

Registration decision: Save Our Arts Centre Society Incorporated

The facts

1. Save Our Arts Centre Society Incorporated (the Applicant) was established as an incorporated society on 12 November 2009. The Applicant applied to the Charities Commission (the Commission) for registration as a charitable entity under the Charities Act 2005 (the Act) on 17 November 2009.
2. The Applicant's original objects were set out in clause 2 of its constitution:

Objects

- 2.1 *The primary Objects of the Society are to benefit the community by:*
 - (a) *Protecting and securing to the Members of the Society and the people of Christchurch their rights, entitlements and interests in the social, cultural, heritage, historical, public open space and public amenity benefits of the Arts Centre of Christchurch (the "Arts Centre") as gifted to the people of Christchurch.*
 - (b) *Supporting the campaign to acquire United Nations Educational, Scientific and Cultural Organisation World Heritage Status for the collection of gothic revival buildings (including the Arts Centre) in Christchurch.*
 - (c) *Promoting the New Zealand [ICOMOS] Charter for the Conservation of Places of Cultural Heritage Value.*
 - (d) *Doing any act or thing incidental or conducive to the attainment of any of the above Objects.*
- 2.2 *Without detracting from the primary Objects, the secondary Objects of the Society are to:*
 - (a) *Oppose the proposed construction at the Arts Centre of a building to house the School of Music by the University of Canterbury.*
 - (b) *To represent the Members in any matter or proceedings which might concern or affect them in relation to the preservation of the Arts Centre as an amenity for the people of Christchurch and elsewhere in New Zealand.*
- 2.3 *Notwithstanding any other provision, the Society shall not expend any money:*
 - (a) *Other than to further the Objects, nor*
 - (b) *For the sole personal or individual benefit of any Member (subject to Rule 3.1 below).*

3. The Commission analysed the application for registration and on 7 December 2009 sent the Applicant a notice that may lead to decline on the basis that the purposes and activities of the entity were political and therefore non-charitable.
4. The Applicant responded to the notice via email on 6 January 2010 with a proposed rules change. The proposed purposes were as follows:

The objects for which the Society is established are:

- (a) *To promote and support the preservation, conservation and protection of the Arts Centre (and its surrounding precinct) in perpetuity according to sound conservation principles.*
 - (b) *To promote and support the use of the Arts Centre as a cultural centre for the benefit of Christchurch and New Zealand so long as such uses do not prejudice the heritage values of the Arts Centre precinct.*
 - (c) *To work collaboratively with the Arts Centre Trust Board and other agencies to promote and facilitate effective administration of the Arts Centre, recognising its registration pursuant to the Historic Places Act 1993 and its aesthetic, architectural, cultural, social and historic significance.*
 - (d) *To foster and assist public understanding of, enjoyment of, and support for the preservation of the aesthetic, architectural, cultural, social and historic significance of the Arts Centre.*
 - (e) *To raise funds for the conservation and preservation of the Arts Centre.*
 - (f) *To promote and support the values and principles of the New Zealand ICOMOS Charter for the Conservation of Places of Cultural Heritage Value.*
 - (g) *To educate the public about the national and international significance of the Arts Centre as part of a wider grouping of Gothic Revival buildings in Christchurch and to publicise and promote the benefits which will accrue to the Arts Centre and the City by reason of the achievement of UNESCO World Heritage Status for Gothic Revival Christchurch.*
 - (h) *To undertake such schemes or projects as members deem appropriate to assist the general objects of the Society.*
 - (i) *To conduct such activities as will promote membership of the Society and support its objects.*
 - (j) *To do any act or thing incidental or conducive to the attainment of any of the above objects.*
5. The Commission reviewed the proposed purposes and on 13 January 2010 sent the Applicant a second notice that may lead to decline on the basis that information about the Applicant's activities on its website (<http://www.soac.org.nz>) indicated that its main focus was on political activities, which were not charitable.

6. On 1 February 2010, the Applicant's solicitor responded to the second notice submitting:

"4 *We note that the letter of 13 January 2010 focuses on SOAC's website, and suggests that its main focus is political activities. Our client is not involved in political activities, nor is it involved in the perpetual advocacy of a particular point of view.*

5 *Our client's objects are to ensure the preservation of heritage buildings in Christchurch, to promote the preservation of heritage buildings in Christchurch and New Zealand, and to educate the public on those buildings and on heritage values.*

6 *We acknowledge that the extract taken from the website in the letter of 13 January 2010 records a dispute in which SOAC is involved. It is a one-off activity to fulfil the charitable objects of SOAC.*

7. *It relates to maintaining the architectural character and integrity of historical stone buildings on the Arts Centre site for the benefit of members of the New Zealand public. The High Court has acknowledged that this litigation is in the public interest. We also note that merely because SOAC is challenging the validity of decisions made by the Christchurch City Council does not make it prima facie a political organisation. ...*

9. *... the long-term activities are to focus on educating the citizens of Christchurch and New Zealand about heritage buildings, in particular those designed by Benjamin Mountfort.*

10. *There is also a focus on working to promote and support the preservation and protection of the Arts Centre and its operation as a cultural centre for the benefit of Christchurch, New Zealand. ..."*

7. On 3 February 2010, the Commission sent the Applicant a third notice that may lead to decline addressing the Applicant's original objects and proposed objects. The Commission advised that the mere fact that an applicant was engaged in litigation would be unlikely affect an assessment of that entity's charitable status. The Commission reiterated that the Applicant's stated purposes, its proposed purposes and other relevant information indicated that the main purpose of the Society is political and therefore non-charitable.

8. On 16 February 2010, the Applicant's solicitor responded to the third notice submitting:

"2. *We do not consider that the activities in which SOAC has been engaged should negate its charitable status. ...*

3. *SOAC has at all times acted only in pursuit of its charitable objects. These are to ensure the preservation of heritage buildings in Christchurch, to promote the preservation of heritage buildings in Christchurch and New Zealand, and to educate the public on those buildings and on heritage values. The activities to which the Commission refers in its letter of 13 January 2010 are both necessary*

and ancillary measures that SOAC has taken to fulfil its charitable objects. ...

7. *Furthermore, SOAC has at all times acted in pursuit of its charitable objects in a reasonable and responsible manner. The activities to which the Commission refers in its letter of 13 January 2010 indicate that SOAC has used both ordinary and reasonable means available to protect heritage buildings in Christchurch. These include opposing a corporate decision of the Christchurch City Council, using the Ombudsman and filing High Court proceedings. SOAC has consistently advocated a position to the extent necessary to conduct its charitable objects in the circumstances."*

The issues

9. 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 established and maintained exclusively for charitable purposes, as required by section 13(1)(b)(i) 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.

The law on charitable purposes

10. Under section 13(1)(b) of the Act, a society or institution must be established and maintained exclusively for charitable purposes and must not be carried on for the private pecuniary profit of any individual.
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 for the public benefit.¹ This means that the purpose must be directed at benefiting the public or a sufficient section of the public.
12. Section 5(3) of the Act provides that any non-charitable purpose must be ancillary to a charitable purpose.
13. Section 5(4) of the Act states that a non-charitable purpose is ancillary to a charitable purpose of the trust, society or institution if the non-charitable purpose is:
 - (a) ancillary, secondary, subordinate, or incidental to a charitable purpose of the trust, society or institution; and
 - (b) not an independent purpose of the trust, society or institution.
14. Also, in considering a registration application, section 18(3)(a) of the Act requires the Commission to have regard to the activities of the entity at the time the application was made, the entity's proposed activities, and any other information that the Commission considers relevant.

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

Charities Commission's analysis

15. The Commission has analysed the Applicant's original objects as it has not been advised that the Applicant has adopted the proposed objects submitted on 6 January 2010, and no amended constitution appears on the Companies Office register.
16. The objects in clause 2 do not indicate an intention to relieve poverty or advance religion. The Commission has therefore considered whether these purposes could be charitable under the advancement of education and any other matter beneficial to the community.

Advancement of education

17. In order for a purpose to advance education, it must provide some form of education and ensure that learning is advanced. The modern concept of "education" covers formal education, training, and research in specific areas of study and expertise. It can also include less formal education in the development of individual capabilities, competencies, skills and understanding, as long as there is a balanced and systematic process of instruction, training, and practice.²
18. Education does not include advertisements for particular goods or services or promotion of a particular point of view.³ In *Re Bushnell (deceased)* the court held that a distinction must be made between propagating a view that can be characterised as political and the desire "to educate the public so that they could choose for themselves, starting with neutral information, to support or oppose certain views."⁴
19. In *Re Collier (deceased)*, Hammond J set out the test for determining whether the dissemination of information will qualify as charitable under the advancement of education:

"It must first confer a public benefit, in that it somehow assists with the training of the mind, or the advancement of research. Second, propaganda or cause under the guise of education will not suffice. Third, the work must reach some minimal standard. For instance, in Re Elmore [1968] VR 390 the testator's manuscripts were held to be literally of no merit or educational value."⁵

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

³ *In re Shaw (deceased)* [1957] 1 WLR 729; as interpreted in *Re Hopkins' Will Trusts* [1964] 3 All ER 46. See also *Re Collier* [1998] 1 NZLR 81.

⁴ *Re Bushnell (deceased)* [1975] 1 All ER 721 at 729.

⁵ [1998] 1 NZLR 81 at 91-92.

20. In that case Hammond J held that the bequest for publication of a book did not qualify as charitable under the test:

*"In my view, the minimal threshold test is not met. There is no educative value, or public utility in the 'book'. Further, it is no more than an attempt to perpetuate a private view held by Mrs Collier."*⁶

21. The Applicant's solicitor, in his letter of 16 February 2010, stated that the Applicant is engaged in educating the public about heritage buildings and heritage values. The Commission notes, however, that none of the purposes set out in clause 2 are aimed at advancing education. In addition, there is no evidence on the Applicant's website (<http://www.soac.org.nz/>) that it is providing objective and neutral information to the public.

Other matters beneficial to the community

22. In order for a purpose to qualify as "any other matter beneficial to the community", the purpose must be beneficial to the community and must be within the spirit and intendment of the purposes set out in the Preamble to the *Charitable Uses Act 1601* (the Statute of Elizabeth), which are as follows:

- relief of aged, impotent, and poor people
- maintenance of sick and maimed soldiers and mariners
- schools of learning
- free schools and scholars in universities
- repair of bridges, ports, havens, causeways, churches, sea banks, and highways
- education and preferment of orphans
- relief, stock or maintenance of houses of correction
- marriage of poor maids
- supportation, aid and help of young tradesmen, handicraftsmen, and persons decayed
- relief or redemption of prisoners or captives and
- aid or ease of any poor inhabitants concerning payment of fifteens, setting out of soldiers and other taxes.⁷

⁶ [1998] 1 NZLR 81 at 84.

⁷ *Re Jones* [1907] SALR 190, 201; *Williams Trustees v Inland Revenue Commissioners* [1947] AC 447, 455; *Scottish Burial Reform and Cremation Society v Glasgow Corporation* [1968] AC 138, 146-48; *Incorporated Council of Law Reporting (QLD) v Federal Commissioner of Taxation* (1971) 125 CLR 659, 667, 669; *Royal National Agricultural and Industrial Association v Chester* (1974) 48 ALJR 304, 305; *New Zealand Society of Accountants v Commissioner of Inland Revenue* [1986] 1 NZLR 147, 157; *Re Tennant* [1996] 2 NZLR 633, 638.

23. In *Travis Trust v Charities Commission*⁸, Joseph Williams J noted that

“... regard must be had to the particular words of the preamble and, it has now long been held, any cases in which purposes have been found to be within the spirit and intendment of the preamble by analogy.”

24. Courts have held that providing public amenities and recreational facilities can be charitable under the fourth head, “any other matter beneficial to the community”.⁹

25. The Commission considers that protecting “public open space and public amenity benefits” in clause 2.1(a) could amount to provision of facilities and therefore be charitable under the fourth head.

26. In *Re Verral*¹⁰, the court held that promoting the permanent preservation of buildings for the benefit of the nation was a charitable purpose.

27. The Commission considers that the purposes set out in clauses 2.1(b) and (c) could be charitable under the fourth head if:

- there is independent expert evidence that the buildings which are being supported by the Applicant are of sufficient historical or architectural interest
- the buildings are not used for non-charitable purposes
- sufficient public access is provided to the buildings, and
- any private benefit to individuals is incidental.

Political purpose?

28. While ancillary purposes do not have to be charitable in their own right, such clauses must still further the charitable purposes of the entity. Section 5(3) of the Act states:

*“To avoid doubt, if the purposes of a trust, society, or an institution include a non-charitable purpose (for example, advocacy) that is merely **ancillary to a charitable purpose** of the trust, society, or institution, the presence of that non-charitable purpose does not prevent the trustees of the trust, the society, or the institution from qualifying for registration as a charitable entity.”*

29. Clause 2.2(a) indicates that a “secondary object” is to

- (a) *Oppose the proposed construction at the Arts Centre of a building to house the School of Music by the University of Canterbury.*

⁸ CIV-2008-485-1689, High Court, Wellington, 3 December 2008 (Joseph Williams J.) at para 20.

⁹ See *Commissioner of Inland Revenue v Wellington Regional Stadium Trust* [2006] 1 NZLR 617, *Re Chapman* (High Court, Napier, CP89/87 17 October 1989, Greig J), and *Re Cumming* [1951] NZLR 498.

¹⁰ [1916] 1 Ch 100.

30. The "About us" section of the Applicant's website¹¹ states:

"Save Our Arts Centre began in July 2009 when Richard Sinke of the Dux de Lux invited a group of people who shared concerns about the proposal to build a music school for the University of Canterbury at the Arts Centre of Christchurch to meet on a regular basis to exchange information and ideas. From this informal grouping the idea grew that a more formal society should be formed which would not only fight the current proposal, but would continue to take an interest in how the Arts Centre is managed for the benefit of the people of Christchurch.

The society was formally incorporated in October 2009. ..."

31. The website also contains a list of the Applicant's activities so far which appears to indicate that the purpose in clause 2.2(a) is a main purpose:

- *We have run an information campaign aimed at getting factual information and expert opinion into the public arena. This has included establishing this website, writing opinion pieces in the newspapers, letters to the editor and interviews on radio and television.*
- *We successfully campaigned for the Council to hold a consultation on the proposed funding by Council. Although this was limited to issues of financing it provided an opportunity for many to participate and gained us valuable time to better inform the public about the issues.*
- *We used the Ombudsman's powers to successfully demand the release of key financial information, including the amount of the proposed City Council loan of \$24.3 million, which had been withheld by the Council from the public.*
- *We made very strong submissions to Council consultation. Some Councillors changed from their previous support for the proposal, but not quite enough. In the end the vote was 7-6 to grant the loan.*
- *We ran a petition against the proposal signed by over 4500 people. Unfortunately this did not sway the Council. However, we have launched a second petition because of the number of requests we have received to keep a petition going. Click here to download forms.*
- *We have filed a claim in the High Court to challenge the validity of the changes made to the Trust Deed by the Arts Centre Trust Board, as well as the validity of the Council decision because of predetermination. We are also seeking an order that hearings for the subdivision of the Arts Centre site and the additional City Council car park take place at the same time as the hearing for the music school (should that still be necessary). Click here for more details.*
- *We have filed for an interim injunction to prevent the Resource Consent hearing from taking place until the above issues have been resolved in the High Court. We did not succeed in preventing the hearing but we were successful in getting the subdivision application notified.*
- *We have presented evidence before the Commissioners on the Resource Consent application.*¹²

¹¹ <http://soac.org.nz/> (last accessed 9 April 2010).

¹² <http://soac.org.nz/> (last accessed 9 April 2010).

32. Since *Bowman v Secular Society Ltd*¹³, courts have consistently held that a trust or a society for the attainment of political objects is not charitable, not necessarily because it is invalid, but because the courts have no means of judging whether a proposed change in the law will or will not be for the public benefit, and therefore cannot say that a gift to secure the change is a charitable gift.
33. In *McGovern v Attorney General*,¹⁴ Slade J held that a trust whose main object is to secure the alteration of the law would not be regarded as charitable because the court had no adequate means of judging whether a proposed change in the law would or would not be for the public benefit. He further held that if a principal purpose of the trust was to reverse government policy or particular administrative decisions of governmental authorities, it would not be charitable.
34. The New Zealand Court of Appeal, in *Molloy v Commissioner of Inland Revenue*,¹⁵ held that the Society for the Protection of the Unborn Child was not a charitable society. Delivering the judgement for the Court, Somers J stated:
- “... reason suggests that on an issue of a public and very controversial character, as in the case of abortion, both those who advocate a change in the law and those who vigorously oppose it are engaged in carrying out political objects in the relevant sense. The law, statutory or otherwise, is not static. ... 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.”*
35. In *Public Trustee v Attorney-General*¹⁶, Santow J summarised the state of the law concerning “political” purposes. He wrote that an organisation “whose main purpose is directed to altering the law or government policy, as distinct possibly from an organisation to encourage law reform generally, cannot be saved from being political by appeal to the public interest.”
36. The Federal Court of Australia has recently held that an entity whose purposes and activities were aimed at influencing government to ensure foreign aid was delivered in a particular manner, did not have exclusively charitable purposes because of its political purposes.¹⁷ In reaching its decision the court relied on a similar position taken by Chadwick LJ in *Southwood v Attorney-General*,¹⁸ who said:

“The court was in no position to determine that promotion of the one view rather than the other was for the public benefit. Not only did the court have no material on which to make that choice; to attempt to do so would be to usurp the role of government. So the court could not recognise as

¹³ [1917] AC 406.

¹⁴ [1982] Ch 321 at 338-340.

¹⁵ [1981] 1 NZLR 688 at 695-696.

¹⁶ (1997) 42 NSWLR 600 at 619.

¹⁷ *Commissioner of Taxation v Aid/Watch Incorporated* [2009] FCAFC 128.

¹⁸ [2000] TLR 541.

*charitable a trust to educate the public to an acceptance that peace was best secured by demilitarisation in the sense in which that concept was used by the appellants. Nor, conversely, could the court recognise as charitable a trust to educate the public to an acceptance that war was best avoided by collective security through membership of a military alliance - say, NATO.*¹⁹

37. In *Re Collier (deceased)* the High Court identified three different types of political trust:
- (i) trusts to change the law;
 - (ii) trusts to support a political party; and
 - (iii) trusts for the perpetual advocacy of a particular point of view or "propaganda" trusts.
38. Accordingly, Hammond J held that propagating a point of view or swaying public opinion on controversial social issues would be considered to be "political" activities and therefore not charitable even when they were not combined with agitating for a change in legislation or government policy.²⁰
39. The Commission considers that the purpose in clause 2.2(a) and information on the Applicant's website indicate that the Applicant is involved in propagating a particular point of view. The Applicant does not appear to be educating "the public so that they could choose for themselves, starting with neutral information, to support or oppose certain views."²¹
40. The Commission considers that, on the basis of the cases cited above, the purpose in clause 2.2(a) is a political purpose that is therefore non-charitable.

Conclusion

41. The Commission concludes that the non-charitable purpose in clause 2.2(a) indicates that the Applicant is not established and maintained exclusively for charitable purposes. In addition, information on the Applicant's website indicates that this non-charitable purpose is an independent purpose of the Applicant that is not ancillary to any charitable purpose.

¹⁹ *Commissioner of Taxation v AidWatch Incorporated* [2009] FCAFC 128 at paragraph 47.

²⁰ See also *Molloy v Commissioner of Inland Revenue* [1981] 1 NZLR 688; *Positive Action Against Pornography v Minister of National Revenue* (1988) 49 DKR (4th) 74; *Re Bushnell (deceased)* [1975] 1 Akk ER 721; *Public Trustee v Attorney-General* (1997) 42 NSWLR 600; *Re Wilkinson (deceased)* [1941] NZLR 1065; *Re Hopkinson (deceased)* [1949] 1 All ER 346; *National Anti-Vivisection Society v Inland Revenue Commissioners* [1948] AC 31; *Re Cripps (deceased)* [1941] Tas SR 19; *Knowles v Commissioner of Stamp Duties* [1945] NZLR 522

²¹ *Re Bushnell (deceased)* [1975] 1 All ER 721 at 729.

Charities Commission's determination

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

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



19 May 2010

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Trevor Garrett
Chief Executive

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Date