

Registration decision: New Zealand Society of Diversional Therapists Incorporated

The facts

1. The New Zealand Society of Diversional Therapists Incorporated (the Applicant) was incorporated under the Incorporated Societies Act 1908 on 18 September 1992. The Applicant applied to the Charities Commission (the Commission) for registration as a charitable entity under the Charities Act 2005 (the Act) on 18 March 2008.

2. The Applicant's purposes are set out in clause 4 of its Constitution as follows:

"4.0 Objects

The Society Shall:

4.1 Develop and regularly review standards of practice for Diversional Therapists.

4.2 Provide mechanisms to ensure that Qualified Diversional Therapists are competent and fit to practise Diversional Therapy.

4.3 Provide guidelines and policies for the Society.

4.4 Act in an advisory capacity for the terms and conditions of employment.

4.5 Develop an education programme and continue to review the national certificate in Diversional Therapy.

4.6 Act as spokesperson for Diversional Therapists on matters pertaining to Diversional Therapy as a whole.

4.7 Develop and Maintain the Code of Ethics for Diversional Therapists.

4.8 Raise Government and Community awareness of Diversional Therapy Practice.

4.9 Accept and honour the Treaty of Waitangi as the basis of a relationship between Maori and Non-Maori and to recognise the differing needs of all cultures."

3. The Applicant's website (www.diversionaltherapy.net.nz) also provides information about its objectives and activities.

4. The Applicant's objectives are stated to be:

"1. To promote the highest standard of Diversional Therapy practice

2. To promote recognition and development of Diversional Therapy Education

3. To liaise with Industry and CSSITO on behalf of Diversional Therapists

4. To encourage cooperation between Diversional Therapists and others in related fields

5. *To promote the common interests of Diversional Therapists*"

5. The Applicant's activities are stated to be:

"The New Zealand Society of Diversional Therapists Inc recognises that Diversional Therapists practice in many areas of the community:

- *Public and private hospitals*
- *Health service providers*
- *The community*
- *Residential care facilities*
- *Hostels or group homes*
- *Rehabilitation centres*
- *Private consultancy*

Diversional Therapists have contacts with a wide range of the community, including those with physical disabilities, both healthy and frail elderly, people with developmental disabilities, people with mental illness, children and youths."

6. The Commission analysed the application for registration, and on 9 July 2008 sent the Applicant a letter advising that its application may be declined because it did not meet the essential requirements for registration. The Commission advised that it considered that the Applicant falls into the category of "professional associations" whose main purposes are for the benefit of members and not primarily for the benefit of the public.
7. The Applicant responded in a letter dated 14 October 2008, submitting that "a lot of the work undertaken by the Society could certainly be considered as charitable" as it is both educative and provides public benefit. The Applicant stated that Regional Support Groups, formed by and run with its support, where both members and non-members participate, should be considered charitable as they provide education for all people who work in the field of providing activities for the elderly and people with special needs. Also, its recent work in enabling members and non-members to obtain the National Certificate in Diversional Therapy should be considered charitable as it benefited the public by lifting the lifestyle of the most vulnerable people in society, the elderly and people with special needs.

The issues

8. The Commission must consider whether the Applicant meets all of the essential requirements for registration under the Act. In this case, the key issue for consideration is whether the Applicant is a society or institution established and maintained exclusively for charitable purposes and not carried on for the private pecuniary profit of any individual, as required by section 13(1)(b)(i) and (ii) of the Act. In particular, whether all of the Applicant's purposes fall within the definition of charitable purpose in section 5(1) of the Act and, if there

are any non-charitable purposes, whether these are ancillary to a charitable purpose.

The law on charitable purpose

9. Under section 13(1)(b)(i) of the Act, a society must be established and maintained exclusively for charitable purposes.
10. In order for a purpose to be charitable, it must fall within the definition of charitable purpose set out in section 5(1) of the Act.
11. 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 aimed at benefitting the public or a sufficient section of the public.
12. In order for a purpose to qualify as "any other matter beneficial to the community", the purpose must be beneficial to the community and analogous to the spirit and intendment of the purposes set out in the Preamble to the Statute of Charitable Uses 1601 (Statute of Elizabeth I).
13. Section 5 of the Act also provides that any non-charitable purpose must be ancillary to a charitable purpose.
14. In considering an application, section 18(3)(a) of the Act requires the Commission to have regard to:
 - (i) *the activities of the entity at the time at which the application was made; and*
 - (ii) *the proposed activities of the entity; and*
 - (iii) *any other information that it considers is relevant; ..."*

Relevant case law

15. There have been a number of Court decisions involving professional bodies.
16. In commenting on the UK position, the authors of *Tudor on Charities*¹ noted:

"..an institution whose main object is in the protection and advantage of those practising a particular profession is not a charity even though the carrying out of the main object results in benefit to the community. Because of this problem, several established charities have formed separate non-charitable bodies for negotiating purposes to preserve the charitable status of the original institutions. For example, the College of

¹ Tudor on Charities, 9th Edition, para 2-045, pg 71.

radiographers is a charitable institution which promotes radiography and the Society of Radiographers is a non-charitable body which negotiates on behalf of its members."

17. Also in the UK context, in *IRC v Oldham Training and Enterprise Council*² the Court held that promoting the interests of individuals engaged in trade, commerce or enterprise, and providing benefits and services to them conferred private benefits on those individuals, regardless of any public benefit. The remoteness of any public benefit disqualified the Council from having charitable status.
18. In the New Zealand context, in *Re Mason*³ the Supreme Court considered that while the objects of the Auckland District Law Society were entirely wholesome and likely to lead to the ultimate benefit of the public, they fell short of making the Society a charity. In that case, the Court made a distinction between charitable institutions whose main object was the advancement of education, which provided a clear public benefit, and non-charitable institutions whose main object was the protection and advantage of those practising in a particular profession.
19. McMullin J cited examples of charitable institutions, such as an institute of pathology⁴ and a college of nursing,⁵ and examples of non-charitable institutions, such as an insurance institute⁶ and a society of writers.⁷ Promotion of charitable purpose must be the institution's predominant object and any benefits to individual members of non-charitable character which result from the institution's activities must be of a subsidiary or incidental character.⁸
20. In *Institution of Professional Engineers New Zealand Inc v Commissioner of Inland Revenue*⁹ the High Court held that, although the advancement of the science of engineering was beneficial to the general public, a significant and non-incidental function of the institution was to act as a professional organisation for the benefit of engineers. Therefore, it could not be said that the institution was established exclusively for charitable purposes.
21. In *Commissioner of Inland Revenue v Medical Council of New Zealand*¹⁰ the Court of Appeal considered that the principal function of

² [1996] STC 1218.

³ [1971] NZLR 714, 721.

⁴ *Royal College of Surgeons of England v National Provincial Bank* [1952] AC 631; [1952] 1 All ER 984.

⁵ *Royal College of Nursing v St Marylebone Corporation* [1959] 1 WLR 1077; [1959] 3 All ER 663.

⁶ *Chartered Insurance Institute v Corporation of London* [1957] 1 WLR.

⁷ *Society of Writers to Her Majesty's Signet v Commissioners of Inland Revenue* (1886) 2 TC 257.

⁸ *Inland Revenue Commissioners v City of Glasgow Police Athletic Association* [1953] AC 380.

⁹ [1992] 1 NZLR 570.

¹⁰ [1997] 2 NZLR 297.

the Medical Council was the registration of medical practitioners. It held that the protection of the public in respect of the quality of medical and surgical services clearly fell within the broad category of purposes beneficial to the community. Any benefits to practitioners were incidental and consequential, therefore the Council was an institution established exclusively for charitable purposes.

Charities Commission's analysis

22. Clause 3 of the Applicant's Constitution provides that the *"aim of the Society is to advocate for Diversional Therapists nationally and in areas related to standards of practice, work conditions and education."*
23. The Applicant is structured as a professional organisation. Under clause 8 of the Constitution, it is a national organisation governed by a Code of Ethics and set standards of practice. Under clause 6, membership is at the discretion of the executive of the Applicant, and is open to all persons employed in the field of diversional therapy, students, volunteers, facilities managers and other interested parties.
24. Based on the information provided to the Commission, the Applicant acts as the umbrella body that represents diversional therapists across New Zealand, oversees their training, qualifications, standards of practice and working conditions, and promotes the practice of diversional therapy. The Applicant also offers both members who are not qualified diversional therapists, and non-members, the ability to undertake training by participating in the Regional Supports Groups and study for the National Certificate in Diversional Therapy.
25. As set out earlier, the objects in clause 4 include the development and regular review of standards of practice for diversional therapists, development of guidelines and policies for the Applicant, development of an education programme, and development and maintenance of the Code of Ethics for Diversional Therapists.
26. The Commission considers that clauses 4.1, 4.2, 4.3 and 4.7, relating to the development and maintenance of proper standards of practice, a Code of Ethics for Diversional Therapists and policies under which it will operate, can be viewed as principally for the regulation of the activities of diversional therapists. These can be seen as analogous to the registration function in the Medical Council case and are therefore 'matters beneficial to the community'. This is because they provide a public benefit by protecting, promoting and maintaining the health, well being and safety of the community. Diversional therapists provide assistance to a wide range of people in the community including those with physical disabilities, the elderly, people with developmental disabilities, people with mental illness, children and young people.
27. Clause 4.5, relating to the development of an education programme for both members and non-members, can be viewed as charitable as

'advancing education', and when read together with the purposes in clauses 4.1, 4.2, 4.3 and 4.7, is providing a public benefit.

28. Clauses 4.4 and 4.6, relating to the Applicant acting both in an advisory capacity on employment matters on behalf of its members and as a spokesperson for them, are purposes that solely advance and benefit the interests of its members. As such, these purposes can only be interpreted as non-charitable as being directed to the benefit of members only and therefore not for the benefit of the public or an appreciable section of the public.
29. It is considered that these purposes are not merely ancillary or secondary to primary purposes that are charitable, and therefore the Applicant is considered to have primary non-charitable purposes.
30. In *Institute of Professional Engineers New Zealand Incorporated v Commissioner of Inland Revenue*¹¹ Tipping J stated:

"I consider that the following words of Lord Normand in the Glasgow Police Association case are highly material:-

What the respondents must show in the circumstances of this case is that so viewed objectively, the association is established for a public purpose and that the private benefits to members are unsought consequences of the pursuit of the public purpose and can therefore be disregarded as incidental. That is a view which I cannot take. The private benefits to members are essential.

While there can be no doubt that there are distinct public benefits from the objects and functions of IPENZ it is my view, after careful consideration of both the oral and documentary evidence, that the private benefits cannot be disregarded as incidental."

31. Taking into account the Applicant's expressed purposes in clause 4, the role of the Applicant in acting on behalf of diversional therapists on matters of employment and as spokesperson for diversional therapists, and the Applicant's activities, the Commission considers that while the Applicant may have some charitable purposes, the Applicant also has main purposes that are directed at benefiting its members, and not at benefiting the public or a sufficient section of the public. The private benefits to the members cannot be viewed as the unsought consequences of the pursuit of public purposes and cannot be disregarded as incidental or ancillary.

Charities Commission's determination

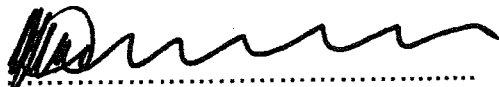
32. The finding of the Commission is that the Applicant has failed to meet an essential requirement for registration as a charitable entity in that the Applicant is not established and maintained exclusively for charitable purposes, as required by section 13(1)(b)(i) of the Act. The

¹¹ [1992] 1 NZLR 570.

primary purposes of the Applicant include representing diversional therapists across New Zealand and overseeing their training, qualifications, standards of practice and working conditions. This is not a charitable purpose as it does not fall within one of the four categories of charitable purpose recognised at law and is considered to be primarily aimed at furthering the interests of the Applicant's members and not at benefiting the public or a sufficient section of the public.

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

9/12/08.
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