

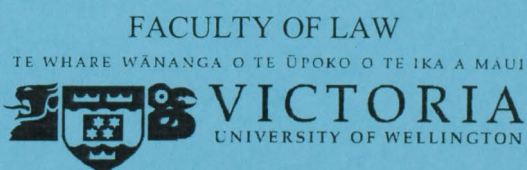
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Clarifying the charitable status of the amateur sport in the charities ACT 2005

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CLARIFYING THE CHARITABLE STATUS OF AMATEUR
SPORT IN THE CHARITIES ACT 2005

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Abstract

The present paper deals with the question of whether and to what extent the charitable status of amateur sport should be clarified in New Zealand charity legislation, especially focussing on a possible amendment of the Charities Act 2005.

At present, the definition of what is charitable is still based on the original, more than 400 year-old definition of charity laid down in the Statute of Elizabeth 1601. The current legal framework for charities in New Zealand, like many other common law jurisdictions, reflects the long-established principles and applies the traditional common law definition of charitable purposes.

However, social perceptions of what is considered charitable change with the passing of time. This also applies to the case of amateur sport as its significant public benefit is beyond doubt and extends beyond the advancement of a recognised charitable purpose. Yet, because the current legal framework is out of touch with social and legislative developments, uncertainty consequently arises. The present confusion among sporting bodies following a High Court decision in the Travis Trust case as to the question whether amateur sport purposes can still receive charity funding illustrates this fact.

In light of this, the present paper examines how to clarify the present charity law for the benefit of amateur sport. The author considers alternatives for legislating New Zealand charity law and seeks recourse to precedents in other jurisdictions, in particular to the Charities Act 2006 of England and Wales. The findings are implemented in a legislative proposal.

The author concludes that the promotion of amateur sport should be recognised in the Charities Act 2005 as a charitable purpose in its own right rather than as a means of advancing another charitable purpose and recommends that this issue be considered in the course of the current review of the Act by the Department of Internal Affairs.

Word length

The text of this paper (excluding abstract, table of contents, footnotes and bibliography) comprises approximately 12163 words.

Subjects and Topics

Charities Act 2005-Charitable Purpose-Amateur Sport

I Introduction

In 2011, New Zealand hosts the Rugby World Cup, the third largest sporting event in the world. The Rugby World Cup is expected to generate \$NZ 1.5 billion worth of economic activity and to attract about 66,000 international supporters.¹ Moreover, the games will be watched by a cumulative television audience of four billion, offering New Zealand the opportunity to showcase itself to the world.²

However, it is not only professional sport that brings great benefits to New Zealand society. Besides the glamorous world of professional sport, amateur sport plays a significant role in the everyday life of New Zealand people. In contrast to sport on a professional level, amateur sport does not pass benefits to players, owners and commercial stakeholders but rather operates on a non-commercial basis. Yet, its benefits are undisputed as it promotes health and provides enjoyment to the community. Recent figures substantiate the importance of amateur sport in New Zealand. According to 2007/2008 Active NZ, a national physical activity survey carried out by Sport and Recreation New Zealand (SPARC),³ 96 per cent of adults participated in one or more sport or recreation activity over the 12 month survey period. 79 per cent of adults even took part in at least one sport or recreation activity during any week. The key findings of the survey also support a statement by Chris Hipkins, Labour's sport and recreation spokesperson, that amateur sports clubs are an essential part of New Zealand's social fabric.⁴ 34 per cent of the adults who take part in sport and recreation activities are members of clubs or centres. The latter are usually local membership-based, promoting and facilitating participation in a particular sport which is predominantly amateur.⁵

Unlike professional sport, however, amateur sport is limited in terms of its access to funding and sports organisations are dependent on grants for amateur sport purposes

¹ Rugby New Zealand "2011 Rugby World Cup bigger and better" (press release, 15 September 2006).

² Rugby World Cup 2011 <www.rugbyworldcup.com>.

³ A report providing an overview of the findings from the survey can be found at <www.activenzsurvey.org.nz>.

⁴ Chris Hipkins "Sports clubs' charity grants funding must be protected" (23 September 2009) New Zealand Labour <www.labour.org.nz>.

⁵ Nicholas Bland "Tax, charities and the Charities Act" (2009) 2 NZLJ 61.

from community trusts⁶, gaming trusts⁷ or other charitable organisations. Grants from the gambling sector are one main source of funding for amateur sport.⁸ According to the gambling expenditure statistics released by the Department of Internal Affairs (hereinafter 'DIA'), \$NZ 2.028 billion were lost on gambling in New Zealand in 2009.⁹ From the gambling proceeds, roughly \$NZ 1 billion have been granted to sports purposes over the last ten years.¹⁰ The statistics also show that almost half of the money is expended on gaming machines outside casinos (so-called 'pokies').¹¹ Under the Gambling Act 2003¹² they are only permitted if they are run for the purpose of creating money for community funding.¹³ Accordingly, more than 20,000 gaming machines are owned and operated in New Zealand by gaming trusts, such as the Christchurch-based Eureka Trust¹⁴ or the Oxford Sport Trust Inc¹⁵ in Whangarei. The trusts have to apply and distribute the net gambling proceeds to authorised purposes.¹⁶ Gaming trusts currently

⁶ For example The Community Trust of Wellington <www.comtrustwn.co.nz>.

⁷ See generally Michael Gousmett "Gaming trusts and charitable activities" (2010) 2 NZLJ 63.

⁸ However, funding sport through gambling is a controversial topic as there are risks associated with gambling, such as problem gambling. See Problem Gambling <www.ourproblem.org.nz> for more information. According to the Department of Internal Affairs, problem gambling can be defined as gambling that causes or may cause harm to the individual, the individual's family, or the wider community. A problem gambling levy is taken by the government from the gambling proceeds to support services to prevent harm from gambling.

⁹ Department of Internal Affairs "Gambling Expenditure Statistics 1985-2009" (2009) and "Gamblers spent a little less in 2008/2009" (press release, 25 March 2010) <www.dia.govt.nz>.

¹⁰ Keith Manch, Deputy Secretary of Internal Affairs "SPARC Conference" (speech to a SPARC Conference, Wellington, 23 June 2008).

¹¹ Furthermore, the spending was made up of losses on racing betting, Lotteries Commission products and gambling in casinos.

¹² The Gambling Act 2003 sets out the main regulatory framework for gambling and is administered by the Department of Internal Affairs.

¹³ The objectives of the Gambling Act 2003 are set out in s 3. The key purposes are to control the growth of gambling, prevent and minimise the harm caused by gambling, including problem gambling, limit opportunities for crime and dishonesty associated with gambling, and to ensure that money from gambling benefits the community.

¹⁴ Eureka Trust <www.eurekatrust.org.nz>.

¹⁵ Oxford Sports Trust Inc. <www.oxfordsportstrust.org.nz>.

¹⁶ According to s 4(1)(a) of the Gambling Act 2003, authorised purpose means a charitable purpose, a non-charitable purpose that is beneficial to the whole or a section of the community and promoting as well as controlling and conducting race Meetings under the Racing Act 2003, including the payment of stakes.

give away more than \$NZ 200 million per year to sporting, educational, health, arts and other charitable purposes. If the trusts use the funds for unauthorised purposes they risk prosecution and/or licence cancellation.

Against this background, the following problems arose. Following a High Court decision in the *Travis Trust* case¹⁷ which dealt with the promotion of horse racing, DIA warned 33 charitable gaming trusts that amateur sport may not be eligible for charity grants from pokies gambling. This caused great concern in the sports sectors.¹⁸ Sports organisations were worried whether they can still rely on charity grants to operate on, grant-makers were uncertain whether they can still fund amateur sport purposes in general or rather have to change their granting practices.¹⁹ In any case the gaming charities have to decide if funding a certain sports organisations complies with the requirements of their trust deed.²⁰ Some trusts, such as Eureka, even stopped funding amateur sport.²¹ If funding from charitable gaming trusts ceases, this would have a devastating effect upon New Zealand communities. Besides amateur sport, countless organisations benefit from the grants each year.²² As millions of dollars were under threat, Nathan Guy, Minister of Internal Affairs, and Tariana Turia, Minister for the Community and Voluntary Sector, published a media statement, trying to reassure that gaming machine funding can still go to sport.²³ Despite some gaming trusts stating that they will continue to make grants,²⁴ great uncertainty surrounding the charitable status of amateur sport remained.

¹⁷ *Travis Trust v Charities Commission* HC Wellington CIV 2008-485-1689, 3 December 2008.

¹⁸ Albeit the general uncertainty surrounding sports funding, such as the inability to rely on an ongoing source of funding. See Bell Gully "Sports Law Update" (August 2008) <www.bellgully.com>.

¹⁹ See generally Jacqueline Smith "Sport Clubs to be given clarity" (25 Sept 2009) New Zealand Herald <www.nzherald.co.nz>.

²⁰ Even though the amount of available funds remains static, the number of submitted grant applications is exponentially increasing and sports organisations apply for a larger amount of money.

²¹ Eureka Trust "Response to The Press article of 1 August 2009" (press release, 1 August 2009). In 2008, Eureka had given \$NZ 1,585,710 to sport purposes, see Eureka Trust <www.eurekatrust.org.nz>.

²² The Eureka Trust mentions various beneficiaries, such as schools and kindergartens, and explicitly names some recipients. See Eureka Trust <www.eurekatrust.org.nz>.

²³ Department of Internal Affairs "Sport can still receive gaming society funding" (press release, 24 September 2009).

²⁴ For example Eureka Trust, above n 21.

The present uncertainty highlights a matter that is overdue for review. The modern interpretation of the word charity is much wider than just generosity to the poor and needy but also incorporates other purposes beneficial to the community as a whole.²⁵ In the light of a changing conception of amateur sport and its social impact, statutory clarification is needed. The gaming trusts would not have been confronted with uncertainty if New Zealand charity legislation clearly recognised the promotion of amateur sport as a charitable purpose. The present paper will elaborate on the charitable status of amateur sport and examine how the current charities legislation can be amended to bring legal certainty to the law. One promising option for legislating could be an amendment of the Charities Act 2005.

Regarding the structure of this paper, a general overview presents the history and legal framework of charity law in New Zealand. The following section outlines the historical evolution of the common law definition of charitable purposes and highlights current definitions in New Zealand charity legislation. Subsequently, the charitable status of amateur sport in particular is examined. Then, the recent decision in the *Travis Trust* case and its impact on the charitable status of amateur sport is considered in detail as it has been the trigger for great uncertainty in the sports sector. The next section presents possibilities for legislating to clarify the charitable status of amateur sport, considering definitions used in other common law jurisdictions and assessing alternatives to the amendment of the Charities Act 2005.

II Charity Law in New Zealand

A History

The regulation of charitable relief in New Zealand law dates back to 1846.²⁶ Six years after New Zealand had become an unelected Crown Colony, the Destitute Persons

²⁵ Nuzhat Malik "Defining 'Charity' and 'Charitable Purposes' in the United Kingdom" (2008) 11 IJNL 11.

²⁶ For a comprehensive overview on the history of charity law see Gino Evan Dal Pont *Charity Law in Australia and New Zealand* (Oxford University Press, South Melbourne) at [44].

Ordinance 1846 statutorily addressed the issue of poverty for the first time. However, the statute did not constitute the right to charitable aid for citizens but rather placed this obligation on near relatives. At this point of time, welfare needs were therefore rather met by self-help and family support than by government aid and formal charity. Voluntary organisations tried to fill welfare gaps but were small in number and mainly focussing on providing hospitals, refuges for prostitutes and homes for destitute children. The first national statute to deal with charitable aid was then the Hospitals and Charitable Institutions Act 1885. However, public welfare remained limited.²⁷ The first government funded welfare was established with the Old Age Pensions Act 1898. However, the Social Security Act 1938 stipulated that income maintenance in time of need is a right of citizenship, making charitable aid residual.

Contrary to the small direct aid by government in terms of meeting welfare needs, charitable trusts were treated favourable under New Zealand law. Various Acts contributed to encourage charitable giving.²⁸ The Charitable Trusts Act 1957 consolidates the law and is still in force.

In 1989, a reform process was set in motion.²⁹ The Working Party on Charities and Sporting bodies published the so-called 'Russel Report', recommending to set up a Commission for Charities and calling for greater accountability while offering incentives through changes to charities' taxes.³⁰ However, as the Report met criticism from the charities sector, its recommendations were not implemented. In 2001 New Zealand Government launched a discussion document on taxation issues relating to charities and

²⁷ The Act did not stipulate a right to charitable aid but rather left it to the local bodies addressed in the Hospitals and Charitable Institutions Act 1885 to decide what kind of assistance should be given to the citizens. The Hospitals and Charitable Institutions Act 1909 then brought hospitals and charitable aid boards under one authority in every district.

²⁸ Namely the Religious, Charitable and Educational Trusts Act 1856, the Religious, Charitable and Educational Trusts Act 1863, the Religious, Charitable and Educational Trust Boards Incorporation Act 1884, the Charitable Funds Appropriation Act 1871, the Charitable Trusts Extensions Act 1886, the Religious, Charitable, and Educational Trusts Act 1908, the Religious, Charitable, and Educational Trusts Amendment Act 1928, the Trustee Amendment Act 1935.

²⁹ See generally Myles McGregor-Lowndes "Modernising Charity Law" (paper presented to Modernising Charity Law Conference, Brisbane, April 2009) and Carolyn Cordery and Rachel Baskerville-Morley "Charity Financial Reporting Regulation: a comparison of the United Kingdom and her former colony, New Zealand" (Working paper, University of Wellington, 2005).

³⁰ New Zealand Working Party *New Zealand Working Party on Charities and Sporting Bodies* 1989.

non-profit bodies which generated a large number of submissions.³¹ In the same year, the Working Party on Registration, Reporting and Monitoring of Charities was appointed. The Working Part issued its final report in 2002. The reform process finally resulted in the Charities Act 2005.

B Charities Act 2005

The Charities Act 2005 was enacted on 20 April 2005 and is administered by the Ministry of Social Development and the Department of Internal Affairs. The purpose of the Act is to regulate and monitor the charity sector in New Zealand by establishing a Autonomous Crown Entity, the Charities Commission, providing for the registration of societies, institutions, and trustees of trusts as charitable entities in a public register and requiring charitable entities and certain other persons to comply with certain obligations.³² The Income Tax Act 2004 and the Estate and Gift Duties Act 1968 were amended correspondingly in order to assign certain benefits under these Acts to registered entities.³³

The Charities Act 2005 is considered to contribute greatly to the regulation and accountability of charitable organisations in New Zealand.³⁴ However, it is also noted that provisions of earlier legislation and common law principles will still be of major significance in New Zealand Charity Law.³⁵

During the drafting process of the Act, the question was considered whether the definition of charity in the Act should specifically include sporting organisations.³⁶ However, the definition was not drafted to this extent as it was considered preferable to deal with this matter in gaming trusts legislation.³⁷

³¹ Policy Advice Division of the Inland Revenue Department *Tax and charities* (June 2001).

³² Section 3 Charities Act 2005.

³³ See Charities Act Commencement Order 2006 for the amendments to the Income Tax Act 2004 and the Estate and Gift Duties Act 1968. For the benefits of registration see section VI.

³⁴ McGregor-Lowndes, above n 29.

³⁵ *Ibid.*

³⁶ Social Services Select Committee *Charities Bill* (2004) at [4].

³⁷ *Ibid.*, at [5].

III Definition of Charitable Purpose

A English Law

Historically, the definition of what is charitable has been determined by English case law. In the *Pemsel* case³⁸, Lord Macnaghten referred to the preamble of the *Statute of Charitable Uses 1601* (commonly referred to as the “Statute of Elizabeth”). The Statute was passed to protect and prevent the misuse of charitable funds and contained in its preamble an illustrative list of accepted charitable uses that can generally be taken as the starting point for the law of charitable purposes in England, and hence in New Zealand:³⁹

The relief of the aged, impotent, and poor people; the maintenance of sick and maimed soldiers and mariners, schools of learning, free schools and scholars in universities; the repair of bridges, ports, havens, causeways, churches, sea-banks and highways; the education and preferment of orphans; the relief, stock or maintenance of houses of correction; the marriages of poor maids; the supportation, aid and help of young tradesmen, handicraftsmen and persons decayed; the relief or redemption of prisoners or captives and the aid and ease of any poor inhabitants concerning payments of fifteens, setting out of soldiers, and other taxes.

From this list, Lord Macnaghten extracted four categories (so-called ‘heads’) of charity:⁴⁰

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.

Any purpose under the fourth head has to be analogous to an existing charitable purpose or has to be within the spirit and intendment of the preamble to the Statute of Elizabeth.⁴¹

³⁸ *Income Tax Special Purposes Commissioners v Pemsel* [1891] AC 531.

³⁹ Statute of Charitable Uses 1601 (Eng) 43 Elizabeth I c 4.

⁴⁰ *Income Tax Special Purposes Commissioners v Pemsel*, above n 38.

⁴¹ *Commissioner of Inland Revenue v Medical Council of New Zealand* [1997] 2 NZLR 297 and *Latimer v Commissioner of Inland Revenue* [2004] 3 NZLR 157.

In *Scottish Burial Reform and Cremation Society v City of Glasgow Corporation*, Lord Wilberforce clarified this approach.⁴²

... for it is now accepted that what must be regarded is not the wording of the preamble itself, but the effect of decisions given by the court as to its scope, decisions which have endeavoured to keep the law as to charities moving according as new social needs arise or old ones become obsolete or satisfied.

Furthermore, in the case of the first three heads, public benefit is presumed unless there is evidence to the contrary.⁴³ As regards the fourth head, not every benevolent purpose is charitable but has rather to be positively demonstrated.⁴⁴ It is therefore necessary to show that a purpose provides a benefit and is aimed at the public or a sufficient section of the community to amount to the public⁴⁵ and not at creating private profit of individuals⁴⁶.

Perceptions of what is considered a purpose falling under the fourth head of charity change over time to reflect the current social environment. However, the reference to the preamble to the Statute of Elizabeth ensures that the key attributes of a charity remain the same.

B New Zealand Law

1 Adoption of the English principles

Five years after Lord Macnaghten had set out the four heads of charity in the *Pemsel* case, his approach was adopted by the New Zealand Court of Appeal in *Re Dilworth*⁴⁷. Denniston J stated:⁴⁸

⁴² *Scottish Burial Reform and Cremation Society v City of Glasgow Corporation* [1968] AC 138.

⁴³ *National Anti-Vivisection Society v Inland Revenue Commissioners* [1948] AC 31 at [65]; *Molloy v Commissioners of Inland Revenue* [1981] 1 NZLR 688 at [695].

⁴⁴ *National Anti-Vivisection Society v Inland Revenue Commissioners*, above n 43; *D.V. Bryant Trust Board v Hamilton City Council* [1997] 3 NZLR 342.

⁴⁵ *Verge v Somerville* [1924] AC 496 at [499].

⁴⁶ *D.V. Bryant Trust Board v Hamilton City Council*, above n 44.

⁴⁷ *Re Dilworth* (1896) 14 NZLR 729.

When words have obtained for centuries such definite and ascertained meaning, it is idle to refer to the circumstances under which that meaning originated. ... The language of the law of England became the language of the law of New Zealand without any reference to the origin of such language. It would be absurd to contend that, apart from any legislation in New Zealand, a bequest for charitable purposes by a testator in New Zealand would be interpreted by any other standard than that of the meaning of the same words in English law.

Prior to 1988, the English Laws Act 1908 stipulated that all the laws of England as they existed in 1840 were part of New Zealand law, including the Statute of Charitable Uses 1601. The Imperial Laws Application Act 1988 did not provide for the continuation of the Statute but s 5 of the Act stipulates that the common law and equity of England shall continue to be part of the laws of New Zealand so far as it was part of the law of New Zealand immediately before the commencement of the Imperial Laws Application Act 1988. Therefore, the Preamble of the Statute of Charitable Uses 1601 sets out the principles of New Zealand charity law.

2 *Statutory Definitions*

(a) Charities Act 2005

However, there are also statutory definitions of charitable purposes in New Zealand law. New Zealand Parliament has not yet seen fit to legislate to prescribe what is charitable and what is not charitable but rather sought recourse to the common law principles. The Charities Act 2005 refers back to the four common law heads of charity:⁴⁹

In this Act, unless the context otherwise requires, charitable purpose includes 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.

⁴⁸ Ibid, at [736-7].

⁴⁹ Section 5(1) Charities Act 2005.

(b) Income Tax Act 2007

The Income Tax Act 2007 just repeats the four heads of charity extracted by Lord MacNaghten in *Re Nottage*.⁵⁰

(c) Charitable Trusts Act 1957

The Charitable Trusts Act 1957 supplements the common law, stating in s 61A (1):

Subject to the provisions of this section, it shall for all purposes be and be deemed always to have been charitable to provide, or assist in the provision of, facilities for recreation or other leisure-time occupation, if the facilities are provided in the interests of social welfare: Provided that nothing in this section shall be taken to derogate from the principle that a trust or institution to be charitable must be for the public benefit.

Yet, the Act only applies to specific circumstances, overriding the four heads of charity in the case of physical facilities provided in the interest of social welfare.⁵¹ As regards the relationship between the Charitable Trusts Act 1958 and the Charities Act 2005, the latter does not supersede the former.⁵² Both are separate acts for separate purposes and are therefore coexistent.⁵³ The definition of charitable purposes is contained in the interpretations section of the Charitable Trusts Act 1957 and generally recurses to the common law. However, as s 61A refers to facilities and the definition of charitable purpose therefore differs from the one in the Charities Act 2005, the interpretation of the Charities Commission must not be the same as the one applied by the Companies Office

⁵⁰ Section YA 1 Income Tax Act 2007.

⁵¹ Section 61A Charitable Trusts Act 1957. The provision is based on ss 1, 3(1)-(3) Recreational Charities Act 1958 (UK).

⁵² The Charities Act 2005 also does not replace the Incorporated Societies Act 1908 or provisions of the Companies Act 1993, see Charities Commission "How the Charities Act affects charitable trusts, incorporated societies and companies" (2007) at 1 <www.charities.govt.nz>.

⁵³ The Charitable Trusts Act 1957 sets up organisations as legal entities. By contrast, the Charities Act 2005 does not have an impact on an organisation's legal entity status.

and an entity must not necessarily be considered as charitable under the Charities Act 2005 even if it is already recognised as charitable under the Charitable Trusts Act 1957.⁵⁴

IV The Charitable Status of Sport

A Traditional Approach

Neither the *Statute of Charitable Uses 1601* nor the *Pemsel* case refers to the charitable status of sport. Yet, it might even appear odd to discuss amateur sport in the context of the historical meaning of charitable purpose as described above. However, to put it in the words of the Charities Commission:⁵⁵

“Charitable purpose” has a special meaning in law. It may include some purposes the public would not consider to be charitable and it may exclude other purposes the public *would* consider to be charitable.

In fact, courts in Commonwealth countries have dealt with the question whether trusts for the promotion of sport can be considered as trusts for other purposes beneficial to the community and therefore fit within the fourth head of charity. Traditionally, gifts to trusts for mere sport were viewed not charitable as those trusts fail the public benefit test. In *Re Nottage*⁵⁶, the reasons for this failure were stated by Lopes L J as he considered mere sport primarily calculated to amuse individuals apart from the community at large.⁵⁷ This

⁵⁴ If an organisation is already registered with the Companies Office as a charitable trust under the Charitable Trusts Act 1957, it does not need to register under the Charities Act 2005 as registration is voluntary. However, the charitable trust needs to register if it wants to be eligible for certain tax benefits on the grounds of charitable purpose (see section VI for the benefits of charitable status under the Charities Act 2005). Regardless of its registration under the Charities Act 2005, organisations registered with the Companies Office still need to comply with the requirements of the Charitable Trusts Act 1957.

⁵⁵ Charities Commission “Charitable Purpose” (2008) <www.charities.govt.nz>.

⁵⁶ *Re Nottage, Jones v Palmer* [1895] 2 Ch 649.

⁵⁷ *Ibid*, at [656].

English Court of Appeal decision has provided authority for the general principle that sport for its own sake is not charitable. However, where sport is expressed to be and is in fact the means by which other valid charitable purposes will be achieved, it will be held charitable. It is therefore necessary to show that the purpose of the sporting body is the promotion of health, education or some other matter that will bring it within one of the four heads of charity.⁵⁸

There are cases suggesting that the promotion of sport can be charitable in this regard. In *Re Gray*⁵⁹, a gift for the promotion of sport was upheld as the deeper purpose was the defence of the realm. Furthermore, in the more recent case of *Inland Revenue Commissioner v McMullen*⁶⁰, the House of Lords upheld a trust that provided facilities for the purpose of enabling and encouraging pupils to play football or other games or sports as its deeper purpose was identified as physical education and development and occupation of the pupils' minds. In the High Court case of *Nelson College*⁶¹ a gift was considered charitable as the deeper purpose was education.⁶² In *Amateur Youth Soccer Association*⁶³ it was at least indicated that the promotion of amateur soccer can be charitable if it would have been carried out for the purpose of health, fitness, education, and physical wellbeing.⁶⁴

In summary, the common law seems to make a distinction between mere sport and sport to advance a recognised charitable object. Yet, as there is a mixture of exceptions to the general rule based on statutory and common law developments, uncertainty and inconsistency in the law are the result.⁶⁵

⁵⁸ For example, if an organisation specialised in rehabilitation services offers swimming sessions to help persons with mobility constraints, this entity is a charity as the offered activities are a means of advancing the organisation's charitable purpose, namely the promotion of health.

⁵⁹ *Re Gray* [1925] Ch 363.

⁶⁰ *Inland Revenue Commissioner v McMullen* [1981] AC 1.

⁶¹ *Nelson College v Attorney General* (1986) (HC Nelson MN. 40/86, Heron J).

⁶² *Ibid*, at [5].

⁶³ *Amateur Youth Soccer Association v Canada (Revenue Agency)* (2007) 287 DLR (4th) 4.

⁶⁴ *Ibid*, at [40] and [41].

⁶⁵ In particular for the law concerning trusts for the advancement of sports see Kiri Hill-Dunne "It's Just Not Cricket – Charitable Trusts Ought To Be More Sporting" (2009) 4 ANZSLA 3.

B Professional Sport

Due to the private benefits it passes to players, owners and commercial stakeholders, professional sport is not charitable and grants from gaming societies can only go to sport that is entirely amateur.⁶⁶ However, there are practical difficulties as to the distinction between professional sport and amateur sport.⁶⁷ In many cases, sporting bodies conduct both professional and amateur competitions. Moreover, some events are largely amateur but have a professional element. The issue of reimbursement for expenses can serve as an example to illustrate the fine line between amateur and professional sport. According to DIA, an amateur team or an amateur player can be reimbursed for certain expenses, such as uniforms, team travel, accommodation and training costs.⁶⁸ Furthermore, coaching of amateur teams, ground maintenance and administration fees can be funded. By contrast, as training for professional sport does not fall under the category "amateur" and grants are confined strictly to amateur sport, players cannot be reimbursed for training or living expenses. If players get paid for training, competing or if they are reimbursed for lost income, DIA would not consider the team's status as "amateur" under the Gambling Act 2003. Moreover, there are restrictions if the funding is used for training programmes to prepare amateur players to become professionals, such as a rugby academy programme. However, if one or two professional players join an amateur team for a few games, the team is still considered amateur. Yet, these players can only receive the same reimbursement as the amateur players. Players who are contracted to join representative teams may also retain their amateur status. In this case, the payments they receive have to be confined to the reimbursement of expenses.

⁶⁶ Department of Internal Affairs <www.dia.govt.nz>.

⁶⁷ The issue becomes even more complicated as the relevant legislative Acts, namely the Gambling Act 2003 and the Income Tax Act 2007, set out different requirements regarding the status "amateur". Under the Gambling Act 2003, the nature of the team and the competition is relevant.

⁶⁸ Department of Internal Affairs <www.dia.govt.nz>.

C Approach of the Charities Commission

Among its various functions the Charities Commission's main purposes is to maintain a register of charities in New Zealand and to monitor these entities.⁶⁹ Since 1 February 2007, the Charities Commission has processed more than 28,000 applications⁷⁰ and has registered approximately 25,000 charities.⁷¹ There are no costs in relation to the initial registration as a charity except time costs and possible charges for the use of advisory services.⁷² However, charities do not need to register with the Commission as registering is voluntary and has no impact on the legal status of charities. Charities not registered can still call themselves charities and solicit funds from the public.

The Commission legally assesses each applicant's eligibility for registration as a charitable entity on a case-by-case basis.⁷³ In general, an organisation must have exclusively charitable purposes as set out in s 5(1) Charities Act 2005 to be registered as a charitable entity.⁷⁴ In the case of the trustees of a trust, the trust has to be of a kind in relation to which an amount of income is derived by the trustees in trust for charitable purposes.⁷⁵ A society or institution needs to be established and maintained exclusively for charitable purposes and must not be carried on for the private pecuniary profit of an

⁶⁹ Section 10 Charities Act 2005.

⁷⁰ Charities Commission "Charities Commission registers 20,000th Charity – Silver Photography Trust" (press release, 28 March 2009). This press release contains the latest figures on processed applications by the Commission.

⁷¹ Charities Commission "25,000 now registered with the Charities Commission" (press release, 4 March 2010).

⁷² However, costs will incur from the necessity of meeting compliance requirements. Registry information has to be updated and registered charities have to provide copies of their financial accounts, including a statement of the financial performance of the charity as part of its annual return. This can incur costs up to \$NZ 75.

⁷³ Charities Commission "Tax – how the Charities Act affects charitable tax status" (2009) at 1. <www.charities.govt.nz>.

⁷⁴ Charities Commission "Charitable Purpose" (2008), above n 55. Examples illustrate the treatment of charitable purpose under the Charities Act 2005. However, s 5(3) Charities Act 2005 stipulates that having a non-charitable purpose will not prevent an organisation from qualifying as a charitable entity under the Act if the non-charitable purpose is ancillary to a charitable purpose of the entity. If the non-charitable purposes are significant in themselves they are not ancillary.

⁷⁵ Section 13(1)(a) Charities Act 2005.

individual in order to be accepted as a charity.⁷⁶ In addition, entities must satisfy the 'public benefit' test.⁷⁷ This means, there must be an identifiable benefit which must be available to the general public, or to a wide section of the public. Finally, registration essentially requires that the name and officers of the entity meet the requirements of the Charities Act 2005.⁷⁸

Amateur sports organisations can qualify as a charity under the Charities Act 2005 and therefore register with the Charities Commission as these requirements apply equally to sports organisations.⁷⁹ However, the position of the Charities Commission on sport and charitable purpose is that registration is possible if a charitable purpose, such as the advancement of physical education or other activities charitable under the fourth head of charity is achieved through sport.⁸⁰ Therefore, the Commission does not consider sport for its own sake as charitable. Moreover, the sports organisations must confer a public benefit. Finally, the sports organisations can not be carried out for private pecuniary profit and profit making activities.⁸¹

Using this approach and creating a new head of charity through the "back door",⁸² amateur sports organisations have been registered as a charitable entity under the Charities Act 2005.⁸³

Even though amateur sports have therefore been accepted by the Charities Commission, the fact cannot be concealed that there is uncertainty as no sporting

⁷⁶ Ibid, s 13(1)(b).

⁷⁷ For detailed information on the test, see Charities Commission "Guidance on the public benefit' test (2009) <www.charities.govt.nz>.

⁷⁸ Section 13(1)(c) and (d) Charities Act 2005.

⁷⁹ Charities Commission "Charitable Purpose and sport and recreation organisations" (2009) <www.charities.govt.nz>.

⁸⁰ Ibid.

⁸¹ In this context, the Charities Commission states that sports organisations can carry out profit making activities, such as selling merchandise, as long as any profits go towards their charitable purpose. Moreover, a sports organisation can make payments to carry out its charitable purpose, such as paying for a coach or buying sports gear, as long as the payments are reasonable and based on 'armslength commercial rates', see Charities Commission, above n 79.

⁸² Richard Pidgeon "Amateur sport and the Charities Act" (2009) 2 NZLJ 65.

⁸³ Unfortunately, it is not possible to state the exact number of amateur sports organisations registered with the Charities Commission as there are no figures available in this regard. For the same reason it cannot be established whether the registered entities represent a majority or, from a reverse perspective, whether many sports organisations miss out.

organisation can assume charitable status under the Charities Act 2005 without considering its purpose carefully against the background of the established case law.

An amendment of the Charities Act 2005 to include the promotion of amateur sport as a charitable purpose would therefore address this situation and make the criteria on which the decision of the Commission is based more transparent. Instead of applying the common law test, the Commission could refer to a new head of charitable purpose and take this as a starting point when assessing the charitable status of an sports organisation.

V Travis Trust v Charities Commission

A Judgment

*Travis Trust*⁸⁴ was the first appeal under the Charities Act 2005. Even though the case mainly deals with horse racing, Joseph Williams J's judgment is of particular relevance as it generally deals with the question whether sports-related purposes can be recognised as charitable. It can serve as an example of the difficulties sporting organisations face in this regard.⁸⁵ An entity had sought registration as a charity under the Charities Act 2005 but the Charities Commission declined the application. As mentioned before, the case has caused great concern among sporting bodies.⁸⁶ It therefore needs to be analysed as to the question whether the concerns in the sporting sector are valid.

The background of the case reads as follows. According to its governing deed, the Travis Trust was established in 1997 for the purpose of providing funds to support the New Zealand racing industry by the anonymous sponsorship of a Group race known as the Travis Stakes.⁸⁷ In accordance with the trust's primary purpose, an amount of

⁸⁴ *Travis Trust v Charities Commission* HC Wellington CIV 2008-485-1689, 3 December 2008.

⁸⁵ Vicky Ammundsen "Amateur sport winner if charitable purpose better defined" *New Zealand Herald* (New Zealand, 1 October 2009) at 13.

⁸⁶ See section I.

⁸⁷ *Travis Trust v Charities Commission*, above n 84, at [6].

\$NZ 40,000 has been contributed to the stake in the race as prize money since 2005.⁸⁸ The overall stake for the Travis Stakes, including contributions from third parties, adds up to \$NZ 120,000.⁸⁹

Joseph Williams J had to decide whether the provision of prize money for horse racing can be recognised as a charitable purpose.⁹⁰ As the promotion of horse racing obviously does not fall under the first three heads of charity, the focus was on the question whether the purpose of the Travis Trust is a matter beneficial to the community. Counsel for the Trust favoured a generous reading of the fourth general benefit category and argued that the requirements of the public benefit test are met as the Trust would not only provide a stake in a particular race but would also benefit the Cambridge Jockey Club which holds the racing meetings, as well as the district and the racing public.⁹¹ The Travis Trust would make a contribution to the success of the club and the wider industry and to provide leisure opportunities to a broad section of the general public.⁹² By contrast, for the Charities Commission it was argued that the fourth category of charitable purposes should be interpreted more narrowly. The argumentation was based on the assumption that the Travis Trust only supported a sectional, essentially private interest.⁹³

The Court applied the public benefit test by first examining if the purpose of the Travis Trust is charitable in nature, and second, if the benefit of the purpose is public. As regards the scope of the purpose, the court referred to the New Zealand Court of Appeal's ruling in *Society of Accountants*⁹⁴ and the decision of the Canadian Supreme Court in *Amateur Youth Soccer Association*⁹⁵. In the New Zealand case, Richardson J had ruled that the alleged public benefit and the expressed purpose of the fund have to be directly related. In *Amateur Youth Soccer Association*, a case in which the fourth head of charity was also a point at issue, Rothstein J stated that a beneficial by-product of a purpose does

⁸⁸ Ibid, at [11].

⁸⁹ Ibid.

⁹⁰ Ibid, at [15].

⁹¹ Ibid, at [23].

⁹² Ibid, at [26].

⁹³ Ibid, at [28].

⁹⁴ *New Zealand Society of Accountants v Commissioner of Inland Revenue* [1986] 1 NZLR 147.

⁹⁵ *Amateur Youth Soccer Association v Canada (Revenue Agency)*, above n 63.

not make the purpose itself charitable in consequence.⁹⁶ Against the background of these rulings, Joseph Williams J identified the genuine purpose of the Travis Trust as the support of a single Group race.⁹⁷ With regard to the other benefits counsel for the Trust had submitted, he stated that they are too remote to be considered within the scope of the Trust's purpose.⁹⁸

Furthermore, Joseph Williams J quoted two more recent judgments which specifically deal with the sport of horse racing, namely *Re Hoey*⁹⁹ and *Re Beckbessinger*¹⁰⁰. In the first case, the Queensland Supreme Court held that a trust for the establishment of a racecourse cannot be considered charitable and does not benefit the public as horse racing only serves a sectional or class interest and does not improve the conditions of life of the persons involved.¹⁰¹ In the New Zealand High Court decision *Re Beckbessinger*, Tipping J made an obiter statement. In his view, a gift to a trotting club to provide a stake cannot be considered charitable.¹⁰²

As regards the first step of the public benefit test, Joseph Williams J therefore concluded that funding a horse race is not charitable.¹⁰³

Despite the fact that the Travis Trust is not charitable in character, Joseph Williams J elaborated on the question whether the beneficiaries of the Trust are sufficiently public. For this purpose, he referred to *New Zealand Society of Accountants*¹⁰⁴. In this case, Richardson J set out the requirement that the public or a section of it must benefit from the purpose of a trust and that the eligible beneficiaries must constitute the public or a sufficient section of it. Yet, Joseph Williams J admitted that it is often difficult to apply this test.¹⁰⁵ Furthermore, he quoted *Strathalbyn*¹⁰⁶, a South Australian Supreme Court case, where Bleby J held in general that rules of

⁹⁶ *Ibid.*, at [22].

⁹⁷ *Travis Trust v Charities*, above n 84, at [34].

⁹⁸ *Ibid.*

⁹⁹ *Re Hoey* [1994] 2 Qd R 510.

¹⁰⁰ *Re Beckbessinger* [1993] 2 NZLR 362.

¹⁰¹ *Re Hoey*, above n 99, at [513-14].

¹⁰² *Re Beckbessinger*, above n 100, at [376].

¹⁰³ *Travis Trust v Charities Commission*, above n 84, at [44].

¹⁰⁴ *New Zealand Society of Accountants v Commissioner of Inland Revenue*, above n 94.

¹⁰⁵ *Travis Trust v Charities Commission*, above n 84, at [55].

¹⁰⁶ *Strathalbyn Show Jumping Club Inc. v Mayes* (2001) SASC 73.

admission render a club private. Joseph Williams J furthermore made reference to the High Court of Australia case of *Thomson*¹⁰⁷ in which the same principles applied. In the latter case, an order was considered insufficiently public because its members had to be elected.

Against the background of these rulings, Joseph Williams J stated that the members of the Cambridge Jockey Club are the widest valid category of beneficiaries of the Travis Trust.¹⁰⁸ As members are admitted only by election and membership is therefore not generally open to the public, he concluded that the Cambridge Jockey Club does not constitute the public or a sufficient section of it.¹⁰⁹ Thus, the Travis Trust does not benefit an appreciable group of the public and also fails the second step of the public benefit test.

At the end of his judgment, Joseph Williams J summarised his findings as follows:¹¹⁰

... the promotion of a horse race is not a charitable purpose in and of itself. Nor is the promotion of horse racing generally – even if the Cambridge Jockey Club did in fact constitute the community or an appreciable section of it which, in my view, it does not. A trust to promote racing could only be charitable in nature if its deeper purpose was the pursuit of some other objective, either in principle or, in accordance with charities jurisprudence, a charitable purpose in its own right within the spirit and intendment of the Statute of Elizabeth. Thus, if it could have been established that the true intention of the support for this race was the promotion of health, education or perhaps even animal welfare, it might have satisfied the test. But it is clear that none of these purposes is the deep reason for this Trust, and counsel for the appellant quite rightly did not pitch this case on that basis.

The decision of the Charities Commission was upheld and the appeal of the Travis Trust was dismissed.

¹⁰⁷ *Thompson v Commissioner of Taxation (Commonwealth)* (1959) 102 CLR 315.

¹⁰⁸ *Ibid.*, at [57].

¹⁰⁹ *Ibid.*, at [58].

¹¹⁰ *Travis Trust v Charities Commission*, above n 84, at [59].

B Impact

Following the decision in *Travis Trust*, it was suggested that the Charities Commission has to review its approach to the registration of sporting bodies.¹¹¹ Furthermore, as mentioned before, gaming charities such as the Eureka Trust have ceased to make grants for the promotion of horse racing as there seemed to be a disparity between the gambling legislation and the charities legislation.¹¹²

However, a closer look at the case reveals that the judgement does not establish any new principles of law but rather confirms the existing common law approach to the charitable status of amateur sport. In this context, it is irrelevant if horse racing and amateur sport are comparable. Admittedly, the former is quite a significant industry closer to business than recreation. However, the judgement also refers to amateur sport in general. Joseph Williams J basically stated that the promotion of a horse race and horse racing in general is not charitable. However, his judgement did not stipulate that horse racing or, in a more general perspective, amateur sport can never be charitable but rather expressively confirmed the opposite. Joseph Williams J stated:¹¹³

... contrary to the line of cases suggesting that trusts or gifts for the promotion of sport and leisure are not charitable, it cannot be said that such purposes are never charitable.

In fact, if sport, including horse racing is expressed to be and is the means by which other charitable purposes will be achieved, it can be considered charitable. This possibility is already recognised in practice by the Charities Commission.¹¹⁴ Therefore, the concerns in the sports sector are not valid as there has been no change as regards the charitable status of amateur sport.

¹¹¹ Bland, above n 5. See section IV for the approach of the Charities Commission.

¹¹² Eureka Trust, above n 21.

¹¹³ *Travis Trust v Charities Commission*, above n 84, at [48].

¹¹⁴ See section IV.

VI Benefits of Charitable Status

A Registration With the Charities Commission

In order to be a charity, entities must be beneficial to the public. It is this element of public benefit that justifies various concessions in legal and fiscal terms granted to charities.¹¹⁵ If the promotion of amateur sport would be recognised as a charitable purpose in the Charities Act 2005, sports organisations could register more easily as a charity with the Charities Commission. Registering under the Charities Act 2005 is voluntary. However, qualifying as a charity under the Act has tax implications and holds other benefits.¹¹⁶

B Tax Implications

Charities registered with the Charities Commission are eligible for tax exemptions on charitable grounds under the Income Tax Act 2007.¹¹⁷ Generally, Inland Revenue Department (hereinafter 'IRD') is responsible for administering the relevant revenue legislation. However, entities registered with the Charities Commission will generally qualify for the tax exemptions as IRD in the majority of cases accepts the decision of the Commission.¹¹⁸

The sporting bodies are exempt from income tax on non-business income. This exemption includes interest, dividends and rental income not earned from carrying on a business. In this context it should be noted, however, that sports and recreation organisations whose main purpose is to promote amateur sport are already generally

¹¹⁵ Dal Pont, above n 26, at [13].

¹¹⁶ See generally Charity Commission "The Charities Register: benefits for charities" (2007) <www.charities.govt.nz>.

¹¹⁷ They are so-called 'tax charities'. The term is defined in s CW41 and CW42 of the Income Tax Act 2007 and means a trustee or trustees of a trust, society, or an institution, registered as a charitable entity under the Charities Act 2005.

¹¹⁸ "Tax – how the Charities Act affects charitable tax status" (2009) at 1 <www.charities.govt.nz>.

exempt from income tax under the Income Tax Act 2007.¹¹⁹ Most sports organisations therefore do not necessarily need to register with the Charities Commission.

Furthermore, tax charities are eligible for an exemption from resident withholding tax.¹²⁰ Banks and other financial institutions have to deduct this kind of tax from the interest they pay.

Moreover, registered charities qualify for an exemption from paying fringe benefit tax. Fringe benefit tax does not have to be paid on benefits provided to employees while carrying out the organisation's charitable activities.¹²¹

Registered charities are also eligible for donee status. This means that donations to a charity are tax deductible for companies and Maori authorities. Individuals can claim a rebate.¹²² However, sports organisations do not need to be registered with the Charities Commission to get donee status and can directly apply to IRD.¹²³

According to s 73(1) of the Estate and Gift Duties Act 1968, any disposition of property for the purpose of setting up a charitable organisation or given in aid of the organisation is exempt from gift duty.¹²⁴

Finally, charitable status under the Charities Act 2005 qualifies for any future tax changes targeted at registered charities.

C Other Benefits

Besides tax implications, registering as a charity offers additional benefits. As the charities register is publicly accessible, providing detailed financial information and other

¹¹⁹ Section CW 46 Income Tax Act 2007.

¹²⁰ In this case, an additional resident withholding tax certificate of exemption has to be obtained from IRD.

¹²¹ Section CX 25 Income Tax Act 2007.

¹²² Section DB 41, LD 1 and DV 12 Income Tax Act 2007. See also s LD 3(2) for a description of the organisations which can be recipients. Schedule 32 of the Act names recipients of charitable or other public benefit gifts.

¹²³ In any case, an approval by IRD of the organisation's donee status is required but as IRD generally accepts the decision of the Charities Commission, the assessment of IRD is limited to the question whether or not the organisation applies its funds wholly or mainly for charitable purposes in New Zealand.

¹²⁴ This exemption does not require a letter of approval from IRD.

information about the registered charity, public confidence and trust in the charitable sector is strengthened. Besides improving public confidence through transparency, being registered with the Charities Commission is especially beneficial in the context of sports funding. Registered charities generally have better access to grants as potential donors can access information about the registered entity and the successful registration officially acknowledges the charitable status of an entity. As regards the latter, registered charities can also use their registration number for promotional and other purposes. Against this background, private donors and other funding bodies are likely to develop a preference for supporting registered charities.¹²⁵ It can be assumed that the information available on the register is increasingly used as the basis for funding applications. Nevertheless, uncertainty remains among funding bodies and sports organisations whether funding amateur sport purposes means grant-making to a charitable purpose.¹²⁶

Finally, it should be noted that registered charities are exempt from the requirement to obtain a passenger vehicle licence under the Land Transport Rules. If a registered charity uses a small team bus carrying up to 12 people, volunteers who drive the bus will be generally exempt.¹²⁷

VII Amending the Law for the Benefit of Amateur Sport

A Alternatives to Legislation

In 2005, New Zealand Parliament did not amend the definition of charitable purposes but rather sought recourse to the definition of a charity established by common law. The select committee that considered the Charities Bill stated that:¹²⁸

¹²⁵ Ammundsen, above n 85, at 13.

¹²⁶ See section I.

¹²⁷ Section 12.1 (1) of the Land Transport Rule: Operator Licensing 2007.

¹²⁸ Social Services Select, above n 36, at [3].

... it may be more appropriate for the Commission to initially offer guidance on appropriate charitable purposes, and, once all initial registrations have been completed, perhaps conduct a review of this definition to consider carefully whether the definition should be changed.

Against this background, it could therefore be questioned whether legislation is the real answer to the uncertainty surrounding the charitable status of amateur sport. In this context, it could be argued that including the promotion of amateur sport legislatively will result in the exclusion of other charities which may benefit society immensely.¹²⁹ Yet, this might also be argued in the reverse direction. If amateur sport is not included, many organisations which benefit society in various ways will be excluded.

Moreover, any kind of non-binding guidance by the Commission will not have the same effect as a statutory provision in terms of its ability to be a legal reference. Admittedly, amateur sports have been accepted by the Charities Commission. However, it is more likely that the New Zealand Courts will follow an amendment of the Charities Act 2005 than referring to the approach of the Commission if they ultimately have to decide whether a sports organisation is charitable or not.

Furthermore, it is generally unlikely that the Courts will expand the definition of charitable purposes in favour of amateur sport beyond the common law definition without a statutory incentive even if they show their willingness in this regard.¹³⁰ The Judicial inaction is due to the fact that New Zealand Courts simply do not have enough cases to decide on the issue.¹³¹ This is illustrated by the fact that *Travis Trust* was the first case under the Charities Act 2005.

B Evolution of a New Charitable Purpose

Generally, it is possible that the concept of charitable purposes can evolve with the passing of time. Just as an object formerly regarded as charitable can lose its status, conversely other purposes can be held charitable in response to changing

¹²⁹ Ibid.

¹³⁰ See section VII.

¹³¹ Hill-Dunne, above n 65, at [16].

circumstances.¹³² Reasons for this might be a change in social ideas, habits or the needs of the community as well as the advancement of knowledge.¹³³ The public value of amateur sport in New Zealand is undoubted but is not sufficiently recognised in the current charity law and legal practice in New Zealand. It is always necessary to prove that amateur sport is undertaken in the pursuit of a recognised charitable purpose. Authority for the latter requirement is *Re Nottage*¹³⁴ where it was held that mere sport is not charitable on the grounds that sport is associated with amusement. However, against the background of a changing public perception of sport it can be pointed out that amusement need not necessarily be the dominant factor but might rather be an incidental side-effect of other benefits of sports, such as the promotion of health or education.¹³⁵ Moreover, even purposes like arts, music and culture are treated less restrictively in this regard.¹³⁶

The process of determining a new charitable purpose by analogy has led to the inclusion of purposes which were not considered charitable in the Statute of Elizabeth and can generally be identified in New Zealand cases. In the Court of Appeal case of *Commissioner of Inland Revenue v Medical Council of New Zealand*¹³⁷ the charitable status of community health was derived from English case law. In addition, entirely new categories of charitable purposes are established by the Courts. In *Latimer v Commissioner of Inland Revenue*¹³⁸ the Court held that racial harmony and social cohesion are charitable purposes.¹³⁹

Besides these Judicial developments, legislative acts, such as the Charitable Trusts Act 1957, have extended the scope of charitable purposes.¹⁴⁰

In summary it can be stated that the definition of charity is still developing and sufficient evidence has been established by the Courts to accept new categories of

¹³² Noal Cameron Kelly and others *Garrow & Kelly's Law of Trusts and Trustees* (6th ed, LexisNexis NZ Limited, Wellington 2005) at [12.6.1].

¹³³ *Ibid.*

¹³⁴ *Re Nottage, Jones v Palmer*, above n 56.

¹³⁵ Hubert Picarda *The Law and Practice Relating to Charities* (3rd ed, Butterworths, London, 1999) at [129].

¹³⁶ Hill-Dunne, above n 65, at [22].

¹³⁷ *Commissioner of Inland Revenue v Medical Council of New Zealand*, above n 41.

¹³⁸ *Latimer v Commissioner of Inland Revenue*, above n 41.

¹³⁹ *Ibid.*, at [40].

¹⁴⁰ See section III.

charitable purposes. As mentioned in the previous section, however, New Zealand Courts will not get many opportunities to make a statement in regard to the case of amateur sport. In addition, they might miss opportunities to deal with the issue. In *Travis Trust*, Joseph Williams J has pointed out that categories of charitable purposes can evolve.¹⁴¹ Unfortunately, however, he did not consider developments in other common law jurisdictions which already recognise the promotion of amateur sport as a new head of charity.¹⁴² Therefore, a statutory embodiment of the charitable status of amateur sport is the preferred option, ensuring clarity, consistency and legal certainty.

C Extent of the Provision

The promotion of amateur sport should be recognised as charitable in its own right rather than as a means of advancing other existing charitable purposes.

Against this postulation the objection could be raised that the benefits provided to the community from the promotion of amateur sports can be encapsulated under the present heads of charity,¹⁴³ especially as the health and educational benefits of sport are accepted in common law.¹⁴⁴ Yet, this would not recognise the many and varied public benefits amateur sport offers to society in general, such as the increase in community cohesion, which would rather qualify sports under the fourth head of charity. Moreover, other purposes have also been accepted as charitable in nature so that it is preferable to acknowledge the advancement of sport as being charitable in itself.¹⁴⁵

If the spiritual and moral-well-being of the community at large is accepted as charitable, as it is in a wide variety of forms, its physical well-being should likewise...

¹⁴¹ See section V.

¹⁴² See section VII.

¹⁴³ See the argumentation of the Charities Definition Inquiry *Report of the Inquiry into the Definition of Charities and Related Organisations* (2001) at 200.

¹⁴⁴ Hill-Dunne, above n 65, at [17] and [21].

¹⁴⁵ Harold Arthur John Ford and William Anthony Lee *Principles of the Law of Trusts* (2nd ed, The Law Book Company, Sydney, 1990) at [867-868].

In addition, it appears that:¹⁴⁶

... if the protection of animals is charitable in raising the moral tone of society, it is anomalous that activities that improve the physical health and fitness of society are not charitable.

Moreover, it can be argued that providing facilities for sport is already considered charitable under the Charitable Trusts Act 1957 without any reference to specified benefits but rather in the interest of social welfare and therefore with the aim of improving the conditions of life for members of the community in general.¹⁴⁷ In addition, the promotion of athletic sports is recognised as a charitable purpose in the context of schemes in respect of charitable funds raised by voluntary contribution, even if the criteria of s 61A of the Act are not met.¹⁴⁸ Therefore, as legislation already acknowledges the charitable status of sport, widening the scope of the existing law would prevent legal inconsistency.

Undoubtedly, even a statutory statement that amateur sport is charitable if it advances a recognised charitable purpose would be a clarification of the status of amateur sport. At the very least, a statutory definition recognising sport as charitable in a wider range of circumstances should be the outcome of an amendment of the Charities Act 2005. However, a provision stipulating the advancement of amateur sport as a charitable purpose in its own right is more desirable.

D Precedents in Other Jurisdictions

I Australia

¹⁴⁶ Dal Pont, above n 26, at [196].

¹⁴⁷ See section III.

¹⁴⁸ Section 38(g) Charitable Trusts Act 1957.

(a) General

There exists no comprehensive list of charities in Australia as there is no centralised system of government regulation or recognition for charities.¹⁴⁹ Each individual agency decides on what is a charity with respect to the laws it is administering. Most important is to register with the Australian Taxation Office (hereinafter 'ATO') as a tax concession charity.¹⁵⁰ The ATO serves as the closest body to a national regulator but is not in fact one. Depending on the type of charity, the registered entities are endorsed to access an income tax exemption, GST charity concessions, a fringe benefits tax rebate or exemption and are entitled to deductible gift recipient status.

(b) Definition of charitable purpose

Australian state and federal jurisdictions follow the definition of charity derived from English case law. However, there are statutory extensions at state level. Similar to the Charitable Trusts Act 1957, Queensland, Western Australia, South Australia and Tasmania have implemented provisions in their charity legislation which basically state that it is charitable to provide, or to assist in the provision of, facilities for recreation or other leisure-time occupation, if those facilities are provided in the interest of social welfare.¹⁵¹

In September 2002, the Federal Government established the Charities Definition Inquiry (hereinafter 'CDI').¹⁵² The CDI inquiry report recommended that a statutory definition of charity and an independent administrative body for federal law be legislated for. This resulted in the Charities Bill 2003 which was released on 22 July 2003 by the

¹⁴⁹ However, several websites provide lists of charities, such as Philanthropy Australia <www.philanthropy.org.au>, OurCommunity <www.ourcommunity.com.au>, Pro Bono Australia <www.probonoaustralia.com.au>, and Auscharity <www.auscharity.org>.

¹⁵⁰ Australian Taxation Office <www.ato.gov.au>.

¹⁵¹ Section 103 (2) Trusts Act 1973 (Qld), s 5 (1) Charitable Trusts Act 1962 (WA), s 69C Trustee Act 1936 (SA) and s 4 (1) Variation of Trusts Act 1994 (Tas). There are only minor variations among these acts.

¹⁵² Charities Definition Inquiry <www.cdi.gov.au>.

Federal Treasurer. The Draft Bill was based on the four heads of charity established by common law and divided them into seven heads, namely the advancement of health, education, social or community welfare, religion, culture, the advancement of the natural environment, or any other purpose that is beneficial to the community. However, the Charities Bill 2003 was abandoned because of widespread criticism.¹⁵³ On 17 May 2004, the Federal Treasurer announced that it would not proceed with the Draft Bill and that the common law definition of a charity would continue to apply.¹⁵⁴ Moreover, the Extension of Charitable Purpose Act 2004 was enacted which extended the common law meaning of a charity for federal purposes to include child care, self-help groups and closed religious orders but did not attempt to codify the definition of charitable purpose.¹⁵⁵ The recommendations of the Inquiry are therefore still largely unimplemented in Australian law.¹⁵⁶

In the context of registering with the ATO, charitable purposes are the relief of poverty, the relief of sickness or distress, the advancement of religion, the advancement of education, other purposes beneficial to the community, and the provision of child care services on a non-profit basis.¹⁵⁷

(c) Amateur sport

The seven heads of charity named in the Charities Bill 2003 did not include the promotion of amateur sport. Moreover, amateur sport was not among the three extensions of the Extension of Charitable Purpose Act 2004. This is not surprising as the CDI report had recommended that the promotion of mere sport should not be recognised as a charitable purpose.¹⁵⁸ However, the CDI had also noted that the advancement of health,

¹⁵³ See generally for the reasons McGregor-Lowndes, above n 29.

¹⁵⁴ Peter Costello "Final Response to the Charities Definition Inquiry" (press release, 11 May 2004).

¹⁵⁵ Extension of Charitable Purpose Act 2004 (Cth).

¹⁵⁶ The latest development has been a report in December 2008 by the Senate Standing Committee on Economics, recommending a single, independent national regulator in the non-profit sector, see Senate Standing Committee on Economics *Disclosure regimes for charities and not-for-profit organizations* (2008).

¹⁵⁷ Australian Taxation Office <www.ato.gov.au>.

¹⁵⁸ Charities Definition Inquiry, above n 143.

education, social and community welfare, religion, culture or the natural environment through the encouragement of sport and recreation would be considered charitable.¹⁵⁹

The ATO expressively states that entities carried on for sporting purposes are not charities.¹⁶⁰ However, sporting activities can be regarded charitable if they are merely means used to achieve existing charitable purposes.¹⁶¹ Furthermore, sporting bodies are generally exempt from income tax under the Income Tax Assessment Act 1997 if they are not-for-profit and have been established for the encouragement of a game or sport.¹⁶²

While Federal legislation therefore does not recognise the case of amateur sport, Tasmanian legislation does. A gift of property to provide opportunities for facilities for sport, recreation or other activities associated with leisure is taken to be, and to have always been, a gift for charitable purposes.¹⁶³

2 Canada

(a) General

As of 2008, Canada has 161,000 non-profit organisations and charities.¹⁶⁴ Over 83,000 of these organisations are registered with the Charities Directorate of the Canada Revenue Agency (hereinafter 'CRA')¹⁶⁵ as charities under the Income Tax Act.¹⁶⁶ Besides reviewing the applications for registration, the Charities Directorate monitors the charities' compliance with registration requirements and provides information for the

¹⁵⁹ Ibid, at 16.

¹⁶⁰ Australian Taxation Office <www.ato.gov.au>.

¹⁶¹ Ibid.

¹⁶² Australian Taxation Office 1997, *Taxation Ruling, Income tax: exempt sporting clubs*, TR 97/22.

¹⁶³ Part 2 (1) Variation of Charitable Trusts Act 1994.

¹⁶⁴ See Charity Central <www.charity-central.ca>.

¹⁶⁵ Canada Revenue Agency <www.cra-arc.gc.ca>.

¹⁶⁶ Charity Central <www.charity-central.ca>.

charitable sector. Registered charity status qualifies for an exemption from income tax¹⁶⁷. Furthermore, registered charities can issue official tax receipts for donations.¹⁶⁸

(b) Definition of charitable purpose

The Income Tax Act does not contain a definition of what is charitable. CRA rather determines whether an organisation qualifies for charitable status, applying the common law definition of charity.¹⁶⁹ In order to register with the Charities Directorate, the purpose or object of an organisation must therefore be the relief of poverty, the advancement of education, the advancement of religion or any other purpose beneficial to the community.

(c) Amateur sport

According to the National Survey of Nonprofit and Voluntary Organizations which was conducted in 2003 and provided for the first time detailed information about the charitable sector in Canada, there are 33,600 Sports and Recreation Organisations (including amateur sport) in the country.¹⁷⁰ They are the most common type of nonprofit and voluntary organisations in Canada. Yet, Sports and Recreation organisations are least likely to be registered as charities with the Charities Directorate as only over a quarter of these organisations have charitable status. *Amateur Youth Soccer Association*¹⁷¹ set out that sports activities have to be ancillary to a recognised charitable purpose in order to

¹⁶⁷ See Part I of the Income Tax Act (Canada).

¹⁶⁸ See subsection 110.1 (2), (3) or subsection 118.1 (2), (6), (7) of the Income Tax Act and s 3500 and 3502 Income Tax Regulations.

¹⁶⁹ Canada Revenue Agency <www.cra-arc.gc.ca>.

¹⁷⁰ The key findings of the survey are published in Statistics Canada "Cornerstones of Community: Highlights of the National Survey of Nonprofit and Voluntary Organizations" (June 2005) Catalogue No 61-533-XIE. See also Imagine Canada <www.imaginecanada.ca>.

¹⁷¹ *Amateur Youth Soccer Association v Canada (Revenue Agency)*, above n 63. See also on the judgment Cristin Schmitz "No charitable status for sports group" *The Lawyers Weekly* (Canada, 19 October 2007).

have charitable status under the Income Tax Act.¹⁷² Besides that, some sports organisations might fall under the category of registered Canadian amateur athletic associations (hereinafter 'RCAAA'). These organisations are established for the primary purpose and primary function of promoting elite amateur athletics in Canada on a nationwide basis and have a special charitable-type status.¹⁷³ However, the RCAAA provisions are not a complete code for amateur sporting activities and do not modify the meaning of charity or charitable activities under the Income Tax Act.¹⁷⁴

In *Amateur Youth Soccer Association Rothstein J* stated that it would be desirable as a matter of policy to give charitable status to sports organisations. However, he concluded that this should be rather achieved through legal amendment by Parliament than through the courts.¹⁷⁵

3 *England and Wales*

(a) General

In England and Wales, charities are registered and regulated by the Charities Commission.¹⁷⁶ To date, the Charities Commission has recorded 180,841 registered charities.¹⁷⁷ This number includes 159,860 main charities as well as 20,981 subsidiary linked and group charities.¹⁷⁸

¹⁷² *Amateur Youth Soccer Association v Canada (Revenue Agency)*, above n 63.

¹⁷³ See subsection 248 of the Income Tax Act.

¹⁷⁴ *Amateur Youth Soccer Association v Canada (Revenue Agency)*, above n 63.

¹⁷⁵ *Ibid.*

¹⁷⁶ The Charities Commission is a non-Ministerial Government department which has been established by the Charitable Trusts Act 1853 and is now governed by the Charities Act 1993. The register of charities was established by the Charities Act 1960 along with the requirement for most charities in England and Wales to register with the Commission.

¹⁷⁷ Charities Commission <www.charity-commission.gov.uk>

¹⁷⁸ *Ibid.*

(b) Definition of charitable purpose

Historically, England and Wales applied the common law definition of charitable purposes. In 2001, the Prime Minister launched a review of the law and regulation of charities and other not-for-profit organisations.¹⁷⁹ This resulted in a report of proposals, produced by the Government's Cabinet Office Strategy Unit and published in 2002 which summarised the results of the review.¹⁸⁰ In responding to the Strategy Unit's review, the Government published in 2003 a document which considered the proposals for charity law reform and the results of the subsequent public consultation, endorsing most of the Strategy Unit's recommendations.¹⁸¹ This resulted in the draft Charities Bill which was published in May 2004. After the draft had been scrutinised and partially amended, the Charities Bill received Royal Assent on 8 November 2006 and is now known as the Charities Act 2006.¹⁸² The Act primarily establishes the Charities Commission for England and Wales, an independent regulatory body for the charities sector,¹⁸³ and the Charity Tribunal.¹⁸⁴

The Charities Act 2006 can be considered historic as it contains a statutory definition of charitable purposes for the first time in England and Wales, replacing the four categories of charity established by earlier case law with a list of 13 heads of charity as set out in s 2(2).¹⁸⁵ In addition, the Charities Act 2006 sets out a test to determine

¹⁷⁹ See Nuzhat Malik, above n25, for an analysis of the reforms to the Charities Act 1993 in respect of the definition of "charities" or "charitable purposes".

¹⁸⁰ Cabinet Office Strategy Unit *Private Action, Public Benefit: A Review of Charities and the Wider Not-For-Profit-Sector* (2002).

¹⁸¹ The Home Office *A Modern Legal Framework for the Voluntary Sector* (2003).

¹⁸² See generally for a comprehensive analysis of the Charities Act 2006 Stephen Lloyd (ed) *Charities – The New Law 2006: A Practical Guide to the Charities Act* (Jordans, Bristol, 2007).

¹⁸³ Section 6 Charities Act 2006.

¹⁸⁴ Section 8 Charities Act 2006.

¹⁸⁵ The list of charitable purposes reads as follows: the prevention or relief of poverty, the advancement of education, religion, health or the saving of lives, citizenship or community development, arts, culture, heritage or science, amateur sport, human rights, the advancement of conflict resolution or reconciliation or the promotion of religious or racial harmony or equality and diversity, the advancement of environmental protection or improvement, the advancement of animal welfare, the relief of those in need by reason of youth, age, ill-health, disability, financial hardship or other disadvantage, the promotion of the efficiency of the armed forces of the Crown or the police, fire and

whether a charity exists for the public benefit, abolishing the historical presumption of public benefit for the first three heads of charity.¹⁸⁶

(c) Amateur sport

The Charities Act 2006 expands the law in this area, reversing *Re Nottage* where it was held that the promotion of sport was not charitable. As a result, for many years single sport clubs could not register as charities, although multi-sport clubs and leisure centres were able to do so under the Recreational Charities Act 1958. The Charity Commission relaxed the position in 2002 by accepting the promotion of 'community participation in healthy recreation' as a charitable object. This allowed single sport clubs to register, provided they were open to the whole community regardless of their ability, and provided fees were kept at a reasonable level.

Now, s 2(2)(g) Charities Act 2006 expressly states that the advancement of amateur sport is one of the new heads of charity. The provision stipulates the promotion of amateur sport as a charitable purpose in its own right, rather than as a means of advancing other existing charitable purposes.

Section 2(3)(d) contains a definition of sports, meaning sports or games which promote health by involving physical or mental skill or exertion.

The Charities Act 2006 also contains special provisions for sport clubs. The Finance Act 2002 introduced a favourable tax treatment for community amateur sports clubs (hereinafter 'CASCs') that register with Her Majesty's Revenue and Customs (hereinafter 'HMRC'). It was feared that introducing the promotion of amateur sport as a charitable object might mean that some CASCs with constitutions that looked charitable would be forced to register with the Charities Commission. Section 5(4) prevents this scenario by stating that a CASC registered with the HMRC cannot be a charity.

rescue services or ambulance as well as any other purpose which is recognised as charitable under existing charity law, including those within the ambit of the Recreational Charities Act 1958, or analogous to, or within the spirit of, any purpose in s 2 (2) or an existing accepted charitable purpose or analogous to, or within the spirit of, any purpose that may come to be accepted as charitable.

¹⁸⁶ See s 3 Charities Act 2006.

Unfortunately, no provision was included for CASCs to become charities if they wished. In consequence, if a CASC wants to become a charity it has to set up a new charitable club and transfer its assets.

4 Scotland and Northern Ireland

Both countries have committed to the same set of charitable purposes as included in the Charities Act 2006 of England and Wales. However, there is one main exception as the promotion of amateur sport is not recognised.

5 Republic of Ireland

The Charities Act 2009 allowed for the creation of new regulatory institutions and provides for the first time in primary legislation a definition of charitable purposes. However, the promotion of amateur sport is not among the charitable purposes defined in the Act.

6 Result

The analysis has shown that the legislative output in the jurisdictions which have been examined appears to be minor compared to the regulation of charity law in New Zealand. Most of the countries have not established a national charity regulator even though there have been attempts to reform the law in this respect. Therefore, most of the jurisdictions do not set a persuasive precedent for a possible amendment of New Zealand charity law in general as well as in regard to the case of amateur sport in particular. However, there is one exception. For the law of England and Wales, the promotion of amateur sport has been recognised as a charitable purpose in nature. From a general perspective, this legal development shows that it is possible and justifiable to amend the law for the benefit of amateur sport. In particular, the findings of the consultation process

as well as the final embodiment in the Charities Act 2006 present a model for the inclusion of the promotion of amateur sport as a charitable purpose in a statute.

E Amending the Charities Act 2005

1 Relevant provisions

In order to propose changes to the Charities Act 2005, the relevant provisions for amendment have to be identified. Section 4 contains definitions of terms used in the Act. It might be possible to implement the definition of charitable purposes and amateur sport in this interpretation section. However, it is more desirable to define the relevant terms in the context of the provision to which is applied. The drafting of the Charities Act 2006 has followed the same approach. Nevertheless, a general statutory definition of a charity could be laid down in s 4.

The next and definitely most relevant provision in the course of an amendment of the Charities Act 2005 is s 5 which contains the four heads of charity established by common law.

Moreover, s 19 could probably be considered for amendment as it refers to the determination by the Charities Commission of the charitable status of an entity under the Charities Act 2005.

2 Issues in the course of the amendment

(a) General definition of charity

There are a number of aspects that have to be considered in the course of a possible amendment of the Charities Act 2005. First, the Act should include a general definition of charity which defines a 'charity' as an entity which is established for charitable purposes only.

(b) Promotion of amateur sport as a charitable purpose

On the basis of the general definition of charity, the promotion of amateur sport as a charitable purpose should be included. The Charities Act of England and Wales sets out the promotion of amateur sport as a new head of charity in its own right. As mentioned before, the promotion of amateur sport has been considered charitable by case law and also by the Charities Commission if it is the means of advancing a recognised charitable purpose. Yet, this does not reflect the important role amateur sport plays in New Zealand society. Besides promoting other charitable purposes, amateur sport itself offers benefits. The Charities Act 2005 should therefore recognise the promotion of amateur sport as a new head of charity in its own right.

(c) Definition of amateur sport

In order to make a distinction between non-charitable professional sport and amateur sport, the Charities Act 2005 should contain a clear definition of the latter. However, the definition of the term 'amateur sport' first requires the meaning of 'sport' in general to be clarified. The Charities Act 2006 contains a definition, stating that sport means sport or games which promote health by involving physical or mental skill or exertion.¹⁸⁷ This wording might suggest, however, that amateur sport is not accepted as a public benefit and therefore not as a charitable purpose in its own right because of the reference to health. The choice of this wording was expressly not intended to create an additional bar in this regard but to be an entry point for sport to prove that it can promote public benefit.¹⁸⁸ Moreover, it was originally not even contained in the definition. A reference to health would force a large number of activities that are commonly accepted as sports such as billiards, crossbow shooting, flying, parachuting and motor sports to show that they promote health which will obviously be a hard task in many cases. Therefore, a new provision in the Charities Act 2005 should not refer to the health

¹⁸⁷ See s 2 (3)(d) Charities Act 2006.

¹⁸⁸ Lloyd, above n 182, at [3.32].

benefits of sports in order not to be ultimately tied down about what can be accepted as a charitable purpose and to benefit amateur sport in its entirety.

However, the Charities Act 2005 should make a reference to mental skill. In this respect, the Charities Act 2006 can be taken as an example. Originally, the Bill defined sport without mentioning mental skill. However, this met criticism as certain sports and games which help mental health, such as chess, would have been excluded from the scope of the provision. For the law of New Zealand, the definition of sport should be broad. Admittedly, a reference to mental skill and through it a broad definition of sport makes it difficult to draw the line between sports and mere games as it by itself does not ultimately identify the entities which fall under the category of 'sport'. Especially activities such as darts and poker raise the question of how narrowly 'sport' should be perceived. Nevertheless, a broad definition is obviously more beneficial to amateur sport and still leaves it to the Charities Commission to narrow down the kind of activities that are charitable.

Despite setting out a general definition of sport, the Charities Act 2005 should define the term 'amateur'. The fine line between amateur sport and professional sport has been previously outlined.¹⁸⁹ The Charities Act 2006 does not define the term 'amateur'. However, according to the Strategy Unit, the Treasury's definition in Sch 18 of the Finance Act 2002 should be applied.¹⁹⁰ This definition reads as follows:¹⁹¹

'Amateur' in relation to any club shall mean a club whose constitution prohibits benefit being received from the club by any member save in respect of any direct or indirect exempt benefit.

Furthermore, Sch 18 Finance Act 2002 names the exempt benefits, such as provision to members of sporting facilities relevant to the club's purposes, reasonable provision and maintenance of club-owned playing equipment, reasonable provision of post-play non-alcoholic refreshment for players and match officials, payment for costs of obtaining coaching qualifications and reimbursement of reasonable travel expenses incurred by players and officials travelling to away matches.

¹⁸⁹ Section IV.

¹⁹⁰ Cabinet Office Strategy Unit, above n 180, at [11].

¹⁹¹ Sch 18 Finance Act 2002.

DIA defines 'amateur' as "any activity that is played and carried out as a pastime which excludes the payment of money or monies (including prizes) to any individual for personal gain".¹⁹²

The Charities Act 2005 could therefore be amended to define the term 'amateur' on the basis of the criteria of prohibited individual benefit and contain clearly defined exemptions as regards possible direct and indirect benefits.

(d) Public benefit requirement

The Charities Act 2006 sets out a public benefit test, removing the presumption of public benefit and providing a level playing field where all charities have to demonstrate that they operate for the benefit of the public. An equivalent in the Charities Act 2005 would consolidate the case law meaning of public benefit and ensure that the public benefit principles that charities already have to comply with are more consistently adhered to. In the course of drafting the Charities Act 2006, concern was raised as to whether the removal of the presumption would change the legal principles on public benefit. Yet, this question could be negated as the public benefit test in the Charities Act 2006 clarified the common law. Therefore, most of the charities will not have any problems in satisfying the public benefit test. In addition, a provision that sets out a public benefit test will not bring any change to the case of sports organisations as they are already not affected by the presumption of public benefit under the present law.

(e) General application

The Charities Act 2005 does not supersede any other legislation such as the Incorporated Societies Act 1908, the Companies Act 1993 or any other law on charities. Therefore, a provision that stipulates the general application of the definition of charitable purposes as laid down in the Charities Act 2005 for the law of New Zealand could be considered. However, if the definition would have such an effect, sporting entities outside

¹⁹² Department of Internal Affairs <www.dia.govt.nz>.

the Charities Act 2005 would consequently be included in the scope of the provisions of the Act without having been approved by the Charities Commission. Thus, the Commission's purpose to regulate and monitor the charity sector in New Zealand and therefore the control mechanisms over misuse of charitable status would be circumvented. This is not desirable for obvious reasons.

(f) Definitive status of the Commission's decision

At present, the decision of the Charities Commission only applies to the provisions of the Charities Act 2005. This renders the charitable status of a sports organisation under the Act inconclusive for funding bodies assessing whether they can give money to an authorised purpose under their trust deed or not. However, if definitive status were given the Commission's assessment, funding bodies could rely on the decision of the Commission and give grants to charities accepted as charitable under the Act. Therefore, the amendment of the Charities Act 2005 should include a provision which sets out that registration is generally binding.

(g) Legal coherence

Finally, an amendment of other legal Acts is necessary to ensure coherence in New Zealand charity law. At present, the Charitable Trusts Act 1957 and the Income Tax Act 2007 refer to charitable purposes.

The Charities Act of England and Wales generally sets out the meaning of charity "for the purposes of the law of England and Wales" except where a different definition applies for those purposes by virtue of the Charities Act 2006 or any other legislation.¹⁹³ Furthermore, the Act states in s 3 that a reference contained in any Act or document to a charity within the meaning of the Charitable Uses Act 1601 or its preamble is to be construed as a reference to the meaning of charity as set out in the Charities Act 2006.

¹⁹³ See s 1(1) Charities Act 2006.

Similar provisions in the New Zealand Charities Act would ensure that other charity laws are also construed as a reference to the meaning of charity in the 2005 Act.

3 *Proposal*

Considering the issues that have been identified in the previous section and the approach in the Charities Act for England and Wales, a possible wording of the relevant provisions of the Charities Act 2005 is as follows:¹⁹⁴

4 **Interpretation**

- (1) For the purpose of the law of New Zealand,—
 - (a) subject to paragraph (b), charity means a body or trust which is established for charitable purposes only.
 - (b) if the purpose of a trust, society, or an institution include a non-charitable purpose that is merely ancillary to a charitable purpose, the presence of that non-charitable purpose does not prevent the trustees of the trust, the society, or the institution from qualifying for registration as a charitable entity if the non-charitable purpose is—
 - (i) ancillary, secondary, subordinate, or incidental to a charitable purpose of the trust, society or institution; and
 - (ii) not an independent purpose of the trust, society, or institution.

This broad definition will serve as the basis for the following provisions, stipulating the basic requirement of having an exclusive charitable purpose.

5 **Meaning of charitable purpose**

- (1) For the purpose of this Act, charitable purpose includes every purpose which—
 - (a) falls within one of the categories set out in subsection (2) and

¹⁹⁴ The proposed provisions do not contain any other amendments that have been made in other common law jurisdictions and only consider the changes necessary to recognise the case of amateur sport in New Zealand charity law.

- (b) benefits the public according to section 6.
- (2) A purpose is charitable if it relates to—
 - (a) the relief of poverty;
 - (b) the advancement of education or religion;
 - (c) the advancement of amateur sport;
 - (d) ...
- (3) In subsection (2)(c)
 - (a) “sport” means sports or games which involve physical or mental skill or exertion;
 - (b) “amateur” refers to sporting activities which are carried out without passing benefits to players, owners and commercial stakeholders unless those benefits, whether direct or indirect, are ones specified by the Commission.
 - (c) ...

The wording set out above recognises the promotion of amateur sport as a charitable purpose in itself. However, the new head of charity is not a comprehensive definition of the charitable activity ‘advancement of amateur sport’ but rather a description of this charitable purpose in order to open up this head of charity to a range of objectives.

Section 5(3)(a) contains a definition of the terms ‘sport’ and ‘amateur’ which distinguishes amateur sport from mere leisure activities and professional sport. It is also necessary to refer to the direct or indirect benefits which are exempt. Yet, they should not be specified in the Act. Rather it should be left to the Charities Commission to set out the exemptions. This approach ensures legal flexibility as the Commission can adjust its approach to changing circumstances.

Further, the proposal removes the presumption of public benefit which exists for the first three heads of charity at present. Charities must rather demonstrate public benefit in accordance with the following provision:

6 Public benefit requirement

- (1) This section applies in connection with the requirement in section 5(1)(b) that a purpose falling within section 2(2) must be for the public benefit in order to be considered as a charitable purpose.
- (2) In determining whether the requirement is satisfied in relation to any such purpose, it is not to be presumed that a purpose of a particular description is for the public benefit.
- (3) In this Part any reference to the public benefit is a reference to the public benefit as that term is understood for the purposes of the law relating to charities in New Zealand.
- (4) Subsection (3) applies subject to subsection (2).

The proposed provision sets out the requirement of public benefit which entities have to meet in order to be accepted as charities. If, for example, a club provides golf on an amateur basis, the club has a charitable purpose under the new head of charity. In order to meet the requirements of the public benefit test, the club needs to be open to the public as a whole. This means, for example, the golf club cannot charge \$NZ 10,000 per year but rather needs to keep membership fees at a reasonable level. This example can be applied to any other sport as, in fact, people usually have to join a club to play a sport.

The definitive status of the decision of the Charities Commission should be emphasised by the following provision:

19 Decision of the Commission to register entity or decline application

- (1) ...
- (2) ...
- (3) The decision of the Commission to register an entity as a charitable entity or to decline the registration of an entity has general application for the law of New Zealand.

F Alternatives For Legislating

1 Gambling Act 2003

Amending the Charities Act 2005 is a possible but obviously complex option. Probably there are other possibilities which could at least temporarily clarify the charitable status of amateur sport and remove traces of doubt from the sports sector.

As mentioned before, gaming trusts were uncertain if funding amateur sport purposes complies with their governing deed. Therefore, the Gambling Act 2003 could be amended to say that gaming societies are entitled to rely on the entities' registration as a charity under the Charities Act 2005 as a proof that their grant will be used for charitable purposes. However, this approach would only apply to gaming societies and would therefore not solve the situation with respect to any other charitable trusts, such as community trusts, or charitable organisations that currently withhold funds from sports organisations. Furthermore, it would not qualify sports organisations for the benefits of charitable status under the Charities Act 2005.¹⁹⁵

Therefore, an amendment of the Gambling Act 2003 seems to be a less favourable option as it is too limited in its scope.

2 Charitable Trusts Act 1957

Another possibility for legislative clarification could be an amendment of the Charitable Trusts Act 1957. As mentioned before, s 61A of the Act overrides the four heads of charity in the case of physical facilities provided for recreation or other leisure-time occupation in the interest of social welfare. Moreover, the provision has general application as it deems the provision of facilities charitable "for all purpose[s]". An amendment of this provision would therefore have legal effect outside the Charitable Trusts Act 1957.

¹⁹⁵ See section VI.

The scope of s 61A could be extended and its wording could be clarified to acknowledge the advancement of amateur sport as an independent charitable purpose.¹⁹⁶ Part 2 (1) Variation of the Charitable Trusts Act 1994¹⁹⁷ could serve as an example as follows: The term 'facilities' could be taken as a starting point as it is not further defined in the Charitable Trusts Act 1957 and could be changed to "opportunities". In support of this approach the Charities Commission for England and Wales has stated that 'facilities' should not mean just land, buildings and equipment but also the organising of sporting activity.¹⁹⁸ Moreover, the facilities are already provided "in the interest of social welfare" if they are provided with the aim of improving the conditions of life for members of the community in general.¹⁹⁹ Amateur sport undoubtedly benefits society in this regard. In order to benefit amateur sport even more, it might be worth considering completely leaving out the requirement of social welfare and therefore not requiring proof of public benefit at all. However, as the proposed amendment to the Charities Act 2005 also keeps public benefit, the reference to social welfare should be kept for the sake of legal consistency.

This solution seems promising,²⁰⁰ especially as the Law Commission is currently reviewing the Charitable Trusts Act 1957. However, it should be considered only as a temporary solution as an amendment of the Charities Act 2005 would have greater impact.

VIII Conclusion

The present paper has argued in favour of an amendment of the charities legislation to include the promotion of amateur sport as a charitable purpose in itself. The

¹⁹⁶ Besides this particular amendment, the language of the section should generally be reviewed as it appears quite "antiquated".

¹⁹⁷ See section VII.

¹⁹⁸ Charities Commission for England and Wales, RR11: *Charitable Status and Sport* (April 2003) <www.charity-commission.gov.uk>.

¹⁹⁹ Charities Commission, above n 55.

²⁰⁰ In support of this view, Hill-Dunne, above n 65, at [16].

first definition of charity in the Statute of Elizabeth, more than 400 year-old, is still the foundation of the modern definition of charitable purposes. Against the background of changing social circumstances, however, this definition needs to be reconsidered and extended. This especially applies to the case of amateur sport which benefits society in various ways. The regulatory reform of charity law in England and Wales has pointed the way to amend New Zealand charity legislation.

The possibilities for legislating have been outlined, identifying an amendment of the Charities Act 2005 to be the most effective and therefore most promising option. Currently, the Act is being reviewed by the Department of Internal Affairs.²⁰¹ Furthermore, the Law Commission is conducting a review of trust law with a view to generally modernising the relevant Acts which inter alia includes a review of the Charitable Trusts Act 1957.²⁰² It remains to be seen if the charitable status of amateur sport will be clarified. At least, the Ministers have announced a review of the Charities Act 2005 in this regard.²⁰³ Yet, as there is currently a disparity between charities and gambling legislation, the reviews should also consider the Gambling Act 2003 to provide for a consistent legal framework. A government move to change the law would also be supported by the New Zealand Labour Party.²⁰⁴

Travis Trust, the main trigger for the great uncertainty in the sports sector,²⁰⁵ would not have to be reversed because of a statutory clarification. However, uncertainty could have been prevented if the charitable status of amateur sport would had been clearly set out.

Furthermore, if the societal importance of amateur sport in New Zealand is taken into account, a modern statutory definition of charities is desirable as it will ultimately generate a wide range of benefits for society as a whole.

²⁰¹ Office for the Community & Voluntary Sector <www.ocvs.govt.nz>.

²⁰² Law Commission <www.lawcom.govt.nz>.

²⁰³ Department of Internal Affairs "Sport can still receive gaming society funding" (press release, 24 September 2009).

²⁰⁴ New Zealand Labour Party "Sports clubs' charity grants must be guaranteed" (press release, 22 September 2009).

²⁰⁵ See section V.

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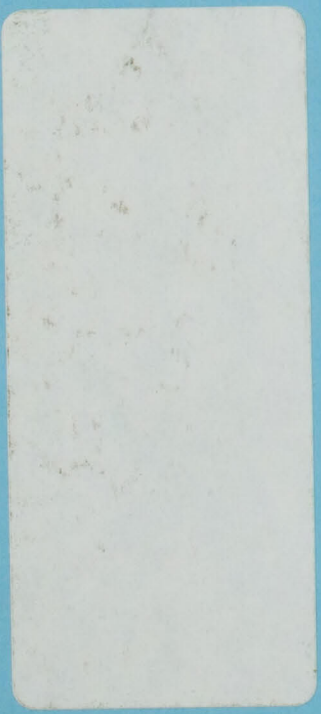
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