

Perspectives on Charity Law, Accounting and Regulation in New Zealand

Hosted by the Charity Law Association of New Zealand & Chartered Accountants Australia and New Zealand



AN OVERVIEW

“Perspectives on Charity Law, Accounting and Regulation in New Zealand” was New Zealand’s first conference bringing together different perspectives on charities law, accounting and regulation. Speakers were from five different countries, including regulators, lawyers, accountants, academics, funders and charities themselves. This document provides a written overview of the conference and key messages from each session.

Contents

- Session 1: Who we are as a sector, why are we here and what do we hope to achieve?
- Session 2: Are there too many charities in New Zealand?
- Session 3: Overview of new financial reporting standards implementation
- Session 4: Approaches to public benefit – different perspectives on social housing and charity
- Session 5: Advocacy by charities
- Session 6: The interplay of judge-made and statute law
- Session 7: Tax issues and charity
- Keynote address: Minister for the Community and Voluntary Sector, Hon Peeni Henare
- Session 8: How to build public trust and confidence in the charitable sector
- Session 9: Funding, social enterprise and the intersection with charities who operate businesses
- Session 10: Charity law and accounting in Te Ao Māori
- View from the Bench, Justice Rebecca Ellis
- Session 11: What needs to be done next?
- Session 12: Future opportunities and challenges

ACKNOWLEDGEMENTS

Thank you to the Organising Committee (Sue Barker, Jamie Cattell, Craig Fisher, Julia Fletcher, Matthew Harding, Brent Kennerley, Justin Martin, Maria Marull, Steven Moe, Sara O’Hara, Andrew Phillips and Wayne Tukiri) and the sponsors for making this successful event happen.¹

This overview has been prepared by Tessa Vincent LLB (Honours dissertation in [charity law appeal processes](#)). The overview draws from notes taken at the Conference and online resources.

¹ BDO; Grant Thornton; RSM; Charities Services; Sue Barker Charities Law; Parry Field; Wellington Not-for-profit Special Interest Group. Details are outlined in the Charity Law booklet pages 3-4.

Session 1: Who we are as a sector, why are we here and what do we hope to achieve?

A. Roger Holmes Miller, Charities Registration Board - Chair

Charities law and the charitable sector is changing rapidly, as is the society we live in.

- The Charities Registration Board makes decisions for the registration and de-registration of charities. Charity Services provides assistance to the Board and acts under their delegation. Their role is to apply the law as directed by the Courts, and all of the Board's decisions are reviewable by the High Court. Over six years, the Board and Charities Services have made around 11,000 decisions.
- Interesting themes in the sector from the Chair's perspective include:
 - Charitable advocacy.
 - The intersection between business and charities.
 - Māori trusts.
 - Too many charities? Charities having identical purposes.

B. Stewart Donaldson, Senior Policy Advisor at Inland Revenue

Inland Revenue has really powerful data that is probably under-used

- Inland Revenue data and Stewart's presentation is available on the [CLAANZ Conference website](#).
- Our not-for-profit sector is made up of:
 - 115,000 not-for-profits (margin of error of 15,000)
 - 28,000 registered charities;
 - 300 foreign charities;
 - 25,000 other tax exempt not-for-profits (eg sports bodies);
 - 10,000-20,000 not-for-profits with income below 1,000.
- Golf clubs? There are around 400 golf clubs, some are registered charities and others are incorporated societies: why are they treated differently?
- "Donee status": Almost all donee organisations are registered charities or state schools. Only 500 have benevolent, philanthropic or cultural purposes (or are unregistered charities).
- About half of registered charities are GST registered.
- About \$800M donations are going through our systems each year subject to tax concessions.
 - Most donations are made by individuals.
 - Proportionally to our population, we have more donations than Australia.
 - About 2/3 of the organisations are religious organisations.
- Registered charities have a gross income of around \$18B and total assets of around \$55B: [see graphs](#).

Considerations for the Charities Act 2005 Review:

- **Should there be a separate register for 300 foreign charities or should we have one register?**
- **Should everyone who receives "donee status" be a registered charity?**
- **What place should religious organisations have in our charitable sector?**

Session 1: Key messages

- **Our charity law should be able to evolve to meet the demands of New Zealand.**
- **The Inland Revenue statistics should be utilised in order to understand the make-up of the not-for-profit sector.**

Session 2: Are there too many charities in New Zealand?

Steven Moe (moderator)

- Approximately 28,000 charities – one for every 168 people.
- Does this signify that we as a country and a nation care deeply and want to help people? Or is there too much duplication, and how do we use resources efficiently?



A. Dellwyn Stuart, Auckland Foundation

What we need is to create a more efficient market that gives donors excellent information so that donations can flow to where good work is being done.

- **Transparency:** A big driver in the charitable sector is transparency: it is not easy to see into the sector and compare and contrast performance, for example, in children's mental health.
- **Communication and awareness:** There is also room to improve the decision-making for those considering whether to make a charity: form follows function (charitable purposes).
- **Incentives:** There is the potential to incentivise different kinds of models to get the change we want to see in the sector.

B. Cheryl Spin, The Gift Trust

There can be duplication and yes there can be inefficiencies, but mergers are not always the answer.

- Charities Services' website is an amazing resource but is not as user-friendly or transparent as it could be.
- Wellington Grant-makers Forum is working on a project around how to share data more effectively. Initiatives like this at a national level could have a lot of potential.
- Questions from donors revolve around inefficiencies and duplication but diversity of approach in the sector can be a good thing.
- Around 5,000 registered grant-making charities on the register: solely set up to distribute funds to other charities. Do we have too many of this same kind?

C. Jamie Cattell, Charities Services

Charities don't exist to do financial reporting; they exist to uphold their charitable purposes

- Reformulation of the question (to reflect s 3 of the Act): does the number of charities registered in New Zealand have a negative impact of public trust and confidence and does it represent the most effective use of charitable resources?
- Tier 4 charities (those that have < \$125,000 in operating expenses, 18,000) significantly outnumber other Tiers.
- Over 5,000 are not using the financial reporting standards yet, which were introduced to provide reliable information. But we should not take from this that these charities are not capable – the charities just don't care about financial reporting.

D. Kate Russell, Fundraising Institute of New Zealand

The proliferation of "me too" charities is at the heart of the issue.

- The issue lies in the questions that are not being asked about how necessary each charity is – instead of working inside and with the organisations that are already here and working with them, people are too often forming something new.
- This leads to confusion, duplication and donor fatigue.
- As a sector we have been talking up collaboration but few charities actually collaborate because of fear towards a loss of autonomy.
- Kate Russell would like to see more resource in holding to account the number of small charitable trusts, whose reporting is far from optimal, and asking the right questions at the early stages.

E. Sue Barker, Sue Barker Charities Law

If we have a mindset that there are too many charities, what impact does that have on our social capital?

- Sue's view is that concerns around the number of charities are not balanced – thousands of charities are being deregistered and those figures are not being taken into account in the headlines.
- Commends the Australian assessment: [see PowerPoint](#)
- New Zealand has the highest level of social capital in the world but it is dropping.
- Freedom of association is prescribed in our NZBORA.
- We are asking the wrong question: the question should be “are all the needs being met and if not, how can we best meet them”?

Considerations for the Charities Act 2005 Review:

- **Transparency: how can a donor more easily see what charities are doing what?**
- **Communication: how can we share data more effectively?**
- **Incentives: is there the potential to incentivise different kinds of models?**
- **Duplication: how to we reduce duplication?**
- **De-registrations: how do we deal with those being deregistered, particularly for non-compliance with reporting standards (and if those charities are still doing good work)?**

Session 2: Key messages

- **We need a more efficient market that gives donors excellent information.**
- **We may have too many grant-making charities (5,000).**
- **Tier four charities (the very small) deserve special attention (18,000).**
- **Perhaps all ideas do not require a legal entity.**
- **Charities should consider amalgamation and use of existing tools like Community Foundations and Donor Advised Funds.**
- **We should not forget the deregistrations that are occurring.**



Session 3: Overview of new financial reporting standards implementation

Julia Fletcher – Charities Services (Moderator)

- Around 82% of all charities have made some attempt to use the standards.
 - The Tier 1 & 2 charities have all adopted the standards.
 - Most Tier 3 charities have and around 70% of Tier 4 charities have.
- There have been changes in behaviour as a result of the reporting standards, for example mergers.

A. Anthony Heffernan – XRB

- Standards came in 1 April 2015.
- NZ came from a position where the majority of charities had no reporting requirements and some people were simply filing their bank statements. There was an aspirational objective to require all charities to provide financial statements in accordance with the new framework. The 82% of charities trying is a success.
- The conversation of “are they achieving the right results” is starting.
- There have been some changes to the standards and one formal (successful) request for a change by a group of charities. XRB is focused on “user needs”: regulators and donors and provides templates.
- A full post-implementation review will be completed in 2019/20.

B. Caroline White – Paralympics NZ

- Provided an overview of Paralympics NZ: [see video](#)
- The reporting standards have been positive: “stakeholders are happy and the organisation is happy”.

C. Ceri-Ann Ross – Chartered Accountants Australia and NZ

- Chartered Accountants Australia and NZ is a [professional accounting body](#) trying to raise awareness and understanding of the new financial reporting standards amongst its members.
- Reporting allows the communication of value, which leads to better conversations with funders and better management.

D. Raewynne Jacobs – Foundation North

- There are 12 community trusts throughout NZ, including Foundation North (for Auckland and Northland).
- Discusses “statements of service performance”, which allow charities to tell their story. Questions whether these could be used in a fuller and wider way.
- Challenges the accountant professionals to prevent inconsistencies and charities services to constantly give feedback.
- Questions whether financial reporting standards should be for all not-for-profits (ie has worked well for charities from a funder’s perspective but most funders also fund not-for-profits that are not registered charities).

E. Robert Buchanan – NZ Audit and Assurance Standards Board

- Financial reporting allows for accountability: to funders and to users.
- Reflects on the future of reporting: video, other forms of reporting eg sustainability, kaitiakitanga and integrated reporting.
- Advice to lawyers: to engage with clients about the *value* of assurance – as he is concerned around charities removing requirements out of the trust deeds.
- The quality of assurance needs to be always kept in mind, which falls within a supply chain.
- Update to everyone: new service performance information standard, tier 3 & 4, will issue mid-year.

Considerations for the Charities Act 2005 Review:

- **Reflect on where we have reached with financial reporting requirements for incorporated societies.**
- **Keep in mind XRB’s post-implementation review of the financial reporting requirements.**

Session 3: Key messages

- **How do we allow charities to tell their story in the context of financial reporting (Service performance reporting requirement)?**
- **Should there be an expectation for all not-for-profits to follow reporting standards?**
- **What is the future of reporting, alongside financial reporting?**

Session 4: Approaches to public benefit – different perspectives on social housing and charity

Professor Matthew Harding – University of Melbourne (Moderator)

A. Andrew Butler – Russell McVeagh

- Housing has currently two possible benefits (a) relief of poverty or (b) in the catch-all public benefit poor, old, disabled. The issue is a distinction between “want” and “need”.
- Discusses the *Queenstown Lakes* case [2011] 3 NZLR 502 where it was held that the Queenstown Lakes Community Housing Trust (the Trust) did not qualify for registration as a charitable entity. Andrew Butler questions the approach taken in the High Court: [see case](#) for more detail.

B. Scott Figenshow – Community Housing Aotearoa

- Housing adequacy factors: habitability, affordability, security of tenure culturally appropriate and accessible.
- The *Queenstown Lakes* case led to a tax exemption for community housing groups but Scott Figenshow says “we have not fixed the main issue”.
- What settings will foster and scale social, affordable housing? How does charitable status and the approach to charitable status fit into this?

C. Peter Gunn – Crown Law

- Mr Gunn agreed with the outcome in the *Queenstown Lakes* case: “there is nothing much wrong with the law in this area”. Consideration of two relevant heads:
 - Relief of poverty head: court thought income levels of those who qualified for housing were too significant to fall within this head.
 - Community benefit: the case turned on its own factors.
- Notes most large housing providers are given charitable status and Queenstown is not an economically deprived region.

Considerations for the Charities Act 2005 Review:

- **To reflect on the current tax exemption for community housing groups and how this was enacted.**
- **Is there more to be done to align government policies on housing with charitable purpose, or is the balance right?**

Session 4: Key messages

- **Different perspectives on the *Queenstown Lakes* case: was the correct outcome reached? Should there be more clarity in this area of the law or is there nothing wrong with it?**



Session 5: Advocacy by charity

Professor Matthew Harding – University of Melbourne (Moderator)

A. Adam Parachin – Associate Professor at the Faculty of Law at Western University

- Restrictions on advocacy in charity law come from a doctrine against political purposes.
- The “public awareness” facet of advocacy is different from those “political” things. Charities are constantly engaging in some form of public awareness so the practical consequences of regulatory over-reach are potentially severe.
- **Input for practitioners:** the authorities are casting suspicion on the charitableness of public awareness eg *Greenpeace/Family First* decisions. His advice is to avoid the label of “advocacy”; give indicia of objectivity; link conclusions with peer reviewed authorities; acknowledge competing perspectives; avoid single issue advocacy; and be self-aware of one’s position.
- **Input for policy:** with respect, there is a mistake of public benefit analysis (questions *Greenpeace*); there is a confusion of “activities” and “purpose” in terms of the law; charitable speech is being held up to the standards of education, which is questionable. The outcomes seem to privilege some speech over others for reasons that aren’t obvious – there is an ethical perspective being drawn on.

B. Andrew Phillips – Charities Services

“There are always going to be contentious lines”

- Noted the SC *Greenpeace* by a majority 3/2 decision lifted a bar on controversial political purposes, but also clearly mandated a consideration of the means a charity uses to advance its end goal when assessing public benefit.
- Defended the Charity Registration Board’s *Greenpeace* decision and says it applied the law correctly, noting the SC did say it would be unlikely advocacy groups would be charitable.
- Almost any political campaign could be justified in pursuing a charitable purpose and questions the public trust in the charitable sector as a whole if we accepted all lobby groups as charitable.
- Makes the point that since *Greenpeace* SC more “advocacy” groups have been accepted.

C. Sue Barker – Sue Barker Charities Law

- There is confusion between purposes and activities.
- There was no political purpose exclusion in the law prior to the Charities Act 2005.
 - Refers to *Molloy*, but *Latimer* held the purpose of the Crown forestry trust in assisting Maori to bring forward claims to the Waitangi Tribunal was charitable.
 - The term “political” was code for we could not see the public benefit on the facts of that case.
- Questions the outcome of the *Queenstown Lakes* case when Parliament changed tax law anyway.
- Expresses concern over the enactment of the Charities Act 2005:
 - The post-implementation review was promised but never followed up with.
 - There were 750 submissions at the time and advocacy was one of the key issues: s 5(3).
 - Appeals were left to the High Court, without full hearings of evidence (either at the Charities Registration Board level or at the appeal level).
 - S 18(3): must have regard to the “activities”: but this does not say what Charities Services is supposed to have regard to the activities *for*. It is purposes that must be charitable.
- **Charitable test:** Ellis J said the test is: are the stated purposes charitable? If so, then we look at whether the activities are carried out in furtherance of that purpose? If so, there is no difficulty. Sue questions the *Greenpeace* Charities Registration Board decision on that basis.
- In Australia, the High Court decision in *AidWatch* said the generation of public debate is itself in the public interest. We need to look at charities rights to freedom of expression.

Considerations for the Charities Act 2005 Review:

- **Whether we need to more explicitly encourage “public awareness” charitable activity.**
- **To consider why some forms of “charitable speech” are being favoured over others.**
- **Reviewing the Charities Act 2005: appeal processes, s 5(3) (advocacy) and s 18(3) (activities).**

Session 5: Key messages

- There can be distinctions drawn within the broader “advocacy” label.
- The legal relevance of “activities” in charities law is contentious and sometimes misconstrued.
- Was the Charities Registration Board decision in *Greenpeace* correct?
- Does the Board’s approach impinge on charities rights to freedom of expression?



Session 6: The interplay of judge-made and statute law

A. Jennifer Batrouney QC – Vice President of the Australian Bar Association

- To codify or not to codify – that is the question? – [View paper here](#)
- **Caution:** The problem of codifying the definition of charity is that you could change a moving subject. The Preamble to the Statute of Elizabeth was not the be all and end all but it was a signpost.
- **Australia:** has effectively codified the law but the question is whether or not the law can now move in line with analogy to cases. Generally, lawyers do not like statutory interference in their “patch”. Australian codification may prevent development in the law – despite the explanatory note reading otherwise.
 - *Unique arrangements.* Australia has a federal law arrangement– registered for commonwealth purposes as a charity but the state says it is not. A lot of development is in the *state law*.
- **New Zealand:** Sees the definition in the New Zealand Act as an “exercise in constraint” – the common law is gently lifted in its entirety without significant legislative intervention. There may be “wisdom” in this approach.

B. Professor Matthew Harding – The University of Melbourne

- Should New Zealand introduce a new statutory definition? Should we move beyond judge-made law?
- There is fundamentally a political question interpreting what counts, here and now, as “charitable purposes” but Matthew Harding focuses on legal issues.
- A new statutory definition will overlay on hundreds of years of judge-made law. What will this look like?
 - The legislation would codify in a strict sense the definition of charity and sever links with previous judge-made law (unlikely).
 - Something like the Australian option where a statute is introduced that it explicitly states it is designed to incorporate and build on prior judge-made law (more likely).
- **Caution:** unpredictable and unintended legal change over time when the statute is *interpreted*. A statute is designed to *change* the law in some way. There will be occasions where the statute seems to have a meaning that finds no counterpart in judge-made law (e.g. in the Australian Act) so the meaning of the statutory texts will have to be worked out by the *interpretation*. This history suggests we cannot take for granted that because the legislation uses words drawn from judge-made law, it will necessarily always be the case that decision-makers will interpret the words accordingly.

Considerations for the Charities Act 2005 Review

- **Both speakers send a “word of warning” around legislating for charitable purposes.**

Session 6: Key messages

- **Codifying definitions may prevent the law developing as a moving subject.**
- **Codifying definitions may risk unpredictable and unintended legal consequences.**

Session 7: Tax issues and charity

Jennifer Batrouney QC – Vice President of the Australian Bar Association (Moderator)

A. Denham Martin – Lawyer

- The tensions and links between charities and taxes are still “bedeviled” (Lord Cross).
- Any serious discussion about taxes needs to recognise that tax concessions are central to charities.
- One of the unique features of this area is there are two regulators involved: Inland Revenue (IR) and Charities Services (CS). A lot of practical guidance is given by CS and IR but it needs to be more user-friendly. The understanding of how those two organisations work together is not clearly communicated.
- The whole area needs “a uniform approach” – Law Commission & Tax Working Group might be a logical organisation to pick up this kind of work and look at “tax” and “charity” combined.
- We need to make sure charities come out well from the work of the Tax Working Group.

B. Stewart Donaldson – Inland Revenue

- There are some key policy statements around tax concessions in the charitable sector.
- Entering the sector from a tax perspective is supposed to be easy: registration → automatic exemption and approved donee status in most cases (80% of charities) – [see presentation](#).
- **Statistics:** half of charities are GST registered; about 70% have a certificate of exemption for resident withholding tax (RWT).
- **Deregistrations** have new tax requirements. The aim is to keep assets within charitable purposes. There are large figures going through the system – important to be familiar with these rules. In June, refining the rules, mostly in a tax-payer friendly way.
- **Overseas:** Charities conducting purposes overseas need to be clear of tax issues.
- **Donations:** concessions introduced in 1962 and from 2008/09 you can claim more. We have increased fraud and tax avoidance schemes in this area. Total amount of the concession is getting up to \$300M.
- **Payroll giving:** is an area where we can take up tax incentives.

C. Andrew Babbage - Deloitte

- There were only three submitters on the deregistration tax issue when these changes were introduced. One of these was GoBus, a bus company owned by charities.
- **In a business charity scenario:** there is a commercial enterprise owned by a charity that enjoys tax-free benefits. Andrew Babbage believes tax exemptions should always be reinvested into charitable purposes. Should you be able to lock in assets to the charitable net forever?
- **Tax relief for the donor:** despite some changes over the years and the expansion to enable payroll giving potentially only a small portion of all charitable giving results in tax relief being claimed by the donor.
- Should a tax credit be available for donations of cultural objects (e.g. art or taonga)?

Considerations for the Charities Act 2005 Review:

- **Tax Working Group: how will this overlap with the Review?**
- **What is the relationship between IR and CS and how can this be better communicated?**
- **Tax considerations in the “business charity scenario”**
- **Donee status and payroll giving raise important tax issues.**
- **Should a tax credit be available for cultural giving?**

Session 7: Key messages

- Policy around charities needs to be considered “hand in hand” with tax policy.
- Deregistration tax requirements need to be worked through.
- Tax exemptions should be reinvested into charitable purposes.

KEYNOTE ADDRESS: Hon Peeni Henare – Minister for the Community and Voluntary Sector

1. Vision as the Minister and the importance of the sector

- Great to see such passionate practitioners in the sector and supportive of this first Conference.
- Acknowledges the volunteers and the engagement of people in this sector throughout all of NZ.
- Acknowledges in particular the pro bono work of people with professional skill-sets working in the sector.
- Priorities include:
 - Removing barriers to not-for-profits;
 - Empowering local communities to solve local problems;
 - Supporting social enterprise.
- Sees his job as Minister to empower people.



2. Review of the Charities Act 2005

- See [press release](#): “Ensuring a fit for purpose Charities Act”
- The review is a timely opportunity to look back on how the Act has worked since 2005.
- Interaction on behalf of the Department of Internal Affairs with the Sector User Group has provided extremely helpful feedback.
- The review will be a legislative review with the intention to bring about change in this Parliament’s term.
- **Engagement and consultation:** will be crucial in the review and the Minister welcomes these views.
- Looking to comparable jurisdictions and the “magpie approach” (looking for the best opportunities).

Session 8: How to build and maintain public trust and confidence in the sector?

Wayne Tukiri, RSM NZ (Moderator)

As passionate as we all are to be here, and committed to the charitable sector, the reality is that not everyone feels the same way about charities. There are aspects of our community and media who will be happy to “put the knife in”. This session deals with that issue.

A. Stephen Reilly – Charities Services

- DIA regulates: local government, gambling, racing industry and charity sector. The policy group is responsible for advising Ministers on those frameworks. Policy-making works best when it is evidence based – and much of that is held by the regulator.
- The most recent survey from 2016 is that NZ trust and confidence is [“moderate” 5.9/10](#) (previously unchanged) – comparable to the education sector.
- What drives public trust? A key driver is how charities use their funds and how transparent they are.
- To respond to these issues, we need to uphold a modern and responsive regulator.

B. Murray Baird – Assistant Commissioner, General Counsel at Australian Charities and Not-for-profits Commission

1. **Regulators build up don’t run down.** Charity regulator should use its objects to create a vibrant sector.
2. **Get engaged.** This is a sector where conversation and consultation is valued. This engagement has a number of benefits because you learn about the schemes early and where to locate them.
3. **Regulate for the whole of the community.** We are neither friend nor foe of the sector.
4. **Tell the community you are out there.** Australians appreciated this.
5. **A light-touch but not a soft touch.** Where there is serious misconduct, the community expects more than a slap of a risk.
6. **Keep an accurate and up-to-date register.** How does the charity use its resources? Ensure clarity about the management of the charity and demonstrating the positivity of the cause.
7. **Be what you want them to be.** Regulators want charities to be transparent but who watches the regulator? Regulators should give reasons, be transparent and accountable.

D. Oonagh Breen – Professor of Law at the Sutherland School of Law – see [presentation](#)

There is a legislative mandate in s 3 of the Charities Act to promote public trust and confidence in the sector.

- **How?** How do we go about regulatory success? When you are developing regulation, you should consider the enforcement mechanism. Will there be civil litigation or criminal prosecution? We know a general member of the public often doesn't have the *locus standii* to take a case – you are dependent on the regulator to protect charities.
- **Where?** Where do we look for proof of regulatory success? Strategic plans and annual reports should match up. This is a particular problem for NZ because our body is within the Department of Internal Affairs. There needs to be an annual report for NZ because it raises the profile.
- **What?** The starting point is developing the regulator. The second phase is about engagement and getting reports in. The next stage is what does the regulator do with that information and what actions do you take with that information. Need to identify the most “impact” driven activities. The cost of effective regulation, can you map your regulatory practices against your compliance outcomes? You should be able to say that the results you see in the market place are as a result of the regulation that is there.
- **Why?** Your register is key.
 - The regulator provides the necessary data to act in an efficient way. Data integrity is a key point – “you can't take good action if you don't have good data.”
 - Risk profiling is also helpful, which comes back to good data.
 - Avoid “the charity regulation starvation cycle”: if you starve your regulation of the essential resources in terms of staff and support, you will be unable to do the job you are set out to do.

Considerations for the Charities Act 2005 Review:

- **How do we resource and ensure a strong regulator that encourages trust and confidence in the sector?**
- **Learnings from Australia can influence what we do in NZ: see Murray Baird's seven pointers.**

Session 8: Key messages

- **Public trust and confidence in the charitable sector could be higher.**
- **We need to consider what drives that trust: eg transparency with funds.**
- **A regulator needs specific qualities: see Murray Baird's points & Oonagh Breen's advice.**

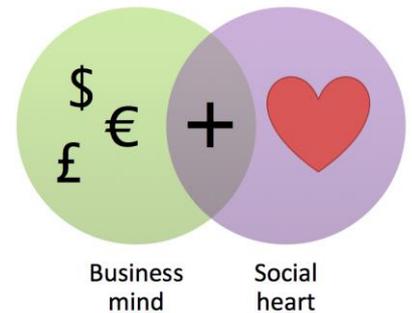


Session 9: Funding, social enterprise and the intersection with charities who operate businesses

Steven Moe – Parry Field Lawyers (Moderator)

Social Enterprise World Forum (SEWF) = 1,616 people gathered together talking about social enterprise. Today, we get to capture some of the thoughts and present them. Some initial thoughts on social enterprise:

- Does it stand the risk of becoming an orphan, not embraced by charities or business?
- Do we need a new legal form for social enterprise?
- What if we had world-leading social enterprise sector?



A. Louise Aitken – Ākina Foundation

- We are trying to grow and strengthen social enterprise in our country.
- *Where we are as a social enterprise sector?* The SEWF was a great point for discussion. A couple of things came out of it: (1) what are the big levers we need in New Zealand and (2) what is our kaupapa and what do we contribute globally? Estimates around 2,000 social enterprises in NZ.
- Workload over the next three years: to establish a social enterprise sector in New Zealand:
 - Do we need a legal structure?
 - How are we able to enable the different types of capital to be available to entrepreneurs as they grow?
 - How do we tell the story of SEs in NZ and create a social procurement?
 - Launching New Zealand's first market place for social procurement this year.
 - How do we capture and report "impact" (that is a big conversation)?
 - How can we contribute to the United Nations Sustainable Development Goals and where we want to get to in 2030?

B. Levi Armstrong – Patu Aotearoa

- Video – [watch here](#) – "When we developed Patu, we wanted to put people before profit"
- Patu is a limited liability company, established five years ago. It brings together all kinds of people (gang members, ex-prisoners, women from violent backgrounds, lecturers, accountants) and engages them in a group exercise programme. It is designed specifically for Māori and Pasifika.
- Patu has developed a research team: quantitative and qualitative sides. Thank you to Ākina and Russell McVeagh for assisting Patu and in setting up a charitable trust.

C. Michael Gousmett – researcher and commentator on charities law

- See [speaker notes](#) and University of Canterbury – [doctoral thesis](#).
- See his submission to the Tax Working Group – explains why commercial charities, that operate activities unrelated to charitable purpose, should be liable for income tax.
 - At least 19 sectors: tourism, hotel accommodation, geo-thermal energy and livestock.
 - "Vet clubs": numerous professional vet practices around NZ who are transferring income exemption to their business.
 - It is about equity and fairness and the conversation needs to be had.
- Approach in other jurisdictions to charities, business and tax:
 - United States: unrelated business income tax –s 501(c)(3): exempt organisations.
 - United Kingdom: pragmatic approach in the UK we should seriously consider, breaking income tax up and the large-scale trading activity is liable to tax.

D. Matt Dodd – Russell McVeagh

- **What is a social enterprise?** Ākina definition: "a purpose driven organisation that trades to deliver social or environmental impact". Many social enterprises will have their purposes in line with charities. *Models?*
 - The traditional "Salvation Army" model – a stand-alone business designed to generate income.
 - Business to create some of the impact itself.
 - Business where the impact is aligned with the product/service – buy one give one model.

Legal structure

- What we often end up doing is recommending a two-part structure, ending up a combination of a charitable entity and a trading entity, either side by side or a trading entity as a sole subsidiary of a charitable entity. We do not have anything specifically tailored to social enterprise.
- On introducing a legal structure: “In my mind, the key benefit is around identity”.
- New Zealand and Australia are unique in not having a structure for social enterprise.

E. David Woods – Whaia Rawa Fund Ltd

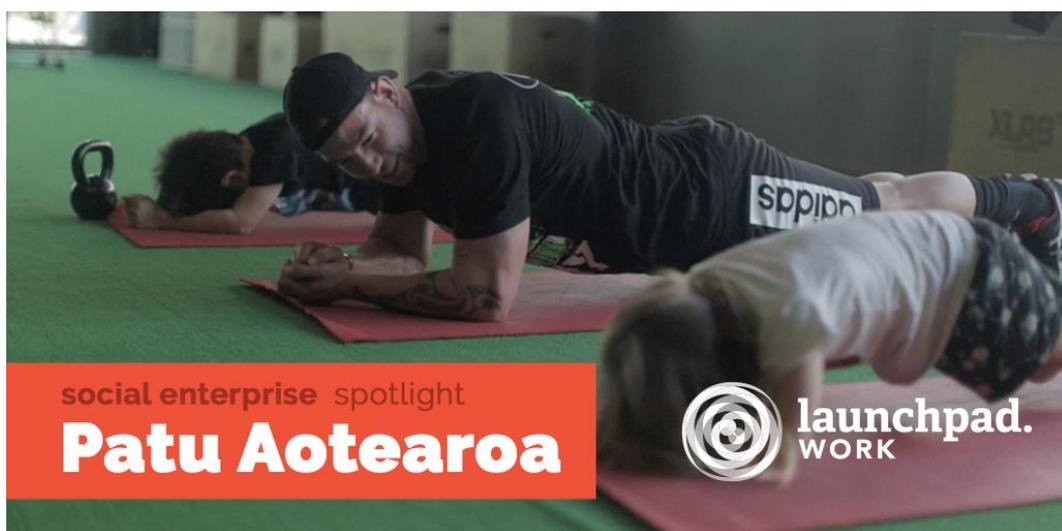
- Involved in the National Advisory Board to bring New Zealand into impact investing.
- The lowest figure = \$75B to reach the United Nations Sustainable Development Goals. Too many charities in New Zealand do not pay people properly.
- Impact investing tends to bring together government, private sector funders and philanthropists.
- We need to think creatively about how to fund. The overall donation pool is declining, and as younger investors come through, they are seeking an impact based return. Everyone is striving to work out how to combine environmental impact, social impact and return.
- For the charity sector, how can NZ sustain 27,000 charities going forward? What are the risks? Can we think more creatively around the impact investing space?

Considerations for the Charities Review 2005

- **An unrelated business income tax: what benefits and issues would this raise?**
- **Social enterprise: How do we support social enterprise? What frameworks are needed? What might a new legal structure involve and what tax benefits might this bring?**

Session 9: Key messages

- **Social enterprise is a way for the future: the heart of charity and the mind of business**
- **Unrelated business income tax: we should monitor charities that are carrying out business activities not for charitable purposes.**
- **Social enterprise requires a framework in NZ: legal structure?**
- **Impact investing should be developed and supported in New Zealand.**



Session 10: Charity law and accounting in te ao Māori

A. Damian Stone – Kahui Legal

B. Alex Wilson - Deloitte

1. Context and Māori charities

There are a number of charities that have operated in the Māori space for a number of years eg Māori Education Foundation, established in 1961 and now it is the Māori Education Trust. Over the decades there has been a resurgence of the collective of Māori society. We have trust boards/ runanga and with the devolution of social service delivery, Māori organisations have engaged in delivering social services to their people, and have gained charitable status in that context.

What is a Māori entity?

- There is no “requirement” to say that you are a Māori entity and the issue is how do you define that. Are you servicing a Māori beneficiary or a Māori entity?
- Around 977 charities registered that are Māori affiliated.
- Māori have had input into charities law development (eg abolition of the blood ties restriction in the Charities Act 2005).

Types of Māori entities that are charitable

- Māori Land Trusts; marae; Māori community purposes; Māori fisheries; Māori forestry: whanau ora charities.

2. Closer look at a Treaty of Waitangi (ToW) settlement structure

We have a situation where collective groups are receiving assets from the Crown in settlement of historical ToW claims, and they have been established to benefit their people.

The Crown will not transfer Treaty settlement redresses to charities, which has left professional advisors having to deliver complex advice. Post-settlement governance entities are organisations set up to represent an iwi and to receive Treaty settlements from the Crown.

3. Observations about the future

- Operating for charitable purposes: we need to keep in mind how money is earned and how it is spent.
- Treaty settlement dilemmas and iwi having to run multiple organisations at the same time because of complex structures.
- “Charitable purposes” – does that differ for iwi and hapu? Charitable purposes are necessarily restrictive and probably don’t cover everything Māori organisations want to do.

Considerations for the Charities Review 2005

- **How does charities law interact with Treaty of Waitangi settlements?**
- **How do we recognise and enhance the special place of Māori charities in NZ?**

Session 10: Key messages

- **Māori charities are unique and have a special place in NZ society.**
- **Treaty of Waitangi settlement processes result in complex situations for Māori wanting to use redress for charitable purposes.**
- **“Charitable purposes” and our legal structures may need refining for Māori.**

VIEW FROM THE BENCH: Justice Rebecca Ellis

See Ellis J's full speech [here](#).

See Ellis J's [judgment](#) regarding cryonics research funding bodies (found charitable under the advancement of education head): *Re Foundation for Anti-Aging Research* [2016] NZHC 2328.



1. Observations about the High Court and charity cases

- The High Court has a varied group of judges and is a court of general jurisdiction.
- There are also few charities cases coming to the High Court: estimates around one case a year.
 - This low number means there may be impediments to coming to court on appeal: costs? time?
 - There is a particular problem because the law of charitable purposes is developed in the courts and that law needs to be reflective of modern society.

2. Process observations from the “cryonics case”

A. Evidence

- Evidence: registration turns on an applicant being able to show the existence of a charitable purpose (mixed question of law and fact) and the requisite public benefit (a question of fact).
 - Regard must be had to the activities: it seems to be that activities are most likely to be relevant if the rules are unclear as to purposes or where there is reason to believe that activities are not consistent with stated charitable purposes. Those are matters that invite evidence.
- Some truths in relation to charitable purposes and public benefit are self-evident. But there are examples of cases where further evidence is required eg stated purposes are unclear or when they are clear but potentially controversial. Judges today are more reluctant to apply their own views for “public benefit” and it is right these are contested. Conversely, those applying for registration are entitled to the same expectation and that the analysis required is based on evidence.
- Discusses/reflects on *Centrepoin Community Growth Trust v Commissioner of Inland Revenue* [1985] 1 NZLR 673. Illustrates the need of decision-makers to call expert evidence, and the consequences where the applicant brings uncontested evidence (e.g. harmful behavior was essentially authorised by the court).
- Charities Act 2005:
 - Does not say much about evidence.
 - Section 18 focuses on the provision of information to the Board and is unspecific as to both the source or form of that information and as to whether or how such information might be tested.
- **The complex case:** accepts registration needs to be simple and effective and those determining should not be bound to formal processes in every single case. But the Act is deficient in not making it clear how less straightforward cases are to be dealt with. Can the Board make its own inquiries? Can expert assistance be sort? Is there funding for this? Is an oral hearing in some cases required? – Ellis J notes the value of oral hearings cannot be underestimated.
- There are implications on appeal with the lack of evidence at the Board level:
 - If the process below seems hazy or ad hoc, then the starting point is more likely to be one of skepticism than deference.
 - The appeal right in s 59 is broad and charity appeals proceed by way of rehearing. Ellis J compares this to the UK position, which asks for evidence and proceeds by way of a de novo hearing.

B. Parties

- 2005 Act does not deal with the issue of parties to appeals.
- The Board has the role of assisting the Court, but there is no real contradictor for the Court.
- Who could fill the gap? Counsel to assist; Board could participate more actively if the Act prescribes (eg the UK Act contemplates the Commission can enter the fray, which is not problematic because appeals involve de novo hearings); or the Attorney-General. The Attorney General has not yet participated in charities appeals.

Considerations for the Charities Review 2005

- **How should the Act deal with the right of appeal? Should charity applicants be entitled to a full hearing of evidence? Should a contradictor for the Court be set out in the legislation?**

Session 11: What needs to be done next?

Andrew Phillips – Charities Services (Moderator)

A. Dr Mary Synge – Associate Professor in Law at the University of Exeter – [see presentation](#)

Arts and Humanities Research Council (AHRC) “Research Network Scheme”, application with Matthew Harding:

- International scheme to undertake research.
- Offer workshops over 18 months – 2 years. Will develop an online forum to exchange ideas and to come up with an impactful research agenda, 20-30 academics interested.
 - *Workshop 1.* Questions around the charitable sector, for example religion, and the boundaries between charity and government.
 - *Workshop 2.* Governance, regulation and enforcement.
 - *Workshop 3.* The value of charity and how do we support it.

B. David McClay – Barrister – [see presentation](#)

- **Mergers and the third sector:** until registration occurred in NZ, no one knew how many charities there were. Back around that registration period, mergers and de-mergers were envisioned.
- **Key issues in mergers:**
 - The Charitable Trusts Act 1957 has a charitable scheme procedure in Part 3 (and Part 4 for voluntary contribution schemes)
 - Although Part 3 schemes are usually amending charitable trusts and rectifying drafting errors.
 - Issues of time and of scope, as well as archaic statutory language and structure.
- **Reform needed:** concerns around the cumbersome processes in the Charitable Trust Act. There was a reference to review this in the Law Commission Trusts Project, but this seems to have fallen away. A new process possibly could involve approval by an administrative tribunal, although there are often affected third parties so that Court approval is desirable.

C. Anthony Heffernan – XRB – [see presentation](#)

- PBE (Public benefit entities): accounting for combinations gets complicated but the reasons for considering combining entities (eg improved efficiency) should not be impacted by the accounting.
- Acquisition vs. Amalgamation type transaction – these will have very different accounting outcomes.
 - Acquisitions: Lots of ways this can work out.
 - Amalgamation: Both parties coming together – no current accounting requirements.
 - Comparatives: A continuing entity has to have its comparatives.
- **A new accounting standard?** There is a new standard being issued by the International Public Sector Accounting Standards Board. The question in NZ is what to do with this standard and XRB is considering this carefully and will be issuing an exposure draft.
- **Amalgamation benefits:** when you get to amalgamation, you can bring them all over at the carried values (meaning numbers of financial standards) and you are not re-measuring the assets and liabilities previously reported. It is a lot easier.
- Questions to think about: Is it a new and continuing entity? Reporting of comparatives? Equity reserves & assets? Higher financial reporting requirements? Tax issues?

Considerations for the Charities Review 2005

- **Should the Charitable Trusts Act (Part 3) be incorporated into the Review?**
- **How might the work of the Research Network Scheme inform the Review?**

Session 11: Key messages

- **The Research Network Scheme will be a useful resource.**
- **The Charitable Trusts Act processes are too cumbersome.**
- **Accounting should not deter merging decisions.**

Session 12: Future challenges and opportunities

The session included a range of questions and answers, which you can listen to [here](#). Topics included:

- religion and charity;
- consulting with Maori and Pasifika on accounting standards;
- charity tribunals; and
- social enterprise structures.

Many expressed enthusiasm for an annual or bi-annual conference.

SUMMARY OF KEY MESSAGES

1. Who we are as a sector

- Our charity law should be able to evolve to meet the demands of New Zealand.
- The Inland Revenue statistics should be utilised in order to understand the make-up of the not-for-profit sector.

2. Are there too many charities in New Zealand?

- We need a more efficient market that gives donors excellent information.
- We may have too many grant-making charities (5,000).
- Tier four charities (the very small) deserve special attention (18,000).
- Perhaps all ideas do not require a legal entity.
- Charities should consider amalgamation and use of existing tools like Community Foundations and Donor Advised Funds.
- We should not forget the deregistrations that are occurring.

3. Overview of the new financial reporting standards implementation

- How do we allow charities to tell their story in the context of financial reporting (Service performance reporting requirement)?
- Should there be an expectation for all not-for-profits to follow reporting standards?
- What is the future of reporting, alongside financial reporting?

4. Approaches to public benefit – different perspectives on social housing and charity

- Different perspectives on the *Queenstown Lakes* case: was the correct outcome reached? Should there be more clarity in this area of the law or is there nothing wrong with it?

5. Advocacy by charity

- There are distinctions to be drawn within the broader “advocacy” label.
- The legal relevance of “activities” in charities law is contentious and sometimes misconstrued.
- Was the Charities Registration Board decision in *Greenpeace* correct?
- Are we impinging on charities rights to freedom of expression?

6. The interplay of judge-made and statute law

- Codifying definitions may prevent the law developing as a moving subject.
- Codifying definitions may risk unpredictable and unintended legal consequences.

7. Tax issues and charity

- Policy around charities needs to be considered “hand in hand” with tax policy.
- Deregistration tax requirements need to be worked through.
- Tax exemptions should be reinvested into charitable purposes.

8. How to build public trust and confidence in the charitable sector

- Public trust and confidence in the charitable sector could be higher.
- We need to consider what drives that trust: eg transparency with funds.
- A regulator needs specific qualities: see Murray Baird’s seven pointers and Oonagh Breen’s advice.



9. Funding, social enterprise and the intersection with charities who operate businesses

- Social enterprise is a way for the future: the heart of charity and the mind of business
- Unrelated business income tax: we should monitor charities that are carrying out business activities not for charitable purposes.
- Social enterprise requires a framework in NZ: legal structure?
- Impact investing should be developed and supported in New Zealand.

10. Charity law and accounting in Te Ao Māori

- Māori charities are unique and have a special place in NZ society.
- Treaty of Waitangi settlement processes result in complex situations for Māori wanting to use redress for charitable purposes.
- “Charitable purposes” and our legal structures may need refining for Māori.

11. What needs to be done next?

- The Research Network Scheme will be a useful resource.
- The Charitable Trusts Act processes are too cumbersome.
- Accounting should not deter merging decisions.

Thank you to those who attended the Charity Law, Accounting and Regulation in New Zealand Conference.