



# **Charities Amendment Bill 169-1 – its impact and risks**

27 April 2023

**Focus on Purpose –  
What Does a World-Leading  
Framework of Charities Law  
Look Like?**





# SUSTAINABLE DEVELOPMENT GOALS

**1** NO POVERTY

**2** ZERO HUNGER

**3** GOOD HEALTH AND WELL-BEING

**4** QUALITY EDUCATION

**5** GENDER EQUALITY

**6** CLEAN WATER AND SANITATION

**7** AFFORDABLE AND CLEAN ENERGY

**8** DECENT WORK AND ECONOMIC GROWTH

**9** INDUSTRY, INNOVATION AND INFRASTRUCTURE

**10** REDUCED INEQUALITIES

**11** SUSTAINABLE CITIES AND COMMUNITIES

**12** RESPONSIBLE CONSUMPTION AND PRODUCTION

**13** CLIMATE ACTION

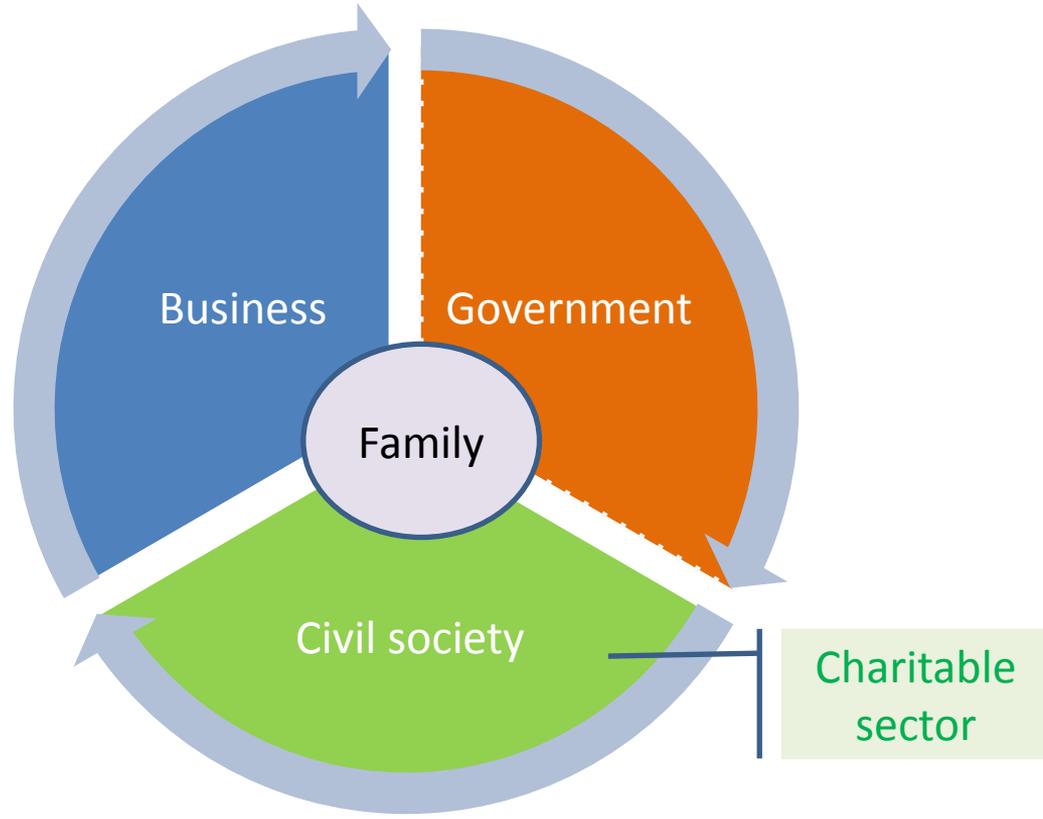
**14** LIFE BELOW WATER

**15** LIFE ON LAND

**16** PEACE, JUSTICE AND STRONG INSTITUTIONS

**17** PARTNERSHIPS FOR THE GOALS

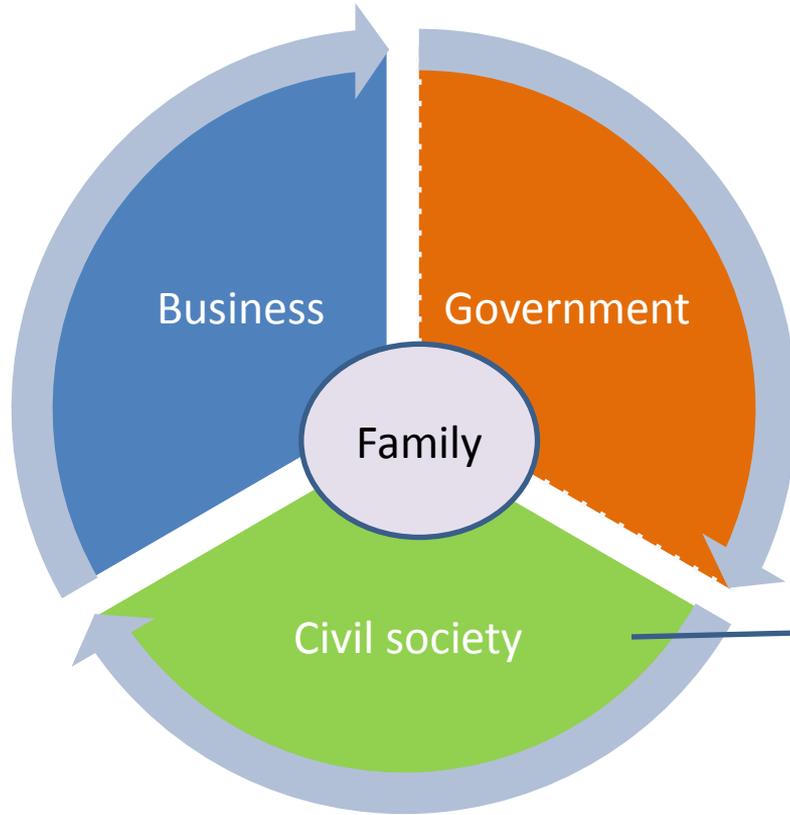
SUSTAINABLE DEVELOPMENT GOALS



# the charitable sector is:

“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 **inadequately utilised as a mechanism for addressing public problems**”

- Dr Lester M Salamon

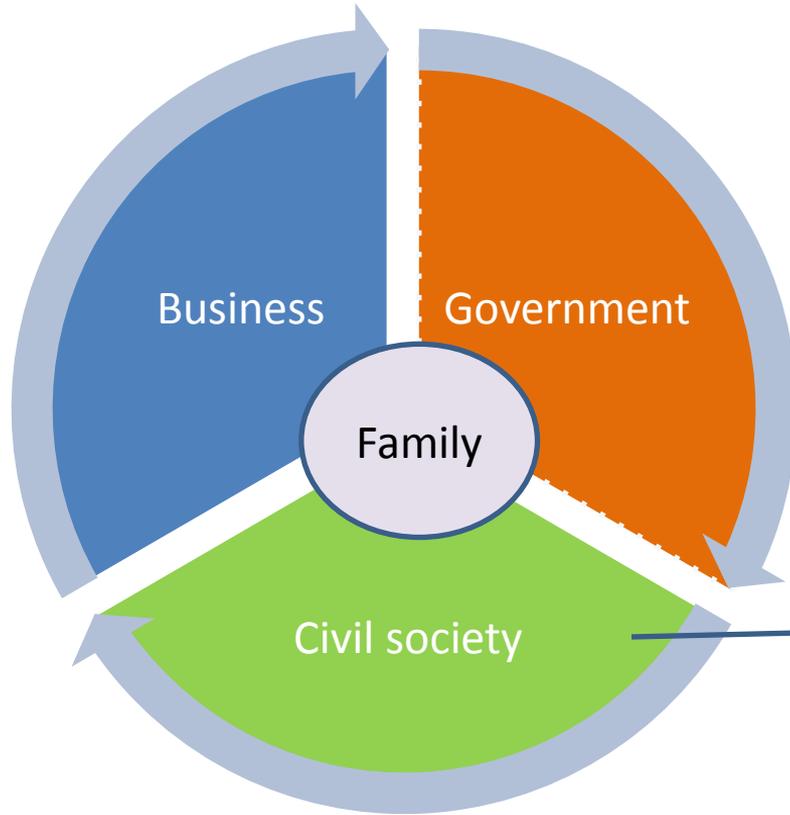


Charitable sector:  
\$73 billion assets  
under management

**“Civil society is essential to building a strong society** and economy and I believe that all of us, regardless of political persuasion, should passionately, explicitly and unashamedly support people getting involved in their community, coming together in clubs, groups and societies, starting charities, social enterprises or community businesses. Doing things for the wider public benefit, not simply private gain.

We know that a better future is about more than growing the economy. In a famous speech of more than 45 years ago, Robert Kennedy said that GDP “does not allow for the health of our children, the quality of their education, or the joy of their play. It measures neither our wisdom nor our learning; neither our compassion nor our devotion to our country; it measures everything, in short, except that which makes life worthwhile.” For many, the answer instead lies in civil society. **It is charity and volunteering that allow them 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.”**

- Sir Stuart Etherington, former chief executive, National Council of Voluntary Organisations, January 2019



Charitable sector:  
private organisations  
for public purposes



# International “wave” of charities legislation:

- **New Zealand** – 2005 / 2012
- Scotland - 2005
- **England and Wales** – 2006 / 2011
- Japan - 2006
- Singapore - 2007
- **Northern Ireland** – 2008 / 2013
- Guernsey - 2008 / 2021
- Zambia – 2009
- **Ireland** – 2009 / 2013
- **Australia** - 2012
- Jamaica – 2013
- Jersey - 2014
- **China** - 2016
- Uganda - 2016
- Isle of Man – 2019
- Pakistan - 2019

# Is all this “regulation” working?

Surveys of public trust and confidence:	
<b>2008</b>	<b>6.6</b>
2012	5.9
2016	5.9
2019	5.9
<b>2021</b>	<b>6.5</b>

# Tax expenditure analysis

- Tax Working Group Te Awheawhe Tāke:
  - “The Group recommends the Government periodically review the charitable sector’s **use of what would otherwise be tax revenue**, to verify that the intended social outcomes are actually being achieved”.
  - “The Government should consider whether to apply a distinction between privately controlled foundations and other charitable organisations, with a view to **removing concessions** for privately controlled foundations or trusts that do not have arm’s length governance or distribution policies.”

# Tax expenditure analysis (cont'd)

- structurally ignores the benefits provided by charities
  - Australian Productivity Commission 2010 report:
    - wider benefits may be intangible and difficult to measure
    - but the reason for the tax privileges in the first place
- leads to a negative narrative about charities:
  - “fiscal cost”
  - “tax loophole”
- “underfunded service delivery arm of government”

# “Modernisation” strategies

- “More third sector, less civil society”
- Threat to independence
- Spread of bureaucratic risk aversion

# Underlying clash of paradigms

Restrictive	Enabling
Tax privileges for charities seen as a <b>subsidy</b> , equivalent to a direct grant, awarded based on government perceptions of what is worth subsidising out of public funds, rather than 'public benefit'	Tax privileges seen as an <b>investment</b> in an overall system that manifests liberal democratic values, such as pluralism, diversity, tolerance and human flourishing
<b>Third sector</b> - charities seen as an (underfunded) service delivery arm of government	<b>Civil society</b> - charities' traditional advocacy and watchdog roles celebrated and protected
Public organisations	Private organisations (for public purposes)
Bureaucratic risk aversion – focus on measurable inputs and outputs (neoliberalism) and the perception of the public interest to which the government of the day seeks to give effect in its policies	<b>Independent</b> - focus on outcomes and impact, charities able to experiment and innovate, self-determination: 'communities know best what communities need'
Efficiency	Effectiveness (even if messy and 'inefficient')
Charitable funds seen as government funds: state control through command and control ' <b>regulation</b> '	Charities <b>accountable</b> for expending their own funds as they see fit in furtherance of their stated charitable purposes (subject to the general law)
Suspicion	Trust
<b>Autocracy</b>	<b>Liberal democracy</b>

# Underlying clash of paradigms (cont'd)

Restrictive	Enabling
<b>Narrow</b> , deficits-based – paternalistic, colonialist, Victorian concept of handouts to the poor – “assuaging need”	<b>Wide</b> , strengths-based - supports innovation and prevention – communities know best what communities need – human flourishing
Focus on direct benefits	Indirect benefits taken into account
Focus on granular assessments of activities, in isolation from the purposes in furtherance of which they are carried out	Focus on <b>fidelity to purpose</b>
Equitable principles ‘crowded out’ by black letter ‘ex ante’ rules	Equitable principles (such as duty of loyalty to purpose) recognised and enforced, obviating the need for additional rules
Ever-increasing <b>complexity</b> – distract charities from their purposes and enliven a culture of regulatory gaming	Simplicity – flexibility within clear boundaries
‘Fiscal consequences’ – lack of transparency in decision-making	Public benefit, a question of fact as established before an independent judicial adjudicator operating as a trier of fact on the basis of established rules of evidence
Subjectivity	<b>Objectivity / rule of law</b>
Regulation as an end in itself	Regulation as a means to an end: intervention limited to cases of impropriety or illegality

# Review of the Charities Act

- Pre-Charities Act:
  - high levels of public trust and confidence
  - lack of information
- Charities Bill 2004 – 16+ years in gestation
  - but widely regarded to be fundamentally flawed
    - “conceived ... in Treasury, and ... designed by the Ministry of Economic Development”
    - a “Trojan horse” that could allow government to “colonise and control” the charitable sector
  - almost completely rewritten at Select Committee stage
  - rushed through under urgency without proper consultation:
    - “we do not really know what we are passing tonight, or what the implications are”
  - promise of post-implementation review
    - almost 20 years later, that is the review we are still waiting for
- Charities Act 2005
  - many unintended consequences
  - exacerbated by a series of piecemeal amendments

# Labour party policy 2017

- consult with the community and voluntary sector on whether the **disestablishment of the Charities Commission** and transfer of its functions ... to the DIA has resulted in effectiveness and improved services and information for the sector
- **prioritise the long-promised review of the Charities Act** ... beginning with a **first principles review** of the legislation, including examining, **updating and widening rather than narrowing** the definition of charitable purpose
- ensure that community and voluntary organisations can engage in **advocacy** without fear of losing government contracts or their charitable status

# Charities Amendment Bill 169-1

- Review commenced May 2018
- Bill introduced 21 September 2022
- First reading **28 September** – referred to Social Services and Community Select Committee
  - Angie Warren-Clark, Emily Henderson, Liz Craig, Anahila Kanongata’a-Suisuiki, Teresa Ngobi (Labour);
  - Maureen Pugh, Louise Upston (National); Ricardo Menéndez March (Green); Karen Chhour (ACT)
- Submissions closed **9 December 2022**
  - 95 submissions
  - submissions overwhelmingly call for the Bill to be **withdrawn**, and for the Government to honour its 2017 manifesto commitment to carry out a proper, independent, first principles, post-implementation review of the Charities Act
- Report due **4 May 2023**

# Kōrerorero / Discussion

[www.charitieslaw.co](http://www.charitieslaw.co)

[www.charitieslawreform.nz](http://www.charitieslawreform.nz)

# Links:

- New Zealand Law Foundation 2019 International Research Fellowship Te Karahipi Rangahau ā Taiao **Focus on purpose - what does a world-leading framework of charities law look like?** – April 2022: <https://www.lawfoundation.org.nz/?p=47523>  
– **update facility:** [www.charitieslawreform.nz](http://www.charitieslawreform.nz)
- New Zealand Initiative **Podcast: The Flaws of the Charities Amendment Bill** 2 March 2023: <https://www.nzinitiative.org.nz/reports-and-media/podcasts/podcast-the-flaws-of-the-charities-amendment-bill/>
- Legalwise **10 Election policies for charities** 18 January 2023 – 10 March 2023: <https://legalwiseseminars.com.au/nz/insights/ten-election-policies-for-charities-for-2023-with-sue-barker-policy-1-press-pause-on-the-charities-act-changes/>
- Trust Democracy **Charities are worth it!** 22 June 2022: [https://trustdemocracy.nz/2022/06/act\\_for\\_charities/](https://trustdemocracy.nz/2022/06/act_for_charities/)
- Legalwise webinar **Charities and Not-for-profits update** 9 March 2023: <https://legalwiseseminars.com.au/nz/course-2/?eventtemplate=2690-charities-and-not-for-profits-update&event=10059>
- **Charity reforms insult to the sector** 3 June 2022: <https://www.rnz.co.nz/national/programmes/morningreport/audio/2018844519/charity-reforms-insult-to-the-sector-lawyer>
- **Fears charities law reform could be colossal mistake** 23 May 2022: <https://businessdesk.co.nz/article/charities/fears-charities-law-reform-could-be-colossal-mistake>
- **The Supreme Court decision in Family First – a gift to the forces of authoritarianism?** 5 July 2022: <https://www.linkedin.com/pulse/supreme-court-decision-family-first-gift-forces-susan-barker/?trackingId=ZNe9vJB65aSD0wY%2BzQ%2FfSw%3D%3D>
- **Charities beware – the government is trying to remove your rights of appeal - again!** 5 June 2022: <https://www.linkedin.com/pulse/charities-beware-government-trying-remove-your-rights-susan-barker/?trackingId=Nyq7vFq0Qki0qph4TLFywg%3D%3D>
- **LinkedIn group:** NZ Charity Law
- **Facebook page:** Charities Act Review 2020