

Deregistration decision: New Zealand Computer Society Incorporated

The facts

1. New Zealand Computer Society Incorporated (the Society) was incorporated as a society under the *Incorporated Societies Act 1908* on 6 October 1960. The Society applied to the Charities Commission (the Commission) for registration as a charitable entity under the Charities Act 2005 (the Act) on 5 May 2008.
2. The Society's purposes are set out in clause 3 of its Constitution:

"The Objects of the Society are to

 - 3.1 *develop the discipline of information technology in New Zealand.*
 - 3.2 *foster the training, education and qualification of persons practising or intending to practise within the discipline in New Zealand.*
 - 3.3 *promote proper conduct within its membership and to set ethical standards for the discipline.*
 - 3.4 *grant qualifications and classes of membership to members in recognition of their proficiency within the discipline.*
 - 3.5 *develop or provide lectures, meetings, conferences and publications and to promote research within the discipline of information technology.*
 - 3.6 *take a public position on matters of concern to the Society and make submissions or advise government as appropriate.*
 - 3.7 *promote any other related activities that are in the interests of the Society."*
3. The Society was registered as a charitable entity on 9 January 2009, with registration backdated to 30 June 2008. In making the decision to approve registration, the Commission concluded that the Society advanced education by promoting a subject of educational value through training, qualifications, lectures, conferences, meetings, publications and research. However, the Commission held some concerns regarding the benefits to members.
4. On 29 June 2009, the Commission received a complaint regarding the Society, which was investigated by the Commission.
5. In the course of the investigation, the Commission developed concerns regarding the Society's purposes and activities. An investigation into the Society's purposes and activities was initiated, and the Commission reached a preliminary view that the purposes of the Society were not exclusively charitable and that the Society was carrying out non-charitable activities.

6. On 2 July 2009, the Commission sent the Society a notice of intention to remove from the register on the basis that the purposes set out in the Constitution and information on the Society's websites indicated an intention to provide benefits to the Society's members and to people involved in the information technology (IT) profession.
7. On 7 August 2009, the Society responded to the notice making the following submissions:
 - The assertion that the Society exists solely or primarily for the benefit of its members is demonstrably false

"The Society exists primarily to promote and advance the education of all persons, including significant actions improving the digital literacy of the public (within 3.7), general education programmes for the public as a whole, IT professionals, work with educational institutions to improve and align education programmes, awarding of educational scholarships and grants to further educational causes, and a range of other related programmes."
 - Any activities which provide benefits to members are secondary or ancillary

"... any benefit to the members of the Society is ancillary to the main purpose of the Society, which by considering the Objects as a whole, is clearly the advancement of Education."

"... the activities of the Society which are solely beneficial to the members are very much secondary and ancillary to the primary charitable purpose of the Society."
8. The Society also requested the opportunity to make further submissions, should the Commission still have concerns about the Society.
9. On 31 August 2009, the Society was sent a second notice of intention to remove from the register, setting out in further detail the Commission's position with regard to the Society.
10. On 20 September 2009, the Society responded to the second notice making further submissions regarding its activities.
11. On 27 November 2009, the Society sent a further letter stating:
 - The Commission has not satisfied the ground for removal with regard to section 35(1) of the Act, which states that, when an objection to removal is received, "the Commission must not proceed with removal unless the Commission is satisfied that it is in the public interest to proceed."

"The Commission have not set out what the public interest criteria are, that are applicable to the Society."
 - The Commission has not observed the rules of natural justice as required by section 36 of the Act:

"The hurdle of s. 36 also needs to be dealt with. The rules of natural justice have to be applied when considering a removal proposal. This includes the right to be given particulars of the complaint which you advised led to the enquiry into removal action and the right to be judged without bias and excluding any irrelevant matter. You have not explained to us how the Commission acting as 'prosecutor' in the removal proceedings and the 'judge' in making a decision to remove, can act without bias. It would seem to require an independent body to pass the judgement."

- The objectives of the Society are not focussed on the membership:

"...these objectives are not membership focused but directed at the public and the wider industry throughout New Zealand"

12. The Society made a further submission on 19 February 2010. This submission provided detail of a new educational project which the Society will be launching in March 2010.

The issue

13. The Commission must consider whether the Society is not, or is no longer, qualified for registration as a charitable entity under section 32(1)(a) of the Act. In this case, the key issue for consideration is whether the Society 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 Society'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 purposes and deregistration

14. Section 13 of the Act sets out the essential requirements for registration. Under section 13(1)(b), a society or institution must be established and maintained for exclusively charitable purposes and must not be carried on for the private pecuniary gain of any individual.
15. 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 to benefiting the public or a sufficient section of the public.
16. In relation to non-charitable purposes carried on by an entity, section 5(3) of the Act provides that any non-charitable purpose that is merely ancillary to a charitable purpose will not prevent an entity from qualifying for registration as a charitable entity.

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

17. Section 32(1)(a) of the Act provides that the Commission may remove an entity from the register if the entity is not, or is no longer, qualified for registration as a charitable entity.
18. Under section 35(1)(a) of the Act, if an objection to removal of an entity from the register is received, the Commission must not proceed with the removal unless it is satisfied that it is in the public interest to proceed with the removal and at least one ground for removal has been satisfied.

Relevant cases

19. There have been a number of Court decisions involving professional bodies.
20. In *Royal College of Nursing v St Marylebone Borough Council*² the English Court of Appeal considered whether the College of Nursing was charitable. The objects of the College were to promote the science and art of nursing and the better education and training of nurses, and to promote the advances of nursing as a profession. The Court of Appeal held, affirming the decision of the divisional court, that both purposes were charitable because they were directed to the advancement of nursing for the relief of the sick. It was held that although the advancement of nursing as a profession might advance the professional interests of nurses in a trade union sense, this was incidental, and that the College did not cease to be a charity because, incidentally, and in order to carry out the charitable objects, it was both necessary and desirable to confer special benefits to the members.
21. 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. 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 its predominant object and any benefits to individual members of non-charitable character which result from its activities must be of a subsidiary or incidental character.⁸

² [1959] 1 WLR 1077, [1959] 3 All ER 663.

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 867.

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.

22. 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.
23. In *Commissioner of Inland Revenue v Medical Council of New Zealand*¹⁰ the Court of Appeal considered that the principal function of the 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.
24. In *Tudor on Charities*¹¹ the authors note that the United Kingdom Charity Commissioners have for some time accepted the New Zealand approach adopted by the Court of Appeal in the *Medical Council of New Zealand* case. However the authors also note:

*“... 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 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.”*¹²

25. In *Commissioners of Inland Revenue v Oldham Training and Enterprise Council*¹³, 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. In that case, the remoteness of any public benefit disqualified the Council from having charitable status.

Charities Commission's analysis

26. The Commission considers that the purposes set out in clauses 3.1 to 3.7 of the Society's Constitution do not indicate an intention to relieve poverty or advance religion, they have therefore been considered in relation to the advancement of education and any other matter beneficial to the community.

⁹ [1992] 1 NZLR 570.

¹⁰ [1997] 2 NZLR 297.

¹¹ *Tudor on Charities*, 9th Edition, London, Sweet & Maxwell, 2003, para 2-083, p 108.

¹² *Tudor on Charities*, 9th Edition, London, Sweet & Maxwell, 2003, para 2-045, p 71.

¹³ [1996] STC 1218.

Advancement of education

27. In order for a purpose to advance education, it must provide some form of education and ensure that learning is advanced. Education does not include advertisements for particular goods or services or promotion of a particular point of view.¹⁴
28. The Commission considers that clauses 3.1, 3.2 and 3.5 can be considered, at least in part, as advancing education.
29. The Commission considers that the promotion of proper conduct and the setting of ethical standards (clause 3.3), granting qualifications and classes of membership in recognition of proficiency in the discipline (clause 3.4), taking a public position on matters of concern to the Society (clause 3.6) and promoting related activities that are in the interests of the Society (clause 3.7) do not amount to the advancement of education. The Commission also considers that clauses 3.2 and 3.5 may allow activities that provide benefits to the members of the Society, the IT profession and the IT industry, which would not be considered charitable.
30. The Commission considers that, read as a whole, the purposes are directed towards the promotion and protection of the Society, the IT profession and the IT industry through the development of professional standards, educational standards, professional development and networking.

Other matters beneficial to the community

31. In order for a purpose to qualify as any other matter beneficial to the community, the purpose must be beneficial to the community and be within the spirit and intendment of the purposes set out in the Preamble to the Charitable Uses Act 1601 (the Statute of Elizabeth). The purposes in the Preamble 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.¹⁵

¹⁴ *Re Collier* [1998] 1 NZLR 81; see also *In re Shaw (deceased)* [1957] 1 WLR 729 and *Re Hopkins Will Trusts* [1964] 3 All ER 46.

¹⁵ *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*

32. The Commission considers that the purposes in clauses 3.3, 3.4, 3.6 and 3.7 do not indicate an intention to provide a benefit to the community – rather the beneficiaries are the members of the Society, members of the IT profession and the IT industry in general.

Public or private benefit?

33. The public benefit criterion necessarily requires that any private benefits arising from the Society's activities must only be a means of achieving an ultimate public benefit and therefore be ancillary or incidental to it. It will not be a public benefit if the private benefits are an end in themselves.¹⁶ In addition, proof that public benefit will necessarily flow from each of the stated purposes is required, not merely a belief that it will or may occur.¹⁷

34. In *Commissioners of Inland Revenue v Yorkshire Agricultural Society*¹⁸ the Court said:

"There can be no doubt that a society formed for the purposes of merely benefiting its own members, though it may be to the public advantage that its members should be benefited by being educated ... or whatever the object may be, would not be for a charitable purpose, and if it were a substantial part of the object that it should benefit its members I should think that it would not be established for a charitable purpose only."

35. In *Institution of Professional Engineers New Zealand Incorporated v Commissioner of Inland Revenue*¹⁹ Tipping J stated:

"I consider that the following words of Lord Normand at page 396 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."

36. In *General Nursing Council for England and Wales v St Marylebone Borough Council*²⁰ the Court considered that an institution whose main

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.

¹⁶ *Commissioners of Inland Revenue v Oldham Training and Enterprise Council* (1996) STC 1218; *Travel Just v Canada (Revenue Agency)* 2006 FCA 343 [2007] 1 CTC 294.

¹⁷ *Gilmour v Coats* (1949) AC 26; *Re Blyth* [1997] 2 Qd R 567, 582; *DV Bryant Trust Board v Hamilton City Council* [1997] 3 NZLR 342, 350.

¹⁸ [1928] 1 KB 611, 631.

¹⁹ [1992] 1 NZLR 570, 582.

object is 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. Given this decision, in order to preserve the charitable status of the original institutions, several established charities have formed separate non-charitable bodies primarily to promote the benefits of the members.

37. The leading New Zealand case in this regard is *Commissioner of Inland Revenue v Medical Council of New Zealand*.²¹ In that case, the Court of Appeal held that the principal function of the Medical Council was the registration of medical practitioners. It considered that the purpose of registration was to provide protection for the public in respect of the quality of medical and surgical services and that this 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.
38. The Commission considers that the Society's purposes set out in clauses 3.1 to 3.7 can be distinguished from the *Medical Council* case because they aim to promote the interests of the Society, its members and the industry, rather than providing protection for the public.
39. Applying the test established by Tipping J in the *Institution of Professional Engineers New Zealand* case, the Commission considers that while some public benefits may arise from the purposes in clauses 3.1 to 3.7, the private benefits arising from these purposes cannot be regarded as incidental.

The Society's activities

40. Where it is unclear, or there is doubt, after considering the written purposes, whether an entity is established exclusively for charitable purposes, the activities of the entity may be considered. In *Institution of Professional Engineers New Zealand Incorporated v Commissioner of Inland Revenue*²² Tipping J stated:

"In so far as there may be uncertainty on an examination of the relevant document or documents it is permissible to look and see what the body actually does or has been doing."

41. The Society engages in a range of educational activities and activities within the education sector. These activities include work in both the secondary and tertiary sectors promoting educational standards and advocating for information and communications technology ("ICT") as a subject and as a career option. The Society also runs a digital literacy programme for the general public, including a new project to be launched in

²⁰ [1959] AC 540.

²¹ [1997] 2 NZLR 297.

²² [1992] 1 NZLR 570, 573; see also *Molloy v Commissioner of Inland Revenue* [1981] 1 NZLR 688 and *Royal College of Surgeons of England v National Provincial Bank Ltd* [1952] AC 631, 661.

March 2010. This is aimed at increasing computer skills and can be considered to advance education.

42. The Society also has a scholarships programme. The Society's website states that the programme is currently on hold, and the Commission notes that there is no evidence of scholarship distribution in the Society's accounts in recent years. The Society has submitted that it has previously distributed *"tens of thousands of dollars worth of scholarships"*, including \$36,700 in 2007, but has not supplied documentation showing this.
43. The Society has submitted that its educational events programme is charitable as the advancement of education. Events run by the Society tend to focus on subjects such as business, marketing and professionalism and are targeted at those working in the industry. While the events are available to the public, the Commission considers these activities to be focussed on the development of the industry and the profession.
44. The Society carries out advocacy, representation and mentoring roles for the ICT sector. The Society's website states:

*"One of the key roles of NZCS is to advocate on behalf of the computing and ICT profession, as well as the ICT sector overall."*²³

*"One of the fundamental purposes of the NZCS is to represent our members, the ICT profession, and by extension, the entire ICT community."*²⁴

45. Mentoring activities are also directed at professionalism and industry development. The Commission considers these activities to be providing benefits to members, the profession and the industry and are not charitable under the advancement of education.
46. The Society has recently implemented an accreditation programme for ICT professionals. This is part of the Society's aim to create an ICT profession in New Zealand. The Society submits that this is part of an overarching intent to promote education. The Society has created a separate website for this activity and is advertising the advantages of the scheme in terms of the benefits it will create for those working in the industry, the industry itself, businesses and the country. This activity is not charitable as it does not advance education and provides clear benefits to the industry and those involved in the industry.
47. The Commission considers that these activities provide benefits to the Society's members, the profession and the industry, and are separate and independent purposes of the Society which cannot be considered ancillary to any charitable purposes of the Society.

²³ <http://www.nzcs.org.nz/activities/advocacy>.

²⁴ <http://www.nzcs.org.nz/activities/representation>.

The Society's submissions

48. The Society has made four separate submissions to the Commission. As summarised earlier, the main points made in these submissions are that the Society carries out educational activities, any non-educational activities are ancillary, and any benefits to members are ancillary.
49. The Society submits that the majority of the income of the Society, after administration costs, is used for charitable purposes and that *"membership can be considered in some respects as a fundraising activity to fund our charitable activities"*.
50. The Society states that *"by and large the primary purpose of membership is to give encouragement to ICT professionals and others to further their own educational endeavours, carry out their duties in an ethical and professional way, and to provide recognition to those that do so."* The Society also submits that provision of benefits to members does not prevent an entity from being considered charitable.
51. With regard to the content of the Society's websites, the Society submits that the material on the websites is for the promotion of membership and thus has a focus on these activities, but *"should not lead to the conclusion that this is the primary purpose of the Society."* However, the Commission is guided by the statement of Tipping J in the *IPENZ*²⁵ case:
- "I agree with the commissioner's submission that it is difficult to resist the implication from this description, in its own publication, of the aims and objects of IPENZ that this is what it is actually doing or at least endeavouring to do."*
52. The Society submits that their professional accreditation programme and events programme can be considered charitable as the advancement of education. While there are educational elements to these programmes, the Commission considers these to be the usual functions of a professional society and that the activities provide benefits primarily to those working in the industry.
53. The Society has also made submissions advising that it intends to engage in new educational projects in the future. In particular, details have been provided of a project to be launched in March 2010 aimed at increasing digital literacy. While this can be considered as advancing education, it does not alter the Commission's assessment of the Society's written purposes or the view that the Society engages in activities which are not charitable and which cannot be considered ancillary.

Conclusion

54. The Commission concludes that the purposes set out in clause 3.1 are charitable, and that the purposes set out in clauses 3.2 and 3.5 are charitable in part, but that the purposes set out in clauses 3.3, 3.4, 3.6 and

²⁵ *Institution of Professional Engineers New Zealand Incorporated v Commissioner of Inland Revenue* [1992] 1 NZLR 570, 575.

3.7 are non-charitable and that the purposes set out in clauses 3.2 and 3.5 would allow non-charitable activities. Further, the Society's non-charitable purposes are not ancillary to any of the charitable purposes.

Public interest

55. Section 10(1)(a) of the Charities Act obliges the Commission to promote public trust and confidence in the charitable sector. The Commission considers that public trust and confidence in registered charitable entities will be diminished if entities that do not meet the essential requirements for registration remain on the register.

Natural justice

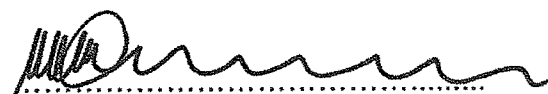
56. When considering whether to remove an entity from the register, section 36(1)(a) of the Charities Act requires the Commission to observe the rules of natural justice. Section 36(1)(b) requires the Commission to give an entity reasonable opportunity to make submissions on the matter.
57. The Commission has observed the rules of natural justice. All relevant matters have been put to the Society, Commission staff met with the Society to discuss the issues, and the Society has been given reasonable opportunity to make submissions in response to the issues raised.

Charities Commission's determination

58. The Commission determines that the Society is not, or is no longer, qualified for registration as a charitable entity because it is not established and maintained for exclusively charitable purposes, as required by section 13(1)(b)(i) of the Act.
59. Under section 35(1) of the Act, the Commission is satisfied that it is in the public interest to proceed with the Society's removal from the register and that one ground for removal from the register has been satisfied, that is, the Society is not qualified for registration as a charitable entity.
60. The decision of the Commission is therefore to remove the Society from the Register, pursuant to section 31 of the Act, with effect from 18 March 2010.

For the above reasons, the Commission determines to deregister the Society as a charitable entity by removing the Society from the Register.

Signed for and on behalf of the Charities Commission



Trevor Garrett
Chief Executive

18/3/10
Date