

Reference: 20150275

31 July 2015

Dave Henderson
Hui E! Community Aotearoa
dave.henderson@huie.org.nz

Dear Dave Henderson

Thank you for your Official Information Act request, received on 3 July 2015. You requested the following:

"In 2010 the Government announced its intention to undertake a first principles review of the Charities Act."

"In light of the recent amendments to the Act which disestablished the Charities Commission and transferred its functions to the Department of Internal Affairs, a first principles review of the Act is no longer appropriate," said Mrs Goodhew."

"The Government considered narrowing the review to look only at the definition of charitable purpose in the Act. However, it is likely that the current tight fiscal environment would limit the scope of such a review, due to the probable tax implications of any widening of the definition."

"Hui E! is seeking copies of all advice that was given by Treasury to Cabinet, to Minister Goodhew, or to the Department of Internal Affairs in their preparation of the papers that led to Minister Goodhew and Cabinet cancelling the promised Review."

We apologise for the transfers of your request and the delay that this caused in providing information to you.

Information Being Released

Please find enclosed the following documents:

Item	Date	Document Description	Decision
1.	15/03/2012	Email including attachments: Briefing note - Comment on DIA paper on targeted review of the Charities Act 2005	Released in Part
2.	15/03/2012	Email: Draft Cabinet Paper A Targeted Review of the Charities Act 2005	Released in Part

3.	16/03/2012	Email and attachments: IRD comment on latest version of Cabinet paper -Targeted Review of the Charities Act 2005	Released in Part
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I have decided to release the documents listed above, subject to information being withheld under one or more of the following sections of the Official Information Act, as applicable:

- personal contact details of officials, under section 9(2)(a) – to protect the privacy of natural persons, including deceased people, and
- names and contact details of junior officials and certain sensitive advice, under section 9(2)(g)(i) – to maintain the effective conduct of public affairs through the free and frank expression of opinions.

Information Publicly Available

The following information is also covered by your request and is publicly available on the Department of Internal Affairs website:

Item	Date	Document Description	Website Address
4.	N/A	The DIA website contains documents relating to the "Future of the Charities Act Review (Cabinet paper)"	http://www.dia.govt.nz/diawebsite.nsf/wpg_URL/Resource-material-Our-Policy-Advice-Areas-Community-Development-Policy?OpenDocument

Accordingly, I have refused your request for the documents listed in the above table under section 18(d) of the Official Information Act – the information requested is or will soon be publicly available.

Some relevant information has been removed from documents listed in the above table and should continue to be withheld under the Official Information Act, on the grounds described in the documents.

Please note that this letter (with your personal details removed) and enclosed documents may be published on the Treasury website.

This fully covers the information you requested. You have the right to ask the Ombudsman to investigate and review my decision.

Yours sincerely



Elizabeth Scurr

Team Leader, Fiscal and State Sector Management

Information Being Released TOIA 20150275

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Document 3	Page 14

[Redacted]

From: Charles Ngaki [Charles.Ngaki@ird.govt.nz]
Sent: Thursday, 15 March 2012 4:43 p.m.
To: [Withheld under s9(2)(g)(i)]
Cc: [Withheld under s9(2)(g)(i)]; parliament.govt.nz; carolyn.palmer@parliament.govt.nz; r Martin; Emma Grigg; Andrea Black; Struan Little; [Withheld under s9(2)(g)(i)]; Charles Ngaki; [Redacted]
Subject: Briefing note - comment on DIA paper on targeted review of Charities Act 2005
Attachments: Briefing note - comment on DIA paper on targeted review of Charities Act 2005.docx; DIA paper on Targeted Review of Charities Act 2005.dot

Hi [Withheld under s9(2)(g)(i)] Carolyn

As discussed, attached is the joint Treasury/IRD briefing note on the draft DIA paper on the targeted review of the Charities Act 2005.

Regards
Charles

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POLICY ADVICE DIVISION



Briefing note

Reference: PAD BN2012/21

Date: 15 March 2012

To: Carolyn Palmer
[Withheld under s9(2)(g)(i)]

cc: Deputy Commissioner, Policy
[Withheld under s9(2)(g)(i)]
[Withheld under s9(2)(g)(i)]
Emma Grigg
Andrea Black

From: Charles Ngaki and Peter Martin

Subject: **Comment on the DIA draft Cabinet paper A Targeted Review of the Charities Act 2005**

Inland Revenue and the Treasury have been asked to comment on the draft Cabinet Committee paper prepared by the Department of Internal Affairs (DIA) entitled *A Targeted Review of the Charities Act 2005*. A copy of the draft paper is attached.

The proposed review would primarily focus on the definition of "charitable purpose". The draft paper proposes the release of a discussion document in August 2012, with legislation to be introduced into the House in mid-2013. The draft paper also states that there are no financial implications.

Set out below are the comments that we have made on the draft paper to DIA.

Fiscal Implications

Together with Treasury tax policy officials, we would need to advise Ministers on the fiscal implications that flow from any amendment to the current definition of charitable purpose. Currently, if an organisation has a charitable purpose it is eligible for an income tax exemption and donations made to such organisations are eligible for the charitable giving tax incentives. Consequently if, for example, the definition of charitable purpose is extended there will be new organisations that will be eligible for these tax benefits.

We consider that the draft paper should refer to the potential for such fiscal implications. To this end, the Treasury has recommended that the following comment be included in the financial implications section of the paper:

The Treasury considers there to be a strong likelihood of fiscal implications from the review to the extent that it recommends amendments to the current definition of charitable purpose. Currently, where an organisation has a charitable purpose, it is eligible for an income tax exemption and donations made to such organisations are eligible for the charitable giving tax incentives. Consequently if, for example, the definition of charitable purpose is extended there will be new organisations that will become eligible to these tax benefits,

which has a bearing on fiscal implications. Given this, the Treasury view is that the Department of Internal Affairs should work closely with the Inland Revenue Department.

An additional recommendation is also recommended for inclusion in the draft paper:

direct the Department of Internal Affairs to work closely with the Inland Revenue Department, given the strong likelihood of fiscal implications from the review, if there are amendments to the current definition of charitable purpose

Support for the Review work and proposed timelines

We understand that there is a commitment to undertake this review, and we support the need to review the definition of charitable purpose, for the reasons set out in the draft paper. We are very keen to be involved closely with DIA on this review and believe we can offer a lot of background to the current settings, together with good information on the state of play in the charitable sector.

We are concerned, however, that the timeline set out in the draft paper does not provide sufficient time to consider the framework or approach to reviewing the definition of charitable purpose, or analyse the full range of potential options. These issues are complex and they will involve consideration of what support or subsidy the Government should provide to the sector, having regard to the current fiscal constraints. Given this, and the fact that the sector will have its own expectations about the review's outcomes and the level of engagement in the review process, we consider the proposed timeframe to progress the review to be unrealistic.

We believe that a considerable amount of work will be required before publication of a discussion document. These pre-discussion document activities would include researching the current state of play and the international experience, engaging with key government and sector stakeholders, testing policy ideas and policy analysis, and Ministerial and Cabinet approval. We are nervous about suggesting an alternative timeframe in the absence of a full scoping exercise – that is, we have not scoped the level of work that has already been undertaken and that which should be undertaken going forward, or the level of policy resource available to undertake this review. For this reason, we would be happy with the original timeline for the Charities Act 2005 Review – which would see the review completed by 2015.

Level of charities-related tax benefits

DIA has also asked for information on the income tax exemption for charities and the tax incentives for charitable giving.

The tax incentives for charitable giving are the donations tax credit for individuals, the donation tax deductions for Māori authorities and companies, and payroll giving.

We estimate the income tax exemption for charities to have an annual fiscal cost in the order of \$350-400 million and the tax incentives for charitable giving to have an annual fiscal cost of around \$200 million. These estimates are based on the Charities Commission's open source data and financial information contained in annual returns from 86% of all registered charities as at 14 March 2012.

Charles Ngaki
Senior Policy Advisor
DDI: 8906 037

Peter Martin
Director, Tax Strategy - Treasury
DDI: 9176 277

In-Confidence

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Office of the Minister for the Community and Voluntary Sector

Chair
Cabinet Social Policy Committee

A TARGETED REVIEW OF THE CHARITIES ACT 2005

Proposal

1. This paper seeks agreement to a targeted review of the Charities Act 2005, focusing on the “charitable purpose” definition and related issues. This targeted review would replace a “first principles review” of the Act previously agreed to by Cabinet and due for completion by 2015 [CAB Min (10) 12/6 & CAB Min (10) 35/3B].

Executive Summary

2. In 2010 Cabinet agreed to a first principles review of the Charities Act 2005 [CAB Min (10) 12/6 & CAB Min (10) 35/3B]. This decision pre-dated the 2011 decision to disestablish the Charities Commission and transfer its functions to the Department of Internal Affairs and to a three person board, as part of the machinery of government reforms proposed in the Crown Entities Reform Bill [CAB Min (11) 28/5].
3. The decision to disestablish the Commission will create a new operating environment for the registration of charities under the Charities Act, once the Bill passes. This means that it would not be optimal to conduct a first principles review of the Act by 2015, as the new model would not have been in operation long enough to fully evaluate its effectiveness. Further delaying the review is not recommended as there is already a strong expectation in the non-profit sector that a review will be conducted either within the original 2015 timeframe or earlier. The sector’s strong interest in a review appears to stem from dissatisfaction with the Charities Act’s definition of a “charitable purpose”.
4. I am of the view that a targeted review of the “charitable purpose” definition (and related issues) is the most appropriate course of action, as it has the potential to address the key concerns of the charitable sector within a reasonable timeframe. Such a review could be completed in 2013, earlier than the scheduled 2015 completion of the first principles review.
5. As well as focusing on the charitable purpose definition, I propose that the review should have the flexibility to identify and propose solutions to any issues concerning the efficient functioning of the Charities Act that are not related to the proposed machinery of government reforms.

Background

The “charitable purpose” definition

6. The law surrounding “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 contained a list of purposes considered to be charitable at that time. The list in the preamble has

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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 Statute.

7. A more refined classification of the Elizabethan preamble was provided in the nineteenth century by Lord MacNaughten in *Commissioners for Special Purposes of Income Tax v Pemsel*¹, when he stated that “charity” comprised four principal heads:
 - the relief of poverty
 - the advancement of education
 - the advancement of religion; or
 - any other purpose beneficial to the community.In addition to “the four Pemsel heads”, the Courts have long recognised that, to be charitable, a purpose must benefit the public, or a sufficient section of the public, rather than for a private purpose.
8. The current statutory definitions of “charitable purpose” in the Charities Act and the Income Tax Act 2007² include the four principal heads of charity, which means that their common law interpretations continue to be relevant today. The public benefit requirement for a charitable purpose is also incorporated in both Acts.
9. A key question is whether the definition, based on case law deriving from a 400 year old statute and a nineteenth century distillation of that statute, continues to meet the needs of 21st century New Zealand.
10. In its 2004 report on the Charities Bill, the Social Services Select Committee acknowledged the concerns of many submitters that the definition of “charitable purpose” was too narrow, with groups undertaking advocacy work being a particular cause of concern. The Committee suggested a review be conducted “to consider carefully whether the definition should be changed”, once all initial registrations for charitable status had been completed by the Charities Commission.
11. Similar reviews to that proposed by the Committee have been conducted in recent years in comparable Anglo-Commonwealth jurisdictions that use the “charitable purpose” definition such as the United Kingdom and Australia.
12. In 2006, the United Kingdom adopted an expanded statutory definition of charitable purpose that retains but extends the common law definition given in *Pemsel*. The new, additional purposes include:
 - the advancement of health or the saving of lives;
 - the advancement of citizenship or community development;
 - the advancement of environmental protection or improvement;
 - the advancement of the arts, culture, heritage or science;
 - the advancement of amateur sport; and
 - the advancement of animal welfare.³

¹ [1891] AC 531.

² Section 5 of the Charities Act 2005 & section YA 1 of the Income Tax Act 2007.

³ Section 2 of the Charities Act 2006 (UK). See appendix for the complete definition.

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13. A similar "Pensel plus" approach will be taken in Australia, with the Federal Government announcing in its 2011/12 budget the introduction of a new statutory definition of charity from 1 July 2013. The proposed definition will include the advancement of health, culture, the natural environment, and social and community welfare.⁴ In explaining its decision, the Australian Government noted that the existing definition was based on 400 years of common law, which they considered complex, outdated and creating uncertainty in the not for profit sector.

Previous Cabinet consideration

14. Cabinet has previously agreed that a first principles review of the Charities Act should be conducted by 2015.

15. Specifically, on 12 April 2010, when cancelling a scheduled baseline review of the Charities Commission, Cabinet noted "that the Department of Internal Affairs will schedule a First Principles Review of the Act to take place in 2015, by which time the Commission will have established its full range of functions, and its overall effectiveness can be assessed" [CAB Min (10) 12/6 confirming SOC Min (10) 6/4].

16. On 4 October 2010, when considering technical amendments to the Charities Act, Cabinet "agreed that the definition of charitable purpose focusing on the four heads of charity and its alignment across the legislation including the Charitable Trusts Act 1957, the Gambling Act 2003, and the Income Tax Act 2007, become a key focus for the first principles review of the Charities Act 2005 which is to be completed by 2015" [CAB Min (10) 35/3B].

17. The technical amendments agreed to by Cabinet in October 2010 were included in the Statutes Amendment Bill (No 2), which was passed by Parliament in February 2012. The Bill inserted a new subsection in the charitable purpose definition providing that the promotion of amateur sport may be a charitable purpose if it is the means by which a charitable purpose is pursued. The amendment addressed uncertainty among sports groups, community grant makers, and the legal profession about the charitable status of amateur sport. It clarified existing law rather than extending it into new areas.

Comment

Rationale for a "Targeted Review" rather than a "First Principles Review"

18. Cabinet's April 2010 decision to undertake a first principles review of the Charities Act by 2015 was based in part on the assumption that this would allow sufficient time to gauge the effectiveness of the Charities Commission in performing its statutory functions.

19. However, on 1 August 2011, Cabinet "agreed to disestablish the Charities Commission by repealing those parts of the Charities Act 2005 that establish or refer to the Charities Commission, with the result that the functions and actions that were previously carried out by the Charities Commission will be carried out by the Department of Internal Affairs (with registration decision-making carried out separately by a statutory board)" [CAB Min (11) 28/5]. This decision was part of the current machinery of government reforms designed to build a better public

⁴ 2011/12 Australian Federal Budget (www.budget.gov.au). See appendix for the complete definition.

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service, and has been included in the current Crown Entities Reform Bill. The Bill is currently being considered by the Government Administration Committee, which is due to report back by 31 March 2012.

20. The 2011 decision to disestablish the Charities Commission and transfer its functions to a three-person Board serviced by the Department of Internal Affairs will create a new operating environment⁵, once the Crown Entities Reform Bill is passed. This means that it is no longer optimal to conduct a first principles review of the Act by 2015, as the new model would not have been in operation long enough to fully evaluate its effectiveness.
21. Extending the review date beyond 2015 to allow more time to complete a first principles review is not recommended. I note that the charitable sector continues to have high expectations concerning the timing of a review of the Charities Act, taking the view that it should be brought forward from 2015⁶. This appears to primarily stem from long-standing dissatisfaction with the “charitable purpose” definition, and issues with the appropriate treatment of bodies that engage in advocacy type activities. For example, in a recent decision, the Charities Commission declined to register the National Council of Women as a charity on the grounds that its primary (rather than ancillary) purpose was to engage in advocacy-type activities, which are deemed non-charitable.
22. These concerns are not confined to the charitable sector. A number of law practitioners have also indicated that they believe that a review of the definition should occur sooner rather than later, with one noting that some of the entities being deregistered or declined registration appear to be precisely the type of organisation the Government would wish to support, particularly given current economic and environmental public concerns.⁷ Concern has also been expressed at the direction taken by the Courts in recent judgements on what constitutes a charitable purpose.⁸
23. In light of these factors, I am of the view that a targeted review of the “charitable purpose” definition that considered the issues identified by Cabinet in October 2010, as well as the effects of ancillary non-charitable activities (like advocacy) is the most appropriate course of action. Such a review could be completed by 2013, earlier than the scheduled 2015 completion of the first principles review, thereby addressing the timing concerns outlined above.

Scope of a targeted review

24. The primary focus of the review would be the Charities Act's “charitable purpose” definition, and its suitability for the needs of 21st century New Zealand. This would involve determining the present parameters of the definition (with reference to recent domestic and international case law, key Charities Commission decisions, and academic literature), pressure points, and assessing whether the

⁵ The new board will be responsible for the registration (and de-registration) of charitable bodies. All other functions will be undertaken by the Department of Internal Affairs.

⁶ For example in a July 2011 position paper on the Charities Commission and the Charities Act 2005, ANGOA (the Association of Non-Governmental Organisations of Aotearoa) stated that the review should be brought forward and accelerated, rather than left to 2015.

⁷ S Barker and K Yesbery, “Are all “charities” equal?”, *Chartered Accountants Journal*, June 2011, 40-46.

⁸ J Bassett, “Charity is a general public use”, [2011] NZLJ 60-62; M Gousmett, “Charity and economic development”, [2011] NZLJ 63-66.

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definition reflects contemporary New Zealand values and expectations of what constitutes "charitable". This would include the interests of Maori, given that the definition already recognises marae-related purposes as charitable in certain circumstances. Finally, any fiscal implications arising as a result of a change in the definition's scope would also have to be assessed in terms of their effect on the taxation base.

25. In addition, I am of the view that the review should have the ability to identify and propose solutions to any issues concerning the efficient functioning of the Charities Act. For the reasons set out earlier, these issues would not be directly related to the machinery of government reforms that will result in the establishment of a decision-making board serviced by the Department of Internal Affairs. This would still leave room to consider issues like, for example, whether the Act provides effective tools to ensure that charitable bodies continue to act in accordance with their statutory obligations and/or their governing instruments.

Proposed process for a targeted review

26. The review will be led by the Department of Internal Affairs. An important review milestone will be the preparation and release of a public discussion document that canvasses the issues relating to the charitable purpose definition and also offers some potential solutions. I anticipate that I will be seeking Cabinet agreement to the release of the document in August 2012.
27. Following Cabinet agreement, I intend to release the discussion document for a 6 week period of public consultation, possibly in August-September 2012. Currently there are approximately 25,500 registered charities and many more non-profit institutions⁹, and it is likely that many of them will take an interest in the consultative process. Targeted meetings with key groups (e.g. representative Maori bodies and key umbrella groups like Philanthropy New Zealand and ANGOA) that have an interest in the charitable purpose definition will be arranged.
28. The final shape of the policy proposals will be informed by the public consultation process. At this stage I anticipate that I will seek policy decisions from Cabinet in late 2012, with a view to introducing a bill to amend the Charities Act in mid-2013. (These timelines are tentative and assume that only one round of consultation would be required.)

Possible linkages with the review

29. Bringing the timing of the review's completion forward to 2013 may mean that there will be only a limited ability to take account of other Government agency work, presently underway or about to commence, that might be relevant to the charitable and non-profit sector.
30. Specifically, Law Commission reviews of the Law on Trusts and of the Incorporated Societies Act are underway, and are due for completion in 2013/14. Some findings from these reviews might be relevant to a review of the Charities Act as many charitable bodies are either charitable trusts or incorporated societies. However, I am of the view that it is not necessary or desirable to wait

⁹ Statistics New Zealand identified 97,000 non-profits institutions in 2005. See Statistics New Zealand (2007), *Non-profit Institutions Satellite Account: 2004*, Statistics New Zealand, Wellington.

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for the outcome of the Commission's work. The Commission's primary focus is updating the relatively old legislation governing trusts and incorporated societies, and on machinery-type issues associated with their efficient functioning, rather than focusing closely on the charitable purpose definition or on the operation of the Charities Act. I note that there could still be potential to implement any relevant Law Commission findings through any legislative processes arising from its reviews if this was necessary.

31. It is also possible that Statistics New Zealand will publish its Non-profit Institutions Satellite Account in 2013. If this transpired, it would be the first time it was published since 2007, and would provide the review with information on the quantity and economic value of the activities of the non-profit sector. However, if publication did not take place, I am advised that there should still be an ability to secure core data from Statistics New Zealand on the non-profit sector to inform the review.

Consultation

32. The Crown Law Office, Ministry of Culture and Heritage, Ministry of Economic Development, Ministry of Health, Inland Revenue Department, Ministry of Justice, Ministry of Pacific Island Affairs, 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.
33. Extracts of this paper were provided to the Charities Commission and the Law Commission for comment. Their views are recorded in this paper.

Financial Implications

34. There are no financial implications arising from this paper.

Legislative Implications

35. There are no immediate legislative implications. In late 2012, the Department of Internal Affairs will prepare a bid for the inclusion of a Charities Amendment Bill on the 2013 Legislation Programme.

Regulatory Impact Statement

36. A regulatory impact statement is not required for the proposal in this paper as it does not involve the consideration of options that would involve creating, amending or repealing either primary or delegated legislation.

Publicity

37. I will announce the Cabinet decision to conduct a targeted review at a "Charitable Purpose Forum" to be hosted by the Charities Commission on 17-18 April 2012. I also recommend that this paper (and the accompanying Cabinet minutes) be placed on the Department of Internal Affairs website to assist in informing the public about review.

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Recommendations

38. It is recommended that the Committee:

1. **note** that there has been long-standing concern about whether the charitable purpose definition in the Charities Act 2005, based on case law deriving from the 400 year old "Statute of Elizabeth" and a nineteenth century distillation of that statute into the four heads of charity, meets the needs of 21st century New Zealand;
2. **note** that on 12 April 2010, Cabinet noted that the Department of Internal Affairs should conduct a first principles review of the Charities Act 2005 by 2015 [CAB Min (10) 12/6];
3. **note** that on 4 October 2010, when considering technical amendments to the Charities Act, Cabinet further agreed that the definition of charitable purpose focusing on the four heads of charity and its alignment across the legislation including the Charitable Trusts Act 1957, the Gambling Act 2003, and the Income Tax Act 2007, should become a key focus for the first principles review of the Charities Act 2005 which was to be completed by 2015 [CAB Min (10) 35/3B];
4. **note** that Cabinet's April 2010 decision to undertake a first principles review of the Charities Act by 2015 was based in part on the assumption that this would allow sufficient time to gauge the effectiveness of the Charities Commission in performing its statutory functions;
5. **note** that on 1 August 2011, as part of the current machinery of government reforms designed to build a better public service, Cabinet agreed to disestablish the Charities Commission, with the result that the functions and actions that were previously carried out by the Commission will be carried out by the Department of Internal Affairs (with registration decision-making carried out separately by a statutory board) [CAB Min (11) 28/5];
6. **agree** that in light of the 2011 decision to disestablish the Charities Commission, it is no longer appropriate to conduct a first principles review of the Charities Act, as insufficient time would have elapsed for there to be a meaningful evaluation of the performance of the new Board and the Department by 2015;
7. **note** that the charitable sector continues to have high expectations concerning the timing of a review of the Charities Act, taking the view that it should be brought forward from 2015;
8. **agree** to the Department of Internal Affairs conducting a targeted review of the Charities Act 2005, focusing on the "charitable purpose" definition and related issues, for completion by 2013;
9. **agree** that the targeted review should also have the flexibility to identify and propose solutions to any issues with the operation of the Charities Act that are not directly related to the recent machinery of government reforms;

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10. **note** that completing the targeted review by 2013 may not allow full consideration of:
- 10.1 the outcomes of the current Law Commission reviews of trusts and incorporated societies that are not due for completion until 2013/14, or
 - 10.2 information on the non-profit sector from the Statistics New Zealand Non-profit Institutions Satellite Account, which may be published in 2013;
11. **note** that Cabinet's agreement to the public release of a discussion document on the future of the charitable purpose definition and related issues will be sought in August 2012, with any policy approvals for legislative change being sought in late 2012 or early 2013; and
12. **agree** to the Department of Internal Affairs placing this Cabinet paper (and the accompanying Cabinet minutes) on its website.

Hon Jo Goodhew
Minister for the Community and Voluntary Sector

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OFFICIAL INFORMATION ACT

From: Richard Braae [Richard.Braae@dpmc.govt.nz]
Sent: Thursday, 15 March 2012 12:18 p.m.
To: mike.osmond@dia.govt.nz; [Withheld under s9(2)(g)(i)]
Subject: RE: Draft Cabinet paper - Targeted Review of Charities Act

Mike [Withheld under s9(2)(g)(i)]

I would echo [redacted] comments and add that I think a brief para about the extent of charitable giving and the current fiscal consequence (tax) would provide useful context within the paper. And otherwise - a very readable, informative and sensible paper...it's not every day that we traverse 400 year statutes

regards
richard

Richard Braae

Policy Advisor
Department of the Prime Minister and Cabinet

[Withheld under s9(2)(a)]

richard.braae@dpmc.govt.nz

>>> [Withheld under s9(2)(g)(i)] treasury.govt.nz 15/03/2012 9:49 a.m. >>>

Hi Mike

Thanks for the opportunity to provide comment and feedback on this paper. As discussed, please see below for the Treasury comment we would like inserted into the 'Financial Implications' section of the paper, and also the wording for the additional recommendation for DIA to work alongside IRD on this review.

Fiscal Implications, Treasury comment:

"The Treasury considers there to be a strong likelihood of fiscal implications from the review to the extent that it recommends amendments to the current definition of charitable purpose. Currently, where an organisation has a charitable purpose, it is eligible for an income tax exemption and donations made to such organisations are eligible for the charitable giving tax incentives. Consequently if, for example, the definition of charitable purpose is extended there will be new organisations that will become eligible to these tax benefits, which has a bearing on fiscal implications. Given this, the Treasury view is that the Department of Internal Affairs should work closely with the Inland Revenue Department.

Additional recommendation:

"direct the Department of Internal Affairs to work closely with the Inland Revenue Department, given the strong likelihood of fiscal implications from the review, if there are amendments to the current definition of charitable purpose"

Cheers,

[Withheld under s9(2)(g)(i)]

[Withheld under s9(2)(g)(i)]

he Treasury
treasury.govt.nz

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From: Mike Osmond [<mailto:Mike.Osmond@dia.govt.nz>]
Sent: Wednesday, 14 March 2012 1:00 p.m.
To: 'Charles Ngaki'; 'tania.warburton@crownlaw.govt.nz'; 'andrew.fieldsend@sparc.org.nz'; Hugh Lawrence; 'richard.braae@dpmc.govt.nz'; ^[Withheld under s9(2)(g)(h)] 'gordon@mwa.govt.nz'; 'bakum@tpk.govt.nz'; 'lana.perese@mpia.govt.nz'; 'stephen.oakley@stats.govt.nz'; 'julia.agar@justice.govt.nz'; 'Ellen MacGregor-Reid'; Ashlin Chand
Cc: Sue Dahl; Raj Krishnan
Subject: Draft Cabinet paper - Targeted Review of Charities Act

Hi again

You received a draft Cabinet paper on the above topic from me earlier in the week, with feedback requested by Friday.

Our Minister's office has since expressed a strong preference for submitting the paper to the 28 March meeting of SOC, rather than the 4 April meeting (which we had previously been aiming for).

So, if you were able to provide your comments as soon as you can, this would be much appreciated. And if you weren't planning to provide comments, an indication of this would also be useful to us.

Thanks, Mike

Michael Osmond
Senior Policy Analyst
Policy Group
Policy, Regulatory & Ethnic Affairs
The Department of Internal Affairs *Te Tari Taiwhenua*
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(DPMC Secured)

From: Charles Ngaki [Charles.Ngaki@ird.govt.nz]
Sent: Friday, 16 March 2012 3:48 p.m.
To: Mike Osmond (Mike.Osmond@dia.govt.nz)
Cc: Emma Grigg; [Withheld under s9(2)(g)] parliament.govt.nz; carolyn.palmer@parliament.govt.nz; [Withheld under s9(2)(g)]
Subject: IRD comment on latest version of Cabinet paper - targeted review of Charities Act 2005
Attachments: 783819DB - Standard Cabinet Paper template (2).dot

Hi Mike

I've made some changes to paragraph 14. Apologies, my original write-up of the level of charities-related tax benefits was misleading. The estimate of the income tax exemption fiscal cost was based on Charities Commission data but the tax incentives for charitable giving fiscal cost was based on IRD data.

In paragraph 26, it is not necessary to refer to "in terms of their effect on the taxation base", because this is implied in the fiscal implications.

Thank you for considering and responding to our concerns relating to the overall timeline for the review. The latest draft of the Cabinet paper (paragraph 28) extends the release data for the discussion document out to December 2012. We are more comfortable with a "December 2012 release date", than an "August release date". Even so, we are still concerned that the December 2012 date may be too ambitious. We will advise the Minister of Revenue that the original timeline of 2015 to complete the review is more preferable.

Kind regards
Charles

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Office of the Minister for the Community and Voluntary Sector

Chair
Cabinet Social Policy Committee

A TARGETED REVIEW OF THE CHARITIES ACT 2005

Proposal

1. This paper seeks agreement to a targeted review of the Charities Act 2005, focusing on the "charitable purpose" definition and related issues. This targeted review would replace a "first principles review" of the Act previously agreed to by Cabinet and due for completion by 2015.

Executive Summary

2. In 2010 Cabinet agreed to a first principles review of the Charities Act 2005 [CAB Min (10) 12/6 & CAB Min (10) 35/3B]. This decision pre-dated the 2011 decision to disestablish the Charities Commission and transfer its functions to the Department of Internal Affairs and to a three-person board, as part of the machinery of government reforms proposed in the Crown Entities Reform Bill [CAB Min (11) 28/5].
3. The decision to disestablish the Commission will create a new operating environment for the registration of charities under the Charities Act, once the Bill passes. This means that it would not be optimal to conduct a first principles review of the Act by 2015, as the new model would not have been in operation long enough to fully evaluate its effectiveness. Further delaying the review is not recommended as there is already a strong expectation in the non-profit sector that a review will be conducted either within the original 2015 timeframe or earlier. The sector's strong interest in a review appears to stem from dissatisfaction with the Charities Act's definition of a "charitable purpose".
4. I am of the view that a targeted review of the "charitable purpose" definition (and related issues) is the most appropriate course of action, as it has the potential to address the key concerns of the charitable sector within a reasonable timeframe. Such a review could be completed in 2013, earlier than the scheduled 2015 completion of the first principles review.
5. As well as focusing on whether or not to change the charitable purpose definition, I propose that the review should have the flexibility to identify and propose solutions to any issues concerning the efficient functioning of the Charities Act that are not related to the proposed machinery of government reforms.

Background

The "charitable purpose" definition

6. The law surrounding "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 contained a list of purposes considered to be charitable at that time. The list in the preamble has formed the basis of several centuries of case law where the Courts, in

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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 Statute.

7. A more refined classification of the Elizabethan preamble was provided in the 19th century by Lord MacNaughten in *Commissioners for Special Purposes of Income Tax v Pemsel*¹, when he stated that “charity” comprised four principal heads:
 - the relief of poverty;
 - the advancement of education;
 - the advancement of religion; or
 - any other purpose beneficial to the community.In addition to “the four Pemsel heads”, the Courts have long recognised that, to be charitable, a purpose must benefit the public, or a sufficient section of the public, rather than be for a private purpose.
8. The current statutory definitions of “charitable purpose” in the Charities Act and the Income Tax Act 2007² include the four principal heads of charity, which means that their common law interpretations continue to be relevant today. The public benefit requirement for a charitable purpose is also incorporated in both Acts. The Charitable Trusts Act 1957 also includes definitions of charitable purpose that go beyond the common law definition and are not consistent with their equivalents in the Charities and Income Tax Acts. This lack of alignment contributes to legal uncertainty regarding the availability of charitable status.
9. A key question is whether the definition, based on case law deriving from a 400 year old statute and a nineteenth century distillation of that statute, continues to meet the needs of 21st century New Zealand.
10. In its 2004 report on the Charities Bill, the Social Services Select Committee acknowledged the concerns of many submitters that the definition of “charitable purpose” was too narrow, with groups undertaking advocacy work being a particular cause of concern. The Committee suggested a review be conducted “to consider carefully whether the definition should be changed”, once all initial registrations for charitable status had been completed by the Charities Commission.
11. Similar reviews to that proposed by the Committee have been conducted in recent years in comparable Anglo-Commonwealth jurisdictions that use the “charitable purpose” definition such as the United Kingdom and Australia.
12. In 2006, the United Kingdom adopted an expanded statutory definition of charitable purpose that retains but extends the common law definition given in *Pemsel*. The new, additional purposes include:
 - the advancement of health or the saving of lives;
 - the advancement of citizenship or community development;
 - the advancement of environmental protection or improvement;
 - the advancement of the arts, culture, heritage or science;
 - the advancement of amateur sport; and

¹ [1891] AC 531.

² Section 5 of the Charities Act 2005 & section YA 1 of the Income Tax Act 2007.

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- the advancement of animal welfare.³
13. A similar “Pensel plus” approach will be taken in Australia, with the Federal Government announcing in its 2011/12 budget the introduction of a new statutory definition of charity from 1 July 2013. The proposed definition will include the advancement of health, culture, the natural environment, and social and community welfare.⁴ In explaining its decision, the Australian Government noted that the existing definition was based on 400 years of common law, which they considered complex, outdated and creating uncertainty in the non-profit sector.

Level of charities-related tax benefits

14. The Inland Revenue Department estimates that the income tax exemption for charities to have an annual fiscal cost in the order of \$350-400 million. This estimate is based on the Charities Commission’s open source data and financial information contained in annual returns from 86% of all registered charities as at 14 March 2012. The fiscal cost for the tax incentives for charitable giving is estimated to have an annual fiscal cost of around \$200 million. The tax incentives for charitable giving are the donations tax credit for individuals, the donation tax deductions for Māori authorities and companies, and payroll giving.

Previous Cabinet consideration

15. Cabinet has previously agreed that a first principles review of the Charities Act should be conducted by 2015.
16. Specifically, on 12 April 2010, when cancelling a scheduled baseline review of the Charities Commission, Cabinet noted “that the Department of Internal Affairs will schedule a First Principles Review of the Act to take place in 2015, by which time the Commission will have established its full range of functions, and its overall effectiveness can be assessed” [CAB Min (10) 12/6 confirming SOC Min (10) 6/4].
17. On 4 October 2010, when considering technical amendments to the Charities Act, Cabinet “agreed that the definition of charitable purpose focusing on the four heads of charity and its alignment across the legislation including the Charitable Trusts Act 1957, the Gambling Act 2003, and the Income Tax Act 2007, become a key focus for the first principles review of the Charities Act 2005 which is to be completed by 2015” [CAB Min (10) 35/3B].
18. The technical amendments agreed to by Cabinet in October 2010 were included in the Statutes Amendment Bill (No 2), which was passed by Parliament in February 2012. The Bill inserted a new subsection in the charitable purpose definition providing that the promotion of amateur sport may be a charitable purpose if it is the means by which a charitable purpose is pursued. The amendment addressed uncertainty among sports groups, community grant makers, and the legal profession about the charitable status of amateur sport. It clarified existing law rather than extending it into new areas.

³ Section 2 of the Charities Act 2006 (UK).

⁴ 2011/12 Australian Federal Budget (www.budget.gov.au).

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Comment

Rationale for a "Targeted Review" rather than a "First Principles Review"

19. Cabinet's April 2010 decision to undertake a first principles review of the Charities Act by 2015 was based in part on the assumption that this would allow sufficient time to gauge the effectiveness of the Charities Commission in performing its statutory functions.
20. However, on 1 August 2011, Cabinet "agreed to disestablish the Charities Commission by repealing those parts of the Charities Act 2005 that establish or refer to the Charities Commission, with the result that the functions and actions that were previously carried out by the Charities Commission will be carried out by the Department of Internal Affairs (with registration decision-making carried out separately by a statutory board)" [CAB Min (11) 28/5]. This decision was part of the current machinery of government reforms designed to build a better public service, and has been included in the current Crown Entities Reform Bill. The Bill is currently being considered by the Government Administration Committee, which is due to report back by 31 March 2012.
21. The 2011 decision to disestablish the Charities Commission and transfer its functions to a three-person Board serviced by the Department of Internal Affairs will create a new operating environment⁵, once the Crown Entities Reform Bill is passed. This means that it is no longer optimal to conduct a first principles review of the Act by 2015, as the new model would not have been in operation long enough to fully evaluate its effectiveness.
22. Extending the review date beyond 2015 to allow more time to complete a first principles review is not recommended. The charitable sector continues to have high expectations concerning the timing of a review of the Charities Act, taking the view that it should be brought forward from 2015⁶. This appears to primarily stem from long-standing dissatisfaction with the "charitable purpose" definition, and issues with the appropriate treatment of bodies that engage in advocacy-type activities. For example, in a recent decision, the Charities Commission declined to register the National Council of Women as a charity on the grounds that its primary (rather than ancillary) purpose was to engage in advocacy-type activities, which are deemed non-charitable.
23. These concerns are not confined to the charitable sector. A number of law practitioners have also indicated that they believe that a review of the definition should occur sooner rather than later, with one noting that some of the entities being deregistered or declined registration appear to be precisely the type of organisation the Government would wish to support, particularly given current economic and environmental public concerns.⁷ Concern has also been

⁵ The new board will be responsible for the registration (and de-registration) of charitable bodies. All other functions will be undertaken by the Department of Internal Affairs.

⁶ For example in a July 2011 position paper on the Charities Commission and the Charities Act 2005, ANGOA (the Association of Non-Governmental Organisations of Aotearoa) stated that the review should be brought forward and accelerated, rather than left to 2015.

⁷ S Barker and K Yesbery, "Are all "charities" equal?", *Chartered Accountants Journal*, June 2011, 40-46.

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expressed at the direction taken by the Courts in recent judgements on what constitutes a charitable purpose.⁸

24. In light of these factors, I am of the view that a targeted review of the “charitable purpose” definition that considered the issues identified by Cabinet in October 2010, as well as the effects of ancillary non-charitable activities (like advocacy) is the most appropriate course of action. Such a review could be completed by 2013, earlier than the scheduled 2015 completion of the first principles review, thereby addressing the timing concerns outlined above.

Scope of a targeted review

25. The primary focus of the review would be the Charities Act’s “charitable purpose” definition, and its suitability for the needs of 21st century New Zealand. This would involve determining the present parameters of the definition (with reference to recent domestic and international case law, key Charities Commission decisions, and academic literature), any pressure points, and assessing whether the definition reflects contemporary New Zealand values and expectations of what constitutes “charitable”. This would include the interests of Maori, given that the definition already recognises marae-related purposes as charitable in certain circumstances.
26. Generally, I envisage that the Review will generate a number of options on the future of the charitable purpose definition for Ministers to consider, with one being the preservation of the status quo of gradual, Court driven change. Other options might involve statutory changes to varying degrees. As part of this process, any fiscal implications arising as a result of a change in the definition’s scope would have to be assessed.
27. In addition, I am of the view that the review should have the ability to identify and propose solutions to any issues concerning the efficient functioning of the Charities Act. For the reasons set out earlier, these issues would not be directly related to the machinery of government reforms that will result in the establishment of a decision-making board serviced by the Department of Internal Affairs. This would still leave room to consider issues like, for example, whether the Act provides effective tools to ensure that charitable bodies continue to act in accordance with their statutory obligations and/or their governing instruments.

Proposed process for a targeted review

28. The review will be led by the Department of Internal Affairs, with assistance from the Inland Revenue Department. An important review milestone will be the preparation and release of a public discussion document that canvasses the issues relating to the charitable purpose definition and also offers some potential solutions. I anticipate that I will be seeking Cabinet agreement to the release of the document, possibly in late 2012. Prior to this, I expect to be gathering information from the wider charitable and non-profit sector to inform the development of the public discussion document.⁹

⁸ J Bassett, “Charity is a general public use”, [2011] NZLJ 60-62; M Gousmett, “Charity and economic development”, [2011] NZLJ 63-66.

⁹ The timeframes for this process are tentative only, given the potential complexity of the issues.

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29. Following Cabinet agreement, I intend to release the discussion document for public consultation. Currently there are approximately 25,500 registered charities and many more non-profit institutions¹⁰, and it is likely that many of them will take an interest in the consultative process. Targeted meetings with key groups (e.g. representative Maori bodies and key umbrella groups like Philanthropy New Zealand and ANGOA) that have an interest in the charitable purpose definition will be arranged.
30. The final shape of the policy proposals will be informed by the public consultation process. At this stage I anticipate that I will seek policy decisions from Cabinet in 2013, with a view to introducing a bill to amend the Charities Act later in 2013.

Possible linkages with the review

31. Bringing the timing of the review's completion forward to 2013 may mean that there will be only a limited ability to take account of other Government agency work, presently underway or about to commence, that might be relevant to the charitable and non-profit sector.
32. Specifically, Law Commission reviews of the Law on Trusts and of the Incorporated Societies Act are underway, and are due for completion in 2013/14. Some findings from these reviews might be relevant to a review of the Charities Act as many charitable bodies are either charitable trusts or incorporated societies. However, I am of the view that it is not necessary or desirable to wait for the outcome of the Commission's work. The Commission's primary focus is updating the relatively old legislation governing trusts and incorporated societies, and on machinery-type issues associated with their efficient functioning, rather than focusing closely on the charitable purpose definition or on the operation of the Charities Act. I note that there could still be potential to implement any relevant Law Commission findings through any legislative processes arising from its reviews if this was necessary.
33. It is also possible that Statistics New Zealand will publish its Non-profit Institutions Satellite Account in 2013. If this transpired, it would be the first time it was published since 2007, and would provide the review with information on the quantity and economic value of the activities of the non-profit sector. However, if publication did not take place, I am advised that there should still be an ability to secure core data from Statistics New Zealand on the non-profit sector to inform the review.

Consultation

34. The Crown Law Office, Ministry of Culture and Heritage, Ministry of Economic Development, Office of Ethnic Affairs, Inland Revenue Department, Ministry of Justice, Ministry of Pacific Island Affairs, 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.

¹⁰ Statistics New Zealand identified 97,000 non-profits institutions in 2005. See Statistics New Zealand (2007), *Non-profit Institutions Satellite Account: 2004*, Statistics New Zealand, Wellington.

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Financial Implications

35. The Treasury considers there to be a strong likelihood of fiscal implications from the review to the extent that it recommends amendments to the current definition of charitable purpose. Currently, where an organisation has a charitable purpose, it is eligible for an income tax exemption and donations made to such organisations are eligible for the charitable giving tax incentives. Consequently if, for example, the definition of charitable purpose is extended there will be new organisations that will become eligible to these tax benefits, which has a bearing on fiscal implications. Given this, the Treasury view is that the Department of Internal Affairs should work closely with the Inland Revenue Department.

Legislative Implications

36. There are no immediate legislative implications. In late 2012, the Department of Internal Affairs will prepare a bid for the inclusion of a Charities Amendment Bill on the 2013 Legislation Programme.

Human Rights Implications

37. The Ministry of Justice advises that the proposal appears to be consistent with the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993.

Regulatory Impact Statement

38. A regulatory impact statement is not required for the proposal in this paper as it does not involve the consideration of options that would involve creating, amending or repealing either primary or delegated legislation.

Publicity

39. I will announce the Cabinet decision to conduct a targeted review at a "Charitable Purpose Forum" to be hosted by the Charities Commission on 17-18 April 2012. I also recommend that this paper (and the accompanying Cabinet minutes) be placed on the Department of Internal Affairs website to assist in informing the public about the review.

Recommendations

40. It is recommended that the Committee:

1. **note** that there has been long-standing concern about whether the charitable purpose definition in the Charities Act 2005, based on case law deriving from the 400 year old Statute of Elizabeth and a 19th century distillation of that statute into the four heads of charity, meets the needs of 21st century New Zealand;
2. **note** that on 12 April 2010, Cabinet noted that the Department of Internal Affairs should conduct a first principles review of the Charities Act 2005 by 2015 [CAB Min (10) 12/6];

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3. **note** that on 4 October 2010, when considering technical amendments to the Charities Act, Cabinet further agreed that the definition of charitable purpose focusing on the four heads of charity and its alignment across the legislation including the Charitable Trusts Act 1957, the Gambling Act 2003, and the Income Tax Act 2007, should become a key focus for the first principles review of the Charities Act 2005 which was to be completed by 2015 [CAB Min (10) 35/3B];
4. **note** that Cabinet's April 2010 decision to undertake a first principles review of the Charities Act by 2015 was based in part on the assumption that this would allow sufficient time to gauge the effectiveness of the Charities Commission in performing its statutory functions;
5. **note** that on 1 August 2011, as part of the current machinery of government reforms designed to build a better public service, Cabinet agreed to disestablish the Charities Commission, with the result that the functions and actions that were previously carried out by the Commission will be carried out by the Department of Internal Affairs (with registration decision-making carried out separately by a statutory board) [CAB Min (11) 28/5];
6. **agree** that in light of the 2011 decision to disestablish the Charities Commission, it is no longer optimal to conduct a first principles review of the Charities Act, as insufficient time would have elapsed for there to be a meaningful evaluation of the performance of the new Board and the Department by 2015;
7. **note** that the charitable sector continues to have high expectations concerning the timing of a review of the Charities Act, taking the view that it should be brought forward from 2015;
8. **agree** to the Department of Internal Affairs conducting a targeted review of the Charities Act 2005, focusing on the "charitable purpose" definition and related issues, for completion by 2013;
9. **note** that the Review will generate a number of options on the future of the charitable purpose definition for Ministers to consider, ranging from the status quo of gradual, Court driven change to proposals for statutory changes to varying degrees, together with any fiscal implications;
10. **direct** the Department of Internal Affairs to work closely with the Inland Revenue Department, given the strong likelihood of fiscal implications from the review, if there are amendments to the current definition of charitable purpose;
11. **agree** that the targeted review should also have the flexibility to identify and propose solutions to any issues with the operation of the Charities Act that are not directly related to the recent machinery of government reforms;
12. **note** that completing the targeted review by 2013 may not allow full consideration of:

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- 12.1 the outcomes of the current Law Commission reviews of trusts and incorporated societies that are not due for completion until 2013/14, or
- 12.2 information on the non-profit sector from the Statistics New Zealand Non-profit Institutions Satellite Account;
13. **note** that Cabinet's agreement to the public release of a discussion document on the future of the charitable purpose definition and related issues are likely to be sought in late 2012, with any policy approvals for legislative change being sought in 2013; and
14. **note** that, prior to the release of the public discussion document, the Minister for the Community and Voluntary Sector and the Department of Internal Affairs will gather information from the wider charitable and non-profit sector to inform the development of the public discussion document; and
15. **agree** to the Department of Internal Affairs placing this Cabinet paper (and the accompanying Cabinet minutes) on its website to assist in informing the public about the review.

Hon Jo Goodhew
Minister for the Community and Voluntary Sector

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