

Murky Waters, Muddled Thinking: Charities and Politics

Opening Address
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[1] Tēnā koutou, tēnā koutou, tēnā koutou katoa. As it happens, I am speaking to you on Election Day in the United States. Perhaps the most momentous election in that country since 1932's contest between Herbert Hoover and Franklin Roosevelt. Because today's election embodies such a dramatic clash of opinion and approach, it feels like a referendum on democracy itself. One by no means confined to the constitutional borders of the United States.

[2] It seems an appropriate day to express some views about the relationship between the law of charity and ostensibly charitable organisations that have a political dimension. I will make some introductory remarks, look briskly at three important cases, and then offer some observations about the mess the law has got into and how it might extricate itself.

Introduction

[3] Charity law's exclusionary "political purpose doctrine" excludes a political purpose from being a charitable purpose. It emerged in the House of Lord's decision in *Bowman v Secular Society* where Lord Parker said "Equity has always refused to recognize such objects as charitable" because courts have no means of judging whether the advocated reform will be for the public benefit and thereby charitable.²

¹ The views expressed in this address are my personal opinions. I express my appreciation to my clerk, Nic Wilson, for his assistance.

² *Bowman v Secular Society* [1917] AC 406 (HL), at 422.

[4] The accuracy of Lord Parker’s statement was questionable from the outset. The Rosetta Stone of the modern law of charity, the Statute of Elizabeth of 1601, contained no political purpose exclusion. Hardly surprising, given the time and politically-charged context in which it was enacted.³ The statute was passed to encourage private philanthropy in the wake of the ousting of the Catholic Church in the English Reformation.⁴ From inception the modern law of charity was tied to the state and political actions.

[5] Indeed, in the 19th century organisations advocating for social change were held to advance charitable purposes. One such example was William Wilberforce’s Society for Effecting the Abolition of the Slave Trade (more snappily known as the Anti-Slavery Society).⁵ Although advocating both reform of the law and the dispossession of personal property rights, could a more charitable purpose really be imagined? Yet even today it has been doubted, at least judicially, that organisations whose primary purpose is the achievement of international peace or nuclear disarmament may not be charitable.⁶ The 19th century was less cautious, recognising as charitable the Howard Society for Penal Reform (which sought reforms of a liberal nature), Lord’s Day Observance Society (which of course sought reforms of a conservative nature) and certain societies advocating for temperance law reform or the abolition of vivisection.⁷ There was no bright line between politics and charity.⁸

[6] Despite that body of case law, *Bowman* considered the political purpose exclusion beyond doubt. To borrow the words of Paul Michell, from *Bowman* the political purpose doctrine “sprang fully grown, like Athena from Zeus’ forehead”.⁹ In

³ Susan Glazebrook, “A Charity in all but law: The political purpose exception and the charitable sector” [2019] 42 MULR 632 at 633; and Juliet Chevalier-Watts and Sue Tappenden *Equity, Trusts and Succession* (Thomson Reuters, Wellington, 2013) at 282.

⁴ *Re Greenpeace of New Zealand Inc* [2014] NZSC 105, [2015] 1 NZLR 169 at [19]–[20] per Elias CJ; and Glazebrook, above n 3, at 633.

⁵ Paul Michell “The Political Purposes Doctrine in Canadian Charities Law” (1995) 12 *The Philanthropist* 3 at 4. Wilberforce was great-great-grandfather of Lord Wilberforce, Lord of Appeal in Ordinary 1964-82.

⁶ *Greenpeace*, above n 4, at [89] per Elias CJ.

⁷ Michell, above n 5 above, at 4; *Farewell v Farewell* (1893) 22 OR 573; *Armstrong v Reeves* (1890) 25 LRI 325 at 339; *Re Foveaux* [1895] 2 Ch 501 (Ch); and *Re Gwynne Estate* (1912) 5 DLR 713 (Ont HC).

⁸ See Hamish McQueen “The peculiar evil of silencing expression: The relationship between charity and politics in New Zealand” (2012) 25 NZULR at 143; and L A Sheridan “Charity versus politics” (1973) 2 *Anglo-Am L Rev* 47 at 50.

⁹ Michell, above n 5, at 6.

due course, Lord Parker's dicta found favour with the House of Lords in *National Anti-Vivisection v Inland Revenue Commissioners*.¹⁰ Lord Simonds considered the proposition lacked authority simply because it was so clear little authority was needed.¹¹ The society in question in that case had the political aim of preventing cruelty to animals though the political means of effecting legislative change — the purpose could not be charitable.¹² An admirable dissent was entered by Lord Porter, in which he famously observed:¹³

I cannot accept the view that the anti-slavery campaign or the enactment of the Factory Acts or the abolition of the use of boy labour by chimney-sweeps, would be charitable so long as the supporters of these objects had not in mind or at any rate did not advocate a change in the laws, but became political and therefore non-charitable if they did so. To take such a view would to me be to neglect substance for form.

[7] Greater specificity as to what acts were political can be found in *McGovern v Attorney-General*.¹⁴ Slade J set out five categories of trusts for political purposes that will not be charitable, which can be summarised as trusts intended to further the interests of a particular political party, procure changes in domestic or foreign laws or procure reversal of domestic or foreign government policy.¹⁵

[8] The doctrine was duly adopted in Australia, albeit with some reluctance.¹⁶ So too in New Zealand, although with perhaps less reluctance. In the 1940s promotion of New Zealand's acceptance of the League of Nations and of temperance through legislative change were both ruled political and non-charitable purposes.¹⁷ In 1981 in *Molloy v Commissioner of Inland Revenue* the Court of Appeal considered both advocacy for and against law reform on issues of controversial character to be

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

¹¹ At 63.

¹² At 63 and 78.

¹³ At 55. Lord Porter also famously dissented, surely rightly, in the "Lord Haw Haw" treason case: *Joyce v DPP* [1946] AC 347.

¹⁴ *McGovern v Attorney-General* [1982] 1 Ch 321.

¹⁵ At 340.

¹⁶ *Royal North Shore Hospital of Sydney v Attorney-General* (1938) 60 CLR 396 (HCA); Joyce Chia, Matthew Harding and Ann O'Connell "Navigating the politics of charity: Reflections on *Aid/Watch v Federal Commissioner of Taxation*" (2011) 35 MULR 353 at 357; and Juliet Chevalier-Watts "Charitable trusts and political purposes: Sowing the seeds of change? Lessons from Australia" (2014) 19 *Canta LR* 52 at 58.

¹⁷ *Re Wilkinson (dec'd), Perpetual Trustees Estate and Agency Co of New Zealand Ltd v League of Nations Union of New Zealand* [1941] NZLR 1065 (SC) at 1077; *Knowles v Commissioner of Stamp Duties* [1945] NZLR 522 (SC) at 528–529.

political, and non-charitable, purposes.¹⁸ That case concerned the deductibility of donations to a society opposing greater availability of abortion.

[9] What then was the justification for the political purpose doctrine? First, deciding whether the political act advocated for was of the public benefit was considered beyond the institutional competence of the courts. Courts were judged ill-equipped to determine the merits of proposed law or policy changes.¹⁹ Secondly, rather mystifyingly, it was said the law would “stultify itself” by holding it was for the public benefit for the law to be changed.²⁰ Both justifications were the subject of significant commentary and criticism.²¹

[10] The political purposes doctrine is framed as neutral. It is anything but. With rare exceptions like *Molloy*, the underlying policy of the doctrine supports organisations seeking preservation of the status quo.²² Such entities tend to be free of the taint of “advocacy” or law reform sentiment, despite the eminent 19th century charitable model of the Anti-Slavery Society which did both. Moreover, the abdication of judicial competence to determine public benefit – despite the explicit terms of the fourth *Pemsel* head – resulted in the remarkable consequence of a court refusing to rule on the public benefit of advocacy to abolish torture.²³

Three cases

Aid/Watch Inc v Federal Commissioner of Taxation

[11] Aid/Watch was an organisation that promoted the effectiveness of Australia’s aid programmes. Its activities included the delivery of humanitarian aid, research into the effectiveness of aid and campaigning for improved aid delivery. In 2010 a majority

¹⁸ *Molloy v Commissioner of Inland Revenue* [1981] 1 NZLR 688 (CA) at 695–696

¹⁹ See *Bowman*, above n 2, at 442 per Lord Parker; *McGovern*, above n 14, at 339.

²⁰ *National Anti-Vivisection*, above n 10, at 62 per Lord Simonds and 50 per Lord Wright.

²¹ See Adam Parachin “Distinguishing charity and politics: The judicial thinking behind the doctrine of political purposes” (2008) 45 Alberta LRev 871 and McQueen, above n 8. The stultification basis was rather exploded by the majority judgment in *Aid/Watch v Federal Commissioner of Taxation* [2010] HCA 42, (2010) 241 CLR 539, at 552, where the argument is described as “ingenuous”.

²² Glazebrook, above n 3, at 650.

²³ Parachin, above n 21, at 886–887, citing *Action by Christians for the Abolition of Torture v Canada* [2002] FCA 499, (2002) 225 DLR (4th) 99; *Commissioners for Special Purposes of the Income Tax v Pemsel* [1891] AC 531 (HL).

of the High Court of Australia held this to be a charitable purpose in *Aid/Watch Inc v Federal Commissioner of Taxation*.²⁴

[12] In doing so, the Court found political purposes were no longer mutually exclusive to charitable purposes. *Bowman* had been decided without consideration of Australia's unique constitutional arrangements.²⁵ These were prominent in the majority's reasoning, and said to require communication between electors, elected legislators and officers of the executive.²⁶ Australia's legal system therefore demanded the "very 'agitation' for legislative and political changes" the doctrine foreclosed from charitable status.²⁷ There was no need to determine the merits of the positions advocated for; the expression and sharing of views themselves are of public benefit.²⁸ The majority accepted Aid/Watch generated public debate as to the best methods to alleviate poverty and therefore had a charitable purpose of public benefit.²⁹ The alleviation of poverty is of course a head of charity. The majority left open whether the encouragement of public debate of activities lying beyond the first three heads of charity, or the balance of the fourth head, would be charitable.³⁰ The majority also left open the possibility that some advocacy may not be of public benefit due to the particular ends and means involved.³¹

[13] Kiefel J (as she then was) dissented. Her Honour also rejected the political purpose doctrine but held the public benefit of the trust's activities must still be proven.³² The mere assertion of views, as practiced by Aid/Watch, was not charitable without proof those views were of benefit to the public.³³

[14] The *Aid/Watch* decision is significant. Not only did it remove the political purpose doctrine, it also accepted political advocacy as a public benefit.³⁴ But the

²⁴ *Aid/Watch*, above n 21.

²⁵ At [39]–[40].

²⁶ At [44].

²⁷ At [45].

²⁸ At [45].

²⁹ At [47].

³⁰ At [48].

³¹ At [49].

³² At [69].

³³ At [69] and [82].

³⁴ Matthew Harding "Finding the Limits of *Aid/Watch*" (2011) 3 *Cosmopolitan Civil Societies Journal* 34 at 39.

exact public benefit of debate is not entirely clear: is it purely in the generation of debate, in the charitable purpose debated, or both?³⁵ The Court largely side-stepped consideration of the content of advocacy (to which I shall return to later).³⁶ It is also strongly arguable that the constitutional underpinning of the majority reasoning is not a distinguishing feature from New Zealand law, given the terms of both the New Zealand Bill of Rights Act 1990 and other elements of our supposedly “unwritten” constitution.

Re Greenpeace of New Zealand Inc

[15] Following the *Aid/Watch* decision, our own Supreme Court faced the issue of whether to depart from the political purpose doctrine in *Re Greenpeace of New Zealand Inc*.³⁷ The case concerned Greenpeace’s bid for registration under the Charities Act 2005.

[16] The majority reasoning (delivered by Elias CJ) rejected the political purposes doctrine. Not all advocacy for legislative change can be excluded from charitable status. Elias CJ gave examples of law reform of the kind undertaken by law commissions or advocacy for law change through participatory processes.³⁸

[17] Advocacy, held the majority, was to be considered as part of the public benefit test. Cause advocacy would “often, perhaps most often” be non-charitable. The majority adopted the dissenting approach of Kiefel J in *Aid/Watch*.³⁹ The overall test was put in these terms:

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

[18] Where the idea promoted is abstract (such as “peace” or “nuclear disarmament”), the focus must be on how such abstraction is to be furthered.⁴⁰ The

³⁵ Chia, Harding and O’Connell, above n 16, at 384.

³⁶ Chevalier-Watts, above n 16, at 65.

³⁷ *Greenpeace*, above n 4.

³⁸ At [62].

³⁹ See at [73]–[74].

⁴⁰ At [102].

Court did not rule definitively on the matter, instead remitting Greenpeace’s application for reconsideration by the Charities Registration Board.

[19] In dissent, William Young J, with whom Arnold J agreed, considered s 5(3) of the Charities Act codified the political purpose doctrine.⁴¹ But he also emphasised concerns regarding institutional competence advanced in support of the doctrine.⁴²

[20] What then, does the *Greenpeace* judgment add to our narrative of politics and charity? I suggest three points.

[21] First, *Greenpeace* is not an acceptance of the majority *Aid/Watch* approach. It rejects the political purpose doctrine on a different basis. Where *Aid/Watch* focuses largely on the means of advocacy (and whether it generates public debate as a public benefit), *Greenpeace* considers both the ends the trust seeks to achieve and the means and manner by which it will do so.⁴³

[22] Secondly, *Greenpeace* does not reject outright the underlying policy justifications for the political purpose doctrine. The majority, quite explicitly, considered those justifications would mean public benefit would not be able to be made out in most cases. As William Young J noted in dissent, on the facts the majority and minority conclusions were similar as a result of the “contentious” issues underlying Greenpeace’s cause advocacy.⁴⁴ It was thought at the time that more controversial charities would still face significant barriers to registration.⁴⁵ The Supreme Court itself thought it doubtful that Greenpeace could establish a charitable purpose.⁴⁶ That prediction proved wrong, as we will see.

[23] Thirdly, and as a consequence, Greenpeace created the inevitable consequence that courts will have to assess the public benefit of more controversial cause advocacy. Without the political purposes doctrine, they may be led into what my friend Matthew

⁴¹ At [124].

⁴² At [125].

⁴³ Glazebrook, above n 3, at 668; and Jane Calderwood Norton “Controversial charities and public benefit” [2018] NZLJ 64 at 67.

⁴⁴ *Greenpeace*, above n 4, at [126].

⁴⁵ Norton, above n 43, at 65.

⁴⁶ *Greenpeace*, above n 4, at [104].

Harding has called “murky and unfriendly waters”.⁴⁷ The potential for difficulty was not helped by the lack of Supreme Court guidance as to how to assess public benefit.⁴⁸

[24] Following the Supreme Court’s judgment, the Charities Registration Board again denied Greenpeace registration as a charity. On appeal, the High Court held Greenpeace’s advocacy for the protection of the environment was a charitable purpose.⁴⁹ Advocacy for the environment was considered charitable in itself, as opposed to advocacy for abstract purposes such as peace and nuclear disarmament (which, incidentally, Greenpeace no longer advanced as a purpose).⁵⁰ Greenpeace did not need to demonstrate its views were of public benefit: its advocacy as a voice for the environment against competing interests was of public benefit.⁵¹

Family First New Zealand v Attorney-General

[25] This turns our attention to the Court of Appeal’s recent judgment in *Family First New Zealand v Attorney-General*.⁵² As with Greenpeace, Family First’s bid for charitable status has been a long-running affair. Family First advocates on issues of families and marriage from a decidedly conservative and traditional perspective, and from the same perspective on other issues such as abortion, anti-smacking legislation, prostitution, censorship and the recent referenda on cannabis and euthanasia legislation. Following a decision of the Charities Registration Board to deregister Family First, upheld by the High Court,⁵³ Family First appealed to the Court of Appeal.

[26] A majority of the Court of Appeal (Clifford and Stevens JJ) allowed the appeal, finding Family First had both educational and generally charitable purposes. It held Family First promoted the support of marriage and core family values.⁵⁴ This was said to be a public good.⁵⁵ That Family First specifically promoted the “traditional family” did not prevent that end being a public good as there are a large number of traditional

⁴⁷ Matthew Harding “An antipodean view of political purposes and charity law” (2015) 131 LQR 181 at 183.

⁴⁸ Norton, above n 43, at 65.

⁴⁹ *Greenpeace of New Zealand v Charities Registration Board* [2020] NZHC 1999.

⁵⁰ At [83]–[84].

⁵¹ At [85].

⁵² *Family First New Zealand v Attorney-General* [2020] NZCA 366.

⁵³ *Re Family First New Zealand* [2018] NZHC 2273.

⁵⁴ *Family First*, above n 52, at [136].

⁵⁵ At [138].

families in New Zealand.⁵⁶ As to Family First’s more specific issue advocacy, the Court considered the approach following *Greenpeace* was to recognise goals and objectives of general public benefit, without the need to settle on a concluded view on self-evident public benefit where public views may differ.⁵⁷ Advocacy on a specific position regarding euthanasia could therefore be charitable, though not on other issues such as abortion considered to fall outside the penumbra of the recognised public good — that is, supporting the institutions of family and marriage.⁵⁸

[27] In dissent, Gilbert J considered Family First’s advocacy provided no tangible public benefit to families, making it necessary to consider whether the ends its advocacy promoted, or the means and manner of promotion, were of public benefit.⁵⁹ He considered they were not. Family First’s purposes closely mirrored the purposes of the relevant anti-abortion society in *Molloy*, which the Supreme Court in *Greenpeace* indicated would continue to be non-charitable even in the absence of the political purpose exclusion.⁶⁰

[28] Leave having been sought to appeal to the Supreme Court, I shall not here enter into the merits of either view.

Some observations

[29] My first observation is the abandonment of the exclusionary doctrine of political purposes – in *Aid/Watch* and *Greenpeace* – is to be welcomed. The attempted creation of a bright line between charity and politics, in the early part of the last century, was judicial legislation undertaken in defiance of history. William Wilberforce’s Anti-Slavery Society undertook inherently political work, but patently for the general public benefit. This was a great cause. Its work was done primarily at an abstract level – through advocacy – rather than by more tangible, direct action.

⁵⁶ At [146]–[147].

⁵⁷ At [172].

⁵⁸ At [176].

⁵⁹ At [198].

⁶⁰ At [200]–[201].

[30] Secondly, tangibility of benefit should not obscure the analysis. The Supreme Court appeared tempted by the concept of tangibility in *Greenpeace*.⁶¹ It is true that public benefit is more easily discerned by, for example, direct acts of generosity to the poor. These are both publicly beneficial and self-denying – the twin hallmarks of charitable endeavour. But why should that determine the metes and bounds of what is charitable? What is the public benefit gained from exposing charities to loss of status because they move from the direct (or tangible) treatment of symptoms to more systematically addressing causes?⁶² Should a society devoted to the prevention of cruelty to children not be permitted to enlarge its focus from dispensing aid to discouraging family violence, including by legislative reform? And is not the debate itself something of great public benefit, as the majority in the High Court of Australia recognised in *Aid/Watch*?⁶³

[31] Thirdly, there is something rather unsatisfactory about the reasoning in cases like *Greenpeace* and its successors, in focusing not only on “ends”, but also “means” and “nature” (of the promotion of the ends and means). As Mallon J observed in *Greenpeace (No 2)*, that is where all the difficulty lay in that case.⁶⁴ The Charities Registration Board, and then the Courts, are placed in the unhappy task of policing the methodologies of an organisation (for instance) devoted to preservation of the environment and reducing climate change, and marking them according to unhappily vague criteria that encourage conservative policy-making, and appeal after appeal, because so much depends on the eye of the beholder. And yet the jurisprudential basis for this “ends, means and (ways)” analysis is itself obscure. For myself, I do not find means and ways particularly illuminating in deciding whether an entity serves charitable purposes, which historically at least focused upon the existence of demonstrable public benefit in the ends pursued.

[32] Fourthly, one can only wonder why we have tied ourselves up in jurisprudential knots (from which we struggle to release ourselves) over politics (as an overlay to three of the four *Pemsel* heads) when the other head – religion – gains a comparatively free pass. In many respects it is hard to distinguish between religious proselytising

⁶¹ See [69], [71] and [102].

⁶² Glazebrook, above n 3, at 669.

⁶³ See discussion above at [12].

⁶⁴ *Greenpeace (No 2)*, above n 49, at [50].

and political advocacy.⁶⁵ Religion instructs people how to live their lives and informs their values and priorities — inherently political objects also. True, religion involves a particularly spiritual dimension. But established churches now increasingly participate in the secular world, and in what might be thought of as politics, even party politics. Just two weeks ago the Archbishop of Canterbury and the archbishops of Scotland, Wales and Northern Ireland wrote to the *Financial Times* — not, it may be noted, the *Church Times* — condemning the Brexit-related Internal Market Bill, legitimising (domestically) potential breaches of international law, as a “disastrous precedent”.⁶⁶

[33] Fifthly, it is tempting (and no less accurate for that) to say that the Courts have made something of a hash of things since *Bowman*. The “muddled thinking” I refer to in my title involves the familiar story of the common law seeking to give definition to Equity, and then making a mess of the exercise. That, I think, exactly describes *Bowman* and *McGovern*. In the process we have lost any sort of cohesive theory of what charity is.⁶⁷ Charity is not, and never has been, confined to the fulfilling of a particular need, tangibly. A fifth of the way through the 21st century, the great causes continue to mount up (and notably, slavery remains one of them, albeit less obviously). The task of Equity now is to restate a cohesive theory of charity, based on a combination of demonstrable public benefit and lack of private benefit. The former will continue to depend on evidence if the task falls to the Courts. The latter offers some constraint at least on direct political enterprise and the PAC funds that have come to dominate United States political activism. Further constraints here are work for Parliament to accomplish.

[34] Finally, however, Parliament itself has rather sat on the sidelines watching Equity’s turmoil. As the Supreme Court noted in *Greenpeace*, Parliament avoided any sort of fundamental reform of charitable status in the Charities Act 2005.⁶⁸ This might, I suppose, connote some approval of the current law. Another view is that if it was proving too hard for the Courts, Parliament thought better of joining the melee. But

⁶⁵ Glazebrook, above n 3, at 657–658.

⁶⁶ “Internal market bill undermines the strength of our union”, *Financial Times*, 19 October 2020, <https://www.ft.com/content/e2e8c1d6-edd4-46d2-bef8-8c69199dc151>

⁶⁷ Parachin, above n 21, at 899; and Chia, Harding and O’Connell, above n 16, at 386.

⁶⁸ *Greenpeace*, above n 4, at [48]-[49].

this leaves untended what Justice Glazebrook called the “elephant in the room”: the benefits of being deemed a charity.⁶⁹ Charitable status carries both legal and tax benefits,⁷⁰ as well as a mark of societal approval which in turn may help a trust raise funds.⁷¹ The benefits of charitable status are not abstract. In short, courts ultimately determine the extent of charitable status, but it is the executive and the public ultimately who foot the bill.

[35] All the more reason, then, for Equity to grasp the nettle and rediscover a cogent, cohesive theory of just what it means, in this century, to be a charity. For my part at least, and taking as I do a long view, I think there is rather more to be said for the majority approach in *Aid/Watch*, for all its tentativeness, rather than the half-measured revision advanced by the minority in that case, and applied here in *Greenpeace*.

[36] I wish you the very best for this conference. My thanks to the organisers, and to you all for your kind attention today. Kia ora rawa atu. Tēnā koutou, tēnā tatou katoa.

⁶⁹ Glazebrook, above n 3, at 648.

⁷⁰ At law, charitable trusts may be for abstract objects, are not subject to the rule against inalienability and are afforded a benign construction of trust documents. Charitable trusts are exempt from income tax on trading and non-business activities used for charitable purposes and gift duty. See Andrew Butler (ed) *Equity and Trusts in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2009) at [11.2].

⁷¹ Norton, above n 43, at 67.