

Please note:

The Foundation for Anti-Aging Research appealed the Charities Registration Board's decision (shown below). The appeal was upheld in the High Court, and the Foundation was registered on the Charities Register on 30 September 2016. The decision of the High Court is available here:

<https://charities.govt.nz/charities-in-new-zealand/legal-decisions/view-the-decisions/view/the-foundation-for-anti-aging-research-and-the-foundation-for-reversal-of-solid-state-hypothermia-v-charities-registration-board>

Registration decision: The Foundation for Anti-Aging Research (FOU43040)

Executive summary

1. The Charities Registration Board (**the Board**) has determined to decline the application for registration of the Foundation for Anti-Aging Research (**the Foundation**).¹
2. The Foundation has applied for registration on the basis that its purposes are charitable under the advancement of education, relief of the aged and impotent and the fourth head of charity (“any other purposes beneficial to the community”): by analogy with cases on protecting human life, promoting human health and relief of human suffering and distress; and under an alternative “presumption of charitable status” test.
3. The Board has determined that the Foundation is not qualified to be registered as a charitable entity under the *Charities Act 2005* (**the Act**).² The Board considers that the Foundation has an independent (non-ancillary) purpose that is not charitable at law, contrary to the registration requirements set out in section 13 of the Act and case law. We consider that the Foundation pursues an independent purpose to fund cryonics research (research into the cryopreservation and reanimation of people).³ This purpose does not advance education and or any other purpose that is charitable at law. Further, we are also not satisfied that the Foundation’s purposes provide sufficient public benefit, which is a requirement for charitable status.
4. The Board’s reasons appear below, organised under the following headings:
 - A. Background
 - B. Legal framework for registration
 - C. Charities Registration Board’s analysis
 - C.1 The Foundation’s purpose to fund cryonics research
 - C.2 The Foundation’s purposes are not charitable
 - D. Section 5(3) of the Act

¹ The decision is made under section 19 of the *Charities Act 2005*.

² The essential requirements for registration are set out in section 13 of the *Charities Act 2005*.

³ Refer paragraph 85 of the Affidavit of Gregory Michael Fahy dated 1 May 2013 which states that cryonics has “as its primary goal the cryopreservation and future revival of a person after a terminal illness or a presently-fatal accident, in the hope that medical science will be able to revive that person in the future, when life extension and medical technologies are sufficient to restore that person to health”.

- E. Other submissions made by the Foundation
- F. Charities Registration Board's determination

A. Background

- 5. The Foundation was established by Deed executed on 20 September 1999. It was incorporated under the *Charitable Trusts Act 1957 (CTA)* on 27 October 1999. On 16 December 2011 the Foundation applied for registration under the Act. Since applying, the Foundation has amended its Trust Deed and the amended Trust Deed was approved by the Registrar of Incorporated Societies on 6 July 2012. This decision is based on the amended Trust Deed.
- 6. The current Trustees of the Foundation are Derek Smith and Mt. Wesley Trustees Limited.⁴
- 7. The Foundation's purposes are set out in Clause 3 of the amended Trust Deed. This clause states:

3. Purposes

- (1) Subject to this clause the purposes of the trust ("the Purposes") shall be all purposes which are charitable under the laws of New Zealand.
- (2) Subject to this clause, the aims of the Foundation shall be:
 - (a) to establish and fund the operation of a non-profit making hospital ("the Hospital") to treat ageing human beings with therapies that are substantiated by peer-review published scientific studies; and
 - (b) to provide for funding of scientific research at the Hospital aimed at discovering medical therapies that will alleviate and eliminate degenerative diseases in human beings.
 - (c) to provide other funding of scientific research projects outside the hospital for the purpose of discovering medical therapies that will alleviate and eliminate degenerative disease in human beings
 - (d) to establish and support a facility to accept anatomical specimens for the purpose of conducting research aimed at reversing disease, senescence, traumatic injury and de-animation.

⁴ Mt. Wesley Trustees Limited is an incorporated New Zealand company, Company number 964039.

- (e) to support other non-profit organisations involved in conducting research aimed at reversing disease, senescence, traumatic injury and de-animation.
- (3) [powers clause]
- (4) Notwithstanding the forgoing, the Purpose shall exclude such purposes as are not charitable purposes as defined by section 501 (c) 3 of the Internal Revenue Code 1986 of the United States of America, and the Foundation shall at no time engage in any activity which is prohibited to a corporation under that section 501 (c) 3 of the Internal Revenue Code 1986 of the United States of America.

Correspondence on the Foundation's application for registration

8. On 9 May 2012, the Charities Commission⁵ wrote to the Foundation notifying that it did not meet registration requirements because of a jurisdiction issue and because it had an insufficient number of independent trustees. The letter also requested information about the Foundation's activities under section 18 of the Act. After considering submissions from the Foundation the jurisdiction issue is no longer of concern. The Foundation has also made changes to its Trust Deed and appointed further trustees so that the trustee issue has now been resolved.
9. On 28 June 2012, the Foundation (via its solicitor) provided a response to the Charities Commission's letter. The Foundation⁶:
 - (a) submitted that the correct test for registration under the Act is whether the Foundation's purposes are charitable. Activities should only be considered where the constituting document does not indicate the entity's purposes with clarity. The enquiry into activities under section 18 of the Act is directed to the question of whether the entity's activities are carried out in furtherance of its purposes;⁷ and
 - (b) further submitted that all of the Foundations activities are directed towards furthering its stated purposes.⁸ Clause 4(1) of the Trust Deed⁹ makes it clear that all income and property of the Foundation will be applied solely towards its objects in clause 3.

⁵ On 1 July 2012, the Charities Commission was disestablished (under section 9 of the *Charities Amendment Act (No 2) 2012*) and its functions and powers moved to the Department of Internal Affairs.

⁶ The Foundation also made other submissions. Submissions relating to the jurisdictional issue referred to in paragraph 7 above will not be discussed in this decision paper as this matter has now been resolved. The Foundation's other submissions are discussed in section E below.

⁷ Refer Susan Barker's letter dated 28 June 2012 at paragraphs 8 to 16.

⁸ Refer Susan Barker's letter dated 28 June 2012 at paragraph 31.

⁹ Clause 4(1) provides "The income and property of the Foundation whencesoever derived shall be applied solely towards to promotion of the objects of this Foundation as set forth at clause 3 above, and no portion thereof shall be paid or transferred directly or indirectly, by way of dividend,

10. The Foundation's response also included the following information about its activities:

- (a) There has been a delay in the Foundation initiating activities due to illness and a long wait in receiving donations that had been pledged. Because of this delay the hospital in clause 3(2)(a) has not been established and the Foundation has not been able to carry out activities under clause 3(2)(c). The Foundation has now received most of the pledge donations and expects to commence activities shortly.
- (b) The hospital project (refer clause 3(2)(a)) will not be pursued.
- (c) The Foundation intends to focus on activities under clause 3(2)(e) "to support other non-profit organisations involved in conducting research aimed at reversing disease, senescence, traumatic injury and de-animation.
- (d) In order to further the purpose in clause 3(2)(e) the Foundation proposes to make substantial grants in 2012 and 2013 to the Charitable Medical Research Foundation (**CMRF**), a registered Liechtenstein charity.¹⁰ The Trustees of the Foundation consider that the supporting the work of the CMRF is the best means to further the Foundation's purposes at present.¹¹
- (e) The core purpose of the CMRF¹² is to provide funding of scientific projects designed to discover cures for aging-related

bonus or otherwise howsoever by way of profit, to any Trustee or any member of the Committee or any sub-committee".

¹⁰ Refer Susan Barker's letter dated 28 June 2012 at paragraph 25 and the extract from the Liechtenstein Register attached to that letter.

¹¹ Refer Susan Barker's letter dated 28 June 2012 at paragraph 29.

¹² Refer Susan Barker's letter dated 28 June 2012 at paragraph 26 and article 3(2) of the Charitable Medical Research Foundation's ("CMRF") statutes attached to that letter. Article 3 of The Statutes of the CMRF provides that its objects are:

(1) The foundation is established for charitable purposes only.

(2) The charitable activities of the Foundation shall be to financially support, promote and encourage research and study in the field of gerontology as it relates to extending the healthy human life span and cryobiology as it relates to preserving human beings who have died in such a way that restoration to life in the future has some chances of success.

The core purpose of the foundation is to provide for the perpetual funding of scientific projects designed to:

- discover cures for aging-related diseases that could lead to an alleviation or elimination of the suffering of human beings,*
- perfect the suspended animation process so that humans who die prematurely have a reasonable chance of being revived when further medical technology improves;*
- reanimate those individuals who have been placed into a state of cryonic suspension even to the point of using time-travel machines to rescue those have not been properly cryonically suspended or whose cause of death prevented cryonic suspension from occurring at all."*

[note references in this quote to the Foundation refer to the CMRF rather than the Foundation applying for charitable status].

diseases, perfect the suspended animation process for humans and reanimate individuals who have been placed in a state of cryonic suspension. In order to further its purposes, the CMRF disburses income to scientific research endeavours.¹³ Until recently it made an annual donation to the Stasis Foundation (in the United States) which is involved in designing the “Timeship facility”. This facility, when completed will cryopreserve humans with the purpose of bringing them back to life if and when advances are made in the reanimation process. The facility will also carry out work into the cryopreservation of human organs and DNA from endangered species.

11. The Department of Internal Affairs, Charities Services (**Charities Services**) wrote to the Foundation on 13 July 2012 to notify that the application may be declined because the Foundation did not have exclusively charitable purposes. This letter also provided the Foundation with information as to why Charities Services must consider activities as well as purposes.
12. On 9 August 2012, the Foundation (via its solicitor) provided further submissions in response to Charities Services’ letter. The Foundation¹⁴:
 - (a) submitted that it is charitable under advancement of education, relief of the aged and impotent and the fourth head of charity (“any other purposes beneficial to the community”): by analogy with cases on protecting human life, promoting human health and relief of human suffering and distress; and under an alternative “presumption of charitable status” test;
 - (b) advised that its main purpose is not to give money to the CMRF. The main purpose is to support non-profit organisations involved “in conducting research aimed at reversing disease, senescence, traumatic injury and de-animation” under clause 3(2)(e) of the Trust Deed;¹⁵
 - (c) submitted that section 18 of the Act is an administrative provision. The fact that the entity has chosen a particular activity to further its purposes does not elevate that activity to a purpose;¹⁶
 - (d) submitted that the research proposed to be supported by the Foundation is not focused on cryopreserving patients’ bodies to later bring them back to life. While the core purpose of the

¹³ Refer Susan Barker’s letter dated 28 June 2012 at paragraph 27

¹⁴ The Foundation also provided supporting documentation including an open letter from Dr Richard Kratz relating to 21st Century Medical’s research into the vitrification of corneas, a document entitled “The Charitable Benefits of Cryonics Research”, a document entitled “Scientists’ Open Letter on Cryonics and an extract from a recent ALCOR magazine showing membership statistics.

¹⁵ Refer Susan Barker’s letter dated 9 August 2012 at paragraph 6.

¹⁶ Refer Susan Barker’s letter dated 9 August 2012 at paragraph 6.

CMRF relates to cryopreservation and reanimation, the research supported by the Foundation will not be limited to these areas. The Foundation will also be funding laboratories in the fields of interventive gerontology, regenerative medicine, immunoengineering, genetic engineering and nanomedicine;¹⁷

- (e) further submitted that the research supported by the Foundation will be a useful subject of study. It will benefit people worldwide and there are many life-saving and life-improving uses for the advancements in cryobiology (including cures for diseases, transplant medicine, cryopreservation of cells, tissues and organs for later use and DNA cryopreservation of endangered species);¹⁸
- (f) submitted that it is incorrect to state that cryonic reanimation is not accepted as feasible. The fact that reanimation of cryopreserved individuals is an unproven procedure illustrates the need for more research to develop the knowledge needed to document the potential of cryonics. The views of the mainstream scientific community as to the feasibility of the reanimation of cryopreserved individuals do not preclude the Foundation's purposes from being exclusively charitable;
- (g) stated that cryopreservation of recently-deceased people may prove to be a way to save lives and could be viewed as continuing to care for sick people when others have given up;
- (h) submitted that the research supported by the Foundation will be disseminated internationally;
- (i) further submitted that Charities Services erred in its analysis of the case law.¹⁹ In particular, the Foundation submitted that *Re Shaw*²⁰ (***Re Shaw***) has no application to the Foundation's factual situation and that it is not authoritative given the decisions in *Re Hopkins Will Trust*²¹ (***Re Hopkins***) and *Re Collier (Deceased)*²² (***Re Collier***);
- (j) submitted that the public benefit is assumed under the first three heads of charity unless the contrary is shown. The Foundation referred to *McGovern v Attorney General*²³ (***McGovern***) where the Court stated "no doubt in some cases a purpose may be so manifestly beneficial to the public that it would be absurd to call evidence on this point";²⁴ and
- (k) submitted that the benefit of the Foundation's research goes to a sufficient section of the public. The fees for cryonic preservation

¹⁷ Refer Susan Barker's letter dated 9 August 2012 at paragraph 7 and 8.

¹⁸ Refer Susan Barker's letter dated 9 August 2012 at paragraphs 13 to 26 and 32 to 34.

¹⁹ Refer Susan Barker's letter dated 9 August 2012 at paragraphs 23 to 25.

²⁰ [1957] 1 WLR 729.

²¹ [1964] 3 All ER 46

²² [1998] 1 NZLR 81.

²³ [1982] Ch. 327 at 352-353.

²⁴ *McGovern v Attorney General* [1982] Ch 327 at 352-353 (*McGovern*) at 333

are not so high as to severely limit the members of the public that can afford them. The costs are often covered by life insurance policies.²⁵ The number of people donating their bodies for cryopreservation is growing²⁶ and the fees are lower than previously.²⁷ The Foundation itself does not itself perform cryopreservation so does not have a fee structure.²⁸ The fact that there are costs associated with the process of cryonics does not exclude the public from benefitting from the research proposed.

13. In order to support its submissions that cryonics research is beneficial, the Foundation provided a document titled "The Charitable Benefits of Cryonics Research"²⁹ This document primarily relates to research funded by a different organisation (The Foundation for the Reversal of Solid State Hypothermia) but provides general information about cryonics research and the Timeship project.³⁰ Information in this document included:

- (a) The past and current research into hypothermia, cryopreservation and basic nanotechnology is funded and/or conducted by the Life Extension Foundation, Critical Care Research, Suspended Animation and 21st Century Medicine. The current research has medical uses for example therapeutic hypothermia is used to reduce risk of injury to tissue. 21st Century Medicine is also conducting research into vitrifying brains and whole organisms.
- (b) While scientists already know how to cryopreserve and revive sperm, blood etc, what is missing is reanimation methods to reverse the damage inflicted on human patients who have to rely on today's imperfect cryopreservation procedures and to reverse the damage caused by disease, injury, and aging.
- (c) Basic research in nanotechnology, currently being carried out in the United States, which will lead to medical advances, will also eventually lead to the development of nanomedicine that will be used in the future to eliminate the damage caused by disease, injury, and aging, and to revive patients who have been cryopreserved.

²⁵ Refer Susan Barker's letter dated 9 August 2012 at paragraph 68.

²⁶ Refer Susan Barker's letter dated 9 August 2012 at paragraph 62

²⁷ Refer Susan Barker's letter dated 9 August 2012 at paragraph 62 –the non-profit Cryonics Institute have memberships for under \$30,000.

²⁸ Refer Susan Barker's letter dated 9 August 2012 at paragraph 63.

²⁹ Attached to Susan Barker's letter dated 9 August 2012.

³⁰ See paragraph 9 above, the Foundation intends to provide significant funds to the CMRF which until recently provided funding to the Stasis Foundation which is carrying out the Timeship project. Also refer to paragraph 15(a) below, the Foundation may provide funding directly to the Timeship facility in the future.

- (d) The Timeship project will create a “modernistic long-term research facility where cryopreserved patients can be cared for, and cryopreservation and nanotechnology research can be conducted, so that such patients can be brought safely to a time where advanced reanimation technologies can be used to cure them of their ailments and injuries and restore them to youthful health life.” Timeship “will be used to preserve near-extinct species and DNA, conduct research into the cryopreservation of human tissues and organs for transplantation, conduct promising reanimation research such as applied molecular nanotechnology, and house more than 10,000 cryopreserved human patients”.
 - (e) In terms of applied reanimation research, it “is not yet possible to fund applied reanimation research. The timeline for this type of research depends upon two factors; first is the pace of progress in cryopreservation... second is the pace of progress in nanotechnology”.
14. On 11 December 2012, Charities Services wrote to the Foundation to notify that, after considering the submissions made and the information provided, the application did not meet registration criteria. This letter advised that the Foundation’s purposes are not exclusively charitable and do not provide sufficient public benefit. The focus of the research funded by the Foundation is the cryopreservation and reanimation of cryopreserved individuals and that this research is not considered charitable at law. The basis for this view is discussed below at paragraphs 27 to 100.
15. The Foundation provided further submissions dated 28 May 2013 including a number of affidavits.³¹ The submissions provided additional information about the Foundation’s activities including:
- (a) Although the Foundation may provide some funding to the CMRF, the CMRF will not be the only recipient of funding. While the Stasis Foundation (the entity managing the Timeship project) may receive funding from the Foundation (either directly or through the CMRF), the Stasis Foundation will not be the only recipient.³² The criteria for the Foundation for any grants will be whether the funds will be used for scientific research that furthers the Foundation’s purposes.

³¹ From Chana de Wolf dated 25 April 2013, Steven Harris dated 25 April 2013, Brian Wowk dated 30 April 2013, Gregory Fahy dated 1 May 2013, Ralph Merkle dated 4 May 2013, Stephen Valentine dated 6 May 2013 and William Faloon dated 16 May 2013.

³² Refer Jackson & Campbell’s letter dated 28 May 2013 at paragraph 3. Also refer to affidavit of William John Faloon dated 16 May 2013 at paragraph 25 which states that the Foundation may contribute funds to the Timeship.

- (b) It is anticipated that the Foundation will provide funding for the research currently funded by the Life Extension Foundation.³³
- (c) Cryopreservation services are not currently provided by the Foundation or any research centres that it funds. The costs for cryopreservation are not prohibitive, many non-profit organisations offer subsidised services, costs will likely reduce over time and life insurance proceeds can cover the costs.

16. The Foundation's submissions of 28 May 2013 repeated a number of submissions made in its response of 28 June 2012. The Foundation:

- (a) submitted that Charities Services has focused on the long-term goals of the Foundation whereas its short-term goals and activities are of more importance. The principal purpose of the Foundation is to fund current scientific research with a variety of stated near-term goals (for example clause 3(2)(a)) and long-term goals. The short-term goals provide substantial benefit to the current population;
- (b) submitted there are many steps between research being conducted now and successful reanimation and that it is not yet possible to fund reanimation research;
- (c) further submitted that Charities Services has erred when specifying the legal test. In particular:
 - The case law relied upon by Charities Services in relation to educational purposes is not relevant³⁴. *McGovern* is a British decision and has not been adopted into New Zealand law. The leading authorities in New Zealand with respect to scientific research are: *Auckland Medical Aid Trust v Commissioner of Inland Revenue*,³⁵ *Re Travis (Deceased)*, *Young and others v Otago University and another*,³⁶ *Re New Zealand Dairy Research Institute v Attorney General*,³⁷ and *Institution of Professional Engineers New Zealand v Commissioner of Inland Revenue*.³⁸

³³ Refer Jackson & Campbell's letter dated 28 May 2013 at paragraph 5. The Board notes that the Life Extension Foundation currently supports research carried out by Critical Care Research (refer affidavit of Steven Harris dated 25 April 2013 at paragraph 65) and 21st Century Medicine (refer affidavit of Brian Wowk dated 30 April 2013 at paragraph 119). Refer to paragraph 13 above for information on the work carried out by these entities.

³⁴ Refer paragraphs 12(i) and 12(j) above.

³⁵ [1979] 1 NZLR 382.

³⁶ [1947] NZLR 382.

³⁷ (High Court, Wellington, CP 7601/91, 30 June 1992, Jaine J).

³⁸ [1992] 1 NZLR 571.

- The research currently being conducted is not controversial. Further, *Molloy v Commissioner of Inland Revenue*³⁹ relates to advocacy so is not relevant.
 - *Scottish Burial Reform and Cremation Society Ltd v Glasgow Corporation*⁴⁰ (**Scottish Burial Reform**) is relevant. In that case cremation and burial were considered activities in furtherance of a charitable purpose (as an analogous extension of repair of churches and cemeteries in churchyards), even though amounts were charged for the services. The Foundation submits that cryopreservation is the next evolution from cremation.
 - When construing an entity's purposes a benign construction is to be applied;
- (d) submitted that the correct test for registration under the Act is whether the Foundation's purposes are charitable. Activities should only be considered where the constituting document does not indicate the entity's purposes with clarity. The enquiry into activities section 18 of the Act is directed to the question of whether the entity's activities are carried out in furtherance of its activities and is clearly directed to Charities Services' monitoring function (rather than its registration function);
- (e) submitted that the public benefit for the charitable purposes of "advancement of education" and "relief of the aged and the impotent" is presumed;
- (f) submitted that Charities Services erred in applying an analogous approach to recognised purposes under the fourth head. An alternative "presumption of charitable status" test exists in New Zealand law and applies to the Foundation. This test provides that under the "any other matter beneficial to the community" head of charity, objects beneficial to the public are prima facie within the spirit and intendment of the preamble of the Statute of Elizabeth;⁴¹
- (g) submitted that the research relating to reanimation of cryopreserved humans is one goal out of many and is ancillary to the general research into cryonics and cryobiology;⁴² and
- (h) further submitted that, if the Foundation was found to have a non-charitable purpose, section 61B of the CTA should be invoked to strike the purpose out in order to "save" the Foundation.

³⁹ [1981] NZLR 688.

⁴⁰ [1968] AC 138.

⁴¹ *Statute of Charitable Uses 1601* (43 Elizabeth 1 c 4) ("Statute of Charitable Uses").

⁴² The Board notes that the primary goal of cryonics is the cryopreservation and future revival of people (Refer to footnote 3 above).

B. Legal framework for registration

17. Section 13 of the Act sets out the essential requirements for registration. 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. This criterion is not met unless the income is derived for exclusively charitable purposes.⁴³
18. 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. This statutory definition adopts the well-established fourfold classification of charitable purpose at general law.⁴⁴
19. To be charitable at law a purpose must be for the public benefit.⁴⁵ Public benefit must be expressly shown where the claimed purpose is benefit to the community.⁴⁶ Further, in every case, the direct benefit of the entity's purposes must flow to the public or a sufficient sector of the public.⁴⁷ Any private benefits

⁴³ See *McGovern* at 340. In New Zealand, see *Canterbury Orchestra Trust v Smitham* [1978] 1 NZLR 787 at 794-796; *Molloy v Commissioner of Inland Revenue* [1981] 1 NZLR 688 ("*Molloy*") at 691. See also the assumption evident in the provision at section 5(3) and (4) of the Act, that a trust will not be disqualified from registration because it has *ancillary* non-charitable purpose.

⁴⁴ This statutory definition adopts the general law classification of charitable purposes in *Commissioner for Special Purposes of Income Tax v Pemsel* [1891] AC 531 extracted from the preamble to the *Statute of Charitable Uses* and previous common law: *Greenpeace of New Zealand Incorporated* [2012] NZCA 533 ("*Greenpeace, CA*") at [42]; *In Re Education New Zealand Trust* HC Wellington CIV-2009-485-2301, 29 June 2010 ("*Education New Zealand Trust*") at [13]; *In re Draco Foundation (NZ) Charitable Trust* HC WN CIV 2010-485-1275 [3 February 2011] at [11].

⁴⁵ Authorities include: *Oppenheimer v Tobacco Securities Trust Co Ltd* [1951] AC 297; *Verge v Somerville* [1924] AC 496; *Dingle v Turner* [1972] AC 601. See also: *New Zealand Society of Accountants v Commissioner of Inland Revenue* [1986] 1 NZLR 147 ("*Accountants*") at 152-155; *Latimer v Commissioner of Inland Revenue* [2002] 3 NZLR 195 ("*Latimer, CA*") at [32]; *Travis Trust v Charities Commission* (2009) 24 NZTC 23,273 (HC) ("*Travis Trust*") at [54], [55]; *Queenstown Lakes Community Housing Trust* HC WN CIV 2010-485-1818, 24 June 2011 ("*Queenstown Lakes*") at [30]; *Education New Zealand Trust* at [23].

⁴⁶ *Canterbury Development Corporation v Charities Commission* HC WN CIV 2009-485-2133, 18 March 2010 ("*CDC*") at [45].

⁴⁷ See discussion in *Latimer, CA* at [32] - [37]. The courts have held that the downstream benefits of an entity's activities do not serve to characterize the purpose of the entity: see *Accountants* at 153 (the "generalised concept of benefit" identified with the public satisfaction of knowing that the fund is there to safeguard and protect clients' interests is too "nebulous and remote" to characterise the purpose of the fund); *Travis Trust* at [30] - [35] (holding that where the express purpose was to "support the New Zealand racing industry by the anonymous sponsor a group race known as the Travis Stakes", the purpose was to support that single group race and not to support the racing industry or racing public as a whole). See to the same effect *Queenstown Lakes* at [68] - [76] (held that the purpose of the Trust was to provide housing for individuals not to advance the overall welfare of the community by enabling workers to stay in the area); *CDC* at [67] (primary purpose is the assistance of individual businesses and the "hope and belief" that the success of those businesses would increase the economic wellbeing of the Canterbury region does not establish public benefit as a primary purpose).

arising from an entity's activities must only be a means of achieving an ultimate public benefit and therefore be ancillary or incidental to it.⁴⁸

20. Section 5(3) of the Act provides that the inclusion of a non-charitable purpose will not preclude registration if it is merely ancillary to a charitable purpose. Pursuant to section 5(4) of the Act, a non-charitable purpose is ancillary 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.
21. It is clear that determining whether a non-charitable purpose is ancillary includes a qualitative assessment of whether it is a means to advance the charitable purpose.⁴⁹ It also involves a quantitative assessment, focusing on the relative significance of the purpose as a proportion of the entity's overall endeavour.⁵⁰

Relevance of entity's activities in registration decision-making

22. Section 18(3)(a)(i) and (ii) of the Act provide that the current and proposed activities of an entity must be taken into consideration when determining whether that entity qualifies for registration under the Act.⁵¹ The courts have confirmed that consideration of activities is a mandatory aspect of decision-making under the Act.⁵²

⁴⁸ See for example *Institution of Professional Engineers New Zealand Inc v Commissioner of Inland Revenue* [1992] 1 NZLR 570 ("Professional Engineers") at 578; *Re New Zealand Computer Society Inc* HC WN CIV-2010-485-924 [28 February 2011] ("Computer Society") at [42]; *Education New Zealand Trust* at [23]; *Queenstown Lakes* at [68] – [76]; *CDC* at [67]. Compare: *Commissioners of Inland Revenue v Oldham Training and Enterprise Council* (1996) STC 1218 ("Oldham"); *Travel Just v Canada (Revenue Agency)* 2006 FCA 343, [2007] 1 CTC 294.

⁴⁹ For recent judicial comment on the qualitative test see *Greenpeace, CA* at [62], [83] – [91].

⁵⁰ The quantitative requirement was applied by the High Court in *Re Greenpeace of New Zealand Incorporated* HC WN CIV 2010-485-829 [6 May 2011] ("Greenpeace, HC") at [68]; *Computer Society* at [16]; *Education New Zealand Trust* at [43]-[44]; *Re The Grand Lodge of Antient Free and Accepted Masons in New Zealand* [2011] 1 NZLR 277 (HC) ("Grand Lodge") at [49]-[51]. The Board notes the Court of Appeal's observation in *Greenpeace, CA* at [92], including footnote 95.

⁵¹ See also section 50(2)(a) *Charities Act 2005*.

⁵² *Greenpeace, CA* at [48] and [51]. See also the approach taken in the High Court in *CDC* at [29], [32], [44], [45] – [57], [67], [84] – [92]; *Queenstown Lakes* at [57] – [67]; *Grand Lodge* at [59], [71]; *Computer Society* at [35] – [39], [60] and [68]; *Greenpeace HC* at [75].

23. Activities are not to be elevated to purposes,⁵³ but reference to activities may assist, for example, to make a finding about:
- (i) the meaning of stated purposes that are capable of more than one interpretation;⁵⁴
 - (j) whether the entity is acting for an unstated non-charitable purpose;⁵⁵
 - (k) whether the entity's purposes are providing benefit to the public;⁵⁶
 - (l) whether a non-charitable purpose is within the savings provision set out in section 5(3) of the Act.⁵⁷
24. The Foundation has submitted that when the terms of the stated objects are clear, activities do not need to be considered. We do not accept that decision-making on the Foundation's qualification for registration under the Act must focus solely on the words in the Trust Deed. Such an approach would be inconsistent with authorities that construe an entity's constitution as a whole, and the clear statutory mandate to consider an entity's current and proposed activities when making a determination whether the entity qualifies for registration under the Act.⁵⁸ In determining qualification for registration under the Act, substance must prevail over form, and an entity cannot qualify for registration, even if its purposes are exclusively charitable, if its activities belie its stated charitable purposes.⁵⁹

Characterisation of an entity's purposes

25. Once an entity's purposes are established as a matter of fact, whether or not they are charitable is a question of law.⁶⁰ The Board is bound to apply the law as declared by the courts and legislature, and adopted by the Act.
26. Determining whether an entity's purposes are charitable involves an objective characterisation, and a declaration in an entity's rules document that the entity's

⁵³ McGovern at 340 and 343; *Latimer v Commissioner of Inland Revenue* [2004] 3 NZLR 157 ("Latimer, PC") at [36]. Compare *Public Trustee v Attorney-General* (1997) 42 NSWLR 600 at 616; *Vancouver Society of Immigrant and Visible Minority Women v the Minister of National Revenue* [1999] 1 SCR 10 ("Vancouver Immigrants"); The Board notes the Foundation's submissions in Susan Barker's letter dated 9 August 2012 at paragraph 6 that section 18 of the Act is an administrative provision and the fact that an entity has chosen to a particular activity to further its purposes does not elevate that activity to a purpose.

⁵⁴ See *Professional Engineers* at 575 (Tipping J).

⁵⁵ *Inland Revenue Commissioners v City of Glasgow Police Athletic Association* [1953] AC 380 ("*Glasgow Police Athletic Association*"); compare *Commissioner of Taxation of the Commonwealth of Australia v Word Investments Limited* [2008] HCA 55 at [25] (Gummow, Hayne, Heydon and Crennan JJ).

⁵⁶ See for example *Glasgow Police Athletic Association; CDC* at [29], [32], [44], [45] - [57], [67], [84] - [92]; *Queenstown Lakes* at [57] - [67]; *Grand Lodge* at [59], [71]; *Computer Society* at [35] - [39], [60] and [68].

⁵⁷ See for example *Greenpeace, CA* at [40], [48], and [87] - [92], [99] and [102], [103]. Earlier authorities to the same effect include *Molloy* at 693 and the authorities cited there.

⁵⁸ Section 18(3) *Charities Act 2005*.

⁵⁹ G E Dal Pont *Law of Charity* (LexisNexis Butterworth, Australia, 2010) at [2.12], [13.19], [13.20].

⁶⁰ *Molloy* at 693.

purposes are charitable in law will not be determinative.⁶¹ Similarly, the subjective intentions of individuals involved in a charity do not establish its charitable status.⁶²

C. Charities Registration Board's analysis

27. The Foundation maintains that its main purpose is to fund scientific research by supporting non-profit organisations involved in conducting research aimed at reversing disease, senescence, traumatic injury and de-animation. It submits that this purpose is charitable and for the public benefit under "advancement of education", "relief of the aged and impotent" and the fourth head: by analogy to protecting human life, promoting human health and the relief of human suffering and distress; and under the alternative test presumption of charitable status for purposes of established public benefit in law.
28. We consider that the Foundation's purposes include a focus on funding research into the cryopreservation and reanimation of individuals. This purpose is not charitable as it does not advance education; provide relief for the aged and impotent or any other benefit to the community that is charitable at law.

C.1. The Foundation's purpose to fund cryonics research

29. We consider that the Foundation has a purpose to fund cryonics research (research into the cryopreservation and reanimation of individuals). The stated objects indicate a focus on this type of research. Further, the current and proposed activities of the Foundation show that this is a focus.
30. The stated purposes manifest a purpose to fund cryonics research. The stated objects in clause 3(2)(d) and 3(2)(e) of the Trust Deed is to fund and support scientific research "aimed at reversing diseases, senescence, traumatic injury and de-animation".
31. We consider that the Foundation's current and proposed activities focus on reanimation research. The Foundation proposes to focus on the purposes set out in clause 3(2)(e) by supporting non-profit organisations involved in conducting research aimed at reversing disease, senescence, traumatic injury and de-animation. The Foundation's current activities include funding research into

⁶¹ *M K Hunt Foundation Ltd v Commissioner of Inland Revenue* [1961] NZLR 405 at 407; *CDC* at [56].

⁶² G E Dal Pont *Law of Charity* (LexisNexis Butterworth, Australia, 2010) at [13.18], and see also the discussion at [2.8] – [2.11]. See for example *Latimer, PC* at 168 (PC) ("whether the purposes of the trust are charitable does not depend on the subjective intentions or motives of the settlor, but on the legal effect of the language he has used. The question is not, what was the settlor's purpose in establishing the trust? But, what are the purposes for which trust money may be applied?"); *Molloy* at 693; *Keren Kayemeth Le Jisroel Ltd v Inland Revenue Commissioners* [1932] AC 650 at 657 (Lord Tomlin), 661 (Lord Macmillan); *Oldham* at 251 (Lightman J).

cryonics and basic nanotechnology,⁶³ which are essential for cryopreservation and reanimation.⁶⁴

32. The Foundation proposes to make “substantial grants” to the CMRF whose core purpose relates to cryopreservation and reanimation.⁶⁵ The Life Extension Foundation currently supports the work of Critical Care Research and 21st Century Medicine.⁶⁶ It is anticipated that the Foundation will also provide funding for the research funded by the Life Extension Foundation.⁶⁷ These entities carry out research essential for cryopreservation and reanimation.⁶⁸ 21st Century Medicine carries out research into cryobiology, however they also carry out research that will assist with cryonics and in 2007 they began research into whole body preservation.⁶⁹ Critical Care Research will fund research into nanotechnology (which is needed for reanimation research to progress).⁷⁰

⁶³ Refer Susan Barker’s letter dated 9 August 2012 at paragraph 7 and 8.

⁶⁴ See for example, The Charitable Benefits of Cryonics Research: Executive Summary (attached to Susan Barker’s letter of 9 August 2012 and Jackson & Campbell’s letter of 28 May 2013) at page 10 states “The timeline for this type of research [reanimation research] depends upon two factors: first is the pace of progress in cryopreservation of the kidney, the brain, and the entire body. The more progress is made in cryopreservation, the less the burden will be for future medicine to revive cryopreserved patients. Second is the pace of progress in nanotechnology, which will have to be developed well beyond what is possible today to be used in the treatment of patients (nanomedicine)”; Gregory Michael Fahy’s affidavit of 1 May 2013 at paragraph 106 states reanimation research “cannot even be attempted without driving forward cutting edge research into nanotechnology, nanomedicine, and advanced computation”; Ralph Charles Merkle’s affidavit of 4 May 2013 at paragraphs 107 to 108 discusses the use of nanotechnology in reanimation;

⁶⁵ Refer Susan Barker’s letter dated 28 June 2012 at paragraphs 25 to 26; and Susan Barker’s letter dated 9 August 2012 at paragraph 7 and 8.

⁶⁶ Refer paragraph 15 above.

⁶⁷ Refer Jackson & Campbell’s letter dated 28 May 2013 at paragraph 5.

⁶⁸ The Foundation provides funding to the Critical Care Research and 21st Century Medicine laboratories. Jackson & Campbell’s letter of 28 May 2013 states that the Foundation does not fund Suspended Animation however, The Charitable Benefits of Cryonics Research: Executive Summary (attached to Susan Barker’s letter of 28 June 2012 and Jackson & Campbell’s letter of 28 May 2013) at page 20 states “There is a methodical ongoing program to perfect the cryopreservation process (examples cited herein are laboratories Critical Care Research, Suspended Animation, and 21st Century Medicine) that will result in a substantial medical benefit to mankind. FRSSH [the Foundation] will continue funding all three of these entities, which it owns virtually 100%”. Whether or not the Foundation provides funding to Suspended Animation does not change the outcome of its application for registration. However, we note that if the Foundation is providing funding to Suspended Animation, this further illustrates the Foundation’s focus on cryopreservation and reanimation research.

⁶⁹ Brian Wowk’s affidavit of 30 April 2013 at paragraph 43 refers to the next step being improving brain cryopreservation to ultimately have reversible technology for cryopreserving human brains, at paragraph 45 states that although “cryobiology is a mainstream area of science and medical application, such important cryobiology research is motivated by cryonics” and at paragraphs 107 and 108 Brian Wowk provides information about 21st Century Medicine’s research programme into whole body preservation.

⁷⁰ Refer Ralph Charles Merkle’s affidavit of 4 May 2013 at paragraphs 65 and 91; The Charitable Benefits of Cryonics Research: Executive Summary (attached to Susan Barker’s letter of 28 June 2012 and Jackson & Campbell’s letter of 28 May 2013) at page 11 and 12.

33. Further, the Foundation may contribute funds towards the Stasis Foundation's Timeship project.⁷¹
34. Having regard to this information, we consider that, as a matter of fact, the Foundation's current purposes include funding cryonics (cryopreservation and reanimation) research and that this purpose is a focus of the Foundation.
35. The Foundation submits that the assessment of its application should focus on its short term goals and that the long term goals are of little immediate consequence.⁷² However, the Board notes that section 18 of the Act requires an assessment into both the current⁷³ and proposed⁷⁴ activities and thus the future or long term activities and aims are relevant. Further, the Applicant's purposes and current and proposed activities show a focus into providing funding for cryopreservation and reanimation research.

C.2. The Foundation's purposes are not charitable

The Foundation's purposes and advancement of education

36. The Foundation has submitted that its research purposes are charitable because it advances education for the public benefit. We consider that the Foundation's purpose to fund research into cryopreservation and reanimation of individuals does not advance education in a way that is charitable at law.
 - (a) Legal framework
37. New Zealand law recognises that a purpose to advance education for the public benefit is a valid charitable purpose in law. Education may be advanced through formal tuition or training. Further, research purposes may be charitable.⁷⁵

⁷¹ Refer to William John Fallon's affidavit dated 16 May 2013 at paragraph 25. Refer The Charitable Benefits of Cryonics Research: Executive Summary (attached to Susan Barker's letter of 9 August 2012 and Jackson & Campbell's letter of 28 May 2013); Life Extension 02 (attached to Susan Barker's letter dated 9 August 2012) at page 39 "Timeship is at the heart of biotechnology. Its mission is research into life extension and preservation of biological materials, including DNA from extinct and near extinct species, organs for transplantation, and patients travelling to the future for reanimation – and, hopefully practical immortality".

⁷² Refer Jackson & Campbell's letter of 28 May 2013 at paragraphs 2 to 14. The Board considers that the cases show that the law of charities is dynamic but does not consider that they are authority that we should assess charities today based on what the Court may or may not extend charity law to recognise in the future. We must assess the Foundation based on its stated goals and activities under the current charities law. As charities law continues to evolve, the Foundation would be able to reapply for charitable status should that evolution mean that it may be able to gain charitable status in the future.

⁷³ Section 18(3)(a)(i) *Charities Act 2005*.

⁷⁴ Section 18(3)(a)(ii) *Charities Act 2005*.

⁷⁵ *Auckland Medical Aid Trust v Commissioner of Inland Revenue* [1979] 1 NZLR 382 ("Auckland Medical Aid"), *In Re Travis (Deceased), Young and Others v Otago University and Another* [1947] NZLR 382; *New Zealand Dairy Research Institute v Attorney General* (High Court, Wellington, CP 760/91, 30 June 1992, Jaine J); *Professional Engineers, McGovern*;

38. In the 1982 British case *McGovern*, Slade J considered research into maintenance and observance of human rights and referred to the unreported case of *Re Bexterman's Will Trust*.⁷⁶ In that case, Slade J set out the principles governing the charitable nature of research as follows:
- (1) A trust for research will ordinarily qualify as a charitable trust if, but only if
 - (a) the subject-matter of the proposed research is a useful subject of study; and
 - (b) it is contemplated that knowledge acquired as a result of the research will be disseminated to others;⁷⁷ and
 - (c) the trust is for the benefit of the public, or a sufficiently important section of the public.
 - (2) In the absence of a contrary context, however, the court will be readily inclined to construe a trust for research as importing subsequent dissemination of the result thereof.
 - (3) Furthermore, if a trust for research is to constitute a valid trust for the advancement of education, it is not necessary either
 - (a) that a teacher/pupil relationship should be in contemplation or
 - (b) that persons to benefit from the knowledge to be acquired be persons who are already in the course of receiving 'education' in the conventional sense.
 - (4) In any case where the court has to determine whether a bequest for the purposes of research is or is not of a charitable nature, it must pay due regard to any admissible extrinsic evidence which is available to explain the wording of, the will in question or the circumstances in which it was made.
39. Although *McGovern* is a British decision and the *McGovern* test in relation to assessing research has not been specifically adopted by New Zealand courts, we consider it provides useful guidance for assessing whether entities established for research purposes are charitable at law.
40. There is broad judicial acceptance of the requirements that research be in an area that is a 'useful subject of study'. In the 1998 New Zealand decision of *Re Collier*,⁷⁸ the Court considered whether the publication of a book was charitable as advancement of education (note this case was not in relation to research). Hammond J stated that the public benefit must be conferred and it was advisable to bring expert evidence before the Court that indicated the "prospective work

⁷⁶ January 21, 1980 unreported, referred to in *McGovern* at 352-353. See also Jean Warburton, *Tudor on Charities* (9th ed, Sweet & Maxwell, London, 2003), at 57.

⁷⁷ See also *Re Shaw's Will Trusts* [1952] Ch 163 ("*Re Shaw*"); *Taylor v Taylor* (1910) 10 CLR 218; *Re Hopkins' Will Trusts* [1965] Ch 669 ("*Re Hopkins*").

⁷⁸ [1998] 1 NZLR 81 (HC) at 92.

has at least *some* educative value or public utility to enable recognition of it” and that “the principle operates as a floor below which a work cannot sink”. In that case the Court held that there was no educative value or public utility in the book.⁷⁹

41. In *Re Hopkins*, Wilberforce J had to consider whether a publication bequest into the Bacon-Shakespeare manuscripts was charitable. Wilberforce J referred to the decision in *Re Shaw* in relation to Harman J’s comments that if the object be merely the increase of knowledge it is not in itself a charitable object unless it is combined with teaching or education. Wilberforce J determined that the word “education” as used by Harman J was to be used in a wide sense, extending beyond teaching and that “the requirement is that, in order to be charitable, research must either be of educational value to the researcher or must be so directed as to lead to something which will pass into the store of communicable knowledge in an area which education may cover – education in this last context extending to the formation of literary taste and appreciation”⁸⁰

(b) Assessment of the Foundation’s purposes

42. The Board acknowledges that some of the research funded by the Foundation may meet the legal tests for charitable research. However, it is an independent purpose of the Foundation to fund research into the cryopreservation and reanimation of individuals. We consider that this subject matter and type of research is not charitable on the test in *McGovern*.
43. Taking into account the information provided by the Foundation and the Court’s view that it will readily be inclined to construe a trust for research as importing subsequent dissemination of the results,⁸¹ the Board is satisfied that the Foundation’s research will be disseminated. However, we are not satisfied that the cryopreservation and reanimation research funded by the Foundation (and intended to be funded) meets the requirements of being a useful subject of study. Further, the Board is not satisfied that the Foundation meets the public benefit requirement.

Useful subject of study

44. The Board considers that cryonics research is not currently an area of charitable educational research as it is not a useful subject of study.

⁷⁹ See also *Re Shaw* and *Re Hopkins* (referred to by Chilwell J in the New Zealand 1979 *Auckland Medical Aid* case at page 393 line 20 when considering whether an object to educate the public in the facts of human reproduction was charitable. Although *Re Shaw* and *Re Hopkins* are not discussed in any detail, Chilwell J includes them in a list of “important authorities”). Also refer to Jackson & Campbell’s letter of 28 May 2013 at paragraph 108 where the Foundation submits that the test in *Re Hopkins* relates to whether results of research would be useful if successful.

⁸⁰ *Re Hopkins* page 680, line E. The Bacon-Shakespeare manuscripts that were thought to show that some of the Shakespeare plays were in fact authored by Bacon.

⁸¹ Refer *McGovern* at 352-353.

45. The Board considers that this determination is open on the *McGovern* and *Re Hopkins* approaches. In *McGovern* the Court considered that the proposed research into the study of human rights was a useful subject of study and took into consideration that the study of human rights had become an accepted academic discipline.⁸² In *Re Hopkins*, the Court considered whether the research was into “an area which education may cover”.⁸³ The Board notes the Foundation’s comments that cryonics, cryobiology and nanotechnology are accepted academic disciplines.⁸⁴ However, the Board does not accept that cryonics (cryopreservation and reanimation of individuals) is an accepted academic discipline. The Foundation has not provided evidence to show that cryonics is an area which education may cover in New Zealand. Further, the Board notes that not all cryonic research facilities and providers consider that cryonic research is current science. For example, the Cryonics Institute states:

Note that cryonics is science-based, but cannot correctly be called current science. Cryonics is based on expectations of the repair capabilities of future science. Although the projection is less, possible human habitation of Mars is similarly a science-based concept based on projections of the capabilities of current science.⁸⁵

46. The Board also notes that there is a lack in the mainstream scientific community as to the feasibility and benefit of the research.⁸⁶ Further, there is strong consensus in the research community that this is not an area which education can cover.

⁸² *McGovern*, at 353.

⁸³ Refer paragraph 41 above.

⁸⁴ Refer Jackson & Campbell’s letter of 28 May 2013 at paragraph 16.

⁸⁵ Cryonics Institute comment (<http://cryonics.org/prod.html>) [accessed 28 June 2013]

⁸⁶ See for example extract from From: Iserson KV: *Death To Dust: What Happens To Dead Bodies?* 2nd Edition, 2001 Galen Press, Ltd. Tucson, AZ; available online at <http://www.galenpress.com/extras/extra32.htm>. This states “Opinion among scientists is divided over the feasibility of cryonic preservation. Those who deal with conventional medicine and cryobiology tend to be pessimistic, while opinions of those in such fields as computer science and nanotechnology (a new field that studies atomic- and molecular-level manipulation of matter) are more favorable. Much of the mainstream scientific community, including those scientists who work in the area of cryobiology, view cryonic preservation as science fiction at best, and a cruel hoax at worst.” The Board notes the Foundation’s submissions regarding the reliability of this reference (Refer Susan Barker’s letter dated 9 August 2012 at paragraphs 43 to 49) and the fact that since this comment was made a process of vitrification has been discovered and there have been developments in nanotechnology which are a significant development. However, even since these developments, the mainstream science community remains divided on the benefits and likelihood of success. Even from the information provided by the Foundation, opinions differ regarding the chances of successful reanimation. See for example, “Scientists’ Open Letter on Cryonics” (attached to Susan Barker’s letter dated 9 August 2012) states “Opinions on how much cerebral ischemic injury (delay after clinical death) and preservation injury may be reversible in the future vary widely among signatories”; Timeship extract “04 Cryopreservation” at page 69 “Most [people] know that the chances of eventual reanimation of cryopreserved patients are uncertain. Those who have chosen to be cryopreserved are even more knowledgeable. They know that no one who has been cryopreserved has ever been brought back, and that no experimental animal has ever been brought back.”

47. To summarise, the Board considers that the research into cryopreservation and reanimation does not meet the legal test for usefulness for the reasons provided above.
48. The Foundation has submitted that the onus is on Charities Services to provide evidence to show that the research is not useful.⁸⁷ This is not correct. The onus is not on the Board or Charities Services to provide evidence. The Board notes MacKenzie J's comments in *Re New Zealand Computer Society*⁸⁸ (**Computer Society**) that:

the question whether a gift is or may be operative for the public benefit is a question to be answered by the Court forming an opinion upon **the evidence before it**".⁸⁹ [emphasis added]

49. Further, the Board notes the comments in *Re Collier* (above in paragraph 40) that it is advisable for the applicant to bring evidence to show that the work has educative value or public utility to enable recognition of it.
50. The Board considers that the Foundation has not proven that the cryonics research is useful or "an area which education may cover".⁹⁰

Public benefit requirement – is there a benefit to cryonics research?

51. The Foundation has submitted that under the "advancement of education" head of charity, the public benefit is presumed. However, as above in paragraph 48, in *Computer Society* MacKenzie J stated:

For the first three heads of charity [which includes advancement of education], public benefit is assumed to arise unless the contrary is shown. This does not mean, however, that existence of public benefit is a foregone conclusion. Rather, "the question whether a gift is or may be operative for the public benefit is a question to be answered by the Court forming an opinion upon the evidence before it".⁹¹

In light of these comments, the Board considers that, while the public benefit is assumed for educational purposes, an objective consideration is still required as to whether there is a public benefit.⁹²

⁸⁷ Refer Jackson & Campbell's letter dated 28 May 2013 at paragraph 114.

⁸⁸ *Computer Society*.

⁸⁹ *Computer Society* at [13].

⁹⁰ Refer *Re Hopkins* discussed in paragraph 41 above.

⁹¹ *Computer Society* at [13].

⁹² The Board further notes Chadwick LJ's comments in his Court of Appeal judgment in the case of *Southwood v Attorney-General* [2000] ECWA Civ 204 (BILII) at <http://www.baillii.org/ew/cases/EWCA/civ/2000/204.html> at [5] that "The question, which the court must address in each case, is whether the objects to be pursued, although expressed to be of a charitable nature within the spirit and intendment of the preamble to the Statute of Elizabeth (43 Eliz. 1 cp 4), should be recognised as being for the public benefit in the sense in which that

52. The Board is not satisfied that the Foundation's cryonics research provides sufficient public benefit.
53. We note that the matter of cryopreservation and reanimation of people raises a number of ethical/moral questions.⁹³ For example it raises questions relating to the meaning of death, immortality and what it means to be a human. Given the controversial nature of the research, it is not possible to conclude that it will be for the public benefit.⁹⁴
54. The Courts have expressed a great deal of scepticism about the appropriateness of defining the purpose of a trust by reference to alleged downstream benefits.⁹⁵ While we acknowledge that some of the research may provide benefits, we consider that any possible public benefits from the cryonics focused research are too downstream or remote from the Foundation's cryonics research focus and the possible funding of the Timeship to meet the legal test for public benefit.

Public benefit requirement – Is “benefit” available to a “sufficient section of the public”?

55. As above, the Board does not consider that there is a benefit from the Foundation's cryonics research. Further, we consider that even if there were to be a benefit, it is not to a sufficient section of the public. While charities can

concept has come to be understood in the light of the many decisions in this area of the law. It is not enough that the objects should be expressed to be the advancement of education; it is necessary that the advancement of education in the manner intended should promote public benefit.”

⁹³ The Foundation submits that Charities Services did not provide any evidence to show the research is controversial or raises ethical/moral questions. However, Charities Services' letter of 11 December 2012 at footnote 22 stated: see for example the “Timeship” extract “02 Life Extension Research” (attached to Susan Barker's letter dated 9 August 2012) at page 31. “*Extreme life extension and possible practical immortality will be enthusiastically welcomed by some and objected to by others*”. “*But the new technologies under discussion here raise deeper questions. What is the “self”? Is identity synonymous with the brain and the memories it stores?... And would we still be “human”? Would it matter?*”; A further example of the moral/ethical questions is the complex question of what “death” means (refer Gregory Michael Fahy's affidavit of 1 May 2013 at paragraphs 92 and 122; Ralph Charles Merkle's affidavit of 4 May 2013 at paragraphs 135 to 139 and 174 and appendix C, Brian Wowk's affidavit of 30 April 2013 at paragraphs 46 and 67).

⁹⁴ In *Molloy* at 695-696 Somers J wrote in relation to the case of abortion “Reason suggests that on an issue of a public and very controversial character, as in the case of abortion.... The inability of the Court to judge whether a change in the law will or will not be for the public benefit must be as applicable to the maintenance of an existing provision as to its change. In neither case has the Court the means of judging the public benefit”. As submitted by the Foundation this case relates to the issue of advocacy. However, we consider that it illustrates that when a matter is controversial the Court does not consider that it has the means of judging whether it is for the public benefit. We consider that this applies here, the research proposed in relation to cryopreservation and re-animation is sufficiently controversial that we cannot judge that it will be for the public benefit.

⁹⁵ See for example *Amateur Youth Soccer Association v Canada (Revenue Agency)* (2007) 287 DLR (4th) 4 (SCC) and *CDC*.

charge fees for their services, the costs must not be so high as to prevent a sufficient section of the public benefiting.⁹⁶ The costs associated with individual cryopreservation and reanimation services are prohibitive⁹⁷ and would exclude the less well off. The fact that some cryopreservations are covered by life insurance policies or subsidised by not-for-profit entities does not negate the costs of the procedure. Further, the fact that prices may reduce in the future does not negate the currently high costs.

56. The Foundation has submitted that they will not be providing cryopreservation and reanimation services and therefore the costs of the services are not relevant. However, the Board notes that the Foundation may provide funding towards the Timeship facility which will provide cryopreservation and reanimation services.

(c) Effect of clauses purporting to limit Foundation to charitable purposes

57. The Board notes that clauses 3(1) and 3(4) of the Trust Deed purport to limit the Foundation to purposes which are charitable under the laws of New Zealand.⁹⁸ However, this is not sufficient to permit a conclusion that the Foundation is charitable.⁹⁹

⁹⁶ See for example *The Independent Schools Council v the Charity Commission for England & Wales* [2011] UKUT 421 (TCC), in the Upper Tax Tribunal and Chancery Chamber of the High Court, where three judges ruled that in order to prove public benefit, private schools must not exclude the poor or have fees that are so high that in practice it excludes the poor.

⁹⁷ For example ALCOR Life Extension Foundation requires minimum funding of \$200,000 for a whole body cryopreservation and \$80,000 for neurocryopreservation (refer <http://www.alcor.org/BecomeMember/scheduleA.html> [accessed 4 July 2013]; Trans Time charges \$150,000 for whole body preservation and \$50,000 for neurocryopreservation (refer <http://cryonics.org/comparisons.html> [accessed 4 July 2013] ; KrioRus and the Cryonics Institute charge approximately \$30,000 for whole body preservation (refer <http://cryonics.org/comparisons.html> [accessed 4 July 2013] and Susan Barker's letter dated 28 June 2012 at paragraph 63).

⁹⁸ Refer to paragraph 7 above.

⁹⁹ Refer *Commissioners of Inland Revenue v White* (1980) 55 TC 651 at 653 and CDC at [56].

(d) Summary of whether research is charitable advancement of education

58. The Board determines that the Foundation's research towards the cryopreservation and reanimation of individuals is not charitable advancement of education. While the research will be disseminated, it fails to meet the test for useful subject matter stated in *McGovern*. Further the Foundation's research into cryopreservation and reanimation does not provide sufficient public benefit.

The Foundation's purposes and provision of relief for the aged and impotent

(a) Law on relief for the aged and impotent

59. The Foundation has submitted that its purposes are charitable under the "relief of poverty" head of charity by providing "relief for the aged and impotent".

60. Hammond J, in *D V Bryant Trust Board v Hamilton City Council (DV Bryant)* wrote:

"The questions in this kind of case can conveniently be broken into two subparts: is there a need to be relieved against; and, is the relief that is afforded 'real', as opposed to fanciful, or trifling, or insubstantial?"¹⁰⁰

61. For the relief of the aged and impotent to be considered charitable, there "must be a need to be relieved by the charitable gift, such need being attributable to the age or impotent condition of the person to be benefited".¹⁰¹ In *DV Bryant*, relief of the needs of the aged were seen to overlap with relief from the distress of solitariness.¹⁰² In that case, Hammond J found that the needs of the aged for fraternity, belonging, respect, mutual activities, interaction and security are real needs, the relief of which are charitable.¹⁰³
62. Purposes which have been seen to provide relief for the aged include erecting and fitting a home for the aged,¹⁰⁴ erection of a home for the purpose of caring for aged women,¹⁰⁵ building homes for 'aged blind pensioners',¹⁰⁶ and a community village for the aged erected to be an institution for the relief of the

¹⁰⁰ *DV Bryant* at 350

¹⁰¹ *Joseph Rowntree Memorial Trust Housing Association Ltd v Attorney-General* [1983] Ch 159. at 174 cited by Hammond J in *DV Bryant Trust Board v Hamilton City Council* [1997] 3 NZLR 342 (HC) ("*DV Bryant*") at 350.

¹⁰² *DV Bryant*.

¹⁰³ *DV Bryant* at 349.

¹⁰⁴ *DV Bryant*.

¹⁰⁵ *Re Bingham* [1951] NZLR 491 at 495 per Hay J

¹⁰⁶ *Lutheran Church of Australia South Australia District Incorporated v Framers' Co-operative Executors and Trustees Ltd* (1970) 121 CLR 628 at 650 per Windeyer J.

aged.¹⁰⁷ Purposes which have been held to provide relief for the impotent include gifts for the blind¹⁰⁸ and gifts to aid mentally afflicted persons.¹⁰⁹

63. The Foundation has submitted that the public benefit is presumed for the relief for the aged and impotent as it falls under the “relief of poverty head” and that under the first three heads of charity, public benefit is assumed to arise unless the contrary is shown.¹¹⁰
64. In the preamble to the *Statute of Charitable Uses*, “the relief of the aged impotent and poor people” appears in one sub-classification. A number of authors, including Tudor and Gino Dal Pont, analyse the relief of the aged and the disabled in the category of relief of poverty. However, Hubert Picarda treats those subjects in a separate category under the fourth head of charity.
65. We consider that Picarda’s approach is preferred particularly as the courts have held that the phrase “the relief of the aged impotent and poor people” must be construed disjunctively.¹¹¹
66. As above in paragraph 51, the public benefit under the first three heads of charity is assumed but can be rebutted. In addition, we consider that “relief of the aged and impotent” should be considered under the fourth head of charity. Under this head the public benefit is not presumed, it is necessary to establish positively¹¹² that the purpose has a tangible or well-recognised benefit to a sufficient section

¹⁰⁷ *Trustees of Church Property of the Diocese of Newcastle v Lake Macquarie Shire Council* [1975] 1 NSWLR 521 at 524 per Moffitt P, at 533-534 per Hutley JA; *Presbyterian Church (New South Wales) Property Trust v Ryde Municipal Council* [1977] 1 NSWLR 620 at 626 per Rath J

¹⁰⁸ *City of Hawthorn v Victorian Welfare Association* [1970] VR 205 (“*City of Hawthorn*”) at 209 per Smith J; *Re Bond* [1929] VLR 333 at 225 per Cussen J; *Re Lewis* [1955] Ch 104. See also Dal Pont *Law of Charity*, above n 1, at 183. See also *Re Joseph* (1907) 26 NZLR 504; 9 GLR 480, where a bequest was made for the relief of the indigent blind of the Jewish persuasion in London; *Re Elliot* (1910) 102 LT 528.

¹⁰⁹ *Diocesan Trustees of the Church of England in Western Australia v Solicitor-General* (1909) 9 CLR 757.

¹¹⁰ Refer Jackson & Campbell’s letter of 28 May 2013 at paragraphs 118 to 122.

¹¹¹ *Re Glyn’s Will Trust* [1950] 2 All ER 1150n; *Re Bradbury* [1950] 2 All ER 1150n; *Re Robinson* [1951] Ch 198. See also Hubert Picarda *The Law and Practice Relating to Charities* (3rd ed, Butterworths, London, 1999) at 118; Gino Dal Pont, *Charity Law in Australia and New Zealand* (Oxford University Press, Oxford, 2000) at 111, footnote 2 citing the following cases: *Re Lucas* (1922) 2 Ch 52; *Re Peacock’s Charity* [1956] Tas SR 142 at 145 per Gibson JK; *Re Resch’s Will Trusts* [1969] 1 AC 514 at 542-543; *City of Hawthorn* at 208 per Smith J; *Trustees of Church Property of the Diocese of Newcastle v Lake Macquarie Shire Council* [1975] 1 NSWLR 521 at 524 per Moffitt P, at 534 per Hutley JA; *Re McIntosh (deceased)* [1976] 1 NZLR 308 at 309-310 per Beattie J; *West Australian Baptist Hospital & Homes Trust Inc v City of South Perth* [1978] WAR 65 at 58 per Lavan SPJ; *McGovern* at 171-174 per Peter Gibson J; *DV Bryant* per Hammond J.

¹¹² *DV Bryant* at 350 per Hammond J.

of the public.¹¹³ Indeed, we note that courts have held that public benefit has to be proven for the relief of the aged and disabled.¹¹⁴

67. Accordingly, as Picarda wrote, we consider that “trusts for the relief of aged or impotent persons must still satisfy the test of public benefit”.¹¹⁵

(b) The Foundation’s purpose and relief of the aged and impotent

68. The Board acknowledges that some of the research funded by the Foundation, may potentially provide relief to the aged and impotent. However, the majority of the Foundation’s activity and the focus of Foundation’s written purposes relate to funding research into the cryopreservation and reanimation of people. The people who are cryopreserved are legally deceased at the time of the cryopreservation.¹¹⁶

69. We do not consider that the cryopreservation of deceased people provides relief of the aged or impotent. As the people are deceased, the cryopreservation of their bodies cannot be seen as relieving a charitable need.

70. We note the Foundation’s submissions on the difference between clinically, legally and biologically dead and the “information theoretic criterion” for death.¹¹⁷ Further we note the Foundation’s comments that there is no connection between declaring someone legally dead and the possibility that future medical advances will forever be unable to restore the individual.¹¹⁸ We have also considered the submission that there are examples of people who are clinically and legally dead

¹¹³ *National Anti-Vivisection Society v Inland Revenue Commissioners* [1948] AC 31 at 49 per Lord Wright.

¹¹⁴ *New South Wales Nursing Service and Welfare Association for Christian Scientists v Willoughby Municipal Council* [1968] NSW 791; *City of Hawthorn*; *Church of England Property Trust, Diocese of Canberra and Goulburn v Imlay Shire Council* [1971] 2 NSWLR 216. See Gino Dal Pont *Law of Charity* (LexisNexis/Butterworths, Australia, 2010) at 179. While these cases are not binding in New Zealand, they provide useful guidance as to the test of the public benefit for relief of the aged and impotent. In *Re Dunlop* [1984] NI 408 at 423 which involved aged or impotent persons, Carswell J considered that the poverty exception from the rule regarding public benefit was limited to relief of poverty cases. Carswell J wrote:

The discussion in *In Re Scarisbrick* [1951] Ch 622 centred solely round trusts for the relief of poor persons, and there was no case cited in the judgments which concerned only aged or impotent people without the added qualification of poverty [...] Although Lord Simonds said in *Oppenheim v Tobacco Securities Trust Co. Ltd* [1951] AC 297, 308 that the law of charity, so far as it related to ‘the relief of aged, impotent and poor people’ has followed its own line, which might indicate a willingness to regard the exception as applying to the whole of Lord Macnaghten’s first head, I consider that the House of Lords in *Dingle v Turner* intended to circumscribe it more closely and to confine it to cases concerning the relief of actual poverty.

¹¹⁵ Hubert Picarda *The Law and Practice Relating to Charities* (4th ed, Bloomsbury Professional Ltd, Haywards Heath, 2010) at 202 at 53.

¹¹⁶ See for example Timeship extract “04 Cryopreservation” (attached to Susan Barker’s letter dated 9 August 2012) “As soon as possible after the heart of a dying patient stops, the patient is cooled down”. “The vitrification process to be used at Timeship begins as soon as possible after the heart of a dying patient stops beating. Ideally, a trained cryonics team is standing by”.

¹¹⁷ Refer to Brian Wowk’s affidavit of 30 April 2013 at paragraph 67.

¹¹⁸ Refer to Ralph Charles Merkle’s affidavit of 4 May 2013 at paragraph 185.

but are later revived (for example drowning victims).¹¹⁹ However, we consider that there is a significant difference between the examples of someone being revived a short time after “death” using existing medicine and someone being preserved for decades or centuries for possible reanimation in the future using possible future medical advances. Further, it is not for the Board to determine there is a “need” when current legislation and regulations treat “death” as an end point.

The Foundation’s purposes and “any other benefit to the community”

(a) Legal framework for “any other benefit to the community”

71. In giving consideration to the fourth category, the courts follow a specific analytical approach, which poses a two part question. First, whether a public benefit to a sufficient section of the public has been established.¹²⁰ Second, whether a benefit falls within the ‘spirit and intendment’ of the Preamble to the *Statute of Charitable Uses*.¹²¹

72. The Foundation has submitted that its purposes are charitable under the fourth head of “other purposes beneficial to the community”: by analogy with cases on protecting human life, promoting human health and the relief of human suffering and distress; and under the alternative “presumption of charitable status” test.¹²²

(b) Protecting human life, promoting human health and relief of human suffering and distress

73. In terms of protecting human life, promoting human health and relief of human suffering and distress, examples of purposes which have been found to be charitable under these categories include the purposes discussed above under relief of the aged and impotent, a Methodist Church children’s home,¹²³ provision of hospital, clinics and related services,¹²⁴ rest homes for those in need of them,¹²⁵ a bequest for a fund for lepers,¹²⁶ provision of lifeboats to a town on the coast,¹²⁷ and the prevention of road traffic accidents or child accident prevention.¹²⁸

74. The Board acknowledges that some of the research funded by the Foundation can be seen as resulting in a public benefit, for example the research into

¹¹⁹ For example, refer to William John Faloon’s affidavit dated 16 May 2013 at paragraph 85.
¹²⁰ Refer paragraph 66 above.
¹²¹ *Statute of Charitable Uses*; *Travis Trust* at [20]; *Queenstown Lakes* at [48].
¹²² Refer Susan Barker’s letter dated 28 June 2012 at paragraph 33.
¹²³ *Re Hook*, High Court, Wellington, A 8/83, 25 October 1984, Ongley J.
¹²⁴ *Auckland Medical Aid* at 390.
¹²⁵ *Re White’s Will Trusts* [1951] 1 All ER 528. That case was followed in New Zealand by *Re Harding* [1960] NZLR 379.
¹²⁶ *Re Chapman* High Court, Napier, CP 89/87, 17 October 1989 at 6.
¹²⁷ *Johnston v Swann* (1818) 3 Madd 457.
¹²⁸ See New Zealand Charities Register, registration numbers CC43668 and CC34708.

transplants. However, as in paragraph 52, this benefit is too downstream from the focus of the Foundation to permit a conclusion that the Foundation has sufficient public benefit.

75. We consider that the Foundation's purpose to fund cryonics research does not have a clear public benefit (see paragraphs 49 to 54 above).
76. Further, we do not consider any benefit is analogous to established charitable purposes contended by the Foundation. We note that the Foundation intends to provide significant grants to the CMRF whose core purpose relates to cryopreservation and reanimation research. The Foundation may also provide funding to the Timeship facility where cryopreservation and reanimation services will be provided. We do not consider that the cryopreservation of deceased people or research into this area can be seen as protecting human life, promoting human health or the relief of a need including human suffering and distress. As the person is deceased it is not possible to protect their life, promote their health or relieve their suffering (see paragraph 68 above for discussion on the Foundation's discussion regarding "death").

(c) Presumption of charitable status where public benefit is established

77. The Foundation has submitted that there is an alternative test of whether a benefit falls within the spirit and intendment of the preamble.¹²⁹ That is a presumption that objects beneficial to the public, or of public utility, are prima facie within the spirit and intendment of the preamble of the Statute of Charitable Uses.
78. The Board considers that the status of this test in New Zealand is not clear.
79. In *Re Greenpeace of New Zealand Incorporated (Greenpeace, CA)*, the Court of Appeal stated:

Second, the retention of the fourth category of charitable purpose, namely "any other matter beneficial to the community", confirms that the decisions of this Court relating to its interpretation and application remain applicable. In particular, the purpose must be for the public benefit and charitable in the sense of coming within the spirit and intendment of the preamble to the Statute of Charitable Uses Act 1601 (43 Eliz I c 4) (the preamble). The public benefit requirement focuses on whether the purpose is beneficial to the community or a sufficient section of the public. The requirement to be charitable within the spirit and intendment to the preamble focuses on analogies or the presumption of charitable status. Even in the absence of an analogy, objects beneficial to the public are prima facie within the spirit and intendment of the preamble and, in the absence of any ground for holding that they are outside its spirit and intendment, are therefore charitable in law.¹³⁰

¹²⁹ Refer Jackson & Campbell's letter of 28 May 2013 at paragraphs 79 to 101.
¹³⁰ *Greenpeace, CA* at [43].

80. The Court concluded¹³¹ that promotion of nuclear disarmament and the elimination of all weapons of mass destruction were purposes beneficial to the community and that they also considered that “it is a purpose within the spirit and intendment to the preamble both on the basis of analogy and the presumption of charitable status. It is in our view analogous to the promotion of peace. There is also no ground for holding that it is outside the spirit and intendment of the preamble.”
81. The Board notes that the Court of Appeal did not hear argument on whether the analogy test or presumption test applied in New Zealand. Further, the presumption was not determinative of the outcome as the Court also found that the purposes provided benefits within the spirit and intendment by analogy.¹³²
82. Further the Board notes that in *Commissioner of Inland Revenue v Medical Council of New Zealand*¹³³ (**Medical Council**) all the Court of Appeal Judges accepted that the New Zealand Medical Council had public benefit or there was public interest in the Council’s functions. However, the Judges’ assessment as to whether those public benefits were charitable differed. McKay J stated that presumption was the “correct approach” but then went on to determine the issue by reference to analogy.¹³⁴ Thomas J referred to the presumption and went on to conclude that the Council was charitable on either the analogy or the presumption test.¹³⁵ Keith J did not address the issue of the presumption. Richardson P and Gault J referred to the presumption but appear to reject it in favour of the analogy approach.¹³⁶ The Board considers that the extent of the difference in view between the minority and majority as to whether the presumption test should apply is unclear, particularly as Keith J did not express a view.
83. In *Latimer*, the High Court found that it was bound to follow the approach in *Medical Council* and apply the presumption test. However, O’Regan J also applied the analogy test as well “lest he be wrong” in adopting the presumption.¹³⁷ The matter was appealed to the Court of Appeal where it was argued that O’Regan J was incorrect to apply the presumption, particularly given that McKay J in the *Medical Council* decision did not actually adopt the presumption in reaching his decision, he instead proceeded by analogy.¹³⁸ The Court of Appeal in *Latimer* found it unnecessary to reach a view on whether all of

¹³¹ *Greenpeace, CA* at [81]

¹³² Refer paragraph 80 above.

¹³³ [1997] NZLR 297.

¹³⁴ *Commissioner of Inland Revenue v Medical Council of New Zealand* [1997] NZLR 297 (“*Medical Council*”) at 314.

¹³⁵ *Medical Council* at 321

¹³⁶ They noted that Somers J in *Accountants* at 157 expressed doubt as to whether the presumption test represents the law in England and that the Privy Council had concluded it was not the law in Australia (*Brisbane City Council v Attorney-General* [1979] AC 411 (“*Brisbane City Council*”) at 422).

¹³⁷ *Latimer, CA* at [13].

¹³⁸ *Latimer, CA* at [33].

the majority in *Medical Council* had adopted the presumption. Instead, they agreed with McKay J's comments that it was important to be guided by principle rather than by a detailed analysis of decisions on particular cases.¹³⁹

84. The Board also notes that, except for *Greenpeace, CA*, the courts have not sought to apply the presumption test when assessing appeals of the Charities Commission's decisions.¹⁴⁰ Also, the presumption test has been rejected in Australia¹⁴¹ and Canada,¹⁴² and it has not been followed in England.¹⁴³
85. Further, it is clear that even if the presumption applies in New Zealand law, the presumption can be rebutted. If the purpose does not have public benefit then the presumption cannot apply.
86. As above, the Board considers that the status of this test in New Zealand is not clear. However, even if this test applies in New Zealand law, the Board considers that it does not render the Foundation as charitable. The focus of the Foundation is on research which, as discussed above, does not confer a public benefit. Accordingly, any presumption is not triggered.

D. Section 5(3) of the Act

87. The Board is satisfied that the Foundation's non-charitable purpose to fund research into the cryopreservation and reanimation of individuals is an independent purpose (see above at paragraphs 29 to 35). That purpose is so pervasive and predominant it cannot realistically be considered ancillary to any valid charitable purpose of the Trust.

E. Other submissions raised by the Foundation

88. The Foundation has also raised other submissions. The Board is not convinced by these submissions and does not consider that these change the outcome of the Foundation's application. The reasons for the Board's view are detailed below.

Submission regarding extension of Scottish Burial Reform

89. The Foundation has submitted that cryopreservation is the next evolutionary step from burials and cremations and that applying the reasoning in *Scottish Burial Reform*, it can be seen as charitable by analogy.

¹³⁹ *Latimer, CA* at [39-40].

¹⁴⁰ See for example *Travis Trust* at [20].

¹⁴¹ *The Royal National Agriculture and Industrial Association v Charter & Ors* [1974] 45 ANR 304; *Brisbane City Council* at 422.

¹⁴² For example, *Vancouver Immigrants* at [46]-[51] (Gonthier J) and [146]-[151] (Iacobucci J).

¹⁴³ Jean Warburton, *Tudor on Charities* (9th ed, Sweet & Maxwell, London, 2003) at 1-005.

90. The Board is not convinced by this argument. In *Scottish Burial Reform* the entity's purposes included the promotion of inexpensive and sanitary methods of disposal of the dead. This differs from the current situation where the research is aimed at the cryopreservation of deceased individuals for future reanimation and the funding of the Timeship facility which aims to store the "patients'" bodies for many years. This differs from the permanent disposal of the dead for sanitation reasons in *Scottish Burial Reform*.

Submission that a benign interpretation is to be applied

91. The Foundation has submitted that in construing an entity's purposes, a benign construction is to be applied.¹⁴⁴ However, the case law surrounding this construction¹⁴⁵ relates to circumstances where there is ambiguity in the trust deed. The Board does not consider that the Foundation's stated purposes are ambiguous. They clearly refer to funding research into cryopreservation and reanimation of individuals, a benign interpretation is therefore not appropriate.

Submissions relating to other examples of medical history

92. We note the Foundation's comments that there are numerous historical examples of one scientist being correct with the entire medical community being proven wrong a short time later,¹⁴⁶ this does not have a bearing on whether the Foundation's research is charitable under the Act. We must still consider whether the Foundation is charitable, which includes an assessment of whether the research is useful and whether the Foundation provides sufficient public benefit.

Submission that section 61B Charitable Trusts Act 1957 should be applied

93. The Foundation has submitted that section 61B CTA applies and that if the Foundation is found to have a non-charitable purpose, section 61B CTA should be invoked to strike that purpose out.¹⁴⁷

94. Section 61B(3) CTA states as follows:

"Every trust under which property is held or applied in accordance with an imperfect trust provision shall be construed and given effect to in the manner in all respects as if –

- (a) the trust property could be used exclusively for charitable purposes; and
- (b) no holding or application of the trust property or any part thereof to or for any such non-charitable and invalid purpose had been or could be deemed to have been so directed or allowed."

95. Case law establishes that this statutory remedy is available in cases where there is a 'substantially charitable' purpose, and it is not sufficient that a fund might be

¹⁴⁴ Refer Jackson & Campbell's letter of 28 May 2013 at paragraphs 73 to 78

¹⁴⁵ *Inland Revenue v McMullen* [1979] 1 WLR 130 and *Hadaway v Hadaway* [1955] 1 WLR 16.

¹⁴⁶ Refer Susan's Barker's letter dated 9 August 2012 at paragraphs 56 to 59.

¹⁴⁷ Refer Jackson & Campbell's letter of 28 May 2013 at paragraph 78.

applied to charitable purposes.¹⁴⁸ Having analysed the wording of the Foundation's purposes and activities, the Board does not consider that these provide evidence of "a substantially charitable" purpose. As discussed above, a focus of the Foundation is on funding cryonics research. This research is not considered charitable. Further, the Foundation does not provide sufficient public benefit. Therefore the remedy in section 61B CTA is not available to the Foundation.

Submission that distributions outside of Trust Deed are a matter for the Attorney-General

96. The Foundation has submitted that if it were to make distributions outside the objects in its Trust Deed the trustees would be acting ultra vires. This would be a matter for the Attorney-General to address and would not impact on the charitable status of the Foundation.¹⁴⁹
97. The Board considers that clauses 3(2)(d) and 3(2)(e) are not exclusively charitable purposes. Therefore, the Foundation is able to make distributions within these objects without acting ultra vires. However, these distributions further a non-charitable purpose so are relevant to an assessment of the Foundation's application for registration under the Act.

Submissions regarding distributions to non-charitable entities

98. The Foundation has submitted that charities are able to make distributions to entities that are not charitable under New Zealand law if such distribution was made in furtherance of the Foundation's objects.¹⁵⁰
99. The Board does not dispute this submission. However, as above, the Board considers that the Foundation's purposes are not exclusively charitable and therefore making distributions to entities to further these purposes cannot be seen as advancing a charitable purpose.

¹⁴⁸ *Re Beckbessinger* [1993] 2 NZLR 362 at 376 (Tipping J).

¹⁴⁹ Refer Susan Barker's letter dated 28 June 2012 at paragraph 30.

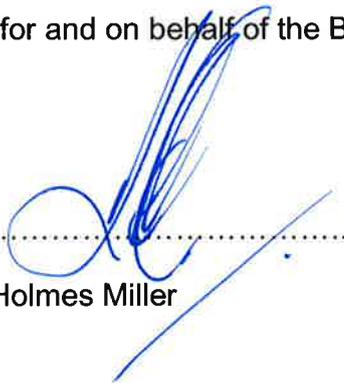
¹⁵⁰ Refer Susan Barker's letter dated 28 June 2012 at paragraph 28 and Jackson & Campbell's letter of 28 May 2013 at paragraph 35.

F. Charities Registration Board's determination

100. The Board's finding is that the Foundation has failed to meet an essential requirement for registration as a charitable entity in that it 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 Act. The Foundation is not for exclusively charitable purposes. Specifically, the Foundation has an independent purpose to fund cryonics research (research into reanimation and cryopreservation of individuals) which is not a charitable purpose. This independent purpose is not ancillary to any other charitable purpose. Further, the Foundation's purposes do not provide sufficient public benefit.

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

Signed for and on behalf of the Board



Roger Holmes Miller

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Date