

What should be the definition of charitable purpose in contemporary Aotearoa New Zealand?

Summary of co-design sprint workshop #2 held on 11-12 March 2021

Charities
LAW REFORM
AOTEAROA NEW ZEALAND

Workshop #2

What should be the definition of charitable purpose in contemporary Aotearoa New Zealand?

Purpose: To undertake a [co-design sprint process](#) focussed on what should be the definition of charitable purpose in 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.

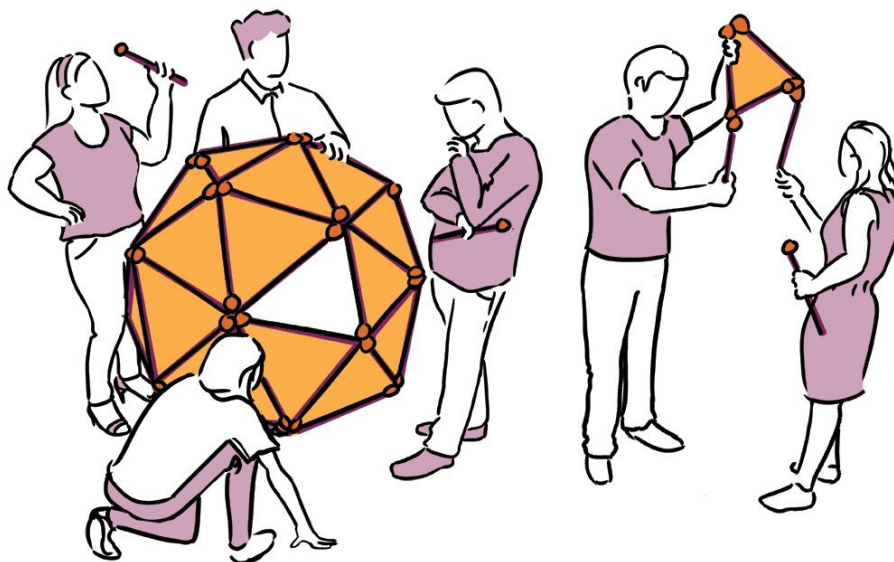
BACKGROUND

What? A workshop was held to co-design the definition of charitable purpose in contemporary Aotearoa New Zealand.

When? Thursday 11 March (in-person) and Friday 12 March 2021 (by Zoom).

Why co-design? Co-design sprints provide an effective and inclusive way of working together focused on action. They allow for a group of people with a diverse range of skills and experiences to come together to collectively problem-solve and create solutions.

Who? 17 sprint participants plus 20 challengers from 3 jurisdictions (New Zealand, Canada and Australia) all with a broad range of experience in the for-purpose sector, including charities, umbrella bodies, students, academics, standard-setters, the legal and accounting professions and others.



THE SPRINT

DAY ONE

Step one: personas

Participants began the day by discussing 5 personas who interact with the charitable sector. Needs and perspectives on the definition of charitable purpose of personas ranging from a registration analyst from the Department of Internal Affairs, to an iwi charity wanting to provide affordable home ownership, to the chairperson of a Christian society, the Minister of the Community and Voluntary Sector, and the general manager of a social enterprise sports charity, were discussed. This process helped view the requirements of the definition of charitable purpose from the perspectives of differing needs.

Step two: designing an ideal definition (in groups)

Sprint participants were then split into 5 different groups to discuss what should be the definition of charitable purpose in contemporary Aotearoa New Zealand. Each group designed an A3 image of their ideal definition, or what they saw as the key components, with the exception of one group which used the "share screen" function on Zoom.

Step three: designing an ideal definition (with everyone)

Each group presented their ideal definition and explained key components, particularly relating to the definition itself but also to the tests to be applied. There was discussion around taking a completely different, human rights-based, approach to the definition of charitable purpose, but there was not consensus around this. Most groups sought to expand the 4 traditional "heads" of charity set out in section 5(1) of the Charities Act 2005 ("**the Charities Act**") (namely, the relief of poverty, the advancement of education, the advancement of religion, and other purposes beneficial to the community) to create new categories, in a similar manner to the approach that has been taken in Australia, England and Wales, Ireland, Northern Ireland and Scotland. Ultimately, commonalities were drawn out and it was decided that one group's suggested definition of charitable purpose would be presented to the challengers.

Step four: challengers

A sprint participant presented this option to 20 challengers who attended by Zoom. They then asked questions of the proposal, such as:

- How do we protect against short-term political interference?
- How do we best ensure the process reflects the Treaty of Waitangi partnership?
- How does the definition sit within the wider context of the Act?
- Will certain terms (eg "faith" and "social enterprise") be defined in the legislation?
- How can this legislation be future-proofed and facilitate innovation?

DAY TWO

Step five: refining an ideal structure

Having reflected on the challengers' questions overnight, the sprint participants met by Zoom the following day to continue discussion about the ideal definition. A key observation was that more consultation with Māori is needed. They went into breakout rooms to consider challengers' questions and how best to move forward. Each group then presented the key points from their discussion back to the cohort. A decision was made to narrow the focus to the definition of charitable purpose itself, without extending to its associated tests. A simplified statutory definition of charitable purpose was then agreed upon to present to the challengers.

Step six: challengers return

A sprint participant presented this simplified definition to 14 challengers who attended by Zoom. The response was that this definition was much-improved and more user-friendly than the current definition. Many noted that the definition sits in a context, and that the independence of the decision-maker is important. The challengers then asked questions of the proposal, such as:

- How do we make sure that the philanthropic/funding community is included?
- Should promoting public giving be a heading eg donor-advised funds?
- Should community development be included as a listed charitable purpose?
- How do we make sure that collective community processes can be supported by charities?

Some larger questions were also raised on the test to be applied, such as:

- What is the relevance of activities in the assessment of whether an entity qualifies for registered charitable status?
- Should we cut ties with the 1601 statute?

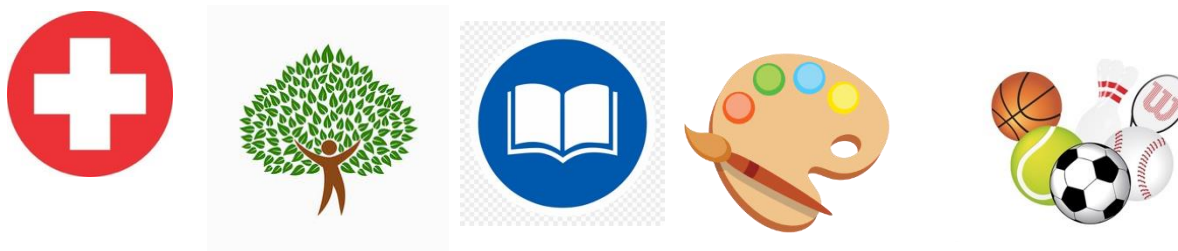
Step seven: next steps and final report

Following further discussion, an updated definition of charitable purpose was collectively agreed upon. Next steps and action points were discussed, including a smaller team that would work on this report, and seeking further input.

THE OUTCOMES

IDENTIFIED KEY FEATURES

There was consensus that the current arrangements were not fit for purpose and that the gateway to registration needs to be inclusive: the principle should be “permissible unless prohibited”, rather than “prohibited unless permissible”. Sprint participants agreed on the importance of enabling communities, and collectively identified and agreed on the following key features of the definition of charitable purpose for contemporary Aotearoa New Zealand:



1. The “heads” of charity in section 5(1) of the Charities Act 2005 need to be expanded. The following list was agreed on:

- The prevention or relief of poverty or hardship;
- The protection and progress of Te Tiriti o Waitangi rights and responsibilities;
- The advancement of education;
- The advancement of faith;
- The advancement of amateur sport;
- The advancement of arts, culture, heritage or science;
- Environmental protection or improvement;
- The advancement of health or wellbeing;
- The advancement of human rights, citizenship or community development; and
- Any other purpose beneficial to the community.

The need for the legislation to be “principles-based” and not too prescriptive was identified. It was agreed that the list should be in primary legislation, and not in underlying regulations or a schedule.

Further guidance will be necessary, however, there must be a clear process by which any guidance around the definition of charitable purpose is subject to sector and public consultation before being finalised.

2. Presumption of public benefit:

In addition to falling within one of the above categories, purposes must also meet the “public benefit” test in order to be considered charitable. The above purposes would be *presumed* to be for the public benefit, with the exception of the final “catch-all” (any other purpose beneficial to the community), where public benefit would not be presumed.

Further discussion is needed around when a purpose might:

- fall within the “catch-all” (currently referred to as the “spirit and intendment test”); and
- meet the public benefit test.

Unlike other jurisdictions, New Zealand does not currently set out the test(s) in the legislation. The sprint participants generally agreed that setting out the test(s) in legislation would be helpful.

3. **The statute should specifically refer to the “non-distribution constraint” as a prerequisite for charitable registration:**

- The distinction between charities running social enterprises, and for-profit entities running social enterprises, is that charities are 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. The sprint participants agreed that New Zealand should do the same.

4. **If the advancement of amateur sport is accepted as a “head” of charity, section 5(2A) of the Charities Act should be repealed:**

- Other countries (England and Wales, Scotland and Northern Ireland) specifically recognise the advancement of amateur sport as a charitable purpose in their statutes. As set out above, the sprint participants agreed that New Zealand should do the same.
- “Sport” is defined to mean sports or games which involve physical or mental skill or exertion.
- Section 5(2A) of the New Zealand Charities Act (inserted by Statutes Amendment Bill in 2012) provides that “the promotion of amateur sport may be a charitable purpose if it is the means by which a charitable purpose...is pursued”. This provision would be superseded by the recognition of the advancement of amateur sport as a charitable purpose in its own right, and the sprint participants agreed that section 5(2A) should therefore be repealed.

FURTHER DISCUSSION

The following points were identified as requiring further discussion:

- A key aspect of the definition of charitable purpose relates to the test to be applied, in particular the public benefit test, and whether we should retain the reference to the **spirit and intendment of the preamble** to the Statute of Charitable Uses 1601 (43 Eliz 1 c4). There were differing views as to whether the reference to the preamble was useful or necessary. The workshop did not focus specifically on the tests to be applied in determining whether a purpose is charitable: more discussion about the test(s) to be applied is needed.

- It was acknowledged that the definition of charitable purpose does not exist in isolation. It is essential to clarify what exactly we are wanting this legislation to do. Also relevant in this context are the outcomes of workshop #1, where the need for an **independent decision-maker** under the Charities Act was identified, as well as the need for a better appeal system, that is more accessible and that enables oral hearings of evidence.
- While the **primacy of purposes** in assessing whether an entity qualifies for registered charitable status was acknowledged, the relevance of activities, as well as the monitoring role of the registration body, requires further clarification/discussion.

In terms of the expanded list of statutory heads, the following areas may need further consideration:

- Does the above list adequately cater for **public infrastructure**?
- Should the list specifically refer to **technology**?
- Does it need to refer to the promotion of **civic responsibility, volunteering and the voluntary sector** (as is currently the case in England and Wales, Scotland and Northern Ireland)? Is this adequately covered by the “human rights, citizenship and community development” head?
- Should the reference to the promotion of amateur sport include a reference to **“recreation”** (the advancement of amateur sport and recreation)?

CONSULTATION

We want to hear your views on the above proposal, in particular:

Consultation questions:

- What is working and not working with the current definition?
- What feedback do you have on the suggested expanded list of “heads” of charity?
 - o Do you agree with the proposed list?
 - o What should be included/excluded?
- In particular:
 - o What are your views on replacing the “advancement of religion” with the “**advancement of faith**”?
 - o What are your views on including the “**advancement of amateur sport**” and deleting section 5(2A)?
- More work and consultation are needed from a Te Ao Māori perspective – how can we make this an ambicultural¹ journey?
- Should the tests (the public benefit test and the spirit and intendment test) be set out in legislation? In particular, should New Zealand retain the reference to the spirit and intendment of the 1601 preamble:
 - o Does it constrain us to anachronistic colonialist interpretations?
 - o Or is it what in fact preserves the essence and “magic” of charity?
- Should the **non-distribution constraint** be set out in legislation?
- What other thoughts/comments/suggestions do you have?

Please contact us via www.charitieslawreform.nz by **30 June 2021** with any thoughts/comments/suggestions you might have.

¹ Kōrero by Professor Mānuka Henare, Philanthropy New Zealand Summit, 2015: <https://www.youtube.com/watch?v=5plyfMtA8nk>