

The review of the Charities Act 2005 – why you should get involved

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Every charity should be concerned about the way the current regime is being administered: good charities are being deregistered, good community organisations are being refused registration as a charity even though their funders require it, and up to one third of organisations applying for charitable status are being persuaded to withdraw their application.

At some stage, your charitable purposes may require you to point out deficiencies in government policy, yet many charities are careful what they say because of the threat of deregistration. The situation is not limited to advocacy; good charities are being affected in many other areas, including: social enterprise, economic development, sport, social housing, arts, and many others.

The review of the Charities Act could be a once-in-a-generation opportunity to create a world-leading framework of charity law in New Zealand: one that facilitates, rather than frustrates, charitable work.

However, it will not happen by accident: it is essential that charities get engaged with the review.

OVERVIEW

In our view, some of the key messages can be summarised as follows:

The importance of the charitable sector

- The charitable sector can help with almost every aspect of what the Government wants to achieve; housing, education, health, poverty reduction, closing the wealth gap, protecting the environment, wellbeing, etc.
- However, currently, the framework of charity law, and the way it is being administered, are “getting in the way” of charities’ ability to do that.
- It is in all our interests to take the time needed to get the framework of charity law right.
- The issues discussed below affect all charities, whether they realise it or not. We should strive to achieve pan-charity solutions, in preference to creating artificial distinctions that will only serve to create further complexity and complication.

The nature, scope and timing of the review

- The Minister wants the review to be completed within this term of Government, including legislation: this will require all policy work to be completed by the middle of this year (2019).
- This timeframe is too short. Many of the issues involved in this area of law are complex, and their impact far-reaching. It is in all of our interests, and likely to be more cost-effective (and prudent) in the long run, to take the time needed to carry out a comprehensive review of the legislative framework, as occurred with the Law Commission’s review of the law of incorporated societies and trusts.
- A review team that was genuinely independent of Charities Services would also assist significantly with rebuilding trust.

Purpose

- We need to consider what is, or should be, the purpose of the Charities Act regime: there has never been a proper look at what we are trying to achieve with the Charities Act regime and why.
- The charitable sector originally supported the regime on the basis that it would allow “bad” charities (those that engage in fraud, tax avoidance, money laundering and the like), to be “weeded out”, so that the public could have trust and confidence in those that remained.
- Beyond “serious wrongdoing” as defined,¹ the Charities Act establishes a “registration, information and disclosure” regime: it requires the disclosure of information by registered charities, so that stakeholders such as members of the public can determine which charities they wish to support, and identify legitimate charities as opposed to sham operations.²
- The regime was not intended to be used by government as a means to “colonise and control”³ the charitable sector.
- The purpose of promoting the “effective use of charitable resources”⁴ appears to be encouraging “regulatory over-reach” in the name of promoting public trust and confidence. Such a purpose has been rejected in most comparable jurisdictions.⁵

Activities

- Section 18(3)(a) of the Charities Act is giving rise to unintended consequences.
- The reason Charities Services is required to “have regard” to charities’ activities under section 18(3)(a), is to determine whether the charity is continuing to act in furtherance of its *stated* charitable purposes over time.⁶
- Section 18(3)(a) was not intended to be a means for Charities Services’ to “vet” charities’ legitimate activities, and to ration the privileges of charity based on changes in government policy.
- Charities are independent entities that are intended to exist into perpetuity. It is for charities to determine how best to further their stated charitable purposes, and they should be able to do so free from undue government interference.

¹ “Serious wrongdoing” is defined in section 4 of the Charities Act in the following terms: (a) an unlawful or a corrupt use of the funds or resources of the entity; (b) an act, omission, or course of conduct that constitutes a serious risk to the public interest in the orderly and appropriate conduct of the affairs of the entity; (c) an act, omission or course of conduct that constitutes an offence; or (d) an act, omission, or course of conduct by a person that is oppressive, improperly discriminatory, or grossly negligent, or that constitutes gross mismanagement.

² Report by the Working Party on Registration, Reporting and Monitoring of Charities, 28 February 2002 (the precursor to the Charities Act 2005), page 2.

³ Charities Bill 108-1, 1R, NZPD, Vol 616, 30 March 2004, from p12108, per Sue Bradford (Green).

⁴ Section 3(b) of the Charities Act 2005 (which was originally a function of the Charities Commission, see section 10(1)(b) of the Charities Act as originally enacted).

⁵ See for example the recent review of the Australian Charities legislation *Strengthening for Purpose: Australian Charities and Not-for-profits Commission Legislative Review 2018* (22 August 2018), pages 25-26 (see: <https://static.treasury.gov.au/uploads/sites/1/2018/08/p2018-t318031.pdf>, last accessed 19 February 2019).

⁶ Report by the Working Party on Registration, Reporting and Monitoring of Charities, 28 February 2002 (the precursor to the Charities Act 2005), page 12.

Appeals

- Most charities who are deregistered or declined registration or otherwise adversely affected by decisions of Charities Services are unable to access justice under the current framework; this is causing New Zealand charities law to become distorted.
- Charities need to be able to access an oral hearing of evidence (a “trier of fact”), like everybody else.
- Charities need to be able to appeal *all* decisions made under the Charities Act,⁷ not just those relating to registration and deregistration.
- The burden of developing the law of charities in New Zealand currently falls on individual charities challenging decisions under the Charities Act. There is a case for test case litigation funding,⁸ as well as judicial specialisation, preferably through a specialist Charity Tribunal.
- The Attorney-General also needs to be involved in Charities Act litigation in a capacity of *parens patriae*, the “protector of charities”, as is the case in England and Wales. It is important to “look after” the definition of charitable purpose and ensure it is developing correctly. This is particularly important because Charities Services appears to be focused on reducing the number of charities on the basis of “fiscal cost” (even though if the empirical analysis were done, charities would probably be found to provide net fiscal *benefits* when all factors are taken into account).

Advocacy

- Charities Services’ interpretation of the Supreme Court decision in *Greenpeace*⁹ is complex, highly subjective and unworkable in practice.¹⁰
- Yet, the terms of reference for the review appear to be heading towards codifying Charities Services’ interpretation of the Supreme Court decision. This would be disastrous for charities’ ability to advocate for their charitable purposes and our democracy.
- It would also be inconsistent with both Labour and Green Party policy, which is to support the *independence* of community sector advocacy, and to ensure that charities can engage in advocacy *without fear of losing their registered charitable status*.¹¹

⁷ As is the case with comparable registers, see for example: section 34B of the Incorporated Societies Act 1908; clause 187 of the Exposure Draft Incorporated Societies Bill; section 151 of the Friendly Societies and Credit Unions Act 1982; section 13B of the Industrial and Provident Societies Act 1908; and section 370 of the Companies Act 1993. See also Charities Bill 108-2 (select committee report) page 13: https://www.parliament.nz/resource/en-NZ/47DBSCH_SCR2973_1/d8233a6a17a3faa906bd28c0b1571b3894ab53de.

⁸ As is the case in Australia: the Australian Tax Office has a Test Case Litigation Program which provides financial assistance to taxpayers to help them meet some or all of their reasonable litigation costs in cases that have broader implications beyond an individual dispute, see *Strengthening for purpose: Australian Charities and Not-for-profits Commission Legislation Review 2018*, 31 May 2018, at pages 82, 83, 91 and 92.

⁹ *Re Greenpeace of New Zealand Inc* [2015] 1 NZLR 169 (SC).

¹⁰ See Krystian Siebert *Could the Charities Act 2013 pose a problem for advocacy charities?* Pro Bono News, 18 December 2018, <https://probonoaustralia.com.au/news/2018/12/charities-act-2013-pose-problem-advocacy-charities/>.

¹¹ See https://d3n8a8pro7vhmx.cloudfront.net/nzlabour/pages/8546/attachments/original/1504489890/Community_Voluntary_Sector_Manifesto.pdf?1504489890, pages 1 and 4; and https://www.greens.org.nz/sites/default/files/community_and_voluntary_sector_2011_0.pdf, pages 1, 2, 4, and 5.

- It is accepted around the common law world that charities cannot engage in partisan political activity (that is supporting political parties or candidates for public office). Beyond that, advocacy is an important and legitimate part of charities' role and a sign of a healthy democracy:¹² seeking peaceful orderly change is itself in the public interest in a participative democracy like New Zealand.¹³
- Advocacy is an activity, not a purpose.¹⁴ The question with respect to advocacy is whether it is carried out in furtherance of the charity's *stated* charitable purposes. If it is, then there is no difficulty.¹⁵ That is the law of New Zealand, and it should be applied by Charities Services.¹⁶
- Note that the terms of reference are framed incorrectly in another respect also: charities advocate for their charitable purposes, not their "causes or points of view".

Businesses

- A similar issue of "regulatory over-reach" arises in the context of charities running businesses.
- Under New Zealand law, charities are able to run businesses to raise funds for their charitable purposes: the question is not how the funds are raised, but rather that all funds raised must always be destined for charitable purposes.
- Despite this, Charities Services applies the following rule:¹⁷
 - Charities that seek to raise funds through business activities need to clearly distinguish their business activities from their charitable purposes. They must also:
 - (a) Show that the business is capable of making a profit to go to charitable purposes; and
 - (b) Show that the charity does not provide any resources to the trading body at less than market rates.
- There is no legal authority for this rule. It is simply a rule that Charities Services has decided to apply.
- Charities Services' approach sees many good charities deregistered or declined registration, even though they meet all the legal criteria for registration. This in turn severely hampers charities in their efforts to raise funds for their charitable purposes, and ultimately to become self-sustaining. In an environment of increasing costs, increasing demand for services, and diminishing revenue streams, Charities

¹² House of Lords Select Committee on Charities, Report of Sessions 2016-17 *Stronger charities for a stronger society*, HL Paper 133, 26 March 2017, paragraph 495.

¹³ See section 12(1)(l) and (2) of the Charities Act 2013 (Cth), codifying the decision of the High Court of Australia in *Aid/Watch Inc v Commissioner of Taxation* [2010] HCA 42, (2020) 241 CLR 539. Australia has also specifically legislated to make it clear that charities are not prevented from advocating against government policy (see the Not-for-profit sector Freedom to Advocate Act 2013: <https://www.legislation.gov.au/Details/C2013A00056>).

¹⁴ It would be extremely rare for advocacy to constitute a charity's "purpose", see *Re The Foundation for Anti-Aging Research and The Foundation for Reversal of Solid State Hypothermia* [2016] NZHC 2328 (30 September 2016) at [82]-[89].

¹⁵ *Re The Foundation for Anti-Aging Research and The Foundation for Reversal of Solid State Hypothermia* [2016] NZHC 2328 (30 September 2016) at [88].

¹⁶ After many years of restrictions, it is also in the process of becoming the law of Canada, see: <https://www.millerthomson.com/en/publications/communiqués-and-updates/social-impact-newsletter-formerly-the-may-5-social-impact/cra-political-activities-report-released/> and <https://www.canada.ca/en/revenue-agency/services/charities-giving/charities/policies-guidance/public-policy-dialogue-development-activities.html>, last accessed 9 February 2019.

¹⁷ See Charities Services' decision in the International Centre for Entrepreneurship (ICE) Foundation case: <https://www.charities.govt.nz/charities-in-new-zealand/legal-decisions/view-the-decisions/view/international-centre-for-entrepreneurship-foundation-ice-foundation>, last accessed 9 February 2019.

Services' approach is unhelpful, and counterproductive for New Zealand society as a whole.

- Charities Services' approach is also not lawful. New Zealand is governed by the rule of law. Laws are promulgated by Parliament following a democratic process. They are not made by Charities Services. Charities that meet the legal requirements for registration should be able to register.

Accountability of the agency administering the Charities Act

- It is Labour Party policy to consult with the community and voluntary sector on whether the disestablishment of the Charities Commission in 2012 and the transfer of its functions to the Department of Internal Affairs has resulted in "effectiveness and improved services and information for the sector".¹⁸
- As predicted, the disestablishment of the Charities Commission has resulted in charities-related functions that are less accessible to the public, and charities sector work is being carried out less transparently.¹⁹
- There is also no meaningful accountability of Charities Services to the charitable sector or the public. Lack of adequate checks and balances can and does lead to poor decision-making.
- A government department classification for the agency administering the Charities Act was originally rejected on the basis that it "fails to recognise the independence and importance of the charitable...sector",²⁰ which would in turn impact significantly on its ability to carry out its role. This has indeed turned out to be the case.
- The Charities Commission was originally proposed to be structured as a **Crown agent**.²¹ Of the 3 types of Crown entities established by the Crown Entities Act 2004 (Crown agents, autonomous Crown entities, and independent Crown entities), Crown agents have the closest connection to government: they are required to give effect to government policy when directed to do so by the responsible Minister.²²
- The classification was changed to that of an **autonomous Crown entity** during Select Committee consideration of the original Charities Bill in response to submissions: submitters were concerned that a Crown agent classification "might allow the Government to interfere with, direct, or control the Commission, and would not reflect the independence from the Government of the charitable sector. Particular concern was expressed at the prospect that the Government might be able to directly or indirectly influence the registration or deregistration of particular charities to reflect government policy".²³ Submitters would have preferred an independent Crown entity but an autonomous Crown entity was nevertheless a significant improvement.

¹⁸ See

https://d3n8a8pro7vnm.cloudfront.net/nzlabour/pages/8546/attachments/original/1504489890/Community_Voluntary_Sector_Manifesto.pdf?1504489890, page 5.

¹⁹ Crown Entities Reform Bill 2011 (332-2) select committee report at 4-5.

²⁰ Report by the Working Party on Registration, Reporting and Monitoring of Charities, 28 February 2002 (the precursor to the Charities Act 2005), page 11.

²¹ Charities Bill 108-1.

²² Section (1)(a) and part 1 of schedule 1 of the Crown Entities Act.

²³ Charities Bill 108-2, page 2.

- However, in 2012, without consultation, the Charities Commission was controversially disestablished and its functions transferred to Charities Services, a business unit within a **government department** (the Department of Internal Affairs). The Charities Act is now being administered by an agency even closer to government than the original Crown agency classification that was so resoundingly rejected in the first place.
- Charities should not be asked to fund this regime, which has turned out to be much more costly than the Commission it replaced.
- The Department of Internal Affairs should not have a monopoly on providing advice to the Minister about issues affecting the charitable sector. An **Advisory Board** should be established, to advise Government on policy and advance the interests of the charitable sector.

FURTHER DETAIL

This summary has been prepared by Dave Henderson and Sue Barker, with support from a consortium of philanthropic trusts. A detailed paper has also been prepared which expands on the above points and sets out the legal basis for the above views; it also discusses other issues that need to be addressed in Government's review of the Charities Act 2005.

An electronic copy of the more detailed paper is available at no cost. Please email Dave Henderson (davehendersonnz@gmail.com) or Sue Barker (susan.barker@charitieslaw.co) to request a copy.

We are also happy to respond to any questions about the issues raised in this paper.

YOUR INPUT

With the help of [Strategic Grants](#), a questionnaire has been developed that seeks information on your experience with the Charities Act regime, whether or not your organisation or community group is a registered charity. We'd welcome your input here: <https://www.surveymonkey.com/r/CA2005>.

The Department of Internal Affairs has also announced a series of seminars as part of the Review. We encourage you to take part. See www.dia.govt.nz/charitiesreview for places and dates, and the chance to register.

APPENDIX 1

The appendix following discusses an example of how the Charities Act regime is working on the ground and is intended to highlight some of the issues that need to be addressed.

APPENDIX 1 – how the Charities Act regime is working on the ground

Picture this scenario:

You are a charity, registered under the Charities Act, passionate about [*insert your charitable purpose here*], and working hard to further your charitable purposes.

The Government introduces a Bill into Parliament that would be detrimental to your charity's charitable purposes. The governing body of your charity makes a considered decision that, in the best interests of the charity's charitable purposes, the charity *must* make a submission to Parliament pointing out why the Bill should not proceed.

The charity makes the submission. However, the submission is not accepted and the Bill ultimately proceeds into law.

Charities Services then investigates your charity on the basis of its "advocacy" work. Charities Services decides that your charity's purposes are "no longer charitable" and issues your charity with a notice of intention to deregister it.

You are shocked by this. Your charity has always worked hard to ensure all requirements under the Charities Act are fully complied with.

You file an objection under section 34 of the Charities Act, pointing out that your charity has done nothing "wrong", and has been faithfully acting in the best interests of its charitable purposes at all times.

Charities Services declines your objection and advises that it will recommend to the Charities Registration Board ("**the Board**") that your charity be deregistered. Charities Services also advises you that you have 1 month to "file any further submissions", and also that you have the option to voluntarily deregister, if you wish.

You know a little bit about charities law: you know that your charity's stated purposes are charitable, and that all the activities have been faithfully undertaken in the best interests of those charitable purposes. You dutifully make submissions in support of your charity remaining on the register.

Several months later, you receive a lengthy written decision from the Board. The Board has accepted Charities Services' decision to deregister your charity. The decision refers to material that Charities Services found on the internet, which does not appear to be correct. The decision also states that your charity has a "purpose" of advocacy, which is surprising because your charity does not have a purpose of advocacy. The Board goes on to state that it is unable to see public benefit in that advocacy purpose, essentially because your charity made submissions opposing a government bill. On that basis, the Board decides that your charity should be deregistered.

The decision states that you have 20 working days from the date of the Board's decision to file an appeal to the High Court. You did not receive the decision until a few days after it was made, which means that your charity now has 17 working days to

reach a decision to fund High Court proceedings, to find and instruct a lawyer, and to lodge a notice of appeal.

The governing body of your charity considers the issues carefully. It knows that if it is removed from the register, its ability to access funding will likely be stymied, which will in turn impact on its ability to survive. It considers it has no option but to file an appeal in the Wellington High Court.

You have seen a number of high profile criminal cases on TV. The cases seem to take weeks as various witnesses give their evidence in Court. You look forward to the opportunity to similarly "have your day in Court": to stand up in the witness box and explain what your charity's purposes are, and how they do in fact operate for the public benefit. You are surprised when Charities Services opposes your application to give evidence, arguing that any evidence you wanted to give should have been given to Charities Services in writing before the Board made its decision (even though Charities Services only asked you to provide "submissions"). The Judge does not let you say anything in Court: your charity is permitted to speak in Court only through its lawyer.

Two years later, the High Court issues its decision: the High Court is quite critical of the Board, and orders that it reconsider its decision to deregister your charity.

The Board does so, and two years later, issues another lengthy written decision, again deciding that your charity should be deregistered, essentially for the same reasons as before. Your charity appeals again, and so it goes on.

More than 7 years after your charity first made submissions on the Bill, and many thousands of dollars of taxpayer and charitable funds later, your charity still does not have a final decision as to whether it can stay on the register.

While this scenario might sound extreme, it is in fact what happened to Family First NZ, after it made submissions opposing the gay marriage bill (which ultimately became the Marriage (Definition of Marriage) Amendment Act 2013).

While you may or may not agree with Family First's position on gay marriage, consider this: Family First's *stated purposes* are in fact charitable (it was of course originally accepted for charitable registration). All of Family First's advocacy work was carried out in furtherance of its stated charitable purposes. In other words, Family First has done nothing "wrong" except advocate for its charitable purposes, as every charity has a duty to do.

You might not agree with what Family First says, but the way it has been treated is unacceptable in a democracy supposedly underpinned by the free exchange of ideas and views. It is a case of "I may not agree with what you say, but I will defend to the death your right to say".

The above scenario could happen to any charity. Every charity should be concerned. At some stage, your charitable purposes may require you to point out deficiencies in government policy.

The situation is not limited to advocacy. Good charities are being deregistered in many other areas, including: social enterprise, economic development, sport, social housing, art, and many others.

The review of the Charities Act could be a once-in-a-generation opportunity to create a world-leading framework of charity law in New Zealand: one that facilitates, rather than frustrates, charitable work.

However, it will not happen by accident: it is essential that charities get engaged with the review.

Appendix 1 ends.
