

## Registration Decision: Exodus Ministries Trust Board

### The facts

1. Exodus Ministries Trust Board (the Applicant) was incorporated under the *Charitable Trusts Act 1957* on the 4 December 1991.
2. The Applicant applied to the Charities Commission (the Commission) for registration as a charitable entity on 15 July 2008.
3. The Applicant's purposes are stated in clause 1 of the trust deed:
  - 1(a) *To promote the teaching that the Christian Church both Catholic and Protestant has traditionally held that God gives to human kind the gift of sex for procreation and the expression of love and pleasure in the context of a heterosexual and monogamous marriage and that deviations from this including homosexuality are morally wrong;*
  - (b) *To counsel and assist homosexuals and others with sexual problems in order that they may find healing and release into wholeness as desired by God and revealed in the Bible;*
  - (c) *To make information available to homosexuals, the Church and the whole community that they can be released from homosexuality and to teach and present the view that a homosexual can change from homosexuality to heterosexuality and that he or she is not born homosexual;*
  - (d) *To operate and conduct seminars, study groups, discussion groups, counselling and other forms of educational and reconciliation methods;*
  - (e) *To do any such thing or perform any such act as is conducive to or necessary for or will enhance the fulfilment of the object purposes and character of this Trust.*
4. On 17 August 2009, the Commission sent a letter to the Applicant requesting further information about its activities.
5. The Applicant's solicitor responded by letter dated 28 January 2010 stating:
  - *Exodus is a Christian organisation that offers non-judgemental support and advice to anyone wishing to leave the homosexual lifestyle, or trying to decide whether to do so. As such it provides counselling to anyone who contacts Exodus, as well as support and encouragement.*
  - *Exodus also plays an educational role, which generally involves Board members speaking in churches on the reasons for homosexuality and the challenges facing anyone wishing to leave a homosexual lifestyle.*
  - *We believe the activities (and purposes) of Exodus are exclusively charitable, as we understand that no-one receives any pecuniary benefit of any kind from its activities which are religious, educational and beneficial to the community.*

6. The Commission considered the information provided and on 17 March 2010, sent the Applicant a notice that may lead to a decline on the basis that the Applicant's purposes were not exclusively charitable and the Commission was unable to determine whether the Applicant provided a public benefit.
7. The Applicant's solicitor responded by letter dated the 28 May 2010 stating:
- *One of the conclusions in your letter is that in order to be charitable under the advancement of education, the information presented must be neutral, not slanted or selective information presented in support of a preconceived point of view. As authority for this your letter cited re Bushnell and re Collier but with respect, we do not think that either case is all on fours with our clients situation.*
  - *In Re Collier, Hammond J's did not view Mrs Collier's Trust as charitable but, as we read his judgement, this was basically because it was political in nature.*
  - *The will in Re Bushnell set up funds to be used for the advancement and propagation of the "socialist application" of medicine to health, to show that the full advantage of the socialist application could only be enjoyed in a socialist state. One of the trusts required the teachers or lecturers to be persons of socialist principles.*
  - *Not surprising the court held that the trust was essentially political rather than charitable.*
  - *Our client is not a political organisation and we think it is a stretch to apply Collier and Bushnell (both based on quite unusual facts where the people involved were politically motivated) to Exodus, an organisation whose members (some of them with homosexual backgrounds themselves) try to work alongside homosexual people.*
  - *Certainly our client has views on homosexuality, but it seems to us that any organisation forms what your letter refers to as a "preconceived point of view" before presenting information on any topic. If this is the requirement for charitable trusts formed (at least partly) for the advancement of education, then it is doubtful whether any would qualify for registration.*
  - *An interesting comparison can be made with the registered charity Rainbow Youth Inc, which is very active in New Zealand schools. Under clause 4(d) of its Constitution, Rainbow Youth Inc's objects include "actively increasing the self-esteem of Gay, Lesbian, Bisexual, Transgender, Takataapui and Fa'afafine youth, their families, and whanau".*
  - *Clearly any education provided by Rainbow Youth Inc. would be from a preconceived point of view, ie that homosexuality and other forms of sexuality are perfectly normal for some people. We doubt that anyone would genuinely expect it to present any information to the contrary.*
  - *Rainbow Youth Inc has been a registered charitable entity for 2 years already however. We fully support its right to registration but it seems to us that Exodus, which does not have a preconceived point of view any more than Rainbow Youth Inc, is equally entitled to be registered.*
  - *Your letter suggests that an association can be connected with the advancement of religion without being an association for the advancement of religion.*

- *Having read some of Exodus' literature, which we enclose, it seems to us however that it is highly evangelical in its nature. It is certainly the hope of our client that a number of people will become Christians through their association with Exodus, and that it will help many others who might otherwise gradually lose their Christian faith.*
- *Your letter expresses concern at any conversion therapies or programmes intended to change a person's sexual orientation from homosexual to heterosexual.*
- *We understand however that our client does not believe in what you refer to as conversion therapy and is not sure why you thought that it did.*
- *The American Psychological Association website that you have referred to, suggests that biology plays a significant role in a person's sexuality. Our client can cite other eminent authorities that say the opposite. It is not for us as mere lawyers to say who is right, but we note that even the American Psychological Association website says that "sexual orientation is most likely a result of the complex interaction of environment, cognitive and biological factors. In most people, sexual orientation is shaped at an early age."*
- *Our client believes that every gay person is different but that in some cases, homosexual behaviour is something that has been learned (probably unintentionally), or "shaped at an early age" (to use the American Psychologist Association's term) by a variety of experiences or relationships.*
- *We think it is impossible to decide who is right of this issue (partly because no one has views that are completely neutral) but we certainly think it would be unfair to refuse to register Exodus on the grounds that it is involved in conversion therapies or programmes, when this is not the case.*
- *In any event we believe our client also qualifies under section 5(1) of the Charities Act on the grounds that its charitable purposes also relate to other matters beneficial to the community.*
- *Our client believes that the support, encouragement and counselling that it provides to homosexuals and others can only benefit members of the community, often at very difficult times in their lives.*

### **The issue**

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:
  - (a) whether the Applicant's purposes fall within the definition of charitable purposes in section 5(1) of the Act;
  - (b) and whether the Applicant provides 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.<sup>1</sup> 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.

## **Charities Commission's analysis**

13. The Commission considers that purpose outlined in clause 1(e) is ancillary and clause 1(d) is a power.
14. The remaining purposes, as set out in clauses 1(a) to 1(c) have been considered under the advancement of religion and other matters beneficial to the community. The purpose in clause 1(b) has also been considered under the relief of poverty and the purposes in clauses 1(a) and 1(c) have been considered under the advancement of education.

## Relief of poverty, aged and the impotent

15. To be charitable under the relief of poverty, a purpose must:
  - be directed at people who are poor, in need, aged or suffering genuine hardship, and
  - provide relief.
16. The Applicant's purposes as outlined in clause 1 do not show an intention to relieve financial poverty or provide relief to the aged.
17. The Courts have held that gifts for the relief of persons who suffer some disability or sickness are charitable. This includes gifts for the physically disabled and the mentally afflicted.<sup>2</sup> The Commission considers that the provision of counselling services may come within the relief of the impotent as being analogous to gifts for the mentally afflicted.

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

<sup>2</sup> *Diocesan Trustees of the Church of England in Western Australia v Solicitor-General* (1909) 9 CLR 757; *Taylor v Taylor* (1910) 10 CLR 218; *Re Laidlaw Foundation* (1984) 13 DLR (4<sup>th</sup>) 491.

18. The Applicant's purpose outlined in clause 1(b) is:

*To counsel and assist homosexuals and others with sexual problems in order that they may find healing and release into wholeness as desired by God and revealed in the Bible.*

19. The Applicant's purpose in clause 1(a) makes it clear that the Applicant is promoting "the teaching that the Christian Church both Catholic and Protestant has traditionally held that God gives to human kind the gift of sex for procreation and the expression of love and pleasure in the context of a heterosexual and monogamous marriage and that deviations from this including homosexuality are **morally wrong**"

20. The Applicant's March 2010 newsletter (provided to the Commission with the Applicant's solicitor's letter of 28 May 2010) states that the American Psychiatric Association removed homosexuality from its list of mental disorders in 1973.<sup>3</sup>

21. In addition, it is not clear that providing counselling that seeks to promote a particular point of view (for example that homosexuality is morally wrong) will necessarily provide "relief" to "homosexuals and others with sexual problems". In this regard, the Commission notes that the American Psychiatric Association website states:

*As a general principle, a therapist should not determine the goal of treatment either coercively or through subtle influence. Psychotherapeutic modalities to convert or "repair" homosexuality are based on developmental theories whose scientific validity is questionable. Furthermore, anecdotal reports of "cures" are counterbalanced by anecdotal claims of psychological harm. In the last four decades, "reparative" therapists have not produced any rigorous scientific research to substantiate their claims of cure. Until there is such research available, APA recommends that ethical practitioners refrain from attempts to change individuals' sexual orientation, keeping in mind the medical dictum to First, do no harm.<sup>4</sup>*

22. The American Psychological Association website states:

*All major national mental health organizations have officially expressed concerns about therapies promoted to modify sexual orientation. To date, there has been no scientifically adequate research to show that therapy aimed at changing sexual orientation (sometimes called reparative or conversion therapy) is safe or effective. Furthermore, it seems likely that the promotion of change therapies reinforces stereotypes and contributes to a negative climate for lesbian, gay, and bisexual persons. This appears to be especially likely for lesbian, gay, and bisexual individuals who grow up in more conservative religious settings.<sup>5</sup>*

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<sup>3</sup> The Board of Trustees of the American Psychiatric Association (APA) removed homosexuality from the Diagnostic and Statistical Manual of Mental Disorders (DSM) in 1973 after reviewing evidence that it was not a mental disorder. In 1987 ego-dystonic homosexuality was not included in the revised third edition of DSM (DSM-III-R) after a similar review.

<sup>4</sup> <http://www.psych.org/Departments/EDU/Library/APAOfficialDocumentsandRelated/PositionStatements/200001a.aspx>, last accessed on the 19 July 2010.

<sup>5</sup> <http://www.apa.org/topics/sexuality/orientation.aspx#>, last accessed on the 19 July 2010.

23. The American Medical Association website states:

*Our AMA: (a) believes that the physician's nonjudgmental recognition of sexual orientation and behavior enhances the ability to render optimal patient care in health as well as in illness.*

*... and (c) opposes, the use of "reparative" or "conversion" therapy that is based upon the assumption that homosexuality per se is a mental disorder or based upon the a priori assumption that the patient should change his/her homosexual orientation.<sup>6</sup>*

24. In light of the above, the Commission does not consider that the provision of counselling in this context is charitable under the relief of poverty.

#### Advancement of education

25. In order for a purpose to advance education, it must provide some form of education and ensure that learning is advanced. However, education does not include advertisements for particular goods or services, the study of subjects that have no educational value, or the promotion of a particular point of view.<sup>7</sup>

26. In *Re Collier (deceased)*,<sup>8</sup> 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:

*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.<sup>9</sup>*

27. In *Vancouver Society of Immigrant and Visible Minority Women v Minister of National Revenue*,<sup>10</sup> 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"<sup>11</sup>. However, Iacobucci J goes 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<sup>12</sup>*

<sup>6</sup> <http://www.ama-assn.org/ama/pub/about-ama/our-people/member-groups-sections/glb-t-advisory-committee/ama-policy-regarding-sexual-orientation.shtm>, last accessed 19 July 2010.

<sup>7</sup> *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.

<sup>8</sup> [1998] 1 NZLR 81.

<sup>9</sup> [1998] 1 NZLR 81 at 91-92.

<sup>10</sup> (1999) 169 D.L.R. (4<sup>th</sup>) 34.

<sup>11</sup> (1999) 169 D.L.R. (4<sup>th</sup>) 34 at 113.

<sup>12</sup> (1999) 169 D.L.R. (4<sup>th</sup>) 34 at 114.

28. In *Re Bushnell (deceased)*,<sup>13</sup> the court held that 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]”.<sup>14</sup>
29. Moreover, in *Positive Action Against Pornography v Minister of National Revenue*<sup>15</sup> the appellant’s purpose was to “develop and distribute educational material concerning the issue of pornography”. The appellant did this through the production of an information kit, which it distributed to the public. The Canadian Federal Court of Appeal held that the appellant was not charitable because “there is simply the presentation to the public of selected items of information and opinion on the subject of pornography. That, in my view, cannot be regarded as educational in the sense understood by this branch of the law.”<sup>16</sup>
30. It appears from the Applicant’s purposes and the information provided by the Applicant that it has a main purpose of promoting the teaching that homosexuality is morally wrong, that people can change from homosexuality to heterosexuality, and that people are not born homosexual.
31. In light of the above case law, the Commission considers that the information provided by the Applicant is not neutral or objective. The Commission therefore considers that the purposes in clauses 1(a) and 1(c) amount to “propaganda or cause under the guise of education” which is not charitable under the advancement of education.
32. The Applicant’s solicitor has submitted that the Applicant is not analogous to *Re Collier*<sup>17</sup> or *Re Bushnell (deceased)*<sup>18</sup> as these cases involved political purposes and the Applicant in this case is not a political organisation.
33. The Commission considers that the principles outlined in *Re Collier* and *Re Bushnell* are applicable to the advancement of education generally and are not limited to situations which involve political purposes.

#### Advancement of religion

34. To advance religion, a purpose must:
- be for the benefit of a religion; and
  - ensure a religious faith is passed on to others.

<sup>13</sup> [1975] 1 All ER 721 at 729.

<sup>14</sup> *Re Bushnell (deceased)* [1975] 1 All ER 721 at 729.

<sup>15</sup> (1988) 49 DLR (4<sup>th</sup>) 74.

<sup>16</sup> (1988) 49 DLR (4<sup>th</sup>) 74 at 80.

<sup>17</sup> [1998] 1 NZLR 81.

<sup>18</sup> [1975] 1 All ER 721.

35. The relevant indicia of a religion was described by the High Court of Australia in *Church of New Faith v Commissioner of Pay-Roll Tax*:<sup>19</sup>

*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.*

36. To "advance" religion, the faith must be passed on to others by promoting it, spreading its message or taking positive steps to sustain and increase the religious belief.
37. Not all purposes that relate to religion will "advance religion". In *Oxford Group v Inland Revenue Commissioners*<sup>20</sup>, Cohen L.J states "I think an institution could be connected with the advancement of religion without being itself an institution for the advancement of religion".<sup>21</sup>
38. In addition, it has been held that "Christian purposes" are not confined to charitable purposes<sup>22</sup>, and in *Re Lawlor*,<sup>23</sup> it was held that a gift to establish a Catholic daily newspaper was not charitable. In coming to this conclusion, Dixon J states:

*In order to be charitable the purposes themselves must be religious; it is not enough that an activity or pursuit in itself secular is actuated or inspired by a religious motive or injunction; **the purpose must involve the spread or strengthening of spiritual teaching within a wide sense, the maintenance of the doctrines upon which it rests, the observances that promote and manifest it** ... whether defined widely or narrowly, the purposes must be directly and immediately religious. It is not enough that they arise out of or have a connection with a faith, church, or a denomination, or that they are considered to have a tendency beneficial to religion, or to a particular form of religion.<sup>24</sup> [Emphasis added]*

<sup>19</sup> (1983) 154 CLR 120 at 126, which was accepted and applied in New Zealand in *Centrepont Community Growth Trust v Commissioner of Inland Revenue* [1985] 1 NZLR 673 at 695-697 per Tompkins J.

<sup>20</sup> [1949] 2 All ER 537.

<sup>21</sup> [1949] 2 All ER 537 at 544

<sup>22</sup> *McCracken v Attorney General* [1995] 1 VR 67 at 76 per Phillips J.

<sup>23</sup> (1934) 51 CLR 1.

<sup>24</sup> (1934) 51 CLR 1 at 32.



39. Guidance on religion and public benefit produced by the Charity Commission for England and Wales states:

*Religion may be advanced either by promoting the totality of the religious and spiritual teachings of a religious body or by particular reference to some of its tenets or to the religious teachings of a particular individual or group. However, the promotion of a single or limited number of tenets cannot be used as a cover for a purpose to advance a particular non-charitable (particularly a political) agenda of any individual or group.*<sup>25</sup>

40. The Commission considers that the purposes of the Applicant are broad enough to allow the Applicant to engage in activities that would not advance religion. The purposes outlined in clauses 1(b) to 1(c), are not limited to advancing a religious faith but are focused on undertaking activities in relation to homosexuality and other sexual problems.

41. In his letter of 20 January 2009, the Applicant's solicitor states:

*Having read some of Exodus' literature, which we enclose, it seems to us however that it is highly evangelical in its nature. It is certainly the hope of our client that a number of people will become Christians through their association with Exodus, and that it will help many others who might otherwise gradually lose their Christian faith.*

42. While the Applicant may be undertaking its purposes in a Christian context, the Commission does not consider that the purposes in clauses 1(a), (b), and (c) involve "the spread or strengthening of spiritual teaching within a wide sense, the maintenance of the doctrines upon which it rests, or the observances that promote and manifest it". The Commission therefore concludes that these purposes will not amount to the advancement of religion.

#### Other matters beneficial to the community

43. In order for a purpose to be charitable as "any other matter beneficial to the community", the purpose must be beneficial to the community and substantially similar to the spirit and intent of the purposes listed in the Preamble to the *Charitable Uses Act 1601* (the Statute of Elizabeth) or very similar to a charitable purpose as decided by the Courts.<sup>26</sup>

<sup>25</sup> UK Charities Commission publication "Analysis of the Law Underpinning The Advancement of Religion for the Public Benefit", <http://www.charity-commission.gov.uk/library/guidance/lawrel1208.pdf>, last accessed 19 July 2010.

<sup>26</sup> *Re Jones* [1907] SALR 190 at 201; *Williams Trustees v Inland Revenue Commissioners* [1947] AC 447 at 455; *Scottish Burial Reform and Cremation Society v Glasgow Corporation* [1968] AC 138 at 146-48; *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.

44. The purposes set out in the Statute of Elizabeth are:<sup>27</sup>
- 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.<sup>28</sup>
45. The Applicant's solicitor has submitted that the Applicant is charitable under "any other matter beneficial to the community" because "the support, encouragement and counselling that it provides to homosexuals and others can only benefit members of the community, often at very difficult times in their lives".
46. In *Centrepont Community Trust v Commissioner of Inland Revenue*,<sup>29</sup> Tompkins J held that the trust was providing medical and psychological care for persons needing it and states:

*As Chilwell J observed in Auckland Medical Aid Trust v Commissioner of Inland Revenue [1979] 1 NZLR 382, 389, 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. He referred to Re Resch's Will Trusts [1969] 1 AC 514, and in particular the observation of Lord Wilberforce delivering the judgement of the Privy Council at p 540:*

*"...the promotion of medical care for the sick is, in modern times, accepted as a public benefit suitable to attract the privileges given to charitable institutions".*

*Chilwell J concluded his review of the authorities by holding:*

*"Hospitals not run for private commercial gain are charitable because they provide for the "relief of the sick". It is my judgement that "relief of the sick" is today used in the broad sense of those requiring medical treatment" ([1979] 382, 390)*

<sup>27</sup> Charitable Uses Act 1601 43 Elizabeth I, c. 4.

<sup>28</sup> *Re Jones* [1907] SALR 190 at 201; *Williams Trustees v Inland Revenue Commissioners* [1947] AC 447 at 455; *Scottish Burial Reform and Cremation Society v Glasgow Corporation* [1968] AC 138 at 146-48; *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.

<sup>29</sup> [1985] 1 NZLR 673.

*This applies in my view just as much to treatment by psychological healing as to treatment by other orthodox methods. In Re Osmund [1944] Ch 206, 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.*<sup>30</sup>

47. Accordingly, the Commission considers that the provision of psychological counselling may be charitable under "any other matters beneficial to the community" if it provides a public benefit. However, in the present case, the Commission considers that the provision of counselling in support of the Applicant's purposes is not charitable for the reasons outlined above under the "relief of poverty" heading.

### Public Benefit

48. In addition to falling within one of the charitable purposes listed in section 5(1) of the Act, a purpose must provide a public benefit, that is, there must be an identifiable benefit assessed in the light of modern conditions and it must be for the general public or a sufficient section of the public.
49. The promotion of conduct that is inconsistent with the prevailing public policy will not be for the benefit of the public.<sup>31</sup>
50. Programmes aimed at helping people to change their sexual orientation have been and continue to be the subject of controversial debate.
51. As outlined above, the Commission notes that homosexuality is no longer classified as a mental disorder. Moreover, the Commission notes that the American Psychiatric Association considers that sexual orientation is not a choice and they have concerns about "conversion therapies" and the potential harm to patients that these can cause.<sup>32</sup> Thus, the American Psychiatric Association has issued a position statement stating that they oppose "any psychiatric treatment such as reparative or conversion therapy which is based upon the assumption that homosexuality per se is a mental disorder or based upon the priori assumption that a patient should change his/her sexual homosexual orientation."<sup>33</sup>
52. The American Psychological Association website states:

*Is Sexual Orientation a Choice?*

*No, human beings cannot choose to be either gay or straight. For most people, sexual orientation emerges in early adolescence without any prior sexual experience. Although we can choose whether to act on our feelings, psychologists do not consider sexual orientation to be a conscious choice that can be voluntarily changed.*

<sup>30</sup> [1985] 1 NZLR 673 at 698-699

<sup>31</sup> Gino Dal Pont, *Charity Law in Australia and New Zealand*, Oxford, Oxford University Press, 2000 at 150, 167.

<sup>32</sup> <http://www.apahelpcenter.org/articles/article.php?id=31>, last accessed 19 July 2010.

<sup>33</sup> <http://www.psych.org/Departments/EDU/Library/APAOfficialDocumentsandRelated/PositionStatements/200001.aspx>, last accessed 19 July 2010.

### *Can Therapy Change Sexual Orientation?*

*No; even though most homosexuals live successful, happy lives, some homosexual or bisexual people may seek to change their sexual orientation through therapy, often coerced by family members or religious groups to try and do so. The reality is that homosexuality is not an illness. It does not require treatment and is not changeable. However, not all gay, lesbian, and bisexual people who seek assistance from a mental health professional want to change their sexual orientation. Gay, lesbian, and bisexual people may seek psychological help with the coming out process or for strategies to deal with prejudice, but most go into therapy for the same reasons and life issues that bring straight people to mental health professionals.*

### *What About So-Called "Conversion Therapies"?*

*Some therapists who undertake so-called conversion therapy report that they have been able to change their clients' sexual orientation from homosexual to heterosexual. Close scrutiny of these reports, however, show several factors that cast doubt on their claims. For example, many of these claims come from organizations with an ideological perspective that condemns homosexuality. Furthermore, their claims are poorly documented; for example, treatment outcome is not followed and reported over time, as would be the standard to test the validity of any mental health intervention.*

***The American Psychological Association is concerned about such therapies and their potential harm to patients. In 1997, the Association's Council of Representatives passed a resolution reaffirming psychology's opposition to homophobia in treatment and spelling out a client's right to unbiased treatment and self-determination. Any person who enters into therapy to deal with issues of sexual orientation has a right to expect that such therapy will take place in a professionally neutral environment, without any social bias. [Emphasis added]***

### *Is Homosexuality a Mental Illness or Emotional Problem?*

*No. Psychologists, psychiatrists, and other mental health professionals agree that homosexuality is not an illness, a mental disorder, or an emotional problem. More than 35 years of objective, well-designed scientific research has shown that homosexuality, in and itself, is not associated with mental disorders or emotional or social problems. Homosexuality was once thought to be a mental illness because mental health professionals and society had biased information.*

*In the past, the studies of gay, lesbian, and bisexual people involved only those in therapy, thus biasing the resulting conclusions. When researchers examined data about such people who were not in therapy, the idea that homosexuality was a mental illness was quickly found to be untrue.*

*In 1973 the American Psychiatric Association confirmed the importance of the new, better-designed research and removed homosexuality from the official manual that lists mental and emotional disorders. Two years later, the American Psychological Association passed a resolution supporting this removal.*

*For more than 25 years, both associations have urged all mental health professionals to help dispel the stigma of mental illness that some people still associate with homosexual orientation.*

53. The above view is shared by many other organisations including the American Academy of Pediatrics, the American Medical Association, The American Counselling Association, and the National Association of Social Workers.<sup>34</sup>

<sup>34</sup>

<http://www.psych.org/Departments/EDU/Library/APAOfficialDocumentsandRelated/PositionStatements/200001.aspx>, last accessed 19 July 2010. See also <http://www.apa.org/pi/lgbt/resources/just-the-facts.aspx>, last accessed 19 July 2010.

54. In contrast to this, the Applicant has provided a copy of their March 2010 newsletter, which outlines research supporting the view that sexual orientation change is not only possible but sustainable.
55. In New Zealand, the *Homosexual Law Reform Act 1986* decriminalised sexual relations between men aged 16 and over and the *Human Rights Act 1993* makes sexual orientation a prohibited ground of discrimination. Moreover, New Zealand now recognises civil unions between members of the same sex.<sup>35</sup>
56. In light of the above, the Commission considers that it is not able to determine whether the Applicant will, or will not, provide a benefit to the public that will outweigh any harm caused by the Applicant's purposes. Accordingly, the Commission is unable to determine whether the Applicant's purposes will provide a public benefit.

#### Applicant's submissions

57. The Applicant's solicitor has submitted that the Applicant does not believe in "conversion therapies" and that it would be unfair to refuse to register the Applicant on the grounds that it is involved in conversion therapies or programmes when this is not the case.
58. The Commission has based its conclusion that the Applicant's purposes are non-charitable on the Applicant's purposes stated in clauses 1(a) to (c) and material provided by the Applicant and its solicitor. These show that the Applicant has a main purpose of promoting a particular point of view – that the teaching that homosexuality is morally wrong, that people can change from homosexuality to heterosexuality, and that people are not born homosexual.
59. The Applicant's solicitor has submitted that the Applicant is equally entitled to be registered because the Commission has registered an organisation which includes among its objects "actively increasing the self-esteem of Gay, Lesbian, Bisexual, Transgender, Takataapui and Fa'afafine youth, their families, and whanau".
60. The Commission takes a case-by-case approach to each application for registration as a charitable entity. The Commission considers the specific wording of each Applicant's rules document and has regard to the current and future activities of each applicant as required by section 18(3)(a) of the Act. The fact that other entities have been registered by the Commission has no bearing on the Applicant's eligibility for registration.

#### Conclusion

61. The Commission concludes that the Applicant's purposes outlined in clauses 1(a), (b), and (c) are non-charitable. In addition, it is unclear whether the Applicant's purposes will provide a public benefit.

## Section 61B of the Charitable Trusts Act

62. 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.
63. 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).<sup>36</sup>
64. In *Re Beckbessinger*,<sup>37</sup> 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.*<sup>38</sup>
65. The Commission considers that the purposes in clause 1(a) to 1(c) are not charitable purposes for the reasons given above. If these purposes were “blue-pencilled out”, the Applicant would be left with no substantial purposes. 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.

<sup>36</sup> *Re Beckbessinger* [1993] 2 NZLR 362 at 373.

<sup>37</sup> [1993] 2 NZLR 36.

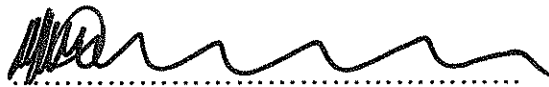
<sup>38</sup> *Re Beckbessinger* [1993] 2 NZLR 362 at 376.

**Charities Commission's determination**

66. The Commission concludes 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*.

**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

18/8/10  
Date