

Charity Ref No: DRA36722

www.charities.govt.nz

11 June 2010

Jarrold Coburn
Draco Foundation (NZ) Charitable Trust
6 Bancroft Tce
Newlands
Wellington 6037

Dear Jarrod

Notice of decline for Draco Foundation (NZ) Charitable Trust

Thank you for the application for Draco Foundation (NZ) Charitable Trust to be registered as a charitable entity under the Charities Act 2005.

This notice is to formally advise you that the Charities Commission is not satisfied that Draco Foundation (NZ) Charitable Trust qualifies to be registered as a charitable entity and therefore declines your application. The reasons for the decline are detailed in the attached decision.

In accordance with section 59 of the Charities Act you have the option to lodge an appeal with the Registrar of the High Court within twenty working days of this letter.

Please note that it is the policy of the Charities Commission to publish a copy of detailed written decisions such as the one attached to this letter. These are published on the Commission's website at www.charities.govt.nz once the time period for lodging an appeal with the High Court has expired.

Yours sincerely



Trevor Garrett
Chief Executive

Registration Decision: Draco Foundation (NZ) Charitable Trust

The facts

1. Draco Foundation (NZ) Charitable Trust (the Applicant) was incorporated as a board under the *Charitable Trusts Act 1957* on 9 February 2010. The Applicant applied to the Charities Commission (the Commission) for registration as a charitable entity under the *Charities Act 2005* (the Act) on 8 March 2010.
2. The Applicant's purposes are set out in clause 3.1 of its trust deed:
 - 3.1 *The purpose of the Trust will be the protection and promotion of democracy and natural justice in New Zealand. In particular the Trust will:*
 - 3.1.1 *hold assets – both tangible and intangible – in perpetuity, to be kept in and used first and foremost for the purposes of achieving the purposes of the Trust;*
 - 3.1.2 *raise funds, either through philanthropic or other means, or by subsidiary organisations, to purchase or lease assets, employ staff, market, promote, or otherwise assist the day-to-day operation of the Trust;*
 - 3.1.3 *raise awareness of – and involvement in the democratic process amongst the citizens organisations, and communities of New Zealand*
 - 3.1.4 *undertake research and engage in public debate on the results;*
 - 3.1.5 *provide training and education to communities;*
 - 3.1.6 *from time to time, and at the sole discretion of the Trustees, support organisations with similar aims; and*
 - 3.1.7 *provide any other support and assistance – or undertake any other business – consistent with this charitable purpose.*
3. On 16 March 2010, the Commission analysed the application for registration and sent the Applicant a letter requesting further information about its activities pursuant to section 18(3)(a) of the Act.
4. The Applicant responded by email on 29 March 2010 with the following information:

CURRENT ACTIVITIES (INCLUDING THE PAST 12 MONTHS)

Activity	Purpose
<ul style="list-style-type: none"> Website: www.councilwatch.org.nz Website www.residents.org.nz 	The purpose of the Trust will be the protection and promotion of democracy and natural justice in New Zealand
<ul style="list-style-type: none"> Sale of: merchandise, training materials, training courses, paid access to sections of website 	3.1.2 raise funds, either through philanthropic or other means, or by subsidiary organisations, to purchase or lease assets, employ staff, market, promote, or otherwise assist the day-to-day operation of the Trust
<ul style="list-style-type: none"> Web activity, including providing free and easy-to-access information for the public Organise conferences for community groups and individuals to discuss democracy and dialogue with central- and local government agencies 	3.1.3 raise awareness of- and involvement in the democratic process amongst the citizens, organisations, and communities of New Zealand
<ul style="list-style-type: none"> Undertake sectoral research across all 85 local authorities and publish the results for free Make public comment, through the internet and media, on the state of democracy in New Zealand 	3.1.4 undertake research and engage in public debate on the results
<ul style="list-style-type: none"> Provide free resources online for citizens to establish residents associations in their local community 	3.1.5 provide training and education to communities

PLANNED ACTIVITIES (IN THE NEXT 24 MONTHS)

Activity	Purpose
<ul style="list-style-type: none"> Sale of: merchandise, training materials, training courses, paid access to sections of website 	3.1.2 raise funds, either through philanthropic or other means, or by subsidiary organisations, to purchase or lease assets, employ staff, market, promote, or otherwise assist the day-to-day operation of the Trust
<ul style="list-style-type: none"> Train and support a network of people across New Zealand (Local Government Advocates) to assist citizens to deal with their local Council, to build sustainable 	3.1.3 raise awareness of- and involvement in the democratic process amongst the citizens, organisations, and communities of New Zealand

<p><i>networks with Councils, and to assist the local government sector to better understand and communicate with communities</i></p>	
<ul style="list-style-type: none"> · <i>Deliver training and adult education programmes directly to community groups</i> · <i>Provide templates and training material to enable community groups to provide adult education to citizens</i> 	<p><i>3.1.5 provide training and education to communities</i></p>

5. The Commission considered the information and on 6 April 2010 sent the Applicant a notice that may lead to decline stating that the Applicant's purposes were not exclusively charitable and a primary purpose of the Applicant was political, therefore the Applicant did not meet registration requirements.
6. The Applicant responded by email on 14 April 2010 stating:

The Government, when it introduced this Bill to be passed, and after much public consultation said this 'The intent behind establishing the commission is twofold: firstly, to improve public trust and confidence in charitable organisations, and, secondly, to obtain better information about the size and scope of the charitable sector.' In response to grave concerns raised by the fundraising and charitable sectors, Minister Tizard stated that during the select committee process "many submitters expressed a concern that the commission's functions were too focused on its registration and monitoring role. To make the bill's intent clearer, the commission's functions are now explicitly set out as providing education and assistance on matters of good governance and management to charitable organisations.

If I may provide further clarification, again taken from Hansard: 'Throughout the select committee process the single biggest concern raised in relation to the charitable purpose test was the position of advocacy, and whether organisations that undertook advocacy work would continue to be classified as charitable and be able to register. The committee has recommended changes that make it clear that the commission will not prevent an organisation from being able to register if it engages in advocacy as a way to support and undertake its main charitable purpose.

... the 'protection and promotion of democracy and natural justice' is not only a charitable purpose, it is also a fundamental duty and right of every citizen. To reject a bona fide charity on these grounds represents a gross perversion of the power of The State and is manifestly undemocratic.

7. On 21 April 2010, the Applicant further submitted that:

Draco Foundation is not Council Watch. Council Watch is only one part of the Foundation. The National Database of Residents Associations is another part (www.residents.org.nz) and needs to be taken into consideration.

The issues

8. The issue the Commission must consider is whether the Applicant meets all of the essential requirements for registration under the *Charities Act 2005* ("the Act"). In this case, the key issue for consideration is whether the Applicant is a trust of a kind in relation to which an amount of income is derived by the trustees in trust for charitable purposes, as required by section 13(1)(a) of the Act. In particular, whether the Applicant's purposes fall within the definition of charitable purposes in section 5(1) of the Act and whether the Applicant will provide a public benefit.

The law on charitable purpose

9. Under section 13(1)(a) of the Act a trust must be of a kind in relation to which an amount of income is derived by the trustees in trust for charitable purposes.
10. Section 5(1) of the Act defines charitable purpose as including every charitable purpose, whether it relates to the relief of poverty, the advancement of education, the advancement of religion, or any other matter beneficial to the community. In addition, to be charitable at law, a purpose must be for the public benefit.¹ This means that the purpose must be directed at benefiting the public or a sufficient section of the public.
11. Section 5(3) of the Act provides that any non-charitable purpose must be ancillary to a charitable purpose.
12. In considering an application for registration, section 18(3)(a) of the Act requires the Commission to have regard to the entity's activities at the time the application was made, the entity's proposed activities, and any other information that the Commission considers relevant.

Political purposes

13. 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.²
14. The rule that political purposes cannot be charitable was set out by Lord Parker of Waddington in *Bowman v Secular Society*.³

[...] a trust for the attainment of political objects has always been held invalid, not because it is illegal, for everyone is at liberty to advocate or promote by any lawful means a change in the law, but because the Court has no means of judging whether a proposed change in the law will or will

¹ See *Latimer v Commissioner of Inland Revenue* [2002] 3 NZLR 195.

² *Re Wilkinson* [1941] NZLR 1065 at p 1077.

³ [1917] AC 406.

*not be for the public benefit, and therefore cannot say that a gift to secure the change is a charitable gift.*⁴

15. In New Zealand, the *Bowman* case has been applied by the Supreme Court in *Re Wilkinson (deceased)*,⁵ when deciding the charitable status of the League of Nations Union of New Zealand, and in *Knowles v Commissioner of Stamp Duties*,⁶ when deciding whether a temperance organisation was charitable.
16. In 1981, the New Zealand Court of Appeal applied *Bowman* in *Molloy v Commissioner of Inland Revenue*⁷ when considering whether a gift to the New Zealand Society for the Protection of the Unborn Child was tax deductible. In his decision, Somers J held that a political purpose included both advocating and opposing any change in the law. He also noted that to preclude recognition as a valid charity the political object must be more than an ancillary purpose, it must be the main or a main object.
17. In the United Kingdom the *Bowman* case has been applied in *National Anti-Vivisection Society v Inland Revenue Commissioners*⁸ and in *McGovern v Attorney-General*,⁹ when the Court was considering the purposes of a trust established by Amnesty International. In the latter case, Slade J summarised his conclusions in relation to trusts for political purposes as:
 - (1) *Even if it otherwise appears to fall within the spirit and intendment of the preamble to the Statute of Elizabeth, a trust for political purposes falling within the spirit of Lord Parker's pronouncement in Bowman's case can never be regarded as being for the public benefit in the manner in which the law regards as charitable.*
 - (2) *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*
 - (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.*¹⁰

⁴ Ibid at p 442.

⁵ [1941] NZLR 1065.

⁶ [1945] NZLR 522.

⁷ [1981] 1 NZLR 688.

⁸ [1948] AC 31.

⁹ [1982] 1 Ch 321.

¹⁰ [1982] 1 Ch 321 at p 340.

18. Two reasons for the principle that the Court will not regard as charitable a trust which has a main object of procuring an alteration of the law were cited by Slade J:

*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 legislature.*¹¹

19. Slade J also considered that for a court to uphold a gift directed to changing the law of a foreign country could prejudice relations with that foreign country. This would mean that the purpose was contrary to public policy and therefore not in the public interest.¹²
20. The judge noted that the mere fact that political means were employed in furthering the non-political purposes of a trust would not necessarily render it non-charitable.

*If all the main objects of the trust are exclusively charitable, the mere fact that the trustees may have incidental powers to employ political means for their furtherance will not deprive them of their charitable status.*¹³

21. Since *McGovern* was decided, there has been some divergence of views between the leading authorities in what will constitute a political purpose. According to *The Law and Practice Relating to Charities*,¹⁴ a principle 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.
22. Alternatively, *Tudor on Charities*¹⁵ suggests that a strong case can be made that advocating for a change in the law and encouraging debate is 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 is still satisfied. The author suggests that a neutral stance could be taken in relation to political purposes in the same way that it is taken between religions.
23. The author of *Tudor* notes that more recent Commonwealth decisions do not appear to have upheld the principles cited in *McGovern* with absolute certainty. For example, 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 in *Public Trustee v Attorney-General of New South Wales*,¹⁶ considered that a purpose directed to changing the law in a direction that the law was already going, particularly if reinforced by treaty obligations, should be charitable.

¹¹ Ibid at pp 336-337.

¹² Ibid at pp 338-339.

¹³ Ibid at p 343.

¹⁴ 3rd edition, London, Butterworths, 1999 at p 189.

¹⁵ 9th edition, London, Sweet & Maxwell, 203 at p 68.

¹⁶ (1997) 42 NSWLR 600.

24. In *Public Trustee v Attorney-General of New South Wales*, Santow J noted:

The cases on charities also involve some confusion between means and ends when it comes to their persuasive activities. 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. [. . .]

*Persuasion directed to political change is part and parcel of a democratic society in which ideas and agendas compete for attention and allegiance. 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.¹⁷*

25. In New Zealand, in *Re Collier (deceased)*,¹⁸ Hammond J upheld the principle that a trust with purposes of changing the law was not charitable, but also considered 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.

26. In coming to this conclusion, Hammond J criticized other decisions holding that political purposes were not charitable, 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 to say that 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. [...] 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.¹⁹

27. In *Victorian Women Lawyers' Association Inc v Commissioner of Taxation*,²⁰ 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. 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

¹⁷ (1997) 42 NSWLR 600 at p 621.

¹⁸ [1998] 1 NZLR 81.

¹⁹ *Re Collier (deceased)* [1998] 1 NZLR 81 at p 90.

²⁰ [2008] FCA 983 (Federal Court of Australia).

*whether that political object precludes the trust satisfying the public benefit requirements.*²¹

28. Finally, the Federal 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 not have exclusively charitable purposes because of its political purposes.²² In reaching its decision the court stated:

*Aid/Watch's attempt to persuade the government (however indirectly) to its point of view necessarily involves criticism of, and an attempt to bring about change in, government activities and, in some cases, government policy. There can be little doubt that this is political activity and that behind this activity is a political purpose. Moreover the activity is Aid/Watch's main activity and the political purpose is its main purpose.*²³

[...]

*We accept that, at one level Aid/Watch's efforts, are not in conflict with government policy. There was no suggestion that government is not concerned to deliver aid efficiently or with due regard to environmental concerns. Aid/Watch's concern however, is that the delivery of aid should conform to its view of the best way to achieve these objects. It does not take into account that government and its agencies inevitably have to make choices in determining where, how and how much aid is to be delivered. Undoubtedly some of these choices will involve factors with which Aid/Watch is concerned. Others, however, will involve domestic and foreign political considerations that do not concern Aid/Watch. Some of these factors may have very little to do with foreign aid or the manner of its delivery.*²⁴

Charities Commission's analysis

29. The Commission considers that the purposes outlined in clauses 3.1.4 and 3.1.5 may advance education, the purposes outlined in clauses 3.1.1 and 3.1.2 are powers, and the purposes outlined in clause 3.1.6 and 3.1.7 are ancillary.
30. The Commission considers that the remaining purposes outlined in clauses 3.1 and 3.1.3 do not indicate an intention to relieve poverty or advance religion. The Commission has therefore considered whether these purposes are charitable under the advancement of education or "any other matter beneficial to the community".

²¹ Ibid at para 128.

²² *Commissioner of Taxation v Aid/Watch Incorporated* [2009] FCAFC 128.

²³ *Commissioner of Taxation v Aid/Watch Incorporated* [2009] FCAFC 128 at para 37.

²⁴ *Commissioner of Taxation v Aid/Watch Incorporated* [2009] FCAFC 128 at para 41.

Advancement of education

31. In order for a purpose to advance education, it 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 can also include less formal education in the development of individual capabilities, competencies, skills, and understanding, as long as there is a balanced, and systematic process of instruction, training, and practice.²⁵ In order to advance education, learning must be passed on to others.
32. Education does not include advertisements for particular goods or services or promotion of a particular point of view.²⁶ If research is being conducted, it must be carried out in an objective and impartial way and the useful results made available, or accessible to the public.
33. In *Re Shaw (deceased)*,²⁷ the Court held that if the object were merely the increase of knowledge that is not in itself a charitable object unless it is combined with teaching or education.
34. Guidelines on the advancement of education and public benefit produced by the regulator for charities in England and Wales, the Charity Commission, state:

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.²⁸

²⁵ *Re Mariette* [1915] 2 Ch 284. See also *Chesterman v Federal Commissioner of Taxation* (1923) 32 CLR 362; *Lloyd v Federal Commissioner of Taxation* (1955) 93 CLR 645; *Chartered Insurance Institute v London Corporation* [1957] 1 WLR 867; *Flynn v Mamarika* (1996) 130 FLR 218.

²⁶ *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.

²⁷ [1957] 1 WLR 729 at p 738.

²⁸ See the United Kingdom Charity Commission, the Advancement of education for the Public Benefit”, December 2008 at D2, on the Commission’s website: http://www.charitycommission.gov.uk/Charity_requirements_guidance/Charity_essentials/Public_benefit/pbeduc.aspx.

35. In New Zealand, in *Re Collier (deceased)*,²⁹ Hammond J set out the 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.*³⁰

36. In *Re Collier*, the judge held that the bequest in question (for the publication of a book) did not qualify as charitable under the test:

*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.*³¹

37. In *Vancouver Society of Immigrant and Visible Minority Women v Minister of National Revenue*,³² Iacobucci J held that the advancement of education included "information or training that is provided in a structured manner and for a genuinely educational purpose – that is, to advance the knowledge or abilities of the recipients" and "informal training initiatives, aimed at teaching necessary life skills or providing information toward a practical end."³³ However, Iacobucci J went on to state:

*[T]he 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. 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.*³⁴

38. Clauses 3.1 and 3.1.3 of the Applicant's trust deed state:

3.1 *The purpose of the Trust will be the protection and promotion of democracy and natural justice in New Zealand. In particular the Trust will:*

...

3.1.3 *raise awareness of – and involvement in the democratic process amongst the citizens organisations, and communities of New Zealand*

39. The Commission cannot be satisfied that these purposes will necessarily advance education. The Commission has therefore looked at the activities undertaken by the Applicant in furtherance of these purposes as required by section 18(3)(a) of the Act.

²⁹ [1998] 1 NZLR 81.

³⁰ [1998] 1 NZLR 81 at pp 91-92.

³¹ *Ibid* at p 92.

³² [1999] 1 SCR 10; (1999) 169 DLR (4th) 34.

³³ [1999] 1 SCR 10 at para 169; (1999) 169 DLR (4th) 34 at 113.

³⁴ *Ibid* at para 171; (1999) 169 DLR 94th) 34 at p 114.

40. In its response of 29 March 2010, the Applicant states that the activities undertaken in furtherance of the purposes outlined in clause 3.1 and 3.1.3 include:
- Providing the website www.councilwatch.org.nz
 - Providing the website www.residents.org.nz
 - Web activity, including providing free and easy-to-access information for the public
 - Organising conferences for community groups and individuals to discuss democracy and dialogues with central and local government agencies.
41. The Applicant also states that it proposes, under clause 3.1.3, to:
- Train and support a network of people across New Zealand (Local Government Advocates) to assist citizens to deal with their local Council, to build sustainable networks with Councils, and to assist the local government sector to better understand and communicate with communities.
42. The Council Watch website (<http://www.councilwatch.org.nz>) includes articles such as:
- Opinion: Auditor General Must Prosecute Errant Councillors***
*Council Watch spokesperson Jim Candiliotis is calling for four Councillors to be **prosecuted, fined, and sacked** from their positions in the Canterbury Regional Council after an investigation by Auditor General Lyn Provost found that the four individuals had **broken the law** by acting in conflict with their official role.*
- Council Watch petitions Crown Law and ECAN***
(Feb 2010)
Council Watch officers have petitioned the Crown Solicitor and the CEO of Environment Canterbury for all documentation, notes, and advice pertaining to the recent investigation by the Office of the Auditor General into conflicts of interest by four Canterbury Councillors.
- Hide's move to sack Councillors is "curious"***
(Mar 2010)
Local government watchdog Council Watch is questioning the measures taken by Local Government minister Rodney Hide after he gave Canterbury Regional Councillors their marching orders yesterday
43. The Commission does not consider that all of the information presented on the Council Watch website is neutral or objective. The Commission notes that the website includes a variety of information such as lists of local councils and information on legislation including the *New Zealand Bill of Rights Act 1990*, the *Human Rights Act 1993*, the *Local Government Official Information and Meetings Act 1987* and the *Local Government Act 2002*. However, a large proportion of the material on the website is focused on promoting a particular point of view in relation to the actions, decisions and policies of local councils. The Commission considers that this material amounts to "propaganda or cause under the guise of

education”³⁵ and therefore this is not charitable under the advancement of education.

44. The residents associations’ website (www.residents.org.nz) outlines a large range of information of interest to residents’ associations. The website also provides a national database of residents associations, which contains information such as the residents association’s name, region, district, address, telephone and fax numbers, email address, website, contact person’s details and information such as when the association meets.
45. The Commission does not consider that the information on the residents associations’ website is of sufficient educational merit, nor does it amount to a “legitimate targeted attempt at educating others”. The Commission therefore does not consider that the provision of this information will amount to advancing education.
46. In light of the above, the Commission concludes that the Applicant’s purposes outlined in clauses 3.1 and 3.1.3 are not exclusively charitable under the advancement of education.

Other matters beneficial to the community

47. In order for a purpose to qualify as “any other matter beneficial to the community”, the purpose must be beneficial to the community and must be within the spirit and intendment of the purposes set out in the Preamble to the Charitable Uses Act 1601 (the Statute of Elizabeth)³⁶ namely:
 - relief of aged, impotent, and poor people
 - maintenance of sick and maimed soldiers and mariners
 - schools of learning
 - free schools and scholars in universities
 - repair of bridges, ports, havens, causeways, churches, sea banks, and highways
 - education and preferment of orphans
 - relief, stock or maintenance of houses of correction
 - marriage of poor maids
 - supportation, aid and help of young tradesmen, handicraftsmen, and persons decayed
 - relief or redemption of prisoners or captives and
 - aid or ease of any poor inhabitants concerning payment of fifteens, setting out of soldiers and other taxes.

³⁵ *Re Collier (Deceased)* [1998] 1 NZLR 81 at p 91.

³⁶ *Re Jones* [1907] SALR 190, 201; *Williams Trustees v Inland Revenue Commissioners* [1947] AC 447 at p 455; *Scottish Burial Reform and Cremation Society v Glasgow Corporation* [1968] AC 138 at pp 146-48; *Incorporated Council of Law Reporting (QLD) v Federal Commissioner of Taxation* (1971) 125 CLR 659 at pp 667, 669; *Royal National Agricultural and Industrial Association v Chester* (1974) 48 ALJR 304 at pp 305; *New Zealand Society of Accountants v Commissioner of Inland Revenue* [1986] 1 NZLR 147 at p 157; *Re Tennant* [1996] 2 NZLR 633 at p 638.

48. In *Travis Trust v Charities Commission*³⁷, 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.*³⁸

49. Furthermore, not all organisations which have purposes that benefit the community will be charitable. In *Williams Trustees v Inland Revenue Commissioners*³⁹ Lord Simonds wrote:

*Now Sir Samuel Romilly did not mean, and I am certain Lord Macnaughten 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 Macnaughten did not mean that all trust 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 purposes 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.*⁴⁰

50. In *Tudor on Charities*, Jean Warburton, citing the Charity Commission in England and Wales, indicates that a trust promoting good citizenship could fall under the fourth head of charity.⁴¹ Although advancing democracy is not given as an example of “promoting good citizenship”, it is possible that promoting democracy could fall into that broad sub-category. The author however includes the following caveat:

*The acceptance of the wider purpose . . . as charitable does not mean, however, that the usual limitations can be ignored and, for example, any educational material must have educational value and not be propagandist. Similarly, the limitation on political purposes applies.*⁴²

51. In *Positive Action against Pornography v Minister of National Revenue*,⁴³ the Canadian Federal Court of Appeal held that the appellant whose purpose was to ‘develop and distribute educational material concerning the issue of pornography’ was not charitable under “any other matter beneficial to the community”. The appellant’s primary purposes or activities were not neutral, went “well beyond being beneficial to the community in a legal sense” and were “political in the sense understood by this branch of the law”.⁴⁴

³⁷ (2009) 24 NZTC 23,273 (William J).

³⁸ (2009) 24 NZTC 23,273 at pp. 23,276-23,277 at para 20.

³⁹ [1947] 1 All ER 513, [1947] AC 447.

⁴⁰ [1947] 1 All ER 513, [1947] AC 447, 455. (Applied by Kennedy J *In re Cumming* [1951] NZLR. 498.)

⁴¹ *Tudor on Charities*, 9th ed., London, Sweet & Maxwell, 2003 at pp 126-127.

⁴² *Tudor on Charities*, 9th ed., London, Sweet & Maxwell, 2003 at p 127.

⁴³ (1988) 49 DLR (4th) 74.

⁴⁴ *Ibid* at p 83.

52. In *Human Life International in Canada Inc v Minister of National Revenue*,⁴⁵ the Canadian Federal Court of Appeal stated “the existing jurisprudence ... generally supports the proposition that activities primarily designed to sway public opinion on social issues are not charitable activities”⁴⁶ and went on to state:

The same rationale leads me to conclude 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. Courts should not be called upon to make such decisions as it involves granting or denying legitimacy to what are essentially political views: namely what are the proper forms of conduct, though not mandated by present law, to be urged on other members of the community. [...]

It must always be kept in mind that the fourth category of charitable activities ... is those ‘for other purposes beneficial to the community, not falling under any of the preceding heads’. Thus the mere dissemination of opinions that are not found to be for the advancement of education or religion ... must be justified under the fourth category if at all as having some beneficial value that can be ascertained by the Minister and by this Court of appeal. But how can we judge which are the views beneficial to society whose distribution merits the name of charity? ... Any determination by this Court as to whether the propagation of such views is beneficial to the community and thus worthy of temporal support through tax exemption would be essentially a political determination and is not appropriate for a court to make.⁴⁷

53. After considering the Applicant’s purposes stated in clauses 3.1 and 3.1.3 and the activities pursued under these provisions, the Commission does not consider that there is any evidence that democracy is being enhanced in an objective or neutral manner. In addition, as indicated above, the Commission does not consider that the content of the Applicant’s websites is limited to material that has educational value.

Public benefit?

54. As outlined above, the Applicant’s purposes in clauses 3.1 and 3.1.3 relate to the “protection and promotion of democracy and natural justice in New Zealand” and raising “awareness of – and involvement in the democratic process amongst the citizens organisations and communities of New Zealand”. It appears that the Applicant primarily does this through the provision of two websites: www.councilwatch.govt.nz and www.residents.org.nz.
55. The Council Watch website (www.councilwatch.govt.nz) includes a number of opinions on national or local body policies or decisions which appear to be aimed at influencing local body policies or decisions. The Commission therefore considers that a main purpose of the Applicant is to advocate for changes in the policy or decisions of central or local government.

⁴⁵ [1998] 3 FC 202 (CA).

⁴⁶ [1998] 3 FC 202 (CA) at pp 215-216.

⁴⁷ [1998] 3 FC 202 (CA) at pp 217-218.

According to the case law cited under the heading “Political Purposes” above, such a purpose cannot be considered to provide public benefit.

Applicant’s submissions

56. In its response of 14 April 2010, the Applicant has provided the following quote from Hansard:

Throughout the select committee process the single biggest concern raised in relation to the charitable purpose test was the position of advocacy, and whether organisations that undertook advocacy work would continue to be classified as charitable and be able to register. The committee has recommended changes that make it clear that the commission will not prevent an organisation from being able to register if it engages in advocacy as a way to support and undertake its main charitable purpose. [Emphasis added]

57. The Commission notes that sections 5(3) and 5(4) of the *Charities Act 2005* state:

- (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 trustees 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.*

58. In the present case, the Commission considers that the Applicant’s purposes allow for political activities that are not ancillary, secondary, subordinate or incidental to a charitable purpose, but rather are of such importance that they amount to an independent purpose.

Conclusion

59. The Commission concludes that while the purposes set out in clauses 3.1.4 and 3.1.5 may be charitable, the Applicant’s purposes in clauses 3.1 and 3.1.3 are non-charitable purposes, which are not ancillary to the charitable purposes.

Section 61B of the Charitable Trusts Act

60. 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. 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.

61. 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** 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).⁴⁸
62. In *Re Beckbessinger*,⁴⁹ Tipping J held:
- 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.*⁵⁰
63. The Commission considers that although the purposes in clause 3.1.4 and 3.1.5 may be charitable, the purposes in clauses 3.1 and 3.1.3 are not charitable purposes for the reasons given above. If the purposes in clauses 3.1 and 3.1.3 were "blue-pencilled out", the Applicant would be left with a very limited purpose and would not be able to carry on its main activity, which is the provision of the websites www.councilwatch.org.nz and www.residents.org.nz. The Commission therefore concludes that the Applicant does not have substantially charitable purposes.
64. The Commission has analysed the wording of the Applicant's purposes, surrounding context, and activities (as directed by section 18 of the *Charities Act 2005*). The Commission does not consider that there is evidence of "a substantially charitable mind" with an intention to create a charitable trust, but which was not conveyed by the drafting. The Commission does not consider that the purposes indicate an intention to create a substantially charitable trust.
65. On these bases, the Commission considers that the Applicant's purposes are not substantially charitable and therefore section 61B of the *Charitable Trusts Act 1957* cannot operate to validate the trust.

Charities Commission's determination

66. The finding of the Commission is that the Applicant has failed to meet an essential requirement for registration as a charitable entity in that the Applicant is not a trust of a kind in relation to which an amount of income is derived by the trustees in trust for charitable purposes as required by section 13(1)(a) of the *Charities Act 2005*.

⁴⁸ *Re Beckbessinger* [1993] 2 NZLR 362 at p 373.

⁴⁹ [1993] 2 NZLR 36.

⁵⁰ *Re Beckbessinger* [1993] 2 NZLR 362 at p 376.

For the above reasons, the Commission declines the Applicant's application for registration as a charitable entity.

Signed for and on behalf of the Charities Commission



.....
Trevor Garrett
Chief Executive



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Date