



To: the Government and Administration
Committee

On: the Charities Amendment Bill (2016)
(formerly Part 3 of the Statutes Amendment
Bill 71-1)

17 July 2016

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INTRODUCTION

1. This submission is from SUE BARKER CHARITIES LAW, PO Box 3065, Wellington 6140.
2. We would like to appear before the Committee to speak to our submission. Our contact details are:



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ABOUT SBCL

3. Sue Barker Charities Law is a boutique law firm in Wellington specialising in charities law and public tax law. The firm acts for a number of charities affected by decisions of the charities regulator: for example, the firm assisted the National Council of Women of New Zealand Incorporated to regain registered charitable status following its deregistration in 2010, and also to resolve income tax issues that arose as a result of the deregistration (see *National Council of Women of New Zealand Incorporated v Charities Registration Board*; *National Council of Women of New Zealand Incorporated v Commissioner of Inland Revenue* [2015] 3 NZLR 72 (HC) and *National Council of Women of New Zealand Inc v Charities Registration Board* (2014) 26 NZTC 21075 (HC)).

The firm's director, Sue Barker, also acted for a number of charities making submissions on the original Charities Bill in 2004, and is a co-author of the text, *The Law and Practice of Charities in New Zealand*, published by LexisNexis in 2013.

More information about the firm can be found at www.charitieslaw.co.

BACKGROUND

4. We welcome the initiative to remove Part 3 of the Statutes Amendment Bill 71 – 1 into a separate Charities Amendment Bill. At least one of the 3 amendments proposed in Part 3 is highly controversial, and was not appropriate for inclusion in a Statutes Amendment bill.

We strongly submit that, in considering reform in this area, it is critical to consider the background context. We set out relevant aspects of the background context in Appendix A.

SUMMARY OF MAIN ISSUES

5. Our submission makes the following key points:
 - (a) The issue of alignment of factors that would disqualify a person from being an officer of a registered charity, with factors that would disqualify a person from being an officer of an incorporated society, should be considered as part of a comprehensive post-implementation review of the Charities Act.
 - (b) A 20-working day timeframe in the context of the Charities Act 2005 is too short and does not reflect the realities of the charitable sector, or the significance of the decisions involved.
 - (c) The proposal to amend section 61 to remove the words “or the chief executive” should not proceed, as it would restrict charities’ rights of appeal to decisions regarding registration and publication only, which would be directly contrary to the original intention of the Charities Act.
 - (d) The current framework of the Charities Act is not working. The promised post-implementation review of the Charities Act needs to be carried out as a matter of urgency.
 - (e) Pending such review, section 59 of the Charities Act should be amended to make it clear that charities are able to have an oral hearing of evidence in undertaking the often-difficult task of determining whether their purposes are charitable, as was originally intended.
6. We expand on these points below.
7. In this submission the following abbreviations are used:

Board: Charities Registration Board

Charities Act: Charities Act 2005

Charities regulator: previously the Charities Commission, and now the Department of Internal Affairs – Charities Services *Ngā Rātonga Kaupapa Atawhai* and the Charities Registration Board

Charities Services: the Department of Internal Affairs - Charities Services

DIA: Department of Internal Affairs

Income Tax Act: Income Tax Act 2007

Tax Administration Act: Tax Administration Act 1994

IRD: Inland Revenue Department

Clause 11 – section 16 amended (Qualifications of officers of charitable entities)

Issue

8. It seems counterintuitive that the requirements to be an officer of a registered charity should be less stringent than the requirements to be an officer of an incorporated society.

Submission

9. *Clause 11* of the Statutes Amendment Bill proposed to amend section 16 of the Charities Act to add a new factor that would disqualify a person from being an officer of a registered charity, namely, if the person has been convicted of an offence under section 143B of the Tax Administration Act 1994 (which relates to tax evasion) and been sentenced to that offence within the last 7 years.
10. Section 16 of the Charities Act is also proposed to be amended by the Exposure Draft Incorporated Societies Bill, which was released for public consultation on 10 November 2015.¹ Part 1 of Schedule 3 of the Exposure Draft proposes to amend section 16 so that a person subject to a banning order under the proposed new Incorporated Societies legislation will also not be qualified to be an officer of a registered charity.
11. Clause 39(2) of the Exposure Draft Incorporated Societies Bill also lists a number of circumstances that would disqualify a person from being an officer of an incorporated society. The proposed disqualifying circumstances generally align with the circumstances that would disqualify a person from being an officer of a registered charity under section 16 (as it is proposed to be amended). However, there are 5 exceptions where clause 39 would disqualify a person from being an officer of an incorporated society in circumstances that would not cause the person to be disqualified from being an officer of a registered charity under section 16:

Clause 39(e) - a person who has been convicted of any of the following and has been sentenced for the offence within the last 7 years:

- (i) an offence under subpart 6 of part 4 of the Exposure Draft (which relates to offences under the proposed new Incorporated Societies' legislation);
- (iv) an offence in a country other than New Zealand that is substantially similar to: an offence under subpart 6 of part 4 of the Exposure Draft, a crime involving dishonesty, or a tax evasion offence;

¹ <http://www.mbie.govt.nz/info-services/business/business-law/incorporated-societies/incorporated-societies-bill-exposure-draft>.

(v) a money laundering offence, or an offence relating to the financing of terrorism, whether in New Zealand or elsewhere

and

Clause 39(f) - a person subject to:

(ii) An order under section 108 of the Credit Contracts and Consumer Finance Act 2003; or

(iii) A confiscation order under the Proceeds of Crime Act 1991.

12. In other words, the offences listed in clause 39(e)(i), (iv) and (v) and 39(f)(ii) and (iii) of the Exposure Draft Incorporated Societies' Bill would disqualify a person from being an officer of an incorporated society, but they would not disqualify a person from being an officer of a registered charity.

13. New Zealand has approximately 30,000 incorporated societies (including those incorporated under the Charitable Trusts Act 1957), only 1/3 of which are estimated to be registered charities. Registered charitable status is currently very difficult to obtain. It seems counter-intuitive that the requirements for being an officer of a registered charity should be less stringent than the requirements for being an officer of an incorporated society.

14. It is desirable that there be consistency between the disqualifying factors in section 16 of the Charities Act, and those in clause 39 of the Exposure Draft. However, we accept that including the above 5 factors in section 16 of the Charities Act, along with the change that is currently proposed in the Charities Amendment Bill, is a material policy change that should not be made without proper consultation. This reinforces the need for a post-implementation review of the Charities Act, which was agreed to by Cabinet in 2010, but then controversially cancelled by the Government in November 2012, without consultation, as discussed further below. The post-implementation review of the Charities Act needs to be undertaken as a matter of urgency.

Recommendation 15. We recommend that:

(i) the post-implementation review of the Charities Act, that was originally promised in 2005 and agreed to in 2010, now be undertaken as a matter of urgency; and

(ii) the issue of alignment of factors that would disqualify a person from being an officer of an incorporated society, and factors that would disqualify a person from being an officer of a registered charity, be considered as part of that review.

Clause 12 - section 18 amended (Chief executive to consider application)

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|---|--|
| Issue | 16. A 20-working day timeframe is too short in practice. |
| Submission | <p>17. <i>Clause 12</i> of the Statutes Amendment Bill proposed to amend section 18 of the Charities Act, so that an application for registration as a charitable entity would be treated as withdrawn if an applicant failed to “adequately respond” within the requisite timeframe, either to a request for further information, or to a notice from the chief executive that the application might be declined. The explanatory note to the Statutes Amendment Bill stated that this would “reduce the administrative burden for the chief executive of processing applications where there has been no response within the requisite time frame and will ensure that the Board only needs to make decisions about complete applications” (page 2).</p> <p>18. The proposal would provide charities with only 20 working days to respond to a request for further information in the context of an application for registration.</p> <p>19. This timeframe will be unreasonably short in many cases.</p> |
| <i>Evidence required may be substantial</i> | <p>20. The Court of Appeal has confirmed that charities applying for registration must provide information as if they were preparing for a High Court trial: if the charities regulator makes an adverse decision, and the charity appeals it under section 59 of the Charities Act, the charity has no automatic right to put any evidence before the High Court that was not before the charities regulator before it made its decision (see <i>Foundation for Anti-Aging Research v Charities Registration Board</i> [2015] NZCA 449 (21 September 2015) at [48]-[53]). The charity must therefore put all the evidence it needs, to prove that its purposes are charitable and in particular that they operate for the public benefit, before the charities regulator <i>before</i> it makes its decision. The Court of Appeal has also confirmed that the legislation appears to have removed charities’ ability to have an oral hearing of evidence. This means that the evidence a charity must provide will likely need to include affidavit evidence, including expert affidavit evidence. The extent of the evidence required can be substantial, as seen from cases such as <i>Latimer v Commissioner of Inland Revenue</i> [2002] 3 NZLR 195 (CA), where the Court of Appeal held, <i>on the evidence</i>, that the Crown Forestry Rental Trust’s purpose of assisting Maori to make claims before the Waitangi Tribunal involving licensed land should be recognised as charitable in New Zealand.</p> <p>21. It may simply be impossible for charities to provide all the material they need to provide in order to have a fair chance of proving their case within 20 working days of the date of a request. It is also relevant to note in this context that the stakes for charities are very high: a failure to gain registered charitable status can and often does mean that a charity will be unable to</p> |

survive. Many funders, rightly or wrongly, are restricting funding to registered charities only (and we have seen evidence that the charities regulator is encouraging this practice).

Experience from section 59

22. The 20-working day timeframe proposed for section 18 may have been chosen for consistency with the 20-working day timeframe for appealing a decision of the charities regulator currently set out in section 59(2)(a) of the Charities Act. However, we have already seen that the 20-working day timeframe in section 59(2)(a) is impossibly short. Charities may simply not be able to gain a mandate from their membership to fund, and then find and instruct a lawyer to file, High Court proceedings within 20-working days of the date of a decision. Charities in New Zealand are often governed and run by volunteers, who may require a mandate from a membership before being able to make a decision of this nature. The restricted timeframe in section 59(2)(a) is causing significant difficulty in practice and should not be replicated in section 18 (see for example *National Council of Women of New Zealand Inc v Charities Registration Board* (2014) 26 NZTC 21075 (HC) and *National Council of Women of New Zealand Inc v Charities Registration Board* [2015] 3 NZLR 72 (HC)).
23. We note that charities unable to meet the 20-working day deadline for filing High Court proceedings have the option of applying for an extension of time to do so under section 59(2)(b) of the Charities Act. However, this option is also problematic as it requires an additional application to the High Court. The costs and time involved are a barrier to charities' ability to access justice, which can be further exacerbated if the charities regulator opposes the application, as is its practice.
24. Imposing such short timeframes on charities also seems unreasonable given the unlimited timeframes available to the charities regulator: we are aware of many examples where the charities regulator has taken months and even years to respond to a charity in the context of issues relating to a charity's registered charitable status. Resourcing pressures on charities are no less than those facing the charities regulator.

Ability to request an extension

25. We note that proposed new section 18(3A) would allow the Department of Internal Affairs to extend the timeframe from 20-working days to "a longer period that the chief executive allows at the request of the applicant". The extent to which the proposed amendments to section 18 would be workable in practice would therefore depend on how the Department of Internal Affairs administers requests for extensions of time under proposed new section 18(3A)(b). In this context, we note that section 18(3)(b) requires the charities regulator to "observe the rules of natural justice".

What does
"adequately"
mean?

26. However, we are concerned that any request for an extension of time would be judged against a starting point of the 20-working day timeframe proposed to be set out in new section 18(2), 18(3)(c)(ii) and 18(3A)(a). The charities regulator has demonstrated on many occasions that it takes a very narrow approach to interpreting the Charities Act (and aspects of this approach are currently the subject of judicial review proceedings on which a decision of the High Court is currently awaited). In the meantime, we submit that the legislation needs to provide guidance to the charities regulator that one of its key functions is to "educate and assist" charities (section 10(a)), that a key purpose of the Charities Act is to "encourage and promote the effective use of charitable resources" (section 3(b)), and that the Charities Act should be interpreted to "facilitate charitable works, not frustrate them" (*National Council of Women of New Zealand Incorporated v Charities Registration Board* [2015] 3 NZLR 72 (HC) at [53]).
27. To that end, the word "adequately" in proposed new section 18(3A) should be removed, as it provides too much scope for the charities regulator to treat applications for registration as withdrawn in circumstances where this would be inappropriate or unfair to the charity concerned. An imposed withdrawal of an application against a charity's wishes would only impose additional delay and cost on the charity concerned. A charity that had its application treated as withdrawn of course could make a new application. However, requiring such a charity to do so may have significant adverse tax consequences, as the charities regulator does not backdate registration (and therefore income tax exemption) to a date prior to the date of receipt of the application it is considering. The difficulty caused by this approach was a feature of the National Council of Women litigation (*National Council of Women of New Zealand Incorporated v Charities Registration Board* [2015] 3 NZLR 72 (HC) and *National Council of Women of New Zealand Incorporated v Charities Registration Board* [2015] 3 NZLR 72 (HC)).
28. Instead, the timeframe in the proposed amendments to section 18, as well as in section 59, should turn on "reasonableness", with the starting point extended to **6 months**. This would represent a much fairer timeframe that recognises the importance of decisions in this context, the importance of evidence in reaching appropriate decisions in this context, and the realities of the New Zealand charitable sector. The government repeatedly states how much it values the work of the New Zealand charitable sector. Allowing a more reasonable timeframe would be consistent with the purposes of the Charities Act, and would reduce the administrative burden for all concerned. A charity can always respond more quickly if

it is able.

Recommendation 29. We recommend that:

- (i) Clause 12(1) of the Statutes Amendment Bill is deleted and replaced with the following:

“(1) In section 18(2), after “documentation”, insert “**within a reasonable timeframe**”.”

- (ii) **Clause 12(2) of the Statutes Amendment Bill is deleted.**

- (iii) Clause 12(3) of the Statutes Amendment Bill is deleted and replaced with the following:

“(3) After section 18(3), insert:

(3A) An application **may** be treated as withdrawn if an applicant **fails to respond** to a request under subsection (2) or to a make submissions to the chief executive on a matter in a notice given under subsection (3)(c) within –

- (a) **6 months** after the date of the request or notice; or
- (b) such longer period as the chief executive **may agree in consultation with the applicant.**”

- (iv) A new clause 13A is inserted as follows:

Section 59 amended (Right of appeal)

“(2) In section 59(2)(a), delete the words “20 working days” and replace them with “**6 months**”.”

Clause 13 - section 61 amended (Determination of appeal)

Issue

30. Section 61(1)(a) should not be amended. The inconsistency between sections 59(1) and section 61(1)(a) should be resolved by amending section 59(1) to insert the words “or the chief executive” after the word “Board”. This would ensure the legislation remains consistent with the intention of the Select Committee considering the original Charities Bill, namely that charities should be able to appeal against *all* decisions of the charities regulator, and not just those relating to registration.

Submission

31. The Select Committee considering the original Charities Bill (2004) made it very clear that charities should be able to appeal *all* decisions of the charities regulator:²

The bill provides a right to appeal to the District Court against decisions of the Commission to refuse to register an entity, or to remove an entity from the register. Clauses 67 to 69 detail the process for appealing a Commission decision. **The majority considers that charities should not be limited to appealing decisions relating to registration** and that it should be possible to appeal from **all** decisions of the Commission that adversely impact on a particular entity. The majority recommends that the bill be amended to achieve this end.

[Emphasis added]

32. Although the changes made to the original Charities Bill at Select Committee stage were not subject to proper consultation (see the discussion in Appendix A), the intent of the Select Committee in regard to the appeal right is clear: charities should be able to appeal **all** decisions of the charities regulator, not just those relating to registration and deregistration.

The 2012 reforms

33. In 2012, the Charities Bill was controversially amended by the Charities Amendment Act (No 2) 2012 (which had formerly been Part 3 of the Crown Entities Reform Bill) (“**the 2012 reforms**”). The 2012 reforms disestablished the Charities Commission, and transferred its functions to the Department of Internal Affairs and the Charities Registration Board. Submissions from the charitable sector expressed strong objection to the proposed disestablishment of the Charities Commission, and the lack of proper consultation regarding the proposal remains a source of grievance. The controversial proposal to enact Part 3 of the Crown Entities Reform Bill was not wanted by the charitable sector and passed by the narrowest of margins (see the discussion in Appendix A).
34. Schedule 8 of the Crown Entities Reform Bill (which became schedule 2 of the Charities Amendment Act (No 2) 2012) contained the consequential amendments to the Charities Act

² Charities Bill 2004 108-2 Select Committee report, pp 13-14. See also *Foundation for Anti-Aging Research v Charities Registration Board* [2015] NZCA 449 (21 September 2015) at [46].

by which the functions of the Charities Commission were to be transferred to the Charities Registration Board and the Department of Internal Affairs (referred to as the “chief executive”).

Errors in the 2012 reforms

35. However, fast law does not make good law: the schedule contained a number of errors.³
36. One of these errors is section 59(1). Section 59(1) of the Charities Act as originally enacted provided that “a person aggrieved **by a decision of the Commission**” may appeal to the High Court. This clearly enabled *all* decisions of the Charities Commission to be appealed. However, the 2012 reforms replaced the word “Commission” with the word “Board”, everywhere it appeared in section 59. On its face, this would mean that only allows decisions of the *Charities Registration Board* are able to be appealed, not the Department of Internal Affairs.
37. Such a change would be significant because, under section 8(3) of the Charities Act, the Charities Registration Board can only make decisions about registration and deregistration of charities (it can also make a decision to publish a notice about a charity under section 55). All other decisions under the Charities Act are made by the chief executive.

2012 amendment to section 59(1)

38. However, section 61(1)(a) of the Charities Act was similarly amended by the 2012 reforms to provide that, in determining an appeal, the High Court may confirm, modify, or reverse the decision of the Board **or the chief executive**.
39. Clearly, these 2 provisions are inconsistent: section 59 provides that only decisions of the Board could be appealed, but the remedy under section 61 can be a modification of the decision of the Board *or the chief executive*.
40. There was no consultation on, or even discussion of, any intention to remove charities’ right of appeal against decisions of the Department of Internal Affairs as part of the process of disestablishing the Charities Commission in 2012. We submit that the 2012 amendment to replace the word “Commission” with the word “Board” in section 59(1) is clearly a mistake, as it clearly contravenes the original intention of the Select Committee: namely, that charities should be able to appeal all decisions of the charities regulator, and not just those relating to registration (and publication), as discussed above.

³ For example, the reference in section 60(3) of the Charities Act, as amended, to the exercise of a power by the chief executive under section 55, is clearly an error, as the chief executive does not exercise powers under section 55.

*Charities
regulator's view*

41. However, we understand that the charities regulator has seen an "email", which states charities' rights of appeal were in fact intended to be altered as part of the 2012 reforms. We have not seen this email, or indeed any publicly available information that charities' rights of appeal were intended to be affected by the disestablishment of the Charities Commission in 2012. Nevertheless, we understand that the charities regulator is using this email to argue strongly that the 2012 reforms were "intended" to provide the Board with "substantive" decision-making power, with the Department of Internal Affairs only having the ability to make "administrative" decisions, which would be subject to judicial review.
42. It is not clear what difference, if any, there might be between "substantive" and "administrative" decisions: all decisions made under the Charities Act are "administrative" in nature. Nevertheless, we understand that the charities regulator now strongly submits that the inconsistency between sections 59 and 61 should be resolved by deleting the words "or the chief executive" from section 61(1)(a).

Process issue

43. This view appears to have been reflected in clause 13 of the Statutes Amendment Bill, which had its first reading without warning on 9 December 2015, shortly before the Christmas break, with submissions closing on 29 January 2016, and, with respect, is a significant proposed amendment that people may not have noticed.

*Derogation of
charities' appeal
rights*

44. The proposed amendment to section 61, if enacted, would put it beyond doubt that charities' ability to appeal decisions of the Department of Internal Affairs has been removed. This would be a significant derogation of charities' rights of appeal that would be entirely inconsistent with the original intention of the Charities Bill, as discussed above.
45. If the proposal proceeded, charities' ability to appeal any of the following decisions (other than by way of judicial review) would be removed:
 - (a) A decision to refuse access to the charities register under section 21(4) of the Charities Act;
 - (b) A decision to prevent or restrict public access to information under section 25;
 - (c) A decision to amend the register under section 26 (this was an issue in the National Council of Women ("NCW") litigation,⁴ as after the NCW were reregistered, members of the public searching on their old charities registration number would come up with an entry recording them as

⁴ *National Council of Women of New Zealand Inc v Charities Registration Board* (2014) 26 NZTC 21075 (HC) and *National Council of Women of New Zealand Inc v Charities Registration Board* [2015] 3 NZLR 72 (HC).

deregistered. The charities regulator eventually agreed to amend the deregistered entry to link it to the registered entry to reduce confusion about whether NCW were registered or not!);

- (d) A decision to approve a change of balance date (with or without conditions) under section 41(6);
- (e) A decision that the financial statements of a charity fail to comply with a financial reporting standard under section 42B (this is likely to be a particular issue in the context of the definition of control and whether accounts need to be consolidated);
- (f) A decision as to whether financial statements should have been audited or reviewed under section 42E (again this could be affected by difficulties over the definition of control and what needs to be included in the financial statements);
- (g) A decision to grant an exemption under section 43;
- (h) A decision to treat one or more entities as a single entity under section 44;
- (i) Terms and conditions of single entity status under section 46;
- (j) A decision to open an inquiry under section 50;
- (k) A decision to require information under section 51;
- (l) A decision to issue a warning notice under section 54;
- (m) A decision to require payment of an administrative penalty under section 58; and
- (n) A decision to treat an application as withdrawn under proposed new section 18(3A).

National Council of Women example

46. It is also impossible to predict what other decisions might be made by the Department of Internal Affairs that would need to be appealed (other than by way of judicial review). For example, as discussed above, even after the NCW were reregistered, members of the public were still confused as to whether NCW were registered or still deregistered. This was having a continued detrimental effect on NCW and their ability to carry out their charitable purposes. Part of the problem was that people searching on NCW's old charities registration number would come up with an entry recording them as deregistered, as discussed above. Another issue was that the charities regulator maintained a list of deregistered charities on their website which continued to include the National Council of Women even after they had been reregistered. Other charities that had been deregistered and then registered again (such as Liberty Trust and the Plumbers, Gasfitters and Drainlayers

Board) had a note beside their entry stating that they were "now reinstated". However, the charities regulator refused to put a similar note by the National Council of Women's entry, despite repeated requests. In the end, because NCW was already before the High Court (appealing against the charities regulator's refusal to backdate NCW's reregistration), NCW finally had to resort to seeking leave to amend its statement of claim to ask for additional relief in the form of an amendment to the list of deregistered charities on the Department of Internal Affairs' website. It was only this threat of Court proceedings that finally led to the Department of Internal Affairs eventually agreeing to amend the list on their website to include a note by the National Council of Women's entry recording them as "now reregistered".

Access to justice

47. It is not clear how forcing a charity to go to such lengths to achieve such an obvious change, causing such difficulty for a charity and that could have been so easily made with no downside for the charities regulator, is consistent with purposes of the Charities Act such as to promote public trust and confidence in the charitable sector, and to encourage and promote the effective use of charitable resources (sections 3(a) and (b)). It is also not clear how NCW could have achieved such a change if the ability to appeal decisions of the DIA had been removed entirely (apart from judicial review). Would it really be reasonable to have required the NCW to file separate judicial review proceedings, in addition to the appeal against the Charities Registration Board, and the challenge proceedings against IRD, that were already before the Court? Judicial review is a significant proceeding, requiring significant Court documents, including affidavits. To have had to file a separate judicial review proceeding would only have caused significant delay, significantly more legal time, and incurred significantly more Court fees. Further, judicial review is only available for process errors, leading to the likelihood of additional preliminary jurisdictional arguments as to whether a charity even has a right to seek a judicial review of a substantive issue of this nature. The likelihood of such procedural hurdles would only further exacerbate issues of cost, time and charities' ability to access justice.
48. We understand that Charities Services is arguing that charities' rights of appeal are unaffected because charities can always ask the Office of the Ombudsman to open an investigation into a matter not covered by the statutory right of appeal. However, while an appeal to the Ombudsmen is valued, it is no substitute for a statutory right of appeal. Further, removal of charities' statutory right to appeal decisions of the Department of Internal Affairs would be directly contrary to the intention of Parliament as discussed above.

Conflict of interest

49. On 7 July 2016, Charities Services issued a news alert to every

registered charity in the country *assuring* them that the proposed amendment to section 61 was a “minor technical amendment” that will have “no impact on charities’ appeal rights *under the Charities Act (section 59).*” It said that 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*” (emphasis added).

50. However, with respect, these statements are highly misleading: the charities regulator did not anywhere disclose that it was basing these statements on a view that charities’ rights of appeal had already been removed when the Charities Commission was disestablished in 2012. That alleged removal did not in fact occur, as discussed above. If it had occurred, without consultation or even notification, we submit that there would have been even more of an uproar than there already was.
51. It is also very concerning that, by effectively encouraging charities not to make submissions on a proposed amendment that affects them, the charities regulator has inappropriately entered the political arena. It has taken one side of a disputed story without giving charities all the information they need to make an informed decision. The situation is exacerbated by the conflict of interest inherent in Charities Services’ stance, as the proposed amendment benefits Charities Services directly (by removing charities’ ability to appeal its decisions). Charities Services imposes very strict requirements on charities in the context of conflicts of interest, yet has manifestly breached its own rules in issuing a partisan news alert on this proposed amendment. With respect, Charities Services’ involvement is entirely inappropriate and unacceptable.

*Correcting the error
inserted in 2012*

52. We submit that, when section 59(1) was amended in 2012, the word “Commission” should have been replaced with the words “**Board or chief executive**”, as was the case with section 61(1)(a). This would have made it clear that decisions of both the Board and the chief executive were able be appealed, as had been the case previously and as was the original intention. If a change to charities’ substantive rights of appeal was in fact intended, it is inconceivable that it would not have been mentioned in the explanatory material. There is no mention of any such change in the explanatory material, or indeed in any publicly-available material that we are aware of. An undisclosed email is not a sufficient basis to make a change of this nature. The correct fix now, in our submission, would therefore be to amend section 59(1) to clearly provide charities with the ability to appeal a decision of the Board *or the chief executive*, as was previously the case. The proposed amendment to section 61(1)(a) should not proceed.

53. We would also like to express our concern that a substantive change of this nature was sought to be made to the Charities Act by way of a Statutes Amendment Bill, without warning, and over the Christmas break. Charities are expected to meet high standards of transparency and accountability. It is not clear why the charities regulator appears so strongly resistant to such standards being similarly applied to itself. We hope that any further changes to the Charities Act will be made with proper notification and adequate time for consultation. Charities deserve no less.

Recommendation 54. We recommend that:

- (i) Clause 13 of the Statutes Amendment Bill is deleted.
- (ii) A new clause 13A is inserted as follows:

Section 59 amended (Right of appeal)

“(1) In section 59(1), insert the words “or the chief executive” after the word “Board”.

New proposal – review of the Charities Act

- | | |
|-----------------------|--|
| Issue | 55. The proposed post-implementation review of the Charities Act needs to be undertaken as a matter of urgency. |
| Submission | <p>56. As Appendix A demonstrates, the charitable sector has been subjected to a series of unhelpful amendments over the past 13 years. Many if not most of these amendments were rushed through, under urgency, without proper consultation. The net result clearly demonstrates that fast law does not make good law.</p> <p>57. An example is the substantial changes that were inserted into the Charities Bill at Select Committee stage in 2004. The government acknowledged at the time that these substantial changes were not subject to proper consultation, but appeased the charitable sector by promising that the matter would be dealt with by means of a thorough post-implementation review.</p> <p>58. Cabinet agreed to a post-implementation review of the Charities Act in 2010. However, the review was then controversially cancelled by the Government in November 2012, again without consultation. As discussed in Appendix A, the reasons given for cancelling the review do not bear critical examination: the review is urgently needed and there is no logical basis for it not to be carried out.</p> <p>59. As also demonstrated in Appendix A, the current framework of the Charities Act is not working and is having an enormously detrimental effect on the New Zealand charitable sector and the people it works so hard to support. A question arises as to what extent we are seeing the consequential damage to New Zealand society being played out before our very eyes. The post-implementation review of the Charities Act needs to be undertaken as a matter of urgency, before any more unhelpful and ill-thought-through amendments are inflicted on the New Zealand charitable sector.</p> |
| Recommendation | 60. We recommend that the post-implementation review of the Charities Act, that was originally promised in 2005 and agreed to in 2010, now be undertaken as a matter of urgency. |

New clause 13A – section 59 amended (Right of appeal)

Issue

61. Pending any post-implementation review of the Charities Act, section 59 of the Charities Act should be amended to permit charities to have an oral hearing of evidence in proving that their purposes are charitable.

Submission

62. In *Foundation for Anti-Aging Research v Charities Registration Board* [2015] NZCA 449 (21 September 2015) at [38]-[54], the Court of Appeal upheld the strong arguments of the charities regulator that sections 59 to 61 of the Charities Act do not admit of an oral hearing of evidence.
63. As discussed in Appendix A, this outcome appears to have arisen because, in changing the words “District Court” to “High Court” in the original Charities Bill in 2004, the Select Committee did not insert any additional amendments into section 59 to clarify the process by which appeals under the Charities Act were intended to be conducted.
64. Prior to the Charities Act, charities were entitled to a full oral hearing of evidence in proving that their purposes are charitable (see *Foundation for Anti-Aging Research v Charities Registration Board* [2015] NZCA 449 (21 September 2015) at [44]-[45]). There is no indication in the Parliamentary record that the Select Committee intended to remove this right. The removal appears instead to have been an unintended consequence of the Select Committee’s attempt to strengthen charities’ rights of appeal by providing a right of appeal to the High Court rather than the District Court (see the discussion in Appendix A).
65. However, as the Court of Appeal noted, the absence of any wording in section 59 regarding the nature of appeals under the Charities Act means that they are to be interpreted as general appeals subject to Part 20 of the High Court Rules. Part 20 of the High Court Rules precludes appellants from having any automatic right to present any evidence to the Court that was not before the decision-maker (in this case, the charities regulator) when it made its decision. Part 20 also requires evidence to be presented by affidavit. These requirements are strict, but they are based on an assumption that a full oral hearing of evidence has already been undertaken at first instance. However, that is not the case under the Charities Act, as neither the Department of Internal Affairs nor the Charities Registration Board conducts an oral hearing. The net result is that charities’ ability to have an oral hearing of evidence has been removed altogether, as an unintended consequence of a change made by Select Committee that was rushed through under urgency without proper consultation.
66. The inability for charities to have an oral hearing of evidence is causing significant difficulty in practice. As discussed above, the

question of whether a purpose is charitable often turns on questions of fact. The inability to call and test evidence at the hearing of the appeal means that Courts often simply do not have the evidence they need to make a decision as to whether a charity is eligible for registration. This has led to an unhelpful development whereby Courts are referring cases back to the regulator for decision in light of their judgment, causing further cost, uncertainty and delay for the affected charities (see for example *Re Greenpeace of New Zealand Inc* [2013] 1 NZLR 339 (CA), *Re Greenpeace of New Zealand Inc* [2015] 1 NZLR 169 (SC) and *Re Family First New Zealand* [2015] NZHC 1493 (30 June 2015)). The Family First example is a case in point: three years after it was originally deregistered, Family First still does not have a decision as to whether it is entitled to remain on the charities register. We understand that the charities regulator still proposes to proceed with the deregistration, despite Family First successfully challenging the deregistration decision in the High Court (see *Charities Board still gunning for Family First*, 7 April 2016: <http://www.scoop.co.nz/stories/PO1604/S00081/charities-board-still-gunning-for-family-first.htm>). This is an unacceptable burden for an individual charity to bear.

67. Fundamentally, the problem is two-fold. At the first level, information obtained from the charities register, and under the Official Information Act 1982, shows that the charities regulator's approach is causing literally hundreds of good New Zealand charities to fail to gain or maintain registered charitable status. As discussed in Appendix A, the charities regulator had no mandate to seek to change the definition of charitable so significantly. At the second level, charities are significantly impeded in challenging controversial interpretations of the charities regulator due to charities' inability to call and test evidence at the hearing of the appeal. This in turn is causing New Zealand's charities law to become disfigured and is preventing the common law from "purifying itself".
68. An added practical difficulty is that Part 20 of the High Court Rules forces charities to present evidence to the charities regulator as if they were preparing for a High Court trial. It is well-established that the definition of charitable purpose is not static, and changes to reflect changing social conditions over time.⁵ In a borderline case, or in recognising a new charitable purpose, it will be critical for a charity to present evidence to prove that its purposes are charitable. However, the Charities Registration Board is not resourced to consider such material in the same manner as a Court might, or even to consider it at all

⁵ *Re Greenpeace of New Zealand Incorporated* [2015] 1 NZLR 169 (SC) at [23] and [17].

in some cases. For example, we are aware of at least one instance where the Charities Registration Board was not even provided with all the material a charity submitted in support of its application for charitable registration.

69. A related issue is that the Charities Registration Board states that it appears in cases, not as a respondent, but “in order to assist the Court”. However, in reality, the charities regulator in fact appears adversarially in support of its decisions, as noted by the High Court in *Re New Zealand Computer Society* (2011) 25 NZTC 20-033 (HC) at [18]. The legislation should be amended to reflect this reality.
70. It would encourage the efficient use of charitable resources (section 3(b)) of the Charities Act), and the development of the common law on the definition of charitable purpose, for charities to be able to have a full oral hearing of evidence in appeals before the High Court. This would also bring the legislation in line with Parliament’s original intent.

Recommendation 71. We recommend that:

A new clause 13A is inserted as follows:

Section 59 amended (Right of appeal)

(3) After section 59(3), insert:

“(4) For the purposes of hearing the appeal, the High Court shall have all the powers vested in its civil jurisdiction, including full discretionary power to hear and receive further evidence on questions of fact, either by oral evidence or by affidavit.

(5) The parties may agree that all or part of the evidence before the Board or the chief executive be treated as evidence for the purposes of the hearing.

(6) The notice of appeal may name the Board, or the chief executive, or both, as a respondent.”

APPENDIX A – BACKGROUND CONTEXT

1. In considering the proposed amendments, it is essential to consider the background context.

The previous regime

2. One of the main forms of government assistance to the charitable sector in New Zealand is an exemption from income tax. The charitable income tax exemptions are available to entities that meet the requirements of sections CW 41 and CW 42 of the Income Tax Act 2007 ("**the Income Tax Act**"). In addition, donors to organisations that meet the criteria in section LD 3 of the Income Tax Act (known as "**approved donees**" or "**donee organisations**") may qualify for tax relief for their donations.⁶
3. Prior to the Charities Act, charities were required to "self-assess" whether their income was exempt under the charitable income tax exemptions. There was no requirement, nor any formal process, for registering charities in New Zealand.⁷ The reporting requirements imposed on charitable organisations were also minimal. Even IRD did not have a complete list of entities claiming the charitable income tax exemptions, as it was possible for an entity to claim charitable status, and have access to the charitable income tax exemptions, without the government having knowledge of this.⁸
4. Monitoring of charities was also minimal under the pre-Charities Act regime: for example, there was very little government monitoring of whether a charity continued to pursue the charitable purposes for which it was established.⁹
5. Complaints about charities could be made to the Attorney-General, who has power under section 58 of the Charitable Trusts Act 1957 ("**the Charitable Trusts Act**") to inquire into the management and administration of any charity. The Attorney-General, or a member of the public, can also commence proceedings to enforce a charitable trust, or to have a scheme formulated.¹⁰
6. However, these powers have practical limitations, and were also rarely used:¹¹

...by the time a complaint is laid with the Attorney-General... all the evidence has gone, all the money has gone, and it is far, far too late.¹²
7. The lack of practical regulatory control over charitable trusts had been a source of concern for some time.¹³ In the 1970s, the Associate-General of the National Council

⁶ Sections LD 1 to LD 3, DB 41 and DV 12 of the Income Tax Act 2007.

⁷ Inland Revenue Department, *Tax and Charities*, paragraph 8.3.

⁸ Inland Revenue Department, *Tax and Charities*, paragraphs 6.2 and 6.3, 7.1-7.4.

⁹ Operational Statement OS 06/02 paragraphs 2 – 4; Inland Revenue Department *Tax and Charities*, paragraphs 2.12-2.13.

¹⁰ See section 60 of the Charitable Trusts Act 1957; *Morgan v Wellington City Corporation* [1975] 1 NZLR 416 (CA); *Mendelssohn v Centrepont Community Growth Trust* [1999] 2 NZLR 88 (CA); Inland Revenue Department, *Tax and Charities*, paragraph 6.7; and Noel Kelly, Chris Kelly and Greg Kelly, *Garrow and Kelly Law of Trusts and Trustees* 6ed (Wellington, LexisNexis, 2005), paragraph 12.40.4.

¹¹ Charities Bill 2R (12 April 2005) 625 NZPD 19946-19948 per Rodney Hide, ACT.

¹² Charities Bill 2R (12 April 2005) 625 NZPD 19952 per Dail Jones, NZ First.

¹³ Charities Bill 1R (30 March 2004) 616 NZPD 12111 per Dail Jones, NZ First.

of Churches, Rev RM O'Grady, had publicly commented that:¹⁴

The public has no protection against charities in New Zealand. It would not be difficult for a skilled promotional person to raise \$10,000 or more for almost any appeal one cares to name. Simply by national advertising and a small mailing to selected persons, any charity can get itself established in a few weeks. Raising really big money for a charity requires time and planning. By far the best method is the house-to-house collection.

8. In 1979, the Property Law and Equity Reform Committee considered Rev O'Grady's comments, and noted that:¹⁵

...the whole of the Charitable Trusts Act 1957 called for a general examination. In particular, the question was raised of the desirability of establishing more effective means of control of charitable trusts, perhaps by means of a charities commission along the lines established in the UK.

9. IRD had wide powers to monitor charitable organisations using its audit powers, as part of its administration of the tax legislation generally.¹⁶ However, this process too had its limitations:¹⁷

...the Commissioner of Inland Revenue's role is to ensure that income not entitled to an exemption is taxed. The role is not about ensuring that the charitable sector is generally accountable to the public. Holding the officers of a charitable organisation to account for an organisation's administration expenses, for example, is well beyond the ambit of the commissioner's current responsibilities. It is also not the role of the Registrar of Incorporated Societies.

10. Further, at that stage, the definition of charitable purpose in the income tax legislation referred only to entities "established" for charitable purposes.¹⁸ This caused IRD to doubt whether it had legislative authority to challenge the tax exemption of an organisation that was established for, but no longer pursuing, the relevant charitable purposes, in any event.¹⁹ As the Privy Council noted:²⁰

In New Zealand (unlike the United Kingdom) the relevant tax exemption does not depend on income actually being applied for the intended charitable purposes. Any alleged deviation from the terms of the Trust would be a matter for the Attorney-General...

11. Instead, if IRD considered the funds of a charitable body were being applied for other than charitable purposes, the statutory mechanism was for IRD to inform the Minister of Revenue under section 89 of the Tax Administration Act.²¹

¹⁴ Charities Bill 1R (30 March 2004) 616 NZPD 12111 per Dail Jones, NZ First.

¹⁵ Charities Bill 2R (12 April 2005) 625 NZPD 19952 per Dail Jones, NZ First.

¹⁶ Charities Bill 2R (12 April 2005) 625 NZPD 19942 per Judith Collins, National.

¹⁷ Charities Bill 3R (12 April 2005) 625 NZPD Vol 625 19973 per Hon Judith Tizard, Associate Minister of Commerce.

¹⁸ See for example section CB 4(1)(c) of the Income Tax Act 1994, prior to its amendment by section 7(1) of the Taxation (Annual Rates, Maori Organisations, Taxpayer Compliance and Miscellaneous Provisions) Act 2003.

¹⁹ Inland Revenue Department *Tax and Charities*, paragraph 4.4.

²⁰ *Latimer v Commissioner of Inland Revenue* [2004] 3 NZLR 157 (PC) at [20].

²¹ *Dick v CIR* [2003] 1 NZLR 741 (HC) at [51] and Inland Revenue Department, *Tax and Charities*, paragraph 6.6.

12. It is not clear to what extent section 89 was ever used.
13. Even if IRD did have power to remove an income tax exemption in any particular case, the absence of obligatory reporting requirements meant there was very little information available to IRD on which it could make a decision to conduct an audit: there was “no means by which the government can measure the cost of the income tax exemption, nor monitor the nature or activities of those entities benefiting from it”.²²

The Charities Bill 2004

14. The lack of registration, reporting and monitoring of charities meant that the integrity and reputation of the entire New Zealand charitable sector was always vulnerable to the inevitable presence of a small number of rogue charities: it was difficult for the public to know whether any particular charity was worthy of its trust and confidence.²³ There was overwhelming support within the New Zealand charitable sector for a Charities Commission to be established to address this concern.²⁴
15. However, the process of establishing a Charities Commission took over 16 years.
16. Subsequent to the report of the Property Law and Equity Reform Committee in 1979, on 17 December 1987, then Minister of Finance, Hon Roger Douglas, had announced an intention to impose a “flat tax” of 15%, including on the income of charities.²⁵ The proposal was highly controversial. Then Prime Minister, Rt Hon David Lange, wrote that it was an “unaccustomed addition to the burdens of office to have the finance minister take leave of his senses”.²⁶
17. Ultimately, the proposal to tax the income of charities did not proceed; the issue was “kicked into touch” through the appointment of the Working Party on Charities and Sporting Bodies in 1988 to conduct a major review of the law of charities in New Zealand.²⁷ When the working party reported in 1989 (“the Spencer Russell report”), its major recommendation was that a Commission for Charities be established in New Zealand, to register, advise and supervise charities, and to increase the accountability of charities to the public.²⁸
18. That initiative did not proceed following the change of government from Labour to National in 1990.²⁹ However, the charitable sector continued to ask Governments to provide greater support.³⁰ For example, the charitable sector consistently asked the Government to lift the maximum level of tax relief available for people who donate to qualifying donee organisations. At that time, the maximum tax relief available for donations by individuals was “capped” at \$500 per year. In 2000, that limit was

²² Inland Revenue Department, *Tax and Charities*, Part III.

²³ Charities Bill 3R (12 April 2005) 625 NZPD 19980 per Jill Pettis, Labour.

²⁴ Charities Bill 3R and In Committee (12 April 2005) 625 NZPD 19982 per Gordon Copeland, United Future and 19967 per Hon Judith Tizard, Minister of Consumer Affairs.

²⁵ Charities Bill 1R (30 March 2004) 616 NZPD 12117-8, and Charities Bill 2R (12 April 2005) 625 NZPD 19950, per Gordon Copeland, United Future.

²⁶ *David Lange My Life (Auckland: Viking, 2005)* [ISBN 0-670-04556-X](#).

²⁷ Charities Bill 1R (30 March 2004) 616 NZPD 12118 per Gordon Copeland, United Future.

²⁸ Sir Spencer Russell, *Working Party on Charities and Sporting Bodies* (Wellington, New Zealand, 1989).

²⁹ Charities Bill 1R (30 March 2004) 616 NZPD 12118 per Gordon Copeland, United Future.

³⁰ Charities Bill 3R (12 April 2005) 625 NZPD 19973 per Hon Judith Tizard, Associate Minister of Commerce.

- adjusted for inflation to \$630 (providing tax relief for a maximum of \$1,890 in donations per year). Deductions for donations by companies were similarly capped.³¹
19. Successive Ministers of Revenue made agreeable noises about “lifting the cap”, but continually verbalised unease about doing so because of anecdotal evidence that “some charities were involved in tax avoidance arrangements”.³² Also, it had traditionally been difficult for any Government to assess how much lifting the cap would cost, because of the absence of robust information about the size and scope of the charitable sector in New Zealand. There was also no specific law, standard procedure, or Government department concerned with ensuring the accountability of organisations that receive donations in cash or kind.³³
 20. In 2000, then Minister of Finance, Hon Dr Michael Cullen expressed a willingness to look at a more generous donations regime provided a means could be found to ensure that those benefits extended only for *bona fide* charities.³⁴ Shortly afterwards, the Government undertook a review of the tax treatment of charities, drawing on all of the preceding work.³⁵ During the consultation stage of the review, the Government issued a discussion document, *Tax and charities, a government discussion document on taxation issues relating to charities and non-profit bodies*, in June 2001 (“**the discussion document**”).³⁶ The discussion document dealt only with issues relating to taxation, but contained a range of proposals for improving the accountability of organisations receiving government assistance, as well as for updating the definition of “charitable purpose”.³⁷
 21. The discussion document noted that the definition of charitable purpose had “broadened over the years”, and expressed concern that the charitable income tax exemptions may have become “too widely available” (discussion document, paragraphs 38 and 4.1). In support of this proposition, the discussion document cited two Court of Appeal decisions, in which the purposes of the New Zealand Council of Law Reporting, and the purposes of the New Zealand Medical Council, respectively, had been found to be charitable (discussion document paragraph 4.2, citing *Commissioner of Inland Revenue v New Zealand Council of Law Reporting* [1981] 1 NZLR 682 (CA) and *Commissioner of Inland Revenue v Medical Council of New Zealand* [1997] 2 NZLR 297 (CA)).
 22. The discussion document then put forward a range of proposals for changing the definition of charitable purpose, so that the “fiscal privileges” accorded to charities would be limited to those charitable purposes that “[accord] with society’s current objectives” (discussion document, chapter 5 and paragraph 4.3).
 23. The discussion document considered 3 options for the definition of “charitable purpose” (paragraphs 5.7-5.20):

³¹ At 5% of company net income, see: Barker et al, *The Law and Practice of Charities in New Zealand*, paragraph 3.677; Charities Bill 2R (12 April 2005) 625 NZPD 19950 per Gordon Copeland, United Future.

³² Charities Bill 1R (30 March 2004) 616 NZPD 12118 per Gordon Copeland, United Future.

³³ Charities Bill 3R (12 April 2005) 615 NZPD 19973 per Hon Judith Tizard, Associate Minister of Commerce.

³⁴ Charities Bill 1R (30 March 2004) 616 NZPD 12118 per Gordon Copeland, United Future.

³⁵ Inland Revenue Department, *Tax and Charities*, foreword and paragraphs 1.1 and 1.5 to 1.7.

³⁶ Inland Revenue Department, *Tax and Charities*.

³⁷ Inland Revenue Department, *Tax and Charities*, foreword and paragraphs 1.1 to 1.4.

- (a) Maintaining the current definition, but allowing the Government to “deem” a particular entity not to be charitable, so that “decisions about government resources [could] be made in a manner consistent with evolving views on what constitutes a charitable purpose”;
 - (b) Replacing the current definition with a new definition to “move away from existing case law, which may have expanded the boundaries of what is charitable to such an extent that it is now too easy to become a charity”; and
 - (c) Limiting the definition to the relief of poverty. However, the Government acknowledged that this would exclude a significant number of charities that had community support, and did not recommend this option.
24. More than 1,700 submissions on the discussion document were received. That, in turn, persuaded the Government to set up a Working Party on Registration, Reporting and Monitoring of Charities, to look at the establishment of a registration, annual return, and monitoring system in relation to all New Zealand charities. The Working Party reported in February and March 2002, recommending that a Charities Commission be established, with responsibility for establishing and maintaining a registration, reporting and monitoring regime for New Zealand charities. The Government accepted those recommendations, and began work, through an establishment group, to set up the Charities Commission.³⁸
25. Finally, after a 2-year review and consultation process and a drafting period, first with the Treasury and then with the Ministry of Economic Development, the Charities Bill was introduced in 2004.³⁹ The Bill was described as the “climax...of a 16-year attempt by the charitable sector to bring about a fundamental change in its status in New Zealand society”.⁴⁰
26. After such a long gestation process, “[o]ne would have hoped that... they would have got it right”. However, concern was expressed that that may not have been the case.⁴¹

The Select Committee report

27. Following its first reading on 30 March 2004, the Charities Bill was referred to the Social Services Select Committee. The Committee received 753 submissions, from submitters collectively representing thousands of New Zealand charities.⁴² It was clear from submissions that the concept of establishing a Charities Commission had the overwhelming support of the charitable sector. However, submitters expressed considerable concern with specific provisions contained in the bill.⁴³ Indeed, it quickly

³⁸ Charities Bill 1R (30 March 2004) 616 NZPD 12118 per Gordon Copeland, United Future.

³⁹ Charities Bill 1R (30 March 2004) 616 NZPD 12113 per Sue Bradford, Green.

⁴⁰ Charities Bill 1R (30 March 2004) 616 NZPD 12118 per Gordon Copeland, United Future.

⁴¹ Charities Bill 1R (30 March 2004) 616 NZPD 12113 per Sue Bradford, Green.

⁴² Charities Bill 2004 (108-2), select committee report at 1; Charities Bill 2R (12 April 2005) 625 NZPD 19944 per Georgina Beyer, Labour; Charities Bill 3R (12 April 2005) 625 NZPD 19982 per Gordon Copeland, United Future.

⁴³ Charities Bill 2004 (108-2) select committee report at 1; Charities Bill 3R (12 April 2005) 625 NZPD 19982 per Gordon Copeland, United Future.

became apparent that the Bill, as originally introduced, was fundamentally flawed.⁴⁴

28. In response to submissions, the Charities Bill was substantially rewritten at Select Committee stage:⁴⁵ there was a “virtual rewrite” of the original bill.⁴⁶ However, the changes were not subject to an open and robust consultation process.⁴⁷ Instead, Ministry of Economic Development officials wrote to approximately 25 selected entities to seek their views on the proposed amendments.⁴⁸
29. National Party members of the Select Committee expressed concern at the lack of consultation on such substantial changes:⁴⁹

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

30. As discussed below, there are indeed a number of structural issues in the Charities Act as passed, and the New Zealand charitable sector is indeed paying the price.
31. The final amendments to the Charities Bill (including further minor, but extensive, changes made by Supplementary Order Paper)⁵⁰ were passed through under urgency, with all final stages occurring on one day (12 April 2005). The comment was made that “we do not really know what we are passing tonight, or what the implications are”:⁵¹

...it is a real pity that we are seeing the Charities Bill come back to the House tonight for its second reading and all further stages under urgency. The community and voluntary sector has seen this as a really significant piece of legislation and **I think it is unfortunate that we now have to deal with it in such haste. A complex bill such as this deserves the time and care needed for last-minute consultation and discussion, especially during the Committee stage, yet with such short notice it is virtually impossible to do that...In a way, the fact that we are dealing with the bill with such unnecessary dispatch in the House tonight typifies the whole unsatisfactory process on the bill from its conception to its delivery**. The facts that the bill was **conceived, evidently in Treasury, and was designed by the Ministry of Economic Development show just how out of touch the originating Minister or Ministers were with the realities of the community sector in this country today**. The officials who worked with us on the Social Services committee had a really tough job on all fronts, and I have a lot of sympathy for them.

⁴⁴ Charities Bill 2004 (108-2) select committee report at 21; Charities Bill 3R (12 April 2005) 625 NZPD 19980 per Sue Bradford, Green.

⁴⁵ Charities Bill (12 April 2005) 625 NZPD 19944; Charities Bill 2004 (108-2) select committee report at 21.

⁴⁶ Charities Bill 2R (12 April 2005) 625 NZPD 19944 per Georgina Beyer, Labour.

⁴⁷ Charities Bill 2004 (108-2) select committee report at 21.

⁴⁸ Charities Bill 2004 (108-2) select committee report at 1; Charities Bill 2R (12 April 2005) 625 NZPD 19940 per Hon Judith Tizard, Associate Minister of Commerce.

⁴⁹ Charities Bill 2004 (108-2) select committee report at 20.

⁵⁰ Charities Bill 2R (12 April 2005) 625 NZPD 19950 per Sue Bradford, Green.

⁵¹ Charities Bill 3R (12 April 2005) 625 NZPD 19981, and Charities Bill 2R (12 April 2005) 625 NZPD 19948, per Sue Bradford, Green.

They should never have been put into such a position in the first place. A bill that deals in such detail with issues of critical importance to all types of community and voluntary sector groups should have been, all along, within the purview of a ministry with substantial experience of the sector, with the most obvious examples of such ministries being the Ministry of Social Development or the Department of Internal Affairs. The bill should not have been the responsibility of a ministry far more accustomed to working with “for profit” business than with the vast diversity that comprises the world of non-government organisations. [Emphasis added]

32. The Bill was also criticised for containing no regulatory impact statement or compliance cost statement, in breach of Cabinet guidelines:⁵²

...there has not been, at any point, comprehensive analysis of the genuine need for or real cost of the proposed legislation, nor has the Government really ever had a clear understanding of what the bill seeks to achieve and how

33. Concerns were, however, assuaged by a clear understanding that the Charities Act would be subjected to a thorough post-implementation review. This point is discussed further below.
34. The Charities Bill received Royal assent and was passed into law just over a week later on 20 April 2005. The Charities Commission was formally established on 1 July 2005, some 16 years after the initial recommendation of the 1989 Working Party. The charities register opened in February 2007 and, from 1 July 2008, charities needed to be registered with the Charities Commission (or otherwise meet the definition of “tax charity” in section CW 41(5) of the Income Tax Act) in order to be eligible for the charitable income tax exemptions (“**the tax provisions**”).
35. The registration system established by the Charities Act was intended to provide a mechanism for improving the accountability and transparency of the charitable sector to the donating public, funders, regulators, and the government.⁵³ There was overwhelming support within the charitable sector for a charities regulator⁵⁴ to be established so that “bad” charities could be “weeded out”, and the public could have trust and confidence in those that remained.⁵⁵ This, in turn, was intended to help foster a culture of philanthropy and giving in New Zealand, by increasing the public’s trust and confidence in charitable organisations.⁵⁶

The definition of charitable purpose

36. A key issue in the context of the reforms brought about by the Charities Act 2005 relates to the definition of charitable purpose, or rather the means by which the definition can be maintained and developed.⁵⁷
37. In order to qualify for registration, section 13 of the Charities Act requires an entity’s *purposes* to be charitable. Section 5(1) of the Charities Act 2005 provides that the

⁵² Charities Bill 1R (30 March 2004) 616 NZPD 12111 per Richard Worth, National, and Charities Bill 3R (12 April 2005) 625 NZPD 19981 per Sue Bradford, Green.

⁵³ Charities Bill 2004 (108-1) explanatory note at 1 and (108-2) select committee report at 1.

⁵⁴ Formerly the Charities Commission and now the Department of Internal Affairs – Charities Services.

⁵⁵ Charities Bill 3R and In Committee (12 April 2005) 625 NZPD 19982 per Gordon Copeland, United Future and 19967 per Hon Judith Tizard, Minister of Consumer Affairs.

⁵⁶ Charities Bill 1R (30 March 2004) 616 NZPD 12108 per Hon Margaret Wilson, Minister of Commerce.

⁵⁷ *Re Greenpeace of New Zealand Inc* [2015] 1 NZLR 169 (SC) at [21] and [32].

term “charitable purpose” *includes*, unless the context requires otherwise, every charitable purpose, whether it relates to the relief of poverty, the advancement of education or religion, or any other matter beneficial to the community.⁵⁸ These four categories are referred to below as the four “heads” of charity.

38. The definition of “charitable purpose” in section 5 of the Charities Act was imported from the statutory definition of charitable purpose that was contained in the income tax legislation.⁵⁹ This definition, with some New Zealand-specific exceptions, restates the common law legal concept of charity as established in *Commissioners for Special Purposes of Income Tax v Pemsel*.⁶⁰
39. It is well-established that the statutory definition of charitable purpose imports the common law meaning of the term.⁶¹ The common law test for whether a purpose is charitable may be summarised as follows:⁶²
 - (i) Is the purpose for the public benefit; and if so,
 - (ii) Is it charitable in the sense of coming within the spirit and intendment of the preamble to the Statute of Charitable Uses Act 1601 (43 Eliz c4) (“**the Preamble**”).
40. The first limb, the “public benefit test”, is not directly referred to in the statutory definitions of charitable purpose, but it is imported as a key element of the charitable purposes test through the medium of the common law.
41. It is also well-established that the question of whether a charity meets the definition of “charitable purpose”, and in particular whether its purposes operate for the public

⁵⁸ See also section YA 1 of the Income Tax Act 2007.

⁵⁹ Sections OB 1 and OB 3A of the Income Tax Act 2004, now contained in section YA 1 of the Income Tax Act 2007.

⁶⁰ [1891] AC 531.

⁶¹ *Re Greenpeace of New Zealand Inc* [2015] 1 NZLR 169 (SC) at [12], [16] and [17].

⁶² Charities Act 2005, s5; *Latimer v Commissioner of Inland Revenue* [2004] 3 NZLR 157 (PC) at [29]-[53]; *Latimer v Commissioner of Inland Revenue* [2002] 3 NZLR 195 (CA) at [32]; *Latimer v Commissioner of Inland Revenue* [2002] 1 NZLR 535 (HC) at [67]-[74] and [83]; *Institution of Professional Engineers New Zealand Inc v Commissioner of Inland Revenue* [1992] 1 NZLR 570 (HC) at 573; *New Zealand Society of Accountants v Commissioner of Inland Revenue* [1986] 1 NZLR 147 (CA) at 152, 157; *Molloy v Commissioner of Inland Revenue* [1981] 1 NZLR 688 (CA) at 695; *Hester v CIR* [2005] 2 NZLR 172 (CA) at 181; *DV Bryant Trust Board v Hamilton City Council* [1997] 3 NZLR 342 at 347, 348; *Re Wilkinson (deceased)* [1941] NZLR 1065 at 1075; *Kaikoura County v Boyd* [1949] NZLR 233 (SC and CA) at 261; *Centrepont Community Growth Trust v Commissioner of Inland Revenue* [1985] 1 NZLR 673 (HC) at 677; *Re Greenpeace of New Zealand Incorporated* [2015] 3 NZLR 72 (SC) at [20]-[23] and [28]; *Queenstown Lakes Community Housing Trust* [2011] 3 NZLR 502 (HC) at [29], [32], [63]-[67]; *Re Education New Zealand Trust* (2010) 24 NZTC 24354 (HC) at [24], [25]; *Travis Trust v Charities Commission* (2009) 24 NZTC 23273 (HC) at [55]; *Re New Zealand Computer Society Inc* (2011) NZTC 20,023 (HC) at [13]; *The Commissioner of Taxation v The Triton Foundation* [2005] FCA 1319 at [21]-[22] and [37]; *Tasmanian Electronic Commerce Centre Pty Ltd v Commissioner of Taxation* [2005] FCA 439 at 36 and 50; *Re McGovern v Attorney-General* [1982] 1 Ch 321 (Ch) at 333, 343, 346; *Inland Revenue Commissioners v McMullen* [1979] 1 All ER 588 (HL) at 14; *Hadaway v Hadaway* [1955] 1 WLR 16 (PC) at 19; *Scottish Burial Reform and Cremation Society Ltd v Glasgow Corporation* [1968] AC 138 (HL) at 147, 150, 151, 152, 154 and 156; *Oppenheim v Tobacco Securities Trust Co Ltd* [1952] AC 297, 305; *IRC v Oldham Training and Enterprise Council* [1996] STC 1218 at 1234; *National Anti-Vivisection Society v Inland Revenue Commissioners* [1947] 2 All ER 217 (HL) at 64, 65 and 234; *Charity Law in New Zealand*, Dr Donald Poirier, Department of Internal Affairs, June 2013, paragraph 4.1.1.3; Barker, Gousmett and Lord, *The Law and Practice of Charities in New Zealand*, LexisNexis 2013, at paragraphs 3.189-3.211.

benefit, can turn on questions of fact that need to be determined *on the evidence* (bearing in mind that in some cases a purpose may be “so manifestly beneficial to the public” that it would be “absurd to call evidence on this point”).⁶³

The Charities Act did not change the definition of charitable purpose

42. In introducing the Charities Bill in March 2004, the Government reiterated the intention it had expressed in the 2001 discussion document to “ensure that those entities receiving tax relief continue to carry out charitable purposes and provide a clear public benefit”.⁶⁴
43. Importantly, however, none of the options put forward in the 2001 *Tax and charities* discussion document for changing the definition of charitable purpose were progressed: the Select Committee considering the Charities Bill specifically recommended that the definition of charitable purpose *not* be changed; the majority was concerned that amending the definition “would be interpreted by the Courts as an attempt to widen or narrow the scope of charitable purposes, or change the law in this area, which was not the intent of the bill”.⁶⁵
44. The Courts have since confirmed that the Charities Act did not alter the definition of “charitable purpose”.⁶⁶
45. Given that the Charities Act did not change the definition of charitable purpose (a definition that was recognised in the 2001 discussion document as being very wide), it is therefore surprising, and of concern, that the charities regulator has taken a very narrow approach to the definition.
46. This very narrow approach has seen many hundreds of good New Zealand charities fail to gain or maintain registered charitable status. It has also arguably changed the law, without mandate, and contrary to the express intention of Parliament.
47. As at 4 September 2015, the charities regulator had deregistered 6,388 charities,⁶⁷ or almost 1 in 4 of the 27,691 charities that are currently registered.⁶⁸ Of these, 3,700 were deregistered for failure to file an annual return. However, only 3 were deregistered for serious wrongdoing which, as discussed above, was the original rationale for the Charities Act regime. The reasons given for deregistering the balance are described as follows:⁶⁹
 - (a) 90 - “no reason is recorded (generally because they were duplicates of already-registered charities)”;
 - (b) 30 - “no longer charitable” (that is, due to changes in jurisprudential

⁶³ *Molloy v Commissioner of Inland Revenue* [1981] 1 NZLR 688 (CA) at 695; *Re Greenpeace of New Zealand Incorporated* [2015] 3 NZLR 72 (SC) at [73], [74] and [116].

⁶⁴ Charities Bill 2004 108-1 explanatory note at 1.

⁶⁵ Charities Bill 2004 (108-2) select committee report at 3.

⁶⁶ See for example *Re Education New Zealand Trust* (2010) 24 NZTC 24,354 (HC) at [13], *Foundation for Anti-Aging Research v Charities Registration Board* [2015] NZCA 449 (21 September 2015) at [10], and *Re Greenpeace of New Zealand Incorporated* [2015] 1 NZLR 169 (SC) at [12], [16] and [17].

⁶⁷ Department of Internal Affairs - Charities Services, News Alert *We’re putting the record straight*, 4 September 2015.

⁶⁸ <https://www.charities.govt.nz/> last accessed 12 June 2016.

⁶⁹ Department of Internal Affairs - Charities Services, News Alert *We’re putting the record straight*, 4 September 2015.

interpretation of the definition of charitable purpose);

- (c) some 2,565 - voluntarily deregistered "either because they had decided to wind up, or had merged with another charity, or just because they didn't want to be registered any more".
48. It is not clear from this disclosure by the charities regulator how many of the 2,565 voluntarily deregistered charities have deregistered voluntarily because, following exchanges with the charities regulator, they had "seen the writing on the wall": a charity faced with a charities regulator that has changed its mind regarding whether purposes are charitable may choose to deregister voluntarily to try not to have an adverse decision published on the charities regulator's website.
 49. While some in-depth research into the impact on the New Zealand charitable sector of this level of deregistration of charities would be helpful, a preliminary analysis of these figures, and of some of the charities affected, provides a very strong indication that the numbers of "good" New Zealand charities being deregistered on the basis of changes in jurisprudential interpretation of the definition of charitable purpose by the charities regulator are extraordinarily high, and are putting New Zealand out of step with charity regulation internationally.
 50. In addition, many hundreds of "good" charities have been declined registration due to similarly controversial, narrow interpretations of the definition of charitable purpose.⁷⁰
 51. The consequences of a failure to gain or maintain charitable registration can be enormous. Many charities that are denied registration struggle to survive: they struggle to gain funding as busy funders rightly or wrongly restrict funding to registered charities only; they struggle with issues of confidence and credibility, as the reasons for having been rejected by their own regulator are difficult to communicate to their stakeholders. As foreshadowed by the National Party in 2004, many are forced to close.
 52. The situation has been described as a "bonfire of the charities" or a "national cull".⁷¹
 53. An exacerbating factor in this context is the question of whether charities have an effective means of appealing decisions of the charities regulator, and therefore of holding the charities regulator to account for its decisions.

The appeal right

54. Prior to the introduction of the Charities Act, charities law cases often arose in the context of the income tax legislation, in particular whether an entity's income was eligible for exemption under the charitable income tax exemptions (currently sections CW 41 and CW 42 of the Income Tax Act).⁷² An example of this is the

⁷⁰ As at 12 June 2016, some 137 "decline" decisions are published on the charities regulator's website: <https://www.charities.govt.nz/charities-in-new-zealand/legal-decisions/view-the-decisions/>. However, this list does not include all charities that have been declined registration, and the total number of charities declined registration is likely to be significantly higher.

⁷¹ Jason Walls *Bonfire of the Charities*, National Business Review, 27 May 2015 <http://www.nbr.co.nz/article/bonfire-charities-jw-p-173335>.

⁷² *Foundation for Anti-Aging Research v Charities Registration Board* [2015] NZCA 449 (21 September 2015) at [8].

Latimer litigation,⁷³ in which the Privy Council ultimately found the income of the Crown Forestry Rental Trust to be exempt from income tax, on the basis that it was derived in trust for exclusively charitable purposes.

55. As was the case in *Latimer*, disputes arising under the income tax legislation fall to be determined under the statutory tax disputes process:⁷⁴ Part 4A of the Tax Administration Act 1994 provides an elaborate process for determination of such disputes. For example, Part 4A requires issues, facts, evidence and propositions of law to be thoroughly canvassed, through notices of proposed adjustment, notices of response and statements of position, before a matter even proceeds to litigation.⁷⁵ Even then, only an *outline* of the facts and evidence are required,⁷⁶ and if the matter does proceed to Court, evidence is not prevented from being adduced simply because it was not provided earlier:⁷⁷ even after a full disputes process, taxpayers are not restricted in the evidence they can produce in challenge proceedings to evidence that had been previously provided.⁷⁸ Taxpayers are also able to avail themselves of the processes of discovery and inspection in any such challenge.
56. Accordingly, in the pre-Charities Act regime, charities were entitled to a full oral hearing of evidence, either before the Taxation Review Authority or the High Court, as part of the process of establishing that their purposes are charitable.⁷⁹
57. In the Charities Bill as originally introduced, appeals against decisions of the charities regulator were to be to the District Court, whose decision was to be final.⁸⁰ Such an appeal would normally be conducted as a first instance *de novo* trial, which would include a full hearing of oral evidence if any party so insisted.⁸¹ The Court of Appeal has confirmed that, if the Charities Bill (2004) had proceeded in the form in which it was introduced, 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

⁷³ *Latimer v Commissioner of Inland Revenue* [2002] 1 NZLR 535 (HC), *Latimer v Commissioner of Inland Revenue* [2002] 3 NZLR 195 (CA) and *Latimer v Commissioner of Inland Revenue* [2004] 3 NZLR 157 (PC).

⁷⁴ *Foundation for Anti-Aging Research v Charities Registration Board* [2015] NZCA 449 (21 September 2015) at [44]. See also *Latimer HC* at [29]-[30].

⁷⁵ See the Tax Administration Act, sections 89A(1)(a), (b) and (d), 89F(2), 89G, 89M(4) and (6B), and 138G. See also Standard Practice Statement *SPS11/05: Disputes resolution process commenced by the Commissioner of Inland Revenue*, Tax Information Bulletin Vol 23 No 9 November 2011 pages 16-19, paras 5-7, 14-18, 237, 241, 262, and 269-281.

⁷⁶ Refer section 89M(4) and (6) of the Tax Administration Act.

⁷⁷ The "evidence exclusion rule" in section 138G of the Tax Administration Act has since been renamed the "issues and propositions of law" exclusion rule.

⁷⁸ See also *Latimer HC* in particular paras [16], [24], [28]-[30], [52], [89], [97], and [132] for an example of this.

⁷⁹ *Foundation for Anti-Aging Research v Charities Registration Board* [2015] NZCA 449 (21 September 2015) at [44]. It should be noted that IRD's administration of the charitable income tax exemptions is not displaced: as a general rule, Charities Act registration is a necessary but not sufficient condition for eligibility for the income tax exemptions in sections CW 41 and CW 42 of the Income Tax Act.

⁸⁰ *Foundation for Anti-Aging Research v Charities Registration Board* [2015] NZCA 449 (21 September 2015) at [45] referring to Charities Bill 2004 (108-1), clauses 67 and 69(6) (pp38-41).

⁸¹ See *Shotover Gorge Jet Boats Ltd v Jamieson* [1987] 1 NZLR 437 (CA), considering section 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*". [Emphasis added]

“full discretionary power to hear and receive further evidence on questions of fact, either by oral evidence or by affidavit”.⁸²

58. However, as discussed above, the original Charities Bill was substantially rewritten at Select Committee stage in response to hundreds of submissions. With respect to appeals, submitters were concerned that to restrict appeals to the District Court, whose decision was to be final, would significantly impede the development of the common law of the definition of charitable purpose: submitters were concerned that charities should continue to have recourse to the highest court in the land on this important issue. Submitters were also concerned that as the definition of charitable purpose resides in equity, the High Court rather than the District Court, would be the most appropriate forum for hearing appeals in the first instance.

59. The Select Committee made the following comments:⁸³

The bill provides a right to appeal to the District Court against decisions of the Commission to refuse to register an entity, or to remove an entity from the register. Clauses 67 to 69 detail the process for appealing a Commission decision. The majority considers that charities should not be limited to appealing decisions relating to registration and that it should be possible to appeal from all decisions of the Commission that adversely impact on a particular entity. The majority recommends that the bill be amended to achieve this end.

The majority also considers that, given the experience of the High Court in considering matters relating to charitable entities, it would be the most appropriate forum for hearing appeals. The majority recommends amending clauses 67, 68, and 69 to give the High Court jurisdiction to consider appeals against Commission decisions, and also recommend amendments to ensure the Court has sufficient powers to appropriately consider these appeals. In addition, the majority recommends that clause 69(6) be omitted. This provision, which made the decision of the Court final, was not appropriate in our view, as the initial appeal to the High Court should not be the final resort for charities.

60. The appeal mechanism was accordingly changed to the following formulation at select committee stage:⁸⁴

Appeals against decisions of Commission

59 Right of appeal

- (1) A **person** who is aggrieved by a decision **of the Commission** under this Act may appeal to the High Court.
- (2) An appeal under this section must be made by lodging a notice of appeal with the Registrar of the **High Court** in Wellington and with the Commission within –
 - (a) **20 working days after the date of the decision**; or
 - (b) any further time **that the High Court may allow** on application made before or after the expiration of that period.

⁸² *Foundation for Anti-Aging Research v Charities Registration Board* [2015] NZCA 449 (21 September 2015) at [45], footnotes omitted.

⁸³ Charities Bill 2004 108-2 Select Committee report, pp 13-14. See also *Foundation for Anti-Aging Research v Charities Registration Board* [2015] NZCA 449 (21 September 2015) at [46].

⁸⁴ Charities Bill 108-2 pp63-67 and 13-14.

- (3) Every notice of appeal must specify –
 - (a) the decision or part of the decision appealed from; and
 - (b) the grounds of appeal in sufficient detail to fully inform the High Court and the Commission of the issues in the appeal; and
 - (c) the relief sought.

60 High Court may make interim order pending determination of appeal

- (1) At any time before the final determination of an appeal, the High Court may make an interim order requiring an entity –
 - (a) to be registered in the register of charitable entities with effect from a specified date; or
 - (b) to be restored to the register of charitable entities with effect from a specified date; or
 - (c) to remain registered in the register of charitable entities.
- (2) The specified date may be a date that is before or after the order is made.
- ...
- (4) An interim order may be subject to any terms or conditions that the High Court thinks fit.
- ...

61 Determination of appeal

- (1) In determining an appeal, the High Court may –
 - (a) confirm, modify, or reverse the decision **of the Commission** or any part of it; or
 - (b) exercise any of the powers that could have been exercised by the Commission in relation to the matter to which the appeal relates.
- (2) Without limiting subsection (1), the High Court may make an order requiring an entity –
 - (a) to be registered in the register of charitable entities with effect from a specified date;
 - (b) to be restored to the register of charitable entities with effect from a specified date;
 - (c) to be removed from the register of charitable entities with effect from a specified date;
 - (d) to remain registered in the register of charitable entities.
- (3) The specified date may be a date that is before or after the order is made.
- (4) The High Court **may make any other order that it thinks fit.**
- (5) An order may be subject to any terms or conditions that the High Court thinks fit.
- (6) Nothing in this section affects the right of any person to apply, in accordance with law, for **judicial review**.

[Emphasis added]

- 61. Section 59, as enacted, therefore contained the appeal right for charities, with section 61 giving the High Court wide powers to make such orders as may be

necessary to justly dispose of the appeal.⁸⁵

62. It can be seen that the statutory appeal mechanism does not prescribe any procedure for dealing with evidence. This is of particular significance because the question of whether a purpose is charitable often turns on questions of fact, as discussed above.
63. Facts are established by evidence, including by cross-examination where appropriate.
64. However, in *Foundation for Anti-Aging Research v Charities Registration Board* [2015] NZCA 449 (21 September 2015), the Court of Appeal upheld the strong arguments of the charities regulator that sections 59 to 61 do not admit of an oral hearing of evidence:⁸⁶

The provisions for appeals in the Act are supplemented by Part 20 of HCR [the High Court Rules]. With specified exceptions not relevant for current purposes, Part 20 applies to all appeals to the High Court under any enactment [HCR20.1(1)]. It applies **subject to any express provision in the enactment under which the appeal is brought** [HCR20.1(3)]. Part 20 prescribes the rules for the filing of a notice of appeal and the contents of any such notice. With the exception of appeals under the Commerce Act 1986, **the notice of appeal must not name the decision-maker as a respondent** [HCR20.9(2) and (3)(a)]. However, the decision-maker is entitled to be represented and heard at the hearing of an appeal on all matters arising in it unless the decision-maker is a District Court or the Court orders otherwise [HCR20.17].

Rule 20.18 provides that appeals are by way of rehearing. The Supreme Court has confirmed in relation to general appeals such as that conferred by s 59 that the appeal is **usually conducted on the basis of the record of the court or tribunal appealed from** [*Austin, Nichols & Co Inc v Stichting Lodestar* [2008] 2 NZLR 141 (SC) at [4]]. There may be exceptions to this general approach which we discuss in more detail below.

Rule 20.16 is of particular relevance to this appeal since it deals with the Court's power to permit an appellant to adduce further evidence on appeal...Key points regarding this rule are that, except in relation to interlocutory applications, a party may adduce evidence only with the leave of the Court. The Court's power to permit further evidence may be exercised only if there are special reasons for doing so. Any further evidence permitted under this rule must be given by affidavit unless the court directs otherwise.

65. This outcome appears to have arisen because, in changing the words "District Court" to "High Court", the Select Committee did not insert additional amendments into section 59 to clarify that charities' ability to have an oral hearing of evidence was not being removed:⁸⁷

The starting point for our consideration of the appellants' argument must be the Act in the **form in which it was enacted** and the provisions of Part 20 of the HCR....**there is nothing in the Act to support the proposition that an appellant under s 59 of the Act is entitled to an oral hearing and nothing to suggest that the High Court has a discretion to order a de novo hearing in appropriate cases.**

Section 59 merely confers a right of appeal to the High Court by a person aggrieved by

⁸⁵ See *Travis Trust v Charities Commission* (2009) 24 NZTC 23,273 (HC) at [15] per Joseph Williams J.

⁸⁶ *Foundation for Anti-Aging Research v Charities Registration Board* [2015] NZCA 449 (21 September 2015) at [23]-[26].

⁸⁷ *Foundation for Anti-Aging Research v Charities Registration Board* [2015] NZCA 449 (21 September 2015) at [38]-[43].

a decision of the Board. **It says nothing about the nature of the hearing to be conducted on appeal.** Similarly with s 61 which specifies the powers available to the High Court upon the determination of the appeal. These powers are to confirm, modify or reverse all or part of the Board's [or the chief executive's] decision or to exercise any of the powers that could have been exercised by the Board or the chief executive....the power under s 61(4) for the High Court to make "any other order that it thinks fit" 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. Section 61(4) is not directed to procedural issues nor intended to oust or override the procedural provisions of the HCR.

The right of appeal under s 59 is plainly a right of general appeal. As such, it is to be determined **by way of rehearing** in terms of r 20.18 of the HCR. As the Supreme Court has confirmed in *Austin, Nichols*, an appeal of this nature **is generally conducted on the record of the court or tribunal appealed from....**

...there is nothing in the [Charities] Act in the present case to suggest that a full rehearing de novo is required or permitted as a matter of discretion. The provisions of Part 20 clearly point to a rehearing on the record with only limited scope for additional evidence. **In the absence of any direction to the contrary under the Act, Part 20 of the HCR applies.** Rule 20.16 in particular restricts the scope of any further evidence on appeal to cases where there are **special reasons** to do so. Even whether further evidence is permitted, it is to be given by **affidavit** unless the Court otherwise directs. These provisions make it plain **that the usual rule confining the appeal to the record in the court or tribunal at first instance is to apply with only limited power to permit further evidence to be admitted.** [Emphasis added]

66. As a result, the Court of Appeal has effectively confirmed that charities need to present material before the charities regulator as if they are preparing for a High Court trial:⁸⁸

...we accept the general proposition that rights of appeal ought to be **effective** and that the court should approach its task in a way **that best promotes the interests of justice....**

...Hearing general appeals on the record of the court or a tribunal whose decision is under appeal generally achieves these objectives. Nevertheless, in prescribed circumstances, the High Court has a discretion to permit additional evidence for special reasons. Further evidence will necessarily require de novo assessment and consideration of how it affects the decision under appeal. Any additional evidence is generally to be adduced by affidavit but the High Court may, in its discretion, permit otherwise if it sees fit....

...In general, an applicant for registration as a charitable should put all relevant material before the Board at first instance....

We agree there may be cases where, in order to secure the objective of a just and effective right of appeal, the discretion to permit further evidence or carefully limited rights of cross-examination may be necessary and appropriate. The requirement for **special reasons** necessarily means that the exercise of discretion to adduce further evidence will usually only be exercised in exceptional circumstances but they need not be rare...The court will be guided by the usual criteria of freshness, relevance and cogency. Material that would merely elaborate or improve upon the evidence already available in the record of proceedings at first instance is unlikely to meet the test.

⁸⁸ *Foundation for Anti-Aging Research v Charities Registration Board* [2015] NZCA 449 (21 September 2015) at [48]-[53].

There may be other circumstances which could justify the exercise of the discretion to admit further evidence, such as the correction of obvious factual errors or where natural justice requires. The latter might arise where, for example, the Board has taken matters into account to which the appellant did not have the opportunity to respond and which the court on appeal considers to be material to the determination of the appeal. We note in passing the existence of judicial review as an alternative means of challenging steps taken by the Board or the chief executive on natural justice grounds or for other procedural or legal error.

67. This means that charities' ability to have an oral hearing of evidence, in the often-difficult task of proving that their purposes are charitable, has been removed. This is particularly concerning given that, as the Court of Appeal noted, the application for charitable registration form is essentially a box-filling exercise; further, no part of the charities regulator, neither the Board nor the Department of Internal Affairs, conducts an oral hearing in practice:⁸⁹

We were told that, in practice, an oral hearing is not accorded. Rather, the process involves the Chief Executive providing a report and recommendation to the Board which then considers the application and issues a formal decision in writing. In the present case, the Chief Executive provided to the Board an extensive report covering legal and factual issues along with a recommendation that the applications be declined. The Board considered these reports and issued decisions which we were told were substantially in the terms contained in the Chief Executive's reports and recommendations.

68. There is no indication in any of the material surrounding the Charities Bill (2004) that, in changing the words "District Court" to "High Court", the Select Committee was intending to remove charities' right to an oral hearing of evidence. This substantial and significant change was then passed through under urgency and without proper consultation, on the basis that a post-implementation review of the legislation would follow.

69. A related difficulty is that the Board's role in litigation under the Charities Act is said to be limited to that of assisting the Court:⁹⁰

...[Counsel for the Charities Registration Board] advised us that s59 appeals are not usually opposed. The Board's role is generally limited to making submissions and providing assistance to the Court. In these circumstances it is unlikely the High Court would be assisted on appeal by oral evidence. Rather, a High Court has the familiar duty of assessing all the material placed before it. This is essentially an evaluative exercise. The Court considers all the evidence afresh and reaches its own independent conclusions on the issues raised. No particular deference is required to the view of the first instance decision-maker but the High Court must be persuaded that the original decision was wrong.

70. This causes further difficulty in establishing whether any particular purpose is charitable, as noted by Joseph Williams J:⁹¹

The Commission appeared in its own right on this appeal even though it was the first instance decider. While this is generally frowned upon, in the circumstances of this case, the assistance of counsel for the Commission was both necessary and valued. This arises

⁸⁹ *Foundation for Anti-Aging Research v Charities Registration Board* [2015] NZCA 449 (21 September 2015) at [13] and [20].

⁹⁰ *Foundation for Anti-Aging Research v Charities Registration Board* [2015] NZCA 449 (21 September 2015) at [53].

⁹¹ *Travis Trust v Charities Commission* (2009) 24 NZTC 23,273 (HC) at [27].

from two circumstances particular to this appeal. The first was that there was **no other party adopting a position contrary to that of the appellant on this appeal. The absence of the usual tension between appellant and respondent can sometimes lead to poor decision-making and that should be avoided.** The second and more important reason is that this was the first appeal under the 2005 legislation and it was important that the court heard submissions properly contextualising the appeal within the 2005 reforms. For this purpose counsel for the Commission acted rather more as counsel assisting than as an adversary to the appellant. I am grateful particularly for that aspect of the contribution of counsel for the Commission

71. In practice, the Board does appear to conduct itself adversarially in litigation under the Charities Act.⁹² This undermines the extent to which this factor can indeed justify the absence of an oral hearing.
72. In the result, charities' appeal rights are heavily restricted, which presents significant barriers to charities' ability to effectively challenge controversial and narrow interpretations of the charities regulator, and indeed to their ability to access justice at all. The net result is preventing the common law from "purifying itself" in the face of the charities regulators' unauthorised "disfigurement" of New Zealand's law of charity. To echo the words of the National Party mentioned above, this is a structural issue in the existing legislation that needs to be addressed.

The Crown Entities Reform Bill 2011

73. The difficulties surrounding the appeal right, as enacted, have been exacerbated by subsequent amendments.
74. On 31 May 2011, only 6 years after the Charities Act had commenced and less than 3 years after the tax provisions had come into force, a proposal was announced to disestablish the Charities Commission. The stated reason was that, in the "current period of fiscal and economic restraint", the Government wished to reduce the number of government agencies as it seeks better value for money.⁹³ However, one may be forgiven for wondering whether the real reason in fact related to controversy that had arisen over the narrow approach that the Charities Commission had taken to the definition of charitable purpose.⁹⁴ Whatever the reason, the proposal was to transfer the functions of the Charities Commission to the Department of Internal Affairs, while ensuring that registration decisions remained separate from Ministers.
75. The Crown Entities Reform Bill was introduced on 29 September 2011, with the proposal to disestablish the Charities Commission contained in Part 3. Part 1 of the Bill proposed to disestablish the Alcohol Advisory Council of New Zealand, the Health Sponsorship Council, and the Crown Health Financing Agency. Part 2 proposed to bring forward the disestablishment of the Mental Health Commission.
76. The Crown Entities Reform Bill had its first reading on 4 October 2011 and was

⁹² See for example the procedural points taken by the Board in *National Council of Women of New Zealand Inc v Charities Registration Board* (2014) 26 NZTC 21075 (HC).

⁹³ See <http://www.scoop.co.nz/stories/PA1105/S00611/government-reviews-more-state-agencies.htm>. See also confirmation of proposal on 11 August 2011: <http://www.beehive.govt.nz/release/reduction-state-agencies-confirmed>.

⁹⁴ See for example *Moving the charitable goal posts*, Mark von Dadelszen, NZLawyer magazine, issue 155, 11 March 2011, and *Charities Act review*, S Barker and K Yesberg, NZLawyer magazine, issue 157, 8 April 2011.

referred to the Government Administration Select Committee.

77. However, a general election took place on 26 November 2011 and the Bill lapsed.
78. Although the Bill was reinstated by the new Parliament, submissions were not clearly called for. Despite this, many submissions were made, and those that did comment on Part 3 were overwhelmingly opposed to the proposal to disestablish the Charities Commission.
79. The Select Committee was split regarding Part 3, as noted in its 30 March 2012 report back on the bill:⁹⁵

We acknowledge the strong concern expressed by submitters in relation to the disestablishment of the Charities Commission, an autonomous Crown entity, and the transfer of its functions to an independent board within the Department of Internal Affairs, which would compromise the commission's independence and autonomy.

The bill was introduced at the end of the previous Parliament and submissions were called without a closing date. We were unable to call for further submissions due to time constraints. We had requested an extension of three months, but were granted an extension of one month. This led to confusion about the status of submissions. **We further acknowledge the frustration felt by submitters, some of whom were unaware of submissions being called. This highlights a problem with the process associated with bills at the end of Parliament**, because they cease being an item of business until reinstated in the new Parliament. We gave consideration to all written submissions.

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.

Review of the Charities Act 2005

A review of the Charities Act is due to take place following the current review of the Incorporated Societies Act 1908.

Government members believe that transferring the commission's current functions to the Department of Internal Affairs will create a more robust, resilient agency, and endorse the intention to do so now rather than after the review of the Charities Act.

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. [Emphasis

⁹⁵ Crown Entities Reform Bill 333-2 Select Committee Report 30 March 2012, pages 4-5.

added]

80. Despite the comments of the Select Committee, the second reading and committee stages of the Bill occurred quickly over 22, 23 and 29 May 2012.
81. Part 3 of the Bill was hotly contested, passing its second reading with the narrowest of margins at 61:60 votes. If one vote had been decided differently, Part 3 may not have passed.
82. 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".⁹⁶ The Supplementary Order Paper noted that:⁹⁷

The independence of the Charities Commission was fundamental to the agreement between this sector and the Government when it was established in 2005. It is difficult to see how this could be retained when part 3 comes into force.

83. However, the Government "had the numbers" and the motion to adopt the Supplementary Order Paper was rejected.

The Charities Amendment Act (No 2) 2012

84. The Committee of the Whole House divided the Crown Entities Reform Bill into 3 separate bills, including the Charities Amendment Bill (No 2) 332-3C. This bill passed its third reading on 30 May 2012 by a narrow margin (60:58 votes, because one member of the Maori party was not able to vote. However, if there had been a suggestion that the bill might have been able to be stopped, no doubt the member would have been called back).
85. Royal assent was given to the Charities Act Amendment Act (No 2) 2012 on 6 June 2012, and the Charities Commission was disestablished from 1 July 2012 ("**the 2012 reforms**").
86. The Charities Commission's functions were transferred to the Department of Internal Affairs, "with registration and deregistration of charities being carried out by an independent decision-making board of 3 persons".⁹⁸ Section 8 of the Charities Act, as amended, provided for the statutory Charities Registration Board. Its 3 members are appointed by the Minister for the Community and Voluntary Sector, and are responsible for decisions relating to the registration and deregistration of charitable entities.⁹⁹
87. The process provisions in sections 18 and 19, as amended, set up an unusual decision-making regime. Section 18 requires the Chief Executive of the Department of Internal Affairs to first "consider whether an [applicant] entity qualifies for registration", including providing the applicant the opportunity to comment on any adverse matters. Section 19 then requires the Chief Executive to "recommend to the Board that it either grant or decline the application". The Board must then itself be

⁹⁶ NZPD Vol 680 p2330 23 May 2012 Crown Entities Reform Bill In Committee per Hon Trevor Mallard.

⁹⁷ Crown Entities Reform Bill, SOP No 32 released 22 May 2012, see http://www.parliament.nz/en-NZ/PB/Debates/Debates/6/f/b/50HansD_20120523_00000012-Crown-Entities-Reform-Bill-In-Committee.htm.

⁹⁸ Crown Entities Reform Bill (332-1) explanatory note.

⁹⁹ Charities Act 2005, section 8(3).

either “satisfied” or “not satisfied” that the entity qualifies for registration, and then direct the Chief Executive to take appropriate action. Reasons are only required if the application is declined.

88. Section 19(5) also requires that, before deciding that it is not satisfied that an entity is qualified to be registered “the Board must be satisfied that the chief executive has complied with section 18(3) in that case”.
89. Section 18(3) provides:
 - (3) In considering an application, the chief executive must—
 - (a) have regard to—
 - (i) the activities of the entity at the time at which the application was made; and
 - (ii) the proposed activities of the entity; and
 - (iii) any other information that it considers is relevant; and
 - (b) observe the rules of natural justice; and
 - (c) give the applicant—
 - (i) notice of any matter that might result in its application being declined; and
 - (ii) a reasonable opportunity to make submissions to the chief executive on the matter.
90. The origins of this odd process lie in the 2012 reforms. Prior to the abolition of the Charities Commission, sections 18 and 19 applied directly and only to the Commission.¹⁰⁰ These provisions set up a standard process for the Commission to receive and consider an application, to comply with the principles of natural justice, and to make a decision, giving reasons if the application were declined.
91. The 2012 reforms abolished the Charities Commission, and established the Charities Registration Board to consider and determine applications for registration. At the same time, the process provisions in sections 18 and 19 were split between the Chief Executive and the new Board. Section 18 was amended to replace the reference to the Charities Commission with a reference to the Chief Executive. Section 19 was amended to replace the reference to the Charities Commission with a reference to the Board, and extra subsections were added: new section 19(1) (providing for the Chief Executive to make a recommendation to the Board), new section 19(3) (providing that the Board is not required to follow a formal process when granting an application) and new section 19(5) (requiring the Board to be satisfied that the Chief Executive had complied with the obligations in section 18 before declining an application).
92. The provision for the Chief Executive to consider an application and make a recommendation does not mean that the Board is not itself charged with making its own decision. On the contrary, the Act is clear that the Board must make its own assessment and act independently.¹⁰¹

¹⁰⁰ See ss 18 and 19 of the Charities Act 2005 as at February 2012.

¹⁰¹ Charities Act 2005, section 8(4), and section 9(2).

93. Section 19 requires the Board to be itself satisfied or not satisfied that an entity qualifies for registration. Similarly, section 19(3) requires the Board to give the Chief Executive *its* own reasons for *its* decision if registration is to be declined.
94. Section 8(4) confirms that, in exercising these functions, the Board is not subject to direction from the Minister, and that each Board member “must act independently in exercising his or her professional judgment”.
95. Section 8(6) sets out the role of the Chief Executive in this context, being to “supply all secretarial and administrative services required to enable the Board to perform or exercise its functions, duties and powers”.¹⁰²
96. Section 10 sets out the functions of the Chief Executive under the Act. In relation to applications for registration, the Chief Executive’s functions are:
 - (b) to make appropriate information available to assist persons to make applications for registration under this Act; and
 - (c) to **receive and process applications for registration** as charitable entities; and
 - (d) to refer to the Board for its decision all applications for registration as charitable entities ...
97. In other words, the receipt and processing of applications for registration is conferred explicitly on the Department of Internal Affairs.¹⁰³
98. The Board is also required to consider whether it could most efficiently and effectively perform or exercise any of its functions, duties or powers by delegating them to the Department of Internal Affairs.¹⁰⁴
99. The independence of the Board from the Chief Executive, and the importance of the Board’s separate decision-making role, was also emphasised in the legislative history of the 2012 reforms.
100. The explanatory note to the Crown Entities Reform Bill explains (page 6), that:

Essentially, the Board will be responsible for deciding matters involving the registration and deregistration of charitable entities...
101. While the Chief Executive:

Essentially, the chief executive will be responsible for functions formerly performed by the Charities Commission other than deciding whether an entity should be registered or deregistered.
102. The Bill as introduced set out the functions of the Board at new section 8 and of the chief executive in new section 10, both in the same terms as enacted, outlined above.
103. The changes to sections 18 and 19 outlined above, setting up the process of the Chief Executive “considering” whether the applicant entity meets the criteria, and then “recommending” a decision to the Board, are addressed in clause 54 and schedule 8 to the Bill, as “consequential amendments” to the Act.
104. The report back from select committee recommended that the Bill pass with minor amendments (not affecting the Charities Act). As discussed above, the committee

¹⁰² Charities Act 2005, sections 8(5) and (6) and 9.

¹⁰³ Charities Act 2005, section 10(c).

¹⁰⁴ Charities Act 2005, sections 8(5) and (6) and 9.

noted the strong concerns that the amendments proposed in the Bill could compromise the independence and integrity that the Charities Commission had provided.

105. The first reading of the Bill confirmed that decision-making on registration applications was to lie with an independent Board, with secretarial and administrative support being provided by the Chief Executive. The Hon Craig Foss, on behalf of the Minister of State Services stated:¹⁰⁵

Part 3 looks at the Charities Act 2005. Part 3 disestablishes the Charities Commission and reassigns the functions and duties under the Charities Act 2005 to the Chief Executive of the Department of Internal Affairs, with the exception of decisions relating to the registration and deregistration of charities, which will be carried out by an independent decision-making board of 3 persons. The decisions of the board will be subject to appeal to the High Court, as are the Charities Commission's decisions now. The board will also retain the Commission's ability to publish details of possible breaches of the Charities Act or possible serious wrongdoings. The bill provides that the board members are not subject to direction from Ministers in performing or exercising their functions, duties, or powers, and that each member must act independently in exercising his or her professional judgment. This will ensure independence in decision-making. The bill places a requirement on the board to actively consider delegations to the chief executive or another person, such as a board member. This will ensure the effective and efficient use of resources. Any delegations carry with them the same independent and professional judgment in decision-making. The bill provides that the chief executive must supply all secretarial and administrative services required to enable the independent board to carry out its functions, duties and powers.

106. Similarly, at the second reading it was emphasised that the registration decisions lie with the Board, unless formally delegated to the Chief Executive, and that a key feature of the legislation is that the Board operates independently from the Department. The Hon Kate Wilkinson on behalf of the Minister of State Services:¹⁰⁶

Part 3 disestablishes the Charities Commission and transfers its functions, duties, and powers to the Department of Internal Affairs, except for decisions on the registration and deregistration of charities. The bill assigns these decisions to an independent board of 3 persons, which will be supported by the Department of Internal Affairs. This independent board may make registration decisions itself or delegate responsibility for them, in whole or part, to the Chief Executive of the Department of Internal Affairs. However, if the board chooses to so delegate, the chief executive will also not be responsible to the Minister for registration decisions, but must act independently...

...There are three different issues that I will speak about in relation to the Charities Act amendments. They are the continued independence of the commission's functions of registration and deregistration of charities, the continuation of the commission's education function, and the request to delay this process until after the review of the Charities Act is complete.

The bill provides for an independent board of three members to make registration and deregistration decisions. The bill has been carefully drafted to ensure the continued independence of this board when exercising its professional judgment on registration and deregistration decisions. The Minister will not be able to direct the board. Likewise, if the board chooses to delegate some or all of its functions to the Chief Executive of the Department of Internal Affairs, then the chief executive will also not be responsible

¹⁰⁵ Crown Entities Reform Bill – First Reading, Hansard 4 October 2011 vol 676 page 21654.

¹⁰⁶ Crown Entities Reform Bill – Second Reading, Hansard 22 May 2012 vol 680, page 2240.

to the Minister for registration and deregistration decisions, but will have to act independently. The board will be statutorily independent from the Crown, but will be supported by the Department of Internal Affairs. The bill therefore strikes an appropriate balance between important independence considerations and achieving administrative efficiency.

The Department of Internal Affairs has extensive experience in supporting independence boards and offices of the kind provided for in the bill. These include the Gambling Commission, the Local Government Commission, the Registrar-General of Births, Deaths and Marriages, and the Chief Archivist. To take the example of the Gambling Commission, it has been successfully supported by the Department of Internal Affairs since 2003, and has demonstrated its independence on numerous occasions by overturning Department of Internal Affairs' decisions. I expect the board established by this bill to operate just as successfully as the Gambling Commission, and any of the other independent entities supported by the Department of Internal Affairs for that matter, in terms of exercising its statutory independence.

107. In the third reading, the Minister for the Community and Voluntary Sector confirmed that the intention of the amendments are structural only, and were not intended to dilute the independence or integrity of the registration decision-making process, or to transfer responsibility for deciding registration to DIA staff. The Minister (Hon Jo Goodhew) stated:¹⁰⁷

The Charities Amendment Bill (No 2) disestablishes the Charities Commission and transfers its functions to the Department of Internal Affairs, except for the registration and deregistration of charities, which will be performed by an independent statutory board of 3 persons. All the functions and duties that the Charities Commission currently performs under the Charities Act 2005 will remain. Indeed, the promotion of trust and confidence function is moved into the Act's purpose section, reflecting its importance.

The bill's changes are structural only, and reflect Government priorities of reducing State sector fragmentation, improving the resilience of functions by having them carried out by larger agencies, and promoting efficiency by integrating similar functions and back-office services. The bill preserves the independence of the charities registration and deregistration functions by providing in law that Ministers may not give any direction to the board or to the Chief Executive of the Department of Internal Affairs in respect of these functions. The Department of Internal Affairs has extensive experience supporting independence boards and offices of this kind. In all other respects, the Chief Executive of the Department of Internal Affairs will be responsible for carrying out the functions set out in the Charities Act and will be responsible to Parliament for its performance in this regard. The Government has every confidence that the charities sector will continue to receive a high level of service and support under the bill's new arrangements.

108. The intention of the Act is clear: an application for registration is entitled to have its application considered and determined by an independent Board, with each member exercising his or her independent professional judgment. Registration decisions are not to be made by DIA unless there has been a formal delegation of decision making to the chief executive.
109. In the absence of a formal delegation, the Department of Internal Affairs' role is to "receive and process" applications,¹⁰⁸ to refer applications to the Board for

¹⁰⁷ New Zealand Public Health and Disability Amendment Bill, Mental Health Commission Amendment Bill, Charities Amendment Bill (No 2) – Third Reading, Hansard 30 May 2012, vol 680 page 2714

¹⁰⁸ Section 10(c).

decision,¹⁰⁹ and to “supply secretarial and administrative support” to the Board.¹¹⁰ As part of its support role, the DIA is tasked with providing the initial consideration of applications (including providing opportunities for comment on matters that may lead to a decline) and making recommendations under section 19.

110. These “consequential” amendments¹¹¹ to sections 18 and 19 are not intended to dilute the independent decision-making function of the Board. They are also not intended to remove charities’ rights of appeal.
111. The Board is clearly not obliged to follow any formal process. Section 19(3) provides that expressly where the Board decides to grant an application. Section 19(5), which applies when the Board decides to decline an application, is in different terms. It requires the Board to be satisfied that the Chief Executive has complied with section 18(3), which includes an obligation on the Chief Executive to observe the principles of natural justice, and to give an applicant a reasonable opportunity to make submissions to the Chief Executive on any matter that might result in its application being declined.
112. The usual position for an application for registration is that the Board’s obligations of natural justice will be discharged by the Board being satisfied that the Chief Executive has met the process requirements under section 18.
113. However, whether the Board is or is not under any obligation of natural justice at all, including any obligation to provide an oral hearing for an applicant, is the subject of judicial review proceedings on which a decision of the High Court is currently awaited.
114. As expected, changing the decision-maker has not ameliorated any of the problems previously being experienced. The charities regulator’s approach has continued to be narrow, and in fact seems even narrower than before. However, charities-related functions appear less transparent and less accessible to the public. Charities are still prevented from having an oral hearing and the decision-maker is now one step removed: it appears that the Board may not even be provided with all material supplied by a charity to the Department of Internal Affairs in support of its registration. Further, while the Board may be statutorily required to be “independent”, in practice it appears to largely “rubber-stamp” lengthy decisions that have been written by the Department of Internal Affairs. The Charities Registration Board is subject to the Official Information Act 1982, independently of the Department of Internal Affairs.¹¹² Despite this, the Department provides “legal advice” to the Board, which both it and the Board have refused to disclose despite requests under the Official Information Act 1982.
115. It is also ironic that the Charities Commission’s functions should be absorbed into a government department, an organisation that is even closer to government than the original “Crown agent” classification that had been originally rejected by the Select Committee considering the Charities Bill. This substantial change was made without

¹⁰⁹ Section 10(d).

¹¹⁰ Section 8(6).

¹¹¹ Crown Entities Reform Bill 2011 clause 54.

¹¹² See the definition of “organisation” in section 2 of the Official Information Act 1982, and the inclusion of “the Board established by section 8 of the Charities Act 2005” in Schedule 1 Part 2 of the Ombudsmen Act 1975.

proper consultation with, and despite clear opposition from, the charitable sector. The resulting situation makes the process very difficult for charities trying to establish that their purposes are charitable.

Amendments to the appeal right

116. The Charities Act Amendment Act (No 2) 2012 consequentially amended the appeal right in sections 59 and 61 so that they now read as follows:

Appeals against decisions of Board

59 Right of appeal

- (1) A person who is aggrieved by a decision **of the Board** under this Act may appeal to the High Court.
- (2) An appeal under this section must be made by lodging a notice of appeal with the Registrar of the High Court in Wellington **and with the Board** within –
 - (a) 20 working days after the date of the decision; or
 - (b) any further time that the High Court may allow on application made before or after the expiration of that period.
- (3) Every notice of appeal must specify –
 - (a) the decision or part of the decision appealed from; and
 - (b) the grounds of appeal in sufficient detail to fully inform the High Court **and the Board** of the issues in the appeal; and
 - (c) the relief sought.

...

61 Determination of appeal

- (1) In determining an appeal, the High Court may –
 - (a) confirm, modify, or reverse the decision of **the Board or the chief executive** or any part of it; or
 - (b) exercise any of the powers that could have been exercised by the **Board or the chief executive** in relation to the matter to which the appeal relates.

...

- (4) The High Court may make any other order that it thinks fit.
- (5) An order may be subject to any terms or conditions that the High Court thinks fit.
- (6) Nothing in this section affects the right of any person to apply, in accordance with law, for judicial review.

117. Clearly, there is an inconsistency, as section 59 provides a right of appeal against a decision “of the Board”, but section 61 provides that the appeal may be determined by confirming, modifying or reversing the decision “of the Board or the chief executive”. This point is discussed further below.

The review of the Charities Act

118. Another exacerbating feature occurred on 16 November 2012 when, only 4 months after unilaterally and controversially disestablishing the Charities Commission, and precisely 21 minutes after the Court of Appeal delivered its decision in

Greenpeace,¹¹³ the Government unilaterally and controversially announced that the promised first-principles review of the Charities Act would not take place.¹¹⁴

119. The review had received Cabinet approval in 2010, and was to be completed by 2015,¹¹⁵ to allow time for the Law Commission to complete its review of the Charitable Trusts Act 1957 (being undertaken as part of its review of the law of trusts).¹¹⁶ In her speech to the Charities Commission Annual General Meeting on 30 November 2010, then Minister for the Community and Voluntary Sector, Hon Tariana Turia, expressed her hope that the review “will help us all determine whether the existing legislation is fit for purpose and reflects the needs and composition of the charitable sector”.¹¹⁷
120. However, in November 2012, a subsequent Minister for the Community and Voluntary Sector, Hon Jo Goodhew, gave 3 reasons for cancelling the review:¹¹⁸ (i) that the definition of charitable purpose was “working reasonably well”; (ii) that a review might lead to more charities being eligible for registered charitable status which “could result in increased fiscal costs”; and (iii) with the disestablishment of the Charities Commission and the transfer of its functions to the Department of Internal Affairs, a first principles review was considered “no longer appropriate”.
121. These reasons do not bear critical examination.¹¹⁹
122. While the definition of charitable purpose has the potential to work well, as demonstrated by its longevity over hundreds of years, the current narrow interpretation of the definition could not be said to be “working reasonably well” for the many hundreds of good charities that are currently being excluded from the regime, or that are being stymied from carrying out their important work for fear being so excluded, as well as those who are denied the benefit of such charities’ work if they fail to survive as a result.
123. Further, the argument that a review might lead to “increased fiscal costs” does not appear to have been critically analysed. While registration as a charitable entity is a gateway to the charitable *income* tax exemptions, many charities do not earn significant “income”. The impact of interpreting the definition of charitable purpose in a manner more consistent with the community’s expectations may in fact be small

¹¹³ *Re Greenpeace New Zealand Incorporated* [2013] 1 NZLR 339 (CA).

¹¹⁴ Hon Jo Goodhew, *No review of the Charities Act at this time*, 16 November 2012

<http://www.beehive.govt.nz/release/no-review-charities-act-time>.

¹¹⁵ CAB Min (10) 12/6, SOC Min (10) 6/4 and CAB Min (10) 35/3B.

¹¹⁶ See <http://www.lawcom.govt.nz/project/review-law-trusts>. Note that as at 25 June 2015, the Law Commission’s review of charitable and purpose trusts, including the Charitable Trusts Act 1957, had not yet commenced and the “future start date will be determined after existing references are completed and emerging priorities are considered by the Minister responsible for the Law Commission (see page 5 of the Law Commission’s statement of performance expectations and financial information 1 July 2015 – 30 June 2016, http://www.parliament.nz/resource/en-nz/51DBHOH_PAP63277_1/51a6d4dc5f1ba92861156397c7e8b4aa34405a00).

¹¹⁷ <http://www.beehive.govt.nz/speech/charities-commission-annual-general-meeting-0>.

¹¹⁸ Hon Jo Goodhew, *No review of the Charities Act at this time*, 16 November 2012

<http://www.beehive.govt.nz/release/no-review-charities-act-time>. See also SOC Min (12) 24/3 7 November 2012, background paper, paragraphs 5 and 29(7).

¹¹⁹ See also the discussion in Barker et al *The Law and Practice of Charities in New Zealand*, paragraphs 10.14 to 10.22.

from the perspective of fiscal cost. At the same time, the benefits to the public that charities provide appear to have been overlooked, as has the loss to the public of those benefits if charities are forced to close through being unable to access funding due to an inability to gain registered charitable status. Similarly, the fiscal costs involved in trying to “work around” the consequences of the current narrow approach, such as those involved in the social housing saga decision, also appear to have been overlooked.¹²⁰ The net fiscal effect from interpreting the definition of charitable purpose in a manner more consistent with the community’s expectations may in fact be positive. The point is that the empirical analysis has not been done.

124. There also appears to be an assumption that interpreting the definition of charitable purpose in a manner more consistent with the community’s expectations would result in a “widening” or a “liberalisation” of the definition. This assumption overlooks the fact that it is the interpretation taken by the Charities Commission, and continued by the Department of Internal Affairs and the Charities Registration Board, that has changed the law, narrowing the definition of charitable purpose without mandate, as discussed above.
125. Further still, the definition of charitable purpose is not an appropriate tool for addressing “fiscal consequences”. As the High Court has noted, Parliament has seen fit, in section 5 of the Charities Act, to adopt the common law definition of charitable purpose. To the extent that Parliament has elsewhere legislated so that taxation consequences are determined by reference to charitable status, “those consequences must follow the application of the common law principles which govern charitable status. The taxation consequences should not play a part in the application of those common law principles”.¹²¹
126. Finally, to not conduct the much-anticipated review on the basis of a controversial and hotly-contested decision to disestablish the Charities Commission was merely to add insult to injury.
127. The net result is a framework of regulation that appears, in practice, to be materially hindering, rather than supportive of, the New Zealand charitable sector. The position falls in sharp contrast to the following comments made by the Minister on the 3rd reading of the original Charities Bill:¹²²

The establishment of the Charities Commission will significantly improve the current framework under which charities operate. It will provide the Government, the sector and the public with more comprehensive information about the charitable sector. From the Government’s perspective, that information will be utilised to assess whether its support for the charitable sector is as well targeted as it can be or whether changes should be made.

For the sector, the information on the register is likely to prove to be useful in a number of ways – for example, as a means of tracking funding trends within the sector, which may help organisations to develop more effective fundraising campaigns, or for determining what service providers are established in a particular locality. The creation of the commission will also allow the public to undertake closer scrutiny of all organisations, purposes, and activities, and the way in which those are delivered to the

¹²⁰ See discussion in Barker, *Fiscal consequences*, The New Zealand Law Journal, April 2016 at 102.

¹²¹ *Queenstown Lakes Community Housing Trust* [2011] 3 NZLR 502 (HC) at [78].

¹²² Charities Bill 3R (12 April 2005) 625 NZPD 19974 per Hon Judith Tizard, Associate Minister of Commerce.

public. It should help to increase public trust and confidence in the charitable sector.

...Charities make an important contribution to the social wellbeing of many New Zealanders, by providing valuable services that help to strengthen and support local communities. The Government recognises and values that work.

The Charities Bill is a significant step forward for the New Zealand charitable sector. As a means to increase the sector's public accountability and transparency, it represents a positive move toward helping to develop a culture of philanthropy and giving in this country. The establishment of the commission is one of a number of projects that the Government is advancing to **strengthen its relationship with the community and voluntary sector**. The passing of this bill will help to ensure that New Zealand's charitable sector is able to **operate effectively and efficiently to deliver important services for the betterment and benefit of our communities**.

[Emphasis added]

The Statutes Amendment Bill

128. Against that background, on 9 December 2015, the Statutes Amendment Bill received its first reading and was referred to the Government Administration Select Committee, with submissions due by 29 January 2016.

129. This bill contained proposals to amend 28 Acts, including the Charities Act. Without warning, the bill proposed the following amendments to the Charities Act:

Clause 11 amends section 16(2)(c) so that a person cannot be an officer of a charitable entity if he or she has been convicted of an offence under section 143B of the Tax Administration Act 1994. Section 143B of the Tax Administration Act 1994 is concerned with tax evasion offences. Such offences are similar to the other disqualifying offences specified in section 16(2)(c).

Clause 12 amends section 18 so that an application for registration as a charitable entity will be treated as withdrawn if an applicant fails to respond within the requisite time frame to a request for further information or documentation or to a notice from the chief executive of any matter that might result in the application being declined. This amendment will reduce the administrative burden for the chief executive of processing applications where there has been no response within the requisite time frame and will ensure that the Board only needs to make decisions about complete applications.

Clause 13 amends section 61(1)(a) to reflect the appeal right given in section 59. Section 59 relates only to decisions of the Board, and not to decisions of the chief executive

130. The first proposal would bring the Charities Act into line with some, but not all, of the disqualifications proposed in clause 39(2)(e) of the Exposure Draft Incorporated Societies bill.¹²³

131. The second proposal would provide charities with only 20 working days to respond to a request for further information in the context of an application for registration. Proposed new section 18(3A) would permit the chief executive to allow a longer period at the request of an applicant. However, given that the Court of Appeal has confirmed that charities applying for registration must provide information as if they were preparing for a High Court trial (as discussed above), a 20-working day starting

¹²³ <http://www.mbie.govt.nz/info-services/business/business-law/incorporated-societies/incorporated-societies-bill-exposure-draft>.

point seems very short (particularly given the length of time it can take the charities regulator to respond to a charity, which can extend to months and even years). Given the difficulties that have already been experienced with the 20 working day timeframe set out in section 59(2)(a),¹²⁴ the starting point for treating applications as withdrawn should be at least 6 months. Section 59(2)(a) should be similarly amended.

132. The third proposal would remove charities' ability to appeal decisions of the Department of Internal Affairs. This would result in a significant derogation of charities' ability to appeal decisions of the charities regulator that would be entirely inconsistent with the original intention of the Charities Act, as discussed above. It is extraordinary that an amendment of this nature should be proposed for inclusion in a statutes amendment bill. Items included in a statutes amendment bills are supposed to be minor, non-controversial and technical that do not affect the substance of the law or people's rights and obligations. We welcome its removal to the Charities Amendment Bill and submit that it should not proceed at all, for the reasons discussed above.

¹²⁴ See for example *National Council of Women of New Zealand Incorporated v Charities Registration Board*; *National Council of Women of New Zealand Incorporated v Commissioner of Inland Revenue* [2015] 3 NZLR 72 (HC) and *National Council of Women of New Zealand Inc v Charities Registration Board* (2014) 26 NZTC 21075 (HC).