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Jayne Beggs
Kaiwhakahaere Kaupapahere
Policy Manager | Policy Group
Te Tari Taiwhenua Internal Affairs
PO Box 805
Wellington 6140

By email: charitiesact@dia.govt.nz / Jayne.Beggs@dia.govt.nz
Copy to: Louise.Cooney@dia.govt.nz

Dear Jayne

Review of the Charities Act 2005 – role of officers

1. Further to your email dated 22 June 2021, and to the meeting with the Core Reference Group ("**CRG**") on 28 June 2021, we write to respond to the request for input from targeted stakeholders on initial options in connection with the review of the Charities Act 2005 ("**the Charities Act**"). We appreciate the opportunity for consultation.

2. The fourth paper ("**the paper**") is entitled "We want your views on the role of officers" and seeks comments on 4 issues in relation to the role of officers in particular.

Summary

3. By way of summary, our comments on the paper are as follows:

   (i) The definition of "officer" should be restored to its pre-2012 version, which made a clear distinction between governance and management: for trusts and for other entities that have a governing body, "officers" should be limited to trustees/members of the governing body. Any reference to the concept of "officer" extending to those exercising "significant influence" should be limited to those entities that do not have a governing body, such as synods, as was originally intended.

   (ii) The term "officer" is used by some charities in their rules in a specific, limited sense. Consideration should be given to the Charities Act using a different term, such as "responsible person", to minimise the potential for confusion.

   (iii) The duty to act in the best interests of an entity, such as a charity, that has purposes is synonymous with a duty to act in the best interests of the entity's *purposes*. It would be helpful for the Charities Act to make this clear by articulating a clear duty on the part of those governing registered charities to act in good faith in the best interests of the charity's *purposes.* It is important that the duty is articulated in primary legislation rather than in codes or "guidance" to reduce scope for the type of political interference we have seen

recently in Australia.[1]

(iv) We would caution against articulating a duty to exercise reasonable care under the Charities Act, given the complicated relationship such a duty would have with the underlying law.

(v) We would also recommend that the Charities Act articulate a duty to keep proper financial records.

(vi) We would also recommend that the Charities Act articulate a duty to disclose and manage conflicts of interest. However, this duty should be articulated at a very high level given the differing requirements of the underlying law in this respect.

(vii) We do not recommend any change to the disqualifying factors in section 16(2). Fraud is already included as a dishonesty offence, and the balance of other offences was carefully struck at the time of the original Charities Bill. However, alignment with the disqualifying factors in the Incorporated Societies Bill 15-1 should be considered.

(viii) We strongly oppose Charities Services having discretion to disqualify an officer. Charities are best placed to determine who best to govern them, and there are many legislative and other tools already available to help them do this. Under clauses 161-166 of the Incorporated Societies Bill 15-1, a decision to ban a person from being an officer of an incorporated society can only be made by a Court. A decision to disqualify a person from being an officer of a registered charity should similarly be made at a judicial level.

(ix) We do not recommend that the section 16(2)(b) be amended to raise the minimum age for holding an officer position to 18. While 16 and 17 year olds may not be a trustee of a trust or a director of a company, they can and should be able to be officers of an incorporated or unincorporated society that is registered as a charity. Charities Services' website incorrectly states that the Charities Act overrides the Trusts Act in this respect:[2] this point needs to be corrected.

(x) However, we do recommend that the legislation make it clear that all registered charities must have a minimum of 3 officers.

4. We set out below our reasons for the above views.

5. This letter is organised as follows:

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[1] See for example: https://www.theguardian.com/society/2021/jun/28/coalition-accused-of-using-charity-crackdown-to-silence-dissent.
[2] https://www.charities.govt.nz/news-and-events/blog/the-new-trusts-act-what-does-it-mean-for-registered-charities/.

DEFINITION OF OFFICER

Problem definition

6. At page 2 of the paper, the problem is articulated in the following terms:

> Under the Charities Act, the definition of officer in a trust is more narrowly defined than other structures and may not include everyone wit significant influence over the management or administration of the entity.

7. The paper suggests that the definition of "officer" should be broadened so that those in a person to exercise significant influence over management or administration of trusts should be included in the definition.

8. We do not recommend extending the definition to those in a position to exercise significant influence in the context of trusts: the intricacies of trust law would make this highly problematic, as discussed further below.

9. In addition, in our view, the current definition blurs the distinction between governance and management: the legislative history reveals that the original extension of the definition to those exercising significant influence was intended to provide a solution for religious bodies that do not have governing bodies as such, but rather synods comprising several hundred people. In all other cases, in our view, only those in governance positions should be within the definition of "officer".

10. We recommend that the definition is reinstated to its pre-2012 version, to make it clear the focus is on governors not managers.

11. We expand below on our reasons for this view.

Legislative history

12. The definition of "officer" in the original Charities Bill 108-1 was in the following terms:

> officer,—
>
> (a) in relation to an entity, means—
>
> (i) in the case of the trustees of a trust, any of those trustees:
>
> (ii) in any other case, a member of the board or governing body of the entity;

13. In other words, the original definition limited the concept of an "officer" of a charity to member of the charity's governing body only. This aspect of the definition was not changed by the Select Committee considering the original Charities Bill.[3]

14. However, the definition was subsequently changed by Supplementary Order Paper 2005 No 357 ("**SOP 357**"), which was introduced into Parliament on 12 April 2005, the day the Charities Bill received its second and third readings. Obviously, this meant there was no opportunity for public consultation on this change. Following

[3] https://www.parliament.nz/resource/en-NZ/47DBSCH_SCR2973_1/d8233a6a17a3faa906bd28c0b1571b3894ab53de.

SOP 357, the Charities Act as originally passed defined "officer" as follows:

> 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**; or
>
> **(ii) in any other case, 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);** [Emphasis added]

15. As the material surrounding SOP 357 makes clear, this change was made to cater for large religious bodies that do not have a board or governing body as such, but rather a synod or other body comprised of hundreds of people: in those circumstances only, the definition of "officer" was amended to refer to those in a position to exercise significant influence.

16. This intention can be seen, for example, at page 1 of SOP 357, where the following comments are made:

> Definition of "officer" SOP 357 proposes the amendment of the definition of the term "officer" **to provide for charities that may not have a board or governing body**. **In those circumstances**, an officer would be a person occupying a position in the entity that allows the person to exercise significant influence over the management or administration of the entity. The definition would also allow the inclusion or exclusion of persons as officers for the purposes of the Bill by Order in Council (Part 1, Clause 4, new definition of "officer"). [Emphasis added]

17. Hansard records that SOP 357 was discussed by Gordon Copeland (United Future) at the Committee stage of the bill in the following terms:[4]

> I really want to talk about just one aspect of the amendments to clause 4, as set out in Supplementary Order Paper 357, which changes the definition of "officer". This is a very worthwhile amendment. **It arose as a result of submissions received from the Inter-Church Working Party on Taxation**, and, in particular, from the representatives of the Anglican and Presbyterian Churches. **Those Churches are governed by bodies—in the Anglican Church referred to as synods—that comprise several hundred people**.
>
> It would be quite impossible to have all those several hundred people designated as officers of the charity. For example, we have to ensure that every one of those people is not disqualified from being an officer in terms of this bill, and it would be quite an **impractical** way to proceed. Accordingly, this amendment is aimed at ensuring that the Anglican and Presbyterian Churches, and to some extent the Methodist Church, will be able to register themselves and have a definition of "officer" that will fit the circumstances of their organisations. That is a very good step forward.
>
> Furthermore, the Minister's Supplementary Order Paper omits and substitutes a new definition of "officer" and adds subclause (c) and subclause (d) to do with regulations, just in case the submitters, the select committee, and the Government itself have missed something and a problem arises about registration to do with officers. Regulations may then be put in place to overcome whatever difficulty arises.
>
> **The intent is to give complete flexibility to the new commission so that it can register charities that come to it, having regard to their particular**

[4] Hansard (12 April 2005): https://www.parliament.nz/mi/pb/hansard-debates/rhr/document/47HansD_20050413_00001881/charities-bill-second-reading-instruction-to-committee

> **circumstances**. Those circumstances **vary enormously**. For example, the situation as between the Catholic Church and the Anglican Church is quite radically different. This is a good step forward and I commend the Supplementary Order Paper to the Committee.

18. In other words, the only reason for adding the reference to those exercising "significant influence" was to cater for the unique situation of churches that did not have a governing body as such.

19. Unfortunately, section 4(1) was then amended again in 2012: Statutes Amendment Bill (No 2) 271-2, introduced into Parliament on 22 February 2011, proposed to make amendments to 20 Acts, one of which was the Charities Act.[5] With respect to the Charities Act, the explanatory note made the following comments at pages 2-3:[6]

> Clause 6 amends the definition of officer in section 4(1) **so that the officers of a society or an institution always include a person who is in a position to exercise significant influence over the entity's management or administration (in addition to the members of any board or governing body of the entity).**
> …
> Clause 11 amends section 40(1) by adding the requirement for a charitable entity to notify the Commission of a change that disqualifies an officer of the entity from being an officer.
> …
> Clause 18 is a transitional provision that applies if a person becomes an officer of a charitable entity because of the amended definition of officer.

20. In other words, the Statutes Amendment Bill proposed to remove the word "or" from the definition of officer, and replace it with the word "and", so that the officers of a society or an institution *always* include a person who is in a position to exercise significant influence over the entity's management or administration (in addition to the members of any board or governing body of the entity).[7]

21. The Bill was referred to the Government Administration Select Committee on 12 April 2011. The closing date for submissions was 13 May 2011. The Committee received 4 submissions and heard 3 oral submissions. The Committee did not discuss or propose any change to the proposed amendments to the definition of "officer" in their 6 July 2011 report.[8]

22. The proposed amendments to the Charities Act were removed to a separate bill, which became the Charities Amendment Act 2012, and received Royal Assent on 24 February 2012.[9] Accordingly, from 2012, the definition of "officer" was worded as follows:

> 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**

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[5] https://www.legislation.govt.nz/bill/government/2011/0271/latest/DLM3558752.html.
[6] file:///E:/Users/User/Downloads/Statutes%20Amendment%20Bill%20No%202%20(22).pdf
[7] See the explanatory note to the Statutes Amendment Bill (No 2) 271-1: http://www.legislation.govt.nz/bill/government/2011/0271/11.0/DLM3558731.html
[8] file:///E:/Users/User/Downloads/Statutes%20Amendment%20Bill%20No%202%20(23).pdf
[9] file:///E:/Users/User/Downloads/Charities%20Amendment%20Act%202012%20(9).pdf

> (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);

23. There is no publicly-available commentary of which we are aware explaining why the definition of officer was extended to persons exercising significant influence for all societies, even those that had governing bodies, or why the definition was so extended for societies and not for trusts. We are concerned that this may be an example of an ill-conceived change that was not subject to proper consultation and has resulted in unintended consequences: since the charities register came into force in February 2007, the Charities Act has been amended almost routinely by Statutes Amendment Bill, with insufficient accompanying commentary, and with changes normally rushed through under urgency without proper consultation. Added to the fact that the original Charities Bill was almost completely rewritten at Select Committee stage in response to hundreds of submissions, the net result is a piece of legislation that suffers from many unintended consequences.

24. It is not clear to us that extending the definition of officer in 2012 to those exercising significant influence for all societies, rather than just those without a governing body, was a well-conceived change, as it unhelpfully conflates the distinction between governance and management.

25. It is also not clear to us that that change should now be extended to trusts.

26. The law relating to trustees does not coincide entirely with the law relating to officers of other entities. In particular, trustees are subject to statutory provisions reflecting a general principle that they may not delegate unless they have an express power to do so:[10] legal responsibility remains with the trustees and we would caution against extending the concept of "officer" for trusts in the Charities Act to people who would not be considered trustees in the context of the Trusts Act 2019. This will likely cause unhelpful confusion.

Option 1 – status quo

27. It is not clear to us from either the 2019 discussion document or the paper why the definition of officer is considered a problem that needs to be "fixed".

28. To the contrary, we are concerned that extending the definition, both in 2012 and as proposed now, may simply be examples of regulatory over-reach. The obligations on officers are significant. Those who take on a position in a governing body can be expected to take on such obligations. Those occupying other positions, such as a chief executive or treasurer, will be governed by different obligations such as those set out in their contract.

29. In the absence of a compelling reason for extending the definition for trusts, we do not support this change. On that basis, we would support option 1.

30. However, we would go one step further. In our view, the definition of "officer" should be restored to its pre-2012 version, which made a clear distinction between governance and management, so that it reads as follows:

> officer—
>
> (a) means, in relation to the trustees of a trust, any of those trustees; and
>
> (b) means, in relation to any other entity,—

[10] See sections 67-72 of the Trusts Act 2019.

> (i) a member of the board or governing body of the entity if it has a board or governing body; or
>
> (ii) in any other case, 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);

31. This approach would mean that, for trusts and for other entities that have a governing body, "officers" would be limited to trustees/members of the governing body. Any reference to the concept of "officer" extending to those exercising "significant influence" would be limited to those entities that do not have a governing body, such as synods, only, as was originally intended

Option 2 – broaden the definition of officer

32. Option 2 aims to remove the reference to trusts, meaning that the meaning of officer would be the same for all charities regardless of the legal structure.

33. We do not support this option for the reasons discussed above: it blurs the distinction between governance and management and would conflict with the rules in the Trusts Act regarding delegation by trustees. It is also contrary to the original intention of the provision, and would conflict with the underlying law.

34. Instead, we recommend that the definition of officer is reinstated to its pre-2012 version, as discussed above.

Questions

Question 1 – if your charity is a trust, or you work with charities that are trusts, what would option 2 mean for you?

35. In our view, broadening the definition of officer would conflict with the delegation provisions of the Trusts Act and cause significant confusion. It would also blur the distinction between governance and management and risks causing regulatory over-reach.

Question 2 – do you see any implications with the options?

36. Yes, a blurring of the distinction between governance and management, and conflict with the delegation provisions of the Trusts Act, both of which would cause significant confusion. We are not convinced that there is a problem that requires extending the definition of officer to trusts in the way proposed and we fear that such an extension would only perpetuate a legislative error that was made in 2012.

37. We do not recommend either option.

Question 3 – are there any alternative options that would better address the problem?

38. Yes. As discussed above, we recommend restoring the definition of officer to its pre-2012 version for the reasons originally articulated in SOP 357. This would respect the distinction between governance and management.

39. We also recommend consulting with the Inter-Church Working Party on Taxation to see if the original problem sought to be addressed by SOP 357 remains. If not, then we recommend restoring the definition to the form set out in the original Charities Bill:

> officer,—
>
> (a) in relation to an entity, means—
>
> (i) in the case of the trustees of a trust, any of those trustees:

(ii) in any other case, a member of the board or governing body of the entity;

40. This approach would make the position consistent for all charities regardless of the legal structure. It would also be very clear, and would avoid any blurring of the distinction between governance and management.

41. Similar amendments should be made to the Incorporated Societies Bill which proposes to follow the Charities Act definition (see the definition of "officer" in clause 5 of the Incorporated Societies Bill 15-1).

42. In addition, the term "officer" is used by some charities in their rules in a specific, limited sense. Consideration should be given to the Charities Act using a different term, such as "responsible person", to minimise the potential for confusion.

GOVERNANCE DUTIES OF OFFICERS

Problem definition

43. At pages 3-4, the paper articulates some perceived issues with governance in the following terms:

> As the Charities Act does not have any detail on the role of officers, it is **potentially unclear** what an officer's role involves. 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 charity's structure.
>
> 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 organization. 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. Poor governance can be intentional, for example in some cases of serious wrongdoing, or unintentional due to low levels of governance capability
>
> It is **unclear** what the governance capability of the charities sector is, 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.

44. We note that there is already a lot of work being undertaken in the area of governance by charities. It is not clear to us that there is such a problem with charities' governance that further change is needed?

Option 1 – status quo

45. Option 1 does not propose any changes to officer duties. Officers would continue to rely on other legislation, common law and guidance to understand their duties. Charities Services would continue to provide guidance and support.

Option 2 – add 4 explicit duties for officers of charities into the Charities Act

46. Option 2 proposes to add 4 duties of officers of charities explicitly into the Charities Act:

(i) **Duty 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

(ii) **Duty to act with reasonable care and diligence**: officers are in a position to 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 or expert, as long as they adequately inform themselves and make an independent assessment of that information or advice.

(iii) **Duty to ensure the charity's financial affairs are managed responsibly**: officers are responsible for the **financial sustainability**[11] of their organisation and ensuring funds and assets are used to advance the organisation's charitable purposes

(iv) **Duty to manage any perceived conflict of interest**: officers are responsible for ensuring the charity has a process in place to manage conflicts of interest or perceived conflicts of interest

47. The paper states that these duties "will not prevent the officer from meeting obligations in other legislation". However, the paper does not elaborate on how the proposed duties would interact with the duties articulated in other legislation, such as the Trusts Act 2019, the Companies Act, and those proposed in the Incorporated Societies Bill 15-1.

Option 3 – more comprehensive guidance and support for existing duties (duties are not explicitly set out in the Charities Act)

48. Option 3 would involve Charities Services producing comprehensive best-practice guidance that outlines the duties officers have when running a charity. 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.

49. With respect, while a Charity Officer 101 course would be a good idea, it would be better if resources already available were highlighted. If further material is needed, it would be preferable for funding to be made available for those within the charitable sector with genuine governance expertise to produce it.

50. We do not recommend option 3.

Discussion

Purpose-based governance

51. The importance of good governance in the charitable sector, as in any sector, cannot be underestimated. A number of governance duties, arising from a number of sources, are imposed on those who govern charities. One such duty is the core duty to act in good faith in the interests of the charity. Questions arise, however, as to what the interests of a charity are and, in particular, whether those interests extend beyond the pursuit of a charity's purposes. In other words, is this core duty better phrased, in the context of a charity, as a duty to act in good faith in the best interests of the charity's *charitable purposes*.

52. The balance between purposes and interests has been considered in recent scholarship and can also be seen in different formulations adopted by legislatures. For example:

[11] This reference to financial sustainability is interesting given the proposals in other papers to restrict charities' ability to accumulate funds.

(i) In England and Wales, section 220 of the Charities Act 2011 (UK) provides that each member of a Charitable Incorporated Organisation ("**CIO**") must exercise their powers in the way that the member decides, in good faith, would be most likely to *further the purposes* of the CIO.[12] Similarly, under section 221, each charity trustee of a CIO must exercise their powers and perform their functions in the way that the charity trustee decides, in good faith, would be most likely to *further the purposes* of the CIO. Section 172(2) of the Companies Act 2006 (UK) similarly states that "Where or to the extent that the purposes of the company consist of or include purposes other than the benefit of its members, subsection (1) has effect as if the reference to promoting the success of the company for the benefit of its members were to *achieving those purposes*".

(ii) In Scotland, section 66(1) of the Charities and Trustee Investment (Scotland) Act 2005 requires a charity trustee 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. Section 51 applies a corresponding duty to members of a Scottish Charitable Incorporated Organisation.

(iii) In Australia, Governance Standard 5 (Australian Charities and Not-for-profits Commission Regulation 2013, regulation 45.25(2)(b)) requires a registered charity to take reasonable steps to ensure that its responsible persons comply with a duty to act in good faith in the charity's best interests and to further the purposes of the charity. Under Protection 2 (regulation 45.110(1)(a) and (d)), a responsible person meets the duty of care and diligence in regulation 45.25.(a) if the responsible person makes a decision in good faith for a proper purpose and rationally believes that the decision is in the best interests of the charity.[13] The ACNC summarises this governance standard as requiring charities to take reasonable steps to ensure their responsible persons act "honestly and fairly in the best interests of the charity and for its charitable purposes", and generally "with standards of integrity and common sense".[14]

53. In New Zealand, section 131 of the Companies Act 1993 formulates a duty of directors to act in good faith in what the director believes to be the *best interests of the company*. Clause 49 of the Incorporated Societies Bill 15-1 proposes to emulate this duty, by articulating a duty of an officer of a society to act in good faith in what the officer believes to be the best interests *of the society*.

54. However, a key distinction between a company and a society is that an incorporated society is by definition a purpose-based organisation.[15] In our May 2021 submission on the Incorporated Societies Bill 15-1, we submitted that clause 49 should be amended by deleting the words "best interests of the society" and replacing them with the words **"best interests of the society's purposes**".

55. Acting in the best interests of an entity that exists to pursue purposes is arguably synonymous with acting in the best interests of those purposes. In other words, fidelity to purpose is the over-arching paradigm in the context of a purpose-based organisation. On that basis, the overarching duty, in the context of a purpose-based organisation such as an incorporated society and/or a charity, should be reframed

[12] https://www.legislation.gov.uk/ukpga/2011/25/section/220/enacted
[13] https://www.legislation.gov.au/Details/F2019C00634.
[14] https://www.acnc.gov.au/for-charities/manage-your-charity/governance-hub/governance-standards/5-duties-responsible-persons
[15] See for example clause 3(a) Incorporated Societies Bill 15-1.

as a duty to act in the best interests of the society's *purposes*.[16]

56. We submitted that making this duty clear would help in circumstances where the best interests of the purposes might be thought of as conflicting with the best interests of the society. For example, a circumstance might arise where the purposes of the society have been satisfied, meaning that it is no longer necessary or useful for the society to continue to exist. Fidelity to *society* would encourage continuation of the society. However, fidelity to *purpose* would make it clear that purpose is the overarching paradigm and the society should close, even though this might not necessarily be in the best interests of the society as an entity in itself.

57. The Trusts Act 2019 does not refer to a "best interests" duty other than in the context of alternative dispute resolution.[17] Instead, the Trusts Act formulates a duty on the part of trustees of all trusts to act honestly and in good faith,[18] and a separate duty to act f*or the benefit* of the beneficiaries (in the case of a family trust: in practice, this duty is generally referred to as a duty to act in the *best interests* of the beneficiaries).[19] In the case of a charitable trust, the Trusts Act articulates the duty as a duty *to further the charitable purposes* of the trust in accordance with the terms of the trust.[20]

58. The review of the Charities Act provides a unique opportunity to make the principles of purpose-based governance clear. In our view, the New Zealand charities' statute should articulate one over-riding duty: a fiduciary duty to act in the best interests of the charity's *stated charitable purposes.* This duty would be applicable to all registered charities, and the responsible persons of all registered charities, regardless of the charity's legal structure.

59. The underlying concept is that the interests of a purpose-based entity are in fact the entity's *purposes*. In other words, governance would be driven by fidelity to purpose, with purpose as the overarching fiduciary paradigm. We refer to this concept as "**purpose-based governance**".

60. The duty might be worded as follows:

> ***Duty to act in best interests of stated charitable purposes***
>
> Every registered charitable entity, and every responsible person of a registered charitable entity, has a duty to act in good faith in the best interests of the entity's stated charitable purposes in accordance with its rules.

61. Other governance duties, such as those expressed in sections 21-39 of the Trusts Act, sections 131-138B of the Companies Act, and clauses 49-56 of the Incorporated Societies' Bill, would emanate from and support clearly-defined purpose.[21]

62. It follows that we recommend the overarching duty be articulated differently from that proposed in option 2(i) above.

63. There are a number of other advantages that would derive from making purpose-based governance clear.

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[16] See Rosemary Teel Langford *Purpose-based governance: a new paradigm* UNSW Law Journal 954; Ian Murray and Rosemary Langford, "The Best Interests Duty and Corporate Charities - The Pursuit of Purpose" (2021) *Journal of Equity* (forthcoming).
[17] Under section 144(2)(a), the representatives must act in the best interests of the beneficiaries on whose behalf they have been appointed.
[18] Trusts Act 2019, section 25.
[19] See for example New Zealand Law Commission, Issues Paper 26 *The duties, office and powers of a trustee – review of the law of trusts, 4th issues paper,* June 2011, paragraphs 1.7, 1.22, 1.46 https://www.lawcom.govt.nz/sites/default/files/projectAvailableFormats/NZLC%20IP26.pdf
[20] Trusts Act 2019, section 26, and definition of "permitted purpose" in section 9.
[21] Rosemary Teel Langford *Purpose-based governance: a new paradigm* UNSW Law Journal 954.

64. For example, because so many charities are small, and so many are governed by volunteers, it is conceptually important to create clear rules that enable charities to further their charitable purposes without undue recourse to legal advice. The approach of creating one overarching purpose-driven duty would obviate creating complicated bespoke rules for different types of activity.[22] Instead, the question with respect to a particular type of activity, such as advocacy, business or social enterprise activities, accumulations, social investments, etc would be whether the charity can demonstrate that the activity is being carried out in the best interests of the charity's stated charitable purposes. If so, in principle, there is no difficulty.[23]

65. This approach would also have the advantage of clearly requiring charities to actually turn their minds to this question.

66. It also resonates and is easily understood in practice, in our experience.

67. The manner in which the duty is framed could make a difference in the following types of circumstances:

    (i) Charity mergers: can directors (or other responsible persons) be said to be acting in the best interests of the charitable entity if they let the entity come to an end in order that the merged entity can better fulfil the charitable purpose?

    (ii) Charity wind-ups: if the charity's purpose has been achieved, can the officers wind up the charity if this is in the best interests of the purposes of the charity, even though this might not be in the best interests of the charity itself?

    (iii) Charity A pays money to Charity B to pursue the same purposes, thus diminishing Charity A's assets, as occurred in *Lehtimäki v Cooper*.[24]

    (iv) Charity directors attempt to determine how to prioritise the interests of members or benefit recipients, where changed circumstances mean that benefit recipients call for changes to a charity's activities that conflict with its purpose.

    (v) Directors may need to determine whether they can support an action that advances the charity's particular charitable purpose, even if the proposed action may itself be detrimental to the public benefit or to a more generalised articulation of the charity's specific charitable purpose. For example, an educational institution which has purposes of furthering tertiary education pays its chief executive officer a sum of money not to work for a competitor for a year upon resignation.

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[22] Such as the "direction and control" rules in Canada, which have been described as "hierarchical, intrusive and onerous" (see Report #1 of the Advisory Committee on the Charitable Sector, January 2021: https://www.canada.ca/en/revenue-agency/programs/about-canada-revenue-agency-cra/corporate-reports-information/advisory-committee-charitable-sector/report-advisory-committee-charitable-sector-february-2021.html). Bill S-222 (the Effective and Accountable Charities Act), currently before the Canadian Parliament, proposes to amend these requirements to enable charities to make transfers to non-charities, so long as the charity takes reasonable steps to ensure that the transferred resources are used exclusively for a charitable purpose (in other words, purpose-based governance). Similar amendments have recently been made in Canada in the context of advocacy: on 13 December 2018, Bill C-86, Budget Implementation Act, No 2, 1st Sess, 42nd Parl, 2018 amended the Canadian Income Tax Act, RSC 1985, c 1 (5th Supp) to permit charities to carry on unlimited advocacy in support of their stated charitable purposes. https://parl.ca/DocumentViewer/en/43-2/bill/S-222/first-reading.

[23] *Re The Foundation for Anti-Aging Research and The Foundation for Reversal of Solid State Hypothermia* (2016) 23 PRNZ 726 ("***FAAR***") at [88].

[24] *Lehtimäki v Cooper* (*Lehtimäki*) [2020] UKSC 33, [2020] 3 WLR 461.

(vi) Can directors promote the amendment of a corporation's purposes — including converting a charity into a for-profit corporation?

68. As discussed at the CRG meeting, we are currently in the process of arranging a series of workshops with specialist charities law academics and practitioners from around the world, with a view to discussing purpose-based governance and in particular considering issues such as the following:

What does it mean to act in the best interests of a purpose?

69. One question is whether a purpose can have "interests", or whether the duty is really to act to *further* the purpose? And, if so, what does a duty to further a purpose entail? Is furthering a purpose sufficient, or would it be helpful to clarify that officers have a duty to act in the *best interests* of the purpose? While articulating purpose-based governance resonates and is very helpful in practice, it is nevertheless important to ask what is the most appropriate way of framing the core duty?

How do we ensure accountability in terms of meeting the duty?

70. Another question is how to demonstrate that a particular activity or decision was in the "best" interests of a charitable purpose: how would the standard of "best" be met? One option might be by means of a burden of proof: in other words, provided the charity or responsible person could demonstrate in good faith that a particular course of action was, in their view, in the best interests of their stated charitable purposes, there would be a rebuttable presumption that the duty had been met. The burden of proof would then fall on the government agency to demonstrate that it was not in the best interests of the stated charitable purposes, if enforcement action was to be taken.

Relation to other duties

71. Another question is how such a duty would relate to other underlying duties and whether, or to what extent, the relationship would need to be specifically clarified. One option would be for specific underlying corporate duties to be "turned off" for registered charities, as is the case in Australia (*Corporations Act 2001* (Cth), pt 1.6). Alternatively, it might be possible to rely on a general provision such as section 7 of the Trusts Act?[25]

72. That said, however, it may be that there is no conflict with underlying duties, and articulating a duty of this nature in the Charities Act, applicable to registered charities and those that govern them, may be merely helpfully clarificatory.

Duty to act with reasonable care and diligence

73. We strongly recommend that a duty to act with reasonable care and diligence is not included in the Charities Act: its relationship with the underlying law is too complicated.

Reference to "skill"

74. For example, clause 52 of the Incorporated Societies Bill 15-1 proposes to require an officer to exercise the "care and diligence" that a reasonable person would

[25] Section 7 (*Interpretation of Act)* provides as follows: https://www.legislation.govt.nz/act/public/2019/0038/latest/DLM7382825.html?search=sw_096be8ed81a240e7_%22best+interests%22_25_se&p=1
(1) This Act— (a) must be interpreted in a way that promotes its purpose and principles; and (b) is not subject to any rule that statutes in derogation of the common law should be strictly construed; but (c) may be interpreted having regard to the common law and equity, but only to the extent that the common law and equity are consistent with— (i) its provisions; and (ii) the promotion of its purpose and principles.

exercise in the same circumstances. By contrast, section 137 of the Companies Act, on which clause 52 is based, requires a director of a company to exercise the "care, diligence *and skill"* that a reasonable director would exercise in the same circumstances. The comparable duty in the Trusts Act 2019 is articulated as a duty to exercise "the *care and skill* that is reasonable in the circumstances",[26] having regard, in particular, to any special knowledge or experience that the trustee has or holds out as having.

75. In other words, directors must exercise "care, diligence and skill", trustees must exercise "care and skill", and the proposal is for officers of incorporated societies to be required to exercise "care and diligence".

76. The omission of the word "skill" from clause 52 of the Incorporated Societies' Bill is deliberate. The Law Commission considered that, even where people taking on governance roles in societies are volunteers, and the objectives of a society are of a social nature, it is reasonable that those running the society meet an objective test of diligence and care. However, unlike care and diligence, which are concerned with the manner in which people go about their roles, **skill** is a measure of competence. Officers of societies may be chosen for reasons other than their management competence. Many are elected or appointed because they have the confidence and support of the membership based on a broader set of considerations. Many also take on roles because it is their turn, or because no one else is willing or available. In such circumstances, the Law Commission considered it was reasonable to expect people to be reasonably careful and diligent when undertaking activities for the society, but that it may not be reasonable to find them wanting because they do not have the necessary competence to undertake the role to a reasonable standard.[27]

77. In our submission on the Incorporated Societies Bill, we stated that, in principle, we support the application of a standard in the Bill that it is reasonable for officers of incorporated societies to be expected to meet. However, we are concerned that the common law may continue to require the officers of incorporated societies to meet a standard of skill, even if the legislation does not. If that is the case, little would be gained by omitting the word "skill" from the legislation.

78. We understand that a similar situation has arisen in Australia: although the statutory articulation of the duty of care in section 180 of the Australian Corporations Act 2001 omits the word "skill", the interpretation of the provision still requires it as an element.

79. The omission of the word "skill" might also send an unhelpful message to those taking on the role of an officer of an incorporated society. In our view, the concerns of the Law Commission set out above can be accommodated within the ambit of the word "reasonable" in clause 52. We submitted that, on balance, the word "skill" should be retained in clause 52.

80. Similar arguments would apply to the duty of care proposed for the Charities Act.

Underlying law

81. However, more fundamentally, it would be highly problematic to introduce a duty of this nature into overriding charities legislation, given the varying nature of the underlying duties in bespoke legislation and the common law.

82. The duty of care in the Trusts Act is a default duty which can be modified by the

[26] Trusts Act 2019, section 29.
[27] Law Commission *Incorporated Societies'* Report, page 77.

terms of the trust deed.[28] The Law Commission stated that standard of care does not apply if or in so far as it appears from the terms of the trust that the duty is not meant to apply.[29] In other words, the duty of care is excludable under the terms of the trust. This reflects the principle of settlor autonomy, under which it is always open to a settlor to require a trustee to exercise a particular level of skill and care.[30]

83. In addition, the duty of care is not a mandatory duty because it is not considered to be fundamental to a trust.[31] It developed in the late 19th century in the context of the increasing use of trusts for commercial investment. It related to the need to ensure trustees invested with care, rather than being a principle fundamental to the existence of the trust relationship.[32] It has been held that the trustee's duty of care is not itself fiduciary in nature, although some aspects of what is likely to fall under the duty of care are covered by the irreducible core of mandatory duties.

84. The proposal was that the duty of care in the exercise of a *mandatory* duty cannot be excluded, but that it can be excluded as it applies to every other exercise of a duty, power or discretion by a trustee.[33] In the specific context of investment, the higher standard of care included in the Trustee Act 1956 continues to apply.[34] However, the duty of prudence is also default law and may be modified or relaxed by the terms of the trust.

85. Failure to exercise reasonable skill and care amounts to negligence.[35]

86. Provisions of a trust that fix a lower standard will be strictly construed and may never altogether dispense with the fundamental requirement that trustees must not behave recklessly and must act in good faith with some suitable degree of care and in a manner consistent with the terms and purposes of the trust and the interests of the beneficiaries.[36] In other words, the key duty is the good faith duty set out above.

87. Importantly, the duty of care in section 29 does not apply to the exercise of a discretion to distribute property. As the Law Commission noted,[37] the standard (as it was originally termed)[38] of care should **not** apply to the exercise of discretions that affect beneficiaries' interests: trustees are often given broad discretions in the terms of a trust about which decisions they may come to regarding the distribution of trust property to beneficiaries. Applying the standard of care in that context could open those discretions up to scrutiny as to whether the decision itself was reasonable, which is something that the settlors who gave those trustees the broad discretions would never have intended. It is the **manner** of how trustees carry out their powers, rather than **what** they decide to do in exercise of their discretions, that is relevant to the standard of care.

88. Section 29 of the Trusts Act emphasises that a higher standard of care is expected of professional trustees, which is described as those acting as a trustee in the course of a business or profession.[39] The Law Commission considered that this framing of the duty of care accurately represents the existing common law position, and would not give rise to a significant risk of discouraging professional trustees from offering

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[28] Trusts Act 2019, section 28.
[29] R130, page 126, referring to R13(3): https://www.lawcom.govt.nz/our-projects/law-trusts.
[30] IP 4, paragraph 3.6: https://www.lawcom.govt.nz/our-projects/law-trusts.
[31] IP 4, paragraph 3.5.
[32] IP 31, paragraph 3.20: https://www.lawcom.govt.nz/our-projects/law-trusts.
[33] See also IP 31 paragraph 3.2.
[34] R130, paragraph 6.36.
[35] IP 31, paragraph 3.20.
[36] IP 4 paragraph 3.23.
[37] R130, paragraph 6.39.
[38] R130, paragraph 6.40.
[39] IP 31, paragraph 3.19.

their services.[40] It would be interesting to assess whether that conclusion has been borne out.

89. Section 29 also makes it clear that any trustee that has knowledge or expertise will be held to a standard of care that takes into account that knowledge or expertise (section 29(a)).[41] It is intended that trustees will be held to a standard of care that is commensurate with their special knowledge, experience or professional status, and regardless of whether or not they are paid.[42] Although some aspects of a trust's administration may require knowledge and experience greater than that of a particular individual of ordinary intelligence, this does not prevent the person serving as a trustee, but emphasises the importance of obtaining competent guidance and assistance to meet the required standards. Essentially, the trustee may either possess or get in the degree and types of skill needed for a specific transaction or required more generally by the strategies of the particular trust. Thus the 2 basic standards are seen as not excessively demanding, neither precluding conscientious service by friends and family nor permitting inattentive behaviour by trustees who are capable of meeting the appropriate standards.

90. In our view, those involved with charities already have a duty to act with reasonable care, and it is not necessary or helpful for the Charities Act to introduce a complicated overlay over the underlying law. We strongly recommend that a duty to act with reasonable care and diligence is not included in the Charities Act: its relationship with the underlying law is too complicated. The key duty should be to act in good faith in the best interests of the charity's stated charitable purposes, as discussed above.

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

91. Although we consider the key duty to act in the best interests of the stated charitable purposes may be all that is required, if a duty with respect to financial affairs is to be included, we recommend that it be articulated as a duty to keep accounting records. Clause 94 of the Incorporated Societies Bill requires incorporated societies to keep accounting records, and it does seem anomalous that a similar requirement is not imposed on registered charities by means of the Charities Act.

92. We recommend the duty is articulated in the following terms:

Duty to keep accounting records

(1) Every registered charitable entity must ensure that there are kept at all times accounting records that –

(a) correctly record and explain the transactions of the entity and its financial position and performance; and

(b) will allow the entity to produce financial statements that comply with the requirements of this Act; and

(c) would enable the financial statements to be readily and properly reviewed or audited (if an audit or review is required under this Act).

(2) Every registered charitable entity must establish and maintain a satisfactory system of control of the entity's accounting records and ensure that the financial affairs of the entity are managed in a responsible manner.

(3) The accounting records must be kept –

[40] IP 31, paragraph 3.19.
[41] R130, paragraph 6.37.
[42] R130, page 129.

(a) in written form in English or te reo Māori; or

(b) in a form or manner that is easily accessible and convertible into written form in English or te reo Māori.

(4) The registered charitable entity must retain the records for at least 7 years after the end of the reporting period to which they relate.

Compare: 1994 No 166, s 22(2) and (2BA); Incorporated Societies Bill 15-1, clause 94; Australian Charities and Not-for-Profits Commission Act 2012 s 55-5

Duty to manage and perceived conflict of interest

93. As part of the research we are undertaking, we have prepared a draft bill that would amend and restate the Charities Act.[43] In the draft bill, we articulated the duty with respect to conflicts of interest in the following terms:

> ***Duty to disclose and manage conflicts of interest***
>
> A responsible person of a registered charitable entity has a duty to disclose and manage perceived or actual material conflicts of interest of the person.
>
> Compare: 2019 No 38 ss 28 and 34; 1993 No 105 ss 139-149; Incorporated Societies Bill 15-1, clauses 57-67

94. In our view, it is important not to be too prescriptive in this regard, as the underlying legislation does differ depending on entity structure (understandably so, given the different features of the different structures).

Questions

Question 4 – in your experience, what are the key governance challenges for charities, if any?

95. In our experience, the key governance challenge for charities derives from the way Charities Services interprets the definition of charitable purpose. Many charities are consciously not undertaking work that should be undertaken in the best interests of their charitable purposes because they fear losing their registered charitable status. In our experience, charities' fear in this regard is justified: many charities have lost or been threatened with losing their charitable registration even though they have not done anything specifically wrong. Although section 13 of the Charities Act requires purposes to be charitable rather than activities, the key governance challenge in our view is that Charities Services' interpretations can be inconsistent and changeable, meaning that charities simply do not know how Charities Services will view any particular activity they might undertake. The uncertainty causes charities to err on the side of caution, meaning that much important and perfectly legitimate charitable work is not undertaken. Examples include charities not advocating for their charitable purposes, not raising funds, not supporting social enterprises, not helping people into affordable housing, and not doing a myriad of other perfectly legitimate activities for fear of losing registration.

96. Purpose-based governance would assist with making it clear that, provided the charity can demonstrate in good faith that any particular activity is carried out in the best interests of their stated charitable purposes, there is no difficulty. This would assist materially with helping to facilitate rather than frustrate charitable work.[44]

Question 5 – which of the options would best address the problem? Why?

97. Fundamentally, governance is an issue for charities, rather than for Charities

[43] See: https://www.charitieslawreform.nz/research

[44] *National Council of Women of New Zealand Incorporated v Charities Registration Board* [2015] 3 NZLR 72 (HC) at [53] per Dobson J.

Services. There is a lot of excellent work being undertaken at the moment with the Centre for Social Impact in the area of community governance. This work should be fully taken into account before assessing whether further work is needed.

Question 6 – are there any alternative options which would better address the problem?

98. In our view, the best way of addressing the actual problem would be to honour the Labour Party's manifesto for the 2017 election to conduct a first principles review, including the definition of charitable purpose, and to consult on reinstating an independent decision-making body. This would be the best way of addressing the key governance challenge facing charities.

99. That said, however, we do recommend that the Charities Act clarify that all charities, and the officers of all charities, have a duty to act in good faith in the best interests of the charity's stated charitable purposes in accordance with its rules (purpose-based governance, as discussed above). Clarifying a duty to keep proper accounting records would also be helpful.

100. The opportunity to take a Charity Officer 101 course when a person becomes an officer of a registered charity would also be helpful.

Question 7 – are the proposed duties practical and feasible for charities?

101. In our view, those involved with charities already have a duty to act with reasonable care, and it is not necessary or helpful for the Charities Act to introduce a complicated overlay over the underlying law. We strongly recommend that a duty to act with reasonable care and diligence is not included in the Charities Act: its relationship with the underlying law is too complicated. The key duty should be to act in good faith in the best interests of the charity's stated charitable purposes in accordance with the charity's rules, as discussed above.

102. Please see discussion above regarding suggested wording for a proposed duty to keep proper accounting records and a proposed duty to disclose and manage any conflicts of interest

Question 8 – should duties fall on the officers of charities, or the entity itself?

103. The duties should fall on both the officers of charities and the entity itself

Question 9 – should the duties be in legislation, a code or in guidance?

104. It is very important that any duties are set in legislation. Setting out the duties at any level lower than legislation provides scope for them to be weaponised against charities, including politically as we are currently seeing in Australia. We are also concerned at the extent to which "guidance" can spill over into law-making, without any opportunity for consultation or any process for ensuring it is legally correct.

Question 10 – does the wording of the duties create any issues with other legislation?

105. Yes it does, as discussed above.

DISQUALIFYING FACTOR – CRIMINAL CONVICTIONS

Problem definition

106. At page 5 of the paper, the perceived problem is articulated as follows:

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

107. The paper does not offer any evidence that the potential to have officers who have been convicted of serious convictions has been posing a risk to the operations of a charity or the safety of people involved with the charity. We understand from discussion at the CRG meeting that there have been one or two instances of charities with an officer they are not able to remove. However, the paper does not discuss the comprehensive requirements already imposed by legislation such as the Health and Safety Act and the Vulnerable Children Act, and the opportunity for charities to seek police vetting. The paper also does not discuss the provisions of the Trusts Act[45] and the Incorporated Societies Bill[46] providing mechanisms for removing trustees and officers.

108. The paper also does not discuss the careful balance that was struck in this regard at the time of the original Charities Bill, where the select committee made the following comments at page 10 of their report:

> The bill, in clause 15, disqualifies a number of classes of people from serving as an officer of a charity. In particular, it excludes people convicted of an offence punishable by a term of imprisonment of two years or more, or two years or less where the person has been sentenced to imprisonment. **Submitters expressed strong opposition to this provision, noting that the specific criminal convictions of an individual may have little bearing on their ability or appropriateness to serve as an officer of a charity**. In addition, some charities are specifically established to offer services to assist current and former prisoners, and in such cases the appointment of officers with past experience of prison would be a positive benefit to that entity.
>
> In our view, 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, but the majority sees no reason why people with other criminal convictions should be barred from serving on a charity**. The majority therefore recommends amending clause 15(2)(c) and (d) **to only disqualify people who have been convicted of a dishonesty offence, such as theft or fraud**. For consistency with the provisions of the Criminal Records (Clean Slate) Act 2004, the majority also recommends introducing a seven-year limitation period on this disqualification. The New Zealand First Party supports the intent of the original bill.

109. In other words, the balance was carefully struck in 2004 and it is not clear that such a problem has developed since that requires this issue to be revisited.

Alignment with the Incorporated Societies' Bill

110. Clause 42(2) of the Incorporated Societies Bill 15-1 lists a number of circumstances that would disqualify a person from being appointed or holding office as an officer of an incorporated society. The disqualifying circumstances listed in clause 42(2) generally align with the circumstances that would disqualify a person from being an officer of a registered charity under section 16(2) of the Charities Act. However, there are 7 exceptions: clause 42(e)(i), (iv), (v) and (vi)[47] and 42(f)(i), (ii) and (iii)[48]

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[45] See sections 103-115.
[46] See for example clause 161.
[47] Clause 42(e) - a person who has been convicted of any of the following and has been sentenced for the offence within the last 7 years:
(i) an offence under subpart 6 of part 4 (which relates to offences under the Incorporated Societies' Bill);
(iv) an offence under section 22(2) (*Financial gain*);
(v) an offence in a country other than New Zealand that is substantially similar to: an offence under subpart 6 of part 4, a crime involving dishonesty, a tax evasion offence, or an offence under section 22(2);
(vi) a money laundering offence, or an offence relating to the financing of terrorism, whether in New Zealand or elsewhere.
[48] Clause 42(f) - a person subject to:
(i) A banning order under the Incorporated Societies Act;
(ii) An order under section 108 of the Credit Contracts and Consumer Finance Act 2003; or
(iii) A forfeiture order under the Criminal Proceeds (Recovery) Act 2009.

of the Bill would disqualify a person from being an officer of an incorporated society, but not from being an officer of a registered charity.

111. It seems counter-intuitive that it should be easier to be an officer of a registered charity than an officer of an incorporated society. In principle, there should be consistency between the disqualifying factors in section 16 of the Charities Act, and those in clause 42 of the Incorporated Societies Bill 15-1.

112. One issue is whether the above 7 factors should be included in section 16 of the Charities Act or removed from clause 42 of the Incorporated Societies Bill. We suspect that clause 42 might update section 16 for developments which have occurred since 2005. Nevertheless, we recommend that the point is properly considered.

Option 1 – status quo - no change to the criminal convictions that are disqualifying factors for officers

113. Option 1 involves no change to the disqualifying factors relating to criminal convictions. Charities would continue to determine if someone with serious criminal convictions is suitable to be an officer of the charity.

114. We favour this option, which reflects the original balance that was carefully struck, and is more consistent with recognizing charities as independent, autonomous entities.

Option 2 – disqualifying factors include serious criminal offences

115. Option 2 proposes changes to the Charities Act to include serious criminal offences as disqualifying factors, such as: fraud, manslaughter, murder, physical violence, serious drug offence, sexual violation and terrorism related offences (that is, officers who are designated terrorists or who have been convicted of relevant offences under the Terrorism Suppression Act 2002).

116. We do not support this option.

117. In the first instance, it is not clear to us why fraud is proposed to be specifically included. Fraud is a dishonesty offence that would already be included under section 16(2)(c)(i), and subject to the clean slate principle.

118. More fundamentally, it is not clear to us that there is a problem with persons with serious criminal offences governing charities. If there are isolated incidences of charities who have had problematic officers, it may be that providing more education about the processes of police vetting etc, and the mechanisms under the Trusts Act and the Incorporated Societies Bill, that are already available, as well as encouraging better drafting of rules that provide mechanisms for removing officers, would be a better way forward than imposing a blanket rejection on all affected persons within the charitable sector, irrespective of good work that they might be doing. If there is evidence that there is a problem with persons with serious criminal offences governing charities, it is important that this evidence is provided so that it can be properly assessed. The alternative of a blanket rejection is inconsistent with the principle of rehabilitation. As discussed above, the original balance was carefully struck. During the Committee stage of the original Charities Bill, the Minister for Consumer Affairs spoke of:[49]

[49] https://www.parliament.nz/en/pb/hansard-debates/rhr/document/47HansD_20050413_00001881/charities-bill-second-reading-instruction-to-committee.

> …cases where, for example, a person helping to run an athletics club in which a charitable trust is involved may have a driving conviction or some issue of that sort. **I think we want charities to be as free as possible to represent the communities for which they are working, and for a range of people to be enabled**.
>
> The point was made that many education trusts have been a means by which people have gone on into business and into self-employment in all sorts of ways. People get governance experience through community organisations. Sometimes they are trustees, sometimes they are members of charitable trusts, and sometimes they are not. **The Government is satisfied that the provisions around who can and cannot be a trustee are satisfactory without prescribing exactly what people may have been convicted or not convicted of.** The point was made that a member of parliament might be affected. **I hope that the widest range of people will realise that working for communities is beneficial, gives people a great deal of hope and energy in life, and can often help individuals, families, and communities. The Government is very happy with the new state**.

119. Charities are best placed to determine who is best to govern them. We are concerned that option 2 would encourage regulatory over-reach and would not respect the independence and autonomy of charities.

120. In our view, in the absence of any clear evidence otherwise, the sentiments expressed by the select committee considering the original Charities Bill should be respected.

Option 3 – all criminal convictions to be disclosed to Charities Services who has the discretion to disqualify an officer when there is a significant risk to the charity or its beneficiaries

121. Option 3 requires organisations to disclose all criminal convictions of each officer when registering their officers with Charities Services. If Charities Services considers the criminal convictions of an officer pose a significant risk to the charity or its beneficiaries, they can disqualify the officer on those grounds. This option takes a case by case approach and allows some scope for officers with criminal convictions to participate in running charities.

122. We strongly oppose this option.

123. Under clauses 161-166 of the Incorporated Societies Bill 15-1, a decision to ban a person from being an officer of an incorporated society can only be made by a Court. A decision to disqualify a person from being an officer of a registered charity should similarly be made at a judicial level.

124. We do not support Charities Services having a unilateral power to determine who may or may be able to govern any particular charity. This option affords far too much discretion on Charities Services, which is already subject to insufficient transparency and accountability requirements.

125. For example, what criteria would Charities Services apply to determine whether criminal convictions of an officer "pose a significant risk to the charity or its beneficiaries"? What protections would there be for persons against whom Charities Services might abuse this power? What would happen if Charities Services disqualified a person incorrectly? The resulting damage could not be adequately repaired by simply reversing the disqualification decision. We also note that such a decision has not been included in the list of decisions recommended for appeal.

126. In our view, this option reflects regulatory over-reach. It is for charities to determine who best to govern them, not Charities Services, subject to the balance already

carefully struck in clause 16.

127. Option 3 is unacceptable and should not be proceeded with.

Questions

Question 11 – which option would best address the problem? Why?

128. As discussed above, it is not clear to us that there is a "problem" to be addressed.

129. On that basis, we recommend option 1, albeit with a proviso to consider alignment with clause 42 of the Incorporated Societies Bill.

130. Options 2 and 3 represent regulatory over-reach and are not respectful of the independence and autonomy of charities. They should not be progressed further.

Question 12 – are there any alternative options that would better address the problem?

131. As discussed above, it is not clear that there is a "problem" to be addressed. However, alignment with the Incorporated Societies Bill should be explored.

DISQUALIFYING FACTOR – MINIMUM AGE OF OFFICERS

Problem definition

132. At page 7 of the paper, the perceived problem is articulated as follows:

> The differences in legislation may create confusion for the organization and make it difficult for organisations with officers under 18 to be established as a trust or company if the officers also want to hold director or trustee roles.

Option 1 - no change – keep the qualifying age to hold an officer position at 16

133. Option 1 proposes no change and would keep the minimum age for holding an officer position at 16. This option recognizes that charities that are structured as trusts or companies would not be able to have 16 or 17 year old officers.

134. In that regard, we note the contrast with Charities Services' website which states the following:[50]

> **IMPORTANT NOTE**: While the new Trusts Act requires officers to be 18, the Charities Act allows for officers that are over 16. In this case, the Charities Act overrides the Trusts Act. This means charitable trusts can have trustees that are 16 and 17, but other trusts under the law cannot

135. This statement is not legally correct: the fact that a 16 year old is not *disqualified* from being an officer of a registered charity does not constitute a *positive entitlement* to be a trustee of a charitable trust when section 96(2)(a) of the Trusts Act makes it very clear a person must have reached the age of 18 to take that position.

136. We accept that section 5(9) of the Trusts Act provides that if there is an inconsistency between the Trusts Act and any other enactment, the provisions of that other enactment prevail unless the Trusts Act provides otherwise.

137. However, in our view, there is no inconsistency: the 2 provisions are perfectly consistent meaning that section 5(9) is not triggered. Section 16(2)(b) simply does not override section 96 of the Trusts Act: 16 and 17 year olds cannot legally be trustees of a charitable trust, even if the trust is registered as a charity under the Charities Act.

[50] https://www.charities.govt.nz/news-and-events/blog/the-new-trusts-act-what-does-it-mean-for-registered-charities/

138. The requirement that a person must be at least 18 to serve as a trustee or a director of a company has been carefully considered in light of the important fiduciary and legal duties that accompany such offices. For example, the balance in the Trusts Act was struck on the basis of legal capacity to hold property.[51]

139. We recommend that Charities Services' website is amended to reflect the legal position as soon as possible, otherwise, 16 and 17 year olds may be misled into thinking they may be a trustee of a trust or a director of a company if the entity is registered as a charity, when that is legally not the case.

Option 2 – raise the qualifying age to hold an officer position to 18

140. Option 2 proposes amending section 16(2)(b) of the Charities Act to raise the qualifying age to hold an officer position to 18 years. This would align with the Trusts Act and the Companies Act but not the Incorporated Societies bill. This would likely be implemented only for new officers, meaning that existing officers under 18 would be able to keep holding their officer positions.

141. In our view, this option would create unhelpful inconsistency between existing officers and new officers aged under 18 (admittedly for only 2 years but it is nevertheless undesirable).

142. However, more fundamentally, it is important to encourage young people to become involved with charities. Many charities commence as unincorporated societies, and 16 and 17 year olds should not be precluded from holding office in such entities if they choose to become registered charities.

143. The Select Committee considering the original Charities Bill made the following comments at page 11 of their report:

> Some submitters argued that the age restriction in clause 15(2)(b), which disqualifies people under the age of 16 years, should be omitted from the bill. The majority disagrees, as it is important that officers should be legally accountable for their actions, and **as a general rule it will therefore be generally inappropriate to have officers younger than 16 years old**. The majority therefore recommends no change to the bill in this respect. We note that clause 15(4) allows the Commission to issue a waiver of a disqualifying factor in specific instances, and the majority considers this would still allow a charity to appoint a younger officer if the specifics of a case meant the appointment was appropriate

144. We do not consider there is any pressing need to increase the minimum age to 18 for all registered charities. To the contrary, we should in fact be encouraging young people to become involved with charities, to the extent possible. Option 2 should not be proceeded with.

Questions

Question 13 – are there any alternative options that would better address the problem?

145. As discussed above, Charities Services' website needs to be amended to reflect the correct legal position. Otherwise, 16 and 17 year olds may be misled into thinking they may be a trustee of a trust or a director of a company if the entity is registered as a charity, when that is legally not the case.

[51] IP 31 paragraphs 6.15 to 6.20.

Question 14 – why might we want to have officers who are under 18? Are there any implications of this?

146. Charities are already struggling to find people to volunteer to serve on Boards. We should be encouraging young people to become involved, not placing barriers in their way. The balance has been struck at 18 for trusts and companies for good legal reason. But there is no reason to limit officers of charities that are incorporated or unincorporated societies in this way.

Further issues

Terminology

147. We would like to raise a further issue, which relates to the use of the term "regulator".

148. Describing Charities Services and/or the Charities Registration Board as the "charities regulator" sends a signal that it is their role to "regulate" charities.

149. While we accept that there is a spectrum of regulation and the concept of "regulation" can be very wide,[52] the use of the term "charities regulator" evokes a "command and control" mindset that is unhelpful and encourages Charities Services to over-reach.

150. Importantly, there has been no consultation with the charitable sector prior to adopting the "regulator" terminology. We note that the Charities Act itself does not use the term.

151. Many within the charitable sector have requested a number of times that use of the term be discontinued, but despite this, use of the term continues.

152. Terminology is important. In our view, the term "charities regulator" sends the wrong message, and has the effect of closing down discussion on a number of important issues that have not yet been properly looked at.

153. We recommend that:

(i) the charitable sector be specifically consulted as to whether Charities Services, the Charities Registration Board, the Charities Commission, or whatever agency ultimately administers the Charities Act, should be referred to as the "charities regulator";

(ii) in the meantime, the term "charities regulator" should not be used, and a more appropriate term used in its place. Suggestions include:

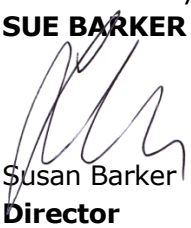
- charities registrar
- an eponymous term, such as "Charities Services"
- supervisor
- monitoring agency
- administrator.

[52] 2019 discussion document page 12.

Conclusion

154. We would appreciate the opportunity to discuss the above issues with you before final proposals are formulated.

Yours sincerely
SUE BARKER CHARITIES LAW



Susan Barker
Director

+64 (0) 21 790 953
susan.barker@charitieslaw.co
PO Box 3065 Wellington 6140