

Te Hunga Rōia Māori o Aotearoa, the Māori Law Society

Submissions on Modernising the Charities Act 2005

30 May 2019

Introduction

This submission is made for and on behalf of Te Hunga Rōia Māori o Aotearoa, the Māori Law Society ("THRMOA") and addresses Māori interests in respect of the Discussion Document Modernising the Charities Act 2005.

THRMOA was formally established in 1988. Since then, THRMOA has grown to include a significant membership of legal practitioners, judges, parliamentarians, legal academics, policy analysts, researchers and Māori law students. Our vision is *Ma te Ture, Mo te Iwi – By the Law, for the People*.

THRMOA encourages the effective networking of members, makes submissions on a range of proposed legislation, facilitates representation of its membership on selected committees, and organises regular national hui which provide opportunities for Māori to discuss and debate legal issues relevant to Māori.

When making submissions on law reform, THRMOA does not attempt to provide a unified voice for its members, or to usurp the authorities and responsibilities of whānau, hapū, and iwi, but rather, seeks to highlight areas of concern, and suggest further reform options where appropriate.

Our submission will mainly focus on the questions relating to Māori, however there will be some overlap with questions from other areas. In particular the questions relating to accumulation of funds, governance, reporting standards, and running businesses.

Accumulation of funds

Should charities be required to be more transparent about their strategy for accumulating funds and spending funds on charitable purposes (for example, through a reserves policy)? Why? Why not?

Should certain kinds of charities be required to distribute a certain portion of their funds each year, like in Australia?

We support the idea of greater transparency in principle. However, we consider that the proposal to limit accumulation of funds and the potential inclusion of a minimum distribution raises concerns for Māori organisations and in particular iwi settlement entities. Restrictions on the accumulation of funds or compulsory minimum distributions could be contrary to intergenerational investment – which is a core principle underpinning Māori organisations.

Therefore, we consider that any restrictions on the accumulation of funds or minimum distribution obligations would need to be limited so as to not be too restrictive or broad sweeping in nature. Further, we consider that any such proposals would require further consultation with Māori and particularly iwi settlement organisations to determine the potential impact on these organisations (and to ensure that any proposed rules do not place unnecessary burdens on Māori charities or significantly limit the types of activities they can undertake).

Therefore, we would require further information about any proposed restrictions on the accumulation of funds and compulsory minimum distributions before we could support these proposals.

Governance Standards

Do you think governance standards could help charities to be more effective? Why?

Do you think the Australian governance standards could be adapted to work in New Zealand?

We support in principle more standardised governance standards and consider that they could help charities to be more effective. However, imposing governance standards may prove onerous for smaller charities (tier 3 and 4) particularly marae charities, who may already struggle to find sufficient expertise required to meet the reporting requirements. It may also result in exposing individuals to greater risk, which may be unnecessarily burdensome for individuals and charities alike. Such burdens may further deter registration or result in deregistration.

We consider that an education programme and increased support for smaller charities is required to ensure that the proposed governance standards do not increase the barriers for smaller charities or place unnecessary burdens on charities officers (particularly those with limited experience or expertise). Further, the review has proposed questions surrounding the definition of an "officer" under the Act. Although we support broadening the definition of an officer, education and training will be even more important as there will likely be more individuals within officer positions that may lack the requisite skill set or experience.

Te Ao Māori questions

What is working for Māori charities under the Act? What is not?

We consider that the restrictions associated with the definition of "charitable purpose" is not working for Māori charities under the Act (and iwi settlement organisations in particular). Although the definition of charitable purpose has been excluded from the review, it is particularly relevant for Māori charities.

We consider that the narrow definition of charitable purpose poses particular issues around what Māori charities can do and as a result has limited the activities Māori charities (and iwi settlement entities in particular) can undertake. For example, housing initiatives, language revitalisation including kapa haka, health initiatives including sport and exercise initiatives, and economic development programmes (discussed in more detail below) are considered necessary to address particular needs of Māori communities, however, aspects of these initiatives do not fall neatly within the current definition of "charitable purpose". As such, Māori charities are restricted in the development of its various programmes to ensure they meet its charitable status.

The Discussion Document states that the review of the Act is an opportunity to assess how well the Act supports the aspirations of Māori communities, and enables the Crown to fulfil its obligations as a Treaty partner. Such an assessment requires a consideration of the entire charities regime and therefore should include the definition of charitable purpose. The myriad of case law, as well as entities like the Law Commission, have identified the need to assess the definition of charitable purpose. In particular, the Law Commission, as part of its review of the Charitable Trusts Act 1957, stated that the whole field of charities law would benefit from a reform project. As part of this review, the Commission identified the definition of charitable purpose as a key issue for consideration.

We consider that the exclusion from the review of the definition of charitable purpose is problematic as it is fundamental to the charities regime and particularly for iwi settlement organisations and therefore essential for answering the question of what is and what is not working for Māori.

Are there any issues under the Act that impact Māori charities differently to other charities?

We consider the Act impacts Māori charities differently to other charities. In particular, Māori charities are often established with a wider scope than other charities to address the needs of the particular Māori community being supported. This is particularly true for iwi settlement organisations, whose purpose is to hold, manage and administer assets received from the Crown for the benefit of the members of the iwi or hapū they represent.

As a result, Māori charities are often established to carry out a range of activities to address the needs of Māori communities (rather than being established for a specific need). These needs can (and do) change over time. As the Act is subject to the common law relating to charities (and therefore a plain reading of the Act is not sufficient to determine whether an activity is charitable), Māori charities are required to constantly assess whether its activities are "charitable". The need to assess individual

activities over time means Māori charities have to seek regular legal advice to determine whether it can undertake a particular activity or not based on its charitable status.

Certainty is identified as a key policy principle of the review. We consider that leaving the development of charities law to the common law does not promote certainty or clarity (and more particularly so for Māori charities).

Cost-effectiveness and equity are also identified as key policy principles of the review. We consider that the need for Māori charities to seek legal advice concerning charitable purposes does not promote either of these two principles because:

- Māori charities are incurring significant (unnecessary) legal costs (that could be better allocated elsewhere); and
- Māori charities are not be treated equitably because they are being compared against similarly sized charities that are not impacted in the same ways Māori charities are.

Therefore, we consider it would be preferable to provide clarity in the legislation by including aspects of the common law so that a plain reading of the Act can be, in most cases, sufficient to determine whether an activity is charitable or not (and therefore mitigate the legal costs incurred by Māori charities).

Are you aware of cases where an iwi settlement organisation has limited its activity because of its charitable status?

As noted above, Māori charities often carry out a range of activities to respond to the needs of Māori communities. Aspects of a number of these activities do not fall within the scope of charitable purposes and therefore limit the way Māori charities undertake these programmes. The following initiatives are of note:

Housing programmes

Iwi settlement organisations that are entirely charitable can only assist their members through housing programmes if those members also have a charitable need under the Act. This means iwi settlement organisations cannot implement rent to buy schemes or sell houses to members for below market price, unless it is connected to a charitable purpose.

We are aware of cases where iwi settlement organisations:

- which are entirely charitable, have not been able to implement housing programmes because what is proposed does not connect to a charitable purpose;
- which are not entirely charitable but have a charitable arm and commercial arm, structure housing programmes through the commercial arm because it is not possible to do so through the charitable arm.

Universal distributions and economic development programmes

Iwi settlement organisations which are charitable cannot make distributions to members unless those distributions are connected with a charitable purpose.

This limitation has required iwi settlement organisations wishing to establish various savings and investment schemes for its members (to improve their financial capability) to structure the schemes through its commercial arm due to the limitations of doing it through its charitable arm.

Language revitalisation and health initiatives

Given the increasing concerns around the decline of Māori language and the decline in health statistics for Māori, iwi settlement organisations are required to invest in these initiatives, which do not clearly fit within the charitable purpose definition.

Should the Act be more flexible for iwi settlement organisations that are charities? If so, how?

We consider that the Act should be more flexible for iwi settlement organisations when the organisations wish to conduct activities that address areas of need in Māori communities.

We would suggest including a new section 2(c) in the Act which enables an iwi settlement organisation to have a charitable purpose if the activity it wishes to undertake addresses an area of need in Māori communities.

An "area of need" could be carefully defined and include activities like housing or investment and savings schemes. Alternatively, the definition of "area of need" could be left subject to the common law.

Regardless, if an iwi settlement organisation wishes to undertake an activity that does not fall directly under the heads of charity in section 2(1) of the Act, but falls under a new section enabling an iwi settlement organisation to have a charitable purpose, approval by Charities Services should be required under the Act to ensure that the activity actually does address an area of need in Māori communities before the activity can be undertaken.

Are there particular problems with reporting for Māori charities?

We consider that the reporting requirements under the Act can be particularly onerous for small Māori charities (particularly marae). In some areas of the country, access to online resources and the internet is difficult, which means those tasked with reporting are unaware of the requirements. Further, the definition of officer may make it difficult for smaller Māori charities and marae from meeting the Act's officer requirements.

We agree that reporting requirements for charities should be reduced (or that we should have a new tier 5 charity with reduced reporting requirements). This would be beneficial because it would result in less charities being deregistered due to reporting compliance issues and also may result in more Māori organisations that are eligible for charitable status registering as a charity. Feedback from the various consultation hui identified reporting requirements (particularly in the first year) as a key concern for smaller charities and has resulted in deregistration as well as deterred registering at all.

Therefore we consider that more support is required for charities to meet their obligations. Forms of support include increased resources, online templates, and training sessions or education programmes.

Another key point raised at consultation hui concerned the often misalignment of reporting requirements and tikanga. In particular, some consultation hui attendees felt uncomfortable invoicing for koha and considered this to be out of alignment with tikanga. This example highlights that there may be other aspects of the charities regime that does not fit kaupapa Māori approaches. As such, further consultation with smaller Māori charities and in particular marae is necessary to ensure that any changes are fit for purpose and culturally appropriate.

Vision and Policy Principles

What is the role of government in achieving this vision?

Do you agree with the vision and policy principles described here?

Would you remove or change any part of the vision and policy principles?

We agree with the vision, policy, and purposes. However, we consider that there are gaps. In particular, we note that neither the review's key policy principles nor the Act's purposes (including the proposed additional purposes contained within the Discussion Document) include a specific reference to Te Tiriti o Waitangi or the Crown-Māori relationship. The review does however state that:

Given the foundation provided to the wider legislative frameworks by the Treaty of Waitangi, the Act must reflect the Crown-Māori relationship. This is continually evolving as historical grievances are settled. The Act should support these relationships into the future.

We consider that an additional purpose addressing the above statement and explicitly giving effect to the principles of the Treaty and the Crown-Māori relationship is required. The Crown has an obligation

to honour the Crown-Māori partnership and to actively protect Māori interests. As the charities regime significantly influences Māori, the policy and purposes should appropriately reflect these obligations.

Running a business

We consider the current regime, which requires at least two entities (one that is charitable and one that is not) is overly complex. Such complex structural arrangements place unnecessary burdens on organisations as they have multiple obligations concerning reporting and tax for example, which increases the compliance burden on these organisations. If the act allowed for charities to have commercial arms, then this would remove the complex structures that have to be set up now.

General comments

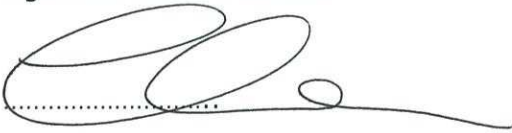
We consider that the Charities regime has and continues to provide a useful vehicle for Māori charities. However, the many challenges Māori charities encounter results from attempting to fit Māori into a Pākehā framework. Although this is beyond the scope of this review, it is important to note that what is required are structures that align with the Māori worldview and a kaupapa Māori approach - we need Māori governance structures that are designed by Māori, for the benefit of Māori. Until this occurs Māori organisations will be required to make allowances to fit within the Pākehā structures available and therefore will continue to encounter similar difficulties in future.

Another key point raised at various consultation hui, is that many smaller Māori groups or marae are not aware that they are eligible to register as a charity or that the charities regime exists (and what benefits they or their supporters can attain). This lack of knowledge demonstrates that further visibility of, and education on, the charities regime is required.

In Closing

Te Hunga Rōia Māori o Aotearoa are grateful for the opportunity to comment on this kaupapa and we hope our submissions assist with the important mahi that the Department of Internal Affairs is tasked with undertaking. Should you have any pātai or wish to discuss any aspect of our submission, please feel free to contact Toni Love at toni.love@chapmantripp.com.

Ngā mihi nui ki a koutou

A handwritten signature in black ink, consisting of a large, stylized 'T' followed by a series of loops and a long horizontal stroke.

Toni Love

On behalf of THRMOA

