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# **POLITICAL PURPOSES AND CHARITY LAW IN NEW ZEALAND**

The public benefit requirement: opportunities, issues and solutions in response to  
*Re Greenpeace of New Zealand Incorporated* [2014] NZSC 105

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**9 October 2015**

A dissertation submitted in partial fulfilment of the requirements of the degree of  
Bachelor of Laws (Honours) at the University of Otago

Te Whare Wananga o Otago

## **Acknowledgements**

To mum and dad.

They say charity begins at home. Thank you for always taking care of me. None of this was possible without your love, generosity, understanding and kindness.

To my supervisor Professor J Stuart Anderson.

Your constant feedback, honesty and guidance has not gone unnoticed. Thank you for your constant and unwavering support. It has been a privilege to work with you.

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# INTRODUCTION

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In 2014 the Supreme Court of New Zealand handed down a majority judgment<sup>1</sup> significantly revising and reorienting the common law relating to charities and political engagement. The first significant development of *Re Greenpeace of New Zealand Incorporated*<sup>2</sup> is a complete departure from continued adherence to the common law doctrine against political purposes. This well-established doctrine dates back to the early 20th Century House of Lords case *Bowman v Secular Society*,<sup>3</sup> and had been applied in New Zealand since the mid 20<sup>th</sup> Century.<sup>4</sup> The doctrine acts to bar charitable registration when the entity in question, such as an association or trust board,<sup>5</sup> has a dominant *purpose* that is deemed *political*. In *McGovern v Attorney-General*, Slade J described the doctrine as applying when a direct or principle purpose is:

(i) to further the interests of a political party;<sup>6</sup> or (ii) to procure changes in the laws of this country;<sup>7</sup> or (iii) to procure changes in the laws of a foreign country; or (iv) to procure a reversal of government policy, or (v) to procure a reversal of government policy or of a particular decision of governmental authorities in a foreign country.<sup>8</sup>

That list was not intended to be exhaustive,<sup>9</sup> and in practice the political purpose label has extended much further.<sup>10</sup> The doctrine includes preserving the current law,<sup>11</sup> promoting a one-sided point of view or attitude of mind,<sup>12</sup> and “promoting one side of a controversial issue or cause”.<sup>13</sup> However, it is well established that “if all the main objects [of the entity] are exclusively

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<sup>1</sup> The dissent was largely focused on a narrow issue of statutory interpretation and has no significance for the

<sup>2</sup> *Re Greenpeace of New Zealand Incorporated* [2014] NZSC 105 (*Greenpeace*).

<sup>3</sup> *Bowman v Secular Society Ltd* [1917] AC 406 (HL).

<sup>4</sup> See *In 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); *Knowles v Commissioner of Stamp Duties* [1945] NZLR 523 (SC); *Molloy v Commissioner of Inland Revenue* [1981] 1 NZLR 688 (CA); *Re Draco Foundation (NZ) Charitable Trust* (2011) 25 NZTC 20-032 (HC) (*Re Draco Foundation*); *Re Greenpeace of New Zealand Incorporated* [2011] 2 NZLR 815 (HC); *Re Greenpeace of New Zealand Incorporated* [2012] NZCA 533.

<sup>5</sup> In New Zealand charitable entities normally take the form of either an association, company, or a trust board. Kerry O’Halloran *Charity Law and Social Inclusion: An International Study* (Routledge, Oxon, 2007) at 290.

<sup>6</sup> See also *Bonar Law Memorial Trust v Inland Revenue Commissioners* (1933) 17 TC 508.

<sup>7</sup> See also *Bowman v Secular Society*, above n 3; *Inland Revenue Commissioners v Temperance Council of the Christian Churches of England and Wales* (1926) 136 Law Times 27 at 28; *National Anti-Vivisection Society v Inland Revenue Commissioners* [1948] AC 31 (HL) (*National Anti-Vivisection Society*); *Hanchett-Stamford v Attorney-General* [2008] EWHC 330; *In re Bushnell, Decd, Lloyds Bank Ltd v Murray* [1975] 1 WLR 1596 (Ch); *Knowles v Commissioner of Stamp Duties*, above n 4.

<sup>8</sup> *McGovern v Attorney-General* [1982] 1 Ch 321 at 340 (*McGovern*).

<sup>9</sup> At 340 per Slade J.

<sup>10</sup> See generally Hubert Picarda *Law and Practice Relating to Charity* (4<sup>th</sup> ed, Bloomsbury Professional Ltd, West Sussex, 2010) Chapter 16.

<sup>11</sup> *Molloy v Commissioner of Inland Revenue*, above n 4.

<sup>12</sup> *In re Wilkinson (Deceased)*, above n 5; *Positive Action Against Pornography v Minister of National Revenue* [1988] 2 FC 340 (Fed. CA) at 348-49; *Re Draco Foundation (NZ)*, above n 4.

<sup>13</sup> *Human Life International in Canada Inc. v Minister of National Revenue* [1998] 3 FC 202 at 4 (*Human Life International*). See also *Southwood v Attorney-General* [2000] EWCA 204.

charitable, the mere fact that the trustees may have incidental powers to employ political means for their furtherance will not deprive them of their charitable status.”<sup>14</sup>

The dominant argument supporting the doctrine claims that a court (or decision-maker) “will ordinarily have no sufficient means of judging as a matter of evidence whether [what is proposed] will or will not be for the public benefit.”<sup>15</sup> Significantly, “public benefit” is the central requirement for charitable status and must be found “by the Court forming an opinion upon the evidence before it.”<sup>16</sup> Furthermore, such decisions from a court “might usurp the functions of the legislature” and “prejudice its reputation for political impartiality.”<sup>17</sup> Such unequivocal departure from the common law status quo,<sup>18</sup> is a bold move but much supported by commentators,<sup>19</sup> and is equalled only by the preceding High Court of Australia case *Aid/Watch v Commissioner of Taxation* (“*Aid/Watch*”).<sup>20</sup>

The second significant feature of *Greenpeace* is the model adopted for the assessment of public benefit in relation to political purposes. Post-doctrine, entities in New Zealand with political purposes seeking charitable status must satisfy the general legal test for determining if a purpose is a charitable purpose. Decision-makers must essentially undertake a merit-based assessment of an entity’s *specific* primary focus or goal.<sup>21</sup> However, this “ends-focused” public benefit model is in stark contrast to that put forward in *Aid/Watch*. There, assessment of public benefit was “process-based” as benefit was found indirectly in the “operation [of certain democratic] processes which contribute to the public welfare” that occurs when an entity pursues an intended goal through political means.<sup>22</sup> The benefit (or merits) of *Aid/Watch*’s intended outcome (being changes in foreign aid policy) were rejected as matters for assessment on the grounds that a court “is not called upon to adjudicate the merits of any particular course of legislative or executive action or inaction which is the subject of advocacy or disputation within those processes.”<sup>23</sup>

The purpose of this paper is to engage with the second significance of *Greenpeace*; the assessment of public benefit in relation to political purposes.<sup>24</sup> Departure from the doctrine provides the opportunity to think seriously about how we want the law to operate post-doctrine. In

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<sup>14</sup> *McGovern*, above n 8, at 343 per Slade J. See also *National Anti-Vivisection Society*, above n 7, at 77 per Lord Normand; *Vancouver Society of Immigrant & Visible Minority Women v Minister of National Revenue* 99 DTC 5034 (SCC) at 190 per Iacobucci J (*Vancouver Society*). This common law position has been codified in New Zealand by ss 5(3) and (4) Charities Act 2005. See *Re Draco Foundation*, above n 4, at [13] per Ronald Young J.

<sup>15</sup> *McGovern*, above n 8, at 336-337 per Slade J.

<sup>16</sup> *In re Hummeltenberg* [1923] 1 Ch 237 at 242 per Russell J.

<sup>17</sup> *McGovern*, above n 8, at 337 per Slade J.

<sup>18</sup> The doctrine still has legal effect in Canada, Ireland, and England and Wales; although there are signs of retreat in England through commission guidance and statutory affirmation of “political” themed charitable purposes. See Joyce Chia, Matthew Harding and Ann O’Connell “Navigating the Politics of Charity: Reflections on *Aid/Watch Inc v Federal Commissioner of Taxation*” (2011) 35 MULR 353 at 359-362.

<sup>19</sup> See Matthew Harding “An Antipodean View of Political Purposes and Charity Law” (2015) 131 LQR 181 at 186.

<sup>20</sup> *Aid/Watch Inc v Commissioner of Taxation* (2010) CLR 396. (*Aid/Watch*).

<sup>21</sup> See *Greenpeace*, above n 2, at [76].

<sup>22</sup> At 556-557 per French CJ, Gummow, Hayne, Crennan and Bell JJ.

<sup>23</sup> At 556 per French CJ, Gummow, Hayne, Crennan and Bell JJ.

<sup>24</sup> Comprehensive commentary already exists on traditional arguments for and against the doctrine. See Adam Parachin “Distinguishing Charity and Politics: The Judicial Thinking Behind the Doctrine of Political Purposes” (2007-2008) 45 *Alta L Rev* 871.

view of the relatively new, untested nature of public benefit adjudication post-doctrine, questions naturally arise regarding the suitability of the *Greenpeace* model when another model is arguably available.<sup>25</sup>

The main proposition of this paper is that a process-based public benefit model, such as that proffered in *Aid/Watch*, is preferable to that offered in *Greenpeace* when measured against an appropriately constructed normative benchmark. A process-based approach is (1) significantly better suited to the adjudication of public benefit in political purposes, and (2) successfully ensures and maximises the production of incidental democratic benefits. In substantiating this proposition I first build a normative benchmark for assessing the relative merits of the two models (Chapter I). This benchmark requires that a successful public benefit model will (1) provide a sound evidential scheme for adjudication; ensuring certainty, objectivity and neutrality, and (2) will ensure and maximise incidental social benefits arising from democratic participation. Both requirements are predicated on the opportunity departure from the doctrine presents to (a) improve upon deficiencies in the pre-existing law, and (b) to harness the potential role of charity law to act as a corrective mechanism for democratic deficit. In building this benchmark I also explore the key issues likely to arise. Understanding these issues will inform what kind of qualities a public benefit model must have to measure successfully against the two requirements. Secondly, I apply each model to three semi-hypothetical test cases (Chapter II). Doing so allows us to evaluate the ways in which each model responds to the proposed benchmark.

Having illustrated the relative superiority of the process-based model, I make one-and-a-half further propositions (Chapter III). First I argue that such a model was available in New Zealand notwithstanding the fact that the Australian constitutional framework produced the process-based approach in *Aid/Watch*. Not only is there significant, albeit obfuscated, common law precedent for a process-based approach, but the current state of democracy in New Zealand means there would be sufficient benefit in the operation of democratic processes to support its operation. What then is the position going forward under the *Greenpeace* precedent? My half-claim is small and admittedly contestable. I argue that the texture and spirit of *Greenpeace* might be flexible enough to enable decision-makers to adopt a process-based approach. Given hesitancy towards the *Greenpeace* approach as-is,<sup>26</sup> combined with the findings of this paper, reinterpretation is arguably a viable option.

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<sup>25</sup> See Chapter III below.

<sup>26</sup> As professed by Matthew Harding in Matthew Harding “An Antipodean View of Political Purposes and Charity Law”, above n 19, at 183.

# CHAPTER I

## *Building a Normative Benchmark*

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I propose two requirements for the normative benchmark:

(1) A successful public benefit model ought to provide a “sound evidential scheme”,<sup>27</sup> appropriate for adjudication thus ensuring certainty, objectivity and neutrality.

(2) A successful public benefit model ought to (a) enable charities to fully use political means to achieve their goals and (b) maximise the extent to which such entities engage politically and thus contribute to the democratic process.

The value of creating a normative benchmark is predicated on the view that departure from the doctrine provides the opportunity to consider what kind of legal framework permits development of the law in a more desirable way in contrast to the problematic development of the law under the doctrine. This task is both retrospective and prospective and the purposes of this chapter are twofold. Firstly, I aim to justify the choice of these dual requirements for our benchmark. Both arise as a response to deficiencies inhering in pre-*Greenpeace* case law and recognised by commentators. However, prospectively the shift in focus away from questions of what is *political* to questions of what is for the *public benefit* brings with it new unique threats to requirement (1). Understanding how and why these threats may arise is a useful predictor to keep in mind when evaluating our two models in Chapter II. Furthermore, a prospective assessment of the potential new relationship between charity and political engagement suggests that charity law could act as a powerful vehicle to correct current democratic deficit.

### **A. (1) SOUND EVIDENTIAL SCHEME: CERTAINTY, OBJECTIVITY & NEUTRALITY**

#### **1. The law under the doctrine: Uncertainty, subjectivity, and incoherence**

Specific application of the “political purpose” label reveals significant issues stemming from the way in which courts decide that such a designation is befitting. Courts have struggled with the divide between the political and the charitable.<sup>28</sup> As Lord Normand noted in *National Anti-Vivisection Society*, “the distinction between a political association and a charitable trust has not been defined and I doubt whether it admits of precise definition.”<sup>29</sup> Indeed in that same case the Viscount Simon and Lords Wright, Simonds and Lord Normand found that the purpose to abolish vivisection was political,<sup>30</sup> while Lord Porter found that it was not.<sup>31</sup> Problems of uncertainty,

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<sup>27</sup> A term adopted from Pauline Ridge’s “defensible public benefit test” in relation to religious purposes. See Pauline Ridge “Religious Charitable Status and Public Benefit in Australia” 35 MULR 1071 at 1083.

<sup>28</sup> GE Dal Pont *Law of Charity* (LexisNexis, Australia, 2010) at 28. See also *Greenpeace*, above n 2, at [60].

<sup>29</sup> *National Anti-Vivisection Society*, above n 7, at 75.

<sup>30</sup> At 52 per Lord Wright; at 63 per Lord Simonds; at 77 per Lord Normand.

<sup>31</sup> At 60.

incoherence and inroads for subjectivity seem to arise in two reasonably distinct but overlapping ways. Firstly, when courts attempt to determine when an entity's purpose is political in itself, and secondly when determining if an entity with charitable purposes is employing political means or activities to such an extent that they become political purposes in themselves.<sup>32</sup> "Obviously there is much subjectivity involved in characterising particular activities as political or non political and in quantifying the resources dedicated to such activities."<sup>33</sup> Case examples, comparisons and critiques illustrate what has happened in practice.

*a. Designating purposes as political*

In terms of the former, such issues commonly arise when courts must distinguish between purposes that might be educational or religious, but could also be construed as political. Decisions pertaining to this distinction reveal significant incoherence, leaving the law both uncertain and potentially prone to subjectivity. Dal Pont suggests that when political change is sought in relation to a wider religious goal there is a greater tendency to find that a purpose is religious and not political.<sup>34</sup> For example, in *In re Scowcroft*, Stirling J was faced with determining the validity of a testamentary gift of a building "to be maintained for the Furtherance of Conservative principles and religious and mental improvement."<sup>35</sup> Although pre-dating the doctrine, Stirling J did consider the potential position that furthering "Conservative principles is not a good charitable gift."<sup>36</sup> However, Stirling J was not compelled to consider that in any detail because he considered that:<sup>37</sup>

"It is either a gift for the furtherance of Conservative principles in such a way as to advance religious and mental improvement at the same time, or a gift for the furtherance of religious and mental improvement in accordance with Conservative principles; and in either case the furtherance of religious and mental improvement is an essential portion of the gift."

This analysis reveals that religion was taken to sufficiently dominate any Conservative political purpose despite the fact that no such weighting in favour of the religious portion is revealed in the stated purpose. *In re Hood* reaffirms this tendency.<sup>38</sup> There, Lord Harnworth MR considered a testamentary gift of residue for the purpose of spreading Christian principles with specific direction that the *key* means of doing so is to attempt to extinguish the "drink traffic."<sup>39</sup> However, Lord Harnworth MR considered that the testator had not indicated "anything but a purpose to advance the Christian religion and its principles" and was prepared to assume that the reference to extinguishing drink traffic was not to be construed as contemplating any changes to the law.<sup>40</sup> This analysis again reveals a bias in favour of a charitable purpose when in a religious context. As

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<sup>32</sup> Elias Clark notes the distinction between groups with true political purposes and groups with charitable purposes that engage significantly with political methods. See Elias Clark "The Limitations on Political Activities: A Discordant Note in the Law of Charities" (1960) 46 Va L Rev 3 at 452-454.

<sup>33</sup> *Human Life International*, above n 13, at 14 per Strayer JA.

<sup>34</sup> See Dal Pont *Law Of Charity*, above n 28 at 236.

<sup>35</sup> *In re Scowcroft, Omrod v Wilkinson* [1898] 2 Ch 638.

<sup>36</sup> At 641.

<sup>37</sup> At 641.

<sup>38</sup> *In re Hood, Public Trustee v Hood* [1931] 1 Ch 240.

<sup>39</sup> At 240.

<sup>40</sup> At 248.



Dal Pont notes, even propaganda can be valid if taken as part of a religious purpose.<sup>41</sup> In Lord Harnworth MR's view the testator's directive as simply "one of the means which, in his opinion, that main object could be best obtained" when it was in fact the *only* one and therefore could not merely be ancillary (see below also). In other non-religion based cases courts have been willing to presume that certain goals can only realistically be achieved through pursuing a change in the law.<sup>42</sup> Arguably, extinguishing drink traffic ought to have been considered political on that rationale.

Commentators note that education is the primary way in which charities attempt to excuse their political involvement.<sup>43</sup> As Gonthier J noted in *Vancouver Society of Immigrant & Visible Minority Women v Minister of National Revenue*, "it has been a recurring theme of the jurisprudence in this area that the advancement of education must be clearly distinguished from the pursuit of political purposes."<sup>44</sup> What the case law instead reveals is inconsistency and evidence of probable subjectivity and bias. At the strict end of the spectrum Stone JA in *Positive Action Against Pornography v Minister of National Revenue* propounded a narrow view of education, stressing the formal and systematic nature of education.<sup>45</sup> However, both Gonthier and Iacobucci JJ in *Vancouver Society* express suspicion that Stone JA's strict formulation was really in response to the fact that the entity in question was "seeking to advance a particular point of view" and was therefore political and uncharitable.<sup>46</sup> This strict interpretation was adopted in another Canadian case *Human Life International in Canada Inc. v Minister of National Revenue* where an entity's purpose was to promote an anti-abortion point of view, similarly charitable status was denied.<sup>47</sup> In contrast, a broader formulation was adopted in *Vancouver Society*. There education was defined as the provision of information or training for a genuinely educational purpose; not *solely* to promote a point of view.<sup>48</sup> Similarly, in *Southwood v Attorney-General* Chadwick LJ in the context of promoting peace saw no issue with education starting from a particular premise.<sup>49</sup> In *In re Strakosch* a purpose to strengthen unity between South Africa and Britain and appease racial feeling was too political.<sup>50</sup> Despite this finding, Lord Greene MR seems to have expressed the view that the testator could well have couched that purpose in educational terms and enabled the purpose to be educational and therefore charitable, notwithstanding the ultimate aim.<sup>51</sup> It seems there is a trend towards adopting a narrow view of education when a potentially political purpose is also controversial.<sup>52</sup> Parachin does note a judicial tendency to

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<sup>41</sup> GE Dal Pont, *Law of Charity*, above n 28, at 211.

<sup>42</sup> See *In re Bushnell*, above n 7, at 1604 per Goulding J.

<sup>43</sup> Elias Clark "The Limitations of Political Activities", above n 32, at 452; GFK Santow "Charity in its Political Voice: A Tinkling Cymbal or a Sounding Brass?" (1999) 18 Australian Bar Review 225 at 275.

<sup>44</sup> Above n 14, at 75 as per Gonthier J citing *Positive Action Against Pornography v Minister of National Revenue*, above n 12, at 348-349.

<sup>45</sup> Above n 12, at 348-349.

<sup>46</sup> Above n 14, at 75 as per Gonthier J.

<sup>47</sup> Above n 13, at 10 per Strayer JA.

<sup>48</sup> At 196 per Iacobucci J.

<sup>49</sup> Above n 14, at 27.

<sup>50</sup> *In re Strakosch, Decd, Temperley v Attorney-General* [1949] 1 Ch 529.

<sup>51</sup> At 538.

<sup>52</sup> See *In re Koeppler Will Trusts, Barclays Bank Trust Co Ltd v Stack* [1984] 1 Ch 243 for another example of adopting an approach to education inclusive of influencing opinion when the purpose was uncontroversial. However, see also *In re Bushnell*, above n 7, where Goulding J adopted a narrow view where education could not include educating in favour of a point of view in the context of a non-controversial purpose.

conflate the political with the controversial.<sup>53</sup> Indeed, in *National Anti-vivisection Society v Inland Revenue Commissioners* the controversial nature of antivivisection was key for Lord Wright in determining that the purpose to abolish vivisection was political.<sup>54</sup>

*b. The ancillary exception*

It is well established that “a charity may engage in political activities so long as they are ‘ancillary and incidental’ to its charitable purposes.”<sup>55</sup> However, “the point at which the pursuit of ancillary activities expands into an ‘end in itself’ is a nice question [but] the courts have been reluctant to establish bright lines in this area.”<sup>56</sup> Accordingly, there is very little consensus in determining the level at which political means and activities will translate into purposes in their own right.<sup>57</sup> Such assessment involves “a quantitative and qualitative assessment.”<sup>58</sup> In *National Anti-Vivisection Society*, Lord Porter considered that the purpose of abolishing vivisection was tantamount to preventing animal suffering and therefore charitable according to preceding case law.<sup>59</sup> For Lord Porter the object of repealing the law was merely a means to achieve a primary charitable goal and therefore ancillary.<sup>60</sup> However, in another context, an object of repeal was a main object in itself and not merely ancillary because of the *central* importance of legislative reform to achieve the intended aim.<sup>61</sup> To further illustrate the difficulty and uncertainty in this area we might examine the New Zealand High Court case *Re Draco Foundation (NZ) Charitable Trust*. The main objects of that trust were largely (and genuinely) educational and directed towards raising “awareness of an involvement in the democratic process among citizens, organisations and communities of New Zealand.”<sup>62</sup> However, their activities and educational merits came under scrutiny specifically in relation to the content of their website.<sup>63</sup> According to Ronald Young J some of the material was a partisan attempt to influence government.<sup>64</sup> His Honour did admit that “in terms of the quantity of opinion material...compared with other material, it is difficult to assess the relative column inches or numbers of words devoted to each.”<sup>65</sup> Key factors preventing the partisan material from being incidental included the fact that the partisan material occupied the same space as neutral material and would “be of more interest,” and had a “substantial and prominent” place on the website.<sup>66</sup> However, the appellants had believed that any partisan material fell “well below 30% of the educational material provided.”<sup>67</sup> What this case demonstrates is the inherently subjective and contestable nature of such decisions. As commentators note, the court has certain latitude in construing the ancillary and incidental

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<sup>53</sup> Adam Parachin “Distinguishing Charity and Politics”, above n 24, at 890.

<sup>54</sup> Above n 7, at 52.

<sup>55</sup> *Vancouver Society*, above n 14, at 107 per Gonthier J. See also *National Anti-Vivisection Society*, above n 7, at 77 per Lord Normand; *Molloy v Commissioner of Inland Revenue*, above n 4, at 695.

<sup>56</sup> *Vancouver Society*, above n 14, at 61 per Gonthier J, citing *Ontario (Public Trustee) v Toronto Humane Society* (1987) 60 OR (2d) 236 at 254.

<sup>57</sup> GE Dal Pont *Law of Charity*, above n 28, at 295.

<sup>58</sup> *Re Draco Foundation*, above n 4, at [2] per Ronald Young J.

<sup>59</sup> Above n 7, at 60.

<sup>60</sup> At 55.

<sup>61</sup> At 61-63 per Lord Simonds.

<sup>62</sup> Above n 4, at [1] per Ronald Young J.

<sup>63</sup> At [17].

<sup>64</sup> At [54].

<sup>65</sup> At [62].

<sup>66</sup> At [63]-[64].

<sup>67</sup> At [61].

exception<sup>68</sup> and in general, cases dealing with the political have lost sight of the distinction between means and ends.<sup>69</sup> Determination is a matter of fact and degree, and much may come down to judicial impression.<sup>70</sup>

## 2. The law going forward: Judicial incapacity and the limits of adjudication

Departing from the doctrine presents the opportunity to leave behind the weaknesses of the old law and to strive for new certainty, objectivity and neutrality in the law. As a society we value the ability to fix long-term goals and to direct ourselves towards them; uncertainty, bias and instability threaten the law's ability to provide people with definite expectations. Such is the rule of law and its virtue.<sup>71</sup> Arguably, these virtues are all the more important in charity law where those who seek to undertake charitable work intend to do so altruistically for the betterment of society. Disincentive and inconvenience ought to be minimal. However, such deficiencies may continue in the future law due to the adjudication of public benefit in relation to political purposes. Understanding why this might be the case explains the focus on a sound evidential scheme, and will shape how we measure the success of our two models.

### a. Judicial incapacity

The doctrine has traditionally been justified on grounds of judicial incapacity.<sup>72</sup> The argument, founded on two separate concerns, states that “the court is in no position to determine that promotion of one view rather than the other [or a change in the law] is for the public benefit. Not only does the court have no material on which to make that choice; to attempt to do so would usurp the role of government.”<sup>73</sup> The first concern relates to evidential incapacity. However, as Slade J noted in *McGovern v Attorney General*, referring to *National Anti-Vivisection Society*, “their Lordships clearly did regard themselves as having such means because one ground of their decision was that the proposed change in the law would be detrimental to the public.”<sup>74</sup> Indeed, Lord Wright proclaimed “there is not, so far as I can see, any difficulty in weighing the relative value of what it called the material benefits of vivisection against the moral benefits which is alleged...I cannot doubt what the moral choice should be.”<sup>75</sup> The second concern relates to functional incapacity. As explained by Slade J, the court “ought not to encroach on the role of the legislature and government for reasons of public confidence in the political impartiality of the judiciary, which is essential to the continuance of the rule of law.”<sup>76</sup> Again, there is reason to reject this claim. Commentators view this justification as based on an anachronistic view of the judge's role.<sup>77</sup> In the contemporary legal landscape, judges are often asked to resolve politicised

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<sup>68</sup> GFK Santow “Charity in its political voice”, above n 43, at 261.

<sup>69</sup> Adam Parachin “Distinguishing Charity and Politics”, above n 24, at 888.

<sup>70</sup> GE Dal Pont *Law of Charity*, above n 28, at 296.

<sup>71</sup> Joseph Raz *The Authority of Law: Essays on Law and Morality* (Clarendon Press, Oxford, 1983) at 217-222.

<sup>72</sup> See Adam Parachin “Distinguishing charity and politics”, above n 24, at 881-887.

<sup>73</sup> *Southwood v Attorney-General*, above n 14, at 29 per Chadwick J. See also *McGovern*, above n 8, at 336-337.

<sup>74</sup> Above n 8, at 336.

<sup>75</sup> At 48. See also Matthew Harding *Charity Law and the Liberal State* (Cambridge University Press, Cambridge, 2014) at 181.

<sup>76</sup> *McGovern v Attorney-General*, above n 8, at 337 citing *Duport Steels Ltd v Sirs* [1980] 1 WLR 142 at 157 per Lord Diplock.

<sup>77</sup> Adam Parachin “Distinguishing Charity and Politics”, above n 24, at 883; Matthew Harding *Charity Law and the Liberal State*, above n 75, at 182; Joyce Chia, Matthew Harding and Ann O’Connell “Navigating the Politics of Charity”, above n 18, at 363.

issues, often suggest amendments and make good use of dissents.<sup>78</sup> Alternatively, in some jurisdictions specific constitutional frameworks mandate politicised decision making in courts. In the Canadian context the Charter has blurred the boundary between legislature and courts.<sup>79</sup> Australia's Constitution makes the High Court "ultimate arbiter" on such matters.<sup>80</sup>

However, such arguments were still taken seriously in both *Aid/Watch* and *Greenpeace*,<sup>81</sup> and may now have force as predictors of threats to requirement (1) despite not having enough strength to support a blanket ban on political purposes. Evidential incapacity may be of two types: complete incapacity when there is no evidence at all, or partial incapacity if evidence is inconclusive.<sup>82</sup> The latter may tend to occur when the suggested end raises deep moral questions.<sup>83</sup> This is of course very likely to occur post-doctrine. Earlier cases discussed indicate that deeply moral issues, such as anti-abortion or anti-pornography points of view, will come before a court (or decision-maker). In *Greenpeace*, the Supreme Court was adamant that despite lifting the ban, most applications will fail as a result of the difficulty in assessing public benefit when views are being promoted, or advocacy is being carried out.<sup>84</sup> As the English Charity Commission has observed more generally:<sup>85</sup>

"Charities are often innovative and pioneering. They may be concerned with matters the merits of which have yet to be proven, or which the general public has yet to appreciate or recognise as having value."

This statement is particularly apposite in relation to political purposes. In controversial or contestable matters, there may be compelling evidence of public benefit for both positions, especially if there is a more established status quo that an entity is seeking to change.

Arguably, functional incapacity has been the main impetus behind continued adherence to the doctrine.<sup>86</sup> Other expressions of this concern include that some matters are "more for political than legal judgment,"<sup>87</sup> and that the court should not be "granting or denying legitimacy to what are essentially political views."<sup>88</sup> Despite such compelling rebuttals, we may nonetheless feel some sense of discomfort with decision-makers making value judgments in relation to political causes, especially if it is a controversial matter. As Slade J noted, when something is very controversial "the court would be faced with even greater difficulty in determining... public benefit; correspondingly, it would be at even greater risk of encroaching on the functions of the legislature and prejudicing its reputation for political impartiality if it were to promote such objects."<sup>89</sup>

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<sup>78</sup> Matthew Harding *Charity Law and the Liberal State*, above n 75, at 183; Joyce Chia, Matthew Harding and Ann O'Connell "Navigating the Politics of Charity", above n 18, at 363.

<sup>79</sup> Adam Parachin "Distinguishing Charity and Politics", above n 24, at 881.

<sup>80</sup> Joyce Chia, Matthew Harding and Ann O'Connell "Navigating the Politics of Charity", above n 18, at 363.

<sup>81</sup> *Aid/Watch*, above n 20, at 562; *Greenpeace*, above n 2, at [32].

<sup>82</sup> Adam Parachin "Distinguishing Charity and Politics", above n 24, at 882.

<sup>83</sup> Adam Parachin "Distinguishing Charity and Politics", above n 24, at 882.

<sup>84</sup> *Greenpeace*, above n 2, at [32].

<sup>85</sup> Charity Commission of England and Wales *Charities and Public Benefit* January 2008, at D8, cited in GE Dal Pont *Law of Charity*, above n 28, at 71.

<sup>86</sup> Adam Parachin "Distinguishing Charity and Politics", above n 24, at 882.

<sup>87</sup> *McGovern v Attorney-General*, above n 8, at 340.

<sup>88</sup> *Human Life International*, above n 13, at 13 per Strayer JA.

<sup>89</sup> *McGovern v Attorney-General*, above n 8, at 337.

A further point of importance is that although the case law and commentary speaks nearly exclusively in terms of judicial adjudication, this obfuscates the reality that, at least initially, decisions are made elsewhere.<sup>90</sup> In New Zealand such matters fall to be decided by the Charities Board within the Department of Internal Affairs. While courts do have the ultimate power in this area, a matter is only likely to come before a court if a decision is appealed.<sup>91</sup> Do the counter-arguments above assuage functional incapacity in this context? Evidential incapacity may also become more pronounced in this context. There may be a greater chance for inconsistent evidential findings if a matter is removed from judicial consideration. Unless there is a sound evidential scheme by which decision-makers can assess matters with some objectivity and neutrality, there is a risk that uncertainty, subjectivity and appearance of (or real) bias may enter the law.

*b. Polycentric situations and the limits of adjudication*

Lon Fuller's theory of the limits of adjudication provides a more general account as to when and why some matters fall outside the proper limits of adjudication and what happens when attempts are nonetheless made. If applied to political purposes, his analysis further supports and enriches our understanding of judicial incapacity. For Fuller, adjudication is but one form of social ordering characterised by decisions reached through the presentation of proofs and reasoned arguments.<sup>92</sup> Alternatively, elections (through voting) or contract (through negotiation) may better resolve disputes in some contexts.<sup>93</sup> Certain conditions must be met for adjudication to function properly as a form of dispute resolution. Because adjudication entails a process in which affected parties' participation consists of opportunities to present proofs and reasoned arguments, it follows that an arbitrator must be impartial.<sup>94</sup> Fuller argues that certain "polycentric" tasks are inherently unsuited to adjudication and therefore best left to the democratic or bargaining processes.<sup>95</sup> In some cases, meaningful participation by all affected parties is not possible due to the large number of effected parties or a fluid state of affairs.<sup>96</sup> A task may be polycentric when a decision in one specific area has implications in many areas. The adjudicator cannot "encompass and take into account the complex repercussions that may result."<sup>97</sup>

Adjudication of political purposes and public benefit may be polycentric. For example, a decision-maker may be asked to adjudicate on the matter of a pro-life point of view as would have been the case had the doctrine not applied in *Molloy* or *Human Life International*.<sup>98</sup> Can this matter be adjudicated without considering the effect a decision (affirmative or negative) would have on any future adjudication of a pro-choice point of view? Arguably an adjudicator might also need to consider moral, medical, social and other factors to truly determine a question of benefit. Potentially, not all matters will be presented for consideration. According to Fuller, adjudication

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<sup>90</sup> Matthew Harding notes the role of non-judicial decision making in this area. See Matthew Harding *Charity Law and the Liberal State*, above n 75, at 184.

<sup>91</sup> See for example *Re Family First New Zealand* [2015] NZHC 1493.

<sup>92</sup> Lon L Fuller "The Forms and Limits of Adjudication" (1978-1979) 92 Harv L Rev 353 at 363.

<sup>93</sup> At 363.

<sup>94</sup> At 365.

<sup>95</sup> At 393.

<sup>96</sup> At 397.

<sup>97</sup> At 394.

<sup>98</sup> *Molloy v Commissioner of Inland Revenue*, above n 4, *Human Life International*, above n 13.

of polycentric situations may result in decisions that act as awkward precedents in situations not foreseen by the arbiter.<sup>99</sup> This can result in a tendency to consult parties not represented at hearings, but can also lead to adjudicators making guesses as to facts not proved.<sup>100</sup>

Fuller's theory leads to a more substantive argument for why we ought to be concerned about the adjudication of political purposes as a matter of evidential and functional incapacity. Even if decisions are possible and appear to be soundly made, there is no certainty that the decision reached is the right one or that subjective factors did not enter the mix. To revisit Fuller's proposed alternatives, one might instead conclude that public benefit of political purposes ought really to be decided through elections and voting; or at least where the decision falls to be worked out among the citizenry, or alternatively in a way that avoids complex questions of value. In evaluating competing public benefit models this must be kept in mind.

To conclude, for a public benefit model to succeed under requirement (1) it ought to provide a sound evidential framework through directing decision-makers towards evidence that is not prone to evidential failure. It must also reduce any undue compromise of the court's (or a decision-maker's) need for impartiality, or that will amount to adjudicating a polycentric situation. Issues of a controversial nature pose the biggest problem in this area and as shown above, could lead to the appearance of bias. If a public benefit test has created a sound evidential framework, decisions ought to seem relatively neutral, certain and objective.

## **B. (2) ENABLING AND MAXIMISING DEMOCRATIC PARTICIPATION**

### **1. The law under the doctrine: Undermining political participation as a vehicle for charity**

The level of uncertainty under the pre-*Greenpeace* law as described has been widely criticised.<sup>101</sup> However, of more *specific* concern is the undesirable *effect* this kind of uncertainty can have on existing charities employing political means to pursue otherwise legitimately charitable aims. We encountered some examples earlier such as *Re Draco Foundation (NZ) Charitable Trust*.<sup>102</sup> Commentators note that charities have often made most significant contributions and have had the most success when they have attempted to change public opinion.<sup>103</sup> As Clark notes, all charities are seeking to improve society and condition human conduct and those charities concerned with governmental issues do not see themselves as any different.<sup>104</sup> Political engagement may bring about the most immediate solution to society's problems,<sup>105</sup> and yet charities have been prone to speak with a muted or discreet voice due to a fear of losing charitable status;<sup>106</sup> a "tinkling cymbal

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<sup>99</sup> At 397.

<sup>100</sup> At 401.

<sup>101</sup> See LA Sheridan "Charity versus Politics" (1973) 2 Anglo-Am L Rev 47 at 57; GE Dal Pont *Law of Charity*, above n 28 at 296; Joyce Chia, Matthew Harding and Ann O'Connell "Navigating the Politics of Charity", above n 18, at 364.

<sup>102</sup> Above n 4.

<sup>103</sup> National Council of Voluntary Organisations, Comments on the Charity Commission Review of the Register Draft Consultation Paper, NCVO, London 1997, cited in GE Dal Pont *Law of Charity*, above n 28, at 71.

<sup>104</sup> Elias Clark "The Limitations of Political Activities", above n 32, at 452.

<sup>105</sup> Elias Clark "The Limitations of Political Activities", above n 32, at 452.

<sup>106</sup> See Elias Clark "The Limitations of Political Activities", above n 32, at 454; GFK Santow "Charity in its Political Voice", above n 43, at 256; Joyce Chia, Matthew Harding and Ann O'Connell "Navigating the Politics

not a sounding brass.”<sup>107</sup> Santow describes a long history dating back to the 19<sup>th</sup> century whereby charities have fought and campaigned to remove political obstacles in the way of public welfare.<sup>108</sup> Clark provides the example of a charity with the purpose of promoting care and treatment in relation to mental illness, which might need to seek enlightened intervention from the government.<sup>109</sup> Commentators claim this has had a “chilling effect”<sup>110</sup> on entities refusing to only deal with symptoms and who instead seek to deal with the political causes of such issues.<sup>111</sup>

## 2. The law going forward: Charity as a vehicle for correcting democratic deficit

Our second requirement must be to (a) ensure that charities in the position described above are not deterred from fully seeking their goals through political means. However, for reasons discussed below, departure from the doctrine provides a greater opportunity in this area than merely ensuring that politics can be a valid vehicle for charity. We can also require (b) that political participation is *maximised*. Moving from a conception of the political as a vehicle for *charity* toward a conception of charity as a vehicle for the *political* is justified when we consider two factors: (1) widespread deficiencies in contemporary democracies<sup>112</sup> and (2) commentary suggesting that charities are uniquely placed to act as a corrective mechanism.

First, reduction in trust of politicians, leaders, and institutions is a common theme in western democracies.<sup>113</sup> The rise of political apathy poses a real problem for modern government.<sup>114</sup> There has been a decline in traditional forms of political association such as party membership, political engagement and the exercise of the right to vote.<sup>115</sup> As Alexander notes, “democracy around the world is growing frailer and frailer.”<sup>116</sup> According to Miller and Marsh, democratic renewal needs to be done in a way that generates enough momentum to engage a broader public.<sup>117</sup> Another perspective in this area is that “social capital” is necessary to sustain a democracy.<sup>118</sup> Social capital refers to “good will, fellowship, sympathy and social intercourse.”<sup>119</sup> “Legitimacy and stability of democratic institutions depend on the capacity of the public to trust and co-operate with others.”<sup>120</sup> However, the civil society institutions primarily responsible for generating social capital, such as churches, hobby groups and citizens’ organisations, have also experienced a

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of Charity”, above n 18, at 364; Alison Dunn “Demanding Service or Servicing demand?” (2008) 71(2) MLR 247 at 259.

<sup>107</sup> GFK Santow “Charity in its Political Voice”, above n 43, at 258.

<sup>108</sup> GFK Santow “Charity in its Political Voice”, above n 43, at 256.

<sup>109</sup> Elias Clark “The Limitations of Political Activities”, above n 32, at 453.

<sup>110</sup> Joyce Chia, Matthew Harding and Ann O’Connell “Navigating the Politics of Charity”, above n 18, at 364.

<sup>111</sup> GFK Santow “Charity in its Political Voice”, above n 43, at 256.

<sup>112</sup> See generally Robert D Putnam “Introduction” in R D Putnam (ed) *Democracies in Flux: The Evolution of Social Capital in Contemporary Society* (Oxford University Press, New York, 2002); Ian Marsh and Raymond Miller *Democratic Decline and Democratic Renewal: Political Change in Britain, Australian and New Zealand* (Cambridge University Press, New York, 2012).

<sup>113</sup> Alison Dunn “Demanding Service or Servicing demand?”, above n 106, at 256.

<sup>114</sup> Alison Dunn “Demanding Service or Servicing demand?”, above n 106, at 257.

<sup>115</sup> J Fishkin *The Voice of the People: Public Opinion and Democracy* (Yale University Press, New Haven 1995) at 142-143, cited in Alison Dunn “Demanding Service or Servicing demand?”, above n 106, at 257.

<sup>116</sup> Gregory Alexander “Civic Property” (1997) 6 Social and Legal Studies 217 at 218.

<sup>117</sup> Ian Marsh and Raymond Miller *Democratic Decline and Democratic Renewal*, above n 112, at 291.

<sup>118</sup> Robert D Putnam “Introduction” in *Democracies in Flux*, above n 112, at 27 (Kindle eBook location).

<sup>119</sup> Robert D Putnam “Introduction” in *Democracies in Flux*, above n 112, at 35 (Kindle eBook location).

<sup>120</sup> Gregory Alexander “Civic Property”, above n 116, at 218.

marked decline in participation.<sup>121</sup> According to Putnam, there is general consensus that “the decay of community bonds is inevitable in modernising societies and that institutions must be created to fill the void.”<sup>122</sup>

Also according to Putnam, charitable groups are a form of outward looking social capital, primarily concerned with public goods.<sup>123</sup> Other commentators have engaged more specifically with the notion that charities can serve a larger democratic role.<sup>124</sup> Charities have a unique ability to galvanise communities into political action and their potential contribution to democratic decision-making has been harnessed into governmental objectives in seeking to enhance civic engagement.<sup>125</sup> Inclusion of the charitable sector in political debate is good for society and leads to a healthier pluralistic civil society.<sup>126</sup> “It is precisely because charities are expressive of different views, values and experiences that their involvement in the political process is so important.”<sup>127</sup> Charities are also rich in goodwill, trust and knowledge, which is a valuable resource in the face of declining participation in civil society.<sup>128</sup> Harnessing charities’ viewpoints and experience and community contact is *essential* to developing a full contribution to civic renewal.<sup>129</sup>

This conception of a new function for charity also accords with traditional conceptions as to the role of charity in society. Under the traditional three-failure theory, philanthropy complements today’s liberal democratic and capitalist market economy.<sup>130</sup> To do so it must be voluntary and pluralistic; producing *many* visions of the social and individual good.<sup>131</sup> Perspectives from within charity law would also support charity as a vehicle for reducing democratic deficit. As was recognised in *Aid/Watch*, “the law of charity is a moving subject which has evolved to accommodate new social needs as old ones become obsolete or satisfied.”<sup>132</sup> “[The concept of charity] must expand with the advancement of civilisation and the daily increasing needs of men... and where new necessities are created new charitable uses must be established...”<sup>133</sup>

Reservations may arise when purposes evoke sharply divergent public reactions.<sup>134</sup> We can recall that pursuant to the doctrine there has been a tendency to equate the controversial with the uncharitable. However, when we switch to a conception of charity as a vehicle or correcting

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<sup>121</sup> Gregory Alexander “Civic Property”, above n 116, at 217-222; Robert D Putnam “Introduction” in *Democracies in Flux*, above n 112, at 124 (Kindle eBook location).

<sup>122</sup> Robert D Putnam “Introduction” in *Democracies in Flux*, above n 112, at loc 170 (Kindle eBook version).

<sup>123</sup> Robert D Putnam “Introduction” in *Democracies in Flux*, above n 112, at loc 124 (Kindle eBook version).

<sup>124</sup> Alison Dunn “Demanding Service or Servicing demand?”, above n 106, at 257.

<sup>125</sup> Alison Dunn “Demanding Service or Servicing demand?”, above n 106, at 248.

<sup>126</sup> Oonagh B. Breen “Too political to be charitable? The Charities Act 2009 and the future of human rights organisations in Ireland” [2012] Public Law 2 at 284.

<sup>127</sup> E Burt “Charities and Political Activity: Time to Rethink the Rules” (1998) Political Quarterly 23 at 27, cited in Oonagh B. Breen “Too political to be charitable?”, above n 126, at 283.

<sup>128</sup> Alison Dunn “Demanding Service or Servicing demand?”, above n 106, at 257.

<sup>129</sup> Alison Dunn “Demanding Service or Servicing demand?”, above n 106, at 259.

<sup>130</sup> Rob Atkinson “Philanthropy’s Function: A Neo-Classical Reconsideration” in Matthew Harding, Ann O’Connell and Miranda Stewart (eds) *Not-For-Profit Law: Theoretical and Comparative Perspectives* (Cambridge University Press, Cambridge 2014) 15 at 17.

<sup>131</sup> At 17.

<sup>132</sup> *Aid/Watch*, above n 20, at 548.

<sup>133</sup> *Attorney-General v Dashaway Association* (1890) 84 Cal 114 at 122, cited in GE Dal Pont *Law of Charity*, above n 28, at 20.

<sup>134</sup> Elias Clark “The Limitations of Political Activities”, above n 32, at 457.



democratic deficit we can start to see that the opposite may be true. To truly broaden the democratic base requires information that is complete and representative of all opinions.<sup>135</sup> As Alexander notes, “a flourishing civil society requires that the entire political community have an opportunity to participate in public conversation.”<sup>136</sup> Debate on contentious issues “remains a cornerstone of any democracy.”<sup>137</sup> Plurality in this context ought to include space for dissenting voices.<sup>138</sup> Democratic principles demand that tax privileges not favour one side in a controversy.<sup>139</sup>

Of course such groups can continue to participate in such ways regardless of charitable status, so why include notions of maximisation and plurality in our benchmark for a successful public benefit model? The answer lies in the strong nexus between charitable status and the ability of such groups to participate in political matters in a suitably effective way. Essentially, the sole reason for having a definition of charity results from the way charities are treated differently in comparison to other legal constructs and accordingly there are various reasons an organisation might seek charitable status.<sup>140</sup> Fiscal advantages are the most prominent privilege of charitable status.<sup>141</sup> For example, in New Zealand,<sup>142</sup> registered charities receive three specific income tax exemptions under the Income Tax Act 2007.<sup>143</sup> Registered charities are also likely to receive donee status, which allows donors to receive tax benefits when making a donation.<sup>144</sup> Aside from direct fiscal advantages, charitable status confers reputational benefits. Many funders only fund charitable entities.<sup>145</sup> “Registration is increasingly becoming the benchmark for eligibility for funding from philanthropic grant-making trusts.”<sup>146</sup> More generally, Dunn also notes that sizeable donations of a type able to sustain political campaigning are not forthcoming unless they are deductible.<sup>147</sup> According to Clark, charitable status has also come to symbolise stability and respectability. Groups without charitable status frequently find themselves at a disadvantage when it comes to recruiting members and successfully engaging with other community agencies and the media.<sup>148</sup> Without charitable status, levels of engagement may not have the same ability to contribute to democratic renewal. A good public benefit test ought to be relatively inclusive when it comes to organisations involved in political engagement. A cautionary example highlights the potential for charitable status to act inimically to any goal of effective participation if public benefit does not act to favour plurality of opinions. Although an old example, Clark explains how the Catholic Church in Connecticut was largely credited with blocking modifications to the local

<sup>135</sup> Elias Clark “The Limitations of Political Activities”, above n 32, at 458.

<sup>136</sup> Gregory Alexander “Civic Property”, above n 116, at 221.

<sup>137</sup> Alison Dunn “Demanding Service or Servicing demand?”, above n 106, at 258.

<sup>138</sup> Oonagh B. Breen “Too political to be charitable?”, above n 126, at 284; although note some reservations that charities involving themselves in controversial issues can tarnish the image of charity. Picarda *Law of Charity*, above n 10, at 245.

<sup>139</sup> Elias Clark “The Limitations of Political Activities”, above n 32, at 459.

<sup>140</sup> See GE Dal Pont *Law of Charity*, above n 28, at 127-129.

<sup>141</sup> See GE Dal Pont *Law of Charity*, above n 28, at 143-159.

<sup>142</sup> See generally Susan Barker, Michael Gousmett, Ken Lord *The Law and Practice of Charities in New Zealand* (LexisNexis, Wellington, 2013) at 27-415.

<sup>143</sup> See Income Tax Act 2007, ss CW 41-43.

<sup>144</sup> See Income Tax Act 2007, s LD 3(2).

<sup>145</sup> Susan Barker, Michael Gousmett, Ken Lord *The Law and Practice of Charities in New Zealand*, above n 142, at 27.

<sup>146</sup> Susan Barker, Michael Gousmett, Ken Lord *The Law and Practice of Charities in New Zealand*, above n 142, at 27.

<sup>147</sup> Elias Clark “The Limitations of Political Activities”, above n 32, at 455.

<sup>148</sup> Elias Clark “The Limitations of Political Activities”, above n 32, at 455.

law making the use of contraception subject to criminal penalties, while a group in opposition would have received no such advantages.<sup>149</sup>

To conclude, for a public benefit model to succeed under requirement (2) it must (a) not prevent existing charities from retaining charitable status merely because their political means are not ancillary, and it must (b) maximise democratic participation but needs to act fairly towards different political goals and points of view without unduly giving fiscal and reputational advantages to groups on one side of an issue, be it controversial or not.

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<sup>149</sup> Elias Clark “The Limitations of Political Activities”, above n 32, at 459.

## CHAPTER II

### *Comparative evaluation of two public benefit models*

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In this chapter I utilise the proposed benchmark to assess the relative merits of the two competing public benefit models. This evaluation reveals that the *Greenpeace* ends-focussed public benefit model exacerbates judicial incapacity concerns and pushes the limits of adjudication. Evidential difficulties in assessing what an entity is trying to achieve demonstrate a lack of a suitable evidential scheme, failing requirement (1). The lack of emphasis placed on democratic benefits undermines the potential ability of charity law to act as a vehicle to ameliorate democratic deficit, thereby failing requirement (2). On the other hand, the *Aid/Watch* process-based approach is successful on both counts. Through locating benefit in the operation of democratic processes in lieu of the intended aims,<sup>150</sup> adjudication is directed towards a more suitable form of evidence. Also, for evidential reasons, groups are likely to bolster democratic engagement aspects of their endeavours, thus maximising their role in correcting democratic deficit. In reaching these conclusions I have attempted a realistic application of both models to three semi-hypothetical test cases designed to demonstrate how the models contend with matters that are highly politicised, controversial and potentially overlap with other heads of charity.

### A. PUBLIC BENEFIT AND TWO CONTRASTING MODELS

#### 1. Overview: Public benefit as a component of the legal definition of charity

The public benefit test is the central component of the wider legal definition of charity, which also encompasses the requirement of charitable purpose and disqualifying factors.<sup>151</sup> Understanding the statutory and common law framework for charitable status provides the necessary context in which to understand the function of the two competing models. In defining charitable *purpose* the Charities Act 2005 effectively codified the common law “four heads of charity” classification as expounded in 19<sup>th</sup> Century common law in the case *Income Tax Special Purposes Commissioner v Pemsel*.<sup>152</sup> According to both Lord Macnaghten in *Pemsel* and section 5 of the New Zealand Act, a charitable purpose is one that is directed to the relief of poverty, the advancement of education

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<sup>150</sup> Matthew Harding “An Antipodean View of Political Purposes and Charity Law”, above n 19, at 184.

<sup>151</sup> See generally Jonathan Garton *Public Benefit in Charity Law* (Oxford University Press, Oxford, 2013).

<sup>152</sup> *Income Tax Special Purposes Commissioner v Pemsel* [1891] AC 531 (HC) at 583. See Susan Barker, Michael Gousmett, Ken Lord *The Law and Practice of Charities in New Zealand*, above n 142, at 88. Other modern charity statutes have for the most part codified the common law definition. Therefore the description of the legal definition here does apply generally across most common law jurisdictions. See the Charities Act 2006 (England and Wales); Charities and Trustee Investment (Scotland) Act 2005;

Charities Act 2013 (Northern Ireland); Charities Act 2013 (Cth). See Jonathan Garton *Public Benefit in Charity Law*, above n 151, at 23-29.

or religion or any other purpose beneficial to the community. When an applicant has come under the “other” category an analogy is required with either the preamble to the statute of Elizabeth 1601 or with other purposes already held to be charitable.<sup>153</sup> In reality, a purpose is unlikely to fall outside the preamble, and in some cases there has been a presumption of charitable purpose once public benefit has been demonstrated.<sup>154</sup> For the purposes of this paper I will assume that the charitable purpose requirement will not be in issue.<sup>155</sup>

Although not explicitly referred to in the New Zealand statute, evidence of demonstrable public benefit is the core requirement for charitable status.<sup>156</sup> When the charitable purpose relates to one of the first three heads, demonstrable evidence is not usually required as a rebuttable presumption applies.<sup>157</sup> This is reflected in the rule against meritless purposes and the rule against merely spiritual benefits.<sup>158</sup> When a purpose comes under the fourth head, or a presumption is rebutted, an applicant must demonstrate that there is a demonstrable benefit in their purpose(s) and that the benefit is available to a sufficient section of the public.<sup>159</sup> This is done “by the Court forming an opinion upon the evidence before it.”<sup>160</sup> Overall, the assessment of demonstrable public benefit is overwhelmingly concerned with the intended and stated purposes of the group seeking charitable status, although in some cases proof of indirect benefit may suffice.<sup>161</sup>

## 2. The *Greenpeace* “ends-focused” model

According to the Supreme Court, the test for public benefit entails:

“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.”<sup>162</sup>

This statement requires some explanation, but appears to accord directly with the common law approach outlined above.<sup>163</sup> It is clear from surrounding statements in the judgment that reference to the “end that is advocated” refers to the substantive goals of a group, for example Greenpeace Inc’s goals in relation to nuclear disarmament.<sup>164</sup> Manner and means also seem considerations targeted to determining an entity’s substantive aims insofar that they serve to reveal the true

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<sup>153</sup> Jonathan Garton *Public Benefit in Charity Law*, above n 151, at 4-5. See also *Greenpeace*, above n 2, at [29].

<sup>154</sup> *Scottish Burial Reform and Cremation Society v Glasgow Corporation* [1968] AC 138 at 147.

<sup>155</sup> This is despite the Supreme Court’s view that the analogy requirement would likely prevent charity for Greenpeace at [89]-[98]. Arguably such a position does not entirely accord with the common law.

<sup>156</sup> Susan Barker, Michael Gousmett, Ken Lord *The Law and Practice of Charities in New Zealand*, above n 142, at 89.

<sup>157</sup> *In re Hetherington* [1989] 2 All ER 129 cited in GE Dal Pont *Law of Charity*, above n 28, at 235

<sup>158</sup> *In re Pinion* [1963] 3 WLR 778; *Gilmour v Coats* [1949] AC 426 (HL).

<sup>159</sup> *R (Independent Schools Council) v Charity Commission for England and Wales* [2012] 2 WLR 100 at 131-156.

<sup>160</sup> *In re Hummeltenberg* [1923] 1 Ch 237 at 242 per Russell J.

<sup>161</sup> See Jonathan Garton *Public Benefit in Charity Law*, above n 151, at 88-92, and Chapter III below.

<sup>162</sup> At [76].

<sup>163</sup> At [3], [18]-[31], [69]. See also Matthew Harding “An Antipodean View of Political Purposes and Charity Law”, above n 19, at 183.

<sup>164</sup> At [72]-[75].

purposes of a group.<sup>165</sup> The Supreme Court did leave open the possibility that evidence of public benefit may come from advocacy itself, stating that:

“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.”<sup>166</sup>

The Court does not elaborate on this point further and the cryptic nature of that passage has been noted elsewhere.<sup>167</sup> What is undeniably clear from the overall scheme of the judgment is that it is an entity’s intended ends that will be the central focal point most of the time and it is to this part of the adjudication process that I wish to draw attention. Interestingly, the Supreme Court does observe:<sup>168</sup>

“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.”

### 3. The *Aid/Watch* “process-based” model

In 2010, the High Court of Australia was called upon to assess the question of political purposes and public benefit. In deciding that the doctrine no longer applies,<sup>169</sup> the Court also considered public benefit, although there is some ambiguity in what was decided. The majority concluded that a court “is not called upon to adjudicate the merits” of the *ends* promoted by a group, and instead it is the *process* by which a group seeks change that generates benefit by contributing to the “public welfare.”<sup>170</sup> Processes included communication between electors and legislators, and communications between electors themselves on matters of government and politics.<sup>171</sup> The group in question, *Aid/Watch*, was an organisation seeking to promote the more efficient use of Australian foreign aid directed at the relief of poverty. Their activities included research, public campaigns, the generation of public debate, media releases, and the holding of public events designed to influence change.<sup>172</sup>

The Australian Constitutional framework was the key impetus behind both the departure from the doctrine, and the formulation of a process-based public benefit model.<sup>173</sup> As the majority noted, the provisions of the Australian Constitution “mandate a system of representative and responsible

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<sup>165</sup> *Greenpeace*, above n 2, at [103]; reinforces this interpretation *Re Family First* at [24].

<sup>166</sup> At [104].

<sup>167</sup> Matthew Harding “An Antipodean View of Political Purposes and Charity Law”, above n 19, at 183. See also Chapter III below.

<sup>168</sup> At [73] Per Elias CJ.

<sup>169</sup> *Aid/Watch*, above n 20, at 557.

<sup>170</sup> At 557.

<sup>171</sup> At 557.

<sup>172</sup> At 539-540.

<sup>173</sup> See generally Matthew Turnour and Elizabeth Turnour “Archimedes, *Aid/Watch*, constitutional levers and where we now stand” in Matthew Harding, Ann O’Connell and Miranda Stewart (eds) *Not-For-Profit Law: Theoretical and Comparative Perspectives* (Cambridge University Press, Cambridge 2014) 37.

government with a universal adult franchise,” thus suggesting that political agitation is necessary for its full operation. The processes described above are therefore an “indispensable incident” of this specific constitutional context.<sup>174</sup>

Under the majority’s expressed formulation of the public benefit test, *Aid/Watch* were successful in attaining charitable status because their generation of public debate in relation to those *specific* aims was of benefit to the community.<sup>175</sup> Here we reach our first ambiguity. The majority did not specify whether or not such a result could occur when the intended ends are outside the scope of what is charitable under the first three heads “or the balance of the fourth.”<sup>176</sup> However, what this likely refers to is the necessary continued use of the preamble and analogy in the same way that *Greenpeace* requires.<sup>177</sup>

The majority also contemplates that a group may nonetheless *not* contribute to the public welfare, thus failing the public benefit test.<sup>178</sup> The proviso states that failure may be the result of a group’s *particular* ends and means involved in their political pursuit.<sup>179</sup> Because the court does not expressly deal with the question of harmful organisations,<sup>180</sup> we can take this proviso to suggest that ends and means can become a cause for a value-based assessment in that context. Because the operation of this proviso may lead to such value-based assessments we must first attempt to understand its true scope. If value-based assessments stand to occur too frequently then adjudication may often resemble that which stands to occur under *Greenpeace*. The underlying commitments espoused in *Aid/Watch* and existing approaches to detriment in charity law suggest that a very narrow approach to the proviso is not just possible, but likely.

The law reveals three distinct approaches to the issue of possible harm, and detriment may occur as a result of a charity or prospective charity’s purposes or activities.<sup>181</sup> I use “conspicuous harm”<sup>182</sup> to refer to the *strong* approach sometimes taken by decision-makers to disqualify a group “only where there can be no doubt that the activity involved is contrary to a fundamental public policy.”<sup>183</sup> Such an approach, sometimes called the “public policy rule”, prevails regardless of whether or not the group meets the public benefit requirement in other ways.<sup>184</sup> It has been noted that cases of conspicuous harm are the easy ones.<sup>185</sup> However, this type of strong approach is used sparingly. Conspicuous harm seems to arise most frequently in cases where an organisation’s purposes entail racial discrimination.<sup>186</sup> However, courts are not likely to find conspicuous harm

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<sup>174</sup> At 557.

<sup>175</sup> At 539.

<sup>176</sup> Joyce Chia, Matthew Harding and Ann O’Connell “Navigating the Politics of Charity”, above n 18, at 375.

<sup>177</sup> Joyce Chia, Matthew Harding and Ann O’Connell “Navigating the Politics of Charity”, above n 18, at 377, 384.

<sup>178</sup> At 557.

<sup>179</sup> At 557.

<sup>180</sup> Joyce Chia, Matthew Harding and Ann O’Connell “Navigating the Politics of Charity”, above n 18, at 385.

<sup>181</sup> See generally Mathew Harding *Charity Law and the Liberal State*, above n 75, Chapter 4.

<sup>182</sup> See Adam Parachin “Public Benefit, Discrimination and the Definition of Charity” in Darryn Jensen and Kit Barker (eds) *Private Law: Key Encounters with Public Law* (Cambridge University Press, 2013) 171.

<sup>183</sup> *Bob Jones University v United States* 461 US 574 (1983) at 591 per Burger CJ.

<sup>184</sup> *Re Canada Trust Co v Ontario Human Rights Commission* (1990) 69 DLR (4<sup>th</sup>) 321 at 346-349 per Tarnopolsky J.

<sup>185</sup> See Adam Parachin “Public Benefit, Discrimination and the Definition of Charity”, above n 182, at 171.

<sup>186</sup> See *Bob Jones University v United States*, above n 183; *Canada Trust Co v Ontario Human Rights Commission*, above n 184.

when discrimination is on grounds of religion or sexuality.<sup>187</sup> From this one can infer that the strong approach will only be used when conspicuous harm is of a kind that would offend current social values on a *very* general and deep level. One reason for reluctance to pronounce against public benefit on lesser grounds is due to the fluidity of the concept of public benefit over time.<sup>188</sup> In the democratic context, such a strong approach may also be warranted when specific purposes or activities run contrary to the maintenance of the system of representative and responsible government.<sup>189</sup> Harding also notes a justifiable limit on the value of democratic participation when it discourages others from participating.<sup>190</sup> Another way in which disqualification may occur on a “conspicuous harm” basis is when a group partakes too extensively in illegal activities.<sup>191</sup>

Most times detriment is dealt with as a matter of “disbenefit” to be weighed against evidence of benefit at the stage when decision-makers search for a “net benefit” to satisfy the public benefit requirement.<sup>192</sup> As Garton notes, once the harm is less obvious there is no necessary impediment under the general public benefit test.<sup>193</sup> There are many examples of cases where moderate harm was no bar to charitable status.<sup>194</sup> For example, in the matter of the Preston Down Trust, the Charity Commission for England and Wales had been concerned that the Plymouth Brethren Christian Church’s doctrine was harmful to members of the church. However, evidence of some harm did not prevent a finding of public benefit.<sup>195</sup> As far as the operation of the proviso goes, decisions against public benefit in cases where process benefits are proved ought to only occur on the basis of conspicuous harm. To allow for a net benefit approach when faced with moderate evidence of detriment would run contrary to democratic principles of allowing for a multitude of viewpoints and is unnecessary when we acknowledge the failure of charity law to consistently disqualify on the basis of moderate detriment. In the *Aid/Watch* context, Matthew Turnour expresses favour towards this narrow approach focused on matters subversive to the foundations of democracy and all morality.<sup>196</sup>

Also ambiguous is the type of public participation necessary for proof of public benefit. In *Aid/Watch* there was a dissent from Heydon J who was not convinced that *Aid/Watch*’s activities contributed to public debate as there was no intention to open a dialogue, no encouragement of getting others involved and no interaction with competing views.<sup>197</sup> However, the majority and subsequent academic consensus agrees that public debate ought to recognise “the practice and variety of political speech, especially in the contemporary media landscape.”<sup>198</sup>

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<sup>187</sup> See Adam Parachin “Public Benefit, Discrimination and the Definition of Charity”, above n 182, citing *Re Ramsden Estate* (1996) 139 DLR (4<sup>th</sup>) 746; *University of Victoria v British Columbia (AG)* [2000] BCJ No. 520.

<sup>188</sup> Adam Parachin “Distinguishing Charity”, above n 24, at 25.

<sup>189</sup> *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, discussed in Matthew Turnour and Elizabeth Turnour “Archimedes, *Aid/Watch*, constitutional levers and where we now stand”, above n 173, at 46.

<sup>190</sup> Matthew Harding *Charity Law and the Liberal State*, above n 75, at 225-226.

<sup>191</sup> See *Greenpeace*, above n 2, at [105]-[106]. There it was decided that in some circumstances illegal activities would lead to disqualification, including if an entity pursues illegal or unlawful purposes.

<sup>192</sup> See *National Anti-Vivisection Society*, above n 7.

<sup>193</sup> Jonathan Garton *Public Benefit in Charity Law*, above n 151, at 195.

<sup>194</sup> Adam Parachin “Public Benefit, Discrimination and the Definition of Charity”, above n 182, at 178-179.

<sup>195</sup> Charity Commission for England and Wales “Preston Down Trust: Application for Registration of the Preston Down Trust” *Decision of the Commission* (3 January 2014).

<sup>196</sup> Matthew Turnour and Elizabeth Turnour “Archimedes, *Aid/Watch*, constitutional levers and where we now stand”, above n 173, at 46.

<sup>197</sup> *Aid/Watch*, above n 20, at 562.

<sup>198</sup> Joyce Chia, Matthew Harding and Ann O’Connell “Navigating the Politics of Charity”, above n 18, at 381.

## B. APPLICATION TO THREE TEST CASES

### 1. Test Case 1: Greenpeace of New Zealand Incorporated

#### a. Introduction

The Supreme Court did not adjudicate on whether or not Greenpeace Inc. qualifies for charitable status, the Court instead referred the decision back to the Department of Internal Affairs.<sup>199</sup> Greenpeace's purposes are the promotion of nuclear disarmament and elimination of weapons of mass destruction.<sup>200</sup> Greenpeace also do not appear to claim that their purposes are anything other than political.<sup>201</sup> They run environmental and educational purposes through a different trust.<sup>202</sup>

#### b. Application of the ends-focused model

The ends-focused model demands that Greenpeace demonstrate to a decision-maker that their ends, manner and means are of public benefit.<sup>203</sup> As the Supreme Court noted, their manner of promotion is not educational.<sup>204</sup> Its purpose is clearly to promoting the elimination of nuclear disarmament and weapons of mass destruction. Accordingly, it is *that* purpose for which public benefit must be affirmatively proved on demonstrable evidence.<sup>205</sup> For this analysis I will confine discussion to nuclear disarmament.

The Court of Appeal in *Greenpeace* did point to various factors suggesting public benefit.<sup>206</sup> Promoting nuclear disarmament was viewed as consistent with New Zealand's international treaty obligations,<sup>207</sup> and is consistent with New Zealand's establishment as a nuclear free zone in domestic law.<sup>208</sup> The Court of Appeal lastly cites "overwhelming public opinion" and the continued intention of successive governments to continue that position. However, the Supreme Court was not convinced that a decision could be made on the evidence provided alone.<sup>209</sup> A decision-maker could look to the substantive arguments in favour of nuclear disarmament. A cursory look at commentary shows genuine divide and controversy. On the "benefit" side of promoting nuclear disarmament, it is argued that retention of nuclear weapons poses an "existential threat" and that "political will" is the only roadblock to a world free of nuclear weapons.<sup>210</sup> Proponents of the "Global Zero" movement do point to impressive support from various global leaders.<sup>211</sup> According to Blechman and Bollfrass, the current movement has at its

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<sup>199</sup> At [103].

<sup>200</sup> At [86].

<sup>201</sup> At [4].

<sup>202</sup> At [103].

<sup>203</sup> See above.

<sup>204</sup> At [103].

<sup>205</sup> See [102].

<sup>206</sup> *Re Greenpeace of New Zealand Incorporated* (CA), above n 4, at [77]-[80] per White J.

<sup>207</sup> Treaty on the Non-Proliferation of Nuclear Weapons 1968.

<sup>208</sup> New Zealand's international obligations have been incorporated into domestic law through the New Zealand Nuclear Free Zone, Disarmament, and Arms Control Act 1987.

<sup>209</sup> At [101].

<sup>210</sup> Barry Blechman and Alexander Bollfrass "Zero Nuclear Weapons" (2010) 17 *The Nonproliferation Review* 3 at 569, 571.

<sup>211</sup> Bruce Blair, Matt Brown and Richard Burt "Can Disarmament Work? Debating the Benefits of Nuclear Weapons" (2011) 90 *Foreign Affairs* 4 at 173.



“heart” a fear of nuclear terrorism, and the current non-proliferation regime is near collapse.<sup>212</sup> However, their description of how the global community might achieve elimination successfully exposes complex issues surrounding potential auditing requirements, and a trajectory that minimises destabilising advantages.<sup>213</sup>

Other commentators point to benefits of nuclear weaponry. Some believe that nuclear weapons fulfil a beneficial security function in preventing the reoccurrence of world wars.<sup>214</sup> There is also real concern that reducing stockpiles to zero cannot be done safely. Blair, Brown and Burt emphasise strategic instability and the vulnerability to a “disabling first strike” compliant states would face.<sup>215</sup> Further claims include that the risks of such weaponry now outweigh any benefits in the age of terrorism,<sup>216</sup> that certain states simply will not relinquish their nuclear weapons,<sup>217</sup> and that we cannot even know for certain that nuclear weapons can prevent world wars.<sup>218</sup> There is even disagreement as to how much support there really is in favour of nuclear disarmament.<sup>219</sup>

This analysis reveals that decision-makers will likely encounter evidential incapacity as described in Chapter I. Evidence of benefit is in fact forthcoming, but is inconclusive. Very quickly a decision-maker may end up considering complex matters of international political strategy and safety. A decision could go either way. In such circumstances subjective views may unintentionally influence decisions, and a decision either way could have the appearance of bias. Additionally, decision-makers, especially if a court was involved, may risk encroaching on the role of the legislature or government as also anticipated in Chapter I. This is especially the case as the Supreme Court suggests that the decision-maker will also need to consider New Zealand’s international relations.<sup>220</sup> There is no way to predict what decision will result under this model.

*c. Application of the process-based model*

Under this model Greenpeace can instead show that the way they promote nuclear disarmament will generate public debate, promote communication between electors and so on. A decision-maker instead undertakes a quantitative assessment of a very different kind of evidence. Additionally, there is nothing adverse to all morality or all public policy in Greenpeace’s ends to invoke the proviso. Under this model Greenpeace will have greater ability to tailor its endeavours to meet this evidential requirement. As long as this is done to suitable levels, it ought to gain charitable status.

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<sup>212</sup> Barry Blechman and Alexander Bollfrass “Zero Nuclear Weapons”, above n 210, at 570-571.

<sup>213</sup> Barry Blechman and Alexander Bollfrass “Zero Nuclear Weapons”, above n 210, at 571.

<sup>214</sup> Harald Muller “Looking at Rivalry: The Role of Nuclear Deterrence” (2014) 38 Strategic Analysis 4 at 464.

<sup>215</sup> Bruce Blair, Matt Brown and Richard Burt “Can Disarmament Work? Debating the Benefits of Nuclear Weapons”, above n 211, at 174.

<sup>216</sup> Bruce Blair, Matt Brown and Richard Burt “Can Disarmament Work? Debating the Benefits of Nuclear Weapons”, above n 211, at 173.

<sup>217</sup> Bruce Blair, Matt Brown and Richard Burt “Can Disarmament Work? Debating the Benefits of Nuclear Weapons”, above n 211, at 177.

<sup>218</sup> Bruce Blair, Matt Brown and Richard Burt “Can Disarmament Work? Debating the Benefits of Nuclear Weapons”, above n 211, at 175.

<sup>219</sup> Harald Muller “Looking at Rivalry: The Role of Nuclear Deterrence”, above n 214, at 467. Contrast with Barry Blechman and Alexander Bollfrass “Zero Nuclear Weapons”, above n 210, at 570.

<sup>220</sup> At [101].

## 2. Test Case 2: Family First New Zealand

### a. Introduction

Family First New Zealand is an organisation that recently received judgment from the High Court allowing its appeal against disqualification as a charity in light of the *Greenpeace* decision.<sup>221</sup> In doing so, Collins J has directed the Charities Board to reconsider Family First's case.<sup>222</sup> The Charities Board had decided that Family First's purposes included political purposes; and sought to remove charitable status because its political purposes and involvement exceeded the ancillary exception.<sup>223</sup>

Family First's purposes are predominantly couched in educational terms such as promoting and advancing research and policy supporting marriage and family as foundational to a strong and enduring society. Family First's website sheds further light on the nature of its values and beliefs include pro-life, anti-pornography and anti-prostitution stances, and a concept of marriage as "one man one woman."<sup>224</sup> Further purposes along the same lines include educating the public in their understanding of the institutional, legal and moral framework that makes a just and democratic society, to participate in social analysis, to produce relevant and stimulating material in different media and to be a voice for family in the media.<sup>225</sup>

### b. Application of the ends-focused model

While Family First's purposes reveal a strong political slant, it denies it is a lobby group and emphasise instead the educational nature of its aims.<sup>226</sup> Justice Collins did direct the Charities Board to factor this into account in deciding whether or not it may in fact legitimately come under the education head of charity.<sup>227</sup> Therefore, there is some possibility that Family First may succeed under the education head of charity, which entails the potential application of a presumption of benefit. If so, Family First might not have to demonstrate the correctness of its views. Moreover, if its beliefs align with religious doctrine it could even seek to amend its purposes to reflect a religious purpose if so willing. This would also allow it to seek charitable status without proving the validity of the views promoted.<sup>228</sup>

However, the Charities Board had considered that seeking political outcomes was "at the forefront of its overall endeavour", and therefore its main purpose was to promote a point of view.<sup>229</sup> If this is the manner in which it seeks to advance its intended goals, their ends will be taken to include said point of view. In this case, a decision-maker employing the ends-focused model will seek to determine the public benefit in Family First's traditional family values. To recapitulate, these include a conservative view of family and marriage focused one woman one man, and stances

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<sup>221</sup> *Re Family First New Zealand* [2015] NZHC 1493.

<sup>222</sup> At [2]. At the time of writing the outcome of reconsideration is unknown.

<sup>223</sup> At [10].

<sup>224</sup> See <https://www.familyfirst.org.nz/about-us/family-policy-priorities/> Last accessed 22 September 2015.

<sup>225</sup> At [3].

<sup>226</sup> At [5], [42].

<sup>227</sup> At [93].

<sup>228</sup> See Chapter I above.

<sup>229</sup> Charities Board *Deregistration decision: Family First New Zealand* (CC42358) Decision No: D2013-1, 15 April 2013 at [99].

against abortion, pornography and prostitution. The first thing to note is that there seems to be less empirical evidence as to whether or not the traditional family model is necessarily more desirable than others. For example, studies (in relation to adoption) suggest family type does not play a part in successful adjustment. Rather, preparedness and low-conflict relationships play an important role. As such, children adopted by same-sex parents may fare no differently than those born into a traditional model.<sup>230</sup>

Furthermore, decision-makers are prepared to look to legislation and broader public opinion for evidence of benefit.<sup>231</sup> Recently the New Zealand Parliament passed the Marriage (Definition of Marriage) Amendment Act 2013. The purpose of this Act is to “clarify that a marriage is between 2 people regardless of their sex, sexual orientation, or gender identity.”<sup>232</sup> If a decision-maker did find against Family First on such evidence, then the ends-focused model may favour a group promoting the opposite view, an undesirable outcome given requirement (2) of our benchmark.

This hints at the larger issue present in this analysis, especially if views on abortion and pornography are assessed. A decision-maker is going to end up “granting or denying legitimacy to what are essentially political views.”<sup>233</sup> Furthermore, when something is very controversial there is an even “greater risk of encroaching on the functions of the legislature and prejudicing [a] reputation for political impartiality.”<sup>234</sup> As these are inherently contestable moral views, there may be a genuine lack of evidence leading to inevitable exclusion. However, Parachin makes an important point:<sup>235</sup>

“... judges have erroneously assumed that they can escape making normative value judgments simply by failing to explicitly rule on the public benefit of a given purpose. Remaining silent as to the public benefit of a purpose can actually speak volumes, since whatever neutrality judges are able to maintain through such silence is only superficial in nature.”

For Parachin, appearances of neutrality and objectivity are threatened in this context by what refusal implicitly communicates.<sup>236</sup>

### *c. Application of the process-based model*

Under this model Family First would not have to prove public benefit in its specific views. As with Greenpeace, it only needs to show that the *pursuit* of promoting its views will generate public debate, promote communication between electors and so on. The same would apply to a group seeking to promote the opposite views, creating a plurality of opinion. There is nothing to suggest that its views would activate the proviso.

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<sup>230</sup> Abbi E Goldberg and Julianna Z Smith, “Predictors of Psychological Adjustment in Early Placed Adopted Children With Lesbian, Gay, and Heterosexual Parents” (2013) 27 *Journal of Family Psychology* 3.

<sup>231</sup> See *Anti-Vivisection*, above 7, at 47 per Lord Wright.

<sup>232</sup> Marriage (Definition of Marriage) Amendment Act 2013, s 4.

<sup>233</sup> *Human Life International*, above n 13, at 12 per Straya JA.

<sup>234</sup> *McGovern v Attorney-General*, above n 8, at 337.

<sup>235</sup> Adam Parachin “Distinguishing Charity and Politics”, above n 24, at 885.

<sup>236</sup> At 885.

### 3. Test Case 3: Legalise Medical Cannabis New Zealand (LMC)

To round off our test cases I propose one further exclusively hypothetical example. The issue of medical cannabis has been a topical question in New Zealand news media after a teenager in a coma was granted the treatment following a ministerial decision.<sup>237</sup> As a test case, LMC is defined as a group whose function is to create public support and increase knowledge as to medical cannabis with the sole intention of lobbying the government to enact the necessary laws to make medical cannabis available to the public.

#### *a. Application of the ends-focused approach*

This last test case further reveals evidential issues in assessing intended aims; but perhaps more so than our other test cases, reveals the potential of political purposes to be polycentric in nature. In this case a decision-maker would simply need to assess if changing the law to allow medical use of cannabis would be of public benefit. This would likely involve evidence of the potential medical benefits and potential corresponding health risks.

The potential benefit of medical cannabis has been noted by the New Zealand Drug Foundation which states that, although the evidence is not overwhelming, it is reasonably well-established that it “has therapeutic benefits in treating people with serious conditions” such as chronic pain and neurological disorders.<sup>238</sup> Therapeutic benefits have been claimed for centuries and therapeutic use stretches back millennia.<sup>239</sup> Internationally there is hard scientific proof supporting these claims.<sup>240</sup> It is this factor that creates compassion for those with serious illnesses, and motivates those seeking legislative reform.<sup>241</sup> Further evidence of benefit may be adduced from legalisation overseas.<sup>242</sup>

Questions of medical benefit need to be weighed against risks. Recreational use during adolescence can produce long-lasting cognitive impairment and psychotic disorders.<sup>243</sup> Evidence from the United States shows that when states legalise for medical purposes there is a corresponding 30% increase in usage among adolescents.<sup>244</sup> However, even in this regard there is conflicting evidence.<sup>245</sup> Other evidence of risk includes inferred escalation from cannabis to other substances,<sup>246</sup> and the cognitive risks posed by different strains of cannabis.<sup>247</sup> In assessing

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<sup>237</sup>Charles Anderson “Change of medical cannabis law after death of Nelson teen is 'matter of time'” (July 14 2015) Stuff.co.nz <http://www.stuff.co.nz/national/health/70205645/Change-of-medical-cannabis-law-after-death-of-Nelson-teen-is-matter-of-time>.

<sup>238</sup><https://www.drugfoundation.org.nz/cannabis/medicinal-cannabis> Last accessed 21 September 2015.

<sup>239</sup>Jerry Wright Jr “Legalising Marijuana” [2015] Drug and Alcohol Dependence 149 at 300.

<sup>240</sup>Jerry Wright Jr “Legalising Marijuana”, above n 239, at 301. See also Garth T Greenwell “Medical Marijuana Use for chronic Pain: Risks and Benefits” [2012] Journal of Pain and Palliative Care Pharmacotherapy 26 at 68.

<sup>241</sup>Gerald Caplan “Medical Marijuana: A Study of Unintended Consequences” (2012) 43 McGeorge L Rev 1 at 127.

<sup>242</sup>Joseph M Pierre “Psychosis associated with medical marijuana: Risk vs. Benefit of Medicinal Cannabis Use” (2010) 167 Am J Psychiatry 5 at 598; see also Ian Freckleton “Medicinal Cannabis Law Reform: Lessons From Canadian Litigation” (2015) 22 Journal of Law and Medicine 4, at 719.

<sup>243</sup>Jerry Wright Jr “Legalising Marijuana”, above n 239, at 298.

<sup>244</sup>Jerry Wright Jr “Legalising Marijuana”, above n 239, at 300.

<sup>245</sup>Jerry Wright Jr “Legalising Marijuana”, above n 239, at 300.

<sup>246</sup>Martin A, Plant “Decriminalising Cannabis” (1977) 4 BJLS 2 at 253.

<sup>247</sup>Jerry Wright Jr “Legalising Marijuana”, above n 239, at 300.

potential risk a decision-maker must contend with conflicting evidence and might need to consider whether or not any benefits can be achieved without the corresponding risks. Apparently this can be achieved,<sup>248</sup> but would entail consideration of the types of laws, restrictions, and safeguards proposed alongside legalisation.

Legalisation of medical cannabis is in many ways a truly polycentric situation. Looking further afield into *social* repercussions indicates certain undesirable outcomes are not always foreseeable. A prime example is the recent experiences in the United States. In his article “A Study of Unintended Consequences”, Caplan explains that legalisation was predicated on the belief that there might be a small class of beneficiaries suffering from debilitating diseases and that availability would be well monitored, individualised and sparingly used.<sup>249</sup> What lobbyists did not anticipate was the extent to which it would result in a new commercial industry.<sup>250</sup> Legalisation had resulted in dispensaries adopting the business practices of the market place.<sup>251</sup> Their practices include “glossy advertisements”, daily specials and a focus on “customer satisfaction.”<sup>252</sup> Simultaneously, “overnight the criminal status of many shifted to one cloaked in legitimacy.”<sup>253</sup> Legalisation has resulted in a new class of illicit sellers obtaining cannabis from dispensaries and on-selling at a profit.<sup>254</sup>

There is no certainty that such evidence would come before a New Zealand decision-maker adjudicating the benefits of medical cannabis. Such issues may not even arise in New Zealand depending on both social and regulatory factors. But the fact that these unintended consequences *did* occur in the United States does suggest that such risks would need to be considered. There may be legitimate impetus to legalise, but there is no way to predict what kinds of benefits and detriments may occur; notwithstanding that current empirical scientific evidence *could* yield a successful answer. A decision on the evidence could go either way, but arguably there is no way to adjudicate this matter in a way that takes note of all relevant issues as repercussions.

#### *d. Application of the process-based model*

Under this model a decision-maker would not have to adjudicate the highly polycentric situation of legalising medical cannabis. Again, LMC only need to show that the pursuit of promoting its views will generate public debate, promote communication between electors and so on. Again, there is no reason to suspect its proposed outcome would activate the proviso.

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<sup>248</sup> Ian Freckleton “Medicinal Cannabis Law Reform: Lessons From Canadian Litigation”, above n 242, at 719.

<sup>249</sup> Gerald Caplan “Medical Marijuana: A Study of Unintended Consequences”, above n 241, at 135.

<sup>250</sup> At 142.

<sup>251</sup> At 135.

<sup>252</sup> At 143.

<sup>253</sup> At 143.

<sup>254</sup> At 144.

## C. EVALUATION AGAINST OUR NORMATIVE BENCHMARK

### 1. The *Greenpeace* ends-focused model

In all our test cases evidential incapacity was a distinct issue and exacerbated by functional incapacity in contexts of controversy. Requirement (1) is not met. Evidential inconsistencies and value judgments may lead to the appearance of bias when decisions are made on evidence that is inconclusive, and may demand that decision-makers assess matters that are best left to government. There is no sound evidential scheme. Evidence may be of unlimited types and may relate to multiple issues if all the implications of an entity's ends are assessed. Uncertainties relating to what kind of evidence may be examinable suggest such decisions can never be predicted and decisions may frequently appear biased. As a result the law cannot guide prospective charities in any meaningful way in conducting their goals. The adjudication of political purposes is likely to be as uncertain and subjective as in pre-*Greenpeace* law. Entities may also still feel the impetus to mask political purposes as educational or religious purposes.

In terms of requirement (2), this model has removed the impediment of the ancillary exception because it is now open to an entity to prove public benefit in any political means that become dominant. However, entities in such a position will still face the issues described above and for that reason the ends-focused model does not fully enable charities to use political means. The ends-focused model also does not maximise democratic benefits and may significantly undermine the use of charity as a vehicle for correcting democratic deficit. Although the Supreme Court acknowledged potential benefit of advocacy in undefined circumstances, the focus on an entity's intended aims provides no impetus for groups to incorporate the production of process benefits into their modus operandi. If benefit is often inconclusive, as it was in the *Greenpeace* example, then many political purpose entities will be excluded from charitable status thus limiting their participatory abilities. Furthermore, as was most explicit in the *Family First* example, decision-makers may end up granting legitimacy to one side of a controversial issue. If that happens on an evidential assessment, the logical corollary is that an opposite group may not receive the same privileges of charitable status. This runs contrary to notions of plurality of opinions and may unfairly advantage certain groups. Such factors are incompatible with the role envisioned for charities in Chapter I.

### 2. The *Aid/Watch* process-based model

The process-based approach achieves a suitable degree of success against both our normative requirements. Assessing process benefits provides decision-makers and prospective charities with a sound evidential scheme. The evidence required is of one specific type: evidence of the operation of certain democratic processes. This type of evidence reduces the scope for uncertainty, subjectivity and bias. Assessment has shifted from qualitative, value-based considerations of conflicting, unexpected and varied evidence, towards quantitative assessments of fact and degree in relation to evidence that is removed from controversial contexts. Inroads for subjectivity and uncertainty are reduced.

Process-based evidence entirely escapes issues of judicial incapacity and polycentric decision-making. We may also recall that Fuller describes other processes that may be more suited to polycentric tasks such as bargaining (contract) and the vote (the democratic process). Fuller also claims that when a task is polycentric, adjudicators may seek to remove the problem to make

matters more amenable to adjudication.<sup>255</sup> Arguably that is what *Aid/Watch* achieves. The polycentric aspects of political purposes are not handled by the decision-maker. When a decision is based on process benefits, the decision-maker instead adjudicates on matters more amenable to adjudication. The substantive and contestable issues are placed in the public sphere for debate, consideration, and ultimate decision and the hands of the citizenry. Such a sound evidential scheme not only circumvents the issues that requirement (1) aims to reduce, but it overlaps with requirement (2). Deferring political considerations to the public reduces issues of over-exclusion faced under our ends-focused model. The process-based model ensures that a *variety* of political voices are given the benefit of charitable status. It also enables the same for matters that are inconclusive of current validity (and benefit) and matters that are highly controversial. It suitably ensures that democratic benefits occur and in a way that accords with general democratic principles. This model also maximises these benefits. By placing evidence of democratic benefits at the heart of the public benefit test, entities with political purposes are compelled to make such participation a central focus of their endeavours.

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<sup>255</sup> Lon L Fuller “The Forms and Limits of Adjudication”, above n 92, at 401.

## CHAPTER III

### *The viability of a process-based approach in New Zealand*

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This paper has sought to demonstrate thus far is (a) that there are significant advantages to departure from the doctrine, and (b) that the process-based model for public benefit is superior to the ends-focused because it adequately circumvents potential issues and measures successfully against the normative benchmark. Such a finding may initially seem overly theoretical in value. Not only has New Zealand's highest court adopted an ends-focused model, but "superficially, the *Aid/Watch* case rests on Australia's particular constitutional framework" and "may limit the decision's utility in other jurisdictions."<sup>256</sup> This latter hurdle was recognised in *Re Draco Foundation (NZ) Charitable Trust*.<sup>257</sup>

Nonetheless, in this final chapter I put forward one-and-a-half arguments to bridge the gap between my theoretical findings and their potential practical implications for New Zealand. Firstly, I demonstrate (a) how the common law of charities is equally capable of generating a process-based model, and (b) how the New Zealand political and democratic context can generate the necessary public benefit in the relevant processes to support the operation of a process-based model; both independently of any constitutional context. Secondly, I make the half-claim that the *Greenpeace* judgment text is malleable enough to generate a process-based model if decision-makers similarly believe in the greater suitability of the *Aid/Watch* approach.

#### A. OVERCOMING THE *AID/WATCH* CONSTITUTIONAL CONTEXT

##### 1. Why a process-based model is a logical common law development

The approach in charity law to religious purposes has not gone unnoticed as precedent for finding public benefit in democratic processes.<sup>258</sup> To substantiate this claim we first need to understand what the common law approach to religious purposes is, and how it relates in substance to the *Aid/Watch* approach. Second, we can look to the rationale behind the approach to religion and compare with rationales in favour of a process-based approach. These factors combine to legitimise the potential generation of a process-based approach directly from existing law.

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<sup>256</sup> Joyce Chia, Matthew Harding and Ann O'Connell "Navigating the Politics of Charity", above n 18, at 380.

<sup>257</sup> Above n 4, at [60] per Ronald Young J.

<sup>258</sup> See Adam Parachin "Distinguishing Charity and Politics", above n 29, at 885. Also Matthew Harding notes case law on religious purposes as potentially supporting the *Aid/Watch* approach in New Zealand. See Matthew Harding "An Antipodean View of Political Purposes and Charity Law", above n 19, at 184.



a. *The public benefit approach to religious purposes*

A presumption of public benefit has largely obscured the approach to religion and public benefit.<sup>259</sup> Because of this presumption, courts have not traditionally had to consider the actual existence of the benefits of religion.<sup>260</sup> Instances where courts have directly addressed the matter reveals a distinctly non-ends-focused approach. As observed in *Neville Estates Ltd v Madden*, a case concerning an absolute gift for the benefit of members of a synagogue:<sup>261</sup>

“Benefit accrues to the public from the attendance at places of worship of persons who live in this world and mix with their fellow citizens. *As between different religions the law stands neutral*, but assumes that any religion is at least likely to be better than none.”

This neutral approach to the actual content of religion is reflected in other judicial statements. In *City of South Melbourne v YMCA of Melbourne*, the court found sufficient public benefit in the religious edification and instruction of the public.<sup>262</sup> It seems a religious body will *only* fail the public benefit test if it takes no part in the secular world at all.<sup>263</sup>

Pauline Ridge describes this approach as focusing on benefit at a higher level of abstraction.<sup>264</sup> As Ridge explains, the focus is on the benefit of religion, not on the benefit of the specific religion in question. Although not writing in the context of political purposes, Ridge views this kind of approach to finding public benefit as essentially no different to the *Aid/Watch* approach.<sup>265</sup> The Court in *Aid/Watch* did not find public benefit in the specific *matter* being promoted, but in *promotion* of that matter.<sup>266</sup> This analogy demonstrates the presence in law of a pre-existing framework for a process-based approach to political purposes.

b. *The rationale for the approach to religious purposes*

The rationales for the approach to religion provide more specific impetus to adopt this pre-existing framework for the adjudication of political purposes. As Garton notes, religion raises particular issues in relation to the public benefit requirement.<sup>267</sup> As Lord Simonds stated in *Gilmour v Coats*, in the context of claims that prayer is beneficial, “[t]his is manifestly not susceptible of proof...The court can only act on proof.”<sup>268</sup> One could describe this rationale as analogous to evidential incapacity concerns as canvassed earlier in relation to political purposes. As Harding notes, issues may occur if decision-makers attempt to assess evidence of benefit in

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<sup>259</sup> Pauline Ridge “Religious Charitable Status and Public Benefit in Australia” above n 27, at 1072.

<sup>260</sup> Matthew Harding “Trusts for Religious Purposes and the Question of Public Benefit” (2008) 71 MLR 159 at 159-161.

<sup>261</sup> *Neville Estates Ltd v Madden* [1962] Ch 832 at 853 per Cross J (emphasis added).

<sup>262</sup> *City of South Melbourne v YMCA of Melbourne* (1960) 6 LGRA 1, cited in Jonathan Garton *Public Benefit in Charity Law*, above n, at 187.

<sup>263</sup> Jonathan Garton *Public Benefit in Charity Law*, above n 157, at 187, citing *Joyce Ashfield Municipal Council* [1976] 1 NSWLR 455 (PC).

<sup>264</sup> Pauline Ridge “Religious Charitable Status and Public Benefit in Australia” above n 27, at 1085.

<sup>265</sup> Pauline Ridge “Religious Charitable Status and Public Benefit in Australia” above n 27, at 1086. It is worth noting that Ridge is instead writing in the context of examining the defensibility of the common law approach to religion and public benefit.

<sup>266</sup> See Chapter II above generally.

<sup>267</sup> Jonathan Garton *Public Benefit in Charity Law*, at 165.

<sup>268</sup> *Gilmour v Coats* [1949] AC 426 at 446.

relation to specific religious points of view.<sup>269</sup> If religious opinion is in question, a decision-maker *could* look to use expert witnesses. However, it is likely that different expert witnesses in this context could present conflicting evidence.<sup>270</sup> As noted in *Church of the New Faith v Commissioner of Pay-Roll Tax (Vic)*, if religions had to prove their truth, then all would fail.<sup>271</sup>

Harding explains another justification for this indirect approach to benefit in religion. Writing from a liberal perspective, Harding explains that decision-makers must provide reasons for a decision that are acceptable to everyone regardless of religious beliefs. If religion is a matter of opinion, then an answer based on evidence one way or the other will not be acceptable to those holding a different opinion.<sup>272</sup> This justification seems reasonably analogous to claims of functional incapacity. Decision-makers in *both* the context of political purposes and religious purposes may appear to stray outside their proper function. As Ridge notes, making decisions at a higher level of abstraction where religion is concerned makes it easier for decision-makers to make objective and neutral findings.<sup>273</sup>

These rationales demonstrate that the same types of concerns underpin the approach to religious purposes that also underpin judicial incapacity arguments in relation to political purposes. In Chapter II we saw how judicial incapacity concerns evaporated under a process-based model. For this reason we would be justified in adopting an almost *Aid/Watch* identical approach from within the common law regardless of constitutional context.

## **2. Public benefit in the democratic process: A New Zealand Perspective**

The process-based model is predicated on there being real and identifiable benefit from the operation of the relevant processes. In Australia, the necessary benefit was located for the Court by the Constitution itself. However, two main factors suggest a decision-maker could legitimately find similar benefit in the operation of democratic processes in New Zealand. Such a finding is vital to the viability of a process-based model locally. First, the New Zealand political and democratic context already recognises value in such processes. Second, revisiting democratic deficiency and social capital in a New Zealand specific context demonstrates that real benefit would accrue from the increased operation of these processes by charities.

### *a. Local recognition of process benefits*

New Zealand's political and democratic framework recognises benefit in processes reasonably analogous to those relied upon in the Australian constitutional context. Firstly, Palmer and Palmer note that New Zealand's current political system places real emphasis on representative government ascertaining public opinion through the use of survey research, and clinics held by both electorate and list Members of Parliament.<sup>274</sup> Accordingly, public opinion has been a great driver of policy and legislative decision-making under the mixed member proportional

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<sup>269</sup> Matthew Harding "Trusts for Religious Purposes and the Question of Public Benefit", above n 260, at 169.

<sup>270</sup> Matthew Harding "Trusts for Religious Purposes and the Question of Public Benefit", above n 260, at 169.

<sup>271</sup> *Church of the New Faith v Commissioner of Pay-Roll Tax (Vic)* (1983) 154 CLR 120 at 149.

<sup>272</sup> Matthew Harding "Trusts for Religious Purposes and the Question of Public Benefit", above n 260, at 170.

<sup>273</sup> Pauline Ridge "Religious Charitable Status and Public Benefit in Australia" above n 27, at 1085.

<sup>274</sup> Geoffrey Palmer and Matthew Palmer *Bridled Power: New Zealand's Constitution and Government* (4<sup>th</sup> ed, Oxford University Press, Melbourne, 2004) at 229.

representation framework.<sup>275</sup> Specifically, not-for-profit groups have had increased opportunities to influence the political process and have even had identifiable effects on policy formation.<sup>276</sup> Marsh describes New Zealand's strong culture of citizens taking advantage of the parliamentary submissions process, taking part in protest marches, formulating internet publicity campaigns, and utilising petitions and citizens' initiated referenda to express public opinion.<sup>277</sup> This context suggests that elector-to-representative and elector-to-electoral communication is already well recognised, especially by the citizenry, as vital to the political process. Sufficient recognition of benefit can be inferred in this way, obviating the need to point to a constitutionally mandated recognition.

*b. The current state of democracy in New Zealand*

In formulating the normative benchmark I discussed how current democratic deficit, decline in social capital and the potential role for charity law as a corrective mechanism pointed towards a public benefit model that harnessed such potential. We can now revisit these ideas in the New Zealand context. Doing so further legitimises a process-based approach through demonstrating the extent to which increased operation of these processes will benefit the New Zealand public.

New Zealand is one of the world's oldest, most enduring democracies and has historically experienced unusually high levels of citizen engagement.<sup>278</sup> At one point nine out of ten registered voters cast votes at elections, and one out of four voters was also a member of a political party.<sup>279</sup> At peak membership the two main parties likely had a combined per capita membership greater than any other party system in the world.<sup>280</sup> In some ways this healthy picture of democracy persists today. The introduction of mixed member proportional representation has led to a more effective, diverse, responsive and accountable Parliament and government.<sup>281</sup> New Zealand has also ranked among the world's most accountable countries and between 65-75% of voters are satisfied with our state of democracy.<sup>282</sup>

Nonetheless, there is a well noted and growing disconnectedness from participation politics, in a way similar to the general picture painted in Chapter I.<sup>283</sup> The most obvious evidence is the declining voter turnout at general elections.<sup>284</sup> New Zealand is a representative democracy,<sup>285</sup> and as such it is understandable that the drop from 93.7% to 77.9% of registered voters casting a vote

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<sup>275</sup> Geoffrey Palmer and Matthew Palmer *Bridled Power*, above n 274, at 228.

<sup>276</sup> In particular, not for profits were instrumental in strengthening social housing, disability strategy, and policy responses to family poverty and family violence. See Michael O'Brien, Jackie Sanders and Margaret Tennant, *The New Zealand Non-profit Sector and Government Policy* (Office for the Community and Voluntary Sector, August 2009) at 35-37.

<sup>277</sup> Ian Marsh and Raymond Miller *Democratic Decline and Democratic Renewal*, above n 112, at 286.

<sup>278</sup> Raymond Miller *Democracy in New Zealand* (Auckland University Press, Auckland, 2015) at 88 (Kindle eBook location).

<sup>279</sup> Raymond Miller *Democracy in New Zealand*, above n 278 at 88-95 (Kindle eBook location).

<sup>280</sup> Ian Marsh and Raymond Miller *Democratic Decline and Democratic Renewal*, above n 112, at 228.

<sup>281</sup> Ian Marsh and Raymond Miller *Democratic Decline and Democratic Renewal*, above n 112, at 332.

<sup>282</sup> Raymond Miller *Democracy in New Zealand*, above n 278, at 3662 (Kindle eBook location).

<sup>283</sup> See Ian Marsh and Raymond Miller *Democratic Decline and Democratic Renewal*, above n 112, at 6.

<sup>284</sup> See Andrew Geddis *Electoral Law in New Zealand: Practice and Policy* (2<sup>nd</sup> ed, LexisNexis, Wellington, 2014) at 3; Raymond Miller *Democracy in New Zealand*, above n 278, at 335 (Kindle eBook location).

<sup>285</sup> For a comprehensive overview of representative democracy in New Zealand see Andrew Geddis *Electoral Law in New Zealand*, above n 284, Chapter 1.

from 1984 to 2014 has been a much-noted cause for concern.<sup>286</sup> A second key observation is a general decline in attentiveness to elections and politics more generally.<sup>287</sup> One example was the anti-smacking law reform. At first, only a small minority appeared to be against the reform. However, when a citizen's initiated referendum was eventually held on the issue, that small minority all of a sudden turned into an 87% majority.<sup>288</sup> This gap between perceived public opinion and actual public opinion is perhaps exacerbated by the way in which the public receives political information. As Palmer notes, information is the key to effective democratic participation, and most people receive their information through the media.<sup>289</sup> Although the media perform an important function in facilitating information and public debate, in order to do so successfully the media need to be recording public affairs truthfully with opinion clearly separated from fact.<sup>290</sup> The media have significant power in this regard because communications can shape voter preferences.<sup>291</sup> Palmer notes however that "the stream of ideas is polluted at the source" as material can be highly selected and slanted.<sup>292</sup> The decrease of civil society institutions necessary for the production of social capital is also likely to have contributed to current levels of disengagement in New Zealand. Empirical evidence demonstrates a steep decline in religion. Adherence to no religion rose sharply from 1.2% in 1966 to 34.7% in 2006.<sup>293</sup> Furthermore, perhaps an even sharper decline was experienced around the same time in relation to community organisations such as political parties, sports clubs and service clubs.<sup>294</sup> However, such groups fulfil an important democratic function in shaping policy and curbing government power.<sup>295</sup>

In this way, charitable participation in the democratic processes outlined above is a public good in New Zealand. Not only can charities increase the operation of such processes, but they can also act to bridge some of the gap between public opinion and government action through increasing social capital. They may even act to counterbalance how the public receive political information through putting a plurality of different opinions before the public, as described in formulating the benchmark.<sup>296</sup> New Zealand has an impressive history of initiating and adapting to change,<sup>297</sup> and interest groups and social movements *have* proliferated and now share the task of political representation.<sup>298</sup> However, the role of such political interest groups is said to have not yet received proper acknowledgement in New Zealand.<sup>299</sup> In this way, process benefits are not only *sufficient* to maintain a process-based approach, but a process-based approach is *necessary* to maintain these benefits. An inclusive approach to charitable status for political purpose organisations is in my view necessary for political purpose groups to take on this role more fully, especially if the goal is to give a platform to different opinions and perspectives, enable

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<sup>286</sup> Electoral Commission *Voter Participation Strategy* (July 2013).

<sup>287</sup> Raymond Miller *Democracy in New Zealand*, above n 278, at 358-367 (Kindle eBook location).

<sup>288</sup> Ian Marsh and Raymond Miller *Democratic Decline and Democratic Renewal*, above n 112, at 334.

<sup>289</sup> Geoffrey Palmer and Matthew Palmer *Bridled Power*, above n 274, at 229.

<sup>290</sup> Geoffrey Palmer and Matthew Palmer *Bridled Power*, above n 274, at 237.

<sup>291</sup> Geoffrey Palmer and Matthew Palmer *Bridled Power*, above n 274, at 238.

<sup>292</sup> Geoffrey Palmer and Matthew Palmer *Bridled Power*, above n 274, at 238.

<sup>293</sup> According to recorded census figures. See John Stenhouse "Religion and society - Towards a more secular society, 1970-2010" (13 July 2012) Te Ara The Encyclopedia of New Zealand <http://www.teara.govt.nz/en/religion-and-society/page-8>.

<sup>294</sup> See John Stenhouse "Religion and society", above n 292.

<sup>295</sup> Raymond Miller *Democracy in New Zealand*, above n 278, at 3779 (Kindle eBook location).

<sup>296</sup> See Chapter I generally for an overview of how charitable organisations may correct democratic deficit.

<sup>297</sup> Ian Marsh and Raymond Miller *Democratic Decline and Democratic Renewal*, above n 112, at 239.

<sup>298</sup> Ian Marsh and Raymond Miller *Democratic Decline and Democratic Renewal*, above n 112, at 295.

<sup>299</sup> Ian Marsh and Raymond Miller *Democratic Decline and Democratic Renewal*, above n 112, at 295.

communication and facilitate debate between a wide class of organisations and individuals. A Non-Profit Organisations Government Funding Survey revealed that civic and advocacy groups received only 1.5% of the total government funding in the voluntary sector.<sup>300</sup> Charitable status would allow these organisations not only tax privileges, but would likely aid the receipt of grants.<sup>301</sup> Additionally, there have been issues where the government has interfered detrimentally with political engagement carried out by the voluntary sector. In the late 20<sup>th</sup> Century the New Zealand government, after being the subject of some criticisms from certain non-profits, took certain steps to pressure some active organisations to combine lest they lose state funding; a move perceived as an attempt to reduce advocacy and opposition from the voluntary sector.<sup>302</sup> The government had also previously ceased funding through a scheme for groups engaged in advocacy, and other controversies and constraints have arisen in the 21<sup>st</sup> Century.<sup>303</sup> Because the state can use its role as a funder to discourage advocacy, it makes it difficult for groups to take positions contrary to policy.<sup>304</sup>

## **B. A FINAL HALF-CLAIM: INROADS FOR IMPLEMENTATION IN NEW ZEALAND**

Having now shown that a process-based model was in fact available in New Zealand on legitimate grounds, we must face the precedent created by the Supreme Court in *Greenpeace*. It is now this precedent that is the only real barrier to adopting our preferred approach. In this last part of the paper I attempt to show how we might both follow *Greenpeace* as a precedent and adopt a process-based approach in future decisions. This involves three related areas of argument. First, I argue that as a matter of textual interpretation, the statement of the ends-focused public benefit approach is malleable enough to generate a process-based model. Second, I use the wider surrounding judgment text to justify taking such an interpretation. Third, I go outside the judgment and examine the wider context of *Greenpeace* as a substantial step in reforming the common law to further justify reinterpretation.

### **1. Argument 1: The nature of the Supreme Court's public benefit statements**

It is possible to reinterpret the Supreme Court's two main public benefit statements to give a process-based approach. Here we must consider the ambiguous statements about the benefit of advocacy more closely. To recapitulate, the main statements tell us that public benefit is determined by:<sup>305</sup>

“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.”

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<sup>300</sup> Local Government and Community Branch of the Department of the Internal Affairs *A Survey of Government Funding of Non-profit Organisations* (Department of Internal Affairs, October 2007) at 38.

<sup>301</sup> See Chapter I.

<sup>302</sup> O'Brien, Jackie Sanders and Margaret Tennant, *The New Zealand Non-profit Sector and Government Policy*, above n 275, at 39.

<sup>303</sup> O'Brien, Jackie Sanders and Margaret Tennant, *The New Zealand Non-profit Sector and Government Policy*, above n 275, at 39.

<sup>304</sup> O'Brien, Jackie Sanders and Margaret Tennant, *The New Zealand Non-profit Sector and Government Policy*, above n 275, at 40.

<sup>305</sup> At [76].

And:<sup>306</sup>

“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.”

The former, as noted earlier, directs a decision-maker to consider an entity’s intended purposes and aims. However, when viewed in isolation from surrounding statements as to probable lack of benefits when views are in question, this passage merely mandates that the ends are one component. Although manner and means seem to be used to ascertain what the purposes are, it does not say that benefit cannot be found in the manner of promotion. The second statement illustrates that public benefit can be found in advocacy and conduct, with explicit reference to “public participation in processes.” Combined, one possible interpretation of these statements is that the ends themselves are not the only way to demonstrate public benefit. Arguably, a decision-maker could assess the ends promoted for compliance with the public policy rule in the same way that the *Aid/Watch* approach contemplates. For example, in assessing our test case Family First, a decision-maker could find that their points of view are of inconclusive public benefit as a matter of evidence, but there is no identifiable infringement of the public policy rule. That decision-maker could then, on clear evidence of process benefits, rely on the second statement to conclude that in the current democratic context there is sufficient public benefit in the entity’s engagement in public debate and other political processes to justify an affirmative finding of benefit. What the decision-maker will have done is considered the ends, manner and means to ascertain the entity’s eligibility for charitable status. In other words, he or she will have complied with the requirements of *Greenpeace* while simultaneously not passing any value judgment on the merits of the entity’s purposes. Viewed in this way we could conclude that although framed very differently, both *Greenpeace* and *Aid/Watch* do in essence require the same considerations, although to different levels of fact and degree.

Such an interpretation might be supported by Matthew Harding who notes that:<sup>307</sup>

“It is not inconceivable that this element of the majority’s reasoning [being the advocacy statements] might, in time, develop along the more robust lines indicated in *Aid/Watch*.”

However, Harding also seems to believe that *Greenpeace* does require decision-makers to assess the benefits in the ends an entity is trying to achieve.<sup>308</sup> Therefore it is contestable as to whether or not my proposed reinterpretation could work. However, as I note above, a decision-maker *can* arguably undertake the required assessment of ends in order to negate public benefit on public policy grounds.

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<sup>306</sup> At [103].

<sup>307</sup> Matthew Harding “An Antipodean View of Political Purposes and Charity Law”, above n 19, at 184.

<sup>308</sup> At 184.

## 2. Argument 2: Why reinterpretation is justified by the wider judgment text

Whether or not the interpretation above is seen as viable depends on an assessment of the wider context of the judgment test. This assessment arguably demonstrates that engaging in substantial reinterpretation can be done in good faith and within the bounds of the decision as a whole.

As Harding notes, the question whether or not to abandon the doctrine against political purposes was the “...first, and most important, question...”<sup>309</sup> How to determine public benefit was not the central focus of the judgment, and neither did the Supreme Court actually adjudicate on that issue.<sup>310</sup> Furthermore, in relation to potential benefit from advocacy, the Supreme Court contemplates that the matter “requires closer consideration than has been brought to bear in the present case.”<sup>311</sup> Placing such a caveat on the matter indicates that the Supreme Court was not intending to set any such matter in stone, and that more thorough argument as to process benefits might happen elsewhere in the future.

We must also consider what factors contributed to the specific ends-focused statements. Firstly, although speculative statements as to the potential benefit of nuclear disarmament reveal the Supreme Court viewed Greenpeace’s ends as the most crucial public benefit matter,<sup>312</sup> they are obiter statements. Secondly, the judgment text between [27]-[31] and [72]-[74] suggests that the Court sees itself as merely removing the doctrine and continuing instead with the general requirements for assessing charitable status under the fourth head. However, as shown above, it is equally possible to continue the common law tradition in the way developed for religious purposes. However, the Court does not appear to consider the approach to religion at any point. Additionally, and also noted by Harding, “the majority chose not to engage at length...with the arguments about the limits of the judicial function...”<sup>313</sup> Also, “the majority chose not to consider in detail the developments in *Aid/Watch*.”<sup>314</sup> As a result the matter of public benefit in relation to political purposes was not considered in a way that attempted to deal with the severity of the issues that our benchmark requirement (1) identified.

Altogether, the lack of full consideration of the implications of an ends-focused model, the absence of an assessment of the potential adoption of *Aid/Watch* and the obvious intention of leaving fuller consideration of advocacy benefits for a different time and place suggests that we may utilise these inroads to build upon *Greenpeace*. Such an endeavour cannot be construed as in bad faith or contrary to any intention to set matters in stone.

## 3. Argument 3: Why reinterpretation is justified on wider grounds

As Robert Atkinson notes, “developments in charity law are notoriously glacial paced.”<sup>315</sup> For example, it was more than three years after first High Court judgment was released and the Supreme Court settled the matter. It is unlikely that a new precedent will be set anytime soon.

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<sup>309</sup> Matthew Harding “An Antipodean View of Political Purposes and Charity Law”, above n 19, at 182.

<sup>310</sup> At [104].

<sup>311</sup> At [103].

<sup>312</sup> At [88]-[102].

<sup>313</sup> Matthew Harding “An Antipodean View of Political Purposes and Charity Law”, above n 19, at 182.

<sup>314</sup> At 182.

<sup>315</sup> Rob Atkinson “Philanthropy’s Function: A Neo-Classical Reconsideration”, above n 130, at 21.

Although writing in the context of legislative reforms, Dunn and Sidel make an important point.<sup>316</sup>

“With an unfortunately less visible profile than other areas of law, charity law reform has often been overlooked or placed on a backburner ... When charity law reform is finally achieved it can be misconstrued as the completion of a long awaited reform process, rather than simply a milestone along the way.”

The same critique must apply to *Greenpeace*. Although a significant step forward for political purposes in charity law, the matter is in many ways still unsettled. *Greenpeace* needs to be understood as the first milestone in a process of refining the law accordingly as we go.

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<sup>316</sup> Alison Dunn and Mark Sidel “Law Reform and the Regulation of Charities: Some Comparative Thoughts” (2014) 17 CL & PR 15 at 139-140.



## CONCLUSION

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In many ways the main theme of this paper is opportunity. The purpose of building the normative benchmark was to assess what opportunities exist when the doctrine against political purposes is abandoned. The purpose of applying that benchmark to three test cases was to assess how well the two public benefit models reflect those opportunities. The *Greenpeace* ends-focused model did not meet the two requirements of the benchmark because of its failure to respond adequately to those opportunities. The *Aid/Watch* process-based model succeeded against the benchmark because its operation is likely to harness the potential of those opportunities. After this assessment what we appeared to be left with was a missed opportunity in New Zealand to adopt such an approach. However, what we then saw was that the opportunity was there all along, and arguably is still there today. Not only did the existing common law and New Zealand's political and democratic context give us the opportunity to adopt an *Aid/Watch* type approach, but *Greenpeace* might not have limited our opportunity to do so in the future. In a sense, *Greenpeace* itself presents the opportunity to still take up the opportunities that departure presented to us in the first instance. *Greenpeace* presents this opportunity to decisions-makers for whom *Greenpeace* may initially appear to have led "into murky and unfriendly waters."<sup>317</sup>

Of course whether or not decision-makers take up such an opportunity, the possibility of reinterpreting *Greenpeace* is undeniably there. It would take full commitment to not assessing the merits of a cause apart from determining if conspicuous harm is present, lest subjectivity and uncertainty remain at the fore. Apart from that, the political process itself presents an opportunity. If others view the process-based model in the same way this paper does but decision-makers do not develop upon *Greenpeace* in the desired way, then legislation to implement such a model is not outside the realm of the possible. No doubt political purpose groups will have seen departure from the doctrine as a new opportunity for increased ability to achieve their goals. If enough groups' expectations are deflated by the operation of an ends-focused model, then we can expect calls for further reform.

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<sup>317</sup> Matthew Harding "An Antipodean View of Political Purposes and Charity Law", above n 19, at 183.

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