

# The Charities Bill

## ***A Submission from Auckland Medical Aid Trust***

### **Introduction**

This document is a submission from the Auckland Medical Aid Trust about the Charities Bill currently under consideration by the Social Services Select Committee, and the Charities Commission proposed by the Bill.

The Auckland Medical Aid Trust is a charitable trust established in 1974 to deal with matters concerning human reproduction. There are currently three Trustees, with the day-to-day affairs managed by an Executive Officer. The Trust has, since inception, operated an Abortion Clinic in Auckland to complement public hospital service provision; it has given charitable grants to various individuals and organizations, sponsored the publication of books within the scope of its objects; it has sponsored the formation of another charitable trust to assist those whose lives have been affected by adoption; and most recently, it has established a doctoral scholarship at the University of Auckland to sponsor research into issues in the field of human reproduction.

It is our belief that, for the reasons below, the legislation should not proceed as is. Our Trustees have reached this position after due consideration of the Bill and its provisions, because it introduces more direct government control over the social activity of charities, because it duplicates existing law and government structures, and because it will place extra compliance costs on the charitable sector.

### **Purpose and function of the Charities Commission**

The Charities Bill is presented as an attempt by the Government to increase the transparency and accountability of charities. The stated purposes of the Commission are to register and monitor charities wanting to retain their tax-exempt status, to collect information about the activities or funding sources of charities, and to monitor the activities of charities. It is intended to improve the sector's accountability to the community by ensuring that charities continue to operate for the purposes for which they were established and by increasing the degree of transparency and public disclosure.

Among the other objectives are the intention to provide government with more detailed information about how much assistance it provides charities through the provision of tax exemptions and rebates, and to assist with the development of social policy by enabling the Government to target policy interventions to areas where more Government assistance is required. Of particular concern is the likelihood of the charitable sector being 'harnessed' for the changing purposes of particular governments, when charitable organisations have been established for particular purposes which may not be liked by various politicians.

### **'Voluntary' registration**

It is intended that registration is voluntary, with charities missing out on tax exemption if they do not sign up. On the surface, if the legislation is to go ahead, that seems a reasonable approach. Advocates of the Bill argue that establishing such a commission brings New Zealand into line with other Commonwealth countries where registration and reporting regimes are commonplace.

However, Internet sources provide considerable detail from the British equivalent in the UK where a charities commission has been implemented. Of concern in relation to 'voluntary' registration is the introduction there of a 'compliance campaign' to assist the 30% of organisations too slow to supply annual accounts and returns etc., with headings like 'How we can help you to meet our requirements'. One of their methods of providing 'help' is to publish a list of 'persistent defaulters' with full details on their website.

Indicative of a heavy-handed approach in New Zealand is the requirement to display registration numbers on written communications and fundraising materials and the provision for a fine of up to \$2,000 for contravention of these obligations (*clause 23*).

Although registration is 'voluntary', it is likely to become compulsory in practice in such a policy environment.

## **Government control of charities**

Our Trustees are concerned to maintain the independence of the charitable sector – independence originally established in 13<sup>th</sup> Century Britain<sup>1</sup>, extended to Charitable Trusts through the Charitable Uses Act in Britain in 1601<sup>2</sup>, and clarified in terms of public benefit by Lord McNaghten in 1891<sup>3</sup>.

Clause 86 of the proposed legislation might rule out any activity that the government does not approve of, limiting charities to the kind of activity that governments considered charitable. The penalty is deregistration if the government of the day is not happy with the objects of a long standing charity, particularly if its social objectives involve research and advocacy in areas of social policy in which the government is vested.

Experience in the Health and Education sector in New Zealand suggests that once registration and accreditation bodies are established, the nature and extent of compliance intensifies. To suggest that this might also be true in the charitable sector, the UK Commission is currently consulting on 'draft guidelines' (which quickly become known as 'regulations') for the recruitment, selection and appointment of Trustees. This direct involvement in issues of Trust governance cuts across responsible trusteeship.

It is important that the community or 'third sector' remain as an independent voice of the community and provide a vital check on government power. The direction of this Bill runs counter to that independence. At very least, the Bill needs to contain explicit provision for charities to engage in lobbying and advocacy work related to their primary purposes.

## **Responsibility for oversight**

Given the 'social good' nature of the proposed legislation, our Trustees are concerned to see the Minister of Commerce responsible for appointing commissioners and overseeing the Commission's establishment, with the Ministry of Economic Development likely to be the department responsible for ongoing monitoring. These appointments clearly signal a commercial focus rather than a social or humanitarian one.

Our Trustees propose that the Ministry of Social Development would be more appropriate given its history working with charities and its role in providing "strategic social policy advice to the New Zealand Government and ...social services to more than one million New Zealanders"<sup>4</sup>. The blatant commercial and economic direction of the proposed supervision does not sit easily with what is currently understood to be charitable activity.

## **Officer's indemnity**

Many charities – our own included – engage in the world of commercial reality as a means of raising funds instead of begging for money. In that commercial activity, it is vital that they are covered by the same indemnity provisions as people in comparable activity in the commercial sector. Charitable trusts are charged with safeguarding their funds in the manner of prudent people of business. Our trustees believe that directors' liability insurance is part of such prudent activity, and that Trust law is sufficient to ensure that Trustees act responsibly in their official capacity. We fear that the intention to prohibit officers obtaining indemnity insurance would be a seriously backward step for the sector, and one which might leave a number of competent executives vulnerable to the exigencies of an increasingly litigious marketplace.

## **Operating costs paid by charities**

Our Trustees feel strongly that it is against the whole nature of charities for the government to insist that the charitable sector fund what is, in effect, government activity. Other regulatory bodies such as the Commerce and Securities Commissions are funded from taxation. The intention to establish the Commission as a Crown Entity will ensure a growing need for staff

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<sup>1</sup> Riddall, J.G. (1992) *The Law of Trusts*, 4<sup>th</sup> Edition, Butterworths, London. p. 90.

<sup>2</sup> Burn, E.H. (1990) *Trusts and Trustees: Cases and Materials*, 4<sup>th</sup> Edition, Butterworths, London. p. 329.

<sup>3</sup> *ibid.*

<sup>4</sup> <http://www.msd.govt.nz/>

and thus an ever-increasing drain on funds. The proposed 'self-funding' nature of the entity is really a euphemism for a 'tax on charities' – a permanent call on charitable funds which were not collected for that purpose.

By definition, the funds collected, held, used and distributed by charities are for specified public good, and each dollar drawn into government administrative infrastructure is lost to that cause. Any funding for the new Commission must come from the general taxation pool, not from the charities themselves.

If there is a need to increase surveillance of charities (and recent news stories and anecdotal evidence suggest there might be), other government departments could cover this with minimal change; e.g. Inland Revenue, Ministry of Commerce, or the Ministry of Social Development. Much of the work of charities falls in the sphere of operation of these departments, and it seems that introducing another Commission is likely to involve further duplication of service within the State sector.

## **Summary**

One way or another, the introduction of the new legislation, the formation of the Commission and the ongoing maintenance of the proposed supervision of charities is going to cost money. It is a concern that extra compliance costs, increased reporting requirements and potential penalties are being applied to the voluntary sector at a time when the social fabric of our society has much need of the very volunteers likely to be driven off by the changes.

Our Trustees support the intentions of the bill – to ensure transparency and accountability, although the reservations above lead our organization to request changes to the proposed legislation: specifically, to ease off on registration requirements; to move responsibility for the changes to a social arm of government; to allow for prudent indemnity arrangements for officers; to minimize compliance issues and costs for charities; and to change provisions to levy charities for the costs of government in this area.

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