



Submission

Modernising the Charities Act 2005

May 2019

Submission summary

1. The current review is problematic. It is not the first principles review promised when the Charities Act 2005 was passed. It lacks independence, being conducted by the government department responsible for Charities Services. A more fundamental review undertaken by an independent body is needed to tackle charity law.
2. New Zealand needs a charities body which promotes a healthy and vibrant charity sector. It does not need one which seeks to limit numbers and restrict activity. Charities Services is opaque in its decision-making, and its decisions appear to be influenced by government priorities. The elevation of core Charities Commission objectives to purposes in Charities Services expanded the regulatory reach of government in ways likely to be detrimental to sector independence.
3. Natural justice is ill-served under the Charities Act 2005 and its amendments. Appeals processes are unduly restricted to registration and de-registration and are expensive to undertake, particularly for small or new charities. There is a need for a Trier of Fact as a first step in dealing with disputes between a charity and the regulator.
4. Advocacy is a legitimate, and even necessary activity for charities seeking to pursue their purposes effectively in the modern world. The activity of advocacy should not be conflated with charitable purpose. This role should be recognised in legislation.
5. Charities Services' current interpretation of business activity is overly restrictive and has no basis in law. The role of business (mission-related enterprises) in charity is a complex and growing one, especially now that many charities gain the largest part of their income from contracting with government. This area requires more widespread discussion and review.

Introduction

Thank you for the opportunity to be part of the consultation on Modernising the Charities Act 2005. Alzheimers NZ has a strong interest in this area as we are a registered charity. Since 1986, we have been representing people living with dementia at a national level by raising awareness of dementia, providing

information and resources, advocating for high quality services, and promoting research about prevention, treatment, cure and care.

Our local Alzheimers organisations (our members) provide support, education, information and related services directly to members of their communities who are affected by dementia. These services may include information and education to assist with understanding and living with a dementia diagnosis; support for family, friends and whānau coping with the demands of caring; and, support groups and day programmes for people affected by dementia. We support local Alzheimers NZ organisations throughout New Zealand, each of which is a member of Alzheimers NZ.

Our organisation has numerous concerns about the current approach to modernising the Charities Act 2005, hence this submission. We wish to thank Dr Pat Webster for her generous assistance and major contribution in preparing this document.

Modernising the Charities Act 2005: Key issues

Alzheimers NZ has four major concerns about the current discussion:

1. We were expecting to be taking part in a wide-ranging review of the Act;
2. The charities' regulatory machinery needs to have a greater distance from Government than it does currently;
3. An independent review is required; and
4. Numerous problems associated with the Charities Act 2005 need to be remedied, for example, access to natural justice; recognition of the legitimacy of advocacy; and, a better approach to charity business activities (mission-related enterprises).

These issues are addressed below.

1. The current review is not the expected one

Civil society organisations, of which charities are a part, are a cornerstone of a free and healthy civil society. It is in the Government's interest to foster a trusting and participative environment which enables them to operate effectively. This was the intention of the *Charities Act 2005*.

The 2005 Act was passed after a Select Committee process which tried to deal with a range of flaws in the original bill. Changes were not consulted publicly, however a “first principles” review of the Act was promised once a register had been established.

Not only has this review been regularly delayed, but significant changes to the 2005 Act have been made as part of Statutes Amendment Bills. These were often rushed through in urgency, with limited public or sector consultation and at times, as in the dis-establishment of the Charities Commission, with no apparent reason.

Regulatory regimes such as those which affect charities operate best with consent. An in-depth review has always been regarded as a necessary part of developing a fit-for purpose regime in New Zealand. The current review is inadequate for that purpose. Therefore, Alzheimers NZ concurs with the Law Society’s view that Terms of Reference for this review are too narrow and do not allow key concerns to be met.

2. Independence of the regulator from government interference is required

A key factor in the agreement of the charitable sector to the establishment of a Charities Commission was that it operated at an arms-length from Government. It worked to make charitable activity more effective which involved not simply registering and monitoring charities, but also supporting and educating them about ways to improve their practice.

The dis-establishment of the Charities Commission and its replacement by the Charities Board and an administrative Charities Services within Internal Affairs has led to an opaque process of decision-making. There is evidence that this decision-making may now involve government fiscal priorities, e.g. the need to maximise tax income. There is also evidence that the interpretation of ‘charitable purpose’ is being confused with ‘charitable activity’.¹

The regime has not only been reduced to a regulatory one which seems more focused on whether charities should exist rather than on how to ensure they are a vibrant part of our society, but the elevation of some objectives of the

¹ Barker, S. and Henderson, D. (2019) The Review of the Charities Act 2005: Issues Paper

Commission to purposes of Charities Services has enabled the government department to develop a more controlling approach towards the sector.

“Promoting public trust and confidence in the charitable sector” and “promoting the effective use of charitable resources”, while sounding reasonable, are the responsibility of the sector itself and not of a government regulator. The Charities Commission was able to work towards these objectives by working with the sector to improve how it operated. Under Charities Services, operating within a government department, it is more likely that sanctions will be employed to bring charities into some perceived norm of behaviour.

One example of this is the proposal to develop governance standards for charities. Under the Charities Commission, there was a proposal to develop Best Practice Guidelines in Governance for charities. This was designed to assist Boards seeking to improve themselves. The Guidelines were to have no regulatory effect, therefore leaving charitable organisations to maintain their right to self-governance and independence.

The current consultation document from Charities Services proposes a set of standards be developed. If these are to be standards against which charitable organisations are judged, the autonomy of the sector would be removed. This is particularly so when so many charitable organisations receive government funding, a situation in which it is likely that the standards would become a factor in meeting funding criteria.

Governance is a very subjective matter for most organisations. It should be based largely on the nature of the organisation, the people involved and their approach to the work they do. Small organisations often involve their board in the work they do whereas large organisations may choose a more corporate model. The trend in recent years has been away from the democratic member representation of the incorporated society towards the less representative and more opaque Trust model. The current approach has been a response to environmental factors, where market concepts of efficiency and effectiveness are dominant.

This is not the same approach which existed 30-40 years ago where grassroots involvement was considered paramount. These concepts are fluid in community-based organisations and today’s approach may not be the

approach of the future. If current approaches form the basis of a standards regime, a great deal of the flexibility and responsiveness of charitable organisations may be lost.

3. The review itself lacks independence

The current review is being carried out by the Department of Internal Affairs which is responsible for the administration of the Act. The terms of reference largely deal with administrative matters of interest to Charities Services.

Several groups and individuals within the sector have sought a Law Commission Review such as the one conducted in relation to Incorporated Societies. This was a lengthy review, but it did involve the sector and its proposals have been accepted because of the widespread participation by those affected in identifying issues and their solution.

A first principles review of the Charities Act 2005 is long overdue and whether this be a Law Commission review or some other means, e.g. a Ministerial review, there is a great need to look at the fitness of our charity regime for the nature of charities in 2019. Several other commonwealth countries operating under similar laws to ourselves, the most relevant of which is Australia, have tackled this issue in recent years.

4. Key Problems with the Charities Act 2005

Alzheimers NZ is concerned about three key problems with the current Act: Charities have a difficulty with recourse to natural justice which could be assisted by means of a “Trier of Fact”; advocacy needs to have more legitimacy amongst charitable activities; and, the role of businesses in charities or “mission-related enterprises” needs more discussion and review.

The need for a Trier of Fact

Barker and Henderson (2019) set out the problems inherent in the Act relating to natural justice when a decision is made against a charity by Charities Services. There is a serious flaw in the Act which removes a charity’s right to be heard in support of its case when a finding has been made against it. The only recourse a charity has, when faced with an adverse decision, is to take its case to the high Court and then the Court of Appeal. The cost of this is

prohibitive for most charities and the terms on which such cases can be argued are heavily circumscribed.

At the very least there is a need for a “Trier of Fact” to be inserted into the process to enable the charity voice to be heard on all the matters relating to the case. There is also a need for a process that is not financially prohibitive, one where resort to the High Court is a last, rather than a first step. The current regime allows only registration and de-registration issues to be appealed but other decisions should be included in this process.

Advocacy

Charities are the eyes, ears and conscience of any society; advocacy is a central part of their work and a sign of a healthy democracy...advocacy is an important and legitimate part of their role.

UK Select Committee on Charities, House of Lords, UK

For too long charities have restrained their advocacy, which is a vital part of their work. It is through advocacy that lawmakers hear and understand the issues with which many charities deal. Studies have shown that advocacy is a vital part of charitable activity.

Labour and Green Party policy supports both the independence of community sector advocacy and they have both committed to ensuring that charities can engage in advocacy without fear of losing their charitable status. In Australia, the Charities Review acknowledged that charitable activity includes “promoting or opposing a change to any matter established by law, policy or practice if it is in furtherance or in aid of its charitable purpose”. New Zealand’s review needs to make it explicit that advocacy is not only permitted but is necessary for the health of our society.

The Terms of Reference for the current review asks the wrong question. It should read “how can the legal framework best support charities to advocate in furtherance of their charitable purposes?” In the modern world, changing laws has more effect on issues such as poverty, education and health than any amount of charitable donations. In our own sector, the well-being of people affected by dementia depends is strongly influenced by law changes which make life easier.

This review needs to ensure the Act explicitly states that advocacy is a positive and necessary part of charitable activity in support of charitable purposes. It is worth noting that for many government departments that contract with the charitable sector, a clause inhibiting the contractee from speaking publicly about their contract has come to mean that many charitable organisations have become severely constrained in their ability to advocate about the very changes they perceive to be needed. This has had a very detrimental impact on the ability of organisations to raise public awareness of issues. It threatens the health of our society, and it is important that this problem is not exacerbated by changes to the Charities Act. Charities should remain independent autonomous organisations whose freedom to operate within necessary boundaries should be respected. We should not be creating new boundaries to make life easier for government departments and legislators.

The review must also ensure that the activity of advocacy is not conflated with ‘charitable purpose’. Advocacy is something which an organisation does to support its charitable purpose. It is an ‘activity’ not a ‘purpose’. At times some organisations developing their charitable purposes have themselves mistakenly viewed advocacy as a purpose.

The role of the Commission/Charities Services is to correct this misapprehension and seek that this activity be put in its proper place, not to reduce this activity. An organization should be judged, in the first instance, on its charitable purposes. Monitoring will reveal whether the organisation is meeting its charitable purposes through its activities.

Charities with business activity (mission-related enterprises)

The issue of charities running businesses, increasingly referred to as ‘mission-related enterprises’, to enhance their charitable purpose is fraught and complex as it includes many types of arrangement involving large and small business enterprises whose profit is ploughed back into the organisation’s charitable purpose. More recently there has been a rise in the number of charities which seek to run businesses for social purposes and whose charity includes activity within the business as well as use of profits for charitable purposes. In other parts of the world, this is considered good practice, because the charity is maximising all its potential, skills and competencies to

deliver its mission. The rules currently applied by Charitable Services might severely hamper this:

“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.”

It is not clear on what basis this decision was made and we note that it would only be when an organisation was able to afford to take the matter to the High Court that determination could be made in law. Barker and Henderson have set out some recent history of the consideration of business activity and charities. They note that the approach adopted by Charities Services prevents good charities from raising funds for their charitable purposes.

They also note that the Tax Working Group 2008 received many submissions on business and charities and concluded that “the underlying issue is more about the extent to which charities are distributing or applying the surpluses from their business activities for the benefit of their charitable purpose.” The Tax Working Group concluded that the question is whether the broader policy settings for charities are encouraging appropriate levels of distribution. They noted that there are a variety of legitimate reasons why businesses run by charities may need to accumulate capital over periods of time.

The Tax Working Group believed that a review of the Charities Act would “shed further light on the issues of accumulation and distribution” and suggested that the Government could consider the tax aspects of the treatment of charities after “this legislative review has concluded”. However, the current review is not a legislative one but rather an administrative one, yet the shortcomings of current legislation which enables the above Charities Board determination are clear.

We recognise that the matters involved in this area are not straightforward and we have no desire to see charitable status used as a way of businesses avoiding legitimate taxes. However, we do not agree with the restriction placed on charities around the use of resources at non-market prices. While we understand that it is necessary to protect people from being exploited in

the name of charity, if a business, run for charity, can use donated goods, this is type of activity should be encouraged in a compassionate society.

We believe that not only is a proper review of the Charities Act needed, but the issue of charities and business requires a great deal more open discussion and consideration which has been beyond the ability of this review. The briefing we attended hardly touched on this matter in anything more than a superficial way. In a regime which exists to promote and enhance the role of charities in our society a review of business activity would look at possibilities rather than restrictions which seems to be at the heart of Charities Services' approach.

Conclusion

Alzheimers NZ seeks a more thorough- going review of the Charities Act 2005. Such a review needs to be independent. Our country needs a charities body with greater independence from government and which promotes a healthy and vibrant charity sector. Charities also need access to natural justice, the ability to engage in legitimate advocacy, and an approach to charities' mission-related enterprises which is consistent with our aspirations for a compassionate society.