

18 January 2024

Toi Hiranga | Regulation & Policy
Te Tari Taiwhenua | Department of Internal Affairs

By email: charitiesact@dia.govt.nz

Re: Consultation on regulations to enable charities appeals

1 Introduction

- 1.1 The New Zealand Law Society Te Kāhui Ture o Aotearoa (**Law Society**) welcomes the opportunity to provide feedback on the consultation paper on regulations to enable charities appeals (**consultation paper**).
- 1.2 This submission has been prepared with input from the Law Society's Civil Litigation & Tribunals Committee, and Commercial and Business Law Committee.¹

2 Questions 1, 2 and 3: filing fees

- 2.1 We agree with the analysis of the relevant policy considerations regarding the level at which the filing fee is set. These are the same considerations relevant to the question of whether, and when, a filing fee should be available (discussed further below).
- 2.2 It is difficult to provide a response regarding the most appropriate balancing of those considerations, and in particular whether requiring the payment of a \$200 filing fee is a "fair" balance between those considerations, without knowing what it costs the Taxation and Charities Review Authority (**Authority**) to hear an appeal. Those costs are likely to vary substantially between cases, given the range of issues capable of appeal to the Authority, and the inherent variability of the complexity and manner of proceeding between cases. The actual costs of hearing an appeal in the Authority should therefore inform any further thinking about filing fees.

Option 1

- 2.3 In the absence of any information regarding the actual costs of hearing an appeal, it is also difficult to evaluate whether option 1 (as the option most consistent with access to justice) is inappropriate. However, the absence of any fee whatsoever would be at odds with the position in other jurisdictions, and there is no clear justification for any such departure.

¹ More information about these committees can be found on the Law Society's website: <https://www.lawsociety.org.nz/branches-sections-and-groups/law-reform-committees/>.

Option 2

- 2.4 We agree with the reasons against the implementation of a tiered fee (option 2) – i.e., increased transactional and administrative costs, and complexity.
- 2.5 It may be appropriate to consider whether different appeals – that is, appeals concerning different decisions and arising under different legislative provisions – should attract different filing fees. The additional complexity of having different rates for different appeals may be justified if it could be identified that appeals arising under different provisions are likely to be substantially more complex, and therefore substantially more expensive for the Authority to resolve. This would be consistent with the approach taken by the High Court Fees Regulations 2013 and District Court Fees Regulations 2009.

Options 3 and 4

- 2.6 Options 3 and 4 are both consistent (especially, as noted in the paper, if a fee waiver is also provided for) with promoting access to justice, which the paper identifies (consistently with the constitutional significance of access to justice) as the primary policy objective. The proposed fees are also reasonably modest, and substantially less than those associated with filing general civil proceedings in the courts of general jurisdiction. Options 3 and 4 therefore address concerns about the significant costs involved in appealing a matter to the High Court,² and appear to be equally broadly consistent with the relevant policy considerations outlined in the consultation paper.
- 2.7 It is not necessarily correct that a lower filing fee should apply in this context because “charities, in general, provide a greater public benefit than a business or individual appealing a tax decision”.³ While that may sometimes be the case, the proper question is not what public benefits different types of entities generally provide, but whether the public benefits of appealing a decision differ depending on the nature of the entity that is the appellant. There is a substantial public benefit associated with individuals and entities (whether charitable or not) obtaining rulings which clarify the administration of the law, especially tax law, for all future users. Therefore, the focus should instead be on the benefit provided by the accessibility and use of the appeal procedure itself, rather than the user.

3 Question 4: should a filing fee waiver be available?

- 3.1 It is appropriate that a fee waiver be available. Fee waivers are available across the civil jurisdiction,⁴ and it would be exceptional for fee waivers not to be available in the context of charities appeals. Nothing in the nature of the jurisdiction suggests such a departure is appropriate.
- 3.2 More generally, the availability of a waiver would be consistent with the principle of promoting access to justice. The availability of a waiver allows the Authority to give

² *Community and Voluntary Sector briefing: Modernising the Charities Act – Introduction to appeals* (Department of Internal Affairs, 13 May 2021) at page 8.

³ Consultation paper, at page 4.

⁴ See, for example, regulation 10A of the Taxation Review Authorities Regulations 1998, regulation 81A of the Customs and Excise Regulations 1996, and regulation 5 of the District Courts Fees Regulations 2009.

expression to that consideration by avoiding a litigant being unable to access justice due to their inability to afford a filing fee. This consideration is particularly pertinent in the case of an applicant whose case discloses a matter of public or general importance, or who would suffer injustice if unable to bring their case, from being unable to access justice. The absence of a discretion to provide a waiver could lead to the abrogation of access to justice in the case of an impecunious but deserving applicant.

- 3.3 At the same time, it is consistent with the policy settings of the justice system in recent decades – and the ‘user pays’ model of civil justice – that participants in court, tribunal, and authority processes should be required to bear some part of the cost of the operation of those bodies. The requirement to pay a non-trivial filing fee may also serve to deter the filing of vexatious and meritless applications.

4 Question 5: are there reasons to depart from the waiver criteria?

- 4.1 The proposed criteria are consistent with the rationale for the establishment of filing fees and fee waivers. The criteria are also based on, and consistent with, those in use in other jurisdictions. As a general proposition, the avoidance of unnecessary differences in procedure between jurisdictions is desirable, as it avoids the possibility of confusion and error, and promotes participants’ understanding of procedure.
- 4.2 In addition to the proposed criteria, we also suggest providing for a more general, residual discretion which would enable a waiver to be granted:
- (a) in any other circumstances not expressly contemplated by the proposed criteria, and
 - (b) where doing so would be consistent with the purpose of a waiver.
- 4.3 The availability of a residual category would be consistent with the framing of the fee waiver criteria in other jurisdictions, as well as the rationale for allowing appellants to seek a waiver. The public interest analysis required in applications for a waiver made under this residual category would be the same required by the framing of the currently proposed criteria.

5 Question 6: are there other waiver criteria that should apply for charities?

- 5.1 There are no factors or considerations that suggest different fee waiver criteria should apply in the charities appeal context as opposed to other jurisdictions.

6 Questions 7 & 10: do the District Court Rules sufficiently cover general administrative processes?

- 6.1 The appeal-related provisions of the District Court Rules 2014 are an appropriate means of providing for what the consultation paper terms the “administration processes” related to charities appeals. Avoiding the creation of multiple procedures and unnecessary differences between different jurisdictions promotes access to justice.
- 6.2 It may be useful to consider the appeal-related provisions of the High Court Rules 2016, which are broadly similar to those in the District Court Rules 2014, but contain some small differences. Rule 17.4, and schedule 6 to the High Court Rules 2016, provide for a standard

set of directions for appeals to the High Court about which the parties are to correspond before the conference. The District Court Rules 2014 do not contain any similar provisions.

- 6.3 It may also be useful to consider the provisions of the Taxation Review Authorities Regulations 1998, as a broadly analogous authority, to supplement the provisions of the District Court Rules 2014.
- 6.4 There are no features particular to the charities context, in terms of the appellate procedure itself, that would require the inclusion of charities-specific regulations for interlocutory procedures.

7 Question 8: is 20 working days enough time to apply for leave to proceed with an appeal?

- 7.1 It is desirable for the regulations to include a clear timeframe for applying for leave to proceed with an appeal, to ensure all participants have clarity as to the status of an appeal. The regulations should also provide expressly for the consequences of an appellant's failure to take steps within the relevant period, as does, for example, Rule 43 of the Court of Appeal (Civil) Rules 2005.
- 7.2 Though the selection of a timeframe is always somewhat arbitrary, absent any clear reason to the contrary, 20 working days appears appropriate. It is used in a number of other appeal-related contexts and provides a balance between finality and access to justice, by enabling an applicant with a meritorious case sufficient time to engage.

8 Question 9: criteria for determining if an appeal should proceed

- 8.1 It is generally desirable to provide clear criteria for the exercise of a discretion. Though the overriding criterion will most appropriately be something as general as "the interests of justice", as is the case elsewhere, there is a well-developed body of case law that articulates the criteria that inhere within that overall criterion. Reference to this body of case law provides a useful basis for articulating these criteria and would promote consistency between this jurisdiction and others (which, as noted above, is generally desirable).
- 8.2 An appropriate analogue, with a significant body of case law, is the jurisdiction of the Court of Appeal to grant an extension of time to an appellant to take steps to file a case on appeal pursuant to Rule 43 of the Court of Appeal (Civil) Rules 2005. These criteria allow for consideration of:
 - (a) the merits of the case in question (to the extent of whether the appeal appears capable of serious argument);
 - (b) the reasons for the appellant's failure to comply;
 - (c) the resources and sophistication of the appellant (in terms of whether they are represented or not, and their experience in the jurisdiction); and
 - (d) the impact on the respondent.

9 **Next steps**

- 9.1 We would be happy to answer any questions, or to discuss this feedback further. Please feel free to get in touch with me via the Law Society’s Senior Law Reform & Advocacy Advisor, Nilu Ariyaratne (Nilu.Ariyaratne@lawsociety.org.nz).

Nāku noa, nā

A handwritten signature in blue ink, consisting of several overlapping loops and a long horizontal stroke extending to the right.

Ataga’i Esera
Vice-President