by case basis.³⁴⁵

There is no official public guidance as to when a particular activity might qualify as “ancillary” and therefore within the concept of primary purpose trading in Ireland.³⁴⁶

The approach taken in practice appears to be one of scale, with insignificant trading ventures tending to be overlooked as “ancillary”, but larger-scale trading likely to be more problematic.³⁴⁷ This approach can be contrasted with the approach described as “principled rather than mathematical” in England and Wales.³⁴⁸

If Revenue finds that the trading activities of a charity are not ancillary to its charitable purpose, but rather constitute non-primary purpose trading, tax will be due on all the trading activities of the charity (even if all the profits ultimately are used for charitable

336 Taxes Consolidation Act 1997 (Ireland) s 3.

337 OB Breen and PA Smith *Law of Charities in Ireland* (Bloomsbury, 2019) at [10.24]. Compare HM Revenue and Customs [Annex iv: trading and business activities – basic principles](#) 4 May 2021 at [2].

338 OB Breen and PA Smith *Law of Charities in Ireland* (Bloomsbury, 2019) at [10.21].

339 OB Breen and PA Smith *Law of Charities in Ireland* (Bloomsbury, 2019) at [10.24].

340 Taxes Consolidation Act 1997 (Ireland) s 208(2)(b).

341 OB Breen and PA Smith *Law of Charities in Ireland* (Bloomsbury, 2019) at [10.25].

342 Taxes Consolidation Act 1997 (Ireland) s 208(2)(b)(ii); OB Breen and PA Smith *Law of Charities in Ireland* (Bloomsbury, 2019) at [10.28] - [10.30].

343 Taxes Consolidation Act 1997 (Ireland) s 208(3).

344 OB Breen and PA Smith *Law of Charities in Ireland* (Bloomsbury, 2019) at [10.31].

345 OB Breen and PA Smith *Law of Charities in Ireland* (Bloomsbury, 2019) at [10.31].

346 OB Breen and PA Smith *Law of Charities in Ireland* (Bloomsbury, 2019) at [10.38].

347 OB Breen and PA Smith *Law of Charities in Ireland* (Bloomsbury, 2019) at [10.37] - [10.38].

348 OB Breen and PA Smith *Law of Charities in Ireland* (Bloomsbury, 2019) at [10.37].

purposes): unlike England and Wales, there is no clear power to apportion charitable and non-charitable trading and to assess them separately for tax purposes.³⁴⁹ There is also no clear “small-trading exemption”, although Revenue has in the past granted a concession from tax liability in respect of small scale non-primary purpose trading.³⁵⁰

If a charity incurs a trading loss, and the charity trustees were found not to have taken sufficient care, the Charities Regulatory Authority may bring an action against the charity trustees:³⁵¹ if the High Court is satisfied that any property of the charity was misapplied, or dealt with in a manner that endangers the property, or there has been any other misconduct or mismanagement on the part of any charity trustee or member of staff in relation to the affairs of the charity, the High Court may make such order as it considers appropriate, including, presumably, ordering trustees to make good the loss to the charity.³⁵²

If the trading activity would put a charity’s assets at significant risk, it becomes “advisable” to separate out its commercial activities into a separate subsidiary, although there is not a clear requirement to do so as in the case of England and Wales.³⁵³ If the trading increases to “such an extent that the non-charitable activity becomes as a matter of fact an unauthorised non-charitable purpose”, the charity’s charitable status could be at risk.³⁵⁴

As with the other jurisdictions examined, the rules regarding charities running businesses in Ireland are clearly very complex. A compelling basis should be demonstrated before introducing such complexity into New Zealand charities law, as discussed further next.

Discussion

Competitive advantage

It should not be assumed that businesses run by charities have a competitive advantage over their for-profit counterparts. As can be seen from the discussion above, once the issue of competitive advantage is analysed, rather than assumed, it is found not to exist: tax exemption for charities’ business income has no practical effects on the competitiveness of for-profit businesses, and instead merely provides a degree of offset to the significant disadvantages charities otherwise face in accessing capital.³⁵⁵

To the extent that comparable jurisdictions have introduced rules to address such a perceived competitive advantage, they are fraught with difficulty. There is no bright line between a “related” or “unrelated” business, or primary or non-primary purpose trading, and attempts to draw one create significant complexity that acutely illustrates why ex ante regulation should be approached with caution in an inherently equitable area of law.³⁵⁶ The complexity inherent in such rules increases compliance costs, and distracts charities from their purposes as they expend scarce resources endeavouring to comply with ill-fitting rules that cut across the destination of funds principle. The complexity of the rules also increases administration costs, potentially well beyond any revenue raised. There is nothing to indicate the rules have any practical impact on the circumstances of competing for-profit businesses; instead, their net impact is to place significant unnecessary barriers in the way of much-needed social enterprise activity,

In considering what a world-leading framework of charities law might look like for Aotearoa New Zealand, and to give effect to the government’s stated objective of

349 OB Breen and PA Smith *Law of Charities in Ireland* (Bloomsbury, 2019) at [10.39].

350 OB Breen and PA Smith *Law of Charities in Ireland* (Bloomsbury, 2019) at [10.35].

351 Charities Act 2009 (Ireland) s 74.

352 OB Breen and PA Smith *Law of Charities in Ireland* (Bloomsbury, 2019) at [10.19].

353 OB Breen and PA Smith *Law of Charities in Ireland* (Bloomsbury, 2019) at [10.49].

354 OB Breen and PA Smith *Law of Charities in Ireland* (Bloomsbury, 2019) at [10.49].

355 Australia Industry Commission; Australian Productivity Commission *Contribution of the Not-for-Profit Sector* 11 February 2010; DR K Henry AC, G Smith, Dr J Harmer, H Ridout, Professor J Piggott *Australia’s Future Tax System – Final Report* 2 May 2010 (Henry Review). See also Ann O’Connell *Taxation and the not-for-profit sector globally: common issues, different solutions* in M Harding (ed) *Research Handbook on Not-for-profit law* (Edward Elgar, UK, 2018) 388 at 397.

356 See also Report to the Treasurer *Australia’s future tax system: Part 2 – Detailed analysis*, December 2009, Pt 2 vol 1: treasury.gov.au/review/the-australias-future-tax-system-review/final-report at 212.

creating an enabling framework for social enterprise, we strongly recommend New Zealand does not seek to address perceptions of competitive advantage in this way.

As discussed in this report, we recommend restoring a focus on first principles: reinforcing the destination of funds test would allow charities to focus their energy and resources on furthering their purposes in good faith in the best way possible without being distracted by the need to fall within blunt, arbitrary, unnecessary and ultimately ineffective rules (and without the need to create complex alternative legal structures to work around them); effective oversight of charities' activities can be more than adequately provided in New Zealand by enforcing the fiduciary duties, supported by comprehensive transparency and accountability rules that are already in place.

Instead, we recommend that perceptions of competitive advantage are addressed through the public awareness-raising campaign recommended in recommendation 5.2: as part of that campaign, we recommend that awareness is also raised of the non-distribution constraint and the destination of funds test, as they are critical to an understanding of the distinction between charities and for-profit entities in a social enterprise context. We also recommend raising awareness that charities running businesses are social enterprises and that, while charities have a number of natural advantages in a social enterprise context, their income tax exemption does not give them a competitive advantage over their for-profit counterparts.

Recommendation 5.3

That, as part of the public awareness-raising campaign recommended in recommendation 5.2, awareness is also raised of the non-distribution constraint and the destination of funds test: charities running businesses do not have a competitive advantage over their for-profit counterparts and there is no basis to remove their income tax exemption. Charities running businesses are in fact social enterprises and their work should be enabled rather than inhibited.

Accumulations

As discussed above, the assumption that charities have a competitive advantage led the Tax Working Group to suggest measures that would tax the accumulations of charities.

In its discussion document for the government's review of the Charities Act, DIA also raised the issue of charities' accumulations, arguing for minimum distribution requirements and reserves policies:³⁵⁷

Holding accumulated funds without clear explanation may cause public concern that a charity is not using its funds for charitable purposes. For example, concerns have been raised regarding charities with businesses that apply very little or no funds to charitable purposes. Accumulating funds in a business or other investment over a long time can increase the risk that charitable funds are lost if it fails ...

Case study: Charity (accumulation of funds by a business)

A charity group is made up of a trust that owns six related companies. The companies provide goods and services for the building industry. The charitable purpose of the trust is to provide grants for charitable purposes in the community.

Over the past 10 years, the companies have provided on average \$2.5 million in income to the trust annually.

At the same time, the group's assets have grown from \$30 million to \$90 million. The trust has used accumulated funds and taken out loans to purchase \$30 million in property. The property is rented by the six subsidiary companies.

The trust makes charitable grants of \$100,000 annually on average. That is about 4% of its income and less than 1% of its total assets.

³⁵⁷ Te Tari Taiwhenua Internal Affairs [Modernising the Charities Act 2005: Discussion Document](#) February 2019 at 21 - 22 (footnotes omitted).

In this case, there has been large growth in assets over a long period and a relatively small amount distributed in grants. So far, most of the accumulation of funds by the trust has not advanced the charitable purposes of the trust.

It is not only charities that operate businesses that have issues with large accumulation of funds. For example, the TWG's interim report raised concerns about accumulation by private foundations. Financial information on the charities register indicates the largest 25-30 foundations established by single donors or their families have total assets exceeding \$1.7 billion. The TWG reported that the average proportion of net surplus by private foundations distributed over this three year period varies widely, from 10% to 92%.

Other countries take different approaches to this issue. In England and Wales, all charities must include in their annual report their policy on reserves, stating the level of reserves held and why they are held. The charity needs to state if it does not have a reserves policy.

In Canada, charities are required to spend a minimum amount each year on their own "charitable programmes" or on gifts to other charities.

In Australia, private foundations that are registered private ancillary funds need to meet specific rules. If a private ancillary fund is a charity, it is required to have a minimum annual distribution of 5% of assets to charitable organisations.

? Should charities be required to be more transparent about their strategy for accumulating funds and spending funds on charitable purposes (for example, through a reserves policy)? Why? Why not?

? Should certain kinds of charities be required to distribute a certain portion of their funds each year, like in Australia?

In addition, the discussion document indicates DIA wishes to impose a "significant risk" test as in England and Wales.³⁵⁸

The examples given in the DIA's discussion document imply there is a problem with the current settings regarding charities' business and accumulation activities, when there is in fact no evidence of issues that could not be adequately addressed within the current framework by reinforcing first principles as discussed above. Such calls themselves undermine public trust and confidence in charities, by creating a perception that there is a problem to be "fixed" when the evidence base for such a claim has not in fact been made out.

In addition, there does not yet appear to have been any analysis of whether the rules adopted in other jurisdictions are working. For example, concern has been expressed that minimum distribution requirements in fact act as a target and therefore a barrier to higher levels of distribution.³⁵⁹ In addition, while Australia has specific rules for public and private ancillary funds, it also allows the equivalent of refundability of imputation credits. Many other jurisdictions enable taxpayers to claim tax relief for donations of non-cash items, such as shares, art work or other property.³⁶⁰

It would be a mistake for New Zealand to chart a course through comparable jurisdictions selecting restrictive measures of considerable complexity, in isolation without a consideration of their context, in a piecemeal fashion, without an evidential basis indicating a need for reform.

When resort is had to first principles, the issues become much simpler. As with advocacy, "business" and "accumulations" are inherently activities, rather than purposes in themselves. As discussed above in Part 1, issues of risk and focus in the context of business activities can be more than adequately dealt with by enforcing the fiduciary duties. Similar arguments apply in relation to accumulations. It should not be assumed that a charity accumulating funds is not applying them for the benefit of its charitable purposes: there may be any number of legitimate reasons why it is in the best interests of a charity's charitable purposes to accumulate funds, particularly for charities that take a long-term or inter-generational perspective (noting that a distinguishing feature

358 Internal Affairs *Modernising the Charities Act 2005: Discussion Document* February 2019 at 42 - 45.

359 D Walker *Why Foundations Like Mine Need to Give More to Stave Off the Collapse of Vital Non-Profits* Chronicle of Philanthropy 8 June 2020: <www.philanthropy.com/article/Why-Foundations-Like-Mine-Need/248942?fbclid=IwAR1GR0MTuoJ5RtknyT--xdjz7t6fITXFGKoJ8ciDhvVWq15P9qPxxSikkKkM>.

360 This issue was recently discussed by the New Zealand Court of Appeal in *Commissioner of Inland Revenue v Roberts* [2019] NZCA 654 (17 December 2019) at [58] - [66].

of charities, at least those structured as charitable trusts, is their ability to exist into perpetuity).³⁶¹ Social enterprises by definition aim to reinvest profits in the social mission of the enterprise, rather than prioritising investor needs (a valued feature rather than something to be discouraged). As noted by submitters such as the Royal New Zealand Coastguard Incorporated, charities need flexibility to determine how best to run their operations, including accumulating funds for various purposes.³⁶² That said, however, it is often said that charity is a verb, it is a “doing” word: if there was genuine concern that a charity was inappropriately “hoarding” funds, the issue can be more than adequately dealt with by simply asking how such accumulations are being made in good faith in the best interests of the charity’s stated charitable purposes. If a charity is unable to meet this test, there is a prima facie breach of fiduciary duty and clear grounds for intervention. Proceeding in this way obviates any need to impose arbitrary and complex minimum distribution requirements, which again may simply distract charities from their purposes (forcing them to distribute when in fact their charitable purposes may be best served by not doing so in a particular case).

Similarly, it is not necessary to introduce a “significant business risk” test, or require all charitable businesses involving “significant risks” to be conducted through a separate entity. The point where risk crosses over into “significant” risk is again a difficult line to draw at an “ex ante”, pan-charity level. Further, as discussed above in Part 1, risks of charities are not limited to cases of business activity. Whether the benefits of a separate entity outweigh the significant additional costs in any particular circumstance is a governance issue for a charity to make. If a charity cannot demonstrate how any particular risk was taken in the best interests of the charity’s purposes, again a fiduciary duty is prima facie breached.

The fiduciary duties applicable to those governing charities are underpinned by comprehensive financial reporting rules that are applicable to all registered charities in New Zealand, without exception. For example, tier 1-3 registered charities are also required to disclose the nature and purpose of each reserve.³⁶³ Tier 4 charities do not have to report on accumulated funds but must report on the amount of cash they have and any other resources they own in a “statement of resources and commitments”.³⁶⁴ All registered charities are now also required to provide an annual service performance report, articulating in non-financial terms what they have done during the reporting period in working towards their broader aims and objectives.³⁶⁵ Registered charities running businesses are subject to significantly more stringent transparency and accountability disclosure requirements than their for-profit counterparts. While it is unquestionably good governance for charities to have a reserves policy, to communicate to their stakeholders why reserves are being held, such governance decisions should be encouraged rather than mandated. There is already a more than adequate basis for “questions from the monitoring authority” as suggested in the 2001 discussion document.

To summarise, the proposed reform of charities’ business and accumulation activities will hinder, rather than support, support, social enterprise. We strongly recommend they are not progressed. Instead, we recommend that any issues of charities’ business

361 See Trusts Act 2019 s 16(6)(a). See also I Murray *Charity law and accumulation: maintaining an intergenerational balance* (Cambridge University Press, 2021).

362 [Submission](#) of Royal New Zealand Coastguard Incorporated.

363 For tier 1 and 2 charities, see Public Benefit Entity International Public Sector Accounting Standard 1 ([PBE IPSAS 1](#)) *Presentation of financial statements* at [95]: “When an entity has no share capital, it shall disclose sub-classifications of net assets/equity, either on the face of the statement of financial position or in the notes, showing separately: (a) Contributed capital, being the cumulative total at the reporting date of contributions from owners, less distributions to owners; (b) Accumulated comprehensive revenue and expense; (c) Reserves, including a description of the nature and purpose of each reserve within net assets/equity; and (d) Non-controlling interests ...”. For tier 3 charities, see Public Benefit Entity Simple Format Reporting – Accrual (Not-for-profit) ([PBE SFR-A \(NFP\)](#)) at [A196]: “The notes to the performance report shall include an explanation of the movements between the opening and closing balances of all categories of Accumulated Funds. An entity shall also disclose the nature and purpose of each reserve”:

364 For tier 4 charities: Public Benefit Entity Simple Format Reporting – Cash (Not-for-profit) ([PBE SFR-C \(NFP\)](#)) s 6 *Statement of Resources and Commitments*.

365 For tier 1 and 2 charities, see [PBE FRS 48 Service Performance Reporting](#) at [IN 2]; for tier 3 and 4 charities, see the [tier 3 standard](#) at [A8(b)] and [tier 4 standard](#) at [A8(b)].

or accumulation activities, perceived or otherwise, are addressed by clarifying first principles, in four key ways:

- i. reinforcing the destination of funds test, by enforcing the fiduciary duties, using the comprehensive information now made available by means of the charities register;
- ii. clarifying the test for charitable purpose in the legislation, and the important distinction between purposes and activities;
- iii. raising awareness that charities running businesses are social enterprises, and business/social enterprise activity is legitimate and encouraged activity for charities; and
- iv. restoring charities' access to a trier of fact, so that the mechanisms by which the common law can correct errors and "purify itself" are not stymied in New Zealand.

Such an approach will do much to protect charities against harmful regulation, and remove considerable barriers currently in the way of social enterprise activity.

Imputation credits

For completeness, it is important to consider the issue of imputation credits which, as the 1995 Australian Industry Commission noted, are relevant to the "competitive advantage" analysis.³⁶⁶

Briefly, dividend imputation is a mechanism used to prevent the double taxation of dividends: the underlying principle is that shareholders in a company should, as far as possible, be treated as if the income earned by the company were earned by the shareholders directly;³⁶⁷ this principle is achieved by allowing a company to attach credits (imputation credits) that reflect the tax paid by the company to the dividends paid to its shareholders; the recipients of the dividends can then use these credits to reduce their own tax liability.

In New Zealand, the fact that imputation credits are not able to be refunded removes any element of "competitive advantage" by effectively forcing tax-exempt entities such as registered charities to pay tax on their investments in New Zealand companies (because there is no tax liability against which such imputation credits might be offset). Non-refundability of charities' imputation credits is distortionary because it effectively biases charities' investment decisions away from investing in New Zealand companies (where any dividends received will effectively be taxed), towards investments where their income tax exemption will be effective (such as interest-bearing debt and shares, such as shares in foreign companies, offering unimputed rather than imputed dividends).³⁶⁸ The distortionary impact of non-refundability was acknowledged by IRD in 2008:³⁶⁹

New Zealand company tax is paid on income earned by New Zealand companies. This company tax paid can then be attached in the form of imputation credits to dividends paid to shareholders, so that, effectively, the company tax is seen as a withholding tax for the shareholder. If shareholders are subject to New Zealand tax they will have tax to pay on the dividend they receive and can use the imputation credits to pay all or part of that tax.

If, however, the shareholder does not have to pay tax on the dividend – for example, if the shareholder is a tax-exempt charity – the imputation credits cannot be used and cannot be refunded. The benefit of the imputation credits is lost to the shareholder. Moreover, the dividend income earned by the tax-exempt shareholder has effectively been taxed at the company rate rather than at the shareholder's effective rate of zero percent.

366 Industry Commission *Charitable organisations in Australia - Report no 45* 16 June 1995 at 318.

367 Inland Revenue Department [Streaming and refundability of imputation credits: a Government tax policy discussion document](#) August 2008 at [4.8].

368 Inland Revenue Department [Streaming and refundability of imputation credits: a Government tax policy discussion document](#) August 2008 at [1.11]; Industry Commission *Charitable organisations in Australia - Report no 45* 16 June 1995 at 271, 318 - 319. See also Inland Revenue Department [Tax and charities, a government discussion document on taxation issues relating to charities and non-profit bodies](#) June 2001 at [9.3] n 25.

369 Inland Revenue Department [Streaming and refundability of imputation credits: a Government tax policy discussion document](#) August 2008: taxpolicy.ird.govt.nz/en/publications/2008/2008-dd-imputation-credits at [4.1] - [4.4], [1.11], [4.13] (emphasis added).

One of the effects of this treatment is that tax-exempt organisations may choose investments that pay them a before-tax return (referred to as non-imputed income, such as interest) over those New Zealand shares that provide an after-tax return, such as imputed dividends.

This outcome is a concern for shareholders in New Zealand companies when those shareholders have a specific exemption from New Zealand income tax and consequently are not subject to tax on the dividends they receive. Registered charities are one example of a group that currently has a specific income tax exemption.

In other words, by denying registered charities the ability to have their imputation credits refunded, double taxation is not prevented, contrary to the underlying principle of the imputation system.

In 1995, the Australian Industry Commission specifically recommended a review to determine “the most cost effective way of removing the distortions in the investment policies of Community Social Welfare Organisations due to the dividend imputation system in Australia”;³⁷⁰ this recommendation was made in the context of a wider effort to “remove unwarranted incentives and disincentives which have accumulated over the years ... and which may inhibit CSWOs from raising their own resources”.³⁷¹

Since 1 July 2000, surplus imputation credits (known as “franking credits”) of charities have been able to be refunded in Australia,³⁷² leading to an inconsistency between Australia and New Zealand which was noted in the OCED report.³⁷³

New Zealand charities have long advocated for a similar change to be made in New Zealand.³⁷⁴

Brief history

In 2001, IRD accepted that non-refundability of imputation credits discourages New Zealand charities from investing in domestic equity, but argued it did not have sufficient *information* to assess the relevant fiscal cost.³⁷⁵ Since then, however, the Charities Act 2005 has been introduced requiring charities to file annual returns.

In 2008, IRD raised concerns about charities being used in “tax planning” arrangements;³⁷⁶ since then, however, the Charities Act was amended from 2015 to subject New Zealand registered charities to comprehensive transparency and accountability disclosure rules, significantly mitigating such concerns.

370 Industry Commission *Charitable organisations in Australia - Report no 45* 16 June 1995 at 318 - 319 and recommendation 12.8.

371 Industry Commission *Charitable organisations in Australia - Report no 45* 16 June 1995 at 424.

372 Income Tax Assessment Act 1997 (Cth) s 207-115; DR K Henry AC, G Smith, Dr J Harmer, H Ridout, Professor J Piggott *Australia's future tax system - Report to the Treasurer* December 2009 (Henry Review) at 190. See also Inland Revenue Department *Streaming and refundability of imputation credits: a Government tax policy discussion* document August 2008 at [4.19].

373 OECD Tax Policy Studies *Taxation and Philanthropy* (2020) 27 (OECD Publishing, Paris) at Box 3.1.

374 See, for example, Philanthropy New Zealand *Getting more from your investment in NZ businesses* 3 December 2019: <philanthropy.org.nz/policy-briefs-and-submissions>. In Canada, a similar recommendation was made by the Ontario Law Reform Commission in 1996: “some thought might be given to extending the exemption to dividend income by making the dividend tax credit refundable for tax-exempt organisations” (Ontario Law Reform Commission *Report on the Law of Charities* (Toronto, 1996) at 377).

375 See also Inland Revenue Department *Tax and charities, a government discussion document on taxation issues relating to charities and non-profit bodies* June 2001 at [12.1] - [12.5].

376 Inland Revenue Department *Streaming and refundability of imputation credits: a Government tax policy discussion document* August 2008 at [4.10], [4.28].

In 2018, as discussed above, officials prepared a background paper for the Tax Working Group focused primarily on donation concessions available to foundations and business income.³⁷⁷ However, the background paper did contain a brief table of seven other issues that might be considered, including refundability of imputation credits.³⁷⁸

The background paper devoted five sentences to this issue, ultimately dismissing it as having a “material fiscal cost”; however, there was no analysis of what that cost might be, or how it might compare with the associated benefits of removing a significant barrier to investment by New Zealand charities in New Zealand companies.

According to the minutes of the July 2018 TWG meeting, refundability of imputation credits for charities was not discussed. In its September 2018 interim report, the TWG noted there had been a shift away from full imputation, particularly in European Union countries (reflecting a European Court of Justice ruling that imputation systems that only provide tax credits to domestic investors are discriminatory),³⁷⁹ but recommended that the New Zealand imputation system be retained. The impact of non-refundability of imputation credits on charities was not discussed in the TWG’s interim or final reports, despite the focus on potential competitive advantage.³⁸⁰

The issue of refundability of charities’ imputation credits was included in the August 2019 tax policy work programme,³⁸¹ but has since been removed without having been progressed.³⁸²

Submissions

Although the issue of non-refundability of imputation credits for charities was specifically out of scope for the DIA’s review of the Charities Act, some submitters raised the issue nevertheless, including two of New Zealand’s most notable private foundations: the JR McKenzie Trust and The Tindall Foundation.

Briefly, the JR McKenzie Trust is a private philanthropic family trust that has been grant-making in New Zealand since 1940. Its funding is made possible by dividends received each year from Rangatira Investments, a company established by Sir JR McKenzie in 1937. Rangatira Investments is described on the JR McKenzie Trust website as having “pioneered private investment in New Zealand”, and as today growing “iconic New Zealand businesses utilising a co-investment model”.³⁸³ In its submission, the JR McKenzie Trust made the following comments:³⁸⁴

We note the decision of the Tax Working Group to defer matters relating to charities and taxation until this review of the Charities Act is complete. This is another area where the terms of reference for the Charities Act review are lacking, and it is not acknowledged at all in DIA’s Discussion Document.

Philanthropic trusts who are unable to receive refunds of imputation credits attached to dividends from New Zealand companies are significantly affected. The loss of imputation credits is effectively a form of tax on non-tax as there is no mechanism for a charity as a non-tax paying entity to access these credits. This review should note and refer back to the

377 Concluding that accumulation of profits was an underlying issue for both. See Inland Revenue and the Treasury for the Tax Working Group [Charities and the not-for-profit sector: Background Paper for Session 13 of the Tax Working Group](#) 6 July 2018 at [9] and coversheet.

378 Inland Revenue and the Treasury for the Tax Working Group [Charities and the not-for-profit sector: Background Paper for Session 13 of the Tax Working Group](#) 6 July 2018 at 20-21, table 3. The seven issues were: coherence of other income tax exemption categories; charities and the FBT exemption; not-for-profits and GST concessions; tax benefits for donee organisations; refundability of imputation credits; mutual organisations; and charities and donee organisations with charitable purposes not limited to New Zealand.

379 Tax Working Group [Future of Tax: Interim Report](#) 20 September 2018 at 100.

380 Tax Working Group [Future of Tax: Final Report](#) 21 February 2019 at [25]: “The current approach to the taxation of business is largely sound. The Group does not see a case to reduce the company rate at the present time or to move away from the imputation system”.

381 Inland Revenue Department [Government tax policy work programme: 2021-22](#).

382 OECD Tax Policy Studies [Taxation and Philanthropy](#) (2020) 27 (OECD Publishing, Paris) at 60 (box 3.1) noting that the refundable credit “is essentially additional income for the entity to use for its worthy purpose”.

383 JR McKenzie Trust: www.jrmckenzie.org.nz/.

384 [Submission](#) of JR McKenzie Trust (emphasis added).

Tax Working Group the need to address this ongoing inequity. *For the period 1998 to 2018 we at J R McKenzie Trust have paid \$33 million in Imputation Credits – funding which could have been invested back into the community where the impact would have been multiplied.*

J R McKenzie Trust would be happy to discuss this issue with DIA's Review team so that progress can be made on this long-outstanding issue.

The Tindall Foundation ("**TTF**") is a private philanthropic family foundation founded in 1995 by Sir Stephen and Lady Margaret Tindall. Working throughout New Zealand to build a stronger, sustainable nation, TTF is driven by a belief that all Kiwis should have the chance to achieve their full potential and contribute to a healthy, strong society.³⁸⁵ In its submission, TTF made the following comments:³⁸⁶

TTF notes that there have been suggestions raised by government about introducing a minimum disbursement regime. Like [Philanthropy New Zealand], TTF is not necessarily opposed to this, as long as it is done with a proper understanding of the restraints and regard for what would be a sustainable nature of the entities concerned. For example:

- For charitable funder organisations that have a responsibility in perpetuity, exercising due diligence with conservative investment funds means that the return on investments is at a low level;
- In other cases, the terms of the trust fund or endowment may be restrictive so that at times there are no eligible recipients or funds available; and
- In other cases, charities may be looking at strategic/impact investments spread over multiple years but paid out in one lump sum.

TTF believes that any requirement on charitable funders to meet minimum disbursements must be part of a balanced approach. For example, TTF has made disbursements and commitments of over \$185m in its 22 years of operation. In addition, it has paid over \$134m in prepaid tax through its inability to claim imputation credits on dividends received from a NZ-owned business. This is contradictory to its apparently tax-exempt status as a charity.

New Zealand is a net importer of foreign capital: in the current environment of international instability and uncertainty, access to domestic capital is critical for the growth of most local firms. Unlocking the balance sheets of philanthropy would have significant flow-on benefits for New Zealand, as noted by the Ākina Foundation in its submission:³⁸⁷

Unlock philanthropic and grant funding: there is limited capital available for organisations which operate for public benefit while the scale of funding required to solve social and environmental problems grows. Alongside this, charitable funders traditionally take a very cautious approach; philanthropic funders, which are registered charities, should be encouraged to invest their funds to provide capital for organisations delivering public benefit (whether also registered charities or not).

Given the Government's acknowledgement of the importance of creating an enabling framework for social enterprise in New Zealand, we strongly recommend that the issue of non-refundability of imputation credits is reviewed, taking into account not just the direct fiscal costs, but also the wider direct and indirect benefits that would be gained from doing so.

Recommendation 5.4:

That, as part of the independent first principles charities law review recommended in recommendation 1.0, the issue of whether imputation credits should be refundable to registered charities is comprehensively assessed, taking into account the comprehensive transparency and accountability requirements to which registered charities are now subject, and the benefits that would accrue from removing a significant barrier to the investment of philanthropic funds in New Zealand companies.

385 The Tindall Foundation: tindall.org.nz/who-we-are/.

386 [Submission](#) of The Tindall Foundation.

387 [Submission](#) of The Ākina Foundation (emphasis added). See also Tax Working Group [Future of Tax: Interim Report](#) 20 September 2018 at 100 - 103.



Chapter 6 – Appeals

A government agency exercising a statutory power of decision “must remain accountable for its actions. Those who believe they have a genuine grievance should not fear making use of the systems put in place to support that accountability”
– Lord Hodgson of Astley Abbot¹

As discussed above in chapter 3, the current framework for appealing decisions under the Charities Act is one of the key mechanisms by which a slow-moving change in underlying paradigm has been effected in New Zealand charities law. Submitters to the Department of Internal Affairs’ (“DIA’s”) review of the Charities Act 2005 expressed considerable concern about the current framework, with concerns falling broadly into four key areas:

- (i) The nature of the hearing on appeal: whether charities should be limited to a rehearing on the record or whether charities’ access to an oral hearing of evidence (otherwise known as a “de novo” hearing) should be restored.
- (ii) What body should hear appeals: the sole option of the High Court is raising access to justice issues for charities.
- (iii) What should be the timeframe for appeals: the current 20-working day timeframe for lodging appeals also contributes to appeal inaccessibility.
- (iv) There has also been considerable dispute as to what decisions are subject to appeal.

A fair process that affords natural justice to charities would do much to alleviate current concerns. We consider each issue in turn.

What should be the nature of the hearing on appeal?

Charities’ current inability to access an oral hearing of evidence is causing distortion to New Zealand charities law, to the point that it is arguably the most important issue that needs to be addressed as part of any review of New Zealand charities’ legislation. A full appreciation of the significance of this issue requires an understanding of the detail of its context, which is discussed next.

The current position

The statutory appeal right is currently contained in ss 59 - 61 of the Charities Act. Given the significance of their wording, ss 59 – 61 are set out in box 6.1 for reference (with emphasis added):

Box 6.1 – statutory appeal right

Appeals against decisions of Board

59 Right of appeal

- (1) A *person* who is aggrieved by a decision *of the Board* under this Act may appeal to the High Court.
- (2) An appeal under this section must be made by lodging a notice of appeal with the Registrar of the High Court in Wellington and with the Board within –
 - (a) *20 working days after the date of the decision*; or
 - (b) any further time *that the High Court may allow* on application made before or after the expiration of that period.

¹ Lord Hodgson of Astley Abbots [Trusted and Independent: Giving charity back to charities – Review of the Charities Act](#) July 2012 at [7.25].

- (3) Every notice of appeal must specify –
 - (a) the decision or part of the decision appealed from; and
 - (b) the grounds of appeal in sufficient detail to fully inform the High Court and the Board of the issues in the appeal; and
 - (c) the relief sought.

60 High Court may make interim order pending determination of appeal

- (1) At any time before the final determination of an appeal, the High Court may make an interim order requiring an entity –
 - (a) to be registered in the register of charitable entities with effect from a specified date; or
 - (b) to be restored to the register of charitable entities with effect from a specified date; or
 - (c) to remain registered in the register of charitable entities.
- (2) The specified date may be a date that is before or after the order is made.
- (3) At any time before the final determination of an appeal relating to a decision under section 55 [*Board may publish details of possible breach, possible serious wrongdoing, and other matters*], the High Court may make an interim order preventing or restricting the exercise of a power by the Board under that section.
- (4) An *interim order* may be subject to any terms or conditions that the High Court thinks fit.
- (5) If the High Court refuses to make an interim order, the person or persons who applied for the order may, within 1 month after the date of the refusal, appeal to the Court of Appeal against the decision.
- (6) If an interim order is made under subsection (1), the chief executive must, –
 - (a) amend the register of charitable entities in accordance with the order as soon as is reasonably practicable after receiving the order; and
 - (b) include a copy of the order in the register of charitable entities, unless the court orders otherwise.
- (7) To enable the chief executive to fulfil the duties imposed by this section, the Registrar of the court in which the interim order is made must send a copy of the order to the chief executive as soon as practicable.

61 Determination of appeal

- (1) In determining an appeal, the High Court may –
 - (a) confirm, modify, or reverse the decision of the Board *or the chief executive* or any part of it; or
 - (b) exercise any of the powers that could have been exercised by the *Board or the chief executive* in relation to the matter to which the appeal relates.
- (2) Without limiting subsection (1), the High Court may make an order requiring an entity–
 - (a) to be registered in the register of charitable entities with effect from a specified date;
 - (b) to be restored to the register of charitable entities with effect from a specified date;
 - (c) to be removed from the register of charitable entities with effect from a specified date;
 - (d) to remain registered in the register of charitable entities.
- (3) The specified date may be a date that is before or after the order is made.
- (4) The High Court *may make any other order that it thinks fit*.
- (5) An order may be subject to any terms or conditions that the High Court thinks fit.
- (6) Nothing in this section affects the right of any person to apply, in accordance with law, for *judicial review*.

To summarise, the appeal right is contained in s 59, with s 61 giving the High Court wide powers to make such orders as may be necessary to justly dispose of the appeal.² The High Court may also make an interim order under s 60 maintaining a charity's registered charitable status pending determination of the appeal.³

However, ss 59 – 61 do not prescribe any *procedure* for dealing with evidence. Although s 61(4) allows the High Court to make "any other order that it thinks fit", the courts have held this provision is directed to the substantive conclusions reached in the appeal, and does not relate to the procedures the court might adopt in hearing the appeal (such as regarding the presentation of evidence).⁴

The fact that the Charities Act is silent on the nature of the hearing to be conducted on appeal, means that appeals under the Charities Act fall to be governed under the general rules for appeals to the High Court set out in Part 20 of the High Court Rules ("**HCR**").⁵ Those general rules include the following:⁶

- (i) Although the decision-maker is entitled to be represented and heard at the hearing, the notice of appeal must not name the decision-maker as a respondent.⁷ This means that the decision-maker is not a "party" to the appeal.
- (ii) The court may, on application, order that a transcript be made of all or part of the evidence given at the hearing before the decision-maker. In addition, the court may direct the decision-maker to prepare a report setting out: any considerations, other than findings of fact, to which they had regard in making the decision appealed against that are not set out in the decision; any information about the effect the decision might have on the general administration of the Act under which the decision was made; and any other relevant matters that should be drawn to the attention of the court. Every party to the appeal is entitled to be heard, and tender evidence, on any matter referred to in the report.⁸

Otherwise, however, the appeal proceeds by way of rehearing.⁹ The procedures for presentation of evidence on the appeal are very restrictive, as can be seen from HCR20.16 (set out in box 6.2 for reference, with emphasis added):

2 See *Travis Trust v Charities Commission* (2009) 24 NZTC 23,273 (HC) at [15] per Joseph Williams J. Section 61(4) affords wider powers to the Court on appeal than those granted by the Act to the original decision-maker, see *National Council of Women of New Zealand Inc v Charities Registration Board* [2015] 3 NZLR 72 (HC) at [52] - [55].

3 Such interim orders were made in *The Plumbers, Gasfitters and Drainlayers Board v Charities Registration Board* [2013] NZHC 1986 at [7]; *Re Queenstown Lakes Community Housing Trust* [2011] 3 NZLR 502 (HC) at [3], [80]; *Re Family First New Zealand* (2015) 4 NZTR 25-014 at [13]. By contrast, income tax exemption may remain in place automatically under Income Tax Act 2007 s CW 41(1)(aa) pending determination of the appeal.

4 *Foundation for Anti-Aging Research v Charities Registration Board* [2014] NZHC 1153 at [41] - [42]; *Foundation for Anti-Aging Research v Charities Registration Board* [2015] NZCA 449 at [39].

5 *Foundation for Anti-Aging Research v Charities Registration Board* [2015] NZCA 449 at [39]; [High Court Rules 2016](#) (LI 2016/225). HCR 20.1 makes specific exception for appeals under the Criminal Procedure Act 2011, the Arbitration Act 1996, the Bail Act 2000, and for appeals by way of case stated under Pt 21 of the HCR. Otherwise, Pt 20 applies "subject to any express provision in the enactment under which the appeal is brought" (HCR20.1(3)).

6 *Foundation for Anti-Aging Research v Charities Registration Board* [2015] NZCA 449 at [23] - [27], [43].

7 HCR20.17; HCR20.9(2).

8 HCR20.14(1)(a); HCR20.15 (*Report by decision-maker*). To date, this provision does not appear to have been utilised in appeals under the Charities Act.

9 HCR20.18.

Box 6.2 – evidence on appeal

20.16 Further evidence

- (1) Without leave, a party to an appeal may adduce further evidence on a question of fact if the evidence is necessary to determine an *interlocutory application* that relates to the appeal.
- (2) In all other cases, a party to an appeal may *adduce further evidence only with the leave of the court*.
- (3) The court may grant leave only if there are *special reasons* for hearing the evidence. An example of a special reason is that the evidence relates to matters that have arisen after the date of the decision appealed against and that are or may be relevant to the determination of the appeal.
- (4) Further evidence under this rule must be given by *affidavit*, unless the court otherwise directs.

In other words, appeals under the Charities Act proceed on the basis of the record created by the decision-maker (Charities Services Ngā Ratonga Kaupapa Atawhai (“**Charities Services**”) and the Charities Registration Board Te Rātā Atawhai (“**the Board**”). Charities are responsible for ensuring that “all relevant factual material” is placed before the decision-maker *before* its decision is made.¹⁰ No “additional evidence” may be adduced in the High Court on appeal, unless the charity can demonstrate “special reasons”.¹¹

Special reasons might be able to be shown for “updating” evidence, if it is necessary for the court to consider the material in order to properly address the appeal. Special reasons might also apply where the appellant has been taken by surprise by findings or reasons not traversed with the applicant before the decision is made, or in order to correct a clear mistake. However, any such additional evidence must be given by affidavit: there is no entitlement to an oral hearing of evidence in appeals under the Charities Act.¹²

Another feature of appeals under the Charities Act is that the decision-maker is not a *party* to the appeal. Their role is limited to assisting the court: while they may oppose, they may not do so adversarially, and are not to unnecessarily enter the fray.¹³ The basis for this rule was discussed by the Court of Appeal in *Attorney-General v Māori Land Court*:¹⁴

... it is not appropriate to give leave to counsel to appear representing a Court where the argument (albeit on jurisdiction) is directed to the very issue which has been determined in the judgment under review and where full argument is available on both sides of the issue from the competing parties.

10 *Canterbury Development Corporation & Ors v Charities Commission* [2010] 2 NZLR 707 (HC) at [107]; *Re New Zealand Computer Society Inc* (2011) NZTC 20-033 (HC) at [33]; *Re Queenstown Lakes Community Housing Trust* [2011] 3 NZLR 502 (HC) at [25]; *Foundation for Anti-Aging Research v Charities Registration Board* [2014] NZHC 1153 at [45] - [60]; *Foundation for Anti-Aging Research v Charities Registration Board* [2015] NZCA 449 at [50].

11 *Re Education New Zealand Trust* (2010) 24 NZTC 24,354 (HC) at [58] - [63]. The Charities Act does not grapple with the issue of evidence, referring only to “information”. See Justice R Ellis *A view from the Bench*, presentation delivered to the *Perspectives on charity law, accounting and regulation in New Zealand* conference organised by the Charity Law Association of Australia and New Zealand in conjunction with Chartered Accountants Australia and New Zealand, April 2018: <www.charitylawassociation.org.au/images/NZ%20event%202018/Presentations/Justice%20Ellis%20Speech.pdf>.

12 *Foundation for Anti-Aging Research v Charities Registration Board* [2014] NZHC 1153 at [58], [59], [68] - [69]; *Foundation for Anti-Aging Research v Charities Registration Board* [2015] NZCA 449 at [51] - [57].

13 *Canterbury Development Corporation & Ors v Charities Commission* [2010] 2 NZLR 707 (HC) at [108] - [111]; *Re Draco Foundation (NZ) Charitable Trust* (2011) 25 NZTC 20-032 (HC) at [8]; *Re Greenpeace New Zealand Incorporated* [2011] 2 NZLR 815 (HC) at [21]; *Re Greenpeace of New Zealand Inc* [2013] 1 NZLR 339 (CA) at [5]; *National Council of Women of New Zealand Inc v Charities Registration Board* (2014) 26 NZTC 21075 (HC) at [11], [29], [52]; *Re Greenpeace of New Zealand Inc* [2015] 1 NZLR 169 (SC) at [11]; *Re Family First New Zealand* (2015) 4 NZTR 25-014 at [103]; *Foundation for Anti-Aging Research v Charities Registration Board* [2015] NZCA 449 at [53].

14 *Attorney-General v Māori Land Court* [1999] 1 NZLR 689 (CA) at 695-696, referred to in *Re Greenpeace New Zealand Incorporated* [2011] 2 NZLR 815 (HC) at [21].

In other words, it is normally inappropriate for the tribunal from which an appeal is brought to be heard: a judicial body “ought not become a protagonist in an appeal from its own decision”, and should strive “not to enter the fray in a way which might appear to favour the interests of one of the parties”.¹⁵ On this basis, the courts have held that the decision-maker under the Charities Act should “not advocate for either its impugned reasoning or the result”, or seek to defend its decision on new or expanded grounds: unless expressly invited to assist in some other respect, it should “confine its submissions to matters on which it can provide impartial assistance to the Court”, such as its jurisdiction or the general administration of the Charities Act; it should not take a proactive role.¹⁶

Another consequence of status as a non-party is that the decision-maker has no right to appeal a court decision that it does not agree with.¹⁷

Difficulties with the current position

These rules are strict, as they are premised on an assumption that a full oral hearing of evidence has already been undertaken at first instance before an independent body adjudicating a dispute between two parties.

However, as the courts have noted, that is not the case in appeals under the Charities Act, and appeals under the Charities Act *differ* from most appeals under Part 20.¹⁸

Under the Charities Act, the original decision-maker is not judicial, and does not “adjudicate” a dispute between two parties; rather, Charities Services or the Board effectively *is* the other party. At first instance, only an informal inquisitorial approach is undertaken: neither Charities Services nor the Board conducts an oral hearing.¹⁹ This means there is no formal oral hearing at which evidence is presented (and therefore no “transcript” of any proceedings below). Charities Services and the Board are not bound to apply the rules of evidence, and evidence on which their decision is based is not tested, meaning that evidence can be considered and given weight in their decision-making, even if it may be irrelevant, unfairly prejudicial, or otherwise inadmissible in a court of law.

These factors are creating a number of difficulties in practice.

Evidence

For example, as can be seen from the *Latimer* litigation, discussed above in chapter 3, evidence can be critical in decisions as to whether an entity’s purposes are charitable: the finding that wider indirect benefits outweighed any direct private benefits in the *Latimer* case was reached on the basis of a comprehensive platform of evidence to which the rules of evidence were applied, and that was tested by cross-examination before an independent judicial hearing authority. Findings of fact as determined on the evidence can be determinative of whether an entity is eligible for registration and therefore, often, able to access the funding it needs in order to be able to survive.

In early Charities Act appeals, both charities and the Charities Commission filed affidavit evidence by agreement.²⁰ However, in *Canterbury Development Corporation & Ors v Charities Commission* (“**Canterbury Development**”), Ronald Young J referred to

15 *National Council of Women of New Zealand Inc v Charities Registration Board* (2014) 26 NZTC 21075 (HC) at [48] - [49].

16 *Re The Foundation for Anti-Aging Research* (2016) 23 PRNZ 726 (HC) at [37], [46].

17 *Re The Foundation for Anti-Aging Research* (2016) 23 PRNZ 726 (HC) at [36], [99].

18 *Re Queenstown Lakes Community Housing Trust* [2011] 3 NZLR 502 (HC) at [25]; *Foundation for Anti-Aging Research v Charities Registration Board* [2014] NZHC 1153 at [59]; *National Council of Women of New Zealand Inc v Charities Registration Board* (2014) 26 NZTC 21075 (HC) at [51]; *Re The Foundation for Anti-Aging Research* (2016) 23 PRNZ 726 (HC) at [38].

19 Te Tari Taiwhenua Internal Affairs [Modernising the Charities Act 2005: Discussion Document](#) February 2019 at 36. See also *Foundation for Anti-Aging Research v Charities Registration Board* [2014] NZHC 1153 at [59]; *Foundation for Anti-Aging Research v Charities Registration Board* [2015] NZCA 449 at [20].

20 *Travis Trust v Charities Commission* (2009) 24 NZTC 23,273 (HC) at [24]; *Canterbury Development Corporation & Ors v Charities Commission* [2010] 2 NZLR 707 (HC) at [104], [106]; *Re Education New Zealand Trust* (2010) 24 NZTC 24,354 (HC) at [58]. The writer also understands from discussion with counsel that in *The Plumbers, Gasfitters and Drainlayers Board v The Charities Registration Board* [2013] NZHC 1986 further evidence was adduced by consent.

HCR20.16 and held that this approach should “not become habitual”:²¹ instead, if a charity wishes to adduce additional evidence at the appeal, the charity must make an application for leave to adduce further evidence under HCR20.16.

Applications to adduce further evidence are now made reasonably routinely, even at superior court level;²² such applications are generally successful (with one notable exception).²³

However, charities that have not had the benefit of such an application, or that otherwise have not had the wherewithal to provide material to Charities Services and the Board as if preparing for a High Court trial (such as affidavit evidence, including expert affidavit evidence) are often materially disadvantaged by lack of evidence.²⁴

21 *Canterbury Development Corporation & Ors v Charities Commission* [2010] 2 NZLR 707 (HC) at [106].

22 See, for example, *Canterbury Development Corporation & Ors v Charities Commission* [2010] 2 NZLR 707 (HC) at [104] - [106]; *Re Education New Zealand Trust* (2010) 24 NZTC 24,354 (HC) at [58] - [63]; *Re New Zealand Computer Society* (2011) 25 NZTC 20-033 (HC) at [23] - [35]; *Re Greenpeace New Zealand Incorporated* [2011] 2 NZLR 815 (HC) at [28] - [33] (see also *Re Greenpeace of New Zealand Inc* [2013] 1 NZLR 339 (CA) at [31]); *Liberty Trust v Charities Commission* [2011] 3 NZLR 68 (HC) at [48] - [50]: “All of the material on the website should be regarded as evidence before the Charities Commission, not just those parts of the website which the Charities Commission regarded as relevant”; *Re Queenstown Lakes Community Housing Trust* [2011] 3 NZLR 502 (HC) at [25] - [26]; the writer understands from discussion with counsel that in *The Plumbers, Gasfitters and Drainlayers Board v The Charities Registration Board* [2013] NZHC 1986 further evidence was adduced by consent; *Foundation for Anti-Aging Research v Charities Registration Board* [2014] NZHC 1153 at [24] - [63]; *National Council of Women of New Zealand Inc v Charities Registration Board* (2014) 26 NZTC 21075 (HC) at [24] - [30]; *Family First New Zealand v Attorney-General* [2020] NZCA 366 at [56] - [58].

23 The one exception is *Re New Zealand Computer Society* (2011) 25 NZTC 20-033 (HC) at [35], which can perhaps be thought of as the “low-water mark” in terms of evidence in Charities Act appeals.

24 See, for example, *Re The Grand Lodge of Antient Free and Accepted Masons in New Zealand* [2011] 1 NZLR 277 (HC) at [27]: “I have found detail on what [freemasonry] involves rather skimpy”; at [29]: “The Grand Lodge also undertakes pastoral activities in relation to its members. It organises training seminars. The details of what these involve are not really provided ...”. As subsequently noted by the High Court in *Liberty Trust v Charities Commission* [2011] 3 NZLR 68 (HC) at [59]: “there was no evidence before the Court that the main object of Masons was to go out in the world and, by their example, lead persons” to live a more moral life. It is therefore arguably lack of evidence rather than “closer scrutiny” that led to the finding (at [60] and [66]) that the public benefit was “too remote”. This finding was determinative in the ultimate decision to decline the charity’s application for registration, despite the fact, as noted at [4], that the Grand Lodge had been considered charitable by the tax authority (Inland Revenue) for more than 50 years. See also *Re Draco Foundation (NZ) Charitable Trust* (2011) 25 NZTC 20-032 (HC) at [26]: “There was no evidence provided, outside of the website, of any training materials or training”; [32]: “As to the proposed future activities, the first such activity, the sale of merchandise, is one of the activities said to be currently undertaken although ... there is no evidence of this”; at [33]: “Because the identified activities are so general it is difficult to understand what is proposed”; at [35]: “It is impossible to know precisely what is proposed ... What is proposed is too vague to be confident it will be tied to any charitable purpose” (noting also that there was no discussion of fiduciary duties to comply with the constituting document in this context); at [48] - [49]: “The difficulty is the paucity of information regarding the conference. There is simply not enough detail provided by Draco to conclude that the conference has educational value and charitable purpose. From the information provided it cannot be said that at the time the Commission considered the application the proposed conference, with the general topics identified, was either for the advancement of education or of general benefit to the community. I accept, as I have noted, that such a conference could have that purpose. Whether, however, organising one such conference in the course of the year means the purposes of Draco are exclusively charitable (within the meaning of exclusive in the context of charities law) is doubtful in any event. Further, beyond organising future “Residents” conferences, there is nothing to suggest other conferences are planned. This rather places conference organisation and presentation at the periphery of Draco’s purposes”; and at [77]: “There is no evidence of educational or training material beyond that on the websites. The conference organisation material is too vague and generalised to reach a conclusion that it is for the advancement of education or for any other purpose beneficial to society”. Putting to one side difficulties in the underlying legal test to be applied, as discussed above in ch 3, the lack of evidence appears to have been determinative in the findings that, while the purposes could be charitable, registration should be denied on the basis of activities (see [17], [21] - [22]). In *Re New Zealand Computer Society* (2011) 25 NZTC 20-033 (HC), the one Charities Act case where an application to adduce further evidence was not successful, the charity also appears to have been particularly disadvantaged by lack of evidence: the lack of evidence appears to have been determinative in the findings (at [68], [80]) effectively that direct private benefits outweighed wider indirect public benefits and that therefore the charity was not eligible for registration. At [64]: “The Society submits that the Commission has placed too much weight on the material available on its website to support the view that benefits to members, the profession and industry are its main purposes”; and at [79]: “... the Society submits that the Commission made its decision on the basis of insufficient evidence ... The Commission responds to that submission by stating that further information relating to the Society’s educational activities would not have affected its decision”, the latter point raising additional concerns about predetermination.

Further, even if such an application is made and granted, evidence is still not *tested*. Lack of a suitable evidential platform appears to have been a factor in courts referring Charities Act decisions back to the original decision-maker for reconsideration in light of their judgment;²⁵ alternatively, superior courts may request and/or receive extensive additional factual material.²⁶ While important for trying to “workaround” the absence of an oral hearing at first instance, these mechanisms are less than ideal substitutes for a full first instance oral hearing of evidence, and also have the unavoidable effect of increasing cost and delay for all concerned.

Status of the original decision-maker

Another difficulty arises from the fact that the original decision-maker is deemed not to be a party to a Charities Act and is therefore unable to take an active role. There is therefore an absence of the usual tension between appellant and respondent which “can sometimes lead to poor decision-making and that should be avoided”.²⁷ In practice, the decision-maker sometimes has taken an active role in the appeal, a position for which they have been criticised.²⁸ More recently, a practice has developed by which the Attorney-General will intervene, which raises other issues as discussed above in chapter 4.

Perceptions of unfairness

In addition, the absence of an oral hearing of evidence makes it very difficult for a charity to challenge the fact-gathering exercise conducted by Charities Services/the Board, for example by suggesting the appeal court consider information other than that considered by the original decision-maker. In other words, notwithstanding the right of general appeal to the court, the original decision-maker effectively sets the parameters for ultimate argument due to the absence of a trier of fact.²⁹ These factors give rise to concerns that the current framework unduly favours the Crown, through a process that is so restrictive it inherently favours the original decision.³⁰

An analogy may illustrate: imagine that a person is accused of a crime they did not commit. They wish to appeal the decision of the Police to charge them with the crime. If the appeal is to the High Court “on the record”, the appeal would proceed solely on the basis of the Police’s investigation, including internet searches of which the accused may be unaware. Even if the accused is made aware of the material gathered by the Police during their investigation, the accused would have no opportunity to cross-examine the Police regarding the evidence they relied on in reaching their decision or

25 See, for example, *Re Greenpeace of New Zealand Inc* [2015] 1 NZLR 169 (SC) at [104]: “Although it may be doubtful on the material before the Court that charitable purpose can be established, it is inappropriate for such assessment to be undertaken as a matter of first and last impression in this Court”; *Re Greenpeace of New Zealand Inc* [2013] 1 NZLR 339 (CA) at [92], [105]; *Re Family First New Zealand* (2015) 4 NZTR 25-014 at [2], [84] - [85], [102].

26 *Family First New Zealand v Attorney-General* [2020] NZCA 366 at [56] - [57].

27 *Travis Trust v Charities Commission* (2009) 24 NZTC 23,273 (HC) at [27]. See also the [submission](#) of the Charities Registration Board: “Since there is no opposing party in a charity’s appeal, the Courts have struggled with the status of the Board, and with the lack of any balancing view. The lack of a respondent party with a right of appeal adversely impacts upon the development of charitable case law ... The Board submits that the decision-maker should be empowered to be a party in any appeal”.

28 See, for example, *Re The Foundation for Anti-Aging Research* (2016) 23 PRNZ 726 (HC) at [43] - [47] and *National Council of Women of New Zealand Inc v Charities Registration Board* [2015] 3 NZLR 72 (HC) at [81]: “The [Charities Registration Board] was not formally a respondent to the appeal, but has taken a full role in defending its earlier decision, and in denying that the Court has any wider powers to alter the outcome. My provisional view is that NCW is entitled to costs ...”. See also *Re New Zealand Computer Society* (2011) 25 NZTC 20-033 (HC) at [18]: “The Commission has in this case adopted an active role on the appeal, in support of its decision”; *National Council of Women of New Zealand Inc v Charities Registration Board* (2014) 26 NZTC 21075 (HC) at [11], [27], [52]; *Re Family First New Zealand* (2015) 4 NZTR 25-014 at [75].

29 *Greenpeace of New Zealand Incorporated v Charities Registration Board* [2019] NZHC 929 at [13], [14].

30 See, for example, the [submissions](#) of Social Service Providers Aotearoa: “Currently, the High Court is only presented with the original evidence presented, and charities have no ability to present additional evidence ... This very narrow system in effect denies justice”; and Volunteering Hawke’s Bay: “... unclear decisions based not on facts but on opinions ... The integrity of the process is important ... The process needs to be fair and not be so restrictive that it automatically favours the original decision”.

the conclusions drawn from it: there are no exhibits; none of the material is tested by cross-examination. The accused would also be expected to provide all necessary material in the abstract *before* the Police make their decision. Once the Police have made a decision, the accused is only able to make submissions. There is no opportunity for “oral forms of story-telling”.³¹ If able to demonstrate “special reasons”, the accused may be able to file additional evidence, but only on a very restricted “updating” basis and only by affidavit. The accused is not able to call their own witnesses in the appeal to provide corroborative evidence of their innocence. In short, the scene is set by the record of the Police’s investigation, and the accused is inherently “on the back foot” in trying to prove important contrary matters of fact that may be determinative of their innocence.

New Zealand criminal law does not proceed in this way, not least because it would undermine confidence in the result: those accused of a crime are entitled to a full *de novo* oral hearing of evidence, even if the hearing may take some time, as the investment is considered worth it in the interests of justice.

Charities deserve no less: as the Law Commission has noted, natural justice can require an oral hearing, particularly in serious or complex cases with potentially significant negative consequences.³² A decision to decline registration may deprive a charity of its ability to access funding, and therefore its ability to survive and carry out its charitable work. Such a threat is comparable to the threat of potential loss of liberty faced by those accused of a crime. As discussed above in chapter 4, it is unlikely that a novel purpose such as the assistance purpose of the Crown Forestry Rental Trust would be found to be charitable under the current framework: in the *Latimer* case, the wider indirect public benefits of social cohesion from a robust Treaty settlement process were found to outweigh the perceived direct private benefits of assistance to bring Treaty claims as a question of fact, a conclusion reached on the basis of a comprehensive platform of evidence to which the rules of evidence were applied, and that was tested by cross-examination before an independent judicial hearing authority. It would have been effectively impossible to reach such a definitive conclusion in the absence of an oral hearing: the die would have been cast by Inland Revenue’s finding to the contrary, and the charity would have been stymied in its ability to prove otherwise. If the concept of charitable purpose is to continue to be defined by reference to the common law, and if the common law is to continue to be able to evolve flexibly to respond to changing social circumstances, it is essential that charities are able to access the time-honoured mechanisms of the common law of establishing facts through testing evidence. As noted by Ellis J, speaking *extra-curially*:³³

One of the main reasons why [charities law cases] require evidence is, I think, because Judges today are, quite rightly, much more reluctant than their forebears simply to apply their own personal (or even majoritarian) ideas about what constitutes a charitable purpose or what might be of benefit to the public. That is particularly so in areas where notions of morality, matters of religion, questions of artistic taste or of scientific merit are at play. In the pluralistic society in which we now live such matters, and their value, are all properly regarded as inherently contestable. And given the flow on financial benefit that charitable status potentially yields it is right that these things are in fact contested. Conversely, those applying for registration are entitled to expect that such a contest will be fair and objective; that their applications will not be determined on the basis of subjective personal views or beliefs of the decision-maker. The analysis required can only be based on evidence.

Charities, by definition, exist for the public benefit; public benefits may be direct or indirect, tangible or intangible, present or future:³⁴ it is not in the interests of the broader community to deprive the community of those benefits by placing procedural barriers in the way of a charity demonstrating them.

31 T Vincent *An uncharitable appeal framework for charities: is it time for a Charity Tribunal?* 9 October 2015 at 30.

32 See Te Aka Matua o te Ture - New Zealand Law Commission *A New Act for Incorporated Societies* (NZLC R129, 2013) at [8.18], [8.19], [8.36].

33 Justice R Ellis “*A view from the Bench*” delivered to the *Perspectives on charity law, accounting and regulation in New Zealand* conference organised by the Charity Law Association of Australia and New Zealand in conjunction with Chartered Accountants Australia and New Zealand, April 2018 at [13].

34 D Poirier *Charity Law in New Zealand* (Department of Internal Affairs, June 2013) at [4.1.1.3].

Cost

DIA argues that de novo hearings are “generally more expensive and slower” than a rehearing on the record.³⁵ However, this argument considers only half the picture: an oral hearing of evidence may in fact be more cost- and time-effective in the long run. Allowing an oral hearing of evidence would allow a more robust result to be reached at first instance which may in turn reduce the need for further appeals, and reduce the risk of harm that follows incorrect results. For example, had Greenpeace been able to access an oral hearing of evidence at first instance, its eligibility for registration might have been confirmed at its first High Court hearing in 2010 rather than at its third High Court hearing in 2020, potentially saving Greenpeace and the taxpayer more than a decade of subsequent litigation. Ability to access an oral hearing of evidence at first instance would also obviate the considerable taxpayer and charitable resources that are currently being expended in frequent applications for leave to adduce additional evidence: charities are inherently reluctant litigants, as any litigation requires them to expend resources they could otherwise expend on charitable work;³⁶ the fact that so many applications are being made is a strong indication of the perceived unfairness of the current framework (an issue which could be easily and cost-effectively addressed by reinstating access to an oral hearing).

Allowing access to an oral hearing would also obviate the need for charities to place all material before the original decision-maker before it makes its decision. Prior to a decision being made, charities may not have a clear picture of the case against them, principally because evidence is not tested,³⁷ yet the consequences of an adverse decision may be fatal. Charities are accordingly incentivised to err on the side of providing more rather than less information to Charities Services, as they will have no automatic right to adduce evidence after a decision has been made. Costs are thereby increased costs for all concerned.

Denying charities access to an oral hearing of evidence on the grounds of cost is a false economy.

Internet searches

A key area of difficulty relates to material Charities Services finds from searches of the internet. Such searches are conducted routinely.³⁸ The High Court described the difficulty in the following terms in *Foundation for Anti-Aging Research*:³⁹

But it seems clear enough that the chief executive also obtained information ... from the internet and that both he, and later the Board, relied on that information. The issue that potentially arises is whether he was entitled to do so, and, if so, whether there are any limits on that power.

It is not ultimately necessary for the determination of the present appeals to decide whether or not the chief executive has any ability to rely on material that is not provided to him by an applicant. *It is certainly arguable that he does not.* The requirement in s 18(3)(iii) that he must have regard to “any other information that it considers is relevant” is plainly a reference to information that is perceived as relevant by the entity that is seeking charitable status.

35 Internal Affairs [Modernising the Charities Act 2005: Discussion Document](#) February 2019 at 36.

36 See the discussion in Tessa Vincent [An uncharitable appeal framework for charities: is it time for a Charity Tribunal?](#) 9 October 2015 at 32.

37 See, for example, the [submission](#) of Youth Search and Rescue Trust NZ: “... a board sitting behind closed doors making judgments on something they might not fully understand doesn’t help them or the charity”.

38 See, for example, *Re The Foundation for Anti-Aging Research* (2016) 23 PRNZ 726 (HC) at [25](a), [32], [52], [71] - [75]; *Greenpeace of New Zealand Incorporated v Charities Registration Board* [2020] NZHC 1999 at [28] - [30], [174], *Re Greenpeace of New Zealand Inc* [2013] 1 NZSC 12 (SC) at [82] - [84], [92], and *Re Greenpeace of New Zealand Inc* [2013] 1 NZLR 339 (CA) at [18], [31] - [32], [92], [100] (referring to the skewed or misrepresentative picture given by the “selective web dredge” undertaken of Greenpeace’s website and other publicly available sources) and *Re Greenpeace [of] New Zealand Inc* [2011] 2 NZLR 815 (HC) at [16], [29] - [32], [72], [76] (referring to criticism of the selective nature of quotations taken from Greenpeace’s website on which Greenpeace had no opportunity to make submissions on the conclusions drawn from its content); *Liberty Trust v Charities Commission* [2011] 3 NZLR 68 (HC) at [50]; *Re Family First New Zealand* (2015) 4 NZTR 25-014 at [48]; *Re Family First New Zealand* [2018] NZHC 2273 at [20]; *Re New Zealand Computer Society* (2011) 25 NZTC 20-033 (HC) at [27].

39 *Re The Foundation for Anti-Aging Research* (2016) 23 PRNZ 726 (HC) at [71] - [75] (emphasis added, footnotes omitted).

I do nonetheless have concerns about what happened here. Those concerns serve to underscore my primary conclusions. I therefore record that, to the extent that the chief executive may (contrary to my own preliminary view) have regard to information from outside sources, it is unclear to me why he would do so. Even putting resourcing issues to one side, such an approach seems to be to be:

- (a) likely to give rise to *increased natural justice concerns and lead to justifiable demands for formal hearings and cross-examination*; and
- (b) fraught with danger, particularly where information is obtained from the internet.

As far as the latter point is concerned, the perils of the internet are legend. It is possible to obtain web support for almost any proposition one cares to name. Sorting the wheat from the chaff is difficult for anyone who is not already well versed in the subject matter. At the very least, there would need to be *some assurance as to the reliability and quality of any such extraneous material*.

More fundamentally, making inquiries that are independent of an applicant seems to me to risk moving some way from the long-established orthodox analysis which focuses on establishing the purposes of the specific entity seeking charitable status. I consider the Board was wrong to put any store in the information obtained from the internet by the chief executive here.

The courts have provided a workaround whereby, where the decision-maker refers to a website, all of the material on the website is required to form part of the record, not just those parts which the original decision-maker regarded as relevant.⁴⁰ There may be many hundreds if not thousands of pages of such material.⁴¹ While such workarounds are critically important, they have a tendency to generate more evidential material than might be presented to a judicial trier of fact, again because the evidence is not tested. Rather than requiring the courts to strive to achieve justice within an ill-fitting framework,⁴² a significantly better and more cost-effective option would be to resolve the issue at its source, by reinstating charities' access to a de novo first instance oral hearing (which would allow both parties an opportunity to respond to all evidence presented).

"Dummy run"

DIA argues that hearing the matter afresh on appeal may increase the risk of the original decision-making process becoming a "test run".⁴³

This argument has carried weight in a competition law context;⁴⁴ however, it is not clear that similar concerns fairly arise in a charities law context.⁴⁵ Decisions under the Commerce Act 1986 follow a complex and iterative inquisitorial process.⁴⁶ By contrast, the key decision as to eligibility for registration under the Charities Act turns on the definition of charitable purpose, a concept that resides in the common law and therefore requires judicial determination. To the extent that charities law decisions turn on contested questions of fact, they will inevitably relate to an enormously diverse range

40 *Liberty Trust v Charities Commission* [2011] 3 NZLR 68 (HC) at [50].

41 See, for example, *Re Greenpeace of New Zealand Inc* [2013] 1 NZLR 339 (CA) at [32]; *Greenpeace of New Zealand Incorporated v Charities Registration Board* [2020] NZHC 1999 at [54] n 64.

42 *Foundation for Anti-Aging Research v Charities Registration Board* [2014] NZHC 1153 at [60].

43 Internal Affairs [Modernising the Charities Act 2005: Discussion Document](#) February 2019 at 36.

44 *Foundation for Anti-Aging Research v Charities Registration Board* [2014] NZHC 1153 at [52] - [57].

45 See, for example, the [submission](#) of the Royal Forest and Bird Protection Society of New Zealand Inc: "We submit that appeals should be heard as de novo hearings, with evidence heard orally. New evidence should be able to be brought. This is because a charity should have a fair chance of ensuring that all possible concerns are addressed in the appeal, and also so that the decision maker on appeal has the best possible information on which to base its decision ... If the appeal is limited to a rehearing, the decision maker is unlikely to have all the relevant information before it to make a robust decision. As such, a charity may be denied charitable status simply because of an oversight in its application, or because it cannot respond properly to the decision made by the Board. In our view this raises natural justice issues. By ensuring that the appeals decision maker ... has all the relevant information, this will allow charities law to develop in an accurate factual context, and in a way that hopefully reflects society's expectations and understandings ... Given the costs associated with appealing ... we think this risk [of a "test run"] is very small ... This risk, such as it does exist, should be weighed against the greater benefit of ensuring the decision maker on appeal has all the relevant information available to it".

46 *Foundation for Anti-Aging Research v Charities Registration Board* [2014] NZHC 1153 at [54].

of subject areas on which the decision-maker under the Charities Act is unlikely to have specific expertise, underscoring the need for an independent judicial “trier of fact” to determine such factual contests according to established rules of evidence.

Under the Charities Act, the Charities Registration Board is officially responsible for all decisions regarding registration and deregistration,⁴⁷ however, the Board meets only monthly, meaning that it may simply not have capacity to consider all of the material provided in respect of a charity. Exchanges of correspondence between charities and Charities Services can be significant and can extend over many months;⁴⁸ as discussed above in chapter 4, it took almost four years for a decision to be made on Greenpeace’s application for registration after the Supreme Court referred the matter to the Board for reconsideration in light of its judgment. Perhaps in recognition of this factor, Charities Services may not forward all of the material provided by a charity to the Board,⁴⁹ raising further unfairness concerns as the decision-maker will therefore be forced to make decisions on the basis of material they have not seen. Further, for the Board to adopt a “governance” function of merely approving the decision-making process undertaken by Charities Services’ staff would exacerbate the unfairness and would not achieve the independent, “two-tiered” consideration of registration matters required by the Act.⁵⁰

Rather than overwhelming Charities Services and the Board with evidential material they are not equipped to properly deal with, it would be more cost-effective to take a “triage” approach: the vast bulk of applications will be straightforward and can be processed without difficulty; those that are not can be readily identified, to be progressed, if a charity wishes, before an independent judicial authority with the benefit of a proper hearing of evidence. Such an approach would make significantly better use of limited resources than reaching adverse decisions without the benefit of an independent oral hearing, and then requiring the affected charity to appeal to the High Court and expend resources arguing over procedural matters in order that it might have a fair opportunity to prove its case (one that will very likely be of acute significance for the charity).

Such an approach would also allow the law of charities to develop on the basis of an evidential platform that has been properly tested.

There is no risk of such an approach resulting in attempts to “improve or revise” material,⁵¹ or to provide a “second bite at a substantive first instance decision”.⁵² To the contrary, such an approach would encourage better first instance decision-making, by allowing factual contests to be dealt with *once*, efficiently and effectively, by an independent judicial authority inherently equipped to deal with it. Such an approach would thereby obviate the need for extensive exchanges of correspondence,⁵³ and would efficiently provide a robust evidential platform from which conclusions of fact can be reliably drawn to the benefit of the entire process.

It would be normal to have an opportunity to give evidence orally in a case that seeks to determine whether purposes are charitable.⁵⁴ It is also normal to hear oral evidence in a trial of a proceeding involving disputed questions of fact.⁵⁵ It is not clear why such an important aspect of our justice system should be denied to charities.

47 Charities Act 2005 s 8(3).

48 *Foundation for Anti-Aging Research v Charities Registration Board* [2015] NZCA 449 at [16] and *Re The Foundation for Anti-Aging Research* (2016) 23 PRNZ 726 (HC) at [21], referring to a process taking more than 18 months from the time applications were made until decisions were made to decline the applications; *Better Public Media Trust v Attorney-General* [2020] NZHC 350 at [3]: “Over the succeeding years, the Trust engaged in a protracted exchange of correspondence with the Department over this issue”.

49 See *Foundation for Anti-Aging Research v Charities Registration Board* [2014] NZHC 1153 at [61] - [62] regarding a DVD which a charity prepared in support of its application for registration, which Charities Services did not provide to the Board as decision-maker.

50 *Re The Foundation for Anti-Aging Research* (2016) 23 PRNZ 726 (HC) at [33].

51 *Re New Zealand Computer Society* (2011) 25 NZTC 20-033 (HC) at [30].

52 *National Council of Women of New Zealand Inc v Charities Registration Board* (2014) 26 NZTC 21075 (HC) at [27].

53 *Re New Zealand Computer Society* (2011) 25 NZTC 20-033 (HC) at [78].

54 See, for example, *Latimer v Commissioner of Inland Revenue* [2002] 1 NZLR 535 (HC) and *Chamber of Commerce and Industry of Western Australia (Inc) and Commissioner of State Revenue* [2012] WASAT 146.

55 HCR 9.51 provides that disputed questions of fact arising at the trial of any proceeding must be determined on evidence given by means of witnesses examined orally in open court.

While there may be legitimate concerns about resource implications if *all* general appeals to the High Court were to be conducted on the basis of a *de novo* hearing,⁵⁶ in the unique context of Charities Act cases, allowing the opportunity for such a hearing in appropriate cases would be infinitely more time-, resource- and cost-effective than persisting with the current ill-fitting framework.

It would also be consistent with the following principles articulated by the High Court of Australia:⁵⁷

Where a right of appeal is given to a court from a decision of an *administrative authority*, a provision that the appeal is to be by way of rehearing generally means that the court will undertake a *hearing de novo*, although there is no absolute rule to this effect ... The nature of the proceeding before the administrative authority may be of such a character as to lead to the conclusion that it was not intended that the court was to be confined to the materials before the authority. *There may be no provision for a hearing at first instance* or for a record to be made of what takes place there. The authority *may not be bound to apply the rules of evidence* ... In all these cases there may be ground for saying that an appeal *calls* for an exercise of original jurisdiction or for a *hearing de novo*.

Obviously, not all charities law cases will require a *de novo* oral hearing of evidence. However, to deprive those that do from the ability to access one on a blanket basis is to create systemic unfairness in breach of natural justice. Many of the cases decided under the Charities Act to date would likely have been decided differently if an oral hearing of evidence had been available:⁵⁸ it is important that cases decided under the current framework are viewed through this lens.

It is also important to bear in mind that providing charities with access to a full oral hearing of evidence would not be new or unusual: to the contrary, it would simply restore charities in New Zealand to the pre-Charities Act position.

The pre-Charities Act position

As discussed above in chapter 4, prior to the Charities Act, charities law cases generally arose in the context of disputes with the Commissioner of Inland Revenue under tax legislation.⁵⁹ The *Latimer* litigation is a case in point. Part 4A of the Tax Administration Act 1994 ("**TAA**") provides an elaborate process for determining such disputes, which is specifically designed to: improve the accuracy of decisions; reduce the likelihood of disputes by encouraging open and full communication; and promote the prompt and efficient resolution of disputes "by requiring the issues and evidence to be considered by the Commissioner and a disputant before the disputant commences proceedings".⁶⁰

The evidence exclusion rule

The tax dispute resolution process emphasises information disclosure, and early discussion between the Commissioner and the taxpayer, to ensure that "each party is fully informed of the facts, propositions of law and arguments on which their respective

56 *Foundation for Anti-Aging Research v Charities Registration Board* [2014] NZHC 1153 at [54], [56], referring to *Commerce Commission v Woolworths Ltd* (2008) 12 TCLR 194 (CA) where the Court of Appeal made the following comments at 206: "While a *de novo* hearing will usually be "better" in terms of resolving the case at hand, a *general* policy of conducting appeals on this basis would have major resource and institutional implications – implications which have dissuaded appellate Courts in New Zealand and similar jurisdictions from adopting this approach when hearing appeals" (emphasis added).

57 *Commissioner of Stamps v Telegraph Investment Co Pty Ltd* (1995) 133 ALR 130 (HCA) at 464, discussed in *Education New Zealand Trust* at [60] (emphasis added). See also *Commissioner of Stamps v Telegraph Investment Co Pty Ltd* (1995) 133 ALR 130 (HCA) at 465, 474 - 475, 481 (emphasis added).

58 Particularly *Canterbury Development Corporation & Ors v Charities Commission* [2010] 2 NZLR 707 (HC); *Re Queenstown Lakes Community Housing Trust* [2011] 3 NZLR 502 (HC); *Re New Zealand Computer Society* (2011) 25 NZTC 20-033 (HC); *Re Draco Foundation (NZ) Charitable Trust* (2011) 25 NZTC 20-032 (HC); *Re The Grand Lodge of Antient Free and Accepted Masons in New Zealand* [2011] 1 NZLR 277 (HC); and *Better Public Media Trust v Attorney-General* [2020] NZHC 350.

59 *Foundation for Anti-Aging Research v Charities Registration Board* [2015] NZCA 449 at [8]; *Re The Foundation for Anti-Aging Research* (2016) 23 PRNZ 726 (HC) at [13].

60 Tax Administration Act 1994 s 89A(1).

positions are based".⁶¹ The process contains a number of specific steps, which are summarised in *Standard Practice Statement 16/06* as follows:⁶²

- (a) A notice of proposed adjustment ("**NOPA**"): this is a notice that either the Commissioner or taxpayer issues to the other advising that an adjustment is sought in relation to [a disputable decision] ... A NOPA is the formal document which begins the disputes process.
- (b) A notice of response ("**NOR**"): this must be issued by the recipient of a NOPA if they disagree with it ...
- (c) A notice rejecting the Commissioner's NOR: this must be issued by the taxpayer if they disagree with the Commissioner's NOR ...
- (d) A disclosure notice and statement of position ("**SOP**"): the issue of a disclosure notice by the Commissioner triggers the requirement for the taxpayer to provide a SOP to continue the dispute Each party must issue a SOP ... The SOPs are important documents because they limit the issues and propositions of law that either party can rely on if the case proceeds to court to what is included in the SOPs (unless a hearing authority makes an order that allows a party to raise new issues and propositions of law under section 138G(2)).

There are also two administrative phases in the disputes process: the conference and adjudication phases. If the dispute has not been already resolved after the NOR phase, the Commissioner's practice will be to hold a conference. A conference can be a formal or informal discussion between the parties to clarify and, if possible, resolve the issues.

If the dispute remains unresolved after the conference phase and the exchange of SOPs, the Commissioner will usually refer the dispute to adjudication, except in limited circumstances. Adjudication involves Inland Revenue independently considering a dispute and is the final phase in the disputes process before the taxpayer's assessment is amended (if it is to be amended) following the exchange of the SOPs ...

Under this process, a NOPA issued by a taxpayer must provide a statement of the facts and the law in sufficient detail to advise the Commissioner of the grounds for the proposed adjustment, and include copies of significantly relevant documents.⁶³ In response, the Commissioner must issue a NOR, within the "response period",⁶⁴ stating concisely the facts or legal arguments in the NOPA considered to be wrong, why they are considered to be wrong, and any other facts and legal arguments relied on.⁶⁵

If the dispute is not resolved following the exchange of NOPAs and NORs, the dispute proceeds to an exchange of SOPs, in which both parties are required to give an *outline* of the facts, evidence, issues and propositions of law on which they intend to rely.⁶⁶ In its original form, the "evidence exclusion rule" in s 138G of the TAA limited the parties in any subsequent hearing to the facts, evidence, issues and propositions of law disclosed in their respective SOPs. This was intended to encourage an "all cards on the table" approach.

However, the attempt to limit the parties to the evidence disclosed in their SOPs simply did not work in practice:⁶⁷ it led to SOPs of vast length as taxpayers and the Commissioner sought to "throw in the kitchen sink" rather than risk being prevented from raising something later. Further, courts strove to find ways to allow evidence to be admitted, even if it had not been previously disclosed, leading to concern that the rule

61 Rt Hon Bill Birch, Treasurer, Minister of Finance, Minister of Revenue *Legislating for self-assessment of tax liability: a Government discussion document*, August 1998: <taxpolicy.ird.govt.nz/en/publications/1998/1998-dd-self-assessment> at [2.10].

62 Inland Revenue Department *SPS 16/06 Disputes resolution process commenced by a taxpayer* 10 October 2016: <www.taxtechnical.ird.govt.nz/standard-practice-statements/disputes/sps-1606-disputes-resolution-process-commenced-by-a-taxpayer> at [4] - [6].

63 Tax Administration Act 1994 s 89F(3).

64 Generally two months. See Tax Administration Act 1994 s 89AB.

65 Tax Administration Act 1994 s 89G(2).

66 Tax Administration Act 1994 s 89M. "Evidence" refers to available documentary evidence only, and does not include a list of potential witnesses: s 89AB.

67 See the discussion in *The Law and Practice of Charities in New Zealand*, S Barker, M Gousmett and K Lord (LexisNexis, Wellington, 2013) at [3.1331] - [3.1346].

was effectively being honoured in the breach. The rule was amended in 2011, and now only restricts the parties to the “issues and propositions of law” disclosed in their SOPs.⁶⁸

Accordingly, even after an elaborate process involving exchange and consideration of considerable information, parties to a tax dispute are not restricted from adducing evidence at a subsequent hearing simply because it had not been provided earlier: a full oral hearing of the evidence is permitted before either the Taxation Review Authority or the High Court.⁶⁹ Further, the decision-maker, Inland Revenue, takes the role of an active protagonist,⁷⁰ including giving oral evidence at the hearing and being available for cross-examination.⁷¹

Although potential fiscal consequences of registration are not relevant to a determination of whether a purpose is charitable, decisions regarding non-eligibility for charitable registration may nevertheless have tax consequences for an entity.⁷² Any other person receiving such a decision would be able to avail themselves of the above elaborate tax disputes procedures and, ultimately, a full oral hearing of evidence before a judicial authority. In denying charities access to an oral hearing of evidence, charities are effectively being singled out for special exclusion.

When the legislative history is examined, it is not clear that such special exclusion was intended.

Unintended consequences

In the Charities Bill as originally introduced in 2004, appeals were to be to the District Court.⁷³ Appeals to the District Court are normally conducted as first instance *de novo* trials, which includes a full hearing of oral evidence if any party so insists.⁷⁴ The Court of Appeal has confirmed that, if the original Charities Bill had proceeded in the form in which it was introduced, the District Court Rules at the time would have permitted the District Court to conduct a full first instance *de novo* oral hearing in appropriate cases.⁷⁵

However, as discussed above, the original Charities Bill was almost completely rewritten at Select Committee stage in response to hundreds of submissions.⁷⁶ On the topic of appeals, submitters expressed concern that restricting appeals to the District Court, whose decision was to be final,⁷⁷ would preclude access to the highest court in the land on the question of whether a purpose is charitable. Submitters were also concerned that, given the equitable origins of the definition of charitable purpose, the High Court should have a first instance jurisdiction.

The Select Committee responded with the following comments:⁷⁸

68 Tax Administration Act 1994 s 138G as amended by the Taxation (Tax Administration and Remedial Matters) Act 2011. See also Inland Revenue and the Treasury *Disputes: a review – an officials’ issues paper* July 2010: taxpolicy.ird.govt.nz/-/media/project/ir/tp/publications/2010/2010-ip-disputes/2010-ip-disputes-pdf.pdf?modified=20200910093446&modified=20200910093446 ch 4.

69 *Foundation for Anti-Aging Research v Charities Registration Board* [2015] NZCA 449 at [44].

70 *Re The Foundation for Anti-Aging Research* (2016) 23 PRNZ 726 (HC) at [13].

71 See, for example, *Latimer v Commissioner of Inland Revenue* [2002] 1 NZLR 535 (HC) at [132].

72 *Re Queenstown Lakes Community Housing Trust* [2011] 3 NZLR 502 (HC) at [78].

73 *Foundation for Anti-Aging Research v Charities Registration Board* [2015] NZCA 449 at [45] referring to [Charities Bill 2004 \(108-1\)](#) cls 67 and 69(6) at 38-41.

74 See *Shotover Gorge Jet Boats Ltd v Jamieson* [1987] 1 NZLR 437 (CA), considering s 5 of the Lakes District Waterways Authority (Shotover River) Empowering Act 1985, at 440, line 15: “There can be no doubt that the District Court was intended to hear the case *de novo*, which would include a full hearing of oral evidence if any party so insisted. That is the normal way in which the District Court exercises its civil jurisdiction” (emphasis added).

75 *Foundation for Anti-Aging Research v Charities Registration Board* [2015] NZCA 449 at [45]: “If the Bill had proceeded in the form in which it was introduced, we accepted that the District Court Rules at the time would have permitted the District Court to rehear the whole or any part of the evidence, and the Court would have had “full discretionary power to hear and receive further evidence on questions of fact, either by oral evidence or by affidavit,” (footnotes omitted).

76 See, for example, Charities Bill 2R (12 April 2005) 625 NZPD 19,944 per Georgina Beyer (Labour): “The committee received 753 submissions ... there has been a virtual rewrite of the original bill”.

77 Charities Bill 2004 (108-1) cl 69(6).

78 Charities Bill 2004 (108-2) ([select committee report](#)) at 13 - 14. See also *Foundation for Anti-Aging Research v Charities Registration Board* [2015] NZCA 449 at [46].

The majority also considers that, given the experience of the High Court in considering matters relating to charitable entities, it would be the most appropriate forum for hearing appeals. The majority recommends amending clauses 67, 68, and 69 to give the High Court jurisdiction to consider appeals against Commission decisions, and also recommends amendments to ensure the Court has sufficient powers to appropriately consider these appeals. In addition, the majority recommends that clause 69(6) be omitted. This provision, which made the decision of the Court final, was not appropriate in our view, as the initial appeal to the High Court should not be the final resort for charities.

The appeal mechanism was accordingly changed at Select Committee stage to remove the reference to the District Court and replace it with a reference to the High Court (and to remove the requirement for the first instance appeal to be final).⁷⁹

However, in making this change, the Select Committee did not take the extra step of clarifying the nature of the hearing to be conducted on appeal. This apparent oversight means that appeals under s 59 of the Charities Act fall to be determined under the *general* rules for High Court appeals set out in Part 20 of the High Court Rules. These rules are very restrictive in relation to evidence, based on an assumption that a full oral hearing of evidence has already been undertaken at first instance in the tribunal appealed from; however, such a prior hearing simply does not take place under the Charities Act, as discussed above.

There is nothing in the Parliamentary materials or Hansard records to indicate that, in making this change, the Select Committee was intending to remove charities' ability to access an oral hearing. To the contrary, the amendment was clearly intended to allay charities' concerns by providing them with a more fulsome right of appeal. The amendment was then passed through under urgency without proper consultation,⁸⁰ on the basis that a post-implementation review of the legislation would follow (the review that, 18 years' later, charities are still waiting for).

Opposition National Party members of the Social Services Select Committee were critical of the rushed process, making the following comments in the Select Committee's report:⁸¹

The consultation process was inadequate with the original [charities] bill and we have major concerns that the redrafted sections of the bill should have been made available for a further period of sector wide consultation. We all know the devil is in the detail and if the bill gets it wrong, as the first draft definitely did *the charitable sector will pay the price and we will see many charitable organisations close*. There is the possibility that there are a number of *structural issues in the bill remaining unaddressed* and without a further period of consultation with the sector it is difficult to fully identify these.

The formulation of the appeal right is a key structural issue for which the New Zealand charitable sector is indeed paying the price.

Recommendation

The courts have made it clear that restoring charities' access to an oral hearing of evidence will require legislative amendment.⁸² As discussed above, such an amendment is arguably the single most important change that needs to be made in any review of the charities' legislation in New Zealand: providing charities with access to an oral hearing would remove an anomalous inconsistency,⁸³ and make the evidential mechanisms of the

79 Charities Bill 2004 (108-2) at 63 – 67, 13 – 14.

80 Charities Bill 2004 (108-2) at 21 per Green Party members: "It became obvious during the hearing of submissions that the bill – as tabled – was fundamentally flawed. Further it is very disappointing that an open and robust consultation process over the considerable changes to the bill was not undertaken...The bill as drafted presents a wide range of problems, many of which are still not addressed, including issues around...the inability to develop common law in relation to the sector because of limited appeal rights".

81 Charities Bill 2004 (108-2) ([select committee report](#)) at 20 (emphasis added).

82 *Foundation for Anti-Aging Research v Charities Registration Board* [2015] NZCA 449 at [43]. See also HCR20.1(3) which provides that the general rules in Part 20 apply "subject to any express provision in the enactment under which the appeal is brought...".

83 See, for example, the [submissions](#) of Birthright New Zealand: "Charities are unable to access justice under the current framework. Charities need to be able to access an oral hearing of evidence like everybody else"; Northland Urban Rural Mission: "Oral evidence must be an option for charities as for anyone else"; and Community Waitakere: "Charities, like everybody else, need to be able to access an oral hearing of evidence (a 'trier of fact')".

common law available to charities once again. Such a change would remove a significant obstacle to the ability of the common law to evolve in response to changes in society, to correct errors and to “purify itself”; it would also materially improve charities’ ability to hold Charities Services and the Charities Registration Board accountable for their decision-making and thereby protect against slow-moving change of paradigm.

On that basis, we recommend that the appeal right (currently contained in s 59) is amended to clarify the nature of the hearing on appeal, as follows:

- (4) For the purposes of hearing the appeal, the hearing authority shall have all the powers vested in its civil jurisdiction, including full discretionary power to hear and receive further evidence on questions of fact, either by oral evidence or by affidavit.
- (5) The parties may agree that all or part of the evidence before the [decision-maker] be treated as evidence for the purposes of the hearing.
- (6) The notice of appeal shall name the [decision-maker] as a respondent.
- (7) The notice of appeal may also name the Attorney-General as a respondent.

Clause 62 of the draft Bill included in chapter 9 of this report incorporates this wording for consultation.

It is important to note that such an amendment would not require an oral hearing in all cases: it is always open to the parties to agree that all or part of the material already provided should be treated as evidence for the purposes of the hearing (such as through an “agreed statement of facts”), thereby obviating the need to lead it again.⁸⁴ Similarly, a court would not be precluded from proceeding “on the papers” where appropriate and all agree. However, such an amendment would permit an oral hearing in appropriate cases where either the decision-maker or the charity so requests. Permitting an oral hearing in appropriate cases would significantly *reduce* issues of cost and delay that are currently being experienced, and materially improve charities’ ability to access justice. It will also remove a factor that is causing significant distortion in New Zealand charities law which, in turn, will have a positive impact on trust and confidence, both in charities and in the framework itself.

Permitting a first instance oral hearing in appropriate cases would also have other important side effects: it would render the original decision-maker a party, enabling them to appear adversarially in support of their decisions, and to appeal court decisions they do not agree with, by addressing such issues at the level of cause, rather than symptom.

Such an amendment would also enable the original decision-maker to conduct searches of extraneous internet material as it sees fit: however, any such material would only be able to be relied on by the independent judicial authority in a subsequent oral hearing if the material meets legal tests for admissibility, with the weight to be given to such material determined by a process of testing by cross-examination. In this way, issues of cost and natural justice would again be addressed at the level of source, rather than symptom.

Comparable jurisdictions

Implementing this recommendation would align New Zealand law with the approach taken in all comparable jurisdictions.

In England and Wales, for example, the First-Tier Tribunal has a *de novo* jurisdiction with the ability to admit evidence whether or not it was available to the original decision-maker;⁸⁵ the Charity Commission for England and Wales is a respondent in the hearing.⁸⁶

⁸⁴ *Foundation for Anti-Aging Research v Charities Registration Board* [2015] NZCA 449 at [42].

⁸⁵ Charities Act 2011 (UK) s 319(4)(b) and [The Tribunal Procedure \(First-tier Tribunal\) \(General Regulatory Chamber\) Rules 2009](#) r 15(a)(ii). See also [Graham Hipkiss v The Charity Commission for England and Wales](#) (2018) First-Tier Tribunal (Charity) CA/2017/0014 at [20]: “The nature of the Tribunal’s jurisdiction in this matter is *de novo*, i.e. we stand in the shoes of the Charity Commission and take a fresh decision on the evidence before us, giving appropriate weight to the Commission’s decision as the body tasked by Parliament with making such decisions” (footnotes omitted). Similar provisions apply on appeal from a decision of the Tribunal. See Charities Act 2011 (UK) s 317(2)(b).

⁸⁶ Charities Act 2011 (UK) s 319(3).

Similar principles apply in Northern Ireland.⁸⁷

In Ireland, parties to an appeal to the Charity Appeals Tribunal may call witnesses to give evidence and be cross-examined;⁸⁸ the Charities Regulatory Authority is a respondent, and therefore a party, in the appeal.

Australia also provides a de novo hearing, with the Administrative Appeals Tribunal able to take into account evidence that was not before the original decision-maker;⁸⁹ the Australian Charities and Not-for-profits Commissioner is a respondent.

The United States has a rich history of charity litigation, with a constant flow of superior court cases.⁹⁰

While Canada is a notable outlier, charities' inability to access a first instance oral hearing of evidence has been identified as a specific problem in Canada, as discussed further next.

In contrast to all other comparable jurisdictions, charities law in Canada and the United States is administered primarily through their respective federal tax systems. In Canada, appeals against decisions made under tax legislation are generally made to the Tax Court of Canada,⁹¹ but an exception is made for charities: a charity wishing to challenge an adverse registration decision of the Canada Revenue Agency ("**CRA**") is required to appeal to the Federal Court of Appeal ("**FCA**").⁹²

This requirement is problematic in a number of respects.

For example, the expense and complexity of appeals to Canada's second highest court deters applicants, raising access to justice issues and concerns that charities have "no practical legal recourse under the current system".⁹³

As the Advisory Committee on the Charitable Sector has noted, bringing appeals to the FCA is not only time-consuming and costly, but "in almost all cases does not allow for a reconsideration of the question of charitable purposes, and the legal definition of what is charitable".⁹⁴ This is because the appeal is required to be "heard and determined in a summary way", which requires the court to ask whether the decision-maker reached a reasonable conclusion on the facts, rather than whether it reached the "right" answer.⁹⁵ This standard of review is considered to favour the decision-maker in charities law cases in Canada.⁹⁶

87 Under Charities Act (Northern Ireland) 2008 sch 1 r 1(3), the Commission is the respondent in an appeal to the Charity Tribunal for Northern Ireland. Rule 29 of the [Charity Tribunal Rules \(Northern Ireland\) 2010](#) provides that the Tribunal must conduct all hearings "in such manner as it considers most suitable to the clarification of the issues before it, and generally to the just, expeditious and economical determination of the proceedings". Subject to any directions by the Tribunal, the parties may give evidence; present expert evidence; call witnesses; question any witnesses; and address the Tribunal on the evidence, and generally on the subject matter of the appeal or application. Evidence may be admitted by the Tribunal whether or not it was available to the Commission when the Commission's final decision was made. Under rule 25, the Tribunal may determine a substantive appeal without an oral hearing only if the parties agree in writing.

88 [Charity Appeals Tribunal \(Charities Act 2009\) Rules](#) 2018 rr 10, 4.

89 See [Global Citizen Ltd v Commissioner of the Australian Charities and Not-for-profits Commission](#) [2021] AATA 3313 at [15].

90 M McGregor-Lowndes and B Wyatt (eds) *Regulating Charities: the Inside Story* (Routledge, 2017) at 278.

91 Income Tax Act (RSC, 1985, c1 (5th Supp)) s 169.

92 Income Tax Act (RSC, 1985, c1 (5th Supp)) s 172(3).

93 M McGregor-Lowndes and B Wyatt (eds) *Regulating Charities: the Inside Story* (Routledge, 2017) at 277; Report of the Special Senate Committee on the Charitable Sector [Catalyst for Change: A Roadmap to a Stronger Charitable Sector](#) June 2019 at 71.

94 Advisory Committee on the Charitable Sector [Report #1 – Towards a federal regulatory environment that enables and strengthens the charitable and nonprofit sector](#) January 2021 "Modernising the regulatory framework in government as it relates to the charitable sector".

95 Income Tax Act (RSC, 1985, c1 (5th Supp)) s 180(3); Report of the Special Senate Committee on the Charitable Sector [Catalyst for Change: A Roadmap to a Stronger Charitable Sector](#) June 2019 at 71 - 72, referring to the evidence of Dr Kathryn Chan.

96 [Report of the Consultation Panel on the Political Activities of Charities](#) 31 March 2017, recommendation 4, rationale: "the standard of review of a decision on whether to register an applicant as a charity or revoke the status of a charity favours the government by requiring a judicial review application to the Federal Court of Appeal. The Federal Court of Appeal is not mandated to review whether the government's decision is correct, but only whether it is reasonable. An appeal to the Tax Court of Canada would allow charities to fully argue why the decision of the government is wrong and balance the position of the parties through this process" (footnote omitted).

In addition, as is currently the case in New Zealand, the appeal proceeds on the basis of the written record: exchanges of correspondence that took place during the administrative process undertaken by the CRA are placed before the court, but no new written or oral evidence may be introduced.⁹⁷ Further, the court is not able to examine evidence: there is no cross-examination of witnesses, usually no room for expert testimony regarding societal changes, and evidence is untested.⁹⁸ These factors have contributed to a perception that the appeal process in Canada is unfairly biased in favour of the decision-maker.⁹⁹ As noted by the Supreme Court of Canada in *Vancouver Society*:¹⁰⁰

... I wish to emphasize that the *factual record in this appeal is very modest, as I suspect it is in the vast majority of cases involving an application for registration as a charitable organisation under the ITA*. This is so for at least two reasons. First, Revenue Canada's decision as to whether to register an applicant as a registered charity is a "strictly administrative function" and is *made without a hearing* ... Although Revenue Canada may request written submissions and further information from an applicant it is under no obligation to do so.

Second, s180(3) of the ITA specifically provides that appeals taken to the Federal Court of Appeal pursuant to s172(3) of the ITA "shall be heard and determined in a summary way". As the Federal Court of Appeal recently observed in *Human Life International* ... at para 1, the effect of s180(3) is that the Federal Court of Appeal "*must therefore review the relevant questions of law and fact without the benefit of any findings of fact by a trial court and indeed without the benefit of any sworn evidence*". The present appeal procedure has been cogently criticized elsewhere (see eg DW Smith, "Tax appeal procedure for charities needs improving" (*The National*, vol 12, No 4, April 1985, at p21) and *its failures are manifest in the present appeal*).

Since 2005, the Charities Directorate of the CRA has implemented an internal review process, providing charities with the opportunity to object to a decision to refuse or revoke registration, explain why they disagree with the decision, and present additional information as desired.¹⁰¹ However, adding this process has not removed the underlying difficulty: lack of access to an oral hearing of evidence has been described as "one of the reasons the cases in Canada are so resoundingly decided against charities";¹⁰² no charity has won a registration appeal in Canada in more than 20 years;¹⁰³ not having a proper hearing "has led to bad law", and puts Canada "out of step with other jurisdictions which increasingly allow appeals de novo".¹⁰⁴

Lack of access to an oral hearing has also been identified as a significant barrier to the development of the common law: charities in Canada have been "worn down by the

97 Advisory Committee on the Charitable Sector [Report #1 – Towards a federal regulatory environment that enables and strengthens the charitable and nonprofit sector](#) January 2021, Appendix 1.

98 Report of the Special Senate Committee on the Charitable Sector [Catalyst for Change: A Roadmap to a Stronger Charitable Sector](#) June 2019 at 72, referring to the evidence of The Muttart Foundation.

99 [Report of the Consultation Panel on the Political Activities of Charities](#) 31 March 2017, recommendation 2(b), rationale; Advisory Committee on the Charitable Sector [Report #1 – Towards a federal regulatory environment that enables and strengthens the charitable and nonprofit sector](#) January 2021 "Charity Appeals and the Tax Court of Canada": "... the law needs to evolve ... in a manner that is fair to all parties".

100 *Vancouver Society of Immigrant and Visible Minority Women v Minister of National Revenue* [1999] 1 SCR 10 at [64] - [65] (emphasis added).

101 Report of the Special Senate Committee on the Charitable Sector [Catalyst for Change: A Roadmap to a Stronger Charitable Sector](#) June 2019 at 69 - 71; Advisory Committee on the Charitable Sector [Report #1 – Towards a federal regulatory environment that enables and strengthens the charitable sector](#) January 2021 Appendix 1; Hon D LeBouthillier, Minister for National Revenue [Government Response to the Report of the Special Senate Committee on the Charitable Sector](#) 30 March 2021 at 12.

102 Advisory Committee on the Charitable Sector [Report #1 – Towards a federal regulatory environment that enables and strengthens the charitable and nonprofit sector](#) January 2021, Appendix 1; Report of the Special Senate Committee on the Charitable Sector [Catalyst for Change: A Roadmap to a Stronger Charitable Sector](#) June 2019 at 72, referring to the evidence of Dr A Parachin.

103 Report of the Special Senate Committee on the Charitable Sector [Catalyst for Change: A Roadmap to a Stronger Charitable Sector](#) June 2019 at 70, referring to the evidence of Dr Kathryn Chan. Note that *Canada Without Poverty*, discussed above in ch 4, took a different legal route which led to a dramatically different result.

104 Report of the Special Senate Committee on the Charitable Sector [Catalyst for Change: A Roadmap to a Stronger Charitable Sector](#) June 2019 at 76, referring to the evidence of S Manwaring; and at 72, referring to the evidence of Dr A Parachin.

long list of losses” and have stopped appealing, resulting in a “near-eradication” of the common law method of developing the legal definition of charitable purpose; cases are the “lifeblood” of the common law, which cannot evolve to keep pace with changes in society in the absence of cases.¹⁰⁵

Numerous reviews have recommended that these issues be addressed by allowing charities to appeal to the Tax Court of Canada.¹⁰⁶ For example, the Special Senate Committee made the following recommendations in their June 2019 report:¹⁰⁷

Recommendation 23:

That the Government of Canada propose amendments to the Income Tax Act to provide that all appeals from decisions of the Charities Directorate of the Canada Revenue Agency proceed to the Tax Court of Canada for a hearing *de novo*, following consideration by the Canada Revenue Agency’s Tax and Charities Appeals Directorate; and

A right to appeal to the Tax Court of Canada for cases where the Canada Revenue Agency’s Tax and Charities Appeals Directorate (the Directorate) has not rendered a decision on an appeal by an organization that has had its application for registered charity status refused, or an existing charity that has had its registration revoked, within six months of it having been referred to the Directorate

Recommendation 24:

That, recognizing the importance of enabling the development of the common law definition of charity, the Government of Canada consider measures to assist organizations that have had their application for registered charity status refused, or existing charities that have had their registration revoked, in appealing decisions from the Canada Revenue Agency’s Charities Directorate.

Recommendation 23 was specifically endorsed by the Advisory Committee on the Charitable sector in January 2021.¹⁰⁸

The ACCS recommends that the Minister of National Revenue formally request the Minister of Finance amend the ITA, to implement recommendation 23 from the Senate Committee Report ... This amendment will provide: that all appeals from decisions of the Charities Directorate of the Canada Revenue Agency proceed to the Tax Court of Canada for a hearing *de novo*, following consideration by the CRA’s Tax and Charities Appeals Branch; and

A right to appeal to the Tax Court of Canada for cases where the Appeals Branch has not rendered a decision on an appeal by an organisation that has had its application for registered charity status refused, or an existing charity that has had its registration revoked, within six months of it having been referred to the Appeals Branch.

Of course, only the most contentious cases need go beyond the initial administrative stage, but providing a “more affordable and accessible pathway to justice” would allow for more judicial pronouncements, which in turn would allow a more rapid evolution of

105 Report of the Special Senate Committee on the Charitable Sector [Catalyst for Change: A Roadmap to a Stronger Charitable Sector](#) June 2019 at 70, referring to the evidence of Dr Kathryn Chan, at 71, and at 77, referring to the evidence of Dr A Parachin and L Hunter QC.

106 See, for example, Ontario Law Reform Commission *Report on the Law of Charities* (Toronto, 1996) at 341: “... reducing administrative costs, and accomplishing the other objectives of procedural fairness, openness, and generating a record might more easily be achieved by tying into an existing judicial institution the Tax Court ... would entail a less expensive procedure for all involved ... with the hope that a stronger body of case law and a certain expertise will develop over time”; [Report of the Consultation Panel on the Political Activities of Charities](#) 31 March 2017, recommendation 2(b): “The Panel recommends that the CRA (Canada Revenue Agency) implement the following changes to its administration of the provisions of the ITA (Income Tax Act) relating to charities ... Recommend to the Minister of Finance that ... appeals be heard by the Tax Court of Canada, rather than by way of judicial review to the Federal Court, to level the playing field and enhance fairness (change to legislation would be required)” and Recommendation 4 “The Panel recommends that a new legislative framework include ... the ability to appeal a refusal to register and revocation decisions to the Tax Court of Canada”; Report of the Special Senate Committee on the Charitable Sector [Catalyst for Change: A Roadmap to a Stronger Charitable Sector](#) June 2019 at 77, recommendation 23; Advisory Committee on the Charitable Sector [Report #1 – Towards a federal regulatory environment that enables and strengthens the charitable and nonprofit sector](#) January 2021 “Recommendations”.

107 Report of the Special Senate Committee on the Charitable Sector [Catalyst for Change: A Roadmap to a Stronger Charitable Sector](#) June 2019 at 77, recommendation 23.

108 Advisory Committee on the Charitable Sector [Report #1 – Towards a federal regulatory environment that enables and strengthens the charitable and nonprofit sector](#) January 2021 “Recommendations”.

the definition of charitable purpose, and increased legal clarity through the development of a “more consistent and intellectually rigorous body of law”.¹⁰⁹

Most importantly, appeals to the Tax Court would allow a de novo hearing of evidence, thereby allowing new evidence to be introduced, and allowing evidence to be examined by the appeal tribunal (rather than merely accepting the facts as established on the record with the decision-maker).¹¹⁰ A more robust hearing of the facts would allow for a more contextual analysis, and more opportunities to move the law forward: the ability to hear evidence has been described as of “paramount importance”.¹¹¹

Allowing a de novo hearing of evidence would also allow for consistency with other taxpayers, as the Advisory Committee on the Charitable Sector noted:¹¹²

In all other aspects of Canadian life, the law is fully tested, discussed, debated, and ultimately evolved to reflect the needs of society, but not as it relates to charities ...

A recommendation to change the appeal process for refusals to register and revocations over to the Tax Court of Canada would address a number of issues. The main reasons for making this change include:

Consistency - While others in society, corporations and individuals, are permitted to appeal to the Tax Court on tax or ITA related matters, charities are not, with the exception of appeals involving penalties and sanctions, which are few in number. This lack of consistency needs to be changed to afford the same opportunity for charities as is provided to all others in society.

Trial De Novo - The current system is an appeal “on the record” meaning that no new written or oral evidence can be introduced, or witnesses can be called. As well, there is no opportunity provided to the applicant or charity to cross examine CRA on the record. This is an enormous disincentive for charities to bring cases forth in the current system. With litigation already being a costly and time-consuming process, charities need a system whereby they can introduce evidence that they deem is valid to their argument on appeal, not simply to be limited to the written record created during the CRA audit.

Rebalancing the Standard - The current system whereby the FCA proceeds only on the basis of the CRA’s written record is challenging for the sector. Quite simply it feels unfair. For the law to have a chance to evolve and adapt, there needs to be a system whereby vigorous debate and the opportunity to introduce relevant information are integral elements of the process.

System in Place - The Tax Court is already in existence to do what is needed because it is doing so in a fair and effective manner for Canadian taxpayers. It has an established mechanism that hears cases in more locations than any other federal court. While there is an argument that allowing charities to appeal to the Tax Court in the first instance would add to its workload, it is unlikely that this change would trigger a tsunami of cases. Rather it would create an accessible pathway that would allow for charity cases to be heard.

These arguments resonate in the New Zealand context also.

In April 2021, the Canadian Government responded to the Senate Committee as follows:¹¹³

The Government is committed to ensuring that the tax system is fair and equitable, and recognizes the importance of having effective and accessible appeal processes for charities. In this respect, the Government will review the framework for appeals relating to registered charity status and determine whether improvements could be made to this process (Recommendations 23 and 24).

The difficulties being experienced in Canada, and the proposals for addressing them, both illuminate and underscore the difficulties being experienced in New Zealand. There was

109 Ontario Law Reform Commission *Report on the Law of Charities* (Toronto, 1996) at 341; Report of the Special Senate Committee on the Charitable Sector [Catalyst for Change: A Roadmap to a Stronger Charitable Sector](#) June 2019 at 75, and at 76, referring to the evidence of Karen Cooper; P Broder “[Report of the Senate Special Committee on the Charitable Sector – A response](#)” (2020) *The Philanthropist Journal*.

110 Report of the Special Senate Committee on the Charitable Sector [Catalyst for Change: A Roadmap to a Stronger Charitable Sector](#) June 2019 at 72, and at 75, referring to the evidence of Dr A Parachin.

111 Report of the Special Senate Committee on the Charitable Sector [Catalyst for Change: A Roadmap to a Stronger Charitable Sector](#) June 2019 at 72, referring to the evidence of Dr A Parachin, and at 76.

112 Advisory Committee on the Charitable Sector [Report #1 – Towards a federal regulatory environment that enables and strengthens the charitable and nonprofit sector](#) January 2021, Appendix 1.

113 Hon D Leboutheillier, Minister for National Revenue [Government Response to the Report of the Special Senate Committee on the Charitable Sector](#) 30 March 2021 at 12 - 13.

strong support in submissions to the DIA's review of the Charities Act for charities' access to an oral hearing of evidence (a "trier of fact") to be restored.¹¹⁴

Recommendation 6.1:

That charities' access to a de novo oral hearing of evidence be reinstated.

114 See, for example, the [submissions](#) of Alan Pace: "Another thing that grieves me with this whole appeal process is Charities Services opposing an application for Family First to provide further evidence in the High Court case. Charities Services successfully argued that any evidence should have been given to Charities Services in writing before the Board made its decision, even though Charities Services only asked to provide 'submissions' and this was all occurring in a very tight and stressful timeframe for the charity! This sort of behaviour is not very charitable to say the least"; Angela McMorran: "We do need to have proper evidence-based hearings, enabling charities to lay out their case in person, with the ability to appeal and actually build our charity law on the basis of the lived experience of our charities, developing it as our society changes and develops – we no longer live in a predominantly European environment and the needs of our new community require crosspollination that often requires listening to the real experience of what is going on before making a judgment based on our own belief systems"; Chapman Tripp: "factual matters relating to evidence that Charities Services and the Board relies on when determining applications must be tested for accuracy on appeal, as misinformation can lead to unwarranted deregistration/denial of registration"; Lake Taupo Hospice Trust Inc: "a de novo hearing should be an option"; Lindsay Jeffs: "Oral evidence should be heard to ensure decisions are based on fact not opinion"; The Methodist Church of New Zealand Te Haahi Weteriana O Aotearoa Auckland Fiji Methodist Parish (Tabacakacaka): "In the absence of traditional court mechanisms for calling and testing evidence, applicants are disadvantaged. The applicants may be further disadvantaged in any subsequent appeal, because the court will only consider information provided in the initial application"; Methodist Church of New Zealand Te Haahi Weteriana O Aotearoa: "Charities need to be able to access an oral hearing of evidence in the first instance"; Oxfam New Zealand: "Charities ability to have an oral hearing of evidence must be reinstated, as per the pre-Charities Act regime. This is not a requirement in all cases but would be permitted when appropriate"; Parihimanihi Marae: "either [rehearing or de novo] as appropriate to the nature of the appeal"; Philanthropy New Zealand (many charities specifically supported Philanthropy New Zealand's call for an appeals system that adopts the following principles: ◦ Fair ◦ Low cost ◦ Certainty ◦ Independence ◦ Accessible ◦ Natural justice ◦ and Participatory - so charities have a right to speak and provide supporting evidence); Roger Eynon "On a case by case basis but an appeal should allow evidence to be represented orally and otherwise. This should be the default unless the appellant waives this right"; Surf Life Saving New Zealand Inc: "The flexibility should be there for both options – so the best outcome can be obtained on a case by case basis"; Te Pūtahitanga o Te Waipounamu: "Facts are established by evidence. The process of testing evidence and establishing facts assists the court in its decision-making... evidence should also be heard orally"; The Fred Hollows Foundation NZ: "there is no testing of evidence orally in re-hearings"; Volunteering New Zealand "One of the unintended consequences of previous changes to the regime included the removal of a charity's right to access an oral hearing of evidence during appeals. This right should be restored"; Wellington Combined Society of Bellringers: "both methods [rehearing and de novo] should be considered depending on the circumstances and the size of the appealing organisation"; Wellington Indian Association: "I feel the appeal should be in writing and oral so that if there is any clarification ... required ... they can get answers on the spot"; Youth Search and Rescue Trust NZ: "Should be optional, especially for Tier 3 and 4 who may not have the technical skill or able to afford lawyers/present the information correctly"; Abuse and Rape Crisis Support Manawatu Inc; Age Concern (Tauranga); Age Concern New Zealand; Alzheimers New Zealand; Asthma and Respiratory Foundation NZ; Auckland Medical Research Foundation; Auckland North Community and Development; Barry Coates, Sustainable Initiatives Aotearoa; Birthright New Zealand; Carolyn Bates; Ced Simpson and Valerie Williams; Central Lakes Trust; Christian Education Trust; College Estate Charitable Trust; Community Housing Aotearoa; Community Networks Aotearoa; Community Waikato; Community Waitakere; ComVoices; ConsumerNZ; Coromandel Independent Living Trust; Dave Henderson; David Boswell; Diane Robinson; Digits Charitable Trust; DV Bryant Trust; English Language Partners New Zealand Trust; Epilepsy Waikato Charitable Trust; Federated Farmers; FinCap (National Building Financial Capability Charitable Trust); Friends of Arataki and Waitakere Regional Parkland Inc; Grace Presbyterian Church of New Zealand; Graham Burger; Graham Burger; Habitat for Humanity New Zealand; Hawke's Bay Community Law Centre; I Got Your Back Pack; Individual B; Individual C; Jackie St John; Joanne Harland; Jon Horne; JR McKenzie Trust; Julia Fink; LEAD; Life in Vacant Spaces; Linda Webb; Lisa Abrams; Literacy Aotearoa Charitable Trust; Lloyd Brewerton; Manukau Christian Charitable Trust; Marine Reach Charitable Trust; Merv Ransom; Methodist Alliance; Motueka Family Service Centre; Multiple Sclerosis New Zealand Inc; Network Waitangi Otautahi Inc; New Zealand Land Search and Rescue Incorporated (LANDSAR); National Assistance Fund; New Zealand Law Society; Northland Urban Rural Mission; Organisation B; Organisation C; Parry Field Lawyers; Perpetual Guardian; Piers Davies; Pirongia Te Aroaro o Kahu Restoration Society Incorporated; Public Trust; Rape and Abuse Support Centre Southland Inc; Renewal Trust Inc; Richard Keam; Ross Beever Memorial Mycological Trust; Royal Forest & Bird Protection Society of New Zealand Inc; RMS; Sarah Doherty; Seed the Change | He Kākano Hāpai; SeniorNet Bream Bay Inc; Social Service Providers Aotearoa; SocialLink Tauranga Moana; Stopping Violence Services; Summit Road Society Incorporated; Taieri Community Facilities Trust; Tairāwhiti Environment Centre Inc; The Kate Edger Educational Charitable Trust; The Presbyterian Church of Aotearoa New Zealand; The Salvation Army Group; The United Fire Brigades' Association of New Zealand; Tiri Porter; Todd Foundation; Trust Democracy; WEL Energy Trust; Weleda Charitable Trust; Youth with a Mission Queenstown Lakes Charitable Trust (Tāhuna ki te Ao Charitable Trust); Youthlaw Aotearoa Inc.

As can be seen from the Greenpeace case study 4.1 above, charities have been experiencing significant delays in registration decision-making under the Charities Act (for example, it took the Board four years to reach a decision on Greenpeace's application following the Supreme Court decision in *Greenpeace*). Justice delayed can be justice denied: we recommend that the New Zealand legislation include a provision along the lines provided for in Australia,¹¹⁵ and recommended in Canada,¹¹⁶ allowing a registered charity or an applicant for registration to treat their registration as having been denied if a decision has not been made within 6 months. The effect of such a provision is to implement the "triage" approach discussed above, allowing matters that are clearly not straightforward to progress expeditiously to an independent judicial authority for determination on the basis of a full oral hearing of evidence.¹¹⁷

Recommendation 6.2:

That, to ameliorate current significant delays in making registration decisions (sometimes extending to several years), the charities' legislation specifically allow a registered charity, or an applicant for registration, to treat their registration as having been denied if a decision has not been made within 6 months, thereby allowing the matter to progress to an independent judicial authority for determination on the basis of a full oral hearing of evidence.

What body should hear appeals?

A strong theme of submissions to the Department's review of the Charities Act was that the cost of an appeal to the High Court is prohibitive, making appeals inaccessible for most charities, in turn raising concerns about access to justice, maintaining the rule of law, and the development of the common law.¹¹⁸ The number of appeals that have been

¹¹⁵ A similar approach is taken in Australia, where s 160-20 of the Australian Charities and Not-for-profits Commission Act 2012 provides that the Commissioner can be taken to have disallowed an objection if a decision is not made within 60 days, following which an appeal against the deemed decision can be made under s 160.25.

¹¹⁶ Report of the Special Senate Committee on the Charitable Sector *Catalyst for Change: A Roadmap to a Stronger Charitable Sector* June 2019 at 77, recommendation 23: "... A right to appeal to the Tax Court of Canada for cases where the Canada Revenue Agency's Tax and Charities Appeals Directorate (the Directorate) has not rendered a decision on an appeal by an organization that has had its application for registered charity status refused, or an existing charity that has had its registration revoked, within six months of it having been referred to the Directorate".

¹¹⁷ For some complex applications, a longer timeframe might in fact be appropriate, however, we expect that such situations could be provided for by means of judicial case management.

¹¹⁸ See, for example, the [submissions](#) of Alan Pace: "Currently a charity has to appeal to the High Court. This is costly and, unsurprisingly, very few charities do this. This means that the Charities Services and the Board are able to exert a lot of power with very little controls in place. This is dangerous. To put it another way, if a tier 4 (or possibly even a tier 3) charity is de-registered, the charity doesn't have the financial resources to challenge this. That is the end of that charity. End of story. It doesn't matter if it was the right or wrong decision; it is the end of that charity. It hasn't cost the board anything to make that decision but it has cost the charity everything. This is not right ... There needs to be a low-cost method of appealing decisions without going to the High Court"; Te Whakakitenga o Waikato Incorporated, on behalf of the Waikato-Tainui iwi, endorsed by the Waikato Raupatu Lands Trust and Group and Waikato-Tainui marae: "It is not appropriate for individual entities to bear the burden of funding the development of New Zealand charity law ... Appeals costs are generally inhibitive for individual entities, and it is very difficult to get other parties to contribute to such costs, so that many [charities law] decisions with wider implications for the charitable sector (eg in relation to sport/recreation purposes, economic development purposes, Maaori land trusts and other issues) are not appealed"; Lisa Abrams: "... the ability of the Sector to access just and equitable solutions is virtually non-existent"; JR McKenzie Trust: "Given the small number of appeals that have been pursued under the current limitations – just 26 appeals in 14 years – our charities law has not been able to evolve in response to changes in society, and NZ lacks the judicial experience necessary to give clarity and consistency of decisions. This results in ongoing debate about which decision, and which interpretation of the law, should be followed. A more affordable and accessible system would address this"; Abuse and Rape Crisis Support Manawatu Inc; Age Concern New Zealand; Alzheimers New Zealand; Braemar Charitable Trust; Cancer Society; Central Lakes Trust; Community Networks Aotearoa; Community Waitakere; Council for International Development; Habitat for Humanity New Zealand; Hawke's Bay Community Law Centre; Joanne Harland; Jon Horne; Julia Fink, K'aute Pasifika Trust; LEAD; Literacy Aotearoa Charitable Trust; Lucy Burt; Marine Reach Charitable Trust; Methodist Church of New Zealand Te Haahi Weteriana O Aotearoa; Neil Walbran; New Zealand Law Society; Piers Davies; Professor Carolyn Cordery; Save the Children New Zealand; Socialink Tauranga Moana; Te Pūtahitanga o Te Waipounamu; The Fred Hollows Foundation NZ; The Presbyterian Church of Aotearoa New Zealand; The UpsideDowns Education Trust; Trinity Lands Ltd; Wellington Youth Orchestra Inc; Youth with a Mission Queenstown Lakes Charitable Trust (Tāhuna ki te Ao Charitable Trust); and YouthLaw Aotearoa Inc.

taken under the Charities Act to date is remarkable given the significant practical barriers to accessing the process, perhaps underscoring the deep sense of unfairness current interpretations of the definition of charitable purpose are engendering.¹¹⁹

Many submitters recommended that New Zealand establish a specialist Charities Tribunal, similar to that established in other jurisdictions, or otherwise provide an option for charities to appeal to an existing lower-level independent body, such as the Taxation Review Authority.¹²⁰

In England and Wales, the cost of appeals to the High Court had been identified as a major barrier to the development of new case law: following major charities law reform in 2006, a specialist Charity Tribunal was established in 2008, intended to be a low-cost arbiter of charities law issues and a forum to hold the Charity Commission for England and Wales to account.¹²¹

Following a wholesale process of tribunal reform, the jurisdiction of the standalone Charity Tribunal was subsequently transferred to the First-Tier Tribunal (Charity), to form part of an integrated tribunal system.¹²² After a slow start, self-representation has started to occur, and expert assessment of the new tribunal is that the Commission has been held to account and has improved its due process procedures accordingly.¹²³

119 As noted in the [submission](#) of Trinity Lands Ltd: "The appeals process provided in law is through the High Court, which for most charities in NZ which are small (tier 3 and 4) becomes cost and resources prohibitive...many charities are likely to give up and not challenge a decision by the Registration board or Charities Services acting on behalf of the Board ... There is a significant power held by the board and its agent Charities Services, which also speaks again to the need for independence in exercising that power".

120 See Strategic Grants [Independent Community Consultation To Inform The Review Of The Charities Act \(2005\) Survey Report](#) 22 May 2019 at 14: 83% of respondents to the survey carried out on our behalf by Strategic Grants favoured establishing an independent specialist Charities Tribunal, along the lines of the Taxation Review Authority. See also the [submissions](#) of Abbeyfield New Zealand Inc; Acts Churches New Zealand; Age Concern New Zealand; Alan Pace; Alzheimers New Zealand; Andrew Bishop; Awhinui Umanga Trust; Auckland North Community and Development; Bishop's Action Foundation; Braemar Charitable Trust; Caleb Firth; Carolyn Bates; Central Lakes Trust; Chapman Tripp; Chartered Accountants Australia and New Zealand; Child Matters; Community Housing Aotearoa; Community Networks Aotearoa; Community Waikato; ComVoices; ConsumerNZ; Dave Henderson; Diane Robinson; Digits Charitable Trust; Don McKenzie CNZM OBE; English Language Partners New Zealand Trust; Federated Farmers; Fertility New Zealand (National) Inc; Friends of Arataki and Waitakere Regional Parkland Inc; Hawke's Bay Community Law Centre; I Got Your Back Pack; Individual B; Individual C; Iola Haggarty; Jackie St John; Joanne Harland; Kapiti Retirement Trust; K'aute Pasifika Trust; Lake Taupo Hospice Trust Inc; LEAD; Linda Webb; Lindsay Jeffs; Lisa Abrams; Lourdes Trainor; Lucy Burt; Make-a-Wish Foundation of New Zealand Trust; Manukau Christian Charitable Trust; Marine Reach Charitable Trust; Massey University Foundation; Methodist Alliance; Methodist Church of New Zealand Te Haahi Weteriana O Aotearoa; The Methodist Church of New Zealand Te Haahi Weteriana O Aotearoa Auckland Fiji Methodist Parish (Tabacakacaka); Motueka Family Service Centre; Multiple Sclerosis New Zealand Inc; National Assistance Fund; National Council of Women of New Zealand Incorporated; Neighbourhood Support New Zealand Inc; New Zealand Association Resource Centre Trust; New Zealand Breastfeeding Alliance; New Zealand Council of Christian Social Services; New Zealand Land Search and Rescue Incorporated; New Zealand Law Society; NZ Navigator Trust; New Zealand Portrait Gallery Trust; Organisation B; Organisation C; Oxfam New Zealand; Parihimanhi Marae; Parry Field Lawyers; Peter Hays; Peter Sharpe; Piers Davies; Platform; Renewal Trust Inc; Retirement Villages Association; Richard Keam; Roger Eynon; Sarah Doherty; Social Service Providers Aotearoa; SocialLink Tauranga Moana; Summit Road Society Incorporated; Surf Life Saving New Zealand Inc; Te Pūtahitanga o Te Waipounamu; The Fred Hollows Foundation NZ; The Kate Edger Educational Charitable Trust; The Presbyterian Church of Aotearoa New Zealand; Trinity Lands Ltd; Trust Democracy; University of Auckland Foundation; Volunteering Hawkes Bay; Youth Search and Rescue Trust NZ; YWCA Christchurch; and Youth with a Mission Queenstown Lakes Charitable Trust (Tāhuna ki te Ao Charitable Trust). See also the recommendations in Tessa Vincent [An uncharitable appeal framework for charities: is it time for a Charity Tribunal?](#) 9 October 2015.

121 See Charities Act 2006 (UK) s 8; Principal Judge A McKenna "Appealing the regulator: experiences from the Charity Tribunal for England and Wales" in M Harding, A O'Connell and M Stewart (eds) *Not-for-profit law: theoretical and comparative perspectives* (Cambridge University Press, 2014) 336 at 337; Tessa Vincent [An uncharitable appeal framework for charities: is it time for a Charity Tribunal?](#) 9 October 2015 at 36 – 37; M McGregor-Lowndes and B Wyatt (eds) *Regulating Charities: the Inside Story* (Routledge, New York, 2017) at 278.

122 Principal Judge A McKenna "Appealing the regulator: experiences from the Charity Tribunal for England and Wales" in M Harding, A O'Connell and M Stewart (eds) *Not-for-profit law: theoretical and comparative perspectives* (Cambridge University Press, 2014) 336.

123 Lord Hodgson of Astley Abbotts [Trusted and Independent: Giving charity back to charities – Review of the Charities Act](#) July 2012 at [7.31]; M McGregor-Lowndes and B Wyatt (eds) *Regulating Charities: the Inside Story* (Routledge, 2017) at 278.

Other aspects of the 2006 reforms included adjusting the traditional roles of the court and the Attorney-General, and making specific provision for “references” (that is, for the Attorney-General, or the Charity Commission with the consent of the Attorney-General, to refer cases to the tribunal to relieve individual charities of the burden of litigation).¹²⁴

Following the lead given by England and Wales, each of the other United Kingdom jurisdictions undertook a similar process of charities law reform, including establishing a specialist Charity Tribunal intended to provide a “cheap and swift alternative to the courts system for reviewing regulatory decisions”.¹²⁵

Ireland similarly established a specialist Charity Appeals Tribunal in 2009.¹²⁶ The amount of available case law in Ireland is limited as the Charities Regulatory Authority has not refused a large number of charity applications: Ireland is understood to be very reliant on case law from England and Wales and other jurisdictions.¹²⁷

Given the extent to which charities law is a specialist legal area, and given the importance of charities’ independence in a liberal democracy, New Zealand would benefit from similarly establishing a specialist Charities Tribunal.

However, we recognise that establishing a new tribunal would face a number of hurdles in the current fiscally-constrained environment: we were advised unequivocally there should be “no new tribunals” in New Zealand at the current time.¹²⁸ An added difficulty in this regard is that, even with recommended improvements to charities’ access to justice, charities’ inherent reluctance to litigate might mean insufficient numbers of charities law appeals in New Zealand to justify the cost of an entirely new, specialist tribunal.

These factors raise the question of whether charities in New Zealand might instead be given the option of appealing to an existing tribunal, and if so, which one.

As discussed above, there are strong proposals in Canada for charities law appeals to be heard before the Tax Court of Canada. Such proposals have parallels with the pre-Charities Act position in New Zealand, where charities had the option of appealing to either the High Court or the Taxation Review Authority, at their choice.¹²⁹ One option therefore might be to restore the pre-Charities Act position and restore charities’ ability to appeal to the Taxation Review Authority (“**TRA**”).

However, the definition of charitable purpose is an inherently equitable concept, which may not be well suited to a specialist tax jurisdiction. We have elsewhere recommended that the potential fiscal consequences of registration are clearly decoupled from an assessment of whether a purpose is charitable (recommendation 4.2).

Balanced against this concern is the fact that the potential fiscal consequences of registration did not appear to cause particular difficulty in pre-Charities Act jurisprudence, where the definition of charitable purpose was in fact interpreted very widely, as discussed above in chapter 3. A number of recommendations in this report are intended

124 Charities Act 2011 (UK) ss 325, 326; see also Principal Judge A McKenna “Appealing the regulator: experiences from the Charity Tribunal for England and Wales” in M Harding, A O’Connell and M Stewart (eds) *Not-for-profit law: theoretical and comparative perspectives* (Cambridge University Press, 2014) 336 at 343, 355. Specific provision is also made for the Attorney-General to be notified of proceedings and to intervene: Charities Act 2011 (UK) s318.

125 The Charity Tribunal for Northern Ireland was established by s 12 of the Charities Act (Northern Ireland) 2008, and came into being on 1 April 2010, intended to provide a more “user-friendly, low-cost alternative to the jurisdiction of the High Court” (Dr O Breen, Rev Dr L Carroll, N Lavery [Independent Review of Charity Regulation Northern Ireland](#) January 2022 at 202). The Scottish Charity Appeals Panel was established by s 75 of the Charities and Trustee Investment (Scotland) Act 2005, but from 2018 charity appeals are heard by The First-tier Tribunal for Scotland (Charities and Trustee Investment (Scotland) Act 2005 s 76). See also Australian Productivity Commission [Contribution of the Not-for-Profit Sector](#) 11 February 2010 at F4 – F5.

126 Charities Act 2009 (Ireland) s 75.

127 Interview with Helen Martin, Chief Executive of the Charities Regulatory Authority (10 December 2020).

128 Interview with Geoff Connor, Chief Advisor, Ministry of Business, Innovation and Employment (3 December 2020).

129 Tax Administration Act 1994 s 3 defines a “hearing authority” for the purposes of tax appeals as either the High Court or the Taxation Review Authority.

to clarify a number of current uncertainties (such as setting out the test for whether a purpose is charitable in legislation). Such factors, combined with restoring charities' access to an oral hearing of evidence, may be sufficient to counter concerns that the TRA may take an unduly tax-based approach to Charities Act appeals.¹³⁰

In addition, allowing appeals to the TRA would have a number of practical advantages. For example, the TRA processes are swifter, less formal and less costly than those applicable to the High Court. The TRA also has facility to hear cases in locations other than Wellington, and does not require the parties to be represented by a lawyer, providing significant potential to reduce cost and facilitate access to justice for affected charities. The TRA also has only limited capacity to order costs,¹³¹ which significantly reduces the risk of an adverse costs award for charities. Most importantly, the TRA operates as a commission of inquiry, which may encourage a more co-operative, fact-finding approach dedicated to finding the right answers than an adversarial approach focused on finding a "winner".¹³²

Charities by definition operate for the public benefit, meaning that a cooperative approach in the context of charities is in itself likely to be more cost-effective: for example, in England and Wales, the Charity Tribunal proactively assists applicants to present their case effectively, such as by utilising procedural flexibility to allow the appellant to "go second" so that they can respond to the government's case.¹³³ Providing a more accessible appeals mechanism would facilitate the development of charities law, providing enhanced potential for more legal clarity and transparency of decision-making.

Allowing Charities Act appeals to be heard by the TRA would, of course, have resource implications for the TRA. Further appointments to the TRA may be required. However, the number of cases being heard by the TRA is understood to have declined;¹³⁴ which is understood to have already led the TRA to hear appeals under other statutes (for example, the TRA may also sit as the Customs Appeal Authority).¹³⁵ Given that there are unlikely to be a large number of Charities Act appeals, and that a tribunal would be able to sit part-time in response to its workload, the resource implications seem likely to be minimal, particularly when compared with the overall benefits inherent in improving charities' access to justice.

On that basis, we recommend that the TRA be given additional jurisdiction to sit as a Charities Tribunal (or Charity Appeals Authority, or similar appropriate name), hearing appeals against decisions made under the Charities Act (with appeals from the TRA lying to the High Court in the normal way). A "charities" division of the TRA would be able to develop specialist expertise in a similar way to that which has been seen in England and Wales.

Despite these advantages, a handful of submitters did favour the High Court for first instance appeals,¹³⁶ and there will undoubtedly be circumstances where the High Court will remain the most appropriate first instance forum. On that basis, we recommend that charities are given the *option* of appealing a decision under the Charities Act to either the

130 As one submitter noted, if the legislation is clear in this regard "then decisions should be easier to make and there is less chance of needing a legal interpretation": [submission](#) of Individual B at 10.

131 Taxation Review Authorities Act 1994 s 22.

132 Taxation Review Authorities Act 1994 s 15; Lord Hodgson of Astley Abbotts *Trusted and Independent: Giving charity back to charities – Review of the Charities Act* July 2012 at [7.21].

133 T Vincent *An uncharitable appeal framework for charities: is it time for a Charity Tribunal?* 9 October 2015 at 39, 41.

134 T Vincent *An uncharitable appeal framework for charities: is it time for a Charity Tribunal?* 9 October 2015 at 52.

135 Comment made by the Taxation Review Authority during the hearing of *Case W52* (2004) 21 NZTC 11,475.

136 See, for example, the [submissions](#) of the Asthma and Respiratory Foundation New Zealand; Greenpeace: "Although continuing to have appeals to the High Court raises access to justice issues and means that appeals are likely to take a long time, while the charitable status test continues to be difficult to apply it is not appropriate for appeals to go to a specialist tribunal. In addition, generalist High Court judges bring objectivity and a fresh approach to the issues. This helps ensure that decision-making does not become too insular"; Merv Ransom; Public Trust; Ruth Wilson; and Tairawhiti Environment Centre Incorporated.

TRA or the High Court at their choice. Concurrent jurisdiction was the case prior to the Charities Act, as discussed above: it remains the case under tax legislation, and is also the case in other jurisdictions.¹³⁷ Many submitters supported this approach.¹³⁸

Recommendation 6.3:

That charities are given the *option* of appealing a decision under the Charities Act to either the Taxation Review Authority or the High Court at their choice, as was the case prior to the Charities Act, remains the case under tax legislation, and is also the case in other jurisdictions.

Broader jurisdiction

The “charities” jurisdiction of the TRA to hear appeals under the Charities Act could also be extended to hear appeals under other legislation, such as the new Incorporated Societies Act 2022, the Charitable Trusts Act 1957, and the Trusts Act 2019.

The Incorporated Societies Act

The Incorporated Societies Act 2022 received Royal Assent on 5 April 2022. It repeals and replaces the Incorporated Societies Act 1908 to modernise the rules for New Zealand’s 24,000 incorporated societies,¹³⁹ bringing to a culmination a review process that began in 2010.¹⁴⁰

Once the new legislation comes into force, every incorporated society will be required to have a set of internal disputes resolutions procedures in their constitutions:¹⁴¹ protracted and potentially destructive disputes within societies is a key issue the new legislation seeks to address.¹⁴² If those internal procedures fail to resolve an issue, Part 4 of the Act will empower a court to exercise a wide range of powers to enforce obligations, including where there has been a breach of natural justice, a serious breach of the procedures in a society’s constitution, a decision made in conflict with the public policy of New Zealand, a breach of an officer’s fiduciary duties, and/or where the operations of the society are being conducted in an oppressive, unfairly discriminatory or unfairly prejudicial manner.¹⁴³

Part 4 is subject to “any other legislation that confers exclusive jurisdiction in relation to a matter involving a society”: for example, if a society is a union, the Employment Authority or the Employment Court will have exclusive jurisdiction under the Employment Relations Act 2000.¹⁴⁴ Such other court or tribunal may make orders under Part 4 as if it were the High Court,¹⁴⁵ or order that a proceeding be transferred to the High Court.¹⁴⁶

The new legislation also provides for recourse to the courts in other circumstances. For example, a court may amend a society’s constitution, or make orders regarding information of a society or the use of a society’s name.¹⁴⁷ Part 5 provides a court with a power to order that a society be restored to, or not removed from, the register of

137 In England and Wales, see Lord Hodgson of Astley Abbotts *Trusted and Independent: Giving charity back to charities – Review of the Charities Act* July 2012 at [7.15]: “... the High Court ... still maintains its own jurisdiction over charitable matters, in parallel to the Tribunal”. In Northern Ireland, to similar effect, see Dr O Breen, Rev Dr L Carroll, N Lavery *Independent Review of Charity Regulation Northern Ireland* January 2022 at 202.

138 See in particular the [submissions](#) of Age Concern New Zealand, ComVoices, the New Zealand Law Society, and Te Whakakitenga o Waikato Incorporated, on behalf of the Waikato-Tainui iwi, endorsed by the Waikato Raupatu Lands Trust and Group and Waikato-Tainui marae.

139 Incorporated Societies Bill 15-2 ([select committee report](#)) at 1.

140 Te Aka Matua o te Ture - New Zealand Law Commission *Incorporated Societies Act 1908 – Project Overview*: <www.lawcom.govt.nz/our-projects/incorporated-societies-act-1908>.

141 Incorporated Societies Act 2022 s 26(1)(j).

142 Te Aka Matua o te Ture - New Zealand Law Commission *A New Act for Incorporated Societies* (NZLC R129, 2013) at 125.

143 Incorporated Societies Act 2022 ss 4(1)(d), 129 - 173.

144 Incorporated Societies Act 2022 s 128(1).

145 Incorporated Societies Act 2022 s 128(2).

146 Incorporated Societies Act 2022 s 128(3).

147 Incorporated Societies Act 2022 ss 35, 83, 121.

incorporated societies,¹⁴⁸ or be put into liquidation.¹⁴⁹ Part 6 provides a right of appeal against any decision of the Registrar of Incorporated Societies made under the Act (with a limited number of specific exceptions).¹⁵⁰

In certain cases, the Act specifies whether a matter is to be heard by the High Court or the District Court: for example, matters relating to liquidation are dealt with by the High Court; appeals against Registrar's decisions are dealt with by the District Court.¹⁵¹ Otherwise, the High Court and District Court have concurrent jurisdiction.¹⁵²

Given that incorporated societies are, by definition, not-for-profit entities,¹⁵³ and given that many incorporated societies are also registered under the Charities Act, it would make sense for the TRA sitting in its "charities" jurisdiction to be able to hear such matters and build up expertise in a specialist and overlapping area. Concurrent jurisdiction with the High Court could be retained.

The Trusts Act 2019

In addition, there may be efficiencies in the TRA sitting in its "charities" jurisdiction hearing certain appeals under the Trusts Act 2019.

The Trusts Act 2019 came into force on 30 January 2021, bringing to a culmination a review process that officially began in 2009 (but in fact commenced much earlier in 2002).¹⁵⁴ The new legislation implements a number of the Law Commission's recommendations for resolving trust disputes: Part 7 of the Trusts Act enables the use of alternative dispute resolution, in the interests of keeping trust-related disputes out of court wherever possible;¹⁵⁵ section 153 also enables a trustee or a beneficiary to apply to Public Trust for investigation of the condition and accounts of trust property.¹⁵⁶ Otherwise, the Trusts Act provides for the High Court to have a general power to review decisions and to hear applications for directions.¹⁵⁷

The power to review decisions does not limit the inherent jurisdiction of the High Court to supervise and intervene in the administration of a trust, or its jurisdiction under the Charitable Trusts Act 1957.¹⁵⁸

The Trusts Act also provides for the High Court to have a number of other powers. For example, the High Court may decide whether a trustee is in breach of trust, has been grossly negligent, or should be relieved from personal liability; appoint special trust advisers; approve the indemnification of a trustee; rank trust property; appoint or remove trustees; approve a termination, variation, or resettlement of a trust; appoint a receiver to administer a trust; vary or extend trustees' powers, bar claims; authorise certain distributions; order payment of trustee remuneration; charge costs on trust property; appoint representatives; order alternative dispute resolution for an internal matter; among other things.¹⁵⁹

However, as the Law Commission noted, trust disputes are often not well suited to litigation: where breaches of trust are at the less serious end of the spectrum, involve less financial loss, or a beneficiary simply wants to warn a trustee before the trustee goes too far, there are few appropriate, satisfactory solutions available for beneficiaries

148 Incorporated Societies Act 2022 ss 182, 188, 190.

149 Incorporated Societies Act 2022 ss 210.

150 Incorporated Societies Act 2022 s 249.

151 Incorporated Societies Act 2022 ss 252, 253.

152 Incorporated Societies Act 2022 ss 5(1), definition of "court".

153 Incorporated Societies Act 2022 s 5(3)(a)(i).

154 Te Aka Matua o te Ture - New Zealand Law Commission [Review of the Law of Trusts: A Trusts Act for New Zealand](#) (NZLC R130, 2013) at iv.

155 Trusts Act 2019 ss 142 - 148.

156 This provision largely re-enacts Trustee Act 1956 s 83B: Te Aka Matua o te Ture - New Zealand Law Commission [Review of the Law of Trusts: A Trusts Act for New Zealand](#) (NZLC R130, 2013), recommendation 44.

157 Trusts Act 2019 ss 9 (definition of "court", with special provision made for the jurisdiction of the Family Court in s 141) 54, 64, 79, 93, 95, 126 - 127, 133 - 134, 137, 157.

158 Trusts Act 2019 ss 8, 126(4). See also Charitable Trusts Act 1957 ss 33, 41.

159 See Trusts Act 2019 ss 128 - 129, 44, 131, 74, 76, 83 - 84, 132, 85, 86, 96(3), 109 - 116, 124 - 125, 138, 130, 134, 135, 139, 140, 144, 145.

to hold trustees to account. The Law Commission noted the relative inaccessibility of the High Court, and considered the system needed a low key, early intervention warning and monitoring mechanism.

For that reason, the Law Commission also examined the options of a Trusts Ombudsman, a Trusts Commission, or a Trusts Tribunal.¹⁶⁰ With respect to the latter, the Law Commission made the following comments:¹⁶¹

Another option to improve trust dispute resolution is a tribunal. A tribunal could be established as an alternative to an ombudsman as a lower level decision-maker than the courts. It would have binding decision-making authority. Tribunals can be an option where there is a need for either a specialist decision-maker with expertise that a court cannot provide, or for a lower level, more informal and accessible decision-maker.

A tribunal could be given jurisdiction to make decisions on certain trust issues. It may need to have a jurisdictional limit, such as only being able to hear complaints where \$200,000 or less is at issue. The likely caseload of a trusts tribunal would be small compared with some tribunals. However, there may be a sufficient number of cases that a tribunal would be warranted. There are existing tribunals that hear fewer than one hundred cases per year. Where there is not a sufficient case load for a full-time tribunal, tribunals can sit on a part-time basis.

The Law Commission's study paper *Tribunal Reform* proposes a unified tribunal service that would unite a large number of tribunals, arranged into divisions, under the leadership of a Principal Tribunals Judge. While it is unclear whether this proposal will be progressed in the future, it is certainly evident that establishing a tribunal within an existing administrative structure could be more cost-effective than a completely independent tribunal. The Ministry of Justice's *Tribunals Unit* is a possible location for a trusts tribunal.

Tribunal Reform sets out guidelines against which new tribunals can be considered in order to avoid tribunals being established indiscriminately without an eye to coherence or a principled structure. One factor that should be considered is whether there are compelling reasons relating to subject-matter or process which mean that trusts matters are more suitable to a tribunal than a court.

In its 1989 report on tribunals, the Legislation Advisory Committee identified three factors for assessing whether the decision-maker under any new statutory scheme should be a court, a tribunal or an arm of government. These are:

- (a) the characteristics of the function, together with the issues to be resolved and the interests affected;
- (b) the qualities and responsibility of the decision-maker; and
- (c) the procedure to be involved.

In trusts disputes, the function is adjudicative. However, the role also requires clarification of complex legal issues. It affects the rights and responsibilities of trustees, beneficiaries and settlors. The decision-maker is likely to need to be a judge, given the complexity and "judge-made" status of the law of equity. Because many trust disputes involve family arrangements, a formal court procedure is not necessarily the most helpful in trust disputes.

Evaluating the option of a trusts tribunal

A trusts tribunal could improve access to dispute settlement compared to the current situation. It is likely to be quicker, cheaper, more informal and less adversarial than the High Court. It would have a different role to an ombudsman. It could make binding decisions rather than recommendations, which may make it more effective at determining disputes. Educative, guidance and mediation functions would fit better with the functions of an ombudsman or commission ... although publicly available tribunal decisions would contribute to public education and guidance.

A tribunal would have the power to make legally binding decisions. At least one of the tribunal members could be a judge and this would imbue its proceedings with greater weight than a non-judicial ombudsman. The trusts tribunal would be able to build up specific

160 Te Aka Matua o te Ture - New Zealand Law Commission, Issues Paper 28 *Court jurisdiction, trading trusts and other issues – Review of the law of trusts fifth issues paper* (NZLC IP 28, 2010): www.lawcom.govt.nz/sites/default/files/projectAvailableFormats/NZLC%20IP28.pdf ch 4.

161 Te Aka Matua o te Ture - New Zealand Law Commission, Issues Paper 28 *Court jurisdiction, trading trusts and other issues – Review of the law of trusts fifth issues paper* (NZLC IP 28, 2010) at 51 - 53 (footnotes omitted).

expertise in the law of equity and trusts. This would address the concern that, as the courts are dealing with trust issues so seldomly, they are not building sufficient expertise in this area of law.

However ... there is a concern that allowing a tribunal to make decisions on trusts would be delegating the court's decision-making authority, and the determination of complex questions of equity, too far. Some powers could be retained for the courts under legislation and there would be a right of appeal.

A trusts tribunal would require some government funding One of the benefits of a tribunal, so long as it is administratively supported within an existing structure, such as the Ministry of Justice's Tribunals Unit, is that it can operate on a part-time basis and sit in response to its workload.

These arguments apply equally to appeals under the Charities Act, where the following benefits would similarly apply: improved access to dispute resolution; a lower level, more informal and accessible decision-maker; a decision-maker that is judicial, given the complexity and "judge-made" status of the law of equity from which charities law derives; quicker, cheaper and less adversarial processes of a tribunal compared to the High Court; the ability to build up specific judicial expertise in an equitable area of law; the ability for a tribunal to sit on a part-time basis in response to its workload; and the benefits of publicly-available decisions that are binding (if not precedential).

The Law Commission's issues paper was published in 2010, in the midst of a global financial crisis, which no doubt explains why the Law Commission considered the cost of a trusts tribunal might be prohibitive "in the current fiscal environment", despite having much to recommend it:¹⁶²

It is likely that for now the best approach is to improve access to the courts in trust matters and improve the processes available under trusts legislation. *The options of a trusts ombudsman, tribunal and commission do have merit, and, especially if trusts continue to be as prolific in New Zealand as they are now, they may warrant consideration at a later time.* We are interested in views about the viability and desirability of these options.

Most charities in New Zealand are structured as charitable trusts and therefore subject to the Trusts Act 2019. If the jurisdiction of the TRA is extended to hear appeals under the Charities Act, consideration should also be given to further extending such jurisdiction to fulfil the role envisaged by the Law Commission for a trusts tribunal. Advantages of this approach would include reducing costs, freeing up High Court time, taking advantage of overlaps and synergies, building specialist experience and expertise, and improving access to justice. Recourse to the High Court in appropriate circumstances can be preserved by means of concurrent jurisdiction, as discussed above.

The Charitable Trusts Act 1957

In addition, a specialist Charities Tribunal could also take over some of the role of the High Court under the Charitable Trusts Act 1957,¹⁶³ such as hearing appeals against registration decisions under s 17 and proceedings to enforce or vary a charitable trust under s 60.

Under Parts 3 and 4 of the Charitable Trusts Act, the High Court also has an important role in approving schemes. In some other jurisdictions, such as England and Wales, Northern Ireland, and Ireland, such cy-près powers have, to some extent, been vested in the agency responsible for administering charities' legislation.¹⁶⁴ The work of the Charity Commission for England and Wales in this regard is understood to be greatly valued.¹⁶⁵

¹⁶² Te Aka Matua o te Ture - New Zealand Law Commission, Issues Paper 28 [Court jurisdiction, trading trusts and other issues – Review of the law of trusts fifth issues paper](#) (NZLC IP 28, 2010) at 53 (emphasis added).

¹⁶³ See the definition of "court" in Charitable Trusts Act 1957 s 2.

¹⁶⁴ Charities Act 2011 (UK) s 69 provides for the Charity Commission to have concurrent jurisdiction with the High Court in charity proceedings for the purposes of: establishing a scheme for the administration of a charity; appointing, discharging or removing charity trustees, officers or employees; and vesting or transferring property. Charities Act (Northern Ireland) Act 2008 s 31 makes similar provision for The Charity Commission for Northern Ireland.

¹⁶⁵ Lord Hodgson of Astley Abbotts [Trusted and Independent: Giving charity back to charities – Review of the Charities Act](#) July 2012 at [5.7].

However, it has also been questioned as an inappropriate use of scarce Commission resources, given that it often requires considerable work for the benefit of only a single charity.¹⁶⁶

In New Zealand, taking on a similar role would require a significant increase in the level of trust law expertise currently available in the agencies responsible for administering the Charities Act. While such expertise may have significant flow-on benefits for the administration of the Charities Act more generally, an alternative option to burdening the agencies with a significant additional scope of work would be to allow such schemes to be approved by a specialist Charities Tribunal. Transferring these functions to the TRA acting in a specialist “charities” jurisdiction would retain independent judicial oversight of these important matters, while also allowing for the freeing up of High Court time and resources, taking advantage of overlaps and synergies, building specialist experience and expertise, and improving access to justice. It would also accord with the principles of the Public Service Act 2020 such as “working across silos”.

On that basis, we recommend that the TRA be given additional jurisdiction to sit as a Charities Tribunal, to hear appeals against decisions made under the Charities Act, the new Incorporated Societies Act, the Trusts Act and the Charitable Trusts Act (with concurrent jurisdiction with the High Court).

Consideration might also be given to the benefits of the Charities Tribunal being able to hear appeals by the bodies responsible for the self-regulation of fundraising in New Zealand (the Public Fundraising Regulatory Authority and the Fundraising Institute of New Zealand).

We also recommend that, in carrying out a first principles post-implementation review of the Charities Act, consideration also be given to the wider legal framework for charities, including the Charitable Trusts Act 1957,¹⁶⁷ and the role of the Attorney-General.¹⁶⁸ The Charitable Trusts Act is over 60 years old and much in need of review and modernisation (for example, the fine under s 23 of the Act is “1 shilling” per day).

Recommendation 6.4:

That the jurisdiction of the Taxation Review Authority to hear appeals under the Charities Act is further extended to hear appeals under other legislation applicable to charities, such as the new Incorporated Societies Act, the Charitable Trusts Act 1957, and the Trusts Act 2019.

¹⁶⁶ Lord Hodgson of Astley Abbotts *Trusted and Independent: Giving charity back to charities – Review of the Charities Act* July 2012 at [5.11].

¹⁶⁷ Many submitters to the DIA’s review of the Charities Act made this point.

¹⁶⁸ The terms of reference for the review of the Charities Act specifically include the “interface between the provisions of the Act, and provisions in the Incorporated Societies Act 1908 (and proposed Incorporated Societies Bill), Charitable Trusts Act 1957 and the Trusts Bill (with the aim of better alignment)”. See Department of Internal Affairs *Terms of reference to review the Charities Act 2005* May 2018 at 3.

What should be the timeframe for Charities Act appeals?

Section 59(2) of the Charities Act requires appeals to be lodged within 20 working days after the date of the decision (or any further time that the High Court may allow on application made before or after the expiration of that period). The 20-working day period runs from the date of decision meaning that, if the decision is not immediately communicated to the charity (for example, if it is posted), the time available for a charity is even further reduced. This is a very short timeframe for a charity (often run by a board of volunteers) to convene, absorb an adverse decision, assess the ability to find funding for legal fees, seek advice, obtain a mandate (if structured democratically), reach a considered decision, and instruct a lawyer to prepare and file High Court proceedings,

Only a handful of submitters to the DIA's review of the Charities Act considered the current timeframe to be reasonable.¹⁶⁹ Almost all submitters that commented on the appeal process considered the timeframe to be unrealistic, a major obstacle to adequate consideration of an appeal, and a material factor in the inaccessibility of appeals for charities.¹⁷⁰

Most comparable jurisdictions allow for a longer timeframe for charities' appeals.

Australia, for example, allows an appeal within 60 days (with time running from the time the charity has been *served* with notice of the decision, rather than simply from the time the decision was made).¹⁷¹

In England and Wales, charities have 42 days to appeal;¹⁷² however, a review of the charities law framework found this timeframe to be too short and recommended an extension to a period "longer than 3 months":¹⁷³

It would allow for many charities' quarterly trustee meeting cycle, allow decisions on taking action to be made after due reflection, and would also give more leeway for the use of both IDR [Internal Decision Review] and the Tribunal process. An extension of time would also allow the inexperienced more time to build their case, thus facilitating improved access to justice.

In Northern Ireland, charities similarly have 42 days to appeal (with time running from the date on which notice of a decision was sent to the appellant to appeal a decision, rather than simply from the time the decision was made).¹⁷⁴ The normal timeframe for appeals to tribunals in Northern Ireland is 28 days,¹⁷⁵ meaning that a specific

169 See the [submissions](#) of Greenpeace; Heather Pennycook; Lake Taupo Hospice Trust Inc; Linda Webb; Renewal Trust; Surf Life Saving New Zealand Inc; and the Tairāwhiti Environment Centre Inc.

170 Te Tari Taiwhenua Internal Affairs [Modernising the Charities Act 2005 - Summary of submissions](#) December 2019 at 5. See also the [submissions](#) of Age Concern (Tauranga); Angela McMorran; Auckland Medical Research Foundation; Carolyn Bates; Central Lakes Trust; Chapman Tripp; Child Matters; College Estate Charitable Trust; Community Trust South; ComVoices; Council for International Development; Dave Henderson; English Language Partners New Zealand Trust; Epilepsy Waikato Charitable Trust; Friends of Arataki and Waitakere Regional Parkland Inc; Habitat for Humanity New Zealand; Jackie St John; K'aute Pasifika Trust; Momentum Waikato; National Assistance Fund; Noela Rendle; Parry Field Lawyers; Perpetual Guardian; Philanthropy New Zealand; Pirongia Te Aroaro o Kahu Restoration Society Incorporated; Public Trust; Ross Beever Memorial Mycological Trust; Seed the Change | He Kākano Hāpai; Social Service Providers Aotearoa; Taieri Community Facilities Trust; Te Pūtahitanga o Te Waipounamu; The United Fire Brigades' Association of New Zealand; Tiri Porter; Todd Foundation; Weleda Charitable Trust; WEL Energy Trust; and Wellington Youth Orchestra Inc.

171 Australian Charities and Not-for-profits Commission Act 2012 ss 170-5, 165-15. This timeframe is also used in a number of other places in the Act. For example, objections must be lodged within 60 days after notice of an administrative decision has been served on a charity under s 160-10. The Commissioner must implement a Tribunal or Court decision within 60 days (ss 165-45 and 170-20). Under s 60-65, small charities are given 60 days to correct an error in their information statement or financial report (medium or large charities are given 28 days). Similar timeframes are provided for required notifications under s 65-5(4). Charities are given 28 days to provide a written response to a "show cause" notice under ss 35-15, 100-10 and 100-15, showing cause why the Commissioner should not revoke their registration or suspend or remove a responsible entity. A 28-day period is also used to calculate the "base penalty amount" under s 175-40.

172 [The Tribunal Procedure \(First-tier Tribunal\) \(General Regulatory Chamber\) Rules 2009](#) r 26(1)(a).

173 Lord Hodgson of Astley Abbotts [Trusted and Independent: Giving charity back to charities - Review of the Charities Act](#) July 2012 at [7.22], [7.34].

174 [The Charity Tribunal Rules \(Northern Ireland\) 2010](#) r 17(1)(a).

175 Northern Ireland Courts and Tribunals Service [Guide to completing the notice of appeal](#): www.justice-ni.gov.uk/sites/default/files/publications/justice/charity-appeal%20guidance-notes.pdf at [4].

exception is made for charities in this regard. Even so, the recent independent review of charities legislation in Northern Ireland similarly considered 42 days to be too short and recommended extension to a period “longer than 3 months”:¹⁷⁶

[42 days] gives the trustees limited time to make decisions and fails to reflect the reality that many trustee meeting cycles operate on a monthly or quarterly basis. [A longer timeframe] would allow for many charities’ quarterly trustee meeting cycles, allow decisions on taking action to be made after due reflection and allow charities without the benefit of staff a longer period to prepare their case, thereby facilitating access to justice.

The United States allows appeals to the United States Tax Court, the United States Court of Federal Claims or the United States District Court for the District of Columbia within 90 days of the date of the Internal Revenue Service’s final determination letter.¹⁷⁷

In Canada, the time limit for filing an appeal to the Tax Court of Canada is also 90 days from the date on the notice;¹⁷⁸ the current timeframe for charities to appeal to the Federal Court of Appeal is 30 days.¹⁷⁹

In Scotland, appeals to the First-tier Tribunal must be made within 28 days of notice of the decision being given to the charity.¹⁸⁰ In Ireland, appeals to the Charity Appeals Tribunal must be made within 21 days after the charity has been served with notice in writing of the Authority’s decision.¹⁸¹

In other words, New Zealand provides the shortest timeframe for charity appeals of all comparable countries (in some cases, two, three or even four times shorter).

In New Zealand, most submitters that specified an alternative timeframe considered 60 days would be any appropriate timeframe for appeals.¹⁸² Others favoured a time period of 90 days, or longer,¹⁸³ with some drawing a comparison with the timeframe of 90 days provided for employees to lodge a personal grievance.¹⁸⁴ By contrast, the DIA draws comparisons with appeals to the High Court under the Companies Act (15 working days), and the Incorporated Societies Act 1908 (21 days, to be extended to 28 working days by the new legislation).¹⁸⁵

176 Dr O Breen, Rev Dr L Carroll, N Lavery *Independent Review of Charity Regulation Northern Ireland* January 2022 at 202 recommendation 67.

177 United States’ Department of the Treasury Internal Revenue Service *How to Appeal an IRS Determination on Tax-Exempt Status* Publication 892 (Rev. 2-2017) Catalog Number 46844C: www.irs.gov/pub/irs-pdf/p892.pdf at 3.

178 Income Tax Act (RSC, 1985, c1 (5th Supp)) s 169.

179 Government of Canada *Objections and appeals: Registered charities, registered Canadian amateur athletic associations (RCAAs), and other listed qualified donees* 31 July 2021: www.canada.ca/en/revenue-agency/services/about-canada-revenue-agency-cra/complaints-disputes/objections-appeals-registered-charities-registered-canadian-amateur-athletic-associations-rcaas-other-listed-qualified-donees.html.

180 Charities and Trustee Investment (Scotland) Act 2005 s 76(4).

181 Charities Act 2009 (Ireland) s 45. Although s 77 provides that an appeal must be brought not later than 21 days “from the date of the decision that is being appealed”.

182 See the [submissions](#) of Abbeyfield New Zealand Inc; Age Concern New Zealand; Braemar Charitable Trust; Caleb Firth; Community Housing Aotearoa; ConsumerNZ; Dave Henderson, DV Bryant Trust; Federated Farmers; I Got Your Back Pack; JR McKenzie Trust; Lindsay Jeffs; Lloyd Brewerton; Make-A-Wish Foundation of New Zealand Trust; Methodist Alliance; The Methodist Church of New Zealand Te Haahi Weteriana O Aotearoa Auckland Fiji Methodist Parish (Tabacakacaka); Multiple Sclerosis New Zealand Inc; Museums Aotearoa; Nano Nagle Charitable Trust; New Zealand Law Society; New Zealand Portrait Gallery Trust; Oxfam New Zealand; Richard Keam; SeniorNet Bream Bay Inc; The Fred Hollows Foundation NZ; The Ozanam House Trust; The Presbyterian Church of Aotearoa New Zealand; The Tindall Foundation; The UpsideDowns Education Trust; Trust Democracy; Volunteering Hawkes Bay (10 weeks); and Youth Search and Rescue Trust NZ.

183 See the [submissions](#) of Community Networks Aotearoa; Community Waikato; Diane Robinson; Digits Charitable Trust; Graham Burger; Hawke’s Bay Community Law Centre; Individual B; Individual C; Individual D; Kapiti Retirement Trust; Merv Ransom; New Zealand Breastfeeding Alliance; New Zealand Land Search and Rescue Incorporated (LANDSAR); Organisation C; Parihimanihi Marae; Roger Eynon; Stopping Violence Services; Summit Road Society Incorporated; The Kate Edger Educational Charitable Trust; Wellington Combined Society of Bellringers; and Wellington Indian Association.

184 Employment Relations Act 2000 s 114.

185 See Te Tari Taiwhenua Internal Affairs *Modernising the Charities Act 2005: Discussion Document* February 2019 at 36, referring to Companies Act 1993 s 370; Incorporated Societies Act 1908 s 34B; Incorporated Societies Act 2022 s 249.

The timeframe of 20 working days is unchanged from the original Charities Bill, introduced into Parliament in 2004.¹⁸⁶ As discussed above, the Charities Bill as originally introduced was widely regarded to be fundamentally flawed, and was almost completely rewritten at Select Committee stage in response to hundreds of submissions. It was ostensibly based on the Companies Act 1993, and criticised for having been “conceived ... in Treasury, and ... designed by the Ministry of Economic Development”.¹⁸⁷

Conceptually, the choice of timeframe reflects a choice of underlying paradigm. If a charities regime is conceived as little more than a licensing regime, such as might be applicable to motor vehicles or dogs, the need for a more fulsome period for appeals may not be readily apparent. If, however, a charities regime is conceived as supporting a charitable sector that is fundamental to social capital and a healthy democracy, eligibility for which may turn on complex, factual questions of public benefit that may have far-reaching consequences, allowing a more fulsome period for appeals would be recognised as critical (as reflected by the timeframes allowed by most comparable jurisdictions).

On the basis of all of the above, we recommend that the timeframe for appeals under the Charities Act be extended to 60 days, in line with Australia and the bulk of submissions that commented on this issue.

Recommendation 6.5:

That the timeframe for appealing decisions under the Charities Act is extended to 60 days, in line with Australia.

What decisions should be subject to appeal?

The question of which decisions made under the Charities Act should be subject to appeal has had a turbulent history and, as at the date of writing, remains the subject of dispute. unresolved. As with the nature of the hearing on appeal, discussed above, a full appreciation of the significance of this issue requires an understanding of the detail of its context, which is discussed next.

Parliament’s original intention

In the Charities Bill as originally introduced, charities would have been able to appeal only a limited range of decisions, principally those relating to registration and deregistration. Because the wording is significant, cl 67(1) of the original Charities Bill is set out in box 6.3 for reference (with emphasis added):¹⁸⁸

Box 6.3 – the appeal right as introduced

67 Appeals against decisions of the Commission

- (1) A person may appeal *to the District Court* against the following decisions:
 - (a) a decision of the Commission to *refuse to register* as a charitable entity that person ...
 - (c) a decision of the Commission to *remove from the register* of charitable entities that person ...
 - (e) a decision of the Commission to *impose an administrative penalty* against that person ...

¹⁸⁶ [Charities Bill 2004 \(108-1\)](#) cl 67(2).

¹⁸⁷ Charities Bill 3R (12 April 2005) 625 NZPD 19,940 per Sue Bradford (Green).

¹⁸⁸ Under the original Charities Bill, the Charities Commission would have administered a register of approved donee organisations, in addition to the register of charities. Paragraphs (b) and (d) of s 67(1) related to decisions to register or deregister entities from the register of approved donees. However, the Select Committee considering the Bill considered it would be inappropriate to have an autonomous Crown entity, which is independent and not required to give effect to Government policy, responsible for making decisions that will impact on the revenue base. Accordingly, all references to administering a register of approved donees were subsequently removed. See Charities Bill 2004 (108-2) ([select committee report](#)) at 2.

As discussed above, the original Charities Bill was substantially rewritten by the Social Services Select Committee in response to hundreds of submissions. One of the key issues raised by submitters related to the limited range of options for appeal. To address these concerns, the Select Committee struck out cl 67(1) altogether, and replaced it with the following:¹⁸⁹

67 Right of appeal

- (1) A person who is aggrieved by *a decision of the Commission* under this Act may appeal to the High Court.

In making this change, the Select Committee made the following comments:¹⁹⁰

The majority considers that charities *should not be limited to appealing decisions relating to registration*, and that it should be possible to appeal from *all decisions of the Commission that adversely impact on a particular entity*. The majority recommends that the bill be amended to achieve this end.

In other words, the intention of the Select Committee was that charities should be able to appeal *all* decisions made by the Charities Commission, not just those relating to registration. Charities had fought hard to achieve this change.

This change progressed into ss 59 and 61 of the Charities Act 2005 as originally passed, which are set out in box 6.4 for reference (emphasis added):

Box 6.4 – the appeal right as originally passed:

59 Right of appeal

- (1) A person who is aggrieved by *a decision of the Commission* under this Act may appeal to the High Court.

...

61 Determination of appeal

- (1) In determining an appeal, the High Court may -
(a) confirm, modify, or reverse the decision of the Commission or any part of it:

In other words, Parliament's original intention in passing the Charities Act was that charities should be able to appeal *any* decision made under the Charities Act.

Disestablishment of the Charities Commission

In May 2011, less than three years after the Charities Act had fully come into force,¹⁹¹ the Government announced a proposal to disestablish the Charities Commission, on the basis that reducing the number of government agencies would result in "better value for money".¹⁹²

The vehicle to effect this change was the Crown Entities Reform Bill 332-1 ("**the Bill**"), which was introduced into Parliament in September 2011. Part 1 of the Bill proposed to disestablish the Alcohol Advisory Council of New Zealand, the Health Sponsorship Council, and the Crown Health Financing Agency. Part 2 proposed to disestablish the Mental Health Commission. Part 3 proposed to disestablish the Charities Commission and transfer its functions to the DIA, with registration and deregistration of charities to be made by a new Board of three persons, to be known as the Charities Registration Board.

The detail of the specific changes in Part 3 is important.

The key provisions (cls 41 - 53 of the Bill) proposed to amend ss 4 to 12 of the Charities Act to reassign the functions and duties of the Charities Commission among the new

¹⁸⁹ Charities Bill 2004 (108-2) at 64 – 65 (emphasis added).

¹⁹⁰ Charities Bill 2004 (108-2) ([select committee report](#)) 17 December 2004 at 13 (emphasis added).

¹⁹¹ The provisions requiring charitable registration as a prerequisite to income tax exemption came into force on 1 July 2008: [Charities Act Commencement Order 2006](#) cl 4.

¹⁹² See "[Government reviews more state agencies](#)" (31 May 2011), online: [Scoop Parliament: <www.beehive.govt.nz/release/government-reviews-more-state-agencies>](#). The proposal was subsequently confirmed in August 2011: New Zealand Government press release [Reduction in State Agencies confirmed](#) 12 August 2011: [<www.beehive.govt.nz/release/reduction-state-agencies-confirmed>](#).

Board and the DIA (referred to in the legislation as the “chief executive” but in practice delegated to Charities Services, a business unit within DIA).

We note in passing that cl 43 of the Bill proposed to remove the Charities Commission’s *functions* of promoting public trust and confidence in the charitable sector and promoting the effective use of charitable resources, and elevate them to *purposes of the Act*. This change is discussed further below in chapter 8.

For current purposes, it is significant to note that cl 54 of the Bill then provided for a number of “consequential amendments” as listed in sch 8. Specifically, schedule 8 worked through all of the remaining sections of the Charities Act replacing every reference to “the Commission” with a reference to either:

- (i) the Board;
- (ii) the chief executive; or
- (iii) both.

Schedule 8 ran to nine pages and contained proposed consequential amendments to 43 sections of the Charities Act.

With respect to the appeal right, schedule 8 provided for s 59 to be amended as follows (emphasis added):

Section 59 Omit “Commission” in each place where it appears and substitute in each case “Board”.

On its face, the proposal to replace the word “Commission” with the word “Board” in s 59 would have been a very significant amendment, as the Board is only able to make a very limited number of decisions under the Charities Act. Specifically, the Board’s decision-making is limited to:

- (i) decisions relating to registration and deregistration;¹⁹³
- (ii) revoking an entity’s status as forming part of a single entity;¹⁹⁴ and
- (iii) publishing notices of possible serious wrongdoing.¹⁹⁵

All other decisions are made by the chief executive (that is, by Charities Services).

Such limited rights of appeal can be contrasted with the intention of Parliament in passing the original Charities Bill, namely that charities should be able to appeal *all* decisions made under the Charities Act, as discussed above. In other words, to limit charities’ appeal rights to decisions made by the Board only would be a significant derogation of charities’ rights of appeal.

It would be normal to expect such a significant policy change to be clearly signalled. However, there was no mention in the explanatory material or any other public notification that such a significant change was intended.

The proposed change to s 59 was inconsistent with the corresponding amendment for s 61. Schedule 8 proposed to amend s 61 as follows (emphasis added):

Omit “Commission” in each place where it appears and substitute in each case “Board or the chief executive”.

In other words, s 59 as amended would mean that charities were only able to appeal decisions of the Board, but s 61 as amended would enable the High Court on appeal to confirm, modify or reverse the decision of the Board *or the chief executive*.

¹⁹³ Charities Act 2005 ss 3(e), 8(3), 9, 10(d), 14, 15(e), 16(4) - (9), 19, 20, 31, 32, 35, 36, 44 - 46.

¹⁹⁴ Charities Act 2005 ss 48, 49.

¹⁹⁵ Charities Act 2005 s 55.

The Crown Entities Reform Bill had clearly been prepared in a degree of haste; it contained a number of errors.¹⁹⁶ The lack of notification of any intention to derogate charities' rights of appeal, coupled with the inconsistency between ss 59 and 61, lent weight to the impression that the proposed amendment to s 59 was one of those errors: s 59 should instead have been worded "Board or the chief executive", so that charities would continue to have the ability to appeal all decisions made under the Charities Act, consistently with Parliament's original intention and the proposed amendment to s 61.

The Crown Entities Reform Bill received its first reading on 4 October 2011 and was transferred to the Government Administration Select Committee. A general election took place on 26 November 2011 and the Bill lapsed. Although the Bill was reinstated by the new Parliament, submissions were not clearly called for. Despite this, many submissions were made, and those that did comment on Part 3 were overwhelmingly opposed to the proposal to disestablish the Charities Commission. Perhaps for this reason, submissions focused on removing Part 3 from the Bill altogether, rather than on the granular level of individual consequential amendments in the lengthy schedule at the back of the Bill.¹⁹⁷

At the Committee of the Whole House stage, Part 3 of the Bill was divided into its own separate Charities Amendment Bill.¹⁹⁸

Schedule 8 of the new Charities Amendment Bill was in identical terms to sch 8 of the Crown Entities Reform Bill, apart from 10 additional references to the word "Commission". These additional references reflected legislative amendments that had been made in the intervening period.¹⁹⁹ The majority of the Select Committee recommended these amendments be incorporated at the Committee of the Whole House stage because they had not been unanimously agreed to (a requirement for Statutes Amendment Bills).²⁰⁰

Schedule 8 now spanned 10 pages and contained proposals to amend 45 sections of the Charities Act. However, the inherent inconsistency in the proposed amendments to sections 59 and 61 remained unchanged.

As discussed above in chapter 1, the proposal to disestablish the Charities Commission was very controversial and ultimately passed by only one vote. The proposal passed into law on 6 June 2012, with the Charities Commission formally disestablished just over three weeks later, on 1 July 2012.²⁰¹

The final legislation did not resolve the inconsistency between ss 59 and 61, which were therefore amended to read as follows (emphasis added):

59 Right of appeal

- (1) A person who is aggrieved by a *decision of the Board* under this Act may appeal to the High Court.

...

60 Determination of appeal

- (1) In determining an appeal, the High Court may –
(a) confirm, modify, or reverse *the decision of the Board or the chief executive* or any part of it:

This inconsistency between ss 59 and 61 remains in the legislation to this day.

196 For example, s 60(3) referred to the exercise of power by the chief executive under s 55, but the chief executive does not have any statutory decision-making power under s 55. See Charities Amendment Bill 2015 (71-2B) ([select committee report](#)) at 2. In addition, s 48(2) as amended provides that an entity's status as forming part of a single entity is revoked if "the Board registers a notice" in the charities register to that effect, but the Board has no power to register notices in the charities register which is administered by the chief executive (s 23). Further, Charities Act ss 56 and 57 as amended refer to notices given by the chief executive only, meaning that notices given by the Board (for example under s 55(3)) are not now provided for.

197 Compare Internal Affairs Te Tari Taiwhenua [Charities Amendment Bill – Report prepared for the Government Administration Committee](#) 5 September 2016: <www.parliament.nz/resource/en-NZ/51SCGA_ADV_00DBHOH_BILL69365_1_A530188/4ba8dca103aa8add726689617ab1841d46820461> at [61]. The issue of removal of charities' rights of appeal did not become a "live issue" until 2016, when DIA sought to resolve the inconsistency between ss 59 and 61 by amending the latter rather than the former, contrary to Parliament's original intention.

198 Charities Amendment Bill 2011 (No 2) 332-3C.

199 Statutes Amendment Bill (No 2) 271-2 (February 2012), which was divided into the Charities Amendment Act 2012.

200 Crown Entities Reform Bill 332-2 ([select committee report](#)) 30 March 2012 at 2 - 3.

201 Charities Amendment Act (No 2) 2012.

The Statutes Amendment Bill 71-1

Three years later, in October 2015, another Statutes Amendment Bill was introduced into Parliament proposing amendments to 28 Acts, including the Charities Act.²⁰²

Statutes Amendment Bills are a particular type of omnibus bill used to make minor, technical, non-controversial and non-substantive amendments to a number of Acts.²⁰³

Part 3 of the Statutes Amendment Bill proposed amendments to three sections of the Charities Act, one of which was s 61. Specifically, cl 13 of the Statutes Amendment Bill proposed to resolve the inconsistency between ss 59 and 61 by removing the words “or the chief executive” from s 61(1).

Such an amendment would have been highly significant: while obviously s 61 does not itself confer a right of appeal, the proposed amendment would have the effect of resolving the inconsistency between ss 59 and 61 in favour of the wording in s 59 (which limited appeals to decisions of the Board only, contrary to the original intention of Parliament). Resolving the inconsistency in this way would have the practical effect of removing charities’ ability to appeal the vast bulk of decisions made under the Charities Act, by putting it beyond doubt that charities’ rights of appeal were now to be limited to decisions of the Board only.

The Statutes Amendment Bill received its first reading on 9 December 2015 and was referred to the Government Administration Committee, with submissions due by 29 January 2016. This timing is significant, because many New Zealanders take an extended holiday over the Christmas/summer break. Again, there was no notification to the charitable sector that such an amendment was being proposed, and it could very easily have been missed.

However, the amendment was noticed by chance, and concern about it raised, first with the DIA, and then directly with the Select Committee. Hui E! Community Aotearoa made a late submission in May 2016,²⁰⁴ following which the Select Committee removed Part 3 of the Statutes Amendment Bill into its own Charities Amendment Bill in order to give charities a short further period in which to make submissions.²⁰⁵ Submissions were due by 29 July 2016.

Charities Services’ news alert

Approximately half way through the submission period, on 7 July 2016, Charities Services issued a news alert to every registered charity in New Zealand, making the following comments:²⁰⁶

This news brief is being sent to you to clarify the details of the Charities Amendment Bill. These amendments were formerly contained in a Statutes Amendment Bill. Information has recently been circulated suggesting the Charities Amendment Bill (the Bill) removes charities’ ability to appeal decisions of the charities regulator.

We can assure you that this is incorrect.

Statutes Amendment Bills are relatively routine matters where minor amendments are made to legislation from time to time. The amendments must be technical and non-controversial in nature to be included in these types of Bills.

The Bill:

- includes tax evasion and similar offences under the Tax Administration Act to the list of disqualifying factors for officers (section 16)
- deems an application “withdrawn” if an entity fails to respond within 20 working days to a notice to provide more information to progress a registration application (section 18)
- removes the words “or chief executive”, to correct a drafting error at the time when the Charities Act 2005 was amended in 2012 (section 61)

202 Statutes Amendment Bill (71-1) 2015.

203 See the discussion further below.

204 The submission was made to the Select Committee on 6 May 2016. The website of Hui E! Community Aotearoa can be found here: www.huie.org.nz/.

205 Charities Amendment Bill (71-2B) 15 June 2016.

206 Charities Services News Alert (undated but issued on 7 July 2016): charitiesupdate.cmail20.com/t/ViewEmail/j/606CFD3BD5AAFE35/DDD978CE7246F1DD6E6039C17E42EE19 (Bolding in original, underlining added)

All of these items are minor technical amendments. We can assure you that the amendment to section 61 will have no impact on charities' appeal rights under the Charities Act (section 59), and that it doesn't change how Charities Services or the Charities Registration Board operate on a day-to-day basis.

All current avenues for charities to seek a review of Charities Services' and the Board's actions and decisions **will remain open and unaffected by the amendment**. For example, the Office of the Ombudsman could be asked to open an investigation into a matter not covered by the statutory right of appeal. Making a complaint to the Ombudsman is free.

In other words, the purpose of the news alert appears to have been to reassure charities that the proposed amendment to s 61 would have no impact on their appeal rights whatsoever (the implication being that it was therefore not necessary to make submissions on the Bill). What the news alert did not say was that this assertion was based on an *assumption* that most of charities' rights of appeal had already been removed when the Charities Commission was disestablished in 2012, despite the uncertainty as to whether that was in fact the case, as discussed above.

A request was made on 29 August 2016 under the Official Information Act 1982 ("OIA") for any information that might indicate charities' rights of appeal were in fact intended to be removed as part of the process of disestablishing the Charities Commission in 2011/2012; however, the request was declined by DIA on 6 September 2016 on the grounds of legal professional privilege.²⁰⁷

Despite the news alert, charities did make submissions to the Select Committee, raising significant concerns about the impact of the proposed amendment to s 61. ActionStation Aotearoa organised a petition opposing the proposed amendment, which reached over 2,500 signatures as at 10 August 2016.²⁰⁸ Opposition to the proposed amendment was expressed in the media.²⁰⁹

Ultimately, the proposed amendment to s 61 was struck from the Bill "due to community concern".²¹⁰

While this change was very welcome, the Select Committee did not take the extra step of adding the words "or the chief executive" to s 59. Such a step would have resolved the inconsistency between the two provisions in line with Parliament's original intention, thereby obviating any further uncertainty. However, such a step may not have been considered possible due to the procedural rules of Parliament.²¹¹ Instead, the Committee issued its report on 22 September 2016 with the inconsistency between ss 59 and 61 intact. The Charities Amendment Bill was passed into law on 13 February 2017.²¹²

Accordingly, the inconsistency between the ss 59 and 61, and the consequent uncertainty regarding the extent of charities' rights of appeal, remained.

207 Letter from the Department of Internal Affairs to the writer, 6 September 2016.

208 The text of the petition was as follows: "Stand up for charities - Dear House of Representatives, Charities do extremely important work on the front lines of our community. Their ability to operate should not be at the whim of the Chief Executive of the Department of Internal Affairs. Stop any changes to the Charities Act that remove the ability of decisions of the Chief Executive of Department of Internal Affairs from being appealed to the court." ActionStation's website can be found here: actionstation.org.nz/.

209 See M Elliott *Marianne Elliott: Unravelling charities' ability to do good* NZ Herald 16 August 2016:

[www.nzherald.co.nz/nz/marianne-elliott-unravelling-charities-ability-to-do-good/](http://www.nzherald.co.nz/nz/marianne-elliott-unravelling-charities-ability-to-do-good/PWRLVNHQMSOG4HH6ERWBU5RVGQ/)

[PWRLVNHQMSOG4HH6ERWBU5RVGQ/](http://www.nzherald.co.nz/nz/marianne-elliott-unravelling-charities-ability-to-do-good/PWRLVNHQMSOG4HH6ERWBU5RVGQ/) See also S Barker "Let them eat cake – what Brexit should tell us about charity regulation in New Zealand" LinkedIn 9 July 2016: www.linkedin.com/pulse/let-them-eat-cake-what-brex-it-should-tell-us-charity-susan-barker/; and S Barker "Charities beware: the government is proposing to remove your rights of appeal" LinkedIn 3 July 2016: www.linkedin.com/pulse/charities-beware-government-proposing-remove-your-rights-susan-barker/.

210 Charities Amendment Bill 71-2B ([select committee report](#)) 22 September 2016 at 2.

211 Such an amendment may have been considered a "substantial policy change" unsuitable for inclusion in a Statutes Amendment Bill. See Internal Affairs Te Tari Taiwhenua [Charities Amendment Bill – Report prepared for the Government Administration Committee](#) 5 September 2016 at [63].

212 The [Charities Amendment Bill \(71-2B\) 2016](#) became the [Charities Amendment Act 2017](#) (2017/1).

Publication of the drafting instructions

Following issue of its report on 22 September 2016, the Select Committee uploaded the submissions it had received on the Bill onto the Parliamentary website.²¹³ Contemporaneously, the Select Committee also published the advice it had received from DIA.²¹⁴ This advice included, by way of appendix, the drafting instructions DIA had prepared for the Parliamentary Counsel Office (“**PCO**”), regarding charities’ rights of appeal in the context of disestablishing the Charities Commission (that is, the information DIA had earlier declined to disclose under the OIA on the grounds of legal professional privilege). The drafting instructions took the form of an email from DIA to PCO dated 9 June 2011.

The terms of the email are significant, and are set out below for reference:²¹⁵

Subject: RE: section 54 and 55 Charities Act...

On reflection, our suggestion is that:

- *section 59(1) should enable appeals against the board’s decisions only; and*
- *the section 55(1) publication power should be a board power.*

The rationale is as follows:

- Under sections 55(3)(a)(iii) and 60, publication of notices under s55 is a matter against which appeals may be lodged. This is why we originally agreed to include a reference to both the CE [chief executive] and the Board in section 59.
- However, there are *unintended consequences*. *Specifying that appeals can be taken against CE decisions potentially creates a great deal of confusion*. For example, can a person appeal the Chief Executive’s recommendation to decline an application (under section 19) as well as, and potentially prior to, a board decision to decline registration? To what extent are other CE administrative decisions subject to appeal?
- We think that enabling appeals against process steps by the CE is *potentially very inefficient, and that originally there was no deliberate legislative intent to enable multiple appeals during the process*. *We don’t see why litigious applicants should get more than one bite at the cherry on the merits of registration or deregistration* (noting that [judicial review] is available at all times to correct process errors).
- Although the actual s61 powers of the Court on appeal are broad, the focus of ss 60 and 61 is clearly controlling registration and deregistration decisions and restricting decisions to publish under s55. On that basis, if s55 and the registration / deregistration powers were all Board decisions, then s59 need only apply to Board decisions;
- When we considered s55 in light of this analysis, it became clear that the section 55 publication power is a decision more in the nature of deregistration than the other administrative powers exercised by the CE. It is likely to form part of a broader deregistration decision process or review of a charity’s operations. The Board should therefore be involved in making the s55 decision.
- The distinction between s55 decisions and other administrative decisions is heightened in my mind by the fact that the Act gives special priority to appeals against s55 decisions. They are the only type of decision where the appeal right must be expressly notified to the charity (s55(3)). They are the only decision in respect of which the power to injunct is expressly noted (section 60). These restrictions doesn’t [sic] apply to other CE decisions, including s54.
- We are minded to think that section 54 is an administrative process that occurs prior to the s55 decision, and which can be left with the CE (and not subject to appeal). However, we’d appreciate your guidance on that conclusion if you have a different view.
- The Cabinet decision refers to the Board only exercising “registration and deregistration”

213 New Zealand Parliament Pāremata Aotearoa *Charities Amendment Bill – submissions and advice*:

www.parliament.nz/en/pb/bills-and-laws/bills-proposed-laws/document/00DBHOH_BILL69365_1/tab/submissionsandadvice.

214 New Zealand Parliament Pāremata Aotearoa *Charities Amendment Bill – submissions and advice*.

215 Internal Affairs Te Tari Taiwhenua *Charities Amendment Bill – Report prepared for the Government Administration Committee* 5 September 2016 at Appendix C “Section 59 drafting instructions – 6 September 2011” (italicising added, underlining in original). The reason for the September 2011 is not clear as the email is dated June 2011. Note that the decision referred to in n 2 of DIA’s advice was delivered shortly afterwards, on 30 September 2016, in the charities’ favour: *Re The Foundation for Anti-Aging Research* (2016) 23 PRNZ 726.

In other words, DIA advised PCO in 2011 that charities' appeals should be limited to Board decisions only, because otherwise charities might appeal a *recommendation* by Charities Services to the Board that an application for registration be declined, which would allow "litigious applicants" to get "more than one bite at the cherry".²¹⁶

In addition, the analysis appears to have been heavily influenced by s 55 of the Charities Act, which was added to the original Charities Bill at Select Committee stage in response to submissions requesting more safeguards for charities.²¹⁷ To infer from the safeguards provided by ss 55(3) and 60(3) that charities should not have an ability to appeal decisions made by Charities Services Act underscores the risk of unintended consequences inherent in "fast law".²¹⁸ It also provides another example of a provision intended to help charities ultimately being used against them.

If the DIA's analysis had been made available for public consultation, either at the time of the disestablishment of the Charities Commission in 2011/2012 or during the Statutes Amendment Bill process in 2015/2016, there might have been an opportunity for such points to be made. It could also easily have been clarified that there is absolutely no evidence, nor any realistic prospect, of "litigious applicants" substantively appealing process steps in a Charities Act context. To the contrary, charities in New Zealand are having considerable difficulty having one bite at the cherry, let alone two.²¹⁹ The reality is that charities are reluctant litigants: charitable resources are scarce and precious, and charities are duty-bound to expend them in the best interests of the charity's charitable purposes, as discussed above; charities are therefore highly unlikely to incur the costs and distraction of bringing unmeritorious multiple appeals; even if they did, the courts have established processes in place to deal with them. It seems unreasonable for a government department to use a "straw man" argument, unsupported by any empirical evidence, to make such a significant change, contrary to the original intention of Parliament, behind closed doors without consultation or even notification.

On the DIA's analysis, none of the following decisions made by Charities Services under the Charities Act would be able to be appealed:

- (a) A decision to refuse access to the charities register under s 21(4);
- (b) A decision to prevent or restrict public access to information under s 25;²²⁰
- (c) A decision to amend the register under s 26;²²¹
- (d) A decision to approve (or not to approve) a change of balance date (with or without conditions) under s 41(6);²²²

216 Internal Affairs Te Tari Taiwhenua [Charities Amendment Bill – Report prepared for the Government Administration Committee](#) 5 September 2016 at [11], [56].

217 The Select Committee made the following comments in Charities Bill 2004 (108-2) ([select committee report](#)) at 17: "We heard a number of submissions expressing concern that the bill lacked sufficient safeguards to protect charities, given the significant negative consequences that could result from the publication of unproven accusations. The majority agrees, and recommends amending the bill to provide charities with a right to appeal against a decision to publish details under cl 64 [now s 55]. In addition, the majority recommends amending cl 68 [now s 60] to allow charities to apply to the Courts for an interim order preventing the publication of the notice while the appeal is ongoing."

218 Charities Act ss 55(3) and 60(3) give special priority to appeals against decisions to publish details of possible breach or serious wrongdoing (a power which, incidentally, has never been used (DIA initial policy paper on compliance and enforcement powers under the Charities Act, 22 June 2021 at 5)). However, the analysis does not consider the background to these provisions, including the fact that they were added to the original Charities Bill at Select Committee stage in response to submissions, and rushed through under urgency without proper consultation.

219 Bearing in mind that judicial review of process issues is specifically provided for in Charities Act s 61(6).

220 In its Policy Paper of 22 June 2021, the DIA now appears to accept that decisions under s 25 should be able to be appealed. As at the time of writing the policy papers have not been placed on the DIA website however, in response to a specific request, Core Reference Group members were advised that the May and June 2021 Policy Papers were not confidential and we may use them as we choose.

221 See the case study in box 6.5 below.

222 Note that the equivalent provision (Incorporated Societies Act 2022 s 100) is able to be appealed under s 249 of that Act.

- (e) A decision that the financial statements of a charity fail to comply with a financial reporting standard under s 42B;²²³
- (f) A decision as to whether financial statements should have been audited or reviewed under s 42E;²²⁴
- (g) A decision to grant an exemption under s 43 (with or without terms and conditions);²²⁵
- (h) A decision by Charities Services, as opposed to the Board, to treat one or more entities as a single entity under s 44;
- (i) Terms and conditions of single entity status, imposed by Charities Services rather than the Board, under s 46;
- (j) A decision to open an inquiry under s 50;
- (k) A decision to require information under s 51;
- (l) A decision to issue a warning notice under s 54;
- (m) A decision to require payment of an administrative penalty under s 58;²²⁶
- (n) A decision to treat an application as withdrawn under s 18(3A);
- (o) A decision to prescribe requirements for forms under s 72A;
- (p) A decision to post "guidance" to Charities Services' website (even if it contains errors).²²⁷

On 5 September 2016, DIA advised the Select Committee that Charities Services does not make any "decisions" under the Charities Act that could be included in a statutory right of appeal, or that could have an "adverse impact" on a charity.²²⁸ DIA now appears

223 Internal Affairs Te Tari Taiwhenua [Charities Amendment Bill – Report prepared for the Government Administration Committee](#) 5 September 2016 at [15] and Appendix D, where DIA argues that s 42B does not confer any power on the chief executive, and that, under Charities Act s 74, a prosecution for this or any offence under the Charities Act can only proceed if a Crown solicitor certifies there are reasonable grounds for prosecution. However, Charities Services does make decisions with respect to individual charities regarding their financial reporting before the point of prosecution. For example, Charities Services may require a charity to prepare consolidated accounts including the financial information of entities that Charities Services considers the charity "controls", even though the charity may consider, advisedly, that the requirements of a "control" relationship are not in fact met. The concept of control can be highly subjective and fact specific, and the costs of preparing consolidated accounts can be disproportionately significant. It does not seem reasonable that a charity should be unable to challenge such a decision of Charities Services on substantive grounds, otherwise than by making a complaint to the Ombudsmen, prior to a prosecution being laid.

224 Internal Affairs Te Tari Taiwhenua [Charities Amendment Bill – Report prepared for the Government Administration Committee](#) 5 September 2016 at Appendix D, where DIA argues that compliance with s 42E is based on objective criteria. However, that is not the case, as the financial reporting rules for charities, and therefore decisions on audit and review criteria, can be based on subjective matters, such as whether a "control" relationship exists such that consolidation is required, as discussed in the footnote above.

225 In its Policy Paper of 22 June 2021, the Department of Internal Affairs now appears to accept that decisions under s 43 should be able to be appealed.

226 This power has never been used: DIA's initial policy paper on compliance and enforcement powers under the Charities Act, 22 June 2021 at 5; see also Internal Affairs Te Tari Taiwhenua [Charities Amendment Bill – Report prepared for the Government Administration Committee](#) 5 September 2016 at 24. In its Policy Paper of 22 June 2021, the DIA now appears to accept that decisions under s 58 should be able to be appealed.

227 Incorrect guidance issued by the Charity Commission for England and Wales led to the case of *The Independent Schools Council v Charity Commission for England and Wales & Ors* [2012] 1 All ER 127: see C Decker and M Harding "Three challenges in charity regulation: the case of England and Wales" in M Harding, A O'Connell & M Stewart (eds) *Not-for-Profit Law: Theoretical and Comparative Perspectives* (Cambridge University Press, 2014) 314 at 320. An individual charity in New Zealand may not have sufficient standing to be able to bring a complaint about guidance issued by Charities Services.

228 Internal Affairs Te Tari Taiwhenua [Charities Amendment Bill – Report prepared for the Government Administration Committee](#) 5 September 2016 at [12] – [18], [57] – [59], Appendix D.

to have resiled from this stance:²²⁹ as many submitters noted, Charities Services makes many decisions that may have significant adverse consequences on a charity.²³⁰

While there may have been “no deliberate legislative intent to enable multiple appeals during the process”, it is also clear there was no deliberate legislative intent to place decision-making under the Charities Act beyond the scope of an appeal. Charities Services exercises a number of statutory powers of decision, over which it is important to have meaningful accountability, as many submitters noted:²³¹

Charities need to be able to appeal all decisions made under the Charities Act (as is the case with the Incorporated Societies Act exposure draft and all other comparable legislation), not just those relating to registration and deregistration ... Overall, there is no meaningful accountability of Charities Services to the charitable sector or the public. Lack of adequate checks and balances can and does lead to poor decision-making – ML Gribble

All decisions made by Charities Services should be subject to appeal ... Firstly as a matter of natural justice. Secondly, Charities Services are a government agency there to serve public interests and should not be beyond an “accessible to all” appeals process – Kapiti Retirement Trust

All decisions should be subject to appeal, as this places a good tension on the process – Neil Walbran

All decisions made by Charities Services should be capable of being appealed. That is not to say that all will, but to have any other situation is for the Charities Service to be a law unto itself, which is an autocratic, not democratic position, and contrary to serving the people – Trevor Goudie

All [decisions should be subject to appeal] to provide some reassurance to the public and charities – Stopping Violence Services

Many submitters pointed out that the ability to appeal decisions that adversely affect a charity’s rights and interests was critical in terms of access to justice and maintaining the rule of law:

It is imperative that charities that are deregistered or declined registration or otherwise adversely affected by the decisions of Charities Services, are able to access justice – Professor Carolyn Cordery

Most Charities who are deregistered or declined registration or otherwise adversely affected by decisions of Charities Services are unable to access justice under the current framework. We strongly recommend Charities be able to appeal all decisions of the Charities Services. – Youth with a Mission Queenstown Lakes Charitable Trust (Tāhuna ki te Ao Charitable Trust)

The original deliberate legislative intent was in fact that *all* decisions made under the Charities Act should be able to be appealed, as discussed above.

DIA’s analysis also appears to overlook the fact that Charities Services is the “registrar” of the charities register by statute;²³² there are myriad other decisions made in the course of administering a register that, under DIA’s analysis, would similarly not be able to be appealed, as illustrated by the case study in box 6.5:

229 The Department’s Policy Paper of 22 June 2021 proposes that charities be able to appeal decisions of Charities Services made under ss 58 (*Chief executive may require payment of administrative penalty*); 43 (*Chief executive may grant exemptions*); 48 (*Board may revoke entity’s status as forming part of single entity*); and 25 (*Chief executive may allow information and documents to be omitted or removed from register and may restrict public access to information and documents*). The inclusion of s 48 is curious, as Charities Services is not able to make any decisions under that provision. It is not clear why only these provisions have been selected.

230 See, for example, the [submission](#) of Greenpeace: “A number of decisions not made by the Board still have significant implications for a charity or organisation applying for charitable status. There should be a mechanism available to challenge these decisions”.

231 See also the [submissions](#) of Lloyd Brewerton: “All decisions should be subject to appeal. Everyone makes mistakes”; ConsumerNZ; Friends of Arataki and Waitakere Regional Parkland Inc; Hawke’s Bay Community Law Centre; Linda Webb; Richard Keam; and Surf Life Saving New Zealand Inc.

232 Charities Act s 23.

Box 6.5 – case study: reregistered charities

A registered charity that has been in existence for over a century was controversially deregistered in 2010 on the basis of its advocacy work.²³³ Given issues relating to the inaccessibility of appeals, discussed above, the charity did not manage to challenge the decision within the 20 working days set out in s 59. However, with pro bono legal support, it did ultimately reapply for registration and was successfully reregistered.²³⁴

At that time, it was Charities Services' practice to give deregistered charities that successfully reapply for registration a new charities registration number, meaning that a member of the public searching the charities register for the charity, using the charity's *original* charities registration number, would be met with an entry recording the charity as deregistered. This practice was causing considerable difficulty for a charity reliant on donations and volunteer support, as it was causing confusion amongst members of the public (including potential funders and donors) as to whether the charity was registered or not.

Given these difficulties, the charity asked Charities Services to *link* its old registration number to its new registration number, so that members of the public searching for the charity would be directed to its new registration, thereby making its registration status clear. However, Charities Services refused to do this.

At the time, Charities Services also maintained a list of deregistered charities on its website; the entries for deregistered charities that had successfully appealed their deregistration (such as Liberty Trust and the Plumbers, Gasfitters and Drainlayers Board) were accompanied by a note stating that the charity was "now reregistered". The charity asked Charities Services to place a similar note against its listing, again to make its registration status clear. However, Charities Services refused to do this, on the basis that the charity had a new registration number.

The charity's inclusion on a list of deregistered charities, despite the fact that it was now reregistered, significantly exacerbated the confusion being caused to members of the public as to its registration status.

In refusing these requests, Charities Services prioritised its preference for its particular internal processes, for no particular reason other than for their own sake, over the significant adverse impacts its decisions were having on public trust and confidence in a registered charity.

Because the charity was already before the High Court (requesting that its reregistration be backdated to mitigate some of the significant adverse consequences it was experiencing as a result of the now-reversed deregistration decision),²³⁵ the charity sought to amend its pleadings to add a request for its entries on the charities register to be linked, and for Charities Services' website to be amended.

Following this action, Charities Services finally agreed to make the requested changes (meaning that the amendment to the pleadings was not made and the matter was not considered by the court). Charities Services has since discontinued its practice of requiring re-registered charities to have a new registration number.

The right of appeal (which at that stage was widely believed to apply to all decisions made under the Charities Act, despite the inconsistency between sections 59 and 61) was critical not only in achieving this outcome, but also in mitigating the damage being caused to the charity. Many thousands of other charities have been deregistered since the charities register opened in February 2007: clarifying the issues which are giving rise to such deregistrations through the exercise of appeal rights can be expected to have significant positive impact beyond the individual charity bringing the appeal.

233 Charities Commission Decision D2010-9 *National Council of Women of New Zealand Incorporated* 22 July 2010: <www.charities.govt.nz/assets/Uploads/national-council-of-women-of-new-zealand-incorporated.pdf>.

234 See *National Council of Women of New Zealand Inc v Charities Registration Board* [2015] 3 NZLR 72 (HC).

235 See *National Council of Women of New Zealand Inc v Charities Registration Board* (2014) 26 NZTC 21075 (HC); *National Council of Women of New Zealand Inc v Charities Registration Board* [2015] 3 NZLR 72 (HC).

It may not be possible to identify in advance all the types of decisions that might be made in the context of administering a register, which may explain why other registration regimes allow a right of appeal against *all* decisions. For example:

- (i) the Companies Act 1993 s 370 allows a right of appeal to a “person who is aggrieved by an act or decision” of the Registrar of Companies;
- (ii) the Incorporated Societies Act 1908 s 34B allows a right of appeal to any person aggrieved by a refusal to register a society, a refusal to register or receive a document submitted under the Act, or by “any other act or decision” of the Registrar of Incorporated Societies;
- (iii) the Industrial and Provident Societies Act 1908 s 13B similarly allows a right of appeal to any person aggrieved by any act or decision of the Registrar of Industrial and Provident Societies;
- (iv) the Friendly Societies and Credit Unions Act 1982 s 151 allows a right of appeal to any person aggrieved by a decision of the Registrar of Friendly Societies and Credit Unions “in relation to any matter or thing done” under that Act; and
- (v) the Charities Act as originally enacted allowed an appeal against all decisions made by the Charities Commission, as discussed above.

Many submitters pointed out the desirability of consistency with other registration regimes in this regard.²³⁶

The Incorporated Societies Act 2022 s 249 proposes a modification of this approach, by allowing a broad general right of appeal of all decisions, with the exception of a small number of decisions that have been specifically carved out (namely, decisions to make an application to the court under Part 4 of the Act, and certain process decisions made during the course of removing or liquidating a society). We have considered whether such a model might provide an appropriate way forward for charities’ legislation.

Adopting a similar approach would require identifying in advance what, if any, particular decisions made under charities’ legislation should genuinely *not* be subject to appeal, and why: if a rationale can be established in any particular case (ideally following a transparent process of consultation), the relevant decision could then be specifically carved out in the legislation. Such an approach of “in unless excluded” rather than “excluded unless specifically included” would have the advantage of ensuring that no decision is “missed”, a key potential issue as illustrated by the case study above (and likely to become even more significant as Charities Services requests even further regulatory powers).²³⁷ Such an approach would also have the advantage of encouraging better decision-making through better structural accountability.

The modified approach taken in the Incorporated Societies Act is discussed further below.

The review of the Charities Act

Following the experience of the Charities Amendment Act 2017, it became Labour Party policy to undertake a first principles post-implementation review of the Charities Act.²³⁸ Following success in the general election in September 2017, a review of the Charities Act was commenced in May 2018 (albeit an attenuated one only). In February 2019, the DIA issued its discussion document for the review, making the following comments about charities’ appeal rights:²³⁹

The *inconsistency* between sections 59 and 61 of the Act has led to *dispute* over whether decisions of the chief executive (delegated to Charities Services) can also be appealed under section 59. The ability to appeal Charities Services’ decisions has been a *significant point of concern* for some charities since the original Charities Bill in 2004 ...

236 See, for example, the [submissions](#) of Oxfam New Zealand; the Cancer Society; Motueka Family Service Centre; LEAD; Joanne Harland; and ML Gribble.

237 Department of Internal Affairs’ initial Policy papers June 2021.

238 New Zealand Labour Party *Community and Voluntary Sector Manifesto 2017* at 5.

239 Te Tari Taiwhenua Internal Affairs [Modernising the Charities Act 2005: Discussion Document](#) February 2019 at 34 - 35 (emphasis added).

The sector's ongoing concern is that any decision made under the Act – not just registration and deregistration decisions – should be subject to appeal. Under the Act, Charities Services makes a range of decisions, when exercising functions of the chief executive. A few examples are decisions to:

- treat one or more entities as a single entity (under section 44);
- omit, remove or withhold information from the charities register (under section 25); and
- undertake compliance activities (for example to open an inquiry under section 50).

An ability to appeal a wider range of decisions would provide *greater accountability* over all regulatory decisions, including relatively minor decisions. On the other hand, allowing appeal of all decisions by Charities Services would have *cost implications and would impact on its ability to carry out its functions in a timely and efficient manner*. In general, an ability to appeal *should be available if a person's rights or interests are affected* by a decision.

Other challenge routes, for example *internal reviews*, could be considered for decisions that may not be appropriate for appeals. Internal reviews are used in other regulatory systems. For example, disputed welfare benefits are initially reconsidered through a Work and Income internal review. Internal reviews can correct mistakes, without the cost and formality of an appeal. *The downside of internal reviews is that they may not be seen as independent as other challenge routes.*

The discussion document specifically sought feedback on “Which decisions made by Charities Services should be subject to appeal” and why? Although some took issue with its framing, the question was welcome as an opportunity for consultation on an important issue.

Nearly all submitters that responded to the question said that *all* decisions made under the Act should be subject to appeal.²⁴⁰ Most of those that did not said the right to

240 See Te Tari Taiwhenua Internal Affairs [Modernising the Charities Act 2005 - Summary of submissions](#) December 2019 at 4 - 5. See also the [submissions](#) of Abuse and Rape Crisis Support Manawatu Inc; Acts Churches New Zealand; Age Concern New Zealand; Alan Pace; Angela McMorran; Arthritis New Zealand; Auckland North Community and Development; Barry Coates, Sustainable Initiatives Aotearoa; Birthright New Zealand; Bishop's Action Foundation; Cancer Society; Carolyn Bates; Ced Simpson and Valerie Williams; Central Lakes Trust; Christian Education Trust; Community Housing Aotearoa; Community Networks Aotearoa; Community Waitako; Community Waitakere; ComVoices; ConsumerNZ; Coromandel Independent Living Trust; Council for International Development; David Boswell; DV Bryant Trust; English Language Partners New Zealand Trust; Federated Farmers; FinCap (National Building Financial Capability Charitable Trust); Friends of Arataki and Waitakere Regional Parkland Inc; Grace Presbyterian Church of New Zealand; Graham Burger; Habitat for Humanity New Zealand; Hawke's Bay Community Law Centre; Heather Pennycook; I Got Your Back Pack; Individual C; Interchurch Bureau; Jackie St John; Joanne Harland; Joanne Harland; Jon Horne; Kapiti Retirement Trust; Lake Taupo Hospice Trust; LEAD; Motueka Family Service Centre; Linda Webb; Lindsay Jeffs; Lisa Abrams; Literacy Aotearoa Charitable Trust; Liz Davies; Lloyd Brewerton; Marine Reach; ML Gribble; Make-A-Wish Foundation of New Zealand Trust; Manukau Christian Charitable Trust; Merv Ransom; Methodist Alliance; Methodist Church of New Zealand Te Haahi Weteriana O Aotearoa; Multiple Sclerosis New Zealand Inc; Museums Aotearoa; Neighbourhood Support New Zealand Inc; Neil Walbran; New Zealand Association Resource Centre Trust; New Zealand Breastfeeding Alliance; New Zealand Council of Christian Social Services; New Zealand Disability Support Network; New Zealand Land Search and Rescue Incorporated (LANDSAR); NZ Navigator Trust; New Zealand Sports Hall of Fame; Noela Rendle; Northland Urban Rural Mission; Organisation B; Oxfam New Zealand; Professor Carolyn Cordery; Rape and Abuse Support Centre Southland Inc; Renewal Trust Inc; Retirement Villages Association; Richard Keam; Roger Eynon; RSM; Save the Otago Peninsula Inc; Social Service Providers Aotearoa; SocialLink Tauranga Moana; Sport Waitakere; Stopping Violence Services; Summit Road Society Incorporated; Surf Life Saving New Zealand Inc; Te Pūtahitanga o Te Waipounamu; Te Whakakitenga o Waikato Incorporated, on behalf of the Waikato-Tainui iwi, endorsed by the Waikato Raupatu Lands Trust and Group and Waikato-Tainui marae; The Fred Hollows Foundation NZ; The Kate Edger Educational Charitable Trust; The Presbyterian Church of Aotearoa New Zealand; The Salvation Army Group; The UpsideDowns Education Trust; Todd Foundation; Tom Brady; Trevor Goudie; Trinity Lands Ltd; Trust Democracy; Volunteering New Zealand; Youth Search and Rescue Trust NZ; Youth with a Mission Queenstown Lakes Charitable Trust (Tāhuna ki te Ao Charitable Trust); and Youthlaw Aotearoa Inc.

appeal should be wider than merely decisions of the Board.²⁴¹ Limiting appeals to Board decisions, or matters of registration, was supported by only five submitters.²⁴²

The case for limiting charities' rights of appeal

The arguments made in support of removing charities' ability to appeal Charities Services' decisions fall broadly into two categories:

- (i) Operational efficiency, in terms of cost implications, and the impact on Charities Services' ability to carry out its functions in a "timely and efficient manner".²⁴³
- (ii) The availability of other challenge mechanisms, such as internal reviews, judicial review, and the ability to make a complaint to the Ombudsmen.²⁴⁴

However, neither argument withstands scrutiny.

Operational efficiency

Clarifying that charities are able to appeal all decisions made under the Charities Act does not mean that every decision *will* be appealed. To the contrary, during the seven-year tenure of the Charities Commission (when a statutory ability to appeal all decisions of the Commission was clearly available) the writer is not aware of any such appeals having been made. Charities are reluctant litigants, unlikely to appeal unduly, as noted by a number of submitters:

The Law Society expects that the number of proceedings would be limited/regulated by the time and cost involved in an appeal or review – New Zealand Law Society

Although charitable status decisions are the most important decisions under the Act, there should not be any limitations on decisions of the Charity Regulator that can be appealed. The costs of any appeal will naturally regulate the number of appeals that are initiated – Waikato-Tainui

In addition, legal duties to act in the best interests of a charity's charitable purposes, and the courts' processes for managing cases, provide powerful checks on any unmeritorious claims.

However, if a decision so egregiously affects a charity that it feels compelled to appeal, in principle a right of appeal should be available. Timeliness and efficiency are worthy goals, but must be balanced against interests of justice, perceptions of fairness, and the importance of accountability for statutory decision-making.

In practical terms, the availability of a right of appeal may in fact *reduce* costs by encouraging better first instance decision-making through better structural accountability. Access to a lower-level tribunal would also likely assist with minimising costs, as discussed above.

241 See the [submissions](#) of Alzheimers New Zealand; Braemar Charitable Trust; Catherine Tempero; Greenpeace; The Methodist Church of New Zealand Te Haahi Weteriana O Aotearoa Auckland Fiji Methodist Parish (Tabacakacaka); New Zealand Law Society; Parry Field Lawyers; Public Trust: "A wider range of powers to appeal ... provides greater accountability and certainty"; Oliver Hoffman; New Zealand Portrait Gallery Trust; The United Fire Brigades' Association of New Zealand "As with most processes, most decisions should be subject to appeal".

242 See the [submissions](#) of Diane Robinson; Diederick Meenken; Judith Miller; Whangarei A&P Society; and Tairāwhiti Environment Centre Inc: "Only registration/deregistration. Increasing the range of decisions subject to review could detract from more important considerations". The answers of the following three submitters to the question was not clear and may in fact also fall into this category: Organisation C: "permanent deregistration should be open to appeal for reasons of natural justice"; Parihimanihi Marae: "Deregistration should be subject to appeal to a less costly authority than the High Court; for example, to a Tribunal similar to Disputes Tribunal or the Tenancy Tribunal"; and Volunteering Hawkes Bay: "Initial registration and continued registration based on delivery of service based on purpose for which the charity is registering".

243 Internal Affairs [Modernising the Charities Act 2005: Discussion Document](#) February 2019 at 35.

244 Internal Affairs [Modernising the Charities Act 2005: Discussion Document](#) February 2019 at 34 - 35.

Concerns about potential cost or harm to operational efficiency do not provide a compelling basis on which to proscribe charities' rights of appeal.²⁴⁵

Alternative challenge mechanisms

Although there was some support in submissions for an internal review process to be instituted, a very strong message of submissions was that an internal review process could not be a substitute for a right of substantive appeal:²⁴⁶

While we see benefits in enabling the Registration board to conduct internal reviews when challenged on a decision (for example as a first step in a challenge before appealing to an external body), we think there always needs to be the option of appeal to an independent body, otherwise the appeal process lacks the credibility needed to instal trust. Given there is currently a trust issue between many in the sector and Charities Services and the Registration Board we are not sure any internal process will work well but may just add another layer of bureaucracy for a charity trying to challenge a decision – Community Networks Aotearoa

We believe charities should be able to review or appeal all decisions of the agencies administering the Act, but we do not believe that an internal review will cure the potential

245 In this respect, we respectfully differ from the findings of recent reviews in England and Wales and Northern Ireland. In England and Wales, Lord Hodgson of Astley Abbotts made the following comments in *Trusted and Independent: Giving charity back to charities – Review of the Charities Act* July 2012 at [7.18]: "Much of the evidence received was in favour of removing Sch 6 altogether and opening up the jurisdiction of the Tribunal to allow an appeal against any action or decision of the Charity Commission. This would, of course, be far simpler. However, this risks an increase in the number of appeals (possibly to the point of becoming unmanageable for the Commission) and could also risk undermining the Commission's authority to make decisions and deploy its resources independently and effectively; in the extreme, the Tribunal's powers to intervene could be sought so frequently as to create an environment in which the Tribunal was virtually directing the Commission". Following this report, the Law Commission recommended in *Technical issues in charity law* that sch 6 be reviewed. However, this recommendation was similarly rejected by the Government in March 2021, on the basis that the "rights of appeal listed in sch 6 to the 2011 Act were all carefully considered in terms of who could exercise them, in what circumstances, and the appropriate remedies in each case. We have no plans to review these". See Department for Digital, Culture, Media & Sport, Office for Civil Society *Government response to the Law Commission report 'Technical issues in charity law'* 22 March 2021: www.gov.uk/government/publications/government-response-to-law-commission-report-on-technical-issues-in-charity-law/government-response-to-the-law-commission-report-technical-issues-in-charity-law "recommendation 27". Given the extent to which the legislation in Northern Ireland was based on the legislation in England and Wales, it is unsurprising that similar findings were reached in Dr O Breen, Rev Dr L Carroll, N Lavery *Independent Review of Charity Regulation Northern Ireland* January 2022 at 203 - 204: "Enlarging the Tribunal's jurisdiction to allow an appeal against any action or decision of the Commission might sound attractive but the disadvantages of such a move would seem to outweigh any likely benefits. One could imagine that there would be increased number of appeals (which could overwhelm the Commission); and that such an appeal mechanism could risk undermining the Commission's authority to make decisions and deploy its resources independently and effectively". Accordingly, the panel recommended no change to sch 3 of the Charities Act (Northern Ireland) 2008. However, it is important to note that these conclusions were reached on the basis of assumption rather than evidence. There is no evidence that such considerations are applicable in a New Zealand context. As discussed above, charities in New Zealand were clearly able to appeal all decisions during the five years of the Charities Commission's tenure, and were widely assumed to be able to appeal all decisions until the Statutes Amendment Bill process of 2015/2016: "floodgates" of appeals simply did not occur.

246 See also the [submissions](#) of Community Housing Aotearoa: "We support the addition of an internal review of Charities Services' decisions as an additional step, but not as a substitute for our proposals regarding appeals ... Given the far-reaching consequences of decisions under the Act, we recommend the establishment of a specialist Charity Tribunal – this would help build up expertise and consistent and robust case law on the Act that provides all stakeholders with certainty and confidence"; Federated Farmers: "Yes, low-level decisions, but only to the extent that reviews would not supersede any right of appeal"; Graham Burger: "Yes, but not to create another drawn-out delay to a proper appeal"; I Got Your Back Pack: "Yes. Internal reviews allowing for further information to be provided are good practice, and therefore should be adopted as part of the appeal process, before escalating if required"; Lloyd Brewerton: "Yes, as long as the internal review is still subject to appeal"; Make-A-Wish Foundation of New Zealand Trust: "Yes – I think this is a pragmatic step and cost effective. However, it should not take away the right to go to appeal"; Neil Walbran: "This may be helpful, but the review process would need some credibility of independence. And should not preclude an appeal"; New Zealand Association Resource Centre Trust: "Yes, provided a mechanism were provided to escalate if internal decision not deemed acceptable by affected party"; Oxfam New Zealand: "Not as an alternative to an appeal process"; Summit Road Society Incorporated: "Yes. There should always be the appeal option, but an internal review option seems like a low cost intermediate step that could simplify matters for everyone involved"; Barry Coates, Caleb Firth; and Sustainable Initiatives Aotearoa.

harm and provide sufficient independence to give charities confidence in any resultant decision. An internal review may also still need a challenge mechanism and so could just further delay any resolution – Hawke’s Bay Community Law Centre

Appeals must be able to be made to genuinely objective bodies, who reflect the sector through practical experience and invite full disclosure of evidence – Marine Reach Charitable Trust

Some submitters were opposed to an internal review process altogether, with many expressing concern about inherent lack of transparency and independence:²⁴⁷

No – not sure why this would happen? If it did need a review why would it be internal and not independent? – The United Fire Brigades’ Association of New Zealand

An external reviewer would be preferable, it is not appropriate to ask an organisation to police itself – Trevor Goudie

No. Internal reviews such as this are too weighted in favour of the organisation and disadvantage the complainant – the UpsideDowns Trust

No, that will be a whitewash exercise – Renewal Trust Inc

There is a significant power held by the board and its agent Charities Services, which also speaks again to the need for independence in exercising that power – Trinity Lands Ltd

With respect to the ability to file judicial review proceedings, judicial review by definition relates to process issues rather than substantive issues. While highly valued, it therefore cannot be considered a substitute for a substantive right of appeal. Judicial review is also very expensive and unlikely to be accessible to most charities, as noted by one submitter:

The current system is loaded in favour of [Charities Services], any application for judicial review is horrendously expensive. A High Court hearing would cost a charity \$100,000 to \$200,000 legal and expert fees if charged at standard rates. Let alone appeals to Court of Appeal and the Supreme Court. As part of a proper review by the Law Commission, alternatives like a special appeals tribunal as in England could be assessed – Piers Davies

Similarly, while the ability to make a complaint to the Ombudsmen is also highly valued and an important opportunity for ordinary people to bring to account the “leviathan of the state”,²⁴⁸ it is a remedy of last resort and cannot be considered a substitute for a right of substantive appeal. For example, the powers of the Ombudsmen are recommendatory only: they do not have the ability to compel Charities Services to act in a particular way and cannot make definitive findings on questions of law like a court can. The processes of the Ombudsmen also normally occur behind closed doors, and are not generally themselves able to be appealed,²⁴⁹ limiting the opportunity to develop charities law by providing clarity on how various provisions of the Act should be interpreted, and thereby also limiting the possibility for the efforts of individual charities to have wider impact to other charities in similar situations. In addition, the Ombudsmen Act 1975 is almost 50 years’ old and itself much in need of review: for example, there is no time limit by which a government department must respond to an Ombudsman’s request for information;²⁵⁰ as a result of this, government departments can and do delay proceedings, which can exacerbate an adverse impact on a particular charity.²⁵¹ The breadth of government agencies subject to the Ombudsmen’s supervision also means the Ombudsmen are often significantly stretched.

The availability of potential other challenge mechanisms does not provide a compelling basis on which to proscribe charities’ rights of appeal.

247 See also the [submissions](#) of Life in Vacant Spaces: “Possibly – by whom and what processes would be required to ensure due diligence, neutral, unbiased and timely investigation”; Judith Miller; Stopping Violence Services; Trust Democracy; Diederick Meenken; and Whangarei A&P Society.

248 B Gilling *Ombudsman in New Zealand* (Dunmore Press, Palmerston North, 1998) at 21.

249 Ombudsmen Act 1975 s 25.

250 Ombudsmen Act 1975 s 19(1).

251 There is also evidence that government agencies can affect the flow of cases to the judiciary by using various means to avert matters going to court on substantive issues. See M McGregor-Lowndes and B Wyatt (eds) *Regulating Charities: the Inside Story* (Routledge, New York, 2017) at 278.

In other words, there is no compelling basis to deviate from the original principle that charities should be able to substantively appeal all decisions made under the Charities Act to an independent judicial body (such as a Charities Tribunal, discussed above).

We are supported in this view by the approach taken in comparable jurisdictions.²⁵²

Comparable jurisdictions

In the lead-up to the Charities Act 2006 (UK) in England and Wales, the idea of creating a specialist Charity Tribunal was widely welcomed, with no witness to the Joint Committee arguing against its creation.²⁵³ The “only real area of dissent” was whether the Charity Tribunal should have power to hear appeals against any decision of the Charity Commission for England and Wales, or whether there should be a list of decisions that are appealable.²⁵⁴ Reporting in September 2004, the Joint Committee recommended that the Charity Tribunal should be able to hear appeals against *any* decision of the Charity Commission (including “non-decisions”) on any basis; this was considered an appropriate measure of improved accountability given that the Charity Commission’s powers at the time were being significantly increased.²⁵⁵

However, the Charity Commission argued that any wider remit of the tribunal would “harm the operational efficiency” of the Commission; the Minister also opposed any wider remit on the basis of making things “simple” and “straightforward”.²⁵⁶

In the result, what is now sch 6 of the Charities Act 2011 (UK) provides a fairly tightly circumscribed list of 70 types of decisions that may be appealed. This “list” approach then appears to have been followed by Northern Ireland,²⁵⁷ and Scotland.²⁵⁸

However, writing in 2014, the Principal Judge of the Charity Tribunal²⁵⁹ in England and Wales has questioned whether the list approach has proved to be the right approach.²⁶⁰

In the first instance, the list approach has resulted in threshold jurisdictional questions, which have seen many charities’ appeals having to be struck out for falling outside the list: such a threshold process creates additional costs for charities and does not assist with objectives of greater accountability or better access to justice.²⁶¹ It also raises concerns as to whether the jurisdiction is “sufficiently well-defined to address the concerns people have about the Commission’s work ... the number of rejected cases does raise questions”.²⁶²

A related issue is that the list, which runs to 16 pages, is widely seen as “over-complicated and too narrowly drawn”: far from being simple and straightforward, the list has proved confusing not only for charities, who “often do not know the provenance of

252 Jurisdictions that administer their charities law through tax legislation, such as Canada and the US, are arguably not directly comparable in this respect.

253 House of Lords, House of Commons, Joint Committee on the Draft Charities Bill *The Draft Charities Bill* 15 September 2004, HL Paper 167-I, HC 660-I: publications.parliament.uk/pa/jt200304/jtselect/jtchar/167/167.pdf at [220].

254 Principal Judge A McKenna “Appealing the regulator: experiences from the Charity Tribunal for England and Wales” in M Harding, A O’Connell and M Stewart (eds) *Not-for-profit law: theoretical and comparative perspectives* (Cambridge University Press, 2014) 336 at 354.

255 House of Lords, House of Commons, Joint Committee on the Draft Charities Bill *The Draft Charities Bill* 15 September 2004, HL Paper 167-I, HC 660-I at [231], [228].

256 House of Lords, House of Commons, Joint Committee on the Draft Charities Bill *The Draft Charities Bill* 15 September 2004, HL Paper 167-I, HC 660-I at [225], [226].

257 The table in Charities Act (Northern Ireland) 2008 sch 3, cl 4 lists more than 50 types of decisions that may be appealed.

258 Charities and Trustee Investment (Scotland) Act 2005 s 71 sets out a list of 20 types of decisions that may be appealed.

259 Subsequently renamed the First-Tier Tribunal (Charity).

260 Principal Judge A McKenna “Appealing the regulator: experiences from the Charity Tribunal for England and Wales” in M Harding, A O’Connell and M Stewart (eds) *Not-for-profit law: theoretical and comparative perspectives* (Cambridge University Press, 2014) 336.

261 Principal Judge A McKenna “Appealing the regulator: experiences from the Charity Tribunal for England and Wales” in M Harding, A O’Connell and M Stewart (eds) *Not-for-profit law: theoretical and comparative perspectives* (Cambridge University Press, 2014) 336 at 336, 344, 345, 349.

262 Lord Hodgson of Astley Abbotts *Trusted and Independent: Giving charity back to charities – Review of the Charities Act* July 2012 at [7.16].

the legal power the Charity Commission has or has not exercised in their particular case”, but several specialist charity lawyers have also complained of difficulty in understanding it.²⁶³

More concerning, the list approach appears to have precipitated a change in approach on the part of the Charity Commission, whereby far fewer formal decisions are actually made: the situation makes the tribunal easy for the Charity Commission to “avoid simply by not making an appealable decision at all”.²⁶⁴ Concern has been expressed that, as the Commission moves towards a more “light-touch” regulatory approach, even more of its work will fall outside the scope of the tribunal’s jurisdiction.²⁶⁵

All of these factors weaken the ability of the charitable sector to hold its government agency to account.²⁶⁶

In Ireland, the Charity Appeals Tribunal has an even more limited range of decisions that charities may appeal: a refusal by the Charities Regulatory Authority to register a charity; a decision to deregister a charity; a determination that a body is no longer deemed to be a charity; and a refusal to give a charity consent to change its name.²⁶⁷

However, unlike its counterparts in England and Wales and Northern Ireland, the Charities Regulatory Authority in Ireland enjoys very few unbridled powers: most of its powers require the prior consent of the courts before they can be exercised, providing charities with the protection of court supervision of the Authority’s decision-making. This factor possibly explains the very limited number of appealable decisions, as it is only in relation to the limited number of unbridled powers that an appeal to the tribunal exists.²⁶⁸

Australia is an outlier in terms of the limited types of decisions able to be appealed. Decisions regarding registration, deregistration, written directions, administrative penalties, and suspension or removal of responsible persons must be internally reviewed before any other review options are available.²⁶⁹ The decision on the internal review, and extension of time refusal decisions, may be appealed to the Administrative Appeals Tribunal, or to a court.²⁷⁰ However, other decisions, such as decisions to replace a responsible person of a charity, or to withhold or remove information from the register, may only be appealed on process grounds (judicial review).²⁷¹ The 2018 review of the Australian charities’ legislation identified the limited rights to challenge the ACNC Commissioner’s decisions as a concern:²⁷²

The Commissioner should not have additional powers nor be subject to less judicial scrutiny than other comparable regulators. A court should be able to consider afresh (a *de novo* review) any decision made by the Commissioner.

263 Principal Judge A McKenna “Appealing the regulator: experiences from the Charity Tribunal for England and Wales” in M Harding, A O’Connell and M Stewart (eds) *Not-for-profit law: theoretical and comparative perspectives* (Cambridge University Press, 2014) 336 at 354; Lord Hodgson of Astley Abbotts *Trusted and Independent: Giving charity back to charities – Review of the Charities Act* July 2012 at [7.16].

264 Principal Judge A McKenna “Appealing the regulator: experiences from the Charity Tribunal for England and Wales” in M Harding, A O’Connell and M Stewart (eds) *Not-for-profit law: theoretical and comparative perspectives* (Cambridge University Press, 2014) 336 at 344.

265 Lord Hodgson of Astley Abbotts *Trusted and Independent: Giving charity back to charities – Review of the Charities Act* July 2012 at [7.17].

266 Principal Judge A McKenna “Appealing the regulator: experiences from the Charity Tribunal for England and Wales” in M Harding, A O’Connell and M Stewart (eds) *Not-for-profit law: theoretical and comparative perspectives* (Cambridge University Press, 2014) 336 at 345.

267 Charities Act 2009 (Ireland) ss 42(3), 45(1) - (3).

268 OB Breen and PA Smith *Law of Charities in Ireland* (Bloomsbury, 2019) at [6.66].

269 Australian Charities and Not-for-profits Commission *Reviewing and appealing ACNC decisions*: <www.acnc.gov.au/about/reviews-and-appeals>. See also Australian Charities and Not-for-profits Commission Act 2012 ss 30-35 (*Review of refusal of registration*); 35-20 (*Review of revocation of registration*); 85-25 (*Objections*); 175-60 (*Remission of penalty*); 100-10(10) (*Suspension of responsible entities*) and 100-15(7) (*Removal of responsible entities*).

270 Australian Charities and Not-for-profits Commission Act 2012 ss 165-5(a), (b), 170-5.

271 Australian Charities and Not-for-profits Commission *Commissioner’s Policy Statement: Reviews and Appeals* 27 November 2017: <www.acnc.gov.au/about/corporate-information/corporate-policies/reviews-and-appeals>. See also Australian Charities and Not-for-profits Commission Act 2012 ss 100-30, 40-10.

272 P McClure AO, G Hammond OAM, S McCluskey, Dr M Turnour *Strengthening for purpose: Australian Charities and Not-for-profits Commission – Legislative Review 2018* 31 May 2018 at 37 (emphasis added) (see also 35 - 36, 75, noting a submission from the Law Council of Australia that all decisions should be subject to judicial review of all issues).

Discussion

DIA has itself acknowledged the importance of appeals in terms of holding decision-makers to account,²⁷³ highlighting the importance of ensuring meaningful accountability of Charities Services' decision-making.

As noted by the Strategy Unit in England and Wales, decisions of the government agency "should be, in both fact and appearance, open to challenge":²⁷⁴ the appeals mechanism needs to be simple and inexpensive, as a complex system is likely to deter charities from bringing claims to the tribunal.²⁷⁵

It is also important that appeals are able to be made to an independent judicial body. An internal review process suffers from lack of independence, as discussed above. It also means that charities do not have the benefit of any systematised pre-hearing processes, any right to disclosure, or any procedural rules:²⁷⁶

We have heard a couple of cases where there was a dispute as to the accuracy of the record of proceedings in the Charity Commission's internal review ... It seems to me that there is a risk that a charity's limited budget for legal costs could easily be used up in the internal review before even accessing the ... Tribunal (especially as the Charity Commission's internal review has no time frame), and that fruitful settlement discussions leading to a consent order could still be undertaken after an application to the ... Tribunal (which might be stayed pending further discussions between the parties) after the benefit of disclosure.

Submitters also expressed concern that requiring internal reviews as a compulsory step in the process can also add to undue cost and delay, as discussed above.

In the interests of transparency and accountability in statutory decision-making in a modern democracy, as well as the principles of simplicity, fairness, accessibility and natural justice,²⁷⁷ care must be taken to protect charities' ability to substantively appeal *all* decisions made under the Charities Act to an independent judicial authority. If there are any specific decisions that, following an open consultation process, are identified as genuinely not amenable to appeal, these should be specifically carved out by statute (following the approach taken in s 249 of the Incorporated Societies Act 2022, as discussed above).

Recommendation 6.6:

That the legislation clarifies that charities remain able to appeal substantively, to an independent judicial body, *all* decisions made under the Charities Act. If, following an open consultation process, any specific decisions are identified as genuinely not amenable to appeal, these should be specifically carved out by statute (following the approach taken in s 249 of the Incorporated Societies Act 2022).

Consideration should also be given to other mechanisms that might reduce the burden on individual charities bringing cases and facilitate the development of case law for the benefit of all, as discussed further below in chapter 8.

273 Internal Affairs [Modernising the Charities Act 2005: Discussion Document](#) February 2019 at 34.

274 Cabinet Office Strategy Unit [Private Action, Public Benefit – A review of Charities and the Wider Not-for-profit Sector](#) September 2002 at [7.73].

275 House of Lords, House of Commons, Joint Committee on the Draft Charities Bill [The Draft Charities Bill](#) 15 September 2004, HL Paper 167-I, HC 660-I at [233].

276 Principal Judge A McKenna "Appealing the regulator: experiences from the Charity Tribunal for England and Wales" in M Harding, A O'Connell and M Stewart (eds) *Not-for-profit law: theoretical and comparative perspectives* (Cambridge University Press, 2014) 336 at 350.

277 Philanthropy New Zealand [submitted](#) that any appeals process should be based on the following principles: fair; low-cost; certainty; independence; accessible; natural justice; and participatory (so charities have a right to speak and provide supporting evidence). Philanthropy New Zealand's position in this regard was specifically supported by a number of submitters, including: Age Concern (Tauranga); Auckland Medical Research Foundation; Carolyn Bates; College Estate Charitable Trust; Community Trust South; Dave Henderson; DV Bryant Trust; Epilepsy Waikato Charitable Trust; Jackie St John; JR McKenzie Trust; Methodist Church of New Zealand Te Haahi Weteriana O Aotearoa; Momentum Waikato; National Assistance Fund; Parry Field Lawyers; Perpetual Guardian; Pirongia Te Aroaro o Kahu Restoration Society Incorporated; Ross Beever Memorial Mycological Trust; Seed the Change | He Kākano Hāpai; Social Service Providers Aotearoa; SocialLink Tauranga Moana; Taieri Community Facilities Trust; The Tindall Foundation; Tiri Porter; Todd Foundation; and WEL Energy Trust.



Chapter 7 – Agency Structure

“The charitable sector is one of New Zealand’s pou tokomanawa – it deserves to have strong foundations, and a legislative framework that upholds its radical potential by holding us all accountable to a biculturally ethical framework, enabling transparent resourcing, impactful work, and the reduction of bureaucratic drag”
– Anya Satyanand, 3 September 2020

As discussed above in chapters 1 and 2, protecting the independence of charities is critical or the charitable sector will lose “that which makes it distinctive and valuable to begin with”.¹ It follows that the independence of the agency responsible for administering charities’ legislation is similarly critical: it is essential that the scope of charity is determined independently of the government of the day.²

In New Zealand, the Sector Group worked hard to have the issue of the *structure* of the agency responsible for administering charities’ legislation added to the terms of reference for the Department of Internal Affairs’ (“**DIA’s**”) review of the Charities Act.³ While the issue was included, it was nevertheless glossed over in DIA’s discussion document for the review with the following comments:⁴

Any perception that key decisionmakers lack independence could undermine trust and confidence in the charities framework. Changing the regulator’s structure could address concerns over the independence of decisionmaking. But structural changes could be disruptive and a distraction, and require significant establishment costs.

The fact that so many submitters commented on the issue nevertheless highlights the fundamental significance of this issue to a charities law framework. This chapter considers what *should* be the structure of the agency responsible for administering charities’ legislation in New Zealand; it begins by setting out extracts from submissions in some detail in box 7.1 in order to provide context to the considerable and widespread concern that exists regarding the current structure.⁵

Box 7.1 – extracts from submissions on agency structure:

New Zealand needs a charities body which promotes a healthy and vibrant charity sector. It does not need one which seeks to limit numbers and restrict activity. Charities Services is opaque in its decision-making, and its decisions appear to be influenced by government priorities. The elevation of core Charities Commission objectives to purposes in Charities Services expanded the regulatory reach of government in ways likely to be detrimental to sector independence ... A key factor in the agreement of the charitable sector to the establishment of a Charities Commission was that it operated at an arms-length from Government ... The dis-establishment of the Charities Commission and its replacement by the Charities Board and an administrative Charities Services within Internal Affairs has led to an opaque process of decision-making. There is evidence that this decision-making may now involve government fiscal priorities, eg the need to maximise tax income. There is also evidence that the interpretation of ‘charitable purpose’ is being confused with ‘charitable activity’. The regime has not only been reduced to a regulatory one which seems more focused on whether charities should exist rather than on how to ensure they are a vibrant part of our society, but the elevation of some objectives of the Commission to purposes of Charities Services has enabled the government department to develop a more controlling approach towards the sector - Alzheimers New Zealand (footnotes omitted)

- 1 Lord Hodgson of Astley Abbots [Trusted and Independent: Giving charity back to charities – Review of the Charities Act](#) July 2012 at [3.15].
- 2 R Fries, Chief Commissioner of the Charity Commission for England and Wales from 1992 - 1999 *The status of the Charity Commission under the 2006 Act* unpublished paper, March 2012 at 1.
- 3 The finalised terms of reference for the review of the Charities Act include the “role, functions, *structure*, powers, accountability and appeal ability” of the government agency. See Department of Internal Affairs [Terms of reference to review the Charities Act 2005](#) May 2018 at 2 (emphasis added).
- 4 Internal Affairs [Modernising the Charities Act 2005: Discussion Document](#) February 2019 at 30.
- 5 See Te Tari Taiwhenua *Modernising the Charities Act – submissions*: www.dia.govt.nz/Charities-Act-Submissions.

The most effective way to strengthen the connections between the regulator and the charities sector is to remove it from the Department of Internal Affairs and create a new Independent Crown entity charged with stewardship of charities. We acknowledge there may be some disruption in the near term. However, we believe that the long-term benefits will be worth it - Community Housing Aotearoa

Concerns over independence are exacerbated because of the level of input and control the chief executive has over decision-making and day-to-day management of the charities sector ... in practice, the vast majority of decisions are not made by the Board or, if made by the Board, this follows a recommendation and written reasoning from Charities Services. This system creates both the perception that charities decision-making is not sufficiently independent from government, and that the Board may not always be acting independently from the recommendations made by charities services. It is particularly important for the decision-maker to be perceived as independent in this area given the complex nature of determining whether an entity meets the charitable purpose test, and ability for the decision-maker's personal views to influence their application of the test. It is a critical problem when viewed from the perspective of the role of civil society in keeping the executive branch of government accountable to the broader public - Greenpeace of New Zealand Incorporated

[We] see a continued need for an independent commission that promotes public trust and confidence in the charities sector. It is difficult to see how the essential autonomy and independence of the Commission can be maintained if it is absorbed into the Department of Internal Affairs. While there are challenges with how the Charities Services narrow interpretation of the word 'charitable', which has undermined the sustainability of several charities, addressing the issues inherent in the definitional question would make more sense than dismantling the Commission which is what has occurred with the core functions moved to internal affairs. The charities sector has a key concern with the Charities Services and its interpretation of the definition of charity and many entities have been deregistered ... Charities Services has deregistered organisations solely on the basis of their advocacy and this should not be the role of Charities Services. A moratorium should be placed on deregistrations that are based on advocacy or community economic development ... [With respect to the Charities Commission, its] unilateral disestablishment and tighter control within a government department just six years later represent a model that lacks independence. It has also resulted in a convoluted decisionmaking process - Te Pūtahitanga o Te Waipounamu

... like many smaller organisations, we are concerned at the loss of the Charities Commission. The Commission worked effectively and transparently and was accountable to government and the sector and most importantly – it was accessible. It was also largely independent of governmental and departmental influence and so charities felt confident to work with the Commission and to collectively raise issues and try to find solutions. The devolution of the Commission's role to the Charities Registration Board and Charities Services has not been helpful ... It is difficult to maintain the appearance of independence when the Board and Charities Services sit within a government department and the staff of that department provide support and inevitably advice to the Board. The situation is more worrying when decisions are made without a referral to the Board and so what could have been an independent check that a decision was correct, can be bypassed. An example is the significant numbers of charities that have deregistered after conversations with or on the advice of Charities Services. This means that the decision does not go to the Board for an independent check on whether the advice was correct or the deregistration warranted. This can include charities to which Charities Services have applied a narrow view of charitable purposes and whether or not they can be registered - Hawke's Bay Community Law Centre

We believe the entity comprising Charities Services and the Registration Board needs to be independent of Government. This structural change may be disruptive but is crucial to the long-term effectiveness of the entity. The reality is that while the entity sits within a government department, the risk of actual or perceived interference will remain. This is exacerbated by the advocacy issue ... having the entity sit within a government department creates a risk, real or perceived, of punishment being handed down to a charity that openly criticises Government. Furthermore, as governments change, having the entity within a government department makes it vulnerable to changing government philosophies and approaches, impacting on overall consistency. We would like to see an independent Charities Commission ... This independence is important to avoid undue Government interference and install confidence both from the perspective of the public and charities - Community Networks Aotearoa

The best model ... would be an independent Crown entity ... giving the agency greater seniority in the structure of government and better leadership ... We need a government agency that proactively works to build public trust and confidence in charities – the current agency makes no effort to build public understanding of the sector. Rather, Charities Services seems to imagine that public trust and confidence will be enhanced by its deregistering groups based on a narrow, legalistic interpretation of the Act. This shortsighted choice is in fact undermining public trust and confidence in the sector, in Charities Services as a section of DIA, and in Government's claim that it values the sector - JR McKenzie Trust

We would like to see an independent Charities Commission, at least as autonomous as a Crown Entity. The placing of Charities Services within DIA has resulted in charities being regulated as if they were a government department. This is not helpful and does not reflect the agile, values driven nature of the sector - Bishop's Action Foundation

Charities Services and the Charities Registration Board are not sufficiently independent. The regulatory body responsible for administering the charities register and making registration and deregistration decisions should be independent of the government of the day, ideally an independent Crown entity ... We therefore request that the timeframe for the review be relaxed and its terms of reference expanded so that it is a true 'first principles' review that asks fundamental questions about our current charities infrastructure. These questions should include ... the form that Charities Services (or a new replacement regulatory body) should take, and its main role and purposes ... Currently, Charities Services is administered by the Department of Internal Affairs. This centrally based regulatory body was rejected by the 2002 Working Party on Registration, Reporting and Monitoring of Charities as potentially liable to perceptions of a conflict of interest (at 11) as the Government of the day may be able to influence registration and deregistration decisions based on Government policy (select committee report p2). There is no independent body that represents the charitable sector which advises Charities Services. We request that the functions of the Board and Charities Services are again placed with a Crown [entity], ideally an independent Crown Entity - Chapman Tripp

An independent Charities Commission should be reinstated ... Whatever agency administers the Charities Act must be accountable to the charitable sector in a meaningful way - Christian Education Trust

In their 2017 manifesto, the Labour Party stated they will consult with the community and voluntary sector on whether the disestablishment of the Charities Commission in 2012 and the transfer of its functions to the Department of Internal Affairs has resulted in "effectiveness and improved services and information for the sector". Overall, there is no meaningful accountability of Charities Services to the charitable sector or the public ... Whatever agency administers the Charities Act must be accountable to the charitable sector in a meaningful way, and an Advisory Board should be established to advise Government on policy and advance the interests of the charitable sector - Community Waitakere

The current agency has to go. I have personal experience of its entrenched dysfunctionality, over a period of years, working through a range of national and local organisations. Committed efforts by myself and other sector experts to try to help make it work for the benefit of New Zealand society at large have not made a difference to its entrenched condescending culture. Respected people with deep experience of the sector and of government processes have been consistently ignored or belittled by the agency even in meetings where we were present. We have been treated as fringe complainers and most insultingly as purely self-interested – not representative of anyone other than ourselves. The attitude to the sector that is demonstrated in decisions and conduct of the Department and especially Charities Services is reflective of a bureaucratic, controlling culture that has had its day, and it's time for a paradigm shift to reflect and respond to dramatic changes in the wider culture. This is not an attack on any individual, but on an entrenched and counterproductive culture. I support strongly the view that Charities Services must be replaced with a crown entity that operates at arm's length from the Government of the day and reports directly to Parliament, as was the position with the former Charities Commission ... In the 2018/19 independent survey of the sector, of the respondents who addressed this question, a total of 58% said the agency should be an arms-length Crown entity, compared to 30% who supported the current arrangement - Dave Henderson

While the current staff of Charities Services work hard, my belief that New Zealand needs an autonomous charities regulator has not changed. Of the other Commonwealth regulators, the Charity Commission for England and Wales, the Office of the Scottish Charities Regulator and the Charity Commission of Northern Ireland, are all independent of government. (Canada's sector is regulated from within the tax agency and Singapore also from within a government department) - Professor Carolyn Cordery

Division of the old Charities Commission has given rise to confusion and added complexity without improving the situation for charities - Friends of Arataki and Waitakere Regional Parkland Inc

We support our colleagues in the community sector who are calling for the reestablishment of an independent Charities Commission to give true independence to the Charity regulator. We know from our extensive contacts in the community sector that many agencies feel that Charities Services presently is frustrating rather than facilitating charitable work across our communities. We, along with many of our funding colleagues, are keen to collaborate with Government to help address the many and various social, economic and environmental challenges we face as a nation ... Together with iwi, business and community we can all help create stronger, more resilient and connected individuals, families and communities - DV Bryant Trust

The churches suggest that the monitoring and support roles ... could be enhanced through reconstituting Charities Services and the Board as a new Charities Commission. A structure somewhat at arm's length from government would tend to foster trust between the sector and the regulator, and increase opportunities to develop compliance mechanisms which are workable for both - InterChurch Bureau

Either an Autonomous or Independent crown entity would facilitate greater trust and transparency between the monitoring agency and registered charities. They would provide greater consistency of decision-making, and potentially timelier and better-informed decisions - Age Concern New Zealand

It seems obvious to me that taking an independent organisation and putting it inside a government department immediately makes the perception of it significantly less independent. Combine this with the fact that there was no sector consultation and it was done at a time when we were promised a full review of the 2005 Act from first principles ... perceptions of independence have been severely jeopardised if not lost altogether ... Charities should be set up again as an independent body that does not sit in a government department. It should ideally be an independent Crown entity ... any such entity should be accountable to the whole sector - Joanne Harland

I think an underlying issue here is the extent to which the Charities Registration Board is independent of government. I suggest the overall aim should be to create an entity that has a much higher level of independence than currently ... eg an independent Crown entity - Neil Walbran

The Law Society understands there is a concern that the current splitting of functions between the three-member CRB and Charities Services can be perceived to be largely illusory (with the CRB being seen as largely dependent on, and beholden to the views of, Charities Services). Consideration should be given to reinstating a Charities Commission or an equivalent body as regulator, ensuring that the regulator is sufficiently independent - New Zealand Law Society

The distance between the regulator and the sector has been significantly commented on and this will require a change in mechanisms and more importantly a change in culture. The role is critical and the current positioning within a Government department does not enhance the perception of confidence and independence - Platform

Charities Services has the potential to publicly promote the importance of charitable giving, raise the profile of the sector in the community and promote best practice. From a funder perspective, Charities Services can play an important role in working with the sector and government agencies to promote the use of its resources - such as the type of information that can be gained from the charities register (and prepopulated in other agency forms) and sharing data - so that it is easier for organisations to see who is funding what or delivering what type of charitable services. There has been a suggestion from a member that Charities Services "lost their identity" when merged within the Department of Internal Affairs and that their position within the department means that they have approached the regulator role at the expense of dedicating time to promoting the importance of charities and examples of best practice - Philanthropy New Zealand

We are concerned about the independence of Charities Services and agree with the PNZ recommendation that it be made a crown entity that operates at arm's length from the Government and Department of Internal Affairs, as was the legal position with the former Charities Commission. There are a number of other areas which benefit from having an independent Crown entity which works closely with Government but which has as an objective the development of charity in New Zealand - Sustainable Initiatives Fund Trust

Charities Services, as a service of ... DIA is part of the core public service and as such is directly accountable to a Minister. This limits its independence and places considerable power over independent and autonomous charities in the hands of a Minister ... [The current framework] does not seem consistent with the Government's own statements of what constitutes good practice in regulation, including the requirement that regulators 'maintain a transparent compliance and enforcement strategy that is evidence-informed, risk-based, responsive, and proportionate to the risks or harms being managed' ... We recommend that the best option is to return to the Crown entity model. The appropriate form would be an Independent Crown Entity (ICE), to provide a more arms-length relationship with ministers while still being able to advise and monitor ... This would place the Charities ICE in the same category as entities such as the Broadcasting Standards Authority, the Privacy Commissioner and the Electoral Commission. The Department of Internal Affairs should still be provider of policy advice to Ministers on charities and community and voluntary sector issues, a role they have carried out well for many years. Arguably, it will be better placed to do so, unencumbered by its current dual role as advisor and regulator. Recommendation 4: Remove Charities Services as a function of the Department of Internal Affairs and establish an Independent Crown entity to register charities, protect the independence of charities, and advise and inform the sector - Social Service Providers Aotearoa

Commissions as independent Crown entities tend to have mandates to provide leadership, planning, regulatory, education, monitoring and advice functions, as provided by, for example, the Quality and Safety Commission, the Commerce Commission and the Human Rights Commission. We think a Commission for the Not-for-profit Sector would provide much needed focus and resources and be an acknowledgement of the sector's significance - SocialLink Tauranga Moana

The government should be doing all it can to support and sustain this sector because of the sheer size and impact it has on our communities, with more than 27,000 charities supported by more than 230,000 volunteers and 180,000 paid staff contributing enormously to New Zealand. Considering the size of the sector, more thought and proper attention is required to support it. This should include the (re)establishment of an independent organisation (at arm's length to government) to "look after" and advocate for this sector, providing support and advancing the interests of charities. This organisation could be an independent Crown entity and will develop trusting relationships, ultimately with the welfare of the charitable sector as its priority. This will enable the sector to remain independent and flourish - Sport Waitakere

Charities Services should be made a crown entity. It is important that this body operates independently and can be seen to be operating independently - Adults in Motion

There was a lack of proper consultation regarding the disestablishment of the Charities Commission ... there is a fundamental lack of independence inherent in the current structure. While the Board is independent in name, it delegates most decisions to, and receives its advice from, Charities Services. Charities Services staff, however, do not report to the board, but through DIA management to the minister. There cannot be the perception of independence when there is no actual independence - Todd Foundation

The controversial and surprise proposal in 2011 to disestablish the Charities Commission and transfer its functions to Charity Services (a business unit of the DIA) was not wanted by the charitable sector and ultimately passed by only one vote. Submissions from the sector expressed strong objection to the proposal, and the lack of proper consultation regarding the disestablishment of the Charities Commission remains a source of grievance ... This change in entity has also resulted in a convoluted decision-making process between the Chief Executive of the Department and a 3-person Registration Board ... as predicted, the disestablishment of the Charities Commission has resulted in charities-related functions that are less accessible to the public, and charities sector work is being carried out less transparently. An exacerbating factor in this context is the question of whether charities have an effective means of appealing decisions of Charities Services and the Board, and therefore of holding them to account for their decisions ... It does seem unfair for the Board to be tasked with decision-making under the current framework: the Board is held responsible for controversial decisions that are largely formed by Charities Services; it is not resourced to provide the independent check that was originally intended, especially against a government department that appears to have very entrenched views as to how the Act should be interpreted - LEAD

... we consider that an independent Charities Commission, accountable to the charities sector, should be reestablished - Acts Churches New Zealand

... The best model for this would be an independent Crown entity - Age Concern (Tauranga)

Many community agencies opposed the disestablishment of the Charities Commission some years ago. The Commission had more independence than the current structure ... We would prefer to see an independent Crown entity - Auckland North Community and Development

We believe that a new approach is required and that stewardship of the charitable sector would best be performed by establishing an Independent Crown entity – ComVoices

We support the reestablishment of an independent Crown entity such as the Charities Commission ... rather than the current set up where the regulator is housed within a government department - FinCap (National Building Financial Capability Charitable Trust

... another group is needed - Ian Brown

... dissolving of the Charities Commission was a definite backward step as to gaining public trust in NZ charities - Iola Haggarty

the regulator needs to be an independent body, not part of a ministry ... as the previous Charities Commission - Kapiti Retirement Trust

the regulator has very limited public accountability currently - Lake Taupo Hospice Trust

We support a return to the Charities Commission format and suggest that the Commission's board should be at least seven people with 3 appointees from the charitable sector, at least 1 from Māori charities and 3 political appointees - Lindsay Jeffs

I endorse SocialLink's recommendation that an independent crown entity be established for the charitable/not-for-profit sector - Liz Davies

the Charities Commission had the perception of independence that is not there now that Charity Services is inside DIA - Make-a-Wish Foundation of New Zealand Trust

The increasing incursion of government policy onto the charitable sector requires accountability ... The common understanding in 2005 of the sector's independence, with the Charities Commission acting independently from government controls, had constituted a significant building-block in the social contract of trust between the sector and government. The sector was shocked when the Commission was disestablished and tighter government controls implemented in 2011. These events spawned mistrust and destroyed the pretence of working collaboratively ... The relationship, in practice, between the 3-person Charities Registration Board and the DIA is now convoluted and integrated ... We recommend an independent Charities Commission be reinstated ... The agency which administers the Charities Act must be able to be held accountable to the charitable sector - Marine Reach Charitable Trust

[The current structure] is of concern to the sector as the Charities Act is now being administered by an agency closer to government than the original Crown entity originally proposed which was rejected at Select Committee in favour of an autonomous Crown entity ... The structure of the charities framework needs to be considered as a whole. The Charities Commission was supported by the sector and the Minister and the later disestablishment of the Commission was done without consultation with the sector. The establishment of an independent Charities Commission would promote public trust and confidence, provide more transparency, and arguably more cost-effective than the current structure. We recommend the reinstatement of an independent Charities Commission as an independent Crown entity - Methodist Alliance

NCWNZ members are in support of an independent body overseeing charities and being able to operate independent of government intervention and note any future governance body should reflect the make-up of those charities in terms of gender, ethnicity and region ... NCWNZ strongly believes the role of the Board be independent from Government. This is particularly relevant to a charity such as NCWNZ where the objective of the charity is to advocate for the rights of women, and this is through challenging structures and processes including the Government ... NCWNZ supports a movement away from the Charities Board being embedded in the Department of Internal Affairs and as such away from the influence of Government - National Council of Women of New Zealand Incorporated Te Kauhinerā Wahine o Aotearoa

The Charities Services should be an independent Crown entity, which ... was originally advocated for when the 2005 Act was being worked on. It has not been helpful to the independent administration of charities to have this brought within a government department and this needs to be changed - New Zealand Council of Christian Social Services

There should be an independent body which monitors charities. Charities should not be regulated within a government department as is currently the case. Charities have a role challenging government policy, and there are obvious conflicts with a body within government monitoring organisations engaging in these activities - New Zealand Family Planning

We would like to see an independent Charities Commission reestablished outside of a government department, answerable to the charitable sector and promoting public trust and confidence. As well as promoting the interests of the sector, the establishment of an Advisory Board would provide an independent view and improve decision-making affecting the sector by providing advice to Government on matters of policy - NZ Navigator Trust

A first principles review should be considering ... ways of ensuring that “purpose” is neither a laissez faire arrangement for the sake of it, nor a means to arbitrarily manipulate the make-up of the sector. That certainly does not in this context be about having a government department tasked with reducing the number of charities. Freedom of association and the impact on social capital are seminal elements of decision-making here, which suggests strongly in favour of the reestablishment of an independent Commission - Project Periscope Ltd

A Charities Commission should be reinstated with an Advisory Board being available to both the Commission and Government on interests of the charitable sector - Stopping Violence Services
... removing from DIA and going back to the previous structure would address the perceptions - Surf Life Saving New Zealand Inc

As part of a government department, this is not an independent body. Accountability would be improved by having charities administered by an independent body, which is not part of the government and having an advisory board established to provide guidance to the government on policy and further the interests of the charitable sector ... The disestablishment of the Charities Commission has resulted in charities-related functions that are less accessible to the public, and charities sector work is being carried out less transparently - The Presbyterian Church of Aotearoa New Zealand

... we believe a truly independent charities sector is more possible when it is independent from the DIA ... Central to our views are the need to have a more independent body outside of the DIA to regulate and support the sector - The Salvation Army Group

Trinity views that it is important for the regulator to be independent of a government department. The best way to promote public trust and confidence is to separate the charities sector body from the government who sets the rules ... [and] address the charities issues more transparently and without bias. The Charities Registration Board focuses solely on the application and deregistration of charities as provided for in the Charities Act 2005. This is a narrow responsibility for a body that should have responsibility for the sector - Trinity Lands Ltd
[Charities Services and the Charities Registration Board] should be completely replaced by an Autonomous Crown Entity which reports directly to Parliament - Trust Democracy

UNICEF NZ recommends that there be an independent body to oversee the administration of the charities. This will also provide a body for the public to voice concerns about the operations of a particular charity - UNICEF New Zealand

Match the regulatory functions under the Charities Act with functions to protect the independence and education of the voluntary and community sector. This would be most effective through an Independent Crown Entity in the form of a Charities Commission as was previously set up under the Charities Act 2005 - Volunteering New Zealand

The Charity Regulator making decisions under the Act, and in particular charitable status (registration / deregistration) decisions, needs to be independent and have the capacity and expertise to efficiently make legally robust decisions. The reinstatement of a Charities Commission (or an equivalent autonomous / independent entity) may be necessary for this purpose. The current Charities Registration Board, although theoretically independent of DIA Charities Services, appears to be substantially dependent upon and influenced by the views of DIA Charities Services - Te Whakakitenga o Waikato Incorporated, on behalf of the Waikato-Tainui iwi, endorsed by the Waikato Raupatu Lands Trust and Group and Waikato-Tainui marae

We would prefer an independent from government agency to manage Charity Services. We would wish for a specialist agency knowledgeable about the sector - Youthline Central South Island

See also the submissions of Auckland Medical Research Foundation; Cancer Society of New Zealand; Ced Simpson and Valerie Williams; College Estate Charitable Trust; Coromandel Independent Living Trust; Epilepsy Waikato Charitable Trust; EY Law; Geoff Pownall; Habitat for Humanity New Zealand; Individual C; Individual D; Jon Horne; Kensington Swan; Lisa Abrams; Literacy Aotearoa Charitable Trust; ML Gribble; Methodist Church of New Zealand Te Haahi Weteriana O Aotearoa; Momentum Waikato; Motueka Family Service Centre; National Assistance Fund; Neighbourhood Support New Zealand Inc; New Zealand Association Resource Centre

Trust; New Zealand Breastfeeding Alliance; Northland Community Foundation; Northland Urban Rural Mission; Perpetual Guardian; Peter Sharpe; Pirongia Te Aroaro o Kahu Restoration Society Incorporated; Public Trust; Rape and Abuse Support Centre Southland Inc; Richard Easton; Ross Beever Memorial Mycological Trust; RSM; Sarah Doherty; Seed the Change | He Kākano Hāpai; SPCA; Steiner Education Development Foundation; Taieri Community Facilities Trust; The Fred Hollows Foundation NZ; The Gift Trust; The Kate Edger Educational Charitable Trust; The Tindall Foundation; Tiri Porter; Wayne Francis Charitable Trust; WEL Energy Trust; Weleda Charitable Trust; Youth with a Mission Queenstown Lakes Charitable Trust (Tāhuna ki te Ao Charitable Trust); and Youthline Central South Island.

The original decision to establish a Charities Commission had been many decades in gestation.⁶ Given the significance of agency structure in a charities' law framework, it is also important to place the issue in its historical context, which is discussed next.

Early developments

In 1979, the Property Law and Equity Reform Committee issued a report on the Charitable Trusts Act 1957, noting that the only provision for general oversight of charitable trusts at the time was the power vested in the Attorney-General by that Act.⁷ This power was considered ineffective in practice because the Attorney-General had "no means of obtaining information about the operation of existing trusts" nor any means of ensuring a knowledge of their existence.⁸ Despite this, the Committee concluded there was unlikely to be sufficient maladministration of charitable trusts in New Zealand to justify the resources involved in establishing organised supervision, such as through a Charities Commission along the lines established in England and Wales; to the contrary, and based on the experience of the United States, the Committee considered it would be impossible to make such an organisation large enough "to carry out full checks of all accounts and returns audited"; instead, the Committee recommended placing a reasonable degree of reliance on audit, particularly the obligations of an auditor to be satisfied that "payments are authorised in terms of the trust instrument", supported by a register of charitable trusts "and someone to check that audited accounts ... were supplied annually and to follow up defaulters".⁹ Such an approach resonates with the "accountability rather than regulation" approach discussed above in chapter 2. The Committee noted that this approach would be less expensive than "establishing an organisation not merely to keep a register but to carry out the checking of accounts itself".¹⁰

As discussed above in chapter 1, the Charitable Trusts Act differs from legislation for incorporated societies in that it does not require entities incorporated under it to file annual accounts.¹¹ As a result, charitable trusts were seen as "uniquely free from supervision", and the Committee recommended amendment to require annual financial information to be filed.¹²

Despite the 1979 report of the Property Law and Equity Reform Committee, many organisations supported the call for a Charities Commission. In May 1988, the New Zealand Federation of Voluntary Organisations proposed that a commission be established to register charities, provide advice to the sector, and promote coordination within the sector; the Federation considered such a mechanism would strengthen and

6 M McGregor-Lowndes and B Wyatt (eds) *Regulating Charities: the Inside Story* (Routledge, 2017) at 187.

7 Charitable Trusts Act 1957 s 68 (*Inquiries into condition and management of charities*).

8 Property Law and Equity Reform Committee *Report on the Charitable Trusts Act 1957* (Wellington, February 1979) at [3]. See also *Report to the Minister of Finance and the Minister of Social Welfare by the Working Party on Charities and Sporting Bodies* (Treasury, Wellington, November 1989) at 57.

9 Property Law and Equity Reform Committee *Report on the Charitable Trusts Act 1957* (Wellington, February 1979) at [1], [8] - [11].

10 Property Law and Equity Reform Committee *Report on the Charitable Trusts Act 1957* (Wellington, February 1979) at [11] - [12].

11 Compare Incorporated Societies Act 1908 s 23 (which will be replaced by a similar requirement in Incorporated Societies Act 2022 s 102 once it comes into force). See also Charities Act 2005 s 41.

12 Property Law and Equity Reform Committee *Report on the Charitable Trusts Act 1957* (Wellington, February 1979) at 2.

increase the accountability of the sector, and also give much-needed advice to the Government. In general, the commission was seen as a supportive agency, rather than a controlling one.¹³

Shortly prior to this, in 1987, and apparently inspired by the doctrines of neoliberalism,¹⁴ then Minister of Finance, Hon Roger Douglas, had announced an intention to impose a “flat tax”, including on the income of charities: in a classic example of a “tax expenditure analysis” approach, the proposal was to support charities instead through a system of direct funding by Government.¹⁵ The proposal was highly controversial: then Prime Minister, Rt Hon David Lange, wrote that it was an “unaccustomed addition to the burdens of office to have the finance minister take leave of his senses”.¹⁶

Charities perceived the proposal as a threat to their independence, and argued that charities were in a better position to determine where their funds should be directed than government.¹⁷ Nevertheless, submissions did acknowledge scope for greater accountability in the voluntary sector at that time.¹⁸

1989 Working Party on Charities and Sporting Bodies

Ultimately the proposal to tax the income of charities did not proceed; instead, in 1988, the Government appointed a working party tasked with reviewing the appropriate taxation regime for charitable organisations and sports bodies.¹⁹ Reporting in November 1989, the Working Party on Charities and Sporting Bodies noted there was no evidence of any widespread abuse of tax-exempt status, although there was an inherent lack of information as the Inland Revenue Department (“IRD”) “does not pursue a policy of requiring returns from tax-exempt bodies as a matter of course”.²⁰

Nevertheless, the Working Party recommended establishing a Charities Commission to “supervise and advise charities” and “help to prevent bogus organisations from masquerading as charities”.²¹ The main purpose of the Commission would be to “increase the accountability of charities to the public”, and “help the donating public to determine which organisations should be supported”:²² this would be achieved by registering charities, requiring them to file annual accounts and make these publicly available, and by monitoring charities’ use of funds to ensure they are “used in accordance with the organisation’s stated objectives”.²³ The Working Party noted the importance of the Commission being independent of the government of the day – and outside the control of

13 *Report to the Minister of Finance and the Minister of Social Welfare by the Working Party on Charities and Sporting Bodies* (Treasury, Wellington, November 1989) at 60.

14 Michael Cullen *Labour Saving – A memoir* (Allen & Unwin, 2021) at 88.

15 [New Zealand Government Economic Statement](#) 17 December 1987: See also *Report to the Minister of Finance and the Minister of Social Welfare by the Working Party on Charities and Sporting Bodies* (Treasury, Wellington, November 1989) at 14-15; Michael Cullen *Labour Saving – A memoir*, (Allen & Unwin, 2021) at 109 - 116; Charities Bill 1R (30 March 2004) 616 NZPD 12,117 - 12,118; Charities Bill 2R (12 April 2005) 625 NZPD 19,950, per Gordon Copeland (United Future).

16 David Lange *My Life* (Auckland: Viking, 2005) at 236 - 238.

17 *Report to the Minister of Finance and the Minister of Social Welfare by the Working Party on Charities and Sporting Bodies* (Treasury, Wellington, November 1989) at [1.2.2(d)].

18 *Report to the Minister of Finance and the Minister of Social Welfare by the Working Party on Charities and Sporting Bodies* (Treasury, Wellington, November 1989) at 16.

19 *Report to the Minister of Finance and the Minister of Social Welfare by the Working Party on Charities and Sporting Bodies* (Treasury, Wellington, November 1989) at 2, 14.

20 *Report to the Minister of Finance and the Minister of Social Welfare by the Working Party on Charities and Sporting Bodies* (Treasury, Wellington, November 1989) at 3, 34. As discussed above in chapter 2, lack of information about charities was one of the key issues the Charities Act regime was intended to address.

21 *Report to the Minister of Finance and the Minister of Social Welfare by the Working Party on Charities and Sporting Bodies* (Treasury, Wellington, November 1989) at [3.3.1], 60.

22 *Report to the Minister of Finance and the Minister of Social Welfare by the Working Party on Charities and Sporting Bodies* (Treasury, Wellington, November 1989) at [3.4.1(b)], [(d)], 63.

23 *Report to the Minister of Finance and the Minister of Social Welfare by the Working Party on Charities and Sporting Bodies* (Treasury, Wellington, November 1989) at iv-v, 2, 10, 60, 63, 65, 67: “The Commission will have the power to investigate the affairs of an organization – and, in particular, whether the organization is meeting its charitable objectives”. See also *Report by the Working Party on Registration, Reporting and Monitoring of Charities* 28 February 2002 at 12, recommending a monitoring function to ensure the activities of charitable organisations continue to “accord with their stated objectives”.

a government department – in order to “carry out its functions effectively, and maintain the confidence of the public and the organisations registered with it”.²⁴ To that end, the Working Party recommended the Commission be constituted similarly to the Law Commission, and required to report annually to Parliament.²⁵

However, the Working Party also made a number of other recommendations, including proposals to remove charities’ exemption from fringe benefit tax, and subject charities to new “income tax anti-abuse rules”. The net result was the report was not well received by the sector,²⁶ and the following year, a change of government saw the initiative to establish a Charities Commission go into hiatus.²⁷

At the time, the tax privileges for donations to approved donee organisations (including charities) were “capped” at the level of \$500 (for individuals) and the lower of \$1,000 or 5% of assessable income (for companies).²⁸ Many argued the cap should be lifted to encourage donations to charities, but government unwillingness to do so was underscored by concern about the charitable tax exemptions being used for tax avoidance,²⁹ and the lack of a means by which the public could “identify legitimate charities as opposed to sham operations”, due to the absence of robust information about charities;³⁰ there was also no specific law, standard procedure, or Government department concerned with ensuring the accountability of charities in New Zealand at the time.³¹

The 2001 review

In 2000, following another change of government, IRD undertook a review of taxation issues relating to charities and non-profit bodies, drawing on the work of the 1989 Working Party.³² In June 2001, as part of the consultation stage of the review, IRD issued a discussion document which focused on three areas: whether the definition of “charitable purpose” remains appropriate in 21st century New Zealand; whether the level of information provided by charities is appropriate; and some specific tax issues affecting the charitable sector.³³

More than 1,700 submissions on the 2001 discussion document were received. The submissions indicated general support for a registration, reporting and monitoring

24 *Report to the Minister of Finance and the Minister of Social Welfare by the Working Party on Charities and Sporting Bodies* (Treasury, Wellington, November 1989) at 62, 69.

25 *Report to the Minister of Finance and the Minister of Social Welfare by the Working Party on Charities and Sporting Bodies* (Treasury, Wellington, November 1989) at 9, 11, 62. The Law Commission is currently structured as an independent Crown entity (see Crown Entities Act 2004 sch 1 pt 3).

26 David McLay “Regulation of charities” NZLJ [2002] 55 at 55.

27 In 1995, media concern about the accountability of charity fundraisers for ensuring that funds raised were used for the purpose stated led to the creation of the Accountability of Charities and Sporting Bodies Working Party, a voluntary group led by Philanthropy New Zealand and the New Zealand Federation of Voluntary Welfare Organisations: D Robinson *Self-Regulation Report: New Zealand*, International Journal of Not-for-Profit Law, Vol 1 Issue 1, September 1998. The Working Party reported in 2001, outlining a proposal for a self-regulatory system, employing a code of practice for voluntary organisations, with oversight from a consortium on the charitable sector. See Inland Revenue Department [Tax and charities, a government discussion document on taxation issues relating to charities and non-profit bodies](#) June 2001 at [1.5] - [1.7]; *Report by the Working Party on Registration, Reporting and Monitoring of Charities* 28 February 2002 at 9.

28 See *The Law and Practice of Charities in New Zealand*, S Barker, M Gousmett and K Lord (LexisNexis, Wellington, 2013) at [3.674] - [3.683]. The deduction for donations by Māori authorities to donee organisations came later, but was also capped at 5% of net income (see [3.699] - [3.709]).

29 *Report by the Working Party on Registration, Reporting and Monitoring of Charities* 28 February 2002 at 2 - 3, 29: “These same concerns have at times been expressed from within the community and voluntary sector itself”.

30 *Report by the Working Party on Registration, Reporting and Monitoring of Charities* 28 Feb 2002 at 2 - 3.

31 *Report by the Working Party on Registration, Reporting and Monitoring of Charities* 28 February 2002 at 3; Inland Revenue Department [Tax and charities, a government discussion document on taxation issues relating to charities and non-profit bodies](#) June 2001 at [6.2], [6.3], [6.6], [6.7], [7.1] - [7.6].

32 Inland Revenue Department [Tax and charities, a government discussion document on taxation issues relating to charities and non-profit bodies](#) June 2001, foreword.

33 Inland Revenue Department [Tax and charities, a government discussion document on taxation issues relating to charities and non-profit bodies](#) June 2001 at [1.3]. See also discussion about the June 2001 discussion document above in chs 3, 5.

system for charities,³⁴ and on 16 October 2001 (shortly following 9/11), the Government announced a decision in principle to introduce such a regime. To that end, in November 2001, the Government set up a Working Party on Registration, Reporting and Monitoring of Charities to consult with the charitable sector on the design details.³⁵ The Working Party was tasked with proposing a “clear, simple, cost-efficient and straight-forward” system for the registration, reporting and monitoring of charities in New Zealand.³⁶

2002 Working Party on the Registration, Reporting and Monitoring of Charities

Reporting in February 2002, the Working Party highlighted the leadership role of Government in “fostering a culture of philanthropy, altruism and generosity” towards the work of charities.³⁷ The Working Party concluded there should be a “transparent system of accountability to the public and government to reinforce the integrity of the charitable sector”.³⁸ Following a national consultation process (considerably larger than that conducted in 2019 for the DIA’s review of the Charities Act),³⁹ the Working Party recommended establishing a single body, a Charities Commission, to be responsible for the registration and monitoring of charities and for investigating complaints; the Charities Commission would be structured as a Crown entity, and required to report annually to the sector and the Government through the Ministers of Finance and the Community and Voluntary Sector; the Working Party also recommended the Charities Commission be responsible for administering the Charitable Trusts Act 1957, and for the “defender of charities” role currently carried out by the Attorney-General; an annual meeting of the Charities Commission was also recommended to provide accountability to both government and the charitable sector.⁴⁰

In reaching these conclusions, the Working Party considered but specifically rejected two alternative structures:⁴¹

It is our *strong view* that a Charities Commission would be most acceptable to the charitable sector. This is important as it would mean the *costs of monitoring and enforcement are likely to be less if the sector supports and has confidence in the organisation*.

Any lesser alternative would *fail to adequately recognise the importance and independence of the charitable sector*.

The first alternative structure considered was a semi-autonomous body within an existing government department, with a statutory advisory board from the charitable sector:⁴²

We believe this option is *considerably inferior* to a Charities Commission. We do not believe a semi autonomous body would have *sufficient status and independence to gain the support and sense of ownership required from the charitable sector*.

We believe this option also *fails to recognise the independence and importance of the charitable sector*.

These issues would *impact significantly on its ability to carry out its recommended role*.

However, in case its recommendation for a Commission was not accepted, the Working Party also considered where such a semi-autonomous body might be placed, and specifically cautioned against locating it within the DIA:⁴³

34 *Report by the Working Party on Registration, Reporting and Monitoring of Charities* 28 February 2002 at 3, 30, 32; Charities Bill 1R (30 March 2004) 616 NZPD 12,118 per Gordon Copeland (United Future).

35 *Report by the Working Party on Registration, Reporting and Monitoring of Charities* 28 Feb 2002 at 30.

36 *Report by the Working Party on Registration, Reporting and Monitoring of Charities* 28 Feb 2002 at 31, 1.

37 *Report by the Working Party on Registration, Reporting and Monitoring of Charities* 28 Feb 2002 at 2, 4.

38 *Report by the Working Party on Registration, Reporting and Monitoring of Charities* 28 February 2002 at 8.

39 See the [submission](#) of Dave Henderson.

40 *Report by the Working Party on Registration, Reporting and Monitoring of Charities* 28 February 2002 at 4 - 5, 10, 13.

41 *Report by the Working Party on Registration, Reporting and Monitoring of Charities* 28 February 2002 at 9 (emphasis added).

42 *Report by the Working Party on Registration, Reporting and Monitoring of Charities* 28 February 2002 at 11 (emphasis added).

43 *Report by the Working Party on Registration, Reporting and Monitoring of Charities* 28 February 2002 at 11 (emphasis added).

The disadvantages of the DIA include a *possible perception of conflict of interest* given its *funding role* and the approval and monitoring role it would be required to undertake. These are problems with not having a Commission and are not exclusive to the DIA.

These comments were prescient. The DIA oversees approximately \$650 million of grants and funding through class 4 gambling activities, lotteries profits, community organisation grants scheme (COGS) and a number of other smaller funds.⁴⁴ A large number of charities, including a number of members of Sector Group, receive funding from the DIA, a factor which may restrict their ability to provide robust feedback on issues relating to administration of the Charities Act for fear of putting that funding at risk.

The second alternative considered was a non-autonomous business unit within an existing government department; however, the Working Party rejected this option for three reasons:⁴⁵

1. It would have the *same disadvantages* as a semi-autonomous body as we have described above.
2. The charitable sector would have *less opportunity to provide feedback* than with the semi-autonomous body.
3. The business unit would *not have the advantage of reporting independently to Ministers on policy*.

We consider these disadvantages would not necessarily be overcome by creating a statutory advisory body to assist the business unit.

The Charities Bill

Following release of the Working Party's report in 2002, the Government began a two-year review and consultation process, leading to introduction of the original Charities Bill into Parliament on 23 March 2004. The Bill was described as the "climax ... of a 16-year attempt by the charitable sector to bring about a fundamental change in its status in New Zealand society".⁴⁶

In the original Charities Bill, the Charities Commission was structured as a **Crown agent**.⁴⁷ Of the three types of statutory entity created by the Crown Entities Act 2004 (Crown agents, autonomous Crown entities ("**ACEs**"), and independent Crown entities ("**ICEs**")),⁴⁸ Crown agents have the closest connection with the Government: Crown agents must *give effect to* Government policy when properly directed to do so by their responsible Minister, meaning they are subject to a high degree of Ministerial control.⁴⁹ Crown agents are established in situations where Government wishes to retain close control over an entity (akin to a Department), but does not want to play a role in making specific funding decisions.⁵⁰

A large number of submitters expressed concern with the original Crown agency classification for the Charities Commission:⁵¹

They were concerned that this classification might allow the Government to *interfere* with, direct, or control the Commission, and would not reflect the *independence* from the Government of the charitable sector. *Particular concern was expressed at the prospect that the Government might be able to directly or indirectly influence the registration or deregistration of particular charities to reflect government policy.*

44 Maria Robertson, Deputy Chief Executive of Kāwai ki te Iwi, Service, Delivery and Operations, Department of Internal Affairs, comments to Charities Services' Annual Meeting, 29 October 2021 during the Q&A Session: charities.govt.nz/news-and-events/past-events/2021-charities-services-annual-meeting/.

45 *Report by the Working Party on Registration, Reporting and Monitoring of Charities* 28 February 2002 at 12 (emphasis added).

46 Charities Bill 1R (30 March 2004) 616 NZPD 12,118 per Gordon Copeland (United Future).

47 Charities Bill 2004 (108-1) [explanatory note](#) at 1.

48 Crown Entities Act 2004 s 7(1)(a).

49 Crown Entities Act 2004 ss 7(1)(a), 28(1)(a), 36(1), 103(1), 113(b).

50 *The Law and Practice of Charities in New Zealand*, S Barker, M Gousmett and K Lord (LexisNexis, Wellington, 2013) at [3.1409] - [3.1416]. Ministers are not authorised to give directions to any Crown entity in respect of a particular person.

51 Charities Bill 2004 (108-2) ([select committee report](#)) at 2 (emphasis added).

In light of these concerns, the classification of the Charities Commission was changed at select committee stage to that of an **autonomous Crown entity**.⁵² ACEs are required to *have regard to* government policy when directed to do so by their responsible Minister, following which the Commission and its Board decide how best to exercise their powers to perform their statutory functions.⁵³ Although not as independent as an independent Crown entity, an ACE structure was nevertheless a significant improvement: the independence of the Charities Commission was fundamental to the original agreement between the charitable sector and government when it was established in 2005.⁵⁴

The 2012 reforms

As discussed above in chapter 6, on 31 May 2011, less than six years after the Charities Act had commenced and less than three years after the tax provisions (requiring registration in order to access the charitable income tax exemptions) had come into force,⁵⁵ the Government announced, without consultation, that it would disestablish the Charities Commission and transfer its functions to the DIA.⁵⁶ The stated reason was that, in the “current period of fiscal and economic restraint”, the Government wished to reduce the number of government agencies as it seeks better value for money; other stated reasons included reducing “duplication of roles and back office functions” and improving the “cohesion of frontline services”.⁵⁷ However, while it is common for a newly-elected National-led government to undertake something of a “quango-hunt”, growing public controversy over the narrow approach taken by the Charities Commission to the definition of charitable purpose may in fact have been a driving factor.⁵⁸

The vehicle to effect this change, the Crown Entities Reform Bill, was introduced into Parliament on 29 September 2011, with the proposal to disestablish the Charities Commission contained in Part 3.⁵⁹ The explanatory note to the Bill described it as an omnibus bill providing for “machinery of government changes”, amalgamating the functions of a number of existing agencies “to achieve gains in financial efficiencies, effectiveness, and future viability of agencies”.⁶⁰

Following its first reading on 4 October 2011, the Crown Entities Reform Bill was referred to the Government Administration Select Committee. As discussed above in chapter 6, submitters to the Committee overwhelmingly opposed the proposal to disestablish the Charities Commission. Reporting in March 2012, the Select Committee recorded a split:⁶¹

52 Charities Act s 9(1) (as originally enacted) and Crown Entities Act 2004 sch 1 pt 2.

53 Crown Entities Act 2004 s 104.

54 See Supplementary Order Paper 2012 (32) Crown Entities Reform Bill (332-2), released 22 May 2012 and Crown Entities Reform Bill In Committee (23 May 2012) 680 NZPD 2,330 per Hon Trevor Mallard. See also, for example, the [submissions](#) of Trust Democracy: “The 2002 Working Party on Registration and Monitoring of Charities (note the very deliberate use of the word ‘monitoring’ – not regulating, which is a very different thing), after a major national consultation made very clear in its report that independence of the planned agency needed to be a key characteristic, so as to reflect the independence of the sector (p9). That independence is crucial because, as the report recognises, to work best and most effectively the monitoring agency needs to sit independently, half way between the sector and the government. Being part of a government agency completely undermines both the key characteristic of the sector – its independence from Government – and the same principle as it applies to the monitoring agency”; LEAD; Motueka Family Service Centre; SPCA; and Te Pūtahitanga o Te Waipounamu.

55 Section CW 41(2), (5) (which require charitable registration as a prerequisite to income tax exemption) came into effect from 1 July 2008 (see s 20 of the Taxation (Personal Tax Cuts, Annual Rates, and Remedial Matters) Act 2008 and [Charities Act Commencement Order 2006](#) cl 4).

56 “[Government reviews more state agencies](#)” (31 May 2011), online: *Scoop Parliament*.

57 New Zealand Government press release [Reduction in State Agencies confirmed](#) 12 August 2011.

58 In New Zealand, a bonfire of unnecessary regulation was championed as a major election policy, being a direct policy transfer from UK conservative parties. See M McGregor-Lowndes and B Wyatt (eds) *Regulating Charities: the Inside Story* (Routledge, New York, 2017) at 267. See also *Moving the charitable goal posts*, Mark von Dadelszen, NZLawyer magazine, issue 155, 11 March 2011, and *Charities Act review*, S Barker and K Yesberg, NZLawyer magazine, issue 157, 8 April 2011.

59 Crown Entities Reform Bill (332-1).

60 Crown Entities Reform Bill (332-1) explanatory note at 1. As discussed above in ch 6, pt 1 of the Bill proposed to disestablish the Alcohol Advisory Council of New Zealand, the Health Sponsorship Council, and the Crown Health Financing Agency, and pt 2 proposed to disestablish the Mental Health Commission.

61 Crown Entities Reform Bill (333-2) (select committee report) 30 March 2012 at 4 - 5.

We acknowledge the strong concern expressed by submitters in relation to the disestablishment of the Charities Commission, an autonomous Crown entity, and the transfer of its functions to an independent board within the Department of Internal Affairs, which would compromise the commission's independence and autonomy.

The bill was introduced at the end of the previous Parliament and submissions were called without a closing date. We were unable to call for further submissions due to time constraints. We had requested an extension of three months, but were granted an extension of one month. This led to confusion about the status of submissions. *We further acknowledge the frustration felt by submitters, some of whom were unaware of submissions being called. This highlights a problem with the process associated with bills at the end of Parliament, because they cease being an item of business until reinstated in the new Parliament. We gave consideration to all written submissions.*

We note that Part 3 of the bill contains a number of provisions designed to support the *independence* of the charities registration function. Clause 45 of the bill as introduced would insert a new section 8(4) into the Charities Act 2005, requiring each board member to act independently in exercising their professional judgment, without direction from the Minister.

Nevertheless, some of us are convinced that the legislative safeguards provided in the bill would be insufficient to maintain the degree of independence that the Charities Commission provides. We also believe that the charities-related functions will be less accessible to the public, and that the charities sector work will be carried out less transparently if the commission's functions are transferred to the Department of Internal Affairs.

Review of the Charities Act 2005

A review of the Charities Act is due to take place following the current review of the Incorporated Societies Act 1908.

Government members believe that transferring the commission's current functions to the Department of Internal Affairs will create a more robust, resilient agency, and endorse the intention to do so now rather than after the review of the Charities Act.

Labour and Green members believe that the transfer of the functions from the Charities Commission to the Department of Internal Affairs *should not occur. No decisions on either legislative or operational change should be made until the review of the Charities Act and the Incorporated Societies Act are completed.* Further, the *independence and integrity that the Charities Commission has given to the process must be retained* and we do not believe that this is possible under the proposal to move the functions of the Charities Commission to the Department of Internal Affairs.

Despite these comments, the next stages of the Bill occurred quickly over 22, 23 and 29 May 2012. Part 3 of the Bill was hotly contested, passing its second reading with the narrowest of margins at only 61:60 votes. Hon Trevor Mallard (Labour) put forward a Supplementary Order Paper, seeking to defer commencement of Part 3 by three years, "to give the opportunity to the Government to fulfil its commitment to have the review of the Charities Act and, in particular, the Charities Commission, before the Charities Commission is disestablished".⁶² However, the Government "had the numbers" and the motion was rejected. The Committee of the Whole House divided Part 3 into a separate Charities Amendment Bill,⁶³ which controversially passed into law on 6 June 2012 against the strong opposition of the charitable sector.⁶⁴

By 1 July 2012, the Charities Commission was disestablished, and its functions transferred to DIA, with registration decisions to be made by a 3-person Charities Registration Board.⁶⁵

62 Supplementary Order Paper 2012 (32) Crown Entities Reform Bill (332-2), released 22 May 2012 and Crown Entities Reform Bill In Committee (23 May 2012) 680 NZPD 2,330 per Hon Trevor Mallard.

63 Charities Amendment Bill (No 2) 332-3C.

64 Charities Amendment Act (No 2) 2012. See the discussion in S Barker "[Charity regulation in New Zealand: history and where to now?](#)" (2020) 26(2) Third Sector Review 28; M McGregor-Lowndes and B Wyatt (eds) *Regulating Charities: the Inside Story* (Routledge, New York, 2017) at ch 10; and *The Law and Practice of Charities in New Zealand*, S Barker, M Gousmett and K Lord (LexisNexis, Wellington, 2013) at [4.50].

65 Charities Act 2005 s 8; Crown Entities Reform Bill (332-1) explanatory note.

Discussion

Many see both the disestablishment of the Charities Commission, and the way it was handled, as symptomatic of poor regard for the charitable sector.⁶⁶ The current structure is inherently problematic in a number of respects.

For example, the hastily-made changes grafted onto the original Charities Commission framework an unusual bipartite decision-making regime that appears to have been based on (a significantly watered-down version of) the Gambling Commission (also administered by DIA).⁶⁷

As Charities Services is a business unit within DIA, its staff report, through DIA management, to the Minister; Charities Services' staff do not report to the Charities Registration Board. Although the Charities Act requires each member of the Board to act *independently* in exercising their professional judgment,⁶⁸ the Board's ability to provide an independent check on Charities Services' decision-making is compromised by the fact that Charities Services provides secretarial and administrative support to the Board.⁶⁹ In practice, the relationship between the Board and DIA staff is too close: instead of the Board acting as an independent decision-maker and reaching its own view on the recommendation of the Chief Executive, as required by the Act, the Board appears to treat the DIA analysts as its own employees/advisers, and takes a "governance" role of merely approving the decision-making process already undertaken by DIA staff.⁷⁰ The result is an unfair process that does not achieve the "two-tiered" consideration of applications required by the Act.

Further, as discussed above in chapter 6, unintended consequences of hastily-made changes to the original Charities Bill, that have resulted in appeals under the Charities Act being conducted as rehearings, incentivise charities to err on the side of providing more factual material to Charities Services rather than less, as they will have no automatic right to adduce any evidence on appeal that was not before the original decision-maker when it made its decision. The three-person Board meets only monthly and does not operate as a trier of fact, meaning that it is not structurally equipped to deal with the volume of material a charity might provide. Due to resourcing issues, it may not even be provided with all the information provided by a charity, resulting in further structural unfairness, as the Board may be responsible for making a final decision based on information it has not seen. In other words, the Board is inadequately structured and resourced to provide the independent check on Charities Services' decision-making that was originally intended.

66 See, for example, the [submissions](#) of Ced Simpson and Valerie Williams: "An independent Charities Commission should be reinstated ... preferably as an independent Crown entity. There was a lack of proper consultation regarding the disestablishment of the Charities Commission. The agency administering the Charities Act is now housed in an entity even closer to government than the original Crown agency classification that was so comprehensively rejected in the select committee stage for the original Bill. Justifiably many in the community/civil society see this as symptomatic of the government's lack of, and poor, regard for the sector despite rhetoric espousing its mana"; Community Waitakere: "The current decision-making framework, since the abolition of the Charities Commission and its role being split across the Charities Registration Board and Charities Services, was cobbled together and rushed through under urgency, based on an original framework that was designed for a different structure. The current framework is replete with unintended consequences, including the denial of natural justice to charities"; Kotare Trust: "Of course, rushed decisions - especially in forming legislation - are likely to have many shortcomings in practice - and such is the case with the Charities Act. Those shortcomings have been exacerbated by the 'bulldozed' decision to dismiss the Charities Commission in 2012 ... [A full first principles review] - promised as a compromise for the rushed legislation - has been long awaited. No other sector would have been treated with such disdain"; and the Todd Foundation.

67 See Gambling Act 2003 Pt 3 and the definition of "Department" in s 4. The Gambling Commission has up to five members, appointed by the Governor-General, operates as a Commission of Inquiry, is specifically authorised to engage experts, and has wide powers to receive evidence (see Gambling Act 2003 ss 221, 225, 226).

68 Charities Act s 8(4)(a), as amended in 2012.

69 Charities Act s 8(5), (6).

70 See *Re The Foundation for Anti-Aging Research* (2016) 23 PRNZ 726 (HC) at [33], [90] - [92].

In addition, decisions relating to charitable registration are often legal decisions: although all Board members are very experienced in the charities sector and bring extensive knowledge and skills, not all are legally trained. Charities Services, in addition to providing secretarial and administrative support, also provides legal advice to the Board, which advice has been withheld from disclosure on the grounds of legal professional privilege.⁷¹ It is difficult to see how the Board can be genuinely independent from its “legal adviser”.

Further, in response to controversy about the high numbers of charities being deregistered in New Zealand,⁷² Charities Services appears to have developed a new practice of encouraging charities to deregister voluntarily (or to withdraw their application for registration).⁷³ This practice creates the impression of a “black-box operation”: it removes decision-making from the Board, and from public and media scrutiny, thereby undermining transparency, but it specifically does not address the underlying issue of controversial interpretations of the definition of charitable purpose.⁷⁴ According to Charities Services’ website, the Board now makes only a handful of decisions every year.⁷⁵

The result is that decisions relating to registration and deregistration are effectively being made, or are at least being very heavily influenced, by a government department, an agency that is even closer to government than the original Crown agency structure that was so comprehensively rejected in 2004.

71 For example, paragraphs 6(c) and (d) and 10 - 12 of memorandum dated 31 July 2019 from Charities Services to the Board, received under the Official Information Act 1982 on 21 September 2019, were withheld on the grounds of legal professional privilege. Following the intervention of the Ombudsmen, it became apparent that the information withheld included both legal advice provided to Charities Services and shared with the Board, and legal advice provided by Charities Services to the Board.

72 See, for example, the discussion in Legalwise “[Significant issues with Review of Charities Act 2005](#)” 10 January 2019.

73 See, for example, Charities Services Ngā Ratonga Kaupapa Atawhai [2020/2021 Annual Review](#) at 10: in the 2020/21 financial year, 385 charities deregistered voluntarily, representing 49% of the 782 charities deregistered in that period. The following explanation is given: “Charitable status is voluntary in Aotearoa. A charity may ask to be deregistered at any time and for any reason. For example, a charity may request deregistration if it is winding-up and will cease to exist”. However, the annual review does not elaborate on how many charities deregistered voluntarily for this reason, or how many were encouraged to deregister voluntarily due to changes in jurisprudential interpretations. Similarly, of the 1,568 applications for registration received during the period, 231 or 15% were withdrawn, with no elaboration as to why so many, having invested in creating a new entity and applying for registration, were subsequently withdrawing their application. This factor was commented on, for example, in the following [submissions](#) of LEAD: “... there appears to be a practice developing of DIA staff commonly encouraging some applicants (whom they, the DIA staff) believe might not be successful in applying for registration) to withdraw their application (or voluntarily deregister) – thereby removing decision-making from the Board, and also as a result removing from public and media scrutiny (ironically undermining the very transparency that the legislation was designed to promote). For example, since February 2007, approximately 9,315 charities have been deregistered (more than a third of those currently registered – so this represents quite a major “purging” of the register). About half (4,774 charities) were deregistered for failure to file annual returns. While the paper work is an important part of an information and disclosure regime, only six charities (0.0006%) have actually been deregistered for “serious wrongdoing” – the main rationale for having such a regulatory regime in the first place. Most of the remaining 4,535 charities have deregistered “voluntarily” so it is unclear how many of these deregistrations are the result of the narrow jurisprudence of concern to many observers. Similarly with registrations being informally dissuaded from being pursued this effectively hides potential areas of conflict, individualises failure to comply and throws a cloak of invisibility over potential systemic biases or jurisdictional peculiarities ... The Charities Act is an information and disclosure regime. Conceptually, Charities Services (and the public) should want charities to be on the register, so that they are subject to the transparency and accountability requirements of the Charities Act. An increasingly narrow interpretation of “charity” serves no-one, and undermines the avowed purpose of the Act”.

74 As noted in the [submission](#) of the Hawkes Bay Community Law Centre, a “great deal of time, effort, planning, resource and hope comes with each application for charitable status and if the charity is knocked back, the effects can be significant ... too many charities are being deregistered and ... there appears to have been little analysis around the numbers and reasons for why so many charities are not able to be registered or their registration has been discouraged. In our view, the Board and Charities Services are too deeply embedded in the DIA and there is a perception that the checks and balances that were inherent when the Commission was in place have become blurred”.

75 See Charities Services *View the decisions*: www.charities.govt.nz/charities-in-new-zealand/legal-decisions/view-the-decisions/.

These factors undermine the ability of the charitable sector to have confidence in the current structure, which in turn, as predicted by the 2002 Working Party, increases friction and therefore cost: although the stated rationale for disestablishing the Charities Commission was to reduce costs, the current structure is in fact more costly than the structure it replaced,⁷⁶ even at a time of reduced applications for registration (now that the initial establishment phase is over). In addition, in practice, charities-related functions appear less accessible to the public, and charities sector work is carried out significantly less transparently, than was the case under the Charities Commission.⁷⁷

All comparable jurisdictions that have located their charities function outside of their tax authority⁷⁸ have created independent agencies to administer charities legislation,

76 OB Breen "Redefining the measure of success: a historical and comparative look at charity regulation" in M Harding (ed) *Research Handbook on Not-for-Profit Law* (Edward Elgar, 2018) 549 at 555: "[t]he Crown appropriation for [Charities Services] in 2014-15 was \$5.21 million, rising to \$5.22 million in 2015-16. In contrast, the Crown appropriation for [the Charities Commission] was \$4.84 million in each of its final years of operation". See also M McGregor-Lowndes and B Wyatt (eds) *Regulating Charities: the Inside Story* (Routledge, New York, 2017) at 267: "The former NZ Commissioner notes, with the benefit of hindsight, that, over 3 years, the cost of the new arrangements increased by nearly half a million dollars and over a third of the staff of the young [Charities Commission] departed". See also Report of the Social Services Committee 2010/11 financial review of the Charities Commission: www.parliament.nz/en/pb/sc/reports/document/50DBSCH_SCR5460_1/201011-financial-review-of-the-charities-commission at 3: "Some of us are very concerned about the proposed transfer of functions and disestablishment of the commission, because of lack of evidence of cost savings..." Charities Services' annual spend was \$6,682,604 for the 2019/20 financial year and \$6,440,685 for the 2020/21 financial year: Charities Services Ngā Ratonga Kaupapa Atawhai [2020/2021 Annual Review](http://www.charities.govt.nz/2020/2021-Annual-Review) at 9. See also the [submission](http://www.lead.org.nz/2020/2021-Annual-Review) of LEAD: "One of the arguments at the time of disestablishing the Charities Commission was to reduce costs. Even if this were true, it does not justify an inferior structural arrangement with so many down-sides. However, the information available suggests that no savings have indeed been made to overall costs, even at a time of reduced applications for registration (now that the establishment phase "rush" is over)"; and Project Periscope Ltd: "the cost of the current regime is stated to be \$6.923 million. Given that Charities Services employs 37 people, that equates to \$187,108 per person employed. One wonders at the comparative cost were the Commission to have survived. Were Charities Services to be subjected to the same level of scrutiny they apply to charities regarding demonstration of effective and efficient contribution to "purpose", it is highly likely to be found wanting. The quoted outputs in the review document of Charities Services hardly demonstrate value: ... resource requirements could/should have been reducing rather than climbing; an absence of data regarding how many complaints Charities Services received and their "clearance rate" in terms of follow-up and resolution, which is pertinent to determining what "behind-the-scenes" work is undertaken on behalf of the sector".

77 See OB Breen "Redefining the measure of success: a historical and comparative look at charity regulation" in M Harding (ed) *Research Handbook on Not-for-Profit Law* (Edward Elgar, 2018) 549 at 559, n 40: "OSCR is (and the former [New Zealand Charities Commission] was), particularly transparent on matters relating to staff numbers and allocation, system requirements and regulatory costs in corporate reports. It is more difficult to unearth this information when the [agency responsible for administering the charities legislation] forms part of a government department (as in New Zealand and Singapore) and is no longer required to produce autonomous corporate reports or be as answerable to select committees as previous independent [agencies] such as the [Charities Commission] were".

78 In Canada and the United States, charities functions remain administered by the respective tax authorities (the Canada Revenue Agency (CRA) and the Internal Revenue Service (IRS)). However, locating the charities function within a tax authority is not without difficulty. In Canada, the 1967 tax reform, which placed the registration requirement for charities in the income tax legislation, has been perceived as a failure due to its preoccupation with fiscal matters and tax incentives: "it is unrealistic to expect a great deal from a legislative scheme whose underlying logic – to promote charity by offering fiscal incentives (on one interpretation) – is self-contradictory ... the principal objective of the regulatory scheme [is also antagonistic]...the main effort of the federal government in this domain ... has been to establish more effective ways to police a costly tax expenditure. This feature of the regime runs contrary to the natural sympathies of most people involved in the sector, including those obliged to administer, enforce and publicly support it. These individuals will often remark that the regime is too intrusive or too cumbersome for social organisations run by volunteers in their spare time". See Ontario Law Reform Commission *Report on the Law of Charities* (Toronto, 1996) at 250 and 341. The Special Senate Committee on the Charitable Sector also noted a potential conflict of interest between CRA as a tax-collector on the one hand and as a supporter of the sector on broader, non-tax-related challenges on the other: Report of the Special Senate Committee on the Charitable Sector *Catalyst for Change: A Roadmap to a Stronger Charitable Sector* June 2019 at 59. In addition, the location of the charities function within the CRA results in a large turnover of staff as people move into the larger tax agency, challenging the ability to retain charitable technical expertise: interview with Dr Susan Phillips, Professor in Philanthropy and Nonprofit Leadership at Carleton University's School of Public Policy and Administration, based in Ottawa, Canada (4 February 2021).

In the United States, McGregor-Lowndes and Wyatt write of the prospect of regulatory failure: "The IRS is plagued by ongoing political controversy, digesting budget cuts, challenged leadership, old legacy IT platforms, and rapidly innovating hybrid structures ... A regulatory vacuum is fast developing ..." M McGregor-Lowndes and B Wyatt (eds) *Regulating Charities: the Inside Story* (Routledge, New York, 2017) at 285.

including: Australia,⁷⁹ Ireland,⁸⁰ Northern Ireland⁸¹ and Scotland.⁸² England and Wales of course has had an independent Charity Commission of some description since 1853.⁸³

In New Zealand, locating the agency responsible for administering the Charities Act within a business unit of a government department, combined with the structural challenges faced by the Board in providing any independent check on Charities Services' decision-making, inherently undermine public trust and confidence in charities.

As noted by Richard Fries,⁸⁴ charities have the right to operate independently of government and be critical of government policy and practice: their ability to advocate in furtherance of their charitable purposes must be upheld and enforced by an authority which is independent of government. A mere government commitment to upholding independence of decision-making is inadequate: the status of the government agency must reflect its manifest independence and protect it against improper interference by future governments. In New Zealand's case, while there is no suggestion of Ministerial direction to the Board, the concern is the level of power wielded over decisions to register or deregister individual charities, in both perception and practice, by a government department. As noted by one submitter:⁸⁵

If the executive branch can control civil society institutions via the charities registration process then we don't really live in a democracy

Another difficulty is the status of such a unit within government overall. As predicted by the 2002 Working Party, a business unit within a government department does not reflect the status and independence of the charitable sector, and effectively sends a message to other parts of government that the charitable sector is not seen as important. It also has flow-on effects in terms of staff retention, as one submitter noted:⁸⁶

Since the original Charities Commission was disbanded and became a business unit within the Department of Internal Affairs there has been a rate of turnover of staff at the senior leadership level that has been problematic to the charities sector. I have seen first-hand where DIA uses Charities Services as a training ground for Team Leaders, Managers and General Managers. Whilst these people had a genuine warmth towards charities, their first priorities have been career development, as evidenced by their high rate of turnover.

79 The Australian Charities and Not-for-profits Commissioner is an independent statutory officeholder with a fixed term. The Australian Charities and Not-for-profits Commission Act 2012 (Cth) s 130-5 requires the Australian Charities and Not-for-profits Commissioner to report to Parliament. Although the ACNC has its own budgetary appropriation "for the sake of operational efficiencies, it is required to purchase backroom services such as human resources and information technology from the taxation agency": M McGregor-Lowndes and B Wyatt (eds) *Regulating Charities: the Inside Story* (Routledge, New York, 2017) at 284.

80 Charities Act 2009 (Ireland) s 13 establishes tÚdarás Rialála Carthanas (the Charities Regulatory Authority). Under ss 22 and 23, the Authority is accountable to the Irish Parliament. Similar to the Charity Commission for Northern Ireland, the CRA has a sponsorship relationship with the Department for Rural and Community Development ("DRCD"). Currently, CRA is staffed by civil servants assigned by DRCD, but a move to corporate independence has become a strategic objective for the CRA (see Dr O Breen, Rev Dr L Carroll, N Lavery [Independent Review of Charity Regulation Northern Ireland](#) January 2022 at 223, 60).

81 Charities Act (Northern Ireland) 2008 s 6 establishes the Charity Commission for Northern Ireland, an independent, non-departmental public body, overseen by the Department for Communities (see Dr O Breen, Rev Dr L Carroll, N Lavery [Independent Review of Charity Regulation Northern Ireland](#) January 2022 at 25, 37, 207, 223). Under cls 6(5) and 8(4) of sch 1, CCNI's annual report and statement of accounts are required to be laid before the Northern Ireland Assembly.

82 Charities and Trustee Investment (Scotland) Act 2005 s 1 establishes the Office of the Scottish Charity Regulator ("OSCR"). Under s 2(1)(c), OSCR is required to report to the Scottish Parliament. As with CCEW, OSCR is a non-Ministerial department. The Third Sector Unit within the Scottish Government has a policy relationship with OSCR but not a control relationship given OSCR's status as a non-Ministerial public body (see Dr O Breen, Rev Dr L Carroll, N Lavery [Independent Review of Charity Regulation Northern Ireland](#) January 2022 at 207, 224).

83 Lord Hodgson of Astley Abbotts [Trusted and Independent: Giving charity back to charities – Review of the Charities Act](#) July 2012 at [1.5]. The Charity Commission for England and Wales is a non-Ministerial department answerable directly to Parliament. It does not have a sponsorship relationship with a government department (see Dr O Breen, Rev Dr L Carroll, N Lavery [Independent Review of Charity Regulation Northern Ireland](#) January 2022 at 223).

84 Richard Fries, Chief Commissioner of the Charity Commission for England and Wales from 1992 - 1999, *The status of the Charity Commission under the 2006 Act*, unpublished paper, March 2012 at 1.

85 [Submission](#) of Greenpeace of New Zealand Incorporated.

86 [Submission](#) of Sarah Doherty.

A stand-alone Charities Commission is more likely to attract specialist staff with deep experience in the charities sector. With a stable staff, especially at the senior leadership level, the sector can develop quality relationships and develop a level of trust in the expertise, experience and commitment of the leadership.

Further, the combination of a business unit within a government department, and an under-resourced Board that is not sufficiently distanced from the business unit, has resulted in the charitable sector in New Zealand being left without an agency able to speak up on its behalf, as discussed further below in chapter 8.

Accountability

Another key difficulty inherent in the current structure relates to accountability.

When the Charities Commission was disestablished, all of the accountability mechanisms provided by the Crown Entities Act 2004, such as a requirement to report annually against a statement of intent, were correspondingly removed. Charities Services is subject to almost no meaningful accountability mechanisms, beyond minimal passing reference in a 200-page DIA annual report covering DIA's comprehensive work across a wide range of areas (including gambling, censorship, countering violent extremism, government recordkeeping, unsolicited electronic messages, anti-money laundering, private security personnel and private investigators).⁸⁷ In recent years, Charities Services has proactively produced its own "annual review" document,⁸⁸ but of course such document is entirely self-directed and contains only the information Charities Services chooses to include. It therefore cannot provide meaningful accountability. As one submitter noted:⁸⁹

It is not appropriate for a government service to be responsible only to itself.

Lack of proper checks and balances can lead to an oracular mindset, an issue also commented on in submissions.⁹⁰

In most comparable jurisdictions, the government agency responsible for administering charities' legislation is required to report to Parliament,⁹¹ and can expect to be publicly questioned on its strategic direction.⁹² There is no formal mechanism in New Zealand by which Charities Services might be similarly challenged. While Charities Services is required to hold at least one meeting each year with representatives of charitable entities, who must be given a reasonable opportunity to ask questions concerning and make submissions on the operation of the Charities Act,⁹³ such meetings provide

87 Te Tari Taiwhenua Department of Internal Affairs 2021 Annual Report *Pūrongo Ā Tau*: <annualreport2021.dia.govt.nz/> at 11, 31, 93, 151, 164, 192.

88 To date, three have been prepared. See Charities Services Ngā Ratonga Kaupapa Atawhai [2020/2021 Annual Review](#); [2019/2020 Annual Review](#): <www.charities.govt.nz/assets/Annual-Review-Report-2020.pdf>; and [2018/2019 Annual Review](#): <charities.govt.nz/assets/Charities_Services_Annual_Review_Report_FINAL.pdf>.

89 [Submission](#) of Trevor Goudie.

90 See, for example, the [submission](#) of Trust Democracy: "Make it more responsive and respectful towards the input it gets from charities eg through the Sector Group – not treat the input it receives so dismissively, with a 'we're the regulator so we know best' arrogance". As recently noted in Dr O Breen, Rev Dr L Carroll, N Lavery *Independent Review of Charity Regulation Northern Ireland* January 2022 at 77, excellence in regulation requires working to "establish an organizational culture that fosters and reinforces humility ..." (referring to Cary Coglianese, *Listening, Learning, Leading: A Framework for Regulatory Excellence* (Penn Program on Regulation, 2015)).

91 In Australia, Australian Charities and Not-for-profits Commission Act 2012 (Cth) s 130-5 requires the Australian Charities and Not-for-profits Commissioner to report to Parliament. In Ireland, under Charities Act 2009 (Ireland) ss 22 and 23, tÚdarás Rialála Carthanais (the Charities Regulatory Authority) is accountable to the Irish Parliament. In Northern Ireland, Charities Act (Northern Ireland) 2008 sch 1 cls 6(5), 8(4) require the Charity Commission for Northern Ireland's annual report and statement of accounts to be laid before the Northern Ireland Assembly. Under Charities and Trustee Investment (Scotland) Act 2005 s 2(1)(c), the Office of the Scottish Charity Regulator is required to report to the Scottish Parliament. In England and Wales, under Charities Act 2011 (UK) sch 1 cl 11, the Charity Commission for England and Wales is required to lay a copy of its annual report before Parliament.

92 Correspondence from Professor Matthew Harding (14 September 2020): "In Australia, the ACNC Commissioner must face questions regularly from a Senate Committee, and there are audit and other reviews from time to time in which matters might be raised".

93 Charities Act 2005 s 12.

very limited accountability in the current climate: charities may feel reluctant to draw attention to themselves as wide powers of deregistration that threaten a charity's very existence are currently being exercised very subjectively with almost no scope for redress. There are also issues of conflict of interest with funding, as discussed above.

In addition, many issues causing difficulty turn on fine points of legal interpretation that are not particularly well-suited to exploration in such a forum. Had Charities Services been required to report publicly that it was subjecting every housing charity in New Zealand to a review in the middle of a housing crisis, there could and should have been a public outcry (see the "social housing" case study discussed above in chapter 3).

Further, as discussed above in chapter 4, the only mechanism for substantively challenging decisions made under the Charities Act is an appeal to the High Court, a mechanism beyond the practical reach of most charities; for those that are able to appeal, the inability to access an oral hearing of evidence is perceived to unfairly favour the decision-maker. Charities Services considers most of its decisions not amenable to appeal, as discussed above in chapter 6. The net result is a lack of meaningful accountability for decision-making under the Charities Act, a point noted by many submitters.⁹⁴

The lack of meaningful accountability is a significant contributing factor to the slow-moving change of paradigm that has occurred:⁹⁵ the gains made by the charitable sector during the original Charities Bill's passage through the Parliamentary process have been and are being slowly eroded in favour of an increasing "command and control" approach to administering the Charities Act. Such a heavy-handed approach creates a perception that charities need to be "controlled", further undermining public trust and confidence when the vast bulk of charities are in fact overly compliant.

A related issue is that the Community and Voluntary Sector Portfolio is routinely held by a Minister outside Cabinet. This means that when important issues affecting charities arise for discussion around the Cabinet table, charities "don't even have a prize-fighter in the ring".⁹⁶ In addition, the Community and Voluntary Sector portfolio is also routinely given to a first-time Minister, sending a message that the portfolio is perceived as "easy", despite its fundamental importance to society, the diversity of views held within and about it and the tension created by the clash of underlying paradigms. The DIA has a monopoly on policy advice to the Minister regarding charities,⁹⁷ with no

94 See, for example, the [submissions](#) of Cancer Society of New Zealand: "There is currently no meaningful accountability of Charities Services to the charitable sector or the public. Having a truly independent Crown entity would rectify this"; Community Waitakere: "Overall, there is no meaningful accountability of Charities Services to the charitable sector or the public. Lack of adequate checks and balances can and does lead to poor decision-making"; SPCA: "SPCA is concerned that Charities Services provides little meaningful accountability to the sector or the general public ... and is disturbed that it is much costlier to run than the Commission that it replaced"; The Presbyterian Church of Aotearoa New Zealand; Joanne Harland; Jon Horne; LEAD; ML Gribble; Motueka Family Service Centre; and Northland Urban Rural Mission. See also OB Breen "Redefining the measure of success: a historical and comparative look at charity regulation" in M Harding (ed) *Research Handbook on Not-for-Profit Law* (Edward Elgar, 2018) 549 at 559, n 40: "it is more difficult to unearth ... information when the regulator forms part of a government department (as in New Zealand and Singapore) and is no longer required to produce autonomous corporate reports or be as answerable to select committees as previous independent regulators such as [the Charities Commission] were".

95 Charities Services does subject its decision-making to periodic external review. However, decisions for review are selected by Charities Services, rather than the external reviewer, which undermines the independence of the external review and its ability to provide meaningful accountability. For example, the external reviewer does not yet appear to have had an opportunity to review whether certain legal interpretations of Charities Services are correct, such as Charities Services' reworking of the test set down by Ellis J in *Re The Foundation for Anti-Aging Research* (2016) 23 PRNZ 726 (HC) at [88], and the new requirement following the ICE Foundation case report that charities must demonstrate capability of making a profit (Charities Services Case Report [International Centre for Entrepreneurship Foundation \(CC27546\)](#) 24 October 2017 at 3).

96 Interview with Bruce MacDonald, President and CEO, Imagine Canada, and Sector Co-Chair of the Advisory Committee on the Charitable Sector (5 June 2020): "if you think of Cabinet as a boxing ring, and Ministers go in to fight for their respective portfolios, the charitable sector doesn't even have a prize fighter in the ring".

97 This point was made by a number of submitters, including Northland Community Foundation; The Presbyterian Church of Aotearoa New Zealand; LEAD; Motueka Family Service Centre; Lisa Abrams, Marine Reach Charitable Trust and Youth with a Mission Queenstown Lakes Charitable Trust (Tāhuna ki te Ao Charitable Trust).

formal mechanism by which the charitable sector might provide context to that advice. This factor has contributed to departmental proposals for legislative change being implemented without sufficient notification, consultation, or scrutiny, which in turn has put a series of Ministers into conflict with the charitable sector:⁹⁸ robustly departing from officials' strong and apparently (if not actually) uncontested advice may not be an easy stance for a new Minister.

The difficulties inherent in the current structure are not remediable by piecemeal amendment and require bold structural reform. Much work went into the original decision to establish a Charities Commission, as discussed above: while its narrow interpretations of the definition of charitable purpose were controversial at the time, addressing that issue directly would have been significantly more effective and efficient than dismantling the organisation altogether, a process which did not address the underlying issue and has in fact made the situation worse.

As can be seen from the extracts set out in box 7.1 above, a clear theme of submissions to the DIA's review of the Charities Act was that the function of administering the Charities Act must be returned to a Crown entity, preferably an independent Crown entity, to give the agency greater seniority in the structure of government, honour and protect the independence of the charitable sector, remove the risk of actual or perceived interference with registration decisions (particularly in the context of advocacy), facilitate greater trust and transparency, build greater public understanding of the sector, and raise the profile of the charitable sector in the community.

This theme was also borne out in our consultation. The co-design workshop held in November 2020 was focused on the question of "What is the best structure for the agency(s) that administer charities legislation in New Zealand?". The outcomes of the workshop are set out in box 7.2 for reference:⁹⁹

Box 7.2 – co-design workshop on agency structure:

Sprint participants collectively identified and agreed on the following key features for the wider ecosystem in which charities' legislation is administered:

1. An independent charities and voluntary sector body is required to administer charities legislation:

- 2/3 of people who submitted in the government's review of the Charities Act wanted an independent commission reinstated;
- participants agreed with the original February 2002 determination of the Working Party on Registration, Reporting and Monitoring of Charities that an independent body was the only way to address concerns about undue government interference in charities and to ensure the confidence of the sector.

2. We need a better appeal system, with oral hearings:

- the system needs to be accessible;
- oral hearings of evidence should be enabled.

3. There needs to be a stronger sector voice – which is well resourced:

- umbrella bodies need to be better resourced;
- a body which focusses specifically on the role of the sector and its relationship with government would be useful.

4. There is a need for research on the sector:

- no one is leading research on the sector in New Zealand – this needs to change;
- we need to capture data on the value of the sector and its impact.

⁹⁸ For example, from material received under the Official Information Act 1982, it is clear that the original decision to conduct an attenuated review of the Charities Act (contrary to the Labour Party's 2017 manifesto commitment to undertake a first principles post-implementation review of the Act), was made on the direct advice of the DIA, before any consultation with the charitable sector was undertaken, and has put a series of Ministers into conflict with the charitable sector.

⁹⁹ The full report from the workshop can be found by scrolling down at the following link: www.charitieslawreform.nz/workshops.

5. There is a need for education:

- education is needed in areas such as: governance, best practice, funding, volunteering etc, as well as raising awareness about the charities register itself and key fundamentals of charities law;
- education could be carried out within the sector (through a stronger sector voice) and by the proposed government agency (see below for detail), through a greater focus.

SUGGESTED STRUCTURE

Sprint participants fleshed out more detail of the structures underpinning this ecosystem and collectively agreed on the following ideal agency structure:

A. *Independent Charities & Voluntary Sector Registrar*

An Independent Charities and Voluntary Sector Registrar ("**ICVS**") would administer charities' legislation. There would be seven members, appointed by the Minister, by Māori, and by the community and voluntary sector. ICVS would have three core divisions:

- (i) A **registration unit**, which would administer the publicly-available register of charitable entities. It would also incorporate a monitoring unit that would monitor existing charities for compliance with the duties to file annual returns and notify changes, as well as to address any instances of serious wrongdoing. It would also monitor, for example using data from the charities register, the wider environment in which charities operate.
- (ii) A **legal services unit**, providing specialist legal advice on charities law issues.
- (iii) An **education and advisory unit**, which would have three key divisions:
 - (A) **research**: recognising that there is a lack of research on the for-purpose sector, research would be encouraged by ICVS.
 - (B) **problem-solving**, which would incorporate general and individual advice as well as education sessions.
 - (C) **capacity-building**, which would incorporate enhancing the charities environment and public information.

Underlying all of this is **accountability** of ICVS, which was identified as a critical factor. ICVS would report directly to Parliament. There would also be a strengthened appeals mechanism, as discussed further below.

Difference to current system? ICVS would be independent of government and have sufficient status and independence to gain the support and sense of ownership required from the charitable sector. Its role would be clearer and it would be more accountable for the decisions it makes. In turn, the costs of monitoring and enforcement are likely to be less as the sector would support and have confidence in the organisation.

It should be noted that the Mental Health Commission, an autonomous Crown entity that was disestablished at the same time as the Charities Commission, was recently reinstated as the Mental Health and Wellbeing Commission and structured as an independent Crown entity.¹⁰⁰

A similar process for the Charities Commission would send a message that the charitable sector is seen as important; it would also protect charities' independence, and their ability to generate benefit to society, including wider benefits to social capital and wellbeing, all of which in turn would promote public trust and confidence in charities. It would also help strengthen New Zealand's democracy.

Recommendation 7.1:

That the agency responsible for administering charities legislation is restructured as an independent Crown entity that reports directly to Parliament.

Clauses 52 and 60 of the draft Bill included in chapter 9 of this report are intended to implement this recommendation.

¹⁰⁰ The Mental Health Commission established by the Mental Health Commission Act 1998 (and listed in the Crown Entities Act 2004 sch 1 pt 2 as an autonomous Crown Entity) was disestablished by the Crown Entities Reform Bill 332-1 Pt 2, which was separated into the Mental Health Commission Amendment Act 2012. The Mental Health and Wellbeing Commission has since been established by the Mental Health and Wellbeing Commission Act 2020.

Whatever agency is responsible for administering charities legislation, it must have deep trust law expertise if access to registration is to continue to turn on the definition of charitable purpose, to help protect against what the President of the Court of Appeal might describe as the common law “making a hash of equity”.¹⁰¹

Recommendation 7.2:

That, while access to registration turns on the definition of charitable purpose, the agency responsible for administering charities legislation has and continuously develops deep expertise in trust law.

Māori Advisory Committee

Another key outcome of our consultation is that, to facilitate due recognition of tikanga and Treaty principles in New Zealand charities law, a Māori Advisory Committee should be established, comprised of three people of mana with expertise in tikanga.¹⁰²

The agency responsible for administering the charities legislation would be required to refer to the Māori Advisory Committee any registration or administration decision that raises or may raise a matter of tikanga. The Māori Advisory Committee would also have the power to make policy statements on matters relating to tikanga, which statements would be binding on the agency responsible for administering the Charities Act, and on any hearing authority hearing an appeal of a decision made under it. The binding nature of the policy statements was a key outcome of our consultation with tikanga experts.

In many respects, a world-leading framework of charities law may be more about process than substance: establishing a Māori Advisory Committee would ensure that decisions relating to tikanga are made by those with expertise in tikanga, and would facilitate a process of ensuring that New Zealand charities law develops in accordance with tikanga, potentially manifesting the “ambicultural” approach put forward by the late Dr Manuka Henare.¹⁰³

A statutory definition of “tikanga principles” might include, without being limited to, the principles of kaitiakitanga, manaakitanga, aroha, mana, rangatiratanga, whanaungatanga, kotahitanga, atawhai and mahi tahi. However, because tikanga depends so heavily on context, it is important that any such principles are not themselves defined in the legislation.

The Māori Advisory Committee would also have the power to provide advice to the agency responsible for administering the Charities Act, to assist it to give effect to a statutory obligation to recognise and respect the principles of Te Tiriti o Waitangi and tikanga principles. The government agency would be required to have regard to that advice.

Another role for the Māori Advisory Committee might be in determining whether a charity could be recognised on the charities register as a kaupapa Māori organisation and/or a Treaty-based organisation. Status as a kaupapa Māori organisation is understood to be a key area of focus for many charities, particularly those linked to education and health: the process of recognising kaupapa Māori organisations could therefore be a potentially enormous task, underscoring the need for it to be carried out by those with the requisite expertise.¹⁰⁴

Recommendation 7.3:

That a Māori Advisory Committee be established to assist the agency responsible for administering charities legislation to give effect to principles of Te Tiriti o Waitangi and tikanga principles.

101 Kós P, opening address to the Charity Law Association of Australia and New Zealand Conference “[Murky Waters, Muddled Thinking: Charities and Politics](#)” 4 November 2020 at [33] - [35].

102 We are grateful to Justice Sir Joe Williams KNZM and the team of tikanga experts he convened in May 2020; the views expressed in this report with respect to a Māori Advisory Committee reflect our understanding of the results of that consultation.

103 Dr Mānuka Henare “Reconsidering the Māori economy as an Economy of Mana”, keynote presentation at the Philanthropy Summit, 16 April 2015: www.youtube.com/watch?v=5plyfMtA8nk.

104 Email correspondence with Stephen Parker, 20 February 2022.

Sector voice

Insufficient representation of the charitable sector within government is an issue of long-standing concern,¹⁰⁵ as highlighted, for example, by Philanthropy New Zealand (New Zealand's peak body for philanthropy and grant-making) in its most recent briefing to the incoming Minister for the Community and Voluntary Sector:¹⁰⁶

... representation for the interests of the Community & Voluntary Sector (CVS) within Government is lacking. The main relationship currently sits with Charities Services in the Department of Internal Affairs who given their remit play a regulatory function. This means that the voice of the sector is weak and there is no lead agency across Government who can actively engage, represent the interests of the sector or undertake policy development on more holistic issues where departmental responsibility is split (for example revitalising the volunteer workforce or advising on the appropriateness of wage subsidy policies).

Many submitters to the DIA's review of the Charities Act recommended the creation of an "Advisory Board", to provide guidance to the Government on policy and advance the interests of the charitable sector with many putting forward the Advisory Board in Australia as a model to refer to.¹⁰⁷ Given the significance of this issue to the slow-moving change of underlying paradigm that has occurred, extracts from submissions on this issue are set out in box 7.3 for reference:

Box 7.3 – extracts from submissions on sector voice:

The sector needs an entity or representative group that looks after and/or represents the rights and roles of charities as they are contributing a significant amount to national and regional economies and social service sectors. The current Charities Services entity is currently focused on compliance with Charities Act requirements rather than a wider sector approach – Central Lakes Trust

an Advisory Board should be established to advise Government on policy and advance the interests of the charitable sector – Community Waitakere

¹⁰⁵ See, for example, the Background papers for the Community Strategic Development Forum, 14 - 16 June 2002, Preliminary papers – number 3 at 2 - 5: "... effective collaboration can take years of painstaking relationship building between voluntary sector agencies themselves and between the collective group and government. It needs the investment of time, energy and resource ... the most common form of systematic collaboration is through an umbrella group or association which is supported by a secretariat. However, funding for these organisations at the subsector level has been identified as a major problem. For many charitable organisations, the pressure to spend funds on their fundraising objective inhibits the availability of funds for strategic networking and collaboration, which is often categorised as administration ... Resourcing becomes more and more difficult the further the issues appear to be from, and the less immediate they seem to, the day to day work at the core of the sector. On the other hand, a strategic approach which substantially changes government policy, eg on methods of funding the voluntary sector, may have a profound impact on the day to day operation of voluntary sector groups ... there is a need for some ongoing mechanism which attempts to link the sector as a whole and develop an overview. That mechanism would need to be reasonably well connected to the core of the sector – the organisations which work at the flaxroots ... There is a large gap between purely local focus and sector wide focus which may not be easily bridged simply through representative processes ... it is not reasonable to expect that an organisation can be developed which has strong links and good accountability to every organisation within the sector. The perception that this could be done, and the threat that this implies, may be one reason why there has been resistance by some umbrella groups to joining a superumbrella or overarching body ... There are also worries that government may choose to deal with only one body rather than the range of umbrellas and national organisations. It is true that government has expressed the desire to have one "point of contact" for the sector. It would be unacceptable to all organisations in the sector if the government chose to use this point of contact to ignore the various representatives of the many parts of the sector. If the premise is accepted that different national and umbrella groups must continue to deal with the government departments who are involved in their specific subsectoral issues, then an overarching body would only deal with government on overarching issues. It should be the role of this body to facilitate the involvement of the sector with government, rather than compete for attention. There are various structures that can provide support for ongoing collaboration. The structure can dictate such things as participation, accountability of decision-making, maintenance of strategic decisions, representation and sometimes credibility ... The body can promote and empower the sector as a whole and the organisations within it".

¹⁰⁶ Philanthropy New Zealand *Briefing to the Incoming Minister* December 2020 at [12].

¹⁰⁷ The Advisory Board in Australia is established under Australian Charities and Not-for-profits Commission Act 2012 div 135.

The establishment of an independent advisory board would greatly strengthen the connection between the regulator and the charities sector. It would provide charities with the opportunity to be included in the decision-making process – The Presbyterian Church of Aotearoa New Zealand

an Advisory Board would add sector experience and views to the decision-making process and so make it more robust and real-life related – an advisory board with elected sector representatives would address perceived lack of independence in decision-making – Friends of Arataki and Waitakere Regional Parkland Inc

An independent Advisory Board with iwi representation should be established to advise the Government on policy and advance the interests of the charitable sector. Iwi representation could assist on advising on Māori-related charitable issues and assist the regulator in giving effect to its obligations under the suggested Te Tiriti clause. An Advisory Board could also engage with the sector thereby improving communication and relations with the charitable sector and provide the Minister with an independent perspective on issues ... an independent Advisory Board or Advisory Committee on the Charitable sector, which would provide advice to Government on an ongoing basis relating to important challenges and issues faced by the sector – Te Pūtahitanga o Te Waipounamu

An Advisory Board would provide the independence required to assist the regulator's decisionmaking – Geoff Pownall

Consideration should be given to ... establish an advisory board to inform and liaise with the Minister and other Government departments – Habitat for Humanity New Zealand

the government needs an ability to interface with the sector and the Minister needs to receive, and be seen as receiving, independent informed advice from a number of places and this advice should not predominantly come from Charities Services and the DIA. It is also important that charities are independent and not adversely affected by ever-changing government policy. To this end, we would support the appointment of an Advisory Board and the reestablishment of the Charities Commission which could work with the sector and assist charities to attain appropriate mechanisms of accountability relevant to the size of the putea they manage. Either body would also act as a conduit between the sector and the Minister, and could provide independent feedback and advice and minimise the chance of criticism of inappropriate Ministerial pressure or influence – Hawke's Bay Community Law Centre

the Law Society sees significant merit in the concept of an advisory board or similar arrangement, with charity law experience and expertise, to facilitate input to the regulator, and to the government, on the registration, reporting and monitoring regime under the Charities Act (and potentially also other aspects of New Zealand charity law) – New Zealand Law Society

As well as promoting the interests of the sector, the establishment of an Advisory Board would provide an independent view and improve decision-making affecting the sector by providing advice to Government on matters of policy – NZ Navigator Trust

An advisory Board is such a good idea. This will keep the regulator abreast of issues facing the charities sector. It will also ensure informed comment back to the regulator when the regulator is intent on invoking change – The Institute De Notre Dame Des Missions Trust Board

Advisory board is more accessible – Individual A

The approach taken in Australia whereby an advisory board provides independent expert advice to assist the regulator in decision making seems worthy of further consideration – Kensington Swan

Serious consideration on the adaptation of the Australian practice where regulator receives advice and recommendations on its functions from a Ministerial appointed advisory board ... The charitable sector needs an independent voice whose mandate it is to think about the charitable and voluntary sector – The Methodist Church of New Zealand Te Haahi Weteriana O Aotearoa Auckland Fiji Methodist Parish (Tabacakacaka)

support from an advisory board would be beneficial as we have seen with other govt agencies – New Zealand Land Search and Rescue Incorporated (LANDSAR)

An advisory committee within Charities Services may improve accountability and assist with charities communications – Organisation A

An advisory function might be useful to ensure that DIA consults before imposing arbitrary changes – Parihimanihi Marae

There is an urgent need to develop a voice for the sector – Richard Easton

It would provide an additional partner to assist in the consistency of decision-making and that need and purpose are adequately considered as part of the application process – Roger Eynon
The idea of an Advisory board may assist the regulator by providing some independent expert advice – RSM

An advisory board may be a useful mechanism at a high level to give advice and support to the Board and the Scottish example of being required to consult with representatives before giving guidance seems sensible. These representatives can point out issues before the guidance goes out, which would hopefully result in clearer advice and relevant examples – Summit Road Society Incorporated

Te Rūnanga recommends that consideration be given to the establishment of an independent advisory board, similar to the Australian approach which provides advice and recommendations to the regulator on its functions. Te Rūnanga believes any such advisory board should include iwi representation (as is the case with the New Zealand Conservation Authority established under the Conservation Act 1987) to advise on Māori-related charitable issues and assist the regulator in giving effect to its obligations under the suggested Te Tiriti clause – Te Rūnanga o Ngāi Tahu

An established advisory panel made up of representatives from the charity sector may prove beneficial as the pace of change within the Sector increases. This panel could provide insight and information to Charities Services on an ongoing basis so that it receives direct feedback from a cross section of charitable organisations operating within the sector – The Hunger Project New Zealand

We believe there could be some traction to the idea of an advisory board, particularly if representatives of this Board came from charities of varying sizes in the country. But again, we submit these kinds of massive decisions are scoped out properly by an independent body like the Law Commission – The Salvation Army Group

An advisory board would help keep the monitoring agency realistic and relevant to what is happening in the sector and society, rather than becoming isolated and unilateral in its decisionmaking. In turn this would enable realistic evolution of the application of the definition. An Advisory Board would of course work much better if the agency it was working with was a Crown Entity at arm's length from Government – the dynamic between the sector and a government department is not able to work the same way because the government department sees itself as regulating the sector, rather than partnering with it for the good of society – Trust Democracy

Consultation requirement and an advisory board would be useful in terms of major issues or changes, mainly because of the length of time it would take for these processes to take place, the overall impersonal nature of the process, and the fact that the outcomes would be designed to cover the sector as a whole. There is a need for individual charities to interact with the regulator at a lower and more mundane level than would be covered by a consultation process and an advisory board. Accessibility in this regard could be achieved by (for example), a call centre with qualified, experienced staff who understand the legislation and the regulator's requirements, and the issues related to the real-time running of non-profit organisations – Volunteering Hawkes Bay

Waikato-Tainui recommends changes to provide for Māori representation, and experience and knowledge of te reo Māori, tikanga Māori and Te Tiriti, both at Charity Regulator level and on an Advisory Board established to provide input to the Charity Regulator and to the government on charity law and policy – Te Whakakitenga o Waikato Incorporated, on behalf of the Waikato-Tainui iwi, endorsed by the Waikato Raupatu Lands Trust and Group and Waikato-Tainui marae

An advisory board could review registration decisions to ensure that they are robust and wellfounded, and that organisations applying for charitable status are not unreasonably refused, and can easily appeal – Wellington Youth Orchestra Inc

An advisory committee within CS would assist charities' communication – Whaiora Whanui Trust
he Department of Internal Affairs should not have a monopoly on providing advice about issues affecting the sector. An advisory board from the charitable sector should be established ... This advisory board would engage directly with the sector and provide the Minister with an independent perspective on issues – Youth with a Mission Queenstown Lakes Charitable Trust (Tāhuna ki te Ao Charitable Trust).

See also the submissions of Coromandel Independent Living Trust; FinCap (National Building Financial Capability Charitable Trust; Joanne Harland; Jon Horne; LEAD; Lisa Abrams; Literacy Aotearoa Charitable Trust; Marine Reach Charitable Trust; ML Gribble; Methodist Alliance; Motueka Family Service Centre; Museums Aotearoa; Northland Community Foundation; Northland Urban Rural Mission; Organisation B; Rape and Abuse Support Centre Southland Inc; Stopping Violence Services; The Fred Hollows Foundation NZ; and Volunteering New Zealand.

It is instructive to consider how the issue of sector voice has been addressed in comparable jurisdictions.

Australia

The Advisory Board in Australia is comprised of certain ex officio members, plus two to eight other persons with expertise relating to not-for-profit entities (including charities), or experience and sufficient qualifications in law, taxation or accounting.¹⁰⁸

The Advisory Board does not exercise any governance function: its function is to provide advice to the Australian Charities and Not-for-profits Commissioner at the Commissioner's request.¹⁰⁹ The inclusion of an Advisory Board within the Australian charities law framework may have been influenced by the fact that decision-making power in Australia is consolidated in the hands of the Commissioner alone.¹¹⁰ The recent review of Australian charities legislation recommended extending the role of the Advisory Board to interface with both the Minister and the sector:¹¹¹

Advisory Board members have significant skills, expertise and networks in relation to the sector and are appointed by the Commonwealth Government. There could be a clear public benefit in the Advisory Board advising not only the Commissioner but also the Minister, and interfacing with the sector. Its independence is important to the credibility of the ACNC.

Currently, the Advisory Board can only advise the Commissioner at the Commissioner's request. This limited role inhibits the Advisory Board's ability to raise issues, contribute to public policy and use its expertise to benefit the sector. The Advisory Board should be able to proactively raise issues and provide advice to the Commissioner.

The Advisory Board's role should also be extended to enable it to engage directly with the sector and provide independent advice to the Minister.

However, while the Australian Government supported the Advisory Board proactively reviewing issues of importance to the sector and providing advice to the Commissioner, the Government did not accept the recommendation to formally extend its role to providing advice to the Minister.¹¹²

This decision occurred in a broader context: one commentator has spoken of an Australian "federal government policy to dismantle many of the consultative mechanisms and advisory groups established to inform and connect central government with issues and communities", resulting in a "limited understanding of communities [and therefore] limited effectiveness in the programs being developed for those communities".¹¹³

¹⁰⁸ Australian Charities and Not-for-profits Commission Act 2012 s 135-15. The current Advisory Board is comprised of seven persons. See Australian Charities and Not-for-profits Commission ACNC Advisory Board: <www.acnc.gov.au/about/acnc-advisory-board>.

¹⁰⁹ P McClure AO, G Hammond OAM, S McCluskey, Dr M Turnour *Strengthening for purpose: Australian Charities and Not-for-profits Commission – Legislative Review 2018* 31 May 2018 at 40.

¹¹⁰ P McClure AO, G Hammond OAM, S McCluskey, Dr M Turnour *Strengthening for purpose: Australian Charities and Not-for-profits Commission – Legislative Review 2018* 31 May 2018 at 35. Email correspondence with Trevor Garrett (18 June 2020).

¹¹¹ P McClure AO, G Hammond OAM, S McCluskey, Dr M Turnour *Strengthening for purpose: Australian Charities and Not-for-profits Commission – Legislative Review 2018* 31 May 2018 at 40 - 41, recommendation 8.

¹¹² Australian Government *Government Response to the Australian Charities and Not-for-profits Commission Legislation Review 2018* 6 March 2020: <treasury.gov.au/sites/default/files/2020-03/p2020-61958-govt-response.pdf> at 10: "The Government supports the Advisory Board proactively reviewing issues of importance to the sector and providing advice to the Commissioner. There is no legal barrier to the Advisory Board meeting with the Minister".

¹¹³ D Crosbie "Four dimensions of government failure" ProBono Australia 9 September 2021.

As discussed above in chapter 1, there is increasing concern about a backsliding of democracy around the world.

Canada

In Canada, an Advisory Committee on the Charitable Sector ("**ACCS**") was established in 2019,¹¹⁴ following a recommendation to "create a permanent mechanism for consultation with the charitable sector to ensure an ongoing and iterative process for developing policy guidance".¹¹⁵ The ACCS terms of reference provide that it is:¹¹⁶

... a consultative forum for the Government of Canada to engage in meaningful dialogue with the charitable sector, to advance emerging issues relating to charities, and to ensure the regulatory environment supports the important work that charities do.

The ACCS is comprised of 14 members, including representatives from the Canada Revenue Agency and Finance Canada. Importantly, it provides its recommendations directly to the Minister of National Revenue.¹¹⁷ To date, the ACCS has consulted widely in producing three reports,¹¹⁸ and has been heralded as government and sector working together and "making progress on some really tough questions" for the first time in 40 years.¹¹⁹

Singapore

Another model that might be interesting to consider in this context is the Charity Council in Singapore.

The Singapore Charity Council is comprised of 14 members appointed by the Minister for Culture, Community and Youth: 11 are drawn from the "people sector" and chosen for their expertise in accountancy, corporate governance and law, and their involvement in volunteer and charity work; the other 3 members are representatives from the sector administrators, namely the Ministry of Education, Ministry of Health and Ministry of Social and Family Development.

114 Government of Canada *Advisory Committee on the charitable sector*:

www.canada.ca/en/revenue-agency/programs/about-canada-revenue-agency-cra/corporate-reports-information/advisory-committee-charitable-sector.html.

115 See *Report of the Consultation Panel on the Political Activities of Charities* 31 March 2017 "Additional Legislative and Policy Changes". In the Fall Economic Statement of November 2018 *Investing in middle class jobs* at 37, the Canadian government announced that it would establish a permanent Advisory Committee on the Charitable Sector that will be "made up of stakeholders from the charitable sector, and will provide advice to the Government on important issues facing charities on an ongoing basis". The Government expressed its commitment at 37 to "engaging in a meaningful dialogue with charities, and ensuring that the regulatory environment in which they operate is appropriate and supports the important work they do". In formally responding to the Panel's report in March 2019, the Canadian Government added that: "The [permanent Advisory Committee on the Charitable Sector] will provide recommendations to the Minister of National Revenue and the Commissioner of the CRA on important and emerging issues facing charities and qualified donees on an ongoing basis ... The Government is providing \$3.2 million in new funding over the 2018 - 2019 to 2023 - 2024 period to the CRA to support the ACCS to strengthen the relationship between the government and this important sector". See Government of Canada *Government response to the Report of the Consultation Panel on the Political Activities of Charities* 7 March 2019, recommendation 4.

116 Government of Canada *Terms of reference - Advisory Committee on the Charitable Sector*:

www.canada.ca/en/revenue-agency/programs/about-canada-revenue-agency-cra/corporate-reports-information/advisory-committee-charitable-sector/terms-reference.html "mandate".

117 Government of Canada *Advisory Committee on the Charitable Sector*:

www.canada.ca/en/revenue-agency/programs/about-canada-revenue-agency-cra/corporate-reports-information/advisory-committee-charitable-sector.html.

118 See Government of Canada *Advisory Committee on the Charitable Sector*: the three reports are dated January, April and July 2021 respectively.

119 Interview with Terrance Carter, Managing Partner, Carters Professional Corporation (28 January 2021).

The Charity Council has three roles: promoting good governance standards and best practices, to enhance public confidence in the charity sector; enabling charities to comply with regulatory requirements and be more accountable to the public; and advising the Commissioner of Charities (COC) on key regulatory issues and significant cases, so that the COC can make more informed and robust decisions.¹²⁰

Other jurisdictions

In some jurisdictions, representation of the interests of the sector, including in the formulation of policy, might be seen as a role for sector umbrella groups,¹²¹ such as the National Council of Voluntary Organisations and the Directory of Social Change in England and Wales,¹²² and The Wheel in Ireland.¹²³

However, in New Zealand, it has always been a challenge for the sector to replicate such a pan-charity policy function: while achieving sufficient critical mass to self-fund is inherently difficult in a small country, the problem is exacerbated by the current competitive contracting environment that often pits charities against each other, as discussed above in chapter 1. Government funding, while necessary and welcome, can undermine an umbrella body's effectiveness if it results in a perception that the body has been co-opted as an advocate for government policies.¹²⁴

Discussion

The initial draft Bill that was circulated for comment in 2020 provided for an Advisory Board ("Te Māngai Aroha"), tasked primarily with advocating on behalf of the charitable sector to both the Minister and the agency responsible for administering the Charities Act. It was also tasked with raising the profile of the sector, and educating and assisting charities. The idea was to separate the registration and advocacy functions of the agency that administers the Charities Act, given the potential conflict inherent in one agency trying to serve both functions.

The proposed structure was based primarily on the model of the New Zealand Conservation Authority:¹²⁵ in the interests of breaking down silos, and recognising that there is unlikely to be any Ministerial portfolio not impacted by the charitable sector, the suggestion was for a wide range of Ministers to be consulted in the process of appointing persons to the Advisory Board. Based on the success of the 14-person ACCS in Canada, the suggestion was for a large Board, enabling much work to be carried out in subcommittees. The Māori Advisory Committee, discussed above, was to be a subcommittee of the Advisory Board.

120 Singapore Government *Charity Portal – Charity Council*: www.charities.gov.sg/Pages/AboutUs/Charity-Council.aspx.

121 This was a point made by Kenneth Dibble, legal board member of the Charity Commission for England and Wales, and former Chief Legal Adviser and Legal Director at the Commission and Director of its International Programme (14 January 2021).

122 Interview with Sarah Vibert, Interim Chief Executive, National Council of Voluntary Organisations (21 January 2021); Interview with Debra Allcock Tyler, Chief Executive, and Jay Kennedy, Director of Policy and Research, the Directory of Social Change (29 June 2020).

123 www.wheel.ie/.

124 A point made in Industry Commission *Charitable organisations in Australia - Report no 45* 16 June 1995 at L.

125 See Conservation Act 1987 [pt 2A](#).

The proposal received a lot of positive feedback, with some considering it the “best proposal around for building understanding of civil society across government”.¹²⁶ However, the proposal was not universally supported, with concerns expressed regarding cost, its relationship with other bodies, and how its authentic independence could be established and maintained.¹²⁷

As discussed above in chapter 1, the co-design sprint workshop held in November 2020 was focused on the question “What is the best structure for the agency(s) that administer charities’ legislation in Aotearoa New Zealand?”. In terms of how to strengthen the not-for-profit sector voice in its interactions with government, the co-design process reached the following conclusions:

A peak “sector group”, appointed by the sector but (at least in part) funded by government, should be formed with three core functions:

- (i) bringing the sector together;
- (ii) advocating for the sector on high-level issues, particularly to the Minister (who needs to be inside Cabinet); and
- (iii) communicating with and between sector organisations.

Such a group would also have a role in co-ordinating research in relation to the sector and working with the sector and the government agency to build capacity.

The optimum number of people for the sector group is a question for the sector to determine, but a starting suggestion was that a 15-member group could capture the diversity of the sector while being workable. It would enable a stronger sector voice and, through working groups, enable sector-wide issues to be more effectively examined and managed.

Such a peak representative body would provide easier and more consistent access to the Minister for the Community and Voluntary Sector. Alongside existing umbrella bodies, it would be better resourced, thereby providing capacity and coherency to the sector.

¹²⁶ Email correspondence with the writer from Trust Democracy, 26 August 2020.

¹²⁷ Kerry O’Halloran made the point (email correspondence January 2021) that composition and membership must be determined by the sector if it is to be authentically independent and equipped to speak for it and “the mechanism for achieving this would have to be provided for in legislation”. See also the [submissions](#) of Grey Power Otago Inc: “We have found advisory boards to have very little impact. If such a board was put in place it would need to be in groups representing each tier”; Lake Taupo Hospice Trust Inc: “adding a formal Advisory Board would simply add to the cost burden on the charitable sector so we would not recommend it. However, informal consulting by way of surveys prior to issuing a particular guidance would be helpful”; Lloyd Brewerton: “This would only be another level of Government appointed people seeking to support the Government and silence any naysayers”; Make-a-Wish Foundation of New Zealand Trust: “it is possible that [an Advisory board] would give a wider viewpoint however it will also add to costs”; Manukau Christian Charitable Trust: “greater complexity which is not needed. So we don’t need an advisory board”; Multiple Sclerosis New Zealand Inc: “We don’t believe that an advisory board would have an effective, or efficient, role in the sector ... We reject the model used by Australia as indicated in the discussion paper of a politically appointed advisory review board. MSNZ recognises that system as being capable of being less than objective or impartial but does have faith in our established court system”; St Pauls Lutheran Church: “that sounds expensive and the cost burden will fall on charities. So no”; The UpsideDowns Education Trust: “an advisory board (as in Australia) is not a good model to follow. The board being ministerially appointed risks the politicisation of such decisions”; Youth Search and Rescue Trust NZ: “Consulting with representatives of the charities sector is a good idea but another ministry-appointed advisory board is just another layer of costly bureaucracy with unpractical starry ideas to justify their position that doesn’t usually provide the benefits for charities who run on a shoe string budget”; Greenpeace of New Zealand Incorporated: “Greater engagement with the sector and a requirement to consult before issuing guidance would help ensure that Charities Services is aware of concerns within the sector, stays in touch with charities’ needs and provides advice on areas that would be beneficial for charities. It would be inappropriate for an advisory board to provide advice on issues such as what advocacy a charity can undertake in the current environment where there are no clear requirements specified in the legislation or case law, and there has been a deliberate decision not to change the current charitable purpose test ... An advisory body would be unnecessary if the restrictions on advocacy were removed as it would go some way to making the law simpler to apply. An advisory board would simply move the decision from the Charities Registration Board to an additional board”; Organisation C: “[An Advisory Board] may help with informing a decision but it would still be restricted to the perspectives of the members of the board. A localised charities services structure with advisory boards would help with more informed local advisory board members”; Graham Burger: “no – they will be governed by their world view and biased”; Merv Ransom; Taranaki Multiple Sclerosis Society Incorporated.

An advantage of providing for such a body in legislation is that it may provide a degree of stability and certainty as to its ongoing existence and funding. However, that is not necessarily the case, as the experience of the Charities Commission has shown. To the contrary, the experience of the ACCS demonstrates how successfully a non-statutory body can perform this role.

In addition, the current Sector Group is perceived as inadequate for this purpose, as it interfaces only with Charities Services at the pleasure of Charities Services and has no independent resourcing. A separate configuration is needed.

However, on balance, we have not replicated the provisions in the original draft Bill providing for a statutory Advisory Board in the draft Bill included with this report. Instead, we recommend further consultation be undertaken on establishing an extra-statutory sector group along the lines recommended by the co-design workshop, as discussed above.

Recommendation 7.4:

That the issue of how best to ensure the charitable sector has representative and adequately funded pan-charity policy capacity, and meaningful input into policy development, is specifically consulted upon as part of the independent first principles review recommended in recommendation 1.0.

Home in government

In addition to creating a mechanism for a “sector voice”, other jurisdictions have also recognised the importance of the charitable sector having a “home in government”, separate from the agency responsible for registering charities.

Canada

A need for charities to have such a “home in government” has been strongly recognised in Canada. For example:¹²⁸

It may surprise many that the non-profit sector, which employs 2.4 million people, contributes \$192 billion in economic activity annually and accounts for 8.3% of Canada’s GDP has no voice in the federal government. But that is the reality ... This lack of a strategic partnership poses a clear threat to the charitable and non-profit sector’s ability to improve the lives of Canadians ... Perhaps most importantly, engagement by the federal government would help drive transformative change. *Charities and non-profits offer the government a pragmatic and cost-efficient way forward on core priorities such as climate action, reconciliation, fighting poverty and inequality, youth services and advancing quality child and senior care*, to name a few ... but none of this is possible in a void. The lack of a working relationship means charitable and non-profit sector leaders must constantly re-educate the federal government every time an issue or emergency arises. A strong leadership voice within the federal government to support the work of charities and non-profits is key to tapping into the sector’s vast potential to be much more – a partner in innovative, transformative change, informed by the communities they benefit

In its June 2019 report, the Special Senate Committee on the Charitable Sector made the following recommendation:¹²⁹

The committee believes that there is no single strategy or quick fix that would ensure the sector can continue to thrive and play its vital role at the heart of Canadian communities. *Key to the sector’s continued success is a strong relationship between the sector and the federal government. This relationship cannot be limited to one between the regulator (the Canada Revenue Agency) and the sector.* To support the development of a renewed relationship with the sector, the committee recommends that the Minister of Innovation, Science and Technology be tasked with creating a regular venue for the facets of the federal government to interact and collaborate with this diverse sector. Supported by a secretariat on the charitable and non-profit sector, the Minister should be expected to report annually on the state of the sector and the efforts undertaken in tandem with federal and provincial/territorial ministers, departments and agencies ...

128 B McDonald “Big majority wants federal support for charities, non-profits: survey” Scarborough Mirror, 25 November 2021: <www.thestar.com/local-toronto-scarborough/opinion/2021/11/25/big-majority-wants-federal-support-for-charities-non-profits-survey.html> (emphasis added).

129 Report of the Special Senate Committee on the Charitable Sector *Catalyst for Change: A Roadmap to a Stronger Charitable Sector* June 2019 at 12 - 13, 61 - 62, recommendation 22 (emphasis added).

'Let's make a home for the sector and not just a regulator, as we have with CRA, that will signal to everyone that Canadians seek to preserve the social equilibrium necessary to protect our environment and our democracy and bequeath a liveable future to our children'

Many witnesses described the importance of a federal focus on the sector outside CRA. There were several models proposed, including: a joint Parliamentary committee focussed on the sector; ... [and] a more broadly dispersed focus on the sector, so that the impact on charitable and non-profit organisations would be considered in all federal government decisions.

In its January 2021 report, the ACCS built on the Senate Committee's recommendations, advocating for a home in government for the sector in a broad manner:¹³⁰

In general, the federal Government has difficulty in designing horizontal policies and programs that work to support productivity and growth of the charitable and nonprofit sector (such as access to financial capital, investments in digital capacity, timely and comprehensive data and human resource supports). This is at least in part because the sector is not "seen" outside of the CRA ... There is no central federal policy unit or cross-cutting ministerial mandate for the charitable and nonprofit sector ...

The [Regulatory Framework Working Group] discussed the need for a federal policy "home" for the charitable and nonprofit sector which would exist outside of the Charities Directorate of the CRA. The lack of such a "home" means the absence of a place for comprehensive and coordinated policy development within the federal government. While there are federal departments and/or ministries that align with various specific mission or cause areas and provide mechanisms for proactive policy development and sub-sectoral funding programs, there is no capacity for a cross-departmental policy view ...

There is broad agreement in the sector that a broader policy perspective afforded by such a policy unit or secretariat would help to ensure a more productive and effective partnership between the charitable and nonprofit sector and the federal government across a range of infrastructural issues such as data collection, financing, and digital connectivity and tools. In the context of the current pandemic, a cross-government policy unit would be able to identify major gaps in the capacity of the sector to respond to community needs and would be able to advocate for policies that create more resilience and more response capacity for sector organisations over the longer term.

On this basis, the ACCS recommended as follows:¹³¹

[that] the Minister of National Revenue ... work with Cabinet colleagues to create a permanent "home in government" for Canada's charities and nonprofits, outside of the [Canada Revenue Agency]. This home will:

- provide a place within government for comprehensive policy development which will strengthen the relationship to ensure a more productive and effective partnership; and
- advocate on behalf of this sector when broader government policies and programs are being considered, acting as a connector and communicator with other government departments.

The ACCS considered a home in government will lead to greater "respect, recognition and effectiveness in the relationship between charities and the federal government".¹³²

In terms of "design elements", the ACCS recommended the following:¹³³

- A sector home in government should be "central" enough that it is part of key discussions and its views and opinions are taken seriously by other parts of government.
- Regardless of whether there is a political head (eg a Minister, Secretary of State, or Parliamentary Secretary), the home in government needs to be part of the permanent machinery of government.
- A home in government should be cost-effective and relatively easy for the federal government to implement ...

130 Advisory Committee on the Charitable Sector [Report #1 – Towards a federal regulatory environment that enables and strengthens the charitable and nonprofit sector](#) January 2021.

131 Advisory Committee on the Charitable Sector [Report #1 – Towards a federal regulatory environment that enables and strengthens the charitable and nonprofit sector](#) January 2021.

132 Advisory Committee on the Charitable Sector [Report #1 – Towards a federal regulatory environment that enables and strengthens the charitable and nonprofit sector](#) January 2021.

133 Advisory Committee on the Charitable Sector [Report #1 – Towards a federal regulatory environment that enables and strengthens the charitable and nonprofit sector](#) January 2021.

- The home in government should recognise that charities and nonprofits make a significant economic as well as social contribution to Canada.

These issues resonate equally in a New Zealand context, highlighting that developments in this regard in Canada are likely to be instructive for New Zealand.

Australia

Similar conclusions have been reached in Australia. In 2008, the Senate Inquiry into disclosure regimes for charities and other not-for-profit organisations recommended the Government establish a unit within the Department of Prime Minister and Cabinet specifically to manage issues arising for not-for-profit organisations (in addition to what became the ACNC).¹³⁴

In 2010, the Australian Productivity Commission similarly recommended a policy “home” within the Australian Government at the national level, to progress ongoing sectoral and governmental reform.¹³⁵

It would give necessary focus to improving the sector’s engagement with the Government and stimulate sector relevant policy development. Such an office would be ideally located within the Prime Minister’s portfolio as it requires a reach across all agencies engaging with NFPs and must be capable of driving sector-wide policy initiatives.

On that basis, the Australian Productivity Commission recommended as follows:¹³⁶

The Australian Government should establish an Office for Not-for-profit Sector Engagement, for an initial term of five years. The Office would support the Australian Government in its efforts to:

- implement sector regulatory and other reforms and the implementation of the Government’s proposed compact with the not-for-profit sector
- promote the development and implementation of the proposed Information Development Plan
- oversee the establishment of the proposed Centre for Community Service Effectiveness
- implement the proposed contracting reforms in government funded services
- act as a catalyst for the promotion and funding by government agencies of social innovation programs
- facilitate the establishment of the advisory panel on development of a not-for-profit capital market
- facilitate stronger community and business collaboration.

The Office should, through the relevant Minister, report publicly on an annual basis on its achievements.

In April 2021, the opposition Australian Labour Party announced plans to establish an expert body that will ensure views of civil society are reflected in policy reform, noting that:¹³⁷

... civil society organisations were the ‘glue that holds together government, the economy and community’ and it was critical they were supported by government [particularly] as we recover from the pandemic and reimagine a new Australia ... We will acknowledge, support, and engage with the expertise held within civil society ... [and re-establish] a ‘genuine, respectful relationship’ between the sector and government

At the time of writing, a federal election is expected to be held in Australia in May 2022.

Other jurisdictions

In England and Wales, Prime Minister Tony Blair established an Office of the Third Sector as a central agency housed in the Prime Minister’s office looking at policy aspects separately from the Charity Commission for England and Wales. In 2010, the Office was replaced by an Office for Civil Society, taking responsibility for charities, social enterprises

134 Commonwealth of Australia *Disclosure regimes for charities and not-for-profit organisations* 4 December 2008: <www.aph.gov.au/parliamentary_business/committees/senate/economics/completed_inquiries/2008-10/charities_08/report/index> at 36, 49, recommendations 2, 3.

135 Australian Productivity Commission *Contribution of the Not-for-Profit Sector* 11 February 2010 at xxxix, 369.

136 Australian Productivity Commission *Contribution of the Not-for-Profit Sector* 11 February 2010, recommendation 14.1.

137 M Coggan “[ALP pledges support for 10-point plan to strengthen the charities sector](#)” ProBono Australia 1 April 2021.

and voluntary organisations in the Cabinet Office.¹³⁸ The office was rationalised into the Department for Digital, Culture, Media and Sport in 2020,¹³⁹ but remains separate from the Charity Commission.

In Scotland, the Third Sector Unit within the Scottish Government has a policy relationship with Office of the Scottish Charity Regulator but not a control relationship given OSCR's status as a Non-Ministerial Public body.¹⁴⁰

In Ireland, the Department for Rural and Community Development takes the lead on policy development, as opposed to the Charity Regulatory Authority.¹⁴¹ Northern Ireland similarly grants policy responsibility to the Department for Communities, rather than the Charity Commission for Northern Ireland.¹⁴²

Discussion

In New Zealand, Hui E! Community Aotearoa strongly advocated for the reestablishment of the Office for the Community and Voluntary Sector ("OCVS"), as a "tool to get the sector's voice heard throughout government which is essential".¹⁴³ Briefly, OCVS was established in 2000 as part of the Ministry of Social Development to work across government to increase understanding of the community and voluntary sector and its contribution to New Zealand. The OCVS website was intended to assist with: providing policy advice on community sector issues; providing a contact point for the community and voluntary sector and the national policy level; fostering good practice in community-government engagement; and building knowledge of the community sector.¹⁴⁴ However, in February 2011, shortly before the disestablishment of the Charities Commission, OCVS was moved to the DIA, before then being disestablished itself.

In 2021, the Ākina Foundation requested a leadership group and a "home in government" for social enterprise,¹⁴⁵ to "unlock the potential of social enterprises to deliver wellbeing outcomes across the economy and across government priority areas".¹⁴⁶

We agree wholeheartedly with the recommendations of the Ākina Foundation's and ask that a home in government for social enterprise be extended to charities more generally, in a similar manner to the Office for Civil Society in England and Wales. Suggestions have been made to adapt the Sector Group to place it on a similar footing to the Prime Minister's Business Advisory Council.¹⁴⁷ Another option is an interdepartmental venture, across agencies. Taking the approach of many other jurisdictions in locating such a group within or reporting to the Department of Prime Minister and Cabinet would assist materially with providing a pan-Government view, helping to push through the reform agenda, and ensuring that the voice of the sector is heard – and responded to.

Recommendation 7.5:

That a "home in government" is created for the charitable sector, separate from the agency responsible for administering the Charities Act, and centrally located, for example within the Department of Prime Minister and Cabinet.

138 V Mair "Office for Civil Society to replace Office of the Third Sector" Civil Society News 18 May 2010.

139 K Weakley "Office for Civil Society's work to be 'rationalised' after spending review" Civil Society News 26 November 2020.

140 Dr O Breen, Rev Dr L Carroll, N Lavery *Independent Review of Charity Regulation Northern Ireland* January 2022 at 224.

141 Dr O Breen, Rev Dr L Carroll, N Lavery *Independent Review of Charity Regulation Northern Ireland* January 2022 at 225.

142 Dr O Breen, Rev Dr L Carroll, N Lavery *Independent Review of Charity Regulation Northern Ireland* January 2022 at 226.

143 <www.huie.org.nz/covid-19/update-recovery-and-long-term-sustainability-for-the-community-sector/>.

144 Information about the Office of the Community and Voluntary Sector can be found here: <www.dia.govt.nz/Decommissioned-websites---Office-of-the-Community-and-Voluntary-Sector-website>.

145 The Ākina Foundation as part of the Impact Initiative *Leadership and connection for social enterprise - Recommendation area 5* April 2021 at 9.

146 Impact Initiative *A Roadmap for Impact* April 2021 at 40.

147 New Zealand Government press release "PM's business advisory council membership announced" 18 October 2018.



Chapter 8 – Commentary to the Draft Bill

“Trusting people to be creative and constructive when given more freedom does not imply an overly optimistic belief in the perfectibility of human nature. It is, rather, belief that the inevitable errors and sins of the human condition are far better overcome by individuals working together in an environment of trust and freedom and mutual respect than by individuals working under a multitude of rules, regulations, and restraints imposed upon them by another group of imperfect individuals”¹

Chapter 9 of this report contains a draft Bill that would amend and restate the Charities Act 2005: the intention is to bring together the principles discussed above in chapters 1 to 7 into a more tangible form for the purposes of consultation. This chapter 8 is intended to accompany and provide commentary to the draft Bill.

Terminology and drafting

Charity

English

A number of submitters to the Department of Internal Affairs’ (“**DIA’s**”) review of the Charities Act suggested that New Zealand move away from the concept of “charity”, arguing that it was outdated and patronising, evoking Victorian, paternalistic, colonialist concepts of handouts to the poor.

Arguably, such sentiments reflect how badly the concept of charitable purpose has been damaged in New Zealand since the introduction of the Charities Act: while it is true that the origins of charities law date from Tudor times and a lot of the case law was laid down by Victorian judges, correctly interpreted, the concept of charitable purpose is not so limited, but is wide, strengths-based, and flexible, as discussed above in chapter 3: correctly interpreted, the concept of charitable purpose is capable of embracing innovative expressions of human flourishing, harnessing people’s potential and equipping them to live the best lives possible; correctly interpreted, the concept of charitable purpose is also capable of embracing prevention, rather than merely relief, often through advocacy work informed by flaxroots experience. Interpreting the definition of charitable purpose correctly is, in fact, critically important to fundamental democratic principles and social capital.²

Even so, we specifically consulted on whether another name might be more appropriate: for example, might a term such as “Social Capital” provide a clear signal that the purpose of the legislation is to facilitate the wider, indirect benefits that charities provide? Or should charities be referred to as “public benefit organisations”, given that “public benefit” is the essence of charitable purpose?

The balance of consultation was not in favour of a change in terminology. The concept of charitable purpose is internationally recognisable and utilised by all comparable jurisdictions: the problems created by moving away from the term would be considerable, particularly given the increasingly international nature of many charities’ work. Retaining the term would also signify a continuation of the focus of the legislation on the registration of charities.

- 1 P Senge (1985) *The new management: moving from invention to innovation* (Boston: Systems Dynamics Group, Sloan School of Management, Massachusetts Institute of Technology): dspace.mit.edu/bitstream/handle/1721.1/2134/SWP-1754-14372002.pdf?sequence=1, referred to in Dr O Breen, Rev Dr L Carroll, N Lavery *Independent Review of Charity Regulation Northern Ireland* January 2022 at 251.
- 2 H Whitehead “[Charity sector reactions to Budget 2021: ‘Taken for granted’ and ‘a missed opportunity’](#)” Civil Society News 4 March 2021.

In that respect, it is important to use the term “charities”, rather than “charity”: the focus of the legal framework should be on the distinctive features of charities as organisations, rather than a focus on “charity” as a concept. The latter can give rise to mission creep and a focus on vague and subjective assessments of the public interest.³ As discussed above in chapter 2, the focus of the legal framework should be on purpose, not “public interest”.

Charities are uniquely recognised by reference to their charitable purposes: while the process of defining and determining charitable purpose can be difficult at the margins, the balance of feedback was that alternatives such as “social capital” would be too amorphous and open-ended to be satisfactory.

On balance, we do not recommend a move away from the term “charitable purpose” and its derivatives.

To the contrary, the recommendations in this report are directed at reclaiming the concept of charitable purpose, including by providing better processes and parameters around its determination, with the aim that its genuine breadth and value to society might be better understood.

In a similar vein, we also do not recommend a move to “public benefit” terminology: as discussed above in chapter 3, public benefit is a necessary, but not sufficient, condition for a purpose to be charitable. Not all purposes of public benefit are charitable. For the same reasons that have led us to recommend retaining the “spirit and intendment” test, we recommend retaining the concept of charities over “public benefit organisations”.

Te reo

We also specifically consulted on a Māori name for the Charities Act, a process complicated by the lack of a direct translation for the concept of “charitable”, and in particular a lack of consensus on whether the term “atawhai” or the term “aroha” should be used.

The term “atawhai” is understood to translate broadly to kindheartedness or benevolence: it is the term currently used by both Charities Services Ngā Ratonga Kaupapa Atawhai and the Charities Registration Board Te Rātā Atawhai.

However, while the term “aroha” perhaps connotes romantic love in non-Māori speakers’ minds, some, including Justice Sir Joe Williams KNZM, consider that, correctly interpreted, the concept is much wider and would best reflect the importance of the sector.⁴

Others consider “atawhai” reflects a manifestation of aroha that captures both principle and action.

For the purposes of consultation, the draft Bill included with this report has adopted Te Ture Whakaū i Ngā Mahi Aroha as a placeholder Māori name.

However, as Justice Sir Joe Williams KNZM noted, an appropriate Māori name for the Act is “a great title to be debated”.⁵ Once a name has been crafted, the appropriate Māori names for other entities under the Charities Act will fall out.

Registrar or regulator

Whether the agency responsible for administering the Charities Act is described as a “registrar” or a “regulator” epitomises the underlying clash of paradigms. The term “regulator” evokes a heavy handed “command and control” approach that

3 See A Purkis *Charities and the Charity Commission: is a reset underway?* 1 February 2021: andrewpurkis.wordpress.com/2021/02/01/charities-and-the-charity-commission-is-a-re-set-underway/: “To conflate charities and charity, as if they were synonymous, is wrong and pregnant with mission creep”. See also A Purkis *The Charity Commission and Populist Attacks on British Institutions* 26 January 2021.

4 Ontario Law Reform Commission *Report on the Law of Charities* (Toronto, 1996) at 146: the term “caritas” in Corinthians 1:13 is invariably translated as “love” not “charity”.

5 Comments made by Justice Sir Joe Williams at the zānanga zui held on 13 May 2020.

arguably misleads people (including the government agency itself) into expecting too confrontational a relationship,⁶ even if it does so unintentionally.⁷

The reform of the charities law framework that took place in England and Wales at the beginning of this century significantly increased the regulatory powers of the Charity Commission for England and Wales ("**CCEW**"), specifically developing its role from one of registrar to one of "regulator".⁸ In jurisdictions such as England and Wales,⁹ Northern Ireland,¹⁰ and Canada,¹¹ use of the term is becoming normalised, and in some jurisdictions the term has even been given statutory force,¹² making change difficult. However, the passing of the Charities Act 2005 in New Zealand predates the change in role of CCEW in England and Wales that was implemented by means of the Charities Act 2006 (UK), and the term "regulator" does not have statutory force in New Zealand. To the contrary, s 23 of the Charities Act 2005 specifically describes the agency responsible for administering the Act as a "registrar" with primary functions as registrar and supervisor of charitable entities in New Zealand.¹³ Charities Services is not formally a "regulator".

Despite this, and no doubt influenced by attendance at regular 18-monthly, "International Charity Regulators" meetings,¹⁴ Charities Services insists on using the term "regulator" to describe itself. For example, the term "regulator" is used 108 times in the DIA's discussion document for the review of the Charities Act,¹⁵ despite specific requests from Core Reference Group members that a more neutral term be used. There has been no consultation with the charitable sector as to whether the term "regulator" should be adopted in a New Zealand context.

While the concept of "regulation" can of course be very wide, encompassing activities such as education and monitoring (which are statutory functions of Charities Services under s 10 of the Charities Act), and while Charities Services is undeniably required to comply with "Government Expectations for Good Regulatory Practice", issued by Treasury

6 Email correspondence with Richard Fries, 4 September 2018.

7 See Te Tari Taiwhenua Internal Affairs *Modernising the Charities Act 2005: Discussion Document* February 2019 at 12: "To some people, the term 'regulator' may suggest a strict approach to compliance and enforcement. This is not what we intend to convey. The term 'regulator' or 'regulatory agency' is a broad term used widely across government to refer to agencies which, among other things, monitor and administer a regulatory system. Regulatory approaches vary considerably according to the nature of the system".

8 Lord Hodgson of Astley Abbotts *Trusted and Independent: Giving charity back to charities – Review of the Charities Act* July 2012 at [5.53].

9 The Charity Commission for England and Wales refers to itself as the "charity regulator". See, for example, The Charity Commission *Charity regulator urges donors to support registered charities to help those affected by the crisis in Afghanistan* 21 December 2021: <www.gov.uk/government/news/charity-regulator-urges-donors-to-support-registered-charities-to-help-those-affected-by-the-crisis-in-afghanistan>.

10 The Charity Commission for Northern Ireland refers to itself as the "charity regulator". See, for example, Charity Commission for Northern Ireland *New guidance asks if your charity is getting it right*: <www.charitycommissionni.org.uk/news/guidance-asks-if-your-charity-is-getting-it-right/>.

11 The Canada Revenue Agency refers to itself as the "federal charities regulator". See, for example, Government of Canada *Small and rural charities initiative*: <www.canada.ca/en/revenue-agency/services/charities-giving/charities/resources-charities-donors/small-rural-charities-initiative-sarc.html>.

12 In Australia, see Australian Charities and Not-for-profits Commission Act 2012 s 10-5 (*Guide to this Act*): "This Act establishes a national regulator for not-for-profit entities. The regulator is the Commissioner of the Australian Charities and Not-for-profits Commission (the ACNC)"; in Ireland, see Charities Act 2009 s 13: "(1) There shall stand established on the establishment day, a body which shall, subject to subsection (2), be known as an tÚdarás Rialála Carthanais or in the English language the Charities Regulatory Authority (in this Act referred to as the "Authority"), to perform the functions conferred on it by this Act. (2) The Authority may, for operational purposes, describe itself as An Rialálaí Carthanais or in the English language the Charities Regulator"; in Scotland, see Charities and Trustee Investment (Scotland) Act 2005 sch 1, referring to the Office of the Scottish Charity Regulator.

13 *Travis Trust v Charities Commission* (2009) 24 NZTC 23,273 (HC) at [2].

14 See, for example, Dr O Breen, Rev Dr L Carroll, N Lavery *Independent Review of Charity Regulation Northern Ireland* January 2022 at 118: "the various charity regulators ... traditionally met every 18 months for the International Charity Regulators Forum and twice yearly for the UK and Ireland Charity Regulators Forum (established in 2006) until the pandemic disrupted such in-person meetings. The objective of these gatherings is to share information and best practice amongst peer regulators and where relevant (particularly in a UK/Irish context) to ensure a consistent regulatory approach".

15 Te Tari Taiwhenua Internal Affairs *Modernising the Charities Act 2005: Discussion Document* February 2019.

in April 2017,¹⁶ use of the term “regulator” is problematic in a charities law context: it sends a signal that the role of the government agency is to “regulate” charities, implying that intervention in the activities of a charity on the judgment of an external body is appropriate, when charities’ independence is a key aspect of their value. Use of the term “regulator” also subtly undermines public trust and confidence in charities by signalling a requirement for centralised control through heavy-handed regulation, when the vast bulk of charities are good actors. As discussed above in chapter 2, a charities law framework is about accountability, not “regulation”.

It is significant that the current legal framework does not of itself indicate that heavy-handed “regulation” is the aim of the Charities Act. The term “regulator” is normally reserved for situations where a government agency is intended to exercise a high level of control over the regulated entities, as is the case, for example, in:

- (i) the Health and Safety at Work Act 2015 s 15, which specifically defines WorkSafe as “the regulator”;
- (ii) the Overseas Investment Act 2005, which specifically uses the term “regulator” to refer to the Overseas Investment Office (a unit within Land Information New Zealand); and
- (iii) the Reserve Bank of New Zealand Act 1989 s 156M, which specifically defines the Reserve Bank and the Financial Markets Authority as “joint regulators”.

By contrast, when an agency is not intended to exercise such a high level of control, different terms are used, such as, for example, in:

- (i) the Anti-Money Laundering and Countering the Financing of Terrorism Act 2009 s 5, which specifically uses the term AML/CFT *supervisor*;
- (ii) the Companies Act 1993, the Incorporated Societies Act 1908, the Incorporated Societies Act 2022, and the Charitable Trusts Act 1957, which specifically use the term “Registrar”; and
- (iii) the Land Transport Management Act 2003 s 93, which uses the term “Agency”.

As submitters to the DIA’s review of the Charities Act have noted, terminology is important and use of the term “regulator” is not helpful.¹⁷ Continued use causes the term “regulator” to become normalised, contributing to the slow-moving change of underlying paradigm that has occurred.

Some argue that the term “registrar” is similarly unhelpful, as it suggests a limited role focused on compliance with registration requirements rather than more general support and complaint functions. Neither term is perfect, but in a choice between the two, we would argue that the more limited conception of the role of the government agency is important for protecting the independence of charities and protecting against creeping regulatory over-reach.

For that reason, and despite the approach taken in other jurisdictions, we strongly recommend that the New Zealand framework of charities law does not describe the agency responsible for administering the legislation as a “regulator”. In the draft Bill included with this report, we have described the government agency as the Charities

16 Te Tai Ōhanga The Treasury *Guide: Government Expectations for Good Regulatory Practice* 21 April 2017: <www.treasury.govt.nz/publications/guide/government-expectations-good-regulatory-practice>.

17 See, for example, [submission](#) of Steven Moe, Partner, Parry Field Lawyers: “I also endorse the idea that terminology used should reflect empowering those who want to do good in our society, rather than it being about penalties and regulations for the amazing people trying to add value to our world ... The words we use are important”; Organisation B: “I disagree with the use of the word ‘regulator’ throughout the principles, the act refers to ‘monitoring’ not regulation, therefore the term should be ‘monitoring agency’. I disagree with the concept of Alignment, we should not be restricted by what other countries think about this matter”; Tom Brady: “The term ‘regulator’ is the wrong one. Regulation is needed when it is necessary to offset abuse or danger. It is the wrong headspace to think of the action of human charity to be a threat” and Trust Democracy: “[The vision and policy principles set out in the DIA’s discussion document] all have an implicit assumption of a very passive role for charities in society, subsidiary to the government ‘regulator’. That wording disrespects the independence of the sector and undervalues charities’ potential to contribute if given the right environment”.

Registrar, in line with current s 23. This term has been translated into Māori as Te Kairēhita Aroha, using the term “aroha” as a placeholder for consultation as discussed above.

Recommendation 8.1:

That use of the term “regulator” is discontinued in a charities law context, and the term “registrar” used instead.

We also note that the review of the Charities Act 2005, a relatively recent Act, has been cast in terms of a “modernisation” exercise:¹⁸ this terminology appears designed to lower expectations about what an attenuated review might achieve, paving the way for a significant increase in regulatory control. While the Charitable Trusts Act 1957 clearly does need to be modernised, the Charities Act in fact does not: as one submitter noted, “It’s not about modernising – it’s about bringing it back to the principles that have been lost under the current arrangements”.¹⁹

Use of colons in drafting

A number of commenters on the draft Bill circulated for consultation in 2020 commented on the use of colons (see, for example, cl 6(2) of the draft Bill included with this report).

The draft Bill uses the drafting convention for lists of paragraphs which is used by Inland Revenue. For reference, Inland Revenue describes its approach as follows:²⁰

If items in a list of paragraphs are linked conjunctively, they are separated by “; and”. The use of “; and” is thus equivalent to introducing the list of paragraphs with the words “all of the following: ...”.

If items in a list of paragraphs are linked disjunctively, they are separated by “; or”. The use of “; or” is thus equivalent to introducing the list of paragraphs with the words “one, but not more than one, of the following: ...”.

A colon is used to separate items in a list of paragraphs if the items in the paragraphs are not linked conjunctively or disjunctively. The use of the colon may thus be equivalent to introducing the list with the words “one or more of the following: ...”.

Comment

Items separated by a colon under the convention could be separated in colloquial English prose by “and” or “or” (which would be equivalent to each other in the context) with or without a comma or semi-colon. The use of “and” and “or” in such a way detracts from the conjunctive and disjunctive senses of the two terms; for drafting purposes, it would be better not to use either conjunction for such a list.

It is not possible to omit all conjunctions from a list when drafting in prose but it is possible to separate items in a list of paragraphs without using a conjunction. Inland Revenue drafters have decided to do so consistently.

For technical drafting reasons, the Parliamentary Counsel Office chose several decades ago to use a bare colon, rather than a bare comma or semi-colon, to link paragraphs that are not linked conjunctively or disjunctively. Inland Revenue drafters are using the same convention.

Purposes of the legislation

The importance of clarifying the purpose of the legislation cannot be overemphasised: the purpose provision sets a “lodestar” for the Act that permeates all decision-making under it, thereby providing strong protection against a slow-moving change of underlying paradigm. The terms of reference for the DIA’s review of the Charities Act specifically precluded consideration of the current purposes of the Charities Act, merely asking

18 See for example the Department of Internal Affairs’ discussion document for the review of the Charities Act, which is entitled “Modernising the Charities Act”: [www.dia.govt.nz/diawebsite.nsf/Files/Charities-Modernising-the-Charities-Act-Discussion-Document-April2019/\\$file/Charities-Modernising-the-Charities-Act-Discussion-Document-April2019.pdf](http://www.dia.govt.nz/diawebsite.nsf/Files/Charities-Modernising-the-Charities-Act-Discussion-Document-April2019/$file/Charities-Modernising-the-Charities-Act-Discussion-Document-April2019.pdf).

19 *Submission* of Trust Democracy at 16.

20 Inland Revenue Department *Drafting convention for lists of paragraphs*: www.taxtechnical.ird.govt.nz/new-legislation/act-articles/taxation-venture-capital-and-miscellaneous-provisions-act-2004-taxation-annual-rates-of-income-tax-a/legislative-drafting-issues/drafting-convention-for-lists-of-paragraphs.

whether any “additional purposes are necessary”.²¹ However, submitters to the DIA’s review expressed considerable disquiet regarding the current purposes of the legislation and their interpretation. Given the significance of this issue, we have set out extracts from submissions in some detail in box 8.1 in order to provide context to the current concerns:

Box 8.1 – comments of submitters regarding the current statutory purposes of the Charities Act and their interpretation:

The review needs to consider what is, or should be, the purpose of the Charities Act regime – Literacy Aotearoa Charitable Trust

We agree that the purposes of the Act should be reviewed and consideration given as to whether section 3(b) should remain as a purpose of the New Zealand charities legislation ... A recent review of the Australian legislation relating to charities rejected a purpose similar to New Zealand’s section 3(b) as being unnecessary and an over reach of power by the commission. We recommend that consideration is given to whether section 3(b) should remain as a purpose of the New Zealand charities legislation ... The discussion document proposes two additional purposes for the Act, while not reviewing whether the current purposes in the Act are adequate and fit and proper for purpose – Methodist Alliance

‘Promoting public trust and confidence in the charitable sector’ and ‘promoting the effective use of charitable resources’, while sounding reasonable, are the responsibility of the sector itself and not of a government regulator ... The elevation of core Charities Commission objectives to purposes in Charities Services expanded the regulatory reach of government in ways likely to be detrimental to sector independence ... The Charities Commission was able to work towards these objectives by working with the sector to improve how it operated. Under Charities Services, operating within a government department, it is more likely that sanctions will be employed to bring charities into some perceived norm of behaviour – Alzheimers New Zealand

This sort of purpose is not an appropriate function any more than it would be for other sectors, such as business. Effective use of resources should be determined by an entity’s governance board, or the public when they decide whether to donate or not. Such a purpose has been rejected in comparable jurisdictions ... We would like to emphasise the need to prevent regulatory overreach, where Charities Services or the Registration Board (or whatever entity may take over) is given too broad a scope that results in a too tightly controlled sector. Our concern is that this is what is currently happening. Over the years the purpose of the entity administering the Act (currently Charities Services) has changed, arguably by stealth. These changes are creating undue burdens and making life difficult for many in the charity sector ... Community Networks Aotearoa does not agree with the regulatory approach that has developed in Charities Services since it ceased as an independent commission – Community Networks Aotearoa

The Charitable Sector has been willing to accept an ‘information and disclosure’ regime but now refute what has essentially become a ‘purpose creep’, where far reaching objectives have been added to the Charities Act’s original purposes since it was passed. The original purposes of the Act have been distorted resulting in ... regulatory over-reach... – Marine Reach Charitable Trust

Transparency (of varying degrees, depending on the circumstances) would appear to be a means to other ends (such as maintaining the integrity of, and public trust and confidence in, the charitable sector), rather than an end in itself. It would be helpful to identify these purposes – New Zealand Law Society

... currently the approach is regulatory and diminishing of charities rather than facilitating and enabling – Age Concern New Zealand

It seems to me that the regulator influence is now too strong and needs to be pulled back – Alan Pace

New objectives appear to have been taken by Charities Services as a driver to impose greater controls on the sector – Jon Horne

The devolution of the Commission’s role to Charities Services and the Charities Registration Board has not been helpful ... A strong tenor of the proposed changes is to increase regulation, compliance and sanctions but there is a real risk that government will put in place heavy handed powers when these are not needed. It is critical that this review does not result in unnecessarily punitive or intrusive powers that would further hamper the good work that is being done – Hawke’s Bay Community Law Centre

21 Department of Internal Affairs [Terms of reference to review the Charities Act 2005](#) May 2018 at 2.

[Elevating the functions to purposes in 2012] has in turn effectively changed their meaning where Charities Services now use them to impose greater controls on charities. SPCA advocates for the Charities Commission to be reestablished and for those purposes to be removed from the legislation and reset as Commission objectives – SPCA

When the Charities Commission was disestablished, two objectives were tacked on as additional purposes of the legislation. These were 'promoting public trust and confidence in the charitable sector' and 'promoting the effective use of charitable resources'. At face value these appear worthy purposes but in actuality some see these as a driver for Charities Services to impose greater controls on the sector – Auckland North Community and Development

Charities Services have interpreted the purpose at subsection 3(b), 'to encourage and promote the effective use of charitable resources', to require it to actively limit the number of registered charities through deregistration and declining to register charities. This is partly due to the view taken by Charities Services and the Board that registration of charities should include consideration of 'loss of revenue' from a tax perspective. This disincentivises any regulatory body from granting new charities registered charity status, but this argument fails because many prospective charities would not operate as tax paying companies if they fail to attain charity status, and instead cease operations entirely. Many charities (registered or not) earn very little income, and accordingly there is very little if any 'lost revenue'. Charities provide benefits to communities and New Zealand at large, and making decisions about the registration and deregistration of charities with tax revenue 'loss' as a key driver is inappropriate ... We suggest the terms of reference be expanded from considering whether any additional purposes are needed, to considering whether the current purposes are appropriate and reflect the true purpose of the Act and the charities regulation regime. This should clarify the intended scope of the Act's regime, so that it is clear that the primary purpose of the Act is to provide an information and disclosure regime which allows for the registration of charities. It should be stressed that regulatory over-reach is not desirable – Chapman Tripp

From a sector perspective, the intent of the public trust and confidence provision in the Act was that the monitoring agency should proactively use the data it was gathering via the register, as the factual basis for responses to ill-founded criticism and negative publicity about the sector, in Parliament or the media. Charities Services has not done any of this ... In the name of supporting public trust and confidence Charities Services is currently in fact, by its actions, undermining public trust and confidence in charities, in the Department, and in Government processes generally. Charities Services seems totally unaware that the people involved in the groups it deregisters – largely volunteers – are the very public whose trust and confidence the agency should be working to enhance – Dave Henderson

A robust and truly independent charitable sector is of significant benefit to society, whether by the alleviation of needs or the promotion of good. The value of volunteer hours alone is huge and accomplishes much at no cost to Government. This more than justifies the traditional principle of allowing tax relief to those who contribute to charities. We believe Government should support and promote charities as robust, independent entities. To this end, charities ought to be as free as possible from regulatory requirements as they further their objectives. Our recommendations for changes are as follows: The statement about "effective use of charitable resources" ought to be deleted. This is not an appropriate function of Government, but a matter for charities to assess according to their own goals and parameters – Grace Presbyterian Church of New Zealand

As regards the purposes of the Act, Kotare registers our concern that the practice of Charities Service is to prioritise its regulatory function to the detriment of its supportive functions for the sector, thereby sliding away from the information and disclosure functions, and the active support for charitable activities, that were originally intended. The Sector deserves much more than that, and indeed needs more than that if it is to contribute to the wellbeing of our society in as robust a way as the sector could do. Primarily it deserves respect for its independence. Such respect means that a legal framework is needed to "facilitate rather than frustrate" the activities of charities, including advocacy. The current framework encourages regulatory over-reach – Kotare Trust

The key problems with the previous arrangements as administered by Inland Revenue (prior to the Charities Act), were the lack of a comprehensive register, the lack of reporting obligations, and the lack of certain and simple processes for dealing with an organisation established for charitable purposes that may no longer be pursuing charitable purposes. Most in the sector were willing to accept an information and disclosure regime to address these specific limitations. Instead, since the Act was passed, we have had 'purpose creep', with new more far-reaching objectives added to the Act's purposes. For example, when the Charities Commission was ... effectively replaced by a unit in DIA, two objectives of the now defunct Commission were

just elevated and tacked on as additional purposes of the overall legislation. These included potentially interfering and controlling functions of the more subjective 'promoting public trust and confidence in the charitable sector' and especially the most insidious 'promoting the effective use of charitable resources'. These new objectives appear to have been taken by Charities Services as a driver to impose greater controls on the sector. This represents regulatory over-reach, and a purpose that has either been rejected in most comparable jurisdictions (see, for example, the recent review of the Australian Charities legislation, Strengthening the Purpose: Australian Charities and Not for profits Commission Legislation Review 2018 at 25-26) or assessed as a dangerous failure (for example, the same review concluded that an equivalent object in England and Wales was also found not to have had any positive impact on the charities sector in the UK). It is a basic principle of good governance that an organisation's own board should be responsible for determining effectiveness, not an outside body - whether an independent regulator, let alone a government agency. The sector supported the Charities Commission having a function of promoting public trust and confidence, envisaging that the Commission would be able to draw on data about the sector using the register, so as to respond in a balanced way to negative media focus on a particular charity or group of charities. This would enable a more balanced public perception of the sector. However, this has essentially not happened. Lifting these objectives to the overall purposes of the legislation has been used to effectively change their meaning and 'control and colonise' the sector – LEAD

I think the Government should be promoting the sector – including the work it does, the impact it has, why it's a rewarding place to work! – Massey University Foundation

Lifting these objectives to the overall purposes of the legislation has been used to effectively change their meaning and impose greater controls on the sector ... The Church believes that the government needs to reflect upon the reasons why it first looked at introducing the Charities Act and what the charitable sector believed it was also agreeing to ... It would appear from the history of the Act and amendments made that successive Governments and the Government Departments involved have treated the sector with little serious regard and a 'we know better' view The original intention was for an oversight regime, administered by the Charities Commission to 'weed out' 'bad' charities ... in order to maintain confidence in the vast majority of legitimate charities, who should be allowed to go about fulfilling their charitable duties as they see fit. Beyond "serious wrongdoing" ... we should be relying on the power of sunshine ('accountability of a thousand eyes') and disclosure of information by the registered charities to public scrutiny ... New Zealand does not need more top-down, centralised control by a government agency who determines which charities are and are not worthy of public support ... There has never been a proper look at which New Zealand is trying to achieve with the Charities Act regime and why ... Beyond 'serious wrongdoing' as defined within the charities Act, the Charities Act was established as a 'registration, information and disclosure' regime ... It should also identify legitimate charities as opposed to sham operations. That is, the Charities Act was to be a simple regime. The regime was not intended to be used by government ... as a means to 'colonise and control' the charitable sector – Methodist Church of New Zealand Te Haahi Weteriana O Aotearoa

Charity Services should be working to empower the charitable sector and philanthropic giving, not simply focusing on regulation – Momentum Waikato

... we need a recognition of the value of a politics of generosity and moving on from the politics of self-interest which has prevailed over the last 30 years - Network Waitangi Otautahi Inc

We support a purpose for Charities Services that balances accountability (from both charities and Charities Services themselves) and support. The suggestions in the Review risk creating an environment of regulatory overreach that will further tighten controls on a group of organisations that are already subject to high levels of compliance from Government. We are already facing a situation where people do not want to volunteer for positions such as Treasurer because of the work involved and where we are having to divert meagre financial resources away from frontline activities in order to have staff that can meet accountability requirements – Neighbourhood Support New Zealand Inc

The purposes of the Act appear to be primarily focused on charitable organisations being accountable for funding and being trustworthy. While this is an important aspect of charities law, it should not be the sole purpose – New Zealand Family Planning

While acknowledging the need for a certain regulatory role, the Charities Act must respect the independence and creativity of the charitable sector - NZ Navigator Trust

The New Zealand Sports Hall of Fame wonders about the phrase 'fit for purpose' which has become something of a bureaucratic catchcry. In the context of the charities review, nowhere is it stated what the purpose is. This surely goes back to the fundamental reason for having a

charities regime in the first place. The Labour Party in its 2017 election campaign committed to a 'long-promised review of the Charities Act ... beginning with a first principles review'. This is not what the current review is doing, yet should. 'First principles' include the crucial purpose for which any legislation should be fit. The DIA's view is that such things as 'charitable purpose', tax exemptions, regulation of the broader not-for-profit sector and contracting arrangements for government services are not within the scope of the current review. While charities will welcome their tax exempt status not being questioned [yet!], it seems to us that the review is a bit pick and mix for reasons of political expediency – New Zealand Sports Hall of Fame

NURM holds that it must be clearly articulated that the purpose of the Charities Act is to provide an information and disclosure regime only (avoiding the evident current 'mission creep') ... NURM does not see the set of purposes for the Act as currently amended as 'good, helpful, providing the right balance'. In part that is because of the mixture of the purposes, but also very much because of how the purposes are being interpreted and implemented. We regret that the current review doesn't include an in-depth evaluation of the purposes of the Act – assessing their adequacy, what other purposes could be considered – which would include a review as to how the purposes are being interpreted in practice. Government talks of a wellbeing lens being applied to governance and society. NURM sees the charities sector ... as being powerful potential contributors to every aspect of a wellbeing approach to society ... To facilitate that contribution, however, the charities sector needs a legal framework that facilitates rather than frustrates charitable work (We consider that a review like this would be more cost-effective if time was taken to do this properly). Though elements of the original Act were debated and resisted by the sector prior to its passing ... the original purpose of running a transparent information and disclosure regime around how charities met their stated charitable purposes had value ... NURM holds that the Act's affirmative purposes – endorsing and supporting charities' contributions to society – should be prior to and have more weighting than the regulatory ways that the 'promoting public trust' (et al) purposes are being interpreted. There is even a question as to whether such purposes are even appropriate purposes for a charity regime. NURM sees hints and signs that they may in fact be encouraging over-reaching exercises of governmental power in the name of enhancing trust and confidence in the public. The current framework seems to encourage over-reach of the regulatory role to the expense of the Crown agent's active encouragement of the sector's charitable activities ... While one of the key issues the Charities Act was intended to address was the lack of monitoring to ensure that charities were continuing to pursue their own stated charitable purposes over time, there does not appear to be clarity about the purpose of that monitoring function. Its practice reflecting more top-down Government control, as the Crown agent determines which charities are or are not worthy of public support, reflects an approach to the sector that it needs to be contained. We would by far prefer that the sector be seen as a key part of the social fabric that should be supported to flourish, than its independence be undermined ... We would rather see purposes that make it clear (removing the doubt seen in current misinterpretation of the Act's purposes) that the Act serves to actively support (rather than undermine) the independence of the charities sector – Northland Urban Rural mission

... allow the sector to flourish independently of government control – Organisation B

The regime was not intended to be used by government to control the charitable sector. Purposes such as 'promoting the effective use of charitable resources' could be seen as regulatory overreach in the name of promoting public trust and confidence. Care needs to be given to ensure independence is protected and the purposes of the Act are not stretched too wide ... Before considering any additions, the review should commence with a re-examination of the overall purpose of the Charities Act regime. The way in which the current purpose of 'promotion of public trust and confidence via the Charities Commission' has been interpreted has arguably led to over regulation. A considered re-framing of the overarching purpose of the Act could protect against undue interference with the role of the sector – The Presbyterian Church of Aotearoa New Zealand

The registration, reporting and monitoring regime under the Charities Act should support the work of New Zealand's charitable sector, not merely 'regulate' the sector – Royal New Zealand Coastguard Incorporated

Society works better with a strong and sustainable charities sector and the review of the Act should support a sustainable charities sector – Royal New Zealand Plunket Trust

While the promotion of public trust and confidence, the encouragement and promotion of effective use of resources are noble in aim, it could be argued that these are a bit fluffy – RSM

The Act should enable rather than disable the good work of the charities sector – Southern Group Training Trust

... the current #2 (encourage and promote effective use of charitable resources) should be removed as that is getting too much involved in day to day operations – Surf Life Saving New Zealand Inc

The purpose of the Charities Act (2005) needs to be clearly articulated. It should be specifically limited to an information and disclosure regime for certain independent organisations. It should not be used as a means for government to control the charitable sector ... The Charities Act should not be used by a government agency to vet what they are consider are legitimate activities for a charity nor to ration the privileges of the charity based on changes to government policy ... Charities should determine how to best further their stated purposes from time to time, and they should be protected from undue government influence when doing so – Te Pūtahitanga o Te Waipounamu

The redrafted purposes of the Act should specifically recognise that the registration regime is a means to other ends, and its purposes should include supporting and sustaining the sector and minimising unnecessary regulatory obligations - Te Whakakitenga o Waikato Incorporated, on behalf of the Waikato-Tainui iwi, endorsed by the Waikato Raupatu Lands Trust and Group and Waikato-Tainui marae

The purpose of the Charities Act needs to be clearly articulated. It should be specifically limited to an information and disclosure regime for certain independent community organisations, not a means for government to 'colonise and control' the charitable sector – Tiri Porter

... this 'modernisation' process seems to be driven by the government's needs, not by the sector's needs Instead of a piecemeal 'modernisation' which leads to scope creep by the government, you need a thorough review by the Law Commission – Wellington Youth Orchestra Inc

Charity originates with the people at the 'ground level'. It does not originate by the government, nor is it intended to benefit the government. Charity comes from community initiatives. The Charitable Sector has been willing to accept an 'information and disclosure' regime but now refute what has essentially become a 'purpose creep', where far reaching objectives have been added to the Charities Act's original purposes since it was passed. The original purposes of the Act have been distorted, resulting in the kind of regulatory over-reach which has been rejected in comparable jurisdictions ... It is not helpful or needed for the Charities Services to arbitrarily 'creep' into implementing a 'top-down' approach to charities in which a centralised government agency determines which charities are 'worthy' of recognition according to their own political leanings across the spectrum ... The original reason for having a charity regulating body was so that it could affirm to the public that a particular charity was continuing to act in accordance with its stated purpose. It was not to decide whether the purposes of that particular charity were needed or even popular ... Society is perfectly able to determine for itself if a purpose is needed. There is no room for over-reaching government impositions which determine the ability of New Zealanders to 'do good' for each other. It is critical that legislation clearly places limits on the Charities Services in order to prevent them expanding their own scope of authority into 'value assessment'. Without legislative constraints, the charitable sector is subject to the discretion of whichever government is in power – Youth with a Mission Queenstown Lakes Charitable Trust (Tāhuna ki te Ao Charitable Trust)

This clause has a potentially long reach by a government agency in deciding how charitable organisations should use their resources. SocialLink believes this is more appropriately determined by the governance and staff of an organisation, by the scrutiny of potential donors and funders and through provision of education, training and other similar mechanisms. The requirements for charities to submit annual returns and provide information in the charities register on their purpose and set up also helps the public make decisions on whether or not to support a particular charity. Within the sector itself a lot of effort is given to developing good governance, effectiveness and efficiency through providing training, discussion, peer review, commentary, and resources. All of these activities help develop confidence in the charitable and broader not for profit sectors – SocialLink Tauranga Moana

See also the submissions of Arthritis New Zealand; Barnados; the Cancer Society of New Zealand; Ced Simpson and Valerie Williams; Christian Education Trust; Community Housing Aotearoa; Community Waikato; Community Waitakere; Coromandel Independent Living Trust; David Boswell; EY Law; Jackie St John; Lisa Abrams; Liz Davies; ML Gribble; Motueka Family Service Centre; New Zealand Council of Christian Social Services; New Zealand Disability Support Network; Northland Community Foundation; Parihimanihi Marae; Philanthropy New Zealand; Rape and Abuse Support Centre Southland Inc; Save the Children New Zealand; Save the Otago Peninsula Inc; The Girl Guides Association New Zealand Incorporated; Todd Foundation; and Volunteering New Zealand.

The current purposes of the Charities Act are set out in s 3 as follows:

3 Purpose

The purpose of this Act is—

- (a) to promote public trust and confidence in the charitable sector;
- (b) to encourage and promote the effective use of charitable resources;
- (c) to provide for the registration of societies, institutions, and trustees of trusts as charitable entities;
- (d) to require charitable entities and certain other persons to comply with certain obligations;
- (e) to provide for the Board to make decisions about the registration and deregistration of charitable entities and to meet requirements imposed in relation to those functions;
- (f) to provide for the chief executive to carry out functions under this Act and to meet requirements imposed in relation to those functions.

The key purposes causing current difficulty are the first two: promoting public trust and confidence and the effective use of charitable purposes. While these purposes might appear innocuous on their face, it is important to understand their historical context in order to fully appreciate why they are the source of such current difficulty in practice.

Promoting public trust and confidence and the effective use of charitable resources

In the Charities Act as originally passed, the purposes of the Act were framed in broadly practical terms around establishing the Charities Commission for the purpose of administering a charities register. Given the significance of the wording, the original purposes provision is set out below for reference:²²

3 Purpose

The purpose of this Act is to—

- (a) establish the Commission as a Crown entity for the purposes of section 7 of the Crown Entities Act 2004;
- (b) state the Commission's functions and powers;
- (c) require the Commission—
 - (i) to have regard to certain matters; and
 - (ii) to comply with certain other obligations;
- (d) provide for the registration of societies, institutions, and trustees of trusts as charitable entities;
- (e) require charitable entities and certain other persons to comply with certain obligations.

In the Charities Bill as originally introduced in 2004, the *functions* of the Charities Commission were similarly primarily framed around administering the charities register. The 1989 Working Party on Charities and Sporting Bodies had recommended that the Charities Commission have a specific role of acting as an advocate for charities:²³ the Working Party had noted changes in the role of government departments (whereas they might previously have acted as advocates for voluntary organisations when advising the Government but that was no longer the case); in addition, the wide range of organisations involved in the charitable sector meant it would be extremely difficult for the charitable sector to establish on its own an organisation that could perform similar functions to those of a Commission. The Working Party's recommendation may have been reflected in the original drafting of the Charities Commission's functions: cl 10(i)(iii) of the original Charities Bill would have required the Commission to "make appropriate information available to the public to ... promote public confidence in the charitable sector".

At Select Committee stage, the functions of the Commission were reworked considerably, as indicated by the bolding below:

10 Commission's functions

The functions of the Commission are to—

- (a) **promote public trust and confidence in the charitable sector**; and
- (b) **encourage and promote the effective use of charitable resources**; and

²² [Charities Act 2005](#), as at 3 September 2007, s 3.

²³ *Report to the Minister of Finance and the Minister of Social Welfare by the Working Party on Charities and Sporting Bodies* (Treasury, Wellington, November 1989) at 61.

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- (c) educate and assist charities **in relation to matters of good governance and management, for example, —**
 - (i) **by issuing guidelines or recommendations on the best practice to be observed by charities and by persons concerned with the management or administration of charities:**
 - (ii) **by issuing model rules:**
 - (iii) by providing information to charities about their rights, duties, and obligations under this Act and other enactments; and
 - (d) make appropriate information available to assist persons to make registration applications under this Act; and
 - (e) receive, consider, and process applications for registration as charitable entities; and
 - (f) compile and maintain a register of charitable entities; and
 - (g) receive, consider, and process annual returns submitted by charitable entities; and
 - (h) **supply information and documents in appropriate circumstances for the purposes of the Inland Revenue Acts;** and
 - (i) monitor charitable entities **and their activities to ensure that entities that are registered as charitable entities continue to be qualified for registration as charitable entities;** and
 - (j) inquire into charitable entities and into persons who have engaged in, or are engaging in, conduct that constitutes, or may constitute, a breach of this Act or serious wrongdoing in connection with a charitable entity; and
 - (k) **monitor and** promote compliance with this Act, **including by taking prosecutions for offences against this Act in appropriate circumstances;** and
 - (l) consider, and to report and make recommendations on, any matter (for example, a proposed government policy) relating to charities—
 - (i) that is referred to it by any Minister of the Crown; or
 - (ii) **on its own motion;** and
 - (m) stimulate and promote research into any matter relating to charities, for example,—
 - (i) by collecting and disseminating information or research about charities:
 - (ii) by advising on areas where further research or information about charities should be undertaken or collected:
 - (iii) by entering into contracts or arrangements for research or information about charities to be undertaken or collected; and
 - (n) carry out any other functions that the Minister may direct the Commission to perform in accordance with section 87; and
 - (o) carry out any functions that are incidental and related to, or consequential on, its functions set out in paragraphs (a) to (n).

In other words, the Commission's education function was substantially reworked, a change the Select Committee described in the following terms:²⁴

We found that most submitters were concerned that the Commission would operate mainly as a regulator of the charitable sector, where they considered that the Commission should also have an extensive education and support function. While the Commission would be able to help charities to comply with regulatory requirements, submitters considered that it should also be able to encourage best practice and provide advice on issues such as governance and management.

In our view, the Commission should have an important role in informing, educating and supporting charitable organisations, as the effective exercise of this role should help charities to build their capacity and develop capabilities. The majority therefore recommends amending the bill to include, as one of the Commission's key responsibilities, the provision of general advice and assistance on governance and management, and recommendations on best practice. Such advice should be available to all charities, registered or not.

We considered the possibility of extending this education and support function to include the provision of financial and legal advice or to allow the Commission to give detailed assistance to individual charities. However, the majority has concluded that such advice might create a conflict of interest between the Commission's regulatory and support roles, and would therefore be inappropriate. The majority therefore recommends no change in this area.

24 Charities Bill 2004 (108-2) ([select committee report](#)) at 8 - 9.

In elevating the Commission's "public confidence" function to prime position, the Select Committee made the following comments:²⁵

Clause 10(i)(iii) specifies that one of the functions of the Commission is to make appropriate information available to the public to promote public confidence in the charitable sector. The majority considers that the current position of this provision in the clause fails to reflect the importance of this specific function. The majority recommends that clause 10 be reorganised to list the promotion of public confidence in the charitable sector as a distinct function.

The majority also considers that, if the public is to hold any confidence in the charitable sector, entities in that sector must use the resources provided to them in an appropriate manner, and believes the Commission should have a role in ensuring this. The majority therefore recommends that the Commission also be given an additional function of promoting and encouraging the effective use of charitable resources.

Accordingly, a function of encouraging and promoting the effective use of charitable resources was added to the Commission's list of functions at Select Committee stage.

These functions were then passed into law substantively unchanged as s 10 of the Charities Act.²⁶

To summarise, the Select Committee amended the Charities Commission's functions to provide for a standalone, first-ranking *function* of promoting public trust and confidence in the charitable sector, supported by a second-ranking function of promoting the effective use of charitable resources (s 10(1)(a) and (b)). These changes were passed into law under urgency, without substantial consultation, as discussed above.

The charitable sector supported the Charities Commission having a *function* of promoting public trust and confidence: the sector envisaged that the Commission would be able to proactively use the data it was gathering by means of the charities register, so as to respond in an evidence-based and balanced way to negative publicity in Parliament or the media about a particular charity or the sector generally, thereby enabling a more balanced public perception of the sector.²⁷

However, the difficulty arose when the Charities Commission was disestablished in 2012. As part of this process, the Charities Commission's functions were split between Charities Services and the three-person Charities Registration Board, with the exception of the first two, as discussed above in chapter 6: in other words, when the Charities Commission was disestablished, its functions of promoting public trust and confidence and the effective use of charitable resources were elevated to *purposes of the Act* (s 3).

The reason for making this change is not clear: there is no discussion of the change in the select committee report on the relevant bill.²⁸ One possible explanation is that, because s 10 now set out the functions of Charities Services only, elevating these functions to s 3 enabled them to apply to *both* Charities Services and the Board.²⁹ Support for this theory might be found in new s 11, which provided that both Charities Services and the Board may perform *functions* relating to promoting public trust and confidence and the effective use of charitable resources (as well as education and research), in relation to any charity, whether or not registered.

On the second reading of the Crown Entities Reform Bill, the Minister of Conservation stated that elevating promoting public trust and confidence and the effective use of charitable resources to purposes of the Act was a "clear and explicit statement on the continued importance of the charities' education functions".³⁰

25 Charities Bill 2004 (108-2) ([select committee report](#)) at 9 - 10, cl 10 at 39 - 40.

26 [Charities Act 2005](#) (as at 3 September 2007) s 10. Three changes were made: paragraph (f) was reworded to require the Charities Commission to "ensure that the register of charitable entities is compiled and maintained"; paragraph (m) was updated to refer to s 112 of the Crown Entities Act 2004; and paragraph (o) was deleted.

27 See for example the [submissions](#) of LEAD; Methodist Church of New Zealand Te Haahi Weteriana O Aotearoa; and Dave Henderson.

28 See Crown Entities Reform Bill 332-2 ([select committee report](#)).

29 Crown Entities Reform Bill 332-1 ([explanatory note](#)) at 6: "Clause 43 replaces section 3 of the principal Act. Section 3 states the purpose of the principal Act *and it is necessary to amend it to reflect the changes contained in this Part*. New aspects of the statement of purpose include— • the promotion of public trust and confidence in the charitable sector: • the encouragement and promotion of the effective use of charitable resources: • recognition of the role of the chief executive of the department."

30 Crown Entities Reform Bill [2R](#) (22 May 2012) 680 NZPD 2,240 per Hon Kate Wilkinson (National).

Whatever the underlying reason, in the rush to legislate the changes, little consideration appears to have been given to the implications of enshrining these two functions of the government agency as purposes of the entire regime.

A functional approach

Most comparable jurisdictions use the phrase “public trust and confidence” in relation to the specific *functions* or objectives imposed on the *agency* responsible for administering charities’ legislation, rather than as a purpose of the legislation itself. For example, the Charity Commission for England and Wales has a specific statutory objective to “increase public trust and confidence in charities”.³¹ The Charity Commission for Northern Ireland has a similar statutory objective to “increase public trust and confidence in charities”.³² In Ireland, the general functions of the Charities Regulatory Authority include to “increase public trust and confidence in the management and administration of charitable trusts and charitable organisations”.³³

The rationale for such a functional approach is to provide clear objectives for the government agency, in order both that the discharge of its functions and powers can be clearly confined, and challenged if exceeded, and that its performance can be measured against those objectives.³⁴ In other words, “public trust and confidence” is intended as an accountability mechanism for the government agency.

It is notable that, with the exception of New Zealand, all of the jurisdictions that use the phrase “public trust and confidence” have an *independent* agency responsible for administering charities’ legislation.

In jurisdictions where charities law is administered by the tax authority, such as Canada and the United States, the phrase is not used, as noted by McGregor-Lowndes and Wyatt:³⁵

The language of both US contributors departs from [a public trust and confidence narrative], preferring to use terms such as transparency, accountability, and oversight. Their focus is on the individual charity giving evidence of its trustworthiness to those who care to inform themselves about such issues. Donors and beneficiaries in these jurisdictions appear to have less assistance from the state in their decision-making. The CRA uses the phrase ‘protecting charities and the public from harm’, and the sector contributor describes the 25-year long hankering of the sector for a shift to a trust and confidence model.

Australia’s approach is unusual: the Australian Charities and Not-for-profits Commission (“ACNC”) Commissioner must have regard to the “maintenance, protection and enhancement of public trust and confidence in the not-for-profit sector” in performing functions and exercising powers;³⁶ however, Australia also adds “to maintain, protect and enhance public trust and confidence in the Australian not-for-profit sector” as an *object of the Act*.³⁷ The Australian legislation was passed in 2012, at approximately the same time as the New Zealand Charities Commission was being disestablished: this coincidence of timing may perhaps have influenced the decision to elevate promoting public trust and confidence to a purpose of the legislation in New Zealand. However, while clearly superficially attractive, whether an overriding purpose of promoting public trust and confidence in charities is appropriate in a jurisdiction that does not have an independent agency responsible for administering charities’ legislation does not appear to have been fully considered.³⁸

Impact of a non-functional approach when the government agency is not independent

In fact, a number of difficulties arise.

For example, as a business unit within DIA, Charities Services appears unable to speak up for charities in the way the Charities Commission was originally intended to do. The effect of this was seen after the mosque shootings of 15 March 2019, when a high-profile charity

³¹ [Charities Act 2011 \(UK\)](#) s 14(1), the “public confidence objective”.

³² [Charities Act \(Northern Ireland\) 2008](#) s 3(1).

³³ [Charities Act 2009 \(Ireland\)](#) s 14(1)(a).

³⁴ Interview with Kenneth Dibble, legal board member of the Charity Commission for England and Wales, and former Chief Legal Adviser and Legal Director at the Commission and Director of its International Programme (14 January 2021).

³⁵ M McGregor-Lowndes and B Wyatt (eds) *Regulating Charities: the Inside Story* (Routledge, New York, 2017) at 261 - 262.

³⁶ Australian Charities and Not-for-profits Commission Act 2012 s 15-10(a).

³⁷ Australian Charities and Not-for-profits Commission Act 2012 s 15-5(1)(a).

³⁸ Bearing in mind the inherent structural limitations of the Charities Registration Board as a “independent check” on Charities Services’ decision-making as discussed above in ch 7 (*Agency structure*).

was overwhelmed with unexpected millions in donations, which it struggled to process and forward to affected families; the inevitable delay in distributing the donations to victims led to trenchant and very unfair criticism of the charity online.³⁹ Charities Services did not take steps to reassure the public that the charity was doing its best in extraordinary circumstances, and that distributions would follow in due course (as did in fact transpire); the absence of such reassurance badly damaged public trust and confidence.⁴⁰ There is no indication that the Board undertakes such a function either, meaning that charities in New Zealand are left vulnerable to negative media narratives that undermine rather than promote trust and confidence. By contrast, when similar issues arose following the 2020 bushfires in Australia, the Australian Charities and Not-for-profits Commission was able to speak up on behalf of the affected charities, reassure the public that the charities had acted appropriately, and thereby minimise damage to public trust and confidence.⁴¹

More fundamentally, since the Charities Commission was disestablished in 2012, there has been a noticeable change in emphasis in the administration of the Charities Act regime: as can be seen from the extracts set out above, many submissions to the DIA's review spoke of "purpose creep" and a steady shift towards an increasingly heavy-handed "command and control" type of "regulation". The slow-moving but discernible change of paradigm, from an enabling framework to one of increasing prescription and restriction, mirrors Tyler's warning that regulatory purposes of ensuring effectiveness and accountability "threaten to morph into over-reaching exercises of governmental power in the name of enhancing trust and confidence".⁴²

Trust and confidence is not an end in itself

Fundamentally, promoting public trust and confidence in charities does not make sense as an end in itself: it would not make sense to promote public trust and confidence in charities for its own sake, or so that levels of public trust and confidence might be admired. Promoting public trust and confidence in charities is arguably merely a means to a deeper goal of maximising the ability of charities to provide benefit for society.⁴³

The difficulty is that, without a clear legislative articulation of such deeper goal, "promoting public trust and confidence", expressed as a purpose of legislation administered by an agency that is not independent of government, can become weaponised against charities: as the New Zealand experience demonstrates, what might promote public trust and confidence in charities is open to interpretation, not helped by a trend internationally towards increasing control over charities. For example, the practical effect of the Australian Charities and Not-for-profits Commission Act 2012 has been to "transform the charity sector from being one of the least regulated to one of the most highly regulated sectors in Australian society".⁴⁴ The Charity Commission for England and Wales has similarly moved towards greater command and control compliance functions, bringing itself closer in paradigm to the United States' and Canadian tax-based regimes.⁴⁵

39 Newstalk ZB *Victim Support right to hold off on Christchurch payouts – lawyer* 7 May 2019: www.newstalkzb.co.nz/on-air/mike-hosking-breakfast/audio/victim-support-right-to-hold-off-on-christchurch-payouts-lawyer/.

40 As noted by The Tindall Foundation in its [submission](#) at [34]: "Charities Services needs better ways of understanding the positive public impact generated by charities and their enterprises. Rather than trying to build public confidence and trust in the charitable sector by focusing on reporting and regulation, Charities Services should at least balance that by measuring and monitoring the positive impact generated by charities and communicate that to the public".

41 See Australian Charities and Not-for-profits Commission *Bushfire response 2019-2020: Review of three Australian charities* 24 October 2020: www.acnc.gov.au/tools/reports/bushfire-response-2019-20-reviews-three-australian-charities.

42 JE Tyler III [Book Review: Myles McGregor-Lowndes and Bob Wyatt \(eds\), *Regulating Charities: the Inside Story*](#), New York: Routledge (2017) 9(1) Nonprofit Policy Forum 5 at 3.

43 Although recent research indicates the link between public trust and confidence in charities and giving to charities may be less clear than is traditionally assumed. See I MacQuillin "[Everything you know about public trust in fundraising is wrong ... probably](#)" ThirdSector; and I MacQuillin "Have people really lost trust in charities?" ThirdSector, 3 August 2021: www.thirdsector.co.uk/ian-macquillin-people-really-lost-trust-charities/fundraising/article/1587140; G Bailey "Rocked by recent scandals, is the charity regulator fit for purpose?" The House 21 June 2021: www.politicshome.com/thehouse/article/rocked-by-recent-scandals-is-the-charity-sector-fit-for-purpose.

44 P Ridge "When is the advancement of religion not a charitable purpose?" (2020) 6 *CJCL* 360 at 393, referring to N Aroney and M Turnour *Charities are the new constitutional law frontier* (2017) 41:2 Melbourne University Law Review 446 at 457.

45 M McGregor-Lowndes and B Wyatt (eds) *Regulating Charities: the Inside Story* (Routledge, New York, 2017) at 264, 271 - 272.

The difference in New Zealand is that the move has not been explicit: it has been made through a series of piecemeal amendments, generally made by Statutes Amendment Bill and rushed through under urgency without proper consultation, the issuing of “guidance”, and complex and subjective interpretations of the definition of charitable purpose, all of which have been slowly eroding the gains made by the charitable sector during the passage of the original Charities Bill through Parliament in 2004.

While public trust and confidence is undoubtedly important, it is not clear that heavy handed regulation is the best way to achieve it. Research indicates that most public trust and confidence in charities is driven by charities themselves;⁴⁶ in other words, it may be better achieved through education, or “carrot” rather than “stick”.⁴⁷

46 Comment made by Charities Services’ staff at the ACNC day, 6 August 2021.

47 Don McKenzie CNZM, OBE made the following points in his [submission](#): “Maintenance of trust and confidence in the Charity principle * I submit that trust and confidence in the charity ethic be supported by Charity Services using its educative and advisory powers through codes of practice and guidance advice to maintain financial prudence and also the following: • integrity of values; • clarity of purpose; • evidence of benefit to recipients and the public; • open communication, accountability, transparency of transaction and objective measures of social outcomes. * I recommend that authentic and comprehensive feedback from recipients be integral to the assessment of service effectiveness and efficiency. The quality of governance available to charities from community volunteers and Boards is a determinant of the Trust and confidence that stakeholders will have in the sector. This justifies the introduction of codes of practice that enable Boards and volunteers to upgrade performance standards, to keep abreast of governance responsibilities, social trends and public expectations without the need for legislative change. Communities administering charities do need to be equipped, energised and benchmarked so enabling them to make a difference. Reminders of good governance standards are empowering for providers and shouldn’t be left to chance at the expense of donors and beneficiaries. The credibility of the charity sector is likely to be increasingly challenged in a fast-changing world of competing values, mixed messages and the number of needy causes. Donors, recipients and society will go on demanding greater scrutiny and better value for money. The donating public are entitled to clear statements of the 400 year old purposes of charity, clear adherence to those purposes and an assessment of those statements against outcomes that are backed by clear evidence of value to society. The enduring ideals from the 1601 Statute of Elizabeth implies voluntary giving in return for public benefit. Nothing should corrupt this principle. The ethic translates human values into a caring society. Voluntary giving by the public is about bettering society. The ethic recognises that No one is immune from natural misfortunes and hardship. In the report True to Label, NZ Sport, 2016, John Page points out that every New Zealand taxpayer forfeits an estimated \$2,000 per annum to the charitable sector. That is, taxpayers invest in creating the ‘public good’. Page makes reference to ‘every citizen as a stakeholder’. He refers to the ethics and trust inherent in good non-profit organisations and the growth that flows from rigorous external review and critique. Thus, open accountability, transparency of transaction and social as well as financial outcomes are vital for the maintenance of trust and confidence.... This submission seeks to ‘encourage and promote the effective use of charitable resources’ by enabling Charity Services over time to achieve the following: Develop codes of practice that imbed non-regulatory guidelines into the educative functions of Charity Services so raising the expectations of disability service providers to deliver clear public benefit. Create a culture of continuous improvement in performance and accountability standards by registered agencies receiving charitable donations from the public. Adhere to clear purposes that are obviously charitable and to the advantage of recipients. Focus on social outcomes that enable recipients to control their own lives and experience freedoms like the rest of the community so far as that is reasonable. Remove the inequitable structural disadvantages in the donor/provider/recipient relationship by investing in hearing the consumer voice and recognising the value of peer support. Preserve the dignity and personal worth of beneficiaries by enabling them to build self-efficacy and capability, so regarding them as equal partners in shaping their own life of meaning. Note that the UNCRPD recognises that, ‘when persons with disabilities are properly consulted, this leads to laws, policies and programmes that contribute to more inclusive societies and environments.’ Encourage the interpretation of charitable purpose in the light of clear public benefit that is open, human and real. In consultation, draft over time best practice guidelines for providers that encourage communities of interest, including beneficiaries, to comment and monitor the quality of community and social outcomes, so improving the value of the donated dollar. Require public accountability, transparency and outcome performance measures to be explicit and readily assessable by all communities of interest. Reinforce the fundamental ideal of charity, that is, voluntary donor giving in return for obvious public benefit. Recognise the value of resourcing beneficiaries to become more informed, more equipped, more politically savvy and more integrated into the way the sector works. Appreciate that the burden of unmet need among disabled people is unknown. Many shoulder the burden of disability alone, despite being tax and rate payers. Note that those with the greatest need are often those who are the most invisible. Understand the need to build capacity within community groups using the educative and advisory functions available. Allow and grow low cost appellant provisions challenging Charity Service decisions in the interests of fair, reasonable and democratic decision-making. Be cognisant of the different motives and objectives of shareholders and stakeholders when considering governance, accumulation of wealth and social responsibility. Disclose fully, the relationship between any charity and any associated business activity. Consider legitimate advocacy that is clearly related to a charity’s purpose as an instrument for potential social change. Ensure service providers protect the interests of their recipients by having a simple constitutional provision for the hearing of complaints and disputes resolution that is fair open and impartial. Offset the risk of donor fatigue by stressing to the public the value from register charities adhering to codes of practice related to financial, social, community and ethical standards consistent with the ancient meaning of charity”.

In its latest annual review, Charities Services states that public trust and confidence in the New Zealand charitable sector has “increased steadily in recent years”, pointing to an increase from 5.9 to 6.5 out of 10 compared to the previous survey.⁴⁸ However, what is not mentioned is that the 2021 score of 6.5 is in fact a drop from the original score of 6.6 obtained by the Charities Commission in 2008.⁴⁹ In other words, after 13 years and many millions of dollars’ worth of “regulation”, public trust and confidence in charities has in fact declined. While of course such surveys have their limitations, a focus on public trust and confidence appears paradoxically to be *reducing* public trust and confidence in charities.⁵⁰

A world-leading framework of charities law for New Zealand in 2022 would resist the trend towards increasingly heavy-handed regulation: over-regulation works against participation and progress, including the opportunities to be innovative and responsive.⁵¹ At the very least, it is necessary to be conscious, open and consultative about which paradigm is chosen and the reasons why: moving to a restrictive “command and control” paradigm should not occur in the absence of a clear evidence-base demonstrating that the benefits of such an increase in regulation would outweigh the associated costs, not only in terms of compliance, administration and litigation costs, but hidden costs such as damage to independence, goodwill, trust and confidence and New Zealand’s culture of volunteering. Such a case has not been made out.

Promoting public trust and confidence in charities and the effective use of charitable resources have not proved useful as overall purposes of a Charities Act regime, raising the question of what should be the overall purpose of a Charities Act regime?

Trust and confidence as a means to an end

In this context, one submitter made the following comments:⁵²

By placing the public confidence objective first in the list, this gives the impression that the public currently think the sector is untrustworthy. Our belief is that the [government agency] should be set up primarily to ‘encourage and support charities to enable them to deliver on their charitable purposes’. If the [government agency] does a great job at this, then the sector will perform better and the public will consequently have greater confidence in it and be even more prepared to provide support. In our opinion, the wording of the Act should be more about enabling rather than mistrusting and/or controlling and restricting.

The Australian Productivity Commission similarly stated that its recommendations had a clear end point, namely providing the sector with legal and regulatory framework and capabilities to “optimise their contribution to improving community wellbeing”, noting that:⁵³

48 Charities Services Ngā Ratonga Kaupapa Atawhai [2020/2021 Annual Review](#) at 1.

49 UMR Research *Trust and Satisfaction Survey* August 2008:

www.charities.govt.nz/charities-in-new-zealand/research-into-charities/ at 4.

50 The Todd Foundation made the following comments in their [submission](#): “Arguably, the implementation of the Charities Act has not been effective in achieving its current stated purposes, with the most recent research available indicating that “New Zealanders’ trust and confidence in charities remains moderate, with an average rating of 5.9 out of 10” [Horizon Research Public Trust and Confidence in Charities Conducted for Charities Services Department of Internal Affairs December 2016]. This is a reduction from an average rating of 6.6 when the survey was first conducted in 2008. As there appears to be no comparable research from prior to the Act’s implementation, we cannot know with certainty whether the Act has had any impact at all on public trust and confidence. However, if it was effective it would be reasonable to expect a neutral, or even positive trend if the implementation of the Act was successful. The same research shows that knowledge that charities are registered and regulated drives only 12% of people’s trust and confidence in the sector, and that knowing there was an organisation that had oversight of charities did not, in itself, increase confidence. Combined these results suggests that the Act (and its implementation) has not been effective in achieving its own stated purposes. This is disappointing given the significant amount of public and community sector resource (money and time) invested in charities registration. The above research may indicate that increasing transparency does not always increase trust. It can have the opposite effect by making people suspicious of something they weren’t suspicious of before. To combat this, alongside the regulation of charities, there must be strong messaging that charities make an enormous contribution to NZ society”.

51 Similar comments were made in P McClure AO, G Hammond OAM, S McCluskey, Dr M Turnour [Strengthening for purpose: Australian Charities and Not-for-profits Commission – Legislative Review 2018](#) 31 May 2018 at 18, referring to the submission of Giving Australia.

52 [Submission](#) of Habitat for Humanity Greater Auckland Ltd.

53 Australian Productivity Commission [Contribution of the Not-for-Profit Sector](#) 11 February 2010 at 368.

This contribution is not limited to delivering services but goes to the heart of civil society, including the sector's role as a voice for those who are marginalised and disadvantaged.

While one of the objects of the Australian charities legislation is to "maintain, protect and enhance public trust and confidence in the Australian not-for-profit sector",⁵⁴ it is balanced by two other statutory objects: to support and sustain a robust, vibrant, independent and innovative Australian not-for-profit sector, and to promote the reduction of unnecessary regulatory obligation on the Australian not-for-profit sector.⁵⁵

In its latest statement of strategic intent, the Charity Commission for England and Wales similarly articulated a deeper focus than mere "public trust and confidence" in itself:⁵⁶

Regulation is a means to an end; it is not an end in itself.

To command the public's confidence and to satisfy Parliament that we are discharging our responsibilities, the Commission has to demonstrate that its purpose is relevant to people's lives. That is why we are articulating our role differently: setting out here what we stand for and where we want to get to ... over the next five years ... [because all involved] need to know what we are trying to achieve and to what end.

"Our purpose is to ensure charity can thrive and inspire trust so that people can improve lives and strengthen society".

This purpose will inform everything the Charity Commission does. To be ... effective ..., the Commission must do all it can to ensure that charities show they are being *true to their own purposes*, can demonstrate the difference they're making, and meet the high expectations demanded by the public. All charities are custodians of what it means to be a charity in the eyes of the public and so are we.

Similarly, in Ireland, the stated strategy of An Rialálaí Carthanais "demonstrates our commitment to championing the success of charities and supporting a sustainable, innovative and vibrant charitable sector".⁵⁷

In the draft Bill included with this report, we have removed promoting public trust and confidence as a purpose of the legislation and returned it to a function of the agency administering the Charities Act. We have also removed promoting the effective use of charitable resources altogether: as many submitters noted, while in principle it might sound reasonable, in practice, the effective use of a charity's resources is a matter for the governance of the charity to determine; it is not an appropriate function of government.⁵⁸ A similar purpose was specifically rejected in Australia.⁵⁹

An enabling purpose

Instead, we recommend that the Charities Act articulate its true underlying purpose: submissions strongly supported a purpose similar to the second Australian purpose of supporting and sustaining a robust, vibrant, independent and innovative charitable sector ("**the second object**"), ideally adapted for the New Zealand context, as set out in box 8.2:

54 Australian Charities and Not-for-profits Commission Act 2012 s 15-5(1)(a). This is also a matter to which the Commissioner must have regard in performing functions and exercising powers: Australian Charities and Not-for-profits Commission Act 2012 s 15-10(a). Under s 35-10(2)(e), in deciding whether to deregister a charity, the Commissioner must take account of the extent (if any) to which the registered entity is conducting its affairs in a way that may cause harm to, or jeopardise, the public trust and confidence in the not-for-profit sector.

55 Australian Charities and Not-for-profits Commission Act 2012 s 15-5(1)(b), (c).

56 Charity Commission *Statement of Strategic Intent for 2018-2023* 4 October 2018: www.gov.uk/government/publications/charity-commission-strategy-2018-2023/charity-commission-statement-of-strategic-intent-2018-2023 "What we stand for" (emphasis added).

57 An Rialálaí Carthanais Charities Regulator *Statement of strategy 2019-2021*: www.charitiesregulator.ie/media/1742/statement-of-strategy-2019-2021.pdf at 6.

58 Australian Charities and Not For-Profits Commission Act 2012 s 15-5(1)(b) as discussed in Internal Affairs *Modernising the Charities Act 2005: Discussion Document* February 2019 at 17.

59 P McClure AO, G Hammond OAM, S McCluskey, Dr M Turnour *Strengthening for purpose: Australian Charities and Not-for-profits Commission – Legislative Review 2018* 31 May 2018 at 25 - 29.

Box 8.2 – views of submitters regarding an enabling purpose:

... we would endorse an Act with the purpose of supporting and sustaining a robust, vibrant, independent and innovative charities sector, with regulation being a means to this end (rather than an end in itself) - Todd Foundation

The redrafted purposes of the Act should specifically recognise that the registration regime is a means to other ends, and its purposes should include supporting and sustaining the sector and minimising unnecessary regulatory obligations – Te Whakakitenga o Waikato Incorporated, on behalf of the Waikato-Tainui iwi, endorsed by the Waikato Raupatu Lands Trust and Group and Waikato-Tainui marae

A robust, vibrant, independent and innovative charitable sector is an essential part of our country's economy and social fabric. This purpose is a clear statement of intent that is missing from the current Charities Act – FinCap (National Building Financial Capability Charitable Trust)

Without this wider purpose behind the information and disclosure regime there is a risk that the sector is essentially regulated and controlled, as a "loophole" that needs to be contained and constrained, rather than a positive part of the social fabric in its own right that should be respected and supported to flourish – Methodist Church of New Zealand Te Haahi Weteriana O Aotearoa

I support adding a clause connoting a robust, independent and innovative charity sector aimed at achieving the Act's purposes through its framework and focused on effective, real and human outcomes – Don McKenzie CNZM, OBE

charities are fundamentally about improving the human condition, whether through education, religion, alleviating poverty or other community benefits. The purpose of the Act should reflect these aspirations – Community Housing Aotearoa

A robust and truly independent charitable sector is of significant benefit to society, whether by the alleviation of needs or the promotion of good. The value of volunteer hours alone is huge and accomplishes much at no cost to Government. This more than justifies the traditional principle of allowing tax relief to those who contribute to charities. We believe Government should support and promote charities as robust, independent entities. To this end, charities ought to be as free as possible from regulatory requirements as they further their objectives – Grace Presbyterian Church of New Zealand

Government support for a robust, vibrant, independent and innovative charities sector would emphasise the government's commitment to supporting charities to achieve their purposes through the Act's framework, this is not currently covered in the Act. The purpose also recognises the changes we, as a sector may be required to face in a future that is predicted to be filled with uncertainties – Save the Children New Zealand

This will help to strengthen charity law in New Zealand and make clearer the core purposes underlying the Act in the present-day context – Barnados

we would strongly encourage the government to introduce an additional purpose that makes the support and sustenance of a robust, vibrant, independent and innovative charities sector a priority – Hawke's Bay Community Law Centre

I regard this as a positive addition that would assist Charities Services to focus on the positive benefits the sector brings to New Zealand communities, and balance against the regulatory/control and management focus taken by the Service – Jackie St John

The current purpose statement of the Act does not address the overall aims. We recommend to change the purpose into high level outcomes, and then further specify how these outcomes are to be obtained (ie by providing a registration, reporting and monitoring system for charities) – the Cancer Society of New Zealand

Just be aware Charities primarily is about outcomes rather than funding/money/cost. Allow for the best way to mobilise the good outcomes charities give to their communities – Individual A

this explicitly recognises the importance of the support which Charities Services provides to the sector, along with the need to maintain the independence of New Zealand's charities – InterChurch Bureau

this will encourage and support future innovation and use of new ideas and technologies by charities – Northland Community Foundation

I think that first and foremost that the Act should clearly state an intention to promote public wellbeing/benefit via the charitable sector. The other purposes already listed would bolster that purpose – Ruth Wilson

The charitable sector provides significant benefits to New Zealand society. The purpose of its governing legislation over the next 10 to 20 years should include supporting and sustaining it as a robust, vibrant, innovative and independent sector – SocialLink Tauranga Moana

providing support for innovation within the charity sector will be critical for its forward movement – The Hunger Project New Zealand

We support this additional purpose. However, as discussed earlier, we believe a truly independent charities sector is more possible when it is independent from the DIA. Hence pursuing different forms of independent structure like a crown owned enterprise or an independent crown entity should be a core part of the proposed wider review of the sector – The Salvation Army Group

Yes. This will require additional funding for charities, more input from charities in terms of Government policy and focus, and extra assistance for smaller charities to meet the administrative requirements legislated by the Act – Volunteering Hawkes Bay

See also the [submissions](#) of Age Concern New Zealand; Amala Wrightson, Auckland Zen Centre, NZ Buddhist Council; Arthritis New Zealand; Barry Coates, Sustainable Initiatives Aotearoa; Blind Foundation; Braemar Charitable Trust; Breast Cancer Aotearoa Coalition; Bridget Frame; Carolyn Bates; Catherine Low; Central Lakes Trust; Christchurch Community Accounting Trust; Christian Education Trust; Community Networks Aotearoa; Community Waikato; Community Waitakere; ConsumerNZ; CPA Australia; Creative New Zealand (endorsed by a further 17 organisations); David Boswell; Diane Robinson; Digits Charitable Trust; Friends of Arataki and Waitakere Regional Parkland Inc; Geoff Pownall; Graduate Women North Shore Charitable Trust; Grey Power Otago Inc; Habitat for Humanity New Zealand; Habitat for Humanity Greater Auckland Ltd; Hamilton Christmas Charitable Trust; Hamish Murray; Heather Pennycook; Individual B; Individual C; Jaram Lallu; Joanne Harland; John Welford; Kapiti Retirement Trust; LEAD; Life in Vacant Spaces; Linda Webb; Lindsay Jeffs; Lisa Abrams; Literacy Aotearoa Charitable Trust; Liz Davies; Mac Jordan; Make-A-Wish Foundation of New Zealand Trust; Manukau Christian Charitable Trust; Marine Reach Charitable Trust; Medical Assurance Society; Merv Ransom; The Methodist Church of New Zealand Te Haahi Weteriana O Aotearoa Auckland Fiji Methodist Parish Methodist Alliance (Tabacakacaka); Motueka Family Service Centre; Multiple Sclerosis New Zealand Inc; Museums Aotearoa; Network Waitangi Otautahi Inc; New Zealand Breastfeeding Alliance; New Zealand Council of Christian Social Services; New Zealand Council of Victim Support Groups Incorporated; New Zealand Disability Support Network; New Zealand Land Search and Rescue Incorporated (LANDSAR); New Zealand Law Society; NZ Navigator Trust; New Zealand Portrait Gallery Trust; Noela Rendle; Northland Urban Rural Mission; Organisation A; Oxfam New Zealand; Parihimanihi Marae; Peter Hays; Peter Sharpe; Philanthropy New Zealand; Planalytics; Public Trust; Rape and Abuse Support Centre Southland Inc; Rawene and Districts Community and Development Inc (Lorene Royal); Richard Easton; Roger Eynon; Royal New Zealand Coastguard Incorporated; Royal New Zealand Plunket Trust; RSM; Save the Otago Peninsula Inc; SeniorNet Bream Bay Inc; SPCA; Sport Waitakere; Summit Road Society Incorporated; Surf Life Saving New Zealand Inc; Tairāwhiti Environment Centre Inc; Te Pūtahitanga o Te Waipounamu; The Fred Hollows Foundation NZ; The Girl Guides Association New Zealand Incorporated; The Institute De Notre Dame Des Missions Trust Board; The Ozanam House Trust; Royal New Zealand Ballet; The United Fire Brigades' Association of New Zealand; Thomas E Stazyk; Tiri Porter; Titirangi Baptist Church; Tom Brady; Toy Library Federation of New Zealand; Tristan Katz; Trust Democracy; University of Canterbury Foundation; Volunteering New Zealand; Waipuna Hospice Incorporated; Wellington Indian Association; Whaiora Whanui Trust; Whenua Iti Trust Board; Youth Search and Rescue Trust NZ; Youth with a Mission Queenstown Lakes Charitable Trust (Tāhuna ki te Ao Charitable Trust; YWCA of Aotearoa NZ, YWCA Whangarei, YWCA Auckland and YWCA Hamilton, Boards and Managers; and Zoe Williams.

To articulate such a deeper purpose would clarify the parameters and objectives of decision-making, by making clear that the framework of the Charities Act is intended to be enabling, not restrictive. Articulating the true purpose of the Charities Act clearly would also help protect charities against harmful regulation and a creeping change in regulatory paradigm,⁶⁰ and make it clear that any tax privileges that might follow from registration are a matter for tax legislation, and are not the focus of the Charities Act.

A number of submitters raised questions about what the various terms in the second Australian object mean, how they would be measured, and how such a purpose might be implemented. In 2018, the Australian Charities and Not-for-profits Commission noted that the second object is not defined in either the legislation, the explanatory memorandum or the Minister's second reading speech, and undertook a consultation process seeking to illuminate and clarify how the ACNC could "measure the degree to which the charity sector exhibits each of these attributes".⁶¹ The resulting report drew on a literature review to provide insight into the phrase "robust, vibrant, independent and innovative" and suggested "a range of measurements to help assess the health of the sector, and how that health changes over time".⁶²

However, Krystian Seibert, the adviser managing the development of the ACNC legislation in 2012, argued this approach was "off the mark" because it "does not take into account the origins of the ACNC legislation and the process of its development".⁶³ Seibert explains the context for the second object in Australia as follows:⁶⁴

Back in late 2011 ... there was ... consternation about the fact that the draft ACNC legislation seemed *unduly harsh* – it seemed to approach the task of regulating the sector using a '*deficit model*', whereby it was presumed that there were all sorts of governance and other deficiencies within the sector, and that a new regulator was needed to rectify them ... Stakeholders were consistently making a very valid point. Yes, the ACNC was to be a regulator of the NGP sector, focusing on charities at first. However, the intention behind the regulator was not that it would be the kind of regulator based on the '*deficit model*' I describe above.

The intention behind the regulator was that it would be a *facilitative regulator* ... It would of course take action where there was misconduct, but it would also have a strong focus on supporting charities so that they could achieve their purposes through good governance and embracing transparency.

After some further examination of the commitments made in relation to the ACNC and some additional consultation, my minister made the decision to include the second object, to effectively codify this intention.

In that sense, the second object is not so much about the sector – it's about the ACNC. *It's about the regulatory approach which the ACNC adopts, and how it positions itself in relation to charities.* That's why it includes the words 'support and sustain' so prominently.

The object is about how the ACNC engages with charities, about how it prioritises education and guidance, about how it ensures that through its regulation, the varied and diverse

60 See, for example, the [submission](#) of Kotare Trust: "One of the reasons that [a full first principles] review is needed is the evident gradual increase of control by Charities Services over the sector, with whittling down of the sector's independence. The Unit's regulatory function, particularly as regards advocacy, but also in terms of assuming the ability to define or constrain the charitable purposes of organisations, has taken over the role of supporting the sector to carry out its charitable purposes. 'Social control' would be a better descriptor of how the Act has been used. In 2005, Sue Bradford was recorded as noting her and others' concern that the Act was a Trojan horse that could allow the government to 'colonise and control' the charitable sector (NZPD 12 April 2005). It appears to us that this was prescient remark is reflected in the implementation of the Act, particularly since the 2012 move, but even more so in the present day".

61 See Australian Charities and Not-for-profits Commission *Setting the record straight: the purpose of the ACNC's exploration of the Act's second object* 26 March 2019: <www.acnc.gov.au/media/news/setting-record-straight-purpose-acncs-exploration-acts-second-object>.

62 Australian Charities and Not-for-profits Commission *Measures in support of the not-for-profit sector – Object 1(B)* 12 December 2018: <www.acnc.gov.au/tools/reports/measures-support-not-for-profit-sector-object-1b>.

63 K Seibert *So what does the second object of the ACNC Act mean?* Probono Australia 19 February 2019: <probonoaustralia.com.au/news/2019/02/second-object-acnc-act-mean/>.

64 K Seibert *So what does the second object of the ACNC Act mean?* Probono Australia 19 February 2019 (emphasis added).

organisations within the sector are better positioned to achieve their objectives and maximise their contribution to the common good ...

That of course doesn't mean that the ACNC shouldn't take swift and firm action against an organisation where needed – if there is wilful wrongdoing, it's certainly the ACNC's job to address that ...

So I would suggest measures which focus on what the ACNC does, and not on what's happening within the sector.

The added benefit of this is that the ACNC can then be held accountable for how it performs in relation to the object ... The better approach is to use measures based around the ACNC's regulatory approach. These could cover matters such as the provision of education and guidance, the number of outreach events held with charities, as well as the ACNC's contributions to any policy development processes in relation to the sector. These are just some ideas, and I'm sure that stakeholders will have other suggestions ... Adopting such an approach would hold true to the real intention behind the second object of the ACNC Act.

In other words, creating a facilitative regulator, rather than one based on a presumption of wrongdoing and the need for heavy-handed compliance measures, was intended to pre-empt reactive regulation in response to crises, and instead proactively pursue regulatory reform that would support the growth of Australia's not-for-profit sector.⁶⁵ Seibert explains that the term "facilitative" is used in a broad sense to describe fostering or nurturing the sector, and supporting organisations within the sector to achieve their objectives and maximise their contribution to the common good.⁶⁶ In addition, the second object is reinforced by the matters to which the ACNC Commissioner must have regard in exercising powers and functions under the ACNC Act, such as "maintenance and promotion of the effectiveness and sustainability" of the sector, and the "unique nature of diversity" of charities and the "distinctive role that they play in Australia".⁶⁷

Expressing such a wider purpose in New Zealand would reduce the risk of the charitable sector being perceived and regulated as a "loophole" that needs to be contained and constrained, rather than as a positive part of the social fabric in its own right that should be respected and supported to flourish.⁶⁸ Fundamentally, expressing such a wider purpose would clarify the underlying paradigm and that the intention is to enable rather than restrict the charitable sector in New Zealand.

As noted in the DIA's discussion document for the review of the Charities Act, a "purpose section" in legislation is intended to "set the scene" and clearly convey the high-level outcomes the Act seeks to achieve: all the functions, powers and duties exercised under it are interpreted in light of the purpose section.⁶⁹ On that basis, cl 3 of the draft Bill included with this report articulates such a wider purpose, and clarifies that such an enabling purpose is intended to be furthered by means of providing and administering a charities register as a forum for transparency and accountability. Charities remain primarily responsible for furthering their stated charitable purposes as they see fit, within the parameters of the terms of their constituting document and the general law. Transparency and accountability are provided for by the inclusion of each charity's constituting document on the charities register, supported by the duties to file annual returns, accompanied by financial and non-financial information prepared in accordance with External Reporting Board ("XRB") standards, to notify key changes and to further the stated charitable purposes. Key objectives for the agency responsible for administering the legislation include ensuring these duties are complied with so that

65 See K Seibert *Navigating Reform in Contested Spaces: Reflections on not-for-profit sector regulatory reform in Australia, 2010-2013*, book chapter in "The Three Sector Solution: Delivering public policy in collaboration with not-for-profits and business" (ANU Press, 2016): <openresearch-repository.anu.edu.au/handle/1885/223433> at 135 - 136 *Proactive reform to establish a facilitative regulator*.

66 K Seibert *Navigating Reform in Contested Spaces: Reflections on not-for-profit sector regulatory reform in Australia, 2010-2013*, book chapter in "The Three Sector Solution: Delivering public policy in collaboration with not-for-profits and business" (ANU Press, 2016) at 135 - 136.

67 Australian Charities and Not-for-profits Commission Act 2012, s 15-10(d), (h).

68 See JE Tyler III *Book Review: Myles McGregor-Lowndes and Bob Wyatt (eds), Regulating Charities: the Inside Story*, New York: Routledge (2017) 9(1) Nonprofit Policy Forum 5 at 3. See also the [submissions](#) of: LEAD, Methodist Church of New Zealand Te Haahi Weteriana O Aotearoa and Network Waitangi Otautahi Inc.

69 Internal Affairs *Modernising the Charities Act 2005: Discussion Document* February 2019 at 17.

the register is up to date and intervening in the case of serious wrongdoing. In short, it is not necessary to create a regulatory “empire”: the Act is intended to be a very simple mechanism by which the government can invest in the sector, and then “get out of the way”.

Transparency

In its February 2019 discussion document, DIA proposed an additional purpose to “promote the transparency of the charities sector to donors, volunteers, beneficiaries and the public”.⁷⁰

While transparency is recognised as fundamentally important, it is inherent in the administration of the charities register. On that basis, a separate “transparency” purpose is not necessary. As one submitter noted, “Transparency is a nice sounding word but it can be used to push for information that is not required and regulation to fix ‘problems’ that don’t exist”.⁷¹ In short, it reflects the wrong paradigm. The balance of submissions was not in favour of a separate “transparency” purpose, as set out in box 8.3:

Box 8.3 – views of submitters regarding a “transparency” purpose:

The [suggested transparency purpose] seems slightly alarming. What problem are you trying to solve? Promoting the transparency of the charities sector doesn’t seem necessary, since we have the new reporting standards. What more transparency is needed? Are you planning to meddle? If so, stop now. It is hard enough already for charities to undertake the work they do. Remember, the sector takes up an awful lot of slack, working for citizens out of sheer good will and generous response to need. The government must ensure it does not get in the way – Wellington Youth Orchestra Inc

We do not support the additional proposed [transparency] purpose ... We absolutely support the need for charities to be transparent; however we consider this is already covered by existing purposes and obligations. This proposal will potentially impose unnecessary further demands on charities that are already feeling overwhelmed by accountability requirements for the Act, funders and the public. This is exacerbated by the limited people resources and relatively modest funding of most charities – Age Concern New Zealand

it is vital that the work and decisions of the Board and Charities Services itself are transparent for the public to see as well as transparency for the broader sector – The Salvation Army Group

Transparency must work both ways – Friends of Arataki and Waitakere Regional Parkland Inc

The churches submit that the desirability of transparency is already implied within the “purpose” section in the provisions for registration (s3(c)) and compliance (s3(d)) – InterChurch Bureau

The additional purpose to promote transparency (etc) is already well covered by existing legislation ... including more in the Charities Act would be duplication and potentially confusing – Habitat for Humanity New Zealand

The sector must be transparent and instil public trust and confidence, however, is the sector not transparent enough to its own board, auditor, funders, community and stakeholders? – Sport Waitakere

it is not clear what problem this is trying to solve. They seem unnecessary – St Pauls Lutheran Church

Transparency (of varying degrees, depending on the circumstances) would appear to be a means to other ends (such as maintaining the integrity of, and public trust and confidence in, the charitable sector) rather than an end in itself. It would be helpful to identify these purposes – New Zealand Law Society

70 Internal Affairs [Modernising the Charities Act 2005: Discussion Document](#) February 2019 at 17.

71 [Submission](#) of Graham Burger.

Waikato-Tainui recommends that the purposes of the Act, currently set out in s 3 of the Act, be redrafted ... Waikato-Tainui's suggested drafting ... does not include a 'transparency' purpose as suggested in the Discussion Document. Transparency is a means to an end, not an end in itself – Te Whakakitenga o Waikato Incorporated, on behalf of the Waikato-Tainui iwi, endorsed by the Waikato Raupatu Lands Trust and Group and Waikato-Tainui marae

We would like to emphasise the need to prevent regulatory overreach, where Charities Services or the Registration Board (or whatever entity may take their place) is given too broad a scope that results in a too tightly controlled sector – Liz Davies

We are concerned that the addition of this purpose will add extra layers of compliance for already stretched and under-resourced small charitable organisations – FinCap (National Building Financial Capability Charitable Trust)

In respect of the second potential additional purpose, it would be good for Charities Services to promote the good work of the sector to the public but it is not the transparency per se of the charities that is being promoted but rather the good beneficial outcomes that are being achieved by the charities – Habitat for Humanity Greater Auckland Ltd

I feel the online charities site what the information that is updated is perfect. I would like to keep this as I feel it is transparent enough – Wellington Indian Association

We do not support the addition of the proposed [transparency] purpose ... transparency is ... covered under the existing obligations that includes, the way we conduct our work to meet our charitable purpose, and regular and thorough reporting to the public and donors – Save the Children New Zealand

All registered charities are currently required to report annually, ensuring transparency about where their funds have been spent and most charities are required to report on what services they have delivered. These reports are all available on the charities register to ensure public accountability. How does the proposed Act intend to promote transparency further? Are there likely to be further reporting standards or will Charities Services start to undertake more analysis (including meta-analysis) and make these available? – Water Safety New Zealand

The Trust does not support the addition of the [transparency] purpose. This additional purpose will add an extra layer of bureaucracy that is not necessary – Hamilton Christmas Charitable Trust

No. The drive for starting and operating charities comes from the community and public-spirited people within the community who see suffering, injustice and needs, and who respond to those needs, often at a cost to themselves. It does not come from central Government – Jacob Ploeg

the wording of both is still heavily weighted toward compliance rather than capacity-building. We would urge the policy makers to consider what these two suggestions mean for the structure of Charities Services to move the emphasis away from compliance and more toward teaching/coaching/capacity-building and encouragement (whilst we all know that compliance is necessary) – University of Canterbury Foundation

no additional purposes are required. Both suggestions are sufficiently covered in the current Act – Lake Taupo Hospice Trust Inc

the present Act provides for all the transparency that is needed – Lloyd Brewerton

we already have all the transparency that is needed – no more compliance rules! – Manukau Christian Charitable Trust

We support a purpose for Charities Services that balances accountability (from both charities and Charities Services themselves) and support. The suggestions in the Review risk creating an environment of regulatory overreach that will further tighten controls on a group of organisations that are already subject to high levels of compliance from Government. We are already facing a situation where people do not want to volunteer for positions such as Treasurer because of the work involved and where we are having to divert meagre financial resources away from frontline activities in order to have staff that can meet accountability requirements – Neighbourhood Support New Zealand Inc

no – I don't think either adds anything to the Act and may risk unintended consequences eg regulatory creep – Neil Walbran

We suggest that the proposed additional purposes are somewhat nebulous and may be prone to ideological interpretation – New Zealand Resource Centre Trust

While not opposed to the principle of transparency per se I don't think it is the government's role to enforce this, consequently I do not support the further focus on "transparency" in the Act. The current focus on 'transparency' is sufficient – Organisation B

no if this creates an additional layer of compliance and cost – Organisation C

Possibly to the transparency additional purpose but with the caveat as to how the Act could promote transparency beyond financial performance. For example: gather information and report on evidence of poor employment practices; evidence of sexual harassment and/or misconduct cases investigated; policies on treatment of volunteers and interns; evidence of sustainable and environmentally sensitive practices; and evidence of complaints processes, number of complaints etc – Oxfam New Zealand

No – I would go back to the basic principle of it being a register of charities that monitors outcomes annually against the meeting of the purpose and recognises that many of the charities only exist because our health and education services fail to deliver enough services and meet diverse needs. Too much is economic directed rather than social directed – Roberta Budvietas

Charities are already required to be transparent so there is no need to promote any further transparency – Southern Group Training Trust

An additional layer is not necessary on top of what is already being completed now by registered charities – The Girl Guides Association New Zealand Incorporated

While transparency is important, it needs to be carefully balanced with additional reporting requirements and compliance. Volunteer organisations often don't have the resources to comply with heavy requirements ... So while we support the concept of transparency, it needs to be balanced with not deterring from providing meaningful charity services to the community – The United Fire Brigades' Association of New Zealand

I do not object to them, but believe they are already included in the existing purposes – Thomas E Stazky

We agree with ... the need to promote the transparency of the charities sector, provided this does not add any additional bureaucracy or require onerous reporting requirements to small organisations – Toy Library Federation of New Zealand

do not support because it implies more compliance burden, when we all know the current burden is for small charities especially oppressive and badly designed – it acts to discourage volunteering – Trust Democracy

transparency must go two ways and therefore there must be increased transparency from the Regulator with regards to its decisions and actions – Volunteering Hawkes Bay

this would not add anything except an additional layer of bureaucracy – Volunteering New Zealand

There is not enough detail ... How would the transparency be achieved – if the proposal is going to suggest more reporting and other compliance obligations then we would not support it ... many organisations are resource (including personnel) and time poor – Whangarei A&P Society

there is already good transparency – Youth Search and Rescue Trust NZ

See also the [submissions](#) of Abbeyfield New Zealand Inc; CPA Australia; Christchurch Community Accounting; Graham Burger; Joanne Harland; John Robinson; Julia Fink; Methodist Alliance; Scott Moran; and the Todd Foundation.

Reducing red tape

Similarly, a purpose directed at "reducing red tape", along the lines of the third Australian object,⁷² has not been included. Many charities in New Zealand are struggling with the compliance burden and it is undeniably important to reduce unnecessary regulatory

⁷² Australian Charities and Not-for-profits Commission Act 2012 s 15-5(1)(c) provides that the objects of the Act include: "to promote the reduction of unnecessary regulatory obligations on the Australian not-for-profit sector".

obligations, as noted by a number of submitters.⁷³ However, the Australian experience of “red tape” is coloured by constitutional federal/state arrangements, which have contributed to considerable complexity that New Zealand does not face. Were New Zealand to clarify the purposes of the legislation as discussed above, and the parameters of decision-making as discussed in this report, “red tape” may be inherently minimised without the need for an express purpose to that end. More fundamentally, once the regime is clarified as a relatively simple one focused on administering a charities register, it is not clear that a purpose of reducing red tape would be appropriate: reducing red tape would be a more appropriate role for Government, including in the context of a review of the wider legal framework in which the charitable sector operates, rather than for a Charities Registrar.

Terminology

In terms of how the second Australian object might be adapted to a New Zealand context, submitters made a number of suggestions, including recommending the addition of the word “diverse”. In that regard, some submitters recommended including a reference to “culturally diverse”,⁷⁴ but other submitters pointed out that diversity is also important by other factors such as gender, age, sexuality, and region.⁷⁵ In order to reflect the broad expanse of diversity in a healthy charitable sector, we recommend inclusion of the word “diverse” without qualifier.

Other submitters raised a concern about how the legislation might “sustain” the charitable sector.⁷⁶ This concern may to some extent be addressed by clarifying that the overarching enabling purpose of the legislation is to be furthered by the reporting, registration and monitoring regime established by the Charities Act. However, we also suggest removing the word “sustain” and replacing it with a reference to “enabling” a “sustainable” sector.

The result is a long list of words, as a number of submitters noted. However, a list of six words need not be inherently problematic, given the role of the purpose provision in “setting the scene” for overall decision-making under the Act.

73 See, for example, the [submissions](#) of Cancer Society of New Zealand: “promote transparency whilst reducing unnecessary regulatory obligations on the New Zealand charities sector”; Methodist Alliance: “the regulatory could and arguably should have a role in identifying and addressing red tape constraints that prevent innovation”; New Zealand Law Society: “the Law Society recommends amending the purpose provisions of the charities Act to...include...promoting the reduction of unnecessary or unjustifiably burdensome regulatory obligations for the New Zealand charitable sector”; Organisation B: “Minimisation of costs of compliance with government requirements, to allow the sector to flourish independently of government control”; Royal New Zealand Coastguard Incorporated “(the charity saving lives at sea, which receives 12.5% of its funding from government, raising all of the remaining 87.5% from boaties and other individual supporters, corporate sponsors and funding bodies): The registration, reporting and monitoring regime under the Charities Act should support the work of New Zealand’s charitable sector, not merely “regulate” the sector; in terms of regulation, focus on enabling and empowering the [government agency] and other authorities to identify and weed out organisations and individuals whose misconduct threatens public trust and confidence in, and support for, the charitable sector; and ensure that in doing so the reporting and other obligations imposed on registered charities are not unduly burdensome or restrictive. Coastguard NZ supports drafting the purposes of the Charities Act so that they are more clearly linked back to the public benefit delivered by the charitable sector... and expressly include supporting the charitable sector (as suggested in the Discussion Document). In particular, Coastguard NZ considers that the purpose(s) of the Act should include:...providing for charity registration, reporting and monitoring in order to advance the above purposes, without imposing disproportionate obligations on charities”; Te Whakakitenga o Waikato Incorporated, on behalf of the Waikato-Tainui iwi, endorsed by the Waikato Raupatu Lands Trust and Group and Waikato-Tainui marae: “The redrafted purposes of the Act should specifically recognise that the registration regime is a means to other ends, and its purposes should include supporting and sustaining the sector and minimising unnecessary regulatory obligations”.

74 See the [submission](#) of Te Whakakitenga o Waikato Incorporated, on behalf of the Waikato-Tainui iwi, endorsed by the Waikato Raupatu Lands Trust and Group and Waikato-Tainui marae: “to support and sustain a robust, vibrant, independent, culturally diverse and innovative charitable sector in New Zealand”.

75 Comments on the draft Bill received from Amy Beliveau, 31 August 2020.

76 See the [submission](#) of RSM: “we do have a concern about how such a purpose may be interpreted by some. Our concern is how this purpose would be practically delivered upon by the Government and where responsibilities end. Some charities reading such a purpose may interpret that to mean that the Government is committing itself to bailing them out when they get into trouble ie to keep them alive and in the sector. Potentially problematic in this regard is the word “sustain” ... As long as expectations are clear around how such a purpose could be delivered upon then we think this this a very useful extension, and focus for the [government agency]”.

Finally, we recommend specifically clarifying that the purpose of the legislation is to enable and support the sector *because of* the benefits such a sector provides. Such benefits are also recognised through tax privileges, some of which may flow from registration: however, the intention is to be clear that tax privileges are a matter for tax legislation and are not the focus of the Charities Act.

Given the difficulties that have been experienced in New Zealand in recognising the wider, intangible benefits provided by charities, we recommend the legislation clarify that such benefits may be direct or indirect. We also recommend underscoring the vital role that such a charitable sector plays in a free and democratic society by specifically referring to the same: the implications of failing to recognise this factor are significant.

As discussed above (recommendation 2.2), we also recommend that the legislation specifically require all persons performing functions or exercising powers under it to do so in a manner that recognises and respects the principles of the Treaty of Waitangi.

Recommendation 8.2:

That the purpose of the Charities Act is clarified as being “to enable and support a diverse, robust, vibrant, independent, innovative, and sustainable charitable sector, in recognition of the direct and indirect benefits such a charitable sector provides in a free and democratic society” (based on the second object of the Australian legislation adapted for the New Zealand context).

That the current purpose to promote public trust and confidence in the charitable sector (section 3(a)) is returned to a *function* of the agency responsible for administering the Charities Act.

That the current purpose to encourage and promote the effective use of charitable resources (section 3(b)) is repealed.

Clauses 3 and 4 of the draft Bill included in chapter 9 of this report are intended to implement this recommendation.

Principles

Equitable and tikanga principles

Following several years of work by the Law Commission, including a series of issues papers and a 2013 report, the Trusts Act 2019 came into force in New Zealand in January 2021.⁷⁷

In proposing that the Trustee Act 1954 be updated, revised, and reformulated, the Law Commission also recommended an enlarged statute that would extend to matters such as the duties of trustees, and a more comprehensive characterisation of what a trust is. However, the Law Commission was also concerned to preserve the flexibility of equity:⁷⁸

... it is not our intention to create a code that completely supplants the case law, principles of equity or the creative role of judges. Courts will continue to have flexibility to deal with situations that do not fit neatly within the terms of the new statute. We do not intend the new Act to be a code to be interpreted simply on its own terms without recourse to equitable principles and case law. Rather, the characteristics of the trust and the duties set out in the new Act should be read against that history of flexibility and principle that has given rise to them. Courts will continue to have flexibility to deal with situations that do not fit neatly within the terms of the new statute. Also the supervisory jurisdiction of the courts over trusts will not be affected by our proposals. The Trusts Act will be the primary source of trust law in New Zealand, but it will not contain everything that conceivably needs to be known about the law of trusts in New Zealand.

⁷⁷ Te Aka Matua o te Ture - New Zealand Law Commission [Law of Trusts – Project Overview](#).

⁷⁸ Te Aka Matua o te Ture - New Zealand Law Commission [Review of the Law of Trusts: A Trusts Act for New Zealand](#) (NZLC R130, 2013) at [13], [12].

The Law Commission elaborated as follows:⁷⁹

During consultation, one of the recurring criticisms of our proposal to set out the definition or the duties in statutory language, was that this will somehow fix those duties and meanings, prevent development and focus attention on the words used rather than the principles they represent. This is not our intention and it misperceives the process that courts, lawyers and other readers will take when interpreting the legislation. The proper approach will be to read the words of the statute in light of the understanding of the equitable principles that gave rise to them. We have chosen the wording with care and that wording has been road tested through our consultation, but the focus should not be on interpreting them in isolation, abstracted from their context.

On that basis, the Law Commission recommended the new statute include an interpretation provision as follows:⁸⁰

Nothing in this Act prevents a court, in interpreting the provisions of this Act, from having recourse to the general law of trusts and equity where that law is consistent with this Act.

The intention was to make trust law “somewhat less mysterious”, but also to “preserve the magic” that lay behind its development.⁸¹

The Trusts Act as finally enacted contains the following provisions:

4 Principles

Every person or court performing a function or duty or exercising a power under this Act must have regard to the following principles:

- (a) a trust should be administered in a way that is consistent with its terms and objectives;
- (b) a trust should be administered in a way that avoids unnecessary cost and complexity.

5 Application, and relationship of Act with trust terms, common law and equity, and other enactments

...

Interrelationship between Act and common law and equity

(8) This Act –

- (a) is not an exhaustive code of the law relating to express trusts; and
- (b) is intended to be complemented by the rules of the common law and equity relating to trusts (except where otherwise indicated or where those rules are inconsistent with the provisions of this Act).

...

7 Interpretation of Act

(1) This Act –

- (a) must be interpreted in a way that promotes its purpose and principles; and
- (b) is not subject to any rule that statutes in derogation of the common law should be strictly construed; but
- (c) may be interpreted having regard to the common law and equity, but only to the extent that the common law and equity are consistent with –
 - (i) its provisions; and
 - (ii) the promotion of its purpose and principles.

(2) Subsection (1) does not affect the application of the Interpretation Act 1999 to this Act.

8 Inherent jurisdiction of court not affected

- (1) The inherent jurisdiction of a court to supervise and intervene in the administration of a trust is not affected by this Act, except to the extent that this Act provides otherwise.
- (2) Despite subsection (1), a court must have regard to the purpose and the principles of this Act when exercising its inherent jurisdiction.

79 Te Aka Matua o te Ture - New Zealand Law Commission [Review of the Law of Trusts: A Trusts Act for New Zealand](#) (NZLC R130, 2013) at [3.19].

80 Te Aka Matua o te Ture - New Zealand Law Commission [Review of the Law of Trusts: A Trusts Act for New Zealand](#) (NZLC R130, 2013) at [3.17], 91.

81 Te Aka Matua o te Ture - New Zealand Law Commission [Review of the Law of Trusts: A Trusts Act for New Zealand](#) (NZLC R130, 2013) at [3.15].

In other words, s 5(8) of the Trusts Act preserves recourse to case law to assist in understanding and applying the duties of trustees set out in the legislation, and allow the courts to continue to apply the nuances and exceptions to those duties that exist in case law:⁸² in other words, rather than the statute providing words intended to stand completely on their own, the duties are intended to be read against the history of flexibility and principle that has given rise to them. Accordingly, the Trusts Act makes it clear that courts continue to have flexibility to deal with situations that do not fit neatly within the terms of the new statute.⁸³

The origins of the concept of charitable purpose lie in the law of trusts. As discussed above in chapter 2, using an equitable concept as the cornerstone of a regulatory regime risks damaging or distorting the very concept on which the charities law framework is based (which appears to have been the experience in Canada, where equitable principles have all but disappeared from Canadian charities law).⁸⁴ Clarifying the role of equitable principles in the Charities Act would help protect against what the President of the Court of Appeal might describe as the common law “making a hash of equity”.⁸⁵

In the draft Bill included with this report, we have included provisions based on the above extracts from the Trusts Act 2019, in the interests of “preserving the magic” of the equitable underpinnings of charities law.

In a similar vein, we also recommend recourse to tikanga principles, where appropriate.

Recommendation 8.3

That the legislation explicitly preserves recourse to equitable principles in a charities law context, in a similar manner to that provided for trusts more generally by the Trusts Act 2019.

Recommendation 8.4

That the legislation explicitly provides for recourse to tikanga principles in a charities law context, where appropriate.

Clauses 5(c), 7 and 8 of the draft Bill included in chapter 9 of this report are intended to implement these recommendations.

Focus on purpose

As discussed above in chapter 2, we recommend that the charities legislation articulate one simple overarching fiduciary duty, applicable to all registered charities irrespective of their underlying legal structure, and to all involved in governing them, to act in good faith to further the entity’s stated charitable purposes in accordance with its rules.

Importantly, it is not intended to replicate key legal fiduciary duties of loyalty, care and obedience, which are set out in underlying legislation and case law and applicable to charities depending on their legal structure. The above duty is intended as a separate overarching duty applicable to registered charities only.

We recommend a reference to this overarching duty of fidelity to purpose is included in the principles section, to emphasise that a “focus on purpose” is intended to underpin and permeate decision-making throughout the entire legal framework.

Other key principles underlying the regime include respect for the independence of charities, and that charities should be able to access the privileges of registration in the absence of serious wrongdoing.

82 Te Aka Matua o te Ture - New Zealand Law Commission [Review of the Law of Trusts: A Trusts Act for New Zealand](#) (NZLC R130, 2013) at [5.14], [5.6] - [5.9].

83 Te Aka Matua o te Ture - New Zealand Law Commission [Review of the Law of Trusts: A Trusts Act for New Zealand](#) (NZLC R130, 2013) at [3.7].

84 Interview with Kathryn Chan, Assistant Professor of Law at the Faculty of Law, University of Victoria (4 February 2021).

85 Kós P, opening address to the Charity Law Association of Australia and New Zealand Conference “[Murky Waters, Muddled Thinking: Charities and Politics](#)” 4 November 2020 at [33] - [35].

Clause 38 of the draft Bill included in chapter 9 of this report is intended to implement this recommendation, supported by a number of other provisions (such as cls 18(2)-(4), 29(1)(d), 54(1)(b)(iv), 68(a), 5(a), (b) and (d), and the definition of “serious wrongdoing” in cl 9).

Advocacy

Many submitters to the DIA’s review of the Charities Act recommended including a purpose in the legislation explicitly protecting charities’ ability to advocate, for example along the following lines:

To respect the autonomy of charities and charities’ rights to freedom of expression, in particular their right and duty to advocate in furtherance of their charitable objectives.

A sample of submissions is set out in box 8.4:

Box 8.4 – views of submitters regarding a specific “advocacy” purpose:

Charity law in New Zealand should aim to protect the independence and autonomy of charitable organisations, including their right to advocate in furtherance of their charitable purposes – New Zealand Red Cross

Advocacy activities of charities carried out in furtherance of their stated charitable purpose to be explicitly protected in the principles of the legislation. The right to advocate should be a fundamental pillar of the Charities Act. The lack of clarity on this issue, the deregistrations that have taken place under the Act in the name of advocacy, and the lack of a [meaningful] right of appeal for charities is highly concerning – Volunteering New Zealand

Advocacy has come through in the public meetings as an area of key concern ... Charities have a duty to advocate in furtherance of their charitable purposes. In order for charities to fulfil their charitable purpose, there is a genuine need for independence from government. Further to this, genuine advocacy is core to a free and healthy democracy. The ability to freely express views (as long as they do not harm, nor are malicious toward, individuals or groups) is enshrined in the New Zealand Bill of Rights Act ... Charities that are working for the social good of society or the environment require a certain amount of autonomy to allow for charities to support and or contribute to change. Part of that change can mean speaking against current (or proposed) legislation, policy and practice. Charities play a crucial part in the development of policies and laws in a democratic and participative society. Charities should not be fearful of consequences, such as deregistration, for speaking up on issues that may be seen as adversarial to the government of the day – Save the Children New Zealand

This review needs to ensure the Act explicitly states that advocacy is a positive and necessary part of charitable activity in support of charitable purposes – Alzheimers New Zealand

UNICEF NZ do not support stringent guidelines being imposed by Charities Services restricting and or determining what charities can and cannot advocate for ... A key aspect of New Zealand’s progress in addressing social issues has been due to the involvement and influence of charities in forming public opinion and policy through advocacy ... Charities should be able to challenge with confidence, from an evidence-based perspective, views or policy that they deem problematic – UNICEF New Zealand

advocacy activities of charities carried out in furtherance of their stated charitable purpose to be explicitly protected in the principles of the legislation. There is currently, in our view, a lack of clarity and often scaremongering on this issue. It is imperative that advocacy is agreed as one of the pillars of a charity – Arthritis New Zealand

we need to be careful about the power to influence or direct the behaviour of organisations that might prevent community advocacy where it is needed. The nature of government monitoring of charities must fit with the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the UN Human Rights Council, and the NZ Bill of Rights Act 1990 – Auckland North Community and Development

the ability of charities to advocate is an important function to be explicitly protected under the Act – Barnados

The review needs to explicitly allow charities to engage in public policy dialogue and development activities in relation to their stated charitable purpose ... That is doing their duty on behalf of their mission, board, staff and members – Centre for Social Impact

Changing the legal and policy environment to promote charitable purposes should be explicitly supported by the Act ... Charities Services should not position itself as a regulator of ideas or opinions – Community Housing Aotearoa

We accept that greater autonomy will result in the promulgation of viewpoints that will not be popular, sometimes within the sector, but also in wider society. Distaste for particular viewpoints should not be the basis for restricting advocacy, however. Canvassing a range of viewpoints is the core of effective democracy and, as noted earlier, ultimately the people (funders, volunteers, beneficiaries and the public) will decide – Community Waikato

Consider legitimate advocacy that is clearly related to a charity's purpose as an instrument for potential social change - Don McKenzie CNZM, OBE

It is irrational to restrict advocating for policies which would alleviate the need for charity to be provided in the first place. This is an infringement on charities' freedom of expression that is out of step with other established democracies – English Language Partners New Zealand Trust

Freedom of expression is a right and should not be circumscribed. Advocacy is a duty and provided boundaries are kept it should be seen as a public benefit and therefore not be assessed as a negative – Friends of Arataki and Waitakere Regional Parkland Inc

We would also support the inclusion of a purpose which specifically supports the right of charities to advocate on behalf of their communities – Hawke's Bay Community Law Centre

As regards the purposes of the Act, Kotare registers our concern that the practice of Charities Service is to prioritise its regulatory function to the detriment of its supportive functions for the sector, thereby sliding away from the information and disclosure functions, and the active support for charitable activities, that were originally intended. The Sector deserves much more than that, and indeed needs more than that if it is to contribute to the wellbeing of our society in as robust a way as the sector could do. Primarily it deserves respect for its independence. Such respect means that a legal framework is needed to 'facilitate rather than frustrate' the activities of charities, including advocacy – Kotare Trust

For the avoidance of doubt ... and especially given the practical difficulties with the way the current regulatory regime is being implemented, the government parties' avowed intention of protecting the independent advocacy role of the sector should also be explicitly enshrined as an additional objective in the legislation ... advocacy is not just an optional extra (let alone something to be limited or constrained) but actually an obligation of all public benefit organisations, including charities ... whenever these organisations come across laws, policies or activities that are not working for the beneficiaries they serve, they cannot ignore such systemic failures but need to advocate on them, as forcefully as they are able, to whoever has the power and/or resource to address the concern. They cannot be held responsible for achieving the change that is in the hands of others, but ... should be held accountable for taking the issue to whoever has the power and resources to address the concern ... [We do not suggest] that failure to advocate should be regulated, but certainly part of ensuring the accountability of charities is expecting and supporting them to advocate in furtherance of their charitable purposes ... The role of advocacy by charities is widely acknowledged as integral to community wellbeing – LEAD:

It is vital that the work of charities in providing an independent voice in the development of policies and services is supported ... Advocacy is a key aspect of a vibrant civil society – it plays an important role in the development of social policy and is integral to community wellbeing. The advocacy activities of charities that are carried out to further their charitable purposes need to be explicitly protected in the legislation ... seeking peaceful orderly change is itself in the public interest in a participative democracy like New Zealand – Literacy Aotearoa Charitable Trust

The policies of both the Labour Party and the Green Party specifically support the role of advocacy for the Community & Voluntary Sector. Therefore consideration should be given to including an additional purpose to give effect to this – Methodist Alliance

Charities operate at the coal face of society and are most familiar with the issues faced by particular groups. Therefore, it would be appropriate for charities to be able to freely advocate for particular points of view without fear that they might be deregistered – Parry Field Lawyers

Advocacy from community organisations is a vital contributor to robust public debate and to policy formation. This important democratic function should be protected by legislation – Social Service Providers Aotearoa

Charities have a duty to advocate for their charitable purpose and this is a sign of a healthy democracy – The Gift Trust

See also the [submissions](#) of: Age Concern New Zealand; Christian Education Trust; Community Networks Aotearoa; Community Waitakere; ComVoices; Coromandel Independent Living Trust; David Boswell; Grey Power Otago Inc; Heather Pennycook; Jon Horne; Lisa Abrams; Liz Davies; Marine Reach Charitable Trust; Motueka Family Service Centre; Multiple Sclerosis New Zealand Inc; Network Waitangi Otautahi Inc; New Zealand Council of Christian Social Services; New Zealand Disability Support Network; NZ Navigator Trust; Northland Urban Rural Mission; Oxfam New Zealand; Rape and Abuse Support Centre Southland Inc; Royal New Zealand Plunket Trust; Save the Otago Peninsula Inc; Scott Moran; SPCA; Steiner Education Development Foundation; Sustainable Initiatives Fund; Te Pūtahitanga o Te Waipounamu; Tiri Porter; and Youth with a Mission Queenstown Lakes Charitable Trust (Tāhuna ki te Ao Charitable Trust).

We included such a purpose in the draft Bill that was circulated for consultation in 2020. However, feedback received did not support imposing a statutory “duty” on charities to advocate. At common law, how charities best pursue their stated purposes falls entirely within the discretion of their governing bodies. Imposing a *legal duty* to advocate undermines this principle, and could expose governors of charities to liability for breach of fiduciary duty if particular members or others felt they had not fought hard enough to address the cause.⁸⁶ Advocacy is also fundamentally an activity rather than a purpose: a legal duty to advocate might therefore have an paradoxical unintended consequence of distracting charities from their charitable purposes.

That raises the question of how a world-leading framework of charities law would best champion charities’ ability to advocate in furtherance of their stated charitable purposes (subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society).⁸⁷

The draft Bill included in chapter 9 of this report includes a number of provisions directed to this goal: at the level of principle, and given that charities’ rights to freedom of expression do not appear to have been fully considered in a New Zealand charities law context to date, we recommend including a specific reference to charities’ rights to freedom of expression and association, intended to ensure that New Zealand charities law is expressly guided by standards and parameters set out in international conventions, treaties and protocols in these important areas. Clause 5(e) is directed to this end.

However, concern has been expressed as to what unintended consequences might arise from singling only these particular rights out. Questions also arise as to whether such a provision is necessary, in addition to the other protections for advocacy protections suggested in the draft Bill. Given that charities’ ability to advocate is critical to their role in society, we recommend further consultation is undertaken on how best to ensure this ability is protected.

Definitions

Registered charity

Section 4 of the Charities Act currently defines an “entity” to mean “any society, institution, or trustees of a trust”. This mechanism creates a helpful legal fiction that allows various relationships (such as unincorporated societies and trusts) to be treated as an “entity” for the purposes of registration under the Charities Act.

We note in passing that a company, even a one-person company, is generally understood to fall within the concept of a “society”.⁸⁸

Section 4 of the Charities Act then defines “charitable entity” to mean “a society, an institution, or the trustees of a trust that is or are registered as a charitable entity under this Act”.

⁸⁶ Interviews with Kenneth Dibble, 14 January 2021; Terrance Carter, 28 January 2021; and Professor Lloyd Hitoshi Mayer, 15 January 2021.

⁸⁷ New Zealand Bill of Rights Act 1990 s 5.

⁸⁸ See the discussion in *The Law and Practice of Charities in New Zealand*, S Barker, M Gousmett and K Lord (LexisNexis, Wellington, 2013) at [3.255].

In practice, this formulation is not as clear as it could be. Registration as a charity is voluntary in New Zealand: unregistered charities are still able to refer to themselves as a charity and seek funds from the public.⁸⁹ It is not always clear that references in the Charities Act to “charitable entities” are references to *registered* charities only. It also seems unnecessary to refer to “charitable entities”, rather than simply “charities”, because all registered charities must first be an “entity”, as defined in s 4, in order to seek registration.

To make clear the distinction between registered charities and unregistered charities, and to more closely reflect common usage, we recommend that references in the legislation to a “charitable entity” be replaced with a reference to a “registered charity”.

To that end, the draft Bill included with this report has removed the definition of “charitable entity” and replaced it with a definition of “registered charity”.

Recommendation 8.5

That the legislation uses the term “registered charity” instead of the term “charitable entity”.

Contact person

The Law Commission commenced a first principles review of the Incorporated Societies Act 1908 in 2010. Reporting in 2013, the Law Commission described the Incorporated Societies Act as a “New Zealand success story”:⁹⁰

When it was enacted it was regarded as world leading and innovative. What it did was to enable the incorporation of community related organisations for a wide variety of purposes. These ranged all the way from local chess clubs through to the New Zealand Rugby Football Union. The Act has been so successful that there are presently over 23,000 incorporated societies in New Zealand. The passage of over a century since the statute was enacted has inevitably thrown up the need for some revision of it.

Among its 102 recommendations, the Law Commission recommended that each incorporated society be required to have a “statutory officer” at all times, and to notify the name and address of that person, and any changes, to the Registrar of Incorporated Societies.⁹¹ In reaching this conclusion, the Law Commission reasoned as follows:⁹²

The next issue is whether societies should be required to have a statutory officer to undertake the various statutory functions of the society and provide a liaison between the society and the Registrar? Again the Australian statutes require the appointment of certain officers to undertake essential functions. New South Wales requires each association to have a public officer appointed to be the liaison between the Registrar and the association. The public officer must be a natural person (not a corporate person) and be aged 18 or older and resident in New South Wales. The Victorian statute requires an incorporated association to have a secretary. The secretary must be an individual person, be at least 18 years old and be resident in Australia.

About three-quarters of submitters considered societies should have at least one statutory officer, responsible for interactions with government and others. The remainder disagreed and said that societies should address the issue in their constitution.

We consider that all societies should have to nominate a member who is accountable to undertake the statutory requirements of the society and whom the Registrar can contact when needed. The identification of a contact point for each society is a necessary aspect of a modern incorporation regime. The statutory officer should be a member of the committee to ensure administrative efficiency and that he or she has full access to information, but it should be up to each society to determine in its constitution which committee member will be the statutory officer.

⁸⁹ Charities Bill 2004 (108-1) [explanatory note](#) at 1.

⁹⁰ Te Aka Matua o te Ture - New Zealand Law Commission [A New Act for Incorporated Societies](#) (NZLC R129, 2013) foreword.

⁹¹ Te Aka Matua o te Ture - New Zealand Law Commission [A New Act for Incorporated Societies](#) (NZLC R129, 2013) recommendation 21.

⁹² Te Aka Matua o te Ture - New Zealand Law Commission [A New Act for Incorporated Societies](#) (NZLC R129, 2013) at [6.15] - [6.18] (footnotes omitted).

Following an exposure draft bill that was released for consultation in 2015,⁹³ this recommendation has been reflected in the Incorporated Societies Act 2022 which will require every incorporated society to have a “contact person” whom the Registrar can contact when needed.⁹⁴ The contact person must be at least 18 years old, and ordinarily resident in New Zealand, but is not required to be a member of the society’s committee (governing body).⁹⁵

Once the Act comes into force, this requirement will apply to the approximately ¼ of registered charities in New Zealand that are also incorporated societies.

The question arises as to whether it would be helpful for a modern charities law framework to require all registered charities similarly to appoint a contact person whom the Charities Registrar can contact when needed. Although the Charities Act is not an incorporation statute, there is much anecdotal evidence of charities’ contact details on the charities register being out of date, with worst case scenarios resulting in deregistration due to important reminders not having reached the charity.⁹⁶

The draft Bill included with this report includes a “contact person” requirement, based on the provisions of the Incorporated Societies Act 2022, with the addition of a requirement that the contact person’s contact information also be included on the charities register. Similar provision made in the original draft Bill circulated for comment in 2020 received some helpful drafting feedback, but no specific objections to the concept in principle.

Clauses 9(1), (5), 33 and 33 of the draft Bill included in chapter 9 of this report are directed to this end.

Financial statements

As discussed above in chapter 1, every registered charity in New Zealand is required to prepare financial statements in accordance with applicable financial reporting standards prepared by the XRB, and make these publicly available on the charities register. The concept of “financial statements” as used in the Charities Act includes the service performance report, which is a non-financial statement that all registered charities are now required to provide.⁹⁷ One commenter recommended the term “performance report” be used instead, as this would more clearly refer to the financial statements, the notes to the financial statements, and the service performance report, all of which are required to be prepared.⁹⁸ As a change of this nature would have wider implications than just the Charities Act, we have retained use of the term “financial statements” in the draft Bill included with this report, but recommend consideration is given to reworking the underlying accounting framework to use a wider term.

Fundraiser

Section 4 of the Charities Act currently defines a “collector” to mean a person who “requests funds, canvasses for subscriptions, sells raffle or lottery tickets, or appeals for donations” on behalf of a registered charity.

The term “collector” is used in s 39, which imposes a duty on telephone and internet “collectors” to disclose the charity’s registration number if requested to do so by a member of the public. Section 39 is a study in unintended consequences, as discussed further below in relation to fundraising.

For the purposes of the definitions section, we recommend that the term “collector” is replaced with the term “fundraiser”, and that the various types of fundraising referred

93 Ministry of Business, Innovation and Employment Hīkina Whakatutuki *Incorporated Societies Act Review*: www.mbie.govt.nz/business-and-employment/business/regulating-entities/incorporated-societies-act-review/.

94 Incorporated Societies Act 2022 ss 112 – 116 (once they come into force)

95 Incorporated Societies Act 2022 s 113.

96 Charities Services Ngā Ratonga Kaupapa Atawhai [2020/2021 Annual Review](#) at 10: “One of the main reasons charities are deregistered is because we can’t get in contact. Remember to update your details every time there is any change to your key people”.

97 The requirement to provide a service performance report applies to Tier 1 and 2 charities from 1 January 2022. See Charities Services *Service Performance Reporting*: www.charities.govt.nz/reporting-standards/tier-1-and-tier-2/service-performance-reporting/.

98 Financial Reporting Act 2013 s 6.

to in the current definition are updated and removed to a separate new definition of “fundraising activity”.

Hearing authority

As discussed above in chapter 6 (*Appeals*), we recommend that charities are given the option of appealing a decision under the Charities Act to either the Taxation Review Authority (“TRA”) or the High Court, at their choice (recommendation 6.3).

The draft Bill included with this report would implement this recommendation by defining a “hearing authority” to mean either the TRA or the High Court. This mechanism restores the pre-Charities Act position, and the process currently available to taxpayers by means of the comparable definition in s 3 of the Tax Administration Act 1994.

In the draft Bill that was circulated for comment in 2020, we had included a separate Part 10 which would have established a specialist Charities Review Authority. While establishing a specialist tribunal remains our preferred option, in light of the associated practical hurdles, Part 10 has not been replicated in the draft Bill included with this report with the intention being to link in to an existing tribunal.

However, some modifications to the TRA’s normal processes may be required to accommodate a Charities’ jurisdiction. For example, the TRA normally sits as an individual authority, whereas most jurisdictions provide panels to hear charities’ appeals in appropriate cases.⁹⁹

It needs to be clear that the TRA has jurisdiction to hear judicial review applications on Charities Act matters. We also recommend clarifying in the legislation that references to a “court” include a reference to the TRA unless the context otherwise requires.

See cls 9(1) and (3) of the draft Bill included with this report.

Responsible person

Section 4 of the Charities Act currently defines the term “officer” as follows:

officer—

- (a) means, in relation to the trustees of a trust, any of those trustees; and
- (b) means, in relation to any other entity,—
 - (i) a member of the board or governing body of the entity if it has a board or governing body; and
 - (ii) a person occupying a position in the entity that allows the person to exercise significant influence over the management or administration of the entity (for example, a treasurer or a chief executive); and
- (c) includes any class or classes of persons that are declared by regulations to be officers for the purposes of this Act; but
- (d) excludes any class or classes of persons that are declared by regulations not to be officers for the purposes of this Act

There are a number of difficulties with the current definition.

Officer

In the first instance, the term “officer” is causing confusion in practice, as an “officer” of a registered charity in terms of its constituting document may not correlate with the concept of an “officer” as that term is defined in the Charities Act. We recommend a more neutral term is used in the legislation.

In England and Wales, the term “charity trustees” is used to refer to the “persons having the general control and management of the administration of a charity”.¹⁰⁰ The term is

⁹⁹ For example, in Ireland, the Charity Appeals Tribunal consists of 5 members, 2 of whom must be judicial and 2 of whom must have experience in areas of expertise relating to charities (Charities Act 2009 (Ireland) s 75). In England and Wales, *R (Independent Schools Council) v Charity Commission for England and Wales* [2011] UKUT 421 (TCC) was heard before a panel of 3. In Australia, *Global Citizen Ltd v Commissioner of the Australian Charities and Not-for-profits Commission* [2021] AATA 3313 was heard before a panel of 2.

¹⁰⁰ Charities Act 2011 (UK) s 177.

used irrespective of legal form, which means that persons are referred to as trustees even if they are not trustees of a trust.

Ireland similarly uses the term “charity trustee”.¹⁰¹

In Australia, the term “responsible entity” is used, even when referring to a natural person.¹⁰² The recent review of the Australian legislation recommended the term be replaced with the term “responsible person”, used in guidance material, to make the legislation “simpler and clearer”.¹⁰³

In the interests of using a more neutral term, we recommend the term “officer” in the Charities Act is replaced with the term “responsible person”.

Corporate trustees

A number of submitters noted that the current definition of “officer” does not extend to the directors of a corporate trustee, and potentially does not extend to the trustees of a charitable trust that have incorporated as a board under the Charitable Trusts Act 1957.¹⁰⁴

The definition of “responsible person” in the draft Bill included with this report extends the concept to any director of a corporate trustee (aligning with the approach taken in Australia).¹⁰⁵

Conflating governance and management

More fundamentally, we recommend that the definition of “officer” / “responsible person” is restored to its pre-2012 wording to maintain the distinction between governance and management.

Briefly, the original definition of “officer” in the Charities Bill 108-1 as introduced in 2004 limited the concept of an “officer” of a charity to member of the charity’s governing body only:

officer, —

(a) in relation to an entity, means—

(i) in the case of the trustees of a trust, any of those trustees:

(ii) in any other case, a member of the board or governing body of the entity;

This aspect of the definition was not changed by the Select Committee considering the original Charities Bill.¹⁰⁶

However, the definition was subsequently changed by Supplementary Order Paper 2005 No 357 (“**SOP 357**”). SOP 357 was introduced into Parliament on 12 April 2005, the day the Charities Bill received its second and third readings, precluding opportunity for public consultation on the change. Following SOP 357, the Charities Act as originally passed defined “officer” as follows (emphasis added):

officer—

(a) means, in relation to the trustees of a trust, any of those trustees; and

(b) means, in relation to any other entity,—

(i) a member of the board or governing body of the entity *if it has a board or governing body*; or

(ii) *in any other case, a person occupying a position in the entity that allows the person to exercise significant influence over the management or administration of the entity (for example, a treasurer or a chief executive)*;

101 Charities Act 2009 (Ireland) s 2(1), definition of “charity trustee”.

102 Australian Charities and Not-for-profits Commission Act 2012 s 205-30 (*Responsible entity*).

103 P McClure AO, G Hammond OAM, S McCluskey, Dr M Turnour [Strengthening for purpose: Australian Charities and Not-for-profits Commission – Legislative Review 2018](#) 31 May 2018 at 9.

104 See the [submissions](#) of Graduate Women North Shore Charitable Trust; Kensington Swan; the New Zealand Law Society; and Te Pūtahitanga o Te Waipounamu.

105 Australian Charities and Not-for-profits Commission Act 2012 s 205-30(b)(ii) includes “if a trustee of the registered entity is a body corporate— a director of the trustee”.

106 Charities Bill 2004 (108-2) ([select committee report](#)).

From the material surrounding SOP 357, it is clear this change was made to cater for large religious bodies that do not have a board or governing body as such, but rather a synod or other body comprised of hundreds of people: for those circumstances only, the definition of “officer” was amended to refer to those in a position to exercise significant influence:¹⁰⁷

Definition of “officer” SOP 357 proposes the amendment of the definition of the term “officer” *to provide for charities that may not have a board or governing body. In those circumstances, an officer would be a person occupying a position in the entity that allows the person to exercise significant influence over the management or administration of the entity. The definition would also allow the inclusion or exclusion of persons as officers for the purposes of the Bill by Order in Council (Part 1, Clause 4, new definition of “officer”).*

Gordon Copeland (United Future) elaborated on these changes at the Committee stage of the bill:¹⁰⁸

I really want to talk about just one aspect of the amendments to clause 4, as set out in Supplementary Order Paper 357, which changes the definition of “officer”. This is a very worthwhile amendment. *It arose as a result of submissions received from the Inter-Church Working Party on Taxation, and, in particular, from the representatives of the Anglican and Presbyterian Churches. Those Churches are governed by bodies—in the Anglican Church referred to as synods—that comprise several hundred people.*

It would be quite impossible to have all those several hundred people designated as officers of the charity. For example, we have to ensure that every one of those people is not disqualified from being an officer in terms of this bill, and it would be quite an *impractical* way to proceed. Accordingly, this amendment is aimed at ensuring that the Anglican and Presbyterian Churches, and to some extent the Methodist Church, will be able to register themselves and have a definition of “officer” that will fit the circumstances of their organisations. That is a very good step forward.

Furthermore, the Minister’s Supplementary Order Paper omits and substitutes a new definition of “officer” and adds subclause (c) and subclause (d) to do with regulations, just in case the submitters, the select committee, and the Government itself have missed something and a problem arises about registration to do with officers. Regulations may then be put in place to overcome whatever difficulty arises.

The intent is to give complete flexibility to the new commission so that it can register charities that come to it, having regard to their particular circumstances. Those circumstances vary enormously. For example, the situation as between the Catholic Church and the Anglican Church is quite radically different. This is a good step forward and I commend the Supplementary Order Paper to the Committee.

In other words, the reference to those exercising “significant influence” was added solely to cater for the unique situation of churches that did not have a governing body as such.

Section 4(1) was then amended again in 2012 by Statutes Amendment Bill,¹⁰⁹ the explanatory note to which explained the proposed amendments to the Charities Act in the context of “officers” as follows:¹¹⁰

Clause 6 amends the definition of officer in section 4(1) *so that the officers of a society or an institution always include a person who is in a position to exercise significant influence over the entity’s management or administration (in addition to the members of any board or governing body of the entity) ...*

Clause 11 amends section 40(1) by adding the requirement for a charitable entity to notify the Commission of a change that disqualifies an officer of the entity from being an officer ...

Clause 18 is a transitional provision that applies if a person becomes an officer of a charitable entity because of the amended definition of officer.

In other words, the Statutes Amendment Bill proposed to remove the word “or” from paragraph (b)(i) of the definition of officer and replace it with the word “and”, and delete

¹⁰⁷ SOP 357 at 1 (emphasis added).

¹⁰⁸ Charities Bill [In Committee](#) (12 April 2005) 625 NZPD 19,940 per Gordon Copeland (United Future) (emphasis added).

¹⁰⁹ [Statutes Amendment Bill \(No 2\) 271-2](#), introduced into Parliament on 22 February 2011, proposed to make amendments to 20 Acts, one of which was the Charities Act.

¹¹⁰ Statutes Amendment Bill (No 2) 271-1 ([explanatory note](#)) at 2 - 3 (emphasis added).

the words “in any other case” from paragraph (b)(ii), so that the officers of a society or an institution *always* include a person who is in a position to exercise significant influence over the entity’s management or administration (in addition to the members of any board or governing body of the entity).¹¹¹

The Bill was referred to the Government Administration Select Committee on 12 April 2011. The Committee received four submissions and heard three. The Committee did not discuss or propose any change to the proposed amendments to the definition of “officer” in their 6 July 2011 report.¹¹²

Accordingly, from 2012,¹¹³ the definition of “officer” was worded as follows (emphasis added):

officer—

- (a) means, in relation to the trustees of a trust, any of those trustees; and
- (b) means, in relation to any other entity, —
 - (i) a member of the board or governing body of the entity if it has a board or governing body; *and*
 - (ii) a person occupying a position in the entity that allows the person to exercise significant influence over the management or administration of the entity (for example, a treasurer or a chief executive);

There is no publicly-available commentary explaining why the definition of officer was extended to persons exercising significant influence for all societies (even those that had governing bodies), or why the definition was so extended for societies and not for trusts.

Extending the definition of “officer” in this way does not appear to have been well-conceived, as it unhelpfully conflates the distinction between governance and management (and for societies but not for trusts). While management may be in a position to exercise “significant influence”, decision-making responsibility lies with governance, for both societies and trusts. We recommend the legislation is clarified to make clear that the “officers” or “responsible people” of a charity are limited to the members of the charity’s governing body, however the charity might be structured.

Recommendation 8.6

That the legislation uses the term “responsible person” instead of the term “officer”, and that the substance of the definition clearly limits its scope to members of the charity’s governing body (extended to include the directors of a corporate trustee).

Serious wrongdoing

The definition of “serious wrongdoing” is pivotal to the Charities Act regime, as it defines the threshold at which the Charities Registrar shifts from facilitator to enforcer. Section 4 currently defines the term as follows:

serious wrongdoing, in relation to an entity, includes any serious wrongdoing of any of the following types:

- (a) an unlawful or a corrupt use of the funds or resources of the entity; or
- (b) an act, omission, or course of conduct that constitutes a serious risk to the public interest in the orderly and appropriate conduct of the affairs of the entity; or
- (c) an act, omission, or course of conduct that constitutes an offence; or
- (d) an act, omission, or course of conduct by a person that is oppressive, improperly discriminatory, or grossly negligent, or that constitutes gross mismanagement

In its submission to the DIA’s review of the Charities Act, the Charities Registration Board described the current definition as difficult to interpret:¹¹⁴

¹¹¹ See Statutes Amendment Bill (No 2) 271-1 ([explanatory note](#)).

¹¹² Statutes Amendment Bill (No 2) 271-2 ([select committee report](#)).

¹¹³ [Charities Amendment Act 2012](#) which received Royal Assent on 24 February 2012.

¹¹⁴ [Submission](#) of the Charities Registration Board at 2.

The definition has four limbs that all reference multiple activities. The actions included in the definition range from criminal conduct, for example “an unlawful use of funds” or “an offence”, to actions that can create a civil liability, for example where an act is “grossly negligent”. The definition includes criminal, civil and non-criminal matters, and overlaps with the fiduciary duties of trustees.

Practice has shown that this definition is extremely hard to apply because of the significant uncertainty over the ambit of its provisions.

We agree that the definition should be reworked based on a clear articulation of the actions that trigger the government agency to move from facilitator to enforcer.

In a framework focused on purpose, the pivotal definition of “serious wrongdoing” should support the overarching legal duty to act in good faith in the best interests of a charity’s stated charitable purposes in accordance with its rules. It is the failure to meet this duty, or otherwise to act in accordance with the charity’s rules or the requirements of the Act, that should trigger the Charities Registrar to move from facilitator to enforcer. As discussed further below, the requirements of the Act should include a prohibition on partisan political activity.

It is important to bear in mind that charities originally supported the Charities Act regime on the basis of protecting the reputation of the charitable sector as a whole by providing a means for removing “rogue actors”.¹¹⁵ In this context, key principles are:

- (i) that there are already general laws in place targeting misconduct, such as laws relating to terrorism financing, money laundering, tax evasion, tax avoidance, fraud and the like, the identification of which is facilitated by the comprehensive information and disclosure regime now provided by the Charities Act;
- (ii) as the High Court noted in *Greenpeace of New Zealand Incorporated v Charities Registration Board* [2020] NZHC 1999 (10 August 2020), civil disobedience is not necessarily inherently inconsistent with charitable purpose; and
- (iii) the need for a “light-touch” approach in an enabling framework of charities law.

¹¹⁵ See for example the [submissions](#) of: Methodist Church of New Zealand Te Haahi Weteriana O Aotearoa: “The original intention was for an oversight regime, administered by the Charities Commission to “weed out” “bad” charities (those that engage in fraud, tax avoidance, money laundering etc.) in order to maintain confidence in the vast majority of legitimate charities, who should be allowed to go about fulfilling their charitable duties as they see fit. Beyond “serious wrong doing” (as defined in Section 4 of the Act), we should be relying on the power of sunshine (“accountability of a thousand eyes”) and disclosure of information by the registered charities to public scrutiny. All stakeholders may then determine which charities they wish to support, and which legitimate charities are. New Zealand does not need more top-down, centralised control by a government agency who determines which charities are and are not worthy of public support”; Alan Pace: “The role of government should be as a quiet enabler in the background, weeding out “bad” charities so that the public can have trust and confidence in those that remain. If the government is at the centre of attention then, in most cases, this indicates that something is seriously wrong”; LEAD: “The key problems with the previous arrangements as administered by Inland Revenue (prior to the Charities Act), were the lack of a comprehensive register, the lack of reporting obligations, and the lack of certain and simple processes for dealing with an organisation established for charitable purposes that may no longer be pursuing charitable purposes. Most in the sector were willing to accept an information and disclosure regime to address these specific limitations. Instead, since the Act was passed, we have had “purpose creep””; Auckland North Community and Development; Chapman Tripp: “The initial purposes were to allow the regulatory body (initially the Charities Commission) to impose sanctions for misconduct, deregister charities who commit serious wrongdoing, and to establish a registration, information and disclosure regime which gives information about charities to stakeholders and the public. This enabled the public to make informed choices as to who to support”; Christian Education Trust; Community Networks Aotearoa; Community Waitakere; Coromandel Independent Living Trust; Hope Foundation for Research on Ageing; Jackie St John; Joanne Harland; Jon Horne; Literacy Aotearoa Charitable Trust; ML Gribble; Motueka Family Service Centre; Neil Walbran; Network Waitangi Otautahi Inc; New Zealand Disability Support Network; Northland Urban Rural Mission: “Though elements of the original Act were debated and resisted by the Sector prior to its passing (including by the Sector asserting that other methods were preferable), the original purpose of running a transparent information and disclosure regime around how charities met their stated charitable purposes had value”; Rape and Abuse Support Centre Southland Inc; Royal New Zealand Coastguard Incorporated; Save the Otago Peninsula Inc; Surf Life Saving New Zealand Inc; Te Pūtahitanga o Te Waipounamu; The Presbyterian Church of Aotearoa New Zealand: “It is important to remember that Charities Services is there to provide an information and disclosure regime not control how a charity operates”; and Tiri Porter.

On the basis of these principles, the question is how the definition of “serious wrongdoing” can specifically target only “rogue charities” that should be removed from the charities register, without impinging too far on charities’ independence or imposing too great a regulatory burden. One suggestion is that the balance could be achieved by a direct focus on purpose: it is unlikely that tax avoidance, money laundering, terrorist financing, dishonesty or other types of misconduct could be carried out in good faith in furtherance of purposes that have been accepted as charitable. It is not clear that a more specific reference to individual instances of misconduct is required: attempts to create ex ante bright lines do not work well in this area of law.¹¹⁶

We have suggested some wording in the draft Bill included with this report but consider the definition of “serious wrongdoing” is key and requires further consultation.

Recommendation 8.7

That the definition of “serious wrongdoing” is reworked to better support the overarching legal duty of every registered charity, and every responsible person of a registered charity, to act in good faith to further the charity’s stated charitable purposes in accordance with its rules.

Tikanga principles

As discussed above, cl 5(c) of the draft Bill included with this report is intended to implement recommendation 8.4, by providing that the Charities Act is intended to be complemented, where appropriate, by tikanga principles.

Following consultation, we have included a list of nine tikanga principles in clause 9(1) of the draft Bill. This list is not intended to be conclusive, but rather a starting point from which a fuller consultation process between Māori and the Crown as Treaty partners might be undertaken.

We have specifically not attempted to define the content of the principles, but instead recommend that the list of principles be accompanied by the words “as interpreted and applied in accordance with tikanga Māori”: the intention is to make it clear that these are not just Māori words in statutes, but an incorporation of tikanga into the law, that must be interpreted in accordance with tikanga Māori.¹¹⁷ The expertise of the proposed Māori Advisory Committee is intended to be critical in these respects.

Definition of charitable purpose

Ascertaining purpose

Section 18(3) of the Charities Act requires activities to be considered as part of an application for registration but has been the cause of considerable difficulty because it does not specify the criteria against which activities are to be assessed.

As discussed above in chapter 4, the High Court has helpfully clarified that an entity’s activities are relevant in construing an entity’s purposes only to the extent that the entity’s constituting documents are unclear as to its purposes, or where there is evidence of activities by an entity that displaced or belied its stated charitable purposes.¹¹⁸ Otherwise, activities are considered to assess whether they are consistent with or supportive of the entity’s stated charitable purposes: if they are then there is no difficulty.¹¹⁹

Clause 11 of the draft Bill included with this report is intended to clarify the orthodox legal approach to ascertaining a charity’s purpose(s): that it is a matter of construction of the entity’s constituting document. In that process, the extent to which extrinsic material may be looked to is a matter for established rules of construction and interpretation: the

¹¹⁶ In this respect, charities law differs from law relating to protected disclosures (where cl 10 of the Protected Disclosures (Protection of Whistleblowers) Bill 294-2, at the time of writing before Parliament, proposes a substantially reworked definition of “serious wrongdoing”, that would extend to private sector use of public funds).

¹¹⁷ Email correspondence with Tai Ahu, 29 May 2020.

¹¹⁸ For a fuller discussion about the extent to which it is permissible to resort to extrinsic material in ascertaining purposes, see S Barker “Unresolved issues in New Zealand charities law” [2021] NZLJ 49.

¹¹⁹ *Re The Foundation for Anti-Aging Research* (2016) 23 PRNZ 726 (HC) at [82] - [88].

process is one of “interpretation, not creation”.¹²⁰ The reference in clause 11 of the draft Bill to “an inference to be drawn” is a reminder that the question is one of fact, and the usual standards for fact-finding by inference must be met: even where the rules may be unclear, and there is evidence of inconsistent activities, a particular inference about purposes might not be supported.¹²¹

In this way, the drafting intends to restore a focus on purpose and reduce the scope for subjectivity and inconsistency in processing applications for registration (see recommendation 3.3 above).

Setting out the legal test in legislation

As discussed above in chapter 3, most comparable jurisdictions have codified the common law requirement to meet the public benefit test in their respective pieces of charities legislation. Ireland, Australia and Scotland have also gone further and set out some parameters for how the public benefit requirement might be satisfied.

Clauses 12 - 14 of the draft Bill included with this report are intended to replicate the test for whether a purpose is charitable set out by the Court of Appeal in *Latimer* CA (recommendation 3.2).

The intention is to be clear that the test applies to all purposes, irrespective of whether advocacy is involved. In order for “advocacy” to be assessed against this test, it must first have reached the level of purpose. On that basis, the intention is to be clear that there is no separate “ends, means and manner” test:¹²² while it is possible to interpret the wording of the Supreme Court regarding ends, means and manner consistently with principle,¹²³ in practice, its interpretation and application are proving capricious and paradigm-shifting. Most problematic is its routine application to advocacy activities without analysis of whether the advocacy has in fact reached the level of a purpose under established principles of construction.¹²⁴ Further, even if advocacy has reached the level of a “purpose”, there is no need for a separate test. Setting out the test in legislation is intended to clarify that there is only one test for whether a purpose is charitable in New Zealand, and it applies to all purposes, without exception: there is no separate “ends, means and manner” test for “advocacy purposes” in New Zealand.

When purposes are ascertained according to established rules of construction, any difficulties in establishing public benefit of those purposes, including wider, intangible benefits, can be resolved and determined in the orthodox manner before a judicial trier of fact on the basis of a properly contested oral hearing of evidence. The absence of access to a trier of fact has been the missing link under the Charities Act to date, with distortionary effect, as discussed above in chapter 6: restoring access to the time-honoured mechanisms on which the common law relies is critical to enabling the common law to “work its magic”.

Presumption of public benefit

We recommend retaining the presumption of public benefit for the first three “heads” of charity, and in fact extended it to an expanded list of statutory heads (see cl 13(2) of the draft Bill included with this report).

In so doing, we acknowledge that we depart from the approach taken in the United Kingdom.¹²⁵ However, the New Zealand context differs from England and Wales,

120 See, for example, *Inglis v Dunedin Diocesan Trust* [2011] NZAR 1 (HC) at [29] - [32] per Baragwanath J; *Public Trust v Cancer Society of New Zealand Incorporated* [2020] NZHC 615 (23 March 2020) at [11] (Churchman J).

121 Comments on the draft Bill circulated for comment by Professor Matthew Harding, received by email dated 16 July 2020.

122 See, for example, Charities Registration Board Decision 2022-1 *New Zealand Entrepreneurs Rescue (NZER)* 9 February 2022 at [15].

123 See, for example, the discussion in S Barker “[Advocacy by charities: what is the question?](#)” (2020) 6 CJCCL 1 at 49 - 50.

124 Charities Services’ approach is documented at Charities Services [Advocacy/Taunakitanga](#).

125 In England and Wales, see Charities Act 2011 (UK) s 4(2): “In determining whether the public benefit requirement is satisfied in relation to any purpose falling within s 3(1), it is not to be presumed that a purpose of a particular description is for the public benefit”. Charities Act (Northern Ireland) 2008 s 3(2) and Charities and Trustee and Investment (Scotland) Act 2005 8(2) are to similar effect. Ireland retains a presumption of public benefit only for the advancement of religion: Charities Act 2009 (Ireland) s 3(4).

particularly in terms of the relative “youth” and small size of New Zealand’s charitable sector.¹²⁶ The presumption is widely accepted in New Zealand and is helpful evidentially in terms of onus of proof; it implements the principle of “permissible unless prohibited”, rather than “prohibited unless permissible”.¹²⁷

It is important to note that, as with any presumption, it can be rebutted in appropriate cases, in which case the onus would then shift and public benefit would need to be demonstrably proved.

Weighing benefits and detriments

In cl 12(a)(i) of the draft Bill included with this report, we have recommended wording intended to clarify that benefits and detriments must be weighed. Such an approach is well accepted in the underlying common law,¹²⁸ and has been codified in Australia¹²⁹ and Scotland.¹³⁰

In Northern Ireland,¹³¹ the original 2008 reference to detriment was removed in favour of more generic wording in 2013.¹³²

However, in New Zealand, it would be helpful to provide statutory clarification of the ability to weigh benefits and detriments as part of the process of determining whether a purpose meets the public benefit test.

Comparison of public and private benefits

In the original draft Bill circulated for comment in January 2020, we had included the following provision:

13(3) For the avoidance of doubt, a purpose that benefits individuals may meet the public benefit requirement in paragraph 12(a) if, having regard to the wider public benefits, the purpose benefits the public more than it benefits individuals as a question of fact.

126 In addition, the charitable status of independent schools, and their potential contribution to perpetuating class divides, appears to have been a key issue in the context of the removal of the presumption of public benefit in England and Wales, see for example: *R (Independent Schools Council) v Charity Commission for England and Wales* [2011] UKUT 421 (TCC). These issues are less predominant in a New Zealand context.

127 We have taken this phrase from a comment made by Laird Hunter QC, Edmonton, Canada, 4 February 2021.

128 See for example *National Anti-Vivisection Society v Inland Revenue Commissioners* [1948] AC 31 (HL) at 41 - 49 (Lord Wright).

129 See Charities Act 2013 (Cth) s 6(2): “For the purposes of paragraph (1)(a) [the public benefit test], have regard to all relevant matters, including: (a) benefits (whether tangible or intangible) (other than benefits that are not identifiable); and (b) any possible, identifiable detriment from the achievement of the purpose to the members of: (i) the general public; or (ii) a section of the general public.

130 Charities and Trustee Investment (Scotland) Act 2005 s 8(2): “In determining whether a body provides or intends to provide public benefit, regard must be had to— (a) how any— (i) benefit gained or likely to be gained by members of the body or any other persons (other than as members of the public), and (ii) disbenefit incurred or likely to be incurred by the public, in consequence of the body exercising its functions compares with the benefit gained or likely to be gained by the public in that consequence...”.

131 Charities Act (Northern Ireland) 2008 s 3(3) originally provided as follows: “In determining whether an institution provides or intends to provide public benefit, regard must be had to – (a) how any – (i) benefit gained or likely to be gained by members of the institution or any other persons (other than as members of the public), and (ii) detriment incurred or likely to be incurred by the public, in consequence of the institution exercising its functions compares with the benefit gained or likely to be gained by the public in that consequence, and (b) where benefit is, or is likely to be, provided to a section of the public only, whether any condition on obtaining that benefit (including any charge or fee) is unduly restrictive”. In Dr O Breen, Rev Dr L Carroll, N Lavery *Independent Review of Charity Regulation Northern Ireland* January 2022 at 27, 28, 42, section 3 was described as unworkable, and as having a drafting flaw that rendered the Charity Commission for Northern Ireland unable to register charities until December 2013, when s 3 of the 2008 Act was replaced by the Charities Act (Northern Ireland) 2013. The difficulty arose out of the inclusion in s 3 of the 2008 Act of a hybrid of unrelated provisions on the “public benefit test” from both the Charities Act 2006 (which applied in England and Wales) and the Scottish Charities and Trustee Investment (Scotland) Act 2005. Amendment was considered necessary in order to provide clarity on the requirements to be met in determining whether an institution is, or is not, a charity within the meaning of that Act: <www.niassembly.gov.uk/globalassets/documents/raise/publications/2012/social_dev/12412.pdf>.

132 Charities Act (Northern Ireland) 2008, as amended by the Charities Act (Northern Ireland) 2013, s 3(3) provides as follows: “In this Act any reference to the public benefit is a reference to the public benefit as that term is understood for the purposes of the law relating to charities in Northern Ireland”.

This wording was based on the argument in *Latimer CA* that it must be shown in respect of every charitable trust that it benefits individuals less than the public at large.¹³³ The intention is to override the finding in *Queenstown Lakes Community Housing Trust* ("**Queenstown Lakes**") that:¹³⁴

Any ... form of public benefit which is capable of being charitable will not generally be charitable if the public benefit is achieved by means of assistance provided to individuals.

As discussed above in chapter 5, although this finding is inconsistent with prior higher authority, it is nevertheless widely applied by Charities Services and the Charities Registration Board, and the New Zealand community is deprived of much significant benefit as a result.

Although the suggested wording for clause 13(3) found favour with a number of commenters on the draft Bill, on reflection, we have been persuaded that it may become yet another provision intended to assist charities that is ultimately used against them.

Instead, we recommend clarifying that "incidental" private benefit is not inconsistent with charitable purpose (clause 13(2)). Restoring charities' access to a judicial trier of fact is critical in allowing any weighing of private and public benefits to be carried out.

Equitable principles

Feedback on the draft Bill questioned some of the language in the statutory tests, such as use of the words "spirit" and "intendment", the reference to a "sufficient section of the public" and even the reference to "public benefit" itself.

On balance, we do not recommend deviating from the underlying common law in these respects.

In addition, as discussed above in chapter 3, we recommend retaining equitable principles, such as the link to the Preamble and the presumption of charity, in the interests of retaining and protecting the "essence" of charity, and the flexibility of the underlying common law.

However, we accept that these factors may be controversial, and welcome discussion and consultation on these points.

Blood ties

As discussed above in chapter 3, the decision of the High Court in *Latimer HC* in relation to the "blood ties" exception was subsequently codified.

Contemporaneously with the High Court decision, in August 2001, the Inland Revenue Department ("**IRD**") had issued a discussion document entitled *Taxation of Māori organisations*,¹³⁵ which noted as an issue of "major concern" the inability of an entity to qualify for charitable status when its beneficiaries are determined on the basis of bloodlines.¹³⁶ Such an inability was considered inappropriate in a New Zealand context,¹³⁷ as many iwi- and hapū-based organisations define their beneficiary class by a personal relationship (through blood ties) to a named person.

In recommending amendment, IRD made the following comments:¹³⁸

The main concern for Māori authorities (including marae) that wish to use the 'charitable' tax exemption is that they will usually fail to meet the 'public benefit' test. While Māori authorities often provide benefits of a charitable nature to iwi and hapū and may in fact have charitable purposes, they may not qualify for an exemption because their benefit extends to a group of people connected by blood ties, rather than to the general public.

133 *Latimer v Commissioner of Inland Revenue* [2002] 3 NZLR 195 (CA) at [35]. The arguments of counsel for the Trust were ultimately upheld by the Court of Appeal.

134 *Re Queenstown Lakes Community Housing Trust* [2011] 3 NZLR 502 (HC) at [68].

135 Inland Revenue Department *Taxation of Māori organisations – a Government discussion document* August 2001: <taxpolicy.ird.govt.nz/publications/2001/2001-dd-maori-organisations> at [8.8] – [8.15].

136 Inland Revenue Department *Taxation of Māori organisations – a Government discussion document* August 2001 at [8.9].

137 Commentary to the Taxation (Annual Rates, Māori Organisations, Taxpayer Compliance and Miscellaneous Provisions) Bill at 5.

138 Inland Revenue Department *Taxation of Māori organisations – a Government discussion document* August 2001 at [2.13] – [2.15].

The Government considers that if an organisation meets the legal requirements for 'charitable purpose', then it should not automatically be excluded from the 'charitable' tax exemption simply because it fails to meet the "public benefit" test.

The Government therefore proposes to amend the Income Tax Act so that an organisation will not cease to be eligible for charitable status simply because its purpose is to benefit a group of people connected by blood ties. However, the organisation must still meet the other requirements of a charity – that is, having a charitable purpose and benefiting an appreciably significant section of the public.

Subsequently, s OB 3B(1) was inserted into the Income Tax Act 1994 from March 2003.¹³⁹ Then, as part of the process of rewriting New Zealand's income tax legislation, this provision became paragraph (a) of the definition of "charitable purpose" in s YA 1 of the Income Tax Act 2007; it was also incorporated into the definition of charitable purpose in s 5(2)(a) of the Charities Act when it was passed into law in 2005.

The 2001 discussion document made it clear the blood ties exception was not limited to Māori:¹⁴⁰

This proposal will apply to both Māori and non-Māori entities, and it is especially relevant to iwi-based and hapū-based entities. However, it should be noted that to obtain charitable status an entity must still meet the other requirements of a charity – that is, it must have a 'charitable purpose' and it must be for the benefit of the public or an appreciably significant section of the public.

In determining whether an entity benefits an appreciably significant section of the public, it will be necessary to consider other factors such as the nature of the entity, the number of potential beneficiaries, and the degree of relationship between beneficiaries.

For example, whānau trusts may qualify for a 'charitable' tax exemption if their pool of beneficiaries is large enough and inclusive enough to constitute an appreciably significant section of the public, or if the purposes for which they are established confer a wide public benefit. However, if the entity benefits a few family members only (so that it is actually a private family trust), it will not be regarded as benefiting an appreciably significant section of the public.

The "blood ties" exception in s 5(2)(a) of the Charities Act is not entirely unique to New Zealand;¹⁴¹ its underlying rationale has not changed and remains important in a New Zealand context. For that reason, it has been incorporated into cl 13(4) of the draft Bill included with this report.

A number of commenters on the draft Bill queried whether the "blood ties" exception would extend to married couples, or adopted children, whose inclusion within an iwi is not necessarily a blood tie. Each individual iwi will have its own processes for determining who is eligible for membership, and the inclusion of some members through marriage or adoption would not of itself cause the public benefit test to cease to be met. The public benefit test remains a question of fact to be determined on a case by case basis according to fundamental principles, supported by the statutory blood ties exception.¹⁴²

Expanding the statutory heads

As discussed above in chapter 3, we recommend that New Zealand expand the statutory "heads" of charitable purpose (recommendation 3.1).

In the first draft Bill that was circulated for comment in 2020, we suggested expanding the heads considerably, with specific provisions intended to counter current cases of difficulty, such as *Canterbury Development Corporation & Ors v Charities Commission* ("**Canterbury Development**")¹⁴³ and *Queenstown Lakes*.

¹³⁹ Taxation (Annual Rates, Māori Organisations, Taxpayer Compliance and Miscellaneous Provisions) Bill 213-2 cl 66.

¹⁴⁰ The public benefit test must still otherwise be satisfied. See Inland Revenue Department *Taxation of Māori organisations – a Government discussion document* August 2001 at [8.15] – [8.18].

¹⁴¹ See Charities Act 2013 (Cth) s 9(1)(b) which provides that purposes of entities that receive, hold or manage benefits related to native title etcetera do not fail the public benefit test "only because of the relationships between the Indigenous individuals to whose benefit the purpose is directed".

¹⁴² See also the discussion in *The Law and Practice of Charities in New Zealand* S Barker, M Gousmett and K Lord (LexisNexis, Wellington, 2013) at [3.1926] – [3.1938].

¹⁴³ *Canterbury Development Corporation & Ors v Charities Commission* [2010] 2 NZLR 707 (HC).

Following consultation, and on reflection, such levels of prescription risk becoming yet another amendment designed to help charities that could ultimately be used against them. As with tikanga principles, the definition of charitable purpose needs to be able to “breathe”.

Instead, we recommend only a modest extension of the statutory “heads”, as set out in cl 15(1) of the draft Bill included with this report (which is intended to reflect faithfully the outcomes of the co-design consultation process set out above in table 3.4).

As with comparable jurisdictions, we also recommend retaining the residual category (the “catch-all” “4th head” of “any other purpose beneficial to the community”),¹⁴⁴ for two reasons: to retain recognition of existing charitable purposes that have not been specifically listed, and to protect against ossification by confirming capacity to recognise new charitable purposes and therefore develop the law further. Clause 15(1)(i) of the draft Bill incorporates this “*Pemsel-plus*” approach, which is intended to be supported by retaining the opening wording of the clause (defining a charitable purpose to “include” every charitable purpose).¹⁴⁵

Clause 14 of the draft Bill included with this report is intended to confirm the pre-Charities Act position in New Zealand, that the process of recognising new charitable purposes can proceed by way of analogy or presumption.

The recommended modest expansion of the statutory heads of charity should be viewed in the context of other measures recommended in this report, such as clarifying the test to be applied for determining whether a purpose is charitable, articulating an overarching enabling purpose of the legislation to clarify the framework for decision-making, and restoring charities’ access to a trier of fact. The combined effect is intended to enable charities to demonstrate that their purposes do in fact operate for the public benefit, that any private benefits are merely incidental, and that they are accordingly eligible for registration, where appropriate.

In this way, the specific income tax exemption for community housing entities that was introduced in response to the *Queenstown Lakes*’ decision (Income Tax Act 2007, s CW 42B) could usefully be repealed, on the basis of resolving the problem of charities being prevented from helping people into affordable housing at the level of source (the interpretation of the definition of charitable purpose), rather than at the level of symptom.

The promotion of amateur sport

As discussed above in table 3.4, we recommend that s 5(2A) of the current Charities Act is repealed. Section 5(2A), which was inserted by Statutes Amendment Bill (No 2) 271-1 in 2011/2012, provides that “the promotion of amateur sport may be a charitable purpose if it is the means by which a charitable purpose ... is pursued”.

Reporting on 6 July 2011, the select committee considering the bill explained the rationale for the proposed amendment as follows:¹⁴⁶

There is uncertainty among sports organisations, community funding groups, and the legal community about the circumstances in which amateur sport may be considered charitable. As a result some charitable organisations are reluctant to fund sport because of doubt about its charitable status. This amendment would clarify the meaning of charitable purpose in relation to amateur sports, which is that amateur sport for its own sake is not charitable, but it may be charitable when it is the means to achieve one of the traditional four heads of charity, as set out in section 5(1) of the Charities Act 2005. It would also align the legislation with current case law. Attaining charitable status has implications for an entity’s tax status. The proposed amendment is consistent with the general practice of both the Charities Commission and the Inland Revenue Department and we do not consider that it would have any significant practical implications for New Zealand’s tax system.

144 See Charities Act 2013 (Cth) s 12(1)(k); Charities Act 2011 (UK) s 3(1)(m); Charities Act 2009 (Ireland) s 3(1)(d), (11); Charities Act (Northern Ireland) 2008 s 2(2)(l), (4); and Charities and Trustee Investment (Scotland) Act 2005 s 2(p).

145 This wording follows the wording used in s 5(1) of the current Charities Act.

146 Statutes Amendment Bill (No 2) (271-2) ([select committee report](#)) at 5.

The Statute Amendment Bill's proposed amendments to the Charities Act were divided into the Charities Amendment Act 2012, and received Royal assent on 1 July 2012, the day on which the Charities Commission was disestablished.

However, in practice, s 5(2A) has proved to be unhelpful, and another example of a provision ostensibly designed to help charities ultimately being used against them.

Section 5(2A) currently impedes the development of the common law in New Zealand by preventing the promotion of amateur sport from being recognised as a charitable purpose in its own right. Many sporting charities are having difficulty gaining or maintaining registration,¹⁴⁷ despite the comprehensive public benefits that they provide (including in terms of health, development of character and life skills, combating loneliness and isolation, and social cohesion).

In a country facing an obesity epidemic, with parental concerns about time spent on electronic devices, and with an ageing population and diminishing social capital, charities should have the opportunity to demonstrate that the promotion of amateur sport can be charitable in its own right in appropriate cases.

Amateur sport can be promoted through elite sport. It is important to note that there is no blanket rule that "elite sport is not charitable";¹⁴⁸ decision-making as to whether a purpose operates for the public benefit should always be carried out on a case by case basis on the evidence before the decision-maker.

The approach taken to the issue of sport in New Zealand appears to have been influenced by the decision in *Re Nottage*,¹⁴⁹ relating to a yacht race, which was applied by the Supreme Court of Canada in *Amateur Youth Soccer Association* to support a finding that "mere sport is not charitable".¹⁵⁰ However, as discussed above, case law in Canada relating to charities is based on a markedly different statutory context. It also derives from an appeal process that has been heavily criticised; in particular, lack of access to an oral hearing of evidence has been described as "one of the reasons the cases in Canada are so resoundingly decided against charities".¹⁵¹ no charity has won a registration appeal in Canada in more than 20 years.¹⁵²

147 See for example: Charities Registration Board Decision 2019-4 [Football Otago Youth Development Academy Trust](#) 12 September 2019; Charities Registration Board Decision 2016-1 [Youth Glide New Zealand Incorporated](#) 24 March 2016; Charities Registration Board Decision 2015-3 [New Zealand Rowing Association Incorporated](#) 11 September 2015; Charities Registration Board Decision 2014-3 [Swimming New Zealand Incorporated](#) 30 September 2014; Charities Registration Board Decision 2013-6 [Northern Region Equestrian Trust](#) 15 April 2013; Charities Registration Board Decision 2013-4 [Southern Zone of NZRL](#) 15 April 2013; Charities Registration Board Decision 2012-3 [Community Health Fitness and Development Trust](#) 19 November 2012; Charities Registration Board Decision 2012-1 [NZ Snowboardcross](#) 1 November 2012; Charities Commission Decision 2011-1 [Waitakere Sailing Development Trust](#) 20 October 2011; Charities Commission Decision 2012-4 [Waikato Rowing and Performance Centre Incorporated](#) 5 April 2012; Charities Commission Decision 2011-11 [Auckland Water Polo Academy and Educational Trust](#) 16 August 2011; Charities Commission Decision 2011-9 [Te Kaporangi Charitable Trust](#) 16 August 2011; Charities Commission Decision 2011-8 [Kaikoura Aero Club Incorporated](#) 15 July 2011; Charities Commission Decision 2011-2 [Optimist Worlds NZ Ltd](#) 16 February 2011; Charities Commission Decision 2010-25 [RPC South \(The Ratas\) Incorporated](#) 29 November 2010; Charities Commission Decision [Greater Auckland Netball Ltd](#) 15 April 2010; Charities Commission Decision [Team New Zealand Ltd](#) 11 February 2010; Charities Commission Decision [Team New Zealand Trust](#) 11 February 2010; Charities Commission Decision [Nelson Lakes Gliding Club Incorporated](#) 13 January 2010; Charities Commission Decision [NZ Billiards and Snooker Association Incorporated](#) 19 October 2009; Charities Commission Decision [The Browns Bay Racquets Club Incorporated](#) 19 October 2009; Charities Commission Decision [The Huia Fishing Club Incorporated](#) 24 August 2009; Charities Commission Decision [The North Shore Riding Club Incorporated](#) 9 July 2008; The Seed Foundation Incorporated (decision now removed from Charities Services' website). Many other decisions will not have been made publicly available.

148 A blanket rule that "elite sport is not charitable" is now apparently applied in practice, despite Charities Services' commentary. See Charities Services *Sports and charity: rules of the game*: www.charities.govt.nz/news-and-events/blog/sports-and-charity-rules-of-the-game/.

149 *Re Nottage* [1895] 2 Ch 649 (CA).

150 *Amateur Youth Soccer Association v Canada Revenue Agency* 2007 287 DLR 4th 4 (SCC).

151 Report of the Special Senate Committee on the Charitable Sector [Catalyst for Change: A Roadmap to a Stronger Charitable Sector](#) June 2019 at 72, referring to the evidence of Dr A Parachin.

152 Report of the Special Senate Committee on the Charitable Sector [Catalyst for Change: A Roadmap to a Stronger Charitable Sector](#) June 2019 at 70, referring to the evidence of Dr K Chan. Note also that *Canada Without Poverty*, discussed above in ch 4, took a different legal route which led to a different result.

Other jurisdictions have legislated to make it clear that the promotion of amateur sport can indeed be charitable in its own right.¹⁵³ As discussed above, we recommend that New Zealand does the same, an approach which would obviate any need for s 5(2A).

However, even if New Zealand does not legislate to make it clear that the promotion of amateur sport may be charitable in its own right, s 5(2A) should be removed to allow the common law to develop in New Zealand without this unnecessary impediment.

Recommendation 8.8:

That the legislation does not preclude the promotion of amateur sport from being a charitable purpose in its own right in appropriate circumstances (an outcome which is currently precluded by section 5(2A) of the Charities Act 2005).

Post-settlement governance entities

Despite the blood ties exception, current interpretations of the definition of charitable purpose are causing significant difficulty in practice for post-settlement governance entities (“**PSGEs**”).¹⁵⁴ The difficulties mostly arise around overly-narrow conceptions of what constitutes a disqualifying private benefit, which are unduly restricting the activities that PSGEs may undertake for the benefit of their iwi and hapū, and are in turn contributing to a sentiment that the concept of charitable purpose is “colonial” and outdated.

We are strongly of the view that such difficulties stem from an overly-narrow *interpretation* of the definition of charitable purpose, and are not inherent in the definition of charitable purpose itself. In that sense, the difficulties are not limited to Māori, but are being experienced widely across the charitable sector by charities of all kinds. As discussed above in chapter 3, correctly interpreted, the definition of charitable purpose in New Zealand is wide and more than capable of embracing New Zealand’s unique cultural groupings; correctly interpreted, the definition supports human flourishing, is not restricted to “assuaging need”, and can support mana Motuhake, tino rangatiratanga, or self-determination for all charities, Māori or non-Māori.

The framework of recommendations included in this report, including restoring a focus on purpose, setting out a process for weaving tikanga and Treaty principles into the fabric of New Zealand charities law, setting out the test for whether a purpose is charitable, and restoring charities’ access to a trier of fact, thereby providing them with a means of demonstrating that their purposes do indeed operate for the benefit of the public, are all intended to protect the definition of charitable purpose against unduly narrow interpretations (and a slow-moving change of underlying paradigm). In so doing, the intention is to remove undue barriers from charities realising their potential, empowering local communities, and working towards creating a healthy, resilient, inclusive, thriving Aotearoa New Zealand for the benefit of all. In other words, to “let 1000 flowers bloom”, in its true sense,¹⁵⁵ potentially manifesting the “ambicultural” approach put forward by the late Dr Mānuka Henare.¹⁵⁶

¹⁵³ See, for example, Charities Act 2011 (UK) s 3(1)(g), (2)(d); Charities and Trustee Investment (Scotland) Act 2005 s 7(2)(h), (3)(c); Charities Act (Northern Ireland) 2008 s 2(g), 3(d).

¹⁵⁴ See for example the [submissions](#) of SociaLink Tauranga Moana; Te Whakakitenga o Waikato Incorporated, on behalf of the Waikato-Tainui iwi, endorsed by the Waikato Raupatu Lands Trust and Group and Waikato-Tainui marae; and Volunteering New Zealand.

¹⁵⁵ Rather than in the sense used by Mao Zedong: www.thegreatcoursesdaily.com/maos-twisted-version-of-freedom-of-expression/. Interview with Sarah Vibert, Interim Chief Executive, National Council of Voluntary Organisations (21 January 2021).

¹⁵⁶ Mānuka Henare *Reconsidering the Māori economy as an Economy of Mana*, keynote presentation at the Philanthropy Summit, 16 April 2015: www.youtube.com/watch?v=5plyfMtA8nk.

However, given the importance of PSGEs to New Zealand society, and given the difficulties they have been experiencing in practice,¹⁵⁷ we recommend that consideration is given to streamlining and clarifying their position in a charities law framework. Clause 15(3), and the definition of “post settlement governance entity” in cl 9, of the draft Bill included with this report are directed to this end, and are intended to clarify that PSGEs may undertake initiatives to promote iwi self-determination, such as housing, employment and economic development programmes, provided at all times the governing body considers to do so is in the best interests of the entity’s charitable purposes and otherwise in accordance with the entity’s governing document. While acknowledging that recovering from Treaty breaches is a long-term process that may take many generations,¹⁵⁸ in principle, all of New Zealand society benefits when all of its citizens are encouraged and empowered to reach their potential. It is important to note that PSGEs are subject to high levels of accountability to their iwi members,¹⁵⁹ which provides a high level of assistance for decision-makers as to whether any particular private benefit is disqualifying or merely incidental in any particular case. However, we welcome discussion on how such a provision would best be worded.

Given the importance of marae to Māori culture, we also recommend retaining s 5(2)(b) of the Charities Act 2005 (see clause 15(2) of the draft Bill included with this report).

Fiscal consequences

Clause 16 of the draft Bill included with this report is intended to implement recommendation 4.2 above, to make clear that potential fiscal consequences of registration are entirely irrelevant to the question of whether a purpose is charitable.

157 See, for example, Chapman Tripp *Te Ao Māori – Trends and insights*, Piripi 2017 at 2: “The formal Treaty of Waitangi process, launched in 1975 and now in its difficult, final stages, has transformed the relationship between Māori and the Crown. The process might have proceeded more smoothly, and produced even better outcomes, had the Government set the rules differently, in particular had it: been less prescriptive in its insistence on negotiating with “large natural grouping”; and thought through more fully the implications of its early policy preference, later reversed, that Post Settlement Governance Entities (PSGEs) and mandated iwi organisations (MIOs) should be charities. The first requirement continues to frustrate settlement negotiations and has always been viewed as undermining the interests of smaller claimant groups. The second continues to create problems for the early PSGE and MIO structures which are limited by their wholly charitable status as to the nature and type of disbursements they can make to their members. The unwritten and ever changing beast that is Crown policy, together with the Crown balancing “legitimate interests” in the Treaty negotiation process, continue to undermine Maori achieving tino rangatiratanga and mana motuhake. Even when the purpose of a Treaty negotiation is to settle historical breaches by the Crown – the Crown still holds all the cards”. In fairness, however, even the Crown would likely have been caught off guard by the unexpectedly narrow approach taken to the interpretation of the definition of charitable purpose since the Charities Act was passed in 2005.

158 [Submission](#) of Te Whakakitenga o Waikato Incorporated, on behalf of the Waikato-Tainui iwi, endorsed by the Waikato Raupatu Lands Trust and Group and Waikato-Tainui marae: “... redressing and recovering from the economic, political, social and cultural deprivations suffered by such iwi and hapuu as a result of raupatu and other Tiriti breaches ... is a long-term process and it will require many generations for Waitako-Tainui to substantively restore the welfare, economy and development potential of our iwi ... The settlements began a process of healing and a new age of cooperation with the Crown, but that process of healing, and the process of regenerating and advancing the welfare, economy and development of our iwi, is ongoing ... Settlement assets are the “seeds” that iwi must grow. It is therefore acknowledged that Tiriti settlements and related processes only provide partial redress and a starting point for recovery, and there is still substantial, and intergenerational, mahi to be done. There is an acute awareness of this reality given that Waikato-Tainui iwi members remain overrepresented in the lower quartile for various socio-economic and health measures...As kaitiaki, or stewards, of our rohe and our whenua and other taonga and assets, our mahi is to preserve, protect and enhance our rich natural environments for both current and future generations. This involves looking many generations into the future, ie over the next 500+ years, not just looking at the next few years or decades...The availability of charitable and tax-exempt status for PSGEs and other Maaori entities that work for the benefit of iwi and hapuu appropriately reflects that we are still in a phase of redress and recovery from the economic, political, social and cultural deprivations suffered as a result of historical and ongoing Tiriti breaches, and this will continue for the foreseeable future”.

159 As noted in the [submission](#) of Te Whakakitenga o Waikato Incorporated, on behalf of the Waikato-Tainui iwi, endorsed by the Waikato Raupatu Lands Trust and Group and Waikato-Tainui marae, Waikato-Tainui iwi comprises more than 76,000 registered members, represented by 68 marae.

Ancillary purposes

As discussed above in chapter 4, the ancillary purpose rule currently contained in s 5(3) and 4 of the Charities Act has been the source of some difficulty.

Section 5(3) and (4) currently provide as follows (emphasis added):

- (3) To avoid doubt, if the *purposes* of a trust, society or an institution include a non-charitable purpose (*for example, advocacy*) that is merely ancillary to a charitable purpose of the trust, society or institution, the presence of that non-charitable purpose does not prevent the trustees of the trust, the society, or the institution from qualifying for registration as a charitable entity.
- (4) For the purposes of subsection (3), a non-charitable purpose is ancillary to a charitable purpose of the trust, society, or institution if the non-charitable purpose is –
 - (a) *ancillary, secondary, subordinate, or incidental* to a charitable purpose of the trust, society or institution; and
 - (b) *not an independent purpose* of the trust, society, or institution.

Section 5(3) and (4) were inserted by the Select Committee considering the original Charities Bill in response to submitters' concerns regarding advocacy:¹⁶⁰

Many submitters expressed concern that they would be prevented from registering as charities, as they believed the advocacy work they undertake would disqualify them from being classed as a charity. However, in the majority's view there is no cause for concern. The common law has established that organisations must have main purposes that are exclusively charitable, but they are permitted to have non-charitable secondary purposes, provided that those secondary purposes are legitimate ways to achieve the main charitable purpose. While a charity cannot have advocacy as its main purpose, it can have another charitable purpose as its main purpose, and then engage in appropriate advocacy as a secondary purpose in order to achieve its main charitable purpose. Given the level of concern raised by submitters concerning this issue, the majority does consider that it may be valuable if the legislation includes a provision codifying the common law regarding secondary purposes, in order to ensure clarity on this issue. The majority therefore recommends amending the bill to clarify that an entity with non-charitable secondary purposes undertaken in support of a main charitable purpose will be allowed to register with the Commission, and to confirm that advocacy may be one such non-charitable secondary purpose.

The changes were then rushed through under urgency without proper consultation, as discussed above.

The addition of the words "for example, advocacy" in s 5(3) is another example of a provision intended to assist charities ultimately being used against them. While these three words were not intended to change the law, the wording has been interpreted as authority for the proposition that a strict political purpose exclusion applied in New Zealand charities law, which in turn has led to many worthy charities being deregistered or declined registration on the basis of their advocacy work.¹⁶¹

However, a political purpose exclusion did not strictly apply in New Zealand charities law, as discussed above in chapter 4: for example, the Court of Appeal in *Latimer* CA held that the purpose of the Crown Forestry Rental Trust to assist Māori to bring claims before the Waitangi Tribunal was charitable and not political, despite the fact that the Treaty settlement process was highly controversial at the time and always, without exception, leads to an Act of Parliament to settle the wrongs.¹⁶² In 2014, the Supreme Court clarified that the question of whether a purpose is "political" is merely one facet of the public benefit test, and a "political purpose exclusion" should not be applied in New Zealand law.¹⁶³ Despite this decision, however, difficulties remain.

We strongly recommend that the words "for example advocacy" are deleted from s 5(3). To the extent that they have been interpreted to implement a strict political purposes exclusion, these words do not represent the law in New Zealand, as the Supreme Court

160 Charities Bill 2004 (108-2) ([select committee report](#)) at 4.

161 The National Council of Women of New Zealand Incorporated is a case in point.

162 As noted by Williams J, as he was then, speaking extra-curially, at the *Charitable purpose forum*, hosted by the Charities Commission, as it was then, in Wellington on 17 – 18 April 2012.

163 *Re Greenpeace of New Zealand Inc* [2015] 1 NZLR 169 (SC) at [3], [72].

has clarified. These words are also problematic in their apparent conceptualisation of “advocacy” as a purpose when it is fundamentally an activity. They have been the source of significant unintended consequences and should not remain in the legislation.

Recommendation 8.9:

That the legislation does not incorporate the words “for example, advocacy” within the ancillary purpose rule (currently contained in section 5(3) of the Charities Act 2005).

Otherwise, and in principle, s 5(3) and (4) reflect the underlying common law in New Zealand, as expressed by the Court of Appeal in *Molloy v Commissioner of Inland Revenue* (“**Molloy**”):¹⁶⁴

In many classes of case the existence of public benefit will be readily assumed – but in the end ‘the question whether a gift is or may be operative for the public benefit is a question to be answered by the Court by forming an opinion upon the evidence before it’ ...

Political objects are not confined to matters of party political philosophy ...

The foregoing principles have been recognised in many cases ... But they do not assert that the mere existence of any such object or purpose ipso facto precludes recognition as a valid charity. To reach that conclusion the political object must be more than an ancillary purpose, it must be the main or a main object. If such a purpose is *ancillary, secondary, or subsidiary*, to a charitable purpose it will not have a vitiating effect ...

However, there are a number of difficulties with the current wording in s 5(4). For example, the inclusion of the word “incidental” unhelpfully mixes concepts. While some jurisdictions have incorporated a concept of “incidental” activity or purpose into their legislation,¹⁶⁵ such a concept was not a feature of New Zealand common law, as can be seen from the extract from *Molloy* above. In New Zealand, the adjective “incidental” is used in the context of “incidental private benefits”, but is problematic in the context of ancillary purposes, not least because it encourages a conflation of the distinction between purposes and activities. The ancillary purpose rule applies to purposes; it does not apply to activities. We recommend deletion of the word “incidental” from s (4)(a).

We also recommend that s 4(b) be deleted in its entirety. A requirement that an ancillary purpose not be “independent” can never be met, as in practice a mere finding that a purpose *exists* inexorably leads to a finding that such a purpose is *independent*. As can be seen from the extract from *Molloy* above, the common law did not impose an additional requirement that a purpose not be “independent” in order to be ancillary. In the interests of clarifying fundamental principles and reducing scope for subjectivity and discretion, we recommend that s 4(b) of the Charities Act be deleted.

Clause 17 of the draft Bill included with this report has been drafted to reflect these recommendations.

Recommendation 8.10:

That the description of an ancillary purpose (currently contained in section 5(4) of the Charities Act 2005) does not include references to “incidental” and “independent” purposes, in order to ensure consistency with the underlying common law in New Zealand and to reduce the scope for subjectivity.

¹⁶⁴ *Molloy v Commissioner of Inland Revenue* [1981] 1 NZLR 688 (CA) at 695 (emphasis added, footnotes omitted).

¹⁶⁵ For example, in Canada, s 149.1(6.2) of the Income Tax Act RSC 1985, c 1 (5th Supp), prior to its amendment in 2018, referred to “political activities” that are “ancillary and incidental to its charitable activities”. In Australia, Charities Act 2013 (Cth) s 5(b)(ii) refers to “purposes that are *incidental* or ancillary to, and in furtherance or in aid of, purposes of the entity covered by subparagraph (i)”.

In practice, New Zealand courts have sought to establish whether a purpose is “ancillary” under s 5(3) and (4) by means of a “quantitative and qualitative” analysis.¹⁶⁶ No authority was cited for the original introduction into New Zealand charities law of such tests, which instigate a neoliberal focus on measurable activities into an inherently equitable area of law focused on purposes. Various aspects of the draft Bill included with this report are intended to reinforce the equitable principles that underly this area of law. It is hoped that such reinforcement might encourage a more nuanced approach to considering whether a purpose is ancillary under s 5(3) and (4).

Clarifying the position with respect to activities

As discussed above, a key source of unintended consequences in the current Charities Act is s 18(3), and the requirement to “have regard to” activities, a point noted by a number of submitters.¹⁶⁷ The difficulty is that the legislation does not currently specify for what reason activities are to be regarded.

The High Court has helpfully clarified the limited extent to which activities should be regarded in construing an entity’s purposes, as discussed above in relation to ascertaining purpose (clause 11).¹⁶⁸

Otherwise, the legal position is that activities are regarded to assess whether they are consistent with or supportive of the entity’s stated charitable purposes.¹⁶⁹ We strongly recommend the legislation make this clear.

Clause 18(1) and (2) of the draft Bill included with this report are intended to clarify that the “charitable” test applies to purposes: activities are considered primarily to assess that they will further those purposes and will not otherwise constitute serious wrongdoing.

Recommendation 8.11:

That the legislation clarify the reasons for which regard is to be had to a charity’s activities (s 18(3) of the Charities Act 2005).

¹⁶⁶ See *Re Education New Zealand Trust* (2010) 24 NZTC 24,354 (HC) at [43] and *Re the Grand Lodge of Antient Free and Accepted Masons in New Zealand* [2011] 1 NZLR 277 (HC) at [49] – [51], which was then followed for example in: *Re Draco Foundation (NZ) Charitable Trust* (2011) 25 NZTC 20-032 (HC) at [14], [61] – [64]; *Re New Zealand Computer Society* (2011) 25 NZTC 20-033 (HC) at [16], [68]; *Re Greenpeace [of] New Zealand Inc* [2011] 2 NZLR 815 (HC) at [66] – [75].

¹⁶⁷ See for example the [submissions](#) of Chapman Tripp: “Charities Services has taken the approach that not only must a charity’s purposes be charitable (which we agree with), but that a charity’s purposes can be inferred by every activity the charity undertakes in the furtherance of these activities (which we do not consider is correct). This is an unintended consequence of s 18(3)’s requirement that Charities Services “have regard” to activities when considering an application for registration. However, the reason Charities Services may consider a charity’s activities is to ensure that the charity is continuing to further its stated charitable purposes over time, not to allow Charities Services to impute new purposes arbitrarily”; Christian Education Trust; Community Networks Aotearoa; Community Waitakere; Coromandel Independent Living Trust; Jackie St John; Jon Horne; LEAD: “Section 18(3)(a) of the Charities Act is a specific example of how poorly drafted legislation-on-the-run is giving rise to unintended consequences ... Charities are independent community entities, usually intended to exist into perpetuity. In principle, it is for charities to determine how to best further their stated charitable purposes from time to time, and they should be protected from undue government interference when doing so. This view was strongly supported by the 662 respondents to the Independent Community Consultation to Inform the Review of the Charities Act (Survey Report, May 2019), where 37.27% agreed and a further 34.38% strongly agreed: ‘In principle, it is for charities to determine how best to further their charitable purposes, not DIA Charity Services’”; Literacy Aotearoa Charitable Trust; ML Gribble; Motueka Family Service Centre; New Zealand Law Society; Northland Urban Rural Mission; Oxfam New Zealand: “Provided the charity’s true purposes, in its founding document, are clear and fit within the Act’s definition of charitable purpose there is no need to add any further regulations for the decision maker. The attention should be on the purpose and only on the activities to ascertain that they are undertaken in furtherance of the charity’s purposes, that they are consistent or supportive. But not whether the activities themselves are ‘charitable’, as activities are not a ‘purpose’”; Rape and Abuse Support Centre Southland Inc; Te Pūtahitanga o Te Waipounamu: “The legitimate reason for a regulator to ‘have regard’ to registered charities’ activities under this section should be limited to determining whether the charity is continuing to act in furtherance of its stated charitable purposes over time. It was not intended to be a means for a government agency to vet what are legitimate activities for a charity, nor to ration the privileges of the charity based on changes in government policy”.

¹⁶⁸ For a fuller discussion about the extent to which it is permissible to resort to extrinsic material in ascertaining purposes, see S Barker “Unresolved issues in New Zealand charities law” [2021] NZLJ 49.

¹⁶⁹ *Re The Foundation for Anti-Aging Research* (2016) 23 PRNZ 726 (HC) at [82] – [88].

Even with a general clarification of this nature, the question arises as to whether, given the significant difficulties that have been experienced with respect to charities' activities since the introduction of the Charities Act, specific clarification in a number of areas may be helpful.

Social enterprise/commercial activity

As discussed above in chapter 5 (*Social enterprise and competitive advantage*), we recommend that a public awareness campaign is conducted to clarify that running a business/carrying out social enterprise are legitimate and encouraged activity for charities (recommendation 5.2).

Many of the recommendations in this report are intended to restore a focus on purpose: those responsible for governing charities already have fiduciary duties to comply with the charity's constituting document, which must include the charity's charitable purposes, as well as the non-distribution constraint/prohibition on private pecuniary profit. All funds of a charity must, by definition, be destined for the charity's charitable purposes: no one can make a private pecuniary profit from a charity *lawfully*. By supporting a focus on purpose, the charities law framework can achieve objectives of protecting against wrongdoing or mission drift efficiently and effectively, thereby promoting public trust and confidence in charities, while also respecting their independence, autonomy and diversity.

In a constrained funding environment, it is important that charities are able to use business activities to raise funds for their charitable purposes. Legally, there is no impediment to their doing so, provided they consider in good faith that to do so is in the best interests of their charitable purposes, and otherwise in compliance with their rules: the same test that applies to any activity. Clause 18(3)(b) of the draft Bill included with this report is intended to make this clear.

Supporting social enterprises

A number of submitters to the DIA's review of the Charities Act raised concerns about supporting social enterprise activity for fear of losing their own registered charitable status.¹⁷⁰

In principle, charities may support entities carrying out social enterprise activity, even if those entities are not charitable in themselves, if the charity considers in good faith that to do so is in the best interests of the charity's charitable purposes. Properly interpreted, the prohibition on private pecuniary profit does not prevent charities from providing "hand ups" rather than "hand outs" (for example in the area of affordable housing), if the benefits to individuals are merely incidental to, or part of the means of furthering, the charity's overriding charitable purposes. Cases where the private benefit generated is inconsistent with charitable status can be more than adequately dealt with by enforcing the fiduciary duties.

It may be that, in a charities law framework focussed on purposes, further clarification is unnecessary. However, given the difficulties that have been experienced, and in the interests of best equipping charities to thrive in contemporary fluid, fast-moving and global markets, clause 18(3)(c) of the draft Bill included with this report is intended to put the matter beyond doubt.

We have specifically not defined the term "social enterprise". As discussed above in chapter 5, social enterprise is appropriately conceptualised as an *activity*, rather than as a legal structure. In that sense, a definition of the term is unnecessary: the relevant criterion is whether the charity at issue considers, in good faith, that any particular type of support, whether it be financial or otherwise, to any particular kind of activity carried on by any particular type of entity, is in the best interests of the charity's own

¹⁷⁰ See, for example, the [submission](#) of The Tindall Foundation: "TTF is both a funder of, and investor in, social enterprises (or charities that operate trading businesses for charitable purposes). We recognise both the desire for charities to grow sustainable income streams in this way, but also the reluctance of some funders to fund those enterprises due to confusion about whether or not they will lose their own charitable status. The effect of this is to remove an alternative and additional source of funding from the charitable sector. It reduces the amount of grant-making, as well as the potential for 'unlocking' the balance sheets of philanthropic funders".

charitable purposes. How the recipient entity is structured, and what protections might be in place to ensure the support provided is in fact used to further the social enterprise activity, are therefore merely factors to be taken into account in decision-making by the charity. The criterion is not success of the particular activity supported: there must be space for “heroic failures”, as discussed above. The criterion is whether the decision is made, on the part of the charity, in good faith, in furtherance of its charitable purposes, in accordance with its rules, supported by the comprehensive transparency and accountability mechanisms provided by means of the charities register.

Social investment

In addition to carrying out social enterprise activity itself, or making distributions to support other entities carrying out social enterprise activity, a charity may also invest in an entity carrying out social enterprise activity in furtherance of its own charitable purposes.

Much has been written about whether trustees of philanthropic charitable trusts are legally able to make such investments, or whether their fiduciary duties require them to maximise financial returns to the trust. Such questions are important, as they can determine the course of billions of dollars of philanthropic investment.¹⁷¹

In New Zealand, recent changes made to the Trusts Act 2019 clarify that trustees of charitable trusts may have regard to their charitable purposes, and their overall investment strategy, in exercising any power to invest.¹⁷² The question is whether this provision is sufficient to “unlock” the balance sheets of philanthropy, or whether further clarification in the charities law framework would be helpful.

As noted by one submitter:¹⁷³

There is already limited capital available for organisations which operate for public benefit while the scale of funding required to solve social and environmental problems grows. Alongside this, charitable funders traditionally take a very cautious approach. Philanthropic funders, which are registered charities, should be encouraged to invest their funds for social and environmental impact by providing capital for organisations delivering public benefit ... TTF supports the ... changes ... to the Trusts Act which will allow Trustees of charitable trusts to make investment decisions in line with the mission or purpose of a Trust without offending their fiduciary duties. It is important to achieve alignment between the...intent of the Trusts Act and the Charities Act ... We're keen to see what may work and to help support social enterprise to maximise social, economic and environmental outcomes.

In England and Wales, the Charities (Protection and Social Investment) Act 2016 recently inserted a new Part 14A into the Charities Act 2011 (UK) dealing specifically with social investments. Section 292B(1) of the Charities Act provides charities with a specific statutory power to make social investments, defined in s 292A(2) as being made when “a relevant act of a charity is carried out with a view to both (a) directly furthering the charity’s purposes; and (b) achieving a financial return for the charity”. Before exercising a power to make a social investment, the trustees of a charity must “satisfy themselves that it is in the interests of the charity to make the social investment, having regard to the benefit they expect it to achieve for the charity (by directly furthering the charity’s purposes and achieving a financial return)” (s 292C(2)(c)).

Clause 18(3)(a) of the draft Bill included with this report is intended to be broadly to the same effect, by providing that a charity may make social investments, even if they might not maximise financial return.

Again, we have not defined the term “social investment”. As with other concepts (such as tikanga principles), statutory definitions may not be helpful. The intention is to turn the focus away from issues such as whether an investment is “social”, and instead simply clarify that trustees may make investments that promise less-than-maximum

171 Email correspondence with Rosalie Sheehy Cates, philanthropic advisor, 21 February 2021.

172 Trusts Act 2019 s 59(1)(a), (n). See also s 58, which provides trustees with a broad power to invest, and s 30 which provides that trustees have a default duty to invest prudently, which may be modified by the terms of the trust deed.

173 See the [submission](#) of The Tindall Foundation.

returns, provided they consider in good faith that to do so is in the best interests of their charitable purposes (and of course in accordance with their rules).¹⁷⁴

We have also used the terms “social enterprise” and “social investment” in preference to “impact enterprise” and “impact investment”, but welcome discussion and consultation as to what terminology would be most helpful.

Accumulations

As discussed above in chapter 5, the accumulation activities of charities has been elevated to one of the top 5 issues for the DIA’s review of the Charities Act.¹⁷⁵

In their background paper for the July 2018 meeting of the Tax Working Group, officials asked themselves the following question:¹⁷⁶

What alignment should exist between the timing of tax concessions and ultimate public benefit?

When Government provides a tax concession such as a donation tax credit or an income tax exemption to a charity, it may wish to ensure certain charities do not accumulate funds *instead of providing public benefit*. This may be because of concerns that benefits should be applied sooner rather than later, and/or because of *risks that money accumulated may not, in the end, all be applied for charitable purposes*. *Introducing minimum distribution requirements*, or taxing accumulated funds, would be examples of ways to achieve this. At the same time, there may be cases (for example, accumulations for an earthquake relief fund) where accumulations are appropriate.

These comments epitomise an underlying tax expenditure analysis and the clash of paradigms discussed above in chapter 2. For example, the comments proceed from an assumption that accumulating funds is inherently inconsistent with public benefit. However, there is nothing inherent in the charitable purposes test that obliges a charity to pursue its charitable purposes in a particular way: accumulating funds for a long-term capital project or to generate income for future charitable expenditure or to protect against future uncertainties etc may be just as valid ways of pursuing charitable purposes in appropriate circumstances as spending the funds upon receipt.¹⁷⁷ Whether any particular item of funding should be “spent or saved” is a decision for the governing body of a charity to make, taking into account all relevant circumstances. As discussed above in chapter 2, the fact that charities receive tax privileges does not convert their funds into government funds, or require them to forfeit control over day-to-day operational decision-making: a decision to accumulate funds may in fact be the best way for a charity to pursue its charitable purposes in particular circumstances, just as accumulating funds may at times be in the best interests of a private company.

Officials’ comments above also appear to overlook the fact that all registered charities are, by definition, subject to the non-distribution constraint and the destination of funds test: all funds of a charity must, by definition, ultimately be destined for charitable purposes. A charity cannot breach this requirement lawfully.

Nevertheless, although there is no evidence of widespread “hoarding” by charities in New Zealand, the DIA’s discussion document specifically asked whether certain kinds of charities should be required to distribute a certain portion of their funds each year, as in Australia and Canada.¹⁷⁸ Submitters strongly opposed imposing a mandatory distribution requirement, on the basis that it would be unworkable. Given the significant impact such a change would have on the charitable sector in New Zealand, extracts from submissions are set out in some detail in box 8.5:

174 Given that the duty to invest prudently is a default duty under the Trusts Act 2019, it may be advisable to provide specifically for the ability to make social investments in the charity’s trust deed. However, specific legal advice should be sought in any individual case.

175 Te Tari Taiwhenua *Resuming work to modernise the Charities Act 2005*: www.dia.govt.nz/charitiesact#Resuming-work.

176 Inland Revenue and the Treasury for the Tax Working Group *Charities and the not-for-profit sector: Background Paper for Session 13 of the Tax Working Group* 6 July 2018 at 42 (emphasis added).

177 Ontario Law Reform Commission *Report on the Law of Charities* (Toronto, 1996) at 297.

178 Internal Affairs *Modernising the Charities Act 2005: Discussion Document* February 2019 at 22.

Box 8.5 – views of submitters regarding introducing a mandatory distribution requirement:

Some asset classes can't be broken up in such a way that a proportion (like 5%) be distributed each year. If the asset is a commercial building or land, then it would be foolish to institute a percentage of the asset base be distributed as this would require the sale of the asset. If the assets held by the trust are of a liquid nature, like funds in a bank account, then the fund should be allowed to increase with the rate of inflation at a minimum so that the value of the distributions doesn't diminish over time - Alan Pace

no, transparency is sufficient – Barry Coates, Sustainable Initiatives Aotearoa

No. This only adds more compliance and requirements for charities instead of allowing charities to have flexibility to be able to change the way they operate and distribute funds in order to advance their charitable purposes. Some charitable entities (especially charitable companies) in their start-up years may not be in a position to be able to distribute funds to their parent charity or beneficiaries as they are re-investing funds in the social enterprise or business. Over time as these charities grow they will be able to change their focus and start their distributions – Caleb Firth

I do wonder if the current regime in NZ may not be already adequate – Canterbury and New Zealand Business Association

I think this is very dependent on the strategic plan of a charity. As some charities may be saving up/fundraising for a future capital/infrastructure project – Catherine Tempero

... minimum annual distribution ... can hinder growth and is inconsistent with intergenerational ownership of Māori-owned assets – Centre for Social Impact

... charities that accumulate funds for legitimate reasons ... should be allowed to continue to do so, subject to adequate disclosure – CPA Australia

We do not support a requirement for a minimum annual distribution by charities. Accumulating funds can enable charities to achieve better outcomes over a longer period, by investing in people, assets, innovation and growth. A minimum annual distribution requirement could promote "short termism" in the sector, disincentivising charities from investing in the means that enable them to have a longer-lasting impact. It could also have significant undesirable effects on charities that purposefully take long-term and inter-generational views, for example iwi entities and post-settlement governance entities. If there were to be such a requirement, there would likely need to be significant exemptions and we consider that it would be hard to achieve balance and equity under such a regime – Chartered Accountants Australia and New Zealand

For charitable funder organisations that have a perpetuity responsibility ... exercising due diligence with conservative investment funds means that the disbursement can be at a conservative level. Perpetual funds, by their nature, have a very long-term strategic view – Community Foundations of New Zealand

... charities should be autonomous and make their own decisions about the funds they accumulate. The transparency required in the financial reporting standards would enable the public to make their own decisions about the charities they choose to support – Community Waikato

... it is important for charities to be able to make their own strategic decisions, particularly if such decisions may impact on their own sustainability. A charity may have legitimate reason for building reserves ... [a minimum distribution requirement would be] regulatory over-reach – Council for International Development

Having a rule that imposes certain actions could impact a charity's survivability – Dr Rowena Sinclair:

As a family trust in perpetuity, we have concerns about such an arbitrary level. Whilst we aim to distribute 3-4% of the value of our net assets in grants each year, the Trust is a property-owning trust that has debt servicing responsibilities and needs also to accumulate funds for ongoing property maintenance and refurbishment. We after all earn our income not through donations, but from our returns from our property investments. Such an arbitrary annual level of disbursement could create issues around long-term sustainability for our Trust and no doubt many other philanthropic trusts – DV Bryant Trust

Any artificial mandatory distributions may also trigger unintended consequences. These include, but are not limited to: Encouraging inefficient financial decisions; an increasing reliance on external funders rather than the charity's own reserves; a change in ethos to short-term

thinking and behaviour, with preference given to current beneficiaries/causes at the expense of future beneficiaries/causes ... a stifling of a charity's long-term innovation and growth; incentive for charities to manipulate financial statements whereby surpluses are deliberately understated; and ignoring the fact that charities come in many different shapes and sizes and that each will need a different approach to reserves – EY Law

The Act clearly states that all charities must only use its funds to further its stated charitable purpose. This overarching restriction on charitable spending provides a sufficient assurance to the public that charitable funds will only be used for their intended purposes. Many charities and foundations exist to make distributions in perpetuity. In order to make distributions in perpetuity, charities and foundations need to be free to accumulate funds for this purpose, without the pressure of minimum annual spend amounts or increased reporting and disclosure standards – Friends of Old St Paul's Society Inc

No. This won't allow for strategic or long-term decision making ... if donors are not informed adequately they will cease support – Graham Burger

... this could be detrimental to charities with large capital requirements or those with inter-generational purposes – Habitat for Humanity New Zealand

Limiting charities' ability to weather harder times by restricting accumulating funds is counter to the purposes of the Act. The current annual reporting scheme and financial reporting requirements are sufficient to hold charities accountable, a distribution requirement would be excessive – Hamish Murray

How a charity chooses to use its funds to achieve its charitable purpose should not be interfered with by introducing arbitrary rules of annual distribution. Imposing a minimum yearly spend undermines a charity's autonomy to choose for itself how it wishes to achieve its charitable purpose and in particular determine the relative merit of distribution options which may or may not fall within any particular accounting period ... Any changes to the Act should seek to respect the autonomy of charities and empower charities' rights to further their charitable objectives in the ways that they deem best for their organisation and ultimately its beneficiaries, especially when it comes to implementing accumulation and distribution policies – IHC Foundation

... we do not support charities having to distribute a certain amount of funds each year – Institute of Directors

I suggest that those needs are best assessed by the Board or Committee of the charity rather than by legislation – Jacob Ploeg

The sector is so diverse, with so many variables, it would seem problematical endeavouring to establish rules that would be fair or readily monitored ... ultimately the value of a charity must be used for charitable purposes. Charities are best left to make their own policy in this area – John Robinson

For a funding charity, the level of reserves may fluctuate each year depending on the investment returns. These reserves carry out through the good and bad income years, allowing you to have a steady gifting programme. The quality of applications for funds, in both quantity and value, can also fluctuate widely over the years, determining how much you can give away – Judith Miller

... as we have a large property portfolio to further our purpose of providing accommodation for the elderly a large portion of our accumulated funds arises from unrealised revaluation of these assets and not in liquid funds that are available for charitable purposes ... an arbitrary requirement to distribute a portion of a charity's accumulated funds will work counter to the long term goals of the charity – Kapiti Retirement Trust

I believe the work that needs to be done here is around public education to grow the understanding around charities and how they work – rather than spending money mandating and monitoring that charities give away a certain percentage of their capital or income each year. As an example, I work for a University Foundation and there are some years when, for very good reasons, the charity does not distribute 5% of its capital. In some years it gives away far more than 5%. The Foundation holds a reasonable endowment fund of some \$40 million. It holds a second fund for current use projects that are not endowed but are invested in fixed interest instead. The endowment fund is made up of around 150 smaller funds that are pooled and invested in the endowment. Each fund within the endowment has a very specific purpose, (usually scholarship or research). These funds have often been bequested to us with very specific instructions on how the funds are to be expended, some of these quite restrictive. Expenditure from the various funds in the endowment vary year-to-year as income fluctuates and, often due to delays with research or the lack of a suitable scholarship candidates some

funds will not pay out in some years. This does however mean that these funds do not always reach the 5% threshold – and the charity overall would sometimes not reach a 5% threshold. This is exacerbated by the fact that the Foundation also fundraises for capital projects (for instance to restore a building on campus). In these cases large funds of several million are held in the current use investment pool for several years while the capital fund grows to reach a specific target. The funds are generally not handed over to the University until the building is complete – so again – this prevents it in some years giving away 5% of capital. I think most charities have similar issues that would legitimately prevent them from giving away 5% in some years (in other years they may distribute far more than 5%). It is also quite complicated to explain these various fluctuations to donors – as well as the retained income to cover inflation in most funds. The work that should be done – and the focus should be on educating the public that charities are actually quite well monitored and controlled and that they don't generally withhold funds that have been donated to them unless on the instruction of the donor - Massey University Foundation

Organisations like MAS cannot legally or sensibly disburse a fixed amount of percentage of funds per year ... Even for organisations without legal or regulatory requirements to hold minimum amounts of capital, it would be undesirable to risk exposing such an organisation to otherwise avoidable financial distress in a scenario where the organisation has a bad year or two. A minimum spend requirement would, in effect, prevent insurance businesses from viably operating as charities ... We urge the Department to be wary of its potential to drive an otherwise healthy organisation into financial unviability because it happens to have a bad year or two - Medical Assurance Society

Don't over regulate ... schools who are also registered charities need to accumulate funds for the long term care of their asset base and to ensure there are funds available for that purpose. It is the same with Churches. They need to set aside funds for future proofing their facilities, funds for changing circumstances (such as seismic strengthening, asbestos removal, etc). Iwi, we assume, have a similar intent in that they wish to grow their asset base (and hence their accumulated funds). If Parliament are going to regulate this area, then it must do so on an even basis for all Charities - Methodist Church of New Zealand Te Haahi Weteriana O Aotearoa

... charities vary widely in how and why they accumulate and distribute funds, and we do not see such a requirement as either practical or necessary - Museums Aotearoa

... we strongly submit there should be scope for a charity to ensure its operational sustainability by accumulating funds to provide not only for unexpected downturns or future projects, but also to provide steady investment income. This may well be achieved by forming an endowment-type fund for long-term stability, so legislating to specify a minimum distribution percentage of either income or assets would not be practical or reasonable in such circumstances. Provided the trustees have developed a clear policy strategy regarding accumulation of funds, each case should be treated on its merits and there should be no further legislative restriction - National Assistance Fund

... such a requirement might undermine the long term effectiveness of some charities ... it is not clear what the problem is that this proposal aims to solve - Neil Walbran

The College must sustain itself over many generations and must retain the ability to manage and grow its assets in line with its charitable objectives. The health sector is a fast-changing and politically driven environment and the College must be able to respond to sector changes and needs in a timely and appropriate manner. The College is a Tier 2 charity and currently must state its reserves /funds set aside for particular purposes, and must describe the restrictions or purposes for its reserves. The College contends that this degree of accountability is sufficient in order to meet the requirements of its charitable purpose / status"; New Zealand Council of Victim Support Groups Incorporated: "New Zealand charities are overwhelmingly prudent managers of hard-raised funds ... Charities will make the greatest impact when their financial independence is respected, allowing them to align financial decisions to their short, medium, and long term operational strategies - New Zealand College of Midwives

Care should be taken not to unduly limit freedom and flexibility to exercise judgement. Care should also be taken in proposing prescriptive expenditure/distributions requirements for private charities (or any wider class of charities), especially minimum requirements that may then become a default, low bar for such charities' expenditure/distributions - New Zealand Law Society

Investment returns vary, and while we aim for a conservative portfolio the returns will still be dependent on the general economy. While some years the return may be quite high, in other years we may have a negative return. Our distributions are also dependent on the wishes

of the donor for each fund, who may want to “spend down” the fund over a period of years, or may prefer to focus on the long term effects of their donation and would therefore like to reinvest some or all of the interest earned in a particular year. By retaining some of the interest earned within the funds we can maintain the value of the funds and their annual distributions, by protecting against inflation, and this is what we encourage donors to choose. Community Foundations both in New Zealand and overseas have as major part of their planning approached the community for bequests structured as Endowment Funds. The aim is to create a perpetual source of funding for the Community. Any law change that required charities to release a set part of their funds each year would seriously disrupt this program. Should the compulsory distribution become law we submit that Community Foundations that specialise in Endowment Funding should be given an exemption to retain the original endowment provided they distribute the income. We are therefore not supportive of a minimum annual distribution or ask that Community Foundations be specifically excluded from this requirement - Northland Community Foundation

Rather than using a percentage use an alignment to projects, outcomes and purposes - Organisation C

Charities must not be prevented from accumulating funds so long as the funds are eventually applied toward charitable purposes. The accumulation of funds is the business of no one outside of the charity - Parihimanihi Marae

Research suggests that any brightline will have unintended consequences. This is because managers will manage towards that cut-off (and may spend charity resources needlessly just to meet it) and if they do not, a very minor infraction can result in deregistration or other sanctions - Professor Carolyn Cordery

In our experience it is not only inadvisable to distribute every year, it may be impossible or impractical eg a trust settled to fund scholarships with no suitable applicants in one year; charities which hold a grant round every 2 or 3 years due to high cost involved; charities with significant fluctuations in annual income; some beneficiaries don't require income every year - Public Trust

... a mandatory distribution threshold could trigger some unhelpful behaviour and/or unintended consequences - RSM

In New Zealand, I have not seen any instances of unnecessary accumulation of funds and lack of distributions, apart from where charities are legitimately accumulating funds to a level where income can be meaningfully deployed and where a legacy project is planned - Scott Moran

Accumulation of funds is a prudent tactic and vital to mitigate against risk for a charitable entity. Distribution of income from invested funds is an important source of annual revenue and use of such funds can protect the charity's ability to deliver its purpose during a significant economic downturn or unforeseen events that impact other income streams such as fundraising. Following the structure change to become one national, united organisation in 2017, the focus of SPCA has evolved from a primary focus on rescue, rehabilitation and rehoming of companion animals to a wider and longer-term view of the animal welfare issues facing New Zealand. To achieve significant improvements in animal welfare outcomes, significant investment will be required. To achieve these goals SPCA will need to both generate and accumulate funds as part of a longer term strategy that is focussed on prevention. It is SPCA's contention that charities should continue to be able to raise funds for charitable purpose, to build endowment funds for future capital or other works that achieve public benefit, and to run businesses in order to generate funds to deliver on the organisation's mission - SPCA

... many charities apply funds directly to charitable purposes and do not necessarily “distribute” them. The cost of upkeep of St George's hospital buildings used by the patients on a daily basis or payment of wages to medical staff are just a couple of examples of St George's applying its funds for charitable purposes. It would not be appropriate to require such charities to make “distributions” to others – such distributions would detract from their ability to carry on their operations in furtherance of their charitable purposes ... accumulation of St George's non-current assets is by necessity – inherently all hospitals have significant accumulations of non-current assets, in particular buildings and medical equipment. The capital cost of hospitals is considerable and not fully understood by many; it is well known that successive governments have been challenged by the cost of replacing and upgrading the nation's hospitals. Charities come in many different shapes and sizes and each needs to have a different approach to managing their accumulations and reserves. St George's is a large charity which needs to accumulate funds and set aside reserves to deal with unexpected events and to buy/upgrade capital assets ... the current assets that St George's had accumulated prior to the earthquakes enabled the staff to reopen St George's Hospital within 2 weeks of the earthquakes. Any artificial

mandatory distributions may also trigger unintended consequences across the charities' sector, such as: an increasing reliance on external funders rather than the charities' own reserves; a move to short-term thinking at the expense of long-term sustainability and growth; disincentive to perform efficiently and effectively; and for many an inevitable inability to continue to exist as viable entities ... Charities with appropriate and robust governing structures like St George's should be left to carry on their functions in the manner their governing body determines as appropriate - St George's Hospital

... this would be overbearing regulation - Surf Life Saving New Zealand Inc

Restrictions on the accumulation of funds or compulsory minimum distributions could be contrary to intergenerational investment - which is a core principle underpinning Māori organisations - Te Hunga Rōia Māori o Aotearoa

... it is too prohibitive. Many charities that take multiple years to raise sufficient reserves for large infrastructure projects such as the Auckland City Mission (took 20 years of accumulated reserves from Bequest income to provide part of the funding required to build the new and much needed City Mission - The Fred Hollows Foundation NZ

THPNZ believes that reporting requirements that clearly outline the purpose and use of the reserves should be satisfactory in providing donors required information - The Hunger Project New Zealand

Charities should be left to distribute their funds at their own discretion. The role of the regulator is oversight, not control - The Presbyterian Church of Aotearoa New Zealand

Financial future-proofing must be as accessible to charities as it is to the private sector. Expecting and even requiring the charities sector to spend when it may not be wise to do so is a symptom of a wider cultural problem regarding charities and their funds in which charities are trusted less than businesses or government agencies to spend their funds wisely. In short, no, this kind of requirement has too many risks and not enough benefits to justify. Increased transparency and understanding of the reasons behind accrual, and Board discretion to question or challenge this accrual is far more valuable for all concerned - The UpsideDowns Education Trust

... can't see any good reason for this - Thomas Stratton

This is control, not guidance. Setting a distribution level created difficulties for charities building up funds for a specific purpose and would artificially delay the implementation of that purpose. If a charity meets the requirements of registration, it should be permitted to hold funds without compulsory distribution requirements being imposed, as long as its charitable purpose is continuing - Trevor Goudie

Absolutely not; there is a lot of complexity with any charity that has accepted gifts on an endowment basis and any set of rules will inevitably conflict with some of the arrangements between the donor and the charity - University of Auckland Foundation

... we urge the policy-makers not to treat charities as an homogenous group. The nature of the mission or purpose for which they were founded, will dictate the extent to which the building of reserves and retention for periods of time, necessary. In essence "One size does not fit all" - University of Canterbury Foundation

... no, as it depends on the charity's purpose - Wintec Student Residence Trust

Now more than ever charities need to plan for the future, prepare for unexpected occurrences and protect their future operation as they see fit. It should be their members who decide, via due process, whether they are meeting the needs of their intended community(ies) or not - YWCA of Aotearoa NZ, YWCA Whangarei, YWCA Auckland and YWCA Hamilton, Boards and Managers.

See also the submissions of Creative New Zealand (endorsed by a further 17 organisations); Diederick Meenken; Dr Michael Gousmett; Friends of Arataki and Waitakere Regional Parkland Inc; Grace Church Gisborne; Kapiti Youth Support One Stop Shop Trust; LEAD; Manukau Christian Charitable Trust; Momentum Waikato; Multiple Sclerosis New Zealand Inc; New Zealand Breastfeeding Alliance; New Zealand Portrait Gallery Trust; Peter Hays; Peter Sharpe; Renewal Trust Inc; Retirement Villages Association; Richard Easton; Royal New Zealand Ballet; Royal New Zealand Plunket Trust; St Anselm's Union Church; St Pauls Lutheran Church; Socialink Tauranga Moana; Stopping Violence Services; Summit Road Society Incorporated; The Institute De Notre Dame Des Missions Trust Board; The Methodist Church of New Zealand Te Haahi Weteriana O Aotearoa Auckland Fiji Methodist Parish (Tabacakacaka); The Ozanam House Trust; Thomas E Stazyk; and Wellington Youth Orchestra Inc; Whaiora Whanui Trust.

A key difficulty with any minimum distribution requirement is its complexity.¹⁷⁹ Its three components (the percentage figure used in the calculation; the revenue base against which the percentage figure is applied; and the types of expenditures eligible to satisfy the requirement) are inherently arbitrary,¹⁸⁰ and its application can have a distortionary effect. For example, in a climate of low interest rates, a minimum distribution requirement may force charities to sell real property that is in fact needed to further their charitable purposes, purely to enable them to meet an arbitrary rule. Compounding the difficulty is that some charities may be legally unable to sell such property: it was relatively common in the previous century for settlors to “hardwire” charitable trusts into perpetuity by requiring their capital to be preserved; the trust deeds of many older charitable trusts specifically prohibit the distribution of capital. Often, these trust deeds will not have clauses permitting amendment of the trust deed or permitting the trust to be terminated/wound up. If such a charitable trust was not able to earn enough income to meet a percentage minimum distribution requirement, its trustees would not legally be able to sell or liquidate capital assets in order to meet the threshold. Neither would they be able to amend the trust deed to enable them to do so. Such trustees would be stymied, and forced into an impossible situation of inability to comply with the law.

As discussed above in chapter 5, a key factor driving mandatory distribution requirements in other jurisdictions has been a desire to prevent abuses, on the basis that endowed charities were not subject to the same level of scrutiny as entities that receive donations from the public.¹⁸¹ In the United States, the minimum distribution requirements were introduced to address concern that private foundations were being used as a means of avoiding capital gains tax on intergenerational wealth transfers. In Canada, the minimum distribution rules were directed to foundations accumulating income with the intention of distributing it to their proprietors on dissolution. However, the applicability of such concerns to a New Zealand context requires critical examination: New Zealand has neither a comprehensive capital gains tax nor an inheritance tax, but does have comprehensive rules protecting against undue private benefit supported by comprehensive disclosure rules.¹⁸² There is no evidence that New Zealand charities are engaging in “abuse” by accumulating, certainly not to the extent that would justify imposing blunt, blanket rules, when the vast majority of which are good actors.

It is often said that charity is a “verb” (a “doing word”): accumulating funds is unlikely to be consistent with a charity’s charitable purposes if it is done for its own sake. However, as noted by the Ontario Law Reform Commission, a minimum disbursement regime is not necessarily the best method of ensuring that all charities are in fact devoted to their charitable purposes; instead, it recommended more reliance be placed on direct supervision and the enforcement of more general standards,¹⁸³ such as an “exclusively charitable purpose” standard.¹⁸⁴ In other words, a focus on purpose, supported by enforcing the fiduciary duties.

179 Ontario Law Reform Commission *Report on the Law of Charities* (Toronto, 1996) at 364.

180 Ontario Law Reform Commission *Report on the Law of Charities* (Toronto, 1996) at 367, 304.

181 Ontario Law Reform Commission *Report on the Law of Charities* (Toronto, 1996) at 261, 273;

A O’Connell *Taxation and the not-for-profit sector globally: common issues, different solutions* in M Harding (ed) *Research Handbook on Not-for-profit law* (Edward Elgar, UK, 2018) 388 at 411. See also The Boston Globe “Some officers of charities steer assets to selves” 9 October 2003: archive.boston.com/news/nation/articles/2003/10/09/some_officers_of_charities_steer_assets_to_selves/.

182 Including the destination of funds test, which means funds impressed with charitable purpose must always by definition be destined for charitable purposes or the charity would not be eligible for registration in the first place, buttressed by s HR 12 of the Income Tax Act 2007, which requires all assets of a deregistered charity to be distributed to charitable purposes within 12 months of deregistration or the charity must pay tax on the balance.

183 Ontario Law Reform Commission *Report on the Law of Charities* (Toronto, 1996) at 289.

184 Ontario Law Reform Commission *Report on the Law of Charities* (Toronto, 1996) at 297, noting that “there is nothing in the exclusively charitable purposes test that obliges a charity to pursue its charitable purposes in a particular way. Investing donations to generate income for future charitable expenditure is just as valid a way of pursuing charity as spending the donations upon receipt”.

We note that the rules imposing minimum distribution requirements on “private ancillary funds”¹⁸⁵ in Australia were introduced *before* the charities register and the ACNC were established.¹⁸⁶ Most countries in fact simply require disclosure of financial information, including surplus, and rely on public scrutiny to ensure funds are applied in pursuit of charitable purposes in a timely manner.¹⁸⁷

In 2013, the New Zealand Government enacted financial reporting reform described as “the most significant change in the financial reporting requirements imposed on charities in New Zealand’s history”:¹⁸⁸ at this time, registered charities became required to provide comprehensive annual financial and non-financial information and make it publicly available on the charities register. The new financial reporting rules apply for reporting periods that commence on or after 1 April 2015, meaning that filing of such information commenced from around 30 September 2016.¹⁸⁹ There is now a more than adequate basis to support “questions from the monitoring authority”¹⁹⁰ as to how any particular decision by a charity to accumulate funds has been made in good faith in furtherance of the charity’s stated charitable purposes (and otherwise in accordance with its rules). Any registered charity should be aware that, as a condition of its registration, it may be called upon to demonstrate how any such decision has been so made. However, provided it can do so, there is no reason for the state to intervene, and no need for additional rules.

Given the misconceptions that have been experienced to date, clause 18(3)(d) of the draft Bill included with this report is intended to make this fundamental principle clear. However, we welcome discussion and consultation as to whether such clarification would be helpful.

Advocacy

As discussed above in chapter 4, in principle, charities in New Zealand are free to advocate in furtherance of their charitable purposes without limit, even if their advocacy reaches the level of a purpose.¹⁹¹ In this respect, New Zealand law differs from those jurisdictions, such as England and Wales, that do recognise a political purpose exclusion. Clause 18(3)(e) of the draft Bill included with this report is intended to implement recommendation 4.1(i) and (ii) above, by making it clear that the only restrictions on charities’ advocacy activity in New Zealand are those contained in the general law and in the charity’s constituting document. The clause aims to do this by specific reference to the various categories of “political purpose exclusion” that have been the cause of so much difficulty in New Zealand.

A concern might be raised that such clarification might lead to the entry, as charities, of political parties or lobbying groups whose sole purpose is to advocate for a specific cause. However, there is no cause for concern in this regard. As noted by the Consultation Panel on the Political Activities of Charities in Canada,¹⁹² the “check” on such an outcome resides in the registration process: only entities with purposes that meet the definition of “charitable purpose” are eligible for registration. Once an entity’s purposes are accepted

185 Australian Tax Office *Public Ancillary Funds: Minimum annual distribution requirements*

23 July 2020: www.ato.gov.au/Non-profit/Getting-started/In-detail/Types-of-DGRs/Public-ancillary-funds/?anchor=mindist.

186 Private ancillary funds, originally known as prescribed private funds, were originally created in 2001: research.qut.edu.au/australian-centre-for-philanthropy-and-nonprofit-studies/research/celebrating-20-years-of-private-ancillary-funds/ and www.ato.gov.au/non-profit/getting-started/in-detail/types-of-dgrs/private-ancillary-funds---trustee-guidance/.

187 A O’Connell “Taxation and the Not for profit Sector globally: common issues, different solutions” in M Harding (ed) *Research Handbook on Not-for-profit law* (Edward Elgar, 2018) 388 at 410.

188 C Fisher, *New Charity Financial Reporting and Audit Requirements – an Opportunity for Alignment?* 20 August 2015: www.rsm.global/newzealand/news/new-charity-financial-reporting-and-audit-requirements-opportunity-alignment.

189 Annual returns and accompanying financial statements are required to be filed 6 months after balance date, see Charities Act 2005 s 41(1).

190 Inland Revenue Department *Tax and charities, a government discussion document on taxation issues relating to charities and non-profit bodies* June 2001 at [9.8].

191 *Re Greenpeace of New Zealand Inc* [2015] 1 NZLR 169 (SC) at [3].

192 *Report of the Consultation Panel on the Political Activities of Charities* 31 March 2017, recommendation 4, rationale.

as charitable, all of its activities must be carried out in good faith in furtherance of those purposes and in accordance with its rules. In other words, as with any activity, all advocacy activity of a charity must be carried out in furtherance of its stated charitable purposes. If it is, then there is no difficulty.¹⁹³

In addition, as also discussed above in chapter 4, if, beyond an entity's constituting document and the general law, there are to be any further restrictions on charities' activities, such activities need to be identified in advance and articulated in legislation "surgically". There is only one activity that immediately presents itself as requiring proscription purely by virtue of charities' status as charities: there is consensus around the common law world that charities may not be *partisan*, that is, they may not engage in activities promoting or opposing a political party, elected official or candidate for political office. In other words, charities law inherently maintains a boundary between charities and political parties.

Clause 18(4) of the draft Bill included with this report is directed to this end, implementing recommendation 4.1(iii) above.

In these ways, the system incorporates inherent checks and balances to prevent abuse, while also protecting charities' independence and their important advocacy role in a democratic society.

Partisan purposes or activities

A question arises in this context as to whether a partisan prohibition should preclude partisan *purposes* (the approach taken in Australia and Scotland),¹⁹⁴ or partisan *activities* (the approach taken in Canada).¹⁹⁵ Given that the political purposes exclusion was directed to political purposes rather than activities, in a charities law framework focused on purpose one might expect the focus to be on partisan *purposes*.

However, advocacy is inherently an activity. Difficulties inherently arise in determining when partisan activity has crossed a threshold to reach the level of a purpose, as highlighted by the 2018 review of charities legislation in Australia:¹⁹⁶

There have been a number of cases that highlight the ambiguity around the threshold between issues-based advocacy which the vast majority of charities engage in, and activities undertaken to achieve a purpose which may turn into a political purpose in its own right, and could constitute a 'disqualifying purpose'. This is a contested area of charity law where litigation would lead to greater clarity and certainty for the sector.

... There is a role for charities in advocacy to promote or oppose changes to any matter of law, policy or practice that is linked to their charitable purpose. However, there is ambiguity around the threshold ...

In addition, partisan activity may be problematic long before it meets the threshold of having become a purpose in itself. For example, a charity distributing pamphlets for one particular political party, or publicly expressing support for a particular political party or candidate for public office as opposed to specific policies proposed, is likely to stray too far into political territory: charities must be careful to be, and be seen to be, politically neutral. The line between supporting policies that further a charity's own charitable purposes, and supporting political parties per se, may not be clear in all cases, but the best protection for charities is to ensure that all decisions are made in good faith in furtherance of their stated charitable purposes in accordance with their rules. In other words, provided their focus is on their own charitable purposes, and they do not promote

193 *Re The Foundation for Anti-Aging Research* (2016) 23 PRNZ 726 (HC) per Ellis J at [82] - [88].

194 In Australia, the limitation only applies once the partisan activity has reached the level of a *purpose*: Charities Act 2013 (Cth) s 11(b). Scotland similarly proscribes charities from having a *purpose* of advancing a political party: Charities and Trustee Investment (Scotland) Act 2005 s 7(4)(c).

195 Section 149.1(6.2) precludes a charitable organization from devoting "any part of its resources to the direct or indirect support of, or opposition to, any political party or candidate for public office". The recommendation of the Consultation Panel on the Political Activities of Charities that this proscription be extended to "elected officials" has not been legislatively implemented to date ([Report of the Consultation Panel on the Political Activities of Charities](#) 31 March 2017, recommendation 3(c)).

196 P McClure AO, G Hammond OAM, S McCluskey, Dr M Turnour [Strengthening for purpose: Australian Charities and Not-for-profits Commission – Legislative Review 2018](#) 31 May 2018 at 82 - 83.

or oppose a particular political party, elected official, or candidate for political office, they should be able to robustly engage in policy debates without fear of losing their registered charitable status.

On that basis, we respectfully differ from the approach taken in Australia and Scotland and would proscribe partisan political activity rather than purpose. However, we welcome discussion and debate on this issue.

Evaluating party policies

A number of submitters to the DIA's review of the Charities Act made the following point:¹⁹⁷

We strongly support PNZ's comments that there needs to be changes to the law to ensure that charities can advocate without fear of losing their charitable status. This should not extend to promoting political parties (ie advocating a partisan preference) but should, for example, enable charities to share an evaluation of party policies that connect to the purpose, activities or operation of their charity.

In principle, sharing an evaluation of party policies in good faith in furtherance of a charity's charitable purposes is not inherently "partisan", and therefore would not fall within the proscription in clause 18(4), even though it might indirectly promote or oppose a particular political party, elected official or candidate. However, given the potential uncertainty in that regard, we recommend the legislation articulate this point more clearly to provide more protection for charities, as for example Australia has done.¹⁹⁸ We welcome discussion and consultation on this point also.

Hate speech

The first draft Bill that was circulated for comment in 2020 included "hate speech", as a particular proscribed activity for charities, specifically set at a very high threshold such as incitement to violence or the equivalent.

On reflection, hate speech is governed by the general law, and applies equally to charities as it does to any other citizen.¹⁹⁹ In addition, cl 12(a)(ii) of the draft Bill included with this report specifically makes clear that benefits must be weighed against detriments or harms flowing from the carrying out of a charitable purpose in assessing whether the purpose operates for the public benefit.

On these bases, specific additional proscription for "hate speech" is not considered necessary in a charities law framework and has therefore not been replicated in the draft Bill included with this report.

Register of charities

The charities register is the bedrock of a charities law framework:²⁰⁰ in New Zealand, the charities register has significantly improved the financial accountability and transparency of the registered charitable sector,²⁰¹ allowing any member of the public to establish for themselves whether any particular charity is worthy of their support.

197 See for example the [submissions](#) of Age Concern (Tauranga); Auckland Medical Research Foundation; College Estate Charitable Trust; Dave Henderson; DV Bryant Trust; Community Trust South; Epilepsy Waikato Charitable Trust; Habitat for Humanity New Zealand; Methodist Church of New Zealand Te Haahi Weteriana O Aotearoa; National Assistance Fund; Parry Field Lawyers; Perpetual Guardian; Pirongia Te Aroaro o Kahu Restoration Society Incorporated; Ross Beever Memorial Mycological Trust; Steiner Education Development Foundation; Sustainable Initiatives Fund; Taieri Community Facilities Trust; The Gift Trust; The Tindall Foundation; Tiri Porter; Wayne Francis Charitable Trust; WEL Energy Trust; Weleda Charitable Trust; and of course Philanthropy New Zealand.

198 The partisan prohibition in Charities Act 2013 (Cth) s 11(b) is accompanied by the following example: "Paragraph (b) does not apply to the purpose of distributing information, or advancing debate, about the policies of political parties or candidates for political office (such as by assessing, critiquing, comparing or ranking those policies)".

199 At the time of writing, New Zealand is engaging in a review of its hate speech laws. See Ministry of Justice *Proposals against incitement of hatred and discrimination in Aotearoa New Zealand*: www.justice.govt.nz/justice-sector-policy/key-initiatives/proposals-against-incitement/ (although progress may have stalled pending the 2023 election).

200 Dr O Breen, Rev Dr L Carroll, N Lavery *Independent Review of Charity Regulation Northern Ireland* January 2022 at 121.

201 [Submission](#) of Oxfam New Zealand.

While some jurisdictions have struggled with legacy paper-based tax systems, New Zealand, like Australia, has been fortunate to have been “digital by default”.²⁰² Submissions expressed a great deal of satisfaction with New Zealand’s charities register, which is very good by world standards. However, they also noted considerable scope for improvement. As one commenter noted:²⁰³

[The charities register] is an incredible resource but not enough people use it or understand it. We need it to be accessible and we need a team of people regularly synthesising the information on the register to create a national picture of our charitable sector.

Now that the charities register has been in place in New Zealand for 15 years, it is timely to consider whether its contents are fit for purpose or could be improved. It is also clear there is a need and considerable scope to make better use of charities register information.

Contents of the register

Better data about the charitable sector enables donors and philanthropists to make more informed giving decisions, and allows governments to encourage volunteering and philanthropic giving more effectively: good data is essential in enabling good policy making, implementation and evaluation. There is an immense amount of rich and valuable data contained on the charities register, but it is currently poorly presented and difficult to analyse.²⁰⁴

Similar concerns have been raised in Canada:²⁰⁵

... while there is considerable available data, there is a lack of coordination, integration, and comparability of data to support policy and program design, targeted research, and public awareness of the economic and programmatic impacts of the sector ...

There is a need to think strategically about the resources and capacity of both the regulator and the sector for data collection, reporting, and compliance. There is a need to identify how information can be shared for comparability, validity, quality, timeliness, representativeness, and accessibility ...

Within the sector itself, there is a lack of human capacity, as many charities are run by few staff and use volunteers to maintain their data from year to year. The use of paper forms and the need for CRA manual processing of paper data collection means long delays in availability of the T3010 data, and the greater possibility of human error, as data is entered incorrectly or omitted. More broadly, there is disappointment over the fact that federal data on the economic contributions of the charitable and non-profit sector are missing or not being collected in a consistent manner by Statistics Canada ...

We believe that more research and thinking needs to go into how to improve data collection and dissemination for the non-profit sector more broadly and we will continue to consult on this issue.

In addition, we heard that increasingly, organizations want to use CRA data to assist in ‘telling the story’ of the sector. The category codes used by the CRA to identify charities on registration and to pull data from the T3010 data set need to be revisited if they are to be helpful in this important kind of analysis. For instance, a First Nations charity would be categorized under ‘community services’, and then only as ‘Aboriginal programs’. This is clearly not accurate or adequate to capture the work that First Nations or other Indigenous charities might be doing. Similarly, if a charity is a daycare, it is ‘lumped in’ with nurseries. The outmoded label of ‘battered women centers’ still exists as a category rather than women’s shelters or domestic violence shelters. It is important for the CRA to revise these out-of-date categories on an urgent basis with advice from the sector in order to allow charities to identify their work and mission more appropriately and to allow for the collection and analysis of data that is more accurate. ...

Without reliable, timely information, the Government is challenged to make evidenced based decisions ... The charitable sector will be a critical partner to the Government in economic recovery and in addressing the social vulnerabilities that have been revealed by the COVID-19 crisis. According to Imagine Canada, there are two million workers in the

202 M McGregor-Lowndes and B Wyatt (eds) *Regulating Charities: the Inside Story* (Routledge, 2017) at 274.

203 Email correspondence with Tessa Vincent (3 September 2021).

204 As noted, for example, in the [submission](#) of SPCA.

205 Advisory Committee on the Charitable Sector [Report #2 – Towards a federal regulatory environment that enables and strengthens the charitable and non-profit sector](#), April 2021 “The Data Landscape, Data Gaps”.

charitable sector. The Canadian Women's Foundation estimates that 80% of these workers are women. An intersectional approach to understanding the sector is essential; without employment diversity information, the Government and the sector have limited capacity to apply this intersectional lens.

Similarly, the Senate Committee on the Charitable Sector noted that:²⁰⁶

The inadequacy of information about the sector prevents evidence-based decisions needed to ensure the sustainability of individual organisations and the sector as a whole.

In terms of the contents of the register, we were surprised to find that England and Wales do not require the constituting documents of charities to be included on the charities register.²⁰⁷ In a framework of charities law focused on supporting a charity's fidelity to its charitable purposes in accordance with its rules, it is critical that up-to-date copies of charities' governing documents are available for viewing on the publicly searchable register.

Additional information

Our research has indicated a number of types of information the charities register might usefully incorporate.

For example, in New Zealand, there is a lack of visibility as to why many thousands of charities are being deregistered. The charities register should clearly disclose the reason why any particular charity has been deregistered.

In the context of deregistration, a number of submitters to the DIA's review strongly supported the following submission made by Philanthropy New Zealand:²⁰⁸

Given the significant financial impact of deregistration for a charity – and to also provide more certainty for funders of charities – we strongly recommend that the charitable status of a charity remains in place until all appeal decisions have been exhausted. This should not require a separate application to the Court.

As discussed above in chapter 6, a charity that has been deregistered automatically retains access to the charitable income tax exemption until the "day of final decision".²⁰⁹ However, apart from their tax status, charities are required to apply for an interim order to retain their *registered* status pending determination of the appeal.²¹⁰ A charity that appeals a deregistration decision will already be before the High Court, and the writer is not aware of any application for interim reinstatement having been declined to date.²¹¹ Many of the recommendations contained in this report are intended to reduce the subjectivity around decision-making as to whether any charity continues to qualify for

206 Report of the Special Senate Committee on the Charitable Sector *Catalyst for Change: A Roadmap to a Stronger Charitable Sector* June 2019 at 127.

207 Lord Hodgson of Astley Abbotts *Trusted and Independent: Giving charity back to charities – Review of the Charities Act* July 2012 at 142: "There is a view that copies of all charity governing documents should be available for viewing on the publicly searchable register, in the same way as charity accounts, to increase transparency. While this would in many ways be helpful, it would also have resource implications for the Commission in relation to updating the register and would add a regulatory burden for charities, albeit a very small one. There are also practical challenges where documents are very long or have been frequently amended. The benefits and disadvantages of this idea will need to be carefully explored pending any further action".

208 See, for example, the [submissions](#) of Age Concern (Tauranga); Auckland Medical Research Foundation; Carolyn Bates; College Estate Charitable Trust; Community Trust South; Council for International Development; Dave Henderson; DV Bryant Trust; Epilepsy Waikato Charitable Trust; JR McKenzie Trust; Kensington Swan; Momentum Waikato; National Assistance Fund; Perpetual Guardian; Pirongia Te Aoro o Kahu Restoration Society Incorporated; Ross Beever Memorial Mycological Trust; Seed the Change | He Kāhano Hāpai; Taieri Community Facilities Trust; The Tindall Foundation; Tiri Porter; Todd Foundation; WEL Energy Trust; and Weleda Charitable Trust.

209 Defined in Income Tax Act 2007 s YA 1 of the as "the day on which all reasonably contemplated administrative appeals and court proceedings, including appeal rights, are finalized or exhausted in relation to the person's charitable status". See s CW 41(1)(aa).

210 Charities Act 2005 s 60.

211 Such interim orders were made in *The Plumbers, Gasfitters and Drainlayers Board v Charities Registration Board* [2013] NZHC 1986 at [7], *Re Queenstown Lakes Community Housing Trust* [2011] 3 NZLR 502 (HC) at [3], [80], *Re Family First New Zealand* [2015] NZHC 1493 (30 June 2015); (2015) 4 NZTR 25-014 at [13]. By contrast, income tax exemption may remain in place automatically under Income Tax Act 2007 s CW 41(1)(aa) pending determination of the appeal.

registration, which should reduce the number of deregistrations.²¹² These factors should also help clarify that funders can support entities that are not themselves registered without putting their own registration at risk, if they consider in good faith that to do so is in the best interests of their own charitable purposes. On that basis, further specific legislative provision for registration to remain in place pending determination of an appeal may not be needed, although we welcome further discussion and consultation on this point.

However, the charities register should include details of whether a charity has appealed or is appealing any decision under the Act, and any court orders, including interim orders, made in respect of the entity under the Act.

We also recommend that the charities register disclose whether the entity identifies as a kaupapa Māori charity, as discussed above in chapter 7.

In addition, we recommend that binding rulings are disclosed on the charities register. Although private binding rulings are normally private, a charities law framework demands transparency, particularly where a private binding ruling enables one charity to remain on the register when similar charities cannot. As discussed further below, disclosing such private binding rulings would improve trust and confidence in the charities law framework and therefore in charities more generally.

In Australia, the ACNC has recently carried out a project to enhance the Australian charities register, resulting in the launch of a new “charities marketplace”.²¹³ It would be useful to explore how similar initiatives might provide benefits in a New Zealand context.

We welcome further discussion and consultation on what other information would be helpfully included in the charities register. It is also important that consideration is given to how better use might be made of the rich information available on the charities register. For example, expending resources in interrogating the data on the charities register and producing the right kinds of useful reports to provide analysis and insights in an easily digestible format about the sector allow for greater understanding of trends and more evidence-based decision-making.²¹⁴

Recommendation 8.12:

That, as part of the independent first principles review recommended in recommendation 1.0, a comprehensive data project is undertaken to analyse what improvements could be made to the contents of the charities register, and how better use could be made of charities register information.

Public awareness of the register

Our research has raised questions as to the level of public awareness of the register.

Given the potential for the charities register to contribute to evidence-based policy-making about an important sector that impacts almost every aspect of New Zealanders’ lives, together with the importance of public scrutiny of charities in a legal framework based on accountability rather than “regulation”, we strongly recommend that a public awareness campaign is conducted about the existence and benefits of the charities register.

Recommendation 8.13:

That a public awareness campaign is conducted to raise awareness, within the public and government, of the existence, purpose and benefits of the charities register.

²¹² Approximately half of all deregistrations are for failure to file an annual return. In addition, many charities will voluntarily deregister because they are closing or merging with another charity. However, the level of deregistration for reasons of controversial jurisprudential interpretation of the definition of charitable purpose remains very high. See the discussion in Legalwise “[Significant issues with Review of Charities Act 2005](#)” 10 January 2019.

²¹³ Australian Charities and Not-for-profits Commission *Official launch of the enhanced charity register* 3 March 2022: www.acnc.gov.au/media/news/official-launch-enhanced-charity-register

²¹⁴ The JB Were *New Zealand Cause Report* September 2021 provides an example of the use that can be made of the rich data available on the charities register.

Purpose of the register

We also recommend that the legislation clarify that the purpose of the charities register is to provide a forum for accountability, to help registered charities, both individually and collectively, demonstrate to their stakeholders and the public generally that they are worthy of support. Clause 20(a) of the draft Bill included with this report is directed to this end.

We have also altered the position of the charities register within the statutory framework in order to reflect its importance.

Restrictions on access to the register

Currently, s 21(3) and (4) of the Charities Act (and ss 231(3) and (4) of the Incorporated Societies Act 2022) enable the respective registrars to refuse access to the register or suspend its operation, in whole or in part, if the registrar considers “it is not practical to provide access to the register”. While the need to take the register down for routine maintenance, or in response to a *force majeure* event, from time to time is understood, a number of commenters queried the rationale for such an open-ended ability and recommended, if the provision is to be retained at all, that the circumstances in which the register can be suspended be much more tightly circumscribed. Clause 19(3) and (4) of the draft Bill included with this report is directed to this end, and also to encourage the registrar to be proactive in explaining the issues behind such a major problem. We welcome discussion and consultation on the precise circumstances in which the register might be able to be suspended.

In addition, the charities register contains a considerable amount of personal information. As noted in the submission of the Privacy Commissioner on the Incorporated Societies Bill,²¹⁵ it is important to balance the public’s legitimate needs to have access to personal information about those involved with registered charities, with the need to limit that access only for legitimate purposes, and to take account of personal safety and privacy.

Section 25 of the Charities Act 2005 currently provides that Charities Services may remove or omit information from the charities register, and may restrict public access, if Charities Services considers that to do so is “in the public interest”. Restrictions on public access are subject to any terms and conditions that Charities Services thinks fit (s 25(3)).

In light of the Privacy Commissioner’s submission, the equivalent provision in the Incorporated Societies Bill was amended to expressly allow the registrar to restrict public access to information in circumstances of protection orders and other name suppression mechanisms.²¹⁶ We have incorporated similar amendments into cl 23 of the draft Bill included with this report.

A number of commenters queried the power to remove or omit information, as opposed to simply restricting public access:²¹⁷

... I think the power should be limited to preventing public access to the information on the register, rather than removing or omitting it from the register entirely. The register is meant to be ‘the one source of truth’ for regulated entities, and allowing things to be removed rather than hidden is problematic. Removal/omission should be limited to circumstances where that is required by some other statute or a court order etc.

In practice, decisions to withhold information under s 25 are generally made in very limited circumstances only, such as to protect safety (eg the physical location of a safe house) or the privacy of individuals (eg the salary of a named individual).²¹⁸ In a framework based on accountability, rather than regulation, it is appropriate to err on the side of transparency except where personal safety or individual privacy genuinely requires otherwise. It is also important for statistical analysis that the amount of information withheld from the register is minimised.

215 Submission of the Privacy Commissioner to the Select Committee considering the Incorporated Societies Bill 31 August 2021: <www.parliament.nz/resource/en-NZ/53SCED_EVI_109429_ED1415/498c1209fb4c58983907d693d4f4fa54f09f028e>.

216 Incorporated Societies Act 2022 s 234.

217 Comments received on the draft Bill from Andrew Ecclestone, 24 August 2020.

218 See Charities Services [Restricting information / Te here mōhihihi](#).

For these reasons, we have suggested retaining the power to remove or omit information in cl 23 of the draft Bill included with this report, but welcome discussion and consultation on this point.

We also welcome discussion as to whether the legislation should specify parameters around legal-decision making in the context of the current very broad power to restrict access subject to terms and conditions under s 25(3). Should there be more transparency around decision-making in this area? For example, should such decisions be reported by the agency responsible for administering the Charities Act in the same way that other decisions are reported? Should the process for decision-making in this area be more clearly set out? Should there be a time limit, and should the agency responsible for administering the Charities Act be specifically required to record the reasons for any prevention or restriction at the time it takes the action, so that it is capable of responding meaningfully to any challenge? We welcome discussion and consultation on these points.

Searching the register

Sections 27 and 28 of the Charities Act, and ss 237 and 238 of the Incorporated Societies Act 2022, set limits around searches of the respective registers.

The provisions appear directed at preventing the gathering of personal information in such a way as would breach the Information Privacy Principles in the Privacy Act 2020. As one submitter noted:²¹⁹

From time to time information is extracted from that contained on the public record and this information is used for purposes for which it is not intended. The Church has found that email addresses and names of charities are being extracted and then mass mail outs are being sent out to charities ... We can see no reason why email addresses and other contact information should be able to be extracted from the public record.

However, a number of commenters queried the need to proscribe such gathering under the Charities Act at all when it is already proscribed under the Privacy Act 2020. Consolidating privacy concerns into the Privacy Act approach may assist with future-proofing charities legislation, as privacy concerns can and do change over time.

For the purposes of consultation, we have followed the model provided by the current Charities Act and Incorporated Societies Act 2022, but welcome consultation and discussion on this point.

We also recommend incorporating additional search criteria that may assist in legitimate decision-making, such as the subsector in which the registered charity operates, activities the registered charity undertakes, area of operation of the registered charity and whether the organisation is a kaupapa Maori charity. The work of the ACNC in enhancing the Australian charities register is relevant in this regard. We welcome consultation as to what criteria would be helpfully included.

We also note that, in submitting on the Incorporated Societies Bill, the Privacy Commissioner recommended there be some means of enforcing compliance with the search purposes provision. The Privacy Commissioner also recommended that technical constraints are put in place to prevent scraping the incorporated societies register by bots. Attention should be given to similar matters in the context of the charities register also as part of the independent first principles review recommended in recommendation 1.0.

²¹⁹ [Submission](#) of The Methodist Church of New Zealand Te Haahi Weteriana O Aotearoa at 17 - 18.

Registration

Voluntary registration

In some jurisdictions, it is compulsory for all charities to register.²²⁰ A comprehensive registration system enhances sectoral visibility by placing all charities on the public radar,²²¹ helping to reveal the breadth of charitable work delivered to and by communities and demonstrate how charities provide crucial pillars for society's good functioning; a comprehensive register also helps to map the charitable sector for policy development and funding purposes.²²²

However, the obligations of registration can be significant. For this reason, some jurisdictions have softened a compulsory registration requirement through exceptions or exemptions: for example, small charities are not required to register in England and Wales (although many do so voluntarily).²²³

The disadvantage of an "exceptions" approach is that it leaves a substantial cohort of charities outside the register and therefore potentially subject to an information void.²²⁴

New Zealand takes a different approach. Charitable registration has always been voluntary in New Zealand: while an unregistered charity may not hold itself out as "registered", it may still call itself a "charity" and seek funds from the public.²²⁵

Unregistered charities are, of course, not subject to the transparency and accountability requirements of the Charities Act 2005 (although they may be subject to some such requirements under other legislation;²²⁶ unregistered charitable trusts, however, remain "uniquely free from supervision",²²⁷ even if their trustees are incorporated as a board under the Charitable Trusts Act 1957).

The quid pro quo is that unregistered charities are also not able to avail themselves of the benefits of registration, such as access to certain types of funding; in addition, the tax privileges for charities are increasingly being restricted to registered charities only.

On that basis, a balance is struck: charities have freedom of association and the ability to exercise their own judgment as to whether the benefits of registration outweigh the costs in any particular case. This ability has been particularly important in New Zealand during recent years where interpretations of the definition of charitable purpose have been so narrow: many charities (including but not limited to those engaging in advocacy work) have consciously chosen not to register so that they can focus on their charitable purposes without constant uncertainty as to whether any particular activity will be deemed unacceptable by the agencies responsible for administering the Charities Act. The consequences of deregistration can be significant, particularly now that the

220 See Dr O Breen, Rev Dr L Carroll, N Lavery [Independent Review of Charity Regulation Northern Ireland](#) January 2022 at 90. For example, the Charities Act (Northern Ireland) 2008 s 16(2) provides that "Every institution which is a charity under the law of Northern Ireland must be registered in the register of charities". The Charities Act 2009 (Ireland) s 41 makes it an offence for any person to advertise, or seek or accept donations, on behalf of a charitable organisation that is not registered or deemed to be registered. See also Charities and Trustee Investment (Scotland) Act 2005 s 14.

221 Dr O Breen, Rev Dr L Carroll, N Lavery [Independent Review of Charity Regulation Northern Ireland](#) January 2022 at 97.

222 Dr O Breen, Rev Dr L Carroll, N Lavery [Independent Review of Charity Regulation Northern Ireland](#) January 2022 at 91.

223 Dr O Breen, Rev Dr L Carroll, N Lavery [Independent Review of Charity Regulation Northern Ireland](#) January 2022 at 90: over 58,000 charities with income of £5,000 or less (accounting for approximately 34% of the 170,000 charities registered in England and Wales) have chosen to voluntarily register. See also Appendix A.

224 Dr O Breen, Rev Dr L Carroll, N Lavery [Independent Review of Charity Regulation Northern Ireland](#) January 2022 at 99, 114.

225 Charities Act 2005 ss 37, 38; Charities Bill 2004 (108-1) [explanatory note](#) at 1.

226 For example, incorporated societies have obligations to file annual financial information (see Incorporated Societies Act 1908 s 23 and Incorporated Societies Act 2022 s 102).

227 Property Law and Equity Reform Committee *Report on the Charitable Trusts Act 1957* (Wellington, February 1979) at 2.

deregistration tax is in force.²²⁸ Given the high risk of significantly adverse consequences, many charities understandably choose to forgo the benefits of registration.

However, for those charities that do choose to register and access the benefits of registration, the corresponding obligations of registration apply, including the requirement to file annual financial statements (with small charities catered for by means of the bespoke, tiered system of financial reporting, discussed above in chapter 1).

Forcing all charities to register would not be appropriate in a New Zealand context. There is unlikely to be a bright line delineating those not-for-profit entities whose purposes are exclusively charitable from those whose are not, meaning that any compulsory registration requirement would be difficult, if not impossible, to enforce. A better approach in a New Zealand context would be to raise awareness of the charities register (recommendation 8.13 above) and leave donors, funders, and other stakeholders to draw their own conclusions from non-registration in any particular case.

Any such public awareness-raising campaign would also ideally raise awareness of the importance and value of the charitable sector itself: addressing deficits in this area would contribute a great deal towards promoting public trust and confidence in the charitable sector.

Essential requirements for registration

Clause 29 of the draft Bill included with this report largely replicates the essential requirements for registration set out in s 13 of the Charities Act 2005. For example, we recommend retaining the distinction between trusts on the one hand and societies and institutions on the other.

For charitable trusts, s 13(1)(a) requires the trust to be “of a kind in relation to which an amount of income is derived for charitable purposes”. This wording replicates the wording in s 41(1)(a) of the Income Tax Act 2007, which in turn reflects the decision of the Privy Council in *Latimer PC*:²²⁹ in order to be a trust “of a kind in relation to which an amount of income is derived by the trustees in trust for charitable purposes”, it must be possible to say with certainty in respect of any amount of income derived by the trustees that it will be applicable for charitable purposes. In other words, a trust satisfies this requirement if its *purposes* are exclusively charitable (with the requirement for exclusivity softened by the ancillary purposes rule set out in s 5(3) and (4) and discussed above).²³⁰ The requirement that income be derived in trust for charitable purposes also “itself excludes any element of private pecuniary profit”.²³¹ These requirements are set out more explicitly for societies and institutions in s 13(1)(b).

Clause 29(1)(b) and (c) follows s 13(1)(a) and (b), subject to a minor modification relating to the non-distribution constraint as discussed further below.

Binding rulings

We also recommend retaining s 13(2) - (4) of the current Charities Act, which requires the agencies responsible for administering the Charities Act to follow any binding ruling issued by Inland Revenue when deciding if an organisation meets registration requirements.

In its 2019 discussion document, the DIA specifically consulted on whether the Charities Registration Board should continue to be bound to follow charitable purpose interpretations made by the Commissioner of Inland Revenue, arguing that the Board might be “bound to follow an interpretation of charitable purpose that it does not agree with”.²³²

228 Income Tax Act 2007 s 12 broadly requires a deregistered charity to divest itself of all its assets (with some exceptions) within 12 months or pay tax on the balance: this can require winding up the charity and transferring its assets to a new charity, all of which can involve considerable cost.

229 See *The Law and Practice of Charities in New Zealand*, S Barker, M Gousmett and K Lord (LexisNexis, Wellington, 2013) at [3.186] - [3.218].

230 See *The Law and Practice of Charities in New Zealand*, S Barker, M Gousmett and K Lord (LexisNexis, Wellington, 2013) at [3.198] - [3.218].

231 *Trustees of the Auckland Medical Aid Trust v Commissioner of Inland Revenue* [1979] 1 NZLR 382 (SC) at 398.

232 Internal Affairs [Modernising the Charities Act 2005: Discussion Document](#) February 2019 at 24.

The writer is aware of at least one economic development charity that received a binding ruling prior to the Charities Act that its purposes were exclusively charitable. The charity remains on the charities register as a result of this binding ruling, even though other similar economic development charities are currently being denied access to registration following the *Canterbury Development* and *Queenstown Lakes* decisions. Both decisions are problematic, as discussed above, not least for their inconsistency with prior higher authority, and the binding ruling is helpful for allowing a well-run charity providing much benefit to its community to retain its place on the charities register. It is notable that IRD, which does have a mandate to maximise revenue, interprets the definition of charitable purpose much less narrowly in this context than the agencies responsible for administering the Charities Act (which legally have no such mandate).

Almost two thirds of submitters considered the Charities Registration Board should continue to be bound by interpretations of charitable purpose made by IRD.²³³ We agree it is critical for charities to be able to obtain certainty in relation to their continued eligibility for registration: s 13(2) - (4) of the Charities Act enables charities to access the capacity and expertise of IRD, providing upfront certainty which in turn reduces the need for downstream enforcement or appeal.²³⁴ As noted by one submitter, the importance of retaining this option is heightened by the fact that it can take a very long time (in excess of 12 months, in some cases, with no time limit) to reach a decision on a Charities Act registration application, whereas IRD generally has the capacity to assess binding ruling applications more quickly.²³⁵ Clause 29(2) - (4) of the draft Bill included with this report accordingly replicates s 13(2) - (4) exactly.

However, although private binding rulings are normally private, we recommend that any such binding rulings are disclosed on the charities register, to help people understand why some charities are registered when similar charities are not (as discussed above in relation to the contents of the charities register).

In the draft Bill circulated for consultation in 2020, we had proposed a mechanism for the agency responsible for administering the Charities Act to be able to issue its own binding rulings, in order to provide charities with more certainty in relation to proposed courses of action. On reflection, as IRD is better resourced and has an established mechanism for providing binding rulings, we recommend continuing to rely on the current provisions in s 13(2) - (4) instead. Accordingly, we have not replicated the proposed binding ruling mechanism in the draft Bill included with this report.

Recommendation 8.14

That the ability for charities to seek binding rulings from Inland Revenue is retained but that, in the interests of transparency, binding rulings relating to charitable registration are disclosed on the charities register, to help people understand why some charities are registered when similar charities are not.

All of the above said, we recommend some minor modifications to the current essential requirements for registration.

Reasonable assumptions in relation to charitable trusts

We recommend that s 14 of the Charities Act (which allows the decision maker to make reasonable assumptions regarding charitable trusts that have not yet earned income) is not replicated: the essential registration requirement for trusts turns on whether the trust's purposes are charitable, which is not affected by whether or not any income has actually yet been derived. Section 14 was hastily added at Select Committee stage,²³⁶ but is not legally necessary and can be dispensed with.

233 Internal Affairs *Modernising the Charities Act 2005 - Summary of submissions* December 2019 at 21.

234 As noted by a number of submitters.

235 [Submission](#) of the New Zealand Law Society.

236 Charities Bill 2004 (108-2) ([select committee report](#)) at 5 referring to cl 13A: "The majority also notes that the bill does not allow the Commission to make reasonable assumptions about the future derivation of an entity's income, which is essential for the successful operation of the registration process. The majority recommends the bill be amended to correct these problems".

Non-distribution constraint

As discussed above, a charity must, by definition, be a not-for-profit entity: in other words, its constituting document must subject the entity to the non-distribution constraint. A key outcome of the co-design sprint workshop held in March 2021 on the definition of charitable purpose is that the statute should specifically refer to the non-distribution constraint as a prerequisite for charitable registration, as Australia,²³⁷ Ireland²³⁸ and Scotland²³⁹ have done. Clause 29(1)(a) of the draft Bill included with this report is directed to this end. Articulating the non-distribution constraint removes the need to separately provide that a society or institution is not carried on for the private pecuniary profit of any individual. Accordingly, we have not replicated s 13(1)(b)(ii) of the current Charities Act.

Defining the concept of “not-for-profit entity” can be difficult. For example, s 2(1) of the Goods and Services Tax Act 1985 defines a “non-profit body” as follows –

- non-profit body** means any society, association, or organisation, whether incorporated or not, —
- (a) which is carried on other than for the purposes of profit or gain to any proprietor, member, or shareholder; and
 - (b) which is, by the terms of its constitution, rules, or other document constituting or governing the activities of that society, association, or organisation, prohibited from making any distribution whether by way of money, property, or otherwise howsoever, to any such proprietor, member, or shareholder

This definition is problematic because it precludes distributions to shareholders even where those shareholders are themselves not-for-profit entities.

Section 5(3) of the Incorporated Societies Act 2022 defines a “not-for-profit” entity as follows:

In this Act, an entity (**A**) is a **not-for-profit entity** if—

- (a) A is one of the following:
 - (i) a society incorporated under this Act;
 - (ii) a charitable entity;
 - (iii) any other society, institution, association, organisation, or trust that is not carried on for the private benefit of an individual, and whose funds are applied entirely or mainly for benevolent, philanthropic, cultural, charitable, sporting, or public purposes in New Zealand; and
- (b) in the case of paragraph (a)(iii), A’s rules, A’s constitution, or the instruments constituting, or defining the constitution of, A provide that, on A’s winding up, any surplus assets that remain after the settlement of A’s debts and liabilities must be given or transferred to 1 or more other entities that are not-for-profit entities within the meaning of this subsection.

Because the essence of a not-for-profit entity is the non-distribution constraint, it may be more straightforward to simply refer to it (without attempting to define it). We have suggested this approach in clause 29(1)(a) of the draft Bill included with this report, but welcome discussion and consultation on this point.

237 Charities Act 2013 (Cth) s 5 defines a “charity” to mean an entity “(a) that is a not-for-profit entity”. What constitutes a “not-for-profit” entity is not specifically defined.

238 Charities Act 2009 (Ireland) s 2(1) defines a charitable organisation to mean: “(a) the trustees of a charitable trust, or (b) a body corporate or an unincorporated body of persons— (i) that promotes a charitable purpose only, (ii) that, under its constitution, is required to apply all of its property (both real and personal) in furtherance of that purpose, except for moneys expended— (I) in the operation and maintenance of the body, including moneys paid in remuneration and superannuation of members of the staff of the body, and (II) in the case of a religious organisation or community, on accommodation and care of members of the organisation or community, and (iii) none of the property of which is payable to the members of the body other than in accordance with section 89, but shall not include an excluded body”.

239 Charities and Trustee Investment (Scotland) Act 2005 s 7(4) provides that a body does not meet the charity test if “its constitution allows it to distribute or otherwise apply any of its property (on being wound up or at any other time) for a purpose which is not a charitable purpose”.

Contact person

As discussed above, we recommend inclusion of a designated “contact person” requirement, along the lines proposed in the Incorporated Societies Act 2022, with the addition of a requirement that the contact person’s contact information also be included on the charities register. Clauses 29(1)(g), 9(1) and (5) of the draft Bill are directed to this end.

Requirement for 3 responsible people

Section 45(2) of the Incorporated Societies Act 2022 will require every incorporated society to have a governing body or “committee” of at least 3 persons.

Charities Services similarly requires charities to have at least three responsible people as a requirement of charitable registration,²⁴⁰ however, there is currently no legal basis for this requirement. We have recommended above that the term “officer” in the Charities Act be replaced with the term “responsible person”, and its definition be more clearly circumscribed to the members of a charity’s governing body. We also recommend that a charity be required to have three responsible people as a condition of registration, for a number of reasons: it precludes the opportunity for “one-person charities” which have been the cause of considerable concern in the past.²⁴¹ A governing body of three also increases a charity’s ability to manage conflicts of interest and for the members of the governing body to hold each other accountable for the overarching duty to further the stated purposes of the charity. It also provides a legal footing for the current practice, all of which would promote public trust and confidence in charities. Clause 29(1)(e) of the draft Bill included with this report is directed to this end.

Clarifying the position with respect to activities

As discussed above, s 18(3) of the Charities Act, which requires regard to be had to activities as part of assessing an application for charitable registration, has been the cause of considerable difficulty. We have recommended a number of measures intended to clarify the reason for which regard is to be had to activities (for example, clause 11 is intended to clarify the extent to which regard might be had to activities in ascertaining purpose, and clause 18(1) and (2) are intended to clarify that the “charitable” test applies to purposes, and that activities are considered primarily to assess that they will further those purposes, and will not otherwise constitute serious wrongdoing).

The question is whether further clarification might be helpful in a provision directed at the “essential requirements for registration”. Clause 29(1)(c) of the draft Bill included with this report is a “belts and braces” provision intended to add further clarification as to why regard is to be had to activities, but we welcome discussion and consultation on whether such further clarification is helpful.

Qualifications of responsible people

Clause 31 of the draft Bill included with this report largely replicates the requirements for qualifications of “officers” of charitable entities set out in s 16 of the Charities Act 2005, updated for consistency with s 47 of the Incorporated Societies Act 2022. At the suggestion of the Fundraising Institute of New Zealand, we also recommend including a provision relating to breaches of professional fundraising standards (see cl 31(2)(h)).

Serious offences

A number of commenters raised the question of whether people convicted of serious crimes should be disqualified by statute from being a responsible person of a registered charity.

240 See Charities Services *Who are your officers and what do they do?*: www.charities.govt.nz/im-a-registered-charity/officer-information/who-are-your-officers-and-what-do-they-do/.

241 Concern about “one-man charities” originally led to the control provisions of the Income Tax Act 2007 s 41(1)(c). See the discussion in *The Law and Practice of Charities in New Zealand*, S Barker, M Gousmett and K Lord (LexisNexis, Wellington, 2013) at [3.437] - [3.448].

The balance in s 16 of the current Charities Act was carefully struck during the passage of the original Charities Bill through Parliament, as noted by the following comments of the select committee considering the original Charities Bill in 2004:²⁴²

The bill, in clause 15, disqualifies a number of classes of people from serving as an officer of a charity. In particular, it excludes people convicted of an offence punishable by a term of imprisonment of two years or more, or two years or less where the person has been sentenced to imprisonment. *Submitters expressed strong opposition to this provision, noting that the specific criminal convictions of an individual may have little bearing on their ability or appropriateness to serve as an officer of a charity.* In addition, some charities are specifically established to offer services to assist current and former prisoners, and in such cases the appointment of officers with past experience of prison would be a positive benefit to that entity.

In our view, it is important to prevent charities from appointing officers that have a history of dishonesty and may pose a risk to the organisation's assets and income, but the majority sees no reason why people with other criminal convictions should be barred from serving on a charity. The majority therefore recommends amending clause 15(2)(c) and (d) to only disqualify people who have been convicted of a dishonesty offence, such as theft or fraud. For consistency with the provisions of the Criminal Records (Clean Slate) Act 2004, the majority also recommends introducing a seven-year limitation period on this disqualification. The New Zealand First Party supports the intent of the original bill.

During the Committee stage of the original Charities Bill, the Minister for Consumer Affairs spoke of:²⁴³

... cases where, for example, a person helping to run an athletics club in which a charitable trust is involved may have a driving conviction or some issue of that sort. *I think we want charities to be as free as possible to represent the communities for which they are working, and for a range of people to be enabled.*

The point was made that many education trusts have been a means by which people have gone on into business and into self-employment in all sorts of ways. People get governance experience through community organisations. Sometimes they are trustees, sometimes they are members of charitable trusts, and sometimes they are not. *The Government is satisfied that the provisions around who can and cannot be a trustee are satisfactory without prescribing exactly what people may have been convicted or not convicted of. The point was made that a member of parliament might be affected. I hope that the widest range of people will realise that working for communities is beneficial, gives people a great deal of hope and energy in life, and can often help individuals, families, and communities. The Government is very happy with the new state.*

Charities are best placed to determine who is best to govern them, and have access to processes, such as police vetting, to assist them in that regard. There must also be scope for people to rehabilitate. It is not clear that blanket statutory prohibitions for criminal offences are required, and we do not recommend any change to the current settings of the Charities Act in this regard.

However, we do recommend that s 16(3) of the Charities Act (which disapplies the disqualification provision to a person appointed, under an Act, by the Governor-General, the Governor-General in Council, or by a Minister) is removed. The criteria for disqualification, including the ability to waive any aspect of the disqualification provision, should apply equally to all.

If s 16(3) is to be retained, we recommend it is extended to include persons appointed by Te Kooti Whenua Māori/the Māori Land Court.

Minimum age

Clause 31(2)(a) of the draft Bill included with this report follows the approach taken in s 16(2)(b) of the Charities Act in setting at 16 the minimum age for being a responsible person of a registered charity. The rationale for the minimum age was described by the Select Committee considering the original Charities Bill as follows:²⁴⁴

242 Charities Bill 2004 (108-2) ([select committee report](#)) at 10 (emphasis added).

243 Charities Bill [In Committee](#) (12 April 2005) 625 NZPD 19,940 per Judith Tizard (Minister of Consumer Affairs) (emphasis added).

244 Charities Bill 2004 (108-2) ([select committee report](#)) at 11 (emphasis added).

Some submitters argued that the age restriction in clause 15(2)(b), which disqualifies people under the age of 16 years, should be omitted from the bill. The majority disagrees, as it is important that officers should be legally accountable for their actions, and *as a general rule it will therefore be generally inappropriate to have officers younger than 16 years old*. The majority therefore recommends no change to the bill in this respect. We note that clause 15(4) allows the Commission to issue a waiver of a disqualifying factor in specific instances, and the majority considers this would still allow a charity to appoint a younger officer if the specifics of a case meant the appointment was appropriate

However, although 16- and 17-year-olds are not disqualified from being an officer or responsible person of a registered charity, other legislation may impose a higher minimum age requirement.

For example, the Trusts Act 2019 requires a person to have reached the age of 18 in order to be a trustee of a trust.²⁴⁵ This requirement applies to the trustees of all express trusts, including all registered charities structured as charitable trusts. The minimum age was set at this level on the basis of full legal capacity to deal with property or enter into contracts.²⁴⁶

The Companies Act 1993 similarly requires a person to have reached the age of 18 to be a director of a company,²⁴⁷ which requirement applies to the directors of all registered charities structured as charitable companies.

The requirements for charities structured as trusts and companies can be contrasted with the for charities structured as incorporated societies.

The Incorporated Societies Act 2022 sets a minimum age of 18 for the contact person of an incorporated society,²⁴⁸ following the recommendation of the Law Commission that the contact person (originally termed “statutory officer”) must have legal capacity.²⁴⁹ Otherwise, however, the Incorporated Societies Act 2022 sets a minimum age of 16 for officers of incorporated societies:²⁵⁰ the Law Commission considered it should be up to the incorporated society whether it wishes to impose a minimum age for members of its governing body;²⁵¹ it was not considered necessary to exclude all persons under 18 from being officers of an incorporated society, and the minimum age was set at 16 for consistency with the Human Rights Act 1993 s 21(1)(i)(i) (which prohibits discrimination on the grounds of age, commencing with the age of 16).²⁵²

Many charities start as informal unincorporated societies, and it is important to encourage young people to be involved. We therefore do not recommend any change to the minimum age of 16 for responsible people of charities (even though a 16- or 17-year-old must wait until they are 18 to be an officer or responsible person of a charity that is structured as a trust or a company).²⁵³

245 Trusts Act 2019 s 96(2)(a) precludes a “child” from being a trustee of a trust. “Child” is defined in s 9 to mean a person under the age of 18 years.

246 Te Aka Matua o te Ture - New Zealand Law Commission *Review of the law of Trusts: Preferred Approach* (NZLC IP31, 2012): <www.lawcom.govt.nz/our-projects/law-trusts> at [6.15] - [6.20].

247 Companies Act 1993 s 151(2)(a).

248 Incorporated Societies Act 2022 s 114(1)(a).

249 Te Aka Matua o te Ture - New Zealand Law Commission *A New Act for Incorporated Societies* (NZLC R129, 2013) at [6.25].

250 Incorporated Societies Act 2022 s 47(3)(a).

251 Te Aka Matua o te Ture - New Zealand Law Commission *Review of the law of Trusts: Preferred Approach* (NZLC IP31, 2012) at [6.15] - [6.20].

252 Ministry of Business Innovation and Employment *Exposure Draft: Incorporated Societies Bill Including consultation on Agricultural and Pastoral Societies legislation Request for Submissions* (November 2015): <www.mbie.govt.nz/assets/7d5df7c03a/exposure-draft-incorporated-societies-bill.pdf> at [64] - [65].

253 In this regard, we respectfully disagree with Charities Services’ advice that “In this case, the Charities Act overrides the Trusts Act. This means that charitable trusts can have trustees that are 16 and 17, but other trusts under the law cannot” (see Charities Services *The new Trusts Act – what does it mean for registered charities?*: <www.charities.govt.nz/news-and-events/blog/the-new-trusts-act-what-does-it-mean-for-registered-charities/>). This advice is understood to be based on s 5(9) of the Trusts Act 2019, which provides that “If there is an inconsistency between the provisions of this Act and those of any other enactment, the provisions of that other enactment prevail, unless this Act provides otherwise”. However, it is not clear that there is an inconsistency that would cause s 5(9) to apply: s 16 of the Charities Act provides that a person aged 16 or 17 is not disqualified from being an officer of a registered charity, but this general non-disqualification does not constitute a specific entitlement to be an officer of any entity. There is therefore arguably no inconsistency with s 96 of the Trusts Act, which contains a clear and specific prohibition on persons under 18 being a trustee of a trust. Further clarification as to whether 16- and 17-year-olds can lawfully be trustees of charitable trusts that are registered under the Charities Act, despite the clear wording of s 96, would be helpful.

Duty regarding responsible persons

One commenter recommended a duty on responsible persons be added to inform the charity if they become disqualified, and suggested a template be developed to help charities check that each of its responsible persons is not disqualified.

Clause 48 of the draft Bill included with this report would impose a duty on every registered charity to take reasonable steps to ensure that each of its responsible persons is not disqualified. The drafting is based on the Australian Charities and Not-for-profits Commission Regulation 2013 (Cth) regulation 45.20(2).

Note 2 to the Australian regulation provides that reasonable steps may include:

(a) obtaining declarations from responsible people and searching public registers on appointment; and (b) obtaining a commitment from a responsible person that, if its circumstances change, it will advise the charity.

An alternative approach would be to address the matter by guidance, such as charities requiring members of their governing body to make a signed declaration each year (for example, at the annual general meeting). We welcome discussion and consultation on whether such a duty would be helpfully included in the New Zealand legislation and, if so, the precise form it should take, or if the matter would be better addressed more informally.

Applications for registration

Clause 34 of the draft Bill included with this report largely replicates the requirements for applications for registration set out in s 17 of the Charities Act 2005, updated for consistency with Incorporated Societies Act 2022 s 9 (including the requirement for a person to formally consent to being an officer or responsible person and to certify that they are not disqualified. Certification is important due to the duties that are imposed on responsible people of registered charities).²⁵⁴

We do recommend some minor modifications, however. For example, we recommend deleting reference to a fee: imposing a fee for charitable registration was strongly opposed as inappropriate and counterproductive by a large number of submitters, as set out in box 8.6:

Box 8.6 - views of submitters regarding imposing a fee for charitable registration:

Waikato-Tainui strongly opposes charities being charged to fund the regulation of the sector - Te Whakakitenga o Waikato Incorporated, on behalf of the Waikato-Tainui iwi, endorsed by the Waikato Raupatu Lands Trust and Group and Waikato-Tainui marae

the charities sector never asked for this. It was a government initiative and they should continue to fund it – Graeme Stockdale

Charities should certainly not be asked to fund this regime, which has turned out to be much more costly than the Commission it replaced – Community Waitakere

without charities the government would potentially have to fund the \$17 billion expenditure that is currently expended by the charitable sector – Dr Rowena Sinclair

It is often difficult for small communities based charities such as toy libraries to find seed funding. Imposing a fee on registrations would create another fundraising barrier on the ability for these small organisations to start up – Toy Library Federation of New Zealand

Most charities/volunteer organisations are already genuinely short of funds. To a large extent it can be argued that if they weren't doing what they are doing, there would be a need for increased taxation to cover the gap (eg St Johns, fire brigades). Therefore, we do not support the payment of fees to contribute to the regulation of the sector. This would only reduce the ability of charities to carry out their work – Northland Community Foundation

If it exists only as income generation – no. The public sector benefits hugely from charitable activity. A fee would be a penalty and is inappropriate – Roger Eynon

SPCA is a responsible charitable organisation and would not support fees being imposed for further regulation unless real value could be demonstrated. Filing annual returns and new registrations should only incur nominal fees at best as again it will be eroding precious donated funds – SPCA

²⁵⁴ Incorporated Societies Act 2022 ss 9(e), 47(2).

Any further cost recovery by Charities Services ... will only add to the significant burden already faced by charities in finding funds for nonproject/programme expenses - Todd Foundation

The charities sector currently contributes 13% of the costs used to support the functions of charities regulations. Any further fees imposed on charities will decrease the amount of funds charities can use for delivery of services. Any system of fees to fund the regulator of the charities sector is effectively imposing another tax on charities. Imposing a fee for registration will act as a disincentive to set up a charity which is often established in response to an unmet need in the community. We recommend that no changes are made to the cost of funding the regulator – Methodist Alliance

if there is recognition that in many cases charities provide services that would otherwise be a cost to Government, it seems unreasonable that charities should pay a fee for registration. In many cases, the charity would not be able to either earn income from business activities or obtain funding until it is registered and there would be difficulty in meeting the fee – Graduate Women North Shore Charitable Trust

As a principle, we do not believe charities should pay any fees to contribute to their regulation. Government should identify other means of bridging the funding shortfall. This could include operational efficiencies that may arise from a 'digital by default' approach, identifying areas for efficiency savings through technology based automation and digitisation – CPA Australia

We do not think charities should be required to contribute more considering the significant public benefit they provide. The crown's cost to administer charities is good value for money when viewed in comparison to the volunteer hours provided in support of charitable activities – Community Housing Aotearoa

Given many charities are under financial pressure, we don't think it's realistic to require them to contribute to the funding of Charities Services and the Registration Board (or whatever entity may take their place). Our public policy system provides financial benefits to charities in recognition of the important, and special, nature of their work. Introducing requirements to contribute to the funding of Charities Services/Registration Board would seem to run contrary to this public policy – Community Networks Aotearoa

many organisations who register do not have a revenue stream at the time of their filing for charitable status. Charities Services should be funded by the government to remove that additional burden from the charitable sector – Community Waikato

There should be no fees paid by charities ... Clearly all purposes are for charitable purposes so the small cost of running the charities commission by the DIA should not be passed on to charities and reduce the amount (however slight) available for charitable purposes – Coory Charitable Trust

no, given charities are delivering central government outcomes relating to community wellbeing – Digits Charitable Trust

No further financial burden should be placed on charities to fund the activities of the regulator. Funding is the primary way that the Government can 'support and sustain a robust, vibrant, independent and innovative charities sector' – Habitat for Humanity New Zealand

The sector provides a number of benefits to New Zealanders. The cost of regulating the sector should sit with Government – Hamilton Christmas Charitable Trust

No. Registration is to be encouraged – Heather Pennycook

no, as the public want their charity dollar to go directly to the purpose of the charity, not administrative costs – Hope Foundation for Research on Ageing

Charities should be encouraged to register. I think it would be better for applications to remain free of charge – John Robinson

would prefer to see this supported by central govt. Charities recognised as supporting areas that govt can't, the least govt could do is ensure the mechanisms of support, regulation and appeal are in place – Life in Vacant Spaces

no. It's a government initiative, therefore should be Crown funded – Lion's Club of Pakuranga Panmure

If a fee is attached to the registration of charities then it could lead to a disincentive to set up a charity for a local need ... if Parliament believes that it is in the best interests of the public to register, monitor and manage charities then it is also in the best interests of the public that they fund the cost. If the costs of providing the service that the public want outweigh the benefits it should not be the charities that fund the difference which may be caused by inefficient use of the funds – Methodist Church of New Zealand Te Haahi Weteriana O Aotearoa

this whole approach fails to recognise the very high levels of efficiency and effectiveness the charitable sector achieves. Any additional burden placed on the sector effectively robs NZ Inc of approximately 3.5 times the cost. See my opening paragraphs – Neil Walbran

the Government already saves large sums of expenditure because of the work done by charities which would otherwise fall on the Government budget. So the current system is appropriate and charities should not be taxed by additional regulator's fees – Piers Davies

a one-off payment at registration would only happen once in the lifetime of the charity but may not be sufficient for the charitable sector to continue to operate effectively. However, the concerns of the sector around independence and the challenges around the appeal process need to be addressed. Again, we would be guided by the sector and would support a system that is fair, transparent and accountable – Te Pūtahitanga o Te Waipounamu

By attaching a fee to the regulation of the sector you remove funding that should be directed to the community in order to further support government departments. This does not make sense and will present a barrier to entry to charities to the sector – The Hunger Project New Zealand

no – because this may stop smaller charities from registering – The Institute De Notre Dame Des Missions Trust Board

no, charities struggle in many ways so this is just another cost. Government should pay – The United Fire Brigades' Association of New Zealand

at the point of registration an entity may well not be in a position to pay such a fee, and if their registration is unsuccessful they should especially not be obligated to pay any registration fee – The UpsideDowns Education Trust

The fee for filing annual returns is sufficient and no further charges should be made to charities – Titirangi Baptist Church

Absolutely not – part of the intention of registration was so we as a nation including government, the sector and the public, could get some data on what was actually happening in our communities. A fee for registration will actually undermine that intention by making it less likely groups will register – Trust Democracy

no. This is inequitable – Wellington Youth Orchestra Inc

Given that 58% of charities are in the 'less than \$125,000 expenditure' category, adding additional compliance costs would be disadvantageous for this group – Whangarei A&P Society

no, a registration could disincentivise registering – Whenua Iti Trust Board

A potential new charity's ability to pay a fee should not define their worth and value to the community in which they have seen a need. What would be the purpose of the fee? If ability to pay a fee is what defines a charity's worth, we have a problem. On the other hand, if the fee is minimal, then it is token and begs the question, what is its purpose? – YWCA of Aotearoa NZ, YWCA Whangarei, YWCA Auckland and YWCA Hamilton, Boards and Managers

See also the [submissions](#) of Abbeyfield New Zealand Inc; Amala Wrightson, Auckland Zen Centre, NZ Buddhist Council; Angela McMorran; Breast Cancer Aotearoa Coalition; Caleb Firth; David Ricquish; Diederick Meenken; Friends of Arataki and Waitakere Regional Parkland Inc; Graham Burger; Graham Coe; Jacob Ploeg; Kapiti Retirement Trust; LEAD; Linda Webb; Lindsay Jeffs; Lisa Abrams; Lloyd Brewerton; Manukau Christian Charitable Trust; Marine Reach Charitable Trust; Motueka Family Service Centre; The Methodist Church of New Zealand Te Haahi Weteriana O Aotearoa Auckland Fiji Methodist Parish (Tabacakacaka); Multiple Sclerosis New Zealand Inc; Neil Hanning; New Zealand Breastfeeding Alliance; New Zealand Land Search and Rescue Incorporated (LANDSAR); New Zealand Mathematical Society Incorporated; New Zealand Portrait Gallery Trust; Oliver Hoffman; Organisation B; Parihimanihi Marae; Peter Hays; Planalytics; Rawene and Districts Community and Development Inc (Lorene Royal); Renewal Trust Inc; Royal New Zealand Coastguard Incorporated; South Auckland Choral Society; St Anselm's Union Church; St Pauls Lutheran Church; Stopping Violence Services; Surf Life Saving New Zealand Inc; The Fred Hollows Foundation NZ; The Ozanam House Trust; The Presbyterian Church of Aotearoa New Zealand; Thomas E Stazyk; Tom Brady; Upper Hutt Toy Library; Whaiora Whanui Trust; Youth Search and Rescue Trust NZ; and Youth with a Mission Queenstown Lakes Charitable Trust (Tāhuna ki te Ao Charitable Trust).

Eleven submitters supported a fee on the basis of disincentivising applications for registration in order to reduce the number of charities in New Zealand. However, the proposition that there are "too many charities" in a liberal democracy such as New Zealand is not accepted, for the reasons discussed above in chapter 1.

Others argued that, if a fee was to be imposed for registration, it should not apply for small charities and/or should be refunded if the application was not successful. See for example the submissions of Braemar Charitable Trust: “rates should be tiered in relation to the size, scale and complexity of the entity”; Barry Coates, Sustainable Initiatives Aotearoa; Carolyn Bates; Geoff Pownall; Grey Power Otago Inc; Hawke’s Bay Community Law Centre; RSM; Volunteering Hawke’s Bay; and Wellington Combined Society of Bellringers. However, in the interests of simplicity, and given the strong opposition of the vast bulk of submitters, we recommend that no fee is imposed for charitable registration.

We also recommend including specific reference to a physical address for service, along the lines required in the Companies Act 1993,²⁵⁵ to provide a legal basis for current practice.²⁵⁶

Considering applications for registration

Clause 35 of the draft Bill included with this report is based on s 18 of the Charities Act 2005 (*Chief executive to consider application*) with some modifications.

For example, we have suggested a number of modifications directed to recommendation 8.11 above (to clarify the reasons for which regard is to be had to a charity’s activities) and to link more clearly to the essential requirements for registration, to reduce scope for subjectivity. We have also suggested a number of modifications to link into the recommended Māori Advisory Committee (recommendation 7.3) and the recommended principles of the Act.

We also recommend removing the requirements to observe the rules of natural justice (ss 18(3)(b) and 36). The rules of natural justice can require an oral hearing, but an oral hearing has never been provided by any of the agencies responsible for administering the Charities Act. The requirement for natural justice can be better addressed by triaging more difficult applications to a trier of fact, and a de novo oral hearing of evidence, as discussed above in chapter 6 (recommendations 6.1 and 6.2).

Section 18(4), which specifically provides that Charities Services is not required to consider an application that has been made in breach of a banning order, also seems tautologous.

We also recommend removing the references to 20 working days.

Timeframe for responding to information requests

As discussed above in chapter 6, s 18 of the Charities Act was amended by Statutes Amendment Bill 71-1 (which became the Charities Amendment Act 2017) to insert a 20-working day timeframe within which charities must respond to requests for information.²⁵⁷ Following these amendments, s 18(3A) now deems an application for registration to be treated as withdrawn if an applicant fails to respond within the 20-working day timeframe (or longer period allowed by Charities Services at the request of the applicant).

The 20-working day timeframe appears to have been chosen for consistency with s 59, which currently provides a 20-working day timeframe for lodging an appeal. As discussed above, such a timeframe is problematically short and we recommend it be extended (recommendation 6.5).

The timeframe in s 18 is similarly problematic, particularly given that charities currently have no automatic right to adduce further evidence on appeal meaning they must provide information to Charities Services as though they are preparing for a High Court trial. The short timeframe for charities is also problematic in comparison to the unlimited timeframe available to Charities Services: it can take months and sometimes even years for Charities Services to respond to a charity.²⁵⁸

²⁵⁵ Companies Act 1993 s 192.

²⁵⁶ The application for registration requires a physical street address for the charity. See Charities Services *Apply now*: www.charities.govt.nz/ready-to-register/ready-to-apply/apply-now/.

²⁵⁷ See Charities Act 2005 ss 18(2), (3)(c)(ii), (3A).

²⁵⁸ Similar concerns were raised in the recent review of charities legislation in Northern Ireland. See Dr O Breen, Rev Dr L Carroll, N Lavery *Independent Review of Charity Regulation Northern Ireland* January 2022 at 175: “It can appear that the Commission works slowly yet when information is requested by them, it must be provided within an exceptionally short timeframe”.

The 2017 amendments to s 18 are an example of reactive legislation passed with undue haste to address perceived symptoms without addressing the underlying cause. A key reason for the disconnect in the context of information requests, and the large numbers of applications for registration that are currently being withdrawn, is uncertainty and subjectivity in current interpretations of the definition of charitable purposes.²⁵⁹ A number of the measures proposed in this report are intended to address this underlying cause, as well as to reduce the amount of information required at entry level by allowing charities to access a trier of fact on appeal, all which should considerably ameliorate the difficulties that led to the 2017 amendments. We recommend that the 2017 amendments to s 18 are reversed, as they are unhelpful and unnecessary.

Clause 35 of the draft Bill included with this report accordingly reverts to the pre-2017 wording.

Deciding applications for registration

Clause 36 of the draft Bill is based on s 19 of the Charities Act 2005 (*Board to decide application for registration*) with some modifications.

As discussed above in chapter 7, we recommend the current bipartite decision-making structure is replaced with a single independent Crown entity (recommendation 7.1).

We also recommend removing the requirement for the decision-maker to be “satisfied” that an entity is eligible for registration. The essential requirements for registration are set out in s 13 of the Charities Act (clause 29 of the draft Bill included with this report). Either the applicant meets these requirements or it does not. The requirement for “satisfaction” introduces an unhelpful element of subjectivity and should be removed.

Given that decision-making under the Charities Act can currently take a considerable amount of time,²⁶⁰ we also recommend including a provision along the lines provided for in Australia, and recommended in Canada, allowing an applicant to treat an application as having been refused if a decision has not been made within 6 months (recommendation 6.2). Such a mechanism would expedite current processes considerably, by allowing more difficult applications to be decided at first instance by a judicial trier of fact on the basis of an oral hearing of evidence, rather than languishing within processes not designed or equipped to deal with them. Clauses 36(3) and 62(1) of the draft Bill included with this report are directed to this end.

Backdating applications for registration

Clause 37 of the draft Bill is based on s 20 of the Charities Act 2005 (*Board may backdate registration of entity as charitable entity*) with some modifications.

Section 20(2)(b) of the Charities Act provides that registration may not be backdated to a date earlier than the date of a “properly completed application”. What constitutes a “properly completed application” has been helpfully clarified by case law.²⁶¹ On that basis, we do not recommend amending s 20 to allow backdating to a date earlier than receipt of a “properly completed application”. As one commenter pointed out:²⁶²

Backdating registration to a time before the application is made is an invitation to the lazy to defer seeking registration – there is no good reason to encourage or allow this.

We also recommend removing the requirement in s 20(3) for the decision-maker to be “satisfied” that an entity is eligible for registration, for the reasons discussed above

259 See, for example, Charities Services Ngā Ratonga Kaupapa Atawhai [2020/2021 Annual Review](#) at 10: in the 2020/21 financial year, of 1,568 applications for registration received, 231 or 15% were withdrawn. According to the [2019/2020 Annual Review](#) at 11, of 1,335 applications received, 171 or 13% were withdrawn. According to the [2018/2019 Annual Review](#) at 10, of 1420 applications received, 205 or 14% were withdrawn. These numbers are very high, particularly given the considerable work that will have preceded most applications for registration.

260 For example, it took the Board almost four years to make a decision on Greenpeace’s application for registration after Supreme Court referred the application back to the Board for reconsideration in light of its decision in *Re Greenpeace of New Zealand Inc* [2015] 1 NZLR 169 (SC).

261 See *National Council of Women of New Zealand Inc v Charities Registration Board* [2015] 3 NZLR 72 (HC) and *Greenpeace of New Zealand Incorporated v Charities Registration Board* [2020] NZHC 2993.

262 Email correspondence from Mark von Dadelszen, 24 June 2021.

in the context of deciding applications for registration: either the applicant meets the requirements for registration or it does not. The requirement for “satisfaction” introduces an unhelpful element of subjectivity and should be removed.

Section 20(2)(a) of the Charities Act currently provides that, for an entity referred to in s 73(1) of the Estate and Gift Duties Act 1968 created by a gift, registration may not be backdated to a date earlier than the time the gift was made. This provision was directed to gift duty which has since been repealed.²⁶³ Section 20(2)(a) is therefore otiose and should be removed.

Recommendation 8.15

That section 20(2)(a) of the Charities Act, which relates to now-repealed gift duty, is removed as otiose.

Group/single entity registration

Sections 44 to 49 of the Charities Act 2005 currently provide for group registration (that is for an entity and “affiliated or closely related” entities to be treated as a “single entity”).

In inserting these provisions, the Select Committee considering the original Charities Bill made the following comments:²⁶⁴

Many submitters expressed concern that the registration requirements did not reflect certain structures common in the charitable sector. Many charitable entities are made up of a number of small entities, usually regionally based, under a larger umbrella organisation. The bill as introduced would have required the umbrella organisation, as well as each local entity, to register and comply with the various requirements of the legislation. In some cases, such as church organisations, this would require the individual registration of over 500 constituent entities. The majority considers this would have been unnecessarily onerous and burdensome on the smaller constituent entities. The majority therefore recommends amending the bill to allow the Commission to provide for umbrella registration, where a central entity and one or more other entities are registered and treated as a single entity. The bill should set out specific criteria for such a registration, such as requiring the entities to be closely related. In addition, the Commission should be able to attach conditions to umbrella registrations, and to vary or revoke it where appropriate. Finally, the bill should detail the effect of treating the various entities as a single entity, and provide options for the filing of annual returns which take into account the circumstances of the charity.

We note that, in some situations, the particular structure of an umbrella organisation may limit the parent entity’s ability to comply with the duties required under this bill with regard to each single entity, particularly the duties to notify the Commission of changes or to prepare an annual return. The majority therefore recommends the bill allow a parent entity, on behalf of a single entity, to make a request to the Commission that a duty under clause 47 or 54 be complied with either by the parent on behalf of all constituent entities, or for each individual entity to comply with the duty. The majority recommends the bill require the Commission to have regard to such a request, but does not believe it should be obliged to comply with the request, as there may be occasions where such a request may be inappropriate.

These provisions have been superseded by the new financial reporting rules for registered charities introduced from 2015. Registered charities that “control” other charities are required to prepare consolidated accounts, yet the requirements for consolidation do not necessarily align with the loose and undefined “affiliated or closely related” standard for group registration in the Charities Act.

²⁶³ See Charities Bill 2004 (108-2) ([select committee report](#)) at 7: “The majority recommends amending the bill to allow the Commission to backdate the effective time of registration. This should ensure that entities are not disadvantaged by any delays in processing a valid application. In making this recommendation, the majority wishes nevertheless to emphasise the importance of ensuring that registration applications are processed in an efficient and timely manner ... In addition, this amendment would ensure that a gift under the Estate and Gift Duties Act 1968 can be exempt from gift duty by allowing the backdating of the registration of an organisation to the time the gift was made”.

²⁶⁴ Charities Bill 2004 (108-2) ([select committee report](#)) at 6 - 7.

In addition, each charity that is separately registered has its own obligation to prepare and file its own financial information. This obligation is important, particularly in a regime focused on accountability rather than regulation, as important information can otherwise be “lost” in the consolidation process. As one commenter noted:²⁶⁵

If an entity is registered it has an obligation to account for the entity that is registered. It is very unhelpful if there is a host of files that do not give an indication of, for example, the intra-group transactions and liabilities, or the conflicts of interest that occur between them through transactions with trustees.

An “umbrella” charity can of course assist its branches or constituent entities with their financial reporting obligations, which is the approach taken, we understand, by some large church organisations that have required the individual registration of their constituent entities. However, the current framework for group or “single entity” registration in the Charities Act cuts across the financial reporting framework.

We recommend that the provisions of the Charities Act dealing with group or “single entity” registration are removed. Alternatively, if they are to remain, they should be comprehensively reviewed in light of changes that have occurred since they were introduced under urgency in 2005.

Recommendation 8.16

That sections 44 - 49 of the Charities Act 2005, which enable affiliated or closely related entities to be treated as a single entity for the purposes of charitable registration, are removed as they have been superseded by the financial reporting rules for charities introduced from 2015.

Duties of registered charities

Duty of loyalty

Clause 38 of the draft Bill included with this report is intended to implement recommendation 2.1: that the New Zealand charities law framework is reorientated to ensure a focus on charities’ *purposes*, by articulating one simple overarching fiduciary duty, applicable to all registered charities irrespective of their underlying legal structure, and to all involved in governing them, to act in good faith to further the entity’s stated charitable purposes in accordance with its rules.

This duty of loyalty links to the definition of “serious wrongdoing” in cl 9 and is intended to highlight that charities, and those responsible for governing them, should be aware they may be called upon to demonstrate how any particular activity furthers their charity’s stated charitable purposes in accordance with its rules as a quid pro quo for the privileges of registration.

This duty is specific to registered charities: it may overlap with, but does not displace, the duties expressed in the Trusts Act 2019, the Companies Act 1993, the Incorporated Societies Act 2022 and the underlying common law, as discussed above.

Annual reporting duty

An annual reporting obligation is a common feature of all common law charities frameworks,²⁶⁶ and is the key quid pro quo for the benefits of registered charitable status. The requirement to file an annual performance report provides an important opportunity for registered charities to make information publicly available by means of the charities register, which in turn enables interested parties (whether funders, policymakers or the public more generally) to learn more about a charity before deciding whether to engage with it. In this sense, the annual reporting obligation is a key aspect of the forum for accountability provided by the charities register, and a key mechanism for protecting and enhancing public trust and confidence in the charitable sector.²⁶⁷

²⁶⁵ Comments received from Professor Carolyn Cordery by email dated 18 September 2020.

²⁶⁶ Dr O Breen, Rev Dr L Carroll, N Lavery [Independent Review of Charity Regulation Northern Ireland](#) January 2022 at 123.

²⁶⁷ Dr O Breen, Rev Dr L Carroll, N Lavery [Independent Review of Charity Regulation Northern Ireland](#) January 2022 at 97.

When the Charities Act was introduced in 2005 there was no legal requirement that charities' financial statements met any particular standard of financial reporting, which led to some highly variable practices (with some charities even filing bank statements and hand-written calculations as "financial statements" with their annual return). The resulting lack of consistency made it difficult to make comparisons, both across charities and within a single charity over time.

From 1 April 2015, ss 41(2)(b) and 42A of the Charities Act require charities' annual returns to be accompanied by financial statements prepared in accordance with generally accepted accounting practice (that is, in compliance with financial reporting standards issued by the XRB).²⁶⁸ As discussed above in chapter 1, the new financial reporting standards require not only increased financial information, such as a statement of cash flows, but also non-financial information such as a "statement of service performance" that addresses why a charity exists and what it is trying to achieve.

The introduction of comprehensive financial reporting requirements for New Zealand registered charities was considered revolutionary:²⁶⁹ the XRB developed a suite of sector-specific and size-appropriate financial reporting standards for "not-for-profit public benefit entities" (of which registered charities are a significant cohort). The concept of legislating service performance reporting to improve reporting and support in the sector was considered world leading.²⁷⁰ In the words of one submitter:²⁷¹

There is another critical aspect of transparency that has been introduced by the new accounting standards. That is, the requirement to report on the outputs delivered in a year, linked to outcomes, in the statement of service performance.

If the charity's vision, mission and outcomes are clearly communicated, supported by reporting on outputs achieved linked to those outcomes, then the reader of the performance report has the context with which they can evaluate the financial performance and position of the charity. This includes the achievement of any surplus and the decision the charity makes around accumulation of surpluses.

The performance report is designed to give an integrated, holistic view of performance. A charity that is seen to be accumulating funds without delivering much by way of outputs, and hence not achieving outcomes, and without any other explanation as regards future plans should expect questions to be raised as to the appropriateness of their policy.

A key feature of the New Zealand charities law framework is that the financial reporting obligation applies to all registered charities, without exception: it is not possible to access the benefits of registration without meeting this obligation. The four-tier system discussed above in chapter 1 provides "sector appropriate standards to apply to large and complex entities at one end of the spectrum to very simple cash accounting at the other end for the very small and simple entities".²⁷²

Following introduction and implementation of the new financial reporting rules, and considerable work and expertise by both the XRB in designing the standards and the XRB and Charities Services in disseminating information about them, New Zealand now has the benefit of consistent and comparable transparency and accountability information for all registered charities as a result of arguably the most comprehensive set of financial reporting rules for registered charities in the world. This information is helpful not only for allowing people to scrutinise the work and financial management of charities, but also for allowing the sector to demonstrate the value it adds and benefits it delivers.²⁷³ The information and discipline required in preparing the information is also helpful for charities internally, in terms of governance, ensuring fair and proper practices are followed, safeguarding trust, and ultimately in furthering their charitable purposes as effectively as possible.

²⁶⁸ Charities Act s 42A(2) and Financial Reporting Act 2013 ss 5, 8. The External Reporting Board is an independent Crown entity: Financial Reporting Act 2013 s 11(2); Crown Entities Act 2004 sch 1 pt 3.

²⁶⁹ Submission of RSM.

²⁷⁰ Email correspondence from Craig Fisher, RSM, 3 October 2017.

²⁷¹ [Submission](#) of RSM at 8.

²⁷² [Submission](#) of RSM.

²⁷³ Lord Hodgson of Astley Abbotts [Trusted and Independent: Giving charity back to charities – Review of the Charities Act](#) July 2012 at [6.19].

New Zealand can be justifiably proud of its financial reporting framework for registered charities.

Despite this, however, the reporting requirements for small charities have consistently been raised as a key issue, including during the public consultation meetings held in April and May 2019, in the May 2019 survey,²⁷⁴ in submissions to the DIA's review of the Charities Act, and in our consultation and research.

Reporting requirements for small charities

According to Charities Services' data, only about 62% of small (tier 4) charities are complying with the financial reporting standards.²⁷⁵ As discussed above in chapter 1, tier 4 charities represent 58% of all registered charities. Given the extent to which a charities law framework relies on accurate and timely reporting, this level of non-compliance undermines the integrity of the entire regime. It also creates an information void that potentially skews any statistical analysis of charities register data.

Although the current framework imposes an administrative penalty of \$200 for failure to file an annual return,²⁷⁶ we understand that no such penalty has ever been imposed. Instead, charities that fail to file annual returns for two consecutive years are deregistered.²⁷⁷ Many thousands of charities have been deregistered for failure to file annual returns.²⁷⁸ While it is important that charities comply with this core obligation, the high level of deregistration creates administrative complexities, and potentially significant tax consequences for the affected charities.

Despite these issues, in considering what a world-leading framework of charities law might look like, we do not recommend any structural change to the current formulation. The XRB is a specialist body that has been subjecting the applicable financial reporting standards for registered charities to regular review.²⁷⁹ The financial reporting standards have been prepared specifically for New Zealand not-for-profit public benefit entities, such as charities, and facilitate proportionality by means of the tiered system. The standards require charities to present both financial and non-financial information, and are an important means by which charities can "tell their story", and demonstrate to their stakeholders that they are worthy of support.²⁸⁰ While the requirements may appear daunting at the outset, they do get easier with practice, and ultimately, will help the charity run better and therefore better further its charitable purposes.

On that basis, cls 41 - 44 of the draft Bill included with this report follow their counterparts in the Charities Act²⁸¹ reasonably closely in terms of their link to the Financial Reporting Act 2013 and the underlying standards prepared by the XRB.²⁸²

274 Strategic Grants [Independent Community Consultation To Inform The Review Of The Charities Act \(2005\) Survey Report](#) 22 May 2019.

275 Charities Services Ngā Ratonga Kaupapa Atawhai [2020/2021 Annual Review](#) at 15.

276 Charities (Fees and Other Matters) Regulations 2006 (SR 2006/301) reg 9(2).

277 Charities Services *Deregistration/Whakakore rēhitatanga*:

www.charities.govt.nz/im-a-registered-charity/deregistration-and-winding-up/deregistration/.

278 See the discussion in Legalwise "Significant issues with Review of Charities Act 2005" 10 January 2019.

279 For example, the External Reporting Board recently undertook a review of the reporting requirements for tier 3 and 4 charities and in May 2021, released a simpler, two-page template for tier 4 charities: www.xrb.govt.nz/accounting-standards/not-for-profit/pbe-sfr-c-nfp/simpler-reporting-format-for-smaller-tier-4-charities/.

280 Email correspondence from Louise Aitken, former chief executive of the Ākina Foundation, 23 August 2020: "I hope in time we move towards reporting impact, rather than just outputs and outcomes and we can try to measure the full value of the charitable sector from the significant impact that is achieved ... Aligned to the Living Standards Framework or other umbrella frameworks like the [Sustainable Development Goals] as a hope".

281 Charities Act ss 41(1), (2), 42A, 42C, 42D, 42F.

282 With definitions moved to the interpretation section (cl 9) and minor updates to reflect changes made to the corresponding provisions in the Incorporated Societies Act 2022. The thresholds for audit and review in s 42D were recently amended by the Financial Reporting (Inflation Adjustments) Regulations 2021 (LI 2021/307) reg 7(1) to \$550,000 and \$1.1 million respectively. A number of submitters made the point that such thresholds should be set out in regulations, rather than legislation, so that they can be amended more easily to keep pace with inflation (the approach taken in s 105 of the Incorporated Societies Act 2022). We agree and cl 43 of the draft Bill included with this report follows this approach.

However, given the level of concern that has been expressed, we recommend that the financial reporting requirements for small charities are comprehensively reviewed as part of an independent first principles review of the wider legal framework for charities (recommendation 1.0 above). It is important that such a first principles review has access to multi-disciplinary expertise, including in such areas as information technology, data, tikanga, accounting, standard-setting, auditing, trust law, as well as coalface experience of charities of different sizes and capabilities. As many submitters mentioned, most charities in New Zealand are small, and many are staffed by volunteers who do not have sophisticated financial expertise. If the compliance burden on such charities has become too high, it risks undermining charities' ability to deliver on their charitable purposes, as either valuable community funding is lost in complying with rules, or charitable effort is squeezed out, thereby reducing the social good and community benefit charities can offer. In a charities law framework focused on accountability rather than regulation, it is important that all charities do provide financial information: as noted in the recent review of charities' legislation in Northern Ireland, it is important that all charities remain visible but are not overburdened.²⁸³ The issue is comprehensive visibility rather than "risk". While acknowledging both the importance of accountability and the fact that good financial hygiene can help charities deliver effectively on their charitable purposes, the requirement to provide financial information should not unduly burden small charities or unduly impede their ability to attract volunteers.

Recommendation 8.17:

That, as part of the independent first principles review recommended in recommendation 1.0, the financial reporting requirements for charities are comprehensively reviewed, incorporating multi-disciplinary expertise, including in standard-setting, accounting, auditing, information technology, data, tikanga, trust law, as well as coalface experience of charities, to ensure a balance is struck between visibility and accountability on the one hand, and not undermining small charities' ability to deliver on their charitable purposes on the other.

As part of such a review, we recommend that consideration is given to the following matters:

Online financial template

Many submitters expressed frustration at the current duplication of effort required in uploading financial statements and then manually entering data into the annual return form.²⁸⁴

The comprehensive data project recommended above (recommendation 8.12) should provide clarity as to exactly what data is required from charities and why. As part of that exercise, it must be possible to create a simple financial and performance report template, that satisfies both annual return and financial reporting requirements, and that charities can complete online. Such a form would require only one set of data entry while also providing technological, largely automated, opportunities for prepopulating data and undertaking basic validity checks, all of which would reduce the compliance burden and the scope for error (and fraud).

Such a solution has recently been proposed in Northern Ireland,²⁸⁵ England and Wales,²⁸⁶ and Canada.²⁸⁷

283 Dr O Breen, Rev Dr L Carroll, N Lavery [Independent Review of Charity Regulation Northern Ireland](#) January 2022 at 139.

284 [Submission](#) of Lions Club of Waipu: "Why is it necessary to report to you twice?"

285 Dr O Breen, Rev Dr L Carroll, N Lavery [Independent Review of Charity Regulation Northern Ireland](#) January 2022 at 139, referring to better machine readable data in a true "less is more scenario".

286 Lord Hodgson of Astley Abbotts [Trusted and Independent: Giving charity back to charities – Review of the Charities Act](#) July 2012 at [6.39].

287 Report of the Special Senate Committee on the Charitable Sector [Catalyst for Change: A Roadmap to a Stronger Charitable Sector](#), June 2019 recommendation 13: "That the Government of Canada develop and implement a standardized set of reporting categories and to develop and implement an on-line tool for charitable and non-profit organisations to submit financial reports based on these categories ..."

An electronic solution has greatly simplified the reporting obligations for small charities in the United States.²⁸⁸

Any such solution must be carefully trialled by ordinary people before being implemented. Guidance on completing the form should be available in different languages, and solutions will have to be found for charities where online access is difficult.

Nevertheless, while such a solution would undoubtedly be difficult to achieve, the benefits of the upfront investment would be significant for little ongoing cost. For example, such simplification would reduce duplication, time, cost and frustration, thereby freeing charities up to focus on their charitable purposes, and hopefully ameliorating current difficulties with finding volunteers willing to take on the financial reporting role. It would also improve compliance, which would provide greater transparency and accountability overall. It would therefore also considerably improve the data available to support charities and their contribution to society.

Recommendation 8.18:

That the review of the financial reporting requirements recommended in recommendation 8.17 include the design of an online financial reporting tool for charities that would reduce duplication and facilitate data collection.

In this context, consideration should also be given to the information required to be contained in the annual reporting obligation. For example, would it be helpful to support the overarching duty of fidelity to purpose recommended above (recommendation 2.1) to require charities to certify annually that all decisions have been made in good faith in furtherance of their stated charitable purposes and in accordance with their rules? Would it be helpful for the annual return to require confirmation of the contact details of the contact person for the charity? We recommend that factors such as these are considered in the development of the online financial reporting tool recommended in recommendation 8.18.

Public perceptions

A number of submitters expressed frustration that, having expended considerable effort preparing the information required by the financial reporting rules, the information then appeared to be rarely used, checked or reviewed.

There does appear to be a distinct public misconception around the level of scrutiny to which charities are subject: many appear to assume that registered charities are subject to rigorous and regular scrutiny,²⁸⁹ when the reality is that no agency around the common law world has the resources or ability to check every set of accounts filed.²⁹⁰

This factor underscores the need for a public awareness campaign on the existence, purpose and benefits of the charities register (recommendation 8.13). It is important that the public (and the media) are aware of their important role in providing the “scrutiny of 1,000 eyes”: the charities law framework merely provides the forum by which information is made available, underscoring the importance of stakeholders making use of it.

²⁸⁸ Email correspondence from Nancy Ortmeyer Kuhn, Director, Jackson & Campbell PC (Washington) (7 August 2021): In the United States, small charities are now only required to submit a “postcard” online (Internal Revenue Service (“**IRS**”) Form 990N *Electronic Filing System*) which primarily establishes that the charity is still in existence and has revenue under \$50,000 per year. This has greatly simplified reporting for small charities, and also provides the IRS with an indication that the charity is still functioning. If there are no Forms 990 filed for three years, then the charity’s exempt status is automatically revoked. The charity can then reapply with complete financial information and a new application fee. Reinstatement is retroactive to the date of revocation. The result has been that the IRS’ records have been cleaned up substantially and inactive charities are now off the list of qualifying charities. It also relieves overworked volunteers at small charities from the burden of reporting when the dollar amounts are so small.

²⁸⁹ This was also identified as an issue in England and Wales. See Lord Hodgson of Astley Abbotts *Trusted and Independent: Giving charity back to charities – Review of the Charities Act* July 2012 at [6.44].

²⁹⁰ This was also identified as an issue in Northern Ireland. See Dr O Breen, Rev Dr L Carroll, N Lavery *Independent Review of Charity Regulation Northern Ireland* January 2022 at 130.

Report once, use often

In addition to reporting under the Charities Act, many charities also have additional reporting requirements to funders, accreditation agencies, other government monitoring agencies, members and others. These multiple reporting obligations are often uncoordinated, with different and sometimes inconsistent formatting and content requirements.

While acknowledging that the community rightly expects a high level of accountability from government for the use of public funds, the Australian Productivity Commission recommended that government agencies rely on existing quality assurance framework, in preference to creating contract-specific accountability and reporting mechanisms.²⁹¹ To that end, the Commission recommended a “report once, use often” framework under which government agencies would be encouraged to use the charities register (as it became) as a single reporting portal from which to meet their organisation level “health check” requirements for contracting purposes.²⁹²

As discussed above in chapter 1, the Working Party on Registration, Reporting, and Monitoring of Charities in New Zealand similarly considered that making information publicly available on the charities register should “reduce the requirement on charities to supply information to a range of funders and government agencies”.²⁹³ Now that the charities register is in place, there is considerable scope to make greater use of the information on it, as a number of submitters noted (recommendation 8.13 above).

In creating an online financial and performance report tool, consideration should be given to streamlining reporting requirements across government departments and other funders, so that charities in New Zealand might similarly be able to “report once, use often”.

Recommendation 8.19:

That the review of the financial reporting requirements recommended in recommendation 8.17 consider the extent to which annual information provided by charities could also be widely used by government agencies and other funders in a “report once, use often” framework.

Impact reporting

The Australian Productivity Commission spoke of a hierarchy of contribution measures, comprising inputs, outputs, outcomes and impacts.²⁹⁴ Generally, moving through the hierarchy provides broader, and more meaningful, measurement of contribution, but also requires more information and increasingly sophisticated evaluation techniques.

The distinction between the four categories of contribution measure is summarised in box 8.7:

Box 8.7: the distinction between inputs, outputs, outcomes and impacts:

Input and output measures generally focus on what an organisation does to fulfil its mission. Inputs are measures of resources used and outputs are indicators of the level of activity undertaken. Inputs and outputs are relatively easy to measure in money terms, but will understate the contribution of the sector to wellbeing.

Outcomes are defined as the intended results of an entity’s activities. While output measures may attempt to place a dollar value on an organisation’s activities, outcome measures go a step further by trying to assess the full value of the activities to those who directly benefit, over and above the market price. From an organisational perspective, outcome measures provide information on how well the organisation is achieving its mission for clients and members.

291 Australian Productivity Commission [Contribution of the Not-for-Profit Sector](#) 11 February 2010 at 385, 338.

292 Australian Productivity Commission [Contribution of the Not-for-Profit Sector](#) 11 February 2010, recommendation 6.6.

293 *Report by the Working Party on Registration, Reporting and Monitoring of Charities* 28 February 2002 at 15.

294 See generally Australian Productivity Commission [Contribution of the Not-for-Profit Sector](#) 11 February 2010, ch 3, Appendix B.

It is important to distinguish between efficiency in production (how well inputs are turned into outputs) and efficiency in allocation (putting resources to the uses that deliver the best outcomes for the community). While both are important, it is the latter, provided the activities are effective, that matters most for wellbeing, especially over time.²⁹⁵

Impacts are the longer-term effects produced by an activity, directly or indirectly, intended or unintended, positive and negative, for the participants and the broader community. Impacts are distinguished from outcomes as they capture the broader, longer-term benefits, both for the individual and for the community as a whole. For example, the impact of improvements in a target community's employment outcomes could be identified in higher household consumption, improved personal security for family members and others in the area, improved health outcomes for the individuals and their households, and the personal value to the individuals of making a worthwhile contribution. Impact is the most important level in terms of contribution: measurement of change at the impact level is important to guide the allocation of resources to deliver the highest community wellbeing for the resources used.²⁹⁶ However, impact is also the most difficult to measure with any degree of confidence due to the difficulties inherent in identifying, quantifying and attributing the intangible effects of an organisation's activities.

As discussed above in chapter 1, the service performance report is commendable for its focus on outputs and outcomes. However, impact is the true bottom line of charities' work. The need to focus on impact was emphasised by one submitter as follows:²⁹⁷

... Charities Services needs better ways of understanding the positive impact generated by charities. Charities Services should be measuring and monitoring the impact generated by charities to build public confidence and trust in the effectiveness of the sector. Performance reports go some way to providing accountability for the impact delivered by charities, but as we detail below, there are further steps that need to be taken to help build capability in charities to measure and report on their impact – rather than just financials and outputs ...

The key opportunity facing the sector over the next 10 years is the positive impact it can make, *but we need to know what that is*. The value of the charities sector has been promoted in the discussion paper – 27,000 registered charities, \$17 billion annual expenditure, \$58 billion in assets. What is striking is the lack of information on how much *impact* the sector creates for New Zealand.

As the Government creates policies and a budget focused on well-being and makes decisions to implement the Living Standards Framework, it should not only be looking to charities to help contribute towards achieving New Zealand's Living Standards Framework goals, but also be able to understand the extent to which they are. There is work that needs to be done to understand what impact is being generated by charities and how. Measuring the impact of charities would give Government, funders, charities themselves and volunteers a clearer understanding of how they are creating positive change and allow them to make adjustments to create even greater impact. To do this requires capability building across multiple stakeholders within the sector. Charities themselves need support to better understand their impact, how they can measure and improve this. And Government needs to work with the sector to more clearly outline how those outcomes can contribute to Government's goals. This would enable charities to better describe their positive impact and tie it back to public policies, such as the Living Standards Framework, to demonstrate to Government and the public how (and how much) their impact is contributing to public policy goals. Consistent language and frameworks are essential to the sector being able to articulate its overall contribution to positive social and environmental impact, and government plays an important role in leading this development and discussion ...

As well as the roles set out in the discussion paper, we see the potential for Government to also fill the following key roles in the development and modernisation of the charities sector:

- capability building: build the capability of sector stakeholders to measure impact so that charities can quantify the positive impact they are creating, and New Zealand better understands and recognises their contribution. This may include workshops, partnerships with organisations able to provide training, and online resources;

295 Australian Productivity Commission [Contribution of the Not-for-Profit Sector](#) 11 February 2010 at 18.

296 Australian Productivity Commission [Contribution of the Not-for-Profit Sector](#) 11 February 2010 at 34.

297 [Submission](#) of The Akina Foundation at 2 - 4 (emphasis in original).

- modern approach to impact: clearly endorse theories of change as an important precursor to effective impact;
- set clear goals: create and publish an outcomes framework to which charities can align their impact;
- utilise charitable service providers: prioritise social procurement, investments and partnerships with charities, social and community enterprise (including, allocating regional / local government funding and contracts to community groups and charities) to increase the impact that Government itself is enabling through its supply chain and investment activities; and
- unlock philanthropic and grant funding: there is limited capital available for organisations which operate for public benefit while the scale of funding required to solve social and environmental problems grows. Alongside this, charitable funders traditionally take a very cautious approach; philanthropic funders, which are registered charities, should be encouraged to invest their funds to provide capital for organisations delivering public benefit (whether also registered charities or not) ...

More impact and better accountability and understanding of the sector can be achieved through investing in building the capability of all participants in the charities sector, including, Charities Services, officers of charities, funders and beneficiaries. The type of support needed includes:

- how to understand impact;
- improve the delivery of impact;
- report on impact; and
- if appropriate, scale impact.

As well as the capability within the organisations, organisations with charitable purposes should be enabled and supported to access professional services support for setting up their legal structures and good governance practices, for example: through grants, low-interest loans or partnerships with providers.

We endorse these comments: impact measurement not only enables better internal decision-making for charities, but also enables the charitable sector as a whole to articulate more clearly its value to wider society. The barriers currently in the way of such articulation contribute to the charitable sector being overlooked and undervalued, which in turn acts as a barrier to its potential being realised. Much work is underway internationally in terms of developing and nurturing charities' efforts to embed impact reporting and effectively convey their impact on society.²⁹⁸

We strongly recommend that these developments are taken into account in the review of financial reporting requirements recommended in recommendation 8.17.

Recommendation 8.20:

That the review of the financial reporting requirements recommended in recommendation 8.17 looks beyond outputs and outcomes to ways to identify, measure and report on the *impact* generated by charities, taking into account international research and development in this area.

Fund accounting

A number of submitters expressed concern that the financial reporting standards for charities in New Zealand had been adapted for the not-for-profit sector from a baseline of for-profit standards.²⁹⁹ In the words of one submitter:³⁰⁰

Part of the problem in New Zealand is that the new accounting standards that are being applied, in spite of the issue of sector neutrality having been addressed, are still redolent of those applied in the for-profit sector. This is because, unlike in the UK, many New Zealand

²⁹⁸ For example, a research team including Professor Carolyn Cordery from Victoria University of Wellington is currently looking at providing evidence and recommendations on how to develop impact reporting requirement and guidance for the Statement of Recommended Practice for Charities from 1 January 2024. Results from the research are expected to be available from the third quarter of 2022. See: www.wycas.org.uk/icas-charity-impact-practice-survey/.

²⁹⁹ The tier 1 and 2 standards draw heavily from international public sector accounting standards: xrb.govt.nz/standards/accounting-standards/not-for-profit-standards/tier-1-and-2/.

³⁰⁰ [Submission](#) of Dr Michael Gousmett at 7 (footnotes omitted).

charities do not understand the nature of funds, and the necessity of fund reporting, which should be the basis of their financial reporting.

Fund accounting in the United Kingdom and the Republic of Ireland

Fund accounting in the UK and Republic of Ireland is a mandatory requirement under the Charities Statement of Recommended Practice (SORP). As noted in the chapter on fund accounting:

[a]ccounting for the particular charitable funds held by a charity is a key feature of charity accounting. Each class of fund has unique characteristics in trust law. Fund accounting distinguishes between two primary classes of fund: those that are unrestricted in their use, which can be spent for any charitable purposes of a charity, and those that are restricted in use, which can only be lawfully used for a specific charitable purpose.

The clear distinction between charity reporting in New Zealand and that of the UK is that in the UK the underlying concept is derived from trust law, whereas that is not the case in New Zealand, having been influenced by accounting standards designed for other purposes, otherwise New Zealand would be following the UK model. The failure to do so means that charities are not accountable for how they intend to use funds ... “[t]he proper administration of individual charitable funds is essential if charity trustees are not to act in breach of trust.”

...

As noted by Sayer Vincent: “[o]ne of the main fundamental principles underlying the format of charity accounts is fund accounting which requires all income and outgoing resources, [and] assets and liabilities to belong to a fund.”

The Charities’ Statement of Recommended Practice (“**SORP**”) is mandatory in preparing charity accounts in England and Wales, Scotland and Northern Ireland (and strongly encouraged in Ireland).³⁰¹ Under the SORP, a Statement of Financial Activities must be prepared analysing the charity’s income and expenditure in columns, distinguishing unrestricted funds, restricted funds and endowment funds where applicable, with a functional breakdown of income and expenditure. Smaller charities (with income not exceeding £500,000) do not have to use the functional analysis of income and expenditure, although they must still distinguish the different types of funds.³⁰²

Fund accounting is an essential aspect of trust law, which in turn underpins charities law. In the review of financial reporting requirements recommended in recommendation 8.17, we strongly recommend that trust law/accounting expertise is included, and that consideration is given to the concept of fund accounting, as that concept is dealt with in the Charities SORP in the United Kingdom.

Recommendation 8.21:

That the review of the financial reporting requirements recommended in recommendation 8.17 includes analysis of the concept of fund accounting, as that concept is dealt with in the SORP (FRS 102 (*Accounting and Reporting by Charities: Statement of Recommended Practice applicable to charities preparing their accounts in accordance with the Financial Reporting Standard applicable in the UK and Republic of Ireland*)).

Audit

Currently, a charity with total operating expenditure (including any entities it controls) of \$1.1 million or more (for each of its two preceding accounting periods) is required to have its financial statements (including its service performance report) audited by a qualified auditor.³⁰³ Charities with such expenditure of \$550,000 or more are required to have their financial statements either audited or reviewed, again by a qualified auditor.³⁰⁴

301 Except for small non-company charities (up to £250,000 income) which have the option of producing receipts and payments accounts.

302 See Association of Charitable Foundations, Scottish Grantmakers and Philanthropy Ireland Survey of Charitable Funders’ Views of Accounts prepared under the Charities SORP December 2020: acf.org.uk/common/Uploaded%20files/Research%20and%20resources/Resources/Strategy%20and%20governance/SORPEngagement_GrantMakersSurvey_Report_Dec2020.pdf at 3 - 4.

303 Charities Act 2005 ss 42C(2)(a), 42D(1)(a) (as recently amended by the Financial Reporting (Inflation Adjustments) Regulations 2021 (LI 2021/307) reg 7(1)).

304 Charities Act 2005, ss 42C(2)(b), 42D(1)(b) (as recently amended by the Financial Reporting (Inflation Adjustments) Regulations 2021 (LI 2021/307) reg 7(1)).

The requirements to be a qualified auditor are strict, as set out in the Financial Reporting Act 2013.³⁰⁵ While such requirements are understandable, a number of submitters commented on the difficulties they are experiencing in finding a person willing to take on the role of auditor or reviewer. In the words of one submitter:³⁰⁶

The 'volunteer only' charities lack access to support yet want to be accountable in terms of their operations. The larger Tier 1 and 2 organisations can access professional staff and do so ... Changes in accounting standards and the general tightening of regulation around who can do audit and review, the costs of insurance for practitioners have meant that many practitioners who previously did pro bono work for smaller charities have withdrawn their services. Costs of compliance take a large portion of smaller charities' income. Better support for the 'volunteer only' ... to meet the obligations of the state is required.

The costs of audit and review are becoming prohibitive:³⁰⁷

The new reporting standards are probably the biggest problem that charities of all sizes are currently facing. It is now imperative to have qualified staff to handle the reporting requirements – so for a church of 30 people, because we also have a Childcare Trust that meets the control requirements, we have to have someone who is qualified to consolidate and prepare the accounts. This also moves us into a requirement to audit so it is even more imperative that we have qualified staff or volunteers to deal with this. Financially, in both organisation's cases, the cost of preparation and then audit is exorbitant. For GBNZ it is \$6500 to audit and probably another \$5000 for preparing the accounts. The church audit would be similar, let alone the time to prepare.

A number of submitters referred to research indicating that charities had spent \$51 million in complying with the new financial reporting rules, pointing out that such a significant sum then became unavailable to further charities' charitable purposes more directly.³⁰⁸

It is important to note that increased audit and accounting fees result in increased overhead for charities. Ultimately, any fees paid by charities need to be sourced from either funders or donors, and charities can find sourcing operational costs challenging, particularly as many funders and philanthropic donors perceive operational and overhead costs as diverting revenue from the charitable purpose of the organisation.³⁰⁹ Perceptions that too much money is spent on administration can also perversely undermine trust and confidence in charities.³¹⁰

At the same time, external assurance is important for accountability and for trust and confidence in charities, and the need for professional standards in audit and review is understood. However, given the significant costs of audit and review (funds which then become unavailable for more directly furthering charities' charitable purposes), a balance must be struck: it is imperative that solutions are found to enable smaller charities to access lower-cost qualified auditor services. Possibilities include shared services models to give smaller charities more buying power for acquiring audit services,³¹¹ providing a register of suitably qualified people who would donate their services,³¹² direct financial assistance, and/or efficiencies that might be found through a "report once, use often" framework.

305 See Charities Act 2005 s 42D(1)(c), which links to the definition of qualified auditor in the Financial Reporting Act 2013 ss 35, 36, 37.

306 [Submission](#) of U3A Whangarei Incorporated at 1.

307 [Submission](#) of Devonport Methodist Church and Girls' Brigade New Zealand at 5. See also the [submission](#) of Wellington Combined Society of Bellringers: "The very major issue for small and small-medium charities is the cost of having the Performance Report reviewed or audited. It is becoming very difficult to find someone in the Commerce/Accounting industry to do this work on a pro bono or very small fee basis. Additionally the organisation Chartered Accountants Aust NZ seems to be discouraging its members from doing this work. Also some, and especially older retired, accounting professionals are not very familiar with the existing Charities Act. Many of the Commerce/Accounting people doing the Performance Report reviews will just do the financial part as it is too difficult for them, and too costly for the small charity, to check the veracity of the information in the 'Statement of Service Performance' section of the report".

308 See, for example, the submissions of Lloyd Brewerton and Organisation B.

309 [Submission](#) of Community Waikato.

310 [Submission](#) of Todd Foundation.

311 [Submission](#) of Hamilton Christmas Charitable Trust.

312 [Submission](#) of Wellington Youth Orchestra Inc.

There would also be benefit in an awareness-raising campaign about audits of charities' accounts: audits have inherent limitations in terms of uncovering fraud, and encouraging funders to take a more nuanced approach to requiring an audit may assist significantly given the significant associated costs. Older charities whose constituting documents require an audit, irrespective of whether they meet the legal thresholds, might also usefully be encouraged to re-examine this position.

We recommend that audit and review requirements are also considered as part of the review of the financial reporting requirements recommended in recommendation 8.17.

Duty to keep accounting records

In order to support the key annual financial reporting duty, we recommend the Charities Act include a requirement on registered charities to keep accounting records, in line with the model proposed in the Incorporated Societies Act 2022.³¹³ Good financial hygiene is essential in order for charities to best further their charitable purposes, and the absence of a requirement to keep accounting records is arguably a glaring omission. Clause 39 of the draft Bill included with this report is directed to this end.

Balance date

We also recommend some minor changes to s 41(3) - (7) of the Charities Act, which relate to an entity's balance date, to reflect the fact that an entity's balance date may be specified in its rules. Clause 40 of the draft Bill included with this report is directed to this end.

Duty to notify changes

As discussed above, the charities register is the bedrock of a charities law framework.³¹⁴ In an information and disclosure regime, the integrity of the information on the charities register is pivotal: it is critical that the information on the charities register is accurate. To that end, s 40 of the Charities Act currently requires charities to notify certain changes (including to its rules, officers and address for service) to Charities Services, so that people searching the register for a particular charity are able to access up to date information. Failure to notify changes within 3 months renders a charity liable to an administrative penalty of \$100.³¹⁵

However, in practice, the obligation to notify changes under s 40 is widely observed in the breach: it is very common for entries on the charities register to be out of date in one or more respects. The net result is that the New Zealand charities register is not accurate.³¹⁶ As discussed above in chapter 4, Charities Services has spent considerable resources punishing charities for engaging in the democratic process, yet has never imposed an administrative penalty for non-compliance with this key core obligation of the Charities Act. While charities have a natural tendency to be over-compliant, the absence of consequences for failure to notify changes may be contributing to a perception that the requirement is not important or at the very least will not be enforced. The result is widespread non-compliance with a fundamental obligation, which is undermining the integrity and utility of the entire regime.

Clause 45 of the draft Bill included with this report follows s 40 of the Charities Act reasonably closely. However, we recommend a number of changes intended to support the key fundamental obligation to keep charities register details up to date.

³¹³ Incorporated Societies Act 2022 s 101.

³¹⁴ Dr O Breen, Rev Dr L Carroll, N Lavery [Independent Review of Charity Regulation Northern Ireland](#) January 2022 at 121 - 122.

³¹⁵ Charities (Fees and Other Matters) Regulations 2006 (SR 2006/301) reg 9(1).

³¹⁶ In England and Wales, under Charities Act 2011 (UK) s 15(1)(4) the Charity Commission for England and Wales has a statutory function of maintaining an "accurate and up-to-date" register.

Timeframe

The original Charities Bill recommended that changes be notified to the Charities Commission within 20 working days.³¹⁷ In extending this to the current timeframe of three months, the Select Committee considering the original Charities Bill made the following comments:³¹⁸

Many submitters expressed a view that the 20-working-day timeframe was too short, and different submitters proposed a wide variety of alternative time limits. After considering this matter, the majority agrees that the bill should allow more time for charities to notify the Commission of any changes, and recommends amending clause 47(2)(d) to require that notification be provided within 3 months.

It is notable that the timeframe for notifying routine changes was set at three months when the timeframe for lodging an appeal (a significant decision requiring due reflection) was set at only 20 working days.³¹⁹

The three-month timeframe for notification can also be contrasted with the 20-working day timeframe proposed for key notifications in the Incorporated Societies Act 2022.³²⁰ For those registered charities structured as incorporated societies, it is not coherent to require notification of certain matters to the Registrar of Incorporated Societies within 20 working days and then provide a further 2 months to make the same notification to the registrar of the charities register. For charities structured as companies, the gap between timeframes is even larger.³²¹ It makes practical sense for charities to attend to such procedural matters for different registrars altogether at the same time.

A further difficulty is that a three-month timeframe is sufficiently long that, even if complied with, it contributes to the charities register being perpetually out of date. We recommend the timeframe for notifying changes under the Charities Act is reduced to 20 working days for closer consistency with other applicable legislation and to encourage a practice of notifying changes to all applicable registrars as part of the process by which they are made: such a practice would improve compliance and the accuracy of the charities register.

Recommendation 8.22:

That the timeframe for notifying changes under section 40 of the Charities Act 2005 is amended to 20 working days for consistency with other applicable legislation, to encourage a practice of notifying changes to all applicable registrars as part of the process by which they are made and to improve the accuracy of the charities register.

Clause 45(2)(d) of the draft Bill included with this report is directed to this end.

Changes to purposes

Section 40(1)(f) of the Charities Act currently requires charities to notify changes to their purposes separately from the requirement to notify changes to their rules (s 40(1)(e)). The fact that the legislation makes such a distinction may perhaps have contributed to confusion as to how a charity's purposes are ascertained. Clause 11 of the draft Bill included with this report is intended to clarify the orthodox position that a charity's purposes are ascertained by a process of interpretation of the charity's rules. Various references to a charity's "stated" purposes are also intended to underscore this fundamental principle: a change to a charity's purposes requires a change to the charity's rules. On that basis, we recommend the separate reference to purposes in s 40(1)(f) is subsumed within the general requirement to notify changes to rules in s 40(1)(e).

317 [Charities Bill 2004 \(108-1\)](#) cl 47(2)(d).

318 [Charities Bill 2004 \(108-2\)](#) ([select committee report](#)) at 13.

319 [Charities Bill 2004 \(108-2\)](#) cl 67(2)(a).

320 [Incorporated Societies Act 2022](#) ss 52(2) 116(2). Following amendments to s 33 (and cl 8(5) of sch 1) a 25-working day timeframe was inserted for notifying changes to an incorporated society's constitution.

321 For example, [Companies Act 1993](#) s 32(3) requires changes in a company's constitution to be notified to the Registrar of Companies within 10 working days.

Clause 45(1)(a) of the draft Bill included with this report is directed to this end.

We also recommend incorporating into legislation the requirement formerly contained in regulations, but still required in practice,³²² that notification of amendments to a charity's rules be accompanied by a copy of the amendment, and a copy of the minute of the meeting or other record specifying the change and the effective date of the change.³²³

Charitable Incorporated Organisations

There appears to be widespread lack of awareness that registered charities who are incorporated under legislation maintained by the Companies Office (such as the Incorporated Societies Act 1908, the Charitable Trusts Act 1957, or the Companies Act 1993) have a dual registration obligation. As discussed above in chapter 1, charities can gain legal status from the Companies Office and can then take an extra step, if they wish, of seeking charitable registration under the Charities Act. Taking this extra step brings with it a number of additional obligations, including regarding notification, some of which may overlap.

This lack of awareness may be contributing to non-compliance with the duty to notify changes under the Charities Act. To address this, we recommend that, as part of the campaign to raise awareness of the charities register recommended in recommendation 8.13 above, awareness is raised of the importance of charities keeping their details on the charities register up to date, in addition to any other notification requirements they may have.

A number of submitters argued that government agencies should share information to enable charities to report to one location only, for example, by notifying all changes to all applicable registrars through a central register. While such a solution sounds eminently sensible, it may present practical difficulties in terms of maintaining the integrity of the separate registers.

Another solution to the dual registration issue that has been adopted in England and Wales,³²⁴ Scotland³²⁵ and Northern Ireland³²⁶ is the creation of a new type of legal entity: a Charitable Incorporated Organisation or "CIO". The CIO structure appears to have been created largely to lessen the reporting burden on smaller charities, by enabling them to prepare receipts and payments accounts, thus avoiding the need for accrual accounts and compliance with the Charities' SORP.³²⁷ These factors may be less of an issue in New Zealand given the tiered financial reporting framework currently in place.

However, the advantages of legal personality and limited liability without dual registration may be worth considering in a New Zealand context. There is currently no legal structure in New Zealand specifically designed for charities: charities must "make do" with legal structures fashioned largely for other purposes, such as for family property holding (trusts) or commercial endeavour (companies).³²⁸ The structures available for charities

322 See Charities Services *Update charity details – Changing your rules*:

www.charities.govt.nz/im-a-registered-charity/update-charity-details/.

323 This requirement was contained in Charities (Fees, Forms, and Other Matters) Regulations 2006 reg 6(1)(a) until 25 February 2012, when reg 6 was revoked by Charities Amendment Act 2012 (formerly the Statutes Amendment Bill (No 2) 271-2) s 19(5).

324 Charities Act 2011 (UK) Pt 11 provides for the establishment of Charitable Incorporated Organisations in England and Wales. There were understood to be approximately 17,000 CIOs on the Charity Commission for England and Wales Charity Register in May 2021: Dr O Breen, Rev Dr L Carroll, N Lavery *Independent Review of Charity Regulation Northern Ireland* January 2022 at 232.

325 Charities and Trustee Investment (Scotland) Act 2005 ch 7 provides for the establishment of Scottish Charitable Incorporated Organisations or "SCIO" in Scotland. There were understood to be 5,247 SCIOs registered on the Office of the Scottish Charity Regulator's (OSCR) Charity Register in September 2021, accounting for approximately 20% of all registered charities in Scotland: Dr O Breen, Rev Dr L Carroll, N Lavery *Independent Review of Charity Regulation Northern Ireland* January 2022 at 232.

326 Charities Act (Northern Ireland) 2008 Pt 11 provides for the establishment of Charitable Incorporated Organisations in Northern Ireland, however, these provisions have not yet commenced. See Dr O Breen, Rev Dr L Carroll, N Lavery *Independent Review of Charity Regulation Northern Ireland* January 2022 at 29.

327 Dr O Breen, Rev Dr L Carroll, N Lavery *Independent Review of Charity Regulation Northern Ireland* January 2022 at 137.

328 *The Law and Practice of Charities in New Zealand*, S Barker, M Gousmett and K Lord (LexisNexis, 2013) at [6.10] - [6.11], referring to P Luxton *The Law of Charities* (Oxford University Press, 2001) at 17.

are currently the same as for any other legal person. Creating a CIO-type of organisation would address this issue, and obviate the need for dual registration by allowing both incorporation and registration under the Charities Act.

We recommend that consideration is given to whether New Zealand should introduce a CIO-type structure as part of the independent first principles review recommended in recommendation 1.0.

Improving compliance

While it is not practically possible for a charities registrar to check every notification of change submitted by registered charities, at the very least spot checks should be undertaken to encourage compliance. It would likely take the imposition of only a handful of \$100 administrative penalties to change current perceptions that compliance with this duty is optional. We recommend that key performance indicators are set for the charities registrar aimed at improving compliance with the important duty to notify changes.

Many submitters also noted that the online interface is clunky and changes are not able to be made in real time. We recommend that technological measures to improve the ability to notify changes are considered as part of the comprehensive data project recommended in recommendation 8.12.

Recommendation 8.23:

That, as part of the independent first principles review recommended in recommendation 1.0, consideration is given to other measures that would improve compliance with the important duty to notify changes, which is currently widely observed in the breach. Suggestions include potential technological improvements, raising awareness of the importance of complying with the duty, setting key performance indicators for the Charities Registrar, and potentially establishing a Charitable Incorporated Organisation structure (which would eliminate the need for dual registration).

Fundraising

Duty to disclose registration number on request

Section 39 of the Charities Act currently imposes a duty on telephone and internet “collectors” to disclose a charity’s registration number on request (emphasis added):

If a collector who acts on behalf of a charitable entity is requesting funds, canvassing for subscriptions, selling raffle or lottery tickets, or appealing for donations, *by means of the telephone or the Internet*, the collector must disclose the registration number of the entity if requested to do so by a member of the public.

“Collector” is in turn defined in s 4(1) to mean a person who “requests funds, canvasses for subscriptions, sells raffle or lottery tickets, or appeals for donations” on behalf of a charitable entity.

Several commenters on the draft Bill circulated for comment during 2020 queried why this duty was imposed only on those seeking to raise funds by means of the telephone or the internet.

The limitation appears to be an unintended consequence of the changes hastily made during the passage of the original Charities Bill through Parliament in 2004. Clauses 23 and 24 of the original Charities Bill would have required registered charities to display their registration number on every written communication sent by, or on behalf of, the entity:³²⁹

Use of registration numbers

23 Charitable entity must display registration number

- (1) Every charitable entity must ensure that its registration number is clearly stated –
 - (a) in every written communication sent by, or on behalf of, the entity; and
 - (b) in, or on, fundraising materials that are on display to members of the public (for example on collection tins).

329 [Charities Bill 2004 \(108-1\)](#).

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- (2) If a collector who acts on behalf of a charitable entity is requesting funds, canvassing for subscriptions, selling raffle or lottery tickets, or appealing for donations by means of the telephone or the Internet, the collector must disclose the registration number of the entity if requested to do so by a member of the public.

24 Offence to contravene section 12

- (1) Every charitable entity commits an offence and is liable on summary conviction to a fine not exceeding \$2,000 –
- (a) if the charitable entity contravenes section 23(1); or
 - (b) if a collector who acts on behalf of the charitable entity contravenes section 23(2).
- (2) Proceedings for an offence against subsection (1) may be commenced within 6 months after the matter giving rise to the contravention was discovered or ought reasonably to have been discovered.

The proposed criminalisation of a failure to display a charity's registration number on all written correspondence and fundraising materials was one of eight key concerns raised by submitters in 2004.³³⁰ In response, the Select Committee simply removed cl 23(1), leaving cl 23(2) intact as a standalone provision, in what became s 39 of the Charities Act.

The offence provision (cl 24) was also removed: instead, a significant or persistent failure by a "collector" to meet their obligations under this Act is grounds for deregistration of the charitable entity under s 32(1)(d).

The net result is that a registered charity carries an onus of ensuring those fundraising on its behalf by means of the telephone or the internet disclose its registration number on request, or it may face deregistration. However, fundraising by other means carries no such onus.

It is not coherent for the legislation to single out telephone or internet fundraising in this way. Fundraising by or on behalf of a registered charity by any means should be subject to a requirement to disclose the charity's registration number on request.

In addition, the requirement in former cl 23(1)(b) to ensure the charity's registration number is clearly stated in, or on, fundraising materials that are on display to members of the public (for example, on collection tins) was sensible and proportionate and would also help raise awareness of the charities register. We recommend it be reinstated.

Feedback from submitters also expressed a dislike for the term "collector", preferring the more commonly-used term "fundraiser".

Clause 47 of the draft Bill included with this report is intended to reflect the above points.

One question is whether charities should have a duty to proactively provide the registration number on such materials, rather than merely providing it on request. We welcome discussion and consultation on this point.

Recommendation 8.24:

That section 39 of the Charities Act, which currently requires only telephone and internet collectors to disclose a charity's registration number on request, is extended to all types of fundraising carried out by or on behalf of a registered charity.

Self-regulation

It is surprising that the Charities Act makes no other mention of fundraising. New Zealand is very well served by the current system of self-regulation of fundraising administered by the Fundraising Institute of New Zealand ("**FINZ**") and the Public Fundraising Regulatory Association ("**PFRA**"), which operates very successfully at no cost to Government. The importance of the work carried out by FINZ and PFRA is highlighted by a comparison with the alternative of government regulation, which the experience of other jurisdictions indicates would likely be a very expensive means of achieving what is already being achieved in New Zealand.

330 Charities Bill [2R](#) (12 April 2005) 625 NZPD 19,940 per Bill Gudgeon (NZ First).

We recommend that the current self-regulatory system continue; given its critical role in maintaining public trust and confidence in charities, we also strongly recommend that it is better supported.

To that end, we recommend that the Charities Act articulate a new duty, requiring every registered charity, and every fundraiser acting on behalf of a registered charity, to adhere to professional fundraising standards when carrying out a “fundraising activity” (which in turn we recommend is defined more widely than current s 39 to include requesting funds, canvassing for subscriptions, selling raffle or lottery tickets, selling tickets to a fundraising event, selling merchandise, and appealing for grants, donations, or sponsorship). Clause 46, and the definition of “fundraising activity” in cl 9(1), of the draft Bill included with this report are directed to this end.

The importance of fundraising standards to promoting public trust and confidence underscores the need to interpret the definition of charitable purpose widely enough to allow all charities that wish to do so to register, and therefore become subject to the duties and oversight provided by the Charities Act, as discussed above in chapter 3.

We also strongly recommend that both FINZ and PFRA are provided with reliable, untagged, core operational central government funding to allow them to focus on maintaining and strengthening fundraising standards in New Zealand.

Recommendation 8.25:

That the Charities Act articulates a new duty, requiring every registered charity, and every fundraiser acting on behalf of a registered charity, to adhere to professional fundraising standards when carrying out a “fundraising activity” (widely defined to include any activity seeking to raise funds, such as requesting funds, canvassing for subscriptions, selling raffle or lottery tickets, selling tickets to a fundraising event, selling merchandise, and appealing for grants, donations, or sponsorship).

Recommendation 8.26:

That the current system of self-regulation of fundraising provided by the Fundraising Institute of New Zealand and the Public Fundraising Regulatory Association is better supported, including by provision of reliable, untagged, core operational funding to allow them to focus on maintaining and strengthening fundraising standards in New Zealand.

Duty to manage conflicts of interest

Historically, equity has taken a strict approach to duties of good faith. For example, a director of a company was not allowed to put themselves in a position where their interests and duty conflict; in cases where directors have had such conflicts, equity has taken the position that any resulting contract is voidable at the instance of the company.³³¹

This strict equitable principle is reflected in the Charities Act 2005 sch 2, which imposes a duty on members of the Charities Registration Board to disclose conflicts of interest and precludes interested members from voting or taking part in any discussion or decision of the Board relating to the matter.³³²

³³¹ Te Aka Matua o te Ture - New Zealand Law Commission [A New Act for Incorporated Societies](#) (NZLC R129, 2013) at [6.132] – [6.134].

³³² Charities Act 2005 sch 2 cl 21.

The Charities Act is otherwise silent on conflicts of interest within charities. However, in practice, Charities Services takes a similarly strict approach, requiring conflicted officers of registered charities to recuse themselves from voting, taking part in discussion, and from being counted as part of the quorum.³³³

A question arises as to whether this approach is too strict to apply on a blanket basis.

For companies, the strict equitable principle has been modified by provisions in the Companies Act.³³⁴ Similarly, for incorporated societies, the Incorporated Societies Act 2022 will require conflicted officers to recuse themselves from voting, taking part in a decision, or signing any document in relation to a conflicted matter, but will not preclude them from taking part in discussions or being present at the time the decision is made unless the governing body decides otherwise.³³⁵ It will also not prevent conflicted officers from being counted as part of the quorum.³³⁶ The protection is that, if 50% or more of the members of the governing body are conflicted, a special general meeting of the society must be called to consider and determine the matter.³³⁷

The rationale for this approach was described by the Law Commission as follows:³³⁸

... The most straight forward way to address the potential for self-interest or the perception of self-interest on the part of an officer is simply to preclude the person from taking part in the decision. We therefore prefer [the option] which requires an officer to disclose his or her interest in the matter and then recuse him or herself from taking part in the decision (voting) on the matter. We consider that in most cases this should be sufficient. We do not think it is normally necessary to preclude the interested person from taking any further part in any discussion of the matter. In fact, as some submitters have indicated, requiring a conflicted officer to be absent from all discussion and involvement with the matter would not only be unrealistic in some cases but also quite burdensome for many societies because the individual will often be key to the functioning of the society and have information of value to contribute.

However, in some situations it would be appropriate to preclude a conflicted officer from taking any part at all in the matter. The significance or nature of the disclosed interest and the circumstances may be such that the presence of the conflicted officer may influence the decisions taken by the non-conflicted members or be perceived to have done so. We think that the committee should determine whether the conflicted officer should also be excluded completely from any further involvement in the matter.

To address concerns that submitters have raised over problems that may arise over maintaining quorum where a number of committee members have disclosed an interest in a matter, we propose that the conflicted officers should continue to be counted for the purposes of maintaining the quorum. While this approach addresses the problem of maintaining quorum, it could mean that a significant decision is left to a small fraction of the original committee. To avoid this possibility, we recommend that in any situation where 50 per cent or more of the minimum needed for the quorum have been recused from voting because of a conflict of interest the remaining members of the committee must call a special general meeting to determine the matter. Referring a matter to the general membership seems to be the only way to address a situation where those entrusted with a significant decision are deeply conflicted.

As noted by the Minister for Commerce and Consumer Affairs:³³⁹

One Māori lawyer suggested that, in small family-based incorporated societies such as marae, there may be conflicts of interest on a regular basis. He argued that banning voting in such circumstances could bog down the administration of the society (for example, by requiring ... the calling of a special general meeting if 50% or more of the members of the

333 See Charities Services *Conflicts of interest and registering as a charity*:

www.charities.govt.nz/news-and-events/blog/conflicts-of-interest-and-registering-as-a-charity/.

334 See, for example, Companies Act 1993 ss 139 – 149 (*Transactions involving self-interest*).

335 Incorporated Societies Act 2022 s 64(1).

336 Incorporated Societies Act 2022 s 64(2).

337 Incorporated Societies Act 2022 s 64(3).

338 Te Aka Matua o te Ture - New Zealand Law Commission *A New Act for Incorporated Societies* (NZLC R129, 2013) at [6.33] (footnotes omitted).

339 Office of Minister of Commerce and Consumer Affairs *Cabinet paper: Reform of the Incorporated Societies Act 1908* 2 May 2019: www.mbie.govt.nz/business-and-employment/business/regulating-entities/incorporated-societies-act-review/ at 38 - 41.

committee are conflicted). Other parties suggested that a special general meeting may not be the appropriate forum for certain committee matters.

In this context, I propose that [the exposure draft bill] be amended to provide that an officer must not vote or sign documents except with the consent of all non-conflicted members of the committee. Where all members of the committee are conflicted, a special general meeting will still be required.

The strict equitable position has been similarly modified for trusts. Section 34 of the Trusts Act 2019 provides that a trustee must avoid a conflict between the interests of the trustee and the interests of the beneficiaries.³⁴⁰ While the Trusts Act does not specify how this duty applies in the context of trusts that do not have beneficiaries, such as charitable trusts, it does provide for this duty to be a default duty (that is, a duty that may be modified or excluded by express or implied terms of the trust).³⁴¹ The Law Commission explained the rationale for this approach as follows:³⁴²

The list of default duties is intended as a non-exhaustive summary of some of the duties of trustees that apply unless and to the extent that they have not been modified by terms of trust. Further duties, rules and exceptions present in the rules of equity continue to apply. Although the [default duties] may be modified or excluded by the terms of a trust, it is not intended that they may do so to the extent that the mandatory duties would be breached. The terms of a trust may allow trustees to exercise discretion to benefit themselves, particularly if they are beneficiaries, or to be in a position where their personal interests conflict with those of other beneficiaries or with their role as a trustee. However, the terms of the trust would not be able to allow trustees to self-benefit without honestly considering the interests of other beneficiaries.

In other words, the law relating to companies, incorporated societies and trusts specifically relaxes the strict approach taken by equity to management of conflicts of interest.

Conflicts of interest are a common issue among registered charities, and it is important to trust and confidence in charities generally that they are properly managed. Nevertheless, most registered charities in New Zealand are structured as trusts, incorporated societies and trusts and will therefore be subject to the more nuanced approach set out above. The circumstances that led to the more relaxed approach will apply equally to charities, raising questions about the advisability of the strict, blanket, extra-statutory approach currently being applied.

The financial reporting rules for registered charities already require disclosure of related party transactions.³⁴³ There is also guidance available to charities, including a template conflicts of interests register.³⁴⁴ Clause 49 of the draft Bill included with this report is intended to strike a balance that respects the independence of charities, and the variety of situations in which conflicts might arise benignly, by articulating a broad and high-level duty on responsible persons of registered charities to disclose and manage perceived or actual material conflicts of interest.

In a framework of charities law based on accountability, rather than regulation, the principle is that decisions as to how best to manage such conflicts in the circumstances of any particular case are best made by charities, acting in good faith in the best interests of their stated charitable purposes in accordance with their rules, and in line with the underlying duties outlined above, supported by comprehensive transparency and disclosure requirements.

We welcome discussion and consultation on the inclusion of a broad high-level duty relating to conflicts of interest along the lines proposed in cl 49.

340 Trusts Act 2019 s 34.

341 Trusts Act 2019 ss 28, 5(4).

342 Te Aka Matua o te Ture - New Zealand Law Commission [Review of the Law of Trusts: A Trusts Act for New Zealand](#) (NZLC R130, 2013) at 109.

343 See External Reporting Board [PBE IPSAS 20 \(Related Party Disclosures\)](#) and Charities Services [Related party transactions for Tier 3 and Tier 4 charities: <www.charities.govt.nz/reporting-standards/tier-3/related-party-transactions-for-tier-3-and-tier-4-charities/>](#).

344 Charities Services [Conflict of interest / Pānga Rongorua: <www.charities.govt.nz/im-a-registered-charity/running-your-charity/conflict-of-interestpanga-rongorua/>](#).

In the interests of transparency and accountability, we also recommend that the Charities Registrar publish its own procedures for managing actual or perceived conflicts of interest.

Recommendation 8.27:

That the charities law framework articulates a broad, high-level duty on responsible persons of registered charities to disclose and manage perceived or actual conflicts of interest.

Recommendation 8.28:

That, in the interests of transparency and accountability, the agency responsible for administering charities' legislation is required to publish its own procedures for managing actual or perceived conflicts of interest.

Exemptions

Section 43 of the Charities Act currently allows Charities Services to exempt a registered charity from compliance with a wide range of provisions, including in relation to applications for registration, duties, inquiries, financial reporting, warning notices, administrative penalties, appeals, and any regulation made under the Charities Act. In recommending insertion of such an exemption power, the Select Committee considering the original Charities Bill in 2004 made the following comments:³⁴⁵

We realise that the charitable sector displays a wide diversity of structures, and that some organisations may experience difficulty meeting specific obligations because of the particular nature of their structure. It is therefore important that the Commission have the power to make allowance for the diversity of structures in the sector, particularly by exercising an exemption power to relieve difficulties that differently structured entities may encounter in meeting the bill's obligations. The majority therefore recommends that the bill give the Commission an exemption power that may be used where necessary to provide different organisational structures with flexibility regarding the way they comply with duties and obligations under subpart 3 of Part 2 or relevant regulations. The exercise of this power should also reduce compliance costs incurred by the entity.

Clause 50 of the draft Bill included with this report replicates s 43 with a number of modifications, including more tightly circumscribing the provisions from which charities may be exempted, and specifically requiring the Charities Registrar to have regard to the purposes and principles of the Act in exercising powers under this section.

However, some commenters expressed fundamental concern about a government agency having such a broad, unilateral and apparently unappealable³⁴⁶ power to simply waive compliance with statutory requirements.

In the interests of transparency, we recommend that any exemptions granted in relation to a charity under the provision are required to be disclosed on the charities register (cls 22(1)(i) and 50(6)) and also reported on in the Charities Registrar's annual report (see cl 60(2)(d)(iv)).

There has also been a suggestion that the Charities Registrar be required to keep a list of all exemptions granted/not granted in one place to incentivise good data and information management to facilitate transparency, openness and accountability. We welcome discussion and consultation on this point.

More fundamentally, however, as s 43 was originally inserted under urgency without proper consultation, and does not appear to have been subject to post-implementation review, we recommend that it is subject to a comprehensive review as to its continuing appropriateness, as part of the independent first principles review recommended in recommendation 1.0.

³⁴⁵ Charities Bill 2004 (108-2) ([select committee report](#)) at 15, 50.

³⁴⁶ See the discussion above in ch 6. In the interests of consistency and fairness, commenters have also raised the suggestion of such decisions being able to be appealed by persons other than the charity in respect of whom the decision was made.

Recommendation 8.29:

That, as part of the independent first principles review recommended in recommendation 1.0, section 43 of the Charities Act, which currently provides Charities Services with a unilateral and apparently unappealable power to exempt charities from compliance with a wide range of statutory provisions, is subject to a comprehensive review as to its continuing appropriateness.

Agency structure

Part 5 of the draft Bill included with this report is intended to implement recommendation 7.1: that the agency responsible for administering charities legislation is restructured as an independent Crown entity that reports directly to Parliament. Controversial interpretations of the definition of charitable purpose aside, Charities Services and the Charities Registration Board have otherwise done as well as possible withing a structure that is inherently not fit for purpose. There is broad agreement that change of agency structure is essential.

The agency responsible for administering the Charities Act must be independent if it is to be trusted by the sector, and to support public trust and confidence in charities more generally. While none of the comparable jurisdictions have managed to find a way to make the appointment process entirely apolitical, we recommend the process for appointing members of the Charities Registrar draws from models such as the Auditor-General and the Electoral Commission, to underscore the importance of independence.

Under the Crown Entities Act 2004, the term of appointment must be stated in the notice of appointment.³⁴⁷ Commenters suggested a term of four years, as well as rotating appointments so that members come up for reappointment in different years (as this creates an additional level of apolitical protection). Commenters also suggested qualifications for appointment should apply (or at least members should be subject to the same qualification requirements as responsible people of registered charities). We welcome consultation and discussion on these points.

Provisions dealing with disclosure of conflicts of interest,³⁴⁸ the ability to delegate,³⁴⁹ and the ability to employ staff,³⁵⁰ are helpfully dealt with in the Crown Entities Act 2004.

Functions

The statutory functions of the Charities Registrar are key to a charities law framework. As discussed above, cl 3(1) of the draft Bill included with this report provides that the purpose of the legislation is to “enable and support a diverse, robust, vibrant, independent, innovative, and sustainable charitable sector, in recognition of the direct and indirect benefits such a charitable sector provides in a free and democratic society”. Clause 3(2) provides that the legislation is intended to further this purpose by:

- (a) providing a forum for transparency and accountability, by means of a charities register on which registered charities are required to disclose certain information; and
- (b) establishing Te Kairēhita Aroha / the Charities Registrar, as an independent Crown entity, to carry out the functions provided for in this Act, including to inform public choice by administering the charities register and raising public awareness of the importance and value of charities.

³⁴⁷ Crown Entities Act 2004 s 28.

³⁴⁸ Crown Entities Act 2004 s 62.

³⁴⁹ Crown Entities Act 2004 s 73. Absence of a specific ability to delegate has been a matter of particular difficulty in Northern Ireland. See Dr O Breen, Rev Dr L Carroll, N Lavery [Independent Review of Charity Regulation Northern Ireland](#) January 2022 at 29 - 30.

³⁵⁰ Crown Entities Act 2004 ss 116 - 119.

Clause 54 of the draft Bill included with this report is intended to give effect to cl 3(2), by setting out the following as key functions of the Charities Registrar:

- (a) raise awareness of the importance of the charitable sector and encouraging a culture of giving; and
- (b) inform public choice and maintain public trust and confidence of the charitable sector, primarily by maintaining the charities register, including by monitoring charities to ensure they continue to act in good faith in furtherance of their stated charitable purposes over time.

A question arises as to whether the agency responsible for administering the Charities Act should continue to have functions to educate and assist charities beyond what is necessary to comply with the Act. There is considerable debate internationally as to whether an agency responsible for administering charities law can legitimately be both enforcer and support (policer and friend). In our view, it is unnecessary to address this issue, as a charities law framework that focuses on charities' purposes, and on accountability rather than regulation, will inherently support charities. Specific education and assistance beyond what is necessary to comply with the Act is arguably more appropriately undertaken by umbrella bodies, who should be adequately funded to discharge this function. Encouraging a government agency to take on this role risks regulatory overreach as "guidance" can become interpreted as mandatory requirement. However, we welcome further discussion and consultation on these points.

All of the above said, we recommend a specific function of undertaking or promoting research into the data available on the charities register. In the words of one submitter commenting on the draft Bill circulated for consultation in 2020:³⁵¹

... the Bill appears to be silent on any responsibilities of the Registrar to undertake research of the Register for the purpose of identifying and publishing trends or statistics warranting attention to improve the governance and/or performance of Registered Entities. This might be a useful addition ... Currently, ignorance of the status and direction of sectoral trends means there is little knowledge, let alone incentive to improve levels of effectiveness, efficiency or responsiveness that often reflect the expectations of the giving public

... In concert with the above, the Register provides significant amounts of data that is rich in information, useful comparative organisational financial and other measures of status and trends. It would be helpful to see some comment on the value of this information being mined from the database, published and used as a basis from within the sector for improvements against benchmarks.

Clause 54(1)(d) is directed to this end.

We also recommend that the Charities Registrar have a specific duty to promote public awareness of its functions, following the model of the Criminal Cases Review Commission. Clause 55 of the draft Bill included with this report is directed to this end.

Accountability

As discussed above in chapter 7, when the Charities Commission was disestablished in 2012, all of the accountability mechanisms provided by the Crown Entities Act 2004 were removed, leaving almost nothing in the way of accountability mechanisms other than the annual meeting currently provided for in s 12 of the Charities Act (and passing reference in a 200-page DIA annual report). Charities Services currently has almost completely-unbridled power, an untenable situation for any government agency exercising statutory powers of decision in a liberal democracy, let alone one that is able to affect so profoundly the nature and composition of New Zealand's civil society. We recommend a number of measures intended to impose meaningful accountability on whatever agency is responsible for administering charities' legislation in New Zealand.

351 Comments received from the Fundraising Institute of New Zealand (10 August 2020).

Statement of intent

Restructuring the agency responsible for administering charities legislation as an independent Crown entity (recommendation 7.1 above) will automatically subject the entity to Crown Entities Act 2004 requirements, such as to prepare a three-yearly statement of intent,³⁵² an annual statement of performance expectations,³⁵³ and an annual report; the annual report of a Crown entity must be provided to its responsible Minister who must in turn present it to Parliament.³⁵⁴

In order to protect against a repeat restructuring that might again remove all meaningful accountability from the agency responsible for administering charities' legislation, we recommend the requirements to report annually against a statement of intent are set out in the Charities Act. Clauses 59 and 60 of the draft Bill included with this report are directed to this end.

Given the importance of the charitable sector to the wellbeing of New Zealanders, and the need to raise awareness in that regard, as well as the need to protect against measures such as the social housing review discussed above at table 3.4, we recommend that the legislation provide for public and stakeholder engagement in the preparation of the statement of intent. As noted by one commenter:³⁵⁵

Public and stakeholder involvement in the Statement of Intent can be increased (which is desirable in my opinion) if the preparation involves two rounds of public engagement – the first of the kind already defined in [clause 59(2)] and the second is public consultation on the draft Statement of Intent. There's a big gap between taking soundings of the kind [clause 59(2)] outlines, and the final document, and in my experience of SOIs as documents to communicate an agency's medium term strategic intentions, they benefit from exposure of the actual proposed wording and indicators of success: people get more out of being able to respond to a consultation on something tangible.

We respectfully agree with these comments.

Recommendation 8.30:

That whatever agency is responsible for administering charities' legislation is required to prepare a statement of intent, at least every three years, and to make a draft statement of intent available for public consultation before finalising.

Annual report

Given the current opaqueness of registration decision-making, we recommend the legislation specifically require that certain information is included in the annual report, such as the numbers of applications for registration that have been voluntarily withdrawn, the numbers of entities that have been deregistered, and the reasons why.³⁵⁶

352 Crown Entities Act 2004 s 139.

353 Crown Entities Act 2004 s 149C.

354 Crown Entities Act 2004 s 150.

355 Comments of Andrew Ecclestone received by email dated 24 August 2020.

356 As noted in the [submission](#) of The UpsideDowns Education Trust at 10 – 12: "The regulator should be required to publicly publish the names of all charities it deregisters, the steps taken to assess the organisation's status, and the reasons for deregistration visibly and accessibly. This is both to keep the regulator to account and to make it easier for the public to know if they are supporting a charity or are considering supporting a charity that has been deregistered or may imminently be deregistered. ... The registration decision-making process must be more transparent. Summaries of the decision-making process (along with whatever information was used to reach decisions) must be made available immediately to the applying body in the first instance, and then to the public. ... A much more transparent and well-publicised decision-making process would alleviate some of these concerns [about lack of independence in decision-making]. ... The ability to deregister a charity is sufficient enforcement power. I believe that, if a charity is deregistered and can then work with the regulator to re-register, this means that intermediate sanctions are unnecessary. Part of the reason for this is that this is the best way of informing the public and potential donors that the charity concerned is experiencing difficulties. Sanctions would be more likely to go under the radar. A second reason is that further enforcement powers would not be subject to the same degree of transparency or recourse to appeal, and have the potential to disadvantage charities".

Other suggestions include details of statistics and trends divined from analysis of data on the charities register, and whether the funding received is sufficient for it to perform its duties (and if not, which activities it has chosen to curtail or forgo). As one commenter noted, the latter requirement would enable “much better-informed public debate on its performance and enable accountability to flow upwards to Government (for Budget/Vote decisions) as well as to TKA itself”.³⁵⁷

We have included a number of other suggestions in cl 60 of the draft Bill included with this report, but welcome discussion and consultation on these and any other suggestions to facilitate transparency, openness and accountability.

We also recommend that the agency be statutorily required to report directly to Parliament, following the approach taken in comparable jurisdictions, as discussed above in chapter 7.

Recommendation 8.31:

That in order to improve transparency and accountability of decision-making, the agency responsible for administering charities’ legislation is required to prepare its own annual report, and that certain information is specifically required to be included within it, such as the numbers of applications for registration that have been voluntarily withdrawn, the numbers of entities that have been deregistered, and the reasons why.

Annual meeting/hui

Clause 61 of the draft Bill included with this report retains the annual meeting requirement currently contained in s 12 of the Charities Act, and proposes that it be extended to require an annual hui with Māori charities also.³⁵⁸

The annual meeting process does not currently appear to be well understood,³⁵⁹ and we also recommend some changes to the annual meeting requirements, in order to strengthen its utility as an accountability mechanism.

For example, we recommend a number of measures designed to link the annual meeting with the Charities Registrar’s annual report, discussed above, including requiring the report to be made available with the same minimum notice as the meeting, so that people can read them in advance and prepare to make a constructive contribution. We also recommend providing members of the public with the opportunity to raise an issue with the Charities Registrar in advance of the meeting, and then make a further submission in writing if they are not satisfied with the response given at the meeting itself. As one commenter noted, this approach would “strengthen the open and participative signals for active stakeholder engagement in the governance of the sector”.³⁶⁰

Clause 61(9) reflects the following submission:

... we would like to think that peak bodies who may or may not be registered charities themselves might be specifically invited to attend and speak.

We agree the annual meeting is an important opportunity for two-way dialogue and welcome discussion and consultation on how best to implement this.

Recommendation 8.32:

That refinements are made to the requirement to hold an annual meeting in order to strengthen its utility as an accountability mechanism.

357 Comments of Andrew Ecclestone received by email dated 24 August 2020.

358 See the [submission](#) of Te Whakakitenga o Waikato Incorporated, on behalf of the Waikato-Tainui iwi, endorsed by the Waikato Raupatu Lands Trust and Group and Waikato-Tainui marae Part 3 at [7].

359 See, for example, the [submission](#) of Whaiora Whanui Trust at 9: “[The current accountability mechanisms for Charities Services and the Charities Registration Board are] inadequate. The annual meeting (S12) process/reporting is not widely understood”.

360 Comments of Andrew Ecclestone received by email dated 24 August 2020.

Appeals

Clause 62 of the draft Bill included with this report is intended to implement recommendations 6.1 (reinstating charities' access to a de novo oral hearing of evidence), 6.5 (extending the timeframe for appealing decisions to 60 days) and 6.6 (clarifying that charities are able to appeal all decisions made under the Charities Act). (See also cl 36(3), which is intended to implement recommendation 6.2).

In our view, clarifying the nature of the hearing to be conducted on appeal is perhaps the most important change that any review of the Charities Act 2005 needs to make, as discussed above in chapters 4 and 6.

Test case litigation funding

Many appeals under the Charities Act, particularly those that consider the definition of charitable purpose, are likely to have implication beyond the individual charity bringing the appeal.

In Australia, the Australian Tax Office ("ATO") runs a Test Case Litigation Program which provides financial assistance to taxpayers to help them bring cases that "involve issues where there is uncertainty or contention about how the law operates" and would be in the public interest to be litigated.³⁶¹ Cases are selected for funding by a test case litigation panel,³⁶² drawn from members of the accounting and legal professions to ensure that issues of importance to the community are funded.³⁶³ The recent review of Australian charities legislation recommended that test case funding similarly be made available to develop the law in matters of public interest in a charities law context.³⁶⁴

In New Zealand, the Tax Administration Act 1994 makes provision for test cases in a tax context,³⁶⁵ however, one of its key stumbling blocks is that test case designation is made unilaterally by the Commissioner of Inland Revenue.³⁶⁶ The courts have procedures that broadly allow for test-case designation,³⁶⁷ however, these procedures require a dispute to have reached the court hearing stage of the process.³⁶⁸

A 2010 review of the tax disputes review procedures noted difficulties with the test case system and recommended introducing "a system that is more agreeable to both Inland Revenue and taxpayers".³⁶⁹ However, the review specifically rejected a taxpayer-funded test-case litigation programme along the lines adopted by the ATO on the following basis:³⁷⁰

There are a number of reasons for favouring the introduction of a similar programme in New Zealand:

- It would promote clarity of law in complex areas. The early recognition of complex issues would allow both taxpayers and Inland Revenue some certainty on how the law applies – even in law that is relatively recently enacted.
- Taxpayer funding is more likely to result in taxpayers volunteering to either be the test case or be bound by the outcome.
- Provided the Commissioner invariably followed the recommendation of a test case panel, the process would arguably be more transparent and acceptable to taxpayers.

361 Australian Tax Office *Test Case Litigation Programme*:

[<www.ato.gov.au/tax-professionals/tp/test-case-litigation-program/>](http://www.ato.gov.au/tax-professionals/tp/test-case-litigation-program/).

362 Australian Tax Office *Test Case Funding*: [<www.ato.gov.au/Forms/Test-Case-funding/>](http://www.ato.gov.au/Forms/Test-Case-funding/).

363 Inland Revenue Department and the Treasury *Disputes: a review – an officials' issues paper* July 2010 at [9.15], [9.21]: "The test case panel is an advisory body only. The chair of the panel is the ATO's Chief Tax Counsel, who makes the final decision on whether funding is offered. The current panel comprises six people, four of whom are external. The panel meets four or five times a year where applications are generally considered".

364 P McClure AO, G Hammond OAM, S McCluskey, Dr M Turnour *Strengthening for purpose: Australian Charities and Not-for-profits Commission – Legislative Review 2018* 31 May 2018 recommendation 20.

365 Tax Administration Act 1994 ss 89N, 89O, 137, 138Q, 138R.

366 Inland Revenue Department *Disputes: a review – an officials' issues paper* July 2010 at [9.26].

367 For example High Court Rules 2016 rule 10.16 allows a Court to consolidate proceedings that share common characteristics and rule 4.27 allows for representative action proceedings.

368 Inland Revenue Department *Disputes: a review – an officials' issues paper* July 2010 at [9.40].

369 Inland Revenue Department *Disputes: a review – an officials' issues paper* July 2010 at [9.43].

370 Inland Revenue Department *Disputes: a review – an officials' issues paper* July 2010 at [9.23] – [9.25] (footnotes omitted).

Countered against these arguments are the following major disadvantages:

- If the purpose of a test-case process is to aid cost reduction and timeliness rather than development of the law, there is more limited justification for funding some taxpayers and not others.
- New Zealand is a small jurisdiction with a limited pool of independent persons qualified to sit on a panel. This is especially problematic for cases that involve a large number of prominent taxpayers.
- There would be a fiscal cost associated with taxpayer funding of all or a substantial part of the costs of both parties to a protracted piece of litigation. There are policy concerns around the circumstances in which government funds should be diverted to assisting tax disputes.
- There appear to be no major advantages over a court making the decisions, which may have substantial experience in test-case designation ... To introduce a separate body would appear to be an unnecessary duplication of resources.
- The panel would need to be established through legislation. As a statutory body, its decisions would be subject to judicial review. Although we consider that the judicial review of the decisions of an independent panel would be rarer than the review of decisions by the Commissioner, this is by no means guaranteed. Therefore, in practical terms, the situation may not be materially advanced from the current position of these decisions being made by the Commissioner.

On balance, we consider that the disadvantages for having a taxpayer-funded test-case programme outweigh the advantages.

As a result, no changes were made to the test case process for tax cases.

As discussed above in chapter 3, prior to the Charities Act charities law in New Zealand was effectively administered by Inland Revenue. However, charities law cases are not inherently tax cases, as discussed in this report. Most of the reasoning given in 2010 for rejecting test case litigation funding in a tax context would not apply in a charities law context. To the contrary, given the inherent reluctance of charities to litigate but the importance of developing legal precedent on the definition of charitable purpose, there would be considerable advantage in assisting charities to bring cases to ensure issues of importance to the community are able to be heard and clarified.³⁷¹

The draft Bill circulated for comment in 2020 included a provision enabling the Charities Registrar, following consultation with an advisory board, to provide test case litigation funding where an appeal may have broader implications beyond an individual dispute. While there was strong support for making test case litigation funding available in a charities law context, and for including a provision to that effect in the statute to protect its ongoing availability, there was not consensus as to how decisions to grant such funding should be made. Concern was expressed at the possibility of the Charities Registrar making such decisions unilaterally and without transparency or accountability. On that basis, we have not reproduced the provision in the draft bill included with this report, and we recommend that the issue be considered further as part of the independent first principles review recommended in recommendation 1.0.

Recommendation 8.33:

That test case litigation funding is made available to develop the law in matters of public interest.

³⁷¹ See further *The Law and Practice of Charities in New Zealand*, S Barker, M Gousmett and K Lord (LexisNexis, Wellington, 2013) at [3.1347] - [3.1352].

Standing

Another issue that arises in the context of appeals is whether persons other than the person directly affected by a decision should have standing to bring an appeal.

Other jurisdictions, such as Australia,³⁷² England and Wales,³⁷³ Northern Ireland³⁷⁴ and, to a lesser extent, Ireland,³⁷⁵ allow a wider range of persons to bring an appeal. Such a facility may be particularly helpful because a decision on one particular charity's appeal may have significant implications for other charities who are not party to the appeal and therefore have little opportunity to influence a decision that will affect them. While the High Court Rules do make provision for interested parties to intervene,³⁷⁶ the question is whether more specific provision would be helpful.

In the interests of enabling charities to have a voice on issues of law that affect them, we recommend that consideration is given to providing standing to persons other than the affected charity who may also be affected by a decision as part of the independent first principles review recommended in recommendation 1.0.

Recommendation 8.34:

That the question of whether persons other than the person directly affected by a decision should have standing to bring an appeal is considered as part of the independent first principles review recommended in recommendation 1.0.

Māori Advisory Committee

Clauses 63 to 67 of the draft Bill included with this report are intended to implement recommendation 7.3 (that a Māori Advisory Committee is established to assist the agency responsible for administering charities legislation to give effect to the principles of Te Tiriti o Waitangi and tikanga principles).

In the draft Bill circulated for consultation in 2020, the Māori Advisory Committee would have been a subcommittee of Te Māngai Aroha – the Advisory Board. However, as discussed above in chapter 7, while the proposal to create an Advisory board received a lot of positive feedback, it was not universally supported, with concerns expressed regarding cost, its relationship with other bodies, and how its authentic independence could be established and maintained. For that reason, on balance, we have not replicated the Advisory Board provisions in the draft Bill included with this report and instead recommend further consultation is undertaken on establishing an extra-statutory sector group (recommendation 7.4).

A consequence of this change is that a different process for appointing members of the Māori Advisory Committee is required. Clause 64 of the draft Bill included with this report would provide for the Minister to make the appointments, following the model of the Māori Advisory Group in s 15 of Taumata Arowai – the Water Services Regulator

372 Australian Charities and Not-for-profits Commission Act 2012 s 165-20 permits “any other person whose interests are affected by the decision” to apply in writing to the Tribunal to be made a party to the proceeding.

373 The Charities Act 2011 (UK) sch 6 generally allows appeals to be brought by a charity, its trustees, and “any other person who is or may be affected by the decision”. In addition, ss 325 and 326 allow both the Charity Commission for England and Wales and the Attorney-General to refer matters to the Charity Tribunal, in which case others likely to be affected by the Tribunal's decision are, with the Tribunal's permission, entitled to be parties to the proceedings. In the two first such references, large numbers of charities intervened: Principal Judge Alison McKenna “Appealing the regulator: experiences from the Charity Tribunal for England and Wales” in M Harding, A O'Connell and M Stewart (eds) *Not-for-profit law: theoretical and comparative perspectives* (Cambridge University Press, 2014) 336 at 344.

374 The Charities Act (Northern Ireland) 2008 sch 3 cl 1(2) allows appeals to be brought by the Attorney-General and, generally, the charity, its trustees, and “any other person who is or may be affected by the decision”. In addition, sch 4 allows both the Charity Commission for Northern Ireland and the Attorney-General to refer matters to the Charity Tribunal, in which case others likely to be affected by the Tribunal's decision are, with the Tribunal's permission, entitled to be parties to the proceedings.

375 In Ireland, power is given to the Minister to appeal a decision of the Charities Regulatory Authority to register a charity (Charities Act 2009 (Ireland) s 45).

376 See, for example, High Court Rules 2016 4.56, 7.43A and the inherent jurisdiction of the Court.

Act 2020, amended to require the Minister to consult with Māori rather than just Māori Ministers. However, further consultation is required as to how the members of the Māori Advisory Committee should be appointed.

One commenter suggested the Māori Advisory Committee should be a genuinely bicultural advisory board developing law and practice in accordance with tikanga.

A number of commenters also queried the ability of the Māori Advisory Committee to make binding policy statements. A key outcome of our research is that binding the appliers of the law in the way would be central to the workability of the concept.

However, we welcome further consultation and discussion on the optimum composition of the committee and its role.

Monitoring

The sheer scope and differentiation of the charitable sector provides immeasurable public benefit and, therefore, the presences of charities are one of the abiding markers of a healthy society. The very diversity of the sector, which is so valued, makes designing a charities law framework more challenging in that one size will not fit all and appreciation of this fact by both the legislator and the administrator is critical to a nuanced a proportionate regime.³⁷⁷

As noted by the recent review of charities law in Northern Ireland, developing a regulatory framework that recognizes the goodwill and willingness of most charities to comply is key to success; while the framework must provide protection from the minority who wish to exploit others, perpetrate harm, or otherwise abuse the system, focusing on enforcement rather than on building strengths risks destroying the goodwill and cooperation on which the success of the system relies. There will never be sufficient time or resources to police every single registered charity and the task of an effective charities registrar is to create an environment that enhances the inherent high levels of compliance by most registered entities. Absence of cooperation by some charities should not trigger a ripple effect of higher enforcement against all charities: it is important to remember that regulation is not an end in itself. A charities law framework will work best when it creates a simple, enabling regime that both encourages and supports charities to focus on their charitable purposes, and creates an informed arena in which the registrar, the public, the media and others become allies in scrutinising the actions of registered charities and holding them to account.³⁷⁸

To this end, part 7 of the draft Bill included with this report is intended to support the overarching duty set out in cl 38: to act in good faith to further the charity's stated charitable purposes in accordance with its rules. In this way, the charities law framework respects the diversity of the charitable sector by focusing on the charitable purposes that those involved with charities have signed up to, as discussed above in chapter 2. This approach also reflects the original vision for the New Zealand charities law framework articulated by the 2002 Working Party on the Registration, Reporting and Monitoring of Charities as follows:³⁷⁹

Advantages to the charitable sector through effective monitoring include:

1. improving the charitable sector's credibility with the public
2. enabling education and support programmes for the sector to be better targeted
3. enabling irregularities to be detected and dealt with at an early date, to the benefit of all concerned.

We considered the monitoring role of the Commission on the basis of three principles that:

- monitoring should maintain the integrity of the register
- monitoring should enhance the charitable sector
- monitoring should ensure that the funds of registered charities are being used as required by the organisation's founding document.

377 Dr O Breen, Rev Dr L Carroll, N Lavery [Independent Review of Charity Regulation Northern Ireland](#) January 2022 at 22.

378 Dr O Breen, Rev Dr L Carroll, N Lavery [Independent Review of Charity Regulation Northern Ireland](#) January 2022 at 45 - 47, 63 - 66, 152 - 154.

379 *Report by the Working Party on Registration, Reporting and Monitoring of Charities*, 28 Feb 2002 at 21.

The Commission should have the power to investigate the affairs of a registered charity where the reporting process shows irregularities or when information received suggests irregularities. This would require an investigating capability within the Commission's office.

In investigating a charity we believe the Commission must have the statutory authority to require that the terms of the governing document are carried out in an appropriate manner ...

We recommend therefore that where organisations are found to be in breach of their obligations, the actions of the Commission should be designed to encourage compliance through education rather than punishment, in the first instance. The actions of the Commission should be to support, advise and educate so as to promote best practice. ... Deregistration should be a last resort.

Accordingly, cls 68 and 69 of the draft Bill included with this report are intended to clarify the purposes for which monitoring is undertaken, and to underscore that the charities law framework is a relatively simple regime, focused on purposes, and on accountability, rather than regulation.

Clause 69(1)(c) provides that the inquiry power may be used to ascertain whether the Charities Registrar has fulfilled or complied with its duties under the Act. This is intended to ensure the Charities Registrar is alive to the possibility that issues at stake for a registered charity or responsible person may have arisen because of its actions.³⁸⁰

Warning notices and compliance agreements

Section 54 of the current Charities Act provides for Charities Services to have a specific power to issue warning notices. The Charities Registration Board has the power to publish warning notices under s 55. To date, s 55 has never been used, and only a handful of warning notices have been issued, at least one of which was issued in response to a charity engaging in the democratic process in good faith in furtherance of its charitable purposes.

We recommend that ss 54 and 55 of the Charities Act are repealed and instead a specific ability to enter into compliance agreements is provided for. Clause 70 of the draft Bill included with this report, which was described by one commenter as a "good collaborative partnership way to educate the organisation and work together to ensure that it meets its compliance obligations", is directed with this end.³⁸¹

Recommendation 8.35:

That sections 54 and 55 of the Charities Act, which relate to the power to issue and publish warning notices, are repealed and replaced with a specific power to enter into compliance agreements.

The ultimate consequence for failure to comply with a compliance agreement would be deregistration, but we welcome consultation and discussion as to whether more detail, such as timeframes for meeting compliance agreements and consequences for failure to do so, is required to be set out in the legislation.

Sharing information

Although our research indicates the ability to share information is important, we do have concerns about the ability of the Charities Registrar to share information with IRD given the importance of decoupling potential fiscal consequences of charitable registration from eligibility for registration, as discussed above. The purpose of the information contained on the charities register is to provide transparency and disclosure for all stakeholders, including Inland Revenue, which has its own very wide information-gathering powers, raising questions as to whether power to share information further is required in the Charities Act. The Charities Act is not a tax Act. Clause 71 of the draft Bill included with this report retains the current ability to share information (combining sections 30 and 53 of the current Charities Act), however, we invite discussion and consultation on whether this power should continue and, if so, the precise form it should take.

³⁸⁰ I am grateful to Andrew Ecclestone for this suggestion.

³⁸¹ Comments of Methodist Alliance, received by email dated 14 October 2020.

The reference to “rebates” in the example that accompanies s 30 also needs to be updated following their replacement with donations tax credits.

Section 75 of the current Charities Act provides that there is no duty or obligation on the Charities Registration Board or Charities Services to supervise the affairs of or exercise any powers in respect of any person. Section 75 was included in the Charities Bill as originally introduced, but the rationale for its inclusion was not made clear. We recommend that section 75 of the current Charities Act is repealed, and the duties and obligations of the Charities Registrar under the legislation are interpreted according to normal rules, unless a rationale can be articulated as to why it should remain.

Recommendation 8.36:

That, in the absence of a rationale for its retention, section 75 of the Charities Act, which provides that there is no duty or obligation on the Charities Registration Board or Charities Services to supervise the affairs of or exercise any powers in respect of any person, is removed.

Deregistration

The key sanction under the proposed charities law framework is deregistration: having been encouraged to comply, a charity that refuses to comply should simply be deregistered. Deregistration removes access to the benefits of registration and, as discussed above in chapters 3 and 5, requires the deregistered charity to divest itself of all its assets within 12 months or pay tax on the balance (the “**deregistration tax**”).³⁸²

Some assets are excluded from the deregistration tax calculation: since its introduction in 2014,³⁸³ s HR 12 has been subject to deferral,³⁸⁴ wholesale replacement,³⁸⁵ and a comprehensive series of amendments³⁸⁶ to fix faults and correct errors such that it is now a reasonably complicated provision. The Tax Working Group recommended the deregistration tax rules be further amended “to more effectively keep assets in the sector”³⁸⁷ or to ensure there is “no deferral benefit through the use – and then deregistration – of charitable structures”,³⁸⁸ but there is no further elaboration as to why such amendment might be needed. At the time of writing no such further amendment has been made.

Section HR 12 is a case study in the difficulties inherent in dealing with symptoms rather than causes: it was a response to the extraordinarily high number of charities being deregistered in New Zealand due to controversial changes in jurisprudential interpretations of the definition of charitable purpose.³⁸⁹ Many of the recommendations

382 See Income Tax Act 2007 ss CV 17, DB 41(2B), DV 12(1B), HR 11, HR 12.

383 Section HR 12 was inserted into the Income Tax Act 2007 on 30 June 2014, by s 129(1) of the Taxation (Annual Rates, Employee Allowances, and Remedial Matters) Act 2014 (2014 No 39) with application from 1 April 2015 (unless a charity voluntarily deregistered, in which case it applied retrospectively from 14 April 2014).

384 The application date of s HR 12 was extended to 1 April 2017 by the Taxation (Annual Rates for 2015–16, Research and Development, and Remedial Matters) Act 2016 s 299 ‘if the person’s activities involve the provision of housing’ and they had not voluntarily deregistered before 1 April 2015. The original grace period to 2015 was intended to allow time for charities affected by the decision in *Re Queenstown Lakes Community Housing Trust* [2011] 3 NZLR 502 (HC) to be deregistered without being affected by the new deregistration tax. This amendment extended the grace period to 1 April 2017 to provide more time for Charities Services to complete the review of the charitable status of community housing providers discussed above in table 3.1. See Inland Revenue Department *Taxation (Annual Rates for 2015–16, Research and Development, and Remedial Matters) Bill; Commentary on the Bill* February 2015 at 63.

385 Section HR 12 was replaced, on 29 March 2018, with retrospective effect from 6 April 2016, by the Taxation (Annual Rates for 2017–18, Employment and Investment Income, and Remedial Matters) Act 2018. This amendment originally applied retrospectively from 14 April 2014, but was deferred to 6 April 2016 at Committee stage in response to submissions (being one year prior to the introduction of the Bill).

386 Section HR 12 was substantially amended again by the Taxation (Annual Rates for 2018–19, Modernising Tax Administration and Remedial Matters) Act 2019.

387 Tax Working Group *Future of Tax: Final Report* 21 February 2019 at 21, recommendation 83.

388 Tax Working Group *Future of Tax: Interim Report* 20 September 2018 at 122.

389 See Inland Revenue Department and the Treasury *Clarifying the tax consequences for deregistered charities – an officials’ issues paper* 23 August 2013 at [1.3], [4.14], [5.22] – [5.27].

contained in this report are designed to clarify the tests to be applied in determining whether a purpose is charitable which, in turn, should reduce the number of deregistrations (including voluntary deregistrations, as discussed above) for this reason.³⁹⁰ We recommend that no further piecemeal amendments are made to legislation affecting charities pending the independent first principles review of the charities law framework recommended in recommendation 1.0 above.

Recommendation 8.37:

That no further piecemeal amendments are made to legislation affecting charities pending the independent first principles review of the charities law framework recommended in recommendation 1.0 above.

Clauses 72 – 77 of the draft Bill included with this report follow the model set by ss 31–36 of the current Charities Act, with some modifications aimed at protecting against overuse of the provision. We welcome discussion and consultation on these points.

The public interest test

Section 35(1) of the current Charities Act provides that a charity must not be deregistered unless, in addition to satisfaction of grounds for deregistration under s 35(1)(a), the decision-maker is “satisfied that it is in the public interest to proceed with the removal”.

In practice, the Charities Commission and the Charities Registration Board apply an approach that equates the two requirements: the analysis routinely taken is that “public trust and confidence in registered charitable entities would not be maintained if entities that did not meet the essential requirements of registration remained on the register” and that it is therefore “in the public interest” to remove a charity from the register to “maintain public trust and confidence in the charitable sector”.³⁹¹ The writer is not aware of any charity where the requirement to consider the public interest has protected them against a deregistration.

The net effect, as discussed above in chapter 5, is that the requirement to consider the public interest in s 35(1) is otiose: in practice, a failure to meet s 13 is routinely considered to constitute a failure to meet s 35(1). It seems unlikely that Parliament would have intended the two provisions to be equated in this way. The very presence of s 35(1) indicates the possibility that an entity proposed to be deregistered might remain registered if it is not in the “public interest” to proceed with the removal, a scenario which might particularly arise in the context of current uncertainty regarding charities’ ability to advocate for their charitable purposes: the public interest test in s 35(1) arguably indicates that, in marginal cases, charities should be given the benefit of the doubt, to protect against the punishment of deregistration being meted out to worthy charities on arguable and controversial points of law.

We recommend that the circumstances in which the public interest test in s 35(1) might protect a charity from deregistration are set out on Charities Services’ website, and are further clarified as part of the independent first principles review recommended in recommendation 1.0. If there are no such circumstances, the provision is otiose, which cannot have been Parliament’s intention.

Recommendation 8.38:

That the circumstances in which the public interest test (currently set out in section 35(1) of the Charities Act) might protect a charity from deregistration are clarified and made publicly available.

³⁹⁰ See the discussion in Legalwise “[Significant issues with Review of Charities Act 2005](#)” 10 January 2019.

³⁹¹ See, for example, Charities Registration Board Decision 2017- 1 *Family First New Zealand* 21 August 2017 at [53] - [55]; Charities Commission Decision D2010 – 9 *National Council of Women of New Zealand Incorporated* 22 July 2010 at [85] - [87]. See also *Re Queenstown Lakes Community Housing Trust* [2011] 3 NZR 502 (HC) at [23]: “The Commission expressed the view that public trust and confidence in registered charitable entities would not be maintained if entities which did not meet the essential requirements for registration remained on the register and so considered that removal was in the public interest, as it would maintain public trust and confidence in the charitable sector”.

Enforcement

Currently, penalties provisions are scattered throughout the Charities Act and in regulations. The penalty for knowingly failing to comply with a financial reporting standard is \$50,000, while the penalty for failure to file an annual return (which must be accompanied by financial statements prepared in accordance with the financial reporting standards) is \$200: this incongruence provides a perverse incentive on a charity that might wish not to comply with a particular reporting standard simply to not file at all, thereby undermining transparency and accountability. Most of the enforcement provisions in the current Charities Act have in fact never been used despite widespread non-compliance, all of which underscores the need for a different approach. Part 9 of the draft Bill included with this report proposes to support the various duties to which registered charities are subject by infringement offences, following the model set out in the Incorporated Societies Act 2022. We welcome discussion and consultation on this approach.

Banning orders

Section 31(4) of the Charities Act currently allows the Charities Registration Board to make an order disqualifying a person from being an officer of a registered charity for up to 5 years. There are two key difficulties with this provision. First, the power to disqualify only applies if a charity has first been deregistered. Secondly, there are inadequate checks and balances on this power.

The Incorporated Societies Act 2022 ss 168 - 173 proposes to introduce a power for people to be banned being an officer of an incorporated society, either for a specified period or permanently: an application for such a banning order can be made independently of any action taken against a society; however, a banning order can only be made by a court, following an oral hearing of evidence.

Other jurisdictions similarly require an order of a court before exercising a power to ban a person from being an officer of a registered charity, including Ireland,³⁹² and Scotland.³⁹³ It has also been suggested in Northern Ireland.³⁹⁴

Clauses 90 - 92 of the draft Bill included with this report provide for a power for persons to be banned from being a responsible person of a registered charity without requiring prior deregistration of the charity, but with the protection of requiring an application to the court.

Recommendation 8.39:

That the legislation makes clear the exercise of any power to ban persons from being officers or responsible people of a registered charity cannot be exercised in the absence of an order of a court.

Miscellaneous

A civil society strategy

As discussed in this report, the period since the Charities Act was passed into law in 2005 has been characterised by a series of piecemeal amendments, generally introduced by Statutes Amendment Bill and normally passed through under urgency either without proper consultation or against the strong opposition of the charitable sector. There

³⁹² Charities Act 2009 (Ireland) s 74.

³⁹³ Charities and Trustee Investment (Scotland) Act 2005 s 34

³⁹⁴ Dr O Breen, Rev Dr L Carroll, N Lavery [Independent Review of Charity Regulation Northern Ireland](#) January 2022 at 193 - 194: "... given the reputational effect that removal of a trustee has on both the individual and charity concern, decisions to remove trustees should be made at least at Commissioner level. It should also be considered whether suspension of a charity trustee or member should be a precursor to subsequent removal. If the power to suspend charity trustees is reserved to Commissioners, then depending upon the type of regulator that the Minister wishes to empower, subsequent applications to remove a trustee could then be made either by the Commissioners or by way of separate application to the High Court".

is currently no overarching strategic vision of how to maximise the potential of the charitable sector to provide benefits for society, including in terms of social cohesion and wellbeing. The result is a muddled framework that is not fit for purpose and even at times counterproductive.

In New Zealand, the requirement to produce a number of strategies that touch on the work of the charitable sector has been enshrined in legislation, including a Health Strategy,³⁹⁵ a Disability Strategy,³⁹⁶ a Child and Youth Wellbeing Strategy,³⁹⁷ conservation management strategies,³⁹⁸ an Energy Efficiency and Conservation Strategy,³⁹⁹ and a Tertiary Education Strategy.⁴⁰⁰ Other national strategies have been developed without a legislative underpinning, including a Biodiversity Strategy,⁴⁰¹ a National Strategy for Financial Capability,⁴⁰² an Employment Strategy,⁴⁰³ and a Tourism Strategy,⁴⁰⁴ with work underway to develop a Research, Science and Innovation Strategy.⁴⁰⁵ However, there is no strategy coherently addressing the work of the charitable sector, and the wider civil society sector in which it sits, as a whole.

The Government of Ireland has developed a national social enterprise policy,⁴⁰⁶ a national volunteering strategy,⁴⁰⁷ and initiated a national policy process to develop a national policy on philanthropy.⁴⁰⁸ The Government of Scotland has developed a social enterprise strategy,⁴⁰⁹ while Amsterdam has developed a circular economy strategy.⁴¹⁰

In Australia, there have been calls for a national Social Enterprise strategy,⁴¹¹ a national Volunteering Strategy,⁴¹² and a national civil society strategy.⁴¹³

395 New Zealand Public Health and Disability Act 2000 s 8. The New Zealand Health Strategy 2016 can be accessed here: www.health.govt.nz/publication/new-zealand-health-strategy-2016.

396 New Zealand Public Health and Disability Act 2000 s 8. The New Zealand Disability Strategy can be accessed here: www.odi.govt.nz/nz-disability-strategy/.

397 Children's Act 2014 s 6. The Child and Youth Wellbeing Strategy can be accessed here: dpmc.govt.nz/our-programmes/child-and-youth-wellbeing-strategy.

398 Conservation Act 1987 s 17D. The Department of Conservation Te Papa Atawhai conservation management strategies can be accessed here: www.doc.govt.nz/about-us/our-policies-and-plans/statutory-plans/conservation-management-strategies/.

399 Energy Efficiency and Conservation Act 2000 ss 8 - 19. The New Zealand Energy Efficiency and Conservation Strategy 2017-2022 can be accessed here: www.mbie.govt.nz/building-and-energy/energy-and-natural-resources/energy-strategies-for-new-zealand/.

400 Education Act 1989 s 159AA. The Tertiary Education Strategy can be accessed here: www.tec.govt.nz/focus/our-focus/tes/.

401 Te Mana o te Taiao Aotearoa New Zealand Biodiversity Strategy 2020: www.doc.govt.nz/globalassets/documents/conservation/biodiversity/anzbs-2020.pdf.

402 He Rautaki-ā-motu te Āheitanga Ahumoni The National Strategy for Financial Capability: retirement.govt.nz/financial-capability/national-strategy/.

403 Employment Strategy: www.mbie.govt.nz/business-and-employment/employment-and-skills/employment-strategy/.

404 New Zealand-Aotearoa Government Tourism Strategy: www.mbie.govt.nz/immigration-and-tourism/tourism/new-zealand-aotearoa-government-tourism-strategy/.

405 Ministry of Business, Innovation and Employment *Draft Research, Science and Innovation Strategy*: www.mbie.govt.nz/have-your-say/draft-research-science-and-innovation-strategy/.

406 Department of Rural and Community Development *National Social Enterprise Policy for Ireland 2019-2022* 18 July 2019: www.gov.ie/en/campaigns/e779c3-social-enterprise-policy/#.

407 Department of Rural Community and Development *National Volunteering Strategy (2021-2025)*: www.gov.ie/en/publication/3cba6-national-volunteering-strategy/.

408 Dublin People *Minister Joe O'Brien launches national policy process on philanthropy* 3 December 2021: dublinpeople.com/news/dublin/articles/2021/12/03/minister-joe-obrien-initiates-national-policy-process-on-philanthropy/.

409 Scottish Government *Riaghaltas na h-Alba Scotland's Social Enterprise Strategy 2016-2026*: www.gov.scot/publications/scotlands-social-enterprise-strategy-2016-2026/.

410 City of Amsterdam *Amsterdam Circular Strategy 2020-2025*

411 Social Change Central *New Research: The Time is Now to Step Towards an Australian Social Enterprise Strategy* May 2021: www.socialchangecentral.com/new-research-the-time-is-now-to-step-towards-an-australian-social-enterprise-strategy/. The States of Victoria and Queensland have already developed social enterprise strategies. See Victorian Social Enterprise Strategy 2021-2025: djpr.vic.gov.au/about-us/overview/strategies-and-initiatives/social-enterprise, and Queensland Social Enterprise Strategy: desbt.qld.gov.au/small-business/strategic-documents/social-enterprise-strategy.

412 Volunteering Australia *Designing the new national strategy for volunteering* November 2021: www.volunteeringaustralia.org/get-involved/national-strategy-for-volunteering/.

413 L Michael *"It's a very big picture vision": Work underway for a national civil society strategy* ProBono Australia 30 July 2020.

In the United Kingdom in July 2001,⁴¹⁴ then-Prime Minister, Tony Blair announced a review of the charities and the not-for-profit sector would be undertaken, including “to clarify the Government’s strategy towards the sector”. In August 2018, the United Kingdom government issued a “civil society strategy”, which it described in the following terms:⁴¹⁵

The government has a vision of the UK with better connected communities, more neighbourliness, and businesses which strengthen society. Technology enables strong communities rather than enabling disconnection and isolation.

Young people and their contribution to a thriving society are recognised as vital, with the ability to help the country tackle its most urgent challenges and deliver a better future for all of us.

People are empowered to take responsibility for their neighbourhoods. Power is decentralised so that local officials and professionals are properly accountable to local people, and trusted to do their job without bureaucratic interference. The provision of services is seen as the business of the community, not solely the responsibility of government, and providers are drawn from a broad range of suppliers from the public sector and beyond. All communities, regardless of levels of segregation and deprivation, are able to take advantage of these opportunities. Alongside public funding, private finance is used imaginatively to support services, stimulate innovation, and reduce risk for the taxpayer.

These developments have the ultimate effect of building a sense of shared identity, improving integration among the people of a place and also among the people of the UK as a whole.

The Civil Society Strategy is intended to set a direction for government policy. A group of civil society leaders wrote to us saying that “[the Strategy] should not be focused on what the government thinks the sector should do ... instead [it] should set out how the government can support and enable civil society to achieve its potential”. They also suggested that the Strategy should be “living and breathing”, not a final communication, but the beginning of a process of policy development and collaboration.

That is exactly what we intend to do. ... Our purpose is to cast a vision of how government can help strengthen and support civil society in England.

Although there was no legal obligation on the government to publish such a strategy, it forms part of the United Kingdom’s recognition of the existence and value of the wider civil society sector, including charities,⁴¹⁶ and a basis for government and charities to work together to move the vision forward.⁴¹⁷

While there is much government activity in New Zealand that touches on the charitable sector, it is not coordinated. The New Zealand government acknowledges that achieving the 17 Sustainable Development Goals by 2030⁴¹⁸ will require a whole of government effort working alongside the private sector and civil society;⁴¹⁹ in addition, open civic space can help to underpin efforts for an inclusive recovery from the pandemic, tackle

414 Lord Hodgson of Astley Abbotts *Trusted and Independent: Giving charity back to charities – Review of the Charities Act* July 2012 at [2.1].

415 HM Government *Civil Society Strategy: building a future that works for everyone* August 2018: <assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/732765/Civil_Society_Strategy_-_building_a_future_that_works_for_everyone.pdf> at 10 - 11 (footnotes omitted).

416 Interview with Kenneth Dibble, legal board member of the Charity Commission for England and Wales, and former Chief Legal Adviser and Legal Director at the Commission and Director of its International Programme (14 January 2021).

417 K Weakley “Charities tell the new civil society minister what they want” *Civil Society News* 30 July 2019.

418 The *2030 Agenda for Sustainable Development*, adopted by all United Nations Member States in 2015, provides a “shared blueprint for peace and prosperity for people and the planet, now and into the future. At its heart are the 17 Sustainable Development Goals (SDGs), which are an urgent call for action by all countries - developed and developing - in a global partnership. They recognize that ending poverty and other deprivations must go hand-in-hand with strategies that improve health and education, reduce inequality, and spur economic growth – all while tackling climate change and working to preserve our oceans and forests”. See: <sdgs.un.org/goals>. See also Ministry for Foreign Affairs and Trade *Sustainable Development Goals*: <www.mfat.govt.nz/en/peace-rights-and-security/our-work-with-the-un/sustainable-development-goals/>.

419 New Zealand Government *He Waka Eke Noa Towards a Better Future Together – New Zealand’s Progress towards the SDGs 2019*: <www.mfat.govt.nz/en/peace-rights-and-security/our-work-with-the-un/sustainable-development-goals/new-zealands-first-voluntary-national-review-vnr/> at 7.

systemic inequalities of income, race and gender in society, and build a more resilient and citizen-centred democracy.⁴²⁰ However, there is no overarching plan for how this might be achieved, and in the meantime the charitable sector continues to be overlooked and undervalued, as discussed above in chapter 1.

The draft Bill circulated for consultation in 2020 included provisions that would have required the Minister to develop a civil society strategy in consultation with the charitable sector, broadly following the model adopted in Ireland.⁴²¹ The idea is not for government to set an agenda that civil society should be setting for itself, but to articulate a vision for how best to unlock the potential of the charitable sector, and the wider civil society in which it sits, thereby reducing its invisibility while also respecting and enhancing its independence and autonomy. Such a purposeful and overarching strategy would guide policy development and help protect against harmful regulation and piecemeal, kneejerk reform.

On reflection, however, while statutory backing for the development of such a strategy would be helpful, waiting for legislation is not necessary, as the United Kingdom experience demonstrates; it would also potentially result in the loss of much valuable time. On that basis, the draft Bill included with this report has not replicated those provisions. Instead, we strongly recommend that the government undertake an extra-statutory process of co-designing with the charitable sector a civil society strategy, articulating a vision for how civil society can best be strengthened and enabled in Aotearoa New Zealand.

Recommendation 8.40:

That the government co-designs with the charitable sector a civil society strategy, along the lines adopted in the United Kingdom and proposed in Australia, articulating a vision for maximising the potential of the charitable sector, and the wider civil society in which it sits, to deliver benefits for Aotearoa New Zealand.

Five-yearly reviews

It is common for significant new legislation to receive a post-implementation review within its first three to five years. The charitable sector in New Zealand has not been well served by allowing the Charities Act to languish for years, if not decades, without being subjected to a proper post-implementation review. In order to protect against a repeat of this scenario, we strongly recommend that the legislation specifically require a review after five years. There is considerable precedent in New Zealand for legislation requiring such a review,⁴²² and it is common internationally in a charities law context to require a review after five years.⁴²³ As noted by one submitter:⁴²⁴

420 Open Government Partnership *Defending Civic Space: How OGP can step up* 9 April 2021:

[<www.opengovpartnership.org/stories/defending-civic-space-how-ogp-can-step-up/>](https://www.opengovpartnership.org/stories/defending-civic-space-how-ogp-can-step-up/).

421 Charities Act 2009 (Ireland) s 29: “(1) The Authority shall, as soon as practicable after the commencement of this section, and thereafter not earlier than 6 months before and not later than the expiration of each subsequent period of 3 years following that commencement, prepare and submit to the Minister a strategy statement in respect of the period of 3 years immediately following the year in which the strategy statement is so submitted. (2) The Minister shall, as soon as practicable after a strategy statement has been submitted to him or her under subsection (1), cause a copy of it to be laid before each House of the Oireachtas. (3) The Authority shall ensure that, as soon as practicable after copies of a strategy statement are laid before both Houses of the Oireachtas in accordance with subsection (2), the strategy statement is published on the internet. (4) In this section “strategy statement” means a statement that— (a) specifies the key objectives, outputs and related strategies, including use of resources, of the Authority, and (b) is prepared in a form and manner that is in accordance with any directions issued from time to time by the Minister”.

422 See, for example, Veterans’ Support Act 2014 s 282; Haka ka mate Attribution Act 2014 s 12; Evidence Act 2006 s 202 and s 26 of the Privacy Act 1993 which led to the Privacy Act 2020.

423 Charities Act 2006 (UK) s 73 which led to [Lord Hodgson’s review](#) in 2012; Australian Charities and Not-for-profits Commission (Consequential and Transitional) Act 2012 (Cth) s 16 which led to the [McClure review](#) in 2018; Charities Act 2009 (Ireland) s 6.

424 [Submission](#) of Philanthropy New Zealand at 5.

There needs to be a built-in legislative review process for an ongoing sustainable framework. There are a number of precedents for this (see, for example, section 282 of the Veterans' Support Act 2014).

The charitable sector is called civil society and the third sector for a reason - it has an incredibly important role in supporting our thriving communities and acting as a steward for the environment, working alongside both government and business. The partnership approach envisaged in the Sustainable Development Goal number 17 means that charities, business and government need to work together to achieve the targets. This will continue to be the case, even after Agenda 2030 targets are met. Impactful investment can happen where the legislation remains relevant and responsive to the changes in society, the economy and the environment. This justifies a government policy priority on a five-yearly basis.

Regular reviews would ensure the legislation is kept up to date and fit for purpose: keeping the legislation under active consideration would allow for new issues to be addressed as circumstances, technology, case law, and attitudes change. We acknowledge that in a climate of scarce resources and competing priorities officials may resist a requirement to conduct such a review. However, as discussed above in the context of recommendation 1.0, it is common for such reviews to be carried out independently of officials: such an approach would enable a balance to be struck between maximising the benefits that flow to society from this important sector while also impacting less on officials' time and resources. It is important that provision is made for the sector to have meaningful input into such a review.

The Election Forum held on 10 June 2020⁴²⁵ highlighted a significant degree of cross-party alignment: enshrining a requirement for a post-implementation review in legislation would provide an opportunity to build on these levels of consensus and elevate this important legislation above the electoral cycle.

Ideally, the legislation would require a post-implementation review after five years, followed by ongoing 10-yearly reviews. However, the former is most critical.

Recommendation 8.41:

That the legislation requires a post-implementation review after five years, following the model of Australia, England and Wales, and Ireland.

Forms

Section 72A of the Charities Act currently gives Charities Services a power to prescribe forms and requirements for forms and documents for registration for the purposes of the Charities Act and subpart LD of the Income Tax Act 2007 (which relates to donee status). In developing a form or requirement, the section requires Charities Services to consult with persons or organisations that Charities Services "considers to be representative of the interests of charitable entities"; having done so, Charities Services can prescribe a form or requirement simply by publishing it on its website.⁴²⁶

Section 72A was inserted into the legislation in February 2012, a few months prior to the Charities Commission being disestablished, by Statutes Amendment Bill (No 2) 271-2 (which ultimately became the Charities Amendment Act 2012). Prior to this amendment, forms and requirements were required to be prescribed by regulations.⁴²⁷ There was no meaningful consultation with the charitable sector, and no publicly-available commentary, of which we are aware, explaining why the protection of a regulation-making power was removed in these regards.

425 <www.huie.org.nz/wp-content/uploads/Webinar-Summary-%E2%80%93-Educating-political-parties-to-help-the-community-sector.pdf>.

426 Charities Act 2005 s72A(5), (6).

427 Charities Act s 73(1) prior to its amendment in February 2012 provided that: "(1) The Governor-General may, by Order in Council, make regulations for all or any of the following purposes: (a) prescribing forms for the purposes of this Act, and prescribing— (i) the inclusion in, or attachment to, forms of specified information or documents: (ii) forms to be signed by specified persons: (b) prescribing requirements with which documents sent or delivered for registration must comply:". The requirements were set out in the Charities (Fees, Forms, and Other Matters) Regulations 2006 prior to their amendment in February 2012.

At the time s 72A was inserted to the legislation, the Charities Act was administered by an autonomous Crown entity. While there is undoubtedly administrative convenience in autonomous Crown entity having an ability to prescribe forms and other requirements without requiring regulations to be promulgated, it is not clear to us that such powers are appropriately conferred now that the Charities Act is administered by a government department, particularly given that s 72A(6) only requires consultation with a self-selected group of people, whose comments may or may not be taken into account at Charities Services' discretion.

The specific requirement to consult in s 72A(6) is also unhelpful, as it appears to be being interpreted as a direction not to consult in other situations, such as before posting "guidance" to Charities Services' website.

In the interests of transparency and accountability, we strongly recommend that s 72A of the Charities Act is repealed, and the power to prescribe forms and related requirements be returned to regulations.

Recommendation 8.42:

That section 72A of the Charities Act is repealed, and the power to prescribe forms and other requirements is returned to regulations.

Tax Administration Act 1994

Section 32E(2)(k) of the Tax Administration Act 1994 (*Applications for RWT-exempt status*) entitles registered charities to apply to the Commissioner of Inland Revenue for RWT-exempt status.

RWT-exempt status is useful because it allows, for example, a bank that is paying interest to a registered charity to do so without withholding resident withholding tax ("**RWT**"). As registered charities are exempt from tax, it does not make sense administratively to require banks to withhold RWT and then require charities to file a tax return to claim it back.

Prior to 1 April 2020, IRD operated a manual system, whereby persons with RWT-exempt status were issued with a certificate of exemption which they could show to a payer of "resident passive income" (such interest or dividends) to enable their income to be paid on a gross basis (that is, without withholding RWT). A list of cancelled and reissued certificates of exemption was published quarterly in the New Zealand Gazette.

From 1 April 2020, IRD introduced an electronic RWT exemption register.⁴²⁸ Now, entities with RWT-exempt status are automatically listed on the register, which payers of resident passive income can access to verify if a customer or payee is exempt from withholding.

An amendment to s 32E of the Tax Administration Act 1994 was added at Select Committee stage of the Taxation (Annual Rates for 2019-20, GST Offshore Supplier Registration, and Remedial Matters) Bill. Clause 71B inserted new s 32E(1A) to provide that "A person who is registered as a charitable trust under the Charitable Trusts Act 1957 is treated as holding an RWT exemption certificate for the duration of the registration". The intention was that registered charities will no longer need to apply for RWT-exempt status, but will automatically be put on the RWT exemption register.⁴²⁹

This provision then became s 98 of the Taxation (Annual Rates for 2019-20, GST Offshore Supplier Registration, and Remedial Matters) Act 2019, which received Royal assent on 26 June 2019.

However, the provision unhelpfully referred to the Charitable Trusts Act 1957, rather than the Charities Act 2005. While many registered charities are incorporated under the Charitable Trusts Act, many are incorporated under other legislation or are not incorporated at all.

⁴²⁸ See Inland Revenue Department *Resident withholding tax exemption register*: www.ird.govt.nz/income-tax/withholding-taxes/resident-withholding-tax-rwt/resident-withholding-tax-exemption-register.

⁴²⁹ Inland Revenue Department *Tax Information Bulletin* Vol 31 No 8 (September 2019) at 101.

Section 32E(1A) was subsequently by s 202 of the Taxation (KiwiSaver, Student Loans, and Remedial Matters) Act 2020 (2020 No 5) to replace “the Charitable Trusts Act 1957” with “the Charities Act”.

However, perhaps highlighting how fast law does not make good law, this amendment did not go far enough, as it still only applies to charitable trusts. While many registered charities are structured as charitable trusts, many are not, including those structured as incorporated or unincorporated societies and those structured as charitable companies. The intention was clearly that all registered charities would be placed automatically on the RWT exemption register without requiring certain types of registered charity to separately apply.⁴³⁰

We recommend that section 32E(1A) of the Tax Administration Act 1994 is amended so that it applies to all registered charities, not just those structured as charitable trusts. We also recommend using the term “entity”, as defined in the Charities Act, in preference to the term “person”, as unincorporated charitable trusts are not “persons”.

Recommendation 8.43:

That section 32E(1A) of the Tax Administration Act 1994 is amended so that all registered charities are automatically included on the RWT exemption register, not just those structured as charitable trusts.

New Zealand has a formalised Generic Tax Policy Process (GTPP) for the formulation of tax policy. The GTPP includes a strong consultative component to provide opportunity for substantial external input into the policy formation process, as noted by Tax Working Group officials:⁴³¹

New Zealand’s tax policy process plays an important role in creating and sustaining a tax system that is both widely accepted by taxpayers, and is able to respond to New Zealand’s changing needs. Our formalised Generic Tax Policy Process (GTPP) model includes a strong consultative component, and has support from the private sector, tax officials, and government ministers. There are opportunities for public engagement throughout the different phases of the GTPP.

The GTPP and public engagement improves policy and regulatory outcomes, and informs stakeholders in advance of regulatory changes. Consultation can also enhance voluntary compliance because it allows taxpayers more time to understand why we need to change, and more time to adjust to changes. There are costs to both submitters and the government in terms of resources required to make a submission, and it can increase the time it takes to develop policy proposals. However, on balance we consider that the benefits outweigh the costs.

Tax policy officials recognise that further improvements can be made to the GTPP to ensure it remains fit for purpose. Work is underway to develop ways in which the GTPP can be refined. Through initial discussions with stakeholders, officials have identified that the following principles should be applied to public engagement on tax policy initiatives:

- Earlier and more frequent engagement
- The use of a greater variety of engagement methods
- Wider engagement
- Greater transparency and accountability

However, in addition to processes, it is also important to note that New Zealand’s broad-base low-rate tax framework plays a role in facilitating productive and cooperative engagement between officials and the private sector. Having an agreed framework helps ensure that both parties are working towards the same goal.

430 Unlike Tax Administration Act 1994 s 59BA(3)(d) which is clearly intended to apply to charitable trusts only.

431 Tax Working Group Secretariat *Position paper for session 14 of the Tax Working Group: The Generic Tax Policy Process* 21 July 2018: taxworkinggroup.govt.nz/sites/default/files/2018-09/twg-bg-3985461-the-generic-tax-policy-process.pdf at 4.

Given the extent to which charities are consistently overlooked, and to protect against difficulties such as that experienced in connection with s 32E above, we recommend including a statutory requirement for IRD to consult publicly before making changes to tax legislation that affect charities.

We also strongly recommend that any guidance issued by Charities Services, or whatever agency is responsible for administering the Charities Act, is required to follow a process similar to the GTPP before being finalised. In practice, guidance issued by Charities Services is administered as though it were legislation, even though it is subject to no democratic checks or balances, an untenable situation in a liberal democracy.

Recommendation 8.44:

That any guidance issued by Charities Services (or whatever agency is responsible for administering the Charities Act) is required to follow a public consultation process, similar to the Generic Tax Policy Process, before being finalised.

The Income Tax Act 2007

Section CW 42B of the Income Tax Act 2007 provides an income tax exemption for community housing entities. As discussed above, s CW 42B of the Income Tax Act is a case study in the difficulties inherent in trying to fix problems at the level of symptom, rather than cause. Various recommendations in this report are directed at addressing the cause (the interpretation of the definition of charitable purpose) which are intended to make it clear that charities are able to help people into affordable housing without fear of losing their charitable registration in appropriate circumstances. If those recommendations are implemented, the separate regime created for community housing entities will not be needed and can be repealed.

Other issues

There are many other issues that would be usefully considered as part of designing a world-leading framework of charities law. For example, might it be possible to put unclaimed money to work for the benefit of the community, following the model of Big Society capital in the United Kingdom?⁴³² How could the potential of payroll giving be maximised? Could the framework better assist the resolution of disputes within charities without requiring individuals to take expensive legal action, for example by better supporting whistleblowers? Would a mediation service assist, similar to the Employment New Zealand Early Resolution Service?⁴³³ How can volunteering be better supported? How can social investment be enhanced? What other measures could be adopted to better assist capital to flow to where it is needed? These issues and many others would be usefully considered as part of preparing the civil society strategy discussed above (recommendation 8.40).

Schedule 32

One particular issue that was raised by a number of submitters is whether the criteria for determining “overseas donee status” should be revisited.⁴³⁴ Briefly, an entity with “donee status” is able to issue receipts to donors that allow them to claim a tax credit or a tax deduction for their donation. In order to be eligible for “donee status”, an entity must apply its funds “wholly or mainly” to charitable, benevolent, philanthropic or cultural purposes *within New Zealand*.⁴³⁵ Entities with an international focus (that is, that apply their funds wholly or mainly *outside* New Zealand) cannot meet this test. However, they may still be able to obtain donee status by applying to Inland Revenue for inclusion on

432 For a discussion of this issue, see T Vincent “Let’s put unclaimed money to good use” 4 February 2021: www.charitieslawreform.nz/blog/lets-put-unclaimed-money-to-good-use/.

433 Employment New Zealand Early Resolution Service: www.employment.govt.nz/resolving-problems/steps-to-resolve/early-resolution/.

434 See the submissions of Catherine Low; Tristan Katz; John Welford; Zoe Williams.

435 Income Tax Act 2007 s LD 3(2)(a).

sch 32 of the Income Tax Act 2007. Currently, such status is limited to organisations that assist New Zealand to meet its international humanitarian aid obligations in one of three key ways:⁴³⁶

- i. relieving poverty, hunger, sickness, damages from war or natural disaster;
- ii. supporting the economy of developing countries recognised by the United Nations; or
- iii. raising the educational standards of a developing country recognised by the United Nations.

Charities are specifically excluded from inclusion on schedule 32 if they form to foster or administer any “religion, cult or political creed”.⁴³⁷

A number of submitters commented on the fact that the world has changed dramatically since Cabinet originally established these guidelines in 2009: many pressing global issues, such as climate change, biosecurity, pandemic risk, human rights violations, global safety and stability, and many others, respect no borders yet are important to New Zealanders. New Zealand charities are currently not supported in their efforts to address these issues unless they operate primarily in New Zealand.

Given the increasingly global nature of many policy challenges, the OECD report specifically suggested that countries reassess the restrictions commonly imposed on access to tax concessions for cross-border philanthropy.⁴³⁸

While international humanitarian aid commitments remain critical, we recommend that the criteria for inclusion on schedule 32 (overseas donee status) are revisited to better support New Zealand charities’ efforts to tackle these important global issues.

Recommendation 8.45:

That the criteria for inclusion on schedule 32 of the Income Tax Act 2007 (“overseas donee status”) are revisited to better support charities working to tackle pressing global challenges such as climate change, biosecurity, pandemic risk, global safety and stability, and the like.

436 See New Zealand Government *Guidance for charitable bodies seeking overseas donee status* 10 December 2009: <www.beehive.govt.nz/release/dunne-guidance-charitable-bodies-seeking-overseas-donee-status>.

437 Inland Revenue Department *New Zealand charities wanting overseas donee status*: <www.ird.govt.nz/roles/charities/new-zealand-charities-wanting-overseas-donee-status>.

438 OECD Tax Policy Studies *Taxation and Philanthropy* (2020) 27 (OECD Publishing, Paris) at 19.



Chapter 9 – Draft Bill to Amend and Restate the Charities Act 2005

Te Ture Whakaū i Ngā Mahi Aroha - Charities Bill

Government Bill

Explanatory note

[TO INSERT]

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The Parliament of Aotearoa New Zealand enacts as follows:

1 Title

This Act is Te Ture Whakaū i Ngā Mahi Aroha/the Charities Act [2024].

2 Commencement

- (1) Section 1, this section, and sections [TO INSERT] come into force on the day after the date on which this Act receives the Royal assent.
- (2) The rest of this Act comes into force on a date to be appointed by the Governor-General by Order in Council, and 1 or more Orders in Council may be made bringing different provisions into force on different dates.
- (3) However, any provision to which subsection (2) applies that has not earlier been brought into force comes into force on the expiry of the 18-month period that starts on the date of Royal assent.
- (4) An Order in Council made under this section is secondary legislation (see Part 3 of the Legislation Act 2019 for publication requirements).

PART 1 - PRELIMINARY PROVISIONS

3 Purposes

- (1) The purpose of this Act is to enable and support a diverse, robust, vibrant, independent, innovative, and sustainable charitable sector, in recognition of the direct and indirect benefits such a charitable sector provides in a free and democratic society.
- (2) This Act is intended to further the above purpose by:
 - (a) providing a forum for transparency and accountability, by means of a charities register on which registered charities are required to disclose certain information;
 - (b) establishing Te Kairēhita Aroha / the Charities Registrar, as an independent Crown entity, to carry out the functions provided for in this Act, including to inform public choice by administering the charities register and raising public awareness of the importance and value of charities; and
 - (c) establishing the Māori Advisory Committee, tasked with overseeing that the Act is administered, and charities law in Aotearoa New Zealand develops, in accordance with the principles of Te Tiriti o Waitangi and, where appropriate, tikanga.

Compare: Australian Charities and Not-for-profit Commission Act 2012 s 15-5(1)(b); 2022 No 12 s 3(d)(ii) and (iii)

4 Treaty of Waitangi

All persons performing functions or exercising powers under this Act must do so in a manner that recognises and respects the principles of Te Tiriti o Waitangi.

Compare: 2020 No 42 s 4

5 Principles

Every person or court performing a function or duty or exercising a power under this Act must have regard to the following principles:

- (a) Every registered charity, and every responsible person of a registered charity, has a duty to act in good faith to further the stated charitable purposes of the registered charity in accordance with its rules.
- (b) Charities are independent, self-governing organisations that should be free to determine how best to further their stated charitable purposes in accordance with their rules without inappropriate government interference.
- (c) This Act is not an exhaustive code of the law relating to charities and is intended to be complemented by the rules of the common law and equity

relating to charities (except where otherwise indicated or where those rules are inconsistent with the provisions of this Act) and, where appropriate, by tikanga principles.

- (d) The privileges of registered charitable status should be available to charities that act to further their stated charitable purposes in accordance with their rules, do not engage in serious wrongdoing, and otherwise meet the requirements of this Act.
- (e) Charities' rights to freedom of expression and association must be respected and must not be subject to undue limitation.

Compare: 2019 No 38 s 4 and s 5(8)(b); 2022 No 12 s 3(d)(iii)

6 Overview

- (1) This section is a guide only to the general scheme and effect of this Act.
- (2) In this Act, –
 - (a) **this Part** provides for preliminary matters, including the purposes and principles of this Act and interpretation:
 - (b) **Part 2** provides for the meaning of charitable purpose:
 - (c) **Part 3** continues the charities register:
 - (d) **Part 4** provides for the registration of charities under this Act, including eligibility for registration, the process for applying for registration, and the duties of registered charities:
 - (e) **Part 5** establishes Te Kairēhita Aroha / the Charities Registrar, and provides mechanisms for its accountability:
 - (f) **Part 6** establishes the Māori Advisory Committee:
 - (f) **Part 7** provides for monitoring:
 - (g) **Part 8** provides for removal from the register:
 - (h) **Part 9** provides for enforcement:
 - (i) **Part 10** provides for miscellaneous matters, including regulations, amendments to Inland Revenue Acts, and miscellaneous provisions.

7 Interpretation of Act

- (1) This Act –
 - (a) must be interpreted in a way that promotes its purposes and principles; and
 - (b) is not subject to any rule that statutes in derogation of the common law should be strictly construed; but
 - (c) may be interpreted having regard to the common law and equity, but only to the extent that the common law and equity are consistent with –
 - (i) its provisions; and
 - (ii) the promotion of its purpose and principles.
- (2) Subsection (1) does not affect the application of the Interpretation Act 1999 to this Act.

Compare: 2019 No 38 s 7; 2006 No 69 s 10

8 Inherent and implied powers not affected

- (1) The inherent and implied powers of a court are not affected by this Act, except to the extent that this Act provides otherwise.
- (2) Despite subsection (1), a court must have regard to the purposes and principles of this Act when exercising its inherent or implied powers.

Compare: 2019 No 38 s 8; 2006 No 69 s 11

9 Interpretation

(1) In this Act, unless the context otherwise requires, –

accounting period has the same meaning as in section 5(1) of the Financial Reporting Act 2013

applicable auditing and assurance standards has the same meaning as in section 5 of the Financial Reporting Act 2013

applicable financial reporting standard has the same meaning as in section 5 of the Financial Reporting Act 2013

balance date means the balance date of a registered charity under section 40 (*Balance date*)

charitable purpose has the meaning given in Part 2 (*Meaning of charitable purpose*)

charities register or **register** means the register of entities registered under this Act, continued under section 19 (*Charities register*)

Charities Registrar means Te Kairēhita Aroha

contact person means the person holding the position of contact person of the registered charity for the purposes of sections 32 and 33 (*Contact person*)

document has the meaning set out in section 2(1) of the Commerce Act 1986

donee organisation has the meaning set out in section YA 1 of the Income Tax Act 2007

entity means any society, institution, or trustees of a trust

financial reporting standard has the meaning set out in section 5 of the Financial Reporting Act 2013

financial statements has the same meaning as in section 6 of the Financial Reporting Act 2013

fundraiser means a person who, on behalf of a registered charity, carries out a fundraising activity

fundraising activity includes requesting funds, canvassing for subscriptions, selling raffle or lottery tickets, selling tickets to a fundraising event, selling merchandise, and appealing for grants, donations, or sponsorship

generally accepted accounting practice has the meaning set out in section 8 of the Financial Reporting Act 2013

hearing authority means –

- (a) a Taxation Review Authority; or
- (b) the High Court

Inland Revenue Acts has the meaning set out in section 3(1) of the Tax Administration Act 1994

Māori Advisory Committee means the committee established under section 63 (*Māori Advisory Committee established*)

Minister means the Minister of the Crown who, under the authority or any warrant or with the authority of the Prime Minister, is for the time being responsible for the administration of this Act

non-GAAP standard has the same meaning as in section 5 of the Financial Reporting Act 2013

post-settlement governance entity means an entity established by an iwi and approved by the Crown for the purpose of receiving redress in the settlement of the historical Treaty of Waitangi claims of that iwi

qualified auditor has the same meaning as in section 35 of the Financial Reporting Act 2013

registered charity means an entity that is registered under this Act

regulations means regulations in force under this Act

reporting period means, in respect of an entity, a year or other accounting period ending on the balance date of the entity

responsible person –

- (a) means, in the case of a registered charity that is the trustees of a trust:
 - (i) any of those trustees; and
 - (ii) if the trustee is a body corporate, any director of the trustee; and
- (b) means, in relation to any other entity, a member of the board or governing body of the entity; or
- (c) includes any class or classes of persons that are declared by regulations to be officers for the purposes of this Act; but
- (d) excludes any class or classes of persons that are declared by regulations not to be officers for the purposes of this Act

rules means, –

- (a) in relation to the trustees of a trust, the rules, trust deeds, and instruments constituting, or defining the constitution of, that trust; and
- (b) in relation to any other entity, the rules, constitution, documents or instruments constituting, or defining the constitution or rules of, that entity

serious wrongdoing, in relation to a registered charity, includes any serious wrongdoing of any of the following types:

- (a) a significant or persistent failure to act in good faith in furtherance of the stated charitable purposes of the registered charity in accordance with its rules;
- (b) any other significant or persistent failure to act in accordance with the rules of the registered charity;
- (c) a significant or persistent failure to act in accordance with the requirements of this Act or any other legislation

specified not-for-profit entity has the meaning set out in section 46 of the Financial Reporting Act 2013

Taxation Review Authority or **Authority** means a Taxation Review Authority established or continued in existence under the Taxation Review Authorities Act 1994

Te Kairēhita Aroha means the registrar of the charities register, established under Part 5 (*Establishment of Te Kairēhita Aroha / the Charities Registrar*)

Te Tiriti o Waitangi means the Treaty of Waitangi

tikanga principles include but are not limited to the principles of kaitiakitanga, manaakitanga, mahi aroha, mahi tahi, mana, rangatiratanga, whanaungatanga, kotahitanga, and atawhai, as interpreted and applied in accordance with tikanga Māori.

- (2) In this Act, unless the context otherwise requires, references to a person performing functions and exercising powers, or carrying out responsibilities, include carrying out duties.
- (3) In this Act, unless the context otherwise requires, references to a *court* include a reference to the Taxation Review Authority.
- (4) An example used in this Act has the following status:
 - (a) the example is only illustrative of the provision to which it relates and does not limit the provision; and
 - (b) if the example and the provision to which it relates are inconsistent, the provision prevails.

- (5) A requirement under this Act to provide the contact details of a person is a requirement to provide at least the person's telephone number and email address.
Compare: 2005 No 39 s 4; 2022 No 12 s 5(2); 1994 No 166 s 3(1) definition of "hearing authority"

10 Act binds the Crown

This Act binds the Crown.

Compare: 2005 No 39 s 7

PART 2 – MEANING OF CHARITABLE PURPOSE

11 Ascertaining an entity's purposes

Ascertaining an entity's purpose or purposes is a question of interpretation of the entity's rules. An inference may be drawn as to an entity's purposes in light of its activities only where the entity's rules are unclear as to its purpose or where there is evidence of activities that displace its purpose as disclosed in its rules.

12 Test for whether a purpose is charitable

Once ascertained under section 11, a purpose of an entity must meet the following test in order to be considered charitable:

- (a) the purpose must benefit the public (the *public benefit requirement*) in the sense that:
 - (i) the purpose must be beneficial, rather than detrimental or neither beneficial nor detrimental, to people (the *benefit limb*); and
 - (ii) the class of persons eligible to benefit from the purpose must constitute the public, or a sufficient section of the public (the *public limb*); and
- (b) the purpose must fall within the spirit and intendment of the preamble to the Statute of Charitable Uses 1601 (43 Eliz I c4) (the *spirit and intendment requirement*).

13 The public benefit requirement

- (1) Subject to this section, determining whether a purpose meets the public benefit requirement in paragraph 12(a) is a question of fact to be determined on the evidence before the decision-maker.
- (2) If a purpose satisfies the spirit and intendment test under paragraph 14(a), the purpose is presumed to benefit the public under paragraph 12(a) in the absence of evidence to the contrary (the *presumption of public benefit*).
- (3) A charity may not be carried on for the private pecuniary profit of an individual, but incidental private benefit does not of itself cause a purpose of an entity to fail the public benefit requirement in paragraph 12(a).
- (4) A purpose of an entity does not fail the public limb of the public benefit requirement in paragraph 12(a) simply because the beneficiaries of the trust, or the members of the society or institution, are related by blood.

Compare: 2005 No 39 s 5(2)(a)

14 The spirit and intendment requirement

A purpose may meet the spirit and intendment requirement in paragraph 12(b) in any of the following ways:

- (a) by being a purpose recognised as charitable within the parameters of section 15 (*Meaning of charitable purpose*);
- (b) by analogy with a purpose previously considered to be charitable;
- (c) by presumption: a purpose that operates for the benefit of the public within the meaning of paragraph 12(a) is presumed to meet the spirit and intendment test, and therefore to be charitable, in the absence of good reason for holding otherwise (the *presumption of charity*).

15 Meaning of charitable purpose

- (1) In this Act, unless the context otherwise requires, **charitable purpose** includes every charitable purpose, whether it relates to:
- (a) the prevention or relief of poverty or hardship;
 - (b) the protection and progress of Te Tiriti o Waitangi rights and responsibilities;
 - (c) the advancement of education;
 - (d) the advancement of faith;
 - (d) the advancement of amateur sport;
 - (e) the advancement of arts, culture, heritage or science;
 - (f) the advancement of environmental protection or improvement;
 - (g) the advancement of health or wellbeing;
 - (h) the advancement of human rights, citizenship or community development; and
 - (i) any other purpose beneficial to the community.
- (2) A **marae** has a charitable purpose if the physical structure of the marae is situated on land that is a Māori reservation referred to in Te Ture Whenua Māori Act 1993 (Māori Land Act 1993) and the funds of the marae are not used for a purpose other than –
- (a) the administration and maintenance of the land and of the physical structure of the marae;
 - (b) a purpose that is a charitable purpose other than under this subsection.
- (3) A **post-settlement governance entity** has a charitable purpose if:
- (a) the overall purpose of the post-settlement governance entity is to help its iwi redress and recover from the economic, social, political and cultural deprivation suffered by the iwi and its members as a result of breaches of Te Tiriti o Waitangi; and
 - (b) all activities of the organisation are carried out in furtherance of that purpose.

Compare: 2005 No 39 s 5; 1957 No 18 s 2; Charities Act 2013 (Cth) s 12; Charities Act 2011 (UK) s 3; Charities Act 2009 (Ireland) s 3; Charities and Trustee Investment (Scotland) Act 2005 s 7; Charities Act (Northern Ireland) 2008 s 2

16 Relevance of potential fiscal consequences

To avoid doubt, the potential fiscal consequences of registration under this Act are not relevant to an assessment of whether a purpose is charitable.

17 Ancillary purposes

- (1) To avoid doubt, if the purposes of an entity include a non-charitable purpose that is merely **ancillary** to a charitable purpose of the entity, the presence of that non-charitable purpose does not prevent the entity's purposes from being exclusively charitable.
- (2) For the purposes of subsection (1), a non-charitable purpose is ancillary to a charitable purpose of the entity if, as a matter of equitable principle, the non-charitable purpose is ancillary, secondary, or subordinate to a charitable purpose of the entity.

Compare: 2005 No 39 s 5(3) and (4)

18 Activities

- (1) The tests in sections 12 (*Test for whether a purpose is charitable*) and 17 (*Ancillary purposes*) apply to an entity's purposes. See section 11 as to how an entity's purposes are ascertained.
- (2) In considering an application for registration, an entity's activities and proposed activities are considered to assess that they:

- (a) will, in good faith, further the entity's stated charitable purposes, in accordance with its rules; and
 - (b) will not otherwise constitute serious wrongdoing.
- (3) To avoid doubt, subject to this Act, any other legislation, and the entity's rules, a registered charity may –
- (a) make social investments, even if they might not maximise financial return:
 - (b) utilise commercial means:
 - (c) support social enterprise activity, even if it might be carried out by an entity that is not itself a registered charity:
 - (d) accumulate funds:
 - (e) subject to subsection (4), raise public awareness, promote or oppose a change to any matter established by law, policy or practice in Aotearoa New Zealand or another country, or otherwise engage in political means or advocacy:

provided that, in each case, the entity considers in good faith that the activity would further its stated charitable purposes in accordance with its rules.

- (4) Notwithstanding subsection (3)(d), a registered charity may not engage in partisan political activity, such as promoting or opposing a particular political party, elected official, or candidate for political office.

Example:

Subsection (4) does not preclude a charity distributing information, or advancing debate, about the policies of political parties, elected officials or candidates for political office (such as by assessing, critiquing, comparing or ranking those policies), provided such activity is carried out in good faith in furtherance of the charity's stated charitable purposes.

Compare: Charities Act 2013 (Cth) ss 11(b) and 12(1)(l)

PART 3 – CHARITIES REGISTER

Subpart 1 – Charities register

Continuing the charities register

19 Charities register

- (1) The register of charitable entities established by the Charities Act 2005 is continued.
- (2) The register must be an electronic register.
- (3) The register must be operated, and able to be accessed by the public, at all times unless –
 - (i) Te Kairāhita Aroha suspends the operation of the register, in whole or in part, in accordance with subsection (4); or
 - (ii) otherwise provided in regulations.
- (4) Te Kairāhita Aroha may refuse access to the register or otherwise suspend the operation of the register, in whole or in part, if necessary to do so for maintenance, or in response to a *force majeure* event, provided that:
 - (i) full access must be restored as soon as possible; and
 - (ii) Te Kairāhita Aroha must publicly state, for example on their website, the reasons for the suspension and the date by which the suspension will be lifted and full access restored.

Compare: 2005 No 39 s 21; 2022 No 12 s 231

20 Purpose of register

The purpose of the charities register is to –

- (a) provide a forum for accountability, to help registered charities, both individually and collectively, demonstrate to their stakeholders and the public generally that they are worthy of support;
- (b) enable a member of the public to –
 - (i) determine whether an entity is registered under this Act; and
 - (ii) obtain information concerning the nature, activities, and purposes of registered charities; and
 - (iii) know how to contact a registered charity; and
- (c) facilitate research into the charitable sector; and
- (d) assist any person in the exercise of the person's powers, or in the performance of the person's functions, under this Act or any other legislation.

Compare: 2005 No 39 s 22; 2022 No 12 s 232

21 *Te Kairēhita Aroha is registrar*

- (1) Te Kairēhita Aroha holds the office of registrar of the charities register.
- (2) Te Kairēhita Aroha must ensure that the register is compiled and maintained on a website controlled by Te Kairēhita Aroha.
- (3) Te Kairēhita Aroha must publicly state if the register is not up to date, the reasons why this is so, and when it is expected to be rectified.

Compare: 2005 No 39 s 23

22 *Contents of register*

- (1) The register must contain the following information for each registered charity:
 - (a) the name of the entity;
 - (b) the address for service of the entity;
 - (c) the registration number of the entity;
 - (d) the names of the responsible persons of the entity and of all persons who have been responsible persons of the entity since the entity was first registered under this Act;
 - (e) contact details of the contact person for the entity;
 - (f) a copy of the rules of the entity, and of any amendments to the entity's rules;
 - (g) the application for registration of the entity under this Act (including all required accompanying information and documents);
 - (h) whether the entity identifies as a kaupapa Māori charity;
 - (i) a link to the website of the registered charity (if applicable);
 - (j) all the financial statements and annual returns given to Te Kairēhita Aroha by or on behalf of the entity;
 - (k) all notices of change given under section 45 (*Duty to notify changes to Te Kairēhita Aroha*);
 - (l) all exemptions, including terms, conditions and variations, granted under subpart 3 of Part 4 (*Exemptions*) that are in force in relation to the entity;
 - (m) any binding rulings issued under Part 5A of the Tax Administration Act 1994 in relation to the entity;
 - (n) the reason for any deregistration of the entity;
 - (o) whether the entity has appealed or is appealing any decision under this Act; and
 - (p) any court orders, including interim orders, made in respect of the entity under this Act.
- (2) The register must contain any other information or documents prescribed by regulations.

- (3) This section is subject to section 23 (*Te Kairēhita Aroha may remove or omit information and may restrict public access*).

Compare: 2005 No 39 s24; 2022 No 12 s 233

23 *Te Kairēhita Aroha may remove or omit information and may restrict public access*

- (1) Te Kairēhita Aroha may remove or omit from the register any information that relates to a registered charity if Te Kairēhita Aroha considers, in the public interest, that the information should not form part of the register.
- (2) Te Kairēhita Aroha may, on request from an entity, an individual referred to in paragraph (b) or (c) or on its own motion, prevent or restrict public access to information on the register that relates to -
- (a) the entity, if Te Kairēhita Aroha considers, in the public interest, that public access to that information should be prevented or restricted; or
 - (b) an individual, if Te Kairēhita Aroha considers that public access to that information would be likely to prejudice the privacy or personal safety of any person; or
 - (c) an individual, if the individual is -
 - (i) a protected person in relation to a protection order under the Family Violence Act 2018; or
 - (ii) a person for whose benefit a suppression provision or order applies under any legislation.
- (3) For the purposes of subsection (2), Te Kairēhita Aroha may prevent or restrict access subject to any terms and conditions that it thinks fit.
- (4) However, in the case of subsection (2)(c), Te Kairēhita Aroha must ensure that those terms and conditions are consistent with the protection order or suppression provision or order.
- (5) This section does not limit the Official Information Act 1982.

Compare: 2005 No 39 s 25; 2022 No 12 s 234; Australian Charities and Not-for-profits Commission Act 2012 s 40-10(3)

24 *Amendments to register*

Te Kairēhita Aroha may make any amendments to the register that are necessary -

- (a) to reflect any changes in the information that relates to a registered charity; or
- (b) to rectify or correct the register if any information -
 - (i) has been wrongly entered in, or omitted from, the register; or
 - (ii) has been incorrectly entered in the register; or
 - (iii) contains a typographical error or a mistake; or
- (c) for the purposes of section 23 (*Te Kairēhita Aroha may remove or omit information and may restrict public access*); or
- (d) to comply with any court order.

Compare: 2005 No 39 s 26; 2022 No 12 s 235

25 *Registration of documents or other information*

Neither registration nor refusal of registration of a document or other information by Te Kairēhita Aroha affects, or creates a presumption as to, the validity or invalidity of the document or information or the correctness or otherwise of any information (unless this Act otherwise provides).

Compare: 2022 No 12 s 236(3)

Searches of register

26 *Search of register*

- (1) A person may search the register in accordance with this Act or regulations.
- (2) The register may be searched only by reference to the following criteria:
 - (a) the name of the registered charity;
 - (b) the registration number of the registered charity;
 - (c) the name of a responsible person of the registered charity;
 - (d) the sector in which the registered charity operates;
 - (e) the activities that the registered charity undertakes;
 - (f) the area of operation of the registered charity;
 - (g) whether the organisation is a kaupapa Maori charity;
 - (h) any other criteria prescribed by regulations.

Compare: 2005 No 39 s 27; SR 2006/301 r 8; 2022 No 12 s 237

27 *Search purposes*

A search of the register may be carried out only by the following persons for the following purposes:

- (a) a person for the purpose of determining whether an entity is registered under this Act;
- (b) a person for the purpose of obtaining information concerning the nature, activities, and purposes of a registered charity, including whether the registered charity identifies as a kaupapa Māori charity;
- (c) a person for the purpose of knowing how to contact a registered charity;
- (d) an individual, or a person with the consent of the individual, for the purpose of searching for information about that individual;
- (e) a person for the purpose of assisting the person in the exercise of the person's powers, or the performance of the person's functions, under this Act or any other legislation.

Compare: 2005 No 39 s 28; 2022 No 12 s 238

28 *When search constitutes an interference with privacy of an individual*

A search of the register for personal information that has not been carried out in accordance with sections 26 (*Search of register*) and 27 (*Search purposes*) constitutes an action that is an interference with the privacy of an individual under section 69 of the Privacy Act 2020.

Compare: 2005 No 39 s 29; 2022 No 12 s 239

PART 4 – REGISTERED CHARITIES

Subpart 1 – Applications for registration

Eligibility

29 *Eligibility for registration*

- (1) An entity is eligible for registration under this Act if, -
 - (a) the rules of the entity subject the entity to the non-distribution constraint;
 - (b) in the case of the trustees of a trust, the trust is of a kind in relation to which an amount of income is derived by the trustees in trust for charitable purposes;
 - (c) in the case of a society or institution, the society or institution is established and maintained exclusively for charitable purposes;

- (d) the activities of the entity are carried out in good faith in furtherance of its stated charitable purposes and do not constitute serious wrongdoing;
 - (e) the entity has a name that complies with section 30 (*Name of entity*);
 - (f) the entity has at least 3 responsible persons;
 - (g) the entity has a designated contact person (see sections 32 and 33 (*Contact person*)); and
 - (h) all of the responsible persons of the entity are qualified to be responsible persons of a registered charity under section 31 (*Qualifications of responsible persons of registered charities*).
- (2) The trustees of a trust must be treated as complying with subsection (1)(a) if, -
- (a) in accordance with a ruling made under Part 5A of the Tax Administration Act 1994, -
 - (i) an amount of income derived by the trustees in trust is treated as having been derived by the trustees in trust for charitable purposes for the purposes of section CW 41 of the Income Tax Act 2007; or
 - (ii) income is treated as having been derived directly or indirectly from a business carried on by, or for, or for the benefit of, the trustees in trust for charitable purposes for the purposes of section CW 42 of the Income Tax Act 2007; or
 - (b) the income derived by the trustees is deemed to be income derived by trustees in trust for charitable purposes under section 24B of the Māori Trust Boards Act 1955.
- (3) A society or an institution must be treated as complying with subsection (1)(b) if, in accordance with a ruling made under Part 5A of the Tax Administration Act 1994, that society or institution is treated as being a society or institution that is established and maintained exclusively for charitable purposes and not carried on for the private pecuniary profit of any individual for the purposes of section CW 41 or CW 42 of the Income Tax Act 2007.
- (4) Subsections (2) and (3) cease to apply in relation to an entity if -
- (a) the period for which the ruling applies has expired; or
 - (b) the ruling has ceased to apply because of section 91G of the Tax Administration Act 1994; or
 - (c) the ruling has otherwise ceased to apply to the entity.
- (5) Despite subsections (1) to (3), an entity does not qualify for registration under this Act if the entity -
- (a) is a designated terrorist entity as defined in section 4(1) of the Terrorism Suppression Act 2002; or
 - (b) has been convicted of any offence under sections 6A to 13E of the Terrorism Suppression Act 2002.
- (6) The registration of the trustees of a trust as a charity under this Act is not affected by -
- (a) 1 or more of the trustees ceasing to be a trustee of the trust; or
 - (b) the appointment of new trustees of the trust.

Compare: 2005 No 39 ss 13, 18(4), 6(2); 2022 No 12 s 45

30 Name of entity

The name of an entity complies with this section if -

- (a) the entity is incorporated under that name under the Incorporated Societies Act 1908; or
- (b) the entity is incorporated under that name under the Incorporated Societies Act 2022;

- (c) the entity is incorporated under that name under the Charitable Trusts Act 1957; or
- (d) the entity is incorporated under that name under the Companies Act 1993; or
- (e) the entity is established, or constituted, by an Act under that name; or
- (f) in any other case, in the opinion of Te Kairēhita Aroha, the name is not –
 - (i) offensive; or
 - (ii) liable to mislead the public.

Compare: 2005 No 39 s 15

31 Qualifications of responsible persons of registered charities

- (1) A person who is not disqualified by this section is qualified to be a responsible person of a registered charity.
- (2) The following persons are disqualified from being a responsible person of a registered charity:
 - (a) an individual who is under the age of 16 years:
 - (b) an individual who is an undischarged bankrupt:
 - (c) a body corporate that is being wound up, is in liquidation or receivership, or is subject to statutory management under the Corporations (Investigation and Management) Act 1989:
 - (d) a person who has been convicted of either of the following and has been sentenced for the offence within the last 7 years:
 - (i) a crime involving dishonesty (within the meaning of section 2(1) of the Crimes Act 1961):
 - (ii) an offence under section 143B of the Tax Administration Act 1994:
 - (iii) an offence under subpart 6 (*Offences*) of Part 4 of the Incorporated Societies Act 2022:
 - (iv) an offence under this Act:
 - (v) an offence, in a country, State or territory other than Aotearoa New Zealand, that is substantially similar to an offence specified in subparagraphs (i) to (iv):
 - (vi) a money laundering offence or an offence relating to the financing of terrorism, whether in Aotearoa New Zealand or elsewhere:
 - (e) a person who is prohibited from being a director or promoter of, or being concerned or taking part in the management of, an incorporated or unincorporated body under the Companies Act 1993, the Financial Markets Conduct Act 2013, or the Takeovers Act 1993:
 - (f) a person who is subject to any of the following orders:
 - (i) a banning order under subpart 7 (*Banning order*) of Part 4 of the Incorporated Societies Act 2022 or sections 90 to 92 (*Banning orders*) of this Act:
 - (ii) an order under section 108 of the Credit Contracts and Consumer Finance Act 2003:
 - (iii) a forfeiture order under the Criminal Proceeds (Recovery) Act 2009:
 - (iv) a property order made under the Protection of Personal and Property Rights Act 1988, or whose property is managed by a trustee corporation under section 32 of that Act:
 - (g) a person who is subject to an order that is substantially similar to an order referred to in paragraph (f) under a law of a country, State, or territory prescribed by the regulations:

- (h) any person found to have breached, within the last 7 years, professional fundraising standards issued by a recognised fundraising body in New Zealand or elsewhere:
 - (i) in relation to any particular entity, a person who does not comply with any qualifications for responsible persons contained in the rules of that entity.
- (3) A person who is disqualified from being a responsible person of a registered charity but who acts as a responsible person is a responsible person for the purposes of a provision of this Act that imposes a duty or an obligation on a responsible person.
 - (4) Te Kairēhita Aroha may, on an application made in the manner prescribed by the regulations (if any), by written notice to the person, waive the application of any of the disqualifying factors set out in subsection (2)(b) to (h) in relation to a particular person and an entity.
 - (5) If Te Kairēhita Aroha waives the application of a disqualifying factor, the person to whom the waiver relates must not be treated as being disqualified from being a responsible person of the registered charitable entity because of that factor.

Example:

The charitable purposes of ABC Incorporated include providing services to facilitate or promote the rehabilitation and reintegration of offenders who have been released from prison.

Te Kairēhita Aroha considers that it may be useful for the governing body of ABC Incorporated to include a person who has been convicted of an offence identified in section 31(2)(d). Te Kairēhita Aroha accordingly waives the disqualifying factor in that paragraph in relation to a particular person

- (6) The waiver may be granted on the terms or conditions that Te Kairēhita Aroha thinks fit.
- (7) Te Kairēhita Aroha may –
 - (a) vary a waiver in the same way as a waiver may be granted:
 - (b) revoke a waiver that has been granted.

Compare: 2005 No 39 s 16; 2022 No 12 s 47 - 49

Contact person

32 Purpose

The purpose of section 33 (*Contact person*) is to provide for every registered charity to have a person whom Te Kairēhita Aroha can contact when needed.

Compare: 2022 No 12 s 112

33 Contact person

- (1) Every registered charity must at all times have a contact person.
- (2) If there is a vacancy in the position of contact person, the registered charity does not breach subsection (1) if the position is filled within 20 working days after the vacancy occurs.
- (3) A registered charity's contact person must be –
 - (a) at least 18 years of age; and
 - (b) ordinarily resident in New Zealand.
- (4) The position of contact person may be held separately or in conjunction with any office in the registered charity.
- (5) In this section, a person is **ordinarily resident in New Zealand** if that person –
 - (a) is domiciled in New Zealand; or
 - (b) is living in New Zealand and the place where that person usually lives is, and has been for the immediately preceding 12 months, in New Zealand, whether

or not that person has on occasions been away from New Zealand during that period.

Compare: 2022 No 12 s 113 - 115

Applications for registration

34 Application for registration

- (1) An application for registration of an entity under this Act must be given to Te Kairēhita Aroha and must –
 - (a) provide information demonstrating that the entity meets the eligibility requirements for registration under section 29 (*Eligibility for registration*);
 - (b) include the legal name of the entity and any other names, including trading names, by which the entity is known;
 - (c) contain or be accompanied by information about every responsible person of the entity, including the person's consent to be a responsible person of the entity and a certificate that the person is not disqualified from being a responsible person of a registered charity under section 31 (*Qualifications of responsible persons of registered charities*);
 - (d) contain the name and contact details of the contact person of the entity;
 - (e) be accompanied by a copy of the rules of the entity (which must include the purposes of the entity and the non-distribution constraint);
 - (f) contain the entity's physical address for service;
 - (g) contain the name and contact details of the entity's nominated contact person; and
 - (h) otherwise be made in the manner, and contain or be accompanied by the information, prescribed by regulations.
- (2) If a request for a waiver under section 31 (*Qualifications of responsible persons of registered charities*) has been made in relation to a person and an entity, the document referred to in subsection (2)(c) is not required to contain a certification referred to in that paragraph in relation to that person.

Compare: 2005 No 39 s 17; 2022 No 12 s 9

35 Te Kairēhita Aroha to consider application

- (1) Te Kairēhita Aroha must, as soon as practicable after receiving a properly-completed application for registration of an entity under this Act, consider whether the entity meets the requirements for eligibility for registration set out in section 29 (*Eligibility for registration*).
- (2) In considering whether the applicant is eligible for registration under section 29 (*Eligibility for registration*), Te Kairēhita Aroha may request that the applicant supply further information or documentation.
- (3) In considering an application, Te Kairēhita Aroha must –
 - (a) have regard to the principles of this Act;
 - (b) refer any matter relating to tikanga to the Māori Advisory Committee, and have regard to any advice provided by the Māori Advisory Committee in relation to the application;
 - (c) ensure any matter relating to tikanga is decided in compliance with any applicable binding policy statement issued by the Māori Advisory Committee under section 67 (*Tikanga Māori policy statements*);
 - (d) have regard to –
 - (i) the activities of the entity at the time at which the application was made; and
 - (ii) the proposed activities of the entity, to ensure that the activities are or would be –

- (iii) permitted by the rules of the entity; and
- (iv) consistent with or supportive of the stated charitable purposes of the entity; and
- (v) not prohibited by this Act; and
- (e) have regard to any other information provided by the entity in relation to its application; and
- (f) give the applicant –
 - (i) notice of any matter that might result in its application being declined; and
 - (ii) a reasonable opportunity to make submissions to Te Kairēhita Aroha on the matter.

Compare: 2005 No 39 s 18

36 Decision on application

- (1) If the entity applying for registration is eligible for registration under section 29 (*Eligibility for registration*), Te Kairēhita Aroha must –
 - (a) register the entity under this Act;
 - (b) allocate a registration number to the entity;
 - (c) notify the entity of its registration and of its registration number; and
 - (d) provide information to the entity regarding the obligations of registered charities under this Act.
- (2) If the entity applying for registration does not meet the eligibility requirements for registration set out in section 29 (*Eligibility for registration*), Te Kairēhita Aroha must–
 - (a) not register the entity under this Act;
 - (b) notify the entity of Te Kairēhita Aroha’s decision and the reasons for it;
 - (c) notify the entity of its rights under section 23 of the Official Information Act 1982 (*Right of access by persons to reasons for decisions affecting that person*); and
 - (d) notify the entity of its right to appeal the decision, including of its right to request an oral hearing before a hearing authority.
- (3) If Te Kairēhita Aroha has not notified the applicant of its decision on the applicant’s eligibility for registration within 6 months of the date Te Kairēhita Aroha received a properly completed application from the applicant, the applicant may give Te Kairēhita Aroha, in the approved form, written notice that the applicant wishes to treat the application as having been declined, following which the applicant may appeal that decision to a hearing authority under section 62 (*Appeals*).

Compare: 2005 No 39 s 19; Australian Charities and Not-for-profit Commission Act 2012 s 30-15(2)

37 Te Kairēhita Aroha may backdate registration

- (1) Te Kairēhita Aroha may, if it thinks fit, register a notice in the charities register that specifies that an entity must be treated as having become registered under this Act at a time (the **effective registration time**) that is before the time at which the entity actually became registered under this Act.
- (2) However, the effective registration time must not be earlier than the time that Te Kairēhita Aroha received a properly-completed application for registration of the entity under this Act.
- (3) Te Kairēhita Aroha may not exercise its powers under subsection (1) unless the entity was eligible for registration under section 29 (*Eligibility for registration*) at all times during the period between the effective registration time and the time at which the entity actually became registered under this Act.

- (4) If Te Kairēhita Aroha exercises its powers under subsection (1) in relation to an entity, the entity must be treated as having become registered under this Act at the effective registration time for the purposes of this Act and the Inland Revenue Acts.

Compare: 2005 No 39 s 20

Subpart 2 – Duties relating to registered charities

Duty of loyalty

38 Duty of loyalty

Every registered charity, and every responsible person of a registered charity, has a duty to act in good faith to further the stated charitable purposes of the registered charity in accordance with its rules.

Compare: 2019 No 38 ss 24 - 26; 1993 No 105 ss 131 and 134; 2022 No 12 ss 54 and 56

Annual reporting duty

39 Duty to keep accounting records

- (1) Every registered charity must ensure that there are kept at all times accounting records that –
- (a) correctly record the transactions of the entity; and
 - (b) allow the entity to produce financial statements that comply with the requirements of this Act; and
 - (c) would enable the financial statements to be readily and properly audited or reviewed (if an audit or review is required under any legislation or the entity's rules).
- (2) Every registered charity must establish and maintain a satisfactory system of control of the entity's accounting records.
- (3) The accounting records must be kept –
- (a) in written form in English or te reo Māori; or
 - (b) in a form or manner that is easily accessible and convertible into written form in English or te reo Māori.
- (4) The registered charity must retain the records for at least 7 years after the end of the reporting period to which they relate.

Compare: 1994 No 166 s 22(2) and (2BA); 2022 No 12 s 101; Australian Charities and Not-for-Profits Commission Act 2012 s 55-5; Charities Act 2009 (Ireland) s 47

40 Balance date

- (1) For the purposes of this Act, –
- (a) an entity may nominate a balance date for the entity in the application for registration of the entity under this Act (which date must be the date specified in the entity's rules if its rules specify a balance date); and
 - (b) if paragraph (a) does not apply, a registered charity must be treated as having a balance date of 31 March in each calendar year.
- (2) Subject to subsection (3), an entity must have a balance date in each calendar year.
- (3) Subject to the entity's rules, an entity may change its balance date for the purposes of this Act either –
- (a) without the approval of Te Kairēhita Aroha if –
 - (i) the period between any 2 balance dates does not exceed 15 months; and
 - (ii) the entity continues to have a balance date in each calendar year; or

- (b) with the approval of Te Kairēhita Aroha before the change is made (and the change may be approved with or without conditions).
- (4) Subsection (1)(b) is subject to subsection (3).

Compare: 2005 No 39 s 41(3) - (7); 2022 No 12 s 100

41 Duty to prepare annual return and financial statements

- (1) Every registered charity must ensure that, within 6 months after each balance date of the entity, an annual return that complies with subsection (2) is –
 - (a) completed in relation to the entity and that balance date; and
 - (b) dated and signed on behalf of the entity by 2 responsible persons of the entity; and
 - (c) given to Te Kairēhita Aroha for registration.
- (2) The annual return of a registered charity must –
 - (a) be in the form and contain the information prescribed by the regulations; and
 - (b) be accompanied by a copy of the financial statements of the registered charity for the most recently completed accounting period.
- (3) The financial statements referred to in subsection (2)(b) must be prepared in accordance with, –
 - (a) in the case of financial statements of a specified not-for-profit entity, generally accepted accounting practice; or
 - (b) in any other case, either generally accepted accounting practice or a non-GAAP standard that applies for the purposes of this section.
- (4) If a registered charity is subject to another Act that imposes duties relating to the preparation, audit, registration, or lodgement of financial statements, the entity must, in addition to complying with this Act, comply with the requirements of that other Act.

Compare: 2005 No 39 s 41(1) - (2), s 42A(1) and (3); 2022 No 12 ss 102 and 109

42 When financial statements must be audited or reviewed

- (1) This section applies to –
 - (a) every registered charity that is **large**; and
 - (b) every registered charity that is of **medium size**.
- (2) Every registered charity to which this section applies (**A**) must ensure that the financial statements of A that accompany an annual return under section 41 (*Duty to prepare annual return and financial statements*) are –
 - (a) audited by a qualified auditor if A is large in respect of the accounting period to which the financial statements relate:
 - (b) audited or reviewed by a qualified auditor if A is of medium size in respect of the accounting period to which the financial statements relate.

Compare: 2005 No 39 s 42C

43 Meaning of large and medium size

- (1) In section 42 (*When financial statements must be audited or reviewed*), a registered charity is **large** or of **medium size** in respect of an accounting period in the circumstances prescribed in the regulations.
- (2) A financial reporting standard, or a part of such a standard, that is expressed as applying for the purposes of subsection (1)(a) or (b) must be applied in determining whether that provision applies (for example, the standard may define operating expenditure or control).

Compare: 2005 No 39 s 42D; 2022 No 12 s 105

44 Audit or review must be carried out in accordance with auditing and assurance standards

- (1) An auditor must, in carrying out an audit or a review of the financial statements of a registered charity, comply with all applicable auditing and assurance standards.
- (2) The auditor's report must comply with the requirements of all applicable auditing and assurance standards.
- (3) This section does not apply in respect of a registered charity that is a public entity (within the meaning of the Public Audit Act 2001).

Compare: 2005 No 39 s 42F

Duty to notify changes

45 Duty to notify changes to Te Kairēhita Aroha

- (1) Every registered charity must ensure that it gives notice to Te Kairēhita Aroha of any of the following changes:
 - (a) a change to the rules of the registered charity (including a copy of the amendment to the rules and a copy of the minute of the meeting or other record specifying the change and the effective date of the change);
 - (b) a change to the name of the registered charity;
 - (c) a change to the address for service of the registered charity;
 - (d) the election or appointment of a new responsible person of the registered charity (including a certification that the new responsible person is qualified to be and consents to being a responsible person of a registered charity);
 - (e) a responsible person of the registered charity ceasing to hold or becoming disqualified from holding office as a responsible person of the registered charity;
 - (f) a change in the contact person, or the name or contact details of the contact person, of the registered charity;
 - (g) a change in the balance date of the registered charity.
- (2) A notice under subsection (1) must –
 - (a) be in the prescribed form (if any); and
 - (b) contain, or be accompanied by, any other prescribed information or documentation; and
 - (c) specify the effective date of the change; and
 - (d) be given delivered to Te Kairēhita Aroha within 20 working days of the registered charity first becoming aware of the change.
- (3) This section does not apply if the change has been notified in an annual return given under section 41 (*Duty to prepare annual return and financial statements*) before the change is required to be notified under subsection (2)(d).
- (4) This section does not affect the obligation of a registered charity to notify any of the above changes under any other legislation.

Compare: 2005 No 39 s 40; SR 2006/301 r 6 (prior to its amendment in 2012); 2022 No 12 ss 52, 111, 116

Fundraising duties

46 Duty to adhere to fundraising standards

If a registered charity, or a fundraiser who acts on behalf of a registered charity, is carrying out a fundraising activity, the registered charity and the fundraiser must adhere to professional fundraising standards of a recognised professional fundraising institute.

47 Duty to disclose registration number

- (1) Every registered charity must ensure that its registration number is prominently displayed in respect of any fundraising activity carried out by it or on its behalf.
- (2) If a registered charity, or a fundraiser who acts on behalf of a registered charity, is carrying out a fundraising activity, the registered charity or fundraiser must disclose the registration number of the registered charity if requested to do so by a member of the public.

Compare: 2005 No 39 s 39; Charities Bill 108-1, cl 23(1)(b)

Duty regarding responsible persons

48 Duty regarding responsible persons

A registered charity must:

- (a) take reasonable steps to ensure that each of its responsible persons is not disqualified from being a responsible person of a registered charity under section 31 (*Qualifications of responsible persons of registered charities*); and
- (b) after taking those steps:
 - (i) be, and remain, satisfied that each responsible person is not so disqualified; or
 - (ii) if it is unable to be, or remain, satisfied that a responsible person is not so disqualified, take reasonable steps to remove that person from office as a responsible person.

Compare: Australian Charities and Not-for-profits Commission Regulation 2013 (Cth) s 45.20(2)

Duty regarding conflicts of interest

49 Duty to disclose and manage conflicts of interest

A responsible person of a registered charity has a duty to disclose and manage perceived or actual material conflicts of interest of the person.

Compare: 2019 No 38 ss 28 and 34; 1993 No 105 ss 139 - 149; 2022 No 12 ss 62 - 73; Australian Charities and Not-for-profits Commission Regulation 2013 (Cth) s 45.25(1)

Subpart 3 – Exemptions

Exemptions

50 Te Kairēhita Aroha may grant exemptions

- (1) Te Kairēhita Aroha may, by written notice to an entity, exempt the entity from compliance with any provision or provisions of –
 - (a) section 34 (*Application for registration*);
 - (b) section 41 (*Duty to prepare annual return and financial statements*);
 - (c) section 42 (*When financial statements must be audited or reviewed*);
 - (d) section 45 (*Duty to notify changes to Te Kairēhita Aroha*);
 - (e) section 47 (*Duty to disclose registration number*); or
 - (f) any regulations made under this Act.
- (2) The exemption may be granted on any terms and conditions that Te Kairēhita Aroha thinks fit.
- (3) Te Kairēhita Aroha may vary an exemption in the same way as an exemption may be granted under this section.
- (4) Te Kairēhita Aroha may, by written notice to an entity, revoke an exemption granted under this section.
- (5) In exercising powers under this section, Te Kairēhita Aroha must have regard to the purposes and principles of this Act.

- (6) Exemptions, including terms, conditions, and variations, granted under this section must be included with the entity's entry on the charities register under section 22(1)(l) (*Contents of register*).
- (7) An exemption under this section is neither a legislative instrument nor a disallowable instrument for the purposes of the Legislation Act 2012 and does not have to be presented to the House of Representatives under section 41 of that Act.

Compare: 2005 No 39 s 43

PART 5 – ESTABLISHMENT OF TE KAIRĒHITA AROHA / THE CHARITIES REGISTRAR

51 Purpose of this Part

The purpose of this Part is to –

- (a) establish Te Kairēhita Aroha / the Charities Registrar; and
- (b) state the functions and powers of Te Kairēhita Aroha; and
- (c) require Te Kairēhita Aroha to –
 - (i) have regard to certain matters; and
 - (ii) comply with certain other obligations; and
- (d) set out the mechanisms by which registered charities and the public may hold Te Kairēhita Aroha accountable for its administration of this Act.

Establishment of Te Kairēhita Aroha

52 Establishment of Te Kairēhita Aroha

- (1) An organisation named Te Kairēhita Aroha is established.
- (2) Te Kairēhita Aroha is an independent Crown entity for the purposes of section 7 of the Crown Entities Act 2004.
- (3) The Crown Entities Act 2004 applies to Te Kairēhita Aroha except to the extent that this Act expressly provides otherwise.

Compare: 2020 No 32 s 7; 2005 No 39 s 9 (prior to its amendment in 2012)

53 Membership of Te Kairēhita Aroha

- (1) The Governor-General, on the recommendation of the House of Representatives, must appoint at least 5 and no more than 7 members of Te Kairēhita Aroha as follows:
 - (a) 1 member as the chairperson; and
 - (b) 1 member as the deputy chairperson; and
 - (c) no less than 3 and no more than 5 other members.
- (2) Members of Te Kairēhita Aroha are the board for the purposes of the Crown Entities Act 2004.
- (3) Subsection (1) applies despite –
 - (a) section 28(1)(b) of the Crown Entities Act 2004; and
 - (b) clause 1(2) of schedule 5 of the Crown Entities Act 2004.

Compare: 1993 No 87 s 4D; 2001 No 10 ss 7 and 9; 2005 No 39 s 11 (prior to its amendment in 2012)

54 Functions of Te Kairēhita Aroha

- (1) The functions of Te Kairēhita Aroha are to –
 - (a) raise awareness of the importance of the charitable sector and encouraging a culture of giving;
 - (b) inform public choice, and maintain public trust and confidence in the charitable sector, by:

- (i) ensuring that the charities register is compiled and maintained;
- (ii) receiving, considering and processing applications for registration under this Act;
- (iii) receiving, considering and processing annual returns submitted by registered charities;
- (iv) monitoring registered charities to ensure that entities registered under this Act continue to act in good faith in furtherance of their stated charitable purposes, in accordance with their rules, and otherwise in accordance with this Act; and
- (v) performing or exercising other functions, duties and powers conferred upon it by this Act or the regulations;
- (c) provide education and support to registered charities to assist them to meet their obligations under this Act;
- (d) undertake or promote research into any matter relating to charities, including into the data available on the charities register;
- (e) make appropriate information available to the public to –
 - (i) assist persons to make registration applications under this Act;
 - (ii) increase public awareness of the existence of the register and its benefits;
 - (iii) promote compliance with this Act; and
 - (iv) encourage charitable giving, and public support of and involvement with the charitable sector; and
- (f) carry out any functions that are incidental and related to, or consequential on, its functions set out in paragraphs (a) to (e).
- (2) Without limiting subsection (1), Te Kairēhita Aroha may, where applicable, perform its functions under subsection (1) in relation to any charity, regardless of whether or not the charity is registered under this Act.

Compare: 2005 No 39 s 10 (prior to its amendment in 2012); 2005 No 39 s 11

55 Duty to promote public awareness of functions

Te Kairēhita Aroha must carry out the activities it considers necessary to make its functions known to, and understood by, the public.

Compare: 2019 No 66 s 13

56 Powers of Te Kairēhita Aroha

- (1) Te Kairēhita Aroha has and may exercise all powers necessary for performing its functions and duties.
- (2) In performing its functions and exercising its powers, Te Kairēhita Aroha must:
 - (a) act in a manner consistent with its functions and current statement of intent;
 - (b) act in a manner consistent with the purposes and principles of this Act;
 - (c) act in accordance with any binding policy statement issued by the Māori Advisory Committee under section 67 (*Tikanga Māori Policy Statements*);
 - (d) refer any registration or administration decision that raises a matter of tikanga, including but not limited to the question of whether any entity should be recognised as a kaupapa Māori charity, to the Māori Advisory Committee for advice.

Compare: 2019 No 66 s 14; Australian Charities and Not-for-profits Commission Act 2012 s 15-10

57 Te Kairēhita Aroha may regulate own procedures

- (1) Subject to this Act, Te Kairēhita Aroha may regulate its own procedures for performing its functions and duties as Te Kairēhita Aroha considers appropriate.

- (2) Te Kairēhita Aroha's procedures must be consistent with the rules of natural justice, the principles of Te Tiriti o Waitangi, and the purposes and principles of this Act.
- (3) Te Kairēhita Aroha must make its procedures publicly available on its website and in such other manner as it considers appropriate.

Compare: 2019 No 66 s 15

58 Independence of Te Kairēhita Aroha

Te Kairēhita Aroha must act independently, impartially and fairly in performing its functions and duties and exercising its powers under this Act.

Compare: 1993 No 87 s 7; 2019 No 66 s 16; 2005 No 39 s 8(4)

Accountability of Te Kairēhita Aroha

59 Statement of intent

- (1) Notwithstanding sections 138 to 149A of the Crown Entities Act 2004, Te Kairēhita Aroha must, at least once in every 3-year period, prepare and publish on its website a statement of intent setting out the strategic objectives it intends to achieve or contribute to (**strategic intentions**), and how it intends to manage its functions and operations to meet its strategic intentions.
- (2) In preparing its statement of intent, Te Kairēhita Aroha must first prepare a draft. In preparing its draft statement of intent, Te Kairēhita Aroha must:
 - (a) consult with the Māori Advisory Committee;
 - (b) comply with any binding policy statements issued by the Māori Advisory Committee;
 - (c) have regard to:
 - (i) any feedback received at annual meetings held under section 61 (*Annual meeting/hui*); and
 - (ii) the civil society strategy.
- (3) Before finalising its statement of intent, Te Kairēhita Aroha must make the draft statement of intent prepared under subsection (2) available, on its website and in such other manner as it considers appropriate, for public consultation for a reasonable period of time, and must take into account any feedback received as a result of that consultation.

60 Annual report

- (1) Notwithstanding sections 150 to 156 of the Crown Entities Act 2004, and without limiting the right of Te Kairēhita Aroha to report at any other time, Te Kairēhita Aroha shall in each year make a report to the House of Representatives on its operations and the performance of its functions under this Act, an assessment of its progress in relation to its strategic intentions as set out in its most recent statement of intent, and on any other matters Te Kairēhita Aroha considers appropriate.
- (2) Without limiting the generality of subsection (1), the annual report of Te Kairēhita Aroha must demonstrate:
 - (a) how it has promoted the purposes of this Act;
 - (b) how it has had regard to any advice of the Māori Advisory Committee in accordance with section 66 (*Role of Māori Advisory Committee*);
 - (c) how it has complied with any binding policy statements issued by the Māori Advisory Committee under section 67 (*Tikanga Māori policy statements*);
 - (d) details of the following for the reporting period:
 - (i) the number of applications for registration received;
 - (ii) a breakdown of the applications received, including the number that have been declined, the number that have been voluntarily withdrawn, and the reasons why;

- (iii) the amount of time it has taken for an application to be processed, including the median amount of time, and the shortest and longest times;
 - (iv) all exemptions granted;
 - (v) the number of entities that have been deregistered, and the reasons why;
 - (vi) the number of objections; and
 - (vii) details of any court judgments of relevance; and
 - (e) details of statistics and trends divined from analysis of data on the charities register;
 - (f) details of any other matters of which Te Kairēhita Aroha has knowledge that are pertinent to the charitable sector;
 - (g) whether the funding it receives is sufficient for it to perform its functions and, if not, which activities it has chosen to curtail or forgo; and
 - (h) any other matters that may be prescribed by regulations or agreed to at the previous year's annual meeting.
- (3) Te Kairēhita Aroha shall also provide its annual report to the Māori Advisory Committee.

Compare: 1986 No 127 s 23; 2004 No 115 s 151(2)

61 Annual meeting/hui

- (1) Te Kairēhita Aroha must hold, in each year, -
 - (a) at least 1 meeting with representatives of charities; and
 - (b) at least 1 hui/meeting with representatives of charities that identify as kaupapa Māori organisations or otherwise represent and/or work for the benefit of iwi.
- (2) However, Te Kairēhita Aroha is not required to hold an annual meeting in the 12-month period after its establishment.
- (3) Each annual meeting must be fully open to the public to attend in person or by electronic means.
- (4) The Minister, or representatives of the Minister, or both, must attend at least 1 of each type of annual meeting specified in subsection (1) in each year in which a meeting is held.
- (5) Te Kairēhita Aroha must give not less than 30 days' written notice of each annual meeting:
 - (a) on a website maintained by, or on behalf of, Te Kairēhita Aroha; and
 - (b) otherwise as Te Kairēhita Aroha considers will best notify persons who may be interested in attending, both in the area or region in which the meeting will be held and nationally.
- (6) The notice provided in subsection (5) must indicate how members of the public may obtain a copy of the annual report and financial statements of Te Kairēhita Aroha for the most recently-completed reporting period for discussion at the annual meeting, and any draft regulations issued for public consultation under section 93(4)(b) (*Regulations*).
- (7) At each annual meeting, Te Kairēhita Aroha must give a reasonable opportunity for persons who attend the meeting to ask questions and make submissions on any matter relating to this Act.
- (8) Te Kairēhita Aroha must also give a reasonable opportunity for persons to ask questions concerning the matters referred to in the annual report, and any draft regulations, and make submissions, before, at or up to 30 days after the meeting, to Te Kairēhita Aroha concerning those matters.

- (9) At each annual meeting, Te Kairēhita Aroha may invite representatives from the charitable sector to attend and speak.
- (10) Nothing in this section requires Te Kairēhita Aroha to disclose any information if there is good reason for withholding that information under the Official Information Act 1982.

Compare: 2005 No 39 s 12; 2005 No 39 s 12 (prior to its amendment in 2012)

62 Appeals

- (1) A person who is aggrieved by a decision or deemed decision of Te Kairēhita Aroha under this Act may appeal to a hearing authority.
- (2) An appeal under this section must be made by lodging a notice of appeal with the Registrar of the relevant hearing authority and with Te Kairēhita Aroha within –
 - (a) 60 working days after the date of the decision; or
 - (b) any further time that the hearing authority may allow on application made before or after the expiration of that period.
- (3) Every notice of appeal must specify –
 - (a) the decision or the part of the decision appealed from; and
 - (b) the grounds of appeal in sufficient detail to fully inform the hearing authority and Te Kairēhita Aroha of the issues in the appeal; and
 - (c) the relief sought.
- (4) For the purposes of hearing the appeal, the hearing authority shall have all the powers vested in its civil jurisdiction, including full discretionary power to hear and receive further evidence on questions of fact, either by oral evidence or by affidavit.
- (5) The parties may agree that all or part of the evidence before Te Kairēhita Aroha be treated as evidence for the purposes of the hearing.
- (6) The notice of appeal shall name Te Kairēhita Aroha as the respondent.
- (7) The notice of appeal may also name the Attorney-General as a respondent.
- (8) The hearing authority may make any order, including any interim order, and give such directions as it thinks fit.
- (9) An order may be subject to any terms or conditions that the hearing authority thinks fit.
- (10) Nothing in this section affects the right of any person to apply, in accordance with law, for judicial review.

Compare: 2005 No 39 ss 59 to 61; 1993 No 105 s 370; 1908 No 212 s 34B; 1908 No 81 ss13B and 13BA; 1982 No 118 s 151; 2022 No 12 s 249

PART 6 – MĀORI ADVISORY COMMITTEE

63 Māori Advisory Committee established

- (1) This section establishes the Māori Advisory Committee.
- (2) The Māori Advisory Committee consists of not fewer than 5, and not more than 7, members.

Compare: 2020 No 52 s 14; 2011 No 14 s 18

64 Appointment of members of Māori Advisory Committee

- (1) The responsible Minister must appoint members to the Māori Advisory Committee.
- (2) The responsible Minister must appoint only persons who, in the responsible Minister's opinion, are persons of mana with expertise in tikanga and relevant experience in the charitable sector.
- (3) The responsible Minister must consult with Māori before making any appointments.
- (4) The responsible Minister must appoint 1 of the members as chairperson of the Māori Advisory Committee.

Compare: 2020 No 52 s 15

65 Further provisions relating to Māori Advisory Committee

- (1) The following provisions of the Crown Entities Act 2004 apply to members of the Māori Advisory Committee as if they were members of the board of a Crown agent:
 - (a) section 28 (method of appointment of members):
 - (b) section 30 (qualifications of members):
 - (c) section 31 (requirements before appointment):
 - (d) section 32 (term of office of members):
 - (e) section 35 (validity of appointments):
 - (f) section 36 (removal of members of Crown agents):
 - (g) section 41 (process for removal):
 - (h) section 43 (no compensation for loss of office):
 - (i) section 44 (resignation of members):
 - (j) section 45 (members ceasing to hold office).
- (2) The members are entitled to –
 - (a) receive remuneration, in accordance with the fees framework; and
 - (b) be reimbursed for actual and reasonable travelling expenses incurred in carrying out their roles as members.

Compare: 2020 No 52 s 16

66 Role of Māori Advisory Committee

- (1) The role of the Māori Advisory Committee is to advise Te Kairēhita Aroha on Māori interests and knowledge, as they relate to the functions of Te Kairēhita Aroha and the purposes and principles of this Act.
- (2) Without limiting the generality of this section, Te Kairēhita Aroha must refer to the Māori Advisory Committee any registration or administration decision that raises or may raise a matter of tikanga, and advise the entity or entities affected that it is making such a referral. The Māori Advisory Committee shall provide advice to Te Kairēhita Aroha to assist it to give effect to its obligation to recognise and respect the principles of Te Tiriti o Waitangi and tikanga principles. Tikanga principles must always be viewed as mixed questions of fact and law, and may differ for different groups or collectives. In developing its advice, the Māori Advisory Committee may convene an oral hearing, and may hear submissions from affected parties as to how tikanga principles apply in any particular context.
- (3) Te Kairēhita Aroha must –
 - (a) have regard to the advice of the Māori Advisory Committee; and
 - (b) demonstrate how it has had regard to that advice in its annual report (prepared under section 60 (*Annual report*)), which must include –
 - (i) information on the situations in which it did not act on the advice; and
 - (ii) the reasons for that; and
 - (iii) the alternative actions that were taken, if any; and
 - (c) provide the Māori Advisory Committee with an opportunity to include commentary in Te Kairēhita Aroha's annual report on the Māori Advisory Committee's role and the advice it provided to Te Kairēhita Aroha over the period covered by the annual report.

Compare: 2020 No 52 s 17

67 Tikanga Māori policy statements

- (1) The Māori Advisory Committee may from time to time issue policy statements on matters of tikanga Māori, but no such statement may be issued without prior public consultation on a draft of the policy statement.

- (2) Tikanga Māori policy statements are binding on Te Kairēhita Aroha and on any court hearing an appeal of a decision of Te Kairēhita Aroha.
- (3) The Māori Advisory Committee may from time to time amend a policy statement issued under subsection (1).

PART 7 – MONITORING

68 Purpose

The purpose of this Part is to set out the framework by which Te Kairēhita Aroha monitors registered charities to ensure that:

- (a) the activities of the registered charity are being carried out in good faith in furtherance of its stated charitable purposes, and otherwise in accordance with its rules and this Act; and
- (b) the entity, or any person in connection with the entity, is not engaging in activities that constitute serious wrongdoing under this Act.

69 Inquiries and additional reports

- (1) Te Kairēhita Aroha or a person authorised in writing by Te Kairēhita Aroha may exercise one or more of the powers referred to in subsection (2) for the purpose of -
 - (a) ascertaining whether a registered charity or a responsible person of a registered charity is complying, or has complied, with this Act;
 - (b) ascertaining whether Te Kairēhita Aroha should exercise any of its rights or powers under this Act; or
 - (c) ascertaining whether Te Kairēhita Aroha has fulfilled or complied with its duties under this Act; or
 - (d) detecting and investigating offences against this Act,
 if Te Kairēhita Aroha considers, in good faith, that to do so would further the purposes and principles of this Act.
- (2) The powers are to:
 - (a) examine and inquire into –
 - (i) any registered charity;
 - (ii) any person who has engaged in, or is engaging in, conduct that constitutes or may constitute –
 - (A) a breach of this Act; or
 - (B) serious wrongdoing in connection with a registered charity;
 - (b) subject to subsection (3), require a person, by notice in writing, to give to Te Kairēhita Aroha, within the period and in the manner and form specified in the notice, any information or document, or class of information or document, specified in the notice;
 - (c) require a particular registered charity, by written notification to:
 - (i) prepare a report, in addition to any other statement or report the registered charity is required to prepare; and
 - (ii) give that report to Te Kairēhita Aroha within the period specified in the notification.
- (3) Persons to whom this section applies have the same privileges in relation to supplying information and documents to Te Kairēhita Aroha as witnesses have in proceedings before a court.

Compare: 2005 No 39 ss 50 and 51; 2022 No 12 s 244; Australian Charities and Not-for-Profits Commission Act 2012 s 60-75(1)(a)

70 Compliance agreements

If Te Kairēhita Aroha considers that a registered charity may have breached or may be at risk of breaching this Act, Te Kairēhita Aroha may, in consultation with the entity, draw up an action plan setting out the measures the entity needs to take to ensure it is meeting its compliance obligations.

71 Te Kairēhita Aroha may supply information or documents

- (1) Te Kairēhita Aroha may supply any information or document that has been withheld from the charities register under section 23 (*Te Kairēhita Aroha may remove or omit information and may restrict public access*) and/or any information or document that it obtains under section 69 (*Inquiries and additional reports*) to any person for either or both of the following purposes:
 - (a) assisting the person in the exercise of the person's powers or in the performance of the person's functions under this Act or any of the Inland Revenue Acts;
 - (b) detecting and prosecuting offences against any other Act, but, in this case, that information and those documents are not admissible in any criminal proceedings against the person from whom the information or documents were acquired or any person to whom the information or documents relate.
- (2) Any person may use and disclose any information or documents supplied to the person by Te Kairēhita Aroha under this section for the purposes referred to in subsection (1).

Example:

A society has become registered as a charity.

Members of the public donate money to the society and claim credits of income tax in respect of those gifts under subpart LD of the Income Tax Act 2007.

In order to determine whether a credit can properly be claimed, the Inland Revenue Department needs to consider whether the society is a donee organisation. So that the society does not have to make a separate application to the Inland Revenue Department, Te Kairēhita Aroha may supply a copy of the application for registration under this Act to the Inland Revenue Department.

Compare: 2005 No 39 ss 30, 53

PART 8 – REMOVAL FROM THE REGISTER

Deregistration

72 Deregistration of registered charity

- (1) An entity is deregistered under this Act if it is removed from the register.
- (2) An entity is removed from the register if Te Kairēhita Aroha registers a notice in the register that states –
 - (a) that the entity is removed from the register;
 - (b) the grounds on which the entity is removed from the register; and
 - (c) the date on which the removal is effective.
- (3) Subject to section 62 (*Appeals*), the entity ceases to be a registered charity on the date referred to in subsection (2)(c).
- (4) Te Kairēhita Aroha may, if it has removed an entity from the register, make an order that an application for the re-registration of the entity as a charity under this Act must not be made before the expiry of a specified period.

Compare: 2005 No 39 s 31; 2022 No 12 s 174

73 Grounds for removal from register

- (1) Te Kairēhita Aroha may remove an entity from the register if, –
 - (a) the entity has given to Te Kairēhita Aroha a request to be removed from the register, which request must be made in the prescribed manner (if any);

- (b) the entity is carrying out activities in breach of section 38 (*Duty of loyalty*);
 - (c) the entity is carrying out activities that are not otherwise in accordance with its rules;
 - (d) the entity engages in partisan political activity proscribed by section 18(4) (*Activities*);
 - (e) subject to section 29(2)-(4) (which relate to binding rulings), the entity makes an amendment to its rules that results in its purposes no longer being exclusively charitable or otherwise ceases to meet the eligibility requirements for registration set out in section 29 (*Eligibility for registration*);
 - (f) the entity has engaged or is engaging in serious wrongdoing;
 - (g) a person has engaged or is engaging in serious wrongdoing in connection with the entity and the entity has not taken appropriate corrective action;
 - (h) there has otherwise been a significant or persistent failure by the entity to comply with its duties under subpart 2 of Part 5 (*Duties of registered charities*), to comply with a compliance agreement entered into under section 70 (*Compliance agreements*) or otherwise to meet its obligations under this Act; or
 - (i) there has been a significant or persistent failure by any 1 or more fundraisers acting on behalf of the entity to meet their obligations under this Act.
- (2) Te Kairēhita Aroha may choose not to proceed with the removal of a registered charity from the register despite subsection (1)(b) to (i) applying.
- (3) Te Kairēhita Aroha may remove a registered charity from the register under subsection (1)(b) to (i) only if –
- (a) Te Kairēhita Aroha has complied with section 74 (*Notice of intention to remove from register*); and
 - (b) Te Kairēhita Aroha –
 - (i) is satisfied that no person has objected to the removal under section 75 (*Objection to removal from register*); or
 - (ii) if an objection to the removal has been received, has complied with section 76 (*Duties of Te Kairēhita Aroha if objection received*).

Compare: 2005 No 39 s 32; 1993 No 105 s 318(1), (1A), (4A); 2022 No 12 s 175

Procedural requirements before deregistration

74 Notice of intention to remove from register

- (1) Before a registered charity can be removed from the register under section 73 (*Grounds for removal from register*), Te Kairēhita Aroha must –
- (a) give notice to the registered charity in accordance with subsection (2); and
 - (b) give public notice, on the website of Te Kairēhita Aroha and in such other manner as it considers appropriate, of the matters set out in subsection (3).
- (2) The notice to be given under subsection (1)(a) must specify:
- (a) the name of the entity; and
 - (b) the registration number of the entity; and
 - (c) the provision of this Act under which it is intended to remove the registered charity from the register and the evidence which supports the alleged grounds for deregistration; and
 - (d) the date by which an objection to the removal under section 75 (*Objection to removal from register*) must be received by Te Kairēhita Aroha, which must be not less than 20 working days after the date of the notice.
- (3) The notice to be given under subsection (1)(b) must specify –

- (a) the name of the registered charity; and
- (b) the registration number of the entity; and
- (c) the provision of this Act under, and the grounds on, which it is intended to remove the registered charity from the register; and
- (d) the date by which an objection to the removal under section 75 (*Objection to removal from register*) must be received by Te Kairēhita Aroha, which must be not less than 20 working days after the date of the notice.

Compare: 2005 No 39 s 33; 2022 No 12 s 177

75 Objection to removal from register

If a notice is given under section 74 (*Notice of intention to remove from register*), any person may deliver to Te Kairēhita Aroha, not later than the date specified in the notice, an objection to the removal on any 1 or more of the following grounds:

- (a) that the grounds on which it is intended to remove the entity from the register have not been satisfied;
- (b) that, for any other reason, it would not be in the public interest to remove the entity from the register.

Compare: 2005 No 39 s 34

76 Duties of Te Kairēhita Aroha if objection received

If an objection to the removal of an entity from the register under section 75 (*Objection to removal from register*) is received on or before the date referred to in section 74(2)(d) or (3)(d) (*Notice of intention to remove from register*), Te Kairēhita Aroha must consider the objection and give each objector a reasonable opportunity to make submissions on the matter. Te Kairēhita Aroha must not proceed with the removal unless:

- (a) all of the objections have been considered; and
- (b) 1 or more of the grounds for removal from the register are satisfied; and
- (c) having regard to the purpose and principles of this Act, it is in the public interest to proceed with the removal.

Compare: 2005 No 39 s 35(1) and s 36(1)(b)

77 Notice of deregistration

- (1) If, having considered any objections received under sections 75 (*Objection to removal from register*) and 76 (*Duties of Te Kairēhita Aroha if objection received*), Te Kairēhita Aroha decides to proceed with the removal of the entity from the register, –
 - (a) Te Kairēhita Aroha must give to the registered charity notice of –
 - (i) the decision and the reasons for it; and
 - (ii) the entity's right to appeal the decision to a hearing authority under section 62 (*Appeals*); and
 - (b) Te Kairēhita Aroha must give to any other person who gives a notice objecting to the removal on a ground specified in section 75(b) (*Objection to removal from register*), notice of their right to apply to a hearing authority for an order that the registered charity not be removed from the register.
- (2) Te Kairēhita Aroha must not proceed to remove the entity from the register earlier than 60 working days after the date on which the notice referred to in subsection (1) is given to the recipient.
- (3) The hearing authority may make an order that the entity should not be removed from the register if:
 - (a) none of the grounds in section 73 (*Grounds for removal from register*) are made out; or

- (b) having regard to the purpose and principles of this Act, it is not in the public interest to proceed with the removal.

Compare: 2005 No 39 s 35(2); 2022 No 12 s 182

PART 9 – ENFORCEMENT

78 Overview

This part relates to matters of enforcement, including providing for –

- (a) infringement offences;
- (b) holding out offences;
- (c) financial reporting offences; and
- (d) banning orders.

Compare: 2022 No 12 s 127

Infringement offences

79 Infringement offences

- (1) A registered charity that fails to comply with any of the provisions listed in subsection (2) commits an infringement offence and is liable to –
 - (a) an infringement fee of an amount prescribed by the regulations; or
 - (b) a fine imposed by a court not exceeding \$3,000.
- (2) The provisions are –
 - (a) section 38 (*Duty of loyalty*);
 - (b) section 39 (*Duty to keep accounting records*);
 - (c) section 41 (*Duty to prepare annual return and financial statements*);
 - (d) section 42 (*When financial statements must be audited or reviewed*);
 - (e) section 45 (*Duty to notify changes to Te Kairēhita Aroha*);
 - (e) section 46 (*Duty to adhere to fundraising standards*);
 - (e) section 47 (*Duty to disclose registration number*);
 - (e) section 48 (*Duty regarding responsible persons*);
 - (e) section 49 (*Duty to disclose and manage conflicts of interest*).

Compare 2005 No 39 ss 42B, 42E, 58; SR 2006/301 reg 9; 2022 No 12 s 160

80 Proceedings for infringement offences

- (1) A registered charity that is alleged to have committed an infringement offence may –
 - (a) be proceeded against by the filing of a charging document under section 14 of the Criminal Procedure Act 2011; or
 - (b) be issued with an infringement notice as provided in section 81 (*When infringement notice may be issued*).
- (2) Proceedings commenced in the way described in subsection (1)(a) do not require leave of a District Court Judge or Registrar under section 21(1)(a) of the Summary Proceedings Act.
- (3) See section 21 of the Summary Proceedings Act 1957 for the procedure that applies if an infringement notice is issued.

Compare: 2022 No 12 s 161

81 When infringement notice may be issued

Te Kairēhita Aroha may issue an infringement notice to a registered charity if Te Kairēhita Aroha believes on reasonable grounds that the registered charity is committing, or has committed, an infringement offence.

Compare: 2022 No 12 s 162

82 Infringement notice may be revoked

- (1) Te Kairēhita Aroha may revoke an infringement notice before the infringement fee is paid, or an order for payment of a fine is made or deemed to be made by a court under section 21 of the Summary Proceedings Act.
- (2) An infringement notice is revoked by giving written notice to the registered charity to which it was issued that the notice is revoked.
- (3) The revocation of an infringement notice before the infringement fee is paid is not a bar to any further action as described in section 80(1)(a) or (b) (*Proceedings for infringement offences*) against the person to whom the notice was issued in respect of the same matter.

Compare: 2022 No 12 s 163

83 What infringement notice must contain

An infringement notice must be in the form prescribed by the regulations and must contain –

- (a) details of the alleged infringement offence that fairly inform the society of the time, place, and nature of the alleged offence; and
- (b) the amount of the infringement fee; and
- (c) an address for Te Kairēhita Aroha; and
- (d) how the infringement fee may be paid; and
- (e) the time within which the infringement fee must be paid; and
- (f) a summary of the provisions of section 21(10) of the Summary Proceedings Act 1957; and
- (g) a statement that the registered charity served with the notice has a right to request a hearing; and
- (h) a statement of what will happen if the registered charity served with the notice does not pay the fee and does not request a hearing; and
- (i) any other matters prescribed by the regulations.

Compare: 2022 No 12 s 164

84 How Infringement notice may be served

- (1) An infringement notice may be served on a registered charity that Te Kairēhita Aroha believes is committing or has committed the infringement offence by –
 - (a) delivering it to a contact person of the registered charity or, if the contact person refuses to accept it, bringing it to the contact person's notice; or
 - (b) sending it to an electronic address of a contact person or of the registered charity; or
 - (c) sending it to the registered charity by prepaid post addressed to the registered charity's address for service.
- (2) Unless the contrary is shown, –
 - (a) an infringement notice (or copy of it) delivered or sent to a contact person or brought to a contact person's notice under subsection (1)(a) or (b) must be treated as having been served on the registered charity;
 - (b) an infringement notice (or copy of it) sent to a valid electronic address under subsection (1)(b) is to be treated as having been served at the time the electronic communication first enters an information system that is outside the control of Te Kairēhita Aroha;
 - (c) an infringement notice (or copy of it) sent by prepaid post to a registered charity under subsection (1)(c) is to be treated as having been served on that registered charity on the fifth working day after the date on which it was posted.

Compare: 2022 No 12 s 165

85 Payment of infringement fee

Te Kairēhita Aroha must pay all infringement fees received into a Crown Bank Account.

Compare: 2022 No 12 s 166

86 Reminder notices

A reminder notice must be in the form prescribed in the regulations, and must include the same particulars, or substantially the same particulars, as the infringement notice.

Compare: 2022 No 12 s 167

Holding out offences

87 No holding out unless registered under this Act

- (1) A person must not –
 - (a) use a style or title including the words “registered charity”; or
 - (b) state or imply, or permit a statement or implication, that –
 - (i) the person is registered as a charity under this Act; or
 - (ii) an entity that the person acts on behalf of is registered as a charity under this Act.
- (2) Subsection (1) does not apply to –
 - (a) a registered charity; or
 - (b) a person who acts on behalf of a registered charity.
- (3) A person must not state or imply, or permit a statement or implication, that the person acts on behalf of a registered charity if the person does not act on behalf of that registered charity.

Compare: 2005 No 39 s 37

88 Offence to contravene section 87 (No holding out unless registered under this Act)

- (1) Every person who acts in contravention of section 87(1) (*No holding out unless registered under this Act*) commits an offence and is liable on conviction to a fine not exceeding \$30,000.
- (2) Despite anything to the contrary in section 25 of the Criminal Procedure Act 2011, the limitation period in respect of an offence against subsection (1) ends on the date that is 2 years after the date on which the matter giving rise to the contravention was discovered or ought reasonably to have been discovered.

Compare: 2005 No 39 s 38

Information offences

89 False statements

- (1) A person commits an offence if, with respect to a document required by or for the purposes of this Act, they –
 - (a) make, or authorise the making of, a statement in it that is false or misleading in a material particular knowing it to be false or misleading in a material particular; or
 - (b) omit, or authorise the omission, from it of any matter knowing that the omission makes the document false or misleading in a material particular.
- (2) A responsible person or employee of a registered charity commits an offence if they –
 - (a) make or provide, or authorise or permit the making or providing of, a statement or report that relates to the operations or affairs of the registered charity, and that is false or misleading in a material particular, to –

- (i) a responsible person, an employee, an auditor, or a member of the registered charity; or
 - (ii) a liquidator, liquidation committee, or receiver or manager of property of the registered charity; and
- (b) know it to be false or misleading in a material particular.
- (3) A person who commits an offence under this section is liable on conviction to imprisonment for a term not exceeding 1 year, a fine not exceeding \$50,000, or both.

Compare: 2022 No 12 s 154; 2005 No 39 s 52

Banning orders

90 Hearing authority may disqualify responsible persons

- (1) A hearing authority may make a banning order against a person (**A**) if –
 - (a) A has been convicted of an offence under this Act, or has been convicted of a crime involving dishonesty as defined in section 2(1) of the Crimes Act 1961; or
 - (b) A has, while a responsible person of a registered charity and whether convicted or not –
 - (i) persistently failed to comply with this Act or, if the registered charity has failed to so comply, persistently failed to take reasonable steps to obtain compliance with this Act; or
 - (ii) been guilty of fraud in relation to the registered charity or of a breach of duty under this Act; or
 - (iii) acted in a reckless or incompetent manner in the performance of A's duties as a responsible person of a registered charity; or
 - (c) A has become a mentally impaired person who, in the opinion of the court, permanently lacks wholly or partly the competence to manage their own affairs.
- (2) A banning order may, permanently or for a period specified in the order, prohibit or restrict A, without the leave of the hearing authority, from doing either or both of the following things:
 - (a) being a responsible person of a registered charity;
 - (b) being concerned or taking part in the management of a registered charity in any way (whether directly or indirectly).
- (3) The hearing authority may make an order under this section permanent or for a period longer than 10 years only in the most serious of cases for which an order may be made.
- (4) The Registrar of the hearing authority must, as soon as practicable after an order is made under this section, give notice that the order has been made to Te Kairēhita Aroha.
- (5) Te Kairēhita Aroha must, after receiving a notice under subsection (4), give notice in the *Gazette* of the name of the person against whom the order is made and add it to the entry in the charities register of the registered charities for which A was a responsible person at the time the order was made.

Compare: 2022 No 12 ss 168 - 170

91 Applications for orders

- (1) A person intending to apply for an order under section 90 (*Hearing authority may disqualify responsible persons*) must give not less than 10 working days' notice of that intention to the person (**A**) against whom the order is sought, and on the hearing of the application, A may appear and give evidence or call witnesses.

- (2) An application for an order under section 90 may be made by –
 - (a) Te Kairēhita Aroha, the Attorney-General, the Official Assignee, or the liquidator of the registered charity; or
 - (b) a person who is, or has been, concerned with the registered charity, including a responsible person, member, creditor, qualified auditor, or other person.
- (3) Subsection (4) applies on the hearing of –
 - (a) an application for an order under section 90 (*Hearing authority may disqualify responsible persons*); or
 - (b) an application for leave under section 90(2) by a person against whom an order has been made.
- (4) The applicant –
 - (a) must appear and call the attention of the hearing authority to any matters that seem to them to be relevant; and
 - (b) may give evidence or call witnesses.

Compare: 2005 No 39 ss 31(4) and 36(2); 2022 No 12 s 171 - 172

92 Banning order contravention

A person who acts in contravention of an order made under section 90 (*Hearing authority may disqualify responsible persons*) commits an offence and is liable on conviction to imprisonment for a term not exceeding 1 year, a fine not exceeding \$50,000, or both.

2022 No 12 s 159

PART 10 - MISCELLANEOUS

Subpart 1 – Regulations

93 Regulations

- (1) The Governor-General may, from time to time, by Order in Council, make regulations for the due administration of this Act and for the conduct of all persons concerned in its administration and generally for carrying this Act into effect.
- (2) Without limiting the power to make regulations conferred by subsection (1), regulations may be made under that subsection for all or any of the following purposes:
 - (a) prescribing forms for the purposes of this Act;
 - (b) prescribing requirements for –
 - (i) specified information or documents to be included in or attached to forms;
 - (ii) forms to be signed by specified persons;
 - (c) prescribing requirements with which documents given for registration must comply;
 - (d) with respect to annual returns, prescribing –
 - (i) the form of the returns;
 - (ii) the particulars to be contained in the returns;
 - (iii) directions to be complied with in the preparation of the returns;
 and different requirements may be prescribed for different types or classes of entities;
 - (e) prescribing procedures, requirements, and other matters for the charities register, including matters relating to –

- (i) the operation of the register:
- (ii) the form of the register:
- (iii) the information to be contained in the register:
- (iv) access to the register:
- (v) search criteria for the register:
- (vi) circumstances in which amendments must be made to the register:
- (f) declaring any class or classes of persons to be, or not to be, responsible persons for the purposes of this Act:
- (g) prescribing the circumstances in which a registered charity would be considered to be large or of medium size in respect of an accounting period:
- (h) prescribing the reporting requirements of Te Kairēhita Aroha under section 60 (*Annual report*):
- (i) prescribing fees payable to Te Kairēhita Aroha in respect of any matter under this Act or the manner in which fees may be calculated:
- (j) setting the infringement fee for each infringement offence, which must not exceed \$2,000:
- (k) prescribing information to be included in infringement notices and reminder notices and the form of notices:
- (l) prescribing the manner of serving documents on a registered charity and when the documents are treated as received:
- (m) prescribing countries, States, or territories for the purposes of section 31(2) (g) (*Qualifications of responsible persons of registered charities*):
- (n) providing for any other matters contemplated by this Act, necessary for its administration, or necessary for giving it full effect.
- (3) Regulations may be made under this section only on the recommendation of the Minister.
- (4) The Minister may make a recommendation under this section only if:
 - (a) the Minister has had regard to the purposes and principles of this Act; and
 - (b) draft regulations, and explanatory material explaining the policy intent of the regulations, have been circulated for public consultation and the Minister has had regard to all feedback received.
- (5) Te Kairēhita Aroha may refuse to perform a function or exercise a power until the fee prescribed by the regulations is paid.
- (6) The regulations may authorise Te Kairēhita Aroha to refund or waive, in whole or in part and on the conditions that may be prescribed by regulations, payment of any fee or amount payable in relation to any person or class of persons.
- (7) A fee or amount payable to Te Kairēhita Aroha is recoverable by Te Kairēhita Aroha in any court of competent jurisdiction as a debt due to the Crown.
- (8) Regulations made under this section are secondary legislation (see Part 3 of the Legislation Act 2019 for publication requirements).

Compare: 2005 No 39 ss 42, 72A, 73; 1994 No 166 s 91I; 1994 No 165 s 30; Charities Bill 2004 (108-2) cl 139; 2022 No 12 ss 254, 255

Subpart 2 – Review of operation of Act

94 Review of operation of Act

- (1) The Minister shall, not later than 5 years after the day on which this Act is passed, and then at intervals of not more than 10 years, cause an independent review of the operation of this Act to be commenced.

- (2) The nature and scope of the review shall be discussed by the Minister with representatives of the charitable sector before being finalised, following which the Minister shall publish draft terms of reference for the review.
- (3) The period for public submissions in response to the terms of reference shall be no less than 12 weeks.
- (4) Te Kairehita Aroha must facilitate public discussion and consultation of the matters at issue in the review.
- (5) After the review has been completed, the person(s) undertaking the review shall give the Minister a written report of the review.
- (6) The Minister must lay before Parliament a copy of the report mentioned in subsection (5).

Compare: 2014 No 56 s 282; 2014 No 18 s 12; 2006 No 69 s 202; 1993 No 28 s 26; Australian Charities and Not-for-profits Commission (Consequential and Transitional) Act 2012 (Cth) s 16; Charities Act 2006 (UK) s 73; Charities Act 2009 (Ireland) s 6

Subpart 3 – Amendments to Tax Administration Act 1994

95 Amendments to Tax Administration Act 1994

This subpart amends the Tax Administration Act 1994.

96 Section 3 amended (Interpretation)

In section 3(1), insert, after the definition of **taxpayer's total tax figure**, the following definition:

Te Kairēhita Aroha means the organisation established under section 52 of Te Ture Whakaū i Ngā Mahi Aroha – the Charities Act **2024**

97 Section 6BA inserted

After section 6B, insert the following section:

6BA – Requirement to consult

Before proposing any amendment to an Inland Revenue Act that would or may affect a charitable entity, whether or not registered under Te Ture Whakaū i Ngā Mahi Aroha – the Charities Act **2024**, the Commissioner must consult with the public.

98 Section 32E amended

Replace section 32E(1A) with:

(1A) An entity that is registered as a charity under the Te Ture Whakaū i Ngā Mahi Aroha – the Charities Act **2024** is treated as having RWT-exempt status for the duration of the registration.

99 Schedule 7 amended

Replace rule 27 of schedule 7 (*Disclosure rules*) with the following:

27 Agency administering charities legislation

Section 18 does not prevent the Commissioner communicating to any person, being a member, an employee, or an agent of Te Kairēhita Aroha, any information, being information that -

- (a) the person is authorised by Te Kairēhita Aroha to receive; and
- (b) the Commissioner considers is not undesirable to disclose and is reasonably necessary to enable that person to carry out any duty lawfully conferred on that person relating to the exercise of the powers, or the performance of the functions and duties, of Te Kairēhita Aroha under Te Ture Whakaū i Ngā Mahi Aroha – the Charities Act **2024**.

Subpart 4 – Amendments to Income Tax Act 2007

100 Amendments to Income Tax Act 2007

This subpart amends the Income Tax Act 2007.

101 Community housing trusts and companies

- (1) Repeal section CW42B (*Community housing trusts and companies*).
- (2) Amend the list of defined terms in section LD 3 (*Meaning of charitable or other public benefit gift*) by removing “community housing entity”, and repeal section LD 3(2)(ac) (which relates to community housing entities).
- (3) Amend section YA 1 by repealing the definition of “community housing entity”.
- (4) Repeal schedule 34 (*Community housing trusts and companies: income and assets of beneficiaries and clients*).
- (5) Repeal the Taxation (Thresholds for Community Housing Entities) Regulations 2016 (2016/220).

102 Consequential amendments

Amend sections CW 41 (*Charities: non-business income*), CW 42 (*Charities: business income*), HF 11 (*Choosing to become Maori authority*), HR 11 (*Non-exempt charities: initial tax base*), HR 12 (*Non-exempt charities: treatment of tax-exempt accumulations*), LD 3 (*Meaning of charitable or other public benefit gift*), MB 7 (*Family scheme income of settlor of trust*), MB 13 (*Family scheme income from other payments*) by replacing each reference to the Charities Act 2005 with a reference to Te Ture Whakaū i Ngā Mahi Aroha – the Charities Act **2024**.

103 Definitions

- (1) In section YA 1, replace the definition of **charitable purpose** with:

charitable purpose has the meaning given to that term by Te Ture Whakaū i Ngā Mahi Aroha – the Charities Act **2024**

- (2) In section YA 1, insert, after the “definition of refundable tax credit”, the following definition:

registered charity means an entity registered under the Te Ture Whakaū i Ngā Mahi Aroha – the Charities Act **2024**

- (3) Amend section YA 1 by replacing the reference to the Charities Act 2005 with a reference to Te Ture Whakaū i Ngā Mahi Aroha – the Charities Act **2024** in the following definitions:
 - (i) paragraph (ab) of the definition of **charitable organisation**:
 - (ii) paragraph (a) of the definition of **day of final decision**:

Subpart 5 – Miscellaneous

104 Repeal of Charities Act 2005

The Charities Act 2005 (2005 No 39) is repealed.

105 Revocation of Charities (Fees and Other Matters) Regulations 2006

The Charities (Fees and Other Matters) Regulations (SR 2006/301) are revoked.

106 Amendments to other Acts

The legislation in **schedule 1** is amended in the manner indicated in that schedule.



Appendix A – Financial Reporting: Comparative Summary

Australia	Section 60-60 of the Australian Charities and Not-for-profits Commission Act 2012 (Cth) exempts “Basic religious charities” (as defined in s 205-35) from the requirement to file financial information. Small charities (defined as charities having annual revenue under \$250,000 (\$500,000 from July 2022)) are also not required to file an annual financial report. ¹ Charities that are required to file an annual financial report must apply Australian Accounting Standards set by the Australian Accounting Standards Board; however, these are not designed specifically for charities and can require either general purpose or special purpose financial statements, which can reduce consistency and comparability. ²
Canada	Registered charities are required to file an annual T3010 <i>Registered Charity Information Return</i> , which is placed on the list of registered charities maintained by the Canada Revenue Agency. ³ The T3010 is a tax form, designed to ensure compliance with tax legislation, and the information inputted may not conform to generally accepted accounting practice; a charity’s financial statements are not automatically uploaded to the charities register but can be individually requested from the Canada Revenue Agency. ⁴ Inconsistent terminology and methodology make the data difficult to share and compare, and there are concerns about timeliness and accuracy of data collected through the T3010. Much of the data is not publicly available. Some of the public data is not collected and released in a timely manner. There is also no standardised set of reporting categories for the financial reports of charities. ⁵ While the charities register is open, it is difficult for the average organisation or consumer of information to use it as it is often raw form. In addition, when data is requested, the Canada Revenue Agency is not able to send it digitally. ⁶ As a result, accessible data on the registered charitable sector in Canada is lacking.

1 Australian Charities and Not-for-profits Commission *Charity size*:

www.acnc.gov.au/tools/topic-guides/charity-size.

2 Australian Charities and Not-for-profits Commission *General and Special Purpose Financial Statements*:

www.acnc.gov.au/for-charities/manage-your-charity/obligations-acnc/reporting-annually-acnc/general-and-special-purpose-financial-statements.

3 Government of Canada *List of charities and other qualified donees*: www.canada.ca/en/revenue-agency/services/charities-giving/list-charities/list-charities-other-qualified-donees.html.

4 M Blumberg and H Pasha *Blumberg’s Snapshot of the Canadian Charity Sector 2019* 5 September 2021 at 17.

5 See Advisory Committee on the Charitable Sector *Report #2 – Towards a federal regulatory environment that enables and strengthens the charitable and non-profit sector* April 2021 “The Data Landscape, Data Gaps”.

6 See Advisory Committee on the Charitable Sector *Report #3 – Towards a federal regulatory environment that enables and strengthens the charitable and non-profit sector* July 2021 “Update on the Charitable Sector Data Working Group”.

England and Wales	<p>Section 30 of the Charities Act 2011 (UK) provides that every charity must be registered with the Charity Commission for England and Wales unless the charity falls within one of the exceptions in s 30(2).</p> <p>Registered charities in England and Wales are required to adopt the Statement of Recommended Practice (<i>Accounting and Reporting by Charities: Statement of Recommended Practice applicable to charities preparing their accounts in accordance with the Financial Reporting Standard applicable in the UK and Republic of Ireland (FRS 102)</i>) ("the SORP"), except for small non-company charities (up to £250,000 gross income) which are able to report on a cash basis (that is, not in accordance with the SORP).⁷</p> <p>However, the following charities are not required to register:⁸ small charities (with annual income of £5,000 or less); exempt charities (defined in s 22 and sch 3 to include certain universities and other educational charities, certain museums and galleries, and social housing providers); and excepted charities (defined in s 30(2)(b) and (c) as a charity with income of £100,000 or less and excepted either by regulations or by order of the Charity Commission).</p> <p>Currently, excepted charities include: churches and chapels belonging to some Christian denominations; charities that provide premises for some types of schools; Scout and Guide groups; charitable service funds of the armed forces; and student unions.⁹ These charities are excepted for various reasons, mainly because historically they had a relationship with an umbrella body that oversaw their activities to the same extent as the Commission's then remit as a registrar. Excepted charities are subject to less onerous reporting requirements.</p> <p>Exempt charities are exempted because they are considered to be adequately supervised by another body or authority.</p> <p>As a result, there are many thousands of unregistered charities (in 2012 estimated to be around 190,000), some holding significant resources, for which the Charity Commission of England and Wales is legally responsible, even though in many cases it has limited information on or real oversight of the bodies involved.¹⁰</p>
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7 Charities Act 2011 (UK) s 133. The first modern Charities SORP was issued in 1995, with subsequent versions in 2000, 2005, and 2015. Following a governance review in 2018/19, the Charities SORP-making body (which comprises the Charity Commission for England and Wales, The Office of the Scottish Charity Regulator, and The Charity Commission for Northern Ireland, with the Charities Regulatory Authority of Ireland having observer status) agreed to instigate a wider engagement process for the next Charities SORP (expected in 2024) than had been possible for previous versions). See Association of Charitable Foundations, Scottish Grantmakers and Philanthropy Ireland [Survey of Charitable Funders' Views of Accounts prepared under the Charities SORP](#) December 2020 at 3 - 4.

8 Charities Act 2011 (UK) s 30(2).

9 See Dr O Breen, Rev Dr L Carroll, N Lavery [Independent Review of Charity Regulation Northern Ireland](#) January 2022 at 90 n 95.

10 See Lord Hodgson of Astley Abbotts [Trusted and Independent: Giving charity back to charities – Review of the Charities Act](#) July 2012 at [5.40], [5.51], [6.1], [6.2].

Ireland	<p>In Ireland, it is not mandatory for registered charities to file financial accounts with their annual return.¹¹ Charitable companies are required to file financial statements with the Companies Registration Office which reports are then shared with the Charities Regulatory Authority. However, small and medium sized charitable companies are able to file abridged accounts and avail themselves of audit exemptions which reduces the amount of information available, thereby reducing the amount of information available on the charities register. Section 48(2) (a) of the Charities Act 2009 (Ireland) enables regulations to be made specifying standards by which charities must prepare annual statements of accounts. Use of the Charities SORP is strongly encouraged in Ireland and expected to become mandatory in due course. However, such regulations have not yet been promulgated pending a Charities Bill that would reform the requirements for charitable companies (so that regulations can be made that apply to all registered charities). We understand that the Charities Bill has been delayed due to COVID-19. In the meantime, however, the information for unincorporated charities has not been published for a number of years, meaning there is no visibility for 40% of charities on the charities register.¹²</p>
United States	<p>Charitable organisations that are exempt from income tax under s 501(c)(3) of the Internal Revenue Code are required to file a reasonably complex annual return form (Form 990), which asks, among other things, whether (and if so, how) the organisation made its governing documents, conflict of interest policy, and financial statements available to the public during the tax year.¹³ Certain financial information is required to be inputted into the form, but financial statements are not required to be attached. Search engines enable members of the public to check an organisation's eligibility to receive tax-deductible charitable contributions, and review information about the organisation's tax-exempt status and filings.¹⁴</p> <p>There are a number of exceptions to the requirement to file the Form 990, including for certain churches and church-related organisations and small charities.¹⁵</p> <p>Small charities may submit an online "postcard" (Form 990N) which primarily establishes that the charity is still in existence and has revenue under \$50,000 per year.¹⁶</p> <p>If there are no Forms 990 filed for three years, the charity's exempt status is automatically revoked. The charity can then re-apply with complete financial information and a new application fee. Reinstatement is retroactive to the date of revocation.¹⁷</p>

11 An Rialálaí Carthanais Charities Regulator *Annual Reporting*:

www.charitiesregulator.ie/en/information-for-charities/annual-reporting.

12 Interview with Dr Oonagh Breen Professor of Law at the Sutherland School of Law, University College Dublin (3 December 2020).

13 Internal Revenue Service *Exempt Organisation Annual Filing Requirements Overview*:

www.irs.gov/charities-non-profits/exempt-organization-annual-filing-requirements-overview and Form 990 question 19.

14 Internal Revenue Service *Search for tax-exempt organisations*:

www.irs.gov/charities-non-profits/search-for-tax-exempt-organizations.

15 Internal Revenue Service *Annual Exempt Organisation return: who must file*:

www.irs.gov/charities-non-profits/annual-exempt-organization-return-who-must-file.

16 Internal Revenue Service *Annual electronic filing requirement for small exempt organisations – Form 990N (e-postcard)*: www.irs.gov/charities-non-profits/annual-electronic-filing-requirement-for-small-exempt-organizations-form-990-n-e-postcard.

17 Email correspondence from Nancy Kuhn, Jackson & Campbell PC, Washington DC (7 August 2021). More information about the e-postcard can be found here: www.irs.gov/charities-non-profits/annual-electronic-filing-requirement-for-small-exempt-organizations-form-990-n-e-postcard.

New Zealand	In New Zealand, by contrast, all registered charities, without exception, are required to file annual financial statements prepared in accordance with financial reporting standards issued by the External Reporting Board, and make this information publicly available on the charities register. ¹⁸ There is provision for information to be withheld from the register on a case-by-case basis under s 25 of the Charities Act, but it is very rarely used. ¹⁹
Other jurisdictions	Our research into the financial reporting requirements for registered charities or their equivalent in other jurisdictions has been necessarily limited. We have not seen anything to indicate that the financial reporting requirements in any other jurisdiction are more comprehensive than those applicable in New Zealand, but further research in this area is required. ²⁰

18 Charities Act 2005 ss 41(2), 42A.

19 Charities Services *Restricting information* / Te herehere mōhiōhio: www.charities.govt.nz/im-a-registered-charity/restricting-information/.

20 At the time of writing, [International Financial Reporting for Non-profit Organisations](http://www.ifr4npo.org/) (IFR4NPO) is undertaking an initiative to develop internationally applicable financial reporting guidance for non-profit organisations. For more information, see: www.ifr4npo.org/.

Appendix B – Historical Background to the *Latimer* Litigation

The Treaty of Waitangi

The trilogy of *Latimer* cases¹ has its genesis in the unique Treaty-based history of Aotearoa New Zealand. On 6 February 1840, the British Crown and Māori (the indigenous population of New Zealand) entered into Te Tiriti o Waitangi/The Treaty of Waitangi (“**the Treaty**”), a “very important event in New Zealand’s history”.²

Land is of special significance to Māori people. The Māori term for land (“whenua”) also means “placenta”: Māori view themselves as tangata whenua, which might be translated as “people of the earth’s womb”; in other words, Māori view themselves as belonging to the land, rather than “owning” it, and as guardians of the land, looking after it for the benefit of future generations. In pre-European times, Māori land was communally owned: there is no concept of individual ownership of land in traditional Māori culture.

At the time of signing the Treaty, Māori comprised 95% of the population of New Zealand, and could claim “ownership”, through occupation, access or use, to 98% of New Zealand land.³

The signing of the Treaty in 1840 established a **partnership** between Māori and the Crown. A full analysis of the Treaty is beyond the scope of this report, however, the essential bargain was that Māori gave the Crown a right of “kawanatanga”, which might be translated as “governance” (the English version of the Treaty used the word “sovereignty”, a concept said to have no equivalent in Māori thinking).⁴ In exchange, the Crown promised the **protection** of Māori “rangatiratanga”, a concept which may have no precise English equivalent,⁵ but which might be thought of, broadly, as a promise by the Crown to actively protect the Māori people, lands, customs, and taonga (treasures), and to respect the autonomy of Māori within their own sphere.⁶

There are many difficulties with the Treaty, not least in reconciling the English and Māori texts, but broadly, the principles of the Treaty might be thought of in terms of **partnership, protection** and **participation**.

Breaches of the Treaty

Following the signing of the Treaty in 1840, the Crown sought to obtain Māori land, using two methods: Crown acquisition and raupatu (confiscation). By 1862, when the Native (now Māori) Land Court was established, roughly two-thirds of New Zealand, including most of Te Wai Pounamu (the South Island), had been acquired by the Crown. Raupatu, and other actions which followed the introduction of British rule, led to armed conflict and land wars, especially in the 1860s. A full analysis of the history of the process by which Māori became alienated from so much of their land is also beyond the scope of this report, however, at the risk of oversimplification, the process involved many breaches by the Crown, over generations, of its duty under the Treaty to protect Māori rangatiratanga, resulting in many significant and deeply-felt grievances. Broadly, a process of colonisation

1 *Latimer v Commissioner of Inland Revenue* [2002] 1 NZLR 535 (HC); *Latimer v Commissioner of Inland Revenue* [2002] 3 NZLR 195 (CA) and *Latimer v Commissioner of Inland Revenue* [2004] 3 NZLR 157 (PC).

2 *Latimer v Commissioner of Inland Revenue* [2004] 3 NZLR 157 (PC) at [2].

3 A Sharp “The history of the taxation of Maori authorities in New Zealand: a unique reflection of law and public policy working together?” in A Maples and A Sawyer (eds) *Taxation issues: existing and emerging* (The Centre for Commercial and Corporate Law Incorporated, University of Canterbury, 2011) at 164, citing Statistics New Zealand “QuickStats about Maori”.

4 *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (HC) at 663.

5 *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (HC) at 663.

6 See Waitangi Tribunal *Rekohu: A Report on Moriori and Ngati Mutunga Claims in the Chatham Islands* (Wai 64, 2001) at [12.6.1].

was adopted which, in turn, was ultimately reflected in the statistical overrepresentation of Māori in prisons, unemployment and domestic violence.⁷

Instrumental in commencing a process of addressing some of the Treaty grievances were two key pieces of legislation:

- (i) In 1962, the Māori Community Development Act set up three mechanisms to support Māori community development, including establishing the **New Zealand Māori Council**, a national, pan-Māori advocacy and leadership body. The role of the New Zealand Māori Council is unique in that it represents the interests of all Māori, not of any particular iwi or hapū.
- (ii) In 1975, the Treaty of Waitangi Act established the **Waitangi Tribunal** as an ongoing commission of inquiry to hear Māori grievances against the Crown concerning breaches of the Treaty. The Waitangi Tribunal is not a court, its main function being to inquire into, and make recommendations to the Crown on, claims made to the tribunal by Māori claimants. The claims that may be submitted are, essentially, claims that Māori are prejudicially affected by legislation, policies, or acts or omissions of the Crown inconsistent with the principles of the Treaty. The tribunal is not confined to recommending monetary compensation and can recommend that Crown land taken from Māori in breach of the principles of the Treaty be returned to the appropriate iwi. The Treaty of Waitangi Act 1975 was the first New Zealand statute to refer to Treaty principles.⁸

The Waitangi Tribunal has played, and continues to play, a very important part in public life in New Zealand.⁹ Over the last 30+ years, successive New Zealand governments and Māori have negotiated a number of settlements for breaches of the Treaty. As at August 2018, 73 settlements had been passed into law, comprising some \$2.2 billion, with further settlements pending.¹⁰ Continuing difficulties aside, the settlements are said to have “utterly transformed New Zealand”, and to have set into motion major change drivers which are expected to strengthen over time:¹¹ the Māori economy is growing and diverse, with an asset base as at January 2021 of some \$68.7 billion in value.¹²

The State-Owned Enterprises Bill

When the fourth Labour Government came to power in July 1984, New Zealand was in the grips of a constitutional and fiscal crisis; in response, as discussed above in chapter 1, New Zealand followed much of the Anglosphere by experimenting with “neoliberalism”.¹³

In this vein, the new Labour Government adopted a policy of state sector reform described as **corporatisation**, that is, of divesting central government of assets and undertakings that were not regarded as core activities. The underlying rationale was that huge resources owned by the Crown were being inefficiently managed within the traditional departmental framework; decisions were taken to restructure as corporations or companies all or parts of six government departments, including the Department of Lands and Survey and the New Zealand Forest Service.

The State-Owned Enterprises Bill, introduced into Parliament on **30 September 1986**, proposed to form nine new companies, called “state enterprises”, including Land Corporation Ltd (“**Landcorp**”) and the New Zealand Forestry Corporation Ltd (“**Forestcorp**”).

7 A Sharp “The history of the taxation of Maori authorities in New Zealand: a unique reflection of law and public policy working together?” in A Maples and A Sawyer (eds) *Taxation issues: existing and emerging* (The Centre for Commercial and Corporate Law Incorporated, University of Canterbury, 2011) at 164, citing Statistics New Zealand “QuickStats about Maori”.

8 See, for example, the Preamble and ss 6(1) and 8(1) of the Treaty of Waitangi Act 1975.

9 *Latimer v Commissioner of Inland Revenue* [2004] 3 NZLR 157 (PC) at [3].

10 A Fyers “The amount allocated to Treaty of Waitangi settlements is tiny, compared with other Government spending” *Stuff.co.nz* (online ed, 3 August 2018): <www.stuff.co.nz/national/104205997/the-amount-allocated-to-treaty-settlements-is-tiny-compared-with-other-government-spending>.

11 Chapman Tripp “TE AO MĀORI – TRENDS AND INSIGHTS PIPIRI 2017” at 2.

12 <www.rbnz.govt.nz/news/2021/01/e-hauora-ana-e-matahuhua-ana-te-ohanga-maori-e-ai-ki-nga-rangahau> 28 January 2021.

13 Michael Cullen *Labour saving – a memoir* (Allen&Unwin, Auckland, 2021) at 48 - 55.

Under the Bill, the principal objective of every state enterprise was to operate as a successful business: the nine new state enterprises would be required to purchase the various businesses conducted by the six government departments, including the assets of the businesses, from the Crown at prices to be negotiated; the state enterprises would then be required to produce a commercial rate of return on those assets.

The proposals affecting Crown forests were of particular concern to the New Zealand Māori Council. A factor in this apprehension was the scale of the proposed transfers: the assets proposed to be transferred included some 14 million hectares of land, which represents over half the land surface area of New Zealand. Of this total, approximately 3 million hectares, including farmland and unallocated Crown land, were to be transferred from the Department of Lands and Survey to Landcorp. Some 880,000 hectares of afforested land, comprising exotic and indigenous forests, were to be transferred from the New Zealand Forest Service to Forestcorp; much of these forests consisted of exotic softwoods that were to reach maturity in about 40 years and were expected to yield a good commercial return.

On **8 December 1986**, the Waitangi Tribunal issued an interim report pointing out that transferring land to enterprises such as Landcorp and Forestcorp would cause the land to cease to be Crown land, which would make it impossible for the Crown to return any of the land to Māori in accordance with a tribunal recommendation.

In response, the Government amended the State-Owned Enterprises Bill to expressly incorporate the principles of the Treaty into the Act. Section 9 was (and remains) in the following terms:

“Nothing in this Act shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi”.

The Bill was also amended to insert cl 27, which related to “Maori land claims” specifically (emphasis added):

(1) Where *land* is transferred to a state enterprise pursuant to this Act *and, before* the day on which this Act receives the Governor-General’s consent, *a claim* has been submitted in respect of that land under section 6 of the Treaty of Waitangi Act 1975, the following provisions shall apply:

- (a) The land shall continue to be subject to that claim:
- (b) Subject to subsection (2) of this section, the State enterprise shall not transfer that land or any interest therein to any person other than the Crown.

In other words, s 27 would protect a claim by Māori to transferred land, but only if the claim was made *before* the Act received Royal assent.

Following these amendments, the State-Owned Enterprises Act 1986 was passed into law on **18 December 1986**, 10 days after the Waitangi Tribunal had issued its interim report.

However, questions remained. For example, there is a significant difference under s 27 depending on whether a claim is submitted to the Waitangi Tribunal *before or after* the date of the Governor-General’s consent (18 December 1986). If a claim had not been submitted to the tribunal in respect of certain land by that date, the land may be transferred to a state enterprise outright, meaning that the corporation would be free, as far as s 27 is concerned, to dispose of the land to a third-party purchaser in the course of its ordinary business activities. This means that, even though the tribunal could still make a recommendation for compensation in money, the prospect of restoration of the land to Māori ownership would likely be less.

The New Zealand Māori Council litigation

On 30 March 1987, the New Zealand Māori Council brought an action in the High Court for judicial review, arguing that there will be circumstances where the protection afforded by s 27 would not be enough, and that a transfer of assets the subject of existing and likely future claims before the Waitangi Tribunal would be in breach of s 9.

On 1 April 1987, the notice of motion was removed into the Court of Appeal, which made an interim order preventing the transfer of assets under the Act pending the hearing of the application for review.¹⁴

The Court of Appeal hearing took place over 4-8 May 1987. On 29 June 1987, the Court delivered its unanimous landmark decision in *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA), a case described as “perhaps as important for the future of our country as any that has come before a New Zealand Court”.¹⁵

The Court of Appeal held that s 9 of the State-Owned Enterprises Act 1986 precluded the Crown from effecting transfers of Crown assets until it first complied with the principles of the Treaty. Compliance with these principles required that consideration be given to *future* Treaty claims by Māori, and the ability of the Crown to provide redress in respect of those claims, particularly if the redress was in the form of a transfer of land. Cooke P held as follows:¹⁶

It will be seen that approaching the case independently we have all reached two major conclusions. First that the principles of the Treaty of Waitangi override everything else in the State-Owned Enterprises Act. Second that those principles require the Pakeha and Maori Treaty partners to act towards each other reasonably and with the utmost good faith. That duty is no light one. It is infinitely more than a formality. If a breach of the duty is demonstrated at any time, the duty of the Court will be to insist that it be honoured.

On this basis, the Court of Appeal was clear that cases will arise where the machinery provisions of s 27 would not be enough to allow the Crown to act consistently with the principles of the Treaty in accordance with s 9. The court accordingly made the following formal orders:¹⁷

1. A declaration that the transfer of assets to state enterprises without establishing any *system* to consider in relation to particular assets or particular categories of assets whether such transfer would be *inconsistent with the principles* of the Treaty of Waitangi would be *unlawful*.
2. Directions as follows:
 - (i) Within 21 days from the delivery of this Court’s present decision, *the Crown is to prepare a scheme of safeguards giving reasonable assurance that lands or waters will not be transferred to state enterprises in such a way as to prejudice Maori claims that have been submitted to the Waitangi Tribunal on or after 18 December 1986 or may foreseeably be submitted to the Tribunal*.
 - (ii) The scheme is to be *submitted to the New Zealand Maori Council for agreement or comment* as to whether it adequately gives effect to the intention of the Court as stated in the present judgments. Such agreement or comment to be given by the Council within 21 days after receipt of the scheme.
 - (iii) The scheme as finally proposed by the Crown having regard to the Council’s agreement or comments is then to be *lodged in this Court* and an early hearing will be arranged at which the question whether it should be approved will be considered.
3. A declaration that *in the meantime, the Crown ought not to take any further action*, affecting any of the assets referred to in the statement of claim, by way of transfer of assets or long-term agreement or arrangement, that is or would be consequential on the exercise of statutory powers conferred by the State-Owned Enterprises Act 1986. The Crown to have leave to move for the discharge or variation of this declaration at any time.
4. Leave is reserved to the parties to apply in writing for any incidental directions ...

In other words, the court effectively sent the Crown and Māori away to work out, together, a system of safeguards that would give reasonable assurance that lands or waters will not be transferred to state enterprises in such a way as to prejudice Māori claims. The Court of Appeal saw the issue in terms of the steps that should be taken by the Crown, as a partner acting towards the Māori partner with the utmost good faith (the characteristic obligation of partnership) to ensure that the powers in the Act are not used

14 *New Zealand Maori Council v Attorney-General* (minute) CA54/87 [1987] NZCA 16 (1 April 1987).

15 *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA) at 641, per Cooke P.

16 *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA) at 667.

17 *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA) at 666 (emphasis added).

inconsistently with Treaty principles. Leave was reserved to the Māori Council to come back to court if not satisfied with the proposed system. In the meantime, no outright transfers were to be made.

The Court of Appeal did suggest that one way of honouring the principles of the Treaty would be to provide for handing over the management of assets on terms ruling out their disposal to third parties, pending any foreseeable Waitangi Tribunal investigations, so that the assets could be returned readily if need be. However, the Court of Appeal considered it was for the Crown to formulate its proposals in the first instance, with the court to settle any outstanding points if need be.

The Treaty of Waitangi (State Enterprises) Bill

In the event, the Crown and Māori agreed to a somewhat different system of safeguards. Broadly, the agreement reached was that if **land** transferred to a state enterprise is later recommended by the tribunal to be returned to Māori ownership, the Crown would be bound to reacquire the land compulsorily, from any third party who may have acquired it by on sale in the meantime, and return it to Māori ownership, paying compensation to the third party. All land transferred from the Crown to state-owned enterprises would carry a **memorial** recording that the land was subject to compulsory resumption for the settlement of Treaty claims.

This agreement was given effect to by the Treaty of Waitangi (State Enterprises) Bill 27-1, which was introduced into Parliament in early December 1987. On 9 December 1987, the Court of Appeal issued a minute, recording that the agreement between the parties should mean the end of the case, but again reserving leave:¹⁸

By consent accordingly we make the formal orders sought discharging the directions and declaration set out in the paragraphs 2 and 3 in my reasons for judgment. *Purely as a precaution, in case anything unforeseen should arise, leave to apply is reserved.* The Court hopes that this *momentous agreement will be a good augury for the future of the partnership. Ka pai.*

The resulting Treaty of Waitangi (State Enterprises) Act 1988 received Royal Assent on 30 June 1988. So far, so good.

But then there appeared to be a change of policy.

The trees but not the land

In 1987 and until 30 June 1988, the understanding of the parties, the court and Parliament had been that the Government intended to transfer the afforested lands to Forestcorp: no one concerned had drawn any distinction between the lands and the trees growing on them.

However, in the course of presenting the Budget, only a few weeks' later on 28 July 1988, then Minister of Finance, Hon Roger Douglas, announced an intention to sell the state's commercial forestry assets, that is, to sell the *trees* (and the right to cut them), but not the *land* on which they were growing. The Crown considered this approach was within the scope of the agreement, because it was not selling the land and therefore its ability to return land to Māori ownership was not being prejudiced.

The following month, in August 1988, the Government established a Forestry Working Group ("**FWG**") to examine the mechanisms by which the Government could maximise the sale of the forestry assets while retaining ownership of the land. The FWG reported to Ministers in October 1988, recommending a reasonably complicated approach favouring guaranteed cutting rights for two *pinus radiata* crop rotations or 70 years. The proposal was approved by Ministers in November 1988.

In December 1988, then Minister of State-Owned Enterprises wrote to relevant Māori groups inviting them to a national hui (meeting) to discuss the proposal. The hui was to be held in the city of Rotorua on 20 January 1989.

However, on 11 January 1989, the Government formally announced its intention to dispose of the Government's commercial forestry assets, stating that some aspects of

¹⁸ *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA) at 719 (emphasis added).

the strategy for sale had been agreed in principle, and others would be finalised when discussions on Treaty claims were completed in 1989. On 13 January 1989, the Minister for State-Owned Enterprises wrote again to relevant Māori groups, highlighting that insecurity of continuing wood supply for potential third-party purchasers was a key sticking point:¹⁹

An important aspect of the Government's plans is that we believe ownership of the land should be kept in the Crown's hands rather than sold to private purchasers. This will make it easier to return ownership to a Maori claimant if the Waitangi Tribunal so recommends ... On the other hand, *if New Zealand's forestry industry is to develop and create jobs then buyers of the forestry rights of the land will naturally need to be assured of continuing wood supply.* I emphasise that the Crown is serious about discussing these issues with you and other Maori interests in good faith and in the spirit of partnership of the Treaty of Waitangi. The Crown broadly accepts the FWG report as a basis for discussion with Maori groups. *Contrary to what newspapers say, the Crown is not trying to cheat anyone and final decisions have not been made as to how to reconcile protection of claims under the Treaty and security of wood supply ...*

I state again the Crown's basic dilemma. On the one hand we realise that there are Maori claims about breaches of the Treaty of Waitangi that involve much of the Crown's afforested land. If these claims are found to be valid, return of the afforested land may be an appropriate method of compensation. On the other hand, *the Government's policy is to sell the Crown's commercial forestry assets to pay off some of the enormous debt we inherited from previous governments. In addition, we believe that such sales will directly contribute to the growth and development of New Zealand's forestry industry.* If purchasers are not guaranteed security from resumption of their forestry rights there will be two seriously negative effects. First the Government and taxpayers will not gain the *true value* of the resource as purchasers will *discount their bids because of uncertainty.* Second, *purchasers will not be prepared to make the investments in New Zealand's forestry industry that could otherwise generate many jobs and economic activity.* It is this dilemma that the Crown is facing and that we wish to discuss with you. As outlined in their report...the FWG has suggested to the Crown a possible mechanism to balance the 2 sets of interests ... *The FWG suggested that splitting ownership of the land from the right to manage the land and cut trees would help do this.* A right to manage the land and cut trees on it could be sold by the Crown and guaranteed as secure to the purchasers for a 50-70 year period. *Ownership of land could be immediately returned to Maori claimants if so recommended by the Waitangi Tribunal or agreed between the claimant and the Crown.* The Crown believes the approach proposed by the FWG balances the interests of Maori claimants and potential purchasers to the benefit of New Zealand overall ... we wish to discuss these ideas with you in good faith as Treaty partners.

At the hui itself, the Minister stated early in his address that the Government's decision to sell the Crown's commercial forestry assets was one to which the Government was committed and was irreversible.

The resulting perception was that Māori were being presented with a *fait accompli*.

On 3 February 1989, the New Zealand Māori Council returned to the Court of Appeal, pursuant to the leave reserved "purely as a precaution" on 9 December 1987, seeking a declaration that the Crown's proposal to dispose of Crown forestry assets was inconsistent with the previous judgment and agreement.

An interlocutory hearing was held on 10 March 1989, where the Crown raised a preliminary question as to whether the application regarding forests was within the scope of the leave reserved: as the court noted, the case is "not a bus into which anything may be put as it goes along".²⁰

Even so, the Court of Appeal rejected the Crown's argument, holding that the matter raised was sufficiently linked with the judgment to make it unjust to refuse to hear the application: if the Crown using Forestcorp as the agent for selling the forests directly to

19 Letter from Minister of State-Owned Enterprises to Māori groups, 13 January 1989, quoted in *New Zealand Maori Council v Attorney General* [1989] 2 NZLR 142 (CA) at 15 - 17 (emphasis added).

20 *New Zealand Māori Council v Attorney-General* [1989] 2 NZLR 142 (CA) at 152.

third parties had been signalled at the time of the hearings in May and December 1987, the court's declaration may well have been worded differently:²¹

In truth, [the application] goes to the very heart of the issue raised by the 1987 case. That issue was whether assets including forest lands could be disposed of through the new state enterprises to interests outside the state enterprises without breach of the principles of the Treaty ...

In this interlocutory ruling, the court again did not impose its own solution; instead, the Crown and Māori embarked on negotiations to reach a settlement.

The Crown Forests Assets Act 1989

An agreement to resolve the situation was reached on 20 July 1989, executed by the Ministers of Finance and State-Owned Enterprises, on behalf of the Crown, and the New Zealand Māori Council and the Federation of Māori Authorities on behalf of Māori ("**the July 1989 Agreement**").

In essence, the July 1989 Agreement provided as follows:

- (i) The Crown would sell the existing tree crop and other forest assets on Crown forestry land to third party commercial purchasers, together with a **licence** for the purchaser to use the land for a period sufficiently long to make the investment commercially feasible.
- (ii) Purchasers were to make a payment of an initial capital sum to the Crown, and an **annual market-based rental** for the use of the land.
- (iii) The annual rental payment payable by each purchaser was to be set aside in a **trust** to be established.
- (iv) The **interest** earned by the investment of the rental proceeds was to be made available to assist Māori in the preparation, presentation and negotiation of claims before the Waitangi Tribunal which involve, or could involve, lands covered by the Agreement.
- (v) When the tribunal made a recommendation determining Treaty claims in respect of a particular piece of licensed land, the ownership of the land by either the Crown or Māori claimants would be confirmed. In the case of a successful claim, the land would be transferred to Māori ownership, together with an amount equal to all past rental payments for the land. If the claim was not successful, the land and accumulated rental proceeds would be paid to the Crown.
- (vi) These provisions were to be reflected in draft legislation, and a trust deed.

The Agreement was given legislative force by means of the **Crown Forest Assets Act 1989**, which received Royal Assent on 25 October 1989. Section 34 of the Act provided for the responsible Ministers, on behalf of the Crown, to "establish by deed a forestry rental trust". The **Crown Forestry Rental Trust** Ngā Kaitiaki Rēti Ngahere Karauna was duly established by deed of trust dated 30 April 1990.

The Privy Council described the arrangement as a "bold and imaginative attempt at resolving a very difficult problem".²²

²¹ *New Zealand Māori Council v Attorney-General* [1989] 2 NZLR 142 (CA) at 152.

²² *Latimer v Commissioner of Inland Revenue* [2004] 3 NZLR 157 (PC) at [18].

Appendix C – Comparative Summary of Definitions of Charitable Purpose

Australia ¹	England and Wales ²	Ireland ³	Scotland ⁴	Northern Ireland ⁵
[relief of poverty only – see “advancing social or public welfare”]	Prevention or relief of poverty	Prevention or relief of poverty or economic hardship	Prevention or relief of poverty	Prevention or relief of poverty
Advancing education	Advancement of education	Advancement of education	Advancement of education	Advancement of education
Advancing religion	Advancement of religion “religion” includes: ⁶ (i) a religion which involves belief in more than one god, and (ii) a religion which does not involve belief in a god	Advancement of religion a gift is not a gift for the advancement of religion if it is made to or for the benefit of an organization or cult— (a) the principal object of which is the making of profit, or (b) that employs oppressive psychological manipulation— (i) of its followers, or (ii) for the purpose of gaining new followers ⁷	Advancement of religion The advancement of any philosophical belief (whether or not involving belief in a god) is analogous ⁸	Advancement of religion “religion” includes: ⁹ (i) a religion which involves belief in one god or more than one god, and (ii) any analogous philosophical belief (whether or not involving belief in a god)
Advancing health including preventing and relieving sickness, disease or human suffering ¹⁰	Advancement of health or the saving of lives “the advancement of health” includes the prevention or relief of sickness, disease or human suffering ¹¹	Promotion of health, including the prevention or relief of sickness, disease or human suffering	Advancement of health The saving of lives “the advancement of health” includes the prevention or relief of sickness, disease or human suffering ¹²	Advancement of health or the saving of lives “the advancement of health” includes the prevention or relief of sickness, disease or human suffering ¹³

1 Charities Act 2013 (Cth) s 12(1).

2 Charities Act 2011 (UK) s 3(1).

3 Charities Act 2009 (Ireland) s 3(1), (11).

4 Charities and Trustee Investment (Scotland) Act 2005 s 7(2).

5 Charities Act (Northern Ireland) 2008 s 2(2).

6 Charities Act 2011 (UK) s 3(2)(a).

7 Charities Act 2009 (Ireland) s 3(10).

8 Charities and Trustee Investment (Scotland) Act 2005 s 7(2)(c), (3)(f).

9 Charities Act (Northern Ireland) 2008 s 2(2)(c), (3)(a).

10 Charities Act 2013 (Cth) ss 12(1)(a), 14.

11 Charities Act 2011 (UK) s 3(2)(b).

12 Charities and Trustee Investment (Scotland) Act 2005 s 7(2)(d), (3)(a).

13 Charities Act (Northern Ireland) 2008 s 2(2)(d), (3)(b).

<p>Advancing social or public welfare</p> <p>including relieving the poverty, distress or disadvantage of individuals or families¹⁴</p>	<p>The relief of those in need because of youth, age, ill-health, disability, financial hardship or other disadvantage</p> <p>including relief given by the provision of accommodation or care to such persons¹⁵</p>	<p>Advancement of community welfare including the relief of those in need by reason of youth, age, ill-health, or disability</p> <p>The integration of those who are disadvantaged, and the promotion of their full participation, in society¹⁶</p>	<p>The relief of those in need by reason of age, ill-health, disability, financial hardship or other disadvantage</p> <p>including relief given by the provision of accommodation or care¹⁷</p>	<p>The relief of those in need by reason of youth, age, ill-health, disability, financial hardship or other disadvantage</p> <p>including relief given by the provision of accommodation or care to such persons¹⁸</p>
	<p>It is charitable to provide, or assist in the provision of, facilities for—</p> <p>(a) recreation, or</p> <p>(b) other leisure-time occupation,</p> <p>if the facilities are provided in the interests of social welfare.¹⁹</p>		<p>The provision of recreational facilities, or the organisation of recreational activities, with the object of improving the conditions of life for the persons for whom the facilities or activities are primarily intended</p> <p>but only in relation to recreational facilities or activities which are:²⁰</p> <p>(i) primarily intended for persons who have need of them by reason of their age, ill-health, disability, financial hardship or other disadvantage, or</p> <p>(ii) available to members of the public at large or to male or female members of the public at large</p>	<p>It is charitable to provide, or assist in the provision of, facilities for—</p> <p>(a) recreation, or</p> <p>(b) other leisure-time occupation,</p> <p>if the facilities are provided in the interests of social welfare.²¹</p>

14 Under Charities Act 2013 (Cth) s 15, the purpose of advancing social or public welfare also includes the purpose of: caring for and supporting the aged or individuals with disabilities; caring for, supporting and protecting children and young individuals (and, in particular, providing child care services); and assisting the rebuilding, repairing or securing of assets after a disaster in certain circumstances as set out in s 15(4).

15 Charities Act 2011 (UK) s 3(1)(j), (2)(e).

16 Charities Act 2009 (Ireland) s 3(11)(l).

17 Charities and Trustee Investment (Scotland) Act 2005 s 7(2)(n), (3)(e).

18 Charities Act (Northern Ireland) 2008 s 2(2)(j), (3)(f).

19 Charities Act 2011 (UK) s 5.

20 Charities and Trustee Investment (Scotland) Act 2005 s 7(2)(i), (3)(d).

21 The Recreational Charities Act (Northern Ireland) 1958 c 16 and Charities Act (Northern Ireland) 2008 s 5.

Advancing culture including promoting or fostering culture and caring for, preserving and protecting Australian heritage ²²	Advancement of the arts, culture, heritage or science	Advancement of the arts, culture, heritage or sciences	Advancement of the arts, heritage, culture or science	Advancement of the arts, culture, heritage or science
	Advancement of citizenship or community development including: ²³ (i) rural or urban regeneration, and (ii) the promotion of civic responsibility, volunteering, the voluntary sector or the effectiveness or efficiency of charities	Advancement of community development, including rural or urban regeneration Promotion of civic responsibility or voluntary work Advancement of the efficient and effective use of the property of charitable organisations	Advancement of citizenship or community development, including: ²⁴ (i) rural or urban regeneration, and (ii) the promotion of civic responsibility, volunteering, the voluntary sector or the effectiveness or efficiency of charities	Advancement of citizenship or community development including: ²⁵ (i) rural or urban regeneration, and (ii) the promotion of civic responsibility, volunteering, the voluntary sector or the effectiveness or efficiency of charities
Promoting or protecting human rights	Advancement of human rights, conflict resolution or reconciliation or the promotion of religious or racial harmony or equality and diversity	Advancement of conflict resolution or reconciliation Promotion of religious or racial harmony and harmonious community relations	Advancement of human rights, conflict resolution or reconciliation Promotion of religious or racial harmony, Promotion of equality and diversity	Advancement of human rights, conflict resolution or reconciliation or the promotion of religious or racial harmony or equality and diversity including the advancement of peace and good community relations ²⁶
Promoting reconciliation, mutual respect and tolerance between groups of individuals that are in Australia				
	Advancement of amateur sport "sport" means sports or games which promote health by involving physical or mental skill or exertion ²⁷		The advancement of public participation in sport "sport" means sport which involves physical skill and exertion ²⁸	Advancement of amateur sport "sport" means sports or games which promote health by involving physical or mental skill or exertion ²⁹

22 Charities Act 2013 (Cth) ss 12(1)(e), 16.

23 Charities Act 2011 (UK) s 3(1)(e), (2)(c).

24 Charities and Trustee Investment (Scotland) Act 2005 s 7(2)(f), (3)(b).

25 Charities Act (Northern Ireland) 2008 s 2(2)(e), (3)(c).

26 Charities Act (Northern Ireland) 2008 s 2(2)(h), (3)(e).

27 Charities Act 2011 (UK) s 3(1)(g) and (2)(d). See also s 6 relating to registered sports clubs (as defined in Corporation Tax Act 2010 pt 13 ch 9 (community amateur sports clubs)).

28 Charities and Trustee Investment (Scotland) Act 2005 s 7(2)(h), (3)(c).

29 Charities Act (Northern Ireland) 2008 s 2(2)(g), (3)(d). See also s 5(3) relating to registered sports clubs (as defined in Corporation Tax Act 2010 pt 13 ch 9 (community amateur sports clubs)).

Advancing the security or safety of Australia or the Australian public including promoting the efficiency of the Australian Defence Force ³⁰	Promotion of the efficiency of the armed forces of the Crown or of the efficiency of the police, fire and rescue services or ambulance services ³¹			
Preventing or relieving the suffering of animals	Advancement of animal welfare	Prevention or relief of suffering of animals	Advancement of animal welfare	Advancement of animal welfare
Advancing the natural environment	Advancement of environmental protection or improvement	Protection of the natural environment Advancement of environmental sustainability	Advancement of environmental protection or improvement	Advancement of environmental protection or improvement
Any other purpose beneficial to the general public that may reasonably be regarded as analogous to or within the spirit of any of the above purposes ³²	Any other purposes that may reasonably be regarded as analogous to, or within the spirit of, any of the above purposes or any purposes which have previously been recognised as charitable ³³	Any other purpose that is of benefit to the community ³⁴	Any other purpose that may reasonably be regarded as analogous to any of the preceding purposes ³⁵	Any other purposes that may reasonably be regarded as analogous to, or within the spirit of, any of the above purposes or any purposes which have been recognised as charitable ³⁶
Promoting or opposing a change to any matter established by law, policy or practice if doing so is in furtherance of one of the above purposes ³⁷				

30 Charities Act 2013 (Cth) ss 12(1)(h), 17.

31 Under Charities Act 2011 (UK) s 2(f), "fire and rescue services" is defined to mean services provided by first and rescue authorities under Part 2 of the Fire and Rescue Services Act 2004.

32 Charities Act 2013 (UK) s 12(1)(k).

33 Charities Act 2011 (UK) s 3(1)(m).

34 Charities Act 2009 (Ireland) s 3(d).

35 Charities and Trustee Investment (Scotland) Act 2005 s 7(2)(p).

36 Charities Act (Northern Ireland) 2008 s 2(2)(l), (4).

37 Specifically, Charities Act 2013 (Cth) s 12(1)(l) includes within the definition of charitable purpose the purpose of "promoting or opposing a change to any matter established by law, policy or practice in the Commonwealth, a State, a Territory or another country, if: (i) in the case of promoting a change – the change is in furtherance or in aid of one or more of the purposes mentioned in paragraphs (a) to (k); or (ii) in the case of opposing a change – the change is in opposition to, or in hindrance of, one or more of the purposes mentioned in those paragraphs". Section 12(2) provides that paragraph (l) is the only paragraph of the definition of charitable purpose in s 12(1) that can apply to the purpose of promoting or opposing a change to any matter established by law, policy or practice in the Commonwealth, a State, a Territory or another country.

Appendix D – Unrelated Business Income Tax Provisions

26 United States Code s 511 – *Imposition of tax on unrelated business income of charitable, etc, organisations*¹

(a) Charitable, etc, organisations taxable at corporation rates

(1) Imposition of tax

There is hereby imposed for each taxable year on the unrelated business taxable income (as defined in section 512) of every organisation described in paragraph (2) a tax computed as provided in section 11. In making such computation for purposes of this section, the term "taxable income" as used in section 11 shall be read as "unrelated business taxable income".

(2) Organisations subject to tax

(A) Organisations described in sections 401(a) and 501(c)

The tax imposed by paragraph (1) shall apply in the case of any organisation (other than a trust described in subsection (b) or an organisation described in section 501(c)(1)) which is exempt, except as provided in this part or part II (relating to private foundations), from taxation under this subtitle by reason of section 501(a).

(B) State colleges and universities

The tax imposed by paragraph (1) shall apply in the case of any college or university which is an agency or instrumentality of any government or any political subdivision thereof, or which is owned or operated by a government or any political subdivision thereof, or by any agency or instrumentality of one or more governments or political subdivisions. Such tax shall also apply in the case of any corporation wholly owned by one or more such colleges or universities.

(b) Tax on charitable, etc, trusts

(1) Imposition of tax

There is hereby imposed for each taxable year on the unrelated business taxable income of every trust described in paragraph (2) a tax computed as provided in section 1(e). In making such computation for purposes of this section, the term "taxable income" as used in section 1 shall be read as "unrelated business taxable income" as defined in section 512.

(2) Charitable etc trusts subject to tax

The tax imposed by paragraph (1) shall apply in the case of any trust which is exempt, except as provided in this part or part II (relating to private foundations), from taxation under this subtitle by reason of section 501(a) and which, if it were not for such exemption, would be subject to subchapter J (sec 641 and following, relating to estates, trusts, beneficiaries, and decedents).

(c) Special rule for section 501(c)(2) corporations

If a corporation described in section 501(c)(2) -

(1) pays any amount of its net income for a taxable year to an organisation exempt from taxation under section 501(a) (or which would pay such an amount but for the fact that the expenses of collecting its income exceed its income), and

(2) such corporation and such organisation file a consolidated return for the taxable year, such corporation shall be treated, for purposes of the tax imposed by subsection (a), as being organisation and operated for the same purposes as such organisation, in addition to the purposes described in section 501(c)(2).

¹ See Legal Information Institute: www.law.cornell.edu/uscode/text/26.

26 United States Code s 512 – *Unrelated business taxable income*

(a) Definition

For purposes of this title -

(1) General rule

Except as otherwise provided in this subsection, the term “unrelated business taxable income” means the gross income derived by any organisation from any unrelated trade or business (as defined in section 513) regularly carried on by it, less the deductions allowed by this chapter which are directly connected with the carrying on of such trade or business, both computed with the modifications provided in subsection (b).

(2) Special rule for foreign organisations

In the case of an organisation described in section 511 which is a foreign organisation, the unrelated business taxable income shall be -

(A) its unrelated business taxable income which is derived from sources within the United States and which is not effectively connected with the conduct of a trade or business within the United States, plus

(B) its unrelated business taxable income which is effectively connected with the conduct of a trade or business within the United States.

(3) Special rules applicable to organisations described in paragraph (7), (9), or (17) of section 501(c)

(A) General rule

In the case of an organisation described in paragraph (7), (9), or (17) of section 501(c), the term “unrelated business taxable income” means the gross income (excluding any exempt function income), less the deductions allowed by this chapter, which are directly connected with the production of the gross income (excluding exempt function income), both computed with the modifications provided in paragraphs (6), (10), (11) and (12) of subsection (b). For purposes of the preceding sentence, the deductions provided by sections 243 and 245 (relating to dividends received by corporations) shall be treated as not directly connected with the production of gross income.

(B) Exempt function income

For purposes of subparagraph (A), the term “exempt function income” means the gross income from dues, fees, charges, or similar amounts paid by members of the organisation as consideration for providing such members or their dependents or guests goods, facilities, or services in furtherance of the purposes constituting the basis for the exemption of the organisation to which such income is paid. Such term also means all income (other than an amount equal to the gross income derived from any unrelated trade or business regularly carried on by such organisation computed as if the organisation were subject to paragraph (1)) which is set aside -

(i) for a purpose specified in section 170(c)(4), or

(ii) in the case of an organisation described in paragraph (9) or (17) of section 501(c), to provide for the payment of life, sick, accident, or other benefits

including reasonable costs of administration directly connected with a purpose described in clause (i) or (ii). If during the taxable year, an amount which is attributable to income so set aside is used for a purpose other than that described in clause (i) or (ii), such amount shall be included, under subparagraph (A), in unrelated business taxable income for the taxable year.

(C) Applicability to certain corporations described in section 501(c)(2)

In the case of a corporation described in section 501(c)(2), the income of which is payable to an organisation described in paragraph (7), (9), or (17) of section 501(c), subparagraph (A) shall apply as if such corporation were the organisation to which the income is payable. For purposes of the preceding sentence, such corporation shall be treated as having exempt function income for a taxable year only if it files a consolidated return with such organisation for such year.

(D) Nonrecognition of gain

If property used directly in the performance of the exempt function of an organisation described in paragraph (7), (9), or (17) of section 501(c) is sold by such organisation, and within a period beginning 1 year before the date of such sale, and ending 3 years after such date, other property is purchased and used by such organisation directly in the performance of its exempt function, gain (if any) from such sale shall be

recognised only to the extent that such organisation's sales price of the old property exceeds the organisation's cost of purchasing the other property. For purposes of this subparagraph, the destruction in whole or in part, theft, seizure, requisition, or condemnation of property, shall be treated as the sale of such property, and rules similar to the rules provided by subsections (b), (c), (e) and (j) of section 1034 (as in effect on the day before the date of the enactment of the Taxpayer Relief Act of 1997) shall apply.

(E) Limitation on amount of setaside in the case of organisations described in paragraph (9) or (17) of section 501(c)

(i) In general

In the case of any organisation described in paragraph (9) or (17) of section 501(c), a set-aside for any purpose specified in clause (ii) of subparagraph (B) may be taken into account under subparagraph (B) only to the extent that such set-aside does not result in an amount of assets set aside for such purpose in excess of the amount limited determined under section 419A (without regard to subsection (f)(6) thereof) for the taxable year (not taking into account any reserve described in section 419A(c)(2)(A) for post-retirement medical benefits).

(ii) Treatment of existing reserves for post-retirement medical or life insurance benefits

(I) Clause (i) shall not apply to any income attributable to an existing reserve for post-retirement medical or life insurance benefits.

(II) For purposes of subclause (I), the term "reserve for post-retirement medical or life insurance benefits" means the greater of the amount of assets set aside for purposes of post-retirement medical or life insurance benefits to be provided to covered employees as of the close of the last plan year ending before the date of the enactment of the Tax Reform Act of 1984 or on July 18, 1984.

(III) All payments during plan years ending on or after the date of the enactment of the Tax Reform Act of 1984 of post-retirement medical benefits or life insurance benefits shall be charged against the reserve referred to in clause (II). Except to the extent provided in regulations prescribed by the Secretary, all plans of an employer shall be treated as 1 plan for purposes of the preceding sentence.

(iii) Treatment of tax exempt organisations

This subparagraph shall not apply to any organisation if substantially all of the contributions to such organisation are made by employers who were exempt from tax under this chapter throughout the 5-taxable year period ending with the taxable year in which the contributions are made.

(4) Special rule applicable to organisations described in section 501(c)(19)

In the case of an organisation described in section 501(c)(19), the term "unrelated business taxable income" does not include any amount attributable to payments for life, sick, accident, or health insurance with respect to members of such organisations or their dependents which is set aside for the purpose of providing for the payment of insurance benefits or for a purpose specified in section 170(c)(4). If an amount set aside under the preceding sentence is used during the taxable year for a purpose other than a purpose described in the preceding sentence, such amount shall be included, under paragraph (1), in unrelated business taxable income for the taxable year.

(5) Definition of payments with respect to securities loans

(A) The term "payments with respect to securities loans" includes all amounts received in respect of a security (as defined in section 1236(c)) transferred by the owner to another person in a transaction to which section 1058 applies (whether or not title to the security remains in the name of the lender) including –

(i) amounts in respect of dividends, interest, or other distributions,

(ii) fees computed by reference to the period beginning with the transfer of securities by the owner and ending with the transfer of identical securities back to the transferor by the transferee and the fair market value of the security during such period,

(iii) income from collateral security for such loan, and

(iv) income from the investment of collateral security.

(B) Subparagraph (A) shall apply only with respect to securities transferred pursuant to an agreement between the transferor and the transferee which provides for –

(i) reasonable procedures to implement the obligation of the transferee to furnish to the transferor, for each business day during such period, collateral with a fair market value not less than the fair market value of the security at the close of business on the preceding business day,

(ii) termination of the loan by the transferor upon notice of not more than 5 business days, and

(iii) return to the transferor of securities identical to the transferred securities upon termination of the loan.

(6) Special rule for organisation with more than 1 unrelated trade or business

In the case of any organisation with more than 1 unrelated trade or business –

(A) unrelated business taxable income, including for purposes of determining any net operating loss deduction, shall be computed separately with respect to each such trade or business and without regard to subsection (b)(12),

(B) the unrelated business taxable income of such organisation shall be the sum of the unrelated business taxable income so computed with respect to each such trade or business, less a specific deduction under subsection (b)(12), and

(C) for purposes of subparagraph (B), unrelated business taxable income with respect to any such trade or business shall not be less than zero.

(b) Modifications

The modifications referred to in subsection (a) are the following:

(1) There shall be excluded all dividends, interest, payments with respect to securities loans (as defined in subsection (a)(5)), amounts received or accrued as consideration for entering into agreements to make loans, and annuities, and all deductions directly connected with such income.

(2) There shall be excluded all royalties (including overriding royalties) whether measured by production or by gross or taxable income from the property, and all deductions directly connected with such income.

(3) In the case of rents –

(A) Except as provided in subparagraph (B), there shall be excluded –

(i) all rents from real property (including property described in section 1245(a)(3)(C)), and

(ii) all rents from personal property (including for purposes of this paragraph as personal property any property described in section 1245(a)(3)(B)) leased with such real property, if the rents attributable to such personal property are an incidental amount of the total rents received or accrued under the lease, determined at the time the personal property is placed in service.

(B) Subparagraph (A) shall not apply –

(i) if more than 50 percent of the total rent received or accrued under the lease is attributable to person property described in subparagraph (A)(ii), or

(ii) if the determination of the amount of such rent depends in whole or in part on the income or profits derived by any person from the property leased (other than an amount based on a fixed percentage or percentages of receipts or sales).

(C) There shall be excluded all deductions directly connected with rents excluded under subparagraph (A).

(4) Notwithstanding paragraph (1), (2), (3), or (5), in the case of debt-financed property (as defined in section 514) there shall be included, as an item of gross income derived from an unrelated trade or business, the amount ascertained under section 514(a)(1), and there shall be allowed, as a deduction, the amount ascertained under section 514(a)(2).

(5) There shall be excluded all gains or losses from the sale, exchange, or other disposition of property other than –

(A) stock in trade or other property of a kind which would properly be includible in inventory if on hand at the close of the taxable year, or

(B) property held primarily for sale to customers in the ordinary course of the trade or business.

There shall also be excluded all gains or losses recognised, in connection with the organisation's investment activities, from the lapse or termination of options to buy or sell securities (as defined in section 1236(c)) or real property and all gains or losses from the forfeiture of good-faith deposits (that are consistent with established business practice) for the purchase, sale, or lease of real property in connection with the organisation's investment activities. This paragraph shall not apply with respect to the cutting of timber which is considered, on the application of section 631, as a sale or exchange of timber.

(6) The net operating loss deduction provided in section 172 shall be allowed, except that –

(A) the net operating loss for any taxable year, the amount of the net operating loss carryback or carryover to any taxable year, and the net operating loss deduction for any taxable year shall be determined under section 172 without taking into account any amount of income or deduction which is excluded under this part in computing the unrelated business taxable income; and

(B) the terms “preceding taxable year” and “preceding taxable years” as used in section 172 shall not include any taxable year for which the organisation was not subject to the provisions of this part.

(7) There shall be excluded all income derived from research for (A) the United States, or any of its agencies or instrumentalities, or (B) any State or political subdivision thereof; and there shall be excluded all deductions directly connected with such income.

(8) In the case of a college, university, or hospital, there shall be excluded all income derived from research performed for any person, and all deductions directly connected with such income.

(9) In the case of an organisation operated primarily for purposes of carrying on fundamental research the results of which are freely available to the general public, there shall be excluded all income derived from research performed for any person, and all deductions directly connected with such income.

(10) In the case of any organisation described in section 511(a), the deduction allowed by section 170 (relating to charitable etc contributions and gifts) shall be allowed (whether or not directly connected with the carrying on of the trade or business), but shall not exceed 10 percent of the unrelated business taxable income computed without the benefit of this paragraph.

(11) In the case of any trust described in section 511(b), the deduction allowed by section 170 (relating to charitable etc contributions and gifts) shall be allowed (whether or not directly connected with the carrying on of the trade or business), and for such purpose a distribution made by the trust to a beneficiary described in section 170 shall be considered as a gift or contribution. The deduction allowed by this paragraph shall be allowed with the limitations prescribed in section 170(b)(1)(A) and (B) determined with reference to the unrelated business taxable income computed without the benefit of this paragraph (in lieu of with reference to adjusted gross income).

(12) Except for purposes of computing the net operating loss under section 172 and paragraph (6), there shall be allowed a specific deduction of \$1,000. In the case of a diocese, province of a religious order, or a convention or association of churches, there shall also be allowed, with respect to each parish, individual church, district, or other local unit, a specific deduction equal to the lower of –

(A) \$1,000, or

(B) the gross income derived from any unrelated trade or business regularly carried on by such local unit.

(13) Special rules for certain amounts received from controlled entities

(A) In general, –

If an organisation (in this paragraph referred to as the “controlling organisation”) receives or accrues (directly or indirectly) a specified payment from another entity which it controls (in this paragraph referred to as the “controlled entity”), notwithstanding paragraphs (1), (2), and (3), the controlling organisation shall include such payment as an item of gross income derived from an unrelated trade or business to the extent such payment reduces the net unrelated income of the controlled entity

(or increases any net unrelated loss of the controlled entity). There shall be allowed all deductions of the controlling organisation directly connected with amounts treated as derived from an unrelated trade or business under the preceding sentence.

(B) Net unrelated income or loss. – For purposes of this paragraph –

(i) Net unrelated income. – The term “net unrelated income” means –

(I) in the case of a controlled entity which is not exempt from tax under section 501(a), the portion of such entity’s taxable income which would be unrelated business taxable income if such entity were exempt from tax under section 501(a) and had the same exempt purposes as the controlling organisation, or

(II) in the case of a controlled entity which is exempt from tax under section 501(a), the amount of the unrelated business taxable income of the controlled entity.

(ii) Net unrelated loss. –

The term “net unrelated loss” means the net operating loss adjusted under rules similar to the rules of clause (i).

(C) Specified payment. –

For purposes of this paragraph, the term “specified payment” means any interest, annuity, royalty, or rent.

(D) Definition of control. – For purposes of this paragraph –

(i) Control. – The term “control” means –

(I) in the case of a corporation, ownership (by vote or value) of more than 50 percent of the stock in such corporation,

(II) in the case of a partnership, ownership of more than 50 percent of the profits interests or capital interests in such partnership, or

(III) in any other case, ownership of more than 50 percent of the beneficial interests in the entity.

(ii) Constructive ownership. –

Section 318 (relating to constructive ownership of stock) shall apply for purposes of determining ownership of stock in a corporation. Similar principles shall apply for purposes of determining ownership of interests in any other entity.

(E) Paragraph to apply only to certain excess payments. –

(i) In general. –

Subparagraph (A) shall apply only to the portion of a qualifying specified payment received or accrued by the controlling organisation that exceeds the amount which would have been paid or accrued if such payment met the requirements prescribed under section 482.

(ii) Addition to tax for valuation misstatements. – The tax imposed by this chapter on the controlling organisation shall be increased by an amount equal to 20 percent of the larger of –

(I) such excess determined without regard to any amendment or supplement to a return of tax, or

(II) such excess determined with regard to all such amendments and supplements.

(iii) Qualifying specified payment. – The term “qualifying specified payment” means a specified payment which is made pursuant to –

(I) a binding written contract in effect on the date of the enactment of this subparagraph, or

(II) a contract which is a renewal, under substantially similar terms, of a contract described in subclause (I).

(F) Related persons. –

The Secretary shall prescribe such rules as may be necessary or appropriate to prevent avoidance of the purposes of this paragraph through the use of related persons.

...

(15) Except as provided in paragraph (4), in the case of a trade or business -

(A) which consists of providing services under license issued by a Federal regulatory agency,

(B) which is carried on by a religious order or by an educational organisation described in section 170(b)(1)(A)(ii) maintained by such religious order, and which was so carried on before May 27, 1959, and

(C) less than 10 percent of the net income of which for each taxable year is used for activities which are not related to the purpose constituting the basis for the religious order's exemption,

there shall be excluded all gross income derived from such trade or business and all deductions directly connected with the carrying on of such trade or business, so long as it is established to the satisfaction of the Secretary that the rates or other charges for such services are competitive with rates or other charges charged for similar services by persons not exempt from taxation.

(16)

(A) Notwithstanding paragraph (5)(B), there shall be excluded all gains or losses from the sale, exchange or other disposition of any real property described in subparagraph (B) if -

(i) such property was acquired by the organisation from -

(I) a financial institution described in section 581 or 591(a), which is in conservatorship or receivership, or

(II) the conservator or receiver of such an institution (or any government agency or corporation succeeding to the rights or interests of the conservator or receiver),

(ii) such property is designated by the organisation within the 9-month period beginning on the date of its acquisition as property held for sale, except that not more than one-half (by value determined as of such date) of property acquired in a single transaction may be so designated,

(iii) such sale, exchange, or disposition occurs before the later of -

(I) the date which is 30 months after the date of the acquisition of such property, or

(II) the date specified by the Secretary in order to assure an orderly disposition of property held by persons described in subparagraph (A), and

(iv) while such property was held by the organisation, the aggregate expenditures on improvements and development activities included in the basis of the property are (or were) not in excess of 20 percent of the net selling price of such property.

(B) Property is described in this subparagraph if it is real property which -

(i) was held by the financial institution at the time it entered into conservatorship or receivership, or

(ii) was foreclosure property (as defined in section 514(c)(9)(H)(v)) which secured indebtedness held by the financial institution at such time.

For purposes of this subparagraph, real property includes an interest in a mortgage.

(17) Treatment of certain amounts derived from foreign corporations

(A) In general. -

Notwithstanding paragraph (1), any amount included in gross income under section 951(a)(1)(A) shall be included as an item of gross income derived from an unrelated trade or business to the extent the amount so included is attributable to insurance income (as defined in section 953) which, if derived directly by the organisation, would be treated as gross income from an unrelated trade or business. There shall be allowed all deductions directly connected with amounts included in gross income under the preceding sentence.

(B) Exception. -

(i) In general. – Subparagraph (A) shall not apply to income attributable to a policy of insurance or reinsurance with respect to which the person (directly or indirectly) insured is –

(I) such organisation,

(II) an affiliate of such organisation which is exempt from tax under section 501(a), or

(III) a director or officer of, or an individual who (directly or indirectly) performs services for, such organisation or affiliate but only if the insurance covers primarily risks associated with the performance of services in connection with such organisation or affiliate.

(ii) Affiliate. – For purposes of this subparagraph–

(I) In general. –

The determination as to whether an entity is an affiliate of an organisation shall be made under rules similar to the rules of section 168(h)(4)(B).

(II) Special rule. –

Two or more organisations (and any affiliates of such organisations) shall be treated as affiliates if such organisations are colleges or universities described in section 170(b)(1)(A)(ii) or organisations described in section 170(b)(1)(A)(iii) and participate in an insurance arrangement that provides for any profits from such arrangement to be returned to the policyholders in their capacity as such.

(C) Regulations. –

The Secretary shall prescribe such regulations as may be necessary or appropriate to carry out the purposes of this paragraph, including regulations for the application of this paragraph in the case of income paid through 1 or more entities or between 2 or more chains of entities.

(18) Treatment of mutual or cooperative electric companies. –

In the case of a mutual or cooperative electric company described in section 501(c)(12), there shall be excluded income which is treated as member income under subparagraph (H) thereof.

(19) Treatment of gain or loss on sale or exchange of certain brownfield sites. –

(A) In general. –

Notwithstanding paragraph (5)(B), there shall be excluded any gain or loss from the qualified sale, exchange, or other disposition of any qualifying brownfield property by an eligible taxpayer.

(B) Eligible taxpayer. – For purposes of this paragraph –

(i) In general. – The term “eligible taxpayer” means, with respect to a property, any organisation exempt from tax under section 501(a) which –

(I) acquires from an unrelated person a qualifying brownfield property, and

(II) pays or incurs eligible remediation expenditures with respect to such property in an amount which exceeds the greater of \$550,000 or 12 percent of the fair market value of the property at the time such property was acquired by the eligible taxpayer, determined as if there was not a presence of a hazardous substance, pollutant, or contaminant on the property which is complicating the expansion, redevelopment, or reuse of the property.

(ii) Exception. – Such term shall not include any organisation which is –

(I) potentially liable under section 107 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 with respect to the qualifying brownfield property,

(II) affiliated with any other person which is so potentially liable through any direct or indirect familial relationship or any contractual, corporate, or financial relationship (other than a contractual, corporate, or financial relationship which is created by the instruments by which title to any

qualifying brownfield property is conveyed or financed or by a contract of sale of goods or services), or

(III) the result of a reorganisation of a business entity which was so potentially liable.

(C) Qualifying brownfield property. – For purposes of this paragraph -

(i) In general. –

The term “qualifying brownfield property” means any real property which is certified, before the taxpayer incurs any eligible remediation expenditures (other than to obtain a Phase I environmental site assessment), by an appropriate State agency (within the meaning of section 198(c)(4)) in the State in which such property is located as a brownfield site within the meaning of section 101(39) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (as in effect on the date of the enactment of this paragraph).

(ii) Request for certification. –

Any request by an eligible taxpayer for a certification described in clause (i) shall include a sworn statement by the eligible taxpayer and supporting documentation of the presence of a hazardous substance, pollutant, or contaminant on the property which is complicating the expansion, redevelopment, or reuse of the property given the property’s reasonable anticipated future land uses or capacity for uses of the property (including a Phase I environmental site assessment and, if applicable, evidence of the property’s presence on a local, State, or Federal list of brownfields or contaminated property) and other environmental assessments prepared or obtained by the taxpayer.

(D) Qualified sale, exchange or other disposition. – For purposes of this paragraph -

(i) In general. – A sale, exchange, or other disposition of property shall be considered as qualified if -

(I) such property is transferred by the eligible taxpayer to an unrelated person, and

(II) within 1 year of such transfer the eligible taxpayer has received a certification from the Environmental Protection Agency or an appropriate State agency (within the meaning of section 198(c)(4)) in the State in which such property is located that, as a result of the eligible taxpayer’s remediation actions, such property would not be treated as a qualifying brownfield property in the hands of the transferee.

For purposes of subclause (II), before issuing such certification, the Environmental Protection Agency or appropriate State agency shall respond to comments received pursuant to clause (ii)IV) in the same form and manner as required under section 117(b) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (as in effect on the date of the enactment of this paragraph).

(ii) Request for certification. – Any request by an eligible taxpayer for a certification described in clause (i) shall be made not later than the date of the transfer and shall include a sworn statement by the eligible taxpayer certifying the following:

(I) Remedial actions which comply with all applicable or relevant and appropriate requirements (consistent with section 121(d) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980) have been substantially completed, such that there are no hazardous substances, pollutants, or contaminants which complicate the expansion, redevelopment, or reuse of the property given the property’s reasonably anticipated future land uses or capacity for uses of the property.

(II) The reasonably anticipated future land uses or capacity for uses of the property are more economically productive or environmentally beneficial than the uses of the property in existence on the date of the certification described in subparagraph (C)(i). For purposes of the

preceding sentence, use of property as a landfill or other hazardous waste facility shall not be considered more economically productive or environmentally beneficial.

(III) A remediation plan has been implemented to bring the property into compliance with all applicable local, State, and Federal environmental laws, regulations, and standards and to ensure that the remediation protects human health and the environment.

(IV) The remediation plan described in subclause (III), including any physical improvements required to remediate the property, is either complete or substantially complete, and, if substantially complete, sufficient monitoring, funding, institutional controls, and financial assurances have been put in place to ensure the complete remediation of the property in accordance with the remediation plan as soon as is reasonably practicable after the sale, exchange, or other disposition of such property.

(V) Public notice and the opportunity for comment on the request for certification was completed before the date of such request. Such notice and opportunity for comment shall be in the same form and manner as required for public participation required under section 117(a) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (as in effect on the date of the enactment of this paragraph). For purposes of this subclause, public notice shall include, at a minimum, publication in a major local newspaper of general circulation.

(iii) Attachment to tax returns. –

A copy of each of the requests for certification described in clause (ii) of subparagraph (C) and this subparagraph shall be included in the tax return of the eligible taxpayer (and, where applicable, of the qualifying partnership) for the taxable year during which the transfer occurs.

(iv) Substantial completion. –

For purposes of this subparagraph, a remedial action is substantially complete when any necessary physical construction is complete, all immediate threats have been eliminated, and all long-term threats are under control.

(E) Eligible remediation expenditures. – For purposes of this paragraph –

(i) In general. – The term “eligible remediation expenditures” means, with respect to any qualifying brownfield property, any amount paid or incurred by the eligible taxpayer to an unrelated third person to obtain a Phase I environmental site assessment of the property, and any amount so paid or incurred after the date of the certification described in subparagraph (C)(i) for goods and services necessary to obtain a certification described in subparagraph (D)(i) with respect to such property, including expenditures –

(I) to manage, remove, control, contain, abate, or otherwise remediate a hazardous substance, pollutant, or contaminant on the property,

(II) to obtain a Phase II environmental site assessment of the property, including any expenditure to monitor, sample, study, assess, or otherwise evaluate the release, threat of release, or presence of a hazardous substance, pollutant, or contaminant on the property,

(III) to obtain environmental regulatory certifications and approvals required to manage the remediation and monitoring of the hazardous substance, pollutant, or contaminant on the property, and

(IV) regardless of whether it is necessary to obtain a certification described in subparagraph (D)(i)(II), to obtain remediation cost-cap or stop-loss coverage, re-opener or regulatory action coverage, or similar coverage under environmental insurance policies, or financial guarantees required to manage such remediation and monitoring.

(ii) Exceptions. – Such term shall not include –

(I) any portion of the purchase price paid or incurred by the eligible taxpayer to acquire the qualifying brownfield property,

(II) environmental insurance costs paid or incurred to obtain legal defense coverage, owner/operator liability coverage, lender liability coverage, professional liability coverage, or similar types of coverage,

(III) any amount paid or incurred to the extent such amount is reimbursed, funded, or otherwise subsidised by grants provided by the United States, a State, or a political subdivision of a State for use in connection with the property, proceeds of any issue of State of local government obligations used to provide financing for the property the interest of which is exempt from tax under section 103, or subsidised financing provided (directly or indirectly) under a Federal, State, or local program provided in connection with the property, or

(IV) any expenditure paid or incurred before the date of the enactment of this paragraph.

For purposes of subclause (III), the Secretary may issue guidance regarding the treatment of government-provided funds for purposes of determining eligible remediation expenditures.

(F) Determination of gain or loss. –

For purposes of this paragraph, the determination of gain or loss shall not include an amount treated as gain which is ordinary income with respect to section 1245 or section 1250 property, including amounts deducted as section 198 expenses which are subject to the recapture rules of section 198(e), if the taxpayer had deducted such amounts in the computation of its unrelated business taxable income.

(G) Special rules for partnerships. –

(i) In general. –

In the case of an eligible taxpayer which is a partner of a qualifying partnership which acquires, remediates, and sells, exchanges, or otherwise disposes of a qualifying brownfield property, this paragraph shall apply to the eligible taxpayer's distributive share of the qualifying partnership's gain or loss from the sale, exchange, or other disposition of such property.

(ii) Qualifying partnership. – The term "qualifying partnership" means a partnership which -

(I) has a partnership agreement which satisfies the requirements of section 514(c)(9)(B)(vi) at all times beginning on the date of the first certification received by the partnership under subparagraph (C)(i),

(II) satisfied the requirements of subparagraphs (B)(i), (C), (D), and (E), if "qualified partnership" is substituted for "eligible taxpayer" each place it appears therein (except subparagraph (D)(iii), and

(III) is not an organisation which would be prevented from constituting an eligible taxpayer by reason of subparagraph (B)(ii).

(iii) Requirement that tax-exempt partner be a partner since first certification. –

This paragraph shall apply with respect to any eligible taxpayer which is a partner of a partnership which acquires, remediates, and sells, exchanges, or otherwise disposes of a qualifying brownfield property only if such eligible taxpayer was a partner of the qualifying partnership at all times beginning on the date of the first certification received by the partnership under subparagraph (C)(i) and ending on the date of the sale, exchange, or other disposition of such property by the partnership.

(iv) Regulations. – The Secretary shall prescribe such regulations as are necessary to prevent abuse of the requirements of this subparagraph, including abuse through -

(I) the use of special allocations of gains or losses, or

(II) changes in ownership of partnership interests held by eligible taxpayers.

(H) Special rules for multiple properties. –

(i) In general. –

An eligible taxpayer or a qualifying partnership of which the eligible taxpayer is a partner may make a 1-time election to apply this paragraph to more

than 1 qualifying brownfield property by averaging the eligible remediation expenditures for all such properties acquired during the election period. If the eligible taxpayer or qualifying partnership makes such an election, the election shall apply to all qualified sales, exchanges, or other dispositions of qualifying brownfield properties the acquisition and transfer of which occur during the period for which the election remains in effect.

(ii) Election. – An election under clause (i) shall be made with the eligible taxpayer or qualifying partnership's timely filed tax return (including extensions) for the first taxable year for which the taxpayer or qualifying partnership intends to have the election apply. An election under clause (i) is effective for the period

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(I) beginning on the date which is the first day of the taxable year of the return in which the election is included or a later day in such taxable year selected by the eligible taxpayer or qualifying partnership, and

(II) ending on the date which is the earliest of a date of revocation selected by the eligible taxpayer or qualifying partnership, the date which is 8 years after the date described in subclause (I), or, in the case of an election by a qualifying partnership of which the eligible taxpayer is a partner, the date of the termination of the qualifying partnership.

(iii) Revocation. –

An eligible taxpayer or qualifying partnership may revoke an election under clause (i) by filing a statement of revocation with a timely filed tax return (including extensions). A revocation is effective as of the first day of the taxable year of the return in which the revocation is included or a later day in such taxable year selected by the eligible taxpayer or qualifying partnership. Once an eligible taxpayer or qualifying partnership revokes the election, the eligible taxpayer or qualifying partnership is ineligible to make another election under clause (i) with respect to any qualifying brownfield property subject to the revoked election.

(I) Recapture. –

If an eligible taxpayer excludes gain or loss from a sale, exchange, or other disposition of property to which an election under subparagraph (H) applies, and such property fails to satisfy the requirements of this paragraph, the unrelated business taxable income of the eligible taxpayer for the taxable year in which such failure occurs shall be determined by including any previously excluded gain or loss from such sale, exchange, or other disposition allocable to such taxpayer, and interest shall be determined at the overpayment rate established under section 6621 on any resulting tax for the period beginning with the due date of the return for the taxable year during which such sale, exchange or other disposition occurred, and ending on the date of payment of the tax.

(J) Related persons. – For purposes of this paragraph, a person shall be treated as related to another person if -

(i) such person bears a relationship to such other person described in section 267(b) (determined without regard to paragraph (9) thereof), or section 707(b)(1), determined by substituting "25 percent" for "50 percent" each place it appears therein, and

(ii) in the case such other person is a nonprofit organisation, if such person controls directly or indirectly more than 25 percent of the governing body of such organisation.

(K) Termination. –

Except for purposes of determining the average eligible remediation expenditures for properties acquiring during the election period under subparagraph (H), this paragraph shall not apply to any property acquired by the eligible taxpayer or qualifying partnership after December 31, 2009.

(c) Special rules for partnerships

(1) In general

If a trade or business regularly carried on by a partnership of which an organisation is a member is an unrelated trade or business with respect to such organisation, such organisation in computing its unrelated business taxable income shall, subject to the

exceptions, additions, and limitations contained in subsection (b), include its share (whether or not distributed) of the gross income of the partnership from such unrelated trade or business and its share of the partnership deductions directly connected with such gross income.

(2) Special rule where partnership year is different from organisation's year

If the taxable year of the organisation is different from that of the partnership, the amounts to be included or deducted in computing the unrelated business taxable income under paragraph (1) shall be based upon the income and deductions of the partnership ending within or with the taxable year of the organisation.

(d) Treatment of dues of agricultural or horticultural organisations

(1) In general

If -

(A) an agricultural or horticultural organisation described in section 501(c)(5) requires annual dues to be paid in order to be a member of such organisation, and

(B) the amount of such required annual dues does not exceed \$100,

in no event shall any portion of such dues be treated as derived by such organisation from an unrelated trade or business by reason of any benefits or privileges to which members of such organisation are entitled.

(2) Indexation of \$100 amount

In the case of any taxable year beginning in a calendar year after 1995, the \$100 amount in paragraph (1) shall be increased by an amount equal to -

(A) \$100, multiplied by

(B) the cost-of-living adjustment determined under section 1(f)(3) for the calendar year in which the taxable year begins, by substituting "calendar year 1994" for "calendar year 2016" in subparagraph (A)(ii) thereof.

(3) Dues

For purposes of this subsection, the term "dues" means any payment (whether or not designated as dues) which is required to be made in order to be recognised by the organisation as a member of the organisation.

(e) Special rules applicable to S corporations

(1) In general

If an organisation described in section 1361(c)(2)(A)(vi) or 1361(c)(6) holds stock in an S corporation -

(A) such interest shall be treated as an interest in an unrelated trade or business, and

(B) notwithstanding any other provision of this part -

(i) all items of income, loss, or deduction taken into account under section 1366(a), and

(ii) any gain or loss on the disposition of the stock in the S corporation, shall be taken into account in computing the unrelated business taxable income of such organisation.

(2) Basis reduction

Except as provided in regulations, for purposes of paragraph (1), the basis of any stock acquired by purchase (as defined in section 1361(e)(1)(C)) shall be reduced by the amount of any dividends received by the organisation with respect to the stock.

(3) Exception for ESOPS

This subsection shall not apply to employer securities (within the meaning of section 409(l)) held by an employee stock ownership plan described in section 4975(e)(7).

26 United States Code s 513 – *Unrelated trade or business*

(a) General rule

The term “unrelated trade or business” means, in the case of any organisation subject to the tax imposed by section 511, any trade or business the conduct of which is not substantially related (aside from the need of such organisation for income or funds or the use or makes of the profits derived) to the exercise or performance by such organisation of its charitable, educational, or other purpose of function constituting the basis for its exemption under section 501 (or, in the case of an organisation described in section 511(a)(2)(B), to the exercise or performance of any purpose or function described in section 501(c)(3), except that such term does not include any trade or business –

(1) in which substantially all the work in carrying on such trade or business is performed for the organisation without compensation; or

(2) which is carried on, in the case of an organisation described in section 501(c)(3) or in the case of a college or university described in section 511(a)(2)(B), by the organisation primarily for the convenience of its members, students, patients, officers, or employees, or, in the case of a local association of employees described in section 501(c)(4) organised before May 27, 1969, which is the selling by the organisation of items of work-related clothes and equipment and items normally sold through vending machines, through food dispensing facilities, or by snack bars, for the convenience of its members at their usual places of employment; or

(3) which is the selling of merchandise, substantially all of which has been received by the organisation as gifts or contributions.

(b) Special rule for trusts

The term “unrelated trade or business” means, in the case of –

(1) a trust computing its unrelated business taxable income under section 512 for purposes of section 681; or

(2) a trust described in section 401(a), or section 501(c)(17), which is exempt from tax under section 501(a);

any trade or business regularly carried on by such trust or by a partnership of which it is a member.

(c) Advertising, etc, activities

For purposes of this section, the term “unrelated trade or business” includes any activity which is carried on for the production of income from the sale of goods or the performance of services. For purposes of the preceding sentence, an activity does not lose identity as a trade or business merely because it is carried on within a larger aggregate of similar activities or within a larger complex of other endeavors which may, or may not, be related to the exempt purposes of the organisation. Where an activity carried on for profit constitutes an unrelated trade or business, no part of such trade or business shall be excluded from such classification merely because it does not result in profit.

(d) Certain activities of trade shows, State fairs, etc

(1) General rule

The term “unrelated trade or business” does not include qualified public entertainment activities of an organisation described in paragraph (2)(C), or qualified convention and trade show activities of an organisation described in paragraph (3)(C).

(2) Qualified public entertainment activities

For purposes of this subsection –

(A) Public entertainment activity

The term “public entertainment activity” means any entertainment or recreational activity of a kind traditionally conducted at fairs or expositions promoting agricultural and educational purposes, including, but not limited to, any activity one of the purposes of which is to attract the public to fairs or expositions or to promote the breeding of animals or the development of products or equipment.

(B) Qualified public entertainment activity

The term “qualified public entertainment activity” means a public entertainment activity which is conducted by a qualifying organisation described in subparagraph (C) in –

-
- (i) conjunction with an international, national, State, regional, or local fair or exposition,
 - (ii) accordance with the provisions of State law which permit the activity to be operated or conducted solely by such an organisation, or by an agency, instrumentality, or political subdivision of such State, or
 - (iii) accordance with the provisions of State law which permit such an organisation to be granted a license to conduct not more than 20 days of such activity on payment to the State of a lower percentage of the revenue from such licensed activity than the State requires from organisations not described in section 501(c)(3), (4), or (5).

(C) Qualifying organisation

For purposes of this paragraph, the term “qualifying organisation” means an organisation which is described in section 501(c)(3), (4), or (5) which regularly conducts, as one of its substantial exempt purposes, an agricultural and educational fair or exposition.

(3) Qualified convention and trade show activities

(A) Convention and trade show activities

The term “convention and trade show activity” means any activity of a kind traditionally conducted at conventions, annual meetings, or trade shows, including, but not limited to, any activity one of the purposes of which is to attract persons in an industry generally (without regard to membership in the sponsoring organisation) as well as members of the public to the show for the purpose of displaying industry products or to stimulate interest in, and demand for, industry products or services, or to educate persons engaged in the industry in the development of new products and services or new rules and regulations affecting the industry.

(B) Qualified convention and trade show activity

The term “qualified convention and trade show activity” means a convention and trade show activity carried out by a qualifying organisation described in subparagraph (C) in conjunction with an international, national, State, regional, or local convention, annual meeting, or show conducted by an organisation described in subparagraph (C) if one of the purposes of such organisation in sponsoring the activity is the promotion and stimulation of interest in, and demand for, the products and services of that industry in general or to educate persons in attendance regarding new developments or products and services related to the exempt activities of the organisation, and the show is designed to achieve such purpose through the character of the exhibits and the extent of the industry products displayed.

(C) Qualifying organisation

For purposes of this paragraph, the term “qualifying organisation” means an organisation which is described in section 501(c)(3), (4), or (5) which regularly conducts as one of its substantial exempt purpose a show which stimulates interest in, and demand for, the products of a particular industry or segment of such industry or which educates persons in attendance regarding new developments or products and services related to the exempt activities of the organisation.

(4) Such activities not to affect exempt status

An organisation described in section 501(c)(3), (4), or (5) shall not be considered as not entitled to the exemption allowed under section 501(a) solely because of qualified public entertainment activities conducted by it.

(e) Certain hospital services

In the case of a hospital described in section 170(b)(1)(A)(iii), the term “unrelated trade or business” does not include the furnishing of one or more of the services described in section 501(e)(1)(A) to one or more hospitals described in section 170(b)(1)(A)(iii) if –

- (1) such services are furnished solely to such hospitals which have facilities to service not more than 100 inpatients;
- (2) such services, if performed on its own behalf by the recipient hospital, would constitute activities in exercising or performing the purpose or function constituting the basis for its exemption; and

(3) such services are provided at a fee or cost which does not exceed the actual cost of providing such services, such cost including straight line depreciation and a reasonable amount for return on capital goods used to provide such services.

(f) Certain bingo games

(1) In general

The term “unrelated trade or business” does not include any trade or business which consists of conducting bingo games.

(2) Bingo game defined

For purposes of paragraph (1), the term “bingo game” means any game of bingo –

(A) of a type in which usually –

(i) the wagers are placed,

(ii) the winners are determined, and

(iii) the distribution of prizes or other property is made

in the presence of all persons placing wagers in such game,

(B) the conducting of which is not an activity ordinarily carried out on a commercial basis, and

(C) the conducting of which does not violate any State or local law.

(g) Certain pole rentals

In the case of a mutual or cooperative telephone or electric company, the term “unrelated trade or business” does not include engaging in qualified pole rentals (as defined in section 501(c)(12)(D)).

(h) Certain distributions of low cost articles without obligation to purchase and exchanges and rentals of member lists

(1) In general

In the case of an organisation which is described in section 501 and contributions to which are deductible under paragraph (2) or (3) of section 170(c), the term “unrelated trade or business” does not include –

(A) activities relating to the distribution of low cost articles if the distribution of such articles is incidental to the solicitation of charitable contributions, or

(B) any trade or business which consists of –

(i) exchanging with another such organisation names and addresses of donors to (or members of) such organisation, or

(ii) renting such names and addresses to another such organisation.

(2) Low cost article defined

For purposes of this subsection–

(A) In general

The term “low cost article” means any article which has a cost not in excess of \$5 to the organisation which distributes such item (or on whose behalf such item is distributed).

(B) Aggregation rule

If more than 1 item is distributed by or on behalf of an organisation to a single distribute in any calendar year, the aggregate of the items so distributed in such calendar year to such distribute shall be treated as 1 article for the purposes of subparagraph (A).

(C) Indexation of \$5 amount

In the case of any taxable year beginning in a calendar year after 1987, \$5 amount in subparagraph (A) shall be increased by an amount equal to –

(i) \$5, multiplied by

(ii) the cost-of-living adjustment determined under section 1(f)(3) for the calendar year in which the taxable year begins, by substituting “calendar year 1987” for “calendar year 2016” in subparagraph (A)(ii) thereof.

(3) Distribution which is incidental to the solicitation of charitable contributions described

For purposes of this subsection, any distribution of low cost articles by an organisation shall be treated as a distribution incidental to the solicitation of charitable contributions only if –

- (A)** such distribution is not made at the request of the distributee,
- (B)** such distribution is made without the express consent of the distributee, and
- (C)** the articles so distributed are accompanied by –
 - (i)** a request for a charitable contribution (as defined in section 170(c)) by the distributee to such organisation, and
 - (ii)** a statement that the distributee retain the low cost article regardless of whether such distributee makes a charitable contribution to such organisation.

(i) Treatment of certain sponsorship payments**(1) In general**

The term “unrelated trade or business” does not include the activity of soliciting and receiving qualified sponsorship payments.

(2) Qualified sponsorship payments

For purposes of this subsection –

(A) The term “qualified sponsorship payment” means any payment made by any person engaged in a trade or business with respect to which there is no arrangement or expectation that such person will receive any substantial return benefit other than the use or acknowledgement of the name or logo (or product lines) of such person’s trade or business in connection with the activities of the organisation that receives such payment. Such a use or acknowledgement does not include advertising such person’s products or services (including messages containing qualitative or comparative language, price information, or other indications of savings or value, an endorsement, or an inducement to purchase, sell, or use such products or services).

(B) Limitations**(i) Contingent payments**

The term “qualified sponsorship payment” does not include any payment if the amount of such payment is contingent upon the level of attendance at one or more events, broadcast ratings, or other factors indicating the degree of public exposure to one or more events.

(ii) Safe harbor does not apply to periodicals and qualified convention and trade show activities

The term “qualified sponsorship payment” does not include –

- (I)** any payment which entitles the payor to the use or acknowledgement of the name or logo (or product lines) of the payor’s trade or business in regularly scheduled and printed material published by or on behalf of the payee organisation that is not related to and primarily distributed in connection with a specific event conducted by the payee organisation, or
- (II)** any payment made in connection with any qualified convention or trade show activity (as defined in subsection (d)(3)(B)).

(3) Allocations of portion of single payment

For purposes of this subsection, to the extent that a portion of a payment would (if made as a separate payment) be a qualified sponsorship payment, such portion of such payment and the other portion of such payment shall be treated as separate payments.

(j) Debt management plan services

The term “unrelated trade or business” includes the provision of debt management plan services (as defined in section 501(q)(4)(B)) by any organisation other than an organisation which meets the requirements of section 501(q).



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