

Registration Decision: Football Otago Youth Development Academy Trust

Board Decision

1. The role of Te Rātā Atawhai, the independent Charities Registration Board, (“the Board”) is to maintain the integrity of the Charities Register through ensuring that entities on the Charities Register qualify for registration. The Board makes its decisions by applying the law to the facts before it. The Board must decline to register an organisation when it does not advance a charitable purpose for the public benefit.
2. The Board’s decision is to decline to register the Football Otago Youth Development Academy Trust (“the Trust”) because it does not advance exclusively charitable purposes.
3. The Board considers that the Trust has a primary, non-charitable purpose to promote the development and success of young, high-performance football players selected on the basis of talent or skill, rather than public participation in sport. Players selected primarily on the basis of talent or skill do not constitute a sufficient section of the public, and therefore the Trust’s primary purpose does not meet the test for charitable public benefit.
4. The Board considers that the Trust may also have charitable purposes to advance education and health, but these purposes do not qualify the Trust for registration, as they are secondary or incidental to the Trust’s primary focus.
5. Following the three-step process of Ellis J in *Re the Foundation for Anti-Aging Research and the Foundation for Reversal of Solid State Hypothermia* (“FAAR and FRSSH”)¹ the Board has considered:
 - whether the Trust’s stated purposes are capable of being charitable;
 - whether the Trust’s activities are consistent with or supportive of a charitable purpose;
 - if the Trust’s activities are found not to be charitable, whether they can be said to be merely ancillary to an identified charitable purpose.
6. The Board has carefully considered all of the submissions that it received from the Trust. The Board has also considered the information about the Trust’s activities collected by Charities Services² from the Trust itself and in its financial statements for the years ending 30 June 2017 and 30 June 2018. The Trust was notified of all the information that Charities Services collected and was given the opportunity to respond.

¹ *Re the Foundation for Anti-Aging Research and the Foundation for the Reversal of Solid State Hypothermia* [2016] NZHC 2328 (“FAAR and FRSSH”).

² Charities Services, Ngā Ratonga Kaupapa Atawhai, is part of the Department of Internal Affairs, and administers the Act.

7. This decision is separated into the following sections:
- Background
 - The law on purposes to promote sport
 - What are the purposes of the Trust?
 - Is the Trust's non-charitable purpose merely ancillary to a charitable purpose?
 - Determination.

Background

8. The Trust was initially registered on 7 March 2011 under the Charities Act 2005 ("the Act") by the former Charities Commission.³ On 27 June 2018 the Trust was deregistered because it failed to file annual returns for the years ending 30 June 2016 and 30 June 2017 as required by section 41 of the Charities Act.⁴
9. The Trust applied for re-registration as a charity on 27 August 2018.⁵ After reviewing the Trust's application, Charities Services notified the Trust on 16 November 2018 that it did not meet registration requirements because its purposes were not exclusively charitable.⁶ In the notice Charities Services advised the Trust that its purpose to promote the development of elite football players and sporting success was not charitable and that the winding up clause in its rules did not meet registration requirements.
10. On 13 December 2018 the Trust responded with a copy of its performance report for the year ended 30 June 2018 and submissions contesting Charities Services' position.⁷ On 22 January 2019 Charities Services responded to the Trust's submissions, notifying the Trust that it continued to consider the Trust did not meet registration requirements.⁸ The Trust provided further submissions on 18 February 2019 contesting Charities Services' position.⁹ Charities Services sent a third notice to the Trust on 28 April 2019 and invited final submissions before the application was referred to the Board.¹⁰
11. On 25 June 2019 Charities Services sent the Trust a reminder email and invited the Trust to make final submissions or withdraw the application.¹¹ On 1 July 2019 Charities Services advised the Trust that its application would be referred to the Board and invited final submissions from the Trust.¹² The Trust's application was referred to the Board on 6 September 2019 for consideration. The Trust provided no further submissions in response.

³ The Trust's previous registration number is CC46295.

⁴ See notice of intention to remove CC46295 from the Charities Register dated 14 May 2018; and notice of removal dated 27 June 2018.

⁵ The Trust provided a copy of its performance report for the year ending 30 June 2017 with its application for re-registration.

⁶ Charities Services' first notice to the Trust dated 16 November 2018.

⁷ The Trust's submissions to Charities Services dated 13 December 2018.

⁸ Charities Services' second notice to the Trust dated 22 January 2019.

⁹ The Trust's submissions to Charities Services dated 18 February 2019.

¹⁰ Charities Services' third notice to the Trust dated 28 May 2019.

¹¹ Charities Services' email to the Trust dated 25 June 2019.

¹² Charities Services' email to the Trust dated 1 July 2019.

The law on purposes to promote sport

12. In New Zealand, the courts have held that a purpose to promote sport as an end in itself is not charitable, but may be charitable where the purpose is the means by which other charitable purposes will be achieved.¹³ The common law position in New Zealand has been adopted in section 5(2A) of the Act, which provides that the promotion of amateur sport may be a charitable purpose if it is the means by which a charitable purpose referred to in subsection 5(1) is pursued.
13. The Board recognises that there is considerable scope for charitable promotion of amateur sport as a means to promote valid charitable purposes. For example, charitable sports promotion purposes include:
 - promotion of public participation in amateur sport as a means to promote public health through cardiovascular exercise;
 - promotion of participation in amateur sport by the elderly and/or disabled as a means to relieve the conditions of old age and/or disability;
 - promotion of participation in amateur sports by individuals in charitable need of social inclusion or rehabilitation, as a means to meet the charitable need for rehabilitation and social inclusion; and
 - promotion of participation in amateur sports by students enrolled at an educational institution, such as a school or university, as a means to advance the education provided at that institution.¹⁴ It is not sufficient, however, for an organisation to merely provide sporting or recreational activities to school-aged individuals.¹⁵ A purpose to provide sporting activities to school-aged individuals will therefore not be capable of advancing education in a charitable manner where the activities are not part of, or sufficiently connected with, a formal education institution.¹⁶
14. In addition, the Board recognises that recreation and sports activities that teach certain skills and abilities to young people may also advance education in a charitable manner.¹⁷
15. Although the Board recognises that the promotion of healthy activity through sport may be a charitable purpose, the promotion of sporting success is not itself a charitable aim: an entity must be focused on public participation in sport, rather than the improvement of high-performance or elite players or supporting their success in sports events. Training and competitions can be the means of achieving public participation, but must not be the focus of the entity. Training should be available to any interested participants, regardless of skill or

¹³ *Travis Trust v Charities Commission* (2009) 24 NZTC 23,273 (HC) at [52].

¹⁴ See for example: *Kearins v Kearins* [1957] SR (NSW) 286 (rugby union at university); *Re Mariette* [1915] 2 Ch 284; and *Inland Revenue Commissioners v McMullen* [1981] AC 1 at 1.

¹⁵ *AYSA Amateur Youth Soccer Association v Canada (Revenue Agency)* [2007] 3 SCR 217 at [41].

¹⁶ See Deregistration Decision: *Youth Glide New Zealand Incorporated* (24 March 2016) at [40] <https://charities.govt.nz/assets/Uploads/Youth-Glide-New-Zealand-decline-decision.pdf>.

¹⁷ See, for example: *Re Dupree's Deed Trusts* [1945] Ch 16 (for example, chess teaching concentration, reasoning and foresight).

ability, and competitions should not be structured in such a manner as to exclude less skilled individuals.¹⁸

16. In particular, the promotion of sports for high-performance or elite athletes is not a charitable purpose in law because such a purpose does not provide sufficient public benefit.¹⁹ In this context, the terms “high-performance” and “elite” not only refer to professional or paid athletes, but also athletes who do not receive payments; it encompasses individuals who are identified as having some talent or skill in a particular sport (for example, through team trials) and, as a result, are trained or developed to achieve success in sporting competitions.²⁰ Where training and development is not also available to those who are not identified as talented, there is insufficient public benefit in a charitable sense.
17. As a preliminary matter, the Board also notes that the Trust has submitted that the fact it has been previously registered is significant.²¹ The Board considers this fact is not sufficient, however, to determine whether the Trust meets registration requirements in light of current case law, subsequent Board decisions, and the Trust’s current activities. The Board further notes that the Trust was originally registered in 2010, before the insertion of section 5(2A) of the Act, which makes a clear legislative statement on when sport can be considered to advance charitable purposes.

What are the purposes of the Trust?

The Trust’s stated purposes

18. The Trust’s stated purposes at clause 7 of its Trust Deed are:²²

- a. General objectives

The object for which the Trust is established are the raising of funds and applying the same for the development of youth soccer in the Otago region of New Zealand, and by doing so creating a benefit to the community.

- b. Specific objectives

Specific objectives of the Trust include

- To expose local players to a high standard development, playing and coaching regime.

¹⁸ See, for example: Deregistration Decision: *Swimming New Zealand Incorporated* (30 September 2014) at [41]–[44] <<https://charities.govt.nz/assets/Uploads/Swimming-New-Zealand-Incorporated.pdf>>; and Charity Commission for England and Wales *Charitable Status and Sport* (RR11) at [28]–[29].

¹⁹ See, for example: Deregistration Decision: *Swimming New Zealand Incorporated* (30 September 2014) <<https://charities.govt.nz/assets/Uploads/Swimming-New-Zealand-Incorporated.pdf>>; and *Registration Decision: New Zealand Rowing Association Incorporated* (11 September 2015) <<https://charities.govt.nz/assets/Uploads/New-Zealand-Rowing-Association-Incorporated.pdf>> (“*New Zealand Rowing Association decision*”).

²⁰ See also *New Zealand Rowing Association decision* at [48].

²¹ The Trust’s submissions to Charities Services dated 13 December 2018.

²² Football Otago Youth Development Academy Trust Deed dated 21 December 2010.

- To develop and grow a local (Dunedin domestic) core of players who form the basis around which Otago United (or future National League) Franchises can develop and grow.
 - To encourage youth players to raise their personal performance and set playing goals beyond those that are currently offered.
 - To provide a platform from which individual players may be recognised for national selection at age group and senior level.
 - To give the local players a cultural/social experience that they are unlikely to experience in their lives both in terms of football and life in general that stretches beyond their Socio-Economic/Cultural status.
 - To enhance the coaching and development of junior football/soccer players via the provision and maintenance of facilities, equipment and coaches targeted specifically at youth development programmes.
 - To benchmark organisation, administration and competition of Otago Football via international best practice examples.
 - To assist coaches, and develop coaching programmes.
 - To provide funding to players whose families are unable to financially commit.
19. Applying the first step of Ellis J's three-step process in *FAAR and FRSSH*, the Board considers that many of the stated purposes of the Trust in clause 7 are not capable of being charitable because they focus primarily on providing benefits to a closed group of high-performance or talented young footballers, and their success in football competitions. Specifically, the Trust has stated purposes in clause 7b to expose local players to a high-standard development, playing and coaching regime; develop and grow a core of players for local or future league franchises; encourage youth players to raise their personal performance and set playing goals beyond those currently offered; provide a platform for national selection at age group and senior level; and benchmark organisation, administration and competition of Otago Football by reference to international best practice. These purposes demonstrate a primary purpose to focus on players selected because of their talent or ability, and promote sporting success, rather than public participation in sport.
20. The Board considers that some the Trust's stated purposes ("specific objectives") at clause 7 are capable of being charitable. Specifically, the Board considers that the general objective in clause 7a is capable of promoting health through encouraging participation in cardiovascular exercise. The Board also considers that the Trust's specific objective to assist coaches and develop coaching programmes is capable of advancing education. The Board considers, however, that the stated purposes of the Trust focus primarily on the development of young footballers selected because of their talent, and promoting success in football competitions.

The Trust's activities

21. Applying the second part of the *FAAR and FRSSH* process, the Board has considered whether the Trust's activities are consistent with or supportive of, an identified charitable purpose.
22. The Trust's performance reports for the years ending ended 30 June 2017 and 30 June 2018 show that it has undertaken the following activities:

- The Trust’s statement of service performance in its performance report for 2017 shows that a significant amount of the Trust’s time was spent on training and preparing the under-17 team for the Super Cup Northern Ireland tour,²³ described as a “prestigious” competition involving some of the world’s best youth football teams.²⁴
 - The Trust’s performance report for 2018 shows that the Trust has a focus on training and developing players selected for the Trust’s youth development programme. The Trust’s Management Committee is charged with identifying local coaching talent to support the programme; implementing the player selection process via trials; establishing the player coaching programme; establishing the tour itinerary and match programme; managing logistics and communication to the related parties to ensure a successful tour; establishing a medical support framework for player welfare; and researching and providing player support in terms of nutrition, sport psychology and school, life and training balance.²⁵
 - The Trust’s 2018 performance report also retains historical “additional information” focused on the sporting successes of the Trust, including the number of overseas tours by the football teams developed by the Trust, and statistics on the number of academy players who have gone on to represent New Zealand at the under-20 level and above, play in the in the national football league, and gained scholarships to the United States.²⁶
 - The Trust’s performance report for 2018 lists under “outputs” “physical training and tour preparation”, which includes under-17 trials, physiological analysis, pre-tour training camps, player training and evaluation and management sessions, and matches played in the Super Cup Northern Ireland Tour.²⁷
 - In the Trust’s “Additional Output Measures” in the 2018 performance report, the Trust states that it “keeps data on the successful transition of players from the programme into Senior Football at ... the Regional Club, National and International levels.²⁸
23. The Board considers that the Trust’s activities indicate that the Trust’s purposes are primarily to focus on high-performance or élite sport and success in sporting competitions, and training individuals selected on the basis of talent or skill, rather than public participation in sport. The Board considers, therefore, that the Trust has a non-charitable, primary purpose to promote the development of football players selected on the basis of talent or skill, and their success in football.

The Trust’s submissions

24. The Trust submits that its activities have a competitive, but not élite, focus. The Trust’s pre-selection training process is open to the public generally, and has attracted rugby players from a nearby school, for example.²⁹ Players are also selected for their enthusiasm and

²³ Performance report for the year ended 30 June 2017 (Statement of service performance) at 4.

²⁴ Otago Polytechnic “Otago Polytechnic sponsors team to Super Cup” <www.op.ac.nz/about-us/news-and-events/item/3044> (accessed 21 May 2019).

²⁵ Performance report for the year ended 30 June 2018 (Entity information) at 1.

²⁶ Performance report for the year ended 30 June 2018 (Entity information) at 3.

²⁷ Performance report for the year ended 30 June 2018 (Statement of service performance) at 4.

²⁸ Performance report for the year ended 30 June 2018 (Statement of service performance) at 4.

²⁹ The Trust’s submissions to Charities Services dated 18 February 2019.

behavioural skills in addition to sporting prowess.³⁰ Players who are unsuccessful are encouraged to remain involved in other football activities surrounding the programme (playing, coaching or management), and the Trust is open to providing and promoting entry into other tournaments and events within New Zealand for those who are not selected in teams for overseas competitions.³¹ Further, the personnel involved in supporting teams to participate in international tournaments are not elite.³²

25. The Board recognises that the Trust's pre-selection training schedules are open to the general public, and that players are drawn from a large pool of potential players for selection. The Board considers, however, that the ultimate purpose of the trials is to select the best players from the initial trial pool for further development and training. The Board also acknowledges that the Trust continues to encourage participation in football by those who are not selected in its programmes, and may, in the future, provide alternative options for those who are not successful in the selection trials to participate in local tournaments and events. The Board considers, however, that these matters do not detract from the Trust's primary focus on developing talented players and promoting success in football, including in international youth football tournaments. The Board also notes that the Trust has not indicated that it will provide, as part of its core activity to provide training and development programmes, additional programmes to those players who are not selected for further training and development.
26. The Board also considers that the Trust's submissions are based on an incorrect understanding of the meaning of "elite" sport in a charitable context. As stated in paragraph [16] above, the term "elite" includes individuals who are identified as having some talent or skill in a particular sport (for example, through team trials) and, as a result, are trained or developed to achieve success in competitions. The Board considers that the fact that players are selected on the basis of non-sporting attributes as well as sporting prowess is merely evidence of further criteria for selection of players. Further, the fact that personnel who accompany tours or otherwise assist selected players are non-professionals or volunteers does not affect the Board's conclusion that the Trust's primary focus is on the development of players selected on the basis of skill or talent. The Board is unable to conclude, therefore, that the Trust's focus on high-performance players selected on the basis of skill or talent demonstrates sufficient public benefit.
27. The Board also considers that the activities of the Trust's volunteer management committee support the Board's conclusion that the primary purpose of the Trust is to promote high-performance sport and success in football competitions. In particular, the Board notes that the management committee identifies local coaching talent to support the programme; implements the player selection process via trials; establishes the player coaching programme, tour itinerary and match programme; manages tour logistics and communication; establishes a medical support framework for player welfare; and provides player support in terms of nutrition, sport psychology and school, life and training balance.
28. The Trust also submits:
 - Its activities provide development and education for young people in other areas apart from football skills, including participation in a disciplined and structured training

³⁰ The Trust's submissions to Charities Services dated 13 December 2018.

³¹ The Trust's submissions to Charities Services dated 18 February 2019.

³² The Trust's submissions to Charities Services dated 18 February 2019.

regime, exposure to a wide variety of both cultural and competitive sporting experiences that enhance intellectual maturation, developing leadership and time management skills, and enhancing social development.³³ The Trust also considers that striving for success in any field helps to develop young minds.³⁴

- The Trust's activities are wider than training and development of individual football players, and benefit volunteers, coaches, managers and medical personnel, as shown by the activities of the volunteer management committee to implement the Trust's programmes.³⁵
- The Trust's activities also have wider charitable public benefit to the community. The Trust has recently provided management expertise to another local football club to enable the club to attend a tournament in the North Island, and is negotiating with the Otago Polytechnic to provide a programme for students in management and communication.³⁶ The Trust has also been asked by local organisations to present talks on injury prevention and concussion management, and it has also worked closely with a local decile 4/5 high school to promote and develop sports and participation in sport.³⁷
- The Trust also benefits the community because its prime focus of the Trust is the development of youth football in the Otago region, and its activities target age groups (14 to 17-year-olds) where there is identified player attrition in sporting codes.³⁸

29. The Board recognises that the Trust's activities may develop the wider life skills and education of young players or participants, and promote the personal or professional development of people associated with the Trust (such as volunteers and coaches), and that the Trust assists with skills training in other organisations, plans to develop a programme for students in management and communication, and has promoted sports and participation in sport at a local high school. The Board further recognises that there may be associated or consequential benefits from the Trust's activities, such as increasing or maintaining participation in sport by members of a particular youth age bracket, which may be said to promote public participation in sport generally.

Is the Trust's non-charitable purpose merely ancillary to a charitable purpose?

30. Applying the third step of Ellis J's three-step process,³⁹ the Board has considered whether the Trust's non-charitable purposes can be said to be merely ancillary to an identified charitable purpose.
31. The Board considers that Trust's non-charitable, primary purpose to promote the development and success of high-performance football players selected on the basis of talent or skill is more than ancillary to any of the Trust's charitable purposes. As discussed

³³ The Trust's submissions to Charities Services dated 13 December 2018; Performance report for the year ended 30 June 2018 (Statement of service performance) at 4.

³⁴ The Trust's submission to Charities Services dated 18 February 2019.

³⁵ The Trust's submission to Charities Services dated 18 February 2019, citing the Trust's performance report for the year ended 30 June 2018 (Entity information) at 1.

³⁶ The Trust's submission to Charities Services dated 18 February 2019.

³⁷ The Trust's submission to Charities Services dated 18 February 2019.

³⁸ The Trust's submissions to Charities Services dated 18 February 2019.

³⁹ *FAAR and FRSSH* at [88].

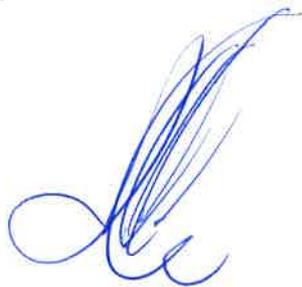
previously, the Trust's stated purposes and activities indicate that this purpose is the primary focus of the Trust.

32. Although some of the Trust's activities may support a charitable purpose, such as promotion of health through participation in sport and advancement of education, the Board considers that these purposes and outcomes are ancillary or secondary to the primary purpose of the Trust to promote the development and success of high-performance football players selected on the basis of talent or skill. The Board also considers that any public benefit arising from the Trust's encouragement of public participation in sport or football by youth in particular age groups is too remote or downstream, and not the primary purpose of the Trust.

Determination

33. The Board determines that the Trust is not qualified for registration as a charitable entity because it is not established for exclusively charitable purposes as required by section 13(1) of the Act.
34. The Board considers that the Trust's independent purpose to promote development and success of high-performance football players selected on the basis of talent or skill is not a charitable purpose. The Board considers that this non-charitable purpose is a primary focus of the Trust and cannot be considered ancillary to another charitable purpose being undertaken by the Trust.
35. The decision of the Board is therefore to decline to register the Trust as a charity, pursuant to section 19 of the Act.

Signed for and on behalf of the Board



Roger Holmes Miller

Date

12th SEPTEMBER 2019

