

Charities Act Review Team  
Toi Hiranga – Policy, Regulation and Communities  
Te Tari Taiwhenua - Internal Affairs

16 July 2021

## **Modernising the Charities Act – Officers’ Duties**

Thank you for the opportunity to contribute to the Charities Act Review by way of responses to the Role of Officers Targeted Engagement Document (**Consultation Document**).

I am a charity law academic who has conducted much research into the duties of charity officers (especially in relation to charity accumulation) and more broadly into charity regulation: <https://research-repository.uwa.edu.au/en/persons/ian-murray-2>

I agree that officers are critically important to charity governance, but that the nature of that role and of the duties of officers in a charity context is not as clear as it could be. I commend Internal Affairs for consulting on the role of officers in charities.

This submission focuses on officers’ duties.

### **Question 4 In your experience, what are the key governance challenges for charities, if any?**

As discussed in my submission on accumulation to the Charities Act Review of 2 June, I think that the key governance challenge for many charities is to adequately take account of intergenerational justice in the course of officers exercising their discretionary powers about when (ie, to which generations) their charity should provide benefits. After all, most charities are intended to last in perpetuity or for a very long time, so it is an issue that invariably arises. A key way to address this challenge would be to explain what is required by the obligation to give genuine consideration in exercising such powers.<sup>1</sup> That is because the matters to which regard ought to be had in giving genuine consideration should frequently include the time at which a charity will provide benefits to the public – as informed by principles of intergenerational justice.

In addition, lack of understanding of existing governance duties is often a broader issue that affects both charities and regulators in many jurisdictions. Sometimes the

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<sup>1</sup> Ian Murray, ‘New Zealand Charities and Accumulation: An Intergenerational Perspective’ [2019] 4 *New Zealand Law Review* 419; Ian Murray, *Charity Law and Accumulation: Maintaining an Intergenerational Balance* (Cambridge University Press 2021) (forthcoming – proof attached).

problem can derive from overlapping duties arising under the numerous pieces of legislation that permit the creation and regulation of charities – this is currently less of a concern in New Zealand than in federations with federal/state overlaps like Australia, the US and Canada. Many charities are also quite small and do not have access to expert legal advice about governance duties. Finally, while there is some case law explaining trustee duties under charitable trusts, there is far less exposition of the duties of officers of charities in other legal forms. In particular, officers of incorporated charities are frequently required to act in ‘the best interests of the company/society’ (eg for charities in the form of limited companies, see section 131 *Companies Act 1993* (NZ); for incorporated societies see clause 49 of the proposed *Incorporated Societies Bill*). Yet, it is very unclear what this means.<sup>2</sup>

The other examples provided in the Consultation Document of risky business decisions or private benefits appear to reflect broader governance challenges of mission drift and conflicts of interest. These can be issues for charities. I would, however, recommend caution in formulating specific rules for certain identified governance challenges. The caution is that charity law is by and large enabling – permitting officers significant leeway to choose the means by which their charity will pursue a state sanctioned purpose. As Parachin has discussed,<sup>3</sup> charity law largely regulates purposes, not activities. Yet, many contemporary pressure points relate to particular types of activities adopted by charities – political activities, discrimination etc.

There could be benefits for both charities and regulators in more clearly articulating groups of activities in which charities should only engage in certain regulated ways. However, to gain the benefits of certainty, the groups of activities and the permissible and impermissible modes should be expressly articulated. Limits should not be imposed indirectly by new, generally-expressed – and hence uncertain – governance standards that may tempt regulators to try and substitute their own view of how best to pursue a charitable purpose.

#### **Question 5 Which of the options would best address the problem?**

A clearer legislative articulation of charity officers’ duties (Option 2) could help to ensure that officers take account of intergenerational justice and could help to address the lack of judicial guidance on charity officer duties that is especially pressing for incorporated charities. Simply relying on the regulator to provide more guidance and support will only be effective where the regulator can interpret the underlying duties with some certainty. However, the paucity of case law on the issues means that is not the case for the degree to which regard should be had to

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<sup>2</sup> See, eg, Ian Murray and Rosemary Langford, ‘The Best Interests Duty and Corporate Charities - The Pursuit of Purpose’ (2021) *Journal of Equity* (forthcoming) – see author version attached.

<sup>3</sup> Adam Parachin, ‘Regulating Charitable Activities through the Requirement for Charitable Purposes: Square Peg Meets Round Hole’ in J Picton and J Sigafos (eds) *Debates in Charity Law* (Oxford: Hart Publishing, 2020) 129.

considerations of intergenerational justice or for the meaning of the best interests duty.<sup>4</sup>

It is difficult to tell from the brief description of the duties under Option 2, whether this option will actually address the uncertainty caused by the current lack of clarity about certain officer duties. It does not discuss intergenerational justice at all. Further, the wording of the best interests duty set out under Option 2 would certainly not help answer questions such as whether the best interests of an incorporated charity mean the advancement of its purpose (as opposed to the continuation of the entity itself), or whether it is the purpose as originally stated or whether they can develop over time. The duty to ensure the charity's financial affairs are managed responsibly seems similar to a portion of the Australian ACNC governance standard 5.<sup>5</sup> This, however, is a relatively new expression of a duty that might otherwise be covered by the duty to act with reasonable care and diligence. Expressing the duty in this new way does beg questions about whether it is intended to cover matters that would not already be covered by duties of care and diligence and the re-expression so may itself create some uncertainty.

#### **Question 6 Are there any alternative options that would better address the problem?**

The creation of a new set of governance standards raises the prospect of creating the uncertainty that exists in places like Australia where overlapping standards at the federal and state levels create confusion about the governance rules that apply to a charity.<sup>6</sup> That is, in addressing one aspect of the certainty problem, a new variety of uncertainty is created. New Zealand has the advantage of being able to expressly align the wording of the duties that apply to officers of charities across the general law and the different pieces of legislation that impose the duties. While some legal forms may require duties expressed in slightly different ways, I recommend considering whether alignment can be achieved to the maximum possible extent so that it is clear that any governance standards imposed represent the same duty and are simply a mechanism for Charities Services to be able to take enforcement action. Where alignment in the wording of duties is not possible, because New Zealand does not have the difficulties of the state/federal overlap, rather than creating new governance standards/duties, Charities Services could potentially be given an ability to take enforcement action for breaches of duties that arise at general law or under other legislation such as incorporated societies legislation or companies legislation.

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<sup>4</sup> See, eg, Ian Murray, 'New Zealand Charities and Accumulation: An Intergenerational Perspective' [2019] 4 *New Zealand Law Review* 419; Ian Murray and Rosemary Langford, 'The Best Interests Duty and Corporate Charities - The Pursuit of Purpose' (2021) *Journal of Equity* (forthcoming).

<sup>5</sup> *Australian Charities and Not-for-profits Commission Regulation 2013* (Cth) r 45.25.

<sup>6</sup> See the discussion in Patrick McClure et al, *Strengthening for Purpose: Australian Charities and Not-for-profits Commission Legislation Review 2018* (Report and Recommendations, 2018) 48.

## **Question 7 Are the proposed duties practical and feasible for charities?**

See Question 5 above. The current wording of the proposed duties, especially the best interests duty and the management of financial affairs duty, has the potential to cause confusion and should be more clearly expressed. For trusts, for instance, it would be uncommon to express the trustee's duty as being to act in the best interests of the trust (see, eg, s26 Trusts Act 2019 (NZ)), with many commentators viewing a best interests 'duty' for trustees as more of an organising principle — in that those duties as a whole focus on achievement of the trust purpose.

I have written with Rosemary Langford on the best interests duty and am currently conducting research with Rosemary Langford and Sue Barker on how this duty might best be expressed.<sup>7</sup> The key idea is that, in the case of an incorporated charity, the best interests of the charity are the pursuit of its charitable purposes. Thus a duty to act in the best interests of that incorporated charity might be better expressed as a duty:

to act in a way that the officer considers, in good faith, will further the charity's purposes.

The further research that we are presently conducting aims for a clear articulation of purpose in the duty, and considers whether there should be some retention of the 'best interests' concept.

The duty could also be expanded to more clearly require regard to intergenerational justice if expressed in a form somewhat similar to that adopted by section 172 of the *Companies Act 2006* (UK), which includes within the best interests duty the requirement to have regard to a range of factors, such as 'the likely consequences of any decision in the long term'. The duty might then be expressed along the lines of:

to act in a way that the officer considers, in good faith, will further the charity's purposes, having regard (amongst other matters) to: intergenerational justice (as reasonably understood by the officer).

## **Question 8 Should duties fall on the officers of charities, or the entity itself?**

The Australian ACNC governance standards apply to the charity, not the officers, even in the case of governance standard 5 which imposes an obligation on the charity to take reasonable steps to ensure that officers comply with their fiduciary obligations. However, that is due to constitutional limitations rather than an active decision to impose obligations on the charity.<sup>8</sup>

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<sup>7</sup> Ian Murray and Rosemary Langford, 'The Best Interests Duty and Corporate Charities - The Pursuit of Purpose' (2021) *Journal of Equity* (forthcoming).

<sup>8</sup> For a discussion of the constitutional limits, see, eg, Ian Murray, 'Regulating Charity in a Federated State: The Australian Perspective' (2018) 9 *Nonprofit Policy Forum* 1; Nicholas Aroney and Matthew Turnour, 'Charities are the New Constitutional Law Frontier'. (2018) 41(2) *Melbourne University Law Review* 446.

The answer to question 8 probably depends in most cases on the intended regulatory consequences of breach (to which the consultation on compliance and enforcement powers relates). For instance, breaches of some standards may suggest that the charity itself ought to be sanctioned – potentially by deregistration. Typically, for officers’ duties though, it is individual officers who have breached their duties and who ought to be sanctioned. Actions by officers in breach of these duties would not typically demonstrate that an entity has ceased to be charitable (and in the case of charitable trusts, it is questionable whether activities could ever demonstrate this) but instead are a call for regulatory action to stop the breaches, potentially remove the officers responsible and help the entity lawfully pursue its purposes.

Attempting to apply some of the proposed duties to the charitable entity may also raise difficult questions of corporate culpability arising from a need to determine the charity’s mental state – for instance, has it acted in good faith? Elise Bant is currently researching the difficulties inherent in this practice and is examining ways of obviating those difficulties.<sup>9</sup>

As discussed under question 4, there may be certain activities in which charities should not engage or in which they should only engage in regulated ways (and which could be described without requiring any particular mental state for breach). For these groups of activities, regulatory consequences may be intended to apply to the charity itself. In Australia, for example, ACNC governance standard 1 requires that an entity ‘comply with its [charitable] purposes and its character as a not-for-profit entity’.<sup>10</sup> This is intended to apply to activities after formation that are insufficient to render an entity non-charitable, but that still seriously impede its pursuit of charitable purposes such that it ought not to receive the tax and other concessions that flow from charity registration. The description of the NZ proposed financial affairs duty potentially partially captures similar concepts in that it requires officers to ‘ensur[e] funds and assets are used to advance the organisation’s charitable purposes’.

### **Question 9 Should officer duties be in legislation, a code or in guidance?**

As discussed for Question 5, to the extent that duties need to be more clearly expressed, they should be expressed in legislation to aid certainty.

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<sup>9</sup> See, eg, Elise Bant, ‘Holding Corporations to Account’ (2020) <https://pursuit.unimelb.edu.au/articles/holding-corporations-to-account>

<sup>10</sup> *Australian Charities and Not-for-profits Commission Regulation 2013* (Cth) r 45.5(2)(c).

Please don't hesitate to contact me (+61 8 6488 8520; [ian.murray@uwa.edu.au](mailto:ian.murray@uwa.edu.au)) if you have any questions.

Yours faithfully

A handwritten signature in blue ink, appearing to read 'Ian Murray', with a large, stylized loop at the end.

**Ian Murray**

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