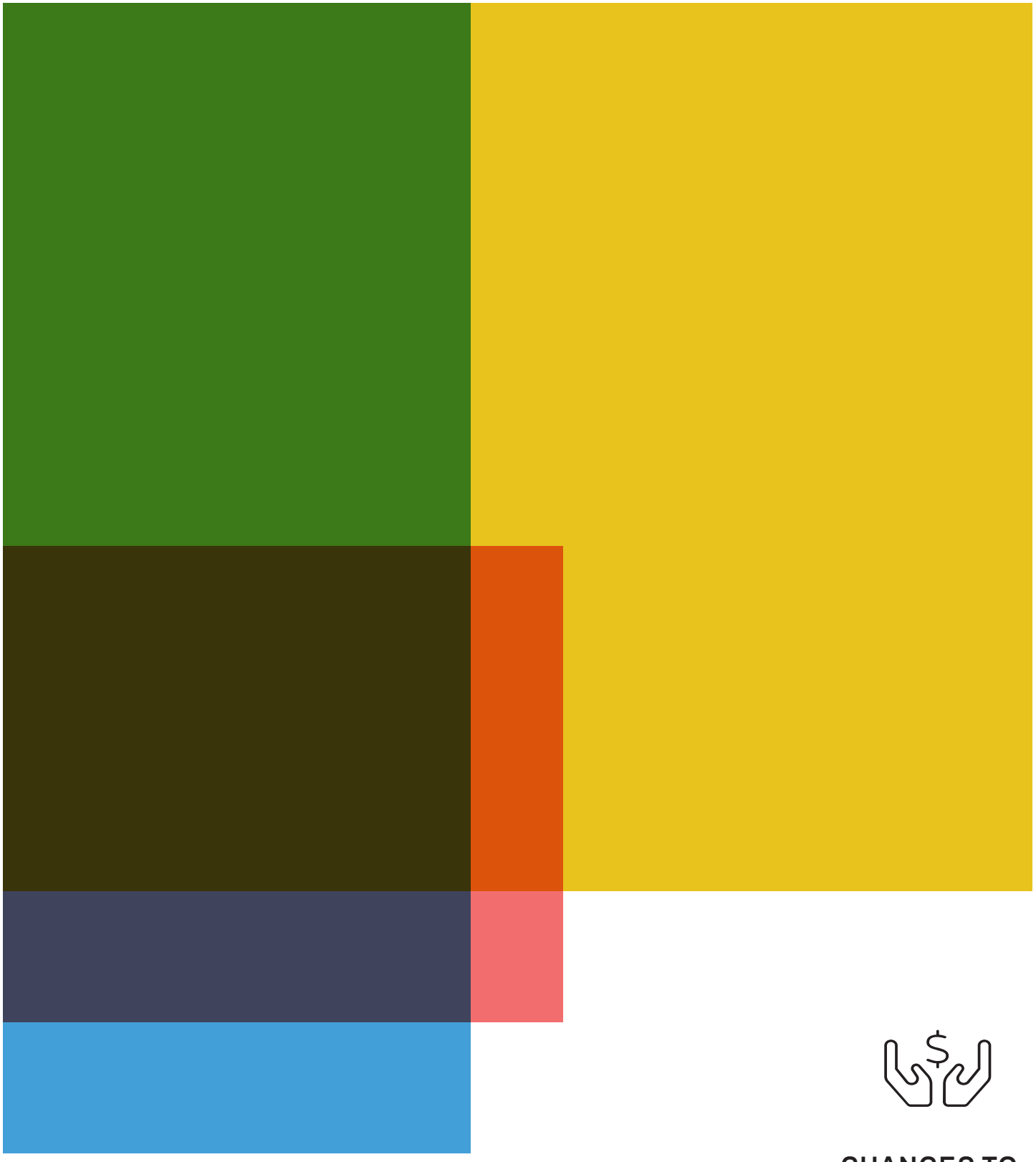

CHANGES TO
THE CHARITIES ACT

What you need to know

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THE CHARITIES Amendment Act 2023 received Royal Assent on 5 July 2023, but most of it does not come into force until either 5 October 2023 or 5 July 2024. The new legislation makes important changes to the legal framework for charities and will affect every registered charity in Aotearoa New Zealand.

This booklet sets out what's changing and when, and what charities need to review about their operations and arrangements to meet the new legislation.

If you have any questions or are interested in the continuing work to reform the regulatory framework for charities in Aotearoa New Zealand, please email Sue Barker at susan.barker@charitieslaw.co or charitiesreform@seedthechange.nz.

Download this booklet at www.seedthechange.nz/charities-reform

Download the wording of the Act at legislation.govt.nz/act/public/2023/0034/latest/LMS757420.html

This booklet is written by Sue Barker, of Sue Barker Charities Law, a boutique law firm based in Wellington specialising in charities law and public tax law.

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Seed the Change | He Kākano Hāpai is delighted to be supporting Sue Barker's authoritative explanation of the Charities Amendment Act 2023. Sue has worked diligently throughout the long process under National and Labour governments whereby this became law, and campaigned hard for it to be better and closer to what was originally promised.

She's produced a practical handbook for charities that need to meet the demands the Act places on them, provided a detailed analysis of the legal situation that now applies, and explained why this has not gone far enough. We, like she, hope further work will continue so that Aotearoa New Zealand achieves a framework for charities appropriate to the Twenty-First Century.

The charitable and not-for-profit sector is an important and rightly independent part of Civil Society. It is often the most innovative in addressing social and cultural issues. It can work constructively with others, including government, but does this best where it keeps its independence and has a robust legal framework which protects it and allows it the most freedom to act and advocate.

We're also delighted to have been able to make this free for use and distributed widely. That's possible because of the support of Community Foundations of Aotearoa New Zealand and other partners. Please circulate the booklet, the pdf and the website at www.seedthechange.nz/charitiesreform widely.

Anake Goodall

Community Foundations of Aotearoa New Zealand

Community Foundations of Aotearoa New Zealand *(CFNZ)* supports its 17 regional community foundation members' efforts working with local communities to grow generosity and build local wealth for the sole benefit of those local communities.

Community foundations grow generosity through accumulated funds, responsibly invested and granted in a measured and sustainable way back to local communities through charitable organisation. We oppose mandated minimum annual distributions rates from accumulated funds, and believe the existing financial reporting rules are clear and adequate with respect to how equity is to be reported and providing transparency to the public. These are the specific areas of concerns held by CFNZ in respect of the charities act review.

Arron Perriam

01

What you need to know

The first part of this booklet gives you an overview of the changes in the Charities Amendment Act and how it will affect you.

What you need to do

What charities need to do now

The changes that came into force on 5 July 2023 do not require charities to make any changes. Charities should continue to ensure that all decisions are made in the best interests of their charity's stated charitable purposes, and comply with their current financial reporting and notification obligations.

Note that the Charities Amendment Act does not reduce the financial reporting requirements for small, tier 4 charities. Tier 4 registered charities – i.e., those with annual operating payments under $140,000 – should continue to report under the current standards until new regulations are made. A simplified tier 4 standard was issued in May 2023 which tier 4 charities can use for accounting periods that end after 15 June 2023.

What charities need to do from 5 October 2023

Definition of "officer"

Charities will need to certify that all the following people are qualified to be an "officer" of a registered charity, list them all on the charities register, and notify any changes to them:

- all members of the charity's governing body;
- all persons occupying a position in the charity (such as a chief executive or treasurer) who are able to exercise "significant influence over substantial decisions" of the charity; and
- all persons with powers conferred on them to make decisions that would otherwise fall on the governing body (regardless of whether they hold a position in the charity).

From 5 October 2023, the Charities Registration Board will be able to ban any of the above people from being an "officer" of a registered charity by sending them an email to that effect. Having done so, the Board is then required to publish the banning order and the reasons for it on the internet. It is left to charities to work out how to deal with any employment law implications of such an order.

Note that for charities that are also incorporated societies, a different definition of "officer" applies under the Incorporated Societies Act 2022.

New duty to review rules

Every registered charity will need to tick a box in their annual return to say that, in the last three years, they have reviewed their governance procedures (whether contained in the charity's rules or elsewhere) to ascertain whether they are fit for purpose, and whether they assist the charity to "achieve" its charitable purpose and its obligations under the Charities Act.

In addition, new section 36A will provide that the role of an officer of a registered charity includes assisting the entity to "deliver" its charitable purpose, and comply with its obligations under the Charities Act or any other enactment.

Charities should be aware that these new provisions do not displace their underlying legal duties, the primary one of which is to act in good faith to further the charity's stated charitable purposes in accordance with its rules.

One officer must be 18

Every registered charity will need to ensure that at least one of its "officers" is at least 18. We understand that every registered charity in New Zealand already meets this requirement.

Fundraising

Every "collector" fundraising on behalf of a registered charity will need to disclose the charity's registration number if requested to do so by a member of the public.

Charitable purpose reviews

New section 13A will give legal legitimacy to Charities Services' practice of conducting "charitable purpose reviews". Charitable purpose reviews are a misnomer, because they primarily relate to a vetting of charities' activities, often in isolation from the purposes in furtherance of which they are carried out. Aside from failure to file annual returns, charitable purpose reviews are the primary mechanism by which charities are deregistered, or encouraged to voluntarily deregister.

Service of documents by email

Charities should be aware that important legal documents will be able to be served on them by email, including by email to an "officer" (as widely defined) or similar person. There is no corresponding provision protecting charities in case an email goes astray.

Consultation on legal guidance

New section 12A can be interpreted to allow Charities Services to "write law", by posting guidance on its website relating to legal interpretations of the definition of charitable purpose, without any consultation whatsoever.

An additional change which arises from the review but is not included in the Charities Amendment Act

Accumulated funds

Charities in tiers 1-3 (that is, with annual expenditure over $140,000) will need to report the reasons why they hold accumulated funds in their annual returns. This change is likely to come into effect in 2024. Charities Services is currently consulting on the annual return forms, and at the time of writing, a number of other changes to the annual return form are also proposed.

Charities would be well-advised to provide fulsome responses in their financial statements and annual returns as to the reasons for holding accumulated funds, to demonstrate to decision-makers that this accumulation is indeed being made in good faith in the best interests of the charity's charitable purposes.

What charities need to do from 5 July 2024

New objections process

Charities will be able to object to a wider range of decisions made about them by the Board or Charities Services, who must also give the charity the right to appear and be heard (whether in person or by electronic means) before the decision is made. Charities will need to know what provision of the Act a decision is made under in order to know whether they can object to it.

New appeals process

The vast bulk of charities' appeal rights will be removed: charities will be able to appeal only a limited range of

decisions, and appeals will only be able to be made to the Taxation Review Authority (to be known as the "Taxation and Charities Review Authority" or "TCRA" when hearing Charities Act appeals).

For most charities, this will make no practical difference. It will if the charity comes under Charities Services' scrutiny for something and it disagrees or is disadvantaged by any decision. And it will also make a difference to the general climate within which all charities operate, and so will make an indirect difference to all charities.

It is not yet clear how the appeals process will work in practice, and whether it will address concerns that charities' current inability to properly challenge adverse findings of "fact" reached by Charities Services from its internet searches effectively tilts the playing field in favour of Charities Services and the Board. More detail may be provided by regulations which have not yet been released.

Case law on the definition of charitable purpose will not be developed unless a TCRA decision is appealed to the High Court. The new appeals process may also have the practical effect of removing charities' ability to appeal to the Supreme Court.

BACKGROUND

The background to the new Act and why it needs further development

ACCORDING TO the Minister for the Community and Voluntary Sector, the review of the Charities Act was prompted by changes to the operating environment for charities.[1]

However, charities have in fact been waiting for a proper post-implementation review of the Charities Act 2005 since the original Charities Bill 108-1 was almost completely rewritten at Select Committee stage in 2004 and then rushed through under urgency without proper consultation. Since then, no such review has been undertaken: instead, the Act has been subject to a series of piecemeal amendments that have similarly been rushed through, often against the strong opposition of the charitable sector. These piecemeal changes have slowly eroded the gains made by charities in 2004, and slowly changed the underlying paradigm of the legislation from an enabling framework to one of ever-increasing restriction. The net result is a piece of legislation that is full of unintended consequences and still in need of further review and amendment.

It was good news in 2017 when it became manifesto policy for the New Zealand Labour Party to prioritise the "long-promised" first principles review of the Act, including looking at the definition of charitable purpose, looking at whether the disestablishment of the Charities Commission has improved things for the sector, and ensuring that charities can advocate for their charitable purposes without fear of losing their registered charitable status.[2]

However, the Charities Amendment Bill 169-1 that was introduced into Parliament in September 2022 addressed none of these issues.

The stated objective of the Bill was to make "practical changes to support charities to continue their vital contribution to community well-being, while ensuring that that contribution is sufficiently transparent to interested parties and the public".[3] From material obtained under the Official Information Act, it appears the then-new Minister wanted to make changes to the legislation that genuinely would support charities to continue their vital contribution. However, behind the scenes, officials from the Department of Internal Affairs persuaded the Minister to add the phrase "while ensuring that that contribution is sufficiently transparent to interested parties and the public". This additional phrasing is curious because New Zealand charities are already subject to the most comprehensive set of transparency and accountability requirements for charities in the world.[4] New Zealand also appears to have the most restrictive charities law framework (in application if not in legislation) of all comparable jurisdictions. Yet, DIA's words appear to have overtaken the review process: the Charities Amendment Act 2023 imposes further restrictions on the charitable sector, in the name of promoting transparency and accountability, while the Minister's concern to make changes

1 *Charities Amendment Bill 169-3* (28 June 2023) NZPD per Hon Priyanca Radhakrishnan.

2 New Zealand Labour Party *Community and Voluntary Sector Manifesto 2017 at 1, 4, 5*.

3 Charities Amendment Bill 169-1 (explanatory note) at 1.

4 S Barker *Focus on purpose – what does a world-leading framework of charities law look like?* [2022] NZLFRR 3, chapter 1 and Appendix A.

that would actually support charities appears to have been lost in the process.

The Charities Amendment Act in fact does nothing to support charities to continue their vital contribution, and instead imposes further piecemeal changes that are more likely to have the opposite effect. To make matters worse, even the DIA's own regulatory impact statement speaks of inadequate consultation, inadequate problem definition, and a lack of evidence to support the proposals.[5] Some of DIA's proposals received no consultation with the charitable sector whatsoever before being included in the Bill.

During the passage of the Bill through Parliament, reference was made to the very large *disconnect* between how DIA views the Charities Act, and how the vast bulk of the charitable sector views it.[6] This disconnect is apparent in the explanatory note to the Bill, where it states that the fundamentals of the Charities Act are considered "sound and fit for purpose" (including the definition of charitable purpose); on this basis, the DIA has consistently argued that a first principles review of the Charities Act is "not needed".[7] However, submitters on the Bill made it very clear that the fundamentals of the Act are not sound, the definition of charitable purpose is not working well, and a first principles review of the Charities Act is very much needed if we genuinely want the charitable sector to thrive and continue its vital contribution to community wellbeing.[8]

The majority of submitters in fact called for the Bill to be *withdrawn*, and for the Labour Party to honour its manifesto commitment to carry out a proper, first principles, post-implementation review of the Charities Act, one carried out *independently* of DIA. It is significant that every MP in Parliament outside of Labour (that is, National, ACT, the Green Party of Aotearoa New Zealand, Te Pāti Māori, Dr Elizabeth Kerekere and Hon Meka Whaitiri) *all* opposed the Bill.

The effectiveness of the charitable sector stems from its independence: both Government and charities themselves must "guard against allowing charities to inadvertently fall under the influence of the State, or the sector will lose that which makes it distinctive and valuable to begin with".[9] In particular, the charities law framework must guard against a business unit of a government department subtly moulding charities in its own image, causing a spread of bureaucratic risk aversion that risks turning charities into pale imitations of the government bureaucracy.[10] Charities make an important contribution to the democratic process by providing a voice to the marginalised and disadvantaged, thereby providing important protection against the skewing of public policy debates in favour of vested monied interests.[11] Charities also have an important role in holding government to account, and a proud tradition of incubating innovative solutions to intractable problems focused on prevention rather than merely cure. While charities may not be partisan (that is, they must not support or oppose a particular political party or candidate for public office), charities should be "political":[12] it is critical that charities are able to advocate for their charitable purposes without fear of losing their registered charitable status. The Minister argues that the decision of the Supreme Court in *Attorney-General v Family First New Zealand* [2022] NZSC 80 (28 June 2022) has addressed this issue:[13] however, the *Family First* decision in fact has precisely the opposite effect.

The reality is that the Charities Amendment Bill has been drafted "by DIA, for DIA": it will entrench current difficulties, and will reinforce the current trend for charities legislation to become weaponised against charities through over-reaching exercises of regulatory power in the name of promoting public trust and confidence. DIA has recently commenced consultation on updating charities' annual return forms,[14] and this, together with other recent developments such as proposed amendments to tax legislation,[15] and recent comments by the Minister,[16] indicate this trend of imposing ever-increasing "regulation" on charities looks set to continue.

When the Charities Commission (an autonomous Crown entity) was disestablished in 2012, the bipartite structure

5 Department of Internal Affairs *Regulatory Impact Statement: Modernising the Charities Act* (Report, 19 October 2021) at 3, 6, 9, 10, 45, 53, 120.

6 See for example Charities Amendment Bill 169-3 *In Committee* (20 June 2023) NZPD per Hon Louise Upston (National—Taupō).

7 *Charities act frequently asked questions - dia.govt.nz*

8 Submissions on the Bill can be accessed *here*.

9 Lord Hodgson of Astley Abbotts *Trusted and Independent: Giving Charity Back to Charities* (Report, July 2012) [3.15], [4.21].

10 Australian Productivity Commission *Contribution of the Not-for-Profit Sector* 11 February 2010 at 309, J3, J4.

11 See the discussion in S Barker "*Advocacy by charities: what is the question?*" (2020) 6 CJCCL 1 at 55 - 57.

12 Canada has recently amended its legislation to make this clear. See Report of the Special Senate Committee on the Charitable Sector *Catalyst for Change: A Roadmap to a Stronger Charitable Sector* June 2019 at 86.

13 Charities Amendment Bill 169-3 *In Committee* (20 June 2023) NZPD per Hon Priyanca Radhakrishnan (Minister for the Community and Voluntary Sector).

14 Charities Services | Ngā Ratonga Kaupapa Atawhai *Consultation on forms changes* 14 August 2023.

15 Clause 46 of the Taxation (Annual rates for 2023-24, Multinational Tax, and Remedial Matters) Bill 255-1 proposes to retrospectively require deregistered charities to divest all of their assets to a registered charity within 12 months if they wish not to pay the deregistration tax. However, it is premature to effect such a change while Charities Services' interpretations of the definition of charitable purpose remain so controversial, and in advance of honouring the commitment to review the definition of charitable purpose, which many other comparable jurisdictions have managed to do without apparent difficulty.

16 See G Cann *Charities sitting on millions more in cash than a year ago* Stuff 15 April 2023: "We considered some other options, for example looking at whether we require a distribution plan, or set a minimum percentage that larger charities need to distribute. But I feel that would be putting the cart before the horse, I want to know why first".

of the Department of Internal Affairs - Charities Services | Ngā Ratonga Kaupapa Atawhai and the Charities Registration Board | Te Rātā Atawhai was created to reassure charities that the function of determining eligibility for registration would remain independent from government.[17] Charities have the right to operate independently of government and be critical of government policy and practice; to that end, their ability to advocate in furtherance of their charitable purposes must be upheld and enforced by an authority which is *independent* of government. A mere government *commitment* to upholding independence of decision-making is inadequate: the status of the government agency must reflect its manifest independence and protect it against improper interference by future governments.[18]

However, in practice, the Charities Registration Board is not sufficiently distanced from Charities Services to be able to perform the independent check on government decision-making that was originally intended.[19] While there is no suggestion of Ministerial direction to the Board, the concern is the level of power wielded over decisions to register or deregister individual charities, in both perception and practice, by Charities Services (a business unit of a government department). As noted by one submitter:[20]

> If the executive branch can control civil society institutions via the charities registration process then we don't really live in a democracy.

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

18 R Fries "The Status of the Charity Commission under the 2006 Act" (Unpublished Paper, March 2012) 2.

19 Registration decisions are officially made by the Board under s 8 of the Charities Act. However, in practice, most decisions are made by Charities Services (s 9). Charities Services also provides secretarial and administrative support to the Board under section 8(6).

20 *Submission* of Greenpeace New Zealand.

In making decisions about which charities are able to get or stay on the charities register, Charities Services and the Charities Registration Board expend millions of dollars of taxpayer funds exercising a statutory power of decision that has far-reaching implications, not only for the charitable sector, but for our society more broadly. In a liberal democracy such as New Zealand, charities are entitled to demand accountability for the exercise of that statutory power, and to have their eligibility for registered charitable status determined according to law. Charities are also entitled to a meaningful say in policy decisions that affect them, particularly when decision-makers repeatedly express their support for a strong, active and vibrant charitable sector while making decisions that have precisely the opposite effect.

It is very important that charities push back and do not allow themselves to be "chilled into submission". Charities must challenge the trend for decision-makers to pay undue deference to DIA while ignoring the concerns of the vast bulk of the charitable sector. The sector must also be alert to forces that seek to "divide and conquer" in the interests of preserving the status quo. Bold reform is needed to create a legal framework that genuinely does have sound fundamentals, and that genuinely would support charities to thrive and continue their vital contribution to our society. However, such reform will not happen by accident: it will require the charitable sector to come together, build policy capacity, coordinate activities, and create common cause across different interests and positions. It will also require a "chorus of voices" of the need for reform, to send a message to decision-makers that cannot be ignored: charities are a critical part of the solution to so many of the multiple intractable challenges we face, yet the current legal framework is a significant barrier to that important contribution. Organising to get the legal framework for charities right is critical to protecting our charitable sector, social cohesion, wellbeing, and democracy.

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The details of the Act

The remainder of this booklet sets out the detail of what's in the Charities Amendment Act.

PART A

Changes that came into force on 5 July 2023

Increasing the size of the Charities Registration Board

One of the key issues consistently raised by submitters throughout the five-year Charities Act review process is "agency structure". It was Labour Party policy to look at whether disestablishing the Charities Commission has improved things for the sector, but DIA has consistently resisted attempts to address this issue, arguing that "structural changes could be disruptive and a distraction, and require significant establishment costs".[21]

These arguments have not made the issue go away, and DIA appears to have sought to appease charities' concerns by lavishing more money on the current structure.

Sections 5 and 32 of the Charities Amendment Act 2023 increase the size of the Charities Registration Board from three to five. It is understood that the government will be looking to induct new Board members "over the next while".[22]

The cost of this measure is estimated to be in the hundreds of thousands of dollars, including $150,000 pa for an additional full-time equivalent staff member "for Charities Services to support expanded Board role".[23] DIA argues this measure will "increase trust" in Charities Services and the Board.[24] However, it is difficult to see how shoring up a structure that has demonstrably failed to protect the independence of charities, and is demonstrably more expensive than the Charities Commission it replaced, will improve the acknowledged "poor perceptions".[25]

Regulations

New section 73(1)(g)-(k) is now in force, and provides a power to make regulations "providing for anything this Act says may or must be provided for by regulations", as

21 Te Tari Taiwhenua Internal Affairs *Modernising the Charities Act 2005: Discussion Document* February 2019 at 30.

22 Charities Services *July 2023 newsletter*.

23 Department of Internal Affairs *Regulatory Impact Statement: Modernising the Charities Act* (Report, 19 October 2021) at 106.

24 Department of Internal Affairs *Regulatory Impact Statement: Modernising the Charities Act* (Report, 19 October 2021) at 105.

25 Charities Amendment Bill 169-1 (explanatory note) at 2.

well as prescribing the procedure for the new appeals process, discussed further below.

The power to make regulations prescribing the financial reporting requirements for very small charities is also now in force.

Financial reporting by small charities

The financial reporting requirements for small charities was undoubtedly a key issue in submissions and public consultation, and there is no question of the importance of removing unnecessary red tape, particularly for small charities.

The Minister argues that new sections 42AB and 42AC of the Charities Act are a "real-life example" of making "practical improvements … to support charities to get on with their work".[26] Section 42AC allows Charities Services to exempt certain small charities from the requirement to comply with financial reporting standards issued by the External Reporting Board ("XRB"), and instead allow them to report "minimum financial information". DIA argues this will reduce the reporting requirements for small charities and, on that basis, has used these provisions as a Trojan horse to usher in a range of unhelpful measures.[27]

However, it is important to note that sections 42AB and 42AC do not actually reduce the financial reporting burden for small charities at all. They are only a promise to make regulations. When DIA comes to make the regulations (if they ever do), they will discover that they cannot reduce the financial reporting requirements for small charities any further than they have already been reduced by the XRB, in its new simplified tier 4 standard released in May 2023,[28] without removing all meaningful accountability. As one submitter (a retired accounting professor) pointed out, if the requirements are different, they will not be less onerous, and the introduction of yet another financial reporting standard will make oversight of the sector more rather than less complicated.[29]

The real reason for introducing these provisions appears to be to reduce pressure on DIA: 59% of tier 4 charities are currently failing to comply with XRB standards, and DIA seeks to "eliminate" the corresponding burden on Charities Services to "manage compliance and enforcement".[30]

In addition, the proposed exemption would apply only to "qualifying charitable entities", which DIA have proposed to define as charities with annual payments under $10,000 and total assets under $30,000.[31] These thresholds were not well supported during consultation, and would allow only 3,636, or 29%, of tier 4 charities to be exempt from XRB standards (note this is much smaller than the 14,000 put forward by Government MPs during the passage of the Bill through Parliament).[32]

By contrast, the Incorporated Societies Act 2022 exempts "small societies" from the requirement to comply with XRB standards, defined as societies with annual operating payments less than $50,000, and total current assets under $50,000 (provided the society is not a registered charity and does not have donee status).[33] At the time of writing, the Ministry of Business Innovation and Employment ("MBIE") proposes to define "current assets" by reference to international accounting standards (broadly, as convertible into cash or expected to be sold within 12 months),[34] and proposes to release guidance on how to calculate this in practice. However, a question arises as to whether working out whether a small society qualifies for the exemption might be more difficult than simply using the new simplified tier 4 standard in the first place.

Under the Incorporated Societies Act, qualifying small societies would be required to provide broadly the same information as is currently required by section 23 of the Incorporated Societies Act 1908: income and expenditure, assets and liabilities, and mortgages, charges and other security interests (with provision to require further information by regulations, although no further information is currently required).[35] By contrast, DIA proposes that qualifying registered charities would be required to provide "at a minimum":[36] income and expenditure; assets and liabilities; mortgages, charges, and other security interests; donations; and related party transactions. The notable omission is the statement of service performance, which allows charities to "tell their story" in narrative form and is widely acknowledged to be the most helpful piece of the financial reporting. However, at the time of writing, DIA proposes to require all tier 4 charities to provide

26 Charities Amendment Bill 169-2 (17 May 2023) per Hon Priyanca Radhakrishnan.

27 See for example Department of Internal Affairs *Regulatory Impact Statement: Modernising the Charities Act* (Report, 19 October 2021) at 60.

28 XRB *Tier 4 standard May 2023*.

29 *Submission* of Paul Dunmore.

30 Department of Internal Affairs *Regulatory Impact Statement: Modernising the Charities Act* (Report, 19 October 2021) at 19, 29.

31 Department of Internal Affairs *Regulatory Impact Statement: Modernising the Charities Act* (Report, 19 October 2021) at 28.

32 Department of Internal Affairs *Regulatory Impact Statement: Modernising the Charities Act* (Report, 19 October 2021) at 23; Te Tari Taiwhenua Internal Affairs *Charities Amendment Bill – Departmental Report v2* 27 March 2023 at [217]. Compare *Charities Amendment Bill 169-2* (17 May 2023) NZPD per Angie Warren-Clark, Dr Emily Henderson, Shanan Halbert (Labour).

33 Incorporated Societies Act 2022, s 103.

34 Ministry of Business Innovation and Employment Hīkina Whakatutuki *Consultation paper: Draft Incorporated Societies Regulations 2023 and proposed 'Initial Fees' under the Incorporated Societies Act 2022*.

35 Incorporated Societies Act 2022, s 104; Incorporated Societies Regulations 2023.

36 Department of Internal Affairs *Regulatory Impact Statement: Modernising the Charities Act* (Report, 19 October 2021) at 22.

a statement of service performance in their annual return form in any event.[37]

The overall result is considerable complexity that will require small entities to navigate a matrix of conflicting provisions in order to work out what they are required to report, with no apparent reduction in the financial reporting requirements for small charities at all. The Minister herself acknowledged that sections 42AB and 42AC were merely a "regulatory backstop",[38] and it will be interesting to see whether regulations under these provisions are ever made.

More fundamentally, there is disquiet about the general approach of granting Charities Services a King Henry VIII power to simply exempt selected charities from compliance with the legislation. This concern already exists with section 43 of the Charities Act, which gives Charities Services a broad, unilateral, and non-transparent power to simply waive compliance with statutory requirements. Section 43 was added to the legislation at select committee stage in 2004 and rushed through under urgency without proper consultation: while it may or may not have been appropriate in the hands of the Charities Commission (an autonomous Crown entity), its ongoing appropriateness in the hands of a business unit of a government department does not appear to have ever been properly considered. Instead, sections 42AB and 42AC simply extend this broad exemption power, and currently remain in the legislation even if they are never used.[39]

The short point is that the Charities Amendment Act 2023 does not reduce the financial reporting burden for small charities, and the basis on which it was used to usher in range of unhelpful measures is questionable, if it exists at all.[40]

Service of legal documents by email

Charities should be aware that new section 57(1)(d) of the Charities Act allows Charities Services and the Board to serve legal documents by email.

This provision is concerning because legal documents are normally required to be served in person (or otherwise as directed by a Court, or as specifically agreed with the recipient for the purposes of a particular proceeding).[41] There is no provision in the Charities Act to protect charities in case an email goes awry: this means that legal proceedings may progress against a charity, or an officer of a charity, potentially without their knowledge, with potentially significant adverse implications for those affected.

These concerns are exacerbated by section 57(3), which provides that a charity can be served by giving a document to "an officer or any other person holding a similar position in the entity". As discussed further below, the concept of "officer" is proposed to be significantly expanded, and the Charities Act does not explain what happens if the person did not in fact receive the email, or if they did receive it but did not pass it on. What if they are in hospital, or otherwise indisposed? To make matters worse, Charities Services proposes to facilitate its ability to serve charities by email by requiring an email address for each registered charity, saying that this email address will be used for "all correspondence"; Charities Services also proposes to request an email address for each "officer", as part of its consultation on forms.[42]

It is not reasonable to serve legal documents on charities or officers by email, unless specifically agreed in writing by the particular recipient, in the circumstances of the particular case, prior to such service being effected. If such agreement is not obtained, then the normal rules of service should apply. The Charities Act should be about more than just the administrative convenience of DIA.

37 Charities Services | Ngā Ratonga Kaupapa Atawhai *Consultation on forms changes* 14 August 2023.

38 *Charities Amendment Bill 169-1* (28 September 2022) NZPD per Hon Priyanca Radhakrishnan (Labour); Te Tari Taiwhenua Internal Affairs *Charities Amendment Bill – Departmental Report v2* 27 March 2023 at [192].

39 DIA argues that any regulations under these provisions will be subject to public consultation: Te Tari Taiwhenua Internal Affairs *Charities Amendment Bill – Departmental Report v2* 27 March 2023 at [217].

40 See SBCL press release *Government has no mandate to pass Charities Amendment Bill* 10 May 2023.

41 See for example Incorporated Societies Regulations 2023, regulations 22 and 24.

42 Charities Services | Ngā Ratonga Kaupapa Atawhai *Consultation on forms changes* 14 August 2023.

PART B

Changes that come into force on 5 October 2023

The definition of "officer"

From 5 October 2023, the Charities Amendment Act 2023 will amend section 4 of the Charities Act, to expand the definition of "officer" so that it:

a. means a person occupying a position in a charity who is able to exercise "significant influence" over "substantial decisions" of the entity, including members of the governing body (if it has a governing body), and a person occupying any other position (for example, a chief executive or treasurer) if that position enables them to exercise such influence; and

b. includes a person who has powers conferred on them to make decisions that would otherwise fall on the governing body (regardless of whether the person holds a position in the entity).

DIA argues this definition "clarifies" which persons are "captured" by the definition of officer, and "would make compliance easier" for charities.[43]

However, charities are required to list all of their "officers" on the charities register, certify that each officer is qualified, and notify any changes to officers, including if an officer becomes disqualified (sections 24(1)(d), and 40(1)(c) and (ca) of the Charities Act). On that basis, it is very difficult to see how this provision makes compliance "easier" for charities, or meets the Bill's stated objective of being a practical change that will support charities to continue their vital contribution.

Charities should be aware of this provision's history. The original Charities Bill 108-1, as introduced in 2004, would have limited the concept of "officer" to members of a charity's governing body only.[44] However, this definition was changed by Supplementary Order Paper ("SOP") on 12 April 2005 (the day the Charities Bill received its second and third readings) to cater for large religious bodies that do not have a governing body as such, but rather a synod or similar body comprised of hundreds of people.[45] It was considered impractical to have to ensure that every one of those people was not disqualified from being an officer of a registered charity.[46] As a result, the definition was changed to refer to people in a position of significant influence, but for charities *without* a governing body only:[47]

> officer—
>
> a. means, in relation to the trustees of a trust, any of those trustees and
>
> b. means, in relation to any other entity,—
>
> i. a member of the board or governing body of the entity *if it has a board or governing body*; or
>
> ii. *in any other case*, a person occupying a position in the entity that allows the person to exercise significant influence over the management or administration of the entity (for example, a treasurer or a chief executive);

Because the SOP was inserted at such a late stage of the Parliamentary process, this change was not subject to any consultation with the charitable sector before being introduced into the legislation.

Subsequently, in one of the piecemeal changes that have been made to the Charities Act over the years, the definition of officer was amended by Statutes Amendment Bill to refer to those in a position to exercise significant influence for all charities (other than trusts), whether they had a governing body or not.[48] From 2012, the definition of "officer" was worded as follows:[49]

> officer—
>
> a. means, in relation to the trustees of a trust, any of those trustees; and
>
> b. means, in relation to any other entity, —
>
> i. a member of the board or governing body of the entity if it has a board or governing body; *and*
>
> ii. a person occupying a position in the entity that allows the person to exercise significant influence over the management or administration of the entity (for example, a treasurer or a chief executive);

43 Charities Amendment Bill 169-2 (select committee report) at 2.

44 Charities Bill 108-1 clause 4(1).

45 Charities Bill 108-3, Supplementary Order Paper 2005 No 357 (12 April 2005) at 8.

46 Charities Bill *In Committee* (12 April 2005) 625 NZPD 19,940 per Gordon Copeland (United Future).

47 Charities Act 2005 (as at 3 September 2007), section 4(1) (italicising added).

48 The Statutes Amendment Bill (No 2) 271-2 became the Charities Amendment Act 2012.

49 Charities Act 2005 (as at 1 July 2012), section 4(1).

The changes made to paragraph (b) of the definition provide an example of how fast law does not make good law: on its face, the definition as amended requires a person to be both a member of the governing body *and* in a position to exercise significant influence in order to be an officer of a charity (other than a trust). This appears to be an error ("the 2012 error"),[50] but we are not aware of any publicly available commentary explaining why this change was made, or why the definition was extended to persons exercising significant influence for all societies but not for trusts.

Nevertheless, having made this change, the concept of "significant influence" was then imported into section 18(b) of the Health and Safety at Work Act 2015,[51] and section 5(1) of the Incorporated Societies Act 2022.

Originally, the November 2015 Exposure Draft Incorporated Societies Bill had proposed to define the concept of "officer" primarily by reference to a society's constitution, but with an extension for the purposes of the duties of officers, as follows:[52]

> 1. In this Act, officer, in relation to a society, means a natural person who—
>
> a. is a member of the committee (including the society's contact officer):
>
> b. holds any other office provided for in the society's constitution.
>
> 2. For the purposes of sections 21 and 48 to 55 and subpart 6 of Part 4 [which relate to officers' duties and offences], officer also includes a natural person—
>
> a. in accordance with whose directions or instructions a person referred to in subsection (1) may be required or is accustomed to act; and
>
> b. in accordance with whose directions or instructions the committee may be required or is accustomed to act; and
>
> c. who exercises or who is entitled to exercise or who controls or who is entitled to control the exercise of powers that, apart from the constitution, would fall to be exercised by the committee; and
>
> d. to whom a power or duty of the committee has been directly delegated by the committee with that person's consent or acquiescence, or who exercises the power or duty with the consent or acquiescence of the committee.
>
> 3. Subsection (2) does not include a person to the extent that the person acts only in a professional capacity.
>
> Compare: 1993 No 105 s 126

While broadly consistent with the recommendations of Te Aka Matua o te Ture – the New Zealand Law Commission,[53] MBIE based subsection (2) of this definition on the "deemed director" provisions of the Companies Act 1993 on the basis that they were "clearer about who, other than members of a society's committee, will be deemed to be an officer of society".[54] However, submitters raised considerable concern that this definition was too broad: trade unions argued that this definition could capture thousands of their (and other federally-structured societies') members, including 'worksite representatives' and those serving on 'area councils'. In addition, many submitters argued that the extension to delegates in clause 36(2)(d) could capture a society's employees.[55]

In response, the definition was narrowed by aligning it with the definition of "officer" in the Charities Act.[56] The current definition in section 5(1) of the Incorporated Societies Act 2022 is therefore in the following terms:

> officer—
>
> a. means, in relation to a society,—
>
> i. a natural person who is a member of the committee; *or*
>
> ii. a natural person occupying a position in the society that allows the person to exercise significant influence over the

50 Department of Internal Affairs *Regulatory Impact Statement: Modernising the Charities Act* (Report, 19 October 2021) at 62.

51 Note that section 18(d) of the Health and Safety at Work Act 2015 specifically excludes from the definition of "officer" people who merely advise or make recommendations to "officers".

52 Exposure Draft Incorporated Societies Bill clause 36.

53 The Law Commission recommended that the definition of officer should "[catch] any person who participates in making significant decisions that affect the affairs of the society or who is able to exercise significant influence over the management or administration of the entity, because of the position they hold or because the office holders are accustomed to acting in accordance with their wishes or instructions. Any person who gives advice to an incorporated society in that person's professional capacity should be excluded": Te Aka Matua o te Ture - New Zealand Law Commission *A New Act for Incorporated Societies* (NZLC R129, 2013) at [6.79]. See also recommendation 30: "For the purposes of the duties of officers an "officer" should be defined as: • the statutory officer of a society; • all other members of the society's committee; • any other office holder provided for in a society's constitution; • a person, including any member of the society or employee of the society, who makes, or participates in making, decisions that affect the whole, or a substantial part, of the operations of the society; • a person who has the capacity to significantly affect the society's financial standing; and • a person whose instructions or wishes the statutory officer, the committee of the society or other office holders are accustomed to acting in accordance with".

54 MBIE Hīkina Whakatutuki *Exposure Draft: Incorporated Societies Bill Request for Submissions* November 2015 ISBN 978-0-908335-76-3 at [61].

55 Office of Minister of Commerce and Consumer Affairs *Cabinet paper: Reform of the Incorporated Societies Act 1908* 2 May 2019 at [34].

56 Office of Minister of Commerce and Consumer Affairs *Cabinet paper: Reform of the Incorporated Societies Act 1908* 2 May 2019 at [35] – [37].

> management or administration of the society (for example, a treasurer or a chief executive); and ...

It is notable that the drafters of this provision did not import the 2012 error, and had the wherewithal to use "or" rather than "and" at the end of paragraph (a)(i), so that the definition extends to either members of the governing body *or* those in a position to exercise significant influence. However, the question of whether the concept of "significant influence" should be in the definition at all does not appear to have been considered: the imperative appears to have been consistency with the Charities Act, even if this meant compounding error upon error.

It is ironic that the Charities Act now returns to the "deemed director" concept that was so resoundingly rejected during consultation on the Incorporated Societies Bill.

In the Charities Act review, DIA originally recommended the following for the definition of officer:[57]

> The current definition of an officer of a charity treats trusts differently to other entities and is interpreted differently across the sector [this is a reference to the 2012 error]. The definition has been an issue for Charities Services in some investigations where the investigated person had a significant role or influence in the charity but was not considered an officer and therefore did not have the accountability that comes with the officer title [this means that Charities Services/the Board could not ban them from being an "officer", although they could deregister the charity].
>
> We recommend expanding the definition of officer to include all who have significant authority, decision-making or direction-setting powers within the charity. This would result in the following groups of people being captured:
>
> - trustees of trusts; and
> - the members of a board or governing body; and
> - any other person(s) with significant influence over the management or administration of the entity.

As a result, the definition of "officer" in the Charities Amendment Bill as introduced was in the following terms:

> officer, in relation to a charitable entity,—
>
> a. means a person who is able to exercise significant influence over the management or administration of the entity:
>
> b. includes, but is not limited to,—
>
> i. in relation to the trustees of a trust, any of those trustees:
>
> ii. in relation to any other entity, a member of the board or governing body of the entity if it has a board or governing body:

In other words, DIA proposed extending the term "officer" to mean any person able to exercise significant influence, *whether or not* they occupied a position in the charity. DIA argued this would create "legislative consistency" by extending the "significant influence" concept to trusts. It would also correct the error they made in 2012.

However, the option of restoring the definition of "officer" to its original wording, which would have achieved both these objectives while also addressing the concerns raised by many submitters about not unduly blurring the distinction between governance and management, does not appear to have been considered. Instead, the imperative appears to have been to broaden Charities Services' powers even if this reduced charities' independence.[58]

DIA advised the Select Committee considering the Charities Amendment Bill that 55 submitters commented on this proposed definition, with four supporting it, two partially supporting it, and 23 clearly opposing it.[59] This wording appears intended to give the impression that there was support for the proposed definition, with only about half of submitters opposing it. However, charities should be aware that these numbers are inaccurate: 77 submitters commented on the proposed definition of officer, with only two submitters supporting it (the Institute of Directors and Manawatu District Council, neither of which are charities) and 75 (or 97%) opposing it. The two submitters put forward as "partially supporting" the changed definition in fact supported "consistency" with other legislation, while raising significant concerns about the proposed change. The same applies to two of the four submitters alleged to have supported the change. In addition, besides the 23 submitters listed as "clearly opposing" the change, at least 25 others also opposed it (more than double the number stated). There are a number of other occasions where DIA's advice to the Select Committee was inaccurate or misleading: it is not clear what consequences befall DIA for providing inaccurate or misleading advice and it is concerning that the majority of the Select Committee appear to have accepted DIA's advice without critical examination.

In fact, almost all submitters pointed out that DIA's proposed definition was too broad, potentially extending to innumerable people, including donors, funders, employees, volunteers, contractors, professional advisers

57 Department of Internal Affairs *Regulatory Impact Statement: Modernising the Charities Act* (Report, 19 October 2021) at 5-6.

58 Department of Internal Affairs *Regulatory Impact Statement: Modernising the Charities Act* (Report, 19 October 2021) at 66.

59 Te Tari Taiwhenua Internal Affairs *Charities Amendment Bill – Departmental Report v2* 27 March 2023 at 10.

such as lawyers and accountants, religious, spiritual or cultural advisers, auditors, members, family members of officers, patrons, and no doubt others. It could even extend to Charities Services. It could extend to such people even if they are not part of the charity, even if they are not mandated by the charity to be an officer, and even if they have not consented to take on the role.

In response, the majority of the Select Committee accepted DIA's advice to amend the definition as follows:

> officer, in relation to a charitable entity,—
>
> a. means a person occupying a position in the entity who is able to exercise significant influence over substantial decisions of the entity including, but not limited to,—
>
> i. in relation to a trust, the trustees of the trust; and
>
> ii. in relation to any other entity, a member of the board or governing body of the entity (if it has a board or governing body); and
>
> iii. a person occupying any other position (for example, a chief executive or treasurer) if that position enables them to exercise such influence:
>
> b. includes a person who has powers conferred on them to make decisions that would otherwise fall on the trustees, the board, or the governing body of the entity (regardless of whether the person holds a position in the entity):

In other words, the requirement to occupy a position in the charity has been reinstated to paragraph (a), but an additional "deemed director" provision, that does not require a position to be occupied, has been added in paragraph (b).

DIA acknowledged that this definition is now inconsistent with the definition in the Incorporated Societies Act, and noted the risk that "courts will interpret the definitions differently";[60] DIA also noted that MBIE would prefer for the two Acts to be in alignment, but argued that "Charities Services will work with MBIE to provide further certainty in guidance".[61] The original terms of reference for the review specifically sought "better alignment" with other legislation,[62] and it is very unlikely that this inconsistency will be able to be resolved by "guidance".

Note that further inconsistency was proposed by the draft incorporated societies regulations issued for consultation in July 2023: draft regulation 8 proposed to exclude liquidators, receivers and statutory managers from the definition of "officer" in the Incorporated Societies Act.[63] No similar carveout had been proposed for the Charities Act, raising concerns that the implications for the ⅓ of incorporated societies that are also registered charities, or the ¼ of registered charities that are also incorporated societies, of this matrix of conflicting provisions, do not appear to have been adequately thought through. The final Incorporated Societies Regulations 2023 were gazetted on 6 September 2023 and did not include draft regulation 8. Nevertheless, concerns about legislative inconsistency remain.

More fundamentally, the original 2012 extension of the "officer" definition to those in a position to exercise significant influence for all societies, whether or not they have a governing body, does not appear to have been well-conceived. While management may be in a position to exercise "significant influence", decision-making responsibility lies with governance, however a charity may be structured. As DIA itself acknowledges, the Charities Act provides a registration regime for charities and "compliance and enforcement should generally sit with the charitable entity, rather than an officer or other person".[64] Any criminal wrongdoing within a charity can already be more than adequately addressed by the existing powers of the Police and it is not clear that encroachment onto the independence of charities by means of an extended definition of officer is in any way needed (see discussion below regarding enforcing the fiduciary duties).

The new definition of "officer" unhelpfully blurs the distinction between governance and management, and will exacerbate what is already a challenging dynamic for charities to navigate at a time when significant investment is being made across the sector to improve understanding about this important distinction. Many submitters pointed out that the new definition will cut across their own rules or settled practices that are working well.

The net result is a very complicated provision that will create unnecessary red tape for charities, contrary to the stated objective of the Bill. It will also undermine public trust and confidence in charities by undermining their independence, contrary to the stated purpose of the Act.[65]

Banning orders

The real reason DIA wants to extend the definition of officer in this way appears to be new section 36C, which allows the Charities Registration Board to ban a

60 Te Tari Taiwhenua Internal Affairs *Charities Amendment Bill – Departmental Report v2* 27 March 2023 at 18.

61 Te Tari Taiwhenua Internal Affairs *Charities Amendment Bill – Departmental Report v2* 27 March 2023 at 18.

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

63 Draft regulation 8: *https://www.mbie.govt.nz/dmsdocument/26971-exposure-draft-of-incorporated-societies-regulations-2023*.

64 Department of Internal Affairs *Regulatory Impact Statement: Modernising the Charities Act* (Report, 19 October 2021) at 16, 114 and 121.

65 Charities Act 2005, section 3(a).

person from being an officer of a charity. Currently, the Board must deregister a charity first before exercising this power,[66] and there is no difficulty in principle with removing that restriction. However, the problem is that from 5 October 2023 there will be almost no checks and balances on this power.

The Incorporated Societies Act 2022 introduces a new power to ban people from being an officer of an incorporated society: an application for such an order can be made independently of any action taken against a society; however, such a banning order can only be made by a Court, following an oral hearing of evidence.[67] Other jurisdictions similarly require an order of a Court before exercising a power to ban a person from being an officer of a registered charity, including Ireland,[68] and Scotland.[69] Given the reputational effect that a banning order has on both the individual and the charity concerned, it has also been suggested in Northern Ireland.[70]

However, in New Zealand, the Board will be able to ban a person simply "by notice", which notice will be able to be provided by email, as discussed above.[71] Further, as soon as practicable after issuing the notice, the Board is required to publish the notice on its website (section 36C(2)).

It is not reasonable for the Board to be able to impose such significant reputational consequences on an officer and charity(s) in such a casual and unbridled way. Concern in this regard is underscored by the ongoing uncertainty as to the circumstances under which such a banning order may be issued. New section 36C(1)(b) allows a banning order to be issued for a "significant or persistent" failure to meet obligations under the Charities Act. However, what exactly constitutes such a "significant or persistent" failure is not clear: many charities continue to be threatened with deregistration for undertaking legitimate activities, such as seeking to provide people with affordable housing (in the middle of a housing crisis), undertaking social enterprise activity, advocating in good faith in furtherance of their stated charitable purpose, and many others.[72] Does a chief executive who undertakes a public awareness campaign, in good faith, in furtherance of their charity's stated charitable purposes, face the reputational consequences of a "banning order", delivered by email and then published on the internet, simply because Charities Services happens to disagree with their charity's views?

In addition, many people captured by the new definition of officer will be employees, and submitters raised considerable concern as to how the Board's new power will interact with charities' employment law obligations. DIA's response was that it is "up to the entity" to determine how a banning order is executed.[73]

DIA acknowledges that these provisions will reduce sector independence, but argues that "charities still get to determine who they want as officers".[74] DIA also acknowledges that the charitable sector "thrives through the involvement of people with passion for the cause, and we do not consider it to be the Government's role

66 Charities Act 2005, section 31(4).

67 Incorporated Societies Act 2022, ss 168 – 173.

68 Charities Act 2009 (Ireland) s 74.

69 Charities and Trustee Investment (Scotland) Act 2005 s 34

70 Dr O Breen, Rev Dr L Carroll, N Lavery *Independent Review of Charity Regulation Northern Ireland* January 2022 at 193 – 194.

71 DIA advised the Select Committee that they considered this approach to notifying when disqualifying an officer to be "sufficient" and recommended no change: Te Tari Taiwhenua Internal Affairs *Charities Amendment Bill – Departmental Report v2* 27 March 2023 at [174] and [179]. DIA instead referred at [175]-[178] to new section 25(2), which allows information to be restricted from the charities register if the chief executive considers that public access to that information would be likely to prejudice the privacy or personal safety of any person, or the individual is a protected person in relation to a protection order or a person for whose benefit a suppression order applies under any legislation. However, these circumstances do not exhaust the possible circumstances whereby a person's reputation could be unfairly damaged by incorrect publication of a banning order.

72 See, for example, Charities Services *2021/2022 Annual Review* at 12 pointing out that 536 charities deregistered voluntarily in 2021/22, representing 64% of the 839 charities deregistered in that period. The following explanation is given: "In Aotearoa, charitable status is voluntary. A charity may ask to be deregistered at any time and for any reason. For example, a charity may request deregistration if it is winding-up and will cease to exist". This wording appears intended to give the impression that charities deregister voluntarily for only benign reasons: there is no indication of how many charities deregistered voluntarily due to DIA's controversial changes in jurisprudential interpretation of the definition of charitable purpose. Similarly, of the 1,409 applications for registration received during the period, 159 or 11% were withdrawn, with no elaboration as to why so many, having invested in creating a new entity and applying for registration, were subsequently withdrawing their application. This factor was commented on in 2019 *submissions* including the submission of LEAD: "... there appears to be a practice developing of DIA staff commonly encouraging some applicants (whom they, the DIA staff) believe might not be successful in applying for registration) to withdraw their application (or voluntarily deregister) – thereby removing decision-making from the Board, and also as a result removing from public and media scrutiny (ironically undermining the very transparency that the legislation was designed to promote). For example, since February 2007, approximately 9,315 charities have been deregistered (more than a third of those currently registered – so this represents quite a major "purging" of the register). About half (4,774 charities) were deregistered for failure to file annual returns. While the paper work is an important part of an information and disclosure regime, only six charities (0.0006%) have actually been deregistered for "serious wrongdoing" – the main rationale for having such a regulatory regime in the first place. Most of the remaining 4,535 charities have deregistered "voluntarily" so it is unclear how many of these deregistrations are the result of the narrow jurisprudence of concern to many observers. Similarly with registrations being informally dissuaded from being pursued this effectively hides potential areas of conflict, individualises failure to comply and throws a cloak of invisibility over potential systemic biases or jurisdictional peculiarities ... An increasingly narrow interpretation of "charity" serves no-one, and undermines the avowed purpose of the Act".

73 Te Tari Taiwhenua Internal Affairs *Charities Amendment Bill – Departmental Report v2* 27 March 2023 at 16. New section 36D(2) provides that "Disqualification of an officer ...under section 36B or 36C does not, unless otherwise provided for, affect the disqualified officer's role or functions under any other Act or rule of law".

74 Department of Internal Affairs *Regulatory Impact Statement: Modernising the Charities Act* (Report, 19 October 2021) at 60.

to determine who can be involved in a charity".[75] However, proposed new section 36C will have precisely the opposite effect, by allowing the Charities Services/the Board to override charities' choices, reach into registered charities and ban people from being "officers".

A number of submitters pointed out that these kinds of changes are shrinking the legal independence of charities from government and disrupting the very structure of the community sector, without mandate. Many submitters pointed out that the definition of "officer" should be limited to governance, as per the original Charities Bill. People should not be held responsible for decisions they are not legally able to make. Decisions that governors make must be theirs alone and they must bear sole responsibility for them. In addition, the Board should be required to obtain an order of the Court before banning anyone from being an "officer" of a registered charity, as is required under the Incorporated Societies Act (see section 168). The Board should also not be able to notify its intention to seek such an order by email, and publication of a banning order should not occur until after a Court has determined that the banning was appropriate.[76] It would also be helpful for the Charities Act to use the term "responsible person", rather than "officer", to avoid confusion with office holders in a charity's constitution.[77]

Despite these factors, the new definition is now law, and it is possible that MBIE may move to amend the Incorporated Societies Act definition of "officer" to align with the new and very complex Charities Act definition.

The Charities Amendment Act does not appear to have incorporated schedule 4 of the Incorporated Societies Act 2022, which amended section 31 of the Charities Act to require the Board to give a copy of any banning order to the Registrar of Incorporated Societies.[78] The schedule 4 amendment refers to banning orders made under section 31(4)(b), which has been replaced by section 36C, and the new provisions of the Charities Amendment Act have not incorporated this requirement. This appears to be another oversight, and it remains to be seen whether the Board will be required to forward banning orders to the Registrar.

New section 12A – Chief executive to consult on significant guidelines

From 5 October 2023, new section 12A will require Charities Services (referred to in the legislation as the "chief executive") to consult "persons or representatives of persons" that Charities Services considers "reasonable to consult" before issuing "significant guidelines or recommendations on the best practice to be observed by charities, officers, and persons concerned with the management or administration of charities".

DIA acknowledges "perceptions" of lack of distance between Charities Services and the Charities Registration Board, but argues that these are addressed by "proposed changes in the Bill that will improve regulatory decision-making".[79]

However, most decisions under the Charities Act are made by Charities Services and new section 12A appears to be the only provision in the Bill addressing fairness or accountability of Charities Services' decision-making.[80] DIA argues that section 12A will improve "fairness and accountability about decisions … that impact charities",[81] but section 12A is in fact highly problematic in a number of respects.

For example, in the Bill as originally introduced, section 12A would have followed the wording of section 72A(6), which provides that, before prescribing forms or requirements for forms for the purposes of the Charities Act, Charities Services must consult "persons or organisations" that Charities Services considers to be "representative of the interests of charitable entities". Having done so, Charities Services can prescribe a form or requirement simply by posting on its website.[82]

Section 72A itself is another example of piecemeal change made without proper consultation. Section 72A was inserted into the legislation by Statutes Amendment Bill in February 2012, a few months before the Charities Commission was disestablished in July 2012.[83] Prior to this amendment, forms and requirements were required to be prescribed by regulations.[84] There was no mean-

75 Department of Internal Affairs *Regulatory Impact Statement: Modernising the Charities Act* (Report, 19 October 2021) at 51.

76 In their advice to Select Committee, DIA argues at [162] that "As section 55B of the Bill proposes that individuals and entities have 2 months to object to a decision, it is likely [sic] that the decision will not be publicly published until that 2-month period has passed". The intention appears to be that charities and officers must simply trust that the Board will never make a mistake.

77 See S Barker *Focus on purpose – what does a world-leading framework of charities law look like?* [2022] NZLFRR 3, recommendation 8.6. This term has also been recommended in Australia. See P McClure AO, G Hammond OAM, S McCluskey, Dr M Turnour *Strengthening for purpose: Australian Charities and Not-for-profits Commission – Legislative Review 2018* 31 May 2018 at 9.

78 Incorporated Societies Act, schedule 4 (*Amendments to other legislation*), inserting a new section 31(5) into the Charities Act.

79 Te Tari Taiwhenua Internal Affairs *Charities Amendment Bill – Departmental Report v2* 27 March 2023 at 34; see also Department of Internal Affairs *Regulatory Impact Statement: Modernising the Charities Act* (Report, 19 October 2021) at 86.

80 Department of Internal Affairs *Regulatory Impact Statement: Modernising the Charities Act* (Report, 19 October 2021) at 80.

81 Department of Internal Affairs *Regulatory Impact Statement: Modernising the Charities Act* (Report, 19 October 2021) at 93. See also: Charities Amendment Bill 169-1 (explanatory note) at 1, 3. Te Tari Taiwhenua Internal Affairs *Charities Amendment Bill – Departmental Report v2* 27 March 2023 at 36.

82 Charities Act 2005 s72A(5), (6).

83 Statutes Amendment Bill (No 2) 271-2.

84 Charities Act s 73(1) prior to its amendment in February 2012 provided that: "(1) The Governor-General may, by Order in Council, make regulations for all or any of the following purposes: (a) prescribing forms for the purposes of this Act, and prescribing— (i)

ingful 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. While it might make sense for an autonomous Crown entity to be able to prescribe forms or requirements without the formality of regulations, it is not clear that such a broad-sweeping and apparently unappealable power is appropriate in the hands of a business unit of a government department. A key area of difficulty is that Charities Services is subject to almost no meaningful accountability beyond minimal passing reference in a 220+ page annual report covering DIA's comprehensive work across a wide range of areas (including gambling, censorship, countering violent extremism, government recordkeeping, unsolicited electronic messages, anti-money laundering, private investigators and others).[85] Section 72A(6) is problematic in that it only requires consultation with a group of people selected by Charities Services, whose comments may or may not be taken into account at Charities Services' discretion. The specific requirement to consult on forms or requirements is also unhelpful, as it can be interpreted to mean consultation is not required in other situations, such as before posting "guidance" to Charities Services' website.

New section 12A only exacerbates this concern: by requiring limited consultation before issuing "significant" guidance on "best practice" to be observed by persons concerned with the "management or administration" of charities, the provision reinforces an interpretation of section 72A that would absolve Charities Services from a requirement to consult on other matters. Most of the problematic "guidance" that has been issued by Charities Services to date relates to controversial legal interpretations of the definition of charitable purpose, which is administered by Charities Services as if it were law, despite not being subject to any democratic checks or balances whatsoever (or, apparently, any appeal right, as discussed further below). Decisions made on the basis of such "guidance" can have a significant impact on charities, including on whether they are able to be registered or remain on the charities register. In most comparable jurisdictions, consultation is conducted with the public before issuing legal guidance in a charities law context. By contrast, new section 12A looks set to be interpreted by Charities Services as permitting them to "write law", that will have significant impacts for charities, simply by posting on their website without any consultation whatsoever.

DIA argued that seven submitters agreed with proposed new section 12A and five disagreed with it.[86] Actually, 15 submitters disagreed with the proposal, arguing that consultation should be with the public to protect against "selective consultation", or the "pick and choose process" that has been a feature of the Charities Act review process. Submitters also argued that public consultation should occur before issuing all guidance, not just that relating to management or administration, and not just guidance selected by Charities Services as "significant".

In response, the majority of the Select Committee simply accepted DIA's advice to amend the provision to require consultation with persons Charities Services considers "reasonable" to consult. DIA argued that this would make the provision "clearer" on who should be consulted.[87] However, this change in wording does nothing to address the concerns raised by submitters, and instead creates additional complexity and confusion due to now being inconsistent with the wording in section 72A(6). Section 12A does nothing to improve transparency and accountability of Charities Services' decision-making, directly contrary to the stated objective of the Bill. More fundamentally, laws should be made by Parliament following a democratic process or otherwise by the Courts: they should not able to be made by a business unit of a government department posting on its website without any consultation whatsoever.

New section 13(1)(e) – at least one "officer" must be 18 or older

There appears to be a lot of confusion about new section 13(1)(e), which from 5 October 2023 will require every registered charity to have at least one officer who is 18 or older at any time.

Currently, section 16(2)(b) of the Charities Act allows anyone 16 or over to be an officer of a registered charity. For reasons that are not clear, DIA was concerned that this provision was inconsistent with the Trusts Act 2019 and the Companies Act 1993, which require people to have reached at least 18 years of age in order to be a trustee of a trust or a director of a company.[88]

It seems reasonably straightforward that an officer of a registered charity must be 16 or over, unless the charity is a company or a trust, in which case its directors or trustees must be at least 18. However, Charities Services interpreted the provisions differently, stating on its website that that the Charities Act overrides the Trusts Act, such that "charitable trusts can have trustees that are 16 and 17, but other trusts under

the inclusion in, or attachment to, forms of specified information or documents: (ii) forms to be signed by specified persons: (b) prescribing requirements with which documents sent or delivered for registration must comply:". The requirements were set out in the Charities (Fees, Forms, and Other Matters) Regulations 2006 prior to their amendment in February 2012.

85 Te Tari Taiwhenua Department of Internal Affairs *Pūrongo Ā Tau – Annual Report 2022 at 20, 106, 166, 201-202*.

86 Te Tari Taiwhenua Internal Affairs *Charities Amendment Bill – Departmental Report v2* 27 March 2023 at 35.

87 Te Tari Taiwhenua Internal Affairs *Charities Amendment Bill – Departmental Report v2* 27 March 2023 at 36-37.

88 See Trusts Act 2019, section 96(2)(a), and Companies Act 1993, section 151(2)(a).

the law cannot".[89] Charities Services seemed to base this view on section 5(9) of the Trusts Act 2019, which provides that:

> If there is an inconsistency between the provisions of this Act and those of any other enactment, the provisions of that other enactment prevail, unless this Act provides otherwise.

However, it is not clear that there was any inconsistency: the fact that people aged 16 or 17 may be an officer of a registered charity is not necessarily "inconsistent" with the requirement that one must have reached 18 to be a trustee of a trust. Charities Services has since removed this wording from its website.

Nevertheless, DIA considered there continued to be a significant problem and proposed raising the minimum age in the Charities Act so that officers of *all* registered charities would have to be at least 18.[90]

In so doing, DIA appear to have overlooked that this proposal would create a new inconsistency for the ¼ of registered charities that are structured as incorporated societies: section 47(3)(a) of the Incorporated Societies Act 2022 enables 16 and 17 year olds to be officers of an incorporated society.

In the result, DIA settled on new section 13(1)(e), arguing that although this option was "not well tested with stakeholders", it "strikes an appropriate balance between ensuring that young people can still participate in charities by holding officer roles and creating greater consistency with other legislation".[91]

There is no question of the importance of supporting youth involvement with charities, but the Trusts Act and the Companies Act set the bar at 18 for good reason, based on legal capacity to deal with property and enter into contracts. As the Law Commission noted, the important principle of settlor autonomy should not extend to empowering those who lack legal capacity to act as trustee.[92] These obligations are not diminished if the trust or company takes the extra step of seeking registration as a charity; if anything, they are increased. In addition, the requirement for trustees or directors to be 18 never precluded 16 and 17 year olds from holding other roles in charities structured as a company or a trust, or from being members of the governing body or otherwise having "significant influence" in other types of charities, such as an incorporated or unincorporated society.

The explanatory note to the Bill argued that requiring every registered charity to have at least one officer aged 18 or over would "create legislative consistency with comparable legislation such as the Companies Act 1993 and Trusts Act 2019".[93] In its advice to Select Committee, DIA appears to have acknowledged that the explanatory note was incorrect:[94]

> We consider that the amendment does not override other legislation. The Trusts Act and Companies Act require trustees and directors to be at least 18 years … Trustees of trusts and directors of companies will still be required to be at least 18 years old and meet their obligations under those Acts. The proposal is intended to align with the definition of officer changes … which may capture people who are not trustees or directors as officers of charities. These people may be at least 16 years.

However, such people were already able to be at least 16. Although it is helpful that DIA has resiled from its original proposal to require all "officers" of a registered charity to be at least 18 (particularly given the breadth of the new definition of "officer"), it is not clear what exactly new section 13(1)(e) achieves apart from additional, unnecessary compliance.

For example, the legislation does not make it clear what happens to 16 and 17 year olds if their 18 year old unexpectedly resigns or otherwise ceases to be an "officer" of the charity: on its face, this would put the younger officers in immediate breach of section 13(1)(e), unless they can find another 18 year old to take on the role at very short notice. However, the role of trustee or director is not a role that should be undertaken lightly: what happens if the 16 and 17 year olds are not able to find an older person to take on the role? Would the charity face deregistration? If so, this would be a significant burden to place on 16 and 17 year olds, who have been put in breach of the Charities Act inadvertently by the unexpected resignation of their one 18-year old officer.

DIA argues that an officer that is no longer qualified due to age would "need replacing, but this process would not trigger deregistration of the charity".[95] Even so, it is not clear why scarce time and resources have been spent on this amendment, which seems unnecessary and incoherent, when so many pressing issues that require attention have gone unaddressed.

89 This wording has since been removed from *<www.charities.govt.nz/news-and-events/blog/the-new-trusts-act-what-does-it-mean-for-registered-charities/>*.

90 DIA policy paper *Topic 3 – the role of officers* June 2021 at 7.

91 Department of Internal Affairs *Regulatory Impact Statement: Modernising the Charities Act* (Report, 19 October 2021) at 6, 79.

92 Te Aka Matua o te Ture - Law Commission *Issues Paper 31 – Law of Trusts: Preferred Approach Paper* –13 November 2012 at [6.22].

93 Charities Amendment Bill 169-1 (explanatory note) at 5.

94 Te Tari Taiwhenua Internal Affairs *Charities Amendment Bill – Departmental Report v2* 27 March 2023 at 19.

95 Te Tari Taiwhenua Internal Affairs *Charities Amendment Bill – Departmental Report v2* 27 March 2023 at 19.

New section 13A – codifying charitable purpose reviews

DIA argues that new section 13A makes explicit the currently implicit obligations for charities to remain qualified for registration, arguing that new section 13A will "make it easier for charities to understand their obligations", and that it "does not introduce new obligations".[96]

However, the real reason for new section 13A appears to be to codify Charities Services' current practice of conducting "charitable purpose reviews".[97] Charitable purpose reviews are a euphemism for a subjective vetting of a charity's activities, often in isolation from the purposes in furtherance of which they are carried out. Charitable purpose reviews are the key mechanism Charities Services uses to threaten deregistration to charities that advocate for their charitable purposes, or that engage in innovative ways of providing hand-ups rather than merely handouts, or that otherwise engage in a range of perfectly legitimate activities in furtherance of their charitable purposes.

There has always been considerable doubt about Charities Services' legal ability to do this, which DIA argues "may make it difficult for compliance and enforcement tools to be used effectively".[98] However, the issue is not that charities do not "understand" their obligations, but that Charities Services' legal interpretations of those obligations are constantly changing. Instead of addressing these issues at source, by honouring the Labour Party's manifesto commitment to look at the definition of charitable purpose and ensure that charities are able to advocate for their charitable purposes without fear of losing their registered charitable status, section 13A will simply give Charities Services' controversial practice a legal legitimacy it does not currently have. As one charity put it:[99]

> There is still a lack of real clarity with the assessment criteria used by the government to decide that Family First failed to meet the legal test for charitable registration in Attorney-General v Family First New Zealand. In our view, there is a very subjective test and approach being applied by the Charities Services and Board in these decisions, which are then seemingly repeated and followed in the courts.
>
> We oppose any subjective assessing or reviewing of a charity's purposes by DIA. It is disingenuous to legislate to conduct these subjective charitable purpose reviews, but then completely exclude any review of the core or first principles of charitable purposes in this government's drawn our review process …. If an entity has already qualified for the charities register under the principal Act, then there is no need for regular reviews of their charitable purpose until there is clearly a legal breach of the charity's legal obligations. Going after charities, seemingly because there is a subjective disagreement with their views without providing a clear test or establishing a more fundamental first principles review is unfair and does not give transparency and confidence to the wider charities sector.

As another charity put it:[100]

> The Church has always maintained that it has a mandate to speak prophetically to power, including advocating on behalf of those in society who are disadvantaged, and the Church is uneasy when it sees unnecessary codification of powers that could be used to censor its prophetic voice. The Church is also disturbed that this power is being codified at a time when some charities, including church congregations, are looking to find alternative sources of income to strengthen the pursuit of their charitable purpose. We would be deeply concerned if the codification of this power acted as a disincentive for charitable entities to embrace an entrepreneurial spirit in the furtherance of their charitable purpose. This would likely reduce the appeal of involvement in a charitable entity for younger generations.

New section 13A is unnecessary: the essential requirements for registration are already set out in section 13, and it is already obvious that a charity must continue to meet these requirements in order to remain "qualified for registration" as required by section 32(1)(a). Instead, new section 13A creates confusion by suggesting that section 13 somehow does not mean what it says.

Charitable purpose reviews are the primary mechanism by which the Charities Act framework is being weaponised against charities and used as a tool for suppression of their advocacy, thereby undermining charities' independence and their important role in our democracy. Charitable purpose reviews have led to increasing subjectivity, complexity, inconsistency and restriction in determining whether any charity remains eligible for registration, which in turn has led to a slow-moving change of underlying paradigm, from an enabling framework to one of ever-increasing restriction. New section 13A is a striking example of how the Bill has

96 Department of Internal Affairs *Regulatory Impact Statement: Modernising the Charities Act* (Report, 19 October 2021) at 4; Charities Amendment Bill 169-1 (explanatory note) at 6.

97 Although DIA appears reluctant to admit it. See Te Tari Taiwhenua Internal Affairs *Charities Amendment Bill – Departmental Report v2* 27 March 2023 at 39: "We disagree with the suggestion that [section 13A] provides legal legitimacy for the Chief executive to conduct charitable purpose reviews".

98 Te Tari Taiwhenua Internal Affairs *Charities Amendment Bill – Departmental Report v2* 27 March 2023 at 38.

99 *https://www.parliament.nz/en/pb/sc/submissions-and-advice/document/53SCSS_EVI_127163_SS5050/the-salvation-army-new-zealand-fiji-tonga-and-samoa-territory*.

100 *https://www.parliament.nz/en/pb/sc/submissions-and-advice/document/53SCSS_EVI_127163_SS5071/the-presbyterian-church-property-trustees-and-the-presbyterian*.

been written "by DIA, for DIA", and how the Bill fails to meet its objective of supporting charities to continue their vital contribution.

Section 18 – timeframes for providing information

From 5 October 2023, the time available for charities to object to a notice of intention to decline their application for registration under section 18 of the Charities Act will increase from 20 working days to two months (as will the timeframe within which Charities Services can treat an application as withdrawn).[101] These amendments to section 18 are one of only two proposals in the Bill that genuinely would be helpful for charities.[102]

That said, however, it should be noted that the 20 working day timeframe was originally inserted into section 18 at DIA's insistence by Statutes Amendment Bill in late 2015,[103] despite submitters' concerns that such a timeframe was unworkable for charities.[104]

While it is good that DIA now recognizes the unworkability of a 20 day timeframe,[105] it would have been better if DIA had listened to the charitable sector in the first place, and not imposed seven years of unworkable legislation on charities that is now needing to be undone by further expensive Parliamentary time and legislative amendment.

It should also be noted that only two of the three references in section 18 to "20 working days" have been amended.[106] Under section 18(2) of the Charities Act, Charities Services will still be able to request that applicants provide information within 20 working days.

Publishing Board decisions

When new sections 19(6), 31(5) and 36C(2) come into force on 5 October 2023, the Board will be required to publish its decisions to decline an application for registration, to deregister a charity, and to issue a banning notice, respectively.

DIA argues these provisions will "improve transparency of decision-making",[107] noting that current perceptions of lack of independence in decision-making could undermine the legitimacy of Charities Services and the Board "which could lead to lower compliance with the Charities Act and reduced public trust and confidence in the charitable sector".[108]

DIA advised the Minister that the Board already publishes most of its decisions,[109] however, it appears that the Board in fact ceased this practice some time ago.[110] Most decisions under the Charities Act are made by Charities Services, which does not publish its decisions,[111] and DIA originally recommended that both the Board *and* Charities Services be required to publish all decline and deregistration decisions.[112] Feedback from targeted consultation identified strong support for making the decision-making of the Board *and* Charities Services more transparent. However, the Bill does nothing to make Charities Services' decision-making more transparent: new sections 19(6), 31(5) and 36C(2) specifically apply only to the Board.[113] In addition, the

101 It should be noted that the ability for Charities Services to treat an application as withdrawn was inserted into the legislation in 2017. DIA advises that, prior to this amendment, "applicants who failed to provide the necessary information for their registration application had their application declined (an 'inactive decline'). The Charities Amendment Act 2017 introduced the ability for Charities Services to deem such applicants as 'withdrawn' as opposed to 'declined'. This change resulted in the number of declined applications dropping significantly, from 134 in 2015/16 to 10 over a three-year period (2017/18 to 2019/20). As the Board made no decisions on the 'withdrawn' applications, there is no ability for these applicants to formally appeal the decision through the High Court, however, they can re-apply" (Department of Internal Affairs *Regulatory Impact Statement: Modernising the Charities Act* (Report, 19 October 2021) at 84). However, there does not appear to have been any analysis of the extent to which the underlying issue might have been controversially-narrow interpretations of the definition of charitable purpose.

102 The other being new section 58B(a), which would extend the timeframe for charities' appeals from 20 working days to 2 months.

103 Statutes Amendment Bill 71-1 became the Charities Amendment Bill 71-2B which became the Charities Amendment Act 2017.

104 Internal Affairs Te Tari Taiwhenua *Charities Amendment Bill – Report prepared for the Government Administration Committee* 5 September 2016 at [42]-[49].

105 Department of Internal Affairs *Regulatory Impact Statement: Modernising the Charities Act* (Report, 19 October 2021) at 85: "The requirement to lodge an appeal within 20 working days is not workable for many charities (which also applies to the timeframe to respond to administrative requests, such as providing more information for an application, or submitting and objection). For example, for charities that meet monthly, 20 working days does not provide enough time for the Board to meet to have an informed discussion and engage legal advice to lodge an appeal".

106 Charities Amendment Act 2023, section 11.

107 Te Tari Taiwhenua Internal Affairs *Charities Amendment Bill – Departmental Report v2* 27 March 2023 at 39. See also Charities Amendment Bill 169-1 (explanatory note) at 3.

108 Department of Internal Affairs *Regulatory Impact Statement: Modernising the Charities Act* (Report, 19 October 2021) at 86-87.

109 Department of Internal Affairs *Regulatory Impact Statement: Modernising the Charities Act* (Report, 19 October 2021) at 82, 86.

110 As at the date of writing, the Board has not published a decision for well over a year. See Charities Services *View the decisions*: <*www.charities.govt.nz/charities-in-new-zealand/legal-decisions/view-the-decisions/*>.

111 Department of Internal Affairs *Regulatory Impact Statement: Modernising the Charities Act* (Report, 19 October 2021) at 82.

112 Department of Internal Affairs *Regulatory Impact Statement: Modernising the Charities Act* (Report, 19 October 2021) at 92, 95 and 105. DIA also recommended at 92 that "Charities Services make some operational changes to provide more information about recent registration decisions".

113 DIA advised the select committee at [166] that "The Registration Board delegates the majority of its day-to-day decision making to the Chief executive (which is executed by Charities Services). The decisions that are being published are under the Registration Board delegation, with the Registration Board having final responsibility for the decisions made". It is not clear if this means that decline and deregistration decisions made by Charities Services will or will not now be published.

vast bulk of Charities Services' decisions are proposed to be put beyond the scope of an appeal, or even an objection, as discussed further below.

The lack of transparency of Charities Services' decision-making is particularly problematic given the practice Charities Services has developed of encouraging charities to voluntarily deregister, or to voluntarily (or forcibly) withdraw their application for registration.[114] This practice effectively removes decision-making from the Board, and from public and media scrutiny, thereby undermining transparency, while specifically not addressing the underlying issue (controversial interpretations of the definition of charitable purpose).[115]

In most comparable jurisdictions, the government agency responsible for administering charities' legislation is required to report to Parliament,[116] and can expect to be publicly questioned on its strategic direction.[117] There is no formal mechanism in New Zealand by which Charities Services might be similarly challenged. To the contrary, there remains a pronounced lack of meaningful accountability for Charities Services' decision-making under the Act.

Submitters noted that promoting transparency, accountability and fairness of decision-making would require "shifts in policy, systems and culture".[118] The Bill does not meet its stated objective of promoting "transparency and fairness" in Charities Services' decision-making.[119]

114 See, for example, the discussion in Legalwise "*Significant issues with Review of Charities Act 2005*" 10 January 2019, and the discussion above regarding section 18 of the Charities Act.

115 As noted in the 2019 *submission* of the Hawkes Bay Community Law Centre, a "great deal of time, effort, planning, resource and hope comes with each application for charitable status and if the charity is knocked back, the effects can be significant … too many charities are being deregistered and … there appears to have been little analysis around the numbers and reasons for why so many charities are not able to be registered or their registration has been discouraged. In our view, the Board and Charities Services are too deeply embedded in the DIA and there is a perception that the checks and balances that were inherent when the Commission was in place have become blurred".

116 In Australia, Australian Charities and Not-for-profits Commission Act 2012 (Cth) s 130-5 requires the Australian Charities and Not-for-profits Commissioner to report to Parliament. In Ireland, under Charities Act 2009 (Ireland) ss 22 and 23, tŪdarás Rialála Carthanas (the Charities Regulatory Authority) is accountable to the Irish Parliament. In Northern Ireland, Charities Act (Northern Ireland) 2008 sch 1 cls 6(5), 8(4) require the Charity Commission for Northern Ireland's annual report and statement of accounts to be laid before the Northern Ireland Assembly. Under Charities and Trustee Investment (Scotland) Act 2005 s 2(1)(c), the Office of the Scottish Charity Regulator is required to report to the Scottish Parliament. In England and Wales, under Charities Act 2011 (UK) sch 1 cl 11, the Charity Commission for England and Wales is required to lay a copy of its annual report before Parliament.

117 Correspondence from Professor Matthew Harding (14 September 2020): "In Australia, the ACNC Commissioner must face questions regularly from a Senate Committee, and there are audit and other reviews from time to time in which matters might be raised".

118 See, for example, the submission of *Social Service Providers Aotearoa*.

119 Charities Amendment Bill 169-1 (explanatory note) at 1.

Purpose-based governance

New section 42G of the Charities Act imposes a new duty on all registered charities to review their "governance procedures" at least every three years. This provision should be considered in conjunction with new section 36A, which defines the role of an officer of a registered charity (as now very broadly defined) to include assisting the entity to "deliver" its charitable purposes, and comply with its legal obligations. DIA argues that these provisions will lead to "improved governance in the sector" which will in turn "result in fewer complaints to Charities Services".[120]

Complaints about charities is currently a significant issue in practice, but there appears to be an underlying assumption that the root of the problem lies with charities, rather than with Charities Services.

This assumption requires critical examination. It is common in legal practice to be approached by people in distress due to something terrible having happened in their charity: someone might have sold a much-loved building without a mandate, or taken action in breach of the charity's rules, or something similar. These people routinely explain that they approached Charities Services for assistance but were told it is "not their role": Charities Services apparently has a policy that they will not "intervene in governance disputes as a mediator"; instead, their policy is to "investigate governance complaints [only] when it could connect to serious wrongdoing".[121] The Attorney-General has a role as the protector of charities, but does not appear to have a budget for such complaints and appears instead to have adopted a practice of referring them to Charities Services. The net result is that the person in distress is left without a remedy, short of taking expensive legal action and funding it themselves personally (which generally they do not have the resources to do).

However, these disputes typically arise precisely because someone is acting in breach of the charity's rules. It does not appear to be widely appreciated that every registered charity must have a set of rules (sections 17(1)(c), 24(1)(e) and 40(1)(e) of the Charities Act), and those rules must meet certain requirements for the entity to qualify as a charity. For example, every charity must, by definition, be a "not-for-profit" entity, which means that its rules must articulate a "non-distribution constraint": all funds of a not-for-profit entity must be devoted to furthering the entity's purposes and may not be distributed to controlling individuals. As the Australian Productivity Commission has noted, not-for-profit entities are "all about their purposes":[122] it is their commitment to their purposes that underpins

120 Department of Internal Affairs *Regulatory Impact Statement: Modernising the Charities Act* (Report, 19 October 2021) at 60.

121 Department of Internal Affairs *Regulatory Impact Statement: Modernising the Charities Act* (Report, 19 October 2021) at 50.

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

support for their activities, protects against mission drift, and builds the trust that enables them to provide their unique value to society.

Charities are a subset of not-for-profit entities, being those not-for-profit entities whose purposes meet the legal definition of being exclusively charitable. It is axiomatic that a charity's rules must articulate charitable purposes, a requirement sometimes referred to as the "destination of funds test": the rules of a charity must make it clear that all funds of the charity must ultimately be destined for charitable purposes, even on winding up.

A charity's rules must also make it clear that none of its funds may be applied to the private pecuniary profit of any individual (although this does not prevent fair value being paid for goods and services actually rendered to the charity, or private benefits being conferred that are merely incidental to the charity's charitable purposes).

These three principles (the non-distribution constraint, the destination of funds test, and the prohibition on private pecuniary profit) are arguably all different ways of saying the same thing: those concerned with a charity can have confidence that its funds will be used only to further the charity's charitable purposes, both during the life of the entity and on its winding up.

It follows that a charity that is complying with its rules must be furthering its stated charitable purposes and cannot, by definition, be providing unacceptable private benefit to anyone.

The fiduciary duties

It is also axiomatic that those involved with charities have important fiduciary duties to know and act in accordance with the charity's rules. For example, section 134 of the Companies Act makes it clear that the directors of a charitable company must act in accordance with the company's constitution. This duty was imported into section 56 the Incorporated Societies Act 2022, which imposes a corresponding requirement on the officers of an incorporated society. For charitable trusts, sections 23 and 24 of the Trusts Act 2019 provide that the trustees must know and act in accordance with the terms of the trust. These duties can collectively be thought of as the "duty of obedience".

For charities that are structured as companies, section 131 of the Companies Act also makes it clear that its directors must act in good faith and in what they believe to be the best interests of the company.[123] This duty was then imported into section 54 the Incorporated Societies Act, which similarly requires officers of incorporated societies to act in good faith in the best interests of the society. However, while incorporated societies have much in common with companies, they are by definition "not-for-profit" entities,[124] and there is considerable support for the proposition that the "best interests" of an entity that exists to pursue purposes are what would best further those purposes. In other words, the "interests" of a purpose-based entity are synonymous with its purposes.[125] This distinction between entities and purposes is important, because what might further the purposes of a charity, and what might be in the best interests of the charity as an entity, might conflict. For example, where the purposes of a charity been satisfied, it may no longer be necessary or useful for the charity to continue to exist. Acting in the best interests of the entity would encourage continuation of the charity despite the fact that its purpose has been satisfied; however, fidelity to purpose would make it clear that purpose is the overarching paradigm, and the charity should close, even if closure would not necessarily be in the best interests of the charity as an entity in itself. It may be for this reason that sections 25 and 26 of the Trusts Act articulate the duty as being one to further the charitable purposes in good faith in accordance with the terms of the trust.

Collectively, these duties can be thought of as the "duty of loyalty".

Most charities in New Zealand are structured as charitable trusts, incorporated societies or charitable companies, to which the above duties would clearly apply by statute. However, it is important to note that these statutory duties of loyalty and obedience merely codify the underlying common law. In its review of trust law, the Law Commission noted that a statutory list of duties in the Trusts Act would be a summary only, intended to restate well-accepted principles of case law in simplified form. In other words, the intention was to clarify rather than reform the existing law.[126] Similarly, the Incorporated Societies Act 2022 sought to codify the duties of officers of incorporated societies "as they might be described if a Court were to comprehensively list them".[127] A similar process of codifying directors' common law duties was followed when the Companies Act was enacted in 1993.

This means that, even if a charity is not incorporated under the Companies Act, Incorporated Societies Act

123 The Companies (Directors' Duties) Amendment Act 2023 inserts a new provision into section 131 as follows:
"(5) To avoid doubt, in considering the best interests of a company or holding company for the purposes of this section, a director may consider matters other than the maximisation of profit (for example, environmental, social, and governance matters)". A similar change has not been made to the Incorporated Societies Act 2022.

124 Incorporated Societies Act 2022, section 3(a) and (d)(iv).

125 See, for example, Rosemary Teele Langford, 'Purpose-Based Governance: A New Paradigm' (2020) 43(3) *University of New South Wales Law Journal* 954; Ian Murray and Rosemary Langford, 'The Best Interests Duty and Corporate Charities: The Pursuit of Purpose' (2021) 15(1) *Journal of Equity* 92.

126 Te Aka Matua o te Ture - Law Commission *Issues Paper 31 – Law of Trusts: Preferred Approach Paper* 13 November 2012 at [3.8] – [3.10].

127 MBIE Hīkina Whakatutuki *Exposure Draft: Incorporated Societies Bill Request for Submissions November 2015 ISBN 978-0-908335-76-3 at [75]*.

or Charitable Trusts Act, a Court would nevertheless be expected to find that those who have signed up to the charity's rules have fiduciary duties to comply with them, including the stated charitable purposes.

However, because there seem to be some doubt about these fundamental principles, a number of submitters recommended that the Charities Act articulate one simple overarching fiduciary duty, applicable to all registered charities regardless of their underlying legal structure, and to all involved in governing them, to act in good faith to further the entity's stated charitable purposes in accordance with its rules.[128]

The purpose of articulating such an overarching duty in the legislation would not be to duplicate the duties that already exist in the underlying law, but rather to provide a clear framework by which the fiduciary duties of loyalty and obedience might be enforced with respect to all registered charities, however structured.

Such an approach would have a number of practical benefits. For example, selling a building without a mandate, or otherwise using the funds or resources of the charity in breach of the charity's rules, is a clear breach of fiduciary duty, and therefore an "unlawful" use of the charity's funds or resources. Such action already constitutes "serious wrongdoing" as that term is defined in section 4 of the Charities Act, which in turn is grounds for Charities Services to take action under the Charities Act, including deregistration under section 32(1)(e). Charities Services therefore has all the tools it needs to take action in these situations. Doing so would do much to improve trust and confidence in both charities and Charities Services.

New section 42G

However, Charities Services refuses to do so. Instead, DIA argues that "options that change the limited role of Charities Services to resolve governance issues in charities (for example, as a mediator)" would be a "fundamental change" that has been "deemed out of scope".[129]

It is not clear why clarifying and/or enforcing the law that already exists would constitute a "fundamental change". It is also not clear why DIA has chosen instead to impose a fundamental change on charities in the form of new section 42G.

New section 42G imposes a new duty on every registered charity to "review its governance procedures (whether those are set out in its rules or elsewhere)" at least every three years, to consider whether they are fit for purpose, and assist the charity to "achieve" its charitable purpose and comply with the requirements of the Charities Act.

The duties of those who govern organisations is an area where angels fear to tread, as evidenced by the care and consideration that went into articulating duties in the Companies Act, Trusts Act and Incorporated Societies Act. New section 42G is particularly problematic because it did not receive any consultation with the charitable sector before being inserted into the Bill.[130]

The Charities Amendment Bill as originally introduced would have required this review to occur annually, and DIA envisaged that charities would be required to "certify that they have updated their rules within the last year as part of their annual reporting requirements"; charities would then be deregistered if they failed to notify that the rules have been updated for more than two years.[131] However, in response to submitters' overwhelming opposition to this provision, the majority of the Select Committee accepted DIA's subsequent recommendation to change the timeframe to every three years. The majority do not appear to have considered the option of removing the provision from the Bill altogether and relying on the law that already exists.

It is difficult to see how new section 42G meets the objective of the Bill to make "practical changes to support charities to continue their vital contribution to community well-being". Adding a new duty in vague and general terms that are not defined or explained, on top of the duties that already apply, creates a new layer of unnecessary compliance burden that will fall disproportionately on small charities, contrary to the stated objective of the Bill.

It is also not clear how this new duty will work in practice. Charities Services' recent forms consultation would require all registered charities to answer yes or no to the following question in their annual return:[132]

> Have the officers of your charity reviewed your governance procedures within the last three years?.

The Minister argues this new duty will not be "particularly onerous".[133] However, if so, and if the new duty can be complied with by a simple "tick box" exercise, it is unlikely to do anything to support charities' governance, as many submitters noted, and is more likely to bring the law into disrepute.[134]

128 See also S Barker *Focus on purpose – what does a world-leading framework of charities law look like?* [2022] NZLFRR 3, recommendation 2.1.

129 Department of Internal Affairs *Regulatory Impact Statement: Modernising the Charities Act* (Report, 19 October 2021) at 51.

130 Department of Internal Affairs *Regulatory Impact Statement: Modernising the Charities Act* (Report, 19 October 2021) at 53.

131 Department of Internal Affairs *Regulatory Impact Statement: Modernising the Charities Act* (Report, 19 October 2021) at 53.

132 Charities Services | Ngā Ratonga Kaupapa Atawhai *Consultation on forms changes* 14 August 2023.

133 Charities Amendment Bill 169-3 (In Committee) NZPD 20 June 2023.

134 In October 2021, DIA initially argued that the "key areas that would be reviewed are the entity's activities and use of funds and making sure they still advance the entity's charitable purpose. The other key benefit would be to make sure the governance processes

To make matters worse, some charities will not be able to comply. The trust deeds of many older charitable trusts were drafted for the trust to exist into perpetuity and contain no amendment clause that would allow the trust deed to be changed: changing these types of rules requires an application to the High Court for a scheme under the Charitable Trusts Act. Other charities have rules that are set in statute and can only be changed by Parliament. DIA acknowledged that some charities may not be able to review their rules documents annually but says "this issue can be addressed during the legislative drafting process".[135] It is not clear how changing the review timeframe from annually to 3-yearly has addressed this issue.

As justification for this provision, DIA argues they have "anecdotal evidence" that people involved with charities are not aware of the charity's rules document, and as a result many charities will not be "actively considering whether they are continuing to meet their charitable purposes"; DIA argues that adding this new duty will also help address other issues such as private profit, risky business decisions, or accumulating funds without valid reasons.[136]

However, all of these issues could be much better addressed by simply enforcing the fiduciary duties that already exist. There is no need to reinvent the wheel, or increase the compliance burden on charities by requiring them to try to comply with two inconsistent and conflicting bodies of law.

New section 36A

A related difficulty relates to new section 36A, which provides that the role of an officer of a charitable entity includes (a) assisting the entity to deliver its charitable purpose and (b) comply with its obligations under the Charities Act or any other enactment.

Again, this provision received no consultation whatsoever with the charitable sector before being inserted into the Bill.[137] New section 36A is highly problematic for a number of reasons, not least because it does not accurately state the role of an officer of a charity. The role of an officer of a registered charity is in fact to act in good faith to further the charity's stated charitable purposes in accordance with its rules, as discussed above.

New section 36A also creates an internal inconsistency, by referring to "delivering" charitable purposes when new section 42G refers to "achieving" charitable purposes. It remains to be seen what the Courts will make of these differences in wording, particularly when neither word makes a great deal of sense in a charities law context: most charitable purposes (for example, the relief of poverty) will never be "achieved" or "delivered", which no doubt explains why the Trusts Act uses the word "furthered".

DIA argues that new section 36A is likely to "improve governance in the sector" without adding a "significant compliance burden like officer duties would".[138] But the point that appears to have been missed is that the underlying fiduciary duties already apply to charities and will continue to apply to them despite the overlay of new sections 36A and 42G. The fact that DIA chooses to disregard this underlying law does not mean that charities have that option.

It would be much clearer to simply state the existing law, rather than creating an additional layer that is inconsistent with it, which will only create complexity and confusion, again contrary to the stated objectives of the Bill. As noted by one charity: it is already difficult to find people willing to serve in charities, and creating new grounds of compliance does not help the task.

Fundraising

Another change that comes into force on 5 October 2023 relates to section 39 of the Charities Act. Currently, section 39 requires "collectors" raising funds on behalf of a registered charity "by means of the telephone or the Internet" to disclose the charity's registration number on request.

Section 39 is a study in unintended consequences.[139] In the *Focus on purpose* report, we had recommended

are up to date – for example, checking whether there has been a change in officers that needs updating, or checking that financial management, conflict of interest, or officer appointment processes are still appropriate and relevant. Reviewing the rules annually would build the governance capability in the charitable sector as officers would become familiar with the governance processes of the organisation" (Department of Internal Affairs *Regulatory Impact Statement: Modernising the Charities Act* (Report, 19 October 2021) at 53). However, at the July 2023 conference of the Charity Law Association of Australia and New Zealand, Charities Services made the following comments: "The team are currently working on things like simple checklists and guidance to help explain what we think good looks like [sic]. Still in the process of drafting, but thinking of questions like: do you know what's in your rules, are you happy that that's going to work well for your charity, do you have something in place to help you navigate conflicts of interest, do you have something in place to manage private benefit. If an officer can go through that, tick those things off and say, yep, we've got them, that's perfect – that's all we'd be looking for. If they're missing something or they're not quite sure, that's something that we'll be there to support with, make sure there are resources and guidance to help point them in the right direction". However, while the fundamentals of the Act remain unaddressed, such approaches risk putting the cart before the horse and creating further over-reaching exercises of regulatory power in the name of enhancing public trust and confidence.

135 Department of Internal Affairs *Regulatory Impact Statement: Modernising the Charities Act* (Report, 19 October 2021) at 53.

136 Department of Internal Affairs *Regulatory Impact Statement: Modernising the Charities Act* (Report, 19 October 2021) at 50, 51.

137 Department of Internal Affairs *Regulatory Impact Statement: Modernising the Charities Act* (Report, 19 October 2021) at 53.

138 Department of Internal Affairs *Regulatory Impact Statement: Modernising the Charities Act* (Report, 19 October 2021) at 60.

139 See the discussion in S Barker *Focus on purpose – what does a world-leading framework of charities law look like?* [2022] NZLFRR 3, chapter 8.

extending the provision to all types of fundraising carried out by or on behalf of a registered charity, not just those carried out by means of the telephone or the internet.[140] Importantly, this recommendation was made as part of a package of suggested reforms, including using the term "fundraiser" rather than "collector". Although the *Focus on purpose* report is not referred to in their advice, DIA appear to have picked up on this recommendation in isolation.[141] DIA describes the changes to section 39 as "minor" and having "no policy implication", which presumably explains why they were inserted into the Charities Amendment Bill at Select Committee stage with no consultation with the charitable sector whatsoever.

140 S Barker *Focus on purpose – what does a world-leading framework of charities law look like?* [2022] NZLFRR 3, recommendation 8.24.

141 Te Tari Taiwhenua Internal Affairs *Charities Amendment Bill – Departmental Report v2* 27 March 2023 at 63.

PART C

Non-legislative change

Accumulations

In June 2022, the Minister for the Community and Voluntary Sector announced that the annual return form will be changed to require larger charities (that is, charities in tiers 1, 2 and 3) to report the reasons for their accumulated funds.[142] This requirement will not apply to tier 4 charities, even though a tier 4 charity may have significant accumulated funds: reporting tiers are measured as a function of expenditure, rather than assets, which means that charities eligible to report in tier 4 (due to low levels of expenditure) may nevertheless have considerable assets. DIA argues that Charities Services can use existing tools to require information from these charities if needed,[143] raising the question of why the same approach could not be taken for tier 1-3 charities as well.

This new requirement derives directly from the work of the Tax Working Group Te Awheawhe Tāke ("the Tax Working Group"),[144] which recommended that the Government "periodically review the charitable sector's use of what would otherwise be tax revenue, to verify that the intended social outcomes are actually being achieved".[145] The Group also considered that "concessions" for "privately controlled foundations or trusts that do not have arm's length governance or distribution policies" should be removed.[146]

It is important to note that the terms of reference for the Tax Working Group were entirely silent on the topic of charities,[147] and charities were considered at only one meeting of the Group. The background paper prepared for the Group's July 2018 meeting focused on what officials described as the two "most important tax policy matters for not-for-profits": private foundations and business income, concluding that "accumulations" were an "underlying issue for both".[148] There does not appear to have been any consultation with the charitable sector in the preparation of this background paper, or in the selection of these two issues as "key". Despite this, the Tax Working Group made four decisions relating to charities at this meeting, relating to: business activities, accumulations, GST, and deregistration tax.[149] These decisions then flowed through to the Group's interim and final reports,[150] and the tax policy work programme.[151] However, perhaps reflecting the fact that issues relating to charities had received little more than one hour's deliberation during the entire tenure of the Group,[152] issues relating to charities were identified as "matters

142 *https://www.beehive.govt.nz/release/charities-act-changes-benefit-nz-communities*

143 Department of Internal Affairs *Regulatory Impact Statement: Modernising the Charities Act* (Report, 19 October 2021) at 46.

144 Department of Internal Affairs *Regulatory Impact Statement: Modernising the Charities Act* (Report, 19 October 2021) at 30.

145 Tax Working Group *Future of Tax: Final Report* 21 February 2019 at [53].

146 These statements reflect a "tax expenditure analysis" which is arguably not appropriate in a charities law context and instead contributes to charities being misunderstood, undervalued, and overlooked. See the discussion in the *Focus on purpose* report, chapter 1.

147 Minister of Finance *Terms of Reference: Tax Working Group 23 November 2017.*

148 Inland Revenue and the Treasury for the Tax Working Group, 6 July 2018, *Charities and the not-for-profit sector: Background Paper for Session 13 of the Tax Working Group* at [69], [9] and coversheet.

149 Secretariat for the Tax Working Group, 6 July 2018 *Minutes* at 4 - 5.

150 Tax Working Group *Future of Tax: Interim Report* 20 September 2018 at [78] - [85]. Tax Working Group *Future of Tax: Final Report* 21 February 2019 at [78] - [85].

151 Inland Revenue Department *Government tax policy work programme 2019-20 8 August 2019*.

152 The agenda for the July 2018 Tax Working Group meeting reveals that 1¼ hours were to be allocated to a discussion about charities (including consideration of a proposal from a scholarship winner to implement a "charity credit account" prior to removing the income tax exemptions for charities altogether). See Secretariat for the Tax Working Group, 6 July 2018 *Agenda* at 1.

requiring further work" and "kicked for touch" to the review of the Charities Act.[153]

Following release of the Tax Working Group's reports, business activities of charities and accumulation of funds were then elevated in February 2020 to two of only three issues to be considered as part of the review of the Charities Act, ahead of key issues of concern for the charitable sector, such as advocacy, appeals and agency structure.[154]

DIA noted that most stakeholders did not agree there was a problem with accumulations that needed to be addressed:[155] there is no evidence of undue hoarding in the charitable sector. Charities already have important fiduciary duties to act in good faith in the best interests of their charitable purposes, and if an individual charity was genuinely hoarding funds, there would be a clear basis for "questions from the monitoring authority",[156] informed by the comprehensive information now made available by means of the charities register. The purpose of the charities register is to enable the "scrutiny of 1,000 eyes":[157] if the charity concerned could not demonstrate that its funds had been accumulated in good faith in the best interests of its stated charitable purposes, there is prima face a breach of fiduciary duty, which already constitutes "serious wrongdoing" as discussed above. In other words, Charities Services already has all the tools needed to deal with any instance of undue accumulation. Given that charities in New Zealand are already subject to arguably the most comprehensive set of transparency and accountability requirements for charities, it is not clear that why any further disclosures were considered necessary.

All of which perhaps sheds light on the real reason this additional compliance requirement is being imposed: to obtain "sector level data" about the level of accumulations in the charitable sector, which will be used by Charities Services and Inland Revenue to "inform compliance activities".[158]

The concern is that this information will then be used as a basis for removing charities' exemptions from income tax and imposing minimum distribution requirements. As the Minister noted:[159]

> We considered some other options, for example looking at whether we require a distribution plan, or set a minimum percentage that larger charities need to distribute. But I feel that would be putting the cart before the horse, I want to know why first.

In other words, requiring these disclosures about accumulations in the annual return forms appears to be a precursor to more unhelpful measures to come.

Noting the lack of stakeholder support for these additional disclosures, DIA suggested that Charities Services undertake consultation on the proposed new annual return form to "reduce the potential lack of stakeholder buy-in".[160] At the time of writing, Charities Services is consulting on the annual return forms, proposing the following question for tier 1-3 charities:[161]

> How do you plan to use your charity's accumulated funds in the future? Things to consider:
>
> - How accumulating funds will help to achieve your charity's goals of advancing your charitable purpose.
> - Specific reasons for accumulating funds (i.e., planning for future generations and the sustainability of your charity or upcoming significant projects or planned capital expenditure (e.g., buildings).

The new tier 3 financial reporting standard, released in May 2023, also requires increased disclosure on "changes in accumulated funds":[162]

> A231. The notes to the performance report shall include an explanation of the movements between the opening and closing balances for each category of Accumulated Funds.
>
> A232. An entity shall disclose information that enables users of its financial statements to evaluate the entity's objectives, policies, and processes for managing its reserves.
>
> A233. In meeting the requirements of paragraph A232 for restricted reserves, an entity shall disclose a description of the purpose of the reserve and the nature of the restriction on the reserve.
>
> A234. In meeting the requirements of paragraph A232 for discretionary reserves, an entity shall disclose a description of the purpose of the reserve, *the entity's plans for applying the reserve towards*

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

154 See the discussion in S Barker "*Charity regulation in New Zealand: history and where to now?*" (2020) 26(2) Third Sector Review 28.

155 Department of Internal Affairs *Regulatory Impact Statement: Modernising the Charities Act* (Report, 19 October 2021) at 35.

156 Inland Revenue Department *Tax and charities, a government discussion document on taxation issues relating to charities and non-profit bodies* June 2001 at [9.8].

157 For an example of this working in practice, see: *https://www.stuff.co.nz/national/300753515/lowprofile-charity-criticised-for-low-donation-rate-despite-111m-fund*.

158 Department of Internal Affairs *Regulatory Impact Statement: Modernising the Charities Act* (Report, 19 October 2021) at 45.

159 *https://www.stuff.co.nz/business/131757175/charities-sitting-on-millions-more-in-cash-than-a-year-ago*

160 Department of Internal Affairs *Regulatory Impact Statement: Modernising the Charities Act* (Report, 19 October 2021) at 35.

161 Charities Services | Ngā Ratonga Kaupapa Atawhai *Consultation on forms changes* 14 August 2023.

162 *https://www.xrb.govt.nz/standards/accounting-standards/not-for-profit-standards/tier-3/* (emphasis added).

> *its stated purposes, and when the entity expects the reserve will be applied*.
>
> A235. Information which an entity may consider disclosing in meeting the requirements of paragraphs A233–A234 includes:
>
> a. Whether the entity intends to begin any specific projects to which the reserve will be applied;
>
> b. To what extent the reserve represents investments in assets. This can be property, plant and equipment that are used in pursuit of its stated purposes in future periods. It can also include long term investments held to generate revenue returns to be used in pursuit of its stated purposes; or
>
> c. Whether the entity is accumulating funds with the intent to make a significant distribution to another entity with similar objectives.

The underlying assumption appears to be that accumulating funds is somehow inconsistent with charitable purpose. However, there is nothing inherent in the charitable purposes test that obliges a charity to pursue its charitable purposes in a particular way: accumulating funds for a long-term capital project or to generate income for future charitable expenditure or to protect against future uncertainties or for myriad other reasons may be just as valid ways of pursuing charitable purposes in appropriate circumstances as spending the funds upon receipt.[163] The fact that charities receive tax privileges does not mean they are "using what would otherwise be tax revenue" or convert their funds into government funds: whether any particular item of funding should be "spent or saved" is a decision for the governing body of a charity to make, taking into account all relevant circumstances. Making the "default setting distribution", as recommended by the Tax Working Group,[164] risks crippling charities and putting their viability and sustainability at risk. Officials also appear to have overlooked the fact that all registered charities are, by definition, subject to the non-distribution constraint and the destination of funds test: all funds of a charity must, by definition, ultimately be destined for its stated charitable purposes. A charity cannot breach this requirement lawfully. Implying there is a problem with the current settings regarding charities' business and accumulation activities itself undermines public trust and confidence in charities, by creating a perception that there is a problem to be "fixed" when there is in fact no evidence of any issue that could not be adequately addressed within the current framework.

Charities would be well-advised to provide fulsome responses in their financial statements and annual returns, to demonstrate to decision-makers that decisions to accumulate are indeed being made in good faith in the best interests of their charity's charitable purposes.

163 Ontario Law Reform Commission *Report on the Law of Charities* (Toronto, 1996) at 297.

164 Secretariat for the Tax Working Group, 6 July 2018 *Minutes* at 5.

PART D

Changes that come into force on 5 July 2024

FROM 5 July 2024, new processes will apply for charities to object to and appeal decisions made under the Charities Act.

The new objections process

From 5 July 2024, charities will have the option of objecting to certain decisions under a new objections process set out in new sections 55B-55E. The new provisions broadly follow the process currently set out in sections 33-36 of the current Charities Act, with 4 key differences:

a. Firstly, charities will be able to object to a broader range of decisions. Section 34 of the Charities Act allows charities to lodge an objection against a proposed decision to deregister a charity only. Section 18(3)(c) allows an applicant for registration to make submissions against a proposed decision to decline the application, which is arguably also a type of "objection". New section 55A lists a broader range of decisions that may be subject to an objection (but note that this same list is repeated in section 58A, and represents a comprehensive narrowing of the decisions that may be appealed, as discussed further below).

b. Secondly, new section 55B requires the decision maker to give notice of certain matters before making a specified decision, including the grounds for the decision, and the date by which

an objection must be received. Section 55B(2) broadly replicates section 33(2) of the current Act in this respect, with the exception of section 33(2)(c), which currently requires the notice to state the provision of the Act under which the decision is proposed to be made. Section 55B's lack of reference to the statutory basis for a proposed decision could be problematic under the new process, because a charity will be required to demonstrate that its objection fits into one of the statutory pigeonholes in section 55A. Such a "statutory list" approach has proved confusing in other jurisdictions as charities "often do not know the provenance of the legal power" a decision maker has or has not exercised in a particular case.[165] Further clarification of how this aspect will work in practice would be helpful.

c. Thirdly, new section 55B(2)(e) allows charities two months to make an objection, an increase from the 20 working days set out in sections 33(2)(d), 18(3)(c)(ii) and 18(3A)(a). As discussed above, this increase in timeframe is one of only two proposals in the Bill that genuinely would be helpful for charities.

d. Fourthly, new section 55D(1)(a) requires the decision-maker to give the objector "the opportunity to appear (whether in person or by electronic means) and be heard" in relation to the objection. This provision appears intended to address criticisms of lack of natural justice: as the Law Commission has noted, natural justice can require an oral hearing, particularly in serious or complex cases with potentially significant negative consequences;[166] however, although current sections 18(3)(b), 36 and 49 require the rules of natural justice to be observed, neither the Board nor Charities Services has ever conducted an oral hearing.[167]

This may be for good reason: it is not clear that either Charities Services or the Board are equipped to conduct oral hearings. In addition, neither Charities Services nor the Board are independent of their own decisions, and neither are subject to the rules of evidence. Arguably, it would be preferable for Charities Services and the Board to provide a "triage" service, as discussed further below.

However, DIA refuses to do this, and instead has proposed a long-winded objections process that appears likely to cause further cost and delay, while not addressing the fundamental issue of charities' inability to properly challenge adverse findings of "fact" reached by Charities Services from its internet searches (a factor which effectively tilts the playing field, throughout the entire decision-making and appeals process, in favour of Charities Services and the Board). While the new objections process appears intended to appease charities for not reinstating their ability to access a proper or "de novo" oral hearing of evidence (as discussed further below), there is considerable concern that devolving to an internal objections process, conducted and controlled by Charities Services and/or the Board, followed by only an attenuated appeals process, will not address concerns that the current process unfairly favours the original decision-maker.

The public interest test

The new objections process will also retain a number of the difficulties inherent in the existing process. For example, new section 55D(b) provides that a decision maker must not proceed to make an intended decision unless they are satisfied both that the grounds for the decision have been met, and that it is in the "public interest" to make the decisions. This wording replicates the "public interest test" in current section 35(1).

The requirement to satisfy both factors indicates the possibility that an adverse decision might not be made, even if the grounds for it are made out, if it was not in the public interest to proceed with the decision. In other words, the mere presence of the public interest test arguably indicates that, in marginal cases, charities might be given the benefit of the doubt (which might be particularly pertinent in deregistration cases, to protect against the punishment of deregistration being meted out to worthy charities on arguable and controversial jurisprudential interpretations).

However, the "public interest" test has proved problematic in practice: there is no example, of which we are aware, where the requirement to consider the public interest has protected a charity against an adverse decision. Instead, a finding by Charities Services or the Board that the grounds for a decision have been made out seems to inexorably lead to a finding that it would be "in the public interest" to make the decision.[168] The

165 Principal Judge A McKenna "Appealing the regulator: experiences from the Charity Tribunal for England and Wales" in M Harding, A O'Connell and M Stewart (eds) *Not-for-profit law: theoretical and comparative perspectives (Cambridge University Press, 2014) 336 at 354; Lord Hodgson of Astley Abbotts Trusted and Independent: Giving charity back to charities – Review of the Charities Act* July 2012 at [7.16].

166 See Te Aka Matua o te Ture - New Zealand Law Commission *A New Act for Incorporated Societies* (NZLC R129, 2013) at [8.18], [8.19], [8.36].

167 Te Tari Taiwhenua Internal Affairs *Modernising the Charities Act 2005: Discussion Document* February 2019 at 36; Department of Internal Affairs *Regulatory Impact Statement: Modernising the Charities Act* (Report, 19 October 2021) at 87. See also *Foundation for Anti-Aging Research v Charities Registration Board [2014] NZHC 1153 at [59]; Foundation for Anti-Aging Research v Charities Registration Board [2015] NZCA 449 at [20]*.

168 See, for example, *Charities Registration Board Decision 2017- 1* Family First New Zealand *21 August 2017 at [53] - [55]; Charities Commission Decision D2010 – 9 National Council of Women of New Zealand Incorporated 22 July 2010 at [85] - [87]. See also Re Queenstown Lakes Community Housing Trust [2011] 3 NZLR 502 (HC) at [23]: "*The Commission expressed the view that public trust and confidence in registered charitable entities would not be maintained if entities which did not meet the essential requirements for registration remained on the register and so

result is that the "public interest test" is effectively not treated as a separate requirement, contrary to the wording of the legislation.

One of the stated objectives of the Charities Amendment Bill is transparency, accountability and fairness in decision-making.[169] To those ends, it would be helpful to publicly clarify the circumstances in which the public interest test in section 55D(1)(b) / section 35(1) might protect a charity from a decision, where the grounds for that decision have otherwise been satisfied.[170] If there are no such circumstances, the requirement to consider the public interest in these provisions serves no practical purpose or result, which cannot have been Parliament's intention.

The new appeals process

From 5 July 2024, there will also be a new process for appealing decisions made under the Charities Act.

It does not appear to be mandatory to progress through an objections process before proceeding to appeal a decision: section 55C does not mandate an objection, and under new sections 55B and 55D, the objections process takes place before a particular decision is made; new section 58B(1) requires an appellant to lodge an appeal after the date of the decision in question.

On that basis, charities that do not object to a particular proposed decision may nevertheless be able to appeal the decision once it is made, although clarification on this point would be helpful.

Broadly, the new appeals process will include the following:

Commencing an appeal

New section 58A provides that a person may appeal to an Authority, defined in section 4(1) as an Authority or deemed to be established under the Taxation Review Authorities Act 1994 ("the TRA Act"). In other words, appeals will lie to the Taxation Review Authority ("TRA") only: the current ability to appeal to the High Court as of right will be removed. Section 35 of the Charities Amendment Act amends the TRA Act so that the functions of the TRA extend to sitting as a judicial authority for hearing and determining appeals under the Charities Act. The TRA will be known as the Taxation and Charities Review Authority, or "TCRA", when hearing Charities Act appeals.

New section 58B(1) requires an appeal to be made within two months after the date of the decision appealed against or "any further time that the Authority may allow". Currently, section 59(2) of the Charities Act requires an appeal to be made within 20 working days after the date of the decision or "any further time that the High Court may allow on application made before or after the expiration of that period". As discussed above, this increase in timeframe is one of only two proposals in the Bill that genuinely would be helpful for charities.

The ability for an appellant to make an application for further time before or after the expiry of the appeal period is retained in section 58B(2). However, new section 58B(1)(b) is significantly more prescriptive in requiring an appellant to demonstrate that "exceptional grounds" outside their control prevented them from lodging an appeal in time. While the increased time to lodge an appeal from 20 working days to two months is welcome, this timeframe may still present a challenge for charities: charities should be aware that they will be required to demonstrate "exceptional grounds outside their control" if they require additional time to lodge an appeal.

New section 58C(1) provides that a charity commences an appeal by filing a notice of appeal, "together with the prescribed fee (if any)", with the TCRA. The notice of appeal "must be in a form approved by the chief executive of the Ministry of Justice after consulting all Authorities and any other parties the chief executive thinks appropriate" (new section 58C(2)). There is no visibility as yet as to whether public consultation will be conducted on the proposed form for commencing an appeal in the TCRA.

New section 58C(3) broadly mirrors section 59(3) of the current Act, in providing what a notice of appeal must specify: the decision (or the part of the decision) to which the appeal relates; the grounds of appeal in sufficient detail to fully inform the Authority and the respondent of the issues in the appeal; and the relief sought. However, section 58C(3)(d) follows regulation 8 of the Taxation Review Authorities Regulations 1998 ("the TRA Regulations") by adding a new requirement that the notice of appeal must include the appellant's address for service. New section 58C(3)(d) specifies that the appellant's address for service may be an email address. As discussed above in Part A, there are difficulties inherent in service of legal documents by email: we trust that section 58C(3)(d) will not be used to force charities to provide an email address for service if that would not be appropriate for them.

New section 58C(4) provides that the decision-maker (either the Board or Charities Services) must be named as a respondent in the appeal. This provision reflects unintended consequences of changes made to the original Charities Bill at Select Committee stage in 2004, as discussed further below. At a practical level, the notice of decision will need to specify very clearly whether the decision-maker is Charities Services or the Board, as this may not be otherwise apparent to a charity. If a charity specifies the incorrect decision-maker, a notice of appeal may be rejected by the TCRA, which

considered that removal was in the public interest, as it would maintain public trust and confidence in the charitable sector".

169 Charities Amendment Bill 169-1 (explanatory note) at 1.

170 See S Barker *Focus on purpose – what does a world-leading framework of charities law look like?* [2022] NZLFRR 3, chapter 8.

may cause the charity to miss the 2-month deadline and/or be required to pay an additional fee.

New section 58D requires the respondent to file a notice of defence with the Authority within two months after being served with the notice of appeal. Section 58D does not appear to have a direct counterpart in either the current Act, the TRA Act or the TRA Regulations. However, in practice, Inland Revenue does file a notice of defence in TRA cases.[171]

New section 58D(2) provides that the notice of defence "must be in a form approved by the chief executive of the Ministry of Justice after consulting all Authorities and any other parties the chief executive thinks appropriate". Under section 58D(4)(a), the notice of defence must specify the grounds of defence in sufficient detail to fully inform the Authority and the appellant of the defence. The respondent must serve the notice of defence on the appellant "at the appellant's address for service" (section 58D(3)).

Grounds of appeal and burden of proof

Section 58E mirrors section 18 of the TRA Act in providing that an appellant is limited in the appeal to the grounds stated in the notice of appeal. However, new section 58E(2) provides that the Authority may amend those grounds, either on the application of the appellant or of its own motion. It is not clear why the Authority would want to amend an appellant's grounds of appeal on the Authority's own motion.

New section 58E(b)(b) was added to the Bill at Select Committee stage in response to submissions, and provides that Charities Services and the Board are similarly limited to the grounds stated in the decision appealed against.

The burden of proof in the appeal is on the appellant (that is, the charity) (new section 58E(1)(c), which mirrors section 18 of the TRA Act).

Procedure for appeal

In England and Wales, the First-Tier Charity Tribunal proactively utilises procedural flexibility to assist charities to present their case effectively. For example, appellants may be permitted to "go second" so that they can respond to the government's case.[172] The rationale for this approach is that charities, by definition, operate for the public benefit, and a cooperative approach is therefore likely to be more cost-effective and facilitate access to justice. It is to be hoped that similar principles will apply to procedures of the TCRA.

That said, the Charities Amendment Act has set out some of the procedural requirements for the TRCA.

For example, new section 58M broadly follows section 19 of the TRA Act in allowing an Authority to sit at the times and locations the Authority considers appropriate. The ability for the TRA to travel to hear appeals is a significant factor in a tax context, as it materially assists taxpayers to exercise their constitutional right to object to taxation decisions, and addresses what is normally an imbalance of resources between an appealing taxpayer and the Crown. However, for charities, an additional provision applies: new section 58M(2), which has no counterpart in the TRA Act, allows the Authority to take into account the location and convenience of "the parties" when considering where an appeal should be heard. It is to be hoped that the ability to take into account the convenience of the Crown when considering where an appeal should be heard will not lead to appeals being consistently heard in Wellington, as this would defeat the key objective of improving access to justice for charities in the appeals process.[173] The Charities Act must be about more than simply the administrative convenience of DIA.

New section 58M(5) requires all sittings of a TCRA to be open to the public, and also has no counterpart in the TRA Act due to the secrecy provisions of tax legislation. However, section 58M(5) allows the Authority to conduct a sitting in private if the Authority considers it appropriate to do so. Charities in New Zealand are subject to comprehensive transparency requirements, as discussed above, and it is not clear when it might be appropriate to conduct a sitting in private in a charities law context. Guidance in this regard would be helpful.

New section 58L broadly mirrors section 20B of the TRA Act in allowing sittings of the Authority to be conducted electronically if an Authority considers it appropriate.

The Authority may also determine an appeal on the papers, provided that the Authority has first given the parties an opportunity to comment on whether the appeal should be dealt with in that manner (new section 58J which broadly replicates section 20A of the TRA Act).

The Authorities acting together may issue practice notes. Under section 25B of the TRA Act, practice notes must not be inconsistent with the TRA Act or any regulations made under it. New section 58U mirrors section 25B, but differs in providing that practice notes must not be inconsistent with the Charities Act: the lack of reference to regulations in section 58U appears to be an oversight, and we doubt that Authorities would issue practice notes inconsistent with any regulations made under the Charities Act. However, clarification on this point would be helpful.

New section 73(1)(g) and (h), which came into force on Royal assent (5 July 2023), allows regulations to

171 Inland Revenue | Te Tari Taake *IR776 - Disputing an assessment August 2020 at 23*.

172 T Vincent *An uncharitable appeal framework for charities: is it time for a Charity Tribunal? 9 October 2015 at 39, 41*.

173 Charities Amendment Bill 169-1 (explanatory note) at 1.

be made providing the procedure for appeals under the Charities Act, and prescribing the fees to be paid for filing an appeal. We do not yet have visibility as to what these regulations may require.

Subject to the Charities Act, any regulations, and any practice notes issued under section 58U, new section 58G provides that an Authority may regulate its own procedure for the commencement, hearing and determination of a Charities Act appeal.

Otherwise, as with regulation 4 of the TRA Regulations, new section 58T provides that the District Court Rules 2014 apply, to the extent they are not inconsistent with the Charities Act or regulations made under it, to the commencement, interlocutory steps, and conduct of proceedings in an Authority as if those proceedings were civil proceedings in the District Court.

Decisions of the Authority

New section 58O provides that an Authority must give their decision in writing with reasons. While this provision mirrors section 25(1) of the TRA Act, it differs in a number of important ways. For example, TCRA decisions, and the reasons for them, must be published on a Ministry of Justice website (new section 58O(2)-(3)), unless the Authority considers it appropriate to withhold information (including information that could identify the appellant) from publication, or if the Authority considers publication would not be in the public interest.[174] There is no visibility as yet as to what criteria might be applied in making a decision to withhold.

The TRA currently has only one Authority member appointed, and hears less than 10 tax appeals per year.[175] DIA and the Ministry of Justice estimate that the new TCRA will hear approximately 25-50 appeals per year,[176] which would likely require a new Authority member to be appointed. In that respect, DIA indicates that "specialist knowledge of charities law would develop over time".[177] However, it is very important, in our view, that any Authority appointed to consider Charities Act appeals has deep expertise in trust law.

New section 58F mirrors section 21A(1) of the TRA Act in providing that an Authority may strike out an appeal, in whole or in part, if satisfied it discloses no reasonable cause of action, is likely to cause prejudice or delay, is frivolous or vexatious, or is otherwise an abuse of process.

In addition, the Authority may determine a proceeding in the absence of a party who failed to appear (new section 58K(1) which broadly follows sections 20(1) and 21A(2) of the TRA Act). Under new section 58K(2) (which broadly mirrors section 20(2) of the TRA Act), the party who failed to appear may apply for a rehearing of the appeal or the setting down of a new hearing. However, section 58K(3), which requires such an application to be made within 20 working days, does not appear to have a counterpart in the TRA Act.

New section 58S mirrors section 25A of the TRA Act in providing an offence for contempt of Authority.

Costs

A key advantage of appeals to the TRA is that taxpayers are not subject to an adverse award of costs unless they behave egregiously: section 22 of the TRA Act provides that if either party fails to appear, or fails to give adequate notice of the abandonment or settlement of the appeal, or if the Authority strikes out a proceeding, the Authority may order either party to pay costs.

However, section 22 has not been replicated in the Charities Amendment Act. Instead, section 58P mirrors section 22B of the TRA Act in empowering an Authority to order the Board or Charities Services to pay costs to an appellant up to the amount of the filing fee. DIA estimates the filing fee will be in the order of $410.[178]

Interim orders

New section 58A(2) provides that an appeal does not operate as a stay of the decision appealed against. Presumably, a deregistered charity that wished to remain on the charities register pending determination of its appeal would need to seek an interim order under section 58Q.[179]

Section 58Q mirrors current section 60 of the Charities Act in allowing interim orders to made requiring an entity to remain registered, to be registered or restored to the register from a specified date, or preventing the Board from publishing details of a charity that has failed to remedy a warning notice under section 55.[180] A copy

174 Compare section 25C of the TRA Act, which only requires the following information to be published on a Ministry of Justice website: information about the purpose of the Authorities and how to commence a proceeding; any requirements that must be met to bring a proceeding; and guidelines on how and when parties may obtain information on the progress of their case and when a decision may be expected.

175 Department of Internal Affairs *Regulatory Impact Statement: Modernising the Charities Act* (Report, 19 October 2021) at 92.

176 Department of Internal Affairs *Regulatory Impact Statement: Modernising the Charities Act* (Report, 19 October 2021) at 94-95.

177 Department of Internal Affairs *Regulatory Impact Statement: Modernising the Charities Act* (Report, 19 October 2021) at 92 and 101.

178 Department of Internal Affairs *Regulatory Impact Statement: Modernising the Charities Act* (Report, 19 October 2021) at 106 and 107.

179 Interim orders have been were made in *The Plumbers, Gasfitters and Drainlayers Board v Charities Registration Board* [2013] NZHC 1986 at [7], *Re Queenstown Lakes Community Housing Trust* [2011] 3 NLZR 502 (HC) at [3], [80], and *Re Family First New Zealand* [2015] NZHC 1493 (30 June 2015); (2015) 4 NZTR 25-014 at [13]. In addition, income tax exemption may remain in place automatically under Income Tax Act 2007 s CW 41(1)(aa) pending determination of the appeal.

180 Note that this power in section 60(3) has never been used: DIA initial policy paper on compliance and enforcement powers, 22 June 2021, at 5. Section 55 is another provision that was added at

of an interim order must be included in the charities register, unless the Authority orders otherwise (new section 58Q(5), which mirrors section 60(6)).

Charities have a right of appeal against a refusal to make an interim order (new section 58R, which mirrors section 60(5)).

Issues with the appeals process

Against this broad outline of the new procedures for appeals, charities should be aware of three key difficulties with the new appeals process:

a. the removal of charities' ability to appeal to the High Court as of right;

b. the removal of most of charities' rights of appeal; and

c. concerns regarding the nature of the hearing on appeal.

The removal of charities' ability to appeal to the High Court as of right

As discussed above, new section 58A provides a right of appeal to the TCRA. Currently, section 59(1) of the Charities Act requires a person aggrieved by a decision under the Charities Act to appeal to the High Court. A strong theme of submissions to the review of the Charities Act was that the cost of an appeal to the High Court is prohibitive, making appeals inaccessible for most charities, in turn raising concerns about access to justice, maintaining the rule of law, and the development of the common law.

While these points are acknowledged, there are nevertheless circumstances when the High Court is the most appropriate first instance forum, which no doubt explains why taxpayers challenging decisions of the Commissioner of Inland Revenue are given a choice of appealing to either the TRA or the High Court.[181]

For example, the TRA does not have jurisdiction to hear judicial review applications.[182] This means that, if a charity is bringing concurrent judicial review proceedings (as is often the case),[183] the new appeals process would require the charity to file their substantive appeal in the TCRA, and the judicial review proceedings in the High Court. Requiring a charity to file two sets of proceedings in two different Courts undermines the stated objective of "improving access to justice for charities in the appeals process".[184]

In addition, the TRA is a quasi-judicial body, meaning that case law will only be made if an appeal is progressed to the High Court.[185] It also means that Charities Services and the Board will not be bound by TCRA decisions in future cases on similar facts.[186] As a result, a particular case that might assist with the development of case law will not be able to do so until the case is heard by the High Court. DIA acknowledged that requiring an additional step prior to the High Court has the "potential to delay the process".[187] It will also cause additional cost to both charities and the Crown.

New section 58X(1)(a) mirrors the TRA Act in allowing the TCRA, on the application of any party or of its own motion, to refer a case to the High Court on any question of law arising in respect of an appeal. In addition, new section 58X(1)(b) goes further in allowing the TCRA to refer a case to the High Court on the very question of whether the appeal should be heard by the High Court.[188] However, requiring charities to incur the additional cost, delay and uncertainty of an additional application (as well as filing proceedings in two different courts if concurrent judicial review is sought) undermines the stated objective of improving access to justice, by limiting choices and adding cost, complexity and delay to the appeals process.

Many submitters argued that charities should have the option of commencing their appeal in either the TRA or the High Court, at their choice,[189] as was the case prior to the Charities Act, as is the case for every other citizen appealing to the TRA, and as is the case in comparable jurisdictions.[190] Charities should be trusted to make the decision of appropriate initial forum for themselves.

Another difficulty with restricting appeals to the TCRA is that it potentially removes charities' ability to access the highest court in the land. Generally, only two appeals from a first instance decision are permitted: this means that, if a charity commences proceedings in the

select committee stage in 2004 and rushed through under urgency without proper consultation.

181 Challenges to decisions of the Commissioner of Inland Revenue are brought under section 138B of the Tax Administration Act 1994 to a "hearing authority", which is defined in section 3 of the Tax Administration Act as either the High Court, or the TRA.

182 See section 8(1) of the Judicial Review Procedure Act 2016.

183 See, for example, *Greenpeace of New Zealand Incorporated v Charities Registration Board* [2020] NZHC 1999 at [178], and *Re The Foundation for Anti-Aging Research and The Foundation for Reversal of Solid State Hypothermia* (2016) 23 PRNZ 726 (HC) at [5].

184 Charities Amendment Bill 169-1 (explanatory note) at 1.

185 Department of Internal Affairs *Regulatory Impact Statement: Modernising the Charities Act* (Report, 19 October 2021) at 103.

186 Department of Internal Affairs *Regulatory Impact Statement: Modernising the Charities Act* (Report, 19 October 2021) at 101.

187 Department of Internal Affairs *Regulatory Impact Statement: Modernising the Charities Act* (Report, 19 October 2021) at 101.

188 Compare TRA Act, sections 24(1) and 26(1).

189 See S Barker *Focus on purpose – what does a world-leading framework of charities law look like?* [2022] NZLFRR 3, at 335-339 and recommendation 6.3.

190 In England and Wales, see Lord Hodgson of Astley Abbotts *Trusted and Independent: Giving charity back to charities – Review of the Charities Act* July 2012 at [7.15]: "... the High Court ... still maintains its own jurisdiction over charitable matters, in parallel to the Tribunal". In Northern Ireland, to similar effect, see Dr O Breen, Rev Dr L Carroll, N Lavery *Independent Review of Charity Regulation Northern Ireland* January 2022 at 202.

TCRA, they would normally be permitted an appeal to the High Court and potentially a subsequent appeal to the Court of Appeal, but the Supreme Court would be very unlikely to give leave to hear a third appeal.[191] The Minister argues that removing the ability to commence proceedings in the High Court as of right would not affect charities' ability to appeal to the Supreme Court.[192] With respect, this statement is likely to be of little comfort to a charity being denied leave to appeal by the Supreme Court on the basis that it has already had two appeals.

Concerns about the removal of charities' ability to access the Supreme Court are exacerbated by new section 58W, which mirrors sections 26 and 26A of the TRA Act in providing for a right of further appeal to the High Court.[193] However, section 28 of the TRA Act, which provides for a right of further appeal to the Court of Appeal, has not been replicated. It is not clear whether this is an oversight, as DIA was very clear that both the High Court and the Court of Appeal should remain a path for further appeals "to ensure a fair process and to provide the opportunity for case law to develop where required".[194] Perhaps the intention was for the right of further appeal to be left to general rules under section 56(1)(a) of the Senior Courts Act 2016. However, confirmation of charities' ongoing ability to appeal to the Court of Appeal would be helpful.

In addition, confirmation that requiring charities to incur the cost and delay of an additional appeal to the TCRA will not have the side-effect of removing their ability to appeal to the Supreme Court would also be helpful. Given the discretionary nature of Supreme Court appeals, legislative confirmation may be required.

The removal of most of charities' rights of appeal

Another significant issue with the new appeals process is the removal of the vast bulk of charities' rights of appeal. New section 58A mirrors new section 55A, in providing the following very limited list of decisions that charities will be able to appeal:

a. a decision under section 25(1) to withhold information or documents from the charities register that relate to a registered charity if the charity is deregistered or if Charities Services considers, in the public interest, that the information or documents should not form part of the register:
b. a decision under section 26(a) to amend the charities register to reflect any changes in the information that relates to a registered charity:
c. a decision under section 26(ba) to amend the charities register to correct a mistake caused by any error or omission on the part of a charity, if Charities Services is "satisfied" it was an honest and genuine mistake or omission (the specific inclusion of section 26(a) and (b) apparently means that a decision under section 26(b), where the amendment is made to correct a mistake caused by any error or omission on the part of Charities Services, is not appealable):
d. a decision on an application by an entity for approval to change its balance date under section 41(5)(b):
e. a decision on an application by an entity under section 43 to grant, vary, or revoke an exemption (it is not clear whether this provision would include a decision to impose terms and conditions on any such exemption under section 43(2)):
f. a decision on a request by an entity under section 44(1) to treat the entity and one or more affiliated or closely related entities as forming part of a single entity (it is similarly not clear whether this provision would include a decision to impose terms and conditions on any such group registration under section 46):
g. a decision to give a warning notice to a registered charity or person under section 54(2):
h. any decision of the Board under the Charities Act. The Board makes a limited range of decisions relating to: registration and deregistration (sections 8, 9, 19, 31 and 32); misleading or offensive names (section 15(e)); waiving a disqualification factor for an officer (section 16(4)-(9)); backdating registration (section 20); ordering that a deregistered charity may not reapply for registration within a specified period (section 31(4)(a)); banning officers (section 36C); approving single entity status (section 44); imposing terms and conditions on single entity status (section 46); revoking single entity status (section 48); and publishing details of a failure to remedy a warning notice (section 55).

This limited list is reflected in section 58N(2), which broadly reflects section 61(2) of the Charities Act in setting out the powers of the Authority in determining appeals: to make an order requiring that an entity be registered, restored to or removed from the register from a specified date, or remain registered. However,

191 Under section 74(1) of the Senior Courts Act 2016, the Supreme Court must not give leave to appeal to it unless it is "satisfied that it is necessary in the interests of justice for the court to hear and determine the appeal": it is unlikely to be "necessary in the interests of justice" if the charity has already had an appeal before the High Court and the Court of Appeal (in addition to its appeal to the Taxation Review Authority).

192 Minister's comments at Charities Services' Annual Meeting, October 2022.

193 Such an appeal is made by filing a notice of appeal in the appropriate registry of the High Court within 20 working days (in contrast to section 26(2) of the TRA Act, which allows an appeal period of 30 days). On appeal, the High Court may make an order or a determination as it thinks fit; otherwise, the procedure in respect of such an appeal is in accordance with the High Court rules (section 58W(4)).

194 Department of Internal Affairs *Regulatory Impact Statement: Modernising the Charities Act* (Report, 19 October 2021) at 127 and 94.

section 58N(2) differs from section 61 in specifying three new types of order: namely, requiring an entity to be or not be treated as forming party of a single entity; requiring an entity to be or not be exempted from compliance requirements; and that information or documents be withheld from or included in the register. These types of orders relate back to appealable decisions listed in section 58A(1)(a)(i), (v) and (vi) respectively.

In addition, new section 58N(2)(g) specifically provides that the Authority may make an order that an entity provide their annual return from a specified date. It is not clear why such an order would be necessary given that it is already a legal requirement for charities to file annual returns.[195] In addition, Charities Services already has the power to "waive" compliance with this requirement under section 43. The official penalty for failure to file an annual return is $200,[196] but no such penalty has ever been imposed.[197] Instead, charities that fail to file annual returns for two consecutive years face deregistration.[198] Many thousands of charities have been deregistered for failure to file annual returns.[199] It is not clear what role new section 58A(2)(g) is intended to play in this process, or why Charities Services does not use the tools already at its disposal.[200]

Returning to section 58N(2), it is notable that the provision contains no reference to new section 58A(1)(iv), which allows charities to appeal a decision relating to their balance date. Section 58N(2) has also not been updated for the amendments made to section 58A at Select Committee stage (which added paragraphs (ii), (iii) and (vii), relating to warning notices, and certain decisions to amend the charities register).

On its face, these discrepancies between sections 58A(1) and 58N(2) could be interpreted to mean that that charities may appeal decisions relating to balance dates, warning notices and certain decisions to amend the register, but the Authority would not be able to make an order in respect of them.

Of course, section 58N(2) is clearly expressed to be without limitation to section 58N(1), which provides the Authority with powers to confirm, modify or reverse the decision appealed from, and exercise any powers that Charities Services and the Board could have exercised in relation to it. In addition, section 58N(4) replicates current section 61(4) in providing that the Authority may make "any other order that it thinks fit".

However, the Court of Appeal has held that section 61(4) is "intended to confer power to make any consequential or ancillary orders the Court may consider to be appropriate upon the determination of the appeal",[201] which may not extend to substantive orders of the type listed in section 58N(2).

In addition, if it was considered necessary for section 58N(2) to list specific types of order for three of the decisions listed in section 58A(1), it is not clear why it was not considered necessary to list specific types of order for the remaining four decisions listed in section 58A(1). It may be that, in making amendments to section 58A, the Select Committee overlooked the need to make corresponding amendments to section 58N. However, now that the provisions are enshrined in legislation, a question arises as to what the Courts will make of the distinction, and what the impact will be for charities appealing decisions under section 58A(1)(ii), (iii), (iv) and (vii).

Background

It is important that charities are aware of the history that preceded section 58N(2). Although DIA consistently argues that the list in section 58N(2) "expands" the types of decisions that can be appealed under the Act,[202] in fact the opposite is the case.

The Charities Bill as originally introduced in 2004 provided charities with a right of appeal against registration and deregistration decisions, and decisions to impose an administrative penalty, only.[203] However, this formulation was changed at Select Committee stage in response to submissions: the majority considered that charities should "not be limited to appealing decisions relating to registration, and that it should be possible to appeal all decisions … that adversely impact on a particular entity".[204]

As a result, section 59(1) of the Charities Act 2005, as originally enacted, enabled charities to appeal all decisions of the Charities Commission.

However, in 2012, the Charities Commission was controversially disestablished and its functions transferred to the Department of Internal Affairs (referred to as the chief executive in the legislation) and a new Charities Registration Board. The vehicle to effect this change was Part 3 of the Crown Entities Reform Bill 332-1 (Part 1 of which disestablished the Alcohol Advisory Council of New Zealand, the Health Sponsorship Council, and

195 See Charities Act, section 41.

196 Charities (Fees and Other Matters) Regulations 2006 (SR 2006/301) reg 9(2).

197 Department of Internal Affairs *Regulatory Impact Statement: Modernising the Charities Act* (Report, 19 October 2021) at 111.

198 Charities Services *Deregistration/Whakakore rēhitatanga*.

199 See the discussion in Legalwise "*Significant issues with Review of Charities Act 2005*" 10 January 2019.

200 DIA argues that it does not impose administrative penalties "due to the cost involved": Department of Internal Affairs *Regulatory Impact Statement: Modernising the Charities Act* (Report, 19 October 2021) at 111. It is not clear how an appeal to the TCRA will be cheaper.

201 *Foundation for Anti-Aging Research v Charities Registration Board [2015] NZCA 449 at [39]*.

202 Department of Internal Affairs *Regulatory Impact Statement: Modernising the Charities Act* (Report, 19 October 2021) at 4, 7.

203 Charities Bill 108-1, clause 67.

204 Charities Bill 108-2 (select committee report) at 13.

the Crown Health Financing Agency, and Part 2 of which disestablished the Mental Health Commission).

Having set up the Board and Charities Services, and disestablished the Charities Commission, Part 3 of the Crown Entities Reform Bill then worked its way through the Charities Act and replaced each reference to the "Commission" with a reference to either the Board, the chief executive, or both. These amendments were described as "consequential" and were listed in a schedule at the back of the Bill. However, fast law does not make good law: the schedule contained a number of errors. For example, section 60(3) was amended to refer to the exercise of a power by the chief executive under section 55, which was clearly an error, as the chief executive does not exercise any powers under section 55. This error was subsequently corrected by legislative amendment in 2017.[205]

Another error was contained in either section 59 or section 61.

The word "Commission" in section 59 was replaced with the word "Board". On its face, this would have been a very significant change, because it would have restricted charities' rights of appeal to decisions of the Board only. As discussed above, the Board makes only a limited number of decisions under the Act, with most decisions under the Charities Act made by the chief executive (delegated to Charities Services). Accordingly, on its face, this change would have effectively restricted charities' rights of appeal to registration decisions only, in direct contradiction to Parliament's original intention in enacting the Charities Act. There was no public indication that such a significant change was intended to be effected by this consequential amendment listed in a schedule at the back of the Bill.

However, there is considerable uncertainty as to whether such a change was actually made. The same schedule also amended section 61 to provide that, in determining an appeal, the High Court could confirm, modify or reverse the decision of the "Board or the chief executive". In other words, section 59 provided that only decisions of the Board could be appealed, but the remedy under section 61 would be a modification of the decision of the Board or the chief executive.

Clearly, the two provisions are inconsistent, and in all the circumstances it seemed reasonably clear that section 59 was a mistake and should have referred to "the Board or the chief executive" as was the case in section 61.

Part 3 of the Crown Entities Reform Bill was very controversial. Reporting back on the Bill in March 2012, the Select Committee reported a split:[206]

> We note that Part 3 of the bill contains a number of provisions designed to support the independence of the charities registration function. Clause 45 of the bill as introduced would insert a new section 8(4) into the Charities Act 2005, requiring each board member to act independently in exercising their professional judgment, without direction from the Minister.
>
> Nevertheless, some of us are convinced that the legislative safeguards provided in the bill would be insufficient to maintain the degree of independence that the Charities Commission provides. We also believe that the charities-related functions will be less accessible to the public, and that the charities sector work will be carried out less transparently if the commission's functions are transferred to the Department of Internal Affairs …
>
> Labour and Green members believe that the transfer of the functions from the Charities Commission to the Department of Internal Affairs should not occur. No decisions on either legislative or operational change should be made until the review of the Charities Act and the Incorporated Societies Act are completed. Further, the independence and integrity that the Charities Commission has given to the process must be retained and we do not believe that this is possible under the proposal to move the functions of the Charities Commission to the Department of Internal Affairs.

Concerns about independence, accessibility and transparency with the current structure have been borne out, as many submitters noted. However, despite the comments of the Select Committee, the second reading and committee stages of the Bill occurred quickly over 22-29 May 2012. Part 3 of the Bill was hotly contested, passing its second reading with the narrowest of margins at 61:60 votes. Hon Trevor Mallard (Labour) put forward a supplementary order paper, seeking to defer commencement of Part 3 by 3 years "in order to give the opportunity to the Government to fulfil its commitment to have the review of the Charities Act and, in particular, the Charities Commission, before the Charities Commission is disestablished".[207] However, the Government "had the numbers" and the motion was rejected.

The Committee of the Whole House then divided the Bill into three parts. Part 3 became the Charities Amendment Bill (No 2) 332-3C, which passed its third reading on 30 May 2012, again by the narrowest of margins: if one vote had been decided differently, the proposal to disestablish the Charities Commission would likely not have passed. However, the Bill received Royal Assent on 6 June 2012,[208] and the Charities Commission was formally disestablished just 3 weeks later on 1 July 2012.

205 Section 6 of the Charities Amendment Act 2017, which originated as Statutes Amendment Bill 71-1, cl 13.

206 Crown Entities Reform Bill 2011 332-2 (select committee report) at 4-5 (emphasis added).

207 Supplementary Order Paper 2012 (32) Crown Entities Reform Bill 332-2.

208 Charities Act Amendment Act (No 2) 2012.

Charities are inherently reluctant litigants, not least because litigation is risky, expensive and likely to distract a charity from furthering its charitable purposes more directly;[209] the question of whether the error was contained in section 59 or section 61 was never subsequently tested.

However, in 2015, Charities Services sought to put the matter beyond doubt.

In October 2015, a Statutes Amendment Bill was introduced into Parliament, containing proposals to amend 28 Acts, including the Charities Act.[210] Statutes Amendment Bills are a particular type of omnibus bill used to make amendments that are minor, technical, non-controversial, and do not affect the substance of the law or people's rights and obligations. The Statutes Amendment Bill proposed 3 amendments to the Charities Act, one of which proposed to resolve the inconsistency between sections 59 and 61 by deleting the words "or the chief executive" from section 61.

Such an amendment would have been very significant, because it would have put it beyond doubt that charities' rights of appeal were indeed removed when the Charities Commission was disestablished in 2012. There was no notification to the charitable sector that such a significant amendment was proposed.

The Statutes Amendment Bill received its first reading before Christmas on 9 December 2015 and was referred to the Government Administration Select Committee, with submissions due by 29 January 2016. It was not until after the expiry of this period that the proposed amendment was noticed by the charitable sector. However, the Select Committee agreed to accept a late submission,[211] in response to which, the Select Committee removed Part 3 of the Statutes Amendment Bill into its own Charities Amendment Bill in order to give charities a short further period in which to make submissions.[212] Submissions were due by 29 July 2016.

On 7 July 2016, approximately half way through this submission period, Charities Services issued a news alert to every registered charity in the country, assuring them that the proposed amendment to section 61 would have "no impact" their appeal rights:[213]

> All current avenues for charities to seek a review of Charities Services' and the Board's actions and decisions **will remain open and unaffected by the amendment**. For example, the Office of the Ombudsman could be asked to open an investigation into a matter not covered by the statutory right of appeal. Making a complaint to the Ombudsman is free.

The news alert appears intended to persuade charities that it was not necessary to make submissions on the Bill. However, the news alert omitted to mention that its assertions were based on an assumption that most of charities' rights of appeal had already been removed when the Charities Commission was disestablished in 2012, despite the considerable uncertainty as to whether that actually was the case, as discussed above.

Despite the news alert, charities did make submissions to the Select Committee, raising significant concerns about the impact of the proposed amendment to section 61. A petition opposing the proposed amendment reached over 2,500 signatures.[214] Opposition to the proposed amendment was also expressed in the media.[215] Ultimately, the proposed amendment to s 61 was struck from the Bill "due to community concern".[216]

In making this change, the Select Committee went against the strong advice of DIA that Charities Services does not make any "decisions" under the Charities Act that could have an "adverse impact" on a charity or that could be included in a statutory right of appeal.[217] Given sections 58A and 58N, it appears DIA now accepts that this advice was incorrect: Charities Services makes many decisions that have significant adverse consequences on a charity, and over which it is important to have meaningful accountability, as many submitters noted.

However, while the Select Committee's removal of the impugned amendment from the Bill was very welcome, the Select Committee did not take the extra step of adding the words "or the chief executive" to s 59. Such a step would have resolved the inconsistency between the two provisions in line with Parliament's original intention, thereby obviating any further uncertainty.

209 See the discussion in T Vincent *An uncharitable appeal framework for charities: is it time for a Charity Tribunal?* 9 October 2015 at 32.

210 Statutes Amendment Bill 71-1.

211 The submission was made by Hui E! Community Aotearoa on 6 May 2016.

212 Charities Amendment Bill (71-2B) 15 June 2016.

213 Charities Services News Alert (undated but issued on 7 July 2016): <*charitiesupdate.cmail20.com/t/ViewEmail/j/606CFD3BD5AAEE35/DDD978CE7246F1DD6E6039C17E42EE19*> (Bolding in original, italicising added)

214 The text of the petition was as follows: "Stand up for charities - Dear House of Representatives, Charities do extremely important work on the front lines of our community. Their ability to operate should not be at the whim of the Chief Executive of the Department of Internal Affairs. Stop any changes to the Charities Act that remove the ability of decisions of the Chief Executive of Department of Internal Affairs from being appealed to the court." ActionStation's website can be found here: <*actionstation.org.nz/*>.

215 See M Elliott *Marianne Elliott: Unravelling charities' ability to do good* NZ Herald 16 August 2016. See also S Barker "Let them eat cake – what Brexit should tell us about charity regulation in New Zealand" LinkedIn 9 July 2016: *www.linkedin.com/pulse/let-them-eat-cake-what-brexit-should-tell-us-charity-susan-barker/*; and S Barker "Charities beware: the government is proposing to remove your rights of appeal" LinkedIn 3 July 2016: <*www.linkedin.com/pulse/charities-beware-government-proposing-remove-your-rights-susan-barker/*>.

216 Charities Amendment Bill 71-2B (*select committee report*) 22 September 2016 at 2.

217 Internal Affairs Te Tari Taiwhenua *Charities Amendment Bill – Report prepared for the Government Administration Committee* 5 September 2016 at [12] – [18], [57] – [59], Appendix D.

However, such a step may not have been considered possible due to the procedural rules of Parliament.[218] Instead, the Committee issued its report on 22 September 2016 with the inconsistency between ss 59 and 61 intact. The Charities Amendment Bill was then passed into law on 13 February 2017,[219] and the inconsistency between sections 59 and 61 remains in the legislation to this day.

In its February 2019 discussion document, DIA acknowledged the dispute as to whether charities' rights of appeal had indeed been removed in 2012:[220]

> The inconsistency between sections 59 and 61 of the Act has led to dispute over whether decisions of the chief executive (delegated to Charities Services) can also be appealed under section 59 …
>
> Appeals are not the only means of challenging decisions by Charities Services and the Board. Decisions can also be challenged by judicial review, or by a complaint to the Ombudsman … Since 2013, the Ombudsman has investigated and made findings on three decisions by Charities Services … None of these three were upheld …
>
> The sector's ongoing concern is that any decision made under the Act – not just registration and deregistration decisions – should be subject to appeal. Under the Act, Charities Services makes a range of decisions, when exercising functions of the chief executive. A few examples are decisions to:
>
> - treat one or more entities as a single entity (under section 44);
> - omit, remove or withhold information from the charities register (under section 25); and
> - undertake compliance activities (for example to open an inquiry under section 50).
>
> An ability to appeal a wider range of decisions would provide greater accountability over all regulatory decisions, including relatively minor decisions. On the other hand, allowing appeal of all decisions by Charities Services would have cost implications and would impact on its ability to carry out its functions in a timely and efficient manner. In general, an ability to appeal should be available if a person's rights or interests are affected by a decision. Other challenge routes, for example internal reviews, could be considered for decisions that may not be appropriate for appeals. Internal reviews are used in other regulatory systems. For example, disputed welfare benefits are initially reconsidered through a Work and Income internal review. Internal reviews can correct mistakes, without the cost and formality of an appeal. The downside of internal reviews is that they may not be seen as independent as other challenge routes.

DIA's arguments require critical examination. Experience clearly indicates that charities do not bring appeals unduly:[221] it is very unlikely that a charity would appeal a "minor decision" that did not have a material impact on its rights or interests. Charities are inherently reluctant litigants, as discussed above, and the cost of an appeal will naturally regulate the number of appeals that are made. As DIA itself notes, appeal mechanisms are important for encouraging high-quality decision-making and ensuring that decisions are made in accordance with the law.[222] Allowing an appeal against all decisions would in fact reduce costs, for both charities and Charities Services, by encouraging better initial decision making through better structural accountability. While there are undoubted benefits to "finality" and "certainty", these must be weighed against the interests of fairness, accountability, and the adverse impacts of potentially incorrect decisions. Continuing to allow an appeal against all decisions would be consistent with the stated objective of the Bill to provide for better accountability, transparency and fairness in decision-making, which would in turn improve trust and confidence in Charities Services and the charitable sector. It would also be consistent with Parliament's original intention, and with other comparable regimes, as discussed below.

Submissions on the Bill

Despite all of this history, the Charities Amendment Bill as introduced into Parliament in September 2022 simply assumes that the vast bulk of charities' rights of appeal were indeed removed when the Charities Commission was disestablished in 2012, and that by limiting charities' appeal rights to only four (subsequently increased by Select Committee to 7) types of decisions made by Charities Services, the Bill was somehow "expanding" the range of appealable decisions.[223]

To the contrary, the Charities Amendment Bill in fact represents the fourth attempt, after three previously-failed attempts, to remove the vast bulk of charities' rights of appeal. It is disingenuous of DIA to claim that the Bill "expands" the decisions available for appeal, or that the claimed expansion was "strongly supported during stakeholder consultation". In fact, submitters made it very clear that all decisions made under the

218 Such an amendment may have been considered a "substantial policy change" unsuitable for inclusion in a Statutes Amendment Bill. See Internal Affairs Te Tari Taiwhenua *Charities Amendment Bill – Report prepared for the Government Administration Committee* 5 September 2016 at [63].

219 The *Charities Amendment Bill (71-2B) 2016* became the *Charities Amendment Act 2017* (2017/1).

220 Te Tari Taiwhenua Internal Affairs *Modernising the Charities Act 2005: Discussion Document* February 2019 at 34-35 (emphasis added).

221 See the discussion in S Barker *Focus on purpose – what does a world-leading framework of charities law look like?* [2022] NZLFRR 3, chapter 6.

222 Charities Bill 169-1 (explanatory note) at 4.

223 Charities Bill 169-1 (explanatory note) at 4.

Charities Act should remain subject to appeal.[224] As one submitter noted:[225]

> It is not right, in our view, that the Department should be able to make decisions about charitable organisations for which the organisations have no right of appeal. As matter of justice, charities must be able to challenge decisions, and the system must be accountable for all decisions made under the Act. The fact that this Bill is proposing to limit this right without making this explicit as a lessening of appeal rights does not promote trust and confidence in the good faith and transparency of [Charities Services] and the regulatory system and in our view, reinforces the need for an independent first principles review and the withdrawal of this Bill.

The Bill itself notes poor perceptions of Charities Services and the need for improved accountability and transparency of decision-making:[226] lack of meaningful accountability for decision-making under the Charities Act is a key factor contributing to the current significant lack of trust in Charities Services. It simply makes no sense for the vast bulk of decisions made by Charities Services under the Charities Act to be beyond the scope of an appeal (or even an objection).

However, when section 58N comes into force on 5 July 2024, charities' ability to appeal the following types of decisions will be removed:

a. a decision to treat an application as withdrawn under s 18(3A);
b. a decision to refuse access to the charities register under section 21(4) of the Charities Act;
c. a decision to amend the register under section 26(b) (as opposed to s 26(a) and (ba));
d. a decision to impose conditions on a change of balance date under s 41(6);
e. a decision that the financial statements of a charity fail to comply with a financial reporting standard under section 42B;
f. a decision as to whether financial statements should have been audited or reviewed under s 42E;
g. terms and conditions of single entity status under s 46;
h. a decision to open an inquiry under s 50;
i. a decision to require information under s 51;
j. a decision to impose an administrative penalty under s 58 (as per the original Charities Bill);
k. a decision to prescribe a form under s 72A;
l. a decision to post "guidance" to Charities Services' website (even if it contains errors);
m. other decisions made in administering the register (see, for example, the case study in box 6.5 of the Focus on purpose report);
n. new decisions added by the Charities Amendment Act (and subsequent legislation).

It is not possible to identify the complete range of types of decisions in advance, which no doubt explains why most comparable registration regimes allow an appeal against all decisions.[227] Charities Services is the "registrar" of the charities register;[228] there are myriad decisions made every day in the course of administering a register that may similarly adversely impact a charity and should be able to be appealed.[229]

The Minister argues that it would not be "efficient" to allow all decisions to be appealed, because Charities Services "will need some decisions to enable them to carry out their compliance and enforcement function, particularly when they need to commence an investigation".[230] With respect, this argument does not bear critical examination. The Charities Act has been in force for almost 20 years, and we are not aware of any charity ever having appealed a decision to commence an investigation. In fact, there has only ever been one decision of the Commission, that subsequently became a decision of Charities Services, that has been challenged by an appeal.[231] Other registrars seem to manage to function efficiently despite an ability for registered entities to appeal all their decisions. Sections 58A(1) and 58N(2) are stark reminders of how the Bill is written "by DIA, for DIA".

224 Te Tari Taiwhenua Internal Affairs *Modernising the Charities Act 2005 - Summary of submissions December 2019* at 4.

225 Submission of Citizens' Advice Bureau.

226 Charities Bill 169-1 (explanatory note) at 2; see also Department of Internal Affairs *Regulatory Impact Statement: Modernising the Charities Act* (Report, 19 October 2021) at 105.

227 See for example Companies Act 1993 s 370, which allows a right of appeal to a "person who is aggrieved by an act or decision" of the Registrar of Companies; Incorporated Societies Act 1908 s 34B, which allows a right of appeal to any person aggrieved by a refusal to register a society, a refusal to register or receive a document submitted under the Act, or by "any other act or decision" of the Registrar of Incorporated Societies; Industrial and Provident Societies Act 1908 s 13B, which similarly allows a right of appeal to any person aggrieved by any act or decision of the Registrar of Industrial and Provident Societies; Friendly Societies and Credit Unions Act 1982 s 151, which allows a right of appeal to any person aggrieved by a decision of the Registrar of Friendly Societies and Credit Unions "in relation to any matter or thing done" under that Act. See also Incorporated Societies Act 2022 section 249, which adopts a modification of this approach, by allowing a broad general right of appeal of all decisions, with the exception of a small number of decisions that have been specifically carved out (namely, decisions by the Registrar of Incorporated Societies to make an application to the Court under certain subparts of Part 4 of that Act, and certain process decisions made during the course of removing or liquidating a society).

228 Charities Act s 23.

229 See, for example, S Barker *Focus on purpose – what does a world-leading framework of charities law look like?* [2022] NZLFRR 3, case study in box 6.5.

230 Charities Amendment Bill 169-3 *In Committee* (20 June 2023) NZPD per Hon Priyanca Radhakrishnan.

231 Department of Internal Affairs *Regulatory Impact Statement: Modernising the Charities Act* (Report, 19 October 2021) at 83.

Comparable jurisdictions

Support for charities' continued ability to appeal all decisions can be found in comparable jurisdictions.

For example, in the lead-up to the Charities Act 2006 (UK) in England and Wales, the idea of creating a specialist Charity Tribunal was widely welcomed,[232] with the "only real area of dissent" being whether the Charity Tribunal should have power to hear appeals against any decision of the Charity Commission for England and Wales, or whether there should be a list of decisions that are appealable.[233] The original recommendation was that the Charity Tribunal should be able to hear appeals against any decision of the Charity Commission (including "non-decisions") on any basis; this was considered an appropriate measure of improved accountability given that the Charity Commission's powers at the time were being significantly increased.[234]

However, the Charity Commission argued that any wider remit of the Tribunal would "harm the operational efficiency" of the Commission; the Minister also opposed any wider remit on the basis of making things "simple" and "straightforward".[235] In the result, what is now schedule 6 of the Charities Act 2011 (UK) provides a fairly tightly circumscribed list of 70 types of decisions that may be appealed. This "list" approach then appears to have been followed by Northern Ireland,[236] and Scotland.[237]

However, the Principal Judge of the Charity Tribunal[238] in England and Wales has questioned whether the list approach has proved to be the right approach.[239] In the first instance, the list approach has resulted in threshold jurisdictional questions, which have seen many charities' appeals having to be struck out for falling outside the list: such a threshold process creates additional costs for charities and does not assist with objectives of greater accountability or better access to justice.[240] The number of rejected cases also raises concerns as to whether the jurisdiction is "sufficiently well-defined to address the concerns people have about the Commission's work".[241]

A related issue is that the list, which runs to 16 pages, is widely seen as "over-complicated and too narrowly drawn": far from being simple and straightforward, the list has proved confusing for charities, who "often do not know the provenance of the legal power the Charity Commission has or has not exercised in their particular case"; several specialist charity lawyers have also complained of difficulty in understanding it.[242]

More concerningly, the list approach appears to have precipitated a change in approach on the part of the Charity Commission, whereby far fewer formal decisions are actually made: the situation makes the Tribunal easy for the Charity Commission to avoid "simply by not making an appealable decision at all".[243] Concern has been expressed that, as the Commission moves towards a more "light-touch" regulatory approach, even more of its work will fall outside the scope of the Tribunal's jurisdiction.[244] All of these factors weaken the ability of the charitable sector in England and Wales to hold the Charity Commission to account.[245] New sections 58A and 58N give rise to these same concerns in New Zealand.

In Ireland, the Charity Appeals Tribunal has an even more limited range of decisions that charities may appeal: a refusal to register a charity; a decision to deregister a charity; a determination that a body is no longer deemed to be a charity; and a refusal to give a charity consent to change its name.[246] However, unlike its counterparts in England and Wales and Northern

232 House of Lords, House of Commons, Joint Committee on the Draft Charities Bill *The Draft Charities Bill* 15 September 2004, HL Paper 167-I, HC 660-I at [220].

233 Principal Judge A McKenna "Appealing the regulator: experiences from the Charity Tribunal for England and Wales" in M Harding, A O'Connell and M Stewart (eds) *Not-for-profit law: theoretical and comparative perspectives (Cambridge University Press, 2014) 336 at 354*.

234 House of Lords, House of Commons, Joint Committee on the Draft Charities Bill *The Draft Charities Bill* 15 September 2004, HL Paper 167-I, HC 660-I at [231], [228].

235 House of Lords, House of Commons, Joint Committee on the Draft Charities Bill *The Draft Charities Bill* 15 September 2004, HL Paper 167-I, HC 660-I at [225], [226].

236 The table in Charities Act (Northern Ireland) 2008 sch 3, cl 4 lists more than 50 types of decisions that may be appealed.

237 Charities and Trustee Investment (Scotland) Act 2005 s 71 sets out a list of 20 types of decisions that may be appealed.

238 Subsequently renamed the First-Tier Tribunal (Charity).

239 Principal Judge A McKenna "Appealing the regulator: experiences from the Charity Tribunal for England and Wales" in M Harding, A O'Connell and M Stewart (eds) *Not-for-profit law: theoretical and comparative perspectives* (Cambridge University Press, 2014) 336.

240 Principal Judge A McKenna "Appealing the regulator: experiences from the Charity Tribunal for England and Wales" in M Harding, A O'Connell and M Stewart (eds) *Not-for-profit law: theoretical and comparative perspectives* (Cambridge University Press, 2014) 336 at 336, 344, 345, 349.

241 Lord Hodgson of Astley Abbotts *Trusted and Independent: Giving charity back to charities – Review of the Charities Act* July 2012 at [7.16].

242 Principal Judge A McKenna "Appealing the regulator: experiences from the Charity Tribunal for England and Wales" in M Harding, A O'Connell and M Stewart (eds) *Not-for-profit law: theoretical and comparative perspectives* (Cambridge University Press, 2014) 336 at 354; *Lord Hodgson of Astley Abbotts Trusted and Independent: Giving charity back to charities – Review of the Charities Act* July 2012 at [7.16].

243 Principal Judge A McKenna "Appealing the regulator: experiences from the Charity Tribunal for England and Wales" in M Harding, A O'Connell and M Stewart (eds) *Not-for-profit law: theoretical and comparative perspectives* (Cambridge University Press, 2014) 336 at 344.

244 Lord Hodgson of Astley Abbotts *Trusted and Independent: Giving charity back to charities – Review of the Charities Act* July 2012 at [7.17].

245 Principal Judge A McKenna "Appealing the regulator: experiences from the Charity Tribunal for England and Wales" in M Harding, A O'Connell and M Stewart (eds) *Not-for-profit law: theoretical and comparative perspectives* (Cambridge University Press, 2014) 336 at 345.

246 Charities Act 2009 (Ireland) ss 42(3), 45(1) - (3).

Ireland, the Charities Regulatory Authority in Ireland enjoys very few unbridled powers: most of its powers require the prior consent of the Courts before they can be exercised, providing charities with the protection of Court supervision of the Authority's decision-making. This factor possibly explains the very limited number of appealable decisions, as it is only in relation to the limited number of unbridled powers that an appeal to the Tribunal exists.[247]

Australia is an outlier in terms of the limited types of decisions able to be appealed. Decisions regarding registration, deregistration, written directions, administrative penalties, and suspension or removal of responsible persons must be internally reviewed before any other review options are available.[248] The decision on the internal review, and extension of time refusal decisions, may be appealed to the Administrative Appeals Tribunal, or to a Court.[249] However, other decisions, such as decisions to replace a responsible person of a charity, or to withhold or remove information from the register, may only be appealed on process grounds (judicial review).[250] The 2018 review of the Australian charities' legislation identified the limited rights to challenge the ACNC Commissioner's decisions as a specific concern:[251]

> The Commissioner should not have additional powers nor be subject to less judicial scrutiny than other comparable regulators. A court should be able to consider afresh (a de novo review) any decision made by the Commissioner.

In New Zealand, there was no mandate for the Government to remove the vast bulk of charities' appeal rights, and it is to be hoped that charities' appeal rights will be subsequently restored.

The nature of the hearing on appeal

Another key issue with the new appeals process is whether it will address concerns about charities' current inability to properly challenge adverse findings of "fact" reached by Charities Services from its internet searches. To this end, reinstating charities' ability to access a full de novo oral hearing of evidence in appropriate cases is arguably the single most important change the review of the Charities Act needed to make.[252] However, a number of provisions in the Charities Amendment Act that have no counterpart in the TRA Act raise concern that the appeals process will not address this issue, and instead will continue to tilt the playing field in favour of Charities Services and the Board.

For example, new section 58H(b) broadly replicates section 16(3)(a) of the TRA Act in providing that, at the hearing of an appeal, the parties must be given an opportunity to be heard, either in person or by a person they have authorised to represent them (whether or not that person is a lawyer). Although one of the key advantages of the TRA is that charities will not need to be represented by a lawyer, DIA considers that legal representation may still be preferable given the complexity of the decisions being made.[253] The experience of England and Wales was that charities chose to be legally represented even when they were not required to.[254]

However, new section 58H(a), which provides that the parties may "call evidence" at the hearing, does not have a counterpart in the TRA Act, and raises the question of whether such evidence will be able to be tested, such as by cross-examination. Ordinarily, an ability to call evidence would imply an ability for that evidence to be tested, but the question arises because of DIA's opposition to reinstating charities' ability to access a de novo oral hearing of evidence.[255] Clarification on this point would be helpful.

In addition, new section 58C(4) provides that the decision maker must be named as a respondent in the appeal, which is also problematic because such a provision would not be necessary if a de novo appeal was available, as discussed further below.

New section 58I is broadly equivalent to section 17(1) of the TRA Act, in providing that an Authority may receive as evidence any statement, document, information or matter that the Authority considers may assist the Authority to deal "effectively" with the appeal, whether

247 OB Breen and PA Smith *Law of Charities in Ireland* (Bloomsbury, 2019) at [6.66].

248 Australian Charities and Not-for-profits Commission *Reviewing and appealing ACNC decisions*. See also Australian Charities and Not-for-profits Commission Act 2012 ss 30-35 (*Review of refusal of registration*); 35-20 (*Review of revocation of registration*); 85-25 (*Objections*); 175-60 (*Remission of penalty*); 100-10(10) (*Suspension of responsible entities*) and 100-15(7) (*Removal of responsible entities*).

249 Australian Charities and Not-for-profits Commission Act 2012 ss 165-5(a), (b), 170-5.

250 Australian Charities and Not-for-profits Commission *Commissioner's Policy Statement: Reviews and Appeals* 27 November 2017. See also Australian Charities and Not-for-profits Commission Act 2012 ss 100-30, s 40-10.

251 P McClure AO, G Hammond OAM, S McCluskey, Dr M Turnour *Strengthening for purpose: Australian Charities and Not-for-profits Commission – Legislative Review 2018* 31 May 2018 at 37 (emphasis added) (see also 35 - 36, 75, noting a submission from the Law Council of Australia that all decisions should be subject to judicial review of all issues).

252 See, for example, the *submissions* of Birthright New Zealand: "Charities are unable to access justice under the current framework. Charities need to be able to access an oral hearing of evidence like everybody else"; Northland Urban Rural Mission: "Oral evidence must be an option for charities as for anyone else"; and Community Waitakere: "Charities, like everybody else, need to be able to access an oral hearing of evidence (a 'trier of fact')".

253 Department of Internal Affairs *Regulatory Impact Statement: Modernising the Charities Act* (Report, 19 October 2021) at 101.

254 Lord Hodgson of Astley Abbotts *Trusted and Independent: Giving charity back to charities – Review of the Charities Act* July 2012 at [7.31].

255 See for example, Department of Internal Affairs *Regulatory Impact Statement: Modernising the Charities Act* (Report, 19 October 2021) at 105: "Despite calls from submitters for a de novo appeal, this is not recommended".

or not it would be admissible in a Court of law.[256] However, section 15(2) of the TRA Act, which provides the Authority with the power to issue summonses requiring the attendance of witnesses before the Authority, or the production of any document, has not been replicated. Instead, new section 58I(2) provides that an Authority may require a respondent to provide to the Authority and all parties any statement, document, information or matter that the Authority considers to be relevant to the decision under appeal. These differences in wording cast doubt on whether charities will be able to access a proper oral hearing of evidence.

Similarly, new sections 58I(3), which provides that an Authority may take evidence on oath, and 58I(4), under which the Authority may permit a witness to give evidence by written statement and verifying it by oath, have no equivalents in the TRA Act. A question arises as to why these provisions were considered necessary, as an Authority would ordinarily be expected to receive only sworn evidence.

Further concern arises because section 17(3) of the TRA Act, which provides that the Evidence Act 2006 applies to all proceedings before an Authority as if an Authority were a Court, has not been replicated in the Charities Amendment Act.

Concerns as to whether charities will be able to access a proper oral hearing of evidence before the Authority are exacerbated by the tortured history of the nature of the hearing in appeals under the Charities Act. It is important charities are aware of this history in evaluating whether to appeal a decision under the Charities Act.

Background

Briefly, charities law cases prior to the Charities Act generally arose in the context of disputes with the Commissioner of Inland Revenue under tax legislation.[257] Part 4A of the Tax Administration Act 1994 provides an elaborate process for determining such disputes, in the interests of improving the accuracy of decisions; reducing the likelihood of disputes by encouraging open and full communication; and promoting the prompt and efficient resolution of disputes "by requiring the issues and evidence to be considered by the Commissioner and a disputant before the disputant commences proceedings".[258]

Importantly, even after such an elaborate process involving exchange of considerable information, parties to a tax dispute are not restricted from adducing evidence at a subsequent hearing simply because it had not been provided earlier: a full oral hearing of the evidence is permitted before either the TRA or the High Court if either party so requests.[259] Further, the decision-maker (Inland Revenue) takes the role of an active protagonist,[260] including giving oral evidence at the hearing and being available for cross-examination.[261]

The Charities Bill as originally introduced in 2004 would have continued this, by allowing for an appeal to the District Court.[262] Appeals to the District Court are normally conducted as first instance de novo trials, including a full hearing of oral evidence if any party so insists.[263] The Court of Appeal has confirmed that, if the original Charities Bill had proceeded in the form in which it was introduced, the District Court Rules at the time would have permitted a full first instance de novo oral hearing in appropriate cases.[264]

However, as discussed above, the original Charities Bill was almost completely rewritten at Select Committee stage in 2004 in response to hundreds of submissions.[265] On the topic of appeals, submitters expressed concern that restricting appeals to the District Court, whose decision was to be final,[266] would preclude access to the highest Court in the land on the question of whether a purpose is charitable. Submitters were also concerned that, given the equitable origins of the definition of charitable purpose, the High Court should have a first instance jurisdiction.

In response, the appeal mechanism was changed at Select Committee stage to replace the reference to the District Court with a reference to the High Court (and to remove the requirement for the first instance appeal to be final).[267] However, in making these changes, the Select Committee unfortunately did not take the extra step of clarifying the nature of the hearing to be conducted on appeal.

256 Note that section 17(1) of the TRA Act uses the word "effectually" rather than "effectively".

257 *Foundation for Anti-Aging Research v Charities Registration Board [2015] NZCA 449 at [8]; Re The Foundation for Anti-Aging Research* (2016) 23 PRNZ 726 (HC) at [13].

258 Tax Administration Act 1994 s 89A(1).

259 *Foundation for Anti-Aging Research v Charities Registration Board* [2015] NZCA 449 at [44].

260 *Re The Foundation for Anti-Aging Research* (2016) 23 PRNZ 726 (HC) at [13].

261 See, for example, *Latimer v Commissioner of Inland Revenue* [2002] 1 NZLR 535 (HC) at [132].

262 *Foundation for Anti-Aging Research v Charities Registration Board* [2015] *NZCA* 449 at [44] - [47] referring to *Charities Bill 2004 (108-1)* cls 67 and 69(6) at 38 - 41.

263 See *Shotover Gorge Jet Boats Ltd v Jamieson* [1987] 1 NZLR 437 (CA), considering s 5 of the Lakes District Waterways Authority (Shotover River) Empowering Act 1985, at 440, line 15: "There can be no doubt that the District Court was intended to hear the case de novo, which would include a full hearing of oral evidence if any party so insisted. That is the normal way in which the District Court exercises its civil jurisdiction".

264 *Foundation for Anti-Aging Research v Charities Registration Board* [2015] NZCA 449 at [45]: "If the Bill had proceeded in the form in which it was introduced, we accept that the District Court Rules at the time would have permitted the District Court to rehear the whole or any part of the evidence, and the Court would have had 'full discretionary power to hear and receive further evidence on questions of fact, either by oral evidence or by affidavit'," (footnotes omitted).

265 See, for example, Charities Bill 2R (12 April 2005) 625 NZPD 19,944 per Georgina Beyer (Labour): "The committee received 753 submissions ... there has been a virtual rewrite of the original bill".

266 Charities Bill 2004 (108-1) cl 69(6).

267 Charities Bill 2004 (108-2) at 63 – 67, 13 - 14.

There is nothing in the Parliamentary materials or Hansard records to indicate that the Select Committee was intending to remove charities' ability to access an oral hearing. To the contrary, the amendments were clearly intended to allay charities' concerns by providing them with a more fulsome right of appeal. The amendments were then passed through under urgency without proper consultation,[268] on the basis that a post-implementation review of the legislation would follow (the review that, almost two decades later, charities are still waiting for).

Opposition National Party members of the Social Services Select Committee were critical of the rushed process, making the following comments in the Select Committee's report:[269]

> The consultation process was inadequate with the original [charities] bill and we have major concerns that the redrafted sections of the bill should have been made available for a further period of sector wide consultation. We all know the devil is in the detail and if the bill gets it wrong, as the first draft definitely did the charitable sector will pay the price and we will see many charitable organisations close. There is the possibility that there are a number of structural issues in the bill remaining unaddressed and without a further period of consultation with the sector it is difficult to fully identify these.

The formulation of the appeal right is a key structural issue for which the New Zealand charitable sector is indeed "paying the price".

The High Court Rules

The fact that the legislation is silent on the nature of the hearing to be conducted on appeal means that Charities Act appeals fall to be governed under the general rules for appeals to the High Court set out in Part 20 of the High Court Rules.[270] Those general rules include the following:[271]

(i) Although the decision-maker is entitled to be represented and heard at the hearing, the notice of appeal must not name the decision-maker as a respondent.[272] This means that the decision-maker is not a "party" to the appeal.

(ii) The Court may, on application, order that a transcript be made of all or part of the evidence given at the hearing before the decision-maker. In addition, the Court may direct the decision-maker to prepare a report setting out: any considerations, other than findings of fact, to which they had regard in making the decision appealed against that are not set out in the decision; any information about the effect the decision might have on the general administration of the Act under which the decision was made; and any other relevant matters that should be drawn to the attention of the Court. Every party to the appeal is entitled to be heard, and tender evidence, on any matter referred to in the report.[273]

Otherwise, however, the appeal proceeds by way of rehearing.[274] This means that appeals under the Charities Act currently proceed on the basis of the record created by Charities Services and the Board: charities are responsible for ensuring that "all relevant factual material" is placed before the decision-maker before its decision is made,[275] and no "additional evidence" may be adduced in the High Court on appeal, unless the charity can demonstrate "special reasons".[276] Any such additional evidence must be given by affidavit.[277]

These rules are very restrictive, but they are premised on an assumption that a full oral hearing of evidence has already been undertaken at first instance before an independent body adjudicating a dispute between two parties.

However, appeals under the Charities Act *differ* from most general appeals to the High Court.[278] For example,

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268 Charities Bill 2004 (108-2) at 21 per Green Party members: "It became obvious during the hearing of submissions that the bill – as tabled – was fundamentally flawed. Further it is very disappointing that an open and robust consultation process over the considerable changes to the bill was not undertaken … The bill as drafted presents a wide range of problems, many of which are still not addressed, including issues around … the inability to develop common law in relation to the sector because of limited appeal rights".

269 Charities Bill 2004 (108-2) (*select committee report*) at 20 (emphasis added).

270 *Foundation for Anti-Aging Research v Charities Registration Board [2015] NZCA 449 at [39]*; *High Court Rules 2016* (LI 2016/225). HCR 20.1 makes specific exception for appeals under the Criminal Procedure Act 2011, the Arbitration Act 1996, the Bail Act 2000, and for appeals by way of case stated under Pt 21 of the HCR. Otherwise, Pt 20 applies "subject to any express provision in the enactment under which the appeal is brought" (HCR20.1(3)).

271 *Foundation for Anti-Aging Research v Charities Registration Board* [2015] NZCA 449 at [23] - [27], [43].

272 HCR20.17; HCR20.9(2).

273 HCR20.14(1)(a); HCR20.15 (Report *by decision-maker*). To date, this provision does not appear to have been utilised in appeals under the Charities Act.

274 HCR20.18.

275 *Canterbury Development Corporation & Ors v Charities Commission* [2010] 2 NZLR 707 (HC) at [107]; *Re New Zealand Computer Society Inc* (2011) NZTC 20-033 (HC) at [33]; *Re Queenstown Lakes Community Housing Trust* [2011] 3 NZLR 502 (HC) at [25]; *Foundation for Anti-Aging Research v Charities Registration Board* [2014] NZHC 1153 at [45] - [60]; *Foundation for Anti-Aging Research v Charities Registration Board* [2015] NZCA 449 at [50].

276 *Re Education New Zealand Trust* (2010) 24 NZTC 24,354 (HC) at [58] - [63]. The Charities Act does not grapple with the issue of evidence, referring only to "information". See Justice R Ellis *A view from the Bench*, presentation delivered to the *Perspectives on charity law, accounting and regulation in New Zealand* conference organised by the Charity Law Association of Australia and New Zealand in conjunction with Chartered Accountants Australia and New Zealand, April 2018.

277 *Foundation for Anti-Aging Research v Charities Registration Board* [2014] NZHC 1153 at [58], [59], [68] - [69]; *Foundation for Anti-Aging Research v Charities Registration Board* [2015] NZCA 449 at [51] - [57].

278 Re *Queenstown Lakes Community Housing Trust* [2011] 3 NZLR 502 (HC) at [25]; *Foundation for Anti-Aging Research v Charities Registration Board* [2014] NZHC 1153 at [59]; *National Council of Women of New Zealand Inc v Charities Registration Board* (2014) 26

the original decision-maker under the Charities Act is not judicial, and does not "adjudicate" a dispute between two parties; rather, Charities Services or the Board effectively *is* the other party. In addition, at first instance, Charities Services undertakes only an informal inquisitorial approach:[279] there is no formal oral hearing at which evidence is presented (and therefore no "transcript" of any proceedings below).

Application of the general High Court Rules explains why the decision-maker is not permitted to be a party to general appeals to the High Court: a District Court Judge, for example, would not normally be permitted to be a party to an appeal of their own decision. Instead, the role of the decision-maker in Charities Act appeals is limited to assisting the Court: while they may oppose, they may not do so adversarially, and they may not unnecessarily enter the fray;[280] unless expressly invited to assist in some other respect, Charities Services and/or the Board are expected to confine their submissions "to matters on which [they] can provide impartial assistance to the Court", such as their jurisdiction or the general administration of the Charities Act. This means that Charities Services and the Board may not take a proactive role in Charities Act appeals,[281] and they have no right to a further appeal of a decision they do not agree with.[282]

In practice, this means there is no opposing party or "contradictor" in Charities Act appeals, an unintended consequence that creates an absence of the usual tension between appellant and respondent which "can sometimes lead to poor decision-making and that should be avoided".[283] In practice, the decision-maker sometimes has taken an active role in Charities Act appeals, a position for which they have been criticised.[284] More recently, a practice has developed by which the Attorney-General will intervene, which raises other issues, as discussed further below.

As touched on above, a key area of difficulty in the context of decision-making under the Charities Act relates to material Charities Services finds from its internet searches.[285] This material may be relied on by Charities Services and/or the Board in reaching their decision, even though the material may be inaccurate or misleading, as illustrated by the following comments of the High Court:[286]

> But it seems clear enough that the chief executive also obtained information … from the internet and that both he, and later the Board, relied on that information. The issue that potentially arises is whether he was entitled to do so, and, if so, whether there are any limits on that power.
>
> It is not ultimately necessary for the determination of the present appeals to decide whether or not the chief executive has any ability to rely on material that is not provided to him by an applicant. It is certainly arguable that he does not. The requirement in s 18(3)(iii) that he must have regard to "any other information that it considers is relevant" is plainly a reference to information that is perceived as relevant by the entity that is seeking charitable status.
>
> I do nonetheless have concerns about what happened here. Those concerns serve to underscore my primary conclusions. I therefore record that, to the extent that the chief executive may (contrary to

NZTC 21075 (HC) at [51]; Re *The Foundation for Anti-Aging Research* (2016) 23 PRNZ 726 (HC) at [38].

279 Te Tari Taiwhenua Internal Affairs *Modernising the Charities Act 2005: Discussion Document* February 2019 at 36. See also *Foundation for Anti-Aging Research v Charities Registration Board* [2014] NZHC 1153 at [59]; *Foundation for Anti-Aging Research v Charities Registration Board* [2015] NZCA 449 at [20].

280 *Canterbury Development Corporation & Ors v Charities Commission* [2010] 2 NZLR 707 (HC) at [108] - [111]; *Re Draco Foundation (NZ) Charitable Trust* (2011) 25 NZTC 20-032 (HC) at [8]; *Re Greenpeace New Zealand Incorporated* [2011] 2 NZLR 815 (HC) at [21]; *Re Greenpeace of New Zealand Inc* [2013] 1 NZLR 339 (CA) at [5]; *National Council of Women of New Zealand Inc v Charities Registration Board* (2014) 26 NZTC 21075 (HC) at [11], [29], [52]; *Re Greenpeace of New Zealand Inc* [2015] 1 NZLR 169 (SC) at [11]; *Re Family First New Zealand* (2015) 4 NZTR 25-014 at [103]; *Foundation for Anti-Aging Research v Charities Registration Board* [2015] NZCA 449 at [53].

281 *Re The Foundation for Anti-Aging Research* (2016) 23 PRNZ 726 (HC) at [37], [46].

282 *Re The Foundation for Anti-Aging Research* (2016) 23 PRNZ 726 (HC) at [36], [99].

283 *Travis Trust v Charities Commission* (2009) 24 NZTC 23,273 (HC) at [27]. See also *the submission* of the Charities Registration Board: "Since there is no opposing party in a charity's appeal, the Courts have struggled with the status of the Board, and with the lack of any balancing view. The lack of a respondent party with a right of appeal adversely impacts upon the development of charitable case law … The Board submits that the decision-maker should be empowered to be a party in any appeal".

284 See, for example, *Re The Foundation for Anti-Aging Research* (2016) 23 PRNZ 726 (HC) at [43] - [47] and *National Council of Women of New Zealand Inc v Charities Registration Board* [2015] 3 NZLR 72 (HC) at [81]: "The [Charities Registration Board] was not formally a respondent to the appeal, but has taken a full role in defending its earlier decision, and in denying that the Court has any wider powers to alter the outcome. My provisional view is that NCW is entitled to costs …". See also *Re New Zealand Computer Society* (2011) 25 NZTC 20-033 (HC) at [18]: "The Commission has in this case adopted an active role on the appeal, in support of its decision"; *National Council of Women of New Zealand Inc v Charities Registration Board* (2014) 26 NZTC 21075 (HC) at [11], [27], [52]; *Re Family First New Zealand* (2015) 4 NZTR 25-014 at [75].

285 See, for example, *Re The Foundation for Anti-Aging Research* (2016) 23 PRNZ 726 (HC) at [25](a), [32], [52], [71] - [75]; *Greenpeace of New Zealand Incorporated v Charities Registration Board* [2020] NZHC 1999 at [28] - [30], [174], *Re Greenpeace of New Zealand Inc* [2013] 1 NZSC 12 (SC) at [82] - [84], [92], and *Re Greenpeace of New Zealand Inc* [2013] 1 NZLR 339 (CA) at [18], [31] - [32], [92], [100] (referring to the skewed or misrepresentative picture given by the "selective web dredge" undertaken of Greenpeace's website and other publicly available sources) and *Re Greenpeace [of] New Zealand Inc* [2011] 2 NZLR 815 (HC) at [16], [29] - [32], [72], [76] (referring to criticism of the selective nature of quotations taken from Greenpeace's website on which Greenpeace had no opportunity to make submissions on the conclusions drawn from its content); *Liberty Trust v Charities Commission* [2011] 3 NZLR 68 (HC) at [50]; *Re Family First New Zealand* (2015) 4 NZTR 25-014 at [48]; *Re Family First New Zealand* [2018] NZHC 2273 at [20]; *Re New Zealand Computer Society* (2011) 25 NZTC 20-033 (HC) at [27].

286 *Re The Foundation for Anti-Aging Research* (2016) 23 PRNZ 726 (HC) at [71] - [75] (emphasis added, footnotes omitted).

> my own preliminary view) have regard to information from outside sources, it is unclear to me why he would do so. Even putting resourcing issues to one side, such an approach seems to be:
>
> a. likely to give rise to increased natural justice concerns and lead to justifiable demands for formal hearings and cross-examination; and
>
> b. fraught with danger, particularly where information is obtained from the internet.
>
> As far as the latter point is concerned, the perils of the internet are legend. It is possible to obtain web support for almost any proposition one cares to name. Sorting the wheat from the chaff is difficult for anyone who is not already well versed in the subject matter. At the very least, there would need to be some assurance as to the reliability and quality of any such extraneous material.
>
> More fundamentally, making inquiries that are independent of an applicant seems to me to risk moving some way from the long-established orthodox analysis which focuses on establishing the purposes of the specific entity seeking charitable status. I consider the Board was wrong to put any store in the information obtained from the internet by the chief executive here.

Currently, there is no assurance as to the reliability or quality of the material Charities Services finds from its internet searches: instead, evidential material can be considered and given weight in Charities Services' and the Board's decision-making, even though it may be irrelevant, unfairly prejudicial, or otherwise inadmissible in a Court of law.

A related issue is that the absence of an oral hearing of evidence makes it very difficult for a charity to challenge the fact-gathering exercise conducted by Charities Services/the Board, for example by suggesting the appeal Court consider information other than that considered by the original decision-maker or place different weight on material found. In other words, the original decision-maker effectively sets the parameters for ultimate argument notwithstanding the right of general appeal to the Court.[287] As a result, the current process carries inherent risk that Charities Services' original adverse findings from its internet searches may unfairly taint the entire appeals process, by unduly favouring the original decision.[288]

The gateway to charitable registration is the definition of charitable purpose, the essence of which is benefit to the public. Public benefits may be direct or indirect, tangible or intangible, present or future.[289] It is critical that public benefit is not conflated with the conception of the public interest to which the Government of the day seeks to give effect in its policies. Public benefit must be determined objectively. Charities by definition are able to exist into perpetuity:[290] their eligibility for registration must not be permitted to ebb and flow depending on which political party is in power.

Cases are won and lost on their facts. Findings of fact can be critical in determining both what an entity's purposes are and whether they operate for the benefit of the public. As a result, determining whether any particular entity is eligible for charitable registration often gives rise to contested questions of fact. Facts are established by evidence. Some facts may fairly require a considerable body of evidence. As noted by Ellis J, speaking extra-curially:[291]

> One of the main reasons why [charities law cases] require evidence is, I think, because Judges today are, quite rightly, much more reluctant than their forebears simply to apply their own personal (or even majoritarian) ideas about what constitutes a charitable purpose or what might be of benefit to the public. That is particularly so in areas where notions of morality, matters of religion, questions of artistic taste or of scientific merit are at play. In the pluralistic society in which we now live such matters, and their value, are all properly regarded as inherently contestable. And given the flow on financial benefit that charitable status potentially yields it is right that these things are in fact contested. Conversely, those applying for registration are entitled to expect that such a contest will be fair and objective; that their applications will not be determined on the basis of subjective personal views or beliefs of the decision-maker. The analysis required can only be based on evidence.

The issue is that New Zealand charities currently have no guarantee that their application will be based on fair and objective criteria, as opposed to the subjective personal views or beliefs of the decision-maker.[292]

287 *Greenpeace of New Zealand Incorporated v Charities Registration Board* [2019] NZHC 929 at [13], [14].

288 See, for example, the *submissions* of Social Service Providers Aotearoa: "Currently, the High Court is only presented with the original evidence presented, and charities have no ability to present additional evidence … This very narrow system in effect denies justice"; and Volunteering Hawke's Bay: "… unclear decisions based not on facts but on opinions … The integrity of the process is important … The process needs to be fair and not be so restrictive that it automatically favours the original decision".

289 D Poirier *Charity Law in New Zealand* (Department of Internal Affairs, June 2013) *at* [4.1.1.3].

290 See for example section 16(6)(a) of the Trusts Act 2019, which specifically provides that the 125-year maximum duration for a trust does not apply to a charitable trust.

291 Justice R Ellis "*A view from the Bench*" delivered to the *Perspectives on charity law, accounting and regulation in New Zealand* conference organised by the Charity Law Association of Australia and New Zealand in conjunction with Chartered Accountants Australia and New Zealand, April 2018 at [13].

292 The decision of the Supreme Court in *Attorney-General v Family First New Zealand* [2022] NZSC 80 (28 June 2022) is arguably an example of this. See the discussion in *M McGregor-Lowndes & F Hannah* [2022] *ACPNZ Legal Case Notes Series: 2022-93 Attorney General v Family First New Zealand: https://eprints.qut.*

Workarounds

In order to mitigate the unfairness of the current appeals process, a number of workarounds have been developed. For example, where the decision-maker refers to a website, all of the material on the website is required to form part of the record, not just those parts which the original decision-maker regarded as relevant.[293] There may be many hundreds if not thousands of pages of such material,[294] underscoring the need for a triage approach, as discussed further below.

In addition, in early Charities Act appeals, both charities and the Charities Commission filed affidavit evidence by agreement.[295] However, this particular workaround was short-lived: in 2010, Ronald Young J held of his own motion that this approach should "not become habitual";[296] instead, if a charity wishes to adduce additional evidence at the appeal, the charity must make an application for leave to adduce further evidence under rule 20.16 of the High Court Rules. Applications to adduce further evidence are now made reasonably routinely, even at Supreme Court level,[297] highlighting the perceived unfairness of the current process. Charities that have not had the benefit of an application to adduce further evidence, or that otherwise have not had the wherewithal to provide material to Charities Services and the Board as if preparing for a High Court trial (such as affidavit evidence, including expert affidavit evidence), are often materially disadvantaged by lack of evidence.[298]

A significant unintended consequence of the current framework is that it encourages a "kitchen sink" approach. Prior to a decision being made, charities may not have a clear picture of the case against them,[299] yet the consequences of an adverse decision may be fatal. Charities are therefore structurally incentivised to err on the side of providing more rather than less information to Charities Services, because they will have no automatic right to adduce evidence after a decision is made. As a result, the decision-making process may generate large amounts of evidential material that neither Charities Services nor the Board is well equipped to deal with. Perversely, there is no obvious signal to charities of the need to provide material in this way, as charities that have not had the benefit of specialist legal advice may intuitively assume they would be able to access a proper oral hearing of evidence on appeal. To reach the appeal and find that no such hearing is available gives rise to a rude shock that underscores why so many applications to adduce further evidence are being made.

However, even if charities provide considerable evidential material, and/or even if an application to adduce further evidence is made and granted, charities remain structurally disadvantaged by their inability to test material that has been relied on by Charities Services and/or the Board. Lack of a robust evidential platform appears to have been a factor in Courts referring Charities Act decisions back to the original decision-maker for reconsideration in light of their judgment;[300] alternatively, superior Courts may request and/or receive extensive additional factual material (which is unusual for a general appeal under the High Court Rules).[301] However, while these mechanisms are important for trying to "workaround" the unfairness of the current framework, they do not adequately address it: instead, they have a tendency to generate significantly more evidential material than might be presented to a judicial trier of fact, thereby increasing cost and delay for all concerned. They are therefore inherently a less than ideal substitute for a proper first instance oral hearing, and underscore the need for a triage approach, as discussed further below.

Many of the cases decided under the Charities Act to date would likely have been decided differently if charities had been able to access a de novo oral hearing of

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293 *Liberty Trust v Charities Commission* [2011] 3 NZLR 68 (HC) at [50].

294 See, for example, *Re Greenpeace of New Zealand Inc* [2013] 1 NZLR 339 (CA) at [32]; *Greenpeace of New Zealand Incorporated v Charities Registration Board* [2020] NZHC 1999 at [54] n 64.

295 *Travis Trust v Charities Commission* (2009) 24 NZTC 23,273 (HC) at [24]; *Canterbury Development Corporation & Ors v Charities Commission* [2010] 2 NZLR 707 (HC) at [104], [106]; *Re Education New Zealand Trust* (2010) 24 NZTC 24,354 (HC) at [58]. The writer also understands from discussion with counsel that in *The Plumbers, Gasfitters and Drainlayers Board v The Charities Registration Board* [2013] NZHC 1986 further evidence was adduced by consent.

296 *Canterbury Development Corporation & Ors v Charities Commission* [2010] 2 NZLR 707 (HC) at [106].

297 *Attorney-General v Family First New Zealand* [2022] NZSC 80 (28 June 2022) at [32]-[38]. *See also Family First New Zealand v Attorney-General* [2020] NZCA 366 at [56] - [58]; *Canterbury Development Corporation & Ors v Charities Commission* [2010] 2 NZLR 707 (HC) at [104] - [106]; *Re Education New Zealand Trust* (2010) 24 NZTC 24,354 (HC) at [58] - [63]; *Re New Zealand Computer Society* (2011) 25 NZTC 20-033 (HC) at [23] - [35]; *Re Greenpeace New Zealand Incorporated* [2011] 2 NZLR 815 (HC) at [28] - [33] *(see also Re Greenpeace of New Zealand Inc* [2013] 1 NZLR 339 (CA) at [31]); *Liberty Trust v Charities Commission* [2011] 3 NZLR 68 (HC) at [48] - [50]; *Re Queenstown Lakes Community Housing Trust* [2011] 3 NZLR 502 (HC) at [25] - [26]; *Foundation for Anti-Aging Research v Charities Registration Board* [2014] NZHC 1153 at [24] - [63]; *National Council of Women of New Zealand Inc v Charities Registration Board* (2014) 26 NZTC 21075 (HC) at [24] - [30]. Such applications are generally successful, with one exception: *Re New Zealand Computer Society* (2011) 25 NZTC 20-033 (HC) at [35].

298 See, for example, *Re The Grand Lodge of Antient Free and Accepted Masons in New Zealand* [2011] 1 NZLR 277 (HC) at [27]; *Liberty Trust v Charities Commission* [2011] 3 NZLR 68 (HC) at [59], [60], [66]; *Re Draco Foundation (NZ) Charitable Trust* (2011) 25 NZTC 20-032 (HC) at [26], [32], [33], [48] - [49] and [77]; *Re New Zealand Computer Society* (2011) 25 NZTC 20-033 (HC) at [64], [68], [79], and [80].

299 See, for example, the *submission* of Youth Search and Rescue Trust NZ: "... a board sitting behind closed doors making judgments on something they might not fully understand doesn't help them or the charity".

300 See, for example, *Re Greenpeace of New Zealand Inc* [2015] 1 NZLR 169 (SC) at [104]; *Re Greenpeace of New Zealand Inc* [2013] 1 NZLR 339 (CA) at [92], [105]; *Re Family First New Zealand* (2015) 4 NZTR 25-014 at [2], [84] - [85], [102].

301 *Family First New Zealand v Attorney-General* [2020] NZCA 366 at [56] - [57].

evidence.[302] It is critical that charities have a proper opportunity to objectively test the factual findings on which the original decision was based before an independent judicial authority according to established rules of evidence.

However, DIA has consistently refused to reinstate charities' ability to access an oral hearing of evidence.[303] Instead, new section 58C(4) seeks to "workaround" the unintended consequences of the decision-maker being unable to take an active role in the appeal,[304] or to appeal a decision they are not happy with,[305] by legislatively requiring the decision-maker to be named as a respondent in the appeal.

It is not clear why DIA seeks to address this issue at the level of symptom rather than source. Section 58C(4) has no counterpart in the TRA Act, no doubt because it would be unnecessary in a de novo oral hearing of evidence (which would normally be the case in an appeal to the TRA, even after an elaborate disputes process involving exchange of considerable information).

The need for a de novo hearing in appropriate cases

DIA argues that de novo hearings are "generally more expensive and slower" than a rehearing on the record.[306] However, this argument does not bear critical examination: charities such as Greenpeace and Family First have been subjected to decades of litigation: allowing an oral hearing of evidence would have allowed a robust result to be reached at first instance, which may in turn have reduced the need for further appeals, extensive exchanges of correspondence, and repeated applications to adduce further evidence. DIA itself notes that having charities tied up in limbo for years does not support a thriving charitable sector.[307] Charities are inherently reluctant litigants, as discussed above; the fact that so much time and cost is currently being expended trying to establish a proper evidential platform is a strong indication of the perceived unfairness of the current approach.

On this basis, reinstating charities' access to de novo first instance oral hearing of evidence is likely to reduce issues of cost and delay, and result in a significantly fairer and more efficient process which, in turn, would have a significant positive impact on trust and confidence, both in charities and in the framework itself.

DIA argues that hearing the matter afresh on appeal may increase the risk of the original decision-making process becoming a "test run",[308] an argument that has carried weight in a competition law context.[309] However, it is not clear that similar concerns fairly arise in a charities law context.[310] Decisions under the Commerce Act 1986 follow a complex and iterative inquisitorial process.[311] By contrast, the key decision as to eligibility for registration under the Charities Act turns on the definition of charitable purpose, a concept that resides in the common law and therefore requires judicial determination. To the extent that charities law decisions turn on contested questions of fact, they will inevitably relate to an enormously diverse range of subject areas on which the decision-maker under the Charities Act is unlikely to have specific expertise, underscoring the need for an independent judicial "trier of fact" to determine such factual contests according

302 Particularly *Canterbury Development Corporation & Ors v Charities Commission* [2010] 2 NZLR 707 (HC); *Re Queenstown Lakes Community Housing Trust* [2011] 3 NZLR 502 (HC); *Re New Zealand Computer Society* (2011) 25 NZTC 20-033 (HC); *Re Draco Foundation (NZ) Charitable Trust* (2011) 25 NZTC 20-032 (HC); *Re The Grand Lodge of Antient Free and Accepted Masons in New Zealand* [2011] 1 NZLR 277 (HC); and *Better Public Media Trust v Attorney-General* [2020] NZHC 350.

303 See for example, Department of Internal Affairs *Regulatory Impact Statement: Modernising the Charities Act* (Report, 19 October 2021) at 105: "Despite calls from submitters for a de novo appeal, this is not recommended. A first appeal to the TRA, a less formal body in comparison to the High Court, provides the opportunity to challenge any facts considered during the decision-making process. It is the decision of the appeal body as to what new evidence they will consider, however, the TRA has more relaxed rules of evidence in comparison to the courts. This, combined with the expanded objection process, provides an entity with the opportunity to challenge any other information that the Board/Charities Services is using when considering an application. Any additional information provided during the objection process would be available at the appeals stage. The TRA also provides that both sides (the entity and decisionmaker) are party to the appeal, which provides the opportunity for the decision-maker to be able to respond to any challenge of evidence (therefore ensuring a fair process for both parties)". In other words, the intention appears to be to devolve to an internal objections process, followed by only an attenuated appeal.

304 *Re The Foundation for Anti-Aging Research* (2016) 23 PRNZ 726 (HC) at [38] - [48]; *Foundation for Anti-Aging Research v Charities Registration Board* [2014] NZHC 1153 at [46] - [47].

305 *Better Public Media Trust v Attorney-General* [2020] NZHC 350 at [36] - [37].

306 Internal Affairs *Modernising the Charities Act 2005: Discussion Document* February 2019 at 36.

307 Department of Internal Affairs *Regulatory Impact Statement: Modernising the Charities Act* (Report, 19 October 2021) at 101.

308 Internal Affairs *Modernising the Charities Act 2005: Discussion Document* February 2019 at 36.

309 *Foundation for Anti-Aging Research v Charities Registration Board* [2014] NZHC 1153 at [52] - [57].

310 See, for example, the *submission* of the Royal Forest and Bird Protection Society of New Zealand Inc: "We submit that appeals should be heard as de novo hearings, with evidence heard orally. New evidence should be able to be brought. This is because a charity should have a fair chance of ensuring that all possible concerns are addressed in the appeal, and also so that the decision maker on appeal has the best possible information on which to base its decision … If the appeal is limited to a rehearing, the decision maker is unlikely to have all the relevant information before it to make a robust decision. As such, a charity may be denied charitable status simply because of an oversight in its application, or because it cannot respond properly to the decision made by the Board. In our view this raises natural justice issues. By ensuring that the appeals decision maker … has all the relevant information, this will allow charities law to develop in an accurate factual context, and in a way that hopefully reflects society's expectations and understandings … Given the costs associated with appealing … we think this risk [of a "test run"] is very small … This risk, such as it does exist, should be weighed against the greater benefit of ensuring the decision maker on appeal has all the relevant information available to it".

311 *Foundation for Anti-Aging Research v Charities Registration Board* [2014] NZHC 1153 at [54].

to established rules of evidence. The question should be whether a charity is eligible for registration, not whether the original decision was "right".

As touched on above, neither Charities Services nor the Board are well equipped to deal with the volume of evidence the workarounds to the current framework are generating. While the Charities Registration Board is officially responsible for all decisions regarding registration and deregistration,[312] the Board meets only monthly, meaning that it may simply not have capacity to consider all of the material provided. Exchanges of correspondence between charities and Charities Services can be significant and may extend over many months;[313] for example, it took almost four years for a decision to be made on Greenpeace's application for registration after the Supreme Court referred the matter to the Board for reconsideration in light of its judgment. Perhaps in recognition of this factor, Charities Services may not forward all of the material provided by a charity to the Board,[314] raising further unfairness concerns as the decision-maker will be forced to make decisions on the basis of material they have not seen. Further, for the Board to adopt a "governance" function of merely approving the decision-making process undertaken by Charities Services' staff would exacerbate perceptions of unfairness and would not achieve the independent, "two-tiered" consideration of registration matters required by the Act.[315]

It should be noted that, despite providing charities with an "opportunity to appear and be heard" (new section 55D(1)(a)), the new objections process will not address these issues, because Charities Services and the Board will not be bound to apply the rules of evidence at any such hearing, and evidence will still not be independently tested.

A "triage" approach

Rather than overwhelming Charities Services and the Board with evidential material they are not equipped to properly deal with, it would be significantly more cost- and time-effective to take a "triage" approach: the vast bulk of decisions will be straightforward and can be processed without difficulty; those that are not can be readily identified, to be progressed to a proper oral hearing of evidence, under established rules of evidence, before an independent judicial authority, if either party so requests. Allowing a process under which decisions that involve contested questions of fact (such as whether a purpose operates for the benefit of the public) can be fairly and objectively tested at first instance would mitigate the need for repeated exchanges of correspondence,[316] decades of litigation, and endless applications to adduce further evidence, including at superior Court level, to try to "workaround" the unfairness of the current process; it would instead provide a robust evidential platform from which conclusions of fact can be reliably drawn at first instance, to the benefit of the entire process, thereby addressing current issues of unfairness in an appropriate, cost-effective and timely way.

There is no risk of such an approach resulting in attempts to "improve or revise" material,[317] or to provide a "second bite at a substantive first instance decision".[318] To the contrary, such an approach would encourage better first instance decision-making, by allowing factual contests to be dealt with once, efficiently and effectively, by an independent judicial authority inherently equipped to deal with it.

It would be normal to have an opportunity to give evidence orally in a case that seeks to determine whether purposes are charitable.[319] It would also be normal to hear oral evidence in a trial of a proceeding involving disputed questions of fact.[320] Any other person appealing to the TRA is able to access a full oral hearing of evidence before a judicial authority, even after an elaborate tax disputes procedures. In denying charities access to an oral hearing of evidence, charities are effectively being singled out for special exclusion. It is not clear why such an important aspect of our justice system should be denied to charities.

Obviously, not all charities law cases will require a de novo oral hearing of evidence, and reinstating access to such a hearing would not necessitate conducting such a hearing in all cases: it is always open to the parties to agree that all of part of the material already provided should be treated as evidence for the purposes of the hearing (such as through an "agreed statement of facts"), thereby obviating the need to lead it again.[321]

312 Charities Act 2005 s 8(3).

313 *Foundation for Anti-Aging Research v Charities Registration Board* [2015] NZCA 449 at [16] and *Re The Foundation for Anti-Aging Research* (2016) 23 PRNZ 726 (HC) at [21], referring to a process taking more than 18 months from the time applications were made until decisions were made to decline the applications; *Better Public Media Trust v Attorney-General* [2020] NZHC 350 at [3]: "Over the succeeding years, the Trust engaged in a protracted exchange of correspondence with the Department over this issue".

314 See *Foundation for Anti-Aging Research v Charities Registration Board* [2014] NZHC 1153 at [61] - [62] regarding a DVD which a charity prepared in support of its application for registration, which Charities Services did not provide to the Board as decision-maker.

315 *Re The Foundation for Anti-Aging Research* (2016) 23 PRNZ 726 (HC) at [33].

316 *Re New Zealand Computer Society* (2011) 25 NZTC 20-033 (HC) at [78].

317 *Re New Zealand Computer Society* (2011) 25 NZTC 20-033 (HC) at [30].

318 *National Council of Women of New Zealand Inc v Charities Registration Board* (2014) 26 NZTC 21075 (HC) at [27].

319 See, for example, *Latimer v Commissioner of Inland Revenue* [2002] 1 NZLR 535 (HC) and *Chamber of Commerce and Industry of Western Australia (Inc) and Commissioner of State Revenue* [2012] WASAT 146.

320 HCR 9.51 provides that disputed questions of fact arising at the trial of any proceeding must be determined on evidence given by means of witnesses examined orally in open court.

321 *Foundation for Anti-Aging Research v Charities Registration Board* [2015] NZCA 449 at [42].

Similarly, a Court is able to proceed "on the papers" where appropriate and all agree. Rather, an oral hearing would be permitted in appropriate cases where either the decision-maker or the charity so requests. Reinstating this ability would materially improve charities' access to justice, and their ability to hold Charities Services and the Charities Registration Board accountable for their decision-making.

Permitting a first instance oral hearing in appropriate cases would also have other important side effects: it would render the original decision-maker a party, thereby enabling them to appear adversarially in support of their decision, and to appeal a Court decision they do not agree with, by addressing such issues at the level of cause, rather than symptom. On this basis, section 58C(4), which specifically provides for the decision-maker to be a respondent in the appeal, would not be necessary.

In addition, permitting a first instance de novo oral hearing would enable the original decision-maker to conduct searches of extraneous internet material as they see fit, with the important qualification that any such material would only be able to be relied on in a subsequent oral hearing before the independent judicial authority if the material meets legal tests for admissibility, with the weight to be given to such material determined by a process of testing by cross-examination. In this way, issues of cost and natural justice would again be addressed at the level of source, rather than symptom.

Comparable jurisdictions

In addition, allowing charities in New Zealand to access a de novo oral hearing of evidence would align New Zealand law with comparable jurisdictions. For example, in England and Wales, the First-Tier Tribunal has a de novo jurisdiction with the ability to admit evidence whether or not it was available to the original decision-maker.[322] Similar principles apply in Northern Ireland.[323] In Ireland, parties to an appeal to the Charity Appeals Tribunal may call witnesses to give evidence and be cross-examined.[324] Australia also provides a de novo hearing, with the Administrative Appeals Tribunal able to take into account evidence that was not before the original decision-maker.[325] While Canada is a notable outlier, charities' inability to access a first instance oral hearing of evidence has been identified as a specific problem in Canada.[326]

On the basis of all the above, it is not clear why DIA refuses to reinstate charities' ability to access a de novo hearing of evidence. Instead, DIA argues that Charities Act appeals should be limited to a "rehearing" only.[327] The intention appears to be to devolve to an internal objections process, conducted and controlled by Charities Services and the Board, followed by only an attenuated appeals process. As such, there is considerable concern that the new appeals process will favour DIA, and will not address concerns about cost, delay, unfairness, accountability, and access to justice.

Role of the Attorney-General

In considering the new appeals process, charities should also be aware of the potential impact of new section 58C(4) on the involvement of the Attorney-General in Charities Act appeals.

Until relatively recently, the Attorney-General of New Zealand has not become involved in cases under the Charities Act, despite requests by charities to do so. For example, in National Council of Women, Clifford J accepted the charity's application that the Attorney-General be served with notice of the proceedings, noting that:[328]

> … the regime introduced by the Charities Act remains a reasonably new one which has given rise to a degree of contention between charities and regulatory authority. The Charities Act itself is silent on the role, if any, of the Attorney-General. This, apparently, is in distinction to the equivalent legislation in the United Kingdom.

A similar application was successfully made in the Foundation for Anti-Aging Research litigation.[329] However, in both cases, the Attorney-General took no steps.

322 Charities Act 2011 (UK) s 319(4)(b) and *The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009* r 15(a)(ii). See also *Graham Hipkiss v The Charity Commission for England and Wales* (2018) First-Tier Tribunal (Charity) CA/2017/0014 at [20]: "The nature of the Tribunal's jurisdiction in this matter is de novo, i.e. we stand in the shoes of the Charity Commission and take a fresh decision on the evidence before us, giving appropriate weight to the Commission's decision as the body tasked by Parliament with making such decisions" (footnotes omitted). Similar provisions apply on appeal from a decision of the Tribunal. See Charities Act 2011 (UK) s 317(2)(b) and 319(3).

323 Rule 29 of the *Charity Tribunal Rules (Northern Ireland) 2010* provides that the Charity Tribunal for Northern Ireland must conduct all hearings "in such manner as it considers most suitable to the clarification of the issues before it, and generally to the just, expeditious and economical determination of the proceedings". Subject to any directions by the Tribunal, the parties may give evidence; present expert evidence; call witnesses; question any witnesses; and address the Tribunal on the evidence, and generally on the subject matter of the appeal or application. Evidence may be admitted by the Tribunal whether or not it was available to the Commission when the Commission's final decision was made. Under rule 25, the Tribunal may determine a substantive appeal without an oral hearing only if the parties agree in writing. See also Charities Act (Northern Ireland) 2008 sch 1 r 1(3).

324 *Charity Appeals Tribunal (Charities Act 2009) Rules* 2018 rr 10, 4.

325 See *Global Citizen Ltd v Commissioner of the Australian Charities and Not-for-profits Commission* [2021] AATA 3313 at [15].

326 See the discussion in S Barker *Focus on purpose – what does a world-leading framework of charities law look like?* [2022] NZLFRR 3, chapter 6.

327 Department of Internal Affairs *Regulatory Impact Statement: Modernising the Charities Act* (Report, 19 October 2021) at 92 and 105.

328 *National Council of Women of New Zealand Inc v Charities Registration Board* (2014) 26 NZTC 21075 (HC) at [35]. The writer was counsel in the case.

329 *Foundation for Anti-Aging Research v Charities Registration*

Significantly, the current restrictions on the ability of the decision-maker in a Charities Act appeal to take an active role in the appeal, or to appeal a decision they are unhappy with, do not apply to the Attorney-General. This factor appears to have led to a recent change in practice, whereby the Attorney-General will seek leave to be joined to a Charities Act appeal in the Attorney-General's capacity as "protector of charities":[330] the charity's consent will normally be sought to the Attorney-General's involvement, perhaps in return for an agreement that both parties will not seek a costs award;[331] the Attorney-General will then appear as the "effective contradictor", with the Board abiding the decision of the Court.[332] Under this approach, the Crown's legal representation may remain unchanged (although it appears the Attorney-General will no longer be instructed by Charities Services or the Board).[333] The net procedural effect is that the Crown, represented by the same legal counsel, becomes able to take an active role in the litigation, and to appeal if unhappy with the Court's decision.

While the appropriateness of this practice has not been tested, it does raise a number of questions: for example, the objectives of the Attorney-General as "protector of charities" are not necessarily aligned with those of the Board as decision-maker under the Charities Act; it is not clear to what extent the Attorney-General's intervention relates to the Attorney-General's parens patriae role of protecting charities, as opposed to the Crown simply working around current procedural limitations.

An alternative approach would be to address the procedural issues arising from the Board's status as a non-party at the level of cause: by reinstating charities' access to a first instance oral hearing of evidence, the Board would then itself be a party, able to take the role of an active protagonist, and to appeal an adverse decision, as was the case prior to the Charities Act and as is the case for appeals against Inland Revenue decisions before the TRA. Instead, however, DIA has chosen to make a number of amendments to normal TRA rules regarding evidence, and instead made the decision-maker a respondent by legislative fiat. It remains to be seen what impact this change will have on the Attorney-General's involvement in Charities Act appeals.

Another factor in this context is new section 58C(5), which requires the appellant to serve a notice of appeal on "all parties". It is not clear which parties, besides the decision-maker, are being referred to, or specifically whether this is intended to be a reference to the Attorney-General. This lack of clarity is underscored by new section 58V, which makes specific provision for the Authority to notify the Attorney-General of the bringing of any appeal to the Authority under the Charities Act.

The net result is considerable concern as to whether the new appeals process will in fact address current issues regarding the nature of the hearing on appeal. More detail may be provided by regulations which have not yet been released.

Board [2014] NZHC 1153 at [70] - [73].

330 See, for example, *Greenpeace of New Zealand Incorporated v Charities Registration Board* [2019] NZHC 929 at [1] - [2]; *Better Public Media Trust v Attorney-General* [2020] NZHC 350; and *Family First New Zealand v Attorney-General* [2020] NZCA 366 at [4]. In *The Foundation for Anti-Aging Research* (2016) 23 PRNZ 726 (HC), Ellis J stated at [40]: "if there are wider public interest issues raised by an appeal, it may be that the preferable course would be for the Attorney-General (in his role as protector of charities) to be joined and to participate".

331 See *Better Public Media Trust v Attorney-General* [2020] NZCA 290 at [16].

332 *Greenpeace of New Zealand Incorporated v Charities Registration Board* [2019] NZHC 929 at [1].

333 Conversation with Natasha Weight, General Manager, Charities Services (5 August 2021).

Glossary

Act, or Charities Act	Charities Act 2005
ACNC	Australian Charities and Not-for-profits Commission
Bill	Charities Amendment Bill 169-1
Board	Charities Registration Board | Te Rātā Atawhai
Charities Amendment Act	Charities Amendment Act 2023
Charities Services	Charities Services | Ngā Ratonga Kaupapa Atawhai, a business unit of DIA
Companies Act	Companies Act 1993
DIA	Department of Internal Affairs | Te Tari Taiwhenua
Incorporated Societies Act	Incorporated Societies Act 2022
Law Commission	Te Aka Matua o te Ture - New Zealand Law Commission
MBIE	Ministry of Business, Innovation and Employment | Hīkina Whakatutuki
Minister	the Minister for the Community and Voluntary Sector, currently Hon Priyanca Radhakrishnan
Tax Working Group	Tax Working Group Te Awheawhe Tāke
TRA	Taxation Review Authority, to be known as the Taxation and Charities Review Authority, or "TCRA" when hearing Charities Act appeals
Trusts Act	Trusts Act 2019
XRB	External Reporting Board