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Doing the Lord's Work or Taking His Name in Vain: Religion and Charity—a New Zealand Perspective

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Abstract

~~The intersection between law, charity and religion can raise some interesting questions, particularly in relation to the advancement of religion as <having?> legally-recognised charitable purposes, and such questions arise in relation to, for example, issues of morality, controversiality or worthiness and sometime resulting<**sometimes resulting in?**> diverging societal views surrounding religious charities. This can then place it<religion?> in conflict with charity law's requirement of public benefit. Consequently, in critically reviewing religious charities as they do the Lord's work within the constructs of public benefit, this article looks to the advancement of religion from a New Zealand charity law perspective, and considers some thorny charity law decisions that challenge whether the advancement of religion may in fact perhaps be taking the Lord's name in vain under the guise of charity.<this is just a repeat of your Introduction; the Abstract should cover all main points of the article including conclusions>~~

~~**Keywords**~~
law; charity law; charity; religion; public benefit.

Introduction

The intersection between law, charity and religion can raise some interesting questions, particularly in relation to the advancement of religion as <hav ing?> legally-recognised charitable purposes<**check wording**>. Such questions arise in relation to, for example, issues of morality, controversiality, or worthiness and som ti ne resulting<**sometimes resulting in?**> diverging societal views surrounding religious charities. This can then place it<reli ion?> in conflict with charity law's requirement of public benefit. Consequently, in critica reviewing religious charities as they do the Lord's work within the constructs of public benefit, this article looks to the advancement of religion from a New Zealand charity law perspective. Thus, this article considers some thorny charity law decisions that challenge whether the advancement of religion may in fact perhaps be taking the Lord's name in vain under the guise of charity. Consequently, in order to contextualise the discussions on the various charity law religious cases, this article will first set out a general charity law framework and then the framework of that law from a New Zealand perspective. It will subsequently delve into matters that have raised questions for the courts in relation to religious charities, with a focus on the legal requirement of public benefit, and in doing so, this article will demonstrate the complexities of the advancement of religion and evaluating its public benefit. Consequently, the underlying question that arises from the navigation of

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these cases is whether the advancement of religion should be reformed, either by judicial decision or by statutory reform. This article will consider whether such reformation will assist in clarifying the associated complexities.

Charity Law Framework—General Principles

Legally-speaking, 'charity' has no one definition and further, its meaning in general terms in comparison with any meaning at<i[illegible] law is different. Thus a layperson may speak of philanthropy or benevolence or good works, when referring to charitable acts but in reality none of these expressions have any meaning from a charity law perspective. This is because those words are said to go beyond what is thought to be charitable (O'Halloran 2011: 22, referring to, inter alia, *Houston v Burns* [1918] AC 337 (HL); *Attorney General for New Zealand v Brown* [1017] AC 393 PC; Picarda 2009; Breach 2018: 159). Further, in order for an organisation to obtain registered charitable status, it is required to demonstrate that it satisfies certain legal requirements. Those are that its purposes must all be charitable; that its purposes fall within the spirit and intendment of the Statute of Elizabeth 1601,[2] where it has been said that it is 'important to be guided by principle rather than by a detailed analysis of decisions in particular cases' (Breach 2018: 163, referring to, inter alia, *Commissioner of Inland Revenue v Medical Council of New Zealand* [1997] 2 NZLR 297 (CA)), thus ensuring that its purposes all have public benefit (Warburton, Morris and Riddle 2003: 1–2). In relation to the Statute of Elizabeth 1601, which has long been repealed, its preamble is still of relevance for today's charity law because it set out a non-exhaustive list of legally-recognised charitable purposes (Dal Pont 2014: 87–88; Picarda 2014: 134) which was subsequently summarised by Lord Macnaghten in *Commissioners for Special Purposes of the Income Tax v Pemsel* (*Pemsel*) [1891] AC 531[3] in to what are generally known as the four heads of charity that are the legally-recognised charitable purposes in contemporary times (Chan 2020: 155; O'Halloran 2011: 32–37). Thus the four heads of charity are: the relief of poverty, the advancement of education, the advancement of religion, and any other purposes beneficial to the community (*Pemsel*).[4] An entity's purposes must fall within one or more of those heads of charity to be deemed legally charitable. Once an entity has met these legal obligations, it will be registered as a charity.[5] Obtaining legal registered charitable status is often important to organisations because of the advantages that come with such a status. Such advantages include tax benefits, wider availability and eligibility for funding, and increased amounts of public confidence.[6]

As noted, public benefit is a key requirement for charities to meet and that means that all purposes must be of public value as opposed to having private value, notwithstanding purposes for the relief of poverty. Thus the requirement is that the benefit is for the public, and those that are eligible to that benefit constitute a sufficient section of the community

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[2] Also referred to as the 'Charitable Uses Act 1601' or the 'Statute of Charitable Uses'.
[3] See also *Morice v Bishop of Durham* (1804) 9 Ves 399 at 405 and Dal Pont (2018: 306–307).
[4] See, for example, Charities Act 2005, §5 (NZ) and for extended lists of charitable purposes Charities Act 2011, §3 (UK) and Charities Act 2013, §12 (Australia).
[5] For example, charities in New Zealand are registered by the Department of Internal Affairs–Charities Services; other commonwealth countries have similar bodies that undertake such duties including the Charity Commission for England and Wales.
[6] See for example Department of Internal Affairs–Charities Services, 'Benefits and Obligations/Ngā hua me ngā here', https://www.charities.govt.nz/ready-to-register/benefits-and-obligations-of-registered-charities/benefits-and-obligations-of-being-registered/ (accessed 13 October 2014); see also Breach (2018: 162).

(Breach 2018: 163, referring to *Pemsel*; *Latimer v Commissioner of Inland Revenue* [2002] 1 NZLR 535 (HC); *Presbyterian Church of New Zealand Beneficiary Fund v Commissioner of Inland Revenue* [1994] 3 NZLR 363 (HC); *Centrepoint Community Growth Trust v Commissioner of Inland Revenue* [1985] 1 NZLR 673 (HC)).[7] Prima facie, this sounds relatively straightforward but this aspect of charity law has been confirmed as a 'difficult and very artificial branch of the law' (Garton 2013: 31, citing *Oppenheim v Tobacco Securities Trust Co Ltd* [1951] AC 297 307) and indeed it 'may appear illogical and even vaguely capricious' (Garton 2013: 31, citing *Gilmour v Coats* [1949] AC 426 (HL) 443). It is against this challenging background that this article concentrates on the first limb of the public benefit test, that a purpose be for the benefit of the public. Of import also in relation to public benefit is that for the first three heads of charity, generally speaking, the public benefit is presumed, and must be set out expressly for the fourth head (*Pemsel*, 583).[8] Thus for the advancement of religion, this means that the public benefit is presumed unless that presumption is rebutted and such a rebuttal may come about as a result of, for example, if the religion operates an oppressive regime that manipulates its followers, or it operates on a for-profit basis (O'Halloran 2011: 32).[9] The presumption of public benefit has been confirmed in New Zealand (*Re Foundation for Anti-Aging Research* [2016] NZHC 2328, [16], referring to Charities Act 2005, §5(1)) and indeed it has been 'well settled' (*Liberty Trust v Charities Commission* (*Liberty Trust*) [2011] 3 NZLR 68, [99], citing Warburton, Morris and Riddle 2003: [2-048]) that 'a gift for religious purposes is prima facie charitable, the necessary element of public benefit being presumed unless and until the contrary is shown' (*Liberty Trust*: [99], citing Warburton et al. 2003: [2-048]).

We have referred to the principle of 'advancement of religion' and this principle needs to be set out to understand the context of the cases that we will be addressing. The advancement of religion, as is evident, is the third head of charity and whilst it has been noted that the construct of 'religion' generally is not 'wholly amenable to legal definition' (O'Halloran 2014: 10), charity law has gone someway to providing a definition of religion for charitable purposes. Thus, in the Australian High Court case of *Church of the New Faith v Commissioner of Pay-roll Tax* (*Scientology case*) (1983) 154 CLR 120:136, their Honours provided this two-stage definition of religion for charitable purposes:[10]

> …the criteria of religion are twofold: first, belief in a supernatural Being, Thing, or Principle; and second, the acceptance of canons of conduct in order to give effect to that belief, though canons of conduct which offend against ordinary laws are outside the area of any immunity, privilege or right conferred on the grounds of religion. Those criteria may vary in their comparative importance, and there may be a different

[7] See also *Re Compton* [1945] Ch 123 and *Oppenheim v Tobacco Securities Trust Co Ltd* [1951] AC 297 and Garton (2013: 33), referring to Warburton (1995: 5).

[8] It should be noted that there are some exceptions to this and one is the law in the United Kingdom where §4(2) of the Charities Act 2011 removes that presumption for all heads of charity, stating 'in determining whether the public benefit requirement is satisfied in relation to any purpose falling within section 3(1), it is not to be presumed that a purpose of a particular description is for the public benefit'.

[9] Of note this is one of the reasons why the Church of Scientology was rejected as charitable by the Charity Commission for England and Wales; see https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/324212/cosfulldoc.pdf.

[10] See also *R (Hodkin) v Registrar-General of Births, Deaths and Marriages* [2013] UKSC 77 at [57] and Pidgeon (2021: [1]).

> intensity of belief or of acceptance of canons of conduct among religions or among the adherents to a religion.

In other words, there must be a belief in some spiritual being and there must be a way of giving effect to that belief through structured concepts, although as their Honours note, this criterion is flexible depending on the belief itself. This definition is recognised in New Zealand (*Liberty Trust*: footnote 34).[11] Further, to advance religion means, in the New Zealand context, 'to promote it, to spread its message ever wider among mankind; to take some positive steps to sustain and increase religious belief' (*Liberty Trust*: [58], citing *United Grand Lodge of Ancient Free and Accepted Masons of England v Holborn Borough Council* (*Grand Lodge*) [1957] 1 WLR 1080 (QB): 1090) and this can occur 'in a variety of ways which may be comprehensively described as pastoral and missionary' (*Liberty Trust*: [58], citing *Grand Lodge*: 1090).**<please explain your use of square brackets, why no square brackets around '1090'?>** We now turn to the New Zealand charity law framework for further discussions on this matter.

New Zealand and Charity Law Framework

New Zealand's 'distinct Colonial heritage' (O'Halloran 2014: 431) is still evident in much of its law, including the Charities Act 2005, which is the main legislative instrument in relation to the governance of charities in New Zealand, whereby §5(1) of that Act makes direct reference to the four heads of charity that were set out by Lord Macnaghten in the earlier mentioned *Pemsel* case (Charities Act 2005, §5(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. (emphasis removed)

As noted above, the meaning of 'religion' from a charity perspective comes from the common law, of which much of that is influenced by English jurisprudence (*Liberty Trust*: [51], referring to, inter alia, Warburton et al. 2003: [2-049]), and the meaning of the 'advancement of religion' has followed a similar path. Therefore, if a purpose is to be construed as advancing religion, not only must its religion be recognised a**s in?>** charity law, but that religion must be advanced in some way, and that means the religion must 'do something positive in the name of that religion and directly relevant to its benefits' (O'Halloran 2014: 64).[12]

Religious Charities from a New Zealand Perspective

With the law now contextualised, we will consider some of the cases that have caused the courts to consider the public benefit of religious purposes in charity law. Whilst public benefit is presumed in New Zealand for the advancement of religion it can still be rebutted, and this is the challenge that can face some religions when carrying out their purposes, and as

[11] Footnote 34: '*Centrepoint Community Growth Trust v Commissioner of Inland Revenue* applied the meaning of religion as determined in *Church of the New Faith v Commissioner for Pay-roll Tax (Vict)* (1983) 154 CLR 120 which held that Scientology was a "religion"'.

[12] See also *Liberty Trust*: [58], citing *Grand Lodge*: 1090. It might be argued that *Gilmour v Coats* [1949] AC 426 (HL) is the classic case on this point but Mallon J in *Liberty Trust* did not make reference to this case when defining the advancement of religion.

a result, whilst they may believe they are carrying out the Lord's work, the public benefit may not be so obvious. Such issues were illustrated in the case of *Centrepoint Community Growth Trust v Commissioner of Inland Revenue* (*Centrepoint* 1985) [1985] 1 NZLR 673 and the Registration Decision: Exodus Ministries Trust Board (Exodus) 18 August 2010. We begin with the Exodus decision and it might be said that this decision appears in contrast to the earlier *Centrepoint* case, thus suggesting that the Charities Commission caused uncertainty in relation to issues of morality and religion.

Exodus Ministries

In this Registration Decision, the Charities Commission, as it was then (the Commission), determined that the Exodus Ministries did not meet charitable requirements because its public benefit was rebutted. This was because the religion was purporting to carry out the Lord's work but from a charity law perspective that work was morally frowned upon and consequently not charitable. In this decision, the applicant's purposes included the promotion of Christian teaching that sex is for procreation, inter alia, within a heterosexual relationship and deviations from that, including homosexuality, are morally wrong. Further, the entity sought to counsel and assist homosexuals, inter alia, to be healed and released from homosexuality, which, they stated, is a learned life choice not a biological matter (Exodus: [3]). In relation to the matter of public benefit, the Commission assessed the entity's purposes 'in light of modern conditions' (Exodus: [48]), in other words, which could mean, inter alia, how the public may perceive Exodus' purposes when the reality is that New Zealand is, generally speaking, a tolerant society and supportive of a variety of lifestyles and viewpoints.[13] As a result, the Commission confirmed that any promotion of conduct that is contrary to prevailing public policy will negate the public benefit and in application to the issue of what is often known as 'conversion therapy', that of trying to change the sexual orientation of a person, the Commission was of the view that such therapy could be harmful. That meant that the harm of the entity's purposes outweighed any benefit such religious purposes may achieve (Exodus: [48]–[56]).

Respectfully it is submitted that this decision was the correct one to make, not only because such views may be considered offensive in a progressive society, but also because of, inter alia, the Homosexual Reform Act 1986 decriminalising sexual relations between men, the Human Rights Act 1993 making sexual orientation a prohibited ground for discrimination (Exodus: [55]) and the Marriage (Definition of Marriage) Amendment Act 2013 clarifying that under §4 of the Act 'a marriage is between 2 people regardless of their sex, sexual orientation, or gender identity'. Therefore, Exodus may well be purporting to carry out the Lord's work but, from a charity law perspective, such work is morally frowned upon and not charitable. The decision was not challenged so it is not possible to state what that outcome might have been had a judgment been handed down although the law might have been further clarified in terms of the impact of morality and public benefit. Nevertheless, whilst it is acknowledged that this decision is not legally-binding, it is submitted that this does not detract from the overall point being made in relation to the morality of the situation negating

[13] New Zealand Parliament, 'Same-sex Marriage': 'Under the Civil Union Act 2004 a civil union may be entered into by couples of the same-sex or by couples of different sexes', https://www.parliament.nz/en/pb/research-papers/document/00PLSocRP12061/same-sex-marriage, 17 December 2010, accessed 21 October 2021 and the Marriage (Definition of Marriage) Amendment Act 2013 received Royal Assent in 2013 clarifying that under §4 of the Act, 'a marriage is between 2 people regardless of their sex, sexual orientation, or gender identity'.**<this is already mentioned in the text, is it necessary to repeat?>**

the public benefit. However, it might be argued that the morality of this decision may appear in conflict with the decision made in the *Centrepoint* 1985 case. In this case, the public support for the Centrepoint Trust was also limited, in a similar fashion to the limited public support likely given to the Exodus Ministries, but the cases appear to have been treated differently.

Centrepoint

The objects<objectives?> of the Centrepoint Trust included advancing the spiritual education and humanitarian teaching of the messengers of god, which included Herbert Potter, who was the Trust's spiritual leader (*Centrepoint* 1985: 673). Tompkins J confirmed the prerequisite of the principle of public benefit, and whilst his Honour also confirmed that it was presumed under this head of charity (*Centrepoint* 1985: 677, referring to *National Anti-Vivisection Society v Inland Revenue Commissioners* [1947] 2 All ER 217 (HL): 234), 'the question whether a gift is or may be operative for the public benefit is a question to be answered by the Court by forming an opinion upon the evidence before it' (*Centrepoint* 1985: 677, citing *Re Hummeltenberg* [1923] 1 Ch 237: 242), which was a key issue for Tompkins J in the case at hand. That was because it was submitted that the real purpose of the Trust was 'to establish and maintain a self-contained and self-perpetuating community in which the teachings of Mr Potter are practised for the benefit of that community' (*Centrepoint* 1985: 699). That view was substantiated with evidence of the amount of land that was owned; Mr Potter's right to select members; and providing weekly personal benefits to members of housing, clothing, food and one dollar (*Centrepoint* 1985: 699). In addition, it was contended that the Trust's businesses did not further the Trust's objects; rather they were utilised to establish 'a self-contained community for the benefit of the members' (*Centrepoint* 1985: 699). If that were correct then the Trust would not be charitable as the private benefits would outweigh the public benefit and indeed might be equated to a professional organisation, which had been addressed on a number of occasions by the courts (*Centrepoint* 1985: 699–700, referring to, inter alia, *Royal College of Surgeons of England v National Provincial Bank Ltd* [1952] AC 631 and *Re Mason* [1971] NZLR 714).

In Tompkin J's view, the fact that the Trust owned extensive assets and also carried out money-making activities did not in itself render it not charitable. This is because there are many charities in the same position, including, and of note, large churches. Further, just because Trust members receive some personal benefit in the form of clothing, housing, food and a weekly allowance does not mean that these benefits are the main purpose of the Trust. Thus, contrary to that which the layperson may believe of charities, 'a purpose will be charitable at law even if it is not "charitable" in the ordinary sense of that word, provided it falls within the Preamble or is analogous to one that does' (Nitikman 2021: 5, referring to *Re Cox / Baker v National Trust Co* [1950] OR 137 (SC)). In relation to the Centrepoint Trust, that meant that owning extensive assets, running businesses and providing benefits to members may not strike an outsider as 'charitable', but as noted, 'a purpose need not be connected to the poor or poverty to be charitable'. In other words, charity is not necessarily 'synonymous with either benevolence or liberality', consequently <**in?**> law this means the Trust in question could still be charitable (Nitikman 2021: 5, citing Chan 2007: 512 <**p. 481 only in biblio entry**>). Indeed, a trust might make 'a surplus of revenue over expenses and still be a charity' (Nitikman 2021: 5) and it 'may charge a fee for its goods or services without ceasing to be a charity' (Nitikman 2021: 5) which all supports the construct that the Trust was still charitable (Nitikman 2021: 11). Whilst there may of course be a public moral perception relating to the amount of profits charities should make or how much they should

charge for services, this is answered quite simply in that 'common sense would suggest that there should be a limit to the cost of such services' (Nitikman 2021: 10, citing Morris 2011: 456–66**<pp is 209–226 in biblio entry>**). This is because if those fees were deemed excessive, then the public benefit would be negated. Further, it seems unlikely that a charity might earn excessive profit in legal terms because a charity is not able to pay profit out to its shareholders or members, thus there can be little point in a charity earning a profit as a purpose. A charity can do nothing with its profit other than, at some point, utilise it to fulfil its purposes (Nitikman 2021: 18). Respectfully therefore, Tompkin J was correct in his opinion that the fundamental purpose of the Trust is to, inter alia, advance religion (*Centrepoint* 1985: 700) because it is a correct statement of the law today.

However, weighed against this was the challenging issue of the sexual allegations surrounding the Trust, which would appear, prima facie, to be able to rebut the presumption of public benefit, and echoes the issues in the Exodus decision. This is because, not least, in charitable terms it was said that 'the only way of disproving a public benefit is to show… that the doctrines inculcated are—"adverse to the very foundations of all religion, and that they are subversive of all morality"' (*Centrepoint* 1985: 692, citing *Re Watson* [1973] 3 All ER 678: 688 referring to *Thornton v Howe* (1862) 31 Beav: 20). Consequently, it was for Tompkins J to be persuaded that the sexual attitudes perpetuated within the community discredited the religion and subverted morality. His Honour noted that there had been much cross-examination of witnesses in relation to sexual attitudes of the members of Centrepoint and he was satisfied that whilst there was much sexual freedom and sexual experimentation, even amongst children, this fell under a moral construct as opposed to being illegal (*Centrepoint* 1985: 686). Overall, without any evidence of detriment to the children or members as a result of such sexual attitudes, and even though it was acknowledged that the wider community outside Centrepoint might deem such attitudes immoral or controversial, there was nothing to suggest that in fact this behaviour was 'socially reprehensible' (*Centrepoint* 1985: 687). Being frowned upon by some outside of the Trust did not render the behaviour sufficient to negate the public benefit based**<delete?>** because it was not 'subversive of all morality', as set out earlier. This is because there is no one level of morality in society and thus religious activities may not ascribe to standard levels of morality, in similar fashion to other groups in society, but this does not mean that their activities or purposes fall below the test acknowledged by Tompkins J. The Lord's work may be carried out even when other members of society may not approve of the methods that that entails.[14]

As a result, it is not evident that changing the law, either judicially or by statute, would be helpful because if one considers the Exodus decision and the *Centrepoint* case, they can be distinguished on their own facts. Thus, the law perhaps should continue to be decided on a case-by-case basis as opposed to prescribed legal principles that may not reflect the intricacies of each religious situation and may only reflect majoritarian, uncontroversial or popular views. Indeed, such an approach was affirmed by the majority in the New Zealand Supreme Court case of *Re Greenpeace of New Zealand Inc* (*Greenpeace*) [2014] NZSC 105 where Elias CJ stated that 'favouring charitable status based on the majority assessment, [or] the status quo' (*Greenpeace*: [75]) risks stagnating the law. In addition, the Court in that *Greenpeace* case also affirmed that any 'emphasis on controversy' (*Greenpeace*: [75]) is

[14] Of note is that there is a current Government inquiry into abuse in the care of the Catholic Church, amongst other investigations; see https://www.abuseincare.org.nz/our-inquiries/abuse-in-the-care-of-the-catholic-church/. It is not known what the impact of the outcome of this investigation will yet have on registered religions where such religions may be deemed to have condoned historical sexual abuse.

misplaced because that too would exclude any promotion of change for society (*Greenpeace*: [75]). For charity to function effectively it must be able to mould to the needs of society, even minority or controversial elements of society. This is because charity is vital to society, especially vulnerable or minority sectors, and as a result charity law should not 'hinder the responsiveness of this area of law to the changing circumstances of society' (*Greenpeace*: [70]). This point was also made by Hammond J (as he was then) in *D V Bryant Trust Board v Hamilton City Council* [1997] 3 NZLR 342: 348 where he noted that '[i]t would be unfortunate if charities law were to stand still: this body of law must keep abreast of changing institutions and societal values'. Of course, changing the law is generally seen as the task of the legislature but the law can be interpreted in a nuanced manner by the courts so as to reflect the needs of society. Such an approach is of particular import for religious groups because as noted in the Australian High Court case of *Church of the New Faith v Commissioner of Pay-Roll Tax (Vic)* (*Scientology* case) [1983] HCA 40), some religious groups may be particularly vulnerable members of society, either because they are a minority, or they are not popular, or not well accepted (*Scientology* case [8], referring to *Jehovah's Witnesses Inc* (1943) 67 CLR: 124). However, the advancement of religion applies to all religions, not just the majoritarian models, thus negating the public benefit because some aspects of that religion may offend other sections of the community <add 'which'?>risks undermining the position of religions generally in society.

Therefore, by Tompkins J in *Centrepoint* acknowledging that the public benefit has not been rebutted, this continues to protect the adherents of Centrepoint's religion to ensure that they can carry out their purposes within that religion and in doing so are protected from any discrimination that may arise as a result of lack of popularity or societal criticism. Thus public benefit moves through the underlying law and is demonstrated by charity law supporting the aforementioned 'machinery or harmony of civil society' (*Greenpeace*: [70]). Indeed, supporting the machinery or harmony of civil society can be undertaken on many levels, and advancing religion is just one way in which society can be supported or be provided with harmony, which Centrepoint would have been able to undertake through their religion. This is an important point to make in relation to religion because whilst it might be thought that New Zealand is a secular country, in reality religious charities are a major component of the charity sector in New Zealand, whereby religious charities make up nearly 19% of the sector. This is second only to education, training and research activities.[15] This reflects the intrinsic importance of religious charities within Aotearoa New Zealand society and indicates that the public benefit of religions should continue to be recognised to ensure that they can continue to play an active role in supporting society regardless of their lack of popularity or any apparent distaste levelled at a religion. A religion's worth to society is not found necessarily in its popularity nor its social acceptance and as such that should not be a reason to negate public benefit, at least not without serious consideration of whether that religion is 'adverse to the very foundations of all religion, and that they are subversive of all morality' (*Centrepoint* 1985: 692, citing *Re Watson* [1973] 3 All ER 678: 688 referring to *Thornton v Howe* (1862) 31 Beav: 20).

It might be argued of course that the existence of socially unpopular or socially rejected religions may call into question whether that religion should be granted charitable status and being a socially unpopular religion was considered in the later *Centrepoint* case of *Re Centrepoint Community Growth Trust* [2000] (*Centrepoint* 2000) 2 NZLR 325 which was in

[15] Charities Services New Zealand, 'Charities by Sector', https://www.charities.govt.nz/view-data/ (accessed 19 October 2021).

reference to varying the charitable trust in question. In this case, Cartwright J stated that public outrage and perceived lack of worthiness were not grounds to deny charitability (*Centrepoint* 2000: [57]). Further, his Honour noted that '[i]n present-day society, many who are not "worthy" are none the less the objects of charitable assistance whether privately or publicly funded' (*Centrepoint* 2000: [57]). This therefore, by analogy, can be applied to the aforementioned sexual attitudes of the Centrepoint members, meaning that such attitudes do not render the members worthless in society; they are merely a section of society. Indeed, humans require charitable assistance for a variety of reasons and they remain human regardless of their perceived worth in society, and as humans they still require humanitarian consideration, which is at the heart of charity. Consequently, it might be said that this is similar to Elias CJ's exhortation in *Greenpeace* to ensure that charity meets the requirements of society and it is likely that not all of society will appeal to other parts of society, and quite often it is religious charities that bear the brunt of public pressure and criticisms. That does not mean that they are any less charitable, on the proviso that those religious entities meet the charitable obligations, which Tompkins J in the 1985 *Centrepoint* case confirmed they did. The benefit was not rebutted because of a certain sense of misplaced morality or propriety that was being applied; rather that was just one way for followers to lead their lives, much like other sections of society lead lives that do not conform to more traditional religious views, including those who seek same-sex marriage, or to have children without being married. Society can accommodate many types of views regardless of their mainstream support or otherwise (*Family First*: [146]–[147])**<write in full at first occurrence?>**. As a result, this suggests that reforming the law may not be necessary when the cases demonstrate that charity law as it stands is capable of ensuring that the public benefit is met or rebutted depending on the circumstances.

Of course, it is acknowledged that Cartwright J's views in the *Centrepoint* 2000 case were made in reference to the relief of poverty as opposed to the advancement of religion. However, in response to that, it has been argued that charity law 'has been built up not logically but empirically' (*Latimer v Commissioner of Inland Revenue* [2002] 3 NZLR 195: [38], citing *Oppenheim v Tobaccos Securities Trust Co Ltd* [1951]: 309), suggesting that there is flexibility in the application of charity law principles to meet the circumstances of each case. Thus, it may be appropriate to apply those principles outside the boundaries of their primary context. Indeed, this approach was followed in the case of *Ip Cheung Kwok v Ip Siu Bun* (Chevalier-Watts 2020: 147, referring to *Ip Cheung Kwok v Ip Siu Bun* (*Ip*) [1990] HKLR 499 at [130], referring to *Re Compton* [1945] Ch 123 and *Oppenheim v Tobaccos Securities Trust Co Ltd* [1951] AC 297 (HL)) where the Court confirmed that advancement of education principles could be applied to advancement of religion principles. This was because the Court recognised that those principles were not restricted to the advancement of education cases solely; rather they could be applied to other heads. As a result, it is submitted that, by analogy, the head of relief of poverty principles may be applied to the advancement of religion circumstances because it has already been confirmed that charity law principles are not limited to specific heads of charity (*Ip*: [130]). Such an approach gives effect to the considerations of both Elias CJ and Hammond J in the aforementioned *Greenpeace* and *Bryant Trust* cases respectively that charity law should adapt to enable charity law to meet the needs of society, and that should be the case regardless of the popularity or moral stance of that section of society.[16]

[16] See *Re Greenpeace of New Zealand Inc* [2014] NZSC 105 and *D V Bryant Trust Board v Hamilton City Council* [1997] 3 NZLR 342.

Therefore, whilst the 1985 *Centrepoint* case certainly may have raised questions regarding morality and worthiness and whether such matters would negate the public benefit, case law suggests that it would have been incorrect to have adopted that approach, and that religious groups can still meet charitable trusts**<wording ok?>** even when perceived convention suggests prima facie that this may not be so. Thus, suggesting the current law is effective as it stands. Nevertheless, one recent New Zealand Court of Appeal case ~~has~~ highlighted some potential issues in relation to the aforementioned 'modern conditions' of contemporary New Zealand society; that case is *Family First New Zealand v Attorney-General* (*Family First*) [2020] NZCA 366. We will ~~also~~ consider the contrasting view of the High Court *Family First* case (*Family First New Zealand* (*Family First* 2018) [2018] NZHC 2273) which led to the successful appeal to the Court of Appeal~~.~~

Family First

It should be noted from the outset that ~~this~~ case ~~was~~ not in relation to the advancement of religion; rather ~~its~~ purposes were addressed under the advancement of education and any other purposes beneficial to the community. However, it is submitted that ~~this~~ case ~~is~~ pertinent to issues of morality or controversiality and apparent conflict with charity law because of the way in which, as submitted earlier, principles relating to specific heads of charity may be applied to other heads of charity. Family First is an organisation that 'promotes the traditional view of family, and seeks to limit the concept of marriage to a union between men and women' (*Family First* 2018: [22]). This seems, in part, contrary to the way in which society in New Zealand is trending, taking into consideration the legal and society support for marriage for all persons, regardless of 'their sex, sexual orientation, or gender identity' (Marriage (Definition of Marriage) Amendment Act 2013, §4). However, the majority of the Court of Appeal was of the view that just because Family First favoured the traditional family unit, this did not negate their charitability. Their Honours did note that in New Zealand there is a tradition of 'pragmatic and progressive social theory and legislation' (*Family First*: [146]), which now means alternative family units and relationships are accepted within society. However, their Honours also confirmed that 'by far the larger part of the social groups constituting families… are those based on… marriages between men and women' (*Family First*: [146]). As a result, they asserted that it would be an odd situation if promoting traditional forms of marriage would fail to be of public benefit even though there is greater social acceptance of alternative ways of having families (*Family First*: [147]). However, Simon France J's view in the High Court case was that promoting the traditional family unit may come at a cost to society, and particularly those in minority groups, such as LBTQ communities, who are still vulnerable to discrimination and attack because of their lifestyle and views. Consequently, his Honour stated that whilst the traditional family unit may be supported by a large section of the community, it cannot be affirmatively said to be in the public interest if other family models may be undermined through its promotion (*Family First* 2018: [65]). This is reflective of the Supreme Court's view in *Greenpeace*, as mentioned, that 'majoritarian assessment' (*Re Greenpeace of New Zealand Inc* [2014] NZSC 105: [75]) should not be determinative of charitable status because it might be contrary to the benefit that is 'approved by the common understanding of enlightened opinion for the time being' (*Re Greenpeace of New Zealand Inc* [2014] NZSC 105: [75], citing *National Anti-Vivisection Society v Inland Revenue Commissioners* [1948] AC 31 (HL): 39). New models of family units and living are part of this 'approved… common understanding of enlightened opinion for the time being' (*Re Greenpeace of New Zealand Inc* [2014] NZSC 105: [75]).

Nevertheless, the Court of Appeal in *Family First* did not share Simon France J's view on this matter, preferring instead to align Family First's purposes with the moral and mental improvement cases that seek to raise moral standards in society, which have been found to be of public benefit (*Family First*: [151]–[154], referring to, inter alia, *Commissioners of Inland Revenue v Falkirk Temperance Café Trust* 1927 SC 261 (HL)). Therefore, their Honours concluded that there was space for traditional and contemporary family lifestyles and both can contribute to providing stable and supportive family environments (*Family First*: [153]). Certainly, this appears to be a persuasive argument but, with respect, the view of Simon France J in the High Court decision also has some gravitas because of the concerns that promoting the traditional family model may come at the expense of the contemporary model when that latter model is the minority and already in a vulnerable position. As such, it ~~is perhaps~~ not so clear wherein the public benefit ~~lies~~ with the Court of Appeal decision and it ~~does~~ appear to be in contrast with the decisions made in the Exodus and *Centrepoint* decisions, raising the question as to whether legal reform may be valuable in this instance. However, in answer to this, it is submitted that case law has already permitted such analogous application, as discussed earlier, and whilst it is correct that controversy or issues of morality are not the basis for making charitable status decisions, public benefit still may be rebutted where questions are raised of possible harm to a section of society. Thus, as suggested earlier, perhaps legal reform is not the most appropriate method of providing clarity because the common law provides opportunities for the rebuttal of public benefit where appropriate. ~~Nevertheless, and of note, the Court of Appeal *Family First* decision has been appealed to the Supreme Court, so perhaps this matter is not yet settled.~~ Further, it appears unlikely that statutory reform will be possible at the time of writing because following a review of the Charities Act 2005, where charitable purposes were outside of the scope of that review, the Minister for the Community and Voluntary Sector has recently announced a number of changes to that Act. Those changes include amendments to reporting requirements and the appeals process. Evidently, statutory amendment to the advancement of religion was not a possibility at this time and therefore is unlikely to be for the foreseeable future as a result of a new bill that is expected in 2022**<up[illegible]e?>** consequent to the review.[17]

Conclusion

This article began by observing that the intersection between law, charity and religion can raise questions, particularly in relation to issues of morality, controversiality or worthiness, and the resulting conflicting societal views surrounding religious charities, which can then place a religion's purposes in conflict with public benefit. As a result, the underlying question arose as to whether the law required reform, either through judicial decision, or statutory amendment. As has become apparent, statutory amendment is unlikely which only leaves the question as to whether judicial change is warranted. In answering this, this article demonstrated that lack of worth to society, or opposing moral viewpoints, will not necessarily render an entity uncharitable. This is important because it ensures that charity can meet the needs of a wide variety of communities, many of which are minority or vulnerable, and if a majoritarian or status quo approach was taken to public benefit, charity would fail in its overarching ethos, that of assisting those in need. Further, need cannot be judged on the apparent worthiness of a beneficiary because humanity encompasses all humans, not just those who are deemed to have strayed below the worth of others' social constructs. Thus, religious charities are in a position to assist those who cannot be assisted by others in society because of society<societal?> views that may exclude them generally, as the *Centrepoint*

[17] See https://www.charities.govt.nz/news-and-events/hot-topics/update-on-the-charities-act-2005/.

cases demonstrated. However, the Exodus decision demonstrates that there are limits to the public benefit to be found in religious charities and that may come where harm, or perceived harm, can be done because of a religion's purpose. The Court of Appeal *Family First* decision ~~has~~ created some uncertainty over this matter ~~whereby~~ the risk to minority groups ~~because of a majority point of view may still exist although, of~~ course, ~~this latter decision was not related specifically to the advancement of religion. Nevertheless, it is submitted that those principles may still be analogous and thus it is respectfully asserted that pursuing purposes that may harm vulnerable groups would appear to negate the public benefit,~~ not least because ~~in~~ failing to take into consideration possible harm to those groups~~, this~~ would likely run contrary to Elias CJ's determination that charity law should 'support the machinery or harmony of civil society' (*Re Greenpeace of New Zealand Inc* [2014] NZSC 105: [70]). Potentially harming a section of society through the promotion of another section of that society cannot support either the machinery, nor the harmony, of civil society. As a result, ~~whilst such uncertainties might suggest it would be valuable for the law to be reformed,~~ I respectfully suggest that it might be more valuable to continue to consider advancement of religion cases on a case-by-case basis rather than setting out more prescriptive legal principles via judicial reform. This is because whilst it might appear that the law lacks clarity in this area, the case law does demonstrate generally through reasoned arguments that the public benefit can be rebutted where the religion's purposes go beyond overall moral constructs. This is an important point to make because in all of these cases, the decisions have highlighted the various constructs of social morality that exist in New Zealand. In doing so, the cases have recognised that not all points of view will be supported, and indicated that generally speaking the majority or popular view will not automatically negate a public benefit. This is relevant for society because minority groups are still relevant members of civil society and therefore should be protected by law. However, equally what these cases have also demonstrated is that where a purpose may lead to discrimination or fundamental issues pertaining to the ethical compass of an entity, then the public benefit is likely to be negated. Consequently, the author is not convinced that law reform is either valuable or warranted at this stage. As for the advancement of religion generally, whilst society may express conflicting views as to religious charities, the case law demonstrates that these charities can and do conduct their religious purposes within the confines of the law and in doing so, they can do the Lord's work as charity intends without taking His name in vain.

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