Hon Priyanca Radhakrishnan

Proactive release of the regulatory impact statement on options to modernise the Charities Act 2005

2 June 2022

These documents have been proactively released:

19 October 2021: Regulatory Impact Statement: Modernising the Charities Act

For Cabinet material and any public service departmental advice use this copyright statement
© Crown Copyright, Creative Commons Attribution 4.0 International (CC BY 4.0)

Regulatory Impact Statement: Modernising the Charities Act

Contents

Regulatory Impact Statement: Modernising the Charities Act 1
Coversheet 3
Section 1: Outlining the problem 11
Context/Background Information 11
What is the policy problem or opportunity? 15
What objectives are you seeking in relation to this policy problem or opportunity? 15
Section 2: Option identification and impact analysis 17
What criteria will be used to evaluate options against the status quo? 17
What scope are you considering options within? 17
Section 2.1 Reporting requirements for small charities 18
Status quo 18
What is the policy problem or opportunity? 19
Describe and analyse the options: reporting requirements for small charities 20
Multi-Criteria Analysis: Reporting requirements for small charities 25
Conclusions 28
Section 2.2: Accumulation of funds 30
Status quo 30
What is the policy problem or opportunity? 34
Describe and analyse the options 36
Multi-Criteria Analysis – accumulation of funds 41
Conclusions 45
Section 2.3: Governance of charities 48
Status quo 48
What is the policy problem or opportunity? 49
Describe and analyse the options 51
Multi-Criteria Analysis: Governance of charities 58
Conclusions 60
Section 2.4: Definition of officer 62
Status quo 62

Proactively released by the Minister for the Community and Voluntary Sector

What is the policy problem or opportunity?....63
Describe and analyse the options 64
Multi-Criteria Analysis – definition of officer....66
Conclusion 67

Section 2.5: Disqualifying factors – Criminal Convictions 68
Status quo....68
What is the policy problem or opportunity?....69
Describe and analyse the options Option 1 – Status quo 69
Multi-Criteria Analysis – disqualifying factors – criminal convictions....72
Conclusions....73

Section 2.6: Disqualifying factor – age of officer....75
Status quo....75
What is the policy problem or opportunity?....75
Describe and analyse the options 75
Multi-Criteria Analysis: Disqualifying factor – age of officer 78
Conclusions....79

Section 2.7 Decision-making and appeals 80
Status quo....80
What is the policy problem or opportunity?....84
Describe and analyse the options Development of options 89
Multi-Criteria Analysis – Decision-making and appeals 100
Conclusions....105

Section 2.8: Compliance and Enforcement 109
Status quo....109
What is the policy problem or opportunity?....112
Describe and analyse the options 115
Multi-Criteria Analysis: Compliance and enforcement....122
Conclusions....124

Section 3: Implementing the preferred options....126
How will it be implemented? 126
Monitoring, Evaluation, and Review 126

Appendix: A3 of proposed changes to modernise the Charities Act 2005 127

Proactively released by the Minister for the Community and Voluntary Sector

Coversheet

Purpose	
Decision Sought:	*Analysis produced for Cabinet decisions on options to modernise the Charities Act 2005, and for Cabinet to agree for legislative drafting to begin.*
Advising Agency:	*Department of Internal Affairs*
Proposing Minister:	*Minister for the Community and Voluntary Sector*
Date:	*19 October 2021*

Problem Definition

The fundamentals of the Charities Act 2005 (Charities Act) are sound, but as the Charities Act has now been in place for some time, there is an opportunity to consider if the Charities Act remains effective and fit for purpose.

The opportunity is to consider if there are practical changes that can be made to make it easier for charities to continue their valued work while ensuring transparency and maintaining public trust and confidence in how the charitable sector operates.

We found that although the fundamentals of the Charities Act are sound, there are areas that can be improved to make it easier for charities to continue their work, while ensuring that contribution is sufficiently transparent to interested parties. These include ensuring a balanced approach to compliance and reporting, considering the role of officer and governance, and considering the regulator's approach and powers to improve transparency and access to natural justice.

Executive Summary

Scope of work

The work to modernise the Charities Act began in 2018, and was re-scoped by the current Minister to consider issues within the below topics:

- reporting requirements for small charities;
- charities' business activities and accumulation of funds;
- investigating potential improvements to the judicial appeals framework;
- matters relating to the regulator; and
- obligations of charities.

Policy problem or opportunity

Overall, the fundamentals of the Charities Act are considered sound, but the environment that charities operate in has changed. There is an opportunity to consider if there are practical changes that can be made that make it easier for charities to continue their work while ensuring transparency in how the charitable sector operates.

As we have looked at a range of topics within scope of the work, we have found that while there is not an apparent overarching problem to address, each of the topics has its own problems that all collectively contribute to the effectiveness of the charitable sector. These problems are outlined in the respective sections.

Proactively released by the Minister for the Community and Voluntary Sector

Objective of the work

The objective of this project as scoped is for the Charities Act to encourage and support charities to continue their trusted and vital contribution to community wellbeing, while ensuring that the contribution is sufficiently transparent to interested parties and the public.

Summary of recommended options

This regulatory impact assessment outlines our analysis for the below recommended options, and other related options we considered as part of the work to modernise the Charities Act:

- Reduce reporting requirements for small charities to reduce the compliance burden;
- Require tiers 1, 2 and 3 charities to report the reasons for accumulated funds in their annual return for transparency about their use of funds;
- Require charities to review their rules documents annually to contribute to stronger governance in the sector;
- Include more about the role of officer in the Charities Act to make it clearer about what is expected from officers;
- Include people with significant influence over the management or administration of trusts in the officer definition;
- Include terrorism offences as a disqualifying factor for officers as per the Financial Action Task Force's recommendations;
- Change the qualifying age of officers so one officer must be 18 years or older (others can be 16 or older) to create legislative consistency with comparable legislation;
- Improve decision-making processes and transparency as per best practice guidance (including increasing the number of Te Rātā Atawhai Charities Registration Board (Board) members to five, expanding the objections process, and requiring more decisions to be published);
- Increase accessibility to the appeals process by allowing appeals to be heard at the Taxation Review Authority (TRA) rather than the High Court and expanding the types of decisions that can be appealed;
- Give the Board the power to disqualify an officer without deregistering the charity to allow charities to continue operating; and
- Make explicit the key obligations in the Charities Act to make it easier for charities to understand their obligations.

The relationship between the proposals and how they fit within the current charities registration and reporting system is included as a diagram in the **Appendix.** The Minister for the Community and Voluntary Sector has agreed in principle to taking these proposals to Cabinet.

Reporting requirements for small charities

Charities are required to report on their financials to accounting standards set by the External Reporting Board (XRB). The standards differ on a tiered approach based on the entity's annual expenses, with those that have higher annual expenses (tiers 1 and 2) being subject to stronger accountability requirements.

For small charities (within tier 4), the current reporting obligations may be disproportionate to the level of transparency and accountability needed. We recommend reducing the reporting requirements by providing the Department of Internal Affairs (the Department) with the power to exempt a subset of small charities with low income and assets from meeting the financial

Proactively released by the Minister for the Community and Voluntary Sector

reporting standard set by the XRB. This would reduce the compliance burden for approximately 3,600 small charities in a way that is proportionate to the lower risk posed by these charities.

Accumulation of funds

Accumulating cash, assets and other resources is an important way for charities to grow and remain sustainable to be able to deliver on their charitable purpose. Accumulating funds can represent good governance practice and is not considered an invalid or non-charitable use of charitable funds.

Information on why charities have accumulated funds is not easily accessible, which does not promote public trust and confidence in the charitable sector. The reasons why a charity is accumulating funds are not always clear to the public in the annual return, financial statements, and statement of service performance. This is because while charities are transparent in their reporting on what or how much is accumulated, the user of the report needs a certain level of knowledge or understanding about charities, investments, business, and accounting to understand why the charities have accumulated funds.

We recommend that large charities (tier 1, 2 and 3) are required to report the reasons for their accumulated funds in their annual return, and that Charities Services partner with iwi to design the annual return form changes. This option is a low-cost and non-legislative change that addresses the problem with minimal additional compliance burden on large charities.

Governance of charities

The Charities Act does not outline any governance requirements that an entity must meet to register as a charity, including any specification on the role of officers of charities. Charities may have governance requirements under other Acts, for example, the Trusts Act 2019 (Trusts Act) or Companies Act 1993 (Companies Act). Charities are required to submit their rules document (constitutional document, trust deed or similar document) to Charities Services as part of the registration process to provide some assurance that the entity has some governance processes in place.

In the charities context, the problems with governance are:

- the role of officers is unclear; and
- poor governance is a key issue that the charitable sector faces and may impact the successful running of charities. For example, poor governance may put charitable funds at risk for private profit.

We recommend legislative change requiring charities to review their rules document annually, and for more detail about the role of officer to be included in the Charities Act. This is likely to contribute to improved governance in the sector in a way that is practical and easy for the sector to understand and apply.

Definition of officer

The current definition of an officer of a charity treats trusts differently to other entities and is interpreted differently across the sector. The definition has been an issue for Charities Services in some investigations where the investigated person had a significant role or influence in the charity but was not considered an officer and therefore did not have the accountability that comes with the officer title.

Proactively released by the Minister for the Community and Voluntary Sector

We recommend expanding the definition of officer to include all who have significant authority, decision-making or direction-setting powers within the charity. This would result in the following groups of people being captured:

- trustees of trusts; and
- the members of a board or governing body; and
- any other person(s) with significant influence over the management or administration of the entity.

Disqualifying factor – criminal convictions

Officers are required to be 'qualified' for an entity to become a registered charitable entity. Officers are disqualified if they have been convicted and sentenced for a crime involving dishonesty within the last seven years. These offences cover theft, burglary, robbery, obtaining by deception, money laundering, receiving, accessing computer systems for dishonest purposes, forgery, and tax evasion.

There may be risks with having officers who have serious convictions involved in charities. This could include risks to the operation of the charity such as fraud or inappropriate use of funds, or risks to the safety of people who are involved with or work with the charity. Public trust and confidence in the charity is also likely to be reduced.

We recommend including financing of terrorism related offences as a disqualifying factor in the Charities Act. There were mixed views on whether to include additional offences as disqualifying factors. Many considered it important that charities can retain their independent decision-making about who can be involved in the organisation. We consider that there are appropriate safeguards in the Charities Act and that including further serious offences may restrict the independence of charities.

Disqualifying factor – age of officer

Currently, a person is disqualified from being an officer of a charitable entity if they are under 16 years of age. The Trusts Act and the Companies Act require trustees and company directors to be at least 18 years old, and the Incorporated Societies Bill proposes that the contact person of the society must be 18 or older, while the officers can be 16 or older.

There are differences across different legislation for the age of officers of charities and similar roles. This legislative inconsistency may create confusion for an organisation and make it difficult for charitable organisations with officers who are 16 or 17 years old to be established as a trust or company if these officers also want to hold trustee or company director roles.

We recommend that one officer must be at least 18 or older, and all the other officers must be at least 16 or older. This option was not well tested with stakeholders, but we consider that it strikes an appropriate balance between ensuring that young people can still participate in charities by holding officer roles and creating greater consistency with other legislation.

Decision-making and appeals

The regulatory function in the Charities Act is split between two bodies: the independent Board, and Charities Services that operates as a business unit within the Department. The Board is responsible for deciding on registration applications and deregistration and directs Charities Services to register the entity as a charity, or if appropriate to remove the entity from the register. In practice, the Board delegates most decisions to Charities Services and only considers complex registration decisions. Charities Services maintains the register, educates and assists

Proactively released by the Minister for the Community and Voluntary Sector

charities on good governance and management, processes registration applications, monitors and promotes compliance with the Charities Act, enquires into possible breaches, and promotes research into charities.

A charity can be deregistered if it is not meeting its obligations under the Charities Act. Typically, around half of deregistrations are made at the charity's request because the entity is no longer operating. Most of the remaining deregistrations are due to the charity having failed to file annual returns for two or more years. In 2020/21, 782 charities were deregistered, 396 for failure to file, 385 voluntary deregistrations, and one for serious wrongdoing.

Decisions of the Board (including those delegated to Charities Services) can be appealed to the High Court. Between 2005 and 2019, there were over 56,000 decisions to approve, decline or deregister entities, however only 25 decisions have been formally appealed. Most of these appeals relate to what constitutes charitable purpose.

The costs to appeal to the High Court are prohibitive for charitable organisations. This is a problem for access to justice. There is also an opportunity to improve the transparency, accountability and fairness of decision-making under the Charities Act. The status quo does not support natural justice or the development of case law and may undermine the legitimacy of the regulator.

We recommend making changes to the decision-making and appeals framework to reflect best-practice advice. This includes legislative changes to require the publication of decline and deregistration decisions, require Charities Services to consult with the sector on significant guidance material, increase the size of the Board from three members to five members, increasing the decisions that are appealable or objectionable, and appeals being first heard at an existing Tribunal, with the High Court and Court of Appeal remaining as a path for further appeals.

Compliance and enforcement

The Charities Act contains obligations that registered charities must meet and consequences for not meeting those obligations. Once registered, the main obligations that charities must comply with are:

- remaining qualified for registration (for example, maintaining charitable purposes);
- filing annual returns with Charities Services; and
- notifying particular changes to Charities Services.

These obligations connect to key behaviours that the tools for non-compliance and enforcement focus on, which are no longer qualifying for registration (for example, not maintaining charitable purposes) and breaches of the Charities Act (for example, failure to file a return or failure to notify changes in officers).

The third type of key behaviour that tools for non-compliance and enforcement focus on is serious wrongdoing. Serious wrongdoing covers:

- an unlawful or corrupt use of the charity's funds;
- conduct that is a serious risk to the public interest in the orderly and appropriate conduct of the charity's affairs;
- conduct that constitutes an offence; or
- conduct that is oppressive, improperly discriminatory, grossly negligent or that constitutes gross mismanagement.

Proactively released by the Minister for the Community and Voluntary Sector

The regulator has a range of tools for compliance and enforcement including education, administrative penalties, investigations, monitoring, warnings, deregistration, disqualification, and prosecution.

The charitable sector has approximately 28,000 charities, and poor behaviour is likely to be occurring in a small portion of them. The problem is it may be difficult for the regulator to address some of the more significant types of poor behaviour, particularly with directed and enforced compliance tools under the Charities Act. In some circumstances, particularly with serious wrongdoing, the existing tools for directed and enforced compliance appear to be sparingly used.

We considered the range of compliance powers and tools that the regulator needs under the Charities Act to fulfil its role, as well as the behaviour and entity/person focused on. We recommend modifying the status quo to improve the clarity and workability of key aspects of the compliance and enforcement framework. This includes making explicit the implicit obligations to remain registered, clarify the behaviour that is serious wrongdoing, an operational review of how the tools are used in practice, and creating a new power in the Charities Act for the Board to disqualify an officer for serious wrongdoing or significant/persistent breaches of obligations by the officer.

Implementation

The legislative proposals will be enacted in an amendment bill to the Charities Act. This will be an omnibus bill to allow for changes to the Taxation Review Authorities Act 1994 (TRAA) to expand the functions of the TRA. Operational recommendations will be implemented by Charities Services.

Limitations or Constraints on Analysis

Scope of commissioning

The Minister for the Community and Voluntary Sector agreed to a narrower scope for the work to modernise the Charities Act to be able to deliver results for the sector within this parliamentary term. The Minister agreed to:

- No significant structural change;
- Limit the work to certain topics. The topics were largely decided based on previous work by the Department (agreed to by former Ministers for the Community and Voluntary Sector) and engagement with the public in 2019. The work would focus on a collection of modernisation issues that affect the day to day work of all charities. Addressing this group of issues would respond to concerns raised by many charities during consultation and deliver meaningful, positive change; and
- Defer fundamental issues such as the meaning of charitable purpose and charity's role in advocacy to a potential further work programme.

The scope included five topics:

- reporting requirements for small charities;
- charities' business activities and accumulation of funds;
- investigating potential improvements to the judicial appeals framework;
- matters relating to the regulator; and
- obligations of charities.

Proactively released by the Minister for the Community and Voluntary Sector

The proposed scope provided a balanced package that considered the likely interests of different stakeholders, including those other than charities. Small charities' interest in the amount of annual reporting requirements is a key issue that sector representatives welcome progress on. Charities' accumulation of funds without clear reason, which interested the Tax Working Group and senior Ministers during the last Parliamentary term, is an example that involves a different set of stakeholders. The proposed scope has also been sized to enable completion of policy work this year and ultimately for an amendment bill to be passed this term.

Stakeholder engagement and evidence

There is a lack of strong quantitative evidence and data to support the work. A lot of the evidence in the work to modernise the Charities Act is anecdotal, based on discussions and submissions from stakeholders. We sought data from Charities Services and in some cases did not have large amounts of data to provide an appropriate representation of the sector, or the data we sought was not collected, or not in a way that was useful to our work.

Te Tiriti o Waitangi and te ao Māori considerations

We focused on te ao Māori considerations for some areas – reporting requirements for small charities, accumulation of funds, and the criminal convictions that are disqualifying factors for officers. Stakeholders identified that these areas affect Māori differently, and are areas that Māori stakeholders were most concerned about. We met with some iwi representatives as part of the stakeholder engagement and discussed all the topic areas to hear iwi views on the package of proposals. We did not receive specific feedback about the impact of the other proposals on Māori throughout consultation.

Further work on how to reflect te ao Māori in the charities framework is being considered by the Minister for the Community and Voluntary Sector. This could include considering the meaning of 'charitable purpose' to reflect te ao Māori and Te Tiriti o Waitangi principles.

Responsible Manager

Suzanne Doig

General Manager, Policy Group

Department of Internal Affairs

21 October 2021

Quality Assurance

Reviewing Agency/Agencies:	Department of Internal Affairs internal panel
Panel Assessment & Comment:	The Department's Regulatory Impact Analysis panel (the panel) has reviewed the Modernising the Charities Act Regulatory Impact Statement (RIS) in accordance with the quality assurance criteria set out in the CabGuide. The panel members for this review were: • Damian Zelas, Principal Policy Analyst (Chair) • Benedict Goodchild, Senior Policy Analyst (Policy member)

Proactively released by the Minister for the Community and Voluntary Sector

- Julia Henderson, Senior Policy Analyst (Local Government Policy and Operations member)
- Leeza Boyd, Senior Policy Analyst (shadow Policy member)
- Amir Nagh, Policy Analyst (Secretariat)

The panel considers that the information and analysis summarised in the RIS received on 19 October 2021 *meets* the quality assurance criteria.

Reasons for decision:

The RIS makes a case for a package of eight changes to improve the operation of the charities regulatory system. The RIS is well structured containing the required information and is for the most part clearly written, given time constraints. It identifies the lack of strong quantitative evidence and data to support some of the work as a limitation. The views of stakeholders are considered throughout the RIS. Not all recommended options are supported by stakeholders and this is identified. Māori and tikanga issues are discussed in the proposals where stakeholders identified them as relevant. Some financial data for the "Decision-making and appeals" proposal had not been finalised in the draft provided for review.

Problem statements are given for each of the eight regulatory proposals, which fit within an overarching problem definition for the package of measures. The quality of these statements is variable, in some cases making it harder to see how the recommended options would impact the identified problem. However, the multi-criteria analysis is clear, identifying why specific legislative and operational options are recommended.

Damian Zelas
Chair of the Department of Internal Affairs' RIA panel
19/10/2021

Proactively released by the Minister for the Community and Voluntary Sector

Section 1: Outlining the problem

This section outlines the overall status quo and rationale for the work to modernise the Charities Act. As this Regulatory Impact Statement covers multiple topics with respective issues, each section will outline the status quo and problem for that topic.

Context/Background Information

About the Charities Act and regulatory system

About the Charities Act

The Charities Act was passed in 2005 and amended in 2012. Prior to the Charities Act, there was no register of charities and no consistent information about their activities and funding. The 2005 Charities Act established a registration, reporting and monitoring framework, to ensure that 'those entities receiving tax relief continue to carry out charitable purposes and provide a clear public benefit'.

The Charities Act provides for the voluntary registration and deregistration of charities where charitable entities are fulfilling a charitable purpose and meeting other obligations, seeks to promote public trust and confidence, and establishes the regulator for the charities sector (the Board and Charities Services). The Charities Act does not set rules for everything that charities do. Rather, it provides a framework of provisions that seek to promote public trust and confidence in charities.

Benefits and obligations of being a registered charitable entity under the Charities Act

Registration is voluntary, but being a registered charitable entity brings with it several benefits, and some obligations. Registered charitable entities are eligible for some tax exemptions and can publicly show that they are registered. Some funders will only fund charities that are registered and being registered improves public trust and confidence in the entity as information about the entity's activities and use of resources is publicly available on the register. The reporting and disclosure requirements ensure reliable information is accessible on the register about how charities further their charitable purposes. Among other things, this helps the public make informed decisions about which charities to support with donations or volunteered time.

The major obligations for being registered are that an entity must carry out activities to advance charitable purposes, ensure the organisation does not provide private benefit, and report financial information annually to Charities Services.

The regulatory structure

Under the Charities Act, the regulatory functions are split between two bodies, the independent Board and Charities Services. Charities Services operates as a business group within the Department. The Board was established following the Charities Act's amendment in 2012 and is responsible for the decision-making on charities' registration and deregistration. If the entity satisfies the requirements, the Board directs Charities Services to register the entity as a charity. The Board can also direct that an entity be removed from the register. While the Board is responsible for all registration and deregistration decisions, in practice it delegates most decisions to Charities Services.

Charities Services' functions are to maintain the register, educate and assist charities on good governance and management, process registration applications, monitor and promote compliance with the Charities Act, enquire into possible breaches, and promote research into charities. Charities Services make decisions impacting registered charities, including:

Proactively released by the Minister for the Community and Voluntary Sector

- the decision to remove or omit information from the public register;
- the approval of a change of balance date for annual returns; and
- the decision to exempt an entity from compliance requirements within the Charities Act.

As a business unit within the Department, Charities Services' public accountability measures are part of the Department's statement of performance expectations and annual reporting requirements.

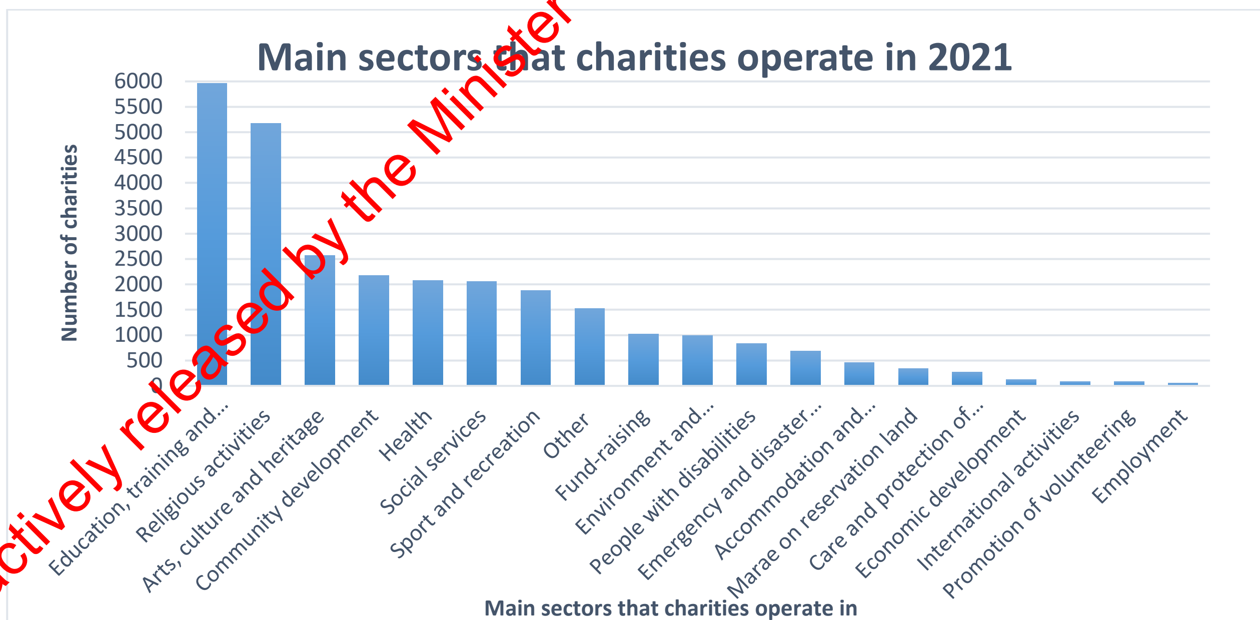
Charities Act's relationship with other legislation

Most charities need to comply with multiple pieces of legislation depending on their legal structure. Being a charity is a status that an entity can hold, rather than a legal way of organising themselves. The entity can choose the legal structure that best suits its circumstances. Of the registered charities in New Zealand:

- 31 per cent are incorporated trusts;
- 28 per cent are unincorporated societies;
- 24 per cent are incorporated societies;
- 13 per cent are unincorporated trusts; and
- 4 per cent are limited liability companies.[1]

About the charitable sector

The community and voluntary sector is large, with over 114,000 non-profit organisations. Approximately 28,000 are registered under the Charities Act. These organisations make a huge contribution across a range of sectors, with around 22 per cent operating in the education, training and research sector, 19 per cent in religion, and the remaining operating in a variety of areas (as illustrated in the graph below).



Based on the information provided by registered charities in annual returns, we know that in 2019/20 registered charities collectively received around $19.6 billion in income, spent around $18 billion, and had over $65 billion in assets. A small number of charities (less than one per cent of

[1] Estimates from Charities Services April 2021

Proactively released by the Minister for the Community and Voluntary Sector

those registered) account for around half of the sector's annual expenditure. They also employ a significant number of the approximately 160,000 people who work either part time or full time in the charities sector. However, most of New Zealand's charities are small and are run substantially by volunteers. Around one third of charities have an annual income under $10,000.

Only organisations that have charitable purposes and are for the public benefit can be registered.[2] The legal definition of charitable purpose is different from what may be commonly understood by the public. Simply demonstrating purposes are "worthy" or "good" is not enough. Charitable purpose is a complex legal concept, which has evolved through 400 years of case law, since the Statute of Charitable Uses came into force in England in 1601.

Background and scope to the review

The registration, reporting and monitoring system that comprises the Charities Act has been in place since 2005. While the fundamentals of the Charities Act are sound, significant change to the sector's operating environment has occurred. For example, the disestablishment of the Charities Commission in 2012 led to the transfer of functions to the independent Board and the chief executive of the Department, which delegates to Charities Services (a business group within the Department).

In May 2018, Cabinet agreed to a review of the Charities Act to ensure that the regime is fit for purpose and suits the needs of the diverse charitable sector. The Terms of Reference agreed by Cabinet outlined that as the Charities Act has now been in place for some time, the review should focus on the substantive issues to ensure the Charities Act is effective and fit for purpose.

Key features of the Charities Act will continue and not form part of this review. These features support a registration and reporting system, with the goals of promoting public trust and confidence in the charitable sector and encouraging and promoting the effective use of charitable resources. These key features will continue, and include

- the overarching purpose of the Act;
- the meaning of 'charitable purpose' (which was specifically excluded from the scope of work launched in 2018);
- provision for a charities' registration and reporting regime, with a public register;
- the availability of a robust check on decision-making through an appeals mechanism, which also enables the meaning of 'charitable purpose' to evolve through case law;
- provision for a range of compliance and enforcement functions split between two bodies (the Board and the chief executive of the Department, who delegates to Charities Services); and
- recognition throughout the Charities Act of, and flexibility to adapt to, the many different forms and entity types of that make up the charitable sector (such as trusts, incorporated societies and companies).

In 2019, we released a public discussion document to seek public opinion on the issues that charities face. We received 364 submissions in total from the charitable and not-for-profit sector, individuals, and others. The work was paused in 2020 due to the Department needing to re-direct resources to the COVID-19 response and changed Ministerial priorities.

The Minister for the Community and Voluntary sector revised the scope in early 2021 to focus on practical changes in the following areas:

- reporting requirements for small charities;

Proactively released by the Minister for the Community and Voluntary Sector

[2] Charitable purposes are the relief of poverty, the advancement of education or religion, or any other matter beneficial to the community.

- charities' business activities and accumulation of funds;
- investigating potential improvements to the judicial appeals framework;
- matters relating to the regulator; and
- the obligations of charities.

First principles issues have been excluded from this work, including some issues that were raised by submitters in 2019. For example, this work does not cover the definition of charitable purpose, whether charities can advocate as part of their charitable work, whether to continue with the registration system or whether tax and charities legislation should be combined into one framework.

Stakeholder engagement

The public consultation in 2019 consisted of 27 community meetings held across the country that 1,200 people attended, an online presentation (viewed 650 times), and 364 written submissions. There are approximately 28,000 registered charities in New Zealand, and while engagement was well-received, it is a small proportion of the charitable sector that engaged in the consultation. However, we did hear from many umbrella organisations and representative groups who provided views from their memberships.

In 2021, the Department conducted targeted consultation with representatives from the sector. The primary limitations from the 2021 engagement are that:

- Stakeholders did not have a lot of time to engage in the consultation (three to four weeks in each round) and were provided a large amount of information to comment on in a short timeframe. The consultation period also coincided with Select Committee submissions on the Incorporated Societies Bill which much of the sector were also engaged in.
- We approached a proportionately small number of people in the sector and did not hear back from everyone (particularly small charities). Several proposals are focused on making it easier for small charities, but we did not receive a lot of feedback from these charities on the proposals.

These invitees for the 2021 engagement were mostly chosen from the 2019 submissions based on:

- Interest in topic(s) in scope; and/or
- Influence in topic(s) in scope; and/or
- A demonstrated understanding and expertise of the topic(s) in the 2019 public consultation; and/or
- Providing diversity of views;
- Representing a diverse range of charities across different sectors, tiers and geographical spread.

We engaged with targeted stakeholders in three rounds during 2021. In May 2021, we consulted 70 people or organisations on options for reporting requirements for small charities, charities accumulating funds, and charitable business activities. We received 35 responses. In August 2021, we consulted 110 people on options relating to officers of charities, and decision-making and appeals. We received 34 responses. In September 2021, we met with some iwi representatives, the Core Reference Group for this work, and the Sector Representative Group to discuss and receive feedback on our preferred options. The focus was on discussing and working through the issues during the meeting rather than receiving written submissions for this final round of engagement.

Related work

Related work that impacts the charitable sector and may change the status quo includes the Incorporated Societies Bill progressing through the House, Inland Revenue's Tax Policy Work

Proactively released by the Minister for the Community and Voluntary Sector

Programme and the XRB's work on financial reporting standards. This related work has been considered as part of the environmental considerations affecting our review.

What is the policy problem or opportunity?

The Charities Act came into effect in 2005 and created a new registration regime for charitable entities. Overall, the fundamentals of the Charities Act are considered sound, but as the Act is now sixteen years old, it is an appropriate time to take stock of how the Act is operating. The opportunity is to consider if there are practical changes that can be made that make it easier for charities to continue their work while ensuring transparency in how the charitable sector operates.

We found that although the fundamentals of the Charities Act are sound, there are areas that can be improved to make it easier for charities to continue their work, while ensuring that charities' contribution is sufficiently transparent to interested parties. These include ensuring a balanced approach to compliance and reporting, considering the role of officer and governance, and considering the regulator's approach and powers to improve transparency and access to natural justice.

We found that some areas where it could be made easier for charities to continue their work include:

- considering the proportionality of the compliance burden of reporting requirements for small charities compared to the level of transparency and accountability;
- ensuring that charities have the governance processes in place to run the charity effectively and meet the obligations under the Charities Act;
- applying consistency in the application of definition of officer to ensure accountability is clear and appropriate; and
- addressing legislative inconsistency for the minimum age required to be an officer, compared to similar roles in other Acts.

We found that some areas where transparency could be improved in the operation of charities and the regulator are:

- the accessibility of information of why charities accumulate funds;
- Improving access to justice to make it easier to continue to participate in the charitable system;
- Further clarity of the regulator's decisions and decision-making processes; and
- Considering where the decision-making process can be made fairer.

What objectives are you seeking in relation to this policy problem or opportunity?

The objective of this project as scoped is for the Charities Act to encourage and support charities to continue their trusted and vital contribution to community wellbeing, while ensuring that contribution is sufficiently transparent to interested parties and the public.

If the objective is met, the policy proposals should contribute to the following outcomes:

- the Charities Act is increasingly recognised in New Zealand charity law and practice to reflect unique New Zealand conditions;
- iwi, hapū and diverse communities across New Zealand benefit from the presence and work of charities;
- the charitable sector is effective, independent and sustainable; and
- the public have trust and confidence in the charitable sector, including charities' use of charitable resources.

For compliance and enforcement, we consider it is important that:

Proactively released by the Minister for the Community and Voluntary Sector

- the compliance and enforcement tools connect back to the regulator's functions under the Charities Act and the Act's purposes;
- existing compliance and enforcement tools are not duplicated;
- available compliance and enforcement tools are proportional to the breach, and follow from clear obligations; and
- compliance and enforcement should generally sit with the charitable entity, rather than an officer or other person.

Proactively released by the Minister for the Community and Voluntary Sector

Section 2: Option identification and impact analysis

What criteria will be used to evaluate options against the status quo?

We have used the following criteria to evaluate our options against the status quo:

- **Effectiveness** – addresses the identified problem/opportunity and meets the objective;
- **Alignment** – aligns with the key fundamentals underlying the Charities Act and broader charities law;
- **Proportionality** – the costs, obligations and tools for the regulatory response are proportional to the risk to charitable resources and to public trust and confidence in the charitable sector;
- **Accountability** – accountability for decision-making is clear and effective;
- **Sector independence** – recognises the independence and importance of a thriving charitable sector; and
- **Support from communities** – likely support from a range of different community interests, including different stakeholder interests.

When considering the potential options, we considered the feasibility of the option within the scope of the work.

What scope are you considering options within?

The Minister for the Community and Voluntary sector agreed that the Department considers practical changes within the following topics:

- reporting requirements for small charities;
- charities' business and accumulation activities;
- investigating potential improvements to the judicial appeals framework;
- matters relating to the regulator; and
- obligations of charities.

We have not considered all possible issues within the topics but have focused on issues that may result in practical changes for the sector to be able to provide the Minister with policy options for Cabinet approval by the end of 2021.

For most of the topics, we considered further guidance as a non-legislative option. However, Charities Services have confirmed that guidance will be issued on the legislative changes. Therefore, we have not considered the options to be mutually exclusive and have assumed that legislative changes will be followed by guidance.

Proactively released by the Minister for the Community and Voluntary Sector

Section 2.1 Reporting requirements for small charities

Status quo

The Charities Act requires charities to report on their finances annually. Section 41 and 42 of the Charities Act require charities to prepare an annual return accompanied by a copy of financial statements, as required by Charities Services. These documents become publicly available on the Charities Register. The financial statements must be prepared in accordance to accounting standard set by the XRB). The XRB is an independent Crown Entity responsible for accounting standards in New Zealand. The standards are about ensuring transparency and consistent financial reporting.

Charities currently report under one of four tiers, developed by the XRB. These tiers are determined by the charities' annual expenses or operating payments of its previous two financial years. Tier 4 includes charities that have annual operating payments under $125,000. Each tier has its own accounting standard, which requires more rigorous reporting from larger entities that sit under tiers 1 and 2. Table 1 shows the types of entities that sit under each tier and the different accounting standards that apply.

Table 1: reporting tiers for charities

Tier	Entity type	Standards
1	Over $30 million annual expense, or has public accountability	Full Public Benefit Entity (PBE) Standards
2	Under $30 million annual expenses, without public accountability	PBE Standards Reduced Disclosure Regime (PBE Standards RDR)
3	Under $2 million annual expenses, without public accountability	PBE Simple Format Reporting Standard - Accrual (SFR-A)
4	Under $125,000 annual operating payments, without public accountability	PBE Simple Format Reporting Standard - Cash (SFR-C)

Most charities in New Zealand are small and often run by volunteers. In 2020, 57 per cent of charities reported under tier 4. The financial information required from tier 4 charities includes details of the entity, outputs and outcomes of the entity, statements receipts and payments, statements of resources and commitment, and notes to performance report.

Most small charities are heavily dependent on volunteers. These volunteers usually do not have the capability of completing complex and extensive reporting requirements. Even when capability of these small charities is improved, these charities also face high turnover of volunteers, which makes it difficult for them to retain sufficient capability within the charity. Charities are sanctioned for regular non-reporting, specifically, if a charity does not report two years in a row, it is deregistered and loses benefits such as tax exemptions.

Of the registered charities, 24 per cent are incorporated societies, which means that as well as complying with the Charities Act, entities have requirements under other legislation. The Incorporated Societies Bill is progressing through the parliamentary process and is relevant to this issue as it proposes to exempt small incorporated societies from the XRB's reporting standard. The XRB made an oral submission on the Incorporated Societies Bill acknowledging small entities are struggling to meet the reporting standard. The XRB has publicly commented that they are working on creating another tier for micro entities and are in support of reducing reporting obligations for these entities. Their indicative timeframes suggest that this work will be completed in 2022.

Proactively released by the Minister for the Community and Voluntary Sector

What is the policy problem or opportunity?

Obligations of reporting

Reporting helps show whether charities are spending money appropriately, but the current reporting obligations may be disproportionate to the level of transparency and accountability needed from small charities.

Charities Services data shows that only 59 per cent of small charities (tier 4) are using, and 41 per cent of tier 4 charities are meeting the standard for financial reporting set by XRB. During public consultation in 2019, reporting requirements for small charities was frequently commented on through submissions and at meetings. Throughout stakeholder engagement and public consultation, stakeholders described current reporting requirements as onerous, with small charities being time-poor and often reliant on volunteers. Many submitters considered that compliance requirements were disproportionate to the benefits from registration.

Non-compliance in reporting for two consecutive years means that the charity is deregistered from the Charities Register, which results in a loss of tax benefits for the charity (as well as the public recognition as a registered charity).

Māori and tikanga reporting

Reporting requirements may not meet the needs of many small Māori charities. We estimate there are around 1,000 Māori charities, based on the number of charities having a Māori kaupapa or run by Māori primarily for the benefit of Māori. Over 60 per cent of the estimated number of Māori charities are in tier 4.

Māori charities are required to report the same financial and non-financial information as non-Māori charities. The starting point for information required is generally Eurocentric, such as donations received. Guidance assists to align tikanga with, or translate tikanga into, existing reporting requirements: for example, providing guidance on how charities can report koha. Practices and principles from tikanga Māori, such as koha based on reciprocal obligations, are currently fitted into existing requirements, where possible. As well as the difficulties with reporting from a tikanga Māori starting point, this view reflects the context of small Māori charities facing many of the same issues as non-Māori charities: for example, not having many resources and/or relying on volunteers to meet reporting requirements.

Stakeholder engagement did not provide any feedback from tier 4 Māori charities and there is very limited information available on what tikanga reporting looks like or how to incorporate reporting from tikanga Māori starting point. However, The XRB acknowledges that there is "room for improvement" in their standard-setting process to effectively engage with Māori. The New Zealand Accounting Standards Board (NZASB) has completed its analysis of submissions received on the Post-Implementation Review of Simple Format Reporting Standards. NZASB agree to consider amending the Tier 3 and Tier 4 standards to better reflect the Te Ao Māori perspective. The XRB is the best organisation to make changes directly to the reporting standards as it is likely to achieve better outcomes with respect to incorporating the Te Ao Māori perspective.

While small Māori charities would face the same issues as other small charities, one of the options considered below (option 4 – establish an advisory committee to input into template and guidance design for reporting requirements) specifically aims to address this issue overall. Other options considered do not directly address this element of the problem because of a lack of feedback from stakeholders.

Proactively released by the Minister for the Community and Voluntary Sector

Describe and analyse the options: reporting requirements for small charities

Option 1 – Status quo

This option does not propose any changes to the reporting requirements for small charities. Small charities would continue to report based on the standards developed by XRB. However, the current work to introduce tier 5 for micro entities could potentially address the problem. At this stage, we do not know what the proposed tier 5 would look like and whether it resolves the problem.

Analysis

The status quo does not meet the policy objective as the expectations of current reporting obligations are seen to be disproportionate to the level of transparency and accountability that is appropriate or small charities. If there are no changes to the current reporting requirements, then compliance rates for small charities may continue to decline. This adds additional burden on Charities Services to support these small charities to meet the compliance requirements. The downward trend of compliance rates would also mean that transparency of the use of charitable resources would be limited, which could compromise public trust and confidence over time. Most submitters from targeted consultation indicated that this option will not address the problem.

Option 2 – Simplify the current reporting templates

This option aims to simplify how XRB's current reporting requirements are expressed in templates and guidance developed by Charities Services. This option does not address tikanga reporting issue identified earlier due to lack of feedback from stakeholder engagement. Charities Services would work with XRB to consider changes to the templates and guidance such as:

- Reducing the number of pages compared to current XRB's 16-page spreadsheet;
- Using simple terms and plain English compared to accounting terms and references (where possible); and
- Using an easily accessible format and platform such as a short document easily available on the website.

The XRB have recently developed a simplified Tier 4 reporting template specifically designed for smaller charities. The existing reporting template of 14 pages includes all mandatory and optional information that a larger Tier 4 charity may choose to report. The simplified Tier 4 reporting template has now been reduced to 3 pages by focusing on the minimum financial information required by the Standard. The simplification and re-expression of the existing reporting requirements to help promote increased adoption by smaller charities does not require any changes to the Charities Act.

Analysis

This option is likely to align with the objective because it maintains the current level of transparency around charity's reporting. The costs of administering this option are relatively low and it also reduces the potential costs for monitoring and enforcement of non-compliance by the regulator. This option is also likely to address the problem by making it easier to comply with the current standards. However, simplifying guidance material would require asking the same level of information and maintains the burden for small charities to comply with complex reporting requirements. Thus, this option only aims to make it easier to report within the current standards, rather than altering the

Proactively released by the Minister for the Community and Voluntary Sector

level of reporting. This is unlikely to fully address the problem of disproportionate reporting obligations for small charities.

Option 3 – provide extra support and education to help small charities to meet the reporting requirements

The aim of option three is to provide extra support and education to small charities so that they can meet the current XRB reporting standards. This option does not address tikanga reporting issue identified earlier due to lack of information from stakeholder engagement. This is a non-legislative change.

Charities Services already provides an array of support services for charities, including providing support and guidance to charities through a free phone service, emails, regular online clinics, and engaging with charities that have failed compliance checks. This option builds on the range of support that Charities Services already provides by increasing the people available for support services and increasing the frequency of lesser used channels, such as roadshows.

The ways in which this option could provide extra support and education all require additional resourcing, but possibilities include:

- launching a dedicated website that brings together the currently available information, resources, and research;
- developing new tools, information and education programmes to help charities to meet current reporting requirements. This may also require extra resources by Charities Services to help with accounting-related questions for small charities; and
- assisting small charities through their accounts. This could involve using community advisors for roadshows or regular regional outreach.

Analysis

This option is likely to align with the objective for this work because providing extra support and education fulfils the element of the objective to encourage and support charities to continue their trusted and vital contribution to community wellbeing. However, when the standards were first developed for charities, the XRB together with Charities Services and other agencies completed four rounds of nationwide roadshows to raise awareness of the new reporting standards. The XRB and Charities Services also held webinars which were well attended. Since then, the percentage of tier 4 charities using, and the percentage meeting the XRB standard has reduced for the 2019/20 financial year, compared to the 2017/18 financial year. An estimated budget from previous roadshows indicates that one roadshow costs over $150,000 for just venue hire and transportation. More roadshows and more staff would require additional funding to run sustainably.

Many submitters support this option. However, they also acknowledged that providing extra support and education will not address the underlying issue of reporting obligations being disproportionate to the level of transparency and accountability needed from small charities. Compliance rates were high when the reporting standards were initially established because of ongoing education and support provided through roadshows and regional outreach. However, providing ongoing support and education does not appear to have a long-lasting impact on the compliance rates for small charities as rates have reduced over the years.

Option 4 – establish an advisory committee to input into template and guidance design for reporting requirements

Option four is a non-legislative option that aims to establish an advisory committee (the committee) to advise Charities Services on sector views so that guidance and templates developed for financial reporting is more user-friendly for charities. While this option maintains current reporting

Proactively released by the Minister for the Community and Voluntary Sector

requirements because the XRB is responsible for reporting standards, it aims to enable the te ao Māori perspective to be incorporated in the guidance material. The advisory committee could include 7 to 14 members who represent the diverse perspectives of the sector. For example, small charities, Māori charities, funders, academics, accountants, regulators, preparers of financial statements, and organisations. This would complement Charities Services' current engagement with Pou Ārahi and Te Atamira, two groups that provide input on te ao Māori views on Charities Services' resources.

Analysis

This option appears to align with the objective and the problem definition because it addresses the issues faced by small charities including small Māori charities. For example, the perspectives of small charities including small Māori charities could feed into the development of reporting requirements, which could incorporate tikanga Māori based practices and values. The acknowledgement of these perspectives will enable small charities to continue their trusted and vital contribution while ensuring transparency to interested parties and the public. However, it maintains the current reporting obligations, which would not address the problem of disproportionate reporting requirements for small charities.

The XRB acknowledges that there is "room for improvement" in their standard-setting process to effectively engage with Māori. The NZASB has completed its analysis of submissions received on the Post-Implementation Review of Simple Format Reporting Standards. NZASB agreed to consider amending the Tier 3 and Tier 4 Standards to better reflect the Te Ao Māori perspective. The XRB is best to make changes directly to the reporting standards as it is likely to achieve better outcomes in respect to incorporate te ao Māori perspective.

Charities Services have indicated that their Capability Team review their support material using a needs-basis approach where they are responsive to feedback received from the sector about the usefulness of the resources they publish. When reviewing (or creating) material, Charities Services seeks feedback from the Charities Sector Group and other contacts in the sector. Overall, this option does not provide the certainty that establishing an advisory committee would address the problem of disproportionate reporting obligations for small charities. Establishing such a committee would also be costly to administer for up to 14 members.

Option 5 – reduce the reporting requirements for small charities

This option proposes to reduce the reporting requirements for small charities by providing the Chief Executive of the Department with the power to exempt a subset of small tier 4 charities from the XRB's reporting standard. This is a legislative change.

The exemption would allow these 'small' charities within tier 4 charities to file annual returns with financial information that is less onerous than the XRB standard. At a minimum, the financial information would include the income and expenditure of the charity during the financial year; the assets and liabilities of the charity at the close of the financial year; and all mortgages, charges, and other security interests of any description affecting any of the property of the charity at the close of the financial year. Specifically, we propose to make it a mandatory requirement for this financial information to include disclosure of donations and related party transactions.

Prior to reporting standards applied, Charities Services required basic financial information as part of the annual return. The minimum financial information under this proposal could reflect similar reporting obligations that existed before the accounting standards were applied at Charities Services' discretion. The table below shows current reporting standard (at a high level) in comparison to minimum financial information required under this proposal.

Proactively released by the Minister for the Community and Voluntary Sector

Table 2: Comparison of current reporting standard and minimum financial information under reduced reporting

<table>
<tr><th colspan="2">Reporting Standard requirements</th><th>Minimum financial information under reduced reporting</th></tr>
<tr><td>Entity Information</td><td>Entity details, including mission and purpose, information on volunteers etc.</td><td rowspan="5">1. Statements of
• Income and payments
○ Donations received
• Assets and liabilities
• Mortgages and other securities
2. Disclosure of related party transactions</td></tr>
<tr><td>Statement of Service Performance</td><td>Outcomes and Outputs</td></tr>
<tr><td>Statements of Receipts and Payments</td><td>Operating receipts, operating payments, capital receipts, capital payments, bank accounts and cash at the end of the financial year, cash on hand, term deposit(s)</td></tr>
<tr><td>Statement of Resources and Commitments</td><td>Schedule of resources, schedule of commitments, schedule of other information</td></tr>
<tr><td>Notes to Performance Report</td><td>Describe the basis of preparation, declare Goods and Services Tax, declare Related Party Transactions, report any significant event(s)</td></tr>
</table>

Analysis

In the 2019/20 financial year, approximately 12,493 charities reported under tier 4. A large portion of tier 4 charities have annual payments under $10,000. Around 34 per cent of tier 4 charities report annual payments under $10,000. The aim is to target small charities within tier 4 that are not asset rich. Thus, an asset test would be able to target smallest of small charities that struggle to comply with the current reporting standard. The thresholds considered for this option were:

- **Threshold one**: Tier 4 charities that have annual payments under $10k and total assets under $30k (recommended).
- **Threshold two**: Tier 4 charities that have annual payments under $10k and total assets under $50k.
- **Threshold three**: Tier 4 charities that have annual payments under $40k and total assets under $50k.

These thresholds were based on figures extrapolated from the Charities Register and information from Inland Revenue on their list of donee organisations. Threshold one, on balance, is recommended given the following:

- the median resources (includes total assets) for tier 4 charities is $26,396;
- under threshold one, we estimate 29 per cent (3,636) of tier 4 charities will be exempt from the reporting standards. For threshold two, 32 per cent (4,012 charities) would be exempt and threshold three would result in 53 per cent (6,646 charities) of tier 4 charities being exempt from reporting.

We consider that the risk with threshold one is low as it affects approximately 3,600 tier 4 charities (approximately one-quarter of tier 4 charities) and will significantly help small charities to reduce their compliance costs without compromising public trust and confidence.

Proactively released by the Minister for the Community and Voluntary Sector

Considering the above analysis, this option proposes that tier 4 charities would not be required to comply with the reporting standard if it has total operating payments under $10K and total assets under $30K.

The XRB and the Ministry of Business, Innovation and Employment (MBIE) have shown support for this proposal and have not made any significant comments on the details of the exemption i.e. the threshold or minimum financial information required. Ongoing engagement with these agencies would have helped in seeking their comfort with this proposal.

Proactively released by the Minister for the Community and Voluntary Sector

Multi-Criteria Analysis: Reporting requirements for small charities

Table 2: multi-criteria analysis for reporting requirements for small charities

Key	++ much better than the status quo	+ better than doing the status quo	0 about the same as the status quo	- worse than the status quo	- - much worse than the status quo

	Effectiveness	Alignment	Proportionality	Accountability	Sector independence	Support from communities	Overall assessment
Option 1 - Maintain Status Quo	Non-compliance continues to be an issue for small charities It doesn't address the gap between the problem of reporting requirements being too onerous for small charities and the objective to support charities while ensuring sufficient public trust and confidence Does not address tikanga reporting issue	No changes are proposed to the current setting of the Charities Act, thus the purpose and outcomes within this Act remain unchanged	Compliance requirements continue to be disproportionate to the benefits that small charities receive from registration Public trust and confidence may be impacted due to non-compliance. Charities risk losing their tax benefits because of deregistration due to regular non-compliance. Ongoing non-compliance would be a burden on Charities Services to monitor and enforce to support charities struggling to meet reporting requirements.	The status quo maintains the level of accountability needed from small charities as there are no changes proposed to the reporting standard. However, given compliance rates are trending downwards, accountability will be poor as charities will not be completing their reporting requirements.	The status quo maintains the limited level of flexibility and independence that small charities have. However, it is also likely that the limited flexibility and independence of small charities may worsen in the future as non-compliance would result in deregistration of the charity.	Small charities continue to raise the issue of reporting requirements being too onerous Almost all submitters from the targeted consultation believe this option does not address the issue Diverse views including Te ao Māori is not represented in the concepts used for reporting requirements	Maintaining the status quo will not address the problem because the reporting standards will remain too onerous for some small charities to meet. This option does not allow small charities to be flexible and independent as the current reporting requirements are too prescriptive for the level of accountability and transparency needed from small charities.
	0	0	0	0	0	0	0
Option 2 - Simplify current templates and guidance	While simplifying the expression of the current templates and guidance will encourage small charities to complete their reporting requirements, the potential positive impact on compliance rates is not quantifiable. Option two may make it easier to comply with the reporting standards, However, it does not address the underlying issue as the templates and guidance must still be based on the current reporting standard XRB has already published a two-page template to support Tier 4 charities to comply with the current reporting standards. This option does not directly address the tikanga reporting issue.	No changes are proposed to the current setting of the Charities Act, thus, the purpose and outcomes within this Act, including the reporting standards established by the XRB, remain unchanged	Option 2 aims to increase understanding of the reporting requirements and make the requirements less onerous, and therefore increase the compliance rates for small charities. The costs of administering this option are low and it also reduces the potential costs for monitoring and enforcement of non-compliance by the regulator. It does not address the underlying issue of current reporting standard being too onerous and prescriptive. Compliance requirements continue to be disproportionate to the benefits small charities receive from registration.	Option 2 maintains the level of accountability needed from small charities as there are no changes proposed to the reporting standard.	Small charities get some level of flexibility as to how they present the information with the simplified templates. This flexibility and independence is likely to remain limited in the future. This is because the templates and guidance will be based on the current reporting standard, which is the underlying issue of the reporting requirements being too onerous for small charities.	All submissions received from targeted stakeholders mentioned that simplification of current templates and guidance (which is already progressed) is a good start to address the issue of reporting requirements for small charities. However, they also acknowledged that this option will not solve the underlying problem of reporting requirements for small charities.	Option two is unlikely to address the problem as XRB has already attempted to simplify the template. Additionally, it does not address the underlying issue of reporting requirements being too onerous for small charities as it only aims to change the expression of reporting requirements without changing the standard that the templates will be based on. The simplification of templates could have benefits and stakeholders believe it's a step in the right direction. The overall assessment would be weak positive.
	0	0	+	0	0	+	+

Proactively released by the Minister for the Community and Voluntary Sector

	Effectiveness	Alignment	Proportionality	Accountability	Sector independence	Support from communities	Overall assessment
Option 3 - Provide extra support and education	Extra support and education for small charities will likely have a positive impact on compliance rates, however, it doesn't address the underlying issue as the current reporting requirements remain unchanged. Does not directly address tikanga reporting issue	No changes are proposed to the current setting of the Charities Act, thus the purpose and outcomes within this Act, including the reporting standards established by the XRB, remain unchanged	While it aids in a better understanding of the reporting requirements for small charities, the reporting standards remain unchanged. Reporting requirements continue to be disproportionate to the benefits small charities receive from registration. There are also significant costs associated with providing extra support and education and the potential positive impact on compliance rates is likely to be short-lived as the turnover of personnel in charities is high, so the educational work is ongoing.	Accountability for charities remains the same, although there may be slightly more accountability on the regulator to provide support.	This option would be about the same as doing nothing for sector independence because small charities can maintain the same level of flexibility and independence that they have currently. This flexibility and independence is likely to remain limited in the future. This is because the extra support and education provided could make small charities dependent on this ongoing support as there is a high turnover of volunteers within the charitable sector thereby making them inflexible.	There is a widespread support for this option from the sector - all submissions received from targeted stakeholders mentioned that extra support and education is a good start to address the issue of reporting requirements for small charities. However, charities also acknowledge that this is not a long-lasting option because many charities rely on volunteers and there will be ongoing dependence due to turnover.	Option three does not reduce the reporting standards but may make it easier to comply with them. Therefore, it may marginally address the problem but there are significant costs associated with this option, and there are possibilities that the positive impact on compliance rates for small charities may be short-lived and result in charities needing ongoing support.
	+	0	-	0	0	+	0
Option 4 - Advisory committee for guidance and templates	Stronger sector representation in developing the templates and guidance for financial reporting could help make the requirements easier for small charities and take into greater consideration the concerns of diverse groups. This may increase compliance and reduce the compliance burden if the guidance is better targeted to the needs of the sector. There is no certainty around addressing the problem definition. Does not address the underlying issue of the standard being too onerous.	This option is better than doing nothing for alignment because it changes the current settings to enable a standard process being implemented for this advisory committee to participate in regular reviews of the performance of reporting requirements	Provides diverse representation in guidance design. The costs of establishing this option are relatively low in comparison to the benefits of better representation of the charitable sector to design appropriate standards and guidance. There is a greater likelihood that tikanga concerns around reporting could be addressed. It does not provide an immediate response to the issues that small charities face. This option is likely to have a greater impact over the long-term	Overall, this option is about the same as doing nothing for accountability because it maintains the level of accountability needed from small charities as there are no changes proposed to the reporting standard. However, there is a likelihood that the level of accountability and transparency needed from small charities may change once the advisory committee starts to initiate reviews of the performance of the current reporting requirements.	This option is better than doing nothing for sector independence because the advisory committee provides the charitable sector with a platform that is well represented to voice their concerns and provide advice for better decision-making. This platform provides the sector including small charities and Māori charities to exercise their flexibility and independence in providing their advice.	There is a widespread support for this option from the sector. Most submissions (if they provided comments on this option) from targeted stakeholders mentioned that this option is a "great idea" and "sensible" to address the issue of reporting requirements for small charities. However, some members of the Core Reference Group believe that this creates further bureaucracy and may not address the underlying issue of reporting requirements being too onerous for small charities immediately.	Option four does not reduce the reporting standards but may make it easier to comply with them. Option four also ensures te ao Māori views are included in guidance design.
	+	+	+	+	+	+	+

Proactively released by the Minister for the Community and Voluntary Sector

	Effectiveness	Alignment	Proportionality	Accountability	Sector independence	Support from communities	Overall assessment
Option 5 (preferred option) – reduce reporting requirements for small charities	Exempting a subset of tier 4 charities from the reporting standard directly reduces the compliance burden for these charities. Exempt charities are still required to provide annual returns to Charities Services with minimum financial information to maintain a level of transparency. Does not directly address tikanga reporting issue.	This change will mostly be in line with the current framework and objective of the Charities Act as the registration, reporting and monitoring regime mostly remains unchanged. However, slight changes in legislation are required to add power for the Department's Chief Executive to exempt a subset of tier 4 charities from XRB's reporting standard.	The size of the risk with threshold 1 (under $10k annual payments, $30k total assets) means that the lack of visibility would be limited, affecting approximately 3,600 tier 4 charities. We know that annual expenditure by all registered charities is approximately $18 billion. To assess materiality, 3,600 charities with expenditure of at most $10k would equal to $36 million, which is a small proportion of all charitable expenditure (in comparison).	This option reduces reporting obligations to the level of accountability needed from the exempt charities. Exempt charities will still need to provide an annual return to Charities Services to maintain public trust and confidence. Overall, this option is better than doing nothing because it promotes transparency through proportionality and accountability, thereby increasing the likelihood of compliance.	This option is much better than doing nothing for sector independence because the exemption of a subset of tier 4 charities from current reporting standards provides small charities with the flexibility and independence to focus on making efforts on ensuring effective use of charitable resources without high compliance costs.	There is a widespread support for this option from the sector. Most submissions (if they provided comments on this option) from targeted stakeholders mentioned that this option will significantly help small charities to reduce their compliance costs without compromising public trust and confidence. However, most submissions received indicated that the threshold proposed ($10k annual payments, $30k total assets) to be eligible for an exemption from reporting standard is low.	Option five is likely to be very effective in addressing the problem as it directly reduces the reporting requirement for some small charities. The risk of reduced transparency for the exempt charities is considered proportionate to the low threshold for operating expenses and assets to receive the exemption. While a level of reporting obligations would be eliminated, all registered charities are still required to be accountable through annual returns and minimum financial information which ensures effective use of charitable resources and public trust and confidence. This option increases flexibility and independence of small charities by allowing them to focus their efforts on ensuring effective use of charitable resources. Some stakeholders believe that the proposed threshold is too low. However, the risk with threshold one to public trust and confidence is low in comparison to other thresholds as it does not affect more than approximately 3,600 tier 4 charities. We have taken on board stakeholders' feedback of allowing charities with donee status to be exempted under this proposal.
	++	+	++	+	++	+	++

Proactively released by the Minister for the Community and Voluntary Sector

Conclusions

We recommend progressing option five, to reduce reporting requirements by providing the Department's Chief Executive. with the power to exempt a subset of Tier 4 charities with annual payments under $10,000, and total assets under $30,000 from the XRB's reporting standards. We consider that this option would best address the problem of disproportionate reporting obligations for small charities and meet the policy objective to encourage and support charities to continue their trusted and vital contribution to community wellbeing, while ensuring that contribution is sufficiently transparent to interested parties and the public. While this option does not directly address the lack of the te ao Māori perspective in reporting standards, the XRB and NZASB have expressed their intention to consider amending tier 3 and 4 reporting standards to better reflect the te ao Māori perspective.

Overall, our preference would be to have the XRB (as a responsible agency for accounting standards in New Zealand) make changes to the financial reporting tiers to accommodate a proportionate level of reporting obligations for small charities (reflected in option five). However, the XRB has recently started work on creating tier 5 for micro entities. The requirements and reporting obligations under this tier are yet to be determined at this stage, which limits our ability to be certain that the new tier 5 will address the problem in accordance to our recommended option. Should the new tier (when introduced) align with our recommended proposal, the power provided to the Department's Chief Executive) to exempt a subset of tier 4 charities under our recommended option would no longer be required.

With a smaller number of tier 4 charities eligible for the exemption under the proposed threshold (threshold one), the reduced transparency risks from the proposed threshold are less than the risks from the alternative thresholds. In addition, while the exempt tier 4 charities would no longer report to the standards required by the XRB, all registered charities (including the exempted charities) would still be accountable through annual returns with minimum financial information, which helps to promote the effective use of charitable resources and contributes to promoting public trust and confidence. The recommended threshold (annual payments under $10,000 and total assets under $30,000) was not well supported during targeted consultation. Since the number of tier 4 charities eligible under the recommended threshold results in a low risk to public trust and confidence, and the threshold could significantly help small charities to reduce their compliance costs without compromising public trust and confidence, we still consider the threshold to be appropriate.

Option five is better than other options because option two (simplify current guidance) would not address the underlying issue of burdensome reporting requirements. Option four (advisory committee for guidance and templates) would be costly to administer and does not ensure proportionate reporting obligations for small charities. Option three (provide extra support and education) will also be costly and while it may improve compliance rates in short term, it will not address the underlying issue of disproportionate reporting obligations.

Proactively released by the Minister for the Community and Voluntary Sector

Summarise the costs and benefits of your preferred option

Table 3: costs and benefits – preferred option for reporting requirements for small charities

Affected groups	**Comment**:	**Impact**
Additional costs of the preferred option compared to taking no action		
Regulated groups	Reduced transparency for some small charities which may reduce public trust and confidence	Low
Regulators	Reduced transparency from small charities from a regulatory perspective	Low
Other groups (e.g. wider government, consumers etc.)	Members of certain organisations i.e. funders, and the general public, may pose a risk of financial mismanagement being undetected	Medium
Total monetised costs	*No monetised costs*	Low
Non-monetised costs	*Transparency costs*	*Low*
Additional benefits of the preferred option compared to taking no action		
Regulated groups	Reduced compliance costs for charities that fall within the threshold. Charities may also have reduced costs from employing accountants to do the returns.	Medium
Regulators	Would largely eliminate the problem of non-compliance, reducing the burden on regulator to manage non-compliance and enforcement. Charities Services will continue their education role for all registered charities.	Medium
Other groups (e.g. wider government, consumers etc.)	Charities are better able to focus on their work in the community, so the services of the charity may improve	Low
Total monetised benefits	Reduced cost of employing professionals to help with reporting	Low
Non-monetised benefits	Reduce compliance burden and non-compliance issues	*Medium*

Proactively released by the Minister for the Community and Voluntary Sector

Section 2.2: Accumulation of funds

Status quo

Why charities accumulate funds and why it is of interest?

Accumulating cash, assets and other resources is an important way for charities to grow and remain sustainable to deliver on their charitable purpose. Charities may accumulate to fund specific projects, benefit future generations, hold assets to carry out charitable purpose (for example, a trust that operates property for a church), ensure funding is available to provide aid following a disaster, hold contingency funding for unexpected events that impact income sources, or for other reasons. As such, accumulating funds can represent good governance practice, and is not considered an invalid or non-charitable use of charitable funds.

Considering the accumulation of funds by charities is important because public trust and confidence in the charitable sector (one of the purposes of the Charities Act) is driven by the transparency and use of charitable funds. Since 2008, Charities Services has conducted public trust and confidence surveys to identify the characteristics of public trust and confidence. These surveys have identified that the drivers of trust are that charities apply most of their funds to make a positive difference, use money wisely and effectively, let the public know how resources from donations are used, and ensure that most donations reach the end cause. The results of the most recent survey in 2021, show that trust levels are moderate at 6.5 out of 10 (relatively consistent with previous years, and slightly higher than 2019).

Charities' accumulation of funds is also being explored due to the recommendations of the Tax Working Group, as mentioned in the scope section at the start of this document. The Tax Working Group, established in late 2017, considered the tax treatment of charities, including the extent to which private foundations and charitable businesses are applying accumulated funds to benefit their charitable purpose. The Group's final report in 2019 recommended that the government consider applying a distinction between these groups and other charities, and the government at the time added this to the policy work programme.

What does accumulating funds mean and are there any rules around it?

In accounting terms, accumulated funds are the charity's equity. Equity is calculated as assets minus liabilities and is the leftover resources available over the charity's lifetime, which may be separated into different "buckets". Accumulated funds will tend to increase as the organisation grows its resources.

The law does not restrict charities accumulating funds. There are no minimum distribution requirements or limits in the Charities Act or other legislation. Charities must not be established for private profit and must act in accordance with their constituting rules documents, which outlines their charitable purpose, their obligations/requirements under the Charities Act and any operating rules. Officers of charities have duties under other legislation (for example, the Trusts Act, the Companies Act, and Incorporated Societies Act 1908) to act honestly and in good faith. For charitable trusts that are subject to the Trusts Act, section 18 states that a trust may accumulate income to the extent that is consistent with its terms. For charities operating businesses, New Zealand case law has confirmed that these charities may accumulate funds in line with normal prudent business practices for developmental purposes. We note that parallel work on the Incorporated Societies Bill has not considered matters of accumulation.

Proactively released by the Minister for the Community and Voluntary Sector

Reporting of accumulated funds

In accordance with the XRB's reporting standards, Tier 1-3 charities must report annually on the funds they have accumulated over the life of the charity. They may volunteer an explanation on the reasons for the accumulated funds in their report, but it is not required. Tier 1-3 charities must also report separately on total assets and total equity. One of the possible "buckets" of accumulated funds is reserves. Reserves are usually contingency funds set aside to provide adequate resources to respond to unexpected or expected crises, to ensure the charity can be sustainable over a long period.[3] Tier 1-3 charities must report on reserves if they have them and describe their purpose or restrictions. However, even if a charity has funds set aside for a specific purpose, this does not mean it is reserves or needs to be reported as reserves – reporting reserves is an accounting decision. Tier 4 charities do not need to report on the funds they have accumulated, or their assets or equity, but must report on the amount of cash they have and other resources they own.

Tier 3 and 4 charities, and from January 2022, Tier 1 and 2 charities, must also provide a statement of service performance with their annual return. This is a non-financial statement that provides information on the activities, outputs and outcomes the charity achieved the previous year. Neither the financial statements, performance reports, or annual return provide a uniform figure for accumulated funds, nor explicit information on what accumulated funds are used for. Even with comprehensive reporting, it can be difficult to identify what accumulated funds are for. Some charities may have financial management strategies, reserves policies or distribution policies that outline expectations around accumulation, but this is not a requirement or typically made public.

Scale of accumulated funds in the charitable sector

Most registered charities in New Zealand are Tier 4 charities, however, a small proportion of large Tier 1 and 2 charities account for over half the sector's annual turnover. They also account for most of the sector's accumulated funds. Charities with the highest accumulated funds are predominantly iwi, charitable businesses (universities, health and disability care providers, and business arms of councils and iwi), churches, and funding/grant providers. It is reasonable to expect that many of these large charities need to maintain high value assets to carry out their charitable purpose, for example, universities and health care providers. Iwi have advised that accumulation is critical for discharging their role is kaitiaki of settlement assets over many generations, to support the long-term economic and social development of iwi members over 500+ years. This is partially achieved by providing a sustainable financial return from the charitable business operations.

The data below (Tables 5 and 6) sets out the charitable sector funds by tier, based on 21,753 charities from the 2019/20 Charities Services Annual Review. The information is self-reported by charities and may be subject to error.

Proactively released by the Minister for the Community and Voluntary Sector

---

[3] Reserves also have other meanings. For example, for Tiers 1 and 2, 'Discretionary reserves' are funds from surplus put it in a reserves bucket for accounting purposes. If discretionary reserves are reported, they must report what the reserves are for (e.g. a new building project, etc). 'Other reserves' are funds that effect equity but would not be reporting in the statement of financial performance, for example foreign currency transaction reserve or asset revaluation reserves.

Table 5: Number of charities and their annual expenditure

Reporting Tier (based on expenditure)	% of charities	Number of Charities*	% of total annual sector expenditure	Total Annual Expenditure
Tier 1 (More than $30m)	1%	155	51%	$ 9.17b
Tier 2 ($2m to $30m)	6%	1,215	33%	$ 5.90b
Tier 3 ($125,000 to $2m)	36%	7,890	14%	$ 2.60b
Tier 4 (Less than $125,000)	57%	12,493	2%	$ 0.344b
Total	100%	21,753	100%	$ 18.02b

* There are approximately 28,000 registered charities in New Zealand, however annual return data varies from the total for reasons such as a charity not filing a return or filing a return on behalf of a group of charities.

Table 6: Charities total operating surplus, assets, and equity

$('000)	Tier 1	Tier 2	Tier 3	Tier 4	All Charities
Operating surplus / deficit	376,433	585,809	509,393	105,361	1,576,996
	24%	37%	32%	7%	100%
Total assets	26,508,734	22,110,425	14,436,889	N/A	63,056,048
	42%	35%	23%	0%	100%
Total equity	20,744,330	17,647,862	12,716,275	N/A	51,108,467
	41%	35%	25%	0%	100%

This data is based on the 21,753 charities included in the 2019/20 Annual Review.

** We note that that data may not be indicative of normal trends due to the impact of COVID-19 at the end of 2019/20. However, the proportions have remained largely the same from previous years.

*** There is no asset information for Tier 4 because they are not required to report this information.

Distribution of accumulated funds

Noting that accumulation of charitable funds is valid, we also considered the reverse of this – the distribution of charitable funds. We primarily focused on those of interest to the Tax Working Group – private foundation charitable trusts and charitable businesses.

Private foundations are typically established by a single donor or closely related group and operated by a closely related group using income generated by private funding. There are approximately 1,100 registered charities which have identified themselves as 'foundations' on the Register. The largest 35 foundations on the Register, while not Tier 1 due to their lower annual expenditure, control almost $1.7B in total assets and $1.2B in accumulated funds. The level of funding distribution to charitable purpose by these foundations varies considerably. This may simply be because some foundations did not have causes they wished to support that year, or for other reasons. We are unable to draw conclusions from the reporting about the validity of the accumulation or distribution.

Proactively released by the Minister for the Community and Voluntary Sector

For example, the Wright Family Foundation distributed eight per cent of their $23 million net surplus in 2017 and had $66 million in accumulated funds. The Friedlander Foundation distributed 95 per cent of its $0.3 million surplus in 2017 and had $6.7 million in accumulated funds.

Charitable businesses include businesses that engage in charitable activity ("related businesses") and those that engage in non-charitable activity as a means of raising funds for charitable purpose ("unrelated businesses"). Examples of unrelated businesses on the Register include:

- livestock and forestry businesses – operated by the Joan Fernie Charitable Trust which provides grants to other charities;
- commercial rental properties – Foundation Properties Limited, which provides funds to Blind and Low Vision NZ;
- an electricity generator company – Pioneer Energy Limited, which provides a financial return to Central Lakes Trust, which provides grants/funding for community projects; and
- dairy farms and kiwifruit orchards – Trinity Lands Limited, which provides profits to churches to advance religion.

Charities are not required to identify whether they own or operate businesses and the number of unrelated businesses on the Register is unknown. However, in 2017, five per cent of charities on the Register were listed as limited liability companies, and in 2018, 9272 charities reported $8.57 billion in income from trading operations, up from $5.06 billion in 2013.

A sample of 20 unrelated businesses on the Register was assessed in 2017. This analysis identified that 15 companies distributed funds by grants or donations and five did not. These five businesses held total assets up to $376 million and accumulated funds of up to $323 million.

This data on large unrelated businesses and private foundations suggests that while these charities have considerable funds, in some cases, very little of this is being distributed to charitable purpose. However, the reasons for this are unclear. The funds may be held in business assets or investments necessary to grow funds for charitable purpose.

Stakeholder views about accumulated funds

Between 2019 and 2021, we heard from stakeholders that:

- Accumulation of funds is good governance practice and some accumulation is necessary for charities to:
  - hold in reserve to cover operating costs if they face a temporary loss of income to mitigate risks and ensure certainty for their staff and beneficiaries;
  - support long-term spending plans, for example, new buildings, equipment or to expand operations;
  - grow investment funds and make larger distributions in the future;
  - develop stable sources of income, as revenue from investments and fundraising businesses provide greater certainty than grants and other income which can vary greatly each year;
  - grow their funds so that they can continue to make distributions in perpetuity to benefit their community (for example, community foundations and charities that manage endowment funds); and
  - manage iwi assets for current and future generations.
- Further transparency would support trust and confidence, particularly for larger charities;

Proactively released by the Minister for the Community and Voluntary Sector

- Further requirements would add compliance costs;
- Minimum distributions would be an unnecessary, costly, and arbitrary requirement.

Te ao Māori

Māori charities make up less than five per cent of the total number of charities, and over 60 per cent have an annual expenditure under $125,000 (Tier 4). However, some iwi settlement organisations, such as Waikato-Tainui and Ngāi Tahu, are Tier 1 charities that maintain large asset and equity holdings. As of April 2018, Māori charities held around $6 billion in total assets, with $1.5 billion in total annual income, and total expenditure of $1.2 billion.

Through targeted engagement, some iwi (Waikato-Tainui, Ngāi Tahu, Ngāti Awa and Ngāti Porou) noted their unique position as opposed to other charities – iwi have a unique relationship with the Government, and iwi charities have a unique relationship with their membership which requires significant accountability. Iwi commented that they should be treated differently when it comes to accumulation, to recognise this unique position and that they are accumulating to benefit their iwi whānui centuries into the future. They submitted that they should be exempt from any new requirements about accumulation of funds.

What is the policy problem or opportunity?

A problem with information about accumulation

Information on why charities have accumulated funds is not easily accessible, which does not promote public trust and confidence in the charitable sector.

Charities have many good and valid reasons for accumulating funds. However, these reasons are not always clear to the public in the annual return, financial statements, and statement of service performance. This is based on a desktop review of the suite of financial and performance reporting of 23 registered charities (single entities, and groups).[4] This sample illustrated that while charities are transparent in their reporting on what or how much is accumulated, the user of the report needs a certain level of knowledge or understanding about charities, investments, business and accounting to understand why the charities have accumulated funds.

For example, as part of targeted engagement, some philanthropic organisations shared that their accumulated funds are to ensure the charity exists in perpetuity, in accordance with the trust's deed, and they can only distribute income generated from investing those funds. However, this is not clear in an annual return, financial statement, or performance report. To conclude that the accumulated funds are valid, a person looking into this would need to:

- know that trusts can be established in perpetuity;
- know that trustees have a duty to act in accordance with the perpetuity rule; and
- refer to the suite of information provided by the charity on their purpose, income sources and expenditure.

We cannot expect the public to have this level of knowledge. There is a problem with the accessibility of information on accumulated funds, in terms of understandability and simplicity. This can

[4] We note that this is a small sample when compared with the number of registered charities. However, due to time constraints we were unable to obtain a significant sample.

Proactively released by the Minister for the Community and Voluntary Sector

undermine public trust and confidence in the charitable sector, because informing the public on how charitable funds are used, using funds wisely and effectively, and ensuring funds go to the end cause are key characteristics of public trust and confidence. Public trust and confidence is critical as it encourages support of the charitable sector, in the form of donations and volunteering.

The objective for this topic is to improve accessibility of information on why charities have accumulated funds, while charities maintain independence to govern and manage funds in ways that service their communities. This aims to support our overall objective that the Charities Act supports charities to continue their vital contribution, while ensuring that contribution is transparent.

Media interest and public queries over the last several years have highlighted an interest in charities accumulating funds, including concerns that charities are accumulating for non-charitable reasons, and that it is unclear why some have significant accumulated funds. However, we do not have direct information on the public's view of the accessibility of accumulated funds information.

Stakeholder views of the problem

Most stakeholders during targeted engagement in 2021 (and in the 2019 consultation) said that charities report enough financial information to provide transparency about accumulated funds, and that further reporting is not required. Some thought that performance report requirements taking effect from 1 January 2022 (as described earlier) would be useful in better understanding how accumulated funds are charitable and said that we should wait and see the full impact of this reporting before making changes.

However, other stakeholders (large charities with business activities, fundraising charities, and academics) agreed that increased transparency and accountability on accumulation or distribution of funds is needed. Some of these stakeholders referred to "passive" private foundations that "hoard tax-free funds" and only distribute funding for administrative costs and professional service fees.

Is the problem the same for all charities?

There are differences between larger and smaller charities, in that:

- Larger charities tend to accumulate funds, with tier 1 and 2 accumulating significant funds;
- Larger charities tend to have more resources;
- We expect a higher level of transparency from larger charities that are managing significant charitable funds, which is evidenced by the current reporting standards for the four tiers, with larger organisations having more rigorous reporting requirements;
- Smaller charities tend to accumulate a small amount of cash reserves rather than significant surpluses, or equity from property etc; and
- Smaller charities tend to have limited resources – compliance rates with current reporting standards are already low, but we expect less rigorous reporting from them, as evidenced by the simplified reporting standards for tier 4.

Noting that public trust and confidence measures apply to the charitable sector, rather than charities based on their size, our view is that addressing the problem with accessibility of information should relate to larger charities – tiers 1, 2 and 3.

An alternative problem that we considered and ruled out

We considered whether there was a problem with distribution of accumulated funds by "fundraising charities". Charitable status can be granted to organisations that exist for certain purposes and that

Proactively released by the Minister for the Community and Voluntary Sector

meet certain requirements. Our initial view was that organisations include those that "do" charitable purpose (i.e. directly further charitable purpose through their activities e.g. education providers, religious organisations, budget service providers etc.), and those that generate funds to support their own or others charitable purpose (e.g. private foundations, and "unrelated" businesses such as opportunity shops, food retailers, transport companies and tourism operators). We identified that in some cases, "fundraising charities" distribute very limited funds to charitable purpose per annum. Our initial problem definition was that it is unclear how or when fundraising charities plan to distribute their funds to benefit charitable purpose, which could undermine public trust and confidence in the charitable sector.

We consulted with targeted stakeholders on this problem definition. Most stakeholders (large and small charities including what we referred to as "fundraising charities", iwi, umbrella groups, and lawyers) did not agree with the problem. They considered that it lacks recognition that charitable purposes can be furthered by accumulating funds, by any type of charity, and an approach to focus on a newly defined class of charities was arbitrary, too simplistic, and would be very difficult to implement. It was also reinforced that any entity must be established for charitable purposes – there is no test of what level of distributed funds is "charitable enough"; the funds must simply be for public benefit, and not private benefit.

Fundamental matters concerning charitable purpose are out of the scope of this work. There is also a lack of evidence that the lack of distribution by some charities is invalid or non-charitable, as there have not been investigations into this. On that basis, and because of the feedback that it would not be practical to define and target "fundraising charities", we discarded this problem definition and focused on the matter of transparency.

Describe and analyse the options

We developed a range of options that could broadly improve the transparency of accumulated funds. We were keen to engage with stakeholders on several different approaches that would vary in their potential effectiveness and implications. There were also some expectations of the options we would look at given the considerations and recommendations of the Tax Working Group. While we heard from stakeholders in 2019 that an option requiring charities to distribute a minimum amount of their funds would have more costs than benefits, it was important that we consulted on this again given the recommendations of the Tax Working Group.

Option 1 – Status Quo

Analysis

Maintaining the status quo will not improve the accessibility of information about accumulated funds, which is not proportionate to accountability and transparency expected for entities managing charitable funds. This option has strong support from the sector (including iwi). This is because most of the sector consider that the current financial reporting requirements, and the performance reporting requirements from 2022, provide enough information about how charities use their funds.

Option 2 – Guidance from Charities Services on managing funds (non-legislative)

For this option, Charities Services would issue guidance on good fund management practices. This would not require changes to the Charities Act. Charities Services have functions under section 10 of the Charities Act to educate and assist charities in relation to matters of good governance and management. This function includes "issuing guidelines or recommendations on the best practice to

Proactively released by the Minister for the Community and Voluntary Sector

be observed by charities and by persons concerned with the management or administration of charities", which means Charities Services are already empowered to issue guidance.

Charities Services already provide such best practice guidelines on a range of matters, with a strong focus on supporting charities to fulfil the annual return requirements. These guidelines could be expanded to include advice on good fund management practices, including matters of accumulation and distribution of funds, and being transparent about those matters. While this option could be more specific on providing guidance about transparency of accumulated funds, we wanted to consider and consult on a guidance tool that would be broader practical advice to support charities in general funding matters.

Analysis

While there is no evidence that a lack of guidance is a barrier to transparency or accessible information, it could help to ensure that charities are accumulating for valid reasons and have good financial management policies in place. Such guidance may assist in holding charities to account for decision-making related to their accumulated funds.

There was some support for guidance, but more broadly rather than in the context of accumulated funds. One stakeholder suggested that guidance could include advice/expectations that charities consider intergenerational justice when the governance body is exercising its discretion on distributing/using funds.

This issue would not address the problem by providing accessible information about accumulated funds. Some stakeholders thought guidance may also inadvertently constrain charities' independence to decide how to maintain their charitable purpose in ways that best support their communities. The public would also not know if the guidelines were being followed.

Option 3 – Large charities report the reasons for accumulated funds in the annual return, designed with iwi (non-legislative)

This option would introduce a new reporting line in the annual return for charities for large charities to describe the reasons they have accumulated funds. In practice, this would likely be a paragraph within the annual return form (the amount of information would depend on the complexity of the reasons for accumulation, and charities could refer to other documents for further detail, such as their financial or performance statements).

This is a non-legislative change as Charities Services (via the Department's Chief Executive) are already empowered to prescribe the form of the annual return. Filing an annual return is currently a key obligation for registered charities under the Charities Act, so this option essentially builds on the status quo. Charities Services would update their guidance to support charities to fulfil the new requirement. As part of this option, Charities Services would be expected to design the annual return form changes with iwi, to incorporate te ao Māori views of accumulation, given their unique position and view of accumulated funds. We considered whether iwi should be exempted from the option, as per their feedback. However, given the level of some accumulation by iwi charities and the minimal compliance burden this option imposes, we considered it to be more pragmatic to ensure that iwi is involved in its implementation.

This option would apply to tier 1, 2 and 3 charities. Small charities present less risk as they are unlikely to hold significant accumulated funds. Requiring more information from small charities about their use of charitable funds will be disproportionate to the level of accountability and

Proactively released by the Minister for the Community and Voluntary Sector

transparency needed from them (and would undermine our reduced reporting requirements for small charities proposal).

We considered that the annual return is the best and most appropriate place for more accessible information on accumulated funds because the items can be searched across the whole sector (because of the database on the charities register which is linked to annual return information) and it is easier to read. While there may be benefits to having the information in the financial statements, XRB set the standards for those reports, which are about more detailed financial information. Additionally, the performance report (standards set by XRB) is about the outcomes and outputs the charity has achieved, rather than the purposes of their funding.

Analysis

This option meets our assessment criteria. It addresses the problem, by providing accessible information, in a way that aligns with the Charities Act's current requirements and is proportionate to the level and nature of the risk to public trust and confidence. We anticipate that it will have minimal impact on most charities, as it does not require them to do anything new – charities already know why they have the equity that have/why they have built up funding – it is just a matter of providing an understandable and accessible explanation of this. We consider that this will help the public because if they look up a charity on the register at present, it is not easy to understand from the reporting information (including the annual return) what all the funding is for. However, the effectiveness of this option does assume that the public will use the information, or that it will be brought to their attention via the media, academics, or the regulator, for example.

In early consultations (in 2019, and the first round of targeted engagement in 2021), many stakeholders did not support the option. This was based on the view that charities already report comprehensive information on how they use their funds through their annual return, which is filed with either a financial statement or performance report. However, other stakeholders (large charities with business activities, fundraising charities, and academics) agreed that increased transparency and accountability on accumulation or distribution of funds is needed. Most of these stakeholders favoured charities reporting more information. There were mixed views on what and how much should be reported, who the requirement should apply to (e.g. private foundations or large charities), what compliance burden this would impose, and whether the information should be reported in the annual return or somewhere else (like the Statement of Service Performance or financial statement, although there was some consensus on using the annual return). However, in the last round of targeted engagement seeking feedback on refined proposals, most targeted stakeholders indicated support with this option, seeing it as a practical way to address the problem that did not impose a significant burden on large charities. Some stakeholders were concerned about how it would be implemented, and iwi did not consider that they should be subject to the changes.

Option 4 – Requirement for large charities to prepare distribution plan / policy (legislative change)

This option would require tier 1, 2 and 3 charities to provide and maintain a distribution policy or plan, which would require a legislative change to the Charities Act. The plan would need to set out, at minimum, when and how much funding will be distributed to further the charitable purpose, and how this would be achieved. For example, an unrelated business could raise funds through its transport logistics company and provide at least 50 per cent of profits from the company per annum to a charity. Providing a distribution plan could be a new registration requirement, or an ongoing obligation, like the current annual return obligation. Charities would also be required to declare that they distributed funds in accordance with their plan in their annual return.

Proactively released by the Minister for the Community and Voluntary Sector

Analysis

A distribution plan or policy that is published on the register will provide accessible information on how charitable funds will be used, which should include an explanation of the purpose of accumulating funds. This will provide clarity on how charitable purpose will be fulfilled and ensure that charities proactively consider how their funds will be used. However, this forward-looking approach (planning, rather than reporting) would not align with the current principle of providing historical information on how charitable funds have been used.

While sharing more information is proportional to the nature of the risk, and would help to hold charities to account, stakeholders thought the sector would be constrained by a distribution plan. They thought it would remove the flexibility needed to respond to unpredictable changes in community needs or external factors, potentially breach the trustee duty under the Trusts Act not to commit trustees to "future non-exercise of discretion" and put decisions about what is best for communities in the hands of donor organisation instead of communities.

Option 5 – Requirement for larger charities to distribute a minimum of five per cent of net assets per annum (legislative change)

This option would require tier 1, 2 and 3 charities to distribute five per cent of their net assets per annum.

A minimum distribution requirement would not provide more accessible information but would ensure some level of accumulated funds is regularly distributed, which may improve public trust and confidence. However, it goes beyond the "light-touch" principle of the Charities Act, which provides for a registration, reporting and monitoring framework. This option is also disproportionate to the level of risk – it would have significant compliance burden and behavioural consequences when there is limited evidence that current accumulation practices are uncharitable or invalid. It was not supported by most stakeholders because:

- if a charity is unable to meet the minimum requirements with surplus funds, they would have to use reserves or sell assets which will impact their ability to achieve their charitable purpose;
- it is inflexible to external influences outside of charities' control and how a charity may need to operate to achieve long-term goals;
- it may encourage charities to distribute the minimum, even if they could do more, or encourage riskier investments to generate higher returns;
- it could lead to damage to perpetual funds by requiring distribution of more funds than is available per year;
- any minimum distribution requirement is arbitrary and does not reflect the objectives and careful planning undertaken by Māori charitable organisations;
- restricting the ability to accumulate funds will adversely impact efforts to support the long-term prosperity of iwi; and
- "net assets" is not an appropriate indicator for various reasons, and the proposed five per cent baseline is short-sighted, and too high given the current low interest and low return market.

There were some stakeholders were not opposed, or even favoured, the minimum distribution option in principle. These stakeholders cited passive charitable funders only distributing funding for administrative costs and professional service fees. Most of these stakeholders thought that a minimum distribution requirement should only be enforced if it was paired with the benefit of a refund imputation credit scheme.

Proactively released by the Minister for the Community and Voluntary Sector

Other options suggested during consultation that we ruled out

Stakeholders made some suggestions during targeted consultation about other options we could consider. Table 7 below outlines these options and why we ruled them out/did not assess further.

Table 7: Accumulation of funds - assessment of other options raised through consultation

Option	Overall assessment
Educating the public on why accumulated funds are necessary	This could partially address the problem, but there are many diverse reasons that individual charities have accumulated funds and it would not make this information more accessible.
Requiring charities to have a reserves policy	Reserves are just one component of accumulated funds, and even if a charity has funds set aside for a specific purpose, this does not mean it needs to be reported as reserves, which is an accounting decision.
Providing guidance on the importance of reserves	Reserves are just one component of accumulated funds, and even if a charity has funds set aside for a specific purpose, this does not mean it needs to be reported as reserves, which is an accounting decision.
Increased reporting on accumulated funds in financial statements or performance reports	The annual return is the most appropriate place for more accessible accumulated funds information because the items can be searched across the whole sector and it is easier to read. While there are benefits to having the information in the financial statements, XRB set the standards for those reports.
Purpose based governance/new officer duty to act in best interests of charitable purpose	*This was considered as part of the role of officers/governance work.*

Proactively released by the Minister for the Community and Voluntary Sector

Multi-Criteria Analysis – accumulation of funds

Table 8: multi-criteria analysis on accumulation of funds

Key	++	much better than the status quo	+	better than doing the status quo	0	about the same as the status quo	-	worse than the status quo	- -	much worse than the status quo

	Effectiveness	Alignment	Proportionality	Accountability	Sector independence	Support from communities	Overall assessment
Option 1 - Maintain Status Quo	No change, this will not address the problem as it will not provide more accessible information on accumulated funds. This is despite Tier 1 and 2 charities soon being required to provide a statement of service performance, as this provides information on the outputs and outcomes they achieved to further their charitable purpose, but not an explanation of accumulated funds.	No change, the status quo does not introduce anything inconsistent with the current charities legal framework	Charities are already transparent about their accumulated funds (in terms of the amount of funds and how they are being spent), so it may be proportional to maintain the status quo. However, charities exist for the public benefit, and it is reasonable to expect the public to be able to easily access information on charitable funds, including why they have been accumulated.	Under the status quo, it's not clear whether decision making on accumulated funds is an effective use of charitable funds, so accountability is not maintained or improved under this option. The lack of information makes it difficult for the regulator to identify whether there may be education and support required around fund management.	Maintaining the status quo will mean that the sector continues to make independent decisions about how to use its funds.	There is strong support by charities, including iwi and Māori charities, to maintain the status quo. This is largely because they consider that charities already report enough information about their funds under current requirements. However, this option is unlikely to be supported by the public who cannot easily see information on why charities are accumulating funds.	The status quo will not address the problem (and therefore not achieve our objective), however, it maintains sector independence and has support from the sector, including iwi.
	0	0	0	0	0	0	0
Option 2 – Guidance on managing funds	It will not address the problem as it will not improve access to information on accumulated funds (even if it has other benefits). Guidance is not a barrier to transparency.	Providing guidance to support charities is consistent with the role of Charities Services under the Charities Act, and the sector seeks further support from Charities Services.	Guidance is an operational intervention that is likely to have minimal impacts on charities, including no new compliance burden. This is proportional to the nature of the small-scale problem.	This option may help to improve the accountability of decision making on accumulated funds, as it will be clear what charities should be considering when managing funds for charitable purpose. It could also improve transparency of decision making by the regulator when it comes to undertaking reviews or inquiries, and potentially other compliance actions.	As part of the consultation, the sector told us that this option may inadvertently constrain charities' independence to decide how to manage its funds or maintain its charitable purpose (essentially, the sector was worried that guidance would become quasi-standards).	The sector, particularly small charities, welcome further support from Charities Services. However, they have highlighted their concerns about guidance becoming quasi-standards, and that guidance may be unable to reflect the diverse perspectives of the sector. This option is not supported in the context of the problem definition/topic, which means it will be difficult to meaningfully promote.	While it does meet objectives of alignment, proportionality, and accountability, it will not address the problem and is not considered necessary by the sector.
	0	+	+	+	-	-	0

Proactively released by the Minister for the Community and Voluntary Sector

	Effectiveness	Alignment	Proportionality	Accountability	Sector independence	Support from communities	Overall assessment
Option 3 – Report reasons for accumulating funds in annual returns, for large charities, designed with iwi	This option will address the problem by ensuring there is accessible information on why funds have been accumulated. It will give charities the opportunity to provide an explanation or narrative on what accumulated funds are for, which is not always clear from the current annual return, or from the financial statements or performance reports. However, if it is not monitored and enforced by the regulator, the information provided in the annual return may not be effective at addressing the problem.	Charities are already required under the Charities Act to provide an annual return. The Act also provides for Charities Services to determine the content of the return, in consultation with the sector. Using the existing annual return framework to maintain public trust and confidence aligns with the existing framework.	Improving reporting is proportional to the problem that information is not accessible. Charities have many valid reasons to accumulate funds and are transparent about the funds they hold. Some explanation in the annual return is a minimal intervention to address a minimal problem.	The public, regulator, and other users (e.g. Inland Revenue) will have individual charity and sector level information on the reasons for the accumulated funds. This information can help to hold charities to account for the effective use of charitable resources. It will provide charities with the opportunity to share their decisions around accumulated funds, which may include providing assurance that they are used for charitable purposes.	Charities would maintain the ability to decide how to use their funds and be required to be clear on how charitable funds are used. This would not impact charities decisions on how to use their funds, and therefore maintain sector independence.	In our first round of targeted engagement, some large charities with business activities, grant making charities, and academics supported increased transparency on accumulated funds, and support improved reporting to achieve this. However, most of the targeted stakeholders did not support this intervention as they considered it unnecessary because of the current reporting standards that provides information on the amount of charitable funds accumulated. However, during another round of targeted consultation on the refined proposals, most stakeholders supported this as a pragmatic solution to the problem. Iwi may be more supportive of this option given that we updated the iwi design partnership proposal.	This option meets all the assessment criteria because it addresses the problem in a way that is proportional to the risks and is consistent with existing requirements of the Charities Act. While stakeholders initially raised concerns about this option, our final round of targeted engagement highlighted that there is some support for this, and that the sector considered it would continue to support their independence.
	+	+	+	+	0	0	+

Proactively released by the Minister for the Community and Voluntary Sector

	Effectiveness	Alignment	Proportionality	Accountability	Sector independence	Support from communities	Overall assessment
Option 4 – Requirement for distribution plan for large charities	A distribution plan or policy that is published on the register will provide accessible information on how charitable funds will be used, which should include an explanation of the purpose of accumulating funds. This will provide clarity on how charitable purpose will be fulfilled and ensure charities proactively consider how their funds will be used. Because this option would require charities to report or declare on whether they operated in accordance with their plan, which would enhance transparency to improve trust and confidence (assuming the reporting information or declaration was accurate).	This option is not consistent with the well-established framework of charities (and other public benefit entities) reporting *historical* information about the use of funds, rather than forward plans.	This option would require significant upfront work by the charity to establish a policy before it is a registered, as well as regular reviews. However, charities should already be considering such policies as part of good governance and financial practice. The regulator may also need to take a position on what plans are acceptable or unacceptable in terms of meeting the charitable purpose test. This could be helpful for ensuring entities such as businesses are established only for charitable purposes and not private profit. This will require some decision-making policy of the regulator, and more time/resources to consider applications. The efforts and costs on both sides go beyond the nature of the problem which is lack of accessible information, even though it should be expected that charities already have this information in place.	Under this option, charities must plan out how they are going to use their charitable funds. The public and the regulator could hold charities to account for those decisions because this information would be publicly available and would be reported on as part of annual return obligations.	The sector thought that this option may take charities away from getting on with their charitable work to focus on administrative requirement that doesn't give them the independence to adjust funding distribution to changes in community demand and other external factors. However, charities should already be thinking about how they are going to use their funds – a key expectation for the benefit of being registered. This option is not consistent with the principle that charities are self-governing and the regulator does not need to be involved in their affairs, so long as they are established for charitable purposes and meet their obligations. If charities feel they have lost control of their funds, they may choose not to register, which does not support a thriving charitable sector, or the providing the transparency and accountability envisioned by the Charities Act.	There was strong opposition to this option when we undertook targeted consultation. This option was not supported because it was considered too inflexible and administratively intensive (this may be because we used the term "plan" instead of "policy" which implies a more rigid approach and perhaps that it would be rare/difficult to change like their rules document). Iwi charities noted that they already have distribution policies, so this option would not impact them in this regard. Because of lack of stakeholder buy-in, this option could be difficult to meaningfully enforce, which may reduce its effectiveness.	This option may address the problem and help with accountability of decision making on the use of charitable funds. But it is inconsistent with the current framework and light-touch regulation, which does not support sector independence, and it is not supported by stakeholders.
	+	-	-	+	-	-	-

Proactively released by the Minister for the Community and Voluntary Sector

	Effectiveness	Alignment	Proportionality	Accountability	Sector independence	Support from communities	Overall assessment
Option 5 – Minimum distribution 5% p.a. for large charities	This option will not improve accessibility of information on accumulated funds, however, it will be clear what charities must distribute and so concerns about reasons for accumulated funds may be limited.	This option is not in keeping with the Charities Act framework, which only provides for a registration, monitoring and reporting scheme. Minimum distribution in other countries is part of tax requirements because of tax avoidance interests. This approach would not align with the Charities Act, which is a light-touch regulatory framework of a registration, reporting and monitoring scheme.	This option is not proportionate to the risk. There is some evidence of lack of distribution of funding, but this could be for valid and charitable reasons. This option would impose significant costs on charities and the regulator and may have unintended consequence on funding sustainability and behaviours. This is not commensurate with the problem of accessibility of information.	This would remove some decision-making about funding distribution from charities. Accountability would therefore consider whether the charity complied with the requirement, rather than the robustness of their decision.	This option does not support sector independence as it takes away decisions about funding distributions from charities and puts them in the hands of the Government. If charities feel they have lost control of their funds, they may choose not to register, which does not support a thriving charitable sector, or the providing the transparency and accountability envisioned by the Charities Act.	There was very strong opposition from stakeholders to this option in consultation from 2019-2021, either in principle or the proposed 5 percent of net assets. Stakeholders thought that this option was inflexible, did not recognise the careful planning and responses by charities, is an arbitrary intervention to an arbitrary problem, and would have significant adverse consequences on funding arrangements and behaviour. Lack of stakeholder buy-in will make it difficult to enforce. However, it is noted that some stakeholders support it (if it is paired with new tax benefits).	This option does not address the problem and does not meet most of the criteria.
	0	- -	- -	0	- -	- -	- -

Proactively released by the Minister for the Community and Voluntary Sector

Conclusions

The preferred option is Option 3 – Large charities (tier 1, 2 and 3) are required to report the reasons for accumulated funds in their annual return, and Charities Services partner with iwi to design the annual return form changes.

This option meets our assessment criteria. This is because it:

- addresses the problem, by providing charities with the opportunity to succinctly and clearly explain why they have accumulated funds for the previous year in a way that is accessible to users of that information;
- aligns to current requirements by building on the existing annual return;
- is a low-cost, non-legislative change that would have minimal additional compliance burden on large charities, which is proportional to the nature of the problem (better access to information);
- aims to incorporate a te ao Māori view of accumulation of funds;
- assists in holding large charities to account for decisions to accumulate charitable funds, and helps the regulator and other interested parties to make informed decisions relating to this information;
- does not impact charities' ability to manage their funds as they see fit, therefore maintaining sector independence; and
- has support from some stakeholders, as demonstrated by recent targeted engagement and the 2019 consultation.

The impact we expect to see from this intervention is more accessible, easy to understand information on why funds have been accumulated. The new information will provide sector-level data that is not available at present, that Charities Services and other interested parties, such as Inland Revenue, can use to inform compliance activities. It can also benefit charities, by helping them to demonstrate to funders that they need more financial support even if they have accumulated funds. They may be more likely to secure funding if they can provide this narrative.

The benefits/effectiveness of this option assume that the reported accumulated funds purposes in the annual return are accurate, meaningfully descriptive, and the public and other interested parties will use the information.

Risks and mitigations

A risk with this option is the residual lack of support from the sector to increase reporting or disclosure requirements. This includes from some iwi Māori charities, who do not consider that any new changes should apply to them because of their existing distribution policies and other transparency measures, as we have not consulted them on the finalised option that the annual return form would be designed in partnership with iwi. We consider the impact of the option will be low (including low cost) given that it will apply to large charities that have the resources to comply, and it is seeking a small amount of information based on matters the charity will have already considered. A potential lack of stakeholder buy-in is also mitigated by the requirement for Charities Services to consult with the sector on changes to its annual return form.

There is a risk that the information about reasons for accumulated funds may be missed if it does not sit in the financial statement or performance report as well as the annual return. To address this, we

Proactively released by the Minister for the Community and Voluntary Sector

will engage with the XRB. As part of targeted engagement, the XRB commented that they would like to consider the stakeholder feedback we received on reporting to help promote improved disclosure on accumulated funds in the financial statements.

There is also a risk that the requirement will not capture asset-rich, cash-poor charities reporting under tier 4. This is because the reporting tiers are based on annual expenditure, rather than the total financial resources available. However, the number of seemingly large charities under tier 4 is likely to be very low (we are unable to identify how many because tiers are based on annual expenditure not assets, and tier 4 charities do not have to report assets), and the regulator can use existing tools to request more information from these charities about their accumulated funds if needed. Focusing on larger charities rather than targeting all charities at the expense of small charities who are lower risk and unable to meet increased requirements is preferred.

Other similar jurisdictions (Australia, the United Kingdom, Canada and the United States) do not appear to request specific information in their annual returns about why accumulated funds are held. While the preferred option proposed does not align with current practices in similar jurisdictions, we consider it best reflects the nature of the different settings (the regime of the Charities Act) and interests (addressing the problem) in New Zealand.

Implementation considerations

Under section 42 of the Charities Act, Charities Services prescribes the form of the annual returns, the particulars to be contained in the returns, and directions to be complied with in the preparation of the returns. The Charities Act also allows the return to have different requirements for different types of entities. This means that no changes to the Charities Act are required to implement our recommended option.

Charities Services have an established process to make changes to the annual return. This includes consulting with the representatives of the charitable sector (usually the Charities Sector Group), which they must do under section 72A (6) of the Charities Act. Charities Services have advised that they are currently undertaking a review of the annual return form and will be consulting on proposed changes in the coming months.

There are several different ways that the annual return could seek information on why accumulated funds are held, and this is best determined with the sector, iwi and Charities Services. There are no costs to implementation of the preferred option, as reviewing the annual return is core business for Charities Services and can be achieved through existing resources.

Summarise the costs and benefits of your preferred option

Table 9: accumulated funds impact on affected groups

Affected groups	Comment	Impact
Additional costs of the preferred option compared to taking no action		
Regulated groups (tier 1 -3 charities)	Large charities tend to accumulate funds and should have considered what these funds are for. This means they will already have a plan or explanation. Extra minimal reporting requirements to provide the explanation is going to have little compliance burden and therefore minimal costs. There will be no to very low burden for those already reporting the information via other channels.	*Low*

Proactively released by the Minister for the Community and Voluntary Sector

Regulators (Charities Services)	There will be costs on Charities Services to establish the new reporting requirements. If new accumulation of funds information is being provided in the annual return, it is expected that this information is being monitored and responded to by Charities Services where necessary. However, Charities Services' risk-based approach to compliance does not mean they are reviewing all annual returns, so they may not pick issues up. This mismatch between expectation and reality could be costly to Charities Services' reputation. However, if Charities Services does monitor the information to help inform their monitoring and compliance activities, this will impose a new small cost.	*Low*
Iwi/Māori	We consider the proposal will have a minimal compliance burden on iwi/Māori because it requires information they already know or have about the use of their funds.	*Low*
Public	None (except time required to source the information from the register).	*Low*
Total monetised costs	No monetised costs	*N/A*
Non-monetised costs	Compliance and implementation	*Low*
Additional benefits of the preferred option compared to taking no action		
Regulated groups (tier 1-3 charities)	Large charities can accumulate significant funds and the public and media have previously raised concerns about this. This option gives charities the opportunity to provide an explanation for that funding, instead of assumptions being made about non-charitable purposes for the funds. This may benefit to the charity – the increased transparency may support them to get more public donations and funders (as assumptions won't be made that they have enough funding to further charitable purpose, if funds are set aside for a particular purpose).	*Medium*
Regulators (Charities Services, Inland Revenue)	The option could provide additional information to support compliance activity, such as charitable purpose reviews. It is likely to be of benefit to Inland Revenue, as additional information that could help direct their tax avoidance compliance activity.	*Medium*
Iwi/Māori	No meaningful benefit to iwi charities who accumulate significant funds to benefit the iwi whānui for generations to come, because they already have distribution policies and strong accountability to their members in terms of how funding is distributed. But like other large charities, it provides the opportunity to be explicit about the reasons for accumulated funds.	*Low*
Public	The public (and funders) can obtain and understand information easily on why charities have accumulated significant funds – this will help to promote public trust and confidence.	*Medium*
Total monetised benefits	No monetised benefits	*N/A*
Non-monetised benefits	Transparency and reputation	*Medium*

Proactively released by the Minister for the Community and Voluntary Sector

Section 2.3: Governance of charities

Status quo

Who is an officer and what do they do?

The Charities Act does not outline the role of officers, instead the Act only defines who can be an officer in section 4 (interpretation of officer), and section 16 (qualification of officers).[5] Charities need to certify their officers are qualified as part of the registration system.[6]

Charities Services guidance says that "Officers of a charitable entity are responsible for ensuring that their organisation is run in accordance with its rules and the requirements of the Charities Act. An officer needs to ensure that their organisation's funds and assets are used exclusively to advance the charitable purposes of the organisation. The organisation's charitable purposes are stated in its rules document, so one of the most important roles of an officer is to have a thorough understanding of these rules."

Charities Services can disqualify officers if the charity has been deregistered for serious wrongdoing.

The Charities Act does not specify governance requirements

The Charities Act does not reference governance duties of officers, or the relationship of duties under the Charities Act with other legislation (for example the Trusts Act, Charitable Trusts Act, Companies Act and Incorporated Societies Act). There are no governance requirements an entity must meet to be able to register as a charity. An officer of a registered charity may also be a trustee of a trust, director of a company or an officer of an incorporated society, for example. Each of these Acts have different duties for these roles, for example, some of the mandatory duties in the Trusts Act requires trustees to:

- know the terms of the trust;
- act in accordance with the terms of the trust;
- act honestly and in good faith;
- exercise your powers for a proper purpose; and
- further the purpose of the trust.

The Incorporated Societies Bill proposes to add duties for officers of incorporated societies, and other governance elements into the legislation, for example, what is required in an incorporated society's constitution. The Bill is at Select Committee stage (as at October 2021).

Proactively released by the Minister for the Community and Voluntary Sector

[5] Charities Act – section 4 determines an officer as a trustee of trusts, or for other entities, a member of the board or governing body (if the entity has one) who has a position that exercises significant influence over the management or administration of the entity.

[6] Charities Act – section 16 outlines the reasons that a person will be disqualified from holding an officer position for example, an individual who is an undischarged bankrupt, under the age of 16, or who has been convicted of dishonesty crimes, tax crimes or offences under other listed Acts.

Many governance elements are decided by the charity in its rules documents. The rules document sets out the organisation's charitable purpose, what they do and how they operate. Rules can be the trust deeds of trusts, or constitutional documents of other entities. Charities are required to submit their rules document as part of the registration process. The rules are uploaded to the charities register for transparency to the public. There is no legal requirement of what is required in the rules document for a charity, although other legislative frameworks specify what is required for constitutional documents. Charities are required to notify Charities Services of any changes to its rules document within three months under section 40(1)(e) of the Charities Act. We have anecdotal evidence that for many charities, the rules documents are often forgotten about, and that many officers are not aware of the rules document.

The rules documents are evidence that the charity has some governance processes in place. As the Charities Act provides a status, it relies on other legislation to provide the legal and governing structure. Charities Services check the rules documents prior to registering the entity for detail on how the entity will meet its obligations under the Charities Act, for example, by checking for the entity's charitable purpose and clauses around preventing private profit. Charities Services also look for governance clauses such as who governs the organisation and what are the governance processes such as how the entity will manage conflict of interests. These governance clauses are not formally required under the Charities Act but are a proxy to maintain public trust and confidence and a measure of whether the entity will be able to meet its obligations under the Charities Act. There is no requirement to review the rules document in the Charities Act.

What is the policy problem or opportunity?

There are two key problems in this area:

1) The role of officers in relation to governing charities is unclear; and
2) Poor governance is a key issue the charitable sector faces and may impact the successful running of charities. This can prevent charities from meeting their obligations under the Charities Act which potentially impacts public trust and confidence in the sector.

Governance issues that some charities in the charities sector face

The role of officers of charities is unclear

As the Charities Act does not have any detail on the role of officers, it is potentially unclear what an officer's role involves in relation to the charity. The duties on officers of charities have been developed through common law and the interface with other legislation. This means that officers of charities may have different duties depending on the entity's structure. We have not been able to find any common law specific to duties on officers of charities. Instead, the common law suggests that if an individual has duties imposed from other legislation for an entity that is also a registered charity (for example trustee or director duties), these duties apply to the governance of the charitable activity as well. This is because the Charities Act provides a status and the other legislation determines the prevailing legal framework.

The sector is reliant on guidance, common law and the requirements in other legislation to determine what their role is as an officer of a charity. There is clarity for the other roles people may hold as officers, for example, trustees of trusts or directors of companies under the parent

Proactively released by the Minister for the Community and Voluntary Sector

legislation, however, there is little clarity on what an officer's role is specific to being a registered charity and meeting the obligations under the Charities Act.

Poor governance could include business decisions that put charitable funds at risk, private profit, and accumulating funds without valid reasons

Charities need to ensure the organisation's funds and assets are used to advance the charitable purpose of the organisation. Poor governance of funds might result in business decisions that put charitable funds at risk, private profit or accumulating funds without valid reason. Charities that do not have business activities may not, in some cases, have robust financial procedures, or put charitable funds at risk by not managing conflicts of interest.

We have heard that governance capability in the sector is limited, particularly in small, volunteer-run charities

Smaller charities are often run by volunteers who may not have the same governance experience as paid employees in a larger charity. A strong theme from the 2019 submissions was that people involved in running charities (particularly volunteers) are often time-poor and additional requirements on charities can be a compliance burden. Officers may not have the time or experience to develop a sound governance approach for their charity.

Charities Services have said that governance issues are an area they hear a lot of complaints from the sector about, and often limits the charity's ability to meet its obligations under the Charities Act. For example, we have heard during stakeholder consultation that many of the sector do not have the financial capability to meet the reporting standard required which may contribute to the many charities who fail to file, and risk being deregistered.[7]

Charities Services received 48 complaints about governance in the year to June 2021. They also received 18 complaints about the potentially related issue of misappropriation of funds. In a survey of public trust and confidence in the charities sector that asked which characteristics give you trust and confidence in an individual charity, "they are well managed" was selected by 43 percent of respondents.[8]

Charities Services' approach is to provide education and support for most low-level governance complaints. They do not intervene in governance disputes as a mediator. Charities Services investigate governance complaints when it could connect to serious wrongdoing.

An example of poor governance contributing to the gross mismanagement of funds (a factor of the serious wrongdoing offence) is the 2020 Samoan Independent Seventh Day Adventist Church case. In this case, the financial administrator was convicted for stealing over $1.6 million of the entity's funds, and the treasurer took $0.5 million of the entity's funds as undeclared income. The Board considered

Proactively released by the Minister for the Community and Voluntary Sector

7 In 2019, 391 charities were deregistered for failing to file their annual return for two or more years. In 2020, 218 charities were deregistered for the same reason.

8 Research New Zealand survey: Public trust and confidence in the Charities Sector (#5236), 24 June 2021.

that the entity's poor financial mismanagement gave the opportunity for the individuals to unlawfully take the entity's funds due to improper record keeping, financial controls, and oversight over individuals.[9]

Charities are not using the rules document as a governance tool

We have heard that for many charities, the rules documents are often forgotten about, and that many officers are not aware of the rules document. This means that many charities will not be actively considering whether they are continuing to meet their charitable purpose (a key obligation of being a registered charity), or if their governance processes are up to date.

Impact of these governance issues

These governance issues have a cumulative effect for the operation of the charity. We heard from stakeholders that it is critical that the standard of governance is improved. Governance is a broad issue with many facets, however, we heard from stakeholders and Charities Services that by addressing the above risk areas, the potential benefits of governance improvements include:

- enhancing the professionalism of the sector;
- promotes greater accountability and transparency, particularly among smaller charities which may not have strong governance frameworks in place;
- ensuring that the charities' funds and activities are advancing its charitable purpose; and
- encouraging good practice in financial management, reporting standards, record keeping, compliance, selection of officers, and managing conflicts of interest.

While there are many elements of governance that could be considered, we consider it important that the charities sector largely remains self-governing and be able to determine for themselves who should be involved in the charity. The charitable sector thrives through the involvement of people with passion for the cause, and we do not consider it to be the Government's role to determine who can be involved in a charity. We consider that a focus on the governance processes of charities, rather than who can be involved, is the most appropriate way to upskill the sector to be able to meet the obligations under the Charities Act and reduce the risk of decisions that put charitable funds at risk.

Describe and analyse the options

The New Zealand charities system relies on charities to be self-governing. We have not considered options that change the limited role of Charities Services to resolve governance issues in charities (for example, as a mediator) as this has been considered a fundamental change to the role of the regulator which has been deemed out of scope.

Option 1 – Status quo

No change in Government's role in governance of the charities sector. Officers would continue to rely on other legislation, common law and guidance to understand their governance responsibilities. Charities Services would continue to provide official guidance and support. The sector (for example,

9 Deregistration decision: Samoan Independent Seventh Day Adventist Church (CC31057).

Proactively released by the Minister for the Community and Voluntary Sector

lawyers in the community sector, umbrella organisations and representative groups) would likely continue to provide guidance and support.

Officers in the Charities Act have factors that disqualify them from being able to participate in the system, but no outline of their role.

Analysis

The status quo does not clarify the role of officer any further as there is nothing in the Charities Act to base this on. Instead, the role of officer continues to develop through the interface with other legislated governance roles (for example, trustees of trusts, directors of companies, and officers of incorporated societies). The status quo assumes that the other legislative frameworks that charities belong to, shape the role of an officer, along with best-practice in governance. The status quo encourages sector independence and aligns with the way the Charities Act is positioned as a fairly enabling Act as it encourages charities to self-govern in a way that works for them and their other legal obligations.

While there is a significant amount of guidance already available in the sector, poor governance remains an issue for the sector. The Incorporated Societies Bill proposes several new governance requirements which may contribute to lifting the standard of governance for part of the sector (24 per cent of charities are incorporated societies).

Option 2 – additional guidance around governing charities

Option 2 would involve Charities Services producing a comprehensive best-practice guide that outlines best practice governance when running a charity, and how the obligations under other legislation fit within the obligations to become a registered charitable entity. The guide could be supported by tools such as a self-evaluation tool like one developed in Australia. The self-evaluation tool helps charities assess whether its governance could be improved. This option would mean all the guidance is in one place. Option 2 does not require any legislative change.

Analysis

This option is unlikely to make a difference as there is already significant guidance produced by the sector and Charities Services. As the charitable sector is so large and diverse, with many organisations considering themselves as leaders of the sector and producing their own guidance, it would likely be the same or more confusing than the status quo. There may be some benefit in streamlining and consolidating the existing guidance material, however this could be difficult to achieve due to the size of the sector and the number of influential players who have produced guidance, including Charities Services.

Option 3 – Charities review rules document annually, and role of officer is included in the Act

Option 3 proposes legislative change stating that charities are required to review their rules document annually (implemented by Charities Services), and more detail about the role of the officer to support the charity to meet its obligations to be included in the Charities Act.

Charities Services review charities' rules documents when they are submitted for registration and look for the following clauses in the document to help them determine if a charity will be able to further its charitable purposes:

Proactively released by the Minister for the Community and Voluntary Sector

- The organisation's charitable purposes;
- Powers clauses – the things the organisations can do to achieve its purposes;
- Clauses that prevent private profit;
- Winding-up clauses, in case the charity ceases to operate, and is voluntarily or involuntarily wound up;
- Governance clauses such as who governs the organisation, how decisions are made, and how conflicts of interest are managed; and
- Amendment clauses that outline how the charity can change its rules.

This option proposes legislative change stating that the rules documents are required to be reviewed annually and that charities are required to certify that they have updated their rules within the last year as part of their annual reporting requirements. Anecdotal feedback suggests that the rules documents are not reviewed often, and many involved in the operation of the charity are unaware of the rules documents. As the rules document governs the operation of the charity, reviewing it more frequently could encourage the charity to better consider its governance and operations, and how it is meeting its charitable purpose to make sure there is no mission drift. The key areas that would be reviewed are the entity's activities and use of funds and making sure they still advance the entity's charitable purpose. The other key benefit would be to make sure the governance processes are up to date – for example, checking whether there has been a change in officers that needs updating, or checking that financial management, conflict of interest, or officer appointment processes are still appropriate and relevant. Reviewing the rules annually would build the governance capability in the charitable sector as officers would become familiar with the governance processes of the organisation.

Charities Services would apply the same compliance response as the reporting requirements where they give significant support to the charity to help them meet the obligation, but a charity could be deregistered for failing to notify that the rules have been updated for more than two years.

Some charities may not be able to review their rules annually due to their rules being in statute, or parent organisations setting the rules documents. This issue can be addressed during the legislative drafting process.

This option was not consulted on during stakeholder engagement. Charities Services consider this option has merit, and that governance in the sector would likely improve if charities had a greater focus on their rules document. However, some of the sector may consider this to be an additional compliance burden. We have considered this in conjunction with the benefits proposed through reducing the reporting requirements for small charities.

Under section 10(a)(i) of the Charities Act, Charities Services have a role to educate and assist charities in relation to matters of good governance and management, for example, by issuing model rules. We propose an operational recommendation for Charities Services to develop model rules with the sector to compliment the guidance Charities Services have already developed on rules documents. This would support the sector to develop their rules documents, and reduce the time taken to get them developed in the first instance. Considerable support already exists to help some entities develop their rules documents, for example, MBIE has model rules for incorporated societies.

Option 3 also proposes a small addition to the legislation to explicitly show that the role of the officer is to support the charity to meet its obligations. This would provide clarity for officers that they are (collectively) responsible for governing the charity in a way that ensures the funds activities of the entity are advancing the entity's charitable purpose.

Proactively released by the Minister for the Community and Voluntary Sector

Analysis

Option 3 supports the charitable sector to remain a largely self-governing sector, with a slight nudge to encourage a more regular focus on governance and operations. We anticipate that a review of the rules document would include checking that the charitable purpose and activities are still relevant, and whether there are any updates to governance processes or individuals that need to be made.

We acknowledge that requiring charities to review their rules document annually is potentially an additional compliance burden on charities. As most charities will have Annual General Meetings (AGM), this is an appropriate time to review the rules document. Due to the low frequency of the review, we do not consider the additional compliance burden to be significant. Charities Services supports this assessment based on their interactions with the sector. There is also significant support available for the sector to help them to review their rules documents for those who are new or unfamiliar with some governance processes. For example, CommunityNet Aotearoa has a guide to running an AGM which includes guidance on changing the rules or constitution during an AGM, as well as a wealth of information and templates on other governance processes.

This also provides greater assurance to Charities Services that charities are meeting their charitable purpose and there is no mission-drift. This means that the Charities Services may spend less time doing charitable purpose reviews.

Option 3 is likely to contribute to improved governance in the sector in a way that is practical and easy for the sector to understand and apply. We heard from stakeholders during consultation in 2019, and consultation on related issues in 2021 that improving governance processes will greatly improve the operation of the charity. Charities Services consider that many of the complaints to Charities Services that relate to governance could be addressed by the charity having robust processes in place to work through the issues, and for people involved in the charity to be aware of the processes. We consider that option 3 will improve the capability of the charitable sector as officers will have to be aware of the rules document and participating in discussions around the governance processes of the organisation.

Charities Services support the idea of working with the sector to develop model rules, subject to resourcing and other work pressures.

Option 4 – Add four duties on officers into the Charities Act, supported by guidance

Option 4 proposes to add four explicit duties for officers of charities in the Charities Act. These duties were considered as the ones most relevant to governing a charity and helps address the key governance challenges we know of. This option is discussed further in the compliance and enforcement section.

An officer of a registered charitable entity would have duties to:

- Act in good faith and the charity's best interests – Officers must consider what would be in the best interests of the charity and would further its charitable purposes (as set out in the charity's rules document) when making decisions.
- Act with reasonable care and diligence – Officers can guide and monitor the management of the charity. They need to understand and keep informed about the charity's activities and finances. An officer can rely on the special knowledge or expertise of another person, adviser

Proactively released by the Minister for the Community and Voluntary Sector

or expert, if they adequately inform themselves and make an independent assessment of that information or advice.

- Ensure the charity's financial affairs are managed responsibly – Officers are responsible for the financial sustainability of their organisation and ensuring funds and assets are used to advance the organisation's charitable purposes. This responsibility does not mean that each officer needs to have financial expertise or access to bank accounts, but that officers are informed enough to have confidence in the charity's processes for managing finances and can contribute to financial decisions where required.
- Manage any perceived conflict of interest – Officers are responsible for ensuring the charity has a process to manage conflicts of interest or perceived conflicts of interest.

These duties will not prevent the officer from meeting obligations in other legislation. Instead, it serves as a minimum framework of governance for those who do not have governance requirements under other legislation (for example, a trustee of trust or a director of company). This in turn, would improve governance by requiring officers to think about these duties and how they are meeting them. These four duties are common across the duties in other relevant legislation (Trusts Act, Companies Act, Charitable Trusts Act and the Incorporated Societies Bill), although the other Acts have additional duties that we have not considered as they are not explicitly relevant to running a charity. This means that directors of companies or trustees of trusts, for example, will be subject to the more stringent duties in the Companies Act or Trusts Act, but charities that do not have a legal structure (unincorporated societies) will now have duties to comply with.

Charities Services already have a role to educate and assist charities in relation to good governance and management and would be able to provide guidance on the new duties as part of this. Option 4 also proposes that Charities Services develop a self-evaluation tool, like the Australian self-evaluation tool, to help officers to understand whether they, and the charity, are meeting their obligations. Breaching a responsibility would not trigger a warning or more significant sanction, but consequences could apply (as they do currently) for serious wrongdoing if the breach meets the threshold – for example, not managing the charity's financial affairs responsibly could equate to a gross mismanagement of funds.

Option 4 retains the self-governing model for the New Zealand charities sector. It is the officer and charity's responsibility to ensure that the duties are met. The regulator will provide guidance and support the charities through a self-assessment. The regulator will only take regulatory action if there is a breach of the duty akin to serious wrongdoing (for example, gross mismanagement of funds). The compliance and enforcement tools that the regulator has available are outlined in section 2.8: compliance and enforcement.

Analysis

This option was consulted on during targeted stakeholder consultation, and themes from the 2019 public engagement were also taken into consideration. In 2019, we posed that some of the issues relating to the obligations on charities (such as accumulation of funds) could be addressed through introducing governance standards and asked if submitters thought governance standards could help charities to be more effective; and if the Australian governance standards could be adapted to work in New Zealand.

During targeted engagement in 2021, there was support for having officer duties of some sort. Just under half of submitters supported having officer duties in legislation, and a third supported having duties in a mandatory code. We asked submitters if the proposed duties are practical and feasible,

Proactively released by the Minister for the Community and Voluntary Sector

and all who commented on that question agreed that the duties are practical and feasible. Many felt the officer duties were a minimum standard for good governance.

However, many submitters provided feedback on the complexities with the duties and other legislative frameworks. Submitters also questioned how the duties would work in practice, and considered duties would be an additional compliance burden, particularly for small, volunteer-run or unincorporated charities.

We consider that the officer duties would improve governance across the sector by providing a minimum governance framework for entities that do not already have a legal governance framework to adhere to. Officers would be required to think about the duties and how they are meeting them, which may be a change for some officers. This would be a considerable additional compliance burden on some officers.

As the Charities Act provides a status, rather than a legal governing framework, we consider that including governance elements extends the Act too far beyond its current scheme as a registration, reporting and monitoring regime.

Duty to act in the best interests of the charity and for its charitable purpose

We sought feedback on the proposed duty to act in good faith and the charity's best interests. The intent of this wording is consistent with the Trusts Act, Companies Act and the Incorporated Societies Bill. Feedback from stakeholders was that the key difference between a company and a charity is that a charity is a purpose-based organisation. Stakeholders suggested that a company needs to act in the best interest of the company, but as charities need to maintain charitable purpose, officers of charities should have regard to this as part of their responsibilities.

The Australian Governance Standards requires responsible persons (the equivalent of officers) to act in good faith in the charity's best interests and to further the purposes of the charity. In England and Wales, members of Charitable Incorporated Organisations must exercise their powers in the way that the member decides, in good faith, would be most likely to further the purposes of the Charitable Incorporated Organisation. In Scotland, a charity's trustee is required to act in the interests of the charity and seek, in good faith, to ensure that the charity acts in a manner which is consistent with its purposes.

Duty to act with reasonable care and diligence

One stakeholder, a lawyer, commented on this proposed duty. They strongly recommended that this duty is not included in the Charities Act as its relationship with the underlying law, predominately the Trusts Act, is too complicated. In the Trusts Act, the duty of care is applied differently based on the circumstances.

However, the Incorporated Societies Bill, Companies Act, Trusts Act, Australian Governance Standards and the United Kingdom, all impose a duty of care on the persons responsible for the organisation. These generally mean that the officer must exercise the care and diligence that is reasonable in the circumstances, considering the nature of the organisation, the nature of the decision, and the nature of the responsibilities undertaken by them.

We consider this duty is sound and common in governance, and that there is a lot of guidance for the sector about what this duty means.

Duty to ensure the charity's financial affairs are managed responsibly

Proactively released by the Minister for the Community and Voluntary Sector

The Australian Governance Standards requires that responsible persons must ensure that the financial affairs of the charity are managed responsibly, and the UK requires that a charity's trustees manage the charity's resources responsibly which includes implementing appropriate financial controls and managing risk.

One stakeholder commented that a duty to be responsible for the financial sustainability of the organisation is different from ensuring funds and assets are being used to advance the organisation's charitable purpose.

Duty to disclose and manage perceived or actual material conflicts of interest

Stakeholders consider this is one of the most important duties. We did not receive any feedback on this wording. Charities Services already consider if charities have conflicts of interest clauses in their rules documents upon registration, so this should not be a significant change for the sector.

Proactively released by the Minister for the Community and Voluntary Sector

Multi-Criteria Analysis: Governance of charities

Table 10: multi-criteria analysis – governance of charities

Key									
++	much better than the status quo	+	better than doing the status quo	0	about the same as the status quo	-	worse than the status quo	- -	much worse than the status quo

	Effectiveness	Alignment	Proportionality	Accountability	Sector independence	Support from communities	Overall assessment
Option 1 - Maintain Status Quo	The status quo will not address the problem, as it does not improve clarity for the role of officers or suggest any changes for how charities are governed.	The status quo does not alter the fundamentals of the Charities Act being primarily a registration and reporting regime.	The regulatory response under the status quo is proportionate to the risk. Charities Services have an investigations team to investigate serious wrong-doing. Most instances of poor governance will not be significant enough to constitute serious wrong doing so will not require any extra regulatory involvement by the investigations team. Charities Services prioritise their resourcing to educating charities as per their risk-based operating model. The status quo is unlikely to increase public trust and confidence in the sector.	Accountability is limited. Decisions about a charity's operation are made by the charity. The status quo does not place accountability on individuals. There is limited ability for intervention if there is poor governance.	The status quo supports sector independence. It gives charities the autonomy to interpret the role of officers how they choose. It also allows charities to determine their own governance approach.	Overall, this is not well supported by the sector (based on consultation in 2019 and 2021). The sector sees governance issues as a key issue and many gave examples of governance issues in their charity. Though the sector does see significant value in having autonomy to determine their own governance approach.	The status quo relies on other legislation and governance to determine the role of officer and set the governance framework. It supports sector independence by encouraging self-governing.
	0	0	0	0	0	0	0
Option 2: best practice guidance on governing charities	There is already a significant amount of best-practice guidance produced by Charities Services and the sector. Further guidance is unlikely to make the role of officer clearer without changes to the Charities Act as there remains assumptions and gaps about the role of the Act to address governance issues and therefore will not be effective at addressing the problem. However, it is unlikely to make the problem any worse.	This option does not change the fundamentals of the Charities Act. Charities Services already have the mandate to provide education, however this option would require Charities Services to devote further resources into developing the guidance.	The costs of this option are minimal. The guidance would likely be funded from Charities Services existing baseline. This option does not add any additional formal obligations. This option is unlikely to increase public trust and confidence in the sector as there is no requirement to follow the guidance.	Accountability for decision-making remains unclear for this option. There are no decisions that need to be made. Following the guidance is voluntary rather than mandatory.	Option 3 recognises the independence of the charitable sector as it does not prescribe mandatory governance requirements. This option recognises the importance of a thriving charitable sector, but the size of the sector and large amount of influential bodies may make it more confusing about where to go for accurate information.	Based on stakeholder feedback in 2019 and 2021, about a quarter to a third of stakeholders support this option. This is because it provides the sector with independence and does not add any additional compliance burden on to the sector. However, this option will recommend ways of governing charities for the charities to take on board, if they wish.	There is significant guidance already, further guidance is unlikely to be effective.
	0	+	0	0	0	0	0

Proactively released by the Minister for the Community and Voluntary Sector

	Effectiveness	Alignment	Proportionality	Accountability	Sector independence	Support from communities	Overall assessment
Option 3: review rules annually and role of officer in Act	This provides slight clarity over the role of officer. It encourages charities to review their governance and operation processes so may contribute to increased standards of governance across the sector. There is a risk that the review of rules becomes a compliance activity and the value in improving governance is not achieved but we consider that overall the despite the compliance burden, this will contribute to a more thriving charitable sector overall.	This is not a fundamental shift of the intent of the Charities Act. The Act remains primarily as a registration and reporting regime.	This option imposes a slight cost on the charities and the regulator – the charities need to review their rules documents more frequently than they may have before which may result in an additional compliance burden for the charity. The regulator considers if the charity has reviewed its rules document as part of its role in assessing if a charity meets the reporting obligations. Charities already have an obligation to notify Charities Services of changes to the rules document but requiring annual reviews could increase public trust and confidence by providing more certainty over the entity's governance and operation.	Accountability on the charity is increased, but charities are still left to determine the content of their rules documents. Charities Services' processes around reviewing charities' reporting are changed slightly.	Option 3 continues to recognise charities as self-governing and the importance of independence to contribute towards a thriving charitable sector. It imposes a slight obligation on charities to encourage regular reviews of its governance and operation.	It is unclear what stakeholders think about this option. It is likely that the sector, particularly small charities, will see this as an additional compliance burden to meet. Some charities also don't have the capacity to review their rules – for example, charities with rules in statute or defined by third parties.	Regularly reviewing rules adds a slight compliance burden on charities, in particular, small charities are most likely to feel the compliance impact but is likely to contribute to improved governance in the sector overall.
	+	+	+	+	0	-	+
Option 4 – Add four duties on officers into the Charities Act, supported by guidance	Addresses the identified problem by developing a minimum standard of governance for officers of charities which will contribute to improving the standard of governance for charities and clarifying the role that officers have as part of a charity.	This goes beyond the fundamentals of the Charities Act as a registration regime. The option aligns with other legislation such as the Companies Act, Trusts Act, Charitable Trusts Act and proposed Incorporated Societies Bill.	Increases the formal obligations on officers. While some argue these obligations already exist in the common law and for directors of companies, trustees of trusts and officers of incorporated societies, there is a general perception that adding the duties into legislation is an additional obligation. The regulatory response is likely to be light in comparison to the obligations posed on officers.	Accountability on officers of charities is increased. This increases the public trust and confidence in how charities are operating. Charities Services are unlikely to change their regulatory approach and would likely continue to use education and guidance as their primary tool to support officers to meet their duties. If the breach of duties equated to serious wrongdoing, Charities Services could use their more significant tools. This means that it remains unclear for officers about what a breach of duties may mean.	Adding duties into legislation imposes the obligations on charities. Some argue that these duties exist already in the common law for certain groups, but are not well understood, and are a minimum for good governance. As the duties or good governance concepts are not well understood by the sector, including them will impose greater burden on the sector, and result in less autonomy about how charities operate.	Support from communities about including in duties is mixed. In 2019, just over half of submitters supported introducing governance standards into legislation. About a third of submitters in 2019 considered that legislated governance standards were unnecessary, with the main concern being that they would add further compliance burden or that guidance would be as effective. We heard similar feedback from targeted stakeholders in 2021. Some supported the duties for greater accountability, others thought the compliance burden is significant. We also heard concerns about the complexities with the underlying law and how it may work in practice.	Overall, duties could improve governance but could also make the requirements more confusing based on the complexities with other law. Officer duties are a significant shift for the Charities Act as a registration and reporting regime.
	+	-	-	+	•	0	-

Proactively released by the Minister for the Community and Voluntary Sector

Conclusions

We consider Option 3 – requiring charities to review their rules document annually, issuing model rules and including more about the role of an officer in the Charities Act – as the most balanced option. It is likely to improve governance in the sector without changing the intent of the Charities Act or adding in a significant compliance burden like officer duties would. The rules document is a tool already in place, that can be better utilised to improve governance. This lever encourages the sector to retain independence around self-governance. Stakeholders emphasised the importance of having the autonomy to determine their own operating approaches during our engagement.

There are risks regarding the sector's response to this option as it was not the one we consulted on during stakeholder engagement. The sector is likely to see this as an additional compliance burden. We consider this compliance burden to be appropriate based on the potentially stronger governance in the sector as a result. Compared to adding duties on officers, the additional burden of an annual review of rules documents is much smaller and clearer for individuals to understand. We consider that as a majority of submitters supported introducing governance standards or officer duties despite the additional compliance burden, only a small part of the sector will consider a requirement to amend the rules as a difficult task. We have considered this in line with the proposals to reduce reporting requirements and consider that overall, small charities are still better off in terms of compliance burden as the financial reporting is a more onerous task that is more likely to require accounting skills.

We are, however, unable to quantify the impact of this option to address governance issues and the impact assessment is based on anecdotal input around how rules documents are used currently.

Summarise the costs and benefits of your preferred option

Table 11: costs and benefits of preferred option for governance of charities

Affected groups	Comment	Impact
Additional costs of the preferred option compared to taking no action		
Regulated groups (charities)	Compliance burden on all charities to review rules documents annually. This will impact all charities differently, but small charities will likely be most affected.	Annual compliance burden - low
Regulators (Charities Services)	Increased role in reviewing charities' annual reporting	low
Other groups (e.g. wider government, consumers etc.)	N/A	N/A
Total monetised costs	No monetised costs	N/A
Non-monetised costs	Compliance and implementation costs	*Low-medium*
Additional benefits of the preferred option compared to taking no action		
Regulated groups (charities)	Assumption that governance in charities will improve from regular review of rules documents and clarity over the role of officer which could result in fewer conflicts or disputes that cannot be managed within the charity	Medium
Regulators (Charities Services)	Assumption that improved governance in the sector will result in fewer complaints to Charities Services	Low

Proactively released by the Minister for the Community and Voluntary Sector

Other groups	N/A	N/A
Total monetised benefits	No monetised benefits	N/A
Non-monetised benefits	Governance benefits	*Low*

Proactively released by the Minister for the Community and Voluntary Sector

Section 2.4: Definition of officer

Status quo

The current definition of an officer of a charity is set out in section 4(1) of the Charities Act:

officer—
(a) means, in relation to the trustees of a trust, any of those trustees; and
(b) means, in relation to any other entity, —
  (i) a member of the board or governing body of the entity if it has a board or governing body; and
  (ii) a person occupying a position in the entity that allows the person to exercise significant influence over the management or administration of the entity (for example, a treasurer or a chief executive); and
(c) includes any class or classes of persons that are declared by regulations to be officers for the purposes of this Act; but
(d) excludes any class or classes of persons that are declared by regulations not to be officers for the purposes of this Act

We found that the legal interpretation of the current definition is different to how Charities Services and the sector apply the definition. On the one hand, legal advice was that a person needs to be both a member of a board or governing body **and** in a position of significant influence (i.e. not everyone on the board or governing body may be captured as officer(s)). On the other hand, Charities Services and many in the sector interpret the current definition as officers are all members of the board or governing body, and in addition, anyone else with significant influence over the management or administration of the entity which is a broader interpretation.

Some cases where people who were not captured by the current definition of officer but were still able to significantly misuse the charity's funds include: [10]

- Samoan Independent Seventh Day Adventist Church - there was confusion over who the officers were as it was a society that was incorporated as a charitable trust. During the investigation, the Chief Executive took over $84,000 of the entity's funds for his personal benefit and influenced the entity to pay over $63,000 of his personal expenses. The Chief Executive was not an officer but was argued to be one by Charities Services due to the significant influence he had over the organisation.
- Terrible New Zealand Charitable Trust – an individual resigned from a trustee role, and his father was never a trustee. Charities Services argued it was clear they were still running the charity and that even though they had tried to distance themselves from the operation of the trust, they should still be considered officers. The Charities Registration Board agreed, and the charity was deregistered due to the two men being considered officers and significantly and persistently failing in their obligations under the Charities Act.
- Southern Cross Charitable Trust involved a related party to a trust who was in effective control of the trust diverting charity funds to his businesses. This person was not an officer as he was not a trustee of a trust.

---

10 Based on Charities Services investigations

Proactively released by the Minister for the Community and Voluntary Sector

- Wellington Foodbank Service Incorporated involved an employee of the society diverting funds for his own benefit. He had signatory powers and effective control of the charity, although he did not sit on the governance board so was not an officer.
- That Was Then This Is Now - the East Chapter president of the Head Hunters who had signatory powers over the trust's accounts but was not a trustee, and therefore not an officer but was involved in directing the funds for private profit.

Trustees of trusts are considered separately in the Charites Act because a trust is not a legal entity according to the Act, so a trust cannot be captured under the definition of entity or charitable entity in section 4. Rather, the Charities Act includes a trustee of a trust under the definition of an entity or charitable entity. To ensure that trusts can be included as an entity, it is necessary to keep the trustees of a trust as part of the officer definition. Options have been considered within this context.

What is the policy problem or opportunity?

The primary problem is that the current definition of officer does not capture everyone with significant influence over the management or administration of the entity. This is because the definition is limited to trustees of trusts, or for entities that are not a trust, people who are both a member of a board or governing body **and** who have a position of significant influence over the management or administration of the entity. This means that the disqualification provisions in section 16 may not always cover the people who are responsible for managing the charity's funds.

For example, a person who is not a trustee of a trust may be able to hold positions of authority and control over the finances (for example, a Treasurer in a trust) even if they have been convicted of dishonesty related offences (for example, fraud). The same could be said for someone who is not a member of the board or governing body, but still holds a position that allows them to determine how the charity's funds are used.

Another issue is that the legal interpretation of the definition is unclear. In practice, the officer definition is being interpreted in a broader manner than the legal interpretation. On the one hand, legal advice was that a person needs to be both a member of a board or governing body **and** in a position of significant influence (i.e. not everyone on the board or governing body may be captured as officers). On the other hand, Charities Services and many in the sector interpret the current definition as officers are all members of the board or governing body, and in addition, anyone else with significant influence over the management or administration of the entity which is a broader interpretation. We understand that the confusion stems from the use of the word 'and' in the definition as it could easily be read either way as 'and' or 'or'. It is however, unclear how many in the sector interpret it each way.

The sector also raised concerns about the status quo definition conflating management and governance roles.

The objective for the definition of officer is to ensure that all people with significant decision-making powers or influence over the management of the entity are captured as officers to ensure accountability.

Proactively released by the Minister for the Community and Voluntary Sector

Describe and analyse the options

Option 1– Status quo: retain the current definition

During targeted engagement in 2021, approximately one quarter of submitters supported the status quo definition. This is about the same percentage as those who supported the status quo during the wider public consultation in 2019. Overall, across both rounds of consultation, a minority of stakeholders supported the current definition of officer. However, there was no clear consensus on ways to change the definition to improve it.

Option 2 – amend the definition to include those with significant influence over a trust and expand the definition to reflect how it is interpreted in practice

This option will capture the persons already captured under the existing definition as well as persons with significant influence over the management or administration of a trust. It will also expand the definition to reflect how the definition is interpreted in practice. This will result in the broadening of the definition to include people who are members of the board or governing body but also include people outside of the board or governing body who have significant influence over the management or administration of the entity.

Option 2 would capture the following groups of persons as officers:

- In an entity which is also a trust, any trustees; or
- If the entity has a board or governing body, any member of the board or governing body; or
- Any person with significant influence over the management or administration of the entity (this includes entities which are trusts).

This would potentially capture more people as officers of charities. During the public consultation in 2019, nearly three-quarters of submitters who commented on this issue supported broadening the definition of officer.

This option will have a positive impact on providing a sound registration/de-registration system of charities by ensuring that the correct group of persons are captured as officers under the definition of an officer.

If this option proceeds, then it will require legislative change to the Charities Act.

Examples of who may be captured using this definition include:

- Chief Executive - a Chief Executive would be captured under the new officer definition (as well as the current definition). They would be captured as an officer even if they were not a member of the board or governing body as they have significant influence over the management or administration of the entity.
- Treasurer in a trust who is not a trustee - a Treasurer who is not a trustee in a trust would be captured under the proposed officer definition, while this role would not be captured under the current definition. Under the proposed definition, they would be regarded to have significant influence over the management or administration of the entity based on their access and decision-making around finances. The current officer definition does not include persons with significant influence in a trust, but only refers to trustees in a trust. Hence, this role would not be captured as an officer under the current definition.
- Cultural Advisor - a Cultural Advisor who is not a member of the board or governing body may be captured under the new officer definition using the 'significant influence over management

Proactively released by the Minister for the Community and Voluntary Sector

or administration of the entity' test. This would depend on the Advisor's degree of influence in the entity – whether it reaches the significant influence threshold and the responsibilities of the role (which considers if the person is contributing to the directions and decisions about how the charity operates).

Proactively released by the Minister for the Community and Voluntary Sector

Multi-Criteria Analysis – definition of officer

Table 12: multi-criteria analysis – definition of officer

Key	++	much better than the status quo	+	better than doing the status quo	0	about the same as the status quo	-	worse than the status quo	- -	much worse than the status quo

	Effectiveness	Alignment	Proportionality	Accountability	Sector independence	Support from communities	Overall assessment
Option 1: Maintain Status Quo	Those with significant influence over trusts are not captured in the current definition.	Maintaining the status quo will have a neutral impact on alignment with the fundamentals of the Charities Act and broader charities law.	Maintaining the status quo will have a neutral impact in terms of proportionality.	This option does not capture persons with significant influence over trusts, leading to a loss of accountability.	Keeping the current officer definition will have a neutral impact on sector independence.	Overall, across both rounds of consultation, a minority of stakeholders supported the current definition of officer.	Overall, the status quo will not capture persons with significant influence over trusts leading to less effectiveness and accountability. This option lacked support from stakeholders.
	0	0	0	0	0	0	0
Option 2: Include those with significant influence over a trust and expand definition to reflect interpretation in practice	This addresses the problem that charities are treated differently depending on their legal structure and captures persons with significant influence in a trust.	This option will ensure that all persons with significant influence over the charity are captured as officers of charities. This will have a positive impact on providing a sound registration/de-registration system of charities by ensuring that the right persons are captured as officers.	Altering the officer definition to have the correct persons as officers will increase public trust and confidence in the system by ensuring all that have decision-making influence over the entity are captured as officers and are publicly accountable by being on the register. Charities will need to do more to certify all their officers are qualified as part of the registration process, but we consider the impact on charities to be low, particularly as we understand the current definition was largely being interpreted more broadly anyway. The main impact will be for trusts having to certify that people with significant influence over the management or administration of the entity (but who are not officers) are qualified. The certification process for registration is an honesty process where the charity ticks the box that certifies the officers are qualified. It is up to the charity to determine that their officers are qualified.	This option will capture persons with significant influence over trusts, leading to greater levels of accountability.	Changing the officer definition may reduce sector independence as those with significant influence will be automatically be captured as officers. However, charities still get to determine who they want as officers.	A majority of submitters supported broadening the definition of officer. Nearly three-quarters agreed with broadening the definition during the 2019 engagement and sixty per cent supported broadening the definition during targeted engagement in 2021.	Overall, this is the preferred option since it addresses the problem and leads to greater effectiveness, alignment and accountability. It is also supported by most stakeholders.
	+	++	+	+	-	+	+

Proactively released by the Minister for the Community and Voluntary Sector

Conclusion

Our preferred option is option 2 – to expand the definition of an officer to include those with significant influence over the management or administration of trusts, and to reflect how we understand the definition is interpreted in practice. We consider that option 2 best addresses the problems by ensuring that the appropriate persons are captured as officers who are persons with influence over the decision-making and direction of the entity.

The preferred option does not address the concern about the separation of management and governance. However, our policy intent is to capture people who contribute to the direction or decision-making of a charity, regardless of how the charity has organised its governance structure. We expect that many smaller charities will not have separate governance and management tiers anyway. Overall, we consider that the proposed definition captures the appropriate people as officers.

Summarise the costs and benefits of your preferred option

Table 13: costs and benefits of preferred option – definition of officer

Affected groups	Comment	Impact
Additional costs of the preferred option compared to taking no action		
Regulated groups	Charities may have more people captured as officers unintentionally.	Low
Regulators	No costs to the regulator	N/A
Other groups (e.g. wider government, consumers etc.)	N/A	N/A
Total monetised costs	No monetised costs	N/A
Non-monetised costs	People are unintentionally captured as officers	*Low*
Additional benefits of the preferred option compared to taking no action		
Regulated groups	More people can hold officer roles without needing to be a trustee of a trust. People with significant influence are accountable.	Low
Regulators	No benefits to the regulator	N/A
Other groups (e.g. wider government, consumers etc.)	Increased public trust and confidence in the charitable sector by capturing persons with significant influence in a trust.	Low
Total monetised benefits	No monetised benefits	N/A
Non-monetised benefits	More people can hold officer roles	*Low*

Proactively released by the Minister for the Community and Voluntary Sector

Section 2.5: Disqualifying factors – Criminal Convictions

Status quo

Officers are required to be 'qualified' as part of charities' registration to become a registered charitable entity. Officers are required to certify (or disclose) in the registration application that they are qualified to be an officer of charity. Qualification of an officer is determined by an officer not meeting any of the disqualifying factors in section 16 of the Charities Act. Charities are eligible for a free Police-vetting to confirm the qualification of officers of the charity to make informed decisions. If a charity works with children or vulnerable people, the charity has a range of obligations to ensure the safety of their clients. Under the Children's Act 2014, all paid employees and contractors who work with children for state-funded organisations must be safety checked. New Zealand Police also offer a fee waiver for Police vetting for registered charities.

The Charities Act has a light-touch approach in terms of the disqualifying factors to prevent charities from appointing officers that have a history of dishonesty and pose a risk to the organisation's assets and income. Officers are disqualified if they have been convicted and sentenced for a crime involving dishonesty within the last seven years. These offences cover theft, burglary, robbery, obtaining by deception, money laundering, receiving, accessing computer systems for dishonest purposes, forgery, and tax evasion.[11] While the Board can waive any disqualifying factors set out in section 16 of the Charities Act, the Select Committee report on the original Charities Bill acknowledged that there was a strong opposition to a more expansive list of convictions proposed in the Charities Bill and recommended to only disqualify people who have been convicted of a dishonesty offence, such as theft or fraud.

Research shows that Māori are over-represented at every stage of the criminal justice process. Though forming just 12.5 per cent of the general population aged 15 and over, 42 per cent of all criminal apprehensions involve a person identifying as Māori, as do 50 per cent of all persons in prison.[12] Considering the addition of criminal convictions is more likely to affect Māori disproportionally because of their over-representation at every stage of the criminal justice process. Therefore, the issue of legislating criminal convictions would require careful consideration of this inequity and the impacts on Māori.

There are some ways that Charities Services can manage risks around ensuring that officers are qualified. Charities Services rely on charities confirming that the officers are qualified when they apply to be registered. Charities Services can decline registration or run a criminal record check if a charity's officer displays risk factors, or if they uncover information through their intelligence and investigations function. Charities Services has provided some evidence where officers have been found to have serious criminal convictions but were able to register as officers of charities as the convictions were not disqualifying factors in the Charities Act. These cases include sexual offences, including the sexual exploitation of children in one case, and serious violence and drug offences. In those cases, Charities Services were able to decline registration applications and deregister the entities through other disqualifying factors, but not based on the serious criminal convictions.

---

11 Charities Act 2005, section 16(2).

12 https://www.corrections.govt.nz/resources/research/over-representation-of-maori-in-the-criminal-justice-system/1.0-introduction/1.0-introduction

Proactively released by the Minister for the Community and Voluntary Sector

What is the policy problem or opportunity?

Having officers who have been convicted of serious convictions may pose a risk to the operation of the charity, or the safety of people involved with the charity.

There may be risks with having officers who have serious convictions involved in charities. This could include risks to the operation of the charity such as risks of fraud or inappropriate use of funds, or risks to the safety of people who are involved with or work with the charity. Public trust and confidence in the charity is also likely to be reduced. Evidence from Charities Services shows that an investigation into an entity (which provided accommodation to individuals after release from prison) showed that all five officers were gang members. The officers had several convictions for a range of serious violence and drug related offences, some of which were committed while they were officers. The investigation uncovered a range of issues, including cash payments to officers and inmates (private benefit). While the entity voluntarily deregistered after the investigation was completed, these officers could not have been disqualified under section 16 of the Charities Act.

We consulted on the issue of whether someone with serious convictions should be disqualified from being an officer of a charity in 2019. More than three-quarters of submitters supported some form of disqualification from being an officer of a charity for people with serious convictions. Just over half of submitters on the issue considered there should be no exceptions. These submitters considered that disqualifying people with serious convictions would maintain community and beneficiary trust in charities and mitigate the potential risk of re-offending.

Some submitters thought that disqualification should only apply if the conviction is related to the charity's purpose or beneficiary group. Other submitters suggested that disqualification should relate to a minimum sentence period rather than a specified crime, for example, two years of imprisonment. Many considered that there should be scope for rehabilitation and redemption, with nearly a quarter of submitters thinking that full disclosure of convictions should enable a person to be considered for an officer role as people with lived experience can provide critical insight.

Submitters also commented on a desire to align the disqualifying factors with other legislation, and a connection across them. For example, someone who has been banned from being a director under the Companies Act should also be banned under the Charities Act.

Describe and analyse the options

Option 1 – Status quo

This option involves no change to the disqualifying factors for officers relating to criminal convictions. Officers would still be able to be disqualified for crimes involving dishonesty committed within the last seven years. Charities would continue to determine if someone with serious criminal convictions is suitable to be an officer of the charity. This can include reasons such as rehabilitation.

Option 2 – status quo with addition of financing of terrorism related offences as disqualifying factors in the Charities Act (preferred option)

Overall, this option involves no significant change to the disqualifying factors for officers relating to criminal convictions. The option proposes an addition of financing of terrorism related offences in the Charities Act. This is because The Financial Action Task Force (FATF) sets and monitors international standards that aim to prevent illegal activities and the harm they cause to society. FATF

Proactively released by the Minister for the Community and Voluntary Sector

recommend including anti-money laundering and countering financing of terrorism policies in legislation. FATF monitors countries to ensure they implement the FATF standards fully and effectively and holds countries to account if they do not comply.

The Select Committee made comments on the original Charities Bill indicating that it is important to prevent charities from appointing officers that have a history of dishonesty and may pose a risk to the organisation's assets and income. This is to ensure the organisation's funds and assets are used to advance the charitable purpose of the organisation. Trustees are already excluded from serving as trustees of a trust under the Charities Act if they have been convicted of an offence under the Terrorism Suppression Act 2002 or if the entity is a designated terrorist entity, as per section 13(5) of the Charities Act. Given that the Charities Act provisions only disqualify people who have been convicted of a dishonesty offence, such as theft or fraud, we consider that including financing of terrorism-related offences would be appropriate.

Option 3 – addition of Serious criminal offences as disqualifying factors in the Charities Act

This option proposes changes to the Charities Act to include serious criminal offences as disqualifying factors. The serious criminal convictions that were consulted on in 2019 and 2021 and that we proposed to add to the list of convictions as disqualifying factors are:

- Fraud;
- Manslaughter;
- Murder;
- Physical violence;
- Serious drug offences; and
- Sexual violation.

The current disqualifying factors for criminal convictions have a seven-year limitation period consistent with the provisions of the Criminal Records (Clean Slate) Act 2004. Adding serious criminal convictions such as sexual offences would not be covered under the Clean Slate Act, which could disrupt the balance already achieved in the Charities Act. If a charity works with children or vulnerable people, the charity has a range of obligations to ensure the safety of their clients. Under the Children's Act 2014, all paid employees and contractors who work with children for state-funded organisations must be safety checked. New Zealand Police also offer a fee waiver for Police vetting for registered charities.

This option also proposes to include terrorism related offences as a disqualifying factor. Currently, the Charities Act only provides that entities that have been convicted of these offences do not qualify for registration. We propose to include that officers who are designated terrorists or who have been convicted of relevant offences under the Terrorism Suppression Act 2002 are disqualified. The Board can continue to waive any disqualifying factors set out in section 16 of the Charities Act.

Option 4 – All criminal convictions including the offences covered in the Charities Act are disclosed to the regulator who has the discretion to disqualify an officer when there is a significant risk to the charity or its beneficiaries

This option would require entities to disclose all criminal convictions when registering their officers with Charities Services. If Charities Services consider the criminal convictions of an officer are serious enough to pose a significant risk to the charity or its beneficiaries, the decision is submitted to the Board for consideration whether to allow registration of the officer. If the Board agrees that there is significant risk to the charity or its beneficiaries, Charities Services can disqualify the officer on those

Proactively released by the Minister for the Community and Voluntary Sector

grounds. This option provides a balanced approach between the safety of the charity or the people involved in the charity, and some scope for rehabilitation of the officers.

Proactively released by the Minister for the Community and Voluntary Sector

Multi-Criteria Analysis – disqualifying factors – criminal convictions

Table 14: multi-criteria analysis – disqualifying factors – criminal convictions

Key	++	much better than the status quo	+	better than doing the status quo	0	about the same as the status quo	-	worse than the status quo	- -	much worse than the status quo

	Effectiveness	Alignment	Proportionality	Accountability	Sector independence	Support from communities	Overall assessment
Option 1 - Maintain Status Quo	The current system relies on charities to self-regulate and make an overall decision on who can be an officer. There have been instances where officers have serious criminal convictions have been able to register thereby putting the charity at risk.	No changes are made to the current settings.	Overall, the regulatory response currently is proportionate to the risk as Charities Services has measures in place to conduct investigations and identify officers that are not qualified to be an officer, if prompted. However, there are some serious criminal convictions that Charities Services cannot disqualify officers with such as sexual offences. Data is limited where disqualifying officers on serious criminal convictions is an issue.	Currently, the accountability falls on the officers certifying themselves as qualified officers.	High level of independence for the sector as the decision-making is in their hands regarding who can be an officer.	Many submitters have indicated that they would prefer having the flexibility and independence of deciding who is qualified to be an officer (including the boundaries that are currently in place)	While this option is ineffective in addressing the problem, many submitters have indicated that they would prefer having the flexibility and independence to make their own internal decisions. This option also maintains the balance between supporting charities to continue their trusted and vital contribution to community wellbeing and ensuring that the contribution is transparent to interested parties and the public.
	0	0	0	0	0	0	0
Option 2 – Status Quo with an addition of financing of terrorism related offences (preferred option)	Acknowledges that the current system relies on charities to make their decision on who can be an officer (within the bounds of current disqualifying factors). However, the addition of terrorism related offences broadens the list of disqualifying factors slightly. This is likely to address parts of the problem.	Slight changes to the Charities Act provisions that align with the original policy intent of the Charities Act.	Overall, the current regulatory response is proportionate to the risk as Charities Services has measures in place to conduct investigations and identify officers that are not qualified to be an officer, if prompted. There is a slightly broader list of disqualifying factors which aids in reducing the risk to charities or people involved in charities.	The accountability falls on the officers certifying themselves as qualified officers.	Sector independence largely remains unchanged.	No concerns were raised in targeted engagement for this proposal.	Overall, this option maintains a balance between supporting charities to continue their trusted and vital contribution to community wellbeing and ensuring that the contribution is transparent to interested parties and the public.
	+	+	+	0	+	+	+
Option 3 - Serious criminal convictions are disqualifying factors	Addresses the problem by adding a list of criminal convictions.	Expands beyond what was originally intended with the Charities Act and other related legislation.	Restricts and adds the burden to the officers while addressing the potential risk to charitable resources. Ends up with a one size fits all approach. Aids in promoting public trust and confidence by requiring a higher standard for qualification of officers. Higher burden on officers to be eligible which may discourage individuals to be involved in charities.	Clear and strict accountability for officers to qualify.	Restricts sector independence. Limits flexibility for charities to make their own decisions. The Government could be perceived as a controlling decision making for the charitable sector.	Some submitters supported adding more criminal convictions, but many mentioned that it uses one size fits all approach. One submitter also mentioned that adding more criminal convictions could potentially increase inequity due to high representation of Māori in the criminal justice system.	This option would add more burden to the officers of charities to comply with more requirements which could discourage individuals from being involved in the charitable sector. While it provides clear and strict accountability for officers to qualify and aids in public trust and confidence, it also restricts independence of the charitable sector.
	++	+	-	+	-	-	0
Option 4 – Disclosure of convictions and regulator discretion	Addresses the issue but may be ineffective due to the increase burden on Charities Services to make decisions.	Changes the role of Charities Services. Charities Services becomes heavily involved in the decision making of the registration process when the Board has that power.	Costs of maintaining the discretionary role for Charities Services is higher in comparison to the risk to charitable resources. Public trust and confidence is impacted due to the current view of Charities Services in the charitable sector. There will also be additional costs of relevant appeals processes for the applicant who Charities Services decide should not be qualified to be officers.	Unclear accountability for officers to qualify. Dependent on Charities Services for decisions. Could have potential difficulties in assessing cases without developed criteria for qualification.	Limits sector independence with regulatory overreach.	Very little support from submitters.	This option changes the role of Charities Services as their role becomes heavily involved in decision making of the registration process. The costs of maintaining the discretionary role for Charities Services is higher than the benefits implementing this option. Overall, submitters did not support this option.
	-	- -	-	-	-	-	-

Proactively released by the Minister for the Community and Voluntary Sector

Conclusions

We recommend option two (status quo with addition of financing of terrorism related offences as disqualifying factors in the Charities Act). This option is likely to best meet the policy objective because the current provisions under the Charities Act for disqualifying an officer encompass factors that achieve a balance between supporting charities to retain their independent decision-making while ensuring that contribution is transparent to interested parties and the public.

As mentioned earlier, the Select Committee report on the original Charities Bill acknowledged that there was a strong opposition to a more expansive list of convictions proposed in the Charities Bill and recommended to only disqualify people who have been convicted of a dishonesty offence, such as theft or fraud.

While some submitters supported adding more criminal convictions, many considered that an addition of criminal convictions would be a one size fits all approach where more nuance is needed. One submitter also mentioned that adding more criminal convictions could potentially increase inequity due to high representation of Māori in the criminal justice system. Further education efforts to increase the awareness of charities to use tools such as free Police-vetting will enable them to make informed decisions about who they appoint as officers of the charity.

Summarise the costs and benefits of your preferred option

Table 15: costs and benefits of preferred option – disqualifying factors, criminal convictions

Affected groups	Comment	Impact
Additional costs of the preferred option compared to taking no action		
Regulated groups	The cost to charities and other groups is limited as the addition of terrorism related offences does not significantly increase their compliance costs.	Low
Regulators	Education and awareness of proper verification of officers of charities will entail costs. It is difficult to estimate this cost.	Low
Other groups (e.g. wider government, consumers etc.)	No impact	No impact
Total monetised costs	No monetised costs	No monetised costs
Non-monetised costs	Increased disqualification requirement for officers by including terrorism offences.	*Low*
Additional benefits of the preferred option compared to taking no action		
Regulated groups	Addition of financing of terrorist related offences will protect charities from potential harm from terrorism-related intentions.	Low
Regulators	Addition of terrorist related offences will provide the regulator with a mechanism to prevent harm to charities and anyone within the charity.	Low
Other groups (e.g. wider government, consumers etc.)	Public trust and confidence remains largely the same, with the added assurance that those with terrorism offences are not involved in running charities.	Low
Total monetised benefits	No monetised benefits	No monetised benefits

Proactively released by the Minister for the Community and Voluntary Sector

Non-monetised benefits	Safety and public trust and confidence	*Low*

Proactively released by the Minister for the Community and Voluntary Sector

Section 2.6: Disqualifying factor – age of officer

Status quo

A person is disqualified from being an officer of a charitable entity if they are under 16 years of age (section 6(2)(b) of the Charities Act). Charities Services data show that as of March 2021, 30 officers were aged 16 or 17 in the charitable sector, and there were no charities where all officers were under 18 years of age.

The status quo allows young people (16 or 17-year olds) to hold officer positions and participate in the governance of charities.

The Trusts Act and the Companies Act require trustees and company directors to be at least 18 years old, and the Incorporated Societies Bill proposes that the contact person of the society must be 18 or older, while the officers can be 16 or older. We understand that the age requirements are different due to the responsibilities of each role, in particular, around entering into contracts and holding property.[13] The Trusts Act was amended in 2019 to reduce the minimum age of a trustee from 20 years old to 18 years to align with the Minor's Contracts Act 1969, Care of Children Act 2004 and Wills Act 2007 as it was considered that under New Zealand law, an 18 year old has the same legal capacity and capability as a 20 year old for most purposes.

What is the policy problem or opportunity?

The policy problem is the legislative inconsistency across different legislation for the age of officers of charities and similar roles such as trustees of trusts and company directors. This legislative inconsistency may create confusion for an organisation and make it difficult for charitable organisations with officers who are 16 or 17 years old to be established as a trust or company if these officers also want to hold trustee or company director roles.

In the context of running a charity, there is no issue with all the officers being 16 or 17 years old. However, if the organisation also wants to be established as a trust, company or charitable trust, the officers will need to be 18 or older. If the organisation wants to be established as an incorporated society (once the Incorporated Societies Bill passes), they will need to have one person who is 18 or older as the contact person.

The scale of the harm is likely to be small since only 30 officers from approximately 28,000 registered charities in New Zealand were aged 16 or 17 as of March 2021. If the age requirement for an officer of a charity is increased, then there will potentially be an adverse impact on young people's (16 or 17-year-olds) ability to contribute to community wellbeing since they are prevented from holding governance roles in charities.

Describe and analyse the options

These options have been considered on the basis that the preferred definition of officer is progressed (as outlined earlier in this document). The options do not override other legislation.

---

13 Contract and Commercial Law 2017 – section 86.

Proactively released by the Minister for the Community and Voluntary Sector

Option 1 – Status quo: disqualifying age to be an officer remains at under 16

The disqualifying age to be an officer of a charitable entity remains at under 16. This option allows young people to continue to participate in charities as officers. However, if the charity is established as a trust or company, people who hold the trustee or director positions will need to be 18 or older. Any other officers who have significant influence over the management or administration of the entity must be over 16 years old. If the charity is a company or trust, maintaining the status quo will mean that officers who are 16 or 17 years old will not be able to hold a company director or trustee role. If the charity as established as an unincorporated society, all officers can be 16 or older.

Keeping the minimum age of an officer of a charity at 16 will not address the statutory inconsistency with the Trusts Act and the Companies Act, where trustees of trusts and company directors are required to be at least 18 years old. For example, if the preferred officer definition proceeds, then a young person aged 16 or 17 with significant influence in a trust will be deemed as an officer but cannot hold a trustee or company director role (if the charitable trust is also established as a company). However, keeping the minimum age at 16 will align with the proposed Incorporated Societies Bill where the minimum age of an officer of an incorporated society is also 16.

Keeping the qualifying age at 16 allows young people to continue to participate in the governance of charities.

Nearly two-thirds of submitters supported keeping the current qualifying age at 16 during targeted consultation in July 2021. The primary reason for support was to enable young people to continue to participate in charities.

Option 2 – Disqualifying age for officers is increased to 18

The second option is increasing the disqualifying age to be an officer of a charitable entity to be under 18. This option aligns with requirements in the Trusts Act and Companies Act but prevents young people (16 or 17-year olds) from holding officer roles. Young people can still be involved in the charity without holding officer positions. This option is subject to the Ministry of Justice (MOJ)'s Bill of Rights vetting as it may impact the right to freedom from discrimination on the ground of age by treating 16 and 17-year olds differently than people aged 18 or over. If this option passes the Bill of Rights vetting, then it would require legislative change to the Charities Act.

It is impractical to assess maturity of every 16 or 17-year-old wishing to become an officer of a charity. Analogies have been drawn to the age of 18 which is the default age for voting in elections and purchasing alcohol. Having the qualifying age as 18 may slightly increase public trust and confidence in the sector.

This option was overall, not well supported by the sector during targeted consultation in 2021.

Option 3 – One officer is 18 or older, other officers can be 16 or older

At least one officer in a charity needs to be 18 or older, while the remaining officers can be 16 or older. This option allows the entity to be set up as a trust or company as the person aged 18 or over can hold trustee or company director positions. Young people (16 and 17-year olds) can continue to hold officer positions allowing to a large extent, these young people to continue to contribute to community wellbeing by holding governance roles in charities. This option also allows the person aged 18 or over to represent the charity in legal situations, if required.

Proactively released by the Minister for the Community and Voluntary Sector

This option is subject to the MOJ's Bill of Rights vetting as it may impact the right to freedom from discrimination on the ground of age by treating 16 and 17-year olds differently than people aged 18 or over. If this option passes the Bill of Rights vetting, then it would require legislative change to the Charities Act.

This option was not well-tested with stakeholders since it was proposed during the third round of consultation involving a smaller group of stakeholders where we tested the whole package of options.

Proactively released by the Minister for the Community and Voluntary Sector

Multi-Criteria Analysis: Disqualifying factor – age of officer

Table 16: multi-criteria analysis for disqualifying factors – age of officer

Key	++ much better than the status quo	+ better than doing the status quo	0 about the same as the status quo	- worse than the status quo	- - much worse than the status quo

	Effectiveness	Alignment	Proportionality	Accountability	Sector independence	Support from communities	Overall assessment
Option 1 - Maintain Status Quo	Maintaining the status quo will have a neutral impact on the effectiveness criterion. If the preferred officer definition proceeds, then in a trust, a young person (16 or 17-year-old) with significant influence will not be allowed to be a trustee or company director (if the charitable trust is also set up as a company).	This option will have a neutral impact on alignment.	This option will have a neutral impact on proportionality.	The status quo will have a neutral impact on accountability.	The status quo will have a neutral impact on sector independence.	Stakeholders clearly favoured keeping the minimum age for an officer at 16 years old to encourage young people to be involved in charities. This information was gathered from the second round of consultation undertaken in 2021.	The overall impact of maintaining the status quo is neutral, although stakeholders did have clear support for the status quo.
	0	0	0	0	0	0	0
Option 2 – Disqualifying age is under 18	This option will address the legislative inconsistency between the Charities Act, Trusts Act and Companies Act regarding the minimum age requirement for an officer or similar role. However, this option will have an adverse impact on meeting the objective by disqualifying 16 or 17-year-olds from holding officer roles, adversely affecting young people's ability to contribute to community wellbeing.	Increasing the minimum age requirement for an officer to 18 will have a neutral impact on alignment.	Changing the minimum age requirement for an officer will have a neutral impact on proportionality.	Increasing the minimum age requirement of an officer of a charity will generate slightly greater levels of accountability from charities. Age is regarded as a proxy for maturity and as a result, 18-year olds would have slightly greater maturity levels than 16 or 17-year olds.	Increasing the minimum age requirement of an officer will adversely impact sector independence by forbidding charities from bringing onboard 16 or 17-year-olds as officers.	A minority of submissions from the second round of consultation in 2021 supported this option.	This option will have a negative impact overall. This option has limited stakeholder support and there will be an adverse impact on sector independence. However, this option does increase accountability.
	0	0	0	+	-	-	-
Option 3 – One officer is 18 or older, others can be 16 or older	This option will address to a large extent, the legislative inconsistency between the Charities Act, Trusts Act and Companies Act regarding the minimum age requirement of an officer or similar role. In terms of meeting the objective, this option may affect slightly the ability of charities to continue their contribution to community wellbeing in comparison to the status quo option by reducing the potential groups of people who can hold officer roles in charities.	This option will have a positive impact on alignment as it allows for all age ranges within the charitable sector, with no confusion over whether another Act overrides the Charities Act.	Charities Services data shows that there are only 30 officers aged 16 or 17, and all these charities also had at least one officer over 18. This is indicative that the impact on the sector is low.	This option will slightly increase accountability since one officer of a charity must be at least 18 years old for 16 or 17-year olds to hold the other officer positions in the charity.	This option will have a minor impact on sector independence since charities will be required to have at least one officer aged 18 or above. The impact is minor because Charities Services' data from March 2021 show that only 30 officers out of approximately 28,000 registered charities in New Zealand were aged 16 or 17.	This option received very limited stakeholder feedback in the third round of consultation in 2021, with only three submissions. Of these three submissions, one supported this option, another opposed it, and the last submission was neutral.	Overall, this option is preferred since it addresses legislative inconsistencies in a way that still largely allows young people to hold officer positions.
	+	+	0	+	-	0	+

Proactively released by the Minister for the Community and Voluntary Sector

Conclusions

We recommend option 3 – one officer must be at least 18 or older, all other officers must be at least 16 or older. This option was not well tested with stakeholders, but we consider that it strikes a balance between ensuring that young people can to a large degree, continue to contribute to community wellbeing by holding governance roles in charities, and addressing the legislative inconsistency across different legislation for the age of officer or other similar roles.

Summarise the costs and benefits of your preferred option

Table 17: costs and benefits of the preferred option –disqualifying factor to be age of officer

Affected groups	Comment	Impact
Additional costs of the preferred option compared to taking no action		
Regulated groups	One officer must be at least 18 years old. Based on current data, there are no charities where all the officers are 16 or 17 years old. There is no impact for current charities and the ongoing impact is likely to remain low.	Low
Regulators	No change to the regulator's role as charities still need to certify that its officers are qualified.	Low
Other groups (e.g. wider government, consumers etc.)	No impact	No impact
Total monetised costs	No monetised costs	No monetised costs
Non-monetised costs	Young people's participation in charities is adversely impact to a slight degree.	*Low*
Additional benefits of the preferred option compared to taking no action		
Regulated groups	Easier to comply with other legislative requirements.	Low
Regulators	No change to the regulator's role.	Low
Other groups (e.g. wider government, consumers etc.)	No impact	No impact
Total monetised benefits	No monetised benefits	No monetised benefits
Non-monetised benefits	Alignment with other legislation.	*Low*

Proactively released by the Minister for the Community and Voluntary Sector

Section 2.7 Decision-making and appeals

Status quo

Decision-making and appeals as one framework

The Charities Act contains several key features that support the registration, reporting and monitoring scheme. These key features include decision-making powers and other regulatory functions of the regulator, so it can discharge its role, and the availability of an appeals mechanism to provide a check on this decision-making. Appeals serve two purposes: they encourage high quality decisions, and ensure decisions are made in accordance with the law. Because appeals provide this check on decision-making, the two parts cannot be viewed in isolation. We therefore consider decision-making and appeals under the Charities Act as an end to end process.

Structure of the regulator

Under the Charities Act, regulatory functions are split between two bodies, the independent Board and Charities Services. Charities Services operates as a business group within the Department.

This arrangement is unique compared to other jurisdictions which mostly have one body providing both registration and compliance functions. Our 'split' regulator was created following the disestablishment of the Charities Commission in 2012. While most of the resource and the traditional regulatory functions were brought into the Department as Charities Services, the Board was established for independent registration and deregistration decision-making, and to provide technical expertise on complex issues. Decisions made under the Charities Act are split between the Board and the Chief Executive of the Department (via Charities Services).

The role of the Board

The Board is comprised of three members appointed by the Minister for the Community and Voluntary Sector. Members continue in office until they are reappointed, resign, or are replaced. The Board is not subject to the Minister's direction and members must act independently in exercising their professional judgement. Decisions made by the Board include:

- the decision to grant or decline application for registration;
- the decision to remove a registered charity from the register;
- the decision to waive any disqualifying factor for an officer;
- the decision to publish details of a possible breach of the Charities Act or serious wrongdoing; and
- the decision to revoke an entity's status as forming part of a single entity (removing the ability for affiliated charities to report as a single entity).

The Board is responsible for deciding on registration applications and deregistration, through applying the Charities Act and court judgments (case law). If it is satisfied that the entity qualifies, the Board must direct Charities Services to register the entity as a charity. The Board can also direct that an entity be removed from the register. While the Board is responsible for all registration and deregistration decisions, in practice, it delegates most decisions to Charites Services (over 1,400 decisions in 2019/20). Delegation powers are provided for under section 9 of the Charities Act – the Board may delegate any of its functions, duties, or powers to the Chief Executive (who can then delegate to Charities Services) if it is effective and efficient to do so.

Proactively released by the Minister for the Community and Voluntary Sector

However, the Board is always the decision-maker for complex registration decisions; where Charities Services recommends a decline outside of their delegated decline criteria; or where Charities Services recommends a deregistration due to serious wrongdoing. In addition, Charities Services sometimes consults the Board on applications where Charities Services makes the final decision. When making its own decisions, the Board receives from Charities Services a recommendation, written reasoning, and all material that the organisation seeking registration has provided to Charities Services. The Board may agree or disagree with Charities Services' recommendation or ask for further information.

The role of Charities Services

Charities Services' functions are to maintain the register, educate and assist charities on good governance and management, process registration applications, monitor and promote compliance with the Charities Act, enquire into possible breaches, and promote research into charities. Charities Services make decisions impacting registered charities, including:

- the decision to remove or omit information from the public register;
- the approval of a change of balance date for annual returns; and
- the decision to exempt an entity from compliance requirements within the Charities Act.

Charities Services is also required to hold an annual meeting with representatives of the sector and consult with sector representatives on any proposed changes to the annual return form that charities must comply with. It delivers these functions alongside their delegated registration and deregistration powers.

As a business unit within the Department, Charities Services' public accountability measures are part of the Department's statement of performance expectations and annual reporting requirements. The current measures include an independent review of decisions by Charities Services and satisfaction surveys from customers and the Board. Charities Services also publishes an annual review document. This is not required under the Charities Act but provides an overview of the team, the Board, appeals, vision and focus areas, outputs such as webinars and concerns addressed, their regulatory and compliance approach, expenditure, funding, and data/insights/case studies about the sector.

Process for applications for registration

The Charities Act sets out the process, procedural obligations and safeguards when considering registration applications. It requires:

- The Board to act independently in exercising its judgments (as the Board is not subject to Ministerial direction);
- That Charities Services receives applications for registration (in the form prescribed by Charities Services) and that it must determine as soon as possible whether the entity qualifies for charitable registration;
- That Charities Services may request further information from the applicant to be provided within 20 working days, and can treat the application as withdrawn if the applicant fails to respond within that time (or a longer period if allowed following a request of the applicant);
- Charities Services to have regard to the activities of the entity, and any other information it considers relevant, and to observe the rules of natural justice when considering an application;
- Charities Services to give notice to the applicant of any matter that might result in the application being declined, with 20 working days for the applicant to make a submission on the matter;

Proactively released by the Minister for the Community and Voluntary Sector

- Charities Services must recommend to the Charities Registration Board to grant or decline the application, and if the Board is satisfied that the application meets the requirements, they must direct Charities Services to register the charity; and
- If the Board is not satisfied, it must give Charities Services the reasons for this so that the entity can be notified of intent to decline the application and the reasons. Before doing so the Board must be satisfied Charities Services observed rules of natural justice in providing its recommendations.

Most applications for registration are approved. In 2019/20, of the 1,408 decisions made on the applications:

- 1,234 were approved;
- 171 were withdrawn; and
- 3 were declined.

In 2020/21 (tentative figures still to be confirmed), no applications were declined.

Removing a charity from the register

Section 32 of the Charities Act sets out when a charity can be deregistered. Typically, around half of deregistrations are made at the charity's request (voluntary), mainly because they are no longer operating. Most of the remaining deregistrations are due to the charity having failed to file annual returns for two or more years. In 2019/20, 684 charities were deregistered, 498 at the request of the charity, 185 because they failed to provide annual returns for two or more years, and one for serious wrongdoing. For indicative figures for 2020/21 – there were 782 de-registrations: 396 for failure to file, 385 voluntarily deregistrations, and one for serious wrongdoing.

Before an entity is removed from the register, Charities Services must give notice of an intent to deregister, and the grounds for deregistration (section 33 of the Charities Act). The entity can object to this within 20 working days of the notice being received, either because it does not consider the grounds satisfied or because it would not be in the public interest. If an objection is received the Board must not proceed with deregistration unless they are satisfied there are still grounds for removal, the facts of the objection are not correct, or the objection is frivolous or vexatious. The form of the objections is not prescribed in the Charities Act. The Board/Charities Services currently accept written submissions. Based on records of Board decisions from 2012 onwards, the Board has considered 16 formal objections, of which one resulted in the Board giving the charity an extension to file annual returns. The remaining objections resulted in deregistration; however, three subsequently appealed the deregistration decision, and one re-registered following changes to the charity. Charities Services also has records of a further nine who formally objected to their notice of intention to deregister and received an extension for filing their annual returns.

Although not required under the Charities Act, the Board currently publishes decline decisions, deregistrations for serious wrongdoing, and some complex/high profile registrations. Charities Services do not publish decisions they are delegated to make. However, Charities Services updates the register with information on why a charity has been deregistered and publish monthly snapshots of the type of entities that are granted registration.

Right of appeal

Decisions of the Board (including those delegated to Charities Services) can be appealed. Prior to the change in 2012 to disestablish the Charities Commission and split the functions of the Commission

Proactively released by the Minister for the Community and Voluntary Sector

between the Board and Charities Services, all decisions of the Commission were available for appeal. However, only one decision of the Commission, that subsequently became a decision of Charities Services, has been challenged by an appeal.

If an entity disagrees with a decision of the Board, the Charities Act provides for the entity to appeal the Board's decision to the High Court. The entity must lodge a notice of appeal within 20 working days after the date of the decision, that specifies the decision that is being appealed, the grounds for appeal, and the relief sought (section 59 of the Charities Act). The Charities Act also outlines the High Court's powers in determining the appeal. The High Court may confirm, modify or reverse the decision of the Board, or exercise any of the powers that could have been exercised by the Board (section 61 of the Charities Act).

The High Court may make an order requiring an entity to: be registered as a charity with effect from a specified date (the specified date may be before or after when the order is made); be restored on the register with effect from a specified date; be removed from the register; or remain registered. The Charities Act provides little guidance as to the other features of an appeal. As a result, several factors are then determined by the High Court Rules. The High Court Rules 2016 specify that:

- appeals will be a 'rehearing', which dictates that the High Court can only consider the evidence that was provided to the original decision-maker. No new evidence can be introduced, unless agreed by the Court;
- there is no ability for the appellant (party appealing the decision) to provide any oral evidence, unless agreed by the Court;
- the original decision-maker cannot be party to the appeal (note that the Rules Committee have proposed this be changed to allow the decision-maker to be party; however, this requires approval by Cabinet); and
- an appeal must be lodged with the High Court within 20 working days (this is also specified within the Charities Act).

The High Court Rules specify that the decision-maker (the Board) is not named as a respondent. The result of this rule is that the Board can appear to assist the Court but cannot advocate for the decision it has made. Another limitation is the Board is unable to appeal a decision made by the High Court. However, each new judgment has implications for the Board and Charities Services (through the powers delegated to them by the Board), in how they assess applications.

Beyond decisions taken by the Board (including those the Board delegates to Charities Services), entities affected by decisions of Charities Services can apply for a judicial review. A judicial review also requires going to the High Court, however, it is limited to examination of the lawfulness of decisions and considers the process that was undertaken to reach the decision, not the decision itself. This option is available for any decision made under the Charities Act, whether it has the right of appeal provided or not. Complaints can also be made to the Ombudsman. The ability to complain to the Ombudsman is limited to decisions that do not have an appeal right provided, however, the Ombudsman may not agree to investigate a complaint. While the Ombudsman's decisions are not legally binding, they are generally accepted and acted upon.

Appeals taken under the Charities Act

Between 2005 and 2019, there were over 56,000 decisions to approve, decline or deregister entities, however only 25 decisions have been formally appealed. Of the 25 appeals that have been lodged since the enactment of the Charities Act, the majority related to what constitutes charitable purpose,

Proactively released by the Minister for the Community and Voluntary Sector

including whether an entity maintains exclusively charitable purposes. Decisions relating to what constitutes charitable purpose are complex and a number have subsequently been taken to the Court of Appeal and the Supreme Court, when the entity challenging the decision of the Board does not agree with the decision of the High Court. The court judgments are then used by the Board for direction on future decisions. For example, the Supreme Court's decision on Greenpeace New Zealand's appeal of a declined registration application has provided further clarification on how to assess whether a political purpose within an entity is considered charitable.

Prior to an amendment to the Charities Act in 2017, applicants who failed to provide the necessary information for their registration application had their application declined (an 'inactive decline'). The Charities Amendment Act 2017 introduced the ability for Charities Services to deem such applicants as 'withdrawn' as opposed to 'declined'. This change resulted in the number of declined applications dropping significantly, from 134 in 2015/16 to 10 over a three-year period (2017/18 to 2019/20). As the Board made no decisions on the 'withdrawn' applications, there is no ability for these applicants to formally appeal the decision through the High Court, however, they can re-apply.

Charities that are deregistered also have the option of appeal. From the introduction of the Charities Register on 1 February 2007 to November 2012, 3,902 charities were deregistered. Of these, 35 per cent (1,375) deregistered voluntarily, and 64 per cent (2,489) were deregistered for failure to file annual returns, which is a compliance issue. Of the remaining 38 that were deregistered, most (24) were for charities having non-charitable purposes. More recently, from the last five-year period (2015/16 to 2019/20), 4,868 charities were deregistered. The majority were deregistered voluntarily, or for failure to file annual returns.

While appeals generally serve to ensure that decisions made that affect a person's rights are correct, for charities law specifically, appeals serve an additional purpose: ensuring the interpretation and application of 'charitable purpose' continues to move with the times. The definition of charitable purpose within the Charities Act is based on four categories: relieving poverty, advancing education, advancing religion, and other purposes beneficial to the community. In New Zealand and other jurisdictions, the definition has evolved through case law.

What is the policy problem or opportunity?

There is problem with a lack of access to justice, and an opportunity to improve the transparency, accountability and fairness of decision-making under the Charities Act. Access to justice is fundamental to upholding and promoting the law, and the status quo does not support the development of case law and may undermine the legitimacy of the regulator.

Each component of the problem and opportunity is explained below.

A problem with access to justice

Under section 27 of the Bill of Rights Act 1990, "every person has the right to the observance of the principles of natural justice by any tribunal or other public authority which has the power to make a determination in respect of that person's rights, obligations, or interests protected or recognised by law." There is no evidence that this is not currently being observed, but this right to natural justice remains critical to our policy analysis on decision-making and appeals.

Proactively released by the Minister for the Community and Voluntary Sector

The cost of taking an appeal through the High Court is high, given the need for significant legal work and representation. For example, Charities Services estimates that the Crown's legal cost of an appeal are currently around $130,000, depending on the complexity of the case. Members of the charitable sector have said that this makes appeals very inaccessible for charities, as they do not have the funds or resources available. Appeals are essentially limited to charities (or entities applying to be registered) with significant resources, and legal aid is not available to entities. The High Court setting is also not easy to navigate for entities who wish to represent themselves. This means the current appeals mechanism under the Charities Act presents barriers for charities to access justice.

There is no data available on applicants or charities who were declined or deregistered respectively, who chose not to appeal the decision. Because of this gap in the data, we do not know if this problem disproportionally affects any population group. Of those registered charities who have appealed a decision of the Board or the Charities Commission, where we have information on their annual income for the year prior to the decision being made, all reported a total income between $186,864 and $4,490,238. Entities who have lodged appeals include professional bodies, for example the New Zealand Computer Society and the Plumbers, Gasfitters and Drainlayers Board, community trusts including Draco Foundation Charitable Trust and Queenstown Lakes Community Housing Trust, and national organisations including the National Council of Women of New Zealand, Greenpeace, and Family First New Zealand.

From the self-reported income of all registered charities for the 2019/20 year, over 16,000 registered charities (58 per cent) received less than $186,000 in income. Small charities support many types of population groups, including the general public, Māori, Pacific and ethnic groups, people with disabilities, and children and young people. While there is no evidence of the reasons why appeals have not been progressed, feedback in 2019 highlighted that cost of an appeal is too expensive for many charities. If decisions of the Board are not challenged because of the cost of taking appeals to the High Court, then there is no check on the decision-making of the Board. This also means no development of case law on the definition of charitable purpose.

The timeframe required to lodge an appeal is also a barrier preventing appeals from progressing. The requirement to lodge an appeal within 20 working days is not workable for many charities (which also applies to the timeframe to respond to administrative requests, such as providing more information for an application, or submitting and objection). For example, for charities that meet monthly, 20 working days does not provide enough time for the Board to meet to have an informed discussion and engage legal advice to lodge an appeal. This was another concern raised during the 2019 consultation.

Because of the limit of decisions available for appeal, appeals have largely concerned declined applications or deregistrations. While an entity can continue to do their charitable work without being registered, being on the register provides some benefits. These benefits include being eligible for tax exemptions and being eligible for funding only available to registered charities. Registration also provides a level of public trust and confidence, as information about registered charities' use of resources is publicly available. This trust and confidence benefits charities, as they seek public funding and volunteer time to continue their work for communities.

Additionally, decisions that have may have a significant impact on an entity cannot be appealed via the primary mechanism under the Charities Act – the High Court (they can be challenged via judicial review or the Ombudsman). While the Board has responsibility for registration and deregistration

Proactively released by the Minister for the Community and Voluntary Sector

decisions, it also makes decisions on more minor decisions that affect registered charities, for example, the decision to revoke an entity's status as forming part of a single entity (removing the ability for affiliated charities to report as one entity). These more minor decisions of the Board are appealable, however, other decisions made by the Chief Executive (Charities Services) have a similar level of impact on registered charities but are not appealable. This includes the approval of a change of balance date (for annual returns), or a decision to withhold information from the public register (for example, annual returns that may impact a charity commercially if released).

It is unclear why the decisions under the Charities Act are split in this way between the Chief Executive and the Board, following the disestablishment of the Charities Commission. In addition, a small number of decisions can be made by Charities Services or the Board. With appeal rights limited to decisions of the Board, there is an inconsistency within the Charities Act. Appeal rights are based not on the impact of the decision, but who made the decision. This means that some decisions that have a significant impact on an entity cannot be appealed.

An opportunity for better transparency of decisions and decision-making

While there are clear procedural requirements for decision-making under the Charities Act (for example, natural justice must be observed, there is an objections process for certain decisions, and a public register must be established), and some transparent operational practices of the regulator (for example, the publishing of most Board decisions on Charities Services' website) there is an opportunity to improve the transparency of how decision-making under the Charities Act works in practice.

It is unclear what and how decisions are delegated and escalated between the Board and Charities Services, and what information is being used to inform decisions. We note that those affected by the decision are given clear information about the decision-making process, but there is a lack of transparency on the general decision-making policies and procedures for the wider sector and public, and for those charities considering registration. For example, there is some information on the Charities Services website about the decision-making process, including the interpretation of charitable purpose and what is to be included in an application. However, this can be difficult to find on the website (the information is in different places and in different formats), and there is not one source of information that provides clear justification and useful extra information about its regulatory processes and how those contribute to the outcomes of the regime (this type of transparency is recommended as regulatory best practice, which we explain later in the development of options). Additionally, not all decisions that have a significant impact, are published.

We learnt in consultation that the sector has concerns that independent registration decisions are not being made, because of the Board's delegation and reliance on Charities Services. The sector also raised concerns that decisions are not consistent, because so many of them are being delegated to Charities Services, that there is a lack of transparency on what and how decisions are being made, and that there is limited accountability on Charities Services' decision-making. However, it should be noted that the perceptions of Charities Services held by some parts of the sector stem from the disestablishment of the Charities Commission in 2012, and that the primary decision-maker is now part of a large government department. Stakeholders commented that there would not be trust and confidence in the regulator unless there was a return to the Charities Commission model/an independent Crown entity. Given that the role of the regulator and structural changes are out of scope, we have focused on practical improvements to addressing these perceptions, which we consider relate to decision-making. This is important because the current perceptions can undermine

Proactively released by the Minister for the Community and Voluntary Sector

the legitimacy of the regulator, which could lead to lower compliance with the Charities Act and reduced public trust and confidence in the charitable sector.

An opportunity for a fairer decision-making process

As noted above, there are safeguards and obligations under the Charities Act to provide for a fair regulatory decision-making process. This includes the requirement for the Board and Charities Services to observe natural justice, and the statutory availability of an objections process. However, there is room for improvement to ensure that an entity significantly affected by a decision under the Charities Act has a fulsome opportunity to provide all the relevant information and state their case. At present, entities can object/submit if the decision-maker is intending to decline their registration application or deregister a registered charity. This objection process gives the person a fair chance to comment before the decision is made. However, there are other decisions that could significantly impact a charity that cannot not be formally objected to. For example, the decision to exempt a charity from compliance requirements, or to not omit information from the public register. Some members of the charitable sector have also commented that they do not feel that they have been given a fair enough chance to state their case because the Board accepts written submissions for the objection, rather than oral hearings.

There is also an opportunity to improve the capacity and capability of the Board. While the robust appointment process has given effect to a well-formed and experienced Board, there have been issues in the past with conflicts of interest on registration applications resulting in quorum issues. This is because there are only three members. There has also been feedback from the sector that the Board is not diverse enough to be representative of the sector that they are making decisions about. There is an opportunity to address these issues as part of this work to support a fair decision-making process.

A fair process also means entities being involved in decisions that may affect them. As noted in the status quo section, Charities Services has a role to educate and support the sector, and they do this by providing guidance material, mainly focused on compliance with the reporting standards (the key obligation for charities under the Charities Act). Charities Services may engage with their sector reference group about new or changed guidance, but it is not a requirement like the obligation to consult with the sector on annual return form changes. Arguably, decisions on the form and function of guidance on how to comply with reporting requirements has the same impact as decisions about the annual return form and other significant decisions. This is because the guidance may affect the process and procedures charities follow. The inconsistencies in statutory requirements for consultation with the sector, in terms of the fair process to develop guidance, is also an area for improvement.

An opportunity for better accountability of decisions and regulatory practice

We also heard from stakeholders that they do not consider the accountability of the regulator's decisions, or accountability for how the regulator operates, is fit for purpose. The matter of accountability of decisions is addressed in the appeals analysis above. Broader accountability of regulatory practices, operations and effectiveness has been considered. We have found that there is a lack of sector buy-in to the current accountability measures for Charities Services that the Department publicly reports on. Members of the sector consider that a separate annual report of Charities Services should be mandated, and its contents and performance measures should be set by the sector. These views are held due to perceptions of a lack of independence with Charities Services sitting within a large government department. These perceptions may undermine the legitimacy of

Proactively released by the Minister for the Community and Voluntary Sector

the regulator. As such, there is an opportunity to improve the broader accountability of the Department (relating to Charities Services).

Scale of the problem

For decision-making:

As noted above, there are safeguards within the Charities Act to support fair and transparent decision-making. As such, the need for improvement is relatively small. However, we have heard strongly from the sector that there is a lack of trust and confidence in the regulator. That means addressing legislative or operational gaps in the robustness of the decision-making framework is important, and could have significant impacts on the perception, and therefore legitimacy, of the regulator.

For appeals:

As outlined earlier, very few applications are declined and while hundreds of charities are deregistered each year, the majority are deregistered voluntarily, or for failure to file annual returns (a requirement of registration). Although no data is collected on the outcome of those who are declined registration or removed from the register, many of the removed entities make it back onto the register. In 2019, Charities Services established a more streamlined application process for those re-applying after deregistration, and re-applications now account for approximately 15 per cent of all registration applications.

Given this, and the unambiguous nature of whether a charity files annual returns or not, deregistrations that are likely to result in an appeal are therefore those that are deregistered for serious wrongdoing, or no longer meeting the requirements under the Charities Act (whether the entity has a legitimate charitable purpose). Deregistrations for this reason are relatively uncommon (nine over a five-year period from 2015/16 to 2019/20).

The scale of the problem is therefore relatively small – even if appeals were more accessible, the decisions that are likely to be appealed are few. However, the nature of the problem is important – it is about the principle of natural justice. While a charities' or individuals' rights are not affected by whether they can register (they can continue charitable work), their interests and benefits are (for example, the status and tax benefits provided by charitable status). A fair and robust decision-making process is necessary in this regard, regardless of whether few or many charities will be affected.

Case for change

If no action is taken, trust and confidence in the regulator may decline, and there may not be a robust check on the regulator's decision-making. This may undermine legitimacy of the regulator, which could lead to lower compliance with the Charities Act and more charities operating outside of the registration system. These charities would lose the benefits of registration, for example, their tax exemption status, and the public would lose the ability to see how donations are being used. This could reduce public trust and confidence in the wider charitable sector. Public trust and confidence in the charitable sector matters – without it, people may be less willing to volunteer or donate money to assist charities, which could negatively impact charities' ability to support their communities.

Proactively released by the Minister for the Community and Voluntary Sector

Key assumptions

The following assumptions have been made:

- That the costs of the High Court are a barrier to entities challenging decisions;
- That the 20-working day timeframe required to appeal the decision is a barrier to entities challenging decisions;
- The 20-working day timeframe for other administrative requests may be a barrier to registration or a decision being reached;
- That regulator should provide procedural transparency and transparency of decisions;
- That decisions that affect a person's or entity's rights or interests need to be fair and support principles of natural justice;
- That case law can be developed by the courts but not through other bodies; and
- That decisions by the regulator (Board and Charities Services) have different types of impacts – nature and scale – on entities, and decisions that have a material impact should be appealable regardless of who made the decision.

Objectives

The objective for this work is 'for the [Charities] Act to encourage and support charities to continue their trusted and vital contribution to community wellbeing, while ensuring that contribution is sufficiently transparent to interested parties and the public. In line with this overarching objective, the objectives of any change to the decision-making and appeals framework are to ensure that:

- decision-making under the Charities Act is fair, transparent, independent, consistent and supports the development of case law; and
- the framework for decision-making, including the mechanisms to challenge and test decisions, is consistent with the Government's best practice guidelines and advice.

Describe and analyse the options

Development of options

To develop a short list of options, we considered stakeholder comments on the decision-making and appeals framework and the broader independence and accountability of the regulator, along with the best practice guidelines outlined below. The status quo is our baseline, and we developed one option modelled on best practice. The remaining options provide trade-offs to achieve different objectives. These trade-offs are primarily around the nature of the appeals mechanism. This is because the options for the first instance decision-making part of the process are relatively narrow in scope, and it was not considered worthwhile to a) assess them all independently, and b) assess them in the absence of the appeals part of the framework.

As such, all options other than status quo include the components of best practice decision-making. These are outlined in the description of options. Some elements of the status quo already align well with best practice. In the options assessment, we clarify what components are status quo and best practice. Each option also includes the right of judicial review, for all decisions made under the Charities Act, and the ability to lodge a complaint with the Ombudsman for decisions where there is no right of appeal.

Proactively released by the Minister for the Community and Voluntary Sector

Best practice decision-making and appeals

The best practice guidance and resources on decision-making and appeals that we considered were the:

- Legislative and Design Advisory Committee guidelines (2018);
- Productivity Commission report on regulatory institutions and practices (2014);
- Office of the Ombudsman guide on good decision-making (2012);
- Treasury guidance on government expectations for good regulatory practice (2017); and
- Crown Law Office "The Judge Over Your Shoulder" resource (2019).

The key principles from this suite of advice that informed our analysis are, in summary:

- There is a tension between certainty (having definite rules and applying them consistently) and flexibility (enabling decisions to be made according to the specific circumstances of the case);
- Regulators need to be transparent in their decisions (gives clear reasons for a decision) and provide for procedural transparency (clear justification and useful extra information about its regulatory process and how they contribute to the desired outcomes of the regime);
- A fair process of decision-making should be followed, which means: giving the person an opportunity to provide all relevant information, where appropriate give the person a fair chance to comment before the decision is made, take measures to address conflicts of interest, act independently and with an open mind, and act without undue delay;
- The government expects regulatory agencies to, among other things, maintain and publish up to date information about their regulatory decision-making processes, including timelines and information and principles that inform their regulatory decisions;
- Consultation increases the transparent and inclusive nature of decision, which improves their legitimacy; improves the quality of decisions by ensuring decision-makers consider all perspectives of those affected; helps to promote understanding and acceptance of a decision; and enables those affect to plan and adjust systems or processes appropriately;
- Legislation should include a requirement to consult when that is necessary to clearly ensure good decision-making practice, by providing additional assurance and certainty to people affected by a decision, set clear processes around consultation, and ensure consistency of consultation practice for similar decisions;
- Regulator independence and independent decision-making can be fostered by operational clarity, clear decision-making powers and a foundation for independence in legislation, an adequate resource base, staffing flexibility, and transparency processes for appointing members;
- The greater the potential impact on a person or group, the greater the requirements of fairness, and that principles of natural justice, including the right to be heard and the rule against bias a predetermination, form the greater part of the duty of fairness;
- That where a public body or agency makes a decision affecting a person's rights or interests, that person should generally be able to have the decision reviewed in some way. However, natural justice does not require that there should be a right of appeal from every decision, and there is no such thing as a common law right of appeal. Whether a right of appeal is required depends on to what extent a person's rights or interests are affected;
- The value of an appeal is dependent on other factors including the potential costs, implications of delay, significance of the subject matter, competence and expertise of the original decision-maker, and the need for finality;
- Courts of general jurisdiction (District Court, High Court) are more appropriate for second appeals from specialist courts and bodies (Environment Court, Social Security Appeal Authority for example). Specialist bodies are generally more appropriate for first appeals from decision-

Proactively released by the Minister for the Community and Voluntary Sector

makers in narrow fields or cases that require technical expertise on the part of the decision-maker. However, new specialist bodies (tribunals) are rarely created.

Limitations on scope of options

Any significant structural change has been ruled out – this includes reverting back to the Crown entity model that was in place prior to 2012.

A new tribunal for appeals was also not considered. This is because the MOJ informed us that there is no appetite for further bespoke tribunals where limited numbers of appeals are expected, and it was therefore not feasible.

We considered several non-regulatory options to address problems with decision-making and appeals, which have been incorporated into our options analysis:

- Guidance and information on how the regulator makes decisions;
- Guidance and information on delegation and escalation arrangements for decision-making between the Charities Registration Board and Charities Services;
- Publishing and using the Charities Services website to provide more information about regulatory decisions; and
- Reviewing Charities Services public accountability performance measures.

An internal review process was considered early on, however, given some in the sector's lack of trust in the regulator, this was not viewed as a viable option – any review of decisions would need to be from an external party. We therefore did not include this non-regulatory option in our analysis.

Options identified did include consideration of appeal rights of decisions of charities regulators in Australia, England and Wales, Scotland, and Canada. However, as noted above, New Zealand is different from these jurisdictions in that the regulatory functions are split across two bodies, with many decisions delegated down from the Board to Charities Services. In addition, while overseas examples were considered, of greater relevance was the appeal mechanisms of other regulators within New Zealand – to ensure any changes align with the wider appeals framework in New Zealand.

Option 1 – Status quo

Status quo means:

- Some information in the Charities Act and other channels on decision-making processes, but not always clear;
- Publication of Board decline and deregistration decisions under Charities Services website (operational decision, not required under the Charities Act);
- Objection (or submission) process available under the Charities Act to object to a decision to decline or deregister an entity before the Board makes the decision;
- Decisions made by the Board, or Charities Services if delegated by the Board, are appealable. Timeframe for lodging appeal is 20-working days following the date of the decision; and
- Appeals go straight to the High Court, as a re-hearing. Further appeals go to the Court of Appeal and the Supreme Court.

Analysis

This option does not fully align with principles of best practice decision-making, giving that some improvements are needed to be clear about how and what decisions are made, and who makes

Proactively released by the Minister for the Community and Voluntary Sector

them. There could also be improvements in entities being able to have more of a say before decisions are made that significantly impact them.

The appeals process, where appeals go direct to the High Court, goes against best practice as no specialist body, or District Court judge, has first considered the decision. There is also an inconsistency in the Charities Act, where some more minor decisions of the Board are appealable, however, decisions made by Charities Services that have a similar level of impact on an entity, are not. There is the ability for those affected by Charities Services' decisions (excluding those delegated to them by the Board) to apply for a judicial review. Complaints can also be made to the Ombudsman.

Option 2 – Appeals and decision-making framework consistent with best practice advice, including empowering a Tribunal to hear appeals under the Charities Act

This option was developed through consideration of Government guidelines of best practice decision-making and appeals frameworks.

Components of option two include:

- Clarify who makes decisions and how via guidance (non-legislative);
- Amend the Charities Act to require the Board and Charities Services to publish all decline and deregistration decisions (legislative change) and Charities Services make some operational changes to provide more information about recent registration decisions;
- Require Charities Services to consult with the sector on significant guidance material (legislative change) and review the Department's public accountability measures as they relate Charities Services (non-legislative change);
- Increase the size of the Board from three members to five members (legislative change);
- Objection process under the Charities Act expanded to include all Board decisions, as well as significant/material decisions made by Charities Services (aligning with all decisions proposed for appeal). Objection process provides for applicant/registered charity to speak to the Board or Charities Services, and timeframe for making an objection extended to two months (legislative change);
- Decisions made by the Board (or Charities Services if delegated by the Board) and significant decisions by Charities Services, are appealable (legislative change). Decisions available for appeal to include:
    - i. decision to remove or omit information or documents from the register (section 25 of the Charities Act);
    - ii. approval of a change of balance date (section 41 of the Charities Act);
    - iii. granting, varying or revoking exemptions from compliance requirements (section 43 of the Charities Act); and
    - iv. decision to treat one or more entities as a single entity (and what terms and conditions will apply to the single entity (sections 44 and 46 of the Charities Act).
    - v. Other administrative decisions by Charities Services challenged via judicial review or Ombudsman;
- Appeals first heard as rehearing at an expanded existing tribunal, the Taxation Review Authority (TRA), with a District Court judge or lawyer with at least seven years' experience. Timeframe for lodging appeal, following date of decision, is extended to two months (legislative change); and
- Further appeals then go to High Court, as rehearing, followed by the Court of Appeal on points of law (status quo, no change required).

Proactively released by the Minister for the Community and Voluntary Sector

The TRA was considered the most appropriate existing tribunal to consider Charities Act appeals, given the historical connections between tax and charities law. Prior to the enactment of the Charities Act, charitable status was determined by Inland Revenue. The connection remains today, as the Tax Administration Act 1994 allows the Commissioner of Inland Revenue to make binding rulings on how taxation law applies to income derived by, or for the benefit of, charities. The Charities Act requires the Board to follow any binding ruling by Inland Revenue when deciding if an organisation meets registration requirements for charitable purpose.[14]

There are tax benefits that come with being registered as a charity, for example, potential exemptions for income tax, resident withholding tax, fringe benefit tax and the benefits to donors of registered charities. Deregistration decisions by the Board therefore have flow-on tax implications, some of which are suspended during any period of appeal of the deregistration decision. No other existing tribunals we have identified have such links to charities law.

The Taxation Review Authorities Act 1994 (TRAA), that establishes the TRA and provides its functions, is administered by Inland Revenue, who have indicated support for expansion of the TRA, which in recent years (from 2017 to 2020) has heard less than 10 appeals per year. The TRA currently has one Authority member appointed, and the MOJ (who appoint tribunal members and provide support to the TRA) indicated that the current member would be able to absorb Charities Act appeals, if the number of appeals were limited to a small number (approximately five) per year.[15] If appeals to the TRA increase further, a new Authority member will need to be appointed. Specialist knowledge of charities law would develop over time.

Analysis

This option leverages the opportunity to improve transparency for the sector and the public, on the decisions and decision-making under the Charities Act. Increasing the size of the Board will provide additional resource to support their role as an independent decision-making body (including ensuring quorums for conflict of interest management) and enhance diversity of thought and experience required to promote robust decision-making. Expanding the objections process within the Charities Act provides the opportunity for entities to provide further evidence, challenge evidence provided by the Board or Charities Services, and to argue their case, prior to the decision being made about current decisions that can be objected to, and other decisions that could have a significant impact on the entity. The ability to speak to the Board as part of this process will help ensure that entities have felt they have been heard. Requiring Charities Services to consult on significant guidance improves fairness and accountability about decisions on regulatory tools that impact charities. A review of the Department's performance measures for Charities Services should also help to improve trust and confidence in the regulator.

Expanding the decisions available for appeal to significant decisions made by Charities Services, ensures that the threshold for what is considered a significant decision (and available for appeal) is applied consistently across the Charities Act, without removing any right of appeal that currently exists (which aligns with the decisions that can be objected to under this option). An expansion of decisions available for appeal was strongly supported during stakeholder consultation.

The use of an existing tribunal, the TRA, will provide an accessible, quasi-judicial body to consider appeals. This meets best practice by providing a specialist body to consider an appeal, before any appeal to the High Court (if required). It has more relaxed rules of evidence, allowing evidence that

Proactively released by the Minister for the Community and Voluntary Sector

14 Binding rulings currently occur infrequently.

15 The current Authority member also sits on other Tribunals.

would not be admissible in court. It also removes a significant barrier for appeal, the cost, with the ability for appellants to represent themselves. The addition of an appeals body prior to the High Court was well supported by stakeholders during targeted consultation. However, there was some concern about the use of the TRA because it could imply that a decision concerning registration of a charity would be based on the tax consequences of the decision.

A further right of appeal to the High Court, and the Court of Appeal on points of law, is required, to ensure a fair process and to provide the opportunity for case law to develop where required. Case law will only be made if an appeal is progressed to the High Court. While appealing to the Courts will add significant costs on all parties, in the interest of fair process and case law development, we do not believe TRA decisions should be final. It is also common practice for tribunal decisions to be appealed further. Additionally, while the Board and Charities Services would be guided by decisions of the TRA, if there was no right to appeal to the High Court then case law on charitable purpose would not develop.

While allowing the Board or Charities Services to be party to the appeal may increase the likelihood of appeals of TRA decisions that go against the Board or Charities Services, this will likely only occur on high profile cases that will have an impact on the definition of charitable purpose. To date, only one appeal has progressed following a successful appeal decision. The Attorney-General became involved in the recent Family First appeal, given the significance of the case to the definition of charitable purpose.

Impact of the changes

We consider that introducing a more accessible appeals mechanism will increase the number of appeals per year, however, not significantly. Our assessments have indicated approximately 10 – 25 appeals per year, based on recent data of decisions available for appeal, and the low number of decisions that negatively impact a charity or entity. This is based on Charities Services' data of declined applications and deregistrations. There are very few declined applications, therefore most decisions that could result in an appeal are deregistrations for failure to file annual returns, a straight-forward compliance issue.

We do not consider that charities deregistered for failure to file will appeal the decision to deregister. This is because Charities Services regularly reminds and supports the charity to comply with the reporting duty before they produce a notice of intent to deregister. In many cases, after a notice of intent is received, the charity will seek an extension to file returns and is able to remain on the register. Those that are deregistered have not made an effort to comply after several years. However, because there have been previous appeals of such decisions, we consider that a number will occur with a more accessible appeals body available.

For the significant decisions made by Charities Services that we are proposing be available for appeal, there is no data available on the outcome of the decisions. These decisions are made on the request of charities, and Charities Services have indicated that such requests are rarely declined. The exception to this is the decision to withhold information from the public register. Charities Services have indicated that they have declined requests to withhold financial information from the register, therefore, challenges to these decisions would be likely.

Given this, costings have been provided for a range of 25 to 50 appeals per year, based on the MOJ's understanding of increases to appeals due to the introduction of a more accessible body, and an expansion of decisions available for appeal. The Department expects appeals to be closer to the lower estimate, and notes that decisions made by the appeal body would provide further guidance for future decisions (of the Board and Charities Services), potentially limiting the number of appeals in subsequent years.

Proactively released by the Minister for the Community and Voluntary Sector

Costs of hearing appeals within the Taxation Review Authority tribunal

MOJ is not currently funded for the TRA to deliver this appeal service. MOJ has therefore made conservative cost estimates for the impacts of the proposed change on the TRA, using estimates of 25 - 50 appeals per year. MOJ estimates that additional costs will likely fall between $445,000 and $580,000 in the first year; these costs include the appointment of a new Authority member to hear an increased number of appeals, and one-off expenses for IT system upgrades.

Sitting days per appeal are based on Charities Act appeal cases heard through the High Court, with a median of 2 days per appeal. Sitting fees are based on current rates for the TRA and MOJ costs are based on appointing appropriately qualified support staff with relevant resources and delivery support.

Table 18: Annual costs of TRA expansion for Charities Act appeals

Estimated volume of appeals	**Low:** up to 25	**Medium:** up to 50
Estimated sitting days	125	250
Estimated costs	$	$
Sitting fees: @$876 per day	110,000	219,000
Operating costs	125,000	220,000
Projected costs	**235,000**	**439,000**

MOJ does not expect High Court cost savings to become available for reprioritisation because of the change. The High Court will remain an available avenue for secondary appeals for Charities Act decisions and will therefore continue to incur costs for cases heard at second appeal.

Option 3: Alternative – broader objection and appeal rights/rules

This option includes elements of best practice decision-making, as Option 2 provides, however considers expanding the right of appeal to all decisions made under the Charities Act and providing for appeals to be conducted as hearing *de novo*. This provides for a new decision-maker (the High Court), to assess the decision afresh, without taking into consideration the decision that the Board or Charities Services came to. This essentially provides the opportunity to have another body consider the decision, without a legal basis or issue of fact to argue against. This option was considered because submitters in 2019 and stakeholder engagement in 2021 showed strong support for these changes, that go beyond best practice guidelines.

Components of Option 3 include:

- Clarify who makes decisions and how via guidance (non-legislative);
- Amend the Charities Act to require the Board and Charities Services to publish all decline and deregistration decisions (legislative change) and Charities Services make some operational changes to provide more information about recent registration decisions;
- Require Charities Services to consult with the sector on significant guidance material (legislative change) and review the Department's public accountability measures as they relate Charities Services (non-legislative change);
- Increase the size of the Board from three members to five members (legislative change);
- Objection process under the Charities Act expanded to include all Board and Charities Services decisions. Objection process provides for applicant to speak to the Board or Charities Services (legislative change);

Proactively released by the Minister for the Community and Voluntary Sector

- All decisions made by the Board and Charities Services become appealable (legislative change); and
- Appeals heard at the High Court as hearings de novo (followed by the Court of Appeal and the Supreme Court) (legislative change).

Analysis

This option provides the same benefits for decision-making as option 2 but expands the objections process further to include all decisions under the Charities Act. These decisions include requesting further information from an applicant, prescribing the form for a registration application, issuing warning notices and starting investigations. These decisions relate to actions that Charities Services are required to undertake in order to perform their functions under the Charities Act. Some, for example, prescribing the form for applications, can only be made following consultation requirements specified within the Charities Act, and impacts all entities applying for registration, rather than an individual entity. Other decisions, for example the issuing of warning notices and starting investigations, may lead to a decision to deregister a charity, which would be appealable.

Expanding the decisions available to appeal to all decisions under the Charities Act was also strongly supported during consultation. However, decisions by Charities Services that relate to it undertaking its core functions, for example, decisions requesting further information or issuing warning notice, should not be appealable. Such decisions may lead to a subsequent decision that is appealable, for example, a declined application or a decision to deregister a charity. However, these steps taken by Charities Services do not impact the rights or interests of the charity, rather they require information or changes by an entity, to ensure they meet the requirements or obligations of the voluntary registration system. This logic also applies to providing an even broader objections process, that includes all decisions.

De novo appeals were well supported during consultation, with submitters highlighting a de novo appeal provides for new evidence to be considered. However, they require significant time and resources from both parties, when there is potentially no basis for an appeal other than the charity or entity not agreeing with the decision of the regulator. In addition, de novo appeals require more High Court time, and therefore greater legal representation for both parties, making it less accessible to charities with limited resources. High Court Rules require appeals at the High Court to be conducted as re-hearings; this option would not be consistent with the High Court Rules. The decision of whether to allow new evidence is a decision for the Court; in practice, seen in Charities Act appeals to date, the High Court has provided for new evidence to be considered.

Option 4: Alternative appeals body prior to High Court

This option includes elements of best practice decision-making, as Option 2 provides, and considers what other appeals body could be introduced prior to the High Court, by assessing the District Court and an Appeals Panel, a judicial and non-judicial option.

Components of option four include:

- Clarify who makes decisions and how via guidance (non-legislative);
- Amend the Charities Act to require the Board and Charities Services to publish all decline and deregistration decisions (legislative change) and Charities Services make some operational changes to provide more information about recent registration decisions;

Proactively released by the Minister for the Community and Voluntary Sector

- Require Charities Services to consult with the sector on significant guidance material (legislative change) and review the Department's public accountability measures as they relate Charities Services (non-legislative change);
- Increase the size of the Board from three members to five members (legislative change);
- Objection process under the Charities Act is amended to be available for significant/material decisions made by Charities Services. Objection process provides for applicant to speak to Charities Services prior to their decision being made (same as option 2);
- Decisions made by the Board (or Charities Services if delegated by Board) and significant decisions by Charities Services, are appealable (legislative change) (same as option 2);
- Appeals first heard as rehearing by either District Court (sub-option 4a) or new Appeals Panel (sub option 4b), made up of lawyers and charities experts (a judicial and non-judicial option); and
- Further appeals then go to the High Court, as rehearing (followed by the Court of Appeal on points of law).

Analysis

This option provides the same benefits for decision-making as option 2 and proposes a different appeals body prior to the High Court.

Sub-option 4a: Appeal to District Court

The District Court is the only option that would provide for the development of case law, however, it does not meet best practice, as an appeal would go direct to a generalist court, as opposed to a specialist body. There is less ability for specialist expertise to develop in the District Court, given there are more District Court judges in comparison to the High Court. As at 16 June 2021, there were 181 District Court judges and 39 High Court judges appointed.

In addition, given the legal representation still required, it would not provide any significant improvement in terms of accessibility. An Appeals Panel, with legal and charities subject-matter expertise, would provide a more accessible, less formal appeals mechanism, where charities or entities appealing decisions could represent themselves. While it would not provide case law, that would bind the Board/Charities Services for any future decision on the same facts, it would provide guidance for the decision-makers.

Sub-option 4b: Appeal to Appeals Panel

An Appeals Panel is likely to be well supported from the sector and has the benefits of a multi-person decision-making body, which includes allowing for different perspectives, and ensuring a better balance of judgment and consistency over time. However, an Appeals Panel would not be dissimilar to the current Board, in terms of level of expertise. This raises an issue of a similar-level body considering appeals of Board decisions, which may not be effective or efficient.

Option 5: Alternative – change the Board to an appeals body

This option provides for the same decisions to be challenged via the objection and appeals process, as per option 2. However, it differs from option 2 and the status quo, by disestablishing the Board, and giving all decision-making powers under the Charities Act to Charities Services.

Components of option five include:

- Disestablish the Board – Charities Services makes all decisions (legislative change);
- Clarify in the Charities Act how decisions are made (legislative change);

Proactively released by the Minister for the Community and Voluntary Sector

- Objection process provided under the Charities Act for decisions that have significant impact. Objection process provides for applicant to speak to Charities Services (legislative change);
- Establish an appeals body to hear appeals first as rehearing (previous Board – no judge; legal and charities expertise; amend the Charities Act to set membership and appointment requirements) (legislative change); and
- Further appeals then go to the High Court as rehearing (followed by the Court of Appeal on points of law).

Analysis

The replacement of the current Board with an Appeals Panel (as described in Option 4b) would provide a more accessible body to hear appeals, with a clear differentiation between the decision-maker and the appeal body, in terms of level of expertise. This option would require all decisions to be made by Charities Services, removing the ability to delegate decisions and therefore some of the confusion present in the status quo. However, the Board currently provides subject-matter expertise to Charities Services and makes the decisions on particularly complex matters. If the Board is disestablished, Charities Services would need to find an additional source of this expertise.

This option also removes the independence that the current Board provides for registration and deregistration decisions. This would be a fundamental change to the Charities Act, and given the importance placed in independence of the decision-maker by the sector, this option would likely not be well supported.

Option 6: Alternative - best practice decision-making with test case litigation fund

This option provides the same benefits for decision-making as option 2 and proposes the establishment of a test case litigation fund. Appeals remain direct to the High Court (status quo).

Components of option 6 include:

- Clarify who makes decisions and how via guidance (non-legislative);
- Amend the Charities Act to require the Board and Charities Services to publish all decline and deregistration decisions (legislative change) and Charities Services make some operational changes to provide more information about recent registration decisions;
- Require Charities Services to consult with the sector on significant guidance material (legislative change) and review the Department's public accountability measures as they relate Charities Services (non-legislative change);
- Increase the size of the Board from three members to five members (legislative change);
- Objection process under the Charities Act is amended to be available for significant/material decisions made by Charities Services. Objection process provides for applicant to speak to Charities Services prior to their decision being made (same as option 2);
- Decisions made by the Board (or Charities Services if delegated by Board) and significant decisions by Charities Services, are appealable (legislative change) (same as option 2);
- Appeals go straight to the High Court, as re-hearing. Further appeals to the Court of Appeal and the Supreme Court; and
- Creation of a test case litigation fund with allocated funding available, and applications for applications for funding to be decided by an independent panel, based on set criteria.

Analysis

This option incorporates best practice decision-making processes; however, it proposes a test case litigation fund to address the issue of accessibility and lack of case law development. The establishment of a fund would allow for cases that develop case law on the definition of charitable purpose to progress, by providing funding to cover some, or all, of the litigation costs of an appeal.

Proactively released by the Minister for the Community and Voluntary Sector

Support to assist accessibility will be limited to cases that provide benefit to the wider sector, by meeting specific criteria, including:

- the case must involve some issue where there is uncertainty about how the law operates; and
- the case must be in the public interest or have significant implications for the sector.

Submitters largely supported this option, however, there were mixed views on the proposed criteria. There were also mixed views as to whether this was the best use of any additional funding for the sector; some argued that it would help to ease the burden on charities to develop case law, where others had alternative proposals for the funding. This option is likely to cost more than the TRA, based on cost estimates from MOJ on expanding the TRA.

Proactively released by the Minister for the Community and Voluntary Sector

Multi-Criteria Analysis – Decision-making and appeals

Table 19: multi-criteria analysis – decision-making and appeals

Key	++	much better than the status quo	+	better than doing the status quo	0	about the same as the status quo	-	worse than the status quo	- -	much worse than the status quo

	Effectiveness	Alignment	Proportionality	Accountability	Sector independence	Support from communities	Overall assessment
Option 1 - Maintain Status Quo	Retaining the status quo will not address the problem of a lack of access to justice, or leverage opportunities to align decision-making and appeals under the Charities Act with best practice.	The registration regime was created to provide transparency of the charitable sector, ensuring those receiving tax relief continue to carry out charitable purposes, and provide clear public benefit (charitable funds used appropriately). Providing clarity on regulatory decision-making, would align with this principle of transparency. The current appeals framework is limited to decisions of the Board, who are responsible for decisions of registration/deregistration (decisions that determine whether you can be part of the regime and receive the benefits of registration).	Decisions regarding deregistration, disqualification of officer (following deregistration), declined applications, publishing decisions of possible breach & serious wrongdoing, are significant decisions that greatly impact the charity/entity and individual. The ability to appeal these decisions to the High Court is warranted given the consequences of the decisions. Incomplete clarity on how these decisions are made is not proportional to the potential impact they could have on a charity. Public trust in the sector is strong (recent survey shows an increase).	Accountability is limited given the low number of appeals taken to date. There has been limited ability to provide a check on the decision-making process. Room for improvement on accountability of Charities Services' decision-making – not all decisions are published, and ability to challenge decisions limited to complaint to the Ombudsman or judicial review.	Very low number of declined applications, or deregistrations for no longer meeting registration requirements (charitable purpose). Most decisions made by the Board/Charities Services are positive for applicants/charities, with the number of registered charities continuing to increase (despite voluntary deregistrations and deregistrations for failure to file annual returns each year).	Not well supported by the charities sector – based on feedback from consultation in 2019 and 2021.	Given that there are few decline or deregistration decisions, the scale of the problem may be considered relatively small, and therefore not doing anything may be proportional to the level of risk. However, the nature of the problem – access to justice - warrants intervention and there is an opportunity to make other improvements. There are also strong messages from the sector to make improvements in the decision-making and appeals space. If we do nothing, the legitimacy of the regulator will be undermined. The status quo is not preferred.
	0	0	0	0	0	0	0

Proactively released by the Minister for the Community and Voluntary Sector

	Effectiveness	Alignment	Proportionality	Accountability	Sector independence	Support from communities	Overall assessment
Option 2 – Consistent with best practice advice	Provides clarity on the decision-making process and outcomes of decisions, therefore improving transparency, accountability and fairness of decision-making. Allows parties implicated by Board/Charities Services decisions the opportunity to speak to decision-maker, which supports a fair process when an entity's interests are at stake. Appeals first heard at specialist body prior to High Court, providing more accessible appeal, and more appropriate body to hear first appeals. However, tribunal does not support the development of case law because a tribunal is quasi-judicial, and so the decision-maker is not bound by these decisions for future decisions with same facts (however in practice, will likely follow direction set by tribunal). Case law will develop if further appeals are progressed to the High Court.	Same as status quo – the key characteristics of the Charities Act include obligations around regulatory decision-making and the availability of an appeals mechanism to provide a check on those decisions. The components of this option align with those key characteristics.	Increased costs & obligations for Charities Services & the Board (to publish more information about how decisions are made, broadened objection process, participation in hearings at Tribunal) is justified given the benefit these changes could provide to increase trust in the regulator. Given the number of decline and deregistration decisions (excluding voluntary deregistration or for failure to file annual returns), and the limited number of significant decisions by Charities Services that adversely affect a charity, the number of potential appeals (and objections) will be limited. This will also limit the impact of these changes on the existing tribunal (MOJ resources, Authority member time). The impact on the TRA and the MOJ are justified given importance of a tribunal prior to the High Court. The ability to complain to the Ombudsman of how day-to-day decisions of the regulator are made (for example requiring more information from an applicant, or issuing a warning notice), is appropriate for such decisions (complaints about conduct or decisions of state agencies & whether they have acted fairly/reasonably).	Decision-making process is more transparent, providing those affected by decisions a greater understanding of how the decision-maker reached their decision. A key component of good decision-making is providing a fair process. Extending the time available for entities to respond to requests for further information provides this. In addition, an expanded objection process provides charities/entities the opportunity to provide new evidence to support their application/argue their deregistration, and challenge evidence provided by the Board/Charities Services. Expansion of decisions available for appeal provides greater accountability over regulator decisions (decisions that have significant impact).	Having charities or entities in limbo for years does not support a thriving charitable sector (tied-up in appeals process rather than doing charitable work and delaying decisions that can provide guidance to the sector). Providing an additional step prior to the High Court has potential to delay the process. If not clear how registration decisions are made/how decision-maker considers applications, charities may spend additional time communicating with Charities Services, which could take resources away from charitable work. Further clarity on decision-making process may limit this. While a Tribunal is less formal than the High Court and legal representation not essential, given complexity of the decisions being made legal representation is preferable. Entities/charities that do not have legal representation may be disadvantaged by this. Connecting charities to a tax tribunal is entrenching the historical connection between charities and tax law	Strong support for more clarity around decision-making process & more decisions required to be published. Strong support for an expansion of decisions available for appeal. Strong support for a more accessible appeals body prior to the High Court. However, there is likely to be limited support for use of an existing tribunal (preference from sector for separate Charities Tribunal, with some concerns that TRA not suitable, given emphasis on tax). Desire from sector for subject-matter expertise, which would develop over time at TRA.	Overall, this option will address the identified problem by aligning the decision-making process with best practice to promote transparency, fairness, accountability, and accessibility. The increased costs and obligations to the regulator are justified (publications, objection process, tribunal set up and participation), and limited by the number of decisions that, in practice, would make use of an expanded objection and new tribunal process. While there are risks of imbalance between strong legal representation by the Board & potentially no legal representation by the charity/entity – this would be the case with any appeals body. The ability for entities to access an appeals process without the need of legal representation outweighs this. Support from sector of a tribunal/specialist body supports this option as well. This option has been developed to meet best practice guidance on regulatory practices in terms of transparency and fairness of decision making, and (along with advice from MOJ) appropriate appeals mechanisms to fit in with the framework of the Charities Act.
	++	0	+	++	0	+	++

Proactively released by the Minister for the Community and Voluntary Sector

	Effectiveness	Alignment	Proportionality	Accountability	Sector independence	Support from communities	Overall assessment
Option 3 - Broader objection and appeal rights/rules	Provides clarity in decision-making process & outcomes and allows parties with opportunity to speak to the Board/Charities Services. Appeal as a hearing de novo does not meet the objective of being consistent with best practice. Does not address the issue of accessibility, as it doesn't introduce a more accessible appeals mechanism before the High Court, and hearings de novo would increase the cost of a High Court appeal, due to the increased length of a de novo appeal.	To expand decisions available for appeal to all decisions made by the Chief Executive would be providing a statutory right of appeal to decisions that Charities Services are required to make to undertake their core functions (for example, issuing warning notices). This does not align with best practice that decisions that can be appealed need to have a material impact on the rights and interests of the entity.	Opportunity to speak on any matter during decision-making process & full de novo appeal at the High Court imposes significant costs on all the parties involved. Increased costs and obligations not proportional to the potential risks of the problem. Full appeal ('from the beginning again') of minor decisions are not proportional to the implications of the decisions on charities.	Provide increased accountability across all decisions/actions made under the Charities Act, with the ability to appeal decisions made by Charities Services (beyond those delegated to them by the Board).	Provides the sector with the ability to challenge any decision made affecting them, however, this has the potential to lead to constant challenge to any small decision, and an extended process to reach the final decisions on them. In practice, this would slow down the decision-making process & put increased strain on the limited resources of the sector & the regulator, which would have implications for registered charities & entities applying to be registered.	Likely to be well supported by the sector, given the lack of trust in the regulator.	This option goes beyond, and is inconsistent with, best practice guidelines. While it may have strong support from the sector, as they would like the opportunity for a new decision to be made (not just a review of the process), and provides for fairness and transparency, it is more than what is needed to provide for robust decision making (decline or deregistration does not remove the right of an entity to do its charitable work) and would impose significant costs on charities, the regulator, and the court system. This option is not preferred.
	--	-	--	++	-	++	-

Proactively released by the Minister for the Community and Voluntary Sector

	Effectiveness	Alignment	Proportionality	Accountability	Sector independence	Support from communities	Overall assessment
Option 4 – Alternative appeals body	An appeals panel provides a specialist body, but it is not judicial and may not be an effective challenge against the Board's decisions (not providing any additional weight or expertise compared with the Board – as another body of similar level reviewing the Board's decision). Appeals to the District Court would allow decision to be made by a District Court judge, but not it is against best practice to appeal to a generalist court.	Same as the status quo – the key characteristics of the Charities Act include obligations around regulatory decision-making and the availability of an appeals mechanism to provide a check on those decisions. The components of this option align with those key characteristics.	Increased costs & obligations for Charities Services & the Board (to allow parties potentially impacted by pending decisions to speak, and to participate in hearing at appeals body respectively) are justified given the benefit this change could provide to trust in the regulator. As with Option 2, the limited number of decisions that adversely affect a charity/entity, the number of potential appeals & objections will be limited.	Decision-making process is more transparent, so decision-maker becomes more accountable. Expanded objection process provides charities with the opportunity to challenge (before the decision is made). More accessible appeals body, however, future decisions are not bound by decisions of the appeal body, although they can use them as guidance. Sub-option of using the District Court would provide case law (and bind the decision-maker to those decisions in future) but would need to be weighed against the limited development of expertise.	Appeals panel sub-option: less formal setting lessens the risk that non-represented entities/charities are at a disadvantage, by not having legal representation. However, this risk cannot be removed entirely in any option. Recognises the importance of the sector by creation of specialist appeals body. Sub-option of District Court: less ability for the District Court to develop expertise in charities law, in comparison to status quo of HC (with higher number of District Court judges). Having charities or entities in limbo for years does not support a thriving charitable sector (tied-up in appeals process rather than doing charitable work and delaying the decisions that can provide guidance to the sector). As per Option 2, providing an additional step prior to the High Court has potential to delay the process.	Support from stakeholders of a specialist body to consider Charities Act appeals. While there was some preference that the body be judicial, this was the minority view from submitters.	Sub-option of District Court is the only option available that would provide for case law development prior to the High Court. However, on balance, the lower likelihood for any specialist expertise to develop in the District Courts, the higher costs associated with District Court, and the pressures on courts (leading to delays), leads to preference for an Appeals Panel over the District Court. An appeals panel is the best option for providing specific charities with subject matter expertise and has the benefits that come with multi-person decision-making bodies. Its decisions would have less weight than those of a 'quasi-judicial' tribunal, however, both sub-options are non-binding on future appeals on the same facts. However, because the appeals body would be at same level as the Board (same expertise), we consider there is more merit in looking at the option where the Board is the appeals body (refer to Option 5).
	0	0	+	++	0	++	+

Proactively released by the Minister for the Community and Voluntary Sector

	Effectiveness	Alignment	Proportionality	Accountability	Sector independence	Support from communities	Overall assessment
Option 5 – Change Board to an Appeals body	Provides clarity and transparency in decision-making process & who makes the decisions by removing the ability to delegate decisions to a separate body. Provides a more accessible appeals body to challenge decisions of the regulator.	Does not align with the current Charities Act (with independent Board). Reverting to a single decision-maker (as Charities Act when introduced provided for), however, the decision-maker is not independent (part of a Government department). Although a significant change for registration decisions, this is consistent with registration decisions of the Incorporated Societies Act & the Companies Act (registrar appointed consistent with the Public Services Act).	Costs of an Appeals Board like the current Board (comparable numbers of decisions made by the Board and numbers of appeals anticipated). Imposing more costs on Charities Services to make all decisions, including the provision of expertise that the Board currently provides. Trust in the regulator's decisions to be strengthened through increased transparency and accountability (publication of more decisions, processes etc), which could be achieved through minimal costs.	Regulatory decision-making process is more transparent, which can help hold decision-maker to account. Clearer objection process (single-body to object to). More accessible appeals body to provide a check on the decisions of the regulator (noting issues in Option 4 above).	As with other options – the benefits of clarification of decision-making etc, however, are more relevant for this option, given all decisions made within the Government. Removing the independence of the regulator does not support recognition of an independent sector. This may be negated by providing a specialist appeals body, to ensure robust challenges to decisions of the regulator.	Likely to have little support from stakeholders – given the lack of independence from Government of the regulator. Limited engagement from stakeholders during consultation on whether the current Board should remain alongside an Appeals Board.	This option would address the identified problem and opportunity, by improving the clarity of decision-making and introducing an accessible appeals body. However, it will not be well supported from stakeholders, given a call from the sector for return to the Charities Commission (independent) model (having Charities Services make all the decisions would not improve the sector's trust and confidence in the regulator). Furthermore, this option is not consistent with the framework of the Charities Act which was set up to have registration decisions made independently from the Government.
	++	--	+	++	--	--	-
Option 6 – Best practice decision-making & test case litigation fund	Does not meet best practice as appeal goes directly to the High Court, however, the availability of a test case litigation fund would partially address the issue of accessibility. Provides the strongest chance to ensure case law development (if required). Also incorporates best practice elements of first instance decision making.	Same as the status quo – the key characteristics of the Charities Act include obligations around regulatory decision-making and the availability of an appeals mechanism to provide a check on those decisions. The components of this decision align with those key characteristics.	Cost to Charities Services to provide more information/publish guidance/process/decisions is minimal and justified because of the improved transparency this change will provide. Cost to implement a test case litigation fund (establishment of a panel to make decisions on applications for funding as well as the actual funds distributed – limited to an annual fund with limits on amount available per application) required to ensure case law develops, which will provide further clarity to the sector.	Same as Option 2 – support accountability of regulatory decision-making by improving transparency, fairness and accountability. Test case litigation fund provides the opportunity for more appeals, which increases accountability on most significant decisions that affect the whole sector, but not all decisions.	Clarification/guidance materials for the sector on how decisions are made may reduce the need for continued 'back-and-forth' of applications which may take resources away from charitable work. Only decisions that are significantly delayed (and therefore creating a gap in knowledge/certainty for the sector) are those that will provide case law, and therefore guidance that the Board is bound by in any future decisions (same as status quo). Test case litigation fund provides greater opportunity for those cases to progress and allows those in the sector with limited funds to access appeals.	Likely to have strong support for test case litigation fund. Support for improving decision making, and expanding objections, including ability to speak to the Board.	Overall, this option is effective at addressing the problem – while it doesn't introduce a more accessible appeals body before High Court, the test case litigation fund would support case law development that would benefit decisions for the whole sector. While it follows best practice for decision-making, because it doesn't incorporate all elements of best practice (appeals), this decision is not preferred, but is a good alternative option to recommend.
	+	0	+	+	+	+	+

Proactively released by the Minister for the Community and Voluntary Sector

Conclusions

We recommend Option 2 – Appeals and decision-making framework consistent with best practice advice. This option best meets the criteria because it:

- addresses the problem of access to justice, by providing a lower cost more informal appeals mechanism prior to the High Court;
- leverages opportunities to align the decision-making processes with best practice, by improving transparency of decisions and decision-making, giving entities more opportunity to state their case on more decisions that affect them, resourcing the board to support robust decision-making, consulting on guidance that impacts charities, and reviewing accountability measures;
- aligns with the role, structure, and key features of the current Charities Act;
- is proportional to the nature of the access to justice problem;
- has support from the sector; and
- leveraging an already established tribunal to make system improvements.

A quasi-judicial body will provide an accessible mechanism for entities, while allowing for subject-matter expertise to develop over time. The increased costs and obligations for Charities Services and the Board, with an increase in Board members, expanded objection process, consultation requirements, and increase in decisions available for appeal, is justified given the benefits these changes could provide to increase trust in the regulator. The costs associated with expanding the TRA are justified given the significance of providing natural justice, however, will be dependent on the approval of new funding.

Concerns were raised during targeted consultation that the TRA would imply that a decision concerning registration of a charity would be based on the tax consequences of the decision. However, given the inability to establish a new tribunal for charities, the TRA was considered the only viable existing tribunal, given the historical connections between charities and tax law. An expanded TRA would no longer be a dedicated tax tribunal and would allow specific charities law expertise to develop. We think this will address submitters concerns.

Despite calls from submitters for a de novo appeal, this is not recommended. A first appeal to the TRA, a less formal body in comparison to the High Court, provides the opportunity to challenge any facts considered during the decision-making process. It is the decision of the appeal body as to what new evidence they will consider, however, the TRA has more relaxed rules of evidence in comparison to the courts. This, combined with the expanded objection process, provides an entity with the opportunity to challenge any other information that the Board/Charities Services is using when considering an application. Any additional information provided during the objection process would be available at the appeals stage. The TRA also provides that both sides (the entity and decision-maker) are party to the appeal, which provides the opportunity for the decision-maker to be able to respond to any challenge of evidence (therefore ensuring a fair process for both parties).

Although Option 5 would address the problem, by providing greater clarity in the decision-making process (clarity on who is making the decisions) and an accessible, effective appeals body (with clear distinction of expertise between it and the decision-maker), it is not considered a viable option. The negative assessment against the criteria of 'sector independence' and 'support from communities' cannot be negated with positive assessments for the 'accountability' and 'effectiveness criteria'.

Proactively released by the Minister for the Community and Voluntary Sector

Summarise the costs and benefits of your preferred option

Table 20: costs and benefits of preferred option for decision-making and appeals[16]

Affected groups	Comment	Impact
Additional costs of the preferred option compared to taking no action		
Regulated groups (registered charities, entities applying to be registered)	Costs associated with an appeal (for decisions that were previously not available for appeal). Costs associated with further appeals to the High Court (if entity or the Board/Charities Services appeals TRA decision)	$410 filing fee per appeal. Legal representation is dependent on complexity of the case (however anticipated to be less than costs of High Court – estimate of $130,000 per appeal). Estimate of $130,000 per appeal.
Regulators (Charities Services and the Board)	Potential to participate in increased number of appeals, leading to increased legal costs and staff resourcing. Increased number of Board members FTE for Charities Services to support expanded Board role	Charities Services currently budgets approximately $100,000 per year for High Court and Crown Law costs. Additional funding for legal costs will likely be sought through Budget 2022 of at least $75,000. Approximately $65,000 per year, which is based on the fees framework for Board members and Charities Services current costs. $150,000/year
Other groups (e.g. wider government, consumers etc.)	MOJ: Costs for TRA – increase in cases being heard at TRA (daily sitting rate, and time outside of hearing) Operating costs for TRA (based on up to 25 appeals per year) Other one-off costs including website and Customer/Case Management System upgrade or implementation (Capex & Opex) Total projected costs for 1 year of TRA (based on assumptions of 10 – 25 cases per year)	$876 daily rate for TRA / based on 25 appeals per year, and 5 days per appeal. $110,000 $15,000 $289,000 **$414,000**

[16] Costs here are based on 25 cases, however, due to uncertainty in predicting the number of appeals, the Budget 22 bid will recognise the range of possible cases and so has bids for 15 cases and 50 cases.

Proactively released by the Minister for the Community and Voluntary Sector

	Inland Revenue administer the TRAA – costs associated with legislative change	Inland Revenue have stated the Department would be able to lead the legislative process (if Charities Amendment Bill was an omnibus bill), so costs for IR expected to be minimal.
Total monetised costs		$410 per applicant (one-off cost associated with each appeal, excluding legal costs); One off costs of $190,000; Ongoing costs of approximately $235,000 each year, based on 25 appeals per year (excluding legal costs for the Board/Charities Services) Ongoing costs of approximately $215,000 for increase in Board members and support costs.
Non-monetised costs		*Low*
Additional benefits of the preferred option compared to taking no action		
Regulated groups (registered charities, entities applying to be registered)	More accessible appeals body with ability to represent oneself (legal representation beneficial but not essential).	Minimal savings based on Tribunal filing fee of $410, in comparison to High Court filing fee of $540, however, there are other fees involved in High Court appeals (for example $640 per half day after the first half day), that are not applicable at the TRA. If entity chooses to represent themselves – benefit is approximately $130,000, dependent on complexity of an appeal (based on costs to the Crown on previous Charities Act appeals, and an assumption that the entity would have similar legal costs to the Crown). This benefit would be limited if an entity appealing a decision chose not to represent themselves, and therefore have legal costs.
Regulators (Charities Services and the Board)	More decisions appealed will provide further guidance to the Board/Charities Services for future decisions (although they will not be bound by decisions of the TRA).	High
Other groups (e.g. wider	Increased transparency of regulator's decisions, providing greater clarity to	High

Proactively released by the Minister for the Community and Voluntary Sector

government, consumers etc.)	future applicants on the reasons behind why applications have been approved/declined.	
Total monetised benefits		Potential for one-off savings of up to $130,000 per appeal (dependent on whether appeals are progressed further to the High Court)
Non-monetised benefits		*High*

Proactively released by the Minister for the Community and Voluntary Sector

Section 2.8: Compliance and Enforcement

Status quo

The Charities Act contains obligations that registered charities must meet and consequences for not meeting those obligations (more often described as compliance and enforcement). Registered charities, and non-registered charities in certain circumstances, can be subject to compliance and enforcement action by Charities Services and the Board under the Charities Act.

Compliance and enforcement exists to support the functioning of a registration and reporting system, and a system that regulates specific behaviour. In turn, this system is intended to promote public trust and confidence in the charitable sector and the effective use of charitable resources.

Behaviour that is subject to compliance and enforcement

Once registered, the main ongoing obligations that charities must comply with are:[17]

- remaining qualified for registration (for example, maintaining charitable purposes);[18]
- filing annually with Charities Services (both an annual return, and depending on the tier, either a performance report containing financial information that meets the reporting standard or financial statements that meet the reporting standard); and
- notifying particular changes to Charities Services (for example, a change to the charity's rules, or a change in officers).

These obligations connect to two of the key behaviours that tools for non-compliance and enforcement focus on, which are no longer qualifying for registration (for example, not maintaining charitable purposes); and breach of the Charities Act (for example, failure to file a return or failure to notify changes in officers).

The third type of key behaviour that tools for non-compliance and enforcement focus on is serious wrongdoing.[19] Serious wrongdoing is defined in the Charities Act and includes a range of very different types of behaviour. For example, serious wrongdoing covers:

- an unlawful or corrupt use of the charity's funds;
- conduct that is a serious risk to the public interest in the orderly and appropriate conduct of the charity's affairs;
- conduct that constitutes an offence; or
- conduct that is oppressive, improperly discriminatory, grossly negligent or that constitutes gross mismanagement.

Proactively released by the Minister for the Community and Voluntary Sector

---

17 The main ongoing obligations are discussed here, but other obligations do exist under the Charities Act. For example, a person has a duty to assist if they are served with a notice requiring them to provide certain information to Charities Services, for example during an investigation.

18 This obligation is not explicit but is made clear by a function of Charities Services being monitoring to ensure that registered charities continue to be qualified for registration (section 10(h)).

19 While the discussion here focusses on three key behaviours, the Charities Act also regulates other behaviour that is not discussed here. An example is the prohibition on a person implying that they are a registered charity when they are not, which has an offence associated with it.

Serious wrongdoing is different from no longer qualifying for registration. This is because no longer qualifying for registration connects to a clear obligation to remain qualified. Serious wrongdoing does not directly connect back to a compliance obligation in the Charities Act (i.e. an obligation requiring 'good' conduct or to meet certain specified behaviour that is the opposite of serious wrongdoing). Rather, the 'obligation' is effectively not to carry out behaviour that amounts to serious wrongdoing.

In addition, some behaviour covered by serious wrongdoing is primarily dealt with through other law, like criminal law for offences. This means that another regulator may consider the behaviour, like the Police or Serious Fraud Office. However, the Charities Act can also regulate that same behaviour as serious wrongdoing. The serious wrongdoing behaviour can form the basis for using a tool, like a warning under the Charities Act. The next section discusses action and tools available.

Action and tools available to regulator, as well as whose behaviour the tools capture and who the consequences apply to

Functions to support compliance and enforcement sit with a regulator, whose responsibilities are split between two bodies. These two bodies are the Board and Charities Services.

In the context of compliance and enforcement, action the regulator can take includes:

- **education and support** – providing guidance materials, advice, education, capacity building;
- **assisted compliance** – reminders for overdue annual returns, agreed actions;
- **proactive and directed compliance** – investigations, use of intelligence, reviews of 'charitable purpose', monitoring, formal letters of expectation, warnings, publication of a notice for failing to remedy an earlier warning; and
- **enforced compliance** – deregistration, disqualification, prosecutions.

As well as **monitoring** and carrying out **investigations**, the specific legislative tools available to the regulator under the Charities Act are:

- **administrative penalties** imposed on charities for specific breaches of the Charities Act. These breaches are for the charity:
    - failing to notify particular changes to Charities Services, or
    - failing to file an annual return;
- **warnings** given to the charity, which include a statement of action to remedy for:
    - a person or charity engaging in conduct that constitutes or may constitute
        - a breach of the Charities Act, or
        - serious wrongdoing, or
    - a charity that is or may no longer qualify for registration;
- **publication of a notice** for failing to remedy the matter stated in the earlier warning, and the action taken or that is being considered to be taken;
- **deregistration** of the charity for:
    - having a significant or persistent failure by the charity or an officer to meet obligations under the Charities Act, or by the charity to meet obligations under another enactment,
    - for the charity or a person having engaged in serious wrongdoing, or
    - for the charity no longer qualifying for registration
        - in deregistering a charity, an **order disqualifying an officer** of the deregistered entity from being an officer can also be made for a specified time;
        - in deregistering a charity, **an order prohibiting a charity from applying to re-register** can be made for a specified time; and

Proactively released by the Minister for the Community and Voluntary Sector

- **offences** for a range of conduct. Offences include:
  - a charity or officer knowingly failing to comply with the standard when filing financial statements;
  - a charity failing to ensure financial statements are audited or are audited/reviewed where required to do so;
  - a person refusing or failing to comply with a notice from Charities Services requesting information; and
  - a person knowingly supplying false or misleading information in purported compliance with a notice from Charities Services requesting information.

As noted earlier, the main obligations under the Charities Act are on the charity. As such, the tools available to the regulator (like warnings) generally capture the charity's behaviour, like no longer qualifying for registration. In turn, the consequences of the tool apply to the charity, like receiving a warning and an instruction to remedy the behaviour for no longer qualifying for registration.

However, tools for serious wrongdoing are different because they do not focus solely on the charity's behaviour. The tools can also be used where a person has engaged in serious wrongdoing in connection with a charity – regardless of whether the person is an officer.

Regardless of who has engaged in the serious wrongdoing, the consequences of the tool used, like a warning or deregistration for serious wrongdoing, still lie with the charity. The consequences do not also lie with an officer, unless the charity is ultimately deregistered, and an order is made at the same time to disqualify an officer from being an officer for a specified period of time.

Summary of range of tools available in context of system

Overall, based on the legislative tools and available non-legislative actions described above, the Charities Act provides or enables a basic set of compliance tools. These tools are in the context of a registration and reporting system that also regulates specific behaviour.[20] Different compliance tools are available, as appropriate to the circumstances and the breach.

For no longer qualifying for registration and for serious wrongdoing, there is arguably a potential 'gap' between education/assistance and warnings (that is, directed compliance). However, monitoring is an existing legislative tool that can influence compliance. Non-legislative tools, like letters of expectation, can also be used.

For breaches of the Charities Act, the availability of administrative penalties partly fills any potential 'gap' between education/assistance and warnings (that is, directed compliance). If administrative penalties are not used (as is current practice due to the cost involved), monitoring and letters of expectation remain available. As such, any gaps in tools to support compliance and enforcement are not extensive and another tool is generally available.

Frequency of use of tools

In practice, approximately 28,000 charities operate under the Charities Act. Most charities meet their key obligations, like filing annually. This is supported by the regulator's ongoing education work and

---

20 We say "provide or enable" as some tools may need a statutory power to perform (e.g. a formal warning), while non-legislative tools (e.g. guidance) do not need a power but connect back to the regulator's statutory functions.

Proactively released by the Minister for the Community and Voluntary Sector

assistance to support compliance. For example, in 2019/20, there were more than 770,000 website views, as well as more than 14,500 webinar views and just over 9,900 customer support queries.

Consistent with how most regulatory systems operate, use of tools for directed and enforced compliance are less frequent than tools for voluntary compliance. Within the parameters of the Charities Act, the regulator has discretion in which tools it uses. The regulator's approach to compliance is set out in a public document, in which it describes its approach as modern, responsive, and risk-based.

In 2019/20, there were no prosecutions and nor were there any formal warnings issued under the Charities Act. With no formal warnings issued, there were also no notices published in 2019/20 for failing to remedy a matter stated in the earlier formal warning.

However, there were 142 concerns addressed in 2019/20.[21] There were seven open inquiries and eight referrals as a result of complaints, with twelve completed inquiries which resulted in:

- one referral to another agency;
- one disqualification;
- one voluntary deregistration; and
- one deregistration for serious wrongdoing.

While only one charity was deregistered for serious wrongdoing, it is worth noting that 185 were deregistered for failing to file twice (with 'a persistent failure' to meet obligations being a reason for deregistration).

In addition, a charity itself can request deregistration in a voluntary system. For example, a charity may wish to wind up or merge with another charity. In the context of requested deregistration, deregistration is rarely used as a tool that follows on from the use of tools for assisted compliance or proactive and directed compliance. In 2019/20, 498 charities were voluntarily deregistered.

What is the policy problem or opportunity?

Problem: difficulties addressing some types of more significant poor behaviour, particularly with directed and enforced compliance tools, could put public trust and confidence in charities and the regulator at risk

With a sector the size of approximately 28,000 charities, a risk of poor behaviour occurring in at least a small portion of charities is likely. The problem is it may be difficult for the regulator to address some types of more significant poor behaviour, particularly with directed and enforced compliance tools under the Charities Act. Some key areas of difficulty are:

- **behaviour** – some behaviour that can carry non-compliance and enforcement consequences is either not sufficiently clear or explicit under the Charities Act. Specifically:
  - behaviour that amounts to serious wrongdoing (and which needs to be avoided), and

21 While numbers vary year to year, the figures from 2019/20 are broadly representative of and generally do not differ markedly from figures for previous years. However, there are exceptions.

Proactively released by the Minister for the Community and Voluntary Sector

- ongoing obligations to remain qualified for registration, which appear to be implicit in the Charities Act.
- **tools targeting behaviour** – difficulties using directed and enforced compliance tools exist, particularly for serious wrongdoing. A specific example is:
  - potential timing difficulties acting on serious wrongdoing.[22]
- **who the tools target** – enforcement consequences that apply more broadly than needed to achieve compliance. The main example is:
  - a charity must be deregistered for the Board to then make an order disqualifying an officer of that charity. An officer cannot be disqualified, without deregistering the charity, when it may be one officer's behaviour that is problematic.

We do not have evidence that this overarching problem leads to some types of more significant poor behaviour going unaddressed with charities continuing on and the public unaware. Rather, the harm is that even just difficulty addressing this behaviour (for example, the time needed to address behaviour) could put public trust and confidence in both charities and the regulator at risk.

This risk could arise because public survey respondents recently indicated that it is very important to have a regulator that both registers charities and regulates them. In that survey, regulating charities was described as: ensuring charities stay within the law and are run for the public benefit, investigating allegations of serious wrongdoing by charities, and providing information and resources to support charities.[23]

If no action is taken, difficulties addressing some types of more significant poor behaviour will continue, with an associated risk to public trust and confidence in charities and the regulator.

Evidence base and stakeholder views

In some circumstances, particularly with serious wrongdoing, existing tools for directed and enforced compliance appear to be little used.

Evidence in a specific context is the low frequency with which deregistration is used for serious wrongdoing, compared to its higher frequency of use for failing to file (being a frequency of 1 to 185 in 2019/20). Since deregistration is used frequently for failing to file, these numbers do not suggest an issue with the tool of deregistration. But nor does the differing frequency in use of deregistration clearly show that the issue is with 'serious wrongdoing'.

Rather, a range of reasons could sit behind the variation in use of deregistration in different circumstances. For example, serious wrongdoing behaviour is primarily dealt with through other law such as offences under criminal law.

As such, a greater focus might be expected instead on behaviour that only the Charities Act regulates like failing to file, where it is a persistent failure to meet obligations.[24] Other possible reasons for the

22 For example, timing difficulties are indicated in the Board's 2019 submission which referred to how assets and equity of a charity can continue to be diverted for private benefit or other non-charitable purposes while due process is being followed in the investigation and deregistration process.

23 June 2021 available at charities.govt.nz

24 Failure to file could be due to a range of reasons. For example, reporting to the required XRB standard may contribute to difficulties filing. Compliance rates for meeting the XRB standard are lowest for tier 4 charities but would be

Proactively released by the Minister for the Community and Voluntary Sector

variation in use of deregistration for serious wrongdoing compared to failing to file include: compliance issues resolved with a lesser tool; resourcing of regulator; and the need for a reliable evidentiary basis.

While deregistration figures are only one piece of evidence, views shared during consultation also assist. The Board, which has tools like publication of notices and deregistration available for serious wrongdoing and other behaviour, made a submission during public consultation in 2019. The Board described the 'serious wrongdoing' definition as extremely hard to apply because of the significant uncertainty over its ambit. The Board submitted that the definition of 'serious wrongdoing' should be removed and replaced with a framework clarifying when regulatory intervention should occur.

However, we also recognise other views expressed during public consultation in 2019. For example, some who commented on the powers of the regulator expressed concern about regulatory overreach and that charities would be unable to do their work if they were subject to too much regulatory interference. On the other hand, several submitters commented that the regulator needed investigation and enforcement powers to maintain the integrity of the register. During targeted consultation in 2021, stakeholder views from the sector varied, but some were concerned about potential new tools or changes to existing tools.

Criteria and objective

During targeted consultation earlier this year, we shared the following principles or secondary objectives for our compliance and enforcement policy work:

- compliance and enforcement tools connect back to the regulator's functions under the Charities Act and the Act's purposes;
- existing compliance and enforcement tools are not duplicated;
- available compliance and enforcement tools are proportional to the breach, and follow from clear obligations; and
- compliance and enforcement should generally sit with the charitable entity, rather than an officer or other person.

While we received little feedback, some stakeholders supported one or more of the matters above at meetings. These secondary objectives align to the overarching objective for work to modernise the Charities Act.

These secondary objectives are also broadly captured by and provide additional context to the 'alignment' and 'proportionality' criteria referred to earlier for assessing options. Along with alignment and proportionality, the remaining criteria referred to earlier (effectiveness, accountability, sector independence, and support from communities) are also relevant to assessing the compliance and enforcement options.

Proactively released by the Minister for the Community and Voluntary Sector

---

expected to improve over time if the proposal (discussed elsewhere) for reporting requirements for small charities is agreed and implemented. In turn, with improved tier 4 compliance rates for meeting the required standard for reporting, we would also expect to see some decrease in the number of deregistrations being due to a persistent failure to file.

Describe and analyse the options

Scope that we are considering options within

In scope:

- The range of compliance powers and tools the regulator needs under the Act to fulfil its role, as well as the behaviour and entity/person focused on.

Out of scope:

- This is not a first principles review of the Charities Act.
  - As such, the question of whether to have a registration and reporting system with a regulator is not in scope.
  - Nor do we consider the regulator's basic compliance-related functions in the Charities Act (such as education, assistance, monitoring and promoting compliance including taking prosecutions, deregistering charities).
- We also do not consider which of the two regulatory bodies (the Board or Charities Services) is or should be exercising a compliance and enforcement power or making a decision.

Discounted options:

We have discounted some compliance and enforcement options in the form in which they were consulted on during targeted consultation earlier this year, being:

- increased education and support for compliance;
- amend current powers; and
- introduce new powers.

We discounted these options following reconsideration of the problem definition. The earlier problem definition, being 'a lack of fit-for-purpose compliance tools', was updated with the current, more specific problem definition. This also followed from further work on the status quo as well as considering the key principles/secondary objectives described above.

Aspects of discounted options, and stakeholder feedback on those options, have been incorporated in the options analysed below.

Option 1 - Status quo

The main elements of the status quo are:

- key obligations sit with charities, being:
  - remaining qualified for registration (an implicit obligation);
  - filing annually with Charities Services (an explicit obligation); and
  - notifying particular changes to Charities Services (an explicit obligation);
- non-compliance and enforcement focus on three main types of behaviour, being:
  - no longer qualifying for registration;
  - breach of the Charities Act; and
  - serious wrongdoing;
- action the regulator can take falls within one of the following areas, being:
  - education and support;
  - assisted compliance;

Proactively released by the Minister for the Community and Voluntary Sector

- proactive and directed compliance; and
- enforced compliance;

- in addition to monitoring and investigation, specific legislative tools for non-compliance and enforcement are available to the regulator, being:
  - administrative penalties;
  - warnings;
  - publication of a notice;
  - deregistration of the charity (with an ability to make an order disqualifying an officer at the same time); and
  - offences.

As noted earlier, consultation on the status quo and potential changes provided a mix of views. Some questioned why existing powers were not being used. Overall, views ranged from concerns of regulatory overreach through to the need to maintain the integrity of the register with investigation and enforcement powers.

Analysis

With no change, difficulties with addressing some types of more significant poor behaviour will continue. Specifically:

- some behaviour that carries consequences will remain insufficiently clear and/or implicit;
- potential timing difficulties with directed and enforced compliance tools for acting on serious wrongdoing will remain; and
- enforcement consequences will remain wider than necessary, by continuing the need to deregister a charity before disqualifying an officer.

By not addressing these issues, some confusion will likely continue over obligations on charities and the behaviour expected, and existing tools will continue to work less than optimally.

Option 2 - Enhanced status quo

This option contains the same key elements as those in the status quo. In summary, the key elements are:

- key obligations sit with charities;
- non-compliance and enforcement focus on three main types of behaviour;
- action the regulator can take falls within one of four main areas; and
- in addition to monitoring and investigation, specific legislative tools for non-compliance and enforcement are available to the regulator.

But within the key elements, a few details are changed in this option:

- **behaviour** – making explicit the current implicit obligation to remain qualified for registration (comprising the following elements):
  - for the charity to maintain exclusively charitable purposes;
  - to have qualified officers; and
  - to have a rules document;
- **behaviour** – to clarify one of the main types of behaviour that is subject to enforcement by amending the definition of 'serious wrongdoing' to express a more consistent level of serious behaviour by:

Proactively released by the Minister for the Community and Voluntary Sector

    - changing the reference in the definition from an offence to an offence that is punishable by imprisonment for a term of 2 years or more;
- **tools targeting behaviour** – improving how compliance and enforcement tools work in practice by carrying out a post-implementation review of operational practice; and
- **who tools target** – to focus compliance and enforcement tools on who is in the best position to change their behaviour (while recognising the continued primary focus on the charity). Specifically, by creating a new power in the Charities Act for the Board to disqualify an officer without deregistering the charity, but only for 'serious wrongdoing' or significant/persistent breach of obligations by the officer.

All the elements in this option involve legislative changes, except for the post-implementation review of operational practice. During targeted consultation, elements of this option were consulted on, but not in the form in which this option is now packaged. For example, there was little feedback in response to the suggestion of clarifying the definition of serious wrongdoing. However, as noted earlier, support for a power to disqualify an officer without deregistering a charity came through at stakeholder meetings.

Analysis

Overall, we consider that this option increases clarity and transparency of what is expected from those in the system, so charities can continue their vital contribution.

This first element of the option, making explicit the current implicit obligation, is about clarity and ease of compliance. It is not about creating new obligations. It recognises that some obligations for positive behaviour like filing annually are already explicit, so as not to breach the Charities Act. As such, this option makes clearer the existing implicit obligations in the Charities Act.

For the second element, this option recognises the need to express a more consistent level of serious behaviour for 'serious wrongdoing'. Some types of behaviour listed in the definition appear inherently serious (e.g. gross negligence or gross mismanagement, rather than simply negligence or mismanagement). Yet the level of seriousness expressed through other listed types of wrongdoing is unclear. Specifically, an act that constitutes an offence is another type of serious wrongdoing. However, offences vary considerably from low level infringement offences to offences resulting in a criminal conviction and a significant penalty. This option changes the reference to an offence to instead refer to an offence that is punishable by imprisonment for a term of 2 years or more.

Another element of this option is to carry out a post-implementation review of operational practice. This recognises that while the legislative settings are important, a review could further investigate the more operational ways in which the problems present themselves. For example, considering ways to operationally address the timing difficulties in using tools promptly, given that the words of the Charities Act indicate that some tools, like warnings, capture conduct that 'may constitute' rather than 'constitutes' serious wrongdoing. The post-implementation review could also consider other matters that arise in practice.

The final element of the option would allow the Board to disqualify an officer from a charity for a specified period, without deregistering the charity. The Board can currently already do this, but only when deregistering the charity.

Deregistering a charity can be disruptive when the wrongdoing may be by one officer. The Board would only be able to exercise this power if the officer has engaged in serious wrongdoing, or a significant or persistent failure by the officer to meet their obligations. With this new power, the

Proactively released by the Minister for the Community and Voluntary Sector

Board would essentially need to go through the same decision-making process as it would to deregister the charity on those grounds.

We consider that this new power focusses on who's responsible and in the best position to change their behaviour. In addition, the focus is not broader than needed to achieve behaviour change (it is not so broad as to affect the whole charity).

Option 3 - Enhanced status quo, plus officer responsibilities

The foundation for this option is the same as option 2 (enhanced status quo), with the addition of responsibilities on officers. All the elements in this option involve legislative changes, except for the post-implementation review of operational practice.

In summary, the 'enhanced status quo' aspects of this option mean:

- key obligations sit with charities;
- non-compliance and enforcement focus on three main types of behaviour;
- action the regulator can take falls within one of four main areas;
- specific legislative tools (on top of monitoring and investigation) are available to the regulator;
- **behaviour** – making explicit the currently implicit obligation to remain qualified for registration;
- **behaviour** – changing the reference to an offence in the definition of 'serious wrongdoing' to instead say an offence that is punishable by imprisonment for a term of 2 years or more;
- **tools targeting behaviour** – carrying out a post-implementation review of operational practice; and
- **who tools target** – creating a new power for the Board to disqualify an officer, without having to deregister the charity.

In addition to the elements from option 2 (enhanced status quo), this option introduces into the Charities Act positive behavioural obligations on officers. These would be framed as officer responsibilities:

- acting with reasonable care and diligence;
- ensuring the charity's financial affairs are managed responsibly; and
- managing any perceived conflicts of interest.

Education and assistance would support officers to meet these responsibilities as well as to support officers in breach of them. But more significant sanctions (like warnings) would not be available simply for breaching these responsibilities. Rather, more significant sanctions would only be available if the officer's underlying behaviour was of such concern that it fell within "serious wrongdoing".

We note that the three matters, framed as officer duties, were commented on during targeted consultation in 2021. As noted earlier in this Regulatory Impact Statement under 'Governance of charities', there was support for having officer duties of some sort. However, many submitters commented on the complexities with the duties and other legislative frameworks.

Analysis

On the face of it, this option appears to further address the problem, beyond what option 2 achieves. Like option 2, it addresses the problem of clarity by ensuring obligations on charities are explicit. But

Proactively released by the Minister for the Community and Voluntary Sector

this option goes further by making clear the behaviour expected from officers too, through the introduced responsibilities on officers.

This approach is like two "bookends", which set the positive behaviour expected and the behaviour that is subject to non-compliance and enforcement. Specifically:

- at one end, it is clear what behaviour is expected from officers through officer responsibilities and from charities through explicit obligations.
- at the other end, the clarity of behaviour regulated as "serious wrongdoing" is also improved.

While this may improve clarity over expected behaviour, there are several issues:

- The connection is not direct between the behaviour covered in officer responsibilities and the behaviour in "serious wrongdoing". As such, "serious wrongdoing" could arguably still occur even if the positive obligation on charities and introduced responsibilities on officers were met (for example, the occurrence of "serious wrongdoing" that is improperly discriminatory conduct).[25]
- While "serious wrongdoing" is in relation to the charitable entity, "serious wrongdoing" could be carried out by the charity or any person, not just an officer. The positive behaviour expected through obligations on charities and introduced responsibilities on officers would still leave a "gap" around behaviour expected from other persons. However, this fits with the notion that generally law is permissive, and more often explicit about what is not allowed.
- For reasons discussed elsewhere, introducing responsibilities on officers raises other issues such as:
  - duplication of matters covered in other legislation which may be relevant to a charity depending on its underlying entity type (e.g. trust, incorporated society, company); and
  - extending the Charities Act too far beyond its current scheme as largely a registration, reporting and monitoring regime for charities (not officers).

Overall, this option increases clarity and transparency of what is expected in the same way as option 2. However, by attempting to fill some further gaps it risks adding to confusion through the gaps it does fill and those it does not.

Option 4 - Reframed compliance and enforcement model

This option shifts the current compliance and enforcement framework towards a model somewhat informed by, but not the same as, the Australian system.[26] This option completely replaces the status quo compliance and enforcement framework. However, this option does draw on individual elements from the earlier options discussed in this Regulatory Impact Statement. All the elements in this option involve legislative changes.

Proactively released by the Minister for the Community and Voluntary Sector

---

25 This is arguable, because the existing obligation on the charity to maintain charitable purposes would be explicit and we have not considered what maintaining charitable purposes encompasses, since charitable purpose is outside scope. Specifically, we have not considered whether conduct in "serious wrongdoing", like improperly discriminatory conduct, would breach the obligation to maintain charitable purposes.

26 For example, the Australian system contains governance standards which a charity must meet (including two standards that relate to the individual members of a charity's governing body, but for which the charity itself is responsible). In contrast, the option here proposes making existing ongoing obligations on the charity explicit, as well as introducing governance-related duties on officers of charities.

Key elements of this option are:

- positive behavioural obligations are clear in the Charities Act by making explicit:
  - what is expected from charities, for example
    - to maintain exclusively charitable purposes, to have qualified officers, and to have a rules document to remain qualified for registration.
    - annual filing in line with a reporting regime, and notifying changes such as a change in officers;
  - what is expected from officers of charities, using three baseline governance-related duties; and
- non-compliance and enforcement consequences are framed around breaches of positive obligations under the Charities Act, and
- a broad range of tools supports compliance and enforcement of those positive obligations, in the areas of education and support, assisted compliance, proactive and directed compliance and enforced compliance. Specific powers that differ from the status quo include:
  - a power to disqualify an officer without deregistering the charity; and
  - a power to suspend an officer.

This option was not consulted on in this form. Rather, elements of this option were consulted on. The views from targeted consultation in 2021 on officer duties, without specific non-compliance and enforcement consequences is discussed earlier.

Again, as noted earlier, a power to disqualify an officer without deregistering the charity was supported at stakeholder meetings during targeted consultation. The power to suspend an officer for a specified period to protect charitable assets during an investigation was also commented on in the context of various powers, with a mix of supporting and opposing views.

Analysis

The positive obligations overall on charities and officers would form the basis for compliance and enforcement. Essentially, a breach of obligations could be subject to non-compliance and enforcement tools.

For officers, this option differs from option three which framed the obligations on officers as responsibilities (supported by education and assistance). Instead, this option frames those same three obligations as duties on officers, with consequences for breaches. A breach of these duties could be subject to a range of compliance and enforcement tools, depending on the circumstance (for example, a lesser tool may be available for a one-off breach, compared to a more significant tool for a persistent breach).

By placing positive obligations (with consequences for breaches) on charities and on officers, this option would not frame compliance and enforcement around "serious wrongdoing".[27] This approach could help improve clarity of what is expected. However, there is an issue with focussing compliance and enforcement solely on charities and officers. Under the "status quo", the compliance and

27 With "serious wrongdoing" alone, the negative behaviour described in the definition is regulated d (e.g. conduct that is an unlawful use of the funds or conduct that is a serious risk to the public interest in the orderly and appropriate conduct of the affairs of the entity). But any more positive behaviour, to directly avoid "serious wrongdoing", is not regulated. The desired positive behaviour may often instead be part of good practice.

Proactively released by the Minister for the Community and Voluntary Sector

enforcement tools recognise that a charity or "a person in connection" with a charity may engage in "serious wrongdoing". By changing the framing of compliance and enforcement to centre on positive obligations on charities and officers (and removing "serious wrongdoing"), a compliance and enforcement gap could exist for behaviour by a person other than an officer.

As part of this option, the Charities Act would provide a slightly broader range of tools (compared to the "status quo") to support compliance and enforcement with the obligations. Tools under the "status quo" would continue (such as non-legislative tools like letters of expectation, but also legislative tools like monitoring, warnings, Board publication of details of possible breaches, offences, and deregistration with a power to disqualify an officer on deregistration of the charity).

The slightly broader range of tools would include a power to disqualify an officer without deregistering the charity (discussed earlier under option two "Enhanced status quo"), as well as a power to suspend an officer. The power to suspend an officer would sit with the Board. The power to suspend would be for a specified period due to the risk of loss of charitable assets: a risk that can arise during investigations into a charity because of the length of time an investigation can take. This power to suspend could partly address the identified problem of difficulties using directed and enforced compliance tools for behaviour. Addressing the timing issue effectively means that a tool needs to work in an urgent intervention situation, meaning that the tool tends to be more invasive. The use of a significant tool for urgent intervention would need to be set at a very high bar, in terms of both the conduct targeted and the likely risk of loss. At a minimum, the bar for conduct would need to sit at the level of conduct of what is currently framed as "serious wrongdoing". However, the ability to more quickly use warning tools is another way to address timing issues (and could be considered in the post-implementation review recommended under options two and three).

Overall, we consider that this option increases transparency of what is expected from those in the system. However, it goes much further than the status quo by regulating officers through compliance and enforcement, in the context of a registration system intended for charities. This option also risks being unable to address behaviour by persons connected to a charity, other than officers.

Proactively released by the Minister for the Community and Voluntary Sector

Multi-Criteria Analysis: Compliance and enforcement

Table 21: multi-criteria analysis compliance and enforcement

Key	++ much better than the status quo	+ better than doing the status quo	0 about the same as the status quo	- worse than the status quo	- - much worse than the status quo

	Effectiveness	Alignment	Proportionality	Accountability	Sector independence	Support from communities	Overall assessment
Option 1 - Maintain Status Quo	Does not address the identified problem that some behaviour is not sufficiently clear and the difficulties addressing some types of more significant poor behaviour, like serious wrongdoing, with the more significant compliance and enforcement (C+E) tools.	Provides some basic obligations and key C+E tools, which helps align to a registration, reporting and monitoring regime for charities (that also regulates the more serious poor behaviour).	Obligations and C+E tools available for breaches are broadly proportional, with more significant tools available for repeated and/or more significant non-compliance.	Current accountability mechanisms for regulator's use of C+E tools continue. Charities' accountability for non-compliance continues.	Continued independent operation and self-governance of registered charities, within parameters of compliance requirements.	Continued support for basic obligations in a registration and reporting regime, and a range of tools proportional to the breach and to regulate the more serious poor behaviour, to support purpose of the Charities Act.	C+E continues as it does currently (e.g. applies to mix of implicit and explicit obligations, with education functions well covered), but risk remains that tools do not enable more serious behaviour to be as well addressed.
	0	0	0	0	0	0	0
Option 2 - Enhanced status quo	To a large extent, addresses the problem identified with the more significant C+E tools by making expected behaviour clear, and ensuring the tools target who's in the best position to change their behaviour. But this option also partly relies on outcomes of post-implementation review of operational practice addressing matters like timing difficulties in using tools (though outcomes are unknown until review is carried out).	By making some basic existing obligations more explicit and improving the workability of key C+E tools, there is clearer alignment to what is needed for a transparently functioning registration reporting and monitoring regime for charities (that also regulates the more serious poor behaviour).	Obligations and tools are broadly proportional, with more significant tools available for repeated and/or more significant non-compliance. Improved proportionality through a more consistent level of "serious" for "serious wrongdoing".	Current accountability mechanisms for regulator's use of C+E tools continue. Charities' accountability for non-compliance continues, and accountability for "serious wrongdoing" may improve with more consistent level of seriousness expressed in definition and with timing difficulties in using tools for serious wrongdoing addressed.	Continued independent operation and self-governance of registered charities, within parameters of compliance requirements (which are clearer).	Support for clarity of existing obligations in a registration and reporting regime, and a range of tools proportional to the breach and to regulate the more serious poor behaviour, to overall support the purpose of the Charities Act.	Greater clarity of existing obligations supports compliance and accountability, and improved workability of tools reduces risk that tools do not enable more serious behaviour to be well addressed.
	++	++	+	++	+	+	++
Option 3 - Enhanced status quo, plus officer responsibilities	To a large extent, addresses problem identified that some behaviour is not sufficiently clear, or the difficulties addressing some types of more significant poor behaviour with the more significant C+E tools. But goes further than what is needed to address problem by placing obligations on officers	Same as option 2, but by introducing responsibilities on officers, this does not align well with current scheme / focus in the Charities Act on charities. Depending on the entity type, officer responsibilities may largely align to existing duties (though may also duplicate).	Same as option 2 but introducing responsibilities on individual officers appears disproportionate when officers are already responsible as a collective (i.e. the charitable entity).	Same as option 2, but lack of C+E consequences for officer responsibilities mean that accountability of officers to regulator is not significantly greater, despite the introduced responsibilities placed on officers.	Same as option 2, but some loss of independence in how charities are run, by introduction of responsibilities on officers.	Same as option 2, but greater support for clarity over what is expected of officers.	Same as option 2, but placing responsibilities on officers goes further than necessary, and by attempting to fill potential gaps (e.g. with responsibilities on officers, but not on others) this raises questions about what to fill and what to leave, and risks creating confusion.
	0	-	-	+	-	++	-

Proactively released by the Minister for the Community and Voluntary Sector

	Effectiveness	Alignment	Proportionality	Accountability	Sector independence	Support from communities	Overall assessment
Option 4 - Reframed C+E model	Addresses the problem identified by regulating a full range of behaviour with clear expectations and consequences for charities but goes further than needed by also applying to officers. Also addresses the problem by reducing the difficulties in addressing some types of more significant poor behaviour by no longer relying on the status quo concept of 'serious wrongdoing', and instead relying on varying degrees of breaches of positive obligations. But it is not clear whether reframing C+E around positive obligations will create unforeseen problems (e.g. difficulties with charities and officers complying if expectations on them are set too high or obligations are too numerous).	Emphasis on C+E around positive obligations is a significant change from/takes a different approach to the current C+E model in supporting a registration, reporting and monitoring regime for charities.	C+E focus in this option does not start, for example, at "serious wrongdoing". Focussing C+E on the full range from 'good' to 'poor' behaviour may be disproportionate to the extent to which behaviour needs regulating to support the registration, reporting, monitoring regime for charities (that also regulates the more serious poor behaviour).	Currently, the accountability mechanisms for the regulator's use of C+E tools continue. Increased accountability of charities and officers through C+E consequences for breaches of positive obligations.	Independent running of charities and self-governance decreases with framing of positive obligations (and C+E consequences) on charities and officers. This is because of the increased emphasis on officers, and because this option could introduce consequences for poor behaviour that is not as significant as what is regulated under the status quo (for example, consequences under this option for poor behaviour that would not meet the high threshold for "serious wrongdoing" under the status quo).	While there is support for clarity over what is expected of officers, this option regulates the full spectrum of behaviour (i.e. from 'good' to 'bad') and is unlikely to have widespread support.	This option goes beyond what is needed to address the problem by regulating a full range of behaviour from 'good' to 'poor' (even if 'regulating' behaviour at one end is in the sense of setting out expected behaviour through education and assistance), and this option goes beyond what is needed by regulating the behaviour of not only charities but also officers' behaviour.
	0	- -	- -	++	- -	-	-

Proactively released by the Minister for the Community and Voluntary Sector

Conclusions

Option two best meets the identified criteria for assessment. This option:

- largely addresses the problem, but does not go beyond it, in reducing difficulties with significant compliance and enforcement tools, to address the risk to trust and confidence from difficulties addressing more serious behaviour;
- aligns with the substance of the Charities Act, which provides a registration, reporting and monitoring regime for charities that also regulates behaviour, like "serious wrongdoing";
- is proportional by making key existing obligations explicit (rather than imposing significant new obligations and consequences) and by improving consistency around the level of seriousness for "serious wrongdoing" to reduce difficulties with existing tools that rely on that definition;
- may improve accountability by improving the workability of "serious wrongdoing";
- enables continued independence for charities, within the parameters of the Charities Act; and
- is likely to have support from some for clarity of obligations and the continuation of tools to support compliance and enforcement.

The impact of this option would be that charities may find their obligations clearer, though any change to "serious wrongdoing" would need clearer communication to the sector. In addition, the regulator would have a degree of greater clarity over what constitutes "serious wrongdoing". In turn (and along with the element of this option that recommends a post-implementation review of operational practice around use of compliance and enforcement tools), greater clarity over "serious wrongdoing" would reduce the risk that tools do not enable more serious behaviour to be well addressed.

Summarise the costs and benefits of your preferred option

Table 22: costs and benefits of the preferred option for compliance and enforcement

Affected groups	Comment:	Impact
Additional costs of the preferred option compared to taking no action		
Charities	Cost of non-compliance to those engaging in "serious wrongdoing" (due to that behaviour being clarified / set at a more consistent level), if the regulator uses a C+E tool.	Low
Board and Charities Services	Cost of revised education and guidance to sector on "serious wrongdoing" and cost of any staff/Board training and development on "serious wrongdoing", and cost of post-implementation review of operational practice around use of C+E tools	Low
Public	N/A	N/A
Total monetised costs		Low
Non-monetised costs		Low
Additional benefits of the preferred option compared to taking no action		
Charities	Ongoing benefit from greater clarity over obligations, but effect on compliance rates is unknown	Low

Proactively released by the Minister for the Community and Voluntary Sector

Board and Charities Services	Ongoing benefit from greater clarity over “serious wrongdoing” to enable use of C+E tools, when appropriate	Low
Public	Ongoing benefit from C+E tools working to support a transparently functioning registration reporting and monitoring regime for charities (that also regulates the more serious poor behaviour).	Low
Total monetised benefits	N/A	N/A
Non-monetised benefits		Low

Proactively released by the Minister for the Community and Voluntary Sector

Section 3: Implementing the preferred options

How will it be implemented?

The legislative proposals will be enacted in an amendment bill to the Charities Act likely to be introduced to the House in the second quarter of 2022. It is anticipated that this will be an omnibus bill, to allow for changes to the TRAA to expand the functions of the TRA. An omnibus bill will provide for the legislative proposals to be implemented concurrently. The Department will work closely with Inland Revenue, who administer the TRAA, on the development of the legislation. The Department will also work closely with MOJ, who support the TRA, on implementing the changes. Expanding the TRA will be subject to funding approval for MOJ.

The Department will be responsible for implementing the new legislation and will also implement the operational recommendations through Charities Services. Exact costs for Charities Services to implement the amendment Bill and operational recommendations are yet to be worked through. Charities Services intends to submit a Budget bid for 2022 for several improvements they are planning to implement including potential non-legislative changes that may require additional resource.

The Department (through Charities Services) will partner with iwi to design the reporting requirements for accumulation. Charities Services will consult with the sector on significant guidance material and review the Department's public accountability measures as they relate to Charities Services.

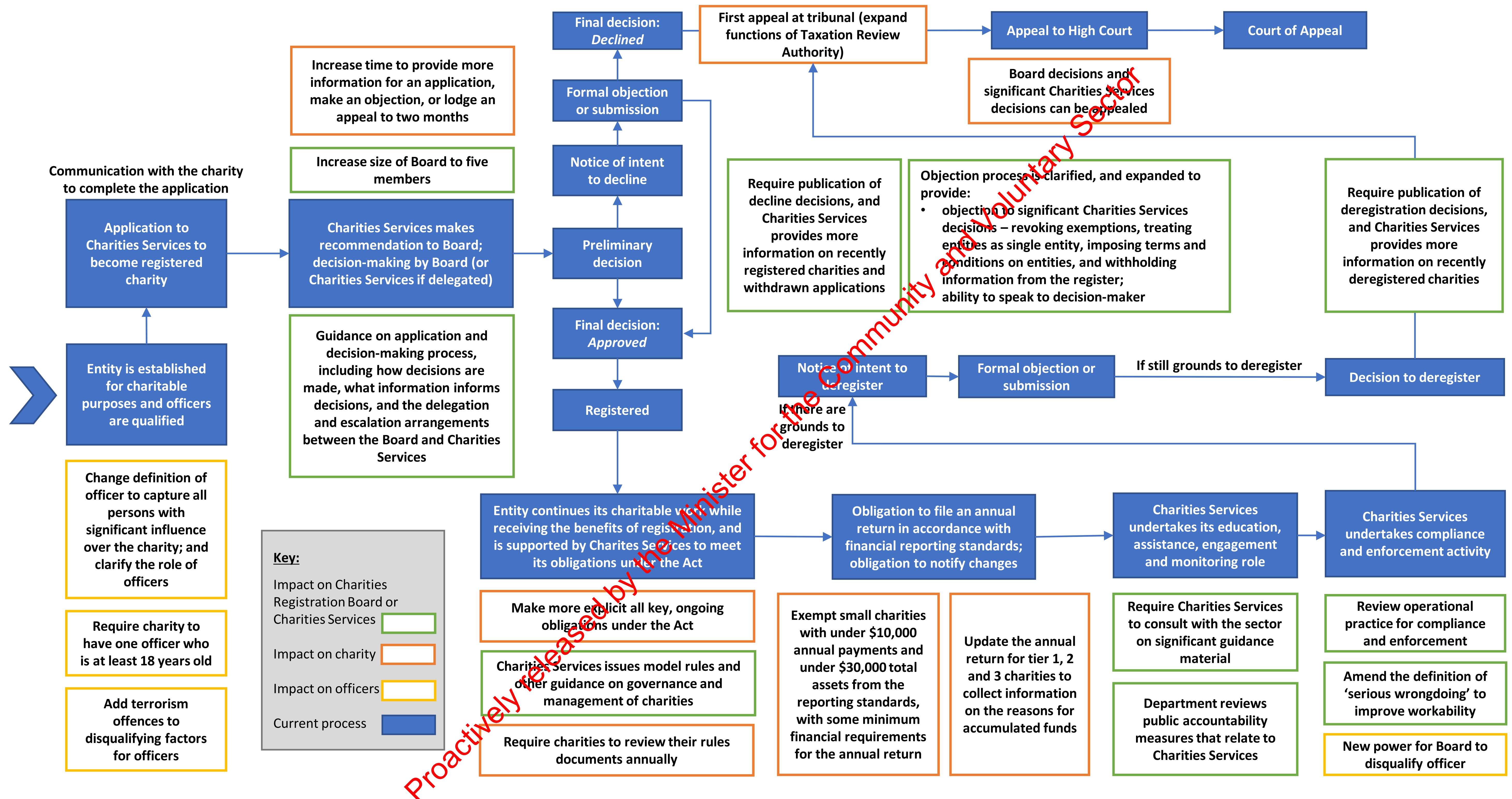
The Department will continue to work with XRB, Inland Revenue, and MBIE to implement the reduced reporting requirements for small charities.

Monitoring, Evaluation, and Review

The Department of Internal Affairs Policy Group will be responsible for monitoring, evaluating and reviewing the changes proposed in this regulatory impact statement. We have proposed a post-implementation review of operational practice around the use of compliance and enforcement tools. We will also be considering how this can incorporate the regulatory stewardship system review that is underway. Charities Services will continue to collect data on registration and deregistration decisions, objections and appeals and other related data.

Proactively released by the Minister for the Community and Voluntary Sector

Appendix: A3 of proposed changes to modernise the Charities Act 2005



Proactively released by the Minister for the Community and Voluntary Sector