Charities are worth it!

22 June 2022

The Law Foundation NEW ZEALAND

SUPPORTING INDEPENDENT LEGAL THINKING.

Key recommendations

Focus on purpose report released 19 April 2022

- 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 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.

Links:

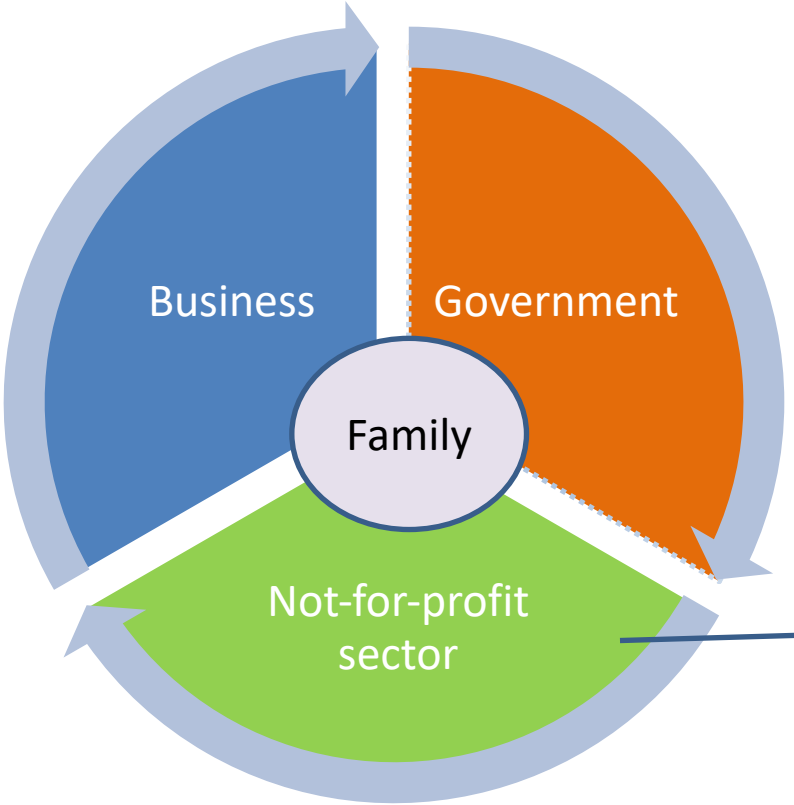
- New Zealand Law Foundation 2019 International Research Fellowship Te Karahipi Rangahau ā Taiao ***Focus on purpose - what does a world-leading framework of charities law look like?*** – April 2022: https://www.lawfoundation.org.nz/?p=47523
- **Recording of CLAANZ webinar 19 May 2022:** https://www.youtube.com/watch?v=o9WyzxbOn0M
- Hui E! webinar ***Charities law reform – why it matters*** 17 March 2021: https://www.youtube.com/watch?v=WYylgE0ylnM
- Conversation with Ros Rice, Collaborative Voices, Community Networks Aotearoa, 24 May 2022: https://www.freefm.org.nz/Programmes/Details.aspx?PID=2c75dca7-b297-40ec-95d3-85c252190c0a
- ***Charity reforms insult to the sector*** **3 June 2022:** https://www.rnz.co.nz/national/programmes/morningreport/audio/2018844519/charity-reforms-insult-to-the-sector-lawyer
- ***Fears charities law reform could be colossal mistake*** **23 May 2022:** https://businessdesk.co.nz/article/charities/fears-charities-law-reform-could-be-colossal-mistake
- ***Charities beware – the government is trying to remove your rights of appeal - again!*** **5 June 2022:** https://www.linkedin.com/pulse/charities-beware-government-trying-remove-your-rights-susan-barker/?trackingId=Nyg7vFg0Qki0qph4TLFywg%3D%3D
- **Sign up for updates:** www.charitieslawreform.nz
- **LinkedIn group:** NZ Charity Law
- **Facebook page**: Charities Act Review 2020: https://www.facebook.com/groups/1932023316889903/
- Human Rights Foundation 4 August 2021: https://hrf.org/unraveling-chinas-attempts-to-hinder-academic-freedom-confucius-institutes/

The importance of charities

"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**. "

- Sir Stuart Etherington, National Council of Voluntary Organisations, January 2019



Charitable sector:
$68 billion assets under management
$21 billion annual income

Importance of an enabling framework:

"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. 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 …**

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 …**

Given the economic challenges posed by the Covid-19 pandemic, it is now even more vital to increase social enterprise activity …

… **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."

- Hon Priyanca Radhakrishnan, Impact Initiative *A Roadmap for Impact* April 2021 at 5-6

but the charitable sector is:

"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"

- Dr Lester M Salamon

Images of the hijacked planes flying into the World Trade Towers on September 11, 2001

International "wave" of charities legislation:

- **New Zealand** - 2005
- Scotland - 2005
- **England and Wales** – 2006 / 2011
- Japan - 2006
- Singapore - 2007
- **Northern Ireland** – 2008 / 2013
- Guernsey - 2008 / 2021
- Zambia – 2009
- **Ireland** – 2009 / 2013
- **Australia** - 2012
- Jamaica – 2013
- Jersey - 2014
- **China** - 2016
- Uganda - 2016
- Isle of Man – 2019
- Pakistan - 2019

Shrinking space for civil society

- counter-terrorism measures prioritising security at the expense of democratic norms
- 2021 CIVICUS monitor: 90% of the world's population are living in countries rated as repressed, obstructed or closed
- charities law frameworks being used as a tool for suppression of not-for-profit advocacy
- backsliding of democracy – increasing authoritarianism around the world

Review of the Charities Act

- Pre-Charities Act:
  - high levels of public trust and confidence
  - lack of information
- Charities Bill 2004 – 16+ years in gestation
  - but widely regarded to be fundamentally flawed
    - "conceived … in Treasury, and … designed by the Ministry of Economic Development"
    - a "Trojan horse" that could allow government to "colonise and control" the charitable sector
  - almost completely rewritten at Select Committee stage
  - rushed through under urgency without proper consultation:
    - "we do not really know what we are passing tonight, or what the implications are"
  - promise of post-implementation review

Unintended consequences

- Charities Act as passed:
  - section 5(3) – "for example, advocacy"
  - sections 10(h) and 18(3) – role of activities
  - section 59 – nature of the hearing on appeal
- Subsequent piecemeal amendments:
  - section 5(2A) – the promotion of amateur sport
  - Crown Entities Reform Bill 2011 – disestablishment of the Charities Commission
  - section 3(a) and (b) – purposes
  - Charities Amendment Bill 2016 – proposal to remove charities' rights of appeal
- Slow-moving change of underlying paradigm

The rule of law

- infer purposes from activities
- undue reliance on Canadian case law
  - to the exclusion of seminal New Zealand case law
- reworking of legal tests
  - advancement of "causes"
  - ends, means and manner
  - *Foundation for Anti-Aging Research*
- disregard wider indirect public benefits
- issuing of "guidance"
- lack of access to an oral hearing of evidence
- lack of meaningful input into policy

Labour party policy 2017

- consult with the community and voluntary sector on whether the **disestablishment of the Charities Commission** and transfer of its functions … to the DIA has resulted in effectiveness and improved services and information for the sector
- **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
- ensure that community and voluntary organisations can engage in **advocacy** without fear of losing government contracts or their charitable status

Charities Act review (cont'd)

- February 2020/April 2021 – telescoped to just 5 issues:
  - reporting requirements for small charities
  - charities' business and accumulation activities
  - investigating potential improvements to the appeals mechanism
  - matters relating to the government agency
  - duties of officers of charities
- "targeted consultation"
  - DIA initial policy papers - May – June 2021
- proposals announced 2 June 2022
- Charities Amendment Bill this year?
- post-implementation review?
- to be followed by unhelpful tax changes?

Tax Working Group Te Awheawhe Tāke

- November 2017 - CGT
- submissions – competitive advantage
- July 2018 meeting:
  - private foundations
  - business income of charities
  - concluded that "**accumulations of profits** were an underlying issue for both"
- no consultation
- competitive advantage assumed rather than analysed
- social enterprise not mentioned
- assumption that accumulating is inconsistent with public benefit
- charities' issues identified as requiring "further work"

Tax expenditure analysis

- Tax Working Group:
  - "concessions"
  - "use of what would otherwise be tax revenue"
- US tax economists – 1960s
  - "subsidy"
  - estimate of "cost", to assess against alternative options, eg direct grants
- accepted by Treasuries around the anglosphere
  - like neoliberalism
  - but without critical examination
- structurally ignores the benefits provided by charities
- ignores a significant debate
- contributes materially to charities being misunderstood, undervalued and overlooked
  - "fiscal cost", "service delivery arm of government"
- government needs to invest in the charitable sector and get out of the way

Underlying clash of paradigms

Enabling	Restrictive
Private	Public
Tax privileges are seen as an investment in an overall system that manifests liberal democratic values, such as pluralism, diversity, tolerance and human flourishing	Tax privileges are seen as a **subsidy**, equivalent to a direct grant, over which government would want to exercise discretion and control
Charitable funds	**Government funds**
Negative rights claim	Positive rights claim
Respect for independence	Command and control
Self-determination	Tyranny of the majority
Civil society – charities' traditional advocacy role celebrated and protected	**Third sector** – charities seen as an (underfunded) service delivery arm of government
Messy, inefficient – but effective	Efficient, but ineffective
Outcomes and impact	Inputs and outputs (neoliberalism)
Trust	Suspicion
Charities	Charity
Registrar	Regulator

Underlying clash of paradigms (cont'd)

Enabling	Restrictive
Wide, strengths-based - supports innovation and prevention – communities know best what communities need – human flourishing	**Narrow**, deficits-based – paternalistic, colonialist, Victorian concept of handouts to the poor – "assuaging need"
Indirect benefits taken into account	Focus on direct benefits
Recognition of presumption of charitability	Analogy test only
Public benefit	Fiscal consequences
Oral hearing of evidence	Appeal on the record only
Equity, principles-based	Statute/common law – rules-based
Ex post	Ex ante
Simplicity – flexibility within clear boundaries	Ever-increasing complexity – enliven a culture of regulatory gaming
Accountability	**"regulation"**
Regulation as a means to an end	Regulation as an end in itself
Purposes	**Activities**

Is all this “regulation” working?

Surveys of public trust and confidence:	
2008	**6.6**
2012	5.9
2016	5.9
2019	5.9
2021	**6.5**

TWG – definition of charitable purpose

- IRD 2018 background paper p9:

"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".

But:

- Other countries have managed to review their definition of charitable purpose without undue fiscal consequences:
  - Australia
  - England and Wales
  - Ireland
  - Northern Ireland
  - Scotland
- Is the narrow approach actually saving any money?
  - social housing
  - public interest journalism
  - sport
- Stopping a watch to save time?
- Narrow interpretation itself undermines public trust and confidence in charities

"charitable purpose reviews"

- "The implicit requirements for charities to remain qualified for registration – maintaining charitable purpose, having a rules document, and having qualified officers – will be made explicit"
- problem definition – the requirements are already explicit
- attempt to codify "charitable purpose reviews" under the guise of "clarification"
- current powers never used
- **Charities Services' powers should not be increased until there is clear agreement as to what those powers are to be used for**
- Report – recommendations 3.2, 3.3, 7.2

2 June 2022 proposals

Regulatory decision-making and accountability

☐ The Charities Registration Board will be required to publish decisions on declining an application for registration and deregistering a charity
☐ There will be a clear process for charities to **object** to significant decisions of the Charities Registration Board and Charities Services
☐ The timeframe for submitting information to the Charities Registration Board or Charities Services on administrative matters & objections will be extended from 20 working days to 2 months
☐ Charities Services will be required to **consult with the sector** when developing significant guidance material for charities
☐ The number of Charities Registration Board members will increase from 3 members to 5 members
☐ The Charities Registration Board and Charities Services will publish information on their regulatory decision-making policies and procedures
☐ The **Department** will review the performance measures that relate to Charities Services

Judicial appeals

☐ The Taxation Review Authority will hear first appeals under the Charities Act instead of the High Court (with further appeals to the High Court and Court of Appeal on points of law)
☐ The **decisions that can be appealed** will be expanded to include significant decisions of Charities Services (as well as the existing decisions made by the Charities Registration Board)
☐ The timeframe for lodging an appeal will be extended from 20 working days to 2 months

Compliance and enforcement powers

☐ The **implicit** requirements for charities to remain qualified for registration – maintaining charitable purpose, having a rules document, and having qualified officers – will be made explicit
☐ Part of the definition of 'serious wrongdoing' will be clarified so that it expresses a more consistent level of serious behaviour, by replacing the reference to an offence with a reference to an offence that is punishable by imprisonment for a term of 2 years or more
☐ The Charities Registration Board will be given a new power to disqualify an officer for 'serious wrongdoing' or a significant or persistent breach of obligations, without having to deregister the charity
☐ The Department will undertake a post-implementation review of operational practice on the use of compliance and enforcement tools

Charities accumulating funds

☐ Charities Services will update the annual return form, in consultation with the sector and iwi, to require larger charities to report the reasons for their accumulated funds

Reporting requirements for very small charities

☐ Charities Services will have the power to **exempt** very small charities from the financial reporting standards set by the External Report Board, instead requiring them to file an annual return with basic financial information (the threshold for charities included in the exemption will be developed in regulations)

Officers of charities and governance improvements

☐ The definition of officer will be amended to capture all persons with **significant influence** over the management or administration of the entity, regardless of the type of entity
☐ The role of an officer, to support the charity to meet its obligations under the Act, will be clarified
☐ Persons who have been convicted of an offence relating to the financing of terrorism will be prevented from holding an officer role in a charity
☐ At least one officer of the charity will need to be 18 years old or over (while the remaining officers can be 16 years old or over)
☐ Charities will be required to review their rules document every year

Perfect storm

- funding/government contracting is environment is pitting charities against each other
  - charities are depleted
- Charities Services has reasonably unbridled power to determine the nature and scope of the charitable sector but no meaningful accountability:
  - decision-making has become arbitrary – New Zealand interpretations of the definition of charitable purpose are out of step with the rest of the common law world
  - conflict of interest with DIA's funding role
  - climate of fear – charities fear speaking out could cost them their registration / funding
- unintended consequences – lack of oral hearing of evidence – taints the appeal process so that it unduly favours the original decision-maker
- structural issues – no one to speak up for the sector
- Minister – usually brand new and outside Cabinet, no formal process for the charitable sector to provide context to DIA advice

Issues

- Government is searching for revenue in a covid-affected environment without a capital gains tax
  - looking to the charitable sector to "fill the gap"?
  - charitable sector seen through a tax lens – a "fiscal cost"
- oversimplification of the issues - media environment quite hostile to charities – leading to reactionary policy
- potential of the charitable sector to help #buildbackbetter overlooked
- 2 June 2022 proposals
  - seek to increase Charities Services' regulatory powers, despite an absence of evidence of any need for such powers, and with no meaningful checks or balances on such power
  - will cement a restrictive paradigm prior to consideration of whether a restrictive paradigm is appropriate for New Zealand
  - once unhelpful legislation is in place, it may be decades before it is able to be turned around, if ever
- proposals unlikely to do anything to benefit New Zealand's communities
- more likely to act perversely to preclude the real issues from being addressed
- DIA regulatory impact statement:
  - lack of trust and confidence in Charities Services
  - inadequate problem definition
  - inadequate consultation
  - lack of evidence to support the proposals
- Minister now in Cabinet - DIA advice requires critical evaluation

Purpose-based governance

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 entity in accordance with its rules.

Purpose-based governance

- charities are private organisations for public purposes
- focus on purpose
  - governors of charities are best placed to determine how best to further their charitable purposes
- clarify the question with respect to activities
  - accumulations
  - business activities
  - advocacy
  - social investment, etc
- enforce the fiduciary duties using the tools already available

Accountability, not "regulation"

- charities are already heavily regulated
- **registration, reporting and monitoring:**
  - annual returns, notify changes
  - an **information and disclosure** regime
- monitor charities to ensure they act in furtherance of their **stated** charitable purposes
  - using the comprehensive information now made available by the comprehensive financial reporting rules
- "serious wrongdoing"
- activities – "surgical" – partisan prohibition only
- no need for a separate police force just for charities

Kōrerorero/Discussion

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