



## **Community Networks Aotearoa**

### **Submission on the Charities Act 2005 Review**

#### **About Community Networks Aotearoa**

We are the umbrella organisation for local community networks. The community sector is an essential part of a healthy thriving society. Our goal is to empower and strengthen the community sector by supporting community networks across Aotearoa.

Our membership includes fifty not-for-profit and voluntary social service organisations all over the country, who in turn support their own local networks of community organisations.

We support our members by providing:

- Information on key events, reforms, and policy affecting the community sector
- Personalised organisational advice and support
- A platform for a collective voice on matters affecting the community sector
- Opportunities to connect with other community networks across Aotearoa

#### **Summary of key points in the submission**

- The Charities Act 2005 needs a first principles review.
- We would like to see this current review referred to the Law Commission for an independent, considered review.
- We support a purpose for Charities' Services that is focused on information and disclosure, as well as an additional purpose on respecting and protecting the autonomy of charities. We would like to emphasise the need to prevent regulatory overreach, where Charities Services or the Registration Board (or whatever entity may take their place) is given too broad a scope that results in a too tightly controlled sector.
- We agree with Volunteer NZ's submission regarding the need to simplify reporting requirements for Tier 4, for example through an online fill in the box template, with a simplified performance report. There is merit in creating a new micro entity tier for charities as suggested in the discussion document.

- The community sector itself has started work on promoting and supporting good governance. We strongly suggest that before any work to develop and include governance standards in the legislation commences, you talk with people and organisations, such as ourselves, who are already working on this issue.
- We would like to see the Charities Services take the form of an independent entity, at least as autonomous as a Crown Entity.
- Charities should be able to appeal all decisions under the Act. Given the far-reaching consequences of decisions under the Act, we recommend the establishment of a specialist Charity Tribunal.
- We would like to see legislation protect the ability of charities to carry out advocacy without fear of deregistration or other penalty.

### **Review approach – need a first principles review**

Charities play an integral role in improving health and wellbeing, from delivering essential services to building social capital. It is clear charities fill a fundamental role in our society. Given this critical role, any reform in this area must be approached carefully.

With this in mind, we believe the Charities Act 2005 (the Act) needs a first principles review.

There are real problems with the current operation of the Act – many of these issues stem from the way the Act was developed.<sup>1</sup> To ease concerns over the way the Act was developed, a first principles review was promised. However, this hasn't happened, and the current review is too limited to address all the issues a first principles review could address.

For example, the current review excludes key issues such as the definition of charitable purpose. We are also concerned that the tight timeframe (requiring all policy work to be done by August this year so legislation can be introduced before the next election) will hamper the deeper analysis needed to make the Act work.

We are aware that members of the Sector User Group have raised similar concerns with the Minister and have recommended that a review of the Act be referred to the Law Commission for an independent, considered review. We support this call, the law around charities is complex and its impact far-reaching. The Law Commission is well placed to review the Act, as they did with the law of incorporated societies and trusts.

### **Challenges / opportunities facing charities**

A clear challenge for many charities is a lack of funding in the context of increasing demand for services. This financial pressure has very real and serious downstream effects. Not only is there the risk that people in need of help cannot get it due to overburdened services, but that charities are unable to fulfil wider functions they have in the past, such as work in the social capital space (that is helping to build connections of trust in communities) – a vital role for any society.

In the future we see the role of charities being increasingly important in assisting Government and the effective development and implementation of public policy. The focus on wellbeing is a core part

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<sup>1</sup> See Garth Nowland-Foreman's blog on the issue (<https://www.lead.org.nz/news/2019/3/22/why-your-organisation-should-get-involved-with-the-charities-act-review-and-before-30th-april-5hcfg>)

of the charity sector's existence. Increasingly we are seeing calls for communities to be at the table in policy discussions, with an approach that 'does with' rather than 'does to'. As many charities work directly with communities, they can assist in the connection between public policy and better community engagement.

### **Purpose of the Act**

We support the recommendation put forward by Garth Nowland-Foreman from LEAD<sup>2</sup>, and believe the purpose should be specifically limited to an information and disclosure regime for certain independent community organisations, as well as an additional purpose on respecting and protecting the autonomy of charities. We would support the additional purposes suggested in the discussion document on transparency and supporting a robust, vibrant, independent and innovative charitable sector.

However, we are concerned about wider purposes, such as ensuring the effective use of charitable resources. This sort of purpose is not an appropriate function any more than it would be for other sectors, such as business. Effective use of resources should be determined by an entity's governance board, or the public when they decide whether to donate or not. Such a purpose has been rejected in comparable jurisdictions.

Community Networks Aotearoa does not agree with the regulatory approach that has developed in Charities Services since it ceased as an independent commission. Rather, we support the following as outlined in Philanthropy NZ's submission:

*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.*

We would like to emphasise the need to prevent regulatory overreach, where Charities Services or the Registration Board (or whatever entity may take over) is given too broad a scope that results in a too tightly controlled sector. Our concern is that this is what is currently happening. Over the years the purpose of the entity administering the Act (currently Charities Services) has changed, arguably by stealth. These changes are creating undue burdens and making life difficult for many in the charity sector. For example, "promoting public trust and confidence" and "encouraging and promoting the effective use of charitable resources" were originally functions of the Charities Commission but were moved into the purposes section of the Act when the Charities Commission was disestablished in 2012. This has effectively resulted in greater control over the sector.

We strongly believe the key means for achieving the Act's purpose should be through information and disclosure. In cases of serious wrong doing it is clear intervention is needed, but beyond this we think public disclosure is key, where the public and funders have access to information on a charity that enables them to assess a charity and make a decision themselves about whether the charity should be supported. This strikes the best balance between ensuring a system we can have

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<sup>2</sup> See reference 1.

confidence in and ensuring there is enough freedom for charities to be whatever the communities they serve need them to be.

### *Assessing a charitable purpose*

Section 18(3)(a) requires Charities Services to have regard to a charity's activities to determine whether the charity is acting in furtherance of its stated charitable purposes. However, we believe the charity and the community it serves should determine how best to meet its own needs and purpose. We are concerned that enabling Charities Services to have regard to a charity's activities (i.e. what a charity does) risks all charities having to fit into a certain mould, which will not serve the needs of Aotearoa's diverse communities.

### **Obligations of a charity**

Registering as a charity brings certain benefits such as a level of public accountability that provides credibility, as well as important financial benefits. Given many charities are under immense financial pressure, these financial benefits are significant.

The reality is that many organisations or groups find they must register as a charity if they are to get funding. In practice it is a general requirement of many funders that a group be a charity. So, registering as a charity is often a necessity, even if the nature of the group is unsuited. We understand from the perspective of funders this is important, so they know the group is legitimate. However, it does mean a number of groups are being forced to register when otherwise it wouldn't be necessary. An example is a small group working together to run a community garden – they may work best together under an informal structure, but to get funding they are required to formalise and create a legal entity, which itself introduces a lot more work and burden not necessarily proportionate to the funding they receive.

One solution is to work closely with the philanthropy sector to consider funding arrangements that don't require registration as a charitable trust or incorporated society. It may also be worth exploring other avenues, for example could there be another tier of recognition that doesn't require a group to be charitable trust or incorporated society, but requires some form of accountability that provides assurances for funders?

### **Reporting requirements**

Reporting requirements are important for accountability and transparency, but there needs to be balance so that the reporting requirements are proportionate to the level of funding a charity is dealing with. We agree with the point raised by Volunteer NZ in its submission regarding needing to simplify reporting requirements for Tier 4, for example through an online fill in the box template, with a simplified performance report. There is merit in creating a new micro entity tier for charities as suggested in the discussion document – the discussion document suggests \$10,000 or less but we would increase this figure. This tier would have fewer reporting requirements, proportionate to the funds these entities deal with.

### **Definition of an officer and qualifications**

We think the wider definition of an officer as suggested in the discussion paper has merit but note that it would be helpful to have consistency between the Charities Act and Incorporated Societies

Act. We do not think a person should be disqualified from being an officer of a charity if they have a serious conviction. Rather we believe disclosure should be required, but that it is then up to the charity to decide the appropriateness of that person for the role.

Charities serve diverse communities. For example, if a charity is focused on people who are likely to have had serious convictions, having people who have had such experience (though no longer involved in criminal activity), can be important in ensuring the charity is fit for purpose and responsive to the needs of the people it is there to serve.

### **Accumulation of funds**

We do not believe any requirements as suggested in the discussion paper on the accumulation of funds is required. We note that a charity's financial status is already readily available online. We also note that it is accepted good practice for a charity to hold a certain amount in reserves. For example, if a charity is an Incorporated Society, which asks its members' for an annual subscription then it may decide to have one year's operating expenses in reserve so that it can ask for annual subscriptions in good faith. We believe the charity itself is best placed to decide how to allocate its resources to meet its purpose and obligations.

### **Governance standards**

The community sector itself is working on promoting and supporting good governance. We strongly suggest that before any work to develop and include governance standards in the legislation commences, DIA talk with the people and organisations, such as ourselves, who are already working on this issue.

We do not believe having governance standards in legislation is the best approach to support good governance in the sector. We reiterate the need to tie in with what's already happening in the sector in this space. We do not think the Australian governance standards, as included in the discussion paper are a good fit for the Aotearoa context.

### **Alignment with other legislation**

In the discussion paper you ask whether the Charities Registration Board should continue to be bound to follow charitable purpose interpretations made by the Commissioner of Inland Revenue. We believe that the Board (and Charities Services) should be bound by binding rulings issued by IRD.

### **Accessibility and accountability**

We believe accessibility and accountability can be improved. Accessibility is not just about structural changes, but from having good relationships built on trust and credibility with the charity sector. At present, we do not believe this relationship is there. The discussion document references Section 12 of the Act which requires an annual meeting between Charities Services and charity sector representatives, where charities can question the operation of the Act. At this meeting, Charities Services reports on the past year's activities and future plans. We feel this forum could be a more effective vehicle for accountability and accessibility if there were more opportunities for two-way conversations / feedback (in a way that feels safe e.g. in smaller workshops versus an audience of hundreds).

Being open about activities is important, along with ensuring organisations that are being investigated know about it, are clear of the parameters of the investigation and have good opportunity to feed in to the process.

### **Strengthening registration decision making**

We believe more guidance should be provided about the type of information organisations need to provide to support an application for registration, and how such information will be assessed. Such guidelines would help ensure that the Registration Board is using appropriate evidence in their decision making. We are concerned that Charities Services uses as evidence information from internet searches that may or may not be correct.

### **Perceptions of independence**

We believe the entity comprising Charities Services and the Registration Board needs to be independent of Government. This structural change may be disruptive but is crucial to the long-term effectiveness of the entity. The reality is that while the entity sits within a government department, the risk of actual or perceived interference will remain. This is exacerbated by the advocacy issue (discussed further below) – having the entity sit within a government department creates a risk, real or perceived, of punishment being handed down to a charity that openly criticises Government. Furthermore, as governments change, having the entity within a government department makes it vulnerable to changing government philosophies and approaches, impacting on overall consistency.

We would like to see an independent Charities Commission, at least as autonomous as a Crown Entity. This independence is important to avoid undue Government interference and install confidence both from the perspective of the public and charities.

### **Funding of Charities Services and Registration Board**

Given many charities are under financial pressure, we don't think it's realistic to require them to contribute to the funding of Charities Services and the Registration Board (or whatever entity may take their place). Our public policy system provides financial benefits to charities in recognition of the important, and special, nature of their work. Introducing requirements to contribute to the funding of Charities Services/Registration Board would seem to run contrary to this public policy.

### **Third party fundraisers**

We do not think regulation is required; it is up to the charity to decide what an appropriate way to fundraise is.

### **Appeals**

The current appeals system is not working and is simply not accessible for a number of charities with limited resources. 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 prospect, and to do so most would need the assistance of a lawyer. All of this, in practice, makes the appeal process out of reach for many charities, both in terms of financial cost and practicalities of time.

Given the far-reaching consequences of decisions under the Act, we recommend the establishment of a specialist Charity Tribunal – this would help build up expertise and consistent and robust case

law on the Act that provides all stakeholders with certainty and confidence. While we see benefits in enabling the Registration Board to conduct internal reviews when challenged on a decision (for example as a first step in a challenge before appealing to an external body), we think there always needs to be the option of appeal to an independent body, otherwise the appeal process lacks the credibility needed to install trust. Given there is currently a trust issue between many in the sector and Charities Services and the Registration Board we are not sure any internal process will work well but may just add another layer of bureaucracy for a charity trying to challenge a decision.

We also suggest /note the following:

- Charities should be able to access an oral hearing of evidence.
- Charities need longer than 20 working days to make an appeal, we suggest 90 days.
- 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.
- Charities should be able to appeal all decisions under the Act without needing to go to the unaffordable and inappropriately high level of 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.
- We see merit in having support 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.

## Advocacy

Charities add an important voice to the advocacy landscape. Many charities are working with communities that are not often heard in policy discussions, and are working at the coalface of big issues, such as poverty, putting them in a unique position to offer advice and insight into what can be done to make a difference. Charities provide a vehicle for participation in policy for many people, including those who feel alienated from more traditional vehicles for participation.

Limiting the ability of charities to contribute to policy discussion and advocacy not only removes essential insights and expertise but may effectively silence the voices of many in the community who participate in policy discussions through charities.

However, the way the Act is currently operating many charities fear contributing to policy discussions for risk of deregistration. The direct consequence is many charities choose not to participate in anything that can be deemed advocacy – which is a significant loss.

At Community Networks Aotearoa we often contribute to policy discussions, and our voice along with others is sought out by government agencies regularly. It is clear Government finds it valuable to hear the insights of charities. Any regulation in this area needs to ensure we can continue this activity without hindrance.

We would like to see legislation protect the ability of charities to carry out advocacy without fear of deregistration or other penalty.

What would be the legitimate policy objective in limiting a charity's ability to advocate and participate in policy discussions? Rather we believe advocacy should be supported as a legitimate and important activity to achieve a charity's stated charitable purpose.

And this last point is important - advocacy is an activity, the key is that it's carried out in furtherance of an accepted charitable purpose.

### **Conclusion**

This review provides an opportunity for the relationship between Government and charities to be reset. Government frequently talks about the partnership between itself and the community sector but in reality there is no equity in the relationship. The focus on regulation and compliance and the silencing of advocacy, means that charities cannot engage with Government in an authentic manner. We hope that the result of this review will be a relationship based on greater trust and respect, with accountability on both sides and a joint focus on achieving good outcomes for the communities we both serve.