

Shedding the Shackles of *Bowman*: A Critical Review of the Political Purpose Doctrine and Charity Law in New Zealand

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The shackles that bound New Zealand to the political purpose doctrine, the notorious doctrine found within charity law, have now, at last, been shed, with the delivery of the long awaited Supreme Court judgment of *Re Greenpeace of New Zealand Incorporated*.¹ This article explores whether the shedding of the shackles that bound New Zealand jurisprudence to this doctrine was inevitable, in light of national and international judicial influences and commentary.

A Brief History of the Political Purpose Doctrine

Whilst it is true that the political purpose doctrine has been the subject of numerous academic and judicial discussions, it would be inappropriate not to give some consideration to the history of this doctrine within New Zealand jurisprudence because this provides much of the context of the doctrine's journey within the courts and charity bodies, and provides evidence as to the inevitability, or otherwise, of the lifting of this doctrine from the shoulders of charity law.

New Zealand expresses charitable purposes in s 5(1) of the Charities Act 2005, which states:

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

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

This expression of the four heads of charity, of course, comes from Lord Mcnaghten's famous dictum in *Commissioners for the Special Purposes of Income Tax v Pemsel*,² where he organised the cases in to the classifications, which are, to this day, the foundations of common law charity, and indeed, were adopted under s 5(1) of the Act in New Zealand. Thus the four charitable purposes are: the relief of poverty, the advancement of education, the advancement of religion, and any other purposes beneficial to the community.

So whilst an entity's purposes must fall within one or more of the heads of charity, as set out in s 5(1) of the Act, to ensure that those purposes are indeed charitable, there is a further requirement. That being that the purposes must be of public benefit, as illustrated in s 5(2) of the same Act:

(2) However,—

(a) the purpose of a trust, society, or institution is a charitable purpose under this Act if the purpose would satisfy the public benefit requirement...

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¹ *Re Greenpeace of New Zealand Incorporated* [2014] NZSC 105 (6 August 2014).

² *Commissioners for the Special Purposes of Income Tax v Pemsel* [1891] AC 531 at 583.

In other words, “it is beyond dispute that [public benefit] is a necessary prerequisite for valid charitable purposes...”³ However, public benefit and charitable purpose do not coincide entirely. For instance, cases that fall within the relief of poverty, and the advancement of education and religion are all treated as falling within the spirit and advancement of the preamble Statute of Elizabeth,⁴ where the public benefit is presumed unless the contrary is shown.⁵ Conversely, under the fourth head of charity, that of any other purposes beneficial to the community, the common law requires that the public benefit be expressly shown and be charitable within the spirit of the cases within the preamble of the Statute of Elizabeth, which has been said to be a “very sketchy list.”⁶

It is undisputed that for many a decade, the common law has decreed that political purposes are not charitable purposes, and this, for the most part, has come from Lord Parker of Waddington’s observations in *Bowman v Secular Society*, where he stated:⁷

...a trust for the attainment of political objects has always been held invalid, not because it is illegal, for everyone 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.

Therefore political purposes raise issues with regard to public benefit because it is argued that a court cannot ascertain the public benefit in such purposes.

Such an approach has been affirmed in the United Kingdom up until the present day. In the House of Lords decision, *National Anti-Vivisection Society v Inland Revenue Commissioners*, Lord Wright affirmed that Lord Parker’s observations were not limited to party political measures, rather they would include “activities directed to influence the legislature to change the law in order to promote or effect the views advocated by the society.”⁸ Further, Lord Simmonds, in the same case, stated that he could see no reason for Lord Parker’s expression of “political objects” to be construed in any narrow sense, or indeed to confine it “objects of acute political controversy.”⁹ Thus his Lordship concurred on the issue of public benefit within a political object that it is not for “the court to judge”¹⁰ its public benefit as the “court has no means of judging it.”¹¹

The later English case of *McGovern v Attorney-General*¹² cited as authority *Bowman*, and also *Bowman*’s predecessor *De Themmines v De Bonneval*.¹³ The question for Slade J in

³ *Molloy v Commissioner of Inland Revenue* [1981] 1 NZLR 688 at 695 (CA).

⁴ The Charitable Uses Act of 1601 (known as the *Statute of Elizabeth*) was repealed by s 13(1) of the Mortmain and Charitable Uses Act 1888. However, the preamble, to which contemporary charity common law still makes reference, sets out a non-exhaustive list of charitable purposes. This list provides the foundations of modern day charitable purposes.

⁵ *Re Greenpeace of New Zealand Incorporated* [2014] NZSC 105 (6 August 2014) at [27], referring to *Re Education New Zealand* (2010) 24 NZTC 24,354 (HC) at [24] and *National Anti-Vivisection Society v Inland Revenue Commissioners* [1948] AC 31 (HL) at 42.

⁶ *Re Greenpeace of New Zealand Incorporated* [2014] NZSC 105 (6 August 2014) at [27], citing *National Anti-Vivisection Society v Inland Revenue Commissioners* [1948] AC 31 (HL) at 41.

⁷ *Bowman v Secular Society* [1917] AC 406 at 442

⁸ *National Anti-Vivisection Society v Inland Revenue Commissioners* [1948] AC 31 (HL) at 51-52.

⁹ *National Anti-Vivisection Society v Inland Revenue Commissioners* [1948] AC 31 (HL) at 62.

¹⁰ *National Anti-Vivisection Society v Inland Revenue Commissioners* [1948] AC 31 (HL) at 62.

¹¹ *National Anti-Vivisection Society v Inland Revenue Commissioners* [1948] AC 31 (HL) at 62.

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

McGovern was “whether the purposes of a trust established by Amnesty International met the criteria for charitable status”.¹⁴ Slade J confirmed that “[t]rusts to promote changes in the law of England are generally regarded as...being non-charitable...”¹⁵ Slade J’s observations reflect a development of the principle that political purposes will likely deny charity, and his Honour helpfully set out five types of trust that would be deemed trusts with political purposes that can be drawn in large part from *Bowman*, and also in some part from *National Anti-Vivisection Society v Inland Revenue Commissioners*.¹⁶ The types of trusts that would be deemed political as follows:¹⁷

- 1) Trusts that further the interests of a political party;
- 2) Trusts to procure changes in the laws of England and Wales;
- 3) Trusts to procure changes in the laws of foreign countries;
- 4) Trusts to procure a reversal of government policy or of particular decisions of government authorities in England and Wales; and
- 5) Trusts to procure a reversal of government policy or of a particular decision of government authorities in foreign countries.

These reflect a liberal interpretation of what may be caught in the doctrine, and further, it fully entrenches the doctrine in to English and Welsh jurisprudence. Indeed, Slade J’s formula, which he stated was not intended to be exhaustive,¹⁸ was later adopted by the Court of Appeal in *Southwood v Attorney-General*.¹⁹ It was further approved in the *Human Dignity Trust v the Charity Commission for England and Wales* in 2013.²⁰ Therefore it is evident that for the courts in England and Wales, the doctrine of political purposes is firmly established, and purposes that fall within in its rubric will undoubtedly negate the charity of the entity.

Likewise, it would also be true to say that, up until recent times, the *Bowman* line of authority was also prevalent in New Zealand, which is probably unsurprising because “New Zealand’s charity law finds its heritage in its colonial ancestry.”²¹ However, evidence points to the inevitability of the breaking free of that doctrine. Such an evolution may have been influenced by judicial misgivings in Australia, which will be addressed shortly, although it may be that the inexorableness of this jurisprudential change was actually ultimately inevitable. This is perhaps not least because, from early times, “it is curious how scanty the authority is for the proposition that political objects are not charitable.”²²

Antipodean Approaches to the Political Purpose Doctrine

¹³ *De Themmines v De Bonneval* (1828) 5 Russ 287, 38 ER 1035.

¹⁴ Juliet Chevalier-Watts “Charitable Trust and Political Activity: Time for a Change?” (2011) 19(2) WLR at 147.

¹⁵ *McGovern v Attorney-General* [1982] 1 Ch 321 at 334.

¹⁶ *National Anti-Vivisection Society v Inland Revenue Commissioners* [1948] AC 31; Juliet Chevalier-Watts “Charitable Trusts and Political Purposes: Sowing the Seeds of Change? Lessons from Australia” [2013] Canterbury Law Review 19 at 56.

¹⁷ *McGovern v Attorney-General* [1982] 1 Ch 321 at 340.

¹⁸ *McGovern v Attorney-General* [1982] 1 Ch 321 at 340.

¹⁹ *Southwood v Attorney-General* [2000] EWCA Civ 204.

²⁰ *Human Dignity Trust v the Charity Commission for England and Wales* [2013] CA/2013/00013 at [80].

²¹ Juliet Chevalier-Watts “The Changing Face of Political Purposes and Charity Law in New Zealand” [2015] Trusts and Trustees, publication forthcoming.

²² *National Anti-Vivisection Society v Inland Revenue Commissioners* [1948] AC 31 (HL) at 54.

Australia

Whilst there is no direct evidence that judicial decisions in Australia have been of great consequence in the decision making of New Zealand courts in relation to the political purpose doctrine, and certainly Australian cases are not binding on New Zealand, it is correct that at least one High Court Australian case, that of *Aid/Watch Incorporated v Commissioner of Taxation*,²³ has been on the radar in terms of New Zealand court considerations. Prior however to addressing *Aid/Watch*, it is worthwhile considering, albeit briefly, earlier Australian case law, because those cases contextualise the decision of *Aid/Watch* in the High Court.

Early Australian case law reflected a decided reluctance in the acceptance of the *Bowman* doctrine.²⁴ In *Royal North Shore Hospital of Sydney v Attorney-General*,²⁵ Dixon J observed that the “case law dealing with the distinction between charitable purposes and political objects is in an unsatisfactory condition”.²⁶ His colleague, Latham J, was similarly reticent, noting that, with regard to the political purpose requirement, that it should not “be regarded as making it impossible to establish a trust as a charitable trust merely because the subject matter of the trust might be associated with political activity.”²⁷

Rich J, in the same case, was more critical of the doctrine, stating that to find that the trust in question not charitable would be driving “to an absurd conclusion” based on a doctrine that was already “vague and indefinite.”²⁸

These Judges were not alone in their concerns. In the case of *Public Trustee v Attorney-General of New South Wales*²⁹ Santow J acknowledged that this was still not a clear cut definition of “political purpose” because it does not make a “distinction between supplementing the law when it may already be moving in a particular direction, and directly opposing its well established policy.”³⁰ Whilst these cases provide illustrations of judicial discomfort with regard to the political purpose doctrine in Australia, the *Aid/Watch* decision in 2010 provided the final nail in the coffin for the doctrine in Australia, and it is this case that gained much interest in the New Zealand courts.

The Aid/Watch Decision

Much has been written about this decision, so we will only consider it in brief terms to provide some foundations for our analysis of shedding of the *Bowman* shackles closer to home. *Aid/Watch* promotes the efficient use of national and international aid directed to the relief of poverty. Its campaigns are designed to stimulate public debate and to bring about changes in government policy and activity in relation to the provision of foreign aid.³¹

²³ *Aid/Watch Incorporated v Commissioner of Taxation* [2010] HCA 42.

²⁴ Joyce Chia, Matthew Harding and Ann O’Connell “Navigating the Politics of Charity: Reflections on *Aid/Watch Inc v Federal Commissioner of Taxation*” (2011) Melbourne University Law Review 35 2 at 357.

²⁵ *Royal North Shore Hospital of Sydney v Attorney-General* (1938) 60 CLR 396.

²⁶ At 426.

²⁷ At 412.

²⁸ At 419; Juliet Chevalier-Watts “Charitable Trusts and Political Purposes: Sowing the Seeds of Change? Lessons from Australia” [2013] Canterbury Law Review 19 at 57-58.

²⁹ *Public Trustee v Attorney-General of New South Wales* [1997] 42 NSWLR 600.

³⁰ At 604.

³¹ *Aid/Watch v Federal Commissioner of Taxation* [2010] HCA 42 at 158.

The majority of the High Court overturned the Federal Court's decision, with Heydon and Kiefel JJ in dissent. The Court noted early on that the remarks of Lord Parker in *Bowman* "were not directed to the Australian system of government established and maintained by the Constitution itself."³² This then, the Court explained, "provides a significant consideration in deciding the content of the common law of Australia respecting trusts for political purposes."³³ Further, the majority rejected the idea that the political purpose doctrine should apply in Australia because the doctrine was in tension with the Constitution. This was because the Australian Constitution mandates "a system of representative and responsible government with a universal adult franchise".³⁴ "It provides for constitutional change through popular referenda and so is assumed to be indispensable regarding communication between the executive, legislature and electors on government and policy matters."³⁵ Therefore the system requires agitation in order for legislative and policy changes to occur, which is presumed to be for the public welfare.³⁶ The importance of this case with regard to the political purpose doctrine cannot be understated. As far as the author is aware, this was the first time that *Bowman* had been rejected, thus it reflected a dramatic shift in the judicial approach to the political purpose doctrine. It was perhaps inevitable therefore that its influence would be felt by its Tasman cousin within a short period of time, and indeed, this was illustrated in *Re Draco Foundation (NZ) Charitable Trust*.³⁷

New Zealand

The Draco Foundation seeks to protect and promote democracy and natural justice in New Zealand. One of the key issues for Young J in this case was whether much of the material provided by the Foundation to support its purposes was partisan or political in nature. His Honour acknowledged that much of the material was merely a method of trying to persuade "local or central government to a particular point of view, and publicising one side of a debate is not advancing education."³⁸ The appellant sought to rely on the applicability of *Aid/Watch*, and this was the first time that this had occurred in New Zealand. This, the Foundation stated, would permit it to "pursue its 'political agenda' through advocacy... without running into the proposition that it did not have exclusively charitable purposes."³⁹

Prima facie, this was always going to be a difficult task, because the authority of *Bowman* was already firmly established in New Zealand. One of the key cases in New Zealand jurisprudence with regard to this is that of *Molloy v Commissioner of Inland Revenue*,⁴⁰ where the Court of Appeal affirmed that Lord Parker's reasons in *Bowman* must be applicable because the Court has no means of judging the public benefit.⁴¹ Further,

³² *Aid/Watch v Federal Commissioner of Taxation* [2010] HCA 42 at [40].

³³ At [40].

³⁴ At [44].

³⁵ Juliet Chevalier-Watts "Charitable Trusts and Political Purposes: Sowing the Seeds of Change? Lessons from Australia" [2013] Canterbury Law Review 19 at 62.

³⁶ Joyce Chia, Matthew Harding and Ann O'Connell "Navigating the Politics of Charity: Reflections on *Aid/Watch Inc v Federal Commissioner of Taxation*" (2011) 35 Melb UL Rev at 375; Juliet Chevalier-Watts "Charitable Trusts and Political Purposes: Sowing the Seeds of Change? Lessons from Australia" [2013] Canterbury Law Review 19 at 62.

³⁷ *Re Draco Foundation (NZ) Charitable Trust* HC WN CIV 2010-485-1275 [3 February 2011].

³⁸ Juliet Chevalier-Watts "Charitable Trusts and Political Purposes: Sowing the Seeds of Change? Lessons from Australia" [2013] Canterbury Law Review 19 at 67.

³⁹ *Re Draco Foundation (NZ) Charitable Trust* HC WN CIV 2010-485-1275 [3 February 2011] at [56].

⁴⁰ *Molloy v Commissioner of Inland Revenue* [1981] 1 NZLR 688.

⁴¹ *Molloy v Commissioner of Inland Revenue* [1981] 1 NZLR 688 at 696.

Hammond J, in the High Court case of *Re Collier*, noted that the conventional approach in the Commonwealth was that charitable trusts that seek to change the law are invalid because a “coherent system of law can scarcely admit that objects which are inconsistent with its own provisions are for the public welfare.”⁴²

Ultimately then Young J confirmed that “the difficulty for the appellant is that contrary to the law in Australia New Zealand does have...a general doctrine which excludes from charitable purposes, political objects.”⁴³ Therefore, whilst *Aid/Watch* was able to cut across the *Bowman* principle in Australia, *Bowman* remained good law in New Zealand and thus *Aid/Watch* was not applicable.⁴⁴ Further, there was an additional reason as to why *Aid/Watch* would not have application in *Draco*:⁴⁵

...*Aid/Watch* applies only to those cases where the charitable purpose involves relief of poverty. And secondly, that the decision in *Aid/Watch* is reliant upon Australian constitutional principles not applicable in New Zealand.

However, his Honour did not actually consider that statement in any more detail. This was because *Bowman* identified the law in New Zealand, “thus rendering that examination unnecessary.”⁴⁶ What this meant in reality was that whilst *Bowman* was the affirmed line of authority in New Zealand, the Court was acknowledging that such authority may not be grounded entirely on firm footing. This suggests therefore that New Zealand was expressing some uncertainty as to the political purpose doctrine in its current guise under the *Bowman* line of authority, and this was not the first time that such uncertainty was expressed.

As a point of note, this was not the first time that judicial uncertainty regarding the doctrine had been expressed in New Zealand. Whilst acknowledging that the traditional Commonwealth approach was rooted in *Bowman*, Hammond J in *Re Collier*, noted that there were a number of categories of political purpose trusts, and the rationale for such prohibition varies, and frankly, “some of those rationales are today distinctly debatable.”⁴⁷ He offered the American case of *Garrison v Little* as one example, where a trust to secure the passage of laws giving women the right to vote was upheld as charitable.⁴⁸ This then “distinguished between attempts to improve the law and subversion or violation of it”.⁴⁹ Thus in America at least, trusts that secure “peaceful and orderly change are in the public interest.”⁵⁰ He further questioned whether in fact it really would be inappropriate for a judge to recognise that a purpose might really be worthy of public debate, even if that debate may lead to a change in the law.⁵¹ “After all, it is commonplace for Judges to make suggestions themselves for changes in the law today”.⁵²

⁴² *Re Collier* [1998] 1 NZLR 81 at 89 citing *Royal North Shore Hospital of Sydney v Attorney-General* (1938) 60 CLR 396 at 426 and referring to *Molloy v Commissioner of Inland Revenue* [1981] 1 NZLR 688 at 696.

⁴³ *Re Draco Foundation (NZ) Charitable Trust* HC WN CIV 2010-485-1275 [3 February 2011] at [58].

⁴⁴ *Re Draco Foundation (NZ) Charitable Trust* HC WN CIV 2010-485-1275 [3 February 2011] at [59].

⁴⁵ At [60].

⁴⁶ Juliet Chevalier-Watts “Charitable Trusts and Political Purposes: Sowing the Seeds of Change? Lessons from Australia” [2013] Canterbury Law Review 19 at 68.

⁴⁷ *Re Collier* [1998] 1 NZLR 81 at 89.

⁴⁸ *Re Collier* [1998] 1 NZLR 81 at 89 referring to *Garrison v Little* 75 III App 402.

⁴⁹ *Re Collier* [1998] 1 NZLR 81 at 89 citing Bogert *The Law of Trusts* (5th ed, 1973) at 236.

⁵⁰ *Re Collier* [1998] 1 NZLR 81 at 89 citing Bogert *The Law of Trusts* (5th ed, 1973) at 236.

⁵¹ *Re Collier* [1998] 1 NZLR 81 at 89.

⁵² *Re Collier* [1998] 1 NZLR 81 at 89.

Interestingly, in the High Court case of *Re Greenpeace New Zealand Plc*,⁵³ Heath J referred to Hammond J's "distinctly debatable" arguments pertaining to political purposes in *Re Collier*,⁵⁴ as well as the judicial commentary in *Re Draco* and *Aid/Watch*,⁵⁵ which reflects the real levels of uncertainty being expressed about the actual applicability of the *Bowman* line of authority. Regardless however of these expressions of reservation, Heath J felt "constrained to apply the full extent of the *Bowman* line of authority on the basis"⁵⁶ that he was bound to do so by *Molloy*. Nonetheless, this application was carried out "with a degree of reluctance."⁵⁷

What this tells us is that the judiciary was expressing clear discontent with the status quo, and it suggests that the *Bowman* line of authority was undoubtedly "beginning to wear thin",⁵⁸ especially with the advent of *Aid/Watch* in our national courts. Perhaps then the inevitability of the decision of the Supreme Court in *Greenpeace* was not so surprising as the groundwork had already been laid.

The Court of Appeal *Greenpeace* decision provided further evidence of the growing voice of discontent, although the Court offered a novel solution with regard to easing the burden of the political purpose doctrine. It is correct that the Court of Appeal affirmed that it was bound by the *Bowman* lines of authority, and that, "in an apparent endorsement of *Molloy*",⁵⁹ asserted that s (5)3 of the Charities Act 2005 identified "advocacy" as a non-charitable purpose, unless it was ancillary to the overall charitable purpose. Indeed, any departure from *Molloy* should be a matter for Parliament because of fiscal consequences of changes to the law.⁶⁰

However, whilst the Court refused to depart from the *Bowman* and *Molloy* authorities underpinning the political purpose doctrine, it turned its attention to distinguishing between political objects that were contentious or controversial in nature, and those that did not qualify as contentious or controversial. The former would not be charitable, in the Court's view, and the latter would. This reflected a clear desire on the Court's behalf to lessen the burden of the political purpose doctrine as evidently the Court was finding it unnecessarily restrictive.

One of Greenpeace's objects before the Court of Appeal was the promotion of peace, nuclear, disarmament and the elimination of all weapons of mass destruction, and the promotion of peace has been noted as having public benefit.⁶¹ As a result, the Court confirmed that it was "uncontroversial and uncontentious today that in itself the promotion of peace is both for the public benefit and within the spirit and intendment of the preamble, either by way of analogy or on the basis of the presumption of charitable status."⁶²

⁵³ *Re Greenpeace New Zealand Plc* [2011] 2 NZLR 815 (HC).

⁵⁴ *Re Greenpeace New Zealand Plc* [2011] 2 NZLR 815 (HC) at [49]-[53].

⁵⁵ *Re Greenpeace New Zealand Plc* [2011] 2 NZLR 815 (HC) at [53]-[58].

⁵⁶ *Re Greenpeace New Zealand Plc* [2011] 2 NZLR 815 (HC) at [59].

⁵⁷ *Re Greenpeace New Zealand Plc* [2011] 2 NZLR 815 (HC) at [59].

⁵⁸ *Re Collier* [1998] 1 NZLR 81 at 89.

⁵⁹ *Greenpeace of New Zealand Incorporated* [2014] NZSC 105 [August 2014] at [52].

⁶⁰ *Re Greenpeace of New Zealand Inc* [2013] 1 NZLR 339 (CA) at [56]-[57]; Juliet Chevalier-Watts "The Changing Face of Political Purposes and Charity Law in New Zealand" [2015] *Trusts & Trustees*, publication forthcoming.

⁶¹ *Re Greenpeace of New Zealand Inc* [2013] 1 NZLR 339 at [72], referring to *Southwood v Attorney-General* [2000] EWCA Civ 204, [2000] WLTR 1199 at [29].

⁶² *Re Greenpeace of New Zealand Inc* [2013] 1 NZLR 339 (CA) at [72].

Indeed, the “question whether peace should be achieved through disarmament or through maintaining military strength is undoubtedly contentious and controversial with strong, genuinely held views on both sides of the debate.”⁶³ Therefore, an organisation that sought to promote peace “on the basis of one or other of these views would be pursuing a non-charitable political purpose.”⁶⁴

It should be noted also that in between the High Court case and the Court of Appeal case, Greenpeace proposed to amend its object on the promotion of peace. The Court of Appeal noted that the object prior to its proposed amendment was not charitable because it pursued a view in a contentious debate.⁶⁵ However, the proposed amendment to that object, in the Court of Appeal’s view, made a significant difference because the reference to “disarmament” was to be replaced with references to “nuclear disarmament and the elimination of all weapons of mass destruction”. This would remove the element of political contention and controversy inherent in the pursuit of disarmament generally. Instead this would be viewed as an uncontroversial public benefit purpose.⁶⁶

Therefore the reality of this was that because the objects were not controversial, the Court accepted them as being charitable. This resulted in the Court of Appeal adding a new facet to the political purpose doctrine. Plainly speaking, purposes that are controversial or contentious would not be charitable, but purposes that were not contentious, albeit political, would be charitable. Such an approach was, however, swiftly rejected by the Supreme Court in the subsequent appeal. What was very interesting nonetheless about this final judgment was whilst it rejected entirely the novel approach of the Court of Appeal, its rejection of the political purpose exclusion actually represented an innate recognition of the burden of that doctrine, which had been expressed for decades by previous courts. Such expressions of discontent thus provided evidence of the inevitability that New Zealand would eventually unshackle itself from the constraints of *Bowman*.

The majority of the Supreme Court in the 2014 *Greenpeace*⁶⁷ case unequivocally asserted that they “did not think that the development of a standalone doctrine of exclusion of political purposes...has been necessary or beneficial.”⁶⁸ Indeed, they concurred with previous authorities that its development has been comparatively recent and “based on surprisingly little authority.”⁶⁹ Elias CJ, delivering the judgment for the majority, addressed a number of the issues pertaining to the political purpose exclusion that has been the cornerstone of many concerns regarding charity law.

Her Honour stated that the notion of “political” actually is used in a number of different senses, for instance, party political, controversial, law changing and opinion moulding, therefore it is a misleading term. Equally so, justifications for excluding political purposes have also been varied. In *National Anti-Vivisection Society*, the Court was of the view that Lord Parker’s reference to political objects in *Bowman* was confined to the promotion of

⁶³ *Re Greenpeace of New Zealand Inc* [2013] 1 NZLR 339 (CA) at [74].

⁶⁴ *Re Greenpeace of New Zealand Inc* [2013] 1 NZLR 339 (CA) at [74].

⁶⁵ *Re Greenpeace of New Zealand Inc* [2013] 1 NZLR 339 (CA) at [75].

⁶⁶ *Re Greenpeace of New Zealand Inc* [2013] 1 NZLR 339 (CA) at [76]; Juliet Chevalier-Watts “The Changing Face of Political Purposes and Charity Law in New Zealand” [2015] *Trusts & Trustees*, publication forthcoming.

⁶⁷ *Re Greenpeace of New Zealand Incorporated* [2014] NZSC 105 (6 August 2014).

⁶⁸ *Re Greenpeace of New Zealand Incorporated* [2014] NZSC 105 (6 August 2014) at [59].

⁶⁹ *Re Greenpeace of New Zealand Incorporated* [2014] NZSC 105 (6 August 2014) at [59].

changes in legislation.⁷⁰ However, the Supreme Court doubted that Lord Parker intended to be so confined. Her Honour added further:⁷¹

...the questionable assumption that a political exclusion depends on whether a purpose entails legislative change does not explain the general agreement that entities which promote political parties are not charitable, even where they do not promote changes in law.

Thus the political purpose exclusion appeared arbitrary. More importantly, the Court found it difficult to see how all advocacy for legislative change should be excluded from being charitable. For example:⁷²

Promotion of law reform of the type often undertaken by law commissions which aims to keep laws fit for modern purposes may well be properly seen as charitable if undertaken by private organisations even though such reform inevitably entails promotion of legislation.

This type of advocacy may indeed have public benefit that would be analogous to other good works recognised as charitable at law. In addition, even with promotion of specific law reform, it was still difficult for the Court to recognise an absolute bar to its charity. This was because it was not apparent why there should be a distinction between promoting legislative change and promoting changes in government policy.⁷³ In addition, and in the Court's view, more significantly:⁷⁴

...in the circumstances of modern participatory democracy and modern public participatory processes in much administrative and judicial decision-making, there is not satisfactory basis for a distinction between general promotion of views within society and advocacy of law change (including through such available participatory processes).

Indeed, some aspects of public benefit may actually require a "creation of a climate of observance or constituency for change in law or administrative policies." Illustrations of this can be found in the abolition of slavery, or advocacy for human rights.⁷⁵ Therefore for a doctrine to preclude advocacy for change in the law without permitting further assessment of its public benefit "is inconsistent with the general principle of flexibility."⁷⁶

Therefore, if the exclusion in reality applied to advocacy generally, which the Court thought was the more natural way of reading Lord Parker's observations, rather than the narrow view cited in *Natioal Anti-Vivisection Society*, then the exclusion would exclude promotion by all advocacy, regardless of whether it may be charitable, unless it could be characterised as ancillary. The Court then made reference to *Aid/Watch*, noting that the High Court specifically rejected a doctrine that advocacy can never be charitable. Whilst the Supreme Court made no explicit comment on whether they approved of this approach or not, it was

⁷⁰ *Re Greenpeace of New Zealand Incorporated* [2014] NZSC 105 (6 August 2014) at [61] referring to *National Anti-Vivisection Society v Inland Revenue Commissioners* [1948] AC 31 (HL) at 49-50, 55, and 62.

⁷¹ *Re Greenpeace of New Zealand Incorporated* [2014] NZSC 105 (6 August 2014) at [61].

⁷² *Re Greenpeace of New Zealand Incorporated* [2014] NZSC 105 (6 August 2014) at [62].

⁷³ *Re Greenpeace of New Zealand Incorporated* [2014] NZSC 105 (6 August 2014) at [63] referring to *National Anti-Vivisection Society v Inland Revenue Commissioners* [1948] AC 31 (HL) at 77, *McGovern v Attorney-General* [1982] 1 Ch 321 at 340 and *Re Wilkinson (Deceased), Perpetual Trustees Estate and Agency Co of New Zealand Ltd v League of Nations Union of New Zealand* [1941] 1 NZLR 1065 (SC) at 1077.

⁷⁴ *Re Greenpeace of New Zealand Incorporated* [2014] NZSC 105 (6 August 2014) at [63].

⁷⁵ *Re Greenpeace of New Zealand Incorporated* [2014] NZSC 105 (6 August 2014) at [64] referring to *Jackson v Philips* (1867) 96 Mass 539, 14 Allen 539 (Mass SC) and Charities Act 2006 (UK), s 2(2)(h), respectively.

⁷⁶ *Re Greenpeace of New Zealand Incorporated* [2014] NZSC 105 (6 August 2014) at [64].

implicitly evident that the *Aid/Watch* decision provided support for New Zealand endeavouring to reject also this doctrine. In light of the observations pertaining to *Aid/Watch*, the Supreme Court concluded that defining a purpose as “political” or “advocacy” will simply obscure correct focus as to whether that purpose is charitable at law. In addition, such a strict exclusion would, inevitably, mean an ensuing rigidity in the law, which is not appropriate, because this area of law should be responsive to the way in which society operates. This historically has been the case in situations where charity law has recognised a need and responded appropriately. For instance, in the case of *Latimer v Commissioner of Inland Revenue*, the Court of Appeal rejected the English approach with regard to blood-tie relationships within charity law, finding instead that assisting Maori in the research, preparation and presentation of claims before the Waitangi Tribunal to be a charitable purpose.⁷⁷

Therefore, in the Court’s view, the better approach was not a doctrine of exclusion of political purposes, but rather “an acceptance that an object which entails advocacy for change in the law is ‘simply one facet of whether a purpose advances the public benefit in a way that is within the spirit and intendment of the statute of Elizabeth.’”⁷⁸ However, whilst some advocacy for a change in the law may advance the public benefit, such advancement of causes may often not be charitable because:⁷⁹

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

It is likely that some matters of opinion may be impossible to characterise as having the requisite public benefit, either in the achievement, or in the promotion itself, therefore Kiefel J’s dissenting view in *Aid/Watch* was approved by the Supreme Court, where her Honour concluded “reaching a conclusion of public benefit may be difficult where the activities of an organisation largely involve the assertion of views.”⁸⁰ Further, the ends being promoted might be outside the scope of those cases that have been built on the spirit and intendment of the preamble, and that being so, there will be no relevant analogy “on which the law might be developed within the sense of what has been recognised to be charitable.”⁸¹ Therefore, whilst it is undoubtedly correct that there may be a number of circumstances where advocacy for particular views will not be charitable because they will fail the public benefit test, this does not “justify a rule that all non-ancillary advocacy is properly characterised as non-charitable.”⁸²

So whilst the majority acknowledged the reality that not all purposes that advocate for a change in law will be charitable, the overall doctrine of the exclusion of political purposes was no longer appropriate in New Zealand law. Thus the shackles of *Bowman* were shed in a

⁷⁷ *Re Greenpeace of New Zealand Incorporated* [2014] NZSC 105 (6 August 2014) at [70] referring to *Latimer v Commissioner of Inland Revenue* [2002] 3 NZLR 195 (CA); see also *Oppenheim v Tobacco Securities Trust Ltd* [1951] AC 297 (HL).

⁷⁸ *Re Greenpeace of New Zealand Incorporated* [2014] NZSC 105 (6 August 2014) at [72] citing LA Sheridan “Charitable Causes, Political Causes and Involvement” (1980) 2 *The Philanthropist* 5 at 16.

⁷⁹ *Re Greenpeace of New Zealand Incorporated* [2014] NZSC 105 (6 August 2014) at [72] citing LA Sheridan “Charitable Causes, Political Causes and Involvement” (1980) 2 *The Philanthropist* 5 at 16.

⁸⁰ *Re Greenpeace of New Zealand Incorporated* [2014] NZSC 105 (6 August 2014) at [73] citing *Aid/Watch Inc v Commissioner of Taxation* [2010] HCA 42 at [69].

⁸¹ *Re Greenpeace of New Zealand Incorporated* [2014] NZSC 105 (6 August 2014) at [73].

⁸² *Re Greenpeace of New Zealand Incorporated* [2014] NZSC 105 (6 August 2014) at [74].

critically appropriate and well-constructed manner by the Court. The correct approach therefore is:⁸³

[A]ssessment of whether advocacy or promotion of a cause or law reform is a charitable purposes depends on consideration of the end that is advocated, the means promoted to achieve that end and the manner in which the cause is promoted in order to assess whether the purpose can be said to be of public benefit within the spirit and intendment of the 1601 Statute.

This meant that the majority of the Supreme Court could not concur with the Court of Appeal, where it was suggested that views that are generally acceptable would be charitable, whilst that of a highly controversial nature would not be charitable. If that approach were to be taken, then this would:⁸⁴

...effectively exclude much promotion of change while favouring charitable status on the basis of majoritarian assessment and the status quo. Just as unpopularity of causes otherwise charitable should not affect their charitable status, we do not think that lack of controversy could be determinative.

As a result, the majority of the Supreme Court thought that the Court of Appeal was in fact wrong to place such emphasis on “the acceptance in New Zealand legislation and society of the ultimate goal of nuclear disarmament and popular support in New Zealand for the elimination of weapons of mass destruction.”⁸⁵

Therefore, in light of previous judicial expressions of concern, and the unstable foundations on which the doctrine has been based, it was perhaps not surprising that the majority of the Supreme Court asserted that a political purpose exclusion should no longer be applied in New Zealand charity law.

Concluding Remarks

For many a decade, case law has decreed that political purposes are not charitable, and this, for the most part, finds its history in Lord Parker’s observations in *Bowman v Secular Society*, where his Lordship asserted that a court has no means of judging the public benefit in a proposed change in the law. English case law entrenched this view,⁸⁶ and still continues to do so to this day. Such an approach was echoed by England and Wales’ antipodean cousins up until recently, although it was evident that Australian courts had, for many years, expressed explicit doubt as to the applicability of this doctrine in Australian jurisprudence.⁸⁷ Then, with the delivery of the *Aid/Watch* judgment, Australia severed its ties with the *Bowman* line of authority. It was therefore inevitable that New Zealand would feel the impact of the *Aid/Watch* decision, and charity law observers watched for signs that New Zealand would, like Australia, shed the shackles of *Bowman*.

⁸³ *Re Greenpeace of New Zealand Incorporated* [2014] NZSC 105 (6 August 2014) at [76].

⁸⁴ *Re Greenpeace of New Zealand Incorporated* [2014] NZSC 105 (6 August 2014) at [75].

⁸⁵ *Re Greenpeace of New Zealand Incorporated* [2014] NZSC 105 (6 August 2014) at [75].

⁸⁶ See *National Anti-Vivisection Society v Inland Revenue* [1948] AC 31 (HL); *McGovern v A-G* [1982] 1 Ch 321; and *Human Dignity Trust v the Charity Commission for England and Wales* [2013] CA/2013/00013.

⁸⁷ See *Royal North Shore Hospital of Sydney v Attorney-General* (1938) 60 CLR 396 and *Public Trustee v Attorney-General of New South Wales* [1997] 42 NSWLR 600.

In the case of *Re Draco Foundation (NZ) Charitable Trust*, the first charity law case to be heard in New Zealand after the *Aid/Watch* decision, the Court refused however to depart from the authority of *Bowman*.⁸⁸ Nonetheless, it was evident that there had been expressions of doubt as to the rationales that have been given over the years for the exclusion of political purposes within charity law in earlier case law.⁸⁹ In the High Court case of *Greenpeace*, whilst Heath J also felt bound by *Bowman*, he applied that authority with some reluctance and the Court of Appeal *Greenpeace* case asserted that non-controversial political purposes could be charitable. Thus there was evidence that New Zealand was expressing similar discontent in a comparable way to that of its Tasman cousin, who had done so some years previously. With the bindings of the political purpose doctrine therefore beginning to fray in New Zealand, the majority of the Supreme Court in the *Greenpeace* decision in 2014 finally managed to shed the burden of the *Bowman* authority and severed the ties completely. They did so in a convincing and eloquent manner, by highlighting that the standalone doctrine of the exclusion of the political purpose doctrine was based on little authority, and that the concept of “political” was in fact, a misleading term. This is because it could be utilised in a number of different senses, for instance, party political, or law changing. Further, there is evidence that actually public benefit has been found in purposes that changed the law, for instance, anti-slavery laws, and advocating for human rights. Thus charity law and political purposes have not always been mutually exclusive.

Whilst the majority of the Supreme Court did acknowledge that not all advocacy will be charitable because the public benefit will be lacking, this did not support an overall exclusion of political purposes as charitable. Thus the better approach would be to accept that advocacy is merely one facet of whether or not a purpose advances public benefit in a way that is recognised as charitable at law. The majority therefore presented evidence that the exclusion of political purposes within New Zealand charity law was no longer a reasonably defensible position. In doing so, the majority rationally shed the shackles of *Bowman*. As to the inevitability of the breaking free of this doctrine, it was perhaps foreseeable that such an evolution would occur because of the weight of history, the various judicial misgivings, and the lack of authority for the doctrine itself.

⁸⁸ *Re Draco Foundation (NZ) Charitable Trust* HC WN CIV 2010-485-1275 [3 February 2011].

⁸⁹ *Re Collier* [1998] 1 NZLR 81.