

Professional Bodies and Charity Law – Public Benefit and the Spirit of Charity

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The word “charity” can mean many things to many people. The legal definition is inevitably rather complex and for the layperson, the general notion of charity is that of benevolence and philanthropy, and whilst the legal meaning and the layperson’s meaning of charity may diverge in some respects,¹ it is widely accepted that the social construct of charity is seen as “means of redressing wrongs in society”² so where “a State may have been unable to provide a function or service, charity could fill that void, and the voids would depend on the government and policies at the time.”³ It would also be fair to say that the four heads of charity, as will be addressed shortly, are rooted in government policy.⁴ Whilst this notion of redressing societal wrongs has been subject to some criticism, in particular that of Victorian society, where attempts were made to distinguish between the deserving poor and the undeserving poor and who should be most entitled to receive charitable gifts, and whilst the inherent issues relating to the concept of charity generally are outside the scope of this article, it is undoubtedly correct that charity itself is recognised as a socially cohesive part of society, both in terms of its origins, where charity “has been seen from the earliest days of Christianity as one of the central tenets of the Christian faith”⁵ to contemporary times, where the central obligation is to put others first, thus engaging the ephemeral concept of the spirit of charity.

One of the most recent examples of this is the call from the internationally renowned charity organisation Oxfam to make donations to help those suffering as a result of the super typhoon Haiyan in the Philippines in November 2013.⁶ Such calls for donations to provide aid in times of crisis is perhaps one of the most socially recognised and accepted schemes of charity, perhaps because this appears to underpin the ethos of charity, that of assisting others, even at the expense of foregoing one’s own comforts in order to do so. It is immediately recognised that such organisations are relieving a need and as such fulfil a fundamental role in society, and such “charitable endeavours are to be encouraged”⁷ because society “is unlikely to be prejudiced by attempts at public benefaction”.⁸ As a result therefore, it may come as some surprise to some that professional bodies and societies, whose functions are not necessarily viewed as fitting in with the traditional construct of “charity”, as having charitable status.

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¹ Juliet Chevalier-Watts “Charities Law in New Zealand” (2014 ThomsonReuters, Wellington) Chapter 2 publication forthcoming.

² Gareth Morgan The Spirit of Charity Professorial Lecture Sheffield Hallam University 3 April 2008 at 11.

³ Sue Tappenden and Juliet Chevalier-Watts “Equity, Trusts and Succession” (2013, ThomsonReuters, Wellington) Chapter 7, publication forthcoming.

⁴ Alison Dunn “Demanding Service or Servicing Demand? Charities, Regulation and the Policy Process” (2008) MLR 71(2) at 251.

⁵ Gareth Morgan, above n **, at 3.

⁶ <https://www.oxfam.org.nz/cart/checkout/7587>.

⁷ Susan Barker The Presumption of Charitability [2012] NZLJ at 295.

⁸ Susan Barker The Presumption of Charitability, above n **, at 295 citing J Bassett Charity is a General Public Use [2011] NZLJ at 60.

This article seeks to assess the public benefit of such bodies, a legal requirement for any registered charity, and asks whether these bodies and organisations fulfil the notion of the spirit of charity as perhaps might be more closely associated with the more ideological charities such as Oxfam and the Salvation Army. This article will firstly outline, briefly, the concept of charitable purpose and public benefit, and will then address two issues. Firstly, the functions of such bodies, and how the courts have interpreted those functions in relation to the public/private benefit dichotomy, and secondly, the consideration of the protection of the public in relation to the services provided by some of the bodies.

Charitable Purpose

It is common knowledge that the Preamble of the Statute of Elizabeth set out the first non-exhaustive list of purposes deemed to be charitable, thus providing the foundations of contemporary charity law, and then later that the seminal case of *Commissioner for the Special Purposes of Income Tax v Pemsel*⁹ set out the now infamous four heads of charity, as codified in s 5(1) of the Charities Act 2005, where charitable purposes are defined as the relief of poverty, the advancement of education, the advancement of religion and any other matter beneficial to the community. However, at no stage has there ever been a statutory definition of charity,¹⁰ and whilst “the question of what constitutes a charitable purpose often strikes different minds differently”,¹¹ the law requires that in order for an organisation to obtain registered charitable status, it must have a charitable character, it must exist for the benefit of the public and must be exclusively charitable.¹²

For the first three heads of charity, it is thought that the public benefit is assumed to arise, unless the contrary can be established, although this does not mean that “the existence of a public benefit is a foregone conclusion.”¹³ What it means instead is that “the question whether a gift is or may be operative for the public benefit is a question to be answered by the Court by forming an opinion upon the evidence before it.”¹⁴ With regard to the fourth head of charity, the presumption of public benefit does not arise and such public benefit “must be expressly shown and must be sufficiently within the spirit and intendment of the Statute of Elizabeth to be a charitable purpose.”¹⁵ It is now to this issue of public benefit that this article turns in relation to the first matter for consideration, that of the purpose of the functions of professional bodies and the considerations of the courts in relation to concerns of private or public benefit.

Professional Bodies, Functions and the Spirit of Charity

⁹ *Commissioner for the Special Purposes of Income Tax v Pemsel* [1891] AC 531.

¹⁰ Sue Tappenden and Juliet Chevalier-Watts “Equity, Trusts and Succession” (2013, ThomsonReuters, Wellington) Chapter 7, publication forthcoming.

¹¹ Susan Barker The Presumption of Charitability, above n **, at 296.

¹² *New Zealand Computer Society Inc* HC WN CIV-2010-485-924 [28 February 2011] at [10]-[12].

¹³ *New Zealand Computer Society Inc*, above n **, at [13].

¹⁴ *New Zealand Computer Society Inc*, above n **, at [13], citing *Molloy v Commissioner of Inland Revenue* [1981] 1 NZLR 688 at 695; see also *Re Hummeltenberg* [1923] 1 Ch 237 at 242.

¹⁵ Juliet Chevalier-Watts “Charities Law in New Zealand” (2014 ThomsonReuters, Wellington) Chapter 2 publication forthcoming.

This article does not seek to set out an exhaustive list of all cases relating to professional bodies that have come before the courts, rather it will address some of the key cases and critically review the question of spirit of charity in relation to their objects and functions, starting with *The Royal College of Surgeons of England v National Provincial Bank*.¹⁶ In this case, one of the questions for the House of Lords was whether the College was a charity at law, and that decision rested primarily on the construction of the constituent documents of the College, particularly the charter granted by King George III in 1800. That document conferred powers and duties for the appointment of officers and for the general carrying on as a college, but it did not set out the objects of the College. Instead, the Court one of the recitals that set out a number of objects, including the “study and practice of the art and science of surgery”.¹⁷ The Court interpreted such an object as signifying:¹⁸

[T]he acquisition of knowledge and skill in surgery both by abstract study and by the exercise of the art in the dissecting room and the anatomy theatre, and they are capable of covering both the discovery of new knowledge, and which is the fruits of research, and the learning of existing knowledge either by students who are qualifying or by qualified surgeons desirous of improving their knowledge and skill.

On that construction therefore the Court held that the objects fell either within the advancement of education or science, and thus were charitable. It is not hard to recognise the significance to the public of such objects and thus, whilst at first sight, the “study and practice of the art and science of surgery” may mean merely the “academic study and professional practice of the art and science of surgery”,¹⁹ with rather more limited public benefit, the House of Lords was of the view that the full benefit to the public should be found in the objects of the College so as to relieve human suffering, or to advance education or science to that end also.²⁰ It was argued that a power to make by-laws for the regulation, governance and advantage of the college actually would confer private benefits on members of the college, in other words, it may further members’ professional interests. However, Lord Normand firmly rebutted that consideration, noting:²¹

The professional advantage which might accrue to individuals from the protection promised them in the exercise and enjoyment of the rights and privileges acquired by them as diplomates of the college is but the inevitable and incidental result of a provision intended to secure the dignity and honour of the college to which they owe their diploma.

In other words, the disciplinary power is actually necessary to ensure the success and good name of the College, and merely incidentally advantageous to individuals. Whilst the general rule is that for an entity to be charitable, it must have exclusively charitable purposes, if there are purposes that ancillary to the overall purpose that are non charitable, this will not necessarily defeat the determination of its charitable

¹⁶ *The Royal College of Surgeons of England v National Provincial Bank* [1952] AC 681.

¹⁷ At 641.

¹⁸ At 641-642.

¹⁹ At 641.

²⁰ At 654.

²¹ At 643.

nature.²² Thus if the ancillary non charitable purposes “lack substance in their own right and amount to no more than something which tends to assist, or which naturally goes with, the achievement of the main purpose”,²³ then the ancillary non charitable purpose will not defeat the acquisition of charitable status. Returning then to the *Royal College of Surgeons*, this incidental private benefit to its members was not sufficient to negative the claim of charity of the College.

It is not difficult to see how a court may find such that the objects and functions of such a professional body as the Royal College of Surgeons as having sufficient public benefit because of its intrinsic purpose of preventing human suffering, thus it inevitably encompasses the spirit of charity.²⁴ What is perhaps more challenging in terms of aligning such functions to the traditional spirit of charity are cases relating to law reporting, to which this article now turns.

In the case of *Incorporated Council of Law Reporting for England and Wales v Attorney-General*,²⁵ the Court of Appeal held that the Council was a charitable entity. The purposes of the Council, inter alia, were to prepare and publish reports of judicial decisions and issue, from time to time, other publications relevant to legal decisions. It was contended that main purpose of the Council was to advance the interests of the legal profession by providing them with tools of their trade, thus providing only a private benefit. Russell LJ contended however that he was:²⁶

...not persuaded of the validity of this contention. It seems to me that *if* the publication of reliable reports of decisions of the courts is for the benefit of the community and of general public utility in the charitable sense, it is an inevitable and indeed necessary step in the achievement of that benefit that the members of the legal profession are supplied with the tools of the trade.

Thus in his Honour’s view, the benefit to individuals was merely ancillary to the overall benefit to the public, although his Honour did dissent from his colleagues on the point that the Council advanced education.

His learned colleague Sachs LJ was of the view that the argument that the benefits were overtly private might be attractive because judges would be anxious not to favour their preferred profession,²⁷ thus inevitably leading one to presume that the spirit of charity is vitally missing from such an organisation. However, Sachs J then likened the purposes of the publication of law reports and equipping of lawyers with their professional tools to that of a doctor studying medical research papers in order to treat his patients effectively and indeed earn fees.²⁸ As a result, it would be difficult to say “that because doctors earn their emoluments the printing and sale of such papers by a[n]...institution could not be held for the advancement of education in

²² Juliet Chevalier-Watts “Charities Law in New Zealand” (2014 ThomsonReuters, Wellington) Chapter 2 publication forthcoming.

²³ Kerry O’Halloran, Myles McGregor-Lowndes and Karla W Simon “Charity Law and Social Policy” (Volume 10, Springer, 2008) at 483.

²⁴ See also *Royal College of Nursing v St Marylebone Borough Council* [1959] 1 WLR 1077; *Auckland Medical Aid Trust v Commissioner of Inland Revenue* [1979] 1 NZLR 382.

²⁵ *Incorporated Council of Law Reporting for England and Wales v Attorney-General* [1972] 1 Ch 73.

²⁶ At 87.

²⁷ At 93.

²⁸ At 93.

medicine.”²⁹ Thus by analogy, the purpose of producing a book or report to enable the education of a professional person must fall within the constraints of charity law, and that “remains its purpose despite the fact that professional men...use the knowledge acquired to earn their living.”³⁰ The analogy to the medical profession therefore brings the purpose of the Council of Law Reporting within the traditional concept of the spirit of charity, that of assisting others for the public good. So whilst at first sight, the public benefit may appear intangible and at odds with traditional views of charity, “[o]ne must not confuse the results flowing from the achievement of a purpose with the purpose itself, any more than one should have regard to the motives of those who set that purpose in motion.”³¹

The later New Zealand case of *Commissioner of Inland Revenue v New Zealand Council of Law Reporting* relied on its earlier English counterpart to determine that the New Zealand Council of Law Reporting was a charitable body. Richardson J, delivering the judgment for the Court noted, referring to the Court of Appeal decision:³²

The service which publication of The Law Reports provides benefits not only those actively engaged in the practice and administration of the law, but also those whose business it is to study and teach law academically, and many others who need to study the law for the purposes of their trades, businesses, professions or affairs. In all these fields, however, the nature of the service is the same: it enables the reader to study, and by study to acquaint himself with and instruct himself in the law of this country. There is nothing here which negatives an exclusively charitable purpose.

Richardson J then applied that statement directly to the case at hand and the New Zealand Council of Law Reporting, noting that “is the Council’s principle function” thus the principle functions of the Council pertain to the publication and sale of law reports for the benefit of those engaged “in the administration and practice of law”.³³ It is clear then that there is great public benefit in enabling persons to acquaint and instruct themselves in the law and whilst it could be argued that such purposes may at first seem at odds with the traditional notions of the spirit of charity, one must consider in reality that spirit and its underlying ethos. Charitable endeavours should be encouraged; they support society and promote humanity and such public benefaction should not be denied, however odd it may appear.³⁴

That is not say that all professional bodies that purport to encompass charitable purposes will actually meet the requisite public benefit requirement. In the case of *Institution of Professional Engineers New Zealand Inc v Commissioner of New Zealand (IPENZ)*,³⁵ the High Court came to the conclusion that the institute

²⁹ At 93.

³⁰ At 93.

³¹ At 93.

³² *Commissioner of Inland Revenue v New Zealand Council of Law Reporting* [1981] 1 NZLR 682 at 686, citing *Incorporated Council of Law Reporting for England and Wales v Attorney-General* [1972] 1 Ch 73 at 103-104. See also *Incorporated Council of Tax Reporting of the State of Queensland v Federal Commissioner of Taxation* (1971) 125 CLR 659.

³³ *Commissioner of Inland Revenue v New Zealand Council of Law Reporting*, above n **, at 687.

³⁴ Susan Barker *The Presumption of Charitability*, above n **, at 295; see also *J Bassett Charity is a General Public Use* [2011] NZLJ at 60.

³⁵ *Institution of Professional Engineers New Zealand Inc v Commissioner of New Zealand* [1992] 1 NZLR 570.

performed a “significant professional role which produces private benefits to its members which are far from incidental to or subsidiary to the learned-society function.”³⁶ This case highlights the notion that whilst the spirit of charity may be a very wide concept, there are limits to its ability to encompass all applicants, and that the doctrine of public benefit is the key to authenticating the concept of the spirit of charity. The object of IPENZ is to advance science and the profession of engineering, and Tipping J was not of the initial view that such a construction would be fatal to IPENZ obtaining charitable status because this does not necessarily mean that the institute was established for the advancement of its members in the profession.³⁷

However, on full analysis of the institute’s documents and publications, Tipping J concluded that IPENZ was “definitely and distinctly a professional body.”³⁸ Its purposes are to act as a professional organisation for the benefit of its members, and whilst there were undoubtedly distinct public benefits in the objects and purpose of IPENZ, the private benefits that it offers its members could not be construed as incidental. This then enabled the Court to distinguish the instant case from the *Royal College of Surgeons* case, where the private benefits to members were incidental to the overall purpose, and the spirit of charity was clearly deeply embedded within that body’s purposes. What is interesting however is that Tipping J found that another medically associated case, that of the *Royal College of Nursing v St Marylebone Corporation*,³⁹ difficult to reconcile with preceding cases. It is pertinent to turn our attention for a moment to Tipping J’s evaluation of the *Royal College of Nursing* case.

His Honour referred to the opinion of Romer LJ, where his Lordship stated that the crucial question in regarding the objects was whether the object advanced nursing or the interests of the nurses.⁴⁰ The Court did not concern itself with what the College actually did, instead, it only concerned itself with construction of the words of the charter of the College, in spite of evidence that one of its objects was to promote the profession of nursing. In summary, the Court in the *Nursing* case found that private benefits that may accrue to the nurses were incidental to its overall charitable purpose, even though the College expressly sought to advance the profession of nursing in all or any of its branches.⁴¹ Tipping J found this case difficult to reconcile then previously decided cases clearly because the private benefit issue was not addressed adequately in his own view and it did not sit comfortably alongside such cases as the *Royal College of Surgeons* case, and he urged caution when considering its applicability.⁴²

Whilst the Court in *Royal College of Nursing* evidently established public benefit in line with other medical bodies, the caution offered by Tipping J in *IPENZ* suggests

³⁶ *Institution of Professional Engineers New Zealand Inc v Commissioner of New Zealand*, above n **, at 583.

³⁷ At 574.

³⁸ At 582.

³⁹ *Royal College of Nursing v St Marylebone Corporation* [1959] 3 All ER 663 (CA).

⁴⁰ *Institution of Professional Engineers New Zealand Inc v Commissioner of New Zealand*, above n **, at 580, referring to *Royal College of Nursing v St Marylebone Corporation* [1959] 3 All ER 663 (CA) at 667.

⁴¹ *Institution of Professional Engineers New Zealand Inc v Commissioner of New Zealand*, above n **, at 580.

⁴² *Institution of Professional Engineers New Zealand Inc v Commissioner of New Zealand*, above n **, at 579.

that whilst the spirit of charity may appear to run inherently through such cases, charity law may not automatically recognise it, and indeed, the law is perhaps required to make more detailed enquiries to ensure that the public benefit is met and in doing so, this then will underpin the spirit of charity. Perhaps then a more pertinent approach for a court in cases such as these where there is doubt as to a body's objects in the terms of its documents is to look at what that body or society actually does, so the enquiry is then as to the purpose for which it was established.⁴³ It is evident that the Court in the *Royal College of Nursing* case chose not to make such enquiries and in doing so did not fully recognise the real relevance of public benefit, thus disassociating it from the spirit of charity; the spirit of charity being to provide succour to those in need, not to provide overt private benefit.

Returning then to the instant case of *IPENZ*, Tipping J was not of the view that the *Royal College of Nursing* case would assist *IPENZ* for the reasons set out above, and instead, his Honour noted that if he were to view the objects of the institute in isolation, then it is very likely that he would have concluded that it provided non-ancillary private benefits. After reviewing the activities of the institute, unfortunately at least for the institute, that "evidence simply fortifies the conclusion to which I would have come when looking at the words of the object alone."⁴⁴ *IPENZ* was evidently therefore performing a significant professional role and could not be construed as charitable.⁴⁵

Here then is evidence of the requisite public benefit being profoundly absent from a professional body and the one case that may have been of assistance to it, that of the *Royal College of Nursing*, was determined as being of uncertain validity because, in Tipping J's view, the Court in that case chose to focus on the charter, instead of the activities. The activities of *IPENZ*, and possibly the Royal College of Nursing, do not appear to support the spirit of charity, and equally so, appeared to provide little in the way of public benefit. It would appear that without public benefit, there can be no spirit of charity, and vice versa, thus whilst some case law appears at odds with the traditional concepts of charity, courts are able to determine, in most circumstances, the true purpose of those professional bodies, and thus the spirit of charity appears still to be alive and well.

However, the challenging High Court case of *Plumbers, Gasfitters and Drainlayers Board v Charities Registration Board*⁴⁶ (*PGDB*) delivered in 2013 provides a contemporary view of the notion of the private/public benefit dichotomy and from this case we may be able to ascertain how the spirit of charity sits in what might be construed as unusual circumstances. The Board of Plumbers, Gasfitters and Drainlayers appears, prima facie, far removed in terms of public benefit and the spirit of charity, from such bodies as the Royal College of Surgeons, Nurses and indeed Councils of Law Reporting. Nonetheless, any such perceptions may have been firmly quashed by the judgment of Goddard J.

⁴³ *Institution of Professional Engineers New Zealand Inc v Commissioner of New Zealand*, above n **, at 579.

⁴⁴ At 583.

⁴⁵ See also *Chartered Insurance Institute v Corporation of London* [1957] 2 All ER 638.

⁴⁶ *Plumbers, Gasfitters and Drainlayers Board v Charities Registration Board* [2013] NZHC 1986 [8 August 2013].

The PGDB was established under s 133 of the Plumbers, Gasfitters and Drainlayers Act 2003 (PGDA) and registered as a charitable entity by the former Charities Commission in 2008.⁴⁷ “In broad terms, the PGDB is responsible for regulating sanitary plumbing, gasfitting and drainlaying (the subject industries).⁴⁸ Section 3 of the PGDA provides that the purpose of the PGDA is to, inter alia, protect the health and safety of the public by ensuring the competency of those who engage in the services outlined and also to regulate those same people in those services. Section 137 of the PGDA sets out the functions of the PGDB, and these include prescribing the minimum standards for registration as a service provider, renewing licences, making arrangements for examinations, hearing complaints and disciplinary matters and to institute prosecutions against those who may breach the Act.⁴⁹ In 2012, the Board of the Department of Internal Affairs – Charities (DIAC) deregistered the PGDB after reviewing its purposes and activities and determining that the PGDB did not qualify for registration. The Board’s reasoning was that the PGDB’s regulation to protect the health and safety of the public through the regulation of the subject industries was not an exclusive purpose as it had an independent purpose that benefited its members significantly.

This paper will consider firstly the issues pertaining to the public/private dichotomy as raised by the Court, and the second part of the article will consider the issues pertaining to the protection of the public.

An important aspect of the Board’s decision to deregister the PGDB was that the PGDB differed substantially from the case of *Commissioner of Inland Revenue v Medical Council of New Zealand*,⁵⁰ where the Court of Appeal found that the Medical Council was a charitable body.⁵¹ Goddard J considered it instructive to deliberate these determinations in detail.

The key issue for Goddard J was to ascertain whether the purpose of the functions of s 137 of the PGDA benefit those working in the industry or the public. In her Honour’s opinion, each of the functions:⁵²

...is directed to promoting the proper regulation of the regulated trades in order to ensure those operating within it are competent and therefore the health and safety of the public is therefore safeguarded, so far as possible.

Thus whilst the functions will undoubtedly benefit those working in the industry, the main purpose is to maintain the safety standards to protect the public. These functions were also “markedly similar to the functions of the Medical Council of New Zealand.”⁵³ The Medical Council of New Zealand was established under the

⁴⁷ The Charities Commission of New Zealand was disestablished in 2012 and the core functions were transferred to the Department of Internal Affairs – Charities.

⁴⁸ *Plumbers, Gasfitters and Drainlayers Board v Charities Registration Board* [2013] NZHC 1986 [8 August 2013] at [3].

⁴⁹ *Plumbers, Gasfitters and Drainlayers Board v Charities Registration Board* [2013] NZHC 1986 [8 August 2013] at [5].

⁵⁰ *Commissioner of Inland Revenue v Medical Council of New Zealand* [1997] 2 NZLR 297 (CA).

⁵¹ *Plumbers, Gasfitters and Drainlayers Board v Charities Registration Board* [2013] NZHC 1986 [8 August 2013] at [26].

⁵² At [48].

⁵³ At [50].

Medical Practitioners Act 1950 and continued under the Medical Practitioners Act 1968 and its main functions are as follows:⁵⁴

- (a) The maintenance of a formal system of registration of medical practitioners.
- (b) The maintenance of discipline within the medical profession.
- (c) The accreditation and surveillance of appropriate undergraduate and postgraduate education of medical practitioners.
- (d) The suspension of impaired medical practitioners and the maintenance of systems for identifying, monitoring and rehabilitating impaired medical practitioners.
- (e) The provision of statistical information to the Minister of Health.

As has already been noted, the role of medical professional bodies as charitable institutions is not uncommon as their benefit to the public generally is readily acknowledged by the courts, and thus the spirit of charity can be easily recognised in their functions. What is most interesting then is Goddard J's comparison of the functions of a medical body with that of the PGDB, which, without wishing to denigrate the functions of the a very important body, would not automatically strike the public has having the same sort of role of medical bodies. Nonetheless, it would appear that public benefit and the spirit of charity can be found in even the less glamorous professional bodies, as perhaps they rightly should, as will become apparent from the discussions.

Goddard J notes that the functions of the PGDB "a markedly similar to the functions of the Medical Council of New Zealand"⁵⁵ and she makes reference to the opinion of McKay J in the *Medical Council* case, who states:⁵⁶

I readily accept ... that a principal function of the council is to provide and maintain a register of qualified medical practitioners. I can also accept that the maintenance of such a register is beneficial to those whose names are included in it... it does not follow, however, that these benefits were either the purpose of the legislation or the purpose of the establishment of the council. The restriction of the right to practise under the recognised descriptions, and the provision for registration of only those who are properly qualified, would seem to have as their obvious and primary focus the protection of the public ...

In Goddard J's view, the very same analysis can be applied to the instant case. The functions of the PGDB "may increase public confidence and thereby provide a flow-on benefit to those working in the subject industries."⁵⁷ However, those benefits were "purely collateral and incidental consequences inherent within a system of registration."⁵⁸ In fact, neither the Board nor the respondent were able to point to any of the functions or activities that were carried out by the PGDB that provided sole benefits to those working in those industries.

⁵⁴ *Commissioner of Inland Revenue v Medical Council of New Zealand* [1997] 2 NZLR 297 (CA) at 297.

⁵⁵ At [50].

⁵⁶ At [51], citing *Commissioner of Inland Revenue v Medical Council of New Zealand* [1997] 2 NZLR 297 (CA) at 309.

⁵⁷ At [51].

⁵⁸ At [51].

Although the Court in the instant case did not make reference to the following views of the *Medical Council* case, I think them worth mentioning as a relevant point of analogy. Thomas J (as was) noted:⁵⁹

It is my opinion that the medical council was established by Parliament for the purpose of protecting and promoting the health of the community. Parliament was seeking to in part discharge the established responsibility of the state for the maintenance of the health of its citizens. No other purpose can reasonably be ascribed to it in enacting the legislation. But this responsibility cannot be met, Parliament clearly determined, unless high standards are maintained in the practice of medicine and surgery. A system for the registration and disciplining of qualified medical practitioners was equally clearly seen to be necessary to achieve that objective. Hence, the medical council was established and vested with the function of registering medical practitioners and disciplining those whose conduct falls short of an acceptable standard.

In a similar fashion, the PGDB was undoubtedly established for the purposes of protecting and promoting the health of the community; without its subject industries society would be much the poorer in terms of health and facilities. Thus it is without doubt equally as valuable in its role in society as any medical or legal professional body and the spirit of charity may be found equally as positively in its purposes as its analogous bodies.

Goddard J then turned to the *IPENZ* case as a “useful comparison in relation to welfare services.”⁶⁰ In that case, Tipping J referred to a corporate plan that set out a committee for employment and welfare, with subsidiary functions of that committee being conducting surveys of salaries and employment benefits, overviews of conditions and pay and the conduct of an employment advisory service. This plan also included detailing promoting the profession and its contribution to society. Goddard J however firmly distinguished *IPENZ* from the *PGDB* case by asserting that if the PGDB were established for similar purposes to the *IPENZ*, in other words, to benefit those members working within the subject industries, then it would be expected that s 137 of the PGDA would have made such provisions for similar services.⁶¹ Whilst “*IPENZ* is a clear example of an institution established for the advantage and in the interests of those working in the subject industries”⁶² it is apparent that the PGDB follows the same ethos of the Medical Council of New Zealand, and indeed the Royal College of Surgeons; their public benefit should not be undermined by merely incidental consequences of the provision of private benefits that come from the registration of their members. The reality is that those benefits are not the purpose of registration. The overall value to the public is the essence of these professional bodies, and that value to society cannot be underestimated, thus the spirit of charity is alive and well within these bodies.

We now turn to the second matter for this article, that of the protection of the public in relation to their services.

⁵⁹ *Commissioner of Inland Revenue v Medical Council of New Zealand* [1997] 2 NZLR 297 (CA) at 316.

⁶⁰ At [52].

⁶¹ At [52].

⁶² At [53].

The Protection of the Public, Professional Bodies and the Spirit of Charity

In many of the cases involving professional bodies that are found to be charitable, there can be seen an implicit acknowledgement that the professional body offers some kind of protection to the public as a result of its existence. For instance, the Royal College of Surgeons prevents suffering in humans and the Councils of Law Reporting ensure that the public have adequate legal protection, however, these cases do not explicitly address these key matters, they merely imply that such services will protect the public and so it is shrouded in the doctrine of public benefit. It is beyond doubt that such protection fully embraces the full ethos of the spirit of charity. Another early example of this type of implied protection can also be found in the case of *McGregor v Commissioner of Stamp Duties*.⁶³

In this case, the Court had to determine if a gift to the New Zealand Obstetrical Society was a valid charitable gift. Its activities included providing ante-natal pamphlets to expectant mothers and the education of the public on maternal welfare in New Zealand.⁶⁴ Smith J determined that the real object of the Society was the promotion of the scientific study of obstetrics and gynaecology in New Zealand, thus its essence was to provide education in the treatment and care of maternity cases for a large section of the community,⁶⁵ and this was sufficient to recognise its charity at law. Clearly there is fundamental protection being offered to expectant mothers and their offspring as a result of the functions of this Society, but this is only implied, whereas in fact, this benefit is actually the stratum of the functions. Whilst this is clearly a very positive function and one that embraces the spirit of charity, it is perhaps surprising that it is not addressed explicitly, until that is the *PGBD* case. This case addresses this issue thoroughly and highlights explicitly how the spirit of charity exists within these decisions.

The Court affirmed that the principle issue in this case is whether this body's purposes are charitable under the fourth head of charity, that of "any other matter beneficial to the community." There are two requirements under this head and these are:⁶⁶

- (a) the purposes of the trust must be such as to confer a benefit on the public or a section of the public; and
- (b) the class of persons eligible to benefit must constitute the public or a sufficient section of the public.

The first limb of the test was met, as discussed above, as there was clear public benefit in the PGDB's regulation of the subject industries, and the class of persons that benefit from such regulations constitutes a sufficient section of the public.⁶⁷

⁶³ *McGregor v Commissioner of Stamp Duties* [1942] NZLR 164.

⁶⁴ *McGregor v Commissioner of Stamp Duties* [1942] NZLR 164 at 164.

⁶⁵ At 169.

⁶⁶ *Plumbers, Gasfitters and Drainlayers Board v Charities Registration Board* [2013] NZHC 1986 [8 August 2013] at [20] citing *Travis Trust v Charities Commission* (2009) NZTC 23,273 (HC) at [54]-[55].

⁶⁷ At [55].

The second limb of the test will be met if the purpose of the body falls within the spirit and intendment of the Preamble of the Statute of Elizabeth. It is worthwhile just noting the list of charitable uses in that Preamble:⁶⁸

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

Goddard J in the *PGDB* case noted that the requirement to be charitable within the spirit and intendment of the Preamble may be met in two ways: firstly, if a purpose is analogous to a purpose that has already been held to be within the spirit and intendment of the Preamble, and secondly, the charitable nature will be presumed if its objects beneficial to the public are at first sight within the spirit and intendment of the Preamble.⁶⁹ In addressing this test, Goddard J stated that the “most efficient way of addressing this issue is to consider whether the PGDB’s purpose is analogous to a purpose that has previously been held to be within the spirit and intendment of the Preamble.”⁷⁰

Goddard J illustrates my views concerning the lack of explicit public protection eloquently. Her Honour referred once again to the *Medical Council* case as it was noted that their purposes are analogous to those of the PGDB. It was determined by the Court that the purpose of the PGDB is to regulate for the protection of the public, similarly to the Medical Council of New Zealand. The Board endeavoured to distinguish the *Medical Council* case from that of the instant case because it “considered the protection of the public in respect of quality of medical and surgical services as distinguishable from maintaining professional standards within the subject industries.”⁷¹

However, Goddard J asserted that this approach by the Board rather missed the point, as “this analysis of the PGDB’s purpose constitutes only half the picture.”⁷² As her Honour explained, it is artificial to talk of their functions whilst ignoring the intended outcomes of those functions, in other words, the intended function being the protection of the health and safety of the public. Here is explicit consideration of the value of such a professional body, and thus I would argue that it is beyond doubt that such protection is the equivalent to the protection offered by medical and surgical professional bodies.⁷³ Goddard J rightly however adds a note of caution, and I respectfully agree that “the charitable purpose of protecting the health and safety of the public does not extend to all industries of public utility.”⁷⁴ There must be a line

⁶⁸ *Plumbers, Gasfitters and Drainlayers Board v Charities Registration Board* [2013] NZHC 1986 [8 August 2013] at [21] citing Preamble of the Statute of Elizabeth 1601.

⁶⁹ At [22].

⁷⁰ At [56].

⁷¹ At [58].

⁷² At [59].

⁷³ At [59]-[60].

⁷⁴ At [60].

drawn by the Court and this must be understanding which professional body falls within the correct side of the line, which is determined by “examining the quality of the protection afforded by the institution or society and the risks against which that institution or society is intended to guard.”⁷⁵

By way of illustration, her Honour referred to the case of *Re New Zealand Computer Society Inc.*⁷⁶ The Society is a not for profit society that works to advance computer-related education and its professional development.⁷⁷ In this case, the Court, whilst acknowledging that the public may derive some remote benefit from the Society’s promotion of education amongst its professionals, that benefit was merely ancillary to its overall purposes. Its functions could not be compared directly to the *Medical Council* case, because the registration of medical professionals ensured high standards of practice and thus was a primary and direct public benefit. Undoubtedly IT is of great importance in modern day life but MacKenzie J could not be persuaded that its importance could be equated “with the medical profession or the nursing profession so far as the public interest in the maintenance of high standards in the profession is concerned.”⁷⁸ Evidently the spirit of charity does not find its place in the standards of IT professionals, and this is demonstrated in the lack of analogous public benefit in comparison with the medical industry.

Returning then to Goddard J’s appraisal of the *Computer Society* case, this case is used to demonstrate how this particular case fell the wrong side of the line of the quality of protection afforded by the Society and the risks against which it sought to guard. In contrast however, Goddard J is clearly of the view that the functions of the PGDB protect the public from substantial risks and these include:⁷⁹

the possibility of a gas explosion; the potential impact on drinking water of unsafe plumbing (sic) practice and the potential risk to public health from unsanitary drainage.

Of course, repairing a gas leak and mending pipes involve different skills and training from those required to undertake surgical procedures, but surely there can be little difference in the level of risk posed to the public if the standards of either profession fell below the minimum standard required. My views find support in the determination of Goddard J, as her Honour submitted that “both activities have the potential to pose substantial risk to the public if not performed competently.”⁸⁰ As a result therefore, the PGDB established that it fell within the spirit and intendment of the Preamble by analogy to the medical profession cases.

The protection of the public from any grave health risks surely encompasses the spirit of charity. Whilst the calls for aid from Oxfam in response to the devastating super typhoon, and their resulting assistance to those suffering and in need may seem a far cry from the purposes of a variety of professional bodies, such as the PGDB, on analogy, it is clear how such bodies do in reality have equally valuable roles in

⁷⁵ At [60].

⁷⁶ *Re New Zealand Computer Society Inc* (2011) 25 NZTC 20-033 (HC).

⁷⁷ *Re New Zealand Computer Society Inc* (2011) 25 NZTC 20-033 (HC) at [4].

⁷⁸ *Re New Zealand Computer Society Inc* (2011) 25 NZTC 20-033 (HC) at [56].

⁷⁹ *Plumbers, Gasfitters and Drainlayers Board v Charities Registration Board* [2013] NZHC 1986 [8 August 2013] at [61].

⁸⁰ At [61].

society as organisations such as Oxfam, and cases such as the *PGDB* case validates their worth. It was refreshing to see Goddard J's explicit reference to the protection of the public as being a valid method of assessing whether a purpose falls within the spirit and intendment of the Preamble, as whilst this protection has been alluded to in the past, I think it is a valuable method of analysis, and it highlights the true value of such bodies in a contemporary society. There may be some criticism that contemporary cases such as *PGDB* may open the flood gates for professional bodies that seek charitable status that may in reality not offer such public benefit, however, Goddard J made it clear that such cases should be examined to ensure that the quality of the protection they offer and the risks against which they guard are of a minimum value, and the *Medical Council* case and the *Computer Society* case offer valuable standards in these respects.

Therefore whilst the role of professional bodies may appear to challenge the ethos of charities and the spirit of charities, these decided cases show us that actually the spirit of charity is very much alive and well and the services afforded by such professional bodies provide a valuable function in today's complex and demanding world.