



Charities law update

- 16 June 2015

Outline

- Deregistered charities
 - Social housing
 - Sport
 - Advocacy
- Options for deregistered charities
- New financial reporting regime
- Law reform
 - Incorporated Societies legislation
 - Health and Safety legislation
 - Trusts legislation
- Anti-money laundering regime

Deregistered charities

- **Background context**

“The establishment of the Charities Commission will significantly improve the current framework under which charities operate. It will provide the Government, the sector and the public with **more comprehensive information** about the charitable sector....

...It should help to **improve public trust and confidence** in the charitable sector.

The establishment of the commission is not just about increasing the sector’s accountability to the public; it is also part of the Government’s wider strategy to **strengthen its relationship with the community and voluntary sectors**. While the commission will have a registration and monitoring role, it will also have a range of other functions that will allow it to be active in **helping to build an effective and efficient charitable sector**. That includes the ability to educate and assist organisations about management and governance issues, and the ability to make policy recommendations to the Government on its own motion...

Charities make an **important contribution** to the social well being of many New Zealanders, by providing valuable services that help to strengthen and support local communities. **The Government recognises and values that work...**

The passing of this Bill **will help to ensure New Zealand’s charitable sector is able to operate effectively and efficiently to deliver necessary and important services for the betterment and benefit of our communities.**”

- Hon Judith Tizard, Charities Bill 3R, (12 April 2005) 625 NZPD p19974

Background

National Party members of the Social Services Select Committee (Report, p20):

“The consultation process was inadequate with the original bill and we have major concerns that the redrafted sections of the bill should have been made available for a further period of sector wide consultation. We all know the devil is in the detail and if the bill gets it wrong, as the first draft definitely did **the charitable sector will pay the price and we will see many charitable organisations close**. There is the possibility that there are a number of **structural issues** in the bill remaining unaddressed and without a further period of consultation with the sector it is difficult to fully identify these.”

[Emphasis added]

Deregistered charities

- 3,902 deregistered by November 2012
- May 2015 estimate:
 - 3,044 failure to file an annual return
 - 1,156 voluntary – winding up
 - 808 voluntary – other
 - 72 failure to respond
 - 39 issues relating to the definition of charitable purpose
 - 3 serious wrongdoing
- Led to new tax rules for deregistered charities 2014!

The definition of charitable purpose – the test

- (i) Is the purpose **beneficial** to the community?
- (ii) If so, is the purpose **charitable** in the sense of coming within the spirit and intendment of the preamble
- (iii) If so, does the class of persons eligible to benefit constitute the **public** or a sufficient section of the public

Jurisprudential interpretations - social housing

- Queenstown Lakes Community Housing Trust deregistered
- "Arbitrary"
- Government pays \$6m tax bill
- Amends the law – s CW 42B
- But: the "booby prize"
- Best approach?

Jurisprudential interpretations – sport

- Swimming New Zealand
- Difficulty of challenging the decision
– becomes the law
- Consequences for 7,500 other charitable sporting bodies?
- “Bonfire of the charities”?

Jurisprudential interpretations – advocacy

- Section 5(3) of the Charities Act – inserted under urgency
- Supreme Court decision in *Greenpeace*:
 - Majority: s 5(3) does not prevent the development of the underlying law on the definition of charitable purpose
 - Blanket political purposes exclusion unnecessary and unhelpful
 - Charitable and political purposes are not mutually exclusive – advocacy can be charitable
 - An object which entails advocacy “is just one facet of the public benefit test”
 - Public benefit - a question of fact, decided on the *evidence*

But:

- New guidance
- No change?
- Family First appeal – 22-23 June

First poll

Do you have a client who is a charity, or are you (or have you been) involved with a charity in another capacity, that has been affected by the charities regulator's narrow approach to the definition of charitable purpose?

- (a) Yes - we decided **not** to seek registration;
- (b) Yes - we sought registration but were **declined** or **withdrew** before the application was determined;
- (c) Yes - we were **deregistered**;
- (d) Yes - although we were registered, we felt our registered charitable status was **at risk** ("the chilling effect");
- (e) **No** - not affected at all.

The National Council of Women litigation

- All provisions at issue (s5(3), s20(2)(b), s61, sCW 41(5)(b)) - passed through under urgency without proper consultation
- Proceedings consolidated
- Outcome:
 - Registration backdated
 - Tax refunded, with interest
- The Charities Act is to be applied “to facilitate charitable works, not frustrate them” (at [53])

What to do if a charity is about to be deregistered

- Notice of intention to remove
- Objections – ss33 and 34
- Section 35 – cannot proceed with the removal unless in the “public interest”
- Natural justice/submissions
- Appeal - difficulties with the appeal right:
 - Appeal on the record
 - Evidence
 - No oral hearing
 - Department/Board
 - Foundation for Anti-Aging Research litigation, 3 September 2015

What to do if a charity is deregistered

- Appeal in time
- Appeal out of time
- Donee status – dual appeals
- Reapply
 - Potential for period of deregistration, unless s 61(4)
 - New charity registration number
- Remain non-registered?
- Restructure
 - Donor-advised funds
- Political solutions?

New financial reporting regime

- The problem - < 5%
- New rules for registered charities
- From 1 April 2015
- Transparency, consistency, comparability
- A “once in a generation” change

The tier structure

- **Tier 1:**
 - public accountability or total expenses over \$30 million
 - default
 - PBE standards
- **Tier 2:**
 - No public accountability
 - total expenses \leq \$30 million and elects
 - PBE standards (RDR)
- **Tier 3:**
 - No public accountability
 - expenses \leq \$2 million and elects
 - PBE SFR – A (NFP)
- **Tier 4:**
 - No public accountability
 - total operating payments $<$ \$125,000 and elects
 - PBE SFR – C (NFP)

Audit and assurance

- **Large** charities: total operating expenditure \geq \$1 million
 - audit
- **Medium size** charities: total operating expenditure $>$ \$500,000
 - audit or review
- **Small** – no requirement
- Qualified auditors
- Auditing and assurance standards

Tier 3 performance report

- Entity information
 - Who are we? Why do we exist?
- Statement of service performance
 - What did we do? When did we do it?
- Statement of financial performance
- Statement of cash flows
- Statement of financial position
- Accounting policies
- Notes

Some practical issues

- Need to know your charity size
- Control
- Interaction with registration
- Grants
- Member transactions
- Cash flow statements
- Data collection
- Related party transactions
- Donations in kind

Incorporated society reform

- Incorporated Societies Act 1908
- Key difficulties:
 - Governance
 - Rights and obligations
 - Resolution of disputes
- Law Commission review and report
- Government response

Incorporated society reform

- New Act
- Governance:
 - Committee of 3 members
 - Conflicts of interest
 - Model constitution – Appendix A

Incorporated society reform

- Rights and obligations
 - Statutory duties
 - Statutory officer
 - Financial reporting – XRB standards
- Internal disputes
 - procedures in constitution
 - Natural justice
 - Backed up by enforcement remedies

Incorporated society reform

- Other matters
 - 15 > 10 members, continuous requirement
 - Branches
 - Amalgamations/voluntary administration
 - Winding up
 - Amendment

Incorporated society reform – practical issues

- Need for every society to review its constitution
- Resource/capacity issue
- Model under pressure?

Health and safety reform

- Introduced in March 2014
- Major change
- Target: 25% reduction by 2020
- Applies to volunteers

Health and safety reform - volunteers

- Organisational:
 - Primary duty on PCBUs
 - “Volunteer associations” excluded
 - But not if employ 1 paid worker
- Volunteer Officers:
 - of a PCBU
 - Duty of due diligence
 - Not an offence

Health and safety reform – volunteers (cont'd)

- Workers:
 - “Work” for a PCBU
 - Worker duties
 - PCBU duties to workers

Health and safety reform

- Bill delayed, but expected to be passed this year
- Health and safety policies
- Australian precedents

Anti-money laundering and countering financing of terrorism

- Terrorists need money!
- Charities and other not-for-profits a target
 - high levels of cash
 - volunteers/governance controls
- Unintended capture

“Financial institution”

A person who, in the **ordinary course of business**, carries on 1 or more of the following financial activities:

- (a) accepting deposits or other repayable funds from the public;
- (b) **lending to or for a customer**, including customer consumer credit, **mortgage credit**, factoring (with or without recourse), and financial or commercial transactions (including forfeiting);
- (c) financial leasing (excluding financial leasing arrangements in relation to consumer products);
- (d) transferring money or value for, or on behalf of a customer;
- (e) issuing or **managing the means of payment** (eg credit or debit cards, cheques, traveller’s cheques, money orders, bankers’ drafts, or electronic money);
- (f) undertaking financial guarantees and commitments;
- (g) **trading** for the person’s own account or **for the accounts of customers** in any of the following:
 - (i) money market instruments (eg cheques, bills, certificates of deposit, or derivatives);
 - (ii) foreign exchange;
 - (iii) exchange, interest rate, or index instruments;
 - (iv) transferable securities;
 - (v) commodity futures trading;
- (h) participating in securities issues and the provision of financial services related to those issues;
- (i) **managing individual or collective portfolios**;
- (j) safe keeping or **administering of cash** or liquid securities **on behalf of others**;
- (k) **investing, administering, or managing funds or money on behalf of other persons**;
- (l) issuing, or undertaking liability under, life insurance policies as an insurer;
- (m) money or currency changing.

Consequences

- Obligations onerous
- High penalties for non-compliance
- Ministerial exemptions
 - low risk
 - disproportionate obligation

Trust law reform

- Law Commission report 2013:
 - Stage 1 - new Trusts Act
- Government response
- Trusts reference group
- Stage 2 – charitable and purpose trusts

Review of the Charities Act?

- Select Committee changes
- Cabinet approval 2010
- Controversially cancelled 2012
- Structural issues
- LinkedIn: NZ Charity Law

Second poll

Consider a registered charity you are aware of or involved with. To what extent do you consider the risks and costs of registration might outweigh the benefits for that charity?

- (a) The risks and costs of registration are projected to significantly outweigh the benefits – the charity plans to cease operations in some way (wind up, transfer, merger, restructure, etc)
- (b) The risks and costs may outweigh the benefits – the charity needs to consider its options
- (c) The benefits of registration still appear to outweigh the associated risks and costs
- (d) The benefits of registration unquestionably outweigh the associated risks and costs
- (e) Don't know



QUESTIONS?