



# Giving Effect to Freedom of Religion through the Advancement of Religion? A New Zealand Charity Law Perspective

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Received 6 February 2024 | Accepted 1 October 2024 |

Published online

## Abstract

The legal frameworks of the human right to freedom of religion and the charity law doctrine of the advancement of religion sit at opposite ends of the legal scale by virtue, inter alia, of the former being a right that protects against a social injustice and the latter being a discretionary benefit bestowed upon beneficiaries and even that discretionary benefit is governed by stringent charity law principles. Consequently, it may be seen that the discretionary benefits bestowed by the advancement of religion might be at odds to the right to freedom of religion. As a result, this article considers whether the advancement of religion can give effect to the freedom of religion, and if not, whether any such limitations may be justified in a democratic society. Thus, this article explores a number of key legal issues pertaining to religion through the charity law lens from a New Zealand perspective, and in doing so, sheds some light on the relationship between the freedom of religion and the advancement of religion.

## Keywords

New Zealand – human rights – charity – charity law – advancement of religion – public benefit – freedom of religion

## 1 Introduction

This article considers the juxtaposition between the human right of freedom of religion and the charity law principle of advancement of religion, and whether the advancement of religion might not give effect fully to right to the freedom of religion. This juxtaposition is relevant because it may be argued that both the charitable principle of the advancement of religion and the human right of the freedom of religion, are situated at other ends of the legal scale from each other. This is in terms of the benevolent interference in the concerns of the populace.

By way of explanation, human rights are created to address social injustices. That means that citizens have the freedom generally to express and follow a religion, amongst other rights. In contrast, charity is considered discretionary. Thus the benefits that are offered by a charitable purpose are given at the discretion of the donor. In addition, these are restricted by the various legal principles that govern, and also that may restrain, the provision of those benefits.<sup>1</sup>

In addition, and in contrast to the right granted by freedom of religion obligations, charity may be thought to be more of a social obligation and addresses needs differently from the rights-based obligations seen in human rights law. Thus, for example the relief of poverty, a charitable purpose, by its very nature relieves poverty, as opposed to addressing the root causes of poverty. Addressing poverty at its cause is a rights-based approach as might be addressed by Article 25 of the Universal Declaration of Human Rights (UDHR) in relation to provision of adequate standards of living.<sup>2</sup> Nevertheless, it would be incorrect to say that charity does not further social cohesion. This is because charity law's key legal principle is public benefit, which will be defined shortly, and through a charitable purpose being of public benefit, a charity will benefit communities as required by law, thus contributing to the overall good of society.<sup>3</sup>

Further differences include the fact that generally charity law is a common law creature with a focus on key charitable purposes. This gives courts freedom from prescriptive legislative burdens, and historically its legislation focused on, inter alia, preventing fiduciary breaches.<sup>4</sup> On the other hand, human rights

<sup>1</sup> K. O'Halloran *Human Rights and Charity Law International Perspectives* (Abingdon: Routledge, 2016), p. 3.

<sup>2</sup> See also Art. 11.1 of the International Covenant on Economic, Social and Cultural Rights (1966).

<sup>3</sup> O'Halloran, *supra* note 1, p. 59.

<sup>4</sup> *Ibid.*, p. 72.

are independent legal impositions. These impact on the civil and criminal systems with wide ranging applications, and only some applications are pertinent to charity law,<sup>5</sup> which evidently will include religious freedoms. However, it should be noted that charities do not have a legal obligation to give effect to human rights, and in particular to this article, those rights affirmed in the New Zealand Bill of Rights Act 1990. Those rights being, inter alia, freedom of thought, conscience, and religion, and manifestation of religion and belief.<sup>6</sup> Nevertheless, it might be said that both human rights and charity law acknowledge that society:

... can leave individuals and groups exposed and vulnerable: they share a concern to set thresholds for intervention, protect the disadvantaged from abuse or exploitation and to prevent or offset the undermining of socially acceptable values and standards.<sup>7</sup>

In other words, both charity and human rights can provide assistance to those in need as well as leaving some unprotected and perhaps in need of help.<sup>8</sup> Thus it could be argued that freedom of religion might be seen as indirectly imposing requirements on charitable entities as a means of providing ‘the checks and balances necessary to promote pluralism, a sense of fairness and overall social coherence.’<sup>9</sup> Nevertheless, both the legal utility of charity and human rights depend upon their social context,<sup>10</sup> generally that of a functioning democratic society. As a result, their very natures, one being a right and one being discretionary, might place the discretionary benefits of the advancement of religion in conflict with the right to freedom of religion. Indeed, it has been argued that ‘[m]atters of faith and equality may be irreconcilable’<sup>11</sup> and further that charity law is not effective at addressing discrimination.<sup>12</sup> Such apparent irreconcilable differences have been seen to arise in relation to a number of moral issues. Such issues include abortion, same sex marriage, euthanasia, and

5 *Ibid.*, p. 71.

6 New Zealand Bill of Rights Act 1990, ss 13 and 15 respectively.

7 O’Halloran, *supra* note 1, p. 3.

8 *Ibid.*

9 *Ibid.*

10 *Ibid.*, p.4.

11 K. O’Halloran, *Religion, Charity and Human Rights* (Cambridge: Cambridge University Press, 2014), p. 2.

12 I. Murray, ‘Charities & Discrimination: Is Charity Law Always a Better Solution than Public Policy?’, *Nonprofit Policy Forum* (2022), p. 1.

genetic engineering.<sup>13</sup> This is even though it is asserted that charity law must operate within the limitations imposed by each States' commitment to various human rights obligations.<sup>14</sup>

Therefore, we consider this possible conflict by focusing on the advancement of religion and we do this because, as noted, the advancement of religion is not a right and as a result, its discretionary nature might undermine the rights granted by freedom of religion.

Whilst there may be more limited case law in relation to religious charity law cases, New Zealand is selected as relevant jurisdiction to consider such matters as its charity law overall might be said to be evolving in line with societal demands. For example, in 2022 the Supreme Court addressed the issue of, inter alia, discrimination in relation to charity and family models in the case of *Attorney-General v. Family First New Zealand*.<sup>15</sup> Their Honours confirmed that purposes that advocate against law changes that would benefit certain types of family were discriminatory towards, for example, same sex relationships. That meant that the purposes were contrary to the principles of charity.<sup>16</sup> Of course this was not a religious charity law case but it is a reflection of courts' 'long preference for adaptive incrementalism'.<sup>17</sup> Consequently, this article will consider the relationship between religious charity cases and human rights and whether the approaches of the courts in those circumstances also reflect those preferences for "adaptive incrementalism" in light of New Zealand's pluralistic and democratic society. In doing so, perhaps then freedom of religion and advancement of religion are not so much in conflict, rather they can provide a sense of balance and cohesion in a democratic society.

In order to contextualise the later discussions, the article will set out some general legal frames of reference pertaining to human rights and freedom of religion within that (section 2), as well as charity law, and within that advancement of religion and place those specific legal frameworks within New Zealand (section 3). The discussions will then (section 4) focus on some key religious charity law decisions that demonstrate how the advancement of religion is positioned in relation to the freedom of religion from a New Zealand perspective.

<sup>13</sup> O'Halloran, *supra* note 1, p. 2.

<sup>14</sup> *Ibid.*, p. 99.

<sup>15</sup> *Attorney-General v. Family First New Zealand* [2022] NZSC 80 [28 June 2022]; see also *Greenpeace of New Zealand Inc v. Charities Registration Board* [2020] NZHC 1999 [10 August 2020] confirming that advocating for the protection of the environment is charitable.

<sup>16</sup> *Attorney-General v. Family First New Zealand* [2022] NZSC 80 [28 June 2022], para. 136; see also *Quilter v. Attorney-General* [1998] 1 NZLR 523 (CA) for religious freedom and discrimination issues generally.

<sup>17</sup> *Attorney-General v. Family First New Zealand*, *ibid.*, para. 169.

## 2 Legal Frames of Reference: Human Rights and Freedom of Religion

When a State becomes a signatory of a human rights treaty or convention, it becomes obliged to ensure that its national laws and policies give effect to those rights.<sup>18</sup> The main corpus of human rights comes from the UDHR.<sup>19</sup> The UDHR provides for the right of freedom of thought, conscience and religion.<sup>20</sup> Freedom of religion is also granted under Article 18 of the International Covenant on Civil and Political Rights (ICCPR). This was ratified by New Zealand, and it provides a right to ‘either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice or teaching.’<sup>21</sup> New Zealand gives effect to its commitment to promote and protect human rights, inter alia, through the New Zealand Bill of Rights Act 1990, whereby in relation to religion ‘[e]very person has the right to manifest that person’s religion or belief in worship, observance, practice, or teaching, either individually or in community with others, and either in public or in private.’<sup>22</sup> Further, the New Zealand Human Rights Act 1993 prohibits discrimination on the grounds of religious or ethical beliefs. As will be argued, these rights can cut across the charitable purpose of the advancement of religion,<sup>23</sup> that is even though, as noted, charitable purposes do not legally have to give effect to the rights affirmed in the New Zealand Bill of Rights Act 1990.

Part of the requirements of international protections of religious freedom is that persons or groups should be permitted to live their lives according to their religious beliefs without interference by the State. However, such freedoms may be qualified or restricted. Thus the ICCPR permits restrictions on religious freedom under Article 18(3), which includes the protection of others’ freedoms and rights, and in New Zealand, for example, the Human Rights Act permits religion to be discriminated against in certain employment situations.<sup>24</sup>

From a charity perspective, religious restrictions may occur if the religion causes suffering or harm to persons, or is contrary to social policy.<sup>25</sup> Such a matter was demonstrated in the Decision by the Board of the Charities

18 O’Halloran, *supra* note 1, p. 59.

19 *Ibid.*, p. 72.

20 Universal Declaration of Human Rights, Art. 18.

21 International Covenant on Civil and Political Rights, Article 18(1).

22 New Zealand Bill of Rights Act 1990, s. 15.

23 O’Halloran, *supra* note 1, p. 80.

24 Human Rights Act 1993, s. 28.

25 Murray, *supra* note 12, p. 3; P. Ridge ‘When is the Advancement of Religion Not a Charitable Purpose?’, *Canadian Journal of Comparative and Contemporary Law* (2020) 6, pp. 379–380; see also Registration Decision: Exodus Ministries Trust Board 2010–15 (18 August 2010).

Services of New Zealand regarding the Exodus Ministries, a Christian entity. Some of this entity's purposes impacted negatively on the homosexual community and thus the decision was made not to register it as a charity. Further, charity law reformation in the United Kingdom has imposed restrictions on the charitable doctrine of public benefit, which impacts on the advancement of religion.<sup>26</sup> Such religious restrictions are perhaps a reflection of the social realities of religion existing in complex democratic and pluralistic societies, which includes the alleged retreat of religion as a socially-relevant institution throughout much of the Western world, including New Zealand.<sup>27</sup> It further suggests that the compatibility between the advancement of religion and freedom of religion may be called in to question. Certain of these restrictions and conflicts are at the heart of this article.

Specifically then, this article will concentrate on the conflict between a person's aforementioned right in New Zealand 'to manifest a religion or belief in worship, observance, practice, or teaching, either individually or in community with others, and either in public or in private',<sup>28</sup> and the first limb of the public benefit test impositions placed upon such rights by charity law. Thus, a failure to demonstrate public benefit is a *prima facie* breach of the right to freedom of religion.<sup>29</sup> However, the breach of this human right does not appear to be challenged in the New Zealand courts. Indeed, none of the specific religious charity law cases to which this article makes reference to freedom of religion. This is because, as noted, there is no requirement for charitable purposes to give effect to freedom of religion. Further, such apparent discrimination may be justified in legal and societal terms, emphasising the aforementioned balance between charity law and human rights, as will be addressed later.

### 3 Charity Law and the Advancement of Religion

#### 3.1 *Charity Law and the Morality Basis*

Whilst it is acknowledged that human rights are key in ensuring that States are legally responsible for the protection of their populace to enable that populace to enjoy justice and freedoms, charities are also still vital to civil society but via the vehicle of morality. Thus, charities are underpinned by their moral

<sup>26</sup> Charities Act 2011, s. 4(2); see for example *Application for Registration of the Gnostic Centre* (Charity Commission for England and Wales, 16 December 2009).

<sup>27</sup> O'Halloran, *supra* note 1, p. 8.

<sup>28</sup> New Zealand Bill of Rights Act 1990, s. 15.

<sup>29</sup> Ridge, *supra* note 25, p. 389.

duty to assist the vulnerable and disadvantaged. As such, charities operate alongside human rights to ensure that societies are relieved of hardship which is achieved through their public benefit outcomes providing succour to those in need.<sup>30</sup>

Consequently, the importance of charities as social enhancers cannot be understated and in order to ensure that charities continue to operate appropriately for society, States govern their operation so as to maximise their potential for the benefit of society. Such governance is important because it reduces abuses and/or fraud, which would impact negatively on society.<sup>31</sup> As a result, there is a significant ‘desirability of ensuring that the resources of charities are not diverted from being used to meet social needs.’<sup>32</sup> The impacts would not only be felt from a beneficiary point of view but also because, in effect, charities are State endorsed through their governance, and because charitable donations and actions are in effect public money. Thus, the impact of breaches of fiduciary duties and/or abuses and fraud would be detrimental to public confidence in the charity sector.

### 3.2 *Charitable Purpose*

However, generally speaking, “charity” has no one definition at law but in many common law jurisdictions, charity has its roots in the long-repealed Statute of Elizabeth (1601),<sup>33</sup> and more precisely the preamble of that Statute. The preamble contained a non-exhaustive list of the legally-recognised charitable purposes at that time. In the late 1800s, Lord McNaghten in *Commissioners for Special Purposes of the Income Tax v. Pemsel*<sup>34</sup> summarised that list of purposes in to four legally-recognised categories of charitable purposes as follows: the relief of poverty, the advancement of education, the advancement of religion, and any other purposes beneficial to the community.<sup>35</sup> These four charitable purposes are embedded in much charity legislation including New Zealand’s section 5 of the Charities Act 2005.<sup>36</sup> For an entity to be recognised as legally charitable, its purposes must fall under one or more of those four heads of charity, or charitable purposes.

30 O’Halloran, *supra* note 1, p. 24.

31 *Ibid.*, p.37.

32 *Z & R v. Hackney London Borough Council* [2020] UKSC 40 (16 October 2020), para. 110.

33 K. O’Halloran et al., ‘Charity law reforms: overview of progress since 2001’, in: M. McGregor-Lowndes and K. O’Halloran (eds.), *Modernising Charity Law Recent Developments and Future Directions* (Cheltenham: Edward Elgar, 2010), p. 13.

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

35 *Ibid.*, p. 583.

36 *See also, for example*, Charities Act 2011, s. 3 (UK) and Charities Act 2013, s. 12 (Australia).

### 3.3 *Public Benefit*

Further, all charities must ensure that their purposes are of public benefit. Public benefit is a vital element of charitable purposes because, in effect, it separates those gifts intended by the donor to further the donor's own interests, and altruistic gifts that will benefit society.<sup>37</sup> The public benefit test has two limbs. There must be a benefit and it must be sufficiently public,<sup>38</sup> meaning that a purpose 'must confer a benefit on the public ... and the class of persons eligible to benefit'<sup>39</sup> must constitute a sufficient section of the public.<sup>40</sup> Further and generally speaking, under the first three heads of charity, public benefit is presumed but under the fourth head, public benefit must be demonstrated explicitly.<sup>41</sup> It is the first limb of the public benefit test that is often-times at conflict with freedom of religion and is at the heart of this article.

### 3.4 *Advancement of Religion*

"Religion" per se was not mentioned in the aforementioned preamble of the Statute of Elizabeth, and in fact the closest the preamble came to acknowledging religion was the repair of churches as a charitable purpose. This anomaly might be explained by considering the secular position of Queen Elizabeth I, which included 'the desire of the Puritans to have a religion free of State interference',<sup>42</sup> although it is affirmed that religion and charity have long had a close nexus,<sup>43</sup> despite the Statute of Elizabeth's apparent aberration. Indeed, even in today's apparently growing secular society, the influence of religion can still be felt. Thus, many cornerstone institutions, such as health and education institutions, have their foundations in religious charities, and

37 K. O'Halloran, *The Church of England—Charity Law and Human Rights* (Switzerland: Springer, 2014), p. 47.

38 J. Garton, *Public Benefit in Charity Law* (Oxford: Oxford University Press, 2013), p. 33; S. Barker, 'Advocacy by Charities: What is the Question?', *CJCL* 6 (2020), pp. 8–9.

39 Garton, *ibid.*, p. 33, citing J. Warburton, D. Morris and N.F. Riddle, *Tudor on Charities* (9th ed, Sweet & Maxwell, 2003), p. 5.

40 Garton, *ibid.*, p. 33.

41 *Ibid.*, p. 102, referring to *National Anti-vivisection Society* [1948] AC 31 (HL) 42; and K. O'Halloran, *The Politics of Charity* (Abingdon: Routledge, 2011), pp. 18–19. It should be noted that the United Kingdom removed this presumption from all the heads of charity; see Charities Act 2011, s. 4(2); see also Australia's Charities Act 2013, s. 10. See M. Syngé, *The 'New' Public Benefit Requirement. Making Sense of Charity Law?* (Hart Publishing, 2015), pp. 20–24 for further discussions on the existence of the presumption of public benefit.

42 G. Dal Pont, *Charity Law in Australia and New Zealand* (Melbourne: Oxford University Press, 2000), p. 147.

43 O'Halloran, *supra* note 37, p. 36; see *Commissioners for Special Purposes of the Income Tax v. Pemsel* [1891] AC 531.

they still continue to underpin contemporary society. In addition, religions and their charities continue to provide a sense of identity and community for significant numbers of people throughout society generally still today.<sup>44</sup>

For charity law purposes, as mentioned, Lord McNaghten in the *Pemsel* case confirmed that advancing religion was a charitable purpose and indeed the reason that it is considered a charitable purpose is likely because ‘law has found a public benefit in the promotion of religion as an influence upon human conduct.’<sup>45</sup> In brief, “religion” for charitable purposes in the New Zealand construct means:

[F]irst, belief in a supernatural Being, Thing or Principle; and second, the acceptance of canons of conduct in order to give effect to that belief ... These criteria may vary in their comparative importance, and there may be a different intensity of belief or of acceptance of canons of conduct among religions or among the adherents to a religion.<sup>46</sup>

Courts do not distinguish between religions nor sects, thus if it falls under the definition of “religion” it is religious for charitable purposes and no one religion or sect is deemed more important than another.<sup>47</sup> As a result, whilst initially religion for charity law purposes was restricted to theist religions found within the Judeo-Christian tradition, this definition now encompasses a wide number of religious and belief systems including Islam, Sikhism and Buddhism.<sup>48</sup> However, a religion might fail for charitable purposes if its doctrines are ‘adverse to the very foundations of all religion, and that they are subversive of all morality.’<sup>49</sup> Such matters were likely the cause of a failing of a

44 O’Halloran, *supra* note 11, p. 42.

45 *Liberty Trust v. Charities Commission* [2011] 3 NZLR 68, para. 53, citing *Roman Catholic Archbishop of Melbourne v. Lawlor* (1934) 51 CLR 1, p. 33; see also O’Halloran, *supra* note 11, pp. 67 and 76 and *Liberty Trust v. Charities Commission* [2011] 3 NZLR 68, para. 54 for discussions on the contentious recognition as religion as a charitable purpose.

46 *Church of the New Faith v. Commissioner of Pay-Roll Tax* [1983] HCA 40, para. 7; see also ‘Advancement of religion’ Charities Services New Zealand, at <<https://www.charities.govt.nz/ready-to-register/need-to-know-to-register/charitable-purpose/advancement-of-religion/>>.

47 *Centrepoint Community Growth Trust v. Commissioner of Inland Revenue* [1985] 1 NZLR 673, p. 692, referring to *Thornton v. Howe* (1862) 31 Beav 14, pp. 19–20; and *Gilmour v. Coats* [1949] AC 426, p.457.

48 O’Halloran, *supra* note 11, p. 128.

49 *Centrepoint Community Growth Trust v. Commissioner of Inland Revenue* [1985] 1 NZLR 673, p. 692, referring to *Thornton v. Howe* (1862) 31 Beav 14, p. 19–20; see also *Cocks v. Manners* (1871) 12 LR Eq 574.

religious entity in New Zealand, as will be addressed later, although that failing may be deemed contrary to the freedom of religious expression.

In addition, a religion for charity law purposes must evidently be ‘advanced’ to qualify as a charitable purpose, and advancing religion means:

to promote it, to spread its message ever wider among mankind; to take some positive steps to sustain and increase religious belief; and these things are done in a variety of ways which may be comprehensively described as pastoral and missionary.<sup>50</sup>

This definition has been interpreted broadly and has included a wide number of purposes, including the promotion of a mortgage scheme.<sup>51</sup> However, there had to be evidence that the mortgage scheme being advanced had to ‘do more than have a connection with religion, be motivated by it or be conducive to it.’<sup>52</sup> In other words, there had to be something done that was positive and directly related to the religion. The advancing of the religion thus speaks to its public benefit in ensuring that its purposes reach out to the community and achieve those purposes for the benefit of the community.<sup>53</sup>

### 3.5 *New Zealand and Religion*

From its earliest colonial days, New Zealand’s prominent religion was Christianity. However, no doubt as a reflection of its substantive immigration over the years, less than half of the population now identify as Christian.<sup>54</sup> Indeed, 48.2 percent of the population identify as having no religion; 36.5 percent identify as Christian; 2.6 percent identify as Hindu; 1.3 percent identify as having Māori religious beliefs and practices; and the remaining responses ascribe to one of the following faiths or beliefs: Buddhism; Islam; Judaism; spiritualism; ‘other beliefs or practices’, or objected to answering.<sup>55</sup> Further, New

<sup>50</sup> *Centrepoint Community Growth Trust v. Commissioner of Inland Revenue* [1985] 1 NZLR 673, p. 691 citing *United Grand Lodge of Ancient Free and Accepted Masons of England v. Holborn Borough Council* [1957] 1 WLR 1080, p.1090.

<sup>51</sup> See *Liberty Trust v. Charities Commission* [2011] 3 NZLR 68.

<sup>52</sup> *Ibid.*, para. 94.

<sup>53</sup> O’Halloran, *supra* note 37, p. 44, referring to *National Deposit Friendly Society Trustees v. Skegness UDC* [1958] 2 All ER 601.

<sup>54</sup> P. Morris, ‘The End of Multiculturalism? Religion, Sovereignty and the Nation State’, in: F. Mansouri and B.E. de B’beri (eds.), *Global Perspectives on the Politics of Multiculturalism in the 21st Century* (Abingdon: Routledge, 2014), pp. 221–222.

<sup>55</sup> See ‘Religion’, available at <[https://www.stats.govt.nz/tools/2018-census-place-summaries/new-zealand?gclid=EAIaIQobChMIseWBUmiC6gIVgiQRCh1TPga1EAAYASAAEgK2B\\_D\\_BwE#religion](https://www.stats.govt.nz/tools/2018-census-place-summaries/new-zealand?gclid=EAIaIQobChMIseWBUmiC6gIVgiQRCh1TPga1EAAYASAAEgK2B_D_BwE#religion)>.

Zealand is confirmed as being a ‘secular state’<sup>56</sup> albeit with significant religious diversity.<sup>57</sup> Consequently it is likely unsurprising that New Zealand courts have noted their religious impartiality, as evidenced in *Liberty Trust v. Charities Commission*, where Mallon J confirmed that it was ‘not for the Court to impose its own view as to ... religious beliefs’.<sup>58</sup> Nevertheless, like many other common law countries, New Zealand’s colonial heritage reflects its early reliance on religious charities to establish State institutions, including hospitals and schools, which is still reflected today within many those contemporary institutions.

The Charities Act 2005, the key legislative framework for charities in New Zealand, is also reflective of that colonial heritage. Section 5 of the Act embeds Lord McNaghten’s four heads of charity from the *Pemsel* case within the charity law framework, stating: ‘... *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.’<sup>59</sup>

#### 4 Key Cases

We now turn to consider a number of the key cases that demonstrate some of the conflicts between the freedom to manifest religion in New Zealand and the imposition of charity law upon that freedom. However, in the first case to be discussed it is evident that in some instances, freedom of religion may be impliedly acknowledged in the fullest of terms.

##### 4.1 *Liberty Trust v. Charities Commission*

In this case, the entity’s main activity was a mortgage lending scheme, which made interest-free loans. The Trust asserted that this scheme advanced religion by teaching Biblical financial principles. The question for Mallon J, *inter alia*, was whether this scheme met the public benefit test. As a result of her Honour finding that the scheme did advance religion, it was therefore clear that the starting assumption was that it conferred a public benefit. Furthermore, her Honour was clear that just because a court may have a different view as to value of the scheme, that did not defeat the presumption of public benefit.<sup>60</sup>

56 Human Rights Commission, ‘Statement on Religious Diversity’, available at <<https://www.hrc.co.nz/our-work/race-relations-and-diversity/religious-diversity-statement/>>.

57 *Ibid.*; see also J. Chevalier-Watts, *The Law of Religion in New Zealand* (Wellington: ThomsonReuters, 2021), Ch. 2 generally.

58 *Liberty Trust v. Charities Commission* HC WN CIV 2010-485-00083, para. 125.

59 Charities Act 2005, s. 5(1) (*emphasis removed*).

60 *Liberty Trust v. Charities Commission* HC WN CIV 2010-485-00083, para. 101.

Indeed, the scheme was not contrary to any aforementioned public policy. What is more, Mallon J emphasised that a court is not at liberty to judge whether teaching biblical principles does not have a public benefit, nor that they are a sham. This would be contrary to the earlier mentioned principles that courts will not judge the value of one religion over another. Rather the question should be whether the scheme conferred private benefits.<sup>61</sup>

From this approach, one is able to ascertain the implicit acknowledgement of freedom of religion, even if that religious activity is one that is apparently uncommon in the public view. That does not preclude a religious activity from being protected by implicit freedoms. Nevertheless, the issue of private benefit did have to be determined. In essence, her Honour confirmed that whilst the scheme did enable the beneficiaries of the loans to buy a house and live debt free, those private benefits were in reality part and parcel of living a Christian lifestyle.<sup>62</sup> This does appear, *prima facie*, to be a persuasive argument and underpins the constructs of religious freedom. However, there may be an argument that such freedoms are being construed too widely. This is because Mallon J stated, in relation to the scheme in question that it is:

difficult to distinguish it from a mass in a Church which is open to the public. A mass in a church may have more ready acceptance as being of a religious nature and for religious purposes than a mortgage scheme that is set up as an example of the Bible's message but that is not the point. On the evidence before me this mortgage scheme is a public example of what is intended to be a Christian approach to money and part of propagating the Christian faith.<sup>63</sup>

With respect, it is submitted that there appears to be some distinctions between attending a mass and receiving a loan that will enable a person to live debt free. This is because the public benefit relating to a loan may in reality be too remote and if it is too remote, it will likely rebut the presumption of public benefit.<sup>64</sup> It is argued, therefore, that because the Trust merely hopes that recipients of the loans will advance Christianity as a result of receiving loans,

61 *Ibid.*, paras.101–102.

62 *Ibid.*, paras.113 and 121.

63 *Ibid.*, para. [122].

64 *Canterbury Development Corporation v. Charities Commission* [2010] 2 NZLR 707 (HC).

any subsequent public benefit is too remote and that the purposes of the Trust must represent more than hope.<sup>65</sup>

This suggests therefore that freedom of religion has been acknowledged in the widest of terms, which may of course be welcomed in a pluralistic and democratic society. However, such a liberal interpretation of public benefit does suggest that the stringent requirements of charity law are being undermined by freedom of religion, which creates a tension between the two legal frameworks. Nevertheless, perhaps it is wise to construe public benefit in such a way so as to give best effect to freedom of religion. In doing so, this can ensure that freedom of religion is protected, which will contribute to social cohesion and pluralism. Indeed, this is not the only case in which New Zealand charity law has demonstrated a liberal approach in impliedly acknowledging religious freedoms, and this was seen in the case of *Centrepoint Community Growth Trust v. Commissioner of Inland Revenue*.<sup>66</sup>

#### 4.2 *Centrepoint Community Growth Trust v. Commissioner of Inland Revenue*

In this case, the Trust sought to advance religion through its spiritual and humanitarian teachings and its spiritual leader, Herbert Potter, was said to be the messenger of God. One of the issues for Tompkins J in this case was the consideration of sexual allegations. Indeed, it might be imagined that such allegations would render the presumption of public benefit to be rebutted, and in effect, limit freedom of religion. Nevertheless, in reflecting the implicit recognition of the right to manifest religion, his Honour confirmed 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”’.<sup>67</sup>

In considering this matter, Tompkins J observed that even though the wider community outside of the Trust may believe that the sexual behaviour of the Centrepoint members was immoral, within Centrepoint itself such behaviour was not regarded as socially reprehensible. Indeed, sexual relations within Centrepoint were deemed ‘an honest expression of a declared relationship or attitude’,<sup>68</sup> and consistent with the teachings of their leader and Centrepoint

65 See also J. Chevalier-Watts, ‘Charitable Trusts and Advancement of Religion: On a Whim and a Prayer?’, 43 *Victoria University of Wellington Law Review* (2012), pp. 403–422.

66 *Centrepoint Community Growth Trust v. Commissioner of Inland Revenue* [1985] 1 NZLR 673 (HC).

67 *Ibid.*, p. 692, citing *Re Watson* [1973] 3 All ER 678, p. 688 referring to *Thornton v. Howe* (1862) 31 Beav, p 20.

68 *Ibid.*, p. 687.

practices.<sup>69</sup> Thus by implication, the sexual practices of this religious community, whilst certainly socially frowned upon, were not ‘subversive of all morality’. As a result, the allegations did not breach the public benefit of the entity.

Whilst this might be deemed a surprisingly liberal rendering of freedom of religion from a charity law context, it is perhaps an important view to take. This is because democratic and pluralist societies are constructed of differing levels of morality, including religious groups. This means that what is acceptable behaviour in one group may not be in another. However, this does not preclude one set of rules from being an accepted form of expressing their religion within New Zealand human rights and thus entrenched in charity law.

What this case therefore demonstrates is that freedom of religion may be expressed implicitly through charity law even when some of the religious expressions are contrary to other viewpoints. Indeed, this implicit underpinning of the freedom of religion, even in controversial circumstances from a charity law perspective, is granted greater gravitas when one considers the views of the Supreme Court in *Re Greenpeace of New Zealand Inc (Greenpeace)*,<sup>70</sup> whereby the majority confirmed that a focus on controversy is likely a mistaken focus. This is because it would risk charity law existing merely as a result of majority views and encouraging the status quo of the law.<sup>71</sup> To take such an approach would risk stultifying the law and further threaten the social licence of minority and/or vulnerable groups. This view was also expressed in the Supreme Court case *Attorney-General v. Family First* whereby Williams J confirmed that recognising controversial causes as charitable is consistent with ‘the pluralist underpinnings of our democratic culture’.<sup>72</sup> Indeed, such contestation of views and perspectives is beneficial for a ‘thriving community’.<sup>73</sup> That being so, majority views or unpopular purposes or beliefs, should not impact on charitable status<sup>74</sup> and thus by implication, should not impede freedom of religion.

Of note further in the *Family First* case, the Court referred to a Bill of Rights approach in relation to charity law decision-making, noting that such an approach ‘might require a more expansive view of benefit’.<sup>75</sup> It is acknowledged that this case was in relation to political purposes, another charity law principle, and not the advancement of religion. Nevertheless, it is submitted respectfully that such an approach might be utilised also in relation to

69 *Ibid.*, p. 686.

70 *Re Greenpeace of New Zealand Inc* [2014] NZSC 105.

71 *Ibid.*, para. 75.

72 *Attorney-General v Family First New Zealand* [2022] NZSC 80, para. 180.

73 *Ibid.*, para.180.

74 *Re Greenpeace of New Zealand Inc (Greenpeace)* [2014] NZSC 105, para. 75.

75 *Family First* 2022, para. 159, referring to J. Calderwood Norton ‘Charities and freedom of expression’ [2019] NZLJ 174, p.178.

the advancement of religion, and certainly the *Centrepoint* and *Liberty Trust* decisions might be said to have observed a Bill of Rights approach because of their expansive view of public benefit. As a result, it could be said that the *Centrepoint* decision reflects this broad and inclusive recognition of the freedom to express religion demonstrating that this can be achieved through charity law. Indeed, Tompkins J's liberal interpretation of the advancement of religion, and implicitly freedom of religion, was given effect in Hammond J's later view in *D.V. Bryant Trust Board v. Hamilton City Council*.<sup>76</sup> In this case, his Honour observed that 'this body of law must keep abreast of changing institutions and societal values.'

It is apparent therefore that 'this body of law', by which Hammond J meant charity law but equally could be analogous to freedom of religion, requires the judiciary to consider a variety of societal values and institutions when considering the application of charity law principles. This is of importance for religious groups generally, as observed by the High Court in Australia in *Church of the New Faith v. Commissioner of Pay-Roll Tax (Vic)*.<sup>77</sup> The reason being is that some religious groups can be vulnerable to societal criticism and abuse, and further, it is worth remembering that religion's value is not reflected in its popularity nor its societal approval. This is because a number of religions began life as minority or unpopular movements. As a result, these matters should not prima facie be a reason to rebut the public benefit. That is unless of course that religion demonstrates that it is 'adverse to the very foundations of all religion, and that they are subversive of all morality.'<sup>78</sup>

Thus, by charity law implicitly enforcing freedom of religion, this emphasises the value of all religions within society, not just populace views, and by association ensures that human rights are realised. Nevertheless, not all advancement of religion cases appear to reflect this Bill of Rights approach, and this is demonstrated in the Registration Decision: Exodus Ministries Trust Board.<sup>79</sup> Although as will be demonstrated, the reality is that whilst freedom of religion may have been at the forefront of the decision-making process, the Charities Board made their decision with consideration of the 'reasonable limits ... as can be demonstrably justified in a free and democratic society'<sup>80</sup> in mind.

<sup>76</sup> *D.V. Bryant Trust Board v. Hamilton City Council* [1997] 3 NZLR 342, p. 348.

<sup>77</sup> *Church of the New Faith v. Commissioner of Pay-Roll Tax (Vic)* [1983] HCA 40, p. 8, referring to *Jehovah's Witnesses Inc* (1943) 67 CLR, p.124.

<sup>78</sup> *Centrepoint*, supra note 63, p. 692, citing *Re Watson* [1973] 3 All ER 678, p. 688, referring to *Thornton v. Howe* (1862) 31 Beav at 20.

<sup>79</sup> Registration Decision: Exodus Ministries Trust Board 2010–15 (18 August 2010).

<sup>80</sup> Bill of Rights Act 1990, s. 5.

### 4.3 *Exodus Ministries*

The Charities Commission of New Zealand<sup>81</sup> (the Commission) found that the public benefit associated with Exodus' advancement of religion was rebutted. This was because Exodus' purposes included promoting the consideration that homosexuality was sinful from a Christian perspective, and that any deviation from a heterosexual relationship was contrary to Christian teaching and thus immoral. Further, Exodus was of the view that homosexuality was a lifestyle choice and not as a result of biology. As a result, homosexuals within that faith were counselled and encouraged to reject their homosexual lifestyle through what has become known as "conversion therapy". In light of these purposes, *inter alia*, and reflecting on the 'modern conditions'<sup>82</sup> of society, the Commission determined that such "therapy" was not supported in a contemporary society and indeed, contrary to public policy.<sup>83</sup> This approach is a legitimate restriction on freedom of religion because, as will be recalled, religions may be restricted if that religion causes harm or suffering to a person, or if it is contrary to social policy.<sup>84</sup> Further, as also mentioned earlier, this restriction is permitted under section 5 of the Bill of Rights Act, whereby those limitations are reasonable and justified in a free and democratic society.

It is difficult to imagine how preventing a harmful practice such as conversion therapy would not be considered just and reasonable in contemporary New Zealand. As a result, the harm imposed by Exodus' practices upon a vulnerable community, that of homosexuals, meant that the public benefit of their religious purposes was rebutted. Indeed, such religious restrictions will likely be welcomed in New Zealand society, not least because the Homosexual Reform Act 1986 decriminalised sexual relations between men. Further, the Human Rights Act 1993 prohibits sexual orientation as a reason for discrimination. In addition, section 4 of the Marriage (Definition of Marriage) Amendment Act 2013 confirms that 'marriage is between 2 people regardless of their sex, sexual orientation, or gender identity'. Thus, a religion that seeks to impose negative views on the homosexual community undermines the legal rights bestowed upon that community. In the conflict between religious freedom and religion within charity law, charity law has implicitly determined that

81 As it was then; it is now the Department of Internal Affairs—Charities Services.

82 Exodus Ministries Trust Board, *supra* note 79, para. 48.

83 It should be noted that the New Zealand Conversion Practices Prohibition Legislation Act 2022 came into effect February 2022 in order to '(a) recognise and prevent harm caused by conversion practices; and (b) promote respectful and open discussions regarding sexuality and gender' (s. 3 of the same Act).

84 Murray, *supra* note 12, p. 3; Ridge, *supra* note 25, pp. 379–380; *see also* Registration Decision: Exodus Ministries Trust Board 2010–15 (18 August 2010).

limiting harmful religious practices are a reasonable limitation on religious freedom.

Indeed, this approach is reflected in the recent Supreme Court decision of *Attorney-General v. Family First New Zealand*.<sup>85</sup> Whilst this was not an advancement of religion case, the Court confirmed that discriminatory purposes, and the purposes in question were again said to discriminate against non-heterosexual relationships, self-evidentially negated public benefit.<sup>86</sup> This means that, as with the Exodus decision, any benefits have to be weighed against any detrimental effects. In the *Family First* decision, the Court considered that it was 'highly debatable that the benefits outweigh the detriments'<sup>87</sup> in the circumstances. It is evident, therefore, that charity law principles, whilst prima facie appearing to be at odds with human rights freedoms, enable the overall benefits to society to be weighed against possible harms that may arise as a result of charitable activities. Thus, where harm may occur, charity law might impact on religious freedom but only in a justifiable and reasonable manner so as to ensure the wellbeing of a contemporary and pluralistic society.

## 5 Conclusion

This article began with the consideration that the charity law principle of the advancement of religion may not give full effect to the freedom of religion and this investigation was carried out through the lens of New Zealand charity law. In reality, what this article demonstrated was that in some circumstances, the advancement of religion fulfilled freedom of religion obligations through a liberal interpretation of the public benefit doctrine. Nevertheless, some charity law cases revealed that the advancement of religion may apparently curtail freedom of religion in certain circumstances. Such alleged curtailment of religious freedom may be seen to be contrary to New Zealand's international human rights obligations. In answer to this, the imposition of charity law could be said to be a reflection of the reasonable limitations permitted under section 5 of the Bill of Rights Act 1990. Or in the alternative, it may also be argued that even though a religious entity is denied charitable status, this does not preclude the entity from manifesting or expressing their religion. This is because that religious group may still manifest their religious belief, just not under the legal vehicle of being a charity. This is because being a legally-recognised

<sup>85</sup> *Attorney-General v. Family First New Zealand* [2022] NZSC 80 [28 June 2022].

<sup>86</sup> *Ibid.*, p. 137.

<sup>87</sup> *Ibid.*, p. 138.

charity is a privilege not a right and human rights are qualified rights.<sup>88</sup> Thus, failure to obtain or maintain charitable status does not mean that an entity is unable to manifest or express their religion.

Nevertheless, the *Family First* case may provide the starting point for future judicial consideration and begin to make explicit a relationship between charity law and freedom of religion, and there may be good cause to do so. This is because religious groups are key to the safeguarding and preservation of the rights and characteristics of religious peoples, particularly those of minority or vulnerable groups.<sup>89</sup> This has been confirmed by the European Court of Human Rights:

[A] pluralistic and genuinely democratic society should not only respect the ethnic, cultural, linguistic and religious identity of each person belonging to a national minority, but also create appropriate conditions enabling them to express, preserve and develop this identity.<sup>90</sup>

In the context of the advancement of religion, it might be that charity could create those ‘appropriate conditions’ that enable persons to ‘express, preserve and develop’ their identity through their religion. As a result, there may be a good case to be made to support the advancement of religion fulfilling human rights obligations because of the public benefit that can be found in promoting religion within communities.<sup>91</sup> Indeed, as this article has demonstrated, freedom of religion may already be promoted through the advancement of religion, just not in an explicit way. Future cases may ensure that that relationship is expressed explicitly for the benefit of society generally. However, this may not always be a straightforward balance to achieve because, as this article demonstrated, issues can arise in relation to morality, minority interests, societal collective good, and the need to resist making worse current social divides.<sup>92</sup> Nevertheless, charity law has demonstrated that balances between manifesting religion and advancing religion can be achieved where the overall good of society is at stake.

88 Ridge, *supra* note 25, p. 389.

89 D.B.M. Ross and I.N. Sinke, ‘Advancing Religion in a “Neutral” State: Understanding Religion as a Constitutional Good’, in B. Bussey (ed.), *The Status of Religion and the Public Benefit in Charity Law* (Wimbledon: Anthem Press, 2020), p.138.

90 *Ibid.*, citing *Gozelik v. Poland* No 44158/98 [2004] 1 ECHR 219 [GC], para. 93.

91 *Ibid.*, p.138.

92 O’Halloran, *supra* note 1, pp. 26–27.