

Modernising the Charities Act 2005

Submission form

Why you should have your say

We encourage any person or organisation interested in modernising the Charities Act 2005 (the Act) to submit a written response to the discussion document by using this form.

Your submission to the Department of Internal Affairs is crucial to help the Government consider improvements to the Act. Submissions received will inform policy development and government decisions.

The questions below are the same as the questions listed in the discussion document. We recommend reading the discussion document to understand the context surrounding each question before answering.

You are welcome to answer as many, or as few, questions as you wish. There is a space at the end for you to provide general comments about modernising the Act.

How to make a submission

Submissions can be posted to:

Charities Act Team
Policy Team
Department of Internal Affairs
PO Box 805
Wellington 6140



Submissions can also be emailed to:

charitiesact@dia.govt.nz



To read the discussion document or to find out more information about the modernisation work and community meetings, visit <https://www.dia.govt.nz/charitiesact>.

The closing date for submissions is **31 MAY 2019**

Submission details

Contact details:

Name:	Ram Subramanian
Organisation (If applicable):	CPA Australia
Role (if applicable):	Policy Adviser – Reporting
Address:	Level 20 28 Freshwater Place Southbank 3006 Victoria Australia
Email:	Ram.subramanian@cpaaustralia.com.au

I am making this submission (please only check one box below):

<input type="checkbox"/> As an individual	<input checked="" type="checkbox"/> On behalf of the group or organisation listed above
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Please note:

The Department of Internal Affairs will analyse the information gathered from the submissions and use it to inform policy development. All submissions will be published to our website www.dia.govt.nz. This will include your name, or the name of your organisation, but not your contact details.

If you want your name or the name of your organisation removed, please let us know and we will remove your name before we publish your submission.

If there is information contained in your submission that you or your organisation do not want to be released, you need to make this clear in the submission and explain why. For example, you might want some information to remain confidential because it is commercially sensitive or personal. The Department will take your request into account.

The Privacy Act 1993 governs how the Department collects, holds, uses and discloses personal information about submitters. Submitters have the right to access and correct personal information.

When the review is completed, all documents (including submissions) will be kept by the Department.

Vision and policy principles – page 16 of discussion document



What are the key challenges facing the charities sector over the next ten years?

CPA Australia has identified the following key challenges facing the New Zealand charities sector over the next ten years:

- **Sustainability**

The ability for charities to remain financially viable and continue to deliver on their charitable purposes will remain a key challenge for the foreseeable future. We expect that the charities sector will continue to rely on traditional funding sources that include government funding, private philanthropy and self-generated income through fundraising activities and commercial business operations.

A commercial mindset, identifying and implementing efficient and innovative ways of operating, and harnessing digital technologies to further charitable purposes will all play a part in ensuring the charities sector remains a vital element of New Zealand's economy and society.

- **Governance**

A significant majority of charities are small charities that do not have any full-time employees. Establishing good governance practices in charities with limited resources is a challenge and the responsibility for ensuring good governance will primarily fall upon charity boards/board equivalents with guidance and support from the regulator, and professional organisations such as CPA Australia.

- **Regulatory burden**

Charities place significant reliance on public support to continue undertaking their charitable activities, and in turn, they are expected to discharge their accountability to the public by demonstrating how well they have applied the resources made available to them in fulfilling their objectives. Whilst in principle, accountability expectations placed on the charities sector are justifiable, sometimes the compliance requirements placed on charities can be disproportionate and unnecessarily burdensome. Regular reviews such as the one this Consultation is part of will assist in calibration of the regulatory framework to meet present-day needs.

- **Competition**

Increasingly, charities operating in some sector do not only face competition from sector participants, but also from for-profit service providers who are often larger with scale efficiency advantages. Whilst tax concessions and philanthropic support from the public provides charities some advantage over for-profit competitors, charities also need to adopt commercial practices to operate on an even footing with their for-profit counterparts.

- **Reputation**

Charities place significant reliance on public support, and to continue to receive such support, they need to ensure public trust and confidence in the sector is maintained. Instances that could undermine public trust and confidence in the sector can include:

- Governance failures that include misappropriation of charity funds for personal benefit and mismanagement of charity funds through bad decision-making.
- Inappropriate/aggressive fundraising tactics.

We have provided some comments in response to other questions in this submission that could address these issues.

- **Attracting talent**

Operating in a competitive environment can often require charities to adopt a commercial approach to attracting suitably skilled and experienced individuals both as employees and as board members (or equivalent). Unlike the for-profit sector which is underpinned by maximising profitability and returns for investors that justify suitable remuneration policies, charities can find it challenging to justify competitive remuneration when they are expected to maximise resource allocation to charitable activities.



What are the key opportunities facing the charities sector over the next ten years?

Adequately addressing many of the challenges we have identified in response to the previous question could also represent opportunities for charities.

In March 2018, CPA Australia, in conjunction with RMIT University, conducted a study on such cooperative arrangements and published the report, [*Merqers, Amalgamations & Acquisitions in the Australian Not-for-profit Human Services Sector*](#). As set out in the report, to remain sustainable, charities could seek to work together with other similar minded charities through a number of arrangements ranging from cooperative efforts based on memoranda of understanding to more formal and permanent arrangements such as mergers or amalgamations.

A charities sector that is able to demonstrate good governance, accountability and transparency is likely to attract more funding and support from the public. It is in the interests of the sector to ensure it is able to maintain public trust and confidence in the sector. We provide below links to three publications that explore the role of charity accountability in enhancing public trust and confidence:

- Yang, Northcott & Sinclair (2017) [The accountability information needs of key charity funders](#)
- Yang & Northcott (2019a) [How can the public trust charities: The role of performance accountability reporting](#)

- Yang & Northcott, 2019b [Together we measure: Improving public service outcomes via the co-production of performance measurement](#)

The charities regulator has a significant role in supporting the sector by developing and providing adequate training and resources that better enable the sector to fulfil its compliance obligations. Professional organisations such as CPA Australia and other stakeholders also have a part to play in developing and providing training and resources to the sector.

The charities sector is well placed to harness evolving digital technologies to better undertake their income generating initiatives, and to deliver against their charitable purposes.



What is the role of government in achieving this vision?

In the context of charity regulation, the government's role is to ensure implementation of a streamlined, efficient and effective legislative and regulatory framework for the charities sector. As part of this regulatory function, the government has a role in developing and implementing a suitable accountability framework for charities through financial and other reporting standards, requirements and guidance.

The government's role is also to ensure sufficient funding and resourcing of the charities regulator to enable it to effectively support the sector and carry out its regulatory oversight functions.

We note the vision states that New Zealanders should benefit from charities effectively delivering on their charitable purposes. We suggest that this should be expanded to include international beneficiaries as well, as charitable giving is also towards international charitable causes.



Do you agree with the vision and policy principles described here?

We agree with a majority of the proposed policy principles, see our response to the next question below for further commentary.



Would you remove or change any part of the vision and policy principles?

We suggest reconsidering the need for the policy principle on "alignment". We agree that adopting international frameworks demonstrates internationally accepted best practice, however, apart from some larger charities that have a multinational focus, many charities within a jurisdiction often evolve to reflect the needs of that jurisdiction. To some extent, the regulatory framework established needs to reflect the unique needs of the charity sector and its stakeholders in New Zealand.

The purpose of the Act – page 17 of discussion document



Do you agree with either of the two possibilities for additional purposes?

We support the proposed additional purpose “to support and sustain a robust, vibrant, independent, and innovative charities sector”. However, we suggest clarifying and defining what is meant by the terms “robust”, “vibrant”, “independent” and “innovative” in the context of the charities sector. We believe this clarification is important as it allows for the assessment and measurement of the performance of the charities regulator, and ultimately the charities sector, against this purpose and its individual elements. Further, it should be clear which provisions of the Act enable fulfilment of this purpose. Subject to the clarification of the purpose as suggested, it could be argued that the current purpose “encourage and promote the effective use of charitable resources” becomes unnecessary if this new purpose is added. Therefore, we suggest removal of this extant purpose if the proposed additional purpose is included in the legislation.

We do not support the second additional purpose “to promote the transparency of the charities sector to donors, volunteers, beneficiaries and the public”. We believe this purpose is covered by the following purposes already in place:

- promote public trust and confidence in the charities sector
- encourage and promote the effective use of charitable resources
- require charitable entities and certain other persons to comply with certain obligations

We suggest clarifying which provisions of the Act relate to “promotion of transparency” and how these provisions assist in the fulfilment of the stated purposes.



Are there any additional purposes you think should be added to section 3?

See our response to the previous question.

Obligations of charities – page 18 of discussion document



Why did your organisation register as a charity? For example, was the main reason public recognition, or to meet a funder’s requirements, or tax benefits?

Not applicable



What benefits does your charity experience from being registered under the Act?

Not applicable

Reporting requirements



Is more support required for charities to meet their obligations? If so, what type of support is needed?

Feedback we have received indicates that there are a significant number of small charities that do not have access to the necessary financial expertise required to ensure compliance with the statutory financial reporting requirements and the underlying record keeping. The statistic that nearly three-quarters of charities have no full-time employee appears to support this feedback. We expect levels of financial literacy amongst board members of smaller charities may also need improvement.

The charities regulator should consider how it can support the majority of smaller charities better fulfil their statutory obligations, through the provision of education and training including online resources. The charities regulator should look to collaborate with sector stakeholders, especially accounting professionals such as CPA Australia to explore opportunities to develop and provide education and training material where needed. For example, CPA Australia has developed and published a number of resources for Australian charities and NFPs that can be accessed at <https://www.cpaustralia.com.au/professional-resources/reporting/not-for-profits>.



Should reporting requirements for small charities be reduced? If so, what would be the benefits? What would be the risks?

Presently a Tier 4 small charity is required to comply with a simple, cash-based standard. We observe that the Standard is over 30 pages long, with another 46 pages of guidance. We suggest the standard could be substantially simplified to a level that appropriately reflects the transparency and accountability required from this segment of the charities sector. We suggest a similar approach for Tier 3 charities also. We suggest a technical working group or project advisory panel be set up to provide assistance with the review of Tier 3 and Tier 4 standards. This exercise could be undertaken as part of the External Reporting Board’s (XRB) post implementation review of the New Zealand accounting standards framework.

The benefits of the proposed simplification could include improved compliance by smaller charities resulting in better transparency that enhances public trust and confidence in the sector. Whilst there remains a risk that charities may still not have access to adequate financial expertise to comply with a simplified framework, we expect a concerted education and training effort by the charities regulator and other sector stakeholders could go some way in addressing this.

We do not support the introduction of a new “micro entity” tier. We believe the current four-tiered structure sufficiently demarcates charities by size, providing a platform for proportional statutory reporting requirements. Adding a further tier is unnecessary and likely to add to the administrative burden for the charities regulator and the XRB to maintain suitable standards/guidance and oversee their compliance. Instead, we suggest a simplification of the existing standards applicable to Tiers 3 and 4 as proposed above.

Definition of an officer and qualifications



Should the definition of ‘officer’ be broadened for trusts that are registered charities?

Yes, we agree that the definition of ‘officer’ should be broadened to include those who undertake the role of an officer but are not captured by the current definition. As suggested in the consultation, it may be worthwhile referring to the definition of ‘responsible entity’ under the Australian ACNC Act 2012.



Should someone with serious convictions be disqualified from being an officer of charity? If so, what kinds of convictions?

Rather than changing the legislation to expand criteria for an officer’s disqualification, we suggest introducing governance standards that include “fit and proper” criteria for an officer. We have provided our comments on the Governance Standards proposals below.

Accumulation of funds



Should charities be required to be more transparent about their strategy for accumulating funds and spending funds on charitable purposes (for example, through a reserves policy)? Why? Why not?

Subject to proportional reporting based on charity size, we agree that charities should be more transparent about their strategy for accumulating and spending funds. Many charities will have legitimate reasons for accumulating funds including spending on future charitable programs, funds relating to long-term programs that run over multiple years, capital endowments with restrictions on use of the capital and building reserves for investing in future capital assets. Transparency around the reasons a charity accumulates funds will provide stakeholders insights into such legitimate reasons.

Whilst we agree that greater transparency around accumulation of funds is appropriate, we note that many charities will soon be preparing a Statement of Service Performance as part of their reporting requirements. We expect charities will include the reasoning behind any accumulation of reserves as part of their service performance reporting.

? Should certain kinds of charities be required to distribute a certain portion of their funds each year, like in Australia?

Yes, we agree that charities similar to Australian Private Ancillary Funds identified in the consultation should be required to distribute a certain portion of their funds each year. However, we suggest charities that accumulate funds for legitimate reasons as described in our response to the previous question should be allowed to continue to do so, subject to adequate disclosure.

Governance standards

? Do you think governance standards could help charities to be more effective? Why?

Yes we believe governance standards could help charities to be more effective in conducting their operations and will provide a principles-based governance framework for charities to follow. Good governance is one of the cornerstones of a charity and adherence to a well-designed set of governance standards will ensure public trust and confidence in the sector is maintained.

? Do you think the Australian governance standards could be adapted to work in New Zealand?

Yes, we agree that the Australian governance standards could be adapted for New Zealand. However, we suggest not adopting/adapting Governance Standard 3: Compliance with Australian Laws.

It is notable that one of the recommendations by the Independent Review Panel that conducted a review of the ACNC legislation is to repeal Governance Standard 3. This recommendation is on the basis that it is not the function of the ACNC to force registered entities to enquire whether they may or may not have committed an offence, advise the ACNC of that offence and for the ACNC to advise the relevant authority regarding the offence.

Alignment of other legislation

? Should the Charities Registration Board continue to be bound to follow charitable purpose interpretations made by the Commissioner of Inland Revenue?

No comment

Role of the regulator – page 25 of discussion document

Strengthening connections between the regulator and the charities sector



How could the regulator be made more accessible to charities? For example, what would consultation requirements or an advisory board achieve?

The ACNC in Australia has established forums for engagement with sector stakeholders through a “Professional Users Group” and a “Sector Users Group”. The Professional Users Group which includes representatives from the legal and accounting professions, meets periodically with the ACNC to discuss current issues faced by the sector, regulatory developments and other matters of relevance. CPA Australia is a member of the ACNC Professional Users Group. The charities regulator may wish to explore setting up similar engagement forums in New Zealand, if it has not already done so. Amongst other things these forums may provide a platform to better understand the issues facing the sector and how the charities regulator may seek to address these issues.



Are the current accountability mechanisms for the Charities Registration Board and Charities Services (described above) adequate? How could accountability be improved?

The need for a Charities Registration Board is not clear to us, particularly given its primary responsibility, to register and deregister charities, is mostly delegated to Charities Services. Subject to our comments in the following paragraph about a potential repurposing of the function of the Charities Registration Board, we suggest reconsidering the need for a separate Charities Registration Board, particularly if all aspects of charity regulation can be undertaken by Charities Services.

We suggest considering repurposing the function of the Charities Registration Board from one that is responsible for registration/deregistration decisions to one that considers appeals on registration/deregistration decisions made by Charities Services. This approach could address some of the concerns raised in the Consultation about the lack of access to an appeals process for the sector, other than through the Courts system.

Strengthening registration decision-making



How could rules and processes for registration decision-making be improved?

No comment

Perceptions of independence



What is driving concerns over the independence of decision-making by the regulator?

No comment



Would alternate structures or governance arrangements address any perceived lack of independence in decision-making?

No comment

Improving the charities register



How could the register be improved?

No comment

Powers when considering applications for registration, powers during an investigation, and enforcement powers



What additional powers, if any, should the regulator have when considering applications for registration? Why?

We suggest the regulator is given the following additional powers:

- Ability to decline to register, or deregister charities that provide false or misleading information. However, this power should be used as a last resort based on the pyramid regulatory approach which allows an opportunity for the offending charity to rectify any errors or issues identified before more severe action is taken.
- Decline an application from a deregistered organisation if the regulator is not satisfied that the matters that led to the deregistration has been adequately addressed



What additional powers, if any, should the regulator have when carrying out an investigation? Why?

No comment



What additional enforcement powers, if any, should the regulator have? Why?

We support the inclusion of a further tier in the regulatory pyramid for “graduated and proportionate sanctions” including enforceable undertakings, compliance agreements, directions, injunctions, suspension or removal of officers and penalty notices. Similar to the ACNC regulatory pyramid, this tier would be below the highest possible regulatory power currently available to the regulator of deregistration of a charity.

The regulator’s funding



Should charities pay fees to contribute to the regulation of the sector? Should fees be tiered?

As a principle, we do not believe charities should pay any fees to contribute to their regulation. Government should identify other means of bridging the funding shortfall. This could include operational efficiencies that may arise from a “digital by default” approach, identifying areas for efficiency savings through technology based automation and digitisation.



Should a fee attach to registrations, as well as to filing annual returns?

See above

Charities’ use of third parties to fundraise



Do you think there is sufficient disclosure of the use of third party fundraisers by charities and the cost? If not, how could greater disclosure be ensured?

Fundraising by charities and its regulation remains a challenging area for regulators in many jurisdictions including Australia and the United Kingdom. Implementing the proposed governance standards, and over time, developing and enshrining a fundraising code of conduct into the charity regulatory framework could assist in establishing fundraising best practices. The consultation does not consider online fundraising, which could also pose some regulatory challenges. Establishment of regulatory measures and any educational efforts by the regulator should also address online fundraising.

Appeal of regulator decisions – page 34 of discussion document

Decisions subject to appeal

? Which decisions made by Charities Services should be subject to appeal? Why?

See our comments above in response to the second question from page 25 of the discussion document.

? Should the Act provide for internal review of Charities Services decisions?

As suggested in response to the second question above under the “role of the regulator” section, repurposing the Charities Board to receive and consider appeals against decisions made by Charities Services may provide an additional avenue for appeals other than through the courts.

Party to appeals

? Should the decision-maker, or anyone else, be a party in appeal cases? Why?

No comment

? Should the Attorney-General, as protector of charities, automatically be named as a party to an appeal?

No comment

Hearing new evidence, and how to hear the appeal

? Should it be easier to bring new evidence on appeal?

No comment

? Should the appeal be heard as a re-hearing (with no oral hearing of evidence), or as a de novo hearing (with evidence heard orally)?

No comment

Time limit for lodging appeals, and appropriate body to hear appeals



What do you consider to be an appropriate time-frame for lodging appeals?
Why?

No comment



What body is most appropriate to hear appeals on registration decisions: the High Court, District Court, or another body?

See our response to the second question above under this section.

Other approaches to enable the law on ‘charitable purpose’ to develop



What other mechanisms (for example support for test cases) could be used to ensure that case law continues to develop?

No comment

Te Ao Māori – page 38 of discussion document



What is working for Māori charities under the Act? What is not?

No comment



Are there any issues under the Act that impact Māori charities differently to other charities?

No comment



Are you aware of cases where an iwi settlement organisation has limited its activity because of its charitable status?

No comment



Should the Act be more flexible for iwi settlement organisations that are charities? If so, how?

No comment



Are you aware of any particular problems with the reporting requirements for Māori charities?

No comment

Business – page 41 of discussion document



What should be the registration requirements for unrelated businesses?

In our view, any unrelated business that operates as a separate legal entity (e.g. a subsidiary company) under the umbrella of a registered charity should also be required to register as a charity if it wishes to receive the tax concessions available to a charity. Profits generated by an unrelated business operated within legal structure of a registered charity should be applied for the charitable purposes of the charity.

Governance Standard 1: Not-for-profit and working towards charitable purpose, if adopted, should address some of the concerns raised about the operation of unrelated businesses by charities.



How should charities report on their business operations and business subsidiaries?

We consider the charity financial reporting requirements, including consolidation, adequate for charities to report on their business operations and business subsidiaries.



Should charities be required to report separately on business subsidiaries that they control that are not registered charities? If so, why?

See our response to the previous question



What, if any, restrictions (such as the 'significant risk' test in England and Wales) should exist on the level of risk for charities undertaking business activities?

No comment



What should be the requirements of charities to manage conflicts of interest when undertaking business activities?

No comment

Advocacy – page 46 of discussion document



Are you aware of charities that are reluctant to advocate for changes to law and policy that would further their charitable purposes? Why are they reluctant to do so?

No comment



How should the public benefit of organisations that advocate for their causes be assessed?

No comment



What would an advisory board (as in Australia) add to the regulator’s decision-making on the registration of charities that advocate? Are there any other ways to help improve the regulator’s decision-making?

No comment



Should there be limits on advocacy by charities? If so, what should those be?

We suggest an approach similar to that taken in Australia that defines charitable purpose as including “promoting or opposing a change to any matter established by law, policy or practice if it furthers or aids a charitable purpose”. We also support the inclusion of disqualifying purposes such as that precluding a charity from promoting or opposing a political party or a candidate for political office, and advocacy for purposes that may be unlawful.



Would you like to see greater freedom for charities to advocate for policy or law change? What would be the benefits? What would be the risks?

No comment

General comments



Do you have any other comments to make about modernising the Act?

This submission has been prepared with the assistance of CPA Australia’s New Zealand Not-for-profit Committee.