CRITIQUE AND COMMENT

A CHARITY IN ALL BUT LAW: THE POLITICAL PURPOSE EXCEPTION AND THE CHARITABLE SECTOR

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This article examines the political purpose exception, which has prohibited charities from having non-ancillary political purposes. The origins of the modern definition of charity in early case law, through to the codification in modern statutes, are traced, and the reasons for the political purpose exception examined, as well as the difficulties and tensions that have arisen because of it. Finally, this article examines recent attempts in Australia and New Zealand to deal with some of the issues arising from the exception.

CONTENTS

* Judge of the Supreme Court of New Zealand. This article is based on the Sir George Turner Lecture, given at Melbourne Law School on 28 March 2018: Dame Susan Glazebrook, 'Charities, Politics and Tax' (Sir George Turner Lecture, Melbourne Law School, 28 March 2018) and was revised in late 2018 for publication. It was particularly apt that this lecture was on politics, tax and charities, given Sir George's illustrious political career, both in Victoria, as the first Australian-born Premier, and federally, as Treasurer. Thanks to the Dean of Melbourne Law School, Professor Pip Nicholson, and to Professor Ann O'Connell for inviting me to present the lecture. Thanks also to my clerk, Nichola Hodge, for her assistance with the lecture and this article. None of the views expressed are to be taken as the views of the Supreme Court of New Zealand. Nor can they be taken as being my definitive views on the matters addressed. My views would obviously be subject to change after hearing full argument in any future case.

I A Tale of Two Cases

I thought I would start by contrasting two cases.[1] The first concerned the establishment of a society for the rescue of badly treated animals and the prevention of cruelty to animals, which, in 1984, was held to be charitable.[2] The second related to an organisation dedicated to securing the release of prisoners of conscience and the eradication of torture, which in 1981 was held not to be charitable.[3] So what was going on? Was this a strange variant of the archaic idea that a gentleman may beat his wife but not his dog? Well, the given rationale was that the second organisation, Amnesty International, fell foul of the political purpose exception to the definition of charity, the subject of this article. In order to examine this exception, we must first start with the rule, in this case, the definition of charity.

II Charity Defined

The modern definition of charity has its origins in the English Reformation and the gap in the systems caring for the poor with the ousting of the Catholic Church.[4] In 1601, to help fill the void left by the Church, the *Statute of Charitable Uses 1601* ('*Statute of Elizabeth*') was passed to create a structure to supervise charities, encourage private donation and prevent abuses in the administration of some charities.[5]

[1] These cases are cited in Adam Parachin, 'Distinguishing Charity and Politics: The Judicial Thinking behind the Doctrine of Political Purposes' (2008) 45(4) *Alberta Law Review* 871, 871–2, 875–6 ('Distinguishing Charity and Politics').

[2] *Re Green's Will Trusts* [1985] 3 All ER 455.

[3] *McGovern v A-G* [1982] 1 Ch 321 ('*McGovern*').

[4] Juliet Chevalier-Watts, *Law of Charity* (Thomson Reuters, 2014) 5–6.

[5] *Statute of Charitable Uses 1601*, 43 Eliz 1, c 4 ('*Statute of Elizabeth*'). See *Gilmour v Coats* [1949] AC 426, 442–3 (Lord Simonds); Donald Poirier, *Charity Law in New Zealand* (Department of Internal Affairs, 2013) 72; ibid 6.

The Preamble to the *Statute of Elizabeth* provided a list of charitable purposes, including relief of aged, impotent and poor people, the maintenance of sick and maimed soldiers and the marriage of poor maids. It also included various educational activities and, somewhat oddly to modern ears, the repair of bridges and highways.

The first authoritative legal definition of charity (and its purpose), based on the preamble, was given by Lord Macnaghten in *Commissioners for Special Purposes of the Income Tax v Pemsel* ('*Pemsel*') in 1891.[6] His Lordship's definition provided a structured approach to the concept:

> 'Charity' in its legal sense comprises four principal divisions: trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads.[7]

Lord Macnaghten's definition survives in modern times. His formulation is the basis of the statutory definitions of charity/charitable purpose in Australia,[8] New Zealand,[9] and England and Wales.[10] In Canada, while there is no legislative definition of charity,[11] in order to get fiscal relief, charities must

[6] [1891] AC 531, 583 ('*Pemsel*'). Lord Macnaghten's formulation has been attributed to the definition advanced by the plaintiffs in *Morice v Bishop of Durham* (1805) 10 Ves Jr 522; 32 ER 947, 951. A legal definition of charity was needed, among other things, when, in 1805, William Pitt the Younger established the Commissioners for the Special Purposes of the Income Tax, who could allow relief from taxation imposed by the *Duties on Income Act 1799*, 39 Geo 3, c 13 if an entity was for charitable purposes: see Poirier (n 5) 81–2.

[7] *Pemsel* (n 6) 583.

[8] *Charities Act 2013* (Cth) s 12. For the purposes of this paper, the federal definition of 'charitable purpose', as defined in the *Charities Act 2013* (Cth), is used. A discussion on the relationship of the state and territorial legislative definitions of charity is beyond the scope of this paper; for more information on this point, see John Vaughan-Williams, 'The Future of Charity Regulation in Australia: Complexities of Change' (2016) 37(1) *Adelaide Law Review* 219, 233; Australian Charities and Not-For-Profits Commission, 'A Common Charity Definition' (Paper, The Tax Institute, 27 July 2016).

[9] *Charities Act 2005* (NZ) s 5.

[10] *Charities Act 2011* (UK) ss 2–3.

[11] See *Income Tax Act*, RSC 1985 (5th Supp), c 1, s 248(1), as at 27 March 2019.

register with the Charities Revenue Agency ('CRA'), which uses the *Pemsel* definition to determine charitable status.[12]

The influence of the Preamble on the definition of charity is of significance for at least two reasons. The first is that the Preamble was not meant to be a definition and the second is that the *Statute of Elizabeth* was passed in very different times and for very different purposes. This may explain some of the issues with modern definitions of charity, based, as they are, on the Preamble.

Further, as Lord Macnaghten noted, difficulties arise because 'the popular meaning of the words "charity" and "charitable" does not coincide with their legal meaning'.[13] I had my clerk do an informal survey of her colleagues at the Court as to what they thought of as charitable.[14] The common thread was that it involved giving altruistic assistance to those in need in a manner that was for the good of the community. The answers effectively concentrated on the first and fourth heads of the *Pemsel* definition and the important value of altruism. Significantly, for the next part of the discussion, they also concentrated on the provision of tangible benefits.

Of the four heads of charity identified by Lord Macnaghten, it is usually the fourth head (any other purpose beneficial to the community) that gives the most trouble, as it has the explicit requirement of being for the public benefit. In most statutory definitions, apart from in England and Wales,[15] the public benefit of the first three heads of charity — relief of poverty, advancement of education and advancement of religion — is assumed, even though that may not necessarily have been the position at common law.[16] The difficulty with the fourth head of charity is that the public benefit is not

[12] Canada Revenue Agency, *Fundraising by Registered Charities* (CG-013, 20 April 2012) <https://www.canada.ca/en/revenue-agency/services/charities-giving/charities/policies-guidance/fundraising-registered-charities-guidance.html>, archived at <https://perma.cc/GY9Y-5435>. See also Juliet Chevalier-Watts, *Charity Law: International Perspectives* (Routledge, 2018) 135–9.

[13] *Pemsel* (n 6) 583.

[14] I do not, of course, pretend that this survey has any statistical validity.

[15] *Charities Act 2011* (UK) s 4(2).

[16] See, eg, *Charities Act 2013* (Cth) s 7. It has been argued that the common law presumption that the first three heads of *Pemsel* (n 6) satisfy the public benefit requirement arose from the dicta of Lord Wright in *National Anti-Vivisection Society v Inland Revenue Commissioners* [1948] AC 31, 42 ('*Anti-Vivisection*'). For a brief discussion on this point in the context of the legislative changes in England and Wales, see Chevalier-Watts, *Charity Law: International Perspectives* (n 12) 97.

assumed. Assessing whether a particular end is in the public benefit is inherently problematic, as it places the courts in the delicate position of having to assess the merits of controversial matters.[17]

The earlier case law also required that, to come within the fourth head, a purpose had to be within the 'spirit and intendment' of the *Statute of Elizabeth*.[18] At the same time, it was recognised that the notion of what is in the public benefit can change as society itself changes.[19] Those two propositions sit rather uneasily together. The first requirement, it seems to me, is best described as seeking the 'vibe' of the *Statute of Elizabeth*.[20] The second concept is, to a degree, orthodox in terms of assuming that statutes are always speaking and adapting to modern conditions. The tension between these two points arises because the courts are left trying to work out how modern situations and views fit within the updated 'vibe' of the Preamble of a statute passed in very different times and for very different purposes, when it was not even intended as a definition.

This, in turn, raises the question of what exactly the 'vibe' of the *Statute of Elizabeth* is. Elias CJ, in *Re Greenpeace of New Zealand Inc* ('*Greenpeace*'), noted that, alongside reforming abuses of charitable trusts, the *Statute of Elizabeth* promoted 'private philanthropy in reducing the burden on parish ratepayers of poor relief'.[21] More generally, the *Statute of Elizabeth* was

[17] In Australia, and England and Wales, there has been a legislative attempt to define more closely the types of entities and issues that potentially come within the fourth head, but the public benefit must still be assessed. In Australia, see *Charities Act 2013* (Cth) s 12(1). In England and Wales, see *Charities Act 2011* (UK) s 3(1). A full discussion on the common law position on the history and governing principles of the public benefit test is beyond the scope of this paper; however, for more on this, see Kathryn Chan, *The Public-Private Nature of Charity Law* (Hart Publishing, 2016) 54–62.

[18] *Pemsel* (n 6) 543 (Lord Halsbury LC), presumably quoting *Morice v Bishop of Durham* (1804) 9 Ves Jr 399; 32 ER 656, 659 (Grant MR) ('*Morice (Trial)*'). For a discussion on *Morice (Trial)*, see GE Dal Pont, *Law of Charity* (LexisNexis Butterworths, 2nd ed, 2017) 85. See also *Anti-Vivisection* (n 16) 41 (Lord Wright), 67 (Lord Simonds); *Re Greenpeace of New Zealand Inc* [2015] 1 NZLR 169, 181–2 [18]–[21] (Elias CJ for Elias CJ, McGrath and Glazebrook JJ) ('*Greenpeace*').

[19] *Bowman v Secular Society Ltd* [1917] AC 406, 467 (Lord Sumner) ('*Bowman*'). See also *Greenpeace* (n 18) 182 [21] (Elias CJ for Elias CJ, McGrath and Glazebrook JJ).

[20] To steal the famous line from the film, *The Castle* (Working Dog Productions, 1997) 0:55:20–0:56:30.

[21] *Greenpeace* (n 18) 181 [19] (Elias CJ for Elias CJ, McGrath and Glazebrook JJ) (citations omitted).

intended to encourage individuals to provide for works that may otherwise have been borne by public resources.[22]

None of this, however, assists much in assessing the relationship between charities and politics and the reasons for the political purpose exception, to which I now turn.

III The Political Purpose Exception

Neither the *Statute of Elizabeth* nor its Preamble mentioned a political purpose exception — probably unsurprising given the date of its passage and the context in which it was passed. The political purpose exception arises from the requirement that the purposes of charities must be exclusively charitable.[23] Modern cases have said that it has long been held that a political purpose is not charitable.[24] Commentators, however, suggest that this was not in fact the case. They say that the exception is a relatively late entry,[25] and that it is based on a text published in 1888[26] and the misinterpretation of earlier case law.[27]

Lord Parker's dicta in *Bowman v Secular Society Ltd* ('*Bowman*') has been treated as the origin of the political purpose exception.[28] However, *Bowman*

[22] See ibid 182 [20] (Elias CJ for Elias CJ, McGrath and Glazebrook JJ).

[23] See *McGovern* (n 3).

[24] See, eg, the comments made by Lord Parker in *Bowman* (n 19), where he noted that 'a trust for the attainment of political objects *has always* been held invalid': at 442 (emphasis added).

[25] LA Sheridan, 'The Political Muddle: A Charitable View?' (1977) 19(1) *Malaya Law Review* 42, 43; Parachin, 'Distinguishing Charity and Politics' (n 1) 872–80. Elias CJ in *Greenpeace* (n 18) also made a similar point: at 193–4 [59]–[60] (Elias CJ for Elias CJ, McGrath and Glazebrook JJ).

[26] Amherst D Tyssen, *The Law of Charitable Bequests: With an Account of the Mortmain and Charitable Uses Act, 1888* (William Clowes and Sons, 1888). See below n 28.

[27] Tyssen relied on *De Themmines v De Bonneval* (1828) 5 Russ 288; 38 ER 1035 ('*De Themmines*'), which held void a charity that wanted to publish material asserting the supremacy of the Pope over the State in ecclesiastical matters: Tyssen (n 26) 125. Tyssen saw the book in question to be political rather than religious and he concluded that the case meant that 'a trust to keep up a particular political opinion is not a charity': at 125. For a discussion on this point, see Parachin, 'Distinguishing Charity and Politics' (n 1) 878–9; Michael Chesterman, *Charities, Trusts and Social Welfare* (Weidenfeld and Nicolson, 1979) 182.

[28] *Bowman* (n 19) 442. Lord Parker did not cite Tyssen (n 26) but is believed to have relied on it: see Parachin, 'Distinguishing Charity and Politics' (n 1) 879. Tyssen (n 26) was later cited

was not in fact a case on charities at all. Rather, the case concerned whether a gift of the remainder of a deceased's estate to a society that discouraged belief in the supernatural was void, which it would have been if promoting anti-Christian information had amounted to the offence of blasphemy.[29] The majority held that it did not, as long as the views were expressed politely.[30] In the course of his judgment, however, Lord Parker discussed the dividing line between charitable and political trusts; the latter, he said, not being charitable.[31]

The political purpose exception was picked up over the years in cases in New Zealand,[32] Canada[33] and, although with a bit less enthusiasm, Australia.[34] It is not the law in Scotland or the United States, where charities

and quoted by Lord Wright in *Anti-Vivisection* (n 16): at 50, quoting Tyssen (n 26) 177. See also Parachin, 'Distinguishing Charity and Politics' (n 1) 876–80.

29 *Bowman* (n 19) 436, 445 (Lord Parker).

30 Ibid 448 (Lord Parker), 466–7 (Lord Sumner), 475, 477 (Lord Buckmaster). Lord Parker summarised the position, noting that

> there is nothing contrary to the policy of the law in an attack on or a denial of the truth of Christianity or any of its fundamental doctrines, provided such attack or denial is unaccompanied by such an element of vilification, ridicule, or irreverence as is necessary for the common law offence of blasphemy.

Ibid 448.

31 Ibid 442.

32 See, eg, *Re Wilkinson; Perpetual Trustee Estate & Agency Co of New Zealand Ltd v League of Nations Union of New Zealand* [1941] NZLR 1065, 1076 (Kennedy J); *Knowles v Commissioner of Stamp Duties* [1945] NZLR 522, 528 (Kennedy J); *Molloy v Commissioner of Inland Revenue* [1981] 1 NZLR 688, 697–8 (Somers J for the Court) ('*Molloy*'). There was a suggestion that New Zealand had codified the political purpose exception but, as I discuss later, that was, by majority, held not to have been so in *Greenpeace* (n 18): see below Part IV(B). New Zealand charities legislation is currently under review, although the political purpose exception is not part of the terms of reference: see 'Modernising the Charities Act 2005', *Te Tari Taiwhenua — Department of Internal Affairs* (Web Page) <https://www.dia.govt.nz/charitiesact>.

33 See, eg, *Vancouver Society of Immigrant Women & Visible Minority Women v Minister of National Revenue* [1999] 1 SCR 10, 82 [107] (Gonthier J for L'Heureux-Dubé, Gonthier and McLachlin JJ), 130 [190] (Iacobucci J for Cory, Iacobucci, Major and Bastarache JJ); *Alliance for Life v Minister of National Revenue* [1999] 3 FC 504, 528–9 [36] (Stone JA, Linden JA agreeing at 559, McDonald JA agreeing at 559). It is of interest to note that the Canadian jurisprudence may have developed differently had Boyd C's dismissal of the political purpose rule in *Farewell v Farewell* (1892) 22 OR 573 been endorsed: at 580–1.

34 See, eg, *Royal North Shore Hospital of Sydney v A-G (NSW)* (1938) 60 CLR 396, 426 (Dixon J) ('*Royal North Shore Hospital*'); *A-G (NSW) v The NSW Henry George Foundation Ltd* [2002] NSWSC 1128, [45] (Young CJ in Eq).

are free to advocate for changes in legislation or policy by lawful means.[35] The exception is that they may not directly or indirectly promote the election of a political party.[36]

Canada, after some difficulty with the issue, had codified the political purpose exception for income tax purposes, but allowed charities to carry out limited non-partisan political activities in support of their charitable purposes.[37] The Charities Revenue Agency ('CRA') guidance allowed no more than 10% of resources to be spent on such activities and required reporting on the political activities carried out.[38]

The political purpose exception in Canada was, however, the subject of controversy. In 2012, the then conservative government announced that it would audit charities to examine their political activities.[39] Many charities saw this as a targeted attack, with allegations that the charities chosen for these audits were those that had been criticising the government's policies and,[40] in

[35] 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(2) *Melbourne University Law Review* 353, 360–1. In the United States, if expenditure for legislative change exceeds certain limits, then it is no longer a charity for taxation purposes: IRC § 501 (2012). In Scotland, it appears that a charity's tax status is assessed by consideration of its 'trading activities', rather than its political engagement: see Scottish Charity Regulator, *Charities and Trading Guide* (Guide, March 2018).

[36] Ibid 361, 361 n 64. See *Charities and Trustee Investment (Scotland) Act 2005* s 7(4); IRC § 501(c)(3) (2012).

[37] *Income Tax Act*, RSC 1985 (5th Supp), c 1, ss 149.1(1), (6.1), (6.2), as at 27 August 2018. See also Chevalier-Watts, *Charity Law: International Perspectives* (n 12) 130–5.

[38] Canada Revenue Agency, *Political Activities* (CPS-022, 2 September 2003) item 9; see also item 13 <https://www.canada.ca/en/revenue-agency/services/charities-giving/charities/policies-guidance/policy-statement-022-political-activities.html>, archived at <https://perma.cc/5L64-BFYV>. This limit has now been removed: see below n 49 and accompanying text. Note the recent decision of *Canada Without Poverty v A-G (Canada)* (2018) OR (3d) 754 (Morgan J) ('*Canada Without Poverty*') (discussed further below Part III(A)).

[39] Dean Beeby, 'Canada Revenue Agency's Political-Activity Audits of Charities', *CBC News* (online, 6 Aug 2014) <https://www.cbc.ca/news/politics/canada-revenue-agency-s-political-activity-audits-of-charities-1.2728023>, archived at <https://perma.cc/ZG4E-R23F>.

[40] See Adam Parachin, 'Reforming the Regulation of Political Advocacy by Charities: From Charity under Siege to Charity under Rescue?' (2016) 91(3) *Chicago-Kent Law Review* 1047, 1048, 1053 ('Reforming the Regulation'); Dean Beeby, 'Canadian Charities Feel 'Chill' as Tax Audits Widen into Political Activities', *The Star* (online, 10 July 2014) <https://www.thestar.com/news/canada/2014/07/10/canadian_charities_feel_chill_as_tax_audits_widen_into_political_activities.html>, archived at <https://perma.cc/M49E-5BNA>.

particular, environmental charities.[41] The threat of audits was said to have created an 'advocacy chill'[42] and the audits became a campaign issue during the 2015 election, with the winning Liberal party promising to stop them.[43] The suspension of the audits only occurred in May 2017.[44]

A consultation panel was set up by the Minister of National Revenue in September 2016 (the 'Panel').[45] In its report of March 2017, the Panel recommended that the CRA should amend its administrative guidance to 'permit a charity to engage in public policy dialogue and development, if it furthers a charity's charitable purposes, is subordinate to those purposes and is non-partisan in nature'.[46] It also recommended that 'charities should not have to quantify and report' on these activities.[47] It was made clear, however, that the current legal requirement that charities be 'constituted and operated exclusively for charitable purposes' be maintained.[48] The Canadian government passed legislation in late 2018 permitting charities to carry on unlimited public policy dialogue and development activities in furtherance

[41] See Dean Beeby, 'Canada Revenue Agency Accused of "Political" Targeting of Charities', *Maclean's* (online, 3 Aug 2014) <https://www.macleans.ca/news/canada/canada-revenue-agencys-political-targeting-of-charities-under-scrutiny/>, archived at <https://perma.cc/PD9R-Z2V3>.

[42] See Gareth Kirkby, 'An Uncharitable Chill: A Critical Exploration of How Changes in Federal Policy and Political Climate are Affecting Advocacy-Oriented Changes' (MA Thesis, Royal Roads University, June 2014).

[43] See below n 44.

[44] See Bruce Campion-Smith and Alex Ballingall, 'Liberals Suspend Tax Audits of Political Charities', *The Star* (online, 4 May 2017) <https://www.thestar.com/news/canada/2017/05/04/ottawa-urged-to-give-charities-more-freedom-to-speak-out.html>, archived at <https://perma.cc/6SUF-T8WP>; Dean Beeby, 'Political Activity Audits of Charities Suspended by Liberals', *CBC News* (online, 5 May 2017) <https://www.cbc.ca/news/politics/canada-revenue-agency-political-activity-diane-lebouthillier-audits-panel-report-suspension-1.4099184>, archived at <https://perma.cc/E6WJ-3MQ7>.

[45] *Report of the Consultation Panel on the Political Activities of Charities* (Report, 31 March 2017) 4–6.

[46] Ibid 17.

[47] Ibid 17–18.

[48] Ibid 22–3.

of a stated charitable purpose.[49] There is also a current Special Senate Committee examining the impact of the federal and provincial policies governing charities.[50]

The courts have become involved in the controversy. In a recent decision,[51] the Ontario Superior Court of Justice held that the CRA's 10% threshold is an arbitrary restriction on freedom of expression and contrary to the *Canadian Charter of Rights and Freedoms*.[52] The Court made a declaration that the CRA must stop enforcing the policy.[53]

[49] *Budget Implementation Act 2018 (No 2)*, SC 2018, c 27, s 17, amending *Income Tax Act*, RSC 1985 (5th Supp), c 1, s 149.1. Section 149.1(10.1) now provides that

> public policy dialogue and development activities carried on by an organization, corporation or trust in support of its stated purposes shall be considered to be carried on in furtherance of those purposes and not for any other purpose.

A charity must still operate 'exclusively for charitable purposes': at ss 149.1(1) (definition of 'charitable foundation'), (definition of 'charitable organization' para (a)); and must not support (or oppose) 'any political party or candidate for public office': at ss 149(6.1)–(6.2). See also draft guidance published by the CRA: Canada Revenue Agency, *Public Policy Dialogue and Development Activities by Charities* (CG-027, 21 January 2019) <https://www.canada.ca/en/revenue-agency/services/charities-giving/charities/policies-guidance/public-policy-dialogue-development-activities.html>, archived at <https://perma.cc/UX2P-KLBL>.

[50] See Special Senate Committee on the Charitable Sector, 'New Senate Committee to Consider Ways to Bolster Charitable Sector' (News Release, 9 May 2018) <https://sencanada.ca/en/newsroom/cssb-new-senate-committee-consider-ways-bolster-charitable-sector/>, archived at <https://perma.cc/88W5-DVDR>. See also Wendy Williams, 'Canada Reviewing Impact of Charity Sector' (News Release, *Pro Bono Australia*, 6 Feb 2018) <https://probonoaustralia.com.au/news/2018/02/canada-reviewing-impact-charity-sector/>, archived at <https://perma.cc/Y5EP-4ENW>.

[51] *Canada Without Poverty* (n 38).

[52] *Canada Act 1982* (UK) c 11, sch B pt I ('*Canadian Charter of Rights and Freedoms*'). Ibid 774 [62], [66] (Morgan J). The ban on partisan politics was maintained: at 776 [73] (Morgan J). For a discussion on this case, see Dean Beeby, 'CRA Loses Court Challenge to its Political-Activity Audits of Charities', *CBC News* (online, 18 July 2018) <https://www.cbc.ca/news/politics/charity-political-audits-cra-lebouthillier-farha-poverty-environmental-gray-liberal-1.4750295>, archived at <https://perma.cc/TP6T-XUVM>.

[53] *Canada Without Poverty* (n 38) 775 [70] (Morgan J). The government planned to appeal the decision: Canada Revenue Agency, 'Statement by the Minister of National Revenue and the Minister of Finance on the Government's Commitment to Clarifying the Rules Governing the Political Activities of Charities' (Press Statement, 15 August 2018) <https://www.canada.ca/en/revenue-agency/news/2018/08/statement-by-the-minister-of-national-revenue-and-minister-of-finance-on-the-governments-commitment-to-clarifying-the-rules-governing-the-political.html>, archived at <https://perma.cc/FWS9-CHQH>. However, it subsequently decided to discontinue its appeal: Government of Canada, 'Government Response to the Report of the Consultation Panel on the Political Activities of Charities'

A *Politics Defined*

But what is political for the purposes of the political purpose exception? My clerk's informal survey of her colleagues included a question on what they understood the term 'political' to mean. Interestingly, there was a split in answers. Around half of the participants talked about 'political' being associated with government or trying to get into government. The other set of answers related to the wider concept of trying to influence the government's legislative programme or policies. For the purposes of the political purpose exception, this wider view of 'political' tends to be used.[54]

With some symmetry with the *Pemsel* definition of charity, there are four heads of activities deemed political in the case law.[55] The first is 'to further the aims of a recognized political party'.[56] Most of us would have no difficulty including this in the term 'political'. The second is to 'promote the spread of a general political doctrine, such as socialism'.[57] Again, most of us would have little difficulty with this coming within the definition of political activities.

The third may be more problematic. It is considered political to 'persuade the public to adopt a particular attitude towards some broad social question', such as improving 'community relations or international peace'.[58] There is an obvious tension with this concept of 'political' and the education limb of the definition of charity.[59] It is also important to note that entities coming within this category seek to influence the public, not necessarily the government. Of course, the government is of, and for, the people, and the public in turn influences the government and its legislation and policy.

Like the definition of charity itself, it is the final category of 'political' that raises the most issues. The term 'political' includes any 'attempt to bring about

(News Release, 7 March 2019) <https://www.canada.ca/en/revenue-gency/services/charities-giving/charities/whats-new/government-response-report-consultation-panel-politcal-activities.html>, archived at <https://perma.cc/Y4LD-6N37>.

54 See, eg, *McGovern* (n 3) 334, 339 (Slade J). See also Chesterman, *Charities, Trusts and Social Welfare* (n 27) 181; Hamish McQueen, 'The Peculiar Evil of Silencing Expression: The Relationship between Charity and Politics in New Zealand' (2012) 25(1) *New Zealand Universities Law Review* 124, 128. The wider view does, of course, encompass the narrower view of the term.

55 Chesterman, *Charities, Trusts and Social Welfare* (n 27) 181.

56 Ibid.

57 Ibid.

58 Ibid.

59 See below Part III(G).

or oppose changes in the law' (whether at home or abroad).[60] This category is usually also seen as encompassing advocation for government policy changes, whether they require legislation or not.

It was the fourth category that, as mentioned above, tripped up Amnesty International in *McGovern*.[61] *McGovern* concerned whether Amnesty International could be registered as a charity in the United Kingdom. Its purposes included looking after victims of torture, undertaking research into the observance of human rights, attempting to procure the release of political prisoners and seeking the abolition of torture.[62] It was the last two of these objects that got it into trouble. It was held that Amnesty International could not be charitable, as one of its main objects was to change domestic or foreign legislation and policy.[63] This was deemed to be political in nature and meant that Amnesty International did not have exclusively charitable purposes, despite its other purposes being charitable.[64]

There had been an argument that Amnesty International's research limb was not charitable, but Slade J held that, had it stood alone, his Honour would not have denied the organisation charitable status.[65] The mere theoretical possibility that the research could be used in the future for a political purpose did not detract from the clear public benefit of disseminating information.[66]

B *Purpose versus Activities*

It was an entity's political purposes rather than its political activities that triggered the exception, although activities could be used to discern purpose in some circumstances.[67] The concentration on charitable purpose meant that,

[60] Chesterman, *Charities, Trusts and Social Welfare* (n 27) 181.

[61] *McGovern* (n 3) 338–9 (Slade J).

[62] Ibid 329–30 (Slade J).

[63] Ibid 347–8, 352 (Slade J). As mentioned above, to be charitable, the purpose of an entity must be exclusively charitable: see above n 23 and accompanying text.

[64] *McGovern* (n 3) 352–3 (Slade J). There is debate as to when advocating for policy change was first considered to fall under the political purpose exception, as Lord Normand in *Anti-Vivisection* (n 16) briefly touched upon the issue: at 76. It was only in *McGovern* (n 3) that it was expressly held that attempting to change governmental policy fell within the exception.

[65] *McGovern* (n 3) 353.

[66] Ibid.

[67] See Chia, Harding and O'Connell (n 35) 356, 356 n 17; Dal Pont (n 18) 306–7.

if an entity only engaged in political activities incidentally and for the attainment of a charitable purpose, then it could still be charitable.[68] This distinction between purposes and activities does, however, require the unrealistic assumption that political activities can exist independently of a political purpose. Dunn has categorised the distinction as 'arbitrary', as it focuses on how a charity presents its message, rather than the message itself.[69]

The leading case on the distinction between purposes and activities is *National Anti-Vivisection Society v Inland Revenue Commissioners* ('*Anti-Vivisection*').[70] It is possible, however, that the law may have taken a different course if the minority view in that case had prevailed. In *Anti-Vivisection*, the majority of the House of Lords held that a society established to stop vivisection was not charitable, as its main purpose was advocating for the repeal of the legislation controlling vivisection and its replacement by legislation outlawing the practice altogether.[71] The majority also held that the objects of the National Anti-Vivisection Society (the 'Society') were not for the public benefit, given the health benefits that could arise to both animals and humans from vivisection.[72]

[68] See *Anti-Vivisection* (n 16) 51 (Lord Wright), 61 (Lord Simonds), 76–7 (Lord Normand). This is the approach adopted by the Charity Commission for England and Wales: Charity Commission for England and Wales, *Campaigning and Political Activity Guidance for Charities* (CC9, March 2008) 10. The Commission has, however, taken what has been seen as a generous approach, as it allows charities to focus all of their resources on political activities for a limited amount of time: at 10–12. The Commission has, as Chan notes, 'effectively replaced the judiciary … for determining questions of charitable status': Chan (n 17) 137 (citations omitted). This can be contrasted to the former 10% limit set by the CRA in Canada: see above n 38 and accompanying text. There is a discussion of the approach taken in England and Wales in McQueen (n 54) 130.

[69] Alison Dunn, 'Charity Law as a Political Option for the Poor' in Charles Mitchell and Susan R Moody (eds), *Foundations of Charity* (Hart Publishing, 2000) 57, 58.

[70] *Anti-Vivisection* (n 16).

[71] It was accepted that the main object of the Society was the total abolition of vivisection which required the repeal of relevant parts of the *Cruelty to Animals Act 1876*, 39 & 40 Vict, c 77 and the replacement with provisions to the desired effect: *Anti-Vivisection* (n 16) 42–3, 51 (Lord Wright), 62 (Lord Simonds).

[72] Lord Wright referenced a report of the Royal Commission on Vivisection: United Kingdom, *Report of the Royal Commission on the Practice of Subjecting Live Animals to Experiments for Scientific Purposes* (C 1397, 1876). He noted that there was 'amply sufficient evidence of the utility of vivisection' and 'enormous advances in science and research which has been accepted by the commissioners in their findings of fact on the utility of vivisection': *Anti-Vivisection* (n 16) 46. I interpolate these health benefits did not of course arise for the vivisected animal.

Had the minority view prevailed, however, the judicial framework may have developed differently, with *McGovern* likely being decided the other way. As Lord Porter, the dissenting judge, saw it, the primary object of the society in *Anti-Vivisection* was the prevention of 'animal suffering caused by vivisection'.[73] Although this could have been achieved without a change to the law (if all members of the community could have been induced to desist from these practices), a direct change in the law was the more effective, and likely, means to that end. Lord Porter was unable to accept the proposition that the anti-slavery campaign, for example, would have been charitable, as long as the supporters did not advocate for legislative change, but would have been political as soon as they did.[74] Lord Porter observed: 'To take such a view would to me be to neglect substance for form.'[75]

As to the issue of public benefit, Lord Porter considered that charities for the protection of animals were within the class of objects considered charitable.[76] Once that conclusion was reached, it was not for the courts to hear evidence as to whether the particular means of achieving the object were in fact beneficial. In the case at hand, therefore, it was not for the courts to decide if the benefits of vivisection outweighed the suffering of animals through an examination of the evidence.[77] Lord Porter did say that, if the means advocated for by the Society had been a mere fad or against public policy, which no one had suggested, then the situation would have been different.[78]

In *McGovern*, had Lord Porter's view prevailed, it could well have been argued that Amnesty International's main purpose was the clearly charitable one of aiding torture victims and stopping torture by a number of means and not just through legislative change. This would have meant it was charitable.

I also remark that it is possible that *McGovern* may have been decided the other way, even by the majority judges in *Anti-Vivisection*. This is because those judges did conceive of situations where seeking legislative change could be a subsidiary or ancillary purpose that did not engage the political purpose

[73] *Anti-Vivisection* (n 16) 55.

[74] Ibid.

[75] Ibid.

[76] Ibid 56. This was in spite of the finding of the Commissioners that the success of the society would be gravely injurious to the public benefit: at 53–4.

[77] Ibid 59 (Lord Porter).

[78] Ibid 60.

exception. Lord Normand put this the most clearly, when he said that it was necessary to discover the general purposes of the entity and see if they are, in the main, charitable or political, it all being a 'question of degree'.[79]

Thus, had the majority found that the Society in *Anti-Vivisection* was advocating for the wider and more general purpose of preventing cruelty to animals rather than simply advocating for legislative change, it is possible that the majority may have held it to be charitable. If the same reasoning had been applied in *McGovern*, it is possible that Amnesty International's purpose would have been found to be the prevention of torture generally, with any political purpose merely ancillary. On this basis, the organisation may have been found to be charitable.

In light of the history of the exception, I now move to a discussion of why the exception may have arisen.

C *Shift in the Role of Charities*

Chesterman has argued that the purpose of philanthropic behaviour has traditionally been to influence the behaviour of the receiving class.[80] This was particularly true of charities of the Tudor era and in the late 18th and 19th centuries. Charity was given to people who, in the eyes of the providers, deserved it.[81] This often meant that it went to those who were prepared to adopt the provider's values — or pretended to at least.[82]

Even now, many charities are still designed to modify behaviour, such as budgeting charities and those dealing with substance abuse or problem gambling.[83] I am not suggesting that entities performing these functions should not be charitable or that their activities are anything other than worthy. Rather, this example highlights that the activities of charities cannot be viewed in isolation from their underlying purpose. Organisations that seek

[79] Ibid 76–7. For the position of the other Lords, see above n 68. This indicated a more generous approach to the terms 'incidental' and 'ancillary' than adopted in other jurisdictions such as Canada (before 2018): see McQueen (n 54) 129–30.

[80] Chesterman, *Charities, Trusts and Social Welfare* (n 27) 352.

[81] Ibid.

[82] See ibid 355, quoting Benedict Nightingale, *Charities* (Allen Lane, 1973) 302.

[83] See, eg, 'What We Do', *Victorian Responsible Gambling Foundation* (Web Page) <https://responsiblegambling.vic.gov.au/about-us/what-we-do/>, archived at <https://perma.cc/L63B-QDHC>.

to persuade their clients to modify their behaviour do so because they believe that it will be in the clients', and the community's, best interests. This can be seen as having a political undertone.

In modern times, as well as undertaking traditional charitable activities (ie those more clearly concentrating on the provision of tangible benefits), many entities are seeking to challenge the established order for the benefit of the vulnerable and for the community as a whole.[84] They argue that it is not individuals but society that needs to change.[85] This is basically an attempt to tackle the cause and not just the symptoms of problems. Such goals can be seen as more traditionally political, albeit espoused for altruistic reasons and with the sincere belief that they will create a better society — claims often supported by scientific and empirical evidence.

It has been argued that the political purpose exception emerged as a response to entities directing their attention away from the individual and turning it towards society as a whole, thus threatening the established order.[86] In light of the exception's common law history, this seems plausible.

Professor Drassinower has said that there is a logical distinction between politics and charity, in that '"[c]harity" seeks changes *in* society' whereas '"[p]olitics" seeks changes *of* society'.[87] I agree this might be a way of articulating the differences in terms of the case law. However, it begs the question of whether such a distinction should be made, which leads us to an examination of the rationale for the exception.

D *Rationale*

So, what of the rationale for the political purpose exception. In *Bowman*, Lord Parker put it this way:

> [A] trust for the attainment of political objects has always been held invalid, not because it is illegal, for every one is at liberty to advocate or promote by any lawful means a change in the law, but because the Court has no means of

[84] Chesterman, *Charities, Trusts and Social Welfare* (n 27) 358.

[85] Ibid.

[86] See ibid 355; Abraham Drassinower, 'The Doctrine of Political Purposes in the Law of Charities: A Conceptual Analysis' in Jim Philips, Bruce Chapman and David Stevens (eds), *Between State and Market: Essays on Charities Law and Policy in Canada* (McGill-Queen's University Press, 2001) 288, 299.

[87] Drassinower (n 86) 299 (emphasis in original).

> judging whether a proposed change in the law will or will not be for the public benefit …[88]

Further justifications for the doctrine have been that 'the law could not stultify itself by holding that it was for the public benefit that the law itself should be changed'.[89] There is the related point that the courts should not usurp the functions of Parliament by deciding whether proposed changes to the law would be for the public benefit.[90] There is an added issue of international comity, where the legislation or policy changes advocated for are to foreign law or policy.[91]

The cases have also addressed the difficult situation where everyone can agree that an ultimate goal is worthy, but where opinions on the means to achieve that goal are divided. In such cases, the courts have said it is impossible to assess the public benefit of the methodology advocated for.[92] Similar issues arise where the topic is highly controversial. The concern is that the courts would be compromising their neutrality by picking one side over the other.[93] This is especially evident where the choice can be seen as arising from moral beliefs, such as issues of abortion or euthanasia.

It is interesting to observe that the commentary on the cases, rather than the cases themselves, addresses the elephant in the room with the final rationale: that it is inappropriate for political organisations to benefit from the fiscal advantages given to charities.[94]

[88] *Bowman* (n 19) 442.

[89] Tyssen (n 26) 177. This justification given by Tyssen was referred to with approval in *Anti-Vivisection* (n 16) by Lord Wright: at 50; and Lord Simonds: at 62.

[90] *Anti-Vivisection* (n 16) 50 (Lord Wright).

[91] *McGovern* (n 3) 337–8 (Slade J).

[92] *Anti-Vivisection* (n 16) 62 (Lord Simonds), quoted in *McGovern* (n 3) 335–6 (Slade J).

[93] Parachin, 'Reforming the Regulation' (n 40) 1067.

[94] Nicola Silke, '"Please Sir, May I Have Some More?" Allowing New Zealand Charities a Political Voice' (2002) 8(2) *Canterbury Law Review* 345, 355–6; Dal Pont (n 18) 276–7, quoting United Kingdom, *Charities: A Framework for the Future* (Cm 694, 1989) 11–12; McQueen (n 54) 140–2. This point was, however, briefly touched upon by Lord Wright in *Anti-Vivisection* (n 16) 52.

E *Assessment of Rationale*

So, let us have a look at these rationales more closely, starting with the rationale given by Lord Parker in *Bowman*. Lord Parker has been criticised for saying that courts have no means to judge proposed changes to the law.[95] I think his main concern might have been to preserve the role of the courts as interpreters, rather than evaluators, of the law. But, even if that is not the case, the criticism may be somewhat unfair. It is unlikely that charities advocating a change in the law would be advocating for technical changes to legislation, where, indeed, judges might have some expertise. Charities will often be advocating for broader legislation with a high policy content, and there may indeed be a question of institutional competence to assess the benefits or otherwise of such legislation.[96]

On the other hand, it is difficult to see how one could say that it is impossible for judges to assess whether or not legislation outlawing torture is, or is not, in the public benefit, as was the issue in *McGovern*. It is, after all, a pretty simple question and one that might be thought to have an obvious answer.[97] So, while institutional incompetence can provide a reason why the courts may not be able to assess public benefit in some cases, it does not, in itself, justify a blanket ban on assessing whether a change in legislation would be for the public benefit in all cases.

The idea that the courts do not have the ability to assess whether a proposed change would be for the public benefit creates an inherent tension with the test for determining whether an entity is charitable.[98] Under the

[95] LA Sheridan, 'Charity versus Politics' (1973) 2(1) *Anglo-American Law Review* 47, 57–8.

[96] See Justice Susan Glazebrook, 'Intermediate and Final Courts of Appeal: Chalk and Cheese?' (2017) 26(2) *Journal of Judicial Administration* 98, 101–3.

[97] See, eg, *Universal Declaration of Human Rights*, GA Res 217A (III), UN Doc A/810 (10 December 1948) art 5; *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 7; *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987); *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 37; *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) art 15; *Optional Protocol to the International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) arts 1–5 (accountability provisions). The prohibition against torture is also a peremptory norm of international law: see below n 114.

[98] Silke (n 94) 353; Parachin, 'Distinguishing Charity and Politics' (n 1) 876, 881–7.

Pemsel definition, the assessment of public benefit is an integral part of the definition of charity, at least for the fourth head. The contradiction thus lies in the necessity of conducting a 'for the public benefit' test in the first step of the inquiry, when determining if an entity can be a charity, but pleading inability to conduct the same inquiry if there is an alleged political purpose.[99]

The next rationale is that the law should not stultify itself, which was a justification given by Lord Wright in *Anti-Vivisection*.[100] This justification is hard to understand. Seeing the law as immutable would be much more likely to stultify the law than admitting the law might be in need of amendment. I think, however, that Lord Wright's concern was better articulated by Dixon J in *Royal North Shore Hospital of Sydney v Attorney-General (NSW)*.[101] His Honour said:

> It is, of course, quite clear that any purpose which is contrary to the established policy of the law cannot be the subject of a good charitable trust. But there is a further consideration arising from the very nature of the doctrine by which charitable trusts are supported. Under all four heads of the well-known classification to which such trusts are referred, an essential element is the real or imputed intention of contributing to the public welfare. A coherent system of law can scarcely admit that objects which are inconsistent with its own provisions are for the public welfare.[102]

While I can see an argument that a fundamental attack on the policy of the law could be a threat to the rule of law, it is difficult to see advocating for change in a particular part of the law as a threat to the coherence of the law.[103] This rationale could also potentially favour those advocating the status quo over those advocating for change and, of course, as recognised in case law, advocating for no change can be just as political as advocating for change.[104]

99 Silke (n 94) 353.

100 *Anti-Vivisection* (n 16) 50, quoting Tyssen (n 26) 177.

101 *Royal North Shore Hospital* (n 34).

102 Ibid 426.

103 A similar point was made more recently by the majority of the High Court of Australia: *Aid/Watch Inc v Federal Commissioner of Taxation* (2010) 241 CLR 539, 555–6 [44]–[45] (French CJ, Gummow, Hayne, Crennan and Bell JJ) ('*Aid/Watch*').

104 Take, for example, the New Zealand case where a society that opposed change to legislative provisions concerning abortion was held to be political: *Molloy* (n 32) 697–8 (Somers J for the Court).

It seems to me that it cannot be assumed that the law as it stands is necessarily in the best interests of all of society. For example, in the past it was not a criminal offence for a man to rape his wife. Marital rape was only made illegal in New Zealand in 1985[105] and in Australia at various times from the 1980s onwards.[106] Further, until 1986 in New Zealand and up until the 1990s in some parts of Australia, gay men risked criminal prosecution for acts between consenting adults in private.[107]

A related rationale for the political purpose exception rests on the function of the courts being to apply the law and not to usurp the functions of

[105] *Crimes Amendment (No 3) 1985* (NZ) s 2, amending *Crimes Act 1961* (NZ). See generally Anne Else, 'Gender Inequalities: Sexuality', *Te Ara: The Encyclopaedia of New Zealand* (Web Page, 20 June 2018) <https://teara.govt.nz/en/gender-inequalities/page-2>, archived at <https://perma.cc/2SAS-VT9C>.

[106] For a general discussion, see Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence: A National Legal Response* (ALRC Report No 114, October 2010) vol 1, 1113 [24.59]. Criminalisation of marital rape in Australia commenced in 1976 with the partial criminalisation through the *Criminal Law Consolidation Act Amendment Act 1976* (SA) s 12, amending *Criminal Law Consolidation Act 1935* (SA) s 73, and ended with full criminalisation of marital rape in 1994 with the *Criminal Code Amendment Act 1994* (NT), amending *Criminal Code Act 1983* (NT) s 192. See also Lisa Featherstone, 'Rape in Marriage: Why Was It So Hard to Criminalise Sexual Violence?', *Australian Women's History Network* (Blog Post, 7 December 2016) <http://www.auswhn.org.au/blog/marital-rape/>, archived at <https://perma.cc/27EU-WFPT>. A majority in the High Court of Australia said in dicta that marital rape was no longer part of the common law, if it had ever been: *R v L* (1991) 174 CLR 379, 390 (Mason CJ, Deane and Toohey JJ). A different majority in the High Court later expressly held that immunity for marital rape had ceased to be part of the common law of Australia (if it had ever been part of it) following the legislative enactment of *Criminal Law Consolidation Act 1935* (SA) in 1935: *PGA v The Queen* (2012) 245 CLR 355, 369 [18] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).

[107] Legislative reform occurred in New Zealand with the passing of the *Homosexual Law Reform Act 1986* (NZ), amending *Crimes Act 1961* (NZ). In Australia, reform occurred over several years, beginning with South Australia passing the *Criminal Law (Sexual Offences) Amendment Act 1975* (SA), amending *Criminal Law Consolidation Act 1935* (SA) and ending in 1997, with Tasmania passing the *Criminal Code Amendment Act 1997* (Tas) s 5, repealing *Criminal Code Act 1924* (Tas) sch 1 s 123. For a general discussion on the Australian position, see Graham Carbery, *Towards Homosexual Equality in Australian Criminal Law: A Brief History* (Australian Lesbian & Gay Archives, 2nd rev ed, 2014). See also Rodney Croome, 'Gay Law Reform' in Alison Alexander (ed), *The Companion to Tasmanian History* (Centre for Tasmanian Historical Studies, 2005) 154, 154; Ben Winsor, 'A Definitive Timeline of LGBT+ Rights in Australia', *SBS* (Web Page, 15 November 2017) <https://www.sbs.com.au/topics/sexuality/agenda/article/2016/08/12/definitive-timeline-lgbt-rights-australia>, archived at <https://perma.cc/R2JZ-QDUR>.

Parliament by deciding that changes in the law are for the public benefit.[108] This is essentially a strict adherence to the doctrine of the separation of powers but it is not the reality. Courts do, quite properly and of their own motion, suggest that matters could do with legislative attention if they come across legislation that does not seem to be working as intended or that is simply unintelligible.[109] Courts may even, quite properly, suggest that legislative action may be appropriate to deal with situations where the common law has become confused or out of date or where new situations have arisen which would benefit from legislative regulation.[110]

Further, as one commentator has put it, the rationale seems to rest on what Lord Reid called the '"fairy tale" that judges never make the law, but only declare it'.[111] More importantly, allowing an entity to advocate for a change in the law does not automatically equate to a change in the law. That is the function of Parliament, which is perfectly entitled to take a different view on the public benefit of any law change. Giving an entity charitable status, even if it advocates a change in the law, therefore, does not affect parliamentary sovereignty.[112]

Where a change is proposed to foreign law and policy, I accept that international comity issues may arise.[113] I do not think, however, that advocating legislative or policy change to foreign governments can be seen as objectionable, where what is advocated for accords with international norms,

[108] See *Anti-Vivisection* (n 16) 50 (Lord Wright).

[109] One such example is Tipping J's recommendation to Parliament that

> the best way of dispelling the fog which surrounds s 290 [of the *Shipping and Seamen Act 1952* (NZ)] is not to rely on whatever judicial radar the Courts may possess, but rather to ground the section itself, take it into dry dock and give it a complete refit from stem to stern.

MacFarlane v Erber [1990] 2 NZLR 69, 87 (High Court of New Zealand). For a general discussion, see Glazebrook (n 96) 100.

[110] See, eg, *Waterhouse v Contractors Bonding Ltd* [2014] 1 NZLR 91, 106 [28] (Glazebrook J for the Court) in relation to litigation funding.

[111] Michael Chesterman, 'Foundations of Charity Law in the New Welfare State' in Charles Mitchell and Susan R Moody (eds), *Foundations of Charity* (Hart Publishing, 2000) 249, 268 ('Foundations of Charity Law'), citing Lord Reid, 'The Judge as Law Maker' (1972) 12(1) *Journal of the Society of Public Teachers of Law* 22, 22. Lord Reid made that point in his 1971 lecture to the 57th Annual Meeting of the Society of Public Teachers of Law, which was later published: Reid (n 111).

[112] See Chesterman, 'Foundations of Charity Law' (n 111) 267–8.

[113] See *McGovern* (n 3) 337–8 (Slade J).

including international universal human rights norms. The prohibition against torture, which was at issue in *McGovern*, is a peremptory norm of international law and is not dependent on treaty obligations.[114] In any event, even with the fiscal advantages they enjoy, charitable entities are separate from their home state and should not be equated with it.

I said I would come back later to the distinction between education and politics. This is particularly relevant for entities advocating for, what all can agree is, a worthy end, but having a particular viewpoint as to how that aim can be achieved. It seems to be the case that advocating for what is considered to be a worthy cause can be classed as education, as long as there are some objective justifications for the views outlined and both sides of any credible debate on the issue are covered. If the debate is one-sided, then it is seen as political.[115]

Another way of looking at it, however, is the approach taken by Lord Porter in *Anti-Vivisection*. If the ultimate goal is for the public benefit and within the spirit and intendment of the *Statute of Elizabeth*, and the object proposed is not a fad, illegal or against public policy, then that suffices for an entity to be charitable.[116] If this approach were adopted, there would be no need for the courts to adjudicate on the merits of a particular means of achieving the end goal, which will always be a difficult task and usually involve value judgments the courts may not be in the best position to make.

As to entities which advocate positions on inherently controversial issues, particularly those that involve competing moral arguments, the courts have been reluctant to confer charitable status, perhaps to avoid appearing to take sides on the issue and thus compromise their neutrality.[117] This is understandable. If the requirement is to look at the underlying merit of the particular position advocated for and decide if that is in the public benefit, there is a legitimate concern that courts would be called upon to make inappropriate value judgments.

[114] For a general discussion on the operation of *jus cogens* in international law, see Malcolm N Shaw, *International Law* (Cambridge University Press, 8th ed, 2017) 91–5. For the prohibition of torture as *jus cogens*, see *Zaoui v A-G [No 2]* [2006] 1 NZLR 289, 311–12 [51] (Keith J for the Court).

[115] See Parachin, 'Reforming the Regulation' (n 40) 1068.

[116] *Vivisection* (n 16) 60 (Lord Porter); see also at 41 (Lord Wright), 67 (Lord Simonds).

[117] See Jane Calderwood Norton, 'Controversial Charities and Public Benefit' [2018] (March) *New Zealand Law Journal* 64, 65; Parachin, 'Reforming the Regulation' (n 40) 1067.

As Parachin has noted, the courts try to get around this issue by using neutral referents, which he describes as independent points of reference, allowing a decision-maker (either a court or a regulator) to verify that a 'public benefit is present without having to form and express a non-neutral value judgment about the [morality] of the purpose'.[118] Conversely, this means that a court may decide that something is not in the public interest if it is unable to point to objective facts or figures.

On the other hand, there is the danger of 'classifying something as a political problem merely because society may be divided about it'.[119] Courts do, and often have, made hard decisions when called upon to do so. As Dal Pont points out, religion can raise strong opinions and, although it does not necessarily have neutral referents that one can easily point to, it has been accepted as being charitable.[120]

This brings us to the elephant in the room: the fiscal benefits of being a charity. There are, of course, other benefits of being a charity,[121] but it is generally accepted that the fiscal benefits are the most important.[122] A strong argument in favour of at least some form of political purpose exception is that taxpayer money should not subsidise political speech, at least in the uncontrolled manner that would likely arise if all political entities could register as charities.[123]

The United States, while allowing entities with political purposes to be charitable, excludes such entities from the associated fiscal benefits if a substantial part of their activities are political.[124] However, as pointed out by

[118] Parachin, 'Reforming the Regulation' (n 40) 1067; see also at 1068.

[119] Dal Pont (n 18) 280, quoting *Public Trustee v A-G (NSW)* (1997) 42 NSWLR 600, 620 (Santow J).

[120] Dal Pont (n 18) 280.

[121] Charitable trusts are entitled to numerous legal advantages over other non-charitable trusts, such as not being required to satisfy certainty of objects or the rule against perpetuities: see Andrew S Butler, 'Charitable Trusts' in Andrew S Butler (ed), *Equity and Trusts in New Zealand* (Thomson Reuters, 2nd ed, 2009) 269, 272.

[122] See 'Q&A: The Pros and Cons of Becoming a Charity', *The Guardian* (online, 10 April 2002) <https://www.theguardian.com/society/2002/apr/09/charities.voluntarysector>, archived at <https://perma.cc/FR9D-2AVU>.

[123] Both New Zealand and Australia allocate public funds for election broadcasting typically on the basis of vote allocation and subject to controls on how and when the funds can be used: *Broadcasting Act 1989* (NZ) ss 74–80J; *Commonwealth Electoral Act 1918* (Cth) pt XX div 3.

[124] IRC § 501(c)(3) (2012).

Professor O'Connell and her colleagues, Scotland and the Council of Europe take a different view.[125] The Council of Europe, for example, has specifically endorsed the need for non-governmental organisations to exercise their right to freedom of expression, regardless of whether it touches upon political issues and their right to support parties or candidates subject to other laws.[126]

F *Freedom of Expression*

Approaching the exception from a human rights angle leads to a different way of considering the issue. Some commentators argue that the courts should not be called upon to adjudicate on the ultimate position or means advocated for and effectively be forced to choose one side of the debate. In their view, the political purpose exception attempts to stop a private entity from becoming involved in public issues, which sits uneasily with the right to freedom of speech.[127]

Democratic debate is normally presumed to be beneficial to the community.[128] The underlining premise of the marketplace of ideas is that allowing views to compete against each other will lead to the correct view prevailing.[129] The political purpose exception, it is said, adopts the opposite presumption.[130] Especially for controversial issues, it is arguably the debate itself that is for the public benefit. Stopping charities from engaging politically under a blanket ban on political purposes poses a risk to a healthy democracy.[131]

[125] Chia, Harding and O'Connell (n 35) 361–2.

[126] Ibid 361. In Scotland, an entity cannot be charitable if its purpose is the advancement of a political party. Any general political engagement by a charity, however, appears to be irrelevant to its tax status: see at 361, 361 n 64.

[127] See ibid 379. See also *Aid/Watch* (n 103) 555–6 [44]–[45] (French CJ, Gummow, Hayne, Crennan and Bell JJ). See also the discussion about the recent decision of *Canada Without Poverty* (n 38): see above nn 51–3 and accompanying text.

[128] See Chia, Harding and O'Connell (n 35) 379, citing Transcript of Proceedings, *Aid/Watch Inc v Federal Commissioner of Taxation* [2010] HCATrans 154, 3086–92 (Hayne J) ('*Aid/Watch (Transcript)*').

[129] See McQueen (n 54) 133.

[130] See Chia, Harding and O'Connell (n 35) 379, citing *Aid/Watch (Transcript)* (n 128) 3086–92 (Hayne J).

[131] See Sarah Maddison, Richard Denniss and Clive Hamilton, 'Silencing Dissent: Non-Government Organisations and Australian Democracy' (Discussion Paper No 65, The Australia Institute, June 2004) 2, 5–6.

Further, it is argued that while refusing tax relief does not in itself stop freedom of speech, it does mean that only those who can afford to speak out do.[132] Charities represent the marginalised and disadvantaged members of society. Often these are the individuals who are the most in need of representation. Charities that attempt to get the state to address key issues in their sphere risk being labelled as political and losing their charitable status.[133] This can have a chilling effect on their willingness to speak out on issues affecting their clientele.[134]

This tension creates the contradiction that entities established with the purpose of permanently solving societal issues, such as poverty, can be deemed to have political non-charitable purposes, with the state rewarding those that address the symptoms, rather than the cause, of problems.[135] So, for example, Amnesty International was told: by all means look after torture victims but, whatever you do, do not venture into advocating for legislation that may be a vital step towards eliminating torture and the need for your services.[136]

The potential value of the contribution of charities to law reform should not be underestimated. Charities can offer unique perspectives from a range of sectors from environmental through to social welfare.[137] As the article co-authored by Professor O'Connell puts it, advocacy and political engagement may be 'better conceptualised as an essential, and perhaps the most effective, method of achieving charitable purposes'.[138]

G *Some Arbitrary Distinctions*

The political purpose exception has led to what can appear to be arbitrary distinctions. I have already mentioned the prevention of cruelty to animals being charitable but the prevention of torture of human beings not being

[132] See ibid 36.

[133] See Sarah Maddison and Andrea Carson, *Civil Voices: Researching for Not-For-Profit Advocacy* (Report, October 2017) 15–16.

[134] See Chia, Harding and O'Connell (n 35) 364–5, 377–8; Maddison, Denniss and Hamilton (n 131) 36.

[135] Chesterman, *Charities, Trusts and Social Welfare* (n 27) 358.

[136] See generally *McGovern* (n 3).

[137] See McQueen (n 54) 134.

[138] Chia, Harding and O'Connell (n 35) 366 (citations omitted).

charitable.[139] Another example that has been pointed to is the case of *Southwood v Attorney-General*, where an education programme that advanced the view that peace is preferable to war was held to be charitable.[140] This has been contrasted with *Anglo-Swedish Society v Commissioner of Inland Revenue*, which held that helping two societies live peacefully together was not charitable.[141]

The political purpose exception is also difficult to reconcile with other heads of charity, such as religion. Under the political purpose exception, a significant political purpose renders an entity non-charitable, regardless of whether the entity's main purpose can be argued to be objectively beneficial. Yet, religious trusts are presumed to be for the public benefit.[142] This is regardless of whether the religion is outside the mainstream view of religion.[143] This apparent inconsistency may arise as there is, except for in England and Wales, an automatic presumption that entities for the advancement of religion, and the other first two heads of charity, are for the public benefit.[144] Take, for example, the case of *Thornton v Howe*, where a woman who was spreading her own writings on Christianity was found to be advancing religion despite her writings being, as the Court described, 'incoherent and confused'.[145]

Religious trusts devoted to spreading and sustaining their own version of religion are, arguably, analogous to political purpose trusts in the manner that

139 See above Part III(B).

140 (2000) 3 ITELR 94, 111–12 [29] (Chadwick LJ).

141 (1931) 16 TC 34. For a general discussion on this case, see Parachin, 'Distinguishing Charity and Politics' (n 1) 872.

142 See *Liberty Trust v Charities Commission* [2011] 3 NZLR 68 (High Court of New Zealand); Chevalier-Watts, *Law of Charity* (n 4) 207.

143 See Dal Pont (n 18) 203–5; Jonathan Garton, *Public Benefit in Charity Law* (Oxford University Press, 2013) 165–78 [7.02]–[7.17].

144 Chevalier-Watts, *Law of Charity* (n 4) 207; Chevalier-Watts, *Charity Law: International Perspectives* (n 12) 95. The presumption in England and Wales was removed: see *Charities Act 2011* (UK) s 4(2).

145 (1862) 31 Beav 14; 54 ER 1042, 1044. See Juliet Chevalier-Watts, 'Charity Law, the Advancement of Religion and Public Benefit: Will the United Kingdom Be the Answer to New Zealand's Prayers?' (2016) 47(3) *Victoria University of Wellington Law Review* 385, 396 for a brief discussion on this case. Chevalier-Watts notes that the case has been said to have set the bar for religious charities to be extremely low: at 396, quoting Hubert Picarda, '*Thornton v Howe*: A Sound Principle or a Seminal Case Past Its Best Buy Date?' (2016) 16 *Charity Law & Practice Review* 85, 90.

they achieve their purpose.[146] Both put forward particular perspectives. Further, religious entities are not required to present more than one side of the debate. This is not to suggest there should be any curb in freedom of religion. But some have questioned whether taxpayer money should be available for spreading and sustaining particular religious beliefs without the same consideration of public benefit, as is required under the fourth head of charity.[147]

Controversy also surrounds the tax exemptions for commercial enterprises run by religious charities, with concerns being expressed about market distortion and unfair advantages over other businesses.[148]

These issues do not, of course, arise with regard to religious entities providing traditional tangible assistance to the vulnerable. These entities provide an invaluable service, the importance of which is often overlooked. For example, it is evident that New Zealand's welfare system has developed alongside their services and it is unlikely that the system would be able to function if their services were curtailed.[149]

IV Modern Mitigation

My analysis of the political purpose exception and the justifications given for it shows, I think, that a blanket political purpose exception has both

[146] It is possible that this similarity is what led Tyssen to conclude that the political purpose exception was part of the common law. He characterised the book proclaiming Papal Supremacy, in *De Themmines* (n 27), to be political rather than religious: Tyssen (n 26) 125.

[147] See, eg, Meredith Doig, 'Religion's Tax Break is a Cross We Shouldn't Have to Bear', *The Sydney Morning Herald* (online, 24 March 2016) <https://www.smh.com.au/opinion/easter-is-a-good-time-to-revisit-taxexempt-status-of-religious-organisations-20160324-gnpzjj.html>, archived at <https://perma.cc/8UM5-2K2C>; 'Campaigners Call for an End to Taxpayers Subsidising Families Which Tithe', *Stuff* (online, 27 Nov 2015) <https://www.stuff.co.nz/business/74460013/null>, archived at <https://perma.cc/ZQ2F-TWTW>.

[148] See, eg, Christopher Adams, 'Lifting the Lid on Sanitarium', *NZ Herald* (online, 30 June 2012) <https://www.nzherald.co.nz/business/news/article.cfm?c_id=3&objectid=10816412>, archived at <https://perma.cc/K6SR-AGW3>; Rachel Clayton, 'How Some New Zealand Business Make Billions and Pay No Tax', *Stuff* (online, 17 September 2017) <https://www.stuff.co.nz/business/96742698/how-some-new-zealand-business-make-billions-and-pay-no-tax>, archived at <https://perma.cc/5MK4-UGDF>.

[149] See Nikhat MA Moulvi, 'Understanding the Community and Voluntary Sector of New Zealand with a Focus on Charities' (MA Thesis, Auckland University of Technology, 2014) 37.

conceptual and practical problems. On the other hand, there may well be valid justifications for some form of the political purpose exception. At the least, few would doubt that political parties, however necessary to our form of democracy, are not charitable. I now turn to two modern cases that have mitigated at least some of the problems with the political purpose exception.

A *Australia*

The 2010 *Aid/Watch Inc v Federal Commissioner of Taxation* ('*Aid/Watch*') decision by the High Court of Australia was the first instance of a higher appellate Commonwealth court rejecting the political purpose exception, at least to the extent that it created a blanket prohibition on political trusts being charitable.[150]

Aid/Watch was an organisation concerned with promoting the effectiveness of Australia's aid programmes. It monitored the delivery of humanitarian aid, researched its effectiveness and campaigned for improved aid delivery. Although originally given charitable status for tax purposes, this was revoked by the Commissioner of Taxation. The Administrative Appeals Tribunal overturned that decision,[151] but it was reinstated by the Full Court of the Federal Court.[152] It then came before the High Court which, by majority, upheld the Administrative Appeals Tribunal's decision and found Aid/Watch to be charitable.[153]

The majority said that where, as in this case, a statute employs a common law concept as a criterion for its operation,[154] a narrow interpretation was not warranted. The statute speaks continuously and picks up developments in the case law as it stands from time to time.[155] The law on the definition of charity

[150] *Aid/Watch* (n 103) 557 [48] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

[151] *Re Aid/Watch Inc and Federal Commissioner of Taxation* (2008) 71 ATR 386, 397 [49] (Downes J).

[152] *Federal Commissioner of Taxation v Aid/Watch Inc* (2009) 178 FCR 423, 430–1 [37], 433 [48] (Kenny, Stone and Perram JJ).

[153] The majority consisted of French CJ, Gummow, Hayne, Crennan and Bell JJ: *Aid/Watch* (n 103).

[154] The decision in *Aid/Watch* (n 103) related to the meaning of the term 'charitable institution' for the purposes of the revenue Acts: at 546 [10] (French CJ, Gummow, Hayne, Crennan and Bell JJ). The more elaborate definition of charitable purpose in the *Charities Act 2013* (Cth) s 12 was brought in later.

[155] *Aid/Watch* (n 103) 549 [23] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

had been developed since *Pemsel* and might be considered likely to keep doing so: '[C]harity is a moving subject which has evolved to accommodate new social needs as old ones become obsolete or satisfied.'[156]

It was noted that the position of Lord Parker in *Bowman* had not been wholeheartedly accepted in Australia, as it had not been decided in the context of Australia's constitutional arrangements.[157] Under the *Australian Constitution*, '[c]ommunication between electors and legislators and the officers of the executive, and between electors themselves, on matters of government and politics is "an indispensable incident" of the [*Australian Constitution*]'.[158] The *Australian Constitution* therefore assumes the legitimacy of agitation for legislative and political change.[159] This contributes to the public welfare. A court is not required to adjudicate on the actual merits of the position advocated for.[160] It is the expression and sharing of views in themselves that can satisfy the element of public benefit.

The majority therefore accepted the submission of Aid/Watch that the generation of public debate on the best methods for the relief of poverty came within the fourth category of the *Pemsel* definition as being for the public benefit.[161] Aid/Watch had also argued that its purpose came within the first and second heads of *Pemsel* being the relief of poverty and the advancement of education. The majority found it unnecessary to rule on this submission. This was 'because the generation by lawful means of public debate … concerning the efficiency of foreign aid directed to the relief of poverty, itself is a purpose beneficial to the community within the fourth head in *Pemsel*'.[162]

I did not read the majority judgment as requiring an entity to present all sides of a debate. Rather, I read it as endorsing the value of freedom of expression and political debate under the *Australian Constitution*. Views, even

156 Ibid 548 [18] (French CJ, Gummow, Hayne, Crennan and Bell JJ) (citations omitted).

157 Ibid 554 [39]–[40] (French CJ, Gummow, Hayne, Crennan and Bell JJ). The majority were approving the observation made by Young CJ in Eq in *A-G (NSW) v The NSW Henry George Foundation Ltd* [2002] NSWSC 1128, [45].

158 *Aid/Watch* (n 103) 556 [44] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

159 Ibid 556 [45] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

160 Ibid. This view is similar to that expressed by the minority in *Anti-Vivisection* (n 16), where Lord Porter noted that 'the opinion which the court has to form is whether the gift is, or may be for the public benefit, not whether on the balance of evidence the scale inclines one way or the other': at 58.

161 *Aid/Watch* (n 103) 557 [47].

162 Ibid.

one-sided ones, will by their expression generate debate, either between the government and the electors or between the electors themselves.

It is worth discussing the dissenting judgments of Kiefel J and Heydon J. Heydon J observed that Aid/Watch was not attempting to generate debate, but was rather attempting to present its own views that aid should have concrete results, including for the environment, local communities, indigenous people and women.[163] Aid/Watch also argued for transparency and accountability and sought to raise awareness about Australian aid in the Australian public.[164] Aid/Watch did not directly provide funds or services for alleviating poverty and it was not conducting educational programmes.[165] Heydon J would have dismissed the appeal.[166]

As pointed out by Professor O'Connell and her colleagues, Heydon J seems to have a conception of charities limited to those providing tangible benefits.[167] They also suggest that, under Heydon J's view, 'there is more value in an organisation that subscribes to no position than an organisation that stands for something and seeks to convince others of it'.[168]

Kiefel J was also apprehensive about allowing public debate to be deemed charitable per se. She accepted that although 'what is regarded as charitable may develop or change, according to the needs of society',[169] there must be a benefit to the public.[170] In her view, '[w]hether an organisation has charitable purposes is determined by reference to the natural and probable consequences of its activities, as well as its stated purposes'.[171] It is the predominant purpose that is of significance, not ancillary or incidental purposes.[172] She considered it axiomatic that organisations with purposes directed at the alleviation of poverty may need to agitate for legislative or

[163] Ibid 561 [58].

[164] Ibid.

[165] Ibid 562 [60], 563 [62] (Heydon J).

[166] Ibid 564 [63]–[64].

[167] Chia, Harding and O'Connell (n 35) 376. This fits with the more traditional model of charity: see above Part III(C).

[168] Chia, Harding and O'Connell (n 35) 376.

[169] *Aid/Watch* (n 103) 564 [66] (citations omitted).

[170] Ibid.

[171] Ibid 564 [67].

[172] Ibid 564–5 [68] (Kiefel J).

policy change in order to advance those public purposes.[173] But she noted that the political purpose cannot be the predominant purpose.[174]

Kiefel J did accept, however, that the political nature of an organisation may not disqualify it outright.[175] It would be necessary to determine if the public benefit test could be met in the particular case. This would be more difficult to do if the activities were, as in the case at hand, dedicated to having one particular point of view accepted; it should not be assumed that the courts would be unable to find a public benefit in such a debate.[176] However, she indicated that the public benefit would be more readily discerned if what was being advanced was not one-sided[177] and, in any event, the debate must come within the spirit of the *Statute of Elizabeth*.[178] Kiefel J did not, however, consider it inconsistent with the role of the courts to recognise that existing laws and policies might need to be changed; she accepted the importance of public debate on these issues.[179]

Having examined both the stated purposes and the way in which Aid/Watch operated, Kiefel J agreed with the Full Court of the Federal Court that it was not possible to determine that accepting Aid/Watch's views would make aid more effective.[180] Aid/Watch was not attempting to generate debate, but was intent on having its views accepted. Its pursuit of the freedom to express its views, therefore, did not achieve the requisite public benefit.[181]

B *New Zealand*

The next decision I would like to discuss is the Supreme Court of New Zealand's decision in *Greenpeace*. Although the result in *Greenpeace* was similar to that in *Aid/Watch*, the reasoning was different from that of the majority of the High Court of Australia. In part, this may have resulted from the different constitutional arrangements. Unlike Australia, New Zealand has

[173] Ibid 564 [68].

[174] Ibid 564 [67].

[175] Ibid 565 [69].

[176] Ibid 565–6 [73] (Kiefel J).

[177] Ibid 568–9 [85]–[86].

[178] See ibid 566 [74] (Kiefel J).

[179] Ibid 565 [71].

[180] Ibid 567–8 [82], 568 [85].

[181] Ibid 568–9 [86] (Kiefel J).

no overriding written constitution, although there are parts of New Zealand's Constitution that are written,[182] including the *New Zealand Bill of Rights Act 1990* ('*Bill of Rights*'), which includes the right to freedom of expression.[183] The *Bill of Rights* is, however, only an ordinary statute and Parliament can pass legislation which is inconsistent with it.[184]

There were two issues in *Greenpeace*.[185] The first was whether an illegal purpose would disqualify an entity from having charitable status. The Court was unanimous that it would, although the assessment of whether there was an illegal purpose would be a matter of fact and degree.[186]

The second issue concerned the political purpose exception. The Court, by majority, held that the political purpose exception would no longer automatically disqualify charities in New Zealand.[187] The difference between the approach of the majority and the minority largely rested on the interpretation of a particular provision in the New Zealand legislation.[188] The majority held that the provision did not legislate for the political purpose exception.[189] The minority took a different view.[190] As the legislative point is

[182] Such as the *Constitution Act 1986* (NZ). For a general discussion on the sources of New Zealand's Constitution, see Philip A Joseph, *Constitutional and Administrative Law in New Zealand* (Brookers, 4th ed, 2014) ch 4; Sir Kenneth Keith, 'On the Constitution of New Zealand: An Introduction to the Foundations of the Current Form of Government' in Cabinet Office, Department of the Prime Minister and Cabinet, *Cabinet Manual 2017* (2017) 1. See also Geoffrey Palmer and Matthew Palmer, *Bridled Power: New Zealand's Constitution and Government* (Oxford University Press, 4th ed, 2004).

[183] *New Zealand Bill of Rights Act 1990* (NZ) s 14.

[184] See ibid s 4.

[185] *Greenpeace* (n 18) 177 [2] (Elias CJ for Elias CJ, McGrath and Glazebrook JJ).

[186] Ibid 209 [111] (Elias CJ for Elias CJ, McGrath and Glazebrook JJ), 210 [119] (Young J for Young and Arnold JJ).

[187] Ibid 197–8 [74]–[76], 209 [114]. The majority were Elias CJ, McGrath and Glazebrook JJ. The minority were Young and Arnold JJ.

[188] This concerned the interpretation of s 5(3) of the *Charities Act 2005* (NZ). Section 5(3) states:

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

See, eg, ibid 211–12 [122]–[124] (Young J for Young and Arnold JJ).

[189] *Greenpeace* (n 18) 177 [3], 209–10 [115]; see also at 193–6 [59]–[71]. The majority held that the *Charities Act 2005* (NZ) s 5(3) was directed towards advocacy that was not in itself charitable but ancillary to a charitable purpose and did not amount to a blanket prohibition

particular to New Zealand, I will not elaborate further, but just discuss some of the general points made by the Court.

First, it is worth noting that the Court was unanimous that, to qualify as charitable under the fourth head of the common law definition of charity, a purpose not only had to be for the public benefit, but also be charitable. This being determined by analogy with objects already held to be charitable and within the spirit and intendment of the *Statute of Elizabeth*.[191] The majority recognised that what is charitable is not immutable, but will change according to changing social needs.[192]

The majority in *Greenpeace* analysed the cases on the political purpose exception to date and concluded that the New Zealand case law excluded non-ancillary advocacy for the promotion of ends, even when those ends were charitable in themselves.[193] This blanket exclusion meant that advocacy (including litigation) could be undertaken by charitable organisations only when ancillary to their charitable purposes.

The majority considered that it was 'difficult to construct any adequate or principled' justification for this blanket ban on non-ancillary political purposes.[194] Political purposes and charitable purposes are not mutually exclusive. In addition, it is difficult to justify a total ban on the promotion of legislation, when such advocacy in some cases may well constitute, in itself, 'a public good analogous to other good works within the sense the law considers charitable'.[195] There is also no meaningful distinction in modern

on advocacy that was more than ancillary: at 209–10 [115] (Elias CJ for Elias CJ, McGrath and Glazebrook JJ).

[190] The minority was unable to reconcile the majority's interpretation with the text of *Charities Act 2005* (NZ) s 5(3): *Greenpeace* (n 18) 210 [119], 212 [124] (Young J for Young and Arnold JJ).

[191] *Greenpeace* (n 18) 182 [21], 185 [30] (Elias CJ for Elias CJ, McGrath and Glazebrook JJ), 210 [120] (Young J for Young and Arnold JJ). As discussed earlier, the statutory definitions are the codification of the *Pemsel* definition. It is noted that earlier cases had made the suggestion that the public benefit element alone was sufficient to qualify as a charity: see at 183 [24]–[25] (Elias CJ for Elias CJ, McGrath and Glazebrook JJ).

[192] Ibid 181 [17], 182 [21], 189–90 [45], 195 [64], 196 [70]–[71] (Elias CJ for Elias CJ, McGrath and Glazebrook JJ).

[193] Ibid 190 [47] (Elias CJ for Elias CJ, McGrath and Glazebrook JJ).

[194] Ibid 196 [69] (Elias CJ for Elias CJ, McGrath and Glazebrook JJ).

[195] Ibid 194 [62] (Elias CJ for Elias CJ, McGrath and Glazebrook JJ).

times between the 'general promotion of views within society and advocacy of law change'.[196]

Further, a 'strict exclusion risks rigidity in an area of law' that requires flexibility in order to be responsive to changes in society.[197] The majority recognised that advocacy for human rights or protection of the environment may, in itself, come to be regarded as charitable, 'depending on the nature of the advocacy, even if not ancillary to more tangible [acts of] charity'.[198]

Advocacy of causes will, however, often be non-charitable.[199] This is because matters of opinion may be impossible to characterise as being for the public benefit, either in achievement of the ends or in the promotion itself. In addition, there may be no sound analogy in the spirit and intendment of the *Statute of Elizabeth* and subsequent case law that is able to be developed. The majority noted that charity is generally concerned with matters of tangible public utility and that it may be difficult to show that the promotion of an idea is in itself charitable.[200]

The majority did not, however, agree that views which are 'generally acceptable may be charitable, while those which are highly controversial are not'.[201] Such an approach would favour the status quo and majoritarian thinking. Whether advocacy is a charitable purpose depends on a 'consideration of the end advocated [for], the means promoted to achieve that end and the manner in which the cause is promoted'.[202]

The dissenting judgment of Young and Arnold JJ (delivered by Young J) relied on their view that the legislation in New Zealand contained a political purpose exception.[203] They also commented, however, that while there were difficulties with the political purpose exception, it was reasonably defensible not only on the authorities, but also as a matter of policy and practicality.[204]

196 Ibid 194 [63] (Elias CJ for Elias CJ, McGrath and Glazebrook JJ).

197 Ibid 196 [70] (Elias CJ for Elias CJ, McGrath and Glazebrook JJ).

198 Ibid 196 [71] (Elias CJ for Elias CJ, McGrath and Glazebrook JJ).

199 Ibid 197 [73] (Elias CJ for Elias CJ, McGrath and Glazebrook JJ).

200 Ibid 197 [73], 206 [102] (Elias CJ for Elias CJ, McGrath and Glazebrook JJ).

201 Ibid 197 [75] (Elias CJ for Elias CJ, McGrath and Glazebrook JJ). This was contrary to the view of the New Zealand Court of Appeal in *Re Greenpeace of New Zealand Inc* [2013] 1 NZLR 339, 363 [74]–[76] (White J for the Court).

202 *Greenpeace* (n 18) 198 [76] (Elias CJ for Elias CJ, McGrath and Glazebrook JJ).

203 See above nn 188, 190.

204 *Greenpeace* (n 18) 212–13 [125]–[127].

Judges, they argued, are simply not the appropriate mediator for determining the merit of controversial issues.

Interestingly, despite the extensive criticism of the political purpose exception, some commentators have criticised the majority decision in *Greenpeace* because, under that decision, a court still has to make judgement calls about the ultimate 'public benefit' of an issue, regardless of how controversial it is.[205] Norton has suggested that in practice, the dissenting Justices' position in *Greenpeace* may prevail in matters concerning controversial charities, as the public benefit of competing moral purposes may be impossible to assess.[206] Others have welcomed the decision for allowing charity law to respond to changes in New Zealand's society as they arise.[207]

As *Greenpeace* was only considering the issue of the interpretation of the New Zealand statute, the issue of Greenpeace's charitable status had to be considered again by the Charities Registration Board (the 'Board') in light of the Supreme Court's decision. On 21 March 2018, the Board declined Greenpeace charitable status.[208] The Board viewed Greenpeace's purpose as being to promote its own views on the environment, peace, nuclear disarmament and weapons of mass destruction.[209] The Board, after considering the evidence before it in some detail, concluded that Greenpeace's

[205] See, eg, Norton (n 117) 66–7.

[206] Ibid.

[207] See, eg, Juliet Chevalier-Watts, 'Shedding the Shackles of *Bowman*: A Critical Review of the Political Purpose Doctrine and Charity Law in New Zealand' [2015] *New Zealand Law Journal* 108; Juliet Chevalier-Watts, 'Post *Re Greenpeace* Supreme Court Reflections: Charity Law in the 21st Century in Aotearoa (New Zealand)' (2016) 28(1) *Bond Law Review* 63, 63, 76–7, 82.

[208] *Registration Decision: Greenpeace of New Zealand Inc (GRE25219)* (Charities Registration Board, Decision No 2018-1, 21 March 2018) ('*Greenpeace (Registration Decision)*'). Greenpeace has indicated that this decision does not affect the deductibility of donations to Greenpeace: Greenpeace New Zealand, 'Greenpeace Isn't a Charity, It's a Necessity' (Press Release, 21 March 2018) <https://www.greenpeace.org/new-zealand/press-release/greenpeace-isnt-a-charity-its-a-necessity/>, archived at <https://perma.cc/J6ZN-5U89>. For more information on the position of deductions in New Zealand tax law for non-charitable organisations, see Inland Revenue, *Charitable and Donee Organisations: A Tax Guide for Charities, Donee Organisations and Other Groups* (IR255, June 2018). For a general discussion on the Board's reasoning, see Juliet Chevalier-Watts, 'Registration Decision: Greenpeace of New Zealand Incorporated (GRE25219) 21 March 2018' [2018] *New Zealand Law Journal* 171.

[209] *Greenpeace (Registration Decision)* (n 208) [2].

views could not be determined to be 'for the public benefit in a way previously accepted as charitable by the courts'.[210]

The Board also considered that Greenpeace had been involved in a deliberate pattern of illegal activities, albeit minor to moderate. From these activities, the Board inferred an illegal purpose, noting that there was no evidence that Greenpeace discourages illegal activities among its members.[211]

As the matter (or a similar matter) might come before the courts again, it is inappropriate for me to comment on the Board's decision, but I can make some general comments below about where we have got to and where we might go to from here.[212]

V Some Reflections

Turning first to Australia, the majority decision in *Aid/Watch* emphasised the constitutional value of free political speech,[213] meaning that even one-sided views will be for the public benefit, at least as long as they relate to the first three heads of the *Pemsel* definition. The majority did not find it necessary to decide whether generating public debate on matters outside the first three categories of the *Pemsel* definition would meet the public benefit test or whether some further public benefit would need to be shown and assessed by the courts.[214] Their Honours left open whether public debate in some circumstances may, nonetheless, not contribute to the public benefit because of the particular ends,[215] but did not consider whether forms of political activity other than public debate, such as lobbying, would be covered by their reasoning. This all means that uncertainty remains in Australia as to the scope of the *Aid/Watch* decision.[216] Nevertheless, the decision does herald a new and modern approach, recognising the key value of freedom of expression.

[210] Ibid [2]; see also at [6].

[211] Ibid [97]–[98].

[212] The comments made in this paper are general comments only, and should not be taken as representing my definitive view on the issues discussed.

[213] *Aid/Watch* (n 103) 555–6 [44]–[45], 557 [48] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

[214] Ibid 557 [48] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

[215] Ibid 557 [48]–[49] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

[216] See Chia, Harding and O'Connell (n 35) 383–6.

The next point is that the New Zealand position aligns more closely with that of Kiefel J than it does with the reasoning of the majority in *Aid/Watch*. Under the New Zealand approach, at least as regards to any advocacy undertaken by an entity, it is not only the aims of the entity that are examined, but also the means of achieving those aims.[217] The manner of any advocacy is also considered.[218] While there is no longer a blanket political purpose exception in New Zealand, the purposes and activities of the charity must still be for the public good and analogous to what has been held to be within the spirit and intendment of the *Statute of Elizabeth*.[219]

Pure advocacy charities could meet that test but, it will be more difficult to do so, particularly if one-sided views are being put forward.[220] Entities that provide tangible charitable benefits may be in a better position, provided any advocacy they undertake is linked to activities that are clearly charitable. Such entities could also argue that their advocacy activities are ancillary or incidental to their charitable purposes, even if not in themselves charitable.[221]

All this means is that any entities engaging in advocacy will have to put forward evidence to show that they meet the test set down by the majority in *Greenpeace*: that is, they must demonstrate a public benefit and analogy to existing heads of charity. There is, however, a legitimate view that gathering the evidence to meet this test could waste resources that would be much better spent on the work of the charity. There is also an argument that this puts burdens on advocacy charities that are not present for charities providing only tangible benefits, such as soup kitchens. Charities which provide such tangible benefits are not required to prove the public benefit or efficacy of their services in order to retain charitable status. This may be justifiable in

217 See, eg, the discussion by Kiefel J in *Aid/Watch* (n 103) 565 [69].

218 Ibid 567 [78] (Kiefel J).

219 *Greenpeace* (n 18) 198 [76] (Elias CJ for Elias CJ, McGrath and Glazebrook JJ). See also *Aid/Watch* (n 103) 566 [74] (Kiefel J).

220 In May 2018, the New Zealand Government announced a review of the *Charities Act 2005* which, among other things, will examine the 'extent to which registered charities can advocate for their causes and points of view': Office of the Minister for the Community and Voluntary Sector, *Terms of Reference to Review the Charities Act 2005* (Cabinet Paper, 24 May 2018) 9. The definition of charity however, will not be considered: at 3. The review is expected to end mid-2019, with any proposed amendments introduced into Parliament by 2020: at 12. For more information on the review and terms of reference, see 'Modernising the Charities Act 2005' (n 32).

221 *Charities Act 2005* (NZ) s 5.

terms of not wasting resources, but it does create an imbalance. I also suspect there may be a number of charities that are providing services that are not in line with modern evidence of what is most effective.[222]

There could also be an argument that the courts, at least in New Zealand, have not totally caught up with the shift in many charities from treating symptoms to addressing causes. There is also the need for the vulnerable to be involved in that debate through the organisations that work with them and that are therefore best qualified to give the vulnerable a voice. All is not lost, however. There may be room for the courts in the future to move further on this point, given the inherent flexibility within the definition of charity to adapt to modern conditions.[223] Watch this space.

[222] For example, see the controversy about whether anti-drug educational campaigns are effective: Scott O Lilienfeld and Hal Arkowitz, 'Just Say No?' (2014) 25(1) *Scientific American Mind* 70; Christopher Ingraham, 'A Brief History of DARE, the Anti-Drug Program Jeff Sessions Wants to Revive', *The Washington Post* (online, 12 July 2017) <https://www.washingtonpost.com/news/wonk/wp/2017/07/12/a-brief-history-of-d-a-r-e-the-anti-drug-program-jeff-sessions-wants-to-revive/>, archived at <https://perma.cc/LE3U-LPS9>. This is given only as an example as to how methods may become outdated. I am not to be taken as advancing any position on this issue.

[223] That flexibility might be a strong argument for retaining the current *Pemsel* (n 6) based definitions, despite the issues and contradictions identified above.