

**EXPOSURE DRAFT - FOR COMMENT AND DISCUSSION ONLY**

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**QUESTIONS WE'VE BEEN ASKED**

**What is required to establish and maintain a “public fund” under s LD 3(2)(d) of the Income Tax Act 2007?**

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A person who donates money to a donee organisation can receive a donations tax credit or deduction. A donee organisation includes a “public fund” established and maintained exclusively for the purpose of providing money for one or more specified purposes within New Zealand. Since 1 April 2020, a public fund must be registered with the Department of Internal Affairs’ Charities Services (if it is entitled to be registered under the Charities Act 2005), and the name of the fund must be on the list of donee organisations the Commissioner publishes for a donor to receive a donations tax credit or deduction. This item considers what is required to establish and maintain a public fund under s LD 3(2)(d) of the Income Tax Act 2007.

This item complements [Interpretation Statement IS 18/05: Income tax – donee organisations – meaning of wholly or mainly applying funds to specified purposes within New Zealand](#) (Inland Revenue, September 2018) and [Question We've Been Asked QB 19/10: Donations – what is required to establish and maintain a fund under s LD 3\(2\)\(c\) of the Income Tax Act 2007?](#) (Inland Revenue, June 2019).

**Key provisions**

Income Tax Act 2007, s LD 3(2)(d)

Tax Administration Act 1994, s 41A

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## Question

What is required to establish and maintain a “public fund” under s LD 3(2)(d) of the Income Tax Act 2007?

## Answer

In the Commissioner’s view, to establish and maintain a “public fund” under s LD 3(2)(d) requires or involves the following:

- **The fund must:**
  - originate in a public initiative or with a founder or founders who intend that the public will contribute to the fund and participate in its administration;
  - attract public financial participation; and
  - have public participation in its administration.
- **A fund originates in a public initiative if it is established by:**
  - a group of individuals who together represent a sector of the public and have the requisite degree of responsibility to the community; or
  - the Crown or local government, or generally if established by an entity controlled by the Crown or local government.
- **If a fund does not originate in a public initiative, the intention of the founder or founders can be ascertained by examining:**
  - any documents establishing the fund;
  - the nature of any advertising campaigns carried out on behalf of the fund or the nature of any other publicity received by the fund (for example, articles in print and online media, social media presence, and radio and television interviews);
  - the number and amounts of donations the fund receives from members of the public unrelated to the founder or founders; and
  - the level of participation in the administration of the fund by people with a requisite degree of responsibility to the community.
- **For the above purposes, “the public” may comprise a section of the community, provided membership of that section is not conditional on the approval of some or all of the members of that section.**

- **The fund must comprise a stock of separately identifiable money or other assets.**
- **A fund should be established and maintained through a combination of book entries and a document setting out terms for the establishment, operation and winding up of the fund (either as part of the rules of the founder or in a stand-alone document such as a resolution). The fund should also have its own bank account.**
- **Maintaining the public fund requires maintaining the stock of money or other assets consistent with any book entries. Movements of the money or other assets in the public fund should be tracked and reported on in financial accounts.**
- **The fund's money may be used:**
  - **for purposes other than the required purpose, but only if those other purposes are subordinate or incidental to the required purpose and are not independent purposes; and**
  - **by the founder (or founders) to meet or reimburse costs it or they incur in administering the fund (or, where the founder is a s LD 3(2)(a) donee organisation, to meet or reimburse costs incurred in furthering the founder's purposes if consistent with the purposes of the public fund).**
- **The public fund must be maintained for the required purpose throughout its lifetime, including on the disposal of the public fund's money or other assets if wound up.**

## Key terms

**Charitable or other public benefit gift** includes a gift of money of \$5 or more that is paid to a fund, if the fund is a "public fund" as described in s LD 3(2)(d) and the fund is named on the list the Commissioner publishes under s 41A(14) to (16) of the Tax Administration Act 1994. It does not include a subscription that confers rights arising from membership in the public fund or in any other society, institution, association, organisation, trust or fund; a testamentary gift; a gift made by forgiving some or all of a debt; or a gift to a public fund that is not registered as a charitable entity under the Charities Act 2005 if, in the Commissioner's opinion, the public fund is eligible to be registered as a charitable entity under that Act.

**Donee organisation** means an entity or fund described in s LD 3(2) or listed in schedule 32 of the Income Tax Act 2007.

**New Zealand** does not include Niue, the Cook Islands, Tokelau or the Ross Dependency of Antarctica.

**Required purpose** means the provision of money for a s LD 3(2)(d) public fund's specified purposes within New Zealand.

**Specified purposes** means charitable, benevolent, philanthropic and/or cultural purposes.

All legislative references are to the Income Tax Act 2007 (the Act), unless otherwise stated.

References to a founder include multiple founders.

## Explanation

### Introduction

1. This item is about **donee organisation** status under the Income Tax Act 2007. Taxpayers who make gifts of money to an entity or fund with donee organisation status under the Act can generally get tax advantages. Subject to limits, the tax advantage for an individual is a refundable tax credit of one-third of their gifts of \$5 or more to donee organisations each year under ss LD 1 and LD 2. Companies and Māori authorities making such gifts can get a deduction for the gift under s DB 41 or s DV 12.
2. Donee organisation status can apply to an entity or a fund. For example, a society, institution, association, organisation or trust that is not carried on for the private pecuniary profit of an individual (a **non-profit entity**) can be a donee organisation under s LD 3(2)(a) if the entity applies its funds "wholly or mainly" to charitable, benevolent, philanthropic or cultural purposes (**specified purposes**) within New Zealand.<sup>1</sup> A fund established and maintained by a non-profit entity exclusively for the purpose of providing money for any one or more specified purposes within New Zealand can be a donee organisation under s LD 3(2)(c).<sup>2</sup>
3. Since 1 April 2020, to qualify as a donee organisation under s LD 3(2)(a), (ab), (b), (c), or (d) the entity must be on the list the Commissioner publishes. Further, if the Commissioner considers that an entity under s LD 3(2)(a), (b), (c) or (d) is eligible to be

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<sup>1</sup> For more details on qualifying under s LD 3(2)(a), see [Interpretation Statement IS 18/05: Income tax – donee organisations – meaning of wholly or mainly applying funds to specified purposes within New Zealand](#) (Inland Revenue, September 2018) (**IS 18/05**).

<sup>2</sup> For more details on qualifying under s LD 3(2)(c), see [Question We've Been Asked QB 19/10: Donations – what is required to establish and maintain a fund under s LD 3\(2\)\(c\) of the Income Tax Act 2007?](#) (Inland Revenue, June 2019) (**QB 19/10**).

registered as a charitable entity under the Charities Act 2005 but it is not so registered, the entity is not a donee organisation. Registration under the Charities Act 2005 is dealt with by the Department of Internal Affairs' Charities Services.

4. A public fund can have donee organisation status under s LD 3(2)(d), provided the fund is established and maintained exclusively for the purpose of providing money for one or more specified purposes within New Zealand (the **required purpose**). However, a public fund cannot generally be registered under the Charities Act 2005 because a fund, of itself, cannot be a society, trust or institution.
5. An example of a public fund could be a fund established by a public body such as a Council that receives donations from the public and that is established for a specified purpose such as the promotion of the arts or a cultural festival. Obtaining donee status under s LD 3(2)(d) may be an option where a fund's situation is such that qualification for donee organisation status under s LD 3(2)(a) or (c) is not possible. A fund held on trust could qualify for donee organisation status under s LD 3(2)(a), (c) or (d), although, under paras (c) and (d), the fund must be established and maintained "exclusively" for specified purposes within New Zealand. Under s LD 3(2)(a) and (c), the fund must be, or must be established and maintained by, a non-profit entity, while under s LD 3(2)(d) this is not necessarily the case, but the fund must be a "public fund".
6. This item concerns the donee organisation status of a fund under only s LD 3(2)(d) (the **key provision**). The key provision applies to:
  - (d) a public fund established and maintained exclusively for the purpose of providing money for any 1 or more of the purposes within New Zealand set out in paragraph (a).
7. The key provision refers to certain purposes within New Zealand set out in s LD 3(2)(a). These purposes are "charitable, benevolent, philanthropic, or cultural purposes" (that is, specified purposes).
8. This item considers the:
  - meaning of the following terms and phrases used in the key provision:
    - public (see [10] to [13]);
    - fund (see [14] to [19]); and
    - public fund (see [20] to [50]); and
  - practical implications of the above terms, including:
    - how a person can establish a fund that qualifies as a "public fund" (see [51] to [57]);

- what the person must do to maintain such a fund (see [58] to [66]); and
  - who may maintain such a fund (see [67] to [69]).
9. This item does not consider:
- the meaning of “established”, “maintained” and “exclusively” (see QB 19/10 for the meaning of these terms);
  - the meaning of “charitable, benevolent, philanthropic, or cultural purposes”; and
  - whether, if the person seeking to establish a “public fund” is an entity, the establishment of a “public fund” is permitted under the governing documents or terms applicable to the entity.

## Analysis

### “Public”

10. The meaning of the term “public” in the *Concise Oxford English Dictionary* (12th ed, Oxford University Press, New York, 2011) is:
- public** ► adj. **1** of, concerning, or open to the people as a whole. ▪ involved in the affairs of the community, especially in government or entertainment: a *public figure*. **2** done, perceived, or existing in open view. **3** of or provided by the state rather than an independent commercial company.
11. In that definition, the meanings “of, concerning, or open to the people as a whole” and “done, perceived, or existing in open view” have the most relevance to the meaning of the term “public” in the phrase “public fund”. The third meaning “of or provided by the state” has some relevance (as discussed from [49]).
12. In *Re Income Tax Acts (No 1)* (1930) VLR 211, the Supreme Court of Victoria considered whether accommodation that admitted only freemasons and their spouses was a “public benevolent asylum”. Macfarlan J held that, generally, if admission to membership of a body or inclusion in a class depends on the consent of some or all of the other members of the body or class (for example, a committee), the body or class is not a section of “the public” in the relevant sense of the term. Macfarlan J stated that he preferred to express the definition in the negative (by identifying what was not a section of the public). However, he also stated that a group of people will, roughly speaking, constitute a section of the public if inclusion in the group depends on only the possession of natural attributes or attributes that any member of the community may acquire. MacFarlan J held that the accommodation did not meet the definition.

13. Therefore, it is considered that a group of people who contribute to and participate in the administration of a fund will usually be considered a section of the public, if the right to membership of the group depends only on natural attributes or on attributes that any member of the community may acquire. A group of people will not generally be considered a section of the public if inclusion in the group depends on the consent of all or some of the other members of the group.

## “Fund”

14. The ordinary meaning of “fund” suggested by the *Concise Oxford English Dictionary* is “a sum of money saved or made available for a particular purpose”.
15. The United Kingdom Court of Appeal decision in *Allchin v Coulthard* [1942] 2 All ER 39 is a commonly cited authority on the meaning of the term. In *Allchin v Coulthard*, Lord Greene considered fund had two meanings (at 44):

The word “fund” may mean actual cash resources of a particular kind (e.g., money in a drawer or at a bank) or it may be a mere accountancy expression used to describe a particular category which a person uses in making up his accounts.

...

A fund in the second sense is merely an accountancy category. It has a real existence in that sense, but not in the sense that a real payment can be made out of it as distinct from being debited to it.

16. In *Rapid Metal Developments (NZ) Ltd v Rusher* (1987) 2 PRNZ 85, McGechan J in the New Zealand High Court considered (at 93) dictionary definitions of fund, including the following definition in the *Shorter Oxford English Dictionary* (vol 1, 1972):

3. Sources of supply; a permanent stock that can be drawn upon 4(a) sing. A stock or sum of money, esp. one set aside for a particular purpose (b) Pecuniary resources.

17. McGechan J considered that in *Allchin v Coulthard* Lord Greene’s second meaning of fund as an accountancy category extended the dictionary definition. McGechan J also considered that the applicable meaning, including whether Lord Greene’s extended meaning applied, depended on the context. McGechan J stated (at 93):

The meaning of “fund” is not necessarily restricted to such dictionary sense of actual stock or sum of money set apart. It can be “a mere accountancy expression used to determine a particular category which a person uses in making up his accounts” *Allchin v Coulthard* [1942] 2 KB 228, 234, per Lord Greene MR.

...

In short, to constitute an [sic] “fund” it is not necessary to set aside actual coin. An accountancy device will suffice. ... The word “fund” can vary in meaning according to context.

18. McGechan J considered that, under any meaning, the essential features of a fund are purpose and retention (at 94):

The underlying feature of a “fund” so exemplified is that it is an aggregation of money or an accounting device directing money to a particular purpose, and that such money is still so held or still so allocated for that purpose. On this common usage approach, the essential features are purpose and retention.

19. In the Commissioner’s view, the relevant meaning is one that recognises that there is a specific fund which is a source from which a real payment can be made to fulfil its specified purpose, rather than an accounting entry or a concept of accountancy. Accordingly, a meaning of “fund” based on the ordinary usage and the dictionary meaning rather than on Lord Greene’s extended meaning of the term, is preferred. That is, a s LD 3(2)(d) fund must be an actual stock of money or other assets set aside for the required purpose. This includes, for example, a fund represented by a credit balance in a bank account.

### “Public fund”

20. No New Zealand case law discusses the meaning of “public fund” under the key provision or any of its predecessors.
21. Two Australian cases discuss the meaning of public fund in relation to an Australian provision, s 78 of the Income Tax Assessment Act 1936: *Bray v FC of T* 78 ATC 4,179 (HCA) (discussed in [24] to [29]) and *Case X13* 90 ATC 165 (AAT) (discussed in [30] to [33]).
22. Section 78 of the Australian Act has since been repealed and replaced with new “donee gift recipient” provisions. However, it had allowed a deduction for donations to “public funds” established for specific purposes. The context in which the phrase public fund was used (in s 78) was, therefore, very similar to the context in which it is used in the key provision, and the legislative purpose of s 78 was also very similar to the purpose of the key provision. Therefore, the Commissioner considers *Bray* and *Case X13* are relevant to the interpretation of the phrase “public fund” in the key provision.
23. We discuss the two Australian cases and their conclusions on the meaning of “public fund” next.



## Bray v FC of T

24. In *Bray*, a solicitor established a trust fund to which he made substantial donations and treated them as deductible. Although the terms of the trust allowed the trust fund to receive donations from the public, at all material times the solicitor was the sole contributor to the fund.
25. By a 4 : 1 majority, the Full High Court held that the fund was not at any relevant time a public fund. This was on the basis that no public elements existed in the establishment or maintenance of the fund under the deed of trust. There was no public initiative in the fund's establishment, and no public participation in its maintenance.
26. Jacobs J concluded that the principal characteristic of a public fund was that the founder of the fund genuinely intends that the public will contribute. If contributions are received from the public this will be strong evidence that the fund is a public fund (provided its funds are used for the required purpose) (at 4,187):

A consideration of these circumstances leads me to conclude that **the principal distinguishing characteristic of a public fund is that contributions thereto are sought from the public or a significant section of the public.**

...

**A fund is a public fund when the purpose of its establishment is the raising of funds from the public or a significant section of the public so that the objects will benefit to an extent greater than the benefit which a founder (if any) confers by his own contribution.** The question is one of fact in each case and the conclusion would not be lightly reached that promoters or founders did not have the requisite intention or purpose. The fact that members of the public unassociated with the promoters or founders did in fact contribute in response to an invitation or request extended to them would no doubt be very strong evidence that the promoters or founders had extended the invitation to the public with the purpose intention and expectation that the result would follow. [Emphasis added]

27. Similarly, Barwick J considered that for a fund to be a public fund, it must either originate in a public initiative or attract public financial participation to a substantial degree. In his view, the critical facts of the case were that the fund was set up on the sole initiative of the appellant and, though the deed setting it up allowed for contributions from members of the public, the appellant was in fact the only contributor to the fund and did not make "any effective endeavour" to obtain subscriptions from the public. Barwick J did not rule out that there may be other circumstances that must be present to warrant the conclusion that a fund is of a public nature (at 4,181):

But at least, in order for a fund to be a public fund, it must, in my opinion, either originate in a public initiative or attract public financial participation to a substantial degree. Given one of these conditions, there may yet be other circumstances which must be present to warrant the conclusion that the fund is of a public nature. In any case, a fund cannot obtain its public character from the nature of the purposes for which the fund may be used. The Act requires both that the fund should be a public fund and that it be devoted to the specified purposes.

28. Mason J considered the fund must be open for subscription by the public and the public must contribute to the fund. He considered participation by the public in the administration of the fund would also advance its public character, provided some level of public contribution to the fund occurred (at 4,182):

That the fund is open for subscription by the public is unquestionably an essential, though not in my opinion a sufficient, manifestation of its public character. It must also appear that the public participates in the fund by making contributions to it. No doubt the public character of the fund will be advanced by the participation of the public in its formation and in its administration but I cannot think that this is enough in itself without participation by the public in the making of contributions to the fund so as to constitute it as a public fund.

29. Therefore, in Mason J's view the assessment involved weighing up the relevant factors (public contribution and public administration), with at least some public contributions to the fund being a requirement.

### Case X13

30. In *Case X13*, the taxpayer and others established a foundation to help pupils of a state school in a disadvantaged area. The foundation paid out money to the school that could not be collected from their parents for school fees and the costs of hobbies and excursions for certain children.
31. The taxpayer claimed deductions under s 78(1)(a) of the Income Tax Assessment Act 1936–1987 for the donations he had made to the foundation. He argued that the foundation was a public fund established and maintained for the relief of persons in Australia who are in necessitous circumstances for which gifts would be deductible under s 78(1)(a)(iii).
32. The Administrative Appeals Tribunal referred to the judgment of Barwick CJ in *Bray* (at 4,181) who said a public fund must either originate in a public initiative or attract public financial participation to a substantial degree (and that there may be other circumstances that must be present to warrant the conclusion that the fund is of a public nature).

33. The tribunal held that in the taxpayer's case the foundation was a private initiative. Although there had been a "public appeal" (by way of advertisements in a newspaper and newsletter), only a minimal amount had been raised, so it could not be said that a substantial degree of public financial participation had occurred; nor had the public participated in the foundation's administration.

### Summary – what a public fund is

34. In summary, the case law establishes that a fund is a public fund where the:
- fund originates in a public initiative or with a founder who intends that the public will contribute to the fund and participate in its administration;
  - fund attracts public financial participation; and
  - public participates in the administration of the fund.
35. The following three aspects of the above requirements are discussed next:
- What is a public initiative?
  - How is the founder's intention ascertained?
  - What is meant by public participation in the administration of the fund?

### What a public initiative is

36. The Australian case law above refers to funds that "originate in a public initiative". However, the case law does not expand on what is meant by a "public initiative".
37. The *Concise Oxford English Dictionary* defines "initiative" as:
- n. **1** the ability to initiate or begin something. ... **2** a fresh strategy intended to resolve or improve something.
38. A "public initiative" will exist where members of "the public" or a sector of it (see [10] to [13]) together decide to establish a public fund.
39. A public initiative may include, for example, a fund established by a club or association (for example, a Rotary or Lions club) if the committee of the club or association controlling the fund is made up of people with a degree of responsibility to the community in general as distinct from having obligations as members of the club or association (see further from [67]). A "public initiative" may similarly include a fund established by a non-profit organisation if the committee of the non-profit organisation meets the above criteria.

40. A public initiative may also include an event (or series of events) such as a telethon, concert or concert tour where members of the public through a committee of people with a degree of responsibility to the community (again, see from [67]) together organise the event to attract public contributions to a public fund to be used exclusively for specified purposes. Only amounts in addition to any set ticket price paid voluntarily qualify for the donations deduction. (For further information on donations collected at or in respect of fundraising events, see [Question We've Been Asked QB 16/05: Income Tax – donee organisations and gifts](#) (Inland Revenue, June 2016).)
41. A “public initiative” may also include a fund established by the Crown or local government or (in appropriate cases) by an entity controlled by the Crown or local government (see further from [49]).

### **How the founder’s intention is ascertained**

42. In *Bray*, the court considered how the intention of the founder should be ascertained.
43. Jacobs J stated (at 4,187) that the receipt of public contributions would be strong evidence of an intention on the part of the founder that the public should contribute to the fund. Jacobs J also stated (at 4,188) that the nature of any advertising should be considered; that is, whether the advertising was genuinely designed to attract donations. On the facts, he considered the form of advertisement chosen (at 4,188) “appear[ed] to have been designed to discourage rather than to encourage contribution”.
44. Barwick CJ (at 4,181) and Mason J (at 4,182) considered the critical facts were that at all material times the taxpayer was the only contributor to the fund. Although the taxpayer claimed to have attempted to obtain public contributions, the contributions obtained were of a minimal nature (Barwick CJ at 4,181). Only Aickin J (dissenting) considered that the intention of the founder should be ascertained solely from the documents establishing the fund.
45. Based on the comments in *Bray*, the Commissioner considers that although any documents establishing the fund are an important starting point, the intention of the founder may be ascertained also from:
  - the extent and nature of any advertising carried out by or on behalf of the fund;
  - any media publicity it attracts (for example, articles in print and online media, social media presence, and radio and television interviews);
  - the number and amounts of donations received by the fund from members of the public unrelated to the founder of the fund; and

- the level of public participation in the administration of the fund.

### **Public participation in the administration of the fund**

46. "The public" must participate in the administration (maintenance) of the fund. This requirement is supported by the judgments of Mason J (at 4,182; see [28]) and Jacobs J (at 4,187; see [26]).
47. The Commissioner considers public participation in the fund's administration is best achieved by way of a committee or a similar group or body. This may be an existing committee already established for similar or related purposes or a new committee specifically established to maintain the public fund. Best practice suggests the majority of the committee members should be people with a sufficient degree of responsibility to the community (see from [67]). Committee members should not hold positions outside the committee that could lead to actual or perceived conflicts of interest (such as their decisions being influenced by the founder or subsequent major donors) unless such conflicts can be adequately managed. A person acting in their own interest is not administering the fund for the public.
48. The Commissioner considers that funds maintained by the Crown or local government or (in appropriate cases) entities controlled by them are considered "administered" (maintained) by the public (see from [49]).

### ***Governmental funds***

49. Some "public funds" are established and maintained (or only maintained) by the Crown or local government or by entities controlled by the Crown or local government.
50. The Commissioner considers that public funds established and maintained (or only maintained) by the Crown or local government or (in appropriate cases) entities controlled by them (**governmental funds**) would meet the requirement that the public participates in the administration of the fund. This is on the basis that employees of central and local government and controlled entities would have the requisite degree of responsibility to the public. Most controlled entities would qualify.

## **What the above definition of public fund means in practice**

### **Establishing a fund**

51. A person looking to establish and maintain a public fund that qualifies as a donee organisation under the key provision must be able to show that the fund meets the requirements of an actual stock of money or other assets set aside on a firm and

permanent basis for the required purpose. The establishment and maintenance of the fund also needs to be within the purposes and powers of the founder, if relevant in the context, for example, if the public fund is established by a non-profit entity. (This is not relevant if the founder is an individual.)

52. As a general matter, establishing a fund does not necessarily require written documentation. However, it is unlikely the Commissioner would be satisfied that a fund meets the requirements of the key provision in the absence of written documentation.
53. As noted above, the Commissioner also considers a fund (it being a public fund) must be an actual stock of money (such as a bank account) or other assets set aside rather than just book entries that support the establishment of the fund. The Commissioner's view is that best practice would be also to have a founding document setting out terms for the establishment, operation and winding up of the fund to show that the specific requirements of the key provision are met. This could be in the form of changes to the founding entity's own founding or governing documents (if the founding person is an entity) or a separate document or documents detailing the terms of the establishment, operation and winding up of the fund. The documents would help satisfy the Commissioner that the fund's establishment and intended operation meet the key provision's requirements (see Examples 1–3 in [70]). This practice may also give greater confidence to the fund's potential donors and reduce the possibility that they will have to demonstrate their donation is eligible for tax benefits.
54. Since 1 April 2020, the Commissioner must be satisfied that the fund meets the requirements of the key provision for it to be included on the list of donee organisations the Commissioner publishes under s 41A of the Tax Administration Act 1994. Since that date, the fund's name must be on this list for it to qualify as a donee organisation. The onus is on the fund to satisfy the requirements of the key provision to obtain and maintain its listing.
55. Also, since 1 April 2020, a donee organisation (including a fund under s LD 3(2)(d)), must now be registered as a charitable entity under the Charities Act 2005 if, in the Commissioner's opinion, it is eligible to register. Entities registrable under the Charities Act 2005 will generally be entities that are societies, institutions, or trusts that are established and maintained, or derive income in trust, exclusively for charitable purposes.
56. Guidance on these requirements is in *Operational Statement, OS 21/XX Charities and donee organisations – part 2 – donee organisations* (Inland Revenue, [month] 2021 – to be consulted on shortly). In summary, entities that are registered with the Department of Internal Affairs' Charities Services will be automatically added to the Commissioner's

list of donee organisations. Those that are declined registration should refer to [#] – [#] of OS 21/XX.

57. The Department of Internal Affairs' Charities Services has a fast-track process that may be used where a charitable entity or fund is required to register and there is a need for this to occur quickly (for example, in a disaster relief situation). Assessment of the entity's application will be given priority.

### **Maintaining a fund**

58. Once established, the fund must be maintained for the required purpose. Adequate record keeping on an ongoing basis must show any changes in the composition of the fund and how the fund's money or other assets have been used for the required purpose. As the money or other assets of the fund at its establishment may change, maintaining the fund requires maintaining the stock of money or other assets comprising the fund, consistent with book entries showing movements of the fund's money and other assets. Movements in the fund should be specifically reported on in financial accounts by showing the balance of the fund brought forward from the prior year, donations and other additions to the fund, expenditure and transfers out of the fund, any other gains or losses, and the closing fund balance.
59. The records kept may include accounting entries in the financial accounts of the founding person (or people). However, the fund, and in particular the fund's money, should be kept separate from the founder's other money and assets. At the very least, and as noted above, the fund should have a separate bank account. This will make it easier to show an actual stock of money exists and that the purposes of the fund have been maintained (by seeing how the money in the account has been used).
60. Donors should clearly indicate they are intending to make a donation to the fund, to avoid any doubt about whether the donation is to the fund or the founder (if the circumstances are such that doubt could arise).
61. As to the uses of the money in the fund, the fund must be used for, or used to provide money for, the required purpose. This includes providing money to a non-profit entity that founded or maintains the fund, provided this is exclusively for the advancement of specified purposes within New Zealand and consistent with the fund's purposes.
62. The Commissioner is also aware the following questions have been raised about the use of the fund's money:
  - Can the founder use the fund's money to meet or reimburse costs they incur specifically relating to administering the fund?



- Can the founder make a charge against the fund's money to reimburse them for a reasonable share of their administration costs, where such costs include the costs of administering the fund?
  - Can the fund's money be used to meet any other costs incurred by the founder?
  - Would the founder exclude the fund from its own assets for financial reporting purposes?
63. The Commissioner considers that the fund's money can be used to meet or reimburse reasonable costs specifically relating to administering the fund, including the costs of record keeping.
64. The Commissioner also considers that the fund's money can be used to meet a charge for a share of administration costs incurred by the founder apportioned to the fund on a reasonable basis where those costs include the direct costs of administering the fund. For example, a reasonable apportionment of employee salaries based on time spent administering the fund could be charged to the fund. Other direct costs would include bank charges, stationery costs, and accounting and audit fees relating expressly to the fund. No apportionment of costs may be made where the founder would have incurred the costs had the public fund not been established.
65. In all cases, the Commissioner considers the above uses of the fund's money would not jeopardise the fund's donee organisation status. In the Commissioner's view, the use of the fund's money for such administration costs advances or is subordinate or incidental to advancing the required purpose.
66. Use of the fund's money to meet any other costs by the founder may advance the required purpose if the founder is a s LD 3(2)(a) donee organisation, but only if the fund's terms permit this. The costs must advance purposes that are exclusively specified purposes within New Zealand and consistent with the fund's purposes. Care would be needed if the founder's purposes included purposes other than specified purposes within New Zealand. This is because using the fund's money to contribute to the founder's costs could mean the fund's money advances a purpose or purposes other than the required purpose. This would be contrary to the key provision's requirement for the fund to be "exclusively" for the required purpose, and the donee organisation status of the fund would be jeopardised. For more information on when money is considered to be applied to specified purposes within New Zealand (including apportionment issues) see IS 18/05 at [245] to [280] and the examples at [280]. If the founder is not a s LD 3(2)(a) donee organisation, the fund's money may not be used to meet any other costs incurred by the founder.
67. Finally, the Commissioner would not expect that the public fund's assets would be included in the assets of the founder where financial reports are prepared, for example,



for the purpose of the founder establishing it is able to provide security for its own or a related party's borrowing.

### People who may maintain a public fund

68. As noted at [46], it is a requirement that "the public" must participate in the administration of a "public fund". The Commissioner considers this is best achieved by way of a committee or similar group or body. The committee may be a pre-existing committee already established for similar or related purposes or a new committee specifically established to maintain the public fund. Best practice suggests the majority of committee members should be people who have a sufficient degree of responsibility to the public (respected community members).<sup>3</sup>
69. People who have traditionally been regarded as respected community members include church authorities, clergy, school principals, kaumātua and iwi leaders, professional people including solicitors, doctors and accountants, mayors, councillors, local government chief executives, members of parliament, judges and appointees of the court.
70. As noted at [47], committee members should not hold positions outside the committee that could lead to actual or perceived conflicts of interest (such as their decisions being influenced by the founder or by subsequent major donors to the fund), unless such conflicts can be adequately managed.

## Examples

71. Examples 1–3 explain the application of the law. They indicate the matters that need to be considered when establishing and maintaining a public fund.

### Example 1: Private founder establishes a fund administered by a community organisation

A taxpayer (the founder) owns land near the centre of a small town. Forty years ago, the founder received a sum of money from the local council to establish and maintain a park and gardens on the land to which the public would be granted access. The park

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<sup>3</sup> For further information on what is expected of officers of charities registered with Charities Services see <https://www.charities.govt.nz/assets/Uploads/Resources/Congratulations-you-are-the-officer-of-a-registered-charity-A4.pdf>. See also <https://www.charities.govt.nz/im-a-registered-charity/officer-information/disqualified-officers/>.

and gardens were duly established and have been well maintained and are well used by the public. However, over time, the sum of money has been used up. The founder approaches the council for further funding but the request is declined.

The founder decides to raise money directly from the public for the maintenance of the park and gardens. The founder approaches a local community club to identify people who might be interested to act as administrators of the fund on a voluntary basis. The founder is able to assemble a group of community members who are interested to participate and form a committee. They comprise, in the majority, people who are respected community members, who include a member of the clergy, a school principal, kaumātua and iwi leaders, professional people including solicitors, doctors, and accountants, councillors, a member of parliament, and a judge. The founder sets up a bank account in the name of the "X Park and Gardens Maintenance Fund" and grants signing authority on the account to the committee members.

The committee resolves to:

- set up a ledger account in the name of the "X Park and Gardens Maintenance Fund";
- draft a founding constitution that establishes themselves as an association making clear how decisions are made and setting out the association's objectives and how the funds will be held and applied;
- ensure the fund is added to the Commissioner's list of donee organisations;
- place a weekly advertisement in local newspapers on an ongoing basis and a series of advertisements in the national newspaper most commonly read in the area seeking donations to the fund;
- approach journalists from the above newspapers and national television networks to gain publicity for the fund in the print, online and television media;
- create a social media presence for the fund and set up a page for the fund on an online gifting platform; and
- place billboards in the local community and surrounding towns to raise awareness of the fund.

These things are duly done by representatives on the committee's behalf. The committee further resolves that it will:

- apply donations received from the public exclusively to the maintenance of the X Park and Gardens and ongoing administration costs directly related to the fund;
- place any funds not immediately required for the maintenance of the X Park and Gardens on term deposit with a reputable financial institution; and
- if the X Park and Gardens are closed to the public at a time when funds remain in the X Park and Gardens fund, apply those funds exclusively to charitable, benevolent, philanthropic and/or cultural purposes within New Zealand.

The founder agrees to contribute an initial amount to cover the costs of the advertising outlined above and other initial costs of administering the fund plus a further amount equal to 10% of total public contributions raised.

A significant amount is raised for the continued maintenance of the park and gardens by way of donations from members of the public, and the founder duly contributes an amount equal to 10% of the donations received by the fund.

The committee ensures the funds are used exclusively to maintain the park and gardens. Funds raised that are not required are placed on term deposit with a trading bank, and the interest is added to the fund's capital.

The fund is a "public fund" under s LD 3(2)(d). Although established on the private initiative of the founder, there are significant public contributions to the fund and the fund is administered by a committee of people with the requisite degree of responsibility to the public. Further, gifts to the fund qualify under s LD 3. The fund is on the Commissioner's list of donee organisations.

### **Example 2: Private founder establishes a fund for specified purposes**

A taxpayer establishes a trust fund and makes donations of money to the fund. The trust deed provides that the trust is established and maintained exclusively for the purpose of providing money for charitable purposes within New Zealand. The deed also states that the trust will solicit and accept donations from the public. The taxpayer and three of the taxpayer's associates are appointed as trustees. The trust applies for and is granted charitable status by the Department of Internal Affairs' Charities Services.

The fund places two advertisements on an online forum with a limited audience. It receives public donations of less than \$100, and the taxpayer is the only other contributor to the fund.

The trust is not considered to be a “public fund”. There was no public initiative in its establishment, no significant public contributions were received by the fund, and there was no public participation in the fund’s administration. Moreover, based on the fund’s actions, there did not appear to be any real intention to attract public contributions to the fund or that the public would participate in its administration.

**Example 3: Local council establishes and maintains a fund**

A local council establishes a fund that promotes events organised by other (non-council-controlled) charitable, benevolent, philanthropic and/or cultural organisations. These events include a lantern festival, a Pasifika festival and the local City Art Gallery's open day. The fund's purposes are limited exclusively to charitable, benevolent, philanthropic and/or cultural purposes within New Zealand.

The council maintains a separate ledger account for the fund and a separate bank account for the fund. The council resolutions establishing the fund record that the fund is open to contributions from the public and record its purposes as outlined above. The resolutions also record that should the fund no longer be required, any remaining money in the fund will be applied to charitable, benevolent, philanthropic and/or cultural purposes within New Zealand.

The fund applies to the Commissioner and is granted donee organisation status on the basis that it has been established and will be maintained exclusively for one or more charitable, benevolent, philanthropic or cultural purposes within New Zealand, will seek and receive contributions from the public, and will be administered by the public.

The council actively seeks contributions to the fund from the public. Over time, the council receives a significant number of donations to the fund from members of the public, which in aggregate amount to a significant sum of money.

Council employees administer the fund and ensure contributions to the fund are used exclusively for the fund's stated purposes. The only costs paid for by the fund or recovered from the fund by the council relate directly to the fund. No costs are apportioned to the fund where those costs would still have been incurred by the council had the fund not been established.

The fund is a "public fund" under s LD 3(2)(d). The fund originates in a public initiative, and the public both contributes to and participates in the administration of the fund. Further, gifts to the fund qualify under s LD 3. The fund is established and maintained exclusively for charitable, benevolent, philanthropic and/or cultural purposes within New Zealand. The fund has applied to the Commissioner for donee organisation status and has been added to the Commissioner's list of donee organisations.

*Draft items produced by the Tax Counsel Office represent the preliminary, though considered, views of the Commissioner of Inland Revenue.*

*In draft form these items may not be relied on by taxation officers, taxpayers, or practitioners. Only finalised items represent authoritative statements by Inland Revenue of its stance on the particular issues covered.*

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## About this document

“Questions we've been asked” are issued by the Tax Counsel Office. They are published items about specific tax issues that set out the answers to enquiries we have received which may be of general interest to taxpayers. A general similarity to the items will not necessarily lead to the same tax result. Each case should be considered on its own facts.