

13 June 2019

Charities Act Team
Policy Team
Department of Internal Affairs
Wellington

By email: charitiesact@dia.govt.nz

Re: Charities Act Review – Modernising the Charities Act 2005

The New Zealand Law Society (Law Society) welcomes the opportunity to make a submission on the Charities Act 2005 review discussion document *Modernising the Charities Act 2005 (discussion document)*.¹

The Law Society's submission covers:

1. the limitations of the review, the review timeframe and allocation of responsibility for the review; and
2. topics covered and questions raised in the discussion document.

Limitations of the review, the review timeframe and allocation of responsibility for the review

Limitations of the review

The current review largely considers the Charities Act in isolation, rather than as part of the wider scheme of New Zealand charity law that, ideally, would be the subject of a comprehensive and cohesive review.²

Because of the narrow terms of reference, the current review does not cover and/or will not adequately take into account, the following matters:

- i. **The "charitable purposes" definition:** As noted in the Law Society's letter of 4 February 2019 to the Minister, the current heads of charity referred to in section 5(1) of the Act are dated and a broader review is required to assess whether the definition is appropriate for modern New Zealand society. The "charitable purposes" definition is the foundation concept on which the Charities Act registration regime is built and the exclusion of the definition from the current review undermines the value of the review. For example, it is difficult to see how the current review can fully address issues relating to Te Ao Māori, and potentially also issues

¹ The submission uses the term "regulator" to refer, as the context requires, to the Department of Internal Affairs – Charities Services (**Charities Services**) and/or the Charities Registration Board (**CRB**) under the current registration, reporting and monitoring regime, and to any alternative body or bodies to whom responsibility for administering the regime may be transferred as a result of the review.

² NZLS letter 4.2.19 to the Hon Peeni Henare, Minister for the Community and Voluntary Sector, regarding the impending review of the Charities Act 2005.

relating to entities' involvement in business and advocacy, without reviewing the "charitable purposes" definition.

- ii. **Interplay with tax concessions linked to Charities Act registration:** Divorcing the review from the tax concessions linked, or to be linked,³ to registration under the Charities Act is artificial. The nature and scope of the different tax concessions, and Inland Revenue's role and powers in relation to administering such concessions under tax legislation, should inform the design of what is essentially a supplementary public registration, reporting and monitoring regime under the Charities Act. In addition, it would also seem premature for the current review to address, in isolation, matters relating to charities involved in business when the business income tax exemption for Charities Act registered charities is a pending item on Inland Revenue's Tax Policy Work Programme.
- iii. **Interplay with other aspects of New Zealand charity law:** There are also other aspects of New Zealand charity law that should be considered as part of a comprehensive and cohesive review, such as the Charitable Trusts Act 1957 (which is overdue for review). That would provide for a more coherent modernisation of New Zealand charity law.
- iv. **Interplay with other regimes:** The review of the Charities Act would also be better informed (for example, in relation to matters such as governance standards) if it were to follow other significant reforms affecting the charitable sector, including the pending enactment of the Trusts Bill and the introduction of proposed new incorporated society legislation.

Timeframe issues

The Law Society welcomes the short extension of the timeframe for submissions on the discussion document from 30 April 2019 to 31 May 2019.

However, given the broad nature of the discussion document, the range of topics and questions raised and other competing priorities for the charitable sector and its stakeholders, the three to four-month period for submissions is still relatively short and will most likely have been very challenging for many sector participants and stakeholders.

We make the following points in relation to the review timeframe:

- i. **Consultation on any proposed changes before introducing legislation:** If the intended next step is for changes to the Charities Act to be proposed (rather than widening the review before taking any further steps), there should be additional sector-wide and targeted consultation on any proposed changes before any amendment legislation is introduced to Parliament. Further sector-wide input should not be limited to the Parliamentary select committee process.
- ii. **Revision of indicative timeline:** Meaningful consultation with the sector would require the indicative timeline for the review, which currently contemplates policy proposals being developed and approved by government and the commencement of work on draft legislation in 2019, to be revised.

³ Currently, Charities Act registration is generally required for the trustees of a trust or a society or institution to be eligible for the "tax charity" income tax exemptions for non-business income (s CW 41 of the Income Tax Act 2007) and business income (s CW 42 of the Income Tax Act 2007). From 1 April 2020, Charities Act registration will also be required for charities to qualify as donee organisations for donation tax incentive purposes (under s LD 3 of the Income Tax Act 2007), and also to qualify for the charitable organisation exemption from fringe benefit tax (under s CX 25 of the Income Tax Act 2007).

Responsibility for the review

Responsibility for a wider review would need to be carefully considered.

The Law Society considers that the Law Commission would be best placed to conduct such a review (as in the case of recent reviews of trust and incorporated society law) and to do so (and be seen to do so) on an independent basis. It is not clear that it is appropriate for the Department of Internal Affairs to lead a review of a Charities Act regime that is principally administered by Charities Services, and given that Charities Services' role as regulator is an important part of the review.

The Law Society has recently written to the Law Commission, recommending that the Commission's future work programme should include a wider, first principles review of the Charities Act and the Charitable Trusts Act.

Topics covered and questions raised by the discussion document

Vision and policy principles

The Charities Act should be reviewed in context, as part of the wider scheme of New Zealand charity law, including charitable trust law, the Charitable Trusts Act, tax concessions and other benefits linked to charitable status, and the role and responsibilities of the various regulators.

The vision and policy principles for the tax concession-linked registration, reporting and monitoring regime under the Charities Act should reflect this wider context, and should focus in particular on the following matters:

- i. **Clear articulation of the Charities Act's purpose(s):** As a starting point, the purpose or purposes that the Charities Act registration, reporting and monitoring regime is intended to achieve or advance should be clearly articulated.
- ii. **Proportionate measures to achieve/advance the Charities Act's purpose(s):** The details of the Charities Act registration, reporting and monitoring regime should involve measures that are necessary or expedient to achieve or advance the regime's purpose(s) and proportionate (taking into account all adverse consequences, including administration and compliance costs for charities).
- iii. **Recognition of the sector's independence, diversity and capacity for innovation:** The charitable sector should be independent, diverse, and have the freedom and flexibility to innovate in advancing a range of charitable purposes for the benefit of the public.

The purpose of the Act

Many of the "purpose" clauses currently set out in section 3 of the Charities Act (in particular, sections 3(b) to (f)) describe details of the regime, rather than articulating the Act's purpose.

The Law Society makes the following points:

- i. **Reference to and adaptation of overseas approaches:** Overseas approaches provide helpful guidance, such as the approach taken in the "objects" provisions of the Australian Charities and Not-for-profits Commission Act 2012 referred to in the discussion document, which can be adapted to suit the New Zealand charity law context.
- ii. **Suggested amendments/redrafting of purpose provisions:** In accordance with that approach, the Law Society recommends amending the purpose provisions of the Charities Act to:
 - acknowledge that the registration, reporting and monitoring regime is put in place on account of the public benefit delivered by the charitable sector and the tax

concessions linked to registration that are provided to support the charitable sector's work;

- include (as in the Australian example, but adapted for New Zealand) purposes relating to:
 - maintaining, protecting and enhancing the integrity of, and public trust and confidence in, the New Zealand charitable sector;
 - supporting and sustaining a robust, vibrant, independent, innovative and diverse New Zealand charitable sector; and
 - promoting the reduction of unnecessary or unjustifiably burdensome regulatory obligations for the New Zealand charitable sector; and
 - require that, in administering the registration, reporting and monitoring regime to advance and achieve such purposes, the regulator and others must have regard to the principles of Te Tiriti o Waitangi.
- iii. **“Transparency”**: Transparency (of varying degrees, depending on the circumstances) would appear to be a means to other ends (such as maintaining the integrity of, and public trust and confidence in, the charitable sector), rather than an end in itself. It would be helpful to identify these purposes.

Obligations of charities

- i. **Territorial application of the Charities Act**: The discussion document notes in passing the regulator's interpretation of the Charities Act that a charity must be established in, or have a very strong connection to, New Zealand in order to register. (In response to this interpretation, the Income Tax Act was amended to provide for Inland Revenue to approve “tax charity” status for charities thereby precluded from registering under the Charities Act.) The Law Society considers that the Charities Act should include provisions that expressly clarify the intended scope of the registration regime.
- ii. **Small charity reporting requirements**: Consideration should be given to simpler, more accommodating annual reporting, and in particular financial reporting, requirements for a large number of very small charities that currently fall within Tier 4 of the reporting regime. The relatively low level of reporting compliance by Tier 4 charities would appear to reflect insufficient support and/or insufficiently tailored reporting requirements and materials for small charities. Small charities' annual financial reporting requirements could be limited to a simple, fill-in-the-box annual financial information form (potentially supported by bank statements or other basic financial information).
- iii. **Other aspects of reporting requirements**: The particular reporting requirements imposed on registered charities should potentially reflect the particular tax concessions they are utilising (for example, whether the charity is just deriving tax-exempt income or is also receiving donations and issuing donation receipts for tax purposes).
- iv. **“Officer” definition**: We agree that different types of charity (trusts, societies and institutions) should be subject to substantially the same requirements in relation to having, and notifying on the register, “officers” who are not disqualified. On this basis, the directors (or equivalent) of a corporate trustee should be treated as “officers”. Care needs to be taken, however, in relation to extending the term “officer” to apply to persons who do not have a governance role, creating compliance uncertainty in relation to identifying who is or is not an “officer”.

Use of the term “officer” in the Charities Act should also be reviewed, as it sometimes causes confusion with other uses of the term “officer” in relation to charities.

- v. **Accumulation of funds:** The Law Society queries the need for any additional reporting and/or substantive requirements relating to charities’ accumulation of funds. Charities accumulate funds for a wide variety of legitimate reasons to advance their charitable purposes. Registered charities are also already subject to annual financial reporting requirements which disclose accumulated funds. Care should be taken not to unduly limit freedom and flexibility to exercise judgement. Care should also be taken in proposing prescriptive expenditure/distributions requirements for private charities (or any wider class of charities), especially minimum requirements that may then become a default, low bar for such charities’ expenditure/distributions.
- vi. **Governance standards:** The benefit of adding general governance standards of the type suggested to the Charities Act would be minimal, and the potential detriment in terms of creating complexity and confusion for charities and their officers may be significant. In particular, charities are typically already subject to governance requirements under general trust, company and incorporated society law (as applicable), as well as under their own governing documents, and the inclusion of general governance standards in the Charities Act would add another layer of regulation.
- vii. **Inland Revenue binding rulings:** Existing provision under section 13 of the Charities Act for the regulator to be bound by Inland Revenue binding rulings should be retained, unless an equally accessible and efficient replacement regime will be introduced. The binding rulings regime is a critical option for entities to be able to obtain, at a cost but efficiently, certainty in relation to their charitable status and eligibility for exemption from income tax. The importance of this option is heightened by the fact that currently the regulator can take a very long time (in excess of 12 months in a number of cases, with no time limit) to assess a Charities Act registration application, whereas Inland Revenue generally has the capacity to assess binding ruling applications more quickly.

Role of the regulator

Again, this section of the discussion document touches on a wide range of matters and the Law Society comments on some of the key matters only (generally in the order in which they raised in the section):

- i. **Charities Commission vs. the Charities Registration Board and Charities Services:** The Law Society understands there is a concern that the current splitting of functions between the three-member CRB and Charities Services can be perceived to be largely illusory (with the CRB being seen as largely dependent on, and beholden to the views of, Charities Services). Consideration should be given to reinstating a Charities Commission or an equivalent or similar body as regulator, ensuring that the regulator is sufficiently independent.
- ii. **External advisory board or similar arrangements:** Regardless of the regulator, the Law Society sees significant merit in the concept of an advisory board or similar arrangement, with charity law experience and expertise, to facilitate input to the regulator, and to the government, on the registration, reporting and monitoring regime under the Charities Act (and potentially also other aspects of New Zealand charity law).
- iii. **Registration/deregistration decision-making and backdating:** Improvements could be made to the first instance registration/deregistration decision-making process as follows:

- the provisions currently set out in the remainder of section 5 (after the section 5(10) definition) could be improved by:
 - adding a new subsection that cross-refers to (or incorporates) the recreational charitable purpose provisions under section 61A of the Charitable Trusts Act 1957;
 - adding a new subsection expressly providing that, to avoid doubt (as in the case of existing subsection (3)), activities undertaken by the trustees of a trust or by a society or institution (including advocacy and business activities) do not prevent the trustees or the society or institution from qualifying for registration as a charitable entity if the activities are undertaken as a means of advancing one or more charitable purposes;
 - deleting existing subsection (2A) relating to amateur sport, as the current drafting is problematic and the provision would effectively be superseded by the new “activities” subsection proposed above; and
 - considering whether it is appropriate to retain the reference to “advocacy” as an example of a non-charitable purpose in existing subsection (3).
- The provisions relating to the applications for registration currently set out in sections 17 to 19 of the Charities Act could be improved by:
 - requiring the regulator to notify an applicant, within a set timeframe (e.g., 5 to 10 working days), whether an application is considered to be properly completed (especially if this continues to impact on backdating registration);
 - expressly providing that the information and documentation that the regulator may request from an applicant must be relevant to the requirements for registration;
 - clarifying the position regarding the regulator accessing any other information and documents from sources other than the applicant, and notifying the applicant of any such information and documents;
 - expressly clarifying that the purpose of the regulator considering the activities or proposed activities of an entity is to clarify any ambiguity or uncertainty in relation to the stated purposes of the entity; and
 - extending the default timeframes for responses from an applicant, for example to two months.
- The provisions relating to backdating an entity’s registration, currently set out in section 20 of the Charities Act, could be improved by:
 - removing or amending subsection (2)(a) referring to the Estate and Gift Duties Act 1968, which now has little, if any, relevance; and
 - in addition to allowing backdating as provided for under subsection (2)(b), allowing backdating of registration to a date earlier than receipt of a properly completed application (potentially back to the date of an entity’s creation/ establishment), for which purpose it may be appropriate to provide for any such backdating to be agreed/approved by Inland Revenue (given that the concern in

relation to backdating will typically relate to the application of tax concessions to income derived, or donations received, by the applicant).

- iv. **Registry information and public vs. regulator access:** While there is a public interest in generally having open access to entities' information and documents on the register, the current drafting of section 25 of the Charities Act (or at least the regulator's current interpretation of the provision) may set too high a threshold in relation to preventing or restricting access in appropriate circumstances. Consideration should be given to providing greater clarity and flexibility in relation to allowing non-disclosure of sensitive commercial or other information and documents filed by registered charities (bearing in mind that the regulator and other authorities will have access to the information and documents).

Appeal of regulator decisions

The ability to appeal, and seek judicial review of, regulator decisions under the Charities Act, including but not limited to charitable status decisions, is critical in terms of access to justice, maintaining the rule of law and developing New Zealand charity law (in particular, in relation to "charitable purposes").

The Law Society submits as follows:

- i. **Decisions should be open to appeal or review:** The regulator's decisions affecting entities and other persons (including decisions regarding: registration/deregistration; issuing warnings or imposing administrative penalties; reporting requirement compliance and exemptions; registry information disclosure/non-disclosure; and officer disqualification etc) should be open to appeal or review, as appropriate. The Law Society expects that the number of proceedings would be limited/regulated by the time and cost involved in an appeal or review.
- ii. **Use of tax disputes process or an equivalent process could be considered:** The tax disputes process under the Tax Administration Act 1994 for disputable decisions in relation to tax matters (or an equivalent process) could be considered for disputed Charities Act decisions (or for certain disputed decisions, such as registration/deregistration decisions).
- iii. **Extended timeframe for lodging appeals:** The default timeframe for lodging appeals should be extended to at least a two-month period.
- iv. **De novo appeals and use of Taxation Review Authority should be considered:** Many of the concerns that have been raised in relation to Charities Act appeals (in particular, in relation to appealing registration/deregistration decisions) would best be addressed by providing for *de novo* appeals and requiring, or permitting as an alternative option, the filing of appeals with an authority other than the High Court. A new specialist Charity Tribunal or similar body could be established for this purpose. The existing Taxation Review Authority (as an optional alternative to the High Court) could be considered for Charities Act appeals.

Te Ao Māori

The Law Society notes the following points in relation to the Te Ao Māori section of the discussion document:

- i. **Further targeted consultation and engagement with Māori is critical:** Consistent with the discussion document's acknowledgement of Te Tiriti o Waitangi and the Crown-Māori relationship, consultation and engagement with Māori is critical. The topics and questions raised in relation to Te Ao Māori and Māori organisations are significant and open-ended,

meaning that further targeted consultation and engagement with Māori will be necessary as part of the review process.

- ii. **Wider review required to incorporate Te Ao Māori:** As noted, it difficult to see how the review can properly address issues relating to Te Ao Māori and Māori charities without undertaking a wider, first principles review, and in particular reviewing the current “charitable purposes” definition that is rooted in English law.
- iii. **Initial changes to the Charities Act should be considered:** Within the scope of the current, narrow review, and subject to the position taken by Māori iwi, hapū and other organisations submitting on the review, amendments to the Charities Act could be made to expressly provide for:
 - the regulator and others to have regard to the principles of Te Tiriti o Waitangi;
 - regulator knowledge and experience in relation to te reo and tikanga Māori; and
 - regular/annual regulator consultation and engagement with Māori.

Business

The section of the discussion document regarding charities’ involvement in business highlights the points already made about the limitations of the review. In particular:

- i. **Interplay with tax concessions linked to Charities Act registration:** As noted earlier in the submission, divorcing the review from the tax concessions linked to registration under the Charities Act is artificial. This is particularly the case in relation to charities’ involvement in business. A key issue in this context is the exemption of charities’ business income from income tax, and the business income tax exemption for Charities Act registered charities is a pending item on Inland Revenue’s Tax Policy Work Programme. The existing business income tax exemption includes extensive requirements (additional to the requirements that apply under the non-business income tax exemption) in relation to avoiding conflicts of interest and any inappropriate diversion of amounts from a tax-exempt business for private benefit. Inland Revenue’s role and powers in relation to administering such concessions under tax legislation should be taken into account in this context.
- ii. **Additional business-related reporting or substantive requirements:** As in the case of charities’ accumulation of funds discussed earlier in the submission, the Law Society queries the need for any additional reporting and/or substantive requirements (for example, regarding risk levels) in relation to charities’ involvement in “related” or “unrelated” business activities. Caution needs to be taken here. Charities become involved in such activities to advance their charitable purposes, in particular by generating income for their purposes, and it is important to avoid unduly hampering their freedom and flexibility to exercise judgment in this regard (which is already subject to governance requirements under general trust, company and society law and specific tax and other legislative requirements, as applicable, as well as their own governing documents). Registered charities are also already subject to annual financial reporting requirements, and their business activities can be reviewed by the regulator and by other authorities if required.
- iii. **Business activities as a means of advancing charitable ends:** Charities’ involvement in business (like advocacy, discussed below) is an area where the distinction between a charity’s purposes/ends and the activities/means to advance or achieve those ends is important and needs to be maintained. As noted earlier in the submission, improvements could be made to

the “charitable purpose” and registration decision-making provisions under the Charities Act to recognise and maintain this distinction.

Advocacy

The same point about the limitations of the review also applies here:

- i. **Interplay with the “charitable purposes” definition:** As least in part, the issue of charities’ involvement in advocacy relates to the scope of the current “charitable purposes” definition (as affirmed by the Supreme Court in *Greenpeace*),⁴ which has been excluded from the review. Legislative changes to clarify the circumstances in which advocacy-related purposes are charitable might be appropriate, however this should be considered as part of a wider review that includes the “charitable purposes” definition.
- ii. **Advocacy activities as a means of advancing charitable ends:** Charities’ involvement in advocacy (like business, discussed above) is an area where the distinction between a charity’s purposes/ends and the activities/means to advance or achieve those ends is important and should be maintained. Consideration needs to be given to whether the current reference to “advocacy” as an example of a “non-charitable purpose” in section 5(3) of the Charities Act should be deleted.

The Law Society notes that there are current/pending proceedings in relation to the Charities Act registration position of Greenpeace of New Zealand Incorporated (in the High Court) and Family First New Zealand (in the Court of Appeal) that may usefully inform the review of the position in relation to charities and advocacy.

These comments were prepared by the Law Society’s Tax Law Committee. If further discussion would be helpful, please contact the committee convenor, Neil Russ, through the Law Society’s Law Reform Adviser Emily Sutton (emily.sutton@lawsociety.org.nz / 04 463 2978).

Yours faithfully



Andrew Logan
Vice President

⁴ *Re Greenpeace of New Zealand Incorporated* [2014] NZSC 105.