

24 September 2021

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Dear Grant

**Review of the Charities Act 2005**

1. Thank you for meeting with us on 17 September 2021. We very much appreciate your taking the time to hear our concerns. In case it might be helpful, we provide a summary of the main points we were hoping to make.

*The charitable sector has an important contribution to make*

2. Even by traditional measures, the New Zealand charitable sector is significant with some \$65 billion of assets under management and a contribution to GDP broadly equivalent to that of the construction sector. But charities also provide important benefits in respect of social cohesion and wellbeing, support for the vulnerable and the relief of poverty. This is even more important now, as New Zealand deals with the disruptive effects of COVID-19, many of which will continue to reverberate long after the pandemic has abated.
3. But the sector is inhibited by legislation that too often frustrates rather than facilitates its work – a fact that successive governments have recognised through a series of piecemeal amendments, and which Labour recognised by promising in its 2017 manifesto to conduct an independent, first principles review of the Charities Act 2005.
4. We have supplied a case study at Appendix 1 of how the Act, as interpreted by the then Charities Commission, the Courts and Charities Services, has impeded the sector's ability to provide affordable housing, and how various attempts by both the Clark Government and the Key Government to remedy the problem have, despite a significant investment of officials' time and effort, proved – ultimately – ineffective.

*Comprehensive reform needed to unleash the charitable sector's potential*

5. We understand that Cabinet will make a decision in November 2021 on the Department of Internal Affairs (DIA) review announced by Minister Peeni Henare on 24 May 2018. As members of the Core Reference Group, and based on our experience with the review process to date, including the latest rounds of "targeted consultation", we are concerned that the proposals likely to be put forward by DIA will not only fall badly short of the sector's expectations but will exacerbate existing difficulties.
6. The Charities Act has had a turbulent history. The Bill as first introduced was widely

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regarded as fundamentally flawed and was almost completely rewritten at Select Committee stage with further changes made by Supplementary Order Paper before being passed under urgency through all final stages on one day (12 April 2005).

7. Concerns about “fast law” not making good law were assuaged at the time by then Finance Minister, the late Hon Sir Dr Michael Cullen, indicating that the Charities Act would be subject to a full first principles post-implementation review.
8. Sixteen years later, that is the review we are still waiting for – a theme which featured prominently in the submissions to the current DIA review.
9. As discussed at our meeting with you, we are carrying out a major piece of research, independently funded by the New Zealand Law Foundation, on the topic: “*What does a world-leading framework of charities law look like?*”. Our report is due by November 2021. We hope it will provide an insightful non-government perspective to assist the Government’s deliberations. We ask that you consider our report alongside the advice of the DIA.

### *An independent first principles review*

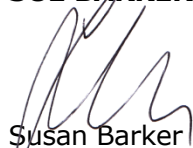
10. It is important that a first principles review be conducted independently of the DIA. Our first choice would be the Law Commission, given that the complexities of legislating in this area have been empirically demonstrated over many years in New Zealand.
11. If the Law Commission is not available, we note that other countries, such as Australia and Northern Ireland, have adopted the multi-disciplinary independent panel model.<sup>1</sup>

### *Conclusion*

12. In our view, getting the legal framework for charities right is one of the most important things we could do as we look to build beyond better in response to COVID-19.
13. Thank you so much again for meeting with us and for considering the above issues. We offer you our continuing support and cooperation for any initiatives which will unleash the charitable sector’s ability to improve social and economic outcomes for Aotearoa New Zealand.

Yours sincerely

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<sup>1</sup> See: <https://treasury.gov.au/publication/p2018-t318031> (Australia) and <https://www.communities-ni.gov.uk/articles/independent-review-charity-regulation> (Northern Ireland). England and Wales appointed an individual (Lord Hodgson): <https://www.gov.uk/government/consultations/charities-act-2006-review>.

### APPENDIX 1 – case study - social housing

The Queenstown Lakes Community Housing Trust (the Trust) was formed by the Queenstown Lakes District Council in 2007 as an independent, not-for-profit community owned organisation to provide affordable housing for the workers Queenstown needed to function effectively. An unusually large number had been leaving the district after 12 to 18 months, citing the high cost of living, particularly accommodation.

The Trust was registered as a charity with the Charities Commission in January 2008 only to be controversially deregistered in 2010, on the basis that assisting people to buy housing resulted in private benefits to individuals – the wider benefit to the community being apparently disregarded.

The Trust appealed to the High Court but the Court upheld the decision of the Charities Commission.<sup>2</sup> (In early decisions under the Charities Act, the Courts appear to have deferred to the Charities Commission as the “specialist body”, rather than embracing their role as the source of the common law definition of charitable purpose).<sup>3</sup>

The Government described the judgment as “arbitrary”<sup>4</sup> but had no clear mechanism of appeal so instead allocated \$6 million of taxpayers’ money to pay the Trust’s income tax liability that arose as a result of the deregistration.<sup>5</sup>

Then, in November 2013, the Government introduced provisions by means of the Taxation (Annual Rates, Employee Allowances, and Remedial Matters) Bill to create a new category of entity (community housing entities) which would have its own specific income tax exemption (Income Tax Act 2007, sCW 42B).

Drafting the work-around became a matter of considerable difficulty, requiring amendment both by the select committee and through SOP before passage in June 2014. Then, before the exemption could be brought into force, eligibility status needed to be specified by regulation – a process which caused such delay that further remedial legislation was required.

This was introduced in February 2015 and took the form of a bill to defer application of section HR 12 of the Income Tax Act 2007 (the new “deregistration tax”) for charities whose purposes or activities were “predominantly the provision of housing”.

The deferral was intended to allow more time for Charities Services to complete a review of the charitable status of every housing charity in New Zealand in light of the *Queenstown Lakes’* decision.

In November 2015, following more than 12 months’ work by officials from the Ministry of Business, Innovation and Employment, Treasury and IRD, then Minister of Revenue, Hon Todd McLay, introduced an SOP proposing further substantive amendments to the community housing provisions. The accompanying regulatory impact statement noted that “although this approach will provide much needed certainty for potentially affected providers, there will be no opportunity to consult formally on the proposed changes”.

The Bill finally passed into law on 24 February 2016, over eight years after the Trust was originally registered.

#### *Comment*

A specific income tax exemption, while welcome, is unfortunately a “second-best” option,

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<sup>2</sup> *Re Queenstown Lakes Community Housing Trust* [2011] 3 NZLR 502 (HC).

<sup>3</sup> See the discussion in *Canterbury Development case*, New Zealand Law Journal August 2010 at 248.

<sup>4</sup> Michael Fox *Housing charity hit by tax bill*, Fairfax media, 28 May 2014.

<sup>5</sup> *ibid*

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as without registered charitable status, housing charities are generally unable to access the philanthropic funding they need to fulfil their charitable purposes.

We are not aware of any charity, other than the Trust, that has made use of the new exemption.

Instead, charitable community housing organisations are forced to artificially curtail their efforts to help people into affordable housing, especially home ownership which provides a permanent pathway out of poverty, for fear of putting their charitable registration at risk.

The social housing saga highlights the difficulties inherent in trying to fix problems at the level of symptom, rather than cause.

Had the definition of charitable purpose been interpreted so as to properly acknowledge the wider public benefits of the Trust's work, as was clearly required by pre-Charities Act Court of Appeal authority,<sup>6</sup> the Trust would not have been deregistered, Charities Services' review of social housing charities would not have been undertaken, enormous amounts of taxpayer and charitable funds would not have been wasted, and arbitrary barriers would not now be placed in the way of charities helping people into affordable housing, just when we need it most.

Charities Services and the Charities Registration Board state that the problem is now "fixed", however that is clearly not the case as they continue to overlook the wider public benefits provided by affordable housing.

There should be an inquiry into how Charities Services and the Charities Registration Board are interpreting the definition of charitable purpose. At the very least, the definition needs to be considered as part of a proper first principles post-implementation review of the Charities Act.

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<sup>6</sup> See for example *Commissioner of Inland Revenue v New Zealand Council of Law Reporting* [1981] 1 NZLR 682 (CA); *Commissioner of Inland Revenue v Medical Council of New Zealand* [1997] 2 NZLR 297 (CA); and *Latimer v Commissioner of Inland Revenue* [2002] 3 NZLR 195 (CA).