

GIVING CHARITIES A HELPING HAND

JASON KRUPP



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ABOUT THE AUTHOR



Jason Krupp is a Research Fellow at The New Zealand Initiative, and has published reports on housing affordability, the impact of the compact planning ideology on cities, and resources. He is also a regular contributor to many of New Zealand's leading media titles. Before joining the Initiative, Jason was a business reporter at Fairfax Media, covering financial markets and the corporate sector for the Dominion Post and Business Day. He has also lived and worked in Hong Kong and South Africa.

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GIVING CHARITIES A HELPING HAND

Charities play an important role in New Zealand, delivering a range of social services to a number of communities and causes that would be difficult to emulate on a private or a state-run basis. According to official figures, there are over 26,000 registered charities active in the country, with a collective income of almost \$16 billion in the 2013 tax year.¹ In 2010, charities active in New Zealand reported an average of 1.1 million volunteer hours each week (equivalent to 27,500 fulltime staff), and just over 4 million paid hours over the same period (equivalent to 102,500 full-time staff).² The benefits provided by these groups are recognised by the government, which not only funds many of their activities, but also confers certain privileges upon them. These include tax exemption

on income, the ability to claim donee status thereby allowing donors to claim a tax credit for their donations, and a fringe benefit tax exemption on non-cash benefits paid to employees.

These privileges provide a significant tailwind for groups that perform charitable work in society, which is why it is important to only confer these privileges upon genuine charities, and not to those looking to avoid taxes that they would otherwise have to pay as a private individual or group. This is why there is a plethora of laws regulating the sector, and a regulator tasked with conferring and removing charitable status according to a long-standing definition of charitable purpose that has stood for at least four centuries.³

But while the core definition of what is and is not a charity has been in existence for hundreds of years, the rules governing charities have changed dramatically in New Zealand. Over the past eight years government has increased the level of legislative control of the charities sector by:

- passing legislation to establish a register of charitable entities and a regulator outside of government,
- replacing the autonomous regulator after four years,
- imposing financial reporting requirements on all registered charities,
- stipulating strict tax implications for groups that lose charitable status, and
- committing to a regulatory review on which it subsequently reneged.

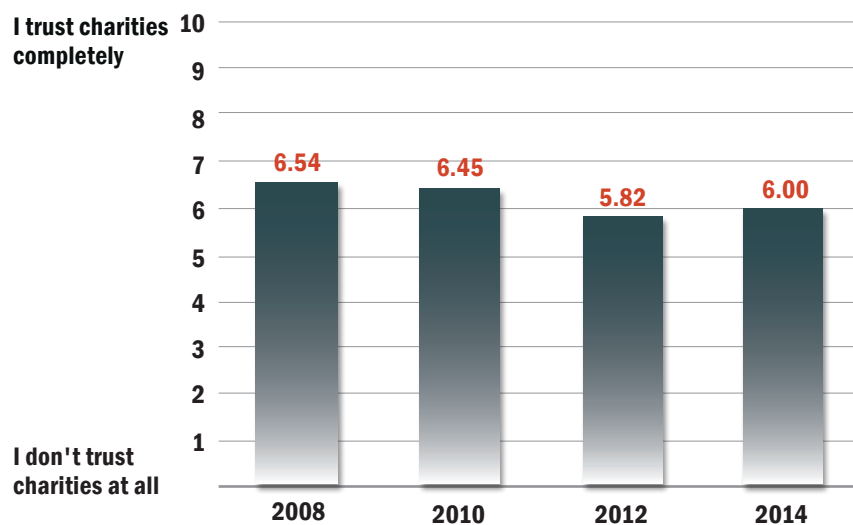
¹ "Charities Services," Charity Services, accessed 29 April, 2015, <https://www.charities.govt.nz/>

² Donald Poirier, *Charity Law in New Zealand* (Wellington: New Zealand Government, Department of Internal Affairs, 2013), p.69.

³ "Purposes Beneficial to the Community," Charity Services, accessed 29 April, 2015, <https://www.charities.govt.nz/apply-for-registration/rules-and-the-charities-act-2005/purposes-beneficial-to-the-community>

Figure 1: Overall trust in charities

TRUST IN CHARITIES: AVERAGE SCORE



Source: Department of Internal Affairs, *Public Trust and Confidence in Charities*, 2014

A number of these changes have been made with the aim of boosting public trust in the charities sector. This is an important consideration since much charity funding is provided by the general public and government, and it follows that excessive levels of fraud are likely to impact on these funding streams to the detriment of legitimate charities and the communities and causes they serve.

Unfortunately, the changes appear to have fallen short of their intended mark. According to a biennial survey, overall trust in the charities sector as at 2014 has shown only a marginal improvement after plummeting to the lowest levels on record in 2012.⁴ Readers should of course be cautious about drawing too strong a conclusion about the regulatory settings from the Horizon poll. The survey only focused on the public's interaction

with charities, and not the nature of the regulatory relationship between charities and the regulator.

As such, members of the public are more likely to be influenced by their experience with so-called 'chuggers' (third party charity agents who solicit donations in public spaces) and door-to-door solicitation rather than the government's oversight of the sector.

Nevertheless, it is also obvious that the regulator has an influence on the public's trust in the sector by granting or removing charitable status and by vetting the financial records of charities. In the case of the former, the regulator must walk a very fine line. Setting the bar too low will allow groups and individuals to qualify for charitable privileges they are not entitled to, damaging public trust in the sector. Setting the bar too high will disqualify many legitimate charities from receiving privileges they are

rightfully due. This will limit the amount of work they can perform in communities, damaging the perception of the sector in the eyes of the public.

This research note argues that the spate of regulatory changes over the last 12 years has resulted in an environment where, at the margin, New Zealand gets it wrong on both counts. On one hand, a strict interpretation of what is and isn't a charitable purpose excludes many charities from attaining registered status, or makes it very difficult. On the other, a longstanding charity law allows an exemption from income tax for charities' commercial arms, allowing them to avoid paying taxes on profits that are not put to charitable purposes but retained within the business. In short, the recent reforms have changed the oversight of the sector without really assessing whether the new arrangements have achieved the optimal outcome of maximising transparency, efficacy and trust.

TALE OF TWO REGULATORS

In order to hone in on the issues with the current regulatory arrangements it is worthwhile to explain how the framework came about. Until the mid-2000s the charities sector was largely governed by Inland Revenue, through its administration of the charitable income tax exemptions. This changed when the Labour-led government passed the Charities Act 2005 (the Act), establishing

⁴ Department of Internal Affairs, *Public Trust and Confidence in Charities*, May 2014, p.8

the Charities Commission, an autonomous Crown entity that was tasked with regulating the sector. One of the commission's primary jobs was to set up and maintain a charity register, a tool intended to bolster the public's trust. The impetus for this change had come from the sector itself, which pushed for a register to be established so that so-called 'bad' charities could be eliminated, and the public could have confidence in those that remained. As part of this change, registration became a prerequisite for an organisation to access the charitable exemptions from income tax.

Around the same time, the Labour government, as part of the confidence and supply agreement with United Future, removed the cap on charitable donations by individuals, which was set at \$1890. This allowed individuals to donate any amount to charity, subject to their maximum income, and claim a third back as a tax rebate. This lifted private charitable giving by about \$95 million a year to \$193 million, and raised the average amount for rebates from \$256 to \$504 per donor per year before the rule change. In addition, the 5% deduction limit that applied to companies and Maori authorities was also removed.⁵

"...the regulator has an influence on the public's trust in the sector by granting or removing charitable status and by vetting the financial records of charities."

The Charities Register opened on 1 February 2007, and charities had until 1 July 2008 to register with the commission before the new tax provisions came into force. However, by 2007, the Charities Commission had accumulated a significant backlog of applications.⁶ In 2008, the National Party was voted into power. The Charities Commission came under significant pressure to reduce the backlog, and some in the sector believe that the regulator responded by registering charities en masse and flagging them for later investigation.⁷ That over 25,000 organisations were added to the register by the end of the 2010 financial year supports this view.

In 2010, the government committed to a first principles review of the Act, looking at the fundamental concepts underpinning the legislation to assess whether these were fit for purpose.⁸ But just as the regulatory structure was getting embedded in 2012, the National-led government disestablished the Charities Com-

mission, handing oversight of the sector to the Department of Internal Affairs (DIA), under a new unit called Charities Services. In response to concerns raised by the sector about the independence of the charities regulator, the Charities Registration Board was established as an independent three-member panel to make decisions regarding registered charitable status autonomously from government. The move to disestablish the Charities Commission was part of a broad state sector consolidation, which brought a number of government functions in-house to reduce cost.⁹ In the same year the government reneged on the first principles review promise, with Community and Voluntary Sector Minister Jo Goodhew saying the "widening" of the definition of charitable purpose would have "fiscal consequences".¹⁰ Other issues that might have been addressed by such a review, such as functioning of the regulatory structure, do not appear to have been considered.

⁵ Michael Gousmett, "The History of Charitable Purpose Tax Concessions in New Zealand: Part 1," *New Zealand Journal of Taxation Law and Policy* 10 (June 2013): 170.

⁶ National Party, "Charities Commission Chokes on Backlog," accessed 1 May 2015, <https://www.national.org.nz/news/news/media-releases/detail/2007/10/11/charities-commission-chokes-on-backlog>.

⁷ Elizabeth Margaret Bang MNZM JP, (Affidavit, 14 June, 2014) NZHC 3200 New Zealand High Court, 9.

⁸ Tariana Turia, "Charities Commission Annual General Meeting," Official Website of the New Zealand Government, accessed 29 April 2015, <http://www.beehive.govt.nz/speech/charities-commission-annual-general-meeting-0>.

⁹ "New Zealand Public Health and Disability Amendment Bill, Mental Health Commission Amendment Bill, Charities Amendment Bill (No 2) — Third Readings," New Zealand Parliament Hansard and Journals, accessed 29 April 2015, http://www.parliament.nz/en-nz/pb/debates/debates/50HansD_20120530_00000028/new-zealand-public-health-and-disability-amendment-bill.

¹⁰ Jo Goodhew, "No review of the Charities Act at this time," Official Website of the New Zealand Government, accessed 29 April 2015, <http://beehive.govt.nz/release/no-review-charities-act-time>.



The passing of the Financial Reporting Act 2013 and the Financial Reporting Amendment Act 2014, which require all registered charities to file annual returns with the regulator, and the new tax rules for charities that lose their registered status¹¹ represented just over a decade of legislative change, with much of it hardly given time to bed in before the next tranche of reform was enacted. This left little time left for reflection and careful consideration of the unintended consequences that might occur.

SLEDGEHAMMER DEFINITION

The Act defines charitable purpose as “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”.¹² Importantly, a charitable purpose must satisfy the public benefit requirement, meaning that purposes must operate for the benefit of the public and not private interests in order to be considered charitable. Allowance is given for groups that have non-charitable purposes, provided those purposes are ancillary to the main charitable purpose.

While this may seem like an easy distinction in theory, in practice it is much harder. The Charities Commission and the Charities

Registration Board opted to take a very narrow, black and white view of what is, and is not, a charitable activity. The Sensible Sentencing Trust, for example, was forced to split its operations into a lobbying unit and a separate victim support unit to maintain the charitable status of the latter because its advocacy for tough criminal sentences was deemed to be political (and hence non-charitable) even though the lobbying activity was ancillary to the trust’s main charitable purposes.¹³ Similarly, the National Council of Women of New Zealand was stripped of its charitable status because its work making submissions on Parliamentary Bills in furtherance of its charitable purposes was deemed to be political advocacy (see case study on page 11).

¹¹ *Income Tax Act 2007*, HR 12.

¹² *Charities Act (2005)*, section 5

¹³ Marty Sharpe, “Charity rejection splits Sensible Sentencing Trust,” *The Dominion Post*, accessed 29 April 2015, <http://www.stuff.co.nz/national/3867650/Charity-rejection-splits-Sensible-Sentencing-Trust>.



"Since Charities Services is not resourced to actively monitor all 26,000 charities on its register, and instead appears to only inspect charities that come to its attention, this has created the perverse situation where legitimate charities may be reluctant to change or update their constitutions for fear of coming to the regulator's attention."

Other charities to fall foul of the strict interpretation of charitable purposes include Swimming NZ. The national organisation was accepted into the charities register in 2008 for its work promoting swim programmes, competitions as well as a programme for top athletes in the sport. Yet amendments to the Swimming NZ constitution in 2012 came under the scrutiny of the Charities Registration Board, which ruled that while the organisation performed charitable work, the high performance and competition programmes were not charitable ends in themselves.¹⁴ As a result, Swimming NZ was deregistered in 2014, despite the Act specifically stating that sport may be a charitable purpose if it is the means through which a charitable purpose is pursued, and despite the ancillary nature of the top

performance programme.¹⁵ In reviewing the decision, a legal commentator noted that the decision would have significant consequences for sport in the country, as over 7,000 sports organisations were reliant on their registration for "access to funding and other benefits which are only available to charities. Losing these benefits could leave many sports without the much needed income to run sport in our communities".¹⁶ Since Charities Services is not resourced to actively monitor all 26,000 charities on its register, and instead appears to only inspect charities that come to its attention, this has created the perverse situation where legitimate charities may be reluctant to change or update their constitutions for fear of coming to the regulator's attention.

Many charities struggle to attain charitable status because of the strict interpretation of charitable purpose. Just Zilch, for example, gathers food from shops and restaurants that would otherwise be thrown away and gives these goods to the public from its retail premises in Palmerston North. Yet the group struggled for two years to get registered status because it could not prove to DIA that those who made use of its services were destitute, and hence it was deemed to confer private benefits to some. Just Zilch Managing Director Rebecca Culver said this was a deliberate choice by the charity to catch people who fell through the cracks, such asset-rich but cashflow-poor middleclass households who fell on hard times but did not qualify for state support.¹⁷

¹⁴ Maria Clarke, "Is sport charitable anymore?" New Zealand Law Society, accessed 29 April 2015, <https://www.lawsociety.org.nz/lawtalk/issue-862/is-sport-charitable-any-more>

¹⁵ *Charities Act (2005)*, section 5(2A).

¹⁶ Maria Clarke, "Is sport charitable anymore?"

¹⁷ Rebecca Culver, personal interview, 8 April, 2015.

The legislation dictates that the charities regulator has to notify a group being declined entry to, or removed from, the register, and why. The group can object to the decision by making a written submission to the charities regulator, who will then consider the case and make a final decision.¹⁸ The parties that object to the charities regulator's decision can challenge it at the High Court.¹⁹ However the requirement to file proceedings in the High Court sets a very high threshold, one that many charities will struggle to meet given the costs, which have to be self-funded as is shown in the National Council of Women case study. More critically, the appeal right is currently being interpreted as an appeal on the record, rather than a fresh hearing, as noted by charities lawyer Susan Barker.

For charities that lose their charitable status, the consequences can be severe. Recent changes to the Income Tax Act 2007 state that any group removed from the charity register is due to pay tax on any net assets held 12 months after the last appeal has been exhausted, as well as tax on any income earned after that period.²⁰ In principle, these new tax rules are appropriate, given that the tax exemption privileges should only be granted to legitimate charities.

However, the new rules can be problematic when coupled with the uncompromising interpretation of charitable purpose, and the nature of the appeal process stipulated by law.

Given that the regulator does not conduct hearings, charities do not have the ability to have an oral hearing of evidence to demonstrate whether their purposes are charitable. Importantly, the regulator is not bound by the rules of evidence when reaching its decision. As such, a charity will not necessarily know what evidence the regulator has considered or ignored, or indeed what weight it may have placed on any particular piece of evidence. This can be problematic as the regulator is increasingly reliant on searches of official websites to assess charitable purpose, as was revealed when Greenpeace challenged its removal from the charities register in the Supreme Court.²¹ Relying on online information could result in the regulator finding material that is out of date, out of context, or simply incorrect. Yet charities are denied the opportunity to test any of the assumptions, or the decisions made regarding what material is considered, disregarded or overlooked.

The high threshold of filing proceedings at the High Court combined with the limited scope for appeal have a chilling effect on the sector. It limits the number of legitimate charities able to gain or maintain registration. This can mean not only loss of income tax exemption, but also funding, as funders increasingly restrict their support to registered charitable entities. More concerning is that it creates a situation whereby many legitimate charities are forced to shut down rather than undergo a costly and uncertain appeal process.

THE TAX THAT GOT AWAY

These regulatory settings, which apply significant stricture on small operators in the sector, could be explained by the economic environment where the government is concerned about maintaining tax revenue. After all, from a fiscal perspective the state foregoes an estimated \$400 million in tax earnings by allowing charities to claim exemptions, excluding tax deductions by individual and corporate donors.²² Unfortunately the focus appears to have unduly fallen on small operators, even as significant sums of profit in the sector remain untaxed.

¹⁸ Charities Act 2005, ss 32-36.

¹⁹ Ibid., ss 59-61.

²⁰ "New rules for deregistered charities," Inland Revenue, accessed 29 April, 2015, <https://www.ird.govt.nz/technical-tax/legislation/2014/2014-39/2014-39-deregistered-charities/>.

²¹ Greenpeace of New Zealand Incorporated v Charities Commission. 2014 NZSC 105. Supreme Court of New Zealand.

²² Phil Taylor, "Please give carefully," New Zealand Herald, accessed 29 April 2015, http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10893671

This is due to a law that dates back more than 100 years, allowing groups that undertake for-profit activities for charitable purposes to access the charitable income tax exemptions. These groups can also assume the same limited liability status as private firms, and retain a portion of their earnings within the business with little oversight by the charities regulator or the government. The effect has been best illustrated by independent charity researcher Michael Gousmett, who has focused on how Ngai Tahu have legally structured their affairs under these rules to best benefit the South Island tribe, albeit to the detriment of the government's tax take.²³ His research shows that as of October 2014, Ngai Tahu Charitable Group had 37 active commercial units (or members) claiming charitable status. The vast majority of these are commercial operations, active in multiple sectors of the economy including fisheries, property and property development, finance, agriculture and tourism. Many of these operations will be familiar to the public, including Ngai Tahu Property, Proseed New Zealand, Shotover Jet Limited, and Ngai Tahu Development Corporation. Critically, Gousmett notes that the law allows these business units to retain much of their untaxed

"This creates the potential for distortions in the market, allowing private businesses to accumulate large cash reserves under the tax exemptions afforded to charities that can be used to unfairly compete against private operators."

profits, with only 20% of the \$161 million earned in the 2014 financial year paid to iwi as a dividend.²⁴ This creates the potential for distortions in the market, allowing private businesses to accumulate large cash reserves under the tax exemptions afforded to charities that can be used to unfairly compete against private operators.²⁵ Ngai Tahu is hardly the only entity to take advantage of these rules to exempt their commercial operations from income tax. Other well-known organisations to have done this include breakfast cereal maker Sanitarium and hospitals such as Dunedin's Mercy Hospital and Christchurch's St. George's Hospital. Gousmett estimates there are 700 limited liability companies on the Charities Register that generate over \$372 million in tax-exempt profits and hold \$3.6 billion in assets

excluding Ngai Tahu.²⁶ To date, Charities Services has provided little to no oversight over how much of these funds are directed towards their respective charities, what the charities do with these funds, and how much is retained by the businesses (although the extent to which this position may change under the new financial reporting rules for registered charities, which came into effect on 1 April 2015 remains to be seen). What is clear is that, at a tax rate of 28%, the government has foregone an estimated \$104 million in fiscal revenue annually by allowing this legal arrangement to exist.

²³ Michael Gousmett, "The failure of Ngai Tahu Holdings Corporation as a charitable entity," New Zealand Centre for Political Research, accessed 29 April 2015, <http://www.nzcprr.com/the-failure-of-ngai-tahu-holdings-corporation-as-a-charitable-entity/>

²⁴ Ibid.

²⁵ Susan Barker, "Are all charities equal?" p.41.

²⁶ Michael Gousmett, "The failure of Ngai Tahu Holdings Corporation as a charitable entity"

REFORM THE LAWS OF GIVING

Although the regulatory structure governing the charitable sector has undergone significant change in the last decade, it is clear from the problem description above that further fine tuning of the policy structure could significantly improve the functioning of the sector.

The first much needed change is a review of the Charities Act. This should not be limited to a review of the definition of charitable purpose, although such a review would allow policymakers to assess whether the current definition is appropriate. In addition, the review might usefully examine whether religious and cultural institutions should continue to qualify for charitable status simply because they pursue the goal of promoting religion and culture. This is not to say that such institutions should not be considered, but the assessment criteria should be the same for all organisations seeking the status of registered charities.

With respect to the charities register, charities must be allowed to challenge the decision of the Charities Review Board at far lower level than the High Court, recognising that this legal channel can prove

highly costly and onerous for many groups. For example, the Act could be amended to allow charities to lodge a challenge at a District Court level, with further appeal to the higher courts if needed. Furthermore, policymakers should instruct the District Court to review the case on a *de novo* (from fresh) basis, as is done in the Environment Court, allowing affected parties to submit evidence to support their case for charitable status and cross-examine the board on the decision that they have reached. This would provide significant relief to small charity operators, even under the current definition of charitable purpose.

Urgent reform of for-profit businesses owned by charities is also needed. The most simple and effective fix is to tax these organisations in the same way that private firms are taxed, while allowing unlimited deductions on distributions made to their relevant charities, as was proposed by Helen Clark's government in 2001.²⁷ The assets accumulated by these businesses should not be subject to tax unless they are stripped of their charitable status, in which case the standard tax process would apply. This policy change would remove any unfair tax advantage that charity-owned businesses have over private for-profit firms. In addition, by

taxing retained profits it would incentivise these firms to distribute more of their pre-tax earnings to their relevant charities, thereby boosting the resources of the sector. Charities Services must also ensure that any significant distribution is assessed to ensure that it funds genuine charitable purposes.

BUILDING BLOCKS OF TRUST

It would be somewhat naïve to expect the policy changes proposed in this report to dramatically lift the public's trust in the charity sector. This is governed by a number of factors that extend beyond the recommendations in this report, such as the conduct of charities when fund raising, the prevalence of fraud and so on. However, greater transparency, clearer rules and processes, and the removal of unfair advantage would go a long way to establishing strong regulatory foundations, allowing the charities sector to further perform the good work that society has come to expect.

²⁷ Michael Gousmett, "The History of Charitable Purpose Tax Concessions in New Zealand: Part 1," *New Zealand Journal of Taxation Law and Policy*, 10 (June 2013) p.170.

CASE STUDY: ENDANGERING KATE SHEPPARD'S LEGACY

In 1896, the National Council of Women of New Zealand started out as a charitable organisation, with renowned suffragette Kate Sheppard as its first president. Over the next 109 years the group, which works for the betterment of women, children and the family, maintained its charitable status under the regulation of Inland Revenue.

With the establishment of the Charities Commission, the council applied to become a registered charity. In June 2009, over a year after it had first submitted its application, the council's application was accepted, with registration being backdated to 30 June 2008. At the time the application was accepted, the council was earmarked for subsequent investigation. The investigation ultimately resulted in the council's deregistration in June 2010 on the basis that its work advocating for "changes in law, policy or decision of central government" was political and ancillary to its stated charitable purposes.²⁸

Stripped of its registration, the charity became affected by a stigma of having done "something wrong",

and soon found it difficult to raise funds from traditional sources that had a preference for supporting registered charities.²⁹ Unable to substantively appeal the deregistration decision, in 2012 the council again applied for registered status, and asked the Charities Registration Board to backdate the group's registered status to 2010 to avoid having to pay taxes during the period it was deregistered. Then-president of the council, Elizabeth Bang, noted that the application "took literally hundreds of hours to prepare" on advice that the group would have no automatic right to submit new evidence to the High Court should it wish to appeal any decision on its reapplication.³⁰

The charity's bid was successful, even though its purposes, constitution and activities had remained unchanged, and in April 2013 it was again accepted onto the register. However, the council's charitable status was only backdated to September 2012. As a result, National Council of Women of New Zealand faced a period from June 2010 to September 2012 when it was not registered as a charity. IRD sought to impose income tax for this period of deregistration.

In January 2014, aided by pro bono legal advice, the council challenged the decision not to backdate the group's charitable status in the High Court. The council argued that it was eligible to be regarded as a registered charity for the entire period, that the Charities Registration Board was empowered to backdate its registered charitable status, and that it should not be liable to pay income tax for that period.

The High Court found in favour of the National Council of Women of New Zealand, and ordered the regulator to backdate the council's charity status to 2010, wiping clear the tax obligation.³¹ The process was not without its costs, racking up \$90,000 in legal expenses. Most of this was conducted on a pro bono basis by charities lawyer Susan Barker. Had this not been available, Bang said the council would not have had the resources to challenge the regulator's decision in court. Nevertheless, the council still "faces the very real prospect of closure as a direct result of the deregistration decision, even now".³²

²⁸ The National Council of Women of New Zealand Inc. v The Charities Registration Board (2014), New Zealand High Court NZHC 1297 (10 June 2014)

²⁹ Affidavit of Elizabeth Margaret Bang MNZM JP (14 June 2014) CIV-2014-485-1017 p.1

³⁰ Stet. p.5.

³¹ The National Council of Women of New Zealand Incorporated v The Charities Registration Board 2014, 14.

³² Bang (Affidavit 2014), 9.

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The New Zealand Initiative
PO Box 10147
Wellington 6143