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IN THE SUPREME COURT OF NEW ZEALAND  
I TE KŌTI MANA NUI

SC 79/2020  
[2021] NZSC Trans 9

**BETWEEN**

**ATTORNEY-GENERAL**

Appellant

**AND**

**FAMILY FIRST NEW ZEALAND**

Respondent

**AND**

**CHARITY LAW ASSOCIATION OF AUSTRALIA**

**AND NEW ZEALAND**

Intervener

Hearing: 24 June 2021

Coram: Winkelmann CJ  
William Young J  
Glazebrook J  
O'Regan J  
Williams J

Appearances: P J Gunn and A P Lawson for the Appellant  
I C Bassett for the Respondent  
J Batrouney QC and K G Davenport QC for the Intervener via VMR

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**CIVIL APPEAL**

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**MR GUNN:**

E ngā Kaiwhakawā, tēnā koutou ko Gunn tōku ingoa. Kei kōnei māua ko Lawson, mā te rōia mātua o te Karauna.

**WINKELMANN CJ:**

Tēnā kōrua.

**MR BASSETT:**

May it please your Honours, Bassett for the respondent.

**WINKELMANN CJ:**

Tēnā koe.

**MS DAVENPORT QC:**

Tēnā koutou e ngā Kaiwhakawā o Te Kooti Mananui. Ko Kate Davenport taku ingoa. Ko au te rōia mā CLAAZ mā ko taku hoamahi, Jennifer Batrouney QC.

**WINKELMANN CJ:**

Tēnā kōrua. Mr Gunn.

**MR GUNN:**

Thank you Ma'am.

**WINKELMANN CJ:**

So just to address some practicalities, I don't know if you've discussed with counsel timing?

**MR GUNN:**

We have your Honour, yes.

**WINKELMANN CJ:**

Can you give us an indication about that?

**MR GUNN:**

Obviously we are in the hands of your Honours but we felt that if we had the Attorney opening and going through for this morning's session, through perhaps for an hour in the afternoon today till three and then Mr Bassett to take up the argument for the respondent. He would also have a period of four hours, which would then leave the Interveners on Friday to have an hour's worth of oral submissions.

**WINKELMANN CJ:**

So I should indicate that the Court has read the Intervener's submissions and we think it is adequate if they have about 15 minutes to address us. The issues are not extensive and we have read their submissions carefully.

**MR GUNN:**

Obliged for that indication your Honour.

**WINKELMANN CJ:**

We also thought the time allocation of two days was very generous for this hearing, so don't feel that you need to take it all up.

**MR GUNN:**

That indication is also appreciated your Honour, thank you. And finally by way of reply from the Attorney, perhaps an hour, an hour and a half but again I have your Honour's indications as to not needing to spend any more time than we have to. So we will do our best in that regard.

Your Honour, there are one or two preliminary matters, if I may. The first is the question of the additional evidence from Mr McCoskrie, which my friend applied or sought leave to put before the Court. That was an application that was opposed by the Attorney-General. We have no indication from the Court, I apologise if we have missed something but I was conferring with my friend

earlier on, we have no indication from the Court as to the Court's attitude on that.

**WINKELMANN CJ:**

So the Court is receiving the evidence on the basis we will make a decision when we issue our decision de bene esse to use the old Latin expression.

**MR GUNN:**

Thank you, your Honour. The next point by way of preliminary was that there has been, as the Court will be aware from the extra evidence in the application from the respondent, some concerns from the respondent about the graph that formed part of the Attorney-General's submissions.

**WINKELMANN CJ:**

Yes.

**MR GUNN:**

And we've endeavoured after the filing of the submissions to see whether we could come together as parties on the contents of that graph, your Honour, with I think some success but not complete success, sadly. What we have provided by electronic hand-up yesterday was a new graph with a document that explains how the various items on the graph have been allocated and I'm seeking leave, your Honour, to put that new material in front of the Court. Obviously, Mr Bassett will have an opportunity to comment on that document, the original graph as well, and the Court will be able to draw its own conclusions as to the value of that material.

The other –

**WINKELMANN CJ:**

And have you discussed that with Mr Bassett, handing that up?

**MR GUNN:**

Have not discussed that, Ma'am.

**WINKELMANN CJ:**

Are you happy with that, Mr Bassett?

**MR BASSETT:**

The respondent's position is, Ma'am, that the amended schedule, but not the amended graph, was tendered to me after hours, I think 7 o'clock on Monday night, two days ago, and then I was able to view that yesterday morning but I have not been able to, in the course of the time available to me yesterday, to be able to reach any conclusion about its contents. It's a revised graph. It's a revised schedule. The schedule is in a different order from the original schedule that was given to me on the 23<sup>rd</sup> of May to which the respondent has responded. I filed yesterday a schedule which, in red and yellow mark-ups, provided my comments on the original schedule. That was the schedule provided on the 23<sup>rd</sup> of May. So I have responded to the original schedule but not the second. I simply didn't have the time yesterday to apply myself to do so.

**WINKELMANN CJ:**

All right, well, we might just have to deal with that by allowing you to file something further to respond to the amended schedule.

**MR BASSETT:**

Okay.

**WINKELMANN CJ:**

So perhaps if you have five further days after the hearing to respond to the amended schedule, five further days?

**MR BASSETT:**

I'll endeavour to do so, Ma'am.

**WINKELMANN CJ:**

Is that not adequate, Mr Bassett?

**MR BASSETT:**

Well, I just have other commitments immediately after.

**WINKELMANN CJ:**

All right, well, shall we make it 10? Will that help you?

**MR BASSETT:**

That would be very helpful, thank you, Ma'am.

**MR GUNN:**

Thank you, Ma'am, and –

**WINKELMANN CJ:**

I should say that Ms Davenport and Ms Batrouney, you can feel free to turn your cameras off. Over to you. We're not requiring it but if you just want to have the freedom of knowing you're not on screen, please feel free to turn the cameras off.

**MR GUNN:**

Thank you, Ma'am. I would make the point, and I will address it in a little more detail in the course of the submissions, but it seems to me that both parties are quite close in terms of their views on the material that forms the graph and I would have some degree of confidence that we might even be able to present an agreed position to the Court on that document and obviously if we can there's advantages for...

**WINKELMANN CJ:**

All right, well, you can use that 10 days to see if you can do that.

**MR GUNN:**

Thank you, Ma'am.

The other material that was handed up electronically yesterday was the full version of the United Nations convention on rights of the child and some

associated general comments. That is already or the preamble I think to that convention is already in the bundle of documents and I have some brief submissions to make on the full version of the convention in the course of the submissions that I am about to make.

The other and final document that was handed up yesterday by the Attorney was the *Tukaki v Commonwealth of Australia* [2018] NZCA 324, [2018] NZAR 1597 decision, which is a decision that is not referred to in the bundle of authorities, it is briefly referred in the outline of oral argument which was also filed with the Court electronically yesterday. Unless there are any further preliminary points from your Honours, I propose to launch, thank you Ma'am.

The Attorney says that the central question in this appeal is whether viewpoint advocacy, that is putting forward a particular position on a matter of public debate may in itself constitute a charitable purpose. In *Re Greenpeace of New Zealand Inc* [2014] NZSC 105, [2015] 1 NZLR 169 and there is no need to remind the Court of this, the Court held that advocacy towards an accepted charitable purpose may be charitable. Here the Attorney says the respondent engages in and seeks to qualify for charitable status, in respect of advocacy and other support for particular viewpoints. For example affirmation of man/woman marriage and conservative education and debate concerning abortion. It is submitted that these activities are not ancillary or incidental and the Attorney's position on such activities is that the core criterion for charitable status in cases of this sort, is whether, as set out in the Charities Act 2005 or in accordance with longstanding principle, and with the decision of this Court in *Greenpeace*, whether objective public benefit and a charitable purpose can be established. That objective benefit must either be self-evident or if not, shown by evidence.

Now as this Court held in *Greenpeace*, as the High Court of Australian found in *Aid/Watch Incorporated v Commissioner of Taxation of the Commonwealth of Australia* [2010] HCA 42, (2010) 241 CLR 539 and as the Court of Appeal found in *Latimer v Commissioner of Inland Revenue* [2002] 3 NZLR 195 (CA), advocacy towards a substantially accepted public good can, whether

self-evidently or on the evidence, demonstrate objective public benefit. That does not extend to advocacy for particular points of view on a range of matters in which there is no objective public benefit nor does it extend to advocacy of viewpoints that are contrary to fundamental human rights.

The consequence, the Attorney says, of that well founded historical approach, is that there is not scope within the Charities Act or the wider context of charities law, to find contributions to public debate to be charitable per se, as contended for by the respondent and as the United States Supreme Court found in *Regan v Taxation Without Representation* (1983) 461 US 540, the right to freedom of expression, contrary to dicta in the majority decision below and in the submissions for the respondent, is not dependent upon charitable status and the Attorney also makes the point that extending charitable status to viewpoint advocacy, as we understand the respondent to be advocating for, would necessarily include an impossibly wide range of entities and activities, including both political parties and self-interested advocacy by commercial entities.

Turning to the significance of the discriminatory purposes and activities point that is addressed in the Attorney's submissions, the courts have regularly had to address proposed charities that are expressed or conducted in potentially or actually discriminatory terms. The point in those cases has been to assess whether there is in fact a discriminatory distinction and then further to assess whether any such distinction is nonetheless reconcilable with public benefit, whether, for example, despite the public policy objection there may be to a charity available only to men, whether that charity could nonetheless stand by virtue of the good it does for the recipients.

The same principle can be applied here, it is submitted, but the consequence of the respondent's principles and the fact it is only an advocacy body mean that unlike the scholarship example that I have referred to there is not an objective benefit.



Turning, your Honours, to the question of tikanga which was a matter that has been raised by both the respondent and by the intervener. The Attorney's submissions are that Family First has established no connection but was tikanga principles and values and its own purposes or ends. In *Takamore v Clarke* [2013] 2 NZLR 733 (SC) this Court found that tikanga Māori is able to be considered as a set of values and principles that inform the common law of New Zealand. Tikanga does not displace other common law or any particular statutory scheme, rather it operates as a relevant consideration for a decision-making process. That is consistent, in my submission, with the principle of analogising from existing charitable purposes when considering new cases. That is, when considering whether a claimed charitable purpose is analogous with previous decisions on charitable purposes, principles of tikanga may inform the consideration of that purpose.

I refer your Honours to the *Tukaki* decision, which I mentioned had been handed up yesterday. The Court of Appeal took judicial notice that whanaungatanga is one of the fundamental precepts of tikanga and indeed Māori society. Notions of family connection therefore extended beyond immediate family to hapū and to iwi. In *Takamore* the Supreme Court was discussing a specified tikanga practice, that is Tuhoē burial practice and its materiality in relation to that area of law. Here, the respondent's purpose, the Attorney says, is to support the traditional married heterosexual nuclear family. That support consists of advocacy and other support for particular viewpoints. The Attorney's position is that Family First's purpose and position on such matters does not constitute objective public benefit in the way the law has previously accepted as charitable, and he says that that conclusion can be reached without requiring evidence on the impact of tikanga.

Thank you, your Honours, that is the oral summary of the submissions. Your Honours also have the written submissions. I am grateful for the fact that your Honours perhaps allowed me more reading time on the oral outline. I thought it was important to make sure that I stuck to script, as it were. In terms of the other submissions that are prepared, I anticipate that your

Honours will have rather more questions for me and some interactive discussion about the points in there.

In terms of explaining just a – and providing a very brief road map to the submissions, your Honours – it seemed to us that it would be useful to set the scene, as it were, with some explanation of what Family First does and how it goes about its activities. I'm conscious that the Attorney is, at least in the charitable space, in the somewhat unusual sense of being appellant rather than respondent, so we will do our best to provide some background for the Court which obviously Mr Bassett will supplement when it comes time for him to talk.

But if I take your Honour perhaps first to the background part of my submissions and that commences at page 3 on paragraph 8 of the written outline of submissions and the first document that I see to draw your Honour's attention to there is the document that is the Family First deed. That is at tab 100 and document 402.0511 of the bundles, your Honours. This is the document obviously that was a focus of attention both in the – before the Charities Board. As I was saying it's been the focus of consideration by firstly, the Charities Commission, the Board, the High Court on two occasions and most recently of course the Court of Appeal.

The point that may be made is that that document has not been amended, subject to any clarification Mr Bassett may provide, since the amendments that are recorded on it for 10<sup>th</sup> of October 2006. The purposes and aims of the Trust are set out at paragraph 4 and the first one is to promote and advance research and policy. The second one at B, to educate the public in their understanding of the institutional, legal and moral framework that makes a just and democratic society possible.

Now the Attorney's perspective on both of those opening purposes is that there are certainly educational references in there and that to that extent there are references to the purpose of advancing education. But the further submission, your Honours, is that the surrounding wording in those purposes

makes it difficult, unclear as to precisely what sort of research and policy is being pursued and also that, in relation to purpose B, exactly what sort of education is contemplated and how that education is to be undertaken. So in those circumstances, your Honours, the Attorney says that it is not only useful but necessary to have regard to what Family First does in actually pursuing those purposes and aims. The next points of comment on the purposes and aims are in relation to C and D.

**GLAZEBROOK J:**

Sorry can I just check, does that mean that the Attorney accepts that you only look at activities if something is unclear? I have to say that does not seem self-evident to me, that's all.

**WINKELMANN CJ:**

Because that is one of the issues in the case I think, whether or not – when you can look at the material.

**MR GUNN:**

I accept that is one of the issues in this case and it is, I also accept, an ongoing issue in charity cases more generally. If you look at the *Re The Foundation for Anti-Aging Research* [2016] NZHC 2328, (2016) 23 PRNZ 726 case that is referred to in the submissions, that was certainly an issue there. If I might try and answer the specific question from your Honour, there are in the Attorney's submissions a range of circumstances in which it is appropriate to look at activities that are purportedly in support of a charitable purpose. If I may, I'll come to that in some greater detail.

**WINKELMANN CJ:**

That's fine if you're coming to it. That's fine.

**MR GUNN:**

The point that I was just seeking to address in terms of the purposes, C, D and E in that document that is in front of your Honours, is that the characterisation from the Attorney's perspective is that those, C, D and E, are

not educational or at least not obviously educational even to the extent that purpose A and B are. They talk at E as Family First being a voice for the family in the media, at D producing and publishing relevant and stimulating material relating to issues affecting families, and then at C to participating in social analysis and debate surrounding issues relating to and affecting the family, and C also talks about networking with other like-minded groups and academics.

In the Court below, the majority found from those statements a common thread of advancement of education and research, and that was at paragraph 90 of the Court of Appeal decision.

The Attorney, with respect, does not accept that there is such a common thread of advancement of education and research, and in the submission in that regard would be that in fact there is certainly at least as a minimum an advocacy object in terms of Family First.

There is another aspect to the deed which I draw your Honour's attention to and that is right at the end of the deed. It's document 402.0520, and that is entitled a "statement of faith". The statement of faith is set out in essentially Christian terms and –

**WILLIAMS J:**

Sorry, can you help me, give me that reference again?

**MR GUNN:**

I'm sorry, your Honour. Yes, that's at page 402.0520. And by way of broad summary it is a statement of belief in Christian principles. Now the deed provides that Family First trustees are required to affirm certain Christian principles, namely those principles in the statement of faith, but Family First is otherwise not religious and certainly as far as the Attorney understands it does not advance a claim to charitable status on advancement of religious grounds.

Continuing on, if I may, with the background –

**O'REGAN J:**

What do you say about that statement? Is that something you say is against it or pro it being a charity?

**MR GUNN:**

I say it's a qualifying – and I'm conscious that I may sound as if I'm not confronting the question full on – but it doesn't go on to form any part in Family First activities. The purposes don't refer to any equivalent statements of faith. It is really just if a qualifying obligation on the trustees for Family First. So to that extent, your Honour, I say that it is consistent with a secular purpose, not a religious purpose. Now that is not to undercut the Family First submission that its views and support for the traditional family is based on Judeo Christian principles, but it seems to, and my submission is that those principles are by way of background, that they are not advanced in the forefront and that they do not create a sort of ethical or moral code, if you like, that is equivalent to some of the codes that the Courts have examined in charitable cases in the past.

**O'REGAN J:**

So the only point you are asking us to take is that the statement of faith isn't an indication that this a religious charity, is that all, that's all you are saying?

**MR GUNN:**

That's correct, your Honour.

**WILLIAMS J:**

So it is a Christian trust whose purposes are not religious, at least not overtly so?

**MR GUNN:**

The trustees have to ascribe to Christian principles.

**WILLIAMS J:**

Yes but the trust itself does not have overt religious purposes?

**MR GUNN:**

That is my submission to this Court your Honour. Now the next, if I may take your Honours to the two Family First principles documents in which Family First define what is meant by the terms *family* and *marriage*, and the first one of these documents, if I may, is at tab 304 and document 404.1158 and that is the principles on family. The principles state at paragraph 2, that the natural family, and this is a phrase that is used by the respondent in its documentation: "The natural family is the union of a man and a woman through marriage for the purposes of sharing love and joy, raising children et cetera."

At paragraph 3, the principles state that: "The natural family cannot change into some new shape nor can it be redefined by social engineering." And then at 4, we affirm that: "The natural family is the foundational family system", although there is in that paragraph an acknowledgment of varied living situations caused by circumstance or dysfunction.

There is also at 5, an acknowledgement of what is called a tremendous contribution that is made by single adoptive and step parents and extended whānau in society and the principles there state that they, that is Family First, wishes to ensure such families receive appropriate levels of assistance without denying the clear empirical evidence that the best environment in which to raise children is the biological two parent, husband, wife family and that point your Honours, is picked up in the next paragraph which an affirmation of the marital union as the authentic sexual bond and the only one that is open to the natural and responsible creation of new life.

The next principle is an affirmation of the sanctity of human life from conception to death and the right of each newly conceived person holding rights to live, to grow, to be born and to share a home with his or her natural parents bound by marriage. That principle is obviously of significance in

terms of the submissions that have been addressed to your Honours on the application of the *Molloy v Commissioner of Inland Revenue* [1981] 1 NZLR 688 (CA) case and the reference to *Molloy* in the *Greenpeace* decision in this Court. The other principles, I do not propose to read. The final one being just an affirmation of the complementarity of the sexes as a source of strength.

Turning your Honours to the principles document on marriage. That is document tab 305, document 404.1159 and this statement of principles reflects I think the principles that we have already been looking at. They certainly provides that marriage is union of husband and wife, it refers to permanence and the importance of marriage in protecting and promoting wellbeing of children and the sustenance that marriage provides for civil society. And then at 7, the laws that govern marriage should reflect the principles above and that is a principle that I will be seeking to take your Honours to again in the submissions that follow about the human right aspects of what Family First seeks to protect and preserve.

Now having had those documents in front of them, having the opportunity to consider them, the High Court and the Court of Appeal both accepted that Family First promoted a traditional view of family and that it sought to limit the concept of marriage to a union between a man and a woman and again my friend will be able to make submissions on that point but certainly the principles make it plain in my submission that Family First advocates for marriage as a union of husband and wife, man and woman.

The way in which Family First supports the traditional family and I am turning now to paragraph 12 of my submissions, your Honours, is in my submission advocacy for or against various causes. Those causes might be euthanasia, might be same sex marriage, might be a viewpoint on censorship, it might be a viewpoint on abortion. That advocacy and taking the wider form of advocacy, includes submitting on Parliamentary Bills and on policy work that is being undertaken by central government and if I may take your Honours to some examples of that work, the first document is at tab 283, document 404.1065 and that document just summarises various submissions

that Family First have made, whether to select committees or otherwise. You will see, your Honours, that Family First made submissions on the Gambling Harm Reduction Amendment Bill. It made submissions on the Green Paper on Vulnerable Children, the Victims of Crime Reform Bill, et cetera, and the summary there sets out, in summary form obviously, the gist of what Family First were saying about those various pieces of legislation and policy papers.

The second document, if I may, your Honours, is at tab 281, document 404.1060.

**WILLIAM YOUNG J:**

What was that reference again?

**MR GUNN:**

The tab is...

**WINKELMANN CJ:**

Don't bother with the tab. Just give the document number.

**MR GUNN:**

I'm conscious that Mr Bassett may need tabs.

**WINKELMANN CJ:**

Is it 404.1060?

**MR GUNN:**

That's the one, your Honour, yes. And I had referred to the summary before the document we were just looking at and that referred in fact to this submission in summary form. This is, as I understand it, the complete submission that was made by Family First on this Bill, and the submission is to the justice and electoral select committee, and it is, in my submission, a pretty conventional submission on a piece of legislation. The submissions support some provisions, as at 1.4, it goes on to support other provisions, and then at 1.11 rejects suggestions that offenders should have a right of reply to



victim impact statements, for example, and it sets out some reasons why it rejects that situation and also talks about the concerns it shares in respect of some of the proposals that are being considered by that select committee.

The next document –

**GLAZEBROOK J:**

What are you taking from this?

**MR GUNN:**

Your Honour, I put that forward as an example of a particular submission on a Bill. I don't suggest that it's anything other than a perfectly conventional submission on a Bill. It really has – advances some reasons in support of the legislation, some against.

**WILLIAMS J:**

There's no controversy that Family First advocates for its position in public and in the political process?

**MR GUNN:**

No, no, no, your Honour.

**WILLIAMS J:**

We've seen a few submissions before, Mr Gunn, generally speaking. I'm just not sure that this is helping us.

**MR GUNN:**

Happy to be –

**WILLIAMS J:**

We know what submissions look like.

**MR GUNN:**

I take your point, your Honour, and that is my point, that these are – they are examples of standard submissions and the Attorney doesn't suggest otherwise.

**WILLIAMS J:**

All right.

**MR GUNN:**

I'm conscious that your Honours have seen submissions before though. If I may just briefly take you to tab 293 and to document 404.1102. That again is a submission, this time on a green paper and contains Family First views about child abuse and what might happen to the green paper in regard to that. The key recommendations that are made in the submission, firstly at page 1104, establish a non-political royal commission into child abuse, and then two, adopt all the recommendations of the Law Commission report on alcohol and three, promote marriage on the basis that the research suggests that children are safest when living with their married parents.

The other aspect of Family First activity which has been a source of some controversy in the courts below, are the reports that Family First commissions on various items to do with the family and if may, your Honours, take you to some examples of those reports. The first one being at tab 316, document 407.2441 and this the document that was at the forefront, in my submission, of the decisions by Justice Collins and also by Justice Simon France in the High Court. It is a report, as your Honours will see, from the Institute of Economic Research and it is an economic analysis of the costs of family breakdown.

The next report I seek to take your Honours to is at tab 317, document 407.2476 and this is a report entitled *Killing Me Softly, Should Euthanasia Be Legalised*, by Professor Rex Ahdar and it is a report to Family First by Professor Ahdar and the report concludes, and this is at page 2479, at paragraph 10: "Legalisation of euthanasia would represent an irreversible

alteration to the way society and the medical profession view the demise of the elderly and the terminally ill. Death would become planned, co-ordinated and state sanctioned in a manner hitherto unknown.”

The next report, and again I'm just sampling these, your Honours, to try and give your Honours a sense of the range of reports that Family First have commissioned. This one is at tab 361 and document 408.3339. This report is entitled *Why Mothers Matter*, and the part of the report that I would take your Honours to is again just to give a summary of it, is the executive summary at page 3344 which talks about the fact that mothers are different kinds of parents than fathers and the countless contributions that mothers make to bringing up children that are distinct from dads' way and the most significant differences are related to the physical differences, play, problem solving, protection and language development and discipline and sex respect.

As well as commissioning and releasing such reports, Family First also publishes articles and places those articles and also media releases on their website and there is a significant amount of this material in the case on appeal. If I can take your Honours to tab 311 and document 404.1195. This is just a summary of those various news releases and articles and media releases on the Family First website. As your Honours will see, there is a huge range of topics and on various issues to do with the family and perhaps even more generally in some respects.

Family First also is involved in sending its subscribers weekly newsletters and it holds an annual conference which is called “Forum on the Family”, and I might take your Honours, if I may, briefly to that function and this document is at tab 306, 404.1160. Now what this document does, your Honours, is advertise the 2010 New Zealand forum on the family. It talks about a range of speakers who are going to appear at that forum and in the registration provisions it says, under the box which is headed “register online at [www.forumonthefamily](http://www.forumonthefamily), what is described, if I can read it: “Forum on the family will bring together a national network of pro-family, pro-marriage and pro-life organisations, as well as lobby groups and leaders that seeks to

promote and protect the wellbeing of families, the role of parents and the welfare of our children.” There is a further example of these forums at document, tab 333, document 407.2916 and that document talks about Mr McCoskrie going on the road to talk about or to give an overview of current family issues and your Honours will see that he was very much on the road, there were extensive engagements at various places throughout the country on that road trip. The road trips are not the only way of organising those forums. As I say most of the forums in the case on appeal appear to have been conferences, I think in Auckland.

Now in terms of there was a process of discussion with the Charities Commission and latterly with the Charities Board and Family First about what it did as a result of concerns that were held that Family First might not be conducting itself in a charitable way, and this is at paragraph 13 of the submissions, your Honours. There was correspondence with Family First at that time in which Mr McCoskrie advised that 75% of Family First time is spent on advocacy and the remainder was spent on administration, fundraising and supporter/database management. That document is at tab 87, 401.0137. It's a letter to Charities Services and talks about the activities that Family First undertakes, and at paragraph 5 in the bolded part, and this is –

**WINKELMANN CJ:**

What was that reference? 401.01...

**MR GUNN:**

37, your Honour. And the particular part where there is a question about the advocacy that is undertaken by Family First is at page 0138 and at paragraph 5 where the question is bolded: “The proportion of Family First’s time (volunteer and paid time) and funds spent on the above causes and the proportion spent on other activities.” Family First response is: “Our estimate would be 75% on these activities, and 25% on administration, fundraising, and supporter/database management.”

Now that figure was relied upon by the minority in the Court of Appeal in support of the minority's view that Family First was an advocacy organisation. The proportion's been, and in fact I think the correspondence itself has been, criticised by my friend on the basis that the Family First responded without getting legal advice and also that the response is perhaps inadvertently misleading because it's not just about advocacy in terms of the narrow definition of that term but includes such things as submissions to Parliament commissioning of educational reports and so forth. Those are submissions that my friend will address you on subsequently but certainly it is a significant proportion of time on advocacy, and my submission the correspondence is material to this Court's decision.

**GLAZEBROOK J:**

Well, do you accept that "these activities" refers to what's actually set out in paragraph 1 which includes a lot of material about commissioning reports?

**MR GUNN:**

Yes, Ma'am, I do.

**GLAZEBROOK J:**

So it's not 75% on advocacy then if you – or do you say those reports in themselves are advocacy?

**MR GUNN:**

It's a little more nuanced than that, your Honour. If I can break that down into two responses. First of all, I accept that the material that we've talked about, or your Honour's just talked about, the research reports, the conference forum and all the rest of it, when Mr McCoskrie was responding to that and saying 75% advocacy, my understanding of what he was meaning was that that included all of those matters.

**GLAZEBROOK J:**

Well, exactly.

**MR GUNN:**

Yes, and –

**GLAZEBROOK J:**

So what's the answer to my question then because it doesn't mean 75% is advocacy then unless the writing, commissioning of reports you say is advocacy.

**MR GUNN:**

And that is part of the Attorney's case, your Honour, to say that yes, there are reports of educative value, and that is not something that is being disputed. It was something that was an issue before the Board, it was something that was also an issue in front of Simon France, his Honour Simon France but in terms of the, and this is no disrespect to the authors of those reports, but in terms of the relatively low bar that there is for educational material in the charitable sector, there is no argument on the part of the Attorney that those reports in themselves are not educative material, it is the way in which they are used, your Honour, and also the tendentious nature of some of those reports which disqualifying in the Attorney's submission.

**WINKELMANN CJ:**

Which what you say takes them over into be clearly advocacy rather than education?

**MR GUNN:**

That's correct Ma'am.

**WINKELMANN CJ:**

And you say it is significant that when Mr McCoskrie was asked to characterise the activities, in his mind this was advocacy?

**MR GUNN:**

That is also significant Ma'am and I think we have – he apparently did not have the opportunity or did not choose to take legal advice but we have an

unvarnished response from him as to what he viewed these activities as being.

**WILLIAMS J:**

Wouldn't this be tendentious in the same way that Greenpeace's publications are tendentious?

**MR GUNN:**

There is no doubt that Greenpeace's publications are tendentious your Honour and the point that I seek to address later in the submissions but I am happy to pick it up in summary form now if it is helpful, is that what we have in the case of *Re Greenpeace of New Zealand Inc* [2020] NZHC 1999, (2020) 29 NZTC 24-071 on the authority of the High Court decision in 2020 is an organisation whose purpose is a charitable purpose and the charitable purpose being protection of the environment and this Court's decision in *Greenpeace* in the Supreme Court I guess provided the groundwork for that eventual High Court decision in 2020. Now the submissions that may be advanced on behalf of *Greenpeace* in support of their environmental activities would be very tendentious to many people. They would be tendentious to fishing industry in some respects, they would be tendentious to the dairy industry, oil industry and not just to commercial entities, I am sure there would be other, even other environmental charities who would say actually I don't agree with what Greenpeace is saying here or how they are going about it. So no question about tendentiousness.

The question though or the submission from the Attorney is on this point is that there can no doubt that what Greenpeace are doing is advancing submissions in support of a charitable purpose which is the protection of the environment. The question and the difference here, your Honour, in my submission is where is the charitable purpose and can you say that these submissions, these reports are supporting that if there is a charitable purposes and the Attorney says there is not, but if there were to be one, are these reports supporting that charitable purpose? So that is the, if you like,

the essence of the distinction between this case, we say, and the *Greenpeace* case.

**WILLIAMS J:**

So let me get that right because I think the point is important, you started off with saying you accept these are educative but then you say but they are not used for an education purpose, is that correct?

**MR GUNN:**

That is the – if I can qualify that a little bit, your Honour, by saying that they meet an education standard, they are not, if you looked at *Re Collier (deceased)* [1998] 1 NZLR 81 (HC) for example as to what meets an educational standard, these are reports that are some cases from academics, well-respected academics, there's the NZIER report, there are other reports, and so in themselves they represent educational material. They are used in a tendentious way in support of what the Attorney says is not a charitable purpose.

**WILLIAMS J:**

I thought you said they are educational.

**MR GUNN:**

Yes, they...

**WILLIAMS J:**

Are you going to come to this in more detail later?

**MR GUNN:**

I...

**WILLIAMS J:**

Shall we let you simmer in that for a little while and come back to us?



**MR GUNN:**

Thank you, your Honour, I can see that I will. But if I may, at the risk of further digging myself deeper...

**WILLIAMS J:**

Your case.

**MR GUNN:**

The reports themselves, in themselves have educational value. It's the way in which they are used, is the submission. And there are other aspects as well which I will come to, which is the volume of reports and whether they represent ancillary or a prime purpose. My understanding –

**WILLIAMS J:**

So when you say it's the way in which they are used, by that do you mean they are used tendentiously and that is not educative? Is that your point?

**MR GUNN:**

That's correct, your Honour, thank you.

**WINKELMANN CJ:**

Or is another way of saying it that they're used for advocacy purposes rather than educational purposes because there's a tendentiousness –

**MR GUNN:**

I think that's also the Attorney's position, Ma'am. The –

**GLAZEBROOK J:**

And you say that some of them might only barely meet an educational purpose as well given the nature of them?

**MR GUNN:**

I think some of them have a stronger claim to educational purpose than others, Ma'am, if I can put it that way.

**GLAZEBROOK J:**

Yes.

**O'REGAN J:**

And are you saying that using educational material for an advocacy purpose disqualifies them as being out of an education ground of charity?

**MR GUNN:**

There are a number of aspects to that question, your Honour, if –

**O'REGAN J:**

Well, if you're going to come it, I'll let you do that later.

**MR GUNN:**

But yes. I think my answer is yes, and it also, as I've just indicated perhaps, it goes to the quantity of activity on the educational front as opposed to the quantity of activity on the advocacy front as well.

Turning to paragraph 14 of the submissions and, by way of reassurance to your Honours, this hopefully is coming to the end of the scene setting and I hope to rattle through the submissions rather more quickly than I'm managing so far. But there is limited evidence as to how Family First determines how and what causes it will support. There is reference in the case on appeal to a survey of its members conducted in 2011 and to three policy priorities that were pursued following that survey. Those three policy priorities were promoting marriage and families, promoting life and promoting community values and standards. Charities Services also asked Family First to describe how it reached decisions about the causes on which it advocates, asked for minutes of meetings, policy documents and the like, and the response from Mr McCoskrie on that was: "Our strategy is a continuation of what we've been doing for the last 10 years," as per the trust deed and based on surveys and feedback from supporters. And I didn't mention, your Honours, but it's in the written submissions that one of the other things that Family First does is seek

to obtain public views by way of opinion polls which it commissions on various matters.

That takes me, your Honours, to the question of the graph, and if I may, this is –

**GLAZEBROOK J:**

Sorry did you have a reference in the materials for those surveys? Is that in your submissions at paragraph 14?

**MR GUNN:**

It is your Honour.

**GLAZEBROOK J:**

That is all right, as long as we know where to find it, that is fine.

**MR GUNN:**

I can provide you with that reference Ma'am and will do so but if I can turn to the graph and looking –

**WINKELMANN CJ:**

So are we talking about the one you handed up yesterday?

**MR GUNN:**

That was what I was proposing to look at your Honour, subject to the points that my friend Mr Bassett was making to the Court earlier on, that he has not had the opportunity to fully consider this material and I understand that. I am wanting to address, if I may, with the Court, why we embarked upon this process of coming up with a graph and the value that we suggest that it may offer the Court. We acknowledge that the respondent says there is no probative value to it and we are simply saying that it is an analysis of the evidence which we are putting forward as part of the appellant's submissions. So it is not evidence in itself.

What is the point of the graph? Well one of the reasons why the appellant thought there might be value in it, your Honours, was because there has been a tendency in previous cases to deep dive into aspects of what Family First does, to concentrate on some documents at the expense of others and we felt, the Attorney felt that is, that there would be some value in trying to step back and get a broader picture of Family First priorities and activities.

The document is also relevant, your Honours, to the Court of Appeal finding in *Family First New Zealand v Attorney-General* [2020] NZCA 366, that Family First advocacy on specific issues can properly be seen as ancillary to Family First education and research purposes and its fourth head advancement of marriage and family values. So in other words the Court of Appeal found that there was advocacy within advocacy and with that conclusion in mind we felt that there was some value in trying to again set out where the advocacy occurs and where the focus of Family First has been.

Acknowledge the limitations that apply to the graph, your Honours, it is all material that comes from the case on appeal and there is difficulty in categorising some material and there is also difficulty in avoiding duplication and in fact difficulty in avoiding triplication I think on some occasions. That is part of the reasons why it has been difficult I think for the parties to actually come to a complete meeting of the minds on the documentation.

There are some minor discrepancies in this new graph which we have taken the opportunity to correct, your Honours, and the other major distinction between this document and the document that was in our original submissions is that we have omitted the reposting material which is on the case, in the case on appeal and that follows some discussion with my friend where he suggested that reposting material wasn't as significant as original material that Family First had developed. Now without actually conceding that point, your Honours, we have taken out the reposted material and that is why the graph looks somewhat different from the earlier version.

**GLAZEBROOK J:**

Sorry what did you mean by taking it out? Okay, so it is out altogether, I see.

**MR GUNN:**

Out altogether your Honour, yes that's right and that has led to some recalibration.

**WINKELMANN CJ:**

But you still say that reposting other people's material, it does show you what the purpose is?

**MR GUNN:**

That is my submission, your Honour, but I accept my friend's point that it perhaps does not portray as much effort as much significance as material that is Family First originated but it is still relevant in my submission to this Court's consideration of what Family First actually does and how it goes about its activities.

If I can just briefly attempt to explain the colour coding on the graph your Honours. It hopefully is relatively straightforward but to make the point that blue is submissions on Bills, policy work et cetera. Those are the documents that I took you to two examples of that earlier one. Then in the orange or the brown, we have research reports that are produced or commissioned by Family First and I took your Honours to some examples of those earlier on and then in the green, those are the articles, the media releases, the videos, the opinion pieces, the op-eds if you like, that Family First has originated.

Now two other points about the graph, no suggestion that these numerical items all have a same value. There may well have been a huge amount of effort gone into a particular report, as compared to a particular op-ed piece and this document does not and cannot measure individual effort in that way but what it does offer assistance on, in my submission, is the areas that Family First has spent time on and where they have directed such things as submissions and commissioned reports.

**WINKELMANN CJ:**

It also shows, doesn't it, what activity they tend to favour, which seems to be release of articles, media releases, videos and opinion pieces in newspapers and op-eds, is that your point?

**MR GUNN:**

I think is also a point that may fairly be drawn from that graph, your Honour. The other qualification that I need to make to be fair, is that this is from the case on appeal from 2006 to 2018 and so it would be, one might expect therefore, that euthanasia which was a very current topic at one point, would feature more heavily than it might otherwise because there was that debate going on. Now my submission is that does not invalidate the graph but it does again suggest that some degree of appreciation of that being a factor needs to be brought to mind.

The other document that was handed up electronically yesterday your Honours, is the table of case on appeal material the updated graph is based on. I do not have any intention of taking your Honours through that document. It is just the underpinning for the graph, your Honours, and so that gives you an indication of where we have derived the various – the codings from. If I may perhaps move on from the graph, unless there were further questions.

**WINKELMANN CJ:**

No, go ahead.

**MR GUNN:**

And this is to paragraph 7, page 7, apologies your Honour, of my submissions. Just to comment briefly on Family First structure and finances to say that there is limited information in the case on appeal about how Family First is structured. There is, as we have seen already, a board of trustees, there is a board of reference as well but the activities and role of either board is not clear in my submission on the evidence. The evidence before the Board and the Courts has established, in my submission, that Family First activities are substantially undertaken by Mr McCoskrie. He is a substantial

mover in the press releases, he commissions the reports and he is not the only one who is doing all this, I am not suggesting that, but he is certainly the prime mover, if you like, in terms of Family First activities.

The summaries of Family First finances in the case on appeal, if I can take your Honours to that document, it is at tab 9 and the document is document 101.0020 and yes I am sorry it's a page reference there, which talks about the funding of Family First from 2006 to 2018, it is an updated submission and it talks about the number of donor supporters, how many people receive Family First email, how many people receive snail mail and then the number of large donors who are described as persons who donate more than \$5,000 to Family First. So, again, that information is put to the Court really as part of the scene setting of –

**GLAZEBROOK J:**

It doesn't have any, apart possibly from the people who receive the email and mailing, any significance for charitable status does it?

**MR GUNN:**

No your Honour, I think really just trying to give a sense of the nature of Family First and its activities.

Now we also felt, your Honours, that it would be useful to provide something of a background to the registration history of Family First and those are submissions that begin at paragraph 19 of the appellant's written submissions.

**WINKELMANN CJ:**

Yes so we have read all this, so perhaps just hit the high notes.

**MR GUNN:**

I am very happy to do that your Honour, in fact if I could call upon my fellow counsel, Ms Lawson, to hit those high notes.

**MS LAWSON:**

Thank you your Honours. I will endeavour to hit the high notes. As Mr Gunn said I am going to take your Honours briefly through Family First's registration history, in particular I propose to speak to a section of the case on appeal index that runs from tab 67 to tab 96. This is in the record section of the index and includes correspondence between the Charities Commission and then later the Charities Registration Board and Charities Services and Family First. I will just note that this correspondence is also separately hyperlinked in a chronology that was filed in the Court of Appeal which is at tab 25 on the case on appeal. It is document 101.0102.

**GLAZEBROOK J:**

Do you think it is still hyperlinked. Let us just check. It is not still hyperlinked.

**MS LAWSON:**

It should be your Honour. If it is not –

**GLAZEBROOK J:**

Just it might be an easier way of us getting to it, that was all, if it were.

**WINKELMANN CJ:**

Is this document 101.0102 in the index, memorandum of counsel for the Attorney-General?

**MS LAWSON:**

Yes your Honour. So it is a memorandum that was filed in the Court of Appeal that appends a chronology and I had thought that we had hyperlinked that chronology.

**GLAZEBROOK J:**

I think it still seems to be working, thank you.

**WINKELMANN CJ:**

Mine doesn't.



**MS LAWSON:**

That material is separately indexed in the case on appeal itself. So it is probably easier if we just focus on the index to the case on appeal, starting at tab 67.

**WILLIAMS J:**

Except tab 67 doesn't mean anything to us.

**MS LAWSON:**

Sorry I will give you that number. That is document 401 –

**WINKELMANN CJ:**

So tab is just the small number on the left-hand side?

**MS LAWSON:**

Correct from that table of contents.

**WINKELMANN CJ:**

It doesn't really help us all that much. The document number helps us.

**MS LAWSON:**

Okay understood.

**WINKELMANN CJ:**

Okay, fine, so that is 401.0001?

**MS LAWSON:**

Yes, I propose to just work through the table of contents because I am not going to go into every document, so I was thinking the table of contents might just give a sort of jumping off point.

**WINKELMANN CJ:**

Well will take a break now, we might get some assistance for the more technically challenged amongst us.

**COURT ADJOURNS: 11.26 AM**

**COURT RESUMES: 11.49 AM**

**WINKELMANN CJ:**

Justice Williams is very keen that I clarify that in fact it was a technical issue with his computer, not his own lack of technical competence.

**MS LAWSON:**

Understood.

**WILLIAMS J:**

I will remain silent.

**MS LAWSON:**

I will carry on with the brief outline of Family First registration history. Family First was established by deed on 26 March 2006 and Mr Gunn has already taken you through that. It applied for registration on the Charities Register on 12 February 2007. The Charities Commission's initial assessment of Family First was that there was insufficient information from its deed alone to identify a charitable purpose. The Charities Commission therefore sought and received further information about Family First's activities.

After considering this additional information, the Charities Commission considered that Family First had a charitable purpose of advancing education under the second head of charity and of promoting moral and spiritual welfare under the fourth head of charity. The Charities Commission's decision is at tab 69 of the case on appeal and I will just give you the pinpoint number. That is pinpoint 401.0004. I do not propose to take your Honours through that but that is just to note that reference. As a result of the Charities Commission's decision Family First was registered in the Charities Register.

In 2009, the Charities Commission put Family First on a monitoring list, in light of increasing media that suggested that advocacy and political lobbying had

become a separate and non-ancillary purpose of Family First's. In 2009 and 2011, the Charities Commission commenced investigations into Family First to determine whether it continued to qualify for registration on the Charities Register. The first investigation report is at tab 77, 401.0030.

The Charities Commission concluded that Family First remained qualified for registration, however warned Family First that its advocacy and political activities were pushing the boundaries of becoming non-ancillary and that they needed to ensure that advocacy did not become a primary purpose. Further, the Commission informed Family First that it would continue to monitor its activities.

The second investigation report is at tab 81, document 401.0043. The Charities Registration Board at that point concluded that Family First no longer qualified for registration, as political advocacy and promotion of a point of view had become a primary purpose. A notice of intention to remove Family First from the Charities Register was issued. Family First filed submissions in response and the Charities Registration Board decided to deregister Family First from the Charities Register.

**WILLIAMS J:**

What date was that report please?

**MS LAWSON:**

That report was dated –

**WILLIAMS J:**

Just give me the year.

**MS LAWSON:**

It is undated but it is in 2012 at some point. Family First appealed the Charities Registration Board's decision to the High Court. This appeal was put on hold until this Court delivered its judgment in *Re: Greenpeace*. Justice Collins in the High Court then allowed Family First's appeal and directed the

Charities Registration Board to reconsider its decision in light of *Re: Greenpeace*. The Charities Registration Board's reconsideration is the focus of this appeal.

In the course of the reconsideration, Charity Services provided three memoranda to Charities Registration Board and these memoranda are at tabs 95, document 401.0325, tab 96, 401.0348 and apologies tab 94, 401.0241.

**WILLIAMS J:**

So that's out of order, it is 0325, 0348.

**MS LAWSON:**

Sorry yes I missed the first one, so the first one is tab 94, 401.0241 and then tab 95, 401.0325 and then tab 96, 401.0348. Those three memoranda are obviously in the case on appeal and they had a lot of material appended to them that make up the bulk of the material in the case on appeal.

After considering all of the information, the charities registration board determined that Family First no longer qualified for registration on the Charities Register and directed Charity Services to issue a notice of intention to remove Family First from the Charities Register. That notice is at tab 91, document 401.0167.

On confirmation that Family First did not wish to file further submissions, the Charities Registration Board directed that Family First be removed from the charities register and that decision is at tab 93, 401.0225.

Just to briefly outline that decision, with respect to the fourth head of charity...

**WINKELMANN CJ:**

So what tab did you say that was at?

**MS LAWSON:**

That is at tab 93, 401.0225. So that's the first page of that is a letter to Family First and then it appends the decision of the Charities Registration Board.

**WINKELMANN CJ:**

Yes, that was what I was wrong-footed by.

**MS LAWSON:**

With respect to the fourth head of charity, the Charities Registration Board determined that Family First's purpose was not analogous to the mental and moral improvement cases and instead was analogous to advocacy cases where it has been found that promoting a particular point of view that is underpinned by an ethical or moral philosophy is not charitable. It also determined that it was not possible for Family First's advocacy to establish a public benefit. As such, it determined that Family First did not have a charitable purpose under the fourth head.

With respect to education, the Board concluded that Family First's educative material sought to persuade and not to educate. It was therefore not educative in a charitable sense.

Family First appealed this decision to the High Court. It also sought and was granted an interim order to keep it on the charities register. The High Court upheld the Charities Registration Board's decision. Justice Simon France held that the purpose of promoting the benefit of a stable family unit for society would likely be charitable, however considered that Family First's true purpose was promoting a singular view of the family called the "traditional family". His Honour concluded that there was insufficient evidence that this purpose was of public benefit and noted that achieving it might run counter to human rights law.

His Honour also considered Family First's priorities, such as promoting life, anti-smacking laws, prostitution law reform and censorship laws, and determined that, as had been the case in *Molloy*, it was not possible to

determine whether the positions Family First takes on these issues were in the public benefit. As such, his Honour concluded that Family First did not have a fourth head charitable purpose.

With respect to education, Justice Simon France held that Family First's educational material did not qualify as charitable education as they did not constitute research, rather they advanced a coherent viewpoint buttressed by citation of published material. Justice Simon France therefore dismissed Family First's appeal.

Family First then appealed this decision to the Court of Appeal. It also sought and received a further interim order keeping it on the charities register.

Running briefly through the Court of Appeal's decision, the majority of the Court of Appeal considered that there was a common thread of education running through Family First's objects. It summarised its educational purpose as "facilitating research on, and public understanding of, the importance of the roles of marriage and family in our society". The majority held that the fact that there may be a political element to the promulgation and public dissemination of Family First's research did not negate this educative purpose. The majority therefore concluded that the educational purpose was for the public good and charitable.

With respect to the fourth head of charity, the majority held that the purpose of supporting the role and importance of families was of self-evident public benefit, and the fact that Family First's focus was on the traditional family did not disrupt the public good stemming from the family generally. Therefore the majority held that Family First's purposes and principles are ones which promote a public benefit in a manner analogous with public charitable benefits. They clarified the analogy was with the moral and mental improvement cases.

With respect to the specific issues Family First advocate for, the majority concluded that Family First's advocacy on issues such as abortion, assisted

death, anti-smacking, prostitution reform and censorship were consistent with its broader purpose of supporting marriage and family as foundational to a strong and enduring society.

By contrast, the majority held that some of Family First's advocacy on specific issues of the day could not be found to be in the public good. For example, their advocacy about abortion, divorce and alternative forms of marriage. However, it considered that this advocacy was ancillary and therefore did not affect Family First's charitable status.

The majority therefore concluded that Family First remained qualified for registration on the charities register.

Justice Gilbert in the Court of Appeal dissented and endorsed the decision of Justice Simon France. Paragraph 191 of the judgment, his Honour found that Family First was essentially a lobby group whose purpose was to promote its particular viewpoints on family and marriage. His Honour disputed the majority's finding that a thread of education runs through Family First's deed and instead thought the word *educate* was used in respect of its advocacy purpose. His Honour therefore held that Family First did not have a charitable purpose of advancing education.

With respect to the fourth head, his Honour disputed the majority's finding that the family or the traditional family was of self-evident public benefit, noting that it appeared the majority had conflated the two limbs of the public benefit test. The family or the traditional family may satisfy the public component of the test but not the benefit component of the test.

Justice Gilbert then considered the subject of Family First advocacy and concluded that it could not be found to be in the public benefit based on the decision in *Molloy*, and his Honour disputed the majority's findings that the advocacy on these issues was ancillary, noting that this conclusion appeared to be seriously at odds with the evidence. As such, Justice Gilbert held that Family First did not qualify for registration on the charities register.

That's the whistle-stop tour of the history. I'll pass back to Mr Gunn.

**WINKELMANN CJ:**

Thank you, Ms Lawson.

**MR GUNN:**

Thank you, your Honours. It seems appropriate in the context to mention that Ms Lawson has whānau support in the courtroom today, so I make that point briefly.

Passing on to the written submissions and to legal principles, which is set out at page 9 of the written synopsis that the Court has, the Charities Act is the relevant legislation, of course. I have set out in the submissions, section 3, section 5, the meaning of *charitable purpose* and the possibility that an entity may still qualify for charitable registration if any of its non-charitable purposes is ancillary. That's under section 5(3) of the Charities Act. And also the charitable purposes set out in section 5: advancement of religion, advancement of education, relief of poverty, and the category that the Attorney suggests is most apposite here, the question of any other matter beneficial to the community.

The Chief Executive of the Department of Internal Affairs is the public servant charged with maintaining and assisting the Charities Board in its use of the register of charitable entities. The Chief Executive has powers under the Charities Act to investigate and examine and enquire into any charitable entity if the Chief Executive considers that there is good reason for doing so.

The Chief Executive also has power to remove entities from the register after hearing from the entity and the Board may agree to remove the entity from the register, as it did in this case, although as my friend has indicated, the registration of Family First has remained constant throughout this litigation.



The other point that may be made in terms of the Charities Board is that that is an independent board, board members must act independently, they must observe the rules of natural justice and they are not subject to direction from the Minister in respect of their decision making capacity.

Now as to making an assessment of charitable status, the issue in front of the Court today, the starting point, the Attorney says, is a consideration of the entity's purpose and if I may, your Honours, take your Honours to the bundle of authorities at tab 110 and this Johnathan Garton on *Charitable Purposes and Activities* and the abstract of that article which is the first page, essentially says that the orthodox position has it that activities carried on in pursuit of an entity's purposes are not relevant but the article considers the extent to which that is correct and argues that there are in fact a number of situations in which it is appropriate to consider either the potential or the actual activities carried on by a prospective charity and that is certainly the Attorney's position in this case. The Charities Act itself, as your Honours will appreciate, requires an examination of activities when an entity seeks to be registered and also may require an examination of activities if the Chief Executive is considering whether or not an entity remains eligible for registration as a charity.

The Attorney says that the obligation to have regard to activities is not just statutory, it also arises under the common law and the footnote, and this is at page 11 of the submissions, the footnote 57 there, refers to a number of cases in which the Courts have had regard to activities. To rehearse them, *Greenpeace* in this Court, *Molloy*, *The Foundations* case and more recently, your Honours, in *Greenpeace* in the High Court and if I may just briefly spend some time on that case in this regard.

In *Greenpeace* in the High Court, one of the issues that was being considered was the extent to which one of Greenpeace's activities, which was the pursuit of nuclear disarmament and avoidance of weapons of mass destruction, was a charitable purpose and the argument from Greenpeace was that that was an historical purpose, that was no longer a preoccupation, if you like, of Greenpeace anymore. Greenpeace I think had considered that the battle in

that regard was won and so the Court examined the evidence that existed on activities in that regard and accepted the Greenpeace submission. My point is that that is another reason why a court may have regard to activities to endeavour to see whether an activity is a principal activity or merely an ancillary activity and in fact it is hard to see how you might make that determination without some regard to activities and how entities conduct their activities.

**WINKELMANN CJ:**

Well purposes are often very – objects are often very broadly stated, purposes are often very broadly stated in charitable trust deeds, do you say it is acceptable for the Courts to have regard to the activities that are actually pursued under those objects or purposes to determine what the purpose truly is?

**MR GUNN:**

Absolutely your Honour. The Attorney's position in that regard is that the activities will give some flavour to purposes that are perhaps not clearly expressed or where there is doubt as to what a particular aspect of a purpose might mean. In this case one can look at –

**WINKELMANN CJ:**

What about broadly expressed?

**MR GUNN:**

Broadly expressed as well, in fact that was the point I was just going to make in terms of Family First's purposes which talk about the family in the deed but when one has regard to the principles that I took your Honours to earlier this morning, it becomes plain on the consideration of those principles, that it is a particular form of family that Family First are seeking to support.

**WINKELMANN CJ:**

And Justice Simon France relied on the statutory provision governing deregistration too, didn't he?

**MR GUNN:**

He did your Honour. In terms of the ability of a chief executive, again as my friend Ms Lawson set out in her history of this case, it is not unusual for an issue to arise or questions to be asked about the charitability of a particular entity on the register as it did in the case of Family First when some issue arises, somebody perhaps sees something in the news media or otherwise and that leads to enquiries that are undertaken by Charity Services on behalf of the Chief Executive and that inevitably involves a consideration of the entity's activities, well almost inevitably, there may be some particular form of enquiry that doesn't, as in fact was the case in Family First and there is statutory ability for the Chief Executive to undertake such enquiries.

The other point that may be mentioned here and it is in the submissions but perhaps timely to refer to it here, is that it can be difficult to discern a bright line difference between a purpose and an activity and I think with respect her Honour Justice Glazebrook writing extra judicially has talked about such cases as *McGovern v Attorney-General* [1982] 1 Ch 321 (Ch) for example where depending on how you frame the charitable purpose, the charitable activity, there may be – that may lead to particular conclusions or to different conclusions, depending on how things are framed. So the point that I seek to put before your Honours is any suggestion that there is a bright line distinction between purposes and activities I think is not borne out by case law and certainly some of the contentious cases that are in the bundle of authorities before your Honours.

I don't propose to take your Honours through the Statute of Elizabeth, the *Commissioners for Special Purposes of the Income Tax v Pemsel* [1891] AC 531 (HL) case, the categories of charitable purpose or really to talk about the presumptions of public benefit under those headings, other than to draw your Honour's attention, if I may, to paragraph 40 of the submission and the presumption of public benefit in the first three heads of charity and the fact that there is no such presumption for purposes under the fourth head.

The other conclusion that flows from *Greenpeace* in this Court, is that in order to find a charitable purpose under the fourth head, you are obliged to find a purpose that is analogous to previous purposes found to be charitable and the reason for that is both positive because it enable the law to evolve as new social need arises but it also maintains an ability to control, if you like, the categories of charitable purpose and to ensure that there is no radical change which would set up a broad and less controlled assessment so that you would have a wide range of entities entitled to charitable status, that would have that broad and less controlled assessment, would obviously have significant implication for tax law given the tax benefits that charities receive.

My friend, the interveners, have submitted that it's not appropriate for a court when having regard to whether there is capacity to recognise a new type of charitable purpose as charitable in law, that it's not appropriate in those circumstances to have regard to potential fiscal considerations, it's not appropriate to have regard to the tax implications if a new type of charitable purpose were to be recognised, and they cite in respect of that proposition *Re Queenstown Lakes Community Housing Trust* [2011] 3 NZLR 502 (HC) which is in the bundle of authorities. But my submission, the Attorney's submission is that the proposition that this Court should not have regard to potential fiscal considerations can't be properly founded on *Queenstown Lakes*. That was an obiter remark, and it also cannot be accepted in the face of the, what I submit is, overwhelming contrary authority which includes *Vancouver Society of Immigrant and Visible Minority Women v MNR* [1999] 1 SCR 10, *AYSA Amateur Youth Soccer Association v Canada (Revenue Agency)* 2007 SCC 42, [2007] 3 SCR 217, two Canadian Supreme Court authorities, and, of course, this Court in *Greenpeace*. I acknowledge that my friends, the interveners, have cited that authority to this Court as well, but the Attorney's firm proposition is that fiscal implications remain relevant to the decisions the courts make in this area.

**GLAZEBROOK J:**

So is the submission that even when you are looking at analogies you still look at fiscal considerations because it becomes slightly difficult to know what

the fiscal considerations might be if you're looking at a very closely analogous? I can understand the submission in the sense of the submission that says, well, any advocacy should be allowed, because that will obviously have fiscal considerations, but if you're saying: "Well, advocacy," and I'm not saying this is necessarily that case, but "advocacy for the family has a public benefit", do you say: "Oh, well, oops, if we extended it to family, that might go too far," without knowing why that might be? I'm just saying family generally because Justice Simon France did say family advocacy has a public benefit more generically.

**MR GUNN:**

Your Honour, I think the submission is to support the *Greenpeace* formulation in favour of analogous decision-making and, if you like, incremental decision-making and –

**GLAZEBROOK J:**

But that will have a fiscal implication.

**MR GUNN:**

It will.

**GLAZEBROOK J:**

But you don't say we take that into account with the incremental but we would with a wholesale?

**MR GUNN:**

I think it still forms part of the context but if you're being invited as my submission is the invitation is here to really look at a new type of charitable purpose, then fiscal implications cannot be ignored and the authority on that point is overwhelming, in my submission. My other point is that there is a need for caution. I think your Honour has touched on this in, with respect, in one of the remarks you just made, that in the absence of evidence about the implications of decision-making in this area there is perhaps a need for caution. I have in mind the submissions from the Interveners which talked

about rare cases and the phrase *rare* was repeated in the submissions and submission I make in respect of that is that we cannot – we have no statistical information in front of us on how rare these cases are likely to be nor do we have any statistical information about how many cases might be waiting in the wings on these propositions. One can reasonably make the assumption perhaps though, that as categories of charitable purpose are opened or as new analogies are adopted by the Courts, that will cause people to seek to obtain charitable status based on those previous decisions.

**WILLIAMS J:**

I guess the problem with those propositions are, well firstly, impact on the revenue didn't seem to bother the Australian High Court, they didn't even mention it on what was clearly a significant, even a radical widening but secondly, apart from the vibe of that submission, what can we say? If this is going to be relevant, a bunch of judges who are not accountants or policy makers, aren't you going to have to give us some information about exactly what it is expected the fiscal implications will be and are we capable of dealing with that in a way that is better than the Commissioner of Inland Revenue in a submission to relevant ministers on law changes could?

**MR GUNN:**

Your Honour, in terms of *Aid/Watch* in the first instance, the Attorney's position on that is that it certainly did away with the political purposes exception in a similar way to the way in which this Court said that that should no longer form part of the law. It, again, in the Attorney's submission, is something that was within the Court's purview, if you like, it was judge-made law, it was done away with by judges and it can –

**WILLIAMS J:**

Yes but it was done away with, done away with might understate what happened there, it was executed and it wasn't followed by *Greenpeace* but the majority of judges didn't seem too anxious about fiscal effects.

**MR GUNN:**

That may be so your Honour. In terms of characterising the decision, I don't see, in my submission before this Court would be that while Aid/Watch certainly extended what might be understood to be a charitable purpose, it was still in support of a first head of charity, in that case the relief of poverty. There was some discussion amongst the Court as to how direct Aid/Watch's activities were in support of relief of poverty and that remains a live question but you can still see that decision, in my submission, as an incremental and a logical argument, that follows on from other steps that are made and my other important submission in this regard, your Honour, is that the Courts have shown in New Zealand, an ability to develop the law of charity in appropriate ways and my sort of submission in that regard is really in terms of *Latimer* I suppose but also *Incorporated Council of Law Reporting for England and Wales v AG* [1971] 3 All ER 1029. You can point to other cases, the public benefit that was found to be in the *Plumbers, Gasfitters and Drainlayers Board v Charities Registration Board* [2013] NZHC 1986, [2014] 2 NZLR 489 charitable trust for example. I'm bound to say as counsel in that case that that public interest did not perhaps present an overwhelming obvious case to me until I was able to read the High Court's decision.

**WILLIAMS J:**

Until you were re-doing your kitchen.

**MR GUNN:**

Exactly your Honour. But those are all examples of the incremental but the way in which the Courts can extend the boundaries but in an incremental analogical way and the arguments for that are arguments for safety which are, I acknowledge, possibly not appealing to the judicial mind, I can't speculate on the judicial mind obviously, but may not have much appeal. The evidence point though, I suggest to your Honour, works both ways. We don't have any evidence that it's a problem but nor do we have any evidence that it's...

**WILLIAMS J:**

I understand, but your argument is that this is relevant so it's got to be taken into account but when we get to the taking it into account are we getting anything more from you or the revenues representative in any of these cases than the vibe?

**WINKELMANN CJ:**

I mean isn't your point simply that what we're taking into account is that we don't know what we don't know, so it's hard for you to give us anything?

**WILLIAMS J:**

Yes, and it's hard for us to take it into account.

**WINKELMANN CJ:**

Well, perhaps not.

**GLAZEBROOK J:**

What I read is if it's incremental then that's within the purview of the Court and unless somebody comes and says: "This'll be catastrophic because there's going to be 50,000 people," we don't do anything with that, whereas if we take a large leap we can assume the fiscal consequences might be or are likely to be severe. Does that sort of sum it up?

**MR GUNN:**

That, I think, is a fair summary of what I'm attempting to say, your Honour, and the...

**GLAZEBROOK J:**

But don't do a large leap and don't – and I suppose in *Aid/Watch* and the majority that was a constitutional issue which I know Justice Kós has said doesn't make a distinction, but I think it probably does because there's a big issue with judicial power, et cetera, in Australia which we don't have here.



**MR GUNN:**

And obliged to your Honour for that indication and to put on the table it's in the written submissions but to be clear we are, the Attorney is not advancing any argument that Australia is different from New Zealand in some respects, so we're not founding any arguments that we're making this morning on the basis that there are constitutional differences between Australia and New Zealand but that is not to undercut the point that your Honour has just made. It perhaps more reflects the fact that I feel very hesitant about putting forward any arguments about the Australian –

**GLAZEBROOK J:**

Well, I was really just saying that that might explain why they weren't looking at fiscal consequences in terms of that majority decision because it was founded on a constitutional provision rather than that there are necessarily differences in terms of freedom of expression being important.

**MR GUNN:**

Yes, I'm happy to accept that as a proposition, your Honour.

**WINKELMANN CJ:**

Right, we'd better get a move on because you're going to run out of even your extended time.

**MR GUNN:**

Thank you. And I will pass over quickly the political purposes exception and the way in which this Court dealt with that in *Greenpeace*. That is covered in the submissions from pages 11 to 13. At paragraph 47 of the written submissions at page 13 the Court did suggest that advocacy for some ends may come to be regarded as charitable purposes in themselves, depending on the nature of the advocacy. In fact, I think the phrase from *Greenpeace* is that advocacy for some ends may have come to be regarded as charitable purposes. So I seek to just make that point because I think the "may have come" is a significant part of that statement.

And underpinning, at 48, this Court's decision in *Greenpeace* was the concern that I have just been talking about with your Honours, this concern that charities law should be responsive to the way that society works and that there may be changes in society which throw up a new need for philanthropy which is properly to be regarded as charitable. So the categories of charitable purpose are there but the fourth head is a head which enables innovation in this space.

The *Plumbers and Gasfitters* case I have mentioned and also referred to *Latimer* and the point that we get to at paragraph 50 of the submissions is that if there is objective evidence of public benefit in an advocacy entity's end, and that is an end that is analogous to previous cases, then the Court should focus, with respect on whether the means chosen by the entity to achieve that end, for example advocacy on particular issues, are sufficiently connected to that purpose. If the means are so connected, and they are not otherwise disqualifying, perhaps because they are not of public benefit, then the entity will be charitable. If the end is not charitable, for example because it is not objectively in the public benefit or it is not analogous to previous cases, then there is no need to consider the means by which that end is advanced but if the entity's end is abstract or unclear, it has not previously been found to be charitable, the Court should review the means chosen by that entity to achieve the end.

And if I may attempt to illustrate the point by looking at what Family First, its purpose and its end, the submission is that there are various difficulties with the finding that Family First's support for the traditional family is charitable. The first of those difficulties is the one that was really pointed out by Justice Simon France, with respect, that the achievement of at least some of Family First's objectives would come at the expense of other forms of family and the example that I put to your Honours in that regard is same sex marriage. If the objective is promotion of traditional marriage, then what does that betoken for same sex marriage? The second point that I seek to –

**WILLIAM YOUNG J:**

Is it really zero sum game? Is disrespecting same sex marriage the other side of the coin to promotion of a traditional concept of marriage?

**MR GUNN:**

I think there are differences your Honour, and my friend in his submissions has made some reference to the fact that Family First is not out to or is not conducting activity to abolish same sex marriage for example. The point that I seek to address is that in the constitution, if you like, of Family First, you have a proposition that the traditional family is really the foundational family and it is superior to other forms of family and it seems to me that carries with it human rights implications as his Honour Justice Simon France was talking about.

**WINKELMANN CJ:**

He sets his reasoning out at paragraph 60, 63 and 64 I think doesn't he? He says: "It is common ground", and I just want to test this with you, was it common ground or no was it conceded by Family First that its purpose is to promulgate a singular view of family called the traditional family? That is at paragraph 60.

**MR GUNN:**

Thank you your Honour.

**WINKELMANN CJ:**

Because I mean I thought that was significant because that seemed to be saying its purpose is in education but rather – well I suppose you could promulgate it through education but to promulgate a singular view of family and at 63 he describes what that concept of family is and how it goes about it.

**MR GUNN:**

That summation, your Honour is certainly consistent with the Attorney's view on what Family First seeks to achieve and –

**WINKELMANN CJ:**

And then he addresses whether it is beneficial to the community in the sense required by a charity.

**MR GUNN:**

Yes. And that is the human rights law point that I was looking to or had mentioned with –

**WILLIAMS J:**

What if Family First was an advocacy organisation for the interests of single mothers?

**MR GUNN:**

I think there is a distinction to be drawn there, your Honour, and it might be single fathers and you could think of a charitable organisation that chose a particular group that it wished to support or promote and single mothers might be a good example, you could think of any other number of groups. You might think of perhaps a group of people that had, even to go to Family First, were married, you might look to support married people by offering them let's say tangible support of one sort or another and the example that I gave in the opening synopsis, if you have a charity that provides support for particular groups, that is not necessarily a disqualifying purpose in a charity.

**WILLIAMS J:**

Yes I get that point but if the purpose of this version of Family First in an alternative universe was to advocate for the position of single parent families as the best way of raising children in this complex and fragmented world and that government should do all it can to provide them with support, marriage is a dead duck. Would that be charitable?

**MR GUNN:**

There are two aspects to that proposition your Honour and it seems to me that if the entity in question was looking to promote the interests of the single

family, then it is difficult to conceive of a reason why that might not be charitable, depending on its activities.

**WILLIAMS J:**

Even if its advocacy is that marriage is a dead duck and the law makers –

**MR GUNN:**

Well that is when I think one needs to examine the purposes and you might say that there is a distinction and I might say compared to the Family First purposes and the purposes of the single mothers entity or single fathers entity, that if you are proceeding on the basis that a particular form of family is one that deserves support, it is hard to see how that might be –

**WILLIAMS J:**

Deserves support at the expense of other forms of family?

**MR GUNN:**

That is where I think the problem arises, your Honour, that if you are saying the – but it depends why you are advancing that proposition your Honour. If you are saying that that because we are superior to another form of family, then I think that is particularly problematic. If there is a, I was going to say a *proper reason*, that is value loaded but if there is an objective reason why there should be support for the single family at the expense, in inverted commas, of other forms of family, then that may be a charitable purpose because you are promoting possibly a public good in a charitable sense, possibly. You are doing that perhaps by way of advocacy and to the extent that you are doing it at the expense of others, you are doing it in a reasoned way and there are particular reasons why you are advancing that proposition.

**WINKELMANN CJ:**

So Justice France has dealt with all of that at 65 of his judgment very succinctly. He makes a point that we are considering here on his analysis of the purpose and advocacy case. He says that there is a narrow issue in these advocacy whether a body whose main or indeed sole function is to promote a

viewpoint is a charity. He says: "Here it can't be shown that Family First's promotion of the traditional family unit, though no doubt supported by a section of the communication, if achieved, would be a public benefit. If it is to be achieved at a cost to other family models it could affirmatively be said not to be in the public interest."

**MR GUNN:**

Absolutely your Honour and the Attorney would, with respect, adopt that.

**GLAZEBROOK J:**

If you were making a distinction with an organisation that might support single mothers or single fathers, is that distinction that you were making basically in terms of what might be thought of as the very traditional form of charity which says a single mother by definition doesn't have two people to do the babysitting, to do the working, to put whatever it happens, so it is a sort righting disadvantage?

**MR GUNN:**

Yes.

**GLAZEBROOK J:**

That might be the distinction in terms of – that you might draw in terms of saying well you can support a particular group but if you are supporting a particular group, it has to be on the basis of that tradition view of disadvantage?

**MR GUNN:**

With respect again I think that is correct, your Honour. I think if you are able to show that the object that you are pursuing is to assist a disadvantaged group or is affirmative in nature, then it is easier to draw an analogy with other charitable activities.

**WINKELMANN CJ:**

It does not have to be in a traditional view of disadvantage though, does it, it could be on a basis of science for instance?

**MR GUNN:**

Absolutely.

**WINKELMANN CJ:**

Or economic research which would suggest that a solo parent has a harder time than two parents together, quite apart from the form of the relationship.

**MR GUNN:**

That is also, with respect, correct in my submission and again I go back to the difference here and as your Honour pointed out, it is summed up in Justice Simon France's summary there at paragraph 65. The point, if I may, in respect of this –

**WILLIAMS J:**

Can I just tease that idea out because isn't Family First's case that the family, man, woman, married, permanent et cetera, is under existential threat, isn't that their very case?

**MR GUNN:**

I think that may be putting it too far in the sense –

**WILLIAMS J:**

That is the impression I get from reading some of the material.

**MR GUNN:**

Well my understanding of my friend's case is that the traditional family is not as numerous, it is the majority in the way that it may have been in this country in previous generations and that it is still – but that does not disqualify it from support and that is a proposition that is hard to argue.

**WILLIAMS J:**

But the point is if the, yes if there is a demonstrable need in respect of single mums, if there is evidence that there is a demonstrable need in respect of this orthodox form of the family, then that would get you there, although it would not get you over the obstacle of at the expense of others, you might suggest.

**MR GUNN:**

It might get you there your Honour, in my submission, but taking the case back to the facts of this case, it seems to me that there is no evidence before this board of any affirmative action, there is the sense that the traditional family may be disadvantaged is not evidentially in front of this Court in my submission and that goes to the point that is made, that the advocacy for the traditional family is advocacy for a group, not a disadvantaged group, it is for a group.

**WILLIAMS J:**

Well I think there are differences of opinion on that.

**MR GUNN:**

Absolutely there will be your Honour and I acknowledge that is the case.

**WINKELMANN CJ:**

Well it doesn't seem to be the Family First's case that the traditional family is disadvantaged, it seems to be rather that policies and societal values are undermining it.

**MR GUNN:**

That is accurate in my submission too your Honour and certainly the idea that the traditional family is in need of support sits uneasily in my submission, with the idea that the traditional family is the optimal means of family life and if I can turn, and I touched on this previously but the Attorney's position is that substantial parts of Family First advocacy is not self-evidently or objectively connected to the purpose of promoting or supporting the tradition family and I touched on this earlier with the Greenpeace example. If you are Greenpeace



and you support the Kermadec marine reserve, then it is pretty easy to see the connection between Greenpeace's charitable purpose of protecting the environment and the reason why they are supporting the Kermadec's marine reserve.

Less easy, in my submission, to understand why support of particular matters or some of the particular matters that Family First advocate for or against is related to the traditional family and I take as an example euthanasia. It seems to me that opposition to euthanasia in some respects, it is hard to see how that might promote or support the traditional family. You might say, and I anticipate that my friend –

**WILLIAM YOUNG J:**

Well if it lasts a bit longer.

**MR GUNN:**

There is that point your Honour and I anticipate my friend Mr Bassett would say that euthanasia is, and a stand against euthanasia, is the sort of stand that the traditional family might be expected to take but my submission is that there is no link between that advocacy and the supposed purpose of Family First in the way or to the degree that there is with Greenpeace and its support of marine reserve.

**WILLIAMS J:**

Isn't that really just a framing issue though? I mean it does seem to me the platform here is that human life is tapu, it is sacred and it is expressed in its greatest, best and most natural form as a family whose parents are male and female and children raised within it. I mean those things are fundamentally connected aren't they? They are a coherent set of principles based around the idea of family and the sanctity of human life?

**MR GUNN:**

There is certainly no argument that the family is at the centre of what Family First does, the name –

**WILLIAMS J:**

So is the sanctity of human life within the family, that is its whole point, it seems to be, whether you agree with it or not.

**MR GUNN:**

The sanctity, well your Honour I make the same point in respect of abortion, euthanasia is just another aspect of that. You can make those arguments that the various policy positions that Family First maintains are related to its support of the family, as your Honour has just done, but in my submission it is not as clear cut as you might have with the Greenpeace example I have given.

**GLAZEBROOK J:**

And that is in support of a submission that these are freestanding, effectively freestanding objectives and not ancillary but in fact –

**MR GUNN:**

Indeed your Honour and it goes to the other point that we touched on earlier this morning which is that sometimes the pursuit of a particular means of advancing an objective becomes so important that it becomes an objective in itself, and that's, I think, what the Court of Appeal grappled with in terms of whether some of the policy positions that Family First were pursuing had become individual objectives rather than means in support. And I think that's where the evidence in front of the Court indicates that some of Family First's policy positions have become purposes of their own, and the framing issue arises there.

There is the further point that –

**WINKELMANN CJ:**

Can I just ask you, you're at your paragraph 73. You say "the majority in the Court of Appeal acknowledged that 'intangible benefits require clear proof of public benefit', finding such proof in Family First's engagement in issues relevant to the role of families in society and core family values", which is

contrasted to Justice France's refusal to find such value, public benefit. So can I just ask you as to what you say about that?

**MR GUNN:**

The first point in relation to 73, your Honour, is that the intangible benefits point is a relevant one and it is harder to establish proof of public benefit if the benefits that you are dealing with are intangible, and so the majority in the Court of Appeal, I think, making a conventional statement in that regard that where as Family First is acting the benefits that it's looking to deliver are intangible. So the –

**WINKELMANN CJ:**

Did the Court of Appeal engage with negative aspects that Justice France engaged with?

**MR GUNN:**

No, and in fact the Court of Appeal's approach almost took the opposite line in relation to various UN conventions and so forth. The Court of Appeal were saying that the activities that Family First could be said to be in justified in light of some of the international agreements on the family and the like, there was – they dismissed Justice Simon France's concerns about the human rights side of things, and if I may I'll just find that part of the Court of Appeal decision.

**WINKELMANN CJ:**

Just on that international instruments, of course, when they refer to the family they're not talking about Family First's definition of the family, are they?

**MR GUNN:**

That's exactly right, your Honour.

I've just run over. I might, if I may, come back after the luncheon break with that.

**WINKELMANN CJ:**

Yes.

**MR GUNN:**

I don't want to hold your Honours up. But certainly the Court of Appeal did consider what Justice Simon France had to say in that regard and turned their mind to it specifically but decided that it wasn't compelling.

Your Honour, I'm not sure whether you were asking me about paragraph 73 of the submissions there. I'm not sure –

**WINKELMANN CJ:**

I was asking you to contrast the approach, because it seems unusual. Well, I was just noting if the Court of Appeal had found public benefit and Justice Simon France hadn't and I was asking you to really, if you could, skewer for us the difference in the approach and why you say Justice Simon France's is to be preferred, because that is revealing. How different judges grapple with these things I think is revealing in the nuance in them.

**MR GUNN:**

Absolutely. The Court of Appeal in its judgment at paragraph 38 refers to paragraph 65 from Justice Simon France's judgment which your Honour had put to me earlier and I suppose the basis on which the Court came to a different conclusion might be, well rests in part on the evidence that was additionally put to the Court of Appeal but essentially just reached a different decision and the references to the universal declaration of human rights, the point your Honour has just made, were at 96 of the Court of Appeal's, paragraph 96 of the Court of Appeal's decision and that followed a discussion of Justice Simon France's comments that if Family First's purposes were solely to promote the role of the family, that is the wider family, not just the traditional family, there would be considerable strength to its claim for charitable status.

So they looked at those instruments of international law, including the universal declaration of human rights, and I guess perhaps the point where the Court came to a view on those matters is also at 146 of the Court of Appeal's decision where the Court of Appeal talks about the fact that Family First favours the traditional family, doesn't mean that its advocacy loses public charitable benefit and they go on in that paragraph to refer to the recognition that there is in New Zealand of alternative forms of family but they seemed to based the decision your Honour on the judicial notice of the fact that by far the larger part of the social groups constituting families in contemporary New Zealand, at least in the nuclear family sense, are those based on civil and religious marriages between men and women. So a very different take on Justice Simon France's position.

**WILLIAMS J:**

Do you know whether that is true, just by the by?

**MR GUNN:**

Well no your Honour I don't and I have read that sentence on a number of occasions, there are a number of components to it.

**WINKELMANN CJ:**

If it is true, at the moment it is probably a fading thing.

**MR GUNN:**

Yes and in fact there are some statistics in the case on appeal which talk about it but it is not clear to me why that would be of – why the numbers game, for want of a better description is of relevance here, whether it is a decreasing number, an increasing number. That doesn't seem to me to be of particular relevance.

**GLAZEBROOK J:**

Do you think the Court of Appeal is really saying if family is for the public benefit, then a subset of family must be for the public benefit which is actually, you can understand as a submission whether it should be charitable or not

because it certainly, you wouldn't – an argument that a nuclear family with a man and a woman in a state of legal matrimony couldn't be a bad thing.

**MR GUNN:**

For the avoidance of doubt that is not part of the Attorney's case either.

**GLAZEBROOK J:**

No exactly, exactly but that's what I understood the Court of Appeal to be saying, that if family is a good thing, then advocacy for a subset of family, whatever subset it happens to be, has to be a good thing for the public benefit.

**MR GUNN:**

Your Honour, and I think from the Court of Appeal's perspective, what comes through from its judgment is that a proper concern about the consequences of family breakdown, dysfunctional families and that is something that Family First is concerned about as well.

**WINKELMANN CJ:**

Isn't one of the differences, one of the significant differences between the Court of Appeal and Justice Simon France's approach is that the Court of Appeal majority de-emphasises the favouring, the advocacy favouring one form of family over another and says as a minor part, so it says the fact that Family First favours the traditional family does not mean that advocacy for family and marriage is important and valuable institutions lose the necessary advancement of public charitable benefit. Whereas Justice Simon France said they weren't just favouring one form of family, their advocacy is in fact for that form of family above others. So they are not just, you know, advancing the family generally and emphasising a little bit one type, they are actually actively advocating for one form of family over the other and that seems to be the difference in analysis.

**MR GUNN:**

I accept that proposition, your Honour, I think that is, with respect, correct in terms of the differences between the two Courts.

**WINKELMANN CJ:**

It is lunchtime. So how are you going? We seem to be moving at more speed now.

**MR GUNN:**

I said that I would rattle through your Honour and I am not sure that I have achieved that but I will do my best for –

**WINKELMANN CJ:**

Well we at about – we are up to “education” are we or not?

**MR GUNN:**

On my analysis we are at page 15 and I think many of the written submissions and I think that various of the discussions we have had this morning will mean that we can save time in terms of later parts of the submissions too. So my anticipation is that I should be finished by before 3 o'clock.

**COURT ADJOURNS: 1.01 PM**

**COURT RESUMES: 2.20 PM**

**WINKELMANN CJ:**

Mr Gunn.

**MR GUNN:**

Thank you, Ma'am, if I might start with an answer to the question that was addressed before the luncheon adjournment. Your Honour was asking me what the Court of Appeal response to the High Court was in terms of the human rights issues that had been raised in the High Court, and if I may direct your Honour's attention to the Court of Appeal decision in *Family First* at paragraph 180. The Court of Appeal discuss the concern about human rights

which was raised by his Honour and talk about an illegal purpose at 180 and make the assessment is that, whether or not the law changes advocated by Family First are in tension with human rights law, its purpose in advocating them, or advancing them, my apologies, cannot be considered to be illegal, and that is a proposition that the Attorney wouldn't disagree with but in my submission it doesn't address the issue of whether or not some of those activities run counter to human rights law or, as the Court of Appeal puts it, are in tension with human –

**WINKELMANN CJ:**

Well, it recasts Justice France's point, doesn't it, because his point was that if it's in breach of international covenants then it's hard to see that it's of public benefit and that's the point he's making, but they're making – they're responding to it, it's a category error, and they're responding to it in another way.

**MR GUNN:**

Yes, a judicial side-step, if I – with respect. Illegality's not the point that's at issue here, in my submission. So that is the point there.

Turning to the submissions and picking up on the point your Honour has just made, at paragraph 54 of the submissions, the purpose, in order for there to be a charitable purpose under the fourth head of charity the purpose must be of public benefit, but not just public benefit. It must be of public benefit within the sense the law recognises as charitable and that is relevant consideration. Here, the Attorney accepts that some of the things that Family First does, we've looked at submissions to the select committee, for example, may be of public benefit. There's an exchange of views there which the select committee might find of benefit in those particular instances but is there public benefit within the sense the law recognises as charitable, and the Attorney's position is that there is not.

Turning to the human rights aspects of the case, the author that I seek to take your Honours to is an author called Adam Parachin who's familiar to at least



some of your Honours, I'm sure. The point that's made at paragraph 58 of the submissions is that Mr Parachin argues that the truly charitable trust affirms equal worth, value and dignity of all persons.

**WINKELMANN CJ:**

What paragraph of your submissions, sorry?

**MR GUNN:**

This is at paragraph 58 of the submissions, Ma'am.

**WINKELMANN CJ:**

We're going back?

**WILLIAM YOUNG J:**

What about a trust for the advancement of a particular religion?

**MR GUNN:**

Religion is a separate charitable head, your Honour, and I acknowledge that there has been some concern expressed by commentators, including judicial commentators speaking extrajudicially, about the fact that the public benefit and the need to prove either self-evident public benefit or public benefit on the evidence, is something that may be that fourth head charities are subjected to in a way that charities advancing religious purposes aren't and that is, I acknowledge the point, but would say in response that they are different categories of charitable purpose and the criteria for establish charitable purpose under each of those heads is different. It is not a completely satisfactory answer your Honour and I don't pretend that it is.

**WILLIAMS J:**

Particularly since category 4 is bounded by the spirit and intendment of the other ones. Isn't that a little bit of a contradiction?

**MR GUNN:**

Indeed there is a degree of contradiction there. In terms of trying to put a basis that might be advanced for the distinction, you might look to freedom of religion, you might look to conscience issues in terms of the advancement of a religious set of principles and beliefs, for example the idea that you will follow a particular course of action because that is what your religion which you believe in demands. That, in my submission, is a different situation from a secular entity which is seeking to establish itself under the fourth head but again acknowledge that there is a degree of incongruity there, your Honour.

**WILLIAMS J:**

But freedom of conscience is not just religious?

**MR GUNN:**

Accept that obviously your Honour and the Attorney, there is no part of the Attorney's case is seeking to restrict freedom of expression, freedom of conscience, the question is, as the submissions detail, whether that extends to a subsidy to advance.

**WILLIAMS J:**

Yes but you justified religiosity as a charitable category by reference to freedom of conscience, now you're saying that it is not relevant.

**MR GUNN:**

I am not seeking to justify it so much as to put forward a rationale for why religion is different but I acknowledge the limitations.

**WILLIAMS J:**

Basically we are tying ourselves in knots because those categories are 400 years old and times have changed and we are not, or at least England is not the Christian country it was and we are not the Christian country we became by the end of the 19<sup>th</sup> century.

**MR GUNN:**

Those propositions have been advanced your Honour and I can understand the basis for that. My response to that is that we, notwithstanding the first three categories, the fourth category does offer a degree of flexibility and an ability to accommodate changing social circumstances in a way that perhaps some of the other categories don't.

So Parachin, and going back to his article which is in the bundle of authorities, it is talking about why and when discrimination is discordant. That is at tab 128 in the bundle of authorities and his suggestion is that native to charity law is a human rights project that is concerned with cultivating and promoting the belief that others are equal and worthy, so that everybody in that sense is –

**WILLIAM YOUNG J:**

This must be a sort of a 20<sup>th</sup>, 21<sup>st</sup> century development. It is probably not to be found in the debates around the Statute of Elizabeth.

**MR GUNN:**

Absolutely, absolutely your Honour and this is I think as 21<sup>st</sup> century attempt to bring the Statute of Elizabeth into –

**WILLIAM YOUNG J:**

Make the statute fit the current ideology.

**MR GUNN:**

Whether one uses the term *ideology* or not your Honour I'm not sure but –

**WINKELMANN CJ:**

Values, just like common law moves always reflect the values of time.

**WILLIAMS J:**

At least the Judge's view of those values.

**WINKELMANN CJ:**

It is the common law.

**MR GUNN:**

I agree, with respect, with both of those points. What the thrust of the Parachin article is about if I can very briefly and doing it violence, attempt to summarise it, is to say that sometimes in a judicial context the Courts have been attempted to reach for public policy as a reason why something is charitable or not charitable and the author's contention is that there is a possible better solution and that that better solution may be found, in part at least, in the concept of human rights values and equal worth value and dignity being part of what a charitable purpose is all about.

**WILLIAMS J:**

I must say that I think for myself the logical difficulty with that, shall we say without be pejorative, motherhood and apple pie submission is what about the people who seek to contradict that, why do they not get treated the same as the people who support it in a human rights context?

**MR GUNN:**

That is, if I can break that down into two possible responses. The first one is that there is no value pro or anti the side of the debate. In other words you are not saying something is charitable because you are on – you are advancing a particular view on something or opposing a particular view on something. The question for the decision maker, whether that is the registration board, a court is, is there a public benefit here and is it a public benefit in a charitable sense and the public benefit in an organisation that is representing human rights or promoting human rights or at least doesn't seek to undercut human rights may be more readily ascertained that an organisation that appears to have amongst its objects, purposes that are either in contradiction to aspects of human rights or are neutral in that regard.

**WILLIAMS J:**

Well if as Justice Simon France did at his paragraph 65 said this is exclusionary and therefore can't be of public benefit, if it is inclusionary per Parachin, and it would have been, the problem with that proposition is that it gags the contradictor which is itself anti-democratic.

**MR GUNN:**

The gag point is addressed later in the submissions in terms of the subsidy point your Honour.

**WILLIAMS J:**

I'm not saying gags in the sense that it is costing them 33 cents in the dollar or whatever it is. It is more expensive to contradict than it is to propound, why is that fair?

**MR GUNN:**

The fairness lies in being able to establish either self-evidently or on the evidence that you are – your objects are working towards the public benefit in a way that the law has decided is charitable and that is not, with respect, just a reference back to the statute of Elizabeth and the marriage of poor maids and things like that, there is a much more contemporary analysis of what that means in the cases that are in front of your Honours and the submission from the Attorney is that that remains a valid and useful fit for purpose test. It doesn't disqualify people who may be on various sides of the debate but it means that everybody must establish a degree of public benefit in the charitable sense.

**WILLIAMS J:**

Yes but the problem I have with that is that by putting a contrary argument in pursuit of free speech, you are by the reasoning in paragraph 65, excluded from charitable status. Now how is that helping project Aotearoa?

**WINKELMANN CJ:**

And you would say you're not, wouldn't you, Mr Gunn? You simply have to show that the argument, the advocacy you're following or propounding is of public benefit. It doesn't matter if it's a contradictor or a propound – you know, contradicting one course of action or proposing another. It's simply the fundamental question is public benefit and why should taxation support something which is a public ill, such as discriminatory conduct.

**MR GUNN:**

Public benefit in the charitable sense, your Honour, and that's certainly the Attorney's submission. The argument about the pros and the cons perhaps can be looked at in the abortion context. There is a neutral approach, it seems to me, taken by charity law towards those organisations that are either pro-abortion or anti-abortion, and there's no value given to pro or anti views on abortion. The question is can you, as an organisation seeking to advance views on that topic, establish a public benefit in the way that the law has accepted is charitable and that in the case of the Auckland Medical Centre Trust meant that the proponents of that trust were able to point to an educational role, I think also a health-related role in those circumstances, and the Court accepted on the evidence public benefit could be made out in a way that they didn't accept could be made out in the *Molloy* case. So the –

**WILLIAMS J:**

Yes, you can see why that would be so. By and large fetuses don't have rights, particularly not human rights. So I'm talking about where public benefit is justified on a human rights basis and lack of public benefit is based on a contradiction to human rights basis. But what the danger is that you can unfairly tilt the debate in a democratic society in a way that causes a group of people within that society, a genuine group of people whatever you think of their views, to feel unfairly discriminated against and excluded.

**MR GUNN:**

Disenfranchised.

**WILLIAMS J:**

Disenfranchised. I just wonder why we would want a charities law like that.

**MR GUNN:**

Your Honour, I think I've gone back to the public benefit and the need to –

**WILLIAMS J:**

Okay, okay, you don't need to repeat yourself.

**WILLIAM YOUNG J:**

Could I just put that slightly differently, although picking up on the point Justice Williams has been making. Let us say we had a foundation set up for the purpose of advancing human rights for all but with a particular focus on a series of themes that are antithetical to the ambitions of Family First. Now you would say, well, each trust would have to be looked at on its merits but would probably say that because the hypothetical trust is advancing human rights, is against discrimination, it would be easier for it to show a public benefit than a trust like Family First which, in a sense, is trying to hold the line. I mean that is the corollary of what you're saying, isn't it?

**MR GUNN:**

That is correct, your Honour.

**WILLIAM YOUNG J:**

So one side of the debate is getting advantaged, as it did in relation to abortion.

**MR GUNN:**

That's also a proposition I accept, your Honour, and my answer to that is that it is easier on the evidence for some charities than it is for – or some entities – to establish charitable status than others. If you're offering charitable relief to a group, if you are looking to operate on behalf of a disadvantaged group, it's likely to be easier. So these are essentially means of weighing the evidence,

the purposes of a charity and it will be easier for some entities to achieve that status than others.

**WILLIAM YOUNG J:**

So be easier for entities on one side of the debate to establish it than for entities on the other side?

**MR GUNN:**

I wouldn't go so far as along the line with that proposition, your Honour. It seems –

**WILLIAM YOUNG J:**

But it was in the abortion cases.

**MR GUNN:**

Well the abortion cases we are discussing in a very black and white way, if I may put it that way. There was a reference from the Court earlier today about the importance of framing the purpose and the activities of an entity and I think that is also an important consideration here. To some extent, as we have already examined, the purpose of an entity is of critical importance in determining whether it should get charitable status or not, so depending on what its purpose is, that will be relevant to any finding that is made.

**WILLIAM YOUNG J:**

But at one level the purposes are exactly the same, they are to advance views on matters of social significance. So on that level the purposes are identical, it's just the particular views are different.

**MR GUNN:**

And in the absence of, and going back to the abortion example again, in the absence of anything else, if there were two organisations, one pro-abortion, one anti-abortion and everything else was equal, then in my submission neither is charitable.



**WINKELMANN CJ:**

And we wouldn't have any difficulty, would we, in saying that a charity which proposes the idea that people who are red head should not be able to be married, is not of public good, so why would we have any difficulty also resisting the idea that a charity that proposes the idea that same sex marriage is not as important as marriage between a husband and wife?

**MR GUNN:**

It goes back to the social compact, the subsidy, with respect, aspect of the argument and the fact that by registration, there is a benefit and a status that has been conferred on these organisation which they do not need to pursue and I do not underestimate the financial point that Justice Williams is making. Plainly there is financial benefits here but the entities that seek charitable registration are entering into a form of social compact in my submission and in order to achieve that recognition, there is some constraints on what they can put themselves forward.

**WINKELMANN CJ:**

And the law has developed a knowledge that how it defines a charitable trust has implications for public funds being effectively allowed to subsidise their activities.

**WILLIAMS J:**

But the contrary proposition is that banning redhead marriage is mad but focuses on the traditional family and so on, are views expressed by a significant proportion of the community. They are not whether they are consistent with human rights legislation or not, they are not mad, they are relatively mainstream views, even if there is a lot of disagreement about it. It seems to me dangerous to discriminate against that view in terms of our constitution and political arrangements as a democracy.

**MR GUNN:**

The registration as a charity and again I'm not sure that I can take your Honour's point any further, but registration as a charity is a distinct point from

expression of a view. You can express a view and nobody is suggesting that the views that Family First express of whatever sort, shouldn't be expressed or can't be expressed, that to take up the Court of Appeal's point that they were illegal views, they are not. The question in my submission is, is Family First able to display that level of public benefit in a charitable sense that qualifies it for registration?

The submissions, and I will very quickly go through these because I am conscious of time, but the submissions at paragraph 18 and following, page 18, and onwards, talk about the analogy cases and whether an analogy can be made out and make the point that there is no appropriate analogy in the Attorney's submission and there is a range of what's been termed the moral improvement cases. I don't propose to spend time on those cases but the – because the submissions are there and your Honours will have seen them.

In terms of just looking again at the Court of Appeal's decision, the point that's made at paragraph 74 of the submissions is that the majority's conclusion in *Family First* does not identify whether or how Family First's purposes and views are of benefit in the way the law recognises as charitable and they rely instead on its exercise of free speech and political discourse which is not the test, and I think that perhaps is a submission that sums up some of the discussion I was having with Justice Williams before.

At page 20 of the submissions the other substantive submission that's made is that Family First is not charitable under an advancement of education head, and that proposition is advanced for more than one reason. The first one is that the 17 reports, and there seems to be agreement now with my friend about the number of those reports, I think the minority in the Court of Appeal thought it was 21 but our count is 17, the test on whether such reports constitute a charitable advancement of education head is set out in *re Collier*, a case I've mentioned, also in *Vancouver Society of Immigrant and Visible Minority Women*, and the submission is made at paragraph 83 citing from that case that if "information or training is provided", and they say "in a structured

manner”, and I accept, your Honours, that there is scope for arguing how structured, what sort of manner, but the key in my submission is the next part of that citation, is the information or training being provided for a genuinely educational purpose, that is to advance or the abilities of the recipients and not solely to promote a particular point of view or political orientation? If it passes that test, the Canadian Supreme Court said, then it may be properly be viewed as failing within the advancement of education. The Attorney that in this case that test is not met.

The reports that we have sampled are commissioned and disseminated to support Family First’s point of view. They are used to persuade the reader to Family First’s point of view on the causes they address and I took your Honours to the euthanasia report which is a case in point where an author concludes and euthanasia should not be supported. That is not to say that that is not a valid point of view, it is not to say that it is a view that shouldn’t be expressed, it is just whether the expression of such views and the use of such reports meets the advancing education charitable purpose and as I have indicated, in the Attorney’s submission it does not.

The other point that is made is one that was made by the minority in the Court of Appeal and that is that even if Family First had a charitable educative purpose it is on the evidence ancillary to its primary purpose which is support for the traditional family.

**WINKELMANN CJ:**

It seems Justice France seemed to think that that was conceded that the predominant ground was support for the traditional family.

**MR GUNN:**

And in fact I think his conclusions was that that was his understanding but in case it wasn’t, he was incorrect.

**WINKELMANN CJ:**

Yes, I don’t know if any one has told us if it was in fact a concession.

**MR GUNN:**

My answer to that question and the question maybe better addressed to my friend, but certainly my response to that would be that the litigation at the High Court, the Court of Appeal level has been conducted throughout on the basis that Family First is an entity which is looking to support the traditional family as we have discussed it.

I have talked about the difference between expression of views and subsidised expression. Those authorities are mentioned in the submissions and I don't propose to deal with them beyond the written submissions.

The argument that incidental wider benefits might flow from the fact of political advocacy in itself, irrespective of the end that is advocated has been advanced, as the Attorney understands it by the respondent and by the intervener and the suggestion is made, it seems, that incidental benefits may provide sufficient public benefit to satisfy the charitable purposes test. The reasons set in the submissions that is a proposition that the Attorney does not accept.

The implications of the law change that is sought, and I am now at page 28 of the submissions, your Honours, is something that we touched on earlier today and the question of whether or not there are implications is something that I discussed with your Honours. The submissions are there and the authorities are there, the Attorney's position is that the fiscal impact of the changes to the law that Family First seeks are not incremental or an updating, the fiscal impact is potentially very broad and the social impact is of equal significant because of the potential for societies and organisations to seek to take advantage of any such extension and it is not just the racist societies, for example, it is political societies, it is commercial entities who may yes we would like to express our views on this issue or that issue and we also think that we should be entitled to state subsidy in the course of doing that.

Your Honours, I will leave the submissions at that point unless your Honours have any questions for me, with one just brief interpolation and that is in terms

of some of the material that was put up by way of electronic hand up last night. I mentioned at the outset that I had put up the convention or the full copy of the convention on the rights of the child which is referred to in summary form in the bundle of authorities. The reason I did that, and I also have attached to that a committee on the rights of the child general comment too. And I don't want to take due time over this, but to make the point that in the convention itself at article 1 and 2, there are prohibitions on discrimination of any kind, including a parent's or legal guardian's status and *status* has been interpreted to include marital status and sexual orientation.

**WINKELMANN CJ:**

Sorry what article was that?

**MR GUNN:**

That was that article 2.1 and article 2.2 Ma'am of the convention. There is also, in the convention, a prohibition at article 37A on no child being subjected to cruel, inhuman or degrading treatment or punishment and in the general comment that is also being put up to your Honours, the point is made that, at paragraph 11 of that general comment, that the definition of corporal or physical punishment is any punishment in which physical force is used and intended to cause some degree of pain or discomfort however light. I don't take the point any further than that, your Honours, other than to say that there are reasons why an argument can be made that Family First's activities are not as consistent with that convention as their submissions might have suggested. I am conscious of the fact that it is four minutes to three Ma'am. I will pass over to my friend.

**WINKELMANN CJ:**

Thank you Mr Gunn.

**MR BASSETT:**

May it please your Honours, I trust that have before you my outline of oral argument?

**WINKELMANN CJ:**

Yes we do Mr Bassett.

**MR BASSETT:**

Sent in this morning. In oral argument I will be submitted as follows, it is paragraph 2 and following in my synopsis of oral argument. The key questions in my submission in this appeal are firstly, 2(a) of my synopsis, whether or not Family First's trust deed purposes are beneficial to the community and I do wish to just define what I mean by that because there does seem to be an ambiguity in the judgments in terms of the use of the word "public benefit", so I just wish to define my reference to the purposes requirement. If I can refer to the footnote 1, reads as follows: "For a trust to be charitable, its purposes must be for the relief of poverty, for the advancement of education, for the advancement of religion, that is within the first three heads, as within the spirit and intendment of the preamble, and therefore presumed beneficial to the community or for any other purpose beneficial to the community", in other words within the fourth head by analogy with decided cases.

Now I have in that first paragraph 2(a) and in the footnote deliberately used the words "benefit to the community", rather than "public benefit". The reason I have done that is because if one uses the phrase "public benefit", in relation to the purpose requirement and that there is an ambiguity created as to whether or not one is referring to 2(a) of my submissions or 2(b). So when I refer in this oral presentation to the purposes requirement, I will be referring to the phrase "benefit to the community", which is indeed a phrased used in section 5 of the Act, the Charities Act, and it also the phrase used in the key case *Pemsel*, it is at tab 31 of your Honours' bundle. The phrase used in *Pemsel* is "beneficial to the community", rather than "public benefit". I think the origin of the use of the phrase "public benefit" stems from the earlier case, that is the *Morice v Bishop of Durham* (1804) 9 Ves Jun 399, 32 ER 65; (1805) 10 Ves Jun 522, 32 ER 947 case, that is at tab 55 of the bundle of authorities and that case refers to public utility which seems to be where the phrase "public benefit" has come from. So regarding 2(a) purposes

requirement, I shall be referring to “benefit to the community”. Then there is a second –

**WINKELMANN CJ:**

Do you say there is a difference?

**MR BASSETT:**

No I don't say there is a difference, I was simply using the phrase “benefit to the community” to distinguish the reference to “public benefit” in the second limb of the test. The second limb of the test is the benefit to the public requirement and the question there is will the pursuit of such purposes benefit the community or a section of the community? And if one flicks down to footnote 2, that is simply the requirement that the trust in question must not be a private trust in that the class eligible to benefit must constitute the public or a sufficient section of the public, that is the public component, and (b) confer a benefit on the public or a section of the public, that is the benefit component.

Now there are a number of cases in relation to the subparagraph (b), for example the *Oppenheim v Tobacco Securities Trust Co Ltd* [1951] AC 297 case which is in the bundle I think at tab 63, where the question was whether or not employees of a large company were a section of the community or was it a privately held trust effectively. There is also I think a reference in the *Latimer* case which is tab 49, where the similar question was raised in relation to hapū, in other words were they a section of the community or not.

So my submission will be in this case that the 2(b) limb of my second paragraph is satisfied. In other words it is quite clear on the facts that Family First is not a private trust, it seeks to confer a benefit on the community or a section of the community and the public nature, if you like, of the activities and the purposes of Family First are satisfied in relation to the second limb, the 2(b) limb.

I can come now to paragraph 3 of my synopsis. I submit that Family First's trust deed purposes, after the advancement of education as held by the Court

of Appeal, and therefore the purposes requirement is satisfied and if so, 3(b) of my synopsis, the benefit to the public requirement is satisfied, as held by the Court of Appeal, as Family First's advancement of education of the public is by dissemination of reports, a virtual reading room, generating public debate, the promotion and participation of public discourse.

So in my submission the key issue in this case, after I think six previous decision makers, there has been two, the Charities Registration Board, twice in the High Court, once in the Court of Appeal, I think is number 6, the issue really comes down, in my submission, to one issue and that is whether or not Family First exists for the advancement of eligibility document. In my submission, if it does, then Family First is entitled to charitable status and that would conclude the case by way of dismissing the appeal in my submission. As I understand it, having read the submissions –

**O'REGAN J:**

Can I just stop you there? So are you not claiming the fourth ground as well?

**MR BASSETT:**

That is a backup argument but my submission is that if it can be established, and I submit that it can be, if the advancement of education is established under the 2(a) limb of my synopsis, then that is the end of the matter. You don't have to go on to the fourth head and consider most of the issues that have been raised by my learned friend in his submissions. I think the first 20 pages of his submissions relate to the question of the fourth head. I think that the submissions in relation to the point that I am raising or addressing or focussing on is just simply the paragraphs I think at 79 to 90, some 15 or 16 sentences in my submission is all I have to answer.

As I understand it, the Attorney-General's and the Charity Board's objections, this is paragraph 5 of my synopsis, their objections or alleged disqualifications to this conclusion are: "(a) Insofar as Family First's educational material advances viewpoints it is non-charitable propaganda and cause advocacy." And I have given the references there in the deregistration decision.



Footnote 3, tab 3, sorry volume 3, tab 93, and I have given the document number there is the reference at paragraph 47 of the Charities Registration Board to propaganda.

In relation to the Attorney-General's submissions dated the 6<sup>th</sup> of May 2021, the objection regarding education is generally at paragraph 79 to 80 and those paragraphs outline the viewpoint objection at paragraphs 81 to 88 and also at paragraphs 3.1 and 3.4 of the introduction to those submissions. However, as has been referred to earlier today, at paragraph 87, the Attorney-General does now accept that Family First's reports are: "Of educative value and meet the minimum standards as set out in *Collier*." And by way of reply on behalf of Family First also referred to paragraph 74 to 84 of the Court of Appeal's decision. So that is the first, that is 5(a), that is the first objection as I understand it by the Attorney-General that the Family First educational material advances viewpoints.

5(b), the second objections, as I understand it, is that Family First's principal purpose is asserted to be, is to support a viewpoint of traditional family as the only or optimal unit and that is footnote 4 and I have given the references there where that assertion is made. In other words that its purpose is to support traditional family as the only or optimal, in other words lobby for the traditional family as only or optimal and in reply I would say or submit that there is no such purpose in Family First's deed and there is no such campaign in Family First's activities to achieve that end. In my submission the burden is on the Attorney-General to demonstrate that the Court of Appeal judgment is wrong on the point of education. My submission that the onus is on the Attorney-General to point to evidence to substantiate and justify its assertions.

Now I come to the Fuller reply, these are at paragraph of my synopsis. My first submission is that the Attorney-General's objections are not twofold. In my submission they are on in the same. Secondly, paragraph 7 –

**WINKELMANN CJ:**

Well is that all you are going to say on that point?

**MR BASSETT:**

No I have got a lot more to say on that point, your Honour, during the course of this afternoon and tomorrow.

**WINKELMANN CJ:**

Good, I am pleased because I wasn't understanding your point.

**MR BASSETT:**

Secondly, that the purpose for which Family First exists is to support marriage and family by seeking to (a) articulate a more complete understanding of marriage and family as foundational to a strong and enduring society and (b) articulate a greater awareness of factors which affect the stability and enduring nature of marriage and family. Therefore, in my submission, Family First in addressing issues as to how society treats the aged, the sick, the young and how society responds to issues of drug, alcohol dependency, pornography, family structures, gender issues, correction of children, daycare provision, child abuse, sex education, is all entirely consistent with the fundamental educational purpose of promotion of a more complete understand of marriage and family in society and a growing awareness of the factors that affect the stability of family.

**WILLIAMS J:**

Your proposition is really that engaging in public debate and discourse, which is a big chunk of what Family First does, is education?

**MR BASSETT:**

Correct Sir.

**WILLIAMS J:**

Wouldn't that open up all political speech?

**MR BASSETT:**

No because Family First does a number of other things and primarily the key distinction does seem to be, as set out by Justice Kiefel, at paragraph 68 and

69 of the *Aid/Watch* decision that was affirmed by – and *Greenpeace* [2015] in this Court, where an entity is simply seeking to assert its own views and makes no attempt to engage in the commissioning or dissemination of research or reports, then yes that may be a situation where it is just an assertion of its own view and therefore non-educational, but that is not this case in my submission. This is a case where I have got I think five different ways in which Family First engages in the educative process. If I can just try and refer to them. One, commissioning and dissemination of reports, two, by its virtual reading room which is the reposting on its website of many hundreds, thousands of views right across the spectrum, from other commentators, not generated by Family First.

**WINKELMANN CJ:**

So these are the ones that you have taken out of the chart?

**MR BASSETT:**

No, no your Honour, those are the ones that are identified in the chart as being items that were not generated by Family First but were reposted, in other words generated by other mostly mainstream media which are referred to or listed in schedule 1, at the very back of my submissions, my main submissions. There is a whole list of them. The *Guardian*, *ODT*.

**WINKELMANN CJ:**

So it's like an editorial service, it is kind of curating information and republishing it, is that what you are saying?

**MR BASSETT:**

Yes it is like a virtual reading room and akin to the notion it was found to be charitable as an amenity in the *Re Scowcroft* [1898] 2 Ch 638 case which is referred to in my main submissions.

**GLAZEBROOK J:**

You say views right across the spectrum, is that correct? So do you views that say the traditional family isn't the only way, in fact other ways are better? I didn't understand so.

**MR BASSETT:**

Well there is two points to raise in relation to that. There are contrary views in schedule 1 attached to my submission which sets out all of the items, as I understand, of all of the items in tab 313 and 314 of the case on appeal but more importantly than that, there is another key feature which was not mentioned by my learned friend but which I do wish to focus on and that is that the items in schedule 1 or in tab 313 and 314, are all selected by the Charities Registration Board, not put forward by Family First. In other words the Charities Registration Board has selected the material and there is no suggestion that somehow this selection is representative of what is on Family First's website. So in a sense the graph really is a self-fulfilling prophecy if you like. They have selected the material.

**WINKELMANN CJ:**

Yes. But you have the opportunity to put the other material to balance it, don't you?

**MR BASSETT:**

Well yes but the material is available, was publicly available on the Family First website.

**WINKELMANN CJ:**

Yes but you have the opportunity to put it before the Court, so have you put it before the Court?

**MR BASSETT:**

Yes but that was not the basis upon that material was selected, as I understand it, it was selected by the Charities Registration Board at their –

**WINKELMANN CJ:**

But can you answer my question, did you put any material before the Court to balance it?

**MR BASSETT:**

One, firstly, I was not involved in the case at that early state in 2012.

**WINKELMANN CJ:**

I mean you as in your client, sorry Mr Bassett, just to be clear.

**MR BASSETT:**

Can I come to that? It is dealt with in my submission. In my submissions I do refer to the fact that the material was not going to be put before Justice Collins or France, in fact objection was taken by senior counsel and it is recorded in Justice France's judgment, objecting to the material going in but it was allowed in only on the basis that it was material that had been before the Charities Registration Board when they made their second deregistration decision. So wasn't, as my understanding, it was not advanced before the Court as some sort of probative evidential basis for some finding that, you know, they hadn't provided a – or that they biased, Family First was biased in the way it presented material.

**WINKELMANN CJ:**

Nevertheless since at least the High Court, it has been planned that this is the evidential basis on which the Court is proceeding, so there has been ample opportunity to correct that.

**MR BASSETT:**

Well no if I can refer to Justice France's decision. I am not sure that I can find the reference straight off but I will see if I can just as we speak. It may be something that I have to come back to. I may have to come back your Honour on that particular point but main submissions do take issue with the entry or the adducing of that evidence into High Court before Justice France and my understanding, it was not advanced as some sort of probative evidential basis

as being representative of what was on Family First's website. That is the point I make.

**WINKELMANN CJ:**

Well I mean what are you asking us to do with that?

**MR BASSETT:**

Put it to one side.

**WINKELMANN CJ:**

Well but it is actually –

**MR BASSETT:**

No put it to one side in the sense of it being representative. I accept that it is there and we are all referring to it.

**WINKELMANN CJ:**

It is very difficult to do that.

**GLAZEBROOK J:**

We have no idea whether it is representative or not, it is put in front of us, so if it wasn't representative, then your client should have said so.

**WINKELMANN CJ:**

I mean you could have filed a cross appeal in relation to the – in the Court of Appeal in relation to the admission of that evidence I guess. It is an issue that should have been pursued at the Court of Appeal level, not here.

**MR BASSETT:**

Well turn it round the other way and say there is no evidence before this Court that it is representative. It was put in on the basis of it was the evidence that was obtained, sourced by the Charities Registration Board when it made its decision. That was the basis upon which it was advanced and that is recorded in Justice France's decision. I can't find the paragraph.

**GLAZEBROOK J:**

Well if they made a mistake when they were looking at that material, then on appeal you should have said they made a mistake, it wasn't representative and therefore you should have put other material in to say they made a mistake, shouldn't you?

**MR BASSETT:**

Because it didn't come into the High Court on that basis, as I understand it.

**GLAZEBROOK J:**

Well it did, because it came to the High Court on the basis that the Registration Board had said it wasn't charitable partly on the basis of that information that was before it.

**WINKELMANN CJ:**

All right in any case Mr Bassett, so you have said that we should proceed, even if we don't accept your admissibility point, we should proceed on the basis, you say there is no evidence it is representative?

**MR BASSETT:**

Correct, that is what I do say and I say it is self-selected by the Charities Registration Board and therefore the graph and everything else just flows from that selection process.

**WINKELMANN CJ:**

Well just to be fair to you, there is some difficulty with the argument, so you just – I just highlight there is some difficulty with your argument in that regard and I think you are clear about that.

**WILLIAMS J:**

Is it called "The virtual reading room", or is this your tag?

**MR BASSETT:**

No, no that is a phrase tagged, if you like, by counsel, having regard to the *Scowcroft* decision which I will come to later, where it was held that the provision of a reading, that was a physical reading room, was for, you know, was a benefit to the community and it is also referred to in various texts as well, the *Picarda* text. It may also be in *Dal Pont*, the Australian text.

**WINKELMANN CJ:**

I note that when the charity was first formed it was called a lobby, it was called the Family First Lobby.

**MR BASSETT:**

Yes it was indeed.

**WINKELMANN CJ:**

So that was how it was conceptualised in the –

**MR BASSETT:**

That was the name that was given to it but as is referred to *Greenpeace*, paragraph 69, labels can be and are unhelpful, so I would say that whether or not –

**WINKELMANN CJ:**

Can be unhelpful. Sometimes they can be incredible helpful.

**MR BASSETT:**

Can be unhelpful your Honour but as my learned friend has done throughout his submission, he has tagged and labelled Family First's activities as advocacy. I am saying that tag takes the submissions of the Attorney-General a very short distance, if any, and it is more important to look at the deed, which we will come to a little later and when one looks at the deed, one sees that the deed on this proper construction is clearly, in my submission, of educative purpose.



So if I can just go back to my oral synopsis, this is paragraph 9. It is submitted that it is legitimate – oh no perhaps if I can, I did just stop half way through the list that I was giving Justice Williams, I said first of all the five ways in which Family First advances education, one was commissioning and disseminating of reports, two the virtual reading room.

**WINKELMANN CJ:**

Is this in your submission somewhere?

**MR BASSETT:**

No this is just an oral response to a question.

**WILLIAMS J:**

This is in the context of a discussion about whether what you were really saying was political discourse is charitable.

**MR BASSETT:**

And I was saying no there is more to it than that and I had firstly, that Family First commissions and disseminates reports, secondly, has a virtual reading room in the nature of *Scowcroft*. There is also a reference I did wish your Honours to note that in *Greenpeace* [2020] at paragraph 116(a), Justice Mallon says that such a reading room as there was in the *Greenpeace* case, was a valid advancement of education, so I would rely on that paragraph as well.

**WILLIAMS J:**

Was that a physical reading room?

**MR BASSETT:**

No that was a virtual one as well your Honour. And then as a third ground, is that Family First generates public debate by participating and encouraging public discourse and that fourthly, Family First brings matters to the attention of the public, attempts to lay out pros and cons, strengths and weaknesses in

order to maximise the ability of citizenry to make up their own minds about these issues that they raise.

**WINKELMANN CJ:**

So what was fourth? Was that fourth?

**MR BASSETT:**

That was four.

**GLAZEBROOK J:**

Where is that sorry?

**MR BASSETT:**

This is just an oral –

**GLAZEBROOK J:**

No, no I understand that, sorry I meant where does it bring things to the attention of the public on the website?

**MR BASSETT:**

And by its media releases and by engaging in op-ed articles in newspapers, by making submissions to select committees, all of things are bringing matters to the attention of the public, attempting to lay out pros and cons, strengths and weaknesses and maximise the ability of citizenry, including MPs to make up their own minds about some of these issues that are raised and fifthly, this is a very general add-on but I would say that or submit that Family First operates and provides a clearing house of ideas for its publications and activities to contribute to and enhance public discourse.

**WINKELMANN CJ:**

What was the fifth sorry?

**MR BASSETT:**

That was the fifth.

**WINKELMANN CJ:**

No can you repeat it for me sorry.

**MR BASSETT:**

It is submitted generally as a fifth catchall that Family First operates and provides a clearing house of ideas.

**WINKELMANN CJ:**

So it's repeating the other ones.

**MR BASSETT:**

Through its publications and activities to contribute to and enhance public discourse which is in stark contrast, as I was saying to Justice Williams before, contrast to the description given by Justice Kiefel in the *Aid/Watch* case at paragraphs 68 and 69, where there was no attempt by the entity *Aid/Watch* in that case to do any more than just assert its own views and made no attempt to commission reports or disseminate, no attempt to educate.

**WINKELMANN CJ:**

Hang on, but you say commissioning reports and disseminating them but to what extent are you commissioning reports and disseminating them because that is found to be quite a low level by Justice France isn't it? Justice France said it was at a very low level, the commissioning of reports, compared to the overall activity.

**MR BASSETT:**

Well no your Honour, I would submit that those reports are very, very significant pieces of work. There is a reference in the case on appeal to I think, I'll have to check this with the client during the overnight break, but as I understand it there is in fact even a reference to the amount of public discourse that was generated by the production and dissemination of these reports, they weren't –

**WINKELMANN CJ:**

But that's not the point I'm asking you, I mean because a lot of the time it is just disseminating its own views and you say but it also commissions reports which just happen to accord with its own views but to what extent does it commission reports? It commissioned the –

**MR BASSETT:**

Well there are 17 reports in the case on appeal. I will also come to this in my main submissions, that there is now evidence before the Court by way of confirmation from the authors of those reports that they were not subject to editorial interference, that they were able to give their own views in those reports and they weren't trammelled in that sense.

**GLAZEBROOK J:**

Can you help me, I am fine with your commissioning and dissemination of reports and I am relatively fine with the virtual reading room in terms of saying that is the advancement of education, I have to say subject to, in terms of the virtual reading room, it being a selection of material that is in fact advocacy rather than just providing information, but I am not sure about public debate, public discourse and clearing house of ideas as being education so much as advocacy. So do you want to assist me on that aspect?

**MR BASSETT:**

Yes.

**GLAZEBROOK J:**

It is probably asking you to assist on the difference between education and advocacy. So probably similar to what Justice Williams was asking.

**MR BASSETT:**

Perhaps if I can take the Court to volume 1 of the authorities and the *Aid/Watch* decision. There are some pertinent paragraphs in that decision.

**GLAZEBROOK J:**

So is this an indication we should be going with the majority, not the minority?

**MR BASSETT:**

No, no this is not an *Aid/Watch* invitation for the Supreme Court even to review the *Greenpeace* decision, this is entirely on the basis of advancing education and although the rule 20A notice was given in January, my thoughts have been refined since then. That is still a backup option, the fourth head is a backup option.

**GLAZEBROOK J:**

No I understand, so this is really looking at – you are going to tell me the answer to what I have asked, yes.

**WINKELMANN CJ:**

What tab is the *Aid/Watch* decision?

**MR BASSETT:**

15 your Honour. I don't overly place support on these paragraphs, I am just simply endeavouring to answer the question from Justice Glazebrook in order to hopefully illustrate or illuminate the answer to the question. Paragraph 69, the last sentence in the middle of that paragraph 69, it is on page 565 of the decision, the sentence commencing: "However reaching a conclusion of public benefit may be difficult with the activities of an organisation largely involve an assertion of its views as is here the case. It might have been otherwise were those activities and the stated purposes capable of being characterised for the advancement of education or as having some other evident benefit to society." And then down to the bottom of the page, paragraph 73: "It should not be assumed that the Courts will be unable to discern a public benefit in trusts concerned with agitation for reform, at least where they encourage public debate or education by way of disseminating knowledge or information upon legitimate topics."

And then paragraph 86, on the second to last page of the decision, this is speaking of the activities of *Aid/Watch*: “If they”, that is the activities of *Aid/Watch*, “were directed to the generation of public debate about the provision of aid, then rather than acceptance by the government and its agencies of its views on the matter, the appellant may well be said to be promoting education in that area.” So I hope that those couple of paragraphs are of assistance to the Court by way of –

**WILLIAMS J:**

Can you give me the last paragraph number please?

**GLAZEBROOK J:**

I don't think it was the paragraphs you gave us.

**WINKELMANN CJ:**

It is 86.

**MR BASSETT:**

There is also a helpful comment at page, sorry paragraph –

**GLAZEBROOK J:**

So you say –

**MR BASSETT:**

I am simply saying that public discourse can be –

**GLAZEBROOK J:**

I understand that submission. So it is public discourse rather than dissemination of own views. What you have got to meet is that the assertion of the Attorney here is that it is dissemination of own views. So what do you say about that?

**MR BASSETT:**

I say that the advancement of a viewpoint is not a disqualifier for education and that is my next point in the oral synopsis.

**WINKELMANN CJ:**

Well I mean yes, and there is also the point there is quite a high level of advocacy isn't there, and you also have the difficulty, even under this first heading as to whether advocacy of its views is at such a level that it cannot be called ancillary, that it is not ancillary to educational purposes?

**MR BASSETT:**

No, with respect the answer would be that advancing a viewpoint is inherently part of an educational function and I would like to develop that in the next couple of paragraphs if I may.

**GLAZEBROOK J:**

Well I am not sure that you get any support at all from what Justice Kiefel says there, in fact quite the opposite because what I understand her saying is if you are advancing public debate by which I am assuming she means putting a number of propositions up and having people discern them, rather than putting one viewpoint up, which she says was happening here, then the former could be education and the latter isn't.

**MR BASSETT:**

Perhaps if I can develop my next point if I can about the inherent nature –

**GLAZEBROOK J:**

Well do you agree that is what she was saying or do you say she was saying something else?

**MR BASSETT:**

No I think that she is – I submit that she is indicating that a contribution to public discourse can be of itself part of education.

**GLAZEBROOK J:**

But only if it is not putting forward a particular viewpoint, is my understanding of what she is saying.

**MR BASSETT:**

No I would submit that it must inherent in what she is saying, that to put forward a viewpoint, value education or a viewpoint education is part of education, it is not a disqualification from education.

**GLAZEBROOK J:**

Okay I think we are reading different things into that.

**WINKELMANN CJ:**

Even were that so, it must be a question of fact and degree. It can't be educational just from putting out a whole lot of material containing your own views or 80% of your own views with a few quotes from other people.

**MR BASSETT:**

No I think the answer really is to go back and look at the deed and first of all determine whether or not the purpose is charitable purpose within one of the heads of *Pemsel*. If the charitable purpose pursuant to the deed is established as being one for the advancement of education, then prima facie, on the face of it, Family First qualifies. It is only if the Court wants to dive into and somehow disqualify and in my submission that is effectively what the Attorney-General has done. The Attorney-General has bypassed a clear wording of the deed, taken scant notice or attention of it and dived into its own analysis of the sub-purposes and sub-activities of Family First and found a disqualifying feature which it has then seized on and elevated to the point of a purpose and I submit that is wrong. The correct entry point is through the deed. The correct analysis is through the deed. Does the deed evidence a purpose which is charitable within one of the first three heads? Is it relief of the poor? No. Is it advancement of religion? No. Is it the advancement of education? I say yes and in relation to one of the first three heads, the presumption of benefit to the community is there. In other words if one fits within one of the first three heads, then you have it, charitable purpose is establish. It is only if there is some way of going past that, if there is some need to go past that, to look at that activities, in my submission what the Attorney has done in all of the Attorney's submissions are to bypass the



correct analysis and entry point of the deed and dive into the sort of the thicket if you like behind that and has come up with a –

**WILLIAMS J:**

But the problem with that submission is really that Justice Kiefel seems to be saying that the mere assertion of your own views is not education, there has got to be more. There has got to be a contributing to debate in a way that is more than mere assertion of a position.

**MR BASSETT:**

And it is my submission that that is exactly what Family First is doing, it is –

**WILLIAMS J:**

All right, so articulate that for us.

**MR BASSETT:**

By the presentation of its reports, it is seeking to do the very thing which I have just referred to which is generate debate and public discourse. It is not merely asserting its own views.

**WILLIAMS J:**

So it hangs on the reports?

**MR BASSETT:**

No, no on the broader description that I have given it.

**WILLIAMS J:**

Okay, so just walk through those categories and articulate how.

**MR BASSETT:**

Would I be able to just refer to the next portion of my oral synopsis because I believe it will illuminate the interchange between us, if I may.

**WILLIAMS J:**

Your case.

**WINKELMANN CJ:**

Just before you do that, you were telling us how you have a purpose, is that something you are going to come back to because that is controversy in this case.

**MR BASSETT:**

Yes.

**WINKELMANN CJ:**

But you are going to come back to that, all right thank you.

**MR BASSETT:**

Yes I will do. At paragraph 9, I'm not sure whether I have read this paragraph or not but it is legitimate in my submission for Family First to educate and generate public debate and contribute to and enhance public discourse on issues that affect the wellbeing and stability of the institutions of marriage and family and I refer the Court to those paragraphs of the Court of Appeal's judgment, 92, 109, 117, 122. For the sake of time I won't take the Court to those.

Paragraph 10, although since *Greenpeace* 2015 lobbying if you like is permitted within certain limits, it is my submission that Family First is not lobbying. Its conduct is more accurately characterised through an educational prism and is consistent with advancement of education. In advancement of education it is submitted it is legitimate for Family First to bring matters to the attention of the public, to lay out pros and cons, strengths and weaknesses of marriage and elaborate on the challenges to them, maximising the ability of citizenry to make up their own minds about marriage and family is to advance education and is not lobbying and it is not indoctrination.

As I have already submitted, the last sentence there, Family First promotes a knowledge base and provides a clearing house of ideas through its publications and activities so as to contribute to and enhance public discourse. And this is the point that I wish to come to about the viewpoint

objection. Taking a viewpoint in my submission is the essence or an essence of education, it is not a disqualifier.

**WILLIAMS J:**

The problem is that Justice Kiefel seemed to think it was.

**MR BASSETT:**

No merely, the mere assertion. What I am saying is that if one engages in advancement of education in a way that contains an educational viewpoint, that is permissible.

**WINKELMANN CJ:**

It may be low quality education but it is still education are you saying?

**WILLIAMS J:**

So this may well hang on your statement in the prior paragraph where you say: "Emphasising pros and cons and strengths and weaknesses", right, that is your pitch? You say that Family First in its material emphasises pros and cons and strengths and weaknesses of the family.

**MR BASSETT:**

No it is not as prescriptive as that. One can have a viewpoint where does put a viewpoint in education without necessarily putting the other side. That is perfectly permissible.

**WILLIAMS J:**

Right but you say you put the other side.

**MR BASSETT:**

Well not in every case. I am saying we put forward –

**WILLIAMS J:**

Well if you do, it would be pretty good if you pointed those places out because as you can tell from the questions from the bench, that is not the perspective that is being reflected at you, so you can disabuse us of that please.

**MR BASSETT:**

Well, I will take you to the portions even in schedule 1 attached to my submissions where there are posts of other views contrary to those of Family First that are put up as part of the virtual reading room.

**WILLIAMS J:**

Oh I see, yes.

**MR BASSETT:**

I will take you to those.

**WILLIAMS J:**

But in terms of the OPED's reports, research and so on, do the writers say: "There are some problems with the traditional family, here they are, but on balance the strengths are better, or greater"?

**MR BASSETT:**

Perhaps if I can take the Court through the next paragraph and then perhaps we can engage on that point.

**WILLIAMS J:**

You're not going to answer me?

**MR BASSETT:**

I'm going to answer you preceded by this next paragraph, if I may. My submission is that advancement of education requires arguments as to a point of view. Parliament has declared that universities as a higher educational institute fulfil the role of critic and conscience of society and I have references to the Education and Training Act 2020 that makes that statement at section 268. This is the highest educational institution in New Zealand, universities and wānanga. Both of them are referred to in that paragraph 268 and I will come to it. In my submission, the role of critic and conscience of society requires viewpoints to be taken. It's implicit. So I use the example if a university scholar believes Marxism is the best form of government and writes

a journal article promoting such a view, that does not disqualify it from advancing education. Values-based education always takes a viewpoint. Integrated Christian schools are not disqualified from providing education, nor are Muslim, Jewish, or Steiner schools, nor is a wānanga disqualified by promoting a view about tikanga. Education promotes tolerance and societal progression. Requirement of uniformity of views in education is a regressive step back to the 1600s and the 1800s in my submission. Exclusive of viewpoints creates a belief test. Beliefs are not aspirational in a democratic and pluralistic society.

So my answer is that advancing a viewpoint when seeing a purposed, Family First purpose through an educational prism in terms of the advancement of education as one of the heads, is not a disqualifying feature.

**GLAZEBROOK J:**

Isn't the issue though that what we are looking at is the difference between education and advocacy because advocacy has to be for a purpose that's analogous and advocacy and certainly in Justice Kiefel's view is different from education. So, you can't say we're advocating because of education. You can say we're advocating in relation to poverty, we're advocating after Greenpeace in relation to the environment, we're advocating in relation to human rights.

**MR BASSETT:**

That's the Greenpeace decision in relation to the fourth head whether or not advocacy is permissible or not.

**GLAZEBROOK J:**

It's not just the fourth head, it's any head, isn't it, because advocacy traditionally hasn't been allowed, especially advocacy that's looking to change the law or to change policy. So, traditionally, that wasn't allowed. What Greenpeace have said: "Well, in limited circumstances it is but you have to bring it within the other heads and it has to be a public benefit."

**MR BASSETT:**

Greenpeace was a fourth head primarily –

**GLAZEBROOK J:**

I'm just looking at the scholar who is saying Marxism is the best form of government or that tikanga is not advocating in respect of those. They're educating whoever is at the wānanga in respect of that which is why I was asking you where the line is drawn between advocacy and education?

**MR BASSETT:**

Well my submission is, is that the taking of a viewpoint is not a disqualifier, it's entirely permissible and value-based education.

**O'REGAN J:**

That's the question, isn't it, charitable within the second head, isn't it, or the education head. It's not is it education, it's is it education that qualifies as a charity.

**MR BASSETT:**

Pardon Sir, your voice is a bit low for me, I couldn't quite hear Sir.

**O'REGAN J:**

Comparing it to a university establishes possibly that it is education, but the question is, is it education that is recognised as a charity? It is not the same thing. And you are saying that you can advocate a cause and by definition that is education and that seems to be completely contrary to centuries of charitable law. I mean on your argument any advocating of a cause, in writing and in put into the public arena, is education, isn't it? That is what you are saying.

**MR BASSETT:**

No I am saying that this is not cause advocacy, I am saying it is for the advancement of education.

**O'REGAN J:**

Well you are saying that but you are saying doing that for the purpose of getting your viewpoint across is education, that is what you have told us.

**MR BASSETT:**

No, no what I am saying your Honour is that making a contribution to the debate, a contribution to –

**O'REGAN J:**

Let me just read back to you what your submission says: "Taking a viewpoint is the essence of education", that is what you said.

**MR BASSETT:**

It can be yes, absolutely.

**O'REGAN J:**

So you are saying anyone who expresses a viewpoint is an educator?

**MR BASSETT:**

No, I am saying that if you engage in – firstly one looks at the deed to see whether or not the purpose is a charitable purpose but in terms of what Family First actually does, it is engaging in education by way of its commissioning and dissemination of reports, that is part of its purpose, part of its activities rather. It does spark debate, it does intend to spark debate and contribute to public discourse in that way. It is not a –

**O'REGAN J:**

But on that basis so does anyone who says these are my views on a political issue.

**MR BASSETT:**

Well no it is my submission that Family First does more than that. It contributes, not just materials, if one looks at the amount of material that it has generated and disseminated, I think I am going take the Court to the numbers

of persons that these reports are sent to, over half a million I think from memory. This is not a situation where an entity is simply asserting its own views, far from it. So it is not a cause advocate in that sense and its purposes –

**O'REGAN J:**

Are you saying if it was it wouldn't be charitable?

**MR BASSETT:**

No.

**O'REGAN J:**

Because I understood your submission as saying it is fine to be an advocacy organisation because advocacy is part of education.

**MR BASSETT:**

If one is going the fourth head route, yes then you can attempt to qualify under *Greenpeace* [2015] by –

**O'REGAN J:**

No, no but you are trying to establish the education head.

**MR BASSETT:**

Correct, that is exactly right.

**O'REGAN J:**

So let's just dealt with that. So you are saying, I mean as I read your submission, you are saying advocating in the public in a way that generates debate is education.

**MR BASSETT:**

No I'm not saying advocating, I am saying educating.



**O'REGAN J:**

But educating in a way where advocacy is the essence of it, that is what you are saying.

**MR BASSETT:**

No I am saying that taking a viewpoint is not a disqualifier. The whole case by the Attorney-General, counsel for the Attorney-General has been that it is all viewpoint based. I am simply answering that by saying having a viewpoint is not a disqualifier in terms of education. To be the critic and conscience of society, you have to start with some proposition, otherwise you cannot fill that role.

**WILLIAMS J:**

Isn't your point that advocacy and education are not mutually exclusive ideas, that you can educate and advocate at the same time, in fact you say the market is doing that but advocacy, mere advocacy without an educational element is yelling down a megaphone. Aren't you saying –

**MR BASSETT:**

Yes, mere assertion of one view is not education but that is not what Family First are doing.

**WILLIAMS J:**

So are you pointing to your virtual reading room and your 17 reports as –

**MR BASSETT:**

And the five things I listed before.

**WILLIAMS J:**

The five things that you listed as thoughtful advocacy that makes the grade as education.

**MR BASSETT:**

That is right Sir.

**WILLIAMS J:**

All right.

**MR BASSETT:**

Certainly *Collier*, Justice Hammond in *Collier* makes that point that it is not for the Court to make some determination about the outcome of debates, it is to sieve out improper debates which does not exclude Family First in my submission and let the debate lie where it falls. Now that is in terms of, I am not sure if that was a fourth or a second head case, I just can't remember, I think it was a second head as well as fourth head but we are not advocating in that sense, it is not merely a debate, we are certainly involved in generating debate but it is not a case of a cause advocate merely advancing its own views. It does have some views and I will come onto this tomorrow but the principles on marriage, principles on family, they are not to be elevated to the level of a charitable purpose or of a trust purpose, they are simply statements of belief and statements of what they see are current issues. It certainly reflects the belief held by the trust as it were, but it does not reach the level of being a constitutive or constitutional document for the trust. I am saying that that submission that was made earlier the statement, submission made by my learned friend is wrong with respect, those principles documents are not part of the trust deed, they do not reflect or amount to a trust purpose, far from it. The trust purposes are discerned from the deed and the deed clearly has a thread of an educational purpose and by the way the traditional family and the promotion thereof is not in the deed. Family First does support the traditional family, affirms that as a belief, man/woman marriage, that is a belief if you like and a statement of their belief but it is not a purpose in the deed.

**WINKELMANN CJ:**

So Justice Hammond said that you the educational object must confer some public benefit, propaganda or cause under the guise of education will not suffice and the work must reach some minimal standard and as for research, he said that it must be of a quality that will pass into the store of human knowledge.

**MR BASSETT:**

Yes and that has been, as I understood it, acknowledged by the Crown, page 87 of their submissions. That part of it is acknowledged by the Crown, accepted by the Crown.

**WINKELMANN CJ:**

And they make those points against you I suppose because they say that what your are saying that propaganda and cause is education.

**MR BASSETT:**

No I am not saying that propaganda and cause is education.

**WINKELMANN CJ:**

Well you would say it is viewpoint and they would say viewpoint is cause.

**MR BASSETT:**

The Crown would say viewpoint is cause and propaganda, I submit that what Family First is doing is not propaganda and is not cause. The deed is clearly an educational – evidence of the educational trust and Family First does not step out that trust purpose and even if it did, which is not accepted, but even if that was to be the argument, then that becomes a breach of trust issue or breach of fiduciary duties issues for the trustees. That doesn't invalidate the trust, it doesn't mean that the purpose is no longer charitable.

**WINKELMANN CJ:**

Well it may do because you cannot just hide behind your objects in the trust.

**MR BASSETT:**

No, no but there is no suggestion in my submission that there is anything like that going on here, we are not –

**WINKELMANN CJ:**

No and that is quite –

**MR BASSETT:**

I raise that as a legal repost.

**WINKELMANN CJ:**

And what about the relationship between this material you put out into the world and the obvious lobbying activities that are undertaken or advocacy activities that are undertaken by Family First because there is a plain relationship isn't there between this material and the advocacy/lobbying work that is undertaken?

**MR BASSETT:**

I am submitted, as you know, that the deed is educational and that their activities do not fall outside that and they don't cross the line from being for the advancement of education into cause advocacy, whereas the Attorney's representatives say that it does. That is really where the –

**WINKELMANN CJ:**

Can we just get that submission again because I am finding it a little –

**GLAZEBROOK J:**

I was perhaps wanting to go to the deed itself to say why you say that is educational.

**WINKELMANN CJ:**

Yes so perhaps if you could just repeat that submission though because there is just something about it that I am finding it hard to follow. You are saying that notwithstanding that they then use this material and other material for lobbying and advocacy –

**MR BASSETT:**

No I would not say those words, that is not part of my submission.

**WINKELMANN CJ:**

Well no I am asking you what do you make of the fact. I mean obviously they do lobby because we have seen the submissions they make on legislation.

**MR BASSETT:**

I would say that is a contribution. I say that is part of the contribution towards the general store of knowledge enabling or to maximise the knowledge and understanding of the citizenry, whether it is private citizens or MPs or whoever is receiving the information to articulate a greater awareness of factors which affect the stability, enduring nature of marriage and family.

**WINKELMANN CJ:**

So you would put the lobbying and advocacy within education?

**MR BASSETT:**

I would not call it lobbying and –

**WINKELMANN CJ:**

Well I mean you are making submissions on legislation, what would you call it?

**O'REGAN J:**

You have to call it lobbying because that is what it is.

**MR BASSETT:**

No I think that aspect of it is part of a –

**O'REGAN J:**

Well why are you denying it? I mean there is nothing wrong with making a submission to a parliamentary select committee, I don't know why you are trying to walk away from it.

**MR BASSETT:**

Well it is a democratic right and it is part of the democratic process and Family First is not disqualified by doing so, it is not disqualified from advancing education by doing so.

**O'REGAN J:**

If that is so, why are you trying to walk away from it?

**MR BASSETT:**

I am not endeavouring to walk away from it.

**O'REGAN J:**

Well you keep saying it is not lobbying but it clearly is.

**WILLIAMS J:**

Well lobbying has got a bad wrap these days and it is usually having quiet whiskeys with relevant –

**GLAZEBROOK J:**

Let's call it *advocacy* I think.

**WINKELMANN CJ:**

Well anyway would you say that when you make submissions on legislation, that is education?

**MR BASSETT:**

It falls within the ambit of the charitable purposes of advancing education.

**WINKELMANN CJ:**

Can you just answer the question, you say it is education?

**MR BASSETT:**

Perhaps if I can dwell on that overnight and come back to you with a more considered response in the morning when I commence my –

**WINKELMANN CJ:**

So you say that anything that you characterise as educational, I mean I am not quite sure how you define education then, where do you get support in the caselaw that education can be so broadly defined?

**MR BASSETT:**

Well certainly the caselaw that was referred to by the Court of Appeal in the *Family First* decision favours a wide definition of education and certainly my submission is that what Family First does falls within that. Perhaps if I can come back to the Court tomorrow morning.

**O'REGAN J:**

Can I just ask you before you do, is this the argument that was put to the Court of Appeal and the High Court?

**MR BASSETT:**

I think it is a refined argument. I think it is certainly focussing heavily on education. I think to be candid, as I am obliged to be as counsel, in the High Court there was a focus on the fourth head. I was only involved at that point, just immediately just days before that hearing and I did argue the educational point. I did focus on the deed and those submissions on the deed are recorded in Justice France's decision in terms of the importance of the deed. In the Court of Appeal, they have clearly considered the educational aspect and found that yes there was indeed an educational thread to the Family First deed and they have put that at the forefront of their judgment. It proceeds the analysis of the fourth head. Whether or not – I think there is definitely a refinement of the educational argument in this Court over and above that which was presented in the Court of Appeal.

**WILLIAMS J:**

While you are thinking about this overnight, good luck, you have got me so far as to where I think you say that the line between advocacy and education is blurred, it is not a bright line.

**MR BASSETT:**

I do say that in my submissions.

**WILLIAMS J:**

Yes. What I haven't got from you and what I personally anyway need from you is what are the fundamental characteristics of one as against another, even if they are cumulative, so I can get some sort of compass for what you are trying to say? Because what I am hearing from you right now is advocacy is education. You are denying you are saying that but that is what I am hearing in substance. I need more help.

**GLAZEBROOK J:**

And I probably need help on the actual purposes and why those actual purposes come within education which a related question because until we know the line between advocacy and education, we don't know whether the actual purposes, and I am happy for you not to look at activities, although you have referred to activities when you are saying it is education. So you are mixing activities and –

**MR BASSETT:**

Well let me be clear, I am engaging with the issue of activities because I have been asked to but my primary submission is to look at the deed.

**WINKELMANN CJ:**

Well we are going to come to that tomorrow.

**MR BASSETT:**

And one does not go to activities to make this decision.

**WINKELMANN CJ:**

Well we will hear you on that submission tomorrow. We will adjourn at this point.



**COURT ADJOURNS: 4.01 PM**

**COURT RESUMES ON FRIDAY 25 JUNE 2021 AT 10.06 AM**

**WINKELMANN CJ:**

Morena Mr Bassett, just before you get underway, I thought it might be helpful if I indicate at this point, well first to thank Ms Batrouney for sending us that case in and to note that having reflected on it overnight, the Court thinks we would be assisted by providing a little bit more time to Ms Batrouney, probably half an hour to 45 minutes but we will have to review how we go during the day and we would be assisted if she would – I am not sure if it is Ms Batrouney or – yes Ms Batrouney. And focussing on the relationship or the line between education and advocacy for these purposes. Thank you Mr Bassett.

**MR BASSETT:**

May it please your Honours, I haven't had an opportunity to see or even know that there was an email this morning. Is the name of the case available to me please?

**WINKELMANN CJ:**

Mr Gunn, I don't know if you managed to print out any copies did you?

**MR GUNN:**

Not at this stage Ma'am I am sorry.

**WINKELMANN CJ:**

Mr Registrar, did you manage to – so they went to you on your email Mr Bassett.

**MR GUNN:**

That is correct Ma'am and I believe Mr Bassett may have a copy on his email.

**WINKELMANN CJ:**

Yes, so Mr Registrar is going to print you a copy Mr Bassett.

**MR BASSETT:**

I have now seen the name of the case but I am not familiar with it your Honour. I will have to look at it during the break.

**WINKELMANN CJ:**

Yes.

**MR BASSETT:**

May it please your Honours, I have reflected overnight and endeavoured to prepare answers to the questions that were put to me yesterday but I do believe it is important for me to commence by outlining to the Court what I understand and submit is the test for advancing education. I believe that that will be illustrative and illuminating as to the distinction between advocacy and advancing education. So if I may commence by doing that, paragraph 18 of my submissions, my substantive submissions.

It is submitted that the Court of Appeal was correct in its statement of law regarding the advancement of education, including that modern authority allows for the commission and dissemination of bona fide research as a form of educational charitable purpose. I can just refer the Court to the various cases in footnote 67 of my submissions. The first case there is the *Latimer* case which New Zealand Court of Appeal, and it is at tab 49 of the common bundle of authorities. It is a well known case of *Latimer v Commissioner of Inland Revenue* in the Court of Appeal. It was a case where a trust was held to be charitable where it was providing funds for the commissioning of, indirectly, the commissioning of historical research for materials to be provided to the Waitangi Tribunal and the relevant passage at paragraph 41 of that judgment indicates that the preparation of research and the dissemination of it can fulfil an educative role. It's a situation where those reports were not providing both sides of a debate, but they were providing reports, expert reports usually, so they did advance potentially a point of view and the key point to take from that case is that the advancing of education may be fulfilled by providing reports, commissioning reports, providing reports and disseminating them.

If I can now go to the *Re Hopkins Wills Trusts* [1965] 669 (ChD) case which is at tab 74. This is a case involving a will trust for the search for Bacon-Shakespeare manuscripts. It was a case before Justice Wilberforce involving a finding in relation to the advancement of education and also the fourth head, but principally in relation to the advancement of education at paragraph or page 52 letter H. This is at tab 74. Justice Wilberforce said: "The word 'education'...must be used in a wide sense, certainly extending beyond teaching, and that the requirement is that, in order to be charitable, research must be either of educative value to the researcher or must be so directed as to lead to something which will pass into the store of educational material, or so as to improve the sum of communicable knowledge in an area which education may cover."

**WILLIAMS J:**

Can you give me the page number for that H, I missed the page number?

**MR BASSETT:**

Page 52.

**WILLIAMS J:**

52, thank you.

**MR BASSETT:**

And the reference is at letter H, commencing just before H and finishing just after. The *Hopkins* case which I've just referred to has been followed numerous times, including by New Zealand Court of Appeal, including in the judgment that's now appealed from in this Court, but before I come to that, there's also a reference to it being followed in the anti-aging case at tab 81 of the materials of the common bundle. In tab 81, the anti-aging case referred to research in relation to the possibility of reanimation of living persons after death and in that case, Justice Ellis referred at paragraph 55 and said as follows: "I am inclined to accept Ms Casey's submission that the Board's acceptance that the Foundations have the aim of funding research into

cryonics, and that the result of that research would be publicly disseminated is probably a sufficient basis upon which to allow the appeal.”

Then in paragraph 56 Justice Ellis referred to the *Collier* decision which in turn quoted the *Hopkins* passage which I’ve just referred the Court to. That’s at the top of page 738 of the report and then down in paragraph 57, Justice Ellis says: “The requirement that the research ‘must be so directed as to lead to something which will pass into the store of educational material’ is simply a different articulation of the dissemination requirement that was noted by the Board in its decisions.”

Paragraph 58: “I agree with Ms Casey that what the authorities make clear is that ‘usefulness’ as that term is applied in the cases constitutes a minimal standard...designed only to exclude the ‘nonsensical’ areas of research and study that are demonstrably devoid of merit.” In that case we know that the research that was at issue was the question of reanimation of human beings after death.

And in paragraph 59, Justice Ellis said, made it clear that even fringe views, such as the one at issue in the *Anti-Aging* case, were not to be excluded. No suggestion in that case that it was necessary for the Anti-Aging Trust to produce also reports with a contrary view.

Now the reason why I was – it is partly in answer to Justice Williams’ question yesterday about the need for putting both sides of a debate. I do have examples, which I will come to in answer to Justice Williams’ question, I do have examples which I will come to shortly in relation to the even handedness in some of the reports by Family First.

If I can now just carry on with the law relating to advancement of education. The next case is the *Law Reporting* case at tab 42 and the page is 1046 where the law in relation to the advancement of education is addressed. This case proceeded on the basis or concluded with a finding in relation to the advancement of education and also a finding in favour of the fourth head by

the majority. That was Lord Justices Sachs and Buckley, whereas Lord Justice Russell found only in relation to the fourth head.

Lord Justice Buckley at page 1046 at (b) on page 1046 said in relation to education: "For the present purpose the second head should, In my judgment, be regarded as extending to the improvement of a useful branch of human knowledge its public dissemination." So that was all that was required in relation to the advancement of education as to the *Law Reporting* case. And that is Lord Justice Buckley who was in the majority which found in favour of the advancement of education and the fourth head.

The next case to come to is the *Barralet v AG* [1980] 3 All ER 918 (ChD) aka South Place Ethical Society, that is at tab 25. This again was a fourth head and advancement of education case.

**WINKELMANN CJ:**

Can you just tell me where you are in your submissions because that helps me pick up the name of the case if I don't quite hear it from you.

**MR BASSETT:**

Yes Ma'am, it is still at paragraph 18(a) and it is footnote 67. All of the cases I am referring to are in that footnote 67, except for the *Law Reporting* case which is at tab 42 and also the *Re Koepler's Will Trusts* [1985] 2 All ER 869 (CA) case which I am going to come to in a moment.

**WINKELMANN CJ:**

So *Barralet*?

**MR BASSETT:**

So the *Barralet* case, the reference in relation to the second head of education is at paragraph 927(j), sorry page 927(j). On the questions of trusts for the advancement of education the authorities show that the term *education* is to be construed widely. The *Incorporated Counsel of Law Reporting* case, Lord Justice Buckley in his judgment said, then the Judge simply quotes the

passage that I have just read to you and then goes on to refer to the passage in *Re Hopkins Wills* accordingly which is again just the same reference that I have referred to but that is an important case where both the fourth head and the advancement of education were found and approved and those tests also affirmed.

In the *McGovern* case, which is at tab 52, I don't think that is in my tab 67, but these other cases are again mentioned at footnote 74 of my submissions which does have a reference to the *Koeppler* case which I will come to in a moment but not the *McGovern* case but it is at tab 52 of the authorities.

The *McGovern* case is the or contains the statement of the law that the Court of Appeal referred to in its judgment in 2020 in this case and that portion of *McGovern* can be found at page 352 at letter F, so it is page 352, letter F, Mr Justice Slade and the passage that was affirmed by the Court of Appeal in this case is at the bottom of the page which says that: "A trust for research", and which I submit this trust is, "will ordinarily qualify as a charitable trust, only if the subject matter of the proposed research is a useful subject to study and it is contemplated that knowledge is acquired as a result of the research will be disseminated to others and the trust is for the benefit of the public or a sufficiently important section of the public." He also finds that in the absence of contrary context a court will readily incline to construe dissemination. Well dissemination is not an issue in this case because it is plain on the evidence that there has indeed been wide dissemination.

The *Re Koeppler's Will Trust* is a case at tab 75 of bundle of authorities. It is a Court of Appeal decision in England. It concerned a wills trust where there was a legacy left by a trust to conduct a series of conferences at a place called Wilton Park. The purpose of the trust was held to advance education in circumstances where there were conferences and courses and the relevant portion of the judgment is at page 878(c). The last sentence of that paragraph is the finding in relation to the advancement of education: "Like the Judge, I find little difficulty in inferring that not only they themselves are likely to benefit," those are the conference and attendees, "from the courses," that is

the conferences, “but are likely to pass on such benefits to others,” and in doing so the Judge referred to the *IRC v McMullen* [1980] 1 All ER 884 case in relation to the advancement of education and I just note that there have been annual conferences by Family First. Now I don’t wish to interrupt the flow of the submissions in relation to the law on advancement of education but I do wish to take the Court shortly to those annual conferences and the number of or the widespread of persons right across the political spectrum who were invited to attend those conferences and who indeed did attend.

If I can go back to my submissions, 18(b) of my written submissions. The test for the advancement of education is that the work meet the minimum threshold of at least some educative value or public utility to enable it recognition, (c) there is no need to enter into an evaluative debate in relation to the second head of education and then (d) quoting *Collier*, if there is an inability of the Court to resolve merits, that is irrelevant in relation to education and there is an acknowledgement of the function of the Courts to sieve out debates for improper purposes.

Subparagraph (f) of my submissions, advancing education is to be construed widely. Some sectors of the public may not be able to receive education pitched at a standard of an academic journal and they may only be able to receive educative materials pitched at a chatty or colloquial style as referred to by the Court of Appeal and it is submitted that the 17 research papers commissioned by Family First in this case within that broad range.

Subparagraph (g) of my submissions, I wish to go on and just draw the Court’s attention quickly to some other cases and also textbooks references in relation to the advancement of education. The advancement of education is permissible regarding ethical knowledge and that is a reference at footnote 77 to *Tudor*, that is the text. That reference is at tab 135, but if the Court clicks on the reference it should take you to page 149 of the *Tudor* text where Christian knowledge is one of a list of categories within which it is permissible to advance education. The reference to Christian knowledge, the case supporting that referred to in *Tudor* is a case called *Attorney-General v*



*Stepney* 32 ER 751. The *Stepney* decision is before the Court in a common bundle at tab 19. That was a case where again, a wills trust, where the purpose of the trust was left to, in the second line of the judgment, increase, this is the bit that's quoted by *Tudor*: "Increase and improvement of Christian knowledge and promoting religion." And at the end of the judgment, page 754 in the penultimate, the end of the penultimate paragraph. It says that, or the judge says that: "There is enough in this Will to give the personal property to charitable purposes, connected with the plan of promoting Christian knowledge."

**GLAZEBROOK J:**

And is that what your submission is that is happening here?

**MR BASSETT:**

No. No, I'm not suggesting that. I'm not suggesting this is. I'm simply saying that there is a broad range of topics that can be advanced legitimately by and within the advancement of education head. It is possible to argue in relation to the fourth head, which I'm not addressing at the moment.

**GLAZEBROOK J:**

In relation to what, sorry?

**MR BASSETT:**

In relation to the fourth head that there is an advancement of an ethical system or of mental and moral improvement, but I'm not addressing that just at the moment. This is in relation to education that I'm speaking. There's also a reference in *Tudor* on the same line of page 149 of the *Tudor* tab to the advancement or the education in relation to ethical principles and the case that's relied on in relation to that particular purpose is referred to in footnote 164 of *Tudor* which is the reference to the *South Place Ethical Society* [1980] W.L.R. 565 and the *South Place Ethical Society* is the same as the, or another name for the *Barralet v AG* case, as I recall. Need to clarify that, but that's my recollection that *South Place* and *Barralet* are the same case.

And then in relation to the other text, just to refer your Honours to is the *Picarda* text which is at tab 130 of the bundle of authorities that also refers to religious instruction within the head of advancement of education. That reference in *Picarda* provides a footnote reference also to *Stephney* which is the case that I've just spoken about.

Those cases, or a number of them, in particular the *Hopkins* case and the *McGovern* case and *McGovern* statement by Justice Slade are all set out carefully in the Court of Appeal's judgment at paragraphs 79–84 and I don't propose to take the Court through all of those, but I do wish to refer the Court to paragraph 84 of the Court of Appeal's decision where the Court of Appeal said: "This Court in *Latimer v Commissioner of Inland Revenue* accepted that research may 'fulfil and educative role'." The research in question in that case is referred to the historical nature of it in relation to the Waitangi Tribunal and they found that: "Accordingly, we accept that useful and publicly disseminated research may constitute a possible form of educational charity, notwithstanding the absence of good works in the nature of teaching and instruction."

Then the Court goes on, the Court of Appeal goes on then to consider purposes which I will come to shortly in relation to the query raised by Justice Winkelmann yesterday but the conclusion of the Court of Appeal is at paragraph 97 in relation to education. "We develop that analysis," that is referring to the previous paragraph, "more fully in considering whether or not Family First is also a fourth head, public benefit, charity. But, for the purpose of considering whether Family First is a second head, educational purpose, charity, we are satisfied the answer to the fundamental question – whether the charitable purposes of promoting and disseminating research about family are 'for a public good' –" the answer "is yes."

Now with that background in mind, if I can now come to, there is one more point just to raise there, at the last paragraph of my submissions, paragraph 18 at the top of page 10, the other aspect is that there is an acknowledgement in the Court of Appeal that of the value of public debate

and the importance of the right to access, receive and impart information, values to the public and within the family such as relate to education. That is referred to at tab 123 I believe of the Court of Appeal's decision. Sorry 122 of the Court of Appeal's decision.

"The evidence we have reviewed," which is the review of the reports above and the immediately preceding paragraphs, "establishes Family First recognised the importance of its objects and purposes to commission research on, and educate the public about, the importance of marriage and family (including core family values) in New Zealand society. Such research is valuable to promoting public knowledge about marriage and family and the many issues that affect the family. Public discussion and debate about such important issues is desirable to encourage the development of related policies and laws," and "the NZIER report is but one of many examples showing how Family First went about fulfilling its educational and research objects."

So with that background in mind, if I can now turn to just answering the questions that were put to me yesterday. Firstly, in relation to I believe it was a question by Justice Glazebrook it was put to me as to what was the dividing line or the characteristics, the dividing line between advocacy and the advancement of education. I accept that lobbying or advocacy is presenting a viewpoint in order to persuade but my point of difference or differentiation is that the test of advancing education in a charitable sense and in relation to charities law, establishes that to have a purpose, a trust with a purpose, that the entity can fulfil by commissioning and disseminating reports on a useful branch of knowledge and disseminating that report, brings the purpose and indeed the activity fairly and squarely within the ambit of the second head of charity, advancing education. So the submission is that –

**GLAZEBROOK J:**

Well the submission is that you can lobby as long as you do it by commissioning reports, is it?

**MR BASSETT:**

Yes but I also submit that there is a point at which advocacy merges with the advancement of education at the point of dissemination. Rather than being one or the other a binary situation, it's my submission that it's perfectly permissible for a research trust to commission a report on a matter of usefulness to the community, beneficial to the community and then to disseminate that report is a requirement. One can't just, as a research trust, commission the report and then put it in the corner. It has to be disseminated in order to fulfil the second requirement of the public aspect, or benefitting a sufficient sector of the community, or the community at large. You have to, the trust has to disseminate it and my submission is that during that, or in the course of dissemination, it is perfectly permissible to disseminate, make it available, but also have a point of view.

**WINKELMANN CJ:**

Is one of the objects, purposes of the trust in its trust deed, research?

**MR BASSETT:**

Yes, the very first one A.

**WINKELMANN CJ:**

It's A is it?

**MR BASSETT:**

And I would like to have commenced by going straight to the deed, but we seem to have, I know I understand there have been questions and I wanted to answer those questions. It was my intention to go straight to the deed after I had finished my synopsis and I still intend to do that as soon as I've finished this identification of the test. Once I've gone through these answers to these questions, it's my intention to go straight to the deed.

**WILLIAMS J:**

You define a report to avoid abuse of that test, to avoid potential abuse of that test if you say: "Commissioning reports is your dividing line provided they are

disseminated.” What’s the difference between a report and typed haranguing?

**MR BASSETT:**

Well, the first point to note is that in my submission none of the reports that are issued in this Court reach that stage.

**WILLIAMS J:**

Sure, I’m not talking about – yes, that’s not my focus.

**MR BASSETT:**

And I want to come to answer your question.

**WILLIAMS J:**

I want a nice bright line, that’s what I’m looking for.

**MR BASSETT:**

I’m not sure that there is a bright line. I think that, you know, the Charities Registration Board is there. If there is a control mechanism in the statute, section 18(3).

**GLAZEBROOK J:**

I think what you said to me is that advocacy and education can merge at the point of dissemination, but it is permissible to have a point of view when you’re disseminating?

**MR BASSETT:**

It’s permissible –

**GLAZEBROOK J:**

I would have to accept that was the case because after you’ve done your report, you presumably come to a point of view based on that report?

**MR BASSETT:**

Well, one can say, you know: "Here is the report, make up your own mind, but this is our viewpoint." I think that must be permissible. That's what Greenpeace does.

**GLAZEBROOK J:**

That's what I understand your submission to be. So you say there isn't a bright line because as soon as you're disseminating and having a point of view, but I suppose the question then is, is there a point where it becomes advocacy which comes within the political purposes. Well, sorry, where it becomes advocacy rather than coming within the head of education.

**MR BASSETT:**

Two points there. I would be submitting that the advocacy comes within the advancement of education rather than it becoming advocacy separate from the advancement of education.

**GLAZEBROOK J:**

Well, that hasn't been the law, at least in respect of say *McGovern*.

**MR BASSETT:**

Well, no *McGovern* was one prior to the removal of the exclusion of political purpose exclusion.

**GLAZEBROOK J:**

Well I understand that, but obviously they thought it was different. They didn't think it came within education.

**MR BASSETT:**

No, it is my understanding the *McGovern* case was a disqualification situation where it involved the advancement or a purpose of attempting to change the laws in relation to human rights in other countries. That was the disqualifier whereas in –

**GLAZEBROOK J:**

Well, it must have, but that must not have been education then. It must have been something else.

**MR BASSETT:**

Well, there was a predominant purpose in that case of political, an attempt to change the laws of other countries in relation to human rights. That's my understanding of the *McGovern* decision.

**GLAZEBROOK J:**

I think you are misunderstanding.

**MR BASSETT:**

Sorry.

**GLAZEBROOK J:**

There clearly was in the past, and we can debate how much or how little that has changed with *Greenpeace*, a point at which if it was advocacy in the sense that we are saying that it is advocacy to change the law or to change practice or even to maintain the law at it is, that was not charitable. So obviously there was, in the minds of whoever came up with that rule, at point at which it was not education. So a submission that advocacy and education, advocacy comes within education.

**MR BASSETT:**

Can do.

**GLAZEBROOK J:**

Yes well that is why I am asking you, when doesn't it? I am asking you where the line is drawn and at the moment I don't have any answer to that from you, as far as I can tell.

**MR BASSETT:**

Well first of all it was never – my understanding is that the reference to advocacy was essentially a shorthand reference to political advocacy. It was the political –

**GLAZEBROOK J:**

Well it is political but in a very wide sense because it is changing the law or changing practice.

**MR BASSETT:**

Yes, and that is the point of difference here because Family First is not endeavouring to change the law in relation to same sex marriage, it was charitable prior to 2013 when the same sex marriage bill came in and was passed, it had charitable from 2006 to 2013 and it still had charitable purposes and the monies it held were still for charitable purposes from 2013 onwards. The passing of the legislation didn't alter the nature of those funds, didn't alter the nature of the purpose for which they were held, it was simply a law change. They weren't and have not since 2013 engaged in a campaign to change the law in relation to same sex marriage. They have a different viewpoint about it but it is not part of their campaign. They don't have a campaign, it is not what they do. That is the first point. I mean I have always understood the objection to advocacy was an objection, it was a shorthand way of referring to political advocacy rather than advocacy per se and that is certainly the law now.

**GLAZEBROOK J:**

Well advocacy included keeping the law as it is, changing law and policy and so it was effectively lobbying is probably a good shorthand but it also would have included submissions to select committees and nobody suggests that they are other than a good thing and no one suggests that putting out views that differ from other views is other than a good thing for public debate, the question is where it falls in the line between what was political purposes and what was education and I still haven't quite got your submission on that.



**MR BASSETT:**

Well there was a clear line, *Bowman v Secular Society* [1917] AC 406 (HL), *Vivisection*, since then right till 2015, that line has been or that exclusion has been removed in 2015, so by definition there is no bright line. I am suggesting that there is a spectrum. I am suggesting that there is a point of advocacy which legitimately can be drawn into and fit under the umbrella of education as opposed to passing out from under the umbrella of education and into pure advocacy which does not meet the test for education.

There is another point I wish to make about advocacy. I am not placing a lot of store on this, I am simply putting it up as a case that I have become aware of overnight and that is a case of – I have a copy of it electronically but I haven't forwarded it to the Court I'm sorry but I can do that during the break. Am I able to make a submission on that basis?

**WINKELMANN CJ:**

Yes, yes.

**GLAZEBROOK J:**

I'm sure the registrar will be able to copy it during the break.

**WINKELMANN CJ:**

Yes go ahead.

**MR BASSETT:**

It is a case called *Commissioner of Taxation of the Commonwealth of Australia v Word Investments Limited* [2008] HCA 55. It is High Court of Australia 2008, the reference is 236 SLR 204 and it commences at page 204.

**O'REGAN J:**

The date is 2008, did you say?

**MR BASSETT:**

2008. It was a case, and I have only had a chance to very quickly scan through it, but it was a case that involved a trust which was conducted or which did conduct missionary and bible activities overseas. So it was effectively a bit like the Liberty – I'm not sure if the Liberty Trust was in that zone, the Justice Mallon decision but this case certainly involved a trust conducting missionary and bible translation activities overseas but it conducted 100% of its activities in Australia, were the running of a commercial operation. So it was running a commercial operation in Australia for profit and the question was whether or not that activity was a disqualifying activity or not and as I understand it the High Court of Australia at paragraph 24 held that the carrying on the business was a means to support the end and therefore did not disqualify the trust from being charitable and it is my submission that it is open, open for the Court, the Court can do this, I'm not putting this too strongly because I haven't had long enough to think about it but it is possible that the Court could consider advocacy as a means to achieving a charitable purposes, in this case the advancement of education. I don't put the submission any higher than that, I simply will arrange to have that decision forwarded to the Court and perhaps that is something which might assist.

If I can now come to Justice O'Regan's question yesterday about select committees. As I understood the question was when Family First makes submissions to a select committee, is Family First lobbying? That was my understanding of the question and Justice Glazebrook has just also referred to the same point. And my answer to that, if you will just listen to the reason why, my answer to that is no and my answer to that is as follows, Family First's purpose, its charitable purpose is for the advance of education as a research trust. If that is established and I believe I can get to that point, Family First therefore then has a legislation interest in the area of marriage and family because of the purposes and it has got a legitimate interest in education. If Parliament puts out a proposal, usually in the form of draft legislation and invites submissions, feedback about that proposal, then although Family First need not attend, it doesn't have to attend but it may do so, in my submission it may do so legitimately as a research trust advancing

education and simply provide its view on the topic and the analogy I give is for example if a school principal who is involved in the advancement of education without doubt, becomes aware of a draft legislative proposal that addresses or affects in some way the conduct of primary school education and parliament, the select committee invites submissions and the principal goes along to the select committee and does make submissions and he even has a viewpoint, the fact that he does so does not make him a lobbyist. He remains a school principal who is advancing education and has been invited to and has accepted the invitation to go along to the select committee, an inquisitorial body, and provide his point of view. He is still an educator, but he, I don't think deserves the label of a "lobbyist".

**WILLIAMS J:**

What about the Association of Primary School Principals?

**MR BASSETT:**

They probably aren't directly advancing education in the sense that they're –

**WILLIAMS J:**

They're more likely to be the ones in front of the select committee.

**MR BASSETT:**

They may be, but it's becoming very common now for individuals to attend en masse if the issue is significant enough.

**WILLIAMS J:**

Family First though is more like the Association of Primary School Principals than like a school principal, that's why I asked the question?

**MR BASSETT:**

Yes, although unlike the Association of School Principals, Family First is in fact advancing education in a way that the School Principals Association is not, so there is a point of difference there.

**WILLIAMS J:**

I suspect if you read the objects of the Association for School Principals they would say that they were advancing education, albeit by that indirect means that you say you are.

**WINKELMANN CJ:**

Can I ask you, Mr Bassett, so Justice Brown issued his judgment, fully reasoned judgment, but he did note that he understood that it was conceded that the primary activity of Family First is advocacy for a specific viewpoint?

**MR BASSETT:**

Yes, I intend to come to that passage in answer to your question yesterday raising the question of purposes. Can I come to the purposes in one block, if I may?

**WINKELMANN CJ:**

That's fine, yes.

**MR BASSETT:**

I definitely am going to address that.

**GLAZEBROOK J:**

Sorry, I didn't catch that paragraph number.

**WINKELMANN CJ:**

The paragraph number was 48.

**MR BASSETT:**

The next question from Justice O'Regan, as I took it down and understood it, was in relation to the sentence in my synopsis which was: "Taking a viewpoint is the essence of education," and the question was that: "On my definition of education any advocacy could be classified as education, do you agree?" I just wish to preface my answer with one point of clarification and that is that the statement I made in relation to a point of view being the essence of

education was in reply to the submission being made earlier yesterday by counsel for the attorney that a point of view was a disqualifier. So, what I was endeavouring to do when I made submissions yesterday about education was to simply make the point that viewpoints were not or did not disqualify what would be otherwise be education. Value-based education necessarily can involve a viewpoint.

The second, now my answer to the question, is that the test for the advancement of education which I've just been through does provide a point of difference between the advancement of education that I'm talking about and pure advocacy which is the *Latimer* category which is commissioning and disseminating research on a useful subject as being for the advancement of education. So there's a subtle difference between what I was talking yesterday about education generally being permitted to involve a point of view without disqualification and now what we're now talking about which is the advancement of education in the charitable sense which is permissible if you meet the *Latimer* test.

I can come now to the strengths and weaknesses question from Justice Williams yesterday. If I can take the Court to the euthanasia report. This is volume 9.

**GLAZEBROOK J:**

So just remind me what the strengths and weaknesses question was?

**MR BASSETT:**

Oh Justice Williams was asking me, can you show me some examples please in the reports or otherwise where Family First has taken an even handed or made an even handed attempt to set out strengths and weaknesses in order to improve the understanding of citizenry and to not just be spouting its own views.

**WILLIAMS J:**

To be fair you said you were doing that and I was just asking you to point to where that was happening.

**MR BASSETT:**

Yes, no I have got some references now I am just about to take those to you Sir, refer those to you. It is tab 317, which is the euthanasia report. If I can take the Court to page 4, the table of contents, Professor Radar, in the manner that one would expect from someone of his status, sets out in his contents, pages of contents, the debate which is the problem or the issue, page 6 and then at page 12, the case for euthanasia, that's page 12 onwards and at page 23 the case against euthanasia. He does reach a conclusion that there is difficulty with consent, obtaining consent and he does have a viewpoint but that is an example of a consideration of the merits of both side of a debate in a way that is befitting of an academic.

**WILLIAMS J:**

Can you just give me a moment because my hyperlinking is not working again and I lack the skill to reinstate it. So you are tab 407.

**O'REGAN J:**

0476.

**MR BASSETT:**

407.2480 and following. Then if I can now refer to the next item which is tab 359 which is the abortion and physical mental health of women. If I can take the Court to page 15, just a couple of examples under the heading "breast cancer", this is just one example. The statement is: "Whether breast cancer", sorry this a report by, I should introduce it, by Dr Gregory Pike, who is an ethicist. His qualifications are set out on page 2, that is 408.3261. And then if we go to – he is a director at the Adelaide Centre for Bioethics and Culture established in 2012. And then go to page 408.3274 regarding breast cancer: "Whether breast cancer risk is elevated by abortion is a controversial question that has been the subject of numerous studies, several showing

increased risk”, and then there is nine footnotes, “and some showing none”, with five footnotes, “The field remains in dispute.” That is one example. Then over the page, at 408.3275, under the heading “reviews”. This is regarding the sentence immediately above it, studies examining the association between abortion and mental health. The reviews statement: “Reviews have arrived at disparate conclusions, highlighting that the field is riven with disagreement.” And there are nine footnotes in total relating to that point.

Then down under the heading “comparison groups” which is on the same page: “One of the more contentious matters and studies on the psychological impact of abortion which may have a bearing on outcome involves what groups should be compared one with another.” And then it goes on to talk about comparison groups and the difficulties of drawing conclusions but those are just three examples of what I submit are even handed approaches.

**GLAZEBROOK J:**

Can I indicate that I was more interested in what you said about even handed approaches and what can be seen as more of the advocacy material in terms of the comments by Family First and the collection of articles, and I don't know if you are going to deal with that.

**MR BASSETT:**

In the reposted material, I have got the reposted material that I will be coming to.

**GLAZEBROOK J:**

And if you are coming to it, that is fine.

**MR BASSETT:**

Yes I am coming to that. Can I also just – I was handed yesterday by –

**WINKELMANN CJ:**

I am just becoming a bit concerned about your timing because we are taking a long time on all these points. So how are we going with your timing?

**MR BASSETT:**

Well perhaps I do have another 15 minutes after lunch if the interveners are not taking 45 minutes rather than one hour.

**WINKELMANN CJ:**

Well I would have expected you to have been finished by lunch I must say.

**MR BASSETT:**

Well I will do my best. I have got a number of other examples in relation to pros and cons but in the light of Latimer, I don't think that I need – I am answering Justice Williams' question but I don't think that that's necessarily a –

**WINKELMANN CJ:**

No I think we have had enough of that, you can move on.

**MR BASSETT:**

Can I come now to the questions that were raised yesterday about the web trawl and paragraph 20 of Justice France's judgment. Paragraph 20 of Justice France's judgment regarding the so-called or what I have referred to as the web trawl. Justice France said: "An elaboration of these objects, Charity Services provided the Charity Services Board with a summary of Family First's policies and principles sourced primarily from Family First websites. Although Mr McKenzie QC", who was the senior counsel in the case at that time for Family First, "was critical of some of the material sourced from the Internet that was placed before the Court, he accepted that this summary was before Charities Board in its decision making process. It is properly part of the material to be considered." Now I have spoken with senior counsel overnight about that process. I was not involved at that stage so I can't shed any light on it, but I am advised as follows, that Mr McKenzie objected to the introduction of that material in the High Court before Justice France he did so because of reference in a case called *re Draco Foundation (NZ) Charitable Trust* (2011) 25 NZTC 20-032 which is a decision by Justice Young, Justice Ronald Young I believe.



**WINKELMANN CJ:**

Well yes I wouldn't spend too much time on this Mr Bassett, because the evidence was before Justice France, he dealt with it and that wasn't the subject of any kind of cross-appeal was it?

**MR BASSETT:**

No but the point I am coming to is that one was objected to and it only went in on the basis that it was material that had been before the Charities Registration Board but crucially it was never the subject of any submission in the High Court or the Court of Appeal as to the nature and effect of that material in the way it has now been done. This is the first time when we got the graph on the 6<sup>th</sup> of May I think it was in the submissions, the first time that any attempt had been made to analyse the material and draw conclusions from it. If that had happened in the High Court, then yes, there would've been an opportunity for Family First to have responded. If it happened in the Court of Appeal they could have responded.

**WINKELMANN CJ:**

Okay, well yes, got the point.

**MR BASSETT:**

It was never raised until six or seven –

**WINKELMANN CJ:**

It was never put into a graph in this fashion?

**MR BASSETT:**

No.

**WINKELMANN CJ:**

But it's obviously been referred to by all of the judges, hasn't it?

**MR BASSETT:**

But not in that way, not in terms of, you know, you've got so many media releases on this topic or so many, therefore, you know, same sex marriages has got greater attention or euthanasia has.

**WINKELMANN CJ:**

I take your point right.

**MR BASSETT:**

If I can go now back to the starting point which is the deed. If you just bear with me just for a moment, I'm just going to get tab 100 which is the deed. If I can take the Court now to paragraph 11 of my submissions which deals directly with the deed. It's submitted that the "determination of the nature and purposes of a trust is ascertained from its trust deed", and I've referred there to the *Latimer* decision. That's footnote 43. I've referred to the Court of Appeal but actually I wish to refer to the Privy Council decision which is at footnote 48, sorry tab 48, I believe and I wish to refer to the Privy Council decision at paragraph 29, so it's tab 48, paragraph 29, the last sentence of paragraph, well, the penultimate sentence of paragraph 49: "Whether the purposes of a trust are charitable does not depend on the subjective intentions or motives of the settlor, but on the legal effect of the language he has used." That's the legal language that is used in the deed and the point of referring to that passage is that it's my submission that the references to Family First favouring a man/woman marriage as only or optimal are not referred to in the deed. They are referred to in the principles document which is not a part of the constitution of Family First. It's their viewpoint. They hold that viewpoint. That's not resiled from at all, but the point is, is that it is not part of the deed and in submission, neither is there any off the deed undisclosed purpose evidenced by activities which might be supported by some sort of campaign in that regard. In my submission, there is no evidence to that effect that could support such a submission.

Following on in my submissions: "Ascertaining the purposes/objects of Family First commences with and primarily concerns an assessment of its

purposes and objects as stated in its trust deed. The purposes primarily depend upon the proper construction and legal effect of the language used.” That’s the Privy Council. *Latimer*: “Charitable status primarily depends upon those stated purposes. Whether the purposes of a trust are charitable does not depend upon the subjective intentions or motives or viewpoints of the settlor, but rather the stated purposes for which the trust monies may be applied. If there is ambiguity,” then there is a benign construction that can be placed on a charitable trust – and the reference to that is the Family First Court of Appeal decision at paragraph 93. I won’t take the Court to that because of time – “in recognition of the social importance of charities to society and the state generally. A purpose appearing broadly to fall within one of the ‘familiar categories’, that is heads 1–3, will be assumed to be of benefit to the community”, and if I cross out the word “public” there, to avoid the problem I talked about at the very start, “benefit to the community unless the contrary is shown.” And that is a reference to the *Vivisection* quote. It is affirmed by the Court of Appeal.

It is my submission that this means if activities are consistent with or supportive of an identified charitable purpose, then the trust is charitable. That is a reference to the *Anti-Aging*, and I support the *Anti-Aging* formulation of the way in which a deed is to be construed. I also say that if the means and activities are consistent with or supportive of an identifiable charitable trust, then the trust is charitable.

Paragraph 13, an organisation established with main charitable purposes but having non-charitable ancillary purposes does not prevent a conclusion that the body was established exclusively for charitable purposes.

Paragraph 14, the text of the stated objects and purposes of Family First trust deed is relied upon as expressing charitable purpose. And coming now to the deed itself, object A is to promote and advance research and policy supporting marriage and family as – this is tab 100. Now the document at tab 100 is unsigned. There is a reference in the Court of Appeal’s judgment at paragraph 9 to the date of the signed version as being 26 March ’06. I can’t

find the original document in the bundle but I do have a copy of it and it is indeed 26 March 2006, so it may be that the original deed was in the bundle before the Court of Appeal but unless my learned friend knows where the signed version, I certainly don't.

**WINKELMANN CJ:**

Well does it matter?

**MR BASSETT:**

It doesn't, precisely your Honour, I'm just making sure we're at one on that. B, object B: "To educate the public in their understanding of the institutional, legal and moral framework that makes a just and democratic society possible", and C: "To participate in social analysis and debate surrounding issues relating to and affecting the marriage being promoted by academics, policy makers, social service organisations and media", and then D: "To publish and produce. E to be a voice for family", as the objects.

**GLAZEBROOK J:**

So your submission is that we couldn't look at other documents, contemporaneous documents or documents that are principles to see what the institution legal and moral framework is that you are talking about in B?

**MR BASSETT:**

Well if it was a situation like in *Latimer* where the trust itself sprang out an agreement between the Crown and Māori, yes in that situation, in fact Justice Blanchard in that case said one could because it's part of the factual matrix, part of the genesis of the trust but that is not this situation.

**WINKELMANN CJ:**

There are however, ample authorities which say you can when you are looking as to whether a purpose is charitable, look at other material in terms of the activities of the trust, aren't there?

**MR BASSETT:**

Well the *Anti-Aging* case says that one only does that if there is some sort of ambiguity or if the stated objects are unclear but my submission is we are in neither of those positions.

**WINKELMANN CJ:**

But there is a decision of Justice Lightman which I cannot now remember the name of which follows on from a long line of authorities which says that when one is determining the nature of the objects of the trust, one is bound by the terms of the trust, can't go beyond it, but when one is determining whether those objects reveal charitable purposes, one may go beyond the terms of the trust to extrinsic evidence.

**MR BASSETT:**

In order to disqualify?

**WINKELMANN CJ:**

In order to assess whether it is a charitable purpose. I will bring you the reference after morning tea. I just thought the counsel would be familiar with all the cases in the area.

**MR BASSETT:**

I am familiar with most of them now your Honour.

**WILLIAMS J:**

Isn't the general proposition that you shouldn't look at activities as proof of objects because an activity can be charitable or non-charitable, depending on the object, you can educate to make money or you can educate for a charitable purpose et cetera, the bible case. If you are the printer that makes bibles, you are not charitable, but if you are the Bible Society paying the printer, you are. Right, so that is pretty straightforward and orthodox. The question here is rather is the list of objects in the deed a full and accurate description of the actual objects of this trust or is it supplementable by the

principles that have been attached to it? In other words, is there more to it than this list, the objects?

**MR BASSETT:**

The principles are not attached to it.

**WILLIAMS J:**

Those principles, are they an indication of objects or are they a supplementation, an adaption, an amendment, whatever it might be of those objects demonstrated in written form, that's the only question, isn't it?

**MR BASSETT:**

In relation to the man/woman marriage issue, that's a statement of belief. I would say it's in the zone of belief rather than purpose. It's a question of whether or not the purposes are charitable, not whether the activities are charitable.

**WILLIAMS J:**

You're not getting my point.

**GLAZEBROOK J:**

When were they set out? Do you know when the principles were set out?

**MR BASSETT:**

Well, I have indeed myself zeroed on that question to try and find out and that is part of the reason why one looks at the date. The date is 26 March '06. In the body of at paragraph 3 of the deed refers to the –

**GLAZEBROOK J:**

You might just have to make sure you're speaking into the microphone. We can hear you but it might be that it doesn't pick up for the record.

**MR BASSETT:**

I think that the original deed which Justice Gilbert referred to as being having the name Family First Lobby is in the original deed because I saw it two days

ago and I don't have the – so that was what was in there on the 26<sup>th</sup> of March '06, so that's the date of inception or settlement of the deed, but the principles document, if one turns to the principles document.

**WINKELMANN CJ:**

Well perhaps you can tell us after the morning break, Mr Bassett. Perhaps you can tell us after the morning break. We don't want to waste your time.

**MR BASSETT:**

The principles on marriage and the principles on family are on the Family First, not the Family Lobby, but the Family First letterhead. If one looks, I think it's at tab 305, 304.

**WINKELMANN CJ:**

So you think you're submitting that those principles were formulated after registration?

**MR BASSETT:**

Certainly, yes, and certainly after because the name is not amended until later and those two documents that are referred to and relied upon by the Crown are on 304, 305, are on the letterhead of Family First not Family Lobby, Family First Lobby or whatever it is, so my point is, it's not contemporaneous with the settlement of the trust so we are not in the situation of a *Latimer* type situation where it's part of the genesis.

So the classic formulation in *Anti-Aging* at paragraph 84 is that: "You ascertain the purpose by looking through the deed. This is Justice Ellis at paragraph 85: "Activities are relevant if the stated objects are unclear or if there's evidence of unstated objects."

**WINKELMANN CJ:**

Yes, that's one view of the law, but the line of authority I'm referring to makes the point that the objects are the objects of the trust. What we're determining is whether it's a charitable purpose and the objects are very large. You know,

they're normally capacious. A trust deed normally has very capacious objects and in order to clarify what sits within them and whether they're charitable, it's permissible to look at other material. I will bring you the reference after morning break.

**MR BASSETT:**

Yeah, your Honour.

**WINKELMANN CJ:**

So where are we at in your submissions?

**MR BASSETT:**

Well, I'm just at the point of determining the purposes.

**WINKELMANN CJ:**

And can I just also ask you about that, because there is one other thing. Of course we are in a situation where we are looking at removal of registration and Justice Simon France makes the point, doesn't he, about the provision in the Act which allows, I think it is section 50, sorry section 18(3). No section 50: "To support this enquiry section 50 of the Act authorises the Chief Executive to require information from the entity about its activities."

**MR BASSETT:**

Yes I accept that's a provision of the Act.

**WINKELMANN CJ:**

So what do you say about it?

**MR BASSETT:**

I submit that that is a provision that is designed to elicit whether or not the trust is being conducted for, and within its purposes.

**WINKELMANN CJ:**

Within its objects.



**MR BASSETT:**

Sorry within its objects or purposes but that is, the intention of that section must include the enquiry as to whether or not there is some collateral or other purpose going on, including breach of trust. In my submission that is not our case. That is not relevant in this particular –

**GLAZEBROOK J:**

What do you say about section 18(3), especially section 18(3)(a)?

**MR BASSETT:**

I support the findings of Justice Ellis that it is not intended to wreck a fundamental change to the common law. That's in her judgment. I refer to that in my submissions.

**GLAZEBROOK J:**

Well if you read it, it would say that you can have regard to the activities of the entity when you are looking at an application and the proposed activities. So why would you just read it as it says?

**MR BASSETT:**

Because this Court in *Greenpeace*, 2015, says that the common law that sits behind –

**GLAZEBROOK J:**

Well that is in terms of whether you are looking at what a charitable purpose is. It certainly wasn't going against expressed provisions of the Act, although I think Justice Young would disagree with that or did disagree with that in *Greenpeace*.

**MR BASSETT:**

Now what I am saying is that is an aid to interpretation of the scope of the section, that is the point I am making.

**WILLIAMS J:**

So you say 18(3) is about making a judgment about whether it will comply with its objects, not whether its objects, its stated objects are an inaccurate explication of the actual objects, is that what you are saying? You have got to give that section in the paragraph some meaning.

**MR BASSETT:**

Perhaps if I can, I always like to look at a section when I am asked a question like that. It is very dangerous to do it from memory.

**WILLIAMS J:**

Good practice.

**MR BASSETT:**

Because I've found that it is not the best mode of operating and I am sorry I don't have that before me.

**WILLIAMS J:**

It just says: "In considering an application the Chief Executive must have regard to the activities of the entity at the time and proposed activities of the entity and any other information it thinks is relevant", that is (a), (b) and (c).

**MR BASSETT:**

I think I just stand on my answer to Justice Glazebrook a moment ago which that section cannot be or should be read in such a way as complies with the *Greenpeace* 2015 decision that affirms the common law position.

**WILLIAMS J:**

What I am really asking you is if that is so, what does it mean? I am suggesting to you one possible meaning is it is about a judgment over whether the applicant will comply with its objects in the future on the basis of the way it has been acting in the past.

**MR BASSETT:**

And that would essentially be a breach of trust issue.

**WILLIAMS J:**

Yes I am just looking for yes or a no.

**MR BASSETT:**

I think yes in terms of a breach of trust issue.

**WINKELMANN CJ:**

So if we are just constrained to looking at objects, as you say, your objects don't look all that charitable in some ways, do they, because there is a focus on policy change. That is not educational.

**MR BASSETT:**

Well I support the very detailed analysis of the objects by the Court of Appeal. I mean if I had more time I would take you through them paragraph by paragraph. Basically I support the detailed analysis of the Court of Appeal which found that the thrust of this deed has an educative thread and I support the findings of the Court of Appeal in that regard.

**WINKELMANN CJ:**

Well that's a very succinct way of making that submission.

**MR BASSETT:**

And that is essentially set out at paragraph 15 of my substantive submissions, 15(a). And then I would just say that, just before I pass off that topic, that Family First's objects are clear, Family First objects are exclusively charitable, advancement of education. There is no evidence of unstated objects and that its activities are entirely consistent with its educative purposes. I would also just like to bring the Court's attention to two legal references. I won't take the Court to them but it's tab 54 and *Molloy* at page 693, at line 15, the basic proposition is that motives and beliefs of set laws are irrelevant. And also *Latimer*, Privy Counsel at paragraph 29.

**WINKELMANN CJ:**

So Mr Bassett, we are going to take the morning adjournment shortly and I would expect you to be finished by lunchtime because that is quite a generous allocation of time for this argument which is reasonably narrow in scope but I just would like, I just give you a heads up that there is one thing that I am interested in which emerges both from Justice Simon France's judgment and from the Court of Appeal's judgment, or at least the minority judgment, which is that both the minority in the Court of Appeal and Justice Simon France seemed to proceed upon the assumption that it was conceded by Family First, that Family First's position that its primary activity is advocacy for a specific viewpoint and Justice Gilbert recorded at 194: "Family First does not string from the task of attempting to demonstrate that its advocacy purpose is charitable under the fourth head. It confronted the issue head on, leading off with this as its primary argument on appeal." Which I just think sits a little strangely with your submission now because you seem to be - Family First seems at this final level of appeal, to be reformulating what its position is as to its purposes.

**MR BASSETT:**

Can I address that with your Honour immediately after the break, your Honour?

**WINKELMANN CJ:**

Yes certainly.

**COURT ADJOURNS: 11.28 AM**

**COURT RESUMES: 11.50 AM**

**MR BASSETT:**

If I can now come to paragraph 60 of Justice France's decision regarding his understanding: "I understand it was accepted by Family First that its purpose was to promulgate a singular view of family, called the traditional family. If I misunderstood this concession, I conclude that it is the case, and plainly so"

that Family First's first and foremost purposes are "to promote the traditional family unit."

I've spoken with senior counsel in the case in the High Court in relation to appearance before Justice France. He does not recall a concession to that effect, but my submissions are as follows. Firstly, that affirmation of belief by Family First of man/woman marriage is part of its educational viewpoint. It is not a separate purpose in the sense of a specialised meaning of the word "purpose" in trust law. It is submitted there is no such purpose disclosed in Family First deed nor evidenced in any other way.

My submission, however, is that if counsel has contributed to the ambiguity about the purposes of Family First in the way that it was put in the cases below, courts below, then Family First ought not to be saddled with the effect of that ambiguity or the use of the word "purpose" in relation to the phrase "traditional marriage", especially where the purposes of Family First in its trust deed are so clearly educational.

**WINKELMANN CJ:**

So, can you just repeat that submission?

**MR BASSETT:**

Yes. If counsel have contributed to the ambiguity about the purposes of Family First in the way the case was put in the courts below, then Family First, it's right and proper that Family First, ought not to be saddled with the effect of that ambiguity or the use of the word "purpose" in relation to the phrase "traditional marriage", especially where the purposes of Family First in its trust deed are so clearly educational having regard to family and marriage generally as foundational and I make that submission on the basis that the trust deed purposes clearly have a thread of education about them as found by the Court of Appeal, that the question of purpose in relation to traditional family can fall within the viewpoint in relation to education and in circumstances where, it's my submission, the Court does not need to go further than the advancement of education and a finding favourable in this

Court to Family First regarding the advancement of education would preclude the need to go on and consider the fourth head where that issue becomes more prominent.

**GLAZEBROOK J:**

And you'd say I guess in any event there's no harm in changing your basis between courts but in fact you're not because you're just picking up on the majority in the Court of Appeal, their finding?

**MR BASSETT:**

Indeed and if counsel have created an ambiguity in the way they have expressed it, then that is candidly acknowledged and if in fact that is the case –

**WILLIAM YOUNG J:**

Not really acknowledged because it is not accepted it is the case I think.

**MR BASSETT:**

Pardon?

**WILLIAM YOUNG J:**

You are not really acknowledging that it is counsel's fault, you are saying it is probably a misunderstanding by the Judge. For what it is worth it doesn't bug me either way really.

**MR BASSETT:**

I don't want to have any disrespect towards the Judge.

**WINKELMANN CJ:**

It's not the Judge anyway, it is the point about how it was argued in the Court of Appeal as well and you are saying it is not irreconcilable.

**MR BASSETT:**

No I am saying that it is still – we are still able – it is still just and right and proper for us to be able to refine our case in the Supreme Court in a way that

does justice to the respondent. There is no prejudice to the Crown or no lasting prejudice to the Crown in that respect. So that is my answer in relation to your query regarding paragraph 60 of Justice France's judgment.

I do note that in relation to the Court of Appeal judgment on that point, I think it is, from memory, paragraphs 47 and 48, where I do make submissions about the educational aspect in relation to family as being inclusive of all families. I think it's paragraphs 47 and 48 from memory and that would be my position, that it is perfectly permissible to have a viewpoint in relation to education that does not disqualify. We have been through that at length earlier in the morning. I can't take it any further than that.

I am going to go to the next section very quickly, after the analysis of the deed but before I do can I just refer to two small point. The first point is I was going to take the Court to the conduct of annual forums, if I can refer to tab 348. There are three tabs to refer to, they are in sequence and I can do it very, very quickly. Now 348, it is the tab that relates to the forum on the family from 2007. The purpose of doing this is just to show the Court the breadth of invitees from across the political spectrum who were invited and who did attend. This is in 2007. The document is 408.3177. Invited and attended were Judith Collins, National, Peter Peroni, New Zealand First, Heather Roy did not –

**WINKELMANN CJ:**

We can see that thanks.

**MR BASSETT:**

These are my instructions that Heather Roy did not attend but somebody did else did stand in and all the others there attended. The next item, if I can go 349, that was 348, 349 is the annual conference to 2008, invited and attended, all of those persons, Peter Sharples, John Key, Rodney Hyde, Winston Peters. Winston Peters did not attend. Peter Dunn did, Jenette Fitzsimons, Laurie Baldock, Phillip Tito-Field and Richard Lewis and there was further to do, 2009 which is tab 352. All of those persons, John Key, Phil

Goff, John Angus, Children's Commissioner, Bruce Pilbrow, Ross Robertson, Labour, Sam Otawinga, Judy Turner and Gordon Copeland all attended. Perhaps there might be a questionmark over Gordon Copeland, but that is just an indication of Family First inviting people who do not share their views, to speak to attendees of the Family First conference.

**GLAZEBROOK J:**

Was that to influence the political views of those people though rather than to educate them, would be the question that you might have to deal with?

**MR BASSETT:**

I think the way – I don't know but I wasn't – I don't have instructions from my client on that point but as I understand it questions were put to the various members of Parliament as to their views on particular points and they were invited to express those views. I think that's how the programme proceeded. So it's in a sense educational of the citizenry of the political candidates rather than trying to influence or persuade. I can't take it any further than that, your Honours.

Before I move on to the next point, can I just pick up one point, a comment? There was an exchange between Justice Winkelmann, Chief Justice, and my learned friends in relation to the articles of the international instruments. There was an interchange where the Judge asked whether or not the family group referred to in the ICCPR and other international instruments referred to man/woman marriage or not and the answer I think from the Crown was that it did not, but my submission is it's quite clear from the international instruments that they do refer, for example, at Article 23 of the ICCPR, they do refer to and intend to refer to man/woman marriage, and the references to that is in my submission which I'll come to shortly but I just didn't want to forget that point.

I'll now identify the paragraph that I'm up to and proceed to it. If I can just refer to paragraph 29 which commences quite a long reference to a number of historical issues, in my submission, where the point to be drawn from it in relation to Magna Carta, Reformation, English Reformation, Statute of Uses,



religious toleration, abolition of slavery, conscientious objection, the Waitangi Tribunal, et cetera, the point to be drawn from all of that is that societal progression is enhanced by permitting viewpoints to be heard and to be able to flourish in a society. And the reverse is true that to exclude and create belief tests creates a or results in regressive steps for society and my submission is that there are benefits to the community from permitting viewpoints across the spectrum to be heard and, in my submission, a macro, I've called it a macro analysis, is to be preferred, by which I mean a wide range of viewpoints to be accommodated without the Charities Registration Board descending into a micro analysis or subjective micro analysis of sub-purposes and activities, and that's a reference I think to a submission I made that's recorded by the Court of Appeal in paragraph 116 of the Court of Appeal's judgment. I don't wish to take that any further.

If I can come now to paragraph 31 which is principally where the synopsis that I addressed at the outset was focused, and in response more particularly now in response to the Charities Board's registration objections, (a) that Family First's principal object is to support the traditional family as the only, emphasise *only*, or optimal family, and that Family First is merely asserting its views and thereby is disqualified. I'd just like to make the following points in response. Paragraph 32(a) I have already referred to. 32(b), the focus of Family First deed is educational, its deeds and activities are discriminatory. Family First's education by in large benefits all families and when I say Family First's purposes are not discriminatory, I referred in footnote 1e8 of my submissions, I just note the just examples of the reports and other materials that are available that are of benefit to all families and not just families of the man, woman variety. Maybe footnote 138 and 139.

My submission at paragraph (d) that marriage and family are self-evidently and empirically foundational to New Zealand as a strong and enduring society and of public benefit and there is references there to the US Supreme Court in the *Obergefell v Hodges* 576 US 644 (2015) (20.6.15) USSC decision and a quotation from the US Supreme Court which I will not read out which is there for the Court to consider.

Subparagraph (e) support of man, woman family does not cease to be of public benefit because of a wider acceptance of other forms of family. That is a reference to paragraphs 146 and 147 of the Court of Appeal's judgement.

Over the page, subparagraph (f) Family First has acknowledged contributions by other kinds of families and there is a reference there to the principles on families subparagraph that my learned friend referred to. Family First does affirm the belief that marriage is a union of husband and wife. This is the point that I was referring to before, paragraph (g), family as fundamental as affirmed by article 23 of the ICCPR, is a reference in fact to man/woman marriage and the authority upon which that statement is made is the *Joslin v NZ* [2002] 7 HRNZ 616 decision which is at tab 141, decision of the UN Human Rights Committee. I think the paragraph reference in the *Joslin* decision is 8.2. I won't for the sake of time take the Court to that paragraph but it is there in the bundle.

Similarly with article 16.3 of the UN Declaration of Human Rights, there is also a reference to Family is Fundamental, in article 10 of the International Code on Economic, Social and Cultural Rights and also in the uncropped preamble. All of those documents are hyperlinked and available to the Court in the bundle.

Subparagraph (8), there is a clear, and perhaps if one deletes the word "public benefit", to try and keep and being consistent with my oral presentation, deletes the word "public benefit" and inserts there: "There is clear benefit to the community or sectors of the community that affirm man/woman marriage and seek to receive educative materials about marriage and family underpinned by Judeo-Christian values as foundation to a strong and supportive society or who wish to transmit those beliefs to their children as is their human right to do so."

There is also a reference to the now repealed section 8 of the Families Commission Act 2003. Section 8 of the Families Commission Act actually required the Commission to advocate for the family. That is an interesting

point. As I understand it that Act was repealed, not because it was considered to be no longer of benefit to advocate but simply the bill that repealed it refers to achieving greater efficiencies by restructuring that commission. That is at footnote 147.

The question of editorial freedom, that was canvassed in the Court of Appeal, subparagraph (j), there was as a result of a request from the Court of Appeal, further material put in by way of affidavit from the director of Family First, annexing as exhibits in all of those are before the Court from various of the authors of these various reports, confirming that they were not told or given or directed as to what to write but were able to produce their reports with editorial freedom. That's at paragraph 149 and all the hyperlink references to those exchanges with the likes of Professor Ahdar and others.

Regarding Mr McCoskrie, the activities are, or a lot of them, most of them substantially undertaken by Mr McCoskrie as national director but the Family First deed shows him as one trustee of seven operating as a board and the Charities Board never enquired about the workings of the Board. It's my submission that Family First's tangible educational endeavours can legitimately be underpinned by marriage/family as foundational and as a belief handed down by generations for thousands of years. Education affirming marriage and family as foundational is perfectly reasonable in my submission. It's consistent with and supportive of charitable purpose and viewed by Parliament as accommodated, and there I'm referring to section 29(2) of the Marriage Act 1959. There is also an interesting reference in section 11(3)(c) where the requisite registrar of marriages I think it is, registrar of births, deaths and marriages, is able to actually appoint marriage celebrants in respect of or with regard to communities of belief interestingly enough. I thought that was an interesting accommodation by Parliament in relation to a State 3(b) Bill of Rights acta. That's quite a concession. It's my submission that if one looks at the Marriage Act, it does appear that celebrants are section 3(b) Bill of Rights Act 1990 persons exercising a public function, so that is a significant accommodation in my view. I also say that it is therefore broad based. That's the same footnotes 155 and by analogy, charitable.

It's my submission that marriage has been foundational of all societies throughout history. It's lawful. It's a human right. A man/woman marriage is not objectionable, neither is supporting it objectionable in my submission.

I have already dealt with the submission in paragraph 33 in terms of the distinction between Family First is doing and what the *Aid/Watch* entity was doing in the *Aid/Watch* case where that entity made no attempt to teach, educate, produce, disseminate reports to the public nor spark public debate, which is in contrast to what Family First is doing.

I have already covered the points I think broadly in 34 which relate to the *Anti-Aging* Justice Ellis test in relation to section 18(3).

If I can come now to paragraph 36 which is the quantitative analysis for the Family First's activities. This is the point that I made before in relation to response from a question from the Chief Justice that despite ongoing investigations by Charities Services since 2008, through two High Court hearings, one Court of Appeal hearing over an 11-year period, neither Charities Services nor the Registration Board nor the Attorney-General has ever before asserted a quantitative analysis of Family First's activities in the way they have in the graph and certainly not in relation to the case on – that should probably read “a quantitative analysis of Family First's case on appeal material,” that should probably read, and it was not until the 6<sup>th</sup> of May at page 6 in the submissions of the Attorney-General that there was this graph produced of assessment of materials on a case of appeal. My submission is that that graph has no probative value regarding Family First's activities or foci because in the light of the subsequent schedule provided by the Crown that the data relied upon, it is clear that, and the following I list: “I submit that the Attorney-General's graph is a mere pictorial representation of what the Charities Services itself selected from Family First's website and forwarded to the Charities Registration Board. In other words, a ‘web trawl’.”

I have already referred to what senior counsel objected to. That's paragraph (b) on page 24 of my submission.

In my submission at subparagraph (c): “The Charity Registration web trawl material gives a skewed picture similar to that described in *Greenpeace* in 2015 in this Court of what Family First does.” I submit that: “The graph is misleading,” and I have also referred to the notice of leave to adduce further evidence and if I can now refer to Mr McCoskrie’s affidavit briefly.

If I can just take your Honours to this affidavit. Exhibit A to the affidavit is just a reproduction for ease of reference of the extract of the extract from the Crown’s submissions and the graph. Exhibit B is a copy of the schedule that was forwarded to me on the 22<sup>nd</sup> or 23<sup>rd</sup> of May. The correct date is referred to in the affidavit, page 1 of the affidavit footnote 1, it was received on the 21<sup>st</sup> of May 2020 by me and it purports to set out each of the items in the graph, for example, euthanasia, gay marriage, polygamy, censorship, abortion, gender roles, prostitution, brothels et cetera. In other words, that’s the data which the Crown says supports the graph. Now, Family First, Mr McCoskrie has undertaken an analysis of that graph and I have, to the best of my ability also, checked all of the references.

If I can take the Court now to exhibit C in the affidavit. Exhibit C takes an extract of the case on appeal tabs 114 through to 280. That’s tabs 114–280 which are the groupings of materials sourced from Family First’s website by Charities Services. In other words, not material provided or selected by Family First and forwarded to the Charities Services, but selected by Charities Services in relation to particular topics and if one looks at the heading in exhibit C immediately above tab 14, you can see that that is the material that relates to abortion. That’s immediately above 114 and if you go down over the next page, these are all part of what’s called appendix G. If one goes down to the heading just above tab 139, one can see that that is the grouping of material selected by the Charities Services which relates to euthanasia. Then if one goes down further to the heading just above tab 181, that’s the grouping of materials in appendix G sourced by Charities Services that relates to parent time with children and then the heading above 194 is the groupings of materials relating to I think it’s child abuse, although it’s called “punishment and publicity of offences”. Then the heading above tab 203 is

the grouping of materials in the case on appeal relating to prostitution and then the heading above tab 209 is the material relating to the material on Family First's website relating to gambling harm and so on. The last one is marriage and family importantly is above, the heading above tab 225 and the last one is above tab, the heading above tab 275, relates to the alcohol law. What Mr McCoskrie has done, is if I can refer your Honours to the colour coding index on the front page of exhibit C, the key if you like to the colour coding is that the yellow, the Family First briefing or media releases, the green colour coded items are New Zealand mainstream news sites, the blue is overseas mainstream news sites and the grey is special interest blogs and if one turns over and then reads the material or refers to exhibit C with that knowledge in mind, one can see that very few of the documents that have been listed and grouped in the case on appeal are items generated or authored by Family First, only the ones that are marked in yellow, all the others relate to third party entities which Family First has then reposted on their website and has been subsequently downloaded by Charity Services. So then if one turns to the graph which is exhibit B, with that knowledge in mind –

**GLAZEBROOK J:**

We have now got a new graph, are we referring to the new graph?

**MR BASSETT:**

We are not your Honour, because that new graph, the new material was sent to me after hours on Monday, I did not see it until Tuesday morning, the day before the hearing, there was no way I could analyse it, look at it and respond to it and in any event the second graph was in a different order, if you look at the two graphs, the topics were in a different order from what they are now presented in this graph. So all I can do is go through this graph.

So if I can now just refer the Court please to the colour coded, it is only six pages, I just want to show the Court if I can, this is the colour coded –

**WINKELMANN CJ:**

Exhibit B.

**MR BASSETT:**

No, it is exhibit B but with my annotations to it. It is a document that was sent to the Court.

**WILLIAMS J:**

It says “marked schedule of the...”, is that what it’s called?

**MR BASSETT:**

Correct.

**WILLIAMS J:**

It was emailed in the day before the hearing, it’s this one.

**WINKELMANN CJ:**

So it’s in the bundle of extra materials.

**MR BASSETT:**

Yes it is. This Family First’s and my analysis of the schedule at exhibit B.

**GLAZEBROOK J:**

What’s it got at the top?

**MR BASSETT:**

It’s got “topic”, top left-hand corner is “BR5 45 FF analysis.”

**WINKELMANN CJ:**

So this is something you have just done, it is not the same thing as exhibit B?

**MR BASSETT:**

It’s in the same format as exhibit B but it has my annotations in red just below each topic.

**WINKELMANN CJ:**

And has counsel for the Attorney-General had an opportunity to – when did they get this?

**MR BASSETT:**

The same time as the Court, exactly the same time as the Court.

**WINKELMANN CJ:**

What is their opportunity to comment on this then?

**MR BASSETT:**

Well in circumstances where the Attorney –

**WINKELMANN CJ:**

No I'm just asking you have they had an opportunity to comment?

**MR BASSETT:**

They have had an opportunity since Monday I believe, it was Monday. In circumstances where it is sent to my late, all I can do is spend my time, do an analysis and send it back to the Crown and then come to the Court on that basis.

**WINKELMANN CJ:**

So what was sent to you late? This is responding to the schedule that was in March is it?

**MR BASSETT:**

That's correct your Honour. So the schedule, I received the graph on the 6<sup>th</sup> of May, I received the schedule from the Attorney-General after requests by me on the 23<sup>rd</sup> of May, 21<sup>st</sup> or 22 of May, the correct date is referred to in the footnote. So this is my analysis now of their graph because that is all I can do.

**GLAZEBROOK J:**

That's fine, I just would quite like to be able to find it. I can't seem to find it.



**MR BASSETT:**

I do have a hardcopy but I am allowed to tender it to the Court?

**GLAZEBROOK J:**

No, no it's fine, it's just if I can work out, so appellant graph of material on case on appeal is that it?

**WINKELMANN CJ:**

Perhaps is it just easier if Mr Bassett hands a copy to the registrar and then you've got it? Because it is confusing trying to find it.

**GLAZEBROOK J:**

Yes. I can't even find it on this. Oh, hang on, I might have it now. No, I think I might have it now, thank you.

**WINKELMANN CJ:**

It's all right Mr Bassett, Justice Glazebrook has it.

**MR BASSETT:**

So, just taking that by way of example, the first box is top left-hand corner is euthanasia. The Attorney-General says: "That there are 55 articles and posts. There are 42 from the case on appeal." In other words, 42 come from the appendix G which I've just taken the Court through and then 13 are two media tab releases which are tabs 313 and 314. I have analysed that. There are in fact only seven items that were authored by Family First in the exhibit, or in the case on appeal tabs 139–180. That's the tab that relates to euthanasia. There are only seven.

**GLAZEBROOK J:**

Tabs, what are the tabs again sorry. Can you just?

**MR BASSETT:**

Well, the tabs, remember in the case on appeal index they were grouped according to topic and the tabs 139–180 relate to euthanasia.

**GLAZEBROOK J:**

139–180.

**MR BASSETT:**

And there are in fact only seven items that are yellow coded in that tranche and there are another 10 items that have been generated by Family First that come from the media release tabs 311 and 312. Then in the next column to the right, the bill submissions, there are only two. That's the two above that are listed, I accept those. Then in the research report there is one. That's the Rex Adhar one and then in the right-hand column, in relation to euthanasia, there are two Op-ed pieces in newspapers. So the total in relation to euthanasia is 22 not 55 according to the –

**WINKELMANN CJ:**

Right, so can I just ask you to summarise. The point of this is to show that many of the items have been counted by the Attorney are not actually authored by –

**MR BASSETT:**

That's right and the Attorney has in response to that produced a different graph which reduces, significantly reduces especially in relation to the key one which is the next one gay marriage which is on the second page. They say on the second page and I will just do this one because it is a key one. The second one gay marriage, they say: "There are 55 articles and posts." I have been through all of them. There are in fact five in the tranche on case on appeal tabs 225–274 and there are no items, none, in the tabs 311 and 312. In fact, at the bottom of the page, all of those footnotes are all crossed out. They're all in relation to censorship. They have nothing whatsoever to do with gay marriage, so I come across the top left-hand corner the Attorney says: "55 articles." I've found eight and that is replicated in relation to the next page censorship.

**WINKELMANN CJ:**

Well, I don't think, we get the point yes.

**MR BASSETT:**

I won't go on, but it's there for the Court to see. That was my best effort in the time that I had available.

**WILLIAMS J:**

That first number, can you clarify for me, the left-hand number, the number provided by the Attorney, includes non-Family First authored or is that after they've sliced out the non-Family First?

**MR BASSETT:**

No, this is before they've sliced out the non.

**WILLIAMS J:**

Right. That's all I needed to know.

**MR BASSETT:**

This is the original. I can't go through the amended one. I think I've got 10 working days to do that.

**WILLIAMS J:**

Sure.

**MR BASSETT:**

I'm trying to find my place again and if I can come to page 24 of my submissions, in summary, subparagraph (d): "80% of the case on appeal tabs of 114–280 are not documents generated by or authored by Family First but are part of Family First's public amenity of a virtual reading room in which Family First reposts mainstream or third party media articles for the purpose of education and generating debate."

Tab 311 and 312 mostly contain by-lines of a document, in other words, if one goes to the case on appeal, there's usually only one line. So the Court has no way of knowing what the content of that document is. All you've got is the by-line. It might be a by-line which might have a, just for example, I'm saying

this is possibly the case, it may have a by-line to catch one's attention, but have a view expressed completely to the contrary in the document. We have no way of knowing. I don't know and the Court can't know either. And there are also many, many duplications and triplications within those tabs on the case on appeal. So when you look at the case on appeal, there are whole tranches of the case on appeal which are complete duplicates of earlier portions on the case on appeal and I have got an analysis of all of that. If the Court wants me to forward it to the Court, I have got an analysis undertaken by Mr McCoskrie where all of the duplicates, and there are pages of them, where all of this from duplicate materials, literally pages of duplicate materials where it has been included in the case on appeal twice. So I am just saying that and stressing that because it is not a case of looking through the materials and saying goodness me look at all this material that is prejudicial, when much of it is a duplication and in some cases it is in there three times.

**WINKELMANN CJ:**

Okay we have got that point.

**MR BASSETT:**

I can provide that analysis additionally to the Court. I didn't want to clutter the Court with too much information but it is there if the Court wishes to see it.

Subparagraph (f) on page 24, the graph includes selective material from 2006, forward to 2018, which is long before and after the CRB made its second deregistration decision on the 21<sup>st</sup> of August 2017. Only some of the material is relevant. The final point in relation to the graph is at point (g) which is that the graph includes different categories of material from different time periods and gives them all the same weighting. For example a 2008 Family First submission to a district Council and I –

**WINKELMANN CJ:**

Well that has been covered by Mr Gunn, he conceded that point in his submissions to us.

**MR BASSETT:**

All right. At paragraph 37 in relation to the 75%, as I understood it –

**WINKELMANN CJ:**

He has conceded this point too.

**MR BASSETT:**

If I can now come to the last or not the last but the last point on page 25, which is the *Molloy* decision, in my submission Family First activities regarding abortion are far removed from the purposes and activities of SPUC in the *Molloy* case in relation to the years ending 31 March 1974 and *Molloy*.

The Society for the Protection of the Unborn Child did, from its activities and its primary purpose appeared to be a front-on campaign of the opposition to abortion. The evidence relied upon by the Attorney-General primarily concerns Family First addressing abortion as an issue connected to all families, regarding teenage girls, women, namely principally in relation to aspects of informed consents and in particular in relation to the question of parental notification and physical and mental health. It is my submission that neither the Court of Appeal nor this Court in *Greenpeace* fully considered the issue of abortion regarding *Molloy* nor did they consider, and they weren't required to, it is not a criticism of Greenpeace, just a statement of what happened, neither did it have the opportunity to consider the other side of the coin, as I put it, in relation to the Auckland Medical Aid Trust, where dissemination of information about abortion was considered an educational purpose beneficial to the community and charitable, together with the provision of actual abortion services, even though such services were of questionable legality at the inception of the trust in 1974 in relation to the years ending 31 March '75 and '76. Now I have carefully looked at that. If one goes to footnote 190, the provisions, the references are there in that regard because Justice Chilwell refers to the fact that by the time that the case was heard in 1981 there is no question about legality because the Abortion, Contraception, Sterilisation and Abortion Act 1977 had been passed

but at the time in 1974, 1975 there was certainly an issue about what was going on there.

In this Court, my submission is that this Court is invited to reconsider *Greenpeace*, at least in relation to *Molloy* in such a way that permits education. Perhaps one could strike out the word “advocacy”, perhaps not the right thing to say, but permits education regarding abortion at least in the context of parental notification, and I have given the references there in the case, informed consent and physical and mental health, insofar as it relates to family. Education including a viewpoint was permitted in the Auckland Medical Aid Trust. My submission is that I invite this Court to reconsider its approach to *Molloy* at least in a way that that discourages the use of the decision in *Molloy* in lower courts as an exclusionary rule of general application. Controversy alone is not a disqualifying feature. In my submission, it’s wrong for the Charities Registration Board and the dissent in the Court of Appeal and the Attorney-General in this case to preclude or exclude a conservative education debate on an issue of abortion by charities by asserting *Molloy* operating as an exclusionary rule. In my submission, *Molloy* should not be interpreted as having that effect. My submission that further to that that *Molloy* needs separate reconsideration in an appropriate case.

Paragraph 43, over the page, I don’t have comment on that. I think I can leave that to be read by the Court, save though perhaps in the heading where it says “public benefit”, that could be amended in the light of my private dictionary that I outlined at the start of the case. That could be amended to strike out the word *public benefit* and replace it with *benefit to the community* so as to avoid the ambiguity I referred to at the outset.

I come now to paragraph 44. It’s my submission that the Charities Board and the Court of Appeal’s dissenting judgment and counsel for the Charities Board in the High Court, Court of Appeal and now in this Court were, with respect, wrong to treat the presumption of benefit to the community regarding the

advancement of education as rebutted by reason that Family First was advancing its own view and in particularly discriminatory.

If I can now just move to paragraph 45 and just address the discrimination point. My submission, the evidence before the Court does not indicate discriminatory purposes or activities. Furthermore, section 19 of New Zealand Bill of Rights Act only has application in relation to governmental acts or policies and likewise section 44 of the Human Rights Act 1993 in relation to the marketplace of goods and services. In my submission section 19 is a very carefully calibrated concept, which is incredibly difficult to apply, I might add, as most people recognise, which ought not to be applied with the resultant effect in the law of charities as somehow requiring uniformity of viewpoints, especially in relation to education regarding marriage and family. It's my submission that there is a self-evident benefit to the community of Family First purposes and activities for educational institutions including parents, families and integrated schools as indeed a sector of the community.

In my submission, the last phrase of that sentence is that it is wrong, in my submission, for the Attorney-General's submissions at paragraph 55 to imply that Family First purposes and activities are discriminatory, especially when Parliament clearly, in my submission, accommodates legitimate difference of views and beliefs in the area of marriage.

And the last sentence in 46, it's my submission that parliamentary accommodation of difference in the area of marriage ought not to be characterised as a licence to discriminate. In other words, for example, section 29(2) of the Marriage Act 1955 is a genuine exception and shouldn't be characterised as some sort of licence to discriminate but rather as an entirely legitimate accommodation.

Paragraph 47 is – I think I've covered that before – but simply the common law of charities should not aspire to uniformity of viewpoints in relation to education and religion regarding marriage and family, and that there ought to be no resurrection of religious or other belief tests which has the effect of

excluding certain sectors of society from democratic participation or fiscal benefit.

Paragraph 48, just finally in relation to discrimination, it's my submission that given the advancement of education regarding ethical knowledge, that's the *Tudor* reference to *Barralet* and *Scowcroft*, religious instruction/Christian knowledge being permissible, it's my submission that the Attorney-General's assertion involves a common law and unnecessarily a micro-analysis of beliefs and sub-purposes in circumstances where charities advancing education of ethical systems by deeming them discriminatory, in my submission that is a wrong approach to take.

In relation to the fourth head, the submissions are before the Court. I don't propose to go through them unless the Court has questions about them. What I do want to spend the rest of my time doing is going to schedule 1 to answer Justice Williams' and Justice Glazebrook's questions about the other items that are on the virtual reading room site that express views or are generated by groups that are perhaps contrary to views held by Family First. So if I can spend the rest of my time focusing on that.

Just in terms of, before I move to that, regarding the fourth head, the submission is that there is no need to go to the fourth head for the Court to consider that if the Court is of the view that Family First qualifies under the head of advance of education. The submission is that there is no need to qualify on both. There are many cases *Barralet*, *Law Reporting*, I just remembered the other cases where some judges have found on one head, some judges in the majority I think in *Law Reporting* found on both, whereas Lord Justice Russell only found on the fourth head. That course is open to the Court in my submission.

**GLAZEBROOK J:**

If you are wrong on that, do you want to make submissions on the fourth head, including there should be any law or any expansion of the law? I'm not



suggesting that you are wrong on the advancement of education because obviously we have to consider your submissions there.

**MR BASSETT:**

No, I didn't take your Honour as implying anything like that. We do rely on that as a backup. We certainly rely on the rule 20A notice as backup. My primary submission is that there is no need for the Court to go there, apart from in relation to *Molloy*. I think in relation to *Molloy* the current state of *Greenpeace* 2015, the Supreme Court decision, it would be beneficial to charities law for there to be a clarification statement in that regard, in the way that I have suggested, if the Court was willing to accept my submission on that point but apart from that I don't submit that we need to go to the point of reconsideration of *Greenpeace* 2015, although I did give a section 20A notice in January. My thoughts and submissions have been refined since then which hopefully will avoid the need to have that huge exercise undertaken.

If I can now go to the last page of my submissions, which is schedule 1. I will try and operate my hyperlink, I find it difficult at the lectern to focus on a computer screen. I will just see if I can bring up these.

**WINKELMANN CJ:**

Sorry what are you taking us to Mr Bassett?

**MR BASSETT:**

I am just taking the Court to the last page of my submissions, that is schedule 1. There are six items, oh no more than that. Perhaps if I can give your Honours the references and then at your leisure you can look at them. If I give you the items where there are –

**WINKELMANN CJ:**

Are you going to highlight ones in your schedule for us?

**MR BASSETT:**

Yes I am. I can give you the numbers and tell you what the names are as well and so that then, rather than me going to them all if your Honours wish, I can leave your Honours with the names of the media outlets and the numbers.

**GLAZEBROOK J:**

The numbers on the case on appeal, the tab references?

**MR BASSETT:**

Yes, in this schedule, if you go to the last page and click on these numbers with the media outlets, then you will be taken to the appropriate material. Sometimes it is very difficult to see exactly which item, sometimes the reference to the media outlet, the name of the media outlet, whether it is the *Washington Times* or the *New York Post*, whatever it is, is sometimes in very, very small print. It is there. I've checked every single one of them to check that there is such a reference, but sometimes they are very difficult to see. It may be that you have to even print them out or look at them on a hard copy but they are there. I can give these references to you now. The first one is, and the quirk of this schedule is that the number comes before, immediately before the media outlet, not afterwards. So, the first one is the BBC and the number is before it which is 405.1654.

**O'REGAN J:**

Do you want us to go to it, or are you just telling us about it?

**MR BASSETT:**

There are quite a few so if I just give your Honours the numbers and perhaps after I've given you the numbers, if I still have time, I can take you to one or two of them, but I will just give you the numbers.

**WINKELMANN CJ:**

I'm sorry to be so dim, but are these items listed in your schedule or not? Are they additional?

**MR BASSETT:**

No, they're on the last page. So once one has the numbers and the name of the entity all one has to do is click on the item and you'll be taken to the hyperlink without having to fossick around and find it. It's page 36.

**WINKELMANN CJ:**

I don't understand it.

**GLAZEBROOK J:**

Have you got an electronic copy of the submissions? No, I don't have them for some reason. I know, I don't know.

**WILLIAMS J:**

Just open up the subs.

**GLAZEBROOK J:**

Yeah, they don't open. I don't even have them. I can't find them. So, where do these take us to, to websites do they?

**MR BASSETT:**

No, they take the Court to portions of tab 313 and tab 314. Does the Court have my submissions?

**GLAZEBROOK J:**

Okay, okay, I understand that.

**WILLIAMS J:**

Yes, yes.

**MR BASSETT:**

At the last page of my submissions –

**GLAZEBROOK J:**

No, no, I know, I just don't have an electronic copy so I don't know what it's taking us to that's all. So, it takes us to portions of 313 and 314, that's fine.

We will be able to find an electronic copy, but unfortunately at the moment I don't have it.

**MR BASSETT:**

If one goes to –

**WILLIAMS J:**

You will need to come to the microphone or you'll fall off the transcription.

**MR BASSETT:**

Pardon, Sir?

**WILLIAMS J:**

Exactly. You will need to come to the microphone or you'll fall off the transcription.

**MR BASSETT:**

Oh yes. Sorry, apologise, Sir. In the case on appeal there are two big volumes.

**GLAZEBROOK J:**

I know, I understand now. So it takes us to part, these hyperlinks take us to the page you want us to look at.

**MR BASSETT:**

In the case on appeal.

**GLAZEBROOK J:**

In tab 313 and 314, that's fine. Yes, understand.

**MR BASSETT:**

In tabs 313 and 314 are the materials that are selected by the Charities Registration Board that relate to items that have been reposted by Family First and are effectively part of what I've called, not what Family First has called, what I have called its virtual reading room a là *Scowcroft*.

**GLAZEBROOK J:**

And the ones you're showing us are ones that show diverse point of view, is that what you're saying?

**MR BASSETT:**

That are by say an entity like *PinkNews* which is, you know, doesn't hold views that accord with where Family First is at. That's just one example that I'm going to take you to, but if you don't all have the hyperlink version there's little point of me...

**GLAZEBROOK J:**

I've just been sent one so I can do it.

**MR BASSETT:**

Oh, okay. Perhaps if I give – would it be also helpful if I sent to the Court after the hearing a list of these items?

**WINKELMANN CJ:**

It would be.

**MR BASSETT:**

Because otherwise it relies on just an oral.

**WINKELMANN CJ:**

Yes, it would be definitely helpful. So, carry on take us through a couple.

**MR BASSETT:**

Perhaps if just take you down then I won't have to go through them all, but perhaps if I take you down say half way down the first case on appeal item 313. There is a reference, I just mentioned it, to *PinkNews* if one goes to 405.1556. I will just try and see if I can follow the same process myself. So this is the situation where the number comes before the media outlet. So the number is, the item is *PinkNews* and the number is 405.1556. So this is an item from *PinkNews*, 4 May 2015, *Polyamorous*, I'm not sure how to say that,

activist and writer Redfern, John Barrett writes for *PinkNews* on the need for a legal recognition of relationships, including three or more people. In March I submitted the following question to Green Party Leader, Natalie Bennett for *PinkNews* Q and A. At present those in a trio, three way relationship are, and then it stops and this is unfortunately a feature of much of the material, not only in tab 313, 314 but also in the other material in Appendix G where only the by-line is reproduced. Unfortunately the content of the document is not available, so one, as I said –

**WILLIAMS J:**

Not much of a reading room.

**MR BASSETT:**

Well no, it is great for a reading room because if you looking at it you can click on it, it is just that these are screenshots.

**WILLIAMS J:**

Oh you mean the – right okay.

**MR BASSETT:**

Yes so the reader can read the article and they are selected articles that are set together so that in the reading room, some who want to look at marriage and family or look at euthanasia, they can go and see a whole selection of different viewpoints but these are ones that were selected by the Charities Registration Board, it is not representative of everything that is on their website.

**WINKELMANN CJ:**

Okay, so I think we have got the point, that contrary views are set up in quite a shocking way actually I suppose in the materials. It is contrary views that given the known readership of Family First is likely to be controversial from their point of view.

**MR BASSETT:**

So a reader can go to the Family First website and see contrary views. Certainly granted there will be many, many views there that are supportive of Family First views but there are also views there from, and I give some of the names, *ABC News*, *Three News*, *Newstalk ZB*, *The Guardian UK*, *LifeSiteNews*, *The Telegraph*, *USA Today*, *PinkNews*, *Mirror UK*, *Washington Times*, *Sydney Morning Herald*, *Irish Times*, *New York Times*, *Time Magazine*, *The British Geriatric Society* et cetera.

**WINKELMANN CJ:**

All right, yes.

**MR BASSETT:**

Variety of views. Perhaps if I can leave that part of the submission there. I did just want to take the Court, I'm not sure if I mentioned this yesterday but I may have done and it is the *Greenpeace* 2020 decision of Justice Mallon. I can take the Court to that decision. This is in relation to the virtual reading room and refer the Court to paragraph 116(a), Justice Mallon says, referring to the research that is undertaken by Greenpeace: "Research of that kind is advancing education by contributing to the general store of human knowledge", and there is a footnote to *Anti-Aging*. "Greenpeace New Zealand makes the report available free of charge on its publicly accessible website. I accept Greenpeace NZ's submission that the Internet can be a forum through which members of the public are educated, depending upon the content of the information provided. I consider that research of this kind and making it available by Greenpeace NZ is advancing education." And essentially Justice Mallon is there referring to the effect of what I have referred to as a virtual reading room because it seems, I don't have personal knowledge myself, but it seems that Greenpeace operates in a similar way to some extent but I doubt, I mean I don't know, I haven't looked at Greenpeace's website but it may be that I doubt that Greenpeace, maybe it does, has reports on there that suggest that importation of coal is a good idea.

**WINKELMANN CJ:**

It probably does.

**MR BASSETT:**

Maybe it does.

**WINKELMANN CJ:**

It probably does the same way that this does, you know, provocative articles because they're provocative on this – I mean, to be frank, aren't they? They're put there because they're provocative not because it's putting a different point of view. It's because it's provocative.

**MR BASSETT:**

They are. Well, what the effect is.

**WINKELMANN CJ:**

I mean it is putting a different point of view, yes, but I'm sure they probably have a similar kind of thing going on.

**MR BASSETT:**

They may do and the critical point is I think that Greenpeace has been slightly more successful over the years than Family First in terms of its litigation anyway. I'm not quite sure what the current state is for Greenpeace.

**GLAZEBROOK J:**

You were referring to 116(a). That seems to be talking about reports rather than news media material.

**MR BASSETT:**

Yes, there is. I'm just wondering whether I've got the right paragraph.

**GLAZEBROOK J:**

I think you probably haven't because certainly it's very supportive of your argument on the reports that Family First commissions.



**MR BASSETT:**

I think if I did a word search on the PDF judgment I think that there is another reference.

**GLAZEBROOK J:**

I think there is too, but I don't think it's 116(a).

**WINKELMANN CJ:**

What would you word search on it for, do you think?

**MR BASSETT:**

I could probably try and do a word. I mean I don't want to waste the Court's time.

**WINKELMANN CJ:**

What would you word search for, do you think?

**MR BASSETT:**

Just go into that little –

**WINKELMANN CJ:**

I know, but what would you word search for? I know how you do that, Mr Bassett.

**MR BASSETT:**

You could try virtual reading room. I'm not sure whether they've used the same.

**WINKELMANN CJ:**

I tried reading and I didn't –

**GLAZEBROOK J:**

Because 116(a) is talking about the reports which of course is very supportive of your submission on your reports.

**WINKELMANN CJ:**

I'm not finding it.

**MR BASSETT:**

I thought I had it as 116(a), but obviously –

**GLAZEBROOK J:**

Because that's talking about a trajectory analysis of a deep sea, deep oil spill as far as I can make out.

**MR BASSETT:**

That's regrettable because I thought that there was a reference at 116(a).

**WINKELMANN CJ:**

That's all right.

**GLAZEBROOK J:**

It may be, but it might be a footnote or something, but anyway, we can look for that, or you can send us the reference when you find it after lunch.

**MR BASSETT:**

All right.

**WINKELMANN CJ:**

Well, you can tell us after lunch.

**MR BASSETT:**

I may have concluded. I will just have a think about that, but we may have made record time. Can I just advise the Court at is it 2 o'clock or 2.15 when we resume?

**WINKELMANN CJ:**

2.15.

**MR BASSETT:**

2.15, I will advise the Court then, but even if I do have something else to say hopefully it will be very, very brief.

**GLAZEBROOK J:**

You can probably find the reference in Justice Mallon to give us.

**MR BASSETT:**

Endeavour to do so, your Honour, and I will email in the next day or so a complete list of the items in the schedule 1 of my submissions which relate to *ContraViews*, *PinkNews* and the like.

**WINKELMANN CJ:**

All right, thank you very much, Mr Bassett. So you have finished?

**MR BASSETT:**

No, I'm just aware it's one minute to one.

**GLAZEBROOK J:**

He's working out whether he's finished over the break.

**MR BASSETT:**

I'm just one minute to one, or two minutes to one.

**WINKELMANN CJ:**

Oh no, apart from that. You want to?

**MR BASSETT:**

Perhaps if we are able to adjourn I can look at some of these points afterwards. It may be that I have concluded. If I have concluded, by 2.15 I will advise my learned friend and perhaps advise the Court at 2.15, otherwise if I can find one of those references I might come back. I will just check whether or not there are any other submissions that I wish to make.

**WINKELMANN CJ:**

Well, we can't run on much past 2.15 is my only thought.

**MR BASSETT:**

I understand that, but if I could have say five minutes or so just to make sure I've closed off everything.

**WINKELMANN CJ:**

All right, okay, we'll adjourn now, thanks.

**COURT ADJOURNS: 12.59 PM**

**COURT RESUMES: 2.18 PM**

**MR BASSETT:**

May it please your Honours, I just have one, two very short points, one substantive, just about a sentence or so long, and that is, your Honours, if the Court was minded to see the need to proceed to consider the fourth head then on behalf of Family First I submit that reliance is placed upon paragraphs 171 and 172 of the Court of Appeal's decision in relation to the interpretation that Justice Mallon placed on the *Greenpeace* 2015 decision. That interpretation is supported by the or adopted, affirmed, by the Court of Appeal. It is my submission that that is also affirmed by Family First in this case should the fourth head need to be considered.

That's the only substantive point I have. The only other collateral matter is I would also seek leave within the 10 days allowed to file comments about the graph also to be able to file any comments about the or submissions in relation to the *Inland Revenue Commissioners v Oldham Training and Enterprise Council* [1996] STC 1218 case, that's Lightman J, or the new case that I've just received regarding the Henry George Ford Foundation, *Attorney General (NSW) v NSW Henry George Foundation Ltd* [2002] NSWSC 1128.

**WINKELMANN CJ:**

Well, I'm not sure about the additional case but...

**MR BASSETT:**

I tried to read it over the break but I'd just like that indulgence if I may. I'll seek that indulgence if I may.

**WINKELMANN CJ:**

Well, that would be limited to two pages.

**MR BASSETT:**

Your Honour pleases. That concludes my –

**WINKELMANN CJ:**

Because I think it's all largely dealt with anyway in your submissions.

**MR BASSETT:**

That concludes my submissions, your Honour.

**WINKELMANN CJ:**

Thank you, Mr Bassett. Now Ms Batrouney and Ms Davenport, I'm not sure how you're dividing this between you.

**MS DAVENPORT QC:**

Well, Ma'am, I think the plan is that Ms Batrouney make her submissions first. My contribution will be anything that I can assist the Court with on section 14 of the Bill of Rights Act and if there's any further questions on the issue of tikanga as an interpretative tool, but otherwise I'll hand over to Ms Batrouney.

**WINKELMANN CJ:**

Thank you. Thank you, Ms Batrouney.

**MS BATROUNEY QC:**

Thank you, and could I start by thanking the Court for allowing CLAANZ to intervene and to be heard in this case. Can your Honours hear me well?

**WINKELMANN CJ:**

Yes, very clearly.

**MS BATROUNEY QC:**

Thank you. I propose to really address two main issues. One is the fiscal consideration issue and the other is the, as Justice Williams and I think the Chief Justice asked me, to address on the line between agitation and advocacy. I will send up a note on these issues to your Honours which will set out all the cases that I think are relevant and the passages.

But could I just say in a nutshell in relation to education and advocacy, it's all about ends, means and manner. If I could take those in the reverse order, manner, there's two separate aspects of education. One, whether material is of educative value and, second, whether it is education as distinct from propaganda. There is authority to the effect that merely providing information is not educative and merely providing materials from which someone can self study is not educative, and I'll take your Honours to those cases. The second is means. Education seems to encompass the generation of public debate and education does not seem to encompass a polemical view or where a particular point of view is pushed, as it were. So that's the difference between means, and then ends, if advocacy is itself the end in view and that advocacy is itself charitable then it doesn't need to be educative at all. So, for example, this Court in *Greenpeace* at paragraph 71 talks about purposes that are advocacy purposes that are regarded as charitable in and of themselves. So this Court has said: "Just as the promotion of abolition of slavery has been regarded as charitable, today advocacy for such ends as human rights or protection of the environment and promotion of amenities that make communities pleasant may have come to be regarded as charitable purposes in themselves, depending on the nature of the advocacy, even if not ancillary to more tangible charity." So if advocacy itself, such as advocacy for the environment, is the end then it doesn't matter whether it's educative or not. It is charitable in its own right. But that is a very rare case. In our main submissions we have said the situation where a charity has a non-ancillary advocacy purpose is very rare, and it is those sorts of cases that is referred to

at paragraph 71 of *Greenpeace*, very narrow class of advocacy, so in abolition of slavery, human rights, et cetera, environment. So for all other charities, whether or not what they are doing falls within the second head of education or whether it falls outside that as promotion of a point of view, as I say, depends on manner and means. So perhaps the best example of this is *Draco Foundation*, that is at tab 17 of your Honour's authorities. *Draco Foundation* has many parallels to the case before your Honours today. *Draco Foundation* existed to encourage citizens to engage and understand with local government and it posted things on its website et cetera, et cetera. And Justice Ronald Young found at paragraph 41, that in relation to what was on Draco's website, it said: "What Draco has compiled (in part) is a very useful summary, helpfully gathered in one place, of information about local and central government. It does not have any independent educational value." It does not have any independent – so it goes on to say that again, it is essentially the provision of information.

And then it goes on at paragraph 43 to say: "At best it is the provision of material for self-study. The 'reader' can choose whether to access the material or not. This is not the advancement of education." Now he referred to *Vancouver* as authority for that but I wonder, your Honours, whether in this COVID day and age, where universities have been forced to almost fully go online, whether it is possible to actually say that anymore, that mere self-study is not educative. But putting that to one side, when his Honour refers to *Vancouver*, I won't take you to *Vancouver*, I will refer to it in the written submissions. I would approach what *Vancouver* says about the form educative value with caution because in Canada it was noted that the Courts have taken a fairly restrictive view about what constitutes education and that case was looking at whether or not sending children on a holiday camp would be considered to educational and whether merely putting material on a website would be considered to be educational.

So that is the first thing, whether the actual form in which the education takes place is education.

**WINKELMANN CJ:**

It's the manner, your manner point?

**MS BATROUNEY QC:**

The manner.

**GLAZEBROOK J:**

I have a slight difficulty with just putting information up isn't education, because most teachers are just providing, certainly in the old-fashioned sense of the word, are just providing information.

**MS BATROUNEY QC:**

Yes, well as I say in this day and age universities have been forced to move to that mode of education. So it wouldn't be our submission that merely putting material on a website is not necessarily education, but I suppose one needs to look at whether it is merely the collation of the information or whether it is collated in a fashion that tends to be educative. I mean in a sense I was thinking if you walk into a library, there is just a collation of information there but no one would deny that that is an educational facility.

**GLAZEBROOK J:**

Well that is why I was having some trouble with the submission really, because it depends what you are doing it for and why you are doing it, but certainly old-fashioned education was just providing someone else's information they had collated to unwilling pupils in some cases.

**MS BATROUNEY QC:**

Which is what Justice Ronald Young was attempting to say in *Draco Foundation*, is one looks at whether it has any independent educational value or whether it is essentially the provision of information.

The means is the more interesting aspect and that is the line between education and propaganda or lobbying as it were. I handed up to the Court the decision in the *Attorney General v NSW Henry George Foundation* and I



apologise for it now being in our list of authorities. It is a decision that I have been looking for, for a while and I only found it last night. Do your Honours have a copy of that decision?

**MS BATROUNEY QC:**

It is the decision of Chief Justice in Equity. He sets out at paragraph 4 what the objectives of the Henry George Foundation were. In essence Henry George was an economical philosopher whose opinion was that there should be a single tax and it should only be a single tax on land and that was no income tax, no fringe benefit tax, et cetera, et cetera. There was expert evidence about whether or not his teachings were of any value, but the main point from this point of view is what the Chief Justice said, quoting from Professor Sheridan at paragraph 52, at paragraph 52 he says: "This problem, an even more difficult scenario appears when the objects displayed in such way that the educational purpose is a prelude to another purpose, particularly where that other purpose is a change in the law." Now this case of course was a pre *Aid/Watch* case. The Chief Justice said: "This problem is also linked with a problem as to when education become propaganda or when propaganda is education. As Professor Sheridan says, there is a thin line, difficult to discern and possibly without great legal significance but there all the same, between trying to convert people to a point of view and informing them of its existence and of the reasons for it between propaganda and education."

Your Honours, I have had Professor Harding looking for Professor Sheridan's article. We will find it and we will send it on to you. We haven't been able to find it as yet.

Could I then take your Honours over to paragraph 71, again where the Chief Justice refers to Professor Sheridan's article and about half way through that paragraph, Professor Sheridan says: "Nevertheless there is a valid distinction between a trust whose funds are to be spent on converting people who have specified political objectives and one whose funds are to be used to make knowledge of the arguments a specified political objective more readily available."

So that is one way of articulating the line, as it were, but I think perhaps another way is as Justice Heydon in dissent set out in *Aid/Watch*. I'm sorry I don't have the reference to *Aid/Watch* but I am sure your Honours know where you can find it and could I take you to page 563, paragraph 52 which is from Justice Heydon and as I say he is in dissent but in this regard it would seem that Justice Kiefel is in agreement with him. At about .5 down paragraph 52 he says: "However, the function of the appellant is not educative but polemical. The appellant has a particular point of view or a series of particular points of view. Those points of view are sometimes worked out, for example, in what Dr Goodman called major, in-depth, on the ground, researched reports. But the points of view are pressed as part of a campaign. The appellant engaged in the targeting of various government policies and seeks to argue for others. The appellant has attacked various government policies as involving perversity or hypocrisy. The appellant's publications take a polemical stand in relation to climate change issues. Its stand may be virtuous, it may even be right, but it is not educational. As noted earlier, the tribunal found that the whole object of the appellant is to influence public opinion by making the results of its research available with the further goals of influencing public opinion and ultimately government agencies and government itself. Influencing public opinion is not by itself educational, even if information has been collected for the purpose of attempting to achieve that influence," and then he adopts the words of Justice Hammond in *Re Collier* and says: "The conduct of the appellant represents an attempt to persuade people into a particular frame of mind. There is no instruction directed; nor is there to be any systemic accumulation of knowledge."

Now, the last paragraph I wish to take your Honours to is from Justice Kiefel's –

**GLAZEBROOK J:**

I didn't get the page number that you were looking at there.

**MS BATROUNEY QC:**

I'm so sorry, Justice Glazebrook. It was page, Justice Heydon was at page 563 at paragraph 62.

**GLAZEBROOK J:**

Thank you.

**MS BATROUNEY QC:**

And over to page 564. I'm so sorry.

**GLAZEBROOK J:**

Thank you.

**MS BATROUNEY QC:**

Justice Kiefel says at page 565 at paragraph 69, she says after the reference to Thames Oil about half way through page 69: "However, reaching a conclusion of public benefit may be difficult where the activities of an organisation largely involve the assertion of its views, as is here the case. It might have been otherwise where those activities, and the stated purposes, capable of being characterised as for the advancement of education." She said at the bottom of that page at paragraph 73, she said: "It should not be assumed that the courts will be unable to discern a public benefit in trusts concerned with agitation for reform, at least where they encourage public debate or education, by way of disseminating knowledge or information, upon legitimate topics."

And then finally at 568 at paragraph 86 she said of the appellant's activities: "If they were directed to the generation of a public debate about provision of aid, rather than to the acceptance by the government and its agencies of its views on the matter, the appellant might be said to be promoting education in that area. But it is not."

So, if there is to be a bright line, it might well be that bright line as to whether or not the putative charity, their activities are directed to the generation of public debate rather than acceptance of its views.

Your Honours, given the time, there's only one other matter that I would like to address in relation to our submissions. Most of the issues we raised have been rehearsed in the course of oral argument, but could I just say one thing about fiscal considerations.

**WILLIAMS J:**

Just before you do, do you mind if I have a question. The reference in *George* to the thin line between converting to a point of view and informing of a point of view's existence, in Justice Heydon's polemical, in Justice Kiefel's assertion versus education. It's hard to see these things as any more than if you're strident you don't get in.

**MS BATROUNEY QC:**

So, it depends what you're talking about getting into.

**WILLIAMS J:**

That you're not a charity.

**MS BATROUNEY QC:**

That you're not a charity under the head of education.

**WILLIAMS J:**

No, but you see, if you read some of the great philosophers, they're as strident as all get out. Read Hegel.

**MS BATROUNEY QC:**

Yes.

**WILLIAMS J:**

He's yelling at you on this page, yet a trust to disseminate Hegel's philosophies would certainly be considered charitable I would have thought. Certainly educative.

**MS BATROUNEY QC:**

Yes. With respect, your Honour, I have struggled with that as well and what I have come to understand is that if you are a charity other than under the head of education, if your advocacy activities are a means to an end and are incidental to your charitable purpose, then you can be strident, you can be polemical. However, to fall within education, your activities must be educational and to the extent to which you are advocating for a political view, then we come up against the problems that your Honour has mentioned. I note certainly in the *George Henry* case there was expert evidence given as to the value of the opinion and if we reflect upon the foundation of *Anti-Aging Research* case, Justice Ellis there set out a number of criteria for educative purposes. They must be of a certain minimum standard, that they're not nonsense, that even if the views are on the fringe that is okay, but it certainly seems that at some stage the point is not to educate, the point is to pursue a particular point of view.

**WINKELMANN CJ:**

Is the line that is to be drawn between what your purpose is, is your purpose through doing this increasing the wealth of public knowledge and understanding, or is your purpose advocating for a change or a maintenance of a particular policy or law?

**MS BATROUNEY QC:**

It certainly, it depends whether the advocacy is itself an activity or a purpose. So, for example, when advocacy is the purpose of the organisation, so for example, an organisation like Greenpeace, then that is their purpose. So, in that circumstance there's no distinction between purposes and activity.

**WINKELMANN CJ:**

No, but the question is can you just dress your advocacy purpose up as education, that's really the fundamental question?

**MS BATROUNEY QC:**

That is the question and again, if you cross the line of pushing a particular point of view, then that would seem to be not of educational value. That would seem to cross over the line of being propaganda.

**WILLIAMS J:**

Parachin writes about the Trinity West University in Canada, one in Ontario and one in British Columbia where it was to be a Christian law school. Are you familiar with that?

**MS BATROUNEY QC:**

No, I'm not, your Honour, I'm sorry.

**WILLIAMS J:**

Okay, thanks.

**MS BATROUNEY QC:**

There seems to be quite some hypocrisy around religious propaganda. Again, the law is in unsatisfactory state and Professor Dal Pont talks about that, that it seems to be okay for religious organisations to engage in propaganda but there seems to be some second standard for everybody else. I'm not quite sure if that's what Parachin was referring to there, but again –

**WILLIAMS J:**

Well, in that case, the law school required all staff and all students to solemnly vow, I can't remember what the phrase is, that they would not engage in premarital sex, that they are straight not gay, they will comply with the 10 commandments and so on and so forth. They didn't get certification from the Law Society of Upper Canada, but there was a very interesting question about whether they would be charities and Parachin says they certainly

should have been by reference to his analysis. You give me the impression that because there is no room for other points of view in such an establishment that it might not have been. If you're Muslim, you don't get in. If you're gay, you don't get in. If you're not prepared to make the vows, you don't get in.

**MS BATROUNEY QC:**

As I say, there is anomalies littered throughout the law of charities and this is one in relation to religion, in relation to cases, grey cases, in relation to animal cases, morality cases. There is anomalies everywhere.

**WILLIAM YOUNG J:**

Sorry, is one possibility for Family First to rebrand itself as an organisation with the purpose of promoting a traditional Christian view of marriage, would that then make it a trust for the propagation of religion? Maybe?

**MS BATROUNEY QC:**

The anomaly in the law leaves that open, but simply, as your Honour would well know, simply labelling yourself one thing or the other may not get you there. I notice that one of the very first questions that Justice Williams asked in this case was whether or not the Family First considered themselves a religious organisation and the answer was no and with respect to Justice Young, that may well have led to a different result which there is no justification for that at all.

**WINKELMANN CJ:**

Apart from the statute.

**MS BATROUNEY QC:**

Yes.

**WILLIAM YOUNG J:**

Well, it's not in the statute though.

**GLAZEBROOK J:**

One of the issues, isn't it, that you will often have academics who, after a lot of research, will come to a particular point of view say on a law change or more likely on a policy change say in relation to domestic violence and they become quite strident, if we're using that term, in support of their view. Well, I mean actually I was thinking perhaps even more topical at the moment is people who think that a number of the governments around the world are not tackling the COVID crisis correctly. Now, they're quite strident in respect of that. Would they somehow be losing charitable status if they were a research organisation?

**MS BATROUNEY QC:**

With respect, great question. It wouldn't be an individual, it would be an organisation. So, it would be Professor Smith, for example, who was advocating that the Wellington government didn't deal with the COVID issue sufficiently well. Again, it would depend on whether the organisation, the Wellington vaccination organisation or trust was seeking to generate public debate about it, or was simply hoisting its point of view on the public. It would involve a characterisation of what the purpose of the entity is and then looking at whether there was public benefit in their purposes. The public benefit aspect is where is it of public benefit when you are simply advocating a point of view and not seeking to generate public debate.

**WILLIAMS J:**

Isn't it the case that by merely expressing that strident view you do generate public debate?

**MS BATROUNEY QC:**

Perhaps.

**WILLIAMS J:**

It is itself a generator.



**MS BATROUNEY QC:**

Perhaps, yes, your Honour, and that's what *Aid/Watch*, the majority in *Aid/Watch* found that the mere discussion in a liberal democracy, the mere discussion of these sorts of issues is of the public benefit.

**WILLIAMS J:**

Well, I don't think there can be any doubt that Family First has generated public debate as well as contributing to it. That was its point.

**MS BATROUNEY QC:**

Yes, but being the intervener, we obviously have no point of view on the actual merits of the case but it seems that the Court in *Greenpeace* did not go to that extent, did not accept that view, that generation of public debate of itself, in and of itself can be of public benefit.

**WILLIAMS J:**

But you said that generating public debate can be educative, mere assertion of views cannot. So if, under the educative head, what you are doing is generating public debate, what the practical effect of what you are doing is to general public debate, doesn't that mean it slips within the education head?

**MS BATROUNEY QC:**

Yes.

**WINKELMANN CJ:**

So moving onto the fiscal thing.

**MS BATROUNEY QC:**

Thank you, the only other thing I would say in relation to the fiscal aspect is again from *Aid/Watch*, and it's from the majority this time at page 549, at paragraph 21 through to 23, so that's *Aid/Watch* at page 549. The majority there refer to Lord Wright's reasoning in the *National Anti-Vivisection Society v IRC* [1948] AC 31 (HL) case where one of the reasons that Lord Wright gave for refusing the *Vivisection Society* charitable status was the proposition that

this result would prevent the society from claiming the benefit of being immune from income tax which would amount to receiving a subsidy from the State to that extent.

And then our Court goes on to say: “The effect of the submissions for the Commissioner in the present case was that the case law respecting the exclusion of political purposes from charitable purposes should be applied and developed consistently with the remarks of Lord Wright,” that is looking at whether or not there was a subsidy from the State. And the majority says: “This would not be a proper approach to the construction of the 1997 Act, the Fringe Benefit Tax Act or the Goods and Services Tax Act,” and then if we could drop down to paragraph 23, he says, they say: “Where a statute picks up as a criterion for its operation, a body of the general law, such as the equitable principles respecting charitable trusts, then, in the absence of a contrary indication in the statute, the statute speaks continuously to the present, and picks up the case law as it stands from time to time. Further, where, as here, the general law comprises a body of doctrine with its own scope and purpose, the development of that doctrine is not directed or controlled by a curial perception of the scope and purpose of any particular statute which has adopted the general law as a criterion of liability in the field of operation of that statute.” And so in short if the tax legislation says that charities should get a particular subsidy if you like or a particular type of tax treatment, then it is a matter for the legislature to change that and we can see an example of that in your own Charities Act where in section 5(2)(a) the New Zealand legislature has tinkered a bit with what is a charity. So at subsection 2(a) in your Charities Act 2005, it is said: “The promotion of amateur sport may be a charitable purpose if it is the means by which a charitable purpose referred to in subsection (1) is pursued.” Now on one view that is simply a codification of the common law but you see here where there is fiscal nut, where the parliament has said we do want this particular activity or this particular purpose to be given a particular fiscal consequence. But other than that, it would be our submission that it is a matter for the parliament to determine whether or not a purpose is accorded a particular fiscal consequence and the Court should not take into account the fiscal

consequences when determining whether or not purposes, such as are being considered in this case, ought to be –

**WILLIAMS J:**

What if the common law itself was concerned with fiscal consequence? If that common law is incorporated into the statute, why would it become irrelevant at that point if it was relevant before?

**MS BATROUNEY QC:**

I wouldn't submit that it was relevant in the common law.

**WILLIAMS J:**

Oh, I see.

**WINKELMANN CJ:**

Do you say that that principle that the fiscal consequences are an irrelevant consideration I think is what you're saying, should be extended beyond cases where you're just simply deciding within the reasonably settled or what's in and out, are you saying that should be extended so that if a change in the law, in the common law, is being urged upon us which would considerably expand the scope of that which is a charitable trust, we should still regard it as an irrelevant consideration?

**MS BATROUNEY QC:**

More particularly it is a matter for the Parliament. So if this Court should decide that a new big purpose should be charitable, it's up to the Parliament to change that by legislation. As it is, fiscal consequences are a matter for the Parliament.

**WINKELMANN CJ:**

But Parliament is proceeding on the basis of settled common law, so we might take the opposite view and think it's a matter for the Parliament if they have been proceeding on the basis of fiscal consequences of a settled common law, that if it is to change, Parliament should change that definition.

**MS BATROUNEY QC:**

Just to give you an example, one occurs to me, in the Australian Charities Act, the law has been changed so that cloistered nuns, cloistered reflection, religious reflection, is included as a charitable purpose whereas it is not in common law.

**WILLIAM YOUNG J:**

Sorry, just pause there. What's the case for that? I vaguely remember that someone said that the Carmelite order were being paid to be good not do good.

**MS BATROUNEY QC:**

Yes.

**WILLIAM YOUNG J:**

But I couldn't really track it down when I was looking for it.

**MR BASSETT:**

*Gilmour v Coats* [1949] AC 426 (HL).

**WILLIAM YOUNG J:**

*Gilmour v Coats*.

**MS BATROUNEY QC:**

*Gilmour v Coats*, yes, thank you. So that is where the Parliament has intervened to say: "We don't like the common law, we're going to afford a particular fiscal consequence to this sort of purpose."

**WINKELMANN CJ:**

That's my point. I mean Parliament could intervene to say: "Well, actually free speech is so important we're going to expand the nominate ground to include all these different things," which they've effectively done in the United Kingdom, haven't they, they've amended their definition.

**MS BATROUNEY QC:**

Yes. But, as I say, that's a matter for the Parliament, not for the courts.

**WINKELMANN CJ:**

Okay, so you agree it is for the Parliament? I thought you were saying it was irrelevant to what we did in terms of definition. I may be misunderstanding you.

**MS BATROUNEY QC:**

Sorry, yes, I'm saying whether or not a fiscal consequence follows or not is a matter for Parliament. They can give it, they can take it away, but the Court should simply focus, with respect, on whether the purpose in front of you is in fact a charitable purpose.

**WILLIAMS J:**

Isn't the point in *Aid/Watch*, isn't the point the majority in *Aid/Watch* says that the incorporation of common law principles and rules into a statute does not freeze them at that point and it is for the courts to continue to develop them as they see fit. It is primarily a common law phenomenon?

**MS BATROUNEY QC:**

Yes, absolutely and the fiscal consequences follow on unless Parliament intervene either to add to what gets that tax subsidy or to take it away.

**WINKELMANN CJ:**

I just find it hard to see how it can be an irrelevant consequence when it's the very water in which we're swimming at this point because we're arguing about the fiscal consequences and we're arguing about that what should receive this benefit, so I find it hard to see that fiscal consequence is irrelevant.

**MS BATROUNEY QC:**

It is simply a consequence that what is before the Court today is whether or not this particular purpose is charitable.

**GLAZEBROOK J:**

What you're saying is that that what you look at is under the common law method you look at whether it's charitable or not without taking account of fiscal consequences?

**WINKELMANN CJ:**

Yes, I understand that point. I just find it hard to see how you match it with all your arguments about how important it is that there be an equal playing field with whose getting the fiscal benefits because in fact a lot of arguments turn on fiscal consequences, but anyway.

**MS BATROUNEY QC:**

Unless the Court has any further questions for me, as I said I will hand up a note to this once we have done it and I will hand up also the Professor Sheridan article but otherwise if the Court pleases I will hand over to my co-counsel Ms Davenport.

**WINKELMANN CJ:**

Thank you Ms Batrouney.

**MS DAVENPORT QC:**

Thank you members of the Court. I am not certain the extent to which the issues that I was going to address the Court on which is the –

**WINKELMANN CJ:**

We can't see you Ms Davenport, but I don't know that that is material because I have done a little – oh we can now see you. You had turned the camera off. So what I can indicate is that I have polled the Court and we do not require any assistance on the issue of section 14 or te kanga, so I think those were the topics that you were going to address on.

**MS DAVENPORT QC:**

They were but, you know, is there anything else that I can you help? I feel I ought to contribute something to this debate.

**WINKELMANN CJ:**

Well it is very nice that we can see you now anyway.

**MS DAVENPORT QC:**

Thank you Ma'am. Actually perhaps there is one more point, the question that your Honour was asking the fiscal consequences, I mean the cases, the American cases say that the granting of subsidy or otherwise is not something that the Courts can consider as unconstitutional or not, and in this context whether it is a charity or not, the decision for the Court is whether it falls within the definition of a charity from which the fiscal consequences will flow which I guess is the same thing that we have been saying and the fact that if you might embrace or expand the common law to make that category wider –

**WINKELMANN CJ:**

So that they receive the tax benefits?

**MS DAVENPORT QC:**

They receive the tax benefits. Then I mean the issue is whether or not you think the common law should go that way or not I guess, rather than the issue of whether or not the subsidy can be taken into account. There we are that is my two minutes worth of my contribution.

**WINKELMANN CJ:**

Thank you very much, they were very helpful. So Mr Gunn.

**MR GUNN:**

I will take one or two minutes, just to set up, with the Court's indulgence.

**WINKELMANN CJ:**

That is fine.

**MR GUNN:**

And with the Court's leave, what I propose to do is go very quickly through both the Intervener's submissions to the extent that I feel that there is a need

for Attorney reply, as well as some of the points that my friend Mr Bassett raised in his submissions before this Court. If I may perhaps start with some of the things that Intervener has mentioned in both written and oral submissions and I don't propose to take the Court through these in any detail, simply really to signpost where the Attorney's is on matters that are seen as relevant.

The first of those points in response is in relation to the Intervener's setting out of Justice Ellis' approach in the *Foundations* case and that is in the Intervener's submissions at paragraph 5. The Attorney's point in relation to those submissions, your Honour, is that the test as the Intervener has set it out, in our submission differs somewhat from the test in the *Foundations* case and the approach that the Attorney advocates for is the approach of turning to the purposes of any charitable entity or putative charitable entity, examining those purposes but as this Court will appreciate, both from the Attorney's written submissions and also answers to oral questions, there is, in the Attorney's submission, a very clear need also to have regard to activities as well and that is because of the statute, it is section 18(3), it is section 50, but also in situations where a trust deed purposes are expressed ambiguously or indeed where they are not expressed at all in situations where a charity or an entity, there may be debate about the extent to which it is undertaking a particular purpose, as we have seen in comments I made yesterday about the *Greenpeace* High Court decision in reference to activities in those circumstances remains important and indeed essential in my submission.

**WILLIAMS J:**

So you say you need ambiguousness or silence or do you say 18(3) cuts through that?

**MR GUNN:**

Ambiguity is one reason why one would look to activities, your Honour, but I make a general submission that you must do it because the –



**WILLIAMS J:**

It is always relevant.

**MR GUNN:**

Yes, but the extent to which it will be relevant will vary from case to case. Your Honours will be sick of hearing that there is no bright line anywhere in this jurisdiction but this is yet another example of that your Honour.

In terms of paragraph 12 of the Intervener's submissions and I acknowledge that this wasn't taken or developed in any detail and it is expressed in a, not equivocal, that is unfair, but certainly not in a hugely positive way, at paragraph 12. The Attorney's approach is that there is no necessity to revisit elements of the reasoning of majority in *Greenpeace*. That is not to say that there is not difficulty in determining which side of the non-bright line a particular entity may fall. That has always been difficult and it was difficult, with respect, before this Court's decision in *Greenpeace*. It is, in my submission, likely to remain difficult in hard cases going forward.

As to the references in the Intervener's submissions to the rarity of the cases that might involve political purposes, I have already commented on that and –

**WINKELMANN CJ:**

Yes and this is strictly in reply.

**MR GUNN:**

Indeed. It was referred to again your Honour in submissions orally today. If I may then turn from the Intervener's submissions and perhaps with the additional comment and hopefully not a gratuitous comment, it is certainly not intended to be gratuitous, that in several respects Ms Batrouney's comments about what is educational and what is not educational is of not too dissimilar, if indeed it is dissimilar at all, from the views that the Attorney has advanced to this Court and to courts below. Plainly there may be a slight divergence of view in relation to the *Vancouver* case. Ms Batrouney made the point that there is a particular background to that. The Attorney's perspective is to

maintain the value and force of *Vancouver* and relies on that case but many of the authorities which Ms Batrouney cited are ones that the Attorney would also rely on in advancing any question as to whether an entity was educational as opposed to an advocacy entity.

**WILLIAM YOUNG J:**

What would you say if Family First reorganised itself as a non-denominational Christian organisation committed to propagating and supporting a traditional religious concept of a Christian marriage, would that be fine?

**MR GUNN:**

Your Honour, the first point on that is that it is open to any entity to recalibrate itself.

**WILLIAM YOUNG J:**

Yes I know it is, just what would you say, because it is not 180 degrees removed from what they are?

**MR GUNN:**

The distinctions from what they are in my submission, would be that if they were religious that would be a distinction and I took your Honours through yesterday. So that would be different. If they were advancing activity in support of a particular group, whether it is a Christian group or some other group and there wasn't an element of denigration, perhaps an element of we are the optimal form.

**WILLIAM YOUNG J:**

But sorry can't a religious denomination say that we're the one true route to salvation and then in that way by implication denigrate those who seek to follow a different path?

**MR GUNN:**

Yes your Honour, and that is the distinction, in my submission, between what Family First is currently doing and a religious entity.

**WILLIAM YOUNG J:**

That is not what I'm – I know it is not bundled in this way but if it were, would you have an objection to its charitable status?

**MR GUNN:**

If Family First were to reconstitute itself as a religious entity and promoting a religious philosophy in the same way as other religious entities do and I apologise for the caveats your Honour but I am trying to respond, then it would be hard to or it may be hard to resist registration as a charity on that basis.

**WILLIAMS J:**

In other words if they put their principles, family and marriage, the two sets of principles into their purposes, that would get them home even though they are arguing now that the purposes are not – sorry those principles are not part of those purposes and so should not be taken in account?

**MR GUNN:**

The other caveat that I would make in relation to the reformulation that his Honour Justice William Young was suggesting was that consideration of activities might also be relevant for the reasons we have previously discussed as well. So there are a number of caveats around that but I don't want to back away from the incongruity that we talked about yesterday either between the religious entity and the non-religious entities when it comes to the law of charities.

**WINKELMANN CJ:**

And it is very hard for you to have to decide whether or not it would qualify under the religious heading I think on your feet.

**MR GUNN:**

Well I wouldn't want to make that decision without a proper consideration of the purposes and also obviously activities as well.

**WINKELMANN CJ:**

And also the law about what is not a religious purpose I suppose.

**MR GUNN:**

Indeed your Honour. But there is certainly a potential for an organisation to reconfigure itself and achieve charitable status. Just to amplify, perhaps if I may, some comments about education versus advocacy, propaganda presenting one side of the political debate and Ms Batrouney made the point that in the COVID environment which we are obviously living in at the moment, the possibility of education by way of electronic means, websites and so forth is increasingly an aspect of the way in which institutions delivery their educational programmes. Two points if I may in relation to that. It seems to me that the evidence is also that a website presents dangers as well as opportunities and that especially a website that is not structured, a website that is unhelpfully set out, may not present any sort of educational tool whatsoever. Now I'm not suggesting that's the Family First website. The point I am attempting to make to your Honours is that just to say that education as delivered by website more commonly these days is not the full perspective on whether you are delivering education.

There is the further point that is the education that's being delivered a primary purpose or an ancillary purpose, and if I may take your Honours in this regard to the Supreme Court to the High Court in *Greenpeace*, Ma'am, and this is the paragraph 116 that I think her Honour, Justice Glazebrook, expressed some interest in with my friend in oral submissions.

I just wanted to take your Honours to that paragraph 116 and the subsequent paragraph because it seemed to me that there were some relevant considerations in terms of the case in front of this Court. Firstly, the document that her Honour was looking at at paragraph 116(a) was an analysis which was one of independent scientific research, it was objective, neutral, balanced and had been peer reviewed by an appropriately qualified, independent person. So the conclusion was that research of that kind was advancing education by contributing to the store of human knowledge and *Foundations*

are cited in support of that proposition. There is the reference to the Internet and the point I think that I've just been addressing your Honours on: "The internet can be a forum through which members of the public are educated, depending on the content of the inform provided." So her Honour goes on and I take your Honours, if I may, to the next –

**WINKELMANN CJ:**

What tab is the case at?

**WILLIAMS J:**

72.

**MR GUNN:**

So we then go to 116(b) where her Honour concludes that Greenpeace makes use of the findings as part of its advocacy activities, and she has already concluded that advocacy was a charitable purpose of public benefit in these circumstances and so that's the distinction that I was looking to draw for your Honours yesterday between what Greenpeace does and what Family First does in this case.

And then at 117, her Honour says: "I therefore consider that Greenpeace does undertake activities to advance education in pursuit of its object to do so." It seems to me that that is a conclusion that can be drawn on the facts of the *Greenpeace* case and in particular with reference to that report that's referred to at 116, but otherwise the conclusions that may be drawn from that particular finding for this case are of limited value, your Honours.

**WILLIAM YOUNG J:**

Doesn't that suggest that the research in that case, the trajectory report, is the ancillary thing, not the advocacy? Is that the point you're trying to make?

**MR GUNN:**

I think that is another point that may be made, your Honour, and it was certainly a point that has been made in this case as to what extent is the

reports and any other educational activity that Family First relies on, to what extent is that ancillary, to what extent is it a primary purpose, and that, as the risk of drawing your Honours back to the dreaded graph, is why we have attempted to set out that in some sort of quantitative way.

**GLAZEBROOK J:**

It would be difficult for you to argue that the reports that we looked at, especially the NZIER and the euthanasia report and I suspect even the abortion one, despite it having a particular point of view, not being items of research by people who are qualified in their field, wouldn't it, in the same way that presumably whatever this one was on the deep oil spill scenarios was? I think you conceded that.

**MR GUNN:**

You Honour, I think that's right, they meet the educational value test in terms of *Collier*, what might also be said though is that with the clear exception of the NZIER report, they do advance a point of view –

**WILLIAM YOUNG J:**

But so does everything that Greenpeace puts forward. None of it is saying oil exploration is great, extract more coal from the ground or anything. Everything goes in one direction, doesn't it?

**MR GUNN:**

I accept that proposition, although the particular report we were talking about just before your Honour I think is not one of those reports, if I may put it in that way but the salient point is that for Greenpeace, they are using that as part of advocacy in support of an advocacy fourth head purposes in my submission and if I can –

**WILLIAM YOUNG J:**

Well Greenpeace says it's an advocacy environment and the environment has been treated effectively as another head of charity.

**MR GUNN:**

That is correct, but an educational head your Honour and I was considering how we might address some of the practical examples that your Honours were putting to counsel yesterday. I wasn't able to find any assistance in the red-headed example but the Marxist lecturer I thought might offer some potential assistance. It seemed to me that you may well have a lecturer who is delivering a lecture and illustrates that lecture by Marxist pre-sets. He might have his own views as to the sensible nature of those pre-sets and may be expressing those views in the lecture or the article that he delivers.

The distinction, it seems to me, goes back to the bible selling example which your Honours were, and I think Justice Williams raised earlier on, if the lecturer's purpose is to educate, even if the lecturer is expressing a point of view in the course of doing that, then it seems to me and my submission is that the lecturer is advancing education. If the purpose is to persuade the lecturer's students or others towards a Marxist point of view then that becomes advocacy in my submission and not education.

**GLAZEBROOK J:**

Well that's a bit unrealistic because of course they are trying to persuade the students to their point of view. Just about every lecturer will be doing that and sometimes, if you write in accordance with their point of view or against their point of view you might even fail the course, in fact students would complain that that is what happens.

**MR GUNN:**

I'm advancing an ideal situation here your Honour, but I –

**GLAZEBROOK J:**

Well it is not a real world situation, is it?

**MR GUNN:**

No but I use it, and I accept that it is not, I use it just to try and illustrate the Attorney's submissions on what is education, what is advocacy.

**WINKELMANN CJ:**

Well that lecturer is doing so within a framework where he has education obligations and if he strays too far into being flat out advocacy then he falls foul of the educational context. Society always draws these fine lines and they are not easy lines.

**MR GUNN:**

Indeed your Honour and the analogy here is of course that the entity threatens its charitable registration if it –

**GLAZEBROOK J:**

I'm not sure the argument was ever if you were trying to persuade people to your point of view, what it was, the political purposes exception was in relation to changing the law or changing policy and obviously if you persuade your students, maybe in 40 years' time they might then be in power and be able to change the law but that can't be your purpose, so I don't think that is the right distinction, at least if we're talking about a political purposes exception.

**MR GUNN:**

I accept that point, your Honour, and I am addressing that in terms of the advancing education point.

**WINKELMANN CJ:**

So we're not on the fourth ground at the moment. As I understand it, you're on the education point at the moment?

**MR GUNN:**

That's right, your Honour, and it arises from my friend's characterisation of Family First case as an advancing education case. The next point that I just seek to touch on is the question that was addressed in submissions, questions to my friend and submissions he made about what concessions may have been made about Family First's activities and whether they were in support of the traditional family or not. I don't propose to talk from the bar about any concessions that may or may not have been made. My simple



submission on that point is that the way in which this case was argued in the High Court, in the Court of Appeal and, as I understand, the way it has been argued in this case, in this Court as well, is that Family First is in support of the traditional family. So whether concessions have been made to that regard or not, that is the way in which the case has been argued as the Attorney understands it.

Going back to the education point if I may briefly, my friend addressed the question of whether or not the Family First website offered a balanced approach and views from various aspects that were not necessarily Family First views. I understood that one of the examples he gave in that respect was the *PinkNews* site reference to polygamous marriage and the fact that that might represent the next step to equality. Now, your Honour, the Chief Justice, queried my friend about that and with respect, I think that query is well founded.

If I may take your Honours to tab 238 document 403.0955, that is a document which is a tab to a Family Matters' marriage equality video and the text underneath the video there which I think shows Mr McCoskrie says: "The debate about whether the definition of marriage should be further redefined has surfaced in the UK, with the Green Party leader declaring they are open to consultation on legalising marriages involving three or more people. Politicians in New Zealand worked hard to silence the debate here around opening up marriage to any number of loving adults. At the time, we were accused of misleading, scaremongering and being dishonest. However, our prediction is unfortunately fast becoming a reality."

So, my submission on that, and it is just one example, and I accept that unhesitatingly, but it is, in my submission more correct to suggest that the way in which Family First uses other and perhaps alternative points of view is typified by that document in which they use the document as a leverage point to argue for their own perspectives and it follows in my submission that that is not education in terms of the authorities.

Your Honours, my friends, learned colleagues addressed you on the fiscal consequences point. I have already touched on that with the Court yesterday and other than to say that I do not resile from those submissions yesterday, I don't propose to take the point any further this afternoon.

Unless your Honours had any questions of me, those are the submissions for the Attorney-General.

**WINKELMANN CJ:**

Thank you, Mr Gunn.

**MR GUNN:**

Thank you.

**WINKELMANN CJ:**

I thank counsel for your very helpful submissions. We will take time to consider our decision. We will retire.

**COURT ADJOURNS: 3.31 PM**