charities commission
Komihana Kaupapa Atawhai

"Public benefit" test: Guidance for charities

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.

Introduction

To be registered as a charitable entity under the Charities Act 2005 (the Act) an organisation must have exclusively charitable purposes.[1]

The Act 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".

These categories of charitable purpose were identified by the Courts in the 1800's[2], although charitable purposes were first developed and applied by the Courts in 1601, when the Charitable Uses Act came into force in England.

Since then, Courts have based their decisions on charitable purposes on whether a purpose is the same or within the spirit and intendment of the purposes set out in the Preamble to that Act. What is considered to be charitable has developed over time and has changed to reflect the changes in society over the last 400 years; however, the underlying qualities of what is charitable have remained consistent.

The Courts have recognised that, to be charitable, a purpose must be aimed at the public, or a sufficient section of the public. This was not specified in the Charitable Uses Act but was explained by the Court of Chancery in 1767.[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.

The Commission will not register an organisation unless it is confident that the entity has exclusively charitable purposes. An organisation can still qualify for registration under the Charities Act if it has non-charitable 'ancillary' purposes that are undertaken to further its main charitable purposes.

In making a registration decision under the Act, the Commission is required to consider the applicant's current and proposed activities. This is to assess whether the activities support a view that the purposes are charitable.

Reference to "public benefit" in the Act

In the Act, the term "public benefit" is specifically used only in section 5(2) (a), i.e.:

> *"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 provision acknowledges that the public benefit test is part of the legal test for charitable purpose. Section 5(2) (a) allows purposes to be charitable even where the people benefiting are related by blood. This section is discussed in more detail below.

The 'public benefit test' as part of charities law

There are two aspects to the "public benefit test", that is:

- There must be an identifiable **benefit**, assessed in the light of modern conditions and
- The benefit must be to the general **public** or to a sufficient section of the public.

To determine whether a purpose is charitable at law, the Commission looks at what the Courts have previously decided and follows the decisions and principles developed in case law.

Under New Zealand law, if a purpose is considered to fall within one of the first three heads of charity, (i.e. relief of poverty, advancement of education or advancement of religion) it is presumed to be a purpose that would benefit the public[5]. This presumption of benefit may be reversed where the circumstances show that the purpose is not in fact beneficial to the public. The courts adopt a benevolent approach in such situations.

However, particularly in the case of advancement of education, and advancement of religion, the public aspect also has to be shown, i.e. – the purpose needs to be established as being for the public or a sufficient section of the public[6].

In the case of the fourth head of charity, "other purposes beneficial to the community", it is necessary to establish positively[7] that the purpose has a tangible or well-recognised benefit to the community[8]. Once this is established, it is also necessary to show that the purpose is for the public or a sufficient section of the public.

The 'benefit' aspect

Benefit to the public should be capable of being identified and defined. 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.

Indirect benefits (where the benefit extends beyond the immediate beneficiaries) as well as direct benefits may be taken into account in assessing whether an entity provides sufficient benefit to the public. For example, courts have held that a registration system for medical practitioners provided a public benefit by ensuring that medical practitioners met an appropriate standard and therefore protecting the public by ensuring that those practitioners were adequately qualified.[9]

Purposes not beneficial

If a purpose is illegal or if, taking into account all of the relevant facts and circumstances, there is a benefit that is outweighed by a greater harm to the community, no benefit will result. For example, a purpose to promote or support an illegal activity such as euthanasia will not provide a public benefit.[10]

The courts have been unwilling to form a view on whether political purposes provide a public benefit. A "political purpose" means 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 Commission 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 political purposes will not be considered to provide a public benefit.[11]

Many charities undertake political activities in order to achieve their charitable purposes. As long as the entity's main purposes are charitable, the use of political activities to achieve these purposes will not disqualify the entity from registration. However, where political activity appears to be an independent purpose in itself, this may cause the Commission to doubt whether the entity's main purposes are exclusively charitable.

The 'public' aspect

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[12]; and it must not be aimed at creating private profit.[13]

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.[14]

Any limitations placed upon who benefits 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 an example, 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.

An entity may charge fees which 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.

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.

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. Benefits must still 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 primary purposes which provide a public benefit.

Section 5(2) (a) of the Act

Under section 5(2)(a) of the Act, a purpose aimed at people who are related by blood, will not be prevented from being a charitable purpose as long as the group could otherwise be considered to be 'the public'

This provision is based on wording which has been in Income Tax legislation since 2003. This approach differs from the traditional legal approach, which is that individuals related by blood are not a "sufficient section of the public".[15]

Examples

Examples of groups of people who are 'the public' include:

- adherents of a particular faith which any member of the public could join[16]
- people who live in a particular town[17]
- refugees[18]
- people related by blood but who would otherwise be considered to be a sufficient section of the public, for example members of an iwi[19]

Examples of groups that are not 'the public' include:

- employees of a specific employer[20]
- members of a particular trade union[21]
- members of a professional group[22]

Private profit

As noted above, it is a key element of charities law that a purpose cannot be charitable if it is for the private profit of individuals.

This means that there cannot be a main purpose of private profit – even if other main purposes could be considered charitable.

This does not prevent a charity from carrying out activities where a person may profit – provided that the purpose of the organisation is not to profit individuals. For example, charities may purchase goods and services where the providers of those goods and services make a profit – i.e. pay a builder or invest money in a bank. However, the activities must be to further their charitable purposes and not to benefit the individuals concerned.

Public benefit issues in relation to the four heads of charity

Relief of poverty

The first head of charity is often referred to as 'the relief of poverty'; however, in fact, it is 'relief of the poor, aged and impotent'.

Over the years, the courts have tended to more easily recognise public benefit where the purpose is the relief of financial poverty.[23] It has been suggested that this is because purposes to relieve those who are impoverished are inherently so beneficial to the community that they do not require proof of public benefit.[24]

In cases of purposes for the relief of the aged or the impotent (i.e. the physically weak, disabled, or helpless), benefit is presumed, but can be negated, and the purpose must still be directed at the public or a sufficient section of the public[25].

Advancement of education

A purpose that advances education will not provide sufficient public benefit where:

- the purpose is to educate specific individuals[26]; or
- the purpose is the protection and advantage of those practising in a particular profession[27].
- the purpose is to change the law or promote a particular viewpoint[28].

A key case in the development of charity law held that purposes to provide educational benefits to the children of employees and former employees of a particular company were not charitable.[29] The ground for this decision was that it was not open to 'the public' but rather only available to an exclusive group, that is all those who had or had had an employment relationship with the company. In that case, even though the employees in question numbered around 110,000, they were not considered to be a section of the public.

Advancement of religion

The courts have taken the view that even though religious purposes are usually aimed at members of a particular faith, there will be sufficient public benefit as long as it is open to anyone to join that faith or church.

A religious purpose may fail to provide public benefit where its practices are detrimental to the safety of the public or against public policy. This could be the case where the purpose promoted practises that are considered harmful, or those that are illegal such as making animal sacrifices.

Purposes otherwise beneficial to the community

To be charitable within the fourth head of charity, a purpose must be 'beneficial to the community' in a positive and tangible sense, and must fall within the spirit of the Preamble to the Statute of Charitable Uses 1601[30]. In addition, the purpose must satisfy the public benefit test by being for the benefit of the public or a sufficient section of the public.

What is considered to be 'beneficial to the community' changes over time to reflect modern views and attitudes. However the essentially charitable character must be found by finding that the purpose in question is within the 'spirit and intendment' of the matters that were originally stated to be charitable 400 years ago. In this way, while the actual purposes will reflect the current environment, the essential attributes of what makes something 'charitable' stay consistent over time.

Examples of classes of purposes that have been held to be charitable under the fourth head of charity are as follows:

- Relief of human distress (provided that is not for political purposes)[31]
- Safety and protection of the community[32]
- Purposes for the benefit of a locality (for example a gift to a local authority)[33]
- Protection of animals (through promoting humane and generous behaviour and discouraging cruelty)[34]
- Improvement of agriculture[35]
- Providing recreation and leisure facilities where these are 'in the interests of social welfare' (however, not where they are for the purposes of mere entertainment or amusement)[36]

In all cases, purposes that fall into these categories, or any other purposes that are considered to pass the 'two-stage test' will not be charitable if a main purpose is considered to be for private benefit or profit.

Matters that do not fall into the fourth head of charity and that are not charitable are:

- Purposes that confer a private benefit on the members of a group or association where that benefit is not merely incidental to a charitable purpose[37],
- Purposes that are to change the law or to lobby for a political outcome[38]
- Purposes for mere entertainment or amusement.[39]

Legal references and comment

1. The Charities Act 2005 contains two tests, one for 'societies and institutions' and the other for 'trustees of trusts'.

   Under section 13(1) (b) a society or institution must be established and maintained exclusively for charitable purposes, and not carried on for the private pecuniary profit of any individual.

   Under section 13(1) (a) the trustees of a trust will qualify for registration where the trust is of a kind in relation to which an amount of income is derived in trust for charitable purposes. However, under trust law, a trust will be 'void for uncertainty' if it is for mixed charitable and non-charitable purposes. This has the effect that, to be a charitable trust, the trust's purposes must be exclusively charitable. Section 61B of the Charitable Trusts Act 1957 operates to validate trusts that are substantially charitable by deeming any non-charitable purposes to be ineffective. Where section 61B applies, this will mean that the trustees must act as if the noncharitable purposes do not exist – having the effect that the trust will only operate for its charitable purposes.

2. The four 'heads of charity' are considered to have originated from Lord Mcnaghten's statements in the case of *Commissioners for Special Purposes of Income Tax v Pemsel*[1891] AC 531 at 583
3. *Jones v Williams* (1767) AMB 651 at 652; 27 ER 422 per Lord Camden LC. See also *Re Delany* [1902] 2 Ch 642 at 649 per Farwell J
4. *Perpetual Trustee Co (Ltd) v Ferguson* (1951) 51 SR NSW 256 at 263 per Sugerman J
5. *National Anti-Vivisection Society v Inland Revenue Commissioners* [1948] AC 31 at 65,*Molloy v Commissioner of Inland Revenue* [1981] 1 NZLR 688 at 695 per Somers J
6. *Verge v Somerville* [1924] AC 496 at 499 per Lord Wrenbury
7. *D.V.Bryant Trust Board v Hamilton City Council* [1997] 3 NZLR 342 at 350 per Hammond J
8. *National Anti-Vivisection Society v Inland Revenue Commissioners* [1948] AC 31 at 49 per Lord Wright
9. *Commissioner of Inland Revenue v Medical Council of New Zealand* [1997] 2 NZLR 297
10. *Re Collier* (deceased) [1998] 1 NZLR 81 at 91
11. *Re Collier* (deceased) [1998] 1 NZLR 81 at 91; *McGovern v Attorney-General* [1981] 3 All ER 493.
12. *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.
13. D.V.Bryant Trust Board v Hamilton City Council [1997] 3 NZLR 342 at 347 – 348 [affd [1999] 1 NZLR 41]
14. *Oppenheim* v Tobacco Securities Trust Co. Ltd [1951] AC 297 at 306 per Lord Simmonds
15. See Re Compton [[1945] 1 Ch 123; [1945] 1 All ER 198] and Davies v Perpetual Trustee Co Ltd [[1959] AC 439; [1959] 2 all ER 128].
16. *Inland Revenue Commissioners v Baddeley* [1955] AC 572 at 590 per Viscount Simmonds
17. *Verge and Somerville* (see above)
18. *Re Cohen* [1954] NZLR 1097
19. Section 5(2)(a) Charities Act 2005
20. *Oppenheim* (see above)
21. *Re Mead's Trust Deed* [1961] 2 All ER 836 at 840 - 841
22. *Re Mason (deceased)* [1971] NZLR 714 at 722
23. *Re Compton* [1945] Ch 123 at 137 – 139; *Re Hobourn Aero Components Limited's Air Raid Distress Fund* [1946] 1 Ch 194 at 203 – 207; *Dingle v Turner* [1972] AC 601
24. *Re Compton* (above)
25. *New South Wales Nursing Service and Welfare Association for Christian Scientists v Willoughby Municipal Council* [1968] NSWR 791
26. *Re Mason* (deceased) [1971 NZLR 714 at 721
27. *Re Mason* (deceased) (see above) (a trust for the constitution and maintenance of a law library or libraries).
28. *McGovern v Attorney-General* [1982] 1 Ch 321 at 336-337, 339 per Slade J
29. *Oppenheim v Tobacco Securities Trust Co. Ltd* [1951] AC 297 at 306 per Lord Simmonds
30. In New Zealand key cases on this issue are *CIR v Medical Council of New Zealand*[1997] 2 NZLR 297; and *Latimer v Commissioner of Inland Revenue* [2004] 3 NZLR 157; (2004) 21 NZTC 18,478
31. *McGovern* (see above)
32. *Downing v Federal Commissioner of Taxation* (1971) 125 CLR 185 at 198
33. *Re Williams Trustees v Inland Revenue Commissioner* [1947] AC 447
34. *National Anti-Vivisection Society v Inland Revenue Commissioners* [1948] AC 31
35. *Re Tennant* [1996] 2 NZLR 633 (gift of land for a creamery for a particular locality held to be charitable as for the promotion of dairying)
36. In accordance with section 61A of the *Charitable Trusts Act 1957*
37. *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
38. *Bowman v Secular Society Ltd* [1917] AC 406 at 442; *McGovern v Attorney-General*[1982] 1 Ch 321 at 336-337, 339 per Slade J; *National Anti-Vivisection Society v Inland Revenue Commissioners* [1948] AC 31 at 62 per Lord Simonds
39. *Re Nottage* [1985] 2 Ch 649

Further information

For further information, please read our information sheet *Charitable purpose*

For more information about the Charities Commission or registration under the Charities Act, please browse www.charities.govt.nz

You can also call the Charities Commission on our free information line **0508 242 748**.

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