



## What is the best structure for the agency(s) that administer charities' legislation in Aotearoa New Zealand?

**Purpose:** To undertake a co-design process focussed on designing the ideal structure for the agency(s) that administer charities-related legislation in Aotearoa New Zealand.

**Long term goal:** A system which strengthens the for-purpose sector, facilitates charitable work and maximises the potential of charities in Aotearoa New Zealand.

### Definitions:

**Board:** the Charities Registration Board Te Rātā Atawhai, a board of 3 persons appointed by the Minister for the Community and Voluntary Sector responsible for making decisions relating to the registration and deregistration of charities.

**Charitable sector/charities:** the concept of charity draws on centuries of case law. Interpreted too narrowly, it evokes Victorian paternalistic, colonialist concepts of handouts to the poor. However, the concept of charity is arguably much wider, strengths-based, and a key aspect of social capital and the wellbeing of New Zealanders.

**Charitable work:** work carried out by charities in furtherance of their charitable purposes.

**Charities Act:** the Charities Act 2005, which set up a registration, reporting, and monitoring system for charities. There are currently approximately 27,000 charities registered under the Charities Act, all of which are required to provide comprehensive, tiered, annual information under financial reporting rules introduced in 2015.

**Charities Commission:** the body originally established to administer the Charities Act, originally structured as a Crown agent, but changed to that of an autonomous Crown entity during Select Committee consideration of the original Charities Bill in 2004/05. The Charities Commission was disestablished in 2012 and its functions transferred to Charities Services and the Charities Registration Board.

**Charities Services:** the Department of Internal Affairs - Charities Services Ngā Rātonga Kaupapa Atawhai, a business unit within DIA, currently responsible for administering the Charities Act.

**Co-design process:** A design development process involving stakeholders to ensure the results meet their needs and are usable.

**DIA:** Department of Internal Affairs.

**IRD:** Inland Revenue Department.

**Sprint:** The term used for the co-design process – from *Sprint: How to Solve Big Problems and Test New Ideas in Just Five Days* by Jake Knapp. At the heart of the process, which involves ideating, brainstorming and testing, is defining problems in terms of who needs what from the solutions.

## The current state

The Charities Act is currently administered by the Charities Services, with registration decisions made by the Charities Registration Board. The Board is required by legislation to be independent,<sup>1</sup> and Board decisions are published on Charities Services' website.<sup>2</sup> However, in practice, most decisions are made by Charities Services under delegation from the Board, with very little transparency regarding Charities Services' decisions.

## The problem(s)

When the Charities Commission was established under the Charities Act in 2005, it had been almost 20 years' in gestation.<sup>3</sup> The structure of a Charities Commission was chosen over a business unit, or a semi-autonomous body, within an existing government department, because the latter would: (i) provide the charitable sector with less opportunity to provide feedback; (ii) "fail to adequately recognise the importance and independence of the charitable sector"; and (iii) would not have "sufficient status and independence to gain the support and sense of ownership required from the charitable sector". These factors would in turn impact on its role: "the costs of monitoring and enforcement are likely to be less if the sector supports and has confidence in the organisation".<sup>4</sup>

The independence of the Charities Commission was fundamental to the original agreement with the charitable sector when the Charities Act was introduced in 2005.<sup>5</sup>

In 2012, the Charities Commission was disestablished by the National-led Government ("**the 2012 reform**"), on the basis 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".<sup>6</sup> The 2012 reform was very controversial and ultimately passed by only 1 vote: the select committee noted strong concerns that the 2012 reform would compromise the independence and integrity that the Charities Commission had provided, that charities-related functions would be less accessible to the public, and that charities sector work would be carried out less transparently.<sup>7</sup> The decision-making framework set up by the 2012 reform is unusual: it grafted on to the original Charities Commission framework an additional Board structure that appears to have been based on the Gambling Commission.

While there is no wish to visit the shortcomings of the legal framework on Charities Services unduly, a question does arise as to why and how such a narrow approach to the definition of charitable purpose came to be adopted by Charities Services: the pre-Charities Act definition of charitable purpose was acknowledged to be very wide,<sup>8</sup> and case law has made it clear the Charities Act was not intended to change the definition.<sup>9</sup> Charities Services' current approach to the definition inhibits innovation and causes many worthy charities that meet all the legal requirements to fail to gain registration; this in turn has a consequential "chilling effect" on charitable work, with many charities self-censoring or limiting their activities for fear of losing registration. While the Board was intended to provide an independent check on Charities Services' decision-making, lack of resourcing, and a framework

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<sup>1</sup> Section 8(4)(a) of the Charities Act.

<sup>2</sup> <https://www.charities.govt.nz/charities-in-new-zealand/legal-decisions/view-the-decisions/>.

<sup>3</sup> See: *Report on the Charitable Trusts Act 1957*, Property Law and Equity Reform Committee, February 1979; Report of the Working Party on Charities and Sporting Bodies to the Ministers of Finance and Social Welfare, November 1989; *Tax and charities: A government discussion document on taxation issues relating to charities and non-profit bodies*, IRD, June 2001 ("**Tax and charities, June 2001**"); *The taxation of Māori organisations; a government discussion document*, IRD, August 2001; Report of the Working Party on Registration, Reporting and Monitoring of Charities, February 2002 ("**the February 2002 report**") and their Second Report, March 2002.

<sup>4</sup> February 2002 report (the precursor to the Charities Act 2005), pp9 and 11.

<sup>5</sup> [Supplementary Order Paper No 32, Crown Entities Reform Bill, 22 May 2012](#) at 1.

<sup>6</sup> See <http://www.scoop.co.nz/stories/PA1105/S00611/government-reviews-more-state-agencies.htm> and <http://www.beehive.govt.nz/release/reduction-state-agencies-confirmed>.

<sup>7</sup> See Crown Entities Reform Bill 333-2 [Select Committee Report](#) 30 March 2012, pages 4-5.

<sup>8</sup> See for example *Tax and charities June 2001*, paras 4.1, 4.2, 5.1 and 5.11.

<sup>9</sup> *Re Greenpeace of New Zealand Inc* [2015] 1 NZLR 169 (SC) at [16]-[17].

whereby Charities Services provides secretarial and administrative support to the Board (section 8(6) of the Charities Act), means this may be difficult in practice.<sup>10</sup>

When the Charities Commission was disestablished, all of the accountability mechanisms provided by the Crown Entities Act 2004, such as a requirement to report annually against a statement of intent, were removed. Charities Services is now subject to almost no accountability mechanisms, beyond passing reference in a 193-page DIA [annual report](#). Charities Services prepares its own “[annual review](#)”, but such document contains only the information Charities Services chooses to include.

In addition, it is not clear that the new framework has saved any costs, as can be seen, for example, by the amount of litigation currently being experienced.

Another difficulty is that the Minister receives advice directly from Charities Services, but there is no formal mechanism by which the Minister might receive independent advice from the charitable sector itself (such as by means of an Advisory Board). When issues relating to the charitable sector arise, such as Covid-19, it is not clear who is responsible for advocating on behalf of the sector to government. Similarly, as seen following the mosque attacks,<sup>11</sup> there appears to be no body able to “speak up” on behalf of the sector, in contrast, for example, to Australia.<sup>12</sup> Many in the sector are also calling for more education and support. A stronger voice for the charitable sector would likely be beneficial.

### **A case for change?**

It was Labour Party policy for the 2017 election to consult with the community and voluntary sector on whether the disestablishment of the Charities Commission and transfer of its functions to the DIA has resulted in effectiveness and improved services and information for the sector. However, consideration of the independence of the decision-maker was only touched on in the DIA’s February 2019 discussion document.<sup>13</sup> Even so, about 2/3 of submitters asked for Charities Services to be restructured as a single entity, outside of government.<sup>14</sup>

There is precedent for the changes made in the 2012 reform to be revisited. The Mental Health Commission, which was disestablished at the same time as the Charities Commission,<sup>15</sup> has recently been reinstated, as the Mental Health and Wellbeing Commission, and structured as an independent Crown entity<sup>16</sup> (in contrast to its previous structure of an autonomous Crown entity).<sup>17</sup>

### **Challenge**

Given that the current legal framework may be presenting barriers to charitable work and its potential, and given that there is likely value in the charitable sector having a strong voice, **what is the best structure for the agency(s) that administer charities’ legislation in Aotearoa New Zealand?**

*Before the sprint process, please think about and formulate your own ideas and answers to this key question.*

*Please come to the sprint process prepared to share, and even advocate for, your perspectives, but also be open to other participants’ perspectives.*

<sup>10</sup> See for example: <https://legalwiseseminars.com.au/nz/significant-issues-with-review-of-charities-act-2005/>.

<sup>11</sup> <https://www.stuff.co.nz/national/christchurch-shooting/113813526/victim-support-reveals-final-payments-to-people-affected-by-christchurch-mosque-attack>

<sup>12</sup> <https://www.theaustralian.com.au/commentary/bushfires-generosity-will-not-be-betrayed-by-charities/news-story/1e5d7d8d68809d2c0285fd817b4ac064>.

<sup>13</sup> [Discussion document](#), pages 29-30.

<sup>14</sup> See the [summary of submissions](#), pages 34-35.

<sup>15</sup> See Part 2 of the Crown Entities Reform Bill 332-1 and the Mental Health Commission Amendment Act 2012.

<sup>16</sup> See the Mental Health and Wellbeing Commission Act 2020.

<sup>17</sup> See Mental Health Commission Act 1998 and schedule 1 Part 2 of the Crown Entities Act 2004.