

## Challenge statement: what should be the definition of charitable purpose in contemporary Aotearoa New Zealand?

**Purpose:** To undertake a co-design process focussed on the critical elements of an ideal definition of charitable purpose for contemporary 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.

### The current state:

Society can be thought of as having four distinct but mutually dependent sectors: a private household sector, and three public sectors: the economy/business, the polity/government, and the non-profit/nongovernmental sector, of which the charitable sector is a subset. One question is how the charitable sector should be distinguished from the business sector on the one hand, and the governmental sector on the other.

In a recent speech to the Charity Law Conference, Justice Stephen Kós QC, President of the Court of Appeal, commented that “Courts have made something of a hash of things” in this area, and referred to “the familiar story of the common law seeking to give definition to Equity, and then making a mess of the exercise”. His Honour concluded that Equity must “grasp the nettle and rediscover a cogent, cohesive theory of just what it means, in this century, to be a charity”, noting that the public benefit test will continue to depend on evidence if the task falls to the Courts (see <https://www.courtsofnz.govt.nz/assets/speechpapers/Murky-Waters-Muddled-Thinking-Charities-and-Politics.pdf> 4 November 2020 at [33] and [35]).

### Registration under the Charities Act

Registration under the Charities Act is the gateway to a number of privileges:

- (i) Tax privileges (such as income tax exemption and donee status) are increasingly being restricted to registered charities only.
- (ii) Funding – many philanthropic funders, and many government agencies engaging contractors, require an entity to be registered as a charity as a condition of receiving funding.
- (iii) Discounted goods or services from corporates/businesses.
- (iv) Registered charitable status can give an air of credibility and respectability, which can be critical in attracting volunteer support.

The privileges are so significant that it can be very difficult for an entity to exist if it does not have registered charitable status. Australia stratifies its tax privileges: all registered charities in Australia gain access to income tax exemption, but its equivalent of donee status is more tightly restricted.

### The charitable purposes test

In order to qualify for registration under the New Zealand Charities Act, the purposes of an entity must be charitable: in other words, the definition of charitable purpose is the gateway to registration and its associated privileges.

**Section 5 of the Charities Act currently defines charitable purpose inclusively by reference to the four “heads” of charity: the relief of poverty, the advancement of education, the advancement of religion, and other purposes beneficial to the community.** This statutory definition imports the common law understanding of “charitable purpose”. The common-law definition of “charity” developed in the context of trust law, where a charitable purpose trust is an exception to the general rule that a purpose trust is invalid. The trust law question therefore focuses on charitable purposes, not activities.

It is well-established that the Charities Act did not change the pre-existing common law definition of charitable purpose, and that the pre-existing case law remains relevant. That pre-existing case law includes the unanimous decision of the Court of Appeal in *Latimer v Commissioner of Inland Revenue* [2002] 3 NZLR 195 (CA), where a 2-step test for determining whether a purpose is charitable was set out at [32]:

- (i) first, does the purpose operate for the public benefit;
- (ii) second, if so, is the purpose charitable, in the sense of falling within the spirit and intendment of the preamble to the Statute of Charitable Uses 1601 (43 Eliz 1 c4) (“**the preamble**”).

**The public benefit test**

The first step, the “**public benefit test**”, is not directly referred to in the statutory definition, but is a key element of the test in the common law. Many comparable jurisdictions have codified this public benefit requirement in their statute (including Australia, England and Wales, Ireland, Scotland and Northern Ireland).

The public benefit test comprises two parts: a “benefit” limb, and a “public” limb. It asks, firstly, whether the purpose is *beneficial* to the community, and secondly whether the class of persons eligible to benefit constitutes the *public*, or a sufficient section of the public.

In New Zealand, purposes for the relief of poverty, the advancement of education and the advancement of religion are presumed to meet the public benefit test. England and Wales, Scotland and Northern Ireland have removed this presumption by statute.

Otherwise, whether a purpose operates for the benefit of the community is a **question of fact**, to be determined, on a case by case basis, by forming an opinion on the *evidence*. Importantly, incidental private benefits, whether direct or indirect, do not disqualify a purpose from meeting the public benefit test. Wider indirect public benefits, and also any detriments, can and should be taken into account. Australia has codified these principles in its legislation.

Recognising that findings of fact are critical in determining whether a purpose operates for the public benefit, all comparable jurisdictions (with the notable exception of Canada) provide for first instance oral hearings of evidence, where witnesses can give evidence orally and be available for cross-examination. Many jurisdictions also provide for a specialist charities tribunal to hear appeals under charities legislation (for example, England and Wales, Ireland and Northern Ireland).

However, the fact that a purpose is found to operate for the benefit of the public has never been sufficient to qualify a purpose as charitable. The purpose must also satisfy the second step, that is, it must be “charitable” in the sense of falling within the spirit and intendment of the preamble.

**The spirit and intendment test**

The requirement to fall within the spirit and intendment of the preamble is an equitable principle that does not mean quite what it says: what must be regarded is not the wording of the preamble itself, but the effect of decisions given by the courts as to its scope. In other words, a purpose simply has to be charitable in the same sense.

A purpose may satisfy the spirit and intendment test by analogy with the purposes set out in the preamble, or by analogy with purposes previously held to be within the spirit and intendment of the preamble and charitable. This analogy upon analogy approach has the tendency to expand the concept of charitable purpose over time. An evolving concept of charity is helpful, as it allows charities law to accommodate new social needs as old ones become obsolete or satisfied. By 1968, the gradual extension by analogy had proceeded so far that there were few modern reported cases where a clearly specified object for the benefit of the public at large and not of individuals was *not* held to be within the spirit and intendment of the preamble. Prior to the Charities Act, it was accepted law in New Zealand that, even in the absence of an analogy, a purpose that met the public benefit test was *presumed* to be within the spirit and intendment of the preamble, and therefore charitable, in the absence of any ground for holding otherwise. This principle is sometimes referred to as the “presumption of charity”, but it is perhaps more accurately termed a “presumption of meeting the spirit and intendment test”. **In summary, the two-step test in New Zealand for whether a purpose is charitable might be conceptualised diagrammatically as follows:**

<p><b>1. Public benefit test:</b> does the purpose operate for the benefit of the public?</p> <p>[Note: there is a presumption of public benefit for the first 3 heads of charity]</p>	<p><b>Benefit limb:</b> is the purpose beneficial to the community?</p>
	<p><b>Public limb:</b> does the class of persons eligible to benefit constitute the public or a sufficient section of the public?</p>

<p><b>2. Spirit and intentment test:</b> does the purpose fall within the spirit and intentment of the preamble?</p> <p>[Note: the first 3 heads of charity are accepted as meeting this test]</p>	<p><b>By analogy:</b> the spirit and intentment test can be satisfied by demonstrating that the purpose is analogous to a purpose set out in the preamble, or to a purpose previously found to be charitable.</p>
	<p><b>By presumption of charity:</b> even in the absence of analogy, a purpose that is found to operate for the benefit of the public is presumed to fall within the spirit and intentment of the preamble in the absence of good reason for holding otherwise.</p>

**The problem:**

The definition of charitable purpose is open to interpretation, and can be interpreted in two key ways: narrowly or widely. Interpreted too narrowly, it evokes old-fashioned, Victorian, paternalistic, colonialist concepts of handouts to the poor, and acts as a handbrake on innovative charitable work, contributing to charities being seen as a symptom of the problem rather than a key part of the solution. Interpreted more widely, the concept of charity can be strengths-based, capable of nurturing innovative solutions to intractable problems, and of devolving decision-making to those closest to the problems. Communities know best what communities need. Interpreted this way, charities can be a “fence at the top of the cliff”, rather than limited to being an ambulance at the bottom, and a key aspect of social capital and the wellbeing of New Zealanders.

Prior to the Charities Act, the definition of charitable purpose in New Zealand was acknowledged to be very wide. However, since the Charities Act has come into force, it has been interpreted, first by the Charities Commission, and even more so by Charities Services and the Board, very narrowly.

A key difficulty relates to the test: there is not currently agreement as to what test is to be applied, or what the test is to be applied to. Purposes and activities are conflated and treated almost interchangeably. The search for “bright lines” in a nuanced, fact-specific and equitable area of law is leading to subjectivity, complexity, uncertainty, inconsistency and unfairness. The net result is that many worthy charities that meet all the legal requirements for registration are not able to gain registration, or have felt obliged to curtail their charitable work for fear of losing registration. Specific areas of difficulty include social housing, advocacy, sport, economic development, social enterprise, art, but there are many others. The issue is exacerbated because of difficulties associated with appealing decisions under the Charities Act as it is currently structured.

**International comparison**

Other countries, such as Australia, England and Wales, Scotland, Northern Ireland and Ireland, have set out an expanded list of charitable purposes in their statutes, including “the advancement of amateur sport” (England and Wales, Scotland and Northern Ireland) and “the advancement of human rights” (Australia, England and Wales, Northern Ireland and Scotland). A summary of these expanded statutory heads is set out in **Appendix A**.

These countries have also set out the test for whether a purpose is charitable in their legislation, including when a purpose might *not* be charitable, for example because it is unlawful, or contrary to public policy (Australia and Ireland). There also appears to be international consensus on two key points:

- (i) Charities cannot be **partisan**, in the sense of promoting or opposing a particular political party, elected official, or candidate for political office.
- (ii) Charities must by definition be subject to the “**non-distribution constraint**”: that is, while charities can make profits, and pay arm’s length market value rates for goods and services rendered, they may not distribute surplus profits to owners or managers. Instead, charities must retain or reinvest their profits. Australia, Ireland and Scotland have set this requirement out in their legislation also.

**Challenge**

Given that the current legal framework and the way it is being applied may be presenting barriers to charitable work and its potential, **what should be the definition of charitable purpose in contemporary Aotearoa New Zealand, and how should it be determined?**

*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.*

## Appendix A: summary of expanded statutory heads in comparable jurisdictions

Australia	England and Wales	Ireland	Scotland	Northern Ireland
Prevention or relief of poverty	Prevention or relief of poverty	Prevention or relief of poverty or economic hardship	Prevention or relief of poverty	Prevention or relief of poverty
Advancing education	Advancement of education	Advancement of education	Advancement of education	Advancement of education
Advancing religion	<p>Advancement of religion</p> <p>“religion” includes—</p> <p>(i) a religion which involves belief in more than one god, and</p> <p>(ii) a religion which does not involve belief in a god</p>	<p>Advancement of religion</p> <p>a gift is not a gift for the advancement of religion if it is made to or for the benefit of an organization or cult— (a) the principal object of which is the making of profit, or (b) that employs oppressive psychological manipulation— (i) of its followers, or (ii) for the purpose of gaining new followers</p>	<p>Advancement of religion</p> <p>The advancement of any philosophical belief (whether or not involving belief in a god) is analogous</p>	<p>Advancement of religion</p> <p>This includes:</p> <p>(i) a religion which involves belief in one god or more than one god, and</p> <p>(ii) any analogous philosophical belief (whether or not involving belief in a god)</p>
Advancing health	<p>Advancement of health or the saving of lives</p> <p>“the advancement of health” includes the prevention or relief of sickness, disease or human suffering</p>	<p>Promotion of health, including the prevention or relief of sickness, disease or human suffering</p>	<p>Advancement of health</p> <p>The saving of lives</p> <p>the advancement of health” includes the prevention or relief of sickness, disease or human suffering</p>	<p>Advancement of health or the saving of lives</p> <p>“the advancement of health” includes the prevention or relief of sickness, disease or human suffering</p>
Advancing social or public welfare	<p>The relief of those in need because of youth, age, ill-health, disability, financial hardship or other disadvantage</p> <p>This includes relief given by the provision of accommodation or care to the persons mentioned in that paragraph</p>	<p>Advancement of community welfare including the relief of those in need by reason of youth, age, ill-health, or disability</p>	<p>The relief of those in need by reason of age, ill-health, disability, financial hardship or other disadvantage</p> <p>This includes relief given by the provision of accommodation or care</p>	<p>The relief of those in need by reason of youth, age, ill-health, disability, financial hardship or other disadvantage</p> <p>This includes relief given by the provision of accommodation or care to the persons mentioned in that paragraph</p>
	<p>It is charitable to provide, or assist in the provision of, facilities for—</p>	<p>The integration of those who are disadvantaged, and the promotion of their full</p>	<p>The provision of recreational facilities, or the organisation of recreational activities, with the object of</p>	

	(a)recreation, or (b)other leisure-time occupation,  if the facilities are provided in the interests of social welfare.	participation, in society	improving the conditions of life for the persons for whom the facilities or activities are primarily intended  Applies only in relation to recreational facilities or activities which are—  (i) primarily intended for persons who have need of them by reason of their age, ill-health, disability, financial hardship or other disadvantage, or  (ii) available to members of the public at large or to male or female members of the public at large,	
Advancing culture	Advancement of the arts, culture, heritage or science	Advancement of the arts, culture, heritage or sciences	Advancement of the arts, heritage, culture or science	Advancement of the arts, culture, heritage or science
	The advancement of citizenship or community development  This includes:  (i) rural or urban regeneration, and  (ii)the promotion of civic responsibility, volunteering, the voluntary sector or the effectiveness or efficiency of charities	Advancement of community development, including rural or urban regeneration  Promotion of civic responsibility or voluntary work  Advancement of the efficient and effective use of the property of charitable organisations	The advancement of citizenship or community development,  This includes—  (i) rural or urban regeneration, and  (ii) the promotion of civic responsibility, volunteering, the voluntary sector or the effectiveness or efficiency of charities	The advancement of citizenship or community development  This includes:  (i)rural or urban regeneration, and  (ii)the promotion of civic responsibility, volunteering, the voluntary sector or the effectiveness or efficiency of charities
Promoting or protecting human rights	The advancement of human rights, conflict resolution or reconciliation or the promotion of religious or racial harmony or equality and diversity		Advancement of human rights, conflict resolution or reconciliation,	Advancement of human rights, conflict resolution or reconciliation or the promotion of religious or racial harmony or equality and diversity
Promoting reconciliation, mutual respect and tolerance between groups of individuals		Advancement of conflict resolution or reconciliation  Promotion of religious or racial harmony and harmonious community relations	Promotion of religious or racial harmony,  Promotion of equality and diversity	This includes the advancement of peace and good community relations

	<p><b>Advancement of amateur sport</b></p> <p>“sport” means sports or games which promote health by involving physical or mental skill or exertion</p>		<p>The advancement of public participation in sport</p> <p>“sport” means sport which involves physical skill and exertion</p>	<p>Advancement of amateur sport</p> <p>“sport” means sports or games which promote health by involving physical or mental skill or exertion</p>
Advancing the security or safety of the country or the public	Promotion of the efficiency of the armed forces of the Crown or of the efficiency of the police, fire and rescue services or ambulance services			
Preventing or relieving the suffering of animals	Advancement of animal welfare	Prevention or relief of suffering of animals	Advancement of animal welfare	Advancement of animal welfare
Advancing the natural environment	Advancement of environmental protection or improvement	Protection of the natural environment Advancement of environmental sustainability	Advancement of environmental protection or improvement	Advancement of environmental protection or improvement
Any other purpose beneficial to the general public that may reasonably be regarded as analogous to or within the spirit of the above purposes	Any other purposes that may reasonably be regarded as analogous to, or within the spirit of, any of the above purposes or any purposes which have previously been recognised as charitable	Any other purpose that is of benefit to the community	Any other purpose that may reasonably be regarded as analogous to any of the preceding purposes	Any other purposes that may reasonably be regarded as analogous to, or within the spirit of, any of the above purposes or any purposes which have been recognised under charity law as falling within any of the above
The purpose of promoting or opposing a change to any matter established by law, policy or practice if the change is in furtherance of one of the above purposes				