

Submission from Philanthropy New Zealand

on the

Department of Internal Affairs'

Review of the Charities Act 2005

April 2019



**Philanthropy
New Zealand**

Tōpūtanga Tuku Aroha o Aotearoa

Introduction

1. This submission is from Philanthropy New Zealand and is divided into the following sections:
 - About Philanthropy New Zealand;
 - Summary of Recommendations;
 - Key Process Issues; and
 - Key Policy Issues.
2. We have consulted with Philanthropy New Zealand members in developing this submission. They provided both early input into what they saw as the key issues and reviewed the draft submission. This submission however does not necessarily represent the individual views of all members. Many members will also make individual submissions, and some may reference our submission.
3. PNZ would like to acknowledge the Combined Community Trusts of New Zealand for providing funding to Philanthropy New Zealand to consult its members and develop this submission.

About Philanthropy New Zealand

4. Philanthropy New Zealand is the peak body representing and supporting philanthropy and grant-making in Aotearoa/New Zealand. We have over 250 members - including community and charitable trusts, foundations, community groups, iwi, individuals, investors and local government. A list of our members is available [here](#)¹.
5. As the hub of philanthropy in New Zealand, we facilitate collaboration and offer practical guidance for anyone with an interest in giving to make the world a better place. Our vision is for a thoughtfully generous Aotearoa/New Zealand and our mission is to:
 - Inspire more philanthropy
 - Support better philanthropy and grantmaking
 - Help build a stronger philanthropic and grantmaking sector.
6. Philanthropy New Zealand is a registered charity, and the majority of our members have charitable status themselves and/or they are donating to organisations with charitable status. As a result, our letter represents the voices of those on the frontline of charitable giving.

¹ <https://philanthropy.org.nz/our-members-2/>.

Summary of Recommendations

Process Recommendations

- That the Department of Internal Affairs refer the review of the Charities Act 2005 to the Law Commission with the public submissions, once the first phase consultation on the discussion document has been completed.
- That the timing of the review be extended to incorporate broader terms of reference, change to an independent reviewer and full consideration given to the proposals.
- That the Charities Act be amended to include a statutory requirement to publicly review and report on any necessary changes to the Act on a five-yearly basis.

Policy Recommendations

- That the scope of the review be broadened to be a first principles' review of the Charities Act 2005, including the fundamental questions outlined below [and to include the definition of charitable purpose].
- Charities Services should be made an independent crown entity that operates at arms' length from the Government and Department of Internal Affairs.
- The functions of Charities Services need to be strengthened so that they have a stronger role in providing education and support to the sector, promoting best practice, and issuing binding decisions.
- Charities Services should adopt the "binding decisions" model used by IRD so that there is more certainty for the charitable sector.
- Philanthropy New Zealand agrees with the proposal in the Government's discussion document, to introduce a new "micro-charity" tier, with more assistance given to small charities to complete any reporting requirements.
- Philanthropy New Zealand also strongly recommends that the Government look at efficiencies in process more generally for all charities - for example, in the way all charities need to report - not just to Charities Services but across departments.
- The Government should approach a minimum disbursement regime with caution, given the complexity of reasons why a charity may not be disbursing large amounts of funds in any given year (discussed more below). Any changes need to be seen alongside the other legislative changes that are proposed in the incorporated societies and trusts legislation.

- Charities need to be free to advocate on the issues that are important to their organisation, their work and the broader sector (for example, advocating on charities legislation). This should not extend to direct endorsement of political parties but should include an assessment of party policies / Ministerial decisions. The current law and interpretation / application by Charities Services is unnecessarily restrictive.
- There should be an appeal system that adopts the following principles:
 - Fair
 - Low cost
 - Certainty
 - Independence
 - Accessible
 - Natural justice
 - Participatory - so charities have a right to speak and provide supporting evidence.
- There should be a right in legislation for a charity to retain its charitable status until all appeals have been exhausted.
- The time to appeal a decision from Charities Services should be extended - 20 days is too short.
- We encourage the Minister and Government officials to engage with the recent report from the Impact Initiative about strengthening social enterprises.
- One of our members has suggested that there should be penalties that will trigger wind-up processes if warranted - but this should not be a decision made by Charities Services - it should be in legislation. They have also asked for a legislative mechanism to make consolidation of charities easier, for example, with registration.

Key Process Issues

7. The key issues with the current review process are:
 - A need for greater independence;
 - Timing of the review process; and
 - Remaining relevant through a regular review.

A need for greater independence

8. The current review is led by the Department of Internal Affairs - the government department with primary responsibility for the charities regulator and administering existing charities law and policy. This has raised serious concerns within the sector about the independence of the review: in appearance, in practice, and in the context of trying to generate new thinking.

9. Will the department be critical of its own previous policy recommendations and be able to consider legal frameworks fresh and outside the silo of their own departmental experience? Independence is also needed to ensure the credibility and longevity of this type of review so that it does not become a political football in years to come.
10. It was only with significant advocacy from the sector that there has been an increase in the number of community meetings, an additional month added to the public consultation part of the process, and the benefit of Sue Barker and Dave Henderson as members of the Sector Advisory Group being present and able to present an alternative view at the meetings.
11. An independent reviewer is needed. The Law Commission is well placed to do this work, being independent of the department and arm's length from government and having conducted similar first principles' reviews on complex legislative policy with multiple stakeholders in the past - for example, the review of incorporated societies law.
12. Once the Law Commission has completed the independent review, it would then be for the Government to decide what changes it wants to implement and how these would be executed by the Department of Internal Affairs after an amendment Bill has been passed by Parliament.

Timing of the review process

13. While we appreciate that the timeline for the submission deadline has been extended, we would like to express serious concerns about the timing of the review process overall. It is too short. We understand that the review of the charities legislation is a priority for the Minister of the Community and Voluntary Sector; however, this should mean that it is given the time and attention that the issues deserve, including meaningful engagement with the sector and time to analyse submissions. Does the extension to the public submission timeframe mean that public officials have less time to consider the results, write up proposals, and instruct PCO on drafting? If so, this risks the quality of the result.
14. Trying to introduce legislation before the General Election inserts an artificial timeframe and appears to demonstrate a fundamental lack of understanding of the capacity of the charitable sector to engage - not just with this review but with the other important government reviews (such as tax reform) and legislative changes (such as the Trusts Bill) that are happening at the same time.
15. We note that Hui E has raised similar concerns about a rushed review and cite the problems with the current legislation being the result of the Act rushing through Select Committee in 2004, amendment Bills that were ad hoc in 2012 and subsequent Statute Amendment Bill changes that did not have the public scrutiny they deserved.
16. The current review process is rushed given the complexity of the issues and the number of stakeholders involved. Rather than trying to push a substandard outcome within the electoral cycle, the sector is asking you to take the time to consider the fundamental questions and

engage meaningfully with those who are impacted by the decisions. The Department's national road trip is a good first step and the outcomes of those conversations should be referred to the independent reviewer as part of their independent review - so that the conversations are not lost but form part of a more comprehensive approach to charities law reform.

Remaining relevant through a regular review

17. The discussion document asks the sector what it expects the issues to be in 20 years' time. This is a good start and should be part of the conversation. However, like technology developments, we cannot anticipate all future scenarios. There needs to be a built-in legislative review process for an ongoing sustainable framework. There are a number of precedents for this (see, for example, section 282 of the Veterans' Support Act 2014).
18. The charitable sector is called civil society and the third sector for a reason - it has an incredibly important role in supporting our thriving communities and acting as a steward for the environment, working alongside both government and business. The partnership approach envisaged in the Sustainable Development Goal number 17 means that charities, business and government need to work together to achieve the targets. This will continue to be the case, even after Agenda 2030 targets are met. Impactful investment can happen where the legislation remains relevant and responsive to the changes in society, the economy and the environment. This justifies a government policy priority on a five-yearly basis.

Key Policy Issues

19. In our submission, we raise the following issues with charities law and policy:
 - Scope of the review;
 - Independence of Charities Services;
 - Functions of Charities Services;
 - Increased use of data collected by Charities Services;
 - "Micro-charities" - different rules
 - Advocacy by charities;
 - Minimum disbursement by charities;
 - New regulatory framework for social enterprises;
 - Appeals under the Act; and
 - Wind-up processes for charities.

Scope of the review

20. The review is too limited in scope and needs to be changed to a first principles' review of the Act. We note that this was promised by the Labour Party² in their election manifesto (and by the National Party when it was in Government) - but is yet to take place.
21. The policy thinking needs to start by acknowledging the good work that the sector is doing and contributing to society, the economy and the environment. But instead of focusing on trying to identify what the problems are in the charitable sector (with the sub-text being how can we regulate these problems away), the starting point should be asking questions like:
 - What is working well and how can we help? How can we better work in partnerships with the charitable sector and philanthropic funders, for example, to deliver New Zealand's commitments to the United Nations Sustainable Development Goals (including SDG 17 - Partnerships); and
 - How can we empower the sector? And promote the good work that the sector is doing? What does the sector need? What is the potential of the sector that is currently being undermined or marginalised? Are there ways to reduce the compliance burden without exposing funders, beneficiaries or the public to risks?
22. In short, the review should start with the fundamental questions of what the purpose and value of the charitable and philanthropic sector is - and how the government can best support positive outcomes from the charitable sector in the public interest. Alongside this, we need to consider what is, or should be, the purpose of the Charities Act regime. As noted by one of our members:

“It is a fundamental failure not to review charitable purpose as part of this review. So many of the issues raised are linked to charitable purpose and how it is interpreted, measured, applied. The common law, the historical legislation, and minor recent amendments, would benefit from a much more detailed and fit for purpose regime rather than the current broad principles and shoehorning of modern activities into outdated principles.”
23. Instead, the current review appears to adopt a deficit regulatory approach and places too much emphasis on trying to create a framework that limits any perceived misbehaviour from a few rogue operators. Philanthropy New Zealand agrees that the regulation needs to be able to respond to charities which are criminal or are not acting charitably. This is discussed more below in the section relating to the role of Charities Services. However, there is too much emphasis on trying to create a framework that limits any perceived misbehaviour without the counter-balancing promotion of the good work that the charitable sector is doing within New Zealand.

² [Labour Party Manifesto](#), page 5.

24. We understand that the issue of charities tax was separately considered by the Tax Working Group and will be considered alongside government decisions on charities law reform. These charity tax decisions should also be informed by the fundamental questions outlined above because they will have a direct impact on the operating budget (and life-blood) of charities.

Independence of Charities Services

25. Charities Services should be made a crown entity that operates at arm's length from the Government and Department of Internal Affairs, as was the legal position with the former Charities Commission. It is important that this body both operate, and be seen to operate, independently. The best model for this would be an independent Crown entity - see the State Services Commission's [advice](#)³.

Functions of Charities Services

26. Fundamentally, Charities Services needs to rethink its relationship with the charitable sector - to be working to empower the charitable sector and philanthropic giving rather than solely focusing on regulation. In Canada, for example, there is a formal and positive relationship between the Philanthropic Foundation and the charities body, including constructive dialogue and an annual meeting where they discuss and work out how to address the priority and upcoming issues in the sector.

27. There needs to be a stronger role for Charities Services in providing education and support to the sector. Many of the smaller charities struggle with understanding the reporting and compliance requirements and Charities Services has the potential to publicly promote the importance of charitable giving, raise the profile of the sector in the community and promote best practice.

28. From a funder perspective, Charities Services can play an important role in working with the sector and government agencies to promote the use of its resources - such as the type of information that can be gained from the charities register (and pre-populated in other agency forms) and sharing data - so that it is easier for organisations to see who is funding what or delivering what type of charitable services.

³ <http://www.ssc.govt.nz/cegmos4>.

29. There has been a suggestion from a member that Charities Services “lost their identity” when merged within the Department of Internal Affairs and that their position within the department means that they have approached the regulator role at the expense of dedicating time to promoting the importance of charities and examples of best practice. One member noted:

“There is a place for the Charities Act to promote effective use of charitable resources if focused on enabling rather than policing. If there is obvious mismanagement and a charity is not acting in the best interests of its beneficiaries and purposes, the Attorney-General is the appropriate party to bring any action, with reference to the rules of the charity, rather than Charities Services dictating things.”

30. There are relevant models to look at overseas when thinking about how Charities Services could be remodelled. For example, the Australian Charities and Not-for-profits Commission Act 2012 has a statutory objective of “*supporting and sustaining a robust, vibrant, independent and innovative sector.*”⁴
31. There also needs to be more certainty for the sector about the types of decisions that Charities Services will make before they happen. We endorse the “binding decisions” model that is currently used by IRD for tax decisions. These are publicly available, and show how IRD will consider and decide on particular issues - with the intention that this will be applied consistently across organisations. This model does not take away any appeal rights but potentially helps to reduce the need for challenging decisions by providing guidance and transparency.

Micro-charities

32. We agree with the suggestion in the discussion document that there should be a new micro-charity tier, with more assistance given to small charities to complete any reporting requirements. We had varying feedback from our members as to what the maximum turnover of a micro-charity should be, and further detail would be required before we could provide a view on the desired size of a micro-charity with lesser reporting requirements.
33. In general, Charities Services and the Department of Internal Affairs should also be working to find efficiencies in the way all charities need to report - not just to their reporting agency but across departments. There needs to be agreed data sharing arrangements, greater use of information available in the charities register, and pre-populating forms so that there are fewer steps. For example, one member noted:

“If you are putting in annual financial statements / why do we repeat everything in the annual return to Charities Services.”

34. We also want to note that any changes to the Act need to be seen alongside other proposed legislative changes, such as incorporated societies and trusts.

⁴ <https://www.legislation.gov.au/Details/C2012A00168>.

Advocacy by charities

35. Currently section 5A in the Act is a problem because it suggests that advocacy is not charitable, and there is no definition of advocacy in the Act. This has led to several court decisions and concern about how the case law is being interpreted and applied by Charities Services.
36. There needs to be changes to the law to ensure that charities can advocate without fear of losing their charitable status. This should not extend to promoting political parties (i.e. advocating a partisan preference) but should, for example, enable charities to share an evaluation of party policies that connect to the purpose, activities or operation of their charity.

Minimum disbursement by charities

37. We note that there have been suggestions raised by government about introducing a minimum disbursement regime. We are not necessarily opposed to this, but this would need to be done with a proper understanding of the restraints and regard for what would be a sustainable nature of the entities concerned. For example:
 - For charitable funder organisations that have a perpetuity responsibility, exercising due diligence with conservative investment funds means that the return on investments is at a low level;
 - In other cases, the terms of the trust fund or endowment may be restrictive so that at times there are no eligible recipients or funds available; and
 - In other cases, charities may be looking at strategic / impact investments spread over multiple years but paid in one lump sum.
38. As noted earlier, any changes to legislation need to be seen in the context of changes to incorporated societies and trust law reform. One of our members made the following comment:

“A charity may of course have legitimate reasons for building reserves. Our view is that governance standards, particularly after the upcoming trusts and incorporated societies law reform are passed, should contain sufficient obligations on charities to manage reserves activity without additional reporting legislative change.”

New regulatory framework for social enterprises

39. Some of our members are interested in investing in, or funding, social enterprises without the worry of losing their charitable status. We note that the Impact Initiative has recently released a [paper](#) about the changes that should happen to unlock the potential of social enterprises. We encourage the Government to engage with the issues it raises to assess the relevance to the definition of charitable purpose, and implications for philanthropic funders. We're keen to see what may work to support social enterprise to maximise social, economic and environmental outcomes.

Appeals under the Act

40. There needs to be changes to the appeal system and timeframes for appeals under the Act. In particular, we submit that the system should be based on the following principles:
- Fair
 - Low cost
 - Certainty
 - Independence
 - Accessible
 - Natural justice
 - Participatory - so charities have a right to speak and provide supporting evidence.
41. In terms of timeframes, 20 days is not sufficient time for a charitable organisation to bring an appeal of a decision (section 59 of the Act). In other civil law jurisdictions there are longer timeframes. For example, a decision from the first tier Employment Relations Authority to the Employment Court needs to be lodged within 28 days of receiving the tribunal's decision, and
42. Given the significant financial impact of deregistration for a charity - and to also provide more certainty for funders of charities - we strongly recommend that the charitable status of a charity remains in place until all appeal decisions have been exhausted. This should not require a separate application to the Court.

Wind-up processes for charities

43. One of our members has suggested that there should be penalties that will trigger wind-up processes if warranted - but this should not be a decision made by Charities Services - it should be in legislation. They have also asked for a legislative mechanism to make consolidation of charities easier, for example, with registration. Currently, if a charity is deregistered then it is required to divest and redistribute assets - this is not an easy or small thing to do. The law needs to be more user-friendly, and the charities register and staff could provide vital information to assist with this process.
44. I look forward to engaging with you on next steps.



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