
CHARITY LAW IN NEW ZEALAND
DR DONALD POIRIER

# CHARITY LAW IN NEW ZEALAND

## DR DONALD POIRIER

***www.charities.govt.nz***
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### Disestablishment of the Charities Commission

The Charities Commission, established by the *Charities Act 2005*, was disestablished by government as of 1 July 2012, and its core functions transferred to the Department of Internal Affairs.

However, many of the decisions referenced throughout the text of this book were made by the Charities Commission prior to its disestablishment. So, to maintain clarity, we have attributed those decisions to the New Zealand Charities Registration Board.

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### IMPORTANT DISCLAIMER

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# Foreword

This online book *Charity Law in New Zealand* is one of the most comprehensive books of its kind to be published in New Zealand on this complex and specialised area of law.

With now more than 26,000 registered charities, the charitable sector is a growing part of New Zealand society and our economy. However, charity law has been evolving since its early origins in 1601 with the S*tatute of Elizabeth* I and New Zealand charity case law draws from legal decisions from many countries.

With his experience as a senior employee at the Department of Internal Affairs Charities Services, and previously the Charities Commission, author Dr Donald Poirier, provides us with an up-to-date analysis of court decisions and decisions by the Charities Registration Board and its predecessor the Charities Commission.

Together, those bodies assessed more than 30,000 rules, trust deeds and wills and tested them against court decisions. In some cases, the decisions of the Charities Commission and the Charities Registration Board have been further tested in the courts.

Just as the case law around charities is diverse and varied, so is our understanding of the concept of charity. What is charity? The answer is likely to vary depending on who is asked, and furthermore the legal answer may well be very different from the common understanding. The publication of this book will help build a greater level of knowledge and understanding in New Zealand of charity law, its complexities and its application.

*Charity Law in New Zealand* is timely and relevant. In acknowledgement of the dynamic state of charity law in New Zealand, the book is presented in an online format that can be readily updated. I anticipate that the book will be a valuable resource for charities and their advisors, and that it will provide a useful guidance for practitioners working with people who are setting-up charities.

My congratulations to author Dr Donald Poirier for what he has achieved in the creation of this book.

*Charity Law in New Zealand* will make a positive contribution to this interesting and worthwhile area of law in New Zealand.

**Brendon Ward**
General Manager Charities Services
*Department of Internal Affairs*
June 2013

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# Abbreviations

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|---|---|
| **A** | NZ Unreported Judgment, part of the file number |
| **AC** | Law Reports, Appeal Cases (Third Series) |
| **AC ## HL** | Appeal Cases ## House of Lords |
| **ALJR** | Australian Law Journal Reports |
| **ALR** | American Law Reports [Mrylnd & Mass cases] |
| **ALRJ** | Australian Law Reports |
| **ATC** | Annotated / Australian Tax Cases |
| **ATR** | Australasian Tax Reports |
| **All ER** | All England Reports |
| **Amb** | Ambler's Chancery Reports |
| **Atk** | Atkyns' Chancery Reports |
| **Atl** | Atlantic Reporter [USA] |
| **BAILII** | British & Irish Legal Information Institute |
| **BCCA** | British Columbia Court of Appeal |
| **BCJ** | British Columbia Judgments |
| **Ball & B** | Ball & Beatty's Reports |
| **Beav** | Beavan's Rolls Court Reports |
| **Bro CC** | Brown's Chancery Cases |
| **Burn Eccl Law** | Burn's Ecclesiastical Law |
| **Burr** | Burrow's King's Bench Reports |
| **C** | NZ Unreported Judgment, part of the file number |
| **(CA)** | Court of Appeal |
| **CJHC [CJHC] (HC Ont)** | Chief Judge High Court (Ontario) |
| **CLR** | Commonwealth Law Reports |
| **CLY** | Current Law Year Book // Scottish Current Law Year Book |
| **CP** | NZ Unreported Judgment, part of the file number |

| | |
|---|---|
| **CTC** | Canada Tax Cases |
| **Calc** | Indian Law Reports, Calcutta Series |
| **CanLII** | Canadian Legal Information Institute |
| **Car** | Statutes of an English Sovereign – name abbrev'n: Charles |
| **Ch** | Chancery Division (3rd Series) |
| **Ch App** | (Law Reports) Chancery Appeal Cases |
| **Ch. Com.** | Charity Commission |
| **Ch Com Rep** | Charity Commission Reports |
| **Ch D** | Chancery Division |
| **Charles II** | Statutes, Charles II |
| **Cl & Fin** | Clark & Finnelly's House of Lords Cases |
| **Coll** | Collinson on the Law of Idiots and Lunatics // Collyer's Chancery Cases |
| **Conn** | Connecticut |
| **Cox Eq Cas** | Cox's Equity Cases |
| **Cro Eliz** | Croke's King's Bench Reports |
| **DLR** | Dominion Law Reports |
| **DLR ... (NSSC)** | Dominion Law Reports (Nova Scotia Supreme Court) |
| **DTC** | Dominion Tax Cases |
| **DeG & J** | De Gex & Jones' Chancery Reports |
| **DeG & Sm** | De Gex, Jones & Smith's Chancery Reports |
| **De GF and J** | 45 ER 1185 |
| **Duke** | Duke's Law of Charitable Uses |
| **EWCA Civ.** | England and Wales Court of Appeal Civil Division |
| **EWCA** | England & Wales Court of Appeal |
| **ER** | English Reports |
| **Eden** | Eden's Chancery Reports tempore Northington |
| **Edw VIII** | Statutes, Edward VIII |

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|---|---|
| **Edward VI** | Statutes, Edward VI |
| **Eliz I** | Statutes, Elizabeth I |
| **Eq** | Equity |
| **FC** | Federal Canada Reporter // Canada Fedl Court Reps |
| **FCA** | Federal Court of Australia // Federal Court of Canada, Appeal Division |
| **FCAFC** | Federal Court of Australia Full Court |
| **FCR** | Federal Court Reporter OR Federal Court Reports (Australia) |
| **FLR** | Federal Law Reports (Aus) |
| **F Supp** | Federal Supplement (US) |
| **GLR** | Gazette Law Reports |
| **Gazette** | The New Zealand Gazette |
| **George II** | Statutes, George II |
| **Geo III** | Statutes, George III |
| **Geo V** | Statutes, George V |
| **HC** | High Court |
| **AK** | Auckland |
| **CHCH** | Christchurch |
| **WN** | Wellington |
| **CIV** | Civil |
| **HCA** | High Court of Australia |
| **HLC** | Clark & Finnelly's House of Lords Cases |
| **Hare** | Hare's Chancery Reports |
| **Henry VIII** | Statutes, ... |
| **Hun** | Hun's New York Supreme Court Reports |
| **ILR** | Irish Law Reports |
| **ILR** | India Law Reports |
| **ILT** | Irish Law Times |
| **IR** | Irish Reports // Irish Law Reports Annotated Reprint |

| | |
|---|---|
| **ITELR** | International Trust & Estate Law Reports |
| **Ill** | Illinois Reports |
| **Iowa** | Iowa Reports |
| **Ir R** | Law Reports (Ireland) |
| **JA** | Judge of Appeal |
| **Jac** | Jacob's Chancery Reports |
| **Jur.** | Jurist |
| **Jur NS** | Jurist (New Series) OR Jurist Reports, New Series |
| **K & J** | Kay & Johnson's Vice Chancellor's Reports |
| **KB** | King's Bench |
| **Ky** | Kentucky Reports |
| **LGERA** | Local Government and Environment Reports of Australia |
| **LGR (NSW)** | Local Government Reports (New South Wales) |
| **LGRA** | Local Government Reports of Australia |
| **LJ Ch** | Law Journal Reports, Chancery New Series |
| **LJKB** | Law Journal Reports, King's Bench |
| **LJKB (CA)** | Law Journal Reports, King's Bench (Court of Appeal) |
| **LJNC** | Law Journal Notes of Cases |
| **LQR** | Law Quarterly Review |
| **LR** | Law Reports |
| **LR Eq** | Law Reports Equity Division |
| **LR Ir** | Law Reports Ireland (4th Series) |
| **LR ## Eq** | Law Reports, Equity Cases |
| **LR ## PC** | Law Reports, Privy Council Appeal Cases |
| **LT** | Law Times Reports (New Series) |
| **LT Jo** | Law Times Journal (Newspaper) |
| **Lev** | Levinz's King's Bench and Common Pleas Reports |
| **M** | NZ Unreported Judgment, part of the file number |

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|---|---|
| **M.&.S.** | Moore & Scott's Common Pleas Reports |
| **MCD** | Magistrates Court Decisions |
| **Mer** | Merivale's Chancery Reports, English Reports |
| **Madd** | Maddock's Chancery Reports |
| **Man R** | Manitoba Reports OR Manitoba Reports, Second Series |
| **Mass** | Massachusetts Reports |
| **My & K** | Mylne & Keen's Chancery Reports |
| **NBR** | New Brunswick Reports |
| **NC** | Bingham's New Cases, English Common Pleas |
| **NE** | North Eastern Reporter [USA] |
| **NH** | New Hampshire Reports [USA] |
| **NI** | Northern Ireland reps |
| **NJ Eq** | New Jersey Equity Reports |
| **N No** | (unreported) |
| **NR** | National Reporter |
| **NSWADT** | New South Wales Administrative Decisions Tribunal |
| **NSWLR** | New South Wales Law Reports |
| **NSWSC** | New South Wales Supreme Court |
| **NW** | Northwestern Reporter [USA] |
| **NY** | New York Reports |
| **NY Supp** | New York Supplement |
| **NZAR** | New Zealand Administrative Reports |
| **NZCPR** | New Zealand Conveyancing and Property Reports |
| **NZ Jur (NS) SC** | New Zealand Jurist Reports, New Series, Supreme Court |
| **NZLJ** | New Zealand Law Journal |
| **NZLR** | New Zealand Law Reports |
| **(CA)** | (Court of Appeal) |
| **NZPCC** | New Zealand Privy Council Cases |

| | |
|---|---|
| **NZPD** | New Zealand Parliamentary Debates (Hansard) |
| **NZRMA** | New Zealand Resource Management Appeals |
| **NZSC** | New Zealand Supreme Court |
| **NZTC** | New Zealand Tax Cases |
| **NZULR** | NZ University Law Review |
| **New LJ** | New Law Journal |
| **OAR** | Ontario Appeal Reports |
| **OR** | Ontario Reports |
| **OWN** | Ontario Weekly Notes |
| **OWR** | Ontario Weekly Reporter |
| **P 2d** | Pacific Reporter, 2nd series (USA) |
| **P.Wms.** | Peere-Williams' Chancery & King's Bench Cases |
| **Pa** | Assizes at Cambridge / Paget's Decisions Affecting Bankers / Pennsylvania State Reports |
| **Pac** | Pacific Reporter (USA) |
| **Pasch** | Paschal Term Reports |
| **Ph // Ph.** | Phillips' Chancery Reports |
| **Poph** | Popham's King's Bench Reports |
| **QBD** | Law Reports, Queen's Bench Division |
| **QB (Man)** | Queen's Bench (Manitoba) |
| **QWN** | Queensland Weekly Notes |
| **Qd R** | Queensland Reports |
| **R** | Rettie, Crawford & Melville, Session Cases (4th Series) |
| **Russ** | Russell's Chancery Reports |
| **SALR** | South Australian Law Reports |
| **SASR** | South Australian State Reports |
| **SCC** | Supreme Court of Canada |
| **SCCA** | Supreme Court of South Carolina |

| | |
|---|---|
| **SCR** | Supreme Court Reports (Canada) |
| **SLT** | Scots Law Times |
| **SR (NSW)** | New South Wales State Reports |
| **SSLR** | Straits Settlements Law Reports |
| **STC** | Simon's Tax Cases |
| **SW 2d** | South Western Reporter, 2nd Series (US) |
| **Salk** | Salkeld's King's Bench Reports |
| **Sim** | Simons' Vice Chancellor's Reports |
| **Sim & St** | Simons & Stuart's Vice Chancellor's Reports |
| **Sm & G** | Smale & Giffard's Chancery Reports |
| **Sol Jo** | Solicitor's Journal |
| **St R Qd** | Queensland State Reports |
| **Swan** | Swanston's Chancery Reports |
| **TC** | Tax Cases |
| **TLR** | Times Law Reports |
| **TRNZ** | Tax Reports, New Zealand |
| **Tas R** | Tasmanian Reports |
| **Tas SR** | State Reports (Tasmania) |
| **Tax Cases** | Tax Cases (Law Reports / UK) |
| **Term Rep** | Durnford & East's Term Reports, King's Bench |
| **Times** | The Times of London |
| **Times Law Report** | Times Law Reports |
| **Toth** | Tothill's Transactions in Chancery |
| **UKUT (TCC)** | United Kingdom Upper Tribunal (Tax and Chancery Chamber) |
| **UKPC** | United Kingdom Privy Council |
| **US** | United States Supreme Court Reports |
| **VCAT** | Victoria Civil and Administrative Tribunal |
| **VLR** | Victorian Law Reports |

| | |
|---|---|
| **VR** | Victorian Reports |
| **Ves** | Vesey |
| **Ves Jun** | Vesey Junior |
| **Ves Sen // Ves.Sen.** | Vesey Senior |
| **Vict** | Victoria (monarch) |
| **WAR** | Western Australian Reports |
| **WASC** | Western Australia Supreme Court |
| **WLR** | Weekly Law Reports |
| **WN** | Weekly Notes |
| **WN (NSW)** | Weekly Notes (New South Wales) |
| **WR** | Weekly Reporter |
| **WTLR** | Wills & Trusts Law Reports |
| **WWLR** | Western Weekly Reports |
| **WWN** | Western Weekly Notes |
| **WWR** | Western Weekly Reports |
| **(Alta TD)** | Alberta Trial Division |
| **Will IV** | William IV |

PART I

# General introduction and history of charity law

Charity law is a specialised area of the law. Its origin can be found in the law of trusts. Charity law is still governed by the principles stemming from a statute enacted under the reign of Elizabeth I. Four centuries later, the Preamble to the *Statute of Charitable Uses 1601* (known also as the *Statute of Elizabeth*) is still referred to and applied by courts in New Zealand, Australia and Canada. Lord Simonds observed that "three hundred and fifty years have passed since the statute became law; few, if any, subjects have more frequently occupied the time of the court".[1]

The law of charities is very much linked to the social and economic developments of its time. Chilwell J, a New Zealand Judge, observed that "the historical path of the law of charities is strewn with the great controversies of the past".[2] This is why the second chapter of this book is devoted completely to a survey of the main historical events that have affected charity law in England and New Zealand.

This part consists of two chapters. The first chapter provides a picture of what is called the third sector, that is, the sector of the economy that comprises not-for-profit organisations. It also delineates the charitable organisations within the not-for-profit sector.

The second chapter concentrates on the history of charity law and regulation, first in England and then in New Zealand.

[1] *Gilmour v Coats* [1949] AC 426 at 443.

[2] *Auckland Medical Aid Trust v Commissioner of Inland Revenue* [1979] 1 NZLR 382 at 396.

CHAPTER 1

# Not-for-profit and charitable entities

The not-for-profit sector encompasses charitable entities and other organisations, which, although not charitable, are established and maintained for not-for-profit purposes. This whole sector has been called the third sector.

This chapter first looks at the sector comprising not-for-profit and charitable entities. Secondly, the similarities and distinctions between not-for-profit and charitable organisations are outlined. Finally, it alludes to the importance of regulating both sectors.

## 1.1 Not-for-profit organisations and charities

A not-for-profit organisation is an organisation that is not a household, government or for-profit business. It is an organisation that does not distribute its surplus funds to owners or shareholders, but instead uses them to help pursue its goals. Charitable organisations are one type of not-for-profit organisation, and represent about one-fourth of all not-for-profit organisations.

This section first looks at the statistics of the not-for-profit sector and its importance for the economy. Secondly, similarities and distinctions between not-for-profit and charitable organisations are analysed. Thirdly, the meaning of charity is briefly canvassed, and finally, the importance of regulating both sectors is discussed.

The not-for-profit sector, in which charities are included, constitutes an important sector of human activities. This subsection looks at statistics in New Zealand and Australia, comparing their not-for-profit sectors.

### *1.1.1 Statistics in New Zealand and Australia about the not-for-profit sector*

In New Zealand, it is estimated that there are about 97,000 not-for-profit organisations.[3] In 2010 the Australian Productivity Commission reported on the contribution of the not-for-profit sector and found that Australia had about 600,000 not-for-profit organisations.[4]

#### *1.1.1.1 What do they cover?*

Not-for-profit organisations may take different legal structures. In New Zealand, it is estimated that 61% of non-profit institutions are unincorporated societies.[5] There are about 22,310 not-for-profit entities incorporated as societies under the *Incorporated Societies Act 1908* and 18,028 entities incorporated under the *Charitable Trusts Act 1957*. The figures for charitable organisations registered with Charities Services, Department of Internal Affairs (Charities Services) are somewhat different. According to data published in October 2009, about two-thirds of registered charities are bodies corporate. These bodies corporate are divided as follows: 9,050 (39% of registered charities) are incorporated under the *Charitable Trusts Act 1957*; some 6,253 entities (26.1% of registered charities) are incorporated under the *Incorporated Societies Act 1908*; and finally, there were 834 companies incorporated under the *Companies Act 1993* registered with the New Zealand Charities Commission in 2009. This represents about 4% of registered charities.[6]

[3] Statistics New Zealand *Counting Non-Profit Institutions in New Zealand 2005*, on the website: www.stats.govt.nz/browse_for_stats/people_and_communities/Households/Non-ProfitInstitutionsSatelliteAccount_HOTP2005/Commentary.aspx.

[4] Australian Government, Productivity Commission report *Contribution of the Not-for-Profit Sector* (Australia, January 2010) on the Government's website: www.csi.edu.au/uploads/31642/ufiles/not-for-profit-report.pdf at xxiii [Productivity Commission Report].

[5] Statistics New Zealand *Counting Non-Profit Institutions in New Zealand 2005*, above n 3.

[6] Snapshot of Registered Charities (Charities Commission, 31 October 2009).

According to the Australian Productivity Commission on the contribution of the not-for-profit sector, which released its report in 2010, some 440,000 out of 600,000 Australian not-for-profit organisations (75%) are small, unincorporated organisations. These are either trusts or unincorporated societies and account for purposes as diverse as neighbourhood sports organisations, babysitting and cards clubs.[7] The remainder of the not-for-profit organisations in Australia are incorporated in one way or another: there are 136,000 incorporated associations, 11,700 companies limited by guarantee, 9,000 organisations incorporated by other means, including 2,500 indigenous corporations, and 1,850 co-operatives.[8]

The activities of not-for-profit organisations include culture, recreation and sport, education and research, health, social services, environment, community development and housing, law, advocacy and politics, philanthropic intermediaries and volunteerism promotion, religion, business and professional associations, including unions, and other organisations not classified (such as co-operative schemes, manufacturers, wholesalers, retailers and cemetery operators).[9]

#### *1.1.1.2 Importance for the economy*

According to the Australian Productivity Commission on the contribution of the not-for-profit sector, about 60,000 Australian not-for-profit organisations, that is about 10%, are deemed economically significant because they employ paid staff and/or have an active tax role. The sector's contribution to GDP grew from $21 billion in 1999-2000 to $43 billion in 2006-2007 (7.7% per annum in real terms). This made up 4.1% of GDP in 2006-2007, which does not include volunteer contributions. Volunteers contributed $14.6 billion in unpaid work in 2006-2007 (4.3% real annual average).

The figures for New Zealand are similar. A snapshot of registered charities reveals that charities have a $10.5 billion impact on New Zealand's economy. In 2010, charities reported spending more than $8.2 billion on carrying out their activities. They reported an average of 1.1 million volunteer hours each week in the same period – equivalent to 27,500 full-time staff – and 4.1 million paid hours each week – equivalent to 102,500 full-time staff. They employed just over 150,000 full or part-time paid staff, but more than 393,000 people volunteered during the year.[10] According to a 2008 comparative study, the non-profit organisational workforce as a percentage of the economically active population in New Zealand was 9.6%, compared with 7.6% in Australia and 9.3% in Anglo-Saxon countries.[11]

Around 50% of the Australian sector's income is self-generated, 33% comes from government, and 10% comes from philanthropic sources.[12] According to the report, these percentages are broadly similar to those in other countries: self-generated income represents 55% of the sector income in New Zealand, 45% in the United States and 43% in the United Kingdom. Government funding represents 25% of the sector income in New Zealand, 40% in the United States and 45% in the United Kingdom. Moreover, philanthropic funding represents 20% of the sector income in New Zealand, 15% in the United States and 11% in the United Kingdom.[13]

Finally, in Australia, tax exemption is valued at $A1 billion, while Australian taxpayers claimed $1.8 billion for deductible gifts in 2006-2007. Income tax exemptions and wealth tax exceptions (principally land tax) are estimated to have provided at least $A44 billion in tax relief in 2008-2009, but could be up to twice that amount.[14] By contrast, in New Zealand, payroll giving for the first year of operation (2010) was $1.4 million, increasing to just over $5 million in 2011. Under payroll giving, people donate automatically from their pay to their chosen charities from a list of donee organisations approved by Inland Revenue.

7 Australian Government Productivity Commission report, above n 4, at xxvi.

8 Ibid, at 58, "Box 4.1 number of not-for-profit organisations".

9 Australian Government Productivity Commission report, above n 4, at 65, "Table 4.3 Activities usually included within the not-for-profit sector".

10 *A Snapshot of New Zealand's Charitable Sector: A Profile of Registered Charities as at 21 October 2010*, on the Commission's website www.charities.govt.nz/LinkClick.aspx?fileticket=1342VRN6nVk%3d&tabid=92.

11 J Saunders, M O'Brien, S Wojciech Sokolowski and L Salamon *The New Zealand Non-Profit Sector in Comparative Perspective* (Office for the Community and Voluntary Sector, Wellington, 2008) on the website www.ocvs.govt.nz/documents/publications/papers-and-reports/the-new-zealand-non-profit-sector-in-comparative-perspective.pdf at 13, figure 2 [Saunders et al].

12 Australian Government Productivity Commission report, above n 4, at xxvi.

13 Ibid, at 73 citing Saunders et al, above n 11.

14 Australian Government Productivity Commission report, above n 4, at 155.

The employees then get their tax credits each payday instead of having to wait until the end of the tax year to make claims.[15] This, however, does not take into account donations by companies and professionals who can deduct donations from their income tax returns.

### *1.1.2 Changes in the charitable and not-for-profit sectors*

Authors, especially in the United States, have identified not-for-profit organisations, including charitable entities, as forming a third sector. The first sector is represented by government and the second sector is represented by businesses and for-profit organisations.[16] As indicated in the previous section of this chapter, the third sector is not insignificant from an economic perspective. The same can be said about its social impacts in our societies.

This section briefly looks at the relationships between the third sector and the other sectors.

#### *1.1.2.1 From endowment to donations*

One of the main changes that has occurred in the third sector, especially within charitable organisations, concerns its sources of revenue. Until the mid-20th century, the traditional type of charity took the form of an endowed trust. The trust received its entire funding through a substantial initial injection of property from its creator, and its income was generated from the investment in that property.

Nowadays, most charities collect donations and contributions from outside sources. A large proportion of the money collected from donations comes from established businesses. Another source of income is government contracts.

#### *1.1.2.2 Relationships between government sector and third sector*

A number of early charities were established to provide services that were not being provided at all, or that were being provided for only a portion of the population. This is clearly the case for hospitals, educational institutions and social services. More recently the welfare state has taken over work done by early charitable organisations. In a number of situations, both government and charities provide similar services; it is notably the case with hospitals, educational institutions and the provision of social services.

Gino Dal Pont[17] wrote that the divide between government and charities had been further narrowed:

> *First, governments have shown a preference for delivering new services or assistance via community-based organisations, including charities, rather than by government agencies. Second, governments have devolved to the non-government sector a range of functions formerly undertaken by government agencies. Third, the provision of government-funded services in many areas is being opened to competition between the not-for-profit sector and for-profit enterprises.*

As indicated in the previous section, government funding represents 25% of the sector's income in New Zealand, 40% in the United States and 45% in the United Kingdom.[18]

The reasons for governments looking at charities and the not-for-profit sector are sometimes ideological. For example, since the 1990s governments have tried to reduce the size and growth of the welfare system. One way of doing so has been to allocate contracts

[15] See www.scoop.co.nz/stories/PA1102/S00169.htm.

[16] See T Levitt *The Third Sector: New Tactics for a Responsive Society* (AMACOM, New York, 1971); M Lyons *Third Sector: the Contribution of Nonprofit and Co-operative Enterprise in Australia* (Allen & Unwin, Sydney, 2001); J Garton *The Regulation of Organised Civil Society* (Hart Publishing, Oxford, 2009).

[17] *Law of Charity* (LexisNexis Butterworth, Australia, 2010) at 12.

[18] Australian Government Productivity Commission report, above n 4, citing Saunders et al, above n 11.

to charitable organisations for the provision of social services. Moreover, governments consider that not-for-profit organisations are better placed to identify the needs of their populations and provide solutions in relation to those needs. Finally, since charitable organisations have smaller structures and are usually less bureaucratic than government agencies, the cost of providing services may be reduced through contracting the provision of some of the services through not-for-profit organisations.[19]

#### *1.1.2.3 Relationships between businesses and the third sector*

A number of charities and not-for-profit organisations have started to behave like for-profit businesses in charging for their services; it is especially the case with not-for-profit hospitals and private schools. However, more and more charitable entities now charge for their services. In doing so, they have adopted the model of for-profit businesses.

Similarly, a number of not-for-profit organisations are trying to create a hybrid between not-for-profit and for-profit organisations. This is notably the case with what is called "social entrepreneurship". A social entrepreneur recognises a social problem and uses entrepreneurial principles to organise, create and manage a venture to achieve social change. Where a business entrepreneur typically measures performance in profit and return, a social entrepreneur focuses on creating social capital. Thus the main aim of social entrepreneurship is to further social and environmental goals. However, whilst social entrepreneurs are most commonly associated with the voluntary and not-for-profit sectors, this need not necessarily be incompatible with making a profit.[20]

The United Kingdom is struggling to recognise that charitable organisations may be involved in business.[21] In New Zealand and Australia, on the other hand, it is clear that courts are more tolerant of such behaviour. In a number of cases, the New Zealand Court of Appeal has recognised, as charitable entities, some that are involved in business trading.[22] In Australia, the High Court has accepted, in *Federal Commissioner of Taxation v Word Investments Ltd*,[23] that a company that pursued non-charitable, profit-making activities was nonetheless a charitable institution for income tax purposes because it devoted its entire profits to the objects of charitable entities.

### 1.2 Similarities and distinctions between not-for-profit and charitable organisations

Although charities and other not-for-profit organisations share a number of similarities, they are also different. The main distinctions between the two types of organisation lie in the notion of what is charitable. This subsection takes an overview of what is charitable and the consequences in terms of the privileges attached to charitable status.

#### *1.2.1 Similarities between not-for-profit and charitable organisations*

It is not always easy to distinguish between not-for-profit and charitable organisations. Both types of organisation share similarities. This subsection looks at the similarities of charities and other not-for-profit organisations in terms of profit, structure and tax exemptions.

#### *1.2.1.1 No profit for individuals*

The main similarity between charities and other not-for-profit organisations is the fact that both types of organisation are not conducted for profit. This means that neither type of organisation distributes any profits to its members. Both are geared at fulfilling the purposes for which they have been established.

[19] D Rose "The Economic Role of the Voluntary Sector" in G R Hawke and D Robinson (eds) *Performance Without Profit: The Voluntary Welfare Sector in New Zealand* (Institute of Policy Studies, Wellington, 1993) at 16-17.

[20] J L Thompson "The World of the Social Entrepreneur" (2002) 15(4/5) *International Journal of Public Sector Management* 413.

[21] *Trustees, Trading and Tax*, 2007, CC25, on the Charity Commission website: www.charity-commission.gov.uk/Publications/cc35.aspx.

[22] *Commissioner of Inland Revenue v Carey's (Petone and Miramar) Ltd* [1963] NZLR 450; *Calder Construction Co Ltd v Commissioner of Inland Revenue* [1963] NZLR 921 at 926; *Auckland Medical Aid Trust v CIR* [1979] 1 NZLR 382 at 387; *Commissioner of Inland Revenue v MTN Bearing-Saeco (NZ) Ltd* (1986) 8 NZTC 5039.

[23] [2008] HCA 55; (2008) 236 CLR 204.

#### *1.2.1.2 Similarity of structures*

Charities cannot be differentiated from other not-for-profit organisations on the basis of their organisational or legal status. Both can be trusts or unincorporated societies. Both charities and other not-for-profit organisations can be incorporated under the *Incorporated Societies Act 1908* or the *Charitable Trusts Act 1957*. Finally, a small number of charities are companies incorporated under the *Companies Act 1993*.

#### *1.2.1.3 Tax exemptions*

Not all not-for-profit organisations are eligible for tax exemptions. For example, organisations that exist to serve only their members do not usually get tax exemptions.

However, a great number of not-for-profit organisations do get tax exemptions, even if they do not have exclusively charitable purposes. For example, the New Zealand *Income Tax Act 2007* provides at CW38 to CW40 and from CW44 to CW55 that a number of entities can have tax exemptions even if they are not exclusively charitable. This is the case for public authorities, local authorities, local and regional promotion bodies, friendly societies, funeral trusts, bodies promoting amateur games and sports, TAB (state-run gambling organisations) and racing clubs, income from conducting gaming-machine gambling, bodies promoting scientific or industrial research, veterinary services bodies, herd improvement bodies, community trusts, distributions from complying trusts, foreign-sourced amounts derived by trustees, Māori authority distributions and tertiary education institutions.

### *1.2.2 Distinctions between not-for-profit and charitable organisations*

The main distinctions between not-for-profit and charitable organisations can probably best be understood from an historical perspective.

#### *1.2.2.1 The origins of charity law*

Hubert Picarda observed that the meaning of charity came from the French word "charité", which meant "love in its perfect sense".[24] As indicated in the first chapter of this book, what is now considered charitable has evolved from the *Statute of Charitable Uses 1601*, also known as the *Statute of Elizabeth*. Lord Simonds observed in a 1949 decision that "three hundred and fifty years have passed since the statute became law; few, if any, subjects have more frequently occupied the time of the court".[25] Lord Simonds went on to say that "a great body of law has thus grown up. Often it may appear illogical and even capricious. It could hardly be otherwise when its guiding principle is so vaguely stated and is liable to be so differently interpreted in different ages".[26]

However, the purpose of the 400-year-old *Statute of Elizabeth* was "directed not so much to the definition of charity as to the correction of abuses which had grown up in the administration of certain trusts of a charitable nature".[27] Nevertheless, although the *Charitable Uses Act 1601* was repealed by the *Mortmain and Charitable Uses Act 1888* (UK), the courts continued to look at its Preamble for guidance, to the extent that Picarda noted "this practice became an inflexible rule of law".[28]

#### *1.2.2.2 Not all not-for-profit organisations are charitable*

As is analysed in much more detail in the next sections and in most of the chapters in this book, not all not-for-profit organisations are charitable. The notion of what is charitable is a creation of the law of equity, which has recognised charitable trusts. For example,

[24] Hubert Picarda *The Law and Practice Relating to Charities* (4th ed, Bloomsbury Professional Ltd, Haywards Heath, 2010) at 3 ["Picarda, 4th ed"].

[25] *Gilmour v Coats* [1949] AC 426 at 443.

[26] Ibid, at 443 per L Simonds.

[27] Ibid, at 442 per L Simonds.

[28] Hubert Picarda *The Law and Practice Relating to Charities* (3rd ed, Butterworths, London, 1999) at 10 cited by Kiri Hill-Dunne "It's Just Not Cricket – Charitable Trusts Ought to Be More Sporting" [2009] 4(1) *Australian and New Zealand Sports Law Journal* 3 at 5.

property would be given to trusts of religious orders to pray for donors' salvation or to establish colleges to educate future generations. In order to correct the abuses that had developed in the administration of certain trusts of a charitable nature, the *Statute of Charitable Uses* was adopted in 1601. This statute gave examples of things that were considered to be charitable. What is remarkable is that judges have continued to consider the *Statute of Elizabeth*, as the *Statute of Charitable Uses 1601* is most often called, as the main authority on and reference for what is charitable today. The examples specified in the *Statute of Elizabeth* were reorganised into four categories in 1891 by Lord Macnaghten in *Commissioner for Special Purposes of the Income Tax v Pemsel*.[29] These categories have been restated by section 5(1) of the New Zealand *Charities Act 2005* as follows: "charitable purpose includes every charitable purpose, whether it relates to the relief of poverty, the advancement of education or religion or any other matter beneficial to the community". Such purposes must also provide public benefit in order to be considered charitable.[30]

Organisations whose purposes do not fall into one of the four categories (of relief of poverty, advancement of education, advancement of religion, or any other matters beneficial to the community) are not considered to be charitable. The test for the fourth head of charity is more often than not whether cases decided by the courts recognise certain purposes as being charitable. Most of this book is devoted to establishing what is charitable and what is not.

#### *1.2.2.3 Charitable entities are established permanently*

A second distinction between not-for-profit organisations and charitable organisations once lay in the fact that charities were established as permanent trusts. In fact, trusts could only be permanent if they had charitable purposes. A judicial rule established that a trust would be illegal and therefore lapse if it was established in perpetuity. The maximum period before a trust's assets had to be vested was measured by the life in being (of someone identified) plus 21 years. However, the New Zealand Parliament has adopted the *Perpetuities Act 1964*,[31] which allows a settlor to select a period not exceeding 80 years, instead of adopting the common law perpetuity period.

Nowadays, however, a great number of not-for-profit organisations established in New Zealand are incorporated under the *Charitable Trusts Act 1957* or the *Incorporated Societies Act 1908*. Incorporated societies, whether they have charitable purposes or not, are established as bodies corporate, having perpetual succession.

#### *1.2.2.4 Upon winding up, surplus assets in charitable organisations must go to some other charitable purpose*

A significant difference between not-for-profit organisations and charities is that the assets of charitable organisations must be maintained exclusively for charitable purposes.[32] Accordingly, when a charitable organisation is dissolved or liquidated, its assets must be given to another organisation that has exclusively charitable purposes.

By contrast, when a not-for-profit organisation is liquidated or dissolved, its assets may be distributed amongst its members. Section 5(b) of the *Incorporated Societies Act 1908* provides that "the members of the society are entitled to divide between them the property of the society on its dissolution". Therefore, an incorporated society will only be considered charitable if it has exclusively charitable purposes and provides in its rules that upon liquidation or dissolution its surplus assets will be distributed to exclusively charitable purposes.

[29] [1891] AC 531 at 583.

[30] *Gilmour v Coats* [1949] AC 426 at 446-447. See also *Latimer v Commissioner of Inland Revenue* [2000] 3 NZLR 195 at [37-42].

[31] S 6.

[32] *Charities Act 2005*, s13(1)(b)(i).

#### *1.2.2.5 Donee status*

In New Zealand, most entities registered with Charities Services as having exclusively charitable purposes also have "donee status", which is granted by Inland Revenue. This means that if a person or a corporation makes a gift to such an organisation, they can claim a tax credit for their donation.

It is a common misconception that only gifts to charities qualify for tax relief. However, "donee status" can be given by Inland Revenue to any entity that is not carried on for the private pecuniary profit of an individual, and whose funds are applied wholly or mainly to charitable, benevolent, philanthropic or cultural purposes within New Zealand. A not-for-profit organisation that does not have exclusively charitable purposes could therefore apply for and receive donee status. Nevertheless, most organisations that are now listed on the Inland Revenue website are organisations that have been registered by the New Zealand Charities Registration Board, although not all charities registered by that Board are on the donee status list.[33]

However, such privilege is mainly available to charitable organisations and not to other not-for-profit organisations. This is an important privilege, because not only does the Government not charge any income tax on the revenue generated by the organisation, it also allows a tax credit on donations, up to 33%. This represents a huge contribution from the Government to charitable organisations.

### 1.3 Regulation of charities and not-for-profit organisations

#### *1.3.1 Reasons for regulation*

Jonathan Garton[34] argued that the regulation of private markets is traditionally justified by reference to five economic conditions: monopoly power and anti-competitive behaviour, the supply of public goods, the production of externalities, information deficits and irregularity of supply. The author suggested that the first and third of these conditions have little relevance to the regulation of organised civil society. However, he acknowledged that the other conditions are relevant to the regulation of the not-for-profit sector.

#### *1.3.1.1 The supply of public goods*

The notion of the supply of public goods means that not-for-profit organisations are better equipped to provide public benefit than for-profit organisations. This is because, being non-profit distribution entities, they are not constrained by the need to maximise profit for their owners. They can therefore commit themselves to achieving their purposes. This notion is very close to the requirement that charities provide public benefit. However, other non-charitable organisations that are non-charitable in nature can and do provide public benefit.

Some authors argue that not-for-profit organisations are better at providing public benefit, for three reasons. Firstly, they are more efficient because they are smaller. Secondly, since they are smaller, they are more flexible and more adaptable to changes that occur in society. Finally, they put more value on positive relationships with their beneficiaries.

Although the supply of public goods was contested by Jonathan Garton[35] as a reason for regulation of the not-for-profit sector, it is very often invoked by legislators as one of the reasons to regulate that sector. Maintaining public confidence in the sector is one of the main reasons for regulating charities. Thus the New Zealand *Charities Act*

[33] As at 10 January 2011, Charities Commission website showed that it contained 25,723 registered charities. By contrast, on the same date, Inland Revenue's list of those with "donee status" contained only 23,424 entities. See: www.ird.govt.nz/resources/b/1/b1c34880451f879d94afbf7747109566/donee.csv.

[34] "The Future of Civil Society Organisations: Towards a Theory of Regulation for Organised Civil Society" in Myles McGregor-Lowndes and Kerry O'Halloran (eds) *Modernising Charity Law: Recent Developments and Future Directions* (Edward Elgar Publishing Ltd, Cheltenham (UK), 2010) 207-227.

[35] Ibid, at 210-214.

*2005* specifically provides in section 3(a) that the main purpose of that Act is "to promote public trust and confidence in the charitable sector". The registration, monitoring and investigation of charitable organisations are therefore seen as means to promote public trust and confidence in the sector.

#### *1.3.1.2 Information deficit*

Regulation is traditionally justified where a particular market does not tend towards the free flow of information that consumers need to make rational decisions. Not-for-profit organisations do not always provide sufficient information to inspire public confidence in them.

Regulation by the state is one way to ensure that the public has access to more information about not-for-profit organisations. Usually the regulation process involves making public the organisation's constitution or rules documents. The documents outline the purposes for which the organisation was established, and if and how the officers can be paid. More interestingly, regulation usually (except in the case of entities incorporated under the *Charitable Trusts Act 1957*) involves the obligation to provide financial statements every year. From these documents the public can appraise whether the assets of the entity are being used to pay officers or for the achievement of the purposes for which the entity was incorporated. Unfortunately, these regulations do not apply to unincorporated trusts or societies or to entities incorporated under the *Charitable Trusts Act 1957* that are not registered with Charities Services. There is therefore a need to regulate those organisations, whether they are charitable or not.

#### *1.3.1.3 Irregularity of supply and taxation privilege*

The third reason to regulate is as a means of ensuring that the market is not disrupted by irregularity of production. In other words, regulation ensures that public goods are produced evenly in every geographical part of the country. Unfortunately, the regulation of not-for-profit and charitable organisations in New Zealand does not address that problem.

On the other hand, through tax exemption privileges bestowed upon some, if not all, not-for-profit organisations, the state can ensure that more money is kept within the entity in order to provide public goods. As indicated earlier, tax exemptions on the profit or interest earned by not-for-profit and charitable organisations, together with a tax credit for donors who contribute to those organisations, constitute a significant contribution from government. These considerable indirect contributions help to correct problems arising from irregular contributions by the public to the not-for-profit sector.

### *1.3.2 Different forms of regulation*

Regulation takes different forms. Some regulation activities are kept to a minimum; others are more heavy-handed. This subsection first examines the regulation of the not-for-profit sector before concentrating on the regulation of charitable organisations in New Zealand.

#### *1.3.2.1 Regulation of the not-for-profit sector*

Not-for-profit organisations are subject to different levels of regulation, depending on their legal structures and whether or not they are entitled to tax exemptions.

Trusts and unincorporated societies are generally not subject to any regulation unless they receive exemption from Inland Revenue because they fall under one of the categories mentioned in sections CW38 to CW55BA of the *Income Tax Act 2007*.

Societies incorporated under the *Incorporated Societies Act 1908* must maintain current rules documents on the Companies Office website. They also have to submit annual financial statements. Failure to submit the relevant documents will cause them to be struck off the Register of Incorporated Societies.

On the other hand, entities incorporated under the *Charitable Trusts Act 1957* need only maintain current rules documents. They do not have to provide annual financial statements.

Each category can also apply to Inland Revenue to be granted tax exemptions if they fall under sections CW38 to CW55BA of the *Income Tax Act 2007*. Tax exemptions are provided for public authorities, local authorities, local and regional promotion bodies, friendly societies, funeral trusts, bodies promoting amateur games and sports, TAB and racing clubs, income from conducting gaming-machine gambling, bodies promoting scientific and industrial research, veterinary services bodies, herd improvement bodies, community trusts, distributions from complying trusts, foreign-sourced amounts derived by trustees, Māori authority distribution and tertiary education institutions. Although Inland Revenue staff do analyse rules documents before making decisions, once a decision has been made the documents are not made public. The financial statements of these organisations are not made public unless the entities are incorporated under the *Incorporated Societies Act 1908*.

*1.3.2.2 Regulation of charities*

The regulation of charities was a creation of the courts of law. This was done through the mechanism of deciding whether trusts were valid or not. Trusts were considered invalid if they were established in perpetuity unless they were established for exclusively charitable purposes. The *Statute of Charitable Uses 1601*,[36] which is still being used to this day, gave examples of purposes and activities that would be considered charitable. That statute was adopted "to rationalise the administration of private charities – to specify the purposes for which funds could be devoted to charity, to ensure such funds were applied to the uses specified by donors, and to place the private charity under the supervision of the State".[37]

The regulation of charities was further necessitated by the introduction of tax exemptions from the *Income Tax Act 1799* and those that followed. A Special Commissioner was established to decide whether the entities that applied for tax exemption were or were not charitable. The *Charitable Trusts Act 1858*, adopted by the British Parliament, established a register of charitable trusts. However, the regulation of charities was left alone until the adoption of the *Charities Act 1960* by the British Parliament.

The *Charities Act 1960* is really the model that has been adopted in New Zealand. Based on the United Kingdom model, the *Charities Act 2005* established a Commission to regulate charities. Registration is not compulsory. However, only those entities that are registered are eligible to receive tax exemptions, unless they fall under other provisions administered by Inland Revenue. Registered charities are also subject to monitoring. This is done mainly through the obligations of registered charities to submit annual returns and financial statements. On 1 July 2012 the Commission was disestablished and its decision making powers were transferred to the New Zealand Charities Registration Board. The Commission's powers to investigate complaints received from the public or concerns discovered through the monitoring process were transferred to the chief executive of the Department of Internal Affairs.

[36] 43 Eliz I, c.4 (UK).

[37] See the website: www.hks.harvard.edu/fs/phall/01.%20Charitable%20uses.pdf at 2.

#### *1.3.2.3 Regulation of both not-for-profit and charitable sectors under the same scheme*

The tendency, as illustrated by the *Charities Act 2006* for England and Wales, has been to expand the list of charitable purposes.

Another way to look at the regulation problem has, however, been formulated by the Australian Productivity Commission report whose recommendations have now been implemented with the establishment of the Australian Not-for-profits and Charities Commission (ACNC). In that report, the Commission recommended that a national registrar for not-for-profit organisations be established to consolidate commonwealth regulation, register and endorse not-for-profits for concessional tax status, register cross-jurisdictional fundraising organisations and provide a single portal for corporate and financial reporting.[38]

This approach seems to have merit, because even if not all not-for-profit organisations have charitable purposes or purposes that can attract tax exemptions, they all comprise the third sector. As such, all not-for-profit organisations need to be regulated. The best way to achieve such regulation is through a single organisation, thus saving time and money.

### 1.4 Conclusion

Not-for-profit organisations, which include charities, represent what is commonly called the third sector. That sector represents an economic force that is being leveraged by governments. The third sector, especially charitable organisations, also represents a liability for governments in the sense that a number of not-for-profit organisations, especially charities, are exempt from tax. Moreover, governments also forgo tax revenue by giving tax credits to people who give money to those organisations, which have "donee status".

Not-for-profit and charitable organisations share a number of similarities. They are established for purposes that are not for profit. Their legal structures do not distinguish them, and both can be exempt from taxes under different income tax legislation. However, not all not-for-profit organisations are charitable. For a not-for-profit organisation to be charitable, it has to have purposes that fall into one of four categories: the relief of poverty; the advancement of education; the advancement of religion; or considered by the law as being beneficial to the community. Upon liquidation or winding up, the surplus assets of charitable organisations must be transferred to exclusively charitable purposes.

The regulation of the third sector has principally been aimed at charitable organisations. Not-for-profit organisations that are incorporated are minimally regulated under the *Charitable Trusts Act 1957* and the *Incorporated Societies Act 1908*. Unincorporated trusts and societies are only regulated if they receive tax exemptions directly from Inland Revenue or through being registered with Charities Services.

The Australian Productivity Commission has opened new horizons by suggesting that the regulation of all not-for-profit organisations be included under one regulatory system, including the determination of their charitable status. The Commission's recommendations have the merit of acknowledging that the third sector as a whole needs to be better recognised and regulated. Moreover, it has acknowledged the problems associated with the lack of regulation of the whole third sector of the economy have now been addressed with the establishment of the Australian Not-for-profits and Charities Commission (ACNC).

[38] Australian Government, Productivity Commission report, above n 4, at xxiii.

CHAPTER 2

# A brief history of charity law in England and New Zealand

Common law as applied in England and other countries that have adopted it cannot be understood unless one knows the history of its development. This is because common law is the accumulation over time of decisions made by judges. These decisions are usually linked to facts that gained their meaning from the social and economic situations of the time they were decided. This is why a minimal understanding of the historical background in which the law evolved is important. This is especially true of the development of charity law.

The first section presents a brief historical view of the development of charity law in England, concentrating on the main statutes adopted concerning charities. The second section examines the main statutory development of charity law in New Zealand.

## 2.1 Brief history of charity law in England

Judges have repeatedly written that the common law is based on history more than on logic. If that is true, one cannot understand the succession of common law cases without knowing some history. One may be surprised by the importance of statutory activity in the field of charity law. The most important changes have been brought about by statute. Statutory interpretations by courts have eventually expanded on the initial legislation.

### *2.1.1 Origins and early history of charity law in England*

The Roman Catholic Church was the main manager of charities until the late Middle Ages. Parish priests used tithes on land and endowments and applied one-third of the personal property of individuals who died intestate to provide alms houses, doles and elementary education for the poor. The church also maintained hospitals and homes for residential care for the poor, the aged and the chronically sick and disabled.[1]

The social and religious changes that occurred during the time of the early Tudors brought about a new era in the influence of the Roman Catholic Church and charity law. Over time, Parliament became more and more active in adopting laws concerning the regulation of poverty and of charities generally. Parliament's activity can be divided into four periods: the replacement of the Roman Catholic Church's charitable activities with state involvement and private philanthropy (1530-1660), the pre-industrial era (1660-1780), tax exemptions for charities under the *Income Tax Act 1799* (1780-1914), and the modern period (1914-2013).

### *2.1.2 Replacement of the Roman Catholic Church's charitable activities with state involvement and private philanthropy (1530-1660)*

Churches' inability to cope with poverty, particularly unemployed men wandering the countryside looking for work, and Henry VIII's attack on the power of the Roman Catholic Church brought about the state regulation of charities.[2]

[1] Garrett Jones *History of the Law of Charity* (1532-1827) (Cambridge University Press, Cambridge, 1969) at 13-15 [*History of the Law of Charity*].

[2] Ibid, at 14-16. See also Gino Dal Pont *Charity Law in Australia and New Zealand* (Oxford University Press, Oxford, 2000) at 45.

Statutes designed to prevent lands being perpetually possessed or controlled by religious corporations were adopted under the *Mortmain Act* in England. The first *Mortmain Act* was enacted during the reign of King Edward I, in 1279. This Act prevented the transfer of lands to the Roman Catholic Church unless the gift complied with certain requirements.[3]

The *Mortmain Act 1531*[4] directed against the holding of lands "to the use of parish churches, chapels, churchwardens, guilds, fraternities, commonalities, companies, or brotherhoods" – purposes previously acknowledged as charitable and religious. In order to finance his reign, Henry VIII seized the Catholic Church's and universities' lands by enacting the *Statute of Uses 1535*[5] and the *Chantries Act 1545*[6]. The *Statute of Uses 1535* "enacted the rule against perpetuities, terminated the situation that most English land, in order to escape feudal dues, was held from family generation to generation in dynastical, perpetual trusts owned by the Church".[7] The *Chantries Act 1545* allowed land held in mortmain (inalienable) by some of the religious corporations to be confiscated and those lands to be transferred to the Sovereign's possession.[8] Finally, Edward VI passed the *Chantries Act 1547*,[9] which condemned as superstitious in the Roman Catholic religion, although formerly approved as charitable, "such superstitious uses as saying of masses for the dead or to pray for souls supposed to be in purgatory". The courts have by a series of judicial decisions held "that the true effect of the statutes was to declare gifts, whether made before or since the passing of the Acts, [...] void; and the result has been that a class of trusts which have been called trusts for 'superstitious uses' have been held to have been prohibited by these statutes".[10]

After the Reformation, many of the values held by the Roman Catholic Church concerning the relief of poverty disappeared. The diminishing role of the Church was complemented by the increasing trend towards secularisation and the recognition that poverty was a national problem. Consequently, the administration of poor relief had to be placed in the hands of municipal authorities. In 1552 registers of the poor were introduced for each parish. In 1563 Justices of the Peace were given the power to raise funds to support the poor. In 1572 it was made compulsory for all people to pay a local poor tax. In 1597 it was made law that every district have an Overseer of the Poor to collect the poor rate from property owners, relieve the poor by dispensing either food or money, and supervise the parish poor house. Finally, in 1601 an Act of Parliament called the *Poor Law Act 1601*[11] was passed by Parliament. The Act brought together all the measures listed above into one legal document.[12]

At the same time, the *Statute of Charitable Uses Act 1601*[13] was adopted. That statute sought "to rationalise the administration of private charities – to specify the purposes for which funds could be devoted to charity, to ensure such funds were applied to the uses specified by donors, and to place the private charity under the supervision of the State".[14] That statute purported to redress the misemployment of lands, goods and money given to charitable uses.[15] It also suppressed the application of the *Statute of Uses 1535* and its rules against perpetuities for charitable entities. The Preamble also laid the foundation for the modern legal definition of charitable purposes. The Preamble read:

> *Whereas land, tenements, rents, annuities, profits, hereditaments, goods, chattels, money, and stock of money, have been heretofore given, limited, appointed, and assigned as well by the Queen's most excellent majesty, and her most noble progenitors, as by sundry other well-disposed persons: some for relief of aged, impotent, and poor people, some for maintenance of sick and maimed soldiers and mariners, schools of learning, free schools, and scholars in universities; some for repair of bridges, ports, havens, causeways, churches, seabanks and highways; some for education and preferment of orphans; some for or towards the relief, stock, or maintenance for houses of corrections; some for marriages of poor*

3 See the website: www.answers.com/topic/mortmain-acts.

4 23 Henry VIII c 10.

5 27 Henry VIII c 10.

6 37 Henry VIII c 4.

7 Professor William Byrnes' website: www.profwilliambyrnes.com.

8 *Catholic Encyclopaedia* "mortmain" on the following website: www.newadvent.org/cathen/10579a.htm.

9 1 Edward VI c 14.

10 *Carrigan v Redwood* [1910] 30 NZLR 244 at 247.

11 43 Eliz I c 2.

12 www.mdlp.co.uk/resources/general/poor_law.htm.

13 43 Eliz I c 4.

14 See the website: www.hks.harvard.edu/fs/phall/01.%20Charitable%20uses.pdf at 2.

15 The title of the *Statute of Charitable Uses 1601*, 43 Eliz I, c. 4 is: *An Acte to redress the Misemployment of Landes Goodes and Stockes of Money heretofore given to charitable Uses.*

*maids; some for supportation, aid, and help of young tradesmen, handicraftsmen, and persons decayed; and others for relief or redemption of prisoners or captives, and for aid or ease of any poor inhabitants concerning payment of fifteens, setting out soldiers, and other taxes; which land, tenement, rents, annuities, profits, hereditaments, goods, chattels, money, and stock of money, nevertheless, have been employed according to the charitable intent of the givers and founders thereof, by reason of frauds, breaches of trust, and negligence in those that should pay, deliver and employ the same.*[16]

It is generally accepted that this statute did not create a concept of charitable uses but restated "a body of law badly wanting classical statement".[17] It also tried to replace the work the Roman Catholic Church had done for the poor and the sick with a secular notion of philanthropy. The lengthy list of uses, if applied by private philanthropy, could have had the effect of relieving poverty, and promoting education and training for young people, thus reducing unemployment and the parish's financial support of vagrants.

The ecclesiastic courts were replaced by the Court of Chancery as the arena for the judicial enforcement of charitable uses. Gino Dal Pont wrote that the Court of Chancery recognised and enforced the charitable use, establishing it as the main legal mechanism for achieving philanthropic purposes. "It also corrected defects in conveyancing to ensure that charitable uses or trusts were not lost through formal errors. Secondly, legal privileges given to charitable institutions were confirmed and extended. Perhaps the most important privilege was the doctrine of *cy-près*".[18] This doctrine applied in a case where a charitable trust failed because its objects were uncertain, impossible to achieve or illegal. The *cy-près* doctrine provided the court with flexibility to interpret the perceived intent of the donor or testator and apply the property as closely as possible to similar charitable uses.[19]

### *2.1.3 The pre-industrial era (1660-1775)*

After the Reformation, the ruling classes adopted more repressive and less paternalistic approaches towards the poor. The *laissez-faire* ideology became predominant and the poor were left to fend for themselves. This was reflected in the *Poor Relief Act 1662*,[20] which provided that the poor could only receive relief in their parishes of origin. After the adoption of that Act, a man who left his settled parish needed a Settlement Certificate if he wanted to benefit under the Act. A Settlement Certificate guaranteed that his home parish would pay if he became a claimant on the poor rates. Since parishes were unwilling to issue such certificates, people tended to stay where they lived because they knew that if the occasion arose, they could claim on the poor rates without additional difficulties.[21]

Furthermore, "during the late sixteenth century and seventeenth century, the Crown often interfered piecemeal with religious charitable trusts, either voiding the trust or employing *cy-près* to divert the trust assets to the Crown's favoured religion".[22] The *Mortmain Act 1736*[23] was adopted as an anti-charity statute. It invalidated real property transfers to any charity *mortis causa*, as well as *inter vivos* transfers made one year or less before death. The purpose of this Act was to maintain property within the families instead of it being given away to charities. Gino Dal Pont wrote that "this statute reflected the concern that land should not be taken out of commerce and that 'the specious pretence of charity, the solicitations of those who are interested in charitable foundations, and the pride and vanity of the donors should not produce an act of injustice towards their heir-at-law' ".[24] This Act had the effect of limiting the funding of charities.[25]

Another example of the courts' attitude towards charity law is reflected in cases considering whether or not they were exempt from paying taxes, notably taxes assessed

[16] The modern version of the Preamble is cited by Dal Pont, *Charity Law in Australia and New Zealand*, above n 2, at 46-47.

[17] *Charity Law in Australia and New Zealand*, above n 2, at 47 citing W K Jordan *Philanthropy in England 1480-1660: A Study of the Changing Pattern of English Social Aspirations* (Allen and Unwin, London, 1959) at 112.

[18] *Charity Law in Australia and New Zealand* above n 2, at 46.

[19] *Oxford Dictionary of Law* (6th ed, Oxford University Press, Oxford, 2006) at 145 "*cy-près* doctrine". See also The Free Dictionary's website: www.legal-dictionary.thefreedictionary.com/cy+pres+doctrine.

[20] 14 Charles II c 12.

[21] "Academic Dictionaries and Encyclopaedias" website: http://en.academic.ru/dic.nsf/enwiki/825098.

[22] Professor Byrnes' website, above n 7.

[23] 9 George II c 36.

[24] *Charity Law in Australia and New Zealand*, above n 2, at 48. See also Jones, *History of the Law of Charity*, above n 1, at 110-111.

[25] Professor Byrnes' website, above n 7.

under the poor rate. In an anonymous case, Holt CJ said, "All lands within a parish are to be assessed to the Poor's Rate. Hospital lands are chargeable to the poor as well as others; for no man, by appropriating his lands to an hospital, can discharge or exempt them from taxes to which they were subject before, and throw a great burden upon their neighbours".[26] However, Lord Mansfield overturned that decision with respect to St Luke's hospital, saying that a hospital for lunatics "was not chargeable to the parish rates; and that in general no hospital is so". This was not because of the house in question being "given to charitable purposes" for use as a hospital, but because "there was no person who could be said to be the occupier of it".[27]

#### *2.1.4 The Industrial Revolution period (1775-1914)*

Major developments in charity law occurred during the Industrial Revolution. These developments were provoked by the social changes that occurred as a result of industrialisation. Industrialisation provoked "a change from an agrarian, handicraft economy to one dominated by industry and machine manufacture".[28] New skills were therefore needed and workers moved from the country to the city. Consequently, the state adopted measures to help the poor who wanted to work but were unable to find jobs. The *Poor Relief Act 1795*[29] provided doles under the poor law to supplement the low wages of rural employees as well as unemployed paupers. This approach, which was first tested by the Justices of the Peace in Speenhamland (United Kingdom), tied the wages of labourers to the price of bread and the size of the families in order to provide their families with a minimum level of subsistence. However, the *Poor Law Amendment Act 1834*[30] was adopted to distinguish between workers and paupers. The Act coerced all able-bodied but unemployed people to gain employment. Gino Dal Pont wrote that "this Act was aimed at making relief under the poor law and entry into the rigid discipline of workhouses less desirable than working for an employer. The undeserving poor would be disciplined and the deserving poor, who could not obtain work, would receive some indoor relief".[31]

The *Poor Law Amendment Act 1834* can be seen as the expression of an attitude that saw poverty as a moral issue. In other words, if people were poor, it was their own fault. The poor were considered to be improvident because they wasted any money they had on drink and gambling. There was therefore a need to educate the poor into morally acceptable attitudes. As a consequence, the Victorian era saw the rise of intense philanthropy and the creation of modern-day charitable institutions such as the Salvation Army, Children's Society and the Royal Society for Prevention of Cruelty to Children.[32] Elementary education for the poor was developed in various ways: charity schools and Sunday schools were organised by philanthropists and evangelists; ragged schools and industrial schools were also organised. Evangelists sent their members into the slums of large cities to teach adults how to live soberly and thriftily.[33]

The social changes that affected society during the Industrial Revolution were reflected in charity law in different ways over more than a century. Four legal changes are examined: the exemption of charities from income taxes, the expansion of the definition of charities, *Pemsel*'s classification, and changes adopted concerning the administration of charities.

##### *2.1.4.1 Exemption from taxes: 1798-1914*

At the end of the 18th century, England was at war with France and needed more taxes to finance its wars against Napoleon. In 1799 William Pitt the Younger introduced the first *Income Act 1799*. Pitt's income tax was levied from 1799 to 1802, when it was abolished by Henry Addington during the Peace of Amiens. It was reintroduced in 1803 by Addington with deduction at source. In 1805, Pitt created the Commissioners for the Special Purposes of the Income Tax, to administer claims for relief for charitable purposes. Income tax was

[26] Anonymous, Pasch 1 Ann BR, 2 Salk 527, 91 ER 48 cited by Michael J Gousmett *The Charitable Purposes Exemption from Income Tax: Pitt to Pemsel 1798-1891* (Doctoral Dissertation, University of Canterbury, 2009) at 96 [Charitable Purposes Exemption from Income Tax].

[27] *Rex v Occupiers of St Luke's Hospital* (1764) Burr 1053; 2 Burn Eccl Law 286. See also Gousmett, "Charitable Purposes Exemption from Income Tax", above n 26, at 96.

[28] *Encyclopaedia Britannica*, "Industrial Revolution" on www.britannica.com/EBchecked/topic/287086/Industrial-Revolution.

[29] 36 Geo III c 23.

[30] 4 & 5 Will IV c 78.

[31] *Charity Law in Australia and New Zealand*, above n 2, at 49.

[32] Barbara Daniels "Poverty and Families in the Victorian Era" on the website: www.hiddenlives.org.uk/articles/poverty.html.

[33] Gousmett, "Charitable Purposes Exemption from Income Tax", above n 26, at 490-491.

abolished again in 1816 after the Battle of Waterloo. However, it was reintroduced by Sir Robert Peel in the *Income Tax Act 1842*.[34]

In his study entitled *The Charitable Purposes Exemption from Income Tax*, Michael Gousmett wrote:

> *Whereas 38 Geo III c. 16* (Assessed Taxes Act 1798) *had exempted Royal or public hospitals from the additional duty on houses, windows, or lights, as well as 'any chambers or apartments therein used or occupied for charitable purpose,' and 39 Geo III c. 13* (Duties upon Income Act 1799) *had provided an exemption for corporations, fraternities, or societies or persons 'established for charitable purposes only,' 43 Geo III c 122 provided for quite a different range of potential sources of income to be exempt from the duties levied in that Act*.[35]

With the deduction at source, charities were again faced with a reduction in income. A mechanism was, however, created to allow them to submit their claims for exemption to the Special Commissioners for consideration. The main problem that arose was that there was no definition of what was charitable. This was the question that was presented to the Court and eventually answered in the *Pemsel* case. In other words, it specified which organisations and bodies should be treated as entitled to the benefit of the exemption clause, even if these bodies were not expressly named in the Act, such as hospitals, public schools and alms houses.

*2.1.4.2 Extension of the charitable concept*

The *Mortmain Act 1736*[36] was adopted as an anti-charity statute. *Morice v Bishop of Durham*[37] is an example of the restricted interpretation that courts put on charitable purposes. In that case, the testatrix bequeathed her residuary personal property on trust to her executor, the Bishop of Durham, "for such objects of benevolence and liberality" as the Bishop "in his own discretion, should most approve of". Her next of kin contested the trust as being void for uncertainty and perpetuity. The Master of the Rolls, William Grant, held that the bequest was void for uncertainty. That decision was approved by Lord Eldon on appeal. The main question for the Court was one of defining "charitable purpose". Both courts held that the object was too indefinite and uncertain and therefore the trust was void for uncertainty. It must be mentioned that in that case, Samuel Romilly, counsel for the next of kin, submitted a four-fold classification of charitable purposes that was to become influential in *Pemsel*'s decision. He offered that charitable purposes fall into four categories: "first, relief of the indigent; in various ways: money: provisions: education: medical assistance: etc; secondly, the advancement of learning; thirdly, the advancement of religion; and fourthly, which is the most difficult, the advancement of objects of general public utility".[38]

Gino Dal Pont wrote that cases based on the *Mortmain and Charitable Uses Act 1736* also affected the concept of public benefit. "The Preamble of the 1601 *Statute of Charitable Uses* held a public benefit to mean for the benefit of the poor or the poor and rich, but cases decided under the 1736 Act maintained that public benefit existed if any section of the community derived benefit".[39]

In that period, judges started to make reference to the purposes listed in the Preamble. For example, in *Attorney-General v Earl of Lousdale*,[40] a bequest of personal property in trust to establish a school for educating "the sons of gentlemen" was held to be charitable because advancement of education was specifically mentioned in the Preamble.

[34] Ibid, at 202-206 and chapter 5 generally.

[35] Ibid, at 221-222.

[36] 9 George II c 36.

[37] (1805) 10 Ves 522; 32 ER 947.

[38] (1804) 9 Ves 399 at 405; 32 ER 656 at 659.

[39] *Charity Law in Australia and New Zealand*, above n 2, at 51.

[40] (1827) 1 Sim 105; 57 ER 518. See also Dal Pont *Charity Law in Australia and New Zealand*, above n 2, at 51.

The doctrine of *cy-près* was also affected by decisions under the *Mortmain and Charitable Uses Act 1736*. When the execution of a purpose was illegal, impossible or impracticable, the Chancery judges required evidence that the donor or testator had a general charitable intention.[41] If such intention could not be shown, the property would revert to the party entitled in the event the trust lapsed.

The *Mortmain and Charitable Uses Act 1888*[42] repealed the *Charitable Uses Act* but it provided that references to charities "should be construed as references to charities within the meaning, purview, and interpretation of the Preamble to the statute". Thus, notwithstanding its repeal long ago, it continues to have effect in the United Kingdom.[43] The *Mortmain and Charitable Uses Act 1891* liberalised devises and other transfers of land for charitable purposes by creating or confirming exemptions, but retained the principle that special formalities should be observed.

#### *2.1.4.3 The* Pemsel *case*

The main question posed to the Court in *Commissioners for Special Purposes of the Income Tax v Pemsel*[44] was about the definition of "charitable purpose", in order to know which entities could be exempted from income tax. Before that case was decided, courts still adhered to the notion that being charitable connoted some degree of relief of the poor or deprived.[45] Two of the Law Lords in *Pemsel*'s case, Lord Halsbury and Lord Bramwell, agreed with the generally accepted view. However, the majority of the House of Lords (Lords Watson, Herschell, Morris and Macnaghten) rejected that view. The most often cited opinion today is that of Lord Macnaghten, who wrote that "no doubt the popular meaning of the words 'charity' and 'charitable' does not coincide with their legal meaning".[46] He asked, "How far, then, does the popular meaning of the word 'charity' correspond with its legal meaning?"[47] His response was to become the most often cited quotation in charity law:

> *Charity in its legal sense comprises four principal divisions: trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads.*[48]

The House of Lords' decision in *Pemsel*'s case has opened the doors for the recognition of numerous organisations that would not have been considered charitable beforehand, that is, organisations whose purposes were not linked to the relief of poverty, the advancement of religion or the advancement of education. This seminal decision coincided with the liberalisation of charitable uses with the *Mortmain and Charitable Uses Acts* of 1888 and 1891.

#### *2.1.4.4 Reforming the administration of charities*

Philanthropy in 18th-century London was considered a means to maintaining social order. According to Ben Wilson, "Philanthropy and religion were ways of obviating the need for an interfering police force by providing other means of regulating the masses. Charity was a way of clearing a path for better reception of the word of God".[49]

Two different kinds of charitable organisation existed at the time: the endowed charities (charities established by bequests), and voluntary charitable relief (charities established by rich people to aid the sick poor and the schooling of the poor).[50] In the City of London, endowments comprised parochial charities, trusts administered by the City parishes and the City's Livery Companies, which held massive funds in trust for charitable purposes.

41 Jones *History of the Law of Charity*, above n 1, at 38-53 citing *Corbyn v French* (1799) 4 Ves 418 at 431-432; 31 ER 213 at 219-220.

42 54 & 55 Vict 42 (1891).

43 Hubert Picarda *The Law and Practice Relating to Charities* (4th ed, Bloomsbury Professional Ltd, Haywards Heath, 2010) at 13.

44 [1891] AC 531.

45 *Baird's Trustee v Lord Advocate* (1888) 15 R (Ct of Session Cases) (4th series) 682.

46 [1891] AC 531 at 583.

47 Ibid.

48 [1891] AC 531 at 583.

49 Ben Wilson *Decency and Disorder: the Age of Cant 1789-1837* (Faber & Faber, London, 2007) at 79 cited by Gousmett, "Charitable Purposes Exemption from Income Tax", above n 26, at 474.

50 Gousmett, "Charitable Purposes Exemption from Income Tax", above n 26, at 480-485.

One problem, however, was that "many charities no longer had objects towards which to apply their rapidly increasing wealth".[51] Another problem was that "liberal reformers, anxious that charitable funds be used effectively, pushed for greater state regulation".[52] These reformers worked for charities to become more scientific and in so doing produced a doctrine to make private benevolence efficient, and spawned the profession of social work.[53]

A Royal Commission into charitable trusts was appointed in 1819. As a result of its recommendations, the *Charitable Trusts Acts* of 1853,[54] 1855[55] and 1860[56] were adopted by Parliament. The *Charitable Trusts Act 1853* (amended in 1855 and 1860) established a permanent commission to supervise charitable activity. The Charity Commission established a register of charitable trusts, and trustees were required to make reports and submit accounts annually. There were also mechanisms for a continuing check upon the administration of the trusts.[57] "The supervisory role of the Commission included from the outset a support function as preventive measures quickly proved more cost-effective than having to salvage and redistribute the assets of defunct charities". [58]

Gino Dal Pont wrote that although the *Charitable Trusts Act 1853* was a major step forward, it was limited in three ways.[59] First, it regulated only charitable endowments – that is, property held for charitable purposes but where capital was to be maintained. Secondly, the Commissioners could not act on their own initiative and had to rely on the trustees to act. Without the approval of the majority of the trustees, the Commissioners could not apply to the Court for a *cy-près* scheme where the property exceeded £50 in value. Finally, even when the Commissioners had authority to apply for a *cy-près* scheme they were limited in two ways: first, they had to show that the donor's or testator's purposes were illegal, impossible or impracticable. The other limitation was that once the original purposes were held obsolete, the new purposes of the *cy-près* scheme had to be as close as possible to those of the original.

The limitation on the *cy-près* schemes was removed by Parliament in order to allow properties of high value to be used for purposes meeting more urgent and contemporary needs. The Schools Inquiry Commission, which produced the *Taunton Report*, found that the provision of secondary education was poor and unevenly distributed. Two-thirds of English towns had no secondary schools of any kind, and in the remaining third there were marked differences in quality. The Commissioners recommended the establishment of a national system of secondary education based on existing endowed schools. The resulting *Endowed Schools Act 1869*[60] empowered Endowed Schools Commissioners to reorganise more than 3,000 endowed schools and make them more effective in the advancement of education.[61] The Act empowered the Commissioners to achieve this objective without having to obtain the consent of the trustees or having to show that the trust's original purposes had been illegal, impossible or impracticable, and without having to adopt purposes as close as possible to the original purposes. The powers and duties of the Charity Commissioners over education were transferred to the Board of Education by an Order of Council of 1901 under the *Board of Education Act 1899*.[62]

On 10 August 1878 a Royal Commission was established to investigate the parochial charities. This was because the richest parochial charities had grown enormously rich from leasing land. An anomaly resulted, of wealthy charities in rich parishes and insufficient resources in needy parishes. The Commission reported on 12 March 1880, which led to the *City of London Parochial Charities Act 1883*.[63] This Act provided that the five largest parishes should continue to administer their own charitable endowments, but that the charities of the remaining 107 parishes should be administered by a new corporate body called the Trustees of the London Parochial Charities, which is today known as the City Parochial Foundation. Section 14 of the Act empowered the Charity

[51] Ibid, at 480.

[52] Dal Pont, *Charity Law in Australia and New Zealand*, above n 2, at 52.

[53] Gousmett, "Charitable Purposes Exemption from Income Tax", above n 2, at 497.

[54] 16 & 17 Vict 137 (1853).

[55] 18 & 19 Vict 124 (1855).

[56] 23 & 24 Vict 136 (1860).

[57] Working Paper, Property Law and Equity Reform Committee, on website: http://132.181.2.68/Data/Library4/law_reports/proplaweq_999437.pdf at 3.

[58] Kerry O'Halloran, Myles McGregor-Lowndes and Karla W Simon *Charity Law & Social Policy: National and International Perspectives on the Functions of the Law Relating to Charities* (Springer, London, 2008) at 200 [*Charity Law & Social Policy*].

[59] *Charity Law in Australia and New Zealand*, above n 2, at 53.

[60] 32 & 33 Vict 56 (1869).

[61] Derek Gillard (2011) *Education in England: a Brief History* at ch 2, on the website: www.educationengland.org.uk/history/chapter02.html.

[62] 62 & 63 Vict 33 (1899). See also Dal Pont *Charity Law in Australia and New Zealand*, above n 2, at 54.

[63] 46 & 47 Vict 36 (1893).

Commissioners to take control of the City of London's parochial charities and redistribute their resources to improve the physical, social and moral condition of the poorer inhabitants of the metropolis, by providing education, hospitals and civic services.[64]

Gino Dal Pont wrote that the only other minor weakening of the *cy-près* doctrine came with the *Charitable Trusts Act 1914*,[65] "which enabled the Court and the Charity Commissioners to extend the scope of any trust confined to a borough or part of a borough so that its funds could be used to benefit residents of adjacent boroughs and, in the case of dole charities, could be applied for 'relief of distress or sickness or for improving the physical, social or moral condition of the poor in the area extended' ".[66]

### *2.1.5 Modern time – 1914-2013*

The development of the welfare state is probably the most important social factor that has influenced philanthropy and legislation pertaining to charity law in modern time. This subsection considers three main aspects: social changes leading to the welfare state, the regulation of charities and the adoption of the *Charities Act 2006*.

#### *2.1.5.1 The welfare state and charities*

The combined involvement of the state and employers under the pressure of unions brought about schemes to alleviate poverty and provide protection against the most important social risks. The welfare state provides education, housing, sustenance, healthcare, pensions, unemployment insurance, sick leave and time off due to injury, supplemental income and equal wages. It also provides for public transportation, childcare, social amenities such as public parks and libraries, and many other goods and services.[67]

Gino Dal Pont considered that these changes affected the operations of philanthropic organisations in three main ways. "Firstly, philanthropy moved to new areas of activity, such as battered women's refuges, developed new ways of collaborating with state welfare agencies, and became more outspokenly critical of the state welfare system".[68] Secondly, the tendency towards the professionalisation of services to the poor, started at the end of the 19th century, was accentuated by the welfare state and "coordinated their activities with state agencies and cognate voluntary bodies through regional and national organisations".[69] Finally, "the income of philanthropic organisations changed. Donations from wealthy individuals substantially declined in proportion to grants and subsidies from local and central government and gifts by private companies, mainly for education and social welfare".[70]

The development of the welfare state brought some changes into the development of charity law: the trend towards tighter regulation was increased in the 20th century.

#### *2.1.5.2 Regulating street collections*

The 20th century saw an increase in abuses of street collections, especially by children. *The Metropolitan Streets Act 1903*[71] gave the Commissioner of the Metropolitan Police power to regulate street collections. The Act provided that a permit for such collections was necessary. The *War Charities Acts* of 1916[72] and 1940[73] required war charities appealing for public donations to register with local authorities. Authorisation could be refused if a charity was unlikely to be properly administered or did not submit appropriate accounts.

Public charitable collections in the street are now regulated under the *Police, Factories, & c. (Miscellaneous Provisions) Act 1916*.[74] Parliament adopted the *House to House Collections*

[64] City Parochial Foundation's website: www.cityparochial.org.uk/cpf/cpf_guidelines.html, historical note.

[65] 4 & 5 Geo V c 56 (1914).

[66] *Charity Law in Australia and New Zealand*, above n 2, at 54.

[67] Katherine Bradley *Poverty, Philanthropy and the State: Charities and the Working Classes in London 1818-1979* (Manchester University Press, Manchester, 2009).

[68] *Charity Law in Australia and New Zealand*, above n 2, at 55.

[69] Ibid.

[70] Ibid.

[71] 3 Edw. VIII c 17 (1903).

[72] 6 & 7 Geo V c 43 (1916).

[73] 3 & 4 Geo VI c 31 (1940). See also Dal Pont, *Charity Law in Australia and New Zealand*, above n 2 at 55-56.

[74] 6 & 7 Geo V c 31 (1916).

*Act 1939*[75] to regulate public charitable collections conducted house to house. The *Local Government Act 1972*[76] transferred responsibility for licensing both forms of collection from the police to local authorities. In London, however, the Metropolitan Police and the Common Council of the City of London are still responsible for the licensing of collections. Finally, the *Charities Act 2006*[77] contains provisions for a new licensing scheme for public charitable collections.

#### *2.1.5.3 The Nathan Committee leading to the* Charities Act 1960

The problems that led to the *Nathan Report*, published in 1952, were not dissimilar to those encountered in the 1850s. It was felt that "financial difficulties have led to a widely-felt need to obtain the greatest advantage from the funds available and to adjust and develop the relationship between voluntary action and the government and local authorities".[78] Among those difficulties was the doctrine of *cy-près*, which had remained unchanged since 1860, and the Nathan Committee found that "the provision for registering trusts was a 'dead letter' while hundreds, perhaps thousands, of trusts need revision".[79] The Committee identified the reasons for this state of affairs as "a shortage of Commissioners, trustee ignorance and the lack of a specific penalty for non-lodgement of accounts".[80]

Parliament's response to the *Nathan Report* was the adoption of the *Charities Act 1960*.[81] That Act reinforced the laws adopted 100 years earlier to regulate charities. The *Charities Act 1960,* however, applied to all charitable entities. Commissioners were given additional powers to investigate and monitor charities. The *Charities Act 1960* clarified the law. It "has repealed either in whole or in part twenty-eight statutes as being obsolete, made consequential amendments in eighteen and superseded forty-seven. In addition, the abolition of the law of mortmain has resulted in the total or partial repeal of no fewer than ninety-seven".[82]

The Act created a general obligation to keep accounts and to provide them to the Charity Commission. If the Commission's investigations revealed mismanagement of or misconduct in a charity's affairs, it could take remedial action such as "freezing" the charity's bank account, directing its assets to be vested in an official custodian for charities, and removing the defaulting individuals.[83]

The main reform of the Act was to give Commissioners extended powers to modernise charities and make them meet current needs. In that regard, the Act modified the *cy-près* doctrine by removing the condition that the purposes had to be impracticable or illegal, requiring instead the Commissioners to show that they were not "suitable and effective according to the spirit of the gifts".[84]

The *Charities Act 1960* was revamped in 1993. The *Charities Act 1993*[85] made provision for the registration of charities, the administration of charities and their affairs, the regulation of charities and institutions of a public character, the regulation of fundraising activities carried on in connection with charities and other institutions and the conduct of fundraising appeals, and for purposes connected therewith.

75 2 & 3 Geo VI c 44 (1939).

76 UK, 1972 c 70.

77 UK, 2006 c 50. The information for the last three footnotes appears at: www.cabinetoffice.gov.uk/voluntary-sector/charity-law-regulation/public-charitable-collections.aspx.

78 *The Report of the Committee on the Law and Practice Relating to Charitable Trusts* (Cmnd. 8710) (HMSO, London, 1952) at 1.

79 O'Halloran et al *Charity Law & Social Policy*, above n 58, at 139.

80 Ibid, at 139.

81 8 & 9 Eliz II c 58 (1960).

82 Spencer G Maurice "The Charities Act, 1960" [1961] *Modern Law Review* 444 at 444.

83 Dal Pont *Charity Law in Australia and New Zealand*, above n 2 at 56.

84 O'Halloran et al *Charity Law & Social Policy*, above n 58, at 140.

85 UK 1993 c 10.

### *2.1.5.4* *The* Charities Act 2006

The *Charities Act 2006*[86] was adopted by Parliament to:

> *Provide for the establishment and functions of the Charity Commission for England and Wales and the Charity Tribunal; to make other amendments of the law about charities, including provision about charitable incorporated organisations; to make further provision about public charitable collections and other fund-raising carried on in connection with charities and other institutions; to make other provision about the funding of such institutions, and for connected purposes.*[87]

The 2006 Act expanded the four heads of charitable purpose to 13 categories. These categories were: the prevention or relief of poverty; the advancement of education; the advancement of religion; the advancement of health or the saving of lives; the advancement of citizenship or community development; the advancement of the arts, culture, heritage or science; the advancement of amateur sport; the advancement of human rights, conflict resolution or reconciliation or the promotion of religious or racial harmony or equality and diversity; the advancement of environmental protection or improvement; the relief of those in need by reason of youth, age, ill-health, disability, financial hardship or other disadvantage; the advancement of animal welfare; the promotion of the efficiency of the armed forces of the Crown, or of the efficiency of the police, fire and rescue services or ambulance services; and any other purpose recognised as charitable under existing charity law, analogous to, or within the spirit of, any purposes listed above or analogous to, or within the spirit of any purposes recognised under charity law as falling within the above paragraphs.[88]

The Act also put emphasis on public benefit, which was not presumed any more, but had to be shown by the applicant. The Charity Commission was required to issue guidance on public benefit in order to promote awareness and understanding of that requirement.[89]

Widened regulatory powers were provided in the Act for the Charity Commission, and the newly established Charity Tribunal had the powers to revisit the Commission's decision-making. Decisions, Directions and Orders made by the Commission could be appealed to the Charity Tribunal. In most cases the Tribunal had powers to quash an Order or Decision, make a substitute Order that the Commission could have made, remit the matter to the Commission or direct the Commission to grant the application. Appeals from the Charity Tribunal were to the High Court.[90]

The new Act provided that every charity be registered except for exempt charities, excepted charities that complied with the conditions of exception and whose gross annual income did not exceed £100,000, and any charity whose gross annual income did not exceed £5,000.[91] Moreover, the Commission received new supervisory powers, amongst which were the power to suspend or remove trustees from membership, give directions for the protection of a charity, direct the application of charity property, give advice and guidance, determine membership of a charity, and enter premises and seize documents.[92]

The *Charities Act 2006* made changes to the *cy-près* rules. The power to alter the purpose of an original gift was extended. The Commission could now exercise this power where the failure of the original purpose was assessed by reference not just to the "spirit of the gift" (i.e. the wishes of the original donor) but also to current social and economic circumstances. [93]

[86] UK 2006 c 50.

[87] Ibid.

[88] Ibid, s 2.

[89] Ibid, ss 3-4.

[90] Ibid, s 8.

[91] Ibid, s 9.

[92] Charity & Community Team, Farer & Co The Charities Act 2006. *A Short Guide to the Main Features of the Act*, 2006, on the website: www.farrer.co.uk/FileServer.aspx?oID=428 at 6 ["Charity & Community Team"].

[93] *Charities Act 2006* (UK), ss 15, 18.

The Act contained an option for charities to adopt new corporate structures as "charitable incorporated organisations". This was a new form of body corporate specifically designed to meet the needs of charities. These organisations had limited liability status and were subject only to the jurisdiction of the Commission, not Companies House. Existing charities could convert to charitable incorporated organisation status.[94]

The new rules encouraged charities to improve their efficiency and effectiveness by enabling them, where appropriate, to merge with other charities working in the same field or to incorporate by transferring their operations to new charitable companies.[95]

Finally, a new framework for the regulation of public charitable collections was established. To run a charitable appeal in a public place the promoter had to hold a valid Public Collections Certificate issued by the Commission, and a permit issued by the local authority. When undertaking a door-to-door charitable appeal the promoter had to hold a Public Collections Certificate issued by the Commission and have notified the local authority of the details of the appeal. Charity officers or employees who fundraised and were paid for doing so were required to make statements on forms provided by the Commission. Finally, professional fundraisers had to make statements about the remuneration they received for their work when fundraising.[96]

## 2.2 Development of charity law in New Zealand

As a British Dominion, New Zealand did not have to adopt laws from the beginning of the colony. It received the common law and some statutory law that was in force at the time the colony was established.

This section studies the reception of British charity law in New Zealand. It then briefly analyses the birth of the welfare state in New Zealand as a way to relieve poverty and other disabilities created by age and other social conditions. Thirdly, it analyses the regulation of legal structures that New Zealand has put into place in order to regulate charities and other not-for-profit organisations. Finally, it outlines the regulation of charities in New Zealand.

### *2.2.1 Reception of English law in New Zealand*

New Zealand became a British colony in 1840. The *English Laws Acts*,[97] passed in New Zealand in 1858, adopted the laws of England as existing on 14 January 1840. The expression "law of England" includes "so much of the English statute law existing on the 14th of January, 1840, as was applicable to the circumstances of the colony".[98] In *Carrigan v Redwood*,[99] Cooper J expressed the view that the *Statute of Mortmain 1531* was not in force in New Zealand, following the House of Lords' decision in *Whicker v Hume*[100] where it was held that statute was not in operation in New South Wales. Cooper J also considered that the *Chantries Act 1547*,[101] prohibiting certain religious practices of the Roman Catholic Church as superstitious, was not in operation in New Zealand.

The *Statute of Charitable Uses 1601* was received integrally into New Zealand law and it has continued unaltered by the 1888 Act that repealed it in England. Finally, the regulation of charities established by the 1853 Act in England had no effect in New Zealand since it was adopted after the reception of English laws into New Zealand.

According to Gino Dal Pont, it seemed that "like Australia, New Zealand did not adopt the English Poor Laws".[102] He quoted Thomson's views that the colonists desired to construct a world without welfare, a world without the English poor house, a world of opportunities for individual advancement, a world, we might add, designed for a youthful, healthy and

[94] Ibid, s 34.

[95] Ibid, ss 43-44.

[96] "Charity & Community Team", above n 92, at 15-16.

[97] *An Act to declare the Laws of England so far as applicable to the circumstances of the Colony, to have been in force therein on and after the 14th day of January, 1840*, Ordinances of New Zealand 1858 no 2 on the website: www.teara.govt.nz/en/law-and-the-economy/1/1.

[98] *Carrigan v Redwood* (1910) 30 NZLR 244 at 249 per Cooper J.

[99] Ibid.

[100] (1858) 7 HLC 124.

[101] 1 Edward VI c 14.

[102] Dal Pont, *Charity Law in Australia and New Zealand*, above n 2, at 78.

energetic population.[103] This is why the *Destitute Persons Ordinance 1846*[104] was adopted with subsequent amendments in 1877, 1883 and 1894. "Far from enshrining the legal right of every destitute citizen to support by the community, the ordinance placed the obligation on specified near relatives".[105] It allowed for the state to enforce the support of destitute persons by near relatives, and for wives/partners and children (legitimate or not) to be provided for by husbands where they had been abandoned illegally.

### *2.2.2 Charitable activities and the advent of the welfare state*

Some researchers have suggested that the dichotomy of communalism and pride in self-sufficiency was reflected in early New Zealand's charity regulatory process. As in the United Kingdom in earlier periods, charity issues were dealt with by *ad hoc* measures to assist specific causes. No regulatory body existed to monitor compliance and entities deemed to be charities by the tax authority were not required to file financial returns, leading to a lack of statistical data as well as a presumed reduction in transparency and accountability.[106]

#### *2.2.2.1* Laissez-faire *philosophy and private philanthropy*

The philosophy that was predominant at the time of the colony was one of *laissez-faire*. New Zealand was seen as a land of opportunity and the Government's focus was on getting individuals and families to be self-supporting through developing land and setting up businesses or obtaining waged and salaried work. New Zealand was to be a land without poverty, and thus a land that did not need public income support for the elderly or others.[107]

Of the early settlers, Rollo Arnold wrote that the element of altruism was implicit in the widespread self-help of these communities. "There was much to encourage the sacrifice of self-interest to the common good. In the absence of professionals and specialists, any settler with medical, midwifery, veterinary, mechanical or other skills found ample opportunity and encouragement to put them at the disposal of the community". [108]

In the absence of state intervention, private philanthropy filled the gaps. This was done primarily by the churches. Gifts were made for the construction and administration of churches. Some were also made for the education of the young in the principles of the Christian faith. While it seems that secondary education was better endowed, it was in the primary department that the churches were weak. H T Purchas wrote that "almost every child in the Dominion attends some government day school, and in these, since 1877, religious teachings have formed no part of the curriculum".[109]

In the areas of charitable relief, Purchas wrote that "in comparison with the churches of older lands, the Church of New Zealand may seem to do little".[110] The reasons he gave for that situation is that in a young and prosperous community there is not the same call for eleemosynary effort. However, he said that the Church has been heavily involved "with the care of the young and the rescue of the tempted and the fallen. Here the spiritual atmosphere is all-important. Our Church possesses orphanages in most of the large towns: Auckland (with three large institutions), Palmerston North, Nelson, Christchurch, and Dunedin; while in Napier and Wanganui it co-operates with other religious organisations to the same end".[111]

Purchas seemed to disagree that the state was not involved in caring for the poor. He went on to say that "in New Zealand the whole community has taken up whatever burden of this kind there may be, and bears it as a part of its ordinary governmental task. That hospitals and asylums, homes for the aged, and even reformatories for the vicious, should

[103] D Thomson *A World Without Welfare: New Zealand's Colonial Experiment* (Auckland University Press, Auckland, 1998) at 147-150 [*World Without Welfare*].

[104] (1846) 10 Vict Session VII no IX (New Zealand).

[105] Dal Pont, *Charity Law in Australia and New Zealand*, above n 2, at 78. A similar view is expressed in "Super History: NZ's Super System Unique" on the website: www.goodreturns.co.nz/article/976486047/super-history-nz-s-super-system-unique.html. It reads "The 19th century British colonists did not bring the Poor Law into New Zealand, and the relatively small number of elderly pakeha were expected to provide for themselves or be supported by their families. Older Māori were supported in the traditional way by their whānau or extended family. The expectation that immigrants would provide for themselves and their family members was enshrined in the Destitute Persons Ordinance of 1846 and subsequent Destitute Persons Acts in 1877, 1883 and 1894".

[106] Carolyn J Cordery and Rachel F Baskerville-Morley *Charity Financial Reporting Regulation: A Comparison of the United Kingdom and her Former Colony, New Zealand* (School of Accounting and Commercial Law, Working Paper Series, Working Paper no 20, Wellington, 2005) on the website: www.victoria.ac.nz/sacl/cagtr/working-papers/WP20.pdf at 18.

[107] Thomson, *World Without Welfare*, above n 103, at 147-150.

[108] Rollo Arnold *New Zealand's Burning – the Settlers' World in the Mid 1880s* (Victoria University Press, Wellington, 1994) on the website: www.nzetc.org/tm/scholarly/tei-ArnNewZ-_N1019F.html at 282-283.

[109] *A History of the English Church in New Zealand* (Simpson and Williams, Christchurch, 1914) on the website: http://anglicanhistory.org/nz/purchas1914/18.html.

[110] Ibid.

[111] Ibid.

be thus undertaken by the State is doubtless right and good, especially as every facility is given for ministers of religion to visit the inmates".[112] This may be explained by the fact that the state did get involved in the creation of the welfare state at the end of the 19th century.

#### *2.2.2.2 The birth of the welfare state*

One of the first state interventions in the field of charitable activities was the adoption by the New Zealand Parliament of the *Hospital and Charitable Institutions Act 1885*, the first national statute dealing with charitable aid. The Act was based on a system used in Ontario, Canada, whereby locally elected hospital and charitable boards were to administer hospitals, and a government subsidy supplemented charges levied on the local bodies. Twenty-eight districts were established under the Act, some of them (for example Patea, Inangahua and Tuapeka) representing very small population bases. Patients continued to be charged maintenance fees, later abolished by the *Social Security Act 1938*. Accurate, audited accounts were required to be kept. The system of local hospital boards established by the Act was to remain largely unchanged until the formation of Area Health Boards more than 100 years later.[113]

New Zealand was the first country in the English-speaking world to provide state-funded old-age pensions.[114] The old-age pension replaced the humiliating experience of applying for charitable aid for people aged 65 and older. The pension scheme, however, was not very generous (£18 a year) with applicants required to submit to a stiff means test (the net capital value of accumulated property had to be less than £270) and have 25 years' residence in New Zealand.[115] Moreover, although Māori were eligible for the pension, they often had difficulty proving their age.[116] Asian residents were prohibited from being paid pensions at all.[117] Despite all these shortcomings, the introduction of the old-age pension marked the beginning of social security as we know it today.

The 20th century saw state pensions extended beyond elderly needy persons. The *Widows Pension Act 1911*[118] provided pensions for widows of sober habits and of good moral character with children aged under 14.[119] The amount of the pension was £12 a year for one child, £18 for two children and £24 for three children.[120] That legislation followed the model adopted under the *Old Age Pension Act 1898* in that a pension claim had to be made before a magistrate who issued a pension certificate. Once the recipient had presented the certificate to the Postmaster, the money would be issued in monthly instalments.[121]

In 1913 the *Pensions Act* was introduced to consolidate and amend the old-age and other pensions.[122] A Commissioner of Pensions was established and Registrars could be appointed in different districts.[123] Military pensions for persons who had served under the Crown in any of the Māori wars were added to the already existing pensions.[124]

In 1915 pensions for invalidity were recognised for miners who had become totally incapacitated for work owing to miners' phthisis (*pneumoconiosis*) contracted while working as miners in New Zealand.[125] In contrast to previous pension schemes, an application, accompanied by a doctor's certificate, was made for this pension to the Registrar of Pensions.[126] In 1924 pensions were instituted for the blind.[127] In 1926 a limited *Family Allowances Act 1926*[128] was adopted. All of these pensions were still instituted for deserving people of "good moral character and sober habits" who had not been convicted of any offence punishable by imprisonment for two years or more.[129]

Finally, in 1930 the New Zealand Parliament adopted the *Unemployment Act*.[130] The Act established a levy from workers and an Unemployment Board, whose functions were to make arrangements with employers for the employment of persons who were out of

[112] Ibid.

[113] K A Simpson "Grabham, George Wallington 1836-1912" in *Dictionary of New Zealand Biography*, on the website: www.dnzb.govt.nz/DNZB/alt_essayBody.asp?essayID=2G14.

[114] *Old Age Pension Act 1898* (NZ), 62 Vict 14.

[115] Ibid, s 8.

[116] Ibid, s 65.

[117] Ibid, s 64(4).

[118] Amended by *Widows' Pension Amendment Act 1912* (NZ).

[119] Ibid, ss 4-6.

[120] Ibid, s 7(1).

[121] Ibid, ss 11-18.

[122] *An Act to Consolidate and Amend Certain Enactments Relating to Old-age and Other Pensions 1913.*

[123] Ibid, ss 4-6.

[124] Ibid, ss 23-26.

[125] (NZ) 1915 c 50, s 3.

[126] Ibid, s 8.

[127] *Pensions Amendment Act 1924*, ss 14-18.

[128] Section 8 of the Act excluded aliens, Asiatics and people of "bad character or who has been guilty of any offence or misconduct dishonouring him or her in the public estimation".

[129] Ibid, s 14(2)(d)(e).

[130] *Unemployment Act 1930.* No 10.

employment, take steps to promote the growth of primary and secondary industries in New Zealand and make recommendations for the payment of sustenance allowances out of the Unemployment Fund.[131] The sustenance allowances could only be allowed for 13 consecutive weeks.[132] The amount of the allowance varied, depending on whether the contributor was alone (21 shillings a week); had a wife (an additional 17 shillings and sixpence); and had children (four shillings per child).

Margaret Tennant wrote that in that period of sporadic efforts to establish better social policies, "interactions between government and voluntary agencies continued, and in various forms – they did not simply involve state financial transfers, and nor were they one-way".[133] She further wrote that during the 1930s Depression, there was "an existing, and accelerating, trajectory of interaction between government and voluntary welfare organisations prior to the election of the first Labour government".[134]

*2.2.2.3 Welfare state*

In 1935 a Labour Government was elected. Steve Maharey wrote that the Labour Government quickly began a process of social and workplace reform. "A five-day, 40-hour week was introduced for workers, minimum wages were set for farm labourers, and previous wage cuts were reversed. Pensions were increased and previous restrictions that prohibited Asian residents gaining the pension were removed".[135] The welfare reform process culminated in the passing of the *Social Security Act 1938*. The long title of that Act is instructive, as it purposes:

> *An Act to provide for the Payment of Superannuation Benefits and of other Benefits designed to safeguard the People of New Zealand from disabilities arising from Age, Sickness, Widowhood, Orphanhood, Unemployment, or other exceptional Conditions; to provide a System whereby Medical and Hospital Treatment will be made available to Persons requiring such Treatment; and, further to provide such other Benefits as may be necessary to maintain and promote the Health and General Welfare of the Community.*

From that long title, it can be deducted that the *Social Security Act 1938* modernised benefits to safeguard people from disabilities arising from age, sickness, widowhood and unemployment. Moreover, other categories were added to those already existing, including benefits for other conditions and provisions of payment for medical and hospital treatment. It covered any person who remained in New Zealand for a continuous period of at least 12 months.[136]

A Social Security Fund replaced the different funds that had been established under legislation adopted between 1898 and 1938, including the Employment Promotion Fund.[137] The Social Security Fund was to comprise registration fees and levies on salaries, wages and other income.[138] The Act was administered by a Social Security Department and a Social Security Commission, not by the courts, as were the benefits first adopted for old people, widows and sick miners.[139]

Family allowances were made universal in 1946 for any child born in New Zealand or who had been permanently resident in New Zealand for at least one year.[140]

The final level in the edifice of the social welfare state was proposed by a Royal Commission (the *Woodhouse Report*) in 1967. It recommended that compensation be extended to all injuries on a no-fault basis. Following this report, the *Accident Compensation Act 1972*[141] was adopted by Parliament. The Accident Compensation Commission (ACC) was established on 1 April 1974 to implement and operate that Act.

[131] Ibid, s 17.

[132] Ibid, s 20(3).

[133] "Two to Tango; The Partnership Between Charity and the Welfare State in New Zealand 1940-1970" (2008) 42(1) *New Zealand Journal of History*, 1-21, on the Massey University website: *mro.massey.ac.nz/.../1538/Tennant_M_Two%20to%20Tango.pdf?* at 3.

[134] Ibid, at 4.

[135] "Social Welfare in New Zealand", 15 September 2000, on the Government website: www.beehive.govt.nz/node/8642.

[136] *Social Security Act 1938*, s 110(2).

[137] Ibid, ss 103-104.

[138] Ibid, ss 108-127.

[139] Ibid, ss 3-7.

[140] *Social Security Amendment Act 1946*, s 4(1).

[141] (NZ) 1972/43.

ACC is the sole and compulsory provider of accident insurance for all work and non-work injuries. The ACC Scheme is administered on a no-fault basis, so that anyone, regardless of the way in which they incurred an injury, is eligible for coverage under the Scheme. The ACC Scheme provides a range of entitlements to injured people, from contributions towards the cost of treatment to weekly compensation for lost earnings (paid at a rate of 80% of a person's pre-injury earnings), and even home and vehicle modifications for the seriously injured.

Researchers have concluded that the decades following World War II saw "an elaboration of non-profit organisations under the umbrella of the welfare state, service organisations generally having a closer connection with the state".[142] In the 1970s it became apparent that even under a welfare state, and even after a period of relative affluence, social problems of various kinds still remained. This meant that there was still a place for non-profit organisations whose task was to work to reduce those inequalities. Moreover, "there was an awareness of global movements in the areas of environmentalism, feminism, indigenous and human rights, which were then translated into the local context"[143] and brought about the creation of non-profit organisations to deal with those issues.

#### *2.2.2.4 The shrinking of the welfare state and cooperation between the welfare state and the charitable sector*

In the 1980s, as everywhere in the world, neoliberal doctrines had profound implications on the welfare state and for the non-profit sector. Mounting debts accumulated from very liberal social programmes gave way to neoliberal doctrines. National debts had to be reduced and paid off, otherwise the burden of future generations would be too heavy for the social programmes to be maintained.

Margaret Tennant and her colleagues wrote that "policies supporting community care, devolution and the culturally appropriate delivery of services assumed the non-profit sector's ability to replace government activities or responsibilities, albeit with public funding".[144] This situation was reflected in situations where "purchase of services through contracts became the preferred mechanism for transferring resources from the state to non-profit organisations and for the delivery of services by these organisations".[145]

As a consequence of the multiple changes that had occurred in society in the previous 30 years, especially in New Zealand, Tennant and her colleagues identified the following trends within non-profit organisations. First, a divide between small, local and largely voluntary organisations and the larger organisations, which increasingly was informed by a managerial and professional ethos. Second, the global forces mentioned at the end of the previous subsection became increasingly important, especially concerning the protection of the environment. Third, ethnic diversity became a major force in the creation of new non-profit organisations. Finally, ethnicity became more important than religion as an organisational force.[146]

### *2.2.3 Regulating charities*

This subsection concentrates on the regulatory mechanisms that New Zealand has put into place to regulate charities. The regulation of charitable trusts and the regulation of charitable entities are analysed.

#### *2.2.3.1 Regulation of charities by the courts*

The regulation of charities was first a creation of the courts of law. This was done through the mechanism of deciding if trusts were valid or not. Trusts were considered invalid if

[142] Margaret Tennant, Mike O'Brien and Jackie Sanders *The History of the Non-Profit Sector in New Zealand* (Office for the Community & Voluntary Sector, Wellington, 2008) on the website: www.ocvs.govt.nz/documents/publications/papers-and-reports/the-history-of-the-non-profit-sector-in-new-zealand.pdf at 25. See also Margaret Tennant *The Fabric of Welfare. Voluntary Organisations, Government, and Welfare in New Zealand, 1840-2005* (Bridget Williams Books, Wellington, 2007) parts 3, 3.8 and 3.9.

[143] Ibid, at 25.

[144] Ibid, at 26.

[145] Ibid, at 26.

[146] Ibid, at 32.

they had been established in perpetuity, unless they had been established for exclusively charitable purposes. The *Statute of Charitable Uses 1601*,[147] which is still being used to this day, gave examples of purposes and activities that would be considered charitable. That statute was adopted to "rationalize the administration of private charities – to specify the purposes for which funds could be devoted to charity, to ensure such funds were applied to the uses specified by donors, and to place the private charity under the supervision of the State".[148]

*2.2.3.2 Regulation of charitable trusts*

The first Act regulating charitable trusts was adopted in 1856 in New Zealand. As its long title indicates, the *Religious, Charitable, and Educational Trusts Act* was adopted "to render more simple and effectual the titles by which property is held for charitable religious or educational purposes in New Zealand".[149] The Act provided that when any freehold or leasehold property was acquired by or on behalf of a body of persons associated for religious or charitable purposes and was conveyed to trustees or to parties named or subject to any trust, the conveyance was vested not only in them but also in their successors in office. The society or body of persons had powers to appoint fresh trustees if necessary.[150]

The *Religious, Charitable, and Educational Trusts Act 1856* was abolished by the *Religious, Charitable, and Educational Trust Boards Incorporation Act 1884*.[151] That statute was enacted "to enable societies or trustees for religious, charitable, educational or scientific purposes to form themselves into bodies corporate".[152]

In 1871 the New Zealand Parliament adopted the *Charitable Funds Appropriation Act*. This Act allowed for funds raised by voluntary contributions for particular charitable purposes, which later became impossible or inexpedient to apply to those purposes, to be applied to other charitable purposes. Charitable purposes were defined broadly to include:

> *(1) supply of physical wants of sick, aged, destitute or poor or helpless persons or of the expenses of funeral of poor persons; (2) the education, physical, mental, technical or social needs of children of the poor or indigent; (3) the reformation of criminals, prostitutes or drunkards; (4) the employment and care of discharged criminals; (5) the provision of religious instruction either general or denominational for the people; (6) the support of libraries, reading-rooms, lectures and classes for the instruction of the people; (7) the promotion of athletic sports and wholesome recreations and amusements of the people; (8) contributions towards losses by fire and other inevitable accidents; (9) encouragement of skill, industry and frugality; (10) rewards for acts of courage and self-sacrifice; (11) the refection, laying out, maintenance or repair of buildings and places for the furtherance of any of the purposes herein mentioned.*[153]

If money was not applied to an original purpose within one year, the money holder could propose a scheme to apply that money to other charitable purposes.[154] The scheme for transferring the money and the amount were required to be approved by a publicly advertised meeting of contributors and then be certified by the Attorney-General.[155]

The *Charitable Trusts Extension Act 1886* was adopted "to empower trustees and others holding property for particular charitable purposes to appropriate that property to other charitable purposes". In other words, when property was acquired for charitable purposes but it later became impossible or impracticable to apply it to those purposes or if the purposes were uncertain or illegal, the Act allowed the money to be applied to other similar charitable purposes.[156] Charitable purpose was defined as "the promotion of any

[147] 43 Eliz I c 4.

[148] See the website: www.hks.harvard.edu/fs/phall/01.%20Charitable%20uses.pdf at 2.

[149] *Religious Charitable and Educational Trusts* (NZ) 19 & 20 Vict Sess I (1856).

[150] Ibid, s 1.

[151] Ibid, s 11.

[152] Ibid, long title.

[153] Ibid, s 2.

[154] Ibid, s 5.

[155] Ibid, ss 6-11.

[156] *Charitable Trusts Extension Act 1886*, s 3.

of the objects specified in the second schedule to the *Hospitals and Charitable Institutions Act 1885*, the supply of the physical wants of sick, aged, destitute, poor or helpless persons, the education, physical, mental, technical or social needs of the poor or indigent and the reformation of criminals, prostitutes or drunkards".[157] The trustees could prepare a scheme that had to be presented to the Attorney-General, who would lay his report before a Supreme Court Judge.[158] The judge had jurisdiction to proceed in a summary way and call for evidence supporting or opposing the scheme.[159] Approved schemes were filed with the Registrar of the Supreme Court.[160]

The *Religious, Charitable, and Educational Trusts Act 1908*[161] consolidated most of the statutory provisions adopted in that respect. The *Religious, Charitable, and Educational Trusts Amendment Act 1928* amended the main Act in two ways. First, the definition of charitable purpose was extended to "every other purpose which in accordance with the law of England is a charitable purpose".[162] Second, section 5 of the amending Act allowed schemes approved by the Supreme Court to be altered in the same manner as the original purposes were altered.

Gino Dal Pont wrote that "after the New Zealand Court of Appeal declared a New Zealand trust void for uncertainty by mixing charitable and non-charitable objects in *Re Catherine Smith*,[163] the *Trustee Act 1935* copied section 131 of the *Victorian Property Law Act 1928*".[164] That provision allowed the Court to "blue pencil" non-charitable purposes if the main intention was to create a charitable trust. That provision was re-enacted as section 61B of the *Charitable Trusts Act 1957*, using the language utilised in the English *Charitable Trusts (Validation) Act 1954*.

The *Charitable Trusts Act 1957* consolidated the different previous statutes concerning charitable trusts. Part 2 of the Act (sections 6-30) deals with the incorporation of trust boards. Part 3 (sections 31-37) allows property to be applied to other charitable purposes when the original purposes are impossible, impracticable or inexpedient to carry out. Part 4 (sections 38-50) deals with schemes in respect of charitable funds raised by voluntary contributions. Finally, Part 5 (sections 51-63) deals with miscellaneous provisions concerning the administration of schemes. In 1963 the *Charitable Trusts Amendment Act 1963* added two more sections to the *Charitable Trusts Act 1957*. Section 61A was concerned with facilities provided with the purpose of improving the conditions of life of people. Such facilities were deemed to have always been charitable. As mentioned in the previous paragraph, section 61B was re-enacted from section 82 of the *Trustee Act 1956*, which was taken over from the *Trustee Amendment Act 1935*. Section 82 of the *Trustee Act 1956* was consequentially repealed by section 4(2) of the *Charitable Trusts Amendment Act 1963*.

#### *2.2.3.3 Regulation by Inland Revenue*

Inland Revenue monitors for exemptions charitable and other not-for-profit entities that fall under one of the categories mentioned in sections CW38 to CW55BA of the *Income Tax Act 2007*. Tax exemptions are provided for public authorities, local authorities, local and regional promotion bodies, friendly societies, funeral trusts, bodies promoting amateur games and sports, TAB and racing clubs, income from conducting gaming-machine gambling, bodies promoting scientific and industrial research, veterinary services bodies, herd improvement bodies, community trusts, distributions from complying trusts, foreign-sourced amounts derived by trustees, Māori authority distribution and tertiary education institutions.

Although Inland Revenue staff analysed rules documents before making decisions on whether or not to grant tax exemptions, once a decision has been made the documents are not made public. The financial statements of these organisations are not made public unless the entities are incorporated under the *Incorporated Societies Act 1908*.

[157] Ibid, s 2 "charitable purposes".

[158] Ibid, ss 4-6.

[159] Ibid, ss 7-9.

[160] Ibid, s 10.

[161] *Consolidated Statutes Enactment Act 1908*, Appendix A no 164.

[162] *The Religious, Charitable, and Educational Trusts Amendment Act 1928*, s 3.

[163] [1935] NZLR 299. The Court of Appeal's decision was affirmed by the Privy Council: (1935) 53 TLR 37.

[164] *Law of Charity* (LexisNexis/Butterworths, Australia, 2010) at 125.

Such societies must maintain current rules documents on the Companies Office website. They also have to submit annual financial statements. Failure to submit current documents will cause them to be struck off the Incorporated Societies Register. On the other hand, trusts incorporated under the *Charitable Trusts Act 1957* need only maintain current rules documents. They do not have to provide annual financial statements. Finally, there is no mechanism for the rules documents or the financial statements of unincorporated trusts and societies to be made available to the public.

#### *2.2.3.4 Charities Act 2005*

In 1979, after an 11-year study, the New Zealand Property Law and Equity Reform Committee released a report on the regulation of charities. After reviewing the English Charity Commission model of regulation, it concluded that it would be difficult to justify the setting up of a body to supervise charitable trusts in New Zealand because there was no justification for recommending any change to the law in the area.[165]

The regulation of charities was discussed for more than 15 years before the New Zealand Parliament decided to act on the matter. In 1989 a working party on charities and sporting bodies produced a report in which it recommended the creation of a commission for charities.[166]

In the early 2000s, the Labour Government issued a discussion document entitled *Tax and Charities*, which reviewed the tax treatment of charities to see if the tax measures could be better targeted to support charities.[167] In a speech to the Philanthropy Association, then Minister of Finance Michael Cullen said that the response had been good, with nearly 1,700 submissions received. The Government announced its decisions on the tax and charities proposals in October 2001. It decided to "introduce registration, reporting and monitoring requirements for organisations claiming charitable status for tax purposes. The aim is to improve the amount of information available to the government and the public about the sector, and so improve decision-making".[168] To that end, a working party comprising representatives of the charitable sector was appointed and asked to come back to the Government with recommendations. The working party gathered considerable feedback from both the sector and the public about their needs and concerns, and from government agencies whose mandates touched upon the sector. Those views were reflected in the design of the recommendation to establish an autonomous Charities Commission, and provide it with powers to register and monitor charities and assist them with education and to deal effectively with any charities that failed to provide the level of assurance required by the public.[169]

The recommendations of the working party were put into a Bill. The Social Services Committee of Parliament reported that it received 753 submissions on the Bill, mostly from entities operating in the charitable sector, and found that there was general support for the establishment of a Charities Commission. The Committee decided not to extend the definition of charitable purpose adopted by the House of Lords in *Pemsel* because "the majority does not believe that expanding the definition of charitable purposes will offer any significant benefit, and therefore does not recommend the definition be amended".[170] The Bill was adopted with a few amendments.

The *Charities Act 1960* is really the model that has been adopted in New Zealand. Based on the United Kingdom model, the *Charities Act 2005* establishes a Commission to regulate charities. Registration is not compulsory. However, only those entities that are registered may receive tax exemption, unless they fall under other provisions administered by Inland Revenue. The legislation governing the fiscal advantages of charitable status is not found in the *Charities Act 2005* but in specific fiscal legislation, namely the *Income Tax Act 2007*.[171]

[165] O'Halloran et al *Charity Law & Social Policy*, above n 58, at 388.

[166] *Report to the Minister of Finance and the Minister of Social Welfare* by the Working Party on Charities and Sporting Bodies (Treasury, Wellington, 1989).

[167] M Cullen, P Swain and J Wright *Tax and Charities: A Government Discussion Document on Taxation Issues Relating to Charities and Non-Profit Bodies* (Policy Advice Division, Inland Revenue, Wellington, 2001).

[168] Hon Dr Michael Cullen "Address to NZ Association of Philanthropic Trusts" (Wellington, 20 November 2001) at www.taxpolicy.ird.govt.nz/news/2001-11-20-minister-tax-and-charities.

[169] Sid Ashton "Chairperson's Review" in *Charities Commission Annual Report 2010* on Charities Services website: www.charities.govt.nz/LinkClick.aspx?fileticket=zBjm1t9G%2bHQ%3d&tabid=268&mid=1094 at 2.

[170] *Charities Bill, Government Bill, as Reported from the Social Services Committee*, on the New Zealand Parliament website: www.parliament.nz/NR/rdonlyres/0DF2C3D0-17D2-4899-8DD6-4B2717227758/48082/DBSCH_SCR_2973_3096.pdf at 3.

[171] Myles McGregor-Lowndes "Introduction" in Myles McGregor-Lowndes and Kerry O'Halloran (eds) *Modernising Charity Law: Recent Developments and Future Directions* (Edward Elgar Publishing Ltd, Cheltenham (UK), 2010) 1 at 33.

Registered charities are also subject to monitoring. This is done mainly through the obligation of registered charities to submit annual returns and financial statements. The Commission also has powers to investigate complaints received from the public or concerns discovered through the monitoring process.

### 2.3 Conclusion

Charities, in New Zealand as well as in the United Kingdom, have for centuries been providing for the poor and for every kind of social need that arises. This was the case until the demands of society were so high that charities could not meet them. It was only then that governments stepped in to establish the means of meeting those needs.

At first, a number of governmental initiatives were adopted to finance charities in meeting the needs of society. It was only when charities could not achieve that Herculean task that governments intervened to establish schemes to meet those specific social and educational needs.

# General considerations about charities

Charity law cannot be understood out of its social and historical context. On the other hand, before getting into the detailed analysis of what is and what is not charitable at law, it is important to have a general overview of how courts approach the interpretation of the constitutional documents of entities that wish to be granted charitable status.

This part consists of two chapters. The first (numbered third in this book) explores the concept of charity, both at common law and in statute law. The approaches used by courts in interpreting the law is also analysed in that chapter.

The second chapter (numbered fourth in this book) deals with the concept of public benefit. The notion of public benefit is essential in charity law. Public benefit is what distinguishes charities from trusts and entities established for the benefit of private individuals or groups of individuals.

CHAPTER 3

# The concept of charity

The present chapter focuses on general considerations about charitable purposes. Considerations such as the legal definitions of charitable purposes are analysed. How courts construe charitable purposes and the process they use in doing so are canvassed. The requirement for exclusively charitable purpose is also analysed, together with different mechanisms to ensure that this is the case, including saving statutory provisions provided by section 61B of the *Charitable Trusts Act 1957*.

## 3.1 Legal definition of "charitable purposes"

This section inquires into the origins of charity law in order to better understand the legal meaning of the concept of charity. The second subsection distinguishes between the legal and the popular meanings of the word "charitable". The third subsection looks at the meanings given to the words "charity" and "charitable" in the legislation. Finally, the fourth subsection considers the concept of charity as a living tree that can adapt to change.

### *3.1.1 The origins of the concept of charity*

Hubert Picarda observed that the meaning of charity came from the French word "charité", which meant "love in its perfect sense".[1] As indicated in the first chapter of this book, what is now considered charitable has evolved from the *Statute of Charitable Uses 1601*, also known as the *Statute of Elizabeth*. Lord Simonds observed in a 1949 decision that "three hundred and fifty years have passed since the statute became law; few, if any, subjects have more frequently occupied the time of the court".[2] Lord Simonds went on to say that "a great body of law has thus grown up. Often it may appear illogical and even capricious. It could hardly be otherwise when its guiding principle is so vaguely stated and is liable to be so differently interpreted in different ages".[3]

However, the purpose of the 400-year-old *Statute of Elizabeth* was "directed not so much to the definition of charity as to the correction of abuses which had grown up in the administration of certain trusts of a charitable nature".[4] Nevertheless, although the *Charitable Uses Act 1601* was repealed in England (although not in the colonies) by the *Mortmain and Charitable Uses Act 1888* (United Kingdom), the courts continued to look at the Preamble for guidance to the extent that Hubert Picarda noted "this practice became an inflexible rule of law".[5]

### *3.1.2 Legal and popular meaning of charitable*

Lord Macnaghten is probably the most often quoted as having tried to distinguish between the popular and the legal meanings of the word charitable as it applied to charity law. In *Commissioners for Special Purposes of Income Tax v Pemsel*, he wrote "that according to the law of England a technical meaning is attached to the word 'charity', and to the word 'charitable' in such expressions as 'charitable uses', 'charitable trusts', or 'charitable purposes', cannot, I think, be denied".[6] The distinction between the legal and the popular meanings was emphasised by the Privy Council, which was the New Zealand court of last resort until 2004. In *Verge v Somerville*, Lord Wrenbury wrote:

1 Hubert Picarda *The Law and Practice Relating to Charities* (3rd ed, Butterworths, London, 1999) at 3 ["Picarda 3rd ed"].

2 *Gilmour v Coats* [1949] AC 426 at 443 per L Simonds.

3 Ibid.

4 Ibid, at 442 per L Simonds.

5 Picarda 3rd ed, above note 1, at 10 cited by Kiri Hill-Dunne "It's Just Not Cricket – Charitable Trusts Ought to be More Sporting" [2009] 4(1) *Australian and New Zealand Sports Law Journal* 3 at 5.

6 [1891] AC 531 at 580.

"The legal meaning and the popular meaning of the word 'charitable' are so far apart that it is necessary almost to dismiss the popular meaning from the mind as misleading before setting out to determine whether a gift is charitable within the legal meaning".[7] Finally, New Zealand courts have also distinguished between the two meanings. In *Re Wilkinson (deceased)*, Kennedy J wrote that "the popular meaning does not coincide with the legal or technical meaning".[8]

New Zealand courts have considered that "there is no intrinsic legal definition of a charity"[9] and that "the term 'charity' is probably incapable of definition".[10] Nevertheless, courts in New Zealand, as in other common law jurisdictions, have followed the enumerations provided in the Preamble of the *Statute of Charitable Uses 1601*. Although no satisfactory definition has been given by the courts, an exhaustive classification has been provided by Lord Macnaghten in the *Pemsel* case, in the sense that "any purpose which is charitable must fit into one or more of the four *Pemsel* categories, although admittedly the fourth category is very broad due to its residual nature".[11] In *Pemsel*, Lord Macnaghten wrote:

> *Charity in its legal sense comprises four principal divisions: trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads. The trusts last referred to are not the less charitable in the eye of the law, because incidentally they benefit the rich as well as the poor, as indeed, every charity that deserves the name must do either directly or indirectly.*[12]

That classification has been accepted in New Zealand, and section 5(1) of the *Charities Act 2005* provides that:

> *In this Act, unless the context otherwise requires,* charitable purpose *includes every charitable purpose, whether it relates to the relief of poverty, the advancement of education or religion, or any other matter beneficial to the community.*

Moreover, Joseph Williams J in *Travis Trust v Charities Commission* wrote that "the four heads of charity [are] now codified in s 5(1)".[13] Finally, in the *Hansard* discussions relating to the second reading of the Charities Bill, it is clearly stated that it was not the intention of the Bill to change the definition of "charitable purpose". Thus, it was said:

> *In many of the submissions received, concern was expressed about the purposes used in the Bill. The test used in the Bill comes from case law, and the select committee has not recommended that that test should be changed. What it has recommended is that the Bill codify, for clarity reasons, the common law on non-charitable incidental purpose [...] For example, we still have big issues around the definition of charity, charitable purpose, and public benefit. The select committee, in its wisdom, decided not to expand or update the definition of "charitable purposes". [...] the majority, does not believe that expanding the definition of charitable purpose will offer any significant benefit, and therefore does not recommend the definition be amended. The majority is concerned that amending this definition would be interpreted by the Courts as an attempt to widen or narrow the scope of charitable purposes, or change the law in this area, which was not the intent of the Bill.*[14]

7 [1924] AC 496 at 502.

8 [1941] NZLR 1065 at 1075.

9 *D V Bryant Trust Board v Hamilton City Council* [1997] 3 NZLR 342 at 347 per Hammond J affd [1999] 1 NZLR 41.

10 *Re Wilkinson (deceased)* [1941] NZLR 1065 at 1075 per Kennedy J citing *Re Nottage, Jones v Palmer* [1895] 2 Ch 649 at 656 per Rigby J.

11 *Vancouver Society of Immigrants and Visible Minority Women v MNR* [1999] 1 SCR 10 at [35] per Gonthier J dissident.

12 *Commissioners for Special Purposes of Income Tax v Pemsel* [1891] AC 531 at 583.

13 (2009) 24 NZTC 23,273 at [20].

14 Charities Bill – Second Reading, Instruction to Committee, In Committee, Third Reading (2005) 625, NZPD 19940.

In *Greenpeace of New Zealand Incorporated*,[15] Heath J cited the above quotation from *Hansard* and took the view that the intrinsic aids to interpretation supported his view that the use of an existing term of art pointed to the adoption of a pre-existing interpretation of the phrase "charitable purposes". He concluded that "the Commission was correct to conclude that the Act did not change the meaning of 'charitable purpose' ".[16]

Gino Dal Pont wrote that the classification of the four heads of charity was one of convenience and had been said "to be useful for excluding cases that do not fall within them rather than for explaining what really are valid charities".[17]

*3.1.2.1 Legal meaning is wider than the popular meaning*

In solving the issue presented in *Salvation Army (Victoria) Property Trust v Fern Tree Gully Corporation*,[18] the High Court of Australia was faced with the difficult task of deciding if the word "charity" should be given a popular meaning or a technical one. The High Court opted for the technical meaning for the following reason:

> *But there is really a fundamental difference between the two senses. There is a subjective element in the term as used non-technically, which is absent when it is used technically. The characteristic of a charitable act or purpose in this sense is that it possesses a certain moral quality. This is so although that quality is extremely vague and difficult to define, and even if it be true that common usage has narrowed the scope of the term by reference to relief of poverty. On the other hand, when we ask whether an act or purpose is charitable in the technical sense, the test to be applied is wholly objective. The whole question is whether the act or purpose itself falls within a particular class which we say is to be defined by reference to the* Statute of Elizabeth.[19]

In the *Salvation Army* case, it is clear that the legal meaning was broader than the popular meaning. In that case, the decision of the Supreme Court of Victoria was reversed because in applying the popular meaning it had refused to consider that a training farm and vocational centre for boys who, by reason of delinquency, parental neglect, apparent defect of character or other disadvantage in life, were in need of assistance. The popular meaning is therefore not as broad as the legal meaning, especially with respect to the advancement of education and religion. It is more restricted to providing relief to the poor or deserving persons, such as the elderly or people with disabilities. It is also clear that other purposes beneficial to the community are much wider than those that would be considered charitable from a popular perspective.

Similarly in *Queenstown Lakes Community Housing Trust*,[20] MacKenzie J wrote that the "term 'charitable' is used not in its ordinary dictionary meaning but in the particular technical meaning that the law has ascribed to that word".

*3.1.2.2 Popular meaning is sometimes broader than the legal meaning: benevolent, philanthropic and public opinion*

On the other hand, the legal meaning may be defined less broadly than the popular meaning in some cases, because the legal meaning of charity does not equate with "benevolent", "philanthropic" or "eleemosynary" as it was made clear in *Commissioner of Inland Revenue v Medical Council of New Zealand*.[21]

Courts have been reticent to recognise as the equivalent of "charitable" words that the dictionary gives as synonymous to "charities", "charitable organisation", "charitable purpose" or "charitable funds", which are presumed to be exclusively charitable.[22]

[15] HC WN CIV 2010-485-829 [6 May 2011] at [38].

[16] Ibid, at [40]. In *Greenpeace of New Zealand Incorporated* [2012] 533 at [55]-[60], the New Zealand Court of Appeal noted that Parliament had not changed the definition of "charitable purpose" when it adopted the *Charities Act 2005* nor when it added "amateur sporting clubs" in 2006.

[17] Gino Dal Pont *Charity Law in Australia and New Zealand* (Oxford University Press, Oxford, 2000) at 8 citing *Re Wallace* [1908] VLR 636 at 638 per Hood J.

[18] (1952) 85 CLR 159; [1952] HCA 4.

[19] Ibid, at 184 per Fullagar J.

[20] HC WN CIV-2010-485-1818 [24 June 2011] at [28].

[21] [1997] 2 NZLR 297 at 321 per Thomas J.

[22] Dal Pont *Charity Law in Australia and New Zealand*, above n 17, at 218.

The word "benevolent" has been defined in the *Concise Oxford English Dictionary* as "serving a charitable rather than a profit-making purpose".[23] However, in *Re Knowls (deceased)*,[24] the Privy Council had to decide whether a bequest left by a testator domiciled in New Zealand was charitable, directing that the property should be held in trust "for such charitable benevolent religious and education institutions, societies and objects". The Privy Council held:

> *In accordance with a well-established series of authorities, beginning at least as early as* James v Allen,[25] *a gift for benevolent purposes is bad, because such purposes go beyond the legal definition of charities – a word which, in the construction of wills, has always possessed a limited and technical meaning. It is far too late to question the soundness of these authorities at the present day. It may well be that the minds of people unversed in the subtlety of legal phrases "benevolent" and "charitable" are equivalent terms. But in the courts the meaning of "charitable" has been influenced by the Preamble to the Statute 43 Eliz., c. 4, and charitable purposes have been regarded as those which that statute enumerates, or which by analogy are deemed within its spirit and intendment: see* Morice v Bishop of Durham.[26] *From this it follows that a gift for charitable or benevolent purposes is void for uncertainty because it is impossible to divide the gift between the two objects, or to determine to which it should be given and consequently the good cannot be separated from the bad, and the gift fails.*[27]

The same reasoning applies to the word "philanthropic". This is because a philanthropic purpose has been defined as being so broad as being able to encompass non-charitable as well as charitable activities and covering "an area of human good feeling which it would not be easy, if possible, to prescribe or define".[28]

Gino Dal Pont[29] further wrote that other expressions had been held to be too wide and vague to come within the legal concept of charity. These included:

> *'general utility',*[30] *'worthy causes',*[31] *'any good work',*[32] *'good compassionate purposes',*[33] *'the elimination of injustice',*[34] *'raising the standard of life',*[35] *'the promotion of social well-being of a community',*[36] *'the greatest benefit to humanity',*[37] *and the 'benefit, maintenance and advancement of youth'.*[38]

The Canadian Federal Court of Appeal in *Everywoman's Health Centre Society (1988) v Minister of National Revenue*[39] wrote that there was no room for evidence gained through canvassing for public opinion to determine whether a gift or organisation was charitable or not:

> *To define charity through public consensus would be a most imprudent thing to do. Charity and public opinion do not always go hand in hand; some form of charity will always precede public opinion, while others will often offend it. Courts are not well equipped to assess public consensus, which is a fragile and volatile concept. The determination of the charitable character of an activity should not become a battle between pollsters. Courts are asked to decide whether there is an advantage for the public, not whether the public agrees that there is such an advantage.*[40]

Finally, the objective approach inherent to the legal meaning eliminates the consideration of the subjective motives of the settlor, which is often taken into account in the popular meaning, in assessing whether or not a purpose is charitable.[41]

[23] *Concise Oxford English Dictionary* (11th ed, Revised, Oxford University Press, Oxford, 2006) at 125 "benevolent".

[24] [1971] NZPCC 698 sub nomine *Attorney-General for New Zealand and Brown and others*.

[25] (1817) 3 Mer 17; 36 ER 7.

[26] (1804) 9 Ves 399 at 405; 32 ER 656 at 658.

[27] [1917] NZPCC 698 at 699-700. This decision was applied in *Re Catherine Smith (deceased)* [1935] NZLR 299 at 325-326 per Myers CJ and at 33 per Smith J. It was also applied in a number of cases including *Chichester Diocesan Fund & Board of Finance (Incorporated) v Simpson* [1944] AC 341 at 348-349 per Viscount Simon LC.

[28] *Will of Forrest* [1913] VLR 425 at 431 per Madden CJ. See also Dal Pont *Charity Law in Australia and New Zealand*, above n 17, at 219.

[29] *Charity Law in Australia and New Zealand*, above n 17, at 219.

[30] *Re Tyson* (1906) 7 SR (NSW) 91 at 196 per Street J.

[31] *Re Atkinson's Will Trusts* [1978] 1 All ER 1275 at 1279-1280 per Megarry VC.

[32] *Re Ashton (deceased)* [1955] NZLR 192 at 196 per Gresson J, at 200-201 per Turner J.

[33] *McGovern v Attorney-General* [1982] 1 Ch 321 at 333 per Slade J.

[34] Ibid, at 334 per Slade J.

[35] *Re Blyth* [1997] 2 Qd R 567 at 581-582 per Thomas J.

[36] *Inland Revenue Commissioners v Baddeley* [1955] AC 572 at 589 per Viscount Simonds, at 613 per Lord Tucker.

[37] *Re Bell* [1943] VLR 103 at 105 per Gavan Duffy J. See also *James v Allen* (1817) 3 Mer 17; 36 ER 7 (in which it was held that the uplifting of humanity is not a charitable purpose).

[38] *Re Payne (deceased)* [1968] Qd R 287 at 293 per Matthews J. See also *Re Belcher (deceased)* [1950] VLR 111 at 14-15 per Fullager J ("welfare of youth" and "youth welfare organisations").

[39] [1992] 2 FC 52.

[40] Ibid, at 68-69. See James Phillips "Case Comment: *Everywoman's Health Centre Society v Minister of National Revenue and Comment on* p 7-8 on *Auckland Medical Aid Trust v Commissioner of Inland Revenue*" at www.google.co.nz/search?hl=en&source=hp&q=everywomen%27s+health+centre+society+%281988%29+v+Minister+of+National+Revenue&meta=&aq=f&oq= .

[41] Dal Pont *Charity Law in Australia and New Zealand*, above n 17, at 9.

#### *3.1.2.3 Charitable purposes as opposed to charitable motives*

In *Latimer v Commissioner of Inland Revenue*,[42] the Privy Council wrote that "whether the purposes of the trust are charitable does not depend on the subjective intentions or motives of the settlor, but on the legal effect of the language he has used. The question is not, what was the settlor's purpose in establishing the trust? But, what are the purposes for which trust money may be applied?".[43] It is clear from that decision that the test is objective and not subjective.

In that respect, the legal definition of what is charitable differs from the common language, which associates a person who gives for altruistic or benevolent motives with being charitable, and a person who gives for a selfish motive as not being charitable.[44] For example, it is considered that Howard Hughes created the Howard Hughes Medical Institute as a mechanism to avoid tax, while paying himself an annual income to administer the trust. Nevertheless, the Howard Hughes Medical Institute is today perhaps the most important charitable organisation in the world doing biomedical research.[45]

Whether funds are dedicated to a charitable use depends, therefore, not on the fact that matters outside the legal definition of "charitable" motivated the settlor, but on the purposes to which they are to be applied. Thus, gifts for masses motivated by the expectation of spiritual advantage have been held to be charitable in Australia.[46] The Court also held that a gift to provide a parish church with stained-glass windows was a good charitable gift notwithstanding that the motive of the donor was not to beautify the church but to perpetuate the memory of the donor and his relatives.[47] Similarly, in *Re Stone (deceased)*,[48] Helsham J surmised that, even though the testator's ultimate aim may have been political, the way the gift was phrased restricted its application to charitable objects.

In *Commissioner of Inland Revenue v Medical Council of New Zealand*,[49] the Court of Appeal emphasised that whether purposes were charitable or not was not to be influenced by the settlors' motives, even when the settlor was Parliament:

> *But just as with charitable trusts the purposes are not identified by reference to the motives of those responsible for settling the trusts and the charitable or non-charitable purposes of bodies privately established are not identified by inference to the motives of the founders (*Keren Kayemeth le Jisroel Ltd v Inland Revenue Commissioners *[1932] AC 650 at p 661), so it seems that the purposes of a statutory body should be inferred not from the overall objective or motivation of the legislature but from its statutory functions.*[50]

Courts have made it clear that the motives of settlors must not be relied on in order to discover if the purposes are charitable or not. Other ways must therefore be canvassed to discover the real purposes.

#### *3.1.2.4 The technical meanings of "charity" and "charitable"*

It is clear from the decided cases that, in interpreting entities' purposes, the technical meaning developed by the courts has to be applied. In *Commissioner of Inland Revenue v Carey's Ltd*,[51] Gresson J, who delivered the judgment for the Court of Appeal, wrote that a gift to use and apply the funds for charitable purposes within New Zealand had "*prima facie* created a trust for charitable purposes".[52] Moreover, Gino Dal Pont wrote that "gifts expressed for charities, charitable institutions, charitable purposes or charitable funds are presumed to be exclusively charitable".[53]

[42] [2004] 3 NZLR 157.

[43] Ibid, at 168.

[44] *Concise Oxford English Dictionary* (11th ed, Oxford University Press, Oxford, 2006) at 39 "altruism". See also Dal Pont *Charity Law in Australia and New Zealand*, above n 17, at 9-10.

[45] "Wonderful by Accident" Legal-Ease on the website: http://timesbulletin.com/main.asp?SectionID=2&SubSectionID=4&ArticleID=157808.

[46] *Nelan v Downes* (1917) 23 CLR 546.

[47] *Re King* [1923] 1 Ch 243. See also Picarda 3rd ed, above n 1, at 30.

[48] (1970) 91 WN (NSW) 704 at 719. See also Dal Pont *Charity Law in Australia and New Zealand*, above n 17, at 11.

[49] [1997] 2 NZLR 297.

[50] Ibid, at 306 per Gault J.

[51] [1963] NZLR 450.

[52] Ibid, at 455.

[53] *Charity Law in Australia and New Zealand*, above n 17, at 218.

However, a gift that may be devoted to either charitable or non-charitable purposes may be invalid. *Prima facie*, the use of a disjunctive (such as the word "or") is interpreted as indicating that the purposes are not exclusively charitable.[54] In that respect Gino Dal Pont[55] summarised the law as follows:

> *Other gifts so expressed in the alternative that have been struck down include gifts for 'charitable or public purposes',*[56] *'charitable or benevolent objects',*[57] *'purposes charitable or philanthropic',*[58] *'charitable, benevolent, educational or religious purposes',*[59] *'charitable, benevolent or philanthropic institutions',*[60] *'benevolent or welfare funds',*[61] *'funds, charities or institutions',*[62] *and 'for such charitable uses or for such emigration uses'.*[63]

As in every general rule, there have been exceptions. In *Chichester Diocesan Fund & Board of Finance (Inc) v Simpson*,[64] the Court recognised that it was possible for a context to justify so drastic a change as that involved in reading the disjunctive as conjunctive. Lord Wright noted that in some contexts the word "and" could be read as "or". He gave a few examples:

> *If "charitable" and "benevolent" had been completely different descriptions, both vague and indeterminate, overlapping, and capable of being applied to the same objects, the result might be different. Thus a gift of pigs or cows would clearly present an alternative. The two descriptions could not be applied indifferently to the same animals, but a disposition in favour of dishonest or unprincipled men would not represent a true alternative, though it might on other grounds be void for uncertainty. Only the adjectival description is alternative, and both adjectives are to be applied indifferently to the same objects. There is then one class and not two.*[65]

Jean Warburton, in *Tudor on Charities*, cited three cases[66] in support of her assertion that the court does not construe phrases such as "religious or charitable" or "educational or religious or charitable" as indicating that there are included purposes that are not necessarily charitable. It is interpreted as conjunctive and not disjunctive.[67]

By contrast, cumulative requirements usually indicated by the word "and" do not indicate an alternative but an intention to restrict the scope of the gift not just to charitable purposes but also to purposes that meet other requirements. Gino Dal Pont[68] wrote that:

> *For example, a gift to a 'religious, charitable and useful institution' is valid in that the word useful can be construed as qualifying both the words 'religious' and 'charitable'.*[69] *Gifts for 'charitable and public purposes',*[70] *'charitable and benevolent purposes',*[71] *and 'charitable and deserving objects'*[72] *have also been upheld.*

However, as for the disjunctive, the cumulative form admits exceptions. In *Attorney-General (New Zealand) v Brown*,[73] the Privy Council had to decide if certain funds in trust "for such charitable benevolent religious and educational institutions, societies and objects" were established for charitable purposes. Taking into account the reminder of the trust deed, the Privy Council rejected the contention that the word "charitable" could have been said to govern each of the following words. Similar results were arrived in a gift for "patriotic purposes or objects and charitable institutions or charitable objects"[74] and in a gift for the "education and welfare of Bahamian children and young people".[75]

54 *Chichester Diocesan Fund & Board of Finance (Inc) v Simpson* [1944] AC 341 at 351 per Lord Macmillan.

55 *Charity Law in Australia and New Zealand*, above n 17, at 221.

56 *Vezey v Jamson* (1822) 1 Sim & St 69; 57 ER 27; *Blair v Duncan* [1902] AC 37 at 42 per Earl of Halsbury LC, at 42 per Lord Shand, at 44 per Lord Davey, at 45 per Lord Brampton, at 48 per Lord Robertson; *Re Davis* [1923] 1 Ch 225.

57 *Chichester Diocesan Fund & Board of Finance (Inc.) v Simpson* [1944] AC 341 at 349 per Viscount Simon LC, at 350-351 per Lord Macmillan, at 364 per Lord Porter, at 370-371 per Lord Simonds; *Re Diplock* [1948] Ch 465. See also *Houston v Burns* [1918] AC 337 at 340 per Lord Finlay LC, at 344 per Lord Atkinson ("public, benevolent or charitable purposes").

58 *Re Macduff* [1896] 2 Ch 451.

59 *Re Catherine Smith (deceased)* [1935] NZLR 299 at 325-326 per Myers CJ, at 333 per Smith J.

60 *Attorney-General v Adams* (1908) 7 CLR 100 at 110 per Griffith CJ, at 113 per Barton J, at 122 per O'Connor J, at 127 per Isaacs J. See also *Re White* [1933] SASR 129 at 132 per Richards J ("charitable, religious, philanthropic, educational or scientific institutions").

61 *Re Wykes (deceased)* [1961] 1 Ch 229.

62 *Re Clarke* [1923] 2 Ch 407 at 413 per Romer J.

63 *Re Sidney* [1908] 1 Ch 488.

64 [1944] AC 341.

65 Ibid, at 362-363.

66 *Re White* [1893] 2 Ch 41; *Re Salter* [1911] 1 I.R. 289; *Re Ward* [1941] Ch 308.

67 Jean Warburton *Tudor on Charities* (9th ed, Sweet & Maxwell, London, 2003) at 79 ["Tudor 9th ed"].

68 *Charity Law in Australia and New Zealand*, above n 17, at 222.

69 *Wilson v Attorney-General* (Vic.) (1882) 8 VLR (E) 215.

70 *Blair v Duncan* [1902] AC 37 at 44 per Lord Davey.

71 *Re Best* [1904] 2 Ch 354 (gift for "such charitable and benevolent institutions" as the trustees should determine); *Re Shortt* (1974) 42 DLR (3d) 673 at 676 per Stark J, Ontario High Court. See also *Chichester Diocesan Fund & Board of Finance (Inc.)* [1944] AC 341 at 350-351 per Lord Macmillan.

72 *Re Sutton* (1885) 28 Ch D 464.

73 [1917] AC 393; [1917] NZPCC 698.

74 *Attorney-General v National Provincial Bank and Union of England* [1924] AC 262 at 264 per Viscount Cave LC, at 268 per Viscount Haldane, at 269 per Viscount Finlay. See also Dal Pont *Charity Law in Australia and New Zealand*, above n 17, at 222.

75 *Attorney-General (Bahamas) v Royal Trust Co.* [1986] 3 All ER 423 at 426 per Lord Oliver. See also *Charity Law in Australia and New Zealand*, above n 17, at 223.

### *3.1.3 Meaning of charity and charitable in legislation*

As indicated in the previous sections, it is clear that in determining the meaning of the terms "charity" and "charitable", courts have opted for the technical meaning. This applies also to the interpretation of these words when used in statutes.[76] In *Molloy v Commissioner of Inland Revenue*,[77] the New Zealand Court of Appeal had to interpret the terms "charitable, benevolent, philanthropic or cultural purposes within New Zealand" found in section 84B(2)(a) of the *Income Tax Act 1954*, which exempted organisations having those characteristics from tax. In delivering the judgment of the Court, Somers J considered that the word "charitable" was defined by reference to the classes of charity distinguished by Lord Macnaghten in the *Pemsel* case. He wrote that "to be charitable in law – unless saved by the provisions of s 61B of the *Charitable Trusts Act 1957* – an expressed purpose upon its true construction must be limited or confined to charitable purpose only".[78]

Gino Dal Pont wrote that "the justification for this approach is that the court can ascertain that which is charitable according to its legal definition, developed as it has been over some four centuries, whereas no similar certainty applies to its popular definition".[79]

#### *3.1.3.1 Charitable Trusts Act 1957*

The *Charitable Trusts Act 1957* consolidated previous Acts, notably the *Religious, Charitable and Educational Trust Boards Incorporation Act 1884*, which itself added to the *Charitable Funds Appropriation Act 1871*. The *Charitable Trusts Act 1957* contains five parts. Part 1 has three sections concerning vesting of property; Part 2 (sections 6-30) is concerned with the incorporation of trust boards; Part 3 (sections 31-37) concerns schemes in respect of certain charitable trusts; Part 4 (sections 38-50) deals with schemes in respect of charitable funds raised by voluntary contributions; and Part 5 (sections 51-63) has miscellaneous provisions, especially about court proceedings and the administration of schemes. It also has section 61A, which includes trusts for recreational and similar purposes, and section 61B, which allows the carving out of non-charitable and invalid purposes that could invalidate a trust.

Section 2 of the Act defines charitable purpose by restricting the term to what is charitable according to the law of New Zealand, and does not extend it even if the Act also applies to non-exclusively charitable purposes. The Act clearly restricts the term to the technical meaning given by the courts since *Pemsel*. However, it provides that "for the purposes of Parts 1 and 2 of this Act, [it] includes every purpose that is religious or educational, whether or not it is charitable according to the law of New Zealand". It must be remembered that Parts 1 and 2 deal with the vesting of property and especially with the incorporation of trust boards, which need not be exclusively charitable as long as they are principally charitable. Therefore, not all trust boards incorporated under this Act have exclusively charitable purposes.

Finally, the definition of charitable purposes applied to Part 4 has the meaning specified in section 38 of the Act. That definition comes from the *Charitable Funds Appropriation Act 1871* and reads as follows:

[76] *Commissioners for Special Purposes of the Income Tax v Pemsel* [1891] AC 531 at 580 per Lord Macnaghten and *Swindburne Federal Commissioner of Taxation* (1920) 27 CLR 377 at 384 per Isaac, Gavan Duffy, Rich and Starke JJ.

[77] [1981] 1 NZLR 688.

[78] Ibid, at 691.

[79] *Charity Law in Australia and New Zealand*, above n 17, at 33-34.

*In this Part of this Act, unless the context otherwise requires, the term charitable purpose means every purpose which in accordance with the law of New Zealand is charitable; and includes the following purposes, whether or not they are beneficial to the community or to a section of the community:*

*(a) The supply of the physical wants of sick, aged, destitute, poor, or helpless persons, or for the expenses of funerals of poor persons;*

*(b) The education (physical, mental, technical, or social) of the poor or indigent or their children;*

*(c) The reformation of offenders, prostitutes, drunkards, or drug addicts;*

*(d) The employment and care of discharged offenders:*

*(e) The provision of religious instruction, either general or denominational;*

*(f) The support of libraries, reading rooms, lectures, and classes for instruction;*

*(g) The promotion of athletic sports and wholesome recreations and amusement;*

*(h) Contributions towards losses by fire and other inevitable accidents;*

*(i) Encouragement of skill, industry and thrift;*

*(j) Rewards for acts of courage and self-sacrifice;*

*(k) The erection, laying out, maintenance, or repair of buildings and places for the furtherance of any of the purposes mentioned in this section.*

Section 39 of the Act provides that the above-cited definition applies only to cases in which money has been raised for any charitable purpose by way of voluntary contribution. The definition is more restricted than the common law definition, especially in regards to the fourth head of charity, which can be very broad.[80] On the other hand, the above-cited definition may be broader than the common law definition in that sections 38(g) and (j) of the Act may not always be charitable at common law. In *Doug Ruawai Trust*,[81] McGechan J wrote that section 38 had taken into account the general law but had also added specified categories that were not charitable at common law. He cited athletic sports and other purposes, whether or not they are beneficial to the community or a section of the community. He also cited contributions to loss by fire and rewards for acts of courage as having a major emphasis on individual losses or individual valour and not necessarily purposes beneficial to the community or a section of the community. In *Doug Ruawai*, McGechan J expressed the opinion that the extended definition of charitable purposes in section 38 of the Act was limited to the application of residual money raised by way of voluntary contribution.[82]

If section 38(g) had broadened the definition of "charitable purpose", there would have been no need to add section 61A in 1963,[83] which covers sport and leisure activities while being more detailed than section 38(g). It is clear that section 61A of the Act applies to the common law definition because it provides that "it shall for all purposes be and be deemed always to have been charitable to provide, or assist in the provision of, facilities for recreation or other leisure-time occupation if the facilities are provided in the interests of social welfare". Section 61A may have the effect of broadening the common law definition.[84]

[80] See chapters 12-18 concerning elements that fall into the fourth head of charity.

[81] CP NO 285/86, 25 November 1987, per McGechan J.

[82] Ibid, at 14 per McGechan J.

[83] This section was inserted by section 3 of the *Charitable Trusts Amendment Act 1963*.

[84] See chapter 18 concerning sport and leisure activities.

*3.1.3.2 Public benevolent purposes or institutions*

As indicated by the New Zealand Court of Appeal in *Molloy v Commissioner of Inland Revenue*,[85] the terms "charitable, benevolent, philanthropic or cultural purposes within New Zealand" that appeared in section 84B(2)(a) of the *Income Tax Act 1954* can now be read in section LD 3 (2)(a) of the *Income Tax Act 2007*. The 2007 version is similar to the 1954 version. Section YA 1 of the *Income Tax Act 2007* states that "charitable purpose includes every charitable purpose, whether it relates to the relief of poverty, the advancement of education or religion, or any other matter beneficial to the community". That definition is also the same one that appears in section 5(1) of the *Charities Act 2005*. In *Molloy*, the New Zealand Court of Appeal decided that these terms had to be interpreted in their technical sense. Somers J wrote for the Court as follows:

> *There is no context in s 84B which would displace that definition. The word "includes" is normally used to bring within a definition something which might not otherwise be embraced by it. But the statutory definition as a whole justifies the view expressed by Mahon J that it was not intended to, and does not have the effect of, enlarging or altering the ordinary legal connotation of charity. It is a definition by reference to the classes of charity distinguished by Lord Macnaghten in C*ommissioners for Special Purposes of Income Tax v Pemsel *[1891] AC 531, 583 itself founded upon the submissions of Sir Samuel Romilly when arguing* Morice v Bishop of Durham *(1805) 10 Ves Jun 522, 32 ER 947. The addition to the word "charitable" of the words "benevolent, philanthropic or cultural" in s 84B(2)(a) supports that construction and extends the scope of the purposes beyond that which is charitable in law. The word "benevolent" is capable of importing both charitable and non-charitable purposes. To be charitable in law – unless saved by the provisions of s 61B of the* Charitable Trusts Act 1957 *– an expressed purpose upon its true construction must be limited or confined to charitable purposes only. In this context the vice of the word benevolent is illustrated by* Attorney-General for New Zealand v Brown *[1917] AC 393;* Attorney-General of New Zealand v New Zealand Insurance Co Ltd *[1937] NZLR 33 (PC);* Chichester Diocesan Fund and Board of Finance (Inc) v Simpson *[1944] AC 341; [1944] 2 All ER 60 (*Diplock*'s case). So with the word philanthropic:* Re MacDuff *[1896] 2 Ch 451;* Re Eades *[1920] 2 Ch 363. And so it is too with the word cultural. That word may properly have attributed to it its ordinary dictionary meaning as relating to the training, development and refinement of mind, tastes and manners.*[86]

It is clear from that rather long citation that the word "benevolent" is not the equivalent of "charitable" and is broad enough to include activities that are not charitable. However, there are a few New Zealand cases where courts have found that the term "benevolent" is charitable. Such is the case of *Clark v Attorney-General*,[87] where the Court held that a gift for charitable and benevolent institutions was held to be a charitable gift, taking into account the definition of "institution" under the *Hospital and Charitable Institutions Act 1885*, and the fact that the institutions were local ones.

Another term that causes problems in the analysis of charitable purposes is "charitable organisation". That term is defined in section YA1 of the *Income Tax Act 2007* as meaning "an association, fund, institution, organisation, society or trust to which section LD3(2) (meaning of charitable or other public benefit gift) or schedule 32 (recipient of charitable or other public benefit gifts) applies and does not include a local authority, a public authority, or a university". Section LD3(2) and schedule 32 referred to in the definition of "charitable organisation" are the same sections that were analysed by the Court of Appeal in *Molloy v Commissioner of Inland Revenue*.[88] As indicated by Somers J in the citation above, it is clear that the term "charitable" must be given its technical meaning as defined by the courts since 1820.

[85] [1981] 1 NZLR 688.

[86] Ibid, at 691.

[87] (1914) 33 NZLR 963; 16 GLR 499 cited by Margaret Soper *The Laws of New Zealand – Charities*, (Butterworths, Wellington, 2004] at [67].

[88] [1981] 1 NZLR 688.

The Australian position seems to differ from the New Zealand one as expressed in the above citation, especially when used in the context of the term "benevolent public institution". Gino Dal Pont[89] wrote that in Australia "an institution is 'benevolent' if it is organised, promoted or conducted for the relief of poverty, sickness, disability, destitution, suffering, misfortune or helplessness".[90] The courts of Australia have observed that the "concept of benevolence being limited to the destitute is no longer accepted"[91] and that benevolence should be defined in terms of a desire "to do good". Dal Pont cited a number of cases, including from the High Court of Australia, in which the term "benevolent purposes" was recognised as charitable. He wrote that in the leading case, *Perpetual Trustee Co Ltd v Commissioner of Taxation*,[92] the High Court of Australia held that the Royal Naval House, which provided petty officers with accommodation and recreation at reduced cost, was not "benevolent" as it had nothing to do with provision to persons in distress. Evatt J wrote that "it is in truth a cheap and convenient club-house for those in regular naval services and pay and for no one else".[93]

In Australia, the term "benevolent" is not confined to practical and material interests and needs and may extend to the promotion of culture. This is particularly so in the context of the preservation and promotion of Aboriginal culture.[94] However, Dal Pont wrote that, aside from Aboriginal culture, "an institution with an independent and main object of fostering cultural values of a particular group is unlikely to be 'benevolent' ".[95]

#### *3.1.3.3 Rates exemption for land used by a charity*

The law applied to charities has followed different paths in its development, notably concerning rate and tax exemptions. Use and occupation are two different concepts at law. This is why the law is entitled to treat them differently.

Concerning rates, for example, in New Zealand the *Local Government (Rating) Act 2002*[96] provides that land is not rateable if it is used and occupied by, or for the purposes of, a school or early childhood education and care centre, to provide health services, as a place of religious worship, as a burial ground or for other charitable purposes. However, such land is deemed to be rateable property for the purposes of any separate rate, charge or fee made and levied for water supply, refuse collection and disposal, or wholly or partly for sewage disposal purposes.[97]

In *Royal New Zealand Foundation of the Blind v Auckland City Council*,[98] the Foundation of the Blind argued that a property it owned in Parnell should have been exempted from rates even if it was not being used as a school any more. Since the 1970s, the focus had shifted towards supporting the blind in the community. Most of the property had been retained for the use of the Foundation (as its national administration centre), but the balance – around 25% – had been leased to the Bledisloe Estate Trust, a charitable trust established in 1988 by the Foundation. It was this portion of the property that was at issue in this case. The Trust was effectively the commercial arm of the Foundation. The Trust sublet the land to various commercial tenants. The rent was paid by the Trust to the Foundation, and the profits, which it distributed back to the Foundation, were used to fund (in part) the services the Foundation offered. The Supreme Court of New Zealand seemed to agree with the Court of Appeal's view, that "the legislative pattern of exemptions pointed to a consistent policy that land held for investment purposes and not for the direct use of the charities concerned should be rateable".[99] The Supreme Court considered that "the catalogue of exempted land which has been accumulated over a period of about 130 years indicates a policy of not excluding from rates land which, although held for or by an organisation with a generally charitable or public service objective, is nevertheless used to produce revenue".[100]

[89] *Law of Charity* (LexisNexis/Butterworths, Australia, 2010) at 38-42.

[90] *Lemm v Federal Commissioner of Taxation* (1942) 66 CLR 399 at 411, per William J (institution controlled by a church property trust providing residential accommodation for 26 aged women in straitened financial circumstances held to be public benevolent institution).

[91] *Commissioner of Taxation v Launceston Legacy* (1987) 15 FCR 527 at 541 (providing relief to dependants of deceased ex-servicemen without regard to circumstances held "benevolent" and charitable). See also Dal Pont *Law of Charity,* above n 89, at 39.

[92] (1931) 45 CLR 224.

[93] Ibid, at 236, at 232 per Starke JK, at 233 per Dixon J. See also Dal Pont *Law of Charity*, above n 89, at 38.

[94] *Tangentyere Council Inc v Commissioner of Taxes* (1990) 21 ATR 239 at 248 per Angel J (the persons whom it served suffered severe health and hygiene problems, had an increased susceptibility to disease and a low life expectancy and were culturally ambivalent). See also *Guambangerrii Aboriginal Corporation v Nambucca Council* (1996) 131 FLR 115 at 121-122 (rented land to Aboriginal people to foster, advance, improve and maintain the wellbeing and welfare of Aborigines by providing low-cost housing, thus relieving poverty). *Trustees of the Indigenous Barristers' Trust v Federal Commissioner of Taxation* [2002] FCA 1474; (2002) 127 FCR 62 (a trust established to relieve poverty, suffering, helplessness, misfortune or other disabilities of indigenous persons that may impede their pursuit of a career at the New South Wales Bar was benevolent). See also Dal Pont *Charity Law in Australia and New Zealand*, above n 17, at 39-41.

[95] *Law of Charity,* above n 89, at 39.

[96] s 8, Sch 1 Part 1.

[97] *Local Government (Rating) Act 2002*, s 9.

[98] [2007] NZSC 61.

[99] Ibid, at [7].

[100] Ibid, at [23].

### *3.1.4 The living tree concept of charity: adaptable to social changes*

The categories of charitable purpose are not static. They can evolve in response to changing social circumstances. As noted in *Garrow and Kelly's Law of Trusts and Trustees*:

> *It is possible that an object held to be charitable in one age may in another age be regarded differently. By reason of change and social ideas, habits, or needs of the community, or by change of law, or by the advancement of knowledge, a purpose once thought to be beneficial and therefore charitable, may become superfluous, detrimental to the community, or even illegal. Conversely, with the passing of time, an object or purpose formerly held not to be charitable may come to be regarded as charitable. It would need a radical change of circumstances, established by sufficient evidence to compel the Court to accept a new view of the matter.*[101]

Similar consideration was mentioned in *Scottish Burial Reform and Cremation Society v Glasgow Corporation*,[102] in which the House of Lords underscored that the *Pemsel* classification was a flexible judicial creation, and thus amenable to subsequent change and development.

This flexibility has enabled the courts to modernise the law of charity in recognition of changing social needs. The *Pemsel* classification provides a framework within which the courts may adapt the law as those social needs change.[103] In the *Scottish Burial Reform* case, a society to encourage cremation was held to be beneficial to the community by reference to legislation allowing local authorities to provide crematoria in addition to burial grounds. Another example of adaptation to social needs is given by the New Zealand Court of Appeal in *Latimer v Commissioner of Inland Revenue*.[104] In that case the Appeal Court wrote that in the New Zealand context it was impossible not to regard as charitable providing the Waitangi Tribunal with relevant material based on research to assist that Tribunal to make informed decisions concerning longstanding disputes between Māori and the Crown.

Finally, in *Travis Trust v Charities Commission*,[105] Joseph Williams J wrote that "the 117 years since *Pemsel* have seen a steady encrustation of new analogous charitable categories by this means. These developments have been evolutionary rather than revolutionary".[106]

The Court of Appeal has echoed that approach in *Greenpeace of New Zealand Incorporated*.[106a] In that case, the Court of Appeal cited with approval Judge Hammond's dictum in *DV Bryant Trust Board v Hamilton City Council*[106b] that the charity body of the law must keep abreast of changing institutions and social values.

### *3.1.5 Summary*

The development and meanings of the terms "charity" and "charitable" have been the result of centuries of accumulated court decisions. In *Gilmour v Coats*,[107] the House of Lords wrote about the development of the law of charities that "a great body of law has thus grown up. Often it may appear illogical and even capricious. It could hardly be otherwise when its guiding principle is so vaguely stated and is liable to be so differently interpreted in different ages".[108]

In most jurisdictions, with the exception of Australia, courts have distinguished between the terms "charitable" and "benevolent", the latter being considered too broad to include exclusively charitable purposes.

[101] Noel Kelly, Chris Kelly and Greg Kelly *Garrow and Kelly: Law of Trusts and Trustees* (6th ed, LexisNexis NZ Ltd, Wellington, 2005) at [12.6.1] ["Garrow and Kelly"].

[102] [1968] AC 138 (HL).

[103] *Vancouver Society of Immigrants and Visible Minority Women v MNR* [1999] 1 SCR 10 at [36] per Gonthier J.

[104] [2002] 3 NZLR 195 at 208.

[105] (2009) 24 NZTC 23,273.

[106] Ibid, at [20].

[106a] [2012] NZCA 533 at [67] per White J.

[106b] [1997] 3 NZLR 342 (HC) at 348.

[107] [1949] AC 426.

[108] Ibid, at 443 per L Simonds.

### 3.2 Construction of purposes and activities

It is now clear that in analysing the purposes of an organisation, the technical meaning of charity must be used in interpreting them. This section concentrates on the general approach to interpreting the purposes of an entity. It also looks at ways to discover the real purposes through an analysis of the entity's activities.

#### *3.2.1 Construction: benignant interpretation*

All instruments, be they wills, trusts or the constitutions of corporations or societies, must be interpreted. In *Re Beckbessinger*,[109] Tipping J wrote that "the starting point on any question of interpretation must be the words used by the testator".[110] The same applies to any document constituting any organisation.

It is generally accepted that a benevolent construction is placed on charitable bequests.[111] In *Re Collier (deceased)*,[112] Hammond J wrote that it is "in the public interest there should be an open recognition of a presumption, as opposed to a construction, in favour of charity".[113] He prefaced this statement by saying that he was assisted to some extent by the general reluctance of courts to render a construction leading to an intestacy, thus leaning toward a general charitable intent, citing *Re Daniels (deceased)*.[114]

Hammond J also indicated that there were strong policy reasons favouring that general approach with respect to charity. The first reason was that charitable bodies had always been distinctly important in socio-economic terms, although with the evolution of the welfare system they could not go a real distance in meeting the need of the poor, the sick and the oppressed in heavily industrialised societies. The second reason was that "in contemporary circumstances, charities often tackle what a conservative bureaucracy or state will not. They are often innovative. And, in some jurisdictions, charities have even become delivery vehicles for state programmes".[115]

#### *3.2.2 The purposes*

It is often said that, for an entity to gain charitable status, it must not be established for the benefit of persons, but for purposes. Therefore, purposes are at the centre of any analysis of entities applying for charitable status. This section analyses the principle that such purposes must be exclusively charitable. It also analyses the distinctions between main purposes, ancillary purposes and means. It briefly criticises the notion that declaring purposes charitable is sufficient. Finally, it analyses the effect of section 61B on entities that have a mixture of charitable and non-charitable purposes.

##### *3.2.2.1 Exclusively charitable purposes*

Courts have time and again enunciated the principle that in order to achieve charitable status, a gift or association must be exclusively charitable.[116] The source of such a principle depends on whether the entity is a trust or a society.

Concerning trusts, courts have always maintained that in order for a trust to gain charitable status, it must have exclusively charitable purposes. As mentioned in the previous section, this is why a bequest "for institutions, societies or objects [...] for charitable benevolent, educational or religious purposes" was refused charitable status because the word "benevolent" was too vague.[117] In *Re Beckbessinger*,[118] Tipping J wrote that "in order to deal with what was regarded as an unfortunate result, Parliament passed section 2 of the *Trustee Amendment Act 1935*. With some expansion this has become the present s. 61B of the *Charitable Trusts Act 1957*".[119]

[109] [1993] 2 NZLR 362.

[110] Ibid, at 367. Tipping J cited *Roddy v Fitzgerald* (1858) 6 HL Cas 823 at 876 per Lord Wensleydale and *Re Taylor* [1931] NZLR 998 at 1009 per Kennedy J.

[111] *McCaul v Booth* (1889) 7 NZLR 562 (CA) and *Re Simmonds* [1933] NZLR 5172; [1933] GLR 757. See also *Inland Revenue Commissioners v McMullen* [1981] AC 1 (HL) cited by Young J in *Canterbury Development Corporation v Charities Commission* [2010] 2 NZLR 707 at [21].

[112] [1998] 1 NZLR 81.

[113] Ibid, at 95.

[114] [1970] VR 72.

[115] *Re Collier (deceased)* [1998] 1 NZLR 81 at 95.

[116] *Re Brewer* [1933] NZLR 1221; [1933] GLR 831 (CA).

[117] *Re Katherine Smith, Campbell v New Zealand Insurance Co Ltd* [1935] NZLR 299, affirmed in the Privy Council [1937] NZLR 33.

[118] [1993] 2 NZLR 362.

[119] Ibid, at 373.

Gino Dal Pont wrote that the rationale for such a principle focused "on the lack of any means of discriminating what part of the property the subject of the gift is to be applied for charitable purposes and what part for non-charitable purposes".[120] Courts have held that in order to be charitable an entity must have exclusively charitable purposes. Thus, in *McGovern v Attorney-General*,[121] Slade J stated:

> *The third requirement for a valid charitable trust is that each and every object or purpose designated must be of a charitable nature. Otherwise there are no means of discriminating what part of the trust property is intended for charitable purposes and what part for non-charitable purposes, and the uncertainty in this respect invalidates the whole trust.*[122]

In *Vancouver Society of Immigrants and Visible Minority Women v Minister of National Revenue*,[123] Gonthier J stated:

> *The first is the principle of exclusivity. To qualify as charitable, the purposes of an organisation or trust must be exclusively charitable ... the primary reason for the exclusivity requirement is, as Slade J observed in* McGovern*, supra, at p. 340, that if charitable organisations were permitted to pursue a mixture of charitable and non-charitable purposes there could be no certainty that donations to them would be channelled to the pursuit of charitable purposes.*[124]

It is probably because the common law was that a trust must have exclusively charitable purposes that section 13(1)(a) of the *Charities Act 2005* does not specify that a trust must be exclusively charitable in order to gain charitable status.

Concerning entities other than trusts, however, the statute makes it clear that in order to gain charitable status, a society or an institution must "be established and maintained exclusively for charitable purposes and not be carried on for the private pecuniary profit of any individual".[125] This is consistent with the statement made in *Molloy v Commissioner of Inland Revenue*[126] that in order for an entity to be registered, it must have exclusively charitable purposes and the presence of but one main purpose that is not charitable prevents the entity being registered as a charity.

*3.2.2.2 Ancillary non-charitable purposes*

*Molloy v Commissioner of Inland Revenue* is often cited to stress the point that the presence of but one main purpose that is not charitable will prevent the entity gaining charitable status. However, an entity remains charitable even though it may have also non-charitable purposes, provided the charitable purpose remains the primary purpose.[127] In delivering the judgment of the Court of Appeal in *New Zealand Council of Law Reporting v Commissioner of Inland Revenue*,[128] Richardson J stated: "It is to be well settled that so long as a non-charitable purpose is not an independent purpose but is 'ancillary, secondary, subordinate or incidental to the charitable purposes', its presence will not have a vitiating effect".[129] The Court of Appeal adopted the expression of the principle by Lord Cohen in *Inland Revenue Commissioners v City of Glasgow Police Athletic Association*:[130]

> *If the main purpose of the body of persons is charitable, and the only elements in its constitution and operations which are non-charitable are merely incidental to the main purpose, that body of persons is a charity notwithstanding the presence of these elements [...] If, however, a non-charitable object is itself one of the purposes of the body of persons and is not merely incidental to the charitable purpose, the body of persons is not a body of persons formed for charitable purposes.*[131]

[120] *Law of Charity*, above n 89, at 309. The author cited the following authorities: *Morice v Bishop of Durham* (1804) 9 Ves 399 at 406; 32 ER 656 at 659 per Grant MR; *Hunter v Attorney-General* [1899] AC 309 at 315 per Lord Halsbury, at 319-320 per Lord Shand; *Dunne v Burne* (1912) 16 CLR 500 at 503 per Lord Macnaghten, PC; *Attorney-General (New Zealand) v Brown* [1917] AC 393 at 396 per Lord Buckmaster; *Chichester Diocesan Fund & Board of Finance (Inc) v Simpson* [1944] AC 341 at 371 per Lord Simonds; *Re Smith (deceased)* [1954] SASR 151 at 159-160 per Ligertwood JK; *McGovern v Attorney-General* [1982] 1 Ch 321 at 340 per Slade J; *Latimer v Commissioner of Inland Revenue* [2004] UKPC 13; [2004] 4 All ER 558 at [2-36] per Lord Millet.

[121] [1982] 1 Ch 321.

[122] Ibid, at 341.

[123] (1999) 169 DLR (4th) 34.

[124] Ibid, at 58.

[125] *Charities Act 2005*, s 13(1)(b).

[126] [1981] 1 NZLR 688 at 691.

[127] *McGregor v Commissioner of Stamp Duties* [1942] NZLR 164; [1942] GLR 101; *New Zealand Council of Law Reporting v Commissioner of Inland Revenue* (1981) 4 TRNZ 321; 5 NZTC 61,053; *Institution of Professional Engineers New Zealand Inc v Commissioner of Inland Revenue* [1992] 1 NZLR 570.

[128] [1981] 1 NZLR 682.

[129] Ibid, at 684 cited by Tompkins J in *Centrepoint Community Growth Trust v Commissioner of Inland Revenue* [1985] 1 NZLR 673 at 677.

[130] [1953] AC 380.

[131] Ibid, at 405. This statement was also cited in *Centrepoint Community Growth Trust v Commissioner of Inland Revenue* [1985] 1 NZLR 373 at 677-678; *Institution of Professional Engineers New Zealand Inc v Commissioner of Inland Revenue* [1992] 1 NZLR 570 at 572-573 per Tipping J; *Commissioner of Inland Revenue v Medical Council of New Zealand* [1997] 2 NZLR 297 at 309 per McKay J.

In *Latimer v Commissioner of Inland Revenue*,[132] the Privy Council made it clear that ends or purposes must be distinguished from means and consequences. It wrote that "the ends must be exclusively charitable. But if the non-charitable benefits are merely the means or the incidental consequences of carrying out the charitable purposes and are not ends in themselves, charitable status is not lost".[133]

The difficulty arises when one tries to disentangle the complex web of purposes, means and ancillary benefits.

In trying to clarify the situation, the New Zealand Parliament has restated the courts' decisions in regard to ancillary purposes by enacting sections 5(3) and (4) of the *Charities Act 2005*. These sections provide as follows:

> *5(3) To avoid doubt, if the purposes of a trust, society or an institution include a non-charitable purpose (for example advocacy) that is merely ancillary to a charitable purpose of the trust, society, or institution, the presence of that non-charitable purpose does not prevent the trustee of the trust, the society, or the institution from qualifying for registration as a charitable entity.*
>
> *(4) For the purposes of subsection (3), a non-charitable purpose is ancillary to a charitable purpose of the trust, society, or institution if the non-charitable purpose is –*
>
> *(a) ancillary, secondary, subordinate, or incidental to a charitable purpose of the trust, society, or institution; and*
>
> *(b) not an independent purpose of the trust, society, or institution.*

Ian Murray[134] has identified three approaches courts have used to determine when a purpose is ancillary. These are when the purpose is:

> *(iii) "conducive to promoting"[135] or*
>
> *(iv) "conducive to the achievements of"[136] or*
>
> *(v) "tend to assist, or which naturally goes with, the achievement of" the charitable purpose.[137]*

The first approach is illustrated by *Stratton v Stratton*.[138] As indicated by Winderyer J in that case, the term ancillary purposes could have two meanings, the first being that secondary objects or activities are capable of being lawfully pursued independently of and without their having any essential bearing upon the pursuit of the main object; and the second one being that ancillary objects must only lawfully be pursued as conducive to promoting the main objects. Gino Dal Pont wrote that "the case law supports the second of those senses".[139]

Similarly in New Zealand, in section 5(4)(a) of the *Charities Act 2005,* there is no indication which of these interpretations Parliament has privileged. However, Parliament's Social Services Committee, in recommending the codification of the common law in regard to ancillary purposes, made it clear that it adhered to the second interpretation. The majority of the Committee recommended "amending the bill to clarify that an entity with non-charitable secondary purposes undertaken in support of a main charitable purpose will be allowed to register with the Commission".[140]

[132] [2004] 3 NZLR 157.

[133] Ibid, at 170 per Lord Millett.

[134] Ian Murray, "Charity Means Business – *Commissioner of Taxation v Word Investment Ltd"* (2009) 31 *Sydney Law Review* 317 www.law.usyd.edu.au/slr/slr31/slr31_2/Murray.pdf.

[135] *Stratton v Stratton* (1970) 125 CLR 138 at 148 (Windeyer J).

[136] *Congregational Union of New South Wales v Thistlethwayte* (1952) 87 CLR 375 at 442.

[137] *Navy Health Ltd v Deputy Commissioner of Taxation* (2007) 163 FCR 1 at [65] (Jessup J).

[138] (1970) 125 CLR 138 at 148. See also Dal Pont *Law of Charity*, above n 89, at 320.

[139] Dal Pont *Law of Charity*, above n 89, at 320.

[140] Charities Bill, Government Bill as reported from the Social Services Committee, at 108.

The second approach is illustrated by *Congregational Union of New South Wales v Thistlethwayte*,[141] where their Honours stated that if an entity had several purposes, non-charitable purposes could only be considered ancillary if they were furthering the main purpose. They wrote: "The fundamental purpose of the Union is the advancement of religion. It can create, maintain and improve educational, religious and philanthropic agencies only to the extent to which such agencies are conducive to the achievement of this purpose".[142] This was also the reasoning followed in *British Launderers' Research Association v Borough of Hendon Rating Authority*[143] where Lord Denning wrote:

> *It is not sufficient that the society should be instituted "mainly," or "primarily" or "chiefly" for the purpose of science, literature, or the fine arts. It must be instituted "exclusively" for those purposes. The only qualification – which indeed is not really a qualification at all – is that other purposes which are merely incidental to the purposes of science and literature or fine arts, that is merely a means to fulfilment of those purposes, do not deprive the society of the exemption. Once however, the other purposes cease to be merely incidental but become an end in themselves; that becomes an additional purpose of the society; then, whether they be main or subsidiary, whether they exist jointly with or separately from the purpose of science, literature or the fine arts, the society cannot claim the exemption.*[144]

Finally, in *Vancouver Society of Immigrants and Visible Minority Women v Minister of National Revenue*,[145] Gonthier J stated that a purpose could only be an ancillary purpose if it was conducive to the achievement of the charitable purpose. He wrote: "I would therefore reformulate my colleague's first propositions on two parts: (a) an organisation must be constituted exclusively for charitable purposes and (b) its activities must be substantially connected to, and in furtherance of, those purposes".[146]

The third approach has been applied in *Navy Health Limited v Deputy Commissioner of Taxation*,[147] in which Jessop J stated:

> *When the courts have described objects of an institution as ancillary, incidental or concomitant to a main object, they have not meant that the lesser object was merely a minor one in quantitative terms. Rather, they have required that that object not be of substance in its own right, but only to be something which tends to assist, or which naturally goes with, the achievement of the main object. Thus in Salvation Army, it was held that trading in the inevitable produce of a training farm established for delinquent boys did not mean the lands in question were not used exclusively for charitable purposes.*[148]

The inquiry into ancillary purposes is sometimes fraught with great difficulties. In *Re Laidlaw Foundation*,[149] Dymond J wrote that "a major stumbling block has frequently been the question as to how exclusive is exclusively charitable?".[150] As mentioned by Dymond J, the pertinent question is "how does one decide whether an object of an organisation is the main object or whether it is merely incidental to the main object?".[151] In answering that question, Dymond J pointed out Mr Justice Ritchie's comment in *Guaranty Trust Co of Canada v Minister of National Revenue*,[152] which held that even if there is more than one object named as such in the letters patent or other document setting out the object of the organisation, the Court may examine extrinsic evidence of the activities of the organisation at the pertinent time in order to determine whether non-charitable purposes are ancillary or main objects. Dymond J further wrote:

[141] (1952) 87 CLR 375.

[142] Ibid, at 442 per Dixon CJ, McTierman, Williams and Fullagar JJ.

[143] [1949] 1 KB 462 Denning LJ.

[144] Ibid, at 467.

[145] (1999) 169 DLR (4th) 34.

[146] Ibid, at [56]. Note that Gonthier J noted the dissenting judgment but not on this point.

[147] [2007] FCA 931.

[148] Ibid, at [65].

[149] (1984) 13 DLR (4th ) 491.

[150] Ibid, at 497.

[151] Ibid.

[152] [1967] SCR 133.

> *In my view the test for exclusivity of purpose should be given a benignant construction as suggested by Lord Hailsham in* Inland Revenue Com'rs v McMullen et al*, [1980] 1 All E.R. 884, and, in accordance with* Guaranty Trust, *supra, where there is some indication in the incorporating documents that the organisation may not be exclusively for a charitable purpose, extrinsic evidence is admissible for purpose of clarification.*[153]

In *Re The Grand Lodge of Antient Free and Accepted Masons in New Zealand*,[154] Simon France J held that the question of whether a purpose was ancillary required both quantitative and qualitative assessments. In that case his Honour found that the functions of the Grand Lodge were not ancillary to the charitable activities of the appellant on either a quantitative or a qualitative analysis. Although there was no evidence as to what proportion of the appellant's expenditure was spent on non-charitable purposes, conceptually, the constitution would have allowed 100% of the appellant's general funds to be applied to non-charitable purposes. Realistically, that could not have amounted to an ancillary purpose. His Honour also noted Dobson J's view in *Re Education New Zealand Trust*[155] that an activity that represented 30% of the Trust's endeavour could not be considered to be ancillary. On a qualitative assessment, Simon France J found that the functions of the Grand Lodge were not secondary or incidental to the charitable purposes. The Grand Lodge functions were essential and independent purposes and could not be regarded as ancillary.

Deciding if purposes are ancillary or main purposes is difficult because it is a question of degree. In that context, one must have regard for the context as a whole and cannot rely solely on analysing the purposes individually.[156] In *Re Bingham*,[157] a gift was made to a home of which the sole purpose or one of the purposes should have been caring for aged women. Reading the provisions as a whole, it was held that the dominant intention of the testatrix had been to benefit a home for aged women. The words "one of the purposes of which" were read as subsidiary to the main purpose.

When analysed individually, some purposes may seem charitable or non-charitable, but when placed in the context of the whole constitution of an entity, they may reveal a contrary conclusion. This is particularly true with professional associations and "political advocacy" cases.[158]

As will be discussed in the next subsection, ancillary purposes are nowadays often considered as means of achieving main purposes. Similarly, as will be analysed in subsequent subsections, the activities of an association may serve to indicate the relative weight to be accorded to each of the objects.

### *3.2.2.3 Distinction between purposes and means*

It is sometimes difficult to distinguish between purposes and means. This is because experienced drafters are writing the constitutions of entities in such a way that all non-charitable purposes and activities are termed "means" of achieving the charitable purposes. In *Auckland Medical Aid Trust v Commissioner of Inland Revenue*,[159] Chilwell J stated that "the law would resist finding a charitable purpose if a trust were dressed up within a cloak of charitable purposes; that cloak being in fact used for non-charitable purposes".[160] The Judge based that statement on previous cases and cited *Royal Choral Society v Commissioners of Inland Revenue*[161] and *Salvation Army (Victoria) Property Trust v Fern Tree Gully Corporation*.[162] In that same vein, in *Attorney-General v Ross*,[163] Scott J wrote that "the skill of Chancery draftsmen is well able to produce a constitution of charitable flavour intended to allow the pursuit of aims of a non-charitable or dubiously charitable flavour". Substance must always prevail over form.[164]

[153] (1984) 13 DLR (4th ) 491 at 498.

[154] [2011] 1 NZLR 277 at [49-52].

[155] (2010) 24 NZTC 24,354 at [43].

[156] *Re Smith (*1938) 54 TLR 851 at 852 per Simonds J; *Re Field* [1951] Tas SR 16 at 20-21 per Green J; *Attorney-General v Ross* [1985] 3 All ER 334 at 341, 343 per Scott J. See also Dal Pont *Law of Charity*, above n 89, at 321.

[157] [1951] NZLR 491; [1951] GLR 223.

[158] For further analysis of professional associations see chapter 19 and for political advocacy see chapter 20.

[159] [1979] 1 NZLR 382.

[160] Ibid, at 395.

[161] [1943] 2 All ER 101, 25 TC 263, per Lord Greene MR at 106; 274-275 and per Du Parcq LJ at 108, 277-278.

[162] (1952) 85 CLR 159 at 185-186, per Fullager J.

[163] [1985] 3 All ER 334 at 343.

[164] *Toomelah Co-operative Ltd v Moree Plains Shire Council* (1996) 90 LGERA 48 at 57 per Stein J; *Federal Commissioner of Taxation v Word Investments Ltd* [2008] HCA 55; (2008) 236 CLR 204 at [175] per Kirby J (dissenting) (although courts "should take the constituting purposes into close account", they should not be blinded by them, but "should view the stated purposes in the context of determining what the propounded entity actually does to fulfil the stated purpose") cited by Dal Pont *Law of Charity,* above n 89, at 322 footnote 129.

A distinction must therefore be made between main purposes and the means to attain these purposes. In *McGovern v Attorney-General*[165] and *Public Trustee v Attorney-General*,[166] courts held that in considering the purposes of an entity, they must find the main purpose of that entity. It is the purpose in question that must be political; the mere fact that political means may be employed in furthering charitable objects does not necessarily render the gift or institution non-charitable. Similarly, in *Vancouver Society of Immigrants and Visible Minority Women v MNR*,[167] the Supreme Court of Canada wrote that "although a particular purpose was not itself charitable, [if] it was incidental to another charitable purpose, [it] was therefore properly to be considered not as an end in itself, but as a means of fulfilment of another purpose, which had already been determined to be charitable. Viewed in this way, it did not vitiate the charitable character of the organisation".[168]

The view expressed in the last paragraph was accepted by the Privy Council in *Latimer v Commissioner of Inland Revenue*.[169] Lord Millett wrote for the Privy Council that some trusts for charitable purposes could not help but confer incidental benefits on individuals without losing their charitable status. He gave the example of some medical professional organisations. He further wrote that "the distinction is between ends, means and consequences. The ends must be exclusively charitable. But if the non-charitable benefits are merely the means or the incidental consequences of carrying out the charitable purposes and are not ends in themselves, charitable status is not lost".[170]

The fact that certain ancillary purposes are called "means" is not conclusive that they are. Case law also indicates that an examination of incidental powers may be necessary in order to determine an entity's real fundamental purpose. For example, in *M K Hunt Foundation Ltd v Commissioner of Inland Revenue*,[171] the Court held that in examining the memorandum, one must, of course, distinguish between objects and powers. Hardie Boys J cited with approval Lord Tomlin's statement in *Keren Kayemeth le Jisroel Ltd v Commissioners of Inland Revenue*:[172]

> *I well appreciate the argument which says that if you once find that the main object is charitable you cannot destroy the charitable character of the main object, because the ancillary powers, which are incidental to it, are, some of them, in themselves, not charitable. That argument may indeed be well founded, but when the question is whether the primary object is itself charitable, it is legitimate, in reaching a conclusion upon that head, to consider the effect of the incidental powers, and it may well be that the incidental powers are such as to indicate or give some indication that the primary object is not itself charitable.*[173]

In that case Lord Tomlin came to the view that the main object was not charitable.

Similarly in *Commissioner of Inland Revenue v Carey's (Petone and Miramar) Ltd*[174] Gresson P considered that the question invoked similar considerations to those addressed by Lord Greene in *Royal Choral Society v Commissioners of Inland Revenue*,[175] where he said:

> *It is true that you have to find the purpose of the alleged charitable establishment. It may very well be that a purpose which, on the face of it looks to be the real purpose, on close examination, is found not to be the real purpose. A body of persons may purport to set themselves up for educational purposes, but on a full examination of the facts, it may turn out that their purpose is nothing of the kind, and is one merely to provide entertainment or relaxation to others, or profit to themselves. In other words, the presence of the element of entertainment or pleasure may be either an inevitable concomitant of a charitable or educational purpose, or it may be the real fundamental purpose, and education may merely be a by-product. Whether a case falls within one class or the other is, no doubt, a question of fact, save and so far as it may depend on the construction of written documents.*[176]

[165] [1982] 1 Ch 321 at 340.
[166] (1997) 42 NSWLR 600 at 616.
[167] [1999] 1 SCR 10.
[168] Ibid, at [157].
[169] [2004] 3 NZLR 157.
[170] Ibid, at 170.
[171] [1961] NZLR 405 at 407-408.
[172] [1932] AC 650; [1932] All ER 971.
[173] Ibid, at 658.
[174] [1963] NZLR 450 at 456.
[175] [1943] 2 All ER 101.
[176] Ibid, at 106.

Cresson P wrote that in the *Carey's* case "what must be decided is whether the real fundamental purpose of this trust is charitable".[177]

Finally, in *Canterbury Development Corporation v Charities Commission*,[178] Young J wrote that "as both counsel accepted the mere fact that the constitution says that CDC's objects are charitable does not make CDC charitable although such a declaration is relevant in assessing whether they are".[179]

*3.2.2.4 Distinction between purposes and activities*

In *Vancouver Society of Immigrants and Visible Minority Women v MNR*,[180] Gonthier J, dissenting judge, wrote that a common source of confusion in this area was that judges and commentators alike often combined the concepts of charitable purposes and charitable activities. He wrote that the former was a long-established concept in the common law of charitable trusts. The latter has no history in the common law and was introduced by the *Income Tax Acts*.[181] The distinction between charitable purposes and activities was identified by Ritchie J for the Supreme Court of Canada in *Guaranty Trust Co. of Canada v Minister of National Revenue*.[182]

Gonthier J wrote that the difference between purposes and activities was that activities were not in themselves charitable or non-charitable. They could only be evaluated in regard to the purposes. He wrote:

> *A critical difference between purposes and activities is that purposes may be defined in the abstract as being either charitable or not, but the same cannot be said about activities. That is, one may determine whether an activity is charitable only by reference to a previously identified charitable purpose(s) the activity is supposed to advance. The question then becomes one of determining whether the activity has the effect of furthering the purpose or not, as Iacobucci J. notes at para. 152. In determining whether an organization should be registered as a charitable organization, we must, as my colleague Iacobucci J. indicates, look not only to the purposes for which it was originally instituted, but also to what the organization actually does, that is, its activities. But we must begin by examining the organization's purposes, and only then consider whether its activities are sufficiently related to those purposes.*[183]

Section 18(3)(a) of the *Charities Act 2005* has made it clear that, in considering an application for registration, the chief executive of the Department of Internal Affairs must have regard to "the activities of the entity at the time at which the application was made, the proposed activities of the entity, and any other information that it considers is relevant". In *Canterbury Development Corporation v Charities Commission*,[184] the appellant submitted that it was only necessary to consider section 18(3)(a) of the Act in relation to distribution-related activities of an applicant for registration under the Act. Young J did cite section 18(3)(a) of the Act, but did not comment on the appellant's submission. However, he did consider the activities of the appellant in deciding that the purposes were not charitable for the relief of poverty,[185] nor under the fourth head of charity.[186] He referred to the following passage in *Commissioners of Inland Revenue v Oldham Training and Enterprise Council*:[187]

> *To determine whether the object, the scope of which has been ascertained by due process of construction, is a charitable purpose, it may be necessary to have regard to evidence to discover the consequences of pursuing that object. What the body has done in pursuance of its objects may afford graphic evidence of the potential consequences of the pursuit of its objects.*[188]

[177] [1963] NZLR 450 at 456.
[178] [2010] 2 NZLR 707.
[179] Ibid, at [56].
[180] [1999] 1 SCR 10.
[181] Ibid, at [52].
[182] [1967] SCR 133 at 141.
[183] *Vancouver Society of Immigrants and Visible Minority Women v MNR* [1999] 1 SCR 10 at [53].
[184] [2010] 2 NZLR 707.
[185] Ibid, at [29].
[186] Ibid, at [44].
[187] (1996) STC 1218.
[188] Ibid, at 1235.

In *Greenpeace of New Zealand Incorporated*,[188a] the Court of Appeal confirmed that "the requirement that a charitable entity be both 'established and maintained' exclusively for charitable purposes reflects the need to focus not only on the objects of the society but also on its activities, current and proposed".

The importance of taking into account the activities of an entity has been stressed by the courts; especially in order to indicate what relative weight should be placed on different objects. As Gino Dal Pont wrote, "It is possible that non-charitable objects that appear of importance on paper, when viewed in the context of the association's actual activities, are in fact directed to forwarding objects that are clearly charitable. Alternatively, an association's activities may serve to indicate that a power in its constitution to carry on non-charitable activities is in truth not subsidiary but rather its main purpose".[189]

The Court of Appeal held in *Greenpeace of New Zealand Incorporated*[189a] that both the mandatory obligations and the discretionary power conferred by section 18 of the Act are significant because they show that Parliament intended the chief executive to have regard to the current and proposed activities of the entity and to be able to obtain information from the applicant about the true nature and scope of the activities. The Appeal Court also held that "under the Act the focus is clearly on consideration of all of the 'activities' of an entity and is not limited to its objects. Furthermore, the chief executive has an obligation to have regard to 'any other information' that he or she considers is relevant, which may include information obtained from other sources".

### *3.2.3 General clauses restricting purposes to charitable activities*

Sometimes constitutions, rules and trust deeds have a clause stating that all purposes must be charitable within the meaning of the laws of New Zealand from time to time, and any purposes that do not qualify as charitable shall be deemed to have been deleted from the rules document. This raises the question of whether such a clause precludes purposes that are not in fact charitable. A number of cases have dealt with that question.

In *M K Hunt Foundation Ltd v Commissioner of Inland Revenue*,[190] Hardie Boys J cited with approval the comments Lawrence LJ made in *Keren Kayemeth le Jisroel Ltd v Commissioners of Inland Revenue*.[191] In that case, the statute under consideration contained the phrase "for charitable purposes only", and Lawrence LJ said in the Court of Appeal that "it is not enough that the purposes described in the memorandum should include charitable purposes. The memorandum must be confined to those purposes".[192] Hardie Boys J further wrote that "in so holding, Lawrence LJ makes it clear in his judgment that he had in mind, not merely the phrase 'charitable purposes only', but also the cases which show that non-charitable objects will prevent recognition of the body in question as a charitable trust".[193]

The Court in *Commissioner of Inland Revenue v White*,[194] considered limitations in the constitution of the Clerkenwell Green Association. The Court noted that the constitution showed a clear intention that its object was exclusively charitable but went on to state:

> *The charitable intention, clear as it is, is not conclusive in establishing charitable status, however, because clause 2(b) limits the field in which the charitable intention is to be effectuated. If the objects specified in clause 2(b) are of such a nature that there is not a charitable purpose which will assist their achievement, then there is no charitable purpose within the specified field and the Association would not be entitled to registration as a charity. In other words, the mere insertion of the word "charitable" in clause 2(b) is not by itself enough to establish that the objects of the Association are charitable.*[195]

[188a] [2012] NZCA 533 at [40] per White J.

[189] Dal Pont *Law of Charity*, above n 89, at 323.

[189a] [2012] NZCA 533 at [48] per White J.

[190] [1961] NZLR 405.

[191] [1932] AC 650.

[192] Ibid, at 481.

[193] [1961] NZLR 405 at 408.

[194] (1980) 55 TC 651.

[195] Ibid, at 653.

In *McGovern v Attorney-General*, Slade J considered a similar clause that appeared to restrict the powers of the trustee to objects that were charitable according to the law of the United Kingdom. He concluded that the trusts could not be regarded as charitable and that the proviso could not enable the trusts declared by the deed to escape total invalidity.[196]

Moreover, it is a recognised canon of interpretation that when a general clause is followed by more specific ones, the more specific clauses determine the true meaning of that clause.[197]

Finally, in *Canterbury Development Corporation v Charities Commission*,[198] Young J wrote that "as both counsel accepted the mere fact that the constitution says that CDC's objects are charitable does not make CDC charitable although such a declaration is relevant in assessing whether they are".[199] The Judge went on to say that "in the end the objects and operation of the organisations either support a charitable purpose or they do not".[200] In the case at bar, he concluded that they did not support a charitable purpose.

### *3.2.4 Section 61B of the* Charitable Trusts Act 1957

In order to be a valid trust at law, a trust for charitable purposes must be exclusively charitable or it will be void for uncertainty. However, section 61B of the *Charitable Trusts Act 1957* intervenes to correct the situation. Section 61B reads as follows:

> *61B (1) In this section the term imperfect trust provision means any trust under which some non-charitable and invalid as well as some charitable purpose or purposes is or are or could be deemed to be included in any of the purposes to or for which an application of the trust property or any part thereof is by the trust directed or allowed; and includes any provision declaring the objects for which property is to be held or applied, and so describing those objects that, consistently with the terms of the provision, the property could be used exclusively for charitable purposes, but could nevertheless (if the law permitted and the property was not used as aforesaid) be used for purposes which are non-charitable and invalid.*
>
> *(2) No trust shall be held to be invalid by reason that the trust property is to be held or applied in accordance with an imperfect trust provision.*
>
> *(3) Every trust under which property is to be held or applied in accordance with an imperfect trust provision shall be construed and given effect to in the same manner in all respects as if –*
>
> *(a) The trust property could be used exclusively for charitable purposes; and*
>
> *(b) No holding or application of the trust property or any part thereof to or for any such non-charitable and invalid purpose had been or could be deemed to have been so directed or allowed.*

Section 61B of the *Charitable Trusts Act 1957*, however, can operate in two situations to "save" a trust that has both charitable and "non-charitable and invalid" purposes. The first is where the entity's stated purposes include charitable and non-charitable purposes (in which case the non-charitable purposes may be "blue pencilled out"). The second is where the stated purposes are capable of both a charitable and a non-charitable interpretation

[196] [1982] 1 Ch 321 at 343-44, 353.

[197] The rule is called *generalia specialibus non derogant* (general provisions do not derogate from specific ones). That rule was formulated as follows in *Goodwin v Phillips* (1908) 7 CLR 1 at 15 per O'Connor J cited by S F Burrows *Statute Law in New Zealand* (3rd ed, LexisNexis, Wellington, 2003) at 314 footnote 46.

> Where there is a general provision which, if applied in its entirety, would neutralise a special provision dealing with the same subject-matter, the special provision must not be read as a proviso to the general provision, and the general provision, in so far as it is inconsistent with the special provision, must be deemed not to apply.

[198] [2010] 2 NZLR 707.

[199] Ibid, at [56].

[200] Ibid.

and the primary thrust of the gift is considered to be charitable (in which case the purposes could be deemed to apply only in terms of the charitable interpretation).[201] As indicated by Young J in *Canterbury Development Corporation v Charities Commission*,[202] the "blue pencil" provision potentially allows the deletion of certain provisions in a trust. If the conditions in section 61B apply then the non-charitable purposes can be "blue pencilled", leaving only the charitable purpose.

In *Re Beckbessinger*,[203] Tipping J specified the requirements that must be present before the non-charitable purposes could be "blue pencilled". Before formulating the applicable test, the learned Judge analysed the previous New Zealand decisions[204] and concluded that the relevant test should be as follows:

> *In the case of designated and identifiable organisations it may well be necessary to have evidence as to whether or not they are charitable to determine the flavour of the gift. The Court cannot in my judgment say, [...] that because a gift might have been applied for charitable purposes, s 61B can be used to save it. The testator must be shown to have had a substantially charitable mind but to have fallen foul of the law of uncertainty by including either actually or potentially a non-charitable element or purpose.*[205]

The test enunciated in *Re Beckbessinger* has now displaced the test formulated in *Re Pettit*.[206] In *Re Pettit*, Chilwell J used the word "substantial" in the sense of "having substance, not imaginary or unreal".[207] Tipping J criticised that test because "substantial" for present purposes meant that charity was the primary thrust of the gift. He wrote that "on Chilwell J's formulation the section would apply if there was a slight suggestion of charity sufficient to make the suggestion real and not imaginary, but nevertheless in a case where the principal thrust of the gift was non-charitable".[208]

As indicated in section 61B of the *Charitable Trusts Act 1957* cited above, this section is a remedial one, which was thought to apply only to charitable trusts. However, in *Canterbury Development Corporation v Charities Commission*,[209] the Charities Commission had submitted that section 61B could not apply to an entity that was a company and not a trust. The appellant argued that the nature of a charitable company necessarily involved the existence of a trust affecting its activities. Young J wrote:

> *It is difficult to see why s 61B would be limited only to a charity carried on expressly by a trust rather than by any other entity. The Act clearly contemplates that a charitable purpose can be carried on by a trust or a company or some other institution (see s 13(1)(a) and (b) and s 4(1) definition of charitable entity). While the word "trust" is used in s 61B I consider Parliament used "trust" in a general sense of being a charitable entity (at least in part) given the context of s 61B. Any other interpretation would be irrational. If the Commission is correct a trust in part charitable and in part non-charitable would be able to seek the invocation of s 61B. A society or institution with exactly the same charitable and non-charitable purposes would not. There is no logic to explain the difference [...] It matters not in those circumstances whether this is through the direct vehicle of a trust or through the indirect vehicle of a society or institution or other body.*[210]

It seems that the learned Judge read the *Charities Act 2005* as amending the *Charitable Trusts Act 1957*. In the first paragraph of his decision, Young J wrote that "existing charities registered under the 1957 *Charitable Trusts Act* are required to apply for registration under the 2005 Act if they want to retain their tax exempt status under the *Income Tax Act* (*2004* and *2007*)".[211] Moreover, the *Charitable Trusts Act 1957* applies only to boards that

[201] *Re Beckbessinger* [1993] 2 NZLR 362 at 373.

[202] [2010] 2 NZLR 707 at [94].

[203] [1993] 2 NZLR 362.

[204] *Re Ashton (deceased)* [1955] NZLR 192; *Re White* [1963] NZLR 788; *Canterbury Orchestra Trust v Smitham* [1978] 1 NZLR 787 and *Re Howey* [1991] 2 NZLR 16. In that last case, the Court of Appeal wrote that "in our view the trust for a sanctuary is not itself charitable, it discloses no general charitable intention nor has it any, let alone a substantial, charitable content" (at p 21).

[205] [1993] 2 NZLR 362 at 376.

[206] [1988] 2 NZLR 513.

[207] Ibid, at 545.

[208] *Re Beckbessinger* [1993] 2 NZLR 362 at 375.

[209] [2010] 2 NZLR 707.

[210] Ibid, at [96-97].

[211] Ibid, at [1].

are incorporated under this Act and not to companies that cannot be incorporated under the Act. In *New Zealand Computer Society Inc*.,[212] MacKenzie J agreed that Young J might have been mistaken. MacKenzie J wrote that "it is clear that section 61B is directed to a particular feature of the law of trusts, and has no application to charitable entities which are not trusts. The appropriate mechanism, for an incorporated society, is an amendment to its objects".[213]

### *3.2.5 Summary*

In the process of analysing whether an organisation has exclusively charitable purposes, the judges of the Supreme Court of Canada agreed that the following steps must be followed. First, the primary purpose of the organisation must be identified and then one must determine whether those purposes are charitable. If one concludes that the purposes are not charitable, then the organisation is not charitable and the inquiry ends there. However, if the organisation's primary purposes are charitable, one must then go a further step and consider whether the other purposes pursued by the organisation are ancillary or incidental to its primary purposes; and whether the activities engaged in by the organisation are sufficiently related to its purposes to be considered to be furthering them. If positive responses are made to these two latter inquiries, then the organisation should be registered as a charitable organisation.[214]

As indicated above, in addition to an applicant's stated purposes, section 18(3)(a) of the *Charities Act 2005* requires the chief executive of the Department of Internal Affairs to have regard to an entity's activities at the time its application is made, the entity's proposed activities, and any other information that the chief executive considers relevant.

## 3.3 Conclusion

The numerous decisions that have analysed the concept of charity are clear that "charity" has a specific, specialised meaning in law. The legal terminology used in charity law is generally wider than the popular meaning, which is more restricted to relieving poverty or specific human or social needs. On the other hand, the legal meaning is sometimes not as broad as the popular meaning, especially when synonymous terms are used, such as "benevolent" and "philanthropic". These synonymous terms have been found not to be charitable.

The concept of charity also has a meaning that differs depending on the context in which it is used. The meaning it has acquired at common law is not always the same as the one that it has received under specific legislation. It is notably the case under the *Charitable Trusts Act 1957*, which has definitions of charity that contradict the common law. Similar differences can be seen in relation to certain definitions used in taxation or rate exemption statutes.

As a special category at law, charitable entities are entitled to a benignant construction. In other words, when a set of purposes can be given a charitable as well as a non-charitable meaning, courts will opt to interpret them as being charitable.

Courts and legislatures have stated that in order for an organisation to be found charitable, its purposes must be exclusively charitable. The preferred process in analysing whether an organisation has exclusively charitable purposes may be summarised in the following three steps. First, the primary purposes of the organisation must be identified and then one must determine whether those purposes are charitable. If one concludes that the purposes are not charitable, then the organisation is not charitable and the inquiry ends there. Second, if the organisation's primary purposes are charitable, one

[212] HC WN CIV-2010-485-924 [28 February 2011] at [71].

[213] Ibid, at [72].

[214] *Vancouver Society of Immigrants and Visible Minority Women v MNR* [1999] 1 SCR 10 at [63].

must then go a further step and consider whether the other purposes pursued by the organisation are ancillary or incidental to its primary purposes. Third, in assessing if the purposes are incidental, one must analyse whether the activities engaged in by the organisation are sufficiently related to its purposes to be considered to be furthering them. If positive responses are made to these two latter inquiries, then the organisation should be registered as a charitable organisation.[215]

In order to be considered charitable, an entity must be established and maintained exclusively for charitable purposes. This means that the disposition of surplus assets must also be directed to exclusively charitable purposes. This aspect will also be analysed in the next part, dealing with particular types of entity that can gain charitable status.

[215] Ibid.

CHAPTER 4

# Public benefit[1]

In order to be a charitable purpose, a purpose must be aimed at the public, or a sufficient section of the public. This was not specified in the *Charitable Uses Act (Statute of Elizabeth)* in 1601, but was explained by the Court of Chancery in 1767 when Kird Camden LC defined charity as a "gift to the general public use", in a case considering that the supply of spring water to a town was a charitable purpose.[2] According to John Bassett:

> *Lord Camden LC is reported to have said: definition of charity; a gift to a general public use, which extends to the poor as well as to the rich: many instances in the statute 43 Eliz carrying this idea, as for building bridges etc. The supplying of water is necessary as well as convenient for the poor and the rich.*[3]

The courts have been concerned to ensure that individuals do not take advantage of the benefits available to charities to carry out private purposes.[4] On the same basis, the benefits given to charities, such as tax benefits, are justified on the basis that the charities exist to benefit the public and relieve governments of the obligation to provide services that are being provided by the charities. As stated by Jean Warburton in *Tudor on Charities*, "While the [public benefit] distinction is not an easy one, its underlying rationale is to distinguish those organisations which look outward and seek to provide public benefits from those which are inward-looking and self-serving".[5]

It is clear from the relevant case law that the required public benefit must be shown. In *Re McIntosh (deceased) and others*,[6] Beattie J summarised the tests that purposes must meet in order to be declared charitable. He wrote:

> *To be charitable a purpose must satisfy certain tests – whether the purpose is enforceable by the court at the instance of the Attorney-General; whether the purpose is by analogy within the spirit and intendment of the Preamble to the ancient* Statute of Elizabeth I *(43 Eliz I, c. 4); whether the purpose falls within any of the so-called four divisions of charity derived from that statute; and the overriding test whether the purpose is for the public benefit.*[7]

Although the New Zealand *Charities Act 2005* does not mention public benefit, recent decisions by the New Zealand courts have clearly indicated that public benefit must be shown in all cases. Different levels of proof are, however, required for each of the four heads of charity.

The difficulty of applying the public benefit test is illustrated by a paper published by New Zealand's Inland Revenue in 2000, which stated: "the courts have [not] adopted any clear approach in applying the public benefit test to different types of charitable entities. There is some uncertainty over how the law is to be applied in this area".[8]

This chapter is divided into five sections. The first section analyses the benefit element in the notion of public benefit, while the second section concentrates on the public element. The third section analyses private benefits as compared with public benefit. The fourth section analyses businesses as a vehicle to provide charitable purposes and public benefit. The final section deals with entities that are not established in New Zealand but raise money and want donee status in New Zealand (so donors can access tax credits for their charitable gifts).

[1] The author acknowledges the research undertaken by David MacKenzie, LLB, for this chapter. David was a registration analyst with the Charities Commission.

[2] *Jones v Williams* (1767) AMB 651 at 652; 27 ER 422 per Lord Camden LC. See also *Re Delany, Conoley v Quick* [1902] 2 Ch 642 at 649 per Farwell J.

[3] John Bassett "Charity is a General Public Use" [2011] NZLJ 60.

[4] *Perpetual Trustee Co (Ltd) v Ferguson* (1951) 51 SR NSW 256 at 263 per Sugerman J.

[5] Jean Warburton *Tudor on Charities* (9th ed, Sweet & Maxwell, London, 2003) at 10 ["Tudor 9th ed"].

[6] [1976] 1 NZLR 308.

[7] Ibid, at 309.

[8] *Issues Paper,* part IP3168 "The Public Benefit Test", January 2000, at [1.2]; quoted in Susan Barker *Canterbury Development Case* [2010] NZLJ 248 at 249.

### 4.1 The benefit element

Benefit to the public should be capable of being identified and defined. For example, in *Gilmour v Coats*,[9] it was held that a closed order of nuns did not have charitable purposes because the benefit provided through intercessory prayer and the example of pious living was too vague and incapable of proof.

This section is divided into three subsections. The first subsection is devoted to defining "benefit". The second subsection discusses the parameters of assessing and quantifying "benefit". The third subsection deals with the notion of public policy applied in assessing "benefit".

#### *4.1.1 Definition of the benefit element*

The definition of the benefit element in public benefit is not static. As is discussed below, it varies across the heads of charity. It also varies over time. Finally, benefits can take different forms.

##### *4.1.1.1 The definition may change across the heads of charity*

When considering purposes under the first three heads of charity, public benefit is generally presumed unless there is evidence to the contrary. Nevertheless, particularly in the case of purposes that advance education or religion, the public aspect also has to be shown; the purpose needs to be established as being for the public or a sufficient section of the public.[10] Purposes that relieve poverty provide some exceptions to the general public benefit requirements, as is dealt with in more detail later in this chapter. In *Gilmour v Coats*,[11] the House of Lords wrote about the development of the law of charities that:

> *It is a trite saying that the law is life, not logic. But it is, I think, conspicuously true of the law of charity that it has been built up not logically but empirically. It would not, therefore, be surprising to find that, while in every category of legal charity some element of public benefit must be present, the court had not adopted the same measure in regard to different categories, but had accepted one standard in regard to those gifts which are alleged to be for the advancement of education and another for those which are alleged to be for the advancement of religion, and it may be yet another in regard to the relief of poverty. To argue by a method of syllogism or analogy from the category of education to that of religion ignores the historical process of the law.*[12]

Public benefit should be assessed on a case-by-case basis, in the particular circumstances of each entity that is claiming charitable status. For example, cases applying the public benefit test in the context of one head of charity may not be applicable to the consideration of other heads. In *Inland Revenue Commissioners v Baddeley*,[13] Lord Somervell stated that he could not "accept the principle ... that a section of the public sufficient to support a valid trust in one category must as a matter of law be sufficient to support a trust in any other category".[14]

In the case of the fourth head of charity, "other purposes beneficial to the community", it is necessary to establish positively[15] that the purpose has a tangible or well recognised benefit to the community.[16] Once this is established, it is also necessary to show that the purpose is for the public or a sufficient section of the public. In *Canterbury Development Corporation v Charities Commission*,[17] Young J agreed with these comments and wrote: "public benefit must be expressly shown where the claimed purpose of the trust is, as here, benefit to the community (*Oppenheim v Tobacco Securities Trust Co Ltd* [1951] AC 297 adopted in New Zealand in *Molloy v CIR* [1981] 1 NZLR 688). While the benefit need not be for all of the public it must be for a significant part".[18]

9 [1949] AC 426, HL.

10 *Verge v Somerville* [1924] AC 496 at 499 per Lord Wrenbury.

11 [1949] AC 426.

12 Ibid, at 449 per Lord Simonds.

13 [1955] AC 572.

14 Ibid, at 615.

15 *D V Bryant Trust Board v Hamilton City Council* [1997] 3 NZLR 342 at 350 per Hammond J.

16 *National Anti-Vivisection Society v Inland Revenue Commissioners* [1948] AC 31 at 49 per Lord Wright.

17 [2010] 2 NZLR 707.

18 Ibid, at [45].

#### *4.1.1.2 Definition of what is beneficial may change with time*

It is also important to note that perceptions of public benefit can change over time, influenced by increasing knowledge and understanding, changes in social and economic conditions, and changes in social values. For example, an anti-vivisection trust was held to be charitable by the English Court of Appeal in *Re Foveaux*.[19] The decision rested on the premise that there was no express authority against it and on the principle that a society for the prevention of cruelty to animals was a charitable society.

However, in *National Anti-Vivisection Society v IRC*,[20] the House of Lords held that an anti-vivisection trust was not charitable. Lord Wright stated that:

> *Where a society has a religious object it may fail to satisfy the test* [of public benefit] *if it is unlawful, and the test may vary from generation to generation as the law successively grows more tolerant ... It cannot be for the public benefit to favour trusts for objects contrary to the law. Again eleemosynary trusts may, as economic ideas and conditions and ideas of social service change, cease to be regarded as being for the benefit of the community, and trusts for the advancement of learning or education may fail to secure a place as charities, if it is seen that the learning or education is not of public value.*[21]

Some 50 years separated these two decisions. During that time, the law had evolved concerning "political activities". In 1917, in *Bowman v Secular Society Ltd*,[22] the House of Lords laid down the principle that entities established to change the law were not charitable. That being so, in *National Anti-Vivisection Society*, the House of Lords was faced with the alternative of reversing *Bowman* or overruling *Re Foveaux*. It opted to maintain its decision in *Bowman* and reverse *Foveaux* because the law had changed since that decision.

#### *4.1.1.3 Forms of benefit*

Public benefits can be direct or indirect. The benefits can also be tangible or intangible, present or future.

Benefits are said to be direct when they benefit the immediate beneficiaries. Most benefits fall into this category. Direct benefits must be taken into account in assessing whether an entity provides sufficient benefit to the public. It must, however, be understood that the concept of providing "benefit" extends beyond material benefit to other forms of benefit, such as social, mental and spiritual benefit.[23]

Benefits are said to be indirect where they extend beyond the immediate beneficiaries. For example, courts have held that a registration system for medical practitioners provides a public benefit by ensuring that medical practitioners meet an appropriate standard, therefore protecting the public by ensuring that those practitioners are adequately qualified.[24] Also, courts have held that assisting nurses in promoting efficient nursing services provides an indirect benefit to patients.[25] The comparison of direct and indirect benefits is an important element when considering professional associations and the promotion of economic development.

Indirect benefit was a main consideration in upholding as charitable trusts for the prevention of cruelty to animals. The indirect benefit was "to stimulate humane and generous sentiments in man towards the lower animals, and by these means promote feelings of humanity and morality generally, repress brutality, and thus elevate the human race".[26] Another example is the indirect benefit of catering for the needs of paying

[19] [1895] 2 Ch 501.

[20] [1948] AC 31 (HL).

[21] Ibid, at 42 per Lord Wright.

[22] [1917] AC 406.

[23] Gino Dal Pont *Charity Law in Australia and New Zealand* (Oxford University Press, Oxford, 2000) at 15.

[24] *Commissioner of Inland Revenue v Medical Council of New Zealand* [1997] 2 NZLR 297.

[25] *In Re Harding, Dixon v Attorney-General* [1960] NZLR 379.

[26] *Re Wedgwood* [1915] 1 Ch 113 at 122 per Swinfen Eady LJ.

patients in a charitable private hospital, which relieves stresses on the public hospital system, and thus provides greater availability of services for non-paying patients.[27]

Public benefits can be tangible or intangible. Benefits are tangible where they are accessible through the senses. Most benefits are of this kind. Benefits are intangible where they are not immediately evident through the senses. If there are intangible benefits, courts will require some evidence that there is "approval by the common understanding of enlightened opinion" or "general consensus of opinion or understanding"[28] before accepting that there is a public benefit. It is mainly because benefits are often intangible that the presumption has been accepted for the advancement of religion.

Gino Dal Pont wrote that "the more indirect, or the more intangible, the alleged 'benefit', the less likely the court will be convinced that the gift or institution exhibits sufficient public benefit to be characterised as charitable".[29] In *Re The Grand Lodge of Antient Free and Accepted Masons in New Zealand*,[30] Simon France J wrote that "these activities of the Grand Lodge and freemasonry generally do not benefit the public other than indirectly and intangibly by seeking to produce members who are better citizens. This is insufficient to meet the public benefit requirement".

Finally, the benefits may accrue in the present or in the future. They accrue in the present when the beneficiaries will benefit immediately from the charitable entity. They will accrue in the future when the benefits are pursued for the benefit of future generations. This is often the case in charitable entities that are for the preservation of the environment. Some of these organisations want to restrict the use of public land for its preservation for future generations. The Charity Commission for England and Wales has suggested that a balance is required in such cases in that "benefiting future generations should not come entirely at the expense of today's".[31]

#### *4.1.2 Assessing and quantifying benefit*

Assessing benefit is not an easy task. This is probably why courts have created a presumption of public benefit for the first three heads of charity. Assessing benefit involves a qualitative as well as a quantitative process.

##### *4.1.2.1 Presumption of benefit*

In *Re Education New Zealand Trust*,[32] Dobson J wrote: "It is well-settled that on the first three specific heads of charitable purposes, public benefit is assumed to arise unless the contrary is shown".[33] The reason for this presumption may be that "in some cases, a purpose may be so manifestly beneficial to the public that it would be absurd to call evidence on this point".[34] In some other cases, such as the advancement of religion, some of the benefits may be intangible and therefore difficult to prove as providing public benefit.

Gino Dal Pont[35] summarised the main justifications for this favourable treatment as follows:

> *The first is a practical one: as the exception enjoys a long history,[36] it would be now inappropriate for a court to overrule the case law upon which it is based,[37] as to do so would upset many dispositions that have been assumed to be valid.[38] The 'horse has bolted', as it were. The second is policy-focused. It suggests that some special quality in relieving poverty – say, it is inherently so beneficial to the community as not to require proof of public benefit,[39] or it 'is of so altruistic a*

[27] *Re Resch's Will Trusts* [1969] 1 AC 514 at 544 per Lord Wilberforce. See also Dal Pont *Law of Charity* (LexisNexis/Butterworths, Australia, 2010) at 69.

[28] Tudor 9th ed, above n 5, at 8 citing *National Anti-Vivisection Society v IRC* [1948] AC 31 at 47-49 per Lord Wright.

[29] Dal Pont *Law of Charity*, above n 27, at 70.

[30] [2011] 1 NZLR 277 at [71].

[31] *Charities and Public Benefit* (January 2008) on the Charity Commission's website: www.charity-commission.gov.uk at F2.

[32] (2010) 24 NZTC 24,354.

[33] Ibid, at [24] citing Tudor 9th ed, above n 5, at [1-008] citing *National Anti-Vivisection Society v IRC* [1948] AC 31 at 65.

[34] *McGovern v Attorney-General* [1982] 1 Ch 321 at 333-334 per Slade J.

[35] Dal Pont *Law of Charity*, above n 27, at 176.

[36] These cases are listed and discussed in *Re Compton* [1945] Ch 123 at 137-139 per Lord Greene MR.

[37] *Gibson v South American Stores (Gath & Chaves)* [1950] 1 Ch 177 at 194 per Evershed MR; *Oppenheim v Tobacco Securities Trust Co Ltd* [1951] AC 297 at 308-309 per Lord Simonds.

[38] *Re Compton* [1945] Ch 123 at 139 per Lord Greene MR; *Gibson v South American Stores (Gath & Chaves) Ltd* [1950] 1 Ch 177 at 195 per Evershed MR; *Dingle v Turner* [1972] AC 601 at 623 per Lord Cross.

[39] *Re Compton* [1945] Ch 123 at 139 per Lord Greene MR; *Gibson v South American Stores (Gath & Chaves) Ltd* [1950] 1 Ch 177 at 194, 195 per Evershed MR.

> *character that the public element may necessarily be inferred thereby'* [40]*– places it in a class by itself. In that class, it is reasoned, consequent private benefit to individuals is outweighed by the public benefit in relieving poverty. Conversely, whatever public benefit there is inherent in gifts other than for the relief of poverty is overridden by the policy against charity conferring direct private benefit on individuals.*[41]

In *The Independent Schools Council v Charity Commission for England and Wales*,[42] the three judges examined the law on public benefit as it stood before the adoption of the *Charities Act 2006*. Concerning the assumption of public benefit, they wrote that the following method should be followed:

> *He [the Judge] would start with a predisposition that an educational gift was for the benefit of the community; but he would look at the terms of the trust critically and if it appears to him that the trust might not have the requisite element, his predisposition would be displaced so that evidence would be needed to establish public benefit. But if there was nothing to cause the judge to doubt his predisposition, he would be satisfied that the public element was present. This would not, however, be because of a presumption as that word is ordinarily understood; rather, it would be because the terms of the trust would speak for themselves, enabling the judge to conclude, as a matter of fact, that the purpose was for the public benefit.*[43]

To displace the presumption of public benefit in the first three heads of charity it is not necessary to show that the purpose is detrimental to the public. Rather it needs to be shown that the purpose is "non-beneficial to the public".[44] In *Re Pinion (deceased)*, a collection of the testator's antique items, in the opinion of the Judge, did not have any museum quality and thus had no public benefit.[45] Similarly, in *Re Hummeltenberg*, a gift for the training of spiritualist mediums was held to be void as there was no evidence of the beneficial nature of the gift.[46]

In *Re Education New Zealand Trust*,[47] Dobson J considered that the presumption of public benefit could be displaced. He wrote: "It may be that the further an entity's purpose is away from the core of educational purposes, that it becomes relatively easier to rebut the presumption that requisite public benefit arises". He adopted the observation of Gallen J from *Educational Fees Protection Society Inc v Commissioner of Inland Revenue*,[48] that "the nature of the charitable purpose may itself be a factor in determining whether or not the requirement of public benefit has been met". In *Re Education New Zealand Trust*,[49] the presumption of public benefit was displaced by evidence that about 30% of the members of the trust were for-profit organisations. Dobson J considered that the entity had a mix of altruistic and non-altruistic purposes and that "a 30 per cent constituency cannot realistically be characterised as ancillary, secondary, subordinate or incidental".[50] Juliet Chevalier-Watts suggested that *Re Education New Zealand Trust* and the *Grand Lodge New Zealand* cases provided "much needed clarity as to what may amount to ancillary purposes as a quantitative measure".[51]

Gino Dal Pont noted that "an object that is harmful to the public cannot be said to be for its benefit, although in this context the purpose could be denied effect equally on the basis that it is against public policy".[52]

Where positive and harmful consequences may result from a particular purpose, a court may determine on balance whether there is public benefit. For example, an anti-vivisection society was held not to be charitable because the harm to medical science and research in prohibiting vivisection outweighed the advancement of morals.[53]

40 *Re Scarisbrick* [1951] Ch 622 at 639 per Lord Evershed MR.

41 *Re Compton* [1945] Ch 123 at 139 per Lord Greene MR; *Dingle v Turner* [1972] AC 601 at 623 per Lord Cross.

42 [2011] UKUT 421 (TCC).

43 Ibid, at [67].

44 *Coats v Gilmour* [1948] 1 Ch 340 at 345.

45 *Re Pinion* [1985] Ch 285.

46 [1923] 1 Ch 237.

47 (2010) 24 NZTC 24, 354 at [26].

48 [1992] 2 NZLR 115 at 125.

49 (2010) 24 NZTC 24, 354.

50 Ibid, at [43].

51 "Freemasonry and Charity" [2011] NZLJ 50 at 52.

52 Dal Pont *Charity Law in Australia and New Zealand*, above n 23, at 15.

53 *National Anti-Vivisection Society v IRC* [1948] AC 31 at 65; *Molloy v Commissioner of Inland Revenue* [1981] 1 NZLR 688 at 695 per Somers J.

#### *4.1.2.2 Assessing benefits*

The assessment of whether a purpose provides a benefit is to be judged objectively by experts, not based on the intention or opinion of a settlor or donor creating a charitable organisation. This was established in *Re Hummeltenberg*,[54] where Russell J stated:

> *If a testator by stating or indicating his view that a trust is beneficial to the public can establish that fact beyond question, trusts might be established in perpetuity for the promotion of all kinds of fantastic (though not unlawful) objects, of which the training of poodles to dance might be a mild example.*[55]

The benefit must be proven, as was asserted in *Vancouver Society of Immigrants and Visible Minority Women v MNR*.[56] In that case, Gonthier J wrote that although the public benefit requirement applied to all charitable purposes, it was of particular concern under the fourth head of Lord Macnaghten's scheme in *Pemsel*. "This is so because under the first three heads, public benefit is essentially a rebuttable presumption, whereas under the fourth head it must be demonstrated".[57] In terms of purposes falling under the fourth head, the court does not assume or presume its existence as in the case of the other heads of charity – the benefit in issue must be affirmatively proved or clear to the court.[58] In *Vancouver Society of Immigrants and Visible Minority Women v MNR*, Iacobucci J, speaking for the majority, stressed that "rather than laying claim to public benefit only in a loose or popular sense, it is incumbent upon the Society to explain just how its purposes are beneficial in a way the law regards as charitable".[59]

The Supreme Court of Canada summarised what is meant by the public benefit requirement. Gonthier J wrote that "there must be an objectively measurable and socially useful benefit conferred; and it must be a benefit available to a sufficiently large section of the population to be considered a public benefit".[60]

In assessing if the purposes provide benefit, courts have to resort to both qualitative and quantitative processes. In *Re Draco Foundation (NZ) Charitable Trust*,[61] Young J wrote that he agreed "with Simon France J's remark in *Re The Grand Lodge of Antient Free and Accepted Masons in New Zealand*[62] that whether a purpose is ancillary involves a quantitative and qualitative assessment".

Courts have not expanded on the qualitative aspect of the assessment other than to say that the entity has to explain how its purposes are socially useful. In *New Zealand Society of Accountants v Commissioner of Inland Revenue*, Richardson J of the Court of Appeal noted that "peace of mind seems to me far too nebulous and remote to be regarded as a public benefit".[63]

Concerning the quantitative aspect of the benefit element, it must be something that can be objectively measured. An indication of the quantitative aspect of the benefit is where the class of persons who will benefit from the entity is numerically negligible.[64] Although the test requires that objectively measurable benefit be shown, it does not necessarily mean that only tangible benefits will be sufficient. Courts have also held that benefits in the intellectual and artistic fields can amount to useful benefits under the fourth head.[65]

### *4.1.3 Public policy*

Public policy is sometimes an important consideration in assessing if the purposes of an organisation provide public benefit. The public nature of charities attracts the requirement that they conform with public policy. It follows that in order to provide public benefit, the purposes must not be detrimental to the community.

[54] [1923] 1 Ch 237.

[55] *Re Hummeltenberg* [1923] 1 Ch 237 at 242.

[56] [1999] 1 SCR 10.

[57] Ibid, at [41].

[58] *D V Bryant Trust Board v Hamilton City Council* [1997] 3 NZLR 342, 350.

[59] [1999] 1 SCR 10 at [176].

[60] Ibid, at [41] per Gonthier J dissident.

[61] HC WN CIV-2010-485-1275 [3 February 2011] at [14].

[62] [2011] 1 NZLR 277.

[63] [1986] 1 NZLR 147 at 153.

[64] *Rogers v Thomas* (1837) 2 Keen 8 (a gift to inhabitants of a street with no poverty restriction was held not to be charitable). In *IRC v Baddeley* [1955] AC 572 at 591, where Lord Simonds discussed public benefit in relation to the fourth head of charity and gave the example of the inhabitants of a particular street as not providing sufficient public benefit.

[65] *Re Hopkins' Will Trusts* [1965] Ch 669 at 680-681 per Wilberforce J.

This was made clear in *National Anti-Vivisection Society v Inland Revenue Commissioners*,[66] whose main object was the abolition of vivisection. Lord Simons wrote that "where on the evidence before it the court concludes that, however well-intentioned the donor, the achievement of his object will be greatly to the public disadvantage, there can be no justification for saying that it is a charitable object".

The purpose cannot be said to be "beneficial to the community" if it is illegal. In *Re Collier (deceased)*,[67] Hammond J wrote that since euthanasia was not lawful in New Zealand, "there cannot be a charitable bequest to promote an illegal purpose".

Purposes that may threaten or undermine national security are contrary to public policy. In *Re Collier (deceased)*,[68] Hammond J noted that an object of promoting world peace by encouraging soldiers to put their arms down was an unlawful end because military law did not allow them to adopt such a course, save on appropriate orders. It could also be said that such an object would undermine national security. The same analysis would apply to an organisation aligned to terrorism, and allowing its assets to be used to support or condone terrorist activities.[69]

Also contrary to public policy are religious purposes that are adverse to the foundation of all religions or subversive of all morality.[70] Courts will, however, be reticent to find religious objects to be against public policy unless there is evidence of some behaviour that is harmful to the religion's adherents or to children. In *Centrepoint Community Growth Trust v Commissioner of Inland Revenue*,[71] Tompkins J refused to find the sexual attitudes of members of the Trust to be significant in deciding the issue before the Court unless more evidence of the effect on children was adduced.

Concerning educational objects, Gino Dal Pont gave examples of purposes that could be against public policy. Encouraging smoking by educating persons on the benefits of tobacco would be against public policy and harmful. "Establishing a school for pickpockets or providing a generally accessible guide on how to launder money effectively fall into the same category".[72]

Until recently, courts have upheld as charitable trusts that discriminated against certain persons because of their race or religion. *Re Lysaght (deceased)*[73] involved a bequest to found medical studentships excluding persons of Jewish or Roman Catholic faith. Buckley J upheld the bequest in the following terms: "I accept that racial and religious discrimination is nowadays widely regarded as deplorable in many respects, but I think that it is going much too far to say that the endowment of a charity, the beneficiaries of which are to be drawn from a particular faith or are to exclude adherents to a particular faith, is contrary to public policy".[74] More recently, by contrast, a Canadian court considered that an entity giving scholarships that set eligibility based on race, religion, ethnic origin and sex was contrary to public policy.[75] Gino Dal Pont wrote that "an association that, under its objects, denies access or services to a class of persons in contravention of anti-discrimination legislation may forfeit charitable status on public policy grounds, except to the extent permitted by law".[76]

The courts have, in the past, been unwilling to form a view on whether political purposes provide a public benefit. A "political purpose" includes any purpose directed at furthering the interests of any political party, or securing or opposing any change in the law or in the policy or decisions of central or local government, whether in this country or overseas. The reason for this is that Parliament is responsible for making laws and it is not appropriate for the courts or the New Zealand Charities Registration Board to pre-empt that process by forming a view on whether a new law or a change to an existing law would benefit the public. For this reason, organisations with main purposes that are political have traditionally not been considered to provide a public benefit.[77]

[66] [1948] AC 31 at 65-66.

[67] [1998] 1 NZLR 81 at 91.

[68] Ibid, at [1-15].

[69] *Charities Act 2005*, s 13(5)(a)(b).

[70] *Thornton v Howe* (1862) 31 Beav 14 at 20; 54 ER 1042 per Romilly MR, cited with approval in *Centrepoint Community Growth Trust v CIR* [1985] 1 NZLR 673 at 692 per Tompkins J; *Re Watson (deceased)* [1973] 3 All ER 678 at 684-88 per Plowman J.

[71] [1985] 1 NZLR 673 at 686-687 per Tompkins J.

[72] Dal Pont *Law of Charity*, above n 27, at 74.

[73] [1966] 1 Ch 191.

[74] Ibid, at 206.

[75] *Canada Trust Co v Ontario Human Rights Commission* (1990) 69 DLR (4th) 321.

[76] Dal Pont *Law of Charity*, above n 27, at 75.

[77] *Re Collier (deceased)* [1998] 1 NZLR 81 at 91; *McGovern v Attorney-General* [1981] 3 All ER 493; *Molloy v Commissioner of Inland Revenue* [1981] 1 NZLR 688, (1981) 5 TRNZ 1 (CA). The approach adopted in *Molloy* was approved by the Court of Appeal in *Greenpeace of New Zealand Incorporated* [2012] NZCA 533 at [45] and [55].

### 4.2 The public element

To be charitable, a purpose must have a public character. This means that it must not be private in nature, that is, it must be aimed at the public or a sufficient section of the community to amount to the public,[78] and it must not be aimed at creating private profit.[79]

This section explores three elements: what constitutes a sufficient section of the public, the impact of restrictions on public benefit, and private benefit.

#### *4.2.1 What constitutes a sufficient section of the public?*

Concerning public benefit, in the 2009 *Travis Trust v Charities Commission*,[80] Joseph Williams J wrote that showing public benefit required the application of a two-fold test: "first, are the purposes of the trust such as to confer a benefit on the public or a section of the public; and second, do the class of persons eligible to benefit constitute the public or a sufficient section of it?".[81]

The assessment of whether a purpose provides a benefit is to be judged objectively, not based on the intention or opinion of a settlor or donor creating a charitable organisation.[82] The question that arises is how to prove that the purpose provides benefit to the public.

Courts have repeatedly commented on the difficulty of clearly articulating what constitutes a sufficient section of the public. Lord Greene MR stated in *Re Compton*[83] that "no definition of what is meant by a section of the public has, so far as I am aware, been laid down and I certainly do not propose to be the first to make the attempt to define it".[84] Lord Cross stated in *Dingle v Turner*[85] that "the phrase 'a section of the public' is in truth a vague phrase that may mean different things to different people".[86] His Lordship concluded that "in truth the question of whether or not the potential beneficiaries of a trust can fairly be said to constitute a section of the public is a question of degree and cannot be by itself decisive of the question of whether the trust is a charity".[87]

This section consists of four subsections. The first subsection analyses the *Compton-Oppenheim* test used to decide what constitutes a sufficient section of the public. The second subsection examines the limits of the *Compton-Oppenheim* test in relation to poverty and preference cases. The third subsection looks at the effects of section 5(2)(a) of the *Charities Act 2005* on the *Compton-Oppenheim* test. Finally, the fourth subsection criticises the *Compton-Oppenheim* test.

##### *4.2.1.1 The* Compton-Oppenheim *test*

Lord Greene MR in *Re Compton*[88] held that a trust for the education of the descendants of three named persons did not provide a sufficient public benefit regardless of the number of beneficiaries, stating that "if a gift is in its nature a private or family benefaction it cannot be regarded as charitable merely because the number is, or at some future date becomes, considerable".[89]

The House of Lords' decision in *Oppenheim v Tobacco Securities Trust Co Ltd*[90] is a key case in the development of charity law. It held that purposes to provide educational benefits to the children of employees and former employees of a particular company were not charitable. In that case, even though the employees in question numbered around 110,000, they were not considered to constitute a section of the public.

[78] *Verge v Somerville* [1924] AC 496 at 499 per Lord Wrenbury; *Lloyd v Federal Commissioner of Taxation* (1955) 93 CLR 645 at 662 per McTiernan J; at 667 per Fullagar J; at 670 per Kitto J; *Oppenheim v Tobacco Securities Trust Co Ltd* [1951] AC 297; *Dingle v Turner* [1972] AC 601; cited in *New Zealand Society of Accountants v Commissioner of Inland Revenue* [1986] 1 NZLR 147 (CA) and *Educational Fees Protection Society v Commissioner of Inland Revenue* [1992] 2 NZLR 115.

[79] *D V Bryant Trust Board v Hamilton City Council* [1997] 3 NZLR 342 at 347-348 [affd [1999] 1 NZLR 41].

[80] (2009) 24 NZTC 23, 273.

[81] Ibid, at [54].

[82] *Hummeltenberg* [1923] 1 Ch 237.

[83] [1945] 1 AC 198.

[84] Ibid, at 201.

[85] [1972] AC 601.

[86] Ibid, at 623.

[87] Ibid, at 624.

[88] [1945] 1 AC 198.

[89] Ibid, at 205.

[90] [1951] AC 297.

Lord Simonds stated that "a group or persons may be numerous but, if the nexus between them is their personal relationship to a single *propositus* or to several *propositi*, they are neither the community nor a section of the community for charitable purposes".[91] Lord Normand stated that the rights and duties stemming from the relationship between an employer and a particular employee contained no relevant public element.[92] If the connection between beneficiaries was their relationship to a single named individual or individuals then the beneficiaries were not a section of the community for charitable purposes.[93]

The *Oppenheim* decision is authority for the proposition that beneficiaries of a charitable organisation "must not be numerically negligible" and that "the quality which distinguishes them from other members of the community ... must be a quality which does not depend on their relationship to a particular individual".[94] Harman LJ stated in *Inland Revenue Commissioners v Educational Grants Association Ltd*[95] that "it does not matter about size [of beneficiary group]. It is the connecting link between them that matters". As such, considering whether an entity benefits a sufficient section of the public is never simply a matter of assessing the number of beneficiaries.

Gino Dal Pont[96] gave the following examples of persons that constitute a section of the public:

> *adherents of a particular faith to which anyone may adhere;*[97] *inhabitants of a parish or town, or a specified class thereof not linked to a single* propositus *or to several* propositi*;*[98] *'persons who resided in the Borough of Hastings in or prior to the year 1880 or the descendants of such persons';*[99] *any ex-member of the armed forces who is 'a Protestant of Scottish or British descent [and] in genuine need of financial assistance';*[100] *'ladies ... who have become reduced in circumstances';*[101] *working people in a locality; and indigenous persons in a locality.*[102]

According to Gino Dal Pont's[103] research, examples of classes of person held not to constitute a section of the public included:

> *descendants of prescribed persons being early settlers of a district;*[104] *members of a specified trade union;*[105] *and young women having their first child in a prescribed maternity home.*[106] *A fund from which only persons with a contractual or legal relationship with a specified class of persons can be compensated is also not charitable for lack of public benefit.*[107]

In *New Zealand Society of Accountants v Commissioner of Inland Revenue*,[108] the Court of Appeal found that the maintenance of a fidelity fund, to allow for reimbursements of losses caused by dishonest lawyers and accountants, was not a charitable purpose. Somers J acknowledged that public benefit could be indirect but stated: "the instant cases do not exhibit the type of eleemosynary, altruistic or other public advantage with which this branch of the law is concerned. The funds are just compulsory insurances against theft of money funded by solicitors and accountants".[109] There was insufficient public benefit because the only potential beneficiaries were those with contractual or fiduciary relationships to accountants or lawyers. Richardson J held that "any benefit to the public from a trust to compensate all victims of misappropriation of funds by lawyers or chartered accountants is too speculative and remote to justify the attribution to the trust of a charitable purpose".[110]

[91] Ibid, at 306.

[92] Ibid, at 310.

[93] Ibid, at 306.

[94] Ibid, per Lord Simonds.

[95] [1967] 2 All ER 893 at 899.

[96] Dal Pont *Law of Charity*, above n 27, at 51-52.

[97] *Inland Revenue Commissioners v Baddeley* [1955] AC 572 at 606, 611-612 per Lord Reid.

[98] *Verge v Somerville* [1924] AC 496 at 499 per Lord Wrenbury; *Peggs v Lamb* [1994] 2 All ER 15 at 34, 36 per Morritt J (freemen of a specified borough).

[99] *Re Tree* [1945] 2 All ER 65 at 69-70 per Evershed J. Cf *Re Mills (deceased)* (1981) 27 SASR 200.

[100] *Re Gillespie* [1965] VR 402 at 404-406 per Little J.

[101] *Shaw v Halifax Corporation* [1915] 2 KB 170 at 179-181 per Buckley LJ; at 184 per Kennedy LJ.

[102] *Re Hadden* [1932] 1 Ch 133 at 142 per Clauson J.

[103] Dal Pont *Law of Charity,* above n 27, at 52.

[104] *Re Mills (deceased)* (1981) 27 SASR 200 at 208-209 per Walters J; at 213 per Wells J; at 213-214 per Sangster J.

[105] *Re Mead's Trust Deed* [1961] 2 All ER 836 at 840-801 per Cross J.

[106] *Re Mitchell* [1963] NZLR 934 at 939 per Wilson J.

[107] *New Zealand Society of Accountants v Commissioner of Inland Revenue* [1986] 1 NZLR 147 (fidelity funds operated by the *New Zealand Society of Accountants and the New Zealand Law Society* pursuant to legislation were held not to be charitable because only persons in a contractual or fiduciary relationship with the defaulting practitioner benefited therefrom: see at 154 per Richardson J; at 156 per Somers J).

[108] [1986] 1 NZLR 147.

[109] Ibid, at 157.

[110] Ibid, at 154.

#### *4.2.1.2 Limits to the* Compton-Oppenheim *test – poverty and preference cases*

The *Compton-Oppenheim* test has not been applied consistently to all categories of cases. The House of Lords in *Dingle v Turner*[111] wrote that the rule of the public benefit test had no application in the field of trusts for the relief of poverty. In that decision, the House of Lords approved the reasoning of Jenkins LJ in *Re Scarisbrick*,[112] who wrote:

> *Trusts or gifts for the relief of poverty have been held to be charitable even though they are limited in their application to some aggregate of individuals ascertained [by reference to some personal tie] and are therefore not trusts or gifts for the benefit of the public or a section thereof. This exception operates whether the personal tie is one of blood ... or contract ... or amongst employees of a particular company or their dependants.*[113]

The consequence of gifts for the relief of poverty not needing to satisfy the same public benefit test as the other heads of charity is discussed in detail in section 9.3.1 chapter 9.

If a gift is directed to a sufficient section of the community, with preference given to persons who are connected by blood, contract, family, membership or employment, this will be acceptable, although the preference is to a class that would not in itself meet the public benefit test.[114] The principle here is that if the main purpose of an organisation is to provide a public benefit, a preference to a private class of persons will not affect its charitable status.[115]

In *Re Koettgen's Will Trusts*,[116] it was held that a trust that provided education with preference given to employees of a named firm was a charitable trust. It was held that as the primary beneficiary class was a sufficient section of the public, the preference to the employees (who could receive up to 75% of trust payments in a year) would not preclude public benefit. This decision has been criticised on the grounds that it "edges very near to being inconsistent with *Oppenheim*'s case".[117]

However, as Gino Dal Pont noted, the Australian case *Public Trustee v Young*[118] upheld a trust that provided a scholarship with preference to be given to employees of a particular company. Zelling J stated that the preference clause in that case was "simply an administrative direction to the trustee administering the scheme that, if other things are equal, preference should be given to [company] employees".[119]

The Charity Commissioners for England and Wales will register educational trusts with preferential provisions as long as the exercise of a power in favour of a preferred class is permissive and not mandatory.[120] However, if that power is exercised unreasonably so that too large a proportion of income or capital is directed to members of the preferred class, it would be an application of non-charitable purposes, and a breach of trust.[121]

Similarly, the New Zealand Charities Registration Board will register an organisation that indicates an intention to benefit the public, even if there is a preference to a named individual or individuals. Moreover, purposes to provide support and assistance to the sufferers of a rare disease will be charitable, even where there are only a few people who actually suffer from that disease. This is because the purposes are open to benefiting all sufferers of that condition regardless of the number. Alternatively, a purpose to benefit named people (even if these were the only sufferers of the same rare disease in New Zealand) would be unlikely to provide sufficient public benefit because it would not be based on open and objective criteria. Moreover, it would point to a trust in favour of a person (private trust) and not to a purpose trust (public trust).

[111] [1972] AC 601 at 623.

[112] [1951] 1 Ch 622.

[113] Ibid, at 649.

[114] *Permanent Trustee Co of New South Wales Ltd v Presbyterian Church (New South Wales) Property Trust* (1946) 64 WN (NSW) 8 at 10 per Roper J; *Perpetual Trustee Co (Ltd) v Ferguson* (1951) 51 SR (NSW) 256 at 263 per Sugerman J; *Public Trustee v Young* (1980) 24 SASR 407 at 414 per Zelling J.

[115] *Permanent Trustee Co of New South Wales Ltd v Presbyterian Church (New South Wales) Property Trust* (1946) 64 WN (NSW) 8 at 10 per Roper J; *Educational Fees Protection Society Inc. v Commissioner of Inland Revenue* [1992] 2 NZLR 115 at 127 per Gallen J.

[116] [1954] 1 Ch 252, [1954] 1 All ER 581.

[117] *Caffoor v Income Tax Commissioner* [1961] AC 584, [1961] 2 All ER 436.

[118] (1980) 24 SASR 407, cited by Gino Dal Pont *Law of Charity* (Australia, LexisNexis/Butterworths, 2010) at 53.

[119] *Public Trustee v Young* (1980) 24 SASR 407 at 414 per Zelling J.

[120] Hubert Picarda *The Law and Practice Relating to Charities* (4th ed, Bloomsbury Professional Ltd, Haywards Heath, 2010) at 80 ["Picarda 4th ed"].

[121] Ibid, citing *Haymarket Charitable Trust* [1978] Ch Com Rep 27-28 at [86-89].

In *Dingle v Turner*,[122] the House of Lords wrote that "the dividing line between a charitable trust and a private trust lies where the Court of Appeal drew it in *Re Scarisbrick's Will Trust* [1951] Ch 622". Summarising the reasons for his decision in that case, Lord Cross wrote:

> *In this field, the distinction between a public or charitable trust and a private trust depends on whether as a matter of construction the gift was for the relief of poverty amongst a particular description of poor people or was merely a gift to particular poor persons, the relief of poverty among them being the motive of the gift. The fact that the gift [took] the form of a perpetual trust would no doubt indicate that the intention of the donor could not have been to confer private benefits on a particular people whose possible necessities he had in mind; but the fact that the capital of the gift was to be distributed at once does not necessarily show that the gift was a private trust.*[123]

The question is whether the applicant has created a perpetual fund for a class of the public, even if the first beneficiary or beneficiaries will be a specifically named individual or category of individuals. In the cases where priority is given to some blood relations, courts have held as being charitable trusts giving priority to classes of relatives, as long as the terms of the dispositions evidence an intention to create perpetual trusts beyond merely benefiting the relatives.[124]

#### *4.2.1.3 Limits to the* Compton-Oppenheim *test – section 5(2)(a) of the* Charities Act 2005

The common law regarding restrictions to entities established for people related by blood has been modified by section 5(2)(a) of the *Charities Act 2005*. Under that section, the purpose of a trust, society or institution is a charitable purpose under the Act if the purpose would satisfy the public benefit requirement apart from the fact that the beneficiaries of the trust, or the members of the society or institution, are related by blood.[125] Section 5(2)(a) is directly based on wording in section OB 3B(1) of the *Income Tax Act 2004*. This wording was inserted following a 2001 set of policy proposals focused on the taxation of Māori organisations. The relevant policy paper noted that Māori organisations had raised concerns about the "inability of an entity to qualify for charitable status when its beneficiaries are determined on the basis of bloodlines".[126] The Government therefore proposed "changing the requirement for charitable status so that an entity will not cease to be eligible for this simply because its purpose is to benefit a group of people connected by blood ties". It stated that:

> *To obtain charitable status an entity must still meet the requirements of a charity – that is, it must have a "charitable purpose" and must be for the benefit of the public or an appreciably significant section of the public.*
>
> *In determining whether an entity benefits an appreciably significant section of the public, it will be necessary to consider other factors such as the nature of the entity, the number of potential beneficiaries, and the degree of relationship between the beneficiaries. For example, whānau trusts may qualify for a "charitable" tax exemption if their pool of beneficiaries is large enough and inclusive enough to constitute an appreciably significant section of the public, or if the purposes for which they are established confer a wide public benefit. However, if the entity benefits a few family members only (so that it is actually a private family trust) it will not be regarded as benefiting an appreciably significant section of the public.*

[122] [1972] AC 601 at 623.

[123] *In Re Scarisbrick's Will Trust* [1951] Ch 622 at 617.

[124] Ibid, at 654-657 and *Re Cohen (deceased)* [1973] 1 All ER 889 at 895.

[125] Section 5(2)(a) of the *Charities Act 2005* reads:

> The purpose of a trust, society, or institution is a charitable purpose under this Act if the purpose would satisfy the public benefit requirement apart from the fact that the beneficiaries of the trust, or the members of the society or institution, are related by blood.

[126] *Taxation for Māori Organisations: A Government Discussion Document*. First published in August 2001 by the Policy Advice Division of Inland Revenue.

By way of background to this provision, in *Latimer v Commissioner of Inland Revenue*,[127] the Court of Appeal held that assistance to Māori iwi and hapū in preparing claims under the Treaty of Waitangi provided a sufficient public benefit – the iwi and hapū were held to constitute a sufficient section of the public notwithstanding the relationships of common descent within each claimant group. Blanchard J questioned the approach crystallised by *Oppenheim*, stating that:

> *There is no indication that the House of Lords had in its contemplation tribal or clan groups of ancient origin. Indeed, it is more likely that the Law Lords had in mind the paradigmatic English approach to family relations. Lord Normand exemplified this approach in his observation that "there is no public element in the relationship of parent and child" (p 310). Such an approach might be thought insufficiently responsive to values emanating from outside the mainstream of English common law, particularly as a response to the Māori view of the importance of whakapapa and whānau to identity, social organisation and spirituality.*[128]

The Inland Revenue commentary on a proposed amendment to the *Income Tax Act 1994* was that:

> *The amendment applies to Māori and non-Māori organisations, but it is especially relevant to Māori organisations as many define their beneficiary class by a personal relationship (through blood ties) to a named person. In determining whether an entity meets the public benefit requirement other factors must be considered, such as the nature of the entity, the activities it undertakes, the potential beneficiary class, the relationship between the beneficiaries and the number of potential beneficiaries. These factors were enumerated in the* Dingle v Turner *decision.*[129]

In reviewing the adoption of the *Charities Act 2005*, David Brown opined that the new test legislated in section 5(2)(b) "is less predictable than the previous blanket ban on blood ties".[130]

#### *4.2.1.4 Criticism of the* Compton-Oppenheim *test*

Gino Dal Pont wrote that the main criticisms of the *Compton-Oppenheim* test derived largely from Lord MacDermott's dissent in that case.[131] Lord MacDermott considered the *Compton* test to be a "very arbitrary and artificial rule".[132]

Summarising Lord MacDermott's argument and commenting on it, Hubert Picarda wrote that "one reaches strange results where, as in the case of railwaymen, those who follow a particular calling are all employed by one employer. Would a trust for the education of railwaymen be charitable but a trust for the education of men employed on the railways by the Transport Board not be charitable?".[133] Lord Simonds, in holding that the personal nexus between beneficiaries would preclude public benefit, stated that he "would consider on its merits any case where the description of the occupation would enable one to know the name of the employer".[134]

In *Dingle v Turner*,[135] Lord Cross of Chelsea considered that the *Compton* distinction between personal and impersonal relationships was unsatisfactory, stating that "a section of the public" was a vague phrase that could mean different things to different people. The distinction between a section of the public and a "fluctuating body of private individuals" was also unhelpful as the same group of people might equally be described as both.[136]

[127] [2002] 3 NZLR 195.

[128] Ibid, at 208.

[129] *Taxation (Annual Rates, Māori Organisations, Taxpayer Compliance and Miscellaneous Provisions) Bill*, Officials' Report to the Finance and Expenditure Committee on Submissions on the Bill, Volume 2, Taxation of Māori organisations (prepared by the Policy Advice Division of Inland Revenue and the Treasury, November 2002) at 6.

[130] "The *Charities Act 2005* and the Definition of Charitable Purposes" (2005) 21 NZULR 598 at 620.

[131] Dal Pont *Law of Charity*, above n 27, at 54.

[132] *Oppenheim v Tobacco Securities Trust Co Ltd* [1951] AC 297 at 317-319.

[133] Picarda 4th ed, above n 120, at 32.

[134] *Oppenheim v Tobacco Securities Trust Co Ltd* [1951] AC 297 at 307.

[135] [1972] AC 601.

[136] Ibid, at 623.

Audrey Sharp and Fiona Martin commented that "unfortunately although Lord Cross stated his reasons for disagreeing with the reasoning behind the *Re Compton* rule, he did not provide any replacement rule or practical method for distinguishing between public and private trusts".[137] Rather, each case was to be considered on its own merits, with the nature of the beneficiaries and any common relationship that they might have or not being the determining factors of whether the trust was in fact charitable.

The key elements for deciding whether a purpose is aimed at the public are that the group that will potentially benefit is not numerically negligible; and that the criteria for identifying those who will be part of the group are essentially objective.[138]

The New Zealand High Court decision on *Educational Fees Protection Society v Commissioner of Inland Revenue*[139] concerned an organisation that operated a contributory scheme to pay for children's educational fees in the event of the death of a parent. In his decision, Gallen J stated that "in that case, the difference in the tests contemplated by *Oppenheim* and *Dingle v Turner* is recognised but neither is in terms preferred".[140] He also stated that "the nature of the charitable purpose may itself be a factor in determining whether or not the requirement of public benefit has been met",[141] and went on to find that the best method of assessing sufficient public benefit "is to pose the questions following the approach adopted by Lord MacDermott [in *Oppenheim*], 'is the trust substantially altruistic in character?' ".[142]

Audrey Sharp and Fiona Martin concluded that "the result of the case was not the creation of a firm rule or approach to the 'public benefit test' being formed in New Zealand but rather a conclusion that the law had moved from the relatively clear position that had existed under cases such as *Re Compton* and *Oppenheim* to something less clear cut".[143]

### *4.2.2 Impacts of restrictions on public benefit*

Any limitations placed on who can benefit from a charitable entity must be justifiable and reasonable given the nature of the charitable purpose being pursued. If the entity's benefits are then available to anyone who, being suitably qualified, chooses to take advantage of them, the purposes will be considered to provide benefit to all the public, even though in some cases the number of actual beneficiaries may be quite small. As stated by Viscount Simonds in *IRC v Baddeley*,[144] the distinction is to be made "between a form of relief extended to the whole community yet, by its very nature, advantageous only to the few, and a form of relief accorded to a selected few out of a larger number equally willing and able to take advantage of it".[145]

This subsection examines restrictions in three areas: restrictions on membership, restriction by levy of fees, and restriction on access to "charitable" property.

#### *4.2.2.1 Restriction on membership*

Where members of an entity are also the beneficiaries, any restrictions placed on who may join as a member must be reasonable and justifiable in the circumstances.

In *Travis Trust v Charities Commission*,[146] Joseph Williams J considered the South Australian Supreme Court case of *Strathalbyn Show Jumping Club Inc. v Mayes*.[147] In *Strathalbyn*, Bleby J considered that the process for admitting members to three polo clubs rendered them essentially private. He stated: "Admission to membership and exclusion from membership is vested in the relatively small Board of Directors or committee of management. It is not open to any member of the public who wishes to join".[148] Joseph Williams J concluded that the Cambridge Jockey Club's members, who could only join the Club by a vote taken after proposal and seconding by two existing members, did not constitute a sufficient section of the public to satisfy the public benefit test.

[137] Audrey Sharp and Fiona Martin "*Charitable Purpose and the Need for a Public Benefit*: A Comparison of the Tax Treatment of Australian and New Zealand Charities for Indigenous Peoples" (2009) 24 Australian Tax Forum 207 at 215 [Charitable Purpose].

[138] *Oppenheim v Tobacco Securities Trust Co Ltd* [1951] AC 297 at 306 per Lord Simonds.

[139] [1992] 2 NZLR 115.

[140] Ibid, at 125.

[141] Ibid.

[142] Ibid.

[143] Sharp and Martin, "Charitable Purpose," above n 137, at 216.

[144] [1955] AC 572.

[145] Ibid, at 592.

[146] (2009) 24 NZTC 23, 273 at 23, 282.

[147] (2001) SASC 73.

[148] *Strathalbyn Show Jumping Club Inc. v Mayes* (2001) SASC 73, as quoted in *Travis Trust v Charities Commission* (2009) 24 NZTC 23,273 at 23,282.

In the recent case of *Re The Grand Lodge of Antient Free and Accepted Masons in New Zealand*,[149] the New Zealand High Court held that the Grand Lodge did not provide a sufficient public benefit owing to membership being limited to men aged over 21 of good character who had been invited to join by a Master Mason, and who had not had three black balls appear against them in a ballot.[150]

Gino Dal Pont considered the effect of membership restrictions on the public benefit test, writing that while it had been stated that "an association with the power to admit or exclude members according to some arbitrary test does not represent a section of the community[151] such a statement is in terms too absolute to be correct. In each case the question is of degree. The nature of the barrier may be relevant".[152]

In practice, the New Zealand Charities Registration Board will accept that clubs that admit as members those who are interested in participating, without imposing unreasonable limitations on who may join, provide a sufficient public benefit.

Generally, benefits must be provided to a sufficient section of the public, either by providing benefits to members of the entity or by providing benefits to non-members. Courts have found that providing amusement, entertainment or social activities for members of an entity are not purposes that provide a public benefit.[153]

*4.2.2.2 Restriction by levy of fees*

In *D V Bryant Trust Board v Hamilton City Council*,[154] Hammond J wrote that "there is also English authority for the proposition that the fact that a charge is made to residents of an old person's home does not preclude a finding of charity".[155] The Privy Council in *Re Resch's Will Trusts*[156] established the relevant test in determining whether a fee-charging institution provides sufficient public benefit:

> *To provide, in response to public need, medical treatment otherwise inaccessible but in its nature expansive, without any profit motive, might well be charitable; on the other hand, to limit admission to a nursing home to the rich would not be so. The test is essentially one of public benefit, and indirect as well as direct benefit enters into the account.*[157]

The reason fees to cover the cost of services do not affect an organisation's charitable status was mentioned in *Re Resch's Will Trusts*.[158] In that case, Lord Wilberforce, who gave the judgment for the Privy Council, wrote:

> *The general benefit to the community of such facilities results from the relief to the beds and medical staff of the general [public] hospital, the availability of a particular type of nursing, and treatment which supplements that provided by the general hospital and the benefit to the standard of medical care in the general hospital which arises from the juxtaposition of the two institutions.*[159]

An interesting debate is open in the United Kingdom about the amount of fees an entity can charge and still be considered to provide public benefit. The Charity Commission for England and Wales has asked private schools that charge considerable fees to show how they provide public benefit, especially by showing that they provide scholarships to avoid excluding persons who cannot afford those charges. Some believe that this goes against decided decisions and have consequently appealed the ruling to the High Court.[160]

[149] [2011] 1 NZLR 277.

[150] Ibid, at [52-56].

[151] *Re Income Tax Acts* [No. 1] [1930] VLR 211 at 222-223, per Lowe J.

[152] *Law of Charities*, above n 27, at 58-59.

[153] *Royal Choral Society v Commissioners of Inland Revenue* [1943] 2 All ER 101; [1943] 112 LJKB 648 (CA) applied in *Canterbury Orchestra Trust v Smitham* [1978] 1 NZLR 787 (CA).

[154] [1997] 3 NZLR 342.

[155] Ibid, at 349, citing *Re Cottam's Will Trust* [1955] 3 All ER 704; and *Joseph Rowntree Memorial Trust Housing Association Ltd v Attorney-General* [1983] Ch 159.

[156] [1969] 1 AC 514.

[157] Ibid, at 544.

[158] [1969] 1 AC 514.

[159] Ibid, at 544. That reasoning was cited with approval in *Auckland Medical Aid Trust v Commissioner of Inland Revenue* [1979] 1 NZLR 382 at 389-392, 398-399 per Chilwell J.

[160] Fiona Millar "Private Schools Do Not Understand 'Public Benefit'" (*The Guardian*, Tuesday 10 May 2011), available online at www.guardian.co.uk/education/2011/may/10/private-schools-charitable-status.

In October 2011, in *The Independent Schools Council v the Charity Commission for England & Wales*,[161] in the Upper Tax Tribunal and Chancery Chamber of the High Court, three judges ruled that in order to prove public benefit, private schools must not exclude the poor or have fees that are so high that in practice they exclude the poor.[162] A school must show that a minimal or threshold level of help for the poor has been offered by the school, such as having a not insignificant number of persons whose fees are funded from other charitable sources.[163] The "level of provision for them [the poor] must be at a level which equals or exceeds the minimum which any reasonable trustee could be expected to provide".[164] Under the judgment, private schools can also offer teachers to state schools, open their playing fields and swimming pools to state school pupils, and invite state school pupils to join classes in subjects their own schools do not offer.

An entity may charge fees that more than cover the cost of the services or facilities it provides, unless the charges are so high that they effectively exclude the less well-off.[165] It has been said that charging fees that will exclude the poor is inconsistent with charity.[166] Consequently, the New Zealand Charities Registration Board maintains a policy concerning fees that can be charged to be admitted to a sports group. It considers that "prohibitive costs associated with the activity (including fees and equipment) [which] will exclude the less well-off"[167] are indicative that the entity does not provide sufficient public benefit.

#### *4.2.2.3 Restriction on access to "charitable" property*

Similarly, some religious institutions have been denied charitable status because they were not open to the public. In *Church of Jesus Christ of Latter-Day Saints v Henning*,[168] the religious building (a temple) was open not to the public at large but only to those selected by the church hierarchy as being worthy persons. The House of Lords refused charitable status to the institution. Lord Pearce summarised the sentiments of the Court in the following remarks:

> *I find it impossible ... to hold that the words 'places of public religious worship' include places which, though from the worshippers' point of view they were public as opposed to domestic, yet in the more ordinary sense were not public since the public was excluded ... The question is one of fact, and there may clearly be difficult questions whether some discrimination may be insufficient to deprive the worship of its public character. Furthermore it is less likely on general grounds that Parliament intended to give exemption to religious services that exclude the public, since exemptions from rating, though not necessarily consistent, show a general pattern of intention to benefit the activities which are for the good of the general public. All religious services that open their doors to the public may, in an age of religious tolerance, claim to perform some spiritual service to the general public.*[169]

Where an entity is set up to provide or maintain particular facilities for the benefit of the public, any restrictions on public access must be reasonable and appropriate in the circumstances.[170] When land was set aside for a private church, to which the public were not entitled to enter, this was held not to provide sufficient public benefit.[171] Similarly, a gift of a private book collection for the use and benefit of the physician, chaplain and surgeon of the time being of a hospital was held not to be charitable for the advancement of education because it lacked the requisite public benefit.[172] Therefore, when an entity provides a heritage building that is only open to the public one day a year, the New Zealand Charities Registration Board doubts that this provides sufficient public benefit.

[161] [2011] UKUT 421 (TCC).

[162] Ibid, at [241].

[163] Ibid, at [237].

[164] Ibid, at [244].

[165] *Auckland Medical Aid Trust v Commissioner of Inland Revenue* [1979] 1 NZLR 382 at 389; *D V Bryant Trust Board v Hamilton City Council* [1997] 3 NZLR 342 at 348-349.

[166] *Re Resch's Will Trusts* [1969] 1 AC 514 at 544 per Lord Wilberforce.

[167] Charities Commission of New Zealand, *Charitable Purpose and Sport and Recreation Organisations*: www.charities.govt.nz/LinkClick.aspx?fileticket=jz%2bLH1FFo68%3d&tabid=218&mid=835 at 4.

[168] [1964] AC 420.

[169] Ibid, at 440-441. See also Dal Pont, *Law of Charity*, above n 27, at 237.

[170] Dal Pont, *Law of Charity*, above n 27, at 60.

[171] *Power v Tabain* [2006] WASC 59.

[172] Re *Trust of the Worth Library* [1995] 2 IR 301.

### *4.2.3 Private benefits*

To be charitable, a purpose must have a public character. This means that it must not be private in nature, that is, it must be aimed at the public or a sufficient section of the community to amount to the public,[173] and it must not be aimed at creating private profit.[174]

It is a key element of charities law that a purpose cannot be charitable if it is for the private profit of individuals.[175] The courts are concerned about any person seeking to "take advantage of the favoured position of charities in order to carry out what is essentially a private purpose".[176] This means that a charitable organisation cannot have a main purpose of providing private profit.

This section explores five different aspects: private benefits given to members' organisations, especially professional organisations; private benefits provided by some economic development organisations; private benefits provided by some housing schemes; profit-making associations; and ways of excluding private benefits.

#### *4.2.3.1 Members' and professional organisations*

Purposes that confer a private benefit on members of closed-membership groups or associations, where that benefit is not merely incidental to a charitable purpose, are not charitable.[177]

In *Inland Revenue Commissioners v Yorkshire Agricultural Society*,[178] Lord Atkin wrote:

> *There can be no doubt that a society formed for the purpose merely of benefiting its own members, though it may be to the public advantage that its members should be benefited by being educated or having their aesthetic tastes improved or whatever the object may be, would not be for a charitable purpose, and if it were a substantial part of the object that it should benefit its members I should think that it would not be established for a charitable purpose only.*[179]

Similarly, mutual benefit schemes where there is no requirement of financial need will be held to fail the public benefit test. For example, in *Re Hobourn Aero Components Ltd's Air Raid Distress Fund*,[180] a fund for the relief of air raid distress among the contributors who were the employees of a particular company was held to provide a private rather than a public benefit. Lord Greene MR stated that:

> *Employees of this company, actuated by motives of self-help, agreed to a deduction from their wages to constitute a fund to be applied for their own benefit without any question of poverty coming into it. Such an arrangement seems to me to stamp the whole transaction as one having a personal character, money put up by a number of people, not for the general benefit, but for their own individual benefit.*[181]

Entities that exist primarily for the benefit of those in a particular profession are not charitable. In *Auckland Medical Aid Trust v Commissioner of Inland Revenue*,[182] Chilwell J said that courts must be alerted to associations whose non-charitable objects, powers and activities existed under a cloak of charitable purposes. In a number of cases, including *Commissioner of Inland Revenue v Medical Council of New Zealand*,[183] courts have held that the general principle dictates that the advancement of persons pursuing a profession is not a charitable purpose. The test is whether the association exists mainly to advance the interests of its professional members, even if carrying out its objects results in benefit to the community.[184]

[173] *Verge v Somerville* [1924] AC 496 at 499 per Lord Wrenbury; *Lloyd v Federal Commissioner of Taxation* (1955) 93 CLR 645 at 662 per McTiernan J; at 667 per Fullagar J; at 670 per Kitto J; *Oppenheim v Tobacco Securities Trust Co Ltd* [1951] AC 297 and *Dingle v Turner* [1972] AC 601 cited in *New Zealand Society of Accountants v Commissioner of Inland Revenue* [1986] 1 NZLR 147 (CA) and *Educational Fees Protection Society v Commissioner of Inland Revenue* [1992] 2 NZLR 115.

[174] *D V Bryant Trust Board v Hamilton City Council* [1997] 3 NZLR 342 at 347-348 [affd [1999] 1 NZLR 41].

[175] Ibid, at 347-348 per Hammond J.

[176] *Perpetual Trustee Co (Ltd) v Ferguson* (1951) 51 SR (NSW) 256 at 263 per Sugerman J.

[177] *Commissioner of Inland Revenue v New Zealand Council of Law Reporting* [1981] 1 NZLR 682 at 687 per Richardson J; *Institution of Professional Engineers New Zealand Inc v Commissioner of Inland Revenue* [1992] 1 NZLR 570 at 572-573 per Tipping J; *Commissioner of Inland Revenue v Medical Council of New Zealand* [1997] 2 NZLR 297 at 309 per McKay J.

[178] [1928] 1 KB 611.

[179] Ibid, at 631.

[180] [1946] Ch 194 (CA).

[181] Ibid, at 200.

[182] [1979] 1 NZLR 382 at 395.

[183] [1997] 2 NZLR 297.

[184] See *Inland Revenue Commissioners v City of Glasgow Police Athletic Association* [1953] AC 380 at 405; *Geologists Association v Inland Revenue Commissioners* (1928) 14 TC 271; and *General Nursing Council for England and Wales v St Marylebone Borough Council* [1959] AC 540.

New Zealand courts have generally followed that decision. For example, in *Re Mason*,[185] the High Court refused to hold as charitable the New Zealand Law Society and the District Law Societies. McMullin J reviewed relevant authorities, which fell into "two classes according to whether the institution was one where the main object was the promotion and advancement of science or one whose main object was the protection and advantage of those practising in a particular profession".[186] The Judge considered the objects of the Law Society, which included the regulation of the legal profession and the maintenance of a law library, and concluded that:

> *... while these objects are entirely wholesome and likely to lead to the ultimate benefit of the public in that the members of the legal profession in this country will be encouraged to be more competent and more ethical in the practice of the law, they fall short of making the Society a charity.*[187]

The Court in *Institution of Professional Engineers New Zealand Inc v Commissioner of Inland Revenue*,[188] considering a body that provided benefits to members who were engineers as well as generally promoting the profession and art of engineering, concluded that "as well as being a learned society, IPENZ is definitely and distinctly a professional body". Tipping J stated as follows:

> *I am satisfied on the evidence that a significant and non-incidental function of IPENZ, and a purpose for which I infer it was established, is to act as a professional organisation for the benefit of engineers. While the motives of engineers who join IPENZ are not themselves material, I consider that the following words of Lord Normand in the* Glasgow Police Association *case are highly material:*
>
> > *"What the respondents must show in the circumstances of this case is that so viewed objectively, the Association is established for a public purpose and that the private benefits to members are unsought consequences of the pursuit of the public purpose and can therefore be disregarded as incidental. That is a view which I cannot take. The private benefits to members are essential".*
>
> *While there can be no doubt that there are distinct public benefits from the objects and functions of IPENZ it is my view, after careful consideration of both the oral and documentary evidence, that the private benefits cannot be disregarded as incidental.*[189]

Courts in the United Kingdom and New Zealand have made an exception to the general rule that the advancement of persons pursuing a profession is not a charitable purpose. Courts consider that medical professionals are so important to the wellbeing of the community that their professional organisations are charitable and provide sufficient public benefit. *Commissioner of Inland Revenue v Medical Council of New Zealand*[190] is a leading New Zealand case on public benefit, which considered the charitable status of the Medical Council, which registers medical professionals and supervises the discipline and education of these professionals. The Commissioner argued that the Council provided benefits for medical practitioners through its principal function of registering practitioners. The Court held that while registration was a principal function of the Council, which did provide benefits to those registered, the provision of these benefits was not the purpose of the Council. Justice McKay, writing for the majority of the Court of Appeal, held that:

[185] [1971] NZLR 714.
[186] Ibid, at 722.
[187] Ibid, at 725.
[188] [1992] 1 NZLR 570.
[189] Ibid, at 582.
[190] [1997] 2 NZLR 297.

> *The purpose for which the council is established is the purpose of the Act and the registration system. In each case, that purpose is to provide for the interests of the public through ensuring high standards in the practice of medicine and surgery. Any benefits to registered practitioners are incidental and consequential. They are inherent in a system of registration. They are intended, but as intended consequences and not as constituting a purpose of the legislation. The medical council was, therefore, exclusively established for the protection and benefit of the public.*[191]

In the recent case of *Re New Zealand Computer Society Inc*,[192] the first case to consider a professional society under the *Charities Act 2005*, the Court reached a similar conclusion to the outcome in the *IPENZ* case in that the appellant was judged to have a mix of charitable and non-charitable purposes, the non-charitable purposes being those that provided benefits to its professional members. MacKenzie J held that:

> *Having regard to the Society's objects, its activities and the material on its website, I consider that the Society's non-charitable purposes that are aimed at benefiting the profession, or members of that profession, are purposes that are not ancillary to the purpose of advancing information technology as a discipline.*[193]

The current position in New Zealand law is that private benefits to professionals or persons in a particular industry must be weighed against the benefits to the public. Where the profession is in the area of health, it has been recognised that there is a clear benefit to the public in promoting high standards of medical knowledge and corresponding quality of care.

#### *4.2.3.2 Case law on private pecuniary profit*

In the course of his decision in *Commissioners of Inland Revenue v Oldham Training and Enterprise Council*,[194] Lightman J set out a helpful summary of four previous cases dealing with private pecuniary profit:

> *In* Commissioners of Inland Revenue v Yorkshire Agricultural Society *[1928] 1 KB 611, the Court of Appeal held that a society formed with the object of promoting the general improvement of agriculture and (for this purpose) of holding an annual meeting for the exhibition of farming stock (unlike a society whose object was to confer benefits on particular members or agriculturalists) was charitable under the fourth head. Likewise in* Crystal Palace Trustees v Minister of Town and Country Planning *[1951] CH 132, the object of promoting industry and commerce in general by holding exhibitions at a public park (unlike the object of promoting the interests of individuals engaged in trade, industry or commerce) was likewise held to be charitable. In* Commissioners of Inland Revenue v White and others and Attorney-General *55 TC 651, the object of preserving and improving standards of craftsmanship was held charitable, though the means required to achieve this end and accordingly adopted included the provision to craftsmen of the premises needed at affordable rents. By contrast in* Hadaway v Hadaway *[1955] 1 WLR 16, a bequest on trust "to assist planters and agriculturalists" by the provision of loans at favourable rates of interest (unlike a gift to promote agriculture generally) was held by the Privy Council to be directed at conferring private benefits and accordingly not charitable.*[195]

[191] Ibid, at 310 per McKay J.

[192] Unreported HC WN CIV-2010-285-924 [28 February 2011] per MacKenzie J.

[193] Ibid, at [68].

[194] (1996) 69 Tax Cases 231.

[195] *Commissioners of Inland Revenue v Oldham Training and Enterprise Council* (1996) 69 Tax Cases 231 at 250.

A key case in the development of charities law, and particularly the assessment of public and private benefits, is the English case of *Commissioners of Inland Revenue v Oldham Training and Enterprise Council*.[196] The Court assessed the charitable status of the Oldham Training and Enterprise Council ("Oldham TEC"), which had two main objects: a) the promotion of vocational training and the training and retraining of the public; b) the promotion of industry, commerce and enterprise for the benefit of the public. There were three subsidiary objects, of which two were ancillary to the first main object, and the third was to develop, secure and provide training and other support services and advice to and for new and small local businesses. Lightman J held that the second main object and third subsidiary object:

> *... on any fair reading must extend to enabling Oldham TEC to promote the interests of individuals engaged in trade, commerce and enterprise and provide benefits and services to them [...] Such efforts on the part of Oldham TEC may be intended to make the recipients more profitable and thereby, or otherwise, to improve employment prospects in Oldham. But the existence of these objects, in so far as they confer freedom to provide such private benefits, regardless of the motive or the likely beneficial consequences for employment, must disqualify Oldham TEC from having charitable status. The benefits to the community conferred by such activities are too remote.*[197]

The reasoning in the *Oldham* case was recently followed in the New Zealand case *Canterbury Development Corporation v Charities Commission*.[198] It was held that the Corporation's goal of promoting the general economic wellbeing of the Canterbury area through assisting businesses and promoting economic development did not provide a sufficient public benefit. In relation to the relief of poverty, Ronald Young J stated: "the possibility of helping someone who is unemployed is too remote for it to qualify as the charitable purpose of relief of poverty".[199] The Judge refused to accept the Corporation's argument that it could be distinguished from the organisation considered in *Oldham*. In relation to the fourth head, the Judge found that:

> *Any public benefit therefore from CDC's purpose and operations is in my view too remote to establish CDC as a charity. Public benefit is not the primary purpose of CDC's objects or operation. Its primary purpose is the assistance of individual businesses. The creation of jobs for the unemployed, as opposed to jobs for those who are employed and not in need, is the hoped for, but remote and uncertain, result of the way in which CDC approaches its task.*[200]

Accordingly, the New Zealand Charities Registration Board will register organisations that promote industry and commerce only where it is satisfied that their purposes provide a public benefit, and that any private benefit to individuals or businesses is incidental. Public benefit may result from assistance to the unemployed, as discussed above, or assistance to a deprived area (for example, Tasmania in the case of *Tasmanian Electronic Commerce Centre Pty Ltd v Federal Commissioner of Taxation*).[201] This is consistent with *Oldham* and *Canterbury Development Corporation*.

[196] (1996) 69 Tax Cases 231.

[197] Ibid, at 251.

[198] [2010] 2 NZLR 707 per Ronald Young J.

[199] Ibid, at [31].

[200] Ibid, at [67].

[201] [2005] FCA 439; see also *Re Tennant* [1996] 2 NZLR 633.

In *Commissioner of Taxation v The Triton Foundation*,[202] the Federal Court of Australia assessed an organisation that promoted entrepreneurship by helping Australian innovators to commercialise their ideas. The Court concluded that "Triton's constituent documents, when read as a whole, show that its main and overarching object was to promote a culture of innovation and entrepreneurship for the ultimate benefit of Australian society".[203] In particular, the Court held that:

> *The assistance given to inventors, though of direct benefit to them, was concomitant or ancillary to its principal object. This assistance, which was intended to enable Triton to "showcase" inventors and their inventions, complemented Triton's activities, also directed to promoting and publicising an innovative and entrepreneurial commercial approach in Australia. Triton offered its services for the benefit of the public or a section of the public, as opposed to individual members of the community.*[204]

Ronald Young J, in the course of his decision in *Canterbury Development Corporation*,[205] commented on the *Triton* decision as follows:

> *To some degree the Court's assessment in* Triton *was a question of perspective. The Court saw the "overarching object was to promote" innovation and entrepreneurship in Australia. It did that by supporting innovations to commercialise these products. The alternative perspective was the Foundation primarily helped innovators commercialise their ideas. As a result the Foundation hoped this commercialisation would promote innovation and thereby benefit Australian society. [...] In* CDC, *however, the pursuit of the objects is focussed on the development of individual businesses. The provision of support to those businesses is done in the hope and belief that their economic success would be reflected in the economic wellbeing of the Canterbury region. This can be contrasted with the broad public benefit identified in Triton.*[206]

In *Queenstown Lakes Community Housing Trust*,[207] MacKenzie J agreed with Young J's reasons in *Canterbury Development Corporation*. He further wrote that "it is not the case that every assistance to business and industry which does provide a public benefit will be charitable. The question is whether the particular form in which that assistance is provided falls within the fourth head of charity. The fact that the assistance is provided by means of assistance to individual businesses may preclude a finding of charity".[208]

Moreover, a trustee or a director of a society cannot personally benefit from the charity's funds. Taking non-incidental benefits would amount to not applying the funds wholly for the charitable purposes for which the society was established. In *Commissioner of Taxation v Bargwanna*,[209] the High Court of Australia had to decide if the use of money from a fund to pay a loan incurred by one of the trustees breached the charitable purposes by providing private pecuniary profit.

These cases reflect an often-difficult assessment, determining the balance between private and public benefits. This assessment needs to be carried out by the New Zealand Charities Registration Board, or its overseas equivalents, when determining whether an entity promoting industry and commerce has charitable purposes.

[202] Ibid.
[203] Ibid, at [27].
[204] Ibid, at [37].
[205] [2010] 2 NZLR 707.
[206] Ibid, at [65-66].
[207] HC WN CIV-2010-485-1818 [24 June 2011].
[208] Ibid, at [67].
[209] [2012] HCA 11 (29 March 2012).

#### *4.2.3.3 Private benefits in housing schemes*

Two 2011 cases decided by New Zealand courts dealt with housing schemes and whether they provided sufficient public benefit or benefited individuals.

In *Liberty Trust v Charities Commission*,[210] the entity had established a scheme "to enable New Zealanders to own their own homes, churches and ministries without long term debt, so that they can be free to fulfil God's call upon their lives". According to that scheme, people could donate money to the Trust. After a number of years (five to ten years), they were eligible for interest-free loans of up to five times their contribution balances. The loans had to be repaid within seven years. The High Court Judge concluded that the Charities Commission had failed to consider the purpose of the Trust and instead focused on the benefits received by members. Mallon J wrote:

> *The Charities Commission was in error to focus only on the fact that contributors benefited from the lending scheme [...] Liberty Trust is not merely a lending scheme set up to provide private benefits to its members [...] For those who join, it is in part intended to provide private benefits, namely to assist with house ownership free of the shackles of interest-incurring debt but those private benefits are seen as part of living as a Christian.*[211]

This decision is surprising, considering that the New Zealand Court of Appeal decided in 2005 that even in the religious context, in order to provide public benefit, an entity could not provide private benefits to individuals. In *Hester v Commissioner of Inland Revenue*,[212] the New Zealand Court of Appeal had to decide if it was a charitable object to establish a contributory superannuation scheme providing retirement income for employees of the Church of Jesus Christ of Latter-Day Saints. Hammond J wrote: "To say, for instance, that gardeners, clerical workers or cafeteria workers who are also Temple Workers should come within the rubric (notwithstanding the sincerity of their personal religious beliefs, and their dedication in pursuing them) simply goes too far".[213] Young and Chambers JJ also noted that there would be serious fiscal implications arising from a decision to accord charitable status to the Church employees' superannuation scheme. They held that if the provision of superannuation benefits by means of a contributory scheme for teachers employed by the Church could be charitable under the advancement of religion, plans for anyone working in the education field would be charitable under the advancement of education. The same would apply to plans for doctors, nurses and ancillary staff (relief of the impotent) and for social workers (relief of poverty) and so on. Allowing this appeal would be likely to start a ball rolling that, unchecked, would have the potential to dent the income tax system severely.[214]

Another New Zealand case was decided on 24 June 2011. In *Queenstown Lakes Community Housing Trust*,[215] the Trust had been established to assist individuals and families with incomes of up to 140% of the national median income to own houses through a shared ownership programme. Under the programme, a house was purchased on terms in which the Trust and the successful applicant each owned a defined percentage share (70/30). The maximum income for eligible persons could not exceed $86,000 for single-person households and $122,000 for four-person households. MacKenzie J wrote that "any other form of public benefit which is capable of being charitable will not generally be charitable if the public benefit is achieved by means of assistance provided to individuals".[216] The means by which that public benefit was achieved "involves conferring a private benefit (assistance in meeting housing costs) on private individuals (persons selected from applicants meeting the Trust's criteria)".[217]

These cases reflect the often-difficult assessments, determining the balance between private and public benefits, that need to be carried out by the New Zealand Charities Registration Board and its overseas equivalents.

[210] HC WN CIV 2010-485-000831 [2 June 2011].

[211] Ibid, at [113].

[212] [2005] 2 NZLR 172; application for leave to appeal to the Supreme Court dismissed: [2005] 2 NZLR 473.

[213] Ibid, at 175 per Hammond J; see also William Young and Chambers JJ at [107], who wrote: "Although we consider that the Presbyterian Church Fund case is to be followed in relation to church-based superannuation schemes established for the dominant purpose of providing benefits for ministers of religion and their dependants, we see it as anomalous and not to be extended".

[214] Ibid, at [106].

[215] HC WN CIV-2010-485-1818 [24 June 2011].

[216] Ibid, at [68].

[217] Ibid, at [71].

#### *4.2.3.4 Profit-making associations*

The question that arises is whether entities earning business income are charitable, and if they are, whether they should be entitled to tax exemptions. Entities carrying on commercial businesses have been treated differently, depending on their country of incorporation. This section analyses cases where commercial activities have been considered not charitable, then cases that have taken the opposite view.

In *R v The Assessors of the Town of Sunny Brae*,[218] Rand and Locke JJ, in the Supreme Court of Canada, considered that in deciding if entities carrying on commercial activities were charitable, the sole test was not the final destinations of the net revenues. They wrote:

> *We have today many huge foundations yielding revenues applied solely to charitable purposes; they may consist, as in one case, of a newspaper business; even if these foundations themselves carried on their charitable ministrations, to characterize them as charitable institutions merely because of the ultimate destination of the net revenues, would be to distort the meaning of familiar language; and to make that ultimate application the sole test of their charitable quality would introduce into the law conceptions that might have disruptive implications upon basic principles not only of taxation but of economic and constitutional relations generally. If that is to be done, it must be by the legislature.*[219]

In *M K Hunt Foundation Ltd v Commissioner of Inland Revenue*,[220] the appellant company had been formed to carry on the trade or business of builders, constructors and financiers of building schemes, etc., and the memorandum also contained provisions for many other mercantile activities commonly found in memoranda of association of commercial undertakings. The memorandum declared that no part of the property or income of the company should be paid or transferred by way of dividend, bonus, return of capital or otherwise howsoever by way of profit to the members of the company, but should be held in trust for the Steward's Trust, an admittedly charitable body, for charitable purposes. The appellant company had purchased land in connection with its building activities, intending to subdivide it into lots and to sell the lots with houses erected on them. The Court held that in deciding whether the appellant company's purposes were exclusively charitable, it had to consider if the ancillary purposes were really ancillary or if they were in fact primary purposes. In this case, the Court decided that the company had not been shown to be a charitable trust, nor had it been shown that it acquired the land to hold it in a charitable trust for the Steward's Trust or otherwise, and the transfer of the land to the appellant company was therefore not exempted from conveyance duty.

Also in Canada, the Federal Court of Appeal has decided that businesses unrelated to the charitable objects of an appellant do not qualify for tax exemption. In *Earth Fund v Canada (Minister of National Revenue)*,[221] the appellant had plans to operate a lottery in order to finance its charitable purposes. The appellant argued, among other things, that it should not matter whether funds were raised in the traditional way, by soliciting gifts, or by a lottery operation. The Court of Appeal distinguished *Alberta Institute on Mental Retardation v Canada*,[222] and did not accept the argument of the appellant that the *Alberta Institute* case was authority for the proposition that any business was a "related business" of a charitable foundation if all of the profits of the business were dedicated to the foundation's charitable objects. The Minister in that case was arguing that the Alberta Institute was "a wholesaler of goods", but in fact the Alberta Institute was simply soliciting donations of goods, which it converted to money. This is somewhat different from the traditional fundraising activities of a foundation, but the difference is only a matter of degree. The Court added:

[218] [1952] 2 SCR 76.

[219] Ibid, at 92.

[220] [1961] NZLR 405 at 407-408.

[221] 2002 FCA 498; 57 DTC 5016; [2003] 2 CTC 10.

[222] [1987] 3 FC 286, (1987) 76 NR 366, [1987] 2 CTC 70, (1987) 87 DTC 5306 (FCA), leave to appeal dismissed, [1988] SCCA No. 32.

> *The appellant proposes to do nothing except market and sell lottery tickets in a manifestly commercial arrangement that will, if all goes as planned, result in a profit that will be donated, I assume, to qualified donees. The appellant is in exactly the same position as any commercial enterprise that commits itself to apply its profits to charitable causes. Such a commitment, by itself, does not derogate from the commercial nature of the activity that generates the profit. Given the particular facts of this case, the Minister was justified in concluding that the appellant's proposed lottery operation would be a business of the appellant that is not a "related business", and thus would not qualify as a charitable activity.*[223]

The same reasoning was applied by the Federal Court of Appeal in *House of Holy God v Canada (Attorney-General)*.[224] In that case the appellant argued that the maple syrup business carried on by its directors, who were remunerated for their efforts, and not by volunteers, was a related business because of a direct relationship between the activities of food production and the objects of the appellant, which required the appellant to carry on the teaching of the principles of Holy God. The Federal Court of Appeal considered that this assertion was unsupported by the record. While the objects of the appellant referred to the principles of Holy God, nowhere in the record was there any evidence of what those principles entailed. In particular, the record did not contain any evidence that the carrying on of a maple syrup business was an element of religious doctrine. Consequently, charitable registration was revoked.

In recent decisions, New Zealand and Australia have not followed the Canadian reasoning or the previous New Zealand decision. The New Zealand Court of Appeal decided in *Commissioner of Inland Revenue v Carey's (Petone and Miramar) Ltd*[225] that a limited company established to carry on the business of drapery and furnishing and general warehousemen was charitable. This is because, under its articles of association, the company was required to account annually for its profits to a trust board that had been set up under a declaration of trust and the board was required to distribute profits for charitable purposes. The Appeal Court distinguished the decision in *M K Hunt Foundation Ltd v Commissioner of Inland Revenue*[226] on the fact that in that case the company had been found not to have exclusively charitable purposes and because it did not have to give its net profits to charitable purposes until it was wound up.

In *Calder Construction Co Ltd v Commissioner of Inland Revenue*,[227] the New Zealand High Court decided that a construction business was charitable because it carried on its business as trustee for a named charitable foundation. Wilson J wrote that "provided the business is carried on in trust for a charitable purpose, it is immaterial that the whole of the income derived from it is not obliged to be paid immediately to the charity or charities".[228]

The High Court applied both the above-mentioned decisions in *Auckland Medical Aid Trust v CIR*.[229] Chilwell J wrote that:

> *It is clear that if either the business itself is conducted in trust for charitable purposes or the income derived from that business is held in trust for charitable purposes the trustees may carry on any business, buy and sell, employ staff, provide for reserves and engage in sundry other commercial operations. It follows that the business itself may have non-charitable characteristics. The test is whether its income is ultimately applied to charitable purposes.*[230]

[223] *Earth Fund v Canada (Minister of National Revenue)* 2002 FCA 498 at [31].
[224] 2009 FCA 148.
[225] [1963] NZLR 450.
[226] [1961] NZLR 405.
[227] [1963] NZLR 921.
[228] Ibid, at 926.
[229] [1979] 1 NZLR 382.
[230] Ibid, at 387.

Finally, in *Commissioner of Inland Revenue v MTN Bearing-Saeco (NZ) Ltd*,[231] a benefactor, who had interests in the motor and engineering trades, decided he wished to pass over parts of these interests to charity. He instructed his solicitors to set up a charitable company. His expressed intention was that the new company should take over a business he controlled, and that all profits derived by the new company should go to charity. He also instructed that a charitable trust be set up to select the charitable recipients of the profits derived by the new company. Thorp J decided that the critical question in determining whether the business was carried on for charitable purposes, was whether all benefits from that business had to go to charity.

In Australia, *Commissioner of Taxation of the Commonwealth of Australia v Word Investments Limited*[232] concerned a limited society that was not itself engaged in any religious activity, but that raised money by collecting interest on its investments and through its commercial funeral business and then disbursed it through other missionary or religious bodies to perform charitable and religious activities. The High Court of Australia decided that Word was a charitable institution because the revenues ultimately went to charitable and religious activities.

In *Word Investments Limited*, Kirby J wrote a strong dissent in which he expressed his concerns that the majority decision would expand the notion of charity beyond the confines of the exemptions approved by Parliament. Michael Gousmett agreed with Kirby J and wrote that "the way is now open for charities in Australia to model themselves on the structure in *Word*, in order to establish tax-exempt businesses to a degree never before seen. The implications for the revenue of Australia are obvious. The implications for other common law jurisdictions may also be significant".[233]

Anticipating serious tax consequences, the Australian Federal Government has announced budget measures to better target charitable tax concessions. Not-for-profit organisations will have to pay tax on profits that are kept for commercial purposes and not redirected towards the organisations' altruistic purposes.[234] Similar measures should be implemented in New Zealand to avoid comparable anticipated problems in the future.

#### *4.2.3.5 Excluding private benefits and ancillary benefits*

The *Charities Act 2005* provides that an entity qualifies for registration as a charitable entity if, in the case of a society or an institution, "the society or institution is not carried on for the private pecuniary profit of any individual".[235]

The New Zealand Charities Registration Board requires that an organisation's governing document provide sufficient protection against private pecuniary profit before it will register that organisation. The New Zealand Charities Registration Board, however, is still required to assess the public and private benefits, including non-pecuniary benefits, arising out of the organisation carrying out its purposes. For example, constitutional protections against private pecuniary profit will not preclude an organisation providing private benefits such as social activities for members, or providing private benefits to external individuals or entities.

Such protections against private pecuniary profit do not prevent a charity carrying out activities where a person may profit, provided that a primary purpose of the organisation is to not generate profit for individuals. Charities may purchase goods and services where the providers of those goods and services make a profit – for example, paying a cleaner or telemarketer. However, the activities must be carried out to further the charitable purposes of the entities and not to benefit the individuals concerned. For example, in

[231] (1986) 8 NZTC 5039.

[232] [2008] HCA 55.

[233] "Charities and Business Activities" [2009] NZLJ 57 at 59.

[234] Phillip Coorey and Peter Hartcher "Charities Face Profits Being Taxed in Budget" (*The Sydney Morning Herald*, 7 May 2011).

[235] S 13(1)(b)(ii).

*Centrepoint Community Growth Trust v Commissioner of Inland Revenue*,[236] Tompkins J found that the Trust furthered the advancement of religion. Members of the Trust, who surrendered their possessions to the Trust, resided at the Trust's premises, and received food, clothes, shelter and $1 a week. It was concluded that the provision of such benefits was not the fundamental purpose of the Trust, but rather incidental to the main purpose of advancing religion.[237]

The Charity Commission for England and Wales makes a clear statement on when private benefit can be considered ancillary:

> *Private benefits will be incidental if it can be shown that they directly contribute towards achieving the charity's aims and/or are a necessary result or by-product of carrying out those aims.*
>
> *In general, a private benefit is a necessary result, or by-product, of carrying out a charity's aims if:*
>
> - *It follows from some other action that is taken, and is only taken, with the intention of, furthering the charity's aims; and*
> - *The amount of private benefit is reasonable in the circumstances.*[238]

The courts have concluded that private benefits can only be considered ancillary or incidental if by pursuing the charitable purpose of the entity the private benefit will be an unsought consequence. Lord Norman stated in *IRC v City of Glasgow Police Athletic Association*:[239]

> *The respondents must show in the circumstances of this case that, so viewed objectively, the association is established for a public purpose, and that the private benefits to members are the unsought consequences of the pursuit of the public purpose, and therefore can be regarded as incidental.*[240]

Case law also indicates that when a private benefit is substantial it cannot be considered an unsought consequence and becomes an independent purpose. In the *IRC v City of Glasgow Police Athletic Association* Lord Reid stated:

> *In some cases where the end is a charitable purpose the fact that the means to the end confer non-charitable benefits may not matter; but in the present case I have come to the conclusion that conferring such benefits on its members bulks so largely in the purposes and activities of the association that it cannot properly be said to be established for charitable purposes only.*[241]

In *Commissioner of Inland Revenue v Yorkshire Agriculture Society*,[242] Lord Justice Atkin stated:

> *There can be no doubt that a society formed for the purpose of benefiting its own members, though it may be to the public advantage that its members should be benefited by being educated or having their aesthetic tastes improved or whatever the object may be, would not be for a charitable purpose. But, on the other hand, if the benefit given to its members is only given to them with a view of giving encouragement and carrying out the main purpose which is a charitable purpose, then I think the fact that the members are benefited in the course of promoting the charitable purpose would not prevent the Society being established for charitable purposes only.*[243]

[236] [1985] 1 NZLR 673.

[237] Ibid, at 700.

[238] Charity Commission publication *Charities and Public Benefit* (January 2008) www.charity-commission.gov.uk/Charity_requirements_guidance/Charity_essentials/Public_benefit/public_benefit.aspx#f.

[239] [1953] 1 All ER 747.

[240] Ibid, at 752.

[241] Ibid, at 756.

[242] [1928] 1 KB 611.

[243] Ibid, at 631.

In *The Geologists' Association v The Commissioners of Inland Revenue*,[244] Lord Justice Greer stated:

> *If you come to the conclusion, as you may in many cases, that one of the ways in which the public objects of an association can be served is by giving special advantages to the members of the association, then the association does not cease to be an association with charitable objects because incidentally and in order to carry out the charitable objects it is both necessary and desirable to confer special benefits upon members.*[245]

If an organisation undertakes non-charitable activities, including trading as a commercial business, it will still be eligible for charitable status as long as "no object other than charitable is or ever can become entitled to participate in the income yield or in any ultimate distribution of capital".[246] However, this will not suffice if distribution to charitable purposes occurs only on the winding up of the organisation.[247]

### 4.3 Connection to New Zealand

Charitable purposes to be carried out overseas are not denied charitable status for lack of public benefit to the domestic community.[248] However, this situation may make it more difficult for courts (or other decision-making bodies) to assess public benefit.[249]

Although the *Charities Act 2005* is silent about the degree of connection that entities seeking registration must have to New Zealand, the Charities Commission previously resolved that only entities that are constituted in New Zealand and/or have a very strong connection to New Zealand are eligible for registration under the Act. This policy is based on the fact that one of the key functions of the Act is to require the compliance of registered entities with the various obligations set out under the Act. All the non-compliance prosecution powers contained in the *Charities Act 2005* are territorially limited to New Zealand. Monitoring and investigation functions cannot be preformed with an entity based in another country, as the entity would be outside the jurisdiction of New Zealand law.

That policy is based on principles enunciated by courts. First, there is a legislative presumption against law having extraterritorial effect.[250] While the terms "charitable entity" and "entity" in the *Charities Act 2005* are not expressly limited to New Zealand societies, institutions or trustees, other provisions of the Act strongly suggest that the Act does not apply extraterritorially. Nor are there any express provisions providing for extraterritorial application. The above approach accords with the conclusion of the United Kingdom's Court of Appeal in *Gaudiya Mission and others v Brahmachary and others*.[251] In that case, the Court of Appeal held that while the United Kingdom *Charities Act 1993* was silent in respect of its application to foreign institutions (which are defined as institutions other than those established for charitable purposes in England and Wales):

> *... a fair reading of the scheme of the 1993 Act, having regard to the principle of implied territoriality of legislation and practical considerations of enforceability, leads to the conclusion that the 1993 Act is neither intended, nor apt, to apply to an institution established for charitable purposes outside England and Wales (i.e. an institution constituted in accordance with the law of a foreign state). Such institutions are not 'within the legislative grasp or intendment of the statute'*.[252]

In assessing whether an overseas applicant has a strong connection with New Zealand, the Charities Registration Board considers factors including: whether the applicant has a centre of administration in New Zealand; how many of the applicant's officers are resident in New Zealand; how much of the applicant's property is held in New Zealand; and if the applicant has any other strong connection with New Zealand.

[244] (1928) 14 TC 271 (CA).

[245] Ibid, at 283.

[246] *Commissioner of Inland Revenue v Carey's (Petone v Miramar) Limited* [1963] NZLR 450 at 456 per Glesson P.

[247] *M K Hunt Foundation Ltd v Commissioner of Inland Revenue* [1961] NZLR 405 at 411 per Hardie Boys J.

[248] *McGovern v Attorney-General* [1982] 1 Ch 321 at 337 per Slade J.

[249] *Re Stone (deceased)* (1970) 91 WN (NSW) 704 at 716-717 per Helsham J.

[250] *CIR v Associated Motorists Petrol Company Ltd* [1971] NZLR 600 at 665 (PC).

[251] [1997] 4 All ER 957.

[252] Ibid, at 964.

## 4.4 Conclusion

Assessing whether or not a purpose, or an entity, provides a sufficient public benefit is one of the most difficult aspects of charities law. In *Gilmour v Coats*,[253] the House of Lords wrote about the development of the law of charities as follows:

> *It is a trite saying that the law is life, not logic. But it is, I think, conspicuously true of the law of charity that it has been built up not logically but empirically. It would not, therefore, be surprising to find that, while in every category of legal charity some element of public benefit must be present, the court had not adopted the same measure in regard to different categories, but had accepted one standard in regard to those gifts which are alleged to be for the advancement of education and another for those which are alleged to be for the advancement of religion, and it may be yet another in regard to the relief of poverty. To argue by a method of syllogism or analogy from the category of education to that of religion ignores the historical process of the law.*[254]

What constitutes a benefit may also vary with time. In that sense, public policy does play a role in deciding what constitutes a benefit.

The difficulty of assessing and quantifying benefits is alleviated by a presumption that the first three heads of charity (relief of poverty, advancement of education and advancement of religion) provide public benefit. For purposes falling under the fourth head, courts do not assume the existence of public benefit – it must be affirmatively proved to the courts. Although a New Zealand judge[255] has considered that the evaluation of benefit is essentially a qualitative exercise, the Supreme Court of Canada considers that there must be an objectively measurable and socially useful benefit conferred.[256] Recent New Zealand decisions seem to have adopted both qualitative and quantitative assessments of public benefit.[257]

In order to be charitable, a purpose must have a public character. This means that it must not be private in nature – that is, it must be aimed at the public or a sufficient section of the community to amount to the public, and it must not be aimed at creating private profit. What constitutes a sufficient section of the public varies with the different heads of charity. The criterion for relief of poverty is much more elastic than that for the other heads of charity and can be limited to a few people. However, for the other heads of charity, the *Compton-Oppenheim* test has set limitations. Beneficiaries linked by their relationships to a named individual may not be considered to be a section of the public. On the other hand, there must be a minimum number of people affected by an entity in order for them to constitute a section of the public for all heads of charity except for the relief of poverty. In that sense, restricting the membership of a society and levying fees that in fact exclude most people except the rich may mean that those members do not constitute a section of the public.

The requirement of public benefit excludes the gain of private pecuniary profit. Thus member and professional organisations have generally been held to be not charitable when they exclude the public. Similarly, courts have considered that entities that allow freedom to provide private benefits, regardless of the motive or the likely beneficial consequences for employment for example, do not constitute public benefit.

[253] [1949] AC 426.

[254] Ibid, at 449 per Lord Simonds.

[255] See Hammond J in *Re Tennant* (1996) 2 NZLR 633 at 638.

[256] See *Vancouver Society of Immigrants and Visible Minority Women v MNR* [1999] 1 SCR 10 at [41] per Gonthier J dissident.

[257] See *Re The Grand Lodge of Antient Free and Accepted Masons* [2011] 1 NZLR 277; *Re New Zealand Computer Society Inc*, HC WN CIV-2010-485-924 [28 February 2011] per MacKenzie J; applied in *Re Draco Foundation (NZ) Charitable Trust* HC WN CIV-2010-485-1275 [15 February 2011] per Young J.

In New Zealand, a number of registered charities advance charitable purposes by conducting unrelated business activities. Decisions made by courts in New Zealand and Australia permit such activities. Anticipating serious tax consequences, the Australian Federal Government has announced measures to better target charitable tax concessions on unrelated business activity. Not-for-profit organisations will have to pay tax on profits that are kept for commercial purposes and not redirected towards the organisations' altruistic purposes.[258] Similar measures should be implemented in New Zealand to avoid comparable anticipated problems in the future.

[258] Coorey and Hartcher, "Charities Face Profits Being Taxed in Budget", above n 233.

# Types of entity that may have charitable purposes

Entities that have purposes that could be charitable and provide public benefit may qualify for charitable status. However, they must have a minimal structure in order to be registered as a charity.

Section 13 of the *Charities Act 2005* determines the essential requirements for registration as a charity. It reads as follows:

> *13. An entity qualifies for registration as a charitable entity if, –*
>
> *(a) in the case of the trustees of a trust, the trust is of a kind in relation to which an amount of income is derived by the trustees in trust for charitable purposes; and*
>
> *(b) in the case of a society or an institution, the society or institution –*
>
> *(i) is established and maintained exclusively for charitable purposes; and*
>
> *(ii) is not carried on for the private pecuniary profit of any individual; and*
>
> *(c) the entity has a name that complies with section 15; and*
>
> *(d) all of the officers of the entity are qualified to be officers of a charitable entity under section 16.*

From these essential requirements, it can be deduced that a number of types of entity can be registered as charities. The first category covered by the Act is trustees of a trust. Consequently, the first chapter of Part III (chapter 5 of this book) is devoted to trusts generally and especially to unincorporated trusts. Chapter 6 analyses the numerous forms that incorporated trusts can take; some can be registered as charities, while others do not meet the criteria for charities.

The second category mentioned by the Act is societies or institutions. Societies can be incorporated as non-profit organisations or as limited companies. They can also be non-incorporated organisations. Chapter 7 is devoted to incorporated and unincorporated societies, while chapter 8 explores the various forms that limited companies can take.

CHAPTER 5

# Trusts

Courts have held that trusts are not legal entities in the sense that they are not legal persons, as are incorporated and limited societies.[1] For example, the *Charities Act 2005* does not define "trust". However, it defines "entity" as meaning "any society, institution, or trustees of a trust".[2]

This does not mean that trusts do not exist in the face of the law; quite the contrary. However, the law does not treat them as legal entities. Legal obligations are imposed not on a trust itself, but on the trustees of that trust, unless statute law specifies otherwise, as is the case with the *Income Tax Act 2004*, which treats trusts as entities for tax purposes.

This chapter examines the characteristics of trusts, and more particularly perpetual and charitable trusts. Different kinds of trust are canvassed, such as perpetual trusts, community trusts, city councils' trusts and family trusts.

## 5.1 Legal definition of a trust

As indicated above, a trust is not a legal entity. In *Dick v Commissioner of Inland Revenue*,[3] Randerson J had to decide if a sole trustee who had applied for a licence under the *Lotteries Act 1977* was a society under that Act, which defined society as "any corporation sole, association of persons (whether incorporated or not), or local unincorporated clubs and societies". The Court decided that the definition was not broad enough to include the trustee of the trust. Randerson J held that "an unincorporated trust is not a separate legal entity" and "has no separate status and the trustee or trustees for the time being are the only true representatives of the trust having separate legal standing".[4]

Most statutes do not define the word "trust". It has, however, been defined by courts and authors. In *Dick v Commissioner of Inland Revenue*, Randerson J accepted the definition given by George W Keeton and George William Sheridan, which reads as follows:

> *A trust is the relationship which arises wherever a person (called the trustee) is compelled in equity to hold property, whether real or personal, and whether by legal or equitable title, for the benefit of some persons (of whom he may be one and who are termed beneficiaries) or for some object permitted by law, in such a way that the real benefit of the property accrues, not to the trustee, but to the beneficiaries or other objects of the trust.*[5]

As indicated by this definition, a trust is a set of obligations imposed on the trustees to deal with the trust property in accordance with the objects of the trust, i.e. the beneficiaries. These obligations come from the trust document and from trust law as defined by the Courts of Equity.

## 5.2 Characteristics of a trust

Courts have decided that in order to create a valid trust, three certainties are needed: an intention to create a trust, identifiable subject matter, and objects. Moreover, trusts must not breach the rules against perpetuities or the rules against accumulation. This section examines the specific requirements for a valid trust to be created.

1 *Dick v Commissioner of Inland Revenue* [1999] 2 NZLR 756 at 759 per Randerson J.

2 S 4(1) "entity".

3 [1999] 2 NZLR 756.

4 Ibid, at 759 per Randerson J. See also Noel Kelly, Chris Kelly and Greg Kelly *Garrow and Kelly Law of Trusts and Trustees* (6th ed, LexisNexis NZ Ltd, Wellington, 2005) at 8 ["Garrow and Kelly 6th ed"].

5 *The Law of Trusts* (11th ed, Sweet & Maxwell, London, 1983) at 2 cited with approval in *Dick v Commissioner of Inland Revenue* [1999] 2 NZLR 756 at 759.

### *5.2.1 Certainty of intention to create a trust*

There must be certainty of intention to create a trust or trust relationship. If it is clear that when property has been given or settled on people (trustees) who must use it for the benefit of beneficiaries, then there is a clear intention to create a trust.

New Zealand courts have decided that "a declaration of trust does not require a technical form of expression; it is a question of construction whether the words used, taking into account the surrounding circumstances, amount to a clear declaration of trust".[6] The main characteristic of a trust is that some persons have constituted themselves as trustees. In other words, the trustees are deemed to have expressed their intention by accepting responsibility for dealing with property so that somebody else – to their own exclusion – acquires the beneficial interest in that property.[7]

The phrases "upon trust for", "in trust for" and "on trust for" are commonly used to indicate the intention of creating a trust.[8] Since the main characteristic of a trust is that a trustee or trustees is/are to hold property for someone else's benefit, the use of the word "trustee" usually confirms the intention of creating a trust.[9] However, in *Wellington Harness Racing Club Inc v Hutt City Council,*[10] the Crown had granted 35 acres of land "in trust for a race course and for purposes connected therewith" to the Club, which eventually requested a surrender of its lease in order to cap its liability to the Council. Hammond J held that the word "trust" was capable of more than one meaning. In that case, he held that a Crown grant "in trust" established by a specific statutory scheme did not create a "trust" as understood by the Courts of Equity. Furthermore, he considered that subsequent statutes had extinguished the trust by enacting that the land could be used "for recreation purposes". Hammond J wrote that "either there was not a trust of the character contended for it from the outset; or there was appropriate and lawful legislation refinement as to the basis on which this land was held [...] To put it in another way, this is a very distinct form of statutory trust of a public character, on the terms contained in the legislation".[11]

Tipping J decided that the words "to someone absolutely" did not always mean an absolute beneficial interest. It depended on the construction of the instrument taking into account the surrounding words used. In *Re Beckbessinger*,[12] the testator left the residue of his estate to "Myra Curley and Duncan Drayton Bamfield absolutely and they are to apply the residue to beneficial interests, which ICB has particularly in Christchurch", in particular as trustees to provide a trophy for Lions Clubs and certain sums to a trotting club at Addington to provide stakes for four-year-old racehorses. In that case, the New Zealand High Court had to consider whether there was sufficient certainty of objects and, if so, if section 61B of the *Charitable Trusts Act 1957* could save the residuary provision in favour of general charitable purposes. Tipping J held that the fact that the testator had used the word "trustees" indicated "that residue was left to Mrs Curley and Mr Bamfield, not absolutely, but in trust".[13]

### *5.2.2 Certainty of subject matter*

The second requirement for a valid trust is that there must be identifiable property. Where the property is not clearly identifiable, the trust can fail for uncertainty of subject matter. A trust with no property is not a trust. For example, if the trustees derive no amount of income from the trust, there cannot be a trust because no property is identifiable. Gino Dal Pont wrote that "importantly, charitable trusts require the actual application of property for charitable purposes".[14]

6 *Thexton v Thexton* [2001] 1 NZLR 237 at 247.

7 Ibid.

8 Garrow and Kelly 6th ed, above n 4, at 53.

9 Ibid, at 54.

10 [2004] 1 NZLR 82.

11 Ibid, at [67].

12 [1993] 2 NZLR 362.

13 Ibid, at 366. The impact of section 61B of the *Charitable Trusts Act 1957* has been discussed in chapter 3 at 3.1.3.1 and 3.2.4.

14 Gino Dal Pont *Charity Law in Australia and New Zealand* (Oxford University Press, Oxford, 2000) at 347.

The authors of *Garrow and Kelly Law of Trusts and Trustees* wrote that "a trust that has been declared is not completely constituted until the settlor has divested himself or herself of the trust property for the benefit of the beneficiaries".[15]

Evidence of property being passed into the trust is necessary. Therefore, in *Hartshorne v Nicholson*,[16] a gift failed because blanks had been left in a will for the amounts to be given to charity. Furthermore, in *Tudor on Charities*, Jean Warburton wrote that the general rule applicable to English trusts was considered to be settled and to be that "where part of a fund is directed to be applied for charitable purposes, but the actual amount or the proportion to be so applied is not stated in the relevant instrument and no guidance is given as to how the amount or proportion is to be ascertained, the attempted charitable trust is void for uncertainty".[17]

The *Charities Act 2005* introduced a certain twist to the general rule that money has to pass to the trustees upon the constitution of a trust. Section 14 was enacted as follows:

> *... [the] Commission may act on basis of reasonable assumptions in relation to charitable trusts*
>
> *(1) A trust is not prevented from being of a kind referred to in section 13(1)(a) merely because the trustees of the trust have not yet derived an amount of income in trust for charitable purposes if, in the opinion of the Commission, –*
>
> *(a) an amount of income will be derived by the trustees in trust for charitable purposes; and*
>
> *(b) it is fit and proper to register the trustees of the trust as a charitable entity.*
>
> *(2) For the purposes of subsection (1), the Commission may act on the basis of any assumptions concerning the future derivation of income for charitable purposes that, in the opinion of the Commission, are reasonable in the circumstances of the case.*

This disposition seems to have relaxed the requirement that property must pass to trustees upon the creation of a trust. It gives the New Zealand Charities Registration Board discretion to make assumptions and decide whether, having regards to reasonable assumptions, an amount of income will be derived in trust for charitable purposes. It is submitted that in order for section 14 of the Act to apply, the trust must first have been validly constituted. The law is clear that no trust is constituted unless some property has been identified. In order to change such a fundamental rule, the legislation must be very clear and very precise concerning its intention to abrogate such a rule and replace it with another.[18]

Within section 14 of the Act, a specific example of a situation envisaged by that section is given. It reads as follows:

> *A charitable trust has recently been created.*
>
> *The trustees of that trust have not yet derived an amount of income in trust for charitable purposes. However, the Commission is of the opinion, having regard to reasonable assumptions, that the trustees will derive an amount of income in trust for charitable purposes. The Commission is also of the opinion that it is fit and proper to register the trustees. Accordingly, the Commission is satisfied that the trust is of a kind referred to in section 13(1)(a).*

[15] Garrow and Kelly 6th ed, above n 4, at 103.

[16] (1858) 26 B. 58. See also Jean Warburton *Tudor on Charities* (9th ed, Sweet & Maxwell, London, 2003) at 137 ["Tudor 9th ed"].

[17] Tudor 9th ed, above n 16, at 137.

[18] See J F Burrows *Statute Law in New Zealand* (Butterworths, Wellington, 1999) at 207-209 citing *Lisafa* case (1988) 15 NSWLR 1 and *Perkins v Police* [1988] 1 NZLR 257.

*The trust has a name that complies with section 15 and the trustees of the charitable trust are qualified to be officers of a charitable entity.*

*The trustees of the trust qualify for registration as a charitable entity.*

This example does not seem to affect the certainty of subject matter considered necessary to constitute a trust. It deals with a recently created charitable trust, which has not yet derived an amount of income for charitable purposes. According to the *Concise Oxford English Dictionary*, "derive" means to "obtain something from a specified source".[19] Accordingly, it appears that this example refers to a trust that has not yet obtained income from the capital, not to one that has not yet been constituted.

Courts have also recognised that a charitable trust can be established by voluntary contributions to establish a fund for a purpose that is charitable.[20] In *Re Doug Ruawai Trust*,[21] McGechan J considered that the fund was a de facto trust constituted when an appeal to the public had been made to raise money in order to facilitate a heart transplant operation overseas for the late Mr Doug Ruawai, a well known citizen who had not had the means to pay for such an operation. Some $85,000 was raised. After Mr Ruawai's death, the de facto trustees asked the Court what to do with the remaining $50,000. Although the Court considered that the Trust was not charitable because it had been established for a person, McGechan J decided that under section 38 of Part IV of the *Charitable Trusts Act 1957*, the Trust could be transformed into a charitable one because he considered Part IV to have expanded the law of charity where money had not been raised for a charitable purpose.

### *5.2.3 Certainty of object*

Finally, a trust must have identifiable objects, usually a named beneficiary or beneficiaries. In a trust for individuals, it is necessary that the individuals be capable of being identified or the trust will be void for uncertainty of object. In *Re Beckbessinger*,[22] the testator left the residue of his estate to "Myra Curley and Duncan Drayton Bamfield absolutely and they are to apply the residue to beneficial interests, which ICB has particularly in Christchurch". Tipping J decided that the expression "is so conceptually uncertain as to be void for uncertainty. It is in my judgment impossible to draw a line so as to be able to say with certainty what interests the testator meant to be within and without the class".[23] Concerning the certainty of objects, he wrote:

> *The question therefore becomes, when deciding whether the testator in the present case has established a class [of beneficiaries], which is sufficiently certain conceptually: can it be said with certainty of any possible claimant that such claimant is or is not a member of the class? [...] Thus conceptual certainty has to do with the precision or accuracy of the language used to define the class. It must be possible to determine with certainty the limits of the class, i.e. whether a particular person or body is or is not within the class. [...] The learned author of the article says, and I agree, that a class of potential beneficiaries will be conceptually certain if the terms used to define the class by the settlor have precise boundaries of meaning.*[24]

The reason behind the requirement for certainty of object is that, without such certainty, no one will be able to ask the courts to carry the trust into execution. However, the law makes an exception to that rule if the objects of the trust are to promote charitable purposes. This is because, in the case of a charitable trust, the Attorney-General has the authority to ask courts to give effect to the trust.[25]

[19] *Concise Oxford English Dictionary* (11th ed, Revised, Oxford University Press, Oxford, 2006) at 386.

[20] Tudor 9th ed, above n 16, at 134.

[21] Palmerston North, CP 285/86, decided on 24 November 2007 per McGechan J.

[22] [1993] 2 NZLR 362.

[23] Ibid, at 372.

[24] Ibid, at 369-370.

[25] *Morice v Bishop of Durham* (1805) 9 Ves 399; affirmed 10 Ves 251.

### *5.2.4 Avoid breach of the rules against perpetuities*

The law considers that trust assets must vest in due course in a beneficiary that is able to alienate or deal with them in an ordinary way. This is because the courts have always considered that, as a matter of public policy, they should prevent property being tied up unnecessarily. The maximum period before assets must vest has been measured by the "life in being [of someone identified] plus 21 years". However, the New Zealand Parliament has adopted the *Perpetuities Act 1964*,[26] which allows a settlor to select a period not exceeding 80 years, instead of adopting the general perpetuity period. If no period is selected by the settlor, section 6(1) of the Act provides that "the perpetuity period applicable to the disposition under the rule against perpetuities, instead of being of any other duration, shall be such period not exceeding 80 years". Furthermore, section 8 of the Act is titled "wait and see" and provides that an interest is void only if it in fact does, as opposed to may, vest outside the period.

The rule against perpetuities does not apply to charitable trusts in the sense that charitable trusts can be expressed to last indefinitely. However, charitable trusts must satisfy, at the time of their inception, the rule against perpetuities.[27] The authors of *Garrow and Kelly Law of Trusts and Trustees* have summarised the application of the rule against remoteness in charitable trusts in the following three propositions:

> *(a) The rule applies if:*
>
> *(i) there is a gift for charitable purposes;*
>
> *(ii) there is a condition that the gift (trust) is to come to an end in some circumstances;*
>
> *(iii) the condition could mean the gift is terminated at some time outside the permitted perpetuity period;*
>
> *(iv) or if the condition is met there is a gift over (substitution) for some non-charitable purpose.*
>
> *(b) The rule also applies if:*
>
> *(i) there is a gift for non-charitable purpose;*
>
> *(ii) there is a condition which provides for termination and this could take effect outside the perpetuity period; or*
>
> *(iii) there is a gift over for charitable purposes.*
>
> *(c) The rule does not apply, however, where the condition is attached to a gift for charitable purposes with a gift over for another charitable purpose.*[28]

These rules have been derived from court decisions. An example of rule (a) is given in *Re Bowen, Lloyd-Phillips v Davis*.[29] In that case, a fund was left on trust to maintain schools in perpetuity (which was a gift for charitable purposes). A condition was included that if the state established a general system of education the money was to go to the sisters of the deceased. The state did establish a general system of education. It was therefore held that the gift over was void because the terminating event could have occurred outside the period allowed. Finally, since the condition had been met, there was a gift over for some non-charitable purpose, that is, the sisters would inherit under the will.

[26] S 6.

[27] *Caldwell v Fleming* [1927] NZLR 145 at 158 per Reed J.

[28] Garrow and Kelly 6th ed, above n 4, at 313.

[29] [1893] 2 Ch 491. See also Garrow and Kelly 6th ed, at 314.

The New Zealand case of *Caldwell v Fleming*[30] discussed the second rule enunciated above. In that case, the testator left nine acres of land in perpetuity to the actual ministers of a church, together with a gift for non-charitable purposes to his nephews if two conditions were not observed: that a church be built within 25 years of the ministers entering into possession of the land; and that the church carry out certain conditions, such as not holding any military parades or shows on the premises and that two of the Psalms of David be sung to sacred tunes during each service. Reed J held that the first condition did not offend against the rules of perpetuities, but that the further conditions did.

However, *Wallis v Solicitor-General for New Zealand*[31] is the authority for the proposition that if the gift is an absolute one for charitable purposes it will not be invalid simply because the manner in which it is to be carried out will depend on future events that will not necessarily take place within any definite time and might never happen at all. In that case, land had been transferred to the Bishop of New Zealand in trust for a college to be erected on it for the general purposes of promoting religion. No college had been erected. Over time, the land had become unsuitable and the rent accumulated to a substantial amount. The Privy Council held that the gift did not offend against perpetuities because the gift over was to another charity.

In *Re Tyler*[32] is an example of the third rule enunciated above. In that case, there was a gift to a charity subject to the condition that the testator's family vault be kept in repair. If the condition was not met, the gift was to go to a second charity. The gift over was held to be a valid gift because it went over to another charity.

### *5.2.5 Avoid rules against accumulation*

Section 21(1) of the *Perpetuities Act 1964* provides that:

> *Where any property is settled or disposed of in such manner that the income thereof may or shall be accumulated wholly or in part, the power or direction to accumulate that income shall be valid if the disposition of the accumulated income is, or may be, valid, and not otherwise.*

The authors of *Garrow and Kelly Law of Trusts and Trustees* interpreted this section as meaning that:

> *In other words, income may be accumulated but only for as long as the time period permitted under the rule against perpetuities. If a period up to 80 years has been selected under s 6 (that is, specifically stated as the perpetuity period applicable to the trust document), then accumulation is allowed for that time. Otherwise, accumulation is allowed for the traditional "life or lives in being and 21 years". If there is no such life (as is often the case with trusts for charitable purposes, for instance), then accumulation is allowed only for 21 years.*[33]

The leading case in New Zealand on accumulations is *Re Clothier*,[34] decided by the Court of Appeal in 1971. In that case, the Court refused to follow earlier English decisions and decided that the accumulation of income was not for the ultimate benefit of life tenants but for the benefit of the church organisation, which would take both capital and surplus income. Therefore the Court of Appeal directed that the surplus income accumulated was to go to the persons who would have been entitled to it if there had not been such an accumulation.

[30] [1927] NZLR 145.
[31] (1903) NZPCC 23.
[32] [1891] 3 Ch 252.
[33] Garrow and Kelly 6th ed, above n 4, at 161.
[34] [1971] NZLR 745.

Courts have held that the rule against accumulation applies not only to private individuals but also to charities. This was made clear in *Trustees, Executors, and Agency Co v Bush*.[35] In that case, the testator had left the residue of his real and personal estate to the University of Otago for the advancement of education. However, the testator directed that the trustees keep 10% of the income every year to accumulate into the capital. Denniston J followed *Saunders v Vautier*[36] and decided that "where there is a trust for charitable purposes and a direction to accumulate the income or a portion of it indefinitely, or for any period in excess of that allowed by the rule against perpetuities",[37] such directions were altogether void. This was because this was not a trust in favour of a charity but a fetter on the charitable trust that prevented the use of the property for charitable purposes during the period for which the accumulation was directed.

In *Perpetual Trust Ltd v Roman Catholic Bishop of the Diocese of Christchurch*,[38] Chisholm J had to review a previous decision decided in 1908. He took into account the *Perpetuities Act 1964*. In the case at bar, the testator had left everything to the Roman Catholic Bishop of the diocese of Christchurch for charitable purposes, but had directed that the last one-fifth be retained for accumulation. Chisholm J wrote that section 21 of the *Perpetuities Act 1964* did not apply to gifts to charitable trusts.

Nevertheless, he considered that the decision in *Trustees, Executors, and Agency Co v Bush*[39] was still good law and should be followed. He consequently decided that the accumulation provision was void. The Judge went on to apply the *cy-près* doctrine, estimating that the testatrix's intention was to make a charitable gift to the Bishop of Christchurch. He therefore modified the will, giving the whole amount in trust for the Bishop, but adding that the Bishop could not receive more than four-fifths of the income in any one year. The authors of *Garrow and Kelly Law of Trusts and Trustees*, however, noted that "if the direction or power to accumulate would exceed the period allowed, but there is a general charitable intention evident, such income is applied *cy-près*".[40]

### 5.3 Private trusts distinguished from charitable trusts

As analysed in the previous section, all trusts, whether they are charitable or not, must have the three certainties (certainty of intent, certainty of objects and certainty as to property). This section analyses the characteristics that distinguish private from charitable trusts.

Private trusts are trusts established for individuals and not for public benefit. An example of a private trust can be found in a family trust, which "is a trust established for the benefit of a family group – often, but not always, the family of the settlor".[41]

It is the intention of the settlor, expressed in the trust deed, that determines whether a trust operates as a private or a public trust. When property is gifted to trustees for the benefit of individuals, it is generally considered a private trust. There are, however, difficult situations. One of them is when property is gifted to an unincorporated society. The other is where money is given to a class of persons.

Concerning property gifted to an unincorporated society, the presumption is that it was given to the individual members of the society. This presumption can, however, be rebutted if the property should be treated as creating a trust for charitable purposes. That position was developed by the Privy Council in *Leahy v Attorney-General (NSW)*.[42] In that case, the gift to a closed order, although not charitable, was nevertheless held to be a valid gift to the individual members of the particular convent referred to in the will. Viscount Simonds expressed the following view about gifts given to unincorporated societies:

[35] (1908) 11 GLR 286, 28 NZLR 117.

[36] (1841) 8 Ch D 261.

[37] *Trustees, Executors, and Agency Company v Bush* (1908) 11 GLR 286, 28 NZLR 117 at 119-120.

[38] HC CHCH CIV 2005-409-465, 23 August 2005, Chisholm J, alternatively cited as *Re Armstrong* [2006] 1 NZLR 282; (2005) 6 NZCPR 649.

[39] (1908) 11 GLR 286; 28 NZLR 117.

[40] Garrow and Kelly 6th ed, above n 4, at 163.

[41] Ibid, at cxiii.

[42] [1959] AC 457; [1959] 2 All ER 300.

> *In law, a gift to such a society simpliciter [without saying anything further] (i.e. where neither the circumstances of the gift nor the directions given nor the objects expressed impose on the donee the character of a trustee) is nothing else than a gift to its members at the date of the gift as joint tenant or tenants in common. [...] It must now be asked then whether, in the present case, there are sufficient indications to displace the prima facie conclusion that the gift made by clause 3 of the will is to the individual members of the selected order of nuns at the date of the testator's death or that they can together dispose of it as they think fit. It appears to their Lordships that such indications are ample.*[43]

Concerning gifts given to a class of persons, the general rule is that "if that class of persons represents a section of the community that fulfils the public benefit requirement, and the trust has charitable overtones, the court is likely to construe it as a charitable purpose trust".[44]

The main area of contention in this regard are gifts to classes of people linked by blood, which are considered not to provide public benefit, except when the purposes are to relieve poverty. Audrey Sharp and Fiona Martin wrote that in Australia, "the views expressed in *Re Compton* and *Oppenheim* have been cited and approved in a line of cases to determine charitable status. While this is also true to some extent in New Zealand it would appear that the law there has been evolving in a different direction".[45]

Section 5(2) of the *Charities Act 2005* provides that "the purpose of a trust, society, or institution is a charitable purpose under this Act if the purpose would satisfy the public benefit requirement apart from the fact that the beneficiaries of the trust, or the members of the society or institution, are related by blood". This section has exactly the same wording as in the *Taxation (Annual Rates, Māori Organisations, Taxpayer Compliance and Miscellaneous Provisions) Act 2003*, which extended the meaning of charitable purpose in section OB 3B(1) of the *Income Tax Act 1994*. Concerning the interpretation of that wording, Inland Revenue has stated that certain factors should be considered, such as: the nature of the entity; the activities it undertakes; the potential beneficiary class; the relationship (degree of connection) between the beneficiaries; and the number of potential beneficiaries.[46] In Gino Dal Pont's opinion, this initiative is "no licence to award charitable status to private family trusts, as proof of benefit to the community is still required".[47] David Brown argued that "the new test is less predictable than the previous blanket ban on blood ties".[48]

Another distinction between private and charitable trusts is that in the case of a private trust, the beneficiaries are entitled to enforce the trust. However, in the case of a public trust, the ultimate beneficiaries of charitable objects have no standing to enforce the trust. That remains the province of the Attorney-General.[49]

Charitable trusts are treated by the law in exactly the same way as private trusts, with a few exceptions. These exceptions are expressed in Part III of the *Charitable Trusts Act 1957* and in section 61B of that Act. These are analysed in the following section.

### 5.4 Failure or impossibility of a trust

Where the stated objects of a charitable trust fail, the whole gift will fail unless the property held on trust can be applied to another charitable purpose.[50] Since the High Court has always assumed jurisdiction in overseeing the administration of trusts, such a rule was developed through the doctrine of *cy-près*. However, that common law doctrine was restated and extended by section 32 of the *Charitable Trusts Act 1957*. Therefore, this subsection starts with a brief overview of the *cy-près* doctrine, but most of it is devoted to the application of section 32 of the *Charitable Trusts Act 1957*. The last subsection deals with money collected through voluntary contributions.

[43] Ibid.

[44] Gino Dal Pont *Law of Charity* (LexisNexis/Butterworths, Australia, 2010) at 447.

[45] "Charitable Purposes and the Need for a Public Benefit: A Comparison of the Tax Treatment of Australian and New Zealand Charities for Indigenous Peoples" (2009) 24:2 Australian Tax Forum 207 at 214.

[46] (May 2003) 15:5 *Tax Information Bulleti*n 59-60.

[47] Dal Pont *Law of Charity*, above n 44, at 56.

[48] David Brown "The *Charities Act 2005* and the Definition of Charitable Purposes" (2005) 21 NZULR 598 at 620.

[49] Dal Pont, *Law of Charity*, above n 44, at 66.

[50] Margaret Soper *The Laws of New Zealand – Charities* (Butterworths, Wellington, 1994) at [135] ["Charities"].

### *5.4.1 The* cy-près *doctrine*

In *Re Pettit*,[51] Chilwell J wrote that, traditionally, textbooks on the law of charities had divided the problem of *cy-près* in regard to institutional gifts between: gifts to a specified charitable institution once existing but ceasing to exist before the death of the testator; gifts to a specified charitable institution in existence at the death of the testator but ceasing to exist before the gift became payable or was in fact paid over; and gifts to what appeared to be a specified charitable institution that never existed. In the first instance *prima facie* the gift lapses in the same way as if it had been a gift to an individual. In the second instance there is no lapse, in consequence of which the testator's next of kin are excluded. In the third instance the gift lapses unless there is a general charitable intention, which enables it to be applied *cy-près*.

The doctrine of *cy-près* was created by the courts in order to save charitable trusts from lapsing by application to other objects "as near as may be". In *Moggridge v Thackwell*,[52] Lord Eldon summarised the history of the *cy-près* doctrine as follows:

> *In what the doctrine originated, whether, as supposed by Lord Thurlow in* White v White,[53] *in the principles of the civil law as applied to charities, or in the religious notions entertained formerly in this country, I know not: but we all know there was a period when in this country a portion of every man's estate was applied to charity, and the ordinary man thought himself obliged so to apply it, upon the ground that there was a general principle of piety in the testator. When the statute*[54] *compelled a distribution it is not impossible that the same favour should have been extended to charity in the construction of wills by their own force purporting to authorise such a distribution. I have no doubt that cases much older than those I shall cite may be found, all of which appear to prove that if the testator has manifested a general intention to give to charity, the failure of the particular mode in which the charity is to be effectuated shall not destroy the charity; but if the substantial intention is charity, the law will substitute another mode of devoting the property to charitable purposes, though the formal intention as to the mode cannot be accomplished.*[55]

The doctrine of *cy-près* was applied in New Zealand by the Privy Council in *Wallis v Solicitor-General for New Zealand*.[56] In that case a Crown grant was made for the use and towards the maintenance of a school only for as long as religious education, industrial training and instruction in the English language were given to youth educated there. The Privy Council held that, as the school had never been established, the occasion on which the trust was to determine had never arisen. However, the gift had been made outright to charity, and could therefore be applied to another charitable purpose. A similar result was reached in *Re The Door of Hope*.[57] In that case a women's home had been established and was later closed. A further home in substitution was subsequently established and after a little while the substituted home was also closed, leaving a sum of money in the hand of the committee of management. Edwards J considered that "it is therefore desirable that the funds should be administered by some existing institution closely corresponding to the Auckland Women's Home".[58]

The equitable *cy-près* doctrine was limited to the impossibility or impracticability of the original purposes. Although section 32 of the *Charitable Trusts Act 1957* seems to have codified the common law while expanding it, in *Alacoque v Roache*[59] the New Zealand Court of Appeal wrote that "the whole of s 32(1) is subject to the preservation of the general law about lapse which applies to the case of charitable gifts where the stated

[51] [1988] 2 NZLR 513 at 546.

[52] (1807) 7 Ves 36.

[53] (1778) 1 Bro CC 12.

[54] *Statute of Distribution*, 1670 (22 Car 2, c. 10); *Statute of Frauds*, 1677 (29 Car 2, c.3).

[55] (1807) 7 Ves 36 at 39. See also Tudor 9th ed, above n 16, at 457.

[56] (1903) NZPCC 23; [1903] AC 173. See also Soper *Charities*, above n 50, at [162].

[57] (1905) 26 NZLR 96.

[58] Ibid, at 100.

[59] [1998] 2 NZLR 250 at 256.

purposes or objects are an indispensable part of the trust to which effect cannot be given – where, in short, there is no discernible general charitable intention". In other words, the statutory provisions establishing these rules apply only to property or income given or held upon trust, or that is to be applied for a charitable purpose. The comment in *Alacoque v Roache* has been held to restrict their application to trusts that have come into existence and subsequently failed. "In other words, they do not apply to gifts which never take effect so as to be held for charitable purposes. In such cases, the common law rules about lapse are preserved and a general intention must be shown before the property can be applied for another charitable purpose".[60]

When the residue of an estate has been given to a number of charities to share alike, the courts have found an indication of a general intention of charity.[61] Such a general intention was also found in gifts to a fund for lepers and for homes for the aged.[62] Gifts to aid the inmates of a convalescent ward within the framework of a public hospital[63] and a gift made to the Jewish Welfare Society for the relief and assistance of Jewish refugees[64] were also found to be charitable. Margaret Soper[65] wrote that:

> *A general intention has also been found in the following circumstances: where a Māori tribe gave land for a school for the education of their children at a particular place, and the trust was not executed for 30 years, by which time the trust had become useless;*[66] *where a testator gave the residue of his estate to purchase land and erect a museum to house and display his works of art, but the residue was insufficient for the purposes;*[67] *where certain Māori gave land in Porirua as a college for the Bishop of the Church of England and that purpose became unsuitable because of the falling of the population;*[68] *where a testator gave a legacy to be expended in the erection of or additions to a building in London for the relief of the indigent blind of the Jewish persuasion;*[69] *where a testatrix bequeathed a legacy to the Society for the Prevention of Cruelty to Animals of New Zealand, which had never existed;*[70] *where a testator bequeathed a legacy to the Old Men's Home at Hunterville when there was no such home;*[71] *and where a gift of residue was to be divided among the "Blind Hospital, the Deaf and Dumb Hospital, Porirua Hospital, the Crippled Children's Hospital, and the Presbyterian Church" at the town at which the testatrix last resided.*[72]

In *Re Pettit*,[73] Chilwell J summarised the notion of general intention by saying that in cases where a testator did not have a particular existing institution in mind, the Court should deem him or her to have been thinking in general terms of the type of charitable purpose indicated by the named institution in the will.

### *5.4.2 Application of section 32 of the Charitable Trusts Act 1957 to property held on trust*

The adoption of section 32 of the *Charitable Trusts Act 1957* has extended the application of the *cy-près* doctrine to other situations, namely where the original purposes have ceased to provide a suitable and effective method of using the trust property and the purpose stated is impossible, impracticable, inexpedient, illegal, useless or uncertain, or where the purpose has already been effected, or the amount is inadequate.

Part III of the *Charitable Trusts Act 1957* provides that the High Court will not declare a trust to be void for lack of certainty of objects, but can approve a scheme that will redirect the property to be applied to a similar charitable purpose. Section 32(1) of the Act provides that:

[60] Soper *Charities*, above n 50, at [136].

[61] *Re Buckley* [1928] NZLR 148; [1928] GLR 127.

[62] *Re Chapman* (High Court, Napier, CP 89/87, 18 October 1989 per Greig J).

[63] *Re Flannagan* [1962] NZLR 480.

[64] *Re Cohen* [1954] NZLR 1097.

[65] *Charities*, above n 50, at [160].

[66] *Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur (NS) SC 72.

[67] *Murdoch v Attorney-General* (1892) 11 NZLR 502.

[68] *Bishop of Wellington v Solicitor-General* (1900) 19 NZLR 214, affirmed sub nom *Solicitor-General v Bishop of Wellington* (1901) 19 NZLR 665 (CA), affirmed in turn sub nom *Wallis v Solicitor-General for New Zealand* (1903) NZPCC 23; [1903] AC 173.

[69] *Re Joseph* (1907) 26 NZLR 504; 9 GLR 329.

[70] *Re Buckley* [1928] NZLR 148; [1928] GLR 127. See also *Re Wilson* [1934] GLR 54.

[71] *Re Palmer* [1939] NZLR 189; [1939] GLR 138.

[72] *Re Gawith* [1952] NZLR 106; [1952] GLR 208.

[73] [1988] 2 NZLR 513 at 532.

> *... in any case where any property or income is given or held upon trust, or is to be applied for any charitable purpose, and it is impossible or impracticable or inexpedient to carry out that purpose, or the amount available is inadequate to carry out that purpose, or that purpose has been effected already, or that purpose is illegal or useless or uncertain, then (whether or not there is any general charitable intention) the property and income or any part or residue thereof or the proceeds of sale thereof shall be disposed of for some other charitable purpose, or a combination of such purposes, in the manner and subject to the provisions hereafter contained in this Part of this Act.*

In *Re Twigger*,[74] Tipping J wrote that "the first point worthy is that in any case falling within s 32(1) of the *Charitable Trusts Act 1957*, the case must be dealt with in accordance with Part III and not under the inherent jurisdiction of the Court".[75] This indicates that the legislature intended the statute to prescribe exhaustively the circumstances in which a *cy-près* application could be made.[76] This statement is subject to section 32(3) of the Act that maintains the common law doctrine of lapse analysed in the previous subsection.[77]

Part III of the Act in fact codifies the general jurisdiction of the Court and its powers in the application of the *cy-près* doctrine for charitable trusts that have been incorporated under the *Charitable Trusts Act 1957*. It also applies to most trusts. Part III applies when the stated purpose is impossible, impracticable, inexpedient, illegal, useless or uncertain, or when the purpose has already been effected or the amount is inadequate. In such cases, the powers of the trustees may be extended or varied in order to facilitate the administration of the property or income.[78] The trustees must prepare a scheme for the disposition of the property or income and for extending or varying the powers of the trustees or for prescribing or varying the mode of administering the trust.[79] That scheme has to be laid before the Attorney-General for his or her comments. At any time after the delivery of the report of the Attorney-General, the trustees may apply to the Court for approval of the scheme.[80] Before the Court considers the scheme, it must be published in the *Gazette* and at least three times in one newspaper circulating in the judicial district in which is situated the office for the Court in which the application was filed.[81] Any person desiring to oppose the scheme must give written notice of his or her intention to oppose the scheme not less than seven clear days before the date of the proposed hearing of the application by the Court.[82]

### *5.4.3 Application of Part IV of the Act to funds raised by voluntary contribution*

Part IV of the *Charitable Trusts Act 1957* deals with schemes in respect of charitable funds raised by way of voluntary contribution.[83] It applies where it has "become impossible or impracticable or inexpedient to carry out the charitable purposes for which the money raised is held".[84] It may only become clear at the end of that period that the purpose for which the money was raised is impracticable, as was the case in *Re Takapuna Women's Progressive League*,[85] where the money was raised by voluntary contribution over a period of time.

Part IV also applies where the amount raised by public appeal is inadequate to carry out the purpose, and where the purpose has been effected already or that purpose is illegal or useless or uncertain. In *Ruawai Trust*,[86] money had been raised through voluntary contributions to help Mr Doug Ruawai to obtain a heart transplant operation overseas. However, he died before getting a heart transplant. The people administering the surplus money applied to the High Court for advice concerning the excess money. McGechan J took the view that the money had not been raised for a charitable purpose because it had been raised for one person only. Nevertheless, he applied Part IV of the Act because he considered Part IV to have expanded the law of charity where money had not been

74 [1989] 3 NZLR 329.

75 Ibid, at 340 citing *Re Palmerston North Hall's Trust Board* [1976] 2 NZLR 161 followed by Holland J in *Re Erskine* (Christchurch, M 292/86, 17 June 1987).

76 Dal Pont *Charity Law in Australia and New Zealand*, above n 14, at 286. However, in *Alacoque v Roache* [1998] 2 NZLR 250 at 256, the New Zealand Court of Appeal wrote that it wished to reserve its opinion about Wild CJ's statement *Re Palmerston North Hall's Trust Board* [1976] 2 NZLR 161, to the effect that "in any case falling within s 32(1) of the *Charitable Trusts Act* the property must be disposed of in accordance with Part III of the Act".

77 *Alacoque v Roache* [1998] 2 NZLR 250 at 256.

78 *Charitable Trusts Act 1957*, s 33.

79 Ibid, s 34.

80 Ibid, s 35.

81 Ibid, s 36.

82 Ibid, s 37. Soper *Charities*, above n 50, at [188], cited the following examples of such notices of opposition in *Re The Door of Hope* (1905) 26 NZLR 96, *Public Trustee v Attorney-General* [1923] NZLR 433, *Re Whatman* (Supreme Court, Wellington, 16 July 1965, Tompkins J), *Re Goldwater* [1967] NZLR 754, *Re Twigger* [1989] 3 NZLR 329, and *Re Nixon* (High Court, Wellington, 4 February 1992, McGechan J).

83 Section 39 of the Act reads as follows:

This Part of this Act is applicable to cases in which money has been raised for any charitable purpose by way of voluntary contribution, or by the sale of goods voluntarily contributed, or as the price of admission to any entertainment, or in any other manner of voluntary contribution, whether or not the money has been invested pending application for that charitable purpose.

84 *Charitable Trusts Act 1957*, s 40(1)(a).

85 [1930] NZLR 39; [1930] GLR 67. See also Soper *Charities*, above n 50, at [145].

86 Palmerston North, CP 285/86, 25 November 1987, per McGechan J.

raised for a charitable purpose. He could see nothing wrong with the proposal that the balance of the funds be held in local trust for the assistance of persons requiring heart transplants. He stressed, however, that the formation of the scheme was a matter for the trustees and the Attorney-General to determine, and only ultimately for the Court.

## 5.5 Termination of charitable trusts

The previous section dealt with the termination of charitable entities where the purposes had failed or were impossible or impracticable. This section analyses the dissolution or liquidation of unincorporated trusts.

### *5.5.1 Limited purposes, limited duration and conditions subsequent*

Besides failure, charitable trusts may be terminated in a number of situations, namely where gifts have been made for limited purposes, for limited duration or upon conditions subsequent.

Where a gift is for a specific charitable purpose, is limited to that purpose and no general intention can be found, the donor parts with his or her interest in the property only to the extent necessary for the achievement of that purpose. A subsequent failure of the purpose brings to an end the charity's interest in the property given. What remains of the property is therefore held upon resulting trust for the donor or falls into the residue.[87]

In *Canterbury Orchestra Trust v Smitham*,[88] two groups of citizens in the Christchurch district had a common interest in music and supported the Christchurch Symphony Orchestra. They disagreed on the means to achieve those purposes and in 1975 one group established a separate trust called the Canterbury Orchestra Trust. The other group then petitioned the High Court to have the Trust declared invalid because it feared that public money and grants were likely to be made in favour of the rival trust rather than its own society. The matter was referred to the Court of Appeal for determination of the relevant questions. The Court of Appeal acknowledged that the general law governing charitable trusts had always recognised that it was possible for the founders of such trusts to limit the durations to definite or indefinite periods.[89] The Court expressed the opinion that sections 25, 26 and 27 of the *Charitable Trusts Act 1957* did not oust the right of the founder of a charitable trust to make his or her own provisions as to the circumstances during which the trust was to endure and as to the destination of the funds on a failure of the primary trust.[90] The Court also acknowledged that the founder of a charitable trust could provide for its termination on the occurrence of a specified event or a condition subsequent.[91] A condition subsequent is a divesting provision and accordingly must be so worded that "the court can see from the beginning, precisely and distinctly upon the happening of what event it was that the preceding vested estate was to determine".[92] Such a condition is not repugnant to the trust unless it is of such a nature as to prevent the charitable purpose being put into practical effect in the meantime.[93]

In *Re Clark*,[94] citing *Re Levy*,[95] McCarthy J concluded: "No doubt, as a general rule it can be said that where there is a gift of income in perpetuity to an individual, *prima facie* the beneficiary is entitled to call for the corpus; but that does not apply in the case of an indefinite gift of income to a charity".[96] Margaret Soper wrote that the reason for an individual's entitlement was that "only by payment of that capital can the individual get the full benefit and extent of the gift which the donor intended. However, a similar conclusion does not follow in the case of an indefinite gift of income to a charity for its general purposes".[97]

87 Soper *Charities*, above n 50, at [163].

88 [1978] 1 NZLR 787 (CA).

89 Ibid, at 798 per Richmond P and Cooke J.

90 Ibid.

91 Ibid, at 799 per Richmond P and Cooke J, Woodhouse J dissenting.

92 Ibid, at 801 per Richmond P.

93 Ibid, at 799 per Richmond P and Cooke J.

94 [1961] NZLR 635.

95 [1960] Ch 346; [1960] 1 All ER 42 (CA).

96 [1961] NZLR 635 at 640. In *Re McGruer* (High Court, Christchurch, M 158/93, 21 October 1994), Tipping J came to a similar conclusion concerning gifts left to charities.

97 *Charities*, above n 50, at [166] citing *Re Levy* [1960] Ch 346; [1960] 1 All ER 42 (CA), applied in *Re Flannagan* [1962] NZLR 480.

### *5.5.2 Dissolution of unincorporated trusts*

Unincorporated trusts may be terminated if gifts are made for limited purposes, for limited durations or upon conditions subsequent. Moreover, an unincorporated trust may also be terminated when the trustees decide to terminate it voluntarily or are forced to do so through liquidation.

The trustees may terminate the trust voluntarily when there is a lack of funds. In such cases, it can be said that the trust has ceased to exist.[98] This situation, however, can only occur where there is no permanent endowment and the trustees can apply the property and the income towards the purposes.

Similarly, a trust can be terminated where the trustees decide to distribute all the funds for the purposes of the charity. However, this can only be accomplished where there is no permanent endowment. Where the fund is permanently endowed, there is no mechanism in New Zealand to terminate the trust. By contrast, in the United Kingdom the Charity Commission can consent to terminate a trust with a permanent endowment and an income of £1,000 or less a year.[99] A permanently endowed trust in New Zealand cannot be terminated voluntarily. In order to be terminated voluntarily, an unincorporated trust must present a scheme for the maintenance of the charitable purposes and obtain the consent of the High Court to vary the purposes according to the doctrine of *cy-près*. However, in approving a scheme of variation or disposal, the Court has the discretion to distribute the capital, even if the original will created a perpetual trust for distribution of income only. Such a course of action may be appropriate if the amount involved is too small to do anything worthwhile.[100]

An unincorporated trust could theoretically be put into liquidation because the entity cannot pay its creditors. Although *Re Wellington Regional Housing Trustees*[101] was a case involving an incorporated trust board, the reasoning in that case also applies to unincorporated trusts. In that case, a creditor made an application for the liquidation of the entity in order to be paid what was owed to him. The Court refused to liquidate the trust, considering such an order premature. This is because there were other options available to the trustees. Moreover, the trustees were personally liable to the extent that the charity's assets were not sufficient to discharge all the debts.

In New Zealand and elsewhere, trustees can provide for the dissolution of a trust after a limited time, the achievement of a limited purpose or the occurrence of condition subsequent.[102] Where such a clause exists, they must ensure that the trust property will be maintained exclusively for charitable purposes; otherwise, they could be held liable for applying the trust's funds to purposes that are not charitable.[103] The New Zealand Charities Registration Board stresses that surplus assets must be directed to similar charitable purposes. It considers that having similar objects is not sufficient because not all similar purposes may be charitable and this could allow surplus assets to go to non-charitable purposes.

The New Zealand Charities Registration Board accepts the following clauses as being sufficient to ensure that surplus assets are directed to charitable purposes. Firstly, a trust deed may refer to dissolution in accordance with section 27 of the *Charitable Trusts Act 1957*, that is, as the courts direct. This is acceptable because it refers to the general *cy-près* rule. Secondly, a clause stating that assets will be given to similar charitable purposes is acceptable because this ensures the assets will be maintained exclusively for charitable purposes. Thirdly, assets and funds given to a named organisation on dissolution are acceptable if the named organisation has exclusively charitable objects. Fourthly, it is acceptable for assets and funds to be given to a local authority either outright or on trust for a particular charitable purpose.[104]

[98] *Re Withall* [1932] 2 Ch 236 at 241 per Clauson J.

[99] *Charities Act 1993*, UK, ch 10, s 75 cited by Tudor 9th ed, above n 16, at 502-504.

[100] *Re Martin* [1968] NZLR 289.

[101] [1980] 2 NZLR 14.

[102] *Canterbury Orchestra Trust v Smitham* [1978] 1 NZLR 787 (CA) at 787 at 789 per Richmond P and Cooke J, Woodhouse J dissenting. For a more complete discussion of that case, see section 5.5.1 of this chapter. See also *Re Roberts* [1963] 1 WLR 406 at 413 where Wilberforce J noted: "Those words that it is not competent, for the court or the charity commissioners to bring an endowed charity to an end, seem to me not necessarily to apply to a case where the trustees of the charity are given express powers to terminate the charity".

[103] *Smith v Kerr* [1902] 1 Ch 744.

[104] *Lysons v Commissioner of Stamp Duties* [1945] NZLR 738 is authority for the proposition that a gift for the benefit of the inhabitants of a parish or town is charitable.

Finally, the assets and funds may be returned to the original donor on dissolution. Assets and funds may be loaned to an organisation on the basis that they will be returned to the donor if the charitable purposes are no longer carried out. This will not be private pecuniary profit because the donor will simply be resuming his or her own property.[105]

An unincorporated trust does not need a specific clause directing that surplus assets go to other charitable purposes. This is because such a trust is permanent and cannot be dissolved. It must apply to the High Court for a variation of its purposes according to the doctrine of *cy-près*. If a specific clause allows the dissolution of the trust, that clause must provide that surplus assets be directed to charitable purposes.

### 5.6 Trustees

This section briefly canvasses who can be trustees, how they are appointed and changed, trustee remuneration, and responsibilities of trustees.

#### *5.6.1 Who can act as a trustee?*

Any person who is capable at law of holding property in his or her own right is capable of being a trustee.[106] In New Zealand, by contrast to the United Kingdom, where the appointment of an infant to be a trustee in relation to any settlement or trust is void, section 9 of the New Zealand *Administration Act 1969* makes special provisions for the administration of the estates of deceased persons where the sole executors are minors.

Two New Zealand Court of Appeal decisions have confirmed that "there is no distinction between a trust and its trustees".[107] Since a trust is not a legal entity distinct from its trustees, a trust, through its trustees, can be the trustee for another trust.

The authors of *Garrow and Kelly Law of Trusts and Trustees* considered that overseas persons could be trustees of wills and trusts in New Zealand. That opinion was based on two New Zealand cases where the courts decided that non-residents could be executors of wills.[108]

Corporations can be trustees of trusts. However, they cannot administer estates unless Parliament has authorised such corporations to do so.[109]

The *Local Government Act 2002* provides that a local authority can be involved in joint ventures with other organisations. This is believed to be sufficient to confer authority to local authorities to act as trustees.[110]

The authors of *Garrow and Kelly Law of Trusts and Trustees* wrote that "the members of an unincorporated charitable association are usually precluded from taking property of the association for their own benefit but an unincorporated charitable association can, however, by its members hold property as trustees for a charitable purpose".[111]

Finally, section 16 of the New Zealand *Charities Act 2005* provides that, in order to be an officer of a charitable entity, including a trustee, such an individual must be 16 years of age or older, not be an undischarged bankrupt or have been in receivership or liquidation if it is a body corporate, not have been convicted of a crime involving dishonesty for which he or she has been sentenced within the previous seven years; not be prohibited from being a director by an Act of Parliament, such as the *Companies Act 1993*; and must qualify as an officer according to the rules of the entity. However, the Act provides that the New Zealand Charities Registration Board may waive any disqualification on terms and conditions it thinks fit.

[105] *Re Gillingham Bus Disaster Fund* [1958] 1 Ch 300. See also Dal Pont *Charity Law in Australia and New Zealand*, above n 14, at 302-306.

[106] Garrow and Kelly 6th ed, above n 4, at 38.

[107] *Wilmott v Johnson* [2003] 1 NZLR 649 at [31] and *CIR v Chester Trustee Services Ltd* [2003] 1 NZLR 395 at [37]. See also Garrow and Kelly 6th ed, above n 4, at 38.

[108] See *Re Tinkler* [1990] 1 NZLR 621 and *Re Waller* [1990] 1 NZLR 621. See "Garrow and Kelly 6th ed", above n 4, at 38-41.

[109] See *Trustee Companies Act 1967*, s 11.

[110] See *Local Government Act 2002*, s 12 and Garrow and Kelly 6th ed, above n 4, at 42.

[111] Garrow and Kelly 6th ed, above n 4, at 43 citing *Re Vernon's Will Trusts* [1971] 3 All ER 1061; *Re Fingers Will Trusts* [1971] 3 All ER 1050; *Re Meyers* [1951] 1 All ER 538; *Rowland & others v Vancouver College Ltd & others* [1004] 3 ITELR 182.

### *5.6.2 Appointment and removal of trustees*

The original trustees of a charitable trust are usually appointed under the trust instrument.

Trustees can be replaced through different mechanisms. Sometimes, the settlor of a trust will reserve the power to remove trustees and appoint new trustees. Most commonly, the trust deed empowers the remaining trustees to fill vacancies caused by resignation, disqualification and death. The *Trustee Act 1956* provides for the surviving trustees to appoint other persons to be trustees in the place of the retired, removed or deceased trustees. The Act also provides for an increase in the number of trustees.[112]

The *Trustee Act 1956* also provides the High Court with jurisdiction to make an order appointing a new trustee or trustees, either in substitution for or in addition to any existing trustee or trustees. Such orders are particularly indicated when a trustee: is held to have misconducted him- or herself in the administration of the trust; is convicted of a crime involving dishonesty; is a mentally disordered person; is a bankrupt; or is a corporation that has ceased to carry on business, is in liquidation or has been dissolved.[113]

Every new appointment, retirement and removal of a trustee should be properly and formally documented by deed.[114]

### *5.6.3 Remuneration of trustees*

It is generally agreed that the rules of equity do not allow trustees to profit by their trust. This means they may not derive any private pecuniary profit from trusts.[115]

Moreover, trustees are not entitled to remuneration for their work for trusts and are not entitled to compensation for their personal trouble or for loss of time.[116]

The authors of *Garrow and Kelly Law of Trusts and Trustees* wrote that trustees could, however, receive remuneration in the following cases:

> *(a) Where remuneration is expressly or impliedly provided for in the instrument of trust.*
>
> *(b) Where there is a special agreement between the trustees and the beneficiaries (if they all have full legal capacity) that the trustees shall be paid for their services. [...]*
>
> *(c) Where the Court expressly allows remuneration to a trustee. The Court has long asserted an inherent jurisdiction to allow remuneration, although it has usually adhered to the view that remuneration is not to be allowed unless a special case for it is made out. [...]*
>
> *(d) Where the trustee is a corporate body and is entitled to charge for its services by virtue of some specific statutory authority, as for example the* Public Trust Act 2001 *and the* Trustee Companies Act 1967. *[...]*
>
> *(e) Where the trust property is situated overseas in a country where the trustees are allowed to charge.*[117]

[112] *Trustee Act 1956*, ss 43(1) and (2).

[113] Ibid, s 51(1) and (2).

[114] Ibid, s 43(1). See also Mark von Dadelszen *Law of Societies in New Zealand* (2nd ed, LexisNexis, Wellington, 2009) at 301.

[115] Garrow and Kelly 6th ed, above n 4, at 560.

[116] See *Peach v Jagger* (1910) 30 NZLR 423, 13 GLR 390.

[117] Garrow and Kelly 6th ed, above n 4, at 561-562.

The *Trustee Act 1956* provides that a trustee may be reimbursed for all expenses reasonably incurred in the execution of the trust or powers, but not for any professional services performed by him or her in the execution of the trust or powers unless the contrary is expressly declared by the instrument creating the trust.[118] However, in *Re Roydhouse; Cockle v Roydhouse*,[119] the High Court ordered a trustee to pay personally the cost incurred by a beneficiary to answer his request for directions because the direction proceeding was unreasonable, unnecessary and inappropriate. Nicholson J wrote:

> *It is a vital part of the role and function of a trustee to make decisions. Professional trustees should not unreasonably and unnecessarily abdicate that responsibility by asking the Court to make decisions for them and thus unjustifiably cause cost to beneficiaries and devour part of the estate, be it a very small oyster or a big pie. If they do, the Court is likely to order personal cost accountability.*[120]

### *5.6.4 Responsibilities of trustees*

The law imposes a number of obligations on trustees. The Charity Commission for England and Wales has outlined the main responsibilities of trustees and directors as being to accept ultimate responsibility for directing the affairs of a charity, and ensure that it is solvent, well run and delivering charitable outcomes for the benefit of the public for which it has been set up.[121]

#### *5.6.4.1 Acquaintance with the property and the objects of the trust*

As elementary as it may seem, the first obligation of a trustee is to understand the trust instrument constituting the charity, the charity's property and records, and any limitations to which the charity is subject, then never to forget the objects and terms of the trust.[122]

Trustees must ensure that the charity does not breach any of the requirements or rules set out in its governing document and remains true to the charitable purposes and objects set out there. Trustees have to remain informed about all issues affecting the trust. They must adhere to the terms of the trust as set out in the constitutional document.

#### *5.6.4.2 Impartiality and acting without personal benefit*

Trustees must act with integrity and avoid any personal conflicts of interest or misuse of charity funds or assets. They must treat all beneficiaries with the same degree of fairness. Trustees must not be partial to, or influenced by, any one beneficiary.

Trustees should avoid, if possible, any situation where a conflict of interest might arise. Where it cannot be avoided, the trustee's interest must be declared, and that trustee should not take part in negotiations or decision-making.

Trustees must pay trust money only to the purposes identified in the trust deed. They will not be excused for giving money to non-charitable purposes even if they mistake the intention of the trust or take professional advice to do so.

Trustees must not benefit personally from being trustees. If the trust permits, they may be entitled to reasonable reimbursement for expenses they incur in carrying out their roles as trustees.

[118] *Trustee Act 1956*, s 38(2).

[119] High Court, Auckland, CP 438/SD02, 19 December 2003.

[120] *Re Roydhouse; Cockle v Roydhouse*, High Court, Auckland, CP 438/SD02, 19 December 2003 at [53].

[121] Charity Commission for England and Wales *The Essential Trustee: What You Need to Know*, February 2008 on the Commission's web site www.charity-commission.gov.uk/publications/cc3.asp.

[122] See *Hallows v Lloyd* (1888) 39 Ch D 686 at 691. See also von Dadelszen *Law of Societies in New Zealand*, above n 114, at 306.

#### *5.6.4.3 Payment of trustees*

The general rule concerning remuneration of trustees is that, in accordance with the rules of equity, trustees must not profit by their trust. Therefore, trustees are not, as a general rule, entitled to remuneration for their work for a trust, or to compensation for their personal trouble or for loss of time.[123]

Remuneration may be allowed where it is expressly or impliedly provided for in the instrument of trust.[124] However, the question of remuneration for trustees expressly allowed to charge for professional services has risen mostly in connection with solicitors and other business people who act as trustees, for example bankers, auctioneers, agents of various kinds and surveyors. It must be noted that clauses allowing charging for professional costs are strictly construed by the courts.[125]

The reason underlying the rule of remuneration for trustees is that the interest and duty of a trustee must not be put in conflict. In other words, no one who has a duty to perform shall place himself or herself in such a position that self-interest will conflict with that duty; if interest and duty do conflict, interest must give way.[126]

The United Kingdom has amended the *Charities Act 2006* to allow payments to trustees. However, strict conditions must be satisfied before payments may be approved. Among those conditions: the payments must be reasonable; the payments must be "for the best interest of the charity"; and at any time the number of paid trustees should be in a minority of the total number of trustees.[127]

#### *5.6.4.4 Conflict of interest*

Trustees must not put themselves in situations of a conflict of interest. A conflict of interest exists when a trustee is or may be or becomes associated with any entity with which the trustee is transacting or dealing in his or her capacity as trustee. A conflict of interest may also arise when a trustee is transacting or dealing as a trustee with himself or herself in another capacity. Finally, a conflict of interest exists when the interests or duty of a trustee in any particular matter conflicts or might conflict with his or her duty to the trust or any of its beneficiaries.

In *Cowan v Scargill*,[128] Sir Robert Megarry VC stated:

> *The starting point in the duty of trustees is to exercise their powers in the best interests of the present and future beneficiaries of the trust [...] this duty of the trustees towards their beneficiaries is paramount. They must of course obey the law, but subject to that they must put the interests of the beneficiaries first.*[129]

When a conflict of interest arises, the trustee for whom the conflict exists must declare the nature of the conflict or the potential conflict at a meeting of the trustees. The trustee must not take part in any deliberations or proceedings, including voting or other decision-making, relating to the conflict.

[123] *Peach v Jagger* (1910) 30 NZLR 423, 13 GLR 390. See also Garrow and Kelly 6th ed, above n 4, at 560-561.

[124] *Re Murray* [1967] NZLR 1 and *Stevens v Dalrymple* [1928] NZLR 95, [1928] GRL 466 (CA). See also Garrow and Kelly 6th ed, above n 4, at 561.

[125] *Harbin v Darby* (1860) 28 Bev 325; *In Re Fish, Bennett v Bennett* [1893] 2 Ch 413 (CA); *Clarkson v Robinson* [1900] 2 Ch 722; *In Re Chalinder and Herington* [1907] 1 Ch 58. See also Garrow and Kelly 6th ed, above n 4, at 565.

[126] *Re Ebbett* [1974] 1 NZLR 392; *Re Thompson's Settlement* [1985] 2 All ER 720. See also Garrow and Kelly 6th ed, above n 4, at 561.

[127] Hubert Picarda *The Law and Practice Relating to Charities* (Bloomsbury Professional Ltd, Haywards Heath, 2010) at 637-638.

[128] [1985] Ch 270.

[129] Ibid, at 286-287.

[130] Charity Commission for England and Wales *The Essential Trustee: What You Need to Know* (February 2008) on the Commission's website www.charity-commission.gov.uk/publications/cc3.asp.

#### 5.6.4.5 *Duty of prudence of trustees*

The Charity Commission for England and Wales has specified the duty of prudence of trustees as follows: "ensure that the charity is and will remain solvent. Use charitable funds and assets reasonably, and only in furtherance of the charity's objects. Avoid undertaking activities that might place the charity's endowment, funds, assets and/or reputation at undue risk. And take special care when investing the funds of the charity, or borrowing funds for the charity to use".[130]

Trustees also have a duty to use reasonable care and skill in their work as trustees, using their personal skills and experience as needed to ensure that their charities are well run and efficient. The test as to the requisite duty of care was set out at the end of the 19th century and is still applied today. In *Re Mulligan*,[131] Panckhurst J wrote:

> *The first [principle] is the duty of trustees to act with due diligence and prudence in the discharge of their duties. In* Re Speight, Speight v Gaunt *(1893) 22 Ch D 727 at 739 Jessell MR held that:*
>
> > *"A trustee ought to conduct the business of the trust in the same manner that an ordinary prudent man in business would conduct his own, and beyond that there is no liability or obligation on the trustees".*
>
> *However, the classic statement of Lindley LJ* in Re Whitely *(1886) 33 Ch D 347 at 355 is also important:*
>
> > *"The duty of a trustee is not to take such care only as a prudent man would take if he had only himself to consider, the duty rather is to take such care as an ordinary prudent man would take if he were minded to make an investment for the benefit of other people for whom he felt morally bound to provide".*[132]

#### 5.6.4.6 *Delegation of responsibilities*

In *Niak v Macdonald,*[133] the New Zealand Court of Appeal concluded that section 29(2) of the *Trustee Act* did not empower trustees to delegate powers on a general basis unless such delegation was specifically permitted by the trust instrument, was specifically permitted by statute, or was practically unavoidable and was usual in the ordinary course of business.

#### 5.6.4.7 *Accountability to the public*

Trustees must ensure that they follow the law and pay levies and money retained on the income tax for their employees. They must also pay Goods and Services Tax (GST) when applicable.

As outlined by the *Charities Act 2005*, trustees (and officers of other entities) must ensure that their charities comply with charity law and the relevant law – namely, not to hold themselves out as charities unless they are registered under the Act, to notify changes to Charities Services, and to prepare annual returns and financial statements as required by the Act.[134]

Trustees must keep their beneficiaries regularly informed and provide full details of the financial positions and performance of their trusts. To that effect, the *Charities Act 2005* obliges each charity to provide annual returns and financial statements.

[131] [1998] 1 NZLR 481.
[132] Ibid, at 500.
[133] [2001] 3 NZLR 334 at 338.
[134] See *Charities Act 2005*, ss 37-42.

## 5.7 Conclusion

A high proportion of entities registered with Charities Services are unincorporated trusts. This is not surprising, since charities first took the form of unincorporated trusts. Until recently, a trust was the main model for carrying out charitable purposes. Trusts are not legally recognised entities. Only trustees of a trust have legal status.

All trusts, whether they are private or charitable trusts, must adhere to the three certainties. In order to create a trust, an investigator or the court must be able to find an intention to do so. This intention is usually grounded in the fact that some trustees have been appointed by a settlor to administer some property or assets on behalf of some beneficiaries (in the case of a private trust) or for the promotion of charitable purposes (in the case of a charitable trust). The second certainty concerns the subject matter of the trust, that is the property or assets, which have been given to the trustees to administer. Where no property or asset has passed to the trustees, there is no trust because trustees cannot administer something that does not exist. Finally, the object of the trust must be certain. The object refers to the beneficiaries (in the case of a private trust) or to the purposes (in the case of a charitable trust). If there is any uncertainty concerning the persons whom it is intended to benefit, a private trust will fail. In that regard, the law treats charitable trusts differently.

Two main characteristics distinguish charitable trusts from private trusts. Firstly, charitable trusts are established for purposes while private trusts are established for the benefit of persons. Therefore, a beneficiary can ask the court to enforce a private trust. However, only the Attorney-General has standing to ask the court to administer a trust. Secondly, although all categories of trust are covered by some provisions of the *Charitable Trusts Act 1957*, only charitable trusts can be declared valid by the court even if they fail or become impossible to enforce. The *cy-près* doctrine was developed by equity specifically to avoid charitable trusts failing. Section 32 of the *Charitable Trusts Act 1957* has codified the *cy-près* doctrine in that regard. Part IV of the Act has the same effect in relation to funds raised by voluntary contributions. Finally, section 61B of the Act applies only to charitable trusts in cases where a trust has both charitable and non-charitable purposes and it is possible for the non-charitable purposes to be "blue pencilled" from the trust deed.

Because only the trustees have legal status in trusts, their roles are important. Trustees, and not the trusts, can be held responsible for the misappropriation or mismanagement of property or money. This is why the law puts such emphasis on the duties of trustees.

CHAPTER 6

# Incorporated trusts

Trusts can be of two types: unincorporated or incorporated. The New Zealand Charities Registration Board has registered some 26,000 entities, of which 16,000 are bodies corporate. Of these, most (9,050) are charitable trust boards incorporated under the *Charitable Trusts Act 1957*.

Unincorporated trusts have been discussed in the previous chapter. This chapter is devoted to trusts incorporated under the *Charitable Trusts Act 1957*, *Te Ture Whenua Māori Act 1993/Māori Land Act 1993* and other statutes.

## 6.1 Trusts incorporated under the *Charitable Trusts Act 1957*

As indicated by Heath J in *J H Tamihere & Ors v E Taumaunu & Ors*,[1] incorporated entities under the *Charitable Trusts Act 1957* can be of two kinds: those without membership and those with membership. Some consequences follow from incorporation under that Act.

### *6.1.1 Two types of charitable organisation under the Charitable Trusts Act 1957*

The Judge in *J H Tamihere & Ors v E Taumaunu & Ors*[2] distinguished the incorporation of trust boards under sections 7 and 8 of the *Charitable Trusts Act 1957*. Under section 7, trustees of any trust that is exclusively or principally for charitable purposes may apply to register as a board. As cited by Heath J, "a trust board is not in law an organisation structured along democratic lines, nor is it susceptible to democratic processes".[3]

On the other hand, section 8 of the Act allows any society that exists exclusively or principally for charitable purposes to apply to the Registrar for the incorporation of the society as a board. Heath J considered that such "a charitable society with members is an organisation structured along democratic lines, and is susceptible to democratic process".[4]

Entities registered under the *Charitable Trusts Act 1957* are not necessarily exclusively charitable because they can be incorporated under the Act if they are principally charitable. In that respect, the Act defines "charitable" very broadly. For the purpose of incorporation, "charitable purposes" include, in addition to every purpose that in accordance with the law of New Zealand is charitable, every purpose that is religious or educational whether or not it is charitable according to the law of New Zealand.[5] In fact, only about half (9,050 of 18,028) of all boards incorporated under that Act are registered.[6]

### *6.1.2 Characteristics of boards*

One of the consequences of incorporation under the *Charitable Trusts Act 1957* is that a board is created,[7] which becomes a body corporate with "perpetual succession and a common seal and shall be capable of holding real and personal property of whatsoever nature and of suing and being sued".[8] The Act provides that the name of the board need not include the word "Trust Board" or any of the following words: "Trust", "Board", "Society" and "Incorporated".[9]

1 HC AK CIV 2005-404-6958 [21 December 2005].
2 Ibid, at [33].
3 Ibid.
4 Ibid.
5 *Charitable Trusts Act 1957*, s 2.
6 See Charities Commission *A Snapshot of New Zealand's Charitable Sector. A Profile of Registered Charities as at 31 October 2009*: www.charities.govt.nz/news/fact_sheets/stats_091206.pdf at 12.
7 *Charitable Trusts Act 1957*, ss 7-8.
8 Ibid, s 13.
9 Ibid, s 15(2).

Consequently, an incorporated trust under this Act is a legally constituted entity, contrary to a trust, which does not have legal status. That legal entity is administered or governed by a board. That board can be constituted by persons, but can also be a body corporate, such as the Public Trust.

As indicated above, a board incorporated under the *Charitable Trusts Act 1957* may be incorporated as a trust or as a society. If it is incorporated as a trust, that entity becomes a body corporate consisting of the persons who are for the time being the trustees of the trust.[10] By contrast to the trustees of an unincorporated trust, the trustees of an incorporated trust are not personally responsible as trustees unless they are held liable to third parties for the board's breach of trust or fiduciary duty if they have knowingly assisted the board in that breach.[11]

Another effect of incorporation under the Act is to "immediately vest without transfer, conveyance or assignment in the Board any property, contracts and equities" held by the trustees of the trust or by the society.[12]

### *6.1.3 Responsibilities of the board and its members*

The New Zealand Charities Registration Board has taken a somewhat surprising stance in its analysis of trusts incorporated under the *Charitable Trusts Act 1957*. It considers that if an entity incorporated under section 7 of the *Charitable Trusts Act 1957* is a trust, then it does not need to have clauses preventing private pecuniary profit because the fiduciary duties imposed on trustees by the common law also apply to them.

However, this position is open to criticism because an incorporated trust is administered by a board and not by individual trustees. The effect of section 14 of the Act is that "the obligations imposed by the constitution apply only to the board and not to its individual members. There is therefore no potential for members becoming liable as a trustee after the incorporation".[13]

The members of a board are in a similar situation to directors of an incorporated society.[14] On the other hand, contrary to the *Incorporated Societies Act 1908*, whose sections 4, 5 and 20 prohibit members from deriving private pecuniary profit from the incorporated society, the *Charitable Trusts Act 1957* does not prohibit members of a board from deriving private pecuniary profit. It would normally follow that in order to be registered as charitable entities by the Charities Registration Board, incorporated charitable boards (trusts and societies alike) should have a specific clause in their constitutions prohibiting private pecuniary profit.

### *6.1.4 Dissolution of trust boards incorporated under the* Charitable Trusts Act 1957

Trusts or societies incorporated as boards under the *Charitable Trusts Act 1957* may be liquidated or dissolved involuntarily or voluntarily.

#### *6.1.4.1 Involuntary liquidation*

Involuntary liquidation can be initiated in two ways: by a court order or the action of the Registrar. The High Court can appoint a liquidator if the Court is satisfied that "it is just and equitable that the Board should be put into liquidation".[15] Such action by the Court will be prompted by an application to the Court to put a board into liquidation presented by the Attorney-General or the board, a member, a creditor, the Registrar or any interested person.[16] In *Misa v Congregational Christian Church of Samoa (Wainuiomata) Trust Board*,[17] the petitioner and over half of the congregation petitioned for a share of the assets because they wanted to form a new congregation. The Court held that the petitioner had

[10] Ibid, s 11(2).

[11] Kerry Ayers and Daniel French *Incorporated Charitable Trusts* [1999] NZLJ 71 at 72. See also Gino Dal Pont *Charity Law in Australia and New Zealand* (Oxford University Press, Oxford, 2000) at 384-385.

[12] *Charitable Trusts Act 1957*, s 14(1).

[13] Ayers and French "Incorporated Charitable Trusts", above n 11, at 71.

[14] Ibid, at 71-74.

[15] *Charitable Trusts Act 1957*, s 25(1).

[16] Ibid, s 25(2).

[17] [1984] 2 NZLR 461 (CA).

a genuine interest in the administration and disposal of the assets of the Trust Board. The Court allowed the petitioner to place before the Court the evidence on which he and those whom he represented sought the making of a liquidation order.

A petition for a liquidation order can be brought by a creditor. However, the inability of a charitable trust board to pay its debts is not expressly a ground upon which a liquidation order might be made. This is because alternative remedies may be available to the petitioner, such as an action against the trustees for breach of their fiduciary duties.[18] Margaret Soper wrote that "there is no statutory presumption of insolvency created by failure [of a creditor] to comply with a properly prepared and delivered notice within a period of 21 days. However, such a failure to comply is one factor which must be brought to account when the Court looks at the question of insolvency if satisfied that a debt is properly due and that a charitable trust board has not paid it".[19]

The Registrar may also effect an involuntary liquidation. He or she may inquire as to whether or not the board is still carrying on its operations. If he or she receives no reply within six months of posting the letter, he or she may consider that the board is no longer carrying on its operations.[20] He or she can also revoke the incorporation if he or she is satisfied that it was made in error or ought to be revoked.[21] He or she also has power to liquidate a trust board when he or she "is satisfied that a Board is no longer carrying on its operations or has registered by reason of a mistake of fact or law".[22] He or she shall thereupon publish the declaration in the *Gazette* and make in the register an entry of the dissolution of the board.[23]

*6.1.4.2 Voluntary liquidation*

The voluntary liquidation of a society incorporated as a board may be put into motion by its members passing a resolution appointing a liquidator at a general meeting. That resolution must be confirmed at a subsequent general meeting called for that purpose between 28 and 42 days after the first resolution.[24]

Voluntary dissolution by a trust board is also possible. Upon the dissolution or liquidation of a board, section 27 of the Act provides that "all surplus assets after the payment of all costs, debts, and liabilities shall be disposed of as the Court directs".[25]

In *Canterbury Orchestra Trust v Smitham*,[26] the Court of Appeal expressed the opinion that sections 25, 26 and 27 of the *Charitable Trusts Act 1957* did not oust the right of the founder of a charitable trust to make his or her own provisions as to the circumstances during which the trust was to endure and as to the destination of the funds on a failure of the primary trust.[27]

However, where such a liquidation clause exists, it must ensure that the trust property will be maintained exclusively for charitable purposes; otherwise the trustees could be held liable for applying the trust's funds to purposes that are not charitable. The New Zealand Charities Registration Board stresses that surplus assets must be directed to similar charitable purposes. It considers that having similar objects is not sufficient because not all similar purposes may be charitable and this could allow surplus assets to go to non-charitable purposes.

The New Zealand Charities Registration Board accepts the following clauses as being sufficient to ensure that surplus assets are directed to charitable purposes. A trust deed may refer to dissolution in accordance with section 27 of the *Charitable Trusts Act 1957,* that is, as the courts direct. Following the *cy-près* doctrine, a court will direct that the surplus assets of a charitable trust board be directed to similar charitable purposes, as close as possible to the initial intention of the settlor.

[18] *Re Wellington Regional Housing Trustees* [1980] 2 NZLR 14.

[19] Margaret Soper *Laws of New Zealand – Charities*, Wellington, Butterworths, 1994, at [123] ["Charities"] citing *Southern Lights Floral Export Ltd v Ngati Kahu Trust Board* (High Court, Whangarei, M 103/93, 18 March 1994, Master Towle).

[20] *Charitable Trusts Act 1957*, s 26(4).

[21] Ibid, s 26(3).

[22] Ibid, s 26(1).

[23] Ibid, s 26(1).

[24] Ibid, s 24(1).

[25] Ibid, s 27.

[26] [1978] 1 NZLR 787.

[27] Ibid, at 798 per Richmond P and Cooke J.

The trust deed may also clearly indicate what is to be done with surplus assets. It is acceptable to give assets and funds to a named organisation on dissolution if the named organisation has exclusively charitable objects. It is acceptable for assets and funds to be given to a local authority either outright or on trust for a particular charitable purpose.[28] Finally, the assets and funds may be returned to the original donor on dissolution. Assets and funds may be loaned to an organisation on the basis that they will be returned to the donor if the charitable purposes are no longer carried out. This will not be private pecuniary profit because the donor will simply be resuming his or her own property.[29]

### 6.2 Trusts incorporated under legislation specific to Māori

In New Zealand, trusts may also be incorporated under *Te Ture Whenua Māori Act 1993 (Māori Land Act 1993*) or as Māori trust boards and Māori reservations.

#### *6.2.1 Māori Land Court trusts*

Under *Te Ture Whenua Māori Act 1993/Māori Land Act 1993*, the Māori Land Court has jurisdiction to constitute trusts over Māori land and general land owned by Māori. The purpose of the Act is to promote the retention of Māori land in the hands of its owners and their whānau and hapū and to facilitate the occupation, development and utilisation of that land for the benefit of its owners and their whānau and hapū.

A landowner can set up a trust by holding a meeting, nominating trustees to manage his or her property interest and then apply to the Māori Land Court. It is the Court order, not the nomination, that appoints the trustees to administer the trust's assets for the general benefit of the beneficiaries.

*6.2.1.1 Types of Māori trust under* Te Ture Whenua Māori Act 1993/Māori Land Act 1993

There are five types of trust that can be created under the Act.

(i) Ahu Whenua Trust

This is the most common type of Māori land trust. Section 215(2) of the Act provides that "an ahu whenua trust may be constituted where the Court is satisfied that the constitution of the trust would promote and facilitate the use and administration of the land in the interests of the persons beneficially entitled to the land".

Ahu Whenua Trusts manage whole blocks of Māori freehold land. They are sometimes used for commercial operations and are the choice of trust for farming operations of Māori freehold land. There are about 5,500 ahu whenua trusts.[30]

(ii) Whenua Topu Trust

This kind of trust is an iwi- or hapū-based land trust. Section 216(2) provides that "a whenua topu trust may be constituted where the court is satisfied that the constitution of the trust would promote and facilitate the use and administration of the land in the interests of the iwi or hapū". This is a land management trust and involves whole blocks of land. This type of trust is used for receiving Crown land as part of any settlement.

[28] *Lysons v Commissioner of Stamp Duties* [1945] NZLR 738 is authority for the proposition that a gift for the benefit of the inhabitants of a parish or town is charitable.

[29] *Re Gillingham Bus Disaster Fund* [1958] 1 Ch 300. See also Gino Dal Pont *Law of Charity* (LexisNexis/Butterworths, Australia, 2010) at 398-399.

[30] Office of the Minister of Commerce *Review of Financial Reporting Framework: Primary Issues* (February 2011) at [108].

(iii) Kaitiaki Trust

A kaitiaki trust relates to an individual who is a minor or has a disability and is unable to manage his or her affairs. It can include all of an individual's assets. Section 217(5) of the Act provides that "a kaitiaki trust may be constituted where the Court is satisfied that the constitution of the trust would best protect and promote the interests of the person under disability".

(iv) Whānau Trust

A whānau trust is a whānau-oriented trust. It allows the whānau to bring together their Māori land interests for the benefit of the whānau and their descendants. Section 214(3) of the Act provides that "the land, money, and other assets of a whānau trust shall be held, and the income derived from those assets shall be applied, for the purposes of promoting the health, social, cultural and economic welfare, education and vocational training, and general advancement in the life of the descendants of any tipuna (whether living or dead) named in the order".

(v) Putea Trust

A putea trust allows the owners of small and uneconomic interests to pool their interests. Section 212(6) provides that "the land, money, and other assets of a putea trust shall be held for Māori community purposes".

*6.2.1.2 Can any of the trusts established under the* Te Ture Whenua Māori Act 1993/ Māori Land Act 1993 *be charitable?*

Most of the trusts established under *Te Ture Whenua Māori Act 1993/Māori Land Act 1993* cannot be charitable because they are established for the benefit of individuals. It is clear that a kaitiaki trust cannot be charitable. Such a trust is established to promote the interests of a person with a disability. It is therefore established for the benefit of one person.

Ahu whenua trusts are not charitable. This is because they are established for the benefit of persons beneficially entitled to the land. They are therefore trusts established for the benefit of persons and not for the benefit of the public.

Most whānau trusts are not charitable. They are similar to family trusts established for the benefit of the whānau and their descendants. Such trusts could, however, be charitable. This is because they are established for the purposes of promoting the health, social, cultural and economic welfare, education and vocational training, and general advancement in the lives of the descendants of any person, living or dead, named in the order. This can therefore be a trust established for charitable purposes. Such trusts can be charitable since most of the purposes for which they are established can be charitable at law. The main question that arises is whether they provide public benefit. The answer was easy before the adoption of section 5(2) of the *Charities Act 2005* because courts considered that trusts established for beneficiaries who were related by blood to the settlors did not provide sufficient public benefit. However, section 5(2) of the *Charities Act 2005* has removed that impediment. Therefore, a whānau trust could provide public benefit if it is not a family trust and if the beneficiaries are sufficiently numerous, thus representing a section of the public.

A whenua topu trust could be charitable. This is because such a trust is not established in the interests of individuals, but in the interest of the iwi or hapū. This type of trust is used

for receiving Crown land as part of any settlement. Here again, the New Zealand Charities Registration Board has to analyse whether such a trust has been established for charitable purposes and if it provides public benefit.

Finally, a putea trust could be charitable if it is established for charitable purposes and provides sufficient public benefit. However, if such a trust is established for the benefit of individuals or for purposes that are not charitable, it cannot receive charitable status.

The trusts established under *Te Ture Whenua Māori Act 1993/Māori Land Act 1993* seem to be a cross between unincorporated and incorporated trusts. On the one hand, they are officially recognised by the Māori Land Court and as such their existence is made public. On the other hand, the Court does not appoint boards but trustees to administer the trusts. Therefore, these trustees are in a fiduciary relationship to the trust property and cannot derive any private pecuniary profit from the trusts. Consequently, the trust deeds or constitutions do not have to provide specifically that trustees may not derive any private pecuniary profit from the trusts. Their fiduciary duties oblige them to spend the money exclusively for the purposes of the trusts.

*6.2.1.3 Termination of Māori trusts that are charitable*

A Māori trust may be terminated on application to the Māori Land Court. The application can be made by anyone, although it is normally made by the trustees and should follow a meeting at which the termination was considered by the beneficial owners. When the Court terminates the trust, the ownership of the land reverts to the current beneficial owners of that land or whoever the Court determines to be entitled to the land.

Section 241 of *Te Ture Whenua Māori Act 1993/Māori Land Act 1993* reads as follows:

> *241 Termination of trust*
>
> *(1) The Court may at any time, in respect of any trust to which this Part applies, terminate the trust in respect of –*
>
> *(a) The whole or any part of the land; or*
>
> *(b) The whole or any part of any interest in land subject to the trust, –*
>
> *by making an order vesting that land or that part of that interest in land in the persons entitled to it in their respective shares, whether at law or in equity, or in such other persons as the beneficial owners may direct.*
>
> *(2) Where a trust terminated under subsection (1) of this section is a whānau trust, the Court shall, notwithstanding anything in subsection (1) of this section, make an order vesting the land or the part of the land or the interest in the land in the persons entitled to it in their respective shares, whether at law or in equity, which persons are –*
>
> *(a) The persons who were, at the creation of the trust and are at the date of the order, the beneficial owners of the land or the part of the land or the interest in the land; and*

*(b) Any persons who, at the date of the order, are successors of any of the persons who were, at the creation of the trust, the beneficial owners of the land or the part of the land or the interest in the land.*

According to that section, if a trust is dissolved, the land might go to an individual and therefore would not be maintained for exclusively charitable purposes. Two distinct alternatives are possible in situations where the trust is for charitable purposes. First, the fact that the property returns to its beneficial owners can be seen as a reversion of the property to the owners having title to the land before it was set aside. In cases of reversion to a donor or previous owner, he or she will simply be resuming his or her own property, and therefore will not derive any private pecuniary profit from the property reverting to him or her.[31]

Secondly, the fact that section 241 of *Te Ture Whenua Māori Act 1993/Māori Land Act 1993* directs where the surplus assets shall go may be seen as a statutory exception to the general rule that, upon liquidation or dissolution, the assets shall be transferred to exclusively charitable purposes. If the Charities Registration Board were to apply strictly the general rule requiring a clause stating that the assets are to be transferred to exclusively charitable purposes, it would be impossible for the applicants to meet this requirement because the High Court has a power under the relevant Act to direct surplus assets otherwise. Moreover, if a Māori trust has charitable status, a judge would have to apply the *cy-près* doctrine upon its dissolution. The surplus assets would have to be directed to similar charitable purposes.

### *6.2.2 Māori trust boards*

The *Māori Trust Boards Act 1955* established 12 Māori trust boards (of which two have since been repealed) as legal entities with perpetual succession and a common seal.[32] The trustees are elected by the beneficiaries, which are identified either in the specific section creating each board or by the Māori Land Court. They must act in accordance with the legal obligations as set out in the *Māori Trust Boards Act 1955*. The Act is administered by Te Puni Kōkiri and the boards are ultimately accountable to the Minister of Māori Affairs.

Māori trust boards have body corporate status and the main function of each board is to administer the board's assets for the general benefit of the beneficiaries. The boards also have discretion to apply money for the benefit or advancement of the beneficiaries and are permitted to spend money on the promotion of health, education, vocational training, and the social and economic welfare of the beneficiaries.[33]

Trusts constituted under the *Māori Trust Boards Act 1955* are not necessarily charitable. However, section 24B of the Act provides that a board may execute a declaration of trust that it stands possessed of all or part of its property upon trust for charitable purposes. Section 24B was inserted into the Act by section 3 of the *Māori Trust Boards Amendment Act 1962*. Such a declaration has to be approved by the Commissioner of Inland Revenue before it has any force. Once it has been approved by the Commissioner, the board is deemed to derive the income from the designated property in trust for charitable purposes.[34]

Inland Revenue[35] has written that there are two possible interpretations of the meaning of section 24B of the *Māori Trust Boards Act*. The first interpretation is that a declaration can only be made under section 24B(1) if the purposes of the trust are exclusively charitable, "charitable" being interpreted using the common law meaning of the term.

[31] See *Beggs v Kirkpatrick* [1961] VR 764 at 770 and *Re Gillingham Bus Disaster Fund* [1958] 1 Ch 300.

[32] Ss 3-12. The relevant entities are: Aorangi Māori Trust Board; Arawa Māori Trust Board (repealed); Aupori Māori Trust Board; Te Runanga o Ngai Tahu (Ngai Tahu Māori Trust Board); Ngati Whatua o Orakei Māori Trust Board; Tainui Māori Trust Board (repealed); Taitakerau Māori Trust Board; Taranaki Māori Trust Board; Tuhe-Waikaremoana Māori Trust Board; Tuwharetoa Māori Trust Board; Wairoa-Waikaremoana Māori Trust Board and Whakatohea Māori Trust Board.

[33] Ibid, s 24(2) reads as follows:

24 (2) Without limiting the general provisions hereinbefore contained, it is hereby declared that each Board may, from time to time, subject to the provisions of this Act, apply money towards all or any of the following purposes:

*(a)* The promotion of health:

*(i)* By installing or making grants or loans towards the cost of installing water supplies, sanitation works, and drainage in Māori settlements;

*(ii)* By promoting, carrying out, or subsidising housing schemes, or by making grants or loans for any such schemes; or

*(iii)* By providing, subsidising, or making grants for medical, nursing, or dental services:

*(b)* The promotion of social and economic welfare:

*(i)* By making grants or loans for the relief of indigence or distress;

*(ii)* By developing, subsidising, or making grants or loans for farming or other industries;

*(iii)* By making grants or loans towards the cost of the construction, establishment, management, maintenance, repair, or improvement of Māori meeting houses, halls, churches, and church halls, villages, maraes, or cemeteries;

*(iv)* By establishing, maintaining, and equipping hostels for the purpose of providing either permanent or temporary accommodation;

*(v)* By making grants or loans towards the establishment of recreational centres for the common use of any Māori community and for such other uses as the Board thinks fit;

*(vi)* By promoting, carrying out, or subsidising roading schemes, power schemes, or such other schemes as the Board thinks fit, or by making grants or loans for any such schemes; or

*(vii)* By purchasing, acquiring, holding, selling, disposing of, or otherwise turning to account shares in any body corporate that has as one of its principal objects the economic or social advancement of Māoris, or the development of land:

The second interpretation is that the income of a section 24B trust can be applied for any of the purposes referred to in section 24 or 24A – whether those purposes are charitable under general law or not. This is because any income derived by the trust is deemed by section 24B(2) to be income derived for charitable purposes for the *Income Tax Act*.

In *Arawa Māori Trust Board v Commissioner of Inland Revenue*,[36] Donne SM ruled that a trust established by the Arawa Māori Trust Board was not charitable for two reasons. Firstly, many of the purposes specified in section 24 of the *Māori Trust Boards Act 1955* were not charitable purposes under the general law; and secondly, the Trust failed the public benefit test because it was for the benefit of a group of persons determined by their bloodline, or whakapapa. The Court determined that such a group of people did not satisfy the public benefit test.

Inland Revenue took the view that the background papers relating to the introduction of section 24B, including *Hansard*, indicated that the new section was intended to remedy the concern, at the time, that trusts established by Māori trust boards were not considered charitable in terms of both the common law and the income tax legislation.

Inland Revenue, however, has noted that section 24B(2) of the *Māori Trust Boards Act* only modifies the requirements of the *Income Tax Act*. It does not apply for any other purposes. Therefore, whatever may be the position of such a trust under common law and irrespective of whether the public benefit test would fail in other contexts, the Commissioner is satisfied that in this provision Parliament intended a trust established under section 24B to be treated as being a charitable trust for income tax purposes. The income of such a trust is therefore treated as having been derived for charitable purposes and as such is exempt from income tax.

Nevertheless, before that exemption can be applied, the requirements of section 24B(3) must be satisfied. That section requires a declaration of trust under section 24B(1) to be approved by the Commissioner of Inland Revenue before it will take effect. The Commissioner must still be satisfied that the constituting documents of the trust meet the legal requirements of a charitable trust, other than the public benefit test discussed above.

As has been outlined earlier in this commentary, section 24B(2) of the *Māori Trust Boards Act 1955* modifies the general law requirements of a trust established under subsection (1) to the extent that the trust is not required to satisfy the meaning of "charitable purpose" or the public benefit test. However, before such a trust will be approved by the Commissioner under section 24B(3) as wholly exempt from tax, the trust must meet the other criteria of a charitable trust.

For example, the Commissioner must also be satisfied that the declaration of trust provides that: (1) the charitable activities are restricted to New Zealand; (2) the rules of the trust cannot be changed in order to allow the income of the trust to be applied to purposes that are not specified in sections 24 or 24A of the *Māori Trust Boards Act*, or to otherwise affect the charitable nature of the trust; (3) no person is able to derive a private pecuniary profit from the trust; (4) trustees are unable to materially influence their remuneration; (5) professional services provided by trustees to the trust are provided at commercial rates and conflicts of interest are avoided; and (6) upon winding up, any remaining trust assets must be applied for charitable purposes.

These trust boards are constituted in perpetuity.[37] Furthermore, the beneficiaries cannot derive any private pecuniary profit from the trust boards[38] and cannot acquire any vested interest in the property.[39]

*(c)* The promotion of education and vocational training:

*(i)* By assisting in the establishment of schools, and in the equipping, managing, and conducting of schools; by making grants of money, equipment, or material to schools or other educational or training institutions; or by making grants to funds established or bodies formed for the promotion of the education of Māoris or for assisting Māoris to obtain training or practical experience necessary or desirable for any trade or occupation;

*(ii)* By providing scholarships, exhibitions, bursaries, or other methods of enabling individuals to secure the benefits of education or training, or by making grants to Education Boards or other educational bodies for scholarships, exhibitions, or bursaries;

*(iii)* By providing books, clothing, or other equipment for the holders of scholarships or other individuals, or by making grants for any such purpose; or by making grants generally for the purpose of assisting the parents or guardians of children to provide for their education or training for any employment or occupation;

*(iv)* By providing, maintaining, or contributing towards the cost of residential accommodation for children in relation to their education or training; or

*(v)* By the promotion of schemes to encourage the practice of Māori arts and crafts, the study of Māori lore and history, and the speaking of the Māori language:

*(d)* Such other or additional purposes as the Board from time to time determines.

34 Ibid, s 24B.

35 Public Ruling – BR Pub 01/07, on IRD's web site: www.ird.govt.nz/resources/2/3/2396c3004bbe403d968cd6bc87554a30/pu01007.pdf.

36 (1961) 10 MCD 391.

37 *Māori Trusts Boards Act 1955*, s 13.

38 Ibid, s 24(3) which reads as follows:

24(3) Nothing in this section shall be deemed to preclude any Board from applying money for the general benefit of a group or class of persons, notwithstanding that the group or class of persons includes persons other than beneficiaries; but no grant or loan shall be made to any individual for his exclusive benefit unless he is a beneficiary.

39 Ibid, s 35.

When a section 24B trust has previously obtained the approval of the Commissioner, as required by section 24B(3) of the *Māori Trust Boards Act*, that approval will continue to apply. Approval given by the Commissioner under section 24B(3) cannot be revoked. However, continued tax exemption in respect of the income of the trust is dependent on the trust continuing to apply its income for the purposes specified in the declaration.

### *6.2.3 Māori reservation and marae*

A Māori reservation can be established over Māori freehold and general land under *Te Ture Whenua Māori Act 1993/Māori Land Act 1993*. Typically, reservations may be set aside over land that is culturally, spiritually or historically significant to Māori. A Māori reservation can be set up and used for a number of purposes. For instance, part of a reservation can be set aside for a marae (meeting hall), part for a sports ground and part for an urupā (cemetery or burial ground). The important thing is that it is for the common use or benefit of the Māori owners of the class or classes specified in the required New Zealand Government *Gazette* notice.

A Māori reservation may be vested by the Māori Land Court in any body corporate or in any two or more persons on trust, and therefore this controlling entity will usually meet the Māori authority eligibility criteria. This entity is answerable to the Māori Land Court. The main function of the corporation or the trustees is to administer the reserve for the beneficiaries named in the Māori Land Court order. The beneficiaries are usually a hapū, although it is possible to set a reservation aside for a local community or even for the people of New Zealand.

Under section 5(2)(b) of the *Charities Act 2005*, which is the re-enactment of an amendment adopted in 2003 to the *Income Tax Act 1994*, a marae is deemed to be charitable if certain conditions are met. It must be situated on a reservation and the funds must be used exclusively for the administration and maintenance of the land and the physical structure of the marae or for exclusively charitable purposes. The relevant section reads as follows:

> *5(2)(b) A marae has a charitable purpose if the physical structure of the marae is situated on land that is a Māori reservation referred to in* Te Ture Whenua Māori Act 1993 (Māori Land Act 1993*) and the funds of the marae are not used for a purpose other than –*
>
> *(i) the administration and maintenance of the land and of the physical structure of the marae;*
>
> *(ii) a purpose that is a charitable purpose other than under this paragraph.*

The New Zealand Charities Registration Board requires proof that the entity is a marae established on a reservation. Such a requirement can be satisfied by providing the *Gazette* notice of the piece of land being set aside as a reservation. If the entity has not provided a copy of the *Gazette* notice, but has supplied the legal description of the land or the formal marae name, the Charities Services analyst can check the *Gazette*.

The marae that seeks charitable status is required to have a governing document. Section 17(1)(c) of the *Charities Act 2005* requires that the application form "be accompanied by a copy of the rules of the entity". As well as being a legal document conferring authenticity on the entity concerned, the document is an instruction manual for the charity trustees, board members and executive.[40]

[40] Inland Revenue *Marae Taxing Issues* (September 2004) at 40-42.

Although a marae is presumed to have charitable purposes, it must still show that it provides public benefit. The common law restriction to entities established for people related by blood has been modified by section 5(2)(a) of the *Charities Act 2005*. Under that section, the purpose of a trust, society or institution is charitable under the Act if the purpose would satisfy the public benefit requirement apart from the fact that the beneficiaries of the trust, or the members of the society or institution, are related by blood. Since a marae is established for the benefit of a community, the New Zealand Charities Registration Board considers that it provides public benefit to a sufficient portion of the public to be considered charitable.

When deciding if a marae is charitable, the New Zealand Charities Registration Board must ensure that there is no possibility of private pecuniary profit. This involves checking that: the funds are applied to these charitable purposes; the entity is not simply being used to channel funds to non-charitable purposes; the ability to alter the rules will not put the entity in breach of its charitable status; no individual can privately benefit; interested members have declared their interest and do not take part in decision-making where they have a declared interest; all commercial transactions are at current commercial rates; and remuneration for any services actually provided is reasonable and at market rates.[41]

In order for a marae to be charitable, it must also be maintained exclusively for charitable purposes. This means that upon liquidation the assets should be directed to exclusively charitable purposes. However, section 338(9) of *Te Ture Whenua Māori Act 1993*/*Māori Land Act 1993* provides that:

> *Upon the exclusion of any land from a reservation under this section or the cancellation of any such reservation, the land excluded or the land formerly comprised in the cancelled reservation shall vest, as of its former estate, in the persons in whom it was vested immediately before it was constituted as or included in the Māori reservation, or in their successors.*

Two interpretations can be given to this clause. First, it can be seen as a reversion of the property to the beneficial owners of the land before it was declared a marae. In cases of reversion to a donor or previous owners, they will simply be resuming their own property and therefore will not derive any private pecuniary profit from the property reverting to them.[42]

Second, the fact that *Te Ture Whenua Māori Act 1993*/*Māori Land Act 1993* directs where the surplus assets shall go may be seen as a statutory exception to the general rule that upon liquidation or dissolution the assets shall be transferred to exclusively charitable purposes.[43] If he New Zealand Charities Registration Board were to apply strictly the general rule requiring a clause stating that the assets were to be transferred to exclusively charitable purposes, it would be impossible for the applicants to meet it, because the High Court has a power under section 338(9) of the Act to direct it otherwise. Furthermore, since section 5(2)(b) of the *Charities Act 200*5 provides that a marae (land that is a Māori reservation referred to in *Te Ture Whenua Māori Act 1993*/*Māori Land Act 1993*) can be registered, surely the *Charities Act* would not have meant to impose impossible conditions on such marae, like having a normal winding-up clause, which is impossible since section 338(9) of *Te Ture Whenua Māori Act 1993*/*Māori Land Act 1993* already directs how the land shall be dealt with upon liquidation or dissolution.

[41] Ibid, at 35.

[42] *Beggs v Kirkpatrick* [1961] VR 764 at 770; *Re Gillingham Bus Disaster Fund* [1958] 1 Ch 300.

[43] See Audrey Sharp and Fiona Martin "Charitable Purpose and the Need for a Public Benefit: A Comparison of the Tax Treatment of Australian and New Zealand Charities for Indigenous Peoples" (2009) 24 *Australian Tax Forum* 207 at 232.

## 6.3 Trusts incorporated under other statutes

Trusts may also be incorporated under special statutes. Examples of such entities are certain community trusts and trusts established by statute for the benefit of churches or for specific organisations that specific statutes have deemed to be charitable.

### *6.3.1 Community trusts*

A community trust is a "community trust established under Part 2 of the *Trustee Banks Restructuring Act 1988* to acquire the shares in the capital of a trustee bank's successor company".[44] Property vested in or belonging to a community trust must be held on trust to be applied for charitable, cultural, philanthropic, recreational and other purposes that are beneficial to the community, principally in the area or region of the trust. Section 12(2) of the *Community Trusts Act 1999* deems a community trust to be a charitable trust for the purposes of the application to a community trust of any enactment or rule of law.

These community trusts are regional and exist to provide funding for a variety of sporting and community activities. Twelve community trusts have been established under the *Community Trusts Act 1999*.[45]

### *6.3.2 Other trusts deemed charitable by statute*

Parliament has adopted a number of statutes creating trusts that have been deemed to have charitable purposes. The following have been deemed to have charitable purposes by legislation: Auckland Museum Trust Board;[46] Eastwoodhill Trust Board;[47] Museum of Transport and Technology Board;[48] New Zealand Game Bird Habitat Trust Board;[49] New Zealand Railways Staff Welfare Trust;[50] Orton Bradley Park Board;[51] Royal New Zealand Foundation of the Blind;[52] and War Pensions Medical Research Trust Fund.[53]

## 6.4 Conclusion

Unincorporated trusts are not legal entities. However, incorporated trusts or trusts created by the Māori Land Court are legally recognised through diverse mechanisms. This chapter has explored three different mechanisms for such recognition: trusts incorporated under the *Charitable Trusts Act 1957*, trusts incorporated under legislation specific to Māori, and trusts incorporated through different statutes.

Trusts incorporated under the *Charitable Trusts Act 1957* are bodies corporate administered by boards. These boards have all the powers to administer the entities. Their members are not liable individually and we cannot rely on their fiduciary duties to ensure that they do not derive any private pecuniary profit.

Most trusts created by the Māori Land Court are trusts for the benefit of individuals. As such they are not charitable. Some of those trusts, however, can be charitable if they have exclusively charitable purposes, do not allow for private pecuniary profit and are maintained for charitable purposes upon liquidation. For example, whenua topu trusts and putea trusts are the main types of trust created by the Māori Land Court likely to be charitable if they meet the conditions mentioned earlier. Māori trust boards can be charitable if the boards file declarations that the trusts will have exclusively charitable purposes. Finally, Māori reservations and marae are deemed to be charitable if they use their funds exclusively for the maintenance of the land and the structures built on it or for charitable purposes.

Some trusts are constituted by specific acts of Parliament, such as community trusts and other trusts specifically deemed to be charitable.

[44] *Community Trusts Act 1999*, s 4.

[45] The 12 community trusts are: Bay of Plenty Community Trust Incorporated, Eastern and Central Community Trust Incorporated, the ASB Community Trust, the Canterbury Community Trust, the Community Trust of Mid and South Canterbury Incorporated, the Community Trust of Otago Incorporated, the Community Trust of Southland, the Waikato Community Trust Incorporated, Trust Bank Wellington Community Trust, TSB Community Trust, West Coast Community Trust and Whanganui Community Foundation Incorporated.

[46] *Auckland War Memorial Museum Act 1996*, Local Act, s 10(1).

[47] *Eastwoodhill Trust Act 1975*, Private Act, s 16.

[48] *Museum of Transport and Technology Act 2000*, Private Act, s 11(1).

[49] *Wildlife Act 1953*, s 44I(3).

[50] *New Zealand Railways Staff Welfare Society Dissolution Act 1999*, s 9.

[51] *R O Bradley Estate Act 1972*, Private Act, s 13.

[52] *Royal New Zealand Foundation of the Blind Act 2002*, Private Act, s 9.

[53] *War Pensions Act 1954*, s 18P.

CHAPTER 7

# Societies: incorporated and unincorporated societies

People who share similar interests, hobbies or philosophies usually establish societies. In contrast to limited companies, however, these societies are established by people who do not pursue profit but associate for non-profit purposes. These purposes are not necessarily charitable even if they are established not for profit. They can be incorporated under different acts of Parliament, namely the *Incorporated Societies Act 1908*, the *Charitable Trusts Act 1957* and specific private Acts. Some societies are not incorporated.

## 7.1 Incorporated societies

Societies can be incorporated under different acts of Parliament, namely the *Incorporated Societies Act 1908*, the *Charitable Trusts Act 1957* and specific private Acts. Each type of incorporation is described briefly below.

### *7.1.1 Incorporated under the* Incorporated Societies Act 1908

The main method of incorporation of societies is to proceed under the *Incorporated Societies Act 1908*.

#### *7.1.1.1 Incorporation*

The *Incorporated Societies Act 1908* provides that in order to be an incorporated society, there must be no fewer than 15 persons associated for any lawful purposes but not for pecuniary gain.[1]

Section 6(1) of the Act provides that incorporated societies must have rules that will cover the following matters: the name of the society followed by "Incorporated" as the last word in the name; the objects for which the society has been established; the modes in which persons become and cease to be members; the mode in which the rules of the society may be altered, added to or rescinded; the mode of summoning and holding general meetings for the society and of voting; the appointment of officers of the society; the control and use of the common seal of the society; the control and investment of the funds of the society; the powers (if any) of the society to borrow money; the disposition of the property of the society in the event of the society being put into liquidation; and other matters as the Registrar may require to be provided.

#### *7.1.1.2 Effect of incorporation*

The effect of incorporation is that the members of that society become a body corporate having perpetual succession and a common seal, and capable of exercising all the functions of a body corporate and holding land.[2] One of the consequences of incorporation is that members of the incorporated society are not personally liable for any contract, debt or other obligation made or incurred by the society and do not have any personal interest in any property or assets owned by the society.[3]

[1] *Incorporated Societies Act 1908*, s 4(1).

[2] Ibid, s 10.

[3] Ibid, ss 10-14.

Concerning membership, one wonders if a society giving voting rights to the world at large or to "all the people of the world" could constitute a valid entity. In *J H Tamihere & Ors v E Taumaunu & Ors*,[4] Heath J cited a previous New Zealand case that answers that question. He wrote:

> *In* Canterbury Orchestra Trust v Smitham *[1978] 1 NZLR 787 (CA), two members of the Court of Appeal (Richmond P and Cooke J) held that rules of a charitable trust that purported to give voting rights to the world at large were void for uncertainty. The other Judge (Woodhouse J) regarded the relevant rule as* ultra vires.

Although *Canterbury Orchestra Trust* dealt with a trust, it was a trust that had members, which made it similar to an incorporated society.

*7.1.1.3 Not established for the private pecuniary profit of members*

By definition, an incorporated society is not established for the pecuniary gain of its members.[5] Section 20 of the Act prohibits an incorporated society from doing any act for pecuniary gain and makes it an offence for members to derive any pecuniary gain from any act done by the society. Pecuniary gain is not defined in the Act other than by exclusion. Section 5 excludes from the definition of pecuniary gain, pecuniary gain made by the society, the division of property among members upon the dissolution of the society, members competing with one another for trophies or prizes (other than money), and where members are paid a salary by the society.

In *Presbyterian Church of New Zealand Beneficiary Fund v Commissioner of Inland Revenue*,[6] Heron J had to define the phrase "not to be carried on for the private pecuniary profit of any individual". He wrote that "private" connotes personal without any overriding characteristic that is public. The word "pecuniary" was defined as meaning "pertaining to or of money".[7]

The incorporated society as a body corporate is entitled to make pecuniary gains as long as such gains are not distributed to or divided among its members.[8] An incorporated body is therefore entitled to raise money to help achieve its purposes and can employ people, including society members, and pay them for the work they do or it can make payments to members to which they would be entitled if they were not members of the society, for example for services rendered.[9]

Since the Act makes it clear that members cannot derive any profit from the society except as employees or for services rendered that would normally be paid at the going rates, it is not necessary that the rules add specific clauses preventing private pecuniary profit. Pecuniary gains are already clearly prohibited in clauses 4(1), 5, 19 and 20 of the Act.

Although all incorporated societies are not for profit by definition, not all have charitable purposes. Such societies may be incorporated for the advancement of professions, economic development or any purpose that is lawful as long as it is not for the private pecuniary gain of members. In New Zealand, there are some 23,310 incorporated societies, but only 6,253 have been registered as charities, or about 28%.[10]

*7.1.1.4 Termination or liquidation of incorporated societies*

The *Incorporated Societies Act 1908* states that an incorporated society needs to provide for the distribution of its property in the event of liquidation or dissolution.[11] In *Hunt v The Border Fancy Canary Club of NZ (Inc)*,[12] Morris J wrote that the purpose of the Act is

4 HC AK CIV 2005-404-6958 [21 December 2005].

5 *Incorporated Societies Act 1908*, s 4(1).

6 [1994] 3 NZLR 363.

7 *Presbyterian Church of New Zealand Beneficiary Fund v Commissioner of Inland Revenue* [1994] 3 NZLR 363 at 376.

8 See sections 4(1) and 5(a) of the *Incorporated Societies Act 1908*. See also *Ashburton Veterinary Club (Inc) v Hopkins* [1960] 564 and *Automobile Association (Wellington) Inc v Daysh* [1955] NZLR 520 at 532-533 (CA). See also Mark von Dadelszen *Law of Societies in New Zealand* (2nd ed, LexisNexis, Wellington, 2009) at 26.

9 *Incorporated Societies Act 1908*, s 5(d) and (e).

10 See Charities Commission *A Snapshot of New Zealand's Charitable Sector, A Profile of registered charities as at 31 October 2009*, at: www.charities.govt.nz/news/fact_sheets/stats_091206.pdf, at 12.

11 *Incorporated Societies Act 1908*, s 6(1)(k) states that "the rules of a society shall state or provide for the following matters, that is to say: (k) the disposition of the property of the society in the event of the society being put into liquidation".

12 High Court, Auckland M 935/98, 20 December 1999.

to establish a state-controlled system of registering and controlling non-profit-making associations and providing for the dissolution and winding up of those associations.[13] Three ways are provided for the dissolution or liquidation of an incorporated society: involuntarily by Registrar's dissolution; involuntarily by the High Court; and voluntarily by members' resolution.

The Registrar of the *Incorporated Societies Act 1908* may dissolve an incorporated society because it is no longer carrying on its operations or because it has been registered by reason of a mistake of fact or law.[14] The Registrar shall publish the declaration of dissolution in the *Gazette* and make an entry of the dissolution in the registry.[15] The society will be dissolved from the time of the making of that entry in the registry.[16] If an incorporated society fails to submit its financial statements at the end of its financial year, it will be struck out of the registry.[17] Creditors may also call for the liquidation of an incorporated society when it cannot meet its debts. Although such occurrences are infrequent, section 23A of the Act provides for a meeting of the creditors to agree to a compromise.[18]

The High Court also has jurisdiction to appoint a liquidator of an incorporated society. A petition for such an appointment must be made by the society, a member, a creditor or the Registrar.[19] The Court can appoint a liquidator if: the society suspends its operations for the space of a year; the members of the society are reduced to fewer than 15; the society is unable to pay its debts; the society carries on any operation whereby members make pecuniary gain; or the Court is of the opinion that "it is just and equitable that the society should be put into liquidation".[20] The procedure for the appointment of a liquidator is governed by Parts XVI and XVII of the *Companies Act 1993*.[21]

The voluntary winding up of an incorporated society is also possible under section 24 of the *Incorporated Societies Act 1908*. Section 24(1) provides that the members may pass a resolution appointing a liquidator at a general meeting. The resolution must, however, be confirmed at a subsequent general meeting called for that purpose and held not earlier than 30 days after the first meeting.

Where the assets cannot be disposed of as provided in the rules, the Registrar may direct how the assets will be disposed.[22] The Registrar usually seeks some consensus from the members. In the absence of such consensus, the Registrar will direct that the assets go to a society similar to the liquidated society or to an appropriate charity operating in the area from which the society drew its membership.[23]

Upon liquidation the assets shall be disposed of in the manner provided by the rules of the society or, if not possible, as the Registrar directs.[24] Section 5(b) of the *Incorporated Societies Act 1908* provides that "the members of the society are entitled to divide between them the property of the society on its dissolution". This is contrary to section 13(1)(b)(i) of the *Charities Act 2005*, which insists that in order to gain charitable status, "a society or organisation must be established and maintained exclusively for charitable purposes". If, upon the dissolution of a society, the property is divided among its members, that society is clearly not maintained exclusively for charitable purposes. To avoid any doubt, the liquidation or dissolution clause of an incorporated society must state clearly that surplus assets will be disposed of to exclusively charitable purposes.

### *7.1.2 Incorporation under the* Charitable Trusts Act 1957

As indicated in the previous chapter, section 8 of the *Charitable Trusts Act 1957* allows any society that exists exclusively or principally for charitable purposes to apply to the

13 Ibid, at 11. See also von Dadelszen *Law of Societies in New Zealand*, above n 8, at 239.

14 *Incorporated Societies Act 1908*, s 28(1).

15 Ibid.

16 Ibid, s 28(2).

17 Ibid, ss 28(1) and 23(1).

18 *Re Riccarton Club Inc*, High Court, Christchurch M 225/99, 9 June 1999. See also von Dadelszen *Law of Societies in New Zealand*, above n 8, at 245.

19 *Incorporated Societies Act 1908*, s 26(1).

20 Ibid, s 25.

21 Ibid, ss 24(3) and 26(3).

22 Ibid, s 27(1).

23 Von Dadelszen, *Law of Societies in New Zealand*, above n 8, at 250.

24 *Incorporated Societies Act 1908*, s 27(1).

Registrar for the incorporation of the society as a board. Heath J considered that such "a charitable society with members is an organisation structured along democratic lines, and is susceptible to democratic process".[25]

Such a society would need a specific clause preventing private pecuniary profit, because since such a society is not a trust, it cannot rely on fiduciary duties to ensure that it does not provide any pecuniary profit.

In the case of dissolution, however, section 27 of the *Charitable Trusts Act 1957* would apply. This section provides that "on the liquidation of a board or on its dissolution by the Registrar, all surplus assets after the payment of all costs, debts, and liabilities shall be disposed of as the Court directs". The New Zealand Charities Registration Board accepts the following clauses as being sufficient to ensure that surplus assets are directed to charitable purposes.

A trust deed may refer to dissolution in accordance with section 27 of the *Charitable Trusts Act 1957,* that is, as the courts direct. Following the *cy-près* doctrine, a court will direct that the surplus assets of a charitable trust board be directed to similar charitable purposes, as close as possible to the initial intention of the settlor.

The rules document of a society incorporated as a board may also clearly indicate what is to be done with surplus assets. Assets and funds given to a named organisation on dissolution are acceptable if the named organisation has exclusively charitable objects. It is acceptable for assets and funds to be given to a local authority either outright or on trust for a particular charitable purpose.[26] Finally, the assets and funds may be returned to the original donor on dissolution. Assets and funds may be loaned to an organisation on the basis that they will be returned to the donor if the charitable purposes are no longer carried out. This will not be private pecuniary profit because the donor will simply be resuming his or her own property.[27]

It is generally thought that section 61B would not apply to societies incorporated under the *Charitable Trusts Act 1957*. It is thought that this section applies only to a trust. However, in *Canterbury Development Corporation v Charities Commission*,[28] Young J expressed the view that "it is difficult to see why s 61B would be limited only to a charity carried on expressly by a trust rather than by any other entity [...] While the word trust is used in s 61B, I consider Parliament used 'trust' in a general sense of being a charitable entity (at least in part) given the context of s. 61B".[29]

### *7.1.3 Incorporation under the* Agricultural and Pastoral Societies Act 1908

The *Agricultural and Pastoral Societies Act 1908* provides that any number of persons not being fewer than 50 associated into a society for the promotion of agriculture can be constituted as an agricultural and pastoral society. The incorporation has the effect of creating a corporate body with perpetual succession and common seal,[30] as is the case under the *Incorporated Societies Act 1908* and the *Charitable Trusts Act 1957*.

Section 10 of the *Agricultural and Pastoral Societies Act* sets out the objects for which agricultural and pastoral societies may be created. These are to: collect information useful to the cultivator of the soil or about the management of wood, plantations and fences or other subject connected with rural improvement; encourage scientific research into the improvement of agriculture, the destruction of insects injurious to vegetable life and the eradication of weeds; promote the discovery of new varieties and other vegetables useful to man or as food for domestic animals; take measures for improving the veterinary art as applied to horses, cattle, sheep and pigs; encourage the best mode of farm cultivation and

[25] *J H Tamihere & Ors v E Taumaunu & Ors*, HC AK CIV 2005-404-6958 [21 December 2005] at [33].

[26] *Lysons v Commissioner of Stamp Duties* [1945] NZLR 738 is authority for the proposition that a gift for the benefit of the inhabitants of a parish or town is charitable.

[27] *Re Gillingham Bus Disaster Fund* [1958] 1 Ch 300. See also Gino Dal Pont *Law of Charity* (LexisNexis/Butterworths, Australia, 2010) at 398-399.

[28] [2010] 2 NZLR 707.

[29] Ibid, at [96].

[30] *Agricultural and Pastoral Societies Act 1908*, s 3.

the improvement of livestock by the distribution of prizes; and encourage enterprise and industry by holding meetings for the exhibition of implements and produce, the granting of prizes for the best exhibits and the holding of competitions for prizes for invention or improvement or for skill or excellence in agricultural and pastoral arts.[31]

Such purposes were held charitable in *Inland Revenue Commissioners v Yorkshire Agricultural Society*,[32] which held that the promotion of agriculture provided a benefit to the community because agriculture was vital to the welfare of the community. Without agriculture, people could not feed themselves and would eventually die from hunger.

The Act does not provide that agricultural and pastoral societies have to be not for profit, contrary to the *Incorporated Societies Act 1908*. It is therefore necessary for the by-laws to contain specific clauses prohibiting private pecuniary profit.

Similarly, section 18 provides that upon liquidation or winding up, surplus assets are to be disposed of in the manner provided by the rules of the society. Nothing in the Act restricts distribution to charitable purposes. This is why entities incorporated under this Act need to adopt liquidation clauses leaving surplus assets to exclusively charitable purposes if they want to be registered as charitable entities.

#### *7.1.4 Incorporation under specific statutes*

Parliament has adopted other statutes that incorporate certain entities and deem them to have charitable purposes. This is the case, for example, with the Alcohol Advisory Council of New Zealand,[33] the Auckland Museum Institute,[34] the Museum of Transport and Technology Society,[35] the Nurse Maude Association[36] and Orton Bradley Park.[37]

Unless these statutes specifically provide that these organisations are not for profit and members cannot derive any private pecuniary profit, specific clauses should be inserted in the by-laws if these entities want to be registered as charities.

Similarly, unless these Acts contain specific clauses concerning winding up or liquidation, the entities would have to adopt specific by-laws providing for surplus assets to be directed to exclusively charitable purposes upon liquidation or winding up.

#### *7.1.5 Duties of officers of incorporated entities*

The duties of officers of incorporated entities are not that different from those of trustees, except that trustees have fiduciary duties and are personally liable for their decisions. This is because trusts and unincorporated societies do not have legal status separate from their trustees and officers. Officers of incorporated entities are not personally responsible for decisions made by the entities because the entities have a separate legal status from the officers.

### 7.2 Unincorporated societies

Unincorporated societies are still being used as a vehicle for charitable purposes.

#### *7.2.1 Legal structure of unincorporated societies*

Jean Warburton, the author of *Tudor on Charities*, wrote that "the use of an unincorporated association as a legal structure for charities gained popularity in the eighteenth century with the rise of voluntary societies and reflected the change from individual to associated

[31] Ibid, s 10.

[32] [1928] 1 KB 611.

[33] *Alcohol Advisory Council Act 1976*, s 37(2).

[34] *Auckland War Memorial Museum Act 1996*, Local Act, s 10(1).

[35] *Museum of Transport and Technology Act 2000*, Private Act, s 11(1).

[36] *Nurse Maude Association Act 2000*, Private Act, s 5.

[37] *R O Bradley Estate Act 1972*, Private Act, s 13.

philanthropy".[38] This structure is mainly used by smaller organisations and it is often the starting point to becoming incorporated under the *Incorporated Societies Act 1908*. The New Zealand Charities Registration Board has registered a great number of unincorporated societies.

Section 13(1)(b) of the *Charities Act 2005* sets out the requirements for an entity to be registered. Section 4(1) of that Act defines entity as meaning "any society, institution, or trustees of a trust".

Section 5(1) of the *Interpretation Act 1999* provides that "the meaning of an enactment must be ascertained from its text and in the light of its purpose". However, the terms "society" and "institution" are not further defined in the *Charities Act 2005*. Furthermore, there is no indication in the Act of what the meaning of these terms could be. It is therefore necessary to look at the standard meanings of these words and when they are normally used.

The conventional starting point for determining the plain meanings of statutory text is the dictionary. The *Concise Oxford English Dictionary* defines these terms as follows:

| | |
|---|---|
| *Society* | *An organisation or club formed for a particular purpose or activity.* |
| *Institution* | *A large organisation formed for a particular purpose, such as a college, bank etc.* |
| *Organisation* | *(which is used in the definition of both "society" and "institution") is defined as: 2. An organised group of people with a particular purpose, such as a business or government department.* |

In the *Law of Societies in New Zealand*, Mark von Dadelszen described three types of society: unincorporated entities, incorporated societies and incorporated charitable societies and trusts.[39] When an applicant is not incorporated under the *Incorporated Societies Act 1908* or under the *Charitable Trusts Act 1957*, it must therefore be treated as an "unincorporated society".

In *Hartigan Nominees Pty Ltd v Rydge*,[40] the Court defined an unincorporated association as "a group of people defined and bound together by rules and called by a distinctive name".

The question then arises as to how many people are needed to constitute a group. This seems to have been answered in *Conservative & Unionist Central Office v Burrell*,[41] where the Court said that an unincorporated association meant:

> *Two or more persons bound together for one or more common purposes, not being business purposes, by mutual undertakings, each having mutual duties and obligations, in an organisation which has rules which identify in whom control of it and its funds rest and on what terms and which can be joined or left at will. The bond of union between the members of an unincorporated association has to be contractual.*[42]

As indicated in the last citation, an unincorporated society must have two or more people. It does not constitute a legal body, except where it is recognised as such for limited purposes, such as an incorporated society that has had its status revoked and continues to function as an unincorporated society,[43] or for the registration of entities under the

[38] *Concise Oxford English Dictionary* (9th ed, Sweet & Maxwell, London, 2003) at 163.

[39] Above n 8, at 3-5.

[40] (1992) 29 NSWLR 405. See also Gino Dal Pont *Charity Law in Australia and New Zealand* (Oxford University Press, Oxford, 2000) at 365.

[41] [1980] 3 All ER 42 and on appeal [1982] 2 All ER 1 (CA).

[42] Ibid, at 4 (CA). See also von Dadelszen *Law of Societies in New Zealand*, above n 8 at 10.

[43] *Discount Brands Ltd v Westfield (New Zealand) Ltd* [2005] 2 NZLR 597 (SCNZ). See also von Dadelszen, *Law of Societies in New Zealand*, above n 8, at 11.

*Charities Act 2005*. Finally, the bond of union between the members of an unincorporated association is contractual and the mutual duties and obligations are defined by the contractual relationship, which is usually expressed in a set of rules.

The New Zealand Court of Appeal provides good examples of what can constitute an unincorporated society. In *Cometa United Corp v Canterbury Regional Council*,[44] it wrote:

> *Unincorporated bodies range from loosely to highly organised groupings. At one end of the spectrum are groups of people who have come together in an ad hoc way for a particular short-term purpose. Examples are residents who are opposing a development in their neighbourhood or parents of schoolchildren who want to take up a particular concern with the school. At the other end of the spectrum are bodies which are long-lived, have officers, governance arrangements and employees just as corporate entities do, and operate and represent themselves to the public as established, independent organisations. Bodies of the latter type are distinct from (and more than) the individuals who make up their membership – as a practical matter, they have independent existence and act as independent entities: see the discussion in, for example,* Willis v Association of Universities of the British Commonwealth *[1965] 1 QB 140 at 147-148 (CA) and* Edwards v Legal Services Agency *[2003] 1 NZLR 145 at paras [26]-[28] (CA). This is presumably, why s 29 of the* Interpretation Act *1999 defines "person" to include an unincorporated body.*[45]

Where an applicant says that he or she has not yet formed a group and that he or she is actually the sole member, the New Zealand Charities Registration Board has decided that the applicant does not meet the definition of an entity stipulated in clause 13(1)(b) of the *Charities Act 2005* and therefore cannot be registered as a charity.[46]

On the other hand, could an unincorporated society giving voting rights to the world at large or to "all the people of the world" constitute a valid entity? As indicated in the section concerning incorporated societies, the New Zealand Court of Appeal held in *Canterbury Orchestra Trust v Smitham*[47] that a charitable trust that purported to give voting rights to the world at large was void for uncertainty. Although that case dealt with a trust, it was a trust that had members, which made it similar to an unincorporated society.

### *7.2.2 Private pecuniary profit and dissolution of unincorporated societies*

The Court has defined an unincorporated association as "a group of people defined and bound together by rules and called by a distinctive name".[48] These people are presumed to have agreed by an implicit or explicit contract to further certain aims. The New Zealand Charities Registration Board requires that an unincorporated society must file its rules before it can be registered. Such rules must contain the name and the purposes of the association together with a clause directing that all income and assets will be used exclusively to further the charitable purposes of the association. They must also contain a clause directing surplus assets to other similar charitable purposes.

The dissolution clause of an unincorporated association usually dictates that it can be dissolved voluntarily by resolution of the majority of its members. In the absence of such a clause, and as an unincorporated society is founded on an implicit contract between the members, the entity could be dissolved with the consent of all the members.[49] If the members disagree and there is no clause providing for dissolution by majority decision, resort must be to the Court.

[44] [2008] NZRMA 158; [2008] NZAR 215.

[45] Ibid, at [23], [32-33]. See also von Dadelszen *Law of Societies in New Zealand*, above n 8, at 12.

[46] See Naturel Freeworld Foundation World Family, on the Charities Services website no NAT34776.

[47] [1978] 1 NZLR 787 (CA) cited by Heath J in *J H Tamihere & Ors v E Taumaunu & Ors*, HC AK CIV-2005-404-6958 [21 December 2005] at [13].

[48] *Hartigan Nominees Pty Ltd v Rydge* (1992) 29 NSWLR 405. See also Dal Pont *Charity Law in Australia and New Zealand*, above n 27, at 365.

[49] *Re William Denby & Sons* [1971] 1 WLR 973 at 978. See also Jean Warburton *Tudor on Charities* (9th ed, Sweet & Maxwell, London, 2003) at 506.

The courts, however, have been reluctant to intervene in the management of unincorporated as well as incorporated societies. Williams J wrote that "the reason for this is, first, that it is now well established that the rules and constitution of an incorporated society are a binding contract between the society and its members and thus in the usual course of events remedy for breach of the constitution or associated rules is the same as for breach of contract".[50] Mark von Dadelszen wrote that "if there is, indeed, a contract between members, the courts may more readily intervene, finding their jurisdiction in that contract".[51]

### *7.2.3 Problems associated with unincorporated societies*

The main advantage of an unincorporated society as a charitable entity is its flexibility. It can be tailored to fit the individual case, is inexpensive to run and is free from statutory control.

On the other hand, there are disadvantages to this kind of entity. For example, an unincorporated society does not have any legal status. It is in a worse situation even than a trust because, while the trustees are recognised at law as having the status to conduct the business of the trust, such is not the case with an unincorporated society. In fact, it lacks any inherent mechanism for holding property. Where there is property, trustees who are not necessarily members of the management committee can be appointed to hold the property for the purposes of the association.

In addition, gifts made to unincorporated societies pose a further problem. The courts have established a presumption that a gift to an unincorporated society is in fact a gift for the benefit of the members of the association. That presumption can, however, be reversed if it can be shown that the donor gave the gift on trust for the purposes of the unincorporated society and not for the members themselves.[52]

## 7.3 Conclusion

Societies can be of two types: incorporated and unincorporated. An incorporated society is recognised at law as an entity separate from its officers. Unincorporated societies do not have legal status and therefore are not separate from their officers.

Societies may be incorporated under the *Incorporated Societies Act 1908*, under section 8 of the *Charitable Trusts Act 1957*, under the *Agricultural and Pastoral Societies Act 1908* or by a specific Act of Parliament to that effect. Most societies incorporated under the *Agricultural and Pastoral Societies Act 1908* have charitable status for the advancement of agriculture. This is not, however, the case for most incorporated societies. This is because a number of them have been established for the promotion of non-charitable purposes, such as the advancement of a profession, the promotion of economic development or the promotion of the interests of their members.

Societies incorporated under the *Incorporated Societies Act 1908* need not have specific clauses preventing private pecuniary profit because sections 4, 5, 19 and 20 of the Act provide that individual members may not derive any private pecuniary profit from the entities. Entities incorporated under other Acts must have clauses preventing private pecuniary profit in their by-laws unless the incorporating Acts specifically prohibit private pecuniary profit by members.

All incorporated entities must have in their rules or by-laws clauses directing surplus assets to exclusively charitable purposes upon liquidation or winding up.

[50] *Hopper v North Shore Aero Club Incorporated*, HC AK CIV 2005-404-2817 [6 December 2005] at [28] citing *Byrne v The Auckland Irish Society Incorporated* [1979] 1 NZLR 351 at 362.

[51] Von Dadelszen, *Law of Societies in New Zealand*, above n 8, at 19 citing the following cases: *Schweikert v Burnell* [1963] NSWLR 821 and *Lee v Showmen's Guild of Great Britain* [1952] 1 All ER 1175 (CA).

[52] *Leahy v Attorney-General* [1959] AC 457 at 484.

CHAPTER 8

# Limited companies and other types of entity

Trusts (unincorporated and incorporated) and societies (unincorporated and incorporated) are not the only types of organisation that can have charitable purposes. This chapter explores the various types of limited company that can have charitable purposes.

Limited companies incorporated under the *Companies Act 1993* are probably the most common types of limited company on the Charities Register that have charitable purposes. Māori organisations incorporated under *Te Ture Whenua Māori Act 1993/Māori Land Act 1993* and under the *Māori Fisheries Act 2004* are the second most common. Most co-operatives are non-charitable because they are like limited companies; they are established for the profit of their members. However, some kinds of co-operative can have charitable purposes, such as retirement villages, friendly societies and industrial and provident societies. Finally, superannuation schemes and single entities are analysed. While these two types of organisation are not necessarily limited companies, they are considered in the context of this chapter.

## 8.1 Companies incorporated under the Companies Act 1993

Charities Services has about 900 limited companies established under the *Companies Act 1993* on its register. This section considers the main characteristics of limited companies, the requirements for charitable entity status, and the requirements imposed by charity law on their liquidation.

### *8.1.1 Characteristics of limited companies*

Forming a company is a way to register a business name formally and therefore notify the world of the name's existence.[1] The 1993 Act provides that the "Registrar must not register a company under a name or register a change of the name of a company unless the name has been reserved".[2] Once the Registrar of Companies approves a company name, no other company can be registered with the identical or a near identical name. The registered name of a company must end with the word "Limited" or the words "Tapui (Limited)" if the liability of the shareholders of the company is limited.[3]

A limited company facilitates continuity. This is because a company "is a legal entity in its own right separate from its shareholders and continues in existence until it is removed from the New Zealand register".[4] Therefore it is not limited to the lifetime of any one particular shareholder. If a shareholder wishes to sell or otherwise transfer part or all of his or her shares to another party, the company continuity is not affected.

A limited company does not need to have a constitution. If a company does not have a constitution, the company, the board, each director and each shareholder of the company has the rights, powers, duties and obligations set out in the Act.[5] If it has a constitution, the constitution has priority except if it is contradicted by the Act.[6]

[1] *Companies Act 1993*, s 22.
[2] Ibid, s 20.
[3] Ibid, s 21.
[4] Ibid, s 15.
[5] Ibid, ss 26 and 28.
[6] Ibid, ss 27 and 31.

Companies are incorporated under the *Companies Act 1993* to carry on business as separate legal entities. An individual cannot enter a contract with himself or herself, but a shareholder can enter a contract with the company. Therefore, a shareholder may be employed by the company or may loan money to the company on the same basis as any other unrelated party.

A company must have at least one share, one shareholder and one director and must have limited liability.[7] This means that the company is liable in full for all obligations that it incurs and the shareholders are only liable for any unpaid money owing on their shares (subject to any personal guarantees given).[8]

The company structure is inherently geared towards creating a profit for shareholders. A company has different opportunities for raising capital. This may be by issuing new shares, the purchase of which by the new shareholders brings capital into the company. The company may also be offered as security (or collateral) for any mortgage or debenture that the company takes. It gives the lender more options and therefore offers more security.

### *8.1.2 Restriction of activities: private pecuniary profit and liquidation of limited companies*

A limited company has the power to adopt in its constitution a provision to restrict the capacity of the company or its rights, powers or privileges.[9] This allows the company to restrict its activities to charitable purposes, prohibit distribution to shareholders and direct surplus assets to charitable purposes on winding up.

Limited companies can be charitable if they have exclusively charitable purposes. The New Zealand Charities Registration Board also requires that limited companies have clauses in their constitutions that either prevent the payment of dividends to shareholders or restrict current shareholders and the transfer and issues of shares to the trustees of charitable entities.[10] Finally, upon liquidation, surplus assets must be directed exclusively to charitable purposes.

The liquidation of a limited company may be commenced by a special resolution of shareholders entitled to vote on the question or by the board of the company on the occurrence of an event specified in the constitution.[11] Liquidation may also be appointed by the Court on the application of the company, a director, a shareholder, a creditor or the Registrar of Companies.[12] Before appointing a liquidator, the Court must be satisfied that the company is unable to pay its debts and has persistently or seriously failed to comply with the Act, and that it is just and equitable that the company be put into liquidation.[13]

Section 316 of the Act establishes how the surplus assets are to be disposed of. At the end of the liquidation process, money representing the unclaimed assets of a company shall be paid to the Public Trust. Upon the expiry of a period of 13 months after the date on which the money was paid, the Public Trust must pay the balance into an account entitled the "Liquidation Surplus Account" for distribution in accordance with section 316. The surplus assets may be paid or distributed to any person entitled to payment or distribution in the liquidation of the company, including creditors.[14]

*Liverpool Hospital v Attorney-General*[15] was the first case considered by the Court concerning the liquidation of a charitable limited company. The entity was incorporated under the *Companies Act* as a company limited by guarantee, with the main objects of providing a hospital for the treatment of heart diseases and promoting research into the cause and cure of such diseases.

7 Ibid, s 10.

8 ibid, ss 97 and 100.

9 Ibid, s 16(2).

10 The following examples are given of acceptable clauses:

No shareholder of the company shall be entitled to receive any benefit from the company by way of dividend or other payment from the company by virtue of a shareholder holding shares whether ordinary or any other class of shares in the company.

None of the capital or income of the company shall be paid or transferred directly or indirectly by way of dividend, distribution or otherwise for the private pecuniary profit of any individual. Provided however that nothing in this clauses shall prevent:

- the payment in good faith of reasonable remuneration to any director, shareholders or employees of the company or to any other person for services rendered to the company,
- the payment of interest to any person at a rate not exceeding the commercial rate of interest for the time being.

The directors shall refuse to register any transfer of shares unless the proposed transferee is a trustee of a registered charitable entity and that transferee holds those shares in trust exclusively for charitable purposes within New Zealand.

No shares shall be issued to any person unless that person is a trustee of a registered charitable entity and that transferee holds those shares in trust exclusively for charitable purpose within New Zealand.

11 *Companies Act 1993*, s 241(2)(a), (b).

12 Ibid, s 241(2)(c).

13 Ibid, s 241(4).

14 Ibid, s 316(1), (2), (4).

15 [1981] 1 Ch 193.

In clause 9 of its memorandum, the company provided that on winding up its assets should not be distributed among its members but transferred to an institution or institutions having similar objects to those of the company. A hospital run by the company was transferred to the National Health Service in 1948 and subsequently the company's limited functions as a research institute ceased. In 1978, the Attorney-General presented a petition for the winding up of the company. The liquidator summoned the Court for directions as to how to dispose of the surplus assets.

The Court held that clause 9 of the memorandum took precedence over the provisions of the Act concerning liquidation. The Court held that the members were deemed to have contracted with the company in accordance with the terms of its memorandum and therefore they were excluded from any rights and interest in the assets.[16] The Court also ordered a *cy-près* scheme. This is because the Court's jurisdiction arose not only where there was a strict trust, but in the case of a corporate body, where under the terms of its constitution there was a strict obligation to apply its assets for exclusively charitable purposes. Since the company's constitution imposed the obligation to hold its assets for strictly charitable purposes and the provisions of the constitution did not oust the jurisdiction of the Court, a scheme would have been directed on the footing that the property and funds of the company were to be applied *cy-près*.[17]

### 8.2 Māori organisations

A number of Māori entities have been incorporated under *Te Ture Whenua Māori Act 1993/ Māori Land Act 1993*, the *Māori Fisheries Act 2004* and the *Māori Commercial Aquaculture Claims Settlement Act 2004*, or they may be incorporated under other legislation.

#### *8.2.1 Incorporation under* Te Ture Whenua Māori Act 1993/Māori Land Act 1993

Incorporations under *Te Ture Whenua Māori Act 1993/Māori Land Act 1993* are based on individual shares in Māori land and produce dividends for shareholders. The Māori Land Court can constitute a Māori incorporation over one or more blocks of Māori freehold land provided that at least one of the blocks has more than two owners. The capacity and powers of Māori incorporations are set out in the order of incorporation, constitution and *Te Ture Whenua Māori Act 1993/Māori Land Act 1993*.

Before 1 July 1993, the powers of a Māori incorporation were limited to the objectives specified in the order of incorporation. Any incorporation in existence at the date of the commencement of the Act can now, pursuant to a special resolution passed by the shareholders, apply to the Court to vary the objectives to include any of the provisions of *Te Ture Whenua Māori Act 1993/Māori Land Act 1993* and any regulations made under the Act.

Upon the making of an order incorporating the owners of any land, the Māori Land Court appoints an interim committee of management of between three and seven people who hold office until the first annual general meeting of the incorporation. At the first annual general meeting of shareholders, the shareholders elect a committee of management. There are about 150 Māori incorporations. A small number are economically viable farms, but most hold very small areas of land. No new incorporations have been formed in the past four or five years and five or so incorporations have been reconstituted as Māori land trusts in the past two or so years.[18]

Section 258 of the Act provides that a Māori incorporation may, by special resolution, declare that it shall stand possessed of any part of its property or of any income derived from any specified part of its property on trust for such charitable purpose as may be specified in the declaration.

[16] Ibid, at 212-213.

[17] Ibid, at 214-215.

[18] Office of the Minister of Commerce, *Review of Financial Reporting Framework: Primary Issues*, February 2011 at [101].

Unless the incorporated entity has adopted specific clauses preventing private pecuniary profit, it is clear that incorporation is to benefit the shareholders, who are Māori individuals.

Section 283 of the Act provides that upon the winding up of an incorporation, the Māori Land Court may make an order "vesting in the persons beneficially entitled to any or all of the land vested in the incorporation, and the property shall vest in those persons accordingly".[19] This means that the interests in the property go to individuals. In order to be registered as a charity, such an organisation would have to adopt a liquidation or winding up clause leaving the surplus to exclusively charitable purposes.

### *8.2.2 Incorporation under the* Māori Fisheries Act 2004

The *Māori Fisheries Act 2004* and *Māori Commercial Aquaculture Claims Settlement Act 2004* provide for the establishment of mandated iwi organisations and related organisations to hold fisheries and aquaculture assets or to administer customary rights under the *Foreshore and Seabed Act 2004*. Mandated iwi organisations must represent one of the iwi set out in schedule 3 of the *Māori Fisheries Act 2004*.

Mandated iwi organisations must also meet the requirements of the 11 kaupapa (principles) set out in schedule 7 of the *Māori Fisheries Act 2004*. These include strict rules as to who can become a member, elections, voting rights, accountability, and governance.

Organisations created under the *Māori Fisheries Act 2004* will only be granted charitable status if they have exclusively charitable purposes. It is, however, possible to establish a trust within those Māori organisations to administer exclusively charitable purposes.

If an entity wishes to gain charitable status, it must be clear that no individual may derive private pecuniary profit from the entity. The income from the company must either be given to exclusively charitable purposes, through a charitable purpose trust or other charitable entity, or be directed exclusively for charitable purposes.

Similarly, upon winding up, surplus assets must be directed to exclusively charitable purposes.

## 8.3 Co-operative and mutual organisations

Co-operative and mutual organisations are owned and democratically controlled by their shareholders or members and run for the mutual benefit of their shareholders or members. The main purposes of these organisations are mutual support for members or the promotion of specific purposes or social benefit. These organisations include building co-operatives companies, building societies, credit unions, friendly societies and industrial and provident societies.

### *8.3.1 Co-operative companies*

A co-operative company is a company incorporated under the *Companies Act 1993* that applies for registration under the *Co-operative Companies Act 1996* in order to operate as a co-operative. The company must principally carry out a co-operative activity as defined in its constitution, which may include providing shareholders of the company with goods or services, such as processing and marketing services and those things ancillary to the activity.[20] Only a registered co-operative company may have the word co-operative in its name.[21]

[19] *Te Ture Whenua Māori Act 1993/ Māori Land Act 1993*, s 283(3).

[20] *Co-operative Companies Act 1996*, s 3(1).

[21] Ibid, s 14.

As indicated by the Act, co-operatives are companies that are established according to a co-operative philosophy that each member has only one vote. Such an organisation is nevertheless a limited company for the benefit of shareholders and its goal is normally to provide private pecuniary profit to its members. Co-operatives are not considered to be charitable entities unless shareholders are exclusively charitable entities or the co-operatives' rules contain clauses restricting dividends to exclusively charitable entities.

### *8.3.2 Credit unions*

Credit unions are member-owned co-operative financial organisations registered under the *Friendly Societies and Credit Unions Act 1982* to provide savings and loan facilities for their members. A credit union must have at least 21 members and may be a body corporate. A common bond must exist between the members, for example residing in a particular geographical location or being employed by a particular employer. Members invest their savings and receive dividends.

A credit union is usually not a charitable entity because its purposes are to promote thrift among its members by the accumulation of their savings, and to use and control the members' savings for their mutual benefit.[22] This means that the credit union members are the ultimate beneficiaries of the entity. Finally, courts have decided that mutual arrangements "stamp the whole transaction as one having a personal character, money put up by a number of people, not for general benefit, but for their own individual benefit".[23]

### *8.3.3 Building societies*

Building societies are mutual organisations with at least 20 members incorporated under the *Building Societies Act 1965* to offer financial services to their members. Funds are raised by the issue of shares to members, who usually pay for them by subscription over time. These funds are used to provide financial services, including mortgage advances for the purchase of house properties.

Building societies are usually not charitable because they are established for the benefit of their members. They are mutual arrangements. Courts have decided that mutual arrangements "stamp the whole transaction as one having a personal character, money put up by a number of people, not for general benefit, but for their own individual benefit".[24] The Charities Commission deregistered a few organisations that were similar to building societies. For example, Liberty Trust was an organisation offering seven-year, interest-free loans to donors who had donated over a period of five to 12 years, at up to five times the amounts that had been donated. The Charities Commission considered that there was insufficient public benefit because those who benefited were those who had contributed to the fund.[25] The High Court, however, has reinstated Liberty Trust as a charity. The High Court Judge concluded that the Charities Commission had failed to consider the purpose of the Trust and instead focused on the benefits received by members. Mallon J wrote:

> *The Charities Commission was in error to focus only on the fact that contributors benefited from the lending scheme [...] Liberty Trust is not merely a lending scheme set up to provide private benefits to its members [...] For those who join, it is in part intended to provide private benefits, namely to assist with house ownership free of the shackles of interest-incurring debt but those private benefits are seen as part of living as a Christian.*[26]

[22] *Friendly Societies and Credit Unions Act 1982*, s 101(1)(a), (b).

[23] *Re Hobourn Aero Components Ltd's Air Raid Distress Fund* [1946] 1 Ch 194 at 200. See also *Re Harris Scarfe Ltd* [1935] SASR 433.

[24] Ibid.

[25] See Charities Commission "Deregistration Decision: Queenstown Lakes Community Housing Trust" (18 August 2010) on the Charities Services website: www.charities.govt.nz/LinkClick.aspx?fileticket=8MS%2b%2fCuln8%3d&tabid=241.

[26] HC WN CIV 2010-485-000831 [2 June 2011] at [113].

This decision is surprising considering that the New Zealand Court of Appeal had decided in 2005 that, even in the religious context, in order to provide public benefit an entity could not provide private benefits to individuals. In *Hester v Commissioner of Inland Revenue*,[27] the New Zealand Court of Appeal had to decide if it was a charitable object to establish a contributory superannuation scheme providing retirement income for employees of the Church of Jesus Christ of Latter-Day Saints. It comes as a surprise that a scheme established to provide private benefits to people who contributed to it would be charitable as long as it was established by a religious organisation, but would certainly not be charitable under any of the other heads of charity.

### *8.3.4 Retirement villages*

Retirement villages are defined in section 6 of the *Retirement Villages Act 2003* and include a wide range of living arrangements. Residents can purchase the right to live in their units by licences to occupy, unit titles, or lifetime leases or tenancies.

Retirement villages: have two or more residential units (a unit may be a villa, an apartment, a studio unit, a kaumātua flat or a room in a rest home); provide residential accommodation, together with services or shared facilities, or both; and are established mainly for people in their retirement (including their spouses or partners). The residents pay a capital sum in return for their right to live there (this can mean either a lump sum or periodic payments if they are substantially more than would be paid to cover rent and such services or facilities). The Act provides that for the avoidance of doubt, the following are not retirement villages for the purposes of the Act: owner-occupied residential units registered under the *Unit Titles Act 1972* and owner-occupied cross-lease residential units that in either case do not provide services or facilities to their occupants beyond those commonly provided by similar residential units that are not intended to provide accommodation predominantly for retired people or residential units occupied under tenancies to which the *Residential Tenancies Act 1986* applies; and boarding houses, guest houses or hostels and halls of residence associated with educational institutions.[28]

Most retirement villages are established for profit. However, a number of them have been registered by the New Zealand Charities Registration Board because the profits go to exclusively charitable purposes. In reaching such decisions, the New Zealand Charities Registration Board has relied on *D V Bryant Trust Board v Hamilton City Council*,[29] where Hammond J had to decide if a trust establishing "a village to help elderly people to live happily and fully in their later years" was charitable. The Board had resolved that residents were to be admitted irrespective of their ability to pay. He wrote that, in his view, Bryant Village was charitable under the relief of poverty, the relief of the aged and even under the fourth head of *Pemsel* (other purposes beneficial to the community).[30]

### *8.3.5 Friendly societies*

Friendly societies are registered under the *Friendly Societies and Credit Unions Act 1982* and provide for the relief or maintenance of members and their families during sickness, old age or in widowhood by voluntary subscriptions from members or by donations. Friendly societies have at least seven members and are not corporate bodies. Friendly societies include benevolent societies (established for any benevolent or charitable purpose) and working men's clubs (established for the purposes of social interaction, mutual helpfulness and recreation).[31]

Friendly societies are a kind of co-operative because every member has one vote only.[32] As indicated in *Re Hobourn Aero Components Ltd's Air Raid Distress Fund*,[33] friendly societies are usually not charitable entities because they do not provide sufficient public benefit

[27] [2005] 2 NZLR 172; application for leave to appeal to the Supreme Court dismissed: [2005] 2 NZLR 473.

[28] *Retirement Villages Act 2003*, s 6.

[29] [1997] 3 NZLR 342.

[30] Ibid, at 348.

[31] *Friendly Societies and Credit Unions Act 1982*, s 11 and schedule 1 (purposes for which friendly societies may be established).

[32] Ibid, s 37.

[33] [1946] 1 Ch 194 at 200. See also *Re Harris Scarfe Ltd* [1935] SASR 433.

since they are for the benefit of particular individuals. There are about 165 societies registered as friendly societies, with 940,000 members and a total annual income of $566 million. The main society in this category is Southern Cross, which has 835,000 members and $523 million in annual revenue.[34]

Inland Revenue has a specific section that provides tax exemptions for friendly societies.[35]

### *8.3.6 Industrial and provident societies*

Industrial and provident societies are established as separate legal entities under the *Industrial and Provident Societies Act 1908* to carry on any industry, business or trade authorised by their rules (except banking) for mutual benefit. The society will either be a co-operative society or carry on an activity that will improve the conditions of living or the social wellbeing of members of the working classes or be for community benefit. It must have at least seven members, and members cannot be liable for the society's debts.

In order to be charitable, this kind of organisation must have exclusively charitable purposes. Moreover, the primary purposes should not be for the profit of its members. Upon liquidation, surplus assets have to be directed to exclusively charitable purposes.

## 8.4 Superannuation schemes

Superannuation schemes are registered by the Government Actuary under the *Superannuation Schemes Act 1989*. A superannuation scheme provides retirement benefits to people either by means of a trust established by a trust deed or by an arrangement constituted under a New Zealand Act, other than the *Social Security Act 1964*.

In *Presbyterian Church of New Zealand Beneficiary Fund v Commissioner of Inland Revenue*[36] the High Court held that a superannuation scheme for the benefit of retired ministers of the church and their widows was charitable under the advancement of religion. In *Hester v Commissioner of Inland Revenue*,[37] the Court of Appeal confirmed that gifts on trust for the support of active, and retired, ministers of religion were charitable. Hammond J, however, indicated that the *Presbyterian Church* case was "very much at the outermost limits of the existing doctrine".[38]

In considering whether a contributory superannuation scheme providing retirement income for employees of the Church of Jesus Christ of Latter-Day Saints was a charitable purpose, Hammond J held:

> *[I]t seems to me that what is important is to appreciate just how far beyond the* Presbyterian Church *case the instant case is. To put it shortly, the position taken by the appellants distinctly overreaches. To say, for instance, that gardeners, clerical workers or cafeteria workers who are also Temple workers should come within this rubric (notwithstanding the sincerity of their personal beliefs, and their dedication in pursuing them) simply goes too far.*
>
> *It follows that, in my view, the scheme under consideration is well beyond the existing doctrine for an allowable religious charitable trust – it is too broadly conceived as to the persons who can come within it – and on that basis alone the present appeal should be dismissed.*[39]

William Young and Chambers JJ indicated that the factors relied on by O'Regan J in the High Court amply justified his distinguishing the *Presbyterian Church Fund* case.[40] In the High Court O'Regan J concluded:

[34] Office of the Minister of Commerce *Review of Financial Reporting Framework: Primary Issues* (February 2011) at [74].

[35] See *Income Tax Act 2007*, s CW 44.

[36] [1994] 3 NZLR 363.

[37] [2005] 2 NZLR 172, application for leave to appeal dismissed by the Supreme Court in [2005] NZSC 21.

[38] Ibid, at [14].

[39] Ibid, at 175.

[40] Ibid, at [70].

- *The Presbyterian Church Fund case is an exceptional case and should not be seen as authority for the proposition that any superannuation scheme controlled by a Church, and established for the benefit of employees of the Church, is charitable.*

- *Sufficient nexus did not exist between the benefits provided to the employees of the Church by the plan and the charitable activities of the Church. In particular, since the employees' activities could be carried out by contracted staff or secular employees, they could not be said to be essential to the operation of the Church and the roles undertaken by the employees were more transportable to other employment than the lifelong commitment undertaken by specially trained ministers.*

- *It was not appropriate to equate the charitable purposes of the Church with the purposes of the Plan when applying the "natural and probable consequences" test from the* Presbyterian Church Fund *and the* Baptist Union *cases. The purpose of the plan was to benefit the employees of the church which was a private benefit not consistent with the charitable purpose claimed by the trustees of the plan.*[41]

Young and Chambers JJ also noted that there would be serious fiscal implications arising from a decision to accord charitable status to the Church employees' superannuation scheme. They held that if the provision of superannuation benefits by means of a contributory scheme for teachers employed by the Church could be charitable under the advancement of religion, plans for anyone working in the education field would be charitable under the advancement of education. The same would apply to plans for doctors, nurses and ancillary staff (relief of the impotent) and for social workers (relief of poverty) and so on. Allowing this appeal would be likely to start a ball rolling which, unchecked, would have the potential to dent the income tax system severely.[42]

### 8.5 Single entities

The *Charities Act 2005* has introduced the term "single entity" to charity law. A single entity is not specifically defined by the Act. However, the Charities Commission has defined a single entity as "a group of closely related charitable organisations registered as one single organisation under the umbrella of a parent organisation known as a parent entity".[43]

Section 44(1) of the *Charities Act 2005* states that the Commission may treat two or more entities as forming part of a single entity if one of these entities (the parent entity) requests this and the Commission is satisfied that: the other entities are affiliated or closely related to the parent entity; each of the entities qualifies for registration as a charitable entity; and it is fit and proper to treat the entities as forming part of a single entity. Finally, the Commission must also have regard to the extent to which the entities have similar charitable purposes.

Single entities may choose one of three ways to present their financial information. The parent entity can provide a single financial statement for all the entities; the parent entity can provide individual financial statements for each entity that is a member of the single entity; or each member entity can provide its own financial statements.

About 123 single entities have been registered as at the end of May 2013. Most single entities have two to four members. However, some have up to 200 individual members.

[41] *Hester v Commissioner of Inland Revenue*, CIV 2002-404-1734, 25 November 2003 at [68-70].

[42] *Hester v Commissioner of Inland Revenue* [2005] 2 NZLR 172 at [105].

[43] Charities Commission Glossary (November 2006) "Single Entity".

## 8.6 Conclusion

This chapter looked briefly at the different types of company that can have charitable purposes. In doing so, it presented a brief analysis of the main characteristics of each type of entity.

Most limited companies are established for profit. If they seek charitable status, they must show that their purposes are exclusively charitable. They must also show that no individual may derive any private pecuniary profit from their activities. Finally, upon liquidation or winding up, they must show that surplus assets will be directed towards exclusively charitable purposes.

# Specified charitable purposes

Charitable purposes fall into four categories: for the relief of poverty, the advancement of education, the advancement of religion or other purposes beneficial to the community. The fourth category is a catch-all category that has in fact been divided into 10 subcategories by the United Kingdom *Charities Act 2006*.

Because of the importance of the fourth category, the purposes will be analysed in two different parts. This part deals with the first three charitable purposes, while Part V analyses the different subcategories of the fourth category.

CHAPTER 9

# Relief of poverty

The "relief of aged, impotent and poor people" are the opening words to the Preamble to the *Statute of Charitable Uses 1601*, and have often been described as the "heart" of charities law. "Poverty" is also the first head of the classification in the *Pemsel* case.

In some textbooks, the relief of the aged and impotent is treated within the general category of relief of poverty. However, there are problems in doing so. The first is that, while applications falling under the category of "relief of poverty" are presumed to provide public benefit, it is not the case with applications falling under the categories of relief of the aged or relief of the impotent. For these two categories, public benefit must be proven. It is therefore more logical to analyse relief of the aged and relief of the impotent as a subcategory under the fourth head of charity. This does not exclude the possibility of aged and impotent people being poor and therefore falling under the category of relief of poverty.

This chapter starts by looking at the definition of poverty. It also analyses the various ways of relieving poverty, that is, directly or indirectly. Public benefit is presumed in relieving poverty. This extends to what has been called "poor relations cases" and other limited classes. However, it does not include relief of the aged and the impotent.

## 9.1 Definition of poverty

In *D V Bryant Trust Board v Hamilton City Council*,[1] Hammond J wrote that "useful though the 'poverty' classification is, it obscures two very real problems: firstly, what is 'poverty'? and secondly, does poverty refer only to persons without any other source of support?".[2] These two questions are canvassed in this section. Two more topics are addressed, namely those relating to aged and impotent persons as being poor.

### *9.1.1 Poverty defined by the intention of the settlor*

Very often, the intention of the settlor is clear from the wording of the gift or the trust deed that the main purpose is to relieve poverty. For example, the intention to relieve poverty was evident in *Law v Acton*,[3] where the gift was for three of the "oldest" and poorest in the municipality. The intention was also clear in *Re Owens*,[4] where the testator directed "small sums" to be given to very poor people.

The intention to relieve people living on low incomes has been held to be charitable.[5] Similarly, where there is an indication of an intention to relieve people who are not making much money or who live in reduced circumstances, this has been held to be charitable, as was the case for providing homes for decayed or distressed gentlefolks,[6] and hostels for working men[7] or young girls.[8]

The inclusion of the word "needy" has generally become synonymous with "poor".[9] A clause in a trust deed giving power to distribute money to people "in needy circumstances" and with "special needs" indicates an intention to relieve poverty.[10] Similarly, a trust "for the relief of necessitous returned soldiers and their widows" was upheld as being for the relief of poverty.[11] The use of the words "indigent" and "impoverished" were also held to convey an intention to relieve poverty in a Canadian case where a trust was established for the "relief of impoverished or indigent members of the Law Society and their wives, widows and children".[12]

1 [1993] 3 NZLR 343.

2 Ibid, at 348.

3 (1902) 14 Man R 246, and *Re Short* [1914] OWN 525.

4 [1929] 37 OWN 97.

5 *Spiller v Maude* (1881) 32 Ch D 158n (gift for incapacitated actors not having an income of more than £50), and *Re Lacy* [1899] 2 Ch 149 and *Re de Carteret* [1933] Ch 103 (gift to aid persons in receipt of less than £120 a year). See also Hubert Picarda *The Law and Practice Relating to Charities* (4th Ed, Bloomsbury Professional Ltd, Haywards Heath, 2010) at 42 ["Picarda 4th ed"].

6 *Re Campbell* [1930] NZLR 713.

7 *Guinness Trust (London Fund) v West Ham Borough Council* [1959] 1 WLR 233.

8 *Rolls v Miller* (1884) 27 Ch D 71; *Re Strong* [1956] NZLR 275; *Re Pearse* [1955] 1 DLR 801.

9 *Re Payne Estate* (1954) 11 WWR 414 (BC) (needy Imperial Veterans); *Re Angell Estate* (1955) 16 WWR 342; *Re Wedge* (1968) 63 WWR 396 (BCCA) (needy displaced persons).

10 *Re Cohen (deceased)* [1973] 1 All ER 889 at 895 per Templeman J.

11 *Barby v Perpetual Trustee Company Ltd* (1937) 58 CLR 316 at 323 per Rich J.

12 *Re Denison* (1974) 43 DLR (3d) 652 at 655 per Wells CJHC (HC Ont).

The word "deserving" does not necessarily connote poverty. In *Re Cohen*,[13] a court held that a trust to provide dowries for deserving Jewish girls was not for the relief of poverty. Nor was a trust to advance deserving journalists a trust to relieve poverty.[14] In *Re Centrepoint Community Growth Trust*,[15] Cartwright J wrote that "it is necessary to avoid interpreting charity as applying only to the poor and worthy. In the present day society, many who are not 'worthy' are none the less the objects of charitable assistance whether privately or publicly funded".[16]

The context in which the word "deserving" is used may indicate that it connotes poverty. A trust for "necessitous and deserving" persons was upheld in *Gibson v South American Stores (Gath and Chaves) Ltd*.[17] In *Re Coulthurst*,[18] the beneficiaries were to be those chosen by the bank as being "by reason of his, her or their financial circumstances ... the most deserving of such assistance". This was because the word "deserving" plainly meant a person needing help. In *Re Bethel*,[19] a Canadian court held that the word "needy" related to poverty, but that "deserving" did not and therefore the gift failed. However, on appeal, it was held by a majority that the word "deserving" indicated poverty. This was because the phrase "needy or deserving" was read in that case as being synonymous and explanatory, and not as disjunctive.[20]

Finally, even if the intention to relieve poverty is not expressed clearly, it may be implied or inferred from the circumstances of the gift. For example, the collocation of words such as "widows" and "orphaned children" has given rise to the inference of poverty.[21]

Courts in Australia have held that gifts in favour of Aboriginal persons or associations benefiting such persons have been tended to be construed as charitable although not expressly directed to relieving poverty.[22] Furthermore, in *Latimer v Commissioner of Inland Revenue*,[23] Blanchard J noted that "it is notorious... that many (if not most) Māori who are members of groups directly benefiting from the assistance of the trust and from settlement of grievances are likely to be at the lower end of the socio-economic scale".[24] Gino Dal Pont wrote that the willingness to accept, almost without question, that Aboriginal persons were as a class "poor" for the purposes of charity law, "is arguably inconsistent with the courts' usual concern to ensure that benefits linked to charity under the poverty head do not accrue to those who are not poor".[25] He therefore recommended that the status of Aboriginals as ultimate beneficiaries of charity, where poverty was not expressed as the relevant object, rest under another head of charity.

Finally, there is no reason to assume that immigrants are poor. Refugees, however, may fall into the "poor" category. In *Canadian Centre for Torture Victims (Toronto) Inc v Ontario*,[26] the applicant operated a centre for the assistance of torture victims. The great majority of its clients were dependent on social assistance, lived in poverty and 80% were refugees. The Ontario Court held that the common link as torture victims did not preclude a finding that the centre operated for the relief of poverty. Justice Lax viewed the applicant's purpose as "to help poor individuals overcome the difficult circumstances which link them to poverty where their poverty is linked to circumstances unique to them as refugees who have been victims of torture, or whose family members have been tortured".[27]

### *9.1.2 Relative poverty and need*

In *D V Bryant Trust Board v Hamilton City Council*,[28] Hammond J wrote that "poverty is not to be equated with destitution". As Jessup JA put it in a very well known Canadian appellate decision, "poverty is a relative term which extends to comprise persons of moderate means".[29] Gino Dal Pont wrote that "in ordinary parlance, the concept of 'poverty' is one of degree".[30]

[13] (1919) 36 TLR 16.

[14] *Perpetual Trustee Co Ltd v John Fairfax & Sons Pty Ltd* (1959) 76 WN NSW 226.

[15] [2000] 2 NZLR 325 at 344.

[16] Ibid, at [57].

[17] [1950] Ch 177 (CA).

[18] [1951] Ch 661 (CA).

[19] (1971) 17 DLR (3d) 652 (Ont, CA).

[20] *Jones v Executive Officers of T Eaton Co Ltd* (1973) 35 DLR (3d) 97 at 104-105 (CSC).

[21] *Attorney-General v Comber* (1824) 2 Sim & St 93; *Re Coulthurst* [1951] Ch 661 (CA).

[22] In *Alice Springs Town Council v Mpweteyerre Aboriginal Corporation* (1997) 139 FLR 236 at 252 and in *Flynn v Mamarika* (1996) 130 FLR 218 at 227-228

[23] [2002] 3 NZLR 157.

[24] Ibid, at 209.

[25] Gino Dal Pont *Law of Charity* (Butterworths/LexisNexis, Australia, 2010) at 170.

[26] (1998) 36 OR (3d) 743.

[27] Ibid, at [10].

[28] [1993] 3 NZLR 343 at 349.

[29] *Re Bethel* (1971) 17 DLR (3d) 652 (Ont, CA), affirmed sub nom *Jones v Executive Officers of T Eaton & Co Ltd* (1973) 35 DLR(3d) 97 (SCC) cited with approval by Hammond J in *D V Bryant Trust Board v Hamilton City Council* [1997] 3 NZLR 343 at 349 and in *Re Pettit* [1988] 2 NZLR 513.

[30] Dal Pont *Law of Charity,* above n 25, at 165.

Lord Evershed MR observed:

> *Poverty of course, does not mean destitution. It is a word of wide and somewhat indefinite import; it may not unfairly be paraphrased for present purposes as meaning persons who have to "go short" in the ordinary acceptation of the term, due regard being had to their status in life and so forth.*[31]

The degree of poverty required to be considered "going short, due regard being had to their status in life" has varied with the times. With the advent of the welfare state in New Zealand and elsewhere, governments have played a significant role in alleviating poverty in the sense of destitution. The function of the welfare state is to ensure that no one is destitute in the sense it was given in Elizabethan England.

Therefore, the legal meaning of "poverty" is "going short", that is, being unable "to obtain all that is necessary, not only for a bare existence, but for a modest standard of living".[32] In *Re Central Employment Bureau for Women and Students' Careers Association Incorporated*,[33] the Court held that a fund established "for the purposes of helping educated women and girls to become self-supporting" was charitable for the relief of poverty. This is because "the implication of the gift to enable recipients to become self-supporting is a sufficient indication that they stand on the poverty side of the borderline, that is to say, that they are persons who could not be self-supporting, in whatever enterprise they embarked, without the assistance of this fund".[34]

Going short, however, does not mean that one should be supplied with all that one should have for one's own good.[35] In *Re Sanders' Will Trust*,[36] where the gift was to provide or assist in providing dwellings for the working class and their families resident in a certain district, the expression "working class" did not itself indicate poverty. However, in *Re Niyazi's Will Trust*,[37] a bequest for "the purposes only of the construction of or as a contribution towards the cost of the construction of a working men's hostel" was upheld as being for the relief of poverty. Megarry VC reasoned that the ordinary meaning of "working men's" was emphasised by the word "hostel", which together carried the connotation of "lower income". In that case, the Judge distinguished *Re Sanders' Will Trusts*, arguing that the word "hostel" was significantly different from the word "dwellings", a word that was appropriate to ordinary houses in which the well-to-do might live, as well as the relatively poor.

Relief of poverty certainly has the connotation of relieving financial needs. However, being in financial disadvantage or in financial need is not the same as being poor. In *Re Gillespie*,[38] Little J wrote that "it is not true that all persons in need of financial assistance are poor". In that case the Judge found that a scheme for providing financial assistance to purchase homes and farms could only be charitable if it was limited to beneficiaries who were in poverty. It was not enough that the testatrix had had the poor in mind; she needed to have had them exclusively in mind. He wrote: "The language goes beyond relief of poverty in a charitable sense and accordingly the gift will fail as a charity".[39] The Charity Commission for England and Wales has suggested that people in poverty might typically mean households living on less than 60% of the median income who go short in some unacceptable way.[40]

In *Queenstown Lakes Community Housing Trust*,[41] the Trust was providing loans to help people who had enough money to make a substantial deposit. As a consequence, only those who were employed and wealthy enough to manage the mortgage payments (a family income of 140% of the median family income for the area) and had the required deposits could be assisted by that scheme. The intention of the Trust was to retain employees who otherwise had a tendency to leave the area after 12-18 months because

31 *Re Coulthurst* [1951] Ch 661 at 666.

32 *Ballarat Trustees Executive and Agency Co v Federal Commissioner of Taxation* (1950) 80 CLR 350 at 385 per Kitto J, and *Trustees of the Indigenous Barristers' Trust v Federal Commissioner of Taxation* [2002] FCA 1474; (2002) 127 FCR 62 at [41] per Gyles J, remarking that "necessitous circumstances" are "not confined to the relief of poverty in the strict sense"). See also Dal Pont *Law of Charity*, above n 25 at 165.

33 [1942] 1 All ER 232.

34 Ibid, at 233 per Simonds J.

35 *Re Blyth* [1997] 2 Qd R 567 at 581 per Thomas J.

36 [1954] 1 Ch 264.

37 [1978] 1 WLR 910 at 915.

38 [1965] VR 402 at 408.

39 *Re Gillespie* [1965] VR 402 at 409.

40 Charity Commission for England and Wales, *The Prevention or Relief of Poverty for the Public Benefit* (UK, 2008) at 8.

41 HC WN CIV-2010-485-1818 [24 June 2011].

of the high cost of housing. The shared ownership programme was a way of subsidising people through a tenant-in-common scheme. If a property was sold, any capital gain on the property would be shared between the beneficiary and the appellant according to their percentage holdings. The entity was deregistered because the Trust did not restrict its activities to the poor but in fact excluded those who did not have an income of at least 140% of the median family income for the area. In that case, MacKenzie J refused to expand the notion of poverty because "an inherent public good of that nature will not be present if too liberal a view is taken of what may constitute poverty. Ordinary members of society would not recognise a general social responsibility to assist persons who may be as well or better off than themselves".[42]

In *Queenstown Lakes Community Housing Trust*,[43] MacKenzie J wrote that there could not be, and the case law did not support, any bright line definition of poverty. "There is no single fixed criterion of what constitutes poverty for the purposes of charity, and the law must be flexible to address new categories of need as they emerge [...] In the fact-specific inquiry, reference to the median income may be a useful aid, but it is not a test in itself".[44]

On the other hand, the relief of poverty may not be limited to relieving financial needs. The relief of other needs may also fall under other heads of charity, especially the relief of the impotent under the fourth head, where a number of counselling and similar services have been held to be charitable. Contemporary notions of relieving poverty are not limited to relief of financial needs but to equipping individuals to overcome difficult circumstances linked with poverty. This was illustrated in the following remarks by a Canadian judge:

> *It is well recognized today that the economic condition of poverty is inextricably linked with despair and hopelessness. Those who provide services to the poor must necessarily concern themselves, in the broadest sense, with the human as well as the physical condition of their clients. It is very difficult to separate one from the other [...] The modern approach to relieving poverty is a multi-dimensional one which seeks to provide something apart from the basic necessities of life such as food, shelter and clothing [...] Many organisations which provide assistance to the poor attempt to address the underlying lack of spirit and hope which makes daily living a struggle for today's poor. We who lead more privileged lives have great difficulty understanding how overwhelmingly disheartening and lonely this struggle can be. Those organisations which are 'for the relief of the poor' do understand this. It is for this reason that the activities of many of these organisations provide support, advice, counselling and community linkages. This is thought to be the best way to help their clients to acquire the basic skills to become economically self-sufficient and, ultimately, productive members of society. 'Relief of the poor' has come to mean equipping individuals to overcome difficult circumstances linked with poverty.*[45]

The problem with the attitude conveyed by this citation is the possible expansion of the concept of poverty to almost anybody who has psychological and social problems. The New Zealand Charities Registration Board has also noticed that some applicants have argued that providing any form of information may relieve poverty by equipping individuals to overcome difficult circumstances, whether or not these are linked to poverty.

### *9.1.3 Aged and impotent as poor*

As mentioned at the beginning of this chapter, it was decided to analyse "relief of the aged" and "relief of the impotent" under the fourth head of charity. This is because, for "relief of the aged" and "relief of the impotent", the presumption of public benefit does not automatically apply, contrary to cases for "relief of poverty".

[42] Ibid, at [39].

[43] Ibid.

[44] Ibid, at [40].

[45] *Canadian Centre for Torture Victims (Toronto) Inc v Ontario* (1998) 36 OR (3d) 743 at [10], per Lax J (Gen Div (Ont Ct)). See also Dal Pont *Law of Charity*, above n 25, at 166.

Another reason to separate "relief of the aged" from the "relief of poverty" concept is that the elderly do not necessarily constitute a burden on society. A challenge to the idea that the elderly are a burden on society, simply pushing up the cost of health and social care, is set out in a study published by a volunteering charity in the United Kingdom. It found that the elderly are in fact net contributors to the tune of £30 billion to £40 billion a year because they pay tax, spend money that creates jobs, deliver billions of pounds of free care to others and contribute to charities and volunteering. Public spending on health, pensions and welfare payments to the elderly runs at about £136 billion a year, the study said. But that is more than offset by their taxes, spending and voluntary activities, it calculated.[46]

Nevertheless, there are cases where "relief of the aged" and "relief of the impotent" also imply poverty. In such cases, "relief of the aged" and "relief of the impotent" can be treated as being for the "relief of poverty". For example, in *Re Lucas*,[47] the gift to the "oldest respectable inhabitant" was construed as a gift to the aged poor.

### 9.2 Various ways of relieving poverty

The word "relief" connotes that something is done to relieve some need. It implies that the persons in question have a need attributable to their condition as poor, aged or impotent that requires alleviating, and that those persons could not alleviate or would find difficulty in alleviating themselves from their own resources.[48]

Poverty can be relieved by direct or indirect methods. The relief of poverty through employment is also discussed.

#### *9.2.1 Direct relief*

Traditionally, the relief of poverty has been achieved through giving alms. Alms-giving was later replaced by the word "dole", that is, the distribution of money or some other thing to the poor. However, the distribution of money has been frequently criticised. For example, in *Re Campden Charities*,[49] Sir George Jessel MR wrote:

> *There is no doubt that it tends to demoralise the poor and benefits no one. With our present ideas on the subject, and our present experience which has been gathered as the result of very careful inquiries by various committees and commissions on the state of the poor in England, we know that the extension of doles is simply the extension of mischief.*[50]

The distribution of food, fuel and articles of clothing is unlikely to be abused. Other more constructive methods of direct relief are to be found in gifts for apprenticing poor children[51] and providing clothes for the poor.[52] The establishment, maintenance and support of institutions or funds for the relief of the fundamental needs of poor people have been held charitable. Hubert Picarda[53] wrote:

> *For example, soup kitchens,[54] hospitals, infirmaries or dispensaries,[55] nursing homes or societies[56] for persons of moderate means,[57] almshouses,[58] orphan and other asylums, convalescent homes,[59] homes of rest,[60] orphanages for children of particular classes of persons (such as railway servants,[61] policemen[62] or clergymen),[63] institutions for the support of decayed actors and actresses[64] or the distressed widows of medical men,[65] and homes for ladies in reduced circumstances[66] or working girls[67] all directly relieve poverty and are therefore charitable.*

46 Nicholas Timmins "Over-65s Boost Society by £30bn, Says Study" (Published: March 1 2011) on the website: www.ft.com/cms/s/0/2595771a-4438-11e0-931d-00144feab49a.html#axzz1FTlrgcfQ .

47 [1922] 2 Ch 52, [1922] All ER 317.

48 *Joseph Rowntree Memorial Trust Housing Association Ltd v Attorney-General* [1983] Ch 159, [1983] 1 All ER 288 applied in *Re Pettit* [1988] 2 NZLR 513.

49 (1881) 18 Ch D 310.

50 (1881) 18 Ch D 310 at 327.

51 *Attorney-General v Minshull* (1798) 4 Ves 11; *Attorney-General v Earl of Winchelsea* (1791) 3 Bro CC 373; *Attorney-General v Wansay* (1808) 15 Ves 231.

52 *Re Monk* [1927] 2 Ch 197.

53 Picarda 4th ed, above n 5, at 45.

54 *Biscoe v Jackson* (1887) 35 Ch D 460.

55 *Pelham v Anderson* (1764) 2 Eden 296; *Attorney-General v Gascoigne* (1833) 2 My & K 647; *Biscoe v Jackson* above (cottage hospital); *Re Cox* (1877) 8 Ch App 206.

56 *Re Clarke* [1923] 2 Ch 407; *IRC v Peebleshire Nursing Association* 1927 SC 215.

57 *Mayor of London's case* (1639) cited in Duke 83, ed Bridgman 380; *Re Whiteley* [1910] 1 Ch 600; and see *Chamberlayne v Brockett* (1872) 8 Ch App 206.

58 *Harbin v Masterman* (1871) LR 12 Eq 559; *Harbin v Masterman* [1894] 2 Ch 184, CA; affd sub nom *Wharton v Masterman* [1895] AC 186, HL.

59 *Re De Rosaz* (1889) 5 TLR 606; *Henshaw v Atkinson* (1818) 3 Madd 306 (blind asylum).

60 *IRC v (Trustees) Roberts Marine Mansions* (1927) 43 TLR 270, (CA) (seaside home at reduced charges for members of drapery and allied trade requiring rest and change of air for their health's sake).

61 *Hall v Derby Sanitary Authority* (1885) 16 QBD 163.

62 *Re Douglas* (1887) 35 Ch D 472.

63 *Re Clergy Society* (1856) 2 K & J 615.

64 *Re Lacy* [1899] 2 Ch 149; *Spiller v Maude* (1881) 32 Ch D 158n.

65 *IRC v Society for Relief of Widows or Orphans of Medical Men* (1926) 136 LT 60.

66 *Attorney-General v Power* (1809) 1 Ball & B 145; *Re Estlin* (1903) 72 LJ Ch 687; *Trustees of the Mary Clark Home v Anderson* [1904] 2 KB 645; *Re Gardom* [1914] 1 Ch 622; *Shaw v Halifax Corporation* [1915] 2 KB 170; *Re Clark* [1923] 2 Ch 407; *Re Campbell* [1930] NZLR 713; *Re Harvey* [1941] 3 All ER 284; *Re Young* [1951] Ch 344; cf *Re Norgate* (1944) Times, 21 July; 88 Sol Jo 267 n (rest home for vegetarians, teetotallers, pacifists, and conscientious objectors).

67 *Rolls v Miller* (1884) 27 Ch D 71; *Re Strong* [1956] NZLR 275; *Re Pearse* [1955] 1 DLR 801 (sick or overworked young governesses).

Entities established to provide shelter or homes for the poor have also been held to be for the relief of poverty. In *Re Centrepoint Community Growth Trust*,[68] it was held that "in contemporary New Zealand poverty can quite readily be equated with lack of affordable accommodation".[69] Thus the following methods of providing housing have been upheld: providing allotments or buying land to be let to the poor at a low rents;[70] providing interest-free loans to poor and deserving inhabitants of a particular parish;[71] providing flats to be let to aged persons of small means at economic rents;[72] and providing rental accommodation at low cost to persons in needy circumstances.[73] Similarly, providing access to hostels for Aboriginal people may be charitable for the relief of poverty,[74] although it would be better to analyse it under the fourth head of charity as being for the relief of human distress.

Gino Dal Pont wrote that providing assistance to purchase a dwelling arguably comes under the umbrella of relieving poverty because, considering the high cost of housing, especially in cities, the poor are unlikely to be in a position to fund purchases of homes.[75] Providing low-interest or interest-free (but reviewable) loans to assist poor young members of the Exclusive Brethren to purchase freehold or leasehold housing accommodation has been held to be charitable.[76]

However, not every scheme designed to help people access property may be charitable. The Charities Commission deregistered a number of trusts established to help people access property where the benefits were not limited to poor people.[77] In *Queenstown Lakes Community Housing Trust*,[78] MacKenzie J acknowledged that the Commission accepted that providing housing to the poor was charitable and that assisting the poor to buy housing through shared ownership or other direct financial aid could be charitable.[79] Nevertheless, in *Queenstown Lakes Community Housing Trust*,[80] MacKenzie J wrote that while housing was a basic need, and right, home ownership was not. "Many people who are not objectively 'poor' may have difficulty providing a deposit on a house or servicing a mortgage. Renting would generally be recognised as an alternative, which, if affordable to the person concerned, would mean that that person was not in need to the extent of poverty. Nor is housing in a particular location a basic need, if there are reasonable available alternatives".[81]

### *9.2.2 Indirect relief*

Although the relief of poverty may be direct, there are cases where it can be indirect. One example of the indirect relief of poverty is the provision of accommodation for relatives who come from a distance to visit patients critically ill in hospital.[82] Another would be provision for a home of rest for nurses at a particular hospital.[83]

Other examples of indirect relief are: gifts to funds of parish churches[84] and to religious communities having for their object the relief of the sick and poor;[85] gifts to friendly societies under whose rules relief may only be given to members who are poor[86] and gifts to those endeavouring to uplift the need;[87] and gifts tending to promote the efficient administration of trusts for the relief of poverty.[88]

Hubert Picarda also gave a somewhat surprising example of indirect relief of poverty that the Charity Commission for England and Wales accepted as being for the indirect relief of poverty. "A trade mark indicating to purchasers that the products on which the mark appears were from Third World producers who had benefited from arrangements for fair dealing might be preferable to handouts because the price for the goods would be higher and would promote education and health care and so forth for the producers".[89] Such a position seems at odds with the positions in other common law countries, including New Zealand.

[68] [2000] 2 NZLR 325.

[69] Ibid, at 343 per Cartwright J.

[70] *Re Cottam's Will Trust* [1955] 1 WLR 1299.

[71] *Re Monk* [1927] 2 Ch 197.

[72] *Re Cottam's Will Trust* [1955] 1 WLR 1299.

[73] *Common Equity Housing Ltd v Commissioner of State Revenue* (1996) 33 ATR 77.

[74] *Aboriginal Hostels Ltd v Darwin City Council* (1985) 55 LGRA 414 at 427-428.

[75] *Law of Charity,* above n 25, at 168.

[76] *Garfield Poverty Trust* (1990) 3 Decisions of the Charity Commissioners (1995) 7-10; and *Habitat for Humanity Great Britain* (1994) 4 Decisions of the Charity Commissioners (1995), cited by Picarda 4th ed, above n 5, at 45 footnote 1.

[77] First Home Ownership Trust, on Charities Services website at www.charities.govt.nz/LinkClick.aspx?fileticket=ZcB1PmPyy7w%3d&tabid=250. See also Queenstown Lakes Community Housing Trust, on Charities Services website www.charities.govt.nz/Portals/o/docs/decisions/Queenstown_Lakes_Comm_Housing_Trust.pdf.

[78] HC WN CIV-2010-485-1818 [24 June 2011].

[79] Ibid, at [35] citing *Common Equity Housing Ltd v The Commissioner of Inland Revenue* (1996) 33 ATR 77; *Garfield Poverty Trust (1990)* [1995] 3 Decisions of the Charity Commissioners 7; *Habitat for Humanity Great Britain (1994)* [1995] Decisions of the Charity Commissioners 13.

[80] Ibid.

[81] Ibid, at [41].

[82] *Re Dean's Will Trusts* [1950] 1 All ER 882.

[83] *Re White's Will Trusts* [1951] 1 All ER 528.

[84] *Re Garrard* [1907] 1 Ch 382.

[85] *Cocks v Manners* (1871) LR 12 Eq 574; *Re Delany* [1902] 2 Ch 642.

[86] *Re Buck* [1896] 2 Ch 727.

[87] *Re Orr* (1917) 40 OLR 567 (Can).

[88] *Re Coxen* [1948] Ch 747; *Re Charlesworth* (1910) 101 LT 908; cf *Re Barnett* (1908) 24 TLR 788. See also Picarda 4th ed, above n 5, at 46.

[89] *The Fairtrade Foundation* (1995) 4 Decisions of the Charity Commissioners 1-7, cited in Picarda 4th ed, above n 5, at 46.

The provision of recreation, entertainment, luxuries or "creature comforts" that are ancillary or indirect objects of the institution or gift will not preclude the institution or gift being charitable if its main object is charitable and these objects are directed to the furtherance of the main object.[90] This was the case where a trust provided for extra comforts for nurses at Christmas[91] and for patients in paying beds at hospitals.[92]

### *9.2.3 Relieving unemployment*

Courts have held that relieving unemployment can be charitable under relief of poverty. In *Re Central Employment Bureau for Women and Students' Careers Association Incorporated*,[93] the Court found that a fund established for the purpose of helping educated women and girls to become self-supporting was charitable. The reason for this was given by Simonds J, who wrote: "The implication of the gift to enable recipients to become self-supporting is a sufficient indication that they stand on the poverty side of the borderline – that is to say that they are persons who could not be self-supporting in whatever enterprise they embarked without the assistance of this fund".[94]

The Court in *Joseph Rowntree Memorial Trust Housing Association Ltd v Attorney-General*[95] reaffirmed that in order to be charitable, any assistance had to be directed to the relief of a charitable need and that the level of assistance should be commensurate with that need. This meant that the entity had to show that it had been set up for the benefit of persons seeking employment but who were unable to obtain work because of one or more of their lack of job opportunities and their youth, age, infirmity or disablement, poverty, and social or economic circumstances.

Lightman J, in *Commissioners of Inland Revenue v Oldham Training and Enterprise Council*,[96] used similar reasoning. He wrote:

> *So far as the object of Oldham TEC is to set up in trade or business the unemployed and enable them to stand on their own feet, that is charitable as a trust for the improvement of the conditions of life of those "going short" in respect of employment and providing a fresh start in life for those in need of it, and accordingly for the relief of poverty within category (1).*[97]

The *Oldham TEC* case was heavily relied upon by Young J in *Canterbury Development Corporation v Charities Commission*.[98] In that case, Young J could not distinguish *Oldham TEC* from the case at bar. Quite on the contrary, he wrote that *Oldham TEC* had a considerably more powerful case in favour of a declaration as a charity than the case at bar. This was because:

> *The trust deed and operation of Oldham TEC is much more focused on directly assisting the unemployed than CDC's. It has cash allowances for those starting businesses (who had to be unemployed and the resulting business had to employ unemployed people). Some of the Oldham training was targeted specifically at assisting young people into work and retraining the unemployed. No such focus is present in the objects or activities of CDC.*[99]

Moreover, in *Canterbury Development Corporation v Charities Commission*,[100] Young J pointed out that it was of some interest to consider the position of the Charity Commission for England and Wales in this regard. It has an extensive publication dealing with what it will accept and what it will not accept as a charity. Under the "Charities Relieving Unemployment" section and that part dealing with public benefit it discusses what are and what are not acceptable activities"[101] by an organisation claiming charitable status. The Judge adopted those guidelines in deciding the case. He wrote:

[90] *City of Hawthorn v Victorian Welfare Association* [1970] VR 205 at 209-210, per Smith J.
[91] *Re Bernstein's Will Trusts* (1971) 115 Sol Jo 808.
[92] *Re Adams* [1968] Ch 80.
[93] [1942] 1 All ER 232.
[94] Ibid, at 233.
[95] [1983] 1 All ER 288.
[96] (1996) 69 Tax Cases 231.
[97] Ibid, at 249.
[98] [2010] 2 NZLR 707 at [46-58].
[99] Ibid, at [54].
[100] [2010] 2 NZLR 707.
[101] Ibid, at [90].

> *The capital grant or equipment or payment to a new business, where the business is started by someone who is unemployed, and not by someone who has quit employment to start its own business, can be charitable. Secondly, where the payment is to an existing commercial business it must be to take on additional staff from unemployed persons before it can be considered charitable. This illustrates the type of direct focus on the unemployed which might be required to relieve poverty and thereby ensure the organisation is charitable. Also with the promotion of economic development, the focus must be directly on the promotion of public development as the primary object.*[102]

In *Canterbury Development Corporation v Charities Commission*,[103] the appellant argued that it created jobs in two ways: where there was a chain of employment, the creation of a new job resulted in the movement of employed persons, thus leaving employment for the unemployed; and the creation of skilled jobs created the need for service jobs, thus providing jobs for the unemployed. In rejecting that reasoning, Young J wrote that he accepted that the unemployed could be one of the ultimate beneficiaries but that "the possibility of helping someone who is unemployed is too remote for it to qualify as the charitable purpose of relief of poverty".[104]

Revenue Canada followed the Charity Commission for England and Wales in its policy document concerning economic development programmes. It wrote that "relieving and preventing unemployment is a charitable purpose under the first head and the fourth. However, providing employment is not a charitable purpose in its own right, though on occasion it can be a way to achieve a charitable purpose".[105]

### 9.3 Public benefit presumed

In *Re McIntosh (deceased) and others*,[106] Beattie J summarised the tests that purposes had to meet in order to be declared charitable. He wrote:

> *To be charitable a purpose must satisfy certain tests – whether the purpose is enforceable by the court at the instance of the Attorney-General; whether the purpose is by analogy within the spirit and intendment of the Preamble to the ancient* Statute of Elizabeth I *(43 Eliz I, c. 4); whether the purpose falls within any of the so-called four divisions of charity derived from that statute; and the overriding test whether the purpose is for the public benefit.*[107]

It is therefore clear that, in most cases, the public benefit test must be met.

It must be noted, however, that the requirement to meet the public benefit test in order to be charitable applies differently in cases falling under the relief of poverty. Furthermore, the House of Lords in *Dingle v Turner*[108] wrote that the rule of the public benefit test had no application in the field of trusts for the relief of poverty.

Gino Dal Pont[109] summarised the main justifications for this favourable treatment:

> *The first is a practical one: as the exception enjoys a long history,*[110] *it would be now inappropriate for a court to overrule the case law upon which it is based,*[111] *as to do so would upset many dispositions that have been assumed to be valid.*[112] *The 'horse has bolted', as it were. The second is policy-focused. It suggests that some special quality in relieving poverty – say, it is inherently so beneficial to the community as not to require proof of public benefit,*[113] *or it 'is of so altruistic a character that the public element may necessarily be inferred thereby'*[114] *– places it in a class by itself. In that class, it is reasoned, consequent private benefit to*

[102] Ibid, at [91].

[103] Ibid, at [27].

[104] Ibid, at [30].

[105] *Registered Charities: Community Economic Development Programs* on the Canada Revenue Agency website: www.cra-arc.gc.ca/E/pub/tg/rc4143/rc4143-e.pdf at 4.

[106] [1976] 1 NZLR 308.

[107] Ibid, at 309.

[108] [1972] AC 601 at 623.

[109] Dal Pont *Law of Charity*, above n 25, at 176.

[110] These cases are listed and discussed in *Re Compton* [1945] Ch 123 at 137-139 per Lord Greene MR.

[111] *Gibson v South American Stores (Gath and Chaves) Ltd* [1950] 1 Ch 177 at 194 per Evershed MR; *Oppenheim v Tobacco Securities Trust Co Ltd* [1951] AC 297 at 308-309 per Lord Simonds.

[112] *Re Compton* [1945] Ch 123 at 139 per Lord Greene MR; *Gibson v South American Stores* (*Gath and Chaves*) Ltd [1950] 1 Ch 177 at 195 per Evershed MR; *Dingle v Turner* [1972] AC 601 at 623 per Lord Cross.

[113] *Re Compton* [1945] Ch 123 at 139 per Lord Greene MR; *Gibson v South American Stores (Gath and Chaves) Ltd* [1950] 1 Ch 177 at 194-195 per Evershed MR.

[114] *Re Scarisbrick* [1951] Ch 622 at 639 per Lord Evershed MR.

> *individuals is outweighed by the public benefit in relieving poverty. Conversely, whatever public benefit there is inherent in gifts other than for the relief of poverty is overridden by the policy against charity conferring direct private benefit on individuals.*[115]

In *Queenstown Lakes Community Housing Trust*,[116] MacKenzie J wrote that trusts for the relief of poverty were, generally speaking, an exception to the general rule that to be charitable a trust had to be for the benefit of the community or a section of it. "Trusts for the relief of poverty may be charitable even though they are limited in their application to a defined category of individuals, and are not trusts for the benefit of the public or a section of the public".[117] This may be explained by the fact that, contrary to other heads of charity, the legal sense of relief of poverty has a close association with the ordinary meaning of charity in general usage.

In *Charity Commission for England and Wales v Attorney-General*,[118] the United Kingdom Upper Tribunal wrote that even though the presumption of public benefit had been abolished in the *Charities Act 2006*, the law had not been fundamentally changed. The Tribunal held that there were two aspects of public benefit: that the nature of the charity's purpose had to be a benefit to the community, and that those who benefited from the carrying out of the purposes had to be sufficiently numerous and identifiable so as to constitute a section of the public.

The Tribunal held that when considering a charity for the relief of poverty of a restricted group, only public benefit in the first sense was necessary, so it did not need to be shown that a charity's purpose benefited a sufficient section of the public. The Tribunal further held that charities for the relief of poverty of a restricted group had never been exempt from the requirement to have purposes for public benefit, but that rather public benefit for such charities should have been understood as referring to public benefit in the first sense only, that is they had only ever needed to show that their purpose was of benefit to the community. Therefore, the fact that only a restricted group would benefit did not affect whether there was public benefit and so did not affect whether the organisation was charitable.

The presumption of public benefit in relief of poverty cases applies even where the settlor is related to the class of people to be relieved.

#### *9.3.1 Poor relations cases*

Although case law has accepted that a settlor may create a valid charitable trust for the relief of poverty amongst persons related to him or her or to a limited class of people, it is important to distinguish between a charitable and a private trust. It is also important to distinguish between the relief of poverty of poor relations and the relief of aged or impotent poor relations.

##### *9.3.1.1 Test distinguishing charitable trust and private trust*

The House of Lords, in *Dingle v Turner*,[119] said that "the dividing line between a charitable trust and a private trust lies where the Court of Appeal drew it in *In Re Scarisbrick's Will Trust* [1951] Ch 622".[120] Summarising the reasons for his decision in that case, Lord Cross wrote:

[115] *Re Compton* [1945] Ch 123 at 139 per Lord Greene MR; *Dingle v Turner* [1972] AC 601 at 623 per Lord Cross.

[116] HC WN CIV-2010-485-1818 24 June 2011.

[117] Ibid, at [32].

[118] Upper Tribunal (Tax and Chancery Chamber) 20 February 2012 .

[119] [1972] AC 601.

[120] Ibid, at 623.

> *In this field, the distinction between a public or charitable trust and a private trust depends on whether as a matter of construction the gift was for the relief of poverty amongst a particular description of poor people or was merely a gift to particular poor persons, the relief of poverty among them being the motive of the gift. The fact that the gift [took] the form of a perpetual trust would no doubt indicate that the intention of the donor could not have been to confer private benefits on a particular people whose possible necessities he had in mind; but the fact that the capital of the gift was to be distributed at once does not necessarily show that the gift was a private trust.*[121]

In cases where priority has been given to some blood relations, courts have held as being charitable trusts giving priority to classes of relatives as long as the terms of the dispositions evidenced an intention to create perpetual trusts beyond merely benefiting the relatives.[122] In that regard, Gino Dal Pont wrote:

> *If the terms of the disposition evidence an intention to create a perpetual fund or institution in which no individuals are to have a personal right, or otherwise demonstrate an intention, in purported poor relations cases, to benefit beyond the statutory next of kin or a narrow class of near relatives of the disponer (whether or not it requires the immediate distribution, or the exhaustion of the capital of the fund), the disposition can be construed as a purpose gift.*[123]

#### *9.3.1.2 What constitutes a sufficient class of persons?*

The donor must have identified the relevant class precisely enough that the trust is not void for uncertainty. However, the courts have not had difficulty interpreting the terms "relations" and "relatives" and have viewed them as being broader than the statutory next of kin.

The principal issue in the "poor relations" cases is usually whether the disposition is for the relief of poverty amongst a class of persons (gift for a charitable purpose) or merely a gift to private individuals, albeit with the relief of poverty amongst those individuals as the motive of the gift.

In *Re Cohen*,[124] the Court found a valid charitable trust to relieve poverty in the case of a will that directed the trustees to apply the whole or any part of the final residue towards the "maintenance and benefit of any relatives of mine whom my trustees shall consider to be in special need".[125]

In *Re Segelman*,[126] a residuary trust fund was for a period of 21 years to be used at the discretion of the trustees for relieving the hardship of certain poor and needy of the family. After 21 years, it was to be distributed at the discretion of the trustees to any needy family including those born after the signing of the will. The group of beneficiaries was made up of six of the testator's family, and included (but did not name) the issue of five of them. Chadwick LJ upheld the trust as charitable and classified the gift as not one to named individuals despite a list of names because of the provision including issue born during the 21-year period. Extrinsic evidence showed that the testator had been careful in his initial choice to focus on real need and not proximity of relationship. The Judge noted that this was close to the line between a purpose gift and one for individuals, but considered it to be for a charitable purpose.

[121] *Re Scarisbrick* [1951] 1 Ch 622 at 617.

[122] Ibid, at 654-657; and *Re Cohen (deceased)* [1973] 1 All ER 889 at 895.

[123] Dal Pont *Law of Charity*, above n 25, at 177.

[124] [1973] 1 All ER 889.

[125] Ibid, at 892.

[126] [1996] Ch 171.

The next question to be answered is: what constitutes a sufficient class of persons? In *Re Doug Ruawai Trust*,[127] the Trust was a de facto one constituted when an appeal to the public was made to raise money in order to facilitate a heart transplant operation overseas for the late Mr Doug Ruawai, a well known citizen who did not have the means to pay for such an operation. Some $85,000 was raised. After Mr Ruawai's death, the de facto trustees asked the Court what to do with the remaining $50,000. In order to decide the case, the Court had to decide whether the trust was charitable. McGechan J wrote:

> *Clearly it is not charitable. [...] and as the law at present stands this trust is not charitable because it is not for public purpose, rather it was for the private benefit of one named individual the late Mr Douglas Ruawai. It does not come within the exceptional and controversial class of the so called poor relations case not only because it is for the benefit of one named individual, but because it is not for the relief of poverty or impotence as such but for the relief of a person.*[128]

McGechan J went on to say that while he accepted "as a matter of general law that it is of the essence of a charity that it be for purposes not persons", he could not accept the Attorney-General's submission that "the so called poor relation cases exception to public purposes does not apply where the trust is for a specified named individual".[129]

It is clear that the law would support as charitable a body set up to benefit sufferers of a disease (objective criteria) even if there were only a few sufferers. However, it is equally clear that there are no cases where a charitable trust has provided a benefit primarily to a single named individual.

### *9.3.2 Gifts for other limited classes*

In a trust for the relief of poverty, the fact that the relief is to be confined to employees of a particular limited company or industrial organisation does not invalidate the trust. Consequently, in *Re Gosling*,[130] a gift from a fund for the purpose of pensioning off the old and worn-out clerks of a firm was held to be a valid charitable bequest. Similarly, in *Gibson v South American Stores Ltd*,[131] a trust for the relief of poverty amongst the employees and ex-employees of a company and their families was held to be a charity by the Court of Appeal.

In *Re Young's Will Trusts*,[132] a testator gave the residue of his estate to the trustees of the benevolent fund of the Savage Club on trust to use the residue for the assistance of members of that club who might fall on hard times. Danckwerts J upheld the gift on the ground that there was no distinction between a gift for the relief of poverty of the employees of a limited company and a similar gift in favour of the members of a club. This argument was also applied where the necessitous beneficiaries were members of a trade union or other similar body.[133] In *Re Hilditch (deceased)*,[134] there was a bequest to provide a home for poor and distressed Freemasons who were members of a specified masonic lodge. This was upheld because the trust was not limited in time and because it was to take effect only on the death of a class of persons of whom most were much younger than the testator.

Hubert Picarda[135] wrote that a trust for the relief of poverty could be valid even though the persons to benefit were limited to those of a particular sex or condition, such as widows,[136] spinsters[137] or working men,[138] or to persons of a particular age group such as "the aged"[139] or young women. The benefits could also be validly limited to persons answering a particular description, such as poor emigrants, poor struggling youths of merit,[140] poor pious persons[141] or debtors.[142] Even indigent bachelors and widowers "who have shown sympathy with science" were good objects of charity.[143] Likewise, the inmates of a work-house[144] or a hospital[145] could be the objects of a valid trust for the relief of poverty.

[127] High Court, Palmerston North, CP 285/86 [25 November 1987].

[128] Ibid, at 5.

[129] Ibid, at 6.

[130] (1900) 48 WR 300. See also *Re Bethel* (1971) 17 DLR (3d) 652 (a trust for needy or deserving Toronto members of a club has been held charitable).

[131] [1950] Ch 177 and see *Re Coulthurst* [1951] Ch 661 (trust to apply income for widows and orphans of deceased bank officials). See also Picarda 4th ed, above n 5.

[132] [1955] 1 WLR 1269.

[133] *Spiller v Maude* (1881) 32 Ch D 158n; *Re Lacy* [1899] 2 Ch 149 (Royal General Theatrical Association); *Pease v Pattinson* (1886) 32 Ch D 154 (Miners' Permanent Relief Fund Friendly Society); *Re Buck* [1896] 2 Ch 727 (Commercial Travellers Society); *Re Mead's Trust Deed* [1961] 1 WLR 1244.

[134] (1985) 39 SASR 469.

[135] Picarda 4th ed, above n 5, at 50.

[136] *Re Coulthurst* [1951] Ch 66/.

[137] *Re Dudgeon* (1896) 74 LT 613.

[138] *Guinness Trust (London Fund) v West Ham Borough Council* [1959] 1 WLR 233.

[139] *Re Dudgeon* (1896) 74 LT 613.

[140] *Milne's Executors v Aberdeen University Court* (1905) 7 F (Ct of Sess) 642.

[141] *Nash v Morley* (1842) 5 Beav 177.

[142] *Attorney-General v Painter-Stainers' Co* (1788) 2 Cox Eq Cas 51; *Attorney-General v Ironmongers Co* (1834) 2 My & K 576.

[143] *Weir v Crum-Brown* [1908] AC 162, HL.

[144] *Attorney-General v Vint* (1850) 3 De G & Sm 704.

[145] *Reading Corpn v Lane* (1601) Duke 81.

[146] *Pease v Pattinson* (1886) 32 Ch Dl 154; *Re Hartley Colliery Accident Relief Fund* (1908) 102 LT 165n; *Cross v Lloyd-Greame* (1909) 102 LT 163 (only six victims).

[147] *Downing v Taxation Comr* (1971) 125 CLR 185; *Re Gillespie* [1965] VR 402; *Re Payne Estate* (1954) 11 WWR 424; *Re Booth* [1954] NZLR 1114.

There are also examples in New Zealand and Australia, amongst others, of a number of limited groups being beneficiaries under the relief of poverty. For example, gifts to the victims of a particular disaster[146] and to the members of a particular regiment[147] have been held to be charitable. In Australia, poor aged Christian Scientists or adherents to Christian Science can qualify for relief,[148] just as in New Zealand a trust for the indigent blind of the Jewish persuasion in London has been upheld as charitable.[149] Hubert Picarda cited a case in the United States of America where a gift was upheld although limited to "worthy, deserving, poor, white, American, Protestant, Democratic widows or orphans residing in the town of Bridgeport".[150]

In *Re Denison*,[151] a Canadian court acknowledged that a trust established for the relief of impoverished or indigent members of the legal profession was charitable. This was consistent with earlier decisions that had established the validity of trusts for needy persons in a trade, profession or calling,[152] such as old decayed tradesmen,[153] domestic servants,[154] soldiers,[155] seamen,[156] poor clergymen,[157] poor actors[158] and unsuccessful literary men.[159]

Although courts have upheld gifts for the relief of the poor in a city[160] or town,[161] one wonders how restrictive the geographical limitation can be. Courts have held that the poor of a village of fewer than 400 inhabitants are proper objects of charity,[162] as are the poor of a particular parish.[163] In *Bristow v Bristow,*[164] a trust for the poor of a particular estate was upheld. Hubert Picarda expressed the opinion that a gift for the poor of a particular street could be charitable.[165]

### *9.3.3 Relief of the aged and the impotent*

In the Preamble to the *Statute of Uses 1601*, "the relief of the aged impotent and poor people" appears in one sub-classification. However, courts have held that the phrase must be construed disjunctively.[166] In *Re Dunlop*,[167] which involved aged or impotent persons, Carswell J considered that the poverty exception from the rule regarding public benefit was limited to relief of poverty cases. Carswell J wrote:

> *The discussion in* Re Scarisbrick *[1951] Ch 622 centred solely round trusts for the relief of poor persons, and there was no case cited in the judgments which concerned only aged or impotent people without the added qualification of poverty [...] Although Lord Simonds said in* Oppenheim v Tobacco Securities Trust Co. Ltd *[1951] AC 297, 308 that the law of charity, so far as it related to 'the relief of aged, impotent and poor people' has followed its own line, which might indicate a willingness to regard the exception as applying to the whole of Lord Macnaghten's first head, I consider that the House of Lords in* Dingle v Turner *intended to circumscribe it more closely and to confine it to cases concerning the relief of actual poverty.*[168]

Accordingly, Hubert Picarda wrote that "trusts for the relief of aged or impotent persons must still satisfy the test of public benefit".[169]

[148] *City of Hawthorn v Victorian Welfare Association* [1970] VR 205 (home for the poor aged).

[149] *Re Trusts of the Will of Jacob Joseph decd* (1907) 26 NZLR 504, 9 GLR 329.

[150] Picarda 4th ed, above n 5, at 51 citing *Beardsley v Selectmen of Bridgeport* 53 Conn 489 (1985) (USA).

[151] (1974) 42 DLR (3d) 654.

[152] *Attorney-General v Pearce* (1840) 2 Atk 87.

[153] *Re White's Trusts* (1886) 33 Ch D 449; *Attorney-General v Painter-Stainers' Co* (1788) 2 Cox Eq Cas 51.

[154] *Loscombe v Wintringham* (1850) 13 Beav 87; *Manorama Dassi v Kali Charan Banerjee* (1904) ILR 31 Calc 616 (testator's poor servant).

[155] *Re Donald* [1909] 2 Ch 410; *Re Robinson* [1931] 2 Ch 122.

[156] *Powell v A-G* (1817) 3 Mer 48.

[157] *Moggridge v Tackwell* (1792) 1 Ves 464.

[158] *Spiller v Maude* (1881) 32 Ch D 158n.

[159] *Thompson v Thompson* (1844) 1 Coll 381.

[160] *Attorney-General v Exeter Corpn* (1827) 2 Russ 362; *Re Lousada* (1887) 82 LT Jo 358.

[161] *Russell v Kellett* (1855) 3 Sm & G 264; *Re Lucas* [1922] 2 Ch 52; *Powell v A-G* (1817) 3 Mer 48.

[162] *Re Monk* [1927] 2 Ch 197.

[163] *Woodford Inhabitants v Parkhurst* (1639) Duke 70 (378); *Attorney-General v Matthews* (1677) 2 Lev 167; *Attorney-General v Comber* (1824) 2 Sim & St 93; *Re Roadley* [1930] 1 Ch 524.

[164] (1842) 5 Beav 289.

[165] Picarda 4th ed, above n 5, at 52.

[166] *Re Glyn's Will Trust* [1950] 2 All ER 1150n; *Re Bradbury* [1950] 2 All ER 1150n; *Re Robinson* [1951] Ch 198. See also Hubert Picarda *The Law and Practice Relating to Charities* (3rd ed, Butterworths, London, 1999) at 118; Gino Dal Pont, *Charity Law in Australia and New Zealand* (Oxford University Press, Oxford, 2000) at 111, footnote 2 citing the following cases: *Re Lucas* (1922) 2 Ch 52; *Re Peacock's Charity* [1956] Tas SR 142 at 145 per Gibson JK; *Re Resch's Will Trusts* [1969] 1 AC 514 at 542-543; *City of Hawthorn v Victorian Welfare Association* [1970] VR 205 at 208 per Smith J; *Trustees of Church Property of the Diocese of Newcastle v Lake Macquarie Shire Council* [1975] 1 NSWLR 521 at 524 per Moffitt P, at 534 per Hutley JA; *Re McIntosh (deceased)* [1976] 1 NZLR 308 at 309-310 per Beattie J; *West Australian Baptist Hospital & Homes Trust Inc v City of South Perth* [1978] WAR 65 at 58 per Lavan SPJ; *McGovern v Attorney-General* [1983] 1 Ch 159 at 171-174 per Peter Gibson J; *D V Bryant Trust Board v Hamilton City Council* [1997] 3 NZLR 342 at 349 per Hammond J (affd [1999] 1 NZLR 41).

[167] [1984] NI 408.

[168] Ibid, at 423.

[169] Picarda 4th ed, above n 5, at 53.

## 9.4 Conclusion

The relief of poverty is a charitable purpose. It is based on Judeo-Christian social doctrine. The persons to benefit need not be destitute or on the border of destitution. Those lacking the resources to obtain what is necessary for a modest standard of living may be accepted as suffering poverty. To relieve poverty implies that the people in question have needs attributable to their conditions that require alleviating and that those people could not alleviate or would have difficulty alleviating by themselves. The ways in which poverty can be relieved include providing money, accommodation and legal and medical aid.

Public benefit is presumed in purposes of relieving poverty. This is why purposes of relieving poverty have been accepted as charitable where those intended to benefit were not numerous or had some relationship with the settlors, such as poor relatives, poor members of an association and poor employees of an employer.

A purpose of relieving needs arising from old age is a charitable purpose unless there is a limitation that deprives it of that character. A purpose of relieving the impotent (sick, incapable) is charitable. Sickness connotes a disorder of health, an illness or an ailment, whether mental or physical and whether permanent or transient. However, public benefit is not presumed for the relief of the aged and the impotent (sick); it must be proven. This is why issues concerning the aged and the sick are analysed in more detail in a further chapter.[170]

[170] See chapter 13 of this book.

CHAPTER 10

# Advancement of education[1]

The advancement of education is specifically mentioned in the *Statute of Elizabeth*, which refers to "the maintenance of schools of learning, free schools and scholars in universities", "the education and preferment of orphans" and "aid and help for young tradesmen and handicraftsmen". In *Morice v Bishop of Durham*,[2] a classification was provided for the four heads of charity that included the advancement of learning as its second category. Lord Macnaghten reiterated this in *Income Tax Special Purposes Commissioners v Pemsel*,[3] where he identified the second head of charity as being for the "advancement of education".

To be charitable under the advancement of education, the education provided must be for a purpose that the law regards as charitable, and must not be political in nature. It also must have sufficient educational value and provide benefit to a sufficient section of the community.[4]

This chapter comprises three sections. The first section analyses the meaning of "education". The second studies what constitutes "advancing" education and the third canvasses what constitutes public benefit in relation to the advancement of education.

## 10.1 The definition of education as a charitable purpose

This section canvasses the definition of "education", the minimal conditions that purposes must meet in order to qualify as educational charity and the differentiation between education, hobby and recreation.

### *10.1.1 Definition of education*

"Education" has been accepted by the courts as bearing the same meaning as that used in current speech by educated persons.[5] The modern meaning of education, taken from the *Shorter Oxford English Dictionary*, is "the systematic instruction, schooling or training given to the young (and by extension to adults) in preparation for the work of life".

Education extends to "the improvement of a useful branch of human knowledge and its public dissemination".[6] It is not limited to the young since education does not stop at any age. It is not confined to formal education of the type supplied by schools and universities.[7]

Gino Dal Pont[8] wrote that advancing education in recognised fields of study such as music,[9] art,[10] religion,[11] history,[12] archaeology,[13] commerce,[14] science,[15] law,[16] engineering,[17] medicine,[18] literature,[19] language[20] and physical education[21] was charitable.

The Australian High Court has stated that "the conception is unquestionably much wider than mere book-learning, and wider than any category of subjects which might be thought to comprise general education as distinguished from education in specialised subjects concerned primarily with particular occupations".[22]

1 The author acknowledges the research undertaken by Alan MacIver, for this chapter. He was Senior Registration Analyst at the New Zealand Charities Commission.

2 (1805) 10 Ves Jun 522, 32 ER 947 at 951.

3 [1891] AC 531.

4 Jean Warburton *Tudor on Charities* (9th ed, Sweet & Maxwell, London, 2003) at 47 ["Tudor 9th ed"].

5 *IRC v McMullen* [1981] AC 1 at 15.

6 *Incorporated Council of Law Reporting for England and Wales v Attorney-General* [1972] Ch 73 at 1002 per Buckley LJ.

7 *Alice Springs Town Council v Mpweteyerre Aboriginal Corporation* (1997) 139 FLR 236 at 353 per Mildren J. see also Gino Dal Pont *Law of Charities* (LexisNexis/Butterworths, Australia, 2010) at 192.

8 Dal Pont *Law of Charities*, above n 7, at 192-193.

9 *Re Lowin* [1967] 2 NSWR 140; *Perpetual Trustee Co (Ltd) v Commissioner of Stamp Duties* (1976) 50 ALJR 749; *Canterbury Orchestra Trust v Smitham* [1978] 1 NZLR 787 at 795 per Richmont P; *Re Fitzpatrick* (1984) 6 DLR (4th) 644 at 649 per Simonsen J (QB (Man)).

10 *Re Chanter (deceased)* [1952] SASR 299 (legacy to art school to be used to aid students to study art in Europe upheld).

11 *Re de Vedas (deceased)* [1971] SASR 169 at 205 per Wells JK.

12 *Re Benham (deceased)* [1939] SASR 450.

13 *Re Estate of Murphy* [2005] NSWSC 104 at [41] per Berecry AM.

14 *Re Koettgen's Will Trusts* [1954] 1 Ch 252 at 257 per Upjohn J.

15 *Re Lopes* [1931] 2 Ch 130 at 135 per Farwell J (zoology and animal physiology); *Re Benham (deceased)* [1939] SASR 450 (marine zoology).

16 *Incorporated Council of Law Reporting (Qld) v Federal Commissioner of Taxation* (1971) 125 CLR 659 at 671-672 per Windeyer J; *College of Law (Properties) Pty Ltd v Willoughby Municipal Council* (1978) 38 LGRA 81 at 86 per Rath J.

17 *Re Evans (deceased)* [1957] St R Qd 345.

18 *Re Osmund* [1944] 1 Ch 206 at 208-209 per Lord Greene MR; *Estate of Schultz* [1961] SASR 377; *Royal College of Surgeons of England v National Provincial Bank Ltd* [1952] AC 631 at 641-641 per Lord Normand, at 654 per Lord Morton.

19 *Re Shakespeare Memorial Trust* [1923] 2 Ch 398; *Estate of Schultz* [1961] SASR 377.

20 *Estate of Schultz* [1961] SASR 377.

21 *Inland Revenue Commissioners v McMullen* [1981] AC 1.

22 *Lloyd v Federal Commissioner of Taxation* (1955) 93 CLR 645 at 675 per Kitto J.

In *Re Webber,*[23] Vaisey J stated that instructing boys in the "principles of discipline, loyalty and good citizenship" was one of the most important elements of education. In *Shaw's Will Trusts*,[24] Vaisey J held that a bequest to improve "the personal qualities and characteristics of Irish men and women, in their training to be better citizens in the various departments of secular life" was charitable under the advancement of education.

The definition of education changes as society changes, and the courts' interpretation of the word alters incrementally to track the changes. As Lord Hailsham put it in *IRC v McMullen*:

> *[T]he legal conception of charity, and within it the educated man's ideas about education are not static, but moving and changing. Both have evolved with the years. In particular, in applying the law to contemporary circumstances it is extremely dangerous to forget that thoughts concerning the scope and width of education differed in the past greatly from those which are now generally accepted.*[25]

The interpretation of "education" was extended by Iacobucci J in *Vancouver Society of Immigrants and Visible Minority Women v Minister of National Revenue*[26] to include less formal education that would lead to the development of individual capabilities, competencies, skills and understanding:

> *There seems no logical or principled reason why the advancement of education should not be interpreted to include more informal training initiatives, aimed at teaching necessary life skills or providing information toward a practical end, so long as information or training is provided in a structured manner and for a genuinely educational purpose [...] and not solely to promote a particular point of view or political orientation.*[27]

In *Auckland Medical Aid Trust v Commissioner of Inland Revenue*,[28] Chilwell J upheld a gift to educate the public in the facts of human reproduction and in all matters concerning reproductive health and physical and social wellbeing.

Gifts expressed in very general terms have been considered charitable. For example, a gift "for the increase of knowledge among men" is charitable. A gift "for educational purposes" is *prima facie* charitable. Nonetheless, section 18 of the *Charities Act 2005* states that the chief executive of the Department of Internal Affairs must have regard to the activities of an entity, as a vaguely worded purpose may be considered too broad to be exclusively charitable without further information.

### *10.1.2 Minimal conditions for purposes to be educational*

In *Vancouver Society of Immigrants and Visible Minority Women v Minister of National Revenue*,[29] Gonthier J agreed with the majority and wrote that "the more that purposes stray from traditional conceptions of education, the more difficult it will be to engage in the task of distinguishing charitable from non-charitable purposes. I share Lord Hailsham's concern that the concept of education is not amenable to indefinite extension".[30]

However, the interpretation of "education" was extended by Iacobucci J in *Vancouver Society of Immigrants and Visible Minority Women v Minister of National Revenue*[31] to include less formal education that would lead to the development of individual capabilities, competencies, skills and understanding:

[23] [1954] 1 WLR 1500 at 1502.
[24] [1952] Ch 163 at 172.
[25] [1981] AC 1 at 15.
[26] (1999) 169 DLR (4th) 34, SCC.
[27] Ibid, at 112-113.
[28] [1979] 1 NZLR 382 at 393-393.
[29] (1999) 169 DLR (4th) 34 (SCC).
[30] Ibid, per Gonthier J at 76.
[31] Ibid.

> *To my mind, the threshold criterion for an educational activity must be some legitimate, targeted attempt at educating others, whether through formal or informal instruction, training, plans of self-study, or otherwise.*[32]

That statement was accepted as being also applicable in New Zealand by Dobson J in *Re Education New Zealand Trust*.[33] In summary, to advance education, a purpose must provide some form of instruction and ensure that learning is advanced.[34]

The Supreme Court of Canada, in *Vancouver Society of Immigrants and Visible Minority Women v Minister of National Revenue*,[35] wrote that "simply providing an opportunity for people to educate themselves, such as by making available materials with which this might be accomplished but need not be, is not enough".[36]

Consequently, the Federal Court of Appeal doubted, in *Travel Just v Canada (Revenue Agency)*,[37] that providing tourist information constituted an educational activity.

The issue of what constitutes education was again canvassed by the Federal Court of Appeal of Canada in *News to You Canada v Minister of National Revenue*.[38] One of the Society's objects was "to fund, develop and carry on activities to research and produce in-depth news and public affairs programs designed to provide unbiased and objective information concerning significant issues and current events". With respect to the advancement of education, the Court determined that while the production and dissemination of in-depth news and public affairs programmes could improve the sum of communicable knowledge about current affairs, such activities were not sufficiently structured to meet the test established in *Vancouver Society* for educational purposes.

Similarly, in *Re Draco Foundation (NZ) Charitable Trust*,[39] Ronald Young J noted that "the essence of advancement of education is that learning must be passed on to others".[40] He then cited the guidelines published by the Charity Commission for England and Wales relating to the advancement of education, which provide that it is not enough to provide information, because "if the process is so unstructured that whether or not education is in fact delivered is a matter of chance, it will not be of educational merit or value".[41] In *Draco*, Young J wrote that "in this case the websites consist of a combination of informational material for the site visitor relating to local and national government and a series of opinion pieces many of which hold a particular point of view [...] there is no evidence of educational material or training material beyond that on the websites".[42]

### *10.1.3 Lack of educational value*

When a purpose lacks educational value, it can be rejected as non-charitable. Judges have usually sought expert evidence to determine educational value. This was the case in *Re Pinion (deceased)*,[43] where the testator gave his studio and everything in it to be kept as an exhibition. Russell LJ argued that "the mere fact that a person makes a gift of chattels to form a public museum cannot establish that its formation will have a tendency to advance education in aesthetic appreciation or in anything else".[44]

After commenting that the paintings were in "an academic style and 'atrociously bad' ", Harmon LJ stated: "I can conceive of no useful object to be served in foisting on the public this mass of junk. It has neither public utility nor educative value".[45]

If a testator gives money to publish a literary work, the question of whether the material is worthy to be published is asked. For example, in *Re Collier (deceased)*,[46] Hammond J opined:

[32] Ibid, at 113-114.

[33] (2010) 24 NZTC 24,354 at [22].

[34] *In Re Shaw (deceased)* [1957] 1 WLR 729; as interpreted in *Re Hopkins' Will Trusts* [1964] 3 All ER 46.
See also *Re Collier* [1998] 1 NZLR 81.

[35] (1999) 169 DLR (4th) 34 (SCC).

[36] Ibid, at 113-114. This was approved in *Re Draco Foundation (NZ) Charitable Trust* HC WN CIV-2010-485-1275 [3 February 2011], at [75-76].

[37] 2006 FCA 343, [2007] 1 CTC 294.

[38] 2011 FCA 192 on the Court's website at www.decisions.fca-caf.gc.ca/en/2011/2011fca192/2011fca192.pdf.

[39] HC WN CIV-2010-485-1275 [3 February 2011].

[40] Ibid, at [73].

[41] Ibid, at [74], Young J cited from the Guidelines published by the Charity Commission for England and Wales as follows:
An organisation advancing education must provide positive, objective and informed evidence of educational merit or value where it is not clear . . .
A modern example might be a 'wiki' site which might contain information about historical events but, if this information is not verified in any way, it would not be accepted as having educational merit or value without positive evidence . . .
Mere blogging comprised of . . . uninformed opinion, on the other hand, is not likely to be of educational merit or value, where neither the subject matter nor the process is of educational merit or value . . .
If the process is so unstructured that whether or not education is in fact delivered is a matter of chance, it will not be of educational merit or value.

[42] Ibid, at [77].

[43] [1965] 1 Ch 85 (CA).

[44] Ibid, at 108.

[45] Ibid, at 107.

[46] [1998] 1 NZLR 81.

> *In this case, at my request, I have now seen the "book". It is no such thing. It is no more than a short pamphlet, with some attachments. It relays what I have summarised as the circumstances of Mrs Gruar's death. I regret that I have to say that I cannot conceive of circumstances in which any publishing house would have had an interest in the book (and some have declined it). In my view, the minimal threshold test is not met. There is no educative value, or public utility in the "book". Further, it is no more than an attempt to perpetuate a private view held by Mrs Collier. I hold that this bequest is not a valid charity.*[47]

Other types of publication may not qualify as an advancement of education, if they are deemed not to contain anything of educational value. In *Briar Patch Inc v The Queen*,[48] a monthly newsletter failed this test. Similarly, in *Re Draco Foundation (NZ) Charitable Trust*,[49] Young J wrote that "in this case the websites consist of the combination of informational material for the site visitor relating to local and national government and a series of opinion pieces many of which hold a particular point of view [...] there is no evidence of educational material or training material beyond that on the websites".[50]

In *Re Shapiro*,[51] a gift to the Ryerson Press for "the purpose of assisting in publishing the work of an unknown Canadian author" was deemed to be charitable, as the publishing of any Canadian author was thought to be advancing literature in Canada. This decision has been heavily criticised, not only for the element of private benefit, but because there was no guarantee that the work would be of educational value.

If a court decides that a work of literature has an educational value, the fact that the owner of the copyright will benefit does not make the gift non-charitable.[52]

#### *10.1.4 Difference between education, hobby and recreation*

The dividing line between education and a hobby is sometimes blurred. For example, a model engineering society may, depending on its stated purposes, be seen to be focused on education through public displays and teaching. On the other hand, if it is primarily inwardly focused with no expressed educational function, it can be viewed as merely a hobby without educational merit.

This is evidenced by the registration of several model engineering societies by the New Zealand Charities Registration Board, including the Auckland Society of Model Engineers Incorporated[53] and the South Canterbury Model Engineers' Society Incorporated.[54] On the other hand, the Otago Model Engineering Society Incorporated[55] was declined registration because it seemed not to have an educational focus, and therefore did not have purposes that were exclusively charitable. Similarly, aviation can be taught as a professional skill or may be a pastime.[56] The compilation of a list of Derby winners,[57] a library of thrillers and a public exhibition of junk[58] have been considered non-charitable by courts.

The distinction between educational and recreational activities also poses difficulties. In *Shaw's Will Trusts*,[59] Vaisey J considered that teaching "social graces" was charitable, but his decision on this point has been widely criticised. In *IRC v Baddeley*,[60] it was decided that "training in social behaviour" was not advancing education because "the sum of the activities permissible under the deed can only be regarded as educational in the sort of loose sense in which all experience may be said to be educational".[61]

The distinction between recreation and education was explored in *Re Dupree's Deed Trusts*,[62] where it was held that the promotion of chess among boys and young men was charitable under the head of education. Although Vaisey J admitted that it was "a little near the line", he concluded that a gift to found annual chess tournaments open to males

47 Ibid, at 92.

48 (1996) 96 DTC 6294.

49 HC WN CIV-2010-485-1275 [3 February 2011].

50 Ibid, at [77].

51 (1979) 27 OR (2d) 517, 107 DLR (3d) 133. See also Hubert Picarda *Law and Practice Relating to Charities* (4th ed, Bloomsbury Professional Ltd, 2010) at 71 [Picarda 4th ed].

52 *Re Newsom* 1971 N No 423, (14 March 1973, unreported), cited by Picarda 4th ed, above n 51, at 72.

53 On Charities Services website, registered as CC40820.

54 On Charities Services website, registered as CC37403.

55 On Charities Services website, entity identified as OTA32000.

56 *Re Lambert* [1967] SASR 19 (science of aviation); cf *Scottish Flying Club Ltd v IRC* 1935 SC 817 (non-charitable amusement). See also Picarda 4th ed, above n 51, at 56.

57 *Brunyate* (1945) 61 LQR 268 at 273.

58 *Re Pinion (deceased)* [1965] Ch 85.

59 [1957] 1 WLR 729.

60 [1955] AC 572.

61 Ibid, at 616.

62 [1945] Ch 16.

under 21 years and resident in Portsmouth was charitable. He considered that the game of chess required such skill and insight as to consider it educational in itself, where directed at the young. The abilities it developed included concentration, reasoning and foresight. This was after hearing evidence that the game of chess was being taught in many schools during the school hours. However, he felt it was the first step on a slippery slope: "If chess, why not draughts? If draughts, why not bezique, and so on, through to bridge and whist, and, by another route, to stamp collecting and the acquisition of birds' eggs?"[63]

In *Kearins v Kearins*,[64] a rugby union club at the University of Sydney was considered charitable, and McLelland J observed:

> *Participation in the sporting activities of the University has, I think, always been regarded as an important element in the development of the men and women at the University, not only in respect of bodily and physical development but also as part of the training of a well-balanced student.*[65]

In the first case interpreting the *Charities Act 2005*, *Travis Trust v Charities Commission*,[66] Joseph Williams J made the following comments concerning sport, leisure and entertainment:

> *In the area of sport and leisure, the general principle appears to be that sport, leisure and entertainment for its own sake is not charitable but that where these purposes are expressed to be and are in fact the means by which other valid charitable purposes will be achieved, they will be held to be charitable. The deeper purpose of the gift or trust can include not just any of the three original* Pemsel *heads but also any other purpose held by subsequent cases or in accordance with sound principle to be within the spirit and intendment of the* Statute of Elizabeth. *In the areas of sport, the deeper purpose is usually health or education.*[67]

Pastimes and social activities are not considered charitable. However, they can be if there are some proper educational activities or when they promote a deeper purpose, usually health or education, as has been discussed in this section.

### 10.2 Advancing education

Five subjects are discussed in this section. The first subsection analyses the charitable status of schools, universities and other facilities and personnel attached to these institutions. The second subsection looks at the treatment of usually non-charitable purposes when they are attached to educational institutions. The third analyses the charitable status of cultural and artistic institutions. The fourth canvasses the treatment of research by tax-exemption-granting authorities. Finally, limits and disqualification factors are considered.

#### *10.2.1 Schools, universities and related facilities*

Four subjects are discussed in this subsection. Schools, universities and teaching positions are first canvassed. Libraries and endowments of teaching and scholarships are also analysed.

##### *10.2.1.1 Schools, universities, faculties and learned societies*

The *Statute of Elizabeth* mentions that schools and universities, and gifts for schools and universities, have long been held to be charitable by the courts. Hubert Picarda wrote that "gifts to establish new departments or faculties in a college are also charitable".[68]

[63] *Re Dupree's Deed Trusts* [1945] Ch 16 at 20.

[64] [1957] SR (NSW) 286.

[65] Ibid, at 291. See also Dal Pont, *Law of Charity*, above n 7, at 202.

[66] (2009) 24 NZTC 23,273.

[67] Ibid, at [52].

[68] Picarda 4th ed, above n 51, at 74. See also *Wellington Education Board v Harrison* (1875) 1 NZ Jur (NS) SC 66 and *Dilworth v Commissioner of Stamps* (1898) NZPCC 578; [1898] AC 99, and Margaret Soper *The Laws of New Zealand – Charities* (Butterworths, Wellington, 1994) at [25] ["Charities"].

He further noted that the term "college" covered a variety of institutions of learning: colleges within the ancient universities, public schools incorporated in connection with a university, the Royal College of Surgeons, a teachers' training college, a Roman Catholic college and a university college.

The *Statute of Elizabeth* refers to schools of learning without any reference to poverty. Therefore it does not make any difference that a school is one for the sons of gentlemen,[69] or for the children of railway workers[70] or for the poorest of the poor.[71] Nor is it relevant that the school charges fees as long as it is established as a non-profit organisation.[72]

Gifts for the erection and maintenance of buildings to be used in connection with schools and colleges are also charitable. A trust to establish an institution for boys for such maintenance, education and training as will enable them to become useful members of society has been held charitable.[73] A residence for students and the provision of a house for a schoolmaster has been held to be charitable.[74] However, the provision of benefits for teachers is not charitable unless educational purposes are advanced in some way.[75]

New Zealand courts have acknowledged that learned societies and societies established primarily for the promotion of science are charitable. These are normally associations whose members are mostly, although not exclusively, university professors and graduate students. In *Re Mason*,[76] McMullin J cited with approval *Commissioners of Inland Revenue v Forest (Institution of Civil Engineers)*,[77] in which the majority in the House of Lords took the view that the Institution as a society established for the promotion of science was charitable. The same principle was applied to the Royal Geographical Society,[78] the Royal Literary Society,[79] the Zoological Society,[80] the British School of Egyptian Archaeology[81] and the Institution of Civil Engineers,[82] all of which have been held charitable by English courts.

*10.2.1.2 Libraries*

A library, attached or not to a school or university, is charitable on the grounds that a large, well assorted library tends to the promotion of education.[83] Trusts to establish or maintain public libraries have also been held charitable.[84] The restoration and housing of old and valuable books for research purposes are also charitable.[85]

It is clear, however, from the decided cases that a library established for the sole use of a restricted group is not charitable because it does not provide sufficient public benefit.[86] In *Re Mason (deceased)*,[87] McMullin J had to decide if a library or libraries to be constructed and maintained by the New Zealand Law Society was charitable. In that case, the trustees could also lawfully: make grants for purchases of all kinds of books for the Law Society's libraries at the Supreme Court and elsewhere; catalogue, restore and house all or any kinds of books or documents or other papers owned by the Society; and print and publish pamphlets for the purpose of training or informing students or graduates in or about legal and practical skills. The evidence showed the libraries to be more than workshops in which lawyers worked solely to make pecuniary gain that would result from professional efficiency. They were also used by lawyers for writing legal work, law reform and pro bono work, by students for the purpose of reading publications not held by the university library, and by members of the public for sociological and legal studies. McMullin J wrote:

[69] *Brighton College v Marriott* [1926] AC 192, HL; *Campbell College v Commissioner of Valuation* (NZ) [1964] NI 107.

[70] *Hall v Derby Sanitary Authority* (1885) 16 QBD 163.

[71] *Re Hedgman* (1878) 8 Ch D 156.

[72] *The Abbey, Malvern Wells Ltd v Ministry of Local Government and Planning* [1951] Ch 728. For New Zealand, see *Educational Fees Protection Society Inc v Commissioner of Inland Revenue* [1992] 2 NZLR 115.

[73] *Re Dilworth* (High Court), Auckland, A 550/82, 24 February 1983, per Thorpe J. See also Soper, *Charities*, above n 68, at [25].

[74] *Gibbons v Maltyard* (1592) Poph 6; 79 ER 1129.

[75] *R v Catt* (1795) 6 Term Rep 332; 101 ER 580 (provision of a residence for a teacher held not to be charitable) and *R v Special Commissioners of Income Tax* (1925) 41 TLR 651.

[76] [1971] NZLR 714 at 721.

[77] (1890) TC 117.

[78] *Beaumont v Oliveira* (1869) 4 Ch App 309; *Royal Society of London and Thompson* (1881) 17 Ch D 407.

[79] *Thomas v Howell* (1874) LR 18 Eq 198.

[80] *Re Lopes* [1931] 2 Ch 130; followed in *North of England Zoological Society v Chester* RDC [1959] 1 WLR 773 (CA).

[81] *Re British School of Egyptian Archaeology* [1954] 1 WLR 546.

[82] *Institution of Civil Engineers v Inland Revenue Commissioners* [1932] 1 KB 149. See also, Picarda 4th ed, above n 51, at 75.

[83] *Attorney-General v Marchant* (1866) LR 3 Eq 424 at 430. See also Tudor 9th ed, above n 4, at 50.

[84] *Abbott v Fraser* (1874) LR 6 PC 96.

[85] *Re Mason* [1971] NZLR 714; and *Commissioner of Inland Revenue v White* (1980) 55 TC 651.

[86] *Carne v Long* (1860) 2 De GF & J 75; *Re Russell Institution* [1898] 2 Ch 72; *Re Jones* [1898] 2 Ch 83; *Re Pitt-Rivers* [1902] 1 Ch 403, (CA).

[87] [1971] NZLR 714.

> *I cannot see that anything which could be purchased for libraries in country towns for some time hence will be of use for other than the day to day work of the courts and practitioners. But as country libraries become better developed, and come to be used for purposes other than the prevarication of cases for pecuniary gain, the trustees may be in order in making grants for the purchase of more unusual books, reports, reviews and periodicals for use in other than a purely professional way.*[88]

Commenting on that decision, Gino Dal Pont wrote that "it is apparent that McMullin J did not consider lawyers' access to material to assist clients' cases as sufficient to establish public benefit, and so looked for evidence of broader use of the library".[89] Similarly, Margaret Soper wrote that "such a library is charitable to the extent that books are purchased that bring more than just basic texts which a practitioner might require as the tools of legal office".[90]

Courts in the United Kingdom, Australia and New Zealand have held that the publication of law reports is charitable. This is because "the publication and sale of law reports [are] for the benefit of those engaged in the administration or practice of law".[91] In *Incorporated Council of Law Reporting for England and Wales v Attorney-General*,[92] Buckley LJ wrote that the purposes were charitable because "the publication of the Law Reports provides benefits not only for those actively engaged in the practice and administration of the law, but also for those whose business it is to study [...] and by study to acquaint himself with and instruct himself in the law of this country".[93]

#### *10.2.1.3 Endowments of teaching and scholarship*

Schools and particularly universities can further education by the endowments of professorial chairs,[94] fellowships[95] and lectureships.[96] A trust to pay the expenses of sending teachers overseas to increase their knowledge in subjects and to pay the expenses of bringing to New Zealand people advanced in learning in such subjects to give lectures has been held to be charitable.[97]

Foundations established to provide scholarships have been held to be charitable in all common law jurisdictions.[98] Scholarships for education at colleges and tertiary institutions have also been held charitable in New Zealand.[99] Scholarships for persons serving in an engineering corps of the New Zealand Army are also charitable.[100]

Funds established to provide prizes[101] and educational bursaries[102] have also been held to be charitable for the advancement of education. New Zealand courts have held that prizes for students receiving tertiary education at the Auckland Technical Institute and grants to full-time tutors for studying methods and developments in tertiary technical education are charitable.[103] Hubert Picarda[104] wrote that "where the prize is a cash prize the mere fact that it can be used for any purpose does not deprive the endowment of its charitable nature: the prize is the spur to academic achievement".[105]

Trusts for public farmers' meetings and meetings relating to farming matters where those meetings are for educational purposes or for the advancement of agriculture are charitable.[106] However, the provision of benefits for teachers is not charitable unless educational purposes are advanced in some way.[107] On the other hand, homes of rest for teachers in need through being sick or overworked are charitable.[108]

88 Ibid, at 730.

89 Dal Pont *Law of Charity*, above n 7, at 207.

90 *Charities*, above n 68, at [29].

91 *Commissioner of Inland Revenue v New Zealand Council of Law Reporting* [1981] NZLR 682 at 687 per Richardson J.

92 [1972] Ch 73, [1971] 3 All ER 1029.

93 Ibid, at 103-104, [1971] 3 All ER 1029 at 1047. See also for Australia: *Incorporated Council of Law Reporting of the State of Queensland v Federal Commissioner of Taxation* (1971) 125 CLR 659 (HC).

94 *Yates v University College London* (1875) LR 7 HL 438 (archaeology); *Re Buckland* (1887) 22 LJNC7 (economics fish culture).

95 *Jesus College Case* (1615) Duke ed Bridgman 363.

96 *Attorney-General v Cambridge Margaret and Regius Professors* (1682) 1 Vern 55, cited by Picarda 4th ed, above n 51, at 73, footnote 16.

97 *Re Erskine* (High Court, Christchurch, M 292/86, 17 June 1987 Holland J. See also Soper *Charities*, above n 68, at [26].

98 *Re Levitt* (1885) 1 TLR 578; *University College of North Wales v Taylor* [1908] P 140, CA; *Re Williams* (1908) 24 TLR 716; *Re Spencer* [1928] 34 OWN 29 (research in geology at Manitoba University); *Re Gott* [1944] Ch 193 (post-graduate scholarship at Leeds University); *Re Welton* [1950] 2 DLR 280; *Wilson v Toronto General Trusts Corporation* [1954] 3 DLR 136; *Re Johnson Estate* (1961) 30 DLR (2d) 474. See also Picarda 4th ed, above n 51, at 73.

99 *Trustees Executor and Agency Co Ltd v Bush* (1908) 28 NZLR 117; 11 GLR 286; *Weston v Commissioner of Stamp Duties* [1945] NZLR 183, [1945] GLR 74; and *Re Keeley* (High Court, Hamilton, M 316/81, 27 July 1982 Bisson J).

100 *Re Hudson Scholarship Fund* (High Court, Auckland, M 567/83, 9 June 1983, Thorp J).

101 *Thompson v Thompson* (1844) 1 Coll 381 at 398; *Farrer v St Catherine's College, Cambridge* (1873) LR 16 Eq 19; *Re Mariette* [1915] 2 Ch 284 (prize for classics); *Chesterman v Federal Commissioner of Taxation* [1926] AC 128, (PC).

102 *Re Evans (deceased)* [1957] QSR 345; *Re MacKenzie* [1962] 2 All ER 890.

103 *Re MacDonald* (High Court, Whangarei, M 38/1992, 8 September 1982, Robertson J). See also *Keir v Attorney-General* (High Court, Auckland, M 901/87, 9 October 1987, Wylie J). See also Soper *Charities*, above n 68, at [25].

104 Picarda 4th ed, above n 51, at 74.

105 *Re Weaver* [1963] VR 257.

106 *Re Cumming* [1951] NZLR 498n.

107 *R v Catt* (1795) 6 Term Rep 332; 101 ER 580 (provision of a residence for a teacher held not to be charitable).

108 *Re Estlin* (1903) 72 LJ Ch 687 and *Re Pearse* [1955] 1 DLR 801.

### *10.2.2 Non-charitable purposes attached to education*

A lengthy string of cases has repeated that mere sport and recreation are not charitable.[109] The first court case interpreting the New Zealand *Charities Act 2005* stated that "sport, leisure and entertainment for its own sake is not charitable".[110] However, when they are linked to education or educational institutions, courts have taken a different view.

#### *10.2.2.1 Sports and recreation*

There has been a liberal interpretation of education by the courts where schoolchildren are the beneficiaries. In *Re Mariette*,[111] a leading decision in this regard, a gift for squash courts to be built at Eton was considered charitable, as the provision of games was considered a vital part of children's education. Eve J reasoned as follows:

> *It is necessary in any satisfactory system of education to provide for both mental and bodily occupation, mental occupation by means of the classics and those other less inviting studies to which a partition of the day is devoted, and bodily occupation by means of regular and organised games. To leave 200 boys at large and to their own devices during their leisure hours would be to court catastrophe; it would not be educating them, but would probably result in their quickly relapsing into something approaching barbarism. For these reasons I think it is essential that in a school of learning of this description, a school receiving and retaining boarders of these ages, there should be organised games as part of the daily routine, and I do not see how the other part of the education can be successfully carried on without them.*[112]

The reasoning in *Re Mariette* has also been applied to gifts to promote sports in universities. In *Kearins v Kearins*,[113] an Australian Court considered that a bequest to the Sydney University Amateur Rugby Union Football Club for the purposes of "fostering the sport of Rugby Union at Sydney University" was charitable. McLelland J wrote in that decision that participation in the sporting activities of the University had always been regarded as an important element in the development of the students, not only in respect of bodily and physical development but also as part of the training of a well balanced student.

In *Inland Revenue Commissioners v McMullen*,[114] a trust was considered charitable with the purpose of providing "facilities which will enable and encourage pupils at schools and universities in any part of the United Kingdom to play association football or other games or sports and thereby to assist in ensuring that due attention is given to the physical education and development and occupation of their minds".

In New Zealand, where rugby is the national sport, the courts have found no difficulty linking educational experience to the playing of that sport. In *Nelson College v Attorney-General*,[115] a bequest was upheld to provide "a coach for improving back play and place kicking in the game of rugby football among the scholars" because the overriding consideration was one of education.

The reasoning in *Re Mariette* was carried even further in *Re Mellody*,[116] where the provision of an annual treat or field day for schoolchildren was deemed charitable under the advancement of education, as participation in the annual treat would encourage regularity in attendance at school and promote industry and zeal in their studies. In *Re Lopes*,[117] amusement rides and food sales at a zoo were considered ancillary to the main object of the advancement of education.

[109] *Re Nottage, Jones v Palmer* [1895] 2Ch 649 [1895-9] All ER Rep 203.

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

[111] [1915] 2 Ch 284.

[112] Ibid, at 288-289.

[113] [1957] SR (NSW) 286 at 291.

[114] [1981] AC 1 at 1 (footnote).

[115] HC Nelson 40/1986 (unreported) per Heron J. See also Dal Pont *Law of Charity*, above n 7, at 202.

[116] [1918] 1 Ch 228.

[117] [1931] 2 Ch 130.

The Scout movement is clearly charitable. The instruction of boys of all classes in the principles of discipline, loyalty and good citizenship is obviously educational because it is training in preparation for the work of life. In *Re Alexander*,[118] a gift for providing holiday camps for the boy scouts of Clapham and Brixton was held to be charitable. A similar decision was arrived at in *Greater Wollongong City Council v Federation of New South Wales Police Citizens Boys' Clubs*,[119] where Brereton J held that the respondent Federation was charitable under the education head of charity.

Most activities for children are likely to be seen as having some educational element. Hubert Picarda pointed out:

> *The hobbies of an adult may widen the minds of school children and in that broad sense fulfil an educational purpose. Stamp-collecting may bring the reality of geography and history to the child's mind; the acquisition of birds' eggs may stimulate his or her enthusiasm for natural history. But these activities can hardly be said to train the minds of adults.*[120]

Consequently, the New Zealand Charities Registration Board accepts that providing toys for pre-school-aged children is charitable under the advancement of education, because at this age toys and play are an important part of the learning and development of children.[121]

*10.2.2.2 Student unions*

An association that may otherwise lack charitable status may achieve that status by linking its objects to education in educational institutions. It is the case with student unions, which are somewhat similar to professional organisations and should therefore not be considered charitable because they are established mostly for the benefit of their members.

In *London Hospital Medical College v Inland Revenue Commissioners*,[122] Brightman J found a student union attached to a medical college that formed part of a university to be charitable. Although they do not engage directly in education, student unions are closely related to educational institutions. In that case, Brightman J opined, "most people would say that the facilities of the union are a practical necessity in these days if the college is to function efficiently".[123]

Similarly, in *Attorney-General v Ross*,[124] Scott J held that the main purpose of a student union at a London polytechnic was "to facilitate the discharge by the polytechnic of its function as an institution of higher education".[125] This decision was reached notwithstanding that one of its main objects was to provide and develop scientific, artistic, cultural, athletic, political, religious and social activities amongst its members, that membership privileges extended to staff and alumni, and that the union was aligned with and contributed funds to a non-charitable society, namely the National Union of Students.

However, student unions that get heavily involved in political activities may be denied charitable status or lose it. In *Baldry v Feintuck*,[126] student union's support for a protest campaign against a Government decision to end a milk programme for schoolchildren was held to be a non-charitable application of funds. Similarly, in *Webb v O'Doherty and others*,[127] a student union's support for a campaign against the Gulf War was considered a non-charitable application of funds. Both cases turned on the lack of a credible connection between the student unions' educational purpose in support of university students and their advocacy activities. The cases established that legitimate activities can only be undertaken when they reasonably further the organisation's charitable purposes.

[118] (1932) *Times*, 30 June.

[119] (1957) 2 LGRA 54 at 63. See also Dal Pont *Law of Charity*, above n 7, at 203.

[120] Picarda 4th ed, above n 51, at 59.

[121] The New Zealand Charities Registration Board has registered some 150 toy library entities. See for example, Akaroa Toy Library, CC27454 and Alexandra Toy Library Inc., CC24901.

[122] [1976] 2 All ER 113.

[123] Ibid, at 122.

[124] [1985] 3 All ER 334.

[125] Ibid, at 341.

[126] [1972] 2 All ER 81.

[127] Times Law Report, 11 February 1991, [1991] 3 Admin LR 731.

### *10.2.3 Cultural and artistic appreciation*

The consistent case law recognising the charitable status of purposes directed at increasing public appreciation in art, music and literature seems to go against the notion that the advancement of education must be through some form of formal education.

This subsection analyses the charitable status of such purposes as the promotion of aesthetic education, museums and culture.

#### *10.2.3.1 Aesthetic education*

The *Shorter Oxford Dictionary's* definition of aesthetic is "of or pertaining to the appreciation or criticism of the beautiful". The first case to look at aesthetic education in a favourable light was *Royal Choral Society v Inland Revenue Commissioners*,[128] where Lord Greene MR stated:

> *In my opinion, a body of persons established for the purpose of raising the artistic taste of the country and established by an appropriate document which confines them to that purpose, is established for educational purposes, because the education of artistic taste is one of the most important things in the development of a civilised human being.*[129]

Lord Greene went on to argue that the pleasure gained by the members through the entity's activities was a by-product rather than a purpose of the Society.

This was supported in New Zealand through the decision in *Canterbury Orchestra Trust v Smitham*,[130] where the encouragement of the performance of orchestral compositions and concert works was held to be charitable. The decision maintained the opinion of the lower court ruling, that "[a] trust for the advancement of musical education is charitable but a society formed to promote music merely for the amusement of the members would not be charitable".[131] The opinion of Woodhouse J in this case suggests that the range of musical styles that can be called educational is broad:

> *[T]here is an important educational flavour and purpose underlying the trust in the sense that the target is the development of an appreciation for and understanding of music by members of the public. Nor am I able to feel moved that in the objects clause of the trust there is an absence of adjectives expressly pointing to musical compositions which have won earlier marks of approval from those critics who are confident enough to believe that they are able to pass final judgment upon such matters. The cultivation of an aesthetic taste or an educated and sensitive feeling for music is likely to depend far more upon access to a wide and catholic sample than the censorship of well-meaning but cautious and conventional minds. There is a continuing process of evolution at work in this field as there should be; and I do not feel that the educative purpose of this trust could in any way be put at risk or the public taste for music subverted by the orchestral performance of compositions, whether ancient or modern, which some sections of the community might find unappealing. Beethoven, like The Beatles, faced a degree of initial resistance.*[132]

In *Re Delius*,[133] a gift to advance the works of a particular composer was found to be charitable. Roxburgh J opined that "if it is charitable to promote music in general it must be charitable to promote the music of a particular composer, presupposing (as in this case I can assume) that the composer is one whose music is worth appreciating".

[128] [1943] 2 All ER at 101.

[129] *Royal Choral Society v Commissioners of Inland Revenue*, [1943] 2 All ER 101 at 105.

[130] [1978] 1 NZLR 787.

[131] Ibid, at 789.

[132] Ibid, at 806.

[133] [1957] Ch 299.

In *O'Sullivan v English Folk Dance and Song Society*,[134] folk music and folk dancing were considered to advance education, even though they are not fine arts.

In *Re Town and Country Planning Act 1947, Crystal Palace Trustees v Minister of Town and Country Planning*,[135] the promotion of art was deemed a charitable purpose. However, gifts for "artistic" works have been determined not to be charitable by the courts. In *Associated Artists v IRC*,[136] as Jean Warburton related, the "adjective 'artistic' in the context in which it occurred was not a word to which any real charitable concept could be given and was too wide and vague to be charitable".[137] In *Re Ogden*,[138] a gift to encourage artistic pursuits or assist needy students in art was held to be non-charitable, because encouraging artistic pursuits could involve merely providing painting materials or musical instruments for one or two individuals for their private entertainment.

#### *10.2.3.2 Museums and culture*

Gifts for the promotion of literature[139] have also been seen by the courts to be charitable, as have museums[140] and art galleries.[141]

In some circumstances, the promotion of culture can be charitable as an advancement of education. The *Concise Oxford English Dictionary* defines "culture" as:

> 1. *The arts and other manifestations of human intellectual achievement regarded collectively; a refined understanding or appreciation of this.*
>
> 2. *The customs, ideas, and social behaviour of a particular people or group.*[142]

The advancement of culture has not been dealt with by the courts in any great depth. The New Zealand Charities Registration Board's current policy is that culture in itself is not charitable. However, it may be charitable under the head of advancement of education where there is a provision of education about a particular culture or language where that activity is available to anyone who chooses.[143]

### *10.2.4 Research*

The courts have recognised research as a charitable purpose under the second and fourth heads of charity as long as the research is undertaken in such a way that it is likely that knowledge will be discovered or improved.

This subsection analyses three aspects of research: the test of charitable research, examples of charitable research and speculative research.

#### *10.2.4.1 Test of charitable research*

The decision in *Re Shaw's Will Trusts*[144] regarding the imparting of knowledge means that any research must be disseminated to qualify as an advancement of education. This was previously decided in *Taylor v Taylor*,[145] where a gift for scientific research generally was held to be charitable, as this type of research was by its very nature bound to be disseminated.

In *Re Hopkins' Will Trusts*,[146] a gift for research into the evidence in favour of Bacon's authorship of plays ascribed to Shakespeare was held to be charitable. Wilberforce J stated:

[134] [1955] 1 WLR 907.
[135] [1951] Ch 132.
[136] [1956] 1 WLR 752.
[137] Tudor 9th ed, above n 4, at 56.
[138] (1909) 25 TLR 383.
[139] *Re Litchfield* (1961) 2 FLR 454 at 459.
[140] *British Museum v White* (1826) 2 Sim & St. 594.
[141] *Gwynn v Cardon* (1805) 10 Ves. 522 at 533; *Abbott v Fraser* (1874) LR 6 PC 96. See also Tudor 9th ed, above n 4, at 54.
[142] *Concise Oxford English Dictionary* (11th ed, Oxford University Press, Oxford, 2006) at 349.
[143] *Carne v Long* (1860) 2 De GF & J 75.
[144] [1952] Ch 163, [1952] 1 All ER 49.
[145] (1910) 10 CLR 218.
[146] [1965] Ch 669.

> *[I]n order that a gift for research should be charitable the research either must be of educational value to the researcher or must be so directed as to lead to something which will pass into the store of educational material, or so as to improve the sum of communicable knowledge in an area which education (including in this last context the formation of literary taste and appreciation) may cover.*[147]

Wilberforce J admitted that it was unlikely that the research would prove that Bacon had written the works attributed to Shakespeare.

In *Re Bexterman's Will Trust*,[148] requirements for research to be charitable were considered by Slade J, who set out the principles governing the charitable nature of research as follows:

> *(1) A trust for research will ordinarily qualify as a charitable trust if, but only if (a) the subject-matter of the proposed research is a useful subject of study; and (b) it is contemplated that knowledge acquired as a result of the research will be disseminated to others; and (c) the trust is for the benefit of the public, or a sufficiently important section of the public. (2) In the absence of a contrary context, however, the court will be readily inclined to construe a trust for research as importing subsequent dissemination of the result thereof. (3) Furthermore, if a trust for research is to constitute a valid trust for the advancement of education, it is not necessary either (a) that a teacher/pupil relationship should be in contemplation or (b) that persons to benefit from the knowledge to be acquired be persons who are already in the course of receiving 'education' in the conventional sense. (4) In any case where the court has to determine whether a bequest for the purposes of research is or is not of a charitable nature, it must pay due regard to any admissible extrinsic evidence which is available to explain the wording of the will in question or the circumstances in which it was made.*

It is now clearly established that research is a charitable object. Both the Charity Commission for England and Wales and the New Zealand Charities Registration Board[149] have registered entities established to carry out research.

*10.2.4.2 Examples of charitable research*

Trusts established for scientific research have been found to be charitable. This has been the case for research in agricultural chemistry,[150] research in geology,[151] research in horticulture and arboriculture,[152] and research in electricity.[153]

Similarly, entities established to do social research, such as historical research,[154] have been held to be charitable. Social research into the works of Voltaire and Rousseau and other authors of the Enlightenment has also been held to be charitable.[155] Research into the maintenance and observance of human rights was considered manifestly a subject of study that was capable of adding usefully to the store of human knowledge.[156] In *Wood v R*,[157] a gift "to the Edmonton Lodge of the Theosophical Society of Canada, a non-profit organisation formed for religious, literary and educational purposes", was construed as a charitable trust for the advancement of education in the study of comparative religion, philosophy and science. Stevenson LJSC stated, "It seems to me that the study and practice of comparative religion, philosophy and science is *prima facie* charitable".[158]

Objective research into terrorism and the activities of terrorists has been treated as a valid educational object of a charitable nature.[159] Finally, research into the history of education and research into the course of known cases having regard to the influence of the patient's mental attitude in this regard have also been treated as for the advancement

[147] Ibid, at 680.

[148] January 21, 1980 unreported, referred to in *McGovern v Attorney-General* [1982] Ch 327 at 352-353. See also Tudor 9th ed, above n 4, at 57.

[149] The New Zealand Charities Registration Board has registered some 200 research entities, for example Deafness Research Foundation Inc. CC24003; Deer Industry New Zealand Research Trust CC33142.

[150] *Matter of Frasch* 245 NY 174 (1927) (USA).

[151] *Re Spencer* [1928] 34 OWN 29.

[152] *People ex rel Hellyer v Morton* 373 Ill 72 (1940) (USA).

[153] *Taysum v el Paso National Bank* 256 SW 2d 172 (1953) (USA).

[154] *Re Compton* [1945] Ch 123 at 127 per Lord Greene MR.

[155] *Re Besterman's Will Trust* (1980) Times 22 January (21 January 1980, unreported) See also Picarda 4th ed, above n 51, at 65-66.

[156] *McGovern v Attorney-General* [1982] Ch 321 at 353.

[157] [1977] 6 WWR 271 (AltaTD).

[158] Ibid, at 284.

[159] *The Institute for the Study of Terrorism* [1988] Ch Com Rep 7-8 [28-34] cited by Picarda 4th ed, above n 51, at 68.

of education.[160]

Entities established to carry out medical[161] and veterinary[162] research have been held to be charitable. In *Re Travis,*[163] money left in a will by the testator to fund cancer research in New Zealand was held to be charitable.

Cases of "speculative" research have been accepted as charitable by the courts. In *Kidd's Estate*,[164] an Arizona court upheld as charitable a fund for research into proof that the human soul leaves the body at death.

Charitable research must be reasonably unbiased. A charity that is able to demonstrate the quality of the results will probably also be able to show that the research is reasonably objective or reasonably free of bias and therefore not "propagandist" or akin to being "political" in nature.

Research in the charitable sense may, however, be based on reasonable assumptions and still be unbiased. For example, most objective and informed people today would agree that eliminating racism is beneficial to the public. A charity could therefore base its research on the premise that tolerance is preferable to racism and explore ways of combating or reducing racism. However, if research is unreasonably biased or promotes a political or predetermined point of view, it cannot qualify as a charitable research activity.[165]

Finally, the results of charities with an educational research purpose must be made available to the public. These charities must disseminate their research findings by putting them into the public realm and making the research widely available to anyone who might want to access it.[166] Dissemination and accessibility can take many forms. A charity might publish the results in a journal, submit the research to an online database of publications, write an article for a newspaper, produce a book, create a paper for a conference, or simply post the research on its external website. The disseminated results of research do not have to be made available to the public free of charge. However, the cost should not be so high that it restricts access to the benefits of the research.

The agencies responsible for registering charities or giving tax exemptions to charities usually consider a research organisation to be charitable if it has the following attributes: (a) it represents a way to achieve or further the organisation's charitable purpose; (b) the research subject has educational value and a research proposal that is capable of being attained through research; (c) it is undertaken in such a way that it might reasonably lead to the discovery or improvement of knowledge; (d) it is conducted primarily for the public benefit that could arise from it and not for self-interest or for mainly private commercial consumption; and (e) the results are disseminated and made publicly available to others who might want access to them.[167]

#### *10.2.4.3 Examples of non-charitable research*

Any research that does not directly further a charitable purpose, or the delivery of a charitable programme, would not constitute research in the charitable sense. For example, research that concerns the betterment of the internal functioning of an organisation's administrative, management or fundraising resources would not be charitable. The Canada Revenue Agency stated that, for example, if an organisation with a charitable research purpose researched the donation patterns of its donors simply to increase the amount of funds it raised annually, the study would not be viewed as charitable research. However, such research could be considered ancillary if the amounts spent on such activities were within the threshold allowed.[168]

[160] *Re Schulz* [1952] 1 Ch 163.

[161] *Re Travis* [1947] NZLR 382; *Schulz's Estate* [1961] SASR 377.

[162] *London University v Yarrow* (1857) 1 De G & J 72.

[163] [1947] NZLR 382.

[164] 479 P 2d 697 (1971).

[165] *Southwood v A-G*, [2000] ECWA Civ. 204 (BAILII) (available online at www.bailii.org/ew/cases/EWCA/Civ/2000/204.html).

[166] *Re Besterman's Will Trusts* (1980) *Times* 22 January (21 January 1980, unreported) and *Vancouver Society of Immigrants and Visible Minority Women v MNR* [1999] 1 SCR 10 at [161].

[167] Canada Revenue Agency, *Research as a Charitable Activity* on the entity's website: www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/cps/rsrch-eng.html, summary, at [11].

[168] Ibid, at [14].

The mere accumulation and production of information on a given subject, or about a specific event or market research, does not constitute, in and of itself, a charitable research activity. The Canada Revenue Agency wrote that "research in the charitable sense does not include the accumulation of information (a) in an unstructured manner, (b) in an unsystematic way, (c) on a subject that has no educational value or that is selective, (d) or unreasonably biased, or promotes a predetermined point of view".[169]

In *Re Draco Foundation (NZ) Charitable Trust*,[170] Young J wrote that the publication of the responses of local authorities to requests for information regarding senior managers' salaries did not constitute research in the true sense of that word. This was because some of the information regarding senior managers' salaries was already in the public domain. It was essentially gathering information and making it available on a website for people to look at if they chose.

Courts have considered that certain objects are too frivolous to rank as educational, such as the compilation of lists of Derby winners and the study of racing or football form.[171] Furthermore, a trust for teaching an irrational belief, such as that the Earth is flat, would not qualify as charitable.[172]

The more controversial a research subject, the more the regulator will expect a charity to take care in ensuring that its research results refer to a well reasoned position. For example, in England, a trust called the Project on Disarmament (Prodem) was established for the "advancement of the education of the public in the subject of militarism and disarmament" by "all charitable means". This included the promotion, improvement, and development for the public benefit of research into this subject and the publication of the useful results of such research.

The Prodem trust failed to establish that it was charitable because of its biased approach to its work. The focus of the trust was stated to be "the new militarism", described as an "undue prevalence of warlike values and ideas which manifests itself in proposals for excessive military forces, judged by any conceivable threat, and a level of military expenditure beyond the requirements for defense". The Court of first instance held that "a trust described as 'educational' may be disqualified, if the subject matter is not of sufficiently educational value or the purpose is predominantly political or propagandist in character".[173]

The Court held that Prodem's purpose was not limited to educating the public in the peaceful means of dispute resolution. Rather, it considered the term "militarism" to be intended to define the current policies of Western governments and the purpose of Prodem to be specifically to challenge those policies, which were not charitable purposes. The Court of Appeal affirmed the reasoning of the Court of first instance by holding:

> *I would have no difficulty in accepting the proposition that it promotes public benefit for the public to be educated in the differing means of securing a state of peace and avoiding a state of war. The difficulty comes at the next stage. There are differing views as to how best to secure peace and avoid war. To give two obvious examples: on the one hand it can be contended that war is best avoided by "bargaining through strength"; on the other hand it can be argued, with equal passion, that peace is best secured by disarmament, if necessary by unilateral disarmament. The court is in no position to determine that promotion of the one view rather than the other is for the public benefit. Not only does the court have no material on which to make that choice; to attempt to do so would usurp the role of government. So the court cannot recognize as charitable a trust to educate the public to an acceptance that peace is best secured by "demilitarisation" in the sense in which that concept is used in the Prodem background paper and briefing documents.*[174]

[169] Ibid, at [17].

[170] HC WN CIV-2010-485-1275 [3 February 2011] at [51].

[171] *Brunyate* (1945) 61 LQR 268 at 273.

[172] *Eckles v Lounsberry* 253 Iowa 172, 11 NW 2d 638 at 642 (1961).

[173] *Southwood v A-G*, [2000] ECWA Civ. 204 (BAILII), (available online at www.bailii.org/ew/cases/EWCA/Civ/2000/204.html); see also Tudor 9th ed, above n 4, at 66-67 and 188-189, cited by Canada Revenue Agency, *Research as a Charitable Activity*, on the entity's website: www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/cps/rsrch-eng.html, summary at [26].

[174] Ibid, at [29].

The Court of Appeal held that, as it was clear from the background paper and the briefing papers that Prodem's object was not to educate the public in the differing means of securing a state of peace and avoiding a state of war but rather to educate the public to an acceptance that peace was best secured by demilitarisation, the trust could not be regarded as charitable, as "the court cannot determine whether or not it promotes the public benefit for the public to be educated to an acceptance that peace is best secured by 'demilitarisation' ".[175]

If the research activities that a registered charity conducts or funds as a charitable activity confer a private benefit that is not incidental, reasonable, inevitable and necessary to achieve the public benefit provided by its charitable purpose, its charitable registration may be revoked. Issues regarding private benefit in the research context generally arise when a charity decides to exploit the intellectual property rights that come from its charitable research. Similarly, research is considered to provide private benefit when the research results are not made public because they are for the business or financial advantage of the person or group doing the research.

### 10.3 Public benefit

To be charitable at law, all education purposes must meet the public benefit test. This means that they must be aimed at the public or a sufficient section of the public. In addition, in the case of trusts (through the operation of trust law) and societies and institutions (because of section 13(1)(b) of the *Charities Act 2005*), an entity will not have charitable purposes if its purposes allow it to be carried on for private pecuniary profit. If an entity is considered to have purposes aimed at furthering the interests of a group that is not the public, or to promote private financial profit, it will not qualify for registration.

Some limited classes of person have been viewed as constituting a sufficient section of the community. For example, women and girls who are not self-supporting,[176] persons of a particular religion[177] and the education of the daughters of missionaries[178] have all been considered sufficiently broad to pass the public benefit test.

However, if there is a personal nexus between the beneficiaries and an individual or company, this is not looked on as a sufficient section of the community. Hubert Picarda explained that "if the nexus between the beneficiaries is their personal relationship to a single *propositus* or to several *propositi* the trust will not be charitable".[179]

This section analyses five elements: the presumption of public benefit; education for a limited class of persons and preference clauses; private pecuniary profit; propaganda and political purposes; and public policy.

#### *10.3.1 Public benefit presumed*

Public benefit is an important aspect in deciding if purposes are charitable.

However, courts have recognised a rebuttable presumption that an entity established for the advancement of education provides public benefit. In *National Anti-Vivisection Society v Inland Revenue Commissioners*,[180] Lord Wright remarked, "The test of benefit to the community goes through the whole of Lord Macnaghten's classification, though as regards the first three heads, it may be *prima facie* assumed unless the contrary appears".[181]

The New Zealand High Court, in *Re Education New Zealand Trust*,[182] accepted that "it is well-settled that on the first three specific heads of charitable purposes, public benefit is assumed to arise unless the contrary is shown".[183] However, in that case, Dobson J wrote

[175] Ibid, at [30].

[176] *Re Central Employment Bureau for Women and Students' Careers Association Inc* [1942] 1 All ER 232.

[177] *Income Tax Special Purposes Commissioners v Pemsel* [1891] AC 531.

[178] *German v Chapman* (1877) 7 Ch D 271 (CA).

[179] Picarda 4th ed, above n 51, at 76-77.

[180] [1948] AC 31.

[181] Ibid, at 42. See also to the same effect Lord Simonds at 65.

[182] (2010) 24 NZTC 24,354.

[183] Ibid, at [24].

that the further from the core of educational purposes an entity is, the easier it is to rebut the presumption that requisite public benefit arises. He adopted the observation of Gallen J from *Educational Fees Protection Society Inc v Commissioner of Inland Revenue*:[184] "the nature of the charitable purpose may itself be a factor in determining whether or not the requirement of public benefit has been met".[185] In evaluating the presence of a requisite public benefit, one must pose the question of whether the entity is substantially altruistic in character. In *Re Education New Zealand Trust*, Dobson J was of the opinion that the entity was not substantially altruistic because about 30% of the educational institutions involved promoted courses run by for-profit education providers.[186]

### *10.3.2 Education for a limited class of persons and preference clauses*

An obvious example of lack of public benefit would be a trust established by parents for the education of their children. Although there is some public benefit from the children's education, the private benefit to them is paramount. In *Re Compton*,[187] a trust for the education of the descendants of three named persons was held to be non-charitable.

However, a gift that gives a preference to relatives or named individuals is permissible, as the inclusion of a significant proportion of non-related persons widens the beneficiaries sufficiently to constitute a section of the community. Similarly, trusts for the advancement of education that contain provisions for the founders' kin in certain schools and colleges are permissible.[188]

An example of a trust registered by the New Zealand Charities Registration Board is the "Terry Boyle Memorial Trust".[189] The purposes of the Trust are to provide "such assistance whether financial or otherwise to assist the education of young people within the Central Southland area or elsewhere (including but not exclusively the nieces and nephews of the Settlor and their issue) who are financially or socially disadvantaged or both or otherwise and without restricting the scope of the foregoing to provide financial assistance, clothing, accommodation, books, equipment, use of facilities, counselling and such other appropriate assistance as is deemed necessary to such students".

Trusts for the education of a limited class of persons have been held not to be charitable. The leading case addressing this was *Oppenheim v Tobacco Securities Trust Co Ltd*,[190] where a gift to advance the education of the children of employees of a company was considered non-charitable, as they were related via the *propositus* of the company. The Court deemed that in order to provide a public benefit, the possible beneficiaries or objects of the dispositions could not be numerically negligible.

However, persons engaged in training in a particular industry are considered a broad enough section of the community.[191] Consequently, there are a number of industry training organisations currently registered as charities.

### *10.3.3 Private pecuniary profit*

At common law and according to section 13(1)(b) of the New Zealand *Charities Act 2005*, a charity cannot be established to confer private benefit. However, some private benefit may occur when a charity pursues activities that further its charitable purpose. Such private benefit is acceptable as long as it arises directly through the pursuit of the charity's purpose, and as long as it is incidental to the achievement of that purpose.[192] Additionally, private benefit must be reasonable in all circumstances. This means that private benefit must be inevitable and necessary for the charity to further or achieve its charitable purpose. Furthermore, private benefit must not amount to a non-charitable collateral purpose, such as the promotion of a business.[193]

[184] [1992] 2 NZLR 115.

[185] Ibid, at 125 cited in (2010) 24 NZTC 24,354 at [26].

[186] (2010) 24 NZTC 24,354 at [41].

[187] [1945] Ch 123.

[188] *Re Spencer* [1928] 34 OWN 29 (scholarship at Manitoba University); *Re Fitzgibbon* [1916] 11 OWN 71; *Re Welton* [1950] 2 DLR 280 (NS) (prize); *Re Johnson*, estate (1961) 30 DLR (2d) 474 (BC). See also Picarda 4th ed, above n 51, at 77.

[189] CC42013.

[190] [1951] AC 297.

[191] *Construction Industry Training Board v Attorney-General* [1971] 1 WLR 1303.

[192] *British Launderers' Research Association v Borough of Hendon Rating Authority* [1949] 1 KB 462 at 467; *Re British School of Egyptian Archaeology v Public Trustee And others* [1954] 1 All ER 887 at 890; and refer to *Incorporated Council of Law Reporting for England and Wales v Attorney-General and others* [1972] Ch 73 [1971] 3 All ER 1029 at 1034 e. See also s. 5(3) and (4) of the *Charities Act 2005*.

[193] *Inland Revenue Commissioners v Oldham Training and Enterprise Council* [1996] BTC 539 at 555.

A college set up for the compulsory attendance of employees of a company is not considered charitable, as private benefit accrues to the company.[194]

*10.3.3.1 Fee-charging educational institutions*

The public benefit element may be considered not met where there is some unreasonable limitation placed on those who can benefit from the purposes, or where the cost of accessing the education is so high as to exclude benefit to a sufficient section of the community. In *D V Bryant Trust Board v Hamilton City Council*,[195] the Court said that an entity could charge fees that more than covered the cost of services provided, unless the fees were so high as to effectively exclude the less well-off.

Therefore, even private schools and universities can be considered charitable, as long as they are not for profit. Following *Re Resch's Will Trusts, Le Cras v Perpetual Trustee Co Ltd*,[196] where a gift of income from a residual estate to the Sisters of Charity for the purposes of a private hospital was considered charitable, it can be concluded that although the fees at a private school are often substantial, it can be considered as benefiting the general public, as it takes strain off the public education system.

However, in October 2011, in *Independent Schools Council v Charity Commission for England & Wales*,[197] three judges of the Upper Tax Tribunal and Chancery Chamber of the High Court ruled that in order to prove public benefit, private schools could not exclude the poor or have fees that were so high that in practice it excluded the poor.[198] It had to be shown that a minimal or threshold level of help for the poor had been offered by a school, such as having a not insignificant number of persons whose fees were funded from other charitable sources.[199] The "level of provision for them [the poor] must be at a level which equals or exceeds the minimum which any reasonable trustee could be expected to provide".[200] Under the judgment, private schools could also offer teachers to state schools, open their playing fields and swimming pools to state school pupils, and invite state school pupils to join classes in subjects their own schools did not offer.

Although that judgment was subsequent to the removal of the presumption of public benefit from the advancement of education through the *Charities Act 2006*, courts in New Zealand may begin examining public benefit more closely for educational entities.

*10.3.3.2 Education of members of a profession*

If the educational purpose is intended to benefit a profession, it is not charitable. In *Institution of Professional Engineers New Zealand Inc v Commissioner of Inland Revenue*,[201] the High Court held that although the advancement of the science of engineering was beneficial to the general public, a significant and non-incidental function of the Institution was to act as a professional organisation for the benefit of engineers, and therefore it could not be said that the Institution was established exclusively for charitable purposes. Tipping J referred to Lord Normand's test in *Glasgow Police Association*:

> *And what the respondents must show in the circumstances of this case is that, so viewed objectively, the association is established for a public purpose, and that the private benefits to members are the unsought consequences of the pursuit of the public purpose, and can therefore be disregarded as incidental.*[202]

In *Re Mason*,[203] the High Court of New Zealand considered that while the objects of the Auckland District Law Society were entirely wholesome and likely to lead to the ultimate benefit of the public, they fell short of making the society a charity. In that case, the Court made a distinction between charitable institutions whose main object was

[194] *Re Leverhulme* [1943] 2 All ER 143.
[195] [1997] 3 NZLR 342.
[196] [1967] 3 All ER 915.
[197] [2011] UKUT 421 (TCC).
[198] Ibid, at [241].
[199] Ibid, at [237].
[200] Ibid, at [244].
[201] [1992] 1 NZLR 570.
[202] *Inland Revenue Commissioners v City of Glasgow Police Athletic Association* [1953] AC 380 at 396.
[203] [1971] NZLR 714 at 721.

the advancement of education that provided a clear public benefit, and non-charitable institutions whose main object was the protection and advantage of those practising in particular professions. McMullin J cited examples of charitable institutions, such as an institute of pathology[204] and a college of nursing,[205] and examples of non-charitable institutions, such as an insurance institute[206] and a society of writers.[207] The promotion of charitable purpose must be its predominant object and any benefits to individual members of non-charitable character that result from its activities must be of a subsidiary or incidental character.[208]

In *Re New Zealand Computer Society Inc*,[209] Ronald Young J wrote that there was no dispute that the Society's purposes included the advancement of education, and that it carried out activities that were designed to achieve that purpose. He further wrote that the entity was not charitable because:

> *The present case is not directly comparable with* CIR v Medical Council*, as submitted by the Society. In that case, registration of medical professionals was held to be of primary benefit to the public, by ensuring high standards of practice. Here, the main benefit that is sought to be derived from objects 3.2, 3.3, 3.4 and 3.6 is clearly the advancement of IT professionals and their industry. It is undoubtedly the case that IT is important in modern life. However, I do not consider that its importance is such that the IT profession can be equated with the medical profession or the nursing profession so far as the public interest in the maintenance of high standards in the profession is concerned.*[210]

The courts have also deemed learned societies an exception.[211] A learned society is an organisation that exists to promote an academic discipline or group of disciplines, and as such can often consist mainly of members of a profession, yet the strong educational flavour of these organisations saves them. However, providing benefits to teachers is only charitable if they advance educational purposes in some manner.[212]

One exception decided by the Australian courts was *Victorian Women Lawyers' Association Inc v Commissioner of Taxation*.[213] In that case, French J held that the Association was charitable as it had been established to overcome a well known social deficit, namely the substantial underrepresentation of women in the legal profession, in its upper reaches and in the judiciary. The activities of the Association, including the social and networking functions, may have benefited its members; however they were plainly directed towards this larger object and in many cases to a larger audience (the legal profession) in Victoria. A similar organisation in New Zealand, the Auckland Women Lawyers' Association Incorporated, has been approved for registration by the New Zealand Charities Registration Board.

### *10.3.4 Propaganda and political advocacy*

Political purposes are sometimes cloaked as educational purposes. To be charitable under the advancement of education, the primary purpose must not be advocacy or propaganda.

Gino Dal Pont wrote that "an apparently political purpose can be upheld if it can be properly construed as an educational purpose".[214] Courts have held that in order for a trust to be charitable for the advancement of education, the information provided must not be limited to one side of complex issues. The test to decide whether the activity is political or genuinely educational is "one of degree of objectivity or neutrality surrounding the endeavour to influence, and assesses whether the political change is merely a by-product or is instead the principal purpose of the gift or institution".[215]

[204] *Royal College of Surgeons of England v National Provincial Bank* [1952] AC 631; [1952] 1 All ER 984.

[205] *Royal College of Nursing v St Marylebone Corporation* [1959] 1 WLR 1077; [1959] 3 All ER 663.

[206] *Chartered Insurance Institute v Corporation of London* [1957] 1 WLR 867.

[207] *Society of Writers to Her Majesty's Signet v Commissioners of Inland Revenue* (1886) 2 TC 257.

[208] *Inland Revenue Commissioners v City of Glasgow Police Athletic Association* [1953] AC 380.

[209] HC WN CIV-2010-485-924 [28 February 2011].

[210] Ibid, at [56].

[211] *Beaumont v Oliveira* (1869) LR 4 Ch 309.

[212] *R v Catt* (1795) 6 Term Rep 332; 101 ER 580 and *R v Special Commissioners of Income Tax* (1925) 41 TLR 651.

[213] [2008] FCA.

[214] Dal Pont *Law of Charity*, above n 7, at 297.

[215] *Re Bushnell (deceased) Lloyds Bank Ltd and others v Murray and others* [1975] 1 All ER 721 as applied by *Public Trustee v Attorney-General* (1997) 42 NSWLR 600 at 608.

A distinction must be made between propagating a view that can be characterised as political and the desire "to educate the public so that they could choose for themselves, starting with neutral information, to support or oppose certain views".[216] Therefore a disposition can be validly construed as for educational purposes notwithstanding that, because of the educational programme, the law may be changed.[217]

In *Re Koeppler's Will Trusts*,[218] a gift to an association that contributed to an informed international public opinion and to the promotion of greater cooperation in Europe and the West in general was held to be educational because it was neither of a party political nature nor designed to change the law or government policy even though it could touch on political matters. Slade LJ described the activities of the association as "no more than genuine attempts in an objective manner to ascertain and disseminate the truth".[219]

In a recent case, the High Court of New Zealand reinforced the distinction between education and propaganda. In *Re Draco Foundation (NZ) Charitable Trust*,[220] Young J had to decide if a website publishing pieces submitted by the public on different city and district councils and some editorial pieces was charitable for the advancement of education. He concluded that "the expressions of opinions were essentially 'propaganda' as understood in charities law. They presented one side of a debate, the opinion writer's view, on issues in the public arena which are essentially political".[221] He further noted that he did not consider the political function of Draco to be ancillary or incidental to any charitable purpose. The political purpose was an important part of the content on both websites that Draco ran.

A similar view was taken in *Greenpeace of New Zealand Incorporated*,[222] where Heath J stated that the promotion of a particular point of view was different from the purpose of generating public debate. "In the former, the idea is to change or (as in *Molloy v CIR* [1981] 1 NZLR 668 (CA)) to retain the *status quo*. Encouragement of rational debate presupposes that both sides of an argument will be equally considered. On that basis, political advocacy can be seen as independent from Greenpeace's charitable purposes".[223]

### *10.3.5 Public policy*

If an educational purpose is contrary to public policy, it cannot be charitable. As Gino Dal Pont pointed out, "Educating persons to engage in criminal or antisocial behaviour presents an example, as does the object of publishing material contrary to prevailing public morals".[224]

## 10.4 Conclusion

Both the *Statute of Elizabeth* and case law have acknowledged that advancing education is charitable. Courts have defined the advancement of education as including less formal education that would lead to the development of individual capabilities, competencies, skills and understanding, as long as information or training is provided in a structured manner and for a genuinely educational purpose and not solely to promote a particular point of view or political orientation. In summary, to advance education, a purpose must provide some form of education and ensure that learning is advanced.[225] Some sort of formal or informal instruction, training or plan of self-study must be provided. Pastimes and social activities are not considered charitable, unless they involve some proper educational activities or promote a deeper purpose, usually health or education.

Advancing education can be achieved by promoting schools, universities and related facilities and buildings, such as libraries and learned societies. Endowments of teaching and scholarship are also considered to be for the advancement of education. Purposes that would not normally be considered charitable may acquire charitable status by

[216] *Re Bushnell (deceased)* [1975] 1 All ER 721 at 729.

[217] *In the Estate of Cole (deceased)* (1980) 25 SASR 489 at 495.

[218] [1986] 1 Ch 423.

[219] Ibid, at 437.

[220] HC WN CIV-2010-485-1275 [3 February 2011].

[221] Ibid, at [67]. A similar decision was reached by the Charity Commission for England and Wales in *Full Fact*, which was decided by the Charity Commission Tribunal, Case No. CA/2011/0001 [26 July 2011].

[222] HC WN CIV-2010-485-829 [6 May 2011].

[223] Ibid, at [69].

[224] Dal Pont *Law of Charity*, above n 7, at 204.

[225] *In re Shaw (deceased)* [1957] 1 WLR 729; as interpreted in *Re Hopkins' Will Trusts* [1964] 3 All ER 46. See also *Re Collier (deceased)* [1998] 1 NZLR 81.

being attached or linked to an educational institution. This is the case for sports and recreation attached to educational institutions and student unions. Cultural and artistic appreciations (including museums) have also been held to be charitable for the advancement of education. Research can also be for the advancement of education as long as it is carried on objectively and is made available to the public.

As is the case for all purposes, they must provide public benefit. In the advancement of education, proof of public benefit is helped by a presumption that the purposes will provide public benefit. The three judges who examined the law on public benefit as it stood before the adoption of the *Charities Act 2006* suggested that a judge would start with a predisposition that an educational gift was for the benefit of the community. His or her predisposition would be displaced so that evidence would be needed to establish public benefit. But if there were nothing to cause the judge to doubt his or her predisposition, he or she would be satisfied that the public element was present.[226] In New Zealand, a High Court Judge suggested that the further from the core of educational purposes an entity was, the easier it was to rebut the presumption that requisite public benefit arose.

[226] *The Independent Schools Council v Charity Commission for England and Wales* [2011] UKUT 421 (TCC) at [67].

CHAPTER 11

# Advancement of religion

It is noteworthy that the *Statute of Charitable Uses 1601* does not mention religion as a charitable purpose, other than through an allusion to the repair of churches. However, courts and commentators have held that *Morice v Bishop of Durham*[1] was the first case to provide a classification of the four categories of charity, which included the advancement of religion as its third category. This was confirmed by the House of Lords in *Income Tax Special Purposes Commissioners v Pemsel*.[2]

One is therefore obliged to recognise that even if religion is not explicitly recognised in the *Statute of Elizabeth*, the courts nevertheless acknowledged it before 1601 and have done since. The relief of poverty and the advancement of education have always been recognised as two of the important functions of the Catholic Church, not only in England but also in Europe.[3] Gino Dal Pont wrote that the omission of the advancement of religion in the *Statute of Elizabeth* could have been explained by "the secular orientation of Elizabeth I, and the desire of Puritans to have a religion free of state interference".[4]

The following sections deal with the development of religion as a charitable purpose, the meaning of religion, and the advancement of religion and public benefit in the context of religious purposes.

## 11.1 The development of religion as a charitable purpose

Since charity law dates back at least to the *Statute of Charitable Uses 1601*, one has to study its development in England and cannot limit oneself to New Zealand.

### *11.1.1 Exclusion of religious denominations other than the Established Church*

After the passage of the *Statute of Elizabeth*, it did not take long for courts to decide that the advancement of the established religion was conceded to be within the ambit of the Act.[5] However, it was only after the adoption of the *Toleration Act 1688* that gifts for Protestants were considered on an equal footing to gifts for those in the Established Church.[6]

Roman Catholics, Jews and Unitarians were not included in the Act's provisions. It was a long time before gifts for the education of children in the Roman Catholic faith, or for instructing the people in the Jewish religion, were held valid even though they were considered valid in the case of similar gifts to the Established Church. In 1813, Parliament adopted an Act recognising Unitarians on the same footing as other Protestant religions.[7] Roman Catholics were accorded the same benefit in 1832[8] and Jews in 1846.[9]

A New Zealand Court decided, in *Carrigan v Redwood*,[10] that since the laws prohibiting Protestant and Roman Catholic religions were abolished before English law was received in New Zealand, these religions were never illegal in New Zealand.[11]

1 (1805) 10 Ves Jun 522, 32 ER 947 at 951.

2 [1891] AC 531.

3 Neil S Rushton and Wendy Single-Rushton "Monastic Poor Relief in Sixteenth-Century England" (2001) 32:2 *Journal of Interdisciplinary History* 193-216.

4 Dal Pont *Charity Law in Australia and New Zealand* (Oxford University Press, Oxford, 2000) at 147.

5 *Pember v Inhabitants of Kingdom* (1637) Toth 34.

6 Hubert Picarda *The Law and Practice Relating to Charities* (4th ed, Bloombury Professional Ltd, Haywards Heath, 2010) at 90 ["Picarda 4th ed"].

7 *Unitarian Relief Act 1813*. A gift for religious purposes of Unitarians was held valid in *Shore v Wilson* (1842) 9 Cl & Fin 355; *Shrewsbury v Hornby* (1846) 5 Hare 406.

8 *Roman Catholic Charities Act 1832*. A gift for religious purposes of the Roman Catholic was held valid in *Bradshaw v Tasker* (1834) 2 My & K 221.

9 *Religious Disabilities Act 1846*. A gift for religious purposes of the Jewish religion was held valid in *Re Braham* (1892) 36 Sol Jo 712.

10 (1910) 30 NZLR 44.

11 Ibid, at 252.

#### *11.1.2 No discrimination between religions*

Since the adoption of those Acts recognising different religions, courts have decided that no distinction should be made between religions, all being equal. The most influential case in this regard was *Thornton v Howe*.[12] In that case, Romilly MR had to decide whether a trust for printing, publishing and propagating the sacred writings of Joanna Southcote was a charitable trust. The Master of the Rolls described her as a foolish, ignorant woman, of an enthusiastic turn of mind, who had long wished to become an instrument in the hands of God to promote some great good on Earth. In considering the Court's approach to the teaching of this kind, the Master of the Rolls said:

> *In this respect, I am of the opinion, that the Court of Chancery makes no distinction between one sort of religion and another. [...]. Neither does the Court, in this respect, make any distinction between one sect and another. It may be, that the tenets of a particular sect inculcate doctrines adverse to the very foundations of all religion, and that they are subversive of all morality. In such a case, if it should arise, the Court will not assist the execution of the bequest, but will declare it to be void [...] But if the tendency were not immoral, and although this court might consider the opinions sought to be propagated foolish or even devoid of foundation, it would not, on that account, declare it void, or take it out of the calls of legacies which are included in the general terms charitable bequest*.[13]

This position was confirmed more than 100 years later in *Re Watson*.[14] In that case, Plowman J was required to decide whether a gift to promote the writings of the testator's father, Mr Hobbs, was charitable. Mr Hobbs had written and published a large number of religious books and tracts. Plowman J considered *Thornton v Howe* and the cases since that had referred to Romilly MR's judgment. He concluded that "the court does not prefer one religion to another and it does not prefer one sect to another".[15]

### 11.2 Meaning of religion

In *Centrepoint Community Growth Trust v Commissioner of Inland Revenue*,[16] Tompkins J wrote that he was not aware of any authorities on the meaning of religion or what were the essential requirements for a trust to be regarded as one for the advancement of religion. He therefore turned to English and United States cases, which expressed two different definitions of what was meant by religion.

#### *11.2.1 The theist approach to religion*

In *Barralet v Attorney-General*,[17] the Court was asked to declare charitable a society for the study and dissemination of ethical principles. That was based on the belief that the object of human existence was the discovery of truth by reason and not by revelation of a supernatural power, and belief in the excellence of truth, love and beauty, as opposed to belief in any supernatural power. Dillon J accepted that a trust could be charitable for the advancement of religion although the religion that is thought to be advanced is not Christian. However, he declined to extend the meaning of religion to that extent. He wrote:

> *Religion, as I see it, is concerned with man's relations with God, and ethics are concerned with man's relations with man. The two are not the same, and are not made the same by sincere inquiry into the question, what is God? If reason leads people not to accept Christianity or any known religion, but they do believe in the excellence of qualities such as truth, beauty and love, or believe in the*

[12] (1862) 31 Beav 14.
[13] *Thornton v Howe* (1862) 31 Beav 14 at 19-20.
[14] [1973] 3 All ER 678.
[15] Ibid, at 688.
[16] [1985] 1 NZLR 673 at 691.
[17] [1980] 3 All ER 918.

> *Platonic concept of the ideal, their beliefs may be to them the equivalent of a religion, but viewed objectively they are not religion.*[18]

He further observed that to him two of the essential attributes of religion were faith and worship: faith in a God, and worship of that God.

### *11.2.2 The broad approach to religion*

A broader approach has been accepted in the United States, which has developed in the context of the interpretation of the constitutional first amendment concerned with individual rights.

In *United States v Seeger,* the case concerned the exemption of a conscientious objector from conscription on the grounds of religion. The conclusion of the Supreme Court of the United States was that "a sincere and meaningful belief, which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption on the grounds of religion comes within the statutory definition".[19]

In *Malnak v Yogi*,[20] the United States Supreme Court held that the term religious in the context of conscientious objectors by reason of "religious training and belief" described an opposition to military service stemming from moral, ethical or religious beliefs about what was right or wrong, when the beliefs were held with the strength of traditional religious convictions.

### *11.2.3 The intermediate approach to religion*

After analysing these cases, Tompkins J considered as particularly helpful the definition given by the High Court of Australia in *Church of the New Faith v Commissioner of Pay-Roll Tax*,[21] because it offered a third option that fitted between the two previous ones, going further than the English cases and refusing to follow the United States decisions. The High Court of Australia said that the advancement of religion was charitable when the religious institution included the following relevant *indicia* of a religion:

> *The criteria of religion are twofold: first, belief in a supernatural Being, Thing or Principle; and second, the acceptance of canons of conduct in order to give effect to that belief, though canons of conduct which offend against ordinary laws are outside the area of any immunity, privilege or right conferred on the grounds of religion. Those criteria may vary in their comparative importance, and there may be a different intensity of belief or acceptance of canons of conduct among religions or among the adherents to a religion. The tenets of a religion may give primacy to one particular belief or to one particular canon of conduct. Variations in emphasis may distinguish one religion from other religions, but they are irrelevant to the determination of an individual's or group's freedom to profess and exercise the religion of his, or their, choices.*[22]

In *Centrepoint Community Growth Trust v CIR*,[23] the Court held that the entity was charitable as a religious organisation, applying the criteria described in the *Church of the New Faith* case. The Centrepoint religious community had 92 members who were residents of the community and who were provided with accommodation, food, clothing and $1 a week. All children of members were clothed, housed and fed by the Trust. The Trust charged for its counselling and therapy activities carried on in Auckland city. At Albany, the members of the Trust were engaged in a number of craft activities; for example they operated a pottery and manufactured hats. All the proceeds from the commercial activities went into the general funds of the Trust.

[18] Ibid, at 924.

[19] 380 US 163 (1965).

[20] 592 F 2d 197 (1979).

[21] (1983) 154 CLR 120 at 126 (HCA).

[22] *Church of the New Faith v Commissioner of Pay-Roll Tax* (1983) 154 CLR 120 at 126 which was accepted and applied in New Zealand in *Centrepoint Community Growth Trust v Commissioner of Inland Revenue* [1985] 1 NZLR 673 at 695-697 per Tompkins J.

[23] [1985] 1 NZLR 673.

### *11.2.4 The limits and disqualifying factors*

The adoption of definitions of religion, which are not limited to theist religion, needs to be limited in some way, otherwise any body suggesting that it is following a religion may be granted charitable status.[24] The protection of the integrity of the New Zealand taxation system demands that the disqualifying factors be known in advance.

The identifying of qualifying factors requires an objective test to be applied, otherwise "any group who assert their beliefs, practices and observances to be religious" would have to be granted charitable status and tax exemptions.[25] The test established in the *Church of the New Faith* case by the Australian High Court is threefold. Firstly, unless there is a "real connection between a person's belief in the supernatural and particular conduct in which that person engages, that conduct cannot itself be characterized as religious".[26] Secondly, conduct, which consists of worship, teaching, propagation, practices or observances, may be held religious "only if the motivation for engaging in the conduct is religious. That is, if the person who engages in the conduct does so in giving effect to his particular faith in the supernatural".[27] Thirdly, the conduct must not be inconsistent with the law or public policy. For example, courts have held that the practice of polygamy by Mormons was illegal although permitted by their religious beliefs.[28]

Furthermore, although the High Court of Australia in the *Church of the New Faith* case did not agree with the conclusion of the Judge who examined the request of the Church of Scientology, it acknowledged that if an organisation were no more than a sham, the entity could not be considered as a charity.[29] However, the High Court wrote that lack of sincerity on the part of the founder was not sufficient for a religion to be considered a sham. The sincerity had to be approached "from the standpoint of the general group of adherents". If they were sincere, although gullible, the entity should qualify as a charity.[30]

### *11.2.5 Application to non-theist organisations*

It is clear from the cases cited above that in New Zealand non-theist organisations can be considered charitable, although they would not necessarily be considered as such in the United Kingdom. In *Re Cox*, Fitzpatrick CJ of the Supreme Court of Canada wrote that Christian Science was "rather a theory of all things in Heaven and earth evolved by the founders of the Scientist Church, than a religion as commonly understood". However, Christian Science was held to be charitable in the United States, where one court upheld the will of Mary Baker Eddy, who left the greater part of her fortune to the "Mother Church for the repair of the church building and for the purposes of more effectually promoting and extending the religion of Christian Science as taught by me".[31] Hubert Picarda wrote that "there is now no doubt about the standing of the Christian Science: it is accounted a *bona fide* religion and has very numerous adherents".[32] Approximately 10 Christian Science organisations have been registered.

Non-Christian religions, including Islam, Buddhism and Hinduism have been registered both in the United Kingdom and in New Zealand.

The question whether spiritualism constitutes a religion has been canvassed in a number of cases. English cases seem to indicate that spiritualism is not a religion. In *Re Hummeltenberg*,[33] a bequest to establish a college for the training of spiritualistic mediums was held not to be charitable. However, Hubert Picarda relied on *Jones v Watford*,[34] in which a New Jersey court upheld as valid for the advancement of religion a trust to purchase and make available books on the philosophy of spiritualism. According to Picarda, "If one accepts the tolerant criteria of Sir John Romilly in *Thornton v Howe*, the decision in *Jones v Watford* seems unexceptionable".[35] The New Zealand Charities Registration Board has registered at least 30 spiritualist churches and foundations.

[24] See *Church of the New Faith v Commissioner of Pay-Roll Tax* (1983) 154 CLR 120 at 132 per Mason ACJ and Brennan J.

[25] Ibid.

[26] Ibid, at 135 per Mason ACJ and Brennan J.

[27] Ibid.

[28] *Reynolds v United States* (1879) 98 US 145 at 167. See also *Adelaide Company of Jehovah's Witnesses Inc v the Commonwealth* (1943) 67 CLR 115 at 156 where the High Court of Australia held that a prohibition of subversion of the war effort was not circumvented by the pacifist ideals of the Jehovah's Witnesses, and the Court rejected their challenge to the validity of the National Security (Subversive Association) Regulation.

[29] See *United States v Kuch* (1968) 288 F.Supp. 439.

[30] *Church of the New Faith v Commissioner of Pay-Roll Tax* (1983) 154 CLR 120 at 141 per Mason ACJ and Brennan J.

[31] *Glover v Baker* 83 Atl 916 (1912) and *Chase v Dickey* 99 NE 410 (1912) (a trust for the Christian Science Monitor held as charitable).

[32] Picarda 4th ed, above n 6, at 100.

[33] [1923] 1 Ch 237, [1923] All ER Rep 49. See also Noel C Kelly, Chris Kelly and Greg Kelly *Garrow and Kelly Law of Trusts and Trustees* (6th ed, LexisNexis, Wellington, 2005) at 265 ["Garrow and Kelly"].

[34] 62 NJ Eq 339 (1901); 64 NJ Eq 785 (1902) (US). See also *Lockwood's Estate* 344 Pa 293 (1942) (US) (gift to an incorporated spiritualist college held valid).

[35] Picarda 4th ed, above n 6, at 99.

The question was canvassed whether a trust constituted to promote atheism would be charitable. In *Kinsey v Kinsey*,[36] an Ontario court held that a trust to promote atheism was not charitable. Similarly, in *Re Jones*,[37] an Australian court held as void a bequest to the Incorporated Body of Freethinkers of Australia, a society that advocated the doctrine that science provided for life and that materialism could be relied upon in all phases of society.

Finally, humanist societies were first held not to be charitable for the advancement of religion nor for the advancement of education.[38] In fact, such societies are generally opposed to the concept of religion,[39] and often have political purposes and carry out political activities.[40] However, Hubert Picarda[41] wrote that the study and dissemination of ethical principles and the cultivation of rational religious sentiments could be charitable for the advancement of education or under the fourth head, although they were non-charitable for the advancement of education, based on *Re South Place Ethical Society*.[42] The Canada Revenue Agency registry for charities, the Charity Commission for England and Wales and the New Zealand Charities Registration Board have registered some humanist groups.[43]

### *11.2.6 Summary of the section*

Applying the broad approach outlined in *Church of the New Faith*, Murphy J wrote that:

> *Any body which claims to be religious, whose beliefs or practices are a revival of, or resemble, earlier cults is religious. Any body which claims to be religious and to believe in a supernatural Being or Beings, whether physical and visible, such as the sun or the stars, or a physical invisible God or spirit, or an abstract God or entity, is religious. For example, if a few followers of astrology were to found an institution based on the belief that their destinies were influenced or controlled by the stars, and that astrologers can, by reading the stars, divine these destinies, and if it claimed to be religious, it would be a religious institution. Any body which claims to be religious, and offers a way to find meaning and purpose in life, is religious. The Aboriginal religion of Australia and of other countries must be included. This list is not exhaustive; the categories of religion are not closed.*[44]

This approach is not as broad as the one adopted by the United States Supreme Court, where a belief in God or a supreme being is no longer regarded as essential to any legal definition of religion. There, it is now sufficient that a person's beliefs, sought to be legally characterised as religious, are to him or her of ultimate concern. However, the definition adopted in Australia and followed in New Zealand is much broader than the theist criteria followed by United Kingdom and Canadian courts, which insist on a belief in a supreme being. In these two countries, Scientology has not been considered a religion.[45] It must, however, be noted that the United Kingdom *Charities Act 2006* has expanded the definition of religion to include "a religion which involves belief in more than one God and a religion which does not involve belief in a God".[46]

Hubert Picarda[47] wrote that no rationale for treating religious organisations as charitable had been given in English, Australian or New Zealand cases; they seemed to take for granted that religious organisations were an important component of their societies. However, some American decisions have mentioned that religion is a valuable constituent in the character of citizens,[48] is the surest basis on which to rest the superstructure of social order[49] and is necessary to the advancement of civilisation and the production of the welfare society.[50]

Although religions have generally been considered beneficial, our secular societies are beginning to be critical of such an approach. Kirby J, dissident in a High Court of Australia

[36] (1894) 26 OR 99.

[37] [1907] SALR 190. See also *Old Colony Trust Co v Welch* 25 F.Supp. 45 at 49 (1938) (Free Thinkers of America Inc not charitable).

[38] See *Berry v St Marylebone Corporation* [1958] Ch 406, [1957] 3 All ER 677. In that case it was held that the Theosophical Society in England, which was "to form a nucleus of the universal brotherhood of humanity without discrimination of race, creed, sex, caste, or colour", did not constitute a charitable purpose because it was worded so broadly that it could include both charitable and non-charitable activities. See also Garrow and Kelly, above n 33, at 265-266.

[39] See *Bowman v Secular Society Ltd* [1917] AC 406 at 442, where Lord Parker wrote: "The abolition of religious tests, the disestablishment of the Church, the secularisation of education, the alteration of the law touching religion or marriage, or the observation of the Sabbath are purely political objects. Equity has always refused to recognize such objects as charitable".

[40] See *Re Stemson's Will Trusts* [1970] Ch 16 at 20-21.

[41] Picarda 4th ed, above n 6, at 101.

[42] [1980] 1 WLR 1565.

[43] See the Canadian Register, which contains 11 humanist associations that are still registered.

The Charity Commission for England and Wales has registered numbers 212653, 309117 and 282251, which have since been removed from the Register. For New Zealand, see CC36074 and CC31395.

[44] *Church of the New Faith v Commissioner of Pay-Roll Tax* (1983) 154 CLR 120 at 151 per Murphy J.

[45] [1999] Ch. Com. Dec. November 17 at 25 cited by Jean Warburton *Tudor on Charities* (9th ed, Sweet & Maxwell, London, 2003) at 74-75 ["Tudor 9th ed"].

[46] UK 2006, c. 50, s. 2(3)(a)(i)-(ii).

[47] Picarda 4th ed, above n 6, at 101.

[48] *Gass and Bonta v Wilhite* 32 Ky 170 at 180 (1834).

[49] *Holland v Peck* 37 NC 255 at 258 (1842).

[50] *People ex Rel Seminary of Our Lady of Angels v Barber* 42 Hun 27 (1886); affd 106 NY 609, 13 NE 936 (1887).

recent decision, wrote that religious institutions sometimes performed functions that were offensive to the beliefs, values and consciences of other taxpayers. He therefore considered that any ambiguity should be construed against the claimed exemption and in favour of the liability of that body to pay applicable tax obligations. This is because others effectively paid for the taxation exemption for religious institutions and it involved a "cross-transference of economic support".[51]

### 11.3 Advancement of religion

An entity may be a religion without having the necessary elements for advancing religion. Furthermore, an entity may be connected with the advancement of religion without itself being an association for the advancement of religion.[52]

In the *Pemsel* case, Lord Macnaghten wrote that the "advancement of religion" is a charitable purpose. Similarly, section 5(1) of the New Zealand *Charities Act 2005* makes it clear that charitable purposes include purposes that relate to the advancement of religion. The meaning of advancing religion must therefore be canvassed in order to better understand what exactly must be established by an entity claiming tax exemption as being for the advancement of religion.

#### *11.3.1 Advancing religion generally*

The meaning of advancing religion was canvassed in *United Grand Lodge of Ancient Free and Accepted Masons of England v Holborn Borough Council*.[53] In that case three judges agreed that "to advance religion means to promote it, to spread its message ever wider among mankind; to take some positive steps to sustain and increase religious belief; and these things are done in a variety of ways which may be comprehensively described as pastoral and missionary".[54]

*Centrepoint Community Growth Trust v CIR*[55] is the only New Zealand recent case decided on the question. In that case, Tompkins J accepted the view of Reverend Dr Armstrong, a senior lecturer in systematic theology at the College of St John the Evangelist, an Anglican theological college in Auckland, that contemporary theologians considered there were four elements that made up a religion. They could be summarised as:

> *(1) A belief in an ultimate reality or an ultimate being, that belief being usually expressed in a series of doctrines in the form of propositions about the ultimate.*
>
> *(2) The observances of sacraments, symbols, ceremonies and rituals taking place within the community. These would include rituals performed to mark the passage of life of the members of the community.*
>
> *(3) An ethical code of behaviour which is understood in most religions to be reflective of the nature of divine reality and of God.*
>
> *(4) The form of organisation and structure of the community and the institution itself.*[56]

In *Centrepoint*, Tompkins J analysed the evidence submitted by the Trust in light of these four elements and concluded that "both in its formal constitution and in the beliefs and practices of its adherents, it has as one of its principal purposes the advancement of religion".[57]

[51] *Commissioner of Taxation of the Commonwealth of Australia v Word Investments Limited*, [2008] HCA 55 at [115], per Kirby, dissenting J (HC Aust).

[52] *Oxford Group v Inland Revenue Commissioners* [1949] 2 All ER 537 at 544 per Cohen LJ. See also *Commissioner of Taxation of the Commonwealth of Australia v Word Investments Limited* [2008] HCA 55 where a limited company was upheld as charitable even though it was carrying on a funeral home and other businesses whose income went to a religious organisation.

[53] [1957] 1 WLR 1080.

[54] Ibid, at 1090.

[55] [1985] 1 NZLR 673 (HC).

[56] *Centrepoint Community Growth Trust v Commissioner of Inalnd Revenue* [1985] 1 NZLR 673 at 696-697.

[57] Ibid, at 698.

By contrast, although the Masons did believe in a supreme being, in *United Grand Lodge of Ancient Free and Accepted Masons of England v Holborn Borough Council*,[58] the Court held that the United Grand Lodge of Freemasons in England did not advance religion as there was "no religious instruction, no programme for the persuasion of unbelievers, no religious supervision to see that its members remain actively constant in the various religions which they might profess, no holding of religious services and no pastoral or missionary work of any kind". Moreover, the Court found that "no mason need practise any religion; provided he believes in a Supreme Being and lives a moral life, he may be and remain a mason".[59]

Although the criteria applicable in New Zealand to determine if an entity was a religion differed from the criteria established in the United Kingdom, the High Court of New Zealand did follow what was said by the Court of Appeal in *United Grand Lodge of Ancient Free and Accepted Masons of England v Holborn Borough Council*.[60] In *Shears v Miller*,[61] Chisholm J concluded that in the previous case the Court had decided that the main objects of Freemasonry did not include the advancement of religion. On the information available to him, he was not prepared to differ from that conclusion.[62]

A distinction between the advancement of religion and conducive to religion was made by Dixon J in *Roman Catholic Archbishop of Melbourne v Lawlor*.[63] In that case, the testator's bequests included a bequest to establish a Catholic daily newspaper. In a split decision, Dixon J considered that mere connexion with religion was not enough and he gave the example of political objects that could be of deep concern to religion but which were not charitable religious purposes. In *Liberty Trust v Charities Commission*,[64] Mallon J relied on *Presbyterian Church (New South Wales) Property Trust v Ryde Municipal Council*[65] in deciding in favour of the Trust. She quoted Mahoney JA, who wrote that "where a church or analogous body has as one of the purposes to which its property may be applied a purpose which is not a mere ulterior secular purpose, but one directed at and able to be seen as assisting in the advancement of its religious purpose, then the purpose of that religion will be held to be religious for present purposes".[66] Mallon J concluded that "advancing religion can include activities in the community rather than being confined to praying, preaching and building churches or looking after priest, minister, nuns and the like".[67]

### *11.3.2 Missionary work and religious purposes*

Courts have upheld as being for the advancement of religion gifts for missions and missionary work.[68] The preaching of the Gospel falls into this category.[69] Finally, in *Re Hood*,[70] the Court held that a gift for the spreading of Christian principles was charitable for the advancement of religion.

Courts have also upheld as charitable gifts for the propagation of religious beliefs. Gifts for the maintenance and promotion of religion[71] and gifts for God's work or for Christian works[72] all fall into this category. The spreading of Christian work and principles has also been held charitable, although the Supreme Court of Canada made a distinction between the phrase "for the service of God", considered charitable, and "for God only", which could include many things not religious or charitable within the sense in which English law restricted charitable bequests.[73] In *Re Brewer (deceased), Solicitor-General v Bydder*,[74] the New Zealand Appeal Court, after considering the relevant English and Canadian authorities, wrote that gifts to trustees of moneys "to be employed in the service of my Lord and Master" were a good charitable gift.

[58] [1957] 1 WLR 1080.

[59] Ibid, at 1090-1091.

[60] Ibid.

[61] 30/05/2000, HC Timaru CP 10/99 per Chisholm J.

[62] Ibid.

[63] (1934) 51 CLR 1 (HCA).

[64] HC WN CIV 2010-485-000831 [2 June 2011].

[65] [1978] 2 NSWLR 387 (NSWCA).

[66] Ibid. at 408 cited in *Liberty Trust v Charities Commission* HC WN CIV 2010-485-000831 [2 June 2011] at [86].

[67] *Liberty Trust v Charities Commission* HC WN CIV 2010-485-000831 [2 June 2011] at [89].

[68] *Re Kenny* (1907) 57 LT 130 (gift for missionary objects); *Re Rees* [1920] 2 Ch 59 at 61-62 per Sargent J (gift for missionary purposes); *Re Moon's Will Trusts* [1948] 1 All ER 300 at 302-303 per Roxburgh J (gift for mission work).

[69] *Re Flatman* [1953] VLR 33 at 37 per Barry J.

[70] [1931] 1 Ch 240.

[71] *Attorney-General v Eagar* (1864) 3 SCR (NSW) 234; *Re Hargreaves* [1973] Wd R 448 at 453 per Lucas J. See also Gino Dal Pont *Law of Charity* (LexisNexis Butterworths, Australia, 2010) at 232.

[72] *Re Darling* [1886] 1 Ch 50 (for the service of God); *Re Brewer (deceased)* [1933] NZLR 1221 (towards Christian work); *Re Barker's Will Trust* (1948) 64 TLR 273 (for God's work); *Re Brooks* (1969) 4 DLR (3d) 694 (towards Christian work).

[73] *Cameron v Church of Christ, Scientist* (1918) 43 DLR 668 at 678 per Anglin J.

[74] [1933] NZLR 1221 per Reed J for the Court of Appeal.

### *11.3.3 Gifts to church officers*

Gino Dal Pont wrote that in the case of gifts to church officers, the Court had to answer two questions:

> *... first, is the gift an absolute gift to the person in question, or is it to be applied by that person as trustee for the purposes for which the office is held? And secondly, if the latter is the case, do the purposes in question (whether by virtue of the office or the terms of the gift) admit non-charitable objects? An affirmative to this second question means that, aside from the operation of saving legislation to validate the gift, the gift fails for not being exclusively charitable.*[75]

Courts have held that a gift to an identified church official, be it a vicar,[76] a vicar and church wardens[77] or the Bishop or Archbishop[78] as trustee and not for their own benefit are charitable.

However, gifts made to church officials as trustees will only be valid if they are exclusively charitable. In *Dunne v Byrne*,[79] the Privy Council had to decide if a gift was charitable where it was "to the Roman Catholic Archbishop of Brisbane and his successors to be used and expended wholly or in part as such Archbishop may judge most conducive to the good of religion in this diocese". In that case, the Privy Council held that the gift was not charitable because it was too wide, since it could be used for non-charitable Roman Catholic purposes, such as closed orders.

In *Re Ashton (deceased)*,[80] the Court of Appeal of New Zealand had to decide if a residuary bequest in a will to "hand any surplus to the trustees of the Church of Christ Wanganui to help in any good work" was charitable for the advancement of religion. Turner J wrote that had the gift been simply to the trustees of the Church of Christ Wanganui it might have been good if the trustees could have been regarded as taking *virtute officii*, because such gifts had been upheld in similar cases. However, he refused to consider the gift as charitable because it was too broad. He wrote that:

> *The dividing line between valid and invalid charitable gifts is very fine. In* Re Ashton, Westminster Bank, Ltd v Farley *[1939] AC 430; [1939] 3 All ER 491, a gift to vicars and churchwardens for parish work was held invalid as being too wide, but in* Re Simson, Fowler v Tinley *[1946] 1 Ch 299; [1946] 2 All ER 220, a gift to the vicar of a named church to be used for his work in the parish was held to be a valid gift. The former gift was held to be too wide to be good, while in the latter case it was held the word to be used for his work in the parish had a limiting effect, and meant such part of his work (that is to say the functions connected with the cure of souls in the particular parish) as lay within the particular parish. I think that a gift in such general terms as "to help in any good work" is outside the limits of a purely charitable bequest.*[81]

In that case, the Court of Appeal decided that "the words of the will 'to help in any good work', could be and should be, deemed to include both charitable purpose and non-charitable purposes".[82] However, the Court applied the ancestor of section 61B of the *Charitable Trusts Act 1957* and decided that the trust should be upheld with the qualification that the trust funds should be restricted to charitable purposes, so that the trust became one for any good and charitable work.

The criticisms by Gino Dal Pont[83] of the appropriateness of such fine distinctions between gifts made for parish work and gifts made for work in the parish are still theoretically relevant. However, the use of section 61B of the *Charitable Trusts Act 1957*

[75] Dal Pont *Charity Law in Australia and New Zealand* (Oxford University Press, Oxford, 2000) at 160.

[76] *Re Simson* [1946] Ch 209; [1946] 2 All ER 220 (gift to the vicar of a named parish for his work in the parish) was held to be a valid charitable gift because it was to the vicar to be used for such part of his work (that is, in the cure of souls in the particular district as lay within the particular parish).

[77] *Re Garrard* [1907] 1 Ch 383, [1904-07] All ER Rep 237 (gift to the vicar and church wardens for the time being of Kington to be applied by them in such manner as they should in their sole discretion think fit, was held to be charitable for the benefit of the parish of Kington for ecclesiastical purpose). See also *In Re Eastes* [1948] Ch 257, [1948] All ER 536 (gift to the vicar and church wardens of a specific parish to be used by them in connection with the said church which they may select, was upheld as a gift for the purposes of the church, its fabric and its services).

[78] *In Re Flinn* [1948] Ch 241, [1948] 1 All ER 541 (residuary estate to His Eminence the Archbishop of Westminster Cathedral London for the time being to be used by him for such purposes as he should in his absolute discretion think fit, was held charitable).

[79] [1912] AC 407.

[80] [1955] NZLR 192.

[81] Ibid, headnote.

[82] Ibid.

[83] Dal Pont *Law of Charity*, above n 71, at 229-230.

(or its predecessors or equivalents in other countries) has made such distinctions obsolete in practice because that Act allows non-charitable purposes to be carved out or "blue-pencilled" by the Court.

### *11.3.4 Maintenance and promotion of public worship*

The maintenance and promotion of public worship is another way to advance religion. This can be done through the building and repair of churches, the erection and maintenance of tombs, the administration of divine service, the support of the present clergy and the support of retired clergy and nuns. A sixth category is less clear, being social welfare activities for advancing religion.

#### *11.3.4.1 Building and repair of churches*

The repair of churches is specifically mentioned in the *Statute of Charitable Uses 1601*. Therefore, there is no doubt that gifts for the building and repair of churches are charitable. The repair of churches was charitable before the adoption of the *Statute of Elizabeth*.[84] The repair of churches extends to the completion of a church, as was the case in *Re Van Wart*,[85] where a gift for the completion of Westminster Cathedral was held to be charitable. The New Zealand High Court has varied a trust constituted by a will and has directed that the money "be applied by the trustees in or towards the cost of erecting, equipping, furnishing, maintaining, and repairing any Anglican Church and its surrounds (including a Parish hall) within the Parish of All Saints Gladstone".[86]

The repair of churches also extends to works for the ornamentation, decoration or improvement of a church.[87] Two New Zealand cases have upheld gifts for the provision and repair of a spire or tower.[88] A New Brunswick court held that a gift to provide stained-glass windows was charitable.[89] Although there do not seem to be any New Zealand cases on that subject, Gino Dal Pont[90] cited a number of Australian courts that had considered as charitable gifts for the maintenance and improvement of the interior of a specified church.[91]

Since religion is not limited to Christian denominations, Hubert Picarda wrote that gifts for "temples and mosques have been held as charitable in Singapore and Malaysia and are treated as charitable by the Charity Commission" in England and Wales.[92] The New Zealand Charities Registration Board has also registered entities whose purpose is for the construction or maintenance of Hindu and Buddhist temples and Islamic mosques.

#### *11.3.4.2 Erection and maintenance of cemeteries and tombs*

The repair of churches has developed a somewhat elastic meaning. Courts have held that a bequest for the repair of a parish churchyard is charitable because the judges have not seen any difference between a gift to keep in repair what is called God's House and a gift to keep in repair the churchyard around it, which is often called God's Acre.[93]

The same reasoning has been used to uphold as charitable gifts for burial grounds and cemeteries, because they are naturally connected to the church.[94] As discussed by Gino Dal Pont,[95] relying on *Hoare v Osborne*,[96] had such gifts not been attached to churches they would not have been charitable for the advancement of religion; they could, however, have been held charitable under the fourth head upon proof that they provided public benefit as decided in *Scottish Burial Reform and Cremation Society Ltd v Glasgow City Corporation*.[97]

[84] *Hart v Brewer* (1595) Cro Eliz 449 (gift for the repair and ornamentation of a church was held to be valid).

[85] (1911) *Times*, 17 February. See also *Re Greene* [1914] 1 IR 305. See also *Re RWA Beck (deceased)* [1967] 2 NSWR 91 at 93 gift to churches for extensions).

[86] *Re Butler and others* unreported High Court of New Zealand, Invercargill Registry, 29 August 1990, M 21/90 at p. 6.

[87] See *Re Doughty* (1930) 64 ILT 50 (gift for the decoration of a Roman Catholic church held to be charitable).

[88] See *Brown v Public Trustee* [1927] GLR 456 and *Rowe v Public* Trustee [1928] NZLR 51.

[89] See *Weatherby v Weatherby* (1927) 53 NBR 403. See also *Re Harding* (1904) 4 OWR 316 (gift for church tower and bell held to be charitable).

[90] Dal Pont *Law of Charity*, above n 71, at 222.

[91] *Re Ross (deceased)* [1964] Qd R 132 at 139 *Re Tyrie (deceased)* [1970] VR 264 at 265 and *Re Findlay's Estate* (1995) 5 Tas R 333 at 335.

[92] Picarda 4th ed, above n 6, at 106.

[93] *Re Vaughan* (1886) 33 Ch D 187 at 192.

[94] See *Attorney-General v Blizard* (1855) 21 Beav 233 and *Re Manser* [1905] 1 Ch 68 at 74.

[95] Dal Pont *Law of Charity*, above n 71, at 223.

[96] (1866) 1 LR Eq 585 at 588 (gift to repair a grave or vault not within a church not charitable and *Chesterman v Mitchel* (1923) 24 SR (NSW) 108 at 112-113.

[97] [1968] AC 138, [1967] 3 All ER 215.

Courts have also held that gifts for the erection or maintenance of tombs in churches or headstones in churchyards are charitable.[98] However, in *Re Budge (deceased)*,[99] Fair J, citing the second edition of *Halsbury's Laws of England*, decided that a gift for the provision or maintenance of a tomb or sepulchral monument to the donor or his family, and not within or forming part of the fabric of a church or place of worship, was not a gift for a charitable purpose because it infringed on the rule of perpetuities. However, in that case, as in *Filshie (deceased), Raymond v Butcher*,[100] both courts decided that a provision for the temporary maintenance of a tomb, although at one time questioned, was then established to be valid, if it did not infringe the rule against perpetuities.[101]

As shown in these two New Zealand cases, courts have decided to ignore the invalid trust for the permanent repair of a tomb and to interpret the gift to be good for a period of 21 years.[102] Although there is no fault with Gino Dal Pont's assertion[103] that logical reasoning should refuse to regard as valid trusts that violate the rules against perpetuities, so many courts have interpreted such trusts as charitable for a limited period that it would create uncertainty to overrule them.

### *11.3.4.3 Administration of divine service*

The main purpose of erecting and maintaining churches and temples is to administer divine service, otherwise these buildings would be for educational purposes or for assembly halls and beneficial to the public under the fourth head of charity.

Religious services tending directly or indirectly toward the instruction or the edification of the public have always been held charitable.[104] However, masses for the dead were considered non-charitable before the adoption of the *Roman Catholic Relief Act 1829*, because as a result of the *Acts of Uniformity of 1548* and *1559*, the celebration of masses for the salvation of the dead became illegal as being superstitious. In *Carrigan v Redwood*,[105] a New Zealand court held that a trust and direction to a trustee to expand half of the testatrix's estate in having public masses offered up for her soul was a good charitable use and valid in New Zealand, although it could have been void in England as superstitious. In that case, Cooper J relied on *O'Hanlon v Logue*,[106] in which the Court of Appeal of Ireland decided that such a gift was valid whether the masses were to be said in public or in private. In 1919 *Bourne v Keane*[107] decided that public masses were charitable. The House of Lords in *Gilmour v Coats* accepted the saying of public masses as being the central act of worship in the Roman Catholic faith. They interpreted the *ratio decidendi* in *Re Caus, Lindeboom v Camille*[108] as being:

> *First, that it [i.e. a gift for the saying of masses] enables a ritual act to be performed which is recognised by a large proportion of Christian people to be the central act of their religion, and, secondly, that it assists in the endowment of priests whose duty it is to perform the ritual act.*[109]

The question, however, arose as to whether a community of cloistered friars or nuns, who devoted their lives to prayer, contemplation, penance and self-sanctification within their convent and engaged in no exterior works was charitable. The House of Lords responded negatively to such a question in *Gilmour v Coats*[110] following *Cocks v Manners*,[111] on the basis that such cloistered communities did not provide sufficient public benefit. Furthermore, the House of Lords commented that the decisions in *O'Hanlon v Logue* and *Re Caus* had been wrongly decided in that private masses did not meet the public benefit test.[112] Consequently Garrow and Kelly wrote that "in view of the comments of this decision in *Gilmour v Coats* it may well be that [the saying of private masses] would not be sustained if the matter came before the Court again".[113]

[98] *Re Pardoe, McLaughlin v Attorney-General* [1906] 2 Ch 184.

[99] [1942] NZLR 350 at 351.

[100] [1939] NZLR 91, [1939] GLR 41.

[101] *Re Budge (deceased)* [1942] NZLR 350 at 351-352 citing the following cases: *Re Dean, Cooper-Dean v Stevens* (1889) 41 Ch. D 552; *Pirbright v Salwey* [1996] WN 86; *Re Hooper, Parker v Ward* [1932] 1 Ch 38; *Mitford v Reynolds* (1842) 1 Ph. 185; 41 ER 602; *Pettingall v Pettingall* (1842) 11 LJ Ch 176; *In re Thompson, Public Trustee v Lloyd* [1934] Ch 342.

[102] *Re Budge (deceased)* [1942] NZLR 350 at 352. See also the following Australian cases cited by Dal Pont *Law of Charity*, above n 71 at 224 footnote 96: *Muir v Archdall* (1918) 19 SR (NSW) 10 at 10; *Perpetual Trustee Co Ltd v John Fairfax & Sons Pty Ltd* (1959) 76 WN (NSW) 226 at 228; *Re Martin* [1952] WN 339; *Re Ross (deceased)* [1964] Qd R 132 at 142; *South Eastern Sydney Area Health Services v Wallace* [2003] NSWSC 1061; (2003) 57 NSWLR 259.

[103] Dal Pont *Law of Charity*, above n 71, at 224-225.

[104] *Gilmour v Coats* [1949] AC 426 at 444 (HL) citing *Cocks v Manners* (1871) LR 12 Eq 574.

[105] (1910) 30 NZLR 244.

[106] [1906] 1 Ir R 247.

[107] [1919] AC 814; [1918-1919] All ER 167.

[108] [1934] Ch 162 at 170.

[109] *Gilmour v Coats* [1949] AC 426 at 448 per Lord Simonds. This decision was followed in Australia in *Leahy v Attorney-General of New South Wales* [1959] AC 457, [1959] 2 All ER 300 PC) and *Re Wilson's Grant* [1960] VR 514.

[110] Ibid.

[111] (1871) LR 12 Eq 574. See also *Re Caus, LindeBoom v Camille* [1934] Ch 162, [1933] All ER 818 which decided that a gift for the saying of private masses was charitable.

[112] *Gilmour v Coats* [1949] AC 426 at 447-448 per Lord Simonds, at 451-452 per Lord Du Parcq and at 459-461 by Lord Reid.

[113] Garrow and Kelly, above n 33, at 280.

Gifts for saying prayers are not only charitable for Christian denominations. In *Re Michel's Trust*,[114] a trust for the recital of Kaddish, a prayer, on the anniversary of the death of a Jewish testator, there being no reference to praying for his soul, was held not to be void as a superstitious use.

In *Methodist Theological College Council v Guardian Trust and Executors Co. of New Zealand Ltd*,[115] Reid J acknowledged that the Trust was charitable because it had been established to buy an organ for the Methodist Theological College and thereafter to apply the income to the maintenance of such organ and purchase of music therefore or accumulate as may be desired for the purchase of another or better instrument. In the same vein, a gift to maintain an organist at a church was also held to be charitable.[116]

Similarly, in *Re Royce, Turner v Wormald*,[117] a gift for the benefit of a church choir was a charitable purpose because it was for the maintenance and improvement of the musical services of the church.

Finally, a gift for a bell to be rung to commemorate the restoration of the monarchy has been held to connote a notion of worship and gratitude to heaven.[118] However, a gift for an annual payment to bell ringers for their ringing a bell on the anniversary of the testator's death has been held not to be charitable because the Court considered that this was an attempt by a testator to commemorate his own memory and therefore did not provide public benefit.[119]

### *11.3.4.4 The support of present clergy*

In *Re Clark, Horwell v Dent*,[120] McCarthy J said that a gift to individual church ministers was charitable because it was "to promote recruitment to the ministry [...] by relieving the minds of ministers of some financial anxiety and also to advance their ministry by enabling them to devote the whole of their time and energies to the work of their church".[121] Consequently, courts have held that gifts for the establishment of a bishopric[122] and the provision of clergy[123] or preachers[124] are charitable, although conditions may be attached.[125] Gifts to increase the stipends of the clergy have also been held charitable.[126] However, a gift to increase the stipend of a specific minister will only be charitable if it is not restricted to the particular minister filling the office at the time.[127]

A gift in perpetuity to the minister of a particular church will fail as a charity if it is accompanied by words indicating that it is given to the minister for his or her personal use.[128] *A fortiori* a gift of an annuity in perpetuity to the wife of the minister for the time being of a specified church for her own use is therefore void as infringing the rule against perpetuities.[129]

Trusts to assist the education of candidates for holy orders in Christian churches have been held charitable;[130] so has a residential training college for missionaries.[131]

Hubert Picarda wrote that "these principles apply equally to gifts for the benefit of non-conformist or Roman Catholic clergy as well as to gifts for the benefit of the clergy of the established Church".[132]

An interesting case arose in the Canadian Federal Court of Appeal concerning whether Roman Catholic pastoral agents were ministers of a cult. In *Canada v Lefebvre*,[133] the Federal Court of Appeal disallowed the claims of several pastoral agents in Quebec for the clergy residence deduction on the grounds that they were not members of the clergy, members of a religious order or regular ministers of a religious denomination for the purposes of section 8(1)(c) of the *Income Tax Act*. Most of the claimants had studied

[114] (1860) 28 Beav 39. See Garrow and Kelly, above n 33, at 275.

[115] [1927] GLR 294.

[116] *Attorney-General v Oakover* (1736) cited 1 Ves Sen 536.

[117] [1940] Ch 514; [1940] 2 All ER 291.

[118] *Re Pardoe, McLaughlin v Attorney-General* [1906] 2 Ch 184.

[119] *Re Archer* (1919) Times 13 December.

[120] *In Re Clark, Horwell v Dent* [1961] NZLR 635.

[121] *In Re Clark, Horwell v Dent* [1961] NZLR 635 at 642-643 citing *In Re Foster, Gellatly v Palmer* [1939] Ch 22, *In Re Mylne, Potter v Dow* [1941] Ch 204, [1941] 1 All ER 405 and *The Baptist Union of Ireland (Northern) Corporation v The Commissioners of Inland Revenue* [1945] NI 99.

[122] *Attorney-General v Bishop of Chester* (1785) 1 Bro CC 444.

[123] *Dundee Magistrate v Dundee Presbytery* (1861) 4 Macq 228 (HL); *Pennington v Buckley* (1848) 6 Hare 451 at 453.

[124] *Pember v Knighton* (1639) Duke 381.

[125] *Attorney-General v Molland* (1832) 1 You 562 (preaching certain doctrines); *Durour v Motteux* (1749) 1 Ves Sen 320; *Re Parker's Charity* (1863) 32 Beav 654 (preaching a sermon in commemoration of the testator); *Re Randell* (1888) 38 Ch D 213 (permitting free sittings). See also Picarda 4th ed, above n 33, at 107.

[126] *Attorney-General v Brereton* (1752) 2 Ves Sen 425.

[127] *Doe d Phillips v Aldridge* (1791) 4 term Rep 264.

[128] *In re Clark, Horwell v Dent* [1961] NZLR 635 at 642 citing *Donellan v O'Neill* (1870) IR 5 Eq 523 and *In re Delany, Conoley v Quick* [1902] 2 Ch 642 at 646.

[129] *In re Clark* [1961] NZLR 635 at 642.

[130] *Re Williams* [1927] 2 Ch 283.

[131] *Worldwide Evangelisation Crusade v Glasgow Corporation* 1965 SLT 339.

[132] Picarda 4th ed, above n 6, at 107-108.

[133] 2009 CAF 307 (CanLII). The decision was approved and applied in a similar Canadian case, *Canada v Proulx*, (2010) FCA 261 (CanLII).

theology and obtained diplomas from faculties of theology, and were deeply involved in a variety of ministries such as catechetic, ministry of the word, ministry to the sick and sacramental preparation. Notwithstanding these various ministerial "functions" and the evidence of their Bishop that they played an essential role in the life of the church, the deductions were disallowed because they did not have the "status" of a "regular minister" with the Roman Catholic denomination.

*11.3.4.5 Support for retired clergy and nuns*

A New Zealand court, in *Re Burke (deceased)*,[134] has examined the law with respect to provisions made for retired clergy and nuns. Neazor J relied on *In Re Foster, Foster, Gellatly v Palmer*,[135] where a bequest was held to be charitable as being for the advancement of religion where the money was directed to a society for the relief of infirm, sick and aged Roman Catholic priests. Bennett J so held on the basis that the cause of religion was advanced by a fund that was to be employed to assist ministers of religion who fit the description. Knowing of the existence of such a provision could make the ministry more efficient by enabling older members to retire or to know that there was a fund for their relief if they were struck down. Neazor J also cited *In Re Mylne, Potter v Dow*,[136] which held that a gift for the benefit of, among others, retired missionaries, did not prevent its being a gift for the advancement of religion, on the basis that a gift providing for retired missionaries could encourage people to take up missionary work, and such a gift was held to be a good charitable trust.

In *Re Burke (deceased)*,[137] Neazor J had to consider whether gifts for retired nuns were charitable. He concluded that gifts attributed to nuns were within what the law regarded as for the advancement of religion. For other nuns who worked in other areas, he wrote that "the trust in my judgment is charitable not as for the advancement of religion, nor as being within the general category of other purposes beneficial to the community, but as for the relief of poverty and distress".[138]

In *Presbyterian Church of New Zealand Beneficiary Fund v Commissioner of Inland Revenue*[139] the High Court held that a superannuation scheme for the benefit of retired ministers of the church and their widows was charitable under the advancement of religion. In the *Presbyterian Church* case the Court heard evidence that parish ministry in the Presbyterian Church involved a lifelong commitment and that accepting a call to the ordained ministry meant a lifetime of financial sacrifice. Heron J concluded that the retired ministers who financially benefited were an integral part of the structure and workings of the church and that they would not have been induced to take up their calling without the assurance of this lifetime security. The benefits conferred on retired ministers were also sufficiently connected with the advancement of religion to provide public benefit.

The New Zealand Court of Appeal was asked to overrule that case in *Hester v Commissioner of Inland Revenue*.[140] The Court of Appeal confirmed that gifts on trust for the support of active and retired ministers of religion and their dependants were charitable.[141] However, in considering whether a contributory superannuation scheme providing retirement income for employees of the Church of Jesus Christ of Latter-Day Saints was charitable, Hammond J wrote: "To say, for instance, that gardeners, clerical workers or cafeteria workers who are also Temple Workers should come within the rubric (notwithstanding the sincerity of their personal religious beliefs, and their dedication in pursuing them) simply goes too far".[142]

William Young and Chambers JJ also noted that there would be serious fiscal implications arising from a decision to accord charitable status to the Church employees' superannuation scheme. They held that if the provision of superannuation benefits by

[134] 16/3/94 HC Christchurch M 92/93 16 March 1994 per Neazor J.

[135] [1935] 3 All ER 767.

[136] [1941] 1 All ER 405.

[137] 16/3/94 HC Christchurch M 92/93 16 March 1994 per Neazor J.

[138] Ibid, at 19 relying on *In re James, Grenfell v Hamilton* [1932] 2 Ch 25.

[139] [1994] 3 NZLR 363

[140] [2005] 2 NZLR 172; application for leave to appeal to the Supreme Court dismissed: [2005] 2 NZLR 473.

[141] Ibid, at [83] citing *Re Amelia Bullock-Webster* [1936] NZLR 814.

[142] Ibid, at [13] per Hammond J; see also William Young and Chambers JJ at 194, at [107], who wrote: "Although we consider that the Presbyterian Church Fund case is to be followed in relation to church-based superannuation schemes established for the dominant purpose of providing benefits for ministers of religion and their dependants, we see it as anomalous and not to be extended".

means of a contributory scheme for teachers employed by the Church could be charitable under the advancement of religion, plans for anyone working in the education field would be charitable under the advancement of education. The same would apply to plans for doctors, nurses and ancillary staff (relief of the impotent) and for social workers (relief of poverty) and so on. Allowing this appeal would be likely to start a ball rolling that, unchecked, would have the potential to dent the income tax system severely.[143]

*11.3.4.6 Non-charitable purposes and social welfare activities associated with a church*

A long line of case law has established that gifts to named churches, denominations and other religious institutions are presumed to be limited to religious purposes and therefore to be for the advancement of religion unless there is evidence to the contrary.[144]

As indicated earlier, a gift that can be interpreted as including non-charitable objects is not charitable.[145] Such was the case in *Re Boland*,[146] where a gift was given to "any deserving Roman Catholic institution". The gift failed because it could include entities that were not exclusively charitable for being benevolent or philanthropic or closed religious orders.

Courts have used a benevolent approach to interpreting gifts to religious organisations and concluded that whether the non-charitable activities that the entities are carrying on are charitable or not "is a question of fact and degree".[147] Gino Dal Pont[148] wrote that there were, however, limits to the courts' beneficence:

> *First, where the rules of a religious association explicitly authorise the periodic diversion of substantial resources to secular (as opposed to religious) purposes, or if such a diversion becomes a common and accepted practice, a court may be inclined to conclude that secular purposes have added to or even replaced a principal religious purpose.*[149] *Second, if a main object of a religious association is clearly non-charitable, or is expressed so broadly as to be incapable of any precise bounds, that body will be denied charitable status.*[150] *Third, a gift to a religious association expressed to be for a non-charitable purpose (such as a political purpose) will not be made charitable merely because of the character of the donee as a religious body.*[151] *Fourth, it has been said that an unrestricted gift to a religious body lacking a written constitution or rules in the application of property is not a gift that must be employed solely for charitable purposes,*[152] *but this should not be seen as an inflexible rule.*

There are, however, a number of cases where courts have decided that social welfare can advance religion. Church halls and recreational facilities for young Christians[153] or Jews have been held ancillary to religious purposes. Nevertheless, there do not seem to be any New Zealand cases on the subject.

Most of the cases rejecting social activities associated with church organisations have been decided in Australia and seem to have been influenced by the decision of the House of Lords in *Inland Revenue Commissioners v Baddeley*.[154] In that case, a gift to promote the religious, social and physical wellbeing of Methodists was held not to be charitable because the provision of recreation, hospitality and entertainment was not charitable, being inconsistent with accepted notions of charity.[155]

In following the decision in *Re Wilson's Grant*,[156] the Supreme Court of Victoria held that a girls' friendly society was not a charitable association although it furthered the teaching and application of Christian principles, because it served to promote the moral, social and physical development of its members and for this purpose provided them with opportunities for friendly association and healthy recreation.

[143] Ibid, at [106].

[144] See Dal Pont *Law of Charity*, above n 71, at 221 footnote 65 citing the following cases: *Cheeseman v Partridge* (1739) 1 Atk 436 at 437, 25 ER 279 at 279-280; *Re White* [1893] 2 Ch 41 at 52-53; *Hardey v Tory* (1923) 32 CLR 529 (gift to Wesleyan Missionary Society); *Re Turner* [1930] SASR 223 at 227 (gift to Congregational Union); *Re Schoales* [1930] 2 Ch 75 at 77 (gift to Roman Catholic Church); *Perpetual Trustee Co (Ltd) v Wittscheibe* (1940) 40 SR (NSW) 501 at 507 (gift to St Peter's Church); *Re Carson (deceased)* [1956] St R Qd 466 at 476 (gift to the Presbyterian Church of Queensland); *Re Armstrong* (1969) 7 DLR (3d) 36 at 53-54 (NSSC) (gift to the Baptist Church); *Re de Vadas (deceased)* [1971] SASR 169 at 183 (gift to Adelaide Hebrew Congregation); *Presbyterian Church (New South Wales) Property Trust v Ryde Municipal Council* [1978] 2 NSWLR 387 at 404.

[145] For New Zealand see *Re Ashton (deceased)* [1955] NZLR 192.

[146] [1950] St R Qd 45 at 50 per Macrossan CJ. See also Dal Pont *Law of Charity*, above n 71, at 220.

[147] *Re de Vedas (deceased)* [1971] SASR 169 at 204. See also *Oxford Group v Inland Revenue Commissioners* [1949] 2 All ER 537 at 539-540; *Presbyterian Church (New South Wales) Property Trust v Ryde Municipal Council* [1978] 2 NSWLR 387 at 408 and *Re Le Cren Clark (deceased)* [1996] 1 All ER 715 at 722-723.

[148] Dal Pont *Law of Charity*, above n 71, at 222.

[149] *Re de Vedas (deceased)* [1971] SASR 169 at 2004 per Wells J. Cf *Oxford Group v Inland Revenue Commissioners* [1949] 2 All ER 537 at 539-540 per Tucker LJ, at 543 per Cohen LJ.

[150] *Oxford Group v Inland Revenue Commissioners* [1949] 2 All ER 537 at 540 per Tucker LJ; *Re Haks* [1973] Qd R 455 at 456 per Hanger CJ, at 457 per Hoare J, at 458-460 per Campbell J.

[151] *Moore v The Pope* [1919] 1 IR 316; *Re Lawton (deceased)* [1940] 1 Ch 984 at 987 per Simonds J; *Presbyterian Church (New South Wales) Property Trust v Ryde Municipal Council* [1978] 2 NSWLR 387 at 410 per Mahoney JA; *Brisbane City Council v Attorney-General* [1979] AC 411 at 424.

[152] *Re Hargreaves* [1973] Qd R 448 at 454 per Lucas J.

[153] *Belfast City YMCA Trustees v Northern Ireland Valuation Commissioners* [1969] NI 3 (CA); *Re Stewart's Will Trust; Pain v Presbyterian Church of Queensland* [1962] WWN 24 (church tennis court). However, see contra *AG for New South Wales v Cahill* [1969] Ch 832 (Catholic boys' club held to be non-charitable). See also Picarda 4th ed, above n 6, at 111.

[154] [1955] AC 572.

[155] Ibid, at 589 per Lord Simonds and at 600 per Lord Reid.

[156] [1960] VR 514 at 518.

Similarly, in *Attorney-General v Cahill*,[157] Wallace ACJ struck down a Catholic boys' club because that phrase without qualification would not import or suggest that the club was devoted to underprivileged boys. He wrote that the word club "conveys to my mind mainly an association of persons for purposes of social intercourse or some form of sport or for entertainment",[158] which were non-charitable activities.

In contrast to these cases, the Full Court of the Queensland Supreme Court's decision in *Re Stewart's Will Trusts*[159] upheld a bequest of land to be used for the celebration of divine service in accordance with the rites and ceremonies of the John Knox Presbyterian Church, or any other purposes having in view the spiritual, intellectual, moral or bodily welfare of its members, even though these could encompass a youth club, a girls' club and even a tennis club.

Commenting on these last two cases, Hubert Picarda wrote that "the Catholic boys' club whose religious tendency and charitable nature were rejected by a New South Wales Court seems to have been rather unlucky".[160] It must be noted that if such social and recreational purposes could be considered ancillary, they would not stop the entity being held charitable.

#### *11.3.5 Summary*

As indicated in this section, it is not enough for a purpose to be religious; it must also advance religion. Advancing religion can be done through professing one's beliefs, holding religious services and providing pastoral or missionary work. Gifts to church officers in their religious or official capacity are generally considered as being gifted for religious purposes unless they are given to an individual personally.

The promotion and maintenance of public worship is considered to be for the advancement of religion if it is to build or repair churches, erect cemeteries and maintain tombs and administer divine service. The support of present and retired clergy and nuns is generally considered charitable for the advancement of religion because these gifts relieve ministers from the obligation of also trying to earn a living and allows them to consecrate most of their time and energy to their religious mission.

Concerning retirement funds for people other than clergy and nuns, courts have noted that there would be serious fiscal implications arising from a decision to accord charitable status to a church employees' superannuation scheme.

### 11.4 Public benefit

The advancement of religion cannot be charitable if it does not also provide public benefit. This section first looks at the presumption of public benefit for the advancement of religion, then at situations where public benefit is considered insufficient.

#### *11.4.1 Presumption of public benefit*

Courts have held that public benefit is assumed where the purposes are found to be of a religious nature, unless the contrary is shown. This proposition was accepted in *Centrepoint Community Growth Trust v CIR*,[161] where Tompkins J cited with approval *Re Watson*,[162] in which Plowman J came to the following conclusions:

> *First of all, as Romilly MR said in* Thornton v Howe *(1862) 31 Beav at 20, the court does not prefer one religion to another and it does not prefer one sect to another. Secondly, where the purposes in question are of a religious nature*

[157] [1969] 1 NSWR 85.
[158] Ibid, at 93.
[159] [1962] QWN 24.
[160] Picarda 4th ed, above n 6, at 111.
[161] [1985] 1 NZLR 673 at 692.
[162] [1973] 3 All ER 678.

> *– and, in my opinion, they clearly are here – then the court assumes a public benefit unless the contrary is shown ... and thirdly, that having regard to the fact that the court does not draw a distinction between one religion and another or one sect and another, the only way of disproving a public benefit is to show, in the words of Romilly MR in* Thornton v Howe*, that the doctrines inculcated are – "adverse to the very foundations of all religion, and that they are subversive of all morality".*[163]

This broad statement seems to be based on the fact that, before the Reformation, only one religion was recognised by the law and in fact the overwhelming majority of the people accepted it. Lord Reid wrote that the situation had changed since the Reformation. He wrote that "if the law before the Reformation accepted gifts for religious purposes as charitable simply because of their piety and without further consideration of the question of public benefit I think that it did so on grounds which are no longer available".[164]

The notion that public benefit is assumed for gifts for religious purposes seems to be contradicted by the decision of the House of Lords in *Gilmour v Coats*.[165] In that case, the House of Lords held that "the element of public benefit is essential to render a purpose charitable in law and this applies equally to religious purposes as to other charities".[166] In that case, the House of Lords agreed with the Court of Appeal in deciding there was insufficient public benefit. Lord Greene MR wrote in the Court of Appeal:

> *Once the religion is recognised by the Court as a religion, the beneficial character of a gift for its advancement will* prima facie *be assumed. But this is not enough. The trust, in order to have all the necessary characteristics, must not only be for the advancement of religion, it must not only be of benefit, but it must be of public, not merely private benefit. Save to the extent which I shall presently mention, no English authority has been quoted to us, and I know of none, in which the existence of a benefit of the necessary public character has, when challenged, been shown to exist otherwise than by proof of works which have a demonstrable impact on the community or a section of it. I use the word impact for want of a better word as covering the benefits conferred by teaching and ministration, by the performance of religious services, by the provision or repair of churches and church ornaments, and so forth. I use the word demonstrable as meaning that the benefit must be capable of proof in a court of law.*[167]

Until 2006 it had been accepted from time immemorial that the advancement of religion or education was a charitable purpose. Under the *Charities Act 2006*, however, this assumption was removed. All charities now have to prove that they serve a public benefit, and the Charity Commission of England and Wales decides what that benefit is, according to criteria that it calls modern.

In *Gilmour v Coats*, money was held on trust for the purposes of a community of cloistered nuns, who devoted their lives to prayer, contemplation, penance and self-sanctification within their convent and engaged in no exterior work. The order argued that it provided public benefit in three ways: firstly from the value of intercessory prayers; secondly from the edification of a wider public by the example of lives devoted to prayer; and thirdly by not limiting admission to the order to any private group of persons; any person being a female Roman Catholic could be accepted. The House of Lords rejected each of these arguments because "the benefit of intercessory prayer to the public is not susceptible of legal proof and the court can only act on such proof. Further, the element of edification by example is too vague and intangible to satisfy the test of public benefit".[168]

[163] Ibid, at 688.

[164] *Gilmour v Coats* [1949] AC 426 at 457.

[165] Ibid.

[166] Ibid, at 427, headnote.

[167] *In re Coat's Trusts, Coats v Gilmour* [1948] Ch 340 at 344.

[168] Ibid, at 427, headnote.

The element of edification being too vague and intangible to satisfy the public benefit test had already been decided in *Re Williams, James v Williams*.[169] In that case, the Court held that a bequest of a house for use as a retreat house was not charitable. Harman J considered that a retirement from the activities of the world for a space of time for religious contemplation and the cleansing of the soul was no doubt a highly beneficial activity for the person who undertook it, but it was not in English law a charitable activity. However, in *Le Cren Clark (deceased)*,[170] Williamson held that a house left by the testatrix to a small religious healing movement was charitable although the group only held public sessions once a month. This was considered "a charitable purpose within which a sufficient element of public benefit was assumed so as to enable the charity to be recognised by law as being such unless there was contrary evidence".[171]

In *Liberty Trust v Charities Commission*,[172] Mallon J reiterated that there was a presumption that purposes for the advancement of religion provided sufficient public benefit, unless the contrary was shown. She then cited Tudor, who said that it "is considered that the presumption will be rebutted, and the public benefit will have to be shown positively, if there is evidence that the purpose is subversive of all morality, or it is a new belief system, or if there has been public concern expressed about the organisation carrying out the particular purposes, or if it is formed too narrowly on its adherents".[173] The Judge concluded that in *Liberty Trust* it had not been proven that the scheme was contrary to public policy, nor had it been suggested that the scheme was contrary to Christian principles. Therefore, the presumption of public benefit had not been displaced. She finally noted that "given the assumption of public benefit, and that the Court does not intrude into matters of faith except where they are contrary to public policy, it is not for the Court to say that teaching biblical financial principles is not a public benefit".[174]

The reason for such a stance seems to be that any religion is at least likely to be better than none.[175]

### *11.4.2 Insufficiency of public benefit*

As mentioned in *Gilmour v Coats*, it is clear that a sufficient public benefit must be established to claim charitable status. The following subsections discuss instances where this is the case, such as where the religion goes against public policy, restricts entry to its religious worship or provides private rather than public benefit, especially in cases of closed religious orders and private prayers and supplication.

#### *11.4.2.1 Public policy*

As in other areas of the law, doctrines or conducts that go against public policy may be held not to be charitable. Such conduct may include illegal activities, superstitions or behaviours harmful to certain sections of the population.

In *Carrigan v Redwood*,[176] Cooper J wrote that certain illegal conducts and superstitions "appear to have arisen not from the common law of England, but from statute" prohibiting Protestant and Roman Catholic religions. Under those statutes, the celebration of masses for souls was considered superstitious. Although Protestant and Roman Catholic religions were restored, courts continued to consider that the saying of masses for the souls of the dead was still a superstition and therefore against public policy. It took a decision of the House of Lords in *Bourne v Keane*[177] to reverse the situation. In that case, Lord Birkenhead LC canvassed as possible examples of superstitious uses, gifts in connection with relics, gifts for the sustenance of miracle workers and gifts for the veneration of saints.[178]

[169] (1910) 26 TLR 307.

[170] [1996] 1 All ER 715 per Williamson DJ.

[171] Ibid, at 723.

[172] HC WN CIV 2010-485-000831 [2 June 2011].

[173] Ibid, at [100] citing Tudor 9th ed, above 46, at [2-048].

[174] Ibid, at [102].

[175] *Gilmour v Coats* [1949] AC 426, 457-458, per Lord Reid; *Neville Estates Ltd v Madden* [1962] Ch 832 at 853. Also cited by the New Zealand Court of Appeal in *Hester v Commissioner of Inland Revenue* [2005] 2 NZLR 172 at [7].

[176] (1910) 30 NZLR 244 at 245.

[177] (1919) AC 815.

[178] Ibid, at 925.

Religious organisations that are engaged in conduct that is illegal would not provide public benefit. For example, courts have held that the practice of polygamy by Mormons is illegal although permitted by their religious beliefs.[179] Similarly, in *Church of Scientology of California v Kaufman*,[180] the Court held that the confidentiality of certain communications relating to Scientology could be disclosed in the public interest because of evidence showing the practices of Scientology to be dangerous.

In *Centrepoint Community Growth Trust v CIR*,[181] Tompkins J did not find the sexual attitudes of members relevant, apart from suggesting, without evidence to that effect, a possible detriment to children. In that case, the members of the Trust considered that behaviour of a sexual nature between children of any age should be accepted as normal; between adults, the teaching of Mr Potter and the practice at Centrepoint was that provided there was consent, any member of the Community was free to have sexual relations with any other member.

Gino Dal Pont[182] wrote that it could be argued that religions that encouraged dangerous risk-taking behaviour as part of their doctrines and services would be against public policy. He gave as an example religions that encourage serpent-handling as tests for faith.

*11.4.2.2 Restrictions on entry to places of religious worship and closed religious orders*

The law in the United Kingdom seems more stringent concerning the element of public benefit for closed religious orders than it is in Australia and New Zealand.

In *Church of Jesus Christ of Latter-Day Saints v Henning*,[183] that religious organisation sought an exemption from rating for one of its temples on the basis that it was a place of public religious worship. The temple was not open to the public at large but only to those selected by the local Bishop endorsed by a President as a worthy person. The Court held that all religious services that opened their doors to the public could, in an age of religious tolerance, claim to perform some spiritual service to the general public. However, the Court thought it unlikely "that Parliament intended to give exemption to religious services that exclude the public, since exemptions from rating, though not necessarily consistent, show a general pattern of intention to benefit those activities which are for the good of the general public".[184]

However, at least two English cases have distinguished the closed religious orders. In *Neville Estates Ltd v Madden*,[185] the Appeal Court held that a synagogue, which was not open to the public as of right, and although the members of the synagogue did not constitute a section of the public, offered sufficient public benefit because the members of the synagogue spent their lives in the world and mixed with fellow citizens, contrary to closed-order nuns who did not go back to the world. Moreover, a convent of enclosed nuns was distinguished from a retreat house for members of a diocese of the Church of England on the grounds that the latter returned back to the world while the nuns did not emerge from their convent and mix with their fellow citizens.[186]

An Australian court seems to have followed these last two cases. In *Joyce v Ashfield Municipal Council*, the New South Wales Court of Appeal upheld the Exclusive Brethren tax exemption even if the public was excluded from public worship. Reynolds JA wrote:

> *Even if the ceremonies of the Exclusive Brethren in the hall can be regarded as a temporary withdrawal from the world, those ceremonies are a preparation for the assumption of their place in the world in which they will battle according to their religious views to raise the standards of the world by precept and example. From the fact that they prepare themselves in private nothing can be deduced to*

[179] *Reynolds v United States* (1879) 98 US 145 at 167. See also *Adelaide Company of Jehovah's Witnesses Inc v the Commonwealth* (1943) 67 CLR 115 at 156 where the High Court of Australia held that a prohibition of subversion of the war effort was not circumvented by the pacifist ideals of the Jehovah's Witnesses, and the Court rejected their challenge to the validity of the National Security (Subversive Association) Regulation.

[180] [1973] RPC 635.

[181] [1985] 1 NZLR 673 at 686-687.

[182] Dal Pont *Law of Charity*, above n 71, at 241.

[183] [1964] AC 420.

[184] Ibid, at 440-441 per Lord Pearce.

[185] [1962] Ch 832. See also Tudor 9th ed, above n 46, at 95-96.

[186] *Re Banfield* [1968] 1 WLR 846 per Goff J.

> *deny the conclusion that these religious ceremonies have the same public value in improving the standards of the believer in the world as any public worship. I am therefore, of the opinion that ... from the fact that their religious ceremonies cannot be classed as public worship, it cannot be deduced that they are not for the public benefit.*[187]

A similar view was adopted in *Association of Franciscan Order of Friars Minor v City of Kew*,[188] where land used by a religious order for the purpose of religious retreats during which lay people resided therein to be engaged in prayer and meditation for short periods was not considered as being for the advancement of religion.

Gino Dal Pont took the view that the approach chosen by the Australian court was "more consistent with the court's modern approach, not only in presuming public benefit, but in the recognition that holding private worship services, as opposed to those that hold public worship services, is to make the unjustified assumption that the latter are directed to the public benefit whereas the former are not".[189] However, Hubert Picarda and Garrow & Kelly took the view that "*Gilmour v Coats* puts it beyond controversy that the convent of contemplative orders falls outside the legal conception of charity".[190]

Considering the fact that the law in England and Wales does not presume public benefit any more for religious organisations, but requires that it be proven, the coming years may see the courts scrutinising more closely the public benefit provided by all religious organisations.

*11.4.2.3 Private prayer and supplication*

The most recent English case on masses is *Re Hetherington's Will Trusts*.[191] In that case, the testatrix in her will left £2,000 to the Roman Catholic Church Bishop of Westminster for masses for the repose of the souls of her husband, parents, sisters and also herself when she died, and the residue of her estate to the Roman Catholic Church for masses for her soul. Sir Nicolas Browne-Wilkinson, Vice-Chancellor, upheld both these bequests as valid charitable trusts upon proof that they were for the saying of masses in public.
He summarised the principles established by the case as follows:

> *(1) A trust for the advancement of education, the relief of poverty or the advancement of religion is* prima facie *charitable and assumed to be for the public benefit:* National Anti-Vivisection Society v IRC *[1948] AC 31, 42 and 65. This assumption of public benefit can be rebutted by showing that in fact the particular trust in question cannot operate so as to confer a legally recognised benefit on the public, as in* Gilmour v Coats *[1949] AC 426.*
>
> *(2) The celebration of a religious rite in public does confer a sufficient public benefit because of the edifying and improving effect of such celebration on the members of the public who attend. As Lord Reid said in* Gilmour v Coats*, 426, 459:*
>
> > *A religion can be regarded as beneficial without it being necessary to assume that all its beliefs are true, and a religious service can be regarded as beneficial to all those who attend it without it being necessary to determine the spiritual efficacy of that service or to accept any particular belief about it.*
>
> *(3) The celebration of a religious rite in private does not contain the necessary element of public benefit since any benefit of prayer or example is incapable of proof in the legal sense, and any element of edification is limited to a private, not public, class of those present at the celebration: see* Gilmour

[187] [1975] 1 NSWLR 744 at 751-752. See also Dal Pont, *Law of Charity*, above n 71, at 169 who wrote: "This finding was upheld by the Privy Council: *Ashfield Municipal Council v Joyce* [1978] AC 122".

[188] [1967] VR 732. See also Dal Pont *Law of Charity*, above n 71, at 231.

[189] Dal Pont *Charity Law in Australia and New Zealand*, above n 75, at 169.

[190] Picarda 4th ed, above n 6, at 126, and Garrow and Kelly, above n 33, at 276-278.

[191] [1990] Ch 1.

v Coates; Yeap Cheah Neo v Ong Cheng Neo *(1875) LR 6 PC 381 and* Hoare v Hoare *(1886) 56 LT 147.*[192]

The statutes making illegal the saying of masses and making them superstitious were abolished before English law was received in New Zealand; this was therefore never illegal in New Zealand. Cooper J wrote:

> *The Roman Catholic Church is, therefore, in New Zealand in the same legal position as the Anglican Church or any other religious denomination. Its adherents have always been present in considerable numbers in New Zealand. It has its churches in every considerable town in the Dominion, and its forms of worship, its creed and tenets are not in any way under the ban of the law. Bequests to and for the support of this Church ought to stand on the same footing as bequests to any other religious denomination recognised by law.*[193]

Consequently, Dal Pont,[194] Picarda[195] and Garrow & Kelly[196] wrote that in New Zealand and Australia, masses for the dead were charitable.

### *11.4.2.4 Gifts for tombs and monuments*

Tombs and monuments associated with churches have generally been held charitable.

However, Jean Warburton wrote that "a bequest for building, maintaining, or keeping in repair the vaults or tombs (not being within a church) of a testator or members of his family is not for the benefit of the inhabitants of the parish generally and, therefore, is not charitable. The public element is completely lacking".[197]

Moreover, as mentioned earlier in this chapter,[198] courts have tried to accommodate tomb cases, which have been described as troublesome, anomalous and aberrant.[199] In *Re Budge (deceased)*[200] and *Filshie (deceased), Raymond v Butcher,*[201] both New Zealand courts decided that a provision for the temporary maintenance of a tomb, although at one time questioned, was then established to be valid, if it did not infringe the rule against perpetuities.[202]

### *11.4.2.5 Organised religious pilgrimages*

There is no decision in the United Kingdom, New Zealand or Australia about the validity of gifts promoting religious pilgrimages. However, the question has been answered in Ireland. In *Re McCarthy*,[203] the deceased testatrix bequeathed the sum of £600 to the Archbishop of Dublin on trust to apply the annual income to help two or more invalid persons taking part in organised religious pilgrimages to Lourdes. The Court considered that such a gift was charitable and provided public benefit because the pilgrimage was organised by religious authorities and done in the public eye for the edification of the public. However, Picarda wrote that "a lone pilgrimage by an individual will be an act of private devotion"[204] as was decided by a Malaysian court concerning a gift for pilgrimages to Mecca.

### *11.4.2.6 Private benefits*

Normally, in order to provide public benefit, an entity must not provide private benefits to individuals. In *Hester v Commissioner of Inland Revenue*,[205] the New Zealand Court of Appeal had to decide if it was a charitable object to establish a contributory superannuation scheme providing retirement income for employees of the Church of

[192] See Picarda 4th ed, above n 6, at 114.

[193] *Carrigan v Redwood* (1910) 30 NZLR 244 at 252.

[194] Dal Pont *Charity Law in Australia and New Zealand*, above n 75, at 171.

[195] Hubert Picarda *The Law and Practice Relating to Charities* (3rd ed., Butterworths, London, 1999) at 98 ["Picarda 3rd ed"]. See also Garrow and Kelly, above n 33, at 277-278.

[196] Garrow and Kelly, above n 33, at 275.

[197] *Masters v Masters* (1718) 1 P Wms 421 at 422, n1 *Durour v Motteux* (1749) 1 Ves Sen 320; *Gravenor v Hallum* (1767) Amb 643; *Doe v Pitcher* (1815) 3 M & S 407; *Mellick v Asylum (President and Guardians)* (1821) Jac 180; *Willis v Grown* (1838) 2 Jur 987; *Mitford v Reynolds* (1841) 1 Ph 185 at 198; *Adnam v Cole* (1843) 6 Beav 353; *Lloyd v Lloyd* (1852) 2 Sim (NS) 255; *Rickard v Robson* (1862) 31 Beav 244; *Fowler v Fowler* (1864) 33 Beav 616; *Hoare v Osborne* (1866) LR 1 Eq 585; *Re Rigley's Trusts* (1866) 36 LJ CH 147; *Fisk v Att-Gen* (1867) LR 4 Eq 521; *Hunter v Bullock* (1872) LR 14 Eq 45; *Dawson v Small* (1874) LR 18 Eq 114; *Yeap Cheah Neo v Ong Cheng Neo* (1875) LR 6 PC 381; *Re Williams* (1877) 5 Ch D 735; *Re Birkett* (1878) 9 Ch D 576; *Re Vaugham* (1886) 33 Ch D 187; *Re Rogerson* [1901] 1 Ch 715; *Re Dalziel* [1943] Ch 277; and see *Toole v Hamilton* (1901) 1 IR 383; *Re Barker* (1909) 25 TLR 753 for the various expedients whereby testators have with varying success attempted to provide for the upkeep of their tombs and those for their families.

[198] See section 11.3.4.2 of this chapter.

[199] *Re Endacott (deceased)* [1960] 1 Ch 232 at 251 per Harman LJ. See also Dal Pont, *Charity Law in Australia and New Zealand,* above n 75, at 158.

[200] [1942] NZLR 350 at 351.

[201] [1939] NZLR 91, [1939] GLR 41.

[202] *Re Budge (deceased)* [1942] NZLR 350 at 351-352 citing the following cases: *Re Dean, Cooper-Dean v Stevens* (1889) 41 Ch. D 552; *Pirbright v Salwey* [1996] WN 86; *Re Hooper, Parker v Ward* [1932] 1 Ch 38; *Mitford v Reynolds* (1842) 1 Ph. 185; 41 ER 602; *Pettingall v Pettingall* (1842) 11 LJ Ch 176; *In re Thompson, Public Trustee v Lloyd* [1934] Ch 342.

[203] [1958] IR 311. See also Picarda 4th ed, above n 6, at 112-113.

[204] Picarda 3th ed, above n 195, at 113 citing *Re Hadjee Esmail bin Kassim* (1911) 12 SSLR 73 (Singapore).

[205] [2005] 2 NZLR 172; application for leave to appeal to the Supreme Court dismissed: [2005] 2 NZLR 473.

Jesus Christ of Latter-Day Saints. Hammond J wrote: "To say, for instance, that gardeners, clerical workers or cafeteria workers who are also Temple Workers should come within the rubric (notwithstanding the sincerity of their personal religious beliefs, and their dedication in pursuing them) simply goes too far".[206]

However, in *Liberty Trust v Charities Commission*,[207] the High Court Judge seems to have ignored the Court of Appeal's decision in *Hester*. She only mentioned it in passing. Instead, she concluded that the Charities Commission had failed to consider the purpose of the Trust and instead focused on the benefits received by members, who had to make payments over a period of seven years in order to receive benefits eventually in the form of interest-free mortgages up to three times their contributions to the fund. Mallon J wrote that:

> *The Charities Commission was in error to focus only on the fact that contributors benefited from the lending scheme [...] Liberty Trust is not merely a lending scheme set up to provide private benefits to its members [...] For those who join, it is in part intended to provide private benefits, namely to assist with house ownership free of the shackles of interest-incurring debt but those private benefits are seen as part of living as a Christian.*[208]

It comes as a surprise that a scheme established to provide private benefits to people who contributed to it would be charitable as long as it had been established by a religious organisation, but would certainly not be charitable under any of the other heads of charity. Such a decision may open the door for "religious organisations" to establish schemes that allow them to avoid paying taxes by pretending they are promoting some economic principles espoused by holy scriptures.

### *11.4.3 Summary of the section*

The position adopted in the United Kingdom concerning public benefit is more severe than the one used by courts in New Zealand and Australia. This is especially true since the adoption of the *Charities Act 2006* (England and Wales), which abolished the presumption of public benefit for all categories, especially for religious organisations.[209] This position has not yet been adopted in Australia and New Zealand. However, the dissenting Judge's opinion in *Commissioner of Taxation of the Commonwealth of Australia v Word Investments Limited*[210] may be an indication that such an approach will eventually be followed in this part of the world.

The Charity Commission for England and Wales has recently issued draft charity guidelines concerning the advancement of religion for public benefit.[211] Churches and Christian charities across Northern Ireland have reacted by threatening to go to court if the Commission does not change its stance on the obligation of churches to prove they provide public benefit. The new guidelines also raise concerns because they could submit churches to the same standards of other charities concerning campaigning to change the law.[212]

The trend that public benefit should not be presumed but should be proven in all cases has been picked up by the Australian Parliament, where the Senate has proposed a bill to "require that religious and charitable institutions meet a public benefit test to justify their exemption from taxation, and for related purposes".[213] No such proposal, however, has been discussed or even mentioned in New Zealand. The recent decision in *Liberty Trust* seems to be going in the opposite direction. It is to be hoped that it will provide a wake-up call for joining the rest of the common law world in abolishing a too lenient interpretation of the presumption of public benefit for religious organisations.

[206] Ibid, at 175 per Hammond J; see also William Young and Chambers JJ at 194, at [107], who wrote: "Although we consider that the *Presbyterian Church Fund case* is to be followed in relation to church-based superannuation schemes established for the dominant purpose of providing benefits for ministers of religion and their dependants, we see it as anomalous and not to be extended".

[207] HC WN CIV 2010-485-000831 [2 June 2011].

[208] Ibid, at [113].

[209] (UK) 2006, c. 50, section 3. Under s 4 of that Act, the Charity Commission for England and Wales must provide guidelines. Such guidelines were adopted by the Commission in *Analysis of the Law Underpinning Charities and Public Benefit*, December 2008 at www.charity-commission.gov.uk/Library/publicbenefit/pdfs/lawpb1208.pdf.

[210] [2008] HCA 55 at [110] per Kirby J, dissenting.

[211] Charity Commission for England and Wales website: www.eauk.org/public-affairs/otherissues/charities/upload/Review-of-Charity-Commission-Guidelines-on-Public-Benefit.pdf.

[212] See *The Christian Institute*, Saturday 10 April 2010 on its website: www.christian.org.uk/news/draft-charity-guidance-concerns-ni-churches/.

[213] The Senate, the Parliament of the Commonwealth of Australia *Tax Laws Amendment (Public Benefit Test) Bill 2010*.

## 11.5 Conclusion

The notion of religion has evolved in the more than 400 years that have elapsed since the adoption of the *Statute of Charitable Uses 1601*. From an initial focus on the established church, it has progressively opened to other Christian religions, notably after the Reformation and with the repeal of certain statutes declaring as superstitious some religious activities by Protestants, Catholics and Jews. In the 20th century, the notion of religion has been extended to theist religions other than Christianity. However, there is still a difference between the law in the United Kingdom and the law in New Zealand and Australia, which takes a broader definition of religion. In Australia and New Zealand, the criteria of religion are twofold: first, belief in a supernatural being, thing or principle; and second, the acceptance of canons of conduct in order to give effect to that belief.

The definition of religion is not enough to decide if an entity is charitable. It must also be shown to advance religion. In this regard, the law in New Zealand and Australia is not essentially different from English law, except with respect to the celebration of private masses. Concerning that area of the law, since the statutes prohibiting as superstitious the celebration of masses for the souls of the dead and private masses were never received in New Zealand, courts have decided that these are charitable as being integrally part of the Roman Catholic religion. On the other hand, these decisions could be contested on the ground that the House of Lords has decided otherwise in more recent decisions. Therefore, there is still some uncertainty in that respect.

As for other charitable purposes, the advancement of religion is a charitable purpose only if the requisite public benefit is present. Public benefit is assumed concerning purposes for the advancement of religion, unless the contrary is shown. It is not enough, however, to make some general declaration about public benefit; it must be susceptible to legal proof and the courts can only act on such proof.

Although courts have generally adopted a benevolent approach concerning the advancement of religion and the public benefit it provides, our secular societies are more and more critical of such an approach. In *Commissioner of Taxation of the Commonwealth of Australia v Word Investments Limited*,[214] Kirby J, dissident in a High Court of Australia decision, wrote that religious institutions sometimes performed functions that were offensive to the beliefs, values and consciences of other taxpayers. Therefore, he considered that any ambiguity as to the ambit of an exemption for such an institution should be construed against the claimed exemption and in favour of the liability of that body to pay applicable tax obligations. This was because "a taxation exemption for religious institutions, so far as it applies, inevitably affords effective economic support from the Consolidated Revenue Fund to particular religious beliefs and activities of some individuals. This is effectively paid for by others. It involves a cross-transference of economic support".[215]

Since courts are guardians of neutrality they should be vigilant, especially where relevant income is derived from investment and commercial business activities and is to be devoted specifically to proselytising activities, such as the translation and distribution of the religious texts of a particular religion.

[214] [2008] HCA 55 at [110] per Kirby J, dissenting.

[215] Ibid, at [115] per Kirby J, dissenting.

PART V

# Other purposes beneficial to the community

The fourth head of charity has been an ever-expanding category. It is now so broad that the *Charities Act 2006* (England and Wales) has replaced it with nine specific new categories. This is why the various elements in the fourth head of charity have been included in a separate part in this book.

This part comprises seven chapters. Chapter 12 is an overview of the main elements of the fourth head as a catch-all category and tries to formulate the method used by the courts in making sense of this category. The other six chapters analyse the different subcategories included in the fourth head of charity. Chapter 13 analyses the relief of human distress of the aged and disabled, the promotion of health and the promotion of social rehabilitation. Chapter 14 analyses patriotic purposes, the promotion of moral or spiritual welfare, safety and protection of human life and property and the enforcement of the law. Chapter 15 deals with the protection of animals. Chapter 16 investigates the provision of public works, community betterment, protection of the environment and gifts for the benefit of the community. Chapter 17 analyses the promotion of agriculture and economic development. Finally, chapter 18 examines the promotion of sports and the provision of recreational facilities.

CHAPTER 12

# Generalities about other purposes beneficial to the community

As mentioned in the previous chapters, the *Statute of Charitable Uses 1601 (Statute of Elizabeth)* specifically mentions the first two categories, that is, the relief of poverty and the advancement of education. It also mentions a few other categories that do not fall into these two. The advancement of religion is basically a development by judges. The courts have also developed the fourth category during the past 400 years.

Hammond J wrote that charities law is of considerable antiquity. In the days of commonly held faith, charitable purposes were closely aligned with expressions of piety. After the Reformation, and with the increasing secularisation of society, other forms of community welfare began to emerge. Inevitably, judges then had to address the problem of evolving workable *indicia* of which activities were for the public benefit.[1]

An ever-expanding category has emerged from what is known in legal jargon as the fourth head of charity, as defined by the House of Lords in *Income Tax Special Purposes Commissioners v Pemsel*.[2] The House of Lords, in that case, considered that the courts had acknowledged three specific categories from the *Statute of Elizabeth*: the relief of poverty, the advancement of education and the advancement of religion. The Law Lords, in that case, also created a fourth category for other purposes beneficial to the community that had been acknowledged by the courts.

Some have argued that the adoption of the *Charities Act 2005* and especially section 5 of that Act intentionally broadened what is now included in "any matter beneficial to the community". In *Travis Trust v Charities Commission*,[3] the first case interpreting section 5 of the *Charities Act 2005*, Joseph Williams J wrote that "s 5(1) of the Act codifies the common law and it is in the common law that the answer to this case is to be found".[4] In that case, Joseph Williams J further wrote:

> *Section 5 includes a number of additions and amendments to that broad definition but none of them are relevant to this case. The definition rather unhelpfully repeats the four heads of charity contained in the celebrated House of Lords decision in* Commissioners for Special Purposes of the Income Tax v Pemsel.[5] *They in turn are extracted, it is said, from the Preamble to the* Statute of Charitable Uses 1601[6] – *generally referred to these days as the* Statute of Elizabeth.[7]

In the *Travis Trust* case, Joseph Williams J wrote about "other purposes beneficial to the community" that in order to interpret what is included in that fourth head of charity, we have to go back to cases that have been considered by the courts to be or not be charitable.[8] Further, court decisions have tried to instil some logic into the ever-growing fourth head of charity.

This chapter analyses the main elements of this catch-all category and tries to formulate the methods used by the courts in making sense of this category.

1 *D V Bryant Trust Board v Hamilton City Council* [1997] 3 NZLR 342 at 348 [*"D V Bryant Trust"*].
2 [1891] AC 531.
3 (2009) 24 NZTC 23,273 at [18].
4 Ibid, at [22]. This was approved by the Court of Appeal in *Re Greenpeace of New Zealand Incorporated* [2012] 3 NZCA 533 at [42].
5 [1891] AC 531.
6 43 Elizabeth I c.4.
7 (2009) 24 NZTC 23,273 at [18].
8 Ibid, at [20].

### 12.1 The main elements of the fourth head of charity

Courts and commentators have held that *Morice v Bishop of Durham*[9] was the first case to provide a classification for the four categories of charity, which were described as: "1st, relief of the indigent; in various ways: money, provisions, education, medical assistance; 2dly, the advancement of learning; 3dly, the advancement of religion; and, 4thly, which is the most difficult, the advancement of objects of general public utility".

However, this classification was later adopted by the House of Lords in the most often cited *Pemsel* case. In that case, Lord Macnaghten wrote that:

> *Charity in its legal sense comprises four principal divisions: trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads. The trusts last referred to are not the less charitable in the eye of the law, because incidentally they benefit the rich as well as the poor, as indeed, every charity that deserves the name must do either directly or indirectly.*[10]

Gonthier J wrote that the Preamble provided an enumeration of charitable purposes. By contrast, *Pemsel* provides a classification that is exhaustive: "any purpose which is charitable must fit into one or more of the four *Pemsel* categories, although admittedly the fourth category is very broad due to its residual nature".[11] However, both the *Pemsel* classification and the Preamble provide a description rather than a definition of charitable purposes.

Courts have commented that the fourth head is a residuary category of "somewhat indeterminate character",[12] an "ever widening scope" of charitable purposes.[13] The approach of the courts has been described as being "somewhat elastic",[14] a "flexible judicial creation and thus amenable to change and development"[15] and indicating a willingness to "adapt the common law to reflect the changing social, moral and economic fabric of the country".[16]

In the New Zealand case of *Re Tennant*, Hammond J wrote that one very helpful description of the category was to be found in the Australian judgment of Dixon J in *Barby v Perpetual Trustee Co Ltd*:[16a]

> *It is no more than a final class into which various objects fall that are not comprised in the first three classes, but are nevertheless charitable. It has been found impossible to give an exhaustive definition of what amounts to a charitable purpose, but the authorities indicate the attributes that are to be looked for. The gift must proceed from altruistic motives or from benevolent or philanthropic motives. It must be directed to purposes that are for the benefit of the community [...] The purposes must tend to the improvement of society [...]. The manner in which this tendency may be manifested is not defined by any closed category. It is capable of great, if not infinite, variation. It may be by the relief of misfortune; by raising moral standards or outlook; by arousing intellectual or aesthetic interests; by general or special education; by promoting religion; or by aiming at some other betterment of the community. The purposes must be lawful and must be consonant with the received notions of morality and propriety.*

In his 1999 edition, Hubert Picarda suggested a number of categories under the fourth head of charity: the promotion of health; the provision of recreational facilities; municipal

[9] (1805) 10 Ves Jun 522, 32 ER 947 at 951.

[10] *Commissioner for Special Purposes of Income Tax v Pemsel* [1981] AC 531 at 583 [*Pemsel* case].

[11] *Vancouver Society of Immigrants and Visible Minority Women v MNR* [1999] 1 SCR 10 at [35] per Gonthier J dissident [*Vancouver Society of Immigrants*].

[12] *Re Tennant* [1996] 2 NZLR 633 at 637.

[13] *Taylor v Taylor* (1910) 10 CLR 218 at 238 per Isaacs J.

[14] *Positive Action against Pornography v Minister of National Revenue* (1988) 49 DLR (4th) 74 at 81 per Stone J (Canadian Federal Court of Appeal).

[15] *Vancouver Society of Immigrant*, above n 11, at [36] per Gonthier J dissident.

[16] Ibid, at [150]. This citation was again approved by the Supreme Court of Canada in *AYSA Amateur Youth Soccer Association v Canada (Revenue Agency)* [2007] 3 SCR 217 at [28] [*"AYSA Amateur Youth Soccer"*].

[16a] *Barby v Perpetual Trustee Co Ltd* (1937) 58 CLR 316 at 324; quoted *Re Tennant* [1996] 2 NZLR 633 at 637-8.

betterment and relief of the tax and rating burden; gifts for the benefit of a locality; certain patriotic purposes; the protection of life and property; social rehabilitation; the protection of animals; and a ragbag of miscellaneous purposes including the promotion of industry and commerce, the promotion of moral or spiritual welfare or improvement, research into and the dissemination of information useful to the community and the preservation of the environment.[17] These different categories are canvassed in the following chapters.

### 12.2 Method: two-stage analogy to the Preamble to the *Statute of Elizabeth*

In *Latimer v Commissioner of Inland Revenue*,[18] the New Zealand Appeal Court wrote that:

> *It is also common ground that there must be a two-step inquiry: first, whether the purpose is for the public benefit and, if so, secondly, whether the purpose is charitable in the sense of coming within the spirit and intendment of the Preamble to the* Statute of Charitable Uses 1601 *(43 Eliz I, c 4).*[19]

Courts have consistently insisted that the two stages of the test are cumulative. Therefore, only purposes that fulfil both legs of the test will be held charitable.[20] This was reiterated in *Canterbury Development Corporation v Charities Commission,*[21] in which Young J wrote:

> *It is common ground that the appellant must pass two tests before they can be registered under this head as a charity. I agree with the respondent's identification of the two stage test as:*
>
> > *Consisting firstly of falling within the spirit and intendment of the* Statute of Elizabeth *(often called the analogy test) and secondly meeting the public benefit requirement.*[22]

Courts have repeatedly insisted that not all purposes that provide public benefit are charitable. The House of Lords decided the matter in *Williams Trustees v Inland Revenue Commissioners*.[23] In that case, the House of Lords had to decide if a trust had been established exclusively for charitable purposes. The House of Lords wrote:

> *Now Sir Samuel Romilly did not mean, and I am certain Lord Macnaghten did not mean to say that every object of public general utility must necessarily be a charity. Some may be and some may not be. [...] Lord Macnaghten did not mean that all trusts for purposes beneficial to the community are charitable, but that there were certain beneficial trusts which fell within that category; and accordingly to argue that because a trust is for a purpose beneficial to the community it is therefore a charitable trust is to turn round his sentence and to give it a different meaning. So here, it is not enough to say that the trust in question is for public purposes beneficial to the community or for the public welfare: you must also show it to be a charitable trust.*[24]

In *Queenstown Lakes Community Housing Trust*,[25] MacKenzie J cited Lord Simonds with approval. He wrote that the first proposition was that the purpose had to be within the spirit and intendment of the Preamble to the *Statute of Elizabeth*. "The second is that Lord Macnaghten's fourfold classification in *Pemsel*'s case must be read subject to the qualification that it does not mean that every object of public general utility must necessarily be a charity. He concluded that the purpose must be both for the benefit of the community and beneficial in a way which the law regards as charitable".[26]

Therefore, in order for an entity to be charitable under the fourth head of charity, its purposes must be "for public benefit which the law regards as charitable".[27] This approach

[17] Hubert Picarda *The Law and Practice Relating to Charities* (3rd ed, Butterworths, London, 1999) at 13-14 and 117-166.

[18] [2002] 3 NZLR 195.

[19] Ibid, at 205.

[20] Gino Dal Pont *Charity Law in Australia and New Zealand* London (Oxford University Press, Oxford, 2000) at 173.

[21] [2010] 2 NZLR 707.

[22] Ibid, at [40].

[23] [1947] 1 All ER 513, [1947] AC 447. That case was heavily relied upon and quoted by Kennedy J *In re Cumming* [1951] NZLR 498.

[24] Ibid, at 455.

[25] HC WN CIV-2010-485-1818 [24 June 2011].

[26] Ibid, at [48].

[27] *National Anti-Vivisection Society v Inland Revenue Commissioners* [1948] AC 31 at 41 per Lord Wright. See also *Vancouver Society of Immigrants*, above n 11, at [176] per Iacobucci J, approved in *"AYSA Amateur Youth Soccer"*, above n 16, at [27].

has also been adopted in Australia where the Federal Appeal Court wrote that "an institution is not necessarily a charitable institution simply because it has a purpose that is beneficial to the public".[28]

The following paragraphs examine the criteria, or tests, that the courts have devised to establish if a purpose provides public benefit of a kind that the law considers as charitable.

### *12.2.1 Beneficial to the community*

The terminology used to describe the fourth head of charity is somewhat ambiguous. This is because the phrase "beneficial to the community" could be confused with "providing public benefit", which is used for the first three heads of charity. As Gino Dal Pont wrote, "courts continue to use the terminology 'beneficial to the community' instead of 'public benefit' when speaking of the fourth head of charity".[29]

The Supreme Court of Canada has summarised what is meant by the public benefit requirement. Gonthier J wrote that "there must be an objectively measurable and socially useful benefit conferred; and it must be a benefit available to a sufficiently large section of the population to be considered a public benefit".[30]

Six considerations can be derived from that definition. Firstly, the benefit must be proven; secondly, it must be objectively measurable; thirdly, a socially useful benefit must be conferred; fourthly, by implication, the benefit must not be detrimental to the community; fifthly, its meaning is a dynamic and living concept; and sixthly, it must be a benefit available to a sufficiently large section of the population. Each part of this definition will now be considered.

The first consideration (that the benefit must be proven) was canvassed in *Vancouver Society of Immigrants and Visible Minority Women v Minister of National Revenue*.[31] In that case, Gonthier J wrote that although the public benefit requirement applied to all charitable purposes, it was of particular concern under the fourth head of Lord Macnaghten's scheme in *Pemsel*. "This is so because under the first three heads, public benefit is essentially a rebuttable presumption, whereas under the fourth head it must be demonstrated".[32] In terms of purposes falling under the fourth head, the courts do not assume or presume its existence as in the case of the other heads of charity – the benefit in issue must be affirmatively proved or made clear to the courts.[33] In *Vancouver Society of Immigrants and Visible Minority Women v MNR*, Iacobucci J, speaking for the majority, stressed that "rather than laying claim to public benefit only in a loose or popular sense, it is incumbent upon the Society to explain just how its purposes are beneficial in a way the law regards as charitable".[34]

The second consideration concerns what constitutes an objectively measurable, socially useful benefit. Courts have not expanded on this aspect other than to say that an entity has to explain how its purposes are socially useful. In the *New Zealand Society of Accountants v Commissioners of Inland Revenue*, Richardson J of the Court of Appeal noted that "peace of mind seems to me far too nebulous and remote to be regarded as a public benefit".[35] Although the test requires that objectively measurable benefits be shown, it does not necessarily mean that only tangible benefits will be sufficient. Courts have also held that benefits in the intellectual and artistic fields can amount to useful benefits under the fourth head.[36]

The third consideration of that test is that the benefit must be socially useful. Courts have not expanded on this aspect other than saying that an entity has to explain how its purposes are socially useful to the community.

[28] *Federal Commissioner of Taxation v The Triton Foundation* [2005] FCA 1319; [2005] ATC 4891 at 4897 at [21] citing *The Incorporated Council of Law Reporting for the State of Queensland v FC of T* (1971) 125 CLR 659 at 667 and 669.

[29] Dal Pont *Charity Law in Australia and New Zealand*, above n 20, at 174.

[30] *Vancouver Society of Immigrants*, above n 11, at [41] per Gonthier J. (dissenting).

[31] Ibid.

[32] Ibid, at [41].

[33] *D V Bryant Trust*, above n 1, at 350.

[34] *Vancouver Society of Immigrants*, above n 11, at [176].

[35] [1986] 1 NZLR 147 at 153.

[36] *Re Hopkins' Will Trusts* [1965] Ch 669 at 680-681 per Wilberforce J.

The fourth consideration about the "beneficial to the community" test must by implication mean that a purpose must not be detrimental to the community. This was made clear in *National Anti-Vivisection Society v Inland Revenue Commissioners*,[37] whose main object was the abolition of vivisection. Lord Simons wrote that "where on the evidence before it the court concludes that, however well-intentioned the donor, the achievement of his object will be greatly to the public disadvantage, there can be no justification for saying that it is a charitable object". Finally, the purpose cannot be said to be "beneficial to the community" if it is illegal. In *Re Collier (deceased)*,[38] Hammond J wrote that since euthanasia was not lawful in New Zealand, "there cannot be a charitable bequest to promote an illegal purpose". He therefore declared the promotion of such purpose non-charitable.

The fifth consideration was mentioned in *Scottish Burial Reform and Cremation Society Ltd v Glasgow Corporation*.[39] The House of Lords underscored that the *Pemsel* classification was a flexible judicial creation, and thus amenable to subsequent change and development. This flexibility has enabled the courts to modernise the law of charity in recognition of changing social needs. The *Pemsel* classification provides a framework within which the courts may adapt the law as those social needs change.[40] In the *Scottish Burial Reform* case, a society to encourage cremation was held to be beneficial to the community by reference to legislation allowing local authorities to provide crematoria in addition to burial grounds. Another example of the adaptation to social needs is given by the New Zealand Court of Appeal in *Latimer v Commissioner of Inland Revenue*.[41] In that case, the Appeal Court wrote that in the New Zealand context it was impossible not to regard as charitable providing the Waitangi Tribunal with relevant material based on research to assist that Tribunal to make informed decisions concerning longstanding disputes between Māori and the Crown.

Finally, the onus is on the applicant to show that the purpose is beneficial to a sufficient portion of the public. Courts have held that it is well established under the fourth head of the *Pemsel* classification that to qualify as charitable, the class of persons eligible to benefit must be the community as a whole, or an appreciably important class of the community. The House of Lords indicated in *Inland Revenue Commissioners v Baddeley*[42] that one must not consider the class apart from the particular nature of the charitable purpose. In V*ancouver Society of Immigrants and Visible Minority Women v MNR*,[43] both the majority and the dissident judges agreed that despite the primary focus on immigrant women, there was no indication that in practice the Society's beneficiaries were exclusively women or members of minority groups. On the contrary, the evidence before the Court suggested that the Society's services were open to all in need of them, so that men had apparently attended some of its programmes.

It is possible that a purpose that seems beneficial to the public will not meet the legal test. Gino Dal Pont, in his *Charity Law in Australia and New Zealand*,[44] gave the example of the New Zealand decision in *New Zealand Society of Accountants v Commissioner of Inland Revenue*.[45] In that case, the issue was whether fidelity funds operated by the appellant society, from which persons whose money had been stolen by an accountant were entitled to be reimbursed for any loss not recoverable from a defaulting practitioner, were exempt from taxation as being charitable under the fourth head of charity. The New Zealand Court of Appeal held that a contractual relationship with a practitioner was a necessary but not sufficient prerequisite for an entitlement to reimbursement from the fund. That relationship meant that the contractual relationship did not constitute the beneficiaries as a section of the community for charitable purposes.[46]

The second leg of the fourth head that must also be proven is that the purposes are analogous to the spirit and intendment of the Preamble of the *Statute of Elizabeth*. Both elements must be present since the two legs of the test are cumulative.

[37] [1948] AC 31 at 65-66.

[38] [1998]1 NZLR 81 at 91. The Court of Appeal reached the same conclusion in *Re Greenpeace of New Zealand Incorporated* [2012] 3 NZCA 533 at [96].

[39] [1968] AC 138 (HL).

[40] *Vancouver Society of Immigrants*, above n 11, at [36] per Gonthier J. (dissenting).

[41] [2002] 3 NZLR 195 at 208.

[42] [1955] AC 572 at 615.

[43] *Vancouver Society of Immigrants*, above n 11, at [104].

[44] Gino Dal Pont *Charity Law in Australia and New Zealand*, above n 20, at 175.

[45] [1986] 1 NZLR 147.

[46] Ibid, at 154 per Richardson J and 156 per Somers J.

### *12.2.2 Analogy to the Preamble*

In most jurisdictions, in determining whether a particular purpose is for the benefit of the public, courts adhere to the analogical approach to legal reasoning familiar to the common law. In doing so, the courts should consider whether the purposes are analogous to one of the purposes enumerated in the Preamble to the *Statute of Elizabeth* or build analogy upon analogy.[47]

Furthermore, courts have consistently held that not all organisations that have purposes that benefit the community will be charitable. As indicated above, the purposes must provide public benefit in a way that the law regards as charitable.

However, in recent years, some court decisions have created a lot of confusion about the right way to decide if certain purposes are analogous to the spirit and intention of those expressed in the *Statute of Elizabeth*. Different approaches have been suggested, of which one is to consider that objects beneficial to the public are *prima facie* within the spirit and intention of the *Statute of Elizabeth* and another is to consider the trends of cases about purposes that are for a public benefit.

#### *12.2.2.1 Objects beneficial to the public are* prima facie *charitable*

The first mention that objects beneficial to the public are *prima facie* charitable came from Russell LJ in *Incorporated Council of Law Reporting for England and Wales v Attorney-General*.[48] This view was endorsed by Lord Wilberforce in *Brisbane City Council v Attorney-General for Queensland*.[49] The approach was, however, considered problematic by Tompkins J in *Centrepoint Community Growth Trust v CIR*[50] citing Dillon J in *Barralet v Attorney-General*[51] commenting on *Williams' Trustees v Inland Revenue Commissioners*.[52]

The relevant test as to whether objects are analogous with purposes falling within the spirit and intendment of the Preamble to the *Statute of Elizabeth* was cited again by the New Zealand Court of Appeal in *Commissioner of Inland Revenue v Medical Council of New Zealand*[53] as follows:

> *... objects beneficial to the public, or of public utility, are* prima facie *within that spirit and intendment and, in the absence of any ground for holding that they are outside its spirit and intendment, are therefore charitable in law.*

In *The Royal National Agricultural and Industrial Association v Chester and others*,[54] the High Court of Australia looked at the decisions in *Scottish Burial Reform and Cremation Society Ltd v Glasgow Corporation*[55] and *Incorporated Council of Law Reporting for England and Wales v Attorney-General*[56] and stated:

> *It must, at least, be found that the breeding of racing pigeons is a purpose both beneficial to the community and within the spirit and intendment of the Preamble to the* Statute 43 Eliz I, *c. 4. The House of Lords' decisions in* Williams' Trustees v Inland Revenue Commissioners, *[1947] A.C. 447, and* Scottish Burial Reform and Cremation Society v Glasgow Corporation, *[1968] A.C. 138 provide modern authority that the existence of these two elements is both necessary and sufficient to warrant the conclusion that a particular purpose is charitable in law [...]*
>
> *The attention of the Court was drawn by counsel for the appellant to the general language used by members of the Court of Appeal in* Incorporated Council of Law Reporting for England and Wales v Attorney-General *[1972] Ch. 73, in*

[47] *Vancouver Society of Immigrants*, above n 11, at [150].
[48] [1972] Ch 73.
[49] [1978] AC 411 at 424.
[50] [1985] 1 NZLR 673 at 678.
[51] [1980] 3 All ER 918 at 926.
[52] [1947] 1 All ER 513 at 518-519 (HL).
[53] (1997) 18 NZTC 13,088 at [11].
[54] [1974] 48 ALJR 304.
[55] [1968] AC 138.
[56] [1972] 1 Ch. 73.

> *particular that of Russell L.J. at pp. 88 and 89 and that of Sachs L.J. at pp. 94 and 95, which, it was contended, justified bringing within the ambit of the Preamble any purpose beneficial to the community unless there is some particular reason for excluding it from the conception of what is charitable. Such a development of the law would certainly go beyond any decision of the House of Lords or of this Court and would, we think, require consideration of authorities to the effect that gifts for benevolent or philanthropic purposes are too wide to be charitable.*[57]

In addition, while in *CIR v Medical Council of New Zealand*[58] the Court of Appeal considered the test that had been cited by the applicant, the majority of the Court did not base its decision on this. Instead, it found that the promotion of community health was within the spirit and intendment of the *Statute of Elizabeth*, relying on and further developing a line of English cases to that effect.

In *Crown Forestry Rental Trust v Commissioner of Inland Revenue*,[59] the Court stated:

> *In view of the decision of the Court of Appeal in the* Medical Council *case, I believe it is appropriate to take the second approach put forward by counsel, that is to accept that a purpose which is beneficial to the public is* prima facie *charitable, unless there is a reason put forward for holding that it is not.*

However, this decision was appealed in *Latimer v Commissioner of Inland Revenue*,[60] where it was decided that:

> *It is also common ground that there must be a two step inquiry: first, whether the purpose is for the public benefit and, if so, secondly, whether the purpose is charitable in the sense of coming within the spirit and intendment of the Preamble to the* Statute of Charitable Uses 1601 *(43 Eliz I, c.4).*[61]

In *Latimer v Commissioner of Inland Revenue*,[62] the Court of Appeal considered the approach taken in *Commissioner of Inland Revenue v Medical Council of New Zealand*[63] and found that it was:

> *... unnecessary to reach any view on whether as might appear, all of the majority in the* Medical Council *case adopted the approach that objects beneficial to the public or of public utility are presumed to be within the spirit and intendment of the Preamble to the* Statute of Elizabeth *in the absence of any ground for holding otherwise [and concluded that] we have no doubt that in this case the public benefit which we have described is, in the context of New Zealand society at this time, of a charitable character.*[64]

The Court of Appeal in *Greenpeace of New Zealand Incorporated*[64a] expressed the view that the requirement to be charitable within the spirit and intendment to the Preamble focuses on analogies or the presumption of charitable status. "Even in the absence of an analogy, objects beneficial to the public are prima facie within the spirit and intendment of the preamble and, in the absence of any ground for holding that they are outside its spirit and intendment, are therefore charitable in law".

Furthermore, while the "public utility" argument from 5(2) *Halsbury's Laws of England*[65] was cited in *CIR v Medical Council of New Zealand*,[66] more recent authorities on charities law do not appear to endorse this approach to the fourth head. For example, in *Tudor on Charities*, Jean Warburton stated that "for a purpose to be charitable under [the fourth head] it is not enough that the purpose is for the public benefit; it must be beneficial in a way that the law regards as charitable. In other words, it must be within the spirit and intendment of the Preamble to the *Charitable Uses Act 1601*".[67]

[57] [1974] 48 ALJR 304 at 305.
[58] [1997] 2 NZLR 297.
[59] (2001) 20 NZTC 17,311.
[60] [2002] 3 NZLR 195.
[61] Ibid, at [32].
[62] Ibid, at 208-209.
[63] (1997) 18 NZTC 13,088.
[64] [2002] 3 NZLR 195 at [39].
[64a] [2012] NZCA 533 at [43] per White J.
[65] (4th edition) 1993, at [37].
[66] (1997) 18 NZTC 13,088.
[67] Jean Warburton *Tudor on Charities* (9th ed, Sweet & Maxwell, London, 2003) at 98.

Similarly in *Charity Law in Australia and New Zealand*, Gino Dal Pont stated:

> *Dispositions under the fourth head must satisfy a 'two-stage' test as a prerequisite of validity. First the court must be satisfied that the purpose in question is beneficial to the community. Secondly, the purpose must fall within the spirit of the Preamble to the* Statute of Charitable Uses. *[. . .] Even if the object were in some way beneficial to the community, it would still be necessary to discover that it fell within the spirit and intendment of the instances given in the* Statute of Elizabeth.[68]

Dal Pont also cited *Re Macduff*, where Rigby LJ said:

> *... to say that every purpose of general use to the community must be a charity is just about as logical as to draw from a statement in the report of an insurance society that 'persons insured with us may be divided into men, women and children', the deduction that every man, every woman and every child is insured in that society.*[69]

In *Travis Trust v Charities Commission*,[70] the first case to interpret the *Charities Act 2005*, Joseph Williams J stated:

> *But as Lord Bramwell said in the same case [*Pemsel *case] "certainly every benevolent purpose is not charitable". So in a deft circumlocution of legal logic, we are required in considering what is beneficial to the community under the last of the* Pemsel *heads to look back to the "spirit and intendment" of the Preamble to the* Statute of Elizabeth *to assist in dividing between those purposes that are both beneficial and charitable and those that are beneficial but not charitable. To make the division, regard must be had to the particular words of the Preamble and, it has now long been held, any cases in which purposes have been found to be within the spirit and intendment of the Preamble by analogy.*[71]

In light of the above authorities, the New Zealand Charities Registration Board has taken the view that the correct test as to whether a purpose comes under "any other matter beneficial to the community" is that the purpose must be both beneficial to the community and within the spirit and intendment of the purposes set out in the *Statute of Elizabeth*.[72]

However, in *Latimer v Commissioner of Inland Revenue*, the New Zealand Court of Appeal agreed with the *Medical Council* case that "in applying the spirit and intendment of the Preamble it is important to be guided by principle rather than by a detailed analysis of decisions on particular cases".[73] The Court of Appeal decision in *Greenpeace of New Zealand Incorporated*[73a] does not say that analogies to the spirit and intendment of the purposes set out in the Preamble of the *Statute of Elizabeth* should be disregarded. Where cases have been decided that certain purposes do not fall under the spirit of the Preamble, such decisions would be *indicia* of grounds for holding that they are outside its spirit and intendment, and therefore not charitable in law.

The problem with the approach taken by the New Zealand Court of Appeal is that it is very difficult to be guided by principles in that area of the law, because no such principles have been clearly enunciated by anyone. When they have been, as Gonthier J wrote in his dissenting opinion in *Vancouver Society of Immigrants and Visible Minority*

[68] Dal Pont *Charity Law in Australia and New Zealand*, above n 20, at 173.

[69] [1896] 2 Ch 451 at 473-474

[70] (2009) 24 NZTC 23,273 per Joseph Williams J.

[71] Ibid, at [20].

[72] See also *Re Jones* [1907] SALR 190 at 201; *Williams Trustees v Inland Revenue Commissioners* [1947] AC 447 at 455; *Auckland Harbour Board v Commissioner of Inland Revenue* [1959] NZLR 204; *Scottish Burial Reform and Cremation Society v Glasgow Corporation* [1968] AC 138 at 146-148; *Incorporated Council of Law Reporting (QLD) v Federal Commissioner of Taxation* (1971) 125 CLR 659 at 667, 669; *Royal National Agricultural and Industrial Association v* Chester (1974) 48 ALJR 304 at 305; *New Zealand Society of Accountants v Commissioner of Inland Revenue* [1986] 1 NZLR 147 at 157; *Re Tennant* [1996] 2 NZLR 633 at 638.

[73] [2002] 3 NZLR 195 at 208-209.

[73a] [2012] NZCA 533 at [43] per White J.

*Women v Minister of National Revenue*,[74] these principles are so broad that they do not offer much help in deciding whether a new organisation is or is not charitable. Gonthier J wrote that:

> *Two central principles have long been embedded in the case law. Speaking of the existing* Pemsel *categories, Rand J observed in* Sunny Brae, *supra, at p. 88, that "the attributes attaching to all are their voluntariness and, directly or indirectly, their reflex on public welfare". These two principles, namely, (1) voluntariness (or what I shall refer to as altruism, that is, giving to third parties without receiving anything in return other than the pleasure of giving); and (2) public welfare or benefit in an objectively measurable sense, underlie the existing categories of charitable purposes, and should be the touchstones guiding their further development.*[75]

Courts have not yet expanded on those two principles. The second one seems circular because it relates back to the notion of public benefit as an objectively measurable sense, which is the first leg of the two-part test under the fourth head of charity. The first principle of altruism is so broad and general that it is not very helpful either.

*12.2.2.2 Trend of cases about purposes that are for a public benefit*

In *Vancouver Society of Immigrants and Visible Minority Women v Minister of National Revenue*,[76] the majority held that under the fourth head, the purposes of the organisation had to be (a) "beneficial to the community" and (b) "in a way the law regards as charitable". Recognising that this reasoning was circular and that the law was not clear, Iacobucci J adopted the following test from *D'Aguiar v Guyana Inland Revenue Commissioner*:

> *[The Court] must first consider the trend of those decisions which have established certain objects as charitable under this heading, and ask whether, by reasonable extension or analogy, the instant case may be considered to be in line with these. Secondly, it must examine certain accepted anomalies to see whether they fairly cover the objects under consideration. Thirdly – and this is really a cross-check upon the others – it must ask whether, consistently with the objects declared, the income and property in question can be applied for purposes clearly falling outside the scope of charity; if so, the argument for charity must fail.*[77]

The Supreme Court of Canada has added to this the general requirement that the purpose must also be "for the benefit of the community or of an appreciably important class of the community" rather than for private advantage.[78]

Australian courts also seem to have adopted that approach. In *Victorian Women Lawyers' Association Inc v Commissioner of Taxation*,[79] the Court made the following *obiter* comments about political purposes: "The High Court's formulation suggests that a trust may survive in Australia as charitable where the object is to introduce new law consistent with the way the law is tending".[80] This was repeated in *Attorney-General for New South Wales v The NSW Henry George Foundation Ltd*, where Young CJ wrote that "His Honour suggests that the way the law is tending is to say [...]".[81]

The method formulated by Iacobucci J is similar to the classical common law method. The first step is to look at all the cases that have been accepted as falling under the fourth head of charity as being beneficial to the community. The second step consists of looking at cases where courts have refused to uphold as charitable certain purposes falling under

[74] [1999] 1 SCR 10.
[75] Ibid, at [37].
[76] Ibid, at [177].
[77] [1970] TR 31 at 33.
[78] *"AYSA Amateur Youth Soccer"*, above n 16, at [27].
[79] [2008] FCA 983.
[80] Ibid, at [128].
[81] [2002] NSWSC 1128 at [47] cited by *Commissioner of Taxation v Aid/Watch Incorporated* [2009] FCAFC 128.

the fourth head of charity. That method is applied when the courts are asked to include situations that have not yet been considered as falling within the relevant category. Finally, the third step consists of asking if the income and property can be applied for purposes that would not be charitable. If so, the entity cannot be considered charitable.

It is clear that while courts can extend the analogies, it would be difficult for them to consider that purposes are charitable when a case in hand is similar to one that has been held by courts not to be charitable. When no case exists that has been denied charitable purpose, it may then be possible to apply this suggested approach.

### 12.3 Reasons for a conservative approach

Courts have insisted that they should not be changing the law, especially when financial matters are involved. In *Re Tennant*, Hammond J of the New Zealand High Court noted that it had to "be recalled that charitable trusts are an exception to the usual revenue and other law. Because of this privileged position charities must meet strict legal requirements".[82]

The Supreme Court of Canada upheld in *AYSA Amateur Youth Soccer Association v Canada (Revenue Agency)* what had been written by Iacobucci J eight years earlier where he emphasised that there were limits to the law reform that could be undertaken by the courts, citing *R v Salituro*:[83]

> *Judges can and should adapt the common law to reflect the changing social, moral and economic fabric of the country. Judges should not be quick to perpetuate rules whose social foundation has long since disappeared. Nonetheless, there are significant constraints on the power of the judiciary to change the law. As McLachlin J indicated in Watkins, supra, in a constitutional democracy such as ours it is the legislature and not the courts which has the major responsibility for law reform; and for any changes to the law which may have complex ramifications, however necessary or desirable such changes may be, they should be left to the legislature. The judiciary should confine itself to those incremental changes which are necessary to keep the common law in step with the dynamic and evolving fabric of our society* [emphasis added by the Supreme Court].[84]

When courts consider expanding the definition of charity, therefore, they must take into account whether what is being proposed is an incremental change, or one with more complex ramifications that is better left to the legislature. This approach was specifically approved by the Court of Appeal in *Greenpeace of New Zealand Incorporated*[84a] where the Court held that "the fiscal consequences involved in amending the definition to enlarge its scope mean that it is a policy matter that constitutionally should be left to Parliament".

[82] [1996] 2 NZLR 633 at 637.

[83] [1991] 3 SCR 654.

[84] Above n 16, at [28].

[84a] [2012] NZCA 533 at [58] per White J.

## 12.4 Conclusion

It is clear from the decided cases that courts will apply a two-step process in the requirements of the first leg of the test when deciding if purposes that do not fall in the first three categories are charitable. An entity wishing to gain charitable status must show by measurable and tangible ways how its purpose will bring social utility and provide benefit to a sufficient portion of the public. The entity must also show how such benefit to the community is analogous to the spirit and intendment of the *Statute of Elizabeth*.

To establish the second part of the test, grounds for holding that the objects are not beneficial to the public may be found in the facts of the application but also in cases decided by the courts on similar facts. Other approaches have been suggested, namely that once an entity has proved that its purpose provides a measurable, objectively socially useful benefit to a sufficient portion of the public, it is *prima facie* charitable or one has to look at the trends in decided court cases. However, these two approaches are still in the infancy of the art and it is therefore not surprising that in *Travis Trust v Charities Commission*,[85] Joseph Williams J noted that "regard must be had to the particular words of the Preamble and, it has now long been held, any cases in which purposes have been found to be within the spirit and intendment of the Preamble by analogy".

The next six chapters analyse in more detail different categories of purpose falling under the fourth head of charity as being "beneficial to the community". The relief of human distress, and the promotion of health and social rehabilitation are canvassed in chapter 13. Patriotic purposes and protection of the community are analysed in chapter 14. Chapter 15 is devoted to the protection of animals. Public works, community betterment and gifts to a locality, including the protection of the environment, are analysed in chapter 16. Chapter 17 is devoted to the evolving area promoting agriculture and economic development. Finally, chapter 18 looks at the promotion of sports and recreation.

[85] (2009) 24 NZTC 23,273 at [20].

CHAPTER 13

# Relief of human distress, promotion of health, protection of life and property

The categories of entity falling under the fourth head of charity, being purposes "beneficial to the community", are so numerous that it is difficult to organise them in logical groups. They are too numerous to form only one chapter in this book, which is why they are organised within chapters that cover related materials.

This particular chapter deals with the relief of human distress (aged and disabled) together with the promotion of health, be it physical or mental health, or social rehabilitation.

## 13.1 Relief of human distress

A number of authors, including Tudor and Gino Dal Pont, analysed the relief of the aged and the disabled in the category of relief of poverty. However, Hubert Picarda treated those subjects in a separate category of "promotion of health". Picarda's approach is preferred because courts have adopted a much more benevolent approach concerning the relief of poverty, where public benefit is presumed, while public benefit has to be proven for the relief of the aged and disabled.[1] Although the very first charitable purpose set out in the *Statute of Charitable Uses 1601* was the relief of the aged, impotent and poor people, authors consider that these words should be read disjunctively.[2] Therefore, people who are not poor also come within the purview of this category. This is illustrated by *Re Glyn's Will Trust*,[3] where Danckwerts J said that aged people needed not be also poor to be subjects of charity.

In *D V Bryant Trust Board v Hamilton City Council*,[4] Hammond J had to decide if a trust establishing "a village to help elderly people to live happily and fully in their later years" was charitable. The Board had resolved that residents were to be admitted irrespective of their ability to pay. He wrote that in his view, Bryant Village was charitable under the relief of poverty, the relief of the aged or even under the fourth head of *Pemsel* (other purposes beneficial to the community).[5] Hammond J considered that one possibility was to say that it relieved distress and would be a charity of compassion because it relieved the needs of the aged from the distress of solitariness.[6] "Thus, even if the institution is not for the relief of poverty, or the aged, it is beneficial to society, and it meets the necessary public benefit test".[7]

Finally, section 5(1) of the *Charities Act 2005* does not specifically put the relief of the aged and the disabled under the relief of poverty. It does not mention those two subcategories at all. This would support the view expressed by Hammond J that relief of the aged and the disabled could fall under the relief of poverty in certain cases but also under the fourth head of charity.

### *13.1.1 Relief of the aged*

As mentioned by Hammond J in *D V Bryant Trust Board v Hamilton City Council*,[8] the relief of the aged is specifically identified in the *Statute of Charitable Uses 1601* as being charitable. This leads to the question of what is meant by the aged and which activities constitute "relief of the aged".

1 *New South Wales Nursing Service and Welfare Association for Christian Scientists v Willoughby Municipal Council* [1968] NSWR 791; *City of Hawthorn v Victorian Welfare Association* [1970] VR 205; *Church of England Property Trust, Diocese of Canberra and Goulburn v Imlay Shire Council* [1971] 2 NSWLR 216. See Gino Dal Pont *Law of Charity* ( LexisNexis/Butterworths, Australia, 2010) at 179.

2 *Re Glyn's Will Trust* [1950] 2 All ER 1150n; *Re Bradbury* [1950] 2 All ER 1150n; *Re Robinson* [1951] Ch 198. See also Hubert Picarda *The Law and Practice Relating to Charities* (4th ed, Bloomsbury Professional Ltd, Haywards Heath, 2010) at 146 ["Picarda 4th ed"]. See also Dal Pont *Law of Charity,* above n1, at 162 footnote 2 citing the following cases: *Re Lucas* (1922) 2 Ch 52; *Re Peacock's Charity* [1956] Tas SR 142 at 145 per Gibson JK; *Re Resch's Will Trusts* [1969] 1 AC 514 at 542-543; *City of Hawthorn v Victorian Welfare Association* [1970] VR 205 at 208 per Smith J; *Trustees of Church Property of the Diocese of Newcastle v Lake Macquarie Shire Council* [1975] 1 NSWLR 521 at 524 per Moffitt P, at 534 per Hutley JA; *Re McIntosh (deceased)* [1976] 1 NZLR 308 at 309-310 per Beattie J; *West Australian Baptist Hospital & Homes Trust Inc v City of South Perth* [1978] WAR 65 at 58 per Lavan SPJ; *McGovern v Attorney-General* [1983] 1 Ch 159 at 171-174 per Peter Gibson J; *D V Bryant Trust Board v Hamilton City Council* [1997] 3 NZLR 342 at 349 per Hammond J (affd [1999] 1 NZLR 41).

3 [1950] 2 All ER 1150n.

4 [1997] 3 NZLR 342 [*"D V Bryant Trust"*].

5 Ibid, at 348.

6 Ibid, at 350.

7 Ibid.

8 Ibid.

#### *13.1.1.1 Meaning of the aged*

In *D V Bryant Trust Board v Hamilton City Council*,[9] Hammond J had to decide, among other things, what was meant by "aged". He refused to follow the decision in *Re Wall*[10] defining aged as when a person attains the age of 50 years. In *Bryant Trust*, all of the residents were of advanced years: none was younger than 70, and most were in their late 70s or into their 80s. From the *Bryant Trust* case, it can be said that people over the age of 70 would certainly fall into the aged category. People 50 and younger would certainly not fit into the aged category.

In *Re Dudgeon*,[11] a gift for a class of persons over 60 years of age was upheld. However, that case was decided in 1896 and not as many people reached that age then as they do today. In this day and age, with more than 12% of the population living past 65 years of age, it is uncertain that people 60 years of age would be considered to need relief because of their age. In fact, in New Zealand, people can only receive superannuation benefits when they reach 65 years of age. A number of countries have pushed back the retirement age to 67. New Zealand, amongst others, has abolished compulsory retirement at age 65. Finally, in New Zealand, people reaching 65 years of age automatically receive a "SuperGold Card" from the Government, which gives them benefits including free rides on buses and trains during off-peak times. Additionally, gifts for people 65 years and older have been held to be charitable.[12]

#### *13.1.1.2 Relief of the aged*

In *D V Bryant Trust Board v Hamilton City Council*,[13] Hammond J cited *Joseph Rowntree Memorial Trust Housing Association Ltd v Attorney-General*.[14] In that case, Peter Gibson J said that there were decisions in which the Judge paid no attention to the word "relief". He wrote "that there must be a need to be relieved by the charitable gift, such need being attributable to the age or impotent condition of the person to be benefited".[15] Hammond J further wrote that "the questions in this kind of case can conveniently be broken into two subparts: is there a need to be relieved against; and, is the relief that is afforded 'real', as opposed to fanciful, or trifling, or insubstantial?".[16]

The *D V Bryant Trust Board* case is clear authority for the proposition that erecting and fitting a home for the aged is a charitable object. In that case, Hammond J made it clear that "relief of the needs of the aged and relief from the distress of solitariness distinctly overlap in this case".[17] Other cases, in New Zealand[18] and elsewhere, have also assumed that the occupants shall be persons in need of the relevant accommodations.[19] The provision of a home for aged persons primarily contemplates the provision of somewhere to live, thus relieving a need of the elderly.

In *Re Bingham*,[20] the testatrix left a legacy for the erection of a home, the sole purpose of which should be the care of aged women in such home. The Court held that the expression "caring for aged women" signified in its natural sense the relief of helplessness and poverty, infirmity or sickness, caused by age, which in itself was a charitable purpose; and a reference to age only, apart from poverty, in its context, constituted a good charitable gift. A similar decision was reached in *Re Palmer*,[21] where a gift to an old men's home was held charitable as an indication of an intention to assist the needy. Finally, in *Re Quinn*,[22] a gift to the "Little Sisters of the Poor", an unincorporated religious order carrying on a home for destitute, aged and infirm persons of both sexes, was held to be charitable.

Courts in Australia and elsewhere have also held that building homes for "aged blind pensioners" is a charitable purpose.[23] So is a gift of land "for use in providing homes for elderly persons",[24] or a community village for the aged erected to be an institution for the

9 Ibid.

10 (1889) 42 Ch D 510.

11 (1896) 74 LT 613.

12 *Re Robinson* [1951] Ch 198 (gift for persons over 65 years of age upheld); *Re Cottam's Will Trusts* [1955] 3 All ER 704 at 705 per Danckwerts J (gift to local authority to provide flats for married couples or bachelors over 65 years of age upheld). See also Dal Pont *Law of Charity*, above n 1, at 180.

13 Above n 4 affirmed by the New Zealand Court of Appeal in [1999] 1 NZLR 41.

14 [1983] Ch 159.

15 Ibid, at 174 cited by Hammond J in *D V Bryant Trust*, above n 4, at 350.

16 Ibid, at 350.

17 Ibid.

18 *Re Bingham* [1951] NZLR 491.

19 *Re Bradbury* [1950] 2 All ER 1150n; *Re McFee* (1929) 37 OWN 266; *Re Pearse* [1955] 1 DLR 801; *In the Will of Clarke* [1957] VLR 171. See also Picarda 4th ed, above n 2, at 148.

20 [1951] NZLR 491 at 495 per Hay J.

21 [1939] NZLR 189; [1939] GLR 138.

22 [1899] 18 NZLR 50. See also *Municipal Council of Sydney v Salvation Army* (1931) 31 SR (NSW) 585, where a Salvation Army Home providing cheap and free beds for needy people was held to be charitable. See also Margaret Soper *The Law of New Zealand – Charities* (Butterworths, Wellington, 1994) at [18] ["Charities"].

23 *Lutheran Church of Australia South Australia District Incorporated v Framers' Co-operative Executors and Trustees Ltd* (1970) 121 CLR 628 at 650 per Windeyer J.

24 *Re Paying's Will Trusts* [1969] 3 All ER 698 at 700 per Buckley J and *Hilder v Church of England Deaconess' Institution Sydney Ltd* [1973] 1 NSWLR 506 at 512 per Street CJ.

relief of the aged.[25] Courts have held land used for the purpose of housing aged persons capable of catering for themselves to be charitable.[26] Finally, the Alberta Supreme Court held that a gift for old people's homes or senior citizen homes provided evidence of a general charitable intention.[27]

In order to qualify under the relief of the aged, an institution does not necessarily need to provide nursing care. In *D V Bryant Trust Board v City of Hamilton*, Hammond J wrote that "the fact that there are no nursing facilities, or care of that kind is not fatal".[28] However, in *Re Chapman*,[29] Greig J considered that geriatric or other total care that was a function of hospital or nursing home institutions was not charitable.[30] Greig J also mentioned *Re Chapman* where bodies that were operating commercially or for profit would not qualify as charitable.

Hubert Picarda wrote, "the provision of extra comforts for inmates presupposes that the inmates would not otherwise get those comforts and so is charitable",[31] citing amongst others the New Zealand case of *Re Mitchell*.[32] The law may be slightly different in New Zealand in that regard. In *D V Bryant Trust Board v City of Hamilton*,[33] Hammond J noted that there was English authority for the proposition that the mere provision of entertainment for a home was not charitable. He cited *Re Cole*[34] and *Inland Revenue Commissioners v Baddeley*[35] in support of that proposition. He further wrote that "it should perhaps be noted, in passing, that on these authorities the provision of the 'creature comforts' which were held charitable in *Re Mitchell* is questionable".[36] However, the provision of recreation, entertainment, luxuries or "creature comforts" that are ancillary or indirect objects of the institution or gift will not preclude the institution or gift from being charitable if its main object is charitable and these objects are directed to the furtherance of the main object.[37]

Finally, Gino Dal Pont pointed out that where a gift or bequest, although expressed to be for the benefit of persons over a certain age, is clearly not intended to provide relief for the needs attributable to that age group, there is little justification in according charitable status to it. He wrote that "for example, a gift for old people to learn to skydive, or to drive racing cars, in no way relates to the needs of those people that stem from their age. A gift for the aged may also be denied charitable status because its terms are incongruent with accepted notions of charity, the classic example being a disposition limited to the 'wealthy aged' ".[38]

### *13.1.2 Relief of the disabled*

Relief of the disabled, as is the case for relief of the aged, can also fall under the relief of poverty. However, in the case of relief of the disabled, public benefit is not presumed, contrary to situations falling under the relief of poverty.

#### *13.1.2.1 Meaning of "disabled"*

The courts have not defined the word "impotent", used in the *Statute of Charitable Uses Act 1601,* although they have interpreted it liberally. The *Oxford English Dictionary* defines it as meaning "physically weak; without bodily strength; unable to use one's limbs; helpless, decrepit". Jean Warburton wrote that the definition was "sufficiently wide to cover not only those suffering from permanent disability, whether of body or mind, but those temporarily incapacitated by injury or illness, or in need of rest, and young children incapable of protecting themselves from the consequences of cruelty or neglect".[39]

[25] *Trustees of Church Property of the Diocese of Newcastle v Lake Macquarie Shire Council* [1975] 1 NSWLR 521 at 524 per Moffitt P, at 533-534 per Hutley JA; *Presbyterian Church (New South Wales) Property Trust v Ryde Municipal Council* [1977] 1 NSWLR 620 at 626 per Rath J.

[26] *West Australian Baptist Hospital & Homes Trust Inc v City of South Perth* [1978] WAR 65 at 72 per Luvan SPJ.

[27] *Re Machin* (1979) 101 DLR 93d) 438 at 446. See also Dal Pont *Law of Charity*, above n 1, at 142.

[28] Above n 4, at 350 citing *Re St Anne's Tower Corp of Toronto and City of Toronto* (1973) 41 DLR (3d) 481; affirmed (1974) 51 DLR (3d) 374.

[29] High Court, Napier, CP 89/87, 17 October 1989, per Greig J.

[30] Ibid, at 12. See also Soper *Charities*, above n 22, at [18] footnote 6.

[31] Picarda 4th ed, above n 2, at 148.

[32] [1963] NZLR 934.

[33] Above n 4.

[34] [1958] Ch 877 (CA).

[35] [1955] AC 572 at 585 per Lord Chancellor.

[36] Above n 4, at 349.

[37] *City of Hawthorn v Victorian Welfare Association* [1970] VR 205 at 209-210, per Smith J.

[38] *Law of Charity*, above n 1, at 181.

[39] Warburton *Tudor on Charities* (9th ed, Sweet & Maxwell, London, 2003) at 35.

### *13.1.2.2 Relief of the disabled*

Gifts for the relief of persons who suffer some disability or sickness have been held to be charitable.[40] Gifts for the blind have been held charitable. The reason given is that "blind persons are so obviously and gravely in need of help in respect of their disability that a gift to their benefit, without distinction as to means, is ordinarily taken to be one for their relief in respect of the needs arising from their disablement, and consequently to be a good charitable gift in relief of the impotent".[41] Gifts to institutions that look after blind[42] people, such as an institute for the blind[43] and a school for the blind are also charitable.

For similar reasons, gifts to assist people with particular disabilities (for example, the deaf) and institutions caring for them, such as institutes[44] and schools,[45] have been upheld as charitable.

In *Re Laidlaw Foundation*,[46] the Ontario High Court held that the assistance of physically disabled athletes was a charitable purpose. Gifts or bequests in aid of mentally afflicted persons have also been held to be charitable; for example, a gift for the lunatics of the Colony[47] and to the Victorian Council for Mental Hygiene[48] were upheld. So was a gift for the assistance of private homes that treated the mentally ill.[49] A gift for a sheltered workshop for the handicapped has been held to be charitable.[50]

In *Re Twigger*,[51] Tipping J upheld as charitable a bequest to a women's refuge that provided temporary and emergency accommodation for women and children who were the victims of physical, emotional, mental and sexual abuse.

Some authors have raised the problem of whether a gift for impotent millionaires would be charitable.[52] Hubert Picarda wrote that such a conception was misconceived. Although a gift could be charitable even though it benefited the rich as well as the poor, gifts exclusively for the rich would fail.[53] Gifts for the disabled, such as a gift to an institute for the blind, could, however, benefit the rich as well as the poor in providing methods to read or communicate with others.

### *13.1.2.3 Children and young people*

Margaret Soper wrote that "simply being young does not make a person an object of charity".[54] It is worth noting, however, that the Preamble to the *Statute of Charitable Uses Act 1601* refers to "the education and preferment of orphans", "the marriage of poor maids" and "the supportation, aid and help of young tradesmen, handicraftsmen and persons decayed". Therefore, a gift to establish an institution for boys who are destitute orphans or children of parents in harsh circumstances has been held charitable as being for the relief of poverty.[55]

In *Gallagher v Attorney-General*,[56] Neazor J held that a trust to support and educate destitute orphan children in the town of Napier was charitable. In 1895, a scheme was approved by the Court to permit the trustees to expend the whole or any part of the income in providing for the maintenance and support of destitute orphan children of either sex. Finally, in 1990, the trustees asked for further changes because they were conscious that a change in social attitudes and needs in the area of support for needy children had meant that the provision of institutional care was no longer regarded as desirable and there was little or no demand for it in the community. The High Court approved a change in the purpose so that the fund could be applied for the maintenance, advancement, support, welfare and education of needy children and young adults living in the Hawke's Bay region, through the provision of accommodation, clothing, sustenance and the necessaries of life.

40 *Re Smith's Will Trusts* [1962] 2 All ER 563 at 566 per Upjohn LJ; *Re Adams* [1968] 1 Ch 80 at 93 per Danckwerts LJ. See also Dal Pont *Law of Charity*, above n 1, at 183.

41 *City of Hawthorn v Victorian Welfare Association* [1970] VR 205 at 209 per Smith J; *Re Bond* [1929] VLR 333 at 225 per Cussen J; *Re Lewis* [1955] Ch 104. See also Dal Pont *Law of Charity*, above n 1, at 183. See also *Re Joseph* (1907) 26 NZLR 504; 9 GLR 480, where a bequest was made for the relief of the indigent blind of the Jewish persuasion in London; *Re Elliot* (1910) 102 LT 528.

42 *Perpetual Trustee Co Ltd v Shelley* (1921) 21 SR (NSW 426 at 440-441 per Harvey J; *Re Inman (deceased)* [1965] VR 238 at 241 per Gowans J.

43 *Re Vosz* [1926] SASR 218 at 237 per Murray CJ.

44 *Perpetual Trustee Co Ltd v Shelley* (1921) 21 SR (NSW 426 at 440-441 per Harvey J; *Re Vosz* [1926] SASR 218 at 237 per Murray CJ.

45 *Trustees for the Roman Catholic Church, Archdiocese of Sydney v Baulkham Hill Shire Council* (1941) 15 LGR (NSW).

46 (1984) 13 DLR (4th) 491 at 508 per Dymond SCJ, upheld on appeal (1984) 13 DLR (4th) 517.

47 *Diocesan Trustees of the Church of England in Western Australia v Solicitor-General* (1909) 9 CLR 757.

48 *Re Cain (deceased)* [1950] VLR 382 at 385 per Dean J.

49 *Taylor v Taylor* (1910) 10 CLR 218. See also Dal Pont *Law of Charity*, above n 1, at 183.

50 *Re Clark*, High Court, Auckland M 1271/186, 10 November 1989, Sinclair J.

51 [1989] 3 NZLR 329 at 339-340.

52 See P S Atiyah "Public Benefit in Charities" (1958) 21 MLR 138 at 140.

53 *Attorney-General v Duke of Northumberland* (1877) 7 Ch D 745 at 752, per sir George Jessel MR; *Re Macduff* [1896] 2 Ch 451 at 471 (CA). See also R*e White's Will Trust* [1951] 1 All ER 528 at 530, per Harman J (a home of rest for millionaires would fail). See also Picarda 4th ed, above n 2, at 149.

54 *Charities*, above n 22, at [20] citing *Re Payne (deceased)* [1968] Qd R 287 and *Attorney-General v Cahill* [1969] 1 NSWR 85 (CA).

55 *Re Dilworth* (High Court, Auckland, A 550/82, 24 February 1983, Thorpe J. See also *Dilworth v Commissioner of Stamps* (1898) NZPCC 578; [1898] AC 99, which was a decision on the same trust under the *Charitable Gifts Duties Exemption Act 1883*. See also Soper, *Charities*, above n 22, at [20].

56 High Court, Napier, CP 7/90, 4 October 1990, Neazor J.

In *Re Twigger*,[57] Tipping J wrote that a gift, "to qualify as charitable, must be to the home rather than to the children and for the purposes of providing necessaries rather than what could loosely be described as luxuries".[58] In *D V Bryant Trust Board v City of Hamilton*,[59] Hammond J questioned the soundness of the decision in *Re Mitchell* that upheld as charitable "creature comforts".[60] However, the provision of recreation, entertainment, luxuries or "creature comforts" that are ancillary or indirect objects of the institution or gift will not preclude the institution or gift from being charitable if its main object is charitable and these objects are directed to the furtherance of the main object.[61]

In New Zealand, a gift for a girls' hostel has been held charitable.[62] A gift to the Presbyterian Orphanage for Girls at Christchurch for providing financial assistance for all or any girls from time to time leaving the Presbyterian Orphanage to seek their fortunes has also been held charitable.[63] Similarly, in New South Wales, a Court upheld as charitable, both for the relief of poverty and the advancement of education, a gift to the Worshipful Master for the time being of a masonic lodge for the purposes of paying for the advancement, preferment and benefit of a boy selected by him leaving the Masonic Baulkham Hills School for Boys for the purpose of setting up in life, by either furthering the said boy's education or putting him into some trade or profession; preference being given to a boy who was a son of a member or past member of the said lodge.[64] Finally, a Methodist Church children's home has been held charitable.[65]

Jean Warburton wrote in *Tudor on Charities* that Lord Evershed MR dissented in *Re Cole*[66] and wrote that the correct view of the law was that "the care and upbringing of children, who for any reason have not got the advantage or opportunity of being looked after and brought up by competent persons, or who could, for these or other reasons properly be regarded as defenceless or 'deprived', are matters which *prima facie* qualify as charitable purposes".[67] The High Court followed this approach in *Re Carapiet's Trusts*,[68] where Jacobs J held that "the advancement in life of children" was a valid purpose under the fourth head.

It must also be noted that the Preamble to the *Statute of Charitable Uses Act 1601* specifically mentions the "marriages of poor maids" as a charitable purpose. Jean Warburton wrote that a gift for the promotion of marriage was charitable under the fourth head and the public benefit requirement was satisfied although the gift was restricted to members of a particular religion.[69] She also wrote that it was charitable to assist young people to emigrate.[70]

### 13.2 Promotion of health

The promotion of health is specifically mentioned in the *Statute of Charitable Uses Act 1601*. It recognises as charitable trusts for the maintenance of sick and maimed soldiers and mariners and trusts for the relief of the aged or impotent. This section analyses court cases concerning the promotion of physical and mental health.

In delivering the judgment of the Privy Council on an appeal from New South Wales in *Resch's Will Trusts*, Lord Wilberforce said "the provision of medical care for the sick is, in modern times, accepted as a public benefit suitable to attract the privileges given to charitable institutions".[71]

The case law on the promotion of health related to charity law can be divided into two categories: those falling into the promotion of physical health; and those promoting mental health. The cases relating to physical health concern hospitals, rest homes, back-up services and the prevention of alcoholism and drug addictions.

57 [1989] 3 NZLR 329.

58 [1989] 3 NZLR 329 at 340 citing two English cases, *Re Cole* [1958] 3 All ER 102 and R*e Sahal's Will Trust* [1958] 3 All ER 428 and two New Zealand cases, namely *Re Mitchel* [1963] NZLR 934 and *Re McIntosh* [1976] 1 NZLR 308.

59 Above n 4.

60 Ibid, at 349.

61 *City of Hawthorn v Victorian Welfare Association* [1970] VR 205 at 209-210, per Smith J.

62 *Re Strong* [1956] NZLR 275. See also *Salvation Army (Vic) Property Trust v Fern Tree Gully* (1952) 85 CLR 159.

63 *Re Mitchel* [1963] NZLR 934.

64 *Perpetual Trustee Co Ltd v Ferguson* (1951) 51 SRNSW 256.

65 *Re Hook*, High Court, Wellington, A 8/83, 25 October 1984, Ongley J. See also Soper, *Charities*, above n 22, at [20].

66 [1958] Ch 877.

67 Ibid, at 892. See also Tudor 9th ed, above n 39, at 111.

68 [2002] EWHC 1304 at [27].

69 Tudor 9th ed, above n 39, at 111 citing *Re Cohen* (1919) 36 TLR 16.

70 Ibid, citing R*e Tree* [1945] Ch 325.

71 [1969] 1 AC 514 at 540; [1967] 3 All ER 915 at 923 cited by *Auckland Medical Aid Trust v CIR* [1979] 1 NZLR 381 at 389.

### *13.2.1 Hospitals and endowments of hospital beds*

In *Auckland Medical Aid Trust v Commissioner of Inland Revenue*,[72] Chilwell J wrote that the provision of hospitals, clinics and related services was charitable because such a purpose was analogous to the phrase "the relief of the impotent" in the *Statute of Elizabeth*. The element of public benefit was not lost because the services were charged for, or because only a section of the public might require the services provided. He further wrote that hospitals not run for private commercial gain were charitable because they provided for the relief of the sick, which today is used in the broad sense of those requiring medical treatment. In *Re Smith's Will Trusts*,[73] Lord Denning MR said that the word "hospital" was capable of a charitable meaning because it provided for the care of the sick and the wounded and of those who required medical treatment.

Lord Wilberforce, in *Re Resch's Will Trusts*,[74] wrote that "a gift for the purposes of a hospital is *prima facie* a good charitable gift. This is now clearly established both in Australia and in England".[75] Chilwell J analysed New Zealand cases to show that the situation in this country was similar. He cited *Re Harding (deceased), Dixon v Attorney-General*,[76] where the Court held that a public hospital was itself a charity. He wrote that "it is implicit in the decision that medical services of a wide nature carried out in a public hospital are charitable".[77] He also cited *Re McIntosh*.[78] In that case, a scheme was placed before the Court for its approval in which provision was made for the comfort of children and other patients in institutions, including hospitals, a convalescent home and a sanatorium, under the control of the Otago Hospital Board. Beattie J held this to be for the relief of the impotent.

It is clear, however, that a hospital is not charitable if it is carried on commercially for the profit of private individuals.[79] Moreover, a hospital is not charitable if those who are in need are excluded, or the services are provided to an insufficiently large class of the public, to satisfy the requirement of public benefit.[80] Lord Wilberforce wrote in *Re Resch's Will Trusts*:[81]

> *In spite of this general proposition, there may be certain hospitals or categories of hospitals, which are not charitable institutions. Disqualifying* indicia *may be either that the hospital is carried on commercially, i.e., with a view to making profits for private individuals, or that the benefits it provides are not for the public, or a sufficiently large class of the public to satisfy the necessary tests of public character.*[82]

In *Auckland Medical Aid Trust v Commissioner of Inland Revenue*,[83] Chilwell J wrote that the fact that the hospital charged patients for admission did not disqualify it from its charitable character provided that the profits were not available to the members or otherwise available for non-charitable purposes.[84] Chilwell J cited Lord Wilberforce in *Resch*'s case in showing how such hospitals provided benefit to the community. The public benefit of such facilities "results from the relief to the beds and medical staff of the general hospital, the availability of a particular type of nursing and treatment which supplements that provided by the general hospital and the benefit to the standard of medical care in general hospital which arises from the juxtaposition of the two institutions".[85]

Hubert Picarda wrote that in 1948 the National Health Service came into operation in England and destroyed the autonomy of the voluntary hospitals. Their management was vested in bodies responsible for a number of hospitals. "It was held shortly after the Act of 1946 came into operation that the individual hospitals continued to exist as separate charities, in the sense that separate charitable work was continued to be carried on in

[72] [1979] 1 NZLR 673 at 390.

[73] [1962] 2 All ER 563 at 564; [1962] 1 WLR 763 at 766 (CA).

[74] [1969] 1 AC 514.

[75] Ibid, at 540-541. For Australia, his Lordship cited *Taylor v Taylor* (1910) 10 CLR 218 at 227 per Griffith CJ, and *Kytherian Association of Queensland v Skalavos* (1958) 101 CLR 56.

[76] [1960] NZLR 379.

[77] [1979] 1 NZLR 382 at 391. See also *Re Hart, Whitman v Eastern Trust Co* [1951] 2 DLR 30.

[78] High Court, Dunedin, M 107/74, 28 October 1975.

[79] *Re Resch's Will Trusts* [1969] 1 AC 514 at 540 per Lord Wilberforce applied in *Auckland Medical Aid Trust v Commissioner of Inland Revenue* [1979] 1 NZLR 382 at 398 per Chilwell J and in *Executor Trustee and Agency Company of South Australia Limited v Warbey* [1971] SASR 255 at 262 per Bray CJ.

[80] Ibid, at 540-541 per Lord Wilberforce, cited in *Auckland Medical Aid Trust v Commissioner of Inland Revenue* [1979] 1 NZLR 382 at 391-392 per Chilwell J. See also *Re Wyld* [1912] SALR 190 at 205 per Murray J ("so long as the poor are not excluded from its benefits, a gift to found a hospital is a good charitable gift"); *Taylor v Taylor* (1910) 10 CLR 218 at 227 per Griffith CJ ("a gift for a hospital would be held to be a good charitable gift, unless, perhaps, if the poor were excluded from its benefits").

[81] Ibid.

[82] Ibid, at 540-541.

[83] [1979] 1 NZLR 673 at 390.

[84] *Taylor v Taylor* (1910) 10 CLR 218 at 239-240 per Isaacs J; *Queensland Trustees Limited v Green* [1911] St R Qd 105 at 110 per Real ACJ; *Perpetual Trustee Co (Ltd) v St Luke's Hospital* (1939) SR (NSW) 408 at 419-421 per Nicholas J; *Re Chown* [1939] VLR 443 at 446 per Mann CJ; *Re Sutherland (deceased)* [1954] St R Qd 99 at 103 per Macrosdsan CJ; *Re Resch's Will Trusts* [1969] 1 AC 514 at 541 per Lord Wilberforce; *West Australian Baptist Hospital & Homes Trust Inc v City of South Perth* [1978] WAR 65 at 69 per Lavan SPJ. See also Dal Pont *Law of Charity*, above n 1, at 186.

[85] *Re Resch's Will Trusts* [1969] 1 AC 514 at 544 per Lord Wilberforce, cited in *Auckland Medical Aid Trust v CIR* [1979] 1 NZLR 381 at 392.

each of them [...] and that if the testator made gifts to the individual hospitals effect could be given to those gifts".[86]

New Zealand, however, has kept private hospitals, some of which are charitable. In *Re Harding (deceased), Dixon v Attorney-General*,[87] it was held that a public hospital was itself a charity. It is implicit in the decision that medical services of a wide nature carried out in a public hospital are charitable. The New Zealand Charities Registration Board has registered a number of public hospitals.[88]

### *13.2.2 Institutions analogous to hospitals: maternity hospitals, rest homes and clinics*

Institutions analogous to hospitals have been accorded charitable status. In *Auckland Medical Aid Trust v CIR*, Chilwell J wrote that "a distinction between health services carried on within hospitals and those within other lawful institutions is no longer valid today in assessing the charitable nature of a purpose".[89] In *Attorney-General ex rel Rathbone v Waipawa Hospital Board*,[90] Beattie J held that a maternity hospital was a charitable purpose. He wrote that "although the establishment of a maternity hospital, *per se*, was not necessarily a charitable purpose [as decided in *Gordon v Commissioner of Stamp Duties*],[91] yet the choice of the Board as trustee does indicate an intention to benefit the public generally so that a valid charitable trust is created".[92]

The decision in *Gordon v Commissioner of Stamp Duties*[93] was made not on principle, but according to its very unusual facts. In that case, the testatrix bequeathed property to her trustees to be held upon trust to carry on a maternity hospital in such manner as they might think fit. The problem with that trust was that she directed that the hospital be leased to one of the trustees. A further problem was an absence of definition of the purposes for which the hospital was being carried on, and an absence of indication of those to benefit by that hospital. Finally, there was an absence of anything to show that it had to be carried on in some way for the benefit of a class of the community or of any particular class of the community sufficiently large to be treated as constituting a public use. Margaret Soper wrote: "This case is to be distinguished from many of the hospital cases on the grounds that in such cases there may be an existing institution whose purposes are charitable, and where the purpose is not defined, there is sufficient indication of the class of the public to be benefited and the mode of benefit to show a public, general, and charitable purposes".[94]

In *Re Wyld*,[95] the High Court of Australia upheld a gift for "the maintenance of a maternity home to be available to young women who have erred for the first time" because a "maternity home is nothing but a hospital for the reception of women about to give birth to children".[96]

The promotion of maternal welfare in New Zealand by the taking of practical steps in cooperation with the Ministry of Health has been held charitable. In *McGregor v Commissioner of Stamp Duties*,[97] gifts to the New Zealand Obstetrical Society, whose activities included the distribution of pamphlets to expectant mothers and the education and shaping of public opinion on all matters that concerned maternal welfare in New Zealand, were held charitable as providing education in the treatment and care of maternity cases for a large section of the community or for the promotion of maternal welfare in New Zealand.

Chilwell J cited Australian cases with approval, among which was *Kytherian Association of Queensland v Skalavos*.[98] In that case a bequest "upon trust for the erection and/or benefit of a Sanatorium and/or Hospital" on a specified Greek island was upheld by the High Court of Australia. The High Court rejected the argument that the term "sanatorium" could describe an institution conducted for the purpose of profit, stating that "when the

[86] Picarda 4th, above n 2, at 151 citing *Re Ginger* [1951] Ch 458.

[87] [1960] NZLR 379, cited with approval in *Auckland Medical Aid Trust v CIR* [1979] 1 NZLR 381 at 391 per Chilwell J. See also *Wellington Hospital and Charitable Aid Board v Mayor of Wellington* (1912) 14 GLR 758; *Public Trustee v Denton* [1917] NZLR 263; *Re Green* [1937] NZLR 908, and *Re List* [1949] NZLR 78; [1948] GLR 541.

[88] On the Charities Register, see amongst others: Braemar Hospital Limited, Registration number CC22667; Calvary Hospital Southland Limited, Registration number CC10515; Mercy Hospital Dunedin Limited, Registration number CC31503; Q.E. Hospital Limited, Registration number CC20347; Selina Sutherland Hospital Limited, Registration number CC25881; Southern Cross Hospitals Limited, Registration number CC33329; St George's Hospital Limited, Registration number CC27014; Te Hopai Hospital Limited, Registration number CC 40546.

[89] [1979] 1 NZLR 381 at 389.

[90] [1970] NZLR 1148.

[91] [1946] NZLR 625 at 633-634.

[92] 1970] NZLR 1148 at 1152.

[93] [1946] NZLR 625.

[94] Soper *Charities*, above n 22, at [22] footnote 2.

[95] [1912] SALR 190.

[96] [1912] SALR 190 at 204-205. See also Gino Dal Pont *Charity Law in Australia and New Zealand* (Oxford University Press, Oxford, 2000) at 130.

[97] [1942] NZLR 164; [1942] GLR 101, cited with approval in *Auckland Medical Aid Trust v Commissioner of Inland Revenue* [1979] 1 NZLR 381 at 392, per Chilwell J.

[98] (1958) 101 CLR 56.

terms of the disposition in question are considered it is seen that the word 'sanatorium' is used in juxtaposition to the word 'hospital' and the notion is inescapable that what the testator was seeking to describe was an institution for the reception and care of persons in need of medical attention".[99]

A rest home for those needing it has been held charitable in a number of cases. The leading case in that regard is *Re White's Will Trusts*.[100] In that case, a gift bequeathed to establish a home of rest for nurses of the Sheffield Royal Infirmary was upheld because it provided a means of restoring the efficiency of the nurses in the performance of their duties. Herman J made it clear that there had to be an indication that the persons to whom the home of rest was aimed had a need for such a home that would enhance a charitable purpose, such as education, the relief of poverty or the relief of the impotent.[101] A trust to establish a rest home for millionaires would fail.[102]

In New Zealand, a trust established to provide staff housing at hospitals, and more particularly a residence for Plunket nurses and children, has been held charitable.[103] Accommodation for the use of relatives of patients who are critically ill was held to be charitable in *Re Dean's Will Trusts*,[104] on the basis that the provision of such accommodation could be a very important purpose of the hospital for the spiritual and psychological comfort of its patients and indeed to aid their recovery. Finally, a trust to establish a convalescent home for children was held charitable in *Re List*.[105]

Chilwell J considered that a general dispensary, a type of clinic that provided for the occasional treatment of outpatients, was similar to a hospital and should be charitable.[106] Consequently, in *Auckland Medical Aid Trust v CIR*,[107] he concluded that the trust was charitable, although it limited the provision of medical services to the control of the human reproductive process. This service provided public benefit because it was a purpose that was beneficial, available to a sufficient section of the public and enforceable by the Court.

### *13.2.3 Back-up services*

The endowment of hospital beds is also a well established form of charity. The English Court of Appeal in *Re Adams*[108] considered what was meant by a trust for endowing a bed for paying patients. It included expenditure in the provision of an increased number of beds available for paying patients but was also able to embrace the investment of funds and application of income in improving the services and therefore the treatment accorded to paying patients. Danckwerts LJ accepted that it would be perfectly proper to apply income to any of the following improvements: (a) the provision of better beds, bedding, furniture, crockery, cutlery, floor coverings, curtains and other furnishings, and the better maintenance of all such things; (b) the more frequent redecoration of the accommodations; (c) the sound-proofing of rooms; (d) the provision of better food and a wider choice of food; and (e) the provision for patients (who were not required to remain in bed) of a day or sitting room and also a dining room.[109]

New Zealand cases have held that the promotion of any of the objects and purposes of a public hospital is charitable. For example, a gift towards the relief of patients in a hospital by providing them with extra comforts, nursing and attendance has been held charitable.[110] A bequest to a hospital and charitable aid board to be applied for the benefit of the convalescent ward of the hospital has been held charitable as affording relief to a class of impotent persons and a benefit to a public hospital.[111] Finally, in *Re McIntosh*,[112] a scheme was placed before the Court for its approval in which provision was made for the comfort of children and other patients in institutions, including hospitals, a convalescent home and a sanatorium, under the control of the Otago Hospital Board. Beattie J held this to be for the relief of the impotent. This case was cited with approval by Chilwell J in *Auckland Medical Aid Trust v CIR*.[113]

[99] Ibid, at 66 per McTiernan, Fullager and Taylor JJ. See also Dal Pont *Law of Charity*, above n 1, at 186.

[100] [1951] 1 All ER 528. That case was followed in New Zealand by *Re Harding* [1960] NZLR 379.

[101] In *Re White's Will Trust*, Harman J followed three other cases that had been held charitable where the intended beneficiaries themselves carried out charitable work and the rest home would restore their efficiency at work. These cases were *Re James* [1932] 2 Ch 25 (a rest home for the members of a religious community); *Re Estlin* [1903] 72 LJ Ch 687 (a rest home for lady teachers); and *Re Chaplin* [1933] Ch 115 (a rest home for persons in need of rest by reason of the stress and strain caused or partly caused by the condition in which they ordinarily lived and/or worked). See also Picarda 4th ed, above n 2, at 153.

[102] *Re White's Will Trust* [1951] 1 All ER 528 at 530.

[103] *Public Trustee v Wanganui Borough* [1918] NZLR 646; [1918] GLR 468.

[104] [1950] 1 All ER 882, applied in *Re Harding* [1960] NZLR 379.

[105] [1949] NZLR 79; [1948] GLR 541.

[106] See *Auckland Medical Aid Trust v Commissioner of Inland Revenue* [1979] 1 NZLR 673 at 391 citing *Re Alfred Ford* [1945] 1 All ER 288 at 288-289.

[107] Ibid.

[108] [1968] Ch 80.

[109] Ibid, at 93. See also Picarda 4th ed, above n 2, at 152.

[110] *Otago Hospital and Charitable Aid Board v Dunedin Hospital Contributors* (1982) 11 NZLR 419.

[111] Re List [1949] NZLR 78; [1948] GLR 541 and *Re Harding* [1960] NZLR 379, both applied in *Re Flannagan* [1962] NZLR 480. See Soper *Charities*, above n 22, at [21].

[112] [1976] 1 NZLR 308.

[113] [1979] 1 NZLR 381 at 391.

### *13.2.4 Other health purposes*

Numerous purposes for the promotion of health that do not fall into the four main categories analysed previously have been held charitable. In *Hewitt v Commissioner of Stamp Duties*,[114] Fair J held that a trust to "promote the improvement of health, the prevention of disease and the mitigation of suffering in the Dominion of New Zealand or elsewhere" was a charitable purpose. The trust established for the general purposes of the New Zealand Red Cross Society has been held charitable. In that case, however, Fair J considered that the trust could not claim death duties exemption because it remitted too much of its funds outside New Zealand to the International Red Cross Society in London and the League of Red Cross Societies.

In *Re Chapman*,[115] Greig J wrote that there could be no doubt that a bequest to a fund for lepers was a charitable bequest showing, at the least, a general charitable intention.

Courts have held that the reduction of intemperance through the promotion of temperance is a charitable purpose because alcoholism and drug addiction are both social evils causing crime and domestic unhappiness.[116] In *Re Hood*,[117] the English Court of Appeal held that temperance was charitable *per se*. This was followed by New Zealand courts in *Knowles v Commissioner of Stamp Duties*,[118] where Kennedy J held that temperance was a charitable purpose. He considered, however, that some of the main purposes were political. He wrote that "where the purposes of the trust are definitely for legislative action such as to secure legislative temperance reform one may not predicate that in the first case the dominant purpose is the general promotion of temperance and disregard the political object and say it is merely subsidiary".[119] The Charities Commission registered the New Zealand Women's Christian Temperance Union Incorporated after it removed its political purpose from its rules.[120]

Hubert Picarda[121] discussed whether a trust to promote family planning would be charitable. He wrote that the Charity Commissioners for England and Wales had recognised that "to preserve and protect the good health both mental and physical of parents, young people and children and to prevent the poverty, hardship and distress causes by unwanted conception" is a charitable object.[122] The Charity Commissioners also upheld the objects of the British Pregnancy Advisory Service[123] as charitable. The objects were the promotion, education and research of the subject of pregnancy and termination of pregnancy. They also included the provision of "advice, treatment and assistance for women who are suffering from any physical or mental illness or distress as a result of or during pregnancy".

It seems that there is no authority in the Commonwealth on family planning, although in the Canadian province of Alberta, organisations to support unmarried mothers have been held charitable.[124] There are two United States decisions on the subject of family planning. In *Slee v IRC*,[125] Hand J held that the particular institution was not exclusively charitable because it purported to enlist the support of legislators and others to effect the lawful repeal and amendment of statutes dealing with the prevention of conception. However, to collect and disseminate lawful information about the consequences of uncontrolled procreation, and to maintain a medical clinic for the giving of advice to married women as to birth control if in the judgement of the physicians such advice was necessary, was considered as charitable. In *Faulkner v IRC*,[126] a gift to the Birth Control League of Massachusetts was upheld as charitable after the League had decided to abandon its political and legislative objects prior to the date of the gift. The New Zealand Charities Registration Board has also registered entities devoted to family planning.[127]

[114] [1952] NZLR 726 at 730, [1952] GLR 498.

[115] High Court, Napier, CP 89/87, 17 October 1989 at 6.

[116] *Inland Revenue Commissioner v Temperance Council of Christian Churches of England and Wales* (1926) 136 LT 27.

[117] [1931] 1 Ch 240.

[118] [1945] NZLR 522.

[119] Ibid, at 530.

[120] See the Charities Register, Registration number CC43921.

[121] Picarda 4th ed, above n 2, at 154.

[122] [1976] Ch Com Rep 26-27 at [54-61] (attack on charitable status rejected).

[123] [1978] Ch Com Rep 26-27 at [82-85].

[124] *Re Andrae* (1967) 61 WWR 182.

[125] 42 F 2d 184 (1930).

[126] 112 F 2d 987 (1940). See also Picarda 4th ed, above n 2, at 154.

[127] See on the Charities Register, Natural Family Planning Foundation Inc, Registration Number CC11030, and New Zealand Family Planning Association Inc, Registration number CC11104.

### *13.2.5 Promotion of mental health and alternative medicine*

In *Re Osmund*,[128] a bequest to trustees upon trust "in their absolute discretion to apply the same to the medical profession for the furtherance of psychological healing in accordance with the teaching of Jesus Christ" was held to be a valid charitable trust. Jean Warburton wrote that "the courts in New Zealand have refused to differentiate between the provision of health services in hospitals and other lawful institutions in determining charitable status and have accepted the provision of psychotherapeutical services as charitable".[129]

In *Centrepoint Community Growth Trust v Commissioner of Inland Revenue*,[130] any member of the public was able to seek the help the Trust offered. By using techniques of psychotherapy the Trust had treated people with emotional and psychological disturbances. It had thereby provided relief for the sick, even though its treatment was by psychological healing and not orthodox medical methods. The provision of these psychotherapy services was one of the main purposes of the Trust. The fact that it imposed a modest charge for some of its counselling and therapy activities did not affect the conclusion that the Trust's activities were for purposes beneficial to the community.

In *Re Le Cren Clark (deceased)*,[131] the testatrix had left her residual estate, including her home, to be used "to further the Spiritual Work now carried on by us together". The spiritual work in question comprised healing sessions that involved the laying on of hands by those with the healing gift and the saying of prayers and meditation. The Court held that the testatrix had established a valid charitable trust because faith healing was recognised as a charitable purpose without any religious element being included and, in any event, the religious nature of the faith healing movement in question rendered the work a charitable purpose within which a sufficient element of public benefit was assumed so as to enable the charity to be recognised by law as being such unless there was contrary evidence.[132] The question of proof of the efficacy of the healing method was also raised in that case. The Court wrote that the test of "efficacy in order to sustain a claim to be charitable, would be quite a low one. The test there [Re *Price, Midland Bank Executor and Trustee Co v Harwood*][133] was stated to be only that the work 'may have that result' meaning, the result of the mental or moral improvement of man".[134]

### *13.2.6 Summary of the section*

The promotion of health has been held to be charitable. This is so for the promotion of physical and mental health, regardless of whether the health promotion activities are practised within a hospital or not. To date 1,657 organisations devoted to health (comprising 7% of all registered charities) have been registered.[135]

## 13.3 Promotion of social rehabilitation

Social rehabilitation plays an important part in human beings' attaining happiness. This is why such a purpose is considered charitable. Social rehabilitation is defined by the *Concise Oxford English Dictionary* as restoring to health or normal life by training and therapy after imprisonment, addiction or illness.[136] Accordingly, social rehabilitation fits into the general promotion of health discussed in this chapter. Hubert Picarda has added a number of subcategories to those defined by the Dictionary, such as the social rehabilitation of returning servicemen and women, refugees and victims of disasters, persons of limited opportunities and others.[137]

This section analyses different types of social rehabilitation, including the resettlement of returning servicemen, the social rehabilitation of victims of disasters, assistance

[128] [1944] Ch 206 cited in *Centrepoint Community Growth Trust v Commissioner of Inland Revenue* [1985] 1 NZLR 763 at 699 per Tompkins J.

[129] "Tudor 9th ed", above n 39, at 108.

[130] [1985] 1 NZLR 763 at 698-699 per Tompkins J.

[131] [1996] 1 All ER 715.

[132] Ibid, at 722-723.

[133] [1943] 2 All ER 505 at 510.

[134] [1996] 1 All ER 715 at 720.

[135] Charities Commission *A Snapshot of New Zealand's Charitable Section* (31 October 2009 on the Commission's website: www.charities.govt.nz/news/fact_sheets/stats_091206.pdf.

[136] *Concise Oxford English Dictionary* (11th ed, revised, Oxford University Press, Oxford, 2006) at 1212 "rehabilitate".

[137] Picarda 4th ed, above n 2, at 207-210.

for refugees and immigrants, the social rehabilitation of persons of limited opportunities, and other types of rehabilitation that are not already covered by the above-mentioned categories.

### *13.3.1 Resettlement of returning servicemen*

The Preamble to the *Statute of Charitable Uses 1601* specifically provides for "the maintenance of sick and maimed soldiers and mariners". In *Verge v Somerville*,[138] the Privy Council decided that a trust established for the rehabilitation of men from New South Wales who had served in the war was charitable. This was so because these men were to be restored to their native land and to be given a fresh start in life. The Privy Council also held that a valid charitable trust could exist although in its administration the benefit was not confined by the donor to the poor to the exclusion of the rich. Although the Privy Council upheld the trust under the fourth head of charity, it noted that it would also be ready to uphold the trust as being for the relief of poverty. In *Re Elgar*,[139] the New Zealand Court of Appeal decided without citing any previous decisions that a bequest "for the re-establishment in civil life of men in New Zealand who have been or are about to be discharged from the navy or air force" was charitable. The testatrix had expressed a preference for assisting men who were farmers or who proposed to become farmers. That New Zealand decision was approved by the High Court of Australia in *Downing v Federal Commissioner of Taxation*.[140]

A number of cases have been decided in New Zealand involving money left for wounded and disabled soldiers. In *Re Simmonds*,[141] Reed J agreed that a gift "to a home for wounded sailors of the British Empire" was charitable because it was not given to individuals but to a defined class of the public and provided sufficient public benefit. In *Re Booth*,[142] the Court found charitable a bequest that was for the benefit and maintenance of New Zealanders who had been disabled or contracted ill health whilst on service during the Second World War or who were suffering or incapacitated by ill health and were indigent or in necessitous circumstances. Similarly, in *Re Oag*,[143] Quilliam J upheld a gift for a recuperative home for invalid sailors or orphans and widows of sailors. Similar conclusions were arrived at by Australian courts.[144]

### *13.3.2 Social rehabilitation of victims of disasters*

Disaster funds also fall into the category of resettlement and social rehabilitation. In *Re North Devon and West Somerset Relief Fund*,[145] the Court held that a fund raised by public subscription for victims of a flood disaster was held on trust for charitable purposes, so was a fund for air raid distress.[146] In the *North Devon* case, the Court did not adequately determine the question of public benefit. It was not clear if such funds had to be open to all the victims in a particular area. Jean Warburton wrote that "it is thought, however, that, if any inhabitants of the trust's area of operation who would otherwise be capable of availing themselves of the benefits of the trusts related to the fund are excluded from benefit by reason of some personal disqualification, the trust would not be charitable".[147] Moreover, a disaster fund will only be charitable if the help is given only to those in need. In *Re Gillingham Bus Disaster Fund*,[148] the appeal for funds was worded so broadly and so vaguely that the Court considered that the trust was void for uncertainty. In that case, the appeal for funds stated that the fund was to be devoted, among other things, to defraying the funeral expenses, caring for the boys who might be disabled and to such worthy cause or causes in memory of the boys who lost their lives as the mayors might determine.

It must be noted, however, that the surrounding circumstances of the gift must be taken into consideration. In *Re Pieper (deceased)*,[149] a bequest to a trustee to be used "for the relief of distress in Europe" was upheld even though its terms went beyond poverty. This

[138] [1924] AC 496 at 506.

[139] [1957] NZLR 1221 (CA).

[140] (1971) 125 CLR 185 at [16].

[141] [1933] NZLR 172; [1933] GLR 757.

[142] [1954] NZLR 1114.

[143] High Court, Wellington, M 279/71, 13 October 1971. See also Soper, *Charities*, above n 39, at [49].

[144] See *Barby v Perpetual Trustee Co (Ltd)* (1937) 58 CLR 316 (gift for the relief of necessitous returned soldiers and their families who may be in necessitous circumstances held charitable); *Armenian General Benevolent Union v Union Trustee Co of Australia Ltd* (1952) 87 CLR 597 at 603 per Dixon CJ and McTiernan J (gift for the benefit of orphans whose fathers fought in a specified war); *Re McAuliffe (deceased)* [1944] St R Qd 167 at 177 per Macrossan ACJ (held that the purpose of safe-guarding the interests of and of obtaining just and equitable treatment for all members of the forces who contracted tuberculosis and the dependants of any members of the association who have died would be charitable). See Dal Pont *Law of Charity*, above n 1, at 257 footnotes 89 and 90 where the author cited and annotated these cases.

[145] [1953] 1 WLR 1260.

[146] *Re Hobourn Aero Components Ltd's Air Raid Distress Fund* [1946] Ch 194.

[147] Tudor 9th ed, above n 39, at 110.

[148] [1959] Ch 2. See also Picarda 4th ed, above n 2, at 207-208.

[149] [1951] VLR 42 at 44. See also Dal Pont *Charity Law in Australia and New Zealand*, above n 96, at 179.

was because the will had been made shortly after the end of the Second World War, and it was well known that since the war, "people may have considerable means and yet be unable to obtain urgently-needed food, clothing, shelter, or medical supplies".

Concerning disaster appeals, the United Kingdom Attorney-General has outlined specific guidance on the subject. It gives specific instructions concerning the form a charitable fund must take. Such appeal must clearly identify that the purpose is to relieve those who may be in need of help (whether now or in the future) as a result of a specific tragedy. Any surplus after their needs have been met will be used for charitable purposes in one or more of the following ways: to help those who suffer in similar tragedies, to benefit charities with related purposes or to help the locality affected by the accident or disaster. It further instructs that public appeal funds cannot be used to give individuals benefits over and above those appropriate to their needs.[150]

### *13.3.3 Assistance for refugees and immigrants*

It is generally agreed that a gift for the relief of refugees would be charitable. In *Re Cohen*,[151] the testator left bequests "for the relief and assistance of Jewish refugees". In holding the bequests to be charitable, Hay J cited *Verge v Somerville*[152] to the effect that the objects as expressed by the testator would make applicable not only the first but also the fourth head of charity. He further wrote that in this case, it was not a question of repatriation but the establishment in a new country of persons uprooted from and compelled to flee their own homes. To suggest that the expression "relief and assistance" as used by the testator might mean nothing more than purely administrative procedures (such as obtaining passports or entry permits) as opposed to financial help was to ignore the realities of the situation.

In *Re Stone (deceased)*,[153] the Supreme Court of New South Wales held that the promotion of a Jewish settlement in Israel was charitable under the fourth head of charity. In finding the trust charitable, Helsham J referred to the case of *Verge v Somerville*. He did not discuss why the resettlement of a Jewish settlement in Israel was similar to the resettlement of soldiers. However, the return to the Promised Land, combined with the persecution of the Jewish people that culminated in the establishment of the State of Israel, made this trust analogous to that in *Verge v Somerville*. The relief of refugees was also upheld as charitable in *Re Morrison*.[154]

In *Vancouver Society of Immigrants and Visible Minority Women v MNR*,[155] the majority of the Supreme Court of Canada was critical of the decision reached *in Re Wallace*,[156] in which a trust to aid immigrants was upheld as a trust for the relief of poverty. Iacobucci wrote that "while it is true that refugees and immigrants may share many interests and needs, it is the fact that refugees are 'compelled to flee their own homes' in the face of persecution that makes their situation analogous to that of soldiers returning from war".[157] Gino Dal Pont also criticised *In Re Wallace*. He wrote: "In modern time, the term 'immigrant' would be unlikely of itself to connote poverty. Perhaps the modern equivalent is the term 'refugee', although in any event a gift providing for the benefit of refugees is likely to fall within the fourth head of charity".[158]

The minority, however, in *Vancouver Society of Immigrants and Visible Minority Women v MNR* would have had no difficulty in recognising that gifts to help immigrants could be charitable. Gonthier J cited with approval *In Re Wallace*. He wrote that Canadian authority recognised assisting immigrants to obtain employment as a charitable purpose, citing *Re Fitzgibbon*.[159] In that case, a bequest to an organisation known as the "Women's Welcome Hostel" was upheld. The bequest created an annual prize to be given to a girl who had spent time at the Hostel, which was an institution for the assistance of immigrant girls,

[150] "Disaster Appeals: Attorney-General's Guidelines" CC40 (January 2002) version on the website: www.charity-commission.gov.uk/Publications/cc40.aspx, at [12, 17].

[151] [1954] NZLR 1097 at 1101.

[152] [1924] AC 496 at 506 (PC).

[153] (1970) 91 WN (NSW) 704 cited and commented on in *Vancouver Society of Immigrants and Visible Minority Women v MNR* [1999] 1 SCR 10 at [1810 per Iacobucci J [*Vancouver Society of Immigrants*].

[154] (1967) 111 Sol Jo 756; 117 New LJ 757 (Ch D).

[155] Above n 153, at [182].

[156] [1908] VLR 636 (SC).

[157] *Vancouver Society of Immigrants*, above n 153, at [184].

[158] Dal Pont *Charity Law in Australia and New Zealand*, above n 96, at 117.

[159] (1916) 27 OWR 207 (HC).

and who had subsequently joined and remained with a single employer for three years or more. Middleton J observed "[t]his institution is undoubtedly a charitable institution, for the laudable purpose of aiding and assisting emigrant girls coming to Canada with a view of obtaining employment".[160] It must be added that no suggestion was made in the case that this purpose fit under the relief of poverty head of charity, so it must have been decided under the fourth head as being another purpose beneficial to the community. Gonthier J wrote that "it is uncontroversial that the institution at issue in *Fitzgibbon* had an educational element, very much like Society under consideration in this appeal, but that does not refute Middleton J.'s characterization of the institution's purpose".[161]

Gonthier J also pointed out that the Internal Revenue Service in the United States had ruled that a non-profit organisation whose objects were to assist immigrants to that country "in overcoming social, cultural and economic problems by either personal counselling or referral to the appropriate public or private agencies" was charitable under the applicable section (501(c)(3)) of the Internal Revenue Code.[162] Likewise, the Charity Commissioners for England and Wales have registered an organisation whose objects are "to assist refugees, asylum seekers, migrants and others who recently arrived in the United Kingdom, in particular those from the Horn of Africa, who through their social and economic circumstances are in need and unable to further their education or gain employment, and who may be at risk or [*sic*] permanent exclusion from the labour market".[163]

Finally, Gino Dal Pont wrote that the dissenting opinion of Gonthier J in *Vancouver Society of Immigrants and Visible Minority Women v MNR*[164] "would be more likely to be followed in Australian and New Zealand courts".[165] In *Vancouver Society of Immigrants*, Gonthier J concluded as follows:

> *The unifying theme to these cases, in my view, is the recognition that immigrants are often in special need of assistance in their efforts to integrate into their new home. Lack of familiarity with the social customs, language, economy, job market, educational system, and other aspects of daily life that existing inhabitants of Canada take for granted may seriously impede the ability of immigrants to this country to make a full contribution to our national life. In addition, immigrants may face discriminatory practices which too often flow from ethnic, language, and cultural differences. An organization, such as the Society, which assists immigrants through this difficult transition, is directed, in my view, towards a charitable purpose. Clearly, a direct benefit redounds to the individuals receiving assistance from the Society. Yet the nation as a whole gains from the integration of those individuals into its fabric. That is the public benefit at issue here. I have no hesitation in concluding that the Society's purpose is charitable under the second or fourth heads of the* Pemsel *classification.*[166]

The New Zealand Charities Registration Board has registered a number of entities whose main purpose is to provide assistance for immigrants in adapting to their new country of choice.[167]

### *13.3.4 Social rehabilitation of persons with limited opportunities*

Hubert Picarda wrote that other examples of charitable gifts for resettlement or rehabilitation were: "loan funds (free of interest) for those who are temporarily distressed, especially craftsmen and small tradesmen; apprenticeship schemes; marriage subsidies for poor girls; and gifts for orphanages or homes established by local authorities".[168] Although all of these can fall under the relief of poverty, not all gifts for orphanages and local authority homes are necessarily for the exclusive benefit of the poor. Lord Evershed

[160] Ibid, at 210.

[161] *Vancouver Society of Immigrants*, above n 153, at [90].

[162] US Rev Rul 76-205 in Internal Revenue Cumulative Bulletin 1976-1981 at 154.

[163] *Ethnic Minority Training and Employment Project* Reg. No. 1050917( registered 22 November 1995) cited in *Vancouver Society of Immigrants*, above n 153, at [92] per Gonthier J.

[164] Above n 153.

[165] Dal Pont *Charity Law in Australia and New Zealand*, above n 96, at 193.

[166] Above n 153, at [95].

[167] See among others: Immigration Legal Support Trust Inc, Registration number CC38842, and South African Immigrant Community Trust, Registration number CC27496.

[168] Picarda 4th ed, above n 2, at 208.

MR in *Re Cole*[169] commented that "the care and upbringing of children, who for any reason have not got the advantage or opportunity of being looked after and brought up by competent persons, or who could, for these or other reasons, properly be regarded as defenceless or 'deprived' are matters which *prima facie* qualify as charitable purposes".[170]

From the class of persons to which a gift is directed, it may be inferred that its aim is to provide social rehabilitation to people with limited opportunities. A Canadian court has decided that a trust to promote aid to and protect citizens of the United States of America of African descent in the enjoyment of their civil rights as provided by the United States Constitution was charitable. Australian courts have made such inferences in a number of cases stating that their social and economic conditions have been judicially described as "notoriously in this community a class which, generally speaking, is in need of protection and assistance".[171] Therefore, a gift for the benefit of Aboriginal women in Victoria[172] and the provision of accommodation for transient Aboriginal persons or families[173] has been found charitable. In *Aboriginal Hostels Ltd v Darwin City Council*, Nader J gave the following reasons for such decisions:

> *It is clear that an object of providing accommodation to all transients of whatever race would not be charitable: after all, the most expensive hotels do just that. What I regard as determinative in this case is that the transient person is Aboriginal. The fact that the purposes of accommodation are in respect of Aboriginal persons gives a special character to those purposes which renders an otherwise neutral purpose charitable.*[174]

Gino Dal Pont wrote that "the same type of logic would apply to the Māori in New Zealand, and to other recognised disadvantaged sections of the community".[175] Moreover, in *Latimer v CIR*,[176] Blanchard J noted that "it is notorious that many (if not most) Māori who are members of groups directly benefiting from the assistance of the trust and from settlement of grievances are likely to be at the lower end of the socio-economic scale".[177] Blanchard J also agreed with "Lord Macnaghten's observation in *Pemsel* that the fourth head of the trust may incidentally benefit the rich as well as the poor".[178] In light of these comments, the New Zealand Charities Registration Board has registered a number of Māori organisations whose purposes are for the promotion of the Māori culture and social and economic development.[179]

Canadian courts have held that a gift for a community project[180] or a gift to a boys' club[181] can be charitable as such if it is confined in some way, for example to the underprivileged. A community project confined to the inhabitants of a particular locality may be charitable. A boys' club may also be exclusively charitable if it is operating within the limits of section 61A of the *Charitable Trusts Act 1957*, which states that facilities for recreation or other leisure-time occupation are deemed to have been always charitable if those facilities are provided in the interest of social welfare.[182] The New Zealand Charities Registration Board has registered a number of such clubs.[183]

Hubert Picarda wrote that the Charity Commission for England and Wales had registered a trust whose purpose was "to relieve lesbian and gay young persons in conditions of need, hardship or distress by the provision of temporary homes for such young persons who have need thereof and by the provision of counselling and other forms of assistance for such young persons".[184] The New Zealand Charities Registration Board has similarly registered entities devoted to the welfare and support of gays and lesbians.[185]

In a case on appeal from Guyana, the Privy Council held that an organisation founded to provide advice for the community on domestic and health matters was not charitable.[186]

[169] [1958] Ch 877.

[170] Ibid, at 892.

[171] *Re Mathew (deceased)* [1951] VLR 226 at 232 per O'Bryan J;

[172] *Re Bryning (deceased)* [1976] VR 100 at 102 per Lush J.

[173] *Aboriginal Hostels Ltd v Darwin City Council* [1985] 55 LGRA 414 at 428 per Nader J; *Maclean Shire Council v Nungera Co-operative Society Ltd* (1994) 84 LGERA 139 at 144 per Handley JA; *Dareton Local Aboriginal Land Council v Wentworth Council* (1995) 89 LGERA 120 at 126-127 per Bignold J; *Alice Springs Town Council v Mpweteyerre Aboriginal Corporation* (1997) 139 FLR 236 at 259 per Thomas J; *Coomelah Aboriginal Housing Co. Ltd. Wentworth Shire Council* (1998) 101 LGERA 10 at 14-15 per Bignold J.

[174] Ibid, at 427-528.

[175] Dal Pont *Charity Law in Australia and New Zealand*, above n 96, at 179.

[176] [2002] 3 NZLR 157 (CA).

[177] Ibid, at 209.

[178] Ibid.

[179] See among others: Ngati Haua Iwi Trust, registration number CC29892; Ngai Te Ao Kapiti Hapu Inc, registration number CC28640; Rangitane o Wairarapa Inc, registration number CC20422.

[180] *Re Jacques* (1967) 63 DLR 92d) 673.

[181] *Re Kiwanis Club* [1967] 2 OR 223.

[182] (1977) NLJ 811. See also Picarda 4th ed, above n 2, at 209.

[183] See among others: Wanganui Boys & Girls Gym Club Inc, registration number CC25956, which took over the assets and liabilities of Wanganui Boys & Girls Club Inc.

[184] *The Albert Kennedy Trust* [1991] Ch Com Rep 42. See also Picarda 4th ed, above n 2, at 209.

[185] See among others: Galaxies (The Lesbian, Gay and Bisexual Christian Community of Wellington) Incorporated, registration number CC24133; Lesbian Support Organisation (Auckland) Incorporated, registration number CC24353; Outline New Zealand Incorporated, registration number CC29680.

[186] *D'Aguiar v Guyana IRC* [1970] 49 ATC 33 (PC).

In the Guyana Court of Appeal, Stoby C in his dissenting judgment pointed out "today accurate information and skilled advice may be more important than money".[187] Based on that dissenting opinion, both the Charity Commission for England and Wales[188] and the New Zealand Charities Registration Board[189] have registered law centres that provide legal advice as charitable.

### *13.3.5 Others*

The reasoning used in *Verge v Somerville*[190] by the Privy Council concerning the return and rehabilitation of servicemen can also be used for the social rehabilitation of alcoholics, drug addicts and prisoners. In fact, "the relief or redemption of prisoners or captives" is specifically identified as charitable in the *Statute of Elizabeth*. The New Zealand Charities Registration Board has registered a number of entities that are devoted to the rehabilitation of alcoholics, drug addicts and prisoners. It is submitted that the reclamation of prostitutes, which in Ireland has been held charitable, would also be held charitable in New Zealand and Australia.[191]

In *Re Twigger*,[192] Tipping J held that associations such as women's refuges, rape crisis groups, pregnancy support groups and battered women's support groups were charitable without having to establish that the beneficiaries in question were poor or impotent, though this could be in fact also be the case.

Entities or organisations established to help victims of crime and victims of accidents would also be charitable under the fourth head of charity, as being similar to the groups mentioned in *Re Twigger*.

## 13.4 Conclusion

The relief of human distress in the form of relief of the aged and relief of the disabled has often been considered as being charitable for the relief of poverty. The reason for these purposes being analysed under the fourth head is that public benefit is not presumed in those cases, contrary to purposes for the relief of poverty.

Similarly, the promotion of health through the provision of hospitals and analogous institutions has been analysed by some authors as being for the relief of poverty. Hubert Picarda's approach was followed because these institutions were not presumed to provide public benefit. Public benefit must be proven.

Some people are criticising private hospitals that have huge incomes and are asking if they should remain charitable. These institutions should have to show that they really provide public benefit because most of them are not accessible to poor people. They are mostly for people who have private insurance or can otherwise pay for the huge costs of diagnosis and treatment.

Social rehabilitation is also linked to the promotion of health, especially for persons with limited opportunities, but also for victims of disasters and for refugees. Such circumstances put people at risk of being physically and mentally ill.

[187] See Picarda 4th ed, above n 2, at 209.

[188] See *Camden Community Law Centre* [1974] Ch Com Rep 20-21 at [67-72].

[189] See among others, Dunedin Community Law Centre Incorporated, registration number CC21802; Marlborough Community Law Centre Incorporated, registration number CC35223; Wellington Community Law Centre Incorporated, registration number CC24391.

[190] [1924] AC 496 at 506. Picarda 4th ed, above n 2, at 207 wrote that the rehabilitation of prisoners, "alcoholics and drug addicts must also rank as charitable under this title".

[191] *Mahony v Duggan* (1880) 11 LR Ir 260 (upheld as a religious charity). See also Tudor 9th ed, above n 39, at 109.

[192] [1989] 3 NZLR 329 at 339-340.

CHAPTER 14

# Patriotic purposes, good citizenship and protection of the community

It might come as a surprise for many that patriotic purposes are generally not seen as charitable because they are too broadly stated. On the other hand, gifts to a government are not considered charitable because governments can use the money for non-charitable purposes.

It is only recently that good citizenship has started to be considered by courts to be a charitable purpose.

The protection of the country and of the community has, however, always been held to be charitable.

## 14.1 Patriotic gifts

Some decided cases go further than leaving gifts to localities and leave them to countries. Such gifts may be considered as being for the promotion of patriotism. While gifts for the encouragement of patriotism are fraught with controversy, those that are aimed at reducing the fiscal burden on citizens are considered charitable.

### *14.1.1 Encouragement of patriotism*

Hubert Picarda wrote that trusts to stimulate or inculcate patriotism had been held to be charitable in the United States.[1] This was because "the fostering of love of country and of respect for civic institutions tends to raise the standard and improve the quality of citizenship and not only relieves the burden of government but advances the public good".[2]

However, in the United Kingdom and New Zealand, the courts have not yet pronounced on trusts to stimulate patriotism. Hubert Picarda suggested "such trusts would be upheld".[3] That suggestion was based on a number of cases that had been decided on grounds other than patriotism. For example, in *Re Pardue*,[4] Kekewitch J upheld a trust to ring a peal of bells on the anniversary of the restoration of the monarchy because it was seen as being for the advancement of religion. The Boy Scout Association, whose purposes include the instruction of boys in the principles of discipline, loyalty and good citizenship, has been held to be charitable.[5] Finally, the Charity Commission for England and Wales has accepted that a trust to provide a statue of Earl Mountbatten of Burma in naval uniform on the Foreign Office Green overlooking Horse Guards Parade and the Admiralty could be charitable as it is likely to foster patriotism and good citizenship, and to be an incentive to heroic and noble deeds.[6]

### *14.1.2 Gifts to the nation and to relieve the community from rates and taxes*

Some decided cases have extended charitable status beyond localities to countries. The leading case in this regard is *Re Smith*,[7] where the English Court of Appeal upheld a bequest "unto my country England for its own use and benefit absolutely". In *Re Smith*, the Appeal Court followed an earlier decision upholding a bequest "to the Queen's Chancellor of the Exchequer for the time being, to be by him appropriated to the benefit and advantage of my beloved country Great Britain".[8]

1 Hubert Picarda *The Law and Practice Relating to Charities* (4th ed, Bloomsbury Professional Ltd, Haywards Heath, 2010) at 202 [Picarda 4th ed] citing *Thorp v Lund* 227 Mass 474 (1917) (fund to be devoted to national or philanthropic purpose in Norway associated with the name of Ole Bull; *Sargent v Cornish* 54 NH 18 (1873) (a trust for the purchase and display of the flag); *Re De Long* 250 NY Supp 504 (1931) (a trust for the celebration of Memorial Day was held to be charitable); *Owens v Owens' Executors* 236 Ky 118 (1930) (a trust to construct monuments to citizens of high character and achievement was held to be charitable).

2 *Molloy Varnum Chapter DAR v Lowell* 204 Mass 487 (1910) at 494.

3 Ibid, at 203.

4 [1906] 2 Ch 184.

5 *Re Webber* [1954] 1 WLR 1500. See also Picarda 4th ed, above n 1, at 203.

6 *The Earl Mountbatten of Burma Statue Appeal Trust* [1981] Ch Com Rep 24-25 at [68-70] cited in Picarda, 4th ed, above n 1, at 203 footnote 3.

7 [1932] 1 Ch 153.

8 Gino Dal Pont *Law of Charity* (LexisNexis/Butterworths, Australia, 2010) at 267 citing *Nightingale v Goulbourn* (1848) 2 Ph 594; [1843-1860] All ER 420.

These cases have been criticised on the grounds that a gift to the Crown is not charitable because the Crown itself is not a charity. A gift to the country would eventually go into the general account unless it was considered to be in trust for the advantage of the inhabitants of that country. In *Latimer v Commissioner of Inland Revenue*,[9] the Privy Council had to decide if a trust, established by the Crown to help Māori in the preparation, presentation and negotiation of claims before the Waitangi Tribunal, was charitable. The main problem was that if Māori were not successful in their claim the proceeds would return to the Crown. The Privy Council wrote that "their lordships cannot accept the trustee's contention that the Crown is itself a charity, or that it holds all its funds to be applied exclusively for charitable purposes".[10]

The Privy Council acknowledged that it was sometimes possible to impress a gift in favour of a recipient, which was not itself a charity, with an implied trust limited to charitable purposes. Lord Millett also wrote that "their Lordships do not question the proposition that an ostensibly outright gift to the Crown may be subject to an implied trust in favour of charity".[11] He interpreted *Re Smith* as being a gift to the benefit of the inhabitants of England, and by analogy with the cases on gifts to a parish, town or city, as impressed with a trust that it be applied for charitable purposes only. He also cited *Thellusson v Woodford*,[12] where a gift over to the Crown was held to be impressed with a charitable trust for the relief of the national debt and therefore charitable.

It could be argued from the cases cited by the Privy Council in *Latimer v Commissioner of Inland Revenue* that *Re Smith* and similar cases were charitable because they were seen as falling within the spirit and intendment of the *Statute of Elizabeth* as being for "the aid or ease of any poor inhabitants concerning payment of fifteens, the setting-out of soldiers and other taxes". The cases cited by the Privy Council in *Latimer* all fall under relieving the community from rates and taxes.[13]

Another problem with trusts established for the benefit of countries is that the purposes must be exclusively charitable. This may explain why the Ontario Court of Appeal upheld a gift "unto the State of Israel for charitable purposes only".[14]

### 14.2 Promotion of moral or spiritual welfare or improvement

Humanist societies, or societies devoted to the promotion of some non-religious ethical principles and behaviours, were first held not to be charitable for the advancement of religion nor for the advancement of education. In *Berry v St Marylebone Corporation*,[15] it was held that the Theosophical Society in England, which was "to form a nucleus of the universal brotherhood of humanity without discrimination of race, creed, sex, caste, or colour", did not constitute a charitable purpose because it was worded so broadly that it could include both charitable and non-charitable activities. In fact, such societies were generally opposed to the concept of religion,[16] and often had political purposes and carried out political activities.[17]

#### *14.2.1 Seminal cases*

In a few cases, the courts have indicated that purposes are charitable for the moral improvement of mankind. In *Re Scowcroft*,[18] there was the devise of a village club and reading room to be maintained for the religious and mental improvement of people in the neighbourhood, and there was an additional reference that it was to be kept free from intoxicants and dancing and to be used for the furtherance of conservative principles. Stirling J regarded this as being a valid charitable trust because it was for religious and mental improvement. He held that the reference to conservative principles was ancillary and not a sufficient limitation to prevent it being a perfectly good charitable gift, as he clearly thought it would be if it were for the furtherance of religious and mental improvement alone.

9 [2004] 3 NZLR 157.

10 Ibid, at 170 per Lord Millett for the Court.

11 Ibid, at 171. Lord Millett cited *Re Smith* [1932] 1 Ch 153.

12 (1799) 4 Ves 227. Lord Millet also cited *Newland v Attorney-General* (1809) 3 Mer 684; *Ashton v Langdale* (1851) 4 De G & Sm 402; and *Nightingale v Goulbourn* (1848) 5 Hare 484, where a testamentary gift to the Chancellor of the Exchequer was expressly impressed with a trust for Great Britain.

13 Jean Warburton *Tudor on Charities* (9th ed, Sweet & Maxwell, London, 2003) at 111 [Tudor 9th ed]. Picarda 4th ed, above n 1, at 202 takes the view that *Re Smith* could be reconciled as being for the relief of taxes as the counsel for the Attorney-General had argued on appeal.

14 *Re Levy Estate* (1989) 58 DLR (4th) 375.

15 [1958] Ch 406; [1957] 3 All ER 677. See also Noel C Kelly, Chris Kelly and Greg Kelly *Garrow and Kelly Law of Trusts and Trustees* (6th ed, LexisNexis, Wellington, 2005) at 265-266 at [12.17.7].

16 See *Bowman v Secular Society* Ltd [1917] AC 406 at 442 where Lord Parker wrote: "The abolition of religious tests, the disestablishment of the Church, the secularisation of education, the alteration of the law touching religion or marriage, or the observation of the Sabbath are purely political objects. Equity has always refused to recognize such objects as charitable".

17 See *Re Stemson's Will Trusts* [1970] Ch 16 at 20-21.

18 [1898] 2 Ch 638, [1895-9] All ER Rep 274.

In *Re Hood*,[19] a trust was established for the application of Christian principles to all human relationships, and this was linked to the reduction and ultimate extinguishment of drink traffic. It was held that the trust for the application of Christian principles to all human relationships was a good charitable trust. The trust was put forward in the lower court by Mr Crossman for the Attorney-General as being charitable for three reasons: for the advancement of religion, for the advancement of education and for the benefit of the community as being calculated to promote public morality.

Hubert Picarda[20] wrote, however, that the study and dissemination of ethical principles and the cultivation of rational religious sentiments could be charitable under the fourth head, although they were non-charitable for the advancement of education. This recognition was based on two cases, which held that promoting moral improvement was charitable under the fourth head if the teaching could have the result of moral improvement and therefore satisfied the requirement of public benefit.[21]

In *Re Price*,[22] the charitable character of the bequest depended exclusively on the element of moral improvement. In that case, the testatrix had given half of her residual estate to an unincorporated association called the Anthroposophical Society of Great Britain to be used at the discretion of the Society's chairman and executive council for carrying on the teachings of the founder, Dr Rudolf Steiner. Cohen J held that, under the terms of the will, there was not an absolute gift to the Society, but that the Society was at liberty to spend both capital and income on the objects defined in the will. Since there was no perpetuity created, the bequest was invalid. It was therefore not necessary for the Court to determine whether the bequest was charitable or not.[23] However, the question was fully argued and Cohen J fully considered it. He agreed that the teaching of Rudolf Steiner was directed to the mental or moral improvement of mankind. He also considered that "providing that this teaching is not *contra bonos mores* the court is not concerned to decide whether it will result in the mental or moral improvement of anyone, but only whether, on the evidence before the court, it may have that result".[24] He wrote that "had it been necessary for me to deal with the point, I should have been inclined to uphold the gift to the Anthroposophical Society as a valid charitable gift".[25]

In *Re Price*, Cohen J referred to *Macaulay v O'Donnell*,[26] in which Clauson J would have been ready to find charitable the objects of the theosophical society to "encourage the study of comparative religion, philosophy and science" and "to investigate the unexplained laws of nature and the powers latent in man". He considered, however, that a third object "for a nucleus of the universal brotherhood of humanity, without distinction of race, creed, sex, caste, or colour" might extend the objects of the society to objects that were not clearly charitable. Lord Tomlin in the House of Lords approved that reasoning.

The entity in *Re South Place Ethical Society*[27] was established for the "dissemination of ethical principles those being the belief that the object of human existence was the discovery of truth by reason and not by revelation by supernatural power". Such dissemination was carried out by holding lectures and musical concerts by persons of high repute, by publishing a monthly magazine and through seminars. Dillon J, in the Chancery Division, held that such purposes and activities were charitable under the fourth head as being for the mental and moral improvement of men. In *Re South Place Ethical Society*, Dillon J also considered that the trust was charitable for the advancement of education. He finally wrote that "alternatively, by analogy to *Re Price*, *Re Hood* and *Re Scowcroft*, the whole of the objects of the society are charitable with the fourth class".[28]

[19] [1931] 1 Ch 240, [1930] All ER Rep 215.

[20] Picarda 4th ed, above n 1, at 221.

[21] *Re Price* [1943] 1 Ch. 422; *Re South Place Ethical Society* [1980] 1 WLR 1565.

[22] Ibid.

[23] Ibid, at 432.

[24] Ibid.

[25] Ibid, at 435.

[26] 10 July 1933 cited at [1943] 1 Ch 435 at [Note].

[27] [1980] 3 All ER 918. This case is also cited as *Barralet and others v Attorney-General* [1980] 3 All ER 918.

[28] Ibid, at 928.

In at least one New Zealand case, the Court indicated its approval with the reasoning in *Re South Place Ethical Society*. In *Centrepoint Community Growth Trust v CIR*,[29] Tompkins J cited with approval Dillon's judgment. He also cited *Re Price*. This was reaffirmed in *Re Collier (deceased)*,[30] where Hammond J wrote that "the 'study and dissemination of ethical principles and the cultivation of a rational religious sentiment' has been held to be charitable (*Re South Place Ethical Society* [1980] 1 WLR 1565)".[31]

### *14.2.2 New developments*

Jean Warburton wrote that *Re Price* and *Re South Place Ethical Society* "provide authority for saying that an organisation that disseminates ideas which are broadly philosophical and which are generally accessible to and can be applied within the community and which can be adopted freely from time to time according to individual choice or judgment by member of the public should be charitable".[32]

In *Re The Grand Lodge of Antient Free and Accepted Masons in New Zealand*,[33] France J considered that the general purposes and principles of Freemasonry were capable of qualifying under the fourth head of charity. He wrote that "they present at least as compelling a case as other organisations which have come under this head. These include: a society whose objects are the study and dissemination of ethical principles and the cultivation of a rational religious sentiment [...] and a gift for the furtherance of religious and mental improvement".[34] However, in that case, France J determined that the Masons were not charitable because they were considered not to provide sufficient public benefit since they "are inward-looking, and its funds and organisation exist primarily for its members".[35] And "while there may be a public benefit in this, it is too remote".[36]

It must be noted that public benefit must be proven where an entity invokes that it is charitable for promoting the moral and spiritual welfare or improvement of humankind. This point was strongly made in *Re South Place Ethical Society*. As Dylan J said:

> *One of the requirements of a charity is that there should be some element of public benefit in the sense that it must not be merely a members' club or devoted to the self-improvement of its own members. In the case of this society I have no doubt that it is not just a members' club and that it is not merely concerned with the self-improvement of its members. In its objects there is reference to the cultivation of a rational religious sentiment; that in my judgment means cultivation wherever it can be cultivated and not merely cultivation among the members themselves.*[37]

The Charity Commission for England and Wales analysed these cases in relation to an application by the Church of Scientology.[38] The Charity Commission concluded that the doctrines, beliefs and practices of Scientology were not generally accessible to the public or capable of being adopted by the public in such a way that the moral or spiritual welfare of the society might be improved.

As indicated earlier, in *Re The Grand Lodge of Antient Free and Accepted Masons in New Zealand*,[39] France J echoed this view and wrote that the entity did not provide sufficient public benefit because the Masons were inward-looking and the benefits were for a limited group of members.

[29] [1985] 1 NZLR 673 at 697-698.
[30] [1998] 1 NZLR 81.
[31] [1998] 1 NZLR 81 at 93.
[32] Tudor 9th ed, above n 13, at 126.
[33] [2011] 1 NZLR 277.
[34] Ibid, at [56].
[35] Ibid, at [59].
[36] Ibid, at [60].
[37] *Barralet v Attorney-General* [1983] All ER 919 (Ch) at 923.
[38] *Re Church of Scientology (England & Wales)* [2005] WTLR 1151
[39] [2011] 1 NZLR 277 at [59-60].

The Charity Commission for England and Wales has published a draft guide to public benefit analysis for the advancement of moral and ethical belief systems, concluding that:

> *Thus the position seems to be as follows:*
>
> - *There must be some corpus of spiritual or philosophical conviction (typically comprising doctrines, practices and beliefs).*
> - *That corpus should in principle be capable of being accepted and applied by the public at large as a philosophy for living their daily lives or as a way of achieving heightened or special awareness.*
> - *It must be generally accessible to and applicable within the community according to individual choice and judgment.*
> - *Its capacity for application or adoption must be such that the moral or spiritual welfare of the community might result.*
> - *The beneficial nature of the process should be shown (and demonstrated) to be accepted on the basis of a consensus of opinion amongst people who are informed, fair-minded and free from prejudice or bias.*[40]
> - *Public benefit must be present as a matter of fact.*[41]

Based on *Re South Place Ethical Society*,[42] the Canada Revenue Agency and the New Zealand Charities Registration Board have also registered some humanist groups.[43]

### 14.3 Safety and protection of human life and property

Courts have held as charitable purposes for the protection of human life as being similar to the intent of the *Statute of Elizabeth*, especially "the repair of sea banks". Since the encroachment of the sea threatens both life and property, it is clear that the protection of human life and property is within the equity of the Statute.[44] This section analyses cases covered by the category of safety and protection of the community, such as the protection of human life and property, defence and army personnel, police, road safety and the prevention of accidents, and the enforcement of the law.

The first case decided by a court on the protection of human life and property seems to be *Attorney-General (New Zealand) v Brown*.[45] In that case the Court held that a parliamentary grant of duty on coal imported into a town in aid of the pecuniary inability of the inhabitants to protect themselves against the ravages of the sea was a charitable trust. In *Wilson v Barnes*,[46] the Court of Appeal held that a trust for the benefit of copyhold tenants for the repair of the sea-dykes was charitable. The main reason was that the encroachment of the sea threatened both life and property.

The protection of human life has been upheld in entities established to provide lifeboats to particular coastal towns.[47] This is because the crews of the lifeboats rescue shipwrecked mariners and voyagers at risk of drowning or death from exposure. Similarly, gifts for the Royal National Lifeboat Institution[48] and the Royal Humane Society for Saving Life[49] have been upheld as charitable. Hubert Picarda wrote that "the provision of lifeguards on beaches is likewise charitable",[50] citing a Massachusetts court that held that a lifesaving station was charitable. Relying on the authority of the above-cited cases, the New Zealand Charities Registration Board has registered a number of organisations whose main purpose is to provide lifeguard services or surf rescue lifeguards.[51]

40 *National Anti-Vivisection Society v IRC* [1948] AC 31 Lord Wright at 49.

41 *Analysis of the Law Underpinning Public Benefit and the Advancement of Moral or Ethical Belief Systems* (September 2008) on the Charity Commission, website www.charity-commission.gov.uk/Library/guidance/pbmora.pdf at [2.11].

42 [1980] 1 WLR 1565.

43 See the Canadian Register which contains 11 Humanist associations that are still registered. The Charity Commission for England and Wales has registered numbers 212653, 309117 and 282251, which have since been removed from the Register. For New Zealand, see on the Register registration numbers CC36074 and CC31395.

44 *Attorney-General v Brown* (1818) 1 Swan 265; *Wilson v Barnes* (1886) 38 Ch D 507 (CA). See also Tudor 9th ed, above 13, at 103.

45 (1818) 1 Swan 265.

46 (1886) 38 Ch D 507. See also, Picarda 4th ed, above n 1, at 205.

47 *Johnston v Swann* (1818) 3 Madd 457.

48 *Thomas v Howell* (1874) LR 18 Eq 198; *Re Richardson* (1887) 56 LJ Ch 784; *Re David* (1889) 43 Ch D 27 (CA).

49 *Beaumont v Oliveira* (1869) 4 Ch App 309.

50 Picarda 4th ed, above n 1, at 206 citing *Richardson v Mullery* 200 Mass 247 (1908) USA.

51 See for example, Far North Surf Rescue Society Incorporated, registration number CC41115 and Paekakariki Surf Lifeguards Incorporated, registration number CC10702.

In *Re Wokingham Fire Brigade Trusts*,[52] Danckwerts J held that a voluntary, non-profit-making fire brigade, which had been formed at a public meeting to meet a public need to fight fires in the district, was a charitable organisation. He commented in the following terms:

> *The Brigade was not formed for the benefit of the members, but for the benefit of the public, and its purpose was to prevent damage and loss of life in that community. It seems to me that the provision of a public fire brigade of this kind is as much a public charitable purpose as the provision of a lifeboat, which has been held in a number of cases to be a public charitable purpose.*[53]

Although his remark that the provision of a public fire brigade was as charitable as the provision of a lifeboat, his Honour made it clear that the protection of human life was itself a charitable purpose. Based on the conclusion in that case, the New Zealand Charities Registration Board has registered about 300 volunteer fire brigades.

The Charity Commission for England and Wales has registered a trust for the promotion of road safety. This is because entities for the promotion of road safety or for the prevention of accidents (whether upon the roads or elsewhere) would obviously be valid as being directed to the prevention of damage and loss of life.[54] The New Zealand Charities Registration Board has also registered a few organisations whose purpose is to prevent road traffic accidents or child accidents.[55]

### 14.4 Defence, army personnel and police

Courts in England,[56] New Zealand[57] and Australia[58] have held that the promotion of the safety and protection of a country represents a good charitable purpose.

In *Re Driffill (deceased)*,[59] the testatrix had left the residue of her estate "to promote the defence of the United Kingdom from the attack of hostile aircraft". In that case, Danckwerts J wrote "this is a case clearly falling within the well-known authorities in which gifts for the promotion of the efficiency of the armed forces of the Crown were held to be a valid charitable bequest".[60] It is therefore not surprising that a gift to provide a town with fortifications has been held charitable.[61]

A gift for an officers' mess has been held charitable for the promotion of the efficiency of the armed forces.[62] In *Inland Revenue Commissioners v City of Glasgow Police Athletic Association*,[63] the House of Lords held that promoting the efficiency of the police force was also a charitable purpose.

The case law has established that a number of different ways of increasing the effectiveness of the armed forces will be charitable.

#### *14.4.1 Recruitment, training and efficiency of service personnel*

Gifts directed to the recruitment, training and efficiency of service personnel, whether regular or auxiliary, have been held charitable.[64] In *Re Stratheden and Campbell*, the Court considered that a gift by will for a bequest to a volunteer corps was a charitable bequest.[65] The same applied to the recruitment, training and efficiency of police officers.[66]

The question of whether the recruitment, training and efficiency of the Mercantile Marine was charitable was canvassed in *Re Corbyn*.[67] In that case, the testator had left a bequest to train selected boys as officers either in the Royal Navy or in the Mercantile Marine. The Court held that the recruitment and training of boys for the Royal Navy was charitable

[52] [1951] Ch 373.

[53] Ibid, at 377.

[54] *The League of Highway Safety and Safe Drivers Ltd* [1965] Ch Com Rep 27 cited by Picarda 4th ed, above n 1, at 205.

[55] See New Zealand Charities Register, registration numbers CC43668 and CC34708.

[56] *Re Driffill (deceased)* (1950) Ch 92; [1949] 2 All ER 933.

[57] *Knowles v Commissioner of Stamp Duties* [1945] NZLR 522, [1945] GLR 235 (CA).

[58] *Downing v Federal Commissioner of Taxation* (1971) 125 CLR 185 at 198 per Walsh J.

[59] [1950] 1 Ch 92.

[60] Ibid, at 95. Danckwerts J relied on *In Re Stephens* (1892) 8 TLR 792 and on *In Re Good* [1905] 2 Ch 60 at 66, where Farwell came to the conclusion that "it is a direct public benefit to increase the efficiency of the army, in which the public is interested, not only financially, but also for the safety and protection of the country".

[61] *Attorney-General v Dartmouth Corporation* (1883) 48 LT 933.

[62] *Re Donald* [1909] 2 Ch 410.

[63] [1953] AC 380.

[64] *Re Corbyn* [1941] Ch 400. See also Tudor 9th ed, above n 13, at 105.

[65] [1894] 3 Ch 265 per Romer J.

[66] *Inland Revenue Commissioners v City of Glasgow Police Athletic Association* [1953] AC 380 at 400 per Lord Morton, at 401-402 per Lord Reid.

[67] [1941] Ch 400.

as designed to promote the efficiency of the armed forces of the Crown. The Mercantile Marine did not form part of the armed forces of the Crown. Nevertheless, the Court held that this was a charitable purpose because the Mercantile Marine was essential to the community. This was because at time of war, but also at all times, it would remain essential unless and until the country could produce all the food and other essentials of life that were required. It was therefore of the greatest importance that boys should be suitably trained as officers.[68]

In *Re Stephens*,[69] the Court held that a gift for teaching shooting was charitable. The bequest was to the National Rifle Association for "a fund to be expanded for the teaching of shooting at moving objects so as to prevent a catastrophe similar to that at Majuba Hill". Kekewich J held that the reference to Majuba Hill and the latter part of the bequest generally showed that the gift was charitable as directed to promoting the efficiency of the armed forces. This reasoning was approved by Danckwerts J in *Re Driffill*.[70] A gift to provide a prize for cadets to compete for was also upheld.[71]

Jean Warburton wrote that "before a trust can be charitable under this heading it must be established that the activities of the particular trust promote the security of the nation and the defence of the realm, not merely that they are capable of doing so".[72] This is why the Charity Commission for England and Wales[73] and the New Zealand Charities Registration Board[74] have refused to register certain rifle clubs. These clubs are considered to be established primarily to provide members with facilities for the enjoyment of shooting as a recreational sport. The promotion of the defence of the country has been held to be merely incidental to those clubs by the relevant Commissions.

### *14.4.2 Education of the police force*

The question of the validity of a gift of a library and plate for an officers' mess was addressed in *Re Good*.[75] In that case, a gift had been given to the officers' mess of a particular regiment to maintain a library for the officers. This gift was held to be charitable because the mess was an integral part of the regiment and the gift directly benefited the public by increasing the efficiency of the army. The *ratio decidendi* was conveniently stated by Farwell J as follows: "I have come to the conclusion that this is a good charitable gift on the first ground – namely, that it is a direct public benefit to increase the efficiency of the army, in which the public is interested, not only financially, but also for the safety and protection of the country".[76] That reasoning was applied in New Zealand in *Laing v Commissioner of Stamp Duties*,[77] and *Re Andrews*.[78]

Gino Dal Pont wrote that a gift to "give the officers greater opportunities of providing themselves with literature" by providing books "must be seen as a high watermark case in that any connection between the reading of varied literature and the efficiency of armed forces is remote at best".[79]

### *14.4.3 The promotion of sports in the armed forces and police forces*

Courts have been willing to interpret gifts for purposes connected with the police and armed forces as being for the promotion of the efficiency of those forces. In *Re Gray*,[80] Romer J held that a gift to a regiment "for the promotion of sport", that is, shooting, fishing, cricket, football and polo in a regiment, was charitable. The Court insisted that "the particular sports specified were all healthy outdoor sports, indulgence in which might reasonably be supposed to encourage physical efficacy".[81] In *Chesterman v Mitchel*,[82] Harvey J upheld a gift to "provide prizes for competition amongst and to be confined to members of the police force of the State of New South Wales" on the basis that it tended to increase the efficiency of the police forces.

[68] See Tudor 9th ed, above n 13, at 106.

[69] (1892) 8 TLR 792.

[70] [1950] 1 Ch 93 at 95.

[71] *Re Barker* (1909) 25 TLR 753.

[72] Tudor 9th ed, above, n 13, at 106.

[73] *City of London Rifle and Pistol Club and the Burnley Rifle Club* (1993) 1 Ch Com. Dec. at [4-13] cited by Picarda 4th ed, above n 1, at 200 footnotes 12-13.

[74] See Charities Services website, HAW10817 (declined); NOR24026 (withdrawn); WHA00051 (withdrawn).

[75] [1905] 2 Ch 60.

[76] Ibid, at 66.

[77] [1948] NZLR 154; [1947] GLR 458.

[78] (1910) 30 NZLR 43; 13 GLR 384.

[79] Dal Pont *Law of Charity*, above n 8, at 256.

[80] [1925] 2 Ch 362.

[81] Ibid, at 365.

[82] [1923] 24 SR (NSW) 108 at 113-114. See also Dal Pont *Law of Charity*, above n 8, at 256.

In *Commissioner of Inland Revenue v City of Glasgow Police Athletic Association*,[83] the House of Lords had to decide if a police athletic association, established for the encouragement of all athletic sports and general pastimes, was charitable. The Association claimed exemption as a charity on the authority of certain English decisions, namely *Re Gray* and *Re Good*. The House of Lords held that the Association was not exclusively charitable. Although the Commissioners were entitled to find that the purpose of increasing the efficiency of the police force for the advantage of the public was charitable, the purpose of providing recreation for the members was non-charitable and was not merely incidental in the charitable purpose.

### *14.4.4 Returned servicemen's associations*

Gifts for the benefit of returned soldiers and their dependants have been held charitable as long as they are not directed principally to non-charitable uses. The reason for this was explained in *Downing v Federal Commissioner of Taxation*[84] by Walsh J as follows:

> *Valid charitable trusts may be created for purposes relating to the welfare and to the assistance of ex-servicemen or their dependants, as well as for the welfare and assistance of persons who are still serving members of the forces, if the purpose can reasonably be considered to advance the safety and security of the country [...] A trust may be considered to tend towards that result by means of providing aid, comfort and encouragement to the armed forces or a section of them, notwithstanding that those who will directly benefit from the trust are those who have ceased to serve or their dependants.*[85]

Jean Warburton, relying on *Re Meyers*,[86] wrote that "gifts for the benefit of former members of the armed forces *simpliciter* and presumably former members of a police force *simpliciter* are not charitable".[87] Hubert Picarda did not seem to have the same interpretation. He wrote that "the Charity Commissioners have accepted that the mixing together of serving officers and former officers helps to keep service traditions alive and to improve *esprit de corps* thus improving the efficiency of the services".[88] Finally, Gino Dal Pont wrote that "it is unlikely that Australian and New Zealand courts would follow the decision of Harman J in *Re Meyers*, in holding a gift for the 'welfare benefit or assistance' of members of the navy and their dependants to be void for uncertainty".[89]

Gifts to ameliorate the conditions of dependants of members of armed forces are charitable, as is a bequest for the benefit of returned soldiers.[90]

On the other hand, in *Downing v Federal Commissioner of Taxation*,[91] Walsh J, for the Australian High Court, wrote: "I have no doubt that there may be gifts for the benefit of a class of ex-servicemen which are not good charitable gifts. For example, the object of a gift may be merely of a social or of a sporting character or of some other character such that the purpose could not be classed as one which the law would recognise as charitable".[92]

It must be noted that the New Zealand Charities Registration Board has registered a great number of returned servicemen's associations. However, the New Zealand Charities Registration Board, similar to the Charity Commission for England and Wales, has taken the view that the promotion of reunions, social functions and similar events for the benefit of members of ex-servicemen's associations is not charitable.[93]

In fact, the position taken by the Charity Commission for England and Wales is that "it is not a charitable purpose to provide the services of a pub or social club (i.e. a members' drinking club)".[94] The sale of alcohol will be considered ancillary "if it is done simply

[83] [1953] AC 380.

[84] (1971) 125 CLR 185.

[85] Ibid, at 200.

[86] [1951] 1 Ch 534.

[87] Tudor 9th ed, above n 13, at 105.

[88] Picarda 4th ed, above n 1, at 200.

[89] Dal Pont *Law of Charity*, above n 8, at 257-258.

[90] *Verge v Somerville* [1924] AC 496 (PC); *Re Booth* [1954] NZLR 1114; *Re Elgar* [1957] NZLR 1221 (CA); *Downing v Commissioner of Taxation* (1971) 125 CLR 185. For detailed analysis of the relevant cases see subsection 13.3.1 of chapter 13.

[91] (1971) 125 CLR 185.

[92] Ibid, at 200.

[93] Picarda 4th ed, above n 1, at 201; and Tudor 9th ed, above n 13, at 105.

[94] Charity Commission for England and wales "CC27 – Providing Alcohol on Charity Premises" (November 2002) on the Charity Commission website www.charity-commission.gov.uk/Library/guidance/cc27text.pdf, at [4].

for the purpose of refreshing people who are on the charity's premises to take part in a recreational, educational or other charitable (or fund-raising activity)".[95] The Charity Commission gives the following example:

> *Where a village hall or community association provides facilities to play games and sports, properly provided facilities for the purchase of alcohol may be made available for the participants or spectators, provided that: a) the bar is open only when the premises are in use for those activities; and b) only participants and spectators use the bar facilities.*
>
> *Similarly, refreshment may be made available (through the sale or provision of alcohol during licensed hours) for those who, for example, visit museums or attend theatrical or other performances in charitable theatres, village halls or community association premises.*[96]

In Canada, it seems that the poppy funds of the Royal Canadian Legion branches have been registered, but not the branches themselves. This is understandable because the main activities of a number of these organisations are providing cafés and bars, which are social and commercial activities rather than activities devoted to the welfare of ex-servicemen. The Charity Commission for England and Wales recommends that "if the trustees want to provide the facilities of a pub or social club on their premises, whether for financial or other reasons, they should transfer the administration of the bar to a separate body".[97]

It is suggested that the New Zealand position should be similar to those in the United Kingdom and Canada. Therefore, when a returned servicemen's association serves alcohol and food in situations that show that these activities are clearly ancillary to charitable purposes, the poppy fund or such other fund that is exclusively charitable should be registered in its own right. However, these trusts should be independent from the organisations that serve food and alcohol, because otherwise the New Zealand Charities Registration Board would be registering organisations that are not exclusively charitable.

### *14.4.5 Maintaining the morale of armed forces and police*

Courts have held that trusts that increase the morale of the armed forces are valid.[98] For that reason, a trust formed in time of war to send "Christmas presents from the whole nation to every sailor afloat and every soldier at the front" has been upheld as charitable.[99] In *Murray v Thomas*,[100] two adjacent villages formed an association for the erection of a permanent memorial or memorials to perpetuate the memory of those from the district who had served in the Great War. Clauson J upheld the association as charitable because the object of the association was to promote for the benefit of the two villages some useful memorial.

The morale of the armed forces or the police can also be uplifted by the availability of accommodation for servicemen on leave. Therefore, a gift to the Union Jack Club for the upkeep of bedrooms and attendance for the use of men of the Royal Engineers was said to be probably charitable on the grounds the funding was to improve the conditions of soldiers.[101] Similarly, in *Re Sahal's Will Trust*,[102] Danckwerts J held that a hostel for young servicemen, merchant seamen and the poor, aged and infirm of a neighbourhood was charitable. A further gift of £2,000 failed, however, because it was not charitable due to the fact that it was to be applied in the purchase of extra comforts for the residents in such a hostel.

[95] Ibid, at [18].
[96] Ibid, at [18-19].
[97] Ibid, at [26].
[98] *Re Barker* (1909) 25 TLR 753.
[99] *Re Princess Mary's Fund* [1921] 1 Ch 655 at 656, 657, 611, 662 per Peterson J. See also Picarda 4th ed, above n 1, at 200.
[100] [1937] 4 All ER 545.
[101] *Re Barker* (1909) 25 TLR 753 per Warrington J *obiter* cited by Picarda 4th ed, above n 1, at 201.
[102] [1958] 1 WLR 1243.

Conversely, in *Re Perry and Kovacs*,[103] the British Columbia Supreme Court held that a gift to the Canadian and New Zealand navies of a small cottage on an island as "a rest for navy personnel" was not exclusively charitable because the term "rest" could be extended to "comfort", the latter not being charitable. Commenting on that decision, Gino Dal Pont wrote that "yet it is not unrealistic to imagine that Australian and New Zealand courts would have upheld the gift reasoning that rest, however defined, is a necessary prerequisite for efficiency in the forces".[104]

### 14.5 Enforcement of the law

The House of Lords made it clear in *Inland Revenue Commissioners v City of Glasgow Police Athletic Association*[105] that the promotion of efficiency in a police force was charitable. This was so because without an efficient police force, law and order could not be maintained nor could the lives and property of the public be protected. However, in that decision, the House of Lords held that the entity was not exclusively charitable because it was an association where a sports club had been formed for the purpose of providing recreation for the members and therefore did not provide sufficient public benefit.

Entities established to promote the sound enforcement and administration of the law have also been upheld as charitable. In *Re Herrick*,[106] a fund to provide rewards to policemen helping to bring to justice cases of cruelty to animals was held charitable. Similarly, as stated by Reed J in the New Zealand case of *Caldwell v Fleming*,[107] a gift "for the purposes of paying a live inspector or inspectors in different localities to persecute those brutally abusing animals by starving or in any other way" was charitable. Although this case was considered charitable for the protection of animals, it could equally have been considered charitable for the enforcement of the law.

The Charity Commission for England and Wales[108] and the New Zealand Charities Registration Board[109] have registered organisations promoting the sound administration and enforcement of the law.

The benefit to the community derived from the advancement of the armed forces and the police may not be tangible, but stems from the public's sense of security. Peace of mind derived from the knowledge of the public that a society's fidelity fund safeguarded its interests was considered too remote to be providing public benefit according to the New Zealand Court of Appeal in *New Zealand Society of Accountants v Commissioner of Inland Revenue*.[110] Gino Dal Pont wrote that the distinction between the sense of security provided by the police and a fidelity fund could be based "firstly on the notion that peace of mind relating to one's own physical security carries greater weight than that relating to one's financial security, and secondly, in the public service performed by the forces in the relief of human distress".[111]

[103] (1984) 12 DLR (4th) 751.

[104] Gino Dal Pont *Charity Law in Australia and New Zealand* (Oxford University Press, Oxford, 2000) at 182.

[105] [1953] AC 380.

[106] (1918) 52 ILT 213. See also Tudor 9th ed, above n 13, at 129.

[107] [1927] NZLR 145.

[108] [1996] Ch Com Rep, at [60-65] cited by Tudor 9th ed, above n 13, at 127.

[109] Thirteen Māori Wardens entities. See for example Kaikohe & Districts Māori Wardens Sub Association, registration number CC41646.

[110] [1986] 1 NZLR 147 (CA), at 153 per Richardson J; at 156-157 per Somers J.

[111] Dal Pont *Law of Charity*, above n 8, at 258.

## 14.6 Conclusion

Not everything that governments do is charitable. This is why gifts for patriotic purposes are not necessarily charitable. They can be charitable, however, if such gifts are to encourage patriotism or relieve the community from rates and taxes.

The promotion of moral and spiritual welfare and improvement has recently been held to be charitable. Such decisions have been reached by courts at about the same time that they agreed that purposes to promote human rights, good citizenship and democracy were charitable. These show a trend at a time where religion is no longer the main institution that dictates which values are to be followed by society. Secular values are now being promoted by philosophies and organisations that promote values such as human rights and good citizenship together with moral and spiritual welfare and improvement.

Similarly, the promotion of the protection of human life and property may be based in religion, but in contemporary societies it is linked to values promoted through human rights and good citizenship. Such values are, in practice, administered by police and army personnel. This may be why courts have always maintained that the recruitment, training and efficiency of defence and police personnel were charitable. Diverse methods of achieving such efficiency of defence and police are therefore also considered charitable. Finally, the enforcement of the law generally, be it by law enforcement or through organisations that help the police, has been found to be charitable by the courts.

CHAPTER 15

# The protection of animals

The *Statute of Charitable Uses 1601* does not make any reference to the protection of animals. Hubert Picarda wrote that a society in which cock-fighting and bear-baiting flourished would have been unlikely to rate the prevention of cruelty to animals as sufficiently important. "Indeed, it was not until the nineteenth century that public agitation secured legislation to prevent cruelty to animals".[1]

Jean Warburton wrote that it is now accepted that an entity devoted to the protection of animals, irrespective of whether or not they are useful to man, is *prima facie* a charitable gift.[2]

This chapter first analyses the general principles applicable to entities that seek charitable status for the protection of animals. Different types of activity that have been upheld as charitable are canvassed. The notion of animal sanctuaries and refuges is analysed. Finally, decisions in which certain purposes for the protection of animals have been held not to be for the benefit of the public are considered.

## 15.1 General principles

In *Re Howey*,[3] Somers J, writing for the New Zealand Court of Appeal, wrote that "in the United Kingdom and in Australia public benefit in gifts for the protection or benefit of animals has been held to exist in cases where the material or moral welfare of mankind is enhanced, for example, where the object is to prevent cruelty to animals. There is no reason to think any different philosophy dominates in New Zealand".[4]

That philosophy was first expressed in *University of London v Yarrow*.[5] In that case, it was said that "the establishment of a hospital in which animals which are useful to mankind should be properly treated and cured and the nature of their diseases investigated with a view to public advantage is a charity".[6] The first decisions at least were based on the usefulness to mankind of the protection of certain animals. This was reinforced in *Re Douglas*,[7] where the Home for Lost Dogs was upheld as a charity, emphasis being put on the usefulness of dogs to mankind.

The rationale for the protection of animals was expanded and expressed in *Re Wedgwood*.[8] In that case, Swinfen Eady LJ explained his decision as follows:

> *A gift for the benefit and protection of animals tends to promote and encourage kindness towards them, to discourage cruelty, and to ameliorate the condition of brute creation, and thus to stimulate humane and generous sentiments in man towards the lower animals, and by these means promote feelings of humanity and morality generally, repress brutality, and thus elevate the human race*.[9]

The modern reason for upholding gifts for the protection of animals is based on the moral improvement of mankind and not on the benefits of animals *per se*.[10] In *Molloy v Commissioner of Inland Revenue*,[11] Somers J, writing for the New Zealand Court of Appeal, wrote that animal cases "derive the element of public good not from notions of general public utility but from the stimulation of sentiments of humanity in mankind, that is to say from the moral improvement of humans which may flow from such gifts".[12] Courts

1 Hubert Picarda *The Law and Practice Relating to Charities* (4th ed, Bloomsbury Professional Ltd, Haywards Heath, 2010) at 211 ["Picarda 4th ed"].

2 Jean Warburton *Tudor on Charities* (9th ed, Sweet & Maxwell, London, 2003) at 128 ["Tudor 9th ed"].

3 [1991] 2 NZLR 16 (CA).

4 Ibid, at 21.

5 (1857) 1 De G & J 72.

6 Ibid, at 79-80, cited with approval in *Re Bruce* [1918] NZLR 16 at 24, per Strout CJ.

7 (1887) 35 Ch D 472. See also Tudor 9th ed, above n 2, at 128.

8 [1915] 1 Ch 113.

9 Ibid, at 122.

10 *Re Moss* [1949] 1 All ER 495; *Re Green's Will Trusts* [1985] 3 All ER 455. See also Picarda 4th ed, above n 1, at 211.

11 [1981] 1 NZLR 688 (CA).

12 Ibid, at 696.

have held therefore that a gift for "the benefit of animals generally" is not charitable because it "is for the benefit of animals rather than the benefit of the community served by the benevolence towards animals".[13]

It is somewhat illogical and surprising that the promotion of "feelings of humanity and morality generally" should be considered charitable when directed towards animals, but not when they are directed towards "philanthropic purposes"[14] or "to the greatest benefit of humanity",[15] "for raising the standard of life"[16] or for "the benefit, maintenance and advancement of youth".[17]

### 15.2 Purposes considered charitable by the courts

Given the state of the law, which considers that purposes for the protection of animals are charitable, it is necessary to consider the entities that have been held charitable in that regard.

As stated by Reed J in the New Zealand case of *Caldwell v Fleming*,[18] a gift "for the purposes of paying a live inspector or inspectors in different localities to persecute those brutally abusing animals by starving or in any other way" was charitable because the prevention of cruelty to animals enhanced the moral welfare of humankind.[19]

Gifts to establish and maintain homes for lost dogs[20] or cats,[21] or even homeless animals,[22] have been recognised as charitable. In *Attorney-General for South Australia v Bray*,[23] the High Court of Australia had to decide if a bequest "to purchase and properly equip a home for the purposes of the maintenance and care of or for otherwise mercifully and kindly dealing with homeless, stray and unwanted animals" was charitable. Kitto J wrote that the main reason for the decision and others concerning "homeless", "stray" and "unwanted" animals was that they were confined to domestic animals. Another reason was that they were "to promote feelings of humanity and morality generally".[24]

Funds directed to establish hospitals for the care of stray, neglected or sick animals have also been held to be charitable. The first case in that regard was *London University v Yarrow*,[25] where the Court held that the establishment of a veterinary college and a hospital in which animals that were useful to mankind could be properly treated and cured and the nature of their diseases investigated with a view to public advantage was a charity.

A gift to establish humane slaughterhouses has also been held charitable on the basis that this would be for the prevention of cruelty to animals.[26] Trusts to promote periodicals and lectures dedicated to propaganda against cruelty to animals have also been held to be charitable.[27] This is somewhat surprising considering that the promotion of propaganda has been held not charitable in cases involving the promotion of peace.[28]

Finally, trusts to promote vegetarianism have been held to be charitable to stop the killing of animals for food condemned as being inconsistent with the rights of animals and calculated to produce demoralising effects upon humans.[29] Lord Wright, in *National Anti-Vivisection Society v Inland Revenue Commissioners*,[30] considered that decision to have been wrongly decided and would have sided with the dissenting Judge in that case. Hubert Picarda[31] criticised such decisions principally because in *Re Cranston*,[32] the two judges who formed part of the majority applied a subjective test instead of an objective test.

[13] *Murdoch v Attorney-General* (1992) 1 Tas R 117 at 131 per Zeeman J and *Re Green (deceased)* [1970] VR 442 at 444 per Anderson J.

[14] *Re Macduff* [1896] 2 Ch 451.

[15] *Re Bell* [1943] VLR 103 at 105 per Gavan Duffy J.

[16] *Re Blyth* [1997] 2 Qd R 567 at 581-582 per Thomas J.

[17] *Re Payne (deceased)* [1968] Qd R 287 at 293-294 per Matthews J.

[18] [1927] NZLR 145 at 165.

[19] *Re Wedgwood* [1915] 1 Ch 113 at 122; *National Anti-Vivisection Society v Inland Revenue Commissioners* [1948] AC 31 at 67; *Re Moss* [1949] 1 All ER 495; *Royal Society for the Prevention of Cruelty to Animals (New South Wales) v Benevolent Society of New South Wales* (1960) 102 CLR 629 (HC) cited in *Re Howey* [1991] 2 NZLR 16 at 21 per Somers J.

[20] *Re Douglas* (1887) 35 Ch D 472 (CA) cited with approval by the Privy Council in *Adamson v Melbourne* [1929] AC 142 at 148, per Anglin CJ.

[21] *Swifte v Attorney-General (Ireland) (No 2)* [1912] 1 IR 133.

[22] *Attorney-General for South Australia v Bray* (1964) 111 CLR 402; [1964] ALR 955 (High Court of Australia).

[23] (1964) 111 CLR 402 per Dixon CJ at [5], and per Kitto J at [7].

[24] Ibid, per Kitto J at [7].

[25] (1857) 1 De G & J 72 at 80, cited with approval in *Re Bruce* [1918] NZLR 16 at 24, per Strout CJ.

[26] *Tatham v Drummond* (1864) 4 De GJ & Sm 484; *Re Wedgwood* [1915] 1 Ch 113 at 116; *Re Winton* (1953) Times, 31 January; *Re Gemmill* [1946] 2 DLR 716.

[27] *Marsh v Means* (1857) 3 Jur NS 790; *Re Cranston* [1898] 1 IR 431 at 433, per Lord Ashbourne C.

[28] See *Re Wilkinson (deceased)* [1941] GLR 533; [1941] NZLR 1065.

[29] *Re Cranston* [1898] 1 IR 431; *Re Slatter* (1905) 21 TLR 295.

[30] [1948] AC 31 at 45-46.

[31] Picarda 4th ed, above n 1, at 212.

[32] [1898] 1 IR 431, per Lord Ashbourne C at 444-445; per Fitzgibbon LJ at 446-447.

## 15.3 Animal sanctuaries

In *Re Grove-Grady*,[33] a majority of the English Court of Appeal held that a gift for the acquisition of land to provide a refuge for the preservation of all animals, birds and other creatures not human where they would not suffer from molestation or destruction by man was not charitable because there was no element of benefit to the community. An animal sanctuary has been described as "a refuge that is free from the molestation of man, while all fauna within it are to be free to molest and harry one another".[34] Lord Hanworth MR explained that "such a purpose does not, in my opinion, afford any advantage to animals that are useful to mankind in particular, or any protection from cruelty to animals generally. It does not denote any elevating lesson to mankind".[35] That decision was referred to with approval in *National Anti-Vivisection Society v Inland Revenue Commissioners*.[36]

In *Molloy v Commissioner of Inland Revenue*,[37] the New Zealand Court of Appeal wrote about the *Re Grove-Grady* decision that "whether current views on conservation may today lead to a different conclusion can be left until the point arises".[38] A case in point has arisen in Australia in *Attorney-General v Sawtell*.[39] In that case, a testatrix had left the net balance of her estate for "the preservation of native wild life (both flora and fauna)" and directed that donations be made to "one or more organisations concerned with wild life by promoting the preservation of wild life". Holland J held that the bequest constituted a valid charitable trust. He gave two reasons for his decision. Firstly, on the question of whether the trust had purposes beneficial to the community, the fact that its object was the preservation of "native" wildlife was of considerable significance in an Australian context, because of the uniqueness of so much of its native wildlife in the world of plants and animals. "The evidence shows that certain species are in danger of extinction, and that elaborate and costly legislative and administrative measures have been and are being taken to preserve in the public interest, not only endangered species, but our native flora and fauna generally".[40] Secondly, Holland J wrote: "I think that it is a fair summary to say that the evidence was to the effect that there has developed over the last few decades a greatly intensified public interest in wild life, its preservation and the opportunity to observe it in the wild".[41]

Concerning *Re Grove-Grady,* Holland J wrote that the evidence before him had shown that between 1929 and his decision in 1978 "there has been a radical change in the recognition throughout the world, and here in Australia, of value to mankind of the preservation of wild life in general. In Australia this would, I think, be particularly true in relation to our native wildlife".[42] Holland J went on to examine whether the trust provided sufficient public benefit. In deciding in the affirmative, he relied on cases that had upheld as charitable gifts to encourage and support the study of natural history such as "marine zoology",[43] trusts to maintain zoos[44] and botanic gardens.[45] Holland J also relied on *Re Ingram*.[46] In that case, the gift had contained a number of trusts "for the benefit of the public of Australia to preserve animals (being mammals) and birds indigenous to Australia but particularly to Victoria, and the indigenous flora that provides cover, food and general conditions suitable for the life habits and preservation of such animals and birds". Finally, he refused to follow *Re Green (deceased)*,[47] a case that followed *Re Grove-Grady* and struck down a bequest of funds to purchase a 1,000-acre parcel of land for the purposes of establishing native fauna and flora without human hindrance and fenced and guarded by a ranger.

The High Court of Australia followed *Re Grove-Grady* in *Royal Society for the Prevention of Cruelty to Animals v Benevolent Society of New South Wales*.[48] In that case, however, the High Court considered that the bequest did not establish a genuine wildlife sanctuary. Windeyer J wrote that "a trust for the provision and preservation of a sufficient area of

33 [1929] 1 Ch 557 (CA).

34 Ibid.

35 Ibid, at 573-574.

36 [1948] AC 31 at 45 per Lord Wright, at 58 per Lord Porter and at 70 per Lord Simonds.

37 [1981] 1 NZLR 688 (CA).

38 Ibid, at 696 (CA).

39 [1978] 2 NSWLR 200.

40 Ibid, at 209.

41 Ibid, at 211.

42 Ibid, at 214.

43 *Re Benham* [1939] SASR 450.

44 *North of England Zoological Society v Chester Urban District Council* [1959] 1 WLR 773; [1959] 3 All ER 116.

45 *Morgan v Wellington City Corporation* [1975] 1 NZLR 416 at 419-420.

46 [1951] VLR 424.

47 [1970] VR 422, cited by Holland J in *Attorney-General v Sawtell* [1978] 2 NSWLR 200 at 219.

48 (1960) 102 CLR 629.

bush land or of inland water, marshland or seacoast, suitably situated, as a place where birds could breed unmolested might well be good".[49] In that case, however, Windeyer J noted that "a suburban household cannot by assuming an obligation to keep a basin filled with water and to put out food for birds convert his home into a public charity of which he can make himself or his nominee the manager".[50]

In *Re Howey*,[51] the New Zealand Court of Appeal had to decide if a bequest by the deceased was charitable; it constituted a trust whereby her residential property was not to be sold or in any other way disposed of but remain in trust in perpetuity as the cat and bird sanctuary it had been for many years. The Court of Appeal held that "a true sanctuary, whether mankind is permitted entry or whether it be a wilderness, would be upheld as charitable".[52] In the present case, however, Somers J wrote that "in our view the trust for a sanctuary is not itself charitable, it discloses no general charitable intention nor has it any, let alone a substantial, charitable content".[53]

Gino Dal Pont summarised the state of the law in Australia and New Zealand concerning animal sanctuaries as follows:

> *First, the reasoning in* Sawtell *arguably does not apply to sanctuaries and refuges not limited to native flora and fauna.* Secondly, Sawtell *did not follow the earlier Victorian case of* Re Green (deceased)[54] *in which a bequest of funds to purchase a 1,000 acre parcel of land for the purposes of establishing native fauna and flora without human hindrance (and so fenced and guarded by a permanent ranger) was struck down.* Thirdly, *the decision in* Sawtell *should not be seen as conferring charitable status to any setting aside of land for native wildlife, as the nature and the scale of the object may dictate otherwise.*[55]

That statement by Dal Pont is echoed in some Canadian decisions. For example in *Grandfield Estate v Jackson*,[56] the British Columbia Supreme Court found that a trust directing the trustee to manage a farm property "for the purpose of providing a game and bird sanctuary" was a valid charitable trust. The main reason for the decision was that children could observe game and birds in their natural environments without having to resort to prohibitively expensive expeditions to national parks and provincial parks far away from the emerging centres of population. This could be viewed as charitable "in that ultimately there is an elevating lesson to mankind in being able to observe game and birds in this natural habitat".[57]

### 15.4 Public benefit in animal cases

In *Attorney-General v Sawtell*,[58] Holland J cited *Royal National Agricultural and Industrial Association v Chester*[59] and reiterated what the High Court had said in the latter case: "to justify an affirmative answer, it seems to us that it must, at least, be found that the breeding of racing pigeons is a purpose both beneficial to the community and within the spirit and intendment of the Preamble to the *Statute 43 Eliz.I*, c.4".

Since the protection of animals falls into the fourth head of charity, there is no presumption that such protection provides public benefit. Public benefit must be proven.

Trusts for the care and protection of animals have been said to be charitable if they provide public benefit. In *National Anti-Vivisection Society v Inland Revenue Commissioners*,[60] the House of Lords denied charitable status to the appellant for two reasons: firstly, because any assumed public benefit in the advancement of morals would

[49] Ibid, at 647-648.

[50] Ibid, at 648-649, at 644-645 per Dixon CJ.

[51] [1991] 2 NZLR 16.

[52] Ibid, at 21.

[53] Ibid.

[54] [1970] VR 442 at 446 per Anderson J.

[55] Gino Dal Pont *Charity Law in Australia and New Zealand* (Oxford University Press, Oxford, 2000) at 189.

[56] [1999] BCJ No 711. See also Karen J Cooper "Environmental Issues under the 4th Head of Charity" (Canadian Bar Association/ Ontario Bar Association, *2010 National Charity Law Symposium*, Toronto, 30 April 2010) at 9.

[57] Ibid, at [46].

[58] [1978] 2 NSWLR 200 at 204.

[59] (1974) 48 ALJR 304.

[60] [1948] AC 31.

have been far outweighed by the detriment to medicinal science and research and consequently to public health, and secondly, because a main object of the society was political in the promotion of legislation. Concerning the first reason, Lord Wright explained that one had to balance the benefits for the animals and the benefits to humankind in deciding if the purpose of protecting animals provided public benefit. He wrote:

> *I do not question that a high degree of regard for animals is a good thing. But it must be a regulated regard. Cruelty, that is purposeless cruelty, whether through brutality or through a purpose to satisfy our pleasure or our pride, cannot be forgiven. It is indeed also a penal offence at law. But it is impossible to apply the word cruelty to efforts of the high-minded scientists who have devoted themselves to vivisection experiments for the purpose of alleviating human suffering [...] However it is looked at, the life and happiness of human beings must be preferred to that of animals. Mankind, of whatever race or breed, is on a higher plane and a different level from even the highest of the animals who are our friends, helpers and companions. No one faced with the decision to choose between saving a man or an animal could hesitate to save the man.*[61]

In *Attorney-General v Gray*,[62] Windeyer J, in the High Court of Australia, wrote that there was public benefit, "provided that in any particular case the disadvantages to mankind of performing the trust do not outweigh the moral benefits that flow from the promotion of kindly feelings for animals and from arrangements which allow such feelings to have effect".[63]

In *Re Wedgwood*,[64] Kennedy J wrote that a trust for the preservation of animals harmful to mankind, such as beasts of prey and mad dogs, was not charitable. Gino Dal Pont wrote that, for instance, "protecting or preserving certain types of animals or plants, such as those that are in plague proportions or otherwise detrimental to the community, can hardly be a charitable purpose".[65]

It seems that gifts for the benefit of animals useful to humans are charitable. In *Re Vernon*,[66] a trust to erect a drinking fountain with a trough for the use of horses, cattle and dogs was upheld as charitable. However, birds are not necessarily useful to humankind, and a trust to feed common birds should not qualify for charitable status. In Australia and New Zealand, courts have decided that a suburban householder cannot convert a home into a public charity by assuming an obligation to keep a basin filled with water and put out food for birds.[67]

In *The Royal National Agricultural and Industrial Association v Chester*,[68] the testator bequeathed the residue of his estate to a charitable body for the purpose of applying the income "in improving the breeding and racing of homer pigeons". The High Court of Australia had to examine whether that purpose was charitable under the fourth head of charity. The Court wrote that in order to justify an affirmative answer, "it must at least be found that the breeding of racing pigeons is a purpose both beneficial to the community and within the spirit and intendment of the Preamble to the *Statute 43 Eliz I*".[69] The High Court considered that the breeding of pigeons for racing was a purpose beneficial to the community. However, it decided that it was not similar to any decided cases. This was mainly because these pigeons were used for racing, which was a sport and therefore not charitable at law.[70]

It should also be noted that a trust established for the benefit of particular designated animals as distinct from a trust for the benefit of animals generally is not charitable. This is presumably because such a trust is not for the benefit of the public but for the benefit of the particular designated animals. However, if the terms of the trust do not infringe

[61] Ibid, at 47-49.

[62] (1964) 111 CLR 402.

[63] Ibid, at 424.

[64] [1915] 1 Ch 113 at 121.

[65] Gino Dal Pont *Law of Charity* (LexisNexis/Butterworths, Australia, 2010) at 272.

[66] (1957) Times 27 June. See also Picarda 4th ed, above n 1, at 213-214.

[67] *Royal Society for the Prevention of Cruelty to Animals v Benevolent Society of New South Wales* (1969) 102 CLR 629 (HC), referred to in *Re Howey* [1991] 2 NZLR 16 at 21 (CA).

[68] [1974] 48 ALJR 304.

[69] Ibid, at 305.

[70] Ibid, at 306, citing *In re Nottage, Jones v Palmer* [1895] 2 Ch 649, and *Peterborough Royal Foxhound Society v Commissioners of Inland Revenue* [1936] 2 KB 497.

the rule against perpetuities, it is lawful for the trustees to carry them into effect, even though no one can compel them to do so.[71]

When the purposes of an entity promote a method of protecting animals that is too remote to provide public benefit, the purposes may not be charitable. This was the case in *Re Joy*.[72] In that case, a bequest to a society founded by the testator was turned down. The reason was that the society had the object of suppressing cruelty to animals through prayers. The Court also considered that the real object was to improve the individuals who prayed and the requisite element of public benefit was lacking.

It must also be noted that although an animal hospital or shelter is a charity, it will lack the quality of a legal charity if it is carried on for private profit as a profession, occupation or trade.[73]

Purposes promoting changes in the law have not always been held not charitable. For example, in *Re Foveaux*,[74] a trust for the suppression of vivisection was held to be a valid charitable trust. That decision occurred 22 years before *Bowman v Secular Society Ltd*,[75] where the House of Lords considered that trusts for the promotion of legislative changes did not provide public benefit. Therefore, some 50 years later, the House of Lords overruled *Re Foveaux* in *National Anti-Vivisection Society v Inland Revenue Commissioners.*[76] In that case, the House of Lords denied the appellant charitable status for two reasons: firstly, because any assumed public benefit in the advancement of morals would be far outweighed by the detriment to medical science and research and consequently to public health; and secondly, because a main object of the Society was political in the promotion of legislation. Concerning the second reason, the object of which was to secure legislation prohibiting vivisection, the House of Lords decided that the object of changing the law was not charitable because the court, unlike the legislature, had no means of knowing whether or not a change in the law was beneficial to the community.[77]

In *Molloy v Commissioner of Inland Revenue*,[78] the New Zealand Court of Appeal had to decide if an organisation was charitable whose main purpose was to oppose changes in statutory provisions about abortion. A central part of the appellant's submission turned on an analogy with the protection of animals.[79] It submitted that if the protection of animals was held to be a valid charitable disposition, the promotion of the value of human life was *a fortiori* a charitable gift. Somers J, writing for the Court of Appeal, rejected that argument. His main reason for doing so was that he could not be satisfied that the "public good in restricting abortion is so self-evident as a matter of law that such charitable prerequisite is achieved".[80] Gino Dal Pont commented that "this decision should not be seen as the law valuing animals more than unborn foetuses, for there is no doubt that the protection of human life, where effected by non-political objects, is charitable".[81]

### 15.5 Conclusion

The protection of animals has been held charitable not because of the animals themselves, but because preventing cruelty towards animals provokes humane feelings in human beings.

As many commentators have noted, it is somewhat illogical and surprising that the promotion of "feelings of humanity and morality generally" should be considered charitable when directed towards animals, but not when they are directed towards "philanthropic purposes" or "to the greatest benefit of humanity", "for raising the standard of life" or for "the benefit, maintenance and advancement of youth". Gino Dal Pont wrote: "This logic leads to the paradoxical conclusion that a gift for the moral improvement of society generally is invalid, whereas a gift for the protection of animals is

[71] *Re Dean* (1889) 41 Ch D 552; *Re Astor's Settlement Trusts* [1952] Ch 534 at 542-547, per Roxburgh J. See also Tudor 9th ed, above n 2, at 130.

[72] (1888) 60 LT 175.

[73] *Re Satterthwaite's Will Trusts* [1966] 1 WWLR 277 at 284, per Russell LJ. See also Tudor 9th ed, above n 2, at 129.

[74] [1895] 2 Ch 501.

[75] [1917] AC 406.

[76] [1948] AC 31.

[77] Ibid, at 50-51 per Lord Wright, at 61-62 per Lord Simonds, at 76-77 per Lord Normand.

[78] [1981] 1 NZLR 688 (CA).

[79] Ibid, at 696.

[80] Ibid, at 697.

[81] Dal Pont *Law of Charity*, above n 65, at 275.

valid because it tends towards moral improvement".[82] In that sense, it could be said that the cases for the protection of animals are an anomaly.

Another problem with the protection of animals being charitable is the leeway that courts allow for such organisations to participate in political activities. This may be explained by the origins of the societies for the prevention of cruelty to animals. They were established by legislation and given police powers with respect to protecting animals against cruelty. In their capacity of administrators of the law, it is understandable that they may be allowed to criticise the present legislation and its flaws and suggest ways to correct such failings.

[82] Ibid, at 269.

CHAPTER 16

# Public works, community betterment and gifts to a locality

Before the creation of the welfare state, a number of public structures and services were provided by charitable organisations. This is why the *Statute of Charitable Uses 1601* specifically includes as charitable purposes the repair of bridges, ports, havens, causeways, churches, sea-banks and highways.

Socialisation and the greater involvement of governments in the provision of public services and the increasing cost of maintaining those services have made somewhat obsolete the involvement of charities in those areas. However, they have not totally abandoned those areas.

This chapter focuses on five different areas: roads and public infrastructure works, public amenities and services, community betterment, protection of the environment, and gifts for the benefit of a locality.

## 16.1 Roads and public infrastructure works

The New Zealand Court of Appeal, in *Morgan v Wellington City Corporation*,[1] was confronted with the fact that the *Statute of Charitable Uses 1601* did not mention the construction of roads. The Court, however, wrote that "by analogy with what is mentioned, it must be held to be within the spirit and intendment, and to fall within the fourth class",[2] that is, other purposes beneficial to the community.

In that case, the respondent intended to facilitate access from certain residential property to public land that had been granted upon trust to the city for the benefit of its citizens in providing public recreation and enjoyment. The reasoning in that case would have also applied to the construction of bridges,[3] ports, havens, causeways and sea-banks.[4] The repair, improvement and fortification of a town's bridges, gates, towers and walls were held to be charitable purposes.[5] Hubert Picarda wrote that "non-profit-making canals and navigable waterways open to public navigation are capable of being charitable objects on the analogy of the maintenance of highways".[6]

A trust established for bringing good spring water to the inhabitants of a town, and building conduits and reservoirs, has been held charitable because "the supplying of water is necessary as well as convenient for the poor and the rich".[7] Based on that case, the New Zealand Charities Registration Board has registered a number of entities founded to establish irrigation services. The irrigation, however, must be available to everybody and not only to farmers.[8]

Gifts for the disposal and burial of the dead, including cremation, have been held to be charitable under the fourth head of charity. This is because "the disposal of the dead is, and always has been, not merely a purpose beneficial to the community but a matter of public necessity".[9] The same reasoning was applied in New Zealand in *Re Thorburn*.[10] In that case, land had been gifted for the burial of settlers residing in a certain area and such other persons as could be approved by the trustees. Sinclair J considered that the trust was not "for a selected group of persons but embraces the whole of the community of the Lower Wade".[11] However, as decided in *Fraser v Campion*,[12] a private burial place

1 [1975] 1 NZLR 416.

2 Ibid, at 419.

3 *Forbes v Forbes* (1854) 18 Beav 552.

4 *Attorney-General v Brown* (1818) 1 Swan 265; *Wilson v Barnes* (1886) 38 Ch D 507 (CA).

5 *Attorney-General v Shrewsbury Corporation* (1843) 6 Beav 220.

6 Hubert Picarda *The Law and Practice Relating to Charities* (4th ed, Bloomsbury Professional Ltd, Haywards Heath, 2010) at 191 ["Picarda 4th ed"], citing Chesterfield Canal Co (Regn No 506925); Dudley Canal Trust (Regn No 240545); Trent and Mercy Canal Society Ltd (Regn No 326498).

7 *Jones v Williams* (1767) Amb 651.

8 See South Canterbury Irrigation Trust (Registration number CC26753); Wairarapa Regional Irrigation Trust (Registration No CC42782).

9 *Scottish Burial Reform and Cremation Society Ltd v Glasgow Corporation* [1968] AC 138 at 150 per Lord Upjohn; [1967] 3 All ER AC 531.

10 High Court, Auckland, M 1229/88, 10 November 1989, per Sinclair J.

11 Ibid, at 8-9 per Sinclair J.

12 (1910) 29 NZLR 1009; 12 GLR 773. See also Margaret Soper *Laws of New Zealand – Charities* (Butterworths, Wellington, 1994) at [45] ["Charities"].

is not a charity.

In *Vancouver Regional FreeNet Association v MNR*,[13] the Federal Court of Appeal of Canada used the analogy of an "electronic highway" in order to find in favour of an entity that provided free access to the internet. Hugessen J wrote for the majority that the provision of free access to information and to a means of communication was similar to giving access to an information highway and was within the spirit and intendment of the Preamble to the *Statute of Elizabeth*.

### 16.2 Public amenities and public services

By analogy to the repair and maintenance of infrastructure, the provision of public amenities and public services may be charitable.

#### *16.2.1 Public buildings and amenities*

The provision of public buildings is charitable under the fourth head of charity as long as the use of such facilities is not limited to a specific group of people but is available to the public. In *Re Cumming*,[14] Kennedy J held that a trust for the erection of a hall, rooms and offices was charitable. However, the Court applied the predecessor of section 61B of the *Charitable Trusts Act 1957* in order to confine the use of the hall to charitable activities and thereby carved out as invalid the provision of a club for farmers.

Earlier court decisions had declared charitable the provision of a library,[15] a public hall[16] and an observatory.[17] In *Monds v Stackhouse*,[18] the leading Australian case, the High Court found that a gift was charitable because it was to build a suitable hall or theatre for the holding of concerts to provide music for the citizens of the city and for the production of dramatic entertainments. This was because, by private benevolence, the donor brought "about a reduction of the burden of rates and taxes on the community".[19]

Gifts for the erection and maintenance of museums and art galleries have been held charitable under the fourth head as well as for the advancement of education.[20] Section 61A(3) of the *Charitable Trusts Act 1957* provides that "the provision of facilities at public halls, community centres, and women's institutes" is deemed always to have been charitable. Under the same section, the provision and maintenance of grounds and buildings to be used for purposes of recreation or leisure-time occupation, and the provision of facilities for those purposes by the organising of any activity are also deemed always to have been charitable.[21]

In *Re Chapman*,[22] a New Zealand High Court Judge found that the provision for a rugby grandstand or facilities to enable the better use of a public recreation ground was charitable. Greig J relied on a number of New Zealand cases and decided that "the provision of a public amenity like a grandstand or an extension to a grandstand, though it be for the comfort of spectators, assists in the encouragement of the public recreation and the general use of the park as a public facility".[23] In that case, the park was used for the playing of rugby union, but also for other purposes including cricket, athletic sports and cycling sports, and had been used for other public functions on special occasions, including concerts, pop band contests and other similar events.

Similarly, gifts to provide water facilities for recreational purposes for the public have been held charitable. Hubert Picarda wrote that "a swimming pool[24] (outdoor or indoor), a lake and its shores,[25] a river[26] and by extension a canal and its environs[27] are all capable of being charitable objects".[28] Land vested in a borough pursuant to a statute for recreation purposes for a memorial hall to commemorate those men from the district who had

[13] [1996] 3 FC 880, 137 DLR (4th) 206, [1996] 3 CTC 1, (1996) 50 DTC 6440.

[14] [1951] NZLR 498.

[15] *Kjar v Mayor of Masterton* [1930] GLR 303.

[16] *Re Spence* [1938] Ch 96; [1937] 3 All ER 684.

[17] *Sadlier v Gibbs* [1919] NZLR 49; [1918] GLR 656.

[18] (1948) 77 CLR 232.

[19] Ibid, at 242 per Latham CJ, at 246 per Dixon J, at 251 per McTiernan J. See also Gino Dal Pont *Law of Charity* (LexisNexis/Butterworths, Australia, 2010) at 263-264.

[20] *Murdoch v Attorney-General* (1892) 11 NZLR 502; *Re Holbourne* (1885) 53 LT 212 at 215 per Chitty J; *Re Spence* [1938] 1 Ch 96 at 102-103; *Re Gwilym* [1952] VLR 282.

[21] See Soper *Charities*, above n 12, at [46].

[22] High Court, Napier, CP 89/87, 17 October 1989.

[23] Ibid, at 17.

[24] *Valuation Comr for Northern Ireland v Lurgan Borough Council* [1968] NI 104, CA.

[25] *Re Spehr* [1965] VR 770.

[26] *Kaikoura County v Boyd* [1949] NZLR 233.

[27] Dudley Canal Trust (Registration No 240545) (keeping up Dudley Canal Tunnel for providing educational historical and recreational facilities for the people of England); Trent and Mersey Canal Society Ltd (Registration No 326498) (to promote the fullest use by both commercial and pleasure traffic).

[28] Picarda 4th ed, above n 6, at 193.

lost their lives in the Second World War, subject to the condition that the memorial would always be available for the uses of all sections of the community, has been held a charitable trust.[29]

In *Re Mair (deceased)*,[30] an Australian court upheld a gift of land as a public park for picnicking on the basis that the provision of recreation in the form of facilities for outdoor activities, such as picnic parties and attendant sporting activities, was beneficial to the public. Gino Dal Pont wrote that the willingness of the courts to uphold gifts of this kind was illustrated by the validity of the following gifts: " 'to be used as a garden park or reserve for the use of the public or for municipal markets or other similar purposes';[31] 'and showground, park and recreation purposes'[32] and for 'playing fields, parks, gymnasium, or other plans which will give recreation to as many people as possible'[33]".[34]

### *16.2.2 Public services*

The provision of public services is also charitable under the fourth head of charity as being similar to the repair and maintenance of bridges, ports, havens, causeways, churches, sea-banks and highways mentioned in the *Statute of Elizabeth*. A trust to put up lampposts or for paving or lighting or cleaning streets has been held to be charitable.[35]

As mentioned in *Monds v Stackhouse*,[36] by creating a fund to provide public services, benefactors reduce the burden of rates and taxes on the community. Therefore, the establishment of a lifeboat[37] or a district fire brigade[38] is charitable.

New Zealand courts have considered that a public authority exercising the power of local government within the area of the harbour limits, and despite holding property for some purposes of benefit to the community, does not hold its assets and funds upon trust for charitable purposes.[39] Similarly, in *Waitemata County v Commissioner of Inland Revenue*,[40] the Court held that a local authority, in the absence of the creation of a specific trust, held property in a fiduciary capacity to carry out the purposes for which the local authority was created by statute, but not for a specific trust.

## 16.3 Community betterment

Courts have long held that gifts for community betterment are charitable. What started with the recognition of community betterment has evolved into the protection of heritage buildings and the protection of the environment. Each of these aspects of community betterment is analysed.

### *16.3.1 Community betterment*

Courts have held that gifts for the beautification of cities and towns are charitable.[41] In *Re Pleasants*,[42] Russell J acknowledged that a gift for annual prizes to residents for the best-kept gardens and cottages was charitable. This was because a gift for the beautification of a locality put emphasis on physical things that had an element of beauty for the edification and enjoyment of the community as a whole and not for the private benefit of private individuals. A trust for the beautification of a city street and paths is a good charitable trust.[43]

In *Morgan v Wellington City Corporation*,[44] the New Zealand Court of Appeal decided that a bequest for the ornamentation of a public reserve and a botanic garden owned by the city was charitable. This decision was reached because the ornamentation and beautification of public lands were for public recreation and enjoyment. A gift of property for a park and recreation ground was held to be charitable in New Zealand.[45] Similarly,

[29] *Watch Tower Bible and Tract Society v Mt Roskill Borough* [1959] NZLR 1236. See also Soper *Charities*, above n 12, at [46].

[30] [1964] VR 529.

[31] *Re Smith (deceased)* [1967] VR 341 at 343 per Menhennitt J.

[32] *Brisbane City Council v Attorney-General (Qd)* [1979] AC 411 at 422-424.

[33] *Re Hadden* [1932] 1 Ch 133 at 141-142 per Clauson J.

[34] Gino Dal Pont *Charity Law in Australia and New Zealand* (Oxford University Press, Oxford, 2000) at 183.

[35] *Attorney-General v Brown* (1818) 1 Swan 265; *Attorney-General v Heelis* (1824) 2 Sim & St 67; *Attorney-General v Eastlake* (1853) 11 Hare 205. See also Picarda 4th ed, above n 6, at 192.

[36] (1948) 77 CLR 232 at 242 per Latham CJ.

[37] *Johnston v Swann* (1818) 3 Madd 457.

[38] *Solicitor-General v Wanganui Borough* [1919] NZLR 763; [1920] GLR 145 (CA); *Re Wokingham Fire Brigade Trusts* [1951] Ch 373.

[39] *Auckland Harbour Board v Commissioner of Inland Revenue* [1959] NZLR 204.

[40] [1971] NZLR 151. See also Soper *Charities*, above n 12, at [45].

[41] *Howse v Chapman* (1799) 4 Ves 542 (Bath); *Re Bones* [1930] VLR 346 (Ballarat). See also Picarda 4th ed, above n 6, at 192.

[42] (1923) 39 TLR 675 at 675. See also *Schellenberger v Trustees Executors and Agency Co Ltd* (1952) 86 CLR 454 at 461 per Dixon CJ (gift for the beautification and advancement of the township of Bunyip was to be construed for advancing the township by means that beautified it and was accordingly charitable).

[43] *Re Knowles* [1938] 3 DLR 178 and *Re Cotton Trust for Rural Beautification* (1980) 117 DLR (3d) 542 at 545 per McQuaid J, Prince Edward Island Supreme Court.

[44] [1975] 1 NZLR 416 at 419-420.

[45] *Re Lushington* [1964] NZLR 161 (CA).

a gift to erect in a public park statuary, fountains or other like works of art tending to the beautification of the park could properly be described as being beneficial to the community and, therefore, charitable.[46] This decision was arrived at even though the donor had made a pronouncement that it was as a tribute to the memory of a particular person. Finally, in *Grant v Commissioner of Stamp Duties*,[47] Johnston J acknowledged that gifts to be spent on fountains, swimming pools or other amenities to render a park more enjoyable to the public were to be regarded as charitable.

### *16.3.2 Protection of heritage buildings*

In *Re Verrall*,[48] the Court held that promoting the permanent preservation of buildings for the benefit of the nation was a charitable purpose. That case was followed in New Zealand in *Re Bruce*,[49] where the Court of Appeal held that the purposes of afforestation and the making of domains or national parks in New Zealand were charitable. The Court concluded that these objects were required to have an overriding public benefit. In particular, Hosking J considered whether enhancing private land could be a charitable purpose. He concluded that:

> *If the land were sold the buyer might decline to go on with the system, or he might cut down the trees that had grown. It is difficult to conceive by what method of covenant or bargain the successive owners of private land or the land itself could be bound by an obligation to maintain the requisite course of management for the future.*[50]

The *Charities Act 2006* (England and Wales) recognised "the advancement of heritage" as a charitable purpose.[51] However, the Charity Commission for England and Wales will only consider organisations set up for preservation purposes to be charitable if they can demonstrate that: (i) there is independent expert evidence that the building or site is of sufficient historical or architectural interest; (ii) the building or site is not used for non-charitable purposes; (iii) sufficient public access is provided to the building or site; and (iv) any private benefit to individuals is incidental.[52] The New Zealand Charities Registration Board has adopted that policy in deciding whether an applicant has charitable purposes or not. It has approved a number of entities aimed at the protection of heritage buildings and sites, but has declined a few for insufficient public access or benefit.[53]

## 16.4 Protection of the environment

The first case in what is now known as the protection of the environment was *Re Verrall*,[54] which dealt with the preservation of buildings. In that case, the Court held that promoting the permanent preservation of buildings for the benefit of the nation was a charitable purpose. That case was followed in New Zealand in *Re Bruce*.[55] That case can be more easily classified as one for the protection of the environment. In that case, the Court of Appeal held that the purposes of afforestation and the making of domains or national parks in New Zealand were charitable. The Court concluded that these objects were required to have an overriding public benefit.

In *Kaikoura County v Boyd*,[56] the New Zealand Court of Appeal had no problem deciding that certain lands vested in the Kaikoura County "in trust for the improvement and protection of the Waimangarara River" were charitable. The Court wrote that the purposes were "akin to the repairing of bridges and highways, and more closely resembles the protection of land from inroads of the sea".[57]

The case of *Attorney-General (New South Wales) v Sawtell*[58] illustrates how changing social

[46] *Grant v Commissioner of Stamp Duties* [1943] NZLR 113 at 115 per Johnston J.

[47] [1943] NZLR 113 at 115.

[48] [1916] 1 Ch 100.

[49] [1918] NZLR 16.

[50] Ibid, at 32.

[51] *Charities Act 2006*, (UK) c. 50, s 2(2)(g).

[52] Charity Commission for England and Wales' website at www.charity-commission.gov.uk/publications/rr9.asp.

[53] The Christchurch Heritage Trust: www.charities.govt.nz/Portals/0/docs/decisions/Christchurch_Heritage_Trust.pdf. The New Zealand Charities Registration Board has however registered a second application by the entity after some of the purposes and activities were changed, see CC48684.

[54] [1916] 1 Ch 100.

[55] [1918] NZLR 16 at 32.

[56] [1949] NZLR 233 (CA).

[57] Ibid, at 261.

[58] [1978] 2 NSWLR 200.

and economic conditions have affected the way courts view environmental purposes. In that case, Holland J refused to follow *Re Grove-Grady*,[59] in which the English Court of Appeal had not been prepared to assume that all environmental purposes provided a benefit to the community. Holland J wrote that the evidence before him had shown that, between 1929 and his decision in 1978, "there has been a radical change in the recognition throughout the world, and here in Australia, of the value to mankind of the preservation of wild life in general. In Australia this would, I think, be particularly true in relation to our native wildlife".[60] He further wrote: "The evidence shows that certain species are in danger of extinction, and that elaborate and costly legislative and administrative measures have been and are being taken to preserve in the public interest, not only endangered species, but our native flora and fauna generally".[61] Secondly, Holland J wrote: "I think that it is a fair summary to say that the evidence was to the effect that there has developed over the last few decades a greatly intensified public interest in wild life, its preservation and the opportunity to observe it in the wild".[62]

In *Hogan v Hogan*,[63] where the charitable nature of the trust was not disputed, the donor had purchased a property with the aim of developing it as an arboretum and public park.

A similar approach was adopted in Canada in *Grandfield Estate v Jackson*[64] in 1999. In that case, the British Columbia Supreme Court found that a trust directing the trustee to manage a farm property "for the purpose of providing a game and bird sanctuary" was a valid charitable trust. This was because "the existence of a game and bird sanctuary in a developing suburban area such as exists near Duncan, B.C., would, in my view, denote an elevating lesson to mankind in the year 1999".[65]

The protection of the environment was central to the determination of the case in *Re Centrepoint Community Growth Trust v Commissioner of Inland Revenue*.[66] Cartwright J agreed with the Attorney-General's submission that it was appropriate that environmental purposes should now be formally recognised as charitable under the heading of "other purposes of benefit to the community". The Judge wrote that "it is very likely that a majority of New Zealanders would support the use of charitable funds for these broadly expressed purposes. The public good element satisfies me that this objective is charitable".[67]

In *Australian Conservation Foundation Inc v Commissioner of State Revenue*,[68] it was held that the Australian Conservation Foundation was a charitable institution under the fourth head because it existed for purposes beneficial to the community. The fact that parliaments of all colours at all levels had passed laws aimed at conserving the environment and all major political parties were committed to the conservation of the environment in one way or another supported this proposition.

The *Charities Act 2006* (England and Wales) has specifically legislated that "the advancement of environmental protection or improvement" is a charitable purpose.[69] The New Zealand Charities Registration Board has registered a large number of organisations whose purpose is to protect the environment in some way or other. For example, it has registered numerous entities for the conservation or preservation, protection and improvement of rivers, streams and watercourses and their river corridors for the benefit of the public.[70]

### 16.5 Gifts for the benefit of localities

Gifts for the benefit of countries, provinces, districts, towns, boroughs, wards and parishes have been held to be charitable under "other purposes for the benefit of the community".[71] Gifts to inhabitants of cities are also charitable.[72] This is because such gifts "necessarily imply that their exercise will be for the benefit of the inhabitants".[73] It is also because a

[59] [1929] All ER 158.

[60] [1978] 2 NSWLR 200 at 214.

[61] Ibid, at 209.

[62] Ibid, at 211.

[63] High Court, Auckland, A 154/84, 15 May 1989 per Thorpe J.

[64] [1999] BCJ No 711.

[65] Ibid, at [45].

[66] [2000] 2 NZLR 325.

[67] Ibid, at 338 at [40].

[68] [2002] VCAT 1491 at [11-12].

[69] *Charities Act 2006*, (UK) c. 50, s 2(2)(i).

[70] See among others, Aotearoa New Zealand Environment Trust, Registration number CC35923; Central Otago Environmental Society Inc, Registration number CC20371.

[71] *Lysons and another v Commissioner of Stamp Duties* [1945] NZLR 738 at 739 approved by the New Zealand Court of Appeal in *Kaikoura County v Boyd* [1949] NZLR 233 at 261-262. See also Picarda 4th ed, above n 6, at 197-198.

[72] *Attorney-General v Mayor of Wellington* [1925] GLR 237 at 240.

[73] *Lysons and another v Commissioner of Stamp Duties* [1945] NZLR 738 at 740.

locality presents a sufficient section of the community to satisfy the requirement that a charitable trust must be for the public benefit.[74]

However, it is clear from decided cases that in order to be charitable, a gift to a locality must be exclusively charitable. In *Attorney-General of New Zealand v New Zealand Insurance Co Ltd*,[75] the Privy Council held that a trust for benevolent purposes was not saved by confining it to a locality. In the case of *In Re Cumming*,[76] Kennedy J cited the House of Lords' decision in *Williams Trustees v Inland Revenue Commissioners*[77] as support for his reasoning. In that case, it was argued that limiting the purposes to a particular locality was sufficient to validate the gift, although purposes beneficial to the community might fail. Lord Simonds wrote that the localisation of the purposes would not make them charitable if they were not charitable *per se*.[78]

In order for a trust established for the inhabitants of a locality to be charitable, it must not be established for a selected group of persons but for the whole community.[79]

Finally, in order for a gift to a locality to be charitable, it must be exclusively charitable. Gino Dal Pont summarised the state of the law as follows: "if the donor fails to identify the objects of the gift with the required certainty, adopts superadded words that extend its application to non-charitable objects, or expresses it in terms that do not clearly evidence an intention to benefit the community, the gift will fail".[80]

### 16.6 Conclusion

The *Statute of Elizabeth* contains specific provisions for the repair of bridges, ports, havens, causeways, churches, sea-banks and highways. Courts have extended the concept of "repair" to the construction of infrastructure mentioned in the Statute. Courts have thereafter extended the notion to building conduits and reservoirs and irrigation methods for the general public. One court at least has gone so far as saying that the "electronic highway" providing free internet access is charitable by analogy.

By analogy to the repair and maintenance of infrastructure, the provision of public amenities and public services has also been held to be charitable. This has been accomplished by the courts, and also by statute. Section 61A of the *Charitable Trusts Act 1957* provides that "the provision of facilities at public halls, community centres, and women's institutes" is deemed to have always been charitable.

Community betterment has long been held to be charitable. Therefore, gifts for the beautification of a city through parks, fountains, statuary or other works of art are considered charitable. This has extended to the protection of heritage buildings. However, strict guidelines have been put into place by the Charity Commission for England and Wales in that regard, which are being followed by the New Zealand Charities Registration Board.

The protection of the environment has evolved to being charitable, especially in the last quarter of the 20th century. It is now clear that the protection of the environment is charitable because courts have acknowledged that most governments and the international community have put in place legislation and treaties in that respect.

Finally, gifts to provinces, districts, towns, boroughs and parishes have been held to be charitable as other purposes beneficial to the community because each represents a sufficient section of the public. However, such gifts must be exclusively charitable.

[74] *Kaikoura County v Boyd* [1949] NZLR 233 at 261-262 (CA). See also Soper *Charities*, above n 12, at [48].

[75] [1937] NZLR 33; [1936] 3 All ER 888 (PC).

[76] [1951] NZLR 498.

[77] [1947] 1 All ER 513.

[78] [1949] 1 All ER 513 at 521 cited by Kennedy J in *In re Cumming* [1951] NZLR 498 at 501.

[79] *Re Thorburn* (High Court, Auckland), M 1229/88, 10 November 1989 at 8 applying the reasoning in *Re Tree, Idle v The Corporation of Hasting* [1945] 2 All ER 65 at 69, per Evershed J.

[80] Dal Pont *Charity Law in Australia and New Zealand*, above n 34, at 186.

CHAPTER 17

# Promotion of agriculture and economic development

Entities established for the promotion of agriculture and economic development are not specifically mentioned in the *Statute of Charitable Uses 1601*. However, the *Statute of Elizabeth* does specifically refer to such items of infrastructure as the repair of bridges, ports and highways, and the provision of assistance to young tradesmen and handicraftsmen. Moreover, in *Income Tax Special Purposes Commissioners v Pemsel*,[1] the House of Lords created a fourth category of other purposes beneficial to the community that has been acknowledged by the courts.

As will be discussed in the following sections of this chapter, the promotion of agriculture was the first category of economic development recognised by the courts. From the promotion of agriculture, the law is still evolving towards the recognition of other forms of economic development. However, that area of the law is still marred with considerable controversy. No court decision has yet categorically recognised the promotion of economic development as a charitable purpose.

This chapter concentrates on the different forms of economic development as a subcategory of the fourth head of charity, that is, "other purposes beneficial to the community". The promotion of agriculture is first examined, together with so-called farmers' markets. This leads us to a general discussion of the promotion of industry and commerce as a charitable purpose falling into the fourth head of charity. The promotion of the economic development of cities, districts and towns and the promotion of tourism are then canvassed. Another section is dedicated to the criticism expressed about court decisions on economic development.

## 17.1 Improvement of agriculture

The improvement of agriculture as a charitable purpose falling under "other purposes beneficial to the community" was first fully discussed in *Inland Revenue Commissioners v Yorkshire Agricultural Society*.[2] This case came before the Court because section 1(b) of the *Income Tax Act 1918* had recognised the promotion of agriculture as a tax-exempt purpose. "Agricultural society" was defined in that section as "any society or institution established for the purposes of promoting the interests of agriculture, horticulture, live-stock breeding or forestry". Following that recognition of the promotion of agriculture as a charitable purpose by the legislation, judges had already recognised that the promotion of horticulture[3] and the general promotion of agriculture[4] were charitable, although carrying on an agricultural show by which the entity made a profit was liable to tax.

### *17.1.1 Improvement of agriculture as another purpose beneficial to the community*

In *Yorkshire Agricultural Society*, the Society had been established in 1837 to hold an annual meeting for the exhibition of farming stock and implements and for the general promotion of agriculture. All prizes were to be open to competition in the United Kingdom. Certain privileges were attached to membership, such as reduced fees for

1 [1891] AC 531.
2 [1928] 1 KB 611.
3 *In re Pleasants* [1923] 39 Times LR 675 (KB).
4 *Royal Agricultural Society of England v Wilson* [1924] 9 Tax Cas 62 (KB).

different activities. The income of the Society was derived from entry fees, subscription and membership fees, and interest on investments. Any excess of income over expenditure was reserved, which amounted to £2,131 in 1923. Rowlatt J, hearing the case in the King's Bench, said that if this Society had been formed for the general improvement of agriculture, then he should have said that it would be a charity. However, he considered that members could benefit and therefore it was not exclusively charitable.

The Court of Appeal disagreed with Rowlatt's view that the Society had been established for the benefit of the members. Lord Hanworth MR, wrote that:

> *It seems to me that the right interpretation to be given to the object of this old Society is that the Society has been formed for the purpose of the improvement of agriculture as a whole, and not for any confined purposes of benefiting only the particular members of the Society or those residents in the locality to which its name attached it, and for a purpose which may bring advancement and improvement to the benefit of the community at large.*[5]

All three judges, however, made it clear that the promotion of agriculture for private profit or benefit would not be charitable.[6]

### *17.1.2* *Improvement of agriculture as being similar to the spirit and intention of the* Statute of Elizabeth

It is interesting to note that while the two other judges based their conclusions on the interpretation of the *Income Tax Act 1918*, Lawrence J based his conclusion solely on the common law, thus allowing other countries that did not have specific provisions in their income tax legislation exempting the promotion of agriculture from taxes to achieve the same result by considering that it fell under the fourth head of charity. The Judge wrote as follows:

> *Agriculture is an industry not merely beneficial to the community but vital to its welfare [...] It is plain to my mind that the general improvement of agriculture is a charitable purpose falling within the fourth class of Lord Macnaghten's well-known classification of legal charities in* Pemsel*'s case [...] Dealing however with the general promotion of agriculture, which is the particular purpose here, and without going through the numerous decided upon other purposes, I have arrived at the clear conclusion that it comes within the spirit and intention of the* Statute of Elizabeth *as interpreted by many eminent judges, and probably much more within that spirit and intention than many other purposes which have been held to be charitable on the sole ground that they are for the benefit of the community.*[7]

The Privy Council, in *Hadaway v Hadaway*,[8] wishing to cast no doubt upon the correctness of the decision in *Yorkshire Agricultural Society*, reiterated the notion advanced by Lawrence J that the promotion of agriculture was a charitable purpose falling within the fourth class of Lord Macnaghten's well known classification of legal charities in *Pemsel*'s case.[9]

In *Hadaway v Hadaway*, however, the Privy Council held that assisting persons carrying on a particular trade or business or profession would not be charitable unless there was a condition that this assistance could only be made for a purpose that was itself charitable.[10] In that case, a testator by his will bequeathed the residue of his personal estate upon trust for the purpose of establishing and founding a bank, the object of which was to be primarily to assist the planters and agriculturalists of St Vincent (Windward and Leeward Islands) by way of loans at a low rate of interest. The Privy Council held that any eventual benefit to the community was too remote:

5 [1928] 1 KB 611 at 623.

6 Ibid, at 622 per Lord Hansworth, at 631 per Lord Atkin and at 637 per Lawrence J.

7 Ibid, at 635-636.

8 [1955] 1 WLR 16.

9 Ibid, at 19.

10 Ibid, at 19.

*The promotion of agriculture is a charitable purpose, because through it there is a benefit, direct or indirect, to the community at large: between a loan to an individual planter and any benefit to the community the gulf is too wide. If there is through it any indirect benefit to the community, it is too speculative and remote to justify the attribution to it of a charitable purpose.*[11]

### *17.1.3 Reasons why improvement of agriculture is charitable as another purpose beneficial to the community*

As mentioned by Lawrence J in *Inland Revenue Commissioners v Yorkshire Agricultural Society*,[12] the promotion of agriculture provides a benefit to the community because agriculture is vital to the welfare of the community. Without agriculture, people could not feed themselves and would eventually die from hunger as happens in cases of famine.

The promotion of agriculture is seen as especially beneficial to the community in New Zealand, where it is the principal industry of the country. Commenting on the result of *Hadaway v Hadaway*, Gino Dal Pont wrote that the decision would appear especially harsh in "primary-production countries such as Australia and New Zealand".[13]

### *17.1.4 Various forms of promoting agriculture that is charitable as another purpose beneficial to the community*

As mentioned at the beginning of this section, one of the first cases dealing with the promotion of agriculture was one involving the promotion of horticulture and awarding annual prizes for the best-kept gardens and cottages.[14] The New Zealand Charities Registration Board has also considered as charitable entities whose purpose is the production of roses and other flowers.[15]

The case of *Inland Revenue Commissioners v Yorkshire Agricultural Society*[16] supported the proposition that the general improvement of agriculture, including the holding of an agricultural show and giving prizes for the best agricultural products, was a charitable object. Similarly, a gift to establish a showground was held to be charitable because the Privy Council interpreted the term in the context of the disposition as applying to an agricultural show.[17]

Other examples of entities to promote agriculture being upheld as charitable include trusts for the prevention of diseases in sheep,[18] for research into wheat[19] and for an agricultural college or farming training.[20]

Finally, reforestation in the sense of the maintenance of the growth of trees by cultivation, treatment and management in order to maintain a regular supply of timber for the wants of the community was held charitable in the New Zealand case of *Re Bruce*.[21] In that case, the Court took into account the fact that New Zealand forests had been significantly destroyed, with detrimental effects for birdlife, and that reforestation was not an attractive proposition for other than the state because of the long time before any financial returns would be realised.

## 17.2 Promotion of industry and commerce for public benefit

Since agriculture is one of the biggest industries, once that promoting it was held charitable there was only a small step before the courts asserted that the promotion of industry and commerce for public benefit was a charitable purpose. It took more than 20 years, however, before courts crossed that gap.

[11] Ibid, at 20.

[12] [1928] 1 KB 611 at 635.

[13] Gino Dal Pont *Charity Law in Australia and New Zealand* (Oxford University Press, Oxford, 2000) at 192.

[14] *In re Pleasants* [1923] 39 Times LR 675 (KB). In that case, Russell J said at 675:

> The gift to provide prizes for the best-kept gardens and cottages, however was one to promote a rivalry, the result of which would be an improvement of horticulture and good housewifery. Such a gift was a good charitable gift, as it was one for the benefit of the community.

[15] At least 24 rose societies appear on Charities Services website, for example see Auckland Rose Society Inc, registration number CC20622.

[16] [1928] 1 KB 611.

[17] *Brisbane City Council v Attorney-General* [1979] AC 411 at 423 (PC).

[18] *McGarne Smith Institute v Campbell Town Municipal Council* [1965] NSWR 1641.

[19] *Freeman v A-G (NSW)* [1973] 1 NSWLR 729.

[20] *Re Tyrie* [1970] VR 264.

[21] [1918] NZLR 16, [1918] GLR 26 (CA).

Jean Warburton, author of *Tudor on Charities*[22] wrote that *Crystal Palace Trustees v Minister of Town and Country Planning*[23] was authority for recognising that the promotion of industry, commerce and art was a charitable purpose. In that case, a body of trustees was entrusted with the control and management of Crystal Palace and Park as a public place for education and recreation, and for the promotion of industry, commerce and art. Danckwerts J stated:

> *[...] it seems to me that the intention of the Act in including in the objects the promotion of industry, commerce and art, is the benefit of the public, that is, the community, and is not the furtherance of the interests of individuals engaging in trade or industry or commerce by the trustees.*[24]

The promotion or advancement of industry or commerce was confirmed as a charitable purpose in *Commissioners of Inland Revenue v White*,[25] which did not bear directly on the promotion of industry or commerce, but with the preservation and improvement of fine craftsmanship. In that case, Fox J held the object of preserving and improving craftsmanship as charitable, although the means required to achieve this end included the provision to craftspeople of particular benefits, including the provision of premises at affordable rent. The fact that individual craftspeople might obtain benefits from an association's activities did not, in this case, operate to deprive the association of charitable status.[26]

MacKenzie J adopted the same reasoning in *Barclay & Ors v Treasurer of Queensland*.[27] In considering the status of the Queensland Construction Training Fund, his Honour held that the object of fostering and developing the knowledge, skills, training and education of persons employed in the Queensland construction industry was a charitable object, and any benefit to any particular individual in the industry was an incidental object of the Fund.

Finally, the Court in *Commissioners of Inland Revenue v Oldham Training and Enterprise Council*[28] repeated that the promotion of industry and commerce was charitable, although in that case it considered that providing support and advice for new businesses would constitute a private benefit and therefore was not charitable.

To our knowledge, only two New Zealand cases have acknowledged the general proposition that commercial and industrial purposes could be charitable: *Waitemata County v Commissioner of Inland Revenue*[29] and *Re Tennant*.[30] The latter case is considered fully in the following section of this chapter. In *Waitemata County* the Court had to decide whether land purchased by Waitemata County for commercial or industrial purposes had established a charitable entity. Perry J, in an *obiter dictum*, wrote that "if this purchase had been one authorised by a special enactment with the County constituted as a trustee, then the *Crystal Palace* decision would be a strong argument that the County as trustee would hold the land upon a charitable trust and one which I think I would find acceptable".[31] Perry J based his *obiter dictum* on *Tudor on Charities*, stating that there seemed to be no reason why it should not be regarded as authority for the general proposition that the promotion of industry and commerce was a charitable purpose. However, Perry J decided the case on the basis that a local authority (in the absence of the creator of a specific trust) held property in a fiduciary capacity to carry out the purposes for which the local authority was created by statute, but not on a specific trust. Therefore, the land purchased for council offices was not within the spirit and intendment of the Preamble to the *Statute of Elizabeth*.[32]

[22] Jean Waburton *Tudor on Charities* (9th ed, Sweet & Maxwell, London, 2003) at 112.

[23] [1951] 1 Ch 132.

[24] Ibid, at 142.

[25] (1980) 55 TC 651 at 659.

[26] Ibid.

[27] (1995) 95 ATC 4496 at 4500.

[28] (1996) 69 Tax Cases 231 at 251.

[29] [1971] NZLR 151.

[30] [1996] 2 NZLR 633 at 640.

[31] *Waitemata County v Commissioner of Inland Revenue* [1971] NZLR 151 at 162.

[32] Ibid, at 162-163.

## 17.3 Promotion of economic development

The next step in expanding the field of the promotion of industry, commerce and art as a purpose beneficial to the community was to consider as charitable organisations promoting economic development. The first case to venture that far was decided in New Zealand in 1996. However, although courts have held the economic development of a community to be charitable under "other matters beneficial to the community", they have until now restricted such expansion of the law to situations where that region has a particular need.[33]

### *17.3.1 Economic development charitable for rural or impoverished regions*

The case of *Re Tennant* related to the provision of a creamery to a rural community. In that case the Court applied other cases that had held agriculture generally to be charitable such as *Inland Revenue Commissioners v Yorkshire Agricultural Society*.[34] Hammond J stated:

> *Obviously each case will turn on its own facts. I would not be prepared to say that there may not be cases which would fall on the other side of the line because of private profit-making of some kind. But here the settlor was attempting to achieve for a small new rural community what would then have been central to the life of that community: a cluster complex of a school, public hall, church and creamery. In my view he was endeavouring to confer an economic and social benefit on that particular community for the public wealth. To see the creamery in isolation from what was really an overall purpose of benefit to this locality – the complex – would be both unrealistic, and in my view wrong in principle.*[35]

The Judge went on to say that if he were to be wrong in the approach cited above, the entity could still be held charitable on a narrower footing, that "this particular purpose was for the promotion of industry (dairying) in that particular locality".[36] He further commented that:

> *Effectively this settlor was donating land to the overall good of the locality to help "kick start" as it were, in an economic sense, dairying in a very fertile area. And with such an enterprise would necessarily have come the associated public benefit of furthering of employment; the training of young men and women in that sort of business; together with the social centre that such institutions were in the life of this country in that era.*[37]

The reference to the promotion of industry was therefore an *obiter* by Hammond J and did not form part of his decision. Furthermore, he took great care to limit his reasoning to this particular settlement made in the 1920s during the post-war expansion of dairying in Waikato. This comment, however, has been used by entities established for the promotion of economic development as authority for the proposition that economic development is a charitable purpose falling under the fourth head as being beneficial to the community.

*Re Tennant* was followed almost 10 years later by the Australian decision in *Tasmanian Electronic Commerce Centre Pty Ltd v Federal Commissioner of Taxation*.[38] In that case, the Australian Federal Court of Appeal decided that the entity was charitable because it was created to provide internet and communications infrastructure for Tasmania, a particularly economically disadvantaged area. Heeney J wrote:

> *As has been seen, the genesis of TECC was the provision of large amounts of Federal funding to assist "regional, rural and remote communities" a current*

[33] *Re Tennant* [1996] 2 NZLR 633.
[34] [1928] 1 KB 611.
[35] *Re Tennant* [1996] 2 NZLR 633 at 640.
[36] Ibid.
[37] Ibid.
[38] [2005] 59 ATR 10 (Australian Federal Court of Appeal).

> *euphemism for those parts of Australia which are economically disadvantaged or, put more bluntly, poor, compared with the rest of the nation [...] Tasmania is a particular case in point. The combination of small population and long distances from markets and raw materials meant that conventional manufacturing industry was always to be at a disadvantage.*[39]

In reaching its decision in the *Tasmanian Electronic Commerce Centre* case, the Australian Federal Court of Appeal relied heavily on *Re Tennant*. Furthermore, as indicated in the citation above, the Appeal Court limited the expansion of economic development as charitable under the fourth head as being beneficial to the community to areas that were "economically disadvantaged or, put more bluntly, poor, compared with the rest of the nation", Tasmania being a particular case in point, with a small population and long distances from markets. The Judge relied on the fact that the Government had participated financially in the economic development of the region as an *indicia* that the objects were for public benefit.

The position adopted in *Re Tennant* and in *Tasmanian Electronic Commerce Centre* is consistent with that accepted in the United Kingdom and Canada. The *Charities Act 2006* of England and Wales specifically recognises as a head of charity "the advancement of citizenship or community development", which "includes rural or urban regeneration".[40] These purposes were based on a paper published by the Charity Commission for England and Wales in 1999, which defined "community regeneration" as being a community in need of regeneration because of poverty and whose activities outweighed any private benefit that might be conferred on individuals or companies.[41] The Canada Revenue Agency has outlined similar criteria for the registration of economic development organisations.[42]

### *17.3.2 Is economic development charitable in all situations?*

In *Commissioner of Taxation v The Triton Foundation*,[43] Kenny J of the Federal Court of Australia acknowledged that the company's mission was "to promote a culture of innovation and entrepreneurship, particularly among our youth". The Court considered the purposes charitable because the main purposes were educational in nature in developing a culture of innovation and entrepreneurship. The benefits to inventors were considered in that case to be ancillary. However, the Court refused to venture into the discussion of Triton's educational status because it considered that it was charitable under the fourth head of the *Pemsel* classification.[44]

In that decision, the Federal Court seems to have broadened what had been said in the other decisions relating to purposes having commercial utility. Kenny J wrote:

> *I accept, as indeed the Commissioner apparently conceded, that this object, which plainly involves the promotion of an aspect of commerce, is capable of being a charitable object; and indeed it is within the spirit and intendment of the Preamble to the* Statute of Elizabeth. *The authorities discussed at [22] and [23] above, including* Oldham TEC, Crystal Palace *and* White, Barclay *and* Tasmanian Electronic, *support this conclusion. I do not consider that* Tasmanian Electronic *should be put to one side as the Commissioner contended.*
>
> *[...] Triton's objects and activities are designed, broadly speaking, to promote commercial activity of a particular kind, which Governments at State and Commonwealth levels apparently regarded as beneficial, in various ways, to the inhabitants of their States and Australia. They are, moreover, of a kind that the law recognizes as charitable.*[45]

[39] Ibid, at [59-60].

[40] *Charities Act 2006*, (UK) c. 50, ss 3(e) and 2(3)(c)(i).

[41] Charity Commission for England and Wales *RR2 Promotion of Urban and Rural Regeneration* (March 1999) on the Commission's website: www.charity-commission.gov.uk/Library/guidance/rr2text.pdf, at [4] [""Promotion of Urban and Rural Regeneration"].

[42] *Registered Charities: Community Economic Development Programs*, on the Canadian Revenue Agency website: www.cra-arc.gc.ca/E/pub/tg/rc4143/rc4143-e.pdf at 8 ["Community Economic Development"].

[43] [2005] FCA 1319, [2005] ATC 4891.

[44] Ibid, at 4903, especially [42].

[45] Ibid, at [32-33].

The Court did not accept the broad interpretation often given to *Crystal Palace Trustees v Minister of Town and Country Planning* concerning economic development. The Australian Federal Court wrote:

> *Similarly, in* Crystal Palace, *Danckwerts J held, at 858, that the promotion of industry and commerce in general* ***by holding public exhibitions, as opposed to the furtherance of the interests of individuals engaged in trade and industry*** *was a public purpose of a charitable nature*[46] [emphasis added].

The discussion is still open as to whether the more recent cases have approved the proposition that economic development is generally charitable under the fourth head of charity as being another purpose beneficial to the community. If they have, it would be a significant departure from the common law. In 1999 the Charity Commission for England and Wales decided, following public consultation, to recognise the promotion of urban and rural regeneration for public benefit in areas of social and economic deprivation as a charitable purpose in its own right. Charitable regeneration organisations can achieve this by the maintenance or improvement of the physical, social and economic infrastructure and by assisting people who are at a disadvantage because of their social and economic circumstances.[47]

In *Canterbury Development Corporation v Charities Commmission*,[48] the Corporation argued that the application of *Tennant* and *Tasmanian Electronic Commerce Centre* should not be restricted to impoverished or underdeveloped communities. However, Young J considered that the Corporation's contention must fail because "no such claim of deprivation is made with respect to Canterbury or Christchurch".[49]

### *17.3.3 Various forms of economic development considered as charitable*

Economic development can take various forms. Other than organisations having general economic development purposes, tourism development is the most frequent form seen. Other forms of economic development are those aimed at job creation and more recently at business incubators.

#### *17.3.3.1 Promotion of tourism as a charitable purpose*

The promotion of tourism is another form of economic development. To our knowledge, only one case has been reported concerning tourism. In *Travel Just v Canada (Canada Revenue Agency)*,[50] the Canadian Federal Court of Appeal had to decide if an organisation whose purpose was to promote "ethical tourism" was charitable. Travel Just had argued that its purposes fell within the line of cases holding that the general promotion of an industry or trade constituted a public benefit for the purpose of the *Pemsel* test. Evens JA, for the Canadian Federal Court of Appeal, wrote:

> *I do not agree. Even if the promotion of tourism is a charitable purpose, Travel Just's object is not to promote tourism in general, but only those tourist projects which meet the undefined goals of contributing to the "realization of international human rights and environmental norms" and "achieve social and conservation aims that are in harmony with economic development aims for the particular region".*
>
> *This object, which is limited to a particular, but vague and subjective, view of what kinds of tourism are beneficial to the community, is not, in my opinion, sufficiently analogous to a purpose already recognized as charitable to qualify under the fourth* Pemsel *head of charity.*[51]

[46] Ibid, at [23].
[47] "Promotion of Urban and Rural Regeneration", above n 41.
[48] [2010] 2 NZLR 707.
[49] Ibid, at [43].
[50] [2006] FCA 343 [2007] 1 CTC 294.
[51] Ibid, at [7-8].

The reasoning in this decision seems to support the proposition that the promotion of tourism generally is charitable. In fact, the Canadian Charity Register shows that a number of organisations promoting tourism generally have been registered. However, the Register does not contain any local or regional organisations promoting tourism in their regions, except those that have been deregistered. The Canada Revenue Agency has written that "it appears impossible to advance a particular industry, such as car manufacturing or tourism, without at the same time conferring an advantage on those who make their living from making cars and serving tourists".[52] It has nevertheless acknowledged that there are circumstances where providing public benefit is possible.

Tourist information centres are often an integral part of the promotion of tourism in particular regions. The question arises as to whether these centres are charitable for the advancement of education and under the fourth head as being beneficial to the community.

Hammond J set out the test for determining whether the dissemination of information qualifies as charitable under the head of advancement of education in New Zealand in *Re Collier (deceased)*:

> *It must first confer a public benefit, in that it somehow assists with the training of the mind, or the advancement of research. Second, propaganda or cause under the guise of education will not suffice. Third, the work must reach some minimal standard. For instance, in* Re Elmore *[1968] VR 390 the testator's manuscripts were held to be literally of no merit or educational value.*[53]

The New Zealand Charities Registration Board has not accepted that providing pamphlets amounts to education. Furthermore, in *Travel Just v Canada (Canada Revenue Agency)*,[54] the Canadian Federal Court of Appeal doubted that the dissemination of tourism information would qualify as either publication of research or an educational purpose.

#### *17.3.3.2 Economic development aimed at creating jobs*

Most economic development entities have as one of their purposes the support, aid and assistance of any person seeking employment. Some entities have more specific purposes in that regard, such as the expansion of employment by the creation of employment for the unemployed, the retention of employment for those persons whose employment could be in jeopardy and the creation and expansion of job opportunities.

Courts have held that relieving unemployment can be charitable under the relief of poverty. In *Re Central Employment Bureau for Women and Students' Careers Association Incorporated*,[55] the Court found that a fund established for the purpose of helping educated women and girls to become self-supporting was charitable. The reason for this was given by Simonds J, who wrote "the implication of the gift to enable recipients to become self-supporting is a sufficient indication that they stand on the poverty side of the borderline – that is to say that they are persons who could not be self-supporting in whatever enterprise they embarked without the assistance of this fund".[56]

The Court in *Joseph Rowntree Memorial Trust Housing Association Ltd v Attorney-General*[57] reaffirmed that any assistance had to be directed to the relief of a charitable need and that the level of assistance should be commensurate with that need. This meant that the entity had to show that it had been set up for the benefit of persons seeking employment but who were unable to obtain work because of one or more of their lack of job opportunities and their youth, age, infirmity or disablement, poverty and social or economic circumstances.

[52] "Community Economic Development", above n 42, at 9.
[53] [1998] 1 NZLR 81 at 91-92.
[54] [2006] FCA 343; [2007] 1 CTC 294 at [9].
[55] [1942] 1 All ER 232.
[56] Ibid, at 233.
[57] [1983] 1 All ER 288.

Lightman J in *Commissioners of Inland Revenue v Oldham Training and Enterprise Council* used similar reasoning.[58] He wrote:

> *So far as the object of Oldham TEC is to set up in trade or business the unemployed and enable them to stand on their own feet, that is charitable as a trust for the improvement of the conditions of life of those "going short" in respect of employment and providing a fresh start in life for those in need of it, and accordingly for the relief of poverty within category (1).*[59]

The *Oldham TEC* case was heavily relied upon by Young J in *Canterbury Development Corporation v Charities Commission*.[60] He could not distinguish *Oldham TEC* from the case at bar and, quite to the contrary, he wrote that *Oldham TEC* had a considerably more powerful case in favour of a declaration as a charity than the case at bar. This is because:

> *The trust deed and operation of Oldham TEC is much more focused on directly assisting the unemployed than CDC's. It has cash allowances for those starting businesses (who had to be unemployed and the resulting business had to employ unemployed people). Some of the Oldham training was targeted specifically at assisting young people into work and retraining the unemployed. No such focus is present in the objects or activities of CDC.*[61]

Moreover, in *Canterbury Development Corporation v Charities Commission*,[62] Young J pointed out that it was of some interest to consider the position of the Charity Commission for England and Wales in that regard, which had an extensive publication dealing with what it would accept and what it would not accept as a charity. Under the "Charities Relieving Unemployment" section and the part dealing with public benefit it discussed what were and what were not acceptable activities"[63] by organisations claiming charitable status. He adopted those guidelines in deciding the case. He wrote:

> *The capital grant or equipment or payment to a new business, where the business is started by someone who is unemployed, and not by someone who has quit employment to start their own businesses, can be charitable. Secondly, where the payment is to an existing commercial business it must be to take on additional staff from unemployed persons before it can be considered charitable. This illustrates the type of direct focus on the unemployed which might be required to relieve poverty and thereby ensure the organisation is charitable. Also with the promotion of economic development, the focus must be directly on the promotion of public development as the primary object.*[64]

In *Canterbury Development Corporation v Charities Commission*,[65] the appellant had argued that it created jobs in two ways. Firstly, where there is a chain of employment, the creation of a new job results in movement of employed persons thus leaving employment for the unemployed. Secondly, the creation of skilled jobs creates the need for service jobs thus providing jobs for the unemployed. In rejecting that reasoning, Young J wrote that he accepted that the unemployed could be one of the ultimate beneficiaries but that "the possibility of helping someone who is unemployed is too remote for it to qualify as the charitable purpose of relief of poverty".[66]

The Canada Revenue Agency has followed the Charity Commission for England and Wales in its policy document concerning economic development programmes. It wrote that "relieving and preventing unemployment is a charitable purpose under the first head and the fourth. However, providing employment is not a charitable purpose in its own right, though on occasion it can be a way to achieve a charitable purpose".[67]

[58] (1996) 69 Tax Cases 231.
[59] Ibid, at 249.
[60] [2010] 2 NZLR 707 at [46-58].
[61] Ibid, at [54].
[62] Ibid.
[63] Ibid, at [90].
[64] Ibid, at [91].
[65] Ibid, at [27].
[66] Ibid, at [30].
[67] "Community Economic Development", above n 42, at 4.

*17.3.3.3 Business incubation learning as a form of economic development*

The formal concept of business incubation began in the USA in 1959 when Joseph Mancuso opened the Batavia Industrial Center in a Batavia, New York, warehouse. Incubation expanded in the USA in the 1980s and spread to the United Kingdom and Europe through various related forms. About one-third of business incubation programmes are sponsored by economic development organisations. Government entities (such as cities or counties) account for 21% of programme sponsors. Another 20% are sponsored by academic institutions, including two-year and four-year colleges, universities and technical colleges.[68]

In New Zealand, business incubation appeared in around 2000. In New Zealand "an incubator is a facility designed to assist businesses to become established and sustainable during their start-up phase".[69] Typically, they do this by providing shared premises, business advice, business services, access to investor, market and international networks, mentoring and providing a full-time, hands-on management team. The incubation period for an individual business is normally two to three years.

The problem with those business incubators is whether they are charitable and whether they provide sufficient public benefit. As indicated in the previous subsection, their charitable status would depend on their clientele. For example, business incubators which are part of a university or college education could be charitable for the advancement of education. These business incubators may be part of a specific educational programme in business administration, for example. They would help unemployed students to begin their own businesses. However, one must keep in mind that in *Canterbury Development Corporation v Charities Commission*,[70] Young J considered that the entity's educational function could hardly be said to provide opportunity to a broad section of the public, because of the narrow way in which it had defined eligibility for the programme.

Could business incubators be charitable if they are aimed at unemployed people? That question is more difficult to answer positively. This is because in *Inland Revenue Commissioners v Oldham Training and Enterprise Council*,[71] the activities of the entity provided for a cash allowance to those thinking of starting up a business. This was specially aimed at people who had been unemployed for at least six weeks and were starting a business which would have the potential to employ other people. Further, the training was specifically targeted at assisting young people into work and lowering the level of unemployment. Even so, the Court concluded that the Enterprise Council was not charitable because it made recipients of assistance more profitable, thus providing them with private pecuniary profit. The Court wrote:

> *[T]he second main object, namely promoting trade, commerce and enterprise, and the ancillary object, of providing support services and advice to and for new businesses, on any fair reading must extend to enabling Oldham TEC to promote the interests of individuals engaged in trade, commerce or enterprise and provide benefits and services to them [...]Such efforts on the part of Oldham TEC may be intended to make the recipients more profitable and thereby, or otherwise, to improve employment prospects in Oldham. But the existence of these objects, in so far as they confer freedom to provide such private benefits regardless of the motive or the likely beneficial consequences for employment, must disqualify Oldham TEC from having charitable status. The benefits to the community conferred by such activities are too remote.*[72]

In *Canterbury Development Corporation v Charities Commission*,[73] Young J approved the reasoning in the *Oldham* case and noted that the *Oldham* case "could be considered to have a considerably more powerful case in favour of a declaration as a charity than *CDC* as

[68] Wikipedia, "Business incubator" at http://en.wikipedia.org/wiki/Business_incubator.

[69] www.nzte.govt.nz/get-ready-to-export/Starting-a-business/Pages/Join-a-business-incubator.aspx.

[70] [2010] 2 NZLR 707 at [33].

[71] (1996) 69 TC 231.

[72] Ibid, at 251.

[73] [2010] 2 NZLR 707 at [50-58].

far as public benefit is concerned".[74] Nevertheless, it seems that the learned Judge would have granted charitable status where unemployed persons are targeted by business incubators. He wrote:

> *The capital grant or equipment or payment to a new business, where the business is started by someone who is unemployed, and not by someone who has quit employment to start their own business, can be charitable. Secondly, where the payment is to an existing commercial business it must be to take on additional staff from unemployed persons before it can be considered charitable. This illustrates the type of direct focus on the unemployed which might be required to relieve poverty and thereby ensure the organisation is charitable. Also with the promotion of economic development, the focus must be directly on the promotion of public development as the primary object. It will only be where the assistance to individual businesses is truly ancillary to this main purpose that the object will be charitable.*[75]

Another economic development decision from Australia was considered and commented on in *Canterbury Development Corporation*. In *Commissioner of Taxation v The Triton Foundation*,[76] the Foundation's principal object was the promotion of a culture of innovation and entrepreneurship in Australia by visibly assisting innovators to commercialise their ideas. Thus the Foundation gave advice to such innovators on marketing, business planning and intellectual property issues for free. The Court concluded that the promotion of that aspect of commerce was capable of being charitable and the Foundation's purposes and objects were beneficial to the Australian public. In *Canterbury Development Corporation v Charities Commission*,[77] Young J noted, without agreeing or disagreeing, that "to some degree the Court's assessment in *Triton* is a question of perspective".[78] However, he distinguished the *Triton* case, which provided broad public benefit, from *CDC*, where "the provision of support to those businesses is done in the hope and belief that their economic success would be reflected in the economic wellbeing of the Canterbury region".[79]

The Canada Revenue Agency has acknowledged that "the setting up in business of hard-to-employ persons [is] a charitable activity".[80] Such programmes usually include entrepreneurial training, plus support services and start-up loans. These loans are usually under $10,000.

From these decisions it is clear that, in New Zealand, business incubators may be charitable when they are aimed solely at unemployed persons. These could be students or unemployed people. Business incubators aimed at helping businesses that are already established would not be charitable because their owners would already be employed. In such cases, the programmes would be aimed at making them more profitable. This would not be charitable.[81]

#### *17.3.3.4 Other forms of economic development*

The promotion of economic development can also take other forms. For example, in *Re Education New Zealand Trust,*[82] the Trust's purposes were to "promote, encourage and develop international education and training in New Zealand for the benefit of people in New Zealand and elsewhere including increasing the profile and usage of New Zealand educational institutions both in New Zealand and elsewhere". The members of the Trust comprised about 70% not-for-profit educational institutions and 30% for-profit educational institutions. Dobson J considered the Trust to be an industry-wide promotional group. He wrote:

[74] Ibid, at [54].

[75] Ibid, at [91].

[76] [2005] FCA 1319.

[77] [2010] 2 NZLR 707.

[78] Ibid, at [65].

[79] Ibid, at [66].

[80] "Community Economic Development", above n 42, at 6.

[81] The New Zealand Charities Registration Board's deregistration decisions ICE Funds Ltd and The Icehouse Ltd may be found at: www.charities.govt.nz/Portals/o/docs/decisions/ICE_Funds_Ltd.pdf, and: www.charities.govt.nz/Portals/o/docs/decisions/The_Icehouse_Ltd.pdf

[82] (2010) 24 NZTC 24,354 per Dobson J.

> *I am equally satisfied that generic promotion of courses run by for-profit education providers cannot be characterised as substantially altruistic. Even at a generic level, the promotion of such courses is an aspect of commercial business. Without casting any aspersions on the quality of the subsequent educational experience that those attracted to New Zealand are likely to enjoy, there is little to distinguish the motivation for and consequences of such promotion from say, generic promotion overseas of New Zealand tourism operators. That certainly does not have an altruistic character and it is unrealistic to suggest that it could become altruistic because some, or even all, of the courses subsequently undertaken by the students to whom they were generically promoted might achieve successful educational outcomes.*[83]

In *Education New Zealand Trust*, the High Court decided that the Trust was not exclusively charitable because "the generic promotion of courses run by for-profit education providers cannot be characterised as substantially altruistic. Even at a generic level, the promotion of such courses is an aspect of commercial businesses".[84]

The film industry may be another category where organisations' main purposes are directed towards economic development. The New Zealand Charities Registration Board has deregistered a number of film organisations whose main purpose was to promote economic development by providing private benefits to individual filmmakers.[85] The New Zealand Charities Registration Board has, however, registered some organisations whose purpose is not providing private pecuniary profit to individuals.

### 17.4 Public benefit

The public benefit criterion necessarily requires that any private benefits arising from an applicant's activities must only be a means of achieving an ultimate public benefit and therefore be ancillary or incidental to it. It is not a public benefit if the private benefits are an end in themselves.[86] In addition, proof is required that public benefit will necessarily flow from each of the stated purposes, not merely a belief that it will or may occur.[87]

It is trite to say that in order to be charitable, the purposes of an entity must not only be charitable but also provide sufficient public benefit. The provision of private benefits to members was precisely the question raised in *Inland Revenue Commissioners v Yorkshire Agricultural Society*.[88] In that case, all three appeal judges made it clear that the promotion of agriculture for private profit or benefit would not be charitable.[89] The question of private profit was again approached by the Privy Council in *Hadaway v Hadaway*.[90]

Courts have time and again reiterated the same principle. In *Commissioners of Inland Revenue v White*, Fox J stated:

> *The promotion or advancement of industry (including a particular industry such as agriculture) or of commerce is a charitable object provided that the purpose is the advancement of the benefit of the public at large and not merely the promotion of the interest of those engaged in the manufacture and sale of their particular products.*[91]

Another example of private benefits to individuals in the profession of agriculture can be found in farmers' markets cases. Although no court case has been published on the subject, the Charity Commission for England and Wales has refused to register farmers' markets as charitable entities. The reasons given are that these organisations provide private pecuniary profits to individual farmers. The Charity Commission has refused to register them as charitable organisations on the ground that the private benefit is sufficiently predominant to negate an exclusively charitable element.[92]

[83] Ibid, at [41].

[84] Ibid, at [41].

[85] Film Central North Island Trust, on Charities Services website www.charities.govt.nz/Portals/0/docs/decisions/Film_central_NI_Trust.pdf; Film New Zealand Trust, on the website www.charities.govt.nz/Portals/0/docs/decisions/Film_NZ_trust.pdf; Film Auckland Incorporated, on the website www.charities.govt.nz/Portals/0/docs/decisions/Film_auckland_Inc.pdf.; Women in Film and Television (NZ) Inc, on the website www.charities.govt.nz/Portals/0/docs/decisions/Women_InFilm_andTV_Inc.pdf.

[86] *Commissioners of Inland Revenue v Oldham Training and Enterprise Council* (1996) STC 1218; *Travel Just v Canada (Canada Revenue Agency)* 2006 FCA 343 [2007] 1 CTC 294.

[87] *Gilmour v Coats* (1949) AC 426; see also Dal Pont *Charity Law in Australia and New Zealand*, above n 13, at 175 where he wrote:

> Whether the relevant criterion is defined as public benefit or beneficial to the community, the court does not assume or presume its existence as in the case of the other head of charity – the benefit in issue must be affirmatively proved or clear to the court. In other words, the word "beneficial" requires independent examination after the purposes and the beneficiaries have been ascertained.

[88] [1928] 1 KB 611.

[89] Per Lord Hansworth at 622, per Lord Atkin at 631 and per Lawrence J at 637.

[90] [1955] 1 WLR 16 (PC).

[91] (1980) 55 TC 651 at 659. See also *Barclay & Ors v Treasurer of Queensland* (1995) 95 ATC 4496 at 4500.

[92] *Wine Standards Board* [1978] Ch Com Rep 30-31 and *Wool Industries Research Association* [1980] Ch Com Rep 30-31 at [97-101]. These cases were cited by Hubert Picarda *The Law and Practice Relating to Charities* (4th ed, Bloomsbury Professional Ltd, Haywards Heath, 2010) at 218.

In *Crystal Palace Trustees v Minister of Town and Country Planning,* a body of trustees was entrusted with the control and management of Crystal Palace and Park as a public place for education and recreation, and for the promotion of industry, commerce and art. Danckwerts J stated:

> *It seems to me that the intention of the Act in including in the objects the promotion of industry, commerce and art, is the benefit of the public, that is, the community, and* ***is not the furtherance of the interests of individuals engaging in trade or industry or commerce by the trustees***[93] *[emphasis added].*

Although in most of the above-cited decisions, including *Yorkshire Agricultural Society, White, Barclay & Ors* and *Crystal Palace*, the courts considered that benefits conferred on any particular individual were incidental to the charitable purposes, the Appeal Court decided otherwise in *Commissioners of Inland Revenue v Oldham Training and Enterprise Council*.[94] The Court wrote:

> *[T]he second main object, namely promoting trade, commerce and enterprise , and the ancillary object, of providing support services and advice to and for new businesses, on any fair reading must extend to enabling Oldham TEC to promote the interests of individuals engaged in trade, commerce or enterprise and provide benefits and services to them [...] Such efforts on the part of Oldham TEC may be intended to make the recipients more profitable and thereby, or otherwise, to improve employment prospects in Oldham. But the existence of these objects, in so far as they confer freedom to provide such private benefits regardless of the motive or the likely beneficial consequences for employment, must disqualify Oldham TEC from having charitable status. The benefits to the community conferred by such activities are too remote.*[95]

Furthermore, in *Tasmanian Electronic Commerce Centre Pty Ltd v Federal Commissioner of Taxation*,[96] the Australian Federal Court did not say that it was not a disqualifying factor for individual business to benefit from the trust. It simply asserted that once assistance to business and industry is recognised as charitable, the fact that individual businesses may benefit cannot be a disqualifying factor.

Similarly, in *Travel Just v Canada (Canada Revenue Agency)*,[97] the Canadian Federal Court of Appeal considered that the entity would not meet the requirement of the public benefit test because it would benefit individuals. It wrote as follows:

> *In addition, the creation and development of model tourism development projects with the characteristics described above could include the financing and operation of luxury holiday resorts in developing countries. Promoting commercial activity of this kind, with a strong flavor of private benefit, is not a purpose beneficial to the public which would make Travel Just eligible for a subvention from Canadians.*[98]

In *Canterbury Development Corporation v Charities Commission*,[99] the High Court of New Zealand was asked to decide whether an economic development organisation provided sufficient public benefit. In his decision, Young J commented on most of the previously cited cases. Concerning *Oldham TEC*, he refused to distinguish that case from the case at bar. On the contrary, he considered that the *Oldham TEC* case had more going for it than the case at bar. "Even so, the Court concluded that the Enterprise Council was not charitable".[100]

[93] [1951] 1 Ch 132 at 142.
[94] (1996) 69 Tax Cases 231.
[95] Ibid, at 251.
[96] [2005] 59 ATR 10 (Australian Federal Court of Appeal) at 25-26 at [9-60].
[97] 2006 FCA 343, [2007] 1 CTC 294.
[98] Ibid, at [9].
[99] [2010] 2 NZLR 707.
[100] Ibid, at [50].

Concerning *Tasmanian Electronic Commerce Centre*, the appellant submitted that the approach of the Australian Federal Court was favourable to his case. Young J rejected that argument because assistance to business was not collateral to its purposes but central to it. "Further, in *Tasmanian Electronic Commerce Centre* public benefit was established because the purpose of encouraging electronic commerce was to boost Tasmania's (relatively) deprived economy and thereby confer public benefit. No such economic deprivation is claimed for Canterbury".[101]

The Judge in *Canterbury Development Corporation v Charities Commission* noted that in *Commissioner of Taxation v The Triton Foundation* the Court had been satisfied that the overreaching object of the Foundation provided public benefit, which was the promotion of a culture of innovation and entrepreneurship in Australia. In *Canterbury Development Corporation*, the pursuit of the objects was focused on the development of individual businesses, which can be contrasted with the broad public benefit identified in *Triton*.[102]

Finally, Young J concluded his analysis of the public benefit in *Canterbury Development Corporation v Charities Commission* in the following sentences:

> *Any public benefit therefore from CDC's purpose and operations is in my view too remote to establish CDC as a charity. Public benefit is not the primary purpose of CDC's objects or operation. Its primary purpose is the assistance of individual businesses [...] the public benefit is hoped for but ancillary. In the same way the general economic lift for the Canterbury region from CDC's work is the hoped for result of helping individual businesses. It is remote from the purpose and operation of CDC. Public benefit is not at the core of CDC's operation.*[103]

### 17.5 Criticism

Decisions on whether economic development is a charitable purpose have been criticised from both sides of the debate. On the one hand, entities promoting economic development have argued that in a capitalist society, what is good for business is good for the public and therefore provides sufficient public benefit. On the other hand, it can be said that the promotion of economic development through subsidies to businesses and commerce provides private benefit and therefore does not provide public benefit.

The view that what is good for business provides public benefit was invoked more than 115 years ago. In *Re Nottage, Jones v Palmer*,[104] Kekewich J wrote that "anything which upholds the reputation and promotes the maritime influence of England must be for the benefit of the community".[105] He further wrote that "any man who spends his income, whether large or small, benefits the community by putting money in circulation".[106] The question is whether the benefit to the community is the direct and not too remote object of the gift.

In *Tasmanian Electronic Commerce Centre Pty Ltd v Federal Commissioner of Taxation*,[107] the Federal Court of Australia took the view that benefits to Tasmania's economy resulting in long-term economic advantage to Tasmania would be a benefit to the Tasmanian public, and indeed to the wider national public. Heerey J further wrote:

> *In a capitalist economy like Australia's, a prosperous and productive private sector generates profits and creates employment which in turn raises incomes which individuals can either spend, creating demand, or save, creating capital for further investment. Either way, people can make a better life for themselves and their families. In a prosperous economy, more money can be raised by taxes to improve education, health and other essential public services.*[108]

[101] Ibid, at [61].
[102] Ibid, at [66].
[103] Ibid, at [67].
[104] [1895] 2 Ch 649.
[105] Ibid, at 653.
[106] [1895] 2 Ch 649 at 653.
[107] [2005] 59 ATR 10 (Federal Court of Australia) at [59-60].
[108] Ibid, at [58].

This argument seems to contradict the position taken in most cases, which insists that no individual should derive any private pecuniary profit from an entity that purports to be exclusively charitable. It must be remembered, however, that in the *Tasmanian* case, that citation was immediately followed by the acknowledgement that Tasmania was a "regional, rural and remote community, a current euphemism for those parts of Australia which are economically disadvantaged or, put more bluntly, poor, compared with the rest of the nation".[109] The above-cited comment cannot therefore be taken out of context to expand on the view that an economic development programme is charitable even if it provides private pecuniary profits to individuals.

Some lawyers, however, have argued that "it is difficult to see how export-led economic development could be achieved otherwise than through assistance to individual businesses".[110]

Another aspect of economic development is that governments heavily invest in such development programmes and projects. The argument has been made that the courts should draw a positive conclusion in favour of charitability where governments fund economic development initiatives. In *Tasmanian Electronic Commerce Centre Pty Ltd v Federal Commissioner of Taxation*,[111] Heerey J took the view that public funding was not sufficient to decide that an entity was an institution of public utility, but he acknowledged that it was certainly relevant as it was in that particular case. Similar considerations were invoked in *Commissioner of Taxation v The Triton Foundation*.[112]

### 17.6 Conclusion

Economic development is not yet, by itself, a charitable purpose. It can, however, be charitable depending on the circumstances. It must be kept in mind that economic development, as a charitable purpose, is one of the areas of law that has been developing slowly in the past 30 years.

From the case law in common law jurisdictions, the following comments can be made. First, the promotion of economic development can be charitable when it promotes the employment of people who are unemployed, are hard to employ because of age or physical, mental or developmental disability, or are located in economically challenged communities. Secondly, economic development programmes can be charitable when they are meeting a need in rural, remote and underprivileged communities for infrastructure that is essential for the development of those communities. Thirdly, micro-enterprises and community loans for starting small businesses can be charitable when they are helping hard-to-employ people to set up sole-proprietorship or collective enterprises. Fourthly, in all these situations, a balance must be struck between individual benefits derived by individuals and businesses and public benefit. Private pecuniary profit is only acceptable when it is ancillary to a main charitable purpose, that is, when it is an unintended consequence flowing from a charitable purpose.

Finally, it must be borne in mind that this area of the law is still developing case by case. It is therefore to be expected that not all cases can be reconciled. Some will go further than others, in a seesaw-like motion. *Commissioner of Taxation v The Triton Foundation* represents the furthest any court has gone in accepting economic development as a charitable purpose.[113] On the other hand, *Canterbury Development Corporation v Charities Commission* could be said to represent the most conservative approach to the promotion of economic development as a charitable purpose.

[109] Ibid, at [59-60].

[110] Susan Barker "*Canterbury Development* Case" [2010] NZLJ 248 at 251.

[111] [2005] 59 ATR 10 (Federal Court of Australia) at [63] citing *Attorney-General v McCarthy* (1886) 12 VLR 535.

[112] Ibid, at [31].

[113] Juliet Chevalier-Watts "Economic Development and Charitable Status" [2010] NZLJ 266 at 270.

CHAPTER 18

# Promotion of sports and recreation

The question of whether sports and recreational activities are charitable is a complex one. Courts have held that mere sport is not charitable. However, it seems that public recreation has always been charitable at common law. Moreover, section 61A of the *Charitable Trusts Act 1957* states that it has always been charitable to provide facilities for recreation or other leisure-time occupations if those facilities are provided in the interests of social welfare.

In order to give justice to these questions, it is necessary to analyse sports separately from the provision of public recreation and the provision of facilities for recreation and other leisure-time occupations. The main problem with organisations promoting sports or providing facilities for recreation and leisure is that very often they also provide hospitality and amusement opportunities, such as cafés, restaurants and bars.

This chapter is divided into three parts. It first analyses sports from the first decision to the latest and tries to define the New Zealand position on sports. Secondly, it analyses the evolution of the law on public recreation, including section 61A of the *Charitable Trusts Act 1957* and the interpretation it has received from the courts. Finally, the third section concentrates on the analysis of clubs providing hospitality (cafés, restaurants and bars) and amusement as part of promoting sports and public recreation facilities.

## 18.1 Sports

In order to understand the context in which the first decisions concerning sports were decided, it must be remembered that the notion was linked to "entertainment, fun".[1] Courts have always held that mere recreation, hospitality and entertainment are not charitable because they are inconsistent with accepted notions of charity.[2] Furthermore, at the turn of the 20th century the practice of sports was mostly reserved for a well-off élite. The general populace exercised on a regular basis through their work or by walking.[3]

Since the beginning of the 20th century, however, our societies have become sedentary. Different governments have recognised the benefits to society of regular exercise. The courts have also recognised that exercise and physical recreation are today objects of benefit to the community and that trusts to provide facilities for exercise and physical recreation could qualify as trusts for objects beneficial to the community.[4]

This section analyses the initial decisions, the purposes linked to educational institutions, and sports linked to or ancillary to other charitable purposes. It also analyses sporting activities that courts have held not to be charitable.

### *18.1.1 Initial decisions*

In 1895 *Re Nottage, Jones v Palmer*,[5] began a long line of case law that held that mere sport or recreation was not a valid charitable purpose. In *Re Nottage*, a testator had bequeathed a fund to provide a cup to be awarded annually to the most successful ocean-going yacht in order to encourage the sport of yacht racing. In concluding that encouraging yacht racing could not be charitable, Lopes LJ said:

1 *Concise Oxford English Dictionary* (11th ed, Oxford University Press, 2006) at 1395, 4.

2 *Inland Revenue Commissioners v Baddeley* [1955] AC 572 at 600 per Lord Reed (HL).

3 *Re Laidlaw Foundation* (1984) 13 DLR (4th) 491 at 505 per Dymond SCJ.

4 Ibid, at 504 per Dymond SCJ, citing Orr LJ and Stamp LJ in *IRC v McMullen* [1979] 1 WLR 130.

5 *Re Nottage, Jones v Palmer* [1895] 2 Ch 649.

> *... a gift, the object of which is the encouragement of a mere sport or game primarily calculated to amuse individuals apart from the community at large, cannot upon the authorities be held to be charitable, though such a sport or game is to some extent beneficial to the public.*[6]

From this citation and the facts of the case, it is clear that the decision was the right one. The trust had been established to provide a cup to be awarded annually to the most successful yacht owners. Moreover, the relevant yacht club was restricted to the amusement of the wealthy. For these reasons, it is no wonder that the judges in that case found there was not sufficient public benefit.

The problem that is still affecting us today, namely the generalisation of the decision to all sports, stems from rather narrow *obiter dicta* by the judges. In *Re Nottage*, Lindley LJ noted that there was no previous "authority pointing to the conclusion that a gift for the encouragement of a mere sport can be supported as charitable".[7] Furthermore, the most often cited *dictum* is that by Lopes LJ who, after saying that the encouragement of mere sport was not charitable, used the "floodgates" argument as follows:

> *If we were to hold the gift before us to be charitable we should open a very wide door, for it would then be difficult to say that gifts for promoting bicycling, cricket, football, lawn tennis, or any outdoor game, were not charitable, for they promote the health and bodily well-being of the community.*[8]

By naming the different sports and implying that they should not be held charitable, Lopes LJ practically closed the door on sports. This was so even though it was acknowledged by the lawyers for the association that "it may be said that every healthy sport is beneficial to the public; but where its object is the amusement of those who engage in it, and it is only beneficial to the public so far as it promotes their wealth and bodily well-being, it is, we admit, without the line".[9]

Nevertheless, in three paragraphs, each one written by one of the three judges of the Court of Appeal, the appeal was rejected. It is therefore surprising that such a short and not very analytical decision should have sustained more than a century of scrutiny both by judges and by academics.

Subsequent to *Re Nottage*, the courts held that promoting angling,[10] teaching and coaching young cricketers,[11] recreational flying,[12] breeding and showing foxhounds,[13] athletic sports and general pastimes,[14] breeding and racing homing pigeons[15] and horse racing[16] were non-charitable purposes.

In 1948 the High Court of New Zealand adopted a similar approach in *Laing v Commissioner of Stamp Duties*[17] when considering whether gifts by a testator to the Otago Rowing Association, the Otago Swimming Association and the Otago Amateur Athletic Association were charitable. Before the Court, the appellants argued that physical fitness was an important factor in considering whether a disposition was charitable or otherwise because of its impact on national security. They argued that "the civilians of today are the soldiers in embryo of tomorrow in the event of war; so that the promotion of the physical well-being of youth is for the public benefit and for public safety and protection".[18] Kennedy J rejected that argument. He wrote that "while the indirect benefits to the public may now be more highly valued, the societies are still not within the analogy of the *Statute [of Elizabeth]*".[19] He further wrote that "it was conceded that the decision in *Re Nottage*, *Jones v Palmer* stood in the way".[20] Therefore, he held, "a gift for the encouragement of mere sport, although it may be beneficial to the public, cannot be upheld as charitable".[21]

6 Ibid, at 656.
7 Ibid.
8 Ibid.
9 Ibid, at 655.
10 *Re Clifford* [1912] 1 Ch 29.
11 *Re Patten* [1929] 2 Ch 276.
12 *Scottish Flying Club Ltd v Inland Revenue Commissioners* [1935] SC 817.
13 *Re Peterborough Royal Foxhound Society v Commissioner for Inland Revenue* [1936] 2 KB 497.
14 *Inland Revenue Commissioners v City of Glasgow Police Athletic Association* [1953] AC 380.
15 *Royal National Agricultural and Industrial Association v Chester* (1974) 48 ALJR 304.
16 *Re Hoey* [1994] 2 Qd R 510.
17 [1948] NZLR 154.
18 Ibid, at 154-155.
19 Ibid, at 160.
20 Ibid.
21 Ibid.

The first case that systematically attacked the decision in *Re Nottage* was *Re Laidlaw Foundation*.[22] In that case, the Ontario High Court of Justice considered whether a corporation, whose purpose was to fund sporting entities including the Olympic Trust of Canada and the Commonwealth Games of Canada Incorporated, was charitable. The Court held that:

> *... participation in organised competitive amateur sports is in itself educational, both in the sense of training in discipline and maintenance of a healthy body and further in respect to education resulting from the interchange of people from different cultures in cases where the competitions involve more than local participants.*[23]

This view was endorsed by Gino Dal Pont[24] and, according to one author,[25] *Re Laidlaw Foundation* was instrumental in the inclusion of amateur sport as a distinct head of charity in the *Charities Act 2006* adopted by England and Wales. Moreover, in *Northern NSW Football Ltd v Chief Commissioner of State Revenue*,[26] the Court agreed that the purposes were charitable, which were to promote football for the benefit of the communities within the state; to promote the health and general wellbeing of participants; to provide and promote the education of players, coaches, referees and administrators; and to provide and promote a healthy lifestyle in schools and the community generally. The Court considered that, taken as a whole, those purposes described a purpose that was not for the encouragement of a mere sport but "to improve the health and general wellbeing of participants and to promote a healthy lifestyle in schools and communities through football education".[27]

However, in *AYSA Amateur Youth Soccer Association v Canada (Revenue Agency)*,[28] an amateur soccer association that operated exclusively at provincial level was refused registration status because the Court had not held the promotion of sports to be a charitable purpose. The Supreme Court of Canada upheld the decision. It distinguished *Re Laidlaw Foundation* by saying that "*Laidlaw* appears to be an anomalous case, based on the statutory provision which adopts only part of the common law test, and is inconsistent with this Court's holding in *Vancouver Society* that public benefit alone is not enough".[29] The Supreme Court wrote:

> *While the analysis in* Re Nottage *is rather perfunctory and should not be considered an insurmountable barrier, a common thread in all the decisions (other than* Laidlaw*) is that they accept that participating in sport is generally beneficial, but hold nevertheless that those benefits alone are not enough to make an organisation charitable. [...] The trend of the cases supports the proposition that sport, if ancillary to another recognized charitable purpose such as education, can be charitable, but not sport in itself.*[30]

In *Travis Trust v Charities Commission*,[31] Joseph Williams J confirmed the restrictive view that "in the area of sport and leisure, the general principle appears to be that sport, leisure and entertainment for its own sake is not charitable but that where these purposes are expressed to be and are in fact the means by which other valid charitable purposes will be achieved, they will be held to be charitable".[32]

Three further points should, however, be borne in mind. Firstly, the encouragement of sport will be charitable if it is part of a wider purpose that is itself charitable or ancillary to it. Secondly, the legal concept of charity is not static and must evolve with changing ideas about social values. Thirdly, each case must turn on its own facts. These points are discussed further below.

[22] (1984) 13 DLR (4th) 491.

[23] Ibid, at 506 per Dymond Surr Ct J.

[24] Gino Dal Pont *Charity Law in Australia and New Zealand* (Oxford University Press, Oxford, 2000) at 195-196.

[25] Richard Pidgeon "Amateur Sport and the Charities Act" [2009] NZLJ 65 at 66.

[26] [2009] NSWADT 113. See also Gino Dal Pont, *Law of Charity* (LexisNexis/Butterworths, Australia, 2010) at 283.

[27] Ibid, at [67].

[28] [2007] 3 SCR 217.

[29] Ibid, at [38].

[30] Ibid, at [40].

[31] (2009) 24 NZTC 23,273 per Joseph Williams J.

[32] Ibid, at [52].

### *18.1.2 Sports linked to educational institutions*

In order to be charitable under the advancement of education, a purpose must provide some form of education and ensure that learning is advanced. The modern concept of "education" covers formal education, training and research in specific areas of study and expertise. It also includes less formal education in the development of individual capabilities, competencies, skills and understanding.[33]

In spite of the approach taken in *Re Nottage*, for nearly 100 years courts have accepted that if a purpose can be characterised as educational, it will be charitable even if it relates to sport or recreation. *Re Mariette*[34] clearly tried to overcome the constricting harness of the *Re Nottage* decision. In that case, the bequest was to the Governing Body of Aldenham School for building playing fields for squash or fives. It was held that because the gift was to an educational institution, it was admittedly a charity for the advancement of education. In this instance, the School was for the benefit of a group of boys between the ages of 10 and 19. The bequest was held charitable because it was essential in a school of 200 boys that there should be organised games as part of their daily routine. Therefore, the gift was a good charitable gift for educational purposes:

> *It is necessary [...] in any satisfactory system of education to provide for both mental and bodily occupation, mental occupation by means of the classics and those other less inviting studies to which a portion of the day is devoted, and bodily occupation by means of regular and organised games. To leave 200 boys at large and to their own devices during their leisure hours would be to court catastrophe; it would not be educating them, but would probably result in their quickly relapsing into something approaching barbarism. For these reasons I think it is essential that in a school of learning of this description, a school receiving and retaining boarders of these ages, there should be organised games as part of the daily routine, and I do not see how the other part of the education can be successfully carried on without them.*[35]

At the same time it was decided that a gift of £100 for an athletics sports prize was also charitable because of "the advancement of that part of the educational work of the charity which has to do with the bodily and physical development of the students".[36]

Unfortunately, the reasoning in *Re Mariette* was not followed by Romer J in *Re Patten*.[37] In that case, the gift was to provide for the teaching and coaching of young cricketers aged between 17 and 21 from the working and lower middle classes who might become cricket professionals. The gift in this case was not to an educational institution but to a cricket club. It was argued that this trust was charitable because it was for the "supportation, aid and help of young tradesmen, handicraftsmen, and persons decayed" within the meaning of the *Statute of Elizabeth*. Romer J rejected that argument on the basis that the trust had been established for the benefit of individuals who "may be embarked upon life as professional cricketers".[38] He wrote: "It is I think, reasonably clear that the object of the fund is the encouragement of the game of cricket and nothing else and it has been held by authorities that are binding upon me that such a bequest is not charitable",[39] citing *Re Nottage*.

A gift for a swimming pool at Marlborough College was held as an educational charitable object.[40] In *Kearins v Kearins*,[41] a New South Wales court interpreted *Re Mariette* very broadly. The *Kearins* case involved a bequest to the Sydney University Amateur Rugby Union Football Club for "fostering the sport of Rugby Union at Sydney University". McLelland J wrote:

[33] *Vancouver Society of Immigrants and Visible Minority Women v MNR* [1999] 1 SCR 10 at 169 per Iacobucci J.

[34] [1915] 2 Ch 284.

[35] Ibid, at 288-289.

[36] *Re Mariette* [1915] 2 Ch 284 at 289.

[37] [1929] 2 Ch 276.

[38] Ibid, at 289.

[39] Ibid.

[40] *Re Geere's Will Trust* (No 2) [1954] CLY 388. See also Hubert Picarda *The Law and Practice Relating to Charities* (4th ed, Bloomsbury Professional Ltd, Haywards Heath, 2010) at 181 ["Picarda 4th ed"].

[41] [1957] SR (NSW) 286.

> *Participation in the sporting activities of the University has always been regarded as an important element in the development of the men and women at the University, not only in respect of bodily and physical development but also as part of the training of a well-balanced student. Indeed, the evidence shows that the fostering and encouraging of sport within the University is regarded as important by the Senate as the controller of the educational institution, the University. So much is this so that the Senate has seen fit to compel every undergraduate to become a member of the Sports Union.*[42]

Gino Dal Pont expressed the opinion that "the arguably tenuous link between university education and the playing of sport at university must mark *Kearins* as a high watermark case, for taken to its logical conclusion any sport, by encouraging sport, by being played under the auspices of an educational institution, qualifies as a charitable purpose".[43]

In *Inland Revenue Commissioners v McMullen*,[44] the Charity Commissioners had decided to register the Trust as a charity under section 4 of the *Charities Act 1960* considering that the Football Association Youth Trust was a valid educational charity. The objects of the Trust were to provide facilities that would enable and encourage students at schools and universities to play association football or other games or sports "to assist in ensuring that due attention is given to the physical education and development of such pupils as well as to the development and occupation of their minds".

Inland Revenue appealed against this decision in a case that went all the way to the House of Lords, which reversed a decision of Walton J that had been affirmed in the Court of Appeal, and found that the Trust was charitable. Lord Hailsham considered that "the limitation to the pupils of schools and universities in the instant case [w]as a sufficient association with the provision of formal education to prevent any danger of vagueness in the object of the trust or irresponsibility or capriciousness in application by the trustees".[45] He went on to say that the *Education Act 1944* expressed recognition of the contribution that extracurricular activities and voluntary societies could play in the education of the young people of the 1980s. He added that he would be reluctant to confine the meaning of education to formal instruction in the classroom or the playground.[46] Both Lord Hailsham and Lord Russell refused to decide the question of whether the promotion of physical education and development by the encouragement of the playing of games and sports was a charitable purpose or not.[47]

Although Heron J did not cite the House of Lords' decision of *Inland Revenue Commissioners v McMullen* in *Re Warburton*,[48] he answered the question left open by Lord Hailsham and Lord Russell. Heron J wrote that in applying *Re Mariette*, "it must follow that if a gift to establish the facility in which the sport can be undertaken is charitable then a gift which is directed to the teaching of the sport itself must likewise be charitable if the overriding consideration is one of education".[49] He therefore considered that a gift to Nelson College for Boys was charitable. This was because the fund was "to be used and applied in providing two honour medals for annual competition among the scholars, one for the Best Back at Rugby Football and one for the Best Place Kick in Rugby Football to be known as the GE Warburton medals and also in providing a coach for improving back play and place kicking in the game".[50]

From that long line of cases, it can reasonably be concluded that when a gift for the promotion of sport is to an educational institution that is charitable, that gift is charitable if the overriding consideration is one of education.

[42] Ibid, at 291.

[43] Dal Pont *Charity Law in Australia and New Zealand*, above n 24, at 144.

[44] [1981] AC 1.

[45] Ibid, at 15.

[46] Ibid, at 18.

[47] Ibid, at 15 per Lord Hailsham, and 18 per Lord Russell.

[48] High Court, Nelson, M 40/86, 1 December 1986.

[49] Ibid, at 5.

[50] Ibid.

### *18.1.3 Sports linked to or ancillary to other charitable purposes*

The latest formulations by courts of the law relating to sport have been by the Supreme Court of Canada and the High Court of New Zealand. In *AYSA Amateur Youth Soccer Association v Canada (Revenue Agency)*,[51] the Supreme Court of Canada wrote, "the trend of the cases supports the proposition that sport, if ancillary to another recognized charitable purpose such as education, can be charitable, but not sport in itself".[52] Joseph Williams J took a similar view in *Travis Trust v Charities Commission*,[53] where he wrote: "in the area of sport and leisure, the general principle appears to be that sport, leisure and entertainment for its own sake is not charitable but that where these purposes are expressed to be and are in fact the means by which other valid charitable purposes will be achieved, they will be held to be charitable".[54]

This section analyses the different situations where sport has been held charitable as being ancillary to or a means to achieve otherwise charitable purposes.

#### *18.1.3.1 Relief of poverty*

The relief of poverty includes providing basic amenities of life that most people take for granted, to those who are poor. Assisting individuals living in poverty by alleviating financial or other barriers to participation in, and increasing access to, physical activity could potentially qualify as the relief of poverty.

In its proposed "Guidelines for Sport", the Canada Revenue Agency has suggested that the following examples could be considered as being for the relief of poverty: "providing subsidies for children of low-income families, so they are able to participate in sports activities in their community. Making new or used sports equipment available to low-income participants through a 'lending bank' would also be an acceptable activity".[55] The Agency also gives the example of "summer camps with a sports component, set up for low-income participants, could potentially qualify in this category of charity".[56]

#### *18.1.3.2 Advancement of religion*

Sport and recreational activities can be ancillary to the advancement of religion. Commenting on *Trustees of the City of Belfast Young Men's Christian Association (YMCA) v Commissioner of Valuation for Northern Ireland*,[57] Hubert Picarda wrote that the "sporting activities of the Young Men's Christian Association are charitable as helping to advance religion, and badminton in a church hall may serve a similar function".[58]

The Canada Revenue Agency also gives the examples of "summer camps run by organizations advancing religion that offer outdoor/sports activities, in addition to religious instruction (for example bible camps)".[59] It notes, however, that there is always an obligation on the applicant to demonstrate that its resources are devoted to charitable activities. "It must be clearly shown how sports activities, which are not charitable in their own right, are furthering or ancillary to the advancement of religion".[60]

#### *18.1.3.3 Defence and efficiency of armed services and police*

In *Re Nottage*, *Jones v Palmer*,[61] the main argument by the appellant was that yachting was charitable because it was highly beneficial to seafaring men and to the community at large. Although the argument was not successful, a similar argument was accepted 30 years later by Romer J in *Re Gray*.[62] In that case, *Re Nottage* was distinguished from other cases where a gift was found charitable that was "to form the nucleus of a regimented fund for the Carabiniers for the promotion of sport (including in that term only shooting,

51 [2007] 3 SCR 217.

52 Ibid, at [40].

53 (2009) 24 NZTC 23,273 per Joseph Williams J.

54 Ibid, at [52].

55 Canada Revenue Agency, "Consultation on Proposed Guidelines for Sport and Charitable Registration under the Income Tax Act", on the Agency's website: www.cra-arc.gc.ca/tx/chrts/cnslttns/sprt-eng.html, 2008 at [11] ["Guidelines for Sport"].

56 Ibid, at [12].

57 [1969] NI 3 (CA).

58 Picarda 4th ed, above n 40, at 183, citing also *Valuation Commissioner for Northern Ireland Trustees of Fishewick Presbyterian Church* [1927] NI 76.

59 Canada Revenue Agency, "Guidelines for Sport", above n 55, at [17].

60 Ibid.

61 [1895] CA 649.

62 [1925] Ch 362.

fishing, cricket, football, and polo)". Romer J wrote: "It is to be observed that the particular sports specified were all healthy outdoor sports, indulgence in which might reasonably be supposed to encourage physical efficiency".[63]

In *IRC v City of Glasgow Police Athletic Association*,[64] the members of the House of Lords agreed that the Society was charitable because its purposes were "to encourage and promote all forms of athletic sports and general pastimes". This was because these purposes were regarded as an essential part of the police organisation and played an important part in the maintenance of health, morale and *esprit de corps* within the police force. However, the majority of the House of Lords considered that the Association was not exclusively charitable. The main reason for this was that the purposes were limited to the members of the Association and therefore would not provide sufficient public benefit.

*18.1.3.4 Social rehabilitation of people with disabilities, aging people and youth at risk*

Sports as a means of social rehabilitation may be charitable. For example, sport structured as part of an addiction treatment programme or a reintegration programme for prisoners leaving custody can be charitable.[65]

Similarly, sports activities used as a means of relieving distress and suffering, or alleviating conditions associated with disabilities, may be charitable. The Canada Revenue Agency gives the following examples: using sports for therapy or rehabilitation, improving functioning, adjustment or self-esteem. Acceptable programmes could include wheelchair sports programmes for people with spinal cord injuries, therapeutic horse-riding programmes for persons with disabilities, martial arts programmes for people with attention deficit disorders, and dragon boat racing to improve the physical and psychological wellbeing of people who have had breast cancer. Providing access to sport or health promotion by removing barriers to participation would also be charitable.[66]

Relieving the conditions associated with aging by maintaining health, fitness and mobility and relieving isolation, could qualify for registration. This could include, for example, activity centres that provide access to sport, or programmes such as weight training that help build bone density and reduce the risk of health problems and injury.[67]

Assisting youth at risk of delinquency, addictions or mental illness has been recognised as charitable. The Canada Revenue Agency wrote that "it is important for applicants to relate the sports activity to the purpose it is intended to achieve. For example, it could be charitable to provide a programme for youth designed to build self-esteem, prevent addictions, or assist in the recovery from addictions that includes leadership skills and team building, as well as some sports activities".[68]

*18.1.3.5 Promotion of health*

As indicated by Dymond J in *Re Laidlaw Foundation*,[69] the promotion of health through sports is a recognised charitable purpose and is akin to those cases that have decided that the promotion of health is a charitable purpose. It would be charitable to inform the public about ways to improve their health and fitness through physical activity. It would also be charitable to encourage public participation in healthy physical activity or provide fitness opportunities that directly promote or preserve health, such as programmes designed to develop fitness, stamina, agility or strength, directly as opposed to indirectly or in the form of a by-product.

[63] Ibid, at 365.
[64] [1953] AC 380.
[65] Canada Revenue Agency, "Guidelines for Sport", above n 55, at [35].
[66] Ibid, at [33-34].
[67] Ibid, at [31].
[68] Ibid, at [28].
[69] (1984) 13 DLR (4th) 491 at 505.

### *18.1.4 Restrictions on participation*

The Charity Commission for England and Wales,[70] the Canada Revenue Agency[71] and the New Zealand Charities Registration Board[72] have all produced lists of charitable and non-charitable indicators that an organisation is, or is not, devoted to promoting the health of the community at large.

The first requirement that a particular sport or physical activity must meet to qualify as a charity is a beneficial effect on the health of those participating in the activities, which can be empirically demonstrated. Secondly, if the activity bears a risk of injury, in contact sports for example, this must be taken into account in assessing the health benefits to the participants in that sport. Where the risks associated with the activity will be so great that they will outweigh any positive benefit that might result, the applicant organisation will not qualify.

Thirdly, public participation, regardless of ability or skill, should be the focus of the sport or physical activity. If training is provided, it should be available to any interested participants, regardless of ability or skill. If there are competitions, they should not be structured in such a manner as to exclude less skilled individuals. Emphasis must be put on participation rather than on winning competitions. Finally, the sport or physical activity should also be affordable. This means that the fees should be reasonable or subsidised so as not to exclude low-income participants.[73]

As indicated above, the sport or physical activity should be open to anyone who wishes to participate. Restrictions may be placed on membership when they are reasonable. However, arbitrary restrictions that are unrelated to the nature of the undertaking will not be tolerated if the entity is to be conferred charitable status. For example, a seniors' fitness programme restricted to individuals practising a certain religion will not be considered charitable.[74]

Restricting access to a specific group is only acceptable if the reasons for the restrictions are justified by the purposes. There must be a logical link between the purposes being advanced and any restriction on the community being served. For example, an activity could meet a unique need, or offering wider availability might not make sense given the nature of the service.

The Canada Revenue Agency considers that an "acceptable restriction" would apply to Aboriginal organisations that devote their activities to teaching, organising and/or playing traditional sports (for example, Northern Games) as a means of preserving their cultural traditions. Providing opportunities for Aboriginal people to maintain their heritage, instil cultural pride and promote the social cohesion of Aboriginal communities has been recognised as charitable.

### *18.1.5 Summary of the section*

For more than 100 years, sports have not been considered charitable in themselves by our courts. This still stands in New Zealand, although the Charities Registration Board has published a broad interpretation on what is ancillary to the promotion of health. A great number of sports organisations have been registered because they are considered to promote health, as they involve cardiovascular activities.

Interested groups earlier lobbied the Government and obtained a promise to change the *Charities Act 2005* with regard to amateur sports. The *Charities Act 2005* was therefore amended as follows:

[70] "Consultation: The Advancement of Amateur Sport" (28 February 2011) on the Charity Commission website: www.charitycommission.gov.uk/Charity_requirements_guidance/Charity_essentials/Public_benefit/pbaas.aspx.

[71] "Guidelines for Sport", above n 55, at [40]. The lists are as follows:

**Charitable indicators:**

- Health benefits of the activity are evident, or can be demonstrated;
- Open to anyone regardless of age or skill level; fees and equipment costs are nominal (or subsidised for low-income participants;
- Emphasis on participation, increasing activity activity levels, improving overall fitness, etc;
- Anyone, regardless of ability, is given an equal opportunity to participate;
- Token, non-monetary rewards for participation;
- No cost to spectators (occasional fundraising through admission fees would be acceptable).

**Non-charitable indicators:**

- Health benefits are secondary or not a consideration;
- Access is limited in some manner (for example, by exclusive membership criteria, skill requirements, prohibitive cost);
- Emphasis is on assisting individuals to succeed in competition, advance in standing;
- Promotion of excellence: priority is given to gifted or promising participants;
- Participants may receive monetary benefit; Spectators charged an entrance fee.

[72] "Charitable Purpose and Sport and Recreation Organisations" (February 2010) at www.charities.govt.nz/Portals/0/docs/infosheet_sport.pdf, at 4.

[73] Canada Revenue Agency "Guidelines for Sport", above n 55, at [42] citing *Native Communication Society of British Columbia v MNR*, 86 DTC 6353 as authority.

[74] *IRC v Baddeley* [1955] AC 572, per Viscount Simonds at 589, and per Lord Reid at 617-618.

*5(2A) The promotion of amateur sport may be a charitable purpose if it is the means by which a charitable purpose referred to in subsection (1) is pursued.*

Such an amendment has validated the policy that the New Zealand Charities Registration Board has endorsed and applied with respect to amateur sport.

### 18.2 Recreational facilities

The law of charities has recognised the charitable nature of public recreation grounds. This was implicitly acknowledged through the adoption by the British Parliament of the *Recreation Grounds Act 1859*.[75] New Zealand, which does not have the equivalent specific legislation in that regard, nevertheless recognises that the purpose of public recreation is charitable at law.[76]

The House of Lords' decision in *IRC v Baddeley*[77] threw some uncertainty into the law. The objects of the trust were "the moral, social and physical well-being of persons resident in West Ham and Leyton who for the time being were or were likely to become members of the Methodist Church and who were of insufficient means otherwise to enjoy the advantages provided". The attainment of these advantages was to be secured by "the provision of facilities for moral, social and physical training and recreation and by promoting and encouraging all forms of such activities". A majority of four to one considered that the purposes were not charitable because they did not fall under any of the four heads of charity; the beneficiaries were a class of persons not only confined to a particular area but selected from within it by reference to a particular creed. The majority also considered that social wellbeing was not a purpose within the spirit and intendment of the Preamble to the *Statute of Charitable Uses 1601* because the concept was too vague.

In order to clarify the law, the United Kingdom Parliament adopted the *Recreational Charities Act 1958*.[78]

#### *18.2.1 Adoption of section 61A of the* Charitable Trusts Act 1957

Since the Privy Council followed decisions from the House of Lords and was then the court of last recourse for New Zealand, the New Zealand Parliament adopted the exact same provisions as those adopted by the United Kingdom Parliament in 1958. What is known as section 61A of the *Charitable Trusts Act 1957* was adopted in 1963[79] and states:

*61A (1) Subject to the provisions of this section, it shall for all purposes be and be deemed always to have been charitable to provide, or assist in the provision of, facilities for recreation or other leisure-time occupation, if the facilities are provided in the interests of social welfare:*

*Provided that nothing in this section shall be taken to derogate from the principle that a trust or institution to be charitable must be for the public benefit.*

*(2) The requirement of subsection (1) of this section that the facilities are provided in the interests of social welfare shall not be treated as satisfied unless –*

*(a) The facilities are provided with the purpose of improving the conditions of life for the persons for whom the facilities are primarily intended; and*

[75] 22 Vict, c. 27.

[76] *Grant v Commissioner of Stamp Duties* [1943] NZLR 113; [1943] GLR 119.

[77] [1955] AC 572.

[78] 6 & 7 Eliz 2, c 17.

[79] *Charitable Trusts Amendment Act 1963*, s 3.

*(b) Either –*

*(i) Those persons have need of such facilities as aforesaid by reason of their youth, age, infirmity, disablement, poverty, race, occupation, or social or economic circumstances; or*

*(ii) The facilities are to be available to the members of the public at large or to the male or female members of the public at large.*

*(3) Without restricting the generality of the foregoing provisions of this section it is hereby declared that, subject to the said requirement, subsection (1) of this section applies to the provision of facilities at public halls, community centres, and women's institutes, and to the provision and maintenance of grounds and buildings to be used for purposes of recreation or leisure-time occupation, and extends to the provision of facilities for those purposes by the organising of any activity.*

### *18.2.2 Four requirements under section 61A*

There are four requirements that must be established before an entity will be deemed to be charitable under section 61A of the *Charitable Trusts Act 1957*: (i) the entity must be providing a "facility"; (ii) the facility must be for "recreation or other leisure-time occupation"; (iii) the facility must be provided in the interests of "social welfare"; and (iv) the facility must provide a public benefit.

#### *18.2.2.1 The entity must be providing a facility*

As indicated clearly in section 61A of the *Charitable Trusts Act 1957*, what is envisaged in that section is: "the provision of facilities at public halls, community centres, and women's institutes, and the provision and maintenance of grounds and buildings to be used for purposes of recreation or leisure-time occupation, and extends to the provision of facilities for those purposes by the organising of any activity".

Two interpretations may be placed on that section. The first is that the organising of an activity may be considered to be the provision of a "facility". However, it is not clear whether this activity must be provided in connection with a physical facility, for example the organising of rugby games in connection with a sports ground, or whether it relates to the organising of any activity generally.

For example, in "Balloons Over Waikato Charitable Trust",[80] the applicant did not provide activities in connection with a physical facility. On a broad interpretation of section 61A(3), that the organising of an activity does not need to be connected to a physical facility, the applicant could have been considered to be organising an activity and therefore providing a "facility". However, on a narrow interpretation, it would not have been registered as a charity.

#### *18.2.2.2 The facility must be for "recreation or other leisure-time occupation"*

The term "occupation" is defined as "the action, state or period of occupying or being occupied" or "a way of spending time".[81] The phrase "recreation and other leisure-time occupation" conveys the notion that the activity involves out-of-hours purposes and pursuits, as opposed to work or trading interests.

[80] At: www.charities.govt.nz/Portals/o/docs/decisions/Balloons_Over_Waikato.pdf.

[81] *Concise Oxford English Dictionary*, above n 1, at 988.

In *Guild v Inland Revenue Commissioners*,[82] the House of Lords held that providing sports facilities for the pupils of schools and universities was charitable by virtue of the United Kingdom equivalent of section 61A of the *Charitable Trusts Act 1957* (section 1 of the *Recreational Charities Act 1958*). Lord Keith of Kinkel held that these facilities were provided with the object of improving the pupils' conditions of life:

> *There cannot surely be any doubt that young persons as part of their education do need facilities for organised games and sports both by reason of their youth and by reason of their social and economic circumstances. They cannot provide such facilities for themselves but are dependent on what is provided for them.*[83]

The facilities, however, do not have to be educational in nature. Hubert Picarda wrote that "popular film and music and local craft exhibitions may all be on offer as part of the facilities. Leisure time occupation should be given a wide interpretation. It includes social intercourse, reading, games, physical training, and even just the opportunity to sit and drink if one is an elderly person".[84]

In *Re Perpetual Trustees Queensland Ltd*,[85] Williams J remarked that "there is no doubt that musical appreciation is a form of recreation or other leisure time occupation".

The High Court of New Zealand, in *Clarke v Hill and Granger*,[86] considered whether encouraging youth radio and providing clubrooms for groups interested in radio was a charitable purpose.

*18.2.2.3 The facility must be provided in the interests of "social welfare"*

Section 61A(2) of the *Charitable Trusts Act 1957* states that to be in the "interests of social welfare":

> *(a) The facilities are provided with the purpose of improving the conditions of life for the persons for whom the facilities are primarily intended; and*
>
> *(b) Either–*
>
> *(i) Those persons have need of such facilities ... by reason of their youth, age, infirmity, disablement, poverty, race, occupation, or social or economic circumstances; or*
>
> *(ii) The facilities are to be available to the members of the public at large or to the male or female members of the public at large.*

The definition given in section 61A reproduced above does not represent an exhaustive definition of the term "social welfare" but rather lists the essential elements that must be present if a facility is to meet the requirement of being in the interests of social welfare.[87]

In *Travis Trust v Charities Commission*,[88] in discussing the decision in *Re Hoey*,[89] Joseph Williams J stated:

> *Demack J applied the Queensland equivalent of our s61A of the* Charitable Trusts Act 1957. *This is a specific provision overriding the four* Pemsel *heads in the case of physical facilities providing "in the interests of social welfare".*
>
> *The case is accordingly not on all fours with the present facts where the gift is not for land or physical plant, but the learned Judge was nonetheless of the view that the purpose lacked the requisite character and the benefit was not public.*[90]

[82] [1992] 2 AC 310.

[83] Ibid, at 320.

[84] Picarda 4th ed, above n 40, at 188.

[85] [2000] 2 Qd R 647 at [39]. See also Dal Pont *Law of Charity*, above n 26, at 288.

[86] High Court, Auckland, 2 February 2001, Priestley J, CP 68-SD99 at 5.

[87] Jean Warburton *Tudor on Charities* (9th ed, Sweet & Maxwell, London, 2003) at 122 ["Tudor 9th ed"], citing *Commissioner of Valuation v Lugan Borough Council* [1968] NI 104.

[88] (2009) 24 NZTC 23,273.

[89] [1994] 2 Qd R 510.

[90] (2009) 24 NZTC 23,273 at [41-42].

In addition, the New Zealand Charities Registration Board considers that in order to be in the interests of social welfare, the facilities must: meet a need of the community that, as a matter of social ethics, ought to be met in the attainment of some acceptable standard of living; and the organisation providing the facility must be altruistic in nature.

Organisations providing only entertainment or social contact will not meet a need of the community that, as a matter of social ethics, ought to be met in the attainment of some acceptable standard of living and therefore do not meet the "social welfare" requirement of section 61A of the *Charitable Trusts Act 1957*.[91]

However, when the facilities are provided to the public at large or to the male or female members of the public at large, it is not required to be shown that those members of the public are suffering from some form of social disadvantage, such as those described in section 61A(2)(b)(i) or that they are a "deprived class".[92]

*18.2.2.4 The facility must provide a public benefit*

In order to provide a public benefit it must be shown that: there is an identifiable benefit, assessed in light of modern conditions; and the benefit is to the general public or to a sufficient section of the public.

In *Clarke v Hill and Granger*,[93] the High Court of New Zealand applied section 61A of the *Charitable Trusts Act 1957*. Priestley J held that amateur radio could be regarded as a recreational or leisure-time occupation and that "the provision of club rooms for youth, scouts and school groups for amateur radio, particularly when coupled with radio's educative function, constitutes the provision of a 'facility' which will improve the conditions of life for such people and will satisfy a need which might not otherwise be available for young people generally".[94]

Older people have also been considered as having needs that can be met by providing facilities for them to meet, thus improving their condition of life. Age is specifically mentioned in section 61A of the *Charitable Trusts Act 1957*.

Similarly, section 61A specifically provides that facilities established to meet the needs of infirm or disabled persons are charitable. Consequently, the Charity Commission for England and Wales registered an entity providing recreational facilities for the blind over 16 years of age.[95]

Section 61A also specifically applies to people who are poor or disadvantaged. In *Wynn v Skegness UDC*,[96] Ungoed-Thomas J held that providing north Derbyshire miners or the miners and their wives and families with the facilities of a holiday centre improved their condition of life because they were in need of a change of air.

Hubert Picarda wrote that "ethnic minorities may by reason of their social and economic circumstances have need of a community association or other recreational facilities".[97]

Finally, section 61A(2)(b)(ii) provides that the facilities can also be for the public at large or males or females of the public at large. The New Zealand Charities Registration Board considers whether applicants' purposes will provide a benefit to a sufficient section of the public and therefore meet the public benefit requirement.

91 See "*A Proposed Approach to Section 61A Charitable Trusts Act 1957*" considered at the New Zealand Registration Committee meeting 16 April 2008.

92 *Guild v Inland Revenue Commissioners* [1992] 2 All ER 10.

93 High Court, Auckland, 2 February 2001 per Priestley J, CP 68-SD99 at 5.

94 Ibid, at 6-7.

95 *Manchester and District Social Club of the Blind* [1965] Ch Com Rep 27 (App C) cited by Picarda 4th ed, above n 40, at 188.

96 [1967] 1 WLR 52.

97 Picarda 4th ed, above n 40, at 189 citing 4 Decisions of the Charity Commissioners (1995) 17-12.

### *18.2.3 Summary*

The provision of facilities for recreation in the interests of social welfare has been deemed by section 61A(1) of the *Charitable Trusts Act 1957* to have always been charitable, provided recreation is in the interests of social welfare.

The requirement that the facilities be provided in the interest of social welfare will not be satisfied unless the facilities are provided with the purpose of improving the conditions of life of the people for whom the facilities are primarily intended. The people for whom the facilities are primarily intended must also have need of such facilities by reasons of their youth, age, infirmity, disablement, poverty, race, occupation, social or economic circumstances. Alternatively, the facilities must be available to members of the public at large, or to male or female members of the public at large.

## 18.3 Leisure and amusement

If mere sports are considered not charitable, neither will mere entertainment, leisure and amusement.

This subsection analyses leisure and amusement and entities providing café, pub and bar facilities.

### *18.3.1 Leisure and amusement are not charitable*

In *Williams Trustees v Inland Revenue Commissioners*,[98] a trust to promote the moral, social, spiritual and educational welfare of the Welsh people by, amongst others, the establishment of a social centre, was held not to be charitable. A society formed to promote music merely for the amusement of its members was also held not to be charitable.[99]

Although the Privy Council did not cite the previous decisions in *Inland Revenue Commissioners v City of Glasgow Police Athletic Association*,[100] it wrote "the Association would not appear to be any more a charity than is any other athletic or social association or club established for the like purpose".[101] This was because the Association did not fall into any of the four principal heads of charity.

This was confirmed in *Inland Revenue Commissioners v Baddeley,*[102] where the House of Lords decided that mere recreation, hospitality and entertainment were not charitable, for the provision of entertainment and amusement *per se* was inconsistent with accepted notions of charity.

Gino Dal Pont[103] wrote that "to provide an annual dinner for members of an association is not ordinarily charitable,[104] unless the dinner is for its managers or trustees for the purpose of discussing the business of the association,[105] or the dinner or other social gathering is incidental to the main charitable purposes of the association".[106]

In more recent decisions, courts have held that participation in leisure activities does not generally provide sufficient public benefit. In *Travis Trust v Charities Commission*,[107] Joseph Williams J made the following comments in relation to sports and recreation:

> *In the area of sport and leisure, the general principle appears to be that sport, leisure and entertainment for its own sake is not charitable but that where these purposes are expressed to be and are in fact the means by which other valid charitable purposes will be achieved, they will be held to be charitable.*

[98] [1947] AC 447.

[99] *Royal Choral Society v Inland Revenue Commissioners* [1943] 2 All ER 101 at 106-107 per Lord Greene MR.

[100] [1953] AC 380.

[101] Ibid, per Lord Morton at 399, per Lord Norman at 395.

[102] [1955] AC 572 at 600.

[103] Dal Pont *Law of Charity*, above n 26, at 282.

[104] *Re Barnett* (1908) 24 TLR 788.

[105] *Re Charlesworth* (1910) 101 LT 908; *Re Coxen* [1948] 1 Ch 747 at 754-6 per Jennings J.

[106] *Guaranty Trust Co of Canada v Minister of National Revenue* (1967) 60 DLR (2d) 481 at 492 per Richie J (with whom Hall and Spence JJ concurred) (SCC).

[107] (2009) 24 NZTC 23,273 per Joseph Williams J.

> *The deeper purpose of the gift or trust can include not just any of the three original* Pemsel *heads but also any other purpose held by subsequent cases or in accordance with sound principle to be within the spirit and intendment of the* Statute of Elizabeth. *In the areas of sport, the deeper purpose is usually health or education.*[108]

As identified in the *Travis Trust* case, leisure and entertainment for their own sakes are not charitable, unless these are the means by which charitable purposes are achieved.

### *18.3.2 Cafés, pubs and bars*

It must be noted that a great number of returned services' associations have been registered in New Zealand. However New Zealand has adopted a similar approach to that of the Charity Commission for England and Wales. That is, the promotion of reunions, social functions and similar events for the benefit of members of an ex-servicemen's association is not charitable.[109]

In fact, the position taken by the Charity Commission for England and Wales is that "it is not a charitable purpose to provide the services of a pub or social club (i.e. a members' drinking club)".[110] The sale of alcohol will be considered ancillary "if it is done simply for the purpose of refreshing people who are on the charity's premises to take part in a recreational, educational or other charitable (or fundraising) activity".[111] The Charity Commission gives the following example:

> *Where a village hall or community association provides facilities to play games and sports, properly provided facilities for the purchase of alcohol may be made available for the participants or spectators, provided that: a) the bar is open only when the premises are in use for those activities; and b) only participants and spectators use the bar facilities.*
>
> *Similarly, refreshment may be made available through the sale or provision of alcohol during licensed hours for those who, for example, visit museums or attend theatrical or other performances in charitable theatres, village halls or community association premises.*[112]

In Canada, it seems that the poppy funds of the Royal Canadian Legion branches have been registered, but not the branches themselves. This is understandable because the main activities of a number of these organisations are providing cafés and bars, which are social and commercial activities rather than activities devoted to the welfare of ex-servicemen. The Charity Commission for England and Wales recommends that "if the trustees want to provide the facilities of a pub or social club on their premises, whether for financial or other reasons, they should transfer the administration of the bar to a separate body".[113]

It is suggested that the New Zealand position should be similar to those in the United Kingdom and Canada. Therefore, when a returned servicemen's association or a sports organisation serves alcohol and food in situations that show that these activities are clearly not ancillary to charitable purposes, the poppy fund or such other fund that is exclusively charitable should be registered in its own right. However, these trusts should be independent from the organisations that serve food and alcohol, because otherwise these organisations are not exclusively charitable and will not registered.

[108] Ibid, at [52].

[109] See Picarda 4th ed, above n 40, at 201 and Tudor 9th ed, above n 87, at 105.

[110] Charity Commission for England and Wales "CC27 – Providing Alcohol on Charity Premises" (November 2002) on the Charity Commission website www.charity-commission.gov.uk/Library/guidance/cc27text.pdf at [4].

[111] Ibid, at [18].

[112] Ibid, at [18-19].

[113] Ibid, at [26].

## 18.4 Conclusion

The general proposition is that mere sports are still considered not to be charitable. This position has been changed by statute in England and Wales, where amateur sport is now a charitable purpose. Examples of the sorts of charity falling under the category of amateur sports include community amateur sports clubs, such as those for football, rugby and tennis, multi-sports centres and other organisations concerned with the promotion of particular amateur sports.[114]

The New Zealand Charities Registration Board has, since the beginning of its functioning, adopted a policy concerning amateur sports. It basically follows the changes adopted in the *Charities Act 2006* recognising amateur sport as a charitable purpose *per se*, presumably because it provides cardiovascular activities for the participants.

The High Court decision in *Travis Trust v Charities Commission* has, however, thrown some doubt on the validity of that policy. In that case, Joseph Williams J seems to have followed the Supreme Court of Canada in *AYSA Amateur Youth Soccer Association v Canada (Revenue Agency)*.[115] Joseph Williams J confirmed the restrictive view that "in the area of sport and leisure, the general principle appears to be that sport, leisure and entertainment for its own sake is not charitable but that where these purposes are expressed to be and are in fact the means by which other valid charitable purposes will be achieved, they will be held to be charitable".[116]

Sports organisations in New Zealand have emphasised that amateur sports should be recognised as a charitable purpose. This is why the Government has adopted the following wording as an amendment to section 5 of the *Charities Act 2005*: "The promotion of amateur sport may be a charitable purpose if it is the means by which a charitable purpose referred to in subsection (1) is pursued". This amendment somewhat restates what Joseph Williams J wrote in *Travis Trust*. This also means that amateur sport is not, by itself, a charitable purpose. It is only charitable if it is a means of achieving some of the traditional charitable purposes (relief of poverty, advancement of education or religion, or another purpose beneficial to the community). It certainly does not go as far as the reform in England and Wales and is quite short of the policy on sports adopted in New Zealand.

[114] Picarda 4th ed, above n 40, at 164.

[115] [2007] 3 SCR 217.

[116] (2009) 24 NZTC 23,273 at [52].

PART VI

# Difficult situations: mixed purposes, professional organisations and political purposes

It is trite to say that in order for an entity to be charitable, it must have exclusively charitable purposes and must provide sufficient public benefit. In most situations, it is easy to determine if the purposes are charitable. They will fall into one of the four categories recognised at law: the relief of poverty, the advancement of education, the advancement of religion or other purposes beneficial to the community. Similarly, it is usually relatively easy to determine if the purposes provide sufficient public benefit.

Some situations, however, are not so straightforward. This is especially so when the main purposes, which are not charitable, are disguised as means to achieve otherwise charitable purposes. Difficult also are rules documents where the purposes seem charitable but are limited to members of a profession.

Finally, entities promoting specific points of view or trying to change the law and policy are difficult to classify. This is because one must determine if advocacy activities are merely means of achieving otherwise charitable purposes or are merely ancillary to those purposes, or whether advocacy is the main purpose promoted by the entities.

This part examines situations that do not fall squarely under any of the four categories of charity. It comprises two chapters. The first is dedicated to professional organisations, while the second deals with political and advocacy purposes.

CHAPTER 19

# Professional organisations

Professional organisations present problems when deciding, firstly, if their purposes are charitable and, secondly, whether they provide sufficient public benefit.

The inquiry into objects, means and ancillary purposes is sometimes fraught with great difficulties. In *Re Laidlaw Foundation*,[1] Dymond J wrote that "a major stumbling block has frequently been the question as to how exclusive is exclusively charitable?".[2] The pertinent question is: "how does one decide whether an object of an organisation is the main object or whether it is merely incidental to the main object?".[3] In answering that question, one must try to discover what the real purposes are by construing the objects and powers in context. In order to do so, recourse may be to extrinsic evidence of the activities of the organisation.

This chapter is divided into two sections. The first analyses the general rules applicable to professional organisations. The second looks at exceptions to general rules, that is, learned societies and medical health professions.

## 19.1 The general rules

The rules concerning members' associations and professional organisations were summarised by Lord Cohen in *Inland Revenue Commissioners v City of Glasgow Police Athletic Association*[4] as follows:

> (1) *If the main purpose of the body of persons is charitable and the only elements in its constitution and operations which are non-charitable are merely incidental to that main purpose, that body of persons is a charity notwithstanding the presence of those elements* – Royal College of Surgeons of England v National Provincial Bank *[1952] AC 631.*
>
> (2) *If, however, a non-charitable object is itself one of the purposes of the body of persons and is not merely incidental to the charitable purpose, the body of persons is not a body of persons formed for charitable purposes only within the meaning of the Income Tax Acts* – Oxford Group v Commissioner of Inland Revenue *31 TC 221.*
>
> (3) *If a substantial part of the objects of the body of persons is to benefit its own members, the body of persons is not established for charitable purposes only* – Inland Revenue v Yorkshire Agricultural Society *[1928] 1 KB 611. The distinction between this class of case and that contemplated in the first principle I have stated is aptly pointed out by Atkin, L.J., in the case last cited, when he says (at p. 631): "There can be no doubt that a society formed for the purpose merely of benefiting its own members, though it may be to the public advantage that its members should be benefited by being educated or having their aesthetic tastes improved or whatever the object may be, would not be for a charitable purpose, and if it were a substantial part of the object that it should benefit its members I should think that it would not be established for a charitable purpose only. But, on the other hand, if the benefit given to its members is only given to them with a view of giving encouragement and carrying out the main purpose which is a charitable purpose, then I think the mere fact that the members are benefited in the course of promoting the charitable purpose would not prevent the society being established for charitable purposes only.*[5]

[1] (1984) 13 DLR (4th) 491.
[2] Ibid, at 497.
[3] Ibid.
[4] [1953] AC 380.
[5] Ibid, at 405.

In *Commissioner of Inland Revenue v Medical Council of New Zealand*,[6] McKay J wrote that no one doubted the correctness of the principle that "if the main object of an institution is the protection and advancement of those practising a particular profession, the institution cannot be a charity even though effectuation of the main object has a consequence of benefiting the community".[7]

In assessing if an association of members or a professional organisation is exclusively charitable, one must consider first if it has charitable purposes, and secondly if these purposes provide sufficient public benefit.

### *19.1.1 Charitable purposes*

In *Re Mason*,[8] the High Court of New Zealand considered that while the objects of the Auckland District Law Society were entirely wholesome and likely to lead to the ultimate benefit of the public, they fell short of making the Society a charity. In that case, the Court made a distinction between charitable institutions whose main object was the advancement of education that provided a clear public benefit, and non-charitable institutions whose main object was the protection and advantage of those practising in particular professions. McMullin J wrote:

> *The test of whether a library is a charity is whether it tends to the promotion of education and learning for the public or a sufficiently wide section of the public or whether it benefits only a more limited number of persons. If it is the first class, it will be charitable, if in the second class it will not be charitable.*[9]

In *Re Mason*, McMullin J based his reasoning on *Society of Writers to Her Majesty's Signet v Commissioners of Inland Revenue*.[10] In that case, the Society claimed tax exemption and argued that its library was devoted to the promotion of education, literature, science and the fine arts. The Lord President of the Court of Session took the view that people became members of the Society of Writers to the Signet, not for the purposes of studying literature or the fine arts or science, nor for being educated. They became writers to the Signet for making pecuniary gain by a profession. He considered that the purposes of the library and all the other institutions connected with the Society were to help, one way or another, with the attainment of the end for which every member entered that Society, that was to make pecuniary gain. The same reasoning was applied by the Court of Session in *Farmer (Surveyor of Taxes) v Juridical Society of Edinburgh*.[11] That Society was formed for the advancement of the science of law and the pursuit of general literature, but its membership was restricted to members of the Faculty of Advocates, writers to the Signet and gentlemen intending to become members of one of those institutions. It was held to be mainly a professional institution.

### *19.1.2 Sufficient public benefit*

Members' and professional associations raise the problem of public benefit. That problem is raised first concerning the provision of public benefits from the education of the members and secondly from the considerations relating to whether the benefits that the members derive from the organisation are incidental or not to the main purposes.

Concerning the education of members, the stumbling block comes from the Court decision in *Oppenheim v Tobacco Securities Trust Co Ltd*,[12] which approved the approach taken in *Re Compton*.[13] In *Oppenheim*, a trust was set up to provide for the education of the children of employees or former employees of British-American Tobacco Co Ltd, and its subsidiaries. The total number of eligible employees was an estimated 110,000. The House of Lords held that this was not charitable. This was because "a group of persons

6 [1997] 2 NZLR 297.

7 Ibid, at 313.

8 [1971] NZLR 714.

9 Ibid, at 722. This test is another version of the one established in *Inland Revenue Commissioners v City of Glasgow Police Athletic Association* [1953] AC 380 at 396 by Lord Normand "who wrote: What the respondents must show, in the circumstances of this case, is that so viewed objectively the association is established for a public purpose, and that the private benefits to members are the unsought consequences of the pursuit of the public purpose, and can therefore be disregarded as incidental. That is a view which I cannot take. The private benefits to members are essential."

10 (1886) 2 TC 257.

11 (1914) 6 TC 467.

12 [1951] AC 297 at 306; [1951] 1 All ER 31.

13 [1945] Ch 123; [1945] 1 All ER 198.

may be numerous, but if the nexus between them is their personal relationship to a single *propositus* or to several *propositi*, they are neither the community nor a section of the community for charitable purposes".[14] This test was eventually reformulated as follows:

> *It is a general rule that a trust or gift in order to be charitable in a legal sense must be for the benefit of the public or some section of the public [...] An aggregate of individuals ascertained by reference to some personal tie (e.g. blood or contract) such as the relations of a particular individual, the members of a particular family, the employees of a particular firm, the members of a particular association, does not amount to the public or a section thereof for the purposes of the general rule.*[15]

Even before the rule in *Compton-Oppenheim* was formulated, a number of cases involving professional organisations had been held by the courts not to be charitable. These cases were analysed by McMullin J in *Re Mason*.[16] He referred to *Society of Writers to Her Majesty's Signet v Commissioners of Inland Revenue*,[17] in which the Court of Session considered that people became members of the society for their own pecuniary profit, which therefore did not provide sufficient public benefit.[18] Some 28 years later, the same reasoning was applied by the Court of Session in *Farmer (Surveyor of Taxes) v Juridical Society of Edinburgh*.[19] In *Ex parte St John Law Society*,[20] the New Brunswick Court adopted the English approach to societies whose main object was the promotion of the interests of bodies of men of particular professions. A library established for the benefit of employees of an insurance company was also held not to be charitable because it would benefit the members of a professional organisation.[21]

In *Re Mason*[22] the Supreme Court considered that while the objects of the Auckland District Law Society were entirely wholesome and likely to lead to the ultimate benefit of the public, they fell short of making the Society a charity. In that case, the Court made a distinction between charitable institutions whose main object was the advancement of education that provided a clear public benefit, and non-charitable institutions whose main object was the protection and advantage of those practising in particular professions.

Courts have also held that professional organisations for civil engineers are not charitable. In *Commissioners of Inland Revenue v Forrest (Institution of Civil Engineers)*,[23] the majority in the House of Lords took the view that the Institution was a society established for the promotion of science and any benefits that its members individually derived were purely incidental benefits. In *Institution of Civil Engineers v Inland Revenue Commissioners*,[24] the question was whether the Institution was a body of persons established for charitable purposes only. On appeal, Lord Hanworth MR wrote that "if there is an object, e.g., the promotion of the profession in addition to the promotion of science that is collateral and not merely incidental, the result is that the Institution cannot be described as established for charitable purposes only".[25]

In *Institution of Professional Engineers New Zealand Inc v Commissioner of Inland Revenue*,[26] the High Court held that although the advancement of the science of engineering was beneficial to the general public, a significant and non-incidental function of the Institution was to act as a professional organisation for the benefit of engineers; therefore it could not be said that the Institution had been established exclusively for charitable purposes. In that case, Tipping J cited *New Zealand Society of Accountants v Commissioner of Inland Revenue*[27] as an organisation that was held to be mainly for the benefit of members.

[14] [1951] AC 297 at 306.

[15] *Re Scarisbrick* [1951] 1 Ch 622 at 648-649 per Jenkins LJ. See also Gino Dal Pont *Law of Charity* (LexisNexis/Butterworths, Australia, 2010) at 51.

[16] [1971] NZLR 714.

[17] (1886) 2 TC 257.

[18] Ibid, at 271.

[19] (1914) 6 TC 467.

[20] (1891) 30 NBR 501.

[21] *Chartered Insurance Institute v Corporation of London* [1957] 1 WLR 867.

[22] [1971] NZLR 714 at 721.

[23] (1890) 15 AC 334.

[24] [1932] 1 KB 149.

[25] Ibid, at 161.

[26] [1992] 1 NZLR 570.

[27] (1986) 9 TRNZ 727. See also *Weir v Crum-Brown* [1908] AC 162 at 167-168 (HL).

In the 2011 case of *Re New Zealand Computer Society Inc*,[28] the first case to consider a professional society under the *Charities Act 2005*, the High Court concluded that the appellant had a mix of charitable and non-charitable purposes, the non-charitable purposes being those that provided benefits to its professional members. MacKenzie J held that:

> *Having regard to the Society's objects, its activities and the material on its website, I consider that the Society's non-charitable purposes that are aimed at benefiting the profession, or members of that profession, are purposes that are not ancillary to the purpose of advancing information technology as a discipline.*[29]

In *Re New Zealand Computer Society Inc*, the Court agreed with and cited previous New Zealand decisions, including *Re Mason*,[30] *Institution of Professional Engineers New Zealand Inc v Commissioner of Inland Revenue*[31] and *Commissioner of Inland Revenue v Medical Council of New Zealand*.[32] MacKenzie J especially insisted on the *Institution of Professional Engineers New Zealand* case, where Tipping J concluded that professional society functions included the promotion of professional proficiency, accrediting and training professional engineers, maintaining the image of the profession, and providing welfare functions for members. The question to be answered was whether the non-charitable purposes were "significant in themselves or simply inevitable and unsought consequences of the pursuit of the principal public and charitable object. Tipping J concluded that the private benefits [could not] be disregarded as incidental".[33]

In *New Zealand Computer Society Inc*,[34] MacKenzie J noted that the Society's objects clearly disclosed both "learned society" functions and "professional society" functions. He wrote that he could not accept the Society's submission that all of its purposes were entirely charitable. He considered that the education was aimed at information technology professionals rather than members of the public, and would thus lead to limited public benefit.

### 19.2 Learned societies and medical health professions as an exception to the general rule

Courts have long held that societies established for the promotion of science are charitable. The problem arises mainly when other purposes, such as the promotion of a profession, are associated with the promotion of science.

#### *19.2.1 Learned societies*

New Zealand courts have acknowledged that learned societies and societies established primarily for the promotion of science are charitable. In *Re Mason*,[35] McMullin J cited with approval *Commissioners of Inland Revenue v Forrest (Institution of Civil Engineers)*,[36] in which the majority in the House of Lords took the view that the Institution, a society established for the promotion of science, was charitable. The same principle was applied to the Royal Society[37] and the Royal Geographical Society, the Royal Literary Society,[38] the Zoological Society,[39] the British School of Egyptian Archaeology,[40] and the Institution of Civil Engineers,[41] all of which were held charitable by English courts.

In *Commissioner of Inland Revenue v New Zealand Council of Law Reporting*,[42] the New Zealand Court of Appeal followed similar cases decided by the highest courts of the United Kingdom[43] and Australia.[44] In that case, the main object of the New Zealand Council of Law Reporting was the publication and sale of law reports for the benefit of those engaged in the administration or practice of law in New Zealand. This was

[28] HC WN CIV-2010-485-924 [28 February 2011] per MacKenzie J.

[29] Ibid, at [68].

[30] [1971] NZLR 714.

[31] [1992] 1 NZLR 570.

[32] [1997] 2 NZLR 297.

[33] [1992] 1 NZLR 570 at 583 cited in R*e New Zealand Computer Society Inc*, HC WN CIV-2010-485-924 [28 February 2011] at [42] per MacKenzie J.

[34] HC WN CIV-2010-485-924 [28 February 2011] at [54] per MacKenzie J.

[35] [1971] NZLR 714 at 721.

[36] (1890) 15 AC 334.

[37] *Beaumont v Oliveira* (1869) 4 Ch App 309; *Royal Society of London and Thompson* (1881) 17 Ch D 407.

[38] *Thomas v Howell* (1874) LR 18 Eq 198.

[39] *Re Lopes* [1931] 2 Ch 130; followed in *North of England Zoological Society v Chester* RDC [1959] 1 WLR 773 (CA).

[40] *Re British School of Egyptian Archaeology v Public Trustee and others* [1954] 1 WLR 546.

[41] *Institution of Civil Engineers v Inland Revenue Commissioners and others* [1932] 1 KB 149. See also Hubert Picarda *The Law and Practice Relating to Charities* (4th ed, Bloomsbury Professional Ltd, Haywards Health, 2010) at 75 ["Picarda 4th ed"].

[42] [1981] 1 NZLR 682 (CA).

[43] *Incorporated Council of Law Reporting for England and Wales v Attorney-General* [1972] Ch 73; [1971] 3 All ER 1029.

[44] *Incorporated Council of Law Reporting of the State of Queensland v Federal Commissioner of Taxation* (1971) 125 CLR 659.

considered to be charitable even if lawyers did use those reports in their paid work, because such benefits were incidental to the main purpose, which was charitable. The Court cited Buckley LJ, who wrote in a similar case:

> *The service which publication of the Law Reports provides benefits not only those actively engaged in the practice and administration of the law, but also those whose business it is to study and teach law academically, and many others who need to study the law for the purposes of their trades, businesses, professions or affairs. In all these fields, however, the nature of the service is the same: it enables the reader to study, and by study to acquaint himself with and instruct himself in the law of this country. There is nothing here which negatives an exclusively charitable purpose.*[45]

In *Re Mason,*[46] the Court stated:

> *There is an established line of authority which draws a distinction between two kinds of institutions – the one which regulates a profession for the advantage of those practising it and the other whose interests include the advancing of some branch of science in a wide sense. The first class of institution has been held to be not charitable; the second class has been held to be charitable.*[47]

In *Institution of Professional Engineers New Zealand Inc v Commissioner of Inland Revenue,*[48] Tipping J drew a distinction between "learned society" functions and professional or "protective society" functions. The latter were intended to confer private benefits on members of a society, and thus were not charitable, while the former were aimed at developing or advancing the body of learning that was central to the organisation's profession, making them charitable. That reasoning was followed in the 2011 case of *Re New Zealand Computer Society Inc*,[49] the first case to consider a professional society under the *Charities Act 2005*.

The above mentioned court decisions showed that the promotion of science was a charitable purpose. The next question is to decide whether medical health professions are charitable or not.

### *19.2.2 Medical health professions*

The New Zealand case of *McGregor v Commissioner of Stamp Duties*[50] was one of the first reported cases in which a gift for the promotion of the scientific study of obstetrics and gynaecology was held to be charitable. In that case, the New Zealand Obstetrical and Gynaecological Society was charitable under the fourth head of charity because "the essential object of the Society appears to be to provide education in the treatment and care of maternity cases, not for some individual doctors, but for a large section of the community".[51] Ten years later, the House of Lords held that the Royal College of Surgeons was a charitable organisation for similar reasons.[52]

However, it took more than 50 years of divided decisions by courts before the matter was more or less settled. In *General Medical Council v Inland Revenue Commissioners*,[53] the English Court of Appeal upheld the decision of Rowlatt J, who had affirmed the decision of the Commissioners that the General Medical Council had not been established for charitable purposes only. This was because the Court considered that although the regulation of the profession provided a public benefit, the main purpose was to protect the profession itself.

[45] *Incorporated Council of Law Reporting for England and Wales v Attorney-General* [1972] Ch 73 at 103-104; [1971] 3 All ER 1029 at 1047 cited by *Commissioner of Inland Revenue v New Zealand Council of Law Reporting* [1981] 1 NZLR 682 at 686 per Richardson J.

[46] [1971] NZLR 714.

[47] Ibid, at 723 approved in *New Zealand Computer Society Inc*, HC WN CIV-2010-485-924 [28 February 2011] per MacKenzie J at [40].

[48] [1992] 1 NZLR 570 at 583 cited in *New Zealand Computer Society Inc*, HC WN CIV-2010-485-924 [28 February 2011] per MacKenzie J at [42].

[49] HC WN CIV-2010-485-924 [28 February 2011] per MacKenzie J.

[50] [1942] NZLR 164; [1943] GLR 101.

[51] Ibid, at 169 per Smith J.

[52] *Royal College of Surgeons of England v National Provincial Bank Ltd* [1951] 1 WLR 1077.

[53] (1928) 97 LJKB 578 (CA).

The *General Medical Council* decision was expressly approved by the House of Lords in *Royal College of Nursing for England and Wales v St Marylebone Borough Council*.[54] In that case, the issue was whether the General Nursing Council was entitled to rating relief as an organisation whose main object was charitable or was otherwise concerned with the advancement of the profession. Their Lordships (except Lord Somervell of Harrow) were of the view that the objects were not charitable. Lord Keith gave the reasoned basis for this conclusion:

> *It is said the conditions as to training and experience imposed as a prerequisite of registration make the council a charitable organisation, because these conduce to the advancement of the nursing of sick persons, which is a charitable object. But assuming for a moment that this is a consequence of imposing these conditions, that cannot, in my opinion, be said to be the reason why they were imposed. The reason was to secure that only properly qualified persons should be registered. That clearly was the direct object indicated by the Act. We are not concerned with indirect consequences or entitled to speculate on what ultimate purposes, if any, Parliament had in view [...]*
>
> *If it is legitimate to look at the effect of the Act at all, as distinct from the actual functions imposed by the Act on the council and their content, it appears to me to be easier to say that one of its results was to raise the professional status of nurses and to protect them in the exercise of their profession, than to say the result was to advance the nursing of sick persons.*[55]

However, another case was decided immediately after the House of Lords' decision in *Royal College of Nursing for England and Wales*. In a separate case, *Royal College of Nursing for England and Wales v St Marylebone Borough Council*,[56] the English Court of Appeal had to decide whether or not the College of Nursing was charitable. Its objects were to promote the science and art of nursing and the better education and training of nurses, and to promote the advancement of nursing as a profession for the benefit of the sick. The Court of Appeal, affirming the decision of the Divisional Court, held that both purposes were charitable because they were directed to the advancement of nursing for the relief of the sick. It was held that although the advancement of nursing as a profession might advance the professional interests of nurses in a trade union sense, this was incidental. Therefore, the College did not cease to be a charity because, incidentally and in order to carry out the charitable objects, it was both necessary and desirable to confer special benefits to the members.

In *Commissioner of Inland Revenue v Medical Council of New Zealand*,[57] the New Zealand Court of Appeal was divided in concluding that the entity was a charitable organisation. In that case, the Court had to decide exactly the same questions that had been considered in the English cases of the *Medical Council* and the *College of Nursing*. The majority of the New Zealand Court of Appeal (McKay, Thomas and Keith JJ; Richardson P and Gault J dissenting) considered the protection of the public in respect of the quality of medical and surgical services clearly fell within the broad charitable category of purposes beneficial to the community. The Council had been exclusively established for the purpose of the protection and benefit of the public. Any benefits to the registered practitioners were incidental and consequential. The Council was therefore an institution established exclusively for charitable purposes and qualified for an exemption under the *Income Tax Act*.

[54] [1959] AC 540.

[55] Ibid, 561, 562.

[56] [1959] 1 WLR 1077, [1959] 3 All ER 663.

[57] [1997] 2 NZLR 297.

In that decision, the New Zealand Court of Appeal seems to have taken a different approach from that of the English courts concerning entities established by Parliament. The New Zealand Court of Appeal held that the purpose for which the Council had been established was to further the health of the community and to protect the public from unqualified medical practitioners. Gino Dal Pont was very critical of the majority decision in the *Medical Council of New Zealand* decision. He wrote that "to accept the majority's conclusion in the Medical Council case is to apply a broader and less stringent test to associations established pursuant to statute than to associations established by private agreement. Yet it is unclear as to what, if any, justification there is for this distinction".[58]

In *Tudor on Charities*,[59] the author noted that:

> *[...] an institution whose main object is in the protection and advantage of those practising a particular profession is not a charity even though the carrying out of the main object results in benefit to the community. Because of this problem, several established charities have formed separate non-charitable bodies for negotiating purposes to preserve the charitable status of the original institutions. For example, the College of Radiographers is a charitable institution which promotes radiography and the Society of Radiographers is a non-charitable body which negotiates on behalf of its members.*[60]

The New Zealand Charities Registration Board has followed the *Medical Council of New Zealand* decision and consequently registered a number of medical professional organisations established under the *Health Practitioners Competence Assurance Act 2003*. The Act identifies 11 bodies of health professionals, including the Medical Council of New Zealand. They are the Chiropractic Board, Dieticians Board, Medical Radiation Technologists' Board, Medical Laboratory Science Board, Nursing Council of New Zealand, Occupational Therapy Board, Optometrists and Dispensing Opticians' Board, Physiotherapy Board, Podiatrists' Board and Psychologists' Board.

On the other hand, the New Zealand Charities Registration Board has declined applications from a number of health organisations that are not identified in the *Health Practitioners Competence Assurance Act 2003*. Such is the case for the New Zealand Society of Diversional Therapists Incorporated,[61] Midwifery and Maternity Providers' Organisation Limited[62] and Naturopaths of New Zealand Incorporated.[63]

### 19.3 Conclusion

Courts have held that an organisation established mainly for the benefit of its members or for the members of a profession is not charitable. This rule is based on the principle that such an organisation does not provide sufficient public benefit. However, if the organisation can show that the benefit to members is merely the unintended consequence of promoting a main charitable purpose, it can be registered as a charity. Such a consideration is one of degree and is not always easy to make.

[58] Dal Pont *Law of Charity*, above n 15, at 329-331.

[59] Jean Warburton *Tudor on Charities* (9th ed, Sweet & Maxwell, London, 2003) at 108.

[60] Ibid.

[61] Charities Services website: www.charities.govt.nz/guidance/Published_decisions/New%20Zealand%20Society%20of%20Diversional%20Therapists%20Incorporated.pdf.

[62] Charities Services website: www.charities.govt.nz/guidance/Published_decisions/Midwifery%20and%20Maternity%20Providers%20Limited.pdf.

[63] Charities Services website: www.charities.govt.nz/guidance/Published_decisions/Naturopaths%20of%20New%20Zealand%20Incorporated.pdf.

CHAPTER 20

# Political purposes and advocacy

Another situation that is difficult to decide is where the entity has, as its main purpose, the promotion of political advocacy. The general rule is that advocacy is not a charitable purpose. Political purposes have been defined as purposes directed at furthering the interests of any political party, or securing, or opposing, any change in the law or in the policy or decisions of central government, local authorities or other public bodies, whether in New Zealand or abroad.[1]

An entity is not charitable if one of its main purposes is to advocate for a change in the law or regulation or to maintain the *status quo*.[2] However, courts have held, and the *Charities Act 2005* provides, that an entity whose purposes include a non-charitable purpose, such as advocacy, that is merely ancillary to a charitable purpose, is not prevented from qualifying for registration as a charitable entity.[3]

This chapter first concentrates on the different types of advocacy: acceptable forms of advocacy as a means of achieving charitable purposes; and prohibited forms of political advocacy. Secondly, it analyses the issue of public benefit in "political advocacy" cases. Thirdly, it canvasses the promotion of peace, international understanding and good race relations. Finally, the promotion of human rights and democracy is analysed.

## 20.1 Types of advocacy

There are different types of advocacy. Some advocacy is representative, in the sense that someone is making a representation to government employees or government representatives on behalf of beneficiaries who cannot speak for themselves because of sickness, youth or old age, or because they do not have the means (for example not speaking the language) to do so. Such representative advocacy is generally seen as charitable or ancillary.

Another type of advocacy is making representation to government about the purposes an entity is pursuing. Such representations can be ancillary to the main purposes. However, in order to be considered ancillary, these representations must be kept within certain limits, because activities directed at political change may demonstrate an effective abandonment of charitable objects.[4]

In *McGovern v Attorney-General*,[5] Slade J summarised his conclusions in relation to trusts for political purposes as follows:

> *Trusts for political purposes falling within the spirit of this pronouncement include, inter alia, trusts of which a direct and principal purpose is either:*
>
> *(i) to further the interests of a particular political party; or*
>
> *(ii) to procure changes in the laws of this country; or*
>
> *(iii) to procure changes in the laws of a foreign country; or*

1 *Re Wilkinson (deceased)* [1941] NZLR 1065 at 1077.

2 *McGovern v Attorney-General* [1982] 1 Ch 321 at 340 per Slade J and *Re Collier (deceased)* [1998] 1 NZLR 81 at 89 per Hammond J.

3 *Charities Act 2005*, s 5(3).

4 *Public Trustee v Attorney-General* (1997) 42 NSWLR 600 at 621 per Santow J.

5 [1982] Ch 321.

*(iv) to procure a reversal of government policy or of particular decisions of governmental authorities in this country; or*

*(v) to procure a reversal of government policy or of particular decisions of governmental authorities in a foreign country.*[6]

In *Re Collier (deceased)*[7] Hammond J considered that there were three categories of political trust that had been impugned in the case law. The first category was "that charitable trusts to change the law itself are invalid".[8] The second category, trusts to support a political party, were rejected because "it is thought undesirable for the advantages of a charity to be conferred on trusts which overtly secure a certain line of political administration and policy".[9] The third category of prohibited political trust was those for the perpetual advocacy of particular points of view or propaganda trusts. This is because the Court had no means of judging whether or not a proposed change in the law would or would not be for the public benefit, and therefore could not say that a gift to secure the change was a charitable gift.[10]

The following subsections discuss these different types of advocacy in more detail.

### *20.1.1 Acceptable forms of political advocacy*

Not all forms of political advocacy are unacceptable. Political activities that are a means to achieve charitable purposes are considered as merely ancillary to the charitable purposes. This is also the case when the purposes are truly educational in nature and are not to promote a particular point of view.

#### *20.1.1.1 Defining acceptable ancillary political activities*

In *Latimer v Commissioner of Inland Revenue*,[11] the Privy Council made a distinction between main purposes and means to attain these purposes. Lord Millet, in rendering the judgment for the Privy Council, wrote that "the distinction is between ends, means and consequences. The ends must be exclusively charitable. But if the non-charitable benefits are merely the means or the incidental consequences of carrying out the charitable purposes and are not ends in themselves, charitable status is not lost".[12]

This reflects what has been said in other cases dealing with political advocacy. In *McGovern v Attorney-General*[13] and *Public Trustee v Attorney-General*,[14] the courts held that in considering the purposes of an entity, they had to find the main purpose of that entity. It was the purpose in question that had to be political. An entity having political purposes was not a charity. However, the mere fact that political means could be employed in furthering charitable objects did not necessarily render the gift or institution non-charitable. Similarly, in *Vancouver Society of Immigrants and Visible Minority Women v MNR*,[15] the Supreme Court of Canada wrote that "although a particular purpose was not itself charitable, [if] it was incidental to another charitable purpose, [it] was therefore properly to be considered not as an end in itself, but as a means of fulfilment of another purpose, which had already been determined to be charitable".[16] The state of the law has been summarised by the adoption of section 5(3) of the New Zealand *Charities Act 2005*, which states as follows:

> *To avoid doubt, if the purposes of a trust, society, or an institution include a non-charitable purpose (for example advocacy) that is merely ancillary to a charitable purpose of the trust, society, or institution, the presence of that non-charitable purpose does not prevent the trustees of the trust, the society, or the institution from qualifying for registration as a charitable entity.*

6 Ibid, at 340.
7 [1998] 1 NZLR 81.
8 Ibid, at 89 per Hammond J.
9 [1998] 1 NZLR 81 at 90, at [10-15] per Hammond J.
10 Ibid, at [17-40] per Hammond J.
11 [2004] 3 NZLR 157 at 170, at [36] per Lord Millett.
12 Ibid, at [30].
13 [1982] 1 Ch 321 at 340.
14 (1997) 42 NSWLR 600 at 616.
15 [1999] 1 SCR 10.
16 Ibid, at [157].

In *Greenpeace of New Zealand Incorporated*,[16a] the Court of Appeal held that "the specific reference in s 5(3) to 'advocacy' makes it clear that 'advocacy' may be an ancillary, non-independent non-charitable purpose, but not a primary, independent purpose. A similar distinction is drawn in the Canadian legislation, but not in the Australian legislation, which does not contain a definition of 'charitable institution'. The absence of this distinction was taken into account by the High Court of Australia in reaching its decision in *Aid/Watch Inc*". The Court of Appeal further held that the prohibition against political advocacy "remains part of the current law of New Zealand and we were not persuaded that there are good grounds for overriding it".[16b]

The hard question is how to distinguish between main political purposes and ancillary ones. Courts and authors insist that it is a question of degree.[17] On the other hand, New Zealand courts have recently decided that in conducting that analysis, both qualitative and quantitative assessments are required to determine whether the non-charitable purposes are ancillary.[18] Tax agencies in Canada and the United Kingdom have developed a number of indices that can help answer that question.

As mentioned by Heath J in *Greenpeace of New Zealand Incorporated*,[19] the first *indicia* can be gathered from section 5(4) of the New Zealand *Charities Act 2005*. This section has summarised the law concerning what is ancillary by stating that a non-charitable purpose is ancillary to a charitable purpose if that purpose is "secondary, subordinate, or incidental to a charitable purpose and is not an independent purpose". The Canadian Tax Agency has explained that when a charity focuses substantially on one particular charitable activity so that it is no longer subordinate to one of its stated purposes, it may question the legitimacy of the activity at law. "This is because when an activity is no longer subordinate to a charity's purposes, it may indicate that the charity is engaged in an activity outside its stated objects, or pursuing an unstated collateral political purpose".[20] For example, when an entity has, as its purpose, sought a ban on deer hunting or sought a change in the status of deer as defined by Parliament's statute or regulations,[21] it requires that the entity enter into a debate about whether such a ban or change is good, rather than providing or working towards an accepted public benefit.

A second *indicia* that an entity is pursuing political objectives can be inferred from the activities of that entity. This may mean that it is reasonable to conclude that the charity is focusing substantially on a particular activity for an unstated political purpose. In *Vancouver Society of Immigrants and Visible Minority Women v Minister of National Revenue*,[22] Iacobucci J, for the majority, observed that the question of whether an organisation was constituted exclusively for charitable purposes could not be determined solely by reference to its stated purposes, but had to take into account the activities in which the organisation was currently engaged.

A third *indicia* that an entity is pursuing collateral political purposes may be inferred from the fact that it is devoting a large amount of its funds and voluntary resources to political activities. In *Vancouver Society of Immigrants and Visible Minority Women v MNR*,[23] the Supreme Court of Canada was unanimous in holding that a charity had to devote substantially all its resources towards its charitable purposes. The Canada Revenue Agency considers that an entity devotes "substantially all" its resources towards its charitable activities if it devotes 90% or more of its resources towards its charitable activities. It wrote that "as a general rule, we consider a charity that devotes no more than 10% of its total resources a year to political activities to be operating within the substantially all provision".[24] However, the Agency uses its discretion, especially in cases of smaller organisations that can allot up to 20% of their resources to political activities. The Agency can also use its discretion to average a registered charity's political activities over a number of years, particularly when an entity has used a greater proportion of its resources in a one-off situation.[25]

[16a] [2012] NZCA 533 at [45] per White J.

[16b] Ibid, at [63].

[17] *Public Trustee v Attorney-General* (1997) 42 NSWLR 600 at 621 per Santow J. See also Gino Dal Pont *Charity Law in Australia and New Zealand* (Oxford University Press, Oxford, 2000) at 208-209.

[18] *Re The Grand Lodge of Antient Free and Accepted Masons in New Zealand* [2011] 1 NZLR 277 (HC) at [49-51] cited with approval by Heath J in *Greenpeace of New Zealand Incorporated*, HC WN CIV 2010-485-829 [6 May 2011] at [66-68].

[19] HC WN CIV 2010-485-829 [6 May 2011] at [67].

[20] Canada Revenue Agency *Policy Statement: Political Activities*, Reference Number: CPS-022 (September 2 2003) on CRA website: www.cra-arc.gc.ca/tx/chrts/plcy/cps/cps-0222-eng.html ["Political Activities"].

[21] See The Game and Forest Foundation of New Zealand Incorporated, on Charities Services website: www.charities.govt.nz/guidance/Published_decisions/The%20Game%20And%20Forest%20Foundation%20Of%20New%20Zealand%20Incorporated.pdf.

[22] [1999] 1 SCR 10 at [194].

[23] Ibid, at [161].

[24] "Political Activities", above n 20, at 8.

[25] Ibid, at 8. See also the Charity Commission for England and Wales, *Speaking Out – Guidance on Campaigning and Political Activity by Charities* CC9 (March 2009) on the Commission's website: www.charitycommission.gov.uk/publications/cc9.aspx at 13-14 ["Campaigning and Political Activity"].

Finally, a fourth *indicia* that a non-charitable purpose is not ancillary may be inferred from the fact that the "political advocacy" activities carried on by an organisation are continual and not merely on an *ad hoc* basis. Activities that are subservient to a charity's dominant charitable purpose must be a minor focus of the charity. The Canada Revenue Agency wrote that "to determine whether this requirement is met, the activity should be considered in relation to the charity's entire program of activities. If the activity becomes the main way of furthering the charity's purposes, it may no longer be a minor focus of the charity, but an end or unstated purposes in itself".[26]

*20.1.1.2 Political advocacy as a means to achieving charitable purposes*

A charity may sometimes have to be involved in "political" activities in order to further its charitable purposes. Activities are presumed to be political by the Canada Revenue Agency if a charity:

> *(1) explicitly communicates a call to political action (i.e., encourages the public to contact an elected representative or public official and urges them to retain, oppose, or change the law, policy, or decision of any level of government in the country or a foreign country);*
>
> *(2) explicitly communicates to the public that the law, policy, or decision of any level of government in Canada or a foreign country should be retained (if retention of the law, policy or decision is being reconsidered by a government), opposed, or changed;*
>
> *(3) or explicitly indicates in its materials (whether internal or external) that the intention of the activity is to incite, or organize to put pressure on, an elected representative or public official to retain, oppose, or change the law, policy, or decision of any level of government in the country or a foreign country.*[27]

However, in carrying out their mandate, registered charities often have to communicate with the public and public officials. Such communications often occur in the context of public awareness campaigns. These campaigns aim to give useful knowledge to the public to enable them to make decisions about the work a charity does or an issue related to that work.

The Supreme Court of Canada, in *Vancouver Society of Immigrants and Visible Minority Women v MNR*,[28] wrote that if the means the applicant was using to achieve its purposes were all contained in its rules and met the requirement that its activities had to be substantially connected to, and in furtherance of those purposes, then the awareness campaign was acceptable and would not be considered political. The Canada Revenue Agency further prescribes that an activity should be based on a position that is well reasoned, rather than information the charity knows or ought to know is false, inaccurate or misleading. Moreover, it would be unacceptable for a charity to undertake an activity using primarily emotive material.[29] Finally, the charity should ensure that advertisements show how interested parties can get background information by providing the charity's telephone number, mailing address and internet address if pertinent. The Charity Commission for England and Wales' *Guidance on Campaigning and Political Activity by Charities*[30] also has similar recommendations.

In promoting its charitable purposes, an entity may have to communicate with elected representatives and public officials. In *Public Trustee v Attorney-General*,[31] Santow J wrote that "if political persuasion [other than direct lobbying of the government for

[26] "Political Activities", above n 20, at 16 definition of "subordinate activities".

[27] Ibid, at 5.

[28] [1999] 1 SCR 10 at [56] per Gonthier J.

[29] "Political Activities", above n 20, at 6.

[30] "Campaigning and Political Activity", above n 25, at 10-13; 21-24.

[31] (1997) 42 NSWLR 600.

legislative or policy change] were not permitted at all, many such educative trusts would be inherently incapable of ever achieving their objects".[32] Moreover, the New South Wales Judge wrote that seeking an amendment of the law according to the law is not a "political" purpose, but a legitimate one if the main purpose is charitable even if the means seem "political".[33]

The High Court of Australia recently considered political objects and charitable purposes in *Aid/Watch Incorporated v Commissioner of Taxation*.[34] The High Court noted that in Australia there was no general doctrine that excluded political objects from charitable purposes. In *Re Draco Foundation (NZ) Charitable Trust*,[35] the New Zealand High Court rejected the broader interpretation of that decision. Young J wrote that there could have been other reasons for the Australian High Court reasoning in *Aid/Watch* having no application in that case:

> *That includes the proposition that the* Aid/Watch *applies only to those cases where the charitable purpose involves relief of poverty. And secondly, that the decision in* Aid/Watch *is reliant upon Australian constitutional principles not applicable in New Zealand. However, given* Bowman *identifies the law in New Zealand, it is unnecessary to assess the strength of that reasoning*.[36]

The Canada Revenue Agency and the Charity Commission for England and Wales have acknowledged that when a registered charity makes a representation, whether by invitation or not, to an elected representative or public official, the activity is considered to be charitable. "Even if the charity explicitly advocates that the law, policy, or decision of any level of government ought to be retained, opposed or changed, the activity is considered to fall within the general scope of charitable activities".[37]

Concerning the release of the content of a representation made by a charity to an elected or public official, the Canada Revenue Agency recommends that the entire text be released. An explicit call to political action in the text or in the representation will be regarded as political activity. As a result, all resources and expenditure associated with these activities could be considered to have been devoted to a political activity.[38]

### *20.1.2 Prohibited forms of political advocacy*

This section is based on the Hammond J classification expressed in *Re Collier (deceased)*,[39] where he considered that there were three categories of political trust that had been rejected as non-charitable in the case law. The first to be analysed is entities that advocate for the perpetual advocacy of a particular point of view or propaganda. The second category is composed of entities to support a political party. The third category is constituted of entities that promote a change of the law or the maintenance of the *status quo*.

#### *20.1.2.1 Promoting a particular point of view: propaganda*

Courts have stipulated that to qualify as a charity under the advancement of education, a targeted attempt must be made to educate others. There must be some structure. It is not enough simply to provide an opportunity for people to educate themselves by making materials available with which they may accomplish this.[40] To advance education in the charitable sense means: training the mind; advancing the knowledge or abilities of the recipient; raising the artistic taste of the community; or improving a useful branch of human knowledge through research. In *Vancouver Society of Immigrants and Visible Minority Women v MNR*,[41] Iacobucci J wrote that "so long as information or training is provided in a structured manner and for a genuinely educational purpose and not solely

[32] Ibid, at 617 citing *Re Koeppler's Will Trust* [1986] 1 Ch 423.

[33] *Public Trustee v Attorney-General* (1997) 42 NSWLR 600 at 618 per Santow J citing *Farewell v Farewell* (1892) 22 OR 573 at 581-582.

[34] [2010] HCA 42.

[35] HC WN CIV 2010-485-1275 [3 February 2011].

[36] Ibid, at [60].

[37] "Political Activities", above n 20, at 6.

[38] Ibid, at 6-7. See also "Campaigning and Political Activity", above n 25, 14-15; 16-18.

[39] [1998] 1 NZLR 81.

[40] *Vancouver Society of Immigrants and Visible Minority Women v MNR* [1999] 1 SCR 10 at [169] per Iacobucci.

[41] Ibid.

to promote a particular point of view or political orientation, it may properly be viewed as falling within the advancement of education".[42]

In *Attorney-General v Ross*,[43] Scott J pointed out that one must be wary of political purposes cloaked as educational. He wrote that "the skill of Chancery draftsmen is well able to produce a constitution of charitable flavour intended to allow the pursuit of aims of a non-charitable or dubious charitable flavour".[44] For example, in *Southwood v A-G*,[45] Chadwick LJ wrote that the objects, as might be expected in professionally drawn documents, were redolent with the flavour of charity. There were references to "the advancement of the education of the public", to "the promotion, improvement and development for the public benefit of research", and to the achievement of those ends "by all charitable means".

Although *Re Collier (deceased)*[46] was decided a year before the *Vancouver Society of Immigrants* case, Hammond J set out a similar test for determining whether the dissemination of information qualified as charitable under the head of advancement of education:

> *It must first confer a public benefit, in that it somehow assists with the training of the mind, or the advancement of research. Second, propaganda or cause under the guise of education will not suffice. Third, the work must reach some minimal standard. For instance, in* Re Elmore *[1968] VR 390 the testator's manuscripts were held to be literally of no merit or educational value.*[47]

Courts have held that in order for a trust to be charitable for the advancement of education, the information provided must not be limited to one side of complex issues. The test to decide whether an activity is political or genuinely educational is "one of degree of objectivity or neutrality surrounding the endeavour to influence, and assesses whether the political change is merely a by-product or is instead the principal purpose of the gift or institution".[48]

A distinction must be made between propagating a view that can be characterised as political and the desire "to educate the public so that they could choose for themselves, starting with neutral information, to support or oppose certain views".[49] Therefore a disposition can be validly construed as being for educational purposes notwithstanding that, because of the educational programme, the law may be changed.[50]

A charity whose objects include the advancement of education must, however, take care not to disregard the boundary between education and propaganda. To be considered charitable, an educational activity must be reasonably objective and based on a well reasoned position. This means a position that is based on factual information that is methodically, objectively, fully and fairly analysed. In addition, a well reasoned position should present serious arguments and relevant facts to the contrary.

These principles have been enunciated and applied in a number of cases. In *Re Hopkinson*[51] a bequest was made to four prominent members of the Labour Party as trustees to be applied for "the advancement of adult education with particular reference to the education of men and women of all classes (on the lines of the Labour Party's memorandum on education) to a higher conception of social, political and economic ideas and values and of the personal obligations of duty and service which are necessary for the realisation of an improved and enlightened social civilisation". Mr Justice Vaisey wrote that the "testator's object here was plainly to secure, not necessarily a certain line of legislation, but a certain line of political administration and policy".[52] The trust was considered non-charitable because its education was not objective but followed a party line.

[42] Ibid, at [169].

[43] [1986] 1 WLR 252.

[44] Ibid, at 263.

[45] [2000] ECWA Civ 204 (BAILII) at www.bailii.org/ew/cases/EWCA/civ/2000/204.html at [4].

[46] [1998] 1 NZLR 81.

[47] Ibid, at 91-92.

[48] *Re Bushnell (deceased) Lloyds Bank Ltd and others v Murray and others* [1975] 1 All ER 721 as applied by *Public Trustee v Attorney-General* (1997) 42 NSWLR 600 at 608.

[49] Ibid, at 729.

[50] *In the Estate of Cole (deceased)* (1980) 25 SASR 489 at 495.

[51] [1949] 1 All ER 346.

[52] Ibid, at 352.

Similarly, in *Re Bushnell (deceased)*[53] a trust for the advancement and propagation of teaching of socialised medicine was struck down. The will had included a direction to further knowledge of the socialist application of medicine and to demonstrate "that the full advantage of Socialised Medicine can only be enjoyed in a Socialist State" by means of public lectures and the publication of literature to that effect. Goulding J noted that if the testator, instead of trying to promote his own theory by education or propaganda, "had desired to educate the public so that they could choose for themselves, starting with neutral information, to support or oppose what he called 'socialised medicine' ",[54] the gift would have been valid as an educational purpose.

By contrast, in *Re Koeppler's Will Trusts*,[55] a gift to an association that contributed to an informed international public opinion, and to the promotion of greater cooperation in Europe and the West in general, was held to be educational because it was neither of a party political nature nor designed to change the law or governmental policy even though it could touch on political matters. Slade LJ described the activities of the association as "no more than genuine attempts in an objective manner to ascertain and disseminate the truth".[56]

The notion that a charity's position must be reasonably objective and based on well reasoned arguments was discussed by the Canadian Federal Court of Appeal in *Positive Action against Pornography v Minister of National Revenue*.[57] In that case, the Court held that the appellant organisation was political rather than educational because the material it distributed under the pretext of being educative showed a strong anti-pornography bias, weighted in favour of greater state control rather than the maintenance of the *status quo*. Stone J, who delivered the judgment of the Court, noted that the material was phrased in terms of influencing legislators, improving the definition of obscenity in the *Criminal Code*, changing public attitudes and beliefs, and establishing regulations on pornography, all directed towards legislative change.[58]

The reasoning was repeated in *Challenge Team v Revenue Canada*.[59] The Canadian Federal Court of Appeal, in a one-paragraph decision, wrote that it was unanimous in holding that "educating people from a particular political and moral perspective may be educational in the charitable sense in that it enables listeners to make an informed and critical choice. However, an activity is not educational in the charitable sense when it is undertaken solely to promote a particular point of view".[60]

In *Greenpeace of New Zealand Incorporated,*[61] Heath J approved the reasoning of Hammond J in *Re Collier*,[62] and the dissenting judges in *Aid/Watch*,[63] and agreed that "the promotion of a particular point of view is different from the purpose of generating public debate. In the former, the idea is to change the law or (as in *Molloy*) to retain the *status quo*. Encouragement of rational debate presupposes that both sides of an argument will be equally considered".[64]

Finally, to be educational in the charitable sense, organisations must not rely on incomplete information or on an appeal to emotions. Even in a classroom setting, promoting a particular point of view may not be educational in the charitable sense. As a result, courses, workshops and conferences may not be charitable if they ultimately seek to create a climate of opinion or to advocate a particular cause. This issue was discussed in *Southwood v A-G*,[65] in which the English Court of Appeal examined the refusal of the Charity Commission to register the Project on Demilitarisation (Prodem). Chadwick LJ wrote for the Appeal Court that the reason for the appeal failing was not the appellant's starting from a perspective that peace was preferable to war. It was because it was clear from the background paper and from the briefing papers that "Prodem's

53 [1975] 1 All ER 721.
54 Ibid, at 729.
55 [1986] 1 Ch 423.
56 Ibid, at 437.
57 [1988] 2 FC 340; (1988) 49 DLR (4th) 74.
58 Ibid, at 83.
59 [2000] 2 CTC 352.
60 Ibid, at [1].
61 HC WN CIV 2010-485-829 [6 May 2011].
62 [1998] 1 NZLR 81 at 93.
63 *Aid/Watch Incorporated v Commissioner of Taxation* [2010] HCA 42 at [56-57].
64 HC WN CIV 2010-485-829 [6 May 2011] at [69].
65 [2000] ECWA Civ 204 (BAILII); [2000] TLR 541 (CA).

object is not to educate the public in the differing means of securing a state of peace and avoiding a state of war. Prodem's object is to educate the public to an acceptance that peace is best secured by 'demilitarisation' ".[66]

The High Court of Australia recently considered political objects and charitable purposes in *Aid/Watch Incorporated v Commissioner of Taxation*.[67] The High Court noted that in Australia there was no general doctrine that excluded political objects from charitable purposes. The High Court wrote that there was public benefit in the generation, by lawful means, of public debate.

The New Zealand High Court refused to follow the Australian High Court decision in *Re Draco Foundation (NZ) Charitable Trust*.[68] Draco's purpose was to enhance and maintain communication between electors and legislators and executive officers. Young J wrote that "the difficulty for the appellant in such an approach is that contrary to the law of Australia, New Zealand does have, as part of its law, a general doctrine which excludes from charitable purposes, political objects".[69] The same reasoning was applied by the High Court in *Greenpeace of New Zealand Incorporated*.[70] The New Zealand Charities Registration Board has declined the applications of a few organisations based on the fact that they were not promoting education but particular points of view.[71]

*20.1.2.2 Political parties*

In *Re Collier (deceased)*,[72] Hammond J considered that trusts to support political parties were rejected because "it is thought undesirable for the advantages of charity to be conferred on trusts which overtly secure a certain line of political administration and policy".[73] Hubert Picarda wrote that "it is now established that a trust to support a particular party or its doctrines is not charitable".[74]

The first case in which this was clearly stated was *Re Jones*.[75] In that case, a gift of land had been given "to the Primrose League of the conservative cause to be used as a habitation in connection with the league or in a manner which will benefit the cause". This was held to be void because the Primrose League was a political organisation that stressed it was most essential that the political character of the Primrose League be conspicuously maintained.

In *Bonar Law Memorial Trust v IRC*,[76] the objects of the Trust were to honour the memory of Bonar Law and to promote political history with special reference to the development of the British constitution and the growth and expansion of the British Empire, and in such other subjects as the governing body might deem desirable. The Trust was declared non-charitable by the Court because the rules were broad enough to allow the governing body to arrange lectures that were really nothing but propaganda for the Conservative Party.

In *Re Hopkinson*,[77] a bequest had been made to four prominent members of the Labour Party as trustees to be applied for "the advancement of adult education with particular reference to the education of men and women of all classes (on the lines of the Labour Party's memorandum on education) to a higher conception of social, political and economic ideas and values and of the personal obligations of duty and service which are necessary for the realisation of an improved and enlightened social civilisation". Mr Justice Vaisey wrote that the "testator's object here was plainly to secure, not necessarily a certain line of legislation, but a certain line of political administration and policy".[78] The trust was considered non-charitable because its education was not objective but followed a party line.

[66] Ibid, at [30].

[67] [2010] HCA 42.

[68] HC WN CIV 2010-485-1275 [3 February 2011].

[69] Ibid, at [58].

[70] HC WN CIV 2010-485-829 [6 May 2011].

[71] See for example the Sensible Sentencing Group Trust: www.charities.govt.nz/guidance/Published_decisions/The_Sensible_Sentencing_Group_Trust.pdf.

[72] [1998] 1 NZLR 81.

[73] Ibid, at [10-15] per Hammond J.

[74] Hubert Picarda *The Law and Practice Relating to Charities* (4th ed, Bloomsbury Professional Ltd, Haywards Heath, 2010) at 226 ["Picarda 4th ed"].

[75] (1929) 45 TLR 259.

[76] (1933) 17 TC 508.

[77] [1949] 1 All ER 346.

[78] Ibid, at 352.

In Canada, a trust for the purpose of promoting and propagating the doctrines and teaching of socialism was held not to be charitable.[79] In Australia, a gift to the Communist Party of Australia for its sole use and benefit was held to be void because the purposes designated were not in the legal sense charitable.[80]

The Charity Commission for England and Wales has issued specific guidelines covering activities in working with political parties. It has stated that a charity must not give its support to any one political party. This is because a charity must always guard its independence and ensure it remains independent. Moreover, once an election has been called, charities that are campaigning will need to take special care to ensure their political neutrality. For example, a charity must not provide funds or other resources to a political candidate.[81]

*20.1.2.3 Advocacy to change the law*

The third type of advocacy that has been held not to be charitable are organisations whose main purpose is to bring a change to the law, maintain the *status quo* or seek changes to or the maintenance of governmental policies.

The Canada Revenue Agency has summarised three reasons for courts ruling out political purposes for charities.[82] The first is that a political purpose, such as seeking a ban on deer hunting, requires a charity to enter into a debate about whether such a ban is good, rather than providing or working towards an accepted public benefit. The second is that in order to assess the public benefit of a political purpose, a court would have to take sides in a political debate. In our parliamentary systems, political issues are for Parliament to decide, and the courts are reluctant to encroach on this sovereign authority. Finally, it is important to remember that although the stated purposes of an organisation are the obvious source of reference on whether or not the organisation is constituted exclusively for charitable purposes, they are not the sole indicator. The relevant regulatory bodies also take into account the activities in which the organisation is currently engaged as a potential indicator of whether it has since adopted other purposes.

Different examples of the promotion of law changes or opposition to such changes can be found in decided decisions in the common law world. In one of the first cases on the subject, *Bowman v Secular Society Ltd*,[83] Lord Parker of Waddington wrote:

> *The abolition of religious tests, the disestablishment of the Church, the secularisation of education, the alteration of the law touching religion or marriage or the observation of the Sabbath are purely political objects. Equity has always refused to recognise such objects as charitable.*[84]

The promotion of temperance has been held to be charitable in England,[85] Tasmania[86] and New Zealand.[87] In *Knowles v Commissioner of Stamp Duties*, a New Zealand court held that the main object of the New Zealand Alliance for Temperance was to secure a legislative change through the election system. This was held to be a political object and therefore not charitable. Hubert Picarda, however, noted that in Canada and the United States "there are decisions to the opposite effect. Some of these transatlantic decisions may be attributed to the sympathy which the judges had for the cause of prohibition".[88]

Advocacy to change the tax system, such as the adoption of the single tax proposed by Henry George, has been held not to be charitable.[89] Similarly, in *Re Tetley*,[90] the English Court of Appeal considered that subsidising a newspaper for the promotion of particular political or fiscal opinions, although a patriotic purpose in the eyes of those who considered that the triumph of those opinions would be beneficial to the community, was not a charitable purpose.

[79] *Re Loney* [1953] 4 DLR 539 [Manitoba]. See also Hubert Picarda *The Law and Practice Relating to Charities* (3rd ed, Butterworths, London, 1999) at 16 [Picarda 3rd ed].

[80] *Bacon v Pianta* [1966] ALR 1044.

[81] "Campaigning and Political Activity", above n 25, 15-16; 18.

[82] "Political Activities", above n 20, at 3-4.

[83] [1917] AC 406.

[84] Ibid, at 442.

[85] *IRC v Temperance Council of Christian Churches of England and Wales* (1926) 136 LT 27.

[86] *Re Cripps* [1941] Tas SR 19.

[87] *Knowles v Stamp Duties Commissioner* [1945] NZLR 522 and *Re Williams* [1950] NZLR 854.

[88] Picarda 4th ed, above n 74, at 236 citing *Farewell v Farewell* (1892) 22 OR 573 at 579 per Boyd C.

[89] *Re Knight* [1937] 2 DLR 285. See also Picarda 4th ed, above n 74, at 238.

[90] [1923] 1 Ch 258.

The opposition to vivisection was one of the modern cases decided by the House of Lords on the subject of advocacy. In *National Anti-Vivisection Society v IRC*,[91] the main object of the Society was the repeal of the *Cruelty to Animals Act 1876* and the substitution of a new enactment prohibiting vivisection altogether. The majority of the House of Lords considered that the Society was not charitable because one of the main objects was political. That decision was followed in later decisions denying charitable status to the anti-vivisectionist cause.[92]

The New Zealand Court of Appeal, in *Molloy v Commissioner of Inland Revenue*,[93] held that the Society for the Protection of the Unborn Child, the main object of which was to preserve the integrity of the current law on abortion against the claims of those who desired its alteration, was not a charitable society. A similar decision was reached in *Human Life International in Canada Inc v MNR*.[94] In that case, the Canadian Federal Court of Appeal held that the activities of the society were not educational in nature. This was because the distribution of literature and the holding of conferences were not carried out in any structured way so as to amount to formal training. Moreover, its literature appeared to be predominantly of a tendentious or polemical character not normally associated with the formal training of the mind. Finally, Strayer JA concluded that "this kind of advocacy of opinions on various important social issues can never be determined by a court to be for a purpose beneficial to the community. The Court should not be called upon to make such decisions as it involves granting or denying legitimacy to what are essentially political views". This decision was followed in *Alliance for Life v MNR*,[95] in which the Canadian Federal Court of Appeal considered that materials disseminated by an anti-abortion organisation were not educational in any structured way and were so partisan as to be political.

The promotion of euthanasia was considered a political activity and not charitable in *Re Collier (deceased)*.[96] Hammond J wrote that "euthanasia is not lawful in New Zealand; there cannot be a charitable bequest to promote an illegal purpose. And, this bequest contravenes against the principle, that there cannot be a political trust to change the law".[97]

Campaigning against pornography was held not to be charitable in *Positive Action against Pornography v Minister of National Revenue*.[98] In that case, the Canadian Federal Court of Appeal decided that an organisation dedicated to swaying public opinion in support of tighter controls on pornography was indulging in political activities and was held not to be charitable. The organisation in question intended to distribute an information kit, which contained a rather strong anti-pornography bias.

The Charity Commission for England and Wales has held the opposition to vaccination and inoculation as being not charitable.[99] In that case, the organisation's main objects were to expose the failures and dangers of vaccination or any kind of inoculation and to secure the abolition of any regulation requiring vaccination or inoculation.

Attempts to influence policy-making processes are not always political. In *Public Trustee v Attorney-General*,[100] a New South Wales judge wrote that seeking an amendment of the law according to the law is not a "political" purpose, but a legitimate one if the main purpose is charitable even if the means seem "political". Sustained efforts, however, aimed at influencing policy-making processes have been held not to be charitable because they are political. In *Scarborough Community Legal Service v Her Majesty the Queen*,[101] a community-based legal clinic had participated in a rally to protest against changes proposed by a provincial government to its Family Benefits programme and was involved in a committee whose activities were aimed at changing certain municipal by-laws.

[91] [1948] AC 31.

[92] *Animal Defence and Anti-Vivisection Society v IRC* (1950) 66 (pt 2) TLR 1091; *Re Inman* [1965] VR 238 and *Re Jenkins' Will Trusts* [1966] Ch 249.

[93] [1981] 1 NZLR 688 at 695-696.

[94] [1998] 3 FC 202.

[95] [1999] 3 FC 504; 3 CTC 1.

[96] [1998] 1 NZLR 81.

[97] Ibid, at 91.

[98] [1988] 1 CTC 232 (FCA).

[99] *National Anti-Vivisection League* [1967] Ch Com Rep 47 (App D6) cited by Picarda 4th ed, above n 74, at 239.

[100] (1997) 42 NSWLR 600 at 618 citing *Farewell v Farewell* (1892) 22 OR 573 at 581-582.

[101] [1985] 1 CTC 98; 85 DTC 5102 (FCA). See also Picarda 4th ed, above n 76, at 238.

Activist tenants' associations have been held not to be charitable when they are involved in campaigning to fight cutbacks in government funding and campaigns for the abolition of water tax and against the conversion of rental properties to condominiums.[102]

Finally, in *Re Co-operative College of Canada v Saskatchewan Human Rights Commission,*[103] the Saskatchewan Court of Appeal refused to recognise the Co-operative College as charitable. This was because the entity's purpose was "to protect the interests of co-operatives and credit unions by appropriate action in making representations to legislative, administrative, judicial and other bodies". The Court considered that "the aim of this object was plainly to influence the legislature, or Parliament, as well as administrative and judicial bodies, to change existing laws, enact new laws, or to resist any such change or enactment of new law".[104]

It must, however, be understood that ancillary politicking will not prevent an organisation being charitable. As was stated by the Supreme Court of Canada in *Vancouver Society of Immigrants and Visible Minority Women v Minister of National Revenue*,[105] "although a particular purpose was not itself charitable, [if] it was incidental to another charitable purpose, [it] was therefore properly to be considered not as an end in itself, but as a means of fulfilment of another purpose, which had already been determined to be charitable".[106]

In *Re Inman*[107] a bequest had been made to the Royal Society for the Prevention of Cruelty to Animals. One of the purposes of the organisation was "to prevent the cruelty to animals, by enforcing where practicable the existing laws, by procuring such further legislation as may be expedient". The Court considered that the Society was charitable because the advocacy to change the law was incidental to its main purpose. Gowans J wrote:

> *The general object, is, therefore, to prevent cruelty to animals. This dominates the statement of objects in the by-laws. None of the methods set out for the achievement of this object detracts from its character. It is true that one of the methods, viz procuring such further legislation as may be thought expedient, if taken alone would be a political object and nothing more. But it is only a method of achieving the main or fundamental object, the prevention of cruelty to animals. If an institution for the prevention of cruelty to animals is a charitable institution, it will not be the less a charitable institution because one of the means indicated for the achievement of its dominant purpose taken alone would not be charitable.*[108]

This decision may also be understood as being to aid the enforcement of some particular law, such as promoting prosecutions for cruelty to animals.[109]

### 20.2 The question of public benefit in "political advocacy" cases

Since *Bowman v Secular Society Ltd*,[110] courts have consistently held that a trust or a society for the attainment of political objects is not charitable, not necessarily because it is invalid but because the courts have no means of judging whether a proposed change in the law will or will not be for the public benefit, and therefore cannot say that a gift to secure the change is a charitable gift.

In *McGovern v Attorney-General,*[111] Slade J distilled the essence of what had been said in the *Bowman* case and *National Anti-Vivisection Society v IRC*.[112] He held that a trust whose main object was to secure the alteration of the law would not be regarded as charitable because the court had no adequate means of judging whether a proposed change in the law would or would not be for the public benefit. He further held that if a principal purpose of the trust was to reverse government policy or particular administrative decisions of governmental authorities it would not be charitable. He wrote:

[102] *Notre Dame de Grace Neighbourhood Association v Revenue Canada, Taxation Section* [1988] 2 CTC 14, 88 DTC 6279 (FCA).

[103] (1975) 64 DLR (3d) 531 (Saskatchewan CA).

[104] Ibid, at 538 per Bayda J.

[105] [1999] 1 SCR 10.

[106] Ibid, at [157].

[107] [1965] VR 238.

[108] [1965] VR 238 at 242.

[109] *Re Vallance* (1876) 2 Seton's Judgments (7th ed) 1304. See also Picarda 4th ed, above n 76, at 240.

[110] [1917] AC 406.

[111] [1982] Ch 321 at 338-340.

[112] [1948] AC 31 (HL).

> *The court will not regard as charitable a trust of which a main object is to procure an alteration of the law of the United Kingdom for one or both of two reasons: first, the court will ordinarily have no sufficient means of judging as a matter of evidence whether the proposed change will or will not be for the public benefit. Secondly, even if the evidence suffices to enable it to form a* prima facie *opinion that a change in the law is desirable, it must still decide the case on the principle that the law is right as it stands, since to do otherwise would usurp the functions of the legislatures.*[113]

The New Zealand Court of Appeal, in *Molloy v Commissioner of Inland Revenue*,[114] held that the Society for the Protection of the Unborn Child was not a charity. This was because its main object was to preserve the integrity of the current law on abortion against the claims of those who desired its alteration. Delivering the judgment for the Court, Somers J wrote that:

> *Reason suggests that on an issue of a public and very controversial character, as in the case of abortion, both those who advocate a change in the law and those who vigorously oppose it are engaged in carrying out political objects in the relevant sense. The law, statutory or otherwise, is not static [...] The inability of the Court to judge whether a change in the law will or will not be for the public benefit must be as applicable to the maintenance of an existing provision as to its change. In neither case has the Court the means of judging the public benefit.*[115]

In *Public Trustee v Attorney-General*,[116] Santow J summarised the state of the law concerning "political" purposes. He wrote that an organisation "whose main purpose is directed to altering the law or government policy, as distinct possibly from an organisation to encourage law reform generally, cannot be saved from being political by appeal to the public interest". In that case, although the Judge took a very progressive view of "advocacy", he nevertheless struck down as non-charitable clauses purporting to change the law discriminating against Aboriginal people. However, he maintained the trust using the *cy-près* doctrine and the power given to the Court by a disposition similar to our section 61B by severing four out of 12 clauses purporting to change the law. He found that the other eight purposes were charitable and could survive even if the "political" purposes were severed.

Furthermore, in *Public Trustee v Attorney-General*,[117] Santow J wrote that seeking the amendment of the law according to law is not a "political" purpose, but a legitimate one if the main purpose is charitable even if the means seem "political". He also wrote that "if political persuasion [other than direct lobbying of the Government for legislative or policy change] were not permitted at all, many such educative trusts would be inherently incapable of ever achieving their objects". As Gino Dal Pont wrote, "the issue is one of degree, for activities directed at political change may demonstrate an effective abandonment of charitable objects".[118]

In *Re Collier (deceased),*[119] Hammond J criticised the decisions about "political advocacy", especially in light of section 13 (freedom of thought, conscience and religion) and section 14 (freedom of expression) of the *New Zealand Bill of Rights Act 1990*. Nevertheless, he wrote:

> *I have considerable sympathy for that viewpoint which holds that a Court does not have to enter into the debate at all, hence the inability of the Court to resolve the merits is irrelevant.*

[113] [1982] Ch 321 at 336-337.
[114] [1981] 1 NZLR 688.
[115] Ibid, at 695-696.
[116] (1997) 42 NSWLR 600 at 619.
[117] Ibid, at 618.
[118] Dal Pont *Charity Law in Australia and New Zealand*, above n 17, at 209.
[119] [1998] 1 NZLR 81.

He went on to say:

> *In this Court at least, there is no warrant to change these well-established principles – which rest on decisions of the highest authority – even though admirable objectives too often fall foul of them.*[120]

The Federal Court of Australia made the following *obiter* comments about political purposes in *Victorian Women Lawyers' Association Inc v Commissioner of Taxation*:[121]

> *The High Court's formulation suggests that a trust may survive in Australia as charitable where the object is to introduce new law consistent with the way the law is tending. In his paper in the* Australian Bar Review, *Santow J also observed that the trust which has an undoubtedly charitable object does not lose its charitable status simply because it also has an object of changing the law or reversing policy (at 248): "the question is always whether that political object precludes the trust satisfying the public benefit requirements".*[122]

Finally, the High Court of Australia has recently held that an entity whose purposes and activities were aimed at influencing government to ensure foreign aid was delivered in a particular manner did have exclusively charitable purposes notwithstanding its political activities.[123] That conclusion was based on the fact that, according to the High Court, Australia has never adopted *Bowman* as applicable in Australia, contrary to the United Kingdom, Canada and New Zealand. Secondly, it considered that the purposes to relieve poverty were charitable and therefore the activities were ancillary to its main charitable purpose. Finally, the High Court of Australia, in *Aid/Watch Incorporated v Commissioner of Taxation*,[124] wrote that it is "unnecessary to determine whether the fourth head encompasses the encouragement of public debate respecting activities of government which lie beyond the first three heads identified in *Pemsel* and, if so, the range of those activities".[125]

The Australian High Court reasoning was rejected by the High Court of New Zealand in *Re Draco Foundation (NZ) Charitable Trust*.[126] MacKenzie J wrote that the reasons for *Aid/Watch* having no application to this case included "the proposition that *Aid/Watch* applies only to those cases where the charitable purposes involve relief of poverty. And secondly, that the decision in *Aid/Watch* is reliant upon Australian constitutional principles not applicable in New Zealand".[127] A similar analysis was applied, although reluctantly, by Heath J in *Greenpeace of New Zealand Incorporated*.[128] He wrote: "I feel constrained to apply the full extent of the *Bowman* line of authority on the basis that I am bound to do so by the Court of Appeal decision in *Molloy*",[129] although he acknowledged that "in modern times, there is much to be said for the majority judgment in *Aid/Watch*".[130]

In *Greenpeace of New Zealand Incorporated*,[130a] the Court of Appeal agreed with a previous New Zealand decision that "the prohibition on political objects is based on the inability of the Court to determine where the public good lies as between competing views of a contentious political nature". The Court of Appeal went further in explaining the reasoning behind such a prohibition by holding that:

> *As we have already noted when referring to the Human Life International in Canada Inc case, there is also no doubt an underlying concern that taxation benefits should not be available to a society pursuing one side of a political debate. In National Anti-Vivisection Society v Inland Revenue Commissioners Lord Wright pointed out that to enable a society to pursue a controversial purpose as a charitable purpose and to claim the benefit of being immune from income tax 'would amount to receiving a subsidy from the state to that extent'.*[130b]

[120] Ibid.

[121] [2008] FCA 983 (Federal Court of Australia).

[122] Ibid, at [128].

[123] *Aid/Watch Incorporated v Commissioner of Taxation* [2010] HCA 42.

[124] Ibid.

[125] Ibid, at [48].

[126] HC WN CIV 2010-485-1275 [3 February 2011].

[127] Ibid, at [60].

[128] HC WN CIV 2010-485-829 [6 May 2011].

[129] Ibid, at [59].

[130] Ibid.

[130a] [2012] NZCA 533 at [63].

[130b] Ibid.

It is clear from this succession of decisions that when an entity's main purpose is to alter the law or maintain the *status quo*, such a purpose is not charitable. This is because courts do not want to be drawn into controversy and take sides. That attitude is also based on the belief that the Parliament is sovereign and the courts' duty is to interpret the statutes, not to adopt them.

### 20.3 Promotion of peace, international understanding and good race relations

Another group of cases concerning advocacy can be found in the law reports concerning the promotion of peace, international understanding and good race relations.

#### *20.3.1 Promotion of peace*

In *Re Harwood*,[131] it was accepted, apparently without argument to the contrary, that gifts to peace societies were charitable gifts. That decision was, however, contradicted in a number of subsequent decisions. Hubert Picarda wrote that "it is submitted that the promotion of peace is a political purpose and therefore not charitable. Its political nature is apparent when in relation to a particular area of conflict one asks the question: peace on what terms? The question cannot be answered without making a political decision".[132]

The promotion of disarmament and peace has been the subject of a number of court decisions. *Re Wilkinson (deceased)*[133] was a New Zealand decision where the Court had to decide whether or not the League of Nations was a charity. In his decision, Kennedy J did not even mention *Re Harwood* in deciding that the League was a political organisation. He noted that the League of Nations encompassed methods for the avoidance of war with a guarantee of territorial integrity against aggression in certain circumstances. Although he considered its purposes might have had high ideals, this did not make them charitable because its main purpose was "advocacy of a particular kind of international politics".[134]

In *Re Koeppler's Will Trusts*,[135] Gibson J stated that "the purposes with which I am concerned are differently worded [from those in *Re Harwood*] and in any event it seems to me at least strongly arguable that the purposes of a peace society are political and not charitable".[136] The Court of Appeal in *Re Koeppler's Will Trusts*[137] reversed the decision that the Wilton Park process was not charitable, holding it to be charitable under the advancement of education. However, the Court of Appeal did not need to decide the peace issue.

New Zealand courts have also been called on to decide if the promotion of world peace was a charitable purpose. In *Re Collier (deceased)*[138] the Court had to decide if a bequest for the promotion of world peace by inviting soldiers to stop the fighting by putting down their arms was a charitable purpose. In his decision Hammond J rejected *Re Harwood* as authoritative and preferred Mr Justice Gibson's opinion expressed in *Re Koeppler's Will Trusts* that *Re Harwood* was political and cited Hubert Picarda's opinion to the same effect.[139] Hammond J wrote:

> *That being the construction, in my view this charitable bequest fails; the objective is overtly political. To the extent that soldiers are to be encouraged to "down arms" it also pursues an unlawful end. The present state of military law does not allow them to adopt such a course, save on appropriate orders.*[140]

In *Re Collier (deceased)*, it was not the bequest for the promotion of world peace itself that was held to be political, but rather that purpose viewed in light of the testatrix's message that it was soldiers who could stop the fighting.

[131] [1936] Ch 285.
[132] Picarda 4th ed, above n 74, at 229.
[133] [1941] GLR 533; [1941] NZLR 1065.
[134] Ibid, at 1076.
[135] [1984] 1 Ch 243.
[136] Ibid, at 257.
[137] [1986] 1 Ch 423.
[138] *Re Collier (deceased)* [1998] 1 NZLR 81.
[139] Ibid, at 89.
[140] Ibid, at 91.

A year before the decision in *Re Collier (deceased)*, and although not cited in that decision, the Queensland Supreme Court decided that a bequest for "the elimination of war" was charitable. In *Re Blyth*,[141] Thomas J wrote that a wide range of cases had been found in which courts had considered peace purposes, some of them finding valid bequests and others finding them invalid. He cited *Re Harwood* and the decision of the Court of Appeal in *Re Koeppler's Will Trusts* as authorities in favour of such bequests being charitable. He also wrote that these two decisions were consistent in approach with the United States' decisions of *Parkhurst v Burrill*[142] concerning benefits given to the "World Peace Foundations" and *Assessors of Boston v Worldwide Broadcasting Foundation of Massachusetts*,[143] where the gift was made "to foster, cultivate and encourage the spirit of international understanding and cooperation". The Judge wrote that "the trend of judicial interpretation suggests that the purpose of elimination of war should be regarded as being within the necessary spirit and intendment of the *Statute of Elizabeth I*". He also took the view that "work for the elimination of war may be regarded as promoting a benefit that accrues for the whole community, and as revealing a general charitable intent".[144]

Finally, the English Court of Appeal, in *Southwood v A-G*,[145] endorsed the finding at first instance that there was "nothing controversial in the proposition that a purpose may be educational even though it starts from the premise that peace is preferable to war, and puts consequent emphasis on peaceful, rather than military techniques for resolving international disputes; and even though one purpose of the education is to 'create a public sentiment' in favour of peace".[146] Chadwick LJ went on to conclude, "that does not lead to the conclusion that the promotion of pacifism is necessarily charitable. The premise that peace is generally preferable to war is not to be equated with the premise that peace at any price is always preferable to any war. The latter plainly is controversial. But that is not this case".[147]

He went on to distinguish between an entity that declared that "peace is preferable to war" and one where Prodem insisted that peace was best secured by "demilitarisation". He wrote that "the Court cannot recognise as charitable a trust to educate the public to an acceptance that peace is best secured by 'demilitarisation'. Nor, conversely, could the Court recognise as charitable a trust to educate the public to an acceptance that war is best avoided by collective security through the membership of a military alliance – say, NATO".[148]

In *Greenpeace of New Zealand Incorporated*,[149] Heath J concluded that Greenpeace's objects of disarmament "fall foul of the admonition against political lobbying about the way in which disarmament should occur, as expressed (for example) in *Southwood*".[150] Consequently, the learned Judge dismissed the appeal by Greenpeace against the Charities Commission's refusal to register its application. The Court of Appeal agreed that "the question whether peace should be achieved through disarmament or through maintaining military strength is undoubtedly contentious and controversial with strong, genuinely held views on both sides of the debate. An entity seeking to promote peace on the basis of one or other of these views would be pursuing a non-charitable political purpose".[150a]

However, the Court of Appeal held that the proposed amendments to Greenpeace's objects which will replace the reference to 'disarmament' with references to 'nuclear disarmament and the elimination of all weapons of mass destruction', will make a significant difference. The Appeal Court agreed that these amendments "will remove the element of political contention and controversy inherent in the pursuit of disarmament generally and instead constitute, in New Zealand today, an uncontroversial public benefit purpose. In other words, applying the test from *Molloy*, the Court is not required to determine where the public good lies as that is now self-evident as a matter of law".[150b]

[141] [1997] 2 Qd R 567.

[142] (1917) 117 NE 39. The reason for the decision was stated as follows at pages 40-41:

> Efforts were not directed immediately to the change of existing laws, constitutions or governments. The general diffusion of intelligence upon the subjects taught well might result ultimately in a modification of governmental policies [...] A conscientious following of the precepts by all people would result in the most enlightened government and wise and just laws perhaps deferring in substantial part from those now prevailing, yet gifts to promote these ends would not come under the prohibition of the rule against gifts to change existing laws.

[143] (1945) 59 NE 2d 188.

[144] [1997] 2 Qd R 567 at 580.

[145] [2000] ECWA Civ 204 (BAILII); [2000] TLR 541 (CA).

[146] Ibid, at [27].

[147] Ibid, at [29].

[148] Ibid, at [29].

[149] HC WN CIV 2010-485-829 [6 May 2011].

[150] Ibid, at [64].

[150a] [2012] NZCA 533 at [74] per White J.

[150b] Ibid, at [76].

According to these decisions, the New Zealand Charities Registration Board considers that if the promotion of disarmament and peace is done in a way that is considered political, for example by requiring a change of law or government policy in New Zealand or abroad, it will not be charitable. The promotion of peace may, however, be considered charitable if it is undertaken in a purely charitable manner, for example through the advancement of education.[151] Moreover, as held by the Court of Appeal in the *Greenpeace* case, "nuclear disarmament and the elimination of all weapons of mass destruction is now sufficiently well accepted in New Zealand society that the promotion of peace through these means should be recognised in its own right as a charitable purpose under the fourth head of the definition".[151a]

### *20.3.2 Promotion of international friendship or understanding*

Just as the promotion of peace has received contradictory treatment from the courts, so has the promotion of international friendship and understanding. The first decision on the subject considered that such a purpose was not charitable.

In *Anglo-Swedish Society v IRC*,[152] the Society had been established to promote "a closer and more sympathetic understanding between the English and Swedish people". The means to achieve that purpose was to afford opportunities for Swedish journalists to visit the United Kingdom and to study at first hand British modes of thought and British national institutions. Mr Justice Rowlatt said that he did not doubt that the promoters of the fund were actuated by perfectly altruistic motives, but he could not bring himself to think that this was a charitable trust. The reason for his decision was that he considered the entity to promote an attitude of mind, a view of one nation by another and it did not fall under the *Statute of Charitable Uses Act 1601*.

The English Court of Appeal decided, in *Re Strakosch*,[153] that a fund established "for any purpose which in the opinion [of the trustees] is designed to strengthen the bonds of unity between the Union of South Africa and the Mother Country and which incidentally will conduce to the appeasement of racial feeling between the Dutch and English-speaking sections of the South African community" was not charitable. The main reason for the decision was that the language was too vague. Another reason was that not everything that contributed to the "common stock" of a community was charitable. Mr Justice Plowman, in *Buxton v Public Trustee*,[154] reached a similar decision and applied both the *Anglo-Swedish Society* and *Strakosch* decisions. In the *Buxton* case, the object was "to promote and aid the improvement of international relations and intercourse".

The only New Zealand case on the subject was decided by a District Court Judge in *Taxation Review Authority Case 46*.[155] In that case, the reviewing authority decided that a society established to promote interest in knowledge about the Commonwealth and to foster better relations between its different peoples was not exclusively charitable. Some of the purposes were charitable for the advancement of education, but most were not charitable because they were pursuing political purposes such as maintaining allegiance to Great Britain. The only decision applied by the Taxation Review Authority was in *Re Strakosch*.[156]

In *Toronto Volgograd Committee v Minister of National Revenue*,[157] the Canadian Federal Court of Appeal decided that an organisation established to recreate links between residents of Toronto and Volgograd touching on the risk of nuclear war and to promote understanding, reduce tensions and help find peaceful ways of living together was not charitable because the purposes were political and not educational in nature. Stone J, writing for the majority, applied the decisions in *Anglo-Swedish Society*, *Buxton* and in *Re Strakosch* to support his reasoning.

[151] See Greenpeace Educational Trust, registration number CC37813: www.charities.govt.nz

[151a] *Greenpeace of New Zealand Incorporated* [2012] NZCA 533 at [82] per White J.

[152] (1931) 3 TLR 295.

[153] [1949] Ch 529.

[154] (1962) 41 TC 235.

[155] (1980) 3 TRNZ 665.

[156] [1949] Ch 529.

[157] [1988] 1 CTC 365, [1988] 3 FC 251.

The tide seems to have changed in the 1980s. In *Re Koeppler's Will Trusts,*[158] the English Court of Appeal held that a gift to an association that contributed to an informed international public opinion and to the promotion of greater cooperation in Europe and the West in general was educational because it was neither of a party political nature nor designed to change the law or government policy, even though it could touch on political matters. Moreover, in *Estate of Cole (deceased)*[159] an Australian court said that a disposition could be validly construed as for educational purposes notwithstanding that, as a result of the educational programme, the law could be changed.

Finally, in *Southwood v A-G*[160] it was stated that there was nothing controversial in the proposition that a purpose could be educational even though it started from the premise that peace was preferable to war, and put consequent emphasis on peaceful rather than military techniques for resolving international disputes. In that case, the Court found no problem in an educational purpose that aimed to "create a public sentiment" in favour of peace. The Court noted that the purpose became a political purpose when promoting a controversial means to achieve peace, in that case by promoting unilateral disarmament.

The New Zealand Charities Registration Board refused to register an application from Sri Lanka Friendship Society Waikato Incorporated[161] because its purposes were considered political in taking sides in the Sri Lanka civil war.

### *20.3.3 Promotion of good race relations*

As mentioned in the previous subsection, it seems to be the law in New Zealand that a gift to promote understanding between nations is not charitable. Hubert Picarda wrote that this "prompts the question whether a trust to promote better relations between various races and creeds with the domestic community is a good charitable purpose, or is rather a political purpose".[162]

The main decision concerning the promotion of better relations between various races is in *Re Strakosch*.[163] In that case, the English Court of Appeal considered as non-charitable a fund established to appease racial feeling between the Dutch and English-speaking sections of the South African community. The main reason for the decision was that the wording of the trust was too vague. Another reason was that not everything that contributed to the "common stock" of a community was charitable. Finally, the Court found it impossible to construe the trust as one confined to educational purposes.

Hubert Picarda wrote that the "Charity Commission for England and Wales has now taken the view that the promotion of good race relations has ceased to be political and can be considered for public benefit now that the nation through Parliament has decided that the promotion of racial harmony is for the public benefit".[164] Similarly, Jean Warburton wrote that "both the court and the Charity Commissioners now appear to be less inclined to hold trusts concerned with international and race relations non-charitable".[165]

The only New Zealand case on the subject, *Taxation Review Authority Case 46*,[166] based its reasoning almost exclusively on the English Court of Appeal decision in *Re Strakosch*. In *Latimer v Commissioner of Inland Revenue*,[167] however, the New Zealand Court of Appeal wrote that the purpose of providing the Waitangi Tribunal with additional material that would help it to produce more informed recommendations, leading in turn to the settlement of longstanding disputes between Māori and the Crown, was charitable. Blanchard J, for the Court of Appeal, wrote that "it is directed towards racial harmony in New Zealand for the general benefit of the community. That is not an object which can legitimately be regarded as political in nature and thus disqualified".[168]

The Federal Court of Appeal for Canada decided that a non-profit corporation established for a variety of objects dealing with communications by radio, television and newspapers

[158] [1986] 1 Ch 423.

[159] (1980) 25 SASR 489 at 495.

[160] [2000] ECWA Civ 204 (BAILII); [2000] TLR 541 (CA).

[161] Refer: www.charities.govt.nz/guidance/Published_decisions/Sri%20Lanka%20Friendship%20Society%20Waikato%20Incorporated.pdf.

[162] Picarda 3rd ed, above n 79, at 187.

[163] [1949] Ch 529.

[164] Picarda 3rd ed, above n 79, at 188.

[165] Jean Warburton *Tudor on Charities* (9th ed, Sweet & Maxwell, London, 2003) at 60-61 ["Tudor 9th ed"].

[166] (1980) 3 TRNZ 665.

[167] [2002] 3 NZLR 195.

[168] Ibid, at 209.

relevant to native people in British Columbia was charitable under the fourth head of charity. This was because the State had a constitutional responsibility for the welfare of its first people.[169]

*Taxation Review Authority Case 46* makes it difficult to register applications whose sole purposes are to promote good race relations. That case, however, can be distinguished because courts have now adopted a wider definition of education. Furthermore, the New Zealand Government is promoting better racial harmony through its legislation and policies. Finally, although that case was not mentioned in *Latimer*, the New Zealand Court of Appeal seems to have taken a view that is more favourable to racial harmony.

### 20.4 Promotion of human rights, good citizenship and democracy

Since the enactment of section 2(2)(h) of the *Charities Act 2006*, "the advancement of human rights, conflict resolution or reconciliation or the promotion of religious or racial harmony or equality and diversity" has been a separate charitable purpose in England and Wales. In New Zealand, however, there is no statutory basis for the promotion of human rights to be charitable and therefore this must be determined by analogy with other purposes that have been held to be charitable.

The Canada Revenue Agency wrote: "Upholding human rights refers to activities that seek to encourage, support, and defend human rights that have been secured by law, both in Canada and abroad. Upholding the administration and enforcement of the law is a well-recognized charitable purpose".[170] Canadian cases have also provided some insight into upholding human rights as a charitable purpose. For example, in *Lewis v Doerle*[171] the Ontario Court of Appeal held that a trust to promote, aid and protect United States citizens of African descent in the enjoyment of their civil rights was clearly a charitable purpose. In the more recent case of *Action by Christians for the Abolition of Torture (ACAT) v The Queen*,[172] the Canadian Federal Court of Appeal was equally clear, declaring, "It is evident, on its face, that the abolition of torture is an objective that is itself eminently laudable and that an organization devoted to it is, *prima facie*, a charity".[173] In that case, however, the organisation's appeal against its revocation as a charitable entity was dismissed because the organisation was held to have political purposes, since it was both trying to change the law, particularly in relation to the death penalty, and engaging in political activity that exceeded the limits allowed by the *Income Tax Act*.

The promotion of human rights often involves engagement in the political process. In fact, Hubert Picarda wrote that "until recently it was possible to say with assurance that in England a trust for advancing civil rights by the promotion of legislation could not be upheld as charitable".[174] Courts have, however, held some entities with such purposes to be charitable, while other entities have been held to be non-charitable because their attempts to secure legislative reform were regarded as primary purposes.

Even before the promotion of human rights was included in the *Charities Act 2006* as a charitable purpose, the Charity Commission for England and Wales considered that the promotion of human rights, democracy and citizenship was charitable by analogy with the well established charitable purpose of promoting the moral and spiritual welfare and improvement of the community.[175] The Charity Commission further wrote:

> *It is by analogy with moral improvement that we have registered as charities bodies which are concerned:*
>
> - *to promote good race relations, to eliminate discrimination on grounds of race and to encourage equality of opportunity between persons of different racial groups;*

[169] *Native Communications Society of British Columbia v Minister of National Revenue* [1986] 2 CTC 170; 86 DTC 6353.

[170] "Upholding Human Rights and Charitable Registration" on the website: www.cra-arc.gc.ca/tx/chrts/plcy/cgd/hmn-rghts-eng.html, at 3.

[171] (1898) 25 OAR 206.

[172] [2002] FCA 499.

[173] Ibid, at [40].

[174] Picarda 3rd ed, above n 79, at 179.

[175] *RR12 – The Promotion of Human Rights* (version January 2005) on the Charity Commission's website: www.charity-commission.gov.uk/publications/rr12.aspx at [8].

- *to promote equal rights for women and for homosexuals;*

- *to promote ethical standards of conduct and compliance with the law in the workplace,*

- *to promote religious harmony; and*

- *to promote equality and diversity.*[176]

The Charity Commission considers that there is obvious public benefit in promoting human rights. For individuals whose human rights are thereby secured, the benefit is immediate and tangible. There is also a less tangible but nonetheless significant benefit to the whole community that arises from our perception that the fundamental rights of all members of the community are being protected. "That provides sufficient benefit to the community to justify treating the promotion of human rights as a charitable purpose in its own right".[177]

Human rights may be promoted by: monitoring abuses of human rights; obtaining redress for victims of human rights abuse; relieving need amongst the victims of human rights abuse; research into human rights issues; educating the public about human rights; providing technical advice to governments and others on human rights matters; contributing to the sound administration of human rights law; commenting on proposed human rights legislation; raising awareness of human rights issues; promoting public support for human rights; promoting respect for human rights by individuals and corporations; international advocacy of human rights; and eliminating the infringement of human rights.[178]

The Charity Commission of England and Wales has also registered a number of trusts within this category as promoting good citizenship. In *Relation to the Earl Mountbatten of Burma Statue Appeal Trust*, it concluded that:

> *The provision of a statue might be held to have a sufficient element of public benefit where the person being commemorated was nationally, and internationally, respected and could be said to be a figure of historical importance. In such a case the provision and maintenance of a statue can be held to be charitable as likely to foster patriotism and good citizenship, and to be an incentive to heroic and noble deeds.*[179]

Most cases on the subject have been decided in the United States. Strangely, Massachusetts, which is now considered one of the most progressive states in promoting human rights, was where courts took the most conservative approach. In *Jackson v Phillips*[180] and *Bowditch v Attorney-General*,[181] trusts to promote the cause of women's rights were interpreted as being directed to the securing of legislative reform and were held non-charitable. By contrast, in other states the courts treated trusts for securing equal rights under the law for women as trusts having the primary purpose of removing discrimination, and held them to be charitable.[182]

In the United States the precarious situation of other minorities, especially the black minority, has brought about the constitution of trusts to "promote, aid and protect citizens of the United States of African descent, in the enjoyment of their civil rights".[183] Similarly, trusts to promote legislation to secure justice for American Indians[184] and equality of opportunity for Jews everywhere[185] have been upheld as charitable. On the other hand, in *Marshall v Commissioner of Inland Revenue*,[186] a trust to safeguard existing civil liberties and to advance them by promoting legislation was held not to be charitable.

[176] Ibid, at [9].

[177] Ibid, at [12].

[178] Ibid, at [3].

[179] [1981] Ch Com Rep at [68-79] cited by Tudor 9th ed, above n 165, at 127.

[180] 96 Mass 539 (1867).

[181] 28 ALR 713 (1922).

[182] *Garrison v Little* 75 ILL App 402 (1898); *Registrar of Wills for Baltimore City v Cook* 22 ALR 3d 872 (Maryland) (1966). See also Picarda 4th ed, above n 74, at 239.

[183] *Re Lewis' Estate* 25 A 878 (1893).

[184] *Collier v Lindley* 266 Pac 526 (1928).

[185] *Re Murphey's Estate* 62 P 374 (1936).

[186] 147 F 2d 75 (1945). See also, Picarda 4th ed, above n 74, at 239.

There is no New Zealand case on the subject of promoting human rights. However, in *Re Draco Foundation (NZ) Charitable Trust,*[187] the main purpose was expressed as being for "the protection and promotion of democracy and natural justice in New Zealand". The case was promoted and analysed as being for the advancement of education. Nevertheless, the argument was made that it could promote human rights. MacKenzie J rejected that contention because he considered that "at best it is the provision of material for self-study. The 'reader' can choose whether to access the material or not. This is not for the advancement of education".[188]

The only contemporary reported case concerning the issue of promoting the rights of minorities in Australia is *Public Trustee v Attorney-General*.[189] In that case, although Santow J took a very progressive view of "advocacy", he nevertheless struck down as non-charitable clauses purporting to change the law discriminating against Aboriginal people. He maintained the trust, however, by applying the *cy-près* doctrine and the power given to the Court by a disposition similar to section 61B of the New Zealand *Charitable Trusts Act 1957*, by severing four out of 12 clauses purporting to change the law. He found that the other eight purposes were charitable and could survive even if the "political" purposes were severed.

In a recent decision, *Victorian Women Lawyers' Association Inc v Commissioner of Taxation*,[190] the Federal Court of Australia held that an association whose main purpose was to remove barriers and increase opportunities for participation by, and the advancement of, women in the legal profession in Victoria was charitable. French J, on behalf of the Court, wrote that "having regard to the social norms reflected in the *Sex Discrimination Act*, cognate State legislation and Australia's membership of the *Convention for the Elimination of all Forms of Discrimination Against Wome*n, that objective was a purpose 'beneficial to the community'. It was also within the spirit and intendment of the *Statute of Elizabeth*".[191] While the Association's objects included "to work towards the reform of the law", the Court held that this object was not a significant element of the Association's purposes such as to affect its characterisation. In reaching this conclusion, the Court relied on Santow J's observation in *Public Trustee v Attorney-General* that "the High Court formulation suggests that a trust may survive in Australia as charitable where the object is to introduce new law consistent with the way the law is tending".[192]

In Canada, there is authority for the proposition that a trust to promote the enjoyment of existing civil rights, as opposed to securing new ones, is charitable.[193] The Canada Revenue Agency gave indications on activities that would be charitable for upholding human rights. It wrote that purposes to promote moral, ethical and humanitarian motivations for upholding human rights could include increasing public awareness of human rights issues, promoting respect for human rights internationally, and collecting and disseminating information on human rights. Upholding the administration and enforcement of the law through upholding human rights would include monitoring and reporting on the fulfilment of human rights obligations under international convention and upholding human rights laws in the country or in the whole world.[194]

The New Zealand Charities Registration Board has recognised that the general promotion of human rights can be charitable, especially where an entity has educational purposes and promotes research and dissemination of the results of such research.[195] It must be noted, however, that the promotion of human rights is submitted to the same limitations as any other purpose. Amongst others, the limitation on political purposes applies. Therefore, wrote Jean Warburton, "an organisation whose main purpose is seeking to change the law or government policy to enforce human rights in a foreign country which does not have human rights enshrined in its domestic law will not be charitable".[196]

[187] HC WN CIV 2010-485-1275 [3 February 2011].

[188] Ibid, at [43].

[189] (1997) 42 NSWLR 600.

[190] [2008] FCA 983 (27 June 2008).

[191] Ibid, at [148].

[192] (1997) 42 NSWLR 600 per Santow J.

[193] *Lewis v Doerle* (1898) 25 OAR 206. See also Picarda 3rd ed, above n 79, at 189.

[194] "Upholding Human Rights and Charitable Registration", above n 170, at 9-10.

[195] On the Charities Register see Amnesty International ANN11828.

[196] Tudor 9th ed, above n 165, at 127.

## 20.5 Criticism

Since *McGovern v Attorney-General* was decided, there has been some divergence of views between the leading authorities on what constitutes a political purpose. According to Hubert Picarda, a principal purpose of educating the public in one particular set of political principles or of seeking to sway public opinion on controversial social issues will be a political purpose and therefore will not be able to be considered charitable.[197]

Alternatively Jean Warburton, in *Tudor on Charities*,[198] suggested that a strong case could be made that advocating for a change in the law and encouraging debate was analogous with educating the public in forms of government and encouraging political awareness. It could therefore be charitable as long as the public benefit test was still satisfied. The author suggested that a neutral stance could be taken in relation to political purposes in the same way that it was taken between religions.

Jean Warburton noted that, in more recent Commonwealth jurisdictions' decisions, courts did not appear to have upheld the principles cited in *McGovern* with absolute certainty, citing Australian and New Zealand cases.[199] Mr Justice Santow, a New South Wales judge, has been one of the most critical about the state of the law.

The first and most frequent criticisms are aimed at the consequences of the state of the law concerning political purposes for the democratic process.[200] In *Public Trustee v Attorney-General of New South Wales*,[201] Santow J noted that "persuasion directed to political change is part and parcel of a democratic society in which ideas and agendas compete for attention and allegiance".[202]

Mr Justice Hammond, of the New Zealand High Court, has also been very critical of the state of the law relating to political activity. In *Re Collier (deceased),*[203] he upheld the principle that a trust with purposes of changing the law was not charitable. He also considered, however, that a court could recognise an issue as worthy of debate even though the outcome of the debate could lead to a change in the law. He wrote:

> *Is it really inappropriate for a Judge to recognise an issue as thoroughly worthy of public debate, even though the outcome of that debate might be to lead to a change in the law? After all, it is commonplace for Judges to make suggestions themselves for changes in the law today, whether in judgments, or extra-curially [...] And we do, after all, live in an age which enjoys the supposed benefits of [freedom of thought, conscience, religion and expression. Should not the benefit be real in all respects, including the law of charities?*[204]

Mr Justice Santow expressed a possible solution for judges in deciding cases involving political advocacy. He wrote that the following test could be applied to such cases:

> *Much will depend on the circumstances including whether an object to promote political change is so pervasive and predominant as to preclude its severance from other charitable objects or subordinate them to a political end. It is also possible that activities directed at political change may demonstrate an effective abandonment of indubitably charitable objects.*[205]

The second most often cited criticism concerning political purposes is the proposition that judges cannot decide if political purposes provide sufficient public benefit. Their refusal to look at the merits of cases involving political purposes is seen as a convenient and easy means for courts to circumvent controversial issues.[206]

[197] Picarda 3rd ed, above n 79, at 189.

[198] Tudor 9th ed, above n 165, at 68.

[199] Ibid, at 67.

[200] Dal Pont *Charity Law in Australia and New Zealand*, above n 17, at 212; David Brown "The *Charities Act 2005* and the Definition of Charitable Purposes" [2005, December] 21 *New Zealand Universities Law Review* 598 at 609-616; Juliet Chevalier-Watts "Under the Law of Charity, is the Principle of 'Public Benefit' Being Hindered by the Doctrinal Rule of Precedent?" [2008] 16 *Waikato Law Review* 194 at 205-208.

[201] (1997) 42 NSWLR 600.

[202] Ibid, at 621.

[203] [1998] 1 NZLR 81.

[204] Ibid, at 89-90.

[205] *Public Trustee v Attorney-General* (1997) 42 NSWLR 600 at 621.

[206] Dal Pont *Charity Law in Australia and New Zealand*, above n 17, at 213.

In *Attorney-General for New South Wales v The NSW Henry George Foundation Ltd*,[207] Young CJ stated that "there is a feeling of what I might call judicial 'cop-out' in the policy that the court cannot judge the public benefit of a proposal to amend the law. Indeed, in many instances, the fact that diverse arguments are presented to the public on issues of importance may itself be important to the community".[208]

There is inconstancy in the involvement of judges in debates concerning "political advocacy" between cases involving law reform and those involving religious activities and the protection of animals. In *Re Scowcroft*[209] the vicar of a parish devised to his successors a building known as the Conservative Club and Village Reading Room, to be maintained "for the furtherance of conservative principles and religious and mental improvement and to be kept free from all intoxicants and dancing". The devise was upheld. The case has been much criticised because had the case been for anything other than activities linked to religion, the devise would have been denied charitable status because of its political overtones.[210]

In relation to public benefit provided by religion, judges have said that they normally will presume that it provides public benefit. However, in *Gilmour v Coats*[211] the House of Lords did not shy away from holding that it would investigate the impacts on the community of the benefits conferred by a religious organisation to ensure that the benefits were not limited to private individuals. Such public benefits had to be demonstrable, meaning that they had to be capable of proof in a court of law.[212] Similarly, in *Re Inman*[213] the Court had no difficulty in finding that one of the purposes of the Royal Society for the Prevention of Cruelty to Animals was ancillary even though it purported to procure "such further legislation as may be expedient".

United States courts view the cause of law reform and public participation in the legislative and government process as providing public benefits in themselves. In *Taylor v Hogg*[214] the Supreme Court of Pennsylvania stated: "To hold that a change in law is in effect an attempt to violate the law would discourage legislation and tend to compel us to continue indefinitely to live under law designed for an entirely different state of society".

A third criticism about political purposes concerns the confusion between means and ends when it comes to their persuasive activities. In *Public Trustee v Attorney-General*[215] Santow J wrote that "there is a range of activity from direct lobbying of the government, to education of the public on particular issues, in the interests of contributing to a climate conducive to political change. The line between an object directed at legitimate educative activity compared to illegitimate political agitation is a blurred one, involving at the margin matters of tone and style".[216]

Courts have held that in considering the purposes of an entity, they must find the main purpose of that entity. It is the purpose in question that must be political; the mere fact that political means may be employed in furthering charitable objects does not necessarily render the gift or institution non-charitable.[217] Similarly, the Supreme Court of Canada wrote that "although a particular purpose was not itself charitable, [if] it was incidental to another charitable purpose, [it] was therefore proper to be considered not as an end in itself, but as a means of fulfilment of another purpose, which had already been determined to be charitable".[218] In Canada and the United Kingdom, one quantitative *indicia* of whether political activities are ancillary is the proportion of the entity's resources, not only its funds, but also its volunteers, spent on activities. A limit of 10% is considered acceptable. Finally, specific guidelines have been issued as to what constitutes "politicking" and what is acceptable, especially in election times.

[207] [2002] NSWSC 1128.

[208] Ibid, at [63]. See also Brown "The *Charities Act 2005* and the Definition of Charitable Purposes", above n 200, at 612.

[209] [1898] 2 Ch 638.

[210] See Picarda 3rd ed, above n 79, at 170.

[211] [1949] AC 426.

[212] Ibid, at 346 per Lord Simonds.

[213] [1965] VR 238.

[214] (1922) 116 A 826 at 827-828. See Dal Pont *Charity Law in Australia and New Zealand*, above n 17, at 216.

[215] (1997) 42 NSWLR 600.

[216] Ibid, at 621.

[217] *McGovern v Attorney-General* [1982] 1 Ch 321 at 340; and *Public Trustee v Attorney-General* (1997) 42 NSWLR 600 at 616.

[218] *Vancouver Society of Immigrants and Visible Minority Women v MNR* [1999] 1 SCR 10 at [157] per Gonthier, dissenting J.

A fourth criticism concerns humanitarian objects, such as the elimination of war and the promotion of human rights. It is somewhat surprising that the prevention of cruelty to animals has been considered charitable because, amongst others, it encourages an attitude of benevolence towards animals,[219] while courts have said that the promotion of a favourable public sentiment towards peace and human rights is not charitable.[220] In *Re Blyth,* however,[221] Thomas J did use the comparison with animal protection cases and held that the "elimination of war" was charitable and provided a public benefit in encouraging changes of attitudes. Similarly, in *Southwood v A-G*[222] the Court found no problem with an educational purpose that aimed to "create a public sentiment" in favour of peace. The purpose, however, became a political purpose when it included promoting a controversial means to achieve peace, in that case by promoting unilateral disarmament. In New Zealand, the Court of Appeal has confirmed that pursuing one view in a contentious debate is not charitable. However, the Court also held that "the promotion of nuclear disarmament and the elimination of all weapons of mass destruction is now sufficiently well accepted in New Zealand society that the promotion of peace through these means should be recognised in its own right as a charitable purpose under the fourth head of the definition".[222a]

A fifth criticism concerns the promotion of human rights and anti-discrimination against minority groups and women. In this regard, it is regrettable that when considering a trust to remove racial discrimination and advance the interests of Aborigines and Torres Strait Islanders, the Supreme Court of New South Wales decided that such purposes were not charitable.[223] It must, however, be said that Santow J in that case heavily criticised the state of the law. That case could be decided differently today, especially since the Federal Court approved the criticisms in two recent cases. Moreover, in *Victorian Women Lawyers' Association Inc v Commissioner of Taxation*,[224] the Federal Court of Australia held that an Association whose main purpose was to remove barriers and increase opportunities for participation by, and advancement of, women in the legal profession in Victoria was charitable. In this regard, it must be noted that the United Kingdom Parliament has included the promotion of human rights as a legitimate head of charity under the *Charities Act 2006*.

In reaching its conclusion in *Victorian Women Lawyers' Association*, the Court relied on Santow J's observation in *Public Trustee v Attorney-General* that "the High Court formulation suggests that a trust may survive in Australia as charitable where the object is to introduce new law consistent with the way the law is tending".[225] That test was also approved by the Australian Federal Court in *Commissioner of Taxation v Aid/Watch Incorporated*.[226] Hubert Picarda suggested that "it is possible that the courts here might accept the suggestion made in New South Wales that the pursuit of legal changes consistent with the way the law is tending might be charitable".[227]

### 20.6 Conclusion

The decision of the High Court of Australia in *Aid/Watch Incorporated v Commissioner of Taxation*[228] raised a number of questions about advocacy by charities. A number of commentators in New Zealand have voiced that it is time for the New Zealand Parliament to adopt a position similar to Australia's in relation to advocacy.

The main distinctions can be stated as follows. Firstly, "in Australia, there is no general doctrine which excludes from charitable purposes 'political objects' with the scope indicated in England by *McGovern v Attorney-General*".[229] It is also different from the law in Canada and in New Zealand.[230] Secondly, section 128 of the Australian Constitution establishes a system for amendments to the Constitution in which the proposed laws

[219] *Murdoch v Attorney-General* (1992) 1 Tas R 117 at 131 per Zeeman J; *Re Green (deceased)* [1979] VR 442 at 444 per Anderson J. See also Dal Pont *Charity Law in Australia and New Zealand*, above n 17, at 188.

[220] *Anglo-Swedish Society v IRC* (1931) 47 TLR 295.

[221] [1997] 2 Qd R 567 at 580-581.

[222] [2000] ECWA Civ 204 (BAILII); [2000] TLR 541 (CA).

[222a] [2012] NZCA 533 at [82] per White J.

[223] *Public Trustee v Attorney-General of New South Wales* (1997) 42 NSWLR 600.

[224] [2008] FCA 983 (27 June 2008).

[225] (1997) 42 NSWLR 600 per Santow J.

[226] [2009] FCAFC 128.

[227] Picarda 3rd ed, above n 79, at 179.

[228] [2010] HCA 42 (1 December 2010).

[229] Ibid, at [48].

[230] Ibid, at [29].

to effect the amendments are to be submitted to the electors. This being so, the High Court concluded that the Australian "system of law postulates for its operation the very 'agitation' for legislative and political changes [...] a court administering a charitable trust for that purpose is not called upon to adjudicate the merits of any particular course of legislative or executive action or inaction which is the subject of advocacy or disputation within those processes".[231]

The Canadian income tax legislation makes express provision for the conduct of "political activities". These are considered to be charitable activities or purposes only if they are of an ancillary and incidental nature and if they do not include the direct or indirect support of, or opposition to, any political party or candidate for public office. The special treatment in Canadian statute law of "political activities" distinguishes it from the Australian legislation.[232]

It can be argued that New Zealand law is similar to Canada's and therefore different from Australia's because section 5(3) of the *Charities Act 2005* provides that "if the purposes of a trust, society or an institution include a non-charitable purpose (for example advocacy) that is merely ancillary to a charitable purpose of the trust, society, or institution, the presence of that non-charitable purpose does not prevent the trustees of the trust, the society, or the institution from qualifying for registration as a charitable entity". The New Zealand Court of Appeal has confirmed that the specific reference in section 5(3) to 'advocacy' makes it clear that 'advocacy' may not be a primary, independent purpose, although it may be an ancillary, non-independent non-charitable purpose.[232a]

The problem in adopting an approach similar to Australia's is that we do not yet know the full extent of how the courts will interpret that decision. This is so because, firstly, the High Court found it "unnecessary to determine whether the fourth head encompasses the encouragement of public debate respecting activities of government which lie beyond the first three heads identified in *Pemsel* and, if so, the range of those activities".[233] Secondly, the High Court wrote that it could be that some purposes that otherwise appear to fall within one or more of the four heads in *Pemsel* nonetheless do not contribute to public welfare in the sense to which Dixon J referred in *Royal North Shore Hospital*. But that will be by reason of the particular ends and means involved, not disqualification of the purpose by application of broadly expressed "political objects" doctrine.[234]

Finally, unless we accept that any amount of "political activity" other than participation in a political party is charitable, the New Zealand Charities Registration Board will have to evaluate whether advocacy activities are ancillary or main purposes.

[231] Ibid, at [45].

[232] Ibid, at [26].

[232a] *Greenpeace of New Zealand Incorporated* [2012] NZCA 533 at [45].

[233] [2010] HCA 42 (1 December 2010), at [48].

[234] Ibid, at [49].

CHAPTER 21

# General conclusion

This chapter summarises the main problems encountered by: Entities that want to become registered as charities; charities that want to make grants to other charities; and regulators who have to decide whether entities are charitable or not. It also offers some suggestions in relation to solutions that have been adopted in other jurisdictions.

This chapter looks at each of the four heads of charity and examines the main problems for each of them. It then canvasses the problems encountered with the notion of public benefit.

## 21.1 The four heads of charity

This section examines each of the four heads of charity in relation to the main problems that are encountered in New Zealand.

### *21.1.1 Relief of poverty*

The relief of poverty is the quintessence of charity. Charity law derives its meaning from the Judeo-Christian concept of helping poorer people in the community. This was seen as a duty imposed by monotheist religions.

The concept of relief of poverty has been extended so much, however, that the relief of the poor can be limited to a very small group of poor, and is extended even to poor relations or to a limited number of poor people working for a particular employer.

The main problem encountered in relation to the relief of poverty is the extension of the concept of relief of poverty to the relief of the aged and handicapped and to entities such as hospitals and other health organisations charging fees for their services. By linking them to the relief of poverty, the logical step would be to presume that such purposes do provide public benefit, without having to prove public benefit. This is even though courts and authors have specified that the relief of the aged and the relief of the handicapped are not presumed to provide public benefit. Therefore, it would be preferable to analyse those purposes as falling under the fourth head of charity and thus requiring proof that they provide public benefit. This is especially the case for fee-charging not-for-profit hospitals. Some have questioned whether these hospitals are any different from other private hospitals because very few poor people are admitted to them for free. Furthermore, some are beginning to question the privileges that doctors are getting from such organisations.

By adopting the *Charities Act 2006*, the United Kingdom's Parliament has resolved the problem by specifying that public benefit must be proved in all cases, thus eliminating the presumption of public benefit for all purposes, including relief of poverty purposes. Another way of resolving the problem is to analyse these purposes as falling under the fourth head of charity, as evidenced by Hubert Picarda even before the adoption of the *Charities Act 2006*.

### *21.1.2 Advancement of education*

At least three issues have been raised concerning the advancement of education. The first is a distinction between what is educational and what is propaganda. The second and third problems are linked to public benefit. One relates to the distinction between private and public trusts and the other refers to fee-charging schools.

The law is clear that propagating a particular point of view or presenting only one side of a controversial issue does not amount to advancing education. Some argue that the law should be changed to allow such an approach to be qualified as advancing education. The problem, however, is that there will always be some line dividing legitimate charitable activities and activities that cannot be seen as educational. Parliament cannot enact a rule that is so perfect and uncontroversial that everybody will agree with it. Decision-making is inherently fraught with difficulties, with the result that some will be satisfied and others will not.

Another problem encountered with entities that purport to advance education is advancing education for a limited number of persons, usually family members. In New Zealand, such purposes are more commonly found in whānau trusts. These are trusts recognised by the Māori Land Court. They are closer to family trusts. The law holds that such trusts are not charitable because their purposes and activities are for a group of people that does not constitute a sufficient section of the public. The problem occurs because such educational purposes may be charitable if the limit is expressed as a preference. However, in practice, the real beneficiaries are usually the family members.

The solution to resolving the charitable status of such entities may be found in analysing these applications in terms of private trusts as opposed to public trusts. A private trust is established to benefit individuals irrespective of any benefit that may be conferred upon the public at large, as opposed to a charitable trust, which is established so that the benefit it confers promotes public welfare, although it may incidentally benefit private individuals.[1]

The third main problem in relation to the advancement of education presents itself where private schools charge so much that only the children of rich people can attend. The legal position at the moment in New Zealand is that such schools are charitable. However, under the United Kingdom's *Charities Act 2006*, entities are obliged to show that they provide public benefit. Such benefits are presumed in New Zealand. This does not mean, however, that entities do not have to show public benefit. A gift for the aged, for example, may be denied charitable status because its terms are incongruent with accepted notions of charity, the classic example being a disposition limited to the "wealthy aged".[2] Although private schools are clearly directed at the advancement of education, it is clear that fees that are so high that the poor are practically excluded would be similar to retirement villages that exclude the poor. Any future legislative changes could make it clear that private schools charging huge fees should show that they provide public benefits, amongst others, by providing scholarships to help deserving poorer children to have access to that level of education.

### *21.1.3 Advancement of religion*

The advancement of religion presents a few problems: the definition is vague, the presumption of public benefit is very strong and it can very often hide political advocacy activities and private pecuniary profit ventures.

[1] See Noel C Kelly, Chris Kelly and Greg Kelly *Garrow and Kelly Law of Trusts and Trustees* (6th ed, Lexis Nexis NZ Ltd, Wellington, 2005) at 24.

[2] Gino Dal Pont *Law of Charity* (LexisNexis/Butterworths, Australia, 2010) at 181.

By adopting the definition of religion espoused by the High Court of Australia in the *Church of the New Faith* case, New Zealand courts have opened the door very broadly to almost any organisation that claims to be religious in nature. This does create problems, as it did in the *Liberty Trust v Charities Commission* case. In that case a trust was established to operate a loan scheme whereby contributors to a donation pool could become eligible for, or sponsor someone else for, an interest-free home loan. Liberty Trust believed that the administration of interest-free home loans was advancing the practice of biblical teachings on financial principles. Justice Mallon found that "teaching religion through a lending scheme intended to be operated in accordance with Scripture, and which is promoted as being such, is to spread the message of the religion or is to take positive steps to sustain and increase religious beliefs".[3] She therefore concluded that the Liberty Trust had the purpose of advancing religion.[4]

Once it has been established that an entity is a religious one, the presumption of public benefit is invoked. In *Liberty Trust*, Mallon J seemed to imply that the presumption could only be disproved when a trust's activities were contrary to public policy in the sense of being subversive of all morality or focused too narrowly on its adherents or if it was a sham.[5] Restricting the inquiry to activities that are against public policy does not take into consideration that certain activities by so-called religious groups are clearly political or for the pecuniary benefit of individuals.

In *Liberty Trust,* for example, Mallon J considered that the element of public benefit was sufficient even if the scheme allowed 73% of the contributors to benefit financially by having interest-free loans, while only 27% of those who received loans had not contributed to the scheme. This is clearly much more than the 30% of private schools benefiting from *Education New Zealand Trust*, which the High Court declared to be too high to be ancillary.

Although courts have stated that it is not appropriate to argue by analogy from one head of charity to another,[6] if we are to maintain the presumption of public benefit, the criteria expressed by Dobson J concerning education should be used. It would mean that the more an entity was moving away from the core tenets of a religion, the easier it would be to overturn the presumption of public benefit. It would be even better to adopt the position adopted in the United Kingdom, to abolish the presumption of public benefit and ask all entities to prove public benefit. A similar position has been advocated by the Australian Senate.

#### *21.1.4 Other purposes benefiting the community*

Concerning "other purposes benefiting the community", at least three areas have provoked many heated debates in New Zealand. They are decisions on economic development, decisions concerning political advocacy and decisions in relation to sports organisations.

Recent New Zealand court decisions concerning economic development have bucked the trend that Australian courts seem to have established. In *Canterbury Development Corporation v Charities Commission,*[7] Young J refused to follow the Australian Federal Court decision in *Commissioner of Taxation v The Triton Foundation*.[8] He considered rather that the pursuit of the objects of the CDC focused on the development of individual businesses in the hope that their economic success would be reflected in the economic wellbeing of the Canterbury region. He considered that public benefit was not the primary purpose of CDC's objects or operations because its main purpose was to benefit individual businesses. "Public benefit was [therefore] too remote to establish CDC as a charity".[9] Young J obviously did not agree with the reasoning used by the Federal Court of

3 *Liberty Trust v Charities Commission* HC WN CIV-2010-485-831 [2 June 2011] at [94].

4 Ibid, at [98].

5 Ibid, at [101].

6 *Gilmour v Coats* [1949] AC 426 (HL) at 499 per Lord Simonds; *Inland Revenue Commissioners v Baddeley* [1955] 1 All ER 255 (HL) at 549 per Lord Somervell.

7 HC WN CIV-2009-485-2135 [11 March 2010].

8 [2005] FCA 1319.

9 [2010] 2 NZLR 707 at [67].

Australia that what is good for individual businesses is ultimately good for the public.[10] One author has written that the *Triton* case represents the furthest any court has gone in accepting economic development as a charitable purpose. On the other hand, *Canterbury Development Corporation* could be said to represent the most conservative approach to the promotion of economic development as a charitable purpose. Perhaps it is time for Parliament to step in and decide if economic development is a charitable purpose and upon which conditions it can be so.

The New Zealand Parliament has shown signs of wanting to amend charity law to allow amateur sports organisations to be recognised as charities. The New Zealand Charities Registration Board has already adopted a policy that allows entities to register if their purposes are to promote amateur sports, because they provide public benefit through stimulating cardiovascular activities. Such a policy has, however, left the New Zealand Charities Registration Board open to criticism because case law, including recent decisions concerning the *Charities Act 2005*, has reasserted the common law position that sport is only charitable when it promotes another charitable purpose. This is why a proposition has been adopted by Parliament that recognises 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 (1) is pursued". This amendment somewhat restated that which Joseph Williams J wrote in *Travis Trust v Charities Commission*. It also means that amateur sport is not, by itself, a charitable purpose. It is only charitable if it is a means of achieving some of the traditional charitable purposes (relief of poverty, advancement of education or religion, or another purpose beneficial to the community).

Another controversial issue, probably the most debated charities issue in New Zealand, is the notion of political advocacy. At least two recent New Zealand decisions have refused to follow the Australian High Court decision in *Aid/Watch Incorporated v Commissioner of Taxation*.[11] Both in *Re Draco Foundation (NZ) Charitable Trust*[12] and in *Greenpeace of New Zealand Incorporated*,[13] the High Court considered that *Bowman* remained good law in New Zealand and had to be followed. Moreover, Young J in *Re Draco Foundation (NZ) Charitable Trust*[14] submitted that *Aid/Watch* applied only to those cases where charitable purposes involved the relief of poverty. Secondly, he considered that the decision in *Aid/Watch* was reliant upon Australian constitutional principles not applicable in New Zealand. Greenpeace has appealed the Court of Appeal decision maintaining that advocacy as a main purpose is not charitable in New Zealand. The Supreme Court of New Zealand could decide to follow the Australian trend instead of the New Zealand and Canadian positions on the law.

Some have argued that sections 5(3) and (4) of the *Charities Act 2005* were adopted specifically to allow entities to get involved in advocacy. Even if that was the intent, what they did was to restate the common law establishing that advocacy does not prevent the registration of an entity if such advocacy is but ancillary to its main purpose. Any future legislative changes could define more clearly what is meant by advocacy and in what circumstances it does not prevent an entity being registered as a charity.

As noted above, sections 5(3) and (4) of the *Charities Act 2005* provide that a body does not cease to be charitable because its constitution includes a non-charitable purpose that is merely ancillary. What is ancillary is a matter touched on in many of the recent cases. In *Re The Grand Lodge of Antient Free and Accepted Masons in New Zealand*,[15] Simon France J wrote that the notion of ancillary has a quantitative component as well as a qualitative component. That approach was followed in *Greenpeace of New Zealand Incorporated*.[16] Concerning the qualitative approach, Heath J wrote in the *Greenpeace* decision that "a qualitative assessment has regard to the particular function at issue and helps to determine whether the function is capable of standing alone or is one that is merely

[10] In *Tasmanian Electronic Commerce Centre Pty Ltd v Federal Commissioner of Taxation* ([2005] 59 ATR 10 (Federal Court of Australia) at [58], Heerey J noted:

> In a capitalist economy like Australia's, a prosperous and productive private sector generates profits and creates employment which in turn raises incomes which individuals can either spend, creating demand, or save, creating capital for further investment. Either way, people can make a better life for themselves and their families.

[11] [2010] HCA 42.

[12] HC WN CIV- 2010-485-1275 [3 February 2011].

[13] HC WN CIV-2010-485-829 [6 May 2011].

[14] HC WN CIV- 2010-485-1275 [3 February 2011] at [60].

[15] [2011] 1 NZLR 277.

[16] HC WN CIV-2010-485-829 [6 May 2011] at [66-68].

incidental to a primary purpose".[17] In the same decision Heath J wrote that "a quantitative assessment is one designed to measure the extent to which one purpose might have a greater or lesser significance than another. That assessment is a question of degree".[18]

In *Re Education New Zealand Trust*,[19] approximately 30% of the students attracted by the Trust ended up at for-profit institutions. The 30% became something of a touchstone in later cases for those appealing decisions of the New Zealand Charities Registration Board. However, there is nothing magical in that percentage. In Canada, about 10% is considered the figure under which activities are considered ancillary.

### 21.2 Public benefit

The requirement for public benefit is not mentioned in the *Charities Act 2005*. This does not mean, however, that the requirement is not part of the law. In *Travis Trust v Charities Commission*,[20] the first case to review the Charities Commission's decision to decline to register an application, Joseph Williams J wrote that "section 5(1) of the Act codifies the common law and it is in the common law that the answer in this case is to be found".[21] Commenting later on the common law, he wrote that once it is established that the purpose of a trust is charitable in character, "it must also be established that the benefits of the trust will accrue to the public".[22]

When considering purposes under the first three heads of charity, public benefit is generally presumed unless there is evidence to the contrary. Nevertheless, particularly in the case of purposes that advance education or religion, public benefit also has to be shown; the purpose needs to be established as being for the public or a sufficient section of the public.[23]

Recent New Zealand court decisions have confirmed that public benefit need not be shown with respect to the relief of poverty. In applications for registration from entities purporting to advance education or religion, New Zealand courts have clarified that public benefit must be shown. Concerning the advancement of education, a judge has proposed a new approach in that "the further an entity's purpose is away from the core of educational purposes, it becomes relatively easier to rebut the presumption that requisite public benefit arises".[24] A similar approach should be applied to the advancement of religion.

In the case of the fourth head of charity, "other purposes beneficial to the community", it is necessary to establish positively[25] that the purpose has a tangible or well recognised benefit to the community.[26] Once this is established, it is also necessary to show that the purpose is for the public or a sufficient section of the public. In *Canterbury Development Corporation Trust v Charities Commission*[27] Young J agreed with these comments and wrote: "Public benefit must be expressly shown where the claimed purpose of the trust is, as here, benefit to the community (*Oppenheim v Tobacco Securities Trust Co Ltd* [1951] AC 297) adopted in New Zealand in *Molloy v CIR* [1981] 1 NZLR 688. While the benefit need not be for all of the public it must be for a significant part".[28]

Recent New Zealand court decisions have tried to clarify the approaches to assessing public benefit.[29] They state that public benefit must be assessed both qualitatively and quantitatively.[30] They have unfortunately not specified what constitutes sufficient qualitative benefit, but have given better guidance concerning the quantitative assessment by indicating that membership of an entity must not be unduly restricted if the entity is to qualify for registration.[31] Moreover, New Zealand courts have refused to follow the recent High Court of Australia's recognition that "political advocacy" may provide sufficient public benefit. Instead New Zealand courts have decided to stick with

[17] Ibid, at [68].

[18] Ibid, at [68].

[19] (2010) 24 NZTC 24,254.

[20] (2009) 24 NZTC 23,273 at [54].

[21] Ibid, at [22].

[22] Ibid, at [54].

[23] *Verge v Somerville* [1924] AC 496 at 499 per Lord Wrenbury. See also *Dingle v Turner* [1972] AC 601 at 623; and *Queenstown Lakes Community Housing Trust* HC WN CIV-2010-485-1818 [24 June 2011].

[24] (2010) 24 NZTC 24,354 at [26].

[25] *D V Bryant Trust Board v Hamilton City Council* [1997] 3 NZLR 342 at 350 per Hammond J.

[26] *National Anti-Vivisection Society v Inland Revenue Commissioners* [1948] AC 31 at 49 per Lord Wright.

[27] [2010] 2 NZLR 707.

[28] Ibid, at [45].

[29] *Re The Grand Lodge of Antient Free and Accepted Masons in New Zealand* [2011] 1 NZLR 277 at [49-51] per Simon France J; *Re New Zealand Computer Society Inc* HC WN CIV-2010-485-924 [28 February 2011] at [68] per MacKenzie J. That approach was also applied in *Re Draco Foundation (NZ) Charitable Trust* HC WN CIV-2010-485-1275 [15 February 2011] per Young J.

[30] Ibid.

[31] *Travis Trust v Charities Commission* (2009) 24 NZTC 23,273 at 23,282; *Re The Grand Lodge of Antient Free and Accepted Masons in New Zealand* [2011] 1 NZLR 277 at [52-56].

the view expressed in earlier cases that courts cannot decide whether "political advocacy" provides public benefit.[32]

To be charitable, a purpose must have a public character. The antithesis of public benefit is private benefit. An entity must not be private in nature, that is, it must be aimed at the public or a sufficient section of the community to amount to the public;[33] and it must not be aimed at creating private profit.[34]

Section 13(1)(b)(ii) of the *Charities Act 2005* clearly states that a society or institution cannot be registered under the Act if carried on for the private pecuniary profit of any individual. Although the Act does not have a corresponding subsection about trusts, "nevertheless the claimed charitable purposes of a trust have still to have public benefit that can be defeated if the beneficiaries of the purpose are not a sufficient section of the community to come within the term 'public' ".[35]

The current position at New Zealand law is that private benefits to professionals or persons in particular industries must be weighed against the benefits to the public.[36] New Zealand courts have distanced themselves from the trend followed in Australia concerning purposes promoting economic development. In 2010 a New Zealand High Court judge handed down a decision affecting three economic development entities.[37] Providing benefits to individuals through housing schemes has been held not to provide sufficient public benefit.[38] It comes as a surprise that a scheme established to provide private benefits to people who contributed to it would be charitable as long as it had been established by a religious organisation, but would certainly not be charitable under any of the other heads of charity.

The fact that the test for assessing public benefit varies with the different heads of charity makes the task of the regulator of charities even more difficult. The New Zealand Charities Registration Board could accept the presumption of public benefit for entities whose main purposes were to relieve poverty. However, the presumption of public benefit concerning the advancement of education and religion creates problems, especially where schools are charging enormous amounts for children to attend and where the advancement of religion seems to be taken at face value without any inquisition into the core of that religion. The approach taken by the United Kingdom in the *Charities Act 2006* that public benefit must be proven, thus abolishing the presumption of public benefit, seems preferable. This is especially true for religious organisations, where a New Zealand court, in the *Liberty Trust* case, has held that private benefits to individuals provide sufficient public benefit if such benefits are seen as part of living as a Christian.

### 21.3 Looking forward

The law concerning charities is dynamic, be it through judicial decisions or through legislative activity. It is possible that in the future, the Law Commission or other mechanisms of law reform may have to undertake a study of the changes needed for the law to meet social changes. If and when such review is undertaken, the issue will arise on how to approach the proposed changes. A report commissioned by the Charities Commission before it was disestablished proposed three options: the "legislative list" approach; the identification and restatement of the underlying concept of the Preamble to the *Statute of Elizabeth*; and the not-for-profit regulatory approach.[39]

[32] *Re Draco Foundation (NZ) Charitable Trust* HC WN CIV 2010-485-1275 [3 February 2011] at [58-60] where Young J stated:

> That includes the proposition that *Aid/Watch* applies only to those cases where the charitable purpose involves relief of poverty. And secondly, that the decision in *Aid/Watch* is reliant upon Australian constitution principles not applicable in New Zealand. However, given Bowman identifies the law in New Zealand, it is unnecessary to assess the strength of that reasoning.
>
> Similarly, in *Greenpeace of New Zealand Incorporated*, HC WN CIV 2010-485-829 [6 May 2011] at [59], Heath J stated: "I feel constrained to apply the full extent of the *Bowman* line of authority on the basis that I am bound to do so by the Court of Appeal decision in *Molloy*", although he acknowledged that "in modern times, there is much to be said for the majority judgment in *Aid/Watch*".

[33] *Verge v Somerville* [1924] AC 496 at 499 per Lord Wrenbury; *Lloyd v Federal Commissioner of Taxation* (1955) 93 CLR 645 at 662 per McTiernan J, at 667 per Fullagar J; at 670 per Kitto J.; *Dingle v Turner cited in New Zealand Society of Accountants v Commissioner of Inland Revenue* [1986] 1 NZLR 147 (CA) and *Educational Fees Protection Society Inc v Commissioner of Inland Revenue* [1992] 2 NZLR 115.

[34] *D V Bryant Trust Board v Hamilton City Council* [1997] 3 NZLR 342 at 347 [affd [1999] 1 NZLR 41].

[35] Ibid, at 347-348. See also Kerry Ayers and Ian Millard "The Legal Concept of Charity – Do We Need It and if We Do, How Should We Deal with the Difficulties It Creates?" in New Zealand Law Society CLE Ltd *Trusts Conference* Wellington, CCH (June 2011) 313 at 319.

[36] *Institution of Professional Engineers New Zealand Inc v Commissioner of Inland Revenue* [1992] 1 NZLR 570 at 583, cited in *Re New Zealand Computer Society Inc.* unreported, HC WN CIV-2010-485-924 [28 February 2011] at [42] per MacKenzie J.

[37] *Canterbury Development Corporation v Charities Commission* [2010] 2 NZLR 707 at [65-66]. This decision was approved by MacKenzie J in *Queenstown Lakes Community Housing Trust* HC WN CIV-2010-485-1818 [24 June 2011] at [56-69].

[38] *Queenstown Lakes Community Housing Trust* HC WN CIV-2010-485-1818 [24 June 2011].

[39] Australian Centre for Philanthropy and Non-profit Studies, *Options for the Development of the New Zealand Law of Charities*, 31 March 2011.

The "legislative list" approach has been adopted in numerous jurisdictions including England and Wales, Scotland, Northern Ireland, Ireland and Barbados. The same approach is being recommended in Australia. This approach consists of having legislated amendments to the common law concept of what is "charitable". If there is a consensus in New Zealand, certain purposes that are not currently charitable could be included in that list.

Identifying and restating the underlying concept of the Preamble to the *Statute of Elizabeth* is more difficult and demanding. Some philanthropic organisations, especially in Canada, have tried to suggest some principles that would restate the essential meaning of what is charitable. These include altruism and public benefit. Such principles, however, are even vaguer than the applicable common law and would create even more uncertainty than the common law approach.

The not-for-profit regulatory approach consists of a comprehensive regulation of the whole not-for-profit sector. This approach has been adopted for Australia. Under this approach a commission registers and regulates all not-for-profit entities. The not-for-profit approach could have different tax consequences: most of the not-for-profit entities could obtain tax exemptions, but only those considered charitable would get tax exemptions and donee status. Another option is to provide both tax exemptions and donee status to all not-for-profit entities that are registered with the commission. It is suggested that the experience of the Australian Charities and Not-for-profits Commission should be monitored closely before adopting this conceptually interesting but unique model.

Finally, a fourth approach is possible. It consists of maintaining the actual New Zealand common law approach but making particular legislative changes to add some purposes that are currently not considered charitable and/or to make more precise requirements of public benefit, for example.

Each of those options has its advantages and disadvantages. Kerry Ayers summarised those as follows:

> *The legislative list approach offers certainty so far as the additional activities expressly listed are concerned but may well forestall further incremental change other than by way of additional legislation. The restatement of the 'spirit and intendment' of the Preamble to the* Statute of Elizabeth I *would require a focus on the intention of the giver as well as the outcome of their action, and, because it is necessarily an abstract concept, issues about its precise boundaries would no doubt remain. This would create a very difficult situation for the regulators who would have to apply such principles. The not-for-profit approach would result in a major expansion of the types of activities encompassed within the relevant category. If the resulting concept was to have any utility, e.g. for tax purposes, there would necessarily have to be substantial exceptions created in relation to its application, for example to co-operatives.*[40]

The approaches that have been suggested above relate more specifically to the definition of charitable purpose and public benefit. A number of problems arising from the registration, monitoring and investigative functions could also be canvassed when the *Charities Act 2005* is reviewed. However, these issues are outside the parameters of this book.

[40] Ayers and Millard, "The Legal Concept of Charity", above n 35, at 326.

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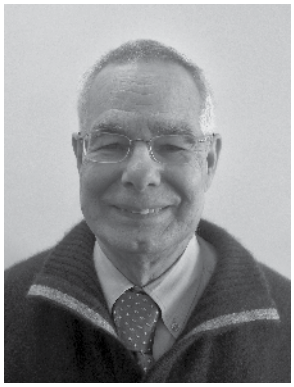

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