

CHARITABLE TRUSTS AND POLITICAL ACTIVITY: TIME FOR A CHANGE?

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For many decades case law and, more recently, statute has determined that a trust will be denied charitable status if its purposes are political. This appears, prima facie, to be a straightforward principle, however jurisprudence suggests that this principle is fraught with difficulties, not only for the judiciary, but also in terms of its justiciability. This paper considers the complex relationship between charity and political activity, and in light of recent decisions coming from the New Zealand Charities Commission and Australia's and New Zealand's High Courts, questions whether it is time for the Charities Commission and the courts to adopt a more liberal approach when applying the principles to reflect contemporary socio-political times.

The ethos of charity is an ancient one, with the oldest active charity on record in the United Kingdom established in AD597,¹ but it took many more centuries before a system of charity law was established. This system of regulation effectively began with the enactment of the Statute of Charitable Uses Act 1601. The preamble of this Act sets out various purposes that are deemed to be charitable, including: the relief of the poor, the aged and the impotent, and whilst the body of the Act has long since been repealed, the preamble lives on in modern day charitable law, and is applied and interpreted by the judiciary, the New Zealand Charities Commission and the Charity Commission of England and Wales. The Charitable Uses Act 1601 may have provided the foundations for the system of regulating charities but it was the seminal case of *Commissioners for the Special Purposes of Income Tax v Pemsel*,² and specifically Lord MacNaghten, who set out the four heads of charity under which all charitable trusts must fall; these heads are still the very foundation of charitable trust law in contemporary times. The four heads of charity are:

- the relief of poverty;
- the advancement of religion;
- the advancement of education; and
- any other purposes beneficial to the community not falling under any preceding heads.

These heads, as set out by Lord MacNaghten, have now been codified in s 5(1) of the Charities Act 2005, but even if a trust falls under one of these heads, there are still further tests that must be satisfied before a trust will be construed as achieving charitable status under the Charities Act 2005. Section 5(2) of the Act also requires that the purpose must be for the public benefit, in other words "[t]his means that the purpose must be directed at benefitting the public or a sufficient sec-

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1 Gareth Morgan "The Spirit of Charity" (paper presented at Professorial Lecture, Sheffield Hallam University, England, April 2008) at 5.

2 *Commissioners for the Special Purposes of Income Tax v Pemsel* (1891) AC 531.

tion of the public.”³ Additionally, the purposes must be charitable and s 5(3) of the Act notes that any non-charitable purposes must be ancillary to the charitable purpose or purposes.

The case of *Bowman v Secular Society*⁴ determined that political purposes cannot be charitable where Lord Parker of Waddington observed that:⁵

...a trust for the attainment of political objects has always been held invalid, not because it is illegal, for every one is at liberty to advocate or promote by any lawful means a change in the law, but because the Court has no means of judging whether a proposed change in the law will or will not be for the public benefit, and therefore cannot say that a gift to secure the change is a charitable gift.

Notwithstanding the observations of Lord Parker of Waddington, however, it is clear that politics and charities have had a long-standing, albeit turbulent, relationship. Dunn notes that:⁶

...the Charitable Purposes Act 1601 was born out of a charged political environment and the purposes contained within it were unified by their association with the financial obligations of, or contributions to, a parish government’s purse strings.

Even after the enactment of that Act, the close relationship between State concerns and charitable purposes remained, so where the State may have failed in some respect, charity fulfilled that need as a consequence of that failing. How much charitable input was required varied depending on the Government and their policies at the time,⁷ but relief of poor, advancement of education, and the advancement of religion have always been at the forefront of government policies, regardless of the party in power at the time, thus reflecting the close affinity between politics and charity.

“Regardless however of the implicit affiliation between charity and politics”,⁸ any organisation wishing to obtain or retain its charitable status under the Charities Act 2005 must avoid having political purposes and avoid engaging in political activity. Prima facie, this appears to be a straightforward requirement and one that would be easy to fulfil, however, case law and academic commentary suggest that this is far from the truth, and recent decisions emanating from the New Zealand Charities Commission and Australia’s Federal and High Court only serve to highlight the challenges confronting the judiciary and statutory bodies when faced with organisations connected with political activity in some fashion.

Before considering the original proposition, it is worthwhile detailing the jurisprudence to date to contextualise the issues demarcating those bodies with overt political activity from those bodies whose political activity is ancillary to their charitable purposes.

Political purposes were defined by Justice Kennedy in *Re Wilkinson (Deceased)*⁹ as being:¹⁰

Any purpose with the object of influencing the Legislature is a political purpose, and similarly, in my view, a purpose that the central executive authority be induced to act in a particular way in foreign relations or that the people be induced to accept a particular view or opinion as to how the central executive shall act in the foreign relations of this country is, in the broadest sense, a political purpose[.]

3 Registration Decision: Greenpeace of New Zealand Incorporated, Charities Commission, 15 April 2010 at [12].

4 *Bowman v Secular Society* [1917] AC 406.

5 *Ibid.*, at 442.

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

7 *Ibid.*

8 Juliet Chevalier-Watts “Politics and Charity” [2009] NZLJ March at 54.

9 *Re Wilkinson (Deceased) Perpetual Trustee Estate and Agency Company of New Zealand, Limited v League of Nations Union of New Zealand* [1941] NZLR 1065.

10 *Ibid.*, at 1077.

This reflects the authority of *Bowman v Secular Society*, as cited earlier in the paper, that political purposes cannot be construed as being charitable, and such views were noted in the 1800s in the English Constitution.¹¹

The case of *Bowman* was applied in *McGovern v Attorney-General*,¹² where the Court was tasked with considering whether the purposes of a trust established by Amnesty International met the criteria for charitable status.

The case of *McGovern* would have been fraught with difficulties for the Court, not least because of the public expectation that an organisation as well known and respected as Amnesty International would automatically be construed as being charitable, but as Justice Slade observed: “the mere fact that an organisation may have philanthropic purposes of an excellent character does not itself entitle it to acceptance as a charity in law.”¹³ In order to clarify this viewpoint, his Honour took time to set out his observations clearly with regard to the thorny issue of political activity, which was a central focus for the Court with regard to this case. Slade J confirmed that “[t] here is no doubt whatever that a trust of which a principle object is to alter the law of this country cannot be regarded as charitable”¹⁴ but “the mere fact that trustees may be at liberty to employ political means in furthering the non-political purposes of a trust does not necessarily render it non-charitable.”¹⁵ His Honour helpfully set out a summary of trusts that would be deemed trusts for political purposes and thus rendering them non-charitable, founding them principally on the *Bowman* case and *National Anti-Vivisection Society v Inland Revenue Commissioners*:¹⁶

Trusts for political purposes falling within the spirit of this pronouncement include, inter alia, trusts of which a direct and principal purpose is either (i) to further the interests of a particular political party; or (ii) to procure changes in the laws of this country; or (iii) to procure changes in the laws of a foreign country; or (iv) to procure a reversal of government policy or of particular decisions of governmental authorities in this country; or (v) to procure a reversal of government policy or of particular decisions of governmental authorities of particular decisions of governmental authorities in a foreign country.¹⁷

As noted earlier in the paper, trust purposes must be exclusively charitable because otherwise there would be no means of determining what part of the trust property was designated for charitable purposes and what part would be for non-charitable purposes, thus uncertainty would render the trust invalid.¹⁸ However, trust purposes that are not charitable will not automatically render the whole trust invalid, including purposes with political connections, so long as those non-charitable activities are merely subsidiary or ancillary to the charitable purpose, but if those non-charitable activities form part of the trust purpose, then the whole trust will be deprived of charitable status.¹⁹ Although, Justice Slade pertinently observed that this “distinction is perhaps easier to state than to apply in practice”.²⁰ This then is the nub of the issue for not only *McGovern*, but also for subse-

11 See *Thornton v Howe* 1862 WL 6423; *De Themmines v De Bonneval* (1825) 38 ER 1035.

12 *McGovern v Attorney-General* [1982] 1 Ch 321.

13 *Ibid.*, at 329.

14 *Ibid.*, at 335.

15 *Ibid.*, at 340, emphasis removed.

16 *National Anti-Vivisection Society v Inland Revenue Commissioners* [1948] AC 31.

17 *McGovern v Attorney-General* above n 12, at 340.

18 *Ibid.*

19 *Ibid.*, at 341.

20 *Ibid.*

quent cases where the distinction between political ancillary purposes and political activities that form part of the trust purpose has been one that has elicited much judicial opinion and vexation.

The reason that a court is unwilling to find a trust to be charitable if it seeks to change the law is because:²¹

...the Court will ordinarily have no sufficient means of judging as a matter of evidence whether the proposed change will or will not be for the public benefit. Secondly, even if the evidence suffices to enable it to form a prima facie opinion that a change in the law is desirable, it must still decide the case on the principle that the law is right as it stands, since to do otherwise would usurp the functions of the legislature.

Justice Slade, in the same case, also made reference to the fact that changes to the law by the judiciary may actually have injurious consequences, thus it should be for Parliament and not the judiciary to decide such matters, and further, it is essential for there to be public confidence in the political impartiality of the judiciary for the continuation of the rule of law.²² With such words of caution therefore it is perhaps surprising that there are strong views advocating for changes in the law in this respect, but nonetheless more recent cases do appear to support the notion that a purpose directed to changing the law should be charitable, as reflected in the case of *Public Trustee v Attorney-General of New South Wales*.²³ Justice Santow observed that “[p]ersuasion directed to political change is part and parcel of a democratic society in which ideas and agendas compete for attention and allegiance.”²⁴ However, I do not think that his Honour meant to suggest entirely that all charitable trusts with political purposes should be construed as charitable because his Honour was quick to note also that “[m]uch will depend on the circumstances including whether an object to promote political change is so pervasive and predominant as to preclude its severance from other charitable objects or subordinate them to a political end.”²⁵ Therefore even though Santow J is supporting a more flexible approach, in reality, I would suggest that what is actually being advocated by his Honour is that the courts must consider the question of degree of the political purpose of a trust, and where the political purposes outweigh the charitable purposes, then charitable status will be denied. Although in the recent English case of *Hancett-Stamford v Attorney General*,²⁶ Justice Lewison is unequivocal in his view that “whatever the rationale, there is no doubt that the principle remains that a trust, one of whose purposes is to change the law, cannot be charitable.”²⁷ However, regardless of continued rhetoric and support for a more liberal judicial approach, this question of degree has been considered in some detail by the Charities Commission of New Zealand in very recent times, and their approach would be unlikely to find favour with the liberalist advocates. It is to these decisions that this paper now turns to provide an understanding of the contemporary standing in New Zealand.

On 15 April 2010, the Charities Commission of New Zealand released its registration decision in relation to Greenpeace of New Zealand Incorporated. The Charities Commission was established by the Charities Act 2005, and all existing charities, and those seeking charitable status, are required to apply for registration by the Charities Commission under the Act for tax exemption

21 Ibid, at 336-337.

22 Ibid, at 337, per Santow J citing *Duport Steels Ltd v Sirs* [1980] 1 WLR 142, per Lord Diplock at 157.

23 *Public Trustee v Attorney-General of New South Wales* (1997) 42 NSWLR 600.

24 Ibid, at 621.

25 Ibid.

26 *Hancett-Stamford v Attorney General and others* [2009] Ch 173.

27 Ibid, at 180.

purposes.²⁸ The Commission, after thorough scrutiny and application of the relevant statutory and common law requirements, is at liberty to register, deregister or to decline registration of such entities.

In the Greenpeace application, the Applicant applied to the Charities Commission for registration as a charitable entity. In January 2009, the Commission sent a notice that may lead to declining the registration for a number of reasons, and asked for further information, inter alia, on how the Applicant sought to promote disarmament and peace. On receiving the Applicant's response, the Commission determined that Clause 2.2 of the Applicant's objects, that of the promotion of disarmament and peace, did not show any intention to relieve poverty, or advance education or to advance religion, thus it should be considered under the fourth *Pemsel* head of "any other matter beneficial to the community." For any purpose to qualify under this head, it must firstly be beneficial to the community, and secondly, fall within the spirit and intendment of the Statute of Elizabeth. The Commission gave great consideration to the issue of promoting world peace and its political alliance. In referring to the case of *Re Collier (deceased)*,²⁹ the Commission noted that a gift for the promotion of world peace was not charitable because it was a political purpose, but the Commission observed that this application of the political purpose principle in *Re Collier* was not as clear-cut as may be presumed.³⁰ In *Re Collier*, the Court determined that it was the manner in which the promotion of world peace was to be exercised that was at issue, not the actual principle of world peace itself because the testatrix wished to encourage soldiers to lay down their arms as a means of promoting world peace. This act was not supported by military law, thus pursued an unlawful end that would have required a change in law to be achieved.³¹ So as the Commission rightly stated: "it was not the bequest for the promotion of world peace itself that was held to be political, but rather that purpose viewed in light of the testatrix's message that it is soldiers who are persons who can 'stop the fighting.'"³²

This may appear to be mere semantics, but I fully endorse the Commission's and the judiciary's apparent linguistic gymnastics in determining the extent of a body's political objects because by observing the manner and the means of the political influence, I submit that as the law stands, it is robust and flexible enough for the courts to construe whether or not an object is overtly political without the need to change fundamentally the current law. Thus "if the promotion of disarmament and peace is done in a way that is considered political, for example, by requiring a change of law or government policy in New Zealand or abroad, it will not be charitable"³³ but this does not rule out the promotion of peace in a purely educational manner, for instance, through the advancement of education. As noted in the case of *Southwood v Attorney-General*:³⁴

There is nothing controversial in the proposition that a purpose may be educational even though it starts with the premise that peace is preferable to war, and puts consequent emphasis on peaceful, rather than military techniques for resolving international disputes[.]

Indeed, the desirability of peace as a general object is not likely to be construed as overtly political and "[t]here is no objection on public benefit grounds to an educational programme which begins

28 Juliet Chevalier-Watts "Economic Development and Charitable Status" [2010] NZLJ at 266.

29 *Re Collier (deceased)* [1998] 1 NZLR 81.

30 Greenpeace of New Zealand Incorporated [2010] above n 3, at [39]–[40].

31 *Re Collier* above n 29, at 91.

32 Greenpeace of New Zealand Incorporated above n 3, at [41].

33 *Ibid*, at [43].

34 *Southwood v Attorney-General* [2000] WTLR 1199 at [27].

from the premise that peace is generally preferable to war.”³⁵ However, the difficulty comes when determining the most appropriate way of securing peace and avoiding war, and as Chadwick LJ rightly asserts:³⁶

The court is in no position to determine that promotion of the one view rather than the other is for the public benefit. Not only does the court have no material on which to make that choice; to attempt to do so would be to usurp the role of government.

Thus a distinction is readily drawn between the public benefit of educating on political matters and the issue of promoting changes in law through political advocacy.

In applying this to the case at hand, the Charities Commission turned to the methods by which Greenpeace seeks to promote disarmament and peace. The Applicant submitted that it campaigns to bring an end to the testing, production and use of nuclear weapons and weapons of mass destruction, and further submits that not all forms of achieving disarmament will be political, for instance, writing letters and organising protest rallies. The Commission acknowledged that 187 countries have signed up to the Nuclear Non-Proliferation Treaty, whose objective is to, *inter alia*, achieve complete disarmament. Nonetheless, the Commission also acknowledged that for international disarmament to occur, all those countries that do have nuclear weapons and/or nuclear weapon programmes would have to change their national laws in order to comply with Greenpeace’s requirements, thus in the Commission’s view, the Applicant’s objective of disarmament has a political purpose and cannot be construed as charitable.³⁷ This conclusion is an unambiguous application of current law, and reflects the authority of the authorised body to observe the manner and the means of the political purpose, and in doing so, confirms that the law is clear on this issue and certainly, on the matter of Greenpeace and political activity, does not require clarification or change.

The Commission further considered whether Clause 2.7 of the Applicant’s constitution could be construed as ancillary. This clause states:³⁸

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.

In including the words “which further the objects of the Society”, this may indicate, *prima facie*, purposes that are ancillary to the Applicant’s other purposes. If this is the case, then even if the ancillary purposes are non-charitable, this will not automatically defeat an applicant’s charitable status application. As stated earlier in the paper, it is this issue of whether such purposes are truly ancillary, or whether they form such an integral part of a body’s purposes that they no longer achieve ancillary status that has brought about academic and judicial concern. So in applying this principle, the Commission looked to the activities of the Applicant at the time of the application, as required under s 18 of the Charities Act 2005. On review of the activities, the Commission concluded that the focus on political activity is of such magnitude in order to effect change that they fall outside the ambit of ancillary purposes, thus rendering them non-charitable.

So whilst on the face of it and in layman’s terms, it may appear counter-intuitive for Greenpeace to have been denied charitable status under the Charities Act 2005, there is little reason to

35 *Ibid*, at [29].

36 *Ibid*.

37 Greenpeace of New Zealand Incorporated above n 3, at [47]–[50].

38 *Ibid*, at [51].

doubt that the law is not robust or clear enough to provide certainty and unambiguity. The question however arises as to whether such a decision is justiciable, taking into consideration the clearly valuable and valued work undertaken by Greenpeace. In response, however, to such a criticism, firstly I would echo the views noted earlier in the paper given by Justice Slade where he notes: “the mere fact that an organisation may have philanthropic purposes of an excellent character does not itself entitle it to acceptance as a charity in law”,³⁹ for all the earlier cited reasons, and secondly, I support the view that it is not for the judiciary or the Charities Commission to determine whether a change in law is for the public benefit; that is a Parliamentary matter, which needs to remain entrenched to avoid issues relating to judicial independence and any undermining of democratic principles. The Registration Decision of Greenpeace of New Zealand Incorporated appeared to be without vexation and undertook the application of well established principles without being required to perform legal linguistic contortions. As such, the original proposition may not have as much validity as perhaps considered. The story however does not end here, because at the time of writing, Greenpeace of New Zealand Incorporated’s appeal to the High Court of New Zealand was heard and Justice Heath released his judgment, to which I will turn to conclude this paper.

The month following the Charities Commission’s issuing of the Registration Decision of Greenpeace, the Commission issued another Registration Decision, also declining an organisation charitable status under the Charities Act 2005. This time it was Sensible Sentencing Group Trust (SSGT), an organisation nationally renowned for its philanthropic and community work, thus raising more questions as to the application of established case law, and its appropriateness, in relation to charitable trusts and political activity.

The task for the Commission was to establish whether the Clauses in the SSGT’s constitution firstly met the criteria of one or more of the four *Pemsel* heads. The advancement of religion was immediately ruled out, so the Commission turned its attention to the first head, that of relief of poverty. Relief of poverty is broadly defined, and does not mean that a beneficiary has to be destitute financially in order to receive the benefit, and as such can include “anyone who does not have access to the normal things of life which most people take for granted.”⁴⁰ The SSGT submitted that it relieved poverty, inter alia, by assisting victims of serious, violent and sexual crimes and advising said victims about their available protection. The Commission acknowledged that these purposes are likely to amount to relief of poverty. This element of the decision clearly caused no issue in relation to political activity, however, in its assessment of whether the SSGT’s purposes fell under the head of advancement of education, the matter of political purposes arose, and the Commission gave great consideration to this thorny issue.

For a purpose to qualify under the head of advancement of education, it must provide some form of education and ensure that that learning is advanced in some fashion. Justice Hammond, in *Re Collier (deceased)*,⁴¹ set out the test:⁴²

It must confer a public benefit, in that it somehow assists with the training of the mind, or the advancement of research. Second, propaganda or cause under the guise of education will not suffice. Third the work must reach some minimum standard.

39 *McGovern v Attorney-General* above n 12, at 329.

40 Sensible Sentencing Group Trust [2010] Registration Decision: Charities Commission, 16 May at [17].

41 *Re Collier (deceased)* [1998] 1 NZLR 81.

42 *Ibid.*, at 91–92.

As a result, the Commission determined that the SSGT's purposes, as set out in Clause 1 of their constitution, constituted advancement of education because they, inter alia, educated the public as to the plight of victims of crime and educated the victims themselves with regards to advocacy.⁴³ However, this was not the end of the matter. The Commission had to consider another element of Clause 1, whereby the SSGT asserted that it made submissions on behalf of victims of serious, violent and sexual crimes. In order to assess this remaining purpose, the Commission reviewed the SSGT's mission statement, its goals and its long term objectives, as set out on its website. Much of the information set out by SSGT refers consistently to lobbying for legislative change, advocating for a particular point of view in relation to legislation, government departments and members of Parliament, and successes as a result of political lobbying.⁴⁴ On the face of it, such activity may be construed as overt political activity, however, the Commission correctly turned its attention to considering if indeed such activity had political purpose, or whether it could still be construed as educational. The Commission observed that a "distinction must be made between propagating a view that can be characterised as political and the desire 'to educate the public so that they could choose for themselves, starting with neutral information, to support or oppose certain views.'"⁴⁵ Therefore just because an educational programme may effect a change in the law, this does not preclude it from being charitable, but that programme must avoid promoting a singular political notion without also proffering an alternative view.

There is little here to doubt that the law is transparent on this matter thus the next step is to consider whether the educational purpose that is being advanced by the body is generally educational, albeit addressing some legislative or policy change, or whether its advocacy favours a particular political point of view. In applying this principle to the instant case, the Commission acknowledged that educating the public in relation to the plight of victims of serious crime and providing advocacy support may be charitable under advancement of education. However, "the applicant's mission statement, goals, and long term objective, and information set out on ... the website ... indicates that ... the activities extend much further than merely assisting victims"⁴⁶ and indeed extends to advocating particular political views in relation to sentencing and penal policy. As a result, the Commission determined that because one of the Applicant's main purposes is to advocate for a change in law, this was politically motivated and therefore could not advance education. I would assert that there is little contention with regard to this issue of political activity and charitable purpose and fully support the notion that for a purpose to be educational, any political views should continue to be neutral otherwise a charitable trust risks supporting and promoting biased views, which cannot be construed as having a public benefit.

The Charities Commission also considered specifically the principle of public benefit and, once again, Justice Santow's opinion in the case of *Public Trustee v Attorney-General* was at the forefront of the Commission's considerations. His Honour observed that "an organisation whose main purpose is directed to altering the law or government policy, as distinct possibly from an organisation to encourage law reform generally, cannot be saved from being political by appeal to the public interest."⁴⁷

43 Sensible Sentencing Group Trust above n 40, at [23].

44 Ibid, at [25]–[28].

45 Ibid, at [32] citing *Re Bushnell (deceased)* [1975] 1 All ER at 729.

46 Ibid, at [38].

47 *Public Trustee v Attorney-General of New South Wales* above n 23, at 619.

The Charities Commission noted that even though Justice Santow supports a more liberal view of political activity and charitable purpose, his Honour still supports the notion that those partisan political views which advocate a change in the law cannot be construed as charitable.⁴⁸ Therefore the Commission reaffirmed that the root of the issue is the question of degree of the activities directed at political change. In considering the question of degree of the SSGT's political activities, the Commission concluded that the Applicant's mission statement, its goals, its long term objectives, the letters of support from the public and general information provided by the SSGT all strongly indicate that the main purpose of the Applicant is to promote a particular point of view on sentencing and policy, which tips the balance of political purpose against having public benefit under charitable law. As a result, with regard to the matter of public benefit, the Commission concluded that the Applicant's main purpose, due to its political bias, could not be construed as having public benefit, thus failing to meet the criteria of charitable purpose.⁴⁹

However, I think it also pertinent to note that as a result of the Registration Decision, the SSGT brought back into use the Red Raincoat Trust that was not being utilised at the time of the application to the Charities Commission.⁵⁰ The Red Raincoat Trust was successfully registered by the Charities Commission and its purpose is to provide aid and rehabilitation to those affected by homicide. The earmarking of this particular trust and reinstating it after the SSGT was denied charitable status could be construed as a double edged sword. On the one hand, the utilisation of an alternative trust by the SSGT implies an undermining of the value of the SSGT overall because it could be seen as it being forced to exploit an alternative trust to achieve charitable status in some fashion. On the other hand, the Registration Decision shows that the law is functioning adequately and is ensuring that charitable trusts do have clear public benefit. As a result, the fact that the SSGT was required make use of a different trust that did comply fully with the requirements of the Charities Act 2005 reflects the importance given to acquiring charitable status for organisations.

In issuing this Registration Decision, the Charities Commission has done little to affect the current jurisprudence in relation to political activity and charitable purpose, nonetheless, I would submit that this Decision is very valuable in a number of respects. Firstly the Decision entrenches the jurisprudence, which provides jurisprudential certainty; a valuable commodity for such a potentially contentious area of law. Secondly, although the Decision supports the judicial status quo, it also outlines more progressive legal notions in relation to political activity and charitable purpose. This suggests that there is some flexibility in the current law, and it shows how the courts can exercise a certain amount of discretion when balancing the issues of political activity and charitable purpose. The Commission utilised this balancing principle without issue apparently and I submit that it set out its reasoning eloquently and objectively, thus suggesting that the original proposition has limited foundations. This leads on to the third point of value, that as a result of this transparent and confident reasoning, I would advance that there is little requirement to amend or change the law.

However, the very recent case of *Aid/Watch Inc v Federal Commissioner of Taxation*⁵¹ heard in the High Court of Australia has thrown doubt on the certainty of the established principle of political activity and charitable purpose. Aid/Watch Incorporated is an independent organisation

48 Sensible Sentencing Group Trust above n 40, at [57].

49 Ibid, at [59]–[65].

50 Email from Garth McVicar to Juliet Chevalier-Watts regarding the Red Raincoat Trust (8 March 2011).

51 *Aid/Watch Inc v Federal Commissioner of Taxation* [2010] HCA 42.

concerned with promoting and campaigning for effective national and international aid policies. In October 2006, the Commissioner of Taxation revoked Aid/Watch's charitable status for the purposes of, inter alia, income tax, but in 2008, the Administrative Appeals Tribunal reversed that decision on the basis that Aid/Watch was a charitable organisation, notwithstanding its commitment to political activity advocating for legislative and government policy change. However, the Full Court of the Federal Court of Australia allowed an appeal by the Commissioner of Taxation and held that Aid/Watch was not a charitable institution because its main purpose was political. In December 2010, the High Court of Australia, by a majority, restored the decision of the Administrative Appeals Tribunal and held that Aid/Watch was a charitable institution.⁵²

The Court acknowledged that any trusts with a "principal purpose to procure a reversal of government policy, or of particular administrative decisions of government authorities, is proscribed as a trust for 'political purposes'"⁵³ and "[s]uch trusts, even if otherwise within the spirit and intentment of the preamble to the Elizabethan statute, can never be regarded as being for the public benefit in the sense required for a charitable trust."⁵⁴ Although the Court may have acknowledged such a principle, its observations following that statement reflect a lack of ease with regard to the immutability of that established principle. It was noted that those propositions were adopted by Justice Slade in the case of *McGovern*, but that *McGovern* was followed somewhat reluctantly by the Court in the case of *Re Collier*,⁵⁵ and whilst it appears to be firmly established that political activity will defeat a charitable trust, the Court in the present case then provided early examples of charitable purposes being connected with politics⁵⁶ observing that in the case of *Farewell v Farewell*,⁵⁷ a Government should be influenced by public opinion, and by calls to amend the law, and that this should not be construed as negatively manipulating the law.

With the seed of doubt cast as to the mutability of the principle of political activity and charitable trusts, the Court in the instant case outlined the liberal approach adopted by the United States where a trust may be charitable although the purpose of that trust is to seek a change in the law; that the mere fact that the purpose of a trust seeks to bring about a specific change of law does not prevent that purpose from being charitable; and developing and disseminating information advocating, inter alia, a particular political view of view may be charitable.⁵⁸ The question then for the Court in *Aid/Watch* was "[w]hat then is the standing in Australia of the line of English authority which stems from *Bowman*."⁵⁹

The Court immediately then took the opportunity to entrench the notion that Lord Parker, in the case of *Bowman*, did not direct his remarks to the Australian system of government, because that system of government was established and is maintained by their Constitution, and noted that Lord Parker's observations have received limited attention from the High Court of Australia.⁶⁰ The High Court then took some time to explore the matter of the Constitution and how that matter

52 *Aid/Watch Inc* *ibid*, Case Summaries [2010] High Court of Australia <[www.austlii.edu.au/other/HCASum/2010/41.html](http://www.austlii.edu.au/au/other/HCASum/2010/41.html)>

53 *Aid/Watch Inc v Federal Commissioner of Taxation* above n 51, at [28].

54 *Ibid*.

55 *Ibid*, at [29]–[31].

56 *Ibid*, at [32] referring to *In re Scowcroft* [1898] 2 Ch 638 and *Farewell v Farewell* (1892) 22 OR 573.

57 *Farewell v Farewell*, *ibid*, at 579–581.

58 *Aid/Watch Inc v Federal Commissioner of Taxation* above n 51, at [38].

59 *Ibid*, at [40].

60 *Ibid*, at [41].

may influence the issue of political activity and charitable purpose. In Australia, the Constitution mandates a system of government that revolves around its electors, the legislators and the executive, and the law itself establishes a system for amendment of the Constitution whereby the proposed law to effect the amendment is submitted to the electors. Thus the Australian Constitution informs the development of the common law and allows agitation of political and legislative change, which is purported to contribute to public welfare. Additionally, a court administering charitable trusts will not be called upon to determine the merits of a specific course of legislative or political activity or avenue⁶¹ thus there will be no biased view point of the court, it will merely be the court administering on a matter for which the Constitution allows, and which contributes to the public welfare by addressing matters of political nature.

On that basis, the Appellant submitted “that the generation by it of public debate as to the best methods for the relief of poverty by the provision of foreign aid has two characteristics indicative of its charitable status.”⁶² The first being that its very activities would contribute to the public welfare under the fourth *Pemsel* head, and the second being that the purposes and activities of Aid/Watch are not disqualified under the Australian system of government.⁶³ On that basis the High Court ruled that because of the lawful means of public debate as prescribed by the Constitution “the efficiency of foreign aid directed to the relief of poverty”⁶⁴ is by itself a purpose beneficial to the community as required under the fourth head of *Pemsel*. Furthermore, and prima facie of great significance with regard to the issue of political purpose, the High Court confirmed that “in Australia there is no general doctrine which excludes from charitable purposes “political objects”.”⁶⁵

What is of note therefore is that in the *Aid/Watch* case, the High Court makes no reference to the issue of non-charitable objects being ancillary, rather, it appears to be broadening the established notion generally that political objects may not defeat a charitable trust, even if they form a more than ancillary role within the charitable trust. This decision therefore of the High Court is unsettling one.

I have set out arguments within this paper that support the notion that the established law is transparent and flexible enough to be relevant in a contemporary society and as such I would dispute the need for a more liberal approach with regard to political activity and charitable purpose, yet this most recent High Court decision suggests that, at least in Australia, the courts are willing, and indeed determined, to adopt a very liberal approach, thus undermining the established status quo, without any clarification on the relevance of the issue of ancillary, which has always played a key role in the decision of any court or the Charities Commission to date.

This decision is likely to be of great significance in Australia and will open up the possibility of a number of organisations now obtaining charitable status where once the law would have determined that their overt political activity should defeat their charitable status as the public benefit could not be determined. The question must be asked therefore how much of an impact such a decision will have on the Charities Commission and court decisions within New Zealand.

During the writing of this paper, the case of *Draco Foundation (NZ) Charitable Trust v The Charities Commission*⁶⁶ was heard in the High Court and thus New Zealand did not have to wait

61 Ibid, at [43]–[45].

62 Ibid, at [46].

63 Ibid, at [46].

64 Ibid, at [47].

65 Ibid, at [48].

66 *Draco Foundation (NZ) Charitable Trust v The Charities Commission* HC WN CIV 2010-1275 [3 February 2011].

long to answer this question. The *Draco Foundation* case arose as a result of the denial of registration by the Charities Commission of the Draco Foundation Trust. The High Court had to consider the purported political activities of the Appellant in the instant case and the Appellant raised the *Aid/Watch* case in argument in order to pursue “its ‘political’ agenda through its advocacy on the website and elsewhere without running into the proposition that it did not have exclusively charitable purpose.”⁶⁷ Prior to this case being heard, my view was that New Zealand may not feel obliged to adopt such a liberal approach for three reasons. Firstly, New Zealand will only regard Australian decisions as persuasive as opposed to being bound by the courts. Secondly, the High Court in the case of *Aid/Watch* made it clear that the Australian Constitution allows for such political agitation, and such agitation can be construed as having tangible public benefit; New Zealand does not have such a Constitution, thus may regard the High Court’s decision as only pertinent to Australia. Thirdly, that New Zealand does have a general doctrine that excludes overt political purposes from being charitable objects.

Two of my own views find support in the judgment of Justice Young in the case of *Draco*. His Honour noted that “the difficulty for the appellant in such an approach is that contrary to the law of Australia New Zealand does have, as part of its law, a general doctrine which excludes from charitable purposes, political objects.”⁶⁸ As a result, Young J agreed with the decision of the Charities Commission that *Bowman* remains good law in New Zealand and thus the courts are obliged to follow that line of reasoning. He also opined that there may be other reasons as to why *Aid/Watch* has limited applicability to the instant case. Firstly, that *Aid/Watch* may actually only apply to charitable purposes that involve the relief of poverty, and secondly that the *Aid/Watch* case was reliant on Australian constitutional principles, which are obviously not applicable in New Zealand. However, he also noted that because *Bowman* was good law in New Zealand, it was not necessary to assess in any detail the strength of those arguments. The *Draco* decision therefore provided the first denial in New Zealand of the liberalist approach being adopted in Australia, which I fully endorse because the more conservative New Zealand approach fully supports the ethos of public benefit, without which a charity has no basis. However, my concern was that the *Aid/Watch* decision could still prove influential in New Zealand, and whilst Justice Young made it clear that on this occasion, it was inapplicable, this was only the first opportunity for it to be considered in the High Court of New Zealand.

However, as noted earlier in the paper, Justice Heath delivered his judgment on the appeal from Greenpeace of New Zealand Incorporated, and his Honour’s findings do much to calm the turbulent waters in the wake of the *Aid/Watch* decision, although I do note that his Honour has reservations about the applicability of current conservative views.

Justice Heath assessed the scope of charitable purpose, referring in detail to the cases of *Re Collier* and *Molloy v Commissioner of Inland Revenue*,⁶⁹ all of which have been bound by the case of *Bowman*, and acknowledged that he too is bound by the principles relating to political activity as set out in *Bowman*.⁷⁰ However, his Honour noted “to be balanced against that body of case law is the recent judgment of the High Court of Australia in *Aid/Watch*.”⁷¹ Justice Heath set out the views of the majority, as addressed earlier in the paper, and he also took the time to consider the

67 Ibid, at [56].

68 Ibid, at [58].

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

70 *Greenpeace of New Zealand Incorporated* HC WN CIV 2010-485-829 [6 May 2011] at [44]–[52].

71 Ibid, at [53].

dissenting views of Heydon and Kiefel JJ. Justice Heydon adopted Justice Hammond's view in *Re Collier*, taking the view that the intention of Aid/Watch was to persuade people of a particular view with no attempt to provide a balanced alternative view from which "knowledge could be accumulated and independent decisions made."⁷² As a result, Heydon J was critical of the majority's view because it supported "those who encourage energetic action to achieve a particular political goal"⁷³ which traditionally has ensured that an object will not meet the requirements of charitable purpose. Justice Kiefel was not, in principle, opposed to the view "that the political nature of an organisation's main purpose should disqualify it from charitable status",⁷⁴ but the issue for her Honour was that Aid/Watch targeted the policies and practices of inter-governmental institutions, the Government and its allies, as opposed to encouraging balanced debate.⁷⁵ These views of the minority are, in my humble opinion, the correct approach because they support the doctrine that excludes political objects from charitable purposes, and the decision in *Aid/Watch* undermines that principle. Justice Heath in the case of *Greenpeace* offers no view on the dissenters' opinions. What his Honour does do however is to acknowledge his learned colleague's view, Justice Young, in the recent *Draco* case.

Justice Heath noted Young J's reasons as to why the majority view in *Aid/Watch* ought not to be applied in New Zealand, as set out earlier in the paper,⁷⁶ however, his Honour opined that although he too is bound by the "full extent of the *Bowman* line of authority"⁷⁷ he does so with a degree of reluctance because, in his view, "there is much to be said for the majority judgment in *Aid/Watch*".⁷⁸ He noted that he does not share the concerns of Justice Young that the political system of Australia would bring a different decision because New Zealand has a mixed member proportional system of parliamentary election, select committees ensure policies are debated non-prejudicially and the New Zealand Bill of Rights Act supports freedom of thought, conscience, religion and freedom of expression.⁷⁹ How these matters, however, relate exactly to the issue of political activity and charitable purpose, his Honour does not elaborate and instead leaves such matters for the Court of Appeal or Supreme Court. Perhaps the significance of the references to the Constitution and human rights can be understood if one considers the views expressed by Justice Santow in *Public Trustee v Attorney General*. His Honour observes the dicta of Justice Dixon in *Royal North Shore Hospital of Sydney v Attorney General*⁸⁰ where Justice Dixon dealt "with the critical distinction between charitable and political objects in terms more discriminating"⁸¹ than that which had been considered previously. Justice Santow opines that his learned colleague's approach in the *Royal North Shore Hospital* case "leaves some room for looking more closely at whether, in a particular case, an object seeking to supplement the law is necessarily inconsistent with it."⁸² In his Honour's view, at least in Australia, this suggests that a trust may be charitable

72 *Ibid.*, at [56].

73 *Ibid.*

74 *Ibid.*, at [57].

75 *Aid/Watch Inc v Federal Commissioner of Taxation* above n 51, at [69].

76 *Greenpeace of New Zealand Incorporated* above n 70, at [58].

77 *Ibid.*, at [59].

78 *Ibid.*

79 *Ibid.*

80 *Royal North Shore Hospital of Sydney v Attorney General* (NSW) (1938) 60 CLR 396 (HCA).

81 *Public Trustee v Attorney-General of New South Wales* (1997) 42 NSWLR 600 at [19].

82 *Ibid.*

where its object is to introduce a new law that is “consistent with the way the law is tending.”⁸³ Therefore, in applying these views, it is possible to understand how the High Court in the case of *Aid/Watch* was able to side step established English cases to ensure that decisions may be human rights compliant. It is possible therefore that the New Zealand Bill of Rights might have a similar application in similar circumstances.

I respectfully submit, however, that the majority decision judgment in *Aid/Watch* is not appropriate in New Zealand for the very reasons set out by the dissenting judges in that case and I cannot share Justice Heath’s view that “there is much to be said for the majority judgment in *Aid/Watch*.”⁸⁴

Overall, however, Justice Heath is clear in his judgment that the Charities Commission did not err in its decision in finding the Greenpeace’s purpose of promoting disarmament and peace as non-charitable because it “fall[s] foul of the admonition against political lobbying about the way in which disarmament should occur[.]”⁸⁵ Thus the next question for his Honour was whether this political activity was ancillary or independent of the entity.

In answering this, Justice Heath approved Justice France’s approach in the case of *Re Grand Lodge of Antient Free and Accepted Masons in New Zealand*⁸⁶ where his Honour in that case determined that a qualitative and quantitative assessment is required to determine if the non-charitable purpose is ancillary.⁸⁷ Justice Heath defined quantitative assessment as “one designed to measure the extent to which one purpose might have a greater or lesser significance than another.”⁸⁸ A qualitative assessment however “helps to determine whether the function is capable of standing alone or is one that is merely incidental to a primary purpose.”⁸⁹ On applying the latter assessment, his Honour confirmed that Greenpeace’s political advocacy is independent from its purposes and those purposes are not necessary to educate members of the public on the issues of relevance to Greenpeace, thus causing that purpose to fail under charitable law.⁹⁰

On the matter of quantitative assessment, his Honour confirmed that this is an exercise of judgment on the facts because “it is the way in which the philosophy is championed that must be measured against the relevant charitable purpose to determine whether, as a matter of degree, it is merely ancillary.”⁹¹ In exercising his judgment on this matter Heath J noted that the extent to which the entity relied on its political activities to further its very causes confirms that these political activities are more than just ancillary to its purposes,⁹² thus falling foul of the charitable purpose requirements. As a result, his Honour confirmed that the Charities Commission was correct in its findings. Overall, I submit that this judgment was necessary to entrench the *Bowman* line of authority, and so quash any suggestion that New Zealand may adopt the more liberal Australian approach, although it is a little disquieting that his Honour finds merit in the contentious majority views in the *Aid/Watch* case.

83 Ibid.

84 Ibid.

85 Ibid, at [64].

86 *Re Grand Lodge of Antient Free and Accepted Masons in New Zealand* [2011] 1 NZLR 277 (HC) at [49]–[51].

87 For further discussion on this approach refer to Juliet Chevalier-Watts “Freemasonry and Charity” [2011] NZLJ 52.

88 *Greenpeace of New Zealand Incorporated* above n 70, at [68].

89 Ibid.

90 Ibid, at [74].

91 Ibid, at [73].

92 Ibid.

In light of my submissions, and the very recent cases of *Draco* and *Greenpeace*, I support the view that New Zealand should resist the urge to deviate from the more conservative, albeit established, approach, which I suggest offers certainty and consistency, and respects the requirement of public benefit, without which charitable law has no basis, thus allaying any issues associated with justiciability.