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Pacific Civil Society Law Programme

***Law and Civil Society in Tonga: A Review of the
Enabling Legislative Framework***

Country Report

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I INTRODUCTION

Often referred to as *the Friendly Islands*, the Kingdom of Tonga is located Southeast of the Fiji Islands in the Central Pacific Ocean. It became a constitutional monarchy in 1875 and eventually attained the status of a British protectorate in 1900. The country gained its independence by an act of emancipation from Britain in 1970, and has since remained the only constitutional monarchy in the South Pacific. Tonga consists of 170 islands with a total land area of just around 688km² spreading across 360'00km² of water. The main island groups are Tongatapu, Vava'u, 'Eua, Niua and Ha'apai, all of which were divided into three regional governments. Characteristic of the larger Polynesian countries, Tonga has a resident population of approximately 100'000 with the same number said to be migrating and residing overseas in countries such as Australia, New Zealand, and the USA.

The country's laws or legal system consist of Acts of the Tongan Legislative Assembly, English statutes of general application, and common law. Contrary to the constitutional approach towards custom in most Pacific island countries, custom or customary law is not formally incorporated into thus not having special status as part of Tonga's laws. The judicial branch of the state comprised the Court of Appeal, Supreme Court, Magistrate Court and Land Court.

And as a constitutional monarchy, the King (a hereditary title) is the Head of State and appoints the Prime Minister, Cabinet and Governors of the regional governments. Composition of the Legislative Assembly reflects the country's highly stratified *class* system, and is made up of 30 seats broken down as follows: **12** ex officio seats reserved for cabinet ministers appointed by the monarch, **9** for nobles elected by and from amongst the country's 33 nobles, and the remaining **9** being elected as peoples' representatives by popular vote of the *commoners*. Suffrage is universal as all Tongan *commoners* of 21 years of age or over is eligible to vote for the 9 peoples' representatives.

The geographical circumstances of the country alone predetermine Tonga's development opportunities and limitations. And given its relatively small economy coupled with a low natural resource endowment, Tonga's economic growth is driven primarily by Government spending and remittances, albeit with slight contributions from the agriculture and tourism sectors. Current statistics have shown that remittances from Tongans abroad have more than quadrupled the value of the country's annual exports.¹ But the strength of Tonga's small economy is reflected in what is otherwise a high GDP per capita of around US \$1'900. Life expectancy in the country is around 70 years for both sexes, with a literacy rate of approximately 99.9% - more or less the highest in the region.

The presence and operation of civil society organisations (CSOs)² in the country have over the years produced results of considerable effect on the community. This has led as a consequence thereof to a gradual proliferation of the sector within various quarters of the community. CSO activities and programs in the country are tailor-made, divergent and reach right down to communities in which government services are seldom seen or felt. Some of the most active CSOs are vocal advocators and promoters *inter alia* of environmental and socioeconomic development issues that affect local communities. Classic examples include the *Tonga Community Development Trust*, *LangaFonua 'a Fafine Tonga*, and the *'Aloua Ma'a Tonga*.

This report will thus present some general and specific findings of a preliminary review of the country's laws that affect the operation of CSOs in Tonga. The key role is to bring to the attention of law and policy makers legal issues that impinge on the present and future operation of CSOs. It is anticipated that this report will make an appreciable contribution to future *law reform exercises* pursued in the quest for an enhanced legislative environment conducive to the CSO community in Tonga.

II ENABLING LEGISLATIVE & OPERATIONAL ENVIRONMENT

¹ Tonga National Assessment Report (2003)

² Unless expressly stated to the contrary or excluded, the expression '*civil society organizations*' (CSOs) will be used throughout this report to refer to non-profits organizations (NPOs), non-governmental organizations (NGOs), community-based organizations (CBOs), societies, trust boards, councils and associations whether incorporated or otherwise.

A Constitutional basis and foundation

The Constitution of Tonga is perhaps the oldest in the region, whilst similarly the most unique in terms of approach towards the issue of fundamental rights and freedoms. Unfortunately for CSOs, the foundational basis for their existence in the island Kingdom is wanting in the Constitution. In other words, the freedoms considered most fundamental for CSOs – the freedoms of association expression assembly and speech – are not expressly provided for or incorporated within provisions of the Constitution. The closest the Constitution could go however is the freedom stipulated under clause 7 which provides:

It shall be lawful for all people to speak write and print their opinions and no law shall ever be enacted to restrict this liberty. There shall be freedom of speech and of the press for ever but nothing in this clause shall be held to outweigh the law of defamation, official secrets or the laws for the protection of the King and the Royal Family.

This Constitutional guarantee was severely restricted by an amendment in 2003 which allows Parliament to enact laws regulating the operation of the media as well as those '*considered necessary or expedient in the public interest, national security, public order, morality, cultural traditions of the Kingdom, privileges of the Legislative Assembly and to provide for contempt of Court and the commission of any offence*'.³

B Nature and Types of CSOs

Civil society organisations in the Kingdom of Tonga comprise both incorporated and unincorporated associations, and membership and non-membership organisations. Whilst some international NGOs do have branches in the country, the majority are local organisations. The non-membership organisations (in particular, international NGOs) mostly operate in the pursuit of activities for the public benefit whilst a good majority of the local organisations were established principally for private gain **albeit** with some spill-over benefit to non-members and the public generally.

³ Act of Constitution of Tonga (Amendment) Act 2003, s.2

It is worth highlighting at this juncture that the concepts of charity, poverty and public benefit are alien thus non-existent in most, if not, all Pacific Island cultures or societies. As such, any membership society established for advancing the interest of members but with spill-over benefits to non-members will, given the socio-cultural context of Pacific societies, satisfy the **island test** for a *public benefit* purpose. In this vein, the adoption and evolution of the western concepts of *charity* and *public benefit* within Pacific societies have landed a narrower definition more attuned towards the socio-cultural circumstances of the same. Thus, a public benefit is deemed as one that spreads out from the activities of a core unit – be it a household or a cluster of households or tribal unit or a territorial grouping - to other non-members of such units. And any help that flows out of the activities an organised unit, such as an incorporated society, to a non-member is considered charitable or of a public benefit *per se* as per evolving perceptions of Pacific Islanders. What is crucial is the fact that a common enterprise jointly undertaken by members of a organised unit (either on the basis of tribes or villages or groups of people with a common interests) for private gain has equally benefited non-members and non-participants alike. Interestingly, such organised units are popular throughout the region and functioning as a formidable force within civil society networks.

As is common throughout the Pacific Islands region, the focus of most CSOs is predominantly socioeconomic development with emphasis on rural communities. Thus, whilst the establishment of some local CSOs may be driven by pecuniary interests, the underlying objective will always be the advancement of livelihood for members and participating communities. There are also church-based organisations whose programs mainly centre on charitable and religious activities. In general, the specific areas of focus in the Kingdom of Tonga in terms of targeted areas are diverse, and include community development, youth, gender equality, good governance and transparency, environment, education and capacity building, health and handicap rehabilitation, family welfare and domestic violence, and food security.

C Purposes and roles of Civil Society Organisations

Whilst the purpose and objects of most incorporated CSOs are prescribed in detail in their constitutions, this section will only focus on objects as set out various statutes enacted by the country's Legislative Assembly. This section will be approached by looking at different legislation categorised according to their scope and application. These are **(a)** legislation with general application which provides the enabling legislative framework for incorporation of all classes of CSOs (*general legislation*) and **(b)** statutes that provide for the incorporation of identifiable specific bodies with prescribed mandates (*special legislation*). General legislation includes the *Charitable Trusts Act 1993*, *Incorporated Societies Act*⁴, and the *Cooperative Societies Act*⁵, whilst special legislation includes the *Tonga Red Cross Society Act*⁶, and the *Polynesian Heritage Trust Act*⁷.

1 Statutory Objects

(i) General Legislation

(a) *Charitable Trusts Act 1993*

As the principal statute governing organisations established for charitable causes, ss.3 and 4 of the Act are unequivocal as provisions of the same apply to trustees or societies which are operating '*exclusively or principally for charitable purposes....*' Thus, no ambiguity emanates out of its provisions as the prescribed object of the Act is specific.

(b) *Incorporated Societies Act*⁸

⁴ Cap 28

⁵ Cap 118

⁶ Cap 83

⁷ Cap 91

⁸ Cap 28

This Act is ambiguous as to the prescribed objects which would qualify or render an organisation eligible for registration under its provisions. Section 3 of the Act however takes an inclusive approach by prescribing only the disqualifying factor or object for denying registration. Thus, by virtue of s.3, *‘[a]ny society consisting of not less than 5 persons associated for any lawful purposes but not for pecuniary gain’* qualifies for registration under the Act. By inference, all lawful objects, whether charitable or otherwise, are covered under the above provision. Note that the ambiguity with the Act as to objects is meant to be addressed in the rules of a society as by virtue of s.5 *‘the rules of a society shall state...the objects for which the society is established’*.

(c) *Cooperative Societies Act*⁹

Opposed to the amorphous approach in the *Incorporated Societies Act*, the definition of objects for registration of cooperative societies is unequivocal. Section 4 of the Act stipulates that a society will be eligible for registration if its principal object is *‘the promotion of the economic interests of its members in accordance with cooperative principles’* or the facilitation of *‘the operations of such a society...’* Rule 69 the *Cooperative Societies Rules*¹⁰ further requires a society to prescribe in its bylaws such matters including *‘the objects for which the society was established’*. Note that cooperative principles founded on western legal systems are not readily compatible with the socioeconomic and cultural circumstances of some Pacific Island societies, thus, in dire need of adaptation to better enhance the important functions of such a vital sector. The failure or lack of success of most community-based cooperative societies in the region is clear testimony to this contradiction.

(ii) Special Legislation

⁹ Cap 118

¹⁰ Subsidiary legislation made pursuant to s.56 of the Act.

(a) *Tonga Red Cross Society Act*¹¹

Whilst incorporating the local chapter of the Red Cross Society, s.4 of the Act clearly states the object of the Society which is *‘to carry on and assist in work for the improvement of health, the prevention of disease and the mitigation of suffering throughout the world in time of peace and war’*.

(b) *Polynesian Heritage Trust Act*¹²

Section 3 of the Act clearly states the object of the Trust as charitable as per the Trust Deed annexed as a schedule to the Act. Clause 4 of the Deed further defines the specific objects as follows:

To foster promote and assert the values and the heritage of the culture of Polynesia not only for the benefit of the people of Polynesia but also for the benefit of all people worldwide; and without limiting the generality of the foregoing and merely by way of illustration of the general intention, to provide and stimulate education and training programmes; to publish and promote the culture of Polynesia through all means of communication; to provide scholarships financial and other assistance to people born in Polynesia and to such other person or persons whom the Trust Board shall approve; to encourage benefit and assist entertainments, exhibitions, seminars and other activities featuring the culture of Polynesia; to create endowments; [and] to do all such other things as may be incidental or conducive to the attainment of the foregoing objects and purposes.

2 Determination of Status

The status of CSOs is entirely dependent on the objects of such organisations, as well as the statute under which an application is made. In terms of objects, these are either prescribed in enabling statutes or other instruments governing the establishment and operation of the same such as constitutions. In this connection, there is no authority established by legislation or otherwise to

¹¹ Cap 83

¹² Cap 91

function as a regulatory institution for determining whether an organisation is established for charitable or public benefit purposes so as to be eligible for benefits such as tax exemption or government subsidy.

General legislation providing the principal legal framework for the operation of CSOs (*viz. Charitable Trusts Act, Cooperative Societies Act, and Incorporated Societies Act*) by construction offers some assistance by way of a clearing house mechanism. Thus, applications for registration emerge as the most crucial stage at which the Registrar of Incorporated Societies¹³ or the Registrar of Cooperative Societies¹⁴ upon accepting an application is deemed to confirm the status of an applicant organisation. However, that alone is inconclusive as the express conferment of status through prescribed instruments is not plainly addressed within the legislative framework. In this contention, the issuance of a certificate of registration by a Registrar only operates as conclusive evidence of an organisation being duly registered – not as evidence of confirmed charitable status. Section 8 of the *Charitable Trusts Act* provides a crucial illustration of this critical point. Thus, s.8 stipulates:¹⁵

Every certificate of incorporation issued under the seal of the Registrar shall be sufficient evidence, in the absence of proof to the contrary, that the Board therein named was incorporated on the date specified in the certificate, and that the procedural requirements of this Part of this Act have been observed, but shall not be evidence that the purposes of the trust or society are exclusively or principally charitable.¹⁶

3 Media Access and Exercise of Related Freedoms

The Kingdom of Tonga is perhaps the only country in the region with strict media laws that not only control but similarly constrains media freedom. As a result, CSOs in the country do not readily enjoy a relatively free environment in terms of freedom of expression or publication. The *Act of Constitution*

¹³ For applications under the *Charitable Trusts Act* and the *Incorporated Societies Act*.

¹⁴ For applications under the *Cooperative Societies Act*.

¹⁵ Its equivalent provision is s.8 of the *Incorporated Societies Act*.

¹⁶ Emphasis added

(Amendment) Act 2003 introduces this swift reform which directly targets the exercise of the said freedoms. Thus, by virtue of the amendment, it is lawful for the Legislative Assembly ‘to enact such laws as are considered necessary or expedient in the public interest, national security, public order, morality, cultural traditions of the Kingdom, privileges of the Legislative Assembly and to provide for contempt of Court and the commission of any offence...[and] to regulate the operation of any media’.

Whist CSOs’ access to and use of the mass media is in general not the direct target of newly enacted laws, strict censorship controls on newspapers – a communication medium more popular for the dissemination of information – nonetheless impinges on the freedom of expression and publication enjoyed by such organisations. The general situation therefore is that media access and freedom is not *readily* guaranteed under existing laws. Any CSO resorting to publishing its own newspaper, information bulletin or material of a similar nature will be caught within the provisions of the *Newspaper Act 2003* and the *Protection from Abuse of Press Freedom Ordination 2003* – the latter being enacted purportedly to protect the King and royal family, and the country’s Government. Controls in the *Newspapers Act* include compliance with publication standards to be prescribed by the Minister responsible for communication,¹⁷ acquisition of a publishing licence¹⁸ as well as a licence for local sale and distribution by agents of foreign newspapers,¹⁹ and censorship measures.²⁰ Any foreign newspaper that interferes with domestic politics will be prohibited from sale or distribution within the country. Against the backdrop of such controls is the notable lack of exemptions for material published by CSOs, as all publishers of newspapers or similar printed material are equally subjected to the requirements of the Act.

D Establishment and Incorporation

¹⁷ s.8

¹⁸ s.9

¹⁹ s10

²⁰ s12

Processes for the conferring of juridical status to CSOs, i.e. registration or incorporation, are not centralised under a single statute. Whilst those that are incorporated by special legislation do not require separate registration to acquire juridical status, those that are not statutory bodies or are not incorporated by special legislative enactment will nonetheless find refuge in the general category of legislation, viz. the *Charitable Trusts Act*, *Incorporated Societies Act*, and the *Cooperative Societies Act*. These will be discussed below.

1 **Registration**

(i) *Charitable Trusts Act*

Eligibility for registration is deemed satisfied if a trust is established exclusively or principally for charitable purposes. The process for incorporation is commenced by an application in the prescribed form (Forms 1 & 2 of the Schedule) lodged with the Registrar – the latter being the Registrar of incorporated societies appointed under the *Incorporated Societies Act*. Application is to be made by the trustees of a trust or an unincorporated society.²¹ Note however that such registration is also contingent upon evidence of authorisation through internal processes of the applicant which includes a resolution passed by the majority in accordance with the rules of the trust or society, or that such application is authorised by the trust deed.²² Documents to be furnished to the Registrar before registration can be effected includes (i) a certified copy of a document (will, trust declaration, etc) evidencing the general purposes of the applicant trustees or society, (ii) a statutory declaration by one subscriber to such application setting out details of any trusts property not specified under (i) above, (iii) a copy of the society's rules providing for constitution of the same, and (iv) a statutory declaration by a subscriber to the application showing proof that such application is made pursuant to a resolution passed in accordance with rules of the applicant society.²³ Upon being satisfied the purpose of the applicant is principally charitable, and

²¹ ss3&4

²² s5

²³ s6

procedural requirements of the Act being complied with, the Registrar will then issue under his seal a certificate of incorporation of the board of the trust or society.²⁴

(ii) *Incorporated Societies Act*

To be eligible for registration, a society must consist of at least 5 persons whose majority resolution authorising incorporation is similarly required for consideration of the application by the Registrar of Incorporated Societies.²⁵ Application for incorporation is to be made pursuant to s.6 of the Act which requires two copies of the rules of the society to be attached with the application and signed by at least 5 members of the society, or in the case of a body corporate, the affixing of its seal. Note however that each signature of a subscriber is to be attested by an independent witness who is not a subscriber. Further, s.6(b) requires that such application must be accompanied by the prescribed fee *‘together with a statutory declaration made by a solicitor to the effect that a majority of the members of the society have consented to the application and that the rules so signed or sealed are the rules of the society’*. Registration is completed with the issuance of a certificate of registration by the Registrar, an act the effect of which would render²⁶

the subscribers to the rules of the society, together with all other persons who are then members of the society or who afterwards become members of the society in accordance with the rules thereof, shall from the date of incorporation mentioned in the certificate, be a body corporate...having perpetual succession... and capable...of exercising all the functions of a body corporate and of holding land.

(iii) *Cooperative Societies Act*

²⁴ s.7

²⁵ s3

²⁶ s.9

Applications for registration are to be made to the Registrar of Cooperative Societies appointed by the Minister under s.4 of the Act. To be eligible for registration, a society must have at least 5 members²⁷ who have attained the age of majority, and *'be resident within or in occupation of land within the society's area of operations as described by the by-laws'*.²⁸ An application is to be made to the Registrar together with copies of proposed bylaws of the society and must be signed by at least 5 persons qualified to be members.²⁹ In the case of a registered society being a corporate member of the applicant society, s.7(2) (b) requires the signature of a duly authorised person on behalf of the former, *'and where all the members of the society are not registered societies, by 5 other members, or when there are less than 5 other members, by all of them'*. Note that such application is to be accompanied by copies of the proposed bylaws of the applicant society.³⁰ Registration will be given effect upon the Registrar being satisfied that a society and its constituent bylaws have complied with provisions of the Act³¹ and is evidenced by a certificate of registration issued by the same.³²

2 Administering Authority

There are two separate Registrars performing all statutory functions set out in the *Charitable Trust Act*, *Incorporated Societies Act*, and the *Cooperative Societies Act*. The registration of all trusts and incorporated societies is done by the Registrar appointed by His Majesty in Privy Council under s. 32 of the *Incorporated Societies Act*, whilst the registration of cooperative societies is done by the Registrar appointed under s.4 of the *Cooperative Societies Act*. It is uncertain whether functions of the two Registrars, for purposes of practicality and operational expediency, are merged and performed by a single civil servant as would have been the case in most Pacific island countries such as Solomon Islands. However, given the small size of the country's civil service, it is most likely that, for practicality reasons, that may have been or ought to be the case.

²⁷ s.6(1)

²⁸ s.25

²⁹ s7(2)

³⁰ s7(4)

³¹ s.8

³² s.10

3 Management of Registry & Accessibility

There is no centralised registry that functions as the sole statutory repository of information relating to all registered CSOs.³³ But given the identical functions of the Registrars appointed under the forgoing enabling statutes, it is imperative that some operational centralisation be put in place. Under the current legislative framework, a register of incorporated societies and trust boards is to be kept and managed by the Registrar by virtue of provisions of the *Incorporated Societies Act*³⁴ and *Charitable Trusts Act*.³⁵ Rule 2 of the *Cooperative Societies Rules* requires the Registrar to keep a register of societies ‘to be called “the Register of Societies” wherein shall be entered particulars relating to the registration of societies and their by-laws’.

Public access to the registers established under the above statutes is guaranteed. However, a nominal fee is or may be charged for the inspection of and extraction of information from the registers kept by the Registrar under the *Charitable Trusts Act*³⁶ and *Incorporated Societies Act*.³⁷ By virtue of rule 4 of the *Cooperative Societies Rules*, the register of societies is ‘open to inspection by the public at all reasonable times and free of charge’. It remains unclear whether the documents, information and records forming part of any register accessible to the public also include annual audited accounts and financial statements of societies and trust boards. Matters to be entered in the register include ‘particulars relating to the registration of societies and their bylaws’³⁸ as well as all matters required by legislation or subsidiary legislation to be recorded by the Registrar.³⁹ Thus, whilst the *Cooperative Societies Act* expressly excludes

³³ However, the author will not speculate on or discount the prospects of such single registry (for practicality reasons) operating at the time of preparing this report as no such information is furnished to the same.

³⁴ s.33

³⁵ s.24

³⁶ s.25

³⁷ s.34

³⁸ *Cooperative Societies Rules*, r.2

³⁹ *Charitable Trusts Act*, s.24, and *Incorporated Societies Act*, s.33

audited accounts and statements from the register accessible to the public, provisions of the *Charitable Trusts Act* and *Incorporated Societies Act* are too wide and ambiguous in this respect.

E Termination of Operation

This section will consider in brief the processes and grounds of bringing to end the operation and juridical existence of a registered society and trust board, as well as the remedies available to a society aggrieved by such acts or decisions. In general, options to terminate the *life* of a registered society or trust board can be pursued through three mechanisms: (i) voluntary winding up, (ii) winding up by court, or (iii) dissolution and cancellation by the Registrar. Discussion herein will be restricted to the powers of the Registrar in relation to any or all of the above options.

1 Cancellation, Dissolution & Winding Up

(i) Charitable Trusts Act

No mechanism for voluntary winding up by resolution of members is provided in the Act. However, an application for winding up by the Supreme Court may be made by any of the following: (a) Attorney General, (b) board, (c) a member of the board, (d) a creditor of the board, (e) Registrar or '*any other person who adduces proof of circumstances which in the opinion of the Court make it proper that he should make the application*'.⁴⁰ Locus standi is thus set in s.21 of the Act. Additionally, the powers of the Registrar is most crucial in s.22 of the Act which confers upon the same the power to dissolve a board upon being satisfied that such board '*is no longer carrying on its operations or has been registered by reason of a mistake of fact or law...*' No other grounds for dissolution are prescribed either implied or express in the Act, thus, giving the Registrar the ultimate power and discretion to make a decision in the exercise of such power. It must be highlighted that absolute discretion without prescribed guidelines for

⁴⁰ s.21(2)

the exercise of the same will often create room for arbitrariness and abuse of statutory powers.

(ii) *Incorporated Societies Act*

By virtue of provisions of the Act, an incorporated society can be wound up voluntarily by resolution of its members confirmed at a subsequent meeting,⁴¹ or it can be wound up by petition to the Supreme Court with such action to be instituted by the society or a member thereof, a creditor or the Registrar.⁴² Opposed to the *Charitable Trusts Act*, the grounds for winding up by the Supreme Court under the *Incorporated Societies Act* are prescribed. Thus, s.25 of the Act provides for the winding up of a society by the Supreme Court if:

(a) the society suspends its operations for the space of a whole year or (b) the members of the society are reduced in number to less than 5 or (c) if the society is unable to pay its debts or (d) if the society carries on any operation whereby any member thereof makes any pecuniary gain contrary to the provisions of [the Act] or (e) a Judge of the Supreme Court is of the opinion that it is just and equitable that the society should be wound up.

Further, the Registrar may by virtue of s.28(1) of the Act dissolve a society if he or she '*is satisfied that a society is no longer carrying on its operations or has been registered by reason of a mistake of fact or law...*' Note however that the Registrar's power to carry out dissolution also includes the power to revive and reinstate a society to the register by revoking the earlier declaration in the event the latter is made on the basis of error or mistake.⁴³ An issue arising out of this provision is whether the Registrar can similarly be compelled to reinstate a society to the register in the event he or she has failed or refused to do so despite having full or reasonable notice of such error or mistake.

(iii) *Cooperative Societies Act*

⁴¹ s.24(1)

⁴² s.26(1)

⁴³ s.28(3)

Only two options for terminating the operation of a society are present within provisions of the Act, viz. dissolution after an inquiry under s.41 into ‘*the constitution, working and financial condition of a registered society*’ or upon application of at least three-quarters ($\frac{3}{4}$) of members of the society,⁴⁴ or a cancellation of registration by the Registrar on the ground that membership of the society is reduced to less than 5. As regards the latter, s.44 provides:

The Registrar may by order in writing cancel the registration of any registered society other than a society which includes among its members one or more registered societies, if at any time it is proved to his satisfaction that the number of the members has been reduced to less than 5.

Strangely enough, the Act lacks provision for the revival and reinstatement of a registered society to the register in the event the Registrar’s exercise of power under ss.43 and 44 is done on the basis of error or mistake. This must be addressed as a society upon being cancelled will, by operation of s.45, ‘*cease to exist as a corporate body from the date in which the order takes effect...*’

2 Liquidation

Whilst a liquidator is to be appointed by the Registrar to undertake liquidation of a cancelled society under the *Cooperative Societies Act*, provisions of the *Charitable Trusts Act* and *Incorporated Societies Act* are rather silent despite the presence of features characteristic of liquidation processes. Thus, the latter two statutes will still form part of the discussions below.

(i) Charitable Trusts Act

By virtue of s. 23, all surplus assets of a board being wound up or dissolved by the Registrar are to be disposed of, after payment of all costs debts and liabilities, ‘*by the Court to such other charity, board or trust which by its nature*

⁴⁴ s.43(1)

and character most closely approaches the Board which has been wound up or failing which, to the Crown'. It is unclear which party will play the role equivalent to a *liquidator*, let alone the instituting party effecting application for Court directions in cases of voluntary winding up or dissolution by the Registrar. Whilst a functional approach will identify the Registrar as in the best position, ambiguity in the Act is of little assistance in confirming this position.

(ii) *Incorporated Societies Act*

Section 27 takes a slightly different approach as upon voluntary winding up or dissolution of a society by the Registrar, '*all surplus assets after the payment of all costs, debts and liabilities shall, subject to any trust affecting the same, be disposed of in the manner provided by the rules of the society or if such assets cannot be disposed of in accordance with the rules, then as the Supreme Court... directs*'. No clarification is however provided in terms of any assets affected by a trust as specifically excluded in the above provision.

(iii) *Cooperative Societies Act*

A liquidator is to be appointed by the Registrar under s.46 in the event of cancellation of a society under ss.43 and 44 of the Act. The powers and functions of a liquidator are set out in s.47 but will be exercised subject to the controlling powers of the Registrar who can *inter alia* remove the liquidator. In essence, the powers of a liquidator are to:⁴⁵

- (a) determine from time to time the contribution to be made by members and past members or by the estates of deceased members of the society to its assets;
- (b) appoint a day by proclamation or notice before which creditors whose claims are not already recorded in the books of the society shall state their claims for admission or be excluded from any distribution made before they have proved them;
- (c) decide any question of priority which arises between creditors;
- (d) refer disputes to arbitration and institute and defend suits and other legal proceedings on behalf of the society by his name or office;
- (f) decide by what

⁴⁵ s.47(1)

persons and in what proportions the costs of liquidation are to be borne; (g) give such directions in regard to the collection and distribution of assets as may be necessary in the course of winding up the society; (h) compromise any claim by or against the society provided the sanction of the Registrar has first been obtained; (i) call such general meetings of members as may be necessary for the proper conduct of the liquidation; (j) take possession of the books, documents society; (k) sell the property of the society; carry on the business of the society for winding it up beneficially: Provided that nothing herein contained shall entitle the liquidator of a creditor society to issue any loan; and (l) arrange for the distribution of the assets of the society in a convenient manner when a scheme of distribution has been approved by the Registrar.

As can be noted from the above, a liquidator's powers are wide and extensive, thus, manifest the importance of the liquidation process and all matters involved. Similarly note that by virtue of the same provision, the liquidator is empowered *'to summon and enforce the attendance of parties and witnesses and to compel the production of documents by the same means and (as so far as may be) in the same manner as is provided in the case of a civil court.'*⁴⁶ The liquidator's exercise of power and functions is not absolute as he or she is however subject to the Registrar's powers of control and revision. Thus, the Registrar may⁴⁷

(a) Rescind or vary any order made by a liquidator and make whatever new order is required; (b) Remove a liquidator from office; (c) Call formal books, documents and assets of the society; (d) By order in writing limit the powers of a liquidator under section 47; (e) Require accounts to be rendered to him by the liquidator; (f) Procure the auditing of the liquidator's accounts and authorise the distribution of the assets of the society; (g) Make an order for the remuneration of the liquidator; (h) Refer any subject of dispute between a liquidator and any third party to arbitration if that party consents in writing to be bound by the decision of the arbitrator.

3 Appeals

⁴⁶ s.47(2)

⁴⁷ s.48

Matters in relation to which appeals can be made are clearly spelt out in the *Charitable Trusts Act, Cooperative Societies Act, and Incorporated Societies Act*. Thus appeals can be lodged (i) to the Supreme Court against any decision of the Registrar,⁴⁸ (ii) to the Privy Council against the decision of the Registrar in refusing to register rules of a society, or an amendment of the said rules,⁴⁹ (iii) to the Minister against decision of the Registrar in refusing to register a society,⁵⁰ (iv) to the Minister against an order of the Registrar for repayment of debts by any person indebted to a society,⁵¹ and (v) to the Registrar as regards a dispute referred by the same to an arbitrator.⁵² There is provision in the *Cooperative Societies Act* for appeals to the Minister against an order by the Registrar for the dissolution or cancellation of a society.⁵³ Such appeal is to be lodged within two months from the date of the Registrar's order. No similar provision is found in the *Incorporated Societies Act* or the *Charitable Trusts Act*. The *Cooperative Societies Act* has similarly gone a step further by providing for the Registrar or Minister, when determining appeals lodged for their respective consideration, to refer questions of law to the Supreme Court for opinion which 'shall be final and conclusive'.⁵⁴

III ADMINISTRATION AND GOVERNANCE

A Umbrella Organisation – The *Civil Society Forum of Tonga (CSFT)*

The coordinating body of CSOs in the country is the *Civil Society Forum of Tonga (CSFT)*, a non-statutory umbrella body established in 2001 with a current membership of 46 organisations representing various quarters of the

⁴⁸ *Charitable Trusts Act*, s.13

⁴⁹ *Incorporated Societies Act*, s.12

⁵⁰ *Cooperative Societies Act*, s.8

⁵¹ *ibid*, s.52

⁵² *ibid*, s.54(3)

⁵³ s43

⁵⁴ s55

community with divergent interests and focal areas. The CSFT aims to ‘coordinate the needs and collective roles of Civil Society Organizations (CSOs) and to strengthen their capacity to be able to better serve their communities’.⁵⁵ Its key areas of strategic focus are capacity building, transparency and good governance, community development, small grant program, environment, youth women and gender equality, and infrastructure capacity building.⁵⁶ CSFT is gradually recognised by the Tongan Government as a strategic partner ‘in taking the lead role for involvement of Non Government Organisations on political, social, and economic activities that lead to sustainable development, economic growth and income generation’.⁵⁷ However, the communication channel between CSOs (a majority of which are affiliated to CSFT) and the Government is at present less developed or formalised, resulting in an ad hoc link that is comparatively weak. But such weak communication channel does not necessarily operate to impede the marvellous work done by CSFT thus far as the inter-agency communication defect is offset by a relatively strong CSO network facilitated largely by the unfaltering umbrella body.

B Management

This section will briefly set out the types and forms of internal management bodies that exercise executive and management functions over the affairs of incorporated or statutory organisations. In focus will be those specified under general legislation as well as bodies specifically incorporated per special enactment.

1 General Legislation

(i) Charitable Trusts Act

Any incorporated trust or society is to be managed by a board of trustees consisting of trustees or persons representing other societies being members of

⁵⁵ www.civilsocietytonga.org

⁵⁶ www.piango.org/tonga

⁵⁷ *op.cit.*

the same. Generally, this matter is regulated in detail by the instrument creating the trust.

(ii) *Incorporated Societies Act*

Management and executive functions fall under the mandate of the management committee or committees as per a society's constitution and rules. Thus, the latter will play a greater role in defining the management body or bodies of an incorporated society.

(iii) *Cooperative Societies Act*

The functions and powers of a society are exercised by a management committee or number of committees as prescribed in its constitution and bylaws. The approach in this Act is similar to that in the *Incorporated Societies Act* which leaves matters relating to internal management to be determined by the bylaws of an incorporated society.

2 Special

(i) *Tonga Red Cross Society Act*

The governing body of the Society is the Executive Committee which is similarly empowered to appoint divisional committees with such powers and duties as prescribed in the Society's rules. Membership of the Executive Committee is to be determined according to such rules.

(ii) *Polynesian Heritage Trust Act*

The Trust is governed and managed by a Trust Board comprising persons appointed as trustees of the same. Composition of the Trust Board is set out in clause 6 of the Trust Deed annexed as schedule to s.2 of the Act. Whilst prescribing a minimum of four members, the Act imposes no limits on Board

membership. Specifically identified in the Deed to be members of the Board are the Sovereign of Tonga, Head of State of Samoa, Tui Lau of Fiji,⁵⁸ and a representative of the Maori people. It is unclear whether reference to *Maori* is meant to refer to either the Maori of the Cook Islands or New Zealand, or to both groups.

C Powers & Duties

Outlined below are the powers of management or governing bodies of societies and trusts registered under general legislation and or incorporated by virtue of special legislation. Whilst the powers prescribed in general legislation are broad, detailed powers and functions are normally set out in the rules bylaws or constitutions of registered societies and trusts. These are as follows:

1 General Legislation

(i) Charitable Trusts Act

Section 9 stipulates that a Board that is incorporated ‘*shall have perpetual succession...and (subject to this Act and to the rules and other documents providing for the constitution of the Board) shall be capable of holding real and personal property of whatsoever nature and whether situated in Tonga or elsewhere, and of suing and being sued, and of doing and suffering all such acts and things as bodies corporate may lawfully do and suffer*’. A Trust Board is similarly empowered to dedicate trust property for any public purpose,⁵⁹ sell or exchange any part thereof,⁶⁰ and to purchase any property whether situated in Tonga or overseas.⁶¹ In the event of a society being registered as a Board, such powers also include the right of the Board to apply for a variation or change to the name of the same subject to a resolution of the society.

(ii) Incorporated Societies Act

⁵⁸ *Tui Lau* means the paramount chief of the Lau district of Fiji.

⁵⁹ s.17(1)(a)

⁶⁰ s.17(1)(b)

⁶¹ s.17(1)(c)

Section 9 states that upon the issuing of a certificate of incorporation, the subscribers to the rules of the society and subsequent members will become ‘*a body corporate...having perpetual succession and a common seal, and capable forthwith...of exercising all the functions of a body corporate and of holding land*’. Further translation of such powers into actionable items is often covered in greater detail in a society’s rules. However, any powers prescribed in a society’s rules the exercise of which would render an effect beyond the scope set in the Act will be deemed ultra vires.

(iii) *Cooperative Societies Act*

By virtue of s.9 of the Act, the registration of a society renders it a body corporate ‘*with perpetual succession and with power to hold property, to enter into contracts, to institute and defend suits and other legal proceedings, and to do all things necessary for the purpose of its constitution*’. A society can similarly make loans to another society subject to consent of the Registrar,⁶² receive deposits and loans from non-members,⁶³ invest its funds in approved schemes including securities,⁶⁴ and can similarly borrow money.⁶⁵ However, the exercise of such borrowing power is subject to a maximum limit set at a general meeting of the society and sanctioned by the Registrar.⁶⁶

2 Special Legislation

(i) *Tonga Red Cross Society Act*

By virtue of s.3 of the Act, the Society ‘*shall have perpetual succession...and power to sue and be sued in its corporate name and to acquire, hold and dispose of moveable and immoveable property in so far as the Laws of the Kingdom allow*’.

⁶² s.34(1)

⁶³ s.35

⁶⁴ s.37

⁶⁵ *Cooperative Societies Rules*, r39

⁶⁶ *ibid*, r20.

(ii) *Polynesian Heritage Trust Act*

Section 5 of the Act unequivocally states that the Trust Board will, upon incorporation, ‘has perpetual succession and...is capable of holding real and personal property of whatsoever nature and wherever situated worldwide, and of suing and of being sued, and of doing and suffering all such acts and things as bodies corporate may fully do and suffer’.

D Financial Audit of Accounts

1 General Legislation

The Registrar is empowered to audit or cause to be audited and inspect the accounts, books, papers or securities of societies registered under the *Cooperative Societies Act*⁶⁷ and the *Incorporated Societies Act*.⁶⁸ Whilst audit requirements and processes are to be instituted by the Registrar under the *Cooperative Societies Act*, the latter *Act* instead requires annual audit statements to be prepared by a society and submitted to the Registrar thereafter. The particulars of an audit statement will include findings of an examination of overdue debts, valuation of assets and liabilities,⁶⁹ examination of income and expenditure mortgages charges and securities of a society at the close of a financial year.⁷⁰ The *Charitable Trusts Act* similarly requires a Trust Board to submit audited annual financial statements to the Registrar. Such statement will contain particulars of⁷¹

[t]he income and expenditure of the Board during the Board's last financial year...assets and liabilities of the Board at the close of the said year...mortgages, charges and securities of any description affecting any of the property of the Board at the close of the said year...names, addresses and occupations of all

⁶⁷ s.39

⁶⁸ s.23

⁶⁹ *Cooperative Societies Act*, s.39(2)

⁷⁰ *Incorporated Societies Act*, s23(1)

⁷¹ s30

trustees or members of the committee or other governing body and the dates of appointment.

Note that statutory requirement for a Trust Board to have audited financial statements furnished annually to the Registrar is absent in most jurisdictions in the Pacific, including Samoa and Solomon Islands. The approach in Tonga is thus plausible.

2 Special Legislation

(i) Tonga Red Cross Society Act

The independence of the Tonga Red Cross Society from the Government renders it *exempted* from statutory audit requirements meant for purposes of accountability and public scrutiny. Such independence as affirmed in s.6 of the Act is a reflection of the UNGA Resolution adopted on 19th November 1946. However, internal requirements of the Society require annual audits to be carried out. Such matters are covered in detail in the Society's rules made by the Executive Committee under its rule-making powers set out in s.8 of the Act.

(ii) Polynesian Heritage Trust Act

Clause 10 of the Trust Deed annexed as schedule to the Act provides:

The Trust Board shall cause proper account records to be kept...[and] books of account shall be kept at the office where the management functions of the Trust are carried out or at such other place as the Trust Board shall decide and shall always be open for inspection by the Trust Board or any of its members. The Trust Board shall appoint an auditor...[who] shall hold a recognised qualification in accounting and be a person recognised by the Trust Board as being competent in auditing.

E Distribution of Profit & Gains

This issue applies principally to membership organisations registered under general legislation of the country. The principal issue is whether legislation permits the distribution of the income and profit of registered societies, and if so, who or what class of persons should or ought to be the beneficiaries.

(i) *Cooperative Societies Act*

Section 38 of the Act permits the distribution to members of the balance of any profit made in a financial year after a quarter ($\frac{1}{4}$) of the total profit made is carried to its reserve fund. Note however that no such dividend or bonus is to be made by a society with unlimited liability without order of the Minister. A society is also given the option of contributing '*an amount not exceeding 10 per cent of the remaining net profit to any charitable purpose or to a common good fund*'.⁷² The latter testifies to the fact that whilst cooperative societies are not established for charitable purposes *per se*, contributions toward charitable or common good causes forms to varying degrees an inherent or integral element in their operations. In this regard, the critical issue is that the prescribed ceiling of 10% is too restrictive on societies that may wish to make charitable donations of larger amounts. Such matters should be left to be decided by resolution of members whose exercise of conscience or choice should not be fettered or constrained by *poorly thought* out statutory restrictions.

(ii) *Incorporated Societies Act*

The Act prohibits pecuniary benefit to members as the objects of any registered society must not be one for pecuniary gain.⁷³ Private benefit by way of pecuniary gain is however defined as excluding pecuniary gain earned by a member of the society by way of salary as servant or officer of the same,⁷⁴ or a gain to which such member would be equally entitled if he or she were not a member.⁷⁵ Any pecuniary gain earned by such society is likewise excluded as gain for private

⁷² s.38(2)

⁷³ s.3

⁷⁴ s.4(d)

⁷⁵ s.4(e)

benefit prohibited under the Act provided the same is not for distribution between members as dividend or bonus.⁷⁶

F Conflict of Interest & Accountability

(i) Charitable Trusts Act

There is absence of provision that expressly regulates matters amounting to conflicts of interest or one that establishes checks and balance mechanisms. However, it is common practice to leave such matters to be governed either by the instrument creating the trust or the rules thereof. Whilst the intervention of the Attorney-General or similar authority is statutorily required in the public interest to randomly examine the affairs of incorporated charities in jurisdictions such as Samoa, no similar approach is entrenched in the Act.

(ii) Incorporated Societies Act

Matters of conflicts of interest are left to be regulated by the rules of a registered society as can be implied from s.5 of the Act which requires a society to have rules regulating various matters including appointment of officers, control and investment of funds, borrowing powers, and '*such other matters as the Registrar may require to be provided for in any particular instance*'. Note that no accountability provisions by way of random inspections for instance are found in the Act. This most probably is attributed to the fact that such matters are left to be addressed in the rules. In general, the Act is silent on matters pertaining to accountability and conflicts of interest.

(iii) Cooperative Societies Act

The approach adopted in the *Incorporated Societies Act* is similarly followed in this Act. Thus, matters relating to conflicts of interest are left to be regulated by bylaws of a society. However, there is provision for the intervention of the

⁷⁶ s.4(a)

Registrar which may operate as a *checks and balance* mechanism. Section 41 of the Act provides for the Registrar to act

of his own motion, and shall on the application of a majority of the Committee, or of not less than one-third of the members of a registered society, hold an inquiry or direct some person authorised by him by order in writing in this behalf to hold an inquiry into the constitution, working, and financial condition of a registered society; and all officers and members of the society shall furnish such information in regard to the affairs of the society and produce the cash in hand and such books, accounts, papers and securities of the society as the Registrar or the person authorised by him may require.

IV PROMOTION OF CAUSE AND BENEFITS

This part briefly looks at how societies, trust boards or other associations (whether incorporated or not) may fundraise or participate in or stand to benefit from privileges attached thereto. Whilst CSOs can engage in numerous fundraising activities, there are some that require special permits or authorisation as prescribed by statute. This is the category that will be discussed immediately below. Section **(B)** discusses tax exemption and other benefits, fiscal or otherwise, to which charitable organisations or those with related objects are entitled by virtue of statutory provisions.

A Fundraising Activities & Privileges

Privileges in this category are relatively few, or at best, minimal compared to the general situation in other countries. In other words, the types of exemptions and privileges enjoyed by CSOs in other jurisdictions under statutes of a similar nature⁷⁷ are not available within the country. This might be reflective of the size of the economy characterised *inter alia* by a small tax base on which the Government relies for revenue.

⁷⁷ Such as lotteries and other gaming legislation.

(i) *Cinematograph Act*⁷⁸

The Act only empowers the Board of Censor appointed under the Censorship Regulation to exempt particular films or class of films from requirements in the Act. No exemption is provided for permit fees for the exhibition of films for charitable or related purposes.

(ii) *Dances Act*⁷⁹

The prescribed fee payable for a licence to hold a dance may be waived by the Minister of Police if the said Minister or a representative thereof '*is satisfied that the proposed dance is for the purpose of raising money for a charitable purpose...*'⁸⁰ Thus, the focus is on the purpose for which the fundraising is held and not the mere status of the fundraiser. Unfortunately, no similar provision is found in other legislation of the same category, viz. the *Bazaars and Concerts Act*⁸¹, and the *Raffles Act*,⁸² as would have been the case in other Pacific countries.

B Tax Exemption and Deductions

(i) *Stamp Duty*

Section 3 of the *Stamp Duty Act*⁸³ provides the basis for exemption of certain documents from stamp duty. Documents to which exemption will apply are specified in paragraph 10 of the Schedule to s.3. Thus, '*receipts given for contribution for charitable institutions or religious bodies*' will be exempted from stamp duty. Note that specific exemptions are further provided under the

⁷⁸ Cap 167

⁷⁹ Cap 166

⁸⁰ s5

⁸¹ Cap 165

⁸² Cap 169

⁸³ Cap 70

Charitable Trusts Act, Cooperative Societies Act, and the Incorporated Societies Act. Hence, no stamp duty is to be charged on documents required by legislation to be delivered to the Registrar.⁸⁴ Likewise, the Minister is empowered under s.60 of the *Cooperative Societies Act* to exempt any registered society or a class of registered societies from paying stamp duty on executed instruments or prescribed registration fees. Distinct to the approach under the other two Acts, any exemption granted by the Minister to a cooperative society is not absolute as it can also be withdrawn.

(ii) *Customs & Excise Act*⁸⁵

The substantive provisions of the Act fail to directly address the issue of imports made by charitable or related organisations or imports made for charitable purposes. Whilst, s.7 sets out a schedule of duty rates, and to a limited extent, exemption, it is ambiguous to what extent CSOs will benefit from that provision.

(iii) *Income Tax Act*⁸⁶

Section 11(b) of the Act expressly provides for exemption from tax any income derived by an organisation established principally and exclusively for a charitable purpose. Thus, no tax will be charged on *'the income derived by any charitable institution or by any body or trust established exclusively for charitable purposes, other than income derived by such institution, body or trust either directly or indirectly from the carrying on of any business'*. Additionally, His Majesty in Council may by order exempt from tax the *'income derived by any fund, society, association or organisation or company whether incorporated or not, which may be specifically exempted'*⁸⁷

Further, an individual tax payer will be entitled under s.29(1) to a tax deduction *'by way of a special exemption from his assessable income the amount of any*

⁸⁴ *Charitable Trusts Act*, s27; *Incorporated Societies Act*, s35

⁸⁵ Cap 67

⁸⁶ Cap 68

⁸⁷ s11(f)

gift (not being a testamentary gift) of money made by him in the fiscal year to any institution, body, trust or fund the funds of which are, in the opinion of the Commissioner, applied wholly or principally to any charitable purposes within the Kingdom...' Whilst the provision prescribes the maximum deductible amount at \$500,⁸⁸ it nonetheless fails to state the minimum amount of monetary gift that would render a tax payer eligible to invoke the said provision. No similar benefit is prescribed for companies or bodies corporate wishing to make donations or gifts towards charitable or related causes. Similarly, the Act is silent on donations *in kind* of an assessed worth that would likely fall into substantial amounts should converted into cash value. In this connection, it must be highlighted that as common practice in the region, donors are more comfortable with contributions or donations *in kind* towards charitable causes. And for companies with strong public relations agendas, this option is more popular to avoid *inter alia* cash flow problems. In any event, the argument for equal treatment of *gifts in kind* under s.29 is even stronger when the monetary value of any such donation or gift *in kind* is easily ascertainable. The above are very important areas to which the Act fails to address or accord proper weight.

C Commercial Undertaking

The primary question to be asked is whether NPOs⁸⁹ and charitable institutions generally are permitted by law to operate businesses and companies, or participate within the operation of the same. If answered in the affirmative, the supplementary question is whether the income earned from such commercial undertakings are tax exempted.

No prohibition, either express or implied is found within the country's current laws restricting NPOs or charitable bodies from engaging in commercial

⁸⁸ s29(2)

⁸⁹ **NPOs** will be used in this context to refer to all **NGOs** engaging in business activities for the purposes of profit-making **BUT** with such profits not to be used for personal gain.

enterprises. In the absence of any such statutory prohibition, the fundamental constitutional principle adopted and practiced in the region would permit, thus, rendering NPOs and charitable bodies at liberty to operate businesses except those expressly forbidden by law. The only contentious issue therefore is the income of commercial enterprises owned either wholly or partially by such organisations.

Section 11(b) of the *Income Tax Act* is unequivocal, as the ‘*income derived by... [a charitable institution or NPO] directly or indirectly from the carrying on of any business*’ will not be covered by the exemption provided under the said provision. This approach is distinct from that found in other jurisdictions in the region. In Samoa for instance, tax exemption provided under s.7(1) of the country’s *Income Tax Act 1974* equally applies to ‘*income derived directly or indirectly from any business carried on by or on behalf of or for the benefit of trustees in trust for charitable purposes within...Samoa, or derived directly or indirectly from any business carried on by or on behalf of or for the benefit of any society or institution established exclusively for such purposes....*’⁹⁰

V CONCLUSION

The legislative framework in Tonga no doubt reflects the circumstances of the country. With a small economy and tax base, very conservative Constitution and a strong cultural influence, the operating environment in the country appears restrictive or less facilitative of the financial interests of CSOs. However, despite such constraining factors, the current legislative framework in general meets the minimum requirements for a functioning CSO community. This is facilitated in part by an enabling legislative framework which operates to rectify among others the limitations or shortfall present within the 1875 Constitution. But such legislative framework is not without defects or faults.

⁹⁰ s7(1)(h)

The need for review and re-strengthening is ever present as changing circumstances, political or otherwise, have called for a comprehensive reform of the country's laws including those affecting CSOs. With the scope of this report limited to the latter, the foregoing discussions have raised to the fore some overarching issues that needs to be addressed in the course of such reform. Below are some observations, both general and specific, of the issues pertinent within the reviewed legislation.

Firstly, rigorous media laws have almost gagged CSOs from standing for the collective interest of members or the general populace in voicing concern against Government policies and programs that do not receive the support of the *common people*. This issue is more controversial within the political arena in which the rally for democracy reforms and the push for phasing out of authoritarian rule gradually gains momentum and support over the recent past. The underlying concern is that media law reforms has impinged on the public awareness and media campaign strategies of CSOs - notably with regard to those tackling issues of a politically sensitive nature.

Secondly, the resources available to well-funded NGOs, either financial or otherwise, have bred suspicious public perceptions and feelings towards such organisations. To an untrained or poorly informed mind in the community, NGOs are secretive fundraisers or enigmatic organisations. Not only that, but there is a public perception that NGOs or CSOs have enjoyed so much tax benefits only to fail to account for their financial dealings. This therefore necessitates the need for more transparency and accountability mechanisms so as to rectify *inter alia* the public perception, either legitimate or distorted, of CSOs highlighted above. Public scrutiny of the financial affairs of organisations, in particular those funded by external donor agencies is imperative as currently there is absence of a mandatory requirement for financial statements to be published and made accessible to the public through operation of the public register. The auditing of accounts only satisfies the relationship between an organisation and the Registrar or its equivalent authority but not necessarily between an organisation and the public.

Thirdly, incentives within the tax regime devised to drive interest from private donors towards charitable or related causes are at present less attractive to the business sector. Whilst the focus and emphasis is on a society as the beneficiary, there is little to acknowledge the donor as benefactor and source of donation. In simple, the present tax regime places more emphasis on exemptions for CSOs than deductions of commensurate value for donors such as private business houses being the ones with deep pockets. Such approach would, as earlier raised, create less motivation in the business community and private donors to continually support societies established principally for charitable, benevolent, public benefit or such other similar causes.

Fourthly, with a flourishing CSO community characterised by a proliferation of organisations, both incorporated and unincorporated, it is high time a central regulatory and supervisory body be established with statutory powers and functions. There certainly is need for such a body with the *teeth to bite* so as to ensure the CSO community is well coordinated. The piecemeal approach within the current legislative framework is a potential source for a disintegrated and uncoordinated environment leading to chaotic situations. A possible function of such body is to act as central liaising channel between the Government and CSOs - thus, a partnership enhancement agent. And in that end, it is a role of the body to translate the Government's community development policies into working programs for implementation by CSOs with focus on that area. This would operate to rectify the current situation characterised by a lack of compatibility or a perceived *miss match* between the Government's development policies, both short and long term, and development programs of CSOs. In total therefore, the absence of a statutory central coordinating body for CSOs and a legal or regulatory framework setting out the jurisdictional or administrative aspects of the supposed partnership between Government and CSOs must be rectified.

Fifthly, as a country with an *import-oriented* economy as is common throughout the Pacific, it is foreseeable that CSOs in the implementation of their programs

will mainly use or rely on imported material or goods, for instance, for distribution to targeted communities or the like. Additionally, such material may similarly be used for logistical purposes to expedite their operations. Given such imports fall under customs legislation, it is imperative that the charitable or related causes of societies be afforded some recognition manifested in exemptions. Unfortunately, there is no duty exemption expressly prescribed within the present legislation for goods or material import for charitable or related purposes.

Sixthly, there is absence of provisions for appeals against the dissolution or cancellation of a society under the *Charitable Trusts Act* and the *Cooperative Societies Act*. Moreover, the exercise of discretion by the Registrar in the cancellation of societies creates room for arbitrariness, aggravated in part by the absence of prescribed grounds for the exercise of such discretion. Similarly, whilst the Registrar may reinstate to the register a dissolved society under the *Incorporated Societies Act* and *Charitable Trusts Act*, there is no equivalent provision within the *Cooperative Societies Act*. This supports the necessity of having appeal provisions that would be invoked in the event the dissolution or cancellation by the Registrar of a society or trust is not done on meritorious grounds worthy of legal sanction.

Furthermore, the ceiling placed on any society registered under the *Cooperative Societies Act* that resolved to contribute towards a charitable or common good purpose operates as a constraint on what is otherwise a good intention. Section 38(2) of the Act restricts the rights of members of a society to give to charitable causes a cash donation not exceed 10% of the net profit balance. There are cooperatives that are pro-charitable in their yearly events and fundraising drives only to be constrained by the effects of the said provision.

Finally, the lack of *Income Tax Act* provisions acknowledging and encouraging donations *in kind* operates to the detriment of charitable organisations that rely on donated material to discharge certain aspects of their objects and functions. In this connection, s.29 of the Act only accords recognition to cash donations

for which a donor will be entitled to a tax deduction. The absence of such a statutory provision will discourage potential donors such manufacturers for instance from making donations in kind towards charitable causes.

*****the author is solely responsible for any errors found in the content hereof.***

Table of Legislation

The Act of Constitution of Tonga 1875

The Act of Constitution of Tonga (Amendment) Act 1990

The Act of Constitution of Tonga (Amendment) Act 1999

The Act of Constitution of Tonga (Amendment) Act 2003

Bazaars and Concerts Act [Cap 165]

Charitable Trusts Act 1993

Cinematograph Act [Cap 167]

Cooperative Societies Act [Cap 118]

Customs & Excise Act [Cap 67]

Dances Act [Cap 166]

Educational Films (Exemption from Duty) Act [Cap 87]

Income Tax Act [Cap 68]

Incorporated Societies Act [Cap 28]

Newspaper Act 2003

Polynesian Heritage Trust Act [Cap 91]

Protection from Abuse of Press Freedom Ordinance 2003

Raffles Act [Cap 169]

Stamp Duty Act [Cap 70]

Tonga Red Cross Society Act [Cap 83]

