Establishing a Charities Commission in New Zealand

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Why Set Up

Background to Establishment

1. The journey to the establishment of a Charities Commission in New Zealand included a number of working parties and committees that considered matters such as, the regulation of charities and the provision of tax benefits for organisations with charitable purposes.

2. Prior to the establishment of a New Zealand Charities Commission, the New Zealand tax regulators, Inland Revenue, operated a system whereby organisations could ask for written confirmation that they qualified as tax exempt on charitable grounds. This was not a legal requirement and many entities self-assessed as charities. On that basis there was no process for gathering information about the size of the charitable sector and its activities.

3. In introducing the Charities Bill in 2004 the Minister of Commerce said:

   This Bill provides for the establishment of a new Crown Entity, the Charities Commission. The Commission’s primary function will be to administer a registration and monitoring system for charitable organisations and approved donees.

   Creating a registration system will help to foster a culture of philanthropy and giving in this country by increasing the public’s trust and confidence in charitable organisations. The Bill provides that all organisations wanting to register will need to supply details of their activities and purposes. The Commission will then assess those details against the requirements of the charitable purposes test, which are the advancement of education and religion, the relief of poverty, and any other purpose beneficial to the community.

   Registration with the Commission may be voluntary, but only those organisations that choose to become registered can continue to access tax exemptions or be classified as approved donees. Registered organisations will have to file an annual return showing that they are undertaking charitable activities. In addition, they will have to provide the Commission with basic financial data when completing their annual returns. That will also help to increase the sectors transparency and accountability to the donating public, and to those to whom it provides assistance.
4. The Minister also noted that:

The establishment of the Charities Commission will also help to bring New Zealand into line with other Commonwealth countries, where registration and reporting regimes for charities are common place. It is also the first step towards instigating measures to satisfy New Zealand’s International obligations under the Financial Action Task Forces eight special recommendations relations to the financial of terrorist organisations through non-for-profit entities.

5. The Bill was considered by the Social Services Committee of Parliament which received a large number of submissions, mostly from entities operating in the charitable sector, and found that there was general support for the establishment of a Charities Commission. Several significant changes where made to the Bill by the Select Committee. Perhaps the main change related to the submissions that expressed concern that the Commission may only have a regulatory role. The Committee concluded that:

In our view, the Commission should have an important role informing, educating and supporting charitable organisations, as the effective exercise of the role should help charities to build their capacity and develop capabilities.

6. The Committee did discuss the definition of charitable purpose and whether the definition should be expanded. Some submitters were concerned that the definition was too narrow and that it excluded certain activities. The Committee examined proposed amendments to charities law in the United Kingdom and Australia which were considering the expansion of the number of heads of charity.

However, the majority does not believe that expanding the definition of charitable purpose will offer any significant benefit, and therefore does not recommend the definition be amended. The majority is concerned that amending the definition would be interpreted by the courts as an attempt to widen or narrow the scope of charitable purposes, or change the law in this area, which was not the intent of the Bill.

7. The Committee also considered the role that the Commission should have with regard to decisions concerning tax and decided that

It would be inappropriate to have an autonomous Crown entity, which is independent and not required to give effect to Government policy, responsible for making decisions that will impact on the revenue tax.
8. Inland Revenue retained the role of making all tax related decisions. Therefore, while the Charities Act provided that from 1 July 2008 all entities must be registered in order to qualify for charitable purpose related tax benefits, the final decision regarding tax liability and donee status is made by Inland Revenue.


What Does the Legislation Do

10. The Charities Act established the Charities Commission as an Autonomous Crown Entity (ACE). An ACE is defined in the Crown Entities Act 2004 which provides that an ACE is independent in its decision making but it must “have regard to government policy when directed by the relevant Minister” (as distinct from “must give effect to…” that Crown agents are required to). The intent in this case is that the Commission is able to make its decisions without political interference. There were concerns that if the Commission was not given the classification of an ACE that:

   It might allow the government to interfere with, direct, or control the Commission, and would not reflect the independence from the government of the charitable sector. Particular concern was expressed at the prospect that the government might be able to directly or indirectly influence the registration or deregistration of particular charities to reflect government policy. (Social Services Committee Report)

11. The Membership of the Commission consists of no more than seven, and no fewer than 5, members. It is contemplated that the Commission will have a Chief Executive and the Board has the power to delegate decision making to the Chief Executive.

12.1 The functions of the Commission are set out in the legislation and are as follows: (abridged)

   (a) Promote public trust and confidence in the charitable sector;
   (b) Encourage and promote the effective use of charitable resources;
   (c) Educate and assist charities in relation to matters of good governance and management;
   (d) Receive, consider and process applications for registration as charitable entities;
   (e) Ensure that the register of charitable entities is compiled and maintained;
   (f) Receive, consider and process annual returns submitted by charitable entities;
(g) Supply information and documents in appropriate circumstances for the purposes of the Inland Revenue Act;

(h) Monitor charitable entities and their activities to ensure that entities that are registered as charitable entities continue to be qualified for registration as charitable entities;

(i) Enquire into charitable entities and into persons who have engaged in, or engaging in, conduct that constitutes, or may constitute a breach of this ACT or serious wrong doing in connection with a charitable entity;

(j) Consider and to report and make recommendations on any matter (for example, a proposed government policy relating to charities that is referred to it by any Minister of the Crown or on its own motion);

(k) Stimulate and promote research into any matter relating to charities.

12.2. The Commission must hold at least one annual meeting each year with representatives of charitable entities. The responsible Minister and or his or her representative must attend at one annual meeting each year. The purpose of the meeting is to report on the operation of the Commission, to table the financial statements of the Commission, and to report on any matters that may significantly effect the charitable sector. Further the Commission must allow people at the meeting to ask questions concerning the operation of the Commission, to make submission to the Commission concerning its operations and to ask questions regarding any significant matters effecting the sector.

12.3 Charitable purpose is defined in the Act to include “every charitable purpose, whether it relates to the relief of poverty, the advancement of education or religion, or any other matter beneficial to the community”. This effectively retains the common law definition of charitable purpose that has been in existence for over 400 years.

12.4 The Charities Act provides some differences to the definition of charitable purpose which may be unique to New Zealand. It says that:

The purpose of a Trust, Society or an Institution is a charitable purpose under this Act if the purpose would satisfy the public benefit requirement apart from the fact that the beneficiaries of the Trust, or the members of the Society or Institution, are related by blood.

This is because many Maori organisations are based around iwi and hapu and by definition there is significant blood relationships within those structures. This wording was based on existing New Zealand tax law and has provided the Commission with some challenges in terms of its interpretation.
12.5 In addition the legislation provides for the effect of an ancillary non-charitable purpose on the qualification for registration of a charitable entity.

To avoid doubt, if the purpose is a trust, society, or an institution include a non-charitable purpose (for example, advocacy) that is merely an ancillary to a charitable purpose of the trust, society or institution, the presence of that non-charitable purpose does not prevent the trustees of the trust, the society or the institution from qualifying for registration as a charitable entity.

12.6 In order to qualify for registration in the case of a trust, the trust must be of a kind which an amount of income is derived by the trustees in trust for charitable purposes. Because a trust for charitable purposes would be void for uncertainty if it included non-charitable purposes, this has been interpreted as requiring a trust to be effectively exclusively charitable. Although New Zealand does have some saving legislation to legitimise trusts that are substantially charitable. In the case of a society or an institution the Institution must be established and maintained exclusively for charitable purpose and can not be carried on for the private pecuniary profit of any individual.

12.7 The Officers of an entity must not be disqualified under the Act from being an officer. For the most part an Officer is disqualified from being such if they are under the age of 16 or who are subject to a number of matters which predominately relate to either dishonesty or who is an undercharged bankrupt. The Commission may grant waivers on any terms and conditions that it thinks fit for a person who has a disqualifying characteristic to be allowed.

12.8 There are a number of matters which relate to the name of the organisation which mean that if an organisation has been established under other legislation with a name then that will be allowed or in any other case, in the opinion of the Commission, the name is not either offensive or liable to mislead the public.

12.9 There are important provisions in the legislation which allow for the date of registration to be back dated to the time that either a properly completed application was submitted to the Commission or the time that a gift was made to establish a trust. These provisions were particularly important in terms of the period in which tax exemptions might apply.

12.10 The Commission is required to establish a register of charitable entities which is available to the public. The register displays charity documentation to the public including application details, founding documents, and annual returns (including financial statements). and the provisions relating to that have been detailed earlier. There is a provision that allows the Commission to withhold information from the Register and this is an important provision. It allows for the restriction of public access where the Commission considers, in the public interest, that public access should be prevented or restricted.
12.11 Each registered charity has a duty to prepare an Annual Return. That return must be submitted within six months after the entity’s balance date. Regulations apply to the requirements of an Annual Return which are essentially they are used to advise of any changes that the entity has made since its last return together with its financial returns for the year.

12.12 The Commission does have significant powers to inquire into charitable entities and other persons. It can inquire into:

(a) any charitable entity;
(b) any person who is engaged in, or engaging in conduct that constitutes or may constitute –
   (i) a breach of this Act; or
   (ii) serious wrong doing in connection with a charitable entity.

The Commission is able to inquire into:

(a) Activities and proposed activities of a charitable entity or person;
(b) The nature, objects, and purposes of the charitable entity;
(c) The management and administration of the charitable entity;
(d) The results and outcomes achieved by the charitable entity or person;
(e) The value, condition, management and application of the property and income belonging to the charitable entity or person.

As a result of its inquiries the Commission can decide to issue warning notices, publish information and also to deregister an entity. Any decision of the Commission under the Charities Act may be appealed to the High Court.

The Commission works very closely with other agencies that have roles in relation to charitable entities and their activities. These include the Crown Law Office that carries out the role of the Attorney-General in representing the public interest in the administration of charities and also enforcement agencies such as the Police.
Getting Set Up

13. Establishing the Commission as a new operating organisation involved work in four general streams. These were organisational development, information technology, registration systems development, and public awareness.

14. Each of these works streams operated in parallel but were obviously connected as they progressed. As indicated this was a ‘challenging process’ as it was a new area for New Zealand and involved a ‘steep learning curve’ While significant planning went into the establishment of these themes, the public policy concept of ‘muddling through’ might usefully describe the process.

Organisation Development

15. There have been three distinct phases of development of the Charities Commission. These are establishment, registration, and moving to business as usual.

Establishment

16.1 Prior to the Commission Board being appointed an establishment unit with the Ministry of Economic Development commenced work on the establishment of the organisation. When the Board was appointed, the establishment team, who were initially solely consultants, became the staff of the Commission. A Chief Executive was appointed within several months of the Board being appointed and over a period of time permanent staff replaced the consultants. The challenges of establishing an organisation could be subject to a separate paper although, it would be fair to say that as permanent staff were appointed, and with a desire to ensure that institutional knowledge is retained within the organisation rather than departing with consultants, the permanent staff often took on a wider range of duties than was envisaged in their job description. As new staff were appointed the roles that earlier appointed staff undertook was reduced.

16.2 The main focus of organisation development at this time was preparing for registration. The key tasks for this were: developing information technology, growing public awareness, and developing the registration process.

16.3 The second part of organisational development was setting up the organisation to process a large number of applications for registration as a one off event.
16.4 All organisations wishing to be tax exempt on charitable grounds once the law changed were required to be registered by a set date in the future (30 June 2008). This meant that a significant but unknown number of charities needed to be registered within a short period of time. It was therefore necessary to set up an organisation to process a large number of applications with the knowledge that the staff required would not be required long term. It meant that there was a need to recruit and train a large number of fixed term employees. These were predominately first year law graduates. Our experience was that after 12 months staff tended to move on to other work. Our feedback was that the work was interesting and challenging for short period of time but that after 12 months it became repetitious.

16.5 Because the decision as to whether an organisation had a charitable purpose in the legal sense was a relatively complex one we found that it took three months to train a new employee to the point where they were comfortable reviewing applications without constant supervision. That created its own difficulties, training a new staff member inevitably reduced the productivity of the trainer at a time where we needed a high processing throughput.

16.6 The third part was moving to a business as usual structure. This process involved a restructure of the organisation and included the recruitment of some of the fixed term contractors to permanent positions.

**Information Technology**

17.1 Prior to the Commission coming into existence the establishment unit commenced the development of a bespoke computer system based on a particular registration model. That involved a fixed price fixed delivery date contract. When the Commission reviewed its legislation in terms of registration requirements it was clear that the assumptions made for the bespoke system needed to change. Consequently both the costs and timeframe for the system started to escalate. A staged development of the system was introduced so that by the time registration was to commence those components of the system that would allow for registration applications online and application processing would be available. (It should be noted that in any system such as this there are both external and internal pressures to get the work, in this case of registration applications, started.)

17.2 Registration commenced on the agreed date but the IT system at that stage had only limited capacity. While it did allow for applications for registration to be processed it did not have the capacity to allow for the filing of annual returns, sharing of information, or for the statutory requirement for a search capacity, as well as having a lack of functionality for application processing.
17.3 At that stage the Commission decided to review its options in terms of its IT. The result of that review was a decision to replace the bespoke system with a CRM package system. The new project was completed within a relatively short period of time and there was a transition from the bespoke system. The new system was significantly less expensive to develop, provided greater ongoing flexibility and lower ongoing costs, and was user friendly for both applicants and registration analysts.

17.4 In brief, the system allows for:

1. Online registration, Notices of Change and Annual Returns
2. Back Office Processing and Search functionality
3. Public Search Capacity
4. Information Sharing.

Public Awareness

18.1 At the time of the Commission’s establishment there was little information, and no common database, on the numbers, names, or contact details of charities in New Zealand. It was also assumed that charities were not aware of the need to register as a charity in order to retain the tax exemptions that they were eligible for.

18.2 Initial estimates suggested that there would up to 15,000 charities in New Zealand. During the awareness raising process undertaken by the Commission it became clear that the 15,000 number was too low and a revised estimate of 25,000 charities was used for budgeting purposes. Later figures from the Department of Statistics estimated that there were 97,000 non-for-profit organisations in New Zealand.

18.3 It also became clear that the public had a poor understanding of the meaning of the word charity. For many it tended to mean an organisation that provided funds or services of a welfare nature.

18.4 The Commission did not have a large advertising budget to promote registration and therefore took a sophisticated but low key approach to awareness raising. Public awareness activities included:

1. An extensive speaking programme to a wide range of organisations within the charitable sector at a national, regional, and local level.
2. The Commission developed its own website which provided guidance material.
3. A series of Fact and Information sheets were prepared and distributed to community information bureaux around the country as well as on the Commission’s website. These were published in six different languages.
4. A toll free call centre was established to answer queries regarding registration. Linked with the Call Centre was the use of Language Line which allowed for people to receive information in more than 39 different languages.

5. The use of a monthly email Update that provided information on registration and answered questions that was sent to more than 4,000 people. Feedback was received that these Updates were further forwarded to a much larger number of people with some estimates being for every Update sent from the Commission that a further 10 people received the information.

6. There was an extensive use of networks to have registration messages sent out. There were networks in various parts of the community sector that operated as national, regional, and local levels. For example in order to reach out to Pacific communities extensive use was made of the Ministry of Pacific Island Affairs, Pacific business organisations, local authority community networks, and Pacific Island churches.

7. Over 80 registration workshops were held across the country where people were educated about the Commission and registration requirements and were shown how to complete registration applications.

8. Extensive use of community media to distribute local interest stories and information on registration.

9. The use of local government to put out registration information in their regular newsletters to ratepayers and residents.

10. Each organisation that was registered with the Companies Office, whether they were charitable trusts or incorporated societies, was written to advising of the requirement to register as a charitable entity.

11. Where possible contact lists from the Inland Revenue Department were used to send out material to all of those that had registered with IRD.

12. All government agencies that had contact with charities, through activities such as contracts or grants, were used to send a registration message.

18.5 At the end of the initial registration period the Commission was satisfied that the majority of charities would have been aware of the requirement to register and of the registration process.
Registration

19.1 One of the biggest challenges faced by the Commission was the development of the registration process. The process started with the preparation of an application, either on paper or online, the processing of an application including developing knowledge on charities law, and decision making around registration.

19.2 As highlighted earlier one of the challenges, and difficulties, faced by the Commission was the development of an application and review process that would work, while at the same time developing an IT System that reflected those processes. This proved not to be an easy task.

19.3 As the application forms were being drafted, the wording of the draft forms was tested in workshops in several centres around New Zealand to satisfy us that they were easily understood and user friendly. That process was repeated on two further occasions so that before the forms were put in to regulations we were satisfied that the public would be able to complete the forms easily. We were mindful that our public ranged from those that had a high level of skill in understanding the processes through to less sophisticated and generally smaller organisations. We were motivated to target our application processes to a level at which a high level of skill, particularly legal, was not required and that they could be completed simply.

19.4 While the application process was being developed there was also a need to develop guidance for, and train, registration staff on charities law in New Zealand so that by the time the first application was received registration staff had a sufficient understanding of the legal criteria for registration. The guidelines were developed using the Charities Act but also through extensive reviews of New Zealand and international case law. Further refinement was carried out by reviewing the guidance material and decisions of the UK Charity Commission. Because UK charities law has recently been amended, the degree of relevance of UK material has changed.

19.5 Through consultation exercises other issues were identified. For example there was concern amongst some sectors about the requirement for information to be publicly displayed on the Charities Register. Consequently a policy to underpin the Commission’s power to withhold information was developed. Essentially the Commission took the view that where an organisation went to the public for funding then they should expect that information would be made public. Where an organisation, such as a philanthropic organisation, did not seek funds from the public then confidentiality might be given.
19.6. Another issue was whether or not sporting organisations might qualify for registration. While amateur sporting bodies did not need to register for tax reasons, the Commission anticipated that sports organisations would apply for other reasons. Therefore, the law was clarified so that guidance could be given to sports organisations that if their purposes qualified as charitable at law, then they might qualify for registration. Once registration commenced several other key issues started to emerge. These related to political advocacy, disposition of funds on winding up, organisations established for economic development purposes, and membership organisations where public benefit was an issue.

19.7. Pressure to have a high level of throughput, as well as maintaining accurate decision making, encouraged us to have several reviews of the registration process. Process reviews were carried out to ensure that our processes were as efficient as they could be. Several changes were made as a result including separating legal analysis from application administration. That meant that staff skilled in analysis did not need to spend their time in application administration. One review also made the recommendation that there was a need to develop a balance between taking a legalistic view of registration as opposed to being helpful with applicants and being able to operate in an environment which minimised decision risks rather than eliminated them.

19.8. In order to maintain consistency in decision making both external and internal legal reviews of a random selection of decisions were carried out.

19.9. What has been described above is the internal process of registration. In addition there was a consistent management of expectations, particularly around the delays that inevitably occurred with a rush of applications. There was an expectation from some that registration would happen very quickly; in fact the time to process an application was about six months.

19.10. Once staff were trained we found that 70% of applications resulted in registration after an initial review of the application. The remainder were referred to more senior analysts because of concerns over matters such as charitable purpose, winding up clauses, activities, or private pecuniary gain. In those cases there were further delays as there was a further queue to be seen by a senior analyst and usually there was communication with the applicant which also resulted in the delaying of a decision on the application.
Future Work

20. As the Commission moves into a business as usual phase it will be developing its three main work streams. These are registration, monitoring and investigation, and education.

21. The registration stream will continue to process applications and deal with notices of change as well receiving annual returns.

22. The monitoring and investigation group will carry out monitoring work, deal with investigation of charities and handle complaints about charities. There is currently a scoping exercise being carried out to determine the fully extend of the role of this work stream.

23. The third work stream is in education and capacity building. Again this role is current being scoped to allow us to better understand the most appropriate role the Commission can take.