

# **An uncharitable appeal framework for charities: is it time for a Charity Tribunal?**

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A dissertation submitted in partial fulfillment of the degree Bachelor of Laws (Honours) at the University of Otago – Te Whare Wanganga o Otago.

9<sup>th</sup> October 2015

## **Acknowledgments**

To my supervisor, Nicola Wheen, for her guidance, support and for demonstrating an interest in the chosen topic.

To the various people working in the not-for-profit sector who have shared their insights. A special thank you to Susan Barker who inspired me to keep pursuing a topic in charity law.

To my family, for their constant love and support.

To the girls on Bath St who have made this final year in Dunedin special.

Finally, to Ignite Consultants, for sparking an interest in the not-for-profit sector and for making me appreciate how invaluable these groups are to our communities.

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## Introduction

*To no one will we sell, to no one deny or delay right or justice – Magna Carta*

Access to the court system for the pursuit of justice is a fundamental right. It is the cornerstone of the rule of law: the notion that no matter how weak or strong, poor or rich, members of society have equal recourse to the same set of rules. The Judiciary continues to call upon the legal profession and policy makers to seek innovative ways of retaining New Zealand's commitment toward an accessible justice system for all.<sup>1</sup>

This dissertation is concerned with access to justice issues for New Zealand charities. Since 2008, the Charities Registration Board has deregistered approximately 6,383 charities,<sup>2</sup> which has had a major impact on the sector. The central argument is that the current appeal framework for charities wishing to challenge deregistration decisions under the Charities Act 2005 is uncharitable. I propose the establishment of a Tribunal forum, the Charity Appeal Authority, to hear and determine issues arising in charity law. Such reform is necessary to pay tribute to an area of law that is at the heart of civil society.

In Chapter I the regulatory framework for charities in New Zealand is outlined. I describe what it means to be a registered charity and to have 'charitable purposes' under the Charities Act 2005. The benefits of registered charitable status, such as income tax exemptions and increased credibility, are contrasted with the detrimental impact and disadvantage of deregistration.

Chapter II puts forward the case why charities deserve attention in receiving a more accessible route of appeal. First, I provide a statistical overview of the recently high number of deregistrations and the contestable nature of these decisions. Second, I illustrate the constitutional role of the court in countering government influence over what is a legal determination of 'charitable purpose'. Third, I underline the relevance of these decisions in reaching the courts for the purpose of developing charity law.

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<sup>1</sup> Justice Helen Winkelmann "Access to Justice- Who Needs Lawyers" (Ethel Benjamin Address, Dunedin, 7 November 2014); Justice Geoffrey Venning "Access to Justice- A Constant Quest" (New  
<sup>2</sup> Charities Services "Advanced Search Function" (25 August 2015) Charities Services  
<[www.register.govt.nz](http://www.register.govt.nz)>

Chapter III looks to problems with the current appeal right as outlined in sections 59-61 of the Charities Act 2005. There are some identified drafting problems alongside broader procedural issues in a first-instance recourse to the High Court. These relate to evidence, the role of the Attorney-General, costs, timing and formality.

Having identified the problem, Chapter IV takes a turn toward the solution. The Charity Tribunal in England and Wales is comparatively studied to explore advantageous features of an alternative adjudicative system in the field of charity law.

In Chapter V, recommendations are put forward to improve the appeal framework currently available to charities. Despite benefits in retaining the High Court, I argue that a Tribunal forum is preferable as a court of first-instance for the majority of charity appeals. I propose the establishment of a Charity Appeal Authority within the already existing Taxation Review Authority. I further propose six specific areas for improved justice in a new procedural framework. These include a hearing of evidence *de novo*, judicial specialisation, a charity law reference procedure, cost reductions, longer time frames and procedural informality.

This leads to the conclusion that the right of appeal for charities against decisions exercised under the Charities Act 2005 can and should be improved. The law of charities in New Zealand is in urgent need of review and the introduction of a Charity Appeal Authority is but one feature of a sector crying out for attention.

# Chapter I. Regulatory Framework

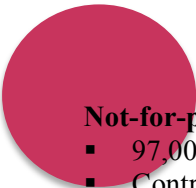


This chapter provides an overview of the regulatory framework for charities in New Zealand.

## A. Distinction between the not-for-profit and charitable sectors

The ‘not-for-profit sector’ is an important sector of human activity. There are approximately 97,000 not-for-profits in New Zealand,<sup>3</sup> providing a range of social services that fall outside government or for-profit ventures. These organisations, and the passionate people who are part of them, make a significant contribution to New Zealand’s society and economy (4.9% of the country’s GDP).<sup>4</sup> Moreover, they are drivers for social change and their philanthropic foundations harness the generosity of Aotearoa.

The ‘charitable sector’ makes up a distinct strand of the not-for-profit sphere. In New Zealand, charities that are registered by the Charities Registration Board and monitored by the Department of Internal Affairs- Charities Services retain a separate legal status, providing a gateway for certain tax exemptions and concessions, alongside other advantages. The privileges of registered charities are wider in scope than those granted to not-for-profit organisations. The justification for such advantage lies in Government recognition of charities furthering social objectives, filling gaps and perhaps being “more responsive to the needs of society than government programmes”.<sup>5</sup> There are currently 27,000 registered charities in New Zealand, with an annual income of \$16.8 billion and a total asset base of \$48.9 billion.<sup>6</sup>



### Not-for-profit sector

- 97,000 not-for-profits in New Zealand
- Contribute to \$6.95 billion or 4.9% country’s GDP
- Over one million current volunteers



### Charitable sector

- 27,000 registered charities in New Zealand
- 16.8 billion per annum gross income
- 48.9 billion total asset base
- 400,000 volunteers
- 180,000 paid employees

<sup>3</sup> An updated figure will be announced in January 2016: Statistics New Zealand “Counting Non-profit Institutions in New Zealand” Statistics New Zealand (16 April 2007) <ccss.jhu.edu>

<sup>4</sup> Statistics New Zealand, above n3.

<sup>5</sup> Michael Cullen and Peter Dunne *Tax incentives for giving to charities and other non-profit organisations: a government discussion document* (Policy Advice Division of Inland Revenue Department, ISBN 0-478-27143-3, October 2006) at 1.13.

<sup>6</sup> Charities Services “Registration: is your organisation considering registering as a charity?” (1 June 2015) Department of Internal Affairs- Charities Services <www.charities.govt.nz>

## **B. Regulation of the New Zealand charitable sector**

The benefit conferred upon charities explains why a regulatory framework has long been in existence. Although there are a number of reasons why regulation might be desirable, Jonathon Garton narrows down two:<sup>7</sup>

- (i) to ensure that the sector is sufficiently trustworthy in its supply of public goods
- (ii) to respond to the insufficiency of resources and encourage the sector to pursue ‘popular’ and socially valuable activities.

Charity regulation targets compliance and ensures transparency. These goals are captured in the purpose provisions of the Charities Act 2005 (“Charities Act”), particularly section 3(a): to promote public trust and confidence in the charitable sector.

In the last ten years, regulatory responses to not-for-profit activity have grown more popular and complex within common law jurisdictions. Striking the right regulatory balance has been the subject of political tension and academic inquiry. For example, suggestions have been made that all not-for-profits should be subject to one regulatory system.<sup>8</sup> Other writers like Helen Rittelmeyer propose that over-regulation is a serious problem and that independent regulators are more appropriate and effective.<sup>9</sup> Alison Dunn, in her analysis of the Charity Commission in England and Wales, explores the potentials of self-regulation within the sector.<sup>10</sup> More recently, in New Zealand, there have been proposals for differentiated regulation.<sup>11</sup> These various regulatory models and approaches are fascinating but outside the scope of this dissertation. The existing regulatory framework in New Zealand, engraining the common law charity model of regulation, provides the focal point.

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<sup>7</sup> Jonathon Garton “The fault line of charity” in Matthew Harding, Ann O’Connell and Miranda Stewart (ed) *Not-for-Profit Law: Theoretical and Comparative Perspectives* (Cambridge University Press, Cambridge, 2014) 297 at 301.

<sup>8</sup> See Dr Donald Poirier *Charity Law in New Zealand* (1<sup>st</sup> ed, eBook ed, Department of Internal Affairs, 2013) at 77 and Jonathon Garton “The fault line of charity” in Matthew Harding, Ann O’Connell and Miranda Stewart (ed) *Not-for-Profit Law: Theoretical and Comparative Perspectives* (Cambridge University Press, Cambridge, 2014), 297 at 314.

<sup>9</sup> Helen Rittelmeyer *Independent Charities, Independent Regulators: the Future of Not-for-profit Regulation* (Centre for Independent Studies, September 2014).

<sup>10</sup> Alison Dunn “Regulatory shifts: developing sector participation in regulation for charities in England and Wales” (2014) 34 *Leg Stud Soc Leg Scholars* 660.

<sup>11</sup> Carolyn Corder, Dalice Sim and Tony van Zijl “Differentiated Regulation: The case of charities” (2014) 55 *ACFI* 52.



### C. The Charities Regulator

The Charities Act changed the charitable sector's regulatory framework in New Zealand by introducing a Charities Commission. The new Autonomous Crown Entity<sup>12</sup> was tasked with the responsibility of registering and monitoring the activities of charitable entities. Broader responsibilities, such as educating and assisting charities in relation to good governance were laid out in section 10 of the Act.

The Commission's establishment was shaped by a number of reviews, dating back to a recommendation put forward by the Working Party on Charities and Sporting Bodies in 1989 that there should be an explicit link between taxation preferences and the accountability of charities.<sup>13</sup> While reaction within the sector was "decidedly hostile",<sup>14</sup> regulation was placed on the government's agenda and engrained in a 2001 government discussion document.<sup>15</sup> Final recommendations to establish a Charity Commission were put forward by the Working Party on Registration, Reporting and Monitoring of Charities and were incorporated into the Charities Bill 2004.

In light of such a major regulatory change, it is perhaps unfortunate that final amendments to the Charities Bill 2004 were passed under urgency. National Party members of the Social Services Select Committee stressed an inadequate consultation process, suggesting that the "charitable sector will pay the price".<sup>16</sup> During the second reading, Sue Bradford (who sat on the select committee) also noted the lack of public consultation and concerns within the sector as to over-regulation, alongside "very limited appeal rights".<sup>17</sup> These initial hesitations during drafting stage indicate the shaky foundations on which the Charity Commission and associated appeal rights were first set out.

The Charities Amendment Act (No 2) 2012 disestablished the Charities Commission and transferred its functions to the Chief Executive of the Department of Internal Affairs-

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<sup>12</sup> An ACE is an organisation that must "have regard" for government policy when directed by the responsible Minister: Crown Entities Act 2004, s 104.

<sup>13</sup> New Zealand Working Party on Charities and Sporting Bodies *The Russell Report* (Report to the Minister of Finance and the Minister of Social Welfare, 1989)

<sup>14</sup> David McLay "Regulation of charities" (2002) 55 NZLJ 60 at 60.

<sup>15</sup> Michael Cullen, Paul Swain and John Wright *Tax and charities: a government discussion document on taxation issues relating to charities and non-profit bodies* (Policy Advice Division of the Inland Revenue, ISBN- 0-478-10343-3, June 2001), foreword.

<sup>16</sup> Charities Bill 2004 (108-2) (select committee report), at 20.

<sup>17</sup> (12 April 2005) 625 NZPD 19940.

Charities Services (“DIA-CS”) and a three-person Charities Registration Board (“CRB”). The CRB is responsible for registration and deregistration decisions, while the DIA-CS is vested with broader functions of building trust and confidence in the sector and encouraging the effective use of charitable resources. The substantive provisions and functions of the transition remain largely unchanged.<sup>18</sup>

#### **D. Registration process**

Registration, the cornerstone of New Zealand charity regulation, was launched with the opening of the Charities Register on 1 February 2007. In order to gain registered charitable status, an organisation must first take the legal form of an “entity”,<sup>19</sup> defined in section 4(1) to mean “any society, institution or trustees of a trust”.<sup>20</sup> An “entity” must certify that its officers are qualified and that requirements in section 13 are met. For a trust, it is sufficient that trust funds are applicable to ‘charitable purposes’. For a society or institution, it must be established and maintained ‘exclusively for charitable purposes’. The meaning of ‘charitable purposes’ is therefore critical and organisations are encouraged to provide to DIA-CS detailed information including funding sources, activities and benefits to assist the application process.

#### **E. Charitable purpose**

The meaning of ‘charitable purposes’ has been the subject of a long and heated debate. Its elusive character is attributable to differential attitudes toward philanthropy and visions of social good. The *Goodman Report*, a landmark 1976 United Kingdom (“UK”) report on the meaning of charity, sums up the underlying difficulty as the:<sup>21</sup>

Dichotomy in relation to charities between those whose objects are the relief of poverty and illness... and those whose objects are of a modern hedonistic nature which contribute to the quality of life.

The tension lies in considering what dimensions contribute to public quality of life and for

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<sup>18</sup> *Re Greenpeace New Zealand Incorporated* [2012] NZCA 533 (CA) at [2] and [35].

<sup>19</sup> Charities Act 2005, s13.

<sup>20</sup> These legal structures are currently under review by the Law Commission: Law Commission *Review of the Law of Trusts* (NZLC R130, 2013) and Law Commission *A New Act for Incorporated Societies* (R129, 2013).

<sup>21</sup> National Council of Social Service, *Committee of Inquiry into the Effect of Charity Law and Practice on Charily Law and Voluntary Organisations* (“Goodman Report”) (Bedford Square Press, 1976) at 1.

whom this benefit is to be grafted upon. In other words, how widely are we to draw the boundaries of ‘charity’? Although centuries of case law have indicated boundary lines and various tests, the underlying philosophical dimension to ‘charity’, alongside its political relevance, undoubtedly contribute to its contested nature.

Nevertheless, the first point to note is that a distinct legal meaning exists. In *Queenstown Lakes Community Housing Trust*, MacKenzie J wrote that the “term ‘charitable’ is used not in its ordinary dictionary meaning but in the particular technical meaning that the law has ascribed to it”.<sup>22</sup>

In section 5(1) of the Charities Act, ‘charitable purpose’ is defined as including every charitable purpose whether it relates to:

- a) the relief of poverty
- b) the advancement of education
- c) or religion
- d) or any other matter beneficial to the community

These are known as the four heads of charity, which were famously put forward by Lord Macnaghten in 1891 in *Pemsel*.<sup>23</sup> The decision liberalised the concept of charity and each head has subsequently been developed through case law (especially the fourth). As a result of discussions in the lead-up to the Charities Act<sup>24</sup> New Zealand has essentially codified the common law.

The common law test for whether a purpose is charitable was set out by the Court of Appeal in *Latimer*:<sup>25</sup>

- (i) Is the purpose for the public benefit; and if so,
- (ii) Is it charitable in the sense of coming within the spirit and intendment of the preamble to the ‘Statute of Elizabeth’<sup>26</sup>

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<sup>22</sup> *Queenstown Lakes Community Housing Trust* HC WN CIV-2010-484-1818 (24 June 2011) at [38].

<sup>23</sup> *Commissioners for Special Purposes of Income Tax v Pemsel* [1891] AC 531.

<sup>24</sup> New Zealand Working Party on Charities and Sporting Boards, above n 13.

<sup>25</sup> *Latimer v CIR* [2002] 3 NZLR 195 (CA)

<sup>26</sup> Statute of Charitable Uses Act 1601 (43 Eliz c4)

Under (i), the decision-maker is to consider firstly whether a purpose confers a *benefit* on the public and secondly whether the class of persons eligible to benefit constitutes the *public*.<sup>27</sup> In New Zealand, Māori organisations are given special consideration.<sup>28</sup> Public benefit is presumed to arise under the first three heads of charity unless the contrary is shown.<sup>29</sup> Private benefits are allowed only if they are ancillary to the charitable purpose.<sup>30</sup> Establishing a public benefit requires evidential proof, but often the entity's purpose may illustrate a self-evident connection to 'public benefit'.

It may seem odd that under (ii), one is to refer to a statute written in 1601. Yet, the preamble to the Statute of Elizabeth imbues historical importance by providing a non-exhaustive list of varied 'charitable purposes'. Many of its enumerations are outdated,<sup>31</sup> but it signifies the starting point of the 'analogy test' approach. This requires decision-makers to draw comparisons with recognised charitable objects (in case law) to accept analogous formulations. Legal commentators have argued that the 'analogy approach' tends to expand the concept of charitable purpose over time.<sup>32</sup>

Although the substantive meaning of 'charitable purpose' is not the focus of this dissertation, it is nonetheless important due to its inevitable collision with access to justice issues. If a liberal approach is taken in which 'charitable purposes' are prima facie accepted, then challenging decisions of the CRB will not be an imperative. If however, 'charitable purposes' boundaries are drawn narrowly by the CRB (as shown by recent trends), then access to the court system becomes more relevant.

## **F. Registration advantages and obligations**

Many advantages come with registration. Most notable are the range of fiscal privileges, with the income tax exemption tracing back to William Pitt the Younger's *Duties upon Income Act*

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<sup>27</sup> *New Zealand Society of Accountants v Commissioner of Inland Revenue* [1986] 1 NZLR 147 (CA) at [152].

<sup>28</sup> Taxation (Annual Rates, Maori Organisations, Taxpayer Compliance and Miscellaneous Provisions) Bill 2003 (213-2).

<sup>29</sup> *National Anti-Vivisection Society v Inland Revenue Commissioners* [1948] AC 31 (HL) at [65].

<sup>30</sup> Charities Act 2005, s3.

<sup>31</sup> For example "marriage of poor maids": An Act to redress the misemployment of lands goods and stocks of money heretofore given to charitable uses 43 Eliz 1 c 4 [1601]

<sup>32</sup> See G E Dal Pont "Charity law – 'no magic in words?'" in Matthew Harding, Ann O'Connell and Miranda Stewart (ed) *Not-for-Profit Law: Theoretical and Comparative Perspectives* (Cambridge University Press, Cambridge, 2014) 87 at 301.

1799.<sup>33</sup> There are three specific charitable exemptions from income tax: section CW 41 (charities: non-business income), section CW 42 (charities: business income) and section CW 43 (charitable bequests).<sup>34</sup> In New Zealand, the government estimates the charitable income tax exemptions to be worth at least \$300 million per annum.<sup>35</sup> Donee status constitutes another fiscal privilege,<sup>36</sup> in which anyone who donates to an approved donee regime will receive a tax benefit. Although the granting of donee status is distinct from the registration process and is governed by Inland Revenue, a registered charity faces a streamlined process and is more likely to succeed.

Beyond tax exemptions, Joyce Chia notes the broader advantages of charitable status:<sup>37</sup>

Perhaps the meaning of ‘charity’ matters most because ‘charity’ is a powerful brand that generates legitimacy, supporting fundraising and the recruitment of volunteers and employees.

Support from the community is essential to a charity’s survival, and is increased from the powerful brand of a registered charity number. Transparency creates a sense of trust and relative justification in contributing to a ‘worthy’ cause. Funding applications are also often restricted to registered charities. A conservative estimate shows government funding to be 25% of the charitable sector’s income.<sup>38</sup> Relatedly, local councils commonly limit license to conduct street fundraising campaigns to registered charities only.<sup>39</sup> In the eyes of society, charitable status conveys a “stamp of virtue”,<sup>40</sup> which in turn provides a gateway for survival.

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<sup>33</sup> Michael Gousmett “The Charitable Purposes Exemption from Income Tax: Pitt to Pemsel 1798-1891” *Business and Law: Theses and Dissertations* (University of Canterbury, 2009) <library.canterbury.ac.nz>

<sup>34</sup> See Susan Barker, Michael Gousmett and Ken Lord *The Law and Practice of Charities in New Zealand* (Lexis Nexis, Wellington, 2013) at chpt. 3.

<sup>35</sup> Policy Advice Division Inland Revenue Department *Official Issues Paper: Recognising salary trade-offs as income* (Policy Advice Division Inland Revenue Department, April 2012) at footnote 14.

<sup>36</sup> Income Tax Act 2007, s LD 3(2).

<sup>37</sup> Joyce Chia “The history and future of the definition of charity in Australia” in Matthew Harding, Ann O’Connell and Miranda Stewart (ed) *Not-for-Profit Law: Theoretical and Comparative Perspectives* (Cambridge University Press, Cambridge, 2014) 179 at 301.

<sup>38</sup> J Sanders, M O’Brien, S Wojciech Sokolowski and L Salmon *The New Zealand Non-Profit Sector in Comparative Perspective* (Office for the Community and Voluntary Sector, Wellington, 2008) at 73.

<sup>39</sup> Susan Barker “Taxation Issues for Charities and For-Profit Organisations” (seminar presented to Centre for Accounting, Governance and Taxation Research, Victoria University of Wellington VUW CAGTR, February 2015).

<sup>40</sup> Kerry O’Halloran, Myles McGregor-Lowndes and Karla Simon *Charity Law & Social Policy: National and International Perspectives on the Functions of the Law Relating to Charities* (Springer, Faculty of Public Administration and Public Policy University of Twente, 2008) at 10.

To counteract the benefits, registered status confers certain obligations:

- The filing of an annual return within 6 months after balance date in the appropriate manner;<sup>41</sup>
- Compliance with new audit and review requirements for medium and large charities;<sup>42</sup>
- Public availability of information on the charities register;<sup>43</sup>
- Notification to the DIA-CS of any changes to name, address, officers, balance date, rules or purposes;<sup>44</sup>
- Upon winding up, surplus assets in charitable organisations must go to some other ‘charitable purpose’.<sup>45</sup>

### **G. Deregistration**

Alongside registration powers, the Board has the power to deregister a charity under section 32 that:

- no longer meets the requirements for registration;<sup>46</sup>
- has acted in a way that is considered to be “serious wrongdoing”;<sup>47</sup> or
- has “significantly and persistently” failed to comply with the Act by for example failing to file an Annual Return<sup>48</sup> or failure to notify changes to the Charities Unit;<sup>49</sup> or
- has requested to be deregistered.

### **H. Impact of deregistration**

Deregistration has a major impact. An entity will likely be required to pay tax from the date of notification (with rates altering depending on the type of entity).<sup>50</sup> In addition, new tax provisions that came into effect 1 April 2015 mean that a deregistered charity must divest itself of its net assets within twelve months of the “day of the final decision” (deregistration

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<sup>41</sup> Charities Act 2005, s14

<sup>42</sup> Financial Reporting (Amendment to Other Enactments) Act 2013.

<sup>43</sup> Charities Act 2005, s22

<sup>44</sup> Charities Act 2005, s40

<sup>45</sup> Dr Donald Poirier, above n 8, at 74.

<sup>46</sup> See ‘registration process’ and ‘charitable purpose’ requirements.

<sup>47</sup> Charities Act 2005, s 4(1).

<sup>48</sup> Charities Act 2005, s 42.

<sup>49</sup> Charities Act 2005, s 40.

<sup>50</sup> Susan Barker, Michael Gousmett and Ken Lord, above n 34, at 436.

or appeal finally determined).<sup>51</sup> Moreover, the IR is likely to review donee status when an entity loses its registration number.<sup>52</sup>

Broader implications are foreboding. During the National Council of Women's period of deregistration, they had to put off four staff members and borrow money on the basis of lost support from various foundations.<sup>53</sup>

### ***Conclusion***

In sum, deregistration threatens survivability, while registration confers significant advantage. It is for this reason that a CRB decision to refuse to register or to deregister a charity may be fatal and why one may choose to challenge the decision.

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<sup>51</sup> Taxation (Annual Rates, Employee Allowances and Remedial Matters) Act 2014, Section HR 12.

<sup>52</sup> Inland Revenue "Interaction of tax and charities rules, covering tax exemption and donee status" (December 2006) OS 06/02 at 31.

<sup>53</sup> Interview with Elizabeth Bang, ex-President National Council of Women (the author, phone call, 20<sup>th</sup> July 2015).

# Chapter II. Justifying a More Accessible Right of Appeal



This chapter argues three reasons why charities require an accessible right of appeal against decisions exercised under the Charities Act. Although a right of appeal to the High Court does exist,<sup>54</sup> I outline in the chapter three why it is procedurally flawed and in many ways inaccessible.

## A. Reason one: deregistrations

The first reason that a more accessible right of appeal is pertinent for charities is that the statistically high and contentious number of deregistrations since 2007 suggests enough cases deserving of challenge.

### i) Statistical Overview

The high number of deregistrations since the Charity Commission’s inception has raised some concerns within the sector, heightening calls for an accessible right of appeal. In July 2013, the Inland Revenue Department noted that 3,902 charities had been deregistered since February 2007. The reasons follow:<sup>55</sup>

Deregistration Decisions	Number
Failure to file an annual return	2,489
Voluntary deregistration	1,375
Non-charitable purposes	24
Serious wrong-doing	3
Did not meet the registration requirements	4
Did not produce evidence of charitable purposes	7

Since 2013, deregistrations have continued to rise and the Charities Register shows a total of 6,383 deregistered charities.<sup>56</sup> The figure does not include groups who were refused

<sup>54</sup> Charities Act 2005, s 59.  
<sup>55</sup> Policy and Strategy Inland Revenue and the Treasury *Clarifying the tax consequences for deregistered charities: an official issues paper* (Inland Revenue Department, ISBN 0478-39218-4, July 2013) at 4.12.  
<sup>56</sup> Charities Services “Advanced Search Function” (25 August 2015) Charities Services <[www.register.govt.nz](http://www.register.govt.nz)>



registration at the first stage, such as Sustain Our Sounds and Focus Paihia Community Trust; so the number of deregistrations is in fact higher.

A large portion of deregistrations arise from a failure to file an annual return. Although appeal rights are less relevant in this realm, Julia Capon, manager of Gift Trust, says that numerous charities seem unaware of deregistration until too late.<sup>57</sup> Perhaps the necessity to file an annual return needs to be impressed more upon charities.

Cases of ‘serious wrongdoing’, defined in section 4(1), are few<sup>58</sup> but there is room for these decisions to be challenged on appeal. Cases of “serious wrongdoing” coincide with initial intentions of using the discretionary power to deregister a charity “only in the most extreme circumstances.”<sup>59</sup>

The most contentious decisions for the purposes of this dissertation are those surrounding the definition of ‘charitable purpose’. DIA-CS lists 187 relevant decisions regarding definitional issues.<sup>60</sup> Only 13 were subsequently appealed.

It is also worth considering the numerous charitable groups who are excluded from these statistics by never seeking registration in the first place. Reasons may include registration being an onerous process or ‘charitable purposes’ lying at the fringe of current legal interpretations, with limited options to appeal.

## **ii) The chilling effect**

The high number of deregistrations and numerous refusals to grant registered status have taken many in the sector by surprise. Susan Barker, specialist New Zealand charity lawyer, is of the view that the CRB has in effect changed the law on the definition of charitable purpose without mandate. This is causing an unwarranted and destructive “chilling effect” on the sector, forcing many good charities to close.<sup>61</sup> Michael Gousmett also says “they are taking

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<sup>57</sup> Interview with Julia Capon, Gift Trust manager (the author, telephone call, 25 August 2015).

<sup>58</sup> See for example: Charities Registration Board *Deregistration Decision: Southern Cross Charitable Trust Decision* No: D2015-1 (8 April 2015).

<sup>59</sup> Charities Bill 2004 (108-2) (select committee report) at 20.

<sup>60</sup> Charities Services “Legal Decisions Advanced Search” (25 August 2015) Charities Services <[www.register.govt.nz](http://www.register.govt.nz)>

<sup>61</sup> Susan Barker “Deregistered charities” (April 2014) NZLJ 87.

far too narrow of an approach in my opinion”.<sup>62</sup> A recent report entitled *Giving Charities a Helping Hand* picks up on a similar theme and says a strict approach is being adopted.<sup>63</sup> The presumption of charity recognised by the Courts is also at odds with some of the CRB’s decisions.<sup>64</sup>

A full analysis of the CRB’s adopted approach is outside the scope of this dissertation.<sup>65</sup> But it is worth stating the obvious that if a less restrictive approach were taken, issues of appeal rights would no longer be in such sharp focus because fewer charities would be excluded from the register.

### **iii) Contested Decisions**

There are many areas of the CRB’s interpretation that have sparked controversy. For example, issues surrounding advocacy<sup>66</sup> and social housing<sup>67</sup> have held some limelight in the courts. The following two decisions indicate further contestable areas (sport and community development) where accessing the courts was seemingly out of reach.

#### **a) *Swimming New Zealand***

Despite being on the register since 2008, Swimming New Zealand was controversially deregistered in September 2014.<sup>68</sup> The decision was based on constitution amendments in 2012, which seemingly indicated that non-charitable purposes (competitive swimming and high performance) were more than ancillary to charitable purposes (water safety and learn to

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<sup>62</sup> Interview with Dr Michael Gousmett, Expert on tax and charities (the author, telephone call, 1 August 2015)

<sup>63</sup> New Zealand Initiative “Giving Charities A Helping Hand” (May 18 2015) <[www.nzinitiative.org.nz](http://www.nzinitiative.org.nz)>

<sup>64</sup> *Commissioner of Inland Revenue v Medical Council of New Zealand* [1997] 2 NZLR 297 (CA) at 310, per McKay J: “it now appears that, even in the absence of such analogy, objects beneficial to the public, or of public utility, are prima facie within the spirit and intendment of the preamble and, in the absence of any ground for holding that they are outside its spirit and intendment, are therefore charitable in law.”

<sup>65</sup> Suggestions have been made that a purpose-centric approach (rather than activities-based) needs to be followed: Susan Barker “The myth of ‘charitable activities’” (September 2014) NZLJ 304.

<sup>66</sup> *Re Greenpeace of New Zealand Incorporated v Charity Commission of New Zealand* [2014] NZSC 105; *The National Council of Women Incorporated v Charities Registration Board* [2014] NZHC 3200.

<sup>67</sup> *Queenstown Lakes*, above n 22.

<sup>68</sup> Charities Registration Board *Deregistration Decision: Swimming New Zealand* No D2014-3 (30 September 2014).

swim programmes). The decision re-iterates the Board's view that "the promotion of sport and recreation in and of itself is not a charitable purpose".<sup>69</sup>

Various legal and sports commentators are concerned with the strict approach taken toward sporting bodies, such as Swimming New Zealand. Queries are being raised whether sport can be charitable anymore, despite an express amendment inserted into the Charities Act 2005 that.<sup>70</sup>

The promotion of amateur sport may be a charitable purpose if it is the means by which a charitable purpose referred to in subsection (1) is pursued.

For many national and regional sports, competitive sport is part of a parcel package of sporting service. It seems that under this new approach, few national or regional sports organisations will remain registered charities.<sup>71</sup> Moreover, the 1800 currently registered sporting organisations will be deterred from constitutional changes for fear of subsequent investigation. Sport undoubtedly provides various social benefits and the decision's controversial elements may have helpfully been discussed had an appeal been accessible, for the sake of the regulator's overall approach to sport. As a result of Swimming New Zealand's deregistration, financial cuts have had to be ironically aimed at services recognised as charitable – water safety and learn-to-swim programmes.<sup>72</sup>

#### **b) *Focus Paihia Community Charitable Trust***

Another decision with less media attention is Focus Paihia Community Charitable Trust's failure to meet registration requirements in 2012.<sup>73</sup> The Trust sought to increase economic growth and local employment opportunities, promote Paihia as a tourist destination, provide training to up-skill the community, and to promote the history of Paihia.

The CRB's decision characteristically contains an analysis under the four heads of charity. Under the relief of poverty heading it was held that local employment opportunities were not

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<sup>69</sup> Charities Services "Sport and recreation" (April 2015) Charities Services <[www.charities.govt.nz](http://www.charities.govt.nz)>

<sup>70</sup> Charities Act 2005, section 5(2A).

<sup>71</sup> Maria Clarke "Is sport charitable anymore?" LawTalk 62 (10 April 2015) at 29-31.

<sup>72</sup> Simon Collins "Charity blitz threatens Olympic Games plan" (February 14 2015) <[www.nzherald.co.nz](http://www.nzherald.co.nz)>

<sup>73</sup> Charities Registration Board *Deregistration Decision: Focus Paihia Community Charitable Trust* No: FOC41117 (16 April 2012).

correlated to people particularly disadvantaged. Under education, the training provided was supposedly to benefit business primarily. Finally, in relation to other matters beneficial to the community, economic development was identified as a non-charitable purpose,<sup>74</sup> alongside tourism.<sup>75</sup> Phraseology like “community development projects” was also considered too broad.

Had there been an accessible avenue to appeal the decision, the Trust may have been able to provide additional evidence as to why their aims were indeed charitable. For example, in *Re Tennant*<sup>76</sup> economic development of a geographical area was considered charitable because essential services were provided to a community considered to be under a particular disadvantage. There may be room to draw an analogy with Paihia.

In addition, the law surrounding economic development and charitable purpose is widely contested<sup>77</sup> and clarification by way of a higher authority would prove useful. Michael Gousmett, in relation to the Canterbury Development Corporation Trust, argues “the encouragement of economic development by a not-for-profit institution is justifiably an activity that is worthy of being exempt from income tax”.<sup>78</sup> To develop this area of economic charitable purposes further or at least continue the requisite discussion over a potentially modern facet of charity law would require an accessible right of appeal.

To conclude, the statistically high number of deregistrations has made the right of appeal practically relevant. The CRB determinations for Swimming New Zealand and Paihia Community Charitable Trust highlight contestable features, which would have helpfully been judicially analysed on appeal.

## **B. Reason two: Charities are distinct from government**

The second reason why charities should have an accessible right of appeal is constitutionally based. Charities, belonging to the ‘third-sector’ of society, should be kept separate from government. The necessity for ‘charitable purposes’ to be separate from ‘government

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<sup>74</sup> *IRC v Oldham Training Enterprises* (1996) STC 1218.

<sup>75</sup> *Travel Just v Canada (Revenue Agency)* [2006] FCA 343, [2007] 1 CTC 294.

<sup>76</sup> *Re Tennant* [1996] 2 NZLR 633.

<sup>77</sup> See for example John Bassett, “Charity is a general public use” (2011) NZLJ 60 and Susan Barker, “Canterbury Development case” (2010) NZLJ 248.

<sup>78</sup> Dr Michael Gousmett, “Charity and economic development” (2011) NZLJ 63.

purposes' is upheld by an available court system, which provides a constitutional check on the decisions of the CRB.

### **i) The contested relationship between the 'first sector' and the 'third sector'**

The relationship between government, social policy and charity has become increasingly entangled. Tennant notes that movement from a welfare state toward a "mixed economy of welfare" in the 1970s allowed for a greater role for "private provision for social need".<sup>79</sup> Broadly speaking, the New Zealand government has formerly devolved functions to various not-for-profits for ideological, practical or fiscal reasons. It provides 25% of the sector's income via grants and government contracts.<sup>80</sup> Regulatory frameworks have "facilitated the channeling of charitable resources in the direction of their respective government's social policy agenda".<sup>81</sup> Thus, the service pull from government connects more charitable activities with politically defined public goods.

Nevertheless, the independence of charity is one of its defining characteristics. Direct engagement with communities and innovative approaches enable charities to address social concerns beyond the government's focus. Their autonomy is pivotal. Debra Morris, who fears over-regulation, says, "as much as possible, the role of Government should be to facilitate and to help to develop capacity in this area, rather than to prescribe".<sup>82</sup> Increased reliance on a 'contract culture', prescribed by government, causes difficulties,<sup>83</sup> such as taking an organisation away from its original purpose to chase funding. Thus, it can be said (and has been argued) that the legitimacy of charities is sustained by their operations being at arm's length from the government.<sup>84</sup>

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<sup>79</sup> Margaret Tennant "Governments and Voluntary Sector Welfare: Historical Perspectives" (Social Policy Journal of NZ, December 2001) at 1.

<sup>80</sup> J Saunders, M O'Brien, S Wojciech Sokolowski and L Salamon *The New Zealand Non-Profit Sector in Comparative Perspective* (Office for the Community and Voluntary Sector, Wellington, 2008) at 17, figure 4.

<sup>81</sup> Kerry O'Halloran, Kerry McGregor-Lowndes, Karla Simons *Charity Law and Social Policy: National and International Perspectives on the Functions of the Law Relating to Charities* (Springer Netherlands, 2010) at 549.

<sup>82</sup> Debra Morris "New Charity Regulation Proposals for England and Wales: Overdue or Overdone?" 80 CKLR 779.

<sup>83</sup> Debra Morris "Charities and the Contract Culture: Partners or Contractors? Law and Practice in Conflict" (Charity Law Unit, Liverpool, July 1999).

<sup>84</sup> Rohan Price and John Kong Shan Ho "The Charity Commission of England and Wales as a Model: Could Hong Kong and Australia be Importing a Constitutional Problem?" (2012) Sing. J. L. S. 55.

In turn, too much government interference in the sector can threaten a feature of our democratic framework. Charities are well equipped to encourage social change, providing a platform for a policy push in the form of civic engagement. A key finding of a recent New Zealand study of the advocacy role of not-for-profits was the importance of hearing the voices of those most affected by change in society.<sup>85</sup> Charitable agencies strengthen these voices and wide-ranging charitable purposes address a pluralistic society. Alison Dunn, an expert in this discussion, sums this up appropriately:<sup>86</sup>

A pluralist charity sector should continue to allow room for all organisations and to foster to the sector’s innovative spirit as well as its contributions to the policy and political field.

One can conclude that it is desirable for charities to be independent from government. Aforementioned trends in deregistrations and questionable approaches taken by the regulator therefore provide a basis for recourse to the Court, to curb potentially excessive government interference and uphold the independent positioning of charities.

## **ii) Charities Registration Board: an independent body?**

To rebut these groundings for independence, one may highlight the independence of the CRB in relation registration decisions. Under section 8(4) of the Charities Act, each member of the Board is to “act independently in exercising his or her professional judgment” and is “not subject to direction from the Minister”. In principle, the Board is expected to limit the ability of short-term political agendas to sway its decisions and to base its decisions in principles of law.

Despite an expectation of independence, the Select Committee reported the following when registration functions transferred from the Charities Commission to the CRB in 2012:<sup>87</sup>

Some of us are convinced that the legislative safeguards provided in the bill would be insufficient to maintain the degree of independence that the Charities Commission provides.

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<sup>85</sup> Susan Elliott and David Haigh, “Advocacy in the New Zealand Not for Profit Sector: Nothing stands by itself” (Department of Social Practice, Unitec May 2012)  
<[www.communityresearch.org.nz](http://www.communityresearch.org.nz)>

<sup>86</sup> Alison Dunn, “Demanding Service or Service Demand - Charities, Regulation and the Policy Process” (2008) 71 Mod L Rev 247, 25.

<sup>87</sup> Crown Entities Reform Bill 2011 (332-2) (select committee report) at 4-5.

Prior to the Charities Act enactment, a recommendation was also made by the Select Committee that the Charities Commission be classified as an Autonomous Crown Entity, rather than a Crown agent (having a closer connection with the Government). It is perhaps ironic that now, the Commission's functions have been absorbed into a government department DIA-CS, with an even closer relationship to government. Similar concerns have been expressed regarding the perceived independence of the Charity Commission in England and Wales (see chapter four). Moreover, as Joskow observes, there is potential for political influence on independent regulators in which the staff of regulators become over-sensitive to political considerations and therefore "internalize" the will of the Executive.<sup>88</sup> There is no denying that the three-person decision-making Board comes from well-qualified and diverse backgrounds. Yet, one may justifiably be skeptical of their independence.

### **iii) The Court: a constitutional check**

The Court system provides a constitutional check on potentially unfounded influence that dissipates the walls of the Beehive to the CRB. A determination as to 'charitable purpose' is a judicial exercise, to which judicial recourse should be accessible and government influence countered. The necessity of maintaining the doctrine of the separation of powers in the area of charities is clearly articulated in an article by Rohan Price and John Kong Shan Ho. It is concluded that:<sup>89</sup>

Both Australia and Hong Kong need to give the judiciary a formidable role in the adjudication of charitable status, so that the charity commission of each jurisdiction, although an arm of the executive, can be checked in crucial cases.

The same concern to give the courts a "formidable role" is present in New Zealand. We should uphold the independence of charities and their voice as being independent from government. To do so, potential government influence as to the CRB's decision-making powers requires curbing and the community regard for the independence of the judiciary ensures the upkeep of a constitutional check.

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<sup>88</sup> Paul L Joskow "Market Imperfections versus Regulatory Imperfections" (20 June 2010) MIT Economics working paper, 9.

<sup>89</sup> Rohan Price and John Kong Shan Ho, above n 84, at 75.

### **C. Reason three: ‘charitable purposes’ and common law development**

A final reason why the right of appeal is so vital for charities is that the meaning of ‘charitable purpose’ rests in the common law. As noted, the analogy upon analogy approach has enabled the legal concept of ‘charity’ to develop over time. Although developments via the doctrine of precedent have been considered “evolutionary rather than revolutionary,”<sup>90</sup> the responsibility rests with the court. Charities with disputable purposes thus rely on judicial interpretation and analysis.

The reformulation of the legal concept of charity via statute has gained traction in overseas jurisdictions such as the UK, but not in New Zealand. Codification is broadly justified in terms of greater clarity surrounding the legal meaning of ‘charity’, which has critically been described as an “area riddled with arcane and archaic learning”.<sup>91</sup> Institutional criticisms could also be struck against the leeway given to courts. Some argue that as elected officials, legislators are better equipped to assess public benefit and balance competing interests.<sup>92</sup>

However, statutory development only offers a limited form of guidance in the UK and judicial interpretation as to ‘charitable purposes’ is still an imperative (see chapter four). There are also strong arguments in favour of retaining a common law definition. As mentioned, it is desirable for ‘charitable purposes’ to be kept distinct from ‘government purposes’. Moreover, writers like Adam Parachin consider statutory definitions to be inappropriate and his critique of radical reform in the UK espouses the view that, “we are better off counting our inherited common law definition of charities as a blessing”.<sup>93</sup>

The main point is that New Zealand has chosen to engrain in our legislation the common law conception of ‘charity’. The courts remain the source of the law on ‘charitable purpose’ and a corresponding responsibility exists to ensure that these purposes are in tune with modern society. The courts are to be wary of what Daniel Poirier deems the ‘living tree concept of

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<sup>90</sup> *Travis Trust v Charities Commission* (2009) 24 NZTC 23,273 at [20].

<sup>91</sup> P C Hemphill, ‘The Civil-Law Foundation as a Model for the Reform of Charitable Trusts Law’ (1990) 64 ALJ 404, 409.

<sup>92</sup> G E Dal Pont, above n 32, at 112.

<sup>93</sup> Adam Parachin “Charities Act 2011: dog’s breakfast or dream come true? A case for further reform” in Matthew Harding, Ann O’Connell and Miranda Stewart (ed) *Not-for-Profit Law: Theoretical and Comparative Perspectives* (Cambridge University Press, Cambridge, 2014) 134 at 138.



charity’, a responsibility to develop this field of law, in line with social change. This was clearly articulated by Williams J in *Travis Trust*.<sup>94</sup>

More recent New Zealand cases tend to support the idea of the concept of charitable purpose is evolving in response to changing circumstances and the steady development of a more unique New Zealand legal culture.

The evolution of ‘charity’ is thus a question of law, which the Courts are comfortable to involve themselves in, rather than policy. Parliament has chosen for it to remain this way. If opportunities for judicial discussion and analysis are excluded, then we are depriving the community of the benefit of regular guidance on an issue of utmost importance to the public interest.

### ***Conclusion***

The high number of deregistration decisions and strict approach being taken by the charity regulator in New Zealand raises the relevance of disputing decisions in the court. The necessary independence of the charitable sector against unfounded government influence, alongside the development of our engrained common law definition of ‘charitable purposes’, further necessitates an accessible route to justice for charities.

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<sup>94</sup> *Travis Trust v Charities Commission*, HC Wellington CIV-2008-485-1689, 3 December 2008 at [45].



## Chapter III. A Problematic Right of Appeal

In this chapter, I will outline various barriers for charities wishing to challenge decisions exercised under the Charities Act. This includes an overview of the appeal right in sections 59-61, followed by an analysis of procedural limitations in relation to evidence, the role of the Attorney-General, costs, timing and formality.

### A. Objections

If an organisation is denied charitable status, it will be given notice and a reasonable opportunity to make an objection<sup>95</sup> within 20 working days.<sup>96</sup> Objections are based on removal grounds not being satisfied or the removal of the entity working against the public interest.<sup>97</sup> Despite potential for the “public interest” test to act as an additional consideration, the component is currently an otiose feature.<sup>98</sup> Although DIA-CS encourages charities to make contact with it first, it is unlikely that its decision will be altered. If deregistration proceeds, the charity will be advised in report form, with reasons for the decision.<sup>99</sup> The deregistered charity is then left with the option to remain de-registered, re-apply or appeal. Deregistration will threaten the charity’s overall survivability. Re-application is a time-consuming ordeal that may prove futile if the entity wants to retain its proposed ‘charitable purposes’. Re-application also subjects a charity to a period of deregistration in which it is not exempt from income tax.<sup>100</sup> Finally, appealing the decision contains various procedural limitations, hidden within an appeal framework.

### B. Appeal Rights

The Ombudsmen Act 1975 applies to the Charities Registration Board<sup>101</sup> and members of the public can lodge complaints to this independent officer. However, this relates to maladministration issues and alongside judicial review,<sup>102</sup> is not discussed in this dissertation.

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<sup>95</sup> Charities Act, s 18(3)(c).

<sup>96</sup> Charities Act 2005, s 33(2)(d).

<sup>97</sup> Charities Act 2005, s 34.

<sup>98</sup> Susan Barker, above n 39, at 138.

<sup>99</sup> Charities Act 2005, s35(2)(a).

<sup>100</sup> Susan Barker, above n 39, at 170.

<sup>101</sup> Ombudsmen Act 1975, sch 1, pt 2.

<sup>102</sup> Charities Act, s 61(6)

The process by which to appeal the decisions of the charities regulator is set out in sections 59-61 of the Charities Act. Jurisdiction lies with the High Court, a significant alteration made at select committee stage. Under the original Charities Bill, appeals were to be heard in the District Court, whose decision was to be final.<sup>103</sup> However, numerous submissions were concerned that the definition of charitable purpose resides in equity, making the High Court the more appropriate forum. The High Court has power to make interim orders,<sup>104</sup> alongside wide powers to “make any other order that it thinks fit”<sup>105</sup> with regard to a charitable entity’s registered status.

There are consistency problems with sections 59-61. Under section 59(1) “a person who is aggrieved by a decision of the Board” may appeal to the High Court. However, in determining an appeal under section 61(1), the High Court may “confirm, modify, or reverse the decision of the Board or the chief executive or any part of it”. Although this dissertation focuses on registration powers, other powers exercisable under the Act (which extend beyond the Board) are contradictorily excluded under section 59(1) but included in section 61(1). For example, the chief executive can carry out an inquiry into charitable entities,<sup>106</sup> with the potential for information to be publicised on the basis of “serious wrongdoing”.<sup>107</sup> Publications and inquiries may cause significant damage to a charity’s reputation and if carried out unlawfully, should be included in the scope of challenge, with power to direct an end to the inquiry.<sup>108</sup> The discrepancy between section 59(1) and section 61(1) should therefore be remedied to extend the scope of appeal to include any power exercised under the Charities Act.

Deregistration nevertheless remains the main issue. In total, there have been thirteen appeals to the High Court under the Charities Act. Two of the charities have been reinstated: *Liberty Trust*<sup>109</sup> and *The Plumbers, Gasfitters and Drainlayers Board*.<sup>110</sup> More recently, the CRB was ordered to “reconsider its decision” with regard to *Family First*,<sup>111</sup> resulting in subsequent

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<sup>103</sup> Charities Bill 2004 (108-1), cl 67-69.

<sup>104</sup> Charities Act 2005, s 2.

<sup>105</sup> Charities Act 2005, s 61(4).

<sup>106</sup> Charities Act, s 50.

<sup>107</sup> Charities Act, s 55.

<sup>108</sup> Similar powers are granted to the Tribunal in the UK with regard to decisions of the same kind: Charities Act (UK) 2011, schedule 6.

<sup>109</sup> *Liberty Trust v Charities Commission* [2011] 3 NZLR 68 (HC) at [126].

<sup>110</sup> *Plumbers, Gasfitters & Drainlayers Board* [2013] NZHC 1986, at [64].

<sup>111</sup> *Re Family First New Zealand* [2015] NZHC 1493, at [102].

registration. The *National Council of Women of New Zealand Incorporated*<sup>112</sup> was also successful in its appeal to backdate the effect of reregistration. The decision played a role in shaping new tax provisions for deregistered charities<sup>113</sup> and is mentioned throughout this chapter as a case study. The appeal lodged by the *Foundation for Anti-Ageing Research*<sup>114</sup> challenged many technicalities of the appeal process in New Zealand and was further taken to the Court of Appeal.<sup>115</sup> Finally, the Supreme Court judgment in *Greenpeace*<sup>116</sup> dramatically altered the law of charity by removing a blanket “political purpose” exclusion that had previously precluded organisations with non-ancillary political purposes from attaining charitable status.

While not all appeals are considered a ‘success’ for the charity, these decisions have contributed to the development of the meaning of ‘charity’ and have paved the way for valuable judicial and external commentary. Within such an important public interest realm, it is concerning that cases have been so few.

## **C. Appeal Framework**

### **i) Evidence**

Determining charitable purposes requires analysis of critical matters of fact. In particular, the question of whether a purpose will or may operate for the public benefit is to be answered by forming an opinion on the evidence.<sup>117</sup> No specific procedure is outlined in sections 59-61. As the law currently stands, a full hearing of evidence is not available to charities on appeal, underlining a procedural barrier to accessing justice.

In *Canterbury Development Corporation*,<sup>118</sup> Ronald Young J held that appeals under the Charities Act fall within Part 20 *Appeals* of the High Court Rules (“HCR”), and are subject to HCR 20.16. This means that a party to an appeal may adduce further evidence only with leave

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<sup>112</sup> *National Council of Women*, above n 66.

<sup>113</sup> Susan Barker, above n 39, at 117-130.

<sup>114</sup> *Foundation for Anti-Aging Research and the Foundation for Reversal of Solid State Hypothermia v Charities Registration Board* [2014] NZHC 1153 (28 May 2014).

<sup>115</sup> *Foundation for Anti-Aging Research and the Foundation for Reversal of Solid State Hypothermia v Charities Registration Board* [2015] NZCA 449.

<sup>116</sup> *Re Greenpeace of New Zealand Incorporated* [2014] NZSC 105.

<sup>117</sup> *Molloy v Commissioner of Inland Revenue* [1981] 1 NZLR 688 (CA) at 695

<sup>118</sup> *Canterbury Development Corporation & Ors v Charities Commission* [2010] 2 NZLR 707 (HC), at [104]-[107].

of the court, granted in limited circumstances when “special reasons” arise. This approach was followed in subsequent cases, such as *Re Education New Zealand Trust*.<sup>119</sup> Therefore, a charity is to rely on the information provided to the CRB, to which an unfavourable decision was reached. Although leave to adduce further evidence has been granted in various instances,<sup>120</sup> an automatic right is absent and appeals are conducted as a re-hearing on the record. The impact can be noted in *Re Draco Foundation*, where no application to adduce further evidence was lodged and the decision repeatedly references a lack of evidence.<sup>121</sup> In the one Charities Act case where an application to adduce further evidence was refused, the charity was also disadvantaged by lack of evidence.<sup>122</sup>

The approach of a rehearing on the record has not always been in place. In the pre-Charities Act regime, charities law cases were determined under the statutory tax disputes process. If the matter did proceed to Court, evidence was not prevented from being adduced simply because it was not provided earlier.<sup>123</sup> For example, in *Latimer*, the Judge concluded that the “best approach is to consider the merits of the arguments raised in the first instance.”<sup>124</sup> Justice O’Regan also took a wide approach to attaining evidence of ‘charitable purpose’, looking beyond the Trust Deed to informal publications of the trust and “statutory setting.”<sup>125</sup> It is also noteworthy that appeals at the District Court level, the original forum proposed for hearing disputes, normally conduct a first instance de novo trial.<sup>126</sup>

The current interpretation of sections 59-61 as a rehearing on the record is disadvantageous to charities. Firstly, the CRB does not conduct a hearing before reaching a decision regarding a charity. This means that an oral hearing of evidence or cross-examination is effectively ruled out. This has since been reiterated in *Foundation for Anti-Aging Research*<sup>127</sup> where despite the appellant arguing that oral evidence would resolve disputed questions of fact, it was not permitted. Preventing the option to elect an oral hearing (unless in “exceptional

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<sup>119</sup> *Re Education New Zealand Trust* (2010) 24 NZTC 24,353 (HC), at [63].

<sup>120</sup> See for example: *Re Greenpeace New Zealand Inc*, above n 18, [28]-[33]

<sup>121</sup> *Re Draco Foundation* (NZ) Charitable Trust (2011) NZTC 20,033 (HC), at [26], [32], [77].

<sup>122</sup> See *Re New Zealand Computer Society Incorporated* (2011) 25 NZTC 20-033 (HC) at [79].

<sup>123</sup> Susan Barker “Appealing Decisions of the Charities Regulator” (paper presented to the Auckland District Law Society Seminar, Auckland, April 2014) at 31.

<sup>124</sup> *Latimer v Commissioner of Inland Revenue* [2002] 1 NZLR 535, at [30].

<sup>125</sup> *Latimer*, above n 124, at [34].

<sup>126</sup> *Shotover Gorge Jet Boats Ltd v Jamieson* [1987] 1 NZLR 437 (CA), at [440].

<sup>127</sup> *Foundation for Anti-Aging Research*, above n 114, at [68]; *Foundation for Anti-Aging Research*, above n 115, at [59].

circumstances”)<sup>128</sup> limits the scope of information gathering and blocks an avenue for transparent justice. It is also at odds with HCR 9.51 where evidence is to be given orally if there are disputed questions of fact, common in charity cases.

Furthermore, the charities regulator is not bound by the rules of evidence and it is clear that many decisions have been based on “web dredges” of the Internet.<sup>129</sup> These may be inaccurate or wrongly interpreted, yet the charity has no opportunity to respond. There is also no certainty that information provided by a charity will be considered by the regulator before it reaches its decision. In addition, the requirement for leave to adduce additional evidence seems contradictory with the broad powers conferred on the Court by the Charities Act. Finally, as the appellant pointed out in *Re Education Trust*, modestly resourced charities cannot be expected to put forward to the CRB as much material as would be expected in a High Court trial.<sup>130</sup>

In summary, the currently narrow approach of the Courts denies charities the opportunity to adduce further evidence without leave removes oral forms of story-telling and subjects charities to a non-evidence bound approach by the CRB. A de novo hearing, in which matters are heard afresh and oral hearings/ cross-examination are permitted, is preferable (see chapters four and five).

## ii) Role of the Attorney-General

Historically, one of the Attorney-General’s (“AG”) core functions is to act as the protector of charities.<sup>131</sup> In *Kaikoura County*, the Court considered that:<sup>132</sup>

It seems generally desirable that the Attorney General should be a party at least to any action concerning a charitable trust of substantial value for the benefit of the general public or a section of them.

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<sup>128</sup> *Foundation for Anti-Aging Research*, above n115, at [51].

<sup>129</sup> *Re Greenpeace New Zealand Incorporated* [2012] NZCA 533 at [31], [32] and [92].

<sup>130</sup> *Re Education*, above n 119 [61].

<sup>131</sup> *Potts v Turnley* (1849) 1 Ir Jur (os) 57 in Tudor, *Charities* (9<sup>th</sup> ed, Sweet & Maxwell, London, 2003) at 381.

<sup>132</sup> *Kaikoura County v Boyd* [1949] NZLR 233 (SC) at 262.

More recently, the 2014 *Briefing to the AG*<sup>133</sup> recognises on paper the Law Officers' responsibility to charities. It captures both the need to protect charitable purposes as well as scrutinising charitable bodies, "in the public interest". Because about half of New Zealand registered charities are trusts,<sup>134</sup> it is further relevant that the AG can "examine and inquire into all or any charities in New Zealand"<sup>135</sup> and his initial approval is required of a scheme amendment under Part 3.

However, post-enactment of the Charities Act there is little evidence that the AG has carried out its ancient *parens patriae* role, particularly regarding registration issues.<sup>136</sup> Charities law is clearly public interest law but the AG has not been joined as a party in any case to date. In *Foundation for Anti-Aging Research*, the appellants were uniquely successful in directing that the AG be served, in novel issues surrounding the treatment of "new science" in charities law. Williams J noted that, "whether the Attorney-General wishes then to apply to intervene is a matter entirely for him."<sup>137</sup> No subsequent action was taken on behalf of the AG. Upon asking the AG in person whether he has had much involvement with charities, he responded that the role was historic and could only recall one instance, related to a one-off trustee inquiry, rather than any registration or litigation issues.<sup>138</sup>

### iii) Costs and Legal Representation

There is an inextricable link between cost and access to the court system. For charities, filing fees constitute a specific expense-related barrier. It costs \$540 to lodge an appeal and \$500 for an interlocutory application, such as an application to adduce further evidence.<sup>139</sup> The Ministry of Justice ("MoJ"), which sets fees, completed a comprehensive review of civil fees in courts and tribunals in 2012.<sup>140</sup> The review recognised the fundamental importance of access to justice but also, appropriate cost recovery in light of frivolous applications and

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<sup>133</sup> Crown Law "Briefing to the Incoming Attorney-General" <[www.crownlaw.govt.nz](http://www.crownlaw.govt.nz)> at 148-149.

<sup>134</sup> Vickia Munsden "Variation of Charitable Trust" (13 October 2013) Matters of Trust <[www.mattersoftrust.co.nz](http://www.mattersoftrust.co.nz)>

<sup>135</sup> Charitable Trusts Act 1957, s 58.

<sup>136</sup> Kerry O'Halloran *Charity Law and Social Inclusion: An International Study* (1<sup>st</sup> ed, Routledge, New York, 2007) at 293

<sup>137</sup> *Foundation for Anti-Aging Research*, above n 115, at [72]

<sup>138</sup> Honours students were invited to an afternoon with the Attorney-General in September 2015 where we each posed a question relating to our dissertation topic.

<sup>139</sup> Ministry of Justice "Table of Court Fee and Charges" (1 July 2013) Ministry of Justice <[www.justice.govt.nz](http://www.justice.govt.nz)>.

<sup>140</sup> Cabinet Social Policy Committee "Civil fees review" (1 July 2013) CAB (12) 34/4.

private benefits. The irony for charitable organisations is that they are seeking to prove a *public* benefit. Their special place in the public interest realm was not recognised in the review.

In the *National Council of Women* preliminary interlocutory matter, Clifford J drew a connection between a need for lower costs in charity law. He said that there was a “real public interest” in the Council’s work calling for an economically efficient streamlining of two separate proceedings into one final hearing.<sup>141</sup> It is unfortunate that this differential treatment for charities in litigation has not been recognised by the MoJ in their setting of court fees. The case was also uniquely significant with respect to Dobson J’s “provisional view” that the Council was deserving of an award of costs from the charities regulator.<sup>142</sup> This is the only case in which costs have been discussed under the Charities Act.

Additional to filing fees is the financially burdensome nature of legal representation. Elizabeth Bang from the National Council of Women comments that it was unlikely the Council would have proceeded with its appeal without the pro bono work of charity lawyer Susan Barker.<sup>143</sup> It is also worth noting that charities uniquely face high levels of public accountability. Members of the public that support a particular group may legitimately be concerned when money is spent on court processes, rather than charitable purposes. This feature came to light when speaking with Rob Schuckard from Sustain our Sounds Incorporated, which was denied charitable status in 2013. He says “the time to take an attitude to environmental issues is more important to us than dealing with the status of charitable or not”.<sup>144</sup> In sum, charities are reluctant litigants, due to various cost impediments.

#### **iv) Timing and Formality**

Charities have 20 working days to file High Court proceedings from the date of the decision.<sup>145</sup> New tax rules allow the income tax exemption to remain while the proceedings occur but this does not equate with registration and interim restoration must be applied for

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<sup>141</sup> *National Council of Women*, above n 66, at [43].

<sup>142</sup> *National Council of Women*, above n 66, at [81].

<sup>143</sup> Interview with Elizabeth Bang, above n 53.

<sup>144</sup> Interview with Rob Schuckard, Sustain Our Sounds Science Director (the author, telephone call, 26 June 2015).

<sup>145</sup> Charities Act 2005, s 59(2).



separately.<sup>146</sup> A charity may apply for an extension of time to appeal under s59 (2)(b) of the Charities Act and such an application must also be made to the High Court. There is no specific time limit on the ability to seek a time extension and the Court has an “open-ended discretion”.<sup>147</sup>

Overall, the short-time period to file an appeal acts as a significant barrier to charitable groups. These entities are often run by a board of volunteers and require unanimity in decisions, especially those relating to costly legal action. Twenty days is not enough to consult within groups, let alone to consult a lawyer. As Susan Barker states, “in practice, this is simply an impossible timeframe in many cases”.<sup>148</sup>

Moreover, the time taken to execute proceedings is likely to deter charities from filing an appeal. The decision of the *National Council of Women* bought to a close a battle for charitable registration under the Charities Act that had lasted more than six and a half years.<sup>149</sup> The Council instructed a lawyer in April 2012, with a final resolution in their favour being issued on 12 December 2014.

More broadly, a study on civil case progression times has outlined an increasing concern that civil cases take too long to resolve,<sup>150</sup> leading to a perceived ‘crisis’ in civil litigation.<sup>151</sup> Although variation in civil litigation is noted, the need for charities to move quick to lodge an appeal, followed by a potentially lengthy response by the Court, undoubtedly dissuades charities from challenging the regulator.

Timing restraints and lengthy procedures further underline the formalistic nature of the High Court, which may dissuade charities who are unfamiliar with or intimidated by large-scale civil litigation in the context of their often small-scale, community groups.

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<sup>146</sup> See *Re Queenstown Lakes*, above n 22, at [3]; *Plumbers, gasfitters & Drainlayers Board*, above n 110, at [7].

<sup>147</sup> *National Council of Women*, above n 66, at [26].

<sup>148</sup> Susan Barker, above n 123, at 49.

<sup>149</sup> Susan Barker *National Council of Women Litigation- Part One* (Taxation Today, Issue 81, 17 March 2015)

<sup>150</sup> Rachel Laing, Saskia Righarts, Mark Henaghan *A Preliminary Study on Civil Case Progression Times in New Zealand* (University of Otago Legal Issues Centre Faculty of Law, 15 April 2011) at 6.1.

<sup>151</sup> Anthony Grant “Courts- Is the High Court’s Civil Jurisdiction in ‘a Death Spiral’ (Part 2)” <[www.anthonygrant.com](http://www.anthonygrant.com)>

### ***Conclusion***

Lord Neuberger<sup>152</sup> recently noted that “an effective procedure for getting a case before the courts” constitutes a crucial component of access to justice.<sup>153</sup> Unfortunately, for charities in New Zealand, features of the appeal framework relating to evidence, the AG’s role, costs and timing create procedural impediments that inhibit cases from reaching the courts.

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<sup>152</sup> President of the Supreme Court of the United Kingdom.

<sup>153</sup> Lord Neuberger *Justice in an Age of Austerity* (Tom Sargant Memorial Lecture, 15 October 2013) at 31.

## Chapter IV. Charity Tribunal in England and Wales



This chapter will shed light on potential solutions to the procedural barriers laid out in chapter two by exploring the legal framework for charities in England and Wales. In particular, the Charities Act (UK) 2006 paved the way for a new Charity Tribunal to hear appeals against the Charity Commission of England and Wales. Its operational commencement in March 2008 marked a “new era of justice”.<sup>154</sup>

### A. Overview of the legal framework in England and Wales

The Charities Act (UK) 2006 (now consolidated in the Charities Act (UK) 2011) constituted “radical reform”<sup>155</sup> in the field of charities in England and Wales. It was intended to reduce bureaucracy and to modernise the definition of “charitable purpose”, to increase accountability of the Charity Commission and to maintain public trust in charities.<sup>156</sup>

Relevant changes included:

- A new statutory definition of ‘charity’<sup>157</sup> and the enlargement of the four common law heads of charity, with the listing of thirteen ‘charitable purposes’;<sup>158</sup>
- The abolition of an alleged ‘presumption’ of public benefit, so as to procure a level playing field for charities;
- A definition of public benefit derived from continuously reviewed guidance from the Charity Commission for England and Wales;
- **An independent charity appeal Tribunal;**
- A reconstituted Charity Commission with wider enjoined objectives<sup>159</sup> and powers.

These changes highlight differences between New Zealand’s and England and Wales’ regulatory frameworks. The newly established Charity Commission (“the Commission”) has a notably wider mandate than the CRB in New Zealand. In particular, the Commission’s task of providing guidance as to the ‘public benefit’ requirement illustrates an extension of powers

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<sup>154</sup> Phil Hope Minister of the Office of the Third Sector in the Cabinet Office “Charities given means to challenge commission rulings” (18 March 2008) Politics UK < [www.politics.co.uk](http://www.politics.co.uk) >

<sup>155</sup> Hubert Picarda, above n 93, at 134.

<sup>156</sup> “Charity law and regulation” (7 May 2008) Cabinet Office <[www.cabinetoffice.govt.uk](http://www.cabinetoffice.govt.uk)>

<sup>157</sup> Charities Act 2011 (UK), s 1.

<sup>158</sup> Charities Act 2011 (UK), s 3.

<sup>159</sup> Charities Act 2011 (UK), s 14.

into the judicial realm, which has resulted in subsequent academic critique<sup>160</sup> and judicial challenge.<sup>161</sup> While registration is similarly a key aim,<sup>162</sup> the Commission has additional powers such as suspending a person's membership of a charity<sup>163</sup> or enforcing a charity name change.<sup>164</sup> The list of appealable decisions is therefore wider in scope.<sup>165</sup>

As of June 2015, there were 164,603 registered charities in England and Wales with a total annual income of 68.22 billion pounds.<sup>166</sup> This is approximately six times our figure and 25 new applications for charitable status are received each day.<sup>167</sup> The lighter-touch approach taken by the regulator<sup>168</sup> contrasts to what experts have criticised as a narrow and strict approach in New Zealand. Nevertheless, recourse to a Tribunal is still seen to be an important feature of charity justice.

## **B. Charity Tribunal Overview**

The establishment of a Charity Tribunal, to hear appeals against the Charity Commission, was a major innovation.<sup>169</sup> Previously, the right of appeal was to the High Court and was rarely exercised. The proposal for a specialist Tribunal was developed in the *Deakin Report*<sup>170</sup> with final recommendations enshrined in the *Strategy Unit Report*.<sup>171</sup> Despite the existence of an internal complaint system and an Independent Complaints Reviewer ("ICR") (similar to an external Ombudsman), the importance of a right of independent appeal was recognised.

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<sup>160</sup> See Peter Luxton "Opening Pandora's box: the Upper Tribunal's decision on public benefit and independent schools" (2012) 15.3 CLPR 27-53.

<sup>161</sup> *Independent Schools Council v The Charity Commission for England and Wales* [2011] UKUT 421 (TCC)

<sup>162</sup> Charities Act 2011 (UK), s 15, ss 29-30.

<sup>163</sup> Charities Act 2011 (UK), s 83(2)

<sup>164</sup> Charities Act 2011 (UK) s 42.

<sup>165</sup> Charities Act 2011 (UK), pt 17, sch 6.

<sup>166</sup> Charity Commission "Recent charity register statistics Charity Commission" (30 June 2015) <www.gov.uk>

<sup>167</sup> Peter Luxton *The role of the Charity Commission and "public benefit": post legislative scrutiny of the Charities Act 2006* (House of Commons, Third Report of Session, 21 May 2013) at 3.

<sup>168</sup> Alison McKenna "Charity Tribunal for England and Wales" in Matthew Harding, Ann O'Connell and Miranda Stewart (ed) *Not-for-Profit Law: Theoretical and Comparative Perspectives* (Cambridge University Press, Cambridge, 2014) 336 at 344.

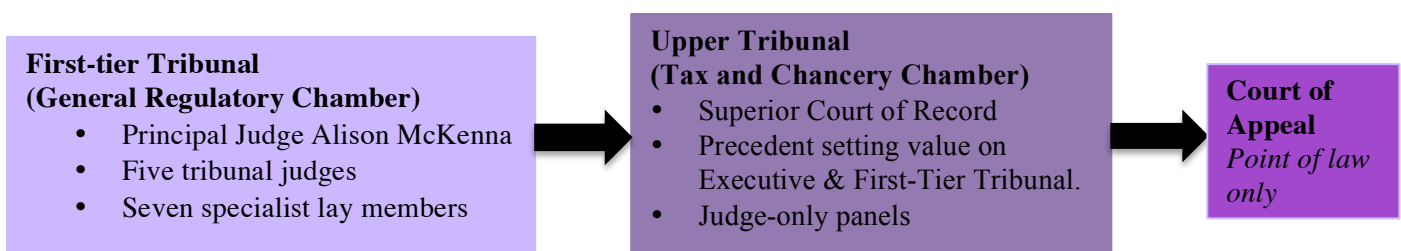
<sup>169</sup> Charities Act (UK) 2011, sch. 6.

<sup>170</sup> Campbell Robb *Voluntary Action: Meeting the Challenges of the 21<sup>st</sup> Century ('Deakin Report')* (London: NCVO, 1996)

<sup>171</sup> Strategy Unit *Private Action, Public Benefit. A Review of Charities and the Wider Not-For-Profit Sector* (Strategy Unit, Cabinet Office, London, September 2002), at 84.

A Charity Tribunal was to fulfill two core aims: “alleviating undue expense and delay” and “ensuring that the law of charity keeps pace with developments in society”.<sup>172</sup> Shortly after enactment in September 2009, the Tribunal was absorbed into a new Tribunal Service in the United Kingdom,<sup>173</sup> containing a two-tiered structure and organised into administrative chamber units. The framework covers a far more extensive field than New Zealand Tribunals (including for example gambling appeals and information rights). Reform was to achieve “a system that is independent, coherent, professional, cost-effective and user-friendly”.<sup>174</sup>

The Charity Tribunal transferred functions to the General Regulatory Chamber within the First-tier Tribunal (Charity) (“First-Tier Tribunal”). Appeals on a point of law are heard in the Tax and Chancery Chamber of the Upper Tribunal (“Upper Tribunal”), with provision for some cases to be ‘fast-tracked’ in suitable situations.<sup>175</sup>



### **i) Appealable and reviewable matters**

The Tribunal’s jurisdiction is restricted to legal issues. Other complaints can enter the Commission’s ICR process. It is not necessary for a charity to exhaust the Charity Commission’s ICR process prior to applying to the Tribunal. There are three distinct types of applications: appeals, reviews and references.<sup>176</sup>

#### **a) Appeals**

The list of decisions, directions or orders of the Commission susceptible to appeal or review includes some fifty forms. The list and the translatable powers of the Tribunal are outlined in schedule 6. To take one example, the decision of the Commission to remove an institution

<sup>172</sup> Strategy Unit, above n 171, at 7.72 and 7.74.

<sup>173</sup> Tribunals Courts and Enforcement Act 2007 (UK).

<sup>174</sup> Sir Andrew Leggatt “The Leggatt Report on the Review of Tribunals” (16 August 2001) <[www.tribunalsreview.org.uk](http://www.tribunalsreview.org.uk)> at 1.

<sup>175</sup> Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 r 19.

<sup>176</sup> Charities Act 2011 (UK), s 315(2).

from the register is subject to appeal. The persons who can bring the appeal are: the charity trustees of the institution; the institution itself (if a body corporate); and any other person who is or may be affected by the decision. The Tribunal has the power to quash the decision and (if appropriate) remit the matter to the Commission.<sup>177</sup>

### ***b) Reviews***

In certain cases, the Tribunal may consider applications to review matters in the same way as the High Court would consider an application for judicial review.<sup>178</sup> The most common review application has involved the Charity Commission's decision to open a statutory inquiry into a charity.<sup>179</sup> These are outside the scope of this dissertation.

### ***c) References***

References are a unique feature of the Tribunal, recommended by the Joint Committee that examined the Charities Bill.<sup>180</sup> Either the AG or the Charity Commission (with consent of the AG) may refer questions relating to charity law to the Tribunal for interpretation without individual charities having to incur the costs of pursuing a specific case. A question must either arise in connection with the exercise of the Commission and its functions or involve the operation of charity law in any respect or the application of charity law to a particular state of affairs.<sup>181</sup> The two references so far have been fast-tracked to the Upper Tribunal.

## **C. Features of the Charity Tribunal**

In her review of the Charity Tribunal in 2010, Debra Morris reflects, "enhanced access to justice is an eagerly anticipated positive outcome of its introduction".<sup>182</sup> Features of the Charity Tribunal indicate some options to incorporate into a new, accessible appeals framework in New Zealand.

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<sup>177</sup> Charities Act 2011 (UK), column 3 of sch 6.

<sup>178</sup> Charities Act 2011 (UK), s 321(4).

<sup>179</sup> Alison McKenna "Response to Joint Committee on the Draft Protection of Charities Bill, Appendix 5: The Charity Tribunal, Letter from the Chairman to the Lord Chief Justice" (7 January 2015) at 1.6.

<sup>180</sup> Joint Committee on the Draft Charities Bill *Report: The Draft Charities Bill Vol 1* (HL 167-I/HC 660-I) London: TSO, September 2004, at [241].

<sup>181</sup> Charities Act 2011 (UK), s 235(1), s 326(1).

<sup>182</sup> Debra Morris "The First-tier Tribunal (Charity): Enhanced Access to Justice for Charities or a Case of David versus Goliath" (2010) 29(4) CJQ 89-108 at 493.

### **i) Evidence**

The treatment of evidence within the Tribunal structure is different from New Zealand. In determining an appeal, the Tribunal shall consider de novo the direction or order appealed against, and may take into account evidence, which was not available to the Charity Commission.<sup>183</sup> The Tribunal may also admit evidence whether or not the evidence would be admissible in a civil trial in the UK.<sup>184</sup>

In *Full Fact*, additional evidence submitted to the Tribunal was clearly helpful in reaching its conclusion that current objects were non-charitable but that alterations, in line with the methodology appropriate to the provision of education, could alter the outcome.<sup>185</sup>

Hearings also contrast to New Zealand by including witness procedures<sup>186</sup> and allowing for oral submissions.<sup>187</sup> It is further positive to note that in cases of litigants in person, the usual order of proceedings is commonly reversed, giving the appellant the advantageous position of responding to the Commission's counsel.<sup>188</sup>

Overall, the approach to evidence is far more flexible, with a statutory obligation to hear matters afresh.

### **ii) Development of charity law: references**

The ability of the AG and Commission to bring references to the Tribunal is an innovative feature that is likely to enhance the development of "charity law"<sup>189</sup> in England and Wales. While only two references have been made, they have resolved contentious legal issues.

In *Independent Schools Council*<sup>190</sup> the Upper Tribunal withdrew parts of the Charity Commission's guidance in relation to the 'public benefit' test and clarifications were made

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<sup>183</sup> Charities Act 2011, s 317(2).

<sup>184</sup> Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 r.15(2)(a).

<sup>185</sup> *Full Fact v The Charity Commission for England & Wales* in the First-Tier Tribunal Case No. CA/2011/0001 at 6.2.4.

<sup>186</sup> Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 r 15(3)(a), r 16.

<sup>187</sup> Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009, r 6.

<sup>188</sup> See for example *Maidment v Charity Commission* [2009] UKFTT 377 GRC.

<sup>189</sup> Defined widely in Charities Act 2011, s 331.

<sup>190</sup> *R. (Independent Schools Council) v. Charity Commission for England and Wales* [2011] UKUT 421 (TCC)

that “more than a token benefit” to the poor must be met. In *Benevolent Funds*,<sup>191</sup> the charitable status of charities for the relief of poverty, where beneficiaries were connected by close-tie relationships was confirmed.

References are very democratic and inclusive. When the reference is published, charities that may be affected are able to make submissions or join as parties, and the relevant information is available on the Internet. In the *Benevolent Funds* reference, forty charities made submissions. By the time of the hearing there were eleven parties and nineteen interveners. The judgment recognised that “many charities were keen to have their say in those circumstances and the process of allowing so many of them to intervene was intended to facilitate this”.<sup>192</sup>

Although Hubert Picarda is critical of the approach, considering charity interveners as a ‘distraction’, I side with Principal Judge McKenna’s view that references are a positive development within the Tribunal structure.<sup>193</sup> The common law roots of ‘charity law’ necessitate judicial activism and development. The ability to incorporate a wide range of charity viewpoints ensures that such development pays tribute to grassroots awareness, to establish judicial interpretations that are in tune with modern society.

The reference procedure and the potential removal of AG permission for the Commission to seek a reference, as well as potential remedies,<sup>194</sup> are currently under review via the Law Commission Project in Charity Law.<sup>195</sup> It is unfortunate that provision for statutory review is absent in New Zealand’s charity law framework.

### **iii) Role of the Attorney-General**

In England and Wales, the role of the AG as *parens patriae*, the protector of charities on behalf of the Crown, has more breadth. In Tribunal cases, the AG may himself initiate appeals

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<sup>191</sup> *Attorney General v. Charity Commission for England and Wales* [2012] UKUT 420 (TCC) (20 February 2012).

<sup>192</sup> *Attorney General v Charity Commission*, above n 191, at [9].

<sup>193</sup> Alison McKenna, above n 168 at 353.

<sup>194</sup> References are currently an advisory opinion in administrative law terms only. What discretion is afforded to the Charity Commission in giving effect to the Tribunal’s decision is an area for further consideration.

<sup>195</sup> Law Commission *Technical Issues in Charity Law* (UKLC 220 2015).



or reviews captured by schedule 6.<sup>196</sup> He or she may also at any stage of any appeal be sent the necessary papers in the proceedings<sup>197</sup> to assist the Tribunal with any questions arising in proceedings. Further, he or she may be joined as a party to any onward appeal from the First-tier Tribunal to the Upper Tribunal, whether or not he or she was party to the original proceedings. Finally the AG has an influential role in initiating references.

The AG has intervened at the instigation of the Tribunal in one case, offered assistance in one other and has made two references. Principal Judge McKenna says:<sup>198</sup>

The involvement of the Attorney-General has proved extremely useful to the Tribunal thus far, but it is, of course, difficult to predict how frequently his powers will be exercised in the future.

As with New Zealand, there is a large disparity between the AG's perceived role and his or her actual role in charities. Nevertheless, the AG has greater potential for positive influence than in New Zealand.

#### **iv) Costs and Legal Representation**

The largest perceived benefit of the Tribunal is a low-cost avenue for appeal. In general, charities cannot afford or are understandably unwilling to take expensive legal action. An applicant's online application has no fee and opting for a hearing to be determined on the papers is a "cost-effective option".<sup>199</sup>

Provision is also made for self-representation. Principal Judge McKenna commends the First-tier Tribunal's "more proactive approach to assisting the appellants to present their case effectively."<sup>200</sup> She, alongside Kenneth Dibble Chief Legal Adviser to the Charity Commission, hope that more litigants in person appear. Roger Thomas an exemplar litigant reflects "not having legal representation meant I had to do a lot of preparation, but the

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<sup>196</sup> Charities Act 2011 (UK), s318(4).

<sup>197</sup> Charities Act 2011 (UK), s318(2).

<sup>198</sup> Alison McKenna "Strike-Outs, Transfers and Elevations: Is the Charity Tribunal Fit for Purpose?" (Speech to Charity Law & Policy Unit, Liverpool University Law School, 18 November 2010) at 10.

<sup>199</sup> Kenneth Dibble "Mind the pennies- using the Charity Tribunal" (2 July 2013) Solicitors Journal <[www.solicitorsjournal.com](http://www.solicitorsjournal.com)>

<sup>200</sup> Alison McKenna, above n 168, at 301.

Tribunal was supportive of me representing myself”.<sup>201</sup> He was successful in his appeal against a scheme made by the Commission.<sup>202</sup>

In situations where legal representation is necessary, the practical issue of costs has been alleviated by discussions between the Chancery Bar Association and the Bar Pro Bono Unit, to assemble a specialist panel to offer pro-bono help to appellants.<sup>203</sup> This development is an encouraging feature of the new Tribunal, especially for smaller charities.

The Tribunal also has the power to order costs in limited circumstances.<sup>204</sup> Aside from wasted costs, it may make an order if a party has acted unreasonably in bringing, defending or conducting the proceedings, or it considers that the decision, direction or order of the Commission in relation to the proceedings to be unreasonable.

However, the power to award costs is limited and a strict approach has been adopted even when the case has been decided in the charity’s favour.<sup>205</sup> Moreover, lack of legal representation is a vexed issue (see chapter five). Costs remain a practical barrier for taking appeals and many are unconvinced of significant cost changes from previous High Court appeals, considering the same complex job is at stake.<sup>206</sup> William Shawcross states, “the Tribunal is turning out to be more expensive than I think parliament envisaged”.<sup>207</sup> The Charity Law Association also reported the Tribunal to be “slow and expensive”.<sup>208</sup> Moreover, the Commission is well resourced with in-house lawyers costing £3,000 to £5,000 for each Tribunal case.<sup>209</sup> Charities inevitably feel pressures to match the financial commitment of the

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<sup>201</sup> “Analysis: the charity tribunal- has it been a success?” (5 November 2013) Third Sector Review <[www.thirdsector.co.uk](http://www.thirdsector.co.uk)>

<sup>202</sup> *The case of Roger Thomas* CA/2012/0001 (20 April 2012).

<sup>203</sup> By October 2008 the Chancery Bar Association had already assembled a panel of about ten lawyers to offer pro-bono help to appellants to the Tribunal: “Tribunal Calls for More Free Help” (October 8, 2008) Third Sector <[www.thirdsector.co.uk](http://www.thirdsector.co.uk)>

<sup>204</sup> Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009, r 10.

<sup>205</sup> *Nagendram Seevaratnam v Charity Commission* [2009] UKFTT 393 GRC.

<sup>206</sup> See for example Kenneth Dibble, above n 199.

<sup>207</sup> House of Commons Public Administration Select Committee *The role of the Charity Commission and “public benefit”: post-legislative scrutiny of the Charities Act 2006: Charity Commission Response to the Committee’s Third Report of Session 2013-14* (House of Commons, HC 927, 18 December 2013) at 32

<sup>208</sup> Daniel Lombard “Analysis: Review of the Charities Act 2006” (24 April 2012) Third Sector <[www.thirdsector.co.uk](http://www.thirdsector.co.uk)>

<sup>209</sup> Joint Committee on the Draft Charities Bill 2004, Minutes of Evidence, Examination of Witnesses (Questions 700-719).

Commission and to be represented in the best possible way. For example, the first case that was heard before the Tribunal cost the charities involved £120,000.<sup>210</sup>

In sum, the major policy goal of the Tribunal in reducing costs for charity applicants is still fraught with underlying difficulties. The challenge is to encourage charities to use the Tribunal in a cost effective way.

#### **v) Timing and Informality**

Tribunals are characteristically quasi-inquisitorial, expeditious and informal. The overriding objective of the Tribunal's procedural rules, "to enable the First-tier Tribunal to deal with cases fairly and justly"<sup>211</sup> encourages such an approach. Moreover, the Tribunal has significant case management powers. Positively, informality acts as an incentive to encourage charities to bring forward cases.

The process of appeal is evidently less daunting than embarking on a High Court trial. A charitable organisation simply fills out an online application form within 42 days from the Charity Commission's decision<sup>212</sup> (nearly double the time granted in New Zealand). The Tribunal also has power to consider an appeal that is out of time.<sup>213</sup> The Commission then responds within 28 days and it is optional for the applicant to reply (within 28 days). If the charity does reply, the Commission has a further 14 days to refer to additional documents it wishes to rely upon. The Tribunal will then promptly issues 'directions', sometimes involving a telephone conference or an oral hearing. It is worth noting that the Upper Tribunal has encouraged the agreement of directions among the parties where possible.<sup>214</sup> In Principal Judge McKenna's words, "the expectation is that parties will co-operate with each other and with the tribunal so that there will not be an adversarial environment or tactical games employed".<sup>215</sup>

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<sup>210</sup> Paul Jump "Catholic charities face £120k legal costs after failed appeal to the Charity Tribunal" (16 June 2009) Third Sector <[www.thirdsector.co.uk](http://www.thirdsector.co.uk)>

<sup>211</sup> Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009, r 2.

<sup>212</sup> Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009, r 25(a)

<sup>213</sup> Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009, r 5(3)(a)

<sup>214</sup> *Dorset Healthcare NHS Foundation Trust v. MH* [2009] UKUT 4 (AAC) (8 January 2009) at [13].

<sup>215</sup> Alison McKenna "Notes for Alison McKenna's session on the First-tier Tribunal (Charity)" (paper presented to Charity Law Review Conference, Melbourne Law School, 25 September 2013) at [4.10].

A final public hearing takes place either orally or on the papers.<sup>216</sup> For final hearings the Tribunal usually sits in panels of three and are these are “kept as informal as possible”.<sup>217</sup> Due to the fact that the Rules allow for pre-hearing decisions to be given, pre-hearing reviews to be held and preliminary questions to be determined, it is likely that many cases will be settled before going to full hearing.<sup>218</sup>

Despite the quest for simplicity, Lord Hodgson’s review highlights a perception that the atmosphere at Tribunal hearings often resembles formal court proceedings and is not always “laymen friendly”.<sup>219</sup> For example, the first preliminary hearing before the Tribunal did not dispose of the appeal and took place over two days, involving five barristers.<sup>220</sup> The case was uniquely difficult but it, alongside Hodgson’s comments, indicates logistical challenges.

Nevertheless, compared to a High Court trial, Tribunal proceedings are concluded more briskly with an aim of less than thirty weeks.<sup>221</sup> Guidance to its procedure is also freely available on the Tribunal’s website.<sup>222</sup> Overall, flexible and informal features of proceedings indicate a valuable feature of Tribunals justice.

#### **vi) Cases so far: *Independent Press Regulation Trust***

The low turnover of charity cases by the Charity Tribunal is noted. The Tribunal has heard an average of seven cases a year since 2008, compared with the 50 each year that were predicted. Cases are so “few and far between” that comment was not considered necessary in the Senior President of Tribunals most recent report.<sup>223</sup>

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<sup>216</sup> Full Fact opted for a determination on the papers in *Full Fact v The Charity Commission for England & Wales* in the First-Tier Tribunal Case No. CA/2011/0001 at [5.3]; Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009, r 32.

<sup>217</sup> National Council Voluntary Organisations “Charity Tribunal: how it works and how you can use it” (1 February 2013) NCVO <[www.ncvo.org.uk](http://www.ncvo.org.uk)>

<sup>218</sup> Hubert Picarda QC *The Law and Practice Relating to Charities* (4<sup>th</sup> ed, Bloomsbury Professional, West Sussex, 2010) at 964.

<sup>219</sup> Lord Hodgson “Trusted and Independent: Giving charity back to charities” *Review of the Charities Act 2006* (London, The Stationery Office, July 2012) at [7.20].

<sup>220</sup> *Catholic Care (Diocese of Leeds) v Charity Commission* [2009] UKFTT 376 GRC at [21].

<sup>221</sup> Alison McKenna, above n 168, at 352.

<sup>222</sup> “Appealing against a Charity Commission decision about your charity” (17 November 2014) HM Courts and Tribunals Service <[www.charity.tribunals.gov.uk](http://www.charity.tribunals.gov.uk)>

<sup>223</sup> Sir Jeremy Sullivan “Senior President of Tribunals’ Annual Report 2015” (February 2015) <[www.judiciary.gov.uk](http://www.judiciary.gov.uk)>.

Nevertheless, the number of charity cases still amounts to double the appeals heard previously in the High Court.<sup>224</sup> Of the approximately 80 Tribunal decisions, three regard registration issues. This number may seem low but is likely attributable to the ‘lighter touch’ approach to regulation in which the Commission has extended charitable purposes in realms such as conflict resolution and promoting diversity.<sup>225</sup> Two out of three deregistration cases, *U-Turn UK*<sup>226</sup> and *Full Fact*,<sup>227</sup> were decided in favour of the Commission.

The most recent case *Independent Press Regulation Trust*<sup>228</sup> (“IPRT”) illustrates the advantages of Tribunal litigation. The case was brought to the First-tier Tribunal (Charity) by the trustees of IPRT, supported a Leveson-compliant regulator,<sup>229</sup> which would be established by the Impress Project (a press regulator in opposition to the one set up by newspaper and magazine publishers). The Commission denied registration on the basis that the regulator who the Trust was seeking to support was not yet in existence, creating a lack of certainty surrounding purpose.

The Tribunal concluded that the Commission was incorrect and that purposes were charitable, namely, promoting the ethical and moral improvement of the community. It was held that the charity sector was uniquely placed to assist in the goal of improving press practice. Specific procedural features assisted in forming this conclusion. For example, in evidence, the appellants included a report prepared by Dr Heawood as to the advantages of a Leveson compliant system of press regulation, which was not available to the Commission at the time of its decision. A de novo approach<sup>230</sup> and relaxed rules of evidence meant the Tribunal was content to heavily rely upon the report<sup>231</sup> and it was held to be persuasive in the public benefit

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<sup>224</sup> Third Sector Review, above n 201.

<sup>225</sup> Kerry O’Halloran “Charity law reforms: overview of progress since 2001” in Myles McGregor-Lowndes & Kerry O’Halloran (eds) *Modernising Charity Law: Recent Developments and Future Directions* (Cheltenham: Edward Elgar, 2010) at 53.

<sup>226</sup> *U-Turn UK CIC v. Charity Commission for England and Wales* unreported, First-tier Tribunal (Charity) (General Regulatory Chamber), 27 February 2012.

<sup>227</sup> *Full Fact v. Charity Commission for England and Wales* unreported, First-tier Tribunal (Charity) (General Regulatory Chamber), 26 July 2011.

<sup>228</sup> *Independent Press Regulation Trust v Charity Commission for England and Wales* (CA/2014/0022) (15 June 2015) at 28.

<sup>229</sup> Lord Justice Leveson has written a report which promotes an independent regulator for the Press. See: *Leveson Inquiry: Culture, Practices and Ethics of the Press* (December 2013) <[www.gov.uk](http://www.gov.uk)>

<sup>230</sup> Charities Act 2011, s 3194(a).

<sup>231</sup> The report is quoted at [18] and [19].

assessment.<sup>232</sup> The decision would arguably not have been reached without the availability of additional evidence, nor the accessibility of a Tribunal appeal.

### **vii) Judicial Specialisation**

Another potential benefit of the Tribunal system is the specialisation of the Judging panel. In the First-tier, there are five specialist Judges, alongside seven specialist lay members. In the Upper Tribunal, the Judge-only panel of the Tax and Chancery Chamber are familiar with charity law cases.

The Law Commission in New Zealand has recently looked at the issue of Judge specialisation in its review of the Judicature Act 1908.<sup>233</sup> It proposed the set-up of a commercial panel in the High Court, which has been incorporated into the Judicature Modernisation Bill via clause 18. The Chief High Court Judge will also have powers to establish other panels of High Court Judges for the purposes of dealing with proceedings other than commercial proceedings.<sup>234</sup> In the charity context there may be room for such a panel. Yet the Law Commission suggests that other panels or sub-sets are not justifiable at this stage.<sup>235</sup>

Judge specialisation is contentious. On the one hand, many view the breakdown of generalist Judges (especially in the High Court) critically. Specialisation creates major changes to the legal order, alongside practical concerns such as tampering with judicial appointments. Chief Justice Dame Sian Elias is famously opposed:<sup>236</sup>

The principles applied by our law are not confined into the compartments it is sometimes convenient for us to use. A sense of the reach and proportions of the whole body of law is necessary to maintain balance.

On the other hand, expert Judges would provide quality decision-making by virtue of familiarity and expertise. Cases would proceed more efficiently and there would be more

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<sup>232</sup> Above n 228, at [40].

<sup>233</sup> Law Commission *Review of the Judicature Act 1908: Towards a new Courts Act* (NZLC IP29 2012), at 10.

<sup>234</sup> Judicature Modernisation Bill 2015 (178-2), cl 18(3).

<sup>235</sup> Law Commission *Review of the Judicature Act 1908: Towards a new Courts Act* (NZLC IP29 2012), at 10.66

<sup>236</sup> Sian Elias “Transition Stability and the New Zealand Legal System” (OtaLawRw1, July 2004) at 475.

incentive to take disputes to Court, raising confidence in our legal system. Significantly, 84% of the New Zealand Bar Association supported judicial specialisation in some form in the lead-up to the Judicature Modernisation Bill.<sup>237</sup> Judicial specialisation provides a positive add-on to charity law.

### ***Conclusion***

The Charity Tribunal in England and Wales brings with it unique features that enhance a charity's access to justice, compared the High Court avenue of appeal in New Zealand. Although underlying issues of expedient justice remain (such as inevitable costs), alongside differences in New Zealand's legal framework, there is ample opportunity for advantageous features of the Tribunal to be implanted onto a New Zealand model.

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<sup>237</sup> Law Commission *Review of the Judicature Act 1908: Towards a Courts Act* (NZLC IP29 2012), at 10.29

## Chapter V. Proposal: A Charity Appeal Authority



This final chapter proposes reform measures to improve access to justice for New Zealand charities. First, I discuss the appropriate adjudicative forum for charities wishing to challenge decisions exercised under the Charities Act and I propose the establishment of a Tribunal forum, the Charity Appeal Authority. The Authority will sit in an already existing Tribunal, the Taxation Review Authority. Second, I will outline six proposed features of a new charity appeals framework. This includes a hearing of evidence *de novo*, judicial specialisation, a reference procedure, cost reductions, longer time frames and procedural informality.

### A. Forum

#### i) Option One: Retaining the High Court

There are many reasons to retain the High Court as the court of first instance for charities. The High Court has general jurisdiction and responsibility for the administration of justice throughout New Zealand.<sup>238</sup> As mentioned, the law of charity resides in equity and enters a familiar territory when exposed to the strong expertise of High Court Judges. It may therefore be inferred that Parliament's decision to retain the High Court as the court of first-instance at select committee stage reflects its experience in charitable cases.<sup>239</sup> Moreover, the High Court has since 1842 maintained constitutional significance in supervisory and administrative functions.<sup>240</sup> Appealing decisions of the CRB, like any judicial review action, is constitutionally significant and in the public interest realm. The higher adjudicative level of the High Court to any Tribunal also binds the CRB through the doctrine of *stare decisis*. Precedent-setting powers of the High Court are relevant to developing the law of charity, so that weight is given to judicial determinations and these are followed at an administrative level. Finally, cases in the High Court are high profile, attracting the attention of the New Zealand media and public. The prestige and status of a High Court judgment is thus noted and seemingly appropriate in the field of charity law.

Despite this, the HC is not currently an accessible forum for charities. Chapter three outlines numerous procedural failings, particularly in relation to evidence. The HCR are being strictly interpreted in a way that is unfavourable to charity applicants. The court's "inherent

<sup>238</sup> Judicature Act 1908, pt 1.

<sup>239</sup> *Foundation for Anti-Aging Research*, above n 115, at [47].

<sup>240</sup> Law Commission, above n 237, chpt 2.



jurisdiction”<sup>241</sup> is not being exercised to broaden the scope of powers, such as granting costs to successful charity applicants. Moreover, the High Court forum and its formalistic nature is intimidating and expensive, especially for smaller charities adverse to litigation. A lower-level tribunal will be more receptive to required change. As a Tribunal and creature of statute, there is more leeway to develop a procedural framework that encourages charities to bring forward cases and see their day in court.

## ii) Option Two: Introducing a Charity Appeal Authority

Any proposal for a new Charity Tribunal in New Zealand must take into account the extensive Tribunal Reform programme<sup>242</sup> that took place on the back of the Law Commission’s Unified Tribunal Framework project. Tribunal development in New Zealand has proceeded on an *ad hoc* basis since the nineteenth century.<sup>243</sup> Despite tribunals having wide-ranging features, defining characteristics are the exercise of an adjudicative function and independence.<sup>244</sup> Overarching goals of the tribunal system are public accessibility, informality and efficiency.<sup>245</sup> The underlying thread of the Law Commission’s findings is a concern toward the current tribunal system, which needs “overhaul and rationalisation”<sup>246</sup> into a unified framework. Although the government deferred large-scale structural reform in 2008 because of cost,<sup>247</sup> aspects of the Commission’s proposals have been re-visited in the introduction of the Courts and Tribunals Enhanced Services Legislation Bill (“CTEB”), which seeks (among other objectives) to establish a new Accident Compensation Corporation (“ACC”) Appeal Tribunal.<sup>248</sup>

The Cabinet Announcement of the CTEB was accompanied with a promise to finalise a set of best practice guidelines when seeking to establish new tribunals.<sup>249</sup> The promise has not yet been met but other sources provide direction. For example, Legislation Advisory Committee

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<sup>241</sup> This refers to a residual source of powers, which the court may draw upon when it is equitable to do so: Law Commission, above n 237, at [2.22].

<sup>242</sup> Office of the Minister for Courts “Tribunal Reform”(2007) Cab 13/1.

<sup>243</sup> Law Commission *Tribunals in New Zealand Issues Paper* (NZLC IP6, 2008) at 10.

<sup>244</sup> Law Commission, above n 243, pt 2.26

<sup>245</sup> Law Commission, above n 243, pt 2.22

<sup>246</sup> Law Commission, above n 243, pt 6.

<sup>247</sup> Office of the Minister for Courts “Courts and Tribunals Enhancements” (June 2014)

<[www.justice.govt.nz](http://www.justice.govt.nz)> at 12.

<sup>248</sup> Courts Minister Chester Burrows “Further Improvements to Tribunals Announced” (24 June 2014) National Party <[www.national.org.nz](http://www.national.org.nz)>

<sup>249</sup> Office of the Minister for Courts, above n 247, at 13.

(“LAC”) Guidelines state that new tribunals should relate to “a clearly defined jurisdiction, usually in a specialist field.”<sup>250</sup> Charity law is clearly a specialist field. The Law Commission’s Strategy Report<sup>251</sup> also develops a principled approach in establishing new tribunals. The following two questions are relevant:<sup>252</sup>

- 1) *Are there compelling reasons relating to the subject matter or process which require a tribunal?*
- 2) *If it is thought that a tribunal is required, can an existing tribunal deal with this matter, rather than creating a new one?*

As to question (1), chapter two makes the case that access to justice for charities is an imperative. Chapter three points out the numerous procedural issues with the current appeal right. In chapter four, the practicality and potential features of a tribunal (as demonstrated by the overseas jurisdiction of England and Wales) are underlined. Charities are reluctant litigants but challenges at the tribunal level will promote accessible justice, executive accountability and clarification over charity law issues. Thus, there are compelling reasons relating to the subject matter and process, which require a tribunal.

However, in light of recognised complexity and the considerable start-up and ongoing costs of a tribunal, the proposal for a new Charity Tribunal in New Zealand must be tempered with pragmatism. An opponent is likely to argue that the necessity of a new tribunal to deal with “large volumes of low level cases”<sup>253</sup> is absent. The number of would-be charities to bring forward cases on appeal is likely to be much lower than ACC claimants for example. In Scotland,<sup>254</sup> the intention to dis-establish the Scottish Charity Appeals Panel (“SCAP”) was announced in November 2008 on the basis that in three years of operation, SCAP had only

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<sup>250</sup> Legislation Advisory Committee Guidelines, chpt 17.

<sup>251</sup> Law Commission *Tribunals in New Zealand Study Paper* (NZLC SP20 2008), pt 9.

<sup>252</sup> Law Commission, above n 251, pt 9.6.

<sup>253</sup> This was recognised as a main purpose for which tribunals are established: Law Commission, above n 251, at 28.

<sup>254</sup> Scotland has a similar number of approximately 23,000 registered charities: Scottish Charity Register <[www.oscr.org.uk](http://www.oscr.org.uk)>

heard one appeal, despite an anticipated 50-100 appeals per year.<sup>255</sup> Perhaps these are indications that a similar tribunal in New Zealand will not have the desired traction.

In light of these concerns, point (2) becomes relevant. Rather than disregarding a tribunal, an existing tribunal may be able to deal with the matter. Despite a low number of cases in Scotland, 35 out of 36 responses to a Government Consultation Paper rejected future Scottish Charity Appeals being directed toward the Court of Session (highest civil court) and their Government has underlined a commitment to a lower-level alternative forum to the courts.<sup>256</sup> New Zealand should follow suit. The option to merge SCAP with another tribunal body was also put forward in the Government's consultation and the Charity Law Association submitted in agreement.<sup>257</sup> In New Zealand, a merger seems to be a similarly attractive alternative option. The Taxation Review Authority ("TRA") also appears to be an appropriate forum.

The TRA is our current specialist tribunal established to assess taxation disputes and Commission of Inland Revenue determinations.<sup>258</sup> The TRA sits at the same level in the judicial hierarchy as the District Court and operates as a Commission of Inquiry.<sup>259</sup> Although an experienced lawyer may be elected as the Authority,<sup>260</sup> a District Court Judge has taken post since 2012.<sup>261</sup> The Authority has undoubtedly developed expertise in considering tax issues, and due to the considerable overlap with charity law, further expertise would be welcome and accessible. A merger further seems appropriate considering the Upper Tribunal in England and Wales also specialises in charity and tax cases. When hearing charity appeals, the TRA would sit as a 'Charity Appeal Authority'.<sup>262</sup> This lower-level tribunal will provide the requisite access to justice that charities in New Zealand need.

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<sup>255</sup> "Options for Future Charity Appeals Route in Scotland: Consultation Report and Analysis of Responses" (September 2010) <www.gov.scot> at 2.

<sup>256</sup> Above n 255, at 24.

<sup>257</sup> Charity Law Association "Response to the Scottish Government's Consultation on Options for Future Charity Appeals Route in Scotland" (April 2010) <www.gov.scot> at 4.

<sup>258</sup> Taxation Review Authorities Act 1994, s 13.

<sup>259</sup> Taxation Review Authorities Act 1994, s 15.

<sup>260</sup> Taxation Review Authorities Act 1994, s 5(3).

<sup>261</sup> "Appointment of a Taxation Review Authority" (7 June 2012) 66 *New Zealand Gazette* 1820 at 1820.

<sup>262</sup> This concept was first proposed by Susan Barker: *The Law and Practice of New Charities in New Zealand* (1<sup>st</sup> ed, Lexis Nexis, Wellington, 2013) at 706.

Another advantage of the TRA is that taxpayers can choose to file proceedings to the TRA or straight to the High Court. There are also powers to have the case fast-tracked from the TRA to the High Court. This maintains the relevance of the High Court as a higher-level adjudicative body and its advantages as set out above.

In turn, there is the hope that beyond this dissertation's focus of registration issues, the Charity Appeal Authority's scope may be widened in the future to deal with broader litigation issues that arise for not-for-profits, where necessary. For example, the Law Commission's report on a New Act for Incorporated Societies outlines issues with enforcing constitutions of Incorporated Societies by way of the High Court and suggests a more practical and flexible alternative.<sup>263</sup> The Law Commission's recent and transformational review of the Law on Trusts also contained a *Fifth Issues Paper*<sup>264</sup> discussing options of introducing a new mechanism for trusts dispute resolution and decision-making outside of the courts. A Charity Appeal Authority could potentially provide a solution to these issues.

## **B. Features**

### **i) Judicial Specialisation**

The Charity Appeal Authority ("CAA") will consist of one, specialist Judge, with expertise in tax and charity law. Although this does not compare with the level of specialisation present in the multi-member panel of England and Wales' First-Tier Tribunal, it provides a necessary inroad into specialisation for a technical area of law.

The appropriateness of the specialist District Court Judge residing in the Tribunal may be assessed on the basis of two criteria: workload and quality. In terms of workload, the steady statistical evidence of a decline in taxation cases is noted<sup>265</sup> and the Authority's cases only take up approximately a quarter of her time.<sup>266</sup> There is therefore ample room to turn attention to charity cases. The quality of the judgment may be put up to question against that of a

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<sup>263</sup> Law Commission *A new Act for incorporated societies* (NZLC R129 2013), pt 9.

<sup>264</sup> Law Commission *Court Jurisdiction, Trading Trusts and Other Issues: Review of the Law of Trusts- Fifth Issues Paper* (NZLC IP28, 2011).

<sup>265</sup> Justice Susan Glazebrook "Taxation Disputes in New Zealand (paper presented to Australasian Tax Teachers Association (ATTA) Conference, Auckland, January 2013) at 3.

<sup>266</sup> Sarah Miles "The Price we Pay for a Specialised Society: Do Tax Disputes Require Greater Judicial Specialisation in New Zealand?" (LLB (Hons) Dissertation, Victoria University of Wellington, 2014) at 14.

higher-ranked High Court Judge. However, the two are non-distinguishable according to Sir Ivor Richardson.<sup>267</sup>

I have read hundreds of Taxation Review Authority judgments and numerous High Court judgments too. I hesitate to generalise or to attempt any kind of ranking. Certainly I have found numerous judgments in both jurisdictions to be very helpful in the depth of the analysis and reasoning.

Therefore, a one-panel specialist Judge seems qualified to fulfill the necessary adjudicative role of the CAA. In light of the author's advocacy for specialist Judges in New Zealand, it is further proposed that consideration be given to a specialist panel residing at the High Court level following the implementation of the commercial panel under the Judicature Modernisation Bill.

## **ii) Evidence**

One major advantage of the CAA would be the viability of a de novo hearing and relaxed rules of evidence, providing scope for oral hearings.<sup>268</sup>

The TRA already conducts challenge procedures as a de novo consideration of the facts and law underlying the original decision-makers assessment, to reach its own correct assessment.<sup>269</sup> Andrew Beck notes "the de novo nature of the hearing means that the Taxation Review Authority is able to address all relevant issues."<sup>270</sup> The current practice can and should be extended to charity cases.

As mentioned, this full appellate jurisdiction also avoids procedural wranglings surrounding interlocutory applications for additional evidence. A charity should have the scope to bring forward any information that may assist the CAA in assessing whether its purposes are charitable. Charity cases are in the public interest realm and it is essential that if any

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<sup>267</sup> Paul Stephan "Courts with Income Tax Jurisdiction: An International Comparison" (1988) 8 Va Tax Rev 233 at 242.

<sup>268</sup> In chapter two I outline the disadvantages of a rehearing on the record and in chapter three contrast this with the advantages of a de novo hearing and relaxed rules of evidence.

<sup>269</sup> Matthew Keating *Tax Disputes in New Zealand: A Practical Guide* (1<sup>st</sup> ed, CCH, New Zealand, 2012) at 300.

<sup>270</sup> Andrew Beck "Process complaints in tax disputes: CA decision on *Dandelion*" *New Zealand Tax Planning Reports* (1 April 2003) cited in Matthew Keating, above n 269, at 301.

development of charity law is to proceed, all relevant factual evidence be taken into account. Therefore, regulations surrounding evidence should be more flexible than a usual civil trial and framed in a similar manner to Rule 15 in the Rules for the Tribunal Procedure (First-Tier) in the UK.<sup>271</sup>

A de novo hearing also lends to a full hearing of oral evidence.<sup>272</sup> The ability to elect an oral hearing or a hearing on the papers is available in the UK context and should also be in New Zealand. The preferential nature of an oral hearing is demonstrated by the fact that ten out of twelve charity cases in the UK between the period of 2008- 2013 were conducted by way of an oral hearing.<sup>273</sup> Especially where new types of charitable purpose are at issue, an extensive hearing of evidence on appeal is preferable and would be available within a Tribunal forum.

If a charity case is fast-tracked to the High Court, I propose that a de novo hearing would still be available. In such circumstances, the appeal would still be one of first-instance and any disparity between the Tribunal and High Court should be remedied. This is consistent with Part 4A of the Tax Administration Act, which ultimately provides a full hearing of the evidence either before the TRA or the High Court.<sup>274</sup>

### **iii) Development of charity law: References**

As mentioned, charity law is a moving subject, which requires development within a modern context. The ability of the AG/ Commission to refer questions relating to charity law to the Tribunal in England and Wales should be replicated in New Zealand.

I note that there are some issues surrounding references. Matthew Smith, expert charity lawyer in the UK, expresses a mixed opinion of references. In relation to the *Independent Schools*<sup>275</sup> case, he pointed out that the reference was merely an afterthought of the Commissions', which coincided with already lodged judicial review proceedings.<sup>276</sup> This reactive approach illustrates an apprehensive attitude taken by the Commission to the

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<sup>271</sup> Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009, r 15.

<sup>272</sup> *Foundation for Anti-Aging Research*, above n 115, at [31].

<sup>273</sup> Kenneth Dibble, above n 199.

<sup>274</sup> Tax Administration Act 1994, pt 8A; *Foundation for Anti-Aging Research*, above n 115, at [44].

<sup>275</sup> *R. (Independent Schools Council) v. Charity Commission for England and Wales* [2011] UKUT 421 (TCC)

<sup>276</sup> Interview with Matthew Smith, Maitland Chambers Lawyer (the author, telephone call, 16 Sep 2015).

questioning of its own decisions. Smith also comments that “it is quite hard to frame a reference” and time and money is inevitably spent.

However, Smith also highlighted the advantage of a reference procedure in equipping the Courts with “a guidance role to the Commission”. The law of charity is unique in its heavy reliance on common law development. There are numerous contentious areas of charity law, such as advocacy, religion and more recently, the issue of social housing.<sup>277</sup> A reference may allow for some clarity, to guide the CRB in the right direction. Other less substantive issues may also be dealt with by way of reference, such as the extent of CRB and DIA-CS powers under the Charities Act. The nature of references to include submissions from charities that may be affected by the decision provides a democratic and inclusive mechanism, in tune with the needs of modern society.

Therefore, I propose that the AG, CRB or the CAA may put forward references.<sup>278</sup> The reference procedure is in many ways analogous to the ‘test cases’ procedure, in which under section 138G of the Tax Administration Act 1994, the Commissioner has power to designate a ‘test case’ to the High Court, if it is thought that the challenge may determine a number of the issues in other challenges.<sup>279</sup> The High Court is therefore likely to be the appropriate forum for delivering relevant precedent on pressing charity law issues.

#### **iv) Role of the Attorney-General**

The New Zealand AG has potential to be far more proactive in the field of charities, particularly surrounding registration issues.

I propose statutory recognition that the AG may initiate appeals, as in England and Wales. Further, any charity law proceedings issued under section 59 of the Charities Act should be served on the AG as protector of charities. Rather than charities having to apply, the placement of the proceedings under the AG’s attention should be automatic. It would then be at the AG’s discretion to intervene.

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<sup>277</sup> Story Three News “Small-scale charities struggle to keep status” (2 September 2015) Story Three News <[www.3news.co.nz](http://www.3news.co.nz)>

<sup>278</sup> Permission from the AG need not be granted in light of current proposals to rid this obstruction in the UK: Law Commission “Technical Issues in Charity Law” Consultation Paper No 220 (Summary) (20 March 2015).

<sup>279</sup> Tax Administration Act 1994, s 138G.

The AG's broader role in keeping up to date with charity issues will be increased by a power to issue references. The pro-active role of the AG for Northern Ireland, who hosted a colloquium on European Development in Charity Law, demonstrates the level of interest that our AG should take in New Zealand.<sup>280</sup>

As Margaret Soper points out, "the name of the Attorney-General is linked with the public interest, and that is particularly so in the context of charities".<sup>281</sup> It should be seen that this name does not fade into an ancient protectorate role and remains relevant in the modern context.

#### **v) Costs**

Cost is inherent to access to justice issues. I propose practical solutions within three areas: filing fees, lawyer fees and awarding costs.

##### **a) Filing fees**

The current application fee to have a case heard by the Taxation Review Authority is \$410, which is only slightly less than the High Court. I propose that initial filing fees are absolved for charity cases heard in the CAA (or those fast-tracked to the High Court for first-instance). In the UK, these fees are absent.<sup>282</sup>

As mentioned in chapter two, it is concerning that the special place of charities was not recognised in the MoJ review of civil fees in courts and tribunals in 2012.<sup>283</sup> Filing fees are likely to reduce the number of challenges and are antagonistic to goals of stimulating the development of charity law. Moreover, not-for-profits are significantly funded by donations from the public and public funding. This creates an anomaly if the justification for reducing one form of 'public' money (running costs of courts and tribunals) reduces another form. An

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<sup>280</sup> "Joint Law Officers' Colloquium" (28 November 2014) Attorney General for Northern Ireland <[www.attorneygeneralni.gov.uk](http://www.attorneygeneralni.gov.uk)>

<sup>281</sup> Margaret Soper "Crown Law Office asks can the Attorney-General be a knight in shiny armour?" (March 2002) NZLJ 57

<sup>282</sup> However the Ministry of Justice has in July 2015 launched a consultation, suggesting to introduce fees: Ministry of Justice, "Court and Tribunal Fees: the Government response to consultation on enhanced fees for divorce proceedings, possession claims, and general applications in civil proceedings and Consultation on further fee proposals" (August 2015) CM 9124.

<sup>283</sup> Cabinet Social Policy Committee *Civil fees review* [CAB (12) 34/4]



exception is to be made for these cases, which are brought for altruistic reasons and a belief in a broader public benefit rather than personal gain.<sup>284</sup>

To take into account the necessity of costs in certain instances, a small fee of \$200 for an oral hearing may be justified.

## **b) Lawyer fees**

The CAA will be user-friendly and attainable to litigants in person. There are benefits to self-representation but also risks, as summarised by Justice Helen Winkelmann:<sup>285</sup>

Fundamental aspects of our system of justice are built upon the assumption that parties will be legally represented. This means that growing levels of unrepresented litigants are a challenge to the functioning of that system.

Legal representation is preferable, especially when the CRB will be represented. One option to alleviate costs is a suitors' fund, which was considered during the initial passage of the UK Charities Bill.<sup>286</sup> The fund would support a number of cases of public importance each year and Professor Luxton suggests that a levy is imposed on all registered charities.<sup>287</sup> A more promising option is a Pro Bono Specialist Panel for Tribunal appeals, similar to the appeal panel in England and Wales. Although there are fewer lawyers specialising in charity law in New Zealand, the idea of pro bono work is increasingly gaining traction<sup>288</sup> and a "professional obligation to act pro bono" in litigation is being developed.<sup>289</sup> In personal involvement with the not-for-profit Ignite Consultants, we have been offered free legal advice.<sup>290</sup> There are practitioners willing to assist those working in the public interest realm. What better area to pull this resource than to the field of charity law.

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<sup>284</sup> Similar arguments were put forward by the Charity Law Association in relation to the MoJ consultation: Charity Law Association "Submission to MoJ Consultation CLA- response 15 09 15".

<sup>285</sup> Justice Helen Winkelmann "New Zealand Law Foundation Ethel Benjamin address: Access to Justice- Who Needs Lawyers" (Dunedin Public Art Gallery, 7 November 2014).

<sup>286</sup> (23 February 2005) HL col GC340.

<sup>287</sup> Peter Luxton *Making Law? Parliament v The Charity Commission* (London, Polietta, 2009) at 39.

<sup>288</sup> See Elliot Sim "Profession's gift to the community" LawTalk 820 (7 June 2013).

<sup>289</sup> Dr Chris Gallavin "A professional obligation to act pro bono" LawTalk 845 (4 July 2014).

<sup>290</sup> Dunedin Law firm Van Aart Sycamore has offered free legal advice to Ignite Consultants and Guest Law has offered free legal advice to our clients.

### **c) Ordering costs**

The TRA currently has no power to award costs. The power to award costs when a party acts unreasonably (as evident in England and Wales) should be introduced, despite being seldom exercised. Provision should also be made for claimants to recover their tribunal fees from the CRB if their appeal succeeds.

### **vi) Timing and Informality**

Before taking a case to the TRA, claimants must first utilise the tax disputes resolution regime.<sup>291</sup> The disputes procedure “is far from straightforward”<sup>292</sup> and even from a tax perspective, the disputes process has been criticised, particularly with regard to the inability of users to opt out in favour of judicial determination.<sup>293</sup> In Justice Glazebrook’s words:<sup>294</sup>

The most important aim of the design of any system, in my view must be that it does not impede access to the courts. Inability to opt-out of the dispute resolution process in my view does inhibit access to the courts.

From a charity perspective, judicial determination as to legal interpretation rather than continued mediation with the CRB is often an imperative. It is clear a disputes procedure similar to that presupposed for taxation challenges is inappropriate and will unnecessarily complicate rather than resolve matters. Procedural ease should follow the same line as the UK approach, which is outlined in detail in chapter four. Informal features (such as online applications) should remain a tool of guidance, to encourage charity litigants.

As mentioned, time restraints in relation to lodging an appeal are important. The 20-day time limit for current applications is too short. Instead, a 40-day time limit should be imposed and provisions to apply for time extensions maintained.

### ***Conclusion***

A newly established Charity Appeal Authority should be the first-instance appeal forum for

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<sup>291</sup> Tax Administration Act 1994, pt IVA.

<sup>292</sup> Matthew Keating, above n 269, at xi.

<sup>293</sup> Shelley Griffiths, “Resolving New Zealand tax disputes: finding the balance between judicial determination and administrative process” (ATTA Conference, 17 January 2012) at 2.

<sup>294</sup> Justice Susan Glazebrook “Taxation Disputes in New Zealand” (ATTA Conference, 22 January 2013), at 19.

charity appeals under the Charities Act 2005.<sup>295</sup> The appeals framework should be improved in relation to the following six features: hearing of evidence de novo, judicial specialisation, a reference procedure, cost reductions, longer time frames and procedural informality.

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<sup>295</sup> With the option to fast-track cases to the High Court.

## Conclusion

*The law of charity is a moving subject – Lord Wilberforce*<sup>296</sup>

Access to justice remains a fundamental objective to which all members of the legal profession should strive. It is an issue that uncovers many facets, both procedural and practical, and its complex application differs according to the area of law at issue.

The purpose of this dissertation is to argue that the current appeal framework for charities is uncharitable. As Chapter III makes clear, recourse to the High Court is riddled with procedural barriers that deter a charity from seeking judicial analysis. As pointed out in Chapter II, there are many reasons why the law of charity deserves special attention in our court system. The fact that its central definition of ‘charitable purposes’ resides in the common law is particularly important and maintains the judiciary as the appropriate interpreter, to keep the law of charity moving.

To interpret and develop the law surrounding charitable existence, charities need an accessible means of challenge in the first place. In Chapter IV, the Charity Tribunal in England and Wales demonstrates the feasibility of a Tribunal forum, whereby procedural features offer a system with features that are favourable to charity applicants, who are adverse litigants. Many of these are implantable into a New Zealand context. In Chapter V, a Charity Appeal Authority has been proposed alongside procedural features that will bring forward charity applicants. These groups, which seek to operate within the public interest realm of civil society, are deserving of a charitable right of appeal.

Finally, I conclude with a call that steps beyond the potential establishment of a Charity Tribunal into the wider realm of the laws governing the not-for-profit sector. On 16 November 2012, a first principle review of the Charities Act 2005 was considered “no longer pressing” and was cancelled.<sup>297</sup> Having spoken to experts in the sector, many disagree with the sentiment and are calling for a review. There are numerous issues that are in need of

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<sup>296</sup> *Scottish Burial Reform and Cremation Society Ltd. v Glasgow Corporation* [1968] AC 138 (HL) at 154.

<sup>297</sup> Jo Goodhew “No review of the Charities Act at this time” New Zealand Government (16 November 2012) <[www.beehive.govt.nz](http://www.beehive.govt.nz)>

reform.<sup>298</sup> Rather than avoiding a contentious area of law, we should be turning to the public to guide an effective regulatory framework that is well researched and premised on democratic accountability.

It is hoped that by 2019, when a current first-year Otago Law student stumbles upon this dissertation, a review has either occurred or is on its way. Perhaps a Charity Appeal Authority will be part of this review.

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<sup>298</sup> See Susan Barker, Michael Gousmett and Ken Lord *The Law and Practice of Charities in New Zealand* (Lexis Nexis, Wellington, 2013) at 695-727.

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**Word Count:** 14,786