Advocacy by Charities: What is the Question?

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"There are no right answers to wrong questions." - Ursula K Le Guin

Despite the decision of the Supreme Court of New Zealand in Re Greenpeace of New Zealand Incorporated, *the issue of advocacy by charities remains unsettled in New Zealand, with at least three cases awaiting determination by the New Zealand courts at the time of writing.*

This article seeks to examine the questions that decision-makers should be asking themselves when considering the issue of advocacy by charities. First, the article considers the legal position prior to the Charities Act 2005, *and concludes that New Zealand charities were able to undertake unlimited non-partisan advocacy in furtherance of their stated charitable purposes. The article then considers whether that position was changed by the* Charities Act, *or by the Supreme Court decision, and concludes that it was not.*

The article then argues that current government interpretations of the Supreme Court decision that require charities to demonstrate public benefit in all of their activities are resulting in a framework in New Zealand that is complex, highly subjective and unworkable in practice. Provided the advocacy is not partisan and complies with other general legal restrictions on speech, charities should be free to advocate for their charitable purposes as they see fit, without undue government interference.

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I. Introduction

The decision of the New Zealand Supreme Court in *Re Greenpeace of New Zealand Inc*[1] was heralded as a victory for charities, ostensibly correcting an unduly strict approach, to the issue of advocacy by charities, that had been taken by the agencies responsible for administering New Zealand's charities' legislation (first, the Charities Commission, and then the Department of Internal Affairs — Charities Services *Ngā Rātonga Kaupapa Atawhai* ("Charities Services") and the Charities Registration Board (the "Board"), collectively referred to below for convenience as "Charities Services").

However, in practice, Charities Services' interpretation of the Supreme Court decision appears even more restrictive of charities' advocacy than that impugned by the Supreme Court. Charities Services' current approach to the issue of advocacy by charities has been described as "complex, highly subjective and … unworkable"[2] in practice. It also puts New Zealand out of step with comparable jurisdictions, such as Australia and Canada.

This article suggests that the Supreme Court decision did not in fact change the law in New Zealand; the law in New Zealand regarding the issue of advocacy by charities, in the writer's respectful submission, was and remains broadly aligned in principle with the approach recently adopted in Canada: that charities may undertake unlimited non-partisan

1. [2015] 1 NZLR 169 (SC) [*Re Greenpeace SC*].
2. Krystian Seibert, "Could the Charities Act 2013 Pose a Problem for Advocacy Charities?" (18 December 2018), online: *Pro Bono Australia* <www.probonoaustralia.com.au/news/2018/12/charities-act-2013-pose-problem-advocacy-charities/>.

advocacy in furtherance of their stated charitable purposes.[3] If such advocacy is in the best interests of those charitable purposes, charities in fact have a duty to undertake it. This article respectfully suggests that, when it comes to the issue of advocacy by charities, Charities Services are not asking themselves the right question.

In considering whether the law in New Zealand was or was not changed by the Supreme Court decision, it is first necessary to consider the law prior to the decision. This article does so in two parts: the position prior to the enactment of the *Charities Act 2005*,[4] and then whether that legislation changed that position.

II. The Position Before the *Charities Act*

Prior to the passing of the *Charities Act*, charities cases in New Zealand generally arose under tax legislation.[5] For decades, the *Income Tax Act 2004*[6] and its predecessors had defined 'charitable purpose' inclusively by reference to the four '*Pemsel* heads':[7] (1) the relief of poverty; (2) the advancement of education; (3) the advancement of religion; and (4)

3. On 13 December 2018, Bill C-86, *Budget Implementation Act*, No 2, 1st Sess, 42nd Parl, 2018 amended the Canadian *Income Tax Act*, RSC 1985, c 1 (5th Supp) to permit charities to carry on unlimited advocacy in support of their stated charitable purposes (although some question marks appear to remain over how the term "public policy dialogue and development activities" will be interpreted in practice, see draft Canada Revenue Agency guidance CG-027, "Public policy dialogue and development activities by charities" (21 January 2019), online: *Government of Canada* <www.canada.ca/en/revenue-agency/services/charities-giving/charities/policies-guidance/public-policy-dialogue-development-activities.html>).
4. 2005/39 (NZ) [*Charities Act*].
5. *Foundation for Anti-Aging Research v Charities Registration Board*, [2015] NZCA 449 at para 8 [*Charities Registration Board*] referring to *Molloy v Commissioner of Inland Revenue*, [1981] 1 NZLR 688 (CA) [*Molloy*]; and *Latimer v Commissioner of Inland Revenue*, [2002] 1 NZLR 535 (HC) [*Latimer HC*].
6. 2004/35 (NZ).
7. See *Commissioners for Special Purposes of the Income Tax v Pemsel*, [1891] AC 531 (HL (Eng)) [*Pemsel*].

other purposes beneficial to the community. The current definition in section YA 1 of the *Income Tax Act 2007*[8] is preceded by corresponding definitions in sections OB 1 and OB 3A of the *Income Tax Act 2004*, sections OB 1 and OB 3B of the *Income Tax Act 1994*,[9] section 2 of the *Income Tax Act 1976*,[10] section 2 of the *Land and Income Tax Act 1954*,[11] and so on.

III. The Test for Whether a Purpose is Charitable

The test for whether a purpose fell within this statutory definition was set out by the Court of Appeal in *Latimer v Commissioner of Inland Revenue*[12] as follows:

> [i]t is … common ground that there must be a *two-step inquiry*: first, whether the *purpose* is for the *public benefit* and, if so, secondly, whether the *purpose* is charitable in the sense of coming within the *spirit and intendment of the preamble* to the Statute of Charitable Uses 1601 (43 Eliz. c.4).[13]

It can be seen at once that this two-step test applies to *purposes*. It does not apply to activities, and it does not apply to the organisation itself. The common law definition of 'charitable purpose' developed in the context of trust law, where a charitable *purpose* trust is an exception to the general rule that a purpose trust is invalid.[14]

It is also axiomatic that a purpose must meet both limbs of the test. A conclusion that a purpose is 'charitable', by definition, meant that the purpose was both within the spirit and intendment of the preamble to the *Statute of Charitable Uses 1601*[15] (the "preamble"), and for the benefit of the public.

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8. 2007/97 (NZ).
9. 1994/164 (NZ).
10. 1976/65 (NZ).
11. 1954/67 (NZ).
12. [2002] 3 NZLR 195 (CA) [*Latimer CA*].
13. *Ibid* at para 32 [emphasis added].
14. This fundamental principle was noted by the Supreme Court of Canada in *Vancouver Society of Immigrant and Visible Minority Women v Minister of National Revenue*, [1999] 1 SCR 10 at para 144, Iacobucci J [*Vancouver Society*].
15. (UK), 43 Eliz I, c 4.

A. Ascertaining an Entity's Purposes

Before applying the common law test to an entity's purposes, it was first necessary to ascertain what those purposes were. This required interpretation of the entity's constituting document, in a manner similar to the process used for interpreting other written documents, but with an added overlay of a 'benignant construction' in favour of charity.[16] The Court's role in this process was interpretation, not creation.[17] An entity's *activities* were regarded as relevant only to the extent that the entity's constituting documents were unclear as to its purpose, or where there was evidence of activities by an entity that displaced or belied its stated charitable purpose[18] (for example, in the case of sham). It was as rare for a purpose to be inferred from activities as it was for extrinsic material to cause the terms of a contract or a statute to be interpreted to mean something they did not say.

16. See *Latimer v Commissioner of Inland Revenue*, [2004] 3 NZLR 157 (PC) at para 29 [*Latimer PC*]; and *Re Collier (Deceased)*, [1998] 1 NZLR 81 (HC) at 95 [*Re Collier*]. See also: *Perpetual Trust Ltd v Roman Catholic Bishop of Christchurch*, [2006] 1 NZLR 282 (HC) at 286; *Hadaway v Hadaway*, [1955] 1 WLR 16 (PC (Eng)) at 19; *Inland Revenue Commissioners v McMullen*, [1981] AC 1 (HL (Eng)) at 4-5; and *McGovern v Attorney-General*, [1982] 1 Ch 321 (Eng) at 343, 346, 353 [*McGovern*].
17. See *Inglis v Dunedin Diocesan Trust*, [2011] NZAR 1 (HC) at paras 29-33.
18. See *Re The Foundation for Anti-Aging Research and The Foundation for Reversal of Solid State Hypothermia*, [2016] NZHC 2328 at para 85 [*Re The Foundation for Anti-Aging Research*] referring to *Institution of Professional Engineers New Zealand Inc v Commissioner of Inland Revenue*, [1992] 1 NZLR 570 (HC) at 572; *New Zealand Society of Accountants v Commissioner of Inland Revenue*, [1986] 1 NZLR 147 (CA) at 148 [*Accountants*]; and *Molloy*, *supra* note 5 at 693.

To meet the requirements for income tax exemption,[19] an entity's purposes had to be *exclusively* charitable.[20] However, the requirement for exclusivity "[did] not mean what at first sight it might be thought to mean".[21] A non-charitable purpose that was ancillary, secondary or subsidiary to a charitable purpose would not have a vitiating effect.[22] Importantly, the 'ancillary' rule applied to *purposes* of an ancillary or subordinate nature; it did not apply to activities.[23]

Advocacy is inherently an activity, rather than a purpose. The common law of charities said very little about charities' activities, the key requirement being that charities' activities must be carried out in furtherance of the charity's stated charitable purposes.[24] Conceptually, it would have been very rare for 'advocacy' to have constituted a purpose

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19. Under the charitable income tax exemption, currently contained in section CW 41 of the *Income Tax Act 2007*, *supra* note 8; the predecessors of which include section CW 34 of the *Income Tax Act 2004*, *supra* note 6; paragraph CB 4(1)(c) of *the Income Tax Act 1994*, *supra* note 9; subsection 61(25) of the *Income Tax Act 1976*, *supra* note 10 and so on.
20. *Latimer PC*, *supra* note 16 at para 30.
21. *Institution of Professional Engineers New Zealand Inc v Commissioner of Inland Revenue*, [1992] 1 NZLR 570 (HC) at 573. See also *Latimer HC*, *supra* note 5 at paras 67-74.
22. *Molloy*, *supra* note 5 at 695.
23. *Ibid*.
24. This common law is in the process of being codified in New Zealand. Sections 22, 24, 26(b) and 9 of the recently-enacted *Trusts Act 2019*, 2019/38 (NZ) provide that the trustees of a trust have a mandatory duty to further the charitable purposes of the trust, in accordance with the terms of the trust. Sections 131 and 134 of the *Companies Act 1993*, 1993/105 (NZ) provide that a director of a company has a duty to act in what the director believes to be the best interests of the company, and must not agree to the company contravening its constitution. Clauses 48 and 50 of the exposure draft Incorporated Societies Bill online (pdf): Ministry of Business, Innovation & Government <www.mbie.govt.nz/assets/7d5df7c03a/exposure-draft-incorporated-societies-bill.pdf> (a final version of which is expected to be introduced into Parliament in late 2019) propose to codify similar requirements for officers of incorporated societies. Most charities in New Zealand take the form of a trust, incorporated society or company.

in itself; it is difficult to conceive of a situation whereby a charity would engage in advocacy for its own sake, without connection to a charitable purpose.

Charities were of course subject to general laws governing advocacy, such as electoral law, laws proscribing breach of copyright, defamation, 'hate speech', and the like. Beyond that, however, as a matter of charities law, there was no legal restriction on charities' ability to engage in non-partisan advocacy activity, provided that it was permitted by their constituting document and carried out in furtherance of their stated charitable purposes.[25] Advocacy activity that was not in furtherance of a charity's stated charitable purposes was *prima facie ultra vires* and liable to be treated as such.

Having ascertained the entity's purposes, or its main or "true"[26] purpose, the next step was to consider whether that purpose was charitable. This required application of the two-step test set out by the Court of Appeal.

B. The Public Benefit Test

The first limb of the two-step test, the *public benefit test*, comprises two parts: a 'benefit' limb, and a 'public' limb. It asks, firstly, whether the purpose in question is beneficial to the community, and secondly whether the class of persons eligible to benefit constitutes the public, or a

25. This factor did not stop then Prime Minister, Right Honourable Rob Muldoon, from stripping CORSO (Incorporated) of its government funding and its legislated tax privileges, in retaliation for its opposition to the 1981 Springbok rugby team's tour of New Zealand (in protest against the South African apartheid regime). However, the legitimacy of these actions was never tested in a court of law. See the discussion in Myles McGregor Lowndes & Bob Wyatt, *Regulating Charities: The Inside Story* (New York: Routledge, 2017) at 192.

26. In *Commissioner of Inland Revenue v Medical Council of New Zealand*, [1997] 2 NZLR 297 (CA) at 309, 318 [*Medical Council*], a majority of the Court of Appeal held that the Medical Council of New Zealand had a non-charitable purpose to benefit individuals, but also had a wider charitable purpose of safeguarding the health of the community. This latter purpose was found to be its 'true purpose'.

sufficient section of the public.[27]

The 'benefit' limb required forming an opinion *on the evidence* before the decision-maker as to whether the particular purpose in question was beneficial to the community, bearing in mind that in many classes of case the existence of public benefit will be readily assumed;[28] the facts may "speak for themselves",[29] or a purpose may be "so manifestly beneficial to the public that it would be absurd to call evidence on this point".[30] Purposes for the relief of poverty, the advancement of education and the advancement of religion were presumed to meet the 'benefit' limb of the public benefit test unless the contrary was shown.[31] Otherwise, Parliament's involvement in, or regulation of, an activity may provide a guide as to public benefit.[32] On rare occasions, direct evidence of public benefit may be required.[33]

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27. See *e.g. Accountants*, *supra* note 18, at 152.
28. *Molloy*, *supra* note 5 at 695, referring to *National Anti-Vivisection Society v Inland Revenue Commissioners*, [1948] AC 31 (HL (Eng)) at paras 49, 65-66, 78-79 [*National Anti-Vivisection Society*]. See also *Medical Council*, *supra* note 26, as noted by counsel for the plaintiff in *Latimer HC*, *supra* note 5 at para 83, there was no direct evidence before the Court that a benefit to the public arose from the maintenance of a Register of Medical Practitioners.
29. *Scottish Burial Reform and Cremation Society Ltd v Glasgow Corporation*, [1968] AC 138 (HL (Eng)) at 156, per Lord Wilberforce [*Scottish Burial Reform*].
30. *McGovern*, *supra* note 16 at 333.
31. *Re Greenpeace SC*, *supra* note 1 at para 27, n 57. See also *Re The Foundation for Anti-Aging Research*, *supra* note 18 at para 16, Ellis J; *Re Family First New Zealand*, [2015] NZHC 1493 at para 21 [*Re Family 2015*]; *Re Education New Zealand Trust*, [2010] NZHC 1097 at para 24 [*Re Education*]; *Re New Zealand Computer Society Inc*, [2011] NZHC 161 at para 13; *Re Queenstown Lakes Community Housing Trust*, [2011] 3 NZLR 502 (HC) at para 32 [*Re Queenstown*]; *Liberty Trust v Charities Commission*, [2011] 3 NZLR 68 (HC) at para 99 [*Liberty Trust*].
32. *Latimer HC*, *supra* note 5 at para 83, referring to *Scottish Burial Reform*, *supra* note 29 at 150; and *Latimer CA*, *supra* note 12 at paras 34-36.
33. See *Latimer HC*, *ibid*.

Importantly, in addressing this evidential question, and in recognition, perhaps, that the courts are the source of the law on the definition of charitable purpose, charities were able to access a full *de novo* oral hearing of evidence before a trier of fact, either the Taxation Review Authority or the High Court.[34] Such a hearing allowed for the evidence of witnesses, including expert witnesses, the decision maker, or both, to be tested by cross-examination if the circumstances required it. In addition, charities were not prevented from adducing evidence simply because it had not been provided earlier.[35] This process allowed for an evidential platform from which decision-makers could make a robust, informed decision as to whether any particular purpose operated for the public benefit.[36]

The 'public' limb of the public benefit test required a comparative weighing of public and private benefits.[37] Incidental private benefits were not inconsistent with charitable purpose.[38] It was acknowledged by the Court of Appeal that "any application of funds by a charitable trust is likely to be for the private pecuniary profit of someone".[39] It was also acknowledged that qualifying public benefit could be achieved indirectly by means of direct assistance to individuals.[40]

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34. See section 138B, and the definition of "hearing authority" in section 3 of the *Tax Administration Act 1994*, 1994/166 (NZ).
35. See *Charities Registration Board*, *supra* note 5 at para 44. Note that section 138G of the *Tax Administration Act 1994*, *ibid* originally contained an 'evidence exclusion rule', which was subsequently relaxed to an 'issues and propositions of law' exclusion rule only.
36. In this regard, see in particular *Latimer HC*, *supra* note 5 at paras 81-131, this point upheld by the Court of Appeal in *Latimer CA*, *supra* note 12 at paras 30-41 and not in issue before the Privy Council in *Latimer PC*, *supra* note 16.
37. See *e.g.* the arguments of counsel for the plaintiff in *Latimer CA*, *ibid* at para 35, which arguments were upheld by the Court of Appeal at para 36.
38. *Latimer PC*, *supra* note 16 at para 35; and *Accountants*, *supra* note 18 at 152.
39. *Hester v CIR*, [2005] 2 NZLR 172 (CA) at 181.
40. See *e.g. Medical Council*, *supra* note 26 and the assistance purpose in *Latimer CA*, *supra* note 12.

C. Was There a Political Purposes Exclusion?

It can also be seen at once that the two-step test for whether a purpose is charitable does not specifically address the question of whether any particular purpose is 'political'.

The writer submits that, despite interpretations to the contrary, there was in fact no political purposes exclusion in New Zealand law prior to the *Charities Act*.

It is acknowledged that purposes to further the interests of a particular political party or a particular candidate for political office were excluded.[41] However, beyond partisan political purposes, to say that a purpose was 'political' in New Zealand was 'code'. It simply meant that the purpose in question had not met the public benefit test on the facts of the particular case.

It is acknowledged that New Zealand case law had referred to the dicta of Lord Parker in *Bowman v Secular Society Ltd*,[42] that a trust for the attainment of political objects is invalid, "because the Court has no means of judging whether a proposed change in the law will or will not be for the public benefit".[43]

For example, the Court of Appeal in *Molloy*[44] held that the main purpose of the Society for the Protection of the Unborn Child was to vigorously oppose a change in the law in relation to abortion, a public and very controversial issue at the time.[45] After referring to *Bowman,* the Court of Appeal held this purpose to be political, and not charitable, on

41. See *Molloy*, *supra* note 5 at 695; and *Re Collier*, *supra* note 16 at 90. See also NZ, *Second Report of the Working Party on Registration, Reporting and Monitoring of Charities* (31 May 2002) at 12 [NZ, *Second Report of the Working Party*].
42. [1917] AC 406 (HL (Eng)) at 442 [*Bowman*].
43. See *In Re Wilkinson (Deceased), Perpetual Trustees Estate and Agency Co of New Zealand Ltd v League of Nations Union of New Zealand*, [1941] NZLR 1065 (SC) [*Re Wilkinson*]; *Knowles v Commissioner of Stamp Duties*, [1945] NZLR 522 (SC) [*Knowles*]; and *Molloy*, *supra* note 5.
44. *Molloy*, *ibid*.
45. *Ibid* at 694-95.

the basis that the Court could not judge the public benefit.[46]

However, the writer respectfully submits that this decision, and the earlier decisions of *Knowles*,[47] regarding temperance, and in *Re Wilkinson*,[48] regarding the failed League of Nations, did not translate into a 'hard and fast rule' that all purposes directed at law reform or changes in government policy were inherently unable to be charitable in New Zealand, forevermore.

With respect, conclusions to the contrary appear to have overlooked the subsequent decision of the New Zealand Court of Appeal in *Latimer CA*.[49]

The *Latimer CA* litigation concerned the Crown Forestry Rental Trust, one of the purposes of which was to assist Māori, the Indigenous population of New Zealand, in the preparation, presentation and negotiation of claims before the Waitangi Tribunal involving licensed Crown forest land (the "assistance purpose"). The High Court upheld the Crown Forestry Rental Trust's argument that providing assistance to the defined class of Māori claimants was an integral part of achieving the wider public benefit of settling historical grievances arising under the Treaty of Waitangi (the "Treaty").[50] The Court of Appeal upheld the assistance purpose as charitable, and not 'political', even though the process of Treaty settlement was highly controversial at the time, and always leads, without exception, to an Act of Parliament being enacted to settle the wrongs.[51]

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46. *Ibid* at 695-96.
47. *Knowles*, *supra* note 43.
48. *Re Wilkinson*, *supra* note 43.
49. *Latimer CA*, *supra* note 12. See *e.g. Re Family First New Zealand*, [2018] NZHC 2273 at paras 4, 10 [*Re Family HC*]; *Re Greenpeace New Zealand Incorporated*, [2011] 2 NZLR 815 (HC) at para 44 [*Re Greenpeace HC*]; *Re Greenpeace of New Zealand Inc*, [2013] 1 NZLR 339 (CA) at paras 56, 60-64 [*Re Greenpeace CA*]; *Re Greenpeace SC*, *supra* note 1 at paras 39-47; and *Re Draco Foundation (NZ) Charitable Trust*, [2011] NZHC 368 [*Re Draco*].
50. *Latimer HC*, *supra* note 5 at para 95.
51. As noted by Justice Williams, speaking extra-curially at the "Charitable purpose forum" organised by the Charities Commission in April 2012.

Clearly a controversial purpose directed towards law reform was not inherently incapable of being charitable in New Zealand law. To the contrary, what the cases demonstrate is the inadvisability of attempting to draw hard and fast lines in an inherently equitable area of law.

As demonstrated by the decision of the House of Lords in *National Anti-Vivisection Society*[52] where a purpose of abolishing vivisection was held to be detrimental to the public, the court sometimes can judge whether a proposed change in the law will or will not be for the public benefit.[53] A policy not to do so has been described as a "judicial cop out".[54]

Further, as subsequently acknowledged by the New Zealand Supreme Court,[55] the decision in *Molloy* seems correct in its factual context. The topic of abortion was extremely divisive in New Zealand society at the relevant time.[56] The writer recalls news media reports of doctors' houses being burned. It seems understandable in all the circumstances that the Court might have considered such an issue not appropriately justiciable. Similarly, while controversy may have been a factor in the Court of Appeal's decision, this did not translate into a 'hard and fast rule' that controversial purposes were inherently unable to be charitable.

Controversy and law and policy reform were simply factors to be taken into account in analysing public benefit. The writer submits that the decision in *Molloy* is simply authority for the proposition that the public benefit test was not met on the facts of that particular case, with the Court of Appeal using a shorthand expression 'political' to convey that particular point.

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52. *National Anti-Vivisection Society*, *supra* note 28.
53. See *e.g.* the comments of Lord Wright in *ibid* at para 47.
54. *Attorney-General for New South Wales v The NSW Henry George Foundation Ltd*, [2002] NSWSC 1128 (Austl) at para 63 [*Henry George Foundation*].
55. *Re Greenpeace SC*, *supra* note 1 at para 73.
56. *Re Greenpeace HC*, *supra* note 49 at para 45.

In addition, the courts have clearly held that the definition of charitable purpose is not static and is constantly developing.[57] The decision in *Molloy* and its 1941 and 1945 predecessors[58] predated important developments in New Zealand, such as: (1) the 1985 changes to standing orders which reorganised the system of Select Committees, opening up their proceedings to the public and the media;[59] (2) the passing of the *New Zealand Bill of Rights Act 1990*[60] and the *Human Rights Act 1993*;[61] (3) developments in Australia (ultimately culminating in the decision of the High Court of Australia in *Aid/Watch Incorporated v Commissioner of Taxation*[62] and its subsequent codification);[63] (4) New Zealand's ratification of a number of international treaties;[64] and (5) a developing awareness of the importance of civil society participating in the democratic process in a participatory democracy.

Coupled with mounting criticism of any political purposes exclusion, there was ample authority available to support the proposition that there was no political purposes exclusion in New Zealand law prior to the

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57. See *e.g. Re Greenpeace SC*, *supra* note 1 at para 23; *Molloy*, *supra* note 5 at 695; and *DV Bryant Trust Board v Hamilton City Council*, [1997] 3 NZLR 342 (HC) at 348.
58. *Re Wilkinson*, *supra* note 43; *Knowles*, *supra* note 43; and *Molloy*, *supra* note 5.
59. See Geoffrey Palmer, *Unbridled Power: An Interpretation of New Zealand's Constitution and Government*, 2d (Oxford University Press, 1990).
60. 1990/109 (NZ) [*Bill of Rights*].
61. 1993/82 (NZ).
62. [2010] HCA 42 [*Aid/Watch*].
63. Subsections 12(1)-(3) of the *Charities Act 2013*, 2013/100 (Austl) define charitable purpose to mean the purpose of promoting or opposing a change to any matter established by law, policy or practice in the Commonwealth, a State, a Territory or another country, if the change is in furtherance or in aid of, or in opposition to, a charitable purpose.
64. Such as the *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) and the *Universal Declaration on Human Rights*, 10 December 1948, GA Res 217A (III) UNGAOR, 3rd Sess, Supp No 13, UN Doc A/810 (1948) 71.

Charities Act.[65]

Importantly, the public benefit test, and therefore any exclusion from the public benefit test on 'political' grounds, applied to purposes, not to activities.[66] This explains the reference to a "political *purposes* exclusion".[67] Charities were not prevented from applying political *means* in furthering purposes that were acknowledged to be charitable.[68] Indeed, many important pieces of law reform and changes in government policy in New Zealand were achieved through the advocacy of charities prior to

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65. See *e.g. Re Collier*, *supra* note 16 at 89-90; *Public Trustee v Attorney-General of New South Wales*, [1997] 42 NSWLR 600 (SC (Austl)); *Henry George Foundation*, *supra* note 54 at paras 63-64. See also subsequent developments such as *Victorian Women Lawyers' Association Inc v Commissioner of Taxation*, [2008] FCA 983 at paras 128-29; and *Re Greenpeace HC*, *supra* note 49 at para 59.
66. Lord Parker's dicta in *Bowman*, *supra* note 42 at 442 referred to "political objects" not activities, as noted in Canada, Minister of National Revenue, *Report of the Consultation Panel on the Political Activities of Charities*, (Ottawa: Consultation Panel on the Political Activities of Charities, 2017) at en 13, online: <www.canada.ca/en/revenue-agency/services/charities-giving/charities/about-charities-directorate/political-activities-consultation/consultation-panel-report-2016-2017.html#ndnts>.
67. *Re Greenpeace SC*, *supra* note 1, n 119, 128 [emphasis added].
68. See *e.g.* the comments of Atkin LJ in *Commissioners of Inland Revenue v Yorkshire Agricultural Society*, [1928] 1 KB 611 (CA (Eng)) at 632: "[i]t is perfectly consistent with the main object of the Society being one for the promotion of agriculture generally, that in order to carry out its object it should watch and advise on legislation affecting agriculture". See also the comments of Slade J in *McGovern*, *supra* note 16 at 340: "the mere fact that trustees may be at liberty to employ political means in furthering the non-political purpose of a trust does not necessarily render it non-charitable". See also NZ, *Second Report of the Working Party*, *supra* note 41 at 12 referring to the permissibility of "advocacy for any cause that is itself charitable", and the fact that, in contrast to the position taken by the Court of Appeal in *Re Greenpeace CA*, *supra* note 49 at para 42, the definition of charitable purpose suggested by the Working Party would not alter the scope of charitable purpose but would be "clearly stating the position that has developed through 400 years of case law".

the passing of the *Charities Act*.[69]

D. The 'Spirit and Intendment' Test

If the purpose in question was found to operate for the benefit of the public under the first limb of the two-step test, the question then turned to the second step: is the purpose 'charitable' in the sense of coming within the spirit and intendment of the preamble.

In this context, the Court of Appeal made it clear that it is "important to be guided by principle, rather than by a detailed analysis of decisions on particular cases".[70]

Purposes for the relief of poverty, the advancement of education and the advancement of religion were accepted as coming within the spirit and intendment of the preamble and therefore charitable.[71] For other purposes, the courts proceeded first by seeking an analogy with purposes enumerated in the preamble. They then went further and were satisfied if they could find an analogy with previous cases found to be within the spirit and intendment of the preamble. In fact, the gradual extension by analogy had proceeded so far that there were "few modern reported cases where a clearly specified object for the benefit of the public at large and not of individuals was not held to be within the spirit and intendment" [72] of the preamble.

The law in New Zealand had in fact extended to the point where there were two approaches to determining whether a purpose was within the spirit and intendment of the preamble; the first was the analogy approach and the second was the presumption of charitability.

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69. Although, in the environment which exists in New Zealand at the time of writing, it seems inadvisable to mention any names.
70. *Medical Council*, *supra* note 26 at 314, cited with approval in *Latimer CA*, *supra* note 12 at para 39.
71. See *e.g.* the statutory definition of charitable purpose in section OB 1 of the *Income Tax Act 2004*, *supra* note 6.
72. *Accountants*, *supra* note 18 at 157 referring to *Scottish Burial Reform*, *supra* note 29 at 147.

The presumption of charitability is described in the following terms:

> [*e*]*ven in the absence of an analogy* with the purposes mentioned in the Preamble to the Statute of Elizabeth, objects beneficial to the public, or of public utility, are prima facie within the spirit and intendment of the Preamble, and *in the absence of any ground for holding that they are outside that spirit and intendment*, are charitable at law.[73]

A presumption of charitability was not part of Canadian law.[74] However, the fact that it was firmly part of New Zealand law was acknowledged by the New Zealand tax authority, the Inland Revenue Department ("IRD"), in its *Tax and charities* 2001 discussion document:

> [p]erhaps more importantly, the court confirmed that the correct approach today is that *objects that are beneficial to the community* or are of public utility *are prima facie charitable* under the fourth category *unless there are good reasons*

73. Margaret A Soper, "Charities" in *The Laws of New Zealand* (Wellington, NZ: Butterworths, 2011) at para 12, citing *Morgan v Wellington City Corporation*, [1975] 1 NZLR 416 (CA) at 419-420 [emphasis added].

74. *Vancouver Society*, *supra* note 14 at paras 47-48.

> *why they should not be*.[75]

In other words, the requirement to be charitable within the spirit and intendment of the preamble was determined in New Zealand by analogy with purposes previously found to be charitable but, even in the absence of an analogy, objects beneficial to the public were *prima face* held to be within the spirit and intendment of the preamble, in the absence of any ground for holding otherwise.

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75. NZ, Policy Advice Division, *Tax and Charities: A Government Discussion Document on Taxation Issues Relating to Charities and Non-profit Bodies* by Hon Dr Michael Cullen, Hon Paul Swain & John Wright MP (Wellington: Inland Revenue Department, 2001) at para 3.17 [*Tax and charities* 2001 discussion document], referring to the decision of the Court of Appeal in *Medical Council*, *supra* note 26 [emphasis added]. Other authority for recognition of the presumption of charitability in New Zealand law includes: *Auckland Medical Aid Trust v Commissioner of Inland Revenue*, [1979] 1 NZLR 382 (SC) at 388 [*Auckland Medical Aid*]; and *Latimer HC*, *supra* note 5 at paras 106, 131. Counsel for the Commissioner of Inland Revenue in the *Latimer CA*, *supra* note 12, litigation argued before the Court of Appeal that the High Court had erred in adopting the presumption of charitability, suggesting that, in the *Medical Council* case, McKay J, although discussing the presumption of charitability, had not in fact followed it and had actually proceeded by reference to analogy. However, the Court of Appeal in *Latimer CA*, found at para 39 that it was unnecessary to reach a view on this point. Their Honours noted that Thomas J had certainly adopted the presumption of charitability approach, McKay J had referred with apparent approval to a passage in *Halsbury's* to that effect, and Keith J had concurred with both McKay J and Thomas J. Their Honours held (agreeing with McKay J's view, at 314) that in applying the spirit and intendment of the preamble, it is important to be guided by principle rather than by a detailed analysis of decisions on particular cases. In finding that the relevant purpose was charitable, and although a reference was made to there being "some analogy", the Court of Appeal did not clearly apply either the presumption of charitability or the analogy test. However, arguably, the relevant "principle" applied by the Court of Appeal is that purposes beneficial to the public are presumed to be charitable unless there are grounds for holding otherwise (that is, the presumption of charitability).

Importantly, the presumption of charitability does not equate with a single test of public benefit. It is simply an alternative and "more intellectually honest"[76] means of satisfying the second limb of the two-step test.

E. Summary

To summarise, prior to the *Charities Act*, the writer submits that there was no 'political purposes exclusion' in New Zealand law. A finding that a purpose was 'political' simply meant that the public benefit test was not met on the facts of the particular case. In principle, charities were able to engage in unlimited non-partisan advocacy activity, provided it was carried out in furtherance of their stated charitable purposes.

IV. Was the Position Changed by Passing the *Charities Act*?

The definition of charitable purpose in New Zealand prior to the *Charities Act* was acknowledged to be very broad.[77]

In this respect, the New Zealand position differed from the position in Canadian jurisprudence, which appears to have taken a more narrow and restrictive approach to the definition.[78] Although the difference in approach may be partly attributable to the different statutory frameworks applicable in the respective jurisdictions, a key reason for the difference appears to be the inability of Canadian charities to access a *de novo* oral

76. *Re Collier*, *supra* note 16 at 95.
77. *Tax and charities* 2001 discussion document, *supra* note 75 at para 5.1.
78. See *e.g. Vancouver Society*, *supra* note 14 at paras 196-98, 200.

hearing of evidence.[79]

In New Zealand in 1996, a majority of the Court of Appeal held that the income of the Medical Council of New Zealand (the "Medical Council") was exempt from income tax. Although the principal statutory function of the Medical Council was to maintain a register of qualified medical practitioners, which provided private benefits to those individuals, the Court of Appeal interpreted the purpose of the relevant constituting legislation more widely, finding the true purpose of the Medical Council to be the safeguarding of the health of the community. This purpose was found to be charitable.[80]

Some years earlier, the New Zealand Court of Appeal had held the purposes of the New Zealand Council of Law Reporting to be charitable.[81]

IRD's lack of success in these Court of Appeal cases led IRD to surmise, in its *Tax and charities* 2001 discussion document, that case law "may have expanded the boundaries of what is charitable to such an extent that it is now too easy to become a charity".[82] This led IRD to put forward two proposals for changing the definition of charitable purpose, to limit the "fiscal privileges" accorded to charities to those charitable purposes that accorded with "current objectives".[83]

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79. See *e.g. Human Life International in Canada Inc v MNR*, [1998] 3 FC 202 [*Human Life International*], Strayer JA: "[t]he Court must therefore review the relevant questions of law and fact without the benefit of any findings of fact by a trial court and indeed without the benefit of any sworn evidence". See also the *Report of the Consultation Panel on the Political Activities of Charities*, *supra* note 66, Recommendations 2(b) and 4:
> the standard of review … favours the government by requiring a judicial review application to the Federal Court of Appeal. The Federal Court of Appeal is not mandated to review whether the government's decision is correct, but only whether it is reasonable. An appeal to the Tax Court of Canada would allow charities to fully argue why the decision of the Government is wrong and balance the position of the parties through this process.

80. *Medical Council*, *supra* note 26 at 309, 318.

81. *Commissioner of Inland Revenue v New Zealand Council of Law Reporting*, [1981] 1 NZLR 682 (CA).

82. *Tax and charities* 2001 discussion document, *supra* note 75 at paras 4.2, 5.11.

83. *Ibid* at para 4.3.

Under both these proposals, the Government would have been permitted to override any registration and 'deem' a particular entity not to be charitable.[84] IRD argued this approach would be "in keeping with recognising the tax exemption as an expenditure decision by the government and would allow the government to target those entities undertaking activities that it wishes or does not wish to support".[85]

This sentiment may have been imported into the *Charities Bill* as originally introduced in 2004[86] as the explanatory note to the original Bill[87] stated that the Charities Commission would "register and monitor charitable entities … to ensure that those entities receiving tax relief continue to carry out charitable purposes and provide a clear public benefit".[88]

However, it is not clear that any initial intention to limit fiscal privileges in fact survived the *Charities Bill*'s passage through Parliament. The *Charities Bill* as originally introduced was widely regarded to be fundamentally flawed;[89] it was almost completely rewritten at the Select Committee stage in response to hundreds of submissions.[90]

This transformation casts doubt on the probative value of statements previously contained in the explanatory note and on the first reading of the *Charities Bill*. Certainly, it can be seen from the two-step test set out above that "fiscal consequences"[91] form no part of the common

84. *Ibid* at paras 5.5, 5.15 and at 9.
85. *Ibid* at para 5.5.
86. *Charities Bill 2004 (108-1)* (NZ) [*Charities Bill*].
87. *Ibid.*
88. *Ibid*, Explanatory Note, at 1.
89. NZ Select Committee, Report on *Charities Bill 2004 (108-2)* at 21; and New Zealand, Parliamentary Debates, *Hansard*, 47-1, vol 625 (12 April 2005) at 19980 (Sue Bradford). See also the discussion in *Regulating Charities: The Inside Story*, *supra* note 25, ch 10.
90. Report on *Charities Bill 2004 (108-2)*, *ibid*; and New Zealand, Parliamentary Debates, *Hansard*, 47-1, vol 625 (12 April 2005) at 19944 (Georgina Beyer).
91. *Re Greenpeace SC*, *supra* note 1 at paras 30, 52.

law test for whether a purpose is charitable.[92] This is understandable, conceptually, as income tax post-dated the common law concept of charity by at least a century. It is also understandable in principle. As noted by Justice Mackenzie in *Re Queenstown*,[93] Parliament has seen fit to adopt the common law definition of charity; to the extent that Parliament has elsewhere legislated that taxation consequences are determined by reference to that definition, those consequences must follow the application of the common law principles which govern the definition. Taxation consequences should not play a part in the application of those common law principles.

A similar point was made by Justice Mallon in *Liberty Trust*.[94] In that case, Her Honour found that Liberty Trust's purposes advanced religion and were therefore presumptively charitable. Her Honour then noted that this presumption was "not displaced merely because the Court may have a different view as to the social utility of the Liberty Trust scheme and whether it is an activity deserving of the fiscal advantages that charitable status brings".[95]

Importantly, none of IRD's 2001 suggestions for amending the definition of charitable purpose were accepted. The Select Committee considering the *Charities Bill* made it clear that the definition of charitable purpose was not intended to be changed.[96] Instead, the long-standing, inclusive, statutory definition of charitable purpose was uplifted from the income tax legislation into section 5 of the *Charities Act*.[97] In other words, the statutory definition was not substantively changed; the Courts have confirmed that the *Charities Act* did not change the common law

92. Compare the comments of the Supreme Court in *Re Greenpeace SC*, *supra* note 1 at para 30.
93. *Re Queenstown*, *supra* note 31 at para 78.
94. *Liberty Trust*, *supra* note 31.
95. *Ibid* at para 101. See also *Pemsel*, *supra* note 7 at 591, Lord Macnaghten: "[w]ith the policy of taxing charities I have nothing to do".
96. Report on *Charities Bill 2004 (108-2)*, *supra* note 89, at 3.
97. See *Re Greenpeace HC*, *supra* note 49 at para 38.

definition of charitable purpose.[98]

Accordingly, the definition of charitable purpose that IRD acknowledged was very broad survived the passing of the *Charities Act*. The key change made by the legislation was simply that, from 1 July 2008, charities had to be registered with the Charities Commission (as it was then) in order to be eligible for the charitable exemptions from income tax.[99] In addition, registered charities had to make certain information publicly available on the charities register.[100] This information would enable charities to be monitored, to ensure that they were continuing to act in furtherance of their stated charitable purposes over time.[101]

A. Unintended Consequences

Despite clarity that the pre-existing common law definition of charitable purpose continued, the *Charities Act* is otherwise an example of how 'fast law does not make good law'. The substantial changes made to the *Charities Bill* at the Select Committee stage were not subject to proper consultation[102] and, together with further minor, but extensive, changes

98. *Re Greenpeace SC*, *supra* note 1 at paras 16-7; *Re Family 2015*, *supra* note 31 at para 21; *Re Education*, *supra* note 31 at para 13; and *Charities Registration Board*, *supra* note 5 at para 10.

99. See paragraph CW 41(5)(a) and subsection CW 42(1) of the *Income Tax Act 2007*, *supra* note 8.

100. See sections 40-42A of the *Charities Act*, *supra* note 4, containing the requirements for registered charities to file annual returns and notify certain changes.

101. Lack of information to monitor whether charities were continuing to act in furtherance of their stated charitable purposes over time was the key issue that the *Charities Act*, *ibid* was intending to address. See the NZ, *Report by the Working Party on Registration, Reporting and Monitoring of Charities* (28 February 2002) at 21-22. See also the NZ, *Report to the Minister of Finance and the Minister of Social Welfare by the Working Party on Charities and Sporting Bodies* (November 1989) at iv-v, 10, 21, 63, 67; *Tax and charities* 2001 discussion document, *supra* note 75 at para 8.7; *Charities Act*, *supra* note 4, s 10(h); and *Re The Foundation for Anti-Aging Research*, *supra* note 18 at para 88. See also the discussion in *Regulating Charities: The Inside Story*, *supra* note 25, ch 10.

102. Report on *Charities Bill 2004 (108-2)*, *supra* note 89, at 20.

made by Supplementary Order Paper,[103] were passed through under urgency, with all final stages occurring on one day (12 April 2005). The comment was made in Parliament that "we do not really know what we are passing tonight, or what the implications are".[104]

In addition, the 14 years since the *Charities Act* was passed have been characterised by a series of 'kneejerk' amendments that have similarly been rushed through under urgency without proper consultation.[105]

The writer submits that the net result is a *Charities Act* that is replete with unintended consequences.

These unintended consequences have given rise to uncertainty as to whether provisions such as subsections 5(3), 18(3), 5(2A) and section 59 of the *Charities Act* might have inadvertently changed the law. The writer submits that the answer is no, for the reasons discussed below.

B. Subsection 5(3)

Subsections 5(3) and (4) of the *Charities Act* provide that a non-charitable purpose will not prevent registration if the purpose is "merely ancillary to a charitable purpose". Subsections 5(3) and (4) were inserted at the Select Committee stage in response to concerns by submitters that the *Charities Act* regime might be used as a means for government to exercise political control of the charitable sector.[106] The subsections were intended to codify the rule regarding ancillary purposes, discussed above; they were not intended to change the law in any way.[107]

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103. New Zealand, Parliamentary Debates, *Hansard*, 47-1, vol 625 (12 April 2005) at 19950 (Sue Bradford).
104. New Zealand, Parliamentary Debates, *Hansard*, 47-1, vol 625 (12 April 2005) at 19981 (Sue Bradford).
105. See *e.g. Statutes Amendment Bill 2015 (71-1)* (NZ); *Charities Amendment Bill (No 2) 2012 332-3C* (NZ) (which began as the *Crown Entities Reform Bill 2011 332-1* (NZ) [*Crown Entities Reform Bill*]); and the *Statutes Amendment Bill (No 2) 2011 271-2* (NZ) [*Statutes Amendment Bill (No 2)*].
106. New Zealand, Parliamentary Debates, *Hansard*, 47-1, vol 616 (30 March 2004) at 12108 (Sue Bradford); and Report on *Charities Bill 2004 (108-2)*, *supra* note 89, at 4.
107. Report on *Charities Bill 2004 (108-2)*, *ibid.*

Subsection 5(3) included the words "for example, advocacy", in brackets, with the specific intention of reassuring the charitable sector that they would continue to be able to undertake advocacy work in support of their charitable purposes.[108]

However, the bracketed words appear to have been used by Charities Services as legislative authority for the imposition of a strict political purposes exclusion. Under the *Charities Act* regime, many charities were surprised to find themselves declined registration or deregistered for engaging with the democratic process,[109] despite clear indications that the definition of charitable purpose was not intended to be changed.

It seems unlikely that a change so significant would have been made by way of parenthetic illustration without further articulation.[110] The more likely explanation is that the words "for example, advocacy"[111] were intended simply to confirm that, in the rare situation where advocacy activity might have become viewed as a purpose in itself, this would not prevent registration if such a purpose could be said to be ancillary to the charitable purposes of the organisation, as discussed above.

The provision did not provide a legislative bar on such an advocacy purpose ever being charitable in itself.[112]

In other words, the words "for example, advocacy"[113] did not codify a political purposes exclusion and should, at the very least, have been no impediment to charities continuing to advocate in furtherance of their

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108. New Zealand, Parliamentary Debates, *Hansard*, 47-1, vol 625 (12 April 2005) at 19941 (Judith Tizard): the changes would "make it clear that the Commission will not prevent an organisation from being able to register if it engages in advocacy as a way to support and undertake its main charitable purpose" at 19941. See also Report on *Charities Bill 2004 (108-2)*, *supra* note 89, at 4.
109. See *e.g. National Council of Women of New Zealand Incorporated v Charities Registration Board*, [2014] NZHC 1297 at para 17.
110. See the arguments of counsel for Greenpeace in *Re Greenpeace SC*, *supra* note 1 at para 54.
111. *Charities Act*, *supra* note 4, s 5(3).
112. As was subsequently found to be the case by the Supreme Court in *Re Greenpeace SC*, *supra* note 1 at paras 56-58.
113. *Charities Act*, *supra* note 4, s 5(3).

stated charitable purposes as they had always done.

C. Subsection 18(3)

Subsection 18(3) of the *Charities Act* requires that, in assessing applications for registration, Charities Services must "have regard" to a charity's activities. Unfortunately, subsection 18(3) did not specify what Charities Services is to "have regard" to activities for.

Subsections 50(1)(a) and (2)(a) of the *Charities Act* similarly enable Charities Services to inquire into a charity's activities, but without specification as to why.

These provisions appear to have encouraged Charities Services to assess entities' activities to ascertain whether those activities are 'charitable' As a result, many worthy charities have been deregistered or declined registration on the basis of their activities, even though such activities were carried out in good faith in furtherance of their stated charitable purposes.[114]

It is axiomatic that the common law recognises a distinction between purposes and activities; this distinction is reflected in subsection 13(1) of the *Charities Act*, which sets out the essential requirements for registration, and requires *purposes* to be charitable, not activities.

When the history of the *Charities Act* regime is examined, it is clear that, beyond "serious wrongdoing"[115] as defined, the reason for considering activities is to ensure that charities are continuing to act in

114. Published decisions of the Charities Registration Board can be found on Charities Services' website (2019), online: <www.charities.govt.nz/charities-in-new-zealand/legal-decisions/view-the-decisions/>. However, these decisions do not include the bulk of decisions, which are made by Charities Services under delegation from the Board under section 9 of the *Charities Act*, *ibid*.

115. See the definition of "serious wrongdoing" in section 4 of the *Charities Act*, *ibid*.

furtherance of their *stated* charitable purposes over time.[116] It is not to ascertain whether those activities are 'charitable'.

There is, in fact, no such thing as a 'charitable activity'. Activities only make sense in the context of the purpose in furtherance of which they are carried out.[117] In limited exceptional circumstances, activities may assist in determining what a charity's purposes are, or whether those purposes are charitable, as discussed above. But there is no indication that subsection 18(3) and section 50 were intended to "wreak some fundamental change in approach or a move away from the fundamental 'purposes' focus of the charities inquiry".[118]

D. Subsection 5(2A)

Subsection 5(2A) of the *Charities Act* provides that the promotion of amateur sport may be a charitable purpose "if it is the means by which a charitable purpose … is pursued". Subsection 5(2A) was inserted into the legislation by the *Charities Amendment Act 2012*,[119] with effect from 25 February 2012.[120]

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116. See the NZ, *Report by the Working Party*, *supra* note 101 at 21-22. See also the NZ, *Report to the Minister of Finance*, *supra* note 101 at iv-v, 10, 21, 63, 67; *Tax and charities* 2001 discussion document, *supra* note 75 at para 8.7; *Charities Act*, *supra* note 4, s 10(h); and *Re The Foundation for Anti-Aging Research*, *supra* note 18 at para 88.
117. As noted by the Supreme Court of Canada in *Vancouver Society*, *supra* note 14 at para 152:

    > the character of an activity is at best ambiguous; for example, writing a letter to solicit donations for a dance school might well be considered charitable, but the very same activity might lose its charitable character if the donations were to go to a group disseminating hate literature. In other words, it is really the purpose in furtherance of which an activity is carried out, and not the character of the activity itself, that determines whether or not it is of a charitable nature.

    See also the discussion in Susan Barker, "The Myth of 'Charitable Activities'" (2014) New Zealand Law Journal at 304, online (pdf): <www.lawnewzealand.co.nz/resources/The%20myth%20of%20charitable%20activities.PDF>.
118. *Re The Foundation for Anti-Aging Research*, *supra* note 18 at para 86.
119. 2012/4 (NZ).
120. *Ibid*, s 2.

The Court of Appeal considered this amendment to be evidence of a political purposes exclusion in New Zealand law.[121] However, the writer respectfully submits that the history of the provision does not support that conclusion.

The process of inserting subsection 5(2A) began quietly in early 2010 with a "technical review of the Charities Act", aimed at "improving the operation of the legislation and charities register".[122] Contemporaneously, Cabinet approved a first principles review of the *Charities Act*, to take place in 2015.[123] The promised first principles review was publicly announced some months' later, in November 2010.[124] In December 2010, the High Court of Australia issued its decision in *Aid/Watch*.

The New Zealand technical review culminated in the *Statutes Amendment Bill (No 2)*[125] which was introduced into Parliament on 22 February 2011, and referred to the Government Administration Select Committee in April 2011. By definition, items included in a Statutes Amendment Bill should be minor, non-controversial and technical amendments that do not affect the substance of the law or people's rights and obligations.[126]

A few weeks later, on 6 May 2011, the High Court issued its decision in *Re Greenpeace HC*,[127] declining to follow the decision of the High Court

121. *Re Greenpeace CA*, *supra* note 49 paras 56-57.
122. NZ Cabinet Office, "Minute of Decision" CAB Min (10) 35/3A at para 1.1.
123. NZ Cabinet Office, "Minute of Decision", CAB Min (10) 12/6; NZ Cabinet Social Policy Committee, "Minute of Decision", SOC Min (10) 6/4; and NZ Cabinet Office, "Minute of Decision", CAB Min (10) 35/3B.
124. Tariana Turia, "Charities Commission Annual General Meeting" (1 December 2010), online: *Beehize.govt.nz* <www.beehive.govt.nz/speech/charities-commission-annual-general-meeting-0>.
125. *Statutes Amendment Bill (No 2)*, *supra* note 105.
126. See the NZ, "Report of the Government Administration Committee on the Statutes Amendment Bill (No 2) 271-1" (6 July 2011) at 1; and NZ, House of Representatives, *Standing Orders*, s 305(2) (2017). See also NZ Select Committee, Report on *Charities Amendment Bill 2016 71-2B* at 1-2.
127. *Re Greenpeace HC*, *supra* note 49.

of Australia in *Aid/Watch*. Greenpeace of New Zealand Incorporated ("Greenpeace") appealed to the Court of Appeal.

On 31 May 2011, the Government announced that it would disestablish the Charities Commission and transfer its functions to the Department of Internal Affairs.[128] The vehicle to effect this change, the *Crown Entities Reform Bill*,[129] was introduced into Parliament a few weeks later in September 2011.

The *Statutes Amendment Bill (No 2)*[130] received its second reading on 16 February 2012, following which the proposed amendments to the *Charities Act*, including subsection 5(2A), were removed into a separate *Charities Amendment Act 2012* and passed into law.[131]

Contemporaneously, the passage of the *Crown Entities Reform Bill* moved quickly, receiving its third reading on 30 May 2012 and passing into law on 6 June 2012. The Charities Commission was disestablished from 1 July 2012.

In November 2012, only four months after the Charities Commission was controversially disestablished, and precisely 21 minutes after the Court of Appeal delivered its decision in *Re Greenpeace CA*,[132] the promised first principles review of the *Charities Act* was controversially cancelled.[133]

With respect, the disestablishment of the Charities Commission and the cancelling of the first principles review of the *Charities Act* are examples of kneejerk reactions that were rushed through without proper consultation, against the strong opposition of the charitable sector. The technical review is of a similar ilk.

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128. "Government reviews more state agencies" (31 May 2011), online: *Scoop Parliament* <www.scoop.co.nz/stories/PA1105/S00611/government-reviews-more-state-agencies.htm>.
129. *Crown Entities Reform Bill*, *supra* note 105.
130. *Statutes Amendment Bill (No 2)*, *supra* note 105.
131. The *Charities Amendment Act 2012*, *supra* note 119, received Royal Assent on 24 February 2012.
132. *Re Greenpeace CA*, *supra* note 49.
133. Jo Goodhew, "No review of the Charities Act at this time" (17 November 2012), online: *Beehive.govt.nz* <www.beehive.govt.nz/release/no-review-charities-act-time>.

Subsection 5(2A) is an unhelpful amendment. On its face, it appears to provide a statutory prohibition on the promotion of amateur sport being considered charitable in and of itself, placing an unhelpful barrier in the way of the socially cohesive and other public benefits that might otherwise be derived from such promotion. In doing so, it puts New Zealand out of step with other comparable jurisdictions which have found such a purpose to be charitable by statute.[134] Such a significant amendment hardly seems minor, technical, non-controversial or non-substantive, raising the question of why it was included in a Statutes Amendment Bill, and why it was not subject to proper consultation.

Subsection 5(2A) appears to have been inserted in response to reluctance by charitable organisations to fund sport in case doing so might threaten their charitable status.[135] The provision appears to reflect Charities Services' interpretation of the decision of the High Court in *Travis Trust v Charities Commission*.[136] In that case, the High Court found that the promotion of the particular horse race in question was not a charitable purpose in and of itself, unless it could be established that the true intention was the promotion of a deeper purpose such as health, education or animal welfare.[137] On the facts before the Court, this was not found to be the case; however, the writer respectfully submits that the case is not authority for the proposition that the promotion of amateur sport could never be charitable in New Zealand in and of itself.

Subsection 5(2A) is arguably another illustration of the inadvisability of seeking to create 'hard and fast' rules in a nuanced and subtle area of law. With respect, it is drawing a long bow to say that the provision evidenced a political purposes exclusion in New Zealand law.[138]

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134. See *Charities Act 2011* (UK), c 25, ss 3(1)(g), 2(d); *Charities Act 2006* (UK), c 50; *Charities and Trustee Investment (Scotland) Act 2005*, ASP 10, ss 7(2)(h), 3(c); and *Charities Act (Northern Ireland) 2008*, c 12, ss 2(g), 3(d), as amended by the *Charities Act (Northern Ireland) 2013*, c 3.
135. *Statutes Amendment Bill (No 2)*, *supra* note 105, Select Committee Report, at 5.
136. [2008] 24 NZHC 1912.
137. *Ibid*.
138. Contrary to the finding in *Re Greenpeace CA*, *supra* note 49 at paras 56-57, 60.

E. Section 59

The most significant bearer of unintended consequences appears to have been section 59, the provision which provides New Zealand charities with a right of appeal.

As discussed above, prior to the *Charities Act*, charities were able to access a full *de novo* oral hearing of evidence. The *Charities Bill* as originally introduced would have continued this, by providing for charities to have a right of appeal to the District Court.[139] Appeals to the District Court are normally conducted as a first instance *de novo* trial, which would include a full hearing of oral evidence if any party so insisted.[140]

However, this formulation was changed at the Select Committee stage in response to submissions. Submitters were concerned that to restrict appeals to the District Court (whose decision was to be final) would significantly impede the development of the common law of the definition of charitable purpose as the definition of charitable purpose derives from equity, which is traditionally the preserve of the High Court and not the District Court; submitters were also concerned that charities should continue to have recourse to the highest Court in the land on this important issue.

The majority agreed that, given its experience in considering matters relating to charitable entities, the High Court would be the most appropriate forum for hearing *Charities Act* appeals. The majority also agreed that the initial appeal should not be the final resort for charities.[141]

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139. *Charities Registration Board*, *supra* note 5 at para 45 referring to *Charities Bill*, *supra* note 86 at 38-41, cls 67, 69(6).
140. See *Charities Registration Board*, *supra* note 5 at para 45. See also *Shotover Gorge Jet Boats Ltd v Jamieson*, [1987] 1 NZLR 437 (CA), considering section 5 of the *Lakes District Waterways Authority (Shotover River) Empowering Act 1985*, 1985/2 (NZ) at 440, line 15: "[t]here can be no doubt that the District Court *was intended to hear the case de novo*, which would include a *full hearing of oral evidence if any party so insisted*. That is the normal way in which the District Court exercises its civil jurisdiction" [emphasis added].
141. Report on *Charities Bill 2004 (108-2)*, *supra* note 89, at 13-4. See also *Charities Registration Board*, *supra* note 5 at para 46.

However, in making this change from the District Court to the High Court, the Select Committee did not clarify the nature of the hearing to be conducted on appeal.[142]

The absence of any wording in section 59 regarding the nature of the appeal means that appeals to the High Court under the *Charities Act* are interpreted as general appeals subject to Part 20 of the High Court Rules.[143] General appeals to the High Court are usually conducted as a rehearing. Part 20 of the High Court Rules precludes appellants from having any automatic right to present any evidence to the Court that was not before the decision-maker when it made its decision.[144] Part 20 also requires evidence to be presented by affidavit, rather than by witnesses giving oral evidence and being available for cross-examination.[145] These requirements are strict, but they are premised on an assumption that a full oral hearing of evidence has already been undertaken at first instance in the court or tribunal appealed from, in an adjudicated dispute between two parties. However, this is not the case under the *Charities Act*. The decision-maker (Charities Services or the Charities Registration Board) does not adjudicate a dispute between two parties and, despite statutory requirements to comply with the rules of natural justice,[146] neither conducts an oral hearing.[147]

In other words, replacing the words "District Court" with the words "High Court" in section 59[148] appears to have inadvertently removed charities' ability to access a trier of fact altogether.

This factor is significant because, as discussed above, whether an entity qualifies for registration often turns on important questions of fact. Facts are established by evidence and an oral hearing of evidence allows that evidence to be tested. Section 59 in its current formulation

142. *Charities Registration Board*, *ibid* at paras 38-43.
143. *High Court Rules*, 2016/225 (NZ) [*High Court Rules*]. See generally *Re The Foundation for Anti-Aging Research*, *supra* note 18 at paras 23-27.
144. *High Court Rules*, *ibid*.
145. *Ibid.*
146. *Charities Act*, *supra* note 4, ss 18(3)(b), 36.
147. *Charities Registration Board*, *supra* note 5 at para 20.
148. *Charities Act*, *supra* note 4.

means that, among other things, charities have no means of adequately testing the material that Charities Services finds from internet searches, whether that material, and the conclusions drawn from it, are correct, or what weight should be placed on it.[149]

The inability to call and test evidence also places Courts in a difficult position, as they will often simply not have the evidence they need to make a properly-informed decision as to whether any particular charity is eligible for registration. This has led to an unhelpful development whereby courts are referring cases back to the Charities Registration Board for reconsideration in light of their judgment, causing further cost, uncertainty and delay for the affected charities.[150]

There is no indication in any of the material surrounding the *Charities Bill* that Parliament intended to remove charities' ability to access an oral hearing of evidence when the right of appeal was changed from the District Court to the High Court at the Select Committee stage. The removal of charities' ability to access a trier of fact appears instead to have been an unintended consequence of the Select Committee's attempt to strengthen charities' rights of appeal. As discussed above, the original *Charities Bill* was almost completely rewritten at the Select Committee stage, and then rushed through under urgency without proper consultation.

Inability to access a trier of fact places charities at a significant disadvantage in the task of establishing important questions of fact, such as what their purposes are, and how those purposes operate for the public benefit. In this respect, New Zealand charities now seem to have been placed at a similar disadvantage to that which has faced Canadian charities, as discussed above.

This factor is exacerbated by the fact that, in New Zealand, an appeal

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149. The results of Charities Services' internet searches has been a significant issue in cases decided under the *Charities Act*, *ibid* to date. See *e.g. Re The Foundation for Anti-Aging Research*, *supra* note 18 at paras 74-75; and *Re Greenpeace CA*, *supra* note 49 at para 31.

150. See *Re Greenpeace CA*, *ibid*; *Re Greenpeace SC*, *supra* note 1; and *Re Family HC*, *supra* note 49. In both the Greenpeace and Family First cases, the result of the Board's reconsideration was to reach the same conclusion which, in both cases, is now subject to further appeal.

to the High Court, which must be lodged within 20 working days of decision,[151] is simply beyond the resources of most New Zealand charities. The net effect is that, for the most part, charities simply have no practical means of holding Charities Services accountable for its decisions.

The writer respectfully submits that these factors are causing New Zealand charities law to become distorted. Decisions decided under the current New Zealand *Charities Act* should be viewed through this lens of inherent structural impediment, and in particular the lack of a sufficient evidential platform.

F. Summary

To summarise, despite the difficulties inherent in many provisions in the *Charities Act*, there is nothing to indicate that the common law definition of charitable purpose was intended to be changed by the passing of that legislation. The broad common law definition of charitable purpose that existed prior to the *Charities Act* continued following the passing of the legislation.[152]

Despite this, it is acknowledged that Charities Services applied a strict political purposes exclusion in practice, even though, in the writer's submission, it was not necessary to do so as a matter of law.

However, the question is, following the Supreme Court decision, what is the law now?

V. Did the Supreme Court Decision Change the Law?

A. Greenpeace's Purposes

At issue in the *Re Greenpeace SC* litigation were two of Greenpeace's purposes.

The first was originally in the following terms:

> 2.2 Promote the protection and preservation of nature and the environment, including the oceans, lakes, rivers and other waters, the land and the air and

151. *Charities Act*, *supra* note 4, s 59(2)(a).

152. See *e.g. Re Greenpeace CA*, *supra* note 49 at para 44.

> flora and fauna everywhere and including but not limited to the promotion of conservation, disarmament and peace.[153]

But was amended at the Court of Appeal stage of the litigation to read as follows:

> 2.2 Promote the protection and preservation of nature and the *environment*, including the oceans, lakes, rivers and other waters, the land and the air and flora and fauna everywhere and including but not limited to the promotion of *conservation, peace, nuclear* disarmament and the *elimination of all weapons of mass destruction*.[154]

Although this purpose was clearly couched in terms of protecting the environment, the references to the promotion of peace and the promotion of disarmament were analysed separately.[155]

The second of Greenpeace's impugned purposes was originally in the following terms:

> 2.7 Promote the adoption of legislation, policies, rules, regulations and plans which further the objects of the Society and support the enforcement or implementation through political or judicial processes, as necessary.[156]

But was amended at the Court of Appeal stage to read as follows:

> 2.7 Promote the adoption of legislation, policies, rules, regulations and plans which further the objects of the Society *listed in clauses 2.1-2.6* and support *their* enforcement or implementation through political or judicial processes, as necessary, *where such promotion or support is ancillary to those objects*.[157]

All of Greenpeace's other stated purposes were accepted as charitable, either for the protection of the environment or the advancement of education.[158]

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153. *Re Greenpeace SC*, *supra* note 1 at para 77.
154. *Re Greenpeace CA*, *supra* note 49 at para 7 [emphasis added].
155. *Application of Greenpeace of New Zealand Incorporated*, (2010) Charities Commission 7 (NZ), online (pdf): *Charities Services* <www.charities.govt.nz/assets/Uploads/Greenpeace-decline-decision.pdf> at paras 36-50 [*Greenpeace of New Zealand Incorporated 2010*].
156. *Re Greenpeace SC*, *supra* note 1 at para 77.
157. *Re Greenpeace CA*, *supra* note 49 at para 7 [emphasis added].
158. *Greenpeace of New Zealand Incorporated 2010*, *supra* note 155 at para 34; *Re Greenpeace HC*, *supra* note 49 at para 10; and *Re Greenpeace CA*, *ibid* at paras 8, 16.

B. The Commission's Decision

The Charities Commission (as it was then) considered that if disarmament and peace were promoted through 'political' means, such as through a change of law or government policy, it could not be charitable.[159] Although the Commission cited the decision in *Latimer CA* as authority for the proposition that a purpose must be for the public benefit,[160] the Commission did not refer to the *Latimer CA* decision in reaching its conclusion that "the promotion of disarmament and peace"[161] is a political purpose and not charitable. The Commission referred instead to the earlier decision of the High Court in *Re Collier*,[162] which itself cast significant doubt on any political purposes doctrine,[163] and four cases from other jurisdictions.

The Commission similarly considered that clause 2.7 was not charitable, on the basis that it allowed for 'political activities'; it considered this was an 'independent purpose' that was not charitable.[164]

With respect, the Charities Commission's approach appears to conflate the concepts of purposes and activities. Under the pre-existing law, the question should have been, were Greenpeace's activities non-partisan and carried out in furtherance of its stated charitable purpose of protecting the environment. If so, there should have been no difficulty.[165]

C. The High Court Decision

Greenpeace appealed to the High Court but, following the hearing of the appeal in November 2010, two developments occurred.

The first was the December 2010 decision of the High Court of Australia in *Aid/Watch*. In that case, the majority held that there was no

159. *Greenpeace of New Zealand Incorporated 2010*, *ibid* at para 42.
160. *Ibid* at para 12.
161. *Ibid* at para 73.
162. *Re Collier*, *supra* note 16.
163. *Ibid* at 89-90.
164. *Greenpeace of New Zealand Incorporated 2010*, *supra* note 155 at paras 52, 73.
165. *Re The Foundation for Anti-Aging Research*, *supra* note 18 at para 88.

general doctrine in Australia which excludes "political objects"[166] from charitable purposes, and the generation by lawful means of public debate concerning the efficiency of foreign aid directed to the relief of poverty is itself a charitable purpose.[167]

The second development was the decision of the High Court of New Zealand in *Re Draco*,[168] which was delivered on 15 February 2011.

D. *Re Draco*

The stated purposes of the Draco Foundation (NZ) Charitable Trust ("Draco") included to protect and promote democracy and natural justice in New Zealand, and to raise awareness of and involvement in the democratic process.[169] Citing *Bowman* and *Molloy,* Justice Ronald Young declined to follow the majority judgment in *Aid/Watch,* and held that "New Zealand does have, as part of its law, a general doctrine which excludes from charitable purposes, political objects".[170] His Honour further considered that *Aid/Watch* may be limited to cases involving the relief of poverty, and that the decision is reliant on "Australian constitutional principles not applicable in New Zealand".[171]

Ostensibly on the basis of an analysis of Draco's activities, or the 'prominence' given to editorial pieces on its website,[172] His Honour went on to hold that expressing the opinion writer's view on issues in the public arena which are "essentially political"[173] meant that Draco was engaging in "partisan advocacy".[174] This *activity* was considered to be a non-charitable *purpose* that was not ancillary to a charitable purpose.[175]

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166. *Aid/Watch*, *supra* note 62 at paras 27, 28, 36, 40, 42, 46, 48, 49.
167. *Ibid* at paras 47-48.
168. *Re Draco*, *supra* note 49.
169. *Ibid* at para 4.
170. *Ibid* at paras 58-59.
171. *Ibid* at para 60.
172. *Ibid* at paras 63-64.
173. *Ibid* at para 67.
174. *Ibid* at para 68.
175. *Ibid* at paras 71, 79.

With respect, the reasoning in the case is surprising. There was no mention of the two-step test for whether a purpose is charitable, or any reference to the preamble. In fact, there was no mention of the *Latimer CA* decision at all, or how it might have impacted interpretation of the *Bowman* and *Molloy* decisions, particularly given developments in New Zealand's participatory democracy since 1917. There was no consideration of whether the purposes of Draco were entirely within the four corners of the *Bowman* and *Molloy* decisions, or whether they might have been distinguishable on their facts. The *Re Draco* decision in fact appears to demonstrate how disadvantaged New Zealand charities currently are by their inability to access a trier of fact, with the decision repeatedly commenting on the lack of evidence necessary to demonstrate the points contended for by the appellant trust.[176]

More fundamentally, the *Re Draco* decision appears to conflate the concepts of purposes and activities, treating purposes, activities and functions as more or less interchangeable.[177] The decision also appears to treat case law from other jurisdictions as if it were directly applicable in New Zealand, without analysis of the different statutory framework on which those decisions were based.[178] This appeared to be particularly the case with Canadian jurisprudence, which at the time contained a specific statutory override of certain common law rules in a manner that was simply not applicable in New Zealand.[179]

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176. See *e.g. ibid* at paras 26, 32, 35, 48-49, 62, 77.
177. See *e.g. ibid* at paras 33-35, 47, 54, 66, 70-72, 78-79.
178. *Ibid* at paras 55, 75-76.
179. Subsection 149.1(6.2) of the *Income Tax Act*, *supra* note 3 required a "charitable organization" to devote substantially all its resources to "charitable activities carried on by it" with a carve-out for certain types of 'political activities', applying an 'ancillary' test to activities rather than purposes. As noted by the High Court of Australia in *Aid/Watch*, *supra* note 62 at para 26, the special treatment in the Canadian statute law of "political activities" distinguishes it from Australian legislation. Contrary to the comments of the Court of Appeal in *Re Greenpeace CA*, *supra* note 49 at para 45, the writer submits that the New Zealand position is similarly distinguished.

The writer respectfully submits that *Re Draco* must be regarded as a 'rogue decision'.

E. *Re Greenpeace HC*

Nevertheless, the *Re Draco* decision appears to have influenced Justice Heath in reaching his decision in *Re Greenpeace HC* a few weeks later in May 2011.

In *Re Greenpeace HC,* the High Court began by noting that, in the most general terms, Greenpeace's object is to promote a philosophy that encompasses protection and preservation of nature and the environment.[180]

Justice Heath noted the questionable foundations of any political purposes exclusion (albeit confusingly referring to it as a "political activity exception"),[181] and considered that, in modern times, there was much to be said for the majority judgment in *Aid/Watch.*[182] Unlike Ronald Young J, Heath J had no real concerns that the political system in Australia ought to bring about a different conclusion, having regard to New Zealand's mixed member proportional system of parliamentary election, New Zealand's reliance on Select Committees to enable policy to be properly debated, and the existence of sections 13 and 14 of the *Bill of Rights*,[183] dealing respectively with freedom of thought, conscience and religion, and freedom of expression.[184]

However, after referring to *Re Draco,* His Honour stated that he felt constrained to apply *Bowman* and *Molloy,* in effectively the same manner, "[a]lbeit with a degree of reluctance".[185]

Again, the decision in *Latimer CA* is not mentioned in the judgment.

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180. *Re Greenpeace HC*, *supra* note 49 at para 1.
181. *Ibid* at paras 47-57.
182. *Ibid* at para 59.
183. *Bill of Rights*, *supra* note 60.
184. *Re Greenpeace HC*, *supra* note 49 at para 59.
185. *Ibid*.

F. The Court of Appeal Decision

Greenpeace's appeal of the High Court decision was heard on 4 September 2012, with the Court of Appeal delivering its decision a few weeks later on 16 November 2012.

With respect to clause 2.2 of Greenpeace's purposes, the Court of Appeal continued the approach of analysing the promotion of peace, and the promotion of nuclear disarmament and the elimination of weapons of mass destruction ("ND and EWMD") as separate purposes, rather than as part of a wider purpose of protection of the environment.

In setting out the applicable test for whether a purpose is charitable, the Court of Appeal referred to the *Latimer CA* decision, and articulated the test as follows:

> The purpose must be for the public benefit and charitable in the sense of coming within the spirit and intendment of the preamble to the Statute of Charitable Uses Act 1601 (43 Eliz I c 4) (the preamble). The public benefit requirement focuses on whether the purpose is beneficial to the community or a sufficient section of the public. The requirement to be charitable within the spirit and intendment to the preamble focuses on analogies or the presumption of charitable status. Even in the absence of an analogy, objects benefit to the public are prima facie within the spirit and intendment of the preamble and, in the absence of any ground for holding that they are outside its spirit and intendment, are therefore charitable in law.[186]

The writer respectfully submits that this is an accurate statement of the test for whether a purpose is charitable in New Zealand law.

However, the Court of Appeal found that the words "for example, advocacy" in subsection 5(3) of the *Charities Act* had codified a political purposes exclusion in New Zealand law,[187] albeit one that was limited to "contentious political purposes".[188] The Court of Appeal noted criticism of such an exclusion, but considered that the rationale for the prohibition remained. In this context, the Court of Appeal referred to the comments of the Canadian Federal Court of Appeal in *Human Life International*[189] that a "guarantee of freedom of expression … is not a guarantee of public

186. *Re Greenpeace CA*, *supra* note 49 at para 43 [footnotes omitted].
187. *Ibid* at paras 45, 56, 59-60, 63, 67.
188. *Ibid* at paras 60, 64.
189. *Human Life International*, *supra* note 79.

funding through tax exemptions for the propagation of opinions no matter how good or how sincerely held" inferring an "underlying concern that taxation benefits should not be available to a society pursuing one side of a political debate".[190]

The Court of Appeal did not refer to the decision in *Latimer CA* in this context.

The writer would respectfully disagree with the Court of Appeal that a strict political purposes exclusion was "part of the current law of New Zealand"[191] on the basis of *Molloy,* or that subsection 5(3) operated to enact one,[192] for the reasons discussed above.

G. The Promotion of Peace

With respect to the promotion of peace, the Court of Appeal held that it was:

> uncontroversial and uncontentious today that in itself the promotion of peace is both for the public benefit and within the spirit of and intendment of the preamble, either by way of analogy or on the basis of the presumption of charitable status.[193]

The Court of Appeal agreed with the decision in *Southwood v Attorney-General*,[194] that promoting peace through either disarmament, or maintaining military strength, would not be charitable, on the basis that promoting peace through these means would be "contentious and controversial with strong, genuinely held views on both sides of the debate".[195]

However, the Court of Appeal held that the foreshadowed amendments to clause 2.2 of Greenpeace's objects would "remove the element of political contention and controversy inherent in the pursuit of disarmament generally and instead constitute, in New Zealand today,

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190. *Re Greenpeace CA*, *supra* note 49 at paras 59, 63, referring to *Human Life International*, *ibid*.
191. *Re Greenpeace CA*, *ibid* at para 63.
192. *Ibid* at para 58.
193. *Ibid* at para 72.
194. [2000] EWCA Civ 204 [*Southwood*].
195. *Re Greenpeace CA*, *supra* note 49 at paras 73-74.

an uncontroversial public benefit test".[196] In reaching this view, the Court of Appeal looked to New Zealand's status as a signatory to the *Treaty on the Non-Proliferation of Nuclear Weapons*,[197] the passing of the *New Zealand Nuclear Free Zone Disarmament, and Arms Control Act 1987*,[198] and "overwhelming public opinion in New Zealand"[199] as demonstrating that the promotion of ND and EWMD was beneficial to the community. The Court of Appeal also held that the purpose was within the spirit and intendment of the preamble, both on the basis of analogy with the promotion of peace, and on the basis that there was no ground for holding otherwise.

On that basis, the Court of Appeal concluded that the public benefit of ND and EWMD is now "sufficiently well accepted in New Zealand society that the promotion of peace through these means should be recognised in its own right as a charitable purpose under the fourth head of the definition".[200]

It seems difficult to argue with the premises that the promotion of peace and the promotion of ND and EWMD are inherently beneficial to the public, and that there is no apparent reason why they should not be considered within the spirit and intendment of the preamble and therefore charitable.

However, in reaching this conclusion, the Court of Appeal appeared to accept the reasoning in *Southwood,* whereby, in analysing whether a purpose for the promotion of peace was charitable, the Court found it necessary to consider the means by which peace would be promoted. If that premise was accepted,[201] it does raise the question of why a similar purpose for the promotion of ND and EWMD should not also require

196. *Ibid* at para 76.
197. *Treaty on the Non-Proliferation of Nuclear Weapons*, 1 July 1968, 729 UNTS 161 (entered into force 5 March 1970).
198. 1987/86 (NZ).
199. *Re Greenpeace CA*, *supra* note 49 at para 79.
200. *Ibid* at paras 76-82.
201. *Ibid* at paras 73-74, 100.

analysis of the means by which that purpose would be promoted.[202]

The writer would also respectfully differ from the Court of Appeal in the emphasis placed on controversy. Rather than having such a determinative effect, the writer respectfully submits that controversy is simply one factor to be taken into account in assessing whether the public benefit test is met on the facts of any particular case.

H. Ancillary Purposes

With respect to clause 2.7 of Greenpeace's purposes, the Court of Appeal noted that Greenpeace had changed the wording of its constituting document to require promotion of the adoption of legislation etc to be *ancillary* to Greenpeace's other objects.[203] Greenpeace appears to have made this change on the basis of the findings by the High Court and the Court of Appeal that there was a strict exclusion against non-ancillary 'political' purposes in New Zealand law.

However, if there was no such strict exclusion, such an amendment was unnecessary. Further, the amendment appears to have caused confusion with respect to the distinction between purposes and activities.[204] The writer respectfully agrees with the subsequent finding of the Supreme Court that, even if a strict political purposes exclusion was to be recognised, if it was correct to find that the promotion of peace, ND, and EWMD was charitable, it would not have been necessary to find advocacy activity properly connected with those purposes to be proscribed unless shown to be ancillary only;[205] among other things, the ancillary rule applies to purposes, not activities, as subsection 5(3) of the *Charities Act* makes clear. In addition, as a matter of law, Greenpeace should have been able to engage in unlimited non-partisan advocacy activities in furtherance of its stated charitable purposes, as discussed above. Arguably, those stated charitable purposes were the protection of

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202. *Re Greenpeace SC*, *supra* note 1 at paras 87, 98, 100; *cf. Re Greenpeace CA*, *ibid* at para 81.
203. *Re Greenpeace CA*, *ibid* at paras 83-92.
204. *Ibid* at paras 91-92.
205. *Re Greenpeace SC*, *supra* note 1 at paras 74, 85.

the environment, as noted by the High Court;[206] however, even if it had been correct to analyse clause 2.2 in separate components, the Court of Appeal had now found all of Greenpeace's purposes to be charitable.

However, the difficulty was that the amended wording of Greenpeace's object now did require Greenpeace's advocacy to be 'ancillary', even if such a requirement did not make sense as a matter of common law. As the Court of Appeal noted, organisations have a legal requirement to comply with the terms of their constituting document.[207] Failure to do so raises issues of breach of duty and *ultra vires*. Having made the amendment, Greenpeace now had a legal obligation to ensure that its advocacy work was 'ancillary'.

Nevertheless, in perhaps another demonstration of the difficulties caused by the absence of a trier of fact, the Court of Appeal considered that the issue of compliance with clause 2.7 in its amended form was a matter of evidence that needed to be addressed by Charities Services at first instance, and not by the Court on a second appeal. The Court of Appeal referred the matter back for reconsideration in light of its judgment.[208]

Greenpeace appealed to the Supreme Court.

I. The Supreme Court Decision

The writer respectfully agrees with the findings of the Supreme Court that there is no political purposes exclusion in New Zealand law, and that subsection 5(3) did not operate to enact one.[209] A blanket exclusion is neither necessary nor beneficial, risks rigidity in an area of law which should be responsive to the way society works, and distracts from the underlying inquiry whether a purpose is of public benefit.[210] Instead, the question of whether a purpose is 'political' is simply one facet of the

206. *Re Greenpeace HC*, *supra* note 49 at para 1.
207. *Re Greenpeace CA*, *supra* note 49 at paras 87-88.
208. *Ibid* at para 92.
209. *Re Greenpeace SC*, *supra* note 1 at paras 56-58, 86, 115.
210. *Ibid* at paras 3, 59, 69, 70, 114.

public benefit test,[211] as is the issue of controversy.[212]

In this respect, the writer respectfully submits that the Supreme Court confirmed the pre-*Charities Act* position.

In two respects, however, the Supreme Court disagreed with the approach taken by the Court of Appeal to assessing whether a purpose to promote ND and EWMD was charitable: (1) the application of the presumption of charitability; and (2) whether it was necessary to consider the manner of promotion of ND and EWMD.[213]

Importantly, however, the Supreme Court did not appear to question the two-step test. In fact, despite at times using a short-hand expression that might appear to conflate the two limbs of the test,[214] the Supreme Court appears to have been at pains to emphasise that both limbs of the test must be satisfied.[215]

J. The Presumption of Charitability

With respect to the presumption of charitability, the Supreme Court disagreed with the Court of Appeal's approach to the second limb of the two-step test, appearing to hold that this limb could be satisfied by analogy only.[216]

However, the writer respectfully submits that the Supreme Court appears to have misdirected itself as to the nature of the presumption. The Supreme Court appears to have mistakenly equated the presumption of charitability with the "single test of public benefit"[217] suggested by counsel for the appellant in *Vancouver Society*.[218] In the *Vancouver Society* case, counsel urged the Supreme Court of Canada to consider adopting

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211. *Ibid* at paras 72-74.
212. *Ibid* at paras 75, 99.
213. *Ibid* at paras 3, 31, 87-100.
214. *Ibid* at paras 3, 18, 73, 103, 114.
215. *Ibid* at paras 27, 29, 30, 32, 113. See also *Re Family HC*, *supra* note 49 at para 8.
216. *Re Greenpeace SC*, *ibid* at paras 29-31.
217. *Ibid* at paras 29, 113.
218. *Vancouver Society*, *supra* note 14; *Re Greenpeace SC*, *supra* note 1 at paras 24-25, 27, 29-30, 113.

an "entirely new approach"[219] to the definition of charitable purpose, in response to the "unduly restrictive"[220] interpretation of the definition that prevailed in Canadian jurisprudence at that time.[221]

Adoption of such a test would clearly have been a radical change for Canada.[222] However, with respect, the presumption of charitability does not correspond with the "single test of public benefit"[223] put forward in that case. In addition, the presumption does not "lose the concept of charity"[224] but seeks to find it, in way that has been recognised by the High Court as being in the public interest, "more intellectually honest"[225] and based on sound policy.[226] Recognition of the presumption would also not have constituted a "radical change"[227] in New Zealand as, in contrast to Canada, the presumption was firmly part of New Zealand law, as discussed above.[228]

A further difficulty is that the Supreme Court appears to hold that the presumption of charitability can only be rebutted if shown to be contrary to analogous cases,[229] citing the comments of Lord Justice Russell in *Incorporated Council of Law Reporting for England and Wales v*

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219. *Vancouver Society*, *ibid* at para 196.

220. *Ibid* at para 168.
221. *Ibid* at paras 196-198, 200.
222. *Re Greenpeace SC*, *supra* note 1 at para 29.
223. *Ibid* at paras 29, 113.
224. *Ibid*.
225. *Re Collier*, *supra* note 16 at 95.
226. *Ibid*.
227. *Vancouver Society*, *supra* note 14 at para 200.
228. The comments of the Court in *Vancouver Society*, *ibid*, referred to in *Re Greenpeace SC*, *supra* note 1 at para 29, were referring to the single test of public benefit, not the presumption of charitability. The presumption of charitability in New Zealand in fact bears more, although not complete, resemblance to the approach put forward by the intervener in *Vancouver Society*, *ibid* at paras 201-02. This too would have been a change in Canada, which as noted above interpreted the definition of charitable purpose much more restrictively than in New Zealand.
229. *Re Greenpeace SC*, *supra* note 1 at paras 25-26.

Attorney-General.[230] With respect, the reference to analogous cases in this context appears misplaced. As discussed above, Russell LJ's comments, which have been cited with approval in many New Zealand cases,[231] hold that a purpose for the public benefit is presumed to be charitable *in the absence of any ground for holding otherwise*. There is no apparent reason why such grounds should be limited to contrariety to analogous cases; indeed, such a limitation would appear to equate the presumption with the analogy test to which it was specifically providing an alternative.

Even so, given four centuries of case law, there are now so many analogies available that, as the Supreme Court notes, whether the second limb of the test is assessed by means of analogy, or by means of a presumption, may make "little difference in result".[232]

K. Manner of Promotion

In terms of the second respect in which the Supreme Court disagreed with the approach taken by the Court of Appeal, the writer respectfully submits that some conflation of the distinction between purposes and activities appears to have occurred.[233] For example, the Supreme Court appears to consider that subsection 18(3) had changed the law to enable the purposes of an entity to be "inferred from the activities it undertakes",[234] apparently without reference to an entity's constituting document.[235]

With respect to this specific point, the High Court has subsequently clarified in *Re The Foundation for Anti-Aging Research* that subsection 18(3) was not intended to "wreak some fundamental change in approach or a move away from the fundamental 'purposes' focus of the charities

230. [1972] Ch 73 (CA (Eng)).
231. See *e.g. Morgan v Wellington City Corporation*, [1975] 1 NZLR 416 (CA) at 419-20; *Medical Council*, *supra* note 26 at 310; *Auckland Medical Aid*, *supra* note 75 at 388; and *Latimer HC*, *supra* note 5 at paras 106, 131. See also *Re Greenpeace CA*, *supra* note 49 at para 43.
232. *Re Greenpeace SC*, *supra* note 1 at paras 27, 31.
233. See *e.g. ibid* at paras 32, 47, 55, 65, 71, 73-74, 102, 104.
234. *Ibid* at para 14.
235. *Ibid*.

inquiry".[236] In other words, subsection 18(3) did not change the pre-*Charities Act* approach to ascertaining a charity's purposes, and the limited role of activities in that regard. The Court's role remains interpretation of the constituting document, not creation, as discussed above.

The fact that it would be very rare for advocacy activity to constitute a purpose in its own right is also significant in this context. The writer submits that this factor explains the following statements of the Supreme Court: that "advancement of causes will often, perhaps most often, be non-charitable",[237] on the basis of difficulty of establishing public benefit;[238] that "the promotion itself, if a standalone object not merely ancillary, must itself be … a charitable purpose"[239]; and that it may be "difficult" or "unusual" to show that "the promotion of an idea is itself charitable".[240] The writer submits that, in these statements, the Supreme Court is simply referring to the rare situation where an advocacy activity may have become a purpose in itself, and is holding that, even in such a case, there is no reason in principle why such a purpose could not be charitable if the two-step test is satisfied. In so doing, the writer respectfully submits that the Supreme Court affirms the pre-*Charities Act* position, and does not disturb the principle that charities may engage in unlimited non-partisan advocacy activity in furtherance of their stated charitable purposes.

Such statements might otherwise be highly problematic as, conceptually, every charitable purpose is a 'cause' and charities must by law act in furtherance of, and therefore 'advance', their charitable purposes. If, by the above statements, the Supreme Court was intending

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236. *Re The Foundation for Anti-Aging Research*, *supra* note 18 at paras 82-87, Ellis J. The High Court decision was recently cited with approval in *Graham Hipkiss v The Charity Commission for England and Wales* (2018) First-Tier Tribunal (Charity) CA/2017/0014, online (pdf): <charity.decisions.tribunals.gov.uk/documents/decisions/Decision%20(23%20August%202018).pdf>.
237. *Re Greenpeace SC*, *supra* note 1 at para 73.
238. See also the comment in *Re Greenpeace SC*, *ibid* at para 74 that such a finding "will not be common".
239. *Ibid* at paras 103, 102; see also para 73.
240. *Ibid* at paras 114-15.

to import an entirely new approach that would see essentially every purpose having difficulty establishing public benefit, and therefore being charitable, the Supreme Court would surely have signalled this clearly, particularly given the extent to which Supreme Court appeared to be eschewing any "radical change".[241] The writer respectfully submits that the former interpretation seems more likely and is to be preferred.

Another issue relates to the comments of the Supreme Court that assessment of whether "advocacy or promotion of a cause or law reform is a charitable purpose depends on consideration of the end that is advocated, the means promoted to achieve that end and the manner in which the cause is promoted".[242] Similarly, the Supreme Court states that: "[e]ven if an end in itself may be seen as of general public benefit (such as the promotion of peace) the means of promotion may entail a particular point of view which cannot be said to be of public benefit".[243]

The Supreme Court does not analyse how these statements relate to the comments of the Privy Council that the relevant distinction is between "ends, means and consequences",[244] and that it is ends, not means, that must be exclusively charitable.[245] Again, such statements might on their face appear highly problematic given that, broadly, every charitable purpose can be conceptualised as "promotion of a cause".[246] However, again, it seems unlikely that the Supreme Court would have meant these statements to usher in a fundamental overhaul of the test for whether a purpose is charitable, particularly given the extent to which the Supreme Court seemed at pains to maintain the traditional two-step test for whether any purpose was charitable.[247]

In principle, there seems no practical distinction between 'means' and 'manner', except in the context of the unique, three-layered abstract

241. *Ibid* at para 29.
242. *Ibid* at para 76.
243. *Ibid* at para 116.
244. *Latimer PC*, *supra* note 16 at para 36.
245. *Ibid*.
246. *Re Greenpeace SC*, *supra* note 1 at paras 76, 116.
247. *Ibid* at paras 29-30.

purpose that was at issue before the Court. In other words, the better interpretation appears to be that the promotion of peace through the promotion of ND and EWMD is one of the exceptions where it may be necessary to look to activities to ascertain the true purpose of an organisation. In other words, the purpose of referring to 'means' and 'manner' was to require a consideration of the means of promoting the means of promoting peace, to ascertain the true nature of the specific purpose before the Court. The specific reference to the promotion of peace provides support for this interpretation.[248]

The writer respectfully submits that the purpose of referring to means and manner was not to ascertain whether 'means' and 'manner' are charitable, or to require a charity to show public benefit in all of its activities. As the High Court has noted in *Re The Foundation for Anti-Aging Research*, it seems unlikely that the Supreme Court was intending to "wreak some fundamental change in approach or a move away from the fundamental 'purposes' focus of the charities inquiry".[249]

L. Assessing Public Benefit

In disagreeing with the approach taken by the Court of Appeal to assessing whether a purpose to promote ND and EWMD was charitable, the Supreme Court stated that it is "no answer" to point to the international and domestic framework for nuclear disarmament.[250]

However, the writer respectfully submits that these statements do not displace the approach to assessing public benefit that was set out by the High Court in *Latimer HC*.[251] To the contrary, while Parliament's involvement may, in the Supreme Court's view, not have resolved the question of public benefit on the facts of the *Re Greenpeace SC* case,[252] that does not translate into a 'hard and fast rule' that Parliament's involvement can never provide a guide as to public benefit. The issue comes down to the facts of each specific case.

248. *Ibid* at para 116.
249. *Re The Foundation for Anti-Aging Research*, *supra* note 18 at para 86.
250. *Re Greenpeace SC*, *supra* note 1 at para 101 [emphasis added].
251. *Latimer HC*, *supra* note 5; *ibid* at para 83.
252. *Re Greenpeace SC*, *supra* note 1 at para 101.

As perhaps another indication of the disadvantage experienced by charities through their inability to access a trier of fact, the Supreme Court considered that it did not have the evidence necessary to determine whether a purpose to promote peace through ND and EWMD was charitable, and referred the matter back to Charities Services for reconsideration in light of its judgment.[253]

VI. What is the Question Following the Supreme Court Decision?

To summarise, in the writer's respectful submission, the Supreme Court decision did not change the law, but restored it to its pre-*Charities Act* position. The test for whether a purpose is charitable remains the two-step test set out by the Court of Appeal in *Latimer CA*, with a question mark over whether the second limb of the test can in fact be met by the presumption of charitability. There is no political purposes exclusion in New Zealand law. Whether a purpose is 'political', 'controversial', or both, are simply facets of the public benefit test. Charities remain lawfully permitted to undertake unlimited non-partisan advocacy in furtherance of their stated charitable purposes, as was the case before the *Charities Act*. In the rare case where advocacy activity may have become a purpose in itself, such a purpose may still be charitable if it can meet both limbs of the two-step test.

A. The Board's Second Decision

However, Charities Services clearly interpret the Supreme Court decision differently.

On 21 March 2018, almost four years after the Supreme Court had delivered its decision, and almost a decade after Greenpeace had first applied for registration, the Board completed its reconsideration in light of the Supreme Court decision. It again declined Greenpeace's

253. *Ibid* at paras 104, 117.

application.[254]

With respect, although the High Court in *Re The Foundation for Anti-Aging Research* had confirmed the distinction between purposes and activities, the Board appears to recast the test set down by the High Court to fit within a paradigm that conflates purposes and activities.[255] The Board now appears to require public benefit to be found in all of a charity's activities.[256] As discussed above, this results in a complex and highly subjective approach under which a charity cannot have certainty as to whether its purposes are charitable unless Charities Services says that it is. This results in a 'deeming' approach similar to the one suggested by IRD in 2001 but was rejected by the Select Committee in 2004.

With respect, the approach seems arbitrary. Is there really a principled basis on which Save Animals from Exploitation qualifies for registration[257] but Greenpeace does not? Or on which Restore Christchurch Cathedral qualifies[258] but the Society for the Protection of Auckland Harbours does not?[259] Greenpeace's purposes for the protection of the environment and the advancement of education, are now no longer found to be charitable,

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254. *Application of Greenpeace of New Zealand Incorporated*, (2018) Charities Registration Board 1 (NZ), online (pdf): <www.charities.govt.nz/assets/Uploads/Greenpeace-of-New-Zealand-Incorporated-Decision.pdf> [*Greenpeace of New Zealand Incorporated*].
255. *Ibid* at para 10.
256. *Ibid* at para 28.
257. *Application of Save Animals From Exploitation*, (2018) Charities Registration Board 1 (NZ), online: <charities.govt.nz/charities-in-new-zealand/legal-decisions/view-the-decisions/view/save-animals-from-exploitation>.
258. *Application of Restore Christchurch Cathedral Group Incorporated*, (2015) Charities Registration Board 1 NZ) online (pdf): <charities.govt.nz/assets/Uploads/Restore-Christchurch-Cathedral-Group-Incorporated-decision.pdf>.
259. *Application of Society for the Protection of Auckland Harbour*, (2016) Charities Registration Board 1 (NZ) online (pdf): <charities.govt.nz/assets/Uploads/Society-for-the-Protection-of-Auckland-Harbours-decision.pdf.pdf>.

despite having been found to be charitable throughout the litigation.[260]

Charities advocating against government policy now appear to be particularly vulnerable to non-registration,[261] raising the spectre of original concerns that the *Charities Act* regime would be used as a means for government to exercise political control of the charitable sector.

The writer respectfully submits that the new approach of Charities Services and the Board does not make sense in charities law terms, is unworkable in practice, and puts New Zealand out of step with comparable countries such as Canada and Australia. Greenpeace has appealed again, and also sought judicial review.[262] At the time of writing, Greenpeace's consolidated appeal is awaiting hearing. Other appeals are also in progress,[263] highlighting that the position in New Zealand is not settled.

The topic of advocacy by charities is specifically included within the terms of reference for the current review of the *Charities Act* (despite the definition of charitable purpose itself being outside the scope).[264] The issue of advocacy has been a key issue raised in consultation meetings and submissions to date.[265] It is the policy of both Labour and the Green Party (two of the three political parties that currently form the coalition government of New Zealand) to support the independence of community

260. *Greenpeace of New Zealand Incorporated*, *supra* note 254 at paras 35, 50, 76.

261. Examples include Greenpeace, Kiwis Against Seabed Mining Incorporated, Family First New Zealand.

262. *Greenpeace of New Zealand Incorporated v Charities Registration Board*, [2019] NZHC 929.

263. Family First New Zealand has appealed the decision of the High Court in *Re Family HC*, *supra* note 49 with a hearing expected in October 2019. The Better Public Media Trust has appealed the decision of the Board to decline its application for registration *Application of Better Public Media Trust*, (2019) Charities Registration Board 1 (NZ), online (pdf): <www.charities.govt.nz/assets/Uploads/Better-Public-Media-Trust4.pdf>.

264. The terms of reference can be found here: "Modernising the Charities Act 2005" (2019), online: *Department of Internal Affairs* <www.dia.govt.nz/charitiesact>.

265. The writer is a member of the Core Reference Group for the review of the *Charities Act*, *supra* note 4.

sector advocacy, and ensure that charities can engage in advocacy without fear of losing their charitable status.[266] Despite this, early indications are that officials may seek to devolve law-making to Charities Services providing guidance on their controversial interpretation, on the basis of promoting 'clarity'.

B. Freedom of Expression

Although freedom of expression is one of the most essential elements of a democratic society,[267] the right to freedom of expression under section 14 of the *Bill of Rights*[268] has not been meaningfully considered in decisions regarding the advocacy functions of charities to date.[269]

The rights and freedoms contained in the *Bill of Rights* may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.[270] Restrictions on the right to freedom of expression must conform to strict tests of necessity and proportionality,[271] and, wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in the *Bill of Rights*, that meaning is to be preferred to any other meaning.[272]

The burden of justifying a limitation upon a guaranteed right, and of demonstrating that the limitation does not impair the democratic

266. See New Zealand Labour Party, "Community and Voluntary Sector" (2017), online (pdf): *New Zealand Labour Party* <d3n8a8pro7vhmx.cloudfront.net/nzlabour/pages/8546/attachments/original/1504489890/Community___Voluntary_Sector_Manifesto.pdf>; and Green Party of Aotearoa New Zealand, "Community and Voluntary Sector" (2011), online (pdf): *Green Party of Aotearoa New Zealand* <www.greens.org.nz/sites/default/files/community_and_voluntary_sector_2011_0.pdf>.
267. *Wall v Fairfax New Zealand Ltd*, [2018] 2 NZLR 471 (HC) at para 26 [*Wall*].
268. *Bill of Rights*, *supra* note 60.
269. John Hancock, "Advocacy – Are Charities able to Advocate Against Government Policy?" (Presentation delivered at the 2019 New Zealand CLAANZ Conference, New Zealand, 11 April 2019) online: <www.charitylawassociation.org.au/events-nzconf2019>.
270. *Bill of Rights*, *supra* note 60, s 5.
271. *Wall*, *supra* note 267 at para 26.
272. *Bill of Rights*, *supra* note 60, s 6.

functioning of society, lies with the state.[273] The onus is therefore on Charities Services to demonstrate how the limitations it seeks to impose on charities' right to freedom of expression can be justified.[274]

The recent decision of the Ontario Superior Court of Justice in *Canada Without Poverty v Attorney-General of Canada*[275] lends support to the proposition that the *Human Life International* approach, discussed above, should not be followed.[276] A government agency denying charitable registration to a charity on the basis of its work advocating for its stated charitable purposes is a limitation on that charity's freedom of expression that needs to be, but has not yet been, demonstrably justified in a free and democratic society.[277]

It is no answer to say that some may disagree with particular positions advocated for by particular charities. There is no requirement, or even realistic possibility, for all to agree with every position taken by every charity. Rather than analysing the tax privileges available to charities in terms of the positions taken by particular individual charities, those tax privileges should be seen in the wider context of generating public debate in a marketplace of ideas in a participatory democracy. It is a case of, 'I may not agree with what you say, but I will defend to the death your right to say it'. As the High Court of Australia has noted, the generation by lawful means of public debate is itself in the public interest.

It is also axiomatic that all advocacy undertaken by a charity must be undertaken in furtherance of that charity's stated charitable purposes. If barriers are placed in the way of charities' ability to advocate, the risk is that the debate will be skewed in favour of vested, monied interests, who

273. Siracusa principles on the limitation and derogation provisions in the *International Covenant on Civil and Political Rights*, *supra* note 64 at paras 12, 20. See also UN Human Rights Committee General Comment 34 on the right to freedom of opinion and expression under Article 19 at para 27.

274. *Bill of Rights*, *supra* note 60, ss 3, 29.

275. 2018 ONSC 4147.

276. Noting that the Court of Appeal's approval of the statements in *Human Life International*, *supra* note 79, were contained within the paragraphs that were overturned by the Supreme Court on appeal.

277. *Bill of Rights*, *supra* note 60, s 5.

may have the resources to dominate the narrative without the discipline of charitable purposes or the transparency and accountability requirements that registered charitable status entails.

As with childhood diseases, we can better resist those germs to which we have been exposed.[278] Rather than silencing charities for their speech, what is really needed in New Zealand is a mature debate as a society about what freedom of speech really means, and why it is important to our democracy.

VII. Conclusion

When it comes to the issue of advocacy by charities, the writer respectfully submits that Charities Services is not asking itself the right question. The question is not whether there is public benefit in any particular point of view. The question, with respect to any advocacy, is whether it is undertaken in furtherance of the charity's stated charitable purposes. If so, and provided the advocacy is not partisan, and complies with other restrictions on speech, such as the requirements of electoral law, defamation law and proscriptions on hate speech, and is otherwise in accordance with the charity's constituting document, there should be no difficulty. Within those parameters, charities should be free to exercise their right to freedom of expression as they see fit without undue government interference.

As Hammond J has observed,[279] the Court does not have to enter into the debate at all; hence the inability of the Court to resolve the merits is irrelevant. The function of the Court ought to be to sieve out debates which are for improper purposes; and to then leave the public debate to lie where it falls, in the public arena.

It is hoped that, in addressing the issue of advocacy by charities, the review of the New Zealand *Charities Act* will be guided by principles, such as: (1) purposes are not to be conflated with activities; (2) charities'

278. Submission by Rowan Atkinson to the English Parliament in 2012 seeking reform to section 5 of the *Public Order Act 1986* (UK) (which made it a public order offence to use "insulting" words).

279. *Re Collier*, *supra* note 16 at 90.

rights to freedom of expression must be respected; (3) there is no political purposes exclusion in New Zealand law; and (4) charities are able to engage in unlimited non-partisan advocacy in furtherance of their stated charitable purposes. In the writer's respectful submission, these principles reflect the pre-existing position and have not been substantively changed by either the passing of the *Charities Act* or the Supreme Court decision. It is to be hoped that the review of the New Zealand Charities Act will follow Canada's lead on this issue and make these principles clear.