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Dear Jayne

Review of the Charities Act 2005 – decision-making and appeals

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 fifth paper ("**the paper**") is entitled "We want your views on the structure of the [government agency], decision-making and the appeals process".

3. The paper states that it seeks input from targeted stakeholders on options to improve the end-to-end registration decision-making process. Specifically, it seeks views to improve: the transparency, accountability and independence of the government agency and its decision-making; and the appeals process.

Summary

4. By way of summary, we recommend the following way forward:

   (i) The legislation should clarify that *all* decisions made under the Charities Act are able to be appealed substantively (that is, not limited to judicial review or appeals to the Ombudsmen). Charities Services should be required to identify any specific decisions which should not be subject to appeal and demonstrate why that should be the case. If that onus can be satisfied, those decisions might be specifically listed in the legislation as excluded from the ambit of appeal, following the approach taken by the Incorporated Societies Bill 15-1. This approach would have the advantage of ensuring that no decisions are "missed".

   (ii) Charities should have the option of appealing to the High Court, or the Taxation Review Authority, at the charity's choice (following which, 2 further appeals may follow, to the Court of Appeal and Supreme Court in the former case, or to the High Court and Court of Appeal in the latter). This approach would reinstate the pre-Charities Act position.

(iii) The legislation should make it clear that appeals are to be conducted as a hearing de novo, if any party so requests. This approach would also reinstate the pre-Charities Act position. It is also, in our view, the single most important change to the Charities Act that needs to be made.

(iv) While the gateway to registration continues to turn on the definition of charitable purpose, which in turn resides in the common law, it is important that appeals are able to be made to a judicial body. The option of a non-judicial "Appeals Panel" should not be proceeded with.

(v) Appeals under other Acts, such as the Charitable Trusts Act 1957, the Incorporated Societies Act, and the Trusts Act 2019, should also have the option of being heard by the Charities Tribunal (whether it be the Taxation Review Authority or some other tribunal), allowing scope for judicial specialization in this area to develop. Further appointments to the Authority may need to be made.

(vi) Section 18(3) requires regard to be had to activities but does not clarify what regard is to be had to activities *for*: the legislation needs to make clear that activities do not need to be "charitable". We recommend that the legislation make a "focus on purpose" and purpose-based governance clear.

(vii) Use of the term "regulator" is unhelpful and needs to be discontinued.

(viii) More research and transparency is needed as to why so many charities are voluntarily deregistering and withdrawing their applications for registration.

(ix) If Charities Services is to remain, it needs to be seen as a temporary option pending the Labour Government honouring its manifesto commitment for the 2017 election to consult with the community and voluntary sector on whether the disestablishment of the Charities Commission and transfer of its functions to the Department of Internal Affairs has resulted in effectiveness and improved services and information for the sector. Ultimately, an independent decision-making body, such as a Charities Commission, needs to be reinstated. Once that is done, the Board (and Charities Services) should be disbanded.

(x) In the meantime, the Board should be provided with its own secretariat, and formally required to seek its own independent legal advice. It should be made clear that Charities Services cannot provide legal advice to the "independent" Board without waiving legal professional privilege in respect of that advice.

(xi) While Charities Services remains, it should be required to prepare an annual report assessing progress against a statement of intent as if it were a Crown entity.

(xii) The Sector Group should be formalized as an advisory body to the government agency and the Minister.

(xiii) Charities Services should 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.

(xiv) A test litigation case fund should be established, together with a "test case litigation panel", to ensure issues of importance to the community are funded. Charities Services should not be the decision-maker as to who should receive funding.

(xv) While there seems no harm in providing applicants with the ability to "speak" to the Registration Board on decline and deregistration decisions, it is important

that such a change is not seen as a substitute for the above changes: an ability to "speak" to the Board would be no substitute for an oral hearing of evidence, and would not in and of itself meet the requirement for natural justice. It would also not address the issue of the overly-close relationship between the Board and Charities Services.

5. We set out below our reasons for the above views.

6. This letter is organised as follows:

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THE REGISTRATION PROCESS

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

Assumptions

Number of declines

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

> 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]

9. With respect, this statement is misleading: the reference to "completed applications" overlooks the significant number of applications that are not progressing through to completion. As a result, this statement sidesteps a key underlying concern, which is the legal and factual correctness of decision-making, and the lack of meaningful accountability in this respect.

10. We expand on this view below.

11. 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".

12. 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.

13. 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".[1] 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":[2]

    (a) Maintaining the current definition, but allowing the Government to "**deem**" a particular entity not to be charitable, so that "decisions about government

[1] 2001 discussion document, paragraphs 38 and 4.1

[2] 2001 discussion document, chapter 5 and paragraph 4.3.

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.

14. 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.[3] The substantial changes were then rushed through under urgency without proper consultation. Opposition National Party Select Committee members expressed concern at the lack of consultation on such substantial changes:[4]

> 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]

15. Despite this, the Select Committee made it clear that the definition of charitable purpose was not intended to be changed:[5]

> 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.

16. The Courts have since confirmed that the Charities did not alter the definition of charitable purpose.[6] 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.

17. 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.

18. The approach appears to have been taken on the assumption that the purpose of the

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

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

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

[6] *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].

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:[7]

> 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.

19. It is also not clear that restricting the concept of charity is reducing fiscal 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".

20. 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.

21. 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

22. In the period since the charities register commenced in February 2007 to August 2018, approximately **9,315** charities were deregistered.[8] This figure constitutes more than 1/3 of the 27,921 charities that are currently registered in New Zealand.

23. 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.

24. 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.

25. 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

[7] *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

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

most extreme circumstances".[9] As the Minister of Consumer Affairs noted at the Committee stage of the Bill:[10]

> 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?

26. 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.[11] 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 is not clear why so many charities are voluntarily seeking removal from the register.

27. 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.[12] By August 2018, Charities Services' website[13] revealed there had been at least 20 more. In addition, the total number of charities that have voluntarily deregistered for this reason is unknown.

28. 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.

29. 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.[14] These impacts can be particularly severe, disproportionate and unfair, highlighting the critical importance of getting decision-making right in this context.

30. 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

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

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

[11] 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.

[12] 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.

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

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

Zealand charities being deregistered?

31. The concern is that many charities are voluntarily deregistering to avoid having a formal deregistration decision published on Charities Services' website.[15]

Is Charities Services encouraging voluntary deregistrations?

32. 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.

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

34. In its December 2018 newsletter, Charities Services made the following comments:[16]

> 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]

35. 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.

36. 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

[15] See https://www.charities.govt.nz/charities-in-new-zealand/legal-decisions/view-the-decisions?start=220
[16] http://createsend.com/t/j-F46252590CA0FD362540EF23F30FEDED.

that as many as 1,135[17] 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.

37. 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.[18] Charities Services does not provide any analysis in its annual review document of why so many charities are seeking voluntary deregistration.

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

Is Charities Services encouraging withdrawal of registration applications?

39. 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.[19] 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.

40. Charities Services' most recent annual review reveals that of 1,335 applications received during the 2020 financial year, 171 or **13%** were withdrawn.[20] 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.

41. 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.

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

43. For the above reasons, we consider the comment that the majority of *completed* applications have been approved is misleading: it minimizes the key underlying

[17] This figure is calculated as ¼ of the 4,541 charities deregistered for reasons other than failure to file an annual return.
[18] https://www.charities.govt.nz/assets/Annual-Review-Report-2020.pdf, page 11.
[19] https://www.charities.govt.nz/charities-in-new-zealand/legal-decisions/view-the-decisions?start=220, last accessed 29 June 2021.
[20] https://www.charities.govt.nz/assets/Annual-Review-Report-2020.pdf, page 11.

issues of concern, such as legal and factual correctness of Charities Services' decision-making, and lack of meaningful accountability.

Accountability of Charities Services

44. Another assumption that requires critical examination is reflected in the following comments at page 2 of the paper:

> A range of accountability and transparency measures are in place to provide oversight of the [government agency], their decisions and use of powers. These include:
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> - requirements for Charities Services to meet annually with the sector and consult on forms or changes
> - proactive publication of annual review reports by Charities Services
> - the Charities Sector Group, proactively established for consultation and engagement purposes
> - independent reviews of a random sample of regulator decisions as part of the Department of Internal Affairs' annual performance reporting
> - ombudsmen and Official Information Act provisions
> - the objection process for deregistration decisions
> - the appeals process.

45. With respect, these statements require critical examination.

Annual meetings

46. Section 12 of the Charities Act requires Charities Services to hold at least 1 meeting in each year with representatives of charitable entities, who must be given a reasonable opportunity to ask questions concerning and make submissions on the operation of the Charities Act.

47. While helpful, the annual meetings provide very limited accountability as most charities are reluctant to "lift their head above the parapet", particularly in such a public forum.

48. Many issues causing difficulty turn on fine points of legal interpretation that are also not particularly well-suited to exploration in this forum.

Forms

49. Section 72A(6) of the Charities Act requires Charities Services, in developing a form or a requirement to be prescribed, to "consult persons or organisations that the chief executive considers to be representative of the interests of charitable entities".

50. There are 2 key difficulties with this provision as an "accountability and transparency measure".

51. First, prior to the introduction of section 72A by Statutes Amendment Bill (No 2) 271-2 (which ultimately became the Charities Amendment Act 2012), these matters were required to be prescribed by regulations (section 73(1)(a) and (b)). There was no meaningful consultation with the charitable sector, and no publicly-available commentary, of which we are aware, explaining why the protection of a regulation-making power was removed in these regards.

52. At the time section 72A was inserted to the legislation, the Charities Act was administered by the Charities Commission, an autonomous Crown entity. It is not clear to us that the powers conferred by section 72A to the Charities Commission are appropriately conferred now that the Charities Act is administered by a government department.

53. In addition, section 72A requires Charities Services to consult with persons *it* considers to be representative of the interests of charitable entities. With respect, a requirement to consult with a self-selected group of people, whose comments may or may not be taken into account at Charities Services' discretion, undermine meaningful accountability.

54. There is also a risk that a specific requirement to consult in section 72A may be interpreted as a direction not to consult in other situations, such as before posting "guidance" to Charities Services' website.

55. It is also not clear to us that a mere requirement to consult demonstrates sufficient transparency or accountability: we recommend that full consideration be given to reinstating the previous regulation-making power, in the interests of ensuring that proper checks and balances are in place.

Annual reviews

56. As a Crown entity, the Charities Commission was required to prepare the accountability documents required by the Crown Entities Act 2004. By contrast, there is no *requirement* on Charities Services to prepare a statement of intent, or to prepare an annual report assessing progress against it. Accordingly, while Charities Services is now proactively publishing annual review reports, they provide little if any accountability, because they only include the information that Charities Services *chooses* to include.

57. The annual review documents are very glossy documents that apparently seek to present Charities Services in the best light possible. However, they also risk deflecting attention away from issues of real concern: the annual review documents cannot be considered to provide "oversight" or meaningful transparency or accountability.

Sector Group

58. While the establishment of the Sector Group is a good development, as with section 72A, it provides very little meaningful accountability because it constitutes a hand-selected group of people, whose tenure exists solely at Charities Services' pleasure, and whose comments may or may not be taken into account at Charities Services' discretion.

59. The ease with which Charities Services may simply ignore the feedback of the Sector Group was evidenced, for example, by the Group's recent request to be consulted in Charities Services' updated "guidance" about advocacy following the recent High Court decision in *Greenpeace.*[21] Our request to be consulted was met with an agreement that 5 Sector Group representatives would meet with the Board. Prior to doing so, the Sector Group collectively and democratically wrote to the Board setting out the unanimous views of the Group. As can be seen from the material which was ultimately posted to Charities Services' website, the Sector Group's feedback was ignored by Charities Services.[22]

60. There is also a difficulty with Charities Services stating that it defers to the Board as the entity having ultimate responsibility for decision-making on registration issues: the fact that the Board is advised by Charities Services undermines its ability to provide an independent check on Charities Services' decision-making. Effectively,

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[21] *Greenpeace of New Zealand Incorporated v Charities Registration Board* [2020] NZHC 1999 (10 August 2020), Mallon J.

[22] https://charities.govt.nz/ready-to-register/need-to-know-to-register/charitable-purpose/advocacy-for-causes/.

the current arrangements result in Charities Services being in a position of "all care and no responsibility".

61. 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**"). The GTPP is a process "designed to ensure better, more effective tax policy development through early consideration of all aspects – and likely impacts – of proposals, and increased opportunities for public consultation".[23] IRD is required to follow the GTPP (although there are some concerns about the extent to which it is currently being followed).

62. In addition, other jurisdictions prepare drafts of guidance for formal public consultation before they are finalized to the website.

63. People involved with charities have a tendency to be over-compliant. The absence of a formal process requiring Charities Services to consult meaningfully with the charitable sector before issuing "guidance" results in Charities Services effectively making law by posting "guidance" on its website, without any requirement for democratic input or scrutiny, or any meaningful ability for the charitable sector to challenge guidance that is not legally correct.

64. Another difficulty with the Sector Group relates to conflicts of interest, a problem specifically identified by the 2002 Working Party which strongly recommended a Charities Commission in preference to a government department:[24]

> The disadvantages [of a semi-autonomous body housed within DIA] include a possible perception of conflict of interest given its funding role and the approval and monitoring role it would be required to undertake. These are problems with not having a Commission and are not exclusive to the DIA.

65. These comments appear to have been remarkably prescient: the Department of Internal Affairs provides funding to a number of members of the Sector Group, which appears to severely restrict their ability to provide robust feedback for fear of losing funding. Again, this undermines the extent to which the Sector Group can provide meaningful transparency and accountability of Charities Services.

Reviews

66. With respect, we do not have confidence that the "independent reviews" of a random sample of decisions provide any meaningful accountability. There is no visibility as to how the "random samples" are chosen or whether they include, for example, any of the 1200 controversial deregistration decisions or controversial withdrawals mentioned above.

67. We are concerned that these reviews are used more to deflect attention than to address any real concerns.

Ombudsmen and Official Information Act

68. While welcome, we are also concerned about the extent to which the Ombudsmen and Official Information Act 1982 ("**OIA**") provisions are able to provide meaningful scrutiny.

69. From our experience with requesting information of Charities Services under the OIA,

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[23] https://www.lawsociety.org.nz/news/legal-news/concerns-about-tax-policy-development/.

[24] Report by the Working Party on the Registration, Reporting and Monitoring of Charities, February 2002, p 11.

it is the practice of Charities Services to withhold key information.

70. We would like to draw your attention to the following example:

71. On 21 May 2020, the Board issued a decision declining to register the Nelson Grey Power Association Incorporated.[25] We note in passing that, according to Charities Services' website, this was the only decision the Board made in 2020.

72. At paragraph 6 of the Nelson Grey Power decision, the following comments are made:

> **Following the three-step process of Ellis J in FAAR and FRSSH**, the Board has considered:
>
> - whether the Society's stated purposes are **capable of being** charitable
> - whether the Society's activities are consistent with or supportive of **a** charitable purpose
> - if the Society's **activities** are found not to be charitable, whether they can be said to be merely **ancillary** to an identified charitable purpose. [Emphasis added]

73. The reference to "FAAR and FRSSH" is a reference to the High Court decision of Ellis J in *Re The Foundation for Anti-Aging Research and The Foundation for Reversal of Solid State Hypothermia* (2016) 23 PRNZ 726 (HC) ("***FAAR***").

74. The Board and Charities Services have applied the above test in every publicly-available decision made since the FAAR case was handed down in 2016.[26] In doing so, they consistently state that they are applying the test set down by the High Court in FAAR.

75. However, the test set down by the High Court in FAAR is different to the test being applied by Charities Services and the Board.

76. We set out below the relevant comments of Ellis J in full for reference as this issue highlights acutely, in our view, some key areas of current difficulty that need to be addressed by the review of the Charities Act. Her Honour's comments were made in the context of the potential uncertainty created by the Supreme Court in *Greenpeace of New Zealand Inc* [2015] 1 NZLR 169 (SC) ("***Greenpeace SC***") at [14] that purposes may be "inferred from activities", seemingly without regard to the charity's constituting document. Her Honour's response was as follows:

> [83] As noted earlier, s 18(3) of the [Charities] Act expressly requires the chief executive to consider an applicant's activities when arriving at a view on whether or not it should be registered.
>
> [84] Prior to the enactment of the [Charities] Act, the relevance of an entity's activities when determining charitable status was summarised in this way in [*IPENZ* at 572]:
>
> > It is clearly established that when one is considering the purpose or purposes for which an institution is established **one must look first to its founding documents**. In *[Accountants],* Richardson J said:
> >
> > > The ascertainment of the purposes for which a statutory body is established is essentially a matter of **construction of the relevant constituting legislation**.
> > >
> > > **The same applies to bodies established by non-legislative means**. In *Royal College of Surgeons v National Provincial Bank Ltd…*Lord Normand said that the decision in that case depended primarily on the **construction of the constituent**

[25] https://www.charities.govt.nz/charities-in-new-zealand/legal-decisions/view-the-decisions/view/nelson-grey-power-association-incorporated.

[26] See for example: Football Otago Youth Development Academy Trust Decision No: 2019-4, 12 September 2019, paragraph 5; Scoop Foundation for Public Interest Journalism, Decision No: 2019-3, 15 July 2019, paragraph 3; Shooters Lottery Incorporated, Decision No: 2019-2, 14 June 2019, paragraph 5; Better Public Media Trust, Decision No: 2019-1, 24 April 2019, paragraph 5; TLF Charitable Trust, Decision No: 2018-4, 9 July 2018, paragraph 4; Greenpeace of New Zealand Incorporated, Decision No: 2018-1, 21 March 2018, paragraph 10; Digital Democracy Limited, Decision No: 2017-2, 11 October 2017, paragraph 3; and Family First New Zealand, Decision No: 2017-1, 21 August 2017, paragraph 5.

> **documents** of the Royal College and particularly the charter granted by King George III in 1800.
>
> To the same effect is the decision of the Court of Appeal in *Molloy v Commissioner of Inland Revenue…,* but with the important additional proposition that where the constituting documents do not indicate with clarity the main or dominant objects of the body, reference may be made not only to the objects expressed therein but also to the activities of the body in question…In this respect reference can also be made to the speech of Lord Reid in the *Royal College of Surgeons* case…where His Lordship said:
>
> > "**If there were anything to show that the affairs of the college had been so conducted that the advancement of the interests of its members had become one of its main purposes**, it may be that this would disentitle the college from pleading that it is a charity, but I do not find anything of that kind."
>
> His Lordship was therefore very clearly of the view that the actual operations of the body concerned were material and the focus of the Court is not inevitably confined to the founding documents.
>
> [85] **Thus an entity's activities were regarded as relevant only to the extent that the entity's constituent documents were unclear as to its purpose or where there was evidence of activities by an entity that displaced or belied its stated charitable purpose**.
>
> [86] **It seems unlikely that the enactment of s 18(3) was intended materially to change this position. In *Re Greenpeace* the Supreme Court said (at [14]) no more than that s 18(3) "makes clear" that the purposes of an entity "may be inferred from the activities it undertakes". That seems wholly consistent with the dicta I have set out above. It is certainly not an indication that the Act was intended to wreak some fundamental change in approach or a move away from the fundamental "purposes" nature of the charities inquiry**.
>
> [87] As I think *Re Greenpeace* itself makes clear the critical question is whether an applicant's activities are **sufficiently connected** with the relevant charitable purpose, not whether the activity itself is charitable [referring to *Greenpeace SC* at [74] and also *Family First 1* at [24]]. That was the whole basis for the Court's finding in that case that political activities may or may not be charitable, depending on their purpose. Apart from anything else, whether or not a particular activity is, itself, charitable can, in many cases, only be determined by reference to its purpose.
>
> [88] In the present case, therefore, my own view is that the proper analysis would have been to begin by asking **whether FAAR's stated purposes are charitable or not**. If they are clearly not, then that is the end of the inquiry. If they are (or if the stated purposes are unclear), then the chief executive or the Board needed to consider what information it has about FAAR's present and proposed activities (and to consider requesting such information). Then the question is whether those activities are **consistent with or supportive of the identified charitable purpose**. If they are, then there is no difficulty. If they are not, then it would need to be determined whether the activities can be said to be merely ancillary to the identified charitable purpose.
>
> [89] That analysis does not, of course, fit with what happened here. The Board found that the identified activity was FAAR's principal purpose and that that activity/purpose was not charitable. In my view both the approach, and these conclusions, were wrong. [Emphasis added]

77. In other words, the first step in Ellis J's reasoning was to ask whether the **stated purposes are charitable** or not. By contrast, Charities Services and the Board interpolate an additional qualification that the stated purposes be "**capable** of being charitable", rather than being actually "charitable" as Ellis J held. The additional qualification of capability rather than actuality imports inherent subjectivity and complexity into the analysis.

78. The second step in Ellis J's reasoning is then to ask whether the activities are consistent with or supportive of those **stated** charitable purposes: if they are then there is no difficulty. Charities Services and the Board rework this test to require activities to be supportive of "a" charitable purpose, rather than the stated charitable purposes as Ellis J held. This reworking of the test results in a micro-analysis of each individual activity to see if it can be retro-fitted back to any charitable purpose,

apparently without connection to the constituting document.

79. The net result is that Charities Services and the Board are applying an entirely different test to the one set down by the High Court, one that is inherently more subjective and leads to materially different results.

80. In July 2019, we wrote to Charities Services drawing the issue to their attention and requesting that they apply Ellis J's test in its terms.

81. On 12 August 2019, Charities Services responded in the following terms:

> The Board discussed your letter at its meeting on 2 August 2019 and carefully considered the matters you raised. **The Board held that its current approach is correct and will continue to be applied by the Board and Charities Services under delegation of the Board**.
>
> Organisations that disagree with the Board's current approach can make submissions during the application process or appeal decisions made by the Board. All submissions are carefully considered by the Board. [Emphasis added]

82. On 16 August 2019, we responded to Charities Services in the following terms:

> Thank you for your letter of 12 August 2019…
>
> In your letter, you state that the Board considered our letter at its meeting on 2 August 2019, and decided that its current approach to the FAAR decision "is correct and will continue to be applied by the Board and Charities Services under delegation of the Board".
>
> However, your letter does not elaborate on **why** the Board considers its current approach to be correct, or **why the Board has decided not to use the wording used by Ellis J in her decision**.
>
> We are aware, as you point out in your letter, that organisations that disagree with the Board's current approach can make submissions during the application process or appeal decisions made by the Board. However, we are also aware that this results in a piecemeal, "divide and conquer" approach that depends on the resources of an individual charity. With respect, if the Board and Charities Services are applying an incorrect approach, that approach is being applied to all charities, and all charities have an interest in ensuring that the law is being correctly applied. [Emphasis added]

83. In order to understand why the Board and Charities Services had decided to use different wording from the wording used by Ellis J in the FAAR decision, we requested the following information under the OIA:

> All information held by the Department of Internal Affairs and/or the Charities Registration Board ("**the Board**") relating to the consideration of the issue of how the 3-step test set out by Ellis J in *Re The Foundation for Anti-Aging Research and The Foundation for Reversal of Solid State Hypothermia* (2016) 23 PRNZ 726 ("**the Test**") should be applied, including, but not limited to:
>
> > (i) all papers relating to the Test that were prepared for the Board for consideration at its meeting held on or about 2 August 2019, together with all minutes relating to consideration of that issue at that meeting, and any other correspondence, memos or other documentation in relation to the consideration of that issue at that meeting;
> >
> > (ii) all documentation, analysis, correspondence, memos, emails, reports (including draft reports), memoranda, papers, research materials, materials from any internet searches, notes or other information, and recollections of oral conversations or meetings, regarding how the Test would be applied by Charities Services and the Board.

84. On 12 September 2019, we received some material in response to our request, including a memorandum from Charities Services to the Board dated 31 July 2019 ("**the memorandum**").

85. In the memorandum, Charities Services recommended to the Board that it continue to apply the current approach. The paragraphs in the memorandum that would appear to contain the relevant analysis (paragraphs 10, 11 and most of 12) were

withheld under section 9(2)(h) of the OIA (which relates to maintaining legal professional privilege).

86. Paragraph 6(c) and (d) of the memorandum, which outlined two sets of documents said to be attached to the memorandum, were similarly withheld under section 9(2)(h).

87. However, the memorandum did contain the following comments at paragraphs 20-22:

> 20. The Board's approach **could be rewritten in future decision papers to more closely follow the language of Justice Ellis** in FAAR/FRSSH, however, **this would unlikely amend the practical application of the test or alleviate Ms Barker's concerns**.
>
> …
>
> 22. **Charities Services considers re-wording** is **not necessary** and that the re-wording would also **imply a stricter** approach than the Board (and Charities Services under delegation) currently applies. The Board's current approach allows it to take a **lenient** view. We consider that this approach is **consistent with FAAR/FRSSH** and also with Justice Dobson's comments that the scheme of charities registration is to "facilitate, and not frustrate" the management of charitable organisations. For example:
>
> - Including the word "capable of being charitable" allows the Board to consider situations where the **stated purposes are unclear and likely to be charitable**. If the Board takes the working "stated purposes are charitable" then if there is any **uncertainty** it may not accept the wording.
> - Including the word "a" rather than "the" stated purposes allows the board to be **more lenient**. **It is not uncommon for rules drafted by non-lawyers to not neatly fit with the actual charitable purposes being advanced by an organisation**. However, both the stated purpose and actual purposes being advanced are charitable so the entity is registered. An example is an organisation may express its stated purposes as "advancing education about the Christian faith" and the purpose is expressed as an educational purpose, however the entity is in fact a Church and would be assessed under the head of charity "advancement of religion". Requiring organisations to amend their stated purposes in these circumstances would frustrate charities and provide undue burden on them. [Emphasis added, footnote omitted]

88. With respect, this reasoning is astonishing.

89. It is simply not correct to say that if the stated purposes are unclear then if there is any uncertainty the Board may not accept the wording. If the stated purposes are unclear, then regard must be had to activities to determine what the purposes are, as discussed by Ellis J in FAAR in the extract set out above. This is precisely why Charities Services are required to "have regard to" activities under section 18(3) of the Charities Act.

90. Having ascertained the stated purposes, the relevant questions then are whether those stated purposes are charitable, and whether activities are being carried out in furtherance of those stated charitable purposes. In this regard, we refer to the discussion in *Unresolved issues in New Zealand charities law* New Zealand Law Journal March 2021 at 49 and *Unresolved issues in New Zealand charities law - the charitable purpose test* New Zealand Law Journal May 2021 at 130.

91. People involved with charities have a legal duty to comply with the rules, including the purposes, that they have signed up to (see Trusts Act 2019, sections 24 and 26; Companies Act 1993, section 134; Incorporated Societies' Bill 15-1, clause 51). If an organisation is furthering different purposes, there is a breach of legal duty. It is not

necessary to rework Ellis J's orthodox test to allow a Church that is "advancing education about the Christian faith" to be registered.

92. Charities Services and the Board are required to apply the law. It is not open to them to apply a different legal test on the basis of an alleged desire to be "more lenient". More fundamentally, such an assertion is entirely misleading: the application of Charities Services' and the Board's reworked test has not resulted in more leniency for the many charities that have been deregistered or declined registration on the basis of the Board's and Charities Services' misapplication of Ellis J's test.

93. What in fact has occurred is an approach that allows Charities Services and the Board to be more *subjective* about which charities will be able to gain registration. However, as recently noted by the High Court in *Christiansen v The Director-General of Health,* [2020] NZHC 887 at [44]-[48] and [67], a person with a legal power must exercise that power within the parameters set by the law. To apply a gloss to a statutory test or to ask themselves the wrong question constitutes an error of law. It is unlawful to blindly follow a policy if that policy is not reflective of the actual legal position.

94. Charities Services' and the Board's approach is not lawful: it applies a gloss to a statutory test that results in Charities Services and the Board asking the wrong questions. The repeated application of the approach by Charities Services and the Board constitutes a repeated error of law. This error has potentially been applied to every charity that has applied for registration or been considered for deregistration since 2016. Charities are entitled to have their eligibility for registration determined according to law, which includes the test in FAAR in the terms used by Ellis J.

95. On 23 September 2019, we responded to Charities Services in the following terms:

> We have carefully reviewed the material provided with your letter, and consider that it **does not answer the question** of why the Board is applying a different test from the one set down by Ellis J in FAAR
>
> …
>
> It is not clear from the material provided in your letter why the Board uses wording in its current approach that is different from the wording used by Ellis J in the FAAR decision. At paragraphs 17 and 20 of the memorandum dated 31 July 2019 ("**the memorandum**"), attached to your letter, Charities Services simply states that using the wording set out by Ellis J would not "likely amend the practical application of the test".
>
> With respect, if using the wording set out by Ellis J would make no difference to the practical application of the test, why, then, does the Board not simply use the wording set out by Ellis J?
>
> …Charities Services then appears to contradict itself by saying, at paragraph 22, that the Board's current approach "allows it to take a lenient view". In other words, **Charities Services clearly appears to be of the view that there is a practical difference between the current approach of the Board and the Test set down by Ellis J in FAAR**. We would be grateful if Charities Services could please clarify which of its 2 statements in this regard is correct….
>
> …we request that the decision to redact material under section 9(2)(h) be reconsidered, and the material withheld under that provision be provided.
>
> If both Charities Services and the Board wish to continue to withhold the requested information, we ask that the information requested in the second part of our Official Information Act request be provided. Specifically, we request all information, including legal opinions, that would explain why Charities Services and/or the Board made the decision to change the wording of Ellis J's Test. The change in wording appears to have occurred at some point between the decision in FAAR on 30 September 2016 and the decision in Family First on 21 August 2017.
>
> Alternatively, we ask that the Board and Charities Services desist from using the current approach, and use the wording as set down by Ellis J in FAAR at [88]. We strongly submit that using the wording set down by Ellis J is the only option legally available to the Board and Charities Services.

> If the Board and/or Charities Services will not desist from using their current approach, we ask that, at the very least, the Board and Charities Services make it very clear in every applicable decision that they are not using the Test as set down by Ellis J in FAAR and the reasons why. Otherwise, readers may be misled. [Emphasis added]

96. On 21 October 2019, Charities Services responded in the following terms:

> …As previously advised, the Board considered your concern and decided that it will continue to apply its current approach.
>
> As you know, the High Court and the appellate courts provide independent judicial supervision of the work undertaken by the Board and Charities Services under delegation. We note that the only reported case to date to substantively consider the test is *Re Family First New Zealand* [2018] NZHC 2273. In the *Family First* judgment there was nothing to suggest that the Board misapplied the *Foundations* case.

97. The reference in the *Family First* judgment to which Charities Services is referring was as follows:

> [34] The Board **identified a three-step process** taken from a recent High Court decision…[Emphasis added]

98. Charities Services argue that these comments provide "nothing to suggest" that the Board misapplied the FAAR case.

99. However, on our reading of these comments, the High Court is distancing itself from Charities Services' and the Board's reworking of Ellis J's test. If the High Court had accepted Charities Services' reworking of the test as correct, the High Court had the opportunity to say so, but it did not. At best, the High Court was simply not expressing an opinion on the correctness or otherwise of the Board's reworking of the test.

100. Since then, however, the High Court has affirmatively cast doubt on Charities Services' and the Board's interpretation. In the *Better Public Media Trust* case, Cull J made the following comments:[27]

> [44] In the analysis of charitable purpose, **there is no concept of a charitable activity**. The activity is to be viewed as consistent with or supportive of **the** charitable purpose. **The Act is concerned with the purposes of an organisation**. In Anti-Aging, Ellis J articulated a three-stage test in the following terms:
>
> > [88] In the present case, therefore, my own view is that the proper analysis would have been to begin by asking whether FAAR's stated purposes are charitable or not. If they are clearly not, then that is the end of the inquiry. If they are (or if the stated purposes are unclear), then the chief executive or the Board needed to consider what information it has about FAAR's present and proposed activities (and to consider requesting such information). Then, the question is whether those activities are consistent with or supportive of the identified charitable purpose. If they are, then there is no difficulty. If they are not, then it would need to be determined whether the activities can be said to be merely ancillary to the identified charitable purpose.
>
> [45] I do not consider it an error for the Board to have adopted the three-stage test in Anti-Aging **so long as it is properly understood**. The first step involves considering the applicant's **stated** purposes (as opposed to its actual purposes as determined by the Court) and whether they are charitable. The second step then **cross-checks the applicant's activities with its stated purposes, to ascertain whether there is a conflict between the activities and the identified charitable purpose**(s). A conflict will only matter if the activities suggest the applicant has an unstated non-charitable purpose. If there is no such purpose, then it is not necessary to consider step three.

[27] *Better Public Media Trust v Attorney-General* [2020] NZHC 350 (2 March 2020) at [44]-[46].

> [46] If there is an unstated non-charitable purpose, then the third step requires consideration of whether that purpose is merely ancillary to the identified charitable purpose. This step was articulated as "it would need to be determined whether the activities can be said to be merely ancillary to the identified charitable purpose". The reference to "the activities" was clearly a shorthand for any unstated non-charitable purpose suggested by the activities. [Emphasis added, footnotes omitted]

101. In other words, in March 2020 the High Court reaffirmed that Ellis J's test needs to be applied in its particular terms, and not in the reworked terms applied by Charities Services and the Board. Yet, despite these comments, Charities Services and the Board continue to apply their incorrect approach, as evidenced for example by the decision to decline registration to the Nelson Grey Power Association Incorporated two months later in May 2020, as discussed above.

102. This approach undermines the legitimacy of Charities Services because it gives the impression Charities Services considers itself to be above the law.

103. Charities Services' letter of 21 October 2019 continued in the following terms:

> You have requested that the information withheld under s 9(2)(h) of the OIA be provided. We have considered your request but have **decided to continue to withhold** the information for the reasons provided in our letter of 12 September 2019.
>
> We do not consider that Charities Services **sharing legal advice with the Board** waives professional privilege. We consider that the withholding of this information is not outweighed by other considerations which make it desirable, in the public interest, to make that information available.
>
> …Our letter of 12 September 2019 (and attachments) provided you with the information about the Board's approach to this test, including information about why the Board follows its current approach (refer to the memorandum for this information). **There is no additional information to release about any decisions to "change the wording".**
>
> You have also requested that the Board (and Charities Services acting under the Board's delegation) stops using the current approach or amend the wording in its decisions about whether the test is being applied. As advised in Natasha Weight's letter of 12 August 2019, the Board carefully considered the concerns you raised about the Board's approach. The Board sought to interpret and apply the *Foundations* judgment, as it does with all charities law decisions. The Board determined that it would continue to apply its current approach, and that Charities Services is to apply this approach under delegation. Organisations can appeal Board decisions, and **if a court determines that the Board has applied the law incorrectly then the Board would seek to apply the law as it is determined by the Courts**. [Emphasis added]

104. With respect, this response is misleading for a number of reasons, as discussed further below.

105. On 25 October 2019, we complained to the Ombudsmen, making the following points:

> …We are concerned that both Charities Services and the Board are applying an incorrect legal test that has important significance for charities trying to gain or maintain registration. We are also concerned that Charities Services and the Board are **not being sufficiently transparent about the legal basis on which they purport to do so**.
>
> We fully appreciate the importance of maintaining legal professional privilege. However, we submit that providing the redacted material in this case would not breach this important principle. **We are concerned that Charities Services' analysis does not give sufficient weight to section 8(4)(a) of the Charities Act 2005, which requires the Board to exercise its decision-making**

> ***independently* of Charities Services. In addition, both the Board and Charities Services are *separately* subject to the Official Information Act.** [Footnote: Definitions of "department" and "organisation" in section 2 of the Official Information Act, and references to the Department of Internal Affairs in Part 1 of schedule 1 of the Ombudsmen Act 1975, and to the Board established by section 8 of the Charities Act in Part 2 of that schedule]. With respect, **if the Board is genuinely independent of Charities Services, Charities Services cannot provide legally privileged information to the Board (a third party that is required by statute to be *independent*) without that privilege being waived**. Registration decision-making was placed in the hands of an independent body precisely so that decisions would be made independently of government. **Charities are entitled to know what law is being applied against them**.
>
> In addition, section 9(2)(h) is subject to section 9(1): maintaining legal professional privilege does not constitute good reason for withholding information if the withholding is outweighed by other considerations which render it desirable, in the public interest, to make that information available. **We submit that public interest considerations outweigh any claim for maintaining legal professional privilege in this case. The decisions in question are *legal* decisions; charities are entitled to know the legal basis for those decisions. While the Board's publicly-available decisions are posted on Charities Services' website, there is no visibility as to why the Board feels it is legally able to apply a different legal test from the one set down by the High Court in *FAAR*.** As discussed in our attached letters, the reasons provided by Charities Services to date simply state that they prefer a different test. **They do not explain why they consider themselves to have a legal ability to dispense with or alter the law** as set down by the High Court.
>
> In our view, these matters raise concerning issues regarding the **rule of law**: charities are entitled to have their applications for registration determined according to the law as it is, not as Charities Services would like it to be.
>
> We write to request that the redacted information in the material attached to Charities Services' letter of 12 September 2019 be provided, on the basis that section 9(2)(h) does not provide a good reason for withholding it in the circumstances of this case.
>
> We would also be grateful for your assistance under sections 13(1) and 22(1) of the Ombudsmen Act 1975 with clarifying that Charities Services' and the Board's reworking of the test set down by the High Court in *FAAR* is contrary to law, based on a mistake of law, and/or was wrong. [Emphasis added]

106. We received a substantive response to our letter almost a year later, on 23 October 2020. Following this response, on 2 November 2020, Charities Services provided us with some of the information that had been redacted from the original 31 July 2019 memorandum. In particular, paragraphs 6(c) and (d), which outlined 2 sets of documents said to be attached to the memorandum, were provided in the following terms:

> 6. The following documents are attached to this memorandum:
>
> (a) letter from Sue Barker Charities Law dated 17 July 2019.
>
> (b) Draft response to Sue Barker Charities Law.
>
> **(c) Legal advice received from the Department's legal team dated 4 October 2019.**
>
> **(d) Legal advice received from Crown Law dated 21 October 2016.**
>
> (e) FAAR/FRSSH High Court decision.
>
> (f) *Family First of New Zealand* High Court decision. [Emphasis added]

107. In other words, it appears that Charities Services was trying to conceal the fact that it, the Department of Internal Affairs, is providing legal advice to the Board, which

both it and the Board are seeking to withhold under section 9(2)(h) of the OIA. With respect, this sheds a different light on the comment set out above that was made in their letter of 21 October 2019:

> We do not consider that Charities Services **sharing legal advice with the Board** waives professional privilege.

108. With respect, Charities Services is not solely *sharing* legal advice with the Board, but appears to be *providing* legal advice to the Board.

109. The Ombudsmen did not otherwise require either Charities Services or the Board to disclose the legal advice on the grounds of maintaining legal professional privilege. While the primacy of legal professional privilege is fully acknowledged and respected, we respectfully submit that this outcome undermines the legal requirement for the Board to be "independent". It also undermines any meaningful transparency of Charities Services' and the Board's decision-making.

110. In its communications, Charities Services consistently refers to the Board as the "*independent* Charities Registration Board".[28] The implication appears to be that charities and members of the public may be reassured that, whatever decisions may be made by Charities Services, they will be subject to an independent check by a separate body.

111. However, by providing its own legal advice to the Board, and then withholding that advice on the grounds of legal professional privilege, independence of the Board's decision-making is undermined. This further risks undermining public confidence in the administration of the Charities Act, and by extension public trust and confidence in charities generally.

112. **In our view, it is simply not possible to say that the Board is independent of Charities Services when the Board is receiving legal advice from Charities Services that is being withheld from disclosure on the grounds of legal professional privilege**.

113. In 2016, the Board's processes were challenged in judicial review proceedings in the High Court.[29] The primary challenge was that the relationship between the Board and the Department of Internal Affairs is too close: instead of the Board acting as an independent decision-maker and reaching its own view on the recommendation of the chief executive, as required by section 8 of the Charities Act, the Board appears to treat the Department of Internal Affairs' analysts as its own employees/advisers, and adopts a "governance" function of merely approving the decision-making process undertaken by Charities Services' staff.[30] This results in an unfair process that does not achieve the "two-tiered" consideration of applications for registration required by the Act.

114. In the end, the charity was successful in its substantive appeal, which meant that its separate application for judicial review became moot.[31] Accordingly, the issues raised in the judicial review application were not resolved, and they remain unresolved to this day.

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[28] See for example Charities Services' October 2020 newsletter: http://createsend.com/t/j-E65497B27634A2982540EF23F30FEDED

[29] *Re The Foundation for Anti-Aging Research and The Foundation for Reversal of Solid State Hypothermia* (2016) 23 PRNZ 726.

[30] *Re The Foundation for Anti-Aging Research and The Foundation for Reversal of Solid State Hypothermia* (2016) 23 PRNZ 726 at [33].

[31] *Re The Foundation for Anti-Aging Research and The Foundation for Reversal of Solid State Hypothermia* (2016) 23 PRNZ 726 at [90]-[92].

115. A related issue is that, although the issues raised apply to charities generally, the Ombudsmen considered themselves unable to investigate the complaint due to section 13(7)(a) of the Ombudsmen Act 1975, which prevents the Ombudsmen from investigating any decision for which there is a right of appeal to the Court.

116. This approach presents real difficulty: most (over 90%) of charities in New Zealand are small,[32] and many do not have access to legal advice. There is no obvious signal to these charities that the test being applied to them is different from the test set down by the Courts, or that their registration may have been successful if the correct test had been applied. In fact, given the wording used by the Board and Charities Services that they are "following" the 3-step test set down by Ellis J in FAAR, when in fact they are not, charities are likely to be positively misled in this respect. A further difficulty is that most charities simply do not have the resources to mount an appeal to the High Court under section 59 of the Charities Act in any event.

117. The net result is that, following the above process which took well over a year and is still not resolved, Charities Services and the Board continue to apply a different test to the one set down by Ellis J in FAAR, and we are no wiser as to the legal basis on which Charities Services and the Board consider it is appropriate for them to do so. Charities Services and the Board also continue to assert that they are applying the law as set down by the Courts, when that is not in fact the case.

118. While we would not like to see the protections provided by both the Ombudsmen and the Official Information Act removed, we are not convinced that they provide meaningful transparency or accountability for the decision-making of either Charities Services or the Board.

Objection process

119. While the objection process is also welcome, there is no transparency or independence to this process. We have not seen any statistics as to what percentage of objections are allowed, but anecdotally we understand it is very rare. The perception is that the process is effectively controlled by Charities Services, and thereby cannot provide meaningful accountability of Charities Services' decision-making.

Appeals

120. While the ability to appeal is critically important, the appeals process as it is currently structured is not accessible for most charities, as discussed further below. In addition, the inability for charities to access a trier of fact is causing New Zealand charities law to become distorted, all of which undermines the ability for the appeals process to provide meaningful accountability and transparency of Charities Services' decision-making.

The review of the Charities Act

121. It would be normal to undertake a "post-implementation review" of significant new legislation, and the review of the Charities Act should be an important opportunity to take stock of important issues, such as whether there is appropriate accountability of Charities Services' decision-making. Many within the charitable sector have been calling for such a review for over a decade. However, with respect, the perception is that the relationship between the review team and Charities Services is too close, a perception which is exacerbated by the issues which have been chosen for fast-

[32] See the Department of Internal Affairs' February 2019 Discussion document at p10: https://www.dia.govt.nz//diawebsite.nsf/Files/Charities-Modernising-the-Charities-Act-Discussion-Document-April2019/$file/Charities-Modernising-the-Charities-Act-Discussion-Document-April2019.pdf

tracking: priority appears to have been given to changes sought by Charities Services, over issues of concern for the charitable sector. Tight timeframes and limited consultation create further concern that issues identified by the sector may be put to one side.

122. While we do not intend any disrespect to the Department of Internal Affairs' Policy Team, the fact that Charities Services is a division within the same department leads to the perception that the Department of Internal Affairs has effectively been tasked with reviewing itself, further undermining the opportunity for meaningful accountability and transparency of Charities Services' decision-making.

123. The situation is exacerbated by the number of assumptions that appear to have been made (as discussed in more detail in the compliance and enforcement powers paper): this results in key fundamental issues that require urgent attention being assumed rather than addressed, undermining the legitimacy of outcomes that may be reached as a result of the current review.

124. The attenuated nature of the review of the Charities Act is directly contrary to Labour Party policy for the 2017 election to conduct the long-promised first principles post-implementation review. The perception is that yet another potential accountability measure is being undermined due to the dominance of Charities Services and the risk is that the charitable sector may mobilise against it.

125. All of this underscores the numerous calls, including by the New Zealand Law Society and the Charities Registration Board, for the review to be transferred to an independent body such as the New Zealand Law Commission, as occurred with incorporated societies and trusts, the Productivity Commission or an independent panel, as occurred in Australia.[33]

Summary of accountability issues

126. The net result is that none of the available accountability mechanisms provide meaningful accountability of Charities Services' decision-making and its interpretations of the law. The lack of agreement on these key underlying issues is undermining confidence in Charities Services itself. In order for accountability to be meaningful, it must be in a form that Charities Services cannot control.

Appeal scope

127. Another assumption that requires critical examination is reflected in the following comments at page 2 of the paper:

> Once the Registration Board makes a decision, applicants have the right to appeal that decision to the High Court. **Beyond decisions made by the Registration Board, applicants or registered charities can lodge a complaint with the Ombudsman**. For all decisions made under the Act, judicial review is an option.
> …
> Key issues raised by submitters included….the **inability** [sic] to appeal decisions made by Charities Services (beyond those delegated to them by the Registration Board). [Emphasis added]

128. Later at pages 7-8, the following comments are made:

> There is a lack of accountability of Charities Services' decisions (an **inability** to use the appeal mechanism to challenge decisions by Charities Services, **beyond those delegated by the Registration Board**)
> …

[33] See: https://www.pc.gov.au/inquiries/completed/not-for-profit/report and https://treasury.gov.au/publication/p2018-t318031.

> **Currently, decisions available for appeal are limited to those made, or delegated by, the Registration Board**.

129. With respect, these statements reflect an assumption that charities do not have the ability to appeal decisions of Charities Services under the Act beyond those delegated to them by the Registration Board.

130. We **strongly object** to this assumption, for the reasons discussed below.

131. In the Charities Act as originally passed, charities were able to appeal all decisions of the Charities Commission: section 59(1) of the Charities Act as originally enacted provided that a person aggrieved by a decision *of the Commission* may appeal to the High Court.

132. This ability to appeal all decisions of the Charities Commission was intentional, as noted by the Select Committee considering the original Charities Bill at page 13 of its report:

> The majority considers that charities should **not be limited to appealing decisions relating to registration**, and that it should be possible to appeal from **all decisions** of the Commission that adversely impact on a particular entity [Emphasis added]

133. Section 59(1) was amended in 2012, when the Charities Commission was disestablished and its functions transferred to Charities Services and the Board, to provide that a person aggrieved by a decision *of the Board* may appeal to the High Court.

134. However, at the same time, section 61(1)(a) was amended to provide that the High Court may "confirm, modify or reverse the decision *of the Board or the chief executive".*

135. Clearly, the 2 provisions are inconsistent: if only decisions of the Board could be appealed, it would not make sense for the High Court to have the power to confirm, modify or reverse the decision of the Board *or the chief executive*.

136. This inconsistency is one of a number of errors that were imported into the Charities Act when the Charities Commission was disestablished in 2012, and demonstrates acutely how "fast law does not make good law".

137. If section 59 had been amended at that time to provide that a person aggrieved by a decision of "the Board **or the chief executive**" may appeal to the High Court, this would have retained charities' ability to appeal any decision made under the Charities Act, and would have ensured there was no inconsistency between sections 59 and 61.

138. It is important to note in this context that there was no indication in any publicly-available material that the bulk of charities' rights of appeal were intended to be removed as a consequence of disestablishing the Charities Commission.

139. In 2016, Charities Services tried to resolve the inconsistency by causing section 61(1)(a) to be amended to remove the words "or the chief executive". This amendment was proposed to be made by Statutes Amendment Bill 2015 (2016 No 71-2),[34] with a very limited consultation period falling over the Christmas break, all of which gave the impression that Charities Services were hoping to make the amendment without the charitable sector noticing. Fortunately, the proposed amendment was noticed by the charitable sector, who mounted a campaign against

[34] https://www.parliament.nz/en/pb/bills-and-laws/bills-digests/document/51PLLaw23711/statutes-amendment-bill-2015-2016-no-71-2-bills-digest.

it:[35] the proposed amendment to section 61(1)(a) was eventually removed from the Bill "due to community concern".[36]

140. While the removal of the impugned amendment is appreciated, the next step (amending section 59 to make it clear that charities may appeal all decisions under the Charities Act) has not yet been taken. This means that the inconsistency remains.

141. However, the remaining inconsistency does not mean it is correct to say that charities are only able to appeal decisions of the Board: the point has simply not been tested or clarified. The fact that Charities Services continues to assert that "decisions available for appeal are limited to those made, or delegated by, the Registration Board", despite the above history, gives the impression that Charities Services is arrogantly dismissing the legitimate concerns of the charitable sector, further underscoring the lack of meaningful accountability or oversight over Charities Services' decision-making.

Why should all decisions be subject to appeal?

142. To the extent that doubt remains, we submit strongly that, for so long as Charities Services is to remain a decision-maker under the Charities Act, section 59 needs to be amended to make it clear that a person aggrieved by a decision of the Board *or the chief executive* may appeal. The submissions to the review of the Charities Act made it very clear that charities should be able to appeal *all* decisions under the Charities Act, as noted in the summary of submissions at page 5:

> **Nearly all** of these submitters said that **all** decisions made under the Act should be appealable. These submitters stated that this would ensure the [government agency] would be more accountable, and transparency and fairness in the sector would be ensured.

143. We understand that Charities Services strongly resists any such clarification as it does not want the bulk of its decisions to be subject to appeal. It argues that allowing appeals of its decisions would increase its costs and cause delay and would go against the finality and certainty that decision-making brings.

144. However, finality and certainty of potentially *incorrect* decision-making is a false economy. Charities are reluctant litigants at the best of times. A charity would not incur the expense and distraction of an appeal lightly. To date (with one exception as discussed in the case study below), we are not aware of any appeal having been brought under the Charities Act against anything other than registration decisions, even though the ability to do so was clearly available during the Charities Commission's tenure, and has been generally understood to be available since 2012. This alone indicates that the spectre of "floodgates" is dramatically overstated.

145. Further, providing for better structural accountability would in fact *reduce* costs and delay, for both charities and Charities Services, by encouraging better decision-making in the first place. Allowing appeals against all decisions under the Charities Act would also be consistent with the original intention of the Charities Act, and with other comparable regimes, as discussed below. It would also improve transparency and accountability of decision-making, which in turn would improve trust and confidence in Charities Services and in turn, trust and confidence in the charitable sector.

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[35] See: https://www.linkedin.com/pulse/charities-beware-government-proposing-remove-your-rights-susan-barker/ and https://www.linkedin.com/pulse/let-them-eat-cake-what-brexit-should-tell-us-charity-susan-barker/.

[36] https://www.parliament.nz/resource/en-NZ/51DBSCH_SCR71066_1/49133708d9e276b2d84335918472e48d372e6422 page 2.

146. The possibility of appeal against all decisions is important: in an environment of increasing transparency and accountability on charities, Charities Services should be expected to "practice what it preaches"; to resist the bulk of its decisions being subject to appeal sets a bad example: Charities Services should expect to be subject to at least comparable levels of transparency and accountability that it expects of the charitable sector.

147. We strongly object to the assumption inherent in the paper that charities' rights of appeal against decisions of Charities Services have already been removed when that is an outstanding issue that requires proper and unbiased consideration.

Terminology

148. There is also an assumption inherent in the paper that Charities Services and/or the Board should be referred to as a "regulator".

149. 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.

150. We accept that there is a spectrum of regulation and that the concept of "regulation" can be very wide.[37] 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 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.

151. 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".

152. 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".

153. The fact that the Charities Act itself does not use the term "regulator" sends a strong

[37] 2019 discussion document page 12.

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.

154. Importantly, there has been no consultation with the charitable sector prior to adoption of 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. The continued dismissal of legitimate concerns raised by the charitable sector in turn contributes to a lack of confidence in Charities Services.

155. 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 in turn risks predetermining a number of important outstanding issues that have yet to be properly addressed.

156. 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 is very much needed and that many within the charitable sector have been calling for for over a decade.

157. 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.

158. 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.

Public trust and confidence in charities

159. Another assumption that requires critical examination is inherent in the following heading at page 1 of the paper:

> The registration **process** and regulation of charities **supports** public trust and confidence in the charitable sector

160. With respect, this statement is not accurate.

161. 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.

162. While the ability for charities to disclose their information on a publicly-available register provides an opportunity for them to demonstrate to stakeholders that they are worthy of support, the registration *process* is not supporting public trust and confidence in the charitable sector; to the contrary, it appears to be having precisely the opposite effect.

163. In fact, the heavy-handed way that charities are being "regulated" appears to be causing support for charities to collapse.

Structure

164. At page 1 of the paper, the comment is made that the structure of the charities agency in New Zealand is **unique.**

165. We agree with this comment and would note the following:

166. The original decision to create a Charities Commission was more than 20 years in gestation. As noted by the Working Party on the Registration, Reporting and Monitoring of Charities, in its 2002 report that preceded the Charities Act:[38]

> 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**.
>
> …
>
> We believe the option [of a semi-autonomous body within a government department with a statutory advisory board from the charitable sector] is **considerably inferior** to a Charities Commission. We do not believe a semi autonomous body would have **sufficient status and independence to gain the support and sense of ownership required from the charitable sector**.
>
> We believe this option also fails to recognise the independence and importance of the charitable sector.
>
> These issues **would impact significantly on its ability to carry out its recommended role**. [Emphasis added]

167. These statements have turned out to be remarkably prescient.

168. The subsequent 2012 decision to disestablish the Charities Commission and replace it with the current structure was made against the strong opposition of the charitable sector, and rushed through under urgency without proper consultation.[39] Along with many other factors, the fact that the structure has not been adopted by other jurisdictions should sound a warning bell.

169. The stated rationale for disestablishing the Charities Commission was to save cost. However, it is not clear that any cost has been saved. In fact, as predicted by the Working Party, the current structure is proving more costly, largely because the charitable sector does not have confidence in it.

170. We appreciate that Charities Services has a vested interest in the status quo. However, the current structure was cobbled together and rushed through under

[38] Working Party on on the Registration, Reporting and Monitoring of Charities, February 2002 report, pages 9 and 11.

[39] See the discussion in *Charity regulation in New Zealand: history and where to now, Third Sector Review,* Vol 26 issue 2, 2020, p28.

urgency without proper consultation. If the current structure is not working that does not necessarily need to be seen as an indictment on Charities Services. To the contrary, honoring Labour Party policy for the 2017 election to consider whether the current structure is working would be met with widespread approbation. Charities Services would be respected for having the humility to recognize that the current issues are not specifically about them, but rather about what is best for Aotearoa New Zealand. At the very least, these issues need to be properly looked at.

171. We note that the Mental Health Commission, which was disestablished at the same time as the Charities Commission,[40] has recently been reinstated, as the Mental Health and Wellbeing Commission, and structured as an independent Crown entity[41] (in contrast to its previous structure of an autonomous Crown entity).[42]

172. A similar process for the Charities Commission would send a message that the charitable sector is seen as important, which in turn would significantly help with promoting public trust and confidence in charities.

The role of Charities Services

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

> Charities Services maintains the public register and undertakes compliance functions to **safeguard the sector from wrongdoing**. [Emphasis added]

174. 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 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 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.

175. At page 3 of the paper, the following comment is made:

> The fundamental functions and decision-making of [the government agency] **appear sound** and **are generally well supported**. Although there have been calls for the [government agency] to be established as an independent agency outside of government, this is out of the scope of this work…[Emphasis added]

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

Relationship between the Board and Charities Services

177. At page 2 of the paper, the following comments are made:

[40] See Part 2 of the Crown Entities Reform Bill 332-1 and the Mental Health Commission Amendment Act 2012.
[41] See the Mental Health and Wellbeing Commission Act 2020.
[42] See Mental Health Commission Act 1998 and schedule 1 Part 2 of the Crown Entities Act 2004.

> The Registration Board is consulted on a number of applications and makes all decline decisions and decisions for complex or high-profile applications **on advice from Charities Services**….
>
> Charities Services has investigation, compliance and enforcement functions under the Act, with the Registration Board being responsible for deregistration decisions **on the advice of Charities Services**. [Emphasis added]

178. Separately from the issue of legal advice discussed above, this wording highlights a key issue with the current structural arrangements: the Charities Registration Board was established to provide an independent check on Charities Services' decision-making, but lack of resourcing, a framework whereby Charities Services provides secretarial and administrative support to the Board (Charities Act, s8(6)), and an oracular mindset on the part of Charities Services, have effectively neutralised the Board's ability to carry out this role.

179. A key issue is that not all Board members are legally trained, which risks limiting the Board's ability to critically examine Charities Services' legal interpretations.

180. In addition, it is important that the Board receives its own advice, independently of Charities Services.

181. As discussed above, in 2016, the Board's processes were challenged in judicial review proceedings in the High Court.[43] The primary challenge was that the relationship between the Board and the Department of Internal Affairs is too close: instead of the Board acting as an independent decision-maker and reaching its own view on the recommendation of the chief executive, as required by section 8 of the Charities Act, the Board appears to treat the Department of Internal Affairs' analysts as its own employees/advisers, and adopts a "governance" function of merely approving the decision-making process undertaken by Charities Services' staff.[44] This results in an unfair process that does not achieve the "two-tiered" consideration of applications for registration required by the Act.

182. In the end, the charity was successful in its substantive appeal, which meant that its separate application for judicial review became moot.[45] The closeness of the relationship between Charities Services and the Board is an important issue that remains unresolved.

Problem definition

183. At page 3 of the paper, the problem is articulated as follows:

> A **perceived** lack of transparency and accountability of decision-making **may** undermine the legitimacy of the [government agency]
>
> Strong views were provided to the 2019 discussion document that the transparency and accountability of how decisions are made needs to be improved and **where possible** improve the overall independence of the [government agency].

Question 1 – do you agree with the problem statement? Why or why not?

184. The problem statement is articulated very tentatively. We respectfully submit that the lack of transparency and accountability of decision-making is not merely perceived: it is *actual,* and it is undermining the legitimacy of the government agency.

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[43] *Re The Foundation for Anti-Aging Research and The Foundation for Reversal of Solid State Hypothermia* (2016) 23 PRNZ 726.
[44] *Re The Foundation for Anti-Aging Research and The Foundation for Reversal of Solid State Hypothermia* (2016) 23 PRNZ 726 at [33].
[45] *Re The Foundation for Anti-Aging Research and The Foundation for Reversal of Solid State Hypothermia* (2016) 23 PRNZ 726 at [90]-[92].

185. We also query the wording that Charities Services' and the Board's independence needs to be "improved": independence of decision-making is fundamental to the integrity of the regime and needs to be beyond doubt.

186. The problem statement also overlooks the "elephant in the room": it is not only the lack of transparency and accountability of decision-making that is undermining the legitimacy of Charities Services and the Board, but also controversy over the *legal correctness of decision-making*. In our view, there appears to be a strong reluctance on the part of Charities Services to meaningfully address this issue, which in fact acutely underscores the need for this issue to be addressed.

187. In our view, the problem statement minimizes the issues of lack of transparency, accountability and independence, and does not address the key issue of legal correctness of decision-making.

Option 1 – status quo

188. This option would maintain the current state.

Question 2 – what are the risks of doing nothing and continuing with the status quo?

189. Public trust and confidence in charities appears to be declining under Charities Services' watch. Charities Services used to conduct surveys of public trust and confidence in charities, however, from a search of Charities Services' website, it appears such surveys are no longer being conducted. This means that another important potential accountability mechanism for how Charities Services are delivering on a key stated purpose of the Act is being undermined.

190. The risk of continuing with the status quo is that public trust and confidence in the charitable sector will continue to decline, impacting negatively on our culture of volunteering, our social capital and the wellbeing of New Zealanders. Our perception is that enormous damage is currently being done to our charitable sector through the current arrangements.

191. If New Zealand is are to #buildbackbetter in response to covid-19, we should be encouraging and enabling charities and charitable work (similar to the approach currently proposed for social enterprises).[46] The current framework appears to be having precisely the opposite effect.

192. As Mark von Dadelszen has noted, Charities Services is not respected, and that will continue to be the case so long as it is part of a government department.

Option 2 – clarify current structure and decision-making processes

193. Option 2 aims to clarify the current state, through improving information available and considering some changes to the Act. This option proposes to:

- provide **more information** to the sector on how the [government agency] operates. This could include **clarifying**:
    - the roles and responsibilities between the Registration Board and Charities Services, including clarifying how decisions are made and what information is considered at what stage and how;
    - the current accountability and transparency measures in place (summarized in the background section) and where to find performance information on the [government agency]; and
    - the role of the Charities Sector Group as an avenue for sector engagement.

[46] https://www.theimpactinitiative.org.nz/publications/roadmap-for-impact.

- **promote** the independence of the Registration Board such as through **separate branding** on Board decisions where published on the Charities Services website;
- amend the Act to clarify the registration decision-making process where possible, specifically on how (and what) information can be used to inform a decision. [Emphasis added]

Question 3 – the [arrangements] in New Zealand [are] unique, with roles and responsibilities split between the Registration Board and Charities Services. Would further clarification of how this split model works, and the independence and accountability measures in place, help address concerns? Why/why not?

194. We strongly object to option 2. With respect, the issue is not a lack of information or a lack of clarity. In our experience, charities are well aware of the roles and responsibilities of the Board and Charities Services, the registration decision-making process, and the accountability and transparency measures in place. It is not that these issues are not understood: it is that, as predicted by the 2002 Working Party, the current structure is fundamentally flawed (with the difficulties exacerbated by the fact that the current arrangements were imposed on the charitable sector against its will).

195. For example, none of the "accountability and transparency measures in place" provide meaningful accountability, as discussed above. In essence, Charities Services is "all care and no responsibility", with too much unbridled power, too few checks and balances, and no meaningful transparency or accountability. These issues cannot be addressed through "clarification".

196. In addition, separate branding of Board decisions, and amending the Act to "clarify" the decision-making process and specifically how and what information can be used to inform a decision, would amount to window-dressing, and would not address the underlying issue.

197. It follows that the answer to question 3 is "**No**". To the contrary, option 2 risks appearing patronizing and giving the impression that the Department of Internal Affairs is not listening to the sector's legitimate concerns.

198. As discussed above, it was Labour Party policy for the 2017 election to consult with the sector on whether the disestablishment of the Charities Commission has improved things. The review is an opportunity to address this issue meaningfully: doing so is likely to be more cost-effective in the long run when all costs are taken into account. Any other approach risks undermining the review process, and the charitable sector mobilizing against it.

Question 4 – how could we make the decision-making process more transparent?

199. The best way to make decision-making more transparent is to remove the process from a government department, reinstate a respected independent decision-making body (like the previous Charities Commission), and reinstate the appeals process that existed prior to the Charities Act.

200. These are key findings of our research to date.[47]

Question 5 – what parts of the decision-making process need clarifying in the Act to reduce confusion and reduce inconsistency?

201. As discussed above, in our view, this question addresses the wrong issue: the issue is not clarification of the current arrangements but fundamental structural reform.

[47] https://www.charitieslawreform.nz/workshops.

202. That said, one helpful change that could be made is to section 18(3). Section 18(3) requires regard to be had to activities but does not clarify what regard is to be had to activities *for*. This provision appears to have caused Charities Services and the Board to consistently conflate the distinction between purposes and activities, which is a key source of current difficulty. The essential requirements for registration are set out in section 13 of the Charities Act, which requires purposes to be charitable, not activities.

203. There is in fact no requirement in the Charities Act for activities to be "charitable" and the legislation needs to make this clear. As the FAAR case clarifies, the key question with respect to activities is whether they are carried out in furtherance of the charity's stated charitable purposes. If they are then there is no difficulty. If not, then there is a breach of legal duty and the charity is not eligible to be registered.

204. We strongly recommend clarification of purpose-based governance, as discussed in our letter responding to the accumulations paper.

205. We also recommend that the legislation make clear that all communications between the Board and Charities Services are disclosable under the OIA, and the provision of any legal advice between them constitutes an automatic waiver of legal professional privilege. If the Board requires legal advice, it should be funded to receive its own independent legal advice, separately from the Department of Internal Affairs and the Crown Law Office.

206. However, no amount of clarification will alleviate the urgent need for root and branch reform of the administrative structure.

Option 3 – increase accountability and transparency requirements on the [government agency]

207. In addition to clarification (option 2), option 3 proposes additional requirements be placed on the government agency:

- introducing **performance reporting requirements** on Charities Services and/or the Registration Board, building off the annual review reports that Charities Services proactively publishes;
- requiring Charities Services to **publish their decisions (where appropriate)** in addition to the current requirement for registration decisions made by the Registration Board to be published (which in practice amounts to only a few every year);
- **formalizing the current role and function of the Charities Sector Group (as a statutory type advisory body).** Also consider the role of the group to engage with the Registration Board (as opposed to just Charities Services) and requirements for the group to have appropriate iwi/Māori representation.

208. Option 3 also proposes clarifying and broadening the scope of the current decision objection process to provide applicants with the ability to speak to the Registration Board on decline and deregistration decisions.

209. Option 3 also proposes that the objections process is amended to:

- include registration **declines** as a matter that can be objected, in addition to the current deregistration decisions (and potentially other decisions being considered under the appeals framework topic); and
- provide entities with the ability to **speak to the Registration Board** as part of the objection process (alongside the opportunity to provide a submission for consideration).

Question 6 – would the proposed increased performance reporting obligations on [Charities Services] improve trust and confidence? Why/why not?

210. The short answer to question 6 is no.

211. Introducing performance reporting requirements that "build off" the current annual review reports seems unlikely to provide meaningful accountability, for the reasons discussed above. In order for accountability to be meaningful, it needs to be in a form that Charities Services cannot control.

212. For example, the annual review documents do not disclose that Charities Services is currently preventing social housing providers from helping people into affordable housing in the middle of a housing crisis. This outcome turns on reasonably complex legal issues such as Charities Services' narrow interpretation of the definition of charitable purpose, what constitutes a disqualifying private benefit, and to what extent wider public benefits, such as the social cohesion provided by security of tenure, can be taken into account. Charities Services' interpretation is controversial, and inconsistent with prior higher authority. It is also underpinned by difficulties associated with the appeal right as it is currently structured, as discussed, for example, in *Charity regulation in New Zealand: history and where to now, Third Sector Review,* Vol 26 issue 2, 2020, p28.

213. The Charities Commission was required to produce an annual report assessing progress against a statement of intent. Such a process applied to Charities Services might have drawn the public's attention to the fact that Charities Services was conducting a review of every single social housing provider in the country, aimed at preventing social housing providers from helping people into affordable housing, in the middle of a housing crisis. The fact that charities are still being prevented from helping people into affordable housing for fear of jeopardizing their registered charitable status should be the cause of a public outcry. By contrast, the deafening radio silence highlights not only the urgent need for Charities Services' overly-narrow interpretation of the definition of charitable purpose to be properly and fully considered, but also the lack of meaningful accountability and the extent to which Charities Services is able to "control the narrative". It seems highly unlikely that "performance reporting" will address these issues.

214. As the annual reviews produced to date demonstrate, Charities Services is well able to produce documents that present itself in the best possible light. However, providing figures about how many "completed applications have been approved" or webinars conducted effectively deflects attention away from key underlying issues, such as legal accuracy of decision-making and the lack of meaningful ability for charities to do anything about it.

215. While transparency about Charities Services' decision-making would be welcome, there is nothing preventing Charities Services from publishing its decisions now. We are concerned at the idea that Charities Services should have discretion as to when it is appropriate to publish its decisions. For accountability to be meaningful, it needs to be in a form that Charities Services cannot control.

216. In addition, decisions to voluntarily deregister or to withdraw an application are made by the charity, not by Charities Services (even though they may have been effectively instigated by Charities Services). It therefore seems unlikely that "performance reporting" by Charities Services will address this critical issue either.

217. Fundamentally, root and branch reform is required to improve trust and confidence, for the reasons discussed above.

Question 7 – what could be the benefits of formalising the Charities Sector Group and expanding their role?

218. In principle, we support the idea of a statutory advisory body.

219. However, if the intention is only to formalize the current role and function of the Sector Group, again the risk is that meaningful accountability would be undermined, for the reasons discussed above: the Sector Group constitutes a hand-selected group of people, whose tenure exists solely at Charities Services' pleasure, and whose comments may or may not be taken into account at Charities Services' discretion. The Department of Internal Affairs' funding role also undermines the extent to which the Sector Group can provide robust feedback, further undermining meaningful transparency and accountability of Charities Services.

220. If the intention is to expand the role of the Sector Group, it would be helpful to have a clearer understanding of what is proposed. The Advisory Board in Australia originally seemed to work well. For example, if the Sector Group were to have a direct and formalized ability to advise the Minister, in addition to providing advice to Charities Services and the Board, this may assist with providing meaningful accountability: at the moment, the sector has no formal means of providing context or an alternative perspective to the advice provided by the Department of Internal Affairs. The benefits of doing so would be enormous in terms of improved relations and improved legislation.

Question 8 – would the ability for applicants to speak to the Registration Board through an amended objection process support the transparency of decision-making? Why/why not?

221. Providing applicants with the ability to speak to the Registration Board on decline and deregistration decisions will not address the issue of the closeness of the relationship between the Board and Charities Services. The problem lies with *Charities Services'* decision-making, and it is not clear that the Board is resourced or structured to provide the independent check on that decision-making that is intended by the Act. On that basis, the ability to speak to the Board may only give an appearance of additional transparency without effecting any meaningful change.

222. In addition, an opportunity to "speak" to the Board is not the same as an oral hearing of evidence before a judicial authority, where evidence and the conclusions drawn from it can be effectively tested. In itself, an opportunity to speak to the Board will not meet the statutory requirement to provide natural justice.[48]

223. In other words, this approach would address symptoms but not causes: the key issue is legal accuracy of Charities Services' decision-making.

224. What is needed is to put in place a process that by and large delivers the right decisions in the first place. Fundamentally, this will require structural reform and proper consideration of the interpretation of the definition of charitable purpose. Setting out the test for the definition of charitable in legislation, as Australia has done, would materially assist in this respect.

Option 4 – strengthen the independence of the Registration Board

225. This option proposes to strengthen the independence of the Registration Board through "further separation" from Charities Services, such as through its own secretariat (currently provided by Charities Services). This option would also consider if additional Board members with a broader range of experience would support decision-making.

226. Option 4 is impacted by option 5 of Part 2, which would disestablish the Registration Board and replace it with an Appeals Board. This would in turn result in Charities

[48] Sections 18, 36 and 49 of the Charities Act 2005.

Services being responsible for all registration and deregistration decisions, but would provide an "independent, and easy to access, appeals process".

Question 9 – how could the Registration Board's role be reframed to give further trust in the independence of decision-making?

227. Fundamentally, reframing the Registration Board's role to give trust in the independence of the government agency and decision-making would require reinstatement of an independent decision-making body such as a Charities Commission.

228. While the Board should have its own **secretariat**, the relationship with Charities Services will still be too close for it to be independent if it is still to continue to receive "advice", including legal advice, from Charities Services. Our perception is that Charities Services has become intractable in its legal interpretations, a situation which is exacerbated by the lack of meaningful accountability or proper checks and balances.

229. It is also not clear what adding additional Board members would achieve. As discussed above, the key issue relates to accuracy of legal decision-making, based on an overly-narrow jurisprudential interpretation of the definition of charitable purpose. While the Registration Board was established to provide an independent check on Charities Services' decision-making, lack of resourcing, a framework whereby Charities Services provides secretarial and administrative support to the Board (Charities Act, s8(6)), and an oracular mindset on the part of Charities Services, have effectively neutralised the Board's ability to carry out this role.

230. The problem is further exacerbated because not all members of the Board may be legally trained or have specialist legal expertise in charities law. These factors undermine the Board's ability to provide critical examination of Charities Services' legal interpretations.

231. If the gateway to charitable registration is to continue to be the definition of charitable purpose, which resides in the common law, charities must have meaningful access to a *judicial* scrutiny of Charities Services' decision-making. The key issue in our view is for charities to have access to a judicial trier of fact and an oral hearing of evidence.

APPEALS

Problem definition

232. At page 7 of the paper, the problem is articulated in the following terms:

> Problem: lack of accessibility and lack of development of case law.
>
> Specifically:
>
> - **The High Court is inaccessible** for a majority of charities, given the significant resources required to progress an appeal, and the **limited time available to lodge an appeal**
> - There is no opportunity for **an initial "trier of fact"** and **no automatic right to provide new evidence and oral evidence**. This follows a decision-making process that does not provide applicants with an opportunity to **speak** to the Board on their application.
> - There is a lack of accountability of Charities Services' decisions (an **inability to use the appeal mechanism to challenge decisions by Charities Services, beyond those delegated by the Registration Board**)
> - There is limited development of case law, given the inaccessibility of High Court and inability for the Board to appeal decisions.

Question 1 – do you agree with the problems identified? Why or why not?

233. In our view, the problem in relation to appeals is not limited to lack of accessibility and lack of development of case law. The key issue is that charities do not currently have access to a trier of fact or an oral hearing of evidence in circumstances where one is required. This constitutes a breach of natural justice, which in turn breaches sections 18, 36 and 49 of the Charities Act which require the rules of natural justice to be observed.

234. The definition of charitable purpose turns on important questions of fact, such as what a charity's purposes are, and whether they operate for the public benefit. The lack of access to a trier of fact means that decision-makers may not have a proper evidential platform from which to make decisions. In our view, this is causing New Zealand charities law to become distorted. It is also leading to anomalies, such as charities trying to adduce further evidence at appellate stages because the necessary evidence has simply not been placed before the lower Courts.

235. The fact that charities' access to a trier of fact appears to have been removed inadvertently, as a result of changes hastily made at the Select Committee stage of the original Charities bill, is also an exacerbating factor.[49]

236. We are concerned that the problem statement appears to link the issue of a trier of fact with the issue of providing new evidence on appeal. However, they are 2 separate issues. Access to an oral hearing is not solely about "new evidence": it is about evidence being properly tested, including through cross-examination, and charities having an opportunity to lay a proper evidential platform from which informed decisions can be made. On occasion, that might require new evidence to be presented but that will not always be the case (however, if new evidence would help the decision-maker, fundamentally, it should be able to be provided).

237. It is important that new evidence is presented before a judicial authority rather than the Board and Charities Services being swamped with copious material that they are ill-equipped to deal with properly. The restrictions on charities being able to adduce evidence in Court that was not before Charities Services and the board is understandably encouraging a "kitchen sink" approach. However, because the vast bulk of applications should be straightforward, the Board and Charities Services should be able to provide a "triage" service, identifying those applications which are more difficult and genuinely do require access to a trier of fact to be filtered out and to proceed to a fuller evidential, judicial stage without undue difficulty.

238. The rules for tax appeals, which applied to charity cases prior to the Charities Act, should be carefully examined and contrasted with the current arrangements in order to gain an understanding of the impact of the current abridged rules. New evidence is able to be provided in tax cases in appropriate cases without any apparent difficulty whatsoever. For reference, we set out below an extract from *The Law and Practice of Charities in New Zealand* (LexisNexis 2013) from paragraphs 3.1331-3.1346 which discusses this issue, and in particular the problem with the "kitchen sink" approach:

> The tax disputes procedures in Part 4A of the Tax Administration Act 1994 were introduced in 1996 in response to the recommendations from the Richardson Review Committee (the *Organisational Review of the Inland Revenue Department, Report to the Minister of Revenue (and on tax policy, also to the Minister of Finance)* from the Organisational Review Committee, chaired by Sir Ivor Richardson, April 1994).
>
> **The previous "objection" procedures were perceived as deficient in that they**

[49] See the discussion in *Charity regulation in New Zealand: history and where to now, Third Sector Review,* Vol 26 issue 2, 2020, p28.

did not adequately support the early identification and prompt resolution of issues leading to tax disputes. The Richardson Review Committee recommended that a comprehensive approach to tax disputes be developed with the following objectives:

- **Every practical effort should be made to ensure that assessments are correct before they are issued**;
- Any dispute should be identified at the earliest practical time;
- Communication between the taxpayer and IRD should be **direct and open, to ensure that all information relevant to the dispute is available as soon as possible**.
- Appropriate independent advice within IRD should be provided at the earliest practical time.

In response, a pre-assessment phase was introduced, comprising a set of prescribed steps designed to facilitate an "**all cards on the table**" approach to tax litigation.

In the context of a tax system based on self-assessment and voluntary compliance, the Government recognised the importance of **early identification and prompt resolution of issues that may lead to tax disputes** (*Legislating for self-assessment of tax liability,* a Government discussion document, 1998, page 5). The new procedures place **increased emphasis on information disclosure and early discussion** between the Commissioner of Inland Revenue and the taxpayer. As noted in *Resolving tax disputes: a legislative review* a Government discussion document at page 1:

> The objective of the legislative disputes process is to **ensure that an assessment is as correct as is practicable and to deal with any disputes over tax liability fairly, efficiently and quickly**. The disputes process is designed to achieve these objectives by ensuring a **high level of disclosure of relevant information and discussion between the parties, which encourages them to place "all cards on the table**". The procedures require time and effort to be put into all cases early in the process before an assessment which would alter a position in a taxpayer's return is issued.
>
> The overall objectives of the process have, therefore, been to **improve the quality and timeliness of assessments and reduce the likelihood and grounds for litigation**.

The purpose of the tax disputes procedures are set out in section 89A of the Tax Administration Act 1994 as follows [this wording has been updated for changes made since 2013, but the essence remains the same]:

(a) to improve the accuracy of disputable decisions made by the Commissioner under certain of the Inland Revenue Acts; and

(b) to reduce the likelihood of disputes arising between the Commissioner and taxpayers by encouraging open and full communication:

  (i) to the Commissioner, of all information necessary for making accurate disputable decisions; and

  (ii) to taxpayers, of the basis for disputable decisions to be made by the Commissioner; and

(c) to promote the early identification of the basis for any dispute concerning a disputable decision; and

(d) promote the **prompt and efficient resolution of any dispute** concerning a disputable decision **by requiring the issues and evidence to be considered by the Commissioner and a disputant before the disputant commences proceedings**.

The intention is to ensure that each party is **fully informed of the facts, propositions of law and arguments on which their respective positions are based** (*Legislating for self-assessment of tax liability,* a Government discussion document, 1998, page 5).

In November 2010, IRD revised its systems for administering disputes and issued two comprehensive standard practice statements setting out its view of how the procedures should operate: *SPS 10/04* and *SPS 10/05.* These standard practice statements were reissued in 2011, following the amendments made by the Taxation (Tax Administration and Remedial Matters) Act 2011, as: *SPS 11/05 Disputes resolution process commenced by the Commissioner of Inland Revenue,* and *SPS 11/06 Disputes resolution process commenced by a taxpayer*. The procedures begin with the issue of a Notice of Proposed Adjustment (a "**NOPA**") under sections 89B to 89DA. A NOPA must be in the prescribed form (IR770, section 89F(1)(b), and must contain sufficient detail of the matters set out in section 89F(2) and (3) to identify the issues arising between the Commissioner and the disputant (section 89F(1)(a)). For example, a taxpayer-initiated NOPA must identify the adjustments proposed to be made to the assessment, **provide a statement of the facts and the law in sufficient detail to inform the Commissioner of the grounds for the disputant's proposed adjustment**, state how the law applies to the facts, and include copies of the documents of which the disputant is aware that are significantly relevant to the issues arising (section 89F(3)).

One of the main reasons a taxpayer may choose to initiate a NOPA is to eliminate their exposure to shortfall penalties. A taxpayer can file a return on a conservative basis, and then file a NOPA on a less conservative basis. As penalties are calculated by reference to the tax position taken in a self-assessment, rather than in a NOPA, this reduces the risk of shortfall penalties applying.[50]

Upon receipt of a NOPA, the recipient must notify the other party that the proposed adjustment is rejected by issuing a Notice of Response (or a "**NOR**"). The NOR must be issued within the "response period" (generally 2 months less one day), or the proposed adjustment is deemed to be accepted (section 89H, unless very limited "exceptional circumstances" apply, section 89K). The NOR must state concisely the **facts or legal arguments in the NOPA considered to be wrong, why they are considered to be wrong, any facts and legal arguments relied on by the issuer of the NOR, how the legal arguments apply to the facts and the quantitative adjustments to any figure referred to** in the NOPA that result from the facts and legal arguments relied on by the issuer of the NOR (section 89G(2)).

If the dispute has not been resolved following the exchange of NOPAs and NORs, an extra-statutory conference phase will take place. The conference is a relatively formal meeting between IRD and the taxpayer which aims to clarify and, if possible, resolve the issues. If the dispute is not resolved through conference between the parties, the Commissioner will issue a "disclosure notice" under section 89M. A disclosure notice triggers the issue of a statement of position or "**SOP**".

There follows an exchange of SOPs which must, with sufficient detail to fairly inform the other party, give an *outline* of the facts, evidence, issues and propositions of law on which the party intends to rely (section 89M). The recipient of the first SOP must respond with their SOP within the response period or deemed acceptance will apply (section 89M(7)). **The SOP is an important document, because parties are limited to the issues and propositions of law disclosed in their SOPs if the case goes to Court. This rule used to be referred to as the "evidence exclusion rule", and previously limited taxpayers and the Commissioner to "the facts and evidence, and the issues arising from them, and the propositions of law" disclosed by either party in their SOPs.** This was intended to prevent "**trial-by-ambush**", which had been a feature of the previous case stated procedures, and to encourage an "all cards on the table" approach. **However, the evidence exclusion rule simply did not work in practice. It led to SOPs of vast length as taxpayers and the Commissioner sought to "throw in the kitchen sink", rather than risk being prevented from raising something later**. Further, **Courts strived to find ways to allow evidence to be admitted, even if it had not been disclosed in the SOPs,**

[50] See commentary to Taxation (Annual Rates, Venture Capital and Miscellaneous Provisions) Bill March 2004 page 38.

causing concern that the rule was effectively honoured in the breach. Following the amendments made by the Taxation (Tax Administration and Remedial Matters) Act 2011, **the rule now only restricts the parties to the "issues and propositions of law" disclosed in their SOPs** (see section 138G. See also discussion in *Disputes: A review,* an officials' issues paper, July 2010, chapter 4). **It therefore does not restrict parties from adducing *evidence* at trial that had not been previously disclosed.** This falls in sharp contrast to the difficulties charities have had in adducing evidence in appeals against decisions of the Charities Registration Board under section 59 of the Charities Act...

Also note that the risk of trial by ambush is reduced in the modern litigation environment in any event. As noted in the officials' issues paper *Disputes: A review,* July 2010, at paragraph 4.30, "**discovery and the advent of the case management system has encouraged an environment where the Court is no longer accepting of trial by ambush, and the traditional adversarial approach to litigation whereby parties "keep their cards close to their chest**"". It is also relevant to note in this context that the Commissioner has wide powers to gather information, see for example sections 16 to 19 of the Tax Administration Act 1994.

Adjudication

One of the criticisms of the previous objection procedures was that the person considering the objection was often the person who had made the original decision being objected to. Now, following the exchange of SOPs, the dispute is referred to the adjudication unit, **intended to be an independent unit within IRD**, who will examine the material and determine whether an amended assessment is to be made. The adjudication unit stage, as with the conference stage, is a non-legislated aspect of the disputes process. **The adjudication unit determines the issue "on the papers": there is no opportunity for a hearing or for evidence to be tested under cross-examination. This has led to criticism of the adjudication unit stage of the process, as taxpayers will not necessarily know what weight is given to any particular piece of evidence prior to a decision being made. However, taxpayers will know what evidence is being placed before the adjudication unit, and will most likely have had an opportunity to respond to it through the preceding disputes process** (see, for example, section 89M(13) which allows the parties to agree to additional information being added, at any time, to either of their SOPs). This process stands in contrast to the process for charities appealing a decision of the Charities Registration Board under the Charities Act, where a charity may not know what evidence has been considered by Charities Services, or have an opportunity to comment on it, prior to a decision being made (see *Re Greenpeace of New Zealand Incorporated* [2013] 1 NZLR 339 (CA) at [17]-[18], and [31]…*).*

Under the tax disputes process, if an amended assessment is made and the disputant does not agree with it, or if the Commissioner refuses to grant the adjustments proposed by the taxpayer and issues a "**challenge notice**" (section 89P), the disputant may issue challenge proceedings under part 8A of the Tax Administration Act 1994. The challenge procedures replaced the previous case stated procedures, which were often long-winded, and often resulted in evidence being submitted to a court in a "trial by ambush"–type scenario, as discussed above. However, the case stated procedures did have the advantage of allowing taxpayers to exercise their "constitutional right to object". By contrast, the challenge procedures are designed along the lines of normal commercial litigation, and the numbers involved must be significant enough for a taxpayer to undertake all the costs and burden associated with issuing challenge proceedings.

The disputes procedures have been heavily criticised as "burning off" taxpayers by an overly long and elaborate process (see for example *Developments in Tax Disputes Procedure – Another Step Backwards*, Michael Lennard and Mark Keating, Auckland University Faculty of Commercial Law, 2012). However, in the officials' report to the Taxation (Tax Administration and Remedial Matters) Bill, April 2011, at page 40, officials

> stated that the Minister of Revenue had agreed to review the operation of the disputes procedures once the revised administrative systems set out in the standard practice statements had been given time to "bed in". At that time, the review was expected to take place in 2013: *"if significant taxpayer concerns then remain, further legislative measures can be considered at that time".*
>
> In the meantime, the disputes and challenge procedures of the Tax Administration Act 1994 remain a compulsory code for the resolution of tax disputes. [Emphasis added]

239. In other words, an attempt to limit evidence able to be adduced on appeal was found to be too harsh in practice, and ultimately the "evidence exclusion rule" was replaced by an "issues and propositions of law exclusion rule".

240. Having an opportunity to "speak" to the Board on their application is also not synonymous with access to a trier of fact. The issue is natural justice, which can and often does require access to an oral hearing of evidence before a judicial authority. This is a different proposition to a conversation, particularly with a Board that does not appear to have sufficient separation from Charities Services.

241. We also disagree with the statement that charities have an inability to use the appeal mechanism to challenge decisions by Charities Services, beyond those delegated by the Registration Board, for the reasons discussed above.

242. It follows that we do not fully agree with the problems identified.

Option 1 – status quo

243. Under this option, no changes would be made and the current state would be maintained.

Question 2 – what are the risks of doing nothing and continuing with the status quo?

244. The key risk is that New Zealand charities law will become increasingly distorted, and the common law will be prevented from purifying itself. Charities will be unduly prevented from carrying out much needed work and this, among other things, will cause public trust and confidence in charities, and in Charities Services, to continue to decline.

245. We would respectfully suggest that option 1 is not a realistic option.

Option 2 – expanding decisions available for appeal

246. Option 2 assumes that decisions available for appeal are limited to those made, or delegated by, the Registration Board. As discussed above, this assumption is not accepted.

247. That said, this option proposes "expanding" decisions available for appeal to include:

- imposing administrative penalties for failure to provide information (impacting charities financially);
- revoking exemptions given to a charity on compliance requirements (therefore creating added compliance requirements to a charity);
- revoking an entity's status as forming part of a single entity (requiring new reporting requirements of the entity); and
- decisions to withhold (or not) information from the public register (against the wishes of a charity).

248. Option 2 also proposes that actions taken by Charities Services where they require charities or entities to provide further information to meet their existing compliance requirements, or to progress their applications, respectively would not be able to be

appealed.

Question 3 – do you think these decisions are appropriate for appeal, and are there any other decisions you believe should be included in this list?

249. With respect, this is a leading question: of course these issues should be able to be appealed, but so should all other decisions made by Charities Services, as per the original intention of the Act.

250. Allowing a right of appeal against all decisions would be consistent with other registration regimes, such as:

(i) section 370 of the Companies Act 1993;

(ii) section 34B of the Incorporated Societies Act 1908;

(ii) clause 240 of the Incorporated Societies Bill 15-1 (with specific exceptions in clauses 217 and 240(3));

(iv) section 13B of the Industrial and Provident Societies Act 1908; and

(v) the Charities Act as originally enacted.

251. Under Charities Services' interpretation, none of the following types of decision would be able to be substantively appealed:

(a) A decision to refuse access to the charities register under section 21(4) of the Charities Act;

(b) A decision to amend the register under section 26;

(c) A decision to approve a change of balance date (with or without conditions) under section 41(6);

(d) A decision that the financial statements of a charity fail to comply with a financial reporting standard under section 42B;

(e) A decision as to whether financial statements should have been audited or reviewed under section 42E;

(f) Terms and conditions of single entity status under section 46;

(g) A decision to open an inquiry under section 50;

(h) A decision to require information under section 51;

(i) A decision to issue a warning notice under section 54;

(m) A decision to treat an application as withdrawn under section 18(3A).

252. In addition, there are many other decisions that would not be able to be appealed, as illustrated by the case study below.

253. **Case study**: a registered charity that has been in existence for many decades is deregistered by Charities Services because it made submissions on Parliamentary Bills in furtherance of its charitable purposes (work that it was contracted by government to do). The charity does not manage to challenge the decision within the 20 working days set out in section 59, but it does ultimately reapply for registration and is successfully reregistered. In this case, the process of reapplying for registration, rather than appealing the decision, means that the charity has a new registration number: although this practice has since changed, at that time Charities Services had a practice of requiring deregistered charities that reapply for registration to be given a new charities registration number. The new number was causing confusion for the charity as members of the public searching for the charity

on the charity's old charities registration number were coming up with an entry recording the charity as deregistered. This in turn was having a significant detrimental effect on the charity and a loss of public trust and confidence. The charity asks Charities Services to link its old registration number to its new registration number, so that members of the public searching for the charity under its old number would be directed to its new registration. However, Charities Services refuses. The reasons for its refusal have never been made clear. Because the charity is already before the High Court on a related matter, the charity seeks to amend its pleadings to add a request for its registration entries to be linked. Following this, Charities Services finally agrees to make the requested change.[51] In the absence of a right of appeal, how could a charity effectively challenge such a decision?

254. Charities Services makes a myriad of decisions such as these every day in administering the charities register. While such decisions may appear minor on their face, they can in fact have significant impact, and impose significant costs, on charities, often for no particular gain in terms of the purposes of the Charities Act. It would not be possible to identify all of these types of decisions in advance.

255. In other jurisdictions, being parsimonious about decisions able to be appealed has given rise to unintended consequences: it can create additional litigation due to the need to work out a threshold issue as to whether an appeal can proceed at all.

256. Charities are reluctant litigants at the best of times. A charity would not incur the expense and distraction of an appeal lightly. To date, with one exception as discussed in the case study above, we are not aware of any appeal having been brought under the Charities Act against anything other than registration decisions, even though the ability to do so was clearly available during the Charities Commission's tenure, and has been generally understood to be available since 2012. any concern of "floodgates" is significantly overstated in our view.

257. In addition, finality and certainty of potentially incorrect decision-making is a false economy. In a modern legal framework, there must be proper checks and balances. As discussed above, providing for better structural accountability would *reduce* costs, for both charities and Charities Services, by encouraging better decision-making. Allowing appeals against all decisions under the Charities Act would also be consistent with the original intention of the Charities Act, and with other comparable regimes, as discussed above. It would also improve transparency and accountability of decision-making, which in turn would improve trust and confidence in Charities Services and in turn, trust and confidence in the charitable sector.

258. The possibility of appeal against all decisions is important: in an environment of increasing transparency and accountability on charities, Charities Services should be expected to "practice what it preaches"; to resist the bulk of its decisions being subject to appeal sets a bad example: Charities Services should expect to be subject to at least comparable levels of transparency and accountability that it expects of the charitable sector.

259. If Charities Services is determined that certain of its decisions should not be able to be appealed, we recommend an approach similar to that taken by the Incorporated Societies Bill as discussed above: rather than selecting a handful of particular decisions that *should* be able to be appealed, Charities Services should identify those decisions that it considers should *not* be able to be appealed, and the reasons why.

[51] This was an issue in *National Council of Women of New Zealand Inc v Charities Registration Board* (2014) 26 NZTC 21075 (HC) and *National Council of Women of New Zealand Inc v Charities Registration Board* [2015] 3 NZLR 72 (HC).

If Charities Services can discharge its onus of demonstrating why any particular decision should not be able to be substantively appealed, all decisions should be able to be appealed with the exception of the handful of decisions that it has been agreed should be specifically carved out.

260. This approach would also have the advantage of ensuring no decision is missed: decisions proposed to be made in other papers, such as decisions to disqualify people from being officers of a registered charity, would be included unless specifically excluded.

Question 4 – should these decisions be appealed to the High Court, or are any of the remaining options a more appropriate mechanism for these decisions?

261. We strongly recommend reinstating the pre-Charities Act mechanism, whereby charities had a *choice* of appealing de novo to either the High Court or the Taxation Review Authority, at the charity's choice.

Option 3 – creation of a test litigation fund

262. Option 3 would provide financial assistance to charities to help them meet some, or all, of the litigation costs of their appeal. Similar funds are used in New Zealand and Australia, such as the Minister for the Environment's Environmental Legal Assistance Fund, and the Australian Tax Office's Test Case Litigation programme. This option will depend on the approval of new funding.

263. Option 3 proposes that those applying would need to meet specific criteria, to ensure their case was providing a benefit beyond their particular case. The criteria could include:

- that the case must involve some issue where there is uncertainty about how the law operates; and
- the case must be in the public interest or have significant implications for the sector.

Question 5 – do you agree with the proposed criteria? Is it [sic] too narrow? Why?

264. There are unlikely to be any objections to the establishment of a test litigation fund. While every case on the definition of charitable purpose will have implications beyond the particular charity involved, any help would be better than none.

265. A key issue is who would decide whether a case met the specific criteria. If Charities Services was to control who may access this funding, this again risks undermining meaningful accountability. In addition, will a decision to decline funding be subject to appeal?

266. The issue of test case litigation funding was discussed in *The Law and Practice of Charities in New Zealand* (LexisNexis 2013) at paragraphs 3.1347-3.1352. For reference, we set out the relevant extract below:

> *Test cases*
>
> Section 138Q of the Tax Administration Act 1994 gives the Commissioner [of Inland Revenue] the power to designate a challenge as a test case if she "considers that the determination of the challenge is likely to be determinative of all or a substantial number of the issues involved in 1 or more other challenges".
>
> Test cases are always heard in the High Court (section 138Q(2)). Under section 89O, disputes that have "significant similarity" in terms of facts and questions of law with the test case may be suspended until the test case is resolved. If such disputes have already reached the stage of challenge proceedings, but not yet been determined by a hearing

> authority, such proceedings may be stayed under section 138R if the Commissioner considers that the test case is likely to be determinative of "all or a substantial number of the issues in the challenge proposed to be stayed" (section 138R(2)). A disputant has the right to challenge such a stay (section 138R(3)).
>
> Neither the Commissioner nor an affected taxpayer (either suspended or stayed) is bound by the outcome of the test case, meaning that any amended assessment issued by the Commissioner in accordance with the outcome of the test case can itself be challenged.
>
> In the officials' issues paper *Disputes: A review*, July 2010, at chapter 9, officials considered the test-case litigation programme in Australia, under which the Australian Tax Office provides financial assistance to taxpayers whose litigation is likely to be important to the administration of Australia's revenue system. **The aim of the programme is to develop legal precedent – that is, legal decisions that provide guiding principles on how specific provisions should be applied**.
>
> The issues paper goes on to discuss **the Australian "test case litigation panel", 2/3 of which is drawn from members of the accounting and legal professions, to guide the Australian Tax Office in its decision to fund test cases, and to ensure that it funds issues of importance to the community**.
>
> In 2010, officials rejected the idea of implementing a taxpayer-funded test case procedure for tax cases in New Zealand, essentially on fiscal cost grounds (*Disputes: A review* an officials' issues paper, July 2010, paragraphs 9.24 and 9.25). However, in the writer's view, consideration should be given to adopting such a procedure for designating and funding "test cases" in the context of appeals against decisions of the Charities Registration Board under the Charities Act 2005. Given the importance of developing legal precedent in the area of the definition of charitable purpose, the normal reluctance of charities to litigate, and the narrow approach taken to the definition by the regulator particularly in terms of its ability to develop the law, it is essential that charities be assisted to take cases so that the law can be permitted to develop….[Emphasis added]

267. We recommend a similar "test case litigation panel" approach be taken in New Zealand, to ensure issues of importance to the community are funded.

268. More importantly, establishing a test case litigation fund should not obscure the need to make other important changes, such as reinstating charities' access to a trier of fact. In our view, this is singly the most important change that needs to be made.

Question 6 – if this new funding were to be available for the sector, is this the best use of it?

269. The best use of funding for the sector would be to honour the commitment to conduct a first principles post-implementation review and to work collaboratively with the sector to create a framework of charities law that genuinely facilitates rather than frustrates charitable work.

270. This is particularly the case given the Government's work on social cohesion: https://social-cohesion.citizenspace.com/social-cohesion/public-consultation/, which appears to have entirely overlooked the importance of the charitable sector (and the importance of creating a legal framework that facilitates rather than frustrates charitable work).

271. Providing access to a specialist tribunal would also assist with providing fair access to justice for all, rather than for just a chosen few.

Option 4 – appeals heard at the High Court as hearings de novo

272. Option 4 would provide the ability for Charities Act appeals at the High Court to be conducted as hearings de novo. This would allow for new evidence and oral evidence

to be presented, and for the Registration Board to be a party to the appeal. In addition, this option would provide for a longer period for charities to lodge an appeal.

Question 7 – is this preferable to the status quo where only appeals that are dismissed by the High Court can be appealed, unless the Attorney-General is involved?

273. This option would be significantly preferable to the status quo.

274. However, as discussed above, charities should be given a *choice* of appealing to *either* the High Court or the Taxation Review Authority, with an appeal in either forum to be heard as a hearing de novo where either party so requests. This is the situation under the Tax Administration Act 1994, which is the jurisdiction previously applicable to charities appeals. It needs to be reinstated.

Question 8 – if applicants and charities had the opportunity to speak to the Board (if the objection process was expanded as provided for in option 3 in part 1) would a de novo appeal be necessary?

275. The answer to question 8 is yes, absolutely.

276. The ability to "speak" to a Board (that does not have sufficient separation from Charities Services) would in no way be an adequate substitute for natural justice, or for the ability to present and importantly test evidence by means of an oral hearing of evidence.

Option 5 – introduction of a new appeals body prior to the High Court

277. Under option 5, a new Appeals Body would be provided to function as the "trier of fact", following which an appeal to the High Court would follow "if required". Option 5 proposes 2 options for a new appeals body:

- An expansion of an already existing tribunal, such as the Taxation Review Authority, or another tribunal, to allow appeals of decisions made under the Charities Act. This would have a number of benefits, including cost and accessibility (for example the location of hearings by the Authority is dependent on where the person making the complaint lives) and decisions would provide new case law.
- This option proposes an Appeals Panel, being an individual or group with relevant subject matter expertise in charities legislation to assess appeals. This option would be easily accessible, provide a full hearing of oral evidence, however, it would not be judicial. While no case law would develop from it, decisions made by the Panel would provide guidance to Charities Services.

278. The paper states that an Appeals Panel could be established alongside but independent of the current Registration Board, or alternatively the Appeals Panel could replace the current Registration Board. The second option would disestablish the current Board, meaning all decisions on registration and deregistration would be made by Charities Services.

Question 9 – would you prefer an Appeals Panel or an expansion of an existing Tribunal?

279. We would strongly prefer expansion of an already existing Tribunal.

280. However, expansion of an already existing Tribunal, such as the Taxation Review Authority, to hear appeals under the Charities Act should be combined with option 4, so that charities have a *choice* of appealing to *either* the High Court or the Taxation Review Authority. This would reinstate the pre-Charities Act position.

281. It is also very important in the interests of natural justice that an appeal in either forum is heard as a hearing de novo where either party so requests, so that charities have access to a trier of fact. In our view, reinstating this process so that charities have meaningful access to a trier of fact is the single most critical change that needs to be made.

282. We do not consider an Appeals Panel would be appropriate: whichever body is to hear appeals under the Charities Act, it is critical that it is **judicial.** The gateway to charitable registration turns on the definition of charitable purpose which resides in the common law. The development of the common law proceeds judicially. An Appeals Panel would not be appropriate for hearing appeals under the Charities Act; it also risks being subject to Charities Services' control, which would again undermine its potential to provide meaningful accountability. In addition, having all registration decisions officially made by Charities Services would again risk there being too much control, too little transparency, and no meaningful accountability.

283. We **strongly oppose** the creation of an Appeals Panel. The pre-Charities Act position, by which charities had a choice of appealing de novo to either the High Court or the Taxation Review Authority, should be reinstated.

Question 10 – is the Taxation Review Authority the most appropriate existing Tribunal to hear Charities Act appeals?

284. It would be helpful to explore what other options there might be, but it should be noted that a choice of the Taxation Review Authority or the High Court was the pre-Charities Act position for charities.

285. We also recommend that appeals under other legislation (such as the Charitable Trusts Act 1957, the Incorporated Societies Act, and the Trusts Act 2019) be considered for bringing within the same ambit: many of the issues will touch on the same subject matter, and this would also provide important opportunities for judicial specialization.

Question 11 – should the current Registration Board remain alongside an Appeals Panel

286. We do not support the option of an Appeals Panel for the reasons discussed above.

287. Mark von Dadelszen makes the point that if the previous Charities Commission model was adopted, there should be better early decision-making.

Conclusion

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

Yours sincerely

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