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F299 FEIST, I. Accountability of charities in New Zealand.

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Submitted for the LLB (Honours) Degree at Victoria University of Wellington

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D) INTRODUCTION

The charitable sector in New Zealand has been under increasing scrutiny from the government, the public and even from itself. There are a range of issues for the sector; does the definition of charities have relevance in New Zealand in 2002? Is the preferential tax treatment of charities causing problems or is it being abused? Is the sector running effectively and efficiently? This paper will focus on the accountability of the sector. There has been increasing investigation into possible ways of increasing accountability in the area but ultimately nothing has been done. This paper will review the New Zealand situation and the proposals that have been set forward. It will then argue that a charities commission should be implemented in New Zealand.

A). Why does the Public and the State Support Charities?

Charities in New Zealand get support from both the private and the public sector. The primary justification for this is that charities are acting to benefit the public¹. One of the founding principles of charity law is that anything charitable must be in the public's benefit. This is a long-standing requirement; in 1767 Lord Camden LC defined charity as a 'gift to the general public use'². This public benefit requirement continues today. In the most quoted statement of the definition of charity Lord MacNaghten stated in *Commissioners for Special Purposes of Income Tax v Pemsel*³:

"Charity in its legal sense comprises four principal divisions, trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community not falling under any of the preceding heads."⁴

¹ Inland Revenue Department *Tax and Charities: Discussion Document*. (Wellington, 2001), 6.

² *Oppenheim v Tobacco Securities Trust Co. Ltd* [1951] AC 297 at 305 per Lord Simonds.

³ *Commissioners for Special Purposes of Income Tax v Pemsel* [1891] AC at 583 per Lord MacNaghten

⁴ [1891] AC 531 at 583.

The courts approach to this definition has been to assume public benefit when a purpose falls broadly into one of the first three of the familiar categories of charity⁵. When the purpose claimed is the relief of poverty public benefit does not need to be shown.⁶ This appears to be somewhat of an anomaly with no clear policy grounds. One possible justification is that relief of poverty is so inherently in the public interest as to not require a demonstration of such. The rationale for the public benefit test seems to be based on preventing tax privileges or other benefits being received for private purposes. For example paying school fees may be charitable under the education head of charity but paying school fees for a son would be a private purpose and not charitable.⁷

The definition of what is a charity has been criticised. The four heads from *Pemsels*⁸ have been described as a matter of convenience for the courts rather than a definition. It excludes non-charitable purposes rather than describing what is or is not charitable.⁹ This has led to an acknowledgment that this definition is not exclusive and that there may be other charitable purposes outside this definition¹⁰. The current definition does not always sit comfortably with what is commonly considered charitable in New Zealand. Maori providers often fall outside the definition as they provide along iwi lines¹¹. This means that there is only "private benefit" as the benefit is for family members not the public at large. The government discussion document *Tax and Charities* takes a colloquial view of what is charitable.¹² Its approach is to suggest that charities provide goods that are somehow "collective in their benefit". Implicitly this view of what is commonly charitable is still based on public benefit grounds, "collective goods" must benefit the public generally, not just individuals. The document suggests that the current definition is too wide and calls

⁵ *National Anti-Vivisection Society v. Inland Revenue Commissioners* [1948] at 65 per Lord Simonds.

⁶ *Re Compton* [1945] Ch 123 at 137-139 per Lord Greene.

⁷ David Brown *Charities and Public Benefit* NZLJ (March 2001) 69, 69.

⁸ *Commissioners for Special Purposes of Income Tax v Pemsel* [1891] AC at 566 per Lord Bremwell.

⁹ *Re Wallace* [1908] VLR 636 at 638 per Hood J.

¹⁰ *D V Bryant Trust Board v Hamilton City Trust Board* [1997] 3 NZLR 342 at 348 per Hammond, following *Scottish Burial Reform and Cremation Society Ltd v Glasgow Corporation* [1968] AC 138.

¹¹ Tax Policy Advice Division *Taxation of Maori Authorities: Discussion Document*. (August 2001.) <http://www.taxpolicy.ird.govt.nz/publications/index.php?catid=2> (Last Accessed 14 August 2002)

¹² Inland Revenue Department *Tax and Charities: Discussion Document*. (Wellington 2001),4.

for a change to the definition in accordance with New Zealand in the 21st century. The 2nd report of the Working Party Charities suggested adopting a legislative definition. This was seen more as a clarification and restatement of the current law than any wholesale change, importantly the public benefit test would remain but would be expanded to include Maori organisations.¹³ While the government has considered this it does not anticipate any change in this area soon; the current approach seems to be to consider what other countries do first.¹⁴ A change to the definition of charities does not have universal support. Submissions to the discussion document *Tax and Charities* have pointed out that the current definition has developed considerably from 1601 and even from the *Pemsels* case 110 years ago.¹⁵ The current definition is not archaic and out of date as has been suggested but has moved over time through the flexibility of the common law. Perhaps the best illustration of this is that the proposed change in definition would in fact have little effect on current charities status. Whether or not the definition is left with the common law or not public benefit can be seen to underlie the definition of charity, this element of public benefit is the primary justification for the government supporting charities.

The public benefit role of charities has become more pronounced with the market reforms of the last decade and the governments continuing withdrawal from the welfare state.¹⁶ An example of this in practice is the behaviour of the Auckland City Mission when the housing reforms of 1991 were introduced. The housing reforms replaced subsidised rental accommodation with market rents. The Auckland City Mission runs a food bank in Auckland. They found that demand for food parcels more than doubled when the reforms were introduced and that the recipients of its

¹³ Treasury *Working Party on Charities 2nd Report*. June 12 2002.

<http://www.treasury.govt.nz/charities/2ndreport/2ndrep-wprmc.pdf> (Last Accessed 14 August 2002)

¹⁴ <http://www.taxpolicy.ird.govt.nz/index.php?view=192> Dr Cullen. (Last Accessed 14 August 2002)

¹⁵ Philanthropy New Zealand "Submission to the Working Party on Tax and Charities 2001", 5.

¹⁶ This process was first started by the 1990 National Government who cut benefits from the 1st of April 1991. <http://www.geocities.com/nzwomen/SusanStJohn/200112PolicyPaper23I.doc> Susan St John: Discussion Paper, page 4, Financial Assistance for the Young NZ's Incoherent Welfare State. (Last Accessed August 14th 2002).

food parcels were paying between 45-60 percent of their income in rent.¹⁷ Without this behaviour some of this burden would have shifted to the state through emergency benefits, increased health costs and other social costs associated with poverty. As the governments withdrew from providing social welfare the charitable sector became an important safety net to low income New Zealanders. The government's support of charities could be seen as a way of mitigating the effects of policy decisions on the community.

Charities can also be a cheap and effective form of service provision. As charities generally run off voluntary support they can often provide more services for less money. The indirect subsidy offered through the tax system may cost the government less than actually providing all the services themselves. Roughly speaking \$1.00 of tax revenue forgone will provide \$3.00 in services.¹⁸ There has been criticism that the government has not looked closely at the value of volunteer time¹⁹. This is despite the fact that over 400,000 New Zealanders identified themselves as being volunteers in the latest census²⁰. Charities have the further benefit of being involved in the community they wish to help; this means they are in a position to better target services. They can also offer a more flexible approach, they can ascertain shifting support requirements and change accordingly without the bureaucracy of government.

2) How does the Government Support Charities?

Socially there is benefit to the community beyond the services provided. The promotion of altruistic behaviour will lead to a growth in the sense of community. Charities' independence means they can act as an important watchdog for marginalized members of society. It should be mentioned that this is somewhat

¹⁷ Diane Robertson and Margaret Flaws *Charity and Change* (2001) NZLS 61, 61.

¹⁸ Philanthropy New Zealand "Submission to the Working Party on Tax and Charities 2001"⁴.
<http://www.treasury.govt.nz/taxreview2001/Subs1/PhilanthropyNewZealand.pdf> (Last accessed 24 August 2002)

¹⁹ Philanthropy New Zealand "Submission to the Working Party on Tax and Charities 2001", 2.

²⁰ 2001 Census "Unpaid Activities" Table 31.

[http://www.stats.govt.nz/domino/external/web/CensusTables.nsf/5980206b72060e97cc256b56006853ca/c9291403f6620474cc256b6d0074a5a9/\\$FILE/Table%2031.xls](http://www.stats.govt.nz/domino/external/web/CensusTables.nsf/5980206b72060e97cc256b56006853ca/c9291403f6620474cc256b6d0074a5a9/$FILE/Table%2031.xls) (Last Accessed August 25, 2002)

limited by the exclusion of “political” activities from the definition of charity²¹. It seems unusual that charities have more limited freedom of speech than individuals or companies, especially considering this aspect of their role. The charitable sector can have an important role in promoting pluralism, freedom of expression and freedom of association that are necessary in promoting the rule of law and democracy.²² Even with its current limits this role is still an important element in a modern democracy.

While charities are seen as making a large contribution to society they have difficulty when trying to raise capital funds.²³ Due to restrictions on distributions charities find it hard to raise capital through shareholders. This is especially relevant when there is a trading company with a charitable purpose. For example Sanitarium is a charitable breakfast food company, but still has to compete with non-charitable companies like Kellogs. The ability of Kellogs to raise share capital through shareholders will leave Sanitarium at a real disadvantage.²⁴ While this disadvantage is more pronounced in a competitive environment it also applies to any charity wishing to expand. Debt financing is also difficult Due to the unstable nature of donations as a source of income debt financing becomes difficult due to an inability to guarantee repayment. The tax exemption can be seen as a very rough way to make up for these disadvantages.

B) How does the Government Support Charities?

The government supports charities through the tax system in two broad ways. First charities get an exemption from income tax under s CB(4)(1)(c) and (e) of the Income Tax Act.²⁵ Secondly donors get a rebate on donations below \$650.²⁶ This supports charities in two ways; firstly their income increases by a third through the

²¹ Perri 6 and Anita Randon *Liberty, Charity and Politics: Non-Profit Law and Freedom of Speech* (Dartmouth Publishing Company, Hants, England, 1995), 99.

²² Karla. W Simon *The Role of Law in Encouraging Civil Society* (1999) ICNL, <http://www.icnl.org/gendocs/Arabconf.htm> (Last accessed August 27 2002)

²³ Gino Dal Pont *Charity Law in New Zealand and Australia* (Oxford University Press, South Melbourne, Victoria, Australia, 2000) 447.

²⁴ “Weetbicking on Tax” Sun Herald, Sydney, Australia, Feb 18 2001, 22.

²⁵ Income Tax Act 1994, CB(4)(1)c.

forgoing of tax revenue by the government, and secondly donations to charities are encouraged through the ability to get a rebate on those donations.

As a rebate for donations needs to be claimed back from IRD the government has some idea of the amount this system is costing them. However the exemption from income tax for charities is a broad exemption. This means the government has no idea how much this subsidy is costing. The courts have the responsibility of deciding charitable status. As most charities do not go to court over their charitable status technically a charity could exist and gain the exemption without the government being aware of this. The broad exemption creates the primary problem in this system, a total lack of information. There is no information about how much this costs, where the money is going or how it is being used. Rebates on donations cannot be used as a reliable guide as there is no information on what proportion of donors claim this rebate. The government at present has very little information with which to analyse the charitable sector in New Zealand.²⁷

II) ACCOUNTABILITY.

While charities act with public money they are also independent from public bodies. They are largely funded off public money, whether through direct public donations or through the subsidy received from the tax system. Their reliance on public money should require them to be publicly accountable for their actions. Accountability in the charitable sector will largely revolve around the systems to provide information. These would allow the public and the government to ascertain whether charities are acting with integrity and appropriately using the money they receive. On a basic level this information would ensure they are fulfilling their charitable purpose. At a higher level this may ensure that charities are using money in the best way to produce as much public benefit for the community as possible.

²⁶ Income Tax Act 1994, KC5, DJ4.

²⁷ Inland Revenue Department *Tax and Charities: Discussion Document*. (Wellington 2001) Foreword.

Charities by their nature do not fit comfortably into existing accountability frameworks. They are not contracted to provide specific services. As there is no requirement to provide specific services, there is no requirement to record progress or to report back on the way the money was ultimately used. The only requirement is that charities fit into a very broad charitable purpose. The current system is even limited at ensuring that the charitable purpose is being fulfilled. Charities receive income from two main sources, the state and donors. Each has specific accountability issues.

A) Accountability to the State.

The state is foregoing revenue in two ways, firstly through the income tax exemption and secondly through offering rebates to donors. This revenue needs to be made up in other parts of the system, meaning the decision to not collect tax can be seen as analogous to a government spending decision. As stated by Lord Bremwell in *Pemsels* case “to exempt any subject to a taxation from a tax is to add to the burden on tax payers generally.”²⁸ As a form of government spending the government has no direct control other how or where this is being spent or even the total amount of expenditure. This leads to problems. There is concern that this lack of information may allow charities to deviate from their charitable purpose without any real scrutiny to put them back on track. Further the lack of transparency means that government has no idea how much it is spending in each area or what services are being provided. This may lead to overlap between state and charitable service provision, or lead to disproportional weighting of government spending in certain areas. The subsidies may even be damaging to the economy through promoting growth in sectors in inefficient ways.²⁹ There has been the suggestion that charities with a trading arm may be using the subsidy to retain higher earnings and gain a competitive advantage over other organisations in the market.³⁰ This may cause

²⁸ *Commissioners for Special Purposes of Income Tax v Pemsel* [1891] AC at 566 per Lord Bremwell.

²⁹ Inland Revenue Department *Tax and Charities: Discussion Document*. (Wellington 2001) 2.12

³⁰ Inland Revenue Department *Tax and Charities: Discussion Document*. (Wellington 2001) 9.1.

charities with sufficient capital to invest money in trading operations rather than other areas that would appear more lucrative without the subsidy.

From a policy point of view there are also problems, the current system gives charity support by income rather than need. A large charity will receive more government funding than a smaller one who works in an area of greater need. There are further concerns that the current system provides a gap in the tax base that may be utilised by individuals rather than the charity themselves. A current illustration of this is the use of charities in mass marketed tax schemes.³¹

B) Accountability to Donors.

In the later part of the 20th century there have been an increasing number of charities that collect from the public instead of relying on private donations. With this shift in behaviour there has also been a growth in the number of professional fundraisers and an increase in the cost of fundraising in general. This trend has led to new accountability issues. How much money is going to professional companies and not the charities?³² Are fundraising techniques appropriate?³³ A current example of this is the tele-marketing style fundraising. An employee will call people and ask for donations for a charity. This illustrates both of these issues. Firstly how much of the donation is going to the tele-marketers? These are professional operations, they may be able to return higher overall returns to a charity, but a greater proportion of the donation may be going to the business. Secondly is this creating a public nuisance and invading donor's privacy? The more widespread this becomes the more of a nuisance it becomes. From an accountability perspective the issue here is whether fundraising practices are creating a public nuisance or infringing on donor privacy. New Zealand has no regulation in this area at the moment.³⁴

³¹IRD Policy Division *Mass Marketed Tax Schemes* (Wellington, January 2002), 5.

³²Gino Dal Pont *Charity Law in New Zealand and Australia* (Oxford University Press, South Melbourne, Victoria, Australia, 2000), 444.

³³See p. Luxton, *Charity Fund-Raising and the Public Interest*, Averbury, Aldershot, 1990, Ch.5.

³⁴Gino Dal Pont *Charity Law in New Zealand and Australia* (Oxford University Press, South Melbourne, Victoria, Australia, 2000), 444.

Regulation of this area is not difficult and is common in overseas jurisdictions. In Australia this is done at State level. The Australian Central Territory, New South Wales, Queensland, Victoria, South Australia and Western Australia all have provisions specifically dealing with charitable fundraising. The following passage will give a brief over view of the ACT and NSW provisions. The Central Territory has the Collections Act 1992³⁵ to regulate fundraising. This makes it an offence for an unlicensed or unauthorised person to collect from members the public or for a licensed person to collect outside the provisions of their license³⁶. A license can be obtained by writing to the Minister stating the purposes to which the goods or money collected will be put, for what period the license is required and contain particulars of expenses proposed to be incurred in connection with the collections³⁷. The Minister may refuse the license in some circumstances, primarily this is around there being either limited or no public interest. This includes if expenses incurred in collecting the donations will be too high. The Minister can also deny licenses on the ground that there are too many other licenses already issued for the same period.³⁸ After collections have been made under the license the licensee must submit to the minister a written statement verified by statutory declaration setting out the money or the goods collected, details of the expenses incurred and the manner in which the proceeds have been dealt with.³⁹ NSW has similar provisions in their Charitable Fundraising Act 1991.⁴⁰ The NSW legislation goes further. Face to face collectors are required to display prominently an identification badge and employed tele-marketers must disclose the fact that they are employed and who has employed them.⁴¹ The legislation also addresses the potential for direct marketing techniques such as tele-marketing to become a nuisance. The authorised fundraisers must have a code of practice that must include provisions that will prescribe that a

³⁵ Collections Act 1992 (ACT)

³⁶ Gino Dal Pont *Charity Law in New Zealand and Australia* (Oxford University Press, South Melbourne, Victoria, Australia, 2000), 388.

³⁷ Collections Act 1959 (ACT) s. 3(1)

³⁸ Collections Act 1959 (ACT) s10-11.

³⁹ Collections Act 1959 (ACT) s. 8(1), s.8(2).

⁴⁰ Charitable Fundraising Act 1991 (NSW).

⁴¹ Charitable Fundraising Regulation 1998 (NSW r. 10)

person must be removed from any database if they ask and that personal information will not be sold without the individual's permission.⁴² Legislation like this would cover most potential issues outlined above. The license system would keep check on the amount of money going to professional fundraisers and the requirement that there is disclosure of the fact that the person that requests a donation is actually employed gives the donator some idea that some of the money will be going to a business. The license system will also avoid direct marketing nuisances. Only a limited amount of fundraisers will have a license at any time and individuals can be removed from the tele-marketing database and avoid being called by the same company again. Legislation like this could be very effective and quite simple to implement. If a Charities Commission was implemented the license system could fit well into its other tasks.

Fundraising is only the beginning of possible public interest in accountability of charities. The public provide donations to charities to perform services for third parties. This makes it extremely hard for them to evaluate these services, yet as a source of funding for charities donors should have the information available to ensure the money is spent appropriately. This currently does not happen. Charities wishing to become more accountable also face issues. Donors vary from those giving continuing support, to large one off donations to those giving money to collectors on the street. Many donations are effectively anonymous; some donors may not even know the specific charity they are dealing with. This can make it extremely hard to find out who charities are accountable to. Charities themselves have viewed the current level of accountability as a problem that may be damaging to the sector.⁴³ The government has also highlighted this problem. The Minister of Finance the Right Honourable Dr Cullen commented in a recent address.

⁴² Charitable Fundraising Regulation 1998 (NSW) Sch. 1 cl. 13(2)

⁴³ Philanthropy New Zealand No. 2 Draft, *Accountability of Charities & Sporting Bodies Working Party Comprehensive Report* (Wellington Feb 1997).

"There is currently no reliable information base and no simple means for members of the public to check the bona fides of organisations claiming charitable status."⁴⁴

There is a call for more accountability from all sectors, the question is how to best implement this in New Zealand's charitable sector.

III) EXISTING ACCOUNTABILITY.

Before reviewing the proposed systems of greater accountability it is necessary to review the current system. The accountability of charities in New Zealand is not a coherent system but there are some mechanisms in place. In some circumstances the state will make direct grants to charities. For example Creative New Zealand makes grants to New Zealand organisations operating in the Arts. Often these organisations are charitable. An example application requires that organisations show they are organised and have budgeted their project.⁴⁵ The board will also require feedback to ensure the funding was used correctly. Members of the public and the government will also contract directly with some organisations to provide services. For example the St Johns Ambulance will charge fees for a First Aid course, in these circumstances there is a contract of service that can provide for accountability.⁴⁶

In order to get a tax exemption in New Zealand a charity must fit into the definition of charity outlined above. All of these heads have the public benefit as an inherent part of their definition. This definition itself can be seen as a form of accountability, those organisations with the label charity are seen to be acting primarily in the public benefit and therefore worthy of support. However, as will be shown, there is little to ensure that this definition is strictly adhered to.

⁴⁴ Hon Dr Michael Cullen, Minister of Finance "Charities Report Received" (Wellington, 1st March 2002) <http://www.executive.govt.nz/speech.cfm?speechralfp=37478&SR=0b> (Last Accessed 23 August 2002).

⁴⁵ See <http://www.creativenz.govt.nz/funding/board/dance.html> (Last accessed 27 August 2002).

⁴⁶ See http://www.stjohn.org.nz/products/first_aid_kits.asp (Last accessed 27 August 2002)

The courts officially decide whether an organisation has charitable status. However most charities do not go to court over their charitable status. There is also no legal requirement for registration.⁴⁷ This means that technically a charity could exist and gain a tax exemption without the government being aware of it.⁴⁸ In practice charities generally have their tax-exempt status unofficially approved by IRD.⁴⁹ This is usually done by having a statement of charitable purpose in their memorandum of incorporation or submitting their founding documents to IRD.⁵⁰ The Department of Inland Revenue does not appear to keep many records of the charities it approves.⁵¹ Further section CB4 of the Income Tax Act⁵² only requires that a charity was established with a charitable purpose to receive a tax exemption. What this means is that an organisation may set up with a charitable purpose but may now be operating outside that purpose while still receiving the exemption. *Tax and Charities* considered the option of leaving the current definition but changing section CB4 of the Income Tax Act to require that a charity was not only established for a charitable purpose but also continued to fulfil that purpose.⁵³ This simple change would have a large effect on accountability; it makes little sense for an organisation that was set up for a charitable purpose can continue to receive benefits while not fulfilling its charitable purpose. While there may be practical issues about monitoring the on going activities of charities, there is no clear policy reason for looking only at the purpose of the charity when it was set up and not how it is currently operating. The current approach means that an organisation with charitable status may not be offering any public benefit and the justifications for the government support is gone.

⁴⁷ Working Party on Charities *Report on Reporting and Monitoring of Charities* (Wellington, February 2002), 2.

⁴⁸ Gino Dal Pont *Charity Law in New Zealand and Australia* (Oxford University Press, South Melbourne, Victoria, Australia, 2000) 371

⁴⁹ IRD Tax Policy Department *Tax and Charities: Discussion Document* (Wellington June 2001) para 6.3

⁵⁰ Gino Dal Pont *Charity Law in New Zealand and Australia* (Oxford University Press, South Melbourne, Victoria, Australia, 2000) 371

⁵¹ David McClay *Charities and Tax in 2001* (2001) NZLJ 63, 63.

⁵² Income Tax Act 1996, sCB4.

⁵³ Inland Revenue Department *Tax and Charities: Discussion Document*. (Wellington 2001), 21.

At present there are currently only limited auditing systems available. The IRD does have a role to ensure that CB4 of the Income Tax Act is complied with.⁵⁴ However due to the lack of registration there is no information available to make a decision on who to audit, this would involve extremely pro-active work on behalf of IRD to be effective.⁵⁵

The Attorney General has the official role of protecting charities in New Zealand. Under s 58 of the Charitable Trusts Act there is the power to “examine and inquire all or any charities in New Zealand.”⁵⁶ There is further power to require any person with a concern in the management of the charity to produce documents and answer questions. Failure to do so is an offence carrying a fine of \$40. Although the purpose of section 58 is to find out what is happening, there is no power to execute a search warrant, freeze a bank account, or direct the trustee’s in the administration of the trust.⁵⁷ The Attorney General’s role is not broad and usually receives an average of about ten complaints a year.⁵⁸

In practice once a complaint is received most investigations are delegated to the Deputy Solicitor-General under s9c of the Constitution Act 1986. The focus of the inquiry is to ensure that trust property is in fact being applied for the charitable purpose that it was set up for. This does not inquire into whether the property is being put to its best use, only that the use is in line with its charitable purpose.

The Attorney General or anybody else with an interest in the trust can also apply to the high court under s 60 of the Charitable Trusts Act for specific court orders.

- order the trustees to carry out the trusts,

⁵⁴ Income Tax Act 1994.

⁵⁵ Inland Revenue Department *Tax and Charities: Discussion Document*. (Wellington 2001), 31.

⁵⁶ Charitable Trusts Act 1957, s58

⁵⁷ Margaret Soper, “The Protector of Charities” (2002) NZLJ 57, 57.

⁵⁸ Margaret Soper, “The Protector of Charities” (2002) NZLJ 57, 59.

- order the trustees to meet any liability for any breach of trust,
- exclude any purpose from the trusts,
- give directions on the administration of the trust,
- direct the preparation of a scheme to vary the terms of the trust.⁵⁹

Applications to the court after a section 58 inquiry have been rare but do exist. In *Re Centrepoint Community Growth Trust*⁶⁰ a public trustee was appointed and preparations were made to vary the trust scheme. In *Hunter v Hunter*⁶¹ The court set down the principles for appointment of a new trustee under s 51 of the Trustee Act. The principle approach to this is to consider the welfare of the beneficiaries. In *Attorney General v Ngati Karewa and Ngati Tahinga Trust*⁶² this approach was applied to a charitable trust.

The Attorney General's role also has issues regarding jurisdiction. Section 58 of the Charitable Trusts Act refers to charities in general while section 60 is based on the presumption of a trust.⁶³ As all charities are not trusts this raises the issue about whether the Attorney General's powers reach to non-trust charities. If the charitable purpose was in a different form, say the rules of an incorporated society, then arguably the Attorney General could have no power of inquiry under s58 if there was no subsequent power to enforce the charitable purpose under s60 of the Act.⁶⁴ The role of the Attorney General is quite a limited one. It has its place in the regulation of charities but cannot be seen as an effective mechanism to hold all charities accountable.

The courts have jurisdiction to judicially review decisions made by charities when these decisions could have a significant effect on New Zealand's social

⁵⁹ Margaret Soper, "The Protector of Charities" (2002) NZLJ 57, 58.

⁶⁰ [2000] 2 NZLR 325

⁶¹ [1938] NZLR 520.

⁶² High Court, Auckland, M 2073/99 and CP 242/00, 5 November 2001

⁶³ Charitable Trusts Act 1957

⁶⁴ Margaret Soper, "The Protector of Charities" (2002) NZLJ 57, 58.

structure. This follows normal judicial review processes, namely that it is a review not an appeal and a court will only intervene if the decision-making process of the body is flawed. To date the courts have assumed jurisdiction to review decisions made by SOE's, by the committee of a trade union, by a sporting association and by an incorporated society.⁶⁵ This power is seldom used and is unlikely to have a great effect on most charities.

There are other methods of Ad Hoc accountability in existence. The consumer's institute has inquired into charities in the past in order to provide their members some form of accountability; this is likely to happen again. The media has reported cases of charities that seem to be operating in a less than scrupulous manner. A recent example of this was allegations that the Pub Charity system was being abused. Pub Charity is a system where a 33% of takings from poker machines must be given to charity. The media highlighted allegations that some people were redirecting monies from the pub to the charity and back to the pub through paying elevated prices for advertisements. While these systems do provide some form of accountability it is selective. The media may choose to ignore some unscrupulous behaviour while focusing on others. A story can easily be blown out of proportion in order to sell more copy. It will also highlight the failing of a few individuals, which will then undermine the entire sector's credibility. Some charities will escape direct scrutiny while deserving charities will be disadvantaged by a distorted overall view of the sector.

Some charities already have some forms of self-regulation. Related charities currently organise and join umbrella organisations⁶⁶. These can have internal measures to ensure that charities are living up to the umbrella organisations

⁶⁵ Philanthropy New Zealand No. 2 Draft, *Accountability of Charities & Sporting Bodies Working Party Comprehensive Report* (Wellington Feb 1997).

⁶⁶ There are many examples of these organizations. Philanthropy New Zealand is a New Zealand umbrella organisation for Philanthropic Trusts. Health Care Aotearoa is an umbrella organisation for Not for Profit health care organisations.

standards. The problem here is that in establishing internal procedures the organisations may have an interest in not highlighting problems or setting itself low standards that are easily met.

IV). SUGGESTED CHANGES TO IMPROVE ACCOUNTABILITY.

There are many approaches to making the charitable sector more accountable. Any approach will need to consider many factors. Does it provide accountability to donors? The government? How expensive will it be? Will it be acceptable to the sector, government and the public? This next section will be an overview of some suggested approaches, many of these are not exclusive, but can be used together as part of a package.

A) Registration

A system of registration would operate by requiring charities to register before they gained any tax benefits. Along with registration there could be a requirement for simple reporting requirements. These reports could be made publicly available. This system can also go further by ensuring that organisations act within the definition of charity. People giving donations will therefore be more assured that organisations at least fit into the broad definition of what is charitable. If this were used by itself, the role of this office would simply be a record keeping one. This means it could be part of an existing department, probably IRD. While there is the potential for a conflict here this should be quite low as this would largely be an administrative role. Administration costs will be low as no new structures are required, however the exact system of registration will dictate the overall level of administration and compliance costs. The Attorney General role may be expanded as registration could highlight more behaviour that will lead to complaints. There are two broad approaches to registration:

1). *Informal registration*

This involves a "signing up" approach to registration. The charity states its charitable purpose which is accepted until it is disproved.⁶⁷ There is no formal approval process but the charity may be required to demonstrate its charitable purpose at some time. Once a charity is registered it can then claim the tax exemption. This system could be a useful way to gain more information on the sector. This could let the government know the amount of charities operating and the amount the subsidy is costing, however as a method of accountability it is still incomplete. There is little incentive for charities to ensure they are actually following their charitable purpose. There is still no scrutiny of how the money is being spent. The label "charity" may still be abused.

2). *Formal Regulation*

This approach would require an investigation by the relevant body. An organisation would apply to be registered as a charity and would only be registered after an investigation showed that it was in fact carrying out a charitable purpose. After this a charity would expect to have regular monitoring of its operations to ensure that it was still meeting its charitable purpose. This system would have the same information gathering advantages as above. The view of the Working Party Charities was that this system would have advantages above informal registration. It would ensure only real charities got the tax exemption and then ensure they kept strictly to their charitable purpose.⁶⁸ From a general public point of view this would ensure that when they gave a donation to a registered charity they would be an organisation worthy of the title charity. There has been concern from the sector that

⁶⁷ Inland Revenue Department *Tax and Charities: Discussion Document*. (Wellington 2001), 19.

⁶⁸ Working Party on Charities *Report on Reporting and Monitoring of Charities* (Wellington, February 2002), 15.

this approach could lead to a level of bureaucracy in the sector that may be avoided by the simple "signing up" process outlined above.⁶⁹

B) Reporting

Either of these systems could also have a reporting requirement. The proposal is that after registration the charities would be asked to prepare formal accounts that are available to both the government and the public. The proposal also suggests that a suitable threshold could be put in place to ensure small charities do not suffer undue hardship. This approach is used in other jurisdictions. In the UK the Commissioner of Charities requires reporting from charities earning over 10,000 pounds. When a charity earns over 100,000 pounds they must get their accounts audited.⁷⁰ Smaller charities are removed from the scheme while larger charities have more stringent requirements as they can afford it.

There could also be a requirement to file audited tax returns. Under s 58 the Attorney General already has the power to require this but it is rarely exercised.⁷¹ The advantage of this over and above the general accounts already mentioned is that the government would have more accurate information about the amount of tax foregone.

While the government has indicated that its preference is for a system of formal registration along with other regulation it has not been included in its latest Bill.⁷² The government is "still considering any change".⁷³ It has been suggested that this system alone is all that will be required in the sector and further regulation will

⁶⁹ Philanthropy New Zealand "Submission to the Working Party on Tax and Charities 2001", 7.

⁷⁰ Inland Revenue Department *Tax and Charities: Discussion Document*. (Wellington 2001) page 63.

⁷¹ Section 58 Charitable Trusts Act.

⁷² Taxation (Annual Returns, Maori Organisations, Taxpayer Compliance and Miscellaneous Provisions) Bill 2002.

not be worth the expense it will carry.⁷⁴ Publicly available accounts would let everybody have the information available to decide if a charity is a worthy cause. The media and the consumers institute could better perform their watchdog role by having access to information. The government will know how much it is spending on the charity subsidy and also know the general areas it is spending in. This system could be effective in providing information at a relatively low cost. There have however been problems highlighted with this approach. First it assumes charities are run off public donations, whereas some charities run off the benefit of a few private donors. Having published accounts may put off some of these donors for privacy reasons.⁷⁵ Implementation of a system like this should consider whether there would be a detrimental effect on donating behaviour.

Such a system would also have accountability shortcomings. The information provided by the accounts has been suggested as income and expenditure, assets and liabilities and perhaps remuneration to senior staff.⁷⁶ This may not provide a complete picture. While this approach will show income sources and give a good indication on whether a charity is fulfilling its charitable purpose it will not show whether a charity is running effectively or efficiently. A charity may be running to its purpose but not producing a large amount of services to the community. If the public benefit is present but is low then the accounts will not highlight this. A lot of charities work will be hard to quantify, meaning that whatever form the accounts take it will not show the complete picture. This approach would also not show whether charities are crossing over services with either the state or other charities and will not co-ordinate and connect the charitable sector. A simple registration system will add costs to charities without returning anything in the way of support or advice. This could build resentment in the sector, making any changes hard to implement smoothly.

⁷³ Commentary on Bill Taxation (Annual Returns, Maori Organisations, Taxpayer Compliance and Miscellaneous Provisions) Bill 2002, 46.

⁷⁴ David McClay *Regulation of Charities* (2002) NZLJ 55,55.

⁷⁵ Philanthropy New Zealand "Submission to the Working Party on Tax and Charities 2001", 7.

C) A Charities Commission

A charities commission would be an independent body that would operate for all charities needs, not just a registrar of charities. This would include advice on both legal and practical issues. A charities commission can also work to connect and network charities and generally make the sector run more efficiently. The Spencer Russell Report on Charities in New Zealand first recommended a Charities Commission in 1989.⁷⁷ This document was the first formal look into the charitable sector in New Zealand. No action was taken at the time and recommendation was repeated 13 years later by the Working Party on Charities.⁷⁸

1). The English model

In the UK most charities were historically endowed trusts. Charities legislation was framed on that basis. In the later half of the 20th century there was shift from endowed trusts to the fundraising trusts that are more common in New Zealand.⁷⁹ This changing environment lead to the 1987 Woodfeild Report, which was followed by a White Paper⁸⁰. The purpose of this paper was to suggest possible ways of implementing the Woodfeild Report. This process acknowledged a shift in the make up of the charitable sector in England that has made it very similar to the New Zealand charitable sector. This change and the legislative response makes the UK Charities Commission a likely model for a New Zealand Charities Commission. The Charities Commission is an independent body that decides charitable status and

⁷⁶ Working Party on Charities *Report on Reporting and Monitoring of Charities* (Wellington, February 2002), 22.

⁷⁷ Working Party on Charities and Sporting Bodies *Report to the Minister of Finance and the Minister of Social Welfare*. (Wellington, November, 1989), 62.

⁷⁸ Working Party on Charities *Report on Reporting and Monitoring of Charities* (Wellington, February 2002)

⁷⁹ Working Party on Charities and Sporting Bodies *Report to the Minister of Finance and the Minister of Social Welfare*. (Wellington, November, 1989), 59.

keeps a register of charities that have receipts of over 10,000 pounds. Its role goes further than just registration; its stated aim is to "give public confidence in the integrity of charity."⁸¹

The Charities Commission in the UK has four main roles. Firstly the Commission registers organisations that it decides have a charitable purpose. The Commission's role has been criticised as largely supplanting the courts' role in deciding who is or is not a charity.⁸² The concern is that a Charities Commission may use a bureaucratic formula based approach of what is charitable that does not move with changing times and attitudes. In reality the commission's role could more accurately be seen as building on the existing common law. When considering whether an organisation is charitable the first step would be to apply the current common law definition, and to then have a procedure in place to expand the definition if it is required.⁸³

This is a two-step process. First is the purpose analogous to a purpose originally accepted as charitable and, secondly, does the purpose satisfy the public benefit test. In practice the UK Charities Commission has not let the law stagnate and has decided that the General Medical Council was a charity despite the decisions in *General Medical Council v IRC*⁸⁴ and *General Medical Council v St Marylebone Borough Council*⁸⁵. Due to the charities commission's role they are in a position to keep the law more up to date than the courts. While the courts will only see a small proportion of charities the commission will investigate most of them. The courts are not totally removed from the UK system, there can be an appeal through the court system if the decision of the Commissioner is incorrect at law.

⁸⁰ Home Department *Charities: A Framework for the Future* (London, May, 1989).

⁸¹ See <http://www.charity-commission.gov.uk/tcc/aimvv.asp>. (Last accessed 22 August 2002).

⁸² David McClay "Regulation of Charities" NZLJ 2002 55, 56.

⁸³ UK Charities Commission *RR1a Recognising a New Charitable Purpose*

⁸⁴ [1928] All ER 252 (CA)

⁸⁵ [1958] AC 540 (HL)

The second function of the commissioner is to draft regulations prescribing the content of accounting standards, statement of account and annual returns and reports, which registered charities must prepare. In New Zealand this approach would involve working closely with the Chartered Accountants Association and charities in order to formulate workable standards for charities that provide useful and timely information for interested members of the public. The third function of the commission is to provide support and guidance to charities through a general newsletter, giving individual advice after requests or when following up monitoring. Fourthly the commission has the power to investigate complaints from the public or after its own monitoring.⁸⁶ In this respect a charities commission in New Zealand could be seen to assume the current role of the Attorney General.

The concept of the commission is that due to its work the public can be assured that a charity is being run efficiently and to its charitable purpose. The commission itself is a form of accountability, as donors will know that because the commission is involved a charity will be running properly. The commission's role sits somewhere between that of a public enforcement agency, such as the Commerce Commission, and a professional regulatory body such as the Medical Council or the Law Society.⁸⁷ The latter bodies have in the past been criticised as protecting their members rather than acting to protect the public. The UK commission largely avoids this by keeping an open register of charities; this means that the public can investigate charities themselves. This ensures the Commission's role is transparent enough to avoid any suggestion that its role may in fact be to protect charities rather than make them accountable. The Charities Commission will also act on complaints from the public; this can remove costs through time and money and therefore increase the willingness of public to make complaints. This role may not be overly

⁸⁶ Gino Dal Pont *Charity Law in New Zealand and Australia* (Oxford University Press, South Melbourne, Victoria, Australia, 2000), 440.

⁸⁷ Kate Tokeley *Consumer Law* (Butterworths, Wellington, 2000), 381.

different to the current role of the Attorney General, but its high profile may mean that it is accessed more often.

2) *Why a Charities Commission is preferred in New Zealand.*

The Working Party on Charities saw a Charities Commission as most suitable for New Zealand⁸⁸. An independent body was seen as necessary to reflect the independence and importance of the sector in New Zealand. As such this was seen as the most acceptable body to the charitable sector. Acceptance from the sector was considered to be very important in the practical implementation of any system. This approach was also seen as being consistent with the 1989 Spencer Russell report.

The approach was seen as being in-line with the governments newly produced 'Statement of Government Intentions for Improved Government-Community Relations'.⁸⁹ This document is used to provide background policy for working with voluntary or Maori/iwi organisations. This statement of principle was written after the report *Communities and Government: Potential for Partnership*⁹⁰. This found that a decade of social and economic change had left many in the Not-for-Profit sector feeling under-valued and mistrusting government. The Statement of Government Intentions for Improved Government-Community Relations specifically acknowledged the importance of the independence of the third sector. Any regulation should be in line with this statement in order to show the government's commitment to this document. Consistently with the document is also more likely to get support from the sector that could help avoid unnecessary transitional problems.

⁸⁸ Working Party on Charities *Report on Reporting and Monitoring of Charities* (Wellington, February 2002), 21.

⁸⁹ Ministry of Social Policy *Statement of Government Intentions for Improved Government-Community Relations*. (Wellington, 2001).

⁹⁰ Department of Social Welfare *Communities and Government: A Potential for Partnership*. Wellington (August 2000).

3) Criticisms of this approach.

The first of these is that this approach will be expensive. The cost of setting up the new body will be large; in England the Charities Commission employs over 540 staff. In New Zealand we will have far less charities. While this means the charities commission will be smaller it also means we will be unable to achieve the same savings through economies of scale. There is also concern over who will fund this. If fees from charities fund it, then there could be a perception that a substantial part of any donation will go to the Charity Commission bureaucracy. In the same way that donors need to be aware how much money is spent on professional fundraisers, they also need to know how much is going to the bureaucracy or how much is being funded through the taxpayer. Estimations of the costs to charities if the recommendations in *Tax and Charities*⁹¹ were implemented are up to between \$10,000-\$15,000 dollars initially and then another \$5,000 each return after that⁹².

There is also criticism of the type of bodies like the Charities Commission. In *Inside Bureaucracy*⁹³ Anthony Downs explored the behaviour of Bureaucrats. Some of these were found to be "Empire Building", these people acted to expand the role of their body unnecessarily. Keeping the registration system inside an existing body would lesson the chance of this happening and simplify regulation⁹⁴.

The government has stressed that this is what the sector wanted; this does not appear to be consistent with the views of Philanthropy New Zealand. Philanthropy New Zealand was set up after the Russell Report was released in 1989. It has 111 members who are grant-making trusts in New Zealand. Their purpose is to educate

⁹¹ Inland Revenue Department *Tax and Charities: Discussion Document*. (Wellington 2001)

⁹² "Charities may bear costly burden of a tax shake up; Tax and charities: Main proposals" *The Dominion*, Wellington, New Zealand June 20 2001, 29.

⁹³ Anthony Downs *Inside Bureaucracy* (Scott Foresman, 1967)

the public, conduct research and to lobby for change. In 1999 they produced a report that considered proposals for accountability of the sector. After surveying its members its recommendation was for a system of self-regulation. It was accepted that this may require some form of legislative under-pinning, but primarily it was based the sector developing its own code of practice. This suggests that a Charities Commission may not be what the sector wanted. If a Charities Commission does not have the support of the charitable sector then this raises several issues. First there is likely to be resistance from the sector that will make the implementation of a new system very difficult. Secondly this would undermine the Statement of Government Intentions for Improved Community-Government Relationships and further create mistrust of the government from the charitable sector. The resistance to a Charities Commission should not be overstated. Elements of the sector do support the idea of a charities commission. The Churches Agency on Social Issues, which is a group representing Methodist, Presbyterian, Quaker and the Church of Christ submission on Tax and Charities agreed with a simple registration system and thought a Charities Commission should be investigated⁹⁵. Philanthropy New Zealand's own submission to *Tax and Charities* seems to show a shift in attitude. The submission appears to be based on the presumption of a charities commission, its focus is on the shape and role of the commission rather than whether to have one or not.⁹⁶

There is the risk the law will stagnate in the hands of a Charities Commission. As mentioned the UK's inbuilt protections have not let this happen. There is no reason why the experience in New Zealand should be any different.

⁹⁴ David McClay "Regulation of Charities" NZLJ 2002 55, 56.

⁹⁵ Churches Agency on Social Issues. "Submission to Government Discussion Document Tax and Charities." <http://www.socialissues.godzone.net.nz/submissions/smtaxcharities.html> (Last accessed 21 August 2002).

Philanthropy New Zealand "Submission to the Working Party on Tax and Charities 2001, 7.

D) Semi-Autonomous Body

This proposal is that a semi-autonomous body would be set up inside an existing government department with a statutory advisory board from the charitable sector. The statutory committee's role would be to advise government of legislation and policy for the sector. The Working party felt either the Department of Internal Affairs or the Ministry of Economic Development would be an appropriate department in which to establish the body. The Department of Internal Affairs was seen as a better option due to its long history of working with community and volunteer groups, where the Ministry of Economic Development on the other hand is focused only on "economic development" and has little in social or cultural support.

This was ultimately rejected by the working party as failing to recognise the importance and independence of the sector. As such there is unlikely to be a feeling of sector ownership and would lack the required support from the sector. The Working Party felt that if such a body were to be set up it would not have the necessary support of the sector to work effectively.

E) Business Unit in a Government Department.

This approach was to have an existing government unit carry out the registration and monitoring of charities. This was rejected by the Working Party on Charities for three reasons. Firstly it has the same problems as above. Secondly the charitable sector would have less opportunity to provide feedback than with a semi

autonomous body. Thirdly the business unit could not have the advantage of reporting back independently to the government⁹⁷.

These two approaches do not appear to be favoured by anybody. If these bodies were to have powers similar to the Charities Commission in England this would be overly detrimental to the independence of the sector. This could lead to organisations simply not claiming charitable status and missing out on deserved government support. If its role was only to keep a registrar then this does not provide a high level of accountability. These approaches are really a half way house between cost and effective accountability, this leaves them with the worst of both worlds. They would provide little more accountability than the status quo while costing more.

F) Direct Government Funding.

Most of the problems with the current system are caused through the lack of transparency caused by indirect funding. One possible answer to avoid this is to move to model of direct government funding. Charities would pay tax and apply to the government for funding. This would let the government know specifically how much they spend, what is provided and have all the relevant feedback mechanisms⁹⁸. This would also keep complete tax neutrality in the sector and resolve other issues, such as charities being used in the mass marketed tax avoidance schemes.

While this approach does have some advantages it also has its limits. This would mean that the deductibility provisions would need to be repealed which would then provide less of an incentive to giving. There would also be higher

⁹⁷ Working Party on Charities *Report on Reporting and Monitoring of Charities* (Wellington, February 2002), 12.

⁹⁸ Gino Dal Pont *Charity Law in New Zealand and Australia* (Oxford University Press, South Melbourne, Victoria, Australia, 2000), 451

administration costs for both government and charities. This system would require charities to apply for funding, and the government to process the claims. These factors lead the Spencer Russell Report to reject this approach.⁹⁹ Further consideration must also be given to the effect this would have on the independence of the sector. A model like this may stop frank feedback from the sector and undermine their role as advocates for marginalized members of society. At present charities have been known to criticise the government. Merepeka Raukawa-Tait often criticised government policy and legislation while running the National Women's Refuge, and a direct funding model may lead to self-censorship of this criticism. This would damage New Zealand's society and be inconsistent with the Statement of Government Intentions for Improved Government-Community Relations¹⁰⁰.

G) Self-Regulation.

Philanthropy New Zealand has argued for a system of self-regulation to be introduced in New Zealand. The proposal is that a sector body would be set up which would issue a code of practice to which member charities would be required to adhere¹⁰¹. This body could be implemented in a number of different ways; ultimately the approach favoured by Philanthropy New Zealand was to establish a new stand-alone committee that would monitor compliance with the code for the whole sector. Its role would be more than just monitoring and compliance and would also include education about the sector, promotion of the sector and providing support and advice to charities¹⁰².

⁹⁹ Gino Dal Pont *Charity Law in New Zealand and Australia* (Oxford University Press, South Melbourne, Victoria, Australia, 2000), 451.

¹⁰⁰ Ministry of Social Policy *Statement of Government Intentions for Improved Government-Community Relations*. (Wellington, 2001)

¹⁰¹ Gino Dal Pont *Charity Law in New Zealand and Australia* (Oxford University Press, South Melbourne, Victoria, Australia, 2000), 439.

One of the main problems with a self-regulated body is how it is funded. A self regulating body will need to get all its funding from its members. This may prove difficult at the initial stages as start up costs are high and charities may take some time to join. This will lead to a situation where foundation members may have to pay a substantial amount to join. This will be a further disincentive to join. By comparison a charities commission may receive some funding from the government, even if this is only for start up costs. It would also have the advantage that all charities would be required to join meaning that costs can be spread over the entire sector. Philanthropy New Zealand recognised these costs as a problem, and its approach was to use existing structures and resources. Its approach was to form a consortium of existing sector umbrella bodies. Each co-ordinating body would host meetings on a rotational basis. This approach avoided the use of many new structures and therefore would keep costs low.¹⁰³

A structure that used umbrella organisations would be more attractive to their members, making it more acceptable to the sector. This should lessen transitional problems, as the umbrella organisations should already be dealing with self-regulation issues in their current work. This approach will allow a meeting of the umbrella organisations to share expertise and achieve more collaborative solutions. The board could also include a member of the consumers institute to avoid the concern that these organisations will simply seek to protect their members.

The code itself would be formulated by the sector. The proposal is that a code of practice should be flexible enough to move with the times. There would be the adoption of some "guiding principles" which would influence the specific standards for the sector. An example of this system is the Maryland Association of Non-Profit

¹⁰² David Robinson *Accountability and Self regulation of Charities and Voluntary Organisations: Project Report*. (1999, Wellington, Philanthropy New Zealand). 4.

¹⁰³ David Robinson *Accountability and Self regulation of Charities and Voluntary Organisations: Project Report*. (1999, Wellington, Philanthropy New Zealand). 4.

Organisations.¹⁰⁴ This is an American organisation that represents over 800 Non-Profit Organisations. This has eight guiding principles that are used as the base for 55 standards for members to adhere to.¹⁰⁵ The concept is that while the principles will not change the standards will adapt as time passes.

This system would run on voluntary compliance, there would be no legislative enforcement mechanisms. The monitoring body would work by giving agencies that implemented the code some form of "badge" that would show that it was abiding by the code. This would be a similar type of programme to the heart foundations "Pick the Tick" programme which labels foods that are seen to be healthy and nutritious.¹⁰⁶ The approach with charities would be that member organisations would all have something to identify themselves as a member, those without that "badge" would be assumed not to be living up to the code. Those member organisations that do not live up to the code would have this badge removed.

Philanthropy New Zealand has already suggested that such a system may require some type of legislative under-pinning, meaning that there is some way to force members to follow the code.¹⁰⁷ This approach is to adopt the same codes of practice but to give them legislative backing. The codes of practice could be used to give donors a remedy if a charity fails to live up to the code of practice. This option was discounted by Philanthropy New Zealand because it would require such a large amount of lobbying of government. The feeling was that this was a major legislative exercise that will just not be practical.

¹⁰⁴ See <http://www.mdnonprofit.org/> for more information. (Last accessed 22 August 2002)

¹⁰⁵ See <http://www.standardsforexcellence.org/> for more information. (Last accessed 22 August 2002)

¹⁰⁶ See http://www.nhf.org.nz/pick_the_tick/pick_the_tick.html for more information. (Last accessed 22 August 2002)

¹⁰⁷ Philanthropy New Zealand No. 2 Draft, *Accountability of Charities & Sporting Bodies Working Party Comprehensive Report* (Wellington Feb 1997)

Philanthropy New Zealand is a group representing Charitable Trusts in New Zealand. Its suggestion of self-regulation is essentially a self-interested one. The media at present provides a random and damaging form of accountability. Self-regulation is seen as a way in which the sector can therefore become accountable to the public and show the sector is generally honest and creditable. With this in mind any code adopted would have to be stringent enough to be credible to the public. There is suggestion that a person from the consumers institute would be included in the process to ensure that any action is transparent and creditable. However there may be problems with the suggestion. First the code requires a voluntary signing up process. Some charities will be put off with the extra costs through both time and money that will be required by this. This means the code is unlikely to cover all charities. If there are not a substantial number of members then the idea of a "badging" system will not work. Such a system relies on recognition that all charities should carry the "badge", less than complete coverage can undermine the entire system. A system like this will rely on the "badge" being recognisable, however charities may find it hard to justify using their resources to sign up to a system before the "badge" is recognisable.

There are further problems with the proposed system. Philanthropy New Zealand's self-regulation proposal was modelled on the experience of the advertising industry in New Zealand. The Advertising Industry in NZ has its own code of practice and complaints board that hears complaints; members agree that decisions are binding on them. Its purpose is to complement the existing law, rather than replace it.¹⁰⁸ There are some important differences between the sectors. There are far less advertisers in New Zealand than charities. By signing up some big agencies, such as TVNZ, you have essentially covered the market. The board can be seen as a way of getting a quick solution and avoid expensive court hearings. The system also runs on a complaint system, advertising by its nature is in the public eye, causing

¹⁰⁸ See <http://www.asa.co.nz/howtocomplain.htm> for more information. (Last accessed 23 August 2002)

members of the public complain. The problem with charities is that they are not in the public eye; there is no information to complain on. The role this body fulfils does not seem to be different to the role of the Attorney General and, as already mentioned, this only seems to receive a very small amount of complaints each year.¹⁰⁹ There is a risk that a self-regulated body will spend more time lobbying government than improving accountability to donors or the government.

As mentioned this is a self-interested suggestion that aims at giving charities a creditable public image. This approach completely ignores accountability to the state. A system of reporting may not work in this situation as the membership is unlikely to be comprehensive. If reporting were required many charities would not join due to the increase in costs that joining the body will bring. The government in this system will still have no idea of the amount they spend, where they spend it and what is being provided by the third sector. It is likely that if a system of self-regulation was implemented then further regulation will still be required in order for charities to be accountable to the government. This system is unsuitable from the government's point of view. There has also been a shift away from this approach by the sector itself. Philanthropy New Zealand who formulated the main arguments for self-regulation were involved in formulating the terms of reference of the Working Party on Charities and had their chair as a Member of the Working Party.¹¹⁰ This body recommended a Charities Commission to be implemented.

V) CONCLUSION.

The charitable sector is in a very delicate situation. Greater accountability is required but any system that is implemented needs to work and to be affordable for the sector. A system that is implemented and fails will be extremely detrimental to

¹⁰⁹ Margaret Soper, "The Protector of Charities" (2002) NZLJ 57,59.

¹¹⁰ Judith Timpany was of Chair of Philanthropy New Zealand and also on the Working Party on Charities.

the finances and goodwill of the sector. In this case a Charities Commission would be the best option. Primarily it will offer the greatest accountability to both the state and the public, however it will also have the advantage that it assists charities. This means it is more likely to be accepted by the charitable sector and therefore more likely to succeed. New Zealand has the advantage of being able gain the knowledge of others who have already implemented such a scheme. New Zealand can move forward with a tried and tested scheme that increases the accountability of charities while supports them in the same process.

- Attorney General v Ngati Kahungaiti and Ngati Takirunga Trust* [High Court, Auckland, M 2073/59 and CP 242/00, 5 November 2001]
- Commissioners for Special Purposes of Income Tax v Peiris* [1991] AC 531
- D F Bryant Trust Board v Auckland City Trust Board* [1997] 3 NZLR 342
- General Medical Council v HC* [1998] All ER 252 (C)
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