

19th July 2021

Tēnā koutou,

Thank you for the opportunity to feedback on the next three issues relating to the Charities Act 2005 being consulted on by Department of Internal Affairs. We appreciate being involved.

Without the context of a fuller review of the Charities Act and purpose, we have again approached this set of issues with the mindset of: how the options proposed might address current challenges whilst supporting and empowering the charitable sector; and how to maintain an appropriate balance between regulation of charities and allowing them the flexibility and innovation needed to thrive in a changing environment.

Most of the comments from our funder members from this recent round of consultation have concentrated on the Roles of Officers in Charities (*see feedback in form attached*). We do wish to signal that this is in part due to the density of the issues contained in the papers relating to the regulator role and appeals framework, and the compliance and enforcement powers of the regulator. These are difficult subjects to respond to in a tight timeframe and can require deep legal knowledge. They would in our view have been better canvassed in face to face workshops.

In addition to the feedback attached, we wish to highlight a couple of points of principle from our 2019 submission:

- We support an **appeals system** that adopts the following principles: fair; low cost; certainty; independence; accessible; natural justice; participatory (charities have a right to speak and provide supporting evidence)
- We support that the **role of Charities Services or an alternative independent body be strengthened and further resourced so that this function can play a stronger role in providing education and support to the sector**, promoting best practice, and issuing decisions (which are publicly available to support transparency and guide others) – *see Option 2, Compliance & Enforcement Powers*

Further than the educative role outlined above, we still see the need for a wider role to be played in the system by a body who can actively engage, champion the interests of, and have specialist policy knowledge of the community and voluntary sector or CVS (including to predict how more holistic changes in Government settings might impact the sector). The main relationship for the CVS currently sits with Charities Services in the Department of Internal Affairs who as described in the papers have a largely regulatory focus.

In terms of the regulatory role itself we support requests for provisions to be incorporated into the Act for the Regulator to have regard to the principles of Te Tiriti and be required to regularly consult with and engage with Māori. We hope that iwi/Māori representation is sought in decision-making and the appeals process. As part of this consultation process, we also hope that you duly consider the views of Māori led trusts and charities as to how the proposed options impact them specifically. We acknowledge for example the perspective of one of our members, Te Pūtea Whakatupu Trust, who will be making their own submission.

In addition to this response, PNZ and some of our members have collaborated with Hui E! to channel feedback and communicate on behalf of many front-line charities, including some of our community members. We also wish to note our respect for the legal knowledge, research and expertise of Sue Barker (Charities Law) who is contributing across the full range of topics in this consultation.

Ngā mihi nui,



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Feedback form: role of officers

Submitted by Philanthropy New Zealand (July 2021)

If you wish, you may use this form to provide your comments on the questions.

Definition of officer

Option 1: no change to the definition of officer (status quo)

Option 2: broaden the definition of officer by removing the reference to trustees of trusts

Question	Comment
1. If your charity is a trust, or you work with charities that are trusts, what would option 2 mean for you?	Our members are often both.
2. Do you see any implications with the options?	<p>We do see a potential problem with the current legislation - Option 1 and new drafting under Option 2 – as some of the organisation’s managers could be deemed to have the same accountability as the organisation’s governing body. This factor might become more significant if officer duties are included in the Act.</p> <p>There needs to be care with the term “administration” of the entity – this could have wide meaning.</p> <p>We want to acknowledge that charities often need to take out liability insurance to cover Board member liability. A broader definition for who is deemed “an officer” in Trusts will mean more expense is likely incurred in this area.</p>
3. Are there any alternative options that would better address the problem?	If there is confusion about who is accountable within a charity, then further guidance/engagement upon registration would be useful to support the legislation.

Governance duties of officers

Option 1: no change to officer duties (status quo)

Option 2: add four explicit duties for officers of charities into the Charities Act 2005

- Duty to act in good faith and the charity’s best interests
- Duty to act with reasonable care and diligence
- Duty to ensure the charity’s financial affairs are managed responsibly
- Duty to manage any perceived conflict of interest

Option 3: more comprehensive guidance and support for existing duties (duties are not explicitly set out in the Charities Act)

Question	Comment
<p>4. In your experience, what are the key governance challenges for charities, if any?</p>	<p>We appreciate that there is much diversity in terms of the roles of officers in different types of charitable organisations.</p>
<p>5. Which of the options would best address the problem? Why?</p>	<p>If the aim is to support the sector to be more effective, we think legislative change can't make this happen on its own. Some guiding standards would be useful – but do these need to be in legislation? The proposed changes do not make an officer's role clear in themselves.</p> <p>Some data and evidence collection from Charities Services would be useful here to determine where poor governance has caused issues in charities, the rate, and profile of those charities (in response to your points that it is unclear what the capability is). Then whatever is put in place to support building governance skills can be evaluated against this baseline.</p> <p>We would prioritise an Option 3 approach but are not opposed to the four duties proposed being included in the legislation if these seem reasonable asks of roles such as a Chief Executive or Treasurer (as per the officer definition). We note under (iii) for example that a duty to be responsible for the financial sustainability of the organisations is quite different from ensuring funds and assets being used to advance the organisation's charitable interests.</p>

<p>6. Are there any alternative options that would best address the problem?</p>	<p>Wider recognition, resource, and support for the National Strategy for NGO and Community Governance, project managed by Centre for Social Impact (which parts of DIA have contributed to but which is not referenced in these papers). See more here: https://www.centreforsocialimpact.org.nz/te-puahā-o-te-ako/2020/september/the-national-strategy-for-ngo-and-community-governance</p> <p>The actions currently being developed and refined include:</p> <ul style="list-style-type: none"> • Establishment of a mentoring programme • A concept for an app to help board members get the information they need, when they need it • Development of training resources and support for chairs • Development of a campaign to raise the profile and celebrate the value of community governance • The use of current registration processes to point new board members and new chairs to training and resources • Sharing and promoting new models of community governance • Co-designing a good governance code
<p>7. Are the proposed duties practical and feasible for charities?</p>	
<p>8. Should duties fall on the officers of charities, or the entity itself?</p>	

<p>9. Should officer duties be in legislation, a code or in guidance?</p>	<p>When considering the merits of a code, please be aware that a code is already planned as part of the National Strategy. <i>The Code of Good Governance</i> incorporates The Diversity Code for Funders and its aim is to create a good governance code for the governance of community organisations in Aotearoa. After developing the code, self-evaluation and self-check tools and capability building support, options for accreditation and external support mechanisms for boards will need to be co-designed.</p> <p>Success is that the code is co-designed and is easy to access accessible, understand relatable and widely adopted.</p> <p>This initiative will be underway later this year with community involvement. There are other “codes” in UK, and Australia as guides as well.</p>
<p>10. Does the wording of the duties create any issues with other legislation?</p>	

Disqualifying factor – criminal convictions

Option 1: no change to the criminal convictions that are disqualifying factors for officers (status quo)

Option 2: disqualifying factors includes serious criminal offences

Option 3: all criminal convictions to be disclosed to the regulator who has the discretion to disqualify an officer when there is a significant risk to the charity or its beneficiaries

Question	Comment
<p>11. Which option would best address the problem? Why?</p>	<p>Based on the options put forward, we support Option 1: no change. We believe fraud would already be covered as a dishonesty offence and we note the flexible approach of enabling the Registration Board to waive any disqualifying factor for an officer as it sees fit.</p> <p>Option 2 does not recognise the potential for rehabilitation (there is no mention of a time limit) and the nature of charitable organisations’ dealing with complex social issues who may often want impactful governors and organisational leaders with lived experience.</p> <p>We are not sure how Option 3 would be workable. It denies charities the chance to elect suitable officers and people they feel represent their communities. Also, how would the regulator understand if there is significant risk to the charity or its beneficiaries? Also if there was discretion, the process would need to be very transparent and as independent as possible, otherwise there is the potential for arbitrary decision making.</p> <p>Options 2 & 3 present the risk of potential discrimination against some population groups who are more highly represented in the criminal justice system (with known bias in the system contributing to this situation).</p>
<p>12. Are there any alternative options that would better address the problem?</p>	<p>Charities could receive guidance to use their rules to set clear standards for who they wish to fill officer roles. Where charities assess there is likely to be any risk from working with officers who have serious criminal convictions, we understand that they have the option of undertaking a criminal record check at the time of recruitment which will offer further information for them to determine suitability.</p>

Disqualifying factor – minimum age of officers

Option 1: no change – keep the qualifying age to hold an officer position at 16

Option 2: raise the qualifying age to hold an officer position to 18

Question	Comment
<p>13. Are there any alternative options that would better address the problem?</p>	<p>We support Option 1 - no change. Even if those 16 and 17 years old are excluded from being officers in Trusts and Companies through conflicting legislation, we wouldn't want to see a situation where they could be excluded from incorporated societies that are charities (given we understand the Charities Act will override the provision in the Incorporated Societies Act if they are a registered charity). Some of these societies may be youth led societies.</p>
<p>14. Why might we want to have officers who are under 18? Are there any implications of this?</p>	<p>We have consulted with our Youth Advisory Group who have advised the following:</p> <p>There would likely be an impact on representation of youth / rangatahi for the community sector if the age is raised.</p> <p>The voices of young people are already marginalised and underrepresented. Having early engagement in the philanthropic and non-profit sector is beneficial to the organisations they serve as well in improving representation and diversity, and it is critical to building a pipeline for youth in the sector. By taking that option away, it would feel like a lose-lose situation, many non-profits will possibly lose out on youth engagement, and youth will lose out on opportunities to be part of governance in the sector and contribute their voices.</p> <p>Also, as a lot of not-for-profit organisations have a focus on improving the lives of tamariki and rangatahi, it is critical that their voices contribute to the way these organisations operate. Instead of being 'done to' or 'consulted with', young people deserve meaningful seats and representation at the key decision-making levels of these organisations.</p>