



Parry Field Lawyers

# Churches

in Aotearoa New Zealand

## Legal Handbook



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***Notice of Disclaimer:*** Every situation is unique. This publication is intended to provide information on topics of interest for Churches in an accurate and complete way. However, it is not intended to deal with every possible situation or option. Parry Field Lawyers exclude fully any liability arising in respect of or resulting from reliance in part or in full on the contents of this book for any purpose (we're lawyers, so you know we had to put this in). We do recommend you consult with a lawyer before making key legal structuring decisions.

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## INTRODUCTION

The Christian Church has contributed so much to life in this country we love - Aotearoa, New Zealand. A lot of that work is in the community among the poor and disadvantaged and goes unacknowledged and unknown today. Many organisations also have Christian roots from seeds planted long ago. The historical legacy and ongoing positive contribution is substantial. Yet there has not been a handbook focused on some of the key legal issues for churches here - until now.

Planting or running a church is not without challenges. The exciting prospect of facilitating the gathering of believers comes with a number of important considerations, many of which touch on complex areas of New Zealand Law. Having a properly established legal structure and system of governance, as well as an understanding of financial, employment, governance and key policy obligations will give a church the best chance at succeeding.

This handbook is one example of our “Impact Initiative” which aims to help church ‘planters’ and existing churches alike. Accordingly, the handbook is split into several key sections. We look first at the key legal decisions and considerations that need to be made when church planting, consider relevant aspects in the day to day operation of an established church, look at contentious issues and consider the future. Of course, even some long established churches may need to consider their own legal structure again (particularly if they start new initiatives) and consider if it is still the best model today. We have also included a section on social enterprise, which is a different concept on the role of trading business as a means to help advance good in the world.

As part of our impact initiative to empower people doing good, we have many other free resources that you may find helpful at [www.parryfield.com](http://www.parryfield.com). A unique offering is also *seeds*, a podcast about purpose with interviews of more than 100 charities, not for profits and social enterprises. In addition, we have released the free eBook ‘*Social Enterprises in New Zealand: A Legal Handbook*.’





We are trying to empower people like you to succeed and hope this publication will help you to consider and resolve any common legal issues and uncertainties you may find when establishing and operating your church. We wish you all the best in whatever stage of the journey you are at.

We look forward to connecting with you to see if there are ways our team can support yours.


Parry Field Lawyers  
Christchurch & Hokitika  
New Zealand

## OUR TEAM

We have around 50 staff in three offices who focus on the full range of legal issues. Some have a particular focus and expertise on helping churches including the following - meet just some of our team!

Kris Morrison Partner		Kris is a Partner who regularly advises Churches and charities on a range of issues. He is an elder at his own Church, and is an experienced board member on a number of other charitable trusts and non-profit organisations. He attends Grace Presbyterian Church with his wife and six children.
Hannah Carey Partner		Hannah is a Partner advising on a variety of employment related matters. This includes new employment agreements, variations to employment terms, the impact of law changes, and resolving employment disputes, including personal grievances. She attends Latimer Church along with her husband and three young children.
Steven Moe Partner		Steven is a Partner with a particular focus on empowering impact. That takes the form of advice to Churches and charities on a regular basis but he also works with many companies that seek to have impact in their work, particularly social enterprises. He has helped organise Christian Lawyer conferences and hosts the podcast <i>seeds</i> . He attends Hope Rolleston Church (Presbyterian) with his wife and four young children.
Ken Lord Consultant		Ken is a co-author of "Charity Law in New Zealand" and is a consultant who has worked at Parry Field for 40 years. Over all that time has had a strong focus on the law relating to churches, as well as a sizeable practice in Property and Personal law including trusts and asset planning combined with strong interests in the charity sector, assisting the elderly and charitable trusts.

Grant Adams Partner		<p>Grant has served on the board of numerous charities and not-for-profits over his 35 + years as a lawyer. In connection with his home church of St Christopher's in Avonhead, he has been a member of Vestry and Synod and is currently a member of a Diocesan Tribunal.</p> <p>His role as Chair in a number of these entities has enabled him to combine his legal knowledge with extensive practical experience. He finds this helps keep the focus on what matters, in an era where compliance and process are placing increasing demands on boards time and energy.</p>
Aislinn Molloy Solicitor	[Add photo]	Aislinn is a solicitor at our firm who works in our property team and assists companies and charities in their initial stages. Aislinn and her husband are involved with the Navigators.
Paul Cowey Partner		<p>Paul leads our dispute resolution team with an innovative and enthusiastic approach born of twenty plus years' experience. Paul understands people. He has spent years living abroad in both Europe and Fiji. He has served in voluntary organisations, churches and as a director of companies in the not-for-profit, aged care and property sectors. He now advises, not only on how to resolve disputes using the Court process when necessary, but also on how best to resolve conflict outside the Courts.</p> <p>Paul enjoys his work. This he balances with his love of sailing, tramping, travel and music. Paul and his wife have two adult children, and three boisterous dogs now filling the empty nest.</p>
Judith Bullin Senior Associate		Judith is a Senior Associate in our firm who regularly advises churches and charities in relation to appropriate structures, trustee obligations, Health and Safety and Property matters. Judith is currently a board member for a charitable trust and is the current Chair of an integrated school Board of Trustees. Judith attends Grace Presbyterian Church with her husband.
Pat Rotherham Partner		Pat is a Partner whose specialty is <a href="#">trusts</a> , their proper administration and asset protection structures. Pat attends St Francis of Assisi Church (Catholic), Rotary and has been the organiser of the Hornby Citizens Advice Bureau (free legal advice) for the past 28 years.

<p>Paul Owens Partner</p>		<p>Paul specialises in property and often advises Churches on their acquisition of new land, leases or other arrangements. He attends Riccarton Community Church and is Chair of the CDN Trust.</p>
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## GLOSSARY OF TERMS

Words are important and this section explains the meaning behind commonly used terms in this handbook. The reason for this is that we have drafted the handbook to be of use across denominations and so we do not want a particular word or phrase used in a particular tradition to cause a barrier to those reading this.

**“Congregation”** means the Church Body, Members, Assembly.

**“Leadership team member”** means someone who has a position of spiritual authority within the Church, sometimes called Elder, Deacon, member of Vestry, Leader, Church Officer, Servant Leader or similar.

**“Minister”** means the Pastor, Senior Pastor, Reverend, Cleric, Priest.

**“Registered Charity”** means a charity which has applied to Charities Services to become registered and (usually) is granted donee status, meaning the entity can issue tax deductible receipts for donations.



# PART 1. ESTABLISHING YOUR CHURCH

## CHURCHES IN AOTEAROA NEW ZEALAND

### Legal Structures - an Overview

In New Zealand churches operate under many different legal structures. These include:

1. Churches created or supported by **Statute of Parliament**. An obvious example here is the Anglican Church of New Zealand which has a number of Statutes supporting its structure. The Presbyterian Church of New Zealand and the Baptist Church of New Zealand also have Statutes of Parliament which outline some of the structures - particularly providing for property holding vehicles such as the Baptist Union. Probably the majority of churches come under one of these structures, but that has not prevented them using trusts (see Para 2 following) for local ventures.
2. **Trusts** incorporated under the Charitable Trusts Act 1957. A number of independent churches are operated under a charitable trust which either owns or leases property and employs staff. The trustees may also be the church officers (deacons/elders etc.) or that may be a separate group. It is not uncommon to have a trust owning the property and employing staff etc., but also having a separate set of congregational rules e.g. a constitution which provides guidance around appointment of deacons/elders etc., annual meetings etc.
3. **Societies** incorporated under the Incorporated Societies Act 1908 are sometimes used in the church context. Incorporated Societies give the protection that incorporating under the Charitable Trusts Act also gives but requires a minimum membership of 15 persons. An advantage is it has a reasonably clear set of rules for members who in turn appoint an executive - so a two-tier structure is easily created.
4. Some churches do not own property and are simply a loose **association** of persons with or without any guiding documents (constitution/rules). As people come and go the legal structure changes and it is difficult to own property. This does not prevent registration with the Charities Office for taxation purposes although such arrangements do carry some risks because of lack of certainty or clarity around operating rules.

### Which Structure is Most Ideal?

There is of course no single answer to that. Obviously with the larger denominations the structures are simply what they are i.e. part of a fixed well established legal structure, with their many advantages and some disadvantages. The rest of this section in the manual will focus on those churches where there is some flexibility as to future structuring - whether at a start-up stage, or with a restructuring of an existing church.

Here are some **key principles** that every church entity should aim for in building a structure;

- (a) **Ownership of assets**: Having a single coherent legal entity for the ownership of property that is preferably incorporated (i.e. made into corporate entity such as a charitable trust incorporated under the Charitable Trusts Act, Incorporated Society or even a Company).
- (b) **Simplicity of identity**: Having a single identifiable entity for the purpose of entering into employment contracts and other contracts for goods and services. Again limiting liability (incorporating) is advisable. This may be the same entity as in (a), but not necessarily.
- (c) **Clarity of control**; If the entity that owns or leases property is separate from the entity that runs the church (and that is quite feasible and probably advisable) then there should be a strong link between the two ensuring that there is a clear and agreeable future for the property should the church run into difficulties e.g. split. In most situations it is preferable that spiritual leaders hold the power to appoint and remove

trustees, or at the very least, the power of veto. In this way the trustees remain aligned with the church's leaders.

- (d) **Good founding documents:** Clear rules around key issues, such as a procedure for appointing key persons e.g. trustees so that the entity or entities are not captured by single or dominant personalities.

## 2. CHOOSING YOUR CHURCH STRUCTURE

There are no instructions in the Bible about legal structures for churches. Yet there are many comments on personnel roles within the church. Perhaps that suggests that structure should always be secondary to people and relationships? If so, it's important to seek structures that don't get in the way of a church's purposes. However it is also important to have structures that ensure the church stays on course over time.

So, for those finding themselves in the position of thinking about forming a new church, one of the first questions that needs to be asked is what legal structure it will have. This is a particularly important decision. As with any organisation, it is much more difficult to change a structure after a church has been established.

Choosing a structure is often influenced by some core considerations:

**1) Control.** Who will have practical or real control? Will it be one person (unlikely and not recommended)? Will it be a small group-elected or unelected? Perhaps a smaller group (e.g. the leadership team), accountable to a larger group e.g., the congregation?

**2) Ownership of assets and entering into contracts.** Whose name will be on the lease or land title? Who will the legal employer be? What will the Bank require when opening an account? Who is liable if something goes wrong?

**3) Costs and benefits.** What does it cost to set up and maintain a proper legal structure? Are there different financial (e.g. tax relief or donation rebate benefits) associated with different structures?

As we mentioned in the Overview (page 10) there are various structures available. There is no one right or wrong option. Each structure has similarities and differences, meaning one might fit more closely with the plan and vision you have for your church.

Let's consider some of these options.

### CHARITABLE TRUSTS

In New Zealand, a charitable trust is the most common structure outside the traditional denominations. It is created by execution of a deed of trust. This means the trustees named in the deed hold a fund on trust to accomplish specified charitable purposes. The process should be taken a step further by having the trust incorporated under the Charitable Trusts Act 1957. Incorporating the trust as a board will mean that the corporate entity is able to own assets, enter into contracts etc. in its own name, not in the name of the trustees.

A charitable trust is often used where there is no private gain intended for any individual from the activities of the trust. This requirement aligns with the charitable motive of most churches, especially where a church facilitates community groups, offers financial assistance, food relief programs etc.

A charitable trust (whether incorporated or not) may (and most often does) choose to officially register as a charity. The main regulator of charitable trusts is Charities Services, which registers charities for certain taxation benefits if they meet legal criteria under the Charities Act 2005). The other, less active, regulator is the Registrar of Incorporated Societies (which



facilitates the incorporation of trust boards as mentioned above. So if the trust is not incorporated this regulator won't be relevant).

## **Key Features**

### **1. Separate Legal Entity**

A charitable trust board, which has been incorporated, is a separate legal entity which can contract with others. This is a significant benefit and in most cases it would be wise to consider incorporation. A charity may deal with many people and agencies. The process of entering into contracts, employing people, opening bank accounts etc. is much more straightforward if there is a single entity involved.

### **2. Limited Liability**

The liability of trustees is limited to the assets of the trust if the trust board has been incorporated. It is also common for a trust to provide indemnities for its trustees and officers and to take out trustees insurance. Note, however, that trustees may still be personally liable under some laws (e.g. for failure by the trust to pay GST, PAYE or ACC) or if the trustees' own conduct is sufficiently bad and is considered to be a breach of trustees' duties.

### **3. Registration**

When a charitable trust has been registered by Charities Services quite a bit of detail about the trust is available for public searching on its website. Also, once registered, section 58 of the Charitable Trusts Act 1957 gives the Attorney General the power to inquire into and examine the operation and condition of any charity in New Zealand. While the requirements for registration with the Charities Service may seem onerous at times, the advantage is that registration and the accompanying transparency does give greater credibility to the registered trust.

### **4. Purposes are Restrictive**

A charity in New Zealand must act to further its purposes which are set out in its trust deed. To be accepted as a registered charity those purposes must be charitable as defined under New Zealand law (which includes advancing religion). The charity cannot distribute funds or assets for the private gain of any trustees or associated persons.

### **5. Powers of Trustees**

Trustees cannot act outside the powers granted under its trust deed. Most trust deeds contain a wide range of powers. They can include matters such as use of funds, purchasing property, accepting money and carrying on a business.

### **6. Tax Exemption**

If a charitable trust is registered with the Charities Service, it will be exempt from income tax on some or all of its income, as well as other tax benefits. It may also be eligible for donee organisation status, which allows donors to claim a tax credit when they donate to the church.

### **7. Establishment Costs**

Establishing a church as a charitable trust has some set up costs involved. A lawyer will likely be involved to make sure that the purposes are charitable according to New Zealand law.

They can also provide ongoing advice on the trust's ongoing regulatory and filing requirements. As at 2019 the average legal costs for formation and incorporation ranged from \$1500 to \$3000 plus GST. While most parts of the documentation can be standard in nature, much time is often spent around drafting purposes, trustee appointment, removal rules and meeting protocols, where particular care is needed. Another time-influencing factor is the number of prospective trustees involved in the process.

## **8. Disclosure and Reporting Requirements**

A registered charity will have reporting requirements which can vary depending on its size (there are currently four tiers). There are financial reporting and auditing obligations on registered charities. These reporting requirements are covered later in this manual.

## **9. Suitability for a Church?**

An incorporated charitable trust is a popular choice as a legal vehicle for the reasons outlined above. However it only generally has one layer of accountability - that of the trustees to the purposes of the trust deed (and also, more practically, reporting to the Charities Office). If the church is large or grows significantly there may be a need to consider having additional rules around reporting to a congregation (like an AGM) and designating certain matters as being for the congregation to vote on e.g. major church operations or even nominations for trustees. These have to be carefully constructed and take into account of what happens in the event of a split in the congregation (yes, it can happen!).

## **INCORPORATED SOCIETIES**

While a charitable trust is probably the most commonly used structure outside the more traditional denominations, it is not the only option. A church can be established as an incorporated society. An incorporated society must have at least 15 members and may be associated for any lawful purpose, so long as it is not for monetary gain. The society can be incorporated under the Incorporated Societies Act 1908 (legislation that is currently being reviewed).

### **Key Features**

#### **1. Two-tier structure**

A society is a group of people (not less than 15) who agree to be members and adhere to a set of rules (sometimes called a constitution) that govern the purposes and workings of the organisation. A key feature (and a big difference from trusts) is that the group generally appoints some of its members to operate as an executive council or committee. The council effectively has the power to run the society (within its rules) and report to the wider membership - usually at an AGM. This structure therefore meets the need to have a small group (like a board of directors in a company) running the church, but being legally accountable to the wider church membership.

#### **2. Separate Legal Entity and Limited Liability**

Once incorporated, a society is, as with an incorporated charitable trust, a separate legal person from its leadership and members. This brings the same limited liability advantages noted with charitable trusts above.

### **3. Voting Input**

As mentioned above, another advantage of using an incorporated society structure is that it allows all the members of the society to have direct voting input into matters affecting the society. In some circumstances, this may fit better within the ecclesiological structure of a church with a tradition of church member voting and participation. On the other hand, churches view pastors, elders, priests and bishops as appointed by vote or otherwise and accountable to their calling.

### **4. Registration with Charities Services**

As with a charitable trust, an incorporated society may be entitled to income tax exemptions if it is a registered charity and with this comes the same reporting requirements as any other registered charity.

### **5. Reporting to Registrar of Incorporated Societies**

An incorporated society will also be required by the Registrar to fulfil various reporting requirements, including annual financial statements.

### **6. Costs**

The establishment costs of a society are similar to those of a trust as outlined above.

### **7. Suitability for a Church?**

An incorporated society can be as useful as a charitable trust for church purposes. In fact it is arguable that it offers better accountability with its two-tier structure. Although the law of incorporated societies in New Zealand is quite old and is due for an update soon, there will be a number of situations where it may still be the best structure for a new church. Some feel that the society model is overly democratic and not quite consistent with the biblical description of church structure. Others debate this.

### **8. Non-Registration - Privacy**

You could be a non-regulated trust or entity in the interests of remaining independent of the State. This means you don't get tax benefits.

### 3. REGISTERING AS A CHARITY

Registering as a charity with Charities Services can provide a number of advantages. For example:

- **Reputation:** Funders and donors tend to gain comfort if the entity is a charity (rather than a private business or individual).
- **Tax status:** There can be tax advantages.
- **Donation Status:** Donors may qualify for rebates.

The application process will go through Charities Services (formerly the Charities Commission). The website at [www.charities.govt.nz](http://www.charities.govt.nz) has a number of helpful resources.

#### HOW TO REGISTER

For a practical insight into the process visit [www.charities.govt.nz/apply-for-registration/ready-to-apply/](http://www.charities.govt.nz/apply-for-registration/ready-to-apply/).

This page gives a checklist as well as the application form to apply as a charity. The form will ask for information including various contact details for the church and trustees/officers, purpose or mission of the church, activities of the church, whether the church receives donations, and an estimated percentage of how much of your church's funds will go towards carrying out charitable purposes overseas (supporting missionaries etc.).

The applicant will receive an email from Charities Services acknowledging the application. The applicant may be contacted further if more information is needed.

#### CONSEQUENCES OF REGISTRATION

There are various obligations that come with being a registered charity. These include:

- Operating in accordance with the Charities Act 2005.
- Only carrying out activities which advance at least one of the charitable purposes as laid out in the Charities Act 2005; These purposes are:
  - The relief of poverty;
  - The advancement of education;
  - The advancement of religion; and
  - Other purposes beneficial to the community.
- Operating in accordance with your trust deed or society's rules.
- If any funds are collected for a charity, the charity's registration number must be provided upon request.
- Reporting annually to Charities Services. This involves including an Annual Return and providing financial and non-financial information through a performance report/financial statements that comply with reporting standards. You can find these standards on the Charities Services website. You may have to pay a fee when filing your annual return.



- Keeping Charities Services updated with any changes to your charity, such as any change in rules, officers or address details.
- Providing any information about your charity when requested by Charities Services.

## 4. FINANCIAL MATTERS

### CHARITY STATUS

Being a charitable organisation will mean that your church has to be very intentional with how it uses its assets. It will not be able to make a financial gain so as to pass the gain onto some or all of the church's members. You are permitted however, to make money and use that to further the objects and purposes of the church.

Once you have become a registered charity you will automatically qualify for income tax-exempt status. Your letter from Charities Services notifying you of your successful application will enclose the relevant IRD information. If your church has any business income, it will only be exempt from tax if it is used for charitable purposes. If any business income is sent overseas that will be liable for income tax.

### DONEE STATUS

Once your church has its charity status, it may be considered a donee organisation. This allows the church to issue receipts for donations of \$5 or more to donors to claim tax credits from the IRD. If, on your application to register as a charity, you stated that you would be receiving donations, the IRD will consider this to be an application for donee status. They will contact you to let you know whether this has been approved.

The IRD will only offer donation rebates on gifts of money of \$5 or more. To qualify as a gift, the donation must be:

- made voluntarily;
- by way of benefaction; and
- the donor must not receive any material benefit or advantage from the gift.

If the church has asked for donations for a specific project, like construction of the building, this will not prevent the payment from being a gift so long as the payments still meet the above criteria.

### Receipts

When you receive a donation, you will need to provide the donor with a receipt that:

- Shows the donor's full name;
- Is officially stamped with the name or branch of your organisation;
- Clearly shows that it's a donation and the amount;
- Shows the date the donation was received;
- Is signed by a person authorised by your organisation to accept donations;
- Ideally you should also include the church's IRD number and/or Charities Services registration number.

### OVERSEAS GIVING

To be considered a donee organisation, your church must apply its funds 'wholly or mainly' to charitable purposes in New Zealand.

In late 2018, the Inland Revenue Department issued their views on the meaning of “wholly or mainly” in an interpretation statement and fact sheet. The change as a result of this new information will likely impact many donee organisations in New Zealand.

The “wholly or mainly” test, is found in section LD 3(2)(a) of the Income Tax Act 2007:

“A society, institution, association, organisation or Trust that is not carried on for the private pecuniary profit of an individual, and whose funds are applied **wholly or mainly** to charitable, benevolent, philanthropic, or cultural purposes within New Zealand”

Uncertainty had arisen as to what exactly is meant by “wholly or mainly”, which this new IRD statement seeks to resolve.

The statement includes a 16 page analysis of the words “wholly” and “mainly”, concluding that, “while something considerably greater than a bare majority is indicated, it is not possible to interpret the expression with any greater certainty”. Inland Revenue has adopted a “safe harbour” approach with a threshold of 75% which will assist in making inquiries under section LD 3(2)(a).

### “Safe Harbour” Approach

This “safe harbour” approach will involve:

1. Using the organisation’s financial statements to determine the “total funds” figure (this is the sum of cash at the end of a year and cash spent during the year);
2. Calculating the amount of funds that were applied to specified purposes within New Zealand; and
3. Dividing this figure by the total funds figure to calculate the percentage.

If the percentage calculated meets or exceeds the 75% threshold, Inland Revenue will generally not need to make any further inquiries as to how the funds of the particular organisation are applied.

### Three Year Rolling Period

In exceptional years there may be flexibility around the 75% threshold. For example, there may be one year where there is a tsunami in another country, and the organisation wishes to give more funds than usual to an aid organisation overseas. In these situations, Inland Revenue will instead be looking at the way the organisation has applied their funds in the past three years. However, in any of those three years, the percentage of funds applied in New Zealand should not be less than 50%, and the average of funds applied for purposes in New Zealand over the three years should not be less than 75%. Organisations should contact Inland Revenue in this situation.

## RESIDENT WITHHOLDING TAX

If you are eligible for income tax exemptions, you will also be entitled to an RWT certificate of exemption. This will stop banks and other financial institutions from deducting resident withholding tax (RWT) from the interest in your church’s account. Once you receive your certificate of exemption, you will need to show this to the interest payer.

## IRD NUMBERS

As a charity registered under the Charities Act, you will need to have an IRD number. If you don't already have one when you register, the IRD will contact you about getting one. You will need this before you apply for exemption from RWT.

## EMPLOYING STAFF

The church will need to be registered as an employer if it will be employing people. This will require it to deduct and pay PAYE. Registration can be submitted through the IRD.

## GOODS AND SERVICES TAX

You may need to register for GST if your church carries out a taxable activity (e.g. selling books, renting out property) and your turnover (total income before expenses) is more than the relevant threshold (currently \$60,000) in a twelve-month period. IRD considers Taxable Activity to include:

*Any activity carried out continuously or regularly by a business, trade, manufacturer, personal profession, association or club. It includes any activity that supplies, or intends to supply, goods and services to someone else for consideration (money, compensation or reward) but not necessarily for profit. It doesn't include: working for salary and wages, being a company director, hobbies or any private recreation pursuit, private transactions such as the occasional sale of household or domestic items, making exempt supplies.*

You will need a "regular activity" which generates a taxable income to maintain your GST status. The IRD have defined this to mean an activity which happens at least once in every 12 month period.

Some examples of income liable for GST include:

- Money received from special services i.e. weddings and funerals.
- Proceeds from the sale of goods or property.
- Charges for hire of the church building and facilities.
- Trading income.
- Advertising.
- Community Grants (however you will need to check the invoice, it will state whether GST is included or whether it is a donation and not liable for GST).

Some examples of income not liable for GST include:

- Donations.
- Gifts.
- Money received from the rental on parsonage/houses as well as the sale of a parsonage/house.
- Money made by a non-profit body of donated goods.

To determine whether this applies to you, download the "GST - do you need to register" form (currently called IR365) on the IRD website.



## 5. CHURCH OFFICERS: APPOINTMENTS AND LIABILITY

### Appointing Officers

Different organisations have different approaches to governance and the appointment of those in charge.

In this Manual we have looked at different structures that can be used to operate a church. These various structures, especially the incorporated trust, are also just as useful in using alongside an existing church structure for specified purposes, such as holding property, or carrying out long term community projects.

Appointing the right people to govern such structures is very important.

One way to describe the options available is to consider a **Single-Tier Model** and a **Multiple-Tier Model**.

**Single-Tier:** Where the existing group of officers (e.g. trustees of a trust) have the power to appoint replacements, with reference to no one else. This is quite common, especially in smaller trusts that have a narrower stakeholder base. In other words, this may not suit a church, where a congregation might want a bit more democracy. However it may suit a special purpose trust raising funds for a cause.

**Multiple-Tier:** Where the officers may have the right to nominate replacements or additional officers, but another group has the power of veto, or that other group has the sole right to such appointments. Some organisations have a combination of these e.g. where the other group has the right to appoint some, but not all the officers. This flexibility is often seen in the trust model. For example, the trustees of a church trust (which, say, owns the assets of the church) may be appointed (and removed) by an eldership of the church. These elders are a group which administer the spiritual life of the church, and who are elected or appointed by the congregation by a process that may be established in a separate document that is outside the trust altogether.

In an incorporated society the multiple (two)-tier structure is entrenched. The officers (executive committee) are generally appointed by the wider membership at an AGM or SGM.

The advantages and disadvantages of these models become rather self-evident but, briefly, include:

**Single-Tier** is simpler to understand and administer. If the trustees are also the equivalent of elders (or whatever the leadership team members are called) then there is no doubt as to who is in charge, no matter what the issue is. It may be that trustees and elders are different groups. A risk is the lack of accountability to other stakeholders, especially after a 'generation' or two of trustees has come and gone. Also it may result in appointments that are not entirely suitable for the wide range of skills required.

**Multiple-Tier** deals with the weaknesses of the Single Tier model by ensuring continuity and alignment with the church's vision and purposes. It also allows appointments that focus on needed skill sets. Perhaps most importantly, it allows the whole church to feel part of the church venture and thus gives the necessary confidence to invest more into it.

## PART 2. OPERATING YOUR CHURCH

## 6. TRUSTEES' OBLIGATIONS

If you choose to operate under a trust structure, your trustees will need to be aware of their legal obligations.

### Trustee Duties

The trustees have certain duties and liabilities placed on them under the relevant trust deed, New Zealand legislation and common law (decisions of the courts in New Zealand and overseas). If the trust is registered as a charitable trust under the Charitable Trusts Act 1957, the incorporated trust board is liable for the obligations of the trust rather than the trustees themselves. The trustees can still be held personally liable if they breach their obligations as a trustee. These duties include to:

- comply with the trust deed;
- advance charitable purposes;
- carry out fiduciary duties of honesty and loyalty and act in the best interests of the trust;
- exercise care, skill and prudent diligence;
- act impartially amongst beneficiaries;
- sell wasting property;
- exercise reasonable care;
- insure assets and keep property safe;
- keep inventories;
- invest within a reasonable time;
- repair trust property;
- invest prudently;
- not delegate;
- act jointly where there is more than one trustee;
- not profit from trust property;
- be accountable; and
- be honest, loyal, diligent and prudent in carrying out the terms of the trust.

Generally a charitable trust will have between 3 to 7 trustees. Usually trustees are a mix of professional and lay people. They will be held to the same standard of care in their actions as applies to directors of a business (the standard is not lowered due to it being a charitable trust).

The Incorporated Societies Act does not list any specific duties for the officers. In general an officer has a duty to:

- act in good faith and in the best interests of the society;
- act in accordance with the rules of the society;
- ensure the society only takes on obligations it is able to fulfil;
- take reasonable care in exercising their duties;
- make sure that they do not personally profit from their position.

## 7. OFFICERS' / TRUSTEES' LIABILITY

Trustees are representatives of their respective entities. They act as fiduciaries who hold the entities' property for the benefit of the charitable purpose set out in the deed.

Officers of an incorporated society also have duties to look after the society's property and can be held accountable if in breach.

The personal liability of trustees is somewhat analogous to the liability of directors of a company (who do owe some duties to the company and its creditors but not direct personal liability for company actions), but is not clearly stated in the Charitable Trusts Act 1957.

It is important that officers/trustees clearly understand what the entity's purposes are and do not overreach and act in a way that is further than what was set out in the deed. If officers/trustees fail to perform their duties then they may be subject to proceedings taken out by interested persons.

It is common for trust deeds to include some limits on trustee liability. However, it is possible for trustees to be jointly and severally liable where a trust fails to account for GST, ACC levies or PAYE payments.

This can also be done for incorporated societies. It is possible to include in the society's rules that officers are indemnified for costs and liabilities incurred from wrongful action carried out in good faith while properly serving the society.

Whether you are an existing church or just starting up, it is highly advisable to consider liability insurance for trustees.



## 8. GOVERNANCE & MEETINGS

The following information sets out some principles on how to implement good governance in your meetings to ensure your leadership meeting/board is most effective. Whether this applies to your situation will depend on the size of the organisation.

**1. Govern: don't manage:** The Board should not focus on the minor issues of how the church operates.

Do: Discuss the strategic plan for the next 5 years.

Don't: Discuss saving \$7 per month by purchasing paper in bulk.

(The larger your organisation, the more important and practical this advice becomes).

**2. Have clear agendas:** Include the key points that need to be addressed.

Do: Circulate the agenda in advance along with any relevant pre-reading.

Don't: Show up late and try to remember what was discussed last time, with no agenda to guide the meeting.

**3. Board Charters:** For larger organisations this can be used to provide additional protocols not covered in a trust deed or constitution e.g. set out roles, relationships, how decisions are made, procedures, inductions, committees.

Do: Consider having a board charter and clearly set guidance out.

Don't: Rely on agreed protocols buried in old meeting minutes. There should be clear thinking and strategy behind what you are doing.

**4. Know your church's purpose:** It is surprising how many trustees/committee members are unclear on the actual purpose and have never read the trust deed/society's rules to see the original purposes.

Do: Be clear on what the purpose is and let it guide decisions.

Don't: Put the trust deed/rules in a drawer and not look at it for 10 years.

**5. Know the purpose behind the purpose:** Think about and understand how the day to day and month to month work is of value. In many cases there are deep needs which are being met by each church.

Do: Know your 'why'. Refresh these in reflection times at the commencement of meetings.

Don't: Forget the real reason behind the activity and work being done. The Board should look beyond the day to day concerns.

**6. Plan ahead:** Think long term, not short term - discuss finances, properties, succession for your board, strategy, growth...

Do: Think about what the landscape will be like in 5 years and consider what needs to be done to prepare.

Don't: Say "We are doing nicely thank you!" or "It's too hard to know where things are heading."

**7. Trust Board size:** We think the optimum size is 4 to 6 trustees/committee members. Many trust boards/management committees are more, but once you get above 8 the opportunity for participation drops. This results in a drop of enjoyment (less sense of contribution) and also reduces the quality of decision making because discussion is more limited.

Do: Keep boards efficient by not growing them too large.

Don't: Think bigger is better - If too big, there is a risk of the board becoming ceremonial whereas smaller boards are often more functional.

**8. Increasing need for professionalism as a trustee/committee member:** There is a growing need to create a culture of continuous improvement or learning within the governance role itself. Have a view that you can never stop learning. Governance is a high calling.

Do: Trustees ought to be encouraged to read material that takes them a bit further in their journey of understanding what it is to a trustee/committee member and how to contribute.

Don't: Just wing it.

**9. Who should be on a trust board?** In a small church this may be a luxury, but the ideal answer is someone who has both a strong belief in the vision and purpose of the church as well as a particular skill set that the church most needs.

Do: Consider skill sets around tangible matters e.g. finances, property matters, operational issues but also the soft issues - the ability to think strategically, a high EQ and skills in team building.

Don't: Choose whoever puts their hand up.

**10. The right Chair?** Good outcomes are largely the result of effective meetings and effective meetings are not possible if the Chair is not suited to the task. A good Chair creates an environment of respect, fair opportunity to speak, but without restricting candour. He/she ensures discussions do not go on any longer than necessary and a clear conclusion is reached.

Do: Have those awkward conversations to ensure that the person most suitable to facilitate good meetings is the Chair.

Don't: Just choose the most popular or dominant person, or the biggest donor!

## 9. FINANCES AND FINANCIAL REPORTING

All registered charities need to submit annual financial reporting to Charities Services. You will need to make sure that good records are kept of all your financial matters. You will need to be able to calculate the income, expenses and GST liability of your church, and enable IRD to confirm your accounts if required. You must keep records of the following for seven years, even if you stop operating:

- Receipt and payment account books.
- Bank statements.
- Invoices (including GST tax invoices).
- Receipts.
- Any other necessary documents to confirm entries in your accounts.
- Stocktake figures for the end of the financial year.
- Wage records for all employees, including KiwiSaver records.
- Interest and dividend payment records.
- Records of donations received and how you have used those funds.

### Annual returns and Auditing

A charitable trust will be required to submit annual returns that vary in requirements depending on the tier of charity. This varies as follows:

- Tier 1: Over \$30 million expenditure;
- Tier 2: Under \$30 million expenditure;
- Tier 3: Under \$2 million annual expenses; or
- Tier 4: Under \$125,000 annual operating expenses.

Regarding the auditing of accounts, if the total operating expenditure for the last two accounting periods was:

- over \$500,000 - financial statements must be either audited or reviewed by a qualified auditor; or
- over \$1 million - financial statements must be audited by a qualified auditor.

Expenses are considered to be part of the organisation's day-to-day activities. This may include expenses such as petrol, insurance, legal fees, office supplies, and salaries and wages. They do not include capital expenses, which may add value to an existing fixed asset, or the repayment of debts. Some examples include land, buildings, computers and furniture.

## 10. CONTROL OF CHURCH RELATED CHARITABLE TRUSTS

Charitable trusts are often doing truly amazing front-line work with people out in the community who really need different types of support. They are wide-ranging from helping children, women, the poor, mentally challenged and those with drug or other addictions (to name just a few). Sometimes those trusts are completely independent and separate to the originating church. Others advance similar purposes to the church itself or work in the same geographic area. Sometimes they may even generate income which goes back to the church (e.g. through day care centres or cafes). They may also provide in the governing documents that the church itself (usually through its elders) has the ability to appoint or remove trustees of the charitable trust.

In all of this, the issue of control becomes very relevant as it may determine what level of reporting the charity has to comply with. If there is a situation of control then it may be that financial accounts consolidation is required by the two related entities. This will then trigger it qualifying for a different set of reporting requirements if it crosses over into a higher threshold of income. In this chapter we will look at what the rules are, what the guidelines tell us and then offer some practical examples of a few different scenarios and how they might be treated.

### What are the Accounting Standards that Apply?

Tier 1	Tier 2	Tier 3	Tier 4
Full standards	Reduced Disclosure Regime	Simple Format Report - ACCRUAL	Simple Format Report - CASH
Over \$30 million annual expenses; or (below)	Under \$30 million annual expenses	Under \$2 million annual expenses	Under \$125,000 annual operating payments
Has public accountability	Without public accountability	Without public accountability	Without public accountability

One of the points at which the differences in the tiers becomes really critical is the distinction between tier 2 and 3. If an organisation has annual expenses of under \$2 million, but is also required to report on other entities that it controls that could lift its totals to above \$2 million. That would result in higher compliance costs and reporting being required.

Let's look at that situation further. Charities Services provide this guidance (emphasis added):

*“If a tier 1, tier 2 or tier 3 registered charity has control relationships with other organisations, these organisations are considered part of the charity's reporting entity. Charities in this situation will need to include information about these organisations in their performance reports by providing consolidated financial statements and submitting these consolidated financial statements to charities services together with their annual returns.”*

## What are “control relationships”?

This is discussed in the various standards issued by the New Zealand Accounting Standards Board (NZASB) under section 24(1)(a) of the Financial Reporting Act 1993.

While we have not gone into them in detail above (because they echo much of what follows in this part) there are two other documents that should be on your radar when researching the regime that applies in this area.<sup>1</sup>

### IPSAS 6 - Consolidated and Separate Financial Statements

Paragraph 39 states: *“The definition of control under this standard requires, subject to two limited exceptions, that there be both a power element and a benefit element...”*.

The paragraph goes on to note that there is a rebuttable presumption of control where there is the following power:

*“A unilateral power to appoint or remove a majority of the members of the governing body of an entity.”*

Based purely on this if a church has the power to appoint the majority of trustees it looks like there could be a strong argument that there was control.

Even if there is a power element that is proven can it be said that the trust provides a benefit to the church? This will likely come back to the purposes of the trust and how it fits within the scheme of the ministries of the church. Paragraph A31 of the guidance notes:

*“It is common for special entities such as trusts to be established to provide certain services to support the operating objectives of another entity. In such circumstances, a controlling entity may benefit from complementary activities”.*

Is the trust considered another arm of the church itself that is used to reach out to the community or is it considered to be distinct and separate? This will need to be analysed in each situation to determine if there is some benefit to the church or not.

The standard draws out another dimension as it specifically talks about trusts and raises the idea of a fiduciary relationship. It states:

*“In the case of trusts, careful consideration is required to determine whether the relationship between an entity and a trust is such that the entity has control over the trust. If the entity’s only relationship with the trust is as a trustee of the trust, the entity is unlikely to have control over the trust because its relationship with the trust is likely to represent a fiduciary relationship rather than an ownership relationship (refer to paragraph A11).”*

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<sup>1</sup> EG A8 - *The Reporting Entity* and EG A9 - *Identifying Relationships for Financial Reporting Purposes*.

Another characteristic which may influence the final assessment is:

*“Where the entity is a beneficiary of the trust and has the ability to direct/determine the operating and financing policies of the trust (or those policies have been irreversibly predetermined), for the benefit of the entity, as a trustee of the trust or by way of an autopilot mechanism.”*

It is easy to imagine the scenario where a trust does benefit the church along the lines of that description with policies irreversibly predetermined and so there could be control.

The circumstances and overall context will need to be examined to determine whether there is actually control or not. For example, what happens on a winding up of the trust - do the assets go back to the church (or could they)? That could impact the analysis as well. The main point to make is that if there is control and a benefit to the church then this could mean that consolidated reporting in accounts will be required. Knowingly failing to report according to the financial standards can also result in a maximum \$40,000 fine.

### **What Does Charities Services Have to Say?**

In the guidance issued by Charities Services there is some commentary on the issue of what it considers control to be:

*“Control for financial reporting purposes is the power to govern the financial and operating policies of another organisation in order to benefit from its activities. There must generally be both power and benefit for a control relationship to exist. The benefits can be both financial and non-financial in nature.*

It goes on to specify the following as indicators of power and benefits:

#### *Indicators of power:*

- *Ability to veto, overrule or modify decisions of organisation’s governing group.*
- *Appoint or remove members from the organisation’s governing group.*
- *Set or modify policy about how revenue is raised or how money is spent by the organisation.*
- *Close or wind up the organisation.*

#### *Indicators of benefit:*

- *Receiving all or a portion of the organisation’s profits/surplus, or even being responsible for the organisation’s losses (negative benefit).*
- *The organisation provides goods or services which contribute to the charity’s objectives.*

As you can expect its conclusion is tied in with how difficult a judgement call can often be:

*“Determining whether charities have this control relationship can be complex. It involves an exercise of judgement, after considering the definition of control and the nature of the relationships between the organisations concerned. Control of an organisation can be attained in a variety of ways, and the underlying circumstances will vary.”*

### Three Scenarios

The following hypothetical scenarios seek to illustrate the above concepts. Every situation will be different so individual circumstances will need to be considered. The illustrations will also demonstrate the different models which can be adopted.

#### Scenario 1: Full control

Church elders appoint or remove all trustees of the charitable trust. This ensures that the trust continues in the direction that the church intends. The trust performs a role which aligns very closely with the mission of the church (advancing religion) and operates out of the church facilities. The senior minister of the church is also the Chair of the trust and most of the trustees are elders of the church or at least attend the church.

**Analysis:** In this situation there are clear indications that the church is in control of the trust. While the use of the same facilities is probably not so important it is a symptom of the other clues here - the ability to appoint and remove trustees, the blurring of the leadership of the trust and the church, the purposes basically being the same. It seems very likely that this would result in a need for consolidation of the accounts.

#### Scenario 2: Some control

Church elders appoint 2 of the 5 trustee positions of the charitable trust. While it operates in the same geographic area and the church refers people in need to the trust, they are focussing on different purposes to the church. The Chair of the trust is appointed by the other trustees and currently that person attends a different church.

**Analysis:** This is more of a 'grey' area, which is where reality often sits, i.e. between the two extremes - above and below. In this situation there is still some involvement by the church in the trust and yet it also has moved to be more independent. To provide a conclusion we probably need additional information (for example whether the church receives any benefit from the trust). However based on this factual situation it looks like the church does not control the trust so there will not be a need to consolidate the accounts.

#### Scenario 3: Little control

The church has no control over appointment or removal of trustees. The trust purposes (advancing education for disadvantaged children) do not align with those of the church. The trust has spread beyond the original boundaries of the geographic area of the church and now works throughout New Zealand. All the trustees involved come from different areas and none attend the church.

**Analysis:** In this situation there is clearly no control by the church over the trust. While it may have its origins in that one place it has moved on from those origins and now operates independently so there is no real question of needing to consolidate accounts in this situation.

### Conclusion

We hope that this overview of the key issues to think about when looking at the issue of control has been helpful. Every situation is unique and cannot be looked at in isolation. While some elements may be present that indicate control others may not be present. It pays to discuss the situation with your advisers in order to be able to come to the right conclusion and ensure that your organisation is reporting under the correct tier.



**And a final word...**

We often find that clients who are looking into this area realise two things. Firstly, that records for their entity are poor and need to be improved going forward and, secondly, that their founding documents were often written decades ago and can be outdated in terms of their terminology and language. Often they are difficult to understand. Sometimes processes that were meant to be followed have never been looked at - e.g. how to appoint trustees. Such documents can very often use a refresh (if permitted by the trust deed) in terms of presentation and ensuring they are easier to understand. Very often the purposes themselves (which are the core of what the entity stands for) will still be applicable and need little amendment but it may be appropriate to look at updating the rest of the document.

## 11. LEASING A BUILDING

We often have clients coming to us wanting to lease a property for their church and end up discussing the same key issues to consider so we thought it would be helpful to set them out here! If you would like to discuss any point in more detail then please contact us and we would be happy to do so.

### Initial thoughts - Is this the right place?

- Do due diligence on the property - will this be suitable for your specific needs?
- Is it worth getting a Land Information Memorandum (LIM) to check consents on property?
- What else is important e.g. is it easy to find/access?
- Heads of Agreement/MOU - can be either binding or non-binding and could include clauses around exclusivity and confidentiality.
- Agreement to Lease - this is a key document. It is the agreement that prepares the way for the formal lease. Sometimes, when the lease period is short the parties do not go beyond the agreement i.e. they don't sign a casual lease, as the agreement contains all the basic points. However for a longer term say more than a year or two, a formal lease is also recommended.
- Due diligence on the building itself (Engineer reports / DEE).
- Resource or other consents.
- Approval of plans and agreement around what Landlord will do and what Tenant will do.
- Approvals such as from a board, bank or franchisor.
- Solicitor approval - note that this is not for "anything" it is a limited remit based on legal reasons (compared to more general due diligence conditions).
- Have a sunset date so if conditions are not met then the Agreement can be terminated (particularly if premises under construction).
- Finance / Insurance cover.
- Consider whether any guarantees are required. This will be less likely in an incorporated structure.
- Ability to assign the lease to a new tenant.

### Incentives that may be offered to tenants could include:

- Rent free period;
- Payment of fit-out costs; or
- Discounted rental for a period.

### How much will be paid in the future?

**Rent reviews** are common - what will you negotiate e.g. a **market** rent review or **CPI rent** review? How will it be calculated e.g. take into account tenant improvements or other factors?

How often will rent reviews take place? On renewal dates or set periods? These are all negotiable.

**Ratchet** clauses may also be used to ensure that rent cannot fall below the current rent amount.

**Other key points to consider:**

**Premises:** It's good to be clear about exactly what area is being rented! Make sure that is clear. Diagrams often help to clarify.

**Security:** May be a bank guarantee, security deposit or personal guarantee - we often see this where a company is renting and the Landlord wants the owner to be personally on the hook as well. Try to limit the amount and time frame if possible and that they do not continue if the lease is assigned to another.

**Landlord works:** What exactly has the Landlord agreed to do to the premises to get it ready and what in time frame? What will happen if there is some delay?

**Tenant works:** When can fit-out begin and will it be rent free? What are the obligations around 'make good' at the end of the tenancy?

**Start Date:** Be clear about when this will actually begin particularly if there are fit-outs or landlord works to be done. It can often be difficult to have a date when the premises is under construction.

**Signage:** What restrictions will there be on signage and approval required? If the building is 'named' by another entity then there may be additional approvals needed.

**Outgoings:** If the tenant is only leasing part of a building, consider the percentage that will be paid by the tenant, e.g. insurance or rates. There may well be other outgoings the Landlord will want to charge you. You should obtain an estimate of outgoings from the Landlord.

**Sub leases:** Are there any special provisions needed regarding sub leasing or assigning that may depend on the context?

**Option to purchase:** Does the tenant wish to have a right to purchase the building if the landlord wants to sell?

We hope this list of issues to think about is helpful. Every situation is unique and we would be happy to discuss your situation with you if that would be helpful.

**Important Note:** Helpfully most of the standard lease forms used these days cover many of the issues we raise above. A danger however is that because they are seen as 'the fine print', important options or negotiable terms can be overlooked.

## 12. WINDING UP

There can come a time when the church decides to wrap up. What are the next steps for the board the legal entity in such a situation? Below we have set out the key points to consider and what the steps involved are.

### **Step 1: Review what the core documents (trust deed/constitution/rules) say**

The core documents will provide guidance on what happens on the dissolution or wind up of the entity. This is a key step and is important because those rules will need to be complied with.

If the entity is charitable, usually there will be some provision that the assets of the entity can only be distributed to some other entity which is also charitable. Therefore anything left over usually needs to go towards “...*carrying out charitable purposes within New Zealand similar to those set out in this deed ...*”

### **Step 2: Do what the core document provides: Likely a deed of distribution/transfer**

We will not go into detail here apart from to say that the officers/trustees will need to comply with the rules and fulfil what they say - for example, they might need to identify another charity that could receive any amounts on wind up. Normally we would expect this to be done via a deed of distribution/transfer signed by the officers/trustees.

Accounting advice should be taken about whether there will be any tax consequences of deregistration to ensure that there is no later liability that results after deregistration that was not anticipated.

### **Step 3: Wind up entity by officers'/trustees' resolution**

Once the assets had been distributed we would expect the officers/trustees to sign a resolution to wind up the entity. There will be other procedural steps to remove the entity from the relevant government registers - depending on whether the entity is a trust, company or incorporated society.

For example the Companies Office provides that a trust board can apply to be dissolved by the Registrar by confirming:

- The board is no longer carrying on its operations.
- All liabilities (debts) of the board have been discharged/paid off.
- All surplus assets (after payment of liabilities) have been distributed.

### **Step 4: Notify Charities Services**

Charities Services require that an officer complete a deregistration form which can be accessed on the online account of that charity. Charities Services will advise Inland Revenue of the deregistration.

## PART 3. OTHER LEGAL ISSUES

### 13. QUICK FIRE Q&A ON KEY ISSUES FACED BY CHURCHES

When preparing this handbook we asked for input from church leaders across a wide variety of denominations and there were some key questions which emerged that they had faced. While some of the answers to these questions are covered in other chapters we thought it would be helpful to have a quick FAQ type chapter which explored these commonly faced issues.

Do you have a question you would like to see covered that we could add to the next edition of this handbook?

**Area of concern: Employees.**

**Issue #1: Churches often just create jobs for people without process. What are the legal issues around this? How do we follow proper processes?**

Answer: You can read more at chapter 14, but overall, you should be clear on the role and what it involves, check the candidate can legally work in New Zealand and you must have a written employment agreement. You should also familiarise yourself with the Human Rights Act and grounds for discrimination, particularly in preparation for the interviews.

**Issue #2: How do we ensure employees maintain the Christian ethics?**

Answer: Have a written policy or statement of faith that guides how the church is run and outlines the founding values. This can set expectations for the employees and provide a structure to give feedback on. If you have concerns that an employee is not following the policy, act quickly to discuss with them how to manage this and what extra help they need. The policy should not be a static document, but should be lived out by those in leadership positions to model and set expectations.

**Issue #3 With our trusts that might not be set up as “Christian Trusts”, is it possible to only employ Christians?**

Answer: The Human Rights Act 1993 prevents employers from discriminating on various grounds including religious belief. The Act also applies to volunteers. However there are certain exceptions to this. The exceptions will not apply if only part of the job falls within the exceptions or if it would not unreasonably disrupt the business (or church) to give that part of the job to another employee.

Employment New Zealand has given the following exceptions under religious purposes:

- *Different treatment based on sex where the job is for the purposes of an organised religion and its doctrines, rules or established customs limit the job to one sex.*
- *Different treatment based on religious or ethical belief:*
  - *under section 65 of the Private Schools Conditional Integration Act 1975, or*
  - *if the duties of the position are, more or less, the same as those of a clergyman, priest, pastor, official, or teacher among people with that belief or involve the promoting of that belief, or are those of a teacher in a private school, or consist of acting as a social worker on behalf of an organisation whose members comprise followers of that belief.*

- *If a religious or ethical belief makes its followers follow a particular practice, an employer must accommodate this as long as they don't need to make changes which unreasonably disrupt the employer's activities.*

**Issue #4: When terminating someone's employment this can often go badly - what are the legal requirements and processes for terminating contract in a legal way?**

Answer: To terminate an employment agreement, the employer must act in good faith, have a good reason, follow a fair and reasonable process and be willing to listen to ensure that the final decision is not pre-determined.

The grounds for dismissing an employee may include serious misconduct, repeated misconduct, performance issues, during a trial period, redundancy, incompatibility and incapacity. Each ground has its own requirements, but in general best practice requires the employer to keep giving feedback to the employee and give them opportunities to work on problem areas before more serious action is taken.

**Issue #5: Temp Contracts. Sometimes due to a lack of money and also due to risk, some employees come on temporary contracts. Is the way we do this always legal? What trial periods and probation periods are we allowed to put in? What does this process look like?**

Answer: Fixed-term contracts can only be offered if there is a genuine reason (replacing someone on maternity leave, one-off project, seasonal work etc.). This reason and the period must be stated in the employment agreement.

From May 2019, 90-day trials cannot be offered at a place of work with 20 or more employees. An employee can be on a 90 day trial period if they have never worked for the employer before and they sign the agreement before they start work. During this time an employee may be dismissed and cannot bring a personal grievance for unjustified dismissal. Employees on trial period have all the minimum employment rights and responsibilities during this time. They can still bring a personal grievance on other grounds, such as discrimination.

A probation period and its length must be recorded in the employment agreement. An employer must give feedback on issues, areas to improve, what good performance looks like and opportunities to improve. At the end of the period the employer must fairly assess them to determine whether they intend to continue or end the employment. They must then give the employee an opportunity to respond to these comments and consider them. An employee on this contract may still raise a personal grievance if they believe the employer did not have a good reason to dismiss them, was not given appropriate advice and/or training or was not fairly assessed by the employer.

**Issue #6: What are rules around kohas for employees and also in addition if congregation members want to give gifts to staff are there rules about that in accepting these gifts?**

Answer: If an employer gives benefits to their employees on top of their salary or wage, they may need to pay a Fringe Benefit Tax (FBT). If the employer gives cash benefits they will not need to pay FBT as this will be treated as part of the employee's wage or salary. Charitable organisations will generally be exempt from paying a FBT on any benefits to employees. However the church should contact the IRD and its accountant to see if it needs to register for FBT, particularly if it operates a business outside of the charitable purpose.



**Issue #7: I've seen a number of churches share the wage with their spouse without contracts, is this OK?**

Answer: Income splitting for tax purposes is not allowed in New Zealand. If a church wishes to employ a couple, they need to have individual employment contracts with each person.

***Area of concern: Volunteers***

**Issue #8: Volunteer and Staff Police Checks. What is the line between legal and good practice? What are the laws on this stuff?**

Answer: Anyone who is engaging (whether paid or volunteering) with vulnerable people, in particular the elderly and children, should undergo a police vetting check. See chapter 16 for more information.

**Issue #9: Code of Conducts for Volunteers. What standard can we call people on before it starts crossing lines?**

Answer: The church should ensure that their Code of Conduct is being followed and modelled, and provide feedback to individuals when necessary. Where it is not complied with, the volunteer could be advised that their assistance is no longer required.

**Issue #10: Does it matter whether someone is a volunteer or employee?**

It is important that all parties are clear as to whether someone is a volunteer or employee, and that they are treated as such. As employment law does not apply to volunteers, there are no minimum entitlements owed to them, such as holiday pay. An employee on the other hand, must be paid and cannot be dismissed without justification. If an employer pays their volunteers then they may be considered to be an employee. Payment of this sort does not include reimbursement for expenses incurred whilst carrying out the volunteer work, a koha or honoraria or any personal satisfaction that a volunteer may receive from doing the work. Any payments given should be clearly explained so that they are not considered payment of wages.

***Area of concern: Child Protection.***

**Issue #11: What are the rules we have to adhere by for protection vulnerable children and adults? Too often in churches there is a lot of trust and as a result there are situations when it creates the possibility of something harmful to the child. Again, what is legal and what is best practice?**

Answer: Legally you only have to undergo police vetting if you are a core worker. Core workers are organisations which are given state funding to provide regulated services to children. Most churches will not come under this umbrella. However, it is recommended as best practice to require everyone who works with vulnerable children and adults to undergo this process.

***Area of concern: Data and Audits***

**Issue #12: Data Protection. With regards to holding physical and digital data and even media content, what are some of the things we need to put in place? What are the rules around data?**

Answer: The Privacy Act 1993 sets out 12 principles which guide how you should process and collect personal information. Visit the Privacy Commissioner's website at [privacy.org.nz](http://privacy.org.nz) to learn more.

**Issue #13: Destroying of Data. How long do we legally need to keep files? Accounts? Contracts etc.**

Answer: A non-profit organisation, such as a church, must hold on to all records that calculate the income, expenses and GST liability of the organisation for seven years, even if it stops operating. This includes records such as receipts, bank statements, invoices and account books.

#### 14. ADVANCEMENT OF RELIGION - HOW EASY IS IT TO QUALIFY?

Generally a Christian Church should not have issues registering and we have some standard wording we include in church trust deeds. However, the Charities Registration Board (the “Board”) issued an interesting decision on 9 July 2018 in relation to the TLF Charitable Trust. It helps to explain their view of when a charity will be admitted to the register when its purpose is the advancement of religion. Before looking at this decision it is worth a reminder of what had been decided earlier in their decision relating to The Jedi Society Incorporated in September 2015.

In that decision the Board decided not to register that Society because it considered that it had not been established for exclusively charitable purposes. Their reasoning was that the Society did not in fact advance religion or promote moral or spiritual improvement. The Society’s purpose was formed based on the Star Wars series of movies but described itself as a “very non-dogmatic, non-organized religion”.

After analysing all the information the Board concluded:

*...the information presented on the quality of Jediism and how it is to be advanced indicates the belief system is merely a collection of interconnected ideas based on the Star Wars universe, rather than structured, cogent and serious religion (para 40).*

In the more recent TLF Charitable Trust case a similar issue was looked at. This Trust had applied to be registered as a charity with its purpose stated as the advancement of religion. The Trust was involved in translating books that were written by Yuko Chino after a vision she had in 1977. When asked about specific teachings the Trust had not responded with any details.

In particular the Board noted:

*The Trust’s activities do not include religious gatherings for the observance of sacraments, symbols or ceremonies and rituals. The Trust has not provided details of the teachings of its followers are encouraged to study and put it into practice. (para 29)*

The Board concluded that it: “...cannot determine that the Trust’s activities are advancing religion when the Trust has not demonstrated that Shoho is a system of beliefs capable of advancing religion.” (para 32). It came to a similar conclusion in relation to whether the Trust was advancing education and decided it was not “sufficiently structured to assist the training of the mind or advance research.” (para 45)

Without all the correspondence it is hard to comment on whether these decisions are correct and do reflect the amount of information provided by the two groups to the Board and whether or not they did have enough “structure” or an explainable belief system. At any rate, it seems likely that if either of these groups had provided more structured information about the belief system they were promoting then the decisions may have been different. If you have a client who wants to apply for registration under this head of charity then the key learning from these two cases is to make sure that they clearly articulate how the belief system is structured.

## 15. HIRING EMPLOYEES

Churches are bound by New Zealand employment laws. Proper processes should be followed when hiring employees for a church. The following chapter will go over what needs to be included when a church undergoes the employment process.

A unique consideration in church contexts is that leaders may have a calling to a particular church. This also needs to be considered as an extra layer when employing someone.

There are different stages of the process that you should consider:

### 1. Understanding the role

- Spend some time being clear on what the job involves, what length of time they will be needed for (permanent, casual, part-time etc.), hours of work, required attributes and skills.
- Create a list of criteria that will guide your decision-making once interviews are done.

### 2. Attracting suitable candidates

- Figure out whether you will advertise internally first, or go straight to public advertising.

### 3. Interviewing

- Contact all applicants beforehand to let them know whether they were successful in getting through to the next round. It is good practice to do this in writing to avoid misunderstanding.
- Consider how many interviews you need to have and how long they need to go for.
- Be clear on the role, so that you are ready to answer any questions about the position.
- Spend some time thinking over open-ended questions to ask the candidates. The same questions should be asked of each one.
- Note that you may not ask any questions that may lead to discrimination under the Human Rights Act 1993. This includes:
  - Gender/Sex (including pregnancy).
  - Marital status.
  - Religious belief or ethical belief (although more on this in Chapter 14).
  - Colour, race or ethnic origin.
  - Disability.
  - Age.
  - Political Opinion.
  - Employment status.
  - Family status.

### 4. Deciding on the employee

- Consider which candidate best suits your criteria from step 1.
- With the express consent of the candidate, you should consult a referee. Think of some questions to ask before you contact them.

- You don't have to hire someone if no-one meets the requirements.
- You should inform all applicants if they are unsuccessful. You can return or destroy their documents or retain their documents in a secure place to consider for future roles (if they consent).

## **5. Offering the position**

- Once a decision has been made, you should offer the position in writing to the person, including any special terms that are lawfully allowed.
- Provide the applicant with a written copy of the proposed agreement.
- Inform them and give them time to seek independent legal advice about the agreement before they respond. Ideally they should be given no less than a week's notice.

## **6. Finalising the employment agreement**

- The agreement must have:
  - The employer and employee's names.
  - A description of the work that will be performed.
  - An outline of the place and hours of work.
  - The wages or salary.
  - The employee's right to be paid at least time-and-a-half for working on public holidays.
  - How to resolve employment relationship problems.
- The agreement may also include terms such as:
  - Leave entitlements.
  - Meal and rest break entitlements.
  - How and when wages or salary will be paid.
  - Any benefits the employee is entitled to.

## **7. Starting the employment relationship**

- By the time the new employee starts you must:
  - Be sure that the person is allowed to work in New Zealand.
  - Have a signed employment agreement with them.
- Once they start, you should:
  - Get their employee's (IR330) tax declaration.
  - Set up a wage, time, leave and holidays record.
  - Have details of their citizenship, residence or work visa.
  - Have emergency contact details.
  - Have a bank account number for their wages.

## 16.EMPLOYMENT: KEY ISSUES

The church environment can seem very different to a typical workplace. Despite this, it must comply with the employment obligations under the Employment Relations Act 2000.

Statistics New Zealand has revealed that almost 1 in 10 employees do not have a written employment agreement in place. It is also likely that many of the existing agreements are not up-to-date. There have been a range of changes to the Employment Relations Act 2000 (ERA) recently. This may be a good time to re-think current employment agreements, and be aware for any future contracts.

There is a minimum standard which you will need to comply with, otherwise employers may be penalised. The ERA requires each employee to have a written employment agreement, regardless of whether the position is for a fixed-term or permanent. The agreements should have the following:

- Names of the employee and employer;
- A description of the work to be performed by the employee;
- An outline of where the employee will perform the work;
- Any agreed hours of work or, if no hours are agreed, an indication of the arrangements relating to the times the employee is to work;
- The wages or salary payable to the employee; and
- A plain language explanation of the services available for the resolution of employment relationship problems, including a reference to the period of 90 days within which a personal grievance must be raised.

### Recent Changes

The Employment Relations Amendment Bill was introduced in 2018 to reflect the commitments of the new government. The changes were in two stages, with the first being implemented in December 2018 and largely relate to union issues. The second stage came into effect on 6 May 2019 and will likely have an impact on those who are employed by the church.

### Rest and Meal Breaks

The right to have rest and meal breaks has been restored. The number and duration of these breaks will depend on the number of hours worked.

- If your employee works 2-4 hours, they must have one 10-minute paid break.
- If they work 4-6 hours, they must also have one 30-minute unpaid break on top of their one 10-minute paid break.
- If they work 6-8 hours, they must have two 10-minute paid breaks and one 30-minute unpaid break.

### 90-Day Trials

90-Day Trials are restricted to businesses with less than 20 employees. A trial period cannot exceed 90 days. The employee must be given an employment agreement that has this provision in advance, and the agreement must be signed before the employee starts work.

## **Parental Leave**

Under the Parental Leave and Employment Protection Amendment Act 2017, parental leave entitlements were extended. On 1 July 2018, the duration of parental leave payments increased from 18 to 22 weeks. On 1 July 2020, this will increase further to 26 weeks.

Additionally, parental leave eligibility was extended to ‘primary carers’ who can include grandparents, aunts and uncles. Those employees on casual and fixed term agreements are also eligible.

There is now also the option of agreeing to ‘keeping in touch’ arrangements. These are where employees can return to work on a limited basis for up to 40 hours (total) during their leave without losing their leave entitlements. This allows employees to keep up-to-date with any training or changes in the workplace, and to maintain their social and professional bonds.

## **It’s Important To Get It Right**

The Employment Standards Bill also made other changes which emphasise the importance of employment agreements:

- There has been a clarification around record keeping requirements;
- The penalties for non-compliance have increased;
- Employers can be publically named if they fail to meet minimum employment standards; and
- You don’t have to be the employer to be held liable. Directors and senior managers, for example, can now be held liable.

Failing to meet minimum standards can result in penalties and infringement notices being issued. It can also have a significant effect, for example, on an employer’s ability to dismiss an employee.

## **Check Your Agreements**

This is a good time for all employers and employees to check their employment agreements to ensure they comply with the minimum standards set out above. Employers may also have policies which may need updating.



## 17. POLICE VETTING

Police vetting was introduced to contribute to public safety, particularly to protect the vulnerable people in society. Police vetting differs from Ministry of Justice criminal record checks as police vetting also includes information on any contact the individual has had with the police.

As churches are often in a position of trust with vulnerable people, your church should require that its workers undergo this service. Organisations that receive government money must vet their workers, however private organisations are strongly encouraged to voluntarily adopt this practice.

To do so, the church will need to become an Approved Agency and undergo police vetting checks. To get approval, you will need to visit [www.police.govt.nz](http://www.police.govt.nz) and follow the steps. The person registering the church will need to have a RealMe account.

Any worker, whether volunteer or paid, who works directly with children, youth and vulnerable adults should undergo this process. Any contractors who will have unsupervised contact with children/elderly should also undergo this process. These checks must be updated every three years.

### Take Note:

- It normally takes around 20 days for a police vet to be processed, which you should take into account when deciding on a new employee's start date.
- Do not use the vetting process as a way to short list candidates.
- You must get the applicant to agree to be vetted.
- Explain to the Applicant that the vetting information will not be held for longer than 12 months unless required by law.
- Make sure that you keep the results confidential and in a secure place.
- Give/send the applicant the New Zealand Police Vetting Service Request and consent form to complete and sign. This can be found on the NZ Police website, and also has a guide on how to fill out the form.
- The applicant may request to see the results and be given the opportunity to correct or explain anything in the results.
- When the purpose of getting the information has been fulfilled, make sure to securely destroy the records.

## 18. PRIVACY

How can you ensure that people have the freedom to share their concerns at meetings without being worried about the consequences of recording them in the minutes?

The Privacy Act 1993 applies to any agency. This is defined as a person or body of persons that collects uses or stores personal information. Examples of this include businesses, organisations, church groups or societies. If you are a private organisation (i.e. not a government body), the Official Information Act does not apply and you will have a lower threshold for disclosing information.

Information is considered to be personal when it is about an identifiable individual. It does not have to be private or sensitive to meet this threshold.

When personal information is stored by an agency, the person it relates to has the right to access this information. This may include:

- Any references to them in the minutes of a meeting;
- Communication between the person and the agency;
- Decisions made in relation to the person;
- Any complaint the person has made or a complaint about that person.

A request to access this information may be refused if:

- the information would disclose a trade secret;
- the information would be likely to unreasonably prejudice the commercial position of the agency or person;
- disclosure would involve personal information about other people. An individual may only request access to information relating to them under the Privacy Act. This may mean that all other references to other people are taken out of the document before it is given to the requester;
- disclosure would result in an unjustifiable breach of another person's privacy.

If you are an agency concerned with not disclosing sensitive information about someone, you should consider:

- censoring the names if disclosure was recorded. As personal information has to be identifiable, removing the names would avoid this;
- not recording the concerns.

Ultimately your response will be determined by what the agency's own policy and constitution allows and the current standard practice.

If you would like assistance in re-writing your agency's policy or constitution, please contact us and we can help draft something that suits your church's needs.

## 19. HEALTH AND SAFETY

There has been some confusion in many churches over the changes to Health and Safety introduced in 2016. Below we set out some of the key points to consider to ensure compliance.

- Be aware
  - Since 4th April 2016 the Health and Safety at Work Act 2015 has been in force. This means greater accountability for Health & Safety for your church if you employ staff.
- Are you a 'PCBU'?
  - If you are a "Person Conducting a Business or Undertaking" then you are a PCBU. A PCBU can operate in a voluntary way without primarily being set up to make money. It has the primary duty of care in a workplace.
- Officers of PCBUs
  - Directors, managers and leaders of the PCBU also face significant penalties under the Act for failing to exercise due diligence in ensuring the PCBU carries out its duties.
- Identify
  - Ensure all risks and hazards in your church are identified. Start by looking at the facility, stage area, equipment, the people, the weather...
- Control & Eliminate
  - Put procedures in place to control or eliminate risks to health and safety so far as is reasonably practicable.
- Prepare
  - Maintain a health and safety policy with the help of your employees. Put it into action and ensure your employees and contractors are aware of it and follow it - don't just hide it in a drawer!
- Tailor your documents
  - Customise your documents so they are practical for you and your church. One size does not fit all.
- Check your visitors
  - If other contractors or other entities come on to your property you must ensure they have proper health and safety procedures in place and provide you with a copy. Ask for it and check it!
- Remember the penalties are high
  - Fines of up to \$3 million and imprisonment of up to 5 years can be imposed. "She'll be right" is no longer OK.
- Think about these issues now, not later
  - There are good materials out there on these issues and we can direct you to a lot of them - for example we have a guide related to volunteers and responsibilities you may owe to them that we can provide at no cost.
- Standing item
  - It is good practice to have this topic as a standing item at your board meetings.

### Is your organisation a PCBU?

Under the Act, a PCBU has the primary duty to ensure the health and safety of its workers and others, so far as is reasonably practicable.

Reasonably practicable means that “which is, or was, at a particular time, reasonably able to be done in relation to ensuring health and safety.” A PCBU is not expected to guarantee the health or safety of their workers but they must do what can reasonably be done to ensure health and safety. Factors that will affect what is reasonably able to be done include:

- The hazards and risks associated with the work and the likelihood of the hazard or risk occurring;
- The severity of the injury or harm to health that could result from the hazard or risk;
- What the person knows or reasonably should know about the hazard or risk and the ways of eliminating or minimising it;
- What can be done to eliminate or minimise the risks and how available and suitable these risk controls may be;
- The cost associated with eliminating or minimising the risk, including whether it is grossly disproportionate to the risk.

Section 17 of the Act states a “volunteer association” is not a PCBU. The Act defines a volunteer association as “a group of volunteers (whether incorporated or unincorporated) working together for 1 or more community purposes where none of the volunteers, whether alone or jointly with any other volunteers, employs any person to carry out work for the volunteer association”.

If your church has no employees then it will be known as a volunteer association under the Act. As a volunteer association your church would not be a PCBU and therefore the Act would not apply to your church. However, most of the time this exemption would not apply to churches.

If your church has one or more employees then it is likely it will be a PCBU and thus the Act will apply.

### **If your organisation is a PCBU**

If your church is a PCBU, it will have a duty to ensure the health and safety of others so far as is reasonably practicable.

### **Volunteer officers**

Officers have a duty to exercise due diligence to ensure the PCBU complies with its duties and obligations under the Act. In exercising due diligence, officers must take reasonable steps to:

- Know about work health and safety matters;
- Gain an understanding of the operations of the PCBU and the hazards and risks associated with those operations;
- Ensure the PCBU has appropriate resources and processes to eliminate or minimise risks;
- Ensure the PCBU receives information about incidents, hazards and risks;
- Ensure there are processes for the PCBU to comply with the Act.

### **Volunteer workers**

Under the Act a “volunteer worker” is a volunteer who carries out work in any capacity for a PCBU on a regular basis, with the PCBU’s knowledge and consent and is integral to the PCBU’s operations. A PCBU would owe a duty to ensure, so far as is reasonable practicable, the health and safety of volunteer workers.

The volunteer worker would also have duties under the Act. While at work they must:

- Take reasonable care for his or her own health and safety;
- Take reasonable care that his or her acts or omissions do not adversely affect the health and safety of other persons;
- Comply, as far as the worker is reasonably able, with any reasonable instruction that is given by the PCBU to allow the PCBU to comply with the act or regulations; and
- Co-operate with any reasonable policy or procedure of the PCBU relating to health or safety at the workplace that has been notified to workers.

“While at work” is not defined but likely means while at the workplace or at an event run by the PCBU.

### **Casual volunteers**

A volunteer is not a “volunteer worker” if their voluntary work includes:

- Participating in a fund-raising activity;
- Assisting with sports or recreation for an educational institute, sports club or recreation club;
- Assisting with activities for an educational institution outside the premises of the educational institution; or
- Providing care for another person in the volunteer’s home.

Even though this volunteer would not be a volunteer worker, the PCBU would still have a duty to them to ensure their health and safety is not put at risk from the PCBU’s work.

The casual volunteer would not have duties under the Act.

If your church is a PCBU and something goes wrong the penalties can be high. It is therefore very important that you are aware of whether your church is a PCBU or not. In some cases this may be unclear. We would be more than happy to talk with you about your particular situation to help you determine whether or not you are a PCBU.

**APPENDIX: FOOD FOR THOUGHT - LOOKING TO THE FUTURE**

## 20. IMPACT INVESTING: THE FUTURE? AND IS THIS RELEVANT TO CHURCHES?

We live in a time when paradigms are colliding. Old conceptions from an extractive economy which have been accepted for decades are being challenged by new ideas that are planted in the soil of a regenerative economy.

One outworking of this is the growth of “Impact Investing”. Traditionally the primary driver when looking at an investment has been monetary returns for the investor. “You can pay a 12% return on investment? Well that is not as high as the 14% I have on offer here so you know where I am going.” However, such an outlook is limited and narrow because it is only focussed on financial returns.

Impact investing offers a different approach. The Global Impact Investing Network provides the following definition: “Impact investments are investments made with the intention to generate positive, measurable social and environmental impact alongside a financial return.”

So the alternative presented by impact investing is that there are other considerations that need to be thought about, such as:

- What does the business actually do - is it an extractive business which is contributing to degradation of the planet? Coal fired power station anyone? Sugary drinks? Tobacco?
- Who does the business employ - is the business model built on the premise that there is exploitation in how cheaply it can produce whatever it makes, either onshore or offshore?
- What other outcomes are there - perhaps social, cultural, environmental or other factors will be impacted by the business.

The key is that there will be some positive impact through the investment, while still generating return for the investor. It’s about thinking a bit longer before you decide what to invest in.

All this is directly relevant to churches because think about how many people who go to church have investments in a variety of funds they have probably never analysed. What if there were ways to invest which actually might benefit the Kingdom? Christian Savings is an example in New Zealand where the model allows for impact investing in a way that resonates with Christian thinking. They take investment and then loan the funds out to churches and Christian charities.

All this is increasingly relevant and growing - the Global Impact Investors Network did a survey and reported US \$114 billion invested by the 208 respondents (large funds) in impact investments. They state regarding this that, “impact investing challenges the long-held views that social and environmental issues should be addressed only by philanthropic donations, and that market investments should focus exclusively on achieving financial returns.”

Locally in New Zealand an Impact Investing Network was set up last year and they provide resources and information. More than \$8 million was raised by one paradigm shifting New Zealand fund (the Impact Enterprise Fund) which is investing into social enterprises and others pushing boundaries with their companies. Impact investing is here to stay and we are confident it will grow as more people step back and think through how they are investing their funds.

## 21. SOCIAL ENTERPRISES AND CHARITIES: PARADIGM SHIFTS

***Note: This first appeared as part of a “Charity Law Update” for the New Zealand Law Society at a course in Wellington held November 2018.***

Social enterprises are growing in popularity and becoming better understood as shown by the 1,600 delegates who attended the Social Enterprise World Forum in Christchurch in 2017 and the national ‘Aotearoa Social Enterprise Forum’ held in Wellington recently. In this section we want to outline exactly what a social enterprise is and focus in particular on how the concept crosses over with, but why they are different from, traditional charity structures.

The reason for this focus in a book on churches is that many churches have side projects that do charity work like second-hand shops or community engagement. Increasingly charities are choosing either to formally identify with what they have always addressed as a social enterprise or explore what it would mean for them to set up a new social enterprise business.

### **What are social enterprises?**

First of all the definition is important.

In New Zealand there is no bespoke legal structure for social enterprises. This means it can be confusing as to what form of entity fits best. The Ākina Foundation (which has a Government contract to promote social enterprise) has adopted the following definition which is a good one: *Social enterprises are purpose-driven organisations that trade to deliver social and environmental impact.*

That definition is similar to ones used overseas where the term ‘social enterprises’ has been in use longer.

Perhaps the simplest way to explain social enterprise and how it relates to both business and to charity is to link them like this:

*Business: Mind*

*Charity: Heart*

*Social Enterprise: Mind and Heart*

Of course that is a very simple overview. Another way to explain it is to focus on the key words of ‘purpose’ and ‘profit’.

Most business is focused primarily on ‘profit’. Usually when directors of a company make decisions they will no doubt be considering the impact of that decision on the shareholders of the company in terms of how high, or low, the dividends will be. Instead of that focus social enterprise places a higher premium on ‘purpose’ over profit.

A social enterprise is therefore trading and making a profit (otherwise it won’t continue) but is also focused on some other purpose which is the real reason they exist. That purpose might be an environmental or social need of some kind. The key is that the business model itself often provides a way for the purpose to be outworked. For example, a café which employs people with disabilities. Or a moving business that employs ex-prisoners.



It is also possible for hybrid forms (with both a charity and non-charity) to be used, such as when a charity owns a company.

### **Criteria to be a social enterprise?**

There is no legal definition or separate category of entity for social enterprises. They can take the form of limited liability companies, trusts, partnerships, incorporated societies. Really, it is not so much the legal structure that is critical as the commitment to purpose.

Some have argued that a new legal structure might assist social enterprises to be clear about their identity and also sit between a charity and a business in a new way. This is not radical as for example in the UK there has been a “Community Interest Company” structure for many years. New Zealand could learn from that and other overseas models in adopting models here. Legal research into the options is currently being carried out with a report expected in early 2019.

What is clear in the emerging social enterprise sector is that there are certain criteria which most would agree are strong indicators of being a social enterprise. Those factors include the following:

*Purpose:* This should be clearly defined and set out;

*Profit use:* A percentage could be reinvested into the purpose (how much is debatable);

*Asset lock:* This also is debatable but constitutional documents may provide for the distribution of assets on wind-up; and

*Transparency:* Clear reporting on how the purpose is being fulfilled.

### **Intersection with Charities?**

So, why are we including this section in a book about how to set up a church in New Zealand? Well, this is where it starts to get really interesting when you throw charities in to the mix. Because traditionally charities are doing something similar to social enterprises as they are also focused on purpose (usually enshrined in charitable purposes) and must be so to meet the criteria for registration with Charities Services.

However, charities are often reliant on grant funding or donations which can dry up as the political mood or culture dictates. This is a big problem for charities. So, the concept of social enterprise can be a very appealing one because it allows for potential access to renewable sources of funding while at the same time reaching out to a group of people they want to help.

### **Is this really new?**

By now, you may be saying this is nothing new - op shops are one example. Or how about Trade Aid which has been around for decades? Aren't they examples? Yes, and this shows that in fact it is arguably just the terminology that has changed. But the new phrasing is something which the next generation can grab hold of and communicate to others about what they want to achieve.

Many existing charities are realising that they may have been operating a social enterprise for many years but never used that terminology. Others are looking to start one as they have

realised it is a new way to connect with their donors while also connecting with the group they want to assist. This can be shown by a real life example.

### **Practical Examples of Charities / Social Enterprises**

This might sound fine as a theory but how might all this work out in practice? There are several examples which have been operating for a number of years which have managed to integrate social enterprise into the operations of their charity.

One example is Pathway (<https://www.pathway.org.nz/>). The idea started in 1997 and it was set up as a charitable trust. The purpose is to help ex-prisoners reintegrate back into society. It receives donations to the trust which is registered with charities services. But it also has two businesses which are 100% owned by the trust.

Those businesses - one building seating for stadiums and other venues, and the other unloading shipping containers - also provide employment for the group which Pathway was set up to assist. Their website describes the business like this:

*Oak Tree Devanning began in 2002. A social enterprise in its purest form, Oak Tree is a professional container devanning company that offers opportunities for employment, training, and skill development to people with barriers to employment. Oak Tree is about hard work and earning an honest day's living. It's about being a part of a team and working for a common goal to provide the best service for our customers. Profits generated by Oak Tree are returned to Pathway Trust.*

Another example is Kilmarnock Enterprises (<https://www.kilmarnock.co.nz/>). This was founded in 1958 with a focus on people with disabilities. It does this by having a registered charitable trust which then owns 100% of a registered charitable company. The company offers several different types of employment for people who might struggle to find jobs otherwise. Their website explains their vision as follows:

*By providing a supportive and enriching paid work environment, we have been teaching adults with a range of abilities, the skills needed to transition into open employment. Through professional training, social development, health and wellbeing initiatives and ongoing support, we are showing our employees their individual value and giving them the confidence and skills they need for success.*

Pathway and Kilmarnock are both good examples of social enterprises being utilised by charities to fulfill their charitable purposes in ways that directly impact the group they want to help.

### **Hybrid approach?**

For any new venture access to capital for growth is essential. Social enterprises which are start-ups are no different. Since there is no bespoke legal structure for social enterprises we often see clients wanting to access the best of both being a charity and not being a charity. This is because charities can access grant funding (but cannot return private gain to investors) while non charities may issue shares to investors and return dividends to them.

The result can be a structure that sees a charity owning all, or some, of a company which is not a registered charity. This may give a chance for the founders to have an ongoing stake in the business itself and receive some income from dividends if the company is a success. Of

course, in developing such structures it is important to involve an accountant and receive tax advice to ensure that there is clarity on how profits will be treated from a tax perspective.

**Looking ahead**

Social enterprise is not going away. In fact, the sector is growing and it continues to provide an alternative way of thinking about doing business. It will be helpful for you to be familiar with the concepts involved as increasingly those involved in charities, and those from the next generation of entrepreneurs, will want to use this language with their lawyers. Regarding charities, it may be that more charities begin to explore how social enterprises are set up to achieve their purposes while also being self-sustaining enterprises.

## ABOUT PARRY FIELD LAWYERS

### What makes us unique

We started 70 years ago so have a proven track record. Our team of around 50 staff work closely together in the areas of Property, Advisory and Disputes. We think that gives us unique advantages as we can be fast moving and nimble. Having the size to deal with major transactions, our rates are more competitive than larger operators. We work with clients across the country.

### Charity, Not for Profit and Social Enterprises

We specialise in the representation of churches, religious organisations, non-profit, tax-exempt organisations, including charities, charitable trusts, private foundations (whether company-sponsored or family-endowed), social enterprises, social welfare organisations, public and private schools, tertiary institutions, as well as organisations that support this sector.

### Our Vision

*Heart:* Provide practical legal guidance while integrating our core values into our practice.

*Team:* Implement a team environment that unleashes and empowers every individual.

*Growth:* Develop new and enduring relationships. Explore innovative approaches to legal practice.

### “To the heart of what matters”

Our tagline above was developed just before the Canterbury earthquakes in 2011. We see the client in a rounded way and want to help them with ‘what really matters’, for legal services.

**Disputes:** We act for both individuals and organisations, providing comprehensive, well-reasoned legal advice, combined with pro-active and creative solutions. Our aim is not just to provide sound legal advice but resolutions which deliver the best practical outcome for clients.

**Advisory:** We support those involved in business, whether big or small, and whether at the early stages in forming a company or entering into a joint venture, ongoing support and compliance, raising capital, or assisting with the sale of the business to a purchaser. We come alongside business owners and seek to fully understand your market and industry so we can provide the best advice possible.

**Property:** Our property specialists offer comprehensive advice on matters of all sizes. At the end of the day you are not just another client. We want to personally help you achieve your property goals, whether big or small, with confidence.

### Taking an Innovative Approach

Gaining a better understanding of the business of our clients and solidifying relationships with them is a priority for us. Sometimes things call for a different approach. We are also a tech focussed law firm who enjoy working with start-ups, tech companies and other new businesses seeking angel investors. In fact, ask us about our own start-up focussing on AI powered chat bots for the legal industry! We help our clients to get their legal structures right from the beginning. We enjoy being lawyers who challenge the way law firms traditionally work with their clients.



**A handbook from the team at Parry  
Field Lawyers with advice on the key  
legal issues that Churches face.**

**For more free resources visit:  
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