

The presumption of charity

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finds an argument going by default

As of 1 July 2012, the Charities Commission has been disestablished, and its functions transferred to the Department of Internal Affairs (or "DIA-Charities"). Disestablishing the Charities Commission was an interesting development, arguably against the flow of charity regulation internationally. For example: England and Wales have had a Charity Commission for over 150 years. Australia is currently in the process of establishing its own Charities and Not-for-profits Commission (the "ACNC"); a Charity Commission for Northern Ireland was recently established in 2009; the Law Reform Commission of Hong Kong recommended the establishment of a Charity Commission in 2011.

Certainly, some of the decisions of the New Zealand Charities Commission had been controversial: many entities that had been considered to be charitable for decades were found by the Charities Commission not to be so, ostensibly on the basis of a "black-letter" approach to interpretation of case law. The approach at times seemed antithetical to charity, with many good entities, carrying out important work in the community, being rejected for registered charitable status on technical, arguably anachronistic and by-no-means-universally-accepted points of law.

However, that did not necessitate the disestablishment of the fledgling Charities Commission. Nor does it mean that things will necessarily be materially different under the new regime, with the current law that we now have.

That current law includes the nine cases so far taken under the Charities Act 2005. Eleven of the approximately 150 charities that were formally denied registration appealed to the High Court under s 59 of the Charities Act. All but one of the nine resulting cases were decided in favour of the Charities Commission (the one being *Liberty Trust v Charities Commission* [2011] 3 NZLR 68 (HC), a case regarding the advancement of religion and a mortgage scheme).

In all of these cases, including *Liberty Trust*, the presumption of charity is notable by its absence. This is puzzling, not only because the presumption of charity is an important principle of New Zealand charities law, but also because it could have solved much of the controversy.

The presumption of charity was raised twice in argument (see *Canterbury Development Corporation v Charities Commission* [2010] 2 NZLR 707 (HC) (CDC) at [21] and *Re Queenstown Lakes Community Housing Trust* [2011] 3 NZLR 502 (HC) at [49]). However, in not one of the nine cases was it applied. Nor was it specifically rejected. At best, the presumption of charity appears to have been overlooked. At worst, it appears to have been reversed.

This position must not be permitted to continue unchecked. The status of the presumption of charity in New Zealand law needs to be specifically addressed, and clarified.

RATIONALE

Under the presumption of charity, purposes beneficial to the public are presumed to be charitable, unless there are grounds for holding otherwise. Whether an entity's purposes are charitable receives a benign construction. Ambiguity is resolved in favour of charity; charity is found unless there is a good reason why not.

As noted by Hammond J in *Re Collier (Deceased)* [1998] 1 NZLR 81 (HC) at 95, an open recognition of a presumption of charity would be in the public interest, is more intellectually honest, and is "based on sound policy". It also seems reasonable. Charitable endeavours are to be encouraged. Society is "unlikely to be prejudiced by attempts at public benefaction, however odd they may seem" (J Bassett, *Charity is a general public use* [2011] NZLJ 60).

Of course, charities receive fiscal privileges but that does not mean the definition of "charitable purpose" should be muddled by a consideration of the fiscal consequences that might follow. A "fiscal consequences test" manifests a "subtle rejection of Parliament's deliberate decision to confer fiscal benefits on the basis of the common law method of defining charity" (see Adam Parachin, "Common Misconceptions of the Common Law of Charity", Conference on Defining, Taxing and Regulating Not-for-Profits in the 21st Century, Melbourne Law School, July 2012 at 7). To apply a fiscal consequences test, even a latent one, as a means of rationing the privileges of charitable status would distort the meaning of charitable purpose for concerns unrelated to the normative ideal of charity (Parachin at 20). Any fiscal concerns must be dealt with openly through tax law, not latently through the definition of charitable purpose.

They must also be dealt with on the basis of empirical evidence. Tax privileges are not the driver for many entities seeking "registered charitable status", as the level of projected income or donations is simply not high enough for tax privileges to be determinative. Instead, the key driver is often funding: many funders now fund only "registered charities" (although in the absence of a requirement to do so in their constituting document, the legal basis for this is dubious). Further, local authorities may restrict street fundraising campaigns to "registered charities".

Fiscal concerns, even latent ones, do not provide a rationale for the presumption of charity to be displaced.

Further, the presumption of charity is part of New Zealand law, and cannot simply be disregarded.

DEFINITION OF CHARITABLE PURPOSE

Courts have found it "impossible to give an exhaustive definition", holding the term "charity" to be "probably incapable of definition" (see *Barby v Perpetual Trustee Co Ltd* (1937) 58 CLR 316 at 324, cited with approval in *Re Tennant* [1996] 2 NZLR 633 (HC) at 637; see also *In re*

Wilkinson (Deceased), Perpetual Trustees Estate and Agency Co of New Zealand Ltd v League of Nations Union of New Zealand [1941] NZLR 1065 (SC) at 1075).

The difficulties inherent in the definition evoke the famous description of the capital/revenue distinction in tax law: an “intellectual minefield in which the principles are elusive and the analogies treacherous” (*Tucker v Granada Motorway Services Ltd* [1977] 3 All ER 865 at 869).

They also evoke the famous comment of Justice Potter Stewart in *Jacobellis v Ohio* 378 US 184 (1964):

I shall not today attempt further to define the kinds of material I understand to be embraced within that short-hand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the [subject matter] involved in this case is not that.

This was, of course, referring to pornography (or rather obscenity) as a concept impossible to define, but “I know it when I see it”.

The definition of charitable purpose is arguably of the same ilk. As centuries of case law have borne out, the question of what constitutes a charitable purpose often strikes different minds differently. It can also strike the same mind differently at different times.

The presumption of charity is helpful in this context. It provides a “road sign”: if in doubt, find charity.

As the presumption of charity is an important aspect of the test for whether an entity’s purposes are charitable, it is also important to consider the correct test to be applied. It cannot be considered in isolation. The correct test for whether a purpose is charitable was set out by the Court of Appeal in *Latimer v Commissioner of Inland Revenue* [2002] 3 NZLR 195 (CA) at [32] as follows:

- (i) Is the purpose for the public benefit; and if so,
- (ii) Is it charitable in the sense of coming within the spirit and intendment of the preamble to the Statute of Charitable Uses Act 1601 (43 Eliz c4).

Public benefit test

The first limb, the “public benefit test”, asks whether a purpose is beneficial to the public, an important key first consideration in applying the presumption of charity. The public benefit test is not directly referred to in the statutory definitions of charitable purpose, but it is imported as a key element of the charitable purposes test through the medium of the common law.

Public benefit has been described as having an elusive quality, not always open to sound reason, but “often plainly recognised when it exists” (*Strathalbyn Show Jumping Club Inc v Mayes* [2001] SASC 73 per Bleby J at [97]).

The public benefit test comprises two parts: a “benefit” limb, and a “public” limb. It asks, firstly, whether the purpose is beneficial to the community, and secondly whether the class of persons eligible to benefit constitutes the public, or a sufficient section of the public (*New Zealand Society of Accountants v Commissioner of Inland Revenue* [1986] 1 NZLR 147 (CA) at 152; see also *Commissioner of Taxation v Triton Foundation* [2005] FCA 1319 at [21]–[22], and *Tasmanian Electronic Commerce Centre Pty Ltd v Commissioner of Taxation* [2005] FCA 439 at 50, referred to with approval in *Re Queenstown Lakes* at [63]–[67], and *CDC* at [42]–[43] and [61]–[65]).

With respect to the benefit limb, the question whether a purpose will or may operate for the public benefit is to be

answered by forming an opinion on the evidence, bearing in mind that there is no need for any proof of public benefit “if the facts speak for themselves”; in many classes of case, the existence of public benefit will be readily assumed. In some cases, a purpose may be “so manifestly beneficial to the public” that it would be “absurd to call evidence on this point” (see *McGovern v Attorney-General* [1982] 1 Ch 321 at 333, *Molloy v Commissioner of Inland Revenue* [1981] 1 NZLR 688 at 695 and *Scottish Burial Reform and Cremation Society Ltd v Glasgow Corporation* [1968] AC 138, at 156).

On rare occasions, direct evidence of public benefit may be required (*Latimer v Commissioner of Inland Revenue* [2002] 1 NZLR 535 (HC) at [83]).

The public benefit test is presumed to be met in relation to the first three “heads” of charity. While the “presumption of public benefit” has been statutorily removed in England and Wales by s 4(2) of the Charities Act 2011 (UK), in New Zealand, a purpose for the relief of poverty, the advancement of education or the advancement of religion (see Charities Act, s 5) is presumed to meet the public benefit test (see *Re New Zealand Computer Society Inc* HC Wellington CIV 2010-485-924, 28 February 2011 at [13]; *Re Education New Zealand Trust* (2010) 24 NZTC 24,354 (HC) at [24]; and *Queenstown Lakes* at [32] and [38]).

The presumption of public benefit can be displaced if the purpose is illegal, or contrary to public policy, or if the achievement of the object will be greatly to the public disadvantage. However, “the Court will not be astute...to defeat on doubtful evidence the avowed benevolent intention of a donor” (*National Anti-Vivisection Society v Inland Revenue Commissioners* [1948] AC 31 (HL) at 65).

Analogy upon analogy

If it is established that a purpose is beneficial to the community, or a sufficient section of it, the question turns to the second limb: is the purpose “charitable” in the sense of falling within the spirit and intendment of the preamble.

This is often referred to as the “analogy test”, proceeding as it does by analogy upon analogy with purposes enumerated in the preamble.

Although the preamble, and the Statute of Elizabeth, has long since been repealed, it remains part of the test for charitable purpose at common law. However, “only in a very wide and broad sense” (*Scottish Burial Reform* at 151).

The object of the Statute of Elizabeth had been to provide new machinery for the reformation of abuses in regard to charities. However, the preamble’s list of some 21 purposes which were regarded as charitable in Elizabethan times, including the marriage of poor maids, and the preferment of orphans, was so varied and comprehensive that it became the practice of the court to refer to it as a sort of index or chart.

The courts proceeded first by seeking an analogy with an object mentioned in the preamble. They then went further and were satisfied if they could find an analogy with an object already held to be charitable (*Scottish Burial Reform* at 147, cited with approval in *New Zealand Society of Accountants* at 157).

Accordingly, the requirement to fall within the spirit and intendment of the preamble “does not mean quite what it says”: what must be regarded is not the wording of the preamble itself, but the effect of decisions given by the courts as to its scope, decisions which have “endeavoured to keep the law as to charities moving according as new social needs

arise or old ones become obsolete or satisfied". The words used in the preamble must "not be given the force of a statute to be construed". The benefit does not have to be in any way ejusdem generis with the listed purposes: it simply has to be charitable in the same sense (*Scottish Burial Reform* at 154 and 152).

We are often reminded that the law of charity is a moving subject which evolves over time. Charities law in New Zealand must keep abreast of, and have regard to, changing New Zealand institutions and societal values. While the approach to whether a purpose is charitable should be cautious, and should usually proceed by analogy, "neither does it set its face against change to what is considered charitable, in law". Courts should, in appropriate cases, be prepared to entertain adjustments to things "once advisedly established" (*DV Bryant Trust Board v Hamilton City Council* [1997] 3 NZLR 342 at 348).

The analogy upon analogy approach has a tendency to expand the concept of charitable purpose over time. In fact, the gradual extension by analogy has proceeded so far that there are "few modern reported cases where a clearly specified object for the benefit of the public at large and not of individuals was not held to be within the spirit and intendment" of the preamble (*Scottish Burial Reform* at 147, cited with approval in *New Zealand Society of Accountants* at 157).

The law has extended so far that there are now two approaches to the method of determining whether a purpose is charitable: the first is the analogy approach. The second is the presumption of charity (see *Latimer* (HC) at [103]).

THE PRESUMPTION OF CHARITABILITY

The correct approach to the second limb of the definition of charitable purpose was stated by the Court of Appeal in *Commissioner of Inland Revenue v Medical Council of New Zealand* [1997] 2 NZLR 297 (CA) at 310, per McKay J, citing 5 *Halsbury's Laws of England*, 4th ed at [37]:

Not all such purposes are charitable; to be so the purposes must fall within the 'spirit and intendment' of the preamble to the Statute of Elizabeth 1. Historically, in order to find whether a particular purpose came within that spirit and intendment, the courts sought to find an analogy with purposes mentioned in the preamble itself, or with purposes previously held to be within its spirit and intendment. It now appears that, even in the absence of such analogy, objects beneficial to the public, or of public utility, 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.

As noted by McKay J, this passage from *Halsbury's* was adopted by the Court of Appeal in *Morgan v Wellington City Corporation* [1975] 1 NZLR 416 (CA) at 419–420. It was also supported by a number of English cases, including *Incorporated Council of Law Reporting for England and Wales v Attorney-General* [1972] Ch 73 (CA) at 88, 95 and 104, and the House of Lords' decisions in *Scottish Burial Reform*, and *Inland Revenue Commissioners v McMullen* [1979] 1 All ER 588 (allowing an appeal but without discussing this point, [1981] AC 1 (HL)).

In the latter case, the House of Lords referred to the "doctrine of the benignant approach" to the construction of charitable constituting documents, and (at 14) to two legal maxims in that regard:

- *semper in dubiis benigniora praeferenda sunt* (in doubtful cases, the more liberal constructions are always to be preferred); and
- *ut res magis valeat quam pereat* (that the thing may rather have effect than be destroyed).

McKay J also noted that the position in Australia had been left open by the Privy Council in *Brisbane City Council v Attorney-General for Queensland* [1979] AC 411 at 422.

In the *Medical Council* case, Thomas J also adopted the statement in *Halsbury's*, which he said at 321:

makes it clear that, even if the objective is not analogous with purposes falling "within the spirit and intendment of the preamble" to the Statute of Elizabeth I, 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.

Thomas J found that the purpose of safeguarding the health of the community, which he found was the purpose of the Medical Council, was a matter beneficial to the community, even if it was not analogous to the purposes mentioned in the preamble. Keith J agreed with the reasons given by McKay and Thomas JJ at 321–322.

Richardson and Gault JJ dissented, referring to the obiter comments of Somers J, in the *New Zealand Society of Accountants* case at 157, where his Honour had expressed a desire to hear further argument on the point before assenting to the presumption of charity. However, the view of the majority of the Court of Appeal in *Medical Council*, over a decade later in 1997, must surely be taken to supersede these comments.

Other authority for the "alternative approach" of the presumption of charity includes *Auckland Medical Aid Trust v Commissioner of Inland Revenue* [1979] 1 NZLR 382 (SC) at 388, and the Laws of New Zealand, *Charities*, at [12], [13] and [44]. The latter describes the position as follows:

Even in the absence of an analogy with the purposes mentioned in the Preamble to the Statute of Elizabeth, objects beneficial to the public, or of public utility, are prima facie within the spirit and intendment of the Preamble, and in the absence of any ground for holding that they are outside that spirit and intendment, are charitable at law.

Accordingly, there can be no doubt that the presumption of charity is part of New Zealand law. Its absence from recent cases under the Charities Act is therefore curious.

In the *Crown Forestry Rental Trust* case, the High Court was considered bound to apply the Court of Appeal presumption of charity reasoning of the Court of Appeal in *Medical Council* (see *Latimer* (HC) at [106] and [131], and *Latimer* (CA) at [13]).

In that case, the Crown Forestry Rental Trust's purpose of assisting Maori claimants in the preparation, presentation and negotiation of claims before the Waitangi Tribunal which involve or could involve Crown forest land ("the assistance purpose"), was held by the High Court to be charitable.

The Commissioner of Inland Revenue appealed this finding, arguing (unsuccessfully) that the High Court had erred in adopting the presumption of charity referred to in *Medical Council* (*Latimer* (CA) at [33]). Counsel suggested

that in the *Medical Council* case, McKay J, although discussing the presumption of charity, had not in fact followed it and had actually proceeded by reference to analogy.

The Court of Appeal found it unnecessary to reach a view on this point. Their Honours noted that that Thomas J had certainly followed the presumption of charity, that McKay had referred with apparent approval to a passage in *Halsbury's* to that effect, and that Keith J had concurred with both McKay J and Thomas J. However, their Honours held (agreeing with McKay J's view (at p314)) that in applying the spirit and intent of the preamble, it is important to be guided by principle rather than by a detailed analysis of decisions on particular cases (*Latimer* (CA) at [39]).

The Court of Appeal went on to find that the public benefit inherent in the assistance purpose is, in the context of New Zealand society at this time, of a charitable character (and interestingly, not "political").

Although a reference was made to there being "some analogy" with trusts for the benefit of aboriginal people, and for the benefit of returned servicemen (*Latimer* (CA) at [40]), the Court of Appeal therefore proceeded on principle, and did not clearly apply either the presumption of charity or the analogy test.

However, arguably, the relevant "principle" is that a purpose beneficial to the public is presumed to be charitable unless there are grounds for holding otherwise (that is, the presumption of charity). In the writer's view, the Court of Appeal decision in *Latimer* applies the presumption of charity; it is certainly not sufficient to displace it, particularly given the clear support for the principle by the majority of the Court of Appeal in *Medical Council*, as well as by the Court of Appeal in *Morgan* and the then Supreme Court in *Auckland Medical Aid Trust*.

The presumption of charity is an important principle of New Zealand charity law and an important protection for charities. It should not be permitted to disappear without challenge.

CHARITIES COMMISSION'S APPROACH

The writer is not aware of any instance of the presumption of charity being applied by the Charities Commission during its reign.

In considering the second limb of the charitable purposes test, the Charities Commission cites cases dating from 1907 to 1996 (see for example the deregistration decision for the National Council of Women of New Zealand Incorporated available through <http://www.charities.govt.nz>, at [44], where the following cases are cited: *Re Jones* [1907] SALR 190, 201; *Williams Trustees v Inland Revenue Commissioners* [1947] AC 447, 455; *Scottish Burial Reform* at 146–48; *Incorporated Council of Law Reporting (QLD) v Federal Commissioner of Taxation* (1971) 125 CLR 659, 667, 669; *Royal National Agricultural and Industrial Association v Chester* (1974) 48 ALJR 304, 305; *New Zealand Society of Accountants* at 157; *Re Tennant* at 638).

Why does the Charities Commission not cite the 1997 decision of the Court of Appeal in *Medical Council*, or the 2002 decision of the Court of Appeal in *Latimer*? Surely, these two cases are authoritative on the point. What has happened to the presumption of charity? If the presumption of charity had been applied, entities such as the

National Council of Women that have been denied registered charity status, would surely be considered charitable.

This must be right. What is the harm if such entities are registered as charities, allowing them to access funding necessary for their survival?

Surely the punishment of deregistration or non-registration should be reserved for "bad" things, like money laundering, misuse of funds, gross mismanagement, and other similar things? On current estimates, some \$248 million is estimated to be lost to the New Zealand charitable sector through fraud every year (see <http://www.charities.govt.nz/assets/docs/events/fraud-workshop/Protectagainstfraudworkshoppresentation.pdf>). Isn't this where a regulator's efforts would be better spent? In terms of the key purposes of promoting public trust and confidence in the charitable sector, and encouraging and promoting the effective use of charitable resources (Charities Act, s 3(a) and (b)), is it not preferable to have charities on the register and subject to monitoring by the regulator, rather than operating entirely outside the regime? What is to be gained by good charities on fine and technical points of legal distinction?

One would expect a regulator, such as the Charities Commission or DIA-Charities, to take a wider view of the definition of charitable purpose, so that more charities would be on the charities register and subject to their monitoring regime. By contrast, one would expect the taxing authority (the Inland Revenue Department) to take a narrower view, so that fewer entities would be able to take advantage of the tax concessions available for charities and less revenue would be foregone. In that sense, it is odd that so many entities that have been denied registration by the Charities Commission, such as the National Council of Women and CDC and others, which were for decades considered to be charitable by IRD.

A further consideration is the practical consequences of deregistration. The Charities Commission recommended that entities restructure, carving out their non-charitable purposes into a separate entity. But what happens to the funds that were considered charitable for decades but now no longer so? Does not the Attorney-General as *parens patriae* have an interest in advocating on behalf of these charitable funds? In many of the early British cases, the Attorney-General was joined as a party in addition to the Charity Commission. However, the Attorney-General has not been a party to any of the cases under the Charities Act to date. Nor has the Inland Revenue Department. Is the sector letting all of this go too lightly?

CONCLUSION

In her speech to the ANGOA Roundtable meeting on 9 February 2012, the Minister for the Community and Voluntary Sector, the Hon Jo Goodhew MP, stated that, in the promised review of the Charities Act, the definition of charitable purpose will be looked at. However, at the time of writing, the terms of reference for the review of the Charities Act have not yet been released, and the review itself, assuming it will take place, is not currently scheduled to be completed until 2015.

In the meantime, the status of the presumption of charity needs to be addressed and clarified before any more good charities are sacrificed. □