



Charities law in New Zealand

July 2021



SUSTAINABLE DEVELOPMENT GOALS

1 NO POVERTY

2 ZERO HUNGER

3 GOOD HEALTH AND WELL-BEING

4 QUALITY EDUCATION

5 GENDER EQUALITY

6 CLEAN WATER AND SANITATION

7 AFFORDABLE AND CLEAN ENERGY

8 DECENT WORK AND ECONOMIC GROWTH

9 INDUSTRY, INNOVATION AND INFRASTRUCTURE

10 REDUCED INEQUALITIES

11 SUSTAINABLE CITIES AND COMMUNITIES

12 RESPONSIBLE CONSUMPTION AND PRODUCTION

13 CLIMATE ACTION

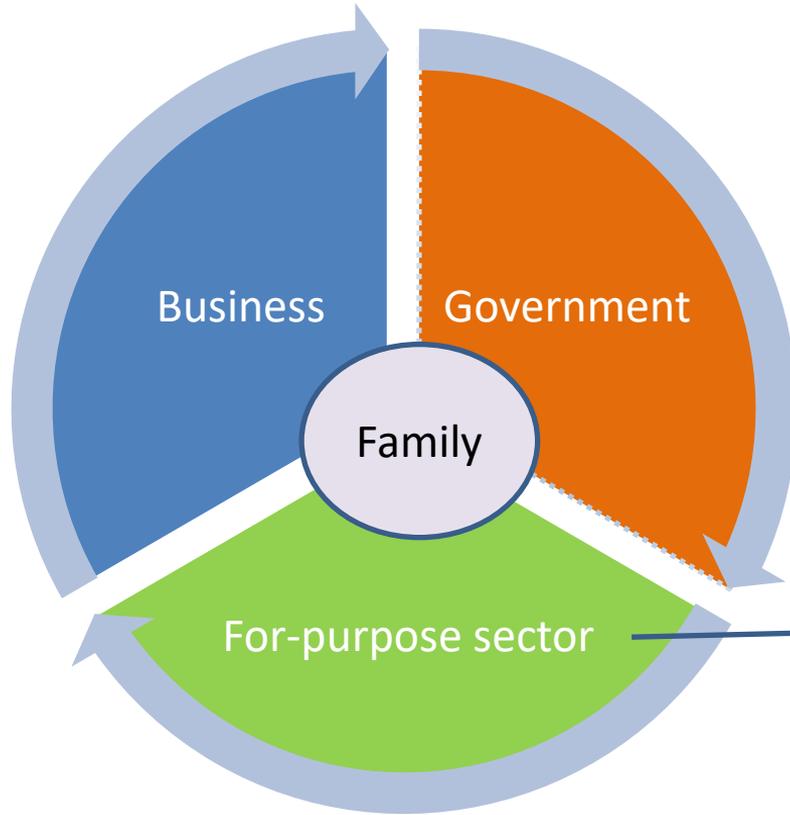
14 LIFE BELOW WATER

15 LIFE ON LAND

16 PEACE, JUSTICE AND STRONG INSTITUTIONS

17 PARTNERSHIPS FOR THE GOALS


SUSTAINABLE DEVELOPMENT GOALS



Charitable sector:
\$65 billion assets
under management

Issue 1:

- Charitable sector not well understood, undervalued and overlooked:
 - Law Commission's review of the Law of Trusts – charitable and purpose trusts review
 - Welfare Advisory Group Kia Piki Ake
 - Productivity Commission: *A fair chance for all*
 - Government work on bolstering social cohesion
 - Tax Working Group Te Awheawhe Tāke
 - Review of the Charities Act

Government contracting

- Eroding the comparative advantage of NFPs:
 - Distract NFPs from their purpose (**mission drift**)
 - Create a **perception** that NFPs are simply an (underfunded) service delivery arm of government
 - **Isomorphism** – incentives to take on the practices and behaviours of government (more centralised, bureaucratic structures – **pale imitations** of government or business)
 - Spread of risk aversion – less able to pursue **innovation** (one of traditional strengths)
 - Subsume voluntary sector within public service agenda – risks damaging important mechanism for change

Government contracting (cont'd)

- Eroding the comparative advantage of NFPs:
 - **Process-driven** - focus on measurable outputs – failure to recognise wider indirect benefits (outcomes/impact)
 - Biased towards larger organisations – loss of **diversity** in the sector
 - Undermine cohesiveness of the sector – foster a **climate of competition** at the expense of socially beneficial collaboration
 - Weaken connections with communities they service – risk **undermining** reach into communities and community participation in decision-making

Government contracting (cont'd)

- Eroding the comparative advantage of NFPs:
 - Erode **independence** in ways that make it difficult to remain responsible and flexible to community needs
 - Diminution of the **advocacy** role of NFPs
 - intrude unnecessarily into the broader operation and activities of NFPs
 - undermine sector's traditional role as a voice for marginalised and disadvantaged
 - **Uncertainty** associated with short-term contracts
 - **Less than full funding** undermining capacity of sector, and ability to attract/retain staff
 - **Undermining viability** of community service providers and their **status** in the community

By contrast:

- Australian Productivity Commission 2010 Report
Contribution of the NFP sector
- NFPs' activities generate **externalities** or spillovers:
 - social inclusion
 - connectedness amongst citizens
 - enhancing societal trust
 - enhancing civil society
- 10 years on - COVID:
 - humanity
 - citizenship
 - community

Tax Working Group Te Awheawhe Tāke

- November 2017 - CGT
- July 2018 meeting:
 - private foundations
 - business income of charities
 - concluded that “**accumulations of profits** were an underlying issue for both”
- No consultation

Tax Working Group Te Awheawhe Tāke

Minutes of July 2018 meeting, p13:

- “The charities section in the interim report should be framed as follows:
- o **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);
 - o **Deregistration** – need to make the rules more robust;
 - o **Private foundations** – **need to require distributions** particularly when the capital has received a tax benefit going in; and
 - o **GST** – should charities be getting GST back? (note: Hinerangi to think about impacts for marae).”

[Emphasis added]

Tax Working Group Te Awheawhe Tāke

Final report, February 2019:

“Matters requiring further work

Charities

51. The Group received many submissions regarding the treatment of **business income** for charities and whether the tax exemption for charitable business income confers an unfair advantage on the trading operations of charities.

52. The Group considers that the underlying issue is more about the extent to which charities are **distributing** or applying the surpluses from their activities for the benefit of their charitable purposes.

...

54. Another area of concern relates to the treatment of **private charitable foundations** and trusts. The rules about these entities appear to be unusually loose. The Government should consider whether to apply a distinction between privately controlled foundations and other charitable organisations, **with a view to removing concessions for privately controlled foundations or trusts that do not have arm’s length governance or distribution policies.”**

2019 Tax policy work programme

Charities

Government **periodically reviews the charitable sector's use of what would otherwise be tax revenue, to verify that intended social outcomes are being achieved.**

This project will include a report to Ministers...to address recommendations of the TWG. It will take into account DIA's...review of the Charities Act....The specific tax policy issues are:

- **accumulation** (will require coordination with DIA);
- **business activity for significant charities** (coordination with DIA);
- **deregistration tax**; and
- **GST and not-for-profits** (NFP)

A second report to Ministers will outline other sector tax matters that could potentially be subject to policy change and sector consultation. For example:

- **imputation credit refundability**;
- tax rules for **mutuals**/the \$1,000 NFP deduction threshold;
- rules for **donating trading stock**;
- removing out-of-date concessions; and
- resetting donee concessions and clarifying the approach to social enterprises

2019 Tax policy work programme

Tax exemptions

The income tax legislation contains various exemptions from income tax, including **income earned by charities and businesses run for charitable purposes**, Local Authorities, Government entities often as public authorities, and Crown-controlled companies (in certain circumstances). In contrast **state enterprises are subject to income tax** and local council-controlled companies are also taxable. The overall treatment of these different entities is not completely consistent. There are an increasing number of requests for income tax exemptions, and a need to adopt **a coherent framework** to consider these requests.

The review will consider **entity tax exemptions with a view to providing more consistency.**

It will consider:

- how different entities fit within the Government's public policy purposes;
- the compliance costs and benefits;
- fiscal implications; and
- the impact of particular exemptions on competitive neutrality with the private sector.

Issue 2:

- Prior to the Charities Act, the definition of charitable purpose was acknowledged to be **very wide** (see 2001 Tax and Charities DD)
- Charities Bill 2004 - IRD's suggestions for narrowing the definition were not accepted:
 - “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 Supreme Court has confirmed that the Charities Act did not alter the definition of “charitable purpose”
- Broad definition **should have survived** the passing of the Charities Act

Key “fault lines”:

- Charities running **businesses**/social enterprises
- Charities **advocating** for their charitable purposes
 - Greenpeace
 - Family First – Supreme Court hearing June 2021
 - Better Public Media Trust
- **Social housing:**
 - *Re Queenstown Lakes Community Housing Trust* [2011] 3 NZLR 502
- Sport
- Economic development:
 - *Canterbury Development Corporation v Charities Commission* [2010] 2 NZLR 707 (HC)
- Public interest journalism
- Many others

Example – social housing

- Queenstown Lakes Community Housing Trust
 - registered 2008
 - deregistered 2010 – “private benefit”
- “Arbitrary”
- Government pays \$6m tax bill
- Parliamentary involvement:
 - specific income tax exemption– s CW 42B
 - difficulty in promulgating regulations – months of work
 - complexity leads to specific deferral of deregistration tax
 - replacement - new schedule 34
- “Booby prize” - exemption little used
- Review of charitable status of all social housing entities – in the middle of a housing crisis!
- Wider public benefits of affordable housing?
- Reapplication 2015 – declined!

Travis Trust	Declined	3 June 2008
Seed Foundation Inc	Declined	9 July 2008
North Shore Riding Club Inc	Declined	9 July 2008
Huia Fishing Club Inc	Declined	24 August 2009
Browns Bay Racquets Club Inc	Declined	24 August 2009
NZ Billiards and Snooker Association Inc	Declined	19 October 2009
Nelson Lakes Gliding Club Inc	Declined	13 January 2010
Team New Zealand Trust and Ltd	Declined	11 February 2010
Greater Auckland Netball Ltd	Declined	15 April 2010
RPC South (The Ratas) Inc	Declined	29 November 2010
Optimist Worlds NZ Ltd	Declined	16 February 2011
Kaikoura Aero Club Inc	Declined	15 July 2011
Auckland Water Polo Academy & Educational Trust	Declined	16 August 2011
Te Kapurangi Charitable Trust	Deregistered	16 August 2011
Waitakere Sailing Development Trust	Deregistered	26 October 2011
Waikato Rowing Performance Centre Inc	Declined	5 April 2012
NZ Snowboardcross	Declined	1 November 2012
Community Health Fitness & Development Charitable Trust	Declined	19 November 2012
Southern Zone of NZRI	Declined	15 April 2012

TWG assumptions:

- 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

And:

- Is the narrow approach actually saving any money?
 - social housing
 - public interest journalism
 - sport
- Stopping a watch to save time?

Assumptions (cont'd):

The Tax Working Group:

“78. recommends that the Government periodically review the charitable sector’s **use of what would otherwise be tax revenue**, to verify that intended social outcomes are being achieved.”

Tax expenditure analysis

- US tax economists – 1960s
- accepted without question by Treasuries around the world
 - like neoliberalism
- but **uncritical acceptance ignores a significant debate:**
 - alternative: proper measure of the tax base
 - as with company deductions, eg interest
 - there is no generally accepted ideal tax base
- is the tax expenditure analysis helpful?
 - leads to a negative narrative about charities:
 - “fiscal cost”
 - “underfunded service delivery arm of government”
 - does not reflect the independence of the charitable sector
 - overlooks the wider picture – social capital
 - Government needs to **invest** in the sector and get out of the way – enabling (eg Canada)

Background – pre-Charities Act 2005

- no requirement or formal process for **registering** charities
 - no complete list
- lack of **reporting** requirements
- therefore very little government **monitoring** of whether charities continued to act in furtherance of their **stated** charitable purposes

Gestation of the original Charities Bill

Original Charities Bill preceded by a number of reports:

- Property Law and Equity Reform Committee **1979** – *Report on the Charitable Trusts Act 1957*
- **“Flat tax” proposal 1987**
- New Zealand Federation of Voluntary Welfare Organisations 1988 – voluntary welfare commission
- **Working Party on Charities and Sporting Bodies 1989**
- Accountability of Charities and Sporting Bodies Working Party 1995
- Committee of Tax Experts, March 1998
- **Government review of the tax treatment of charities:**
 - ***Tax and charities, June 2001***
 - *Taxation of Māori organisations, August 2001*
 - **Working Party on Registration, Reporting and Monitoring of Charities 2002**
 - recommended a Charities Commission, responsible for a registration, reporting and monitoring regime for New Zealand charities

Pre-Charities Act recommendations

Working Party on Registration and Monitoring of Charities
2002

- recommended a Charities Commission, structured as a Crown entity:

“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.”

Charities Bill 2004

- Introduced March 2004
- The concept of a Charities Commission had overwhelming support
- But the Bill itself was heavily criticised:
 - “conceived in Treasury and designed in the Ministry of Economic Development”
- The Bill was virtually rewritten at Select Committee stage in response to hundreds of submissions
- Changes subject to very limited consultation only

Charities Bill 2004

National Party members of the Social Services Select Committee (Report, p20):

“The consultation process was inadequate with the original 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”. [Emphasis added]

Charities Bill 2004

- Remaining stages passed through under urgency on 1 day
- But: promise of **full first principles post-implementation review**
- Charities Commission established 1 July 2005
- Charities register opened February 2007
- Tax provisions came into force on 1 July 2008
 - had to be registered to access the charitable income tax exemptions
- Cap on donee status lifted April 2008

Unintended consequences

- Section 5(3) – ancillary purposes and “for example advocacy”
- Section 18(3) and 10(h)
- Section 20 – ability to backdate registration
- **Section 59 – appeals to High Court**
- Section 3(b) – purposes of the Act

Review of the Charities Act

First-principles review announced by Minister Turia in November 2010:

“I am hopeful that the **first principles review** of the Charities Act 2005 – **which is scheduled for completion by 2015** – will help us all to determine **whether the existing legislation is fit for purpose and reflects the needs and composition of the charitable sector... the regulatory environment the wider non-profit sector operates in is fragmented and confusing. In fact some would call it “antiquated”**....I want to see this review expanded to provide for a **simpler, more cohesive regulatory framework for the wider sector**. I believe the timing is right to do this. **The Law Commission is also reviewing the Charitable Trusts Act 1957 as part of its current review of trust law**. This will have important consequences for many of you here today. Approximately 30% of charities registered with the Commission are also incorporated under the Charitable Trusts Act so any changes in the two reviews that will impact on the charitable sector need to be aligned and undertaken in a consistent manner – **and importantly, have the support of the charitable sector.**”

Disestablishment of Charities Commission

- Announcement 31 May 2011
 - Less than 3 years after the Charities Act had fully come into force
- Crown Entities Reform Bill introduced 29 September 2011
 - Part 3 proposed to disestablish the Charities Commission and transfer its functions to the Department of Internal Affairs
 - Registration decisions to be made by the Charities Registration Board

Result

- Charities Amendment Act (No 2) 2012
 - Controversial proposal ultimately passed by only one vote
- Lack of consultation
- Issues:
 - Unusual decision-making framework
 - Importance of independence but resourcing of the Board
 - Bypassing the Board?
 - Decision-making now effectively housed in a government department
 - Has not saved any cost
 - Issues of transparency and accountability
 - Public trust and confidence in charities is declining

Cancellation of the review

- Change of Minister December 2011
- Review **cancelled** by Minister Goodhew in November 2012
 - absence of consultation
 - reasons given need to be critically examined

Piecemeal amendments

- Section 5(2A) – the promotion of amateur sport:
 - “(2A)The promotion of amateur sport may be a charitable purpose if it is the means by which a charitable purpose referred to in subsection (1) is pursued.”
- Section 18 – 20 day time limit
- Charities Amendment Bill 2016
 - proposal to remove charities’ rights of appeal!
 - fortunately did not proceed, but inconsistency remains

Labour party policy 2017

- consult with the community and voluntary sector on whether the **disestablishment of the Charities Commission** and transfer of functions back to the Department of Internal Affairs has resulted in effectiveness and improved services and information for the sector
- **prioritise the long-promised review of the Charities Act** that National abandoned, beginning with a **first principles review** of the legislation, including examining, **updating and widening rather than narrowing** the definition of charitable purpose
- ensure that community and voluntary organisations can engage in **advocacy** without fear of losing government contracts or their charitable status

Mental Health Commission

- Autonomous Crown entity
- Disestablished
 - Part 2 of the Crown Entities Reform Bill
- Mental Health and Wellbeing Commission Act 2020
 - Independent Crown entity

Progress so far:

- Change of Government September 2017
- Review announced November 2017
- Draft terms of reference circulated to sector group January-February 2018
 - but concerns about the nature, scope and timing of the review
- Terms of reference finalised anyway in May 2018!
- Original intention to have legislation passed in last term of government

Progress

- Core reference group established August 2018
 - note: no report
- timeframe extended:
 - DIA discussion document issued **February 2019**
 - Public consultation **March/April 2019**
 - submissions closed May 2019
 - 363 submissions received
- summary of submissions released December 2019
 - “the charitable sector has spoken”

Progress (cont'd)

- February 2020 – 3 issues:
 - reporting requirements for small charities
 - charities' **business** activities
 - **accumulation** of funds
- May 2020 – review paused for 6 months due to covid
- General election – October 2020

Charities Act review

- New Minister, speech to Charities Services' Annual Meeting December 2020
 - “proceed with care”
- April 2021 – 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
- 3 policy papers, 13 May 2021
 - asking for responses by 24 May (extended to 31 May)
- 3 policy papers, 22 June 2021
 - asking for responses by 12 July (extended to 19 July)

DIA Policy Papers

May-June 2021

Business activities

- ICE Foundation case report 2017:
 - “capable of making a profit”
 - no resources at less than market rates
- *Auckland Medical Aid Trust*
 - destination of funds test
- “Arbitrary”

Business activities

DIA Policy Paper, 13 May 2021:

- **Option 1:** No change (maintain the current settings)
- **Option 2:** Charities Services recommends Board formally approve the approach
- **Option 3:** More information on the charitable business registration requirements and process in plain English

Social enterprise

The Impact Initiative (a partnership between The Ākina Foundation and Government) - Final report: ***A roadmap for impact*** (April 2021):

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

- Minister for the Community and Voluntary Sector, Hon Priyanca Radhakrishnan

Accumulations

DIA Policy Paper, 13 May 2021:

"Problem: a lack of transparency on when and how fundraising charities will further charitable purpose

Because of the annual reporting requirements that apply to all charities, there is **good information** on the amount of funds held by **fundraising charities**. However, it is not clear from this information **why** funds are being accumulated, and **how and when** the funding will be distributed to charitable purpose. This is a problem because it **undermines public trust and confidence in the charitable sector**.

Some submitters in 2019 suggested that the **reserves reporting standards** for Tier 1 to 3 charities provides enough information on accumulated funds. However, **even if a charity is accumulating funds or has funds reserved for a specific purpose, this does not mean it must be reported as reserves**.

We think there is a need to **improve transparency on charitable distribution by fundraising charities**, while continuing to support and encourage them to continue their valued contributions in our communities...

Under the current reporting requirements, there is **no single number across all charities that provides a consistent view of what funds have been accumulated**. This is because **charities can report and calculate funds differently**. For some charities "equity" may be the best representation of accumulation of funds, but for others this may be "reserves" or "accumulated funds". "

Accumulations

DIA Policy Paper, 13 May 2021:

“Questions

1. Do you agree that the public not knowing if, when and how fundraising charities will distribute their funds is a problem?

Why or why not?

2. Do you think this...matters for all types of fundraising charities? For example, should we focus on charities of a certain size/expenditure (eg Tier 1 vs Tier 4); certain types (eg private foundations, businesses); or with certain arrangements (eg not iwi charities that have membership accountability and distribution policies)?”

Accumulations

DIA Policy Paper, 13 May 2021:

- **Option 1:** No change
- **Option 2:** Charities Services develops best practice guidance on maintaining charitable purpose
- **Option 3:** Require fundraising charities to report reasons for accumulated funds in their annual return
- **Option 4:** Require “fundraising charities” to have a **funding distribution plan**
- **Option 5:** Require “fundraising charities” to **distribute 5% of their net assets per annum.**

But:

- New Zealand charities are already subject to the most comprehensive transparency and accountability requirements for charities in the world
 - Tiers 1-3 already required to disclose the nature and purpose of each reserve
 - Tier 4 required to report on resources held
 - consistency of disclosure already required
 - no mention of service performance reporting (required for Tier 1 and 2 from January 2022)
- “questions from the monitoring authority” (2001 DD) – now we have the information
- public awareness campaign about the existence and benefits of the information on the charities register
 - potential for public, including media, scrutiny
- base philanthropy awards on impact rather than size of endowments

Purpose-based governance

- charities are private organisations for public purposes
- governors of charities are best placed to determine how best to further their charitable purposes
- duty to act in the best interests of charitable purposes:
 - accumulations
 - business activities
 - advocacy
 - social investment, etc
- use the tools already available

Other suggestions

- Lack of **imputation credit refundability** for charities is distortionary
 - bias investment away from New Zealand companies
 - information now available
 - no need for anti-streaming rules - all funds of charities must be destined for charitable purposes
 - perceived fiscal costs must be balanced against wider public benefits
- clarify rules regarding **social investment**
 - unlock the balance sheets of philanthropy
- **unclaimed money**
 - “Social bank”
- **first principles review of the Charities Act**

Reporting requirements for small charities

DIA Policy Paper, 13 May 2021:

- **Option 1: Maintain** current reporting requirements established by the XRB (no change)
- **Option 2: Simplify** expression of current reporting requirements set by the XRB through templates and guidance
- **Option 3:** Improve compliance by providing **extra support and education** through Charities Services to better support small charities to meet current reporting requirements
- **Option 4: Exemption** from current financial reporting requirements established by the XRB for a subset of tier 4 charities
- **Option 5: Modify current standard-setting or guidance setting process** for reporting to involve diverse views from interested parties at decision-making stages of the process

Role of officers

DIA Policy Paper, 22 June 2021:

- **Definition of officer: broaden** for trusts?
- **Governance duties: add 4** explicit duties?
- **Disqualifying factors: extend** for serious criminal offences?
- **Disqualifying factors:** raise the minimum qualifying age to 18?

Decision-making

DIA Policy Paper, 22 June 2021:

- **Option 1: No change** (status quo)
- **Option 2: Clarify** current structure and decision-making processes
- **Option 3: increase** requirements under the Act for accountability and transparency
- **Option 4: strengthen the independence of the Charities Registration Board**

Appeals

DIA Policy Paper, 22 June 2021:

- **Option 1: No change** (status quo)
- **Option 2: expanding decisions available for appeal**
- **Option 3: establishing a test case litigation fund**
- **Option 4: appeals heard at the High Court as hearings de novo**
- **Option 5: introduction of a new appeals body** prior to the High Court

Compliance and enforcement powers

DIA Policy Paper, 22 June 2021:

- **Option 1: No change** (status quo)
- **Option 2: increase education and support for compliance**
- **Option 3: amend current powers**
- **Option 4: introduce new powers**

Accountability, not “regulation”

- **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
- “Serious wrongdoing”

General themes

- 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”
- Potential of the charitable sector to help #buildbackbetter overlooked
 - even in the context of work on “social cohesion”
- Tax amendments may progress in advance of the Charities Act review
- Advocacy cases before the Courts – CRB calling for the review to be transferred to the Law Commission

Last word:

- **Charity Law Association of Australia and New Zealand:**
 - Melbourne Conference, 5 August 2021
 - New Zealand “hubs” in Auckland, Wellington and Christchurch
- **New Zealand Law Foundation 2019 International Research Fellowship Te Karahipi Rangahau ā Taiao** – November 2021: www.charitieslawreform.nz
- **LinkedIn group:** NZ Charity Law
- **Facebook** page: Charities Act Review 2019: <https://www.facebook.com/groups/1932023316889903/>

Questions?

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