Cabinet Social Policy Committee

FUTURE OF THE CHARITIES ACT REVIEW

Proposal

1. I seek agreement to rescind the 2010 Cabinet decision to conduct a "first principles review" of the Charities Act 2005. I have also considered whether to conduct a more focused review of the "charitable purpose" definition in place of the first principles review, but have come to the view that no review should be conducted for now.

Executive Summary

2. In 2010 Cabinet agreed that a first principles review of the Charities Act be undertaken and completed by 2015 [SOC Min (10) 6/4 & CAB Min (10) 35/3B]. The review was to assess both the effectiveness of the Charities Commission since its inception in 2005 and the "charitable purpose" definition. The review was publicly announced.

3. However, on 1 August 2011, Cabinet agreed to disestablish the Charities Commission and transfer its functions to the Department of Internal Affairs (with registration decision-making carried out by a three-person board) [CAB Min (11) 28/5]. The transfer of the Commission's functions created a new governance model for charities registration and regulation under the Charities Act. The model was only implemented on 1 July 2012. Accordingly, my view is that it is no longer appropriate to conduct a first principles review of the Act.

4. Two options arise from a decision not to conduct a first principles review of the Charities Act. One is to conduct a more targeted review that includes a focus on the Act's "charitable purpose" definition. The definition can be unclear, and concerns have been expressed by some about whether it is in line with contemporary New Zealand expectations of what is "charitable". Conducting a review of the definition would go some way to meeting the expectations of the charitable and non-profit sector.

5. The second option of not conducting any review for now reflects the fact that the regulatory regime for charities is still bedding in. The definition of "charitable purpose" is working reasonably well in the majority of situations, meaning that the need to review it is not pressing. Also, it might be unhelpful to conduct a review while the fiscal environment remains constrained as it may create expectations of more organisations being eligible for charitable status, which in light of the associated taxation concessions, could result in increased fiscal costs.

6. On balance, I prefer the second option and propose that no review be conducted for now. I note that this option will attract adverse comment from the charitable and non-profit sector, which had expectations that a review would be conducted.
Background

Previous Cabinet consideration

7. On 31 March 2010, the Cabinet Social Policy Committee agreed that decisions about whether to undertake a baseline review of the Charities Commission would be made following a first principles review of the Charities Act. The Committee also noted that by 2015 the Charities Commission would have established its full range of functions, and its overall effectiveness could be assessed [SOC Min (10) 6/4]. On 4 October 2010, Cabinet further agreed that the definition of charitable purpose should be a key focus for the first principles review, which was to be completed by 2015 [CAB Min (10) 35/3B].

8. On 1 August 2011, Cabinet agreed to disestablish the Charities Commission and transfer its functions to the Department of Internal Affairs (with registration decision-making carried out separately by a statutory board) [CAB Min (11) 28/5]. This decision was implemented on 1 July 2012.

9. On 17 September 2012, Cabinet noted that the Minister of Finance, the Minister for the Community and Voluntary Sector and the Minister of Revenue would report back on a proposed targeted review of the definition of “charitable purpose” if necessary [CAB Min (12) 33/14]. The proposals in this paper mean such a report back is unnecessary.

The “charitable purpose” definition

10. In New Zealand the definition of “charitable purpose” is defined in the Charities Act for two reasons:
   - to define the scope of the regulator’s jurisdiction; and
   - to act as a gateway to tax concessions, such as the income tax exemption for charities and tax incentives for donors who make charitable donations.

11. The law on “charitable purpose” dates back to the passing of the Charitable Uses Act in England in 1601, during the reign of Elizabeth I. Commonly known as the Statute of Elizabeth, its preamble has formed the basis of several centuries of case law where the Courts, in considering whether or not a particular purpose is charitable, have tended to look for an analogy between the purpose at issue and the list of items in the preamble. A summary of the preamble was provided in the 19th century Pemsel court decision where “charitable” was defined as meaning:
   - the relief of poverty;
   - the advancement of education;
   - the advancement of religion; or
   - any other purpose beneficial to the community.

12. The current statutory definition of “charitable purpose” in the Charities Act includes the four Pemsel heads of charity (identified above), which means that their common law interpretations continue to be relevant today.

The regulation of charities

13. The Charities Act also introduced a new requirement to register with the Charities Commission in order to obtain charitable status (and the associated tax
concessions). As regulator, the Commission has brought a more rigorous and consistent approach to the vetting of bodies seeking to obtain or retain charitable status, and has developed a considerable body of knowledge regarding charities law. The result has been that some bodies whose charitable status was confirmed by Inland Revenue under the previous regime have, on closer examination, been found not to be charitable. To date approximately 28 bodies have been removed from the register on these grounds, and more may follow. Some of the bodies concerned have appealed to the Courts\(^1\) and in almost all cases, the Commission’s approach has been upheld. Further judicial guidance on the parameters of the definition is likely to become available as more cases are brought before the Courts.

**First principles review of the Charities Act no longer appropriate**

14. As noted above, in 2010 Cabinet agreed to conduct a first principles review of the Charities Act, for completion by 2015. This decision was publicly announced. Cabinet made the decision to conduct the review by 2015 on the assumption that this deadline would allow sufficient time to assess the Charities Commission’s performance, as well as an opportunity to review the “charitable purpose” definition.

15. However, the 2011 decision to disestablish the Commission and transfer its functions to the Department of Internal Affairs (and a three-person registration board) created a new governance model for the registration and regulation of charities. This decision was only implemented in July 2012. Accordingly, one of the two key elements behind the decision to conduct the first principles review is no longer valid. For this reason, I am of the view that a first principles review of the Act is no longer appropriate.

**A more targeted review focusing on “charitable purpose” or no review at this time?**

**Issues with “charitable purpose”**

16. I have considered the case for undertaking a targeted review that includes a focus on the “charitable purpose” definition. Given its 400-year history and the long line of case law, the definition’s meaning can be unclear and uncertain. Concerns have also been expressed about whether the definition is still in line with contemporary New Zealand expectations of what is “charitable”. These concerns appear to primarily stem from the recent Court cases discussed above, where the application of the law has resulted in some high profile non-profit groups either being de-registered as charities or having their applications for charitable status refused.

**Assessing the issues**

17. Making a decision on whether to conduct a review involves an assessment of the magnitude and urgency of problems associated with the definition, and the availability of robust information to inform it. Using these criteria, my view is that no review should be conducted for now.

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\(^1\) For example, the Queenstown Lakes Community Housing Trust and the Canterbury Economic Development Corporation. The Court of Appeal is currently considering another appeal involving Greenpeace.
18. I acknowledge that interpreting the “charitable purpose” definition can present difficulties. However, I am also of the view that a misleading impression of the definition’s current usefulness can be created by focusing solely on these issues, which often exist on its margins. At present there are over 25,500 registered charities. All obtained their charitable status on the basis of the existing definition, which provides well-established principles governing the majority of situations and a level of certainty because of the links to existing case law. While the requirement to find an analogous Court decision can create uncertainties, it also confers a helpful level of flexibility and an ability to adapt to changing circumstances. Overall, the definition is working reasonably well at present as a means of determining charitable status and in my view there is no pressing need to review it.

19. Another point is that the Charities Act regime is relatively new and is still bedding in. A specialised registration and regulatory body was created (initially the Charities Commission and latterly, the Department of Internal Affairs) that assesses applications for registration as a charity, and then ensures that the bodies that became registered continue to operate as charities. The recent Court cases noted in paragraph 13 above are an outcome of the regime’s introduction and provide fresh guidance on the ambit of the “charitable purpose” definition. More are likely to follow. Also, the regime’s introduction of ongoing monitoring of charities via an annual reporting requirement is continuing to deliver previously unavailable information that will enable a more comprehensive analysis of trends in charities operations to inform policy development and any review in future years.

20. Other sources of information will become available in coming years. For example, the Law Commission is conducting reviews of the Incorporated Societies Act 1908 and the Law on Trusts, which are due for completion in 2013/14. Some of the findings from these reviews are likely to be relevant as many charitable bodies are either charitable trusts or incorporated societies.

21. Finally, it might also be unhelpful to conduct a review while the fiscal environment remains constrained. A review may create expectations of greater liberalisation of the definition of charitable purpose with more organisations being eligible for charitable status. In light of the associated taxation concessions this could result in increased fiscal costs.

22. Balancing the need for a review of the charitable purpose definition and when this should be undertaken has been difficult. I have previously acknowledged that a review is needed given the history of the definition and the long standing issues that are worthy of consideration. However, on balance, after consideration of the factors set out above, I have come to the view that now is not the right time to undertake a review. In particular, a review in the current fiscal environment may raise expectations that are unable to be met.

Consultation

Ministry of Social Development, Sport New Zealand, Statistics New Zealand, Te Puni Kokiri, the Treasury, and the Ministry of Women's Affairs were consulted in the development of this paper. The Department of the Prime Minister and Cabinet was informed.

Financial Implications

24. There are no financial implications arising from this paper as it is simply seeking decisions on whether or not to conduct a review of the Charities Act and/or the "charitable purpose" definition.

Legislative Implications and Regulatory Impact Analysis

25. There are no legislative implications and a regulatory impact statement is not required.

Human Rights and Gender Implications

26. There are no human rights and gender implications.

Publicity

27. Following Cabinet approval, I will announce the decisions on the future of the review of the Charities Act 2005 in due course. I also intend to proactively release this paper and related Cabinet decisions online, subject to consideration of any deletions that would be justified under the Official Information Act 1982.

28. A decision to not conduct a review will attract adverse comment from the charitable and non-profit sector, which has expectations that one will take place. In response to this, communications relating to such a decision are likely to acknowledge that there are concerns with the charitable purpose definition, but emphasise that it is not appropriate to conduct a wide-ranging review for the reasons set out in this paper. A review may be more appropriate at a later date.

Recommendations

29. I recommend that the Committee:

Background

1. note that in March and October 2010, Cabinet agreed to conduct a first principles review of the Charities Act 2005 by 2015 to assess both the effectiveness of the Charities Commission and the "charitable purpose" definition [SOC Min (10) 6/4; CAB Min (10) 35/3B];

2. note that on 1 August 2011, Cabinet agreed to disestablish the Charities Commission and transfer its functions to the Department of Internal Affairs (with registration decision-making carried out separately by a statutory board) [CAB Min (11) 28/5];

3. note that on 17 September 2012, Cabinet noted that the Minister of Finance, the Minister for the Community and Voluntary Sector and the Minister of
Revenue would report back on a proposed targeted review of the definition of “charitable purpose” if necessary [CAB Min (12) 33/14];

4. note that the proposals in this paper mean that such a report back is unnecessary;

The “charitable purpose” definition

5. note that in New Zealand the “charitable purpose” definition acts as a gateway to tax concessions such as the income tax exemption for charities and tax incentives for donors who make charitable donations;

6. note that the definition of “charitable purpose” is drawn from a 19th century court decision where “charitable” was defined as meaning the relief of poverty, the advancement of education, the advancement of religion, or any other purpose beneficial to the community;

Decisions on the future of the Charities Act review

7. note that the transfer of the Charities Commission’s functions has created a new governance model, and that it is no longer appropriate to conduct a first principles review of the Charities Act;

8. agree to rescind Cabinet’s 2010 decisions relating to the conduct of a first principles review of the Charities Act, referred to in paragraph 1 above, specifically decision 2.2 of SOC Min (10) 6/4 and decision 10 of CAB Min (10) 35/3B;

9. agree to not conduct any review of the “charitable purpose” definition at this time;

Publicity

10. note that I intend to publish this paper and related Cabinet decisions online, subject to consideration of any deletions that would be justified under the Official Information Act 1982; and

11. note that a decision to not conduct a review will attract adverse comment from the charitable and non-profit sector, which has expectations that one will take place.

Hon Jo Goodhew
Minister for the Community and Voluntary Sector

/ / 2012
Future of the Charities Act 2005 Review

Portfolio: Community and Voluntary Sector

On 7 November 2012, the Cabinet Social Policy Committee:

Background

1. noted that in March and October 2010, it was agreed that a first principles review of the Charities Act 2005 (the Act) be conducted by 2015 to assess both the effectiveness of the Charities Commission (the Commission) and the "charitable purpose" definition [SOC Min (10) 6/4 and CAB Min (10) 35/3B];

2. noted that in August 2011, Cabinet agreed to disestablish the Commission and to transfer its functions to the Department of Internal Affairs (with registration decision-making carried out separately by a statutory board) [CAB Min (11) 28/5];

3. noted that in September 2012, Cabinet noted that the Minister of Finance, the Minister for the Community and Voluntary Sector, and the Minister of Revenue would report on a proposed targeted review of the definition of "charitable purpose", if necessary [CAB Min (12) 33/14];

The "charitable purpose" definition

4. noted that in New Zealand, the "charitable purpose" definition acts as a gateway to tax concessions such as the income tax exemption for charities and tax incentives for donors who make charitable donations;

5. noted that the definition of "charitable purpose" is drawn from a 19th century court decision where "charitable" was defined as meaning the relief of poverty, the advancement of education, the advancement of religion, or any other purpose beneficial to the community;

Decisions on the future of reviews of the Charities Act 1995 and the "charitable purpose definition

6. noted that the transfer of the Commission's functions has created a new governance model, and that it is no longer appropriate to conduct a first principles review of the Act;

7. agreed to recommend that Cabinet rescind the decisions in paragraph 1 above relating to a first principles review of the Act;
8 noted the assessment in the paper under SOC (12) 133 of the issues relating to the "charitable purpose" definition;

9 agreed not to conduct any review of the "charitable purpose" definition at this time;

10 noted that, as a result, the report referred to in paragraph 3 above will no longer be required;

Publicity

12 noted that the Minister for the Community and Voluntary Sector intends to publish the paper under SOC (12) 133 and related Cabinet decisions online, subject to consideration of any deletions that would be justified under the Official Information Act 1982;

13 noted that a decision not to conduct a review will attract adverse comment from the charitable and non-profit sector, which has expectations that a review will take place.

Saphron Powell
Committee Secretary

Reference: SOC (12) 133

Present:
Rt Hon John Key (part of item)
Hon Tony Ryall (Chair)
Hon Paula Bennett (part of item)
Hon Jo Goodhew
Hon Chester Borrows

Distribution: (see over)

Officials present from:
Office of the Prime Minister
Officials Social Policy Committee