Critical Review of Advocacy in New Zealand Charity Law

By Samantha Johnston*

I. Introduction

The law around charity law is recognised as "a moving subject".[1] In 2014, the Supreme Court of New Zealand in *Re Greenpeace of New Zealand Inc (Greenpeace (SC))*[2] determined that if there is a recognised public benefit, a political purpose can be seen to be a charitable purpose.[3] This development was a departure from the United Kingdom approach, which New Zealand charity law has followed for almost a century.[4] This traditional approach is more commonly referred to as the doctrine of the exclusion of political purposes ("the doctrine").[5] Recently in 2020, the High Court, in the case of *Greenpeace of New Zealand Inc v Charities Registration Board* (*Greenpeace (HC))*[6] applied the precedent of *Greenpeace (SC)* and held that the organisation Greenpeace of New Zealand Inc (Greenpeace NZ) to be charitable for the purpose of advocating for and protecting the environment. This law change allows associations with a dominant political purpose to apply and potentially succeed at receiving charitable status. Such was the case for Family First New Zealand (Family First). Family First, like Greenpeace NZ, has been contending for charitable status for many years, and the recent 2020 decision of the Court of Appeal in *Family First New Zealand v Attorney-General* (*Family First (CA))*[7] has, controversially, awarded the association charitable status.

The central proposition of this research is that the decision in *Family First (CA)*[8] has done little to improve clarity around the application and understanding of what constitutes a charitable political purpose.

In support of this proposition, a critical review will be done, inter alia, of the *Greenpeace (SC)* and *Greenpeace (HC)* cases, the three-stage public benefit test developed for political purposes, as well as the case under scrutiny *Family First (CA)*.

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1 *Scottish Burial Reform and Cremation Society Ltd v Glasgow City Corporation* [1968] AC 138 (HL) at 154 per Lord Wilberforce.

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

3 At [69].

4 The New Zealand legal framework was founded and structured from the English common law system.

5 When reference is made to "the doctrine" it shall only stand for this historic doctrine of exclusion and will not refer to any recent changes in the doctrine.

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

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

8 *Family First New Zealand v Attorney-General* (CA), above n 7.

II. Principles of Charity Law

For the proposition to be justified, it first ought to be contextualised. New Zealand inherits much of its law from the United Kingdom. Accordingly, New Zealand has followed the United Kingdom's approach to charity law and political purposes up until the case of *Greenpeace (SC)*. Charitable status is determined on a case by case basis, by analogy that the purpose generally falls within the "spirit and intendment" of the preamble to the Statute of Charitable Uses 1601, commonly known as the Statute of Elizabeth.[9] The Statute of Elizabeth was enacted to reform the use and abuse of charitable trusts which had not been employed with charitable intent.[10] The preamble to the Statute of Elizabeth[11] is the starting point for determining whether a purpose can be considered charitable. It contains a non-exhaustive list that underpins modern charity.

The case of *Commissioners for Special Purposes of the Income Tax v Pemsel* (*Pemsel*) summarised the purposes set out in the preamble into four heads of charity.[12] Lord Macnaghten provided a definition that resulted in a structured approach to the concept for latter courts to refer to:[13]

> "Charity" in its legal sense comprises four principal divisions: trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads.

Pemsel's four heads of charity have been codified into New Zealand legislation[14] under s 5 of the Charities Act 2005 (the Act).[15] The purpose of the Act is to provide specific requirements for the registration and monitoring of charities.[16] The definition of charitable purpose in New Zealand states as follows:[17]

> 5 Meaning of charitable purpose and effect of ancillary non-charitable purpose
>
> (1) In this Act, unless the context otherwise requires, **charitable purpose** includes every charitable purpose, whether it relates to the relief of poverty, the advancement of education or religion, or any other matter beneficial to the community.
>
> (2) However, —
>
> (a) the purpose of a trust, society, or institution is a charitable purpose under this Act if the purpose would satisfy the public benefit requirement apart from the fact that the beneficiaries of the trust, or the members of the society or institution, are related by blood; and
>
> (b) …

9 Statute of Charitable Uses 1601, 43 Eliz 1, c 4.

10 *Re Greenpeace of New Zealand Inc* (SC), above n 2, at [19].

11 Statute of Charitable Uses, above n 9.

12 *Commissioners for Special Purposes of the Income Tax v Pemsel* [1891] AC 531 (HL) at 583.

13 At 583.

14 The United Kingdom codified an expanded list of the preamble's charitable purposes in their Charities Act 2006 (UK), repealed and updated by the Charities Act 2011 (UK). There are now 13 recognised heads of charity in the United Kingdom.

15 Charities Act 2005, s 5.

16 *Re Greenpeace of New Zealand Inc* [2012] NZCA 533 at [37].

17 Charities Act, s 5. The most applicable components of this section have been included; subss (2)(b) and (2A) have been excluded.

> (2A) …
>
> (3) To avoid doubt, if the purposes of a trust, society, or an institution include a non-charitable purpose (for example, advocacy) that is merely ancillary to a charitable purpose of the trust, society, or institution, the presence of that non-charitable purpose does not prevent the trustees of the trust, the society, or the institution from qualifying for registration as a charitable entity.
>
> (4) For the purposes of subsection (3), a non-charitable purpose is ancillary to a charitable purpose of the trust, society, or institution if the non-charitable purpose is—
>
> (a) ancillary, secondary, subordinate, or incidental to a charitable purpose of the trust, society, or institution; and
>
> (b) not an independent purpose of the trust, society, or institution.

Section 13(1)(b) of the Act sets out the two essential requirements which qualify an association for registration as a charitable entity:

> (i) it is established and maintained exclusively for charitable purposes; and
>
> (ii) it is not carried on for the private pecuniary benefit of any individual.

An association must have a charitable purpose, but it also must carry out its purpose for public benefit.[18] There is a presumption of public benefit under the first three heads of charity, which can be rebutted with evidence that proves contrary.[19] Under the fourth head of "any other purpose beneficial to the community", it must be expressly shown that there is a public benefit and falls within the spirit and intendment of the Statute of Elizabeth.[20] *New Zealand Society of Accountants v Commissioner of Inland Revenue* sets out the public benefit requirement in a two limb test:[21]

> 1. Whether the purpose of the trust confers a benefit on the public or a section of the public; and,
>
> 2. Whether that class of persons constitutes the public or a least a section of it.

This case also noted that not every purpose which is beneficial to the public is charitable, as it must be seen to fall in the spirit and intendment of the preamble to the Statute of Elizabeth.[22] The case of *Oppenheim v Tobacco Securities Trust Ltd* (Oppenheim) developed a two-limb test for determining whether a class of persons can be regarded as a section of the community.[23]

> 1. The possible beneficiaries are numerous; and,
>
> 2. The quality which distinguishes them from other community members does not depend on their relationship to a particular individual.

Until recently, New Zealand did not consider a political purpose to fall within the spirit and intendment of the preamble. However, the Supreme Court in *Greenpeace (SC)* held that political and charitable purposes are not mutually exclusive.[24] Accordingly, a political purpose can be

18 Charities Act, s 5.

19 Juliet Chevalier-Watts *Charity Law: International Perspectives* (1st ed, Routledge, 2018) at 17.

20 Statute of Charitable Uses, above n 9.

21 *New Zealand Society of Accountants v Commissioner of Inland Revenue* [1986] 1 NZLR 147 (CA).

22 At 152.

23 *Oppenheim v Tobacco Securities Trust Ltd* [1951] AC 297 (HL) at 317.

24 *Re Greenpeace of New Zealand Inc* (SC), above n 2, at [3].

charitable so long as the organisation can show public benefit. This is a development from the previous position in New Zealand, whereby political purposes could only be ancillary to the dominant purpose of the association.

III. The Law Under the Political Purpose Doctrine

The context from which the doctrine emerged must be considered. This historical background will provide a basis for the doctrine but remain brief, with only essential information included.[25] It will follow the timeline of the doctrine to when it reached the courts of New Zealand before ultimately ending in the decision of *Greenpeace (SC)*, as will be discussed later in this research.

Associations seeking charitable status are required to be established and operated for an exclusively charitable purpose.[26] Historically, a political purpose has not been considered charitable. The reasoning for this is that the Court cannot supposedly judge whether a proposed change in the law will benefit the public.[27] This well-established doctrine dates to the 1917 House of Lord's case *Bowman v Secular Society*[28] and remains in the United Kingdom and Canada. As "New Zealand's charity law is a reflection of the heritage of its colonial ancestry",[29] the doctrine was soon firmly established in New Zealand jurisprudence[30] as demonstrated by the case of *Molloy v Commissioner of Inland Revenue*.[31]

The case of *Bowman v Secular Society Ltd* (*Bowman*) is often treated as the origin of the political purpose exception.[32] The case concerned a gift given for the purposes of the Secular Society rather than to the Society itself, which required that consideration be given to whether these purposes were charitable at law. Lord Parker of the Court characterised the objects of the Secular Society as being "purely political" and observed that a political object does not explicitly pertain to party political measures.[33] Nowadays, most, if not all, latter cases involving political purposes refer to Lord Parker's famous dictum: "a trust for the attainment of political objects has always been held invalid".[34]

Lord Parker's argument became the leading approach favouring the doctrine that a court cannot determine where the public good lies when distinguishing between competing views of a

25 Whilst there is a magnitude of information on the historical background of the doctrine, this research is focused on the effect of the removal of the doctrine; as a result, this section is confined to the information deemed most important.

26 Adam Parachin "Distinguishing Charity and Politics: The Judicial Thinking Behind the Doctrine of Political Purposes" (2007-2008) 45(4) Alta L Rev 871 at 873.

27 *Bowman v Secular Society Ltd* [1917] AC 406 (HL) at 442.

28 *Bowman v Secular Society Ltd*, above n 27.

29 Juliet Chevalier-Watts "The changing face of political purposes and charity law in New Zealand" (2015) 21(10) Trusts & Trustees 1121 at 1121.

30 The authority of *Bowman* was initially entrenched in New Zealand law by *Re Wilkinson (Deceased)* [1941] NZLR 1065 (SC).

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

32 *Bowman v Secular Society Ltd*, above n 27.

33 *Bowman v Secular Society Ltd*, above n 27.

34 *Bowman v Secular Society Ltd*, above n 27.

controversial political nature.[35] It should be noted that whilst this statement was spoken as obiter, it has since been relied upon by subsequent courts.[36] Parachin maintains that Lord Parker relied on the opinions of Amherst Tyssen,[37] despite not citing him, as no prior decision had established the doctrine.[38] Due to this, Parachin described Lord Parker humorously as a "poor historian".[39]

Tyssen was later cited and quoted in the case of *National Anti-Vivisection Society v Inland Revenue Commissioners* (*National Anti-Vivisection Society*) by Lord Wright.[40] In this case, the House of Lords concluded that the purpose of obtaining a law reform, specifically the abolition of vivisection, was a political purpose that disqualified the association from charitable status.[41] Additionally, the Court concluded that there was no public benefit associated with this purpose on the evidence provided.[42] Lord Wright and Lord Simmonds affirmed the observations of Lord Parker in defining political purposes or objects to be construed in the broader sense and to include "activities directed to influence the legislature to change the law to promote or effect the views advocated by the society."[43]

The latter case of *McGovern v Attorney-General* (*McGovern*) cited *Bowman* as an authority for determining whether the purposes of a trust established by Amnesty International met the criteria to be a valid charitable trust.[44] In this case, Slade J developed the five types of trust, with guidance from *Bowman* and *National Anti-Vivisection Society*, that would be deemed trusts with political purposes.

Slade J explicitly noted that this categorisation was "not intended to be an exhaustive one."[45] The general argument favouring the doctrine, in this case, was that the courts should be precluded from determining whether a change in the law is of public benefit. Parachin held that by doing so, the Courts would "usurp the functions of the legislature," thereby prejudicing an institution that is meant to remain impartial.[46]

Molloy v Commissioner of Inland Revenue (*Molloy*) was a New Zealand case where a society that opposed changes to the legislative provisions relating to abortion was held to be political.[47] The Court of Appeal, in this case, affirmed that Lord Parker's reasoning in *Bowman* must be applicable as the Court has no means of judging the public benefit for political purposes, despite the purpose

35 Juliet Chevalier-Watts "Shedding the shackles of Bowman: A critical review of the political purpose doctrine and charity law in New Zealand" [2015] NZLJ 108 at 109.

36 Parachin, above n 26, at 876.

37 Parachin, above n 26, at 879; referencing Amherst D Tyssen "The Law of Charitable Bequests: With an Account of the Mortmain and Charitable Uses Act" (1888) William Clowes and Sons at 177.

38 Parachin, above n 26, at 877.

39 Parachin, above n 26, at 877.

40 *National Anti-Vivisection Society v Inland Revenue Commissioners* [1948] AC 31 (HL) at 50.

41 Joyce Chia, Matthew Harding and Ann O'Connell "Navigating the politics of charity: Reflections on Aid/Watch Inc v Federal Commissioner of Taxation" (2011) 35(2) MULR 353 at 357.

42 Parachin, above n 26, at 882.

43 *National Anti-Vivisection Society v Inland Revenue Commissioners*, above n 40, at 51–52.

44 Chevalier-Watts, above n 35, at 110.

45 Chevalier-Watts, above n 35, at 110.

46 Parachin, above n 26, at 882.

47 *Molloy v Commissioner of Inland Revenue*, above n 31.

being for a stay of law rather than a change.[48] Regardless, the Court recognised that charitability might not be negated should the political purposes be "ancillary, secondary, or subsidiary" to the main object rather than the dominant purpose.[49]

Aid/Watch v Federal Commissioner of Taxation (*Aid/Watch*)[50] is a pivotal case that impacted the decision of *Greenpeace (SC)*[51] as it changed the law in Australia for political purposes and charities. Aid/Watch designed their campaigns to stimulate public debate by challenging government policy and legislation, thus making the organisation politically focused and motivated.

Before *Aid/Watch*, the doctrine developed by Bowman was upheld in *Royal North Shore Hospital of Sydney v Attorney-General (NSW)*.[52] Notwithstanding this history, the High Court of Australia in *Aid/Watch* rejected the principle in *Bowman*, arguing instead that the Australian constitution requires agitation for legislative and policy changes to occur.[53] The majority stated that, where a statute requires the common law for its operation, a broader interpretation should be applied so that the statute develops with the case law.[54]

The Court developed the proposition that a political purpose can be charitable should it be for the public benefit by applying the process-based test. Through applying this test, the majority accepted that Aid/Watch's purposes generated public debate around the best methods to alleviate poverty.[55] Therefore, they had a charitable purpose of public benefit. Critics of the case state that the ruling in *Aid/Watch* rests on "Australia's particular constitutional framework", and other jurisdictions should be wary of departing from the doctrine.[56]

The majority decision emphasised the constitutional value of free political speech, which means a one-sided political view could be considered for public benefit.[57] The majority did not comment on whether generating public debate outside the three heads would meet the public benefit test.[58] No consideration was given to whether other forms of political activity, such as lobbying for a political party, would be covered by their reasoning.[60] Overall, there is still uncertainty to the scope of the *Aid/Watch* decision in the Australian legal framework; nevertheless, it is still a modern approach to extinguishing the doctrine.[61]

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48 At 696.

49 At 695.

50 *Aid/Watch Inc v Commissioner of Taxation* (2010) 241 CLR 539.

51 *Re Greenpeace of New Zealand Inc* (SC), above n 2.

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

53 *Aid/Watch Inc v Commissioner of Taxation*, above n 50, at [45].

54 At [23].

55 At [45].

56 Chia, Harding and O'Connell, above n 41, at 380.

57 At 378.

58 *Aid/Watch Inc v Commissioner of Taxation*, above n 50, at [48].

59 *Aid/Watch Inc v Commissioner of Taxation*, above n 50, at [48]–[49].

60 *Re Draco Foundation (NZ) Charitable Trust* (2011) 3 NZTR 21-009, (2011) 25 NZTC 20-032 (HC).

61 At [56]. This was the first New Zealand case which sought to apply the decision of *Aid/Watch* in New Zealand, which was denied.

IV. Case Analysis of the Supreme Court Decision of Greenpeace

For clarity, this section will critically examine the critical points of decision in *Greenpeace (SC)*. Greenpeace NZ is the New Zealand based portion of the larger international Greenpeace movement. This movement seeks a more peaceful and greener future for the world.

Greenpeace (SC) was a pivotal moment of clarity in New Zealand charity law. The appeal concerned the application and interpretation of s 5 of the Act, which New Zealand has historically accepted as a codification of the doctrine.[62]

The Act defines charitable purpose; however, the courts readily accept that the legislature allows for the concepts of charity to be developed in case law.[63] In addition, the Supreme Court clarifies that the common law approach to charities is not capable of codification, which allows charity law to develop over time.[64]

The majority's interpretation of s 5(3) of the Act was that the section is included to provide latitude for charities seeking charitable status when also engaged in non-charitable purposes. The concluding decision of the Court was that s 5(3) was a general application for all ancillary purposes, with "advocacy" being provided as an example.[65] The subsection is not "expressed as an exclusion of advocacy from charitable purposes" where the advocacy is of a more than ancillary nature.[66] Accordingly, the Supreme Court disagreed with previous Courts that s 5 of the Act enacted a general political purpose exclusion. There was no suggestion in the "structure or language" to justify using the example advocacy to be treated as an outright exclusion.[67] This position taken by the Court elucidates the legislative position in New Zealand, opening the doors to the possibility of charitable political purposes.

The overarching conclusion by the Supreme Court was that political purposes and charitable purposes are not mutually exclusive and that a blanket exclusion of political purposes obscures the focus of charitability.[68] The doctrine "risks rigidity in an area of law which should be responsive to the way society works."[69]

The Court refers to examples such as the abolition of slavery, protection of the environment and human rights as charitable purposes in themselves.[70] The Supreme Court set out the three-stage test: of end, means and manner, to determine whether advocacy is advancing public benefit.[71] *Greenpeace (SC)* did endeavour to provide clarity on judging the public benefit for political purposes. However, the guidance provided was sparse and did not necessarily aid in understanding each aspect of the test. Whilst the Court was not specific about how this test should be applied,

62 *Re Greenpeace of New Zealand Inc* (SC), above n 2, at [9].

63 At [16].

64 At [56].

65 At [57].

66 At [57].

67 At [57].

68 At [59].

69 At [70].

70 At [71].

71 This three-stage test will be discussed later in the research.

Better Public Media Trust v Attorney-General (Better Public Media Trust)[72] and *Greenpeace (HC)* clarified the topic.

The dissenting views of William Young and Arnold JJ echo the arguments in previous cases in favour of the doctrine. Arguments are made to the practical difficulties and policy issues that a Judge may encounter in making such a decision. Additionally, that such an inquiry falls outside the "scope of the judicial role."[73] A well-founded point, when considering that Greenpeace NZ's purpose requires policy changes to achieve its end. However, as the latter case of *Greenpeace (HC)* will demonstrate, this issue is addressed by including the means and manner aspects of the three-stage test.

The Supreme Court remitted Greenpeace NZ back to the Charities Commission, now the Charities Registration Board ("the Board"),[74] for consideration in light of the Court's findings. The Board declined registration, to which Greenpeace NZ appealed to the High Court.

V. End, Means and Manner

An understanding of the three-stage test developed in *Greenpeace (SC)* is necessary before considering the application of the test in *Greenpeace (HC)* and *Family First (CA)*. As mentioned earlier in this research, an association must be both charitable and for the public benefit. This three-stage test relates to the first limb of the test set out in *New Zealand Society for Accountants v Commissioner of Inland Revenue.*[75] *Greenpeace (SC)* set out the three-stage test for determining whether a political purpose is for the public benefit:[76]

> Assessment of whether advocacy or promotion of a cause or law reform was a charitable purpose depended on consideration of the end advocated, the means promoted to achieve that end and the manner in which the cause was promoted in order to assess whether the purpose could be said to be of public benefit within the spirit and intendment of the Statute of Charitable Uses 1601.

This three-stage test is exclusive to political purposes, as "the organisation claiming to be charitable is not itself performing the charitable acts"; instead, it advocates that others perform the acts.[77] As a result, both the cause and the way in which it is advocated must be considered charitable.

This test was primarily formulated and based on the dissenting judgment of Kiefel J in *Aid/Watch*, as her Honour considered that the motives of an organisation are not sufficient to establish a public benefit.[78] This takes a different approach to that of the majority in *Aid/Watch,* which concluded that a Court is not to "adjudicate the merits" of the ends promoted by an organisation.[79] Instead, the majority favoured that it is the process by which an organisation seeks to change that generates

72 *Better Public Media Trust v Attorney-General* [2020] NZHC 350 at [53].

73 *Re Greenpeace of New Zealand Inc* (SC), above n 2, at [125].

74 At this time, the Charities Commission was dismantled, and the role of registering charities was allocated to the Charities Registration Board.

75 *New Zealand Society of Accountants v Commissioner of Inland Revenue*, above n 21.

76 *Re Greenpeace of New Zealand Inc* (SC), above n 2, at [76].

77 *Better Public Media Trust v Attorney-General*, above n 71, at [54].

78 *Aid/Watch Inc v Commissioner of Taxation*, above n 50, at [82].

79 At [45].

the public benefit by contributing to the overall public welfare.[80] However, the Supreme Court in *Greenpeace (SC)* furthered this test by requiring an assessment of the benefit of achieving the stated purpose (the end) rather than just the benefit of pursuing it.[81]

The end, means and manner test was applied and further explicated by Cull J in *Better Public Media Trust*:[82]

> The *end* is the ultimate goal or objective for which the organisation is advocating … The *means* is then the way in which the organisation advocates achieving the *end* … Finally, the *manner* is the way in which the organisation conducts its advocacy.

The end will generally be created at a high level of abstraction so long that it does not appear to favour one particular form.[83] *Greenpeace (SC)* gives examples of abstract ends, including abolishing slavery, advancing human rights, and protecting the environment.[84] The means are the more practical application; the steps in which the association supports are being taken to achieve the end goal.[85] They are the processes of achieving the "end" without taking a specific standpoint. The manner is distinct from the means in that it assesses the practical steps the association takes to advocate for its cause.[86]

This three-stage test will be critically reviewed regarding its application in New Zealand versus the Australian public benefit test.

VI. Critique of Public Benefit

The three-stage test is not without its critics. Kós P, in his opening address at the Charity Law Association of Australia and New Zealand (CLAANZ) Conference, stated that the ends, means and manner analysis is "obscure." He believed that the means and manner aspects were not "particularly illuminating in deciding whether an entity serves charitable purposes."[87]

Since 1805, the case authority regarding public benefit has predominantly required both the public benefit and the charitable object to be within the same sense.[88] This is affirmed by Kós P, who stated that historically the focus has been "upon the existence of demonstrable public benefit in the ends pursued."[89] Accordingly, his Honour preferred the majority approach in *Aid/Watch* instead of the dissenting judgment of Kiefel J.[90]

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80 At [45].

81 *Greenpeace of New Zealand v Charities Registration Board* (HC), above n 6, at [47].

82 *Better Public Media Trust v Attorney-General*, above n 71, at [53].

83 Juliet Chevalier-Watts "Post-Greenpeace, Better Public Media Trust, and advocacy: on the current charity law landscape" (2020) 6(1) NZLJ 190 at 193.

84 *Re Greenpeace of New Zealand Inc* (SC), above n 2, at [71].

85 *Better Public Media Trust v Attorney-General*, above n 71, at [53].

86 At [53].

87 Hon Justice Stephen Kós, President of the Court of Appeal of New Zealand "Murky Waters, Muddled Thinking: Charities and Politics" (Charity Law Association of Australia and New Zealand Conference, 4 November 2020) at [31].

88 *Re Greenpeace of New Zealand Inc* (SC), above n 2, at [29].

89 Kós, above n 86, at [31].

90 At [35].

The majority in *Aid/Watch* held that the doctrine of political purposes no longer applied in Australia. However, it did state that in a "particular case, the ends and means involved could result in a finding that there was insufficient public benefit."[91] It is the process (manner) by which the association takes which is initially assessed though. With this in mind, the approaches do not appear too dissimilar. What differs is the "starting point" for each approach. *Greenpeace (SC)* supports an "end" focused approach, where the end is assessed with reference to the means and manner used to achieve the end. *Aid/Watch* supports a "process based" approach, favouring the manner used that generates benefit.

However, whilst the "end" focused test has been argued as more difficult for charities to prove public benefit,[92] this area of charity law is complex and arguably needs a more demanding test to ensure that those which meet the threshold are charitable.

VII. High Court Judgment of Greenpeace

The Supreme Court remitted Greenpeace NZ for consideration of charitable status by the Board and Chief Executive. The Board denied Greenpeace NZ charitable status because, inter alia, Greenpeace NZ's advocacy did not meet the Supreme Court's three-stage test.[93] Greenpeace NZ appealed this decision to the High Court, whose decision was a straightforward application of how a political purpose is determined to be charitable in New Zealand.[94]

Firstly, the High Court followed the approach of the Supreme Court in determining an association's purpose. In deciding if an association is established and maintained for charitable purposes, the associations "stated objects, as well as current and proposed activities, will be considered."[95] Accordingly, the association's purpose may be "inferred from its activities" as stated in *Greenpeace (SC)* and s 18(3) of the Charities Act.[96] This aids in determining the "relative weight" of the association's stated objects, as well as assists in determining if the potential consequences of pursuing said purpose are not considered charitable.[97] Where the charitability of an object is unclear, the inference from the activities will provide a better understanding of the purpose.

This general approach to determining an association's purpose is not without criticism specifically pertaining to when the Court can infer a purpose from the association's activities and what the Court is to look for. Section 18(3) of the Act does not provide guidance or criteria on what the Court is to look for in the activities, nor does it state whether the activities must be charitable. Furthering this argument, Ellis J in *Re the Foundation for Anti-Aging Research and the Foundation for Reversal of Solid State Hypothermia* (*Anti-Aging*) observed that an association's activities

91 Chia, Harding and O'Connell, above n 42, at 375; referencing *Aid/Watch Inc v Commissioner of Taxation* (2010) CLR 396 at [49].

92 Jane Calderwood Norton "Controversial charities and public benefit" (2018) NZLJ 64 at 65.

93 *Greenpeace of New Zealand v Charities Registration Board* (HC), above n 6, at [7].

94 The issues within this case relating to "advancing education", "illegal purpose", or "judicial review" are outside the scope of this research.

95 *Greenpeace of New Zealand v Charities Registration Board* (HC), above n 6, at [22].

96 *Re Greenpeace of New Zealand Inc* (SC), above n 2, at [14].

97 *Greenpeace of New Zealand v Charities Registration Board* (HC), above n 6, at [22].

should be regarded as relevant "only to the extent that the entity's constituent documents were unclear to its purpose" or where there was evidence of activities that contradict the stated purpose.[98]

This constraint is reasonable for the reasons, among other things, that it ensures that associations are complying with their constituting document, and it provides a more standardised process to purpose determination. *Greenpeace (HC*) does not support this notion, as it states that "regard must be had to the entity's current and proposed activities."[99] Greenpeace NZ made amendments to their objects and activities and stopped campaigning for peace and nuclear disarmament; to fully comprehend their primary purpose, the Court had to look at the activities. A potential alteration to the observation of Ellis J is to regard activities as relevant where an association's purpose is ancillary to their dominant purpose. Despite the conflict in approaches, there is still a clear allowance of inference of an association's activities in determining what the purpose is, as supported by *Greenpeace (SC)* and *Greenpeace (HC)*.

Secondly, the High Court applied the three-stage test established in *Greenpeace (SC)* when determining whether Greenpeace NZ's purpose was charitable. Greenpeace NZ's primary purpose and "end" is advocating for the protection of the environment. Therefore, Greenpeace NZ's end to be considered charitable would depend on what is being advocated and how that advocacy is being carried out, i.e., the means and manner, respectively. Regarding the means, the Court confirmed that competing interests are not relevant; public benefit is gained through "raising awareness of environmental issues" and ensuring that the "public's interest in protecting the environment" is considered.[100]

Campaign activities are generally the means by which Greenpeace NZ promote their objects.[101] The manner in which this is undertaken is through advocating for measures, by engaging in the democratic process, to mitigate climate change, improving freshwater quality, protection of the ocean and sustainable fishing. Mallon J held that there is a charitable public benefit in this form of advocacy, as it requires "broad-based support and effort" for achieving the end goal of protecting the environment.[102] This purpose was stated in *Greenpeace (SC)* to be charitable.

Thirdly, regarding Greenpeace NZ's purpose to promote peace, nuclear disarmament and the elimination of weapons of mass destruction, the High Court held that this was ancillary to the association's dominant purpose.[103] This was evidenced by the lack of activity in relation to peace, nuclear disarmament and elimination of weapons.[104] In the *Greenpeace (HC)* decision, Mallon J viewed the promotion of peace and nuclear disarmament as different from that of protecting the environment.[105] This was primarily because advocating for peace and nuclear disarmament as a general end was very broad and theoretical and included various considerations about the "right way" to achieve this end.[106] Around the means and manner of the purpose, these issues would

98 *Re the Foundation for Anti-Aging Research and the Foundation for Reversal of Solid State Hypothermia* [2016] NZHC 2328 at [85].

99 *Greenpeace of New Zealand v Charities Registration Board* (HC), above n 6, at [22].

100 At [86].

101 At [61].

102 *Re Greenpeace of New Zealand Inc* (SC), above n 2, at [71].

103 *Greenpeace of New Zealand v Charities Registration Board* (HC), above n 6, at [125].

104 At [82].

105 At [83].

106 Juliet Chevalier-Watts "Greenpeace, advocacy, and the long winding road" (2020) 10 NZLJ 354 at 355.

make the public benefit "difficult to establish."[107] Additionally, the Supreme Court supported the dissenting judgment by Kiefel J in *Aid/Watch,* which stated that "reaching a conclusion of public benefit may be difficult where the activities of an organisation largely involve the assertion of its views."[108]

This indicates that it will unlikely be seen to be in the public benefit for an association to say that they advocate for "justice", a highly abstract goal, with no specific means or manner of achieving it.[109] It also indicates that if the activities of achieving justice regarded propaganda materials, it would be challenging to establish public benefit from the assertion of this view.

Contrarily, the "end" of advocating for the protection of the environment will likely require broad-based support and effort, which then enables the public interest to be assessed. In examining the two purposes, *Greenpeace (HC)* has effectively demonstrated where political purposes would fail to meet the criteria of the three-stage test. Overall, the *Greenpeace (HC)* case applied the principles and tests established in *Greenpeace (SC)*, providing comprehensibility as to what will and will not be recognised as a charitable political purpose in New Zealand.

VIII. Case Analysis of Family First

Similar to the critical review done of the Greenpeace NZ decisions, the provision of the necessary case history for Family First will be given before setting out how the Court of Appeal case provided limited-to-no clarity on the determination of charitable political purposes in New Zealand law.

A. Case History

Family First is an organisation devoted to advocating on a broad range of issues, including abortion, prostitution, censorship, anti-smacking legislation, euthanasia and cannabis legislation.[110] Family First seeks to promote a conservative and traditional perspective on strong families, marriage and the value of life, specifically referring to a union being between a man and woman.

The Board deregistered Family First because the organisation did not exist solely for charitable purposes.[111] This was the second deregistration decision by the Board, as the first decision was quashed by the decision in *Greenpeace (SC)* and was referred back to the Board for reconsideration. The decision did not change, and Family First appealed to the High Court. The High Court upheld the decision of the Board that Family First's "core purpose of promoting the traditional family unit cannot be shown to be in the public benefit in the charitable sense under the Act."[112] The purpose argued by the association is that Family First is to educate and conduct research relating to family values and family life. The association also seeks to promote these family values and participate in the democratic process to advance the interests of families. The association also engages in "issues of the day" or day-to-day issue advocacy. Therefore, assessing whether there is public benefit for

107 *Greenpeace of New Zealand v Charities Registration Board* (HC), above n 6, at [83].

108 *Re Greenpeace of New Zealand Inc* (SC), above n 2, at [73]; citing *Aid/Watch* at [69].

109 This is a basic example of a theoretical, general end; this is not an assumption on whether this sort of advocacy will or will not meet the public benefit criteria.

110 *Greenpeace of New Zealand v Charities Registration Board* (HC), above n 6, at [11].

111 *Re Family First New Zealand* [2015] NZHC 1493.

112 *Re Family First New Zealand* (HC), above n 110.

this advocacy in a charitable sense requires consideration of the end promoted and the means and manner of that promotion.

Family First requested to take this decision to the Court of Appeal, which is the case in discussion. This analysis will outline the approaches taken by the Court and how these approaches and outcomes have re-complicated what was simplified in *Greenpeace (SC)* and *Greenpeace (HC)*.[113]

B. Over-generalisation of the Purpose and "End"

The Court of Appeal has over-generalised the association's purpose and "end", despite Family First's stated objects being very narrow in scope. Case law dictates that the purpose of an association should be construed and understood as a whole in the context of the relevant activities.[114] Charitable status depends principally on purposes and the stated objects, not activities.[115] However, as outlined earlier by Elias CJ in *Anti-Aging*, the Court should turn to the activities where they appear to conflict with the stated objects.[116]

The majority contends that the objects stated have an underlying theme of family and marriage. However, when taken as a whole, the activities of Family First support a specific form of family and marriage, being the union between a man and woman. This specificity is where the Court in *Family First (CA)* complicated the approach to advocacy as a charitable purpose.

A straightforward approach on how the Court is to determine the "end" of an organisation would ensure a more standardised application. As described in *Greenpeace (SC)*[117] and *Better Public Media Trust,*[118] an end is an abstract and general goal that the entity aims to achieve. The "end" determined by Family First was general in nature and was stated by the Court to be abstracted from the day-to-day issue advocacy that Family First are engaged in.[119] The majority interpreted the "end" advocated for to be for the support and promotion of family and marriage.[120] However, Family First's promotion of marriage and family is specific and narrow.

The Court acknowledged that Family First's two "Statements of Principle" clarify the organisation's exact position on the term's "marriage" and "family."[121] Family First emphasised that such principles were intended to "bring us back to the core values of the family," those values of a "traditional" or "natural" family.[122] This supports the notion that Family First supports a specific family form being promoted. Adversely, the "end" of promoting family and marriage, as set out by the majority, suggests incorporating all family and marriage forms, a position that Family First does not support. This differs from Greenpeace NZ's end advocated for. Greenpeace NZ's purpose of protecting the environment defines the association's position regarding that form of advocacy,

113 For legibility, each issue should be read independent of other issues discussed, unless explicitly referred to.

114 G E Dal Pont *Law of Charity* (2nd ed, LexisNexis Australia, 2017) at [13.17] [13.18].

115 *Family First New Zealand v Attorney-General* (CA), above n 7, at [87].

116 *Re the Foundation for Anti-Aging Research and the Foundation for Reversal of Solid State Hypothermia*, above n 97, at [85].

117 *Re Greenpeace of New Zealand Inc* (SC), above n 2.

118 *Better Public Media Trust v Attorney-General*, above n 71.

119 *Family First New Zealand v Attorney-General* (CA), above n 7, at [90].

120 At [136].

121 At [137].

122 At [99]; referencing Family First New Zealand "Family First releases 'Principles of Family'" (press release, July 2006).

and their activities further emphasise this purpose. Unlike Family First's end, there is coherency between Greenpeace NZ's purpose and activities.

The majority have generalised the dominant purpose of Family First to its broadest interpretation. One which the majority stated is not dissimilar to peace or nuclear disarmament as once sought by Greenpeace NZ. However, peace and nuclear disarmament were stated by the Courts in *Greenpeace (SC)* and *Greenpeace (HC)* to be challenging to prove a public benefit for due to the nature of the means and manner necessary to achieve the end. The effect of this interpretation distorts the approach to determining the "end" of an association. It opens the possibility of the Courts to "create" rather than "interpret" what an association's purpose might be.

C. Public Benefit Application

An explicit deliberation in determining how Family First's purpose is of "self-evident" public benefit could have been better understood when a purpose meets this threshold. Initially, the majority appears to argue that Family First's purpose of advocating for family and marriage is of self-evident public benefit under the fourth head of charity, providing legislation to support this statement.[123]

As stated earlier, the Court determined that the association has an "end" goal of promoting the support of family and marriage. This is abstracted to the extent that it could be considered to include all family forms. This version of the abstraction will be used to demonstrate the argument. If the "end" included all family forms, the reasoning given by the Court, including references to supporting legislation, could support the proposition of "self-evident" public benefit. Firstly, the legislation provided to "support" the majority's "self-evident" claim is general in nature. As an example, art 16 of the Universal Declaration of Human Rights states:[124]

> 1. Men and women of full age, without any limitation due to race, nationality, or religion, have the right to marry and to found a family. Furthermore, they are entitled to equal rights as to marriage, during marriage and at its dissolution.
>
> 2. Marriage shall be entered into only with the free and full consent of the intending spouses.
>
> 3. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

The Universal Declaration of Human Rights[125] does not define what constitutes a "family."[126] Accordingly, the term "family" should be given its definition under New Zealand legislation.

A family relationship will exist where one person has "a close personal relationship with the other person".[127] A family group, in relation to a child or young person, means a family group:[128]

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123 *Family First New Zealand v Attorney-General* (CA), above n 7, at [138].

124 Universal Declaration of Human Rights GA Res 217A (adopted 10 December 1948), art 16.

125 Above n 123.

126 It should be noted that neither do the International Covenant on Economic, Social and Cultural Rights A/RES/2200 (opened for signature 6 December 1966, entry into force 3 January 1976) and the Convention on the Rights of the Child E/CN.4/RES/1990/74 (opened for signature 20 November 1989, entry into force 2 September 1990); both legislative pieces which were provided as evidence supporting a "self-evident" claim.

127 Family Violence Act 2018, s 14.

128 Oranga Tamariki Act 1989, s 2.

(a) in which there is at least 1 adult member—

(i) with whom the child or young person has a biological or legal relationship; or

(ii) to whom the child or young person has a significant psychological attachment; or

(b) that is the child's or young person's whanau or other culturally recognised family group

This includes extended family as well. However, there is nothing in the legislature to suggest a specific form of accepted "family" in New Zealand; this directly contradicts the position of Family First.

Article 16 of the Declaration supports the "end" of promoting family and marriage; however, it does not explicitly support the "end" of the traditional family and marriage between a man and a woman. This entails that the Declaration supports the family forms of same-sex, single, adoptive and any other family form so long as it constitutes a family in terms of ordinary meaning. As explained previously, the "end" of Family First pertains to a more specific and confined understanding of family and marriage. Within the "Principles on Family", Family First affirms the "natural family" to be the union of a man and a woman.[129] This "natural family" cannot change into some new shape, nor can it be re-defined by social engineering.[130] As the purpose is for a particular form of family, the "end" promoted and advocated for should reflect this purpose, and the three-stage test should be applied where the public benefit is not "self-evident." I refer to the majority's argument that the end being promoted by Family First is of "self-evident" public benefit.

1. Interpretation

It is unclear how *Family First (CA)*[131] decided that Family First's purpose is of self-evident public benefit. If the "end" advocated for were for the family in the term's ordinary meaning, this statement would be clearer—however, Family First advocates for the "traditional" family and "traditional" marriage. As a result, it cannot be said that the public benefit is self-evident for the reasons outlined earlier. A more developed explanation of what constitutes "self-evident" public benefit and how this assessment is undertaken would have assisted future application.

D. Assessment of Potential Harms

An assessment of the fiscal consequences of Family First's purpose of promoting family and marriage would have aided in the clarity of factors to consider in relation to political purposes. Unfortunately, the lack of deliberation by the majority in *Family First (CA)*[132] to the potential harms associated with Family First's purpose has resulted in ambiguity as to what the judiciary, and Charities Board, should consider relevant in determining whether a political purpose is charitable.

1. Prior New Zealand precedent

The Act does not prescribe that this assessment be done, so Courts must look to the common law. Mallon J in *Greenpeace (HC)*[133] stated that the purpose of an entity could be inferred from

129 *Family First New Zealand v Attorney-General* (CA), above n 7, at [10].

130 *Family First New Zealand v Attorney-General* (CA), above n 7, at [10].

131 *Family First New Zealand v Attorney-General* (CA), above n 7.

132 *Family First New Zealand v Attorney-General* (CA), above n 7.

133 *Greenpeace of New Zealand v Charities Registration Board* (HC), above n 6, at [22].

its activities. These activities may also assist in determining the consequences of pursuing a purpose that has not been adjudged as charitable. In examining each of the political activities and types of advocacy Greenpeace NZ undertakes, his Honour examined and weighed the potential consequences of such advocacy.[134] One example of advocacy that Greenpeace NZ undertakes concerns sustainable fishing practices. Mallon J determined that such advocacy is of public benefit despite the competing interests of the fishing industry and other economic considerations.[135] Also supporting this assessment, albeit differently, is the Court in *Re Centrepoint Community Growth Trust* (*Centrepoint*). The Court had to determine whether a revised scheme for the community could be held to be for the relief of poverty, the first head of charity.[136] The Court, in this case, considered the harms of not providing relief, that those within the community had no life skills, personal assets and would struggle to find work and housing.[137] This would result in them being a burden on New Zealand society, and for this reason, Cartwright J held that payments under the relief of poverty could be justified on these grounds. Despite the public distaste towards this decision, the harms and consequences were assessed according to the charitable purpose.

2. Family First (CA) assessment of potential harms

The majority in *Family First (CA)* did not scrutinise the different political activities, and advocacy Family First involves itself in. In this case, Mr Mckenzie, senior counsel for Family First, provided the Court with a summary of Family First's activities, including advocacy on sex education.[138] Regarding sexuality and sex education being taught in schools, Family First provides this comment:[139]

> The government is currently pursuing and promoting a curriculum where children are indoctrinated on "gender identity" ideology and the harms of gender stereotypes, and given dangerous messages that they're sexual from birth, that the proper time for sexual activity is when they feel ready, and that they have rights to pleasure, birth control, and abortion.

Family First engages in activities that seek to grant fewer privileges to the LGBTQ+ community, women and certain forms of family life.[140] Family First undertakes and projects such as "Ask Me First," an initiative that opposes transgender women access to female bathrooms and toilets,[141] and "Protect Marriage," which opposes the legal recognition of same-sex marriage.[142] In Family First's "Principles on Family", they acknowledge the "contribution made by single, adoptive and step-parents and extended whānau in society."[143] However, Family First also describes other family

134 *Greenpeace of New Zealand v Charities Registration Board* (HC), above n 6, at [93-94].

135 At [93-94].

136 *Re Centrepoint Community Growth Trust* [2000] 2 NZLR 325 (HC).

137 At [51].

138 *Family First New Zealand v Attorney-General* (CA), above n 7, at [44].

139 Family First New Zealand "Sexuality Education in Schools" <https://familyfirst.org.nz/>.

140 Jane Calderwood Norton and Jordan Grimmer "The charity conundrum: should Family First get the same status as Greenpeace?" (University of Auckland, News and opinion, 1 September 2020). <www.auckland.ac.nz/en/news/2020/09/01/the-charity-conundrum--should-family-first-get-the-same-status-a.html>.

141 Family First "Ask Me First" <http://askmefirst.nz/>.

142 Protect Marriage NZ "One Man. One Woman. That's Marriage." <https://protectmarriage.org.nz/>.

143 Family First New Zealand "Principles" <https://familyfirst.org.nz/principles/>.

forms as "incomplete or fabrications of the state."[144] With these considerations provided, it appears that Family First's advocacy for the traditional family entails working against other forms of family life, effectively harming them.

3. Interpretation

The issue is not whether the purpose is controversial, as demonstrated in *Centrepoint*, as a controversial purpose can still be proven to be charitable, so long as there is a public benefit. Instead, this issue lies in what type of assessment the Court should undertake when assessing a purpose's potential harm and whether this harm negates that purpose's public benefit. This can become a problem in the future concerning the reliability of charities in the public eye as if harms and consequences are not taken into account, it devalues the concept of charity. It also opens the window for organisations that undertake particular activities which could be construed as "harmful" to apply for charitable status under the premise that *Family First (CA)* does not set out the requirement that an assessment is done. These potential situations support the argument that an assessment on the fiscal consequences of Family First's purpose would have aided in the clarity of factors a court is required to consider in relation to public benefit and demonstrates how *Family First (CA)* failed to assist in this aspect.

E. Focus on the Traditional Family

The Court of Appeal's determination of Family First's purpose contradicts within itself and provides little direction for how such a purpose should be defined. As previously mentioned, the purpose and "end" of Family First has been construed in the most general sense. It is difficult to see the majority's reasoning to determine this abstract end of a family, later to define Family First's focus as the traditional family. These appear to be contradicting purposes.

The majority state that Family First's focus on the "traditional family" did not bar them from obtaining charitable status.[145] The reasoning to support this notion was that traditional families constitute a larger portion of families in contemporary New Zealand. The majority state that it would be "curious" if the promotion of the traditional family were not of public benefit because of the growing acceptance of other family forms.[146] The majority appear to be stating that advocating for the traditional family is self-evidently in the public benefit despite other forms of family life being accepted in New Zealand. Simon France J in *Family First (HC)* observed that whilst Family First's promotion of the "traditional family" form is likely to be supported by a section of the community. However, if it is achieved at the cost of other family models, it cannot benefit the public.[147] This links back to previous arguments made in this research regarding implementing an assessment of fiscal consequences.

1. Two-limb test

Outlined by Gilbert J in the dissenting judgment, it could be argued that the majority erred in determining that the "traditional family" or "family" is of public benefit "in the sense the law regards

144 Family First New Zealand (CC42358) Charities Board Decision D2013-1, 15 April 2013 (First deregistration decision) at [3].

145 *Family First New Zealand v Attorney-General* (CA), above n 7, at [145].

146 *Family First New Zealand v Attorney-General* (CA), above n 7, at [147].

147 *Re Family First New Zealand* (HC), above n 110, at [65].

as charitable, rather than a section of society on whom charitable benefits may be conferred."[148] Gilbert J is referencing the aforementioned two-limb public benefit test.[149] The two-limb test sets out that the purpose must confer a benefit on the public or at least a large section of it, and the class of persons receiving the benefit constitute this section of the public. The majority state that Family First's purpose is to promote the support of family and marriage. For this purpose, the application of the two-limb test would determine that the benefit of the purpose would be the "support" aspect. These would be the activities such as, among others, publishing media releases, articles on topics relevant to its cause, commissioning reports, and making submissions on legislation.[150] Thus, the public or section of the public aspect of the two-limb test would be the "family" or "traditional family", which Family First advocates for. This section of the public benefits from the advocacy the support of Family First. The majority's analysis "appears to conflate" these two separate limbs and puts forward the proposition that the "family" is the benefit.[151] However, under this analysis, it is unclear who the section of the public would be which is benefitting from the "family" other than the family itself.

F. Endorsement of the Australian Approach

The endorsement by *Family First (CA)* of the argument set forward CLAANZ[152] has created the potential for a hybridised public benefit approach whilst also confusing New Zealand jurisprudence about what approach should be taken in determining the public benefit of advocacy. CLAANZ argues that there is a public benefit associated with political discourse in a free and democratic society and that the content of the position advocated for is not essential.[153] Their submission to the Court of Appeal supports that if the political advocacy furthers some "unquestionably beneficial law or policy change," such as advocating for the environment, such benefits can be demonstrated directly by the end advocated for.[154] However, regarding incidental, wider benefits, these might be shown through the means and manner in which the advocacy is undertaken.[155] Where CLAANZ deviates from the principal in *Greenpeace (SC)*[156] is that they submit that the possibility of incidental wider benefits should be considered, regardless of the end advocated for.[157] This approach aligns closely with the majority decision in *Aid/Watch* in support of the "process-based" approach to public benefit, detailed in previous sections. This creates confusion as to which approach is more appropriate in New Zealand jurisprudence for the following reasons.

Firstly, the endorsement contradicts the earlier affirmation of the three-stage public benefit test set out by *Greenpeace (SC)*.[158] *Greenpeace (SC)* aligns with Kiefel J in that "matters of opinion

148 *Family First New Zealand v Attorney-General* (CA), above n 7, at [197].

149 *New Zealand Society of Accountants v Commissioner of Inland Revenue*, above n 21, at 152.

150 Family First New Zealand v Attorney-General (CA), above n 7, at [32].

151 At [197].

152 At [153].

153 At [53].

154 At [53].

155 At [53].

156 *Re Greenpeace of New Zealand Inc* (SC), above n 2.

157 *Family First New Zealand v Attorney-General* (CA), above n 7, at [53].

158 At [123].

may be impossible to characterise as of public benefit either in achievement or in the promotion itself."[159] Based on this reasoning, *Greenpeace (SC)* set out the three-stage test so that all aspects of the advocacy are considered in determining whether the advocacy is beneficial or not. On the other hand, the Australian High Court solely focused on the means that the organisation was pursuing and avoided assessing the benefit of the ends if they were achieved.[160] These are two distinct approaches in determining the public benefit, endorsed by *Family First (CA)* in the same legal jurisdiction.

Secondly, as these are two distinct approaches, there is also a difference between the purpose and activities of Family First and Aid/Watch. As per the Australian High Court, Aid/Watch encouraged general public debate about how poverty is best relieved.[161] Family First, however, seeks the end goal of promoting family and marriage by changing specific laws and policies on matters related to the family, as demonstrated through their day-to-day issue advocacy. Note also that the Australian High Court found that the Aid/Watch advocacy was not favouring particular changes in the law but rather encouraging general public debate on the activities of the government concerning the relief of poverty. In this way, Aid/Watch and the approach taken by the Court in relation to the organisation differs from Family First.

Thirdly, the majority judgment in *Aid/Watch* is heavily reliant on aligning with the Australian Constitution. This system requires an "agitation" for legislative and political change, which the majority assumed would contribute to public welfare.[162] New Zealand does not have a single written constitution; as a result, the constitutional arrangements are derived from a variety of written and unwritten sources. This includes the New Zealand Bill of Rights Act 1990, which confirms the protection of fundamental rights, such as the freedom of expression. This is not to say that the Australian approach cannot be applied in New Zealand because of the lack of a written constitution; it merely demonstrates that New Zealand can be more fluid and evolving in its legal development.

Finally, by undertaking and endorsing the majority's approach in *Aid/Watch* and aligning with a more "process-based" decision, there comes the point of contention that was addressed earlier. In Australian law, when determining the public benefit of an entity, the Australian Charities and Not-for-profits Commission (ACNC) is required to take into account public detriment. This considers any harms that an entity's purpose or activities might have on a group of people. As stated previously, the majority in *Family First (CA)* has not considered the harms of Family First's advocacy in their discussion. This creates confusion as it demonstrates that Family First have not entirely undertaken the Australian public benefit approach despite endorsing it and undertaking certain aspects of it as previously discussed.

To conclude, the endorsement of the CLAANZ approach contradicts the approach of *Greenpeace (SC)*. The endorsed approach is also applied to Family First with little regard to whether the means of Family First's advocacy is charitable in the same sense as *Aid/Watch*. Overall, it appears that

159 *Re Greenpeace of New Zealand Inc* (SC), above n 2, at [74].

160 Norton, above n 91, at 67.

161 At 68.

162 Chia, Harding and O'Connell, above n 41, at 375.

Family First (CA)[163] has hybridised the *Greenpeace (SC)*[164] and *Aid/Watch*[165] majority decisions. This creates confusion as to which approach: end-focused, process-based, or hybridised version, should be applied in New Zealand.

G. Dominant vs Ancillary Purposes

The lack of differentiation between Family First's dominant and ancillary issue advocacy creates more difficulty in determining whether a political purpose is charitable. It is a well-established principle that its purposes must be exclusively charitable for an entity to be charitable.[166] Any non-charitable purposes would not necessarily negate the charitability of the organisation so long as they are considered ancillary to the dominant purpose.[167] The Court of Appeal concluded that the position Family First took regarding euthanasia could be charitable. However, the other issues regarding abortion "fall outside the penumbra" of the recognised public good, their purpose of promoting family and marriage.[168] The majority found these other day-to-day issues to be no more than ancillary to the purpose. This specific aspect of the majority judgment did not clearly explain how these issues that "fall outside the penumbra" are distinguishable from those considered charitable. Gilbert J regarded Family First's primary purpose as to engage in issue advocacy. Family First's purposes closely mirror the purposes considered in the case of *Molloy*,[169] which *Greenpeace (SC)*[170] indicated would continue to be non-charitable even in the absence of the political purpose exclusion. This issue advocacy could not be demonstrated to have public benefit under the three-stage test from *Greenpeace (SC)*.[171]

The majority could be criticised for inferring the organisation's purpose from the day-to-day issue advocacy, yet, later in the judgment, determined that some of those issues are held not to advance this purpose. It is recognised that ancillary purposes do not have to be charitable, nor do they have to support the dominant purpose of the entity. However, as the majority based their determination of the purpose off the day-to-day issue advocacy undertaken by Family First, it is reasonable to assume that this advocacy would be supporting the purpose which the majority set out, that being to support and promote marriage and family. The issue arises because the majority has determined that the issue advocacy is only ancillary, despite inferring the purpose of these activities. Furthermore, the majority have done little to distinguish the promotion of family and marriage in the abstract from advocating for particular positions in debates concerning family and marriage. This adds to the confusion in determining whether a political purpose and the advocacy that is undertaken is charitable.

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163 *Family First New Zealand v Attorney-General* (CA), above n 7.

164 *Re Greenpeace of New Zealand Inc* (SC), above n 2.

165 *Aid/Watch Inc v Commissioner of Taxation*, above n 50.

166 Chevalier-Watts, above n 19, at 60.

167 Chevalier-Watts, above n 19, at 60.

168 *Family First New Zealand v Attorney-General* (CA), above n 7, at [176].

169 *Molloy v Commissioner of Inland Revenue*, above n 31.

170 *Re Greenpeace of New Zealand Inc* (SC), above n 2.

171 *Re Greenpeace of New Zealand Inc* (SC), above n 2.

H. The Warning

Family First (CA) provided Family First with a warning regarding some of the issue advocacy undertaken. This warning by the Court could create issues in the future and could open the floodgates to charities undertaking activities not related to their purpose. The majority conceded that there were issues that Family First advocates for that fall outside the "end" for advocating for family and marriage as it is currently recognised in society. The majority warned Family First that it will need to "bear that in mind as it determines its priorities and activities for the future."[172] This form of aversion by the Court could be viewed as troublesome in the future. When an association is already undertaking advocacy on a specific position that is not ancillary to its primary purpose, issues may arise as to the policing of this advocacy. A similar procedure of political audits undertaken in Canada caused controversy due to those being audited feeling targeted.[173] One can expect a response not dissimilar in New Zealand should the government implement this.

1. Opposing argument

Some arguments oppose the hypothesis, which will be addressed accordingly.

It is agreed that Family First had a "strong case for saying that promoting the role of the family in society would be charitable."[174] The statement supports the argument that:[175]

> … some level of controversy in an organisation's purposes, and arguably an inability to definitively conclude which side of the controversy is correct, would not seem to prevent an assessment of public benefit.

However, the majority's approach to determining Family First's purpose and applying the three-stage test makes it difficult to determine whether the advocacy controversy impedes its ability to be charitable. The purpose of peace and nuclear disarmament was regarded by both *Greenpeace (SC)*[176] and *Greenpeace (HC)* to unlikely be considered in the public benefit because of the incapability of which approach to achieve peace is "best". Greenpeace NZ's purpose of protecting the environment could be considered controversial, as there were opposing views. However, the benefit stemmed from the awareness and broad-based support. In application to Family First, the issue is not solely regarding the controversy of the end promoted; it is the means and method the association achieves that end through their issue advocacy.

For these reasons, it is argued that the majority in *Family First (CA)* have caused more issues than clarity by blurring the lines between New Zealand and Australian approaches to advocacy as a charitable purpose.

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172 *Family First New Zealand v Attorney-General* (CA), above n 7, at [176].

173 Susan Glazebrook "A charity in all but law: The political purpose exception and the charitable sector" (2019) MULR 42(2) 632 at 639.

174 *Re Family First New Zealand* (HC), above n 110, at [52].

175 *Re Family First New Zealand* (HC), above n 110, at [52].

176 *Re Greenpeace of New Zealand Inc* (SC), above n 2.

IX. Conclusion

Where does this leave New Zealand in relation to advocacy in charity law? Respectfully, I agree with the description set forward by Matthew Harding that advocacy in New Zealand charity law is "murky and unfriendly waters".[177] This research has argued that the decision of *Family First (CA)* has not aided in clarity on the topic of advocacy, as it has created more questions than answers.

The case of *Aid/Watch* has impacted the development of New Zealand charity law in relation to advocacy, and *Family First (CA)* demonstrated that *Aid/Watch* continues to impact the approach New Zealand Courts take. The majority decision in *Aid/Watch* places a heavy emphasis on the constitutional value of free political speech, ensuring that even one-sided views may be found to be for public benefit.[178] The High Court in *Aid/Watch* held that the Courts are not required to adjudicate the proposed law or policy change being put forward by an organisation, rather than generating debate in itself is in the public welfare.[179] The New Zealand position before *Family First (CA)* aligned more closely with the dissenting judgment of Kiefel J than with the majority in *Aid/Watch.*

The Supreme Court in *Greenpeace (SC)* held that an enquiry into the public benefit of a political advocacy purpose must focus on the end advocated for before addressing the means and manner that this end is to be carried out.[180] Both of the *Family First (HC)*[181] and *Family First (CA)*[182] cases applied, what they stated to be, the approach set out in *Greenpeace (SC)*.[183] The stark difference between the two cases is in defining Family First's purpose and applying the public benefit test to this purpose. The arguments concerning the purpose and end determination and an assessment of public benefit support the hypothesis that the Court has done little to improve the clarity of the law, as it has ultimately changed the approach as to what to assess in a public benefit test.

The principle that *Family First (CA)* has made clear is that much of the difficulty in cases where the public benefit is in question lies in the interpretive exercise undertaken by decision-makers in determining the purpose of that organisation. New Zealand charity law appears to be missing a coherent and practicable theory of advocacy as a charitable purpose to aid judicial decision-making. Until such a theory is developed and consistently applied by the Courts, advocacy in charity law will continue to be misunderstood. The courts will continue to struggle to differentiate charitable political purposes from those that are not.

In light of the registration of Family First, the Attorney-General has applied for and been granted leave to appeal to the Supreme Court about the Court of Appeal's decision that Family First qualifies for registration under the Charities Act 2005.[184] The upcoming case may bring more clarity to the acceptance of advocacy in New Zealand charity law.

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177 Matthew Harding "An Antipodean View of Political Purposes and Charity Law" (2015) 131 LQR 181 at 183.

178 Glazebrook, above n 168, at 667.

179 *Aid/Watch Inc v Commissioner of Taxation*, above n 50.

180 *Re Greenpeace of New Zealand Inc* (SC), above n 2, at [76].

181 *Re Family First New Zealand* (HC), above n 110.

182 *Family First New Zealand v Attorney-General* (CA), above n 7.

183 *Re Greenpeace of New Zealand Inc* (SC), above n 2, at [76].

184 Charities Services "Update from Te Rātā Atawhai, the Charities Registration Board on the Family First Court of Appeal decision" (11 January 2021) <www.charities.govt.nz/news-and-events/hot-topics/update-from-te-rata-atawhai-the-charities-registration-board-on-the-family-first-court-of-appeal-decision/>.