

**Submission to the
Department of Internal Affairs
on the
Charities Act Review**

April 2019

This submission is from:

The Methodist Alliance

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Methodist Alliance Submission on the Welfare System

1 Who we are

The Methodist Alliance is a formal alliance of Methodist Missions, parishes and community based social services and trusts, including cooperating ventures. This grouping constitutes a major provider of a range of services for children, young people and their families, and vulnerable adults. Our members are all registered charities.

The Methodist Alliance brings together a number of large social service providers such as Lifewise in Auckland, Wesley Community Action in Wellington, Christchurch Methodist Mission as well as local community services provided by individual parishes. It includes new social service organisations, for example, Siaola Vahefonua Methodist Mission, the Samoan Synod within the Methodist Church and Te Taha Māori.

The Methodist Alliance is grounded in a commitment to Te Tiriti o Waitangi and the bi-cultural journey of the Methodist Church of New Zealand - Te Hāhi Weteriana o Aotearoa, where Te Taha Māori and Tauīwi work in partnership.

2 Overview

The Methodist Alliance is part of the charitable sector which helps the government achieve its goals in housing, social wellbeing, poverty reduction, foster care, education, health, etc. It is essential that the review of the charitable sector takes the time to ensure that an appropriate supportive framework is created to ensure that charities can operate more effectively and efficiently. Therefore time should be taken for a first principles review of the Charities Act, undertaken by the Law Commission.

We agree that the purposes of the Act should be reviewed and consideration given as to whether section 3(b) should remain as a purpose of the New Zealand charities legislation. We recommend two additional purposes to be added to the Act:

- to support and sustain a robust, vibrant, independent and innovative charitable sector by reducing unnecessary regulatory obligations on the charitable sector” and
- to respect the autonomy of charities and charities’ rights to freedom of expression, in particular their right and duty to advocate in furtherance of their charitable objectives.

In addition to the qualifications of officers in the Act, charities are able to impose further restrictions on office holders; however there should be consistency with other legislation regarding disqualification of officers.

The proposed introduction of governance standards for charities along the lines of those in Australia are unnecessary and the recent review of the Australian legislation noted that these requirements were complex and confusing and it was unreasonable to expect volunteer directors in the sector to understand and comply with them.

There is no need to make changes to the cost of funding the regulator or the use and disclosure of third parties to fundraise.

This review provides the opportunity to ensure there is a supportive framework for charities. Therefore we recommend the establishment of an advisory board to advise Government on policy and engage directly with the sector; the reinstatement of independent Charities Commission as an independent Crown entity; and the establishment of a specialist and independent Charities Tribunal to hear appeals of decisions made by the Charities Services.

Oral hearings of evidence should be reinstated for charities and they should have the ability to appeal all decisions made under the Charities Act. The timeframe for appeals is extended to 60 working days from the date of the decision.

The Attorney-General should have an active role in Charities Act litigation as a protector of charities with the capacity to be named as a party to an appeal and/or served with appeal papers.

Whanaungatanga, manaakitanga and kaitiakitanga are the values that underpin the mahi tahi and the mahi aroha in charities. An expanded definition of charity that incorporates tikanga Māori concepts would ensure a charities framework that reflects our unique culture and strengths.

The rule currently imposed by Charities Services on charities running businesses should not be applied when considering the registration of charities and charitable organisation's abilities to raise funds for their charitable purposes, including running businesses, should protected and supported.

To ensure that the voices of the most vulnerable in our society are heard, the right of charities to advocate should be protected. Charities should be able to advocate without fear of being deregistered, as they provide government with valuable grassroots knowledge which is essential in shaping good public policy to ensure a just inclusive society where all people can flourish.

3 The Charitable Sector and the Scope of the Review

J B Were's "The New Zealand Cause Report – Shape of the Charity Sector" stated that the not for profit sector in New Zealand is the glue which holds much of New Zealand society together and allows it to function and prosper.¹ Government funds the charitable sector to carry out its work in housing, education, health, poverty reduction, foster care, etc.

It is therefore essential that any review of the charitable sector takes the opportunity to create a framework of charity law that supports and enables charitable work to operate more effectively and efficiently. We have concerns about the ability of the review to do this as it is limited in scope. It is not a first principles review which was promised in 2010. The definition of "charitable purpose" is specifically ruled out, as is tax exemptions for registered charities, and regulation of the broader no-for-profit sector. We strongly believe the scope of the review is too narrow and prevent some concerns being properly addressed.

The review is essentially an internal review as it is being undertaken by the Department of Internal Affairs. We therefore **recommend** that a first principles review should be undertaken by the Law Commission. This would put the review in line with the review of incorporated societies and the law of trusts, which the Law Commission carried out. It would also build trust within the sector of having an independent body carry out the review.

4 The Timing of the Review

All the work associated with the review, including draft legislation and policy work needs to be completed by August this year, so that legislation can be passed prior to the general election in 2020. Consultation with the sector is scheduled for March and April this year with submissions closing at the end of April. This timeframe is far too short.

There is the very real risk that this review may make things worse not better for the sector and ultimately the communities they serve. NZ Parliament states that the drafting process involves continuous revision and can take months.² Once drafting is complete the bill needs to be referred to Cabinet for approval prior to being introduced to Parliament.³ As the issues in this area of law are complex and given the backdrop of significant changes, including the disestablishment of the independent Charities Commission in 2012, it would be prudent to take the time

¹ John MacLeod, "The New Zealand Cause Report – Shape of the Charity Sector" 2017, p6

² <http://www.pco.govt.nz/how-we-work/>

³ Ibid

needed to undertake a proper and independent review to ensure the new legislation is right and fit for purpose, especially in the environment of the Child Wellbeing Strategy and the proposed Wellbeing Budget.

Taking the time will provide appropriate transparency and accountability to the public of Aotearoa New Zealand as well as being cost effective in the long run.

We **recommend** that the time is taken for a first principles review undertaken by the Law Commission.

5 The Purpose of the Act

The Charities Act 2005 currently provides the following six purposes of the Act:

- a. to promote public trust and confidence in the charitable sector
- b. to encourage and promote the effective use of charitable resources
- c. to provide for the registration of societies, institutions, and trustees of trusts as charitable entities
- d. to require charitable entities and certain other persons to comply with certain obligations
- e. to provide for the Board to make decisions about the registration and deregistration of charitable entities and to meet requirements imposed in relation to those functions
- f. to provide for the chief executive to carry out functions under this Act and to meet requirements imposed in relation to those functions.

The discussion document proposes two additional purposes for the Act, while not reviewing whether the current purposes in the Act are adequate and fit and proper for purpose. A recent review of the Australian legislation relating to charities rejected a purpose similar to New Zealand's section 3(b) as being unnecessary and an over reach of power by the commission.⁴ We **recommend** that consideration is given to whether section 3(b) should remain as a purpose of the New Zealand charities legislation.

We note that the first proposed additional purpose "to support and sustain a robust, vibrant, independent and innovative charitable sector" is a stated purpose in the equivalent Australian Act. For the charitable sector to survive and thrive it needs an environment where it can be innovative, however, this is a role for the sector, not the regulatory body. However the regulatory body could and arguably should have a role in identifying and addressing red tape constraints that prevent innovation. We note the Australian legislation has an object which relates to this – "to promote

⁴ <https://static.treasury.gov.au/uploads/sites/1/2018/08/p2018-t318031.pdf>, at p 25

the reduction of unnecessary regulatory obligations on the Australian not-for-profit sector.”

Providing practical support to the sector including access to resources, and a knowledge basket for excellence and best practice would be a useful function and one we would welcome.

We **recommend** an additional purpose “to support and sustain a robust, vibrant, independent and innovative charitable sector by reducing unnecessary regulatory obligations on the charitable sector.”

The second proposed additional purpose “to promote the transparency of the charities sector to donors, volunteers, beneficiaries and the public” could impose more reporting on charities. We believe that the first stated purpose “to promote public trust and confidence in the charities sector” is all that is required.

The policies of both the Labour Party and the Green Party specifically support the role of advocacy for the Community & Voluntary Sector. Therefore consideration should be given to including an additional purpose to give effect to this. We **recommend** an additional purpose “to respect the autonomy of charities and charities’ rights to freedom of expression, in particular their right and duty to advocate in furtherance of their charitable objectives.”

6 Obligations of Charities

Qualification of officers

The current legislation disqualifies people holding office in charities if they have been convicted and sentenced for a crime involving dishonesty within the last seven years. Some charities have further restrictions on this in their constitution, eg. “A board member will cease to hold office if that member...is convicted of an indictable offence”⁵ and “Officers and members may be disqualified by...having a criminal conviction for dishonesty, sexual crimes, or any offence involving the harm or exploitation of children or crimes against the person.”⁶ At present charities are able to impose further restrictions on office holders where they think it is necessary.

However, it would be useful to have consistency across legislation so that if a person has been banned from being an officer under the Companies Act, then they should also be banned under the Charities Act.

⁵ The Trust Deed for the Lifewise Trust clause 11.5(g)

⁶ The Constitution of Pillars Incorporated, clause 19(c)

We **recommend** that qualification of officers is aligned with other legislation to provide consistency.

Accumulation of funds

Some charities are in the enviable position of having significant reserves and increasing these. They may have a legitimate reason to build their reserves for a specific purpose. The constitution or rules of the charity usually specifically state that all funds have to be used for the charitable purpose and some have clauses specific to income accumulation. The constitutions are available on the Charities Register and available to the public.

In addition, the law reform for trusts and incorporated societies may impose further reporting requirements on charities in relation to managing reserves. Therefore additional reporting obligations and mandatory reserves policies are not necessary.

Governance standards

The discussion document proposes introducing governance standards for charities like Australia. The recent review of the Australian legislation noted that these requirements were complex and confusing and it is unreasonable to expect volunteer directors in the sector to understand and comply with multiple jurisdictional and sometimes inconsistent requirements.⁷ Therefore we **recommend** caution before adopting similar governance standards in Aotearoa New Zealand.

7 Role of the regulator

The independence of the Charities Commission was prescribed by the legislation in 2005, but the Commission was disestablished in 2012. It was replaced by the Charities Registration Board which comprises three members appointed by the Minister for the Community and Voluntary Sector; and the Charities Services, which is part of the Department of Internal Affairs. This is of concern to the sector as the Charities Act is now being administered by an agency closer to government than the original Crown entity originally proposed which was rejected at Select Committee in favour of an autonomous Crown entity.

We **recommend** the establishment of an advisory board to advise Government on policy and engage directly with the sector.

Australia has an Advisory Board, a single Commissioner and two Assistant Commissioners. The function of the Australian Advisory Board is to provide advice

⁷ <https://static.treasury.gov.au/uploads/sites/1/2018/08/p2018-t318031.pdf>, at p47

and make recommendations to the Commissioner. The recent review of Australian charities legislation recommended the Advisory Board be empowered to provide advice to the Minister and to engage directly with the charities sector.⁸

Canada has an Advisory Committee to engage in meaningful dialogue with the charitable sector, to advance emerging issues relating to charities and to ensure the regulatory environment supports the important work that charities do.⁹

Therefore the establishment of an advisory board in the charities law framework would bring New Zealand in line with similar jurisdictions.

The structure of the charities framework needs to be considered as a whole. The Charities Commission was supported by the sector and the Minister and the later disestablishment of the Commission was done without consultation with the sector. The establishment of an independent Charities Commission would promote public trust and confidence, provide more transparency, and arguably more cost effective than the current structure. We **recommend** the reinstatement of an independent Charities Commission as an independent Crown entity.

The charities sector currently contributes 13% of the costs used to support the functions of charities regulations. Any further fees imposed on charities will decrease the amount of funds charities can use for delivery of services. Any system of fees to fund the regulator of the charities sector is effectively imposing another tax on charities. Imposing a fee for registration will act as a disincentive to set up a charity which is often established in response to an unmet need in the community. We **recommend** that no changes are made to the cost of funding the regulator.

Charities should be able to self-regulate and monitor their own costs in relation to fundraising. Governing boards are able to choose the most efficient fundraising process for their organisation. There is no need for further disclosure of the use of third party fundraisers by charities and the resultant cost of this fundraising. We therefore **recommend** no changes to the charities use of third parties to fundraise.

8 Appeal of regulator decisions

The effect of disestablishing the Charities Commission has resulted in the original framework now being used by a different structure. This has resulted in the denial of natural justice as there is no opportunity for Charities Services or the Board to hear oral evidence to support applications for registration.

⁸ <https://static.treasury.gov.au/uploads/sites/1/2018/08/p2018-t318031.pdf>, at p41

⁹ <https://www.canada.ca/en/revenue-agency/programs/about-canada-revenue-agency-cra/corporate-reports-information/advisory-committee-charitable-sector.html>

This has further impacted appeals of decisions which have to be made to the High Court where applicants are prevented from presenting any new evidence, with evidence required to be presented in affidavit rather than oral evidence. The High Court requirements are based on the assumption that a full oral hearing of evidence has already been undertaken. However this is not the case as neither the Board nor Charities Services hold oral hearings and therefore natural justice is denied. We therefore **recommend** that charities are given the ability to have an oral hearing of evidence is reinstated.

We **recommend** that charities are able to appeal **all** decisions made under the Charities Act, not just those relating to registration and deregistration. This statutory right of appeal would be consistent with the original intention of the Charities Act.

The timeframe for appeals of 20 working days after the date of the decision is too short. In some cases a charity has to seek a mandate from its membership to make an appeal and then find and hire a lawyer to file the appeal in the High Court. A timeframe of 60 working days would be much more reasonable and also in line with the timeframe for appeals in Australia. We **recommend** that the timeframe for appeals is extended to 60 working days from the date of the decision.

We **recommend** the establishment of a specialist and independent Charities Tribunal to hear appeals of decisions made by Charities Services. This would provide a low cost, accessible, and independent appeal authority as an alternative to the High Court. It could hear oral submissions as well as receive supporting evidence.

We further **recommend** the Attorney-General is involved in Charities Act litigation as a protector of charities with the capacity to be named as a party to an appeal and/or served with appeal papers.

9 Te Ao Māori

We agree that underlying values that often motivate and guide both Māori and Pakeha participation in charities are whanaungatanga, manaakitanga and kaitiakitanga. Mahi tahi describes the unity of people coming together and working collaboratively towards a specific goal. We therefore **recommend** careful consideration on how kaupapa Māori approaches can be applied in any changes made to the Charities Act; in particular an expanded definition of charity that incorporates tikanga Māori concepts would ensure a charities framework that reflects our unique culture and strengths.

10 Businesses

It is clear that charities are able to run businesses to raise funds for their charitable purposes, with the test being whether the income raised is applied to charitable purposes. The Charities Services applies the rule that a charity with an unrelated business must show that the business is capable of making a profit to go to charitable purposes; and the charity does not provide any resources to its business operation at less than market rates. However there is no legal authority for this rule and charities are deregistered or declined registration. Charities that meet the legal statutory requirements for registration should be able to register.

The imposition of the rule applied by Charities Services also impacts on charities ability to raise funds for their charitable purpose. We **recommend** this rule should not be applied when considering the registration of charities.

In addition, we **recommend** that charities abilities to raise funds for their charitable purposes, including running businesses, must be protected and supported.

11 Advocacy

Charities often provide the voice for the most vulnerable in society, including the poorest and the most marginalised. The knowledge charities gain from working at the grassroots level is essential to inform government and provide a balance to ability of the most economically powerful to dominate and shape policy.

If the purposes of a charity are truly charitable it is irrelevant whether advocacy is an activity or a purpose. Australian legislation provides for charities to advocate for and against government policy, while promoting or opposing a political party or candidate for political office is a disqualifying purpose.

We note that the policies of both the Labour and Green Parties specifically support the role of advocacy for the Community & Voluntary Sector. Therefore we **recommend** that charities right to advocate to further their charitable purposes, without fear of being deregistered, is protected.

12 Summary of Recommendations

The Methodist Alliance makes the following recommendations to the Department of Internal Affairs:

1. A first principles review should be undertaken by the Law Commission
2. Consideration is given to whether section 3(b) should remain as a purpose of the New Zealand charities legislation.

3. An additional purpose “to support and sustain a robust, vibrant, independent and innovative charitable sector by reducing unnecessary regulatory obligations on the charitable sector” is added to the Act.
4. An additional purpose “to respect the autonomy of charities and charities’ rights to freedom of expression, in particular their right and duty to advocate in furtherance of their charitable objectives” is added to the Act.
5. The qualification of officers should be aligned with other legislation to provide consistency.
6. There is no need for mandatory reserves policies or additional reporting requirements obligations on charities for accumulation of funds.
7. We recommend caution before adopting governance standards in Aotearoa New Zealand similar to those in Australia.
8. The establishment of an advisory board to advise Government on policy and engage directly with the sector.
9. The reinstatement of an independent Charities Commission as an independent Crown entity.
10. No changes are made to the cost of funding the regulator.
11. No changes are made to the use and disclosure of third parties to fundraise.
12. Oral hearings of evidence are reinstated for charities.
13. Charities are able to appeal **all** decisions made under the Charities Act.
14. The timeframe for appeals is extended to 60 working days from the date of the decision.
15. Establish a specialist and independent Charities Tribunal to hear appeals of decisions made by Charities Services.
16. The Attorney-General is involved in Charities Act litigation as a protector of charities with the capacity to be named as a party to an appeal and/or served with appeal papers.
17. Careful consideration is required on how kaupapa Māori approaches can be applied in any changes made to the Charities Act. An expanded definition of charity that incorporates tikanga Māori concepts would ensure a charities framework that reflects our unique culture and strengths.

18. The rule currently imposed by Charities Services on charities running businesses should not be applied to considering the registration of charities.
19. Charities abilities to raise funds for their charitable purposes, including running businesses, is protected and supported.
20. The right of charities to advocate furthering their charitable purposes, without fear of being deregistered, should be protected.