

NBR

'The bonfire of charities'

JASON WALLS

WEDNESDAY MAY 27, 2015



Sue Barker Charities Law director Sue Barker

“Black letter interpretations” by regulators have led to hundreds of charities being unfairly stripped of their registered charitable status, a charity lawyer says.

Sue Barker Charities Law director Sue Barker says the definition of what is, or is not deemed charitable – which draws on hundreds of years of case law – is complex, and is up to the interpretation of the charities regulator.

She says many of those interpretations are arguably too narrow, which is frustrating charitable works and having an enormous chilling effect on the sector.

Ms Barker says the unwarranted stripping of organisations' charitable status by the charities regulator (formerly the Charities Commission and now the Department of Internal Affairs – Charities Services and the

Charities Registration Board) is having an enormously destructive impact on the sector.

"Charities are being culled. These narrow interpretational decisions which lead to good charities being deregistered can be, and often are, a fatal blow."

Many smaller charities struggle to attract funding if they are stripped from the register. It gives the implication a charity has done something wrong which in many situations, is not the case.

Last week, NBR ONLINE reported many smaller charities have been forced to liquidate, as they were not able to afford court costs to appeal the decision to strip them of their charities status. New Zealand Initiative research fellow Jason Krupp says many of these decisions by the charities regulator were "unfair."

Although Ms Barker says it is difficult to get a clear picture of how many charities have been deregistered since the charities services website was changed, she says she can make an educated assumption.

"I would say, based on information that I have seen published, there are hundreds of good charities which are being either deregistered, denied registration or who see the writing on the wall and don't go any further because of these black letter interpretations."

And this does not include charities that have been deregistered for failing to file an annual return, which she says she has no problem with.

"From what I am seeing in my practice, the New Zealand charity sector is being deconstructed at the moment, and if the current situation continues I expect we will see many more good charities fall."

Ms Barker is calling for a post-implementation review of the Charities Act, which she says is essential and urgent.

National Council of Woman saga reveals how unfair system is

As NBR ONLINE reported last week, the National Council of Women New Zealand (NCWNZ), was deemed by the regulator to be "non-charitable" and was stripped of its charitable status.

Two years later and after an appeal, it was allowed back on to the register even though its purposes, activities and constitution had not changed.

Ms Barker, who represented the council in a largely pro bono capacity, says NCWNZ's story helps to show how unfair the system is.

She says NCWNZ was deregistered by the Charities Commission because it made submissions on Parliamentary Bills in furtherance of its charitable purposes.

But, ironically, the NCWNZ was contracted by the government to carry out the very work it was deregistered for.

"Everyone thought the NCWNZ had done something wrong, but it had simply been doing the same thing it had been doing for more than 100 years.

"The question of whether an entity's purposes are charitable often turns on questions of fact, which need to be proven by evidence. However, under the appeal right in the Charities Act as it is currently being interpreted, charities have no automatic right to adduce evidence that was not before the charities regulator when it made its decision."

This means if a charity wanted to file further evidence, it would have to apply to the High Court – an expensive process, especially for a charity.

Even then, because the High Court case is conducted "on the papers," the charity has no ability to give oral evidence in support of its case that its purposes operate for the benefit of the public and are charitable, nor does it have the right to cross-examine the decision-maker as to why it reached a different view.

"As the charities regulator doesn't conduct a hearing of evidence, a charity's ability to have a hearing of evidence in deciding if its purposes are charitable has effectively been removed altogether," Ms Barker says.

"So charities have the onus of proving their purposes are charitable but they have both hands tied behind their back because there is no oral hearing of evidence."

Fortunately, when NCWNZ reapplied for registered charitable status, it submitted evidence to the charities regulator as if it was preparing for a High Court trial. Ms Barker says the charities regulator was persuaded before both parties went to Court and NCWNZ’s charitable status was reapplied.

She says nothing had changed about the NCWNZ’s purpose, activities, constitution or the underlying law since the status was stripped. “It was just a different interpretation of the definition of charitable purpose.”

"However, I don’t like to think what would have happened to NCWNZ if it had not had a lawyer who was prepared to act for it pro bono. A good charity of more than 100 years’ standing could have been lost to New Zealand altogether."

She says many of the charities which have been unfairly stripped of their registered charitable status just haven’t got the resources to fight a potentially unfair decision.

COMMENTS & QUESTIONS

Commenter icon key:  Subscriber  Verified