

INTERNATIONAL NEWS

Australia

1. The Senate passed a bill to extend the common law meaning of charity for the purposes of all Commonwealth legislation with effect from 1st July 2004. The bill provides for charitable purposes to include the provision of child care to the public on a non-profit basis; however, organisations providing such services must show that they are of public benefit. In addition, self-help bodies with open and non-discriminatory membership and closed or contemplative religious orders that offer prayerful intervention to the public are deemed to be for the public benefit. An organisation qualifies as a self-help group for this purpose if:

- it is an association of individuals that has an open and non-discriminatory membership;
- it is established for the purpose of assisting individuals affected by a particular disadvantage or discrimination, or a need that is not being met arising out of such a disadvantage or discrimination;
- it comprises and is controlled by individuals who are so affected;
- all its membership criteria relate to its purpose; and
- its membership is open to any individual who satisfies the criteria.

It remains necessary for self-help groups and closed or contemplative orders to show that their purposes are charitable.

(Extension of Charitable Purposes Act 2004, 25th June 2004)

Bahamas

1. A new law came into force on 22nd October 2004 that provides for the creation of a private, civil law style, foundation as a legal entity resident and domiciled in the Bahamas. The foundation can be established for private or public benefit and for a limited or an indefinite period. A licensed financial and corporate services provider or a trust company must be appointed as secretary of the foundation. The foundation is governed by a Council (if appointed), or in the absence of a Council by one or more Officers who must be appointed prior to registration of the foundation. The requirements for registration include minimum assets of USD 10,000 and a registered office in the Bahamas.

(Foundations Act 2004)

Canada

1. The British Columbia Law Institute has published a proposal to modernise provincial trust law. The report, which includes a draft of a new Trustee Act, incorporates recommendations from earlier reports on investment powers, statutory powers of delegation, trustee remuneration, exculpation clauses, total return investing, variation and termination of trusts, and creditor access to assets of a purpose trust. It is envisaged that the proposed legislation would apply only to charities organised as trusts, i.e. that it would not be relevant to a charitable corporation unless it acts as a trustee. The proposed legislation would permit both private and charitable trusts to invest on a total return basis without distinction between income and capital. It is also proposed to allow the creation of non-charitable purpose trusts, but only to the extent that they are established for the categories of purposes for which a society can be formed under the Society Act. Other draft provisions would give the court power to approve a *cy-pres* scheme without a requirement that the settlor be found to have created the trust with a general charitable intent.

(A Modern Trustee Act for British Columbia, British Columbia Law Institute, BCLI Report No. 33, October 2004, www.bcli.org)

Europe

1. The King Baudouin Foundation launched a new website in March 2005 to promote cross-border philanthropy. The “Giving in Europe” website provides extensive free information on how to make a charitable donation or bequest to

another European country. The intention is to provide information on giving in all the EU Member States and Switzerland.

(King Baudouin Foundation News Release 24th March 2005, www.givingineurope.org)

2. The European Commission Internal Market Directorate General published a draft proposal for a regulation requiring all senders of money transfers to provide details of the identity of the sender. Article 10 of the draft Regulation allows Member States to exempt service providers in their territory from these requirements in the case of money transfers up to a maximum of EUR 150 for the benefit of charitable organisations that are subject to reporting and external audit requirements.

(European Commission Press Release IP/05/1008, 26th July 2005, http://europa.eu.int/comm/internal_market/payments/docs/transfers/proposal_en.pdf)

3. The European Commission Directorate-General Justice, Freedom and Security issued draft recommendations to Member States in July 2005 regarding a code of conduct for non-profit organisations that is intended to counter terrorist financing. The proposals are intended as an EU response to the Financial Action Task Force Special Recommendation VIII on Non-profit Organisations (see further “Effective regulation worldwide”, Emma Turnbull, CL&PR 8/2 [2005] 43). The consultation document, which was open for comments until 19th September 2005, lists risk factors that might indicate that a charity is financing terrorism and calls for higher standards of transparency and accountability. If implemented, charities could be required to maintain audit trails of cross-border fund transfers, retain financial statements for at least 5 years, and use registered bank accounts.

(Draft Recommendations to Member States regarding a Code of conduct for Non-profit Organisations, European Commission Press Release 26th July 2005, http://www.europa.eu.int/comm/justice_home/news/intro/news_intro_en.htm)

Iraq

1. The Coalition Provisional Authority (CPA) issued an Order on 25th November 2003 establishing a legal framework for domestic and foreign NGOs (defined as nonprofit public benefit organisations) operating in Iraq with effect from 27th November 2003. All NGOs operating in Iraq must register by

submitting an application to the NGO Assistance Office (NAO) within the Ministry of Planning and Development Cooperation. The application must include:

- full details of prior visits to and activities in Iraq;
- accounts for the current year and the three previous years (or shorter periods in the case of recently established NGOs);
- details of organisations that are effectively controlled by the NGO and organisations or individuals that effectively control the NGO;
- names and addresses of substantial contributors to the NGO (a contribution is substantial if it was received within the current or three previous years and amounts to more than IRD 10 million and is over 10% of the NGO's total revenue in the year of receipt);
- details of all non-bank loans to the NGO exceeding both IRD 10 million and 10% of the NGO's total revenue);
- details of the funding of the activities within Iraq; and
- a report on its proposed program prepared in consultation with the relevant ministry and a budget for the first year of activity.

Foreign NGOs must provide details of the head of the mission in Iraq and the worldwide head of the NGO, plus proof that the NGO is registered as a non-profit legal entity in its home country.

Once registered, all NGOs acquire legal status to operate programs in Iraq and are required to submit quarterly activity reports and annual accounts to the NAO, which is empowered to audit or otherwise conduct reviews of NGOs at any time.

NGOs are permitted to conduct economic activities and to own or manage assets within Iraq in order to raise funds to further their programs. Foreign NGOs are not permitted to acquire real estate in Iraq, either directly or through other entities.

If a NGO is found to be operating programs after its registration has been suspended or revoked, the CPA Administrator has power in his discretion to close the operation and confiscate its assets.

Order No. 45 supersedes any inconsistent provisions of Iraqi law relating to the registration and operation of foreign NGOs, including relevant provisions of Law No. 34 of 1962 and Law No. 13 of 2000. The Order will terminate with

immediate effect when the CPA transfers all governmental authority to the transitional Iraqi administration and recognises the full sovereignty of that administration.

(Coalition Provisional Authority Order No. 45, 25th November 2003)

Ireland

1. The Irish Charities' Tax Reform Group (ICTRG) has published the results of a survey on the burden of irrecoverable Value Added Tax (VAT) imposed on Irish charities. Based on data supplied by 191 charities relating to 2001, the irrecoverable VAT incurred by the sampled charities for 2001 was EUR 18 million. Around 47% of these VAT costs were funded directly or indirectly by public expenditure, with the remaining 52% being funded by fundraising activities and donations. The ICTRG is campaigning for the Government to introduce a VAT refund mechanism, managed by the tax authorities, to compensate charities for these costs.

(Irish Charities' Tax Reform Group, September 2003, www.charitytaxreform.com)

2. The Department of Community, Rural and Gaeltacht Affairs issued a consultation paper on charity law reform in December 2003. The proposals include:

- the introduction of a statutory definition of charity by way of codification of the existing interpretation of the law, possibly including new categories of charitable purpose, such as the advancement of community welfare and the advancement of the natural environment, which are currently part of the residual category of "other purposes beneficial to the community";
- establishing an independent statutory body, with functions similar to those of the Charity commission in England and Wales, as the centrepiece of a modern regulatory framework;
- creation of a public register of charities;
- empowering the regulatory body to take action to ensure compliance with the new framework; and
- codifying the law relating to the duties of charity trustees.

The present intention is to replace the whole of the existing charities legislation with the new statutory regime and to review the reforms after they have been in operation for five years.

A report by an independent consultant on the public consultation was published in September 2004.

(“Establishing a modern statutory framework for charities”, Department of Community, Rural and Gaeltacht Affairs, 17th December 2003; Report on the public consultation for the Department of Community, Rural and Gaeltacht Affairs, 27th September 2004, www.pobail.ie)

Japan

1. On 6th November 2003 Japan and the USA signed a new income tax treaty which, if ratified, will replace the existing 1971 income tax treaty. The new treaty includes a protocol that provides that the US excise tax on private foundations will not be imposed on:

- dividends and interest derived by private foundations established in Japan at a rate exceeding the maximum rates of withholding tax on these sources of income specified by the new treaty; and
- royalties or other income derived by private foundations established in Japan.

The maximum withholding tax rates under the new treaty are 10% for dividends and interest, subject to lower rates of 0% or 5% being applicable to dividends paid to, respectively, controlling or portfolio shareholders in certain circumstances.

(Ernst & Young International Tax Alert, 14th November 2003)

Jersey

1. The Jersey Law Commission launched a consultation on charity law in January 2004. The main recommendations include the adoption of a new charities law which would:

- establish a non-governmental Charities Commission based on the Jersey Charities Association;

- provide for a system of public registration with the Charities Commission;
- require both private and public charities to have at least one trustee who is registered under the Financial Services (Jersey) Law 1998;
- redefine charitable purposes along the lines recommended in the 2002 UK Government Cabinet Office Strategy Unit Report and require them to be of public benefit;
- require larger registered charities to file audited accounts with the Commission;
- exempt from these requirements any charity already registered in an EU member state.

Other changes proposed include new provisions, based on Guernsey trust law, to amend the trust law to provide for *cy-pres* schemes, and the abolition of income tax relief for covenanted gifts and its replacement by a Gift Aid type scheme open to Guernsey or EU charities as well as Jersey registered charities.

(“The Jersey Law of Charities”, Jersey Law Commission, Consultation Paper No. 7th January 2004, www.lawcomm.gov.je)

2. The Economic Development Committee launched a consultation on proposals for a new law on foundations in November 2004. Comments were invited by 18th February 2005. The main features of the proposals include:

- a foundation will be a legal entity registered with the Registrar of Companies;
- foundations can be established for private and/or charitable purposes by a natural or a legal person;
- a foundation will be governed by a charter, supplemented by a set of rules if appropriate;
- a foundation will be required to have a registered office in Jersey, which may be provided in the course of business only by a financial services business regulated by the Jersey Financial Services Commission;
- a foundation will be governed by a council, which is responsible for fulfilling the aims of the foundation;

- the role of the council members will be contractual rather than fiduciary in nature;
- a foundation may also have an adviser whose powers will be set out in the foundation's constitution;
- a foundation can change its domicile from or to Jersey;
- the Attorney General and the Financial Services Commission will have power to investigate foundations if necessary.

("Foundations - Proposals for a new law", States of Jersey, 25th November 2004, www.edd.gov.je)

New Zealand

1. The Parliament of New Zealand has passed the Charities Act establishing the Charities Commission with effect from 1st July 2005. Charities will be required to register with the Commission in order to receive tax exempt status, and will be able to register from 2006. The Commission is given the responsibility to provide a registration, reporting, and monitoring system for charities, and education and assistance to the charitable sector.

(Government of New Zealand Press Release which af0\dbch\af17\loch\af0, 14th April 2005; <http://www.charities.govt.nz> www.charities.govt.nz)

2. The Government launched a new department, the Office for the Community and Voluntary Sector (OCVS), within the Ministry of Social Development on 15th September 2003. The OCVS has been established to improve the Government's relationship with the third sector by providing advice on cross-departmental policy issues affecting the sector and enhancing the sector's involvement in government decision making.

(Ministry of Social Development, www.mosp.govt.nz)

3. In December 2003, following consultation with a sample of NGOs, government departments and other agencies, the Treasury released a revised version of the "Guidelines for Contracting with Non-Governmental Organisations for Services sought by the Crown", which were originally issued in 2001. The guidelines are intended to encourage the use of better contracting practices by

government departments and agencies involved in negotiating arrangements with NGOs for the provision of services that support government objectives.

(“Guidelines for Contracting with Non-Governmental Organisations for Services sought by the Crown”, The Treasury, December 2003, www.treasury.govt.nz)

4. The Inland Revenue Department has issued a provisional non-binding opinion that the Church of Scientology of New Zealand is established exclusively for charitable purposes and can therefore qualify for exemption from income tax on non-business income and as a recipient of tax privileged donations. The opinion expresses a reservation, subject to further representations, that repayment of an outstanding loan from the “mother church” may amount to the application of funds to non-charitable purposes outside New Zealand.

(Inland Revenue Department Opinion of 24th December 2002, reported by the Center for Studies on New Religion)

Saudi Arabia

1. In May 2003 the Saudi Arabian Monetary Authority (SAMA) issued a circular to all banks and financial institutions in the country requiring full and immediate implementation of nine new policies and procedures relating to the accounts of charities and welfare institutions. The new requirements include the following:

- all bank accounts of charities and welfare institutions must be consolidated into a single account for each society;
- deposits in these accounts will only be accepted after the depositor provides the bank with identification and other required information;
- each charity requires a valid licence to be able to operate these accounts;
- all cash withdrawals are prohibited;
- funds cannot be transferred outside the country without prior authorisation.

These rules incorporate both domestic regulations and the Financial Action Task Force (FATF) 40 Recommendations and the FATF 8 Special Recommendations on Terrorist Financing, and the relevant UN Security Council Resolutions.

(Royal Embassy of Saudi Arabia Washington D.C. Press Release, 12th June 2003)

2. On 18th August 2003 the Council of Ministers approved an anti-money laundering law, which criminalises the financing of terrorism organisations. The penalties introduced by the new law, which comes into effect 60 days after its publication in the official gazette, include fines of up to SAR 7 million (USD 1.86 million) and prison terms of up to 15 years for money laundering through charities. A financial investigations unit will be established to pursue suspected money laundering transactions and will have power to recommend the seizure of money and assets for a maximum of 20 days. Further regulations are to be issued within 90 days after the publication of the law.

Subsequent measures include:

- a ban on the use of charity collection boxes in mosques and commercial premises (a special police division has started to check compliance with the new law);
- an order from the Ministry of Education to all schools within its jurisdiction to stop collecting charitable donations from students;
- a ban on the use of media outlets by Islamic centres for soliciting donations ordered by the Ministry of Islamic Affairs.

(Arab News, 19 August, 17th September and 23rd October 2003, www.arabnews.com; Tax News Service, 22nd September 2003)

Singapore

1. The Budget for 2005 was presented to the parliament on 18th February 2005. The Government proposes to redefine charitable purposes in a manner similar to that proposed in the Charities Bill for England and Wales by specifically recognising the following categories of purposes in addition to the traditional *Pemsel* categories:

- advancement of health;
- advancement of citizenship or community development;
- advancement of the arts, heritage or science;
- advancement of sport where the sport advances the health of individuals;
- advancement of environment protection or improvement;

- relief of those in need by reason of youth, age, ill health, disability, financial hardship or other disadvantage; and
- advancement of animal welfare.

Other proposals include doubling the existing deductions for income tax purposes of certain donations to an institution of public character (IPC) or other approved bodies by:

- extending the system of double deductions to donations carrying naming opportunities with effect from 1st January 2005; and
- extending the scheme of double tax deductions for donations of computers to designated research and educational institutions in Singapore to donations of computers to IPCs with effect from 1st January 2005;

The Government also hopes to attract philanthropic trusts to locate in Singapore by exempting qualifying foreign charitable trusts from income tax on foreign income without restrictions on expenditure levels or where funds are spent.

(Tax News Service, 25th February 2005; PricewaterhouseCoopers Budget Commentary 2005)

2. The Trustees Act (Chapter 339) has been amended with effect from 15th December 2004. Many of the changes reflect those adopted in the UK Trustees Act 2000 and apply both to new trusts and existing trusts created before the amendments came into force. The amendments include:

- the introduction of a statutory standard of care, with a higher standard required for a professional trustee;
- the introduction of a general power of investment, whether or not the investments produce an income, subject to the investment being suitable for the trust concerned;
- a requirement for trustees to obtain proper advice before making an investment except where the trustee considers it unnecessary or inappropriate;
- broader powers to insure trust property;
- powers to delegate certain functions and to appoint agents and custodians;

- authorisation of remuneration for services provided or expenses incurred by trustees;
- setting a new perpetuity period of 100 years or such shorter period as is specified in the trust instrument.

The new Act also provides that, where a trust declared to be subject to Singapore law is created by a person who is not a citizen of or domiciled in Singapore with legal capacity under the law of that person's nationality or domicile, the law of Singapore or the proper law of the property transferred to the trust, the settlor's capacity cannot be questioned nor can the validity of the trust be challenged by any rule of inheritance or succession.

(Trustee (Amendment) Act 2004, 25th November 2004)

USA

1. The U.S. Senate Committee on Finance held a hearing on proposals to reform charities and charitable giving in April 2005. The hearing addressed a series of recommendations to enhance the accountability and governance of charitable organizations, which are exempt from tax under the Internal Revenue Code. Reforms proposed during the hearing include improved exchange of information between the IRS and state agencies, comprehensive review of rules relating to tax-exempt organizations, e-filing of forms 990 and 1023, and study of excessive executive compensation and fringe benefits in the nonprofit sector.

(U.S. Senate Committee on Finance hearing, April 2005, <http://finance.senate.gov/sitepages/hearing030505.htm>)

2. The Treasury Guidelines Working Group of Charitable Sector Organizations and Advisors released the final version of new guidance on international grant-making in March 2005. The principles emphasise the importance of due diligence procedures that make it possible to reduce the risk of diversion of charitable assets from their intended purposes.

(“Principles of International Charity”, Treasury Guidelines Working Group of Charitable Sector Organizations and Advisors, March 2005, www.usig.org)

3. The House Committee on Ways and Means held a series of hearings to look at broad reform proposals aimed at providing more scrutiny and control over

the nonprofit sector. At the first hearing on 20th April 2005, experts testifying at the hearing examined concepts, theories, and tax policies relevant to tax exempt organisations. They emphasised the need to improve and refine the Federal supervision of the nation's nonprofit sector, and noted that the IRS should have the resources to ensure accountability and transparency in the nonprofit sector. Tax exemptions for nonprofit hospitals came under scrutiny at a second hearing on 26th May 2005.

(House Committee On Ways And Means hearings 20th April and 26th May 2005, <http://waysandmeans.house.gov>)

4. The Panel On The Nonprofit Sector presented its final report to the US Senate Finance Committee in June 2005. The report recommends more than 120 actions to be taken by charities, by Congress, and by the Internal Revenue Service, which together would strengthen the sector's transparency, governance, and accountability. If implemented, these recommendations would be the most

sweeping changes to the operation and regulation of charities and foundations since the Tax Reform Act of 1969. The Panel will offer further comments later in 2005 on issues including financial reporting and transparency, accreditation and standard setting, and possible changes in the legal framework.

("Strengthening Transparency Governance Accountability of Charitable Organizations", Panel On The Nonprofit Sector, 22nd June 2005, www.nonprofitpanel.org)

5. Boardsource and Independent Sector have published a guide to the implications for nonprofit organisations of the American Competitiveness and Corporate Accountability Act of 2002, commonly known as the Sarbanes-Oxley Act. While most of the provisions of the Act apply only to publicly traded companies, two provisions apply to all corporate entities, including nonprofits. These provisions concern whistleblower protection and document destruction. The Act prohibits all corporate entities from taking retaliatory action, including dismissal, against a whistleblower; moreover, the employee is protected even if he or she only has a reasonable suspicion of, but cannot prove, financial misconduct by the employer. The law criminalises the alteration, concealment, forgery or destruction of any document to prevent its use in an official proceeding (e.g. federal investigation or insolvency proceedings). Furthermore, the Act requires any intentional document destruction to be properly monitored and justified.

(“The Sarbanes-Oxley Act and implications for nonprofit organisations”, Boardsource and Independent Sector, 2003, www.boardsource.org, www.independentsector.org)

6. Independent Sector has published the findings of a report that suggests that the decisions of US donors about the size of their gifts to charity are influenced by their ability to claim a tax deduction for the donation. Key findings of the report include:

- itemising households give 37% more in donations than nonitemising households;
- itemisers give 61% more to religion than nonitemisers;
- at every income group examined, itemising homeowners give more than nonitemising homeowners.

Currently, about two thirds of all US taxpayers claim only the standard deduction and do not itemise their donations on their tax returns.

(“Deducting generously: The effect of charitable tax incentives on giving”, Independent Sector, 16th April 2003)

7. The Internal Revenue Service (IRS) has issued a letter ruling on the gift tax implications of a contractual pledge to make donations to a charity. In contrast to countries using English common law principles, charitable pledges are generally held to be contractually binding on the donor under US state law. The taxpayer concluded an agreement with a university to establish and fund a research institute, under which he undertook to contribute a lump sum endowment, contingent on the university fulfilling its annual obligation to fund the institute. The taxpayer’s commitment was secured by a non-recourse pledge of securities held by the university under a pledge agreement. The IRS ruled that the taxpayer’s agreement would not amount to a completed gift until the earlier of the date when the endowment was paid and the date when he became obligated to provide a specific amount of funds under a budget approved by the board of the institute. The deposit of securities under the pledge agreement would not be a transfer of property for federal gift tax purposes. Similarly, for income tax purposes, a charitable contribution is deductible only when payment is made to the charity or its agent, regardless of the date of the pledge.

(IRS Ltr. Rul. 200241044, reported in *Journal of Taxation*, January 2003)

8. The American Law Institute has published the first two volumes of its third restatement of the law of trusts. These publications include a revision of the guidance on charitable purposes, focussing in particular on the ability to save a charitable trust through the application of the *cy-pres* doctrine.

(“Restatement of the Law Third, Trusts, Volumes 1 and 2”, American Law Institute, 2003)

United Nations

On 1st December 2003 the United Nations Security Council released the second report of the Monitoring Group, established by Security Council resolution 1363 (2001), on sanctions against al-Qaida, the Taliban and their associates and associated entities. A section of the report is devoted to the use of charities to finance terrorism. In relation to charities the report notes that:

- before “9/11” few countries regulated charities or required them to report on their collection and disbursement activities;
- Brazil, Croatia, Cuba, Morocco and Paraguay reported that new controls are now in force to provide effective supervision of charities;
- some 50 charities are reported to have been closed down in Gulf countries and a further 235 domestic charities have been audited in Saudi Arabia, but very few of these have yet been submitted to the Security Council Committee for designation;
- to date only 17 charities or branches of charities have been designated by the Committee;
- even where charities and their managers have been designated and their existing bank accounts frozen, it has proved difficult to close them down completely; and
- in some cases it has proved difficult to pierce the charity veil and ascertain the identity of their major donors.

The recommendations of the Monitoring Group include:

- special requirements should be imposed to ensure that as far as possible charities route their transactions through established banking systems;

- where cash transfers are necessary, special efforts should be made to record and verify every transaction;
- a database containing both favourable and unfavourable information regarding recipient entities should be established and published, and it would then be the responsibility of charities to check that their grants are not being made to blocked entities.

(Second Report of the Monitoring Group to the Security Council Committee established pursuant to Resolution 1267 (1999), www.un.org/Docs/sc/committees/1267/Template.htm)