



Social Service  
Providers  
Aotearoa

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Submission on the Department of Internal  
Affairs Review of the Charities Act 2005

May 2019

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This submission is from:

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## Introduction

SSPA welcomes this review of the Charities Act 2005 and appreciates the decision to extend the consultation period. This Act is of great interest and relevance to SSPA members, most of which are registered charities. While much of the discussion paper is on technical and legal points, we have focused this submission on the wider matters shaping the landscape within which charities operate and on concrete suggestions for how to proceed.

While we appreciate the wish to make progress on this matter, we are concerned that the drive to bring in new legislation in this election cycle is favouring speed over getting it right. We urge Ministers and agencies to take the time needed to get it right and to seek expert advice on the more complex technical and legal issues. As others have done, we recommend the Law Commission be invited to review the charities legislation and related Bills.

## About SSPA

Social Service Providers Aotearoa (SSPA) is the New Zealand peak body for government-funded community-based providers working with children, young people, families, and communities.

SSPA exists to support member service providers to make a positive and significant difference in their communities through their work with children, young people and families.

SSPA also draws on its grass-roots membership to engage with government in the legislative and policy development process, including submissions, information and advice, and facilitating consultation.

With a membership of some 200 social service providers nationwide, SSPA represents an approximate collective capacity of 6500 staff and 5000 volunteers providing essential services to children, families and communities throughout New Zealand.

SSPA is a registered charity and an incorporated society.

Our membership is almost exclusively in the charitable sector. Providers are mainly registered charities and either incorporated societies or charitable trusts. SSPA members range from large employers to micro-organisations. They offer a wide range of services, have a variety of forms of governance and often very complex funding arrangements. Some include social enterprises within their organisational structures. Most include advocacy in their range of services and functions, whether for individual clients or more generally on the issues relevant to their charitable purposes.

Further information about SSPA is available [here](http://www.sspa.org.nz)<sup>1</sup>.

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<sup>1</sup> [www.sspa.org.nz](http://www.sspa.org.nz)

## Summary of Submission and Recommendations

The Review should take the opportunity to modernise our charities legislation. A 'first principles' review including updated definition of charitable purpose is essential in achieving the step change both government and the sector want. Charitable advocacy must be protected and included in the legislation.

Charities Services should be removed from DIA and an Independent Crown Entity established to maintain a register of charities, to protect the independence of the sector, and to support, inform and advise charities.

A fairer and more effective appeal process is needed, including recourse to appeal decisions either in lower Courts than the High Court, or, preferably, through an appeals tribunal. All decisions should have an appeal procedure.

Streamlining compliance and reporting will contribute to the effective operation of charities, with reporting requirements more closely aligned to the level of risk and scale of organisations, and with better co-ordination between agencies.

To give effect to these matters, we make the following recommendations:

Recommendation 1: Review 'charitable purpose' and include an updated definition in any Charities Bill.

Recommendation 2: Seek a review from the Law Commission on all aspects of the proposed changes, in conjunction with considering the combined impact of proposed changes in the law on incorporated societies and charitable trusts, and use this review as the basis for preparing drafting instructions.

Recommendation 3: Include a clear and workable definition of charitable advocacy in any Charities Bill, as a means of protecting this function where it is a part of charitable purpose.

Recommendation 4: Remove Charities Services as a function of the Department of Internal Affairs and establish an Independent Crown Entity to register charities, protect the independence of charities, and advise and inform the sector.

Recommendation 5: Establish a more wide-ranging appeal process that promotes access to appeal.

Recommendation 6: Simplify the processes and requirements for reporting.

## **The Review should take the opportunity to modernise our charities legislation**

The narrow scope of the Review, and in particular the intention not to consider first-principles, is a significant missed opportunity.

There is widespread agreement that we need modern charity legislation that reflects the diversity of forms and approaches we now have, protects the independence of charities whilst maintaining public accountability, and helps support and sustain charities.

In particular, the failure to properly review what ‘charitable purpose’ means in our current context will undermine the good intentions to have charity legislation that is modern and fit for purpose. The notion of charitable purpose is the fulcrum of the Act and must be updated. There are forms of charitable organisation not envisaged when the current Act was designed – such as social enterprises – and the narrow definition currently in place has a limiting effect.

This is the opportunity to look at our charitable sector, to draw on the lessons from other jurisdictions and to truly modernise this piece of legislation.

The discussion paper has a significant focus on technical and legal issues which few would have the time, resources or ability to understand. SSPA joins with other organisations<sup>2</sup> in recommending that the best course of action is to seek the review of the Law Commission before proceeding to draft a Bill.

Further, there is an opportunity to consider the combined impact on charities of the Charities Act, and the Bills on incorporated societies and trusts, and to ensure a consistent and streamlined approach across these three critical pieces of legislation. The Law Commission would be best placed to do this as well as considering the impact of other instruments such as the International Financial Reporting Standards (IFRS), and provide advice to Ministers.

Recommendation 1: Review ‘charitable purpose’ and include an updated definition in any Charities Bill.

Recommendation 2: Seek a review from the Law Commission on all aspects of the proposed changes, in conjunction with considering the combined impact of proposed changes in the law on incorporated societies and charitable trusts, and use this review as the basis for preparing drafting instructions.

## **Advocacy is a core function for many charities and must be protected in legislation**

For many organisations, advocacy is a key part of their charitable purpose and is an activity which they carry out to fulfil their charitable purpose. Currently there is a lack of clarity about what advocacy is permissible in terms of charitable purpose, and deregistrations have followed as a result. We note a particular concern for focused charities which have charitable advocacy as their primary purpose.

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<sup>2</sup> In particular, ComVoices, Volunteering NZ and Philanthropy NZ

Advocacy is a key role for many charities and helps protect human rights, reduce discrimination and contributes to a healthy society. Advocacy from community organisations is a vital contributor to robust public debate and to policy formation. This important democratic function should be protected by legislation. Advocacy should be defined and explicitly protected in the Act.

We do not support the advocacy role being extended to political advocacy which encourages support for particular political parties.

We note that both Labour and the Green Party included a commitment to protecting the advocacy role in their recent election manifestoes, and we expect to see this commitment carried through into revised legislation.

Recommendation 3: Include a clear and workable definition of charitable advocacy in any Charities Bill, as a means of protecting this function where it is a part of charitable purpose.

## It's time to re-set the role of Charities Services

SSPA shares the concerns of others in the charitable sector that the current mechanism for registering charities is not the best solution, specifically:

- Charities services, as a service of the Department of Internal Affairs (DIA) is part of the core public service and as such is directly accountable to a Minister. This limits its independence and places considerable power over independent and autonomous charities in the hands of a Minister.
- It has a limited focus and is primarily a regulator.
- The model of regulation is operates is negatively-geared system at present, designed to deal with problems, not to identify and support good practice, and to sustain and build a capable and effective charitable sector.
- This narrow view of the role of regulator does not seem consistent with the Government's own statements of what constitutes good practice in regulation, including the requirement that regulators "maintain a transparent compliance and enforcement strategy that is evidence-informed, risk-based, responsive, and proportionate to the risks or harms being managed"<sup>3</sup>

The review of the legislation offers an opportunity to reset this model and to move to a model and form of organisation that has the primary function of supporting and sustaining an effective charitable sector.

We recommend that the best option is to return to the Crown entity model. The appropriate form would be an Independent Crown Entity<sup>4</sup> (ICE), to provide a more arms-length relationship with ministers while still being able to advise and monitor. We suggest the following requirements:

- Establish a Charities body as an Independent Crown Entity
- Roles to include:
  - Regulator and manager of a register of charities
  - Protect the independence of the charitable sector and its organisations
  - Advise and inform the sector and promote education and support

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<sup>3</sup> <https://treasury.govt.nz/sites/default/files/2015-09/good-reg-practice.pdf> p5

<sup>4</sup> <http://www.ssc.govt.nz/cegmos4>

This would place the Charities ICE in the same category as entities such as the Broadcasting Standards Authority, the Privacy Commissioner and the Electoral Commission.

The Department of Internal Affairs should still be provider of policy advice to Ministers on charities and community and voluntary sector issues, a role they have carried out well for many years. Arguably it will be better placed to do so, unencumbered by its current dual role as advisor and regulator.

Recommendation 4: Remove Charities Services as a function of the Department of Internal Affairs and establish an Independent Crown Entity to register charities, protect the independence of charities, and advise and inform the sector.

## **A fairer and more effective appeal process is needed**

SSPA is a member of ComVoices and concurs with the view set out by ComVoices in its submission on the need for changes to the appeal process as the current settings for appeal are hard to navigate and in practice restrict access to fair process. We are particularly concerned with these key problems with the current system:

- The current 20 day timeframe to appeal is too short.
- This is compounded by the fact that the only recourse is an appeal to the High Court. A High Court appeal is an intimidating and expensive course of action and 20 days is too short a time to consider whether to proceed with an appeal.
- Appeals are not allowable for decisions other than on registration.

The appeal process needs a thorough overhaul to ensure efficiency as well as natural justice. A revised appeal system should consider the following matters:

- A revised appeal process should enable appeals for all decisions and be prescribed in the legislation
- We endorse the call from Philanthropy NZ to embed the following principles in an appeal system:
  - Fair
  - Low cost
  - Certainty
  - Independence
  - Accessible
  - Natural justice
  - Participatory
- Define what matters could be dealt with in a lower Court and which should have access to the High Court.
- Consider an alternative mechanism such as an Appeal Tribunal (similar to that for tax disputes, for example).
- Provide for the ability to hold oral hearing of evidence. Currently, the High Court is only presented with the original evidence presented, and charities have no ability to present additional evidence or to ask questions. This very narrow system in effect denies justice.

Recommendation 5: Establish a more wide-ranging appeal process that promotes access to appeal.

## **Streamlining compliance and reporting will contribute to the effective operation of charities**

The current compliance regime is onerous for all and is especially burdensome for many small organisations. Transparency and accountability are vital but suggest the current processes are not well-aligned to the level of risk.

Many organisations including all SSPA members, have additional reporting requirements to funders, to accreditation agencies, and to members or trustees. The IFRS changes have added to the compliance complexity. The combined impact of these unco-ordinated requirements places a considerable compliance burden on community organisations.

We understand that a very large number of deregistration decisions have been because of failure to file financial returns. We agree that financial accountability is important, as a means of transparency and public confidence, but suggest that a streamlined and scaled system would make it easier to report and file financial returns without compromising these requirements.

There is scope for Charities Services to make changes to the way charities need to report and to lead work across government agencies about reporting requirements from the non-government sector generally. This may include data sharing.

The legislative review provides an opportunity for some practical changes to reduce the compliance burden without losing accountability, including:

- Raising the threshold for Tiers 2 and 3
- A more simplified performance reporting framework
- One point of filing for all agencies that require the financial returns.

Recommendation 6: Simplify the processes and requirements for reporting.