CHARITIES IN NEW ZEALAND
A LEGAL HANDBOOK

Parry Field Lawyers

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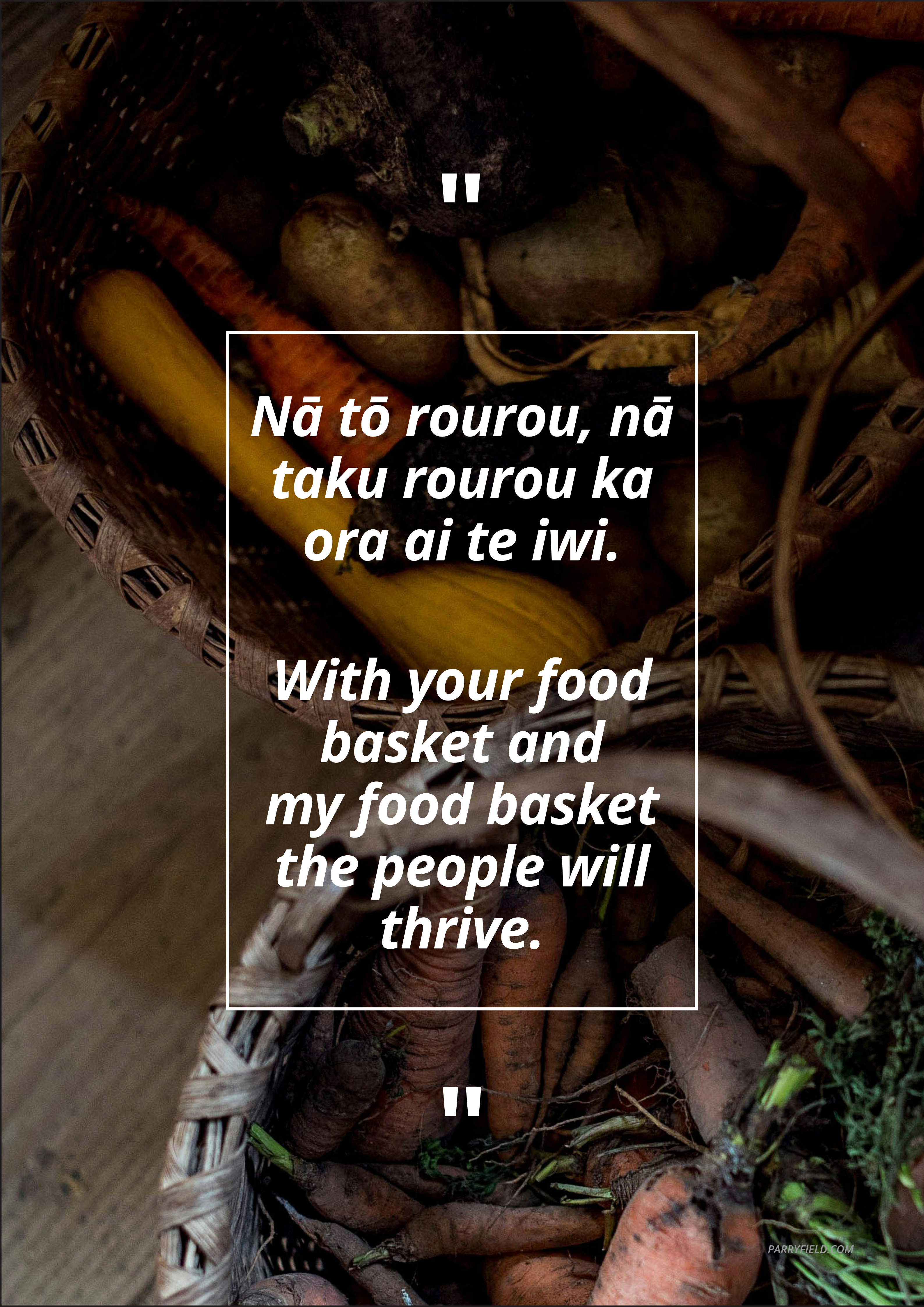
To the heart of what matters.


"
Nā tō rourou, nā taku rourou ka ora ai te iwi.
With your food basket and my food basket the people will thrive.
"
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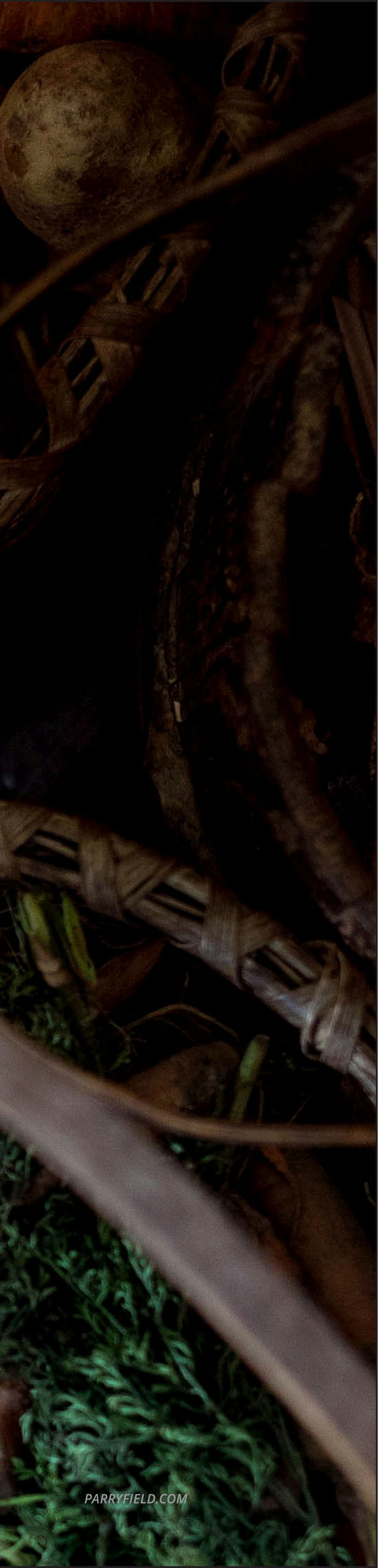

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About Parry Field Lawyers

We are New Zealand's leading law firm supporting purpose-led and mission focused organisations that range from charities to companies, entrepreneurs, and impact investors, as well as those with hybrid structures that combine approaches.

Our Impact Team works across the country providing free training, resources, articles, and videos to empower the 'for purpose' sector and we have almost 100 staff across five offices that can support with legal set ups, charity questions, governance, property, disputes, employment, IP, and more.

Find out more at parryfield.com

Compiled by the Parry Field Lawyers Impact Team

parryfield.com

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PARRY FIELD LAWYERS

CHARITIES IN AOTEAROA NEW ZEALAND

Charities contribute a great deal 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, with many New Zealanders unaware of it.

This handbook is one example of our "Impact Initiative" which aims to help start-ups and existing charities 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 starting a charity, consider relevant aspects in the day to day operation of an established charity, look at contentious issues and consider the future. It is good practice for even long established charities to consider their legal structure again from time to time (particularly if they start new initiatives), to ensure the structure is still the best one for its purpose. 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 parryfield.com. A unique offering is also *seeds*, a podcast about purpose with interviews of more than 450 charities, not for profits and social enterprises. In addition, we have released the free eBooks 'Social Enterprises in New Zealand: A Legal Handbook' and 'Churches in Aotearoa New Zealand: A Legal Handbook.'

We want 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 charity. 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.

NGĀ MIHI NUI

STEVEN MOE

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PART 1
ESTABLISHING YOUR CHARITY

Legal structures - an overview

1. **Trusts** incorporated under the Charitable Trusts Act 1957. A number of charities are operated under a charitable trust, which either owns or leases property and employs staff.
2. **Societies** incorporated under the Incorporated Societies Act 2022 are often used in the charity context. Incorporating as a society gives the same protection as incorporating as a charitable trust, but involves a two-tier structure with at least 10 members and a governing group. An advantage is more people can be involved in an incorporated society than a charitable trust owing to its membership structure.
3. **Companies** can also be charities provided that their rules contain certain provisions so that no private individuals have private gain.
4. Some charities 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 Charities Services 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. It will likely depend on the size, characteristics, and objectives of the charity. The rest of this section will focus on those charities where there is some flexibility as to future structuring - whether at a start-up stage, or with a restructuring of an existing charity.

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

- **Ownership of assets:** Having a single coherent legal entity for the ownership of property that is preferably incorporated (i.e. made into a corporate entity such as a charitable trust incorporated under the Charitable Trusts Act, Incorporated Society, or even a Company).
- **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.
- **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.

Choosing your charity structure

For those finding themselves in the position of thinking about forming a new charity, 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 charity has been established.

1. **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?

2. **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 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 charity.

Let’s consider some of these options.

Option One: Charitable Trusts

In New Zealand, a charitable trust is a commonly used structure. 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.

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 Registrar of Charitable Trusts, which is part of the New Zealand Companies Office, facilitates the incorporation of trust boards.

Key features

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.

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.

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.

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.

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. The charity cannot distribute funds or assets for the private gain of any Trustees or associated persons.

Tax Exemption

If a charitable trust is registered with Charities Services, 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 charity.

Establishment Costs

Establishing a charity 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.

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.

Option Two: Incorporated Societies

While a charitable trust is a commonly used structure, it is not the only option. A charity can be established as an incorporated society. An incorporated society must have at least 10 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 2022.

Key features

Two-tier structure

A society is a group of people (not less than 10) 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.

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.

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.

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.

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.If the incorporated society is also a registered charity, then it will only need to complete annual financial statements for Charities Services.

Costs

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

Suitability for a Charity?

An incorporated society can be as useful as a charitable trust. In fact it is arguable that it offers better accountability with its two-tier structure. The law of incorporated societies in New Zealand has had a much needed refresh in the Incorporated Societies Act 2022, which provides clarity around key issues like contents of a society's constitution, membership and governance. There are situations where it may be the best structure for a new charity, especially one where a membership element is appropriate.

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.

Option Three: Companies

A company can be a charity, so long as it is not for monetary gain. It will be governed by the Companies Act 1993 and the usual rules that apply to a company would also apply to a charitable company. It can be an option to consider, particularly where the mission is to be achieved through trading of some kind. We suggest if you are considering this that you also have a look at our free handbook "Social Enterprises in New Zealand" as it will likely also be relevant.

Key features

Separate Legal Entity and Limited Liability

A company is a separate legal person. This brings the same limited liability advantages noted with charitable trusts above.

Voting Input

The Directors of a Company will make most decisions about direction but some will need to be made by the Shareholders instead.

Registration with Charities Services

As with a charitable trust, a Company 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.

Costs

The establishment costs of a company are similar to those of a trust as outlined above – the key requirements are a shareholder and a director (one director needs to be NZ resident).

Suitability for a Charity?

This can be a good structure for a new charity – we sometimes see a charitable trust set up which then owns 100% of the charitable company. This is usually to ring fence liability so if the company fails, the trust continues. However, it can also be useful when it comes to financing as banks and other corporate investors may better understand how a company operates compared to a charitable trust.

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 ***charities.govt.nz*** has a number of helpful resources.

How to register

For a practical insight into the process visit ***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 charity and Trustees/Officers, purpose or mission of the charity, activities of the charity, whether the charity receives donations, and an estimated percentage of how much of your charity's funds will go towards carrying out charitable purposes overseas.

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.

Charitable purposes: what are they?

The definition of charitable purposes in New Zealand charity law derives from English common law.

The foundations for the legal definition of charitable purposes and charity law owe their inception to the Preamble of the Statute of Charitable Uses Act 1601, commonly known as the Statute of Elizabeth. It is remarkable to think that a document written more than 400 years ago would have had such influence on the development of this area of law.

After various legal changes and evolutions, charitable purposes in New Zealand are now included in section 5(1) of the Charities Act 2005. They still retain the four 'heads' of charity from the case of Pemsel which was an English case decided in 1891. These four heads of charity are as follows:

1. The relief of poverty.
2. The advancement of education.
3. The advancement of religion.
4. Any other purposes beneficial to the community, not falling under the preceding heads.

Of importance is the fact that the Charities Act 2005 and case law require that a charitable purpose must have a public benefit to qualify as being charitable.

The New Zealand courts have exercised a presumption when they look at the first three heads of charity that a public benefit exists (unless a contrary intention is shown). The presumption is not a conclusive determination and the question for the court as to whether a purpose operates for the public benefit will depend very much on the full range of evidence presented to the court.

For a purpose to be deemed charitable under this arm, a public benefit must be specifically shown. Showing a particular need to be alleviated can qualify.

In New Zealand, charitable purposes are assessed by Charities Services as to whether or not an organisation's purposes are indeed charitable and therefore worthy of being tax exempt. One of the key criteria will be to examine the statement of purposes of the charity. For example, a Trust would include those in its founding document, the Trust Deed. A company might include the purposes in its constitution. To aid practitioners and those seeking to set up a charitable trust, Charities Services include on their website examples of how these charitable purposes clauses can be worded in a founding document.

The reason this is important is that you may have a "good idea" which you think will help others but it actually needs to qualify as a charitable purpose as defined in law. So it needs to fit within one of the four categories set out above. Sometimes people get confused about this and try to describe the good that they are going to do but don't relate it to the strict legal categories of charitable purpose. They are therefore unlikely to get across the line and qualify as a charity.

Case Study: Canterbury Development Corporation

A fascinating case which came before the courts just a few years ago provides a great lesson and insight in to what makes a "charity". Canterbury Development Corporation (CDC) is a great organisation doing a lot of good things in Canterbury and it challenged Charities Services over its decision not to allow CDC to be registered as a charity. CDC eventually lost the case in the High Court to be registered and have tax exempt status. This is an interesting case to understand because it is likely that other community focused groups could also be in the same boat as the CDC.

CDC helps to promote economic development in the Canterbury region. CDC was therefore arguing that it acted for charitable purposes – specifically the relief of poverty, advancement of education and the beneficial effect to the community (due to the development of industry and commerce). The case analysed whether CDC could come within one of the four charitable heads contained in the Charities Act 2005 (the only head not argued was that of advancing religion).

The court concluded that CDC was not a charity. Looking first at education, it decided that this was provided not to a broad section of the public but to a narrow group who met strict eligibility criteria. The Judge said:

> *"The objects and work of the CDC are commendable. Its intention is to help fledgling businesses. By itself this does not establish CDC as having the necessary focus on charitable intent ... These are essentially the provision of help to individual businesses in the hope they will grow. Not all businesses that ask for or indeed need help are offered it. Only those within a narrow band. This help may promote these individual businesses. It may make them more profitable. This promotion and profitability is not incidental to the work of CDC. It is at its core. This illustrates how the spirit and intendment of charitable purpose is not central to CDC's function and thereby cannot be charitable."*

Regarding whether CDC promoted the relief of poverty through job creation the judge said:

> *"What is illustrated by this analysis is that the purpose of the CDC is not relief of poverty through providing those who are unemployed with jobs. It is to improve the general economic wellbeing of the area. In that sense, therefore, CDC's purpose cannot be the relief of poverty. The possibility of helping someone who is unemployed is too remote for it to qualify as the charitable purpose of relief of poverty."*

Regarding public benefit, the Judge said:

> *"In CDC... the pursuit of the objects is focused on the development of individual businesses. The provision of support to those businesses is done in the hope and belief that their economic success would be reflected in the economic wellbeing of the Canterbury region...any public benefit therefore from CDC's purpose and operations is in my view too remote to establish CDC as a charity. Public benefit is not the primary purpose of CDC's objects or operation. Its primary purpose is the assistance of individual businesses. The creation of jobs for the unemployed, as opposed to jobs for those who are employed and not in need, is the hoped for, but remote and uncertain, result of the way in which the CDC approaches its task.... The general economic lift for the Canterbury region from CDC's work is the hoped for result of helping individual businesses. It is remote from the purpose and operation of CDC. Public benefit is not at the core of CDC's operation."*

This case and the conclusions reached are important for other organisations which may have a broad purpose to assist a region by helping individual businesses in that region. Just because there is good work being done and there may be positive results, it does not mean that the organisation will necessarily be able to register as a charity. It pays to think about this sooner rather than later if you are at the early stages of forming your charity and we can help work through that process with you.

Financial Matters

Charity status

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

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 charity 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 charity has its charity status, it may be considered a donee organisation. This allows the charity 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 charity has asked for donations for a specific project, 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 charity's IRD number and/or Charities Services registration number.

Overseas giving

To be considered a donee organisation, your charity 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.

Schedule 32

Applying to be added to Schedule 32 of the Income Tax Act 2007 can give qualifying charities a unique status in the New Zealand tax regime. Schedule 32 status is only granted to a select few international charities which, as at the date of this article, is around 120. It provides the ability for the organisation to issue receipts to their donees for donations made to the charity. Those donees can then use those receipts to claim a credit or deduction against their income tax. If they are an individual they can get a third of the donation as a credit, just as long as the donation was not more than their taxable income. If a company, they can claim a deduction, as long as the donation was not more than their taxable income in the absence of that deduction. When it was first introduced the Government had a flood of requests and it even published special guidelines to charities on how to make the application. For those charities that do not have their charitable purposes principally (more than 50%) in New Zealand, then the charity cannot qualify as a donee organisation (unless it is listed on Schedule 32).

Resident withholding tax

If you are eligible for income tax exemptions, you will also be entitled to a RWT certificate of exemption. This will stop banks and other financial institutions from deducting resident withholding tax (RWT) from the interest in your charity'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 charity 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 charity 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 charity's buildings 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.

What is public benefit and why is it needed for charities?

Charitable trusts have a long history of supporting those in need. Yet those in charge of decisions about how to use funds should be cautious to ensure that any giving does not create a private gain or financial benefit to an individual. Failure to give in accordance with the permitted charitable purposes can mean a charity may lose its registered status.

To illustrate this it is good to look at a practical example. In 2014, the Charities Registration Board determined that the New Zealand Affordable Art Trust no longer qualified for registration as a charitable entity. The Board found that the Trust's primary purpose was to promote the private interests of artists. This was outside the scope of charity as it conferred private benefits on artists which were more than incidental to any charitable purpose.

The Trust submitted that its support of artists fell under the 'relief of poverty' charitable purpose. This argument was rejected as the Trust chose to assist artists based on criteria such as originality, technique and development, rather than the relative wealth or poverty of the artist. The Board did acknowledge that the Trust helped to advance education in the arts for the general public, however this was not the main focus of the Trust.

A similar approach has been found in the courts. In *Commissioners of Inland Revenue v White,* Fox J held:

> *"The promotion or advancement of industry (including a particular industry such as agriculture) or of commerce is a charitable object provided that the purpose is the advancement of the benefit of the public at large and not merely the promotion of the interest of those engaged in the manufacture and sale of their particular products. The charitable nature of the object of promoting a particular industry depends upon the existence of a benefit to the public from the promotion of the object."*

At the risk of providing too much detail, Lord Simonds, when considering the question of whether an element of public benefit is necessary to achieve charitable status in *Oppenheim v Tobacco Securities Trust Co Ltd* said:

> *"My Lords, once more your Lordships have to consider the difficult subject of charitable trusts … It is a clearly established principle of the law of charity that a trust is not charitable unless it is directed to the public benefit. This is sometimes stated in the proposition that it must benefit the community or a section of the community. Negatively it is said that a trust is not charitable if it confers only private benefits. In the recent case of Gilmour v Coats [1949] AC 448 this principle was reasserted. It is easy to state and has been stated in a variety of ways, the earliest statement that I can find being in Jones v Williams (1767) 2 Amb 651, in which Lord Hardwicke, LC, is briefly reported as follows: 'Definition of charity: a gift to a general public use, which extends to the poor as well as to the rich …'With a single exception, to which I shall refer, this applies to all charities. We are apt now to classify them by reference to Lord MacNaughten's division in Income Tax Commissioners v Pemsel [1891] AC 531, and, as I have elsewhere pointed out, it was at one time suggested that the element of public benefit was not essential except for charities falling within the fourth class, 'other purposes beneficial to the community'. This is certainly wrong except in the anomalous case of trusts for the relief of poverty with which I must specifically deal. In the case of trusts for educational purposes the condition of public benefit must be satisfied. The difficulty lies in determining what is sufficient to satisfy the test, and there is little to help your Lordships to solve it"*

What does this mean for charities?

Charitable trusts should ensure that any benefits they bestow are intended to create a benefit for the public. While a private benefit incidental to a charitable public benefit may be allowed, this should not be the primary focus if a trust wishes to maintain its charitable status.

Charity Officers: appointment 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 charity. These various structures, especially the incorporated trust, are also just as useful in using alongside an existing charity 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 charity, where the organisation 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 charitable trust (which, say, owns the assets of the charity) may be appointed (and removed) in accordance with the trust deed.

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. 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 charity's vision and purposes. It also allows appointments that focus on needed skill sets.

Does your charity need a common seal?

Once you have set up your charitable trust, you will need to order a common seal. It's a common misconception that a "common seal" is outdated and not needed – but it is essential that you obtain a common seal as it is legally required.

A common seal is how a board of Trustees can execute documents. Section 13 of the Charitable Trusts Act 1957 states it is required: "Every board shall have perpetual succession and a common seal...". It is normally a rubber stamp that must include the name of the trust and the term 'common seal'. The charitable trust deed should have a provision that deals with the use of the common seal. For example:

The Board shall have a common seal (the Common Seal) which shall be kept in the custody of the secretary (or such other Officer as shall be appointed by the Board) and which shall be used only by authority of the Trustees previously given to any document requiring execution under Common Seal by the Trustees. Each such use of the seal shall be performed in the presence of and accompanied by the signatures of at least two Trustees and shall be sufficient evidence of the authority to use such seal. No person dealing with the Trustees shall be bound or concerned to see or enquire as to the authority under which any document is sealed and in whose presence it was sealed.

To learn about what other steps you should take after you have set up a charitable trust, see our practical checklist ***here***.

PART 2
OPERATING YOUR CHARITY

Trustee 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).

Incorporated Society Officer Duties

The Incorporated Societies Act 2022 codified the duties that officers of societies must comply with. These duties are owed to the society and include to:

- Act in good faith and in the best interests of the society.
- Exercise powers for proper purposes only.
- Comply with the Act and the society's constitution.
- Exercise reasonable care and diligence.
- Not create a substantial risk of serious loss to creditors.
- Not incur an obligation the officer doesn't reasonably believe the society can perform.

Officers may rely on advice or information they receive when they exercise their powers and carry out their duties. However they must do so in good faith, make proper inquiry, and have no knowledge that it is unwarranted to rely on the advice.

Officer/Trustee 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 charity or just starting up, it is highly advisable to consider liability insurance for Trustees.

Governance and 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.

Govern

Don't manage: The Board should not focus on the minor issues of how the charity 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).

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.

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.

Know your charity'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.

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 charity.

- **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.

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."

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.

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.

Who Should be on a Trust Board?

In a small charity this may be a luxury, but the ideal answer is someone who has both a strong belief in the vision and purpose of the charity as well as a particular skill set that the charity 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.

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!

15 Questions for Trustees to ask

Here are 15 key questions that your Trustees should consider when reviewing how your charity operates:

1. Are there adequate safeguards in place to prevent fraud?
2. What is our policy on reserves?
3. How can we make best use of our permanent endowment investments?
4. Have we reviewed our contractual commitments?
5. Are we financially strong enough to continue to provide services for our beneficiaries?
6. Do we know how the social and/or economic climate is impacting our donors and the support for our charity?
7. Are we maximising the use of our property?
8. Are we an effective Trustee body?
9. Are we making the best use of our staff and volunteers?
10. Have we considered collaborating with other not-for-profits?
11. Have we reviewed any contracts to deliver public services?
12. Are we satisfied with our banking arrangements and our current and future investment policy?
13. If we have a pension scheme, have we reviewed it recently?
14. How is the current economic climate affecting our charity and its activities?
15. Are we making the best use of the financial benefits we have as a charity?

Adapted from ***https://www.gov.uk/government/publications/charity-trustee-meetings-15-questions-you-should-ask***.

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 charity, 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.
- Stock-take 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.

Leasing building

We often have clients coming to us wanting to lease a property for their charity 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 premise 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?

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.

Winding up

There can come a time when the charity 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.

As 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 de-registration to ensure that there is no later liability that results after de-registration 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 de-registration form which can be accessed on the online account of that charity. Charities Services will advise Inland Revenue of the de-registration.

PART 3
OTHER LEGAL ISSUES

Quick fire Q&A on key issues faced by charities

When preparing this handbook we asked for input from various charitable trusts 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: Charities 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: 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 #3: 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 #4: What are rules around kohas for employees and also in addition if people 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 charity 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 #5: I've seen a number of charities 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 charity wishes to employ a couple, they need to have individual employment contracts with each person.

Area of concern: volunteers

Issue #6: 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 #7: Code of Conducts for Volunteers. What standard can we call people on before it starts crossing lines?

Answer: The charity 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 #8: Does it matter whether someone is a volunteer or employee?

Answer: 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: data and audits

Issue #10: 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*** to learn more.

Issue #11: Destroying of Data. How long do we legally need to keep files? Accounts? Contracts etc.

Answer: A non-profit organisation, such as a charity, 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.

Hiring employees

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

A unique consideration in charity contexts is that leaders may have a calling to a particular charity. 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 your 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 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

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.

Employment Key Issues

The charity 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 charity.

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.

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 charities are often in a position of trust with vulnerable people, your charity 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 charity will need to become an Approved Agency and undergo police vetting checks. To get approval, you will need to visit ***www.police.govt.nz*** and follow the steps. The person registering the charity 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, makes sure to securely destroy the records.

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, charity 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:

- Censuring 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 charity's needs.

Health and Safety

There has been some confusion in many charities 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 charity 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 charity 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 charity. 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 of 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 charity has no employees then it will be known as a volunteer association under the Act. As a volunteer association your charity would not be a PCBU and therefore the Act would not apply to your charity. However, most of the time this exemption would not apply to charities.

If your charity 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 charity 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 charity is a PCBU and something goes wrong the penalties can be high. It is therefore very important that you are aware of whether your charity 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

Impact Investing: The future? And is this relevant to charities?

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 that dreams 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 offer a 9% return on investment? Well, I can get the 11% over here..." However, such an outlook is limited and narrow because it is only focussed on financial returns.

Increasingly, organisations are being pressured by both shareholders and stakeholders to achieve a social impact alongside financial returns. Larry Fink, CEO of Blackrock (the largest investor in the world at around US$6.8 Trillion) has stated, "Society is demanding that companies, both public and private, serve a social purpose. To prosper over time, every company must not only deliver financial performance, but also show how it makes a positive contribution to society." According to the Morgan Stanley Institute for Sustainable Investing, 85% of investors surveyed were interested in engaging with Impact Investing. It is clear that funders are now expecting more from the organisations they choose to invest in.

Impact investing offers a different and more holistic approach. Some of the key attributes of impact investing include a desire to achieve a positive social/environmental (or other) impact, a plan to measure this impact and an expectation of generating a financial return on the capital invested. 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 beyond financial returns, such as:

- What does the business actually do – is it an extractive business which is harmful to the planet?
- 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?

By just relying on grants, NFPs are reliant on other activities (such as fundraising) to raise funds. Conversely, the tenets of traditional investment may clash with the charitable purposes of a NFP. Impact investing provides NFPs with a unique way to invest funds in accordance with their charitable purposes (or potentially to receive investment themselves). The Trustees of a charitable trust may be able to invest the trust's assets in projects that are making an impact, while receiving a return.

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. It represents one element of a broader shift in thinking, as the traditional values of investing and capitalism are challenged. While not all organisations will be able to engage in impact investing, NFPs should consider how they can best achieve their desired impact and whether impact investment is the way forward.

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.

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.

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?

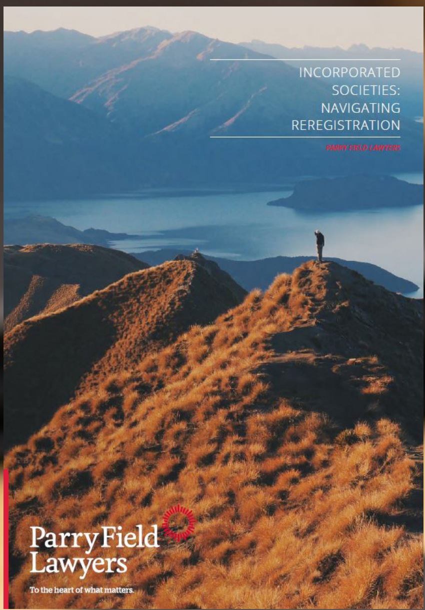
For any new venture access to capital for growth is essential. Social enterprises which are start-ups are no different. Since there is no bespoke legal structure for social enterprises we often see clients wanting to access the best of both being a charity and not being a charity. This is because charities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

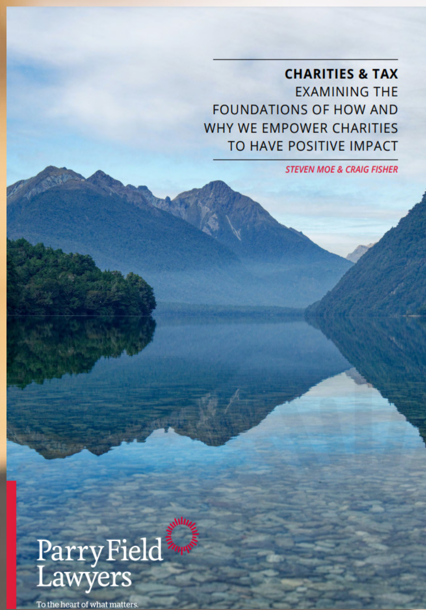
The result can be a structure that sees a charity owning all, or some, of a company which is not a registered charity. This may give a chance for the founders to have an ongoing stake in the business itself and receive some income from dividends if the company is a success. Of course, in developing such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

Other free guides at www.parryfield.com/publications include:





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