

Modernising the Charities Act 2005

Submission form

Why you should have your say

We encourage any person or organisation interested in modernising the Charities Act 2005 (the Act) to submit a written response to the discussion document by using this form.

Your submission to the Department of Internal Affairs is crucial to help the Government consider improvements to the Act. Submissions received will inform policy development and government decisions.

The questions below are the same as the questions listed in the discussion document. We recommend reading the discussion document to understand the context surrounding each question before answering.

You are welcome to answer as many, or as few, questions as you wish. There is a space at the end for you to provide general comments about modernising the Act.

How to make a submission

Submissions can be posted to:
Charities Act Team
Policy Team
Department of Internal Affairs
PO Box 805
Wellington 6140



Submissions can also be emailed to:
charitiesact@dia.govt.nz



To read the discussion document or to find out more information about the modernisation work and community meetings, visit <https://www.dia.govt.nz/charitiesact>.

The closing date for submissions is **31 MAY 2019**

Submission details

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I am making this submission (please only check one box below):

<input type="checkbox"/> As an individual	<input checked="" type="checkbox"/> On behalf of the group or organisation listed above
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Please note:

The Department of Internal Affairs will analyse the information gathered from the submissions and use it to inform policy development. All submissions will be published to our website www.dia.govt.nz. This will include your name, or the name of your organisation, but not your contact details.

If you want your name or the name of your organisation removed, please let us know and we will remove your name before we publish your submission.

If there is information contained in your submission that you or your organisation do not want to be released, you need to make this clear in the submission and explain why. For example, you might want some information to remain confidential because it is commercially sensitive or personal. The Department will take your request into account.

The Privacy Act 1993 governs how the Department collects, holds, uses and discloses personal information about submitters. Submitters have the right to access and correct personal information.

When the review is completed, all documents (including submissions) will be kept by the Department.

Vision and policy principles – page 16 of discussion document

? What are the key challenges facing the charities sector over the next ten years?

The key issues facing the charities sector go beyond the scope of the review of the Charities Act. For example, pressure to resolve issues that are systemically driven without the resources or political authority to do this, underfunding of contracts for service and limited access to reliable and varied revenue streams. This review can assist with access to reliable and varied funding streams by adopting a broader approach to social enterprises.

? What are the key opportunities facing the charities sector over the next ten years?

Community led ideology is a powerful opportunity for communities (as long as the Government and funders are not overly prescriptive in defining 'community')

Enabling and supporting charities to create enterprises can be a real opportunity for growth in organisational sustainability but the system needs to support this (including finding ways to minimise and manage risk) and it cannot be seen as a blanket solution that absolves the government and funders from contributing to the charitable sector.

? What is the role of government in achieving this vision?

We would like to see the Government genuinely partner with the community sector to seek better outcomes. The government needs to take responsibility for the structural and systemic issues that contribute to societal inequities through effective policies while the community sector partners with government to provide short term individualised support and community-based programmes. We would encourage the Government to listen to the experience and knowledge of those operating in the charitable sector regarding challenges facing communities, the efficacy of specific policies that impact on those most vulnerable in our communities. We would also encourage the Government to address the problems with the funding/contracting models (such as single year contracting, contracts not being signed off prior to the expected start dates, partial funding for service and non-adjustment of contract remuneration when costs to deliver the services increase).

? Do you agree with the vision and policy principles described here?

We believe the statement does not describe a vision for the sector but rather the outcomes that the sector should generate

? Would you remove or change any part of the vision and policy principles?

We would submit that the vision and policy principles capture an aspirational vision for the sector that includes concepts such as a well-supported, sustainable, resilient, vibrant independent and innovative sector

The purpose of the Act – page 17 of discussion document



Do you agree with either of the two possibilities for additional purposes?

One of the original purposes of the act is to 'require charitable entities and certain other persons to comply with certain obligations'. This is a vague purpose that should be more clearly defined.

We support the addition of the first new principle 'To support and sustain a robust, vibrant, independent, and innovative charities sector'.

We believe the second new principle could be covered by the vague purpose statement referred to in first paragraph above.



Are there any additional purposes you think should be added to section 3?

We would like to see the addition of a second new principle 'To respect the autonomy of charities and charities' rights to freedom of expression, in particular their right and duty to advocate in furtherance of their charitable objectives'

Obligations of charities – page 18 of discussion document



Why did your organisation register as a charity? For example, was the main reason public recognition, or to meet a funder’s requirements, or tax benefits?

We registered because it was a funder requirement and for public recognition. Tax exemption is also a positive incentive for registration.



What benefits does your charity experience from being registered under the Act?

We are able to access funding from those funders who require charitable status and we benefit from being tax exempt.

Reporting requirements



Is more support required for charities to meet their obligations? If so, what type of support is needed?

Ongoing education around the financial reporting, especially the statement of service performance



Should reporting requirements for small charities be reduced? If so, what would be the benefits? What would be the risks?

The compliance obligations for those charities with less than \$20000 annual income or in assets could be reconsidered.

Definition of an officer and qualifications



Should the definition of ‘officer’ be broadened for trusts that are registered charities?



Should someone with serious convictions be disqualified from being an officer of charity? If so, what kinds of convictions?

It is important to get the balance right. There are times when those with serious criminal convictions make significant contributions to charities. Their experiences and knowledge can be vastly beneficial. This needs to be balanced with the need to safeguard charities (internal processes can assist with this) and ensure public confidence in the sector. Charities have access to police vetting services and this could be a mandatory requirement of boards to ensure transparency. But charities also should have the right to make their own decisions about who they engage in governance or employ in leadership roles.

Accumulation of funds

? Should charities be required to be more transparent about their strategy for accumulating funds and spending funds on charitable purposes (for example, through a reserves policy)? Why? Why not?

No. This is an overreach of the purpose of the act and does not contribute to building resilience, innovation and vibrancy in the sector.

? Should certain kinds of charities be required to distribute a certain portion of their funds each year, like in Australia?

No, charities should be autonomous and make their own decisions about the funds they accumulate. The transparency required in the financial reporting standards would enable the public to make their own decisions about the charities they chose to support.

Governance standards

? Do you think governance standards could help charities to be more effective? Why?

Mandating governance standards is not the most effective way to increase the efficacy or capacity of charities. This would potentially create further barriers for charities attracting governance members and growing the capability of new boards.

Community Waikato would prefer to see a more constructive approach to building governance capacity through the distribution of resources and the funding of governance training.

? Do you think the Australian governance standards could be adapted to work in New Zealand?

No, the New Zealand experience is unique and as such, any standards should be designed specifically for the New Zealand context. For example, the Treaty of Waitangi should be integral in the charities framework and should underpin the first principles of the Charities Act.

Alignment of other legislation

? Should the Charities Registration Board continue to be bound to follow charitable purpose interpretations made by the Commissioner of Inland Revenue?

Role of the regulator – page 25 of discussion document

Strengthening connections between the regulator and the charities sector



How could the regulator be made more accessible to charities? For example, what would consultation requirements or an advisory board achieve?

We would like to see Charities Services have the role of the regulator. This would make the regulator more accessible. The board could become an Appeals Authority. Those on the board should have a blend of legal and community knowledge. We feel an appeals process where evidence can be heard and discussed would be a fairer system. We believe that capacity and capability building services and support around the preparation of accounts and service performance reports could be contracted out in the sector. This would require greater resourcing but would also enable greater accessibility to the services and greater pathways to natural justice



Are the current accountability mechanisms for the Charities Registration Board and Charities Services (described above) adequate? How could accountability be improved?

Yes

Strengthening registration decision-making



How could rules and processes for registration decision-making be improved?

Perceptions of independence



What is driving concerns over the independence of decision-making by the regulator?

I genuinely do not believe that is an issue



Would alternate structures or governance arrangements address any perceived lack of independence in decision-making?

Improving the charities register



How could the register be improved?

Powers when considering applications for registration, powers during an investigation, and enforcement powers



What additional powers, if any, should the regulator have when considering applications for registration? Why?



What additional powers, if any, should the regulator have when carrying out an investigation? Why?



What additional enforcement powers, if any, should the regulator have? Why?

The regulator’s funding



Should charities pay fees to contribute to the regulation of the sector? Should fees be tiered?

The financial burden of funding the regulation of the sector should not sit with the charitable sector. The costs associated with maintaining charitable status can be high (depending on a Charity’s tier) both in terms of the costs of financial reviews/audits and in staff time.

Charities can find sourcing operational costs challenging, particularly as many funders and philanthropic donors perceive operational and overhead costs as diverting revenue from the charitable purpose of the organisation. Requiring additional operational costs for charities to fund their regulation adds a burden on organisations who already face reluctance – even hostility – when attempting to fund the real costs of the work they undertake.

The Charitable sector exists to provide support to those whose needs have not been met by the private sector or government. They are often vulnerable and limited in terms of financial resources. In order to provide this support, the sector relies on grants and donations (that are not an ongoing reliable source of income), contracts (which are often under resourced and single year), membership fees (which are often determined by the financial capacity of clients) and enterprise (which has its own inherent risks as any business, and potentially diverts resources and focus from the core business of the charity). As such, we don’t think it is realistic to require organisations to fund Charities Services and the Registration Board.



Should a fee attach to registrations, as well as to filing annual returns?

No, many organisations who register do not have a revenue stream at the time of their filing for charitable status.

Charities Services should be funded by the government to remove that additional burden from the charitable sector.

Charities' use of third parties to fundraise



Do you think there is sufficient disclosure of the use of third party fundraisers by charities and the cost? If not, how could greater disclosure be ensured?

Yes

Appeal of regulator decisions – page 34 of discussion document

Decisions subject to appeal

? Which decisions made by Charities Services should be subject to appeal? Why?

All decisions made by Charities Services should be subject to appeal. Charities should be able to appeal all decisions under the Act without needing to go to the High Court. Appeals to the High Court assume an appellant has already had the opportunity to put their case to a district court. For charities this is not the case.

? Should the Act provide for internal review of Charities Services decisions?

The current appeals system does not enable most charities the opportunity to access to justice. Currently an appeal can be made to the High Court within 20 working days of a Board decision. Going to the High Court is an intimidating and expensive prospect, generally requiring the support of a lawyer. This means the appeal process is out of reach for many charities, both in terms of financial cost and practicalities of time.

An internal review process would be one step towards a more accessible process for Charities as would the appointment of an Ombudsman.

Party to appeals

? Should the decision-maker, or anyone else, be a party in appeal cases? Why?

? Should the Attorney-General, as protector of charities, automatically be named as a party to an appeal?

We support the suggestion that the Attorney General have a role as *parens patriae*, protector of charities – to look after the definition of charitable purpose and ensure it is developing correctly.

Hearing new evidence, and how to hear the appeal

? Should it be easier to bring new evidence on appeal?



Should the appeal be heard as a re-hearing (with no oral hearing of evidence), or as a de novo hearing (with evidence heard orally)?

Charities should be able to access an oral hearing of evidence

Time limit for lodging appeals, and appropriate body to hear appeals



What do you consider to be an appropriate time-frame for lodging appeals? Why?

Charities need longer than 20 working days to make an appeal. Charities need time to inform the board, to process the decision and to create a considered response. Some charities may need to go back to a membership for decision-making. Community Waikato would suggest that the timeframe for lodging appeals should be at least 90 days.



What body is most appropriate to hear appeals on registration decisions: the High Court, District Court, or another body?

Given the gravity of the consequences of decisions made under the Act, Community Waikato proposes the establishment of a specialist Charity Tribunal or Arbitrator. This could be coupled with the Registration Board having the power to conduct internal reviews when challenged on a decision. We believe that in the interests of democracy and social justice, there should always be an option of appeal to an independent body that is both affordable and accessible.

Other approaches to enable the law on 'charitable purpose' to develop



What other mechanisms (for example support for test cases) could be used to ensure that case law continues to develop?

We see merit in having support for test cases, as well as the ability of Charities Services or the Registration Board to provide advice/opinions for organisations unsure of something in the Act. We understand potential issues around providing legal advice but being able to get trusted advice in this area is important.

Te Ao Māori – page 38 of discussion document



What is working for Māori charities under the Act? What is not?



Are there any issues under the Act that impact Māori charities differently to other charities?



Are you aware of cases where an iwi settlement organisation has limited its activity because of its charitable status?



Should the Act be more flexible for iwi settlement organisations that are charities? If so, how?



Are you aware of any particular problems with the reporting requirements for Māori charities?

Business – page 41 of discussion document



What should be the registration requirements for unrelated businesses?

There should be no requirements that are different from registering a charity. A business run by a charity is, as long as all its net income is used for a charitable purpose, no different than a charity being run on a Government contract or any other source of funding.



How should charities report on their business operations and business subsidiaries?

Charities should use the same format of accounting practice for their business operations as for their charitable purposes. In New Zealand the accounting standards have been promulgated through the XRB and carry a legal bearing. These are the standards for Generally Accepted Accounting Practice. This taken together with the requirements for an audit for a charity (business or otherwise) with more than \$1 million in expenses gives sufficient reporting regulations for charities that run businesses



Should charities be required to report separately on business subsidiaries that they control that are not registered charities? If so, why?

There should be no distinction as to how charity's finance streams are achieved. If a business is not a registered charity, then that business would fall under the For Profit Standards. It may be required to be consolidated and if so, that is all that is required. By following Generally Accepted Accounting Practice there are sufficient regulations for businesses that are run by charities.



What, if any, restrictions (such as the 'significant risk' test in England and Wales) should exist on the level of risk for charities undertaking business activities?

There should be no restrictions on charities undertaking business activities in respect of those risks. New Zealand has a different culture to England and Wales. It is a nation of small businesses and small charities that have an attitude of DIY. In England and Wales there are some very large multi-national charities that are regulated in a different manner. We do not see a need for New Zealand to follow the English and Welsh law in this instance.



What should be the requirements of charities to manage conflicts of interest when undertaking business activities?

The charities founding document, being an Incorporated Rules, a Trust Deed or Company Constitution, should be the first level of management of conflict. We also encourage all charities to have good governance policies in place. In respect of regulatory requirements, Generally Accepted Accounting Practice covers accounting standards on related parties. If these are applied correctly and audited there are more than sufficient safeguards to report on conflicts of interest and manage and these.

Advocacy – page 46 of discussion document



Are you aware of charities that are reluctant to advocate for changes to law and policy that would further their charitable purposes? Why are they reluctant to do so?

In our experience, charities with government contracts are more likely to be reluctant to engage in advocacy. This is directly related to the terms of their contracts, the likelihood of termination of the contracts or loss of future contracts and the associated loss of funding.



How should the public benefit of organisations that advocate for their causes be assessed?

We might also ask, “why is *public benefit* the test at all?” We find no compelling reason for the regulator to be involved in assessing the worth or otherwise of any charity’s pursuit of advocacy. What constitutes the public good varies according to time and place – women’s suffrage, for example, was not classified as such for many years. Conferring the task of determining its present (arbitrary) definition to a body that may have no particular expertise in this regard is both unjust and undemocratic. The public benefit will be assessed by the “market”. If funders and the public do not agree with a particular charity’s stand, the charity will lose support, financial and otherwise. Existing laws (covering human rights, hate speech, financial accountability, for example) already cater to the concerns associated with less direct regulation via the Charities Act. Any given charity’s Constitution, Trust deed or other founding documents will also provide regulation of the organisation’s activities.



What would an advisory board (as in Australia) add to the regulator’s decision-making on the registration of charities that advocate? Are there any other ways to help improve the regulator’s decision-making?

Because we do not support the regulator’s role in determining the public good, we subsequently see the introduction of an advisory board as redundant. A key factor in ensuring the sector maintains its integrity without the oversight of the regulator is the adoption of additional purposes within the Charities Act. We therefore encourage the inclusion of both suggested additional purposes in the Discussion Document. Transparency is essential to the proper functioning of the sector and as a means of regulating activities and behaviours. We also endorse the importance of supporting and sustaining “a robust, vibrant, independent and innovative charities sector” (p.17). Additionally, we support the inclusion of a further purpose “to respect the autonomy of charities, and charities’ rights to freedom of expression, in particular their right and duty to advocate in furtherance of their charitable purposes” (Barker & Henderson, 2019). We accept that greater autonomy will result in the promulgation of viewpoints that will not be popular, sometimes within the sector, but also in wider society. Distaste for particular viewpoints should not be the basis for restricting advocacy, however. Canvassing a range of viewpoints is the core of effective democracy and, as noted earlier, ultimately the people (funders, volunteers, beneficiaries and the public) will decide.



Should there be limits on advocacy by charities? If so, what should those be?

No. Limiting advocacy inherently limits democracy. We concur with the House of Lords' position (2017) that "advocacy is an important and legitimate part of charities' role and a sign of a healthy democracy" Advocacy is part of what we do, rather than our purpose, though our very existence and the purpose that drives us, is itself an act of advocacy. Charities should be free to advocate without the fear of losing their charitable status and their independence should be protected through the legislation, rather than being constrained by it.



Would you like to see greater freedom for charities to advocate for policy or law change? What would be the benefits? What would be the risks?

Absolutely. Many individuals, groups and businesses with vested interests are well resourced in the private sector to lobby on their own behalf. Those for whom the charities exist are seldom in a position to advocate for themselves. Charities therefore need to give voice to their clients' problems and needs, hopes and dreams. If social justice is to prevail, their voices must be as free and as loud as those advocating in sectors not dependent on charity. We acknowledge that this will allow for what we might consider "less desirable" causes to be promoted, but a robust democracy requires that all voices are heard and considered.

General comments



Do you have any other comments to make about modernising the Act?

We propose that the timeframe to make a submission on this has been too short to respond with a comprehensive and well considered submission. The review is requiring people and organisations understand some very complex law and the long-term implications for the sector are significant. Many people associated with the charity sector are already working to capacity or are volunteers with day jobs. In fact, nearly three quarters of charities in New Zealand have no full-time employees. Finding the time to process the information, to consider the implications and to write a comprehensive submission is challenging, and this is exacerbated by such a restricted timeframe.

The charitable sector is also diverse. We urge that the Minister also consider how many of our charitable organisations are managed and governed by those for whom English is their second language. These contributors face additional challenges in processing the information and framing their response. Again, more time and support to do this would enable greater sector participation and a more democratic process.

Community Waikato put in a submission regardless of the timeframe, but it is important to be clear the quality, the depth and the breadth of our submission has been compromised.

We would also encourage the Government undertake a comprehensive review of the first principles of the Charities Act. In particular, the definition of 'charitable purpose'. We understand that these concerns have been raised with the Minister from a broad range of submitters associated with the sector. We would recommended that a review of the Charities Act be referred to the Law Commission for an independent review.