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Dear Jayne

Review of the Charities Act 2005 – compliance and enforcement powers

1. Further to your email dated 22 June 2021, and to the meeting with the Core Reference Group ("**CRG**") on 28 June 2021, we write to respond to the request for input from targeted stakeholders on initial options in connection with the review of the Charities Act 2005 ("**the Charities Act**"). We appreciate the opportunity for consultation.

2. The sixth paper ("**the paper**") is entitled "We want your views on the compliance and enforcement powers of the [government agency]".

3. The paper states that it seeks input from targeted stakeholders on the powers of the government agency during the registration, investigation and deregistration processes.

Summary

4. By way of summary, we recommend that:

   (i) use of the term "charities regulator" be discontinued, and the charitable sector be formally consulted as to what would be appropriate terminology for the agency responsible for administering the Charities Act;

   (ii) we are concerned that Charities Services is not using many of the powers it currently has under the Charities Act, indicating a disconnect between what the regime is intending to achieve and how Charities Services conceptualizes the regime. While the Charities Act is full of unintended consequences, the original balance in the context of powers was carefully struck, and underpins the conception of the regime as about accountability, rather than regulation;

   (iii) we strongly oppose any increase in Charities Services' powers, particularly in relation to the definition of charitable purpose, until there is clear agreement and a clear mandate as to what constitutes "non-compliance" in this context;

   (iv) we have significant concern that much of the "guidance" material on Charities Services' website is legally incorrect, and recommend strongly that Charities Services be required to issue exposure drafts of any proposed "guidance" for

public consultation before posting them to its website, in a similar manner to what is expected under the Generic Tax Policy Process ("**GTPP**");

(v) we are also concerned that, even though 2/3 of submitters strongly opposed removing the requirement for the Registration Board to be bound by any binding rulings made by Inland Revenue on charitable purpose, this issue is being raised again, ahead of important issues of concern for the charitable sector;

(vi) fundamentally, we are concerned that this paper "assumes" key questions to be decided: progressing issues in advance of clarifying fundamental issues risks significantly exacerbating current difficulties, creating further friction that will increase cost and tension for both the sector and the state, which in turn will only further undermine trust and confidence in Charities Services and by extension, the charitable sector itself.

5. We discuss the above views in more detail below.

6. This letter is organised as follows:

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DISCUSSION

7. The paper contains a number of underlying assumptions which we respectfully suggest need to be critically examined.

Assumptions

Terminology

8. The paper contains an inherent assumption that Charities Services and/or the Board should be referred to as a "regulator".

9. Describing Charities Services and/or the Charities Registration Board as the "charities regulator" sends a signal that it is their role to "regulate" charities. However, charities are already subject to high degrees of regulation, such as by means of Health and Safety legislation, tax legislation, criminal law, anti-money laundering legislation etc. It is by no means clear that charities require further "regulation" by means of the Charities Act.

10. We accept that there is a spectrum of regulation and that the concept of "regulation" can be very wide.[1] However, the fact that Charities Services engages in education and monitoring, and the fact that such activity might fall towards the lower end of a

[1] 2019 discussion document page 12.

spectrum of "regulation", does not mandate use of the term "regulator". To the contrary, use of the term evokes a "command and control" mindset that is unhelpful, encourages Charities Services to over-reach, and ultimately undermines public trust and confidence in charities.

11. Language is important: use of the term "regulator" should be reserved for when an agency is intended to exercise control over the regulated entities, as is the case, for example, in:

    (i) section 15 of the Health and Safety at Work Act 2015, 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 LINZ); and

    (iii) section 156M of the Reserve Bank of New Zealand Act 1989, which specifically defines the Reserve Bank and the Financial Markets Authority as "joint regulators".

12. By contrast, when an agency is not intended to exercise such a level of control, different terms are used, such as, for example, in:

    (i) section 5 of the Anti-Money Laundering and Countering the Financing of Terrorism Act 2009, which specifically uses the term AML/CFT *supervisor*;

    (ii) the Companies Act 1993, the Incorporated Societies Act 1908 and the Charitable Trusts Act 1957, which specifically use the term "Registrar";

    (ii) section 93 of the Land Transport Management Act 2003 which uses the term "Agency".

13. The fact that the Charities Act itself does not use the term "regulator" sends a signal that heavy-handed "regulation" is not the aim of the Charities Act. Use of the term also undermines public trust and confidence in charities by sending a message that charities need to be "controlled", when for the vast bulk of charities, that is not in fact the case.

14. Importantly, there has been no consultation with the charitable sector prior to adopting the "regulator" terminology. Many within the charitable sector have requested a number of times that use of the term be discontinued, but despite these requests, use of the term continues, which in turn contributes to a lack of confidence in Charities Services.

15. Terminology is important. In our view, the term "charities regulator" sends the wrong message. It contributes to a "narrative" dominated by a heavy regulatory focus that risks predetermining a number of important outstanding issues that have yet to be properly addressed.

16. Casting the review of the Charities Act 2005 as a "modernization" exercise similarly falls into this category: "modernization" is an odd description for a relatively recent Act; use of the term appears designed more to lower expectations about what such an attenuated review might achieve compared to the proper first-principles post-implementation review that many within the charitable sector have been calling for for over a decade.

17. In our view, whether the Charities Act is about accountability or "regulation" is a key outstanding issue that needs to be specifically and openly addressed. Many issues flow from how the regime is fundamentally conceived. Use of the term "regulator" has the effect of closing down discussion on important fundamental issues, effectively shepherding charities subliminally, like lemmings, into a regulatory rabbit-

hole created by Charities Services for Charities Services' benefit. More specifically, continuing to use the term "regulator" causes its use to become normalised, ultimately precluding any reasonable analysis of whether the term is appropriate in New Zealand.

18. We recommend that:

    (i) the charitable sector be specifically consulted as to whether Charities Services, the Charities Registration Board, the Charities Commission, or whatever agency is ultimately responsible for administering the Charities Act, should be referred to as the "charities regulator";

    (ii) in the meantime, the term "charities regulator" should not be used, and a more appropriate term used in its place. Suggestions include:

    - charities registrar
    - an eponymous term, such as "Charities Services"
    - supervisor
    - monitoring agency
    - administrator.

The purpose of the legislation

19. Another underlying assumption is inherent in the following comments, made at page 1 of the paper:

> [Charities Services and the Board have] the important functions of registering charities and undertaking enforcement and compliance actions which **underpin public trust** in the charitable sector.
>
> The registration **process** and regulation of charities enhances the accountability of charities to donors, beneficiaries and the public. [Emphasis added]

20. With respect, these statements are misleading.

21. Prior to the Charities Act, charities enjoyed high levels of public trust and confidence: public trust and confidence in charities does not derive from the Charities Act.

22. The charities register provides a forum for accountability designed to maintain public trust and confidence in charities by providing them with the ability to demonstrate to stakeholders that they are worthy of support, through public disclosure of their information on the charities register.

23. The registration *process* is not supporting public trust and confidence in the charitable sector in itself: to the contrary, it appears to be having precisely the opposite effect. Public trust and confidence in charities appears to have declined significantly since the Charities Commission was disestablished and its functions transferred to Charities Services in 2012.

24. It is not correct to say that public trust and confidence in charities is underpinned by the work of Charities Services and the Board. To the contrary, and with respect, to the extent that public trust and confidence in charities is persisting, this appears to be *despite* rather than because of the current arrangements: the heavy-handed way that charities are being "regulated" appears to be causing support for charities to collapse.

Number of declines

25. Another underlying assumption which requires critical examination is inherent in the

following comments, which are also made at page 1 of the paper:

> The majority of **completed** applications are **approved** by Charities Services or the Board, with 10 declines in the last 3 years compared to 3,336 applications approved over the same period. [Emphasis added]

26. With respect, this statement is misleading: the reference to "completed applications" overlooks the fact that Charities Services are encouraging high numbers of charities to withdraw their applications, or to voluntarily deregister.

27. As you may be aware, Charities Services adopts a controversially narrow interpretation of the definition of the definition of charitable purpose: from discussions with Charities Services, the writer understands Charities Services has made a unilateral decision that the definition of charitable purpose should be limited essentially to the relief of poverty or "assuaging need".

28. No consultation was undertaken with the charitable sector prior to making this decision, which appears to have been made without due regard to pre-existing New Zealand case law.

29. Prior to the Charities Act, the definition of charitable purpose was acknowledged to be very wide: in its June 2001 discussion document, *Tax and charities, a government discussion document on taxation issues relating to charities and non-profit bodies,* in June 2001 ("**the 2001 discussion document**"), the Inland Revenue Department ("**IRD**") cited the Court of Appeal decisions in *Commissioner of Inland Revenue v New Zealand Council of Law Reporting* [1981] 1 NZLR 682 (CA) and *Commissioner of Inland Revenue v Medical Council of New Zealand* [1997] 2 NZLR 297 (CA) in support of its proposition that the definition of charitable purpose had "broadened over the years", and expressed concern that the charitable income tax exemptions may have become "too widely available".[2] In the 2001 discussion document, IRD then put forward 3 options for changing the definition of charitable purpose, so that the "fiscal privileges" accorded to charities would be limited to those charitable purposes that "[accord] with society's current objectives":[3]

    (a) Maintaining the current definition, but allowing the Government to "**deem**" a particular entity not to be charitable, so that "decisions about government resources [could] be made in a manner consistent with evolving views on what constitutes a charitable purpose";

    (b) **Replacing** the current definition with a new definition to "move away from existing case law, which may have expanded the boundaries of what is charitable to such an extent that it is now too easy to become a charity"; and

    (c) **Limiting** the definition to the relief of poverty. However, the Government acknowledged that this would exclude a significant number of charities that had community support, and did not recommend this option.

30. These sentiments, and a desire to limit the tax privileges of charity in accordance with a government department's view of "society's current objectives", might have been reflected in the explanatory note of the original Charities Bill. However, it is very important to bear in mind that these sentiments were not reflected in the Charities Bill as originally passed into law. The original Bill was almost completely rewritten at Select Committee stage in response to hundreds of submissions.[4] The substantial changes were then rushed through under urgency without proper

[2] 2001 discussion document, paragraphs 38 and 4.1

[3] 2001 discussion document, chapter 5 and paragraph 4.3.

[4] Charities Bill 2004 (108-2) select committee report at 21; Charities Bill (12 April 2005) 625 NZPD 19944 per Georgina Beyer, Labour.

consultation. Opposition National Party Select Committee members expressed concern at the lack of consultation on such substantial changes:[5]

> 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. [Emphasis added]

31. However, despite this, the Select Committee made it clear that the definition of charitable purpose was not intended to be changed:[6]

> 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.

32. The Courts have since confirmed that the Charities did not alter the definition of charitable purpose.[7] Accordingly, IRD's suggestions in the 2001 discussion document for changing the definition were not accepted by Parliament: the definition of charitable purpose that IRD acknowledged was very broad should have survived the passing of the Charities Act.

33. It is therefore very surprising that Charities Services has chosen to take such a narrow interpretation of the definition of charitable purpose. Key areas of difficulty include charities engaging in **advocacy** work in furtherance of their charitable purposes, **economic development**, **social housing**, **sport**, charities running start-up **businesses** to raise funds for their charitable purposes, **member organisations**, charities that further their charitable purposes by helping **individuals**, and many others.

34. The approach appears to have been taken on the assumption that the purpose of the Charities Act regime is to limit the ability of good charities to access the charities register in order to "reduce fiscal costs". To the extent that these sentiments reflect a "tax expenditure analysis", it should be noted that whether such an analysis is even appropriate requires critical examination, as discussed in our letter responding to the "accumulations" paper. In addition, the Charities Act at no point provides Charities Services with any fiscal mandate. Managing the fisc is the responsibility of the Inland Revenue Department, which is specifically not responsible for administering the Charities Act. Potential "fiscal consequences" are not relevant to the interpretation of the definition of charitable purpose, as noted by McKenzie J:[8]

> 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.

35. It is also not clear that restricting the concept of charity is in fact reducing fiscal

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[5] Charities Bill 2004 (108-2) select committee report at 20.

[6] Charities Bill 108-2 (Select Committee report) page 3.

[7] *Re Greenpeace of New Zealand Incorporated* [2015] 3 NZLR 72 (SC) at [16]-[17] and *Foundation for Anti-Aging Research v Charities Registration Board* [2015] NZCA 449 (21 September 2015) at [10].

[8] *Re Queenstown Lakes Community Housing Trust* [2011] 3 NZLR 502 (HC) at [78]. See also the June 2021 submissions of the Charity Law Association of Australia and New Zealand to the Supreme Court: http://www.charitylawassociation.org.au/submission-familyfirst

costs in any event. The New Zealand government is currently spending millions of dollars in areas where charities are being prevented from doing their work, including social housing, sport, and public interest journalism. Stopping good charities from accessing the charities register on the basis of perceived fiscal consequences may not actually be saving any money, and may in fact be more like "stopping a watch to save time".

36. Nevertheless, in light of the controversy associated with its very narrow interpretation of the definition of charitable purpose, Charities Services appears to have adopted a new practice of encouraging charities that do not fit within its narrow paradigm to *withdraw* their application, or to voluntarily deregister. The effect of this practice is to avoid having to refer a matter to the Board for decision, resulting in effectively no transparency or accountability of decision-making in this area.

37. We discuss this point in more detail below (see also the article *Significant issues with review of the Charities Act,* which can be found here: https://legalwiseseminars.com.au/nz/insights/significant-issues-with-review-of-charities-act-2005/).

Deregistered charities

38. In the period since the charities register commenced in February 2007 to August 2018, approximately **9,315** charities were deregistered.[9] This figure constitutes more than 1/3 of the 27,921 charities that are currently registered in New Zealand.

39. Of these, **4,774,** or approximately half, were deregistered for failure to file annual returns. In the context of an information and disclosure regime such as the Charities Act, it is obviously important that charities comply with this key requirement.

40. However, of the remaining 4,541 charities that had been deregistered, only **6**, or 0.0006%, had been deregistered for "serious wrongdoing", arguably the key rationale for the Charities Act regime.

41. As noted by the Select Committee considering the original Charities Bill, the discretionary power to deregister a charity was intended to be used "used only in the most extreme circumstances".[10] As the Minister of Consumer Affairs noted at the Committee stage of the Bill:[11]

> 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 [Emphasis added]

Why are so many charities voluntarily deregistering?

42. Of these 9,315 charities deregistered between February 2007 to August 2018, many of the remaining **4,535** charities had deregistered voluntarily: at that stage, voluntary deregistrations were accounting for approximately half of all deregistrations.[12] However, while some charities obviously voluntarily deregister because they have ceased operating, or merged with another charity, for most charities no reason whatsoever has been given for their voluntary deregistration: it

[9] This figure has been calculated from an "open data" search of the charities register as at August 2018.

[10] Charities Bill 108-2, Select Committee report: https://www.parliament.nz/resource/en-NZ/47DBSCH_SCR2973_1/d8233a6a17a3faa906bd28c0b1571b3894ab53de p8.

[11] https://www.parliament.nz/en/pb/hansard-debates/rhr/document/47HansD_20050413_00001881/charities-bill-second-reading-instruction-to-committee

[12] Although this number appears to be increasing: from Charities Services' 2022 annual review, 73% (498/684) of all deregistrations are voluntary: https://www.charities.govt.nz/assets/Annual-Review-Report-2020.pdf, p11.

is not clear why so many charities are voluntarily seeking removal from the register.

43. In that context, there is a notable lack of transparency regarding the number of charities that have been deregistered for reasons of jurisprudential interpretation. As at 2014, Inland Revenue Department calculations indicated that at least 35 charities had been deregistered on the basis of narrow jurisprudential interpretations of the definition of charitable purpose.[13] By August 2018, Charities Services' website[14] revealed there had been at least 20 more. In addition, the total number of charities that have voluntarily deregistered for this reason is unknown.

44. These numbers are significant: such charities will not necessarily have done anything "wrong", but will have been deregistered simply because Charities Services has changed its mind about how the definition of charitable purpose should be interpreted.

45. Deregistration will not only result in denial of all the privileges of registered charitable status, but may also result in historical tax consequences, perhaps dating back to the commencement of the organisation on the basis that the charity's purposes have "never" been charitable. Deregistration will also require a charity to divest itself of all its assets within 12 months or pay tax on the balance.[15] These impacts can be particularly severe, disproportionate and unfair, highlighting the critical importance of getting decision-making right in this context.

46. New Zealand appears to be out of step with other jurisdictions in this regard: other jurisdictions do not appear to spend so much resource deregistering good charities on the basis of narrow jurisprudential interpretations. The New Zealand position is particularly notable given that all New Zealand charities had to proactively seek registration in the first place, in the transition to the original regime (unlike, for example, Australia, where charities simply "rolled over"). Why are so many New Zealand charities being deregistered?

47. The concern is that many charities are voluntarily deregistering to avoid having a formal deregistration decision published on Charities Services' website.[16]

Is Charities Services encouraging voluntary deregistrations?

48. As discussed above, controversy over deregistration decisions appears to have resulted in Charities Services taking a new approach: if a charity might not fit within Charities Services' narrow paradigm, Charities Services now appears to be actively encouraging the charity to deregister voluntarily. A voluntary deregistration avoids Charities Services having to refer the matter to the Charities Registration Board for decision, effectively bypassing what was intended to be an independent check on Charities Services' decisions. This might explain the comment at page 5 of the "Appeals" paper that only a few decisions of the Board are being published every year (and we note there has been a noticeable drop in the number of Board decisions being published since Charities Services adopted its new approach). Charities Services' approach also results in a significant reduction in transparency, as there will be no written decision published on Charities Services' website.

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[13] See IRD issues paper, *Clarifying the tax consequences for deregistered charities,* 2013, paragraphs 4.14 to 4.15: https://taxpolicy.ird.govt.nz/consultation/2013/clarifying-tax-consequences-deregistered-charities. "Non-charitable purposes", "did not meet registration requirements", and "did not produce evidence of charitable purposes" all appear to be different ways of saying the charity concerned did not meet Charities Services' narrow paradigm.

[14] https://www.charities.govt.nz/charities-in-new-zealand/legal-decisions/, last accessed 29 June 2021.

[15] Section HR 12 of the Income Tax Act 2007.

[16] See https://www.charities.govt.nz/charities-in-new-zealand/legal-decisions/view-the-decisions?start=220

49. Importantly, this approach does not *solve* the problem of over-deregistration – it simply *moves* it.

50. In its December 2018 newsletter, Charities Services made the following comments:[17]

> Why do charities voluntarily deregister?
>
> About 500 charities voluntarily deregistered in the last financial year, **following a fairly consistent trend over the last five years**. There are a number of reasons why this is the case:
>
> - The charity is no longer operating (68%)
> - **The charity decides that it does not want to be a registered charity but will still continue to operate (13%)**
> - The charity decides that it can do greater work collaboratively and merges with another registered charity (8%)
> - **Other reasons include merging with a non-charity, consolidating, no longer meets requirements, and 'other' (11%).**
>
> The majority of these charities were very small organisations: 82% of these charities had $10,000 or less in assets or income, and 55% had no assets at all."
>
> [Emphasis added]

51. It can be assumed that the most common reason a charity would be found to "no longer meet requirements" would relate to a change in jurisprudential interpretation of the definition of charitable purpose. This reason most likely also explains why a charity would no longer "want to be a registered charity", or would "merge with a non-charity". It also most likely explains the "other" category. On that basis, up to ¼ of voluntary deregistrations (13% + 11% = 24%) may have been caused by unduly-narrow interpretations of the definition of charitable purpose.

52. Charities Services states that these statistics follow a "fairly consistent trend over the last 5 years". It is not clear how this conclusion has been reached, as there has been a consistent lack of information about the reasons for voluntary deregistrations in the past. However, assuming a similar percentage for previous years, this means that as many as 1,135[18] voluntary deregistrations may have occurred because of controversially narrow interpretations of the definition of charitable purpose. Adding to this number the 55 that appear to have been formally deregistered by the Board for this reason, as discussed above, means that, as at August 2018, there may have been as many as **1,200 deregistrations** due to a change in interpretation of the definition of charitable purpose. This figure represents approximately 26%, or 1 in 4, of the total number of charities deregistered for reasons other than failure to file an annual return. It also represents 5%, or 1 in 20, of the total number of registered charities.

53. Three years later, this figure is undoubtedly higher now. Charities Services' most recent annual review reveals that of 684 charities deregistered during the 2020 financial year, 498 or **73%** deregistered voluntarily.[19] Charities Services does not provide any analysis in its annual review document of why so many charities are seeking voluntary deregistration.

54. More research is needed to shed light on why so many charities are deregistering or being deregistered in New Zealand.

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[17] http://createsend.com/t/j-F46252590CA0FD362540EF23F30FEDED.

[18] This figure is calculated as ¼ of the 4,541 charities deregistered for reasons other than failure to file an annual return.

[19] https://www.charities.govt.nz/assets/Annual-Review-Report-2020.pdf, page 11.

Is Charities Services encouraging withdrawal of registration applications?

55. The impact of a narrow jurisprudential approach to the definition of charitable purpose is not limited to deregistration decisions. A similar issue arises in the context of applications for registration. Charities Services' website reveals a large number of charities that have been formally declined registration for jurisprudential reasons.[20] As with deregistrations, controversy over decline decisions appears to have resulted in a new approach: if a charity might not fit within Charities Services' narrow paradigm, Charities Services now appears to be actively encouraging the charity to withdraw its application. The writer understands that, as at January 2019, approximately 1/3 of all applications for charitable registration were being withdrawn.

56. Charities Services' most recent annual review reveals that of 1,335 applications received during the 2020 financial year, 171 or **13%** were withdrawn.[21] While an improvement on 33%, this number is still disturbingly high, particularly given the amount of work a charity will necessarily undergo before even making an application for registration.

57. A withdrawal of an application avoids Charities Services having to refer the matter to the Charities Registration Board for decision, thereby bypassing what was intended to be an independent check on Charities Services' decisions. Again, this might explain the comment at page 5 of the "Appeals" paper that only a few decisions of the Board are being published every year. It also similarly results in a reduction in transparency, as there will be no written decision published on Charities Services' website.

58. More research is needed to shed light on why so many charities are withdrawing their applications for registration.

59. As the above discussion highlights, the comment at page 1 of the paper referring only to the number of *completed* applications that have been approved is misleading, as it overlooks the significant number of applications that are not progressing through to completion. The underlying concern relates to legal and factual correctness of decision-making, and Charities Services' apparent reluctance to allow its decision-making to be subject to proper scrutiny.

The role of Charities Services

60. At page 1 of the paper, the following comment is made:

> Charities Services' **primary focus** is on providing **support and education** to charities to help them comply with their obligations under the Act and **remain registered**. They also have a range of investigation, compliance and enforcement functions which they can use following a breach of the Act or serious wrongdoing. [Emphasis added]

61. With respect, this statement is misleading. While "serious wrongdoing" is the key underlying rationale for the Charities Act regime, and is where Charities Services *should* be focusing its efforts, we have not seen any evidence that Charities Services' *primary* focus is on providing support and education to charities to help them comply with their obligations under the Act and remain registered. To the contrary, our overwhelming impression is that Charities Services' primary focus is on imposing a very narrow interpretation of the definition of charitable purpose on the charitable sector, with no apparent legal mandate, as discussed above, preventing many

[20] https://www.charities.govt.nz/charities-in-new-zealand/legal-decisions/view-the-decisions?start=220, last accessed 29 June 2021.

[21] https://www.charities.govt.nz/assets/Annual-Review-Report-2020.pdf, page 11.

worthy charities from accessing the charities register unduly and unfairly. Fundamentally, Charities Services' narrow approach is causing a loss of confidence in Charities Services. However, we are also very concerned about the impact it is having on the charitable sector, on public trust and confidence in charities, on New Zealand's culture of volunteering, and on New Zealand's social capital and social cohesion. We respectfully suggest that failing to acknowledge and address this key issue as part of the review of the Charities Act risks undermining the review process altogether.

62. At page 2 of the paper, the following comment is made:

> The fundamental [government agency] functions are **sound** and **well supported** and therefore significant changes to powers are out of scope. [Emphasis added]

63. With respect, the fundamental functions of Charities Services and the Board are neither sound nor well supported. To the contrary, the fundamental functions and decision-making of Charities Services are key issues that need to be addressed.

64. At page 2 of the paper, the following comment is made:

> **Charitable purpose reviews** help to determine if a charity continues to further a charitable purpose and remains qualified for registration. [Emphasis added]

65. With respect, this statement is entirely misleading. "Charitable purpose reviews" are a euphemism for the mechanism by which Charities Services imposes its unduly narrow interpretation of the definition of charitable purpose on the charitable sector, following which it threatens deregistration on many worthy charities that have in no way breached any obligation owed under the Charities Act or any other legislation. Charities Services' approach causes a high degree of friction, that merely serves to increase tension and costs for both the sector and the state, which in turn undermines confidence in Charities Services and by extension, the charitable sector itself. This is a key issue that needs to be addressed.

66. At page 2 of the paper, the following comment is made:

> …sending warnings when a charity, or person in connection with a charity, **has breached the Act** or engaged in serious wrongdoing. The warning outlines actions that **must** be taken by the charity. Formal letters of expectation can also be provided to outline longer-term expectations (letters of expectation are not prescribed for in the Act). [Emphasis added]

67. With respect, this statement is also entirely misleading, for similar reasons. By way of example, we have acted for a charity that received a warning notice from Charities Services threatening it with deregistration because it was advocating to its local regional council regarding water. This activity was carried out in good faith in furtherance of the charity's charitable purposes: it constitutes neither serious wrongdoing nor a breach of the Act, yet it resulted in Charities Services issuing a warning notice. Charities Services' heavy-handed approach is having an enormous chilling effect on the sector and raises concerning questions regarding the rule of law.

68. We are concerned that there should be no suggestion of extending Charities Services' powers until there is clear agreement as to what those powers are to be used for.

Problem definition

69. At page 2 of the paper, the following comment is made:

> Charities Services have advised of a number of operational challenges they face in taking compliance actions… Generally submitters wanted Charities Services to focus their efforts on education and support for charities to help them comply, over any

> heavy regulatory steps. But many submitters agreed that there were some gaps in [Charities Services'] toolkit that should be addressed.

70. The paper does not discuss whether or to what extent the "operational challenges" faced by Charities Services, in taking "compliance" actions, relate to the fact that its narrow conception of what constitutes "non-compliance" in relation to the definition of charitable purpose is highly controversial and is not accepted.

71. At page 3, the paper states that a range of potential options have been developed that could address "the problem". In contrast to the other papers, the paper does not ask the reader whether they agree with the problem statement. We assume this is because no "problem" has been articulated: we are not clear what exactly is the problem that the paper seeks to address.

Option 1 – status quo

72. This option would maintain the current state.

Question 1 – what are the risks of doing nothing and continuing with the status quo?

73. We do not see any risks of doing nothing and continuing with the status quo in the context of the issues raised in the paper. There are many key issues that need to be addressed as part of the long-awaited review of the Charities Act, but increasing Charities Services' regulatory powers is not one of them.

74. By contrast, we see enormous risk in increasing Charities Services' powers when there is no agreement as to what those powers are to be used for.

Option 2 – increase education and support for compliance

75. Option 2 proposes that additional guidance and tools are developed focused on "supporting charities to develop policies and procedures that help reduce the risk of non-compliance, by the charity and their officers". This option also proposes to increase the use of current proactive compliance powers by Charities Services, including the ability to undertake "proactive monitoring and charitable purpose reviews to confirm if charities are continuing to meet their obligations".

76. We **strongly oppose** this option.

77. There should be no increase in Charities Services' powers, particularly in relation to the definition of charitable purpose, until there is clear agreement as to what constitutes "non-compliance" in this context. This is already a key area of difficulty, as discussed above, and increasing Charities Services' powers in advance of agreement as to what those powers are to be used for will only make the problem worse.

78. In that context, we have significant concern that much of the "guidance" material on Charities Services' website is legally incorrect. We recommend that Charities Services be required to issue exposure drafts of any proposed "guidance" for public consultation before posting them to its website, in a similar manner to what is expected under the Generic Tax Policy Process ("**GTPP**"), as discussed in our letter on decision-making and appeals.

79. To the contrary, we recommend clarifying purpose-based governance, as discussed in our response to the "officers" paper, which would involve Charities Services using its powers to ask how any particular activity was being carried out in good faith in the best interests of a charity's stated charitable purposes. If the charity can demonstrate that, there is no difficulty, and no need for the state to become involved.

Question 2 – have you received support from Charities Services to help you comply with your obligations under the Act? What additional support would be useful?

80. We have received instructions from many charities who have received "support" from Charities Services to help them comply with their obligations under the Act.

81. In our experience, "support" from Charities Services to help them "comply with obligations" is a euphemism for Charities Services managing a charity off the register, ideally by getting them to voluntarily deregister or withdraw their application, because they do not fit within with Charities Services' unduly narrow paradigm of the definition of charitable purpose.

82. The legal authority for Charities Services' approach in this respect is highly questionable; the approach is destructive of the charitable sector, causing trust and confidence in the charitable sector, and in Charities Services, to be undermined. We are very concerned at the impact this approach is having on wider New Zealand society, social cohesion and social capital.

83. We do not support Charities Services being encouraged to provide any "additional support" in this regard. To the contrary, what is urgently required is discussion, clarification and agreement regarding the purpose of the Charities Act regime and what in fact constitutes compliance with it. We are concerned that progressing issues in advance of such fundamental clarification risks "putting the cart before the horse" and further exacerbating current difficulties.

84. Fundamentally, there is little to be gained from a review that "assumes" key questions to be decided.

Question 3 – would you support Charities Services increasing resource in practice monitoring and/or charitable purpose reviews. Why/why not?

85. Absolutely not, for the reasons discussed above. The key underlying rationale for the Charities Act regime is "serious wrongdoing" and removing "bad charities" from the register so that the public can have trust and confidence in those that remain: serious wrongdoing is where Charities Services should be focusing its efforts, not on preventing worthy charities from accessing the charities register based on controversially narrow jurisprudential interpretations of the definition of charitable purpose.

Option 3 – amend new powers

86. Option 3 proposes to amend some current powers to "improve the compliance regime". Option 3 does not intend to change the role or scope of Charities Services' compliance approach.

Proposed new intermediate power

Warning power

87. This option proposes broadening the purpose of the current warning power (section 54 of the Act) to enable its use to set longer-term expectations alongside immediate actions. The paper notes that, currently, letters of expectations are used to fill this gap, but "these are not prescribed for in the Act".

88. We do not support this extension because it would exacerbate current difficulties. Despite the emphasis placed by the Charities Act on "serious wrongoing", Charities Services is using its powers to prevent worthy charities from accessing the charities register based on controversially narrow jurisprudential interpretations of the definition of charitable purpose. Such an approach represents regulatory over-reach

and is one of the key issues causing trust and confidence in Charities Services to be undermined. Before there is any suggestion of increasing Charities Services' regulatory powers, it is very important that there is discussion, clarification and agreement as to what those powers are to be used for, and proper checks and balances in place to prevent powers from being used incorrectly.

89. We do not support this option.

Serious wrongdoing

90. This option proposes clarifying the definition of serious wrongdoing to remove wording that is difficult to interpret, including the terminology of an act that is "oppressive" or "improperly discriminatory".

91. The definition of serious wrongdoing is the key principle underlying the Charities Act regime. We would support looking closely at what should constitute "serious wrongdoing", provided this was carried out with full consultation.

92. It would also be helpful to clarify that acting in breach of the legal duty to act in good faith in the best interests of a charity's stated charitable purposes constitutes an "unlawful" use of funds and therefore falls within the definition of serious wrongdoing. This would support a focus on purpose-based governance.

93. However, we strongly oppose "tinkering" with the definition of serious wrongdoing, a key plank of the Charities Act regime, while so many fundamental issues remain unresolved.

Publication

94. This option proposes enabling Charities Services to publish investigation outcomes where notifying non-compliance may be in the public interest. The paper states that this "could replace the Registration Board's ability to publish warning notices under section 55 (which to date has not been used)".

95. Our understanding is that Charities Services already has the power to publish investigation outcomes, and in fact has often done so, in contrast to the position in Australia where such publication is specifically precluded by secrecy provisions. It is also not clear why a power to publish investigation outcomes "where notifying non-compliance may be in the public interest" would be in *replacement* for a power to publish warning notices.

96. It is concerning that the Board's ability to publish warning notices under section 55 to date has not been used and we note that there is no explanation as to why that is the fact. This is one of a number of powers under the Charities Act that have not been used, which indicates a clear disconnect between what the regime is intending to achieve and how Charities Services conceptualizes the regime. While the Charities Act is full of unintended consequences, having been the subject of many amendments that have been rushed through under urgency without proper consultation, the original balance in the context of powers was carefully struck, and underpins the conception of the regime as about accountability, rather than regulation.

97. We strongly oppose amending these powers: before any powers are devolved from the Board to Charities Services, it is very important to have clarification as to what Charities Services' powers are to be used for, and in particular what constitutes "non-compliance" in the context of the definition of charitable purpose.

98. We are concerned that progressing issues in advance of such fundamental clarification risks "putting the cart before the horse" and further exacerbating current

difficulties.

99. Fundamentally, there is little to be gained from a review that "assumes" key questions to be decided.

Penalties

Failure to file

100. This option proposes amending the penalty for failure to file to "make it more useful as a disincentive". Options include:

    (i) introducing a graded penalty regime for failure to file (with cost based on tier/size of charity);

    (ii) removing the current penalty and replacing it with a penalty at time of reregistration, where an entity has previously been deregistered for failure to file;

    (iii) considering additional incentives to support compliance with annual return requirements, such as introducing a "flag" that would be attached to a charity on the public register who are non-compliant.

101. It is concerning that the current administrative penalty of $200 for failure to file to date has not been used. This is one of a number of powers under the Charities Act that have not been used, indicating a clear disconnect between what the regime is intending to achieve and how Charities Services conceptualizes the regime. While the Charities Act is full of unintended consequences, having been the subject of many amendments that have been rushed through under urgency without proper consultation, the original balance in the context of powers was carefully struck, and underpins the conception of the regime as about accountability, rather than regulation. Before any change is made to the current settings, it would be important to understand why Charities Services are not using their current powers. How can it be said that the $200 penalty is not "useful as a disincentive" when it has never been used?

102. The requirement to file annual information is a key facet of an information and disclosure regime such as the Charities Act. In our view, what is needed is an education campaign about the benefits to charities of ensuring accurate and up to date information on the register: rather than seeing it as a regulatory burden, it can be seen as an important opportunity and mechanism to help charities further their charitable purposes.

103. While a "flag" on the charities register may be helpful, we strongly oppose altering the current balance of powers set out in the Charities Act in advance of clarifying fundamental issues such as the purpose of the Charities Act regime (and in particular, whether it is about accountability or "regulation").

104. Fundamentally, there is little to be gained from a review that "assumes" key questions to be decided.

Failure to comply with standards

105. This option proposes removing or amending offences and penalties associated with failure to comply with standards and failure to have returns audited (which are currently not used).

106. It is concerning that these powers are not currently used (particularly given Charities Services' power to issue exemptions under section 43). The extent to which powers under the Charities Act are not being used gives rise to significant concern about a

fundamental disconnect between what the regime is intending to achieve and how Charities Services appears to conceptualize the regime.

107. Complying with financial reporting and auditing standards is fundamentally important to the integrity of the Charities Act regime. While the Charities Act is full of unintended consequences, having been the subject of many amendments that have been rushed through under urgency without proper consultation, the original balance in the context of powers was carefully struck, and underpins the conception of the regime as about accountability, rather than regulation. Before any change is made to the current settings, it would be important to understand why Charities Services are not using their current powers.

108. This is particularly the case because the sector has been calling for the purpose of the regime to be specifically considered as part of the review, but has been told that this issue has been taken off the table.

109. Proceeding to make the changes Charities Services is requesting would effectively predetermine the issue of the true underlying purpose of the regime without allowing the issue to be properly looked at. This would be one-sided and short-sighted. It would also be putting the cart before the horse.

110. Fundamental issues need to be clarified and agreed, rather than assumed, before any consequential changes are made.

Option 4 – new powers

111. Option 4 builds off option 3 with some proposed new powers to address "remaining gaps in Charities Services' ability to respond to non-compliance". Option 4 also does not intend to change the role or scope of Charities Services' compliance approach.

Proposed new registration powers

False, misleading, serious wrongdoing

112. This option proposes to enable the decline of registration applications when an applicant has provided **false or misleading information or is engaged in serious wrongdoing**. This power would rely on enabling investigation powers (section 50) to apply during the application/reapplication phase.

113. With respect, section 18(3) of the Charities Act already requires Charities Services to have regard to activities when considering an application for registration. If a charity was engaged in activities such as fraud or other serious wrongdoing, Charities Services already has the power not to register them. If fraud is indicated, Charities Services should refer the matter to the police who have wide powers of investigation.

114. If the serious wrongdoing comes to light subsequently, Charities Services already has powers under the Charities Act to deal with it, for example deregistration for serious wrongdoing under section 32(1)(e).

115. We strongly oppose extending powers in this way, particularly when the original balance of powers was so carefully struck. We are concerned that the "gaps" Charities Services is identifying may not in fact be gaps at all, and may to the contrary reflect a fundamental misconception of the regime. At the very least, they demonstrate that key fundamental issues need to be addressed and clarified rather than simply assumed. It is important that Charities Services focus on using the powers it already has rather than trying to shift the axis of the regime in advance of a proper consideration as to whether that axis might in fact be in the right place.

Evidence of having addressed outstanding issues

116. This option proposes to enable the decline of registration applications when an applicant who was previously deregistered has not sufficiently demonstrated they have addressed outstanding issues which led to their deregistration. Applicants would be required to provide evidence of how they have addressed issues when reapplying.

117. With respect, section 18(3) already requires Charities Services to have regard to activities when considering an application for registration. If a charity had been deregistered, and the reason for the deregistration has not been fixed, how could it be eligible for reregistration? If a charity is not eligible for registration, the entity is not able to be registered under section 19(4).

118. Our concern is that entities are being deregistered on the basis of unduly narrow jurisprudential interpretations of the definition of charitable purpose, as discussed above. In such cases, the affected charity may not be to address the "non-compliance" because the alleged "non-compliance" is merely regulatory over-reach.

119. We strongly oppose extending powers in this way, in advance of clarifying what in fact constitutes "non-compliance" under the Charities Act.

Proposed new intermediate power

Suspension

120. This option proposes to introduce a power to suspend an officer for a specified period to protect charitable assets during an investigation.

121. We **strongly oppose** Charities Services being given such a serious extension to its powers, particularly when there is no clear evidential basis as to why such a power might be needed, and particularly given the underlying disconnect as to the purpose of the regime and therefore the basis on which such a power would be exercised, as discussed above.

122. If there is a clear evidential basis demonstrating a need for a power to suspend an officer, exercise of the power should require an application to a Court: that is, the power should be exercised judicially, to ensure proper checks and balances are in place, and to protect against undue sequestration of charitable assets by the state.

Deregistration, disqualification, prosecutions

Banning orders

123. This option proposes to introduce a power to disqualify an officer, without having to first deregister the charity. It would also enable disqualification to occur after a charity has been deregistered where wrongdoing of an officer was identified after the fact.

124. Clauses 161-166 of the Incorporated Societies Bill 15-1 require any power to disqualify an officer of an incorporated society to be made by a court, on the application of the Registrar, the Official Assignee, the liquidator, or a member or creditor of the society. The grounds on which such an order can be made are strictly proscribed.

125. Any similar power to disqualify an officer under the Charities Act should be similarly proscribed and must similarly require an application to a Court: any power to disqualify officers must be exercised judicially, to ensure proper checks and balances are in place.

126. Section 31(4)(b), which empowers the Board to make an order disqualifying an officer of a deregistered charity from being an officer of a registered charity for up

to 5 years, should be similarly amended to require an application to the Court.

127. We are also concerned that an ability to disqualify an officer after a charity has been deregistered appears vindictive. Further information is needed to establish a clear basis as to why such a power might be needed. In the absence of such clear evidence, we would oppose such a power.

128. As part of the research we are undertaking, we have prepared a draft bill that would amend and restate the Charities Act.[22] In the draft bill, we articulated a power to disqualify officers in the following terms:

Banning orders

152 Court 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 charitable entity and whether convicted or not –

(i) persistently failed to comply with this Act or, if the registered charitable entity 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 charitable entity 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 charitable entity; or

(c) A has become of unsound mind.

(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 charitable entity:

(b) being concerned or taking part in the management of a registered charitable entity 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.

153 Applications for orders

(1) A person intending to apply for an order under section 152 (*Court 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 152 may be made by –

(a) Te Kairēhita Aroha, the Official Assignee, or the liquidator of the registered charitable entity; or

[22] See: https://www.charitieslawreform.nz/research

(b) any person who is concerned with the registered charitable entity, including a responsible person, member, creditor, the Attorney-General, or other person.

(3) Subsection (4) applies on the hearing of –

(a) an application for an order under section 152 by Te Kairēhita Aroha, the Official Assignee, or the liquidator; or

(b) an application for leave under section 152 by a person against whom an order has been made on the application of Te Kairēhita Aroha, the Official Assignee, or the liquidator.

(4) Te Kairēhita Aroha, the Official Assignee, or the liquidator (as the case may be) –

(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); Exposure Draft Incorporated Societies Bill clause 125

154 Banning order contravention

A person who acts in contravention of an order made under section 153 (*Applications for orders)* 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.

Exposure Draft Incorporated Societies Bill clause 119

Penalties

129. This option proposes to introduce a new penalty for providing false or misleading information as part of a registration application, to support the proposed new decline power above.

130. As discussed above, it is not clear that there is any need to extend powers in this way, particularly when the original balance of powers was so carefully struck. Providing false or misleading information is already a criminal offence. Given that Charities Services already has power to deal with an entity providing false or misleading information through non-registration, it is not clear to us why a further penalty is needed.

131. In addition, if a registration was able to be obtained on the basis of false or misleading information, it seems unlikely it would be able to be sustained given the comprehensive transparency and accountability requirements already imposed on New Zealand's charities.

132. We are concerned that such a penalty has the potential to be used vindictively. Further information is needed to establish a clear basis as to why such a power might be needed. In the absence of such clear evidence, we would oppose such a power.

Question 4 – are warnings generally viewed as an effective tool? Why/why not?

133. Warnings can be a very effective tool, but they must be used properly. Charities understand that their continued survival depends on continued support of their stakeholders, which in turn depends on their reputation. The ability to publish a warning under section 55 would be a deterrent of nuclear proportions, which makes it all the more curious why the power provided in section 55 has never been used.

134. If there was genuine serious wrongdoing occurring, and refusal to comply, publication of a warning notice under section 55 would be entirely appropriate. However, the difficulty is that charities are receiving warning notices when they have done nothing wrong. Publication in such a case would be entirely inappropriate.

135. The fact that Charities Services are not using the powers they already have under

the Charities Act underscores significantly the importance of clarifying, transparently and with proper consultation, what does in fact constitute "non-compliance" with the Charities Act, particularly in connection with Charities Services' narrow interpretation of the definition of charitable purpose.

Question 5 – what option or approach to addressing failure to file would best support compliance?

136. The approach that would best support failure to file would be an education campaign explaining the benefits to charities of the information and accountability regime provided by the Charities Act and of ensuring accurate and up to date information on the register: rather than seeing it as a regulatory burden, it can be seen as an important opportunity and mechanism to help them further their charitable purposes. In addition, a public awareness-raising campaign of the existence of the charities register, and the importance and value of charities generally, would also help materially.

137. Clarification that the Charities Act regime is about accountability, rather than regulation, would also be helpful and may shed light on why Charities Services has never used the mechanism provided by the Act and regulations (namely the administrative penalty).

138. Otherwise, charities that have not filed for 2 consecutive years should continue to be removed from the register. Failure to file does constitute non-compliance and undermines the integrity of the regime. Registration is voluntary and charities are not required to be registered in order to operate and solicit funds from the public. We are concerned that if a charity cannot comply with this fundamental requirement, it is not appropriate for them to be managing other people's money. As such, they should not be able to take advantage of the benefits of registration.

139. Other options to support this approach might include suspending registration until the outstanding returns have been filed. A "flag" on the register that the charity has been suspended might also assist.

Question 6 – what could be the unintended consequences of additional decline powers?

140. The key risk associated with additional decline powers is encouraging regulatory over-reach, and a "command and control" mindset, which in turn risks frustrating, rather than facilitating, charitable work, and undermining trust and confidence in both Charities Services and the charitable sector.

141. Charities Services' narrow approach to the interpretation of the definition of charitable purpose already causes considerable difficulty, tension and unnecessary cost: it effectively forces charities to wait until a person has fallen off a cliff before being able to help them.

142. The current heavy-handed regulatory approach is already causing support for charities to decline, in direct contradiction to the stated purpose of the Act to promote public trust and confidence in charities. This trend needs to be reversed, not exacerbated.

143. The best approach would be to take the opportunity presented by the review of the Charities Act to address fundamental issues, such as what the Charities Act regime is trying to achieve. Reaching agreement in these respects would free up considerable charitable and taxpayer resources to more productive endeavours and would be considerably more cost-effective in the long run, when all costs are taken into account. It would also honour Labour Party Policy for the 2017 election, send a

message that the charitable sector is valued, and would be received with widespread approbation.

Question 7 – apart from powers to suspend or remove officers, what steps could Charities Services take to work with charities and protect charitable assets before deregistration action is taken?

144. It is not clear to us that further powers on Charities Services to "protect" charitable assets are needed.

145. As discussed above, we strongly oppose powers to suspend or remove officers in the absence of a clear evidential basis as to why such powers are needed. At the very least they must be exercised judicially.

146. In the absence of a clear evidential basis as to why even further powers are needed, we strongly oppose further extension.

147. If assets are being directed otherwise than in accordance with a charity's rules, Charities Services already has power to take action. Although purpose-based governance already applies, making purpose-based governance clearer would assist with this.

148. Clarifying the purpose of the Charities Act regime would also assist with promoting public trust and confidence in charities and Charities Services.

149. In addition, if a charity is deregistered, section HR 12 of the Income Tax Act requires the charity to divest its assets to charitable purposes or pay tax on the balance.

150. We are not clear that there is a "problem" that requires fixing in this regard, and are concerned that it may be merely another instance of attempted regulatory over-reach stemming from a misconception of the underlying purpose of the regime.

Other issues

Binding rulings

151. At page 6, the paper states that officials are considering the implications of removing the requirement for the Registration Board to be bound by any binding rulings made by Inland Revenue on charitable purpose.

152. We are surprised that this issue is being raised again when 2/3 of submitters opposed it.

153. Binding rulings can cost many thousands of dollars to obtain. If a charity has gone to the trouble and expense of obtaining a binding ruling from Inland Revenue, it would be highly unfair to allow it to be rendered nugatory by allowing Charities Services and the Board to ignore it. Inland Revenue does not issue binding rulings lightly.

154. This issue again highlights a key underlying issue: the extent to which Charities Services and the Board are misinterpreting the definition of charitable purpose. The fact that Charities Services' and the Board's interpretations are inconsistent with even those of the Inland Revenue Department, who unlike Charities Services and the Board does in fact have a fiscal mandate, should give rise to considerable concern.

155. A better approach would be for the legislation to give better guidance to Charities Services as to how the law is required to be interpreted, for example, by clarifying section 18(3) as discussed above, and setting out the test for whether a purpose is charitable in the legislation (as Australia has done).

156. In the absence of the clarification of fundamental underlying issues, such as the definition of charitable purpose and the purpose of the Charities Act regime, we **strongly oppose** removing the requirement for the Board to be bound by binding rulings made by Inland Revenue on charitable purpose.

157. We are also concerned that this issue is being fast-tracked with no clear mandate, ahead of issues of fundamental concern for the charitable sector.

Backdating registration

158. At page 6, the paper also states that officials are considering if the Registration Board should be able to backdate a new registration to before their application was received.

159. The issue of backdating was clarified by the National Council of Women litigation. Further clarification is not needed.

160. To the contrary, as Mark von Dadelszen has pointed out, making this change would simply be an invitation to the lazy to defer seeking registration: there is no good reason to encourage or allow this.

Charities register

161. At page 6, the paper also states that officials are considering amendments to the Act "to reflect recent changes to usability of the charities register, and to enable information collected on forms to be used for all required purposes under the Income Tax Act 2007".

162. We are not aware of the detail of the changes referred to or the amendments being considered. We understand from discussion at the CRG meeting that further information will be forthcoming in these regards. We look forward to provision of that information.

Notification penalty

163. The paper also states that officials are considering amending the administrative penalty for failure to notify Charities Services of changes so that the requirement and associated penalty is to notify changes at the time of annual return filing (rather than within 3 months).

164. With respect, such a change would undermine the integrity of the register, as it would mean important information would always be up to a year out of date.

165. In our experience, the duty to notify changes under section 40 of the Charities Act is widely observed in the breach. Again, this factor highlights the key underlying issue regarding the conception of the purpose of the Charities Act regime: if the regime is conceived as an accountability regime, the need to keep the information on the charities register up to date becomes critical. It is concerning to us that Charities Services have never used the administrative penalty provided by the Act to respond to this.

166. We also note that clauses 33, 47, and 109 of the Incorporated Societies Bill 15-1 require notification of changes in officers and amendments to the constitution of incorporated societies to be notified to the Registrar of Incorporated Societies within 20 working days. Many incorporated societies are also registered charities. It would not make sense for an incorporated society that is a registered charity to have to notify changes to the Registrar within 20 working days, and to Charities Services up to a year later.

167. The Charities Act should require changes to be notified in a similar timeframe of

20 working days. The current 3 month timeframe is contributing to the requirement to notify being overlooked. Importantly, Charities Services should be held accountable for ensuring the duty to notify is complied with.

Other issues

168. We also recommend that the words "for example advocacy" are deleted from section 5 of the Charities Act. These words were inserted into the legislation by the Select Committee considering the original Charities Bill in order to reassure charities that they were able to advocate in furtherance of their charitable purposes. Instead, these words have been the source of considerable unintended consequences, and appear to have been use instead as a weapon against charities to precisely the opposite of the intended effect. It is not clear why the above issues have been prioritised ahead of an issue as important as this.

169. We also recommend that the Charities Act make it clear that all registered charities must have 3 "officers".

Conclusion

170. We would appreciate the opportunity to discuss the above issues with you before final proposals are formulated.

Yours sincerely

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