



Submission to: the Productivity Commission

On: the September 2022 Interim report *A fair chance for all – breaking the cycle of persistent disadvantage*

7 November 2022

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INTRODUCTION

1. This submission is from **SUE BARKER CHARITIES LAW**, PO Box 3065, Wellington 6140
2. We would welcome the opportunity to discuss our submission with the Commission. Our contact details are:



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ABOUT SBCL

3. Sue Barker Charities Law is a boutique law firm specialising in charities law and public tax law. Since its founding in 2012, the firm has won a number of awards, including Boutique Law Firm of the Year at the New Zealand Law Awards.

The firm's director, Sue Barker, is a director of the Charity Law Association of Australia and New Zealand, a member of Charities Services' Sector Group, and a member of the Core Reference Group for the Review of the Charities Act 2005. Sue is a co-author of the text, The Law and Practice of Charities in New Zealand (LexisNexis, 2013), and a contributor to a number of other texts, including Charity Law: Exploring the Concept of Public Benefit (Routledge, 2022); and Regulating Charities: the Inside Story (Routledge, 2017). In 2016, Sue was made an Honorary National Life Member of the National Council of Women of New Zealand Incorporated Te Kauhinerā Wahine o Aotearoa for her work assisting the Council with charities law issues.

In 2019, Sue was awarded the New Zealand Law Foundation International Fellowship Te Karahipi Rangahau ā Taiao, New Zealand's premier legal research award, to undertake research into the question "What does a world-leading framework of charities law look like?". The final report from the Fellowship, entitled Focus on purpose, was released in April 2022 making 70 recommendations for charities law reform in Aotearoa New Zealand. The *Focus on purpose* report is based on 2 years of research, building on more than 2 decades of specialist legal practice in this area. It is also based on consultation interviews conducted with over 145 people from 9 jurisdictions, and a review of each of the 363 submissions made to the Government's review of the Charities Act in 2019.

More information about the research can be found at: www.charitieslawreform.nz.

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

PRIMARY SUBMISSION

1. We welcome the Productivity Commission's Interim report *A fair chance for all – breaking the cycle of persistent disadvantage* (“**the Interim report**”). We agree that system barriers, such as short termism, status quo bias, risk aversion, siloisation and unbalanced power dynamics, as well as the underlying assumptions that give rise to them, are out of step with a wellbeing approach and are holding New Zealand back. We agree that existing funding and accountability mechanisms are designed to support siloed delivery and do not support collaborative initiatives well, and that agencies are too inwardly focused and disconnected from the public.
2. We see these factors playing out on a daily basis in our work as lawyers specialising in the law of charities. The system barriers identified in the Interim report are currently being spread unduly to registered charities through administration of the Charities Act 2005 (“**the Charities Act**”) registration system. Based on our experience over many years, the current settings of the Charities Act, and in particular the way it is being administered, are significant contributing factors to persistent disadvantage in Aotearoa New Zealand, as well as to a loss of social cohesion and social capital, a weakening of our democracy, and a weakening of our culture of volunteering.
3. We agree that transformative change is required if we are to address the complex challenges of our time: our primary submission is that the legal framework for charities must be considered as part of the framework for any such change. It will not be sufficient to wait for administration of the Charities Act to change as part of the overall systems changes proposed: unless corresponding contemporaneous change is made to the legal framework for charities, charities will be thwarted in their ability to implement the innovative, preventative measures required, as doing so will cause their registered charitable status to be put at risk under current settings.

Why charities matter

4. The legal framework for charities matters: it underpins our democracy and goes to the heart of the type of society we want to live in. As noted by Sir Stuart Etherington:¹

It is charity and volunteering that allow [people] to find identity, meaning and purpose, a sense of autonomy, pride and utility. It is often how we find balance in our lives, pursue our passions, or fight for change. And for society at large, it is often how we build stronger communities, give people a say in what happens to them. It is how we provide services that people depend upon, develop new ways of doing things, and nurture the people who will lead our future ... In short, civil society is about creating a better future for all. The world is changed by charity”

5. Despite this, the charitable sector, and the legal framework that it operates in, are consistently overlooked: the charitable sector has been described as “the invisible subcontinent on the social landscape of most countries, poorly understood by policymakers and the public at large, often encumbered by legal limitations, and

¹ Sir Stuart Etherington, former chief executive, National Council of Voluntary Organisations (the umbrella body for the voluntary and community sector in England) 8 January 2019: blogs.ncvo.org.uk/2019/01/08/brexit-then-what-its-time-for-civil-society-to-shape-our-future/.

inadequately utilised as a mechanism for addressing public problems”.²

6. While the 28,000 registered charities in New Zealand are not a homogeneous group, many registered charities carry out social sector commissioning work. As the Interim report notes, current accountability settings are likely to pose a major barrier to implementing Ministers’ intentions for social sector commissioning. This reasoning applies to charities more generally. Current administration of the legal framework for registered charities is a significant additional barrier that requires consideration in these contexts.

The definition of charitable purpose

7. In New Zealand, the gateway to charitable registration is the definition of charitable purpose,³ an equitable trust law concept dating back many centuries. Currently, there are insufficient guardrails in the Charities Act to guide how the definition of charitable purpose should be interpreted. In the hands of a business unit of a government department (Charities Services), this has led to a spread of the current systems barriers of the public management system to the charitable sector, undermining its key role as an important source of renewal in our society.
8. In principle, the definition of charitable purpose turns on the concept of “public benefit”. Whether the definition of charitable purpose should be interpreted narrowly or widely is a manifestation of an underlying clash of paradigms that permeates this area of law.

Underlying clash of paradigms

9. Broadly, one paradigm sees the tax privileges for charities as a “subsidy”, more or less equivalent to a direct grant; decisions to award such a “subsidy” may therefore be based on government perceptions as to what is worthwhile subsidising out of the consolidated revenue fund, rather than whether the thing itself is of public benefit. As such, under this paradigm, charitable funds come to be seen as government funds, and charities come to be perceived and regulated as though they are merely (underfunded) service delivery arms of the state.
10. It should be noted that this approach reflects the policy of the Chinese Communist Party in relation to its 2016 Charity law, a policy which Mark Sidel describes as “more third sector and less civil society”:⁴ this approach is based on a view of the charitable sector as purely service-oriented, with a role limited to taking over social services from government or contracting with government to provide services.
11. However, such a limited conception of charities comes at a cost: combined with a “hunger games” government contracting environment, such conceptions risk spreading bureaucratic risk aversion, and turning charities into pale imitations of the government bureaucracy. It also causes the charities law framework to become focused on restricting tax privileges, rather than on supporting and enabling the work of charities.
12. The other paradigm does not see the tax privileges for charities as a “subsidy”, but

² Dr Lester M Salamon, as quoted by Megan Haddock *Salamon Crafted Lenses to Better See Civil Society – Will we Wear Them?* Nonprofit Quarterly 5 October 2021: nonprofitquarterly.org/salamon-crafted-lenses-to-better-see-civil-society-will-we-wear-them/?mc_cid=8f07978388&mc_eid=7c71b4ef5b.

³ See Charities Act 2005 s 13(1).

⁴ Interview with Mark Sidel, Doyle-Bascom Professor of Law and Public Affairs, University of Wisconsin-Madison (14 January 2021).

rather as an *investment* in an overall system that allows people to manifest important liberal democratic values, such as diversity, pluralism, social tolerance, and freedom of association, in pursuit of public benefit. Under this paradigm, the fact that some individual activities might not be selected for “subsidisation”, in isolation, by the government of the day, is therefore tolerable: some overbreadth is merely the price we pay for an overall system that contributes significantly to our social cohesion, social capital, and wellbeing.

13. This paradigm sees charities’ *independence* as their hallmark, and key to what makes them distinctive and valuable: charities enable people to come together in furtherance of a shared purpose, untethered by electoral cycles and free from the dictates of the median voter. Charities’ independence enables them to take risks, experiment, innovate, and reach into communities in ways that governments cannot. Charities’ independence underpins their advocacy work, which has been critical in many important societal changes that have been achieved over the centuries, including the abolition of slavery, universal suffrage, anti-smoking laws, and many others. This paradigm recognises that charities play an important role in raising public (and government) awareness of issues, providing an independent voice and valuable flax-roots knowledge in the development of social policy: charities also provide critical balance to the ability of the most economically powerful to dominate and shape policy, thereby providing important protection against the skewing of public policy debates in favour of vested monied interests.
14. Importantly, this paradigm recognises charities’ right to *mana Motuhake*, *tino rangatiratanga*, or self-determination (within the bounds of their charitable purpose), allowing them to realise their potential, empower local communities, and work towards creating a healthy, resilient, inclusive, thriving Aotearoa for all, without undue government interference. The diversity of the charitable sector allows for authentic expressions of pluralism, democratisation, and localism, as people come together to address issues *they* see arising in their community (which issues may not yet be on the radar of government). Many solutions are needed to the complex and connected challenges that humanity faces: governments cannot solve these challenges alone; communities know best what communities need.
15. In other words, at the risk of oversimplification, one paradigm seeks to *restrict* charities and the other seeks to *enable* their work.
16. Interpreting the definition of charitable purpose too narrowly leads to charities being seen as anachronistic, old-fashioned, restricted to providing “hand-outs” rather than “hand-ups”, and therefore forced to wait until people have fallen off a cliff before being able to help them. This in turn perpetuates a deficits-based, paternalistic, capitalist, colonialist distinction between “haves” and “have-nots” that contributes to charities being seen as symptoms of the problem rather than integral to the solution.
17. A wide interpretation allows the concept of charitable purpose to “breathe”, to focus on strengths rather than deficits, to embrace innovation, prevention rather than merely cure, and to support many manifestations of human flourishing.
18. Prior to the Charities Act, the definition of charitable purpose in New Zealand was acknowledged to be very wide.⁵ Both Parliament and the Courts have confirmed that

⁵ See, for example, Inland Revenue Department [Tax and charities, a government discussion document on taxation issues relating to charities and non-profit bodies](#) June 2001 at [2.4], [3.8], [4.1] - [4.2], [5.1].

the definition of charitable purpose was not changed by the passing of the Charities Act in 2005. It is therefore surprising that the definition of charitable purpose has come to be interpreted so narrowly in New Zealand, particularly since the Charities Commission was disestablished in 2012.

19. As discussed in the [Focus on purpose report](#), many submitters to the Government's review of the Charities Act have commented on how there has been a slow-moving change of underlying paradigm from an enabling framework towards an ever-increasingly restrictive approach: this shift has primarily been achieved through controversially-narrow interpretations of the definition of charitable purpose, exacerbated by the fact that decision-makers under the Charities Act are not sufficiently independent of Government, as well as a lack of meaningful accountability for decisions made under the Charities Act.
20. The impact of this narrow approach is particularly noticeable in areas such as affordable housing (key to preventing persistent disadvantage, as discussed in the Interim report), social enterprise, public interest journalism, and sport, where the government is having to expend considerable amounts of taxpayer funds to "fill the gap" created by charities being unduly prevented from carrying out their work. However, there are many other examples, reflecting how charities touch almost every aspect of our society.
21. There appears to be a perception in New Zealand that the definition of charitable purpose "cannot" be reviewed. This perception requires critical examination. Most comparable jurisdictions (including England and Wales, Australia, Ireland, Northern Ireland and Scotland) have reviewed their definitions of charitable purpose without undue difficulty. Allowing the definition, and perhaps more importantly the legal tests for how it is to be interpreted, to continue in its current state, particularly when administered by an agency that is manifestly not independent of the government of the day, is undermining the charitable sector, and our democracy.⁶

Accountability not "regulation"

22. In terms of accountability, it should be noted that registered charities in New Zealand are arguably subject to the most comprehensive set of transparency and accountability requirements for charities in the world. Importantly, these requirements apply to all registered charities, without exception, with differences in size catered for by the 4-tier framework of reporting standards developed by the External Reporting Board. These requirements include a "service performance report", by which charities must articulate in non-financial terms how the charity is working towards its broader aims and objectives;⁷ this information, together with comprehensive financial information, is required to be made publicly available on the

Despite this, Inland Revenue's interpretation of the definition was considered to be too narrow in some respects, particularly in relation to sport and advocacy: Charities Bill 2004 (108-2) ([select committee report](#)) 17 December 2004 at 3.

⁶ See for example *The Supreme Court decision in Family First: a gift to the forces of authoritarianism* 5 July 2022: <www.linkedin.com/pulse/supreme-court-decision-family-first-gift-forces-susan-barker/?trackingId=ZNe9vJB65aSD0wY%2BzQ%2FfSw%3D%3D>.

⁷ For tier 1 and 2 charities, see [PBE FRS 48 Service Performance Reporting](#) at [IN 2]; for tier 3 and 4 charities, see the [tier 3 standard](#) at [A8(b)] and the [tier 4 standard](#) at [A8(b)].

- charities register on an annual basis if the charity wishes to remain registered.⁸
23. In this way, the charities register acts as a “forum for accountability”, enabling the “scrutiny of 1,000 eyes”, or a triumvirate of security, to ensure that charities are indeed acting in furtherance of their stated charitable purposes and are not otherwise engaging in serious wrongdoing. Beyond this, it is not necessary or helpful, in our submission, to impose an additional bureaucratic layer of regulatory risk aversion on charities by undertaking granular assessments of their activities second-guessing *how* they should further their charitable purposes rather than *whether* they are doing so.
 24. It is our considered view that the very restrictive approach currently being taken in New Zealand (arguably the most restrictive of all comparable jurisdictions) is causing charities to be *over-regulated*.
 25. Over-regulation is expensive, not only in terms of administration, compliance and litigation costs, but “hidden” costs, such as damage to independence, goodwill, trust, confidence and New Zealand’s traditionally strong culture of volunteering and levels of social capital. Over-regulation works against participation and progress, including the opportunities to be innovative and responsive.⁹
 26. An overly-restrictive approach also doesn’t work: after 14 years and many millions of dollars of “regulation”, public trust and confidence in charities has declined.¹⁰
 27. “Command and control” regulation is not the pathway to public trust and confidence in charities: research indicates that most public trust and confidence in charities is not driven by “regulation” but is driven by charities themselves, and most importantly by their *purposes*: it is charities’ commitment to their purposes that underpins support for their activities, protects against mission drift, and builds the trust that enables charities to provide their unique value to society.
 28. In our view, a world-leading framework of charities law would focus on charities’ purposes, hence the title of the [Focus on purpose report](#). The Charities Act framework is about accountability, not “regulation”.

Focus on purpose

29. Restoring a focus on purpose would have many advantages: it would inherently respect the diversity of the charitable sector, and the independence and autonomy of charities, by holding people involved with charities to the charitable purposes that *they have signed up to*. In practice, this means that, rather than trying to regulate charities’ legitimate activities by asking “how much” of a particular activity was acceptable, or whether an activity meets complex, subjective rules, the question with respect to any activity (such as remunerating staff, advocacy, running a business, or accumulating funds) would simply be whether the charity or its responsible people can demonstrate that the decision to undertake the activity was made in good faith in furtherance of the charity’s *stated* charitable purposes (and otherwise in

⁸ Failure to file annual returns for two consecutive years may lead to the charity being deregistered. See Charities Services *Annual returns*: <www.charities.govt.nz/ready-to-register/benefits-and-obligations-of-registered-charities/annual-returns/>.

⁹ Similar comments were made in P McClure AO, G Hammond OAM, S McCluskey, Dr M Turnour [Strengthening for purpose: Australian Charities and Not-for-profits Commission – Legislative Review 2018](#) 31 May 2018 at 18, referring to the submission of Giving Australia.

¹⁰ From 6.6 in 2008 to 6.5 in 2021. See Charities Services *Public trust and confidence in charities*: <www.charities.govt.nz/charities-in-new-zealand/research-into-charities/>.

accordance with the charity's rules and the general law).

30. In other words, restoring a focus on purpose would not ignore charities' activities or permit charities to do whatever they liked: rather it would clarify what regard is to be had to activities *for*.¹¹
31. The current framework does not do that: instead, it has been subtly reworked to focus on granular assessments of charities' activities, in isolation from the purposes in furtherance of which they are carried out. This approach leads to inherent subjectivity and complexity, to the point that over-regulation is now *undermining* charities, and causing people - particularly young people - to turn away from charities and choose other modes of social action.
32. Restoring a focus on purpose would also have advantages for the agency responsible for administering the legislation: it would provide certainty within clear parameters, while also providing inherent flexibility to cater for the wide variety of ways in which public benefit might be furthered; it also provides a clear basis for oversight of charities' activities while respecting the independent, private nature of charities, and the equitable origins of charities law.
33. Such an approach would therefore protect against harmful regulation that risks inhibiting innovation and stifling or demoralising voluntary effort, and would allow charities to further their stated charitable purposes with considerably greater confidence and certainty than is currently the case.
34. We saw during COVID-19 lockdown how efficient and effective a trust-based approach can be. In our view, it is critical that the Government re-establish an *independent* agency to administer the Charities Act and reduce the scope for subjectivity and discretion by setting out in legislation the *test* for ascertaining an entity's purposes and whether they are charitable. In other words, if we are to have any hope of achieving the transformative change required, the Government needs to invest in the charitable sector and get out of the way.

Conclusion

35. We expand on all of these points in the [Focus on purpose report](#). We have prepared this submission reasonably quickly in order to meet the deadline. We would very much welcome the opportunity to discuss these ideas in more detail with you.
36. Thank you very much for your consideration of our submission.

Yours sincerely

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¹¹ This lack of clarity has been a key mechanism by which the underlying paradigm has been slowly changed, as discussed in the [Focus on purpose report](#).