IN THE SUPREME COURT OF NEW ZEALAND

SC 97/2012
[2014] NZSC 105

IN THE MATTER OF	An appeal from a decision of the Charities Commission under the Charities Act 2005
	RE GREENPEACE OF NEW ZEALAND INCORPORATED Appellant
Hearing:	1 August 2013
Court:	Elias CJ, McGrath, William Young, Glazebrook and Arnold JJ
Counsel:	D M Salmon, K L J Simcock and D E J Currie for Appellant P J Gunn and D Baltakmens for the Charities Board (formerly Charities Commission)
Judgment:	6 August 2014

JUDGMENT OF THE COURT

A **The appeal against the Court of Appeal's determination that a political purpose cannot be a charitable purpose is allowed.**

B **The appeal against the Court of Appeal's determination that purposes or activities that are illegal or unlawful preclude charitable status is dismissed.**

C **The matter of the charitable status of the objects of Greenpeace of New Zealand Inc is remitted to the chief executive of the Department of Internal Affairs and the Charities Board for reconsideration in light of this decision.**

D **No order for costs is made.**

REASONS

ELIAS CJ, McGRATH and GLAZEBROOK JJ

(Delivered by Elias CJ)

[1] Greenpeace of New Zealand Inc is an incorporated society which has sought registration as a "charitable entity" under Part 2 of the Charities Act 2005. Societies or institutions qualify for registration under s 13 of the Act only if they are "established and maintained exclusively for charitable purposes".[1] A principal advantage gained by registration as a charitable entity is tax relief.[2]

[2] The appeal concerns how "charitable purpose" within the meaning of s 5 of the Charities Act is properly assessed. In particular, it is concerned with the extent to which purposes that are "political" (including those that advocate particular views) can be charitable. And it raises questions about the extent to which an entity which engages in illegal activities or has illegal purposes can be charitable.

[3] The conclusions reached are:

- A "political purpose" exclusion should no longer be applied in New Zealand: political and charitable purposes are not mutually exclusive in all cases; a blanket exclusion is unnecessary and distracts from the underlying inquiry whether a purpose is of public benefit within the sense the law recognises as charitable.

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1 Charities Act 2005, s 13(1)(b)(i).

2 Indeed, although charitable status has had other advantages (charitable trusts are exempt from the aspect of the perpetuity rule that is termed the "rule against inalienability", charitable gifts are generally construed benevolently, and courts can, pursuant to their "cy-près" jurisdiction, modify charitable purposes that have become impossible or impracticable to carry out), tax relief has been the principal modern benefit under successive tax statutes long before enactment of the 2005 Act: see *New Zealand Society of Accountants v Commissioner of Inland Revenue* [1986] 1 NZLR 147 (CA) at 157.

- Section 5 of the Charities Act does not enact a political purpose exclusion with an exemption if political activities are no more than "ancillary" but rather provides an exemption for non-charitable activities if ancillary.

- The Court of Appeal applied an incorrect approach to assessment of charitable purposes when it concluded that an object "to promote nuclear disarmament and the elimination of weapons of mass destruction" was charitable.

- Illegal activity may disqualify an entity from registration when it indicates a purpose which is not charitable even though such activity would not justify removal from the register of charities under the statute.

Background to the appeal

[4] The Charities Commission declined Greenpeace registration on the basis that two of its objects were not charitable.[3] The objects found to be not charitable were the promotion of disarmament and peace and the promotion of "legislation, policies, rules, regulations and plans which further [Greenpeace's other objects] and support their enforcement or implementation through political or judicial processes as necessary".[4] In distinguishing between charitable objects and those that are "political", the Commission followed *Molloy v Commissioner of Inland Revenue*[5] in which the Court of Appeal adopted the view that "a trust for the attainment of political objects has always been held invalid".[6] The Commission found that the political purposes of Greenpeace were not merely ancillary to its charitable purposes (as would be permitted by s 5 of the Act, in adoption of a similar common law latitude) but were independent purposes.[7] In addition, the Commission concluded that the direct action which it found to be "central" to the activities carried on by Greenpeace could entail illegal activity, which also could not be said to be in the public interest and charitable.[8]

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3 *Greenpeace of New Zealand Inc* Charities Commission Decision, 2010–7, 15 April 2010.
4 At [6].
5 *Molloy v Commissioner of Inland Revenue* [1981] 1 NZLR 688 (CA).
6 At 695, quoting *Bowman v Secular Society Ltd* [1917] AC 406 (HL) at 442.
7 *Greenpeace of New Zealand Inc* Charities Commission Decision 2010–7, 15 April 2010 at [73].
8 At [64].

[5] Greenpeace was unsuccessful on appeal to the High Court.[9] Heath J considered that he was bound by *Molloy* to find that the two objects of promoting peace and disarmament and advocacy through political and other forums meant that Greenpeace was not "established and maintained exclusively for charitable purposes".[10] Although he did not need to determine the issue of illegal activity, Heath J expressed "some reservations" about whether there was sufficient evidence for the Commission to find that Greenpeace was deliberately involved in undertaking illegal activity.[11]

[6] Greenpeace appealed to the Court of Appeal.[12] It indicated that it had resolved to recommend to a general meeting that the two objects which had caused the difficulty be changed. The promotion of "disarmament" would be restricted to the promotion of "nuclear disarmament and the elimination of all weapons of mass destruction" (on the basis that these purposes accorded with New Zealand's international obligations and domestic law and were not controversial) and the advocacy object would be changed to make it clear that it was truly "ancillary" to Greenpeace's charitable objects.

[7] The Court of Appeal set aside the decision of the Commission declining to register Greenpeace as a charity. It affirmed the exclusion of "political" purpose.[13] But it held that the foreshadowed amendments to the Greenpeace objects avoided the political purpose exclusion: first, it was not controversial in New Zealand that promoting nuclear disarmament and eliminating weapons of mass destruction are for public benefit;[14] and secondly, the political advocacy object was now expressed to be limited to that which was "ancillary" only to other charitable purpose.[15]

[8] The Court of Appeal considered however that the advocacy actually carried out by Greenpeace could well be beyond a level merely "ancillary" to its charitable

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9 *Re Greenpeace of New Zealand Inc* [2011] 2 NZLR 815 (HC).
10 At [59].
11 At [76].
12 *Re Greenpeace of New Zealand Inc* [2012] NZCA 533, [2013] 1 NZLR 339 (Harrison, Stevens and White JJ).
13 At [60].
14 At [82].
15 At [84].

purposes.[16] If that proved to be the case, Greenpeace would not be maintained exclusively for charitable purposes. The matter had not been considered by the Commission because of the view it had taken that the expressed objects before amendment prevented registration. The Court of Appeal accordingly referred the application for registration for reconsideration by the chief executive of the Department of Internal Affairs and the Charities Board,[17] which now make the decision following amendment to the Act in 2012.[18] The reconsideration was also to cover whether the direct action taken by Greenpeace entails unlawful activities that are inconsistent with charitable status.[19]

[9] Greenpeace appeals to this Court. It challenges the Court of Appeal's acceptance that the law treats objects which are "political" as non-charitable and prevents registration of an entity with such objects unless they are merely "ancillary" to charitable objects. It argues that the exclusion of political purpose should no longer be applied in New Zealand, especially following the High Court of Australia decision in *Aid/Watch Inc v Commissioner of Taxation*.[20] In *Aid/Watch*, the majority opinion treated contribution to public debate concerning charitable ends (in that case the relief of poverty abroad and education about poverty) as of public benefit and charitable in itself, while leaving open the question whether generating public debate in relation to other matters could also be charitable.[21] Greenpeace argues that there is no proper basis for a free-standing prohibition on political purpose. Rather, the only question is whether the purposes of an entity are charitable within the sense accepted by the common law.

[10] Greenpeace also contends that illegal purposes or activities, if ancillary or minor, do not disqualify an entity from registration as charitable. It therefore challenges the basis on which the Court of Appeal remitted its application to the chief executive and the Board for reconsideration of the question of illegal means. It argues that the approach of the Court of Appeal in relation to illegal activities which

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16 At [91].
17 At [101] (hereafter "the Board").
18 Charities Amendment Act (No 2) 2012, s 7.
19 At [103].
20 *Aid/Watch Inc v Commissioner of Taxation* [2010] HCA 42, (2010) 241 CLR 539.
21 At [48] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

are minor cuts across the scheme of the Act in which it is only "serious wrongdoing" (as defined in the legislation[22]) which justifies removal from the register.

[11] In the absence of a contradicting party, the Board has appeared to assist the Court.

"Charitable purpose" in the Charities Act

[12] The appeal concerns application of the Charities Act. The Act builds on the pre-existing common law understanding of "charitable purpose" and it is necessary to make reference to the case-law on the topic. The Act itself however is the appropriate starting point because it provides the framework for consideration of what constitutes "charitable purpose" in New Zealand law.

[13] A society or institution qualifies for registration as a charitable entity under s 13(1)(b) (which deals with "essential requirements") if it:

> (i) is established and maintained exclusively for charitable purposes; and
>
> (ii) is not carried on for the private pecuniary profit of any individual[.]

[14] The purposes of an entity may be expressed in its statement of objects or may be inferred from the activities it undertakes,[23] as s 18(3) of the Charities Act now makes clear. Section 18 provides for the considerations the chief executive must take into account in making a recommendation to the Board which, under s 19, makes the decision on registration:[24]

> **18 Chief executive to consider application**
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> (1) The chief executive must, as soon as practicable after receiving a properly completed application for registration of an entity as a charitable entity, consider whether the entity qualifies for registration as a charitable entity.
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> (2) …
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> (3) In considering an application, the chief executive must—

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22 Charities Act 2005, s 4, "serious wrongdoing", as discussed further below at [107].

23 *Molloy v Commissioner of Inland Revenue* [1981] 1 NZLR 688 (CA) at 693 per Somers J.

24 Before amendment in 2012, s 18 was directed to the Commission, which also made the final determination, but since nothing turns on this substitution in the present case it is convenient to refer to the current legislation.

(a) have regard to—

(i) the activities of the entity at the time at which the application was made; and

(ii) the proposed activities of the entity; and

(iii) any other information that it considers is relevant.

…

[15] Although "charitable purpose" is defined in s 5 of the Act, the definition is an inclusionary one by reference to "relief of poverty, the advancement of education or religion, or any other matter beneficial to the community":

5 Meaning of charitable purpose and effect of ancillary non-charitable purpose

(1) In this Act, unless the context otherwise requires, **charitable purpose** includes every charitable purpose, whether it relates to the relief of poverty, the advancement of education or religion, or any other matter beneficial to the community.

(2) …

(2A) The promotion of amateur sport may be a charitable purpose if it is the means by which a charitable purpose referred to in subsection (1) is pursued.

(3) 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.

(4) For the purposes of subsection (3), 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.

[16] The legislative history makes it clear that it was a deliberate choice to retain the concepts of charity developed in the case-law.[25] The Select Committee which considered the Bill received submissions that the common law test should be

[25] (12 April 2005) 625 NZPD 19941 (Associate Minister of Commerce, Hon Judith Tizard MP).

replaced with a new statutory definition.[26] Its report indicates that some who made submissions considered that the "long-established definition of 'charitable purpose' in common law" was "too narrow, excluding sporting groups and groups that undertake advocacy work".[27] By majority, the Select Committee concluded that there would not be benefit in such amendment. It expressed concern that "amending this definition would be interpreted by the Courts as an attempt to widen or narrow the scope of charitable purposes, or change the law in this area, which was not the intent of the bill".[28] It also considered that amendment would "result in inconsistencies with other legislation that contain definitions of 'charitable purpose'".[29]

[17] For guidance on the interpretation and application of s 5 it is therefore necessary to look to the common law developed through the cases. Unless a development of the common law would be inconsistent with the statute, Parliament in referring to common law concepts is to be taken to expect the common law to continue to develop to meet fresh facts and changing perceptions of what justice requires (a matter touched on below in relation to the argument that s 5(3) codifies the common law exclusion of political purposes).[30]

Common law approaches to charitable purpose

[18] At common law, charitable status is recognised on a case by case basis, by analogy with previous common law authorities falling generally within the "spirit and intendment" of the preamble to the Statute of Charitable Uses 1601 (UK) 43 Eliz I c 4.[31] Objects have been accepted to be charitable if they advance the public benefit in a way that is analogous to the cases which have built on the preamble to the 1601 Act.[32]

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26 Charities Bill 2004 (108-2) (select committee report) at 3.

27 At 3.

28 At 3.

29 At 3.

30 *British Railways Board v Herrington* [1972] AC 877 (HL) at 921 per Lord Wilberforce.

31 The expression, picked up by the subsequent cases, is that used by Sir William Grant MR in *Morice v Bishop of Durham* [1804] 9 Ves 399, (1804) 32 ER 659 (MR) (aff'd (1805) 10 Ves 522, 32 ER 947 (Ch)): "Those purposes are considered charitable, which that Statute enumerates, or which by analogies are deemed within its spirit and intendment …"

32 *D'Aguiar v Guyana Commissioner of Inland Revenue* [1970] TR 31 (PC) at 33 per Lord Wilberforce; *Vancouver Society of Immigrant and Visible Minority Women v Minister of National Revenue* [1999] 1 SCR 10 at [44] per Gonthier J (dissenting).

[19] The Statute of Charitable Uses was legislation to reform abuses of charitable trusts which had not been employed "according to the charitable intent of the givers and founders".[33] It was contemporary with the Act for Relief of the Poor 1601 (UK) 43 Eliz I c 2 and seems to have reflected in part the importance of private philanthropy in reducing the burden on parish ratepayers of poor relief.[34] The preamble to the Statute of Charitable Uses alluded to the various objects for which settlements had been made by monarchs and by "sundry other well-disposed persons":

> some for relief of aged, impotent and poor people, some for maintenance of sick and maimed soldiers and mariners; schools of learning, free schools, and scholars in universities; some for repair of bridges, posts, havens, causeways, churches, sea banks, and high ways; some for education and preferment of orphans; some for or towards relief, stock or maintenance for houses of correction; some for marriages of poor maids; some for supportation, aid and help of young tradesmen, handicrafts men, and persons decayed and others for relief or redemption of prisoners or captives, and for aid or ease of any poor inhabitants concerning payments of fifteens, setting out of soldiers …

[20] The touchstone of the "spirit and intendment" of the preamble does not require close focus on the specific purposes identified in it.[35] The preamble itself set out purposes treated as charitable at the time. It was never regarded as an exclusive catalogue, but rather as "typical of the kind of charity which the State wished to encourage".[36] In their original form, the examples given "were unified by their association with the financial obligations of, or contributions to, a parish government's purse strings".[37]

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33 Statute of Charitable Uses 1601, preamble.

34 Gareth Jones *History of the Law of Charity 1532–1827* (Cambridge University Press, Cambridge, 1969) at 26; Francis Moore "Reading on the Statute of Charitable Uses" in G Duke *The Law of Charitable Uses*; *Revised and Much Enlarged with Many Cases in Law Both Antient and Modern Whereunto is Now added the Learned Reading of Sir Francis Moor, K. Sergeant at Law, 4 Jacobi in The Middle Temple Hall* (Twyford, 1676), quoted in Jean Ely "*Pemsel* Revisited – The Legal Definition of Charitable: A Case Study of a Moveable Feast" [2006] ANZLH E-Journal 1 at 5.

35 *New Zealand Society of Accountants v Commissioner of Inland Revenue* [1986] 1 NZLR 147 (CA) at 157 per Somers J.

36 Jones, above n 34, at 26–27.

37 Alison Dunn "Demanding Service or Servicing Demand? Charities, Regulation and the Policy Process" (2008) MLR 71 at 251.

[21] The "spirit and intendment" of the preamble is the "accepted test" only "in a very wide and broad sense".[38] Rather the spirit of the preamble is looked to through the cases decided in the intervening centuries.[39] The case-law "endeavoured to keep the law as to charities moving according as new social needs arise or old ones become obsolete or satisfied".[40] In order to be within the "spirit and intendment" of the preamble, "one must find something charitable *in the same sense* as the recited purposes are charitable".[41]

[22] In 1891 Lord Macnaghten in *The Commissioners for Special Purposes of the Income Tax v Pemsel*[42] organised the cases into the classification which was adopted in earlier tax legislation in New Zealand and which is now expressed in s 5(1) of the Charities Act. In this, he drew on the four-fold classification earlier adopted by Lord Eldon in *Morice v Bishop of Durham*:[43]

> First, relief of the indigent; in various ways: money: provisions: education: medical assistance: etc; secondly, the advancement of learning; thirdly, the advancement of religion; and fourthly, which is the most difficult, the advancement of objects of general public utility.

[23] Even though in popular understanding charity may have been principally associated with alleviating poverty,[44] Lord Macnaghten in *Pemsel* considered that the technical legal meaning of charitable purposes had come to entail the four purposes: the relief of poverty; the advancement of education; the advancement of religion; and other purposes also beneficial to the community but not falling within the first three categories.[45] Like all such common law restatements, and as the fourth category

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38 *Scottish Burial Reform and Cremation Society Ltd v Glasgow City Corporation* [1968] AC 138 (HL) at 151 per Lord Upjohn. See also Lord Reid at 146–147 and Lord Wilberforce at 154.

39 See *D'Aguiar v Guyana Commissioner of Inland Revenue* [1970] TR 31 (PC) at 33, quoted in *Vancouver Society of Immigrants and Visible Minority Women v Minister of National Revenue* [1999] 1 SCR 10 at [46] per Gonthier J (dissenting).

40 *Scottish Burial Reform and Cremation Society Ltd v Glasgow City Corporation* [1968] AC 138 (HL) at 154 per Lord Wilberforce.

41 *Re Strakosch (dec'd)* [1949] Ch 529 (CA) at 537 per Lord Greene MR (emphasis added).

42 *The Commissioners for Special Purposes of the Income Tax v Pemsel* [1891] AC 531 (HL).

43 *Morice v Bishop of Durham* (1805) 10 Ves 522, 32 ER 947 (Ch) at 532.

44 In *The Commissioners for Special Purposes of the Income Tax v Pemsel* [1891] AC 531 (HL), Lord Halsbury LC at 552 and Lord Bramwell at 564 dissented on the basis that relief of poverty was necessary for charitable purposes.

45 At 583.

explicitly allows, the *Pemsel* classification itself is not set in stone. The law of charity has been acknowledged to be "a moving subject".[46]

[24] The fourth *Pemsel* category has led some judges and commentators to suggest that an object of benefit to the public is itself charitable.[47] This approach has the attraction of making it unnecessary to attempt to discern system in the large number of sometimes irreconcilable cases on charities. As Professor Gareth Jones has pointed out, however, although the approach was earlier favoured by equity, it was rejected decisively in *Morice v Bishop of Durham* in 1805.[48]

[25] In *New Zealand Society of Accountants v Commissioner of Inland Revenue*, Somers J expressed doubt as to whether the more direct approach, by which public benefit is treated as itself charitable, represented the law.[49] He considered that it "may be too simple a view".[50] Despite these doubts, at least two judges of the New Zealand Court of Appeal in *Commissioner of Inland Revenue v Medical Council of New Zealand* have taken the view that public benefit gives rise to a presumption of charitable status.[51] Such presumption is said to be rebutted if shown to be contrary to analogous cases.[52] In *Latimer v Commissioner of Inland Revenue*, a differently constituted Court of Appeal[53] preferred the more traditional methodology of analogy with cases found to be charitable because within the spirit of the preamble, without finding it necessary to decide whether public benefit alone would be sufficient.[54]

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46 *Scottish Burial Reform and Cremation Society Ltd v Glasgow City Corporation* [1968] AC 138 (HL) at 154 per Lord Wilberforce.

47 See *Incorporated Council of Law Reporting for England and Wales v Attorney-General* [1972] Ch 73 (CA) at 88 per Russell LJ, with whom on the point the other members of the Court of Appeal agreed. The Privy Council declined to follow this approach in the Australian case *Brisbane City Council v Attorney General for Queensland* [1979] AC 411 (PC), preferring to "follow the route of precedent and analogy in the present appeal": at 422.

48 Jones, above n 34, at 122.

49 *New Zealand Society of Accountants v Commissioner of Inland Revenue* [1986] 1 NZLR 147 (CA) at 157.

50 At 157.

51 *Commissioner of Inland Revenue v Medical Council of New Zealand* [1997] 2 NZLR 297 (CA) at 321 per Thomas J, with whom Keith J agreed at 321–322. McKay J, concurring, approvingly cites a passage in *Halsbury*'s *Laws of England* to that effect (at 310) but seems to have preferred himself to reason by analogy: at 311–314. Richardson P and Gault J dissented: at 302. See further the discussion of this case of a differently constituted Court of Appeal in *Latimer v Commissioner of Inland Revenue Revenue* [2002] 3 NZLR 195 (CA) at [39].

52 *Incorporated Council of Law Reporting for England and Wales v Attorney-General* [1972] Ch 73 (CA) at 88 per Russell LJ.

53 It included Richardson P and Gault J, who had dissented in *Commissioner of Inland Revenue v Medical Council of New Zealand* [1997] 2 NZLR 297 (CA).

54 *Latimer v Commissioner of Inland Revenue Revenue* [2002] 3 NZLR 195 (CA).

Greenpeace in the Court of Appeal: "charitable purpose"

[26] The Court of Appeal judgment does not deal at length with the appropriate general approach to "charitable purpose." Its focus, rather, was on the issue of political purpose. In relation to the fourth *Pemsel* category, the Court said that in order to be charitable a purpose must be both for the public benefit and "charitable in the sense of coming within the spirit and intendment of the preamble to the Statute of Charitable Uses Act 1601".[55] It was the Court's view however that, even in the absence of an analogy with the purposes in the 1601 Statute, objects of public benefit will be presumed to be "charitable". It treated such presumption as rebuttable where an analogous case had decided that a similar purpose was not charitable.[56]

How "charitable purpose" is to be assessed

[27] It may be that in many cases there is little difference in result between presuming charitable status from demonstrated or self-evident public benefit, on the one hand, and, on the other, assessing whether benefit is "charitable" in the sense in which that concept is used in the decided cases based on the "spirit and intendment" of the preamble. The *Pemsel* classification, now contained in the Charities Act, does not however treat "public benefit" and "charitable purpose" as coinciding entirely. The cases have generally insisted that the purposes of relief of poverty, advancement of education and advancement of religion (all treated as being within the "spirit and intendment" of the preamble) must also be for the benefit of the public.[57] Conversely, in the case of the fourth head, the common law required objects of benefit to the public still to be charitable within the spirit of the cases based on the "very sketchy list in the statute of Elizabeth".[58]

[28] Identifying whether a purpose is charitable or not has always been difficult. While part of the difficulty arises from the origin of the classification in the preamble to the statute, Lord Porter, dissenting in *National Anti-Vivisection Society*, rightly

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55 *Re Greenpeace of New Zealand Inc* [2012] NZCA 533, [2013] 1 NZLR 339 at [43].

56 At [43].

57 Public benefit may be assumed until the contrary is shown with respect to the first three heads of charity: *Re Education New Zealand Trust* (2010) 24 NZTC 24,354 (HC) at [24]; *National Anti-Vivisection Society v Inland Revenue Commissioners* [1948] AC 31 (HL) at 42 per Lord Wright, and 65, per Lord Simonds.

58 *National Anti-Vivisection Society v Inland Revenue Commissioners* [1948] AC 31 (HL) at 41 per Lord Wright.

pointed out that the difficulty is "inherent in the subject-matter under consideration":[59]

> Whether any two persons would agree in all cases as to what "charity" should include is at least doubtful. It is not the law but the diversity of subjects which creates the difficulty.

[29] The preponderance of authority since 1805[60] has required both public benefit and charitable object "in the same sense"[61] as the cases developed from the preamble to the Statute of Charitable Uses. A single test may have the attraction of simplicity but loses the concept of charity which has always been essential. Identifying what is of public benefit without restriction to the kind of objects held to be charitable would set up a broad and less controlled assessment which could increase the entities entitled to charitable status. As was recognised in Canada by Iacobucci J when delivering the majority judgment of the Supreme Court in *Vancouver Society of Immigrant and Visible Minority Women v Minister of National Revenue*, adoption of a single test of "public benefit" would "constitute a radical change to the common law and, consequently, to tax law".[62]

[30] The language and structure of s 5(1) make it clear that, although "any other matter beneficial to the community" may qualify, the object must also be a "charitable purpose". The method of analogy to objects already held to be charitable is also the safer policy since charitable status has significant fiscal consequences.[63] Since the common law methodology is assumed in New Zealand by the Charities Act, we consider that it would not be appropriate for this Court to abandon the

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59 *National Anti-Vivisection Society v Inland Revenue Commissioners* [1948] AC 31 (HL) at 52.

60 See *Re Macduff* [1896] 2 Ch 451 (CA) at 473–474 per Rigby LJ; *Attorney-General v National Provincial and Union Bank of England* [1924] AC 262 (HL); *Williams Trustees v Inland Revenue Commissioners* [1947] AC 447 (HL) at 458 per Lord Simonds; *National Anti-Vivisection Society v Inland Revenue Commissioners* [1948] AC 31 (HL) at 41 per Lord Wright; *Scottish Burial Reform and Cremation Society Ltd v Glasgow Corporation*, [1968] AC 138 (HL) at 154 per Lord Wilberforce; *Royal National Agricultural and Industrial Association v Chester* 3 ALR 486 (HCA) at 487; *Vancouver Society of Immigrant and Visible Minority Women v Minister of National Revenue* [1999] 1 SCR 10 at [176] per Iacobucci J.

61 *Re Strakosch* [1949] Ch 529 (CA) at 537 per Lord Greene MR.

62 *Vancouver Society of Immigrant and Visible Minority Women v Minister of National Revenue* [1999] 1 SCR 10 at [200].

63 A point made by Somers J in *New Zealand Society of Accountants v Commissioner of Inland Revenue* [1986] 1 NZLR 147 (CA) at 157 and in *Re Tennant* [1996] 2 NZLR 633 (HC) at 637 per Hammond J.

analogical approach in favour of the view that benefit to the public presumptively establishes the purpose as charitable.

[31] We therefore disagree with the approach preferred in the Court of Appeal, although by itself the approach may not matter in the result (since the presumption may be rebutted if a purpose is treated as non-charitable in analogous cases). The appeal turns, rather, on whether New Zealand should continue to adhere to a political purpose exception for objects otherwise charitable and whether the objects of Greenpeace were charitable, as the Court of Appeal found.

Development of a "political" exception to charitable purpose

[32] Where an entity seeking charitable status has objects or conducts activities that involve promoting its own views or advocacy for a cause, it may be especially difficult to conclude where the public benefit lies and whether the object or activities come within the spirit and intendment of the preamble to the Statute of Charitable Uses. As the American Law Institute's Restatement of Trusts puts it, a charitable trust does not exist to give satisfaction to those who believe in the cause it promotes. Rather, it "is designed to accomplish objects that are beneficial to the community",[64] as the examples given in the preamble to the 1601 Statute demonstrate.

[33] The difficulty in assessing charitable purpose in promotion of views was adverted to by Lord Bramwell, dissenting in the result in *Pemsel*:[65]

> I hold that the conversion of heathens and heathen nations to Christianity or any other religion is not a charitable purpose. That it is benevolent, I admit. The provider of funds for such a purpose doubtless thinks that the conversion will make the converts better and happier during this life, with a better hope hereafter. I dare say this donor did so. So did those who provided the faggots and racks which were used as instruments of conversion in times gone by. I am far from suggesting that the donor would have given funds for such a purpose as torture; but if the mere good intent makes the purpose charitable, then I say the intent is the same in the one case as in the other. And I believe in all cases of propagandism there is mixed up a wish for the prevalence of those opinions we entertain, because they are ours.

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64 The American Law Institute *Restatement of the Law (Third): Trusts* 3d (2003), Part 3, ch 6, § 28.

65 *The Commissioners for Special Purposes of the Income Tax v Pemsel* [1891] AC 531 (HL) at 564. See also *National Anti-Vivisection Society v Inland Revenue Commissioners* [1948] AC 31 (HL) at 45–46 per Lord Wright.

[34] Adopting similar reasoning, Lord Parker in *Bowman v Secular Society* drew a distinction between "political" and "charitable" objects.[66] That case concerned a gift to a secular society with the objects of promoting "the principle that human conduct should be based upon natural knowledge, and not upon super-natural belief, and that human welfare in this world is the proper end of all thought and action".[67] The gift was not upon a trust and whether the Society was charitable (therefore saving the gift from invalidity for uncertainty) was not in issue. Rather, the gift itself was attacked as being for an illegal purpose or contrary to public policy because "anti-Christian".[68] In upholding the gift, Lord Parker indicated that, if the gift had been on trust, it would not have been saved from invalidity as charitable. In that context, he said:[69]

> The abolition of religious tests, the disestablishment of the Church, the secularization of education, the alteration of the law touching religion or marriage, or the observation of the Sabbath, are purely political objects. Equity has always refused to recognize such objects as charitable. It is true that a gift to an association formed [for the attainment of non-charitable objects] may, if the association be unincorporated, be upheld as an absolute gift to its members, or, if the association be incorporated, as an absolute gift to the corporate body; but a trust for the attainment of political objects has always been held invalid, not because it is illegal, for every one is at liberty to advocate or promote by any lawful means a change in the law, but because the Court has 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. … If therefore, there be a trust in the present case it is clearly invalid. The fact, if it be the fact, that one or other of the objects specified in the society's memorandum is charitable would make no difference. There would be no means of discriminating what portion of the gift was intended for a charitable and what portion for a political purpose, and the uncertainty in this respect would be fatal.

[35] In *National Anti-Vivisection Society*, the House of Lords concluded on the evidence that the purposes of the Society in promoting an end to vivisection were not for the public benefit.[70] But members of the panel also considered the nature of charity under the fourth *Pemsel* classification and the exclusion of objects characterised as "political", as proposed in *Bowman*. So, Lord Wright took the view

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66 *Bowman v Secular Society Ltd* [1917] AC 406 (HL).
67 At 418.
68 At 451.
69 At 442.
70 *National Anti-Vivisection Society v Inland Revenue Commissioners* [1948] AC 31 (HL)

that the fourth category of charity required either "tangible and objective benefits" or:[71]

> … at least that approval by the common understanding of enlightened opinion for the time being is necessary before an intangible benefit can be taken to constitute a sufficient benefit to the community to justify admission of the object into the fourth class.

Both Lord Simonds, who delivered the principal majority judgment in *National Anti-Vivisection Society* and Lord Porter, who dissented, commented on the scanty authority for the proposition that "political" objects are not charitable.[72] Nevertheless the Court recognised the existence of a political purpose exclusion.

[36] With the exception of Lord Normand (who considered promotion of change in government policy would also be within a political purpose exclusion),[73] the members of the House of Lords confined the political purpose exclusion to promotion of legislation,[74] although it is difficult to derive anything as definite from the statement of Lord Parker in *Bowman*, on which they relied. Lord Wright, applying this refinement, thought that the political purpose exclusion was justified not only on the basis explained by Lord Parker in *Bowman* (the difficulty of assessing public benefit) but also because the law would "stultify itself" if it could be held that a change in law was for the public benefit and the courts would be "usurping the function of the legislature" if they recognised a purpose to change the law as charitable.[75]

[37] Considerations such as these were addressed by Slade J in his important decision in *McGovern v Attorney-General.*[76] There it was held that Amnesty International, which promoted humane treatment of prisoners of conscience in foreign countries, was not charitable. Slade J considered that such objects were

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71 At 49.

72 At 54 per Lord Porter; at 63 per Lord Simonds. As explained by Slade J in *McGovern v Attorney-General* [1982] Ch 321 (Ch) at 341: "The difference of opinion between the majority of the House and Lord Porter, who dissented, centred on the question whether an alteration in the law should itself be regarded as being a main object of the trust. Lord Porter thought it should not."

73 At 77.

74 At 49–50 per Lord Wright; at 55 per Lord Porter; at 62 per Lord Simonds, with whom Viscount Simon agreed: at 40.

75 At 50.

76 *McGovern v Attorney-General* [1982] Ch 321 (Ch).

political not only when they promoted legislative change but also when they fell "within the spirit" of Lord Parker's reasoning in *Bowman* because they promoted change of government policies, whether at home or abroad:[77]

> Even if it otherwise appears to fall within the spirit and intendment of the preamble to the Statute of Elizabeth, a trust for political purposes falling within the spirit of Lord Parker's pronouncement in *Bowman's* case can never be regarded as being for the public benefit in the manner which the law regards as charitable… Trusts for political purposes falling within the spirit of this pronouncement include, inter alia, trusts of which a direct and principal purpose is either:
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> (i) to further the interests of a particular political party; or
>
> (ii) to procure changes in the laws of this country; or
>
> (iii) to procure changes in laws of a foreign country; or
>
> (iv) to procure a reversal of government policy or of particular decisions of governmental authorities in this country; or
>
> (v) to procure a reversal of government policy or of particular decisions of governmental authorities in a foreign country.
>
> This categorisation is not intended to be an exhaustive one, but I think it will suffice for the purposes of this judgment.

[38] Slade J emphasised that his categorisation was "directed to trusts of which the *purposes* are political": "the mere fact that trustees may be at liberty to employ political *means* in furthering the non-political purposes of a trust does not necessarily render it non-charitable".[78] The distinction between objects and means was developed further by Slade J in considering whether the trust was maintained "exclusively for charitable purposes". He considered the necessary distinction to be between:[79]

> (a) those non-charitable activities authorised by the trust instrument which are merely subsidiary or incidental to a charitable purpose, and (b) those non-charitable activities so-authorised which in themselves form part of the trust purpose. In the latter but not the former case, the reference to non-charitable activities will deprive the trust of its charitable status.

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77 At 340.
78 At 340.
79 At 341.

Slade J remarked that "[t]he distinction is perhaps easier to state than to apply in practice".[80]

Application of the political purpose exception in New Zealand

[39] In New Zealand, the political purpose exception considered in *Bowman* was adopted in two decisions of the High Court, which preceded the decision in *National Anti-Vivisection Society*.

[40] In *Re Wilkinson*, decided in 1941, a gift to the League of Nations Union of New Zealand (which advocated the acceptance of the League of Nations in New Zealand as a course likely to bring the benefits of peace and security), was held by Kennedy J in the High Court to fail because the Union was not a charity:[81]

> It is only those objects of public general utility which are mentioned in the statute or which are analogous to those mentioned in the Statute of Elizabeth which are charities. …
>
> This, in my view, is not analogous. The Union exists for the attainment of political objects by advocacy and the creation of a particular opinion to influence the central executive authority of New Zealand to accept or to continue to accept the League of Nations as its instrument in certain relations with other nations. The Union can do nothing except through the executive authority of the Dominion which it must seek to influence through the opinion of the people; for only then can there be acceptance of the League of Nations by the people of New Zealand.

Citing Lord Parker's judgment in *Bowman*,[82] Kennedy J held that a purpose of gaining acceptance of the particular opinion of the Union was, "in the broadest sense, a political purpose".[83]

[41] *Bowman* was applied, too, in *Knowles v Commissioner of Stamp Duties*, a case concerning death duties payable on a bequest to the New Zealand Alliance, an organisation which had as its dominant purpose the promotion of temperance in New Zealand.[84] Although Kennedy J there considered it established on the authorities that

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80 At 341.

81 *Re Wilkinson (Deceased), Perpetual Trustees Estate and Agency Co of New Zealand Ltd v League of Nations Union of New Zealand* [1941] NZLR 1065 (SC) at 1076–1077.

82 *Bowman v Secular Society* [1917] AC 406 (HL) at 442.

83 *Re Wilkinson (Deceased), Perpetual Trustees Estate and Agency Co of New Zealand Ltd v League of Nations Union of New Zealand* [1941] NZLR 1065 (SC) at 1077.

84 *Knowles v Commissioner of Stamp Duties* [1945] NZLR 522 (SC).

the promotion of temperance itself could be a charitable object (if promoting abstinence or moderation by personal choice rather than compulsion), the object of the New Zealand Alliance was to be attained through legislation, a political purpose which could not be charitable. The political purpose was the main purpose of the organisation and not subsidiary to other charitable purposes.[85]

[42] *Molloy*, the principal authority applied by the Court of Appeal in the present case, concerned a tax deduction claimed for a donation to the Society for the Protection of the Unborn Child.[86] It was disallowed by the Commissioner of Inland Revenue on the basis that the Society was not charitable. *Molloy* was decided after *National Anti-Vivisection Society* but before *McGovern*, although it anticipated the approach taken by Slade J to non-charitable activities "subsidiary or incidental to a charitable purpose".[87]

[43] Somers J delivered the judgment of the Court of Appeal upholding the High Court's dismissal of an appeal from the Commissioner. The Court accepted that the public benefit in many cases will be readily assumed.[88] In others, however, charitable status would have to be resolved on the evidence[89] (as had occurred in *National Anti-Vivisection Society*).[90] "Political objects" were held not to be confined to "matters of party political philosophy",[91] for which proposition the Court cited the opinions of Lord Simonds in *National Anti-Vivisection Society*[92] and Dixon J in *Royal North Shore Hospital of Sydney v Attorney-General for New South Wales*,[93] as well as the New Zealand authorities of *Wilkinson* and *Knowles*.

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85 At 528–529.
86 *Molloy v Commissioner of Inland Revenue* [1981] 1 NZLR 688 (CA).
87 *McGovern v Attorney-General* [1982] Ch 321 (Ch) at 341.
88 *Molloy v Commissioner of Inland Revenue* [1981] 1 NZLR 688 (CA) at 695.
89 At 695.
90 *National Anti-Vivisection Society v Inland Revenue Commissioners* [1948] AC 31 (HL) at 65–66 and 78–79.
91 *Molloy v Commissioner of Inland Revenue* [1981] 1 NZLR 688 (CA) at 695.
92 *National Anti-Vivisection Society v Inland Revenue Commissioners* [1948] AC 31 (HL) at 62.
93 *Royal North Shore Hospital of Sydney v Attorney-General for New South Wales* (1928) 60 CLR 396 at 426.

[44] On the other hand, Somers J was of the view that the cases do not suggest that "the mere existence of any such object or purpose ipso facto precludes recognition as a valid charity":[94]

> To reach that conclusion the political object must be more than an ancillary purpose, it must be the main or a main object. If such purpose is ancillary, secondary, or subsidiary, to a charitable purpose it will not have a vitiating effect…

[45] The cases cited in *Molloy* involved trusts which had as their principal purpose achieving a change in the law. Although in *Molloy* the object of the Society was to maintain the existing law against possible reform, the Court of Appeal took the view that "reason suggests that on an issue of a public and very controversial character, as is 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":[95]

> The law, statutory or otherwise, is not static. Unless it is for purposes such as the present to be regarded as immutable and having attained an unchallengeable degree of perfection the reasons given by Lord Parker of Waddington in *Bowman v Secular Society* … – 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.

[46] The Court was unable to conclude that the public good in restricting abortion was "so self-evident as a matter of law that such charitable prerequisite is achieved".[96] The issue was "much wider than merely legal".[97] Since the division of public opinion was only able to be resolved ("whether in the short or the long term") by legislation,[98] the Court was unable to determine where the public good lay, making the object of the Society "relevantly political in character":[99]

> The main, or a main, object of the Society in the present case was opposition to a change in the statutory provisions about abortion. It was political. In those circumstances the application of its funds cannot be said to be principally for charitable purposes.

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94 *Molloy v Commissioner of Inland Revenue* [1981] 1 NZLR 688 (CA) at 695.
95 At 695–696.
96 At 697.
97 At 697.
98 At 697.
99 At 697–698.

The view taken in *Molloy* was that principal purpose must be charitable but that subsidiary non-charitable purpose does not change the charitable character of an entity.

[47] In summary, the political purpose exclusion recognised to date in New Zealand excludes non-ancillary advocacy for or promotion of ends, even those charitable in themselves. A blanket exclusion of this sort means that advocacy (including by such means as litigation) can be undertaken by charitable organisations only when ancillary to charitable purpose, as was the conclusion of Ronald Young J in the recent High Court decision of *Re Draco Foundation (NZ) Charitable Trust*.[100]

Section 5(3) of the Charities Act

[48] The position reached in *Molloy* that ancillary non-charitable purposes do not alter the charitable nature of an entity was adopted in the Charities Act. The Select Committee considering the Bill reported that "the single biggest concern raised in relation to the charitable purpose test was the position of advocacy, and whether organisations that undertook advocacy work would continue to be classified as charitable and be able to register".[101] As a result, the Committee recommended changes to the Bill as introduced to "make it clear that the Commission will not prevent an organisation from being able to register if it engages in advocacy as a way to support and undertake its main charitable purpose".[102] The Committee said in its report:[103]

> The common law has established that organisations must have main purposes that are exclusively charitable, but they are permitted to have non-charitable secondary purposes, provided that those secondary purposes are legitimate ways to achieve the main charitable purpose. While a charity cannot have advocacy as its main purpose, it can have another charitable purpose as its main purpose, and then engage in appropriate advocacy as a secondary purpose to achieve its main charitable purpose. Given the level of concern raised by submitters concerning this issue, the majority does consider that it may be valuable if the legislation includes a provision codifying the common law regarding secondary purposes, in order to ensure

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100 *Re Draco Foundation (NZ) Charitable Trust* (2011) 25 NZTC 20-032 (HC) at [69]. In this case, a trust with the very general purpose of promoting awareness about "democracy and natural justice in New Zealand", which was a vehicle for promoting particular views, was held to be excluded by the political purposes doctrine.

101 (12 April 2005) 625 NZPD 19941 (Associate Minister of Commerce, Hon Judith Tizard MP).

102 At 19941.

103 Select Committee report, above n 26, at 4.

> clarity on this issue. The majority therefore recommends amending the Bill to clarify that an entity with non-charitable secondary purposes undertaken in support of a main charitable purpose will be allowed to register with the Commission, and to confirm that advocacy may be one such non-charitable secondary purpose.

[49] The recommendation of the Select Committee led to the adoption of s 5(3), expressed "to avoid doubt", and s 5(4), which further explains s 5(3):

> (3) 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.
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> (4) For the purposes of subsection (3), a non-charitable purpose is ancillary to a charitable purpose of the trust, society, or institution if the non-charitable purpose is—
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> 1. ancillary, secondary, subordinate, or incidental to a charitable purpose of the trust, society, or institution; and
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> 2. not an independent purpose of the trust, society, or institution.

[50] Under these subsections, the inclusion of a non-charitable purpose ("for example, advocacy") does not prevent registration as a charity if it is "merely ancillary to a charitable purpose of the trust". Such non-charitable purpose is "ancillary" if "ancillary, secondary, subordinate, or incidental" to a charitable purpose and if it is not "an independent purpose" of the society.[104]

Greenpeace in the Court of Appeal: "political" purpose and s 5(3)

[51] The Court of Appeal was not prepared to depart from the exclusion of non-ancillary political purposes affirmed in *Molloy*. It recognised the different view recently taken by the High Court of Australia in *Aid/Watch*[105] (which is discussed below at paragraphs [66] to [68]) and it acknowledged that there had been anomalies in application of the prohibition against political purpose and criticism of it in

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[104] Charities Act, s 5(4).

[105] *Re Greenpeace of New Zealand Inc* [2012] NZCA 533, [2013] 1 NZLR 339 at [63].

academic writing.[106] It approved the views expressed in other jurisdictions[107] that the law relating to charities must move with changes in society "while bearing in mind that the development of the law here must be consistent with and constrained by the provisions of the Act".[108]

[52] But the Court considered it significant that Parliament had not taken the opportunity to remove the prohibition when the Charities Act was enacted in 2005 or when it was amended in 2012 (after delivery of the High Court decision in the present case) to change the definition of "charitable purpose" to include promotion of amateur sport if "it is the means by which [a charitable purpose] referred to in subsection (1) is pursued".[109] Instead, in apparent endorsement of *Molloy*, s 5(3) of the Act had identified "advocacy" as a purpose that was non-charitable and inconsistent with charitable status unless merely "ancillary" (the exception in *Molloy*). The Court of Appeal therefore treated s 5(3) as legislating a prohibition on non-ancillary political purpose "by drawing the distinction between 'advocacy' as a permitted non-independent ancillary purpose and a prohibited primary purpose".[110] Moreover, the Court considered that any departure from *Molloy* was a matter that should be left to Parliament, because of the fiscal consequences of change to the law.[111]

[53] Despite its refusal to depart from the exclusion of political purpose, the Court of Appeal considered that the prohibition was focused "on objects which are political in a contentious or controversial sense", such as the continuing debate about abortion.[112] Because it considered that the object of promoting nuclear disarmament and the elimination of weapons of mass destruction was not controversial, it accepted that object to be charitable.[113]

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106 At [63].

107 In particular by Lord Wilberforce in *Scottish Burial Reform and Cremation Society v Glasgow City Corporation* [1968] AC 138 (HL) at 154 and the High Court of Australia in *Aid/Watch Inc v Commissioner of Taxation* [2010] HCA 42, (2010) 241 CLR 539 at [24].

108 *Re Greenpeace of New Zealand Inc* [2012] NZCA 533, [2013] 1 NZLR 339 at [67].

109 Section 5(2A) as inserted by the Charities Amendment Act, s 5.

110 *Re Greenpeace of New Zealand Inc* [2012] NZCA 533, [2013] 1 NZLR 339 at [56].

111 At [58].

112 At [64].

113 At [72].

Does s 5(3) of the Charities Act codify when political purpose is permissible?

[54] In this Court, Greenpeace challenged the Court of Appeal position. It maintains that the reference to "advocacy" in s 5(3) is by way of illustration of an ancillary non-charitable purpose and does not in its terms constitute a prohibition on advocacy properly characterised as charitable in itself. It points to the implausibility of codification of a prohibition on political purpose by the side-wind of a parenthetical illustration when other core concepts, such as "public benefit" or "charitable purpose", are left in the statute to be construed in accordance with the common law in the particular context. It argues that, had Parliament intended to codify the prohibition, it could have been expected that the nature and scope of the prohibition would be better articulated, at least by some definition of the term "advocacy", given the "nuanced and subtle" application of the principles identified in *Bowman* and *Molloy*.

[55] In our view, the language and legislative history[114] of s 5(3) make it clear that the "avoid[ance of] doubt" to which the subsection is directed is the risk of exclusion of charitable status by adoption of non-charitable purposes which are purely ancillary to a charitable purpose of the entity. Case-law had already reached the position that non-charitable purposes, including political activity and advocacy, do not affect charitable status if ancillary to the principal charitable purposes. The pre-existing acceptance in cases such as *Molloy* explains why the legislation is expressed as being to avoid doubt.

[56] The very fact that s 5, and the Act as a whole, assumes the common law approach to charities (as the Select Committee report makes clear) points away from codification. Reference in statutes to the common law without more is to the common law as it develops from time to time.[115] There is no inconsistency between s 5(3) and development of what is charitable. Section 5(3) provides latitude for non-charitable purposes if no more than ancillary. It says nothing about the scope of the purposes the common law recognises from time to time as being charitable.

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114 See Select Committee report, above n 26, at 4.

115 See above at [17].

[57] Section 5(3) is of general application to all ancillary purposes, with "advocacy" being given only as an illustration. The subsection is not expressed as an exclusion of advocacy from charitable purposes in all cases where it is more than ancillary, such as would enact a general political purpose exclusion. There is nothing in the structure and language of the provision or its legislative history to justify the words in parenthesis being treated as excluding any non-ancillary purpose, including advocacy or political activity which would otherwise properly be regarded as charitable (a matter considered in relation to Greenpeace's objects further at paragraphs [87] to [104]).

[58] For these reasons, we agree with the submission of Greenpeace that the Court of Appeal was in error in the view that s 5(3) enacts a general prohibition on advocacy unless it is ancillary to a charitable purpose. The latitude granted by s 5(3) is in respect of advocacy that cannot itself be characterised as a charitable purpose. If "promotion" by advocacy may itself properly be treated as charitable as a matter of common law (the topic next addressed), then s 5(3) does not impose a statutory exclusion.

Charitable purpose and "political" purpose are not mutually exclusive

[59] We do not think that the development of a standalone doctrine of exclusion of political purposes, a development comparatively recent and based on surprisingly little authority (as the discussion at paragraphs [32] to [47] indicates), has been necessary or beneficial. In *Bowman* Lord Parker found no basis for deciding that the views there advanced were in the public benefit in the sense the law regards as charitable.[116] It is not clear he intended any new departure in describing as "political" the purposes he considered to be not charitable because the Court was unable to say whether they were for public benefit.[117]

[60] The label "political" itself has been used in a number of different senses (party political, controversial, law-changing, opinion-moulding, among others) and is apt to mislead. Similarly, the justifications for exclusion of "political" purposes have varied. The view subsequently taken in *National Anti-Vivisection Society* that

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116 *Bowman v Secular Society* [1917] AC 406 (HL) at 442.

117 At 442.

Lord Parker's reference in *Bowman* to "political objects" is confined to promotion of legislative change led to the additional suggested justifications that the courts would be usurping the functions of the legislature in finding charitable purpose of public benefit in legislative change and that the law would not be "coherent" or would be "stultif[ied]" if it was not treated as "right as it stands".[118]

[61] The view of the *National Anti-Vivisection Society* court that Lord Parker's reference to "political objects" in *Bowman* is confined to promotion of changes in legislation[119] seems to have been on the basis of inference from the examples Lord Parker gave.[120] Given his reasoning, it is doubtful that Lord Parker meant to confine it in this way. As well, the questionable assumption that a political exclusion depends on whether a purpose entails legislative change does not explain the general agreement that entities which promote political parties are not charitable, even where they do not promote changes in the law.

[62] More importantly, it is difficult to see that all advocacy for legislative change should be excluded from being recognised as charitable. Promotion of law reform of the type often undertaken by law commissions which aims to keep laws fit for modern purposes may well be properly seen as charitable if undertaken by private organisations even though such reform inevitably entails promotion of legislation.[121] Such advocacy may well constitute in itself a public good which is analogous to other good works within the sense the law considers charitable.

[63] Even in the case of promotion of specific law reform, an absolute rule that promotion of legislation is never charitable is hard to justify. First, it is not apparent why there should be any distinction between promoting legislative change and promoting change in government policy. That was the conclusion reached, in our

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118 If the law is not considered to be "right as it stands", it would be either "stultif[ied]" (*National Anti-Vivisection Society* [1948] AC 31 (HL) at 50 per Lord Wright) or made incoherent (*Royal North Shore* (1938) 60 CLR 396 at 426 per Dixon J).

119 *National Anti-Vivisection Society v Inland Revenue Commissioners* [1948] AC 31 (HL) at 49–50 per Lord Wright; at 55 per Lord Porter; and at 62 per Lord Simonds (with whom Viscount Simon agreed). But Lord Normand stated that promotion of change in government policy would also be within a political purposes exclusion: at 77. This assumption was not adopted in *Molloy v Commissioner of Inland Revenue* [1981] 1 NZLR 688 (CA).

120 Set out at [34] above.

121 LA Sheridan "Charitable Causes, Political Causes and Involvement" (1980) 2 The Philanthropist 5 at 13.

view rightly, by Lord Normand in *National Anti-Vivisection Society*,[122] by Slade J in *McGovern*,[123] and by Kennedy J in *Wilkinson*[124] (in a judgment later approved by Somers J in *Molloy*[125]). Perhaps more significantly, in the circumstances of modern participatory democracy and modern public participatory processes in much administrative and judicial decision-making, there is no satisfactory basis for a distinction between general promotion of views within society and advocacy of law change (including through such available participatory processes). That was a point accepted by Strayer JA in *Human Life International In Canada Inc v Minister of National Revenue*.[126]

[64] Some ends of public benefit of the sort the law has recognised as charitable may require creation of a climate of observance or constituency for change in law or administrative policies. Suggestions in some of the cases that promotion of change in law cannot be charitable because the courts must accept the correctness of the law as it is are not reconcilable with the authorities cited at paragraph [71], which make it clear that the law of charities changes in response to change in social conditions. Doctrine which would preclude without further assessment whether advocacy for change in law is charitable is inconsistent with the general principle of flexibility.

[65] If the exclusion is not confined to activity which is "political" in a narrow sense, but is concerned with advocacy of views more generally (as we think is the more natural reading of Lord Parker's statement in *Bowman* and as is consistent with the justification he advanced), then a "political exception" would exclude "promotion" by all advocacy, irrespective of whether it is properly assessed as charitable in itself, unless it is characterised as "ancillary" only.

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122 *National Anti-Vivisection Society v Inland Revenue Commissioners* [1948] AC 31 (HL) at 77.
123 *McGovern v Attorney-General* [1982] Ch 321 (Ch) at 340.
124 *Re Wilkinson (Deceased), Perpetual Trustees Estate and Agency Co of New Zealand Ltd v League of Nations Union of New Zealand* [1941] NZLR 1065 (SC) at 1077.
125 *Molloy v Commissioner of Inland Revenue* [1981] 1 NZLR 688 (CA) at 695.
126 *Human Life International In Canada Inc v Minister of National Revenue* [1998] 3 FC 202 (FCA) at [12].

[66] A doctrine that advocacy can never be charitable was rejected by the High Court of Australia in *Aid/Watch v Commissioner of Taxation*.[127] Aid/Watch was an organisation which monitored the aid programme of the Australian government. It did not itself directly provide relief of poverty, although it argued in the course of the litigation that it contributed to the relief of poverty indirectly by helping to ensure that Australian aid was sustainable and supportive of the ecosystems in the countries in which it was provided.

[67] In the High Court, the majority judgment did not find it necessary to decide whether the objects of Aid/Watch were too remote from the alleviation of poverty to be charitable under that head. The majority treated the purposes of Aid/Watch as falling under the fourth category in the *Pemsel* classification because, against the background of Australian democracy, its generation of debate "concerning the efficiency of foreign aid directed to the relief of poverty" was itself for the public benefit and charitable.[128] The judges in the majority held that there was in Australia "no general doctrine which excludes from charitable purposes 'political objects' and has the scope indicated in England by *McGovern v Attorney-General*".[129]

[68] Heydon and Kiefel JJ dissented from the result on the basis that the activities of Aid/Watch in monitoring the aid programme of the Australian government were insufficiently connected with the charitable purpose of alleviating poverty.[130] Heydon J did not express a concluded view on the political purpose exclusion. Kiefel J, however, accepted that charitable purpose was not necessarily excluded by

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127 *Aid/Watch Inc v Commissioner of Taxation* [2010] HCA 42, (2010) 241 CLR 539 at [48] per the majority (French CJ, Gummow, Hayne, Crennan and Bell JJ) and at [68] per Kiefel J (dissenting). The remaining judge, Heydon J, did not distinctly address the doctrine.

128 At [47]. In the present case Greenpeace did not suggest that the generation by lawful means of public debate was in itself charitable, being content to argue that a political purposes exclusion should not continue to be followed. While the majority in the High Court in *Aid/Watch* expressed a wider proposition, it may well be that the result reached could have been justified on the basis of the relief of poverty (an argument the majority did not address), rejecting the assessment of the minority judges that what Aid/Watch did was too far removed from the relief of poverty: see [68] below.

129 At [48].

130 At [60]–[61] per Heydon J, and at [80]–[82] per Kiefel J. Heydon J stated that any indirect alleviation of poverty (there being no such direct alleviation) was "diffused by" and "actually contradicted by" Aid/Watch's other objectives, such as demanding a complete phase out of support for extractive industries and opposing the Free Trade Agreement between Australia and the United States of America: at [61]. Both Judges also concluded that the advancement of education was not a main purpose of Aid/Watch: at [62] per Heydon J, and at [83]–[85] per Kiefel J.

political purpose in a modern democracy and, like the majority Judges, rejected an absolute exclusion of political purpose as a standalone doctrine.[131]

[69] A conclusion that a purpose is "political" or "advocacy" obscures proper focus on whether a purpose is charitable within the sense used by law. It is difficult to construct any adequate or principled theory to support blanket exclusion. A political purpose or advocacy exclusion would be an impediment to charitable status for organisations which, although campaigning for charitable ends, do not themselves directly undertake tangible good works of the type recognised as charitable.

[70] As well, a strict exclusion risks rigidity in an area of law which should be responsive to the way society works. It is likely to hinder the responsiveness of this area of law to the changing circumstances of society. Just as the law of charities recognised the public benefit of philanthropy in easing the burden on parishes of alleviating poverty, keeping utilities in repair, and educating the poor in post-Reformation Elizabethan England, the circumstances of the modern outsourced and perhaps contracting state may throw up new need for philanthropy which is properly to be treated as charitable. So, for example, charity has been found in purposes which support the machinery or harmony of civil society, such as is illustrated by the decisions in England and Australia holding law reporting to be a charitable purpose[132] and in New Zealand by the decision of the Court of Appeal in *Latimer v Commissioner of Inland Revenue* holding the assistance of Maori in the preparation, presentation and negotiating of claims before the Waitangi Tribunal to be a charitable purpose.[133]

[71] Just as promotion of the abolition of slavery has been regarded as charitable,[134] today advocacy for such ends as human rights[135] or protection of the environment and promotion of amenities that make communities pleasant may have

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131 At [68]–[69].

132 *Incorporated Council of Law Reporting for England and Wales v Attorney-General* [1972] Ch 73 (CA); *Incorporated Council of Law Reporting (Qld) v Commissioner of Taxation of the Commonwealth of Australia* (1971) 125 CLR 659.

133 *Latimer v Commissioner of Inland Revenue* [2002] 3 NZLR 195 (CA).

134 *Jackson v Philips* (1867) 96 Mass 539, 14 Allen 539 (Mass SC).

135 See Charities Act 2006 (UK), s 2(2)(h).

come to be regarded as charitable purposes in themselves, depending on the nature of the advocacy, even if not ancillary to more tangible charity. That result was looked to as one that might well come about in relation to protection of the environment by Somers J in *Molloy*.[136] In the present case the Board has accepted that Greenpeace's object to "promote the protection and preservation of nature and the environment" is charitable. Protection of the environment may require broad-based support and effort, including through the participatory processes set up by legislation, to enable the public interest to be assessed. In the same way, the promotion of human rights (a purpose of the New Zealand Bill of Rights Act 1990, as its long title indicates) may depend on similar broad-based support so that advocacy, including through participation in political and legal processes, may well be charitable.

Exclusion of political purpose is unnecessary

[72] The better approach is not a doctrine of exclusion of "political" purpose but acceptance that an object which entails advocacy for change in the law is "simply one facet of whether a purpose advances the public benefit in a way that is within the spirit and intendment of the statute of Elizabeth I":[137]

> The reason for the failure of many trusts involving a change in the law is that the particular change could not be proved to be for the public benefit, or that it was not within the spirit and intendment of the statute, or both; not that all changes in the law are outside the pale.

[73] Advancement of causes will often, perhaps most often, be non-charitable. That is for the reasons given in the authorities – it is not possible to say whether the views promoted are of benefit in the way the law recognises as charitable. Matters of opinion may be impossible to characterise as of public benefit either in achievement or in the promotion itself. Thus in *Aid/Watch*, Kiefel J held that "reaching a conclusion of public benefit may be difficult where the activities of an organisation largely involve the assertion of its views".[138] She concluded that Aid/Watch had failed to establish that the views it asserted were correct and would in

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136 *Molloy v Commissioner of Inland Revenue* [1981] 1 NZLR 688 (CA) at 696.
137 Sheridan, above n 121, at 16.
138 *Aid/Watch Inc v Commissioner of Taxation* [2010] HCA 42, (2010) 241 CLR 539 at [69].

fact promote the delivery of aid.[139] Furthermore, the ends promoted may be outside the scope of the cases which have built on the spirit of the preamble, so that there is no sound analogy on which the law might be developed within the sense of what has been recognised to be charitable. Even without a political purpose exclusion, the conclusion in *Molloy* (that the purpose of the Society for the Protection of the Unborn Child was not charitable) seems correct. The particular viewpoint there being promoted could not be shown to be in the public benefit in the sense treated as charitable.

[74] It may be accepted that the circumstances in which advocacy of particular views is shown to be charitable will not be common, but that does not justify a rule that all non-ancillary advocacy is properly characterised as non-charitable. As Professor Sheridan observed in 1972, in relation to promotion of legislation, the true rule is that advocacy is "charitable in some circumstances and not in others".[140] We agree with the view expressed by Kiefel J in *Aid/Watch* that charitable and political purposes are not mutually exclusive.[141] As a result, we depart from the approach taken in the Court of Appeal. If it was correct to find that the promotion of nuclear disarmament and the elimination of all weapons of mass destruction are charitable (the matter we next address), we do not think it should have found "political" activity properly connected with those purposes to exclude such charitable status unless shown to be ancillary only.

[75] We are unable to agree with the Court of Appeal suggestion that views generally acceptable may be charitable, while those which are highly controversial are not. In *Molloy* the existence of public controversy over abortion helped explain why maintaining the legal status quo on abortion could not be assumed to serve the public benefit in the way the law regards as charitable.[142] But the more general emphasis on controversy taken from it may be misplaced. It is reminiscent of the

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139 At [82].

140 Sheridan, above n 121, at 12. That was the approach of Lord Normand in *National Anti-Vivisection Society v Inland Revenue Commissioners* [1948] AC 31 (HL) at 75–77.

141 *Aid/Watch Inc v Commissioner of Taxation* [2010] HCA 42, (2010) 241 CLR 539 at [68]–[69].

142 As indicated above at [45], the more direct reason is that if promoting change in law is properly regarded as non-charitable, maintaining the law is non-charitable for the same reason, as Vaisey J observed in *Re Hopkinson* [1949] 1 All ER 346 (Ch) at 350. And see *Re Co-operative College of Canada and Saskatchewan Human Rights Commission* (1975) 64 DLR (3d) 531 (SK CA) at [23].

suggestion by Lord Wright in *National Anti-Vivisection Society* that "intangible benefit" which is charitable is that "approv[ed] by the common understanding of enlightened opinion for the time being".[143] Such thinking would effectively exclude much promotion of change while favouring charitable status on the basis of majoritarian assessment and the status quo. Just as unpopularity of causes otherwise charitable should not affect their charitable status, we do not think that lack of controversy could be determinative. We consider that the Court of Appeal was wrong to place such emphasis in the present case on the acceptance in New Zealand legislation and society of the ultimate goal of nuclear disarmament and popular support in New Zealand for the elimination of weapons of mass destruction.

[76] Instead, assessment of whether advocacy or promotion of a cause or law reform is a charitable purpose depends on consideration of the end that is advocated, the means promoted to achieve that end and the manner in which the cause is promoted in order to assess whether the purpose can be said to be of public benefit within the spirit and intendment of the 1601 Statute. These principles are discussed further below in the course of considering Greenpeace's purposes.

Greenpeace in the Court of Appeal: the promotion of nuclear disarmament and elimination of weapons of mass destruction

[77] As has been indicated, the Court of Appeal was prepared to deal with the arguments on the basis of the amendments proposed by Greenpeace. Including the foreshadowed amendments (which are italicised in what follows), the objects of Greenpeace identified in seven clauses are to:

> 2.1 Promote the philosophy that humanity is part of the planet and its interconnected web of life and whatever we do to the planet we do to ourselves.
>
> 2.2 Promote the protection and preservation of nature and the environment, including the oceans, lakes, rivers and other waters, the land and the air and flora and fauna everywhere and including but not limited to the promotion of conservation, peace, *nuclear disarmament and the elimination of all weapons of mass destruction*.
>
> 2.3 Identify, research and monitor issues affecting these objects, and develop and implement programmes to increase public awareness and understanding of these and related issues.

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143 *National Anti-Vivisection Society v Inland Revenue Commissioners* [1948] AC 31 (HL) at 39.

2.4 Undertake, promote, organise and participate in seminars, research projects, conferences and other educational activities which deal with issues relating to the objects of the Society.

2.5 Promote education on environmental issues by giving financial and other support to the Greenpeace New Zealand Charitable Trust [the charitable registered entity through which Greenpeace carries out educational activities[144]].

2.6 Cooperate with other organisations having similar or compatible objects and in particular to cooperate with Stichting Greenpeace Council by abiding by its determination in so far as it is lawful to do so. [Coordination of Greenpeace's global activities depends on this cooperation[145]].

2.7 Promote the adoption of legislation, policies, rules, regulation and plans which further the objects of the Society *listed in clauses 2.1–2.6* and support *their* enforcement or implementation through political or judicial processes as necessary, *where such promotion or support is ancillary to those objects*.

[78] The Court of Appeal cited decisions in the United Kingdom[146] and the United States[147] as authorities for the proposition that the promotion of peace was for the public benefit "and therefore capable of being a charitable purpose".[148] It considered it to be "uncontroversial and uncontentious today that in itself the promotion of peace is both for the public benefit and within the spirit and intendment of the preamble [of the Statute of Charitable Uses], [149] either by way of analogy or on the basis of the presumption of charitable status".[150]

[79] It was accepted by the Court of Appeal that the promotion of particular views as to *how* peace is best achieved is essentially a political decision.[151] It cited with approval *Southwood v Attorney-General*, a case concerning the educational purpose

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144 In response to questions from the Commission, Greenpeace advised that the "Greenpeace New Zealand Education Trust" was a registered charitable entity through which Greenpeace would continue to support education projects on conservation and education in New Zealand formerly supported by the Greenpeace Charitable Trust.

145 Greenpeace advised the Commission that "Stichting Greenpeace Council" is a non-profit Dutch foundation which is the "supervisory body for the broader Greenpeace International organisation, in a loose sense", which coordinates international policy ("so Greenpeace national offices have similar positions on matters such as whaling, fisheries policy and climate change") and facilitates the exchange of information and skills between national offices: *Re Greenpeace of New Zealand Inc* Charities Commission Decision 2010–7, 15 April 2010 at 5.

146 *Re Harwood* [1936] 1 Ch 285 (Ch), where testamentary gifts to"Peace Societies" in Ireland were held to evidence a general charitable intent for the purposes of exercise of the cy-près doctrine.

147 *Parkhurst v Burrill* 177 NE 39 (Mass 1917), a decision of the Massachusetts Supreme Court.

148 *Re Greenpeace of New Zealand Inc* [2012] NZCA 533, [2013] 1 NZLR 339 at [71].

149 Discussed at [99]–[104] below.

150 *Re Greenpeace of New Zealand Inc* [2012] NZCA 533, [2013] 1 NZLR 339 at [72].

151 At [73].

head of charity.[152] There, Chadwick LJ pointed out that, in a clash of views as to whether peace was best promoted through "bargaining through strength" or "unilateral disarmament", the Court was "in no position to determine that promotion of the one view rather than the other is for the public benefit".[153] Although the Court of Appeal in the present case accepted that the promotion of peace on the basis of one or other of these views "would be pursuing a non-charitable political purpose",[154] it thought the position had become different with the change of the Greenpeace objects to replace the reference to "disarmament" with references to "nuclear disarmament and the elimination of all weapons of mass destruction":[155]

> … we agree with the submission for Greenpeace that these amendments will remove the element of political contention and controversy inherent in the pursuit of disarmament generally and instead constitute, in New Zealand today, an uncontroversial public benefit purpose. In other words, applying the test from *Molloy*, the Court is not required to determine where the public good lies as that is now self-evident as a matter of law.

[80] The Court of Appeal concluded that the promotion of peace through nuclear disarmament and the elimination of all weapons of mass destruction was "beneficial to the community" and "should be recognised in its own right as a charitable purpose under the fourth head of the definition".[156] The promotion of nuclear disarmament and the elimination of all weapons of mass destruction was "within the spirit and intendment to the preamble [of the Statute of Charitable Uses] both on the basis of analogy and the presumption of charitable status"[157] (by which benefit to the community is assumed to be charitable unless excluded by analogous cases to which it would be right to adhere):[158]

> It is in our view analogous to the promotion of peace. There is also no ground for holding that it is outside the spirit and intendment of the preamble.

[81] The reasons given by the Court for this conclusion were:[159]

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152 *Southwood v Attorney-General* [2000] WTLR 1199 (CA) at 1217.
153 *Re Greenpeace of New Zealand Inc* [2012] NZCA 533, [2013] 1 NZLR 339 at [73], quoting *Southwood v Attorney-General* [2000] WTLR 1199 (CA) at 1217.
154 *Re Greenpeace of New Zealand Inc* [2012] NZCA 533, [2013] 1 NZLR 339 at [74].
155 At [76].
156 At [81]–[82].
157 At [81].
158 At [81].
159 At [77]–[79].

(a) the promotion of nuclear disarmament is in accordance with New Zealand's international obligations under the Nuclear Non-Proliferation Treaty;[160]

(b) such promotion is in accordance with domestic New Zealand law in the New Zealand Nuclear Free Zone, Disarmament, and Arms Control Act 1987 which has the purpose of promoting and encouraging "an active and effective contribution by New Zealand to the essential process of disarmament and international arms control"; and

(c) the promotion of nuclear disarmament was consistent with the confirmation by successive governments of the intention to support the Treaty and maintain the legislation, "reflecting overwhelming public opinion in New Zealand".

[82] Despite its conclusion, the Court of Appeal took the view that the question whether Greenpeace was "established and maintained" exclusively for charitable purpose required reassessment by the chief executive and the Board to ensure that the "political advocacy" objective in the amended object 2.7 was "truly ancillary to its principal objects and not an independent stand-alone object".[161] It referred to submissions on behalf of the Board which drew on material on the Greenpeace website in which Greenpeace was described as "synonymous with action", and referred to its methods of taking "[n]on-violent direct action … physically, in person, to stop environmental destruction at its source". Such non-violent direct action was said to be "at the core of Greenpeace's values and worth".[162]

[83] In relation to disarmament and peace, Greenpeace had indicated on its website that it considered there to be a "contradiction in the heart of the [Nuclear Non-Proliferation Treaty]" because it permits states to use nuclear power for peaceful purposes. Greenpeace explained its advocacy of the end of nuclear power

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160 Treaty on the Non-Proliferation of Nuclear Weapons 729 UNTS 161 (opened for signature 1 July 1968, entered into force 5 March 1970).

161 *Re Greenpeace of New Zealand Inc* [2012] NZCA 533, [2013] 1 NZLR 339 at [87] and [91].

162 At [26].

on the ground that it is "inevitably linked with the production of weapons" and has been pursued by states in "anti-democratic ways". Its reported protest activities targeted the invasion of Iraq, the "Star Wars" defence programme, and nuclear testing.[163] The website described its campaigns against chemicals and pollution, against genetic engineering (including campaigning for food labelling in New Zealand), against New Zealand's quota management system, for changes to international fishing agreements, for a 50 per cent reduction in fishing, and its consumer campaigns including in relation to labelling of seafood to promote consumer awareness of sustainability issues.[164] Other consumer campaigns described had targeted specific companies.[165] In connection with energy, Greenpeace advocated the phasing out of fossil fuels and opposed nuclear energy. It explained its campaigns to bring the farming sector more fully under the Emissions Trading Scheme and to prevent expansion of dairying. And it urged the public to send messages to the government and politicians in support of climate change measures.[166] Greenpeace described "direct action" it had undertaken which included boarding ships, occupying power stations and mines, blocking deliveries to factories, and erecting signs and planting trees on land cleared for dairy farming.[167]

[84] The Court of Appeal noted that Greenpeace had submitted that the material extracted by the Board from its website gave a skewed picture.[168] It accepted that s 18 made it clear that it is the current and proposed "activities" of the entity to which the chief executive and the Board must have regard. In assessing whether the political advocacy undertaken was truly ancillary and not an "independent stand-alone object", the focus should be "Greenpeace's amended objects and its proposed activities in light of those objects" rather than the past activities of Greenpeace,[169] which had been the focus of the earlier assessments made by the Commission and the High Court:

> [91] This question needs to be considered by the chief executive and the Board because Greenpeace should be given the opportunity to provide the

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163 At [27].
164 At [28].
165 At [29].
166 At [28].
167 At [30].
168 At [31].
169 At [90].

> chief executive with relevant up-to-date information relating to its proposed activities in light of its new ancillary "political advocacy" object. It is important that Greenpeace should be given this opportunity because we share the concerns of the Commission and the High Court that the information provided by Greenpeace to date does suggest that its "political advocacy" activities when assessed qualitatively were being pursued by Greenpeace as an independent object in its own right. Those concerns were reinforced for us by the material obtained from Greenpeace's website set out in the submissions for the Board which we summarised earlier in this judgment. If, notwithstanding the amendments to object 2.7, Greenpeace intends to pursue its "political advocacy" role to the same extent as that material would indicate, then in our view the Board could well be justified in reaching the same conclusion as the Commission and the High Court reached.
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> [92] But Greenpeace should be given the opportunity to persuade the chief executive and the Board that with the amendments to object 2.7 the focus of its proposed "political advocacy" activities will be truly ancillary to its principal objects and not independent stand-alone activities. In particular, the chief executive and the Board should have the opportunity to consider the evidence of Ms McDiarmid adduced for Greenpeace in the High Court and the matters referred to by Mr Salmon in response to what he described as the Board's selective "web dredge" of Greenpeace's website. These are matters of evidence which should be assessed by the chief executive and the Board at first instance and not by this Court on a second appeal.

[85] The decision of the Court of Appeal that the Greenpeace object of "the promotion of conservation, peace, nuclear disarmament and the elimination of all weapons of mass destruction" is charitable may seem on its face inconsistent with its further determination that the case be remitted for further inquiry into whether, in fact, the campaigning activities carried out by Greenpeace were more than ancillary. If the purpose of "the promotion of conservation, peace, nuclear disarmament and the elimination of all weapons of mass destruction" is indeed charitable, resort to s 5(3) or cl 2.7 (ancillary non-charitable purposes) would be unnecessary. The only issue could be whether the activities undertaken are sufficiently connected to the charitable object to be within it.

[86] The apparent inconsistency in the Court of Appeal decision disappears if the Court treated the charitable object of "promotion" of the ends identified in cl 2.2 as necessarily excluding any promotion by political means in application of a standalone doctrine of exclusion of "political" purpose. That, we think, was indeed its approach. For the reasons we have already given, we do not think that the Court of Appeal's application of a "political purpose" exception was sound. And we think it was wrong to treat s 5(3) as providing an exception for political purpose provided

it was no more than "ancillary". For present purposes, however, and as is explained in the next section, we think the approach taken in concluding that the promotion of nuclear disarmament and the elimination of weapons of mass destruction was charitable was incorrect.

Is the promotion of nuclear disarmament and the elimination of weapons of mass destruction charitable?

[87] Perhaps because of the course taken by the litigation, the essential point of the charitable status of the objects in issue was in our view inadequately addressed. The Commission and the High Court applied a strict political purpose exclusion and dealt with the Greenpeace objects before amendment. And in the Court of Appeal, the conclusion that the purpose of promoting nuclear disarmament and the elimination of weapons of mass destruction was charitable was made on two bases we think to be suspect – the view that the promotion of peace is established by the authorities to be a charitable purpose and the assumption that avoidance of the political purpose exclusion (on the basis that the objects were not controversial) made it unnecessary to consider more closely the manner of promotion.

[88] The Court of Appeal considered that the purpose of promoting nuclear disarmament and the elimination of weapons of mass destruction was charitable by analogy with the charitable status of the promotion of peace. It was of the view that "the Courts have consistently held that the promotion of peace itself is for the public benefit and therefore capable of being a charitable purpose".[170] Although the Court acknowledged that charitable status would be excluded by political purpose in the means by which an entity promoted peace, it considered that no such political purpose exclusion applied to the amended Greenpeace objects because nuclear disarmament and the elimination of weapons of mass destruction are not controversial in New Zealand.[171] It is necessary to question both premises.

[89] Although the view that the promotion of peace is established to be a charitable purpose was accepted by counsel for the Board to be correct, there is surprisingly little authority directly on point and it has been doubted by at least one

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170 At [71].
171 At [76].

leading text writer.[172] The cases cited by the Court of Appeal were not critically reviewed by it and do not support the view that an end as general can be said to be charitable without closer inquiry into the method of promotion.

[90] The only New Zealand authority to deal with the promotion of peace is *Re Wilkinson*,[173] described above at paragraph [40].[174] There, Kennedy J held that the promotion of peace through adherence to the League of Nations depended on "the creation of a particular opinion to influence the central executive authority of New Zealand" and was, accordingly, not charitable by analogy with the "objects of public general utility" mentioned in the preamble of the Statute of Charitable Uses.[175]

[91] The Court of Appeal in the present case cited two authorities in support of its acceptance that the promotion of peace is established to be charitable. They are *Re Harwood*,[176] a decision of the English High Court, and *Parkhurst v Burrill*,[177] a decision of the Massachusetts Supreme Court.

[92] *Re Harwood* was concerned with a bequest to societies which were unable to be identified but which had been described by the testatrix as ones with the objects of promoting peace in Ireland. The decision itself was about application of the cy-près doctrine to enable the bequest to be applied by other charitable societies with the same object, on the basis that the purpose of the testatrix in the gift was charitable. Not surprisingly (since the entities to which the bequest was made could not be identified), the case contains no consideration of whether they were themselves set up for charitable purposes. It was concerned, rather, with the charitable intention of the testatrix. It does not discuss whether a society with the object of promoting peace is properly regarded as charitable.

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172 Hubert Picarda *The Law and Practice Relating to Charities* (4th ed, Bloomsbury Professional, London, 2010) at 229.

173 *Re Wilkinson (Deceased), Perpetual Trustees Estate and Agency Co of New Zealand Ltd v League of Nations Union of New Zealand* [1941] NZLR 1065 (SC).

174 *Re Collier (Deceased)* [1998] 1 NZLR 81 (HC) concerned a bequest for world peace, but that was to be accomplished through encouraging soldiers to lay down their arms and not by encouraging a change in attitudes throughout society.

175 *Re Wilkinson (Deceased), Perpetual Trustees Estate and Agency Co of New Zealand Ltd v League of Nations Union of New Zealand* [1941] NZLR 1065 (SC) at 1076.

176 *Re Harwood* [1936] Ch 285 (Ch).

177 *Parkhurst v Burrill* 177 NE 39 (Mass 1917).

[93] *Parkhurst v Burrill*, a decision of the Massachusetts Supreme Court, concerned a bequest made in 1912 to the World Peace Foundation, an organisation constituted:[178]

> … for the purpose of educating the people of all nations to a full knowledge of the waste and destructiveness of war and of preparation for war, its evil effects on present social conditions, and on the well-being of future generations and to promote international justice and the brotherhood of man: and generally by every practical means to promote peace and good will among all mankind.

[94] Rugg CJ, delivering the judgment of the Court, cited *Bowman*[179] and *Jackson v Phillips*[180] (in which the Massachusetts Supreme Court had held that promoting a change in law to secure the vote for women was "political", not charitable). The Court accepted that promotion of change to the law "cannot be sustained as a charity",[181] but held that the trust in issue did not have such a purpose. Rather, it attempted by publications and public addresses by speakers "widely respected for their character and attainments" to:[182]

> … attempt to propagate an opinion among the peoples of earth in favor of the settlement of international disputes through some form of international tribunal and to cultivate a belief in the waste of warlike preparation, and in the practical wisdom of reductions in the armaments of nations, and in the education of children as well as of adults in the knowledge of peace and the superior advantages of peaceful solutions of international difficulties.

[95] Since the methods used by the trust were found to be legitimate educational ones, it was concluded in *Parkhurst v Burrill* that the purposes of the trust were not political. The efforts of the trust were "not directed immediately to the change of existing laws, constitutions or governments".[183] The fact that its "general diffusion of intelligence upon the subjects taught" might result ultimately in modification of government policies, did not prevent the purposes being treated as charitable.[184] The case was considered to be "on the same footing as the charitable gifts upheld to secure the abolition of human slavery".[185]

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178 At 40.
179 *Bowman v Secular Society* [1917] AC 406 (HL).
180 *Jackson v Phillips* (1867) 96 Mass 539, 14 Allen 539.
181 *Parkhurst v Burrill* 177 NE 39 (Mass 1917) at 40.
182 At 40.
183 At 40–41.
184 At 41.
185 At 41.

[96] *Parkhurst v Burrill* is not authority for the proposition that promotion of peace is of itself charitable. The case was determined on the basis that the purposes of the Foundation were shown to be of general direct educational benefit, not undone by their tendency, if accepted, to lead ultimately to a shift in attitudes which in turn could result in modification of government policy. It may be noted that this approach is not dissimilar to that taken in relation to temperance in cases such as *Knowles* where promoting abstinence or moderation in relation to liquor was accepted to be charitable (most plausibly perhaps on the basis of public health and well-being), even though direct advocacy of prohibition by legislation was not.[186]

[97] In *Southwood v Attorney-General*, the English Court of Appeal expressed no criticism of the approach taken by the Court in *Parkhurst v Burrill*, but came to the conclusion on the facts in *Southwood* that the promotion of pacifism on the basis that "peace at any price is always preferable to any war" was not charitable.[187] The Court was "in no position to determine" that unilateral disarmament, such as the society there advocated, was a sound way to secure peace and was in the public benefit in the sense the law regards as charitable.[188]

[98] In the present case, the Court of Appeal accepted, in adoption of the reasoning in *Southwood v Attorney-General*, that the manner of promotion of peace will be a "non-charitable political purpose" where there is a range of different options (such as through unilateral disarmament or "bargaining through strength") and an entity seeks to promote peace on one basis.[189] But it did not attempt any comparable assessment in relation to promotion of nuclear disarmament and the elimination of all weapons of mass destruction once it had determined that those ends were not in themselves controversial in New Zealand.

[99] It is not clear why the change in Greenpeace's objects was treated by the Court of Appeal as being so decisive in the result. First, as already indicated, the Court of Appeal's emphasis on the lack of controversy in New Zealand about the ends of nuclear disarmament and the elimination of weapons of mass destruction

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186 *Knowles v Commissioner of Stamp Duties* [1945] NZLR 522 (SC).
187 *Southwood v Attorney-General* [2000] WTLR 1199 (CA) at 1217.
188 At 1217.
189 *Re Greenpeace of New Zealand Inc* [2012] NZCA 533, [2013] 1 NZLR 339 at [73]–[74].

seems misplaced. Usefulness within the sense the law regards as charitable does not turn on lack of controversy (had it done, it seems unlikely there would have been need for the legislature in 2012 to make specific, if circumscribed, provision for the promotion of amateur sports.[190])

[100] Secondly, and more importantly, it is insufficiently explained by the Court of Appeal why the promotion of peace was accepted to require further inquiry into the range of options available, but the promotion of nuclear disarmament and the elimination of weapons of mass destruction required no such inquiry. This may be because the Court of Appeal treated the promotion of nuclear disarmament and elimination of weapons of mass destruction as itself the means by which the charitable purpose of promoting peace would be achieved. But the substitution of one abstract end for another does not provide sufficient answer. Questions of how nuclear disarmament and elimination of weapons of mass destruction are to be achieved raise in much the same way the choices which have led to the application of the political purpose doctrine to exclude the purpose of promoting peace itself.

[101] It is no answer to point to the international and domestic framework for nuclear disarmament. The Nuclear Non-Proliferation Treaty's express recognition of the continued existence of nuclear-weapon states and Greenpeace's position that the acceptance of nuclear power is "the contradiction at the heart of the Treaty" and inextricably linked to the production of nuclear weapons illustrate the policy choices entailed in the promotion of the abstract end of nuclear disarmament and the elimination of weapons of mass destruction. The matter is further complicated by the fact that the actors critical in obtaining the end of nuclear disarmament, to whom such promotion must be directed, are states. Achievement of the end of nuclear disarmament will require change in the policy pursued by such states and, to the extent to which New Zealand supports the status quo under the Treaty, to the dealings of the New Zealand government towards other nations. For the reasons discussed by Slade J in *McGovern*, the court would have no adequate means of judging the public benefit of such promotion of nuclear disarmament and elimination of all weapons of mass destruction, taking into account all the consequences, local and international. Whether promotion of these ideas is beneficial is a matter of

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[190] Charities Act, s 5(2A) as inserted by the Charities Amendment Act, s 5.

opinion in which public benefit is not self-evident and which seems unlikely to be capable of demonstration by evidence.

[102] It is the case that it will usually be more difficult for those who promote ideas they consider to be of public benefit to show charitable purpose as readily as those who can show tangible utility in the good they do.[191] There is truth in the point that where a charity promotes an abstraction, such as "peace" or "nuclear disarmament", the focus in assessing charitable purpose must be on *how* such abstraction is to be furthered.[192] The Court of Appeal treated lack of controversy in New Zealand about the goals of nuclear disarmament and the elimination of weapons of mass destruction as determinative of the question whether the promotion of these ends was charitable. We consider that it was necessary to focus rather on the manner of promotion.

[103] Since the educational objects of Greenpeace are conducted through a separate charitable trust, any educational element in promoting the ends of nuclear disarmament and the elimination of weapons of mass destruction seems unlikely to be central to the promotional effort. The emphasis on direct action and advocacy on the Greenpeace website may indicate the principal means of promotion. Although, for the reasons given, a political purpose exclusion is inappropriately conclusive when considering charitable purpose, we consider that the promotion itself, if a standalone object not merely ancillary, must itself be an object of public benefit or utility within the sense used in the authorities to qualify as a charitable purpose. As indicated above at paragraphs [59] to [71], such public benefit or utility may sometimes be found in advocacy or other expressive conduct. But such finding depends on the wider context (including the context of public participation in processes and human rights values), which requires closer consideration than has been brought to bear in the present case.

[104] The matter of the charitable status of the purposes of Greenpeace has not been considered on the correct basis. Although it may be doubtful on the material before the Court that charitable purpose can be established, it is inappropriate for such assessment to be undertaken as a matter of first and last impression in this

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[191] A point made in Gino Dal Pont *Law of Charity* (LexisNexis/Butterworths, Australia, 2010) at [3.40].

[192] See *Southwood v Attorney-General* [2000] WTLR 1199 (CA) at 1217 per Chadwick LJ.

Court. The Court of Appeal has acknowledged that the changes to Greenpeace's objects make it necessary for Greenpeace to have the opportunity to provide further evidence about its activities. That was the basis on which the case was returned to the chief executive and Board for further consideration. The assessment of charitable purpose is theirs in the first instance. If it is concluded that the object of promoting nuclear disarmament and the elimination of weapons of mass destruction is not shown to be charitable, then the question whether the activities undertaken by Greenpeace are no more than ancillary to its charitable purposes will require further assessment by the chief executive and Board, as the Court of Appeal required. In all the circumstances, the best course seems to us to be to remit the application for reconsideration in the light of the changes to the Greenpeace objects and in the light of the reasons in this Court.

Greenpeace in the Court of Appeal: illegal activities

[105] The final issue addressed by the Court of Appeal was whether possible illegal direct action, such as through trespass, meant that Greenpeace failed the public benefit test. This was a point that the High Court had found it unnecessary to resolve because of its conclusion that the objects of Greenpeace were not charitable.[193] The Court of Appeal accepted that a society which pursues illegal or unlawful purposes or activities is not entitled to registration as a charitable entity and that a registered charity would lose eligibility to maintain its status if it pursued its charitable purposes through illegal or unlawful activities. It considered this matter would need to be addressed by the Board in the first instance because it has the responsibility for deregistering societies no longer eligible for registration.[194]

[106] Although the Court of Appeal took the view that the assessment was a matter of "fact and degree", it gave some guidance to the Board:

> [97] The question whether involvement by Greenpeace or its representatives or agents in an illegal or unlawful activity will be sufficiently material or significant to preclude registration or justify deregistration will be a question of fact and degree in each case. It is likely to be influenced by a range of factors such as:

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193 *Re Greenpeace of New Zealand Inc* [2011] 2 NZLR 815 (HC) at [76].

194 *Re Greenpeace of New Zealand Inc* [2012] NZCA 533, [2013] 1 NZLR 339 at [96].

(a) the nature and seriousness of the illegal activity;

(b) whether the activity is attributable to the society because it was expressly or impliedly authorised, subsequently ratified or condoned, or impliedly endorsed by a failure to discourage members from continuing with it;

(c) whether the society had processes in place to prevent the illegal activity or has since put processes in place to prevent the activity occurring again;

(d) whether the activity was inadvertent or intentional; and

(e) whether the activity was a single occurrence or part of a pattern of behaviour.

[98] In considering these factors, the chief executive and the Board would no doubt be careful to avoid declaring activity to be illegal or unlawful when that activity had not been judicially determined to be in violation of the law. Where potentially illegal or unlawful activity has come to the attention of the chief executive, it may be appropriate for the chief executive to refer the activity to the appropriate investigative authority in the first instance. The rights and interests of persons alleged to be involved in illegal or unlawful activities are subject to the principles of natural justice and the applicable provisions of the New Zealand Bill of Rights Act.

[99] In Greenpeace's case, where there is some evidence of illegal activities, particularly trespass, by its members, endorsed by Greenpeace through inclusion of reports of those activities on its website, it will be necessary for Greenpeace to explain its involvement in those activities when its application is reconsidered by the chief executive and the Board. It will then be for the chief executive and the Board to decide the nature and extent of those activities and whether they should be attributed to Greenpeace so that it may be concluded that Greenpeace is pursuing illegal activities which would mean that it would not be entitled to registration as a charitable entity.

[100] In the absence of any finding of illegality in the High Court or any evidence of any finding of illegality or criminal charges involving Greenpeace in New Zealand, this question should be considered by the chief executive and the Board at first instance and not by this Court on a second appeal.

Illegal activities may point to absence of charitable purpose

[107] An entity can be removed from the register under s 32 of the Charities Act if it no longer qualifies or fails to meet its obligations under the Act or if it "has engaged in serious wrongdoing or any person has engaged in serious wrongdoing in connection with the entity".[195] "Serious wrongdoing" is defined in s 4 to include "any serious wrongdoing of any of the following types":

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[195] Charities Act, s 32(1)(e).

(a) an unlawful or a corrupt use of the funds or resources of the entity; or

(b) an act, omission, or course of conduct that constitutes a serious risk to the public interest in the orderly and appropriate conduct of the affairs of the entity; or

(c) an act, omission, or course of conduct that constitutes an offence; or

(d) an act, omission, or course of conduct by a person that is oppressive, improperly discriminatory, or grossly negligent, or that constitutes gross mismanagement[.]

[108] Greenpeace argues that the scheme of the Act is that only serious offending as defined in s 4 justifies removal from the register under s 32, after investigation by the chief executive under s 50. Because of that scheme, it contends that purposes which are unlawful or illegal are governed by s 5(3), so that if no more than ancillary, they do not preclude charitable status. The Board argues in response that it is well-established that illegal or unlawful purposes will preclude registration as a charity.

[109] An entity which has a purpose properly characterised as illegal will not be "established and maintained exclusively for charitable purposes". Where it is suggested that a non-charitable illegal purpose is to be inferred from the activities of an entity, "the rules of natural justice" required alike by s 18 (in respect of registration) and s 36 (in respect of removal from the register) require notice and an opportunity to be heard.

[110] It is not clear from the Commission's decision that the possibility that Greenpeace's activities entailed some illegal actions was material to its decision to decline registration. It acknowledged that illegal activities are not stated to be a purpose of Greenpeace, and it accepted that "not all of the Applicant's non-violent direct action activities are illegal".[196] It observed that it was clear that "non-violent direct action is central to the Applicant's work and that non-violent direct action may involve illegal activities such as trespassing".[197] And then it remarked that the case

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196 *Re Greenpeace of New Zealand Inc* Charities Commission Decision 2010–7, 15 April 2010 at [64].

197 At [64].

law made it clear that "the Commission cannot consider that illegal activities will provide a public benefit".[198]

[111] It may be accepted that an illegal purpose is disqualifying. It does not constitute a charitable purpose and would mean that the entity is not "established and maintained exclusively for charitable purposes". While illegal activities may indicate an illegal purpose, breaches of the law not deliberately undertaken or coordinated by the entity are unlikely to amount to a purpose. Isolated breaches of the law, even if apparently sanctioned by the organisation, may well not amount to a disqualifying purpose. Assessment of illegal purpose is, as the Court of Appeal recognised, a matter of fact and degree. Patterns of behaviour, the nature and seriousness of illegal activity, any express or implied ratification or authorisation, steps taken to prevent recurrence, intention or inadvertence in the illegality, may all be relevant. On the other hand, we are unable to accept the submission by Greenpeace that only serious offending, such as would permit sanction under the legislation on a one-off basis even if not indicative of any system or purpose, is required before illegal conduct amounts to a purpose of the entity.

[112] It is not clear that the question of illegal purpose is a live one so far as the chief executive and the Board are concerned. The remarks about possible illegal purpose in the Commission's decision may not arise on reconsideration. If so, however, the comments of the Court of Appeal, which are acknowledged by counsel for the Board to have been unnecessary for the Court's decision, are for the most part a sensible list of the factors that may be relevant in a particular case. Whether illegal activity cannot be taken into account unless it has been the subject of criminal prosecution may be more doubtful and is a point which should wait for an actual controversy.

Conclusion

[113] "Charitable purpose" is not established where objects are of benefit to the community unless the benefit is also shown to be charitable within the sense used by the common law. A single test of public benefit alone loses the concept of charity

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198 At [64].

which authority establishes as essential. The traditional method of analogy to objects already held to be charitable is better policy.

[114] Since charity is generally concerned with matters of tangible public utility, it will be difficult to show that the promotion of an idea is itself charitable. But "charitable" and "political" purposes are not mutually exclusive if the political purpose is itself charitable because of public benefit within the sense the law regards as charitable. A "political purpose exclusion" as a matter of law is not necessary.

[115] Section 5(3) of the Charities Act does not enact a political purpose exclusion, codifying the common law. It provides that non-charitable purposes do not affect charitable status if no more than ancillary and includes "advocacy" as an example of such ancillary non-charitable purpose. It does not deal with the case where promotion of views is properly regarded as charitable in itself. Such cases are likely to be unusual.

[116] If the object of an entity is the promotion of a cause which cannot be assessed as charitable because attainment of the end promoted or the means of promotion in itself cannot be said to be of public benefit within the sense treated as charitable, the entity will not qualify for registration as charitable. That is because it will not be "established and maintained exclusively for charitable purposes". Even if an end in itself may be seen as of general public benefit (such as the promotion of peace) the means of promotion may entail a particular point of view which cannot be said to be of public benefit.

[117] The conclusion of the Court of Appeal that the Greenpeace purpose of promoting nuclear disarmament and the elimination of all weapons of mass destruction was charitable was arrived at without the benefit of determinations by the Board or the High Court because of the course taken in the litigation. We consider that in reaching its conclusion the Court of Appeal was in error in failing to address the manner of promotion. We would remit the matter of the charitable status of Greenpeace's objects for consideration by the chief executive and Board in the light of this decision.

[118] No order for costs is made.

WILLIAM YOUNG and ARNOLD JJ

(Delivered by William Young J)

[119] We agree with the fourth conclusion recorded by Elias CJ at [3] above and do not wish to add to what she has said in relation to it. We will therefore confine our comments to the first three conclusions. As will become apparent, our primary point of difference is with the second of her conclusions. As a corollary of our approach on that issue, we disagree with her first conclusion and our reasons for agreeing with her third conclusion differ (only slightly as it turns out) from those which she has provided.

[120] It is trite that charitable purpose must be within the spirit and intendment of the preamble to the Statute of Charitable Uses 1601.[199] That preamble is set out in the reasons given by Elias CJ.[200] Its focus is on the performance of activities which provide tangible benefit for (a) the public generally or those who live in a particular locality, (b) those in need (by reason of poverty, ill-health, advanced years, youth, status as orphans or captivity) and (c) the purposes of education. The only mention of religion is in terms of the repair of churches, albeit that the advancement of religion has long been recognised as a charitable purpose.

[121] Religious proselytising is recognised as charitable[201] but, that aside, the courts have been reluctant to recognise advocacy as a charitable purpose – a reluctance which has been most explicit in the case of political advocacy. That such advocacy is not a charitable purpose is supported by cases of high authority in the

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199 *Williams' Trustees v Inland Revenue Commissioners* [1947] AC 447 (HL) at 455.

200 Above at [19].

201 For an example, see *The Commissioners for Special Purposes of the Income Tax Act v Pemsel* [1891] AC 531 (HL).

United Kingdom,[202] New Zealand[203] and Canada.[204] Political advocacy is not confined to advocacy in favour of (or against) particular political parties[205] but encompasses also the promotion of, or opposition to, existing or proposed legislation and attempts to change or support government policy.[206] But, as explained in the judgment of Slade J in *McGovern v Attorney-General*, an institution's status as a charity is not lost because it employs political means to advance its charitable purposes, providing such activities are subsidiary or incidental to those purposes.[207] The same proposition was endorsed by Somers J in the Court of Appeal in *Molloy v Commissioner of Inland Revenue*.[208]

[122] As the reasons of Elias CJ make clear, the advocacy exclusion was the major concern in the submissions made to the Select Committee which considered the Charities Bill.[209] The Committee responded in this way:[210]

> The common law has established that organisations must have main purposes that are exclusively charitable, but they are permitted to have non-charitable secondary purposes, provided that those secondary purposes are legitimate ways to achieve the main charitable purpose. While a charity cannot have advocacy as its main purpose, it can have another charitable purpose as its main purpose, and then engage in appropriate advocacy as a secondary purpose to achieve its main charitable purpose. Given the level of concern raised by submitters concerning this issue, *the majority does consider that it may be valuable if the legislation includes a provision codifying the common law regarding secondary purposes, in order to ensure clarity on this issue.* The majority therefore recommends amending the bill to clarify that an entity with non-charitable secondary purposes undertaken

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202 The first definitive statement to this effect was by Lord Parker in *Bowman v Secular Society* [1917] AC 406 (HL) at 442: "a trust for the attainment of political objects has always been held invalid". Lord Parker's assertion appears to have had, at best, a "shallow root in earlier precedent": *Aid/Watch Inc v Commissioner of Taxation* [2010] HCA 42, (2010) 241 CLR 539 at [36]. See also the discussion in Adam Parachin "Distinguishing Charity And Politics: The Judicial Thinking Behind The Doctrine of Political Purposes" (2008) 45 Alta L Rev 871 at 877–880. Lord Parker's view has, however, substantial support: see *National Anti-Vivisection Society v Inland Revenue Commissioners* [1948] AC 31 (HL); *McGovern v Attorney-General* [1982] Ch 321 (Ch).

203 See *Re Wilkinson (Deceased), Perpetual Trustees Estate and Agency Co of NZ Ltd v League of Nations Union of New Zealand* [1941] NZLR 1065 (SC); *Knowles v Commissioner of Stamp Duties* [1945] NZLR 522 (SC); and *Molloy v Commissioner of Inland Revenue* [1981] 1 NZLR 688 (CA).

204 *Action by Christians for the Abolition of Torture v Canada* [2002] FCA 499, (2002) 225 DLR (4th) 99. The position in Canada is affected by the Income Tax Act RSC 1985 c 1, s 149.1(6.2).

205 *Bonar Law Memorial Trust v Inland Revenue Commissioners* (1933) 49 TLR 220 (KB).

206 All of this is reviewed in the judgment of Slade J in *McGovern v Attorney-General* [1982] Ch 321 (Ch) and by Elias CJ in her reasons at [36]–[37] above.

207 *McGovern v Attorney-General* [1982] Ch 321 (Ch) at 340–341.

208 *Molloy v Commissioner of Inland Revenue* [1981] 1 NZLR 688 (CA) at 695.

209 Above at [48].

210 Charities Bill 2004 (108-2) (select committee report) at 4 (emphasis added).

in support of a main charitable purpose will be allowed to register with the Commission and to confirm that advocacy may be one such non-charitable secondary purpose.

The result was s 5(3) of the Charities Act 2005. This section (including a later amendment) provides:

> **5 Meaning of charitable purpose and effect of ancillary non-charitable purpose**
>
> (1) In this Act, unless the context otherwise requires, charitable purpose includes every charitable purpose, whether it relates to the relief of poverty, the advancement of education or religion, or any other matter beneficial to the community.
>
> (2) However,—
>
> (a) the purpose of a trust, society, or institution is a charitable purpose under this Act if the purpose would satisfy the public benefit requirement apart from the fact that the beneficiaries of the trust, or the members of the society or institution, are related by blood; and
>
> (b) a marae has a charitable purpose if the physical structure of the marae is situated on land that is a Maori reservation referred to in Te Ture Whenua Maori Act 1993 (Maori Land Act 1993) and the funds of the marae are not used for a purpose other than—
>
> (i) the administration and maintenance of the land and of the physical structure of the marae:
>
> (ii) a purpose that is a charitable purpose other than under this paragraph.
>
> (2A) The promotion of amateur sport may be a charitable purpose if it is the means by which a charitable purpose referred to in subsection (1) is pursued.
>
> (3) 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.
>
> (4) For the purposes of subsection (3), 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.

[123] Section 5 is very largely premised on the existing jurisprudence as to charitable status[211] which subss (2) and (2A) supplement by conferring charitable status in respect of particular purposes and institutions which would not qualify in equity. Subsections (3) and (4) are declaratory in effect, making it clear that an institution may engage in advocacy which is ancillary to its statutory purpose without losing its charitable status. All of this is a legislative adoption of the approach taken by Slade J in *McGovern* and Somers J in *Molloy*, or, as the Select Committee put it, a "codifying" of the existing law.

[124] The view of the majority is that political advocacy can be a charitable purpose. We find it difficult to reconcile this approach with the text of s 5(3) which presupposes that advocacy in support of a charitable purpose is non-charitable unless it is merely ancillary to that charitable purpose. The intention of the legislature, as indicated by the Select Committee, was to codify this aspect of the law of charities. If advocacy in support of a charitable purpose is not in itself charitable, how can political advocacy ever be charitable in itself?

[125] We accept that the exclusion of political advocacy from charitable status may give rise to difficulties of application in particular cases (for instance as to what constitutes political advocacy).[212] As well, it is not consistent with the approach taken by the High Court of Australia in *Aid/Watch Inc v Commissioner of Taxation*[213] and, as Elias CJ shows, it has attracted much criticism.[214] On the other hand, such exclusion is consistent with the preamble to the statute of 1601, the focus of which is on tangible benefit. As well, judges are usually not well-placed to determine whether the success of a particular cause would be in the public interest. This may be for reasons of institutional competence. By way of example, a dispute between Greenpeace and the chief executive of the Department of Internal Affairs under the Charities Act does not provide an ideal forum for determining the appropriate

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211 It is far less ambitious than s 2 of the Charities Act 2006 (UK).

212 Parachin, above n 202, provides a striking list of anomalies. There is also an apparent inconsistency between the different approaches taken to the promotion of religion and advocacy of political causes.

213 *Aid/Watch Inc v Commissioner of Taxation* [2010] HCA 42, (2010) 241 CLR 539.

214 Above at [74].

policies for New Zealand to adopt towards other states in relation to nuclear weapons and weapons of mass destruction.[215] Similar considerations may apply in relation to Greenpeace's purpose of protecting the environment, a purpose which is closely intertwined[216] with the advocacy of causes (for instance against genetic engineering) the worth of which are not easily determined by the courts.[217] As well, and leaving aside the practical difficulties of forming a judgment on such issues, a judge may feel that entering into such an inquiry lies outside the proper scope of the judicial role.[218]

[126] The points we have just made are illustrated by Elias CJ's discussion of the promotion of peace and nuclear disarmament and the elimination of weapons of mass destruction. As she demonstrates, lying just under the surface of such objectives are very contentious positions. She is inclined to the view that the courts would have no adequate means of judging the public benefit of these purposes which, for this reason, are not charitable. This is not much different from our approach, on which these purposes are not charitable because they involve political advocacy.

[127] Although there is much scope for debate and controversy[219] as to the appropriateness of the political advocacy exception, it seems to us that the position that political advocacy is not charitable is reasonably defensible not only on the basis of the authorities but also as a matter of policy and practicality and that there is

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215 It may sometimes be possible to say that the cause which is to be promoted is contrary to the public interest. *National Anti-Vivisection Society v Inland Revenue Commissioners* [1948] AC 31 (HL) seems to have been determined on this basis.

216 As the Chief Justice illustrates, a broad and unexceptionable objective, such as the promotion of peace, may not be able to be addressed without an inquiry as to the means by which that objective is to be obtained: see [100]–[101] above.

217 The Charities Commission found that Greenpeace's general environmental object in cl 2.2 was charitable. From this it might be thought that it also concluded that opposing the introduction or field testing of genetically engineered crops was either charitable in character or of only ancillary significance, albeit that it did not address this point. In the Court of Appeal, however, the Board relied on this advocacy in support of its opposition to the appeal: see *Re Greenpeace of New Zealand Inc* [2012] NZCA 533, [2013] 1 NZLR 339 at [28].

218 There are a number of cases where such caution has been expressed. See, for instance, *McGovern v Attorney-General* [1982] Ch 321 (Ch) at 336; *Southwood v Attorney-General* [2000] WTLR 1199 (CA) at 1217; and *Hanchett-Stamford v Attorney-General* [2008] EWHC 330, [2009] Ch 173 (Ch) at [16].

219 Including as to whether stimulation of public debate is itself for the public benefit, as the High Court of Australia held was the case in *Aid/Watch Inc v Commissioner of Taxation* [2010] HCA 42, (2010) 241 CLR 539, albeit that this was in the context of debate as to the efficiency of foreign aid addressed to the relief of poverty.

accordingly no requirement to depart from the ordinary language approach to s 5(3) which we favour.

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