Proposal

1. I seek Cabinet agreement to a broadly scoped, substantive review of the Charities Act 2005 (the Act), based on the terms of reference attached at Appendix A.

2. The review will focus on substantive issues to ensure the Act is effective and fit for purpose. I intend to complete the review this parliamentary term.

Executive summary

3. The Act is a key piece of legislation for the charitable sector. It seeks to promote public trust and confidence in the sector. It provides for the registration and deregistration of charities, and annual reporting requirements. Being listed on the charities register entitles an organisation to tax exemptions on most income.

4. The objective of the review is to ensure an effective and fit for purpose Act, with sufficient flexibility for today’s diverse charitable sector. The role of the regulator in overseeing and assisting the diverse needs of more than 27,000 charities also needs review.

5. Now is the time to look at how well the Act is working. The fundamentals of the Act are sound, but the Act has been in place for over a decade. The sector’s operating environment has changed since the Act came into force. For example, the introduction of financial reporting standards for charities and increasing pressure on volunteers. Stakeholders within the sector have been calling for a review of the Act for a number of years.

6. The proposed scope of the review is broad, enabling a focus on substantive issues with the Act. As the fundamentals of the Act are sound, the review will not look at first principles, despite calls from a number of stakeholders. In particular, this means excluding from scope the definition of ‘charitable purpose’ (covering the relief of poverty, advancement of religion or education, or other matter that benefits the community).

7. With a large and diverse sector that holds strong views, engagement will be key. A stakeholder engagement plan will be developed that supports strong levels of engagement, and extends to the wider charitable sector and the public. This review will provide an opportunity to strengthen the government’s relationship with a sector which directly supports our many and diverse New Zealand communities.

Background

8. The charitable sector contributes significantly to New Zealand society. There are more than 27,000 charities, supported heavily by volunteers. These charities contribute in diverse areas including sports, recreation, arts, culture and heritage, emergency and social services, health, education, religion, conservation and the environment. Being listed on the charities register entitles an organisation to tax exemptions on most income. Registration on the charities register is voluntary.
9. Prior to 2005, the Tax Administration Act 1994 and the Income Tax Act 2004 were the main Acts applicable to charities. There was no formal register of charitable entities. Nor was there any ongoing accountability to donors or the public once charities became eligible for income tax exemptions.

10. In 2005, the Charities Act was enacted. The Act aims to promote public trust and confidence in the charitable sector. It provides for the registration of societies, institutions, and trusts as charitable entities. It also places certain obligations on charitable entities, such as annual reporting. The Act established a Charities Commission to register and deregister entities as charities, and to carry out functions such as education and investigations.

11. The Charities Commission was disestablished by the Charities Amendment Act (No. 2) 2012. Responsibility for registering and deregistering charities passed from the Commission to an independent three person Charities Registration Board. The Department of Internal Affairs received the Commission’s remaining functions, including education, monitoring, and investigations.

Purpose of the review

12. The purpose of this legislative review is to ensure an effective and fit for purpose Act. Sufficient flexibility is essential both for today’s diverse charitable sector, and the regulator.

13. While the fundamentals of the Act are sound, the sector’s operating environment has changed since the Act was introduced. These changes include the introduction of financial reporting standards for registered charities and increasing pressure on volunteers. Changes mean that it is now timely to consider substantive issues with the Act. Stakeholders within the sector have also been calling for a review for a number of years.

14. The review will focus on charities and the Charities Act, not on the wider not-for-profit sector.

Progress to date: targeted consultation on draft terms of reference

15. In December 2017 I approved draft terms of reference for consultation with targeted stakeholders over a six week period. The draft terms of reference were developed on the basis that the review would consider substantive issues, not first principles. I informed Ministers whose portfolios closely connect to charities that terms of reference were being developed and consulted on.

16. Over January and February 2018, consultation on the draft terms of reference was undertaken with the Sector User Group (SUG). SUG is a 25 member group first brought together by the Department of Internal Affairs in May 2017 to discuss issues and priorities. SUG represents a range of views from the charitable sector. While there was no consensus, the majority of SUG members preferred a full, first principles review of the Act over the long term. The reasons for this preference were wide-ranging, including a need to consider the interpretation of ‘charitable purpose’, a need to critically examine the Act’s purposes, and to fulfil a 2005 Ministerial promise for a first principles post implementation review. The majority also sought closer working level arrangements in the terms of reference. Co-production was discussed, as was a smaller working group than SUG.
17. The independent Charities Registration Board was also consulted. The Charities Registration Board wants to be involved in the review, and sought confirmation that the scope could encompass the regulator’s appeal rights.

Proposed terms of reference

18. Having taken account of feedback received during consultation on the draft terms of reference, I propose to proceed with a substantive issues review, rather than a first principles review. A first principles review is not currently needed, as the key elements underpinning the Charities Act (the system of registering charities, for example) remain sound. Also, a first principles review could not be completed within this term.

Scope of review

19. The substantive issues within scope are comprehensive and broad. The scope includes:
   - matters relating to additional purposes of the Act;
   - matters relating to the regulatory framework (for example the role of the regulator and appeal mechanisms);
   - matters relating to registration and deregistration of charities;
   - matters relating to the obligations of registered charities; and
   - links to other legislation.

20. Very little in the Act is excluded, and this broad scope will enable consideration of key issues. Improving the accessibility of appeal mechanisms in the Act could better enable the evolution of case law on ‘charitable purpose’, for example. Reviewing the range of regulatory sanctions available where charities fail to meet their obligations is another key issue (currently deregistration is the only option in many cases).

21. The scope does not include first principles, such as:
   - the definition of ‘charitable purpose’;
   - whether to continue with the registration system; or
   - whether tax and charities legislation should be combined into one framework.

22. The definition of ‘charitable purpose’ is specifically excluded from scope. This means the review will not consider the ‘four heads’ of charity (relief of poverty, advancement of religion, advancement of education, and any other matter beneficial to the community). Given the strongly held and diverse views of stakeholders on this issue, there would be little chance of consensus and the debate could overshadow other important matters within scope. Any fundamental change to the definition of ‘charitable purpose’ may also have implications for tax exemptions and tax revenue.

23. Nevertheless, I believe stakeholder concerns about the definition of ‘charitable purpose’ and more specifically its interpretation can be partly addressed by ensuring the Act better enables the evolution of case law. This could be achieved through improved review and appeal mechanisms, for example.

24. Also excluded from the scope of the review are:
   - tax exemptions (under the Income Tax Act 2007) that result from registration under the Act;
   - regulation of the broader not-for-profit sector; and
   - contracting arrangements for government services.
25. While tax exemptions sit outside scope of this review, the Tax Working Group may consider the tax treatment of charities in its work. Any interim findings of the Tax Working Group relevant to charities would be considered as part of this review.

**Working level arrangements for the review**

26. The terms of reference provide for the establishment of a Core Reference Group (CRG). The CRG will work with officials to identify issues and provide possible solutions. This group will comprise six representatives. Three will be SUG members. The others will be nominated by the Department and will bring additional skills and views, including expertise in Te Ao Māori and the perspective of small charities. The three SUG members, drawn from the 25 member SUG, will seek SUG’s input at appropriate points.

27. In leading the review under my direction, the Department of Internal Affairs will also work closely with the regulator and other government officials.

**Approach to engagement**

28. Engagement and communication throughout the review will be key. Officials will work particularly closely with CRG (which in turn will seek input from SUG), the regulator, and other government officials (including those supporting the Tax Working Group).

29. At key points, officials will also look to engage closely with SUG, and consultation will also take place with the wider charitable sector and members of the public. A detailed stakeholder engagement plan will be developed to support this approach.

30. Consultation will also provide an opportunity to build strong relationships with the charitable sector. It will likely provide information that extends beyond the Act, and allow for a clearer picture to be built up of the full impact of different regulatory regimes on the charitable sector.

**Potential risks and mitigation**

31. Table 1 below sets out the potential risks associated with the review, and intended mitigation:

<table>
<thead>
<tr>
<th>Potential Risk</th>
<th>Approach to manage risk</th>
</tr>
</thead>
<tbody>
<tr>
<td>Insufficient support from the charitable sector</td>
<td>Work closely with CRG to manage expectations, and communicate process and benefits of review to the sector</td>
</tr>
<tr>
<td>Perception that the scope of review and possible changes to Act are too narrow, and risk that stakeholders focus on matters that are outside scope (for example, on the definition of ‘charitable purpose’ or operational issues)</td>
<td>Clearly outline what is and is not within scope, and reasoning (e.g. why ‘four heads’ sit outside scope) Communicate any operational feedback to the regulator</td>
</tr>
<tr>
<td>Engaging with CRG does not provide a wide enough range of views</td>
<td>Encourage CRG to engage more widely with SUG, where appropriate Also, consult with SUG, the wider sector and members of the public during the review</td>
</tr>
<tr>
<td>Working arrangements involving CRG are perceived to exclude some organisations or</td>
<td>Communicate reasons for using the CRG</td>
</tr>
</tbody>
</table>

Table 1: Potential risks and mitigation in the review process
Implications for other portfolios

32. The review focuses on the Charities Act 2005. Importantly, it is not a full review of the broader not-for-profit sector (which extends beyond charities, and includes sports groups, for example). However, I will keep relevant portfolio Ministers informed about progress, as issues arising from reviewing the Charities Act could touch on other portfolios.

33. As noted above, consultation will likely provide information that extends beyond the Act. This information could assist post-review, and lead to consideration of how the wider regulatory landscape could be improved for the not for profit sector.

Consultation

34. The following departments and other agencies were consulted on this paper: Inland Revenue; Te Puni Kōkiri; Ministry of Business, Innovation and Employment (Commerce and Consumer Affairs, and Housing and Urban Development); Ministry of Justice; Ministry for Culture and Heritage; Ministry of Health; Sport New Zealand; Ministry of Social Development (Social Development, and Seniors); Oranga Tamariki; Crown Law Office; and the Department of the Prime Minister and Cabinet (Policy Advisory Group). The Treasury was informed.

Financial implications

35. No financial implications arise from this proposal to approve the terms of reference. While being registered under the Act does result in tax exemptions for most income that charities receive, the scope of the review specifically excludes the definition of ‘charitable purpose’. This means that the number of charities that can be registered under the Act is unlikely to change significantly as a result of the review. There may be some potential financial implications from reviewing the scope and functions of the regulator, but these are unlikely to be significant.

Human rights implications

36. No potential inconsistencies have been identified between the proposal and the New Zealand Bill of Rights Act 1990, or the Human Rights Act 1993.

Gender implications and disability perspective

37. There are no gender or disability implications arising from this proposal for approval of the terms of reference. A detailed stakeholder engagement plan will ensure effective engagement with organisations representing women and people with disabilities during the review.
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Legislative implications

38. There are no legislative implications that would result from the approval of the terms of reference. However, the review may identify the need for legislative change. Policy decisions for any such changes will be sought in due course.

Publicity

39. I discussed my desire to review the Charities Act during an interview on Radio New Zealand Checkpoint on 23 November 2017, and I was quoted by TVNZ on 7 March 2018 as having taken the first steps to start a comprehensive review. I also released a statement in late February in the quarterly Charities Services Newsletter outlining early plans for the review and that more information would be released soon. I also spoke about the review at the Perspectives on Charity Law, Accounting and Regulation in New Zealand conference on 27 April 2018.

40. I will publicly announce the beginning of the review and terms of reference, following Cabinet agreement. At the same time as this public announcement, I intend to publish this Cabinet paper and related Cabinet decisions on the Department of Internal Affairs’ website, subject to the Official Information Act 1982.

Recommendations

41. The Minister for the Community and Voluntary Sector recommends that the Cabinet Social Wellbeing Committee:

1. note that the charitable sector plays an important role in, and makes a significant contribution to, New Zealand society;

2. note that the Charities Act 2005 is a key piece of legislation for the charitable sector;

3. note that the Charities Act 2005 seeks to promote public trust and confidence in the charitable sector through fundamental aspects like registration and deregistration of charities;

4. note that while the fundamentals of the Charities Act 2005 are sound, it is now over 10 years old and it is timely to review the Act;

5. agree to review the Charities Act 2005 to ensure it is effective and fit for purpose, with sufficient flexibility for today’s charitable sector;

6. note that targeted stakeholders were consulted on the draft terms of reference for the review;

7. note that the stakeholders had strong and diverse views on the draft terms of reference, and any review of the Charities Act 2005 is likely to generate wide debate that extends beyond the charitable sector;

8. note that the attached terms of reference take account of feedback received during targeted consultation, while seeking to ensure the review can be achieved within this parliamentary term;

9. agree to include within scope:

9.1 consideration of whether any additional purposes of the Act are necessary;
9.2 matters relating to the regulatory framework;
9.3 matters relating to registration and deregistration of charities;
9.4 matters relating to the obligations of registered charities; and
9.5 links to other legislation;

10. agree to exclude from scope:
    10.1 the definition of ‘charitable purpose’;
    10.2 tax exemptions that result from registration under the Act;
    10.3 regulation of the broader not-for-profit sector; and
    10.4 contracting arrangements for government services;

11. note that the scope set out in the attached terms of reference for the review reflect recommendations 9 to 11 above;

12. note that while tax exemptions sit outside scope of this review, any interim findings of the Tax Working Group relevant to charities would be considered as part of this review;

13. note that during the review officials will work closely with the regulator (currently, the independent Charities Registration Board, and Charities Services within the Department of Internal Affairs), a Core Reference Group, and other government officials (including those supporting the Tax Working Group);

14. note that strong engagement with the charitable sector will be important to the review’s success;

15. note that subject to Cabinet agreement on its scope, I will publicly announce the beginning of the review and the terms of reference; and

16. note that I intend to publish this paper and related Cabinet decisions online, subject to consideration of any deletions that would be justified if the information had been requested under the Official Information Act 1982.

Authorised for lodgement

Hon Peeni Henare
Appendix A: Terms of reference to review the Charities Act 2005

Context of review

Charities form a significant part of New Zealand’s not-for-profit sector. With more than 27,000 registered charities, the charitable sector makes an important contribution to New Zealand society, founded on the Treaty of Waitangi.

In 2001 the Government announced its intention to introduce registration, reporting and monitoring requirements for organisations claiming charitable status. A working party of charitable sector representatives was appointed and recommended that a Charities Commission be established and provided powers to register, monitor, assist and educate charities. The Charities Act (Act) was enacted in 2005, with the aim of promoting public trust and confidence in the charitable sector.

Over ten years have passed since the first charity was registered under the Act. Significant change has taken place in that time. This includes: changes in the charitable sector’s wider operating environment (for example, increasing pressure on volunteers); the disestablishment of the Charities Commission and establishment of the independent Charities Registration Board; the introduction of financial reporting standards for registered charities; and a new tax that applies to deregistered charities.

The legislative regime promotes public trust and confidence in the charitable sector through its treatment of charitable entities, and through the regulator’s actions. Charitable entities can voluntarily apply for registration, which brings both benefits and obligations. For example, charities must report annually and that information is publicly available. The regulator also has responsibilities including registering charities, maintaining a charities register, providing education and assistance, and monitoring compliance.

The Government considers the fundamentals underpinning the Act are fit for purpose. These include:

- provision for the registration of charities;
- the voluntary nature of registration;
- public access to information about charities; and
- the obligation on charities to file annual returns with financial statements.

Stakeholders in the charitable sector have sought a review of the Act for a number of years. The Government agrees that it is timely to review whether the Act is working effectively for the charitable sector, volunteers, our communities (including Māori) and the wider public, the Government, and others with an interest. The review will take into account the experiences of stakeholders over the last 13 years, and lessons from other jurisdictions.

Purpose of the review

The purpose of the review is to ensure that the Act is effective and fit for purpose. This comprehensive legislative review will focus on substantive issues arising under the Act, while recognising and building on the Act’s strengths.
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Scope of the review

Matters within scope

Substantive policy matters within the scope of the review are:¹

1. Matters relating to additional purposes of the Act
   • Whether any additional purposes of the Act are necessary (while recognising that the Government considers the fundamentals of the Act are fit for purpose).

2. Matters relating to the regulatory framework
   • The role, functions, structure, powers, accountability and appeal ability of the charities regulator (currently, the independent Charities Registration Board and the Department of Internal Affairs – Charities Services);
   • The purpose and content of the publicly-accessible charities register;
   • Funding for the regulator to administer the legislation (including the mix of Crown funding and fees from the charitable sector);
   • Mechanisms to challenge or appeal decisions of the charities regulator, including decisions over the interpretation of ‘charitable purpose’, and to support the development of case law;
   • Offences and penalties. For example, creating intermediate sanctions as alternatives to deregistration, or issuing penalties after an entity has been deregistered but before it is wound up; and
   • Regulation of third-party fundraisers (that is, professional fundraisers or commercial operators that fundraise on behalf of a charity).

3. Matters relating to registration and deregistration
   • Registration requirements (not including the definition of ‘charitable purpose’), and the ability to backdate the registration of an entity;
   • Deregistration requirements;
   • The extent to which businesses that solely raise funds for registered charities can register under the Act; and
   • The extent to which registered charities can advocate for their causes and points of view.

4. Matters relating to the obligations of registered charities
   • The obligations of registered charities; and
   • The obligations of individuals on governance boards and in senior management roles in registered charities, including looking into governance standards for registered charities.

5. Links to other legislation

¹ While this list of fourteen bullet points is comprehensive, the list does not identify all of the specific issues that could fall under each bullet point (e.g. bullet point two would cover more specific issue of regulator’s independence). Further exploration will occur during the review.
• The interface between the provisions of the Act, and provisions in the Incorporated Societies Act 1908 (and proposed Incorporated Societies Bill), Charitable Trusts Act 1957 and the Trusts Bill (with the aim of better alignment).

Matters outside of scope

As a legislative review focussing on substantive policy issues, operational issues fall outside of scope.

The following matters are also outside scope:

• The definition of ‘charitable purpose’;
• Tax exemptions that result from registration under the Act;
• Regulation of the broader not-for-profit sector; and
• Contracting arrangements for government services.

While tax exemptions sit outside scope of this review, the Tax Working Group may consider the tax treatment of charities in its work. Any interim findings of the Tax Working Group relevant to charities would be considered as part of this review.

Governance arrangements for decision-making on the review

The Minister for the Community and Voluntary Sector (the Minister) will be the key decision-maker on the review, subject to decisions that require Cabinet approval.

The Minister will engage with the Attorney-General, and others whose portfolios are touched by this review. This includes the Ministers of Finance; Revenue; Commerce and Consumer Affairs; Justice; Housing and Urban Development; and Health. It also includes the Ministers for Māori Development; Arts, Culture and Heritage; Social Development; Children; Seniors; and Sport and Recreation.

The Department of Internal Affairs (the Department) is the lead agency. The Minister for the Community and Voluntary Sector will provide strategic direction to the Department of Internal Affairs.

Working level arrangements

The Department of Internal Affairs will work closely with:

(a) a Core Reference Group (CRG);
(b) the regulator; and
(c) other government officials (including those supporting the Tax Working Group).

At key points, the Department will also seek input from:

(d) the Sector User Group (SUG); and
(e) the wider charitable sector, and members of the public.

The diagram below shows the governance and working level arrangements:
(a) Core Reference Group – role and six member composition

CRG’s role will be to work with the Department to identify issues and possible solutions within the scope of this review. With the group's small size, it is also intended that the Department will be able to test ideas with this group, before the Department advises the Minister.

CRG is intended to comprise six people, who bring a variety of perspectives and experiences. Given the size and reach of the charitable sector, the intention is to bring together the broadest possible range of views, skills and experiences.

SUG will be asked to appoint three of its members to CRG. SUG is an established group of 25 member organisations that provides broad representation from the charitable sector. The Department of Internal Affairs expects the three SUG members who join CRG to seek SUG’s input, and the Department will also look to use SUG at key points.

The Department will also look to invite three members onto CRG. The intention is these members bring diverse views, skills, and/or experiences, including Te Ao Māori perspective, and the perspective of small charities.

(b) Regulator

The regulator is the three member independent Charities Registration Board, and also Charities Services (within the Department of Internal Affairs).

(c) Other government officials

The Department will also look to work closely with officials from the Treasury and Inland Revenue (including those supporting the Tax Working Group); officials from the Ministry of Business, Innovation and Employment; Ministry of Justice; Ministry for Culture and Heritage; Te Puni Kōkiri; Sport and Recreation New Zealand; Ministry of Health; Ministry of Social Development; Oranga Tamariki; and the Crown Law Office.

(d) The Sector User Group

As described earlier, CRG would seek SUG’s input, and the Department would also look to use SUG at key points.

(e) The wider charitable sector, and members of the public

The involvement in the review of the wider charitable sector and the public will also be crucial. For example, public submissions on an options document will be sought, as well as workshops on key issues. Public submissions would also usually be called for by select committee if a Bill was to amend the Act.
Timeframe for the review

The review is expected to take between two to three years. This review is expected to start when the Minister seeks, and Cabinet approves the review’s terms of reference in early 2018. It is expected to finish with the passing of a Bill to amend the Act.

The table below outlines an indicative timeline:

<table>
<thead>
<tr>
<th>Phase</th>
<th>Timing</th>
<th>Review activities/steps</th>
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<tbody>
<tr>
<td>One</td>
<td>Dec 2017 – May 2018</td>
<td>Develop draft terms of reference, then test and revise</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Cabinet approval of final terms of reference</td>
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<tr>
<td></td>
<td></td>
<td>Publicly announce review</td>
</tr>
<tr>
<td>Two</td>
<td>May 2018 – August 2018</td>
<td>Identify issues and possible solutions, to help inform options development</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Cabinet approval of an options document</td>
</tr>
<tr>
<td>Three</td>
<td>August 2018 – Dec 2018</td>
<td>Consult and receive submissions on options document</td>
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<tr>
<td></td>
<td></td>
<td>Develop policy</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Cabinet approval of policy decisions</td>
</tr>
<tr>
<td>Four</td>
<td>2019</td>
<td>Development of draft legislation</td>
</tr>
<tr>
<td>Five</td>
<td>2020</td>
<td>Passage through the House of a Bill to amend the Act</td>
</tr>
</tbody>
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