

Review of the Charities Act 2005

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Background

The Charities Act 2005 (the Act) was an important piece of legislation when it was enacted as prior to this the charities sector in New Zealand had not been subject to a significant amount of regulation.

In general, the stated purposes of the Act were considered appropriate to protect the charities sector in New Zealand. Charities receive public support and benefit in terms of the provision of volunteer and in-kind services, financial support through donations, bequests and other avenues and the income tax exemption. However public support is only provided where there is public trust and confidence in the sector and regulation plays an important role in enabling this.

The stated purposes of the Act are:

- to promote public trust and confidence in the charitable sector:
- to encourage and promote the effective use of charitable resources:
- to provide for the registration of societies, institutions, and trustees of trusts as charitable entities:
- to require charitable entities and certain other persons to comply with certain obligations:
- to provide for the Board to make decisions about the registration and deregistration of charitable entities and to meet requirements imposed in relation to those functions:
- to provide for the chief executive to carry out functions under this Act and to meet requirements imposed in relation to those functions.

Scope of the review

The review, as outlined in this article, covers 6 main areas. The stated intention is to ensure that “the Act is fit for purpose and suits the different needs of New Zealand’s diverse charities sector”. It is important to note that the review is not a “first principles” review and does not consider which entities should be able to register as ‘charitable’ entities and whether the 2005 judgement remains appropriate in 2019.

How do I make a submission?

The [questionnaire has been issued by the Department of Internal Affairs](#) (DIA) and we encourage all those interested in having a say on the Charities Act 2005 review to submit a written response to the Discussion Document using this form by the 31 May 2019.

Your submission to the DIA will help the Government consider improvements to the Act and inform policy development and future government decisions in this area.

You can view the discussion document and find out how to have your say at <http://www.dia.govt.nz/charitiesact>

Why change the Act?

The Act provides a registration, reporting and monitoring system for charities. The review of the Act is an opportunity to consider whether the Act has been effective in enacting these three core functions. The review is driven by a desire to modernise the Act and to ensure it is fit for purpose and suits the different needs of New Zealand’s diverse (and numerous) charities.

The key issues being examined as part of the review:

(1) Obligations of charities

Charities obligations need to be clear, manageable and robust, to ensure the public can place trust and confidence in the sector. The review looks at whether the current requirements placed on charities are reasonable and the level of support charities require to meet their obligations, including the financial and performance reporting and Annual Return requirements. In the year to June 2016, there were 28,000 registered charities in New Zealand managing about \$64 billion in assets, though nearly a third recorded less than \$10,000 in revenue. One of the suggestions raised in the Discussion Document is whether there could be a ‘de minimus’ level below which financial and performance reporting requirements could be removed or relaxed. We consider that some level of reporting is important to ensure that all charities are able to provide accountability for the public support received. Such reporting should be proportionate to the size of the charity. In our

view reporting is a key avenue in which charities are able to provide transparent information to engender public trust and confidence. However a balance needs to be struck between reporting requirements and obligations which place charities limited resources under pressure. While the Tier 4 requirements, based on cash accounting principles, are reduced from the requirements placed upon larger charities, there is scope for refining (i.e. further reducing these). We do not consider that removing reporting requirements altogether however would be beneficial for the charities sector.

(2) The charities regulator

The regulator's role, functions, and powers under the Act are important because they enable promotion of public trust and confidence in the charities sector and to encourage the effective use of charitable resources. The charities 'regulator' comprises the Charities Registration Board (the Board) made up of three members, and Charities Services (a business unit of the DIA)

The Board makes decisions regarding the registration and deregistration of charities. Charities Services provides educational support and advice to charities, maintains the Charities Register, and monitors and promotes compliance across the sector. Charities Services also makes initial decisions regarding registration and deregistration of charities under delegation from the Board.

The review encompasses such matters as how the regulator could be made more accessible to charities. We support the views expressed in the Discussion Document in this regard and consider it is an opportune time to consider the role of the regulator and whether Charities Services is adequately positioned and funded to provide the educative support required by the sector.

(3) Appeal of decisions

The review looks at how the appeals process could be improved. The ability to appeal registration decisions helps with the development of charities law and hold decision-makers to account. Currently, a person can appeal a decision of the Board by filing a formal appeal with the High Court (including appealing the decisions that Charities Services makes under delegation from the Board). High Court appeals can be costly, and as such few appeals are made each year.

The review questionnaire looks at which decisions made by Charities Services should be subject to appeal and why and which body is most appropriate to hear these appeals. Concerns raised in the sector include potential reinstatement of full oral hearing of evidence and being able to appeal all decisions made under the Act rather than just registration and deregistration decisions. We support the review of the appeals process and consider it would be sensible to make the appeals process more accessible and less costly.

(4) Te Ao Māori

The review looks at how the Act could achieve better outcomes for Māori charities, support the aspirations of Māori communities and enable the Crown to fulfil its obligations as a Treaty partner. Māori charities are a diverse and significant part of the charities sector, providing benefits to Māori as well as the wider public. Māori charities range from large iwi settlement organisations to small rural marae.

The review examines whether there are issues with the current level and nature of reporting requirements placed upon Māori charities. The Discussion Document also considers whether there are any issues that impact Māori charities in a different way in which they impact other charities because of their unique underlying cultural values. It also considers structural issues, such as whether it is appropriate for an iwi settlement organisation to be structured as a registered charity, and more philosophical issues such as whether Māori charities should be required to limit their activity because of their charitable status.

(5) Charities and businesses

Under the existing Act, charities are entitled to run businesses to raise funds for their charitable purposes. The review looks to address how the risks of charities operating businesses to raise funds should be best managed. The Discussion Document seeks views on the registration requirements for 'unrelated businesses' and how charities should report on the results of their business operations and business subsidiaries.

Business enterprises are often an important income source for charities, with approximately 30% of registered charities having some form of trading arm. However, there is a risk that business enterprises can put charitable funds at risk in the event funds extended to charitable trading arms are not returned. Charities may run 'unrelated businesses', where the service or product does not directly contribute to a charitable purpose (e.g. food and drink retailers, hotels, breakfast cereal manufacturers).

The current test applied is whether income from those business activities is ultimately applied to charitable purposes. The review considers whether charities should be able to raise funds to support their work and if so, how. The review considers the need for charities to demonstrate that they are only undertaking business activities in order to further their charitable purposes (rather than to further their own means) and to demonstrate that no individual, or unrelated party, is profiting from the trading activities of registered charities.

In our view, it is important to allow charities to continue to earn revenue from their trading arms and that, in order to promote public trust and confidence in the charities sector, it is appropriate to require charities to report against these activities. We also consider it is appropriate for restrictions to be in place to prevent charities from distributing profits generated by their trading arms, for purposes beyond their intended charitable purpose.

(6) Advocacy

'Advocacy' is about generating public support to change, stop or create laws or government policy. It also includes promoting points of view on core societal issues and is often seen as controversial. Advocacy can be a legitimate and important way for charities to achieve their charitable purposes. However, the Discussion Document raises the issue that there is currently a lack of clarity regarding when charities can engage in advocacy.

The review asks whether you would like to see greater freedom for charities to advocate for policy or law change, what the associated risk and benefits of advocacy and whether there should be limits on the advocacy rights charities. Thoughts raised at the recent Charities Law, Accounting and Regulation Conference on this matter included the what, who and how. There was general acceptance that some level of advocacy on key human rights, societal and environmental issues was considered appropriate, but that the manner in which charities advocated and sought government support was one of the key issues that needed to be resolved and clarified. There was much discussion regarding the Greenpeace and Family First cases, being the primary two cases where the advocacy role of registered charities in New Zealand have been tested.

We agree that further clarification on the advocacy role of charities would be useful.

For more information on the Charities Act Review visit: <http://www.dia.govt.nz/charitiesact>.

In our next article we will visit "accumulation of funds" and the ability of charities to build up reserves. The appendix to the Discussion Document poses two questions to submit on in relation to this:

1. Should charities be required to be more transparent about their strategy for accumulating funds and spending funds on charitable purposes (e.g. through reserves policy)? Why? Why not?
2. Should certain kinds of charities be required to distribute a certain portion of their funds each year, like in Australia?

Just to get you started - we do not support the suggestion raised in the Discussion Document that charities should be required to distribute a certain portion of their funds each year. In our experience charities often operate in the medium-long term and need to accumulate funds to purchase much needed capital assets for example. Requiring charities to distribute a pre-determined portion of their funds each year may prevent charities from doing so. However transparency over the strategy for accumulating funds would be useful. More on this next time!