

# THE OPERATION OF PUBLIC BENEFIT IN NEW ZEALAND - MEETING CONTEMPORARY CHALLENGES?

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## Introduction

Much has been written about the concept of public benefit in charity law, and the quantity of judicial and academic commentary on this concept is indicative of its challenging and often nebulous character. This article considers public benefit and charity law from a New Zealand perspective and it will illustrate that the New Zealand courts are not afraid to address controversial or challenging circumstances relating to these matters. Indeed, such cases reflect the ability of the courts to meet the contemporary challenges of determining public benefit.

To understand the concept of public benefit, we have to consider the common law model that can be traced back to the Statute of Elizabeth 1601, or the Statute of Charitable Uses 1601. This statute has long since been repealed, although the essence of its preamble lives on in modern day charity law, both in English law, and in New Zealand law, and as may be apparent, much of New Zealand charity law finds its heritage in its English counterpart.

The preamble to the 1601 Statute set out a non-exhaustive list of charitable purposes, which included the relief of aged, impotent and poor people, the maintenance of sick and maimed soldiers and mariners, and the repair of bridges, havens and churches,<sup>1</sup> and because the list was not exhaustive, in essence, the

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1 Jean Warburton, Debra Morris and NF Riddle, *Tudor on Charities* (9th edn, Sweet & Maxwell, 2003) 2-3; Gino Dal Pont, *Charity Law in Australia and New Zealand* (Oxford University Press) 46-47; see also Juliet Chevalier-Watts, 'Trusts for Religious Purposes' [2010] *New Zealand Law Journal* Mar 55.

purposes 'are charitable which that statute enumerates or which by analogies are deemed within its spirit and intendment.'<sup>2</sup> Thus the preamble was regarded as a 'loose and flexible concept.'<sup>3</sup> Early cases appeared to recognise that the common thread running through the wide range of purposes that were deemed to be charitable was that of public benefit.<sup>4</sup> For instance, in *Jones v Williams*,<sup>5</sup> which concerned a gift to fund the supply of spring water to an English town, the Court determined that such a gift was charitable and noted that this was:<sup>6</sup>

... a gift to a general public use, which extends to the poor as well as to the rich: many instances in the statute 43 Eliz carrying this idea, as for building bridges etc.

As Bassett noted, the observation of 'general public use' suggests that so long as some public benefit was present, then a bequest would be charitable.<sup>7</sup> In the now seminal case of *Commissioners for Special Purposes of Income Tax v Pemsel*,<sup>8</sup> Lord Macnaghten set out a condensed list of the classification of charitable purposes, which finds its heritage in the preamble to the 1601 Act, and is often referred to as the four heads of charity. These are as follows:

- Trusts for the relief of poverty;
- Trusts for the advancement of education;
- Trusts for the advancement of religion; and
- Trusts for any other purposes beneficial to the community not falling under any of the preceding heads.

This classification has been codified to some extent in New Zealand in the Charities Act 2005, where it states:<sup>9</sup>

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.

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2 *Morice v Bishop of Durham* (1805) 9 Ves 300, 405.

3 John Bassett, 'Charity is a General Public Use' [2011] New Zealand Law Journal Mar 60.

4 Jonthan Garton, *Public Benefit in Charity Law* (Oxford University Press, 2013) 2.

5 (1767) Amb 651.

6 *ibid* 652 (Lord Camden LC).

7 Bassett (n 3).

8 [1891] AC 53, 583; see also *Morice* (n 2) 532 (Lord Eldon LC).

9 Charities Act 2005, s 5(1).

In England and Wales, the heads of charity have been similarly codified by the Charities Act 2006 and the Charities Act 2011, although there are now 13 purposes as being charitable in English law,<sup>10</sup> as opposed to the four that are recognised in New Zealand law. It should be noted however that the additional purposes under English and Welsh legislation largely exemplify the original fourth head classification, and codify earlier case law, so that there is no real expansion as such.

Whilst the law of charity has been noted as being a ‘difficult and very artificial branch of the law’,<sup>11</sup> and even ‘illogical and vaguely capricious’<sup>12</sup> because it has built up by analogy as opposed to reason,<sup>13</sup> it is still possible to state that the requirement of public benefit has two aspects. The two aspects are:<sup>14</sup>

... first, whether the purposes of the trust confer a benefit on the public or a section of the public, and second, whether the class of persons eligible to benefit constitutes the public or a section of it; that so far as the first question is concerned, not every purpose that is beneficial to the public is charitable - it must be within the letter of spirit and intentment of the preamble to the Statute of Elizabeth I.

In essence therefore the purposes of the trust must confer a benefit on the public, or a section of the public; and the class of persons must constitute the public or a section of the public.

In New Zealand, it is well established that for the first three heads of charity, as set out in section 5 of the Charities Act 2005, public benefit is presumed to arise, although it may still be rebutted.<sup>15</sup> With regard to the fourth head of charity, the presumption of public benefit does not exist in New Zealand, rather that public benefit must be expressly demonstrated and the purpose must be sufficiently within

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10 Charities Act 2011, s 2(1), 3(1).

11 *Oppenheim v Tobacco Securities Trust Co Ltd* [1951] AC 297, 307 (Lord Simonds).

12 *Gilmour v Coats* [1949] AC 426, 443 (Lord Simonds).

13 *Scottish Burial Reform & Cremation Society Ltd v Glasgow Corp* [1968] AC 138.

14 *New Zealand Society of Accountants v Commissioner of Inland Revenue* [1986] 1 NZLR 147, 152 (Richardson J); see also *Scottish Burial Reform* (n 13) 154 (Lord Wilberforce); *Travis Trust v Charities Commission* (2009) 24 NZTC 23, 273 [54] and [55], citing *New Zealand Society of Accountants v Commissioner of Inland Revenue* [1986] 1 NZLR 147 (Williams J).

15 *Re Education New Zealand Trust* HC WN CIV-2009-485-2301 [29 June 2010] [25] (Dobson J); *Re Greenpeace of New Zealand Incorporated* [2014] NZSC 105 [6 August 2014] [27] (Elias CJ) and footnote 57; *National Anti-Vivisection Society v Inland Revenue Commissioners* [1948] AC 31, 42.

the spirit and intendment of the Statute of Elizabeth, in other words, within the spirit of the cases based on the ‘very sketchy list in the statute of Elizabeth.’<sup>16</sup>

Whilst New Zealand’s law of charity might find its heritage in English law, it is evident that New Zealand has not shied away from recognising its own distinctive characteristics that would set its jurisprudence apart from its colonial ancestry, and in doing so, reflecting its ability to recognise that charity law can adapt to suit its own personal circumstances. This is well illustrated in one particular case concerning Maori-based tribal claims, that of *Latimer v Commissioner of Inland Revenue*.<sup>17</sup> To understand the importance of this case in New Zealand law, it is important to contextualise it in relation to English law.

### ***Public benefit and Maori***

The case of *Oppenheim v Tobacco Securities Securities Trust Co Ltd*<sup>18</sup> is one of the leading authorities with respect to public benefit. This case concerned a trust to provide education for the children of employees or former employees of British American Tobacco. One of the key issues for the House of Lords was determining the public benefit of such a trust. Lord Simonds began his deliberations on the matter of public benefit by noting that a trust established by a father for the education of his son would not be charitable because the public element will not be found in the son’s education. At the opposite end of the scale however would be the establishment of a college or university which would undoubtedly be charitable because the public element would be present. However, whilst this describes the notion of public benefit, it does not capture what is really meant by public benefit in a particular sense. Indeed, the ‘difficulty arises where the trust is not for the benefit of any institution either then existing or by the terms of the trust to be brought into existence, but for the benefit of a class of persons at large.’<sup>19</sup> Therefore, his Lordship stated that the real question is whether a class of persons can be properly regard as a section of the community to satisfy the test of public benefit. In answering this, he determined:<sup>20</sup>

Then the question is whether that class of persons can be regarded as such a ‘section of the community’ as to satisfy the test of public benefit. These words ‘section of the community’ have no special sanctity, but they conveniently indicate first, that the possible (I emphasize the word

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16 *Greenpeace* (n 15) [27] (Elias CJ) citing *National Anti-Vivisection Society* (n 15) 41 (Lord Wright); see also Juliet Chevalier-Watts, *The Law of Charity* (ThomsonReuters, 2014) ch 2.

17 *Latimer v Commissioner of Inland Revenue* [2002] 3 NZLR 195.

18 *Oppenheim* (n 11).

19 *ibid* 306 (Lord Simonds).

20 *ibid*.

‘possible’) beneficiaries must not be numerically negligible, and secondly, that the quality which distinguishes them from other members of the community, so that they form by themselves a section of it, must be a quality which does not depend on their relationship to a particular individual.

For the reasons stated above, a trust to educate a member of a family, or a number of families could not be charitable, even if the number of persons may be numerous.<sup>21</sup> This is because the ‘nexus between them is their personal relationship to a single propositus or to several propositi,’<sup>22</sup> thus negating the principle of their being a community or section of the community. That being so, the public benefit requirement is not met. In turning then to the children of the employees at issue in *Oppenheim*, Lord Simonds noted that whilst the beneficiaries were numerous, ‘the difficulty arises in regard to their common and distinguishing quality.’<sup>23</sup> In other words, their quality is that they are children of employees and as a result, he could make no distinction between children of employees and employees themselves; in both cases the ‘common quality is found in employment by particular employers.’<sup>24</sup> Therefore the close nexus between the beneficiaries and the employer defeated the public benefit requirement. The underlying rationale for this is to ‘distinguish those organisations which look outward and seek to provide public benefits from those which are inward looking and self-serving.’<sup>25</sup> Therefore, what the case of *Oppenheim*, and the earlier case of *Re Compton* illustrate, is that the class of beneficiaries must not be numerically small, and the ‘variable which distinguishes them from other members of the community, must not depend upon any personal relationship, such as connections based on blood relationships.’<sup>26</sup>

Up until just over a decade ago, New Zealand had adopted this approach, and an early case that illustrates this is *Arawa Maori Trust Board v Commission of Inland Revenue*.<sup>27</sup> One of the issues for the Court was whether the members of a Maori tribe, that of the Awara tribe, and their descendants would satisfy the public benefit test. In order to qualify as Awara, a person must be able to demonstrate

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21 See also *Re Compton* [1945] Ch 123, which provides further evidence of this principle.

22 *Oppenheim* (n 11) 306 (Lord Simonds).

23 *ibid.*

24 *ibid.*; see also *Re Hobourn Aero Component Ld's Air Raid Distress Fund* [1946] Ch 194 and *Re Compton* (n 21).

25 Warburton et al (n 1) 10.

26 Paul Harpur, ‘Charity Law’s Public Benefit Test: Is Legislative Reform in the Public Interest?’ [2003] Queensland University of Technology Law and Justice Journal 3(2) 425; Chevalier-Watts (n 16) ch 2.

27 (1961) 10 MCD 391.

their lineage to someone living in that area,<sup>28</sup> in other words, their bloodline, or whakapapa. Relying on *Oppenheim*, Donne SM stated that the nexus principle enunciated in *Oppenheim* applied in the instant case ‘whether relationship be near or distant, whether limited to one generation or extended to two or three in perpetuity.’<sup>29</sup> Therefore the trust in *Arawa Maori Trust Board* failed the public benefit test because the group of persons was determined by their whakapapa.

Whilst therefore it was evident that English principles of public benefit were approved in New Zealand, the case of *Latimer v Commissioner of Inland Revenue*<sup>30</sup> created a sea change with respect to public benefit and blood tie relationships, and led the way in recognising indigenous tribal claims in Aotearoa, thus separating its jurisprudence from that of England.

By an agreement between the Crown and the New Zealand Maori Council and the Federation of Maori Authorities Inc, the Crown sold existing tree crops on Crown forestry land to third party commercial purchasers. These purchasers were to make an initial capital payment, and then an annual rental for the use of the land. The initial payment and the rental payment were to be placed in a fund administered by a trust. The interest earned on the rental proceedings was to be made available to Maori to assist in the preparation, presentation and negotiation of claims before the Waitangi Tribunal, which involved lands covered by the agreement. The trustees contended that the purpose of the trust was charitable. The question for the Court, inter alia, was whether the trust had public benefit, and did the Maori beneficiaries demonstrate that they were a sufficient section of the community.

In determining this, the Court noted that ‘what is involved in the preparation of a case before the Waitangi Tribunal in relation to the land in question, and the intended product of the assistance to claimants is high-quality historical research.’<sup>31</sup> As a result, the funding or assistance of the type of research that is required will provide detailed historical records to be made to the Tribunal, which in turn will enable the Tribunal to assess accurately the circumstances by which the Crown came in to possession of the land. Therefore any breaches of the Treaty of Waitangi can be given recognition, and where appropriate, the land returned. In reality, this means that the research funded by the trust ‘is a means of finally determining the truth about grievances long held by a significant section of New

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28        *ibid* 396 (Donne SM).

29        *ibid*; see also *Davies v Perpetual Trust Co* [1959] AC 439.

30        *Latimer* (n 17). It should be noted that this case went on to the Privy Council, however, the issues of public benefit were not considered.

31        *ibid* [37] (Blanchard J).

Zealand society ... for the benefit of all members of New Zealand society.’<sup>32</sup> If such research is not undertaken correctly, then the findings of the Tribunal would not be seen to be having such a sound basis, and may not be accepted by Crown, Maori, or indeed the public. Settlements therefore may not be achieved, or ‘might not be regarded as truly full and final.’<sup>33</sup> Without accurate research, then grievances are likely to continue, which will lead to ‘social ferment at a future time.’<sup>34</sup>

The public benefit element was therefore affirmed by the Court of Appeal, and whilst perhaps a novel situation, this was, in reality, merely a reflection of the notion that charity law must evolve with social changes, as illustrated in *Scottish Burial Reform and Cremation Society Ltd v Glasgow Corporation*, where it was stated:<sup>35</sup>

... the effect of decisions given by the courts as to its scope, decisions which have endeavoured to keep the law as to charities moving according as new social needs arise or old ones become obsolete or satisfied.

As a result it could be argued that the approach taken in *Latimer* on this point was not such a suprising approach, although it certainly added much to the concept of public benefit. However, the real point at issue with regard to land mark jurisprudential changes was made when the Court determined the issue of Maori as a sufficient section of the community. The Court acknowledged that it was correct that there was a relationship of common descent for each claimant group. However, the Court asserted:<sup>36</sup>

In any event, the common descent of claimant groups is a relationship poles away from the kind of connection which the House of Lords must have been thinking of in the *Oppenheim* case when it said that no class of beneficiaries could constitute a section of the public for the purpose of the law of charity if the distinguishing quality which linked them together was a relationship to a particular individual either through common descent or through common employment. There is no indication that the House of Lords had in its contemplation tribal or clan groups of ancient origin.

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32        *ibid.*

33        *ibid.*

34        *ibid.*

35        *Scottish Burial Reform* (n 13) 154 (Lord Wilberforce); see also *McGovern v Attorney-General* [1982] Ch 321, 331 (Slade J).

36        *Latimer* (n 17) [38] (Blanchard J).

Indeed, it is far more likely that in reality, the House of Lords ‘had in mind the paradigmatic English approach to family relations’<sup>37</sup> as opposed to any indigenous relationships. The Court of Appeal in *Latimer* asserted that evidence of this could be found in Lord Normand’s approach, where he observed that ‘there is no public element in the relationship of parent and child.’<sup>38</sup> As such, the approach in *Oppenheim* would likely be insufficient to respond to ‘values emanating from outside the mainstream of the English common law, in particular as a response to the Maori view of the importance of whakapapa and whanau to identity, social organisation and spirituality.’<sup>39</sup>

The Court of Appeal also referred to evidence of the criticism of *Oppenheim* in *Dingle v Turner*,<sup>40</sup> and by way of further illustration ‘the approach of the *Oppenheim* dissentient, Lord MacDermott, who also sat, no doubt to his great satisfaction, in *Dingle*, was generally preferred.’<sup>41</sup>

As a result therefore, the Court of Appeal in *Latimer* thought it impossible not to regard the Maori beneficiaries of this trust, ‘both together and in their separate iwi or hapu groupings, as a section of the public for the purposes of a trust’.<sup>42</sup> Overall then, the finding of public benefit was of great importance in the context of New Zealand society as it was ‘directed to racial harmony in New Zealand for the general benefit of the community’.<sup>43</sup> In making this finding, New Zealand stepped firmly away from the constraints of *Oppenheim* in relation to blood ties and public benefit. This unique approach has now been underpinned by section 5(2) of the Charities Act 2005 in New Zealand, which states:

- (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) a marae has a charitable purpose if the physical structure of the marae is situated on land that is a Maori reservation referred to in Te Ture Whenua Maori Act 1993 (Maori Land Act 1993) and the funds of the marae are not used for a purpose other than-

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37 *ibid.*

38 *ibid*, citing *Oppenheim* (n 11) 310 (Lord Normand).

39 *Latimer* (n 17) [38] (Blanchard J).

40 *ibid*, referring to *Dingle v Turner* [1972] AC 601.

41 *Latimer* (n 17) [38] (Blanchard J).

42 *ibid.*

43 *ibid* [40] (Blanchard J).

- (i) the administration and maintenance of the land and of the physical structure of the marae:
- (ii) a purpose that is a charitable purpose other than under this paragraph.

The purpose of this section is therefore to ensure that ‘whanau, iwi or hapu based trusts are capable of registration under the Act.’<sup>44</sup>

Whilst this may be perceived to have been a bold approach by the Court of Appeal in *Latimer*, it is submitted that this was the entirely correct approach, taking into consideration the social context of New Zealand in comparison with England. However, this was not the last time in which New Zealand courts illustrated their ability to address the notion of public benefit in a contemporary manner, and indeed, to plough a separate furrow from that of English jurisprudence. The 2014 Supreme Court decision of *Greenpeace of New Zealand Incorporated*<sup>45</sup> exemplifies this approach.

### ***Public Benefit and Political Purposes***

This case saw the Supreme Court divided on the issue of whether political purposes can be charitable. Prior to the Supreme Court case of *Greenpeace*, New Zealand had, for many a decade, followed the English view that purposes that are political in nature, generally, will not be charitable. The primary reason given for this prohibition on political purposes in charity law is that courts cannot say wherein the public benefit lies in the political purpose. This was first exemplified explicitly, as far as the author is aware, in the now infamous dicta of Lord Parker in *Bowman v Secular Society*, where his Lordship drew a distinction between political objects and charitable objects, stating:<sup>46</sup>

... a trust for the attainment of political objects has always been held invalid, not because it is illegal, for every one is at liberty to advocate or promote by any lawful means a change in the law, but because the Court has no means of judging whether a proposed change in the law will or will not be for the public benefit, and therefore cannot say that a gift to secure the change is a charitable gift ...

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44 Andrew S Butler, ‘Charitable Trusts’ in Andrew S Butler (ed), *Equity and Trusts in New Zealand* (2nd edn, ThomsonReuters, 2009) 304; Chevalier-Watts (n 16) ch 2.

45 *Greenpeace* (n 15).

46 *Bowman v Secular Society* [1917] AC 406 (HL) 442.

This approach was supported in *National Anti-Vivisection Society v Inland Revenue Commissioners*,<sup>47</sup> where the majority of the House of Lords confirmed that because the main object of the organisation was political, this defeated any charitable nature, no doubt in part because of the concern that finding otherwise this would amount to ‘usurping the functions of the legislature.’<sup>48</sup> England and Wales continue to support this view, as evidenced by the Charity Commission of England and Wales, which states ‘a trust for political purpose is not regarded as being for the public benefit.’<sup>49</sup>

The political purpose exception doctrine, as expounded in *Bowman*, was accepted into New Zealand law firstly in *Re Wilkinson*<sup>50</sup> in 1941, where the Supreme Court, as it was then, applied *Bowman*. In other words, ‘a trust for the attainment of political objects has always been held invalid’.<sup>51</sup> However, the principle New Zealand authority on the political purpose exclusion doctrine was *Molloy v Commissioner of Inland Revenue*.<sup>52</sup> This case concerned a tax deduction that was claimed for a donation to the Society for the Protection of the Unborn Child, whose object was to oppose any attempt to change legislation, which at the time, prohibited abortion. Somers J did state that the mere existence of political purposes will not automatically preclude an entity from being charitable because to attain ‘that conclusion, the political object must be more than an ancillary purpose, it must be the main or main object.’<sup>53</sup> Indeed, the Court of Appeal in *Greenpeace New Zealand Inc*<sup>54</sup> noted that the ‘important qualification to the prohibition on political objects has now been given statutory effect by sections 5(3) and 5(4) of the [Charities] Act [2005].’ This part of the Act reads:<sup>55</sup>

- (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

47 *National Anti-Vivisection Society* (n 15).

48 *ibid* 50.

49 Charity Commission of England and Wales, ‘Public Benefit: Analysis of the law relating to public benefit’ (September 2013) [54]; see Garton (n 4) 208.

50 *Re Wilkinson (Deceased) Perpetual Trustees Estate and Agency Co of New Zealand Ltd v League of Nations Union of New Zealand* [1941] NZLR 1065 (SC).

51 *Molloy v Commissioner of Inland Revenue* [1981] 1 NZLR 688 (CA) 695 (Somers J) citing *Bowman* (n 46) 442 (Lord Parker); see also *Greenpeace* (n 15) [4] (Elias CJ).

52 *Molloy* (n 51).

53 *ibid* 695 (Somers J).

54 *Greenpeace New Zealand Inc* [2013] 1 NZLR 339 (CA) [62] (White J).

55 Charities Act 2005, ss 5(3) and 5(4).

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.

In other words, as was the position prior to the Supreme Court case of *Greenpeace*, a political object would not negate charity so long as that political object was ancillary to the overall charitable purpose of the entity.

Returning then to the case of *Molloy*, the Court held that the objects of the Society were not charitable because ‘we are unable to accept ... that the public good in restricting abortion is so self-evident as a matter of law that such charitable prerequisite is achieved.’<sup>56</sup> In other words, the Court ‘could not determine the public good in permitting the law on abortion to remain static’.<sup>57</sup>

The later cases of *Re Collier*<sup>58</sup> and *Re Draco Foundation (NZ) Charitable Trust*<sup>59</sup> were also bound by the earlier authority. Hammond J (as he was then) in *Re Collier* stated:<sup>60</sup>

... there is no warrant to change these well-established principles - which rest on decisions of the highest authority - even though admirable objectives too often fall foul of them.

*Re Draco* was heard in the shadow of the Australian High Court case of *Aid/Watch v Federal Commissioner of Taxation*.<sup>61</sup> The latter case created a sea change in Australian jurisprudence relating to political purposes and charity law because the High Court held that Lord Parker’s dicta in *Bowman* ‘were not directed to the Australian system of government established and maintained by the Constitution

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56 *Molloy* (n 51) 697 (Somers J).

57 Chevalier-Watts (n 16) ch 7.

58 *Re Collier (Deceased)* [1998] 1 NZLR 81.

59 *Re Draco Foundation (NZ) Charitable Trust* (2011) 25 NZTC 20-032 (HC).

60 *Re Collier* (n 58) 90 (Hammond J).

61 *Aid/Watch v Federal Commissioner of Taxation* [2010] HCA 42.

itself.’<sup>62</sup> Therefore the system of law and governance in Australia ‘thus postulates for its operation in the very “agitation” for legislative and political changes.’<sup>63</sup> In other words, constitutional practices contribute to public welfare and thus demonstrate public benefit. What this meant overall therefore was that Australia no longer acknowledged the political purpose doctrine, which has had the result that:<sup>64</sup>

... there is no restriction on the amount of advocacy in which organisations may engage meaning that organisations do not have to concern themselves with whether purposes are ancillary or dominant.

As might be imagined, *Aid/Watch* was then firmly on the radar of New Zealand courts, and indeed the appellant in *Re Draco* tried to rely on this new approach to the political purpose doctrine. Unfortunately, at least for the appellant in *Re Draco*, Young J stated:<sup>65</sup>

The difficulty for the appellant in such an approach is that contrary to the law of Australia New Zealand does have, as part of its law, a general doctrine which excludes from charitable purposes, political objects.

I agree with the Commissioner that *Bowman* remains good law in New Zealand which I must follow. Currently, therefore where *Aid/Watch* cuts across the principles in *Bowman*, it cannot have application in the High Court of New Zealand.

In other words, *Bowman* identified the law in New Zealand, as well as *Molloy*, and *Aid/Watch* was not applicable. However, with the Supreme Court case of *Greenpeace* came a contemporary approach, sweeping away many years of ties to English, and earlier New Zealand, jurisprudence.

Greenpeace of New Zealand Inc is an incorporated society that sought registration as a charitable entity under Part 2 of the Charities Act 2005. Entities may only qualify for registration if they are ‘established and maintained exclusively for charitable purposes.’<sup>66</sup> The Charities Commission, as it was then, rejected the application. The Commission did accept that most of the purposes were charitable but declined registration, inter alia, on the basis of its political advocacy, because, at that time, New Zealand was bound by *Bowman* and *Molloy*. Thus, non-

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62        *ibid* [40] per the majority.

63        *ibid* [45] per the majority.

64        Juliet Chevalier-Watts and Sue Tappenden, ‘Equity, Trusts and Succession’ (ThomsonReuters, 2013) 287.

65        *Re Draco* (n 59) [59] (Young J) footnotes deleted.

66        Charities Act 2005, s 13.

ancillary political purposes did not meet the public benefit requirement, and so began *Greenpeace's* journey through the courts, appealing this decision. The Court of Appeal held that the doctrine of the prohibition on purposes that were primarily political as non-charitable was still effective in New Zealand. Thus a society that had been established for contentious political purposes could not be said to be established principally for charitable purposes. The political purpose exclusion was, the Court said, codified in section 5(3) of the Charities Act 2005. The Court did add however that 'not all objects with political overtones would necessarily vitiate a charitable purpose. Truly ancillary political objects were permissible.'<sup>67</sup> *Greenpeace* appealed to the Supreme Court to consider, in particular, the extent to which purposes that are 'political' can be charitable.

The majority of the Supreme Court disagreed with the Court of Appeal's finding that section 5(3) of the Act enacted a general prohibition on advocacy unless that advocacy was ancillary to a charitable purpose, because it is possible to find public benefit in such activities. The majority spent some time setting out their rationale for this novel approach. They began by noting:<sup>68</sup>

We do not think that the development of a standalone doctrine of exclusion of political purposes, a development comparatively recent and based on surprisingly little authority ... has been necessary or beneficial. In *Bowman* Lord Parker found no basis for deciding that the views there advanced were in the public benefit in the sense the law regards as charitable. It is not clear he intended any new departure in describing as 'political' the purposes he considered to be not charitable because the Court was unable to say whether they were for public benefit.

The Court went further, asserting that the label 'political' has been used in a number of different ways, and may be taken to mean party political, law changing and opinion moulding, to name but three, and as such its use is 'apt to mislead.'<sup>69</sup> Similarly, the justifications for the political purpose exclusion have been varied,<sup>70</sup> and the majority found it difficult to 'see that all advocacy for legislative change should be excluded from being recognised as charitable.'<sup>71</sup> This was because promoting law reform, which is often undertaken by Law Commissions, keeps the law fit for purpose. Such activities may still be seen as charitable even if

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67 *Greenpeace CA* (n 54) 340 (White J).

68 *Greenpeace* (n 15) [59] (Elias CJ) (footnotes removed).

69 *ibid* [60] (Elias CJ).

70 *ibid* [60-61] (Elias CJ) referring to *Bowman* (n 46) and *National Anti-Vivisection Society* (n 15).

71 *ibid* [62] (Elias CJ).

undertaken by private organisations because this type of advocacy ‘may well constitute in itself a public good which is analogous to other good works within the sense the law considers charitable.’<sup>72</sup> In other words, public benefit may be found in some types of political activities, which would thus render a total exclusion on political purposes as being charitable, untenable. Indeed, the majority asserted that some ‘ends of public benefit of the sort the law has recognised as charitable may require creation of a climate of observance or constituency for change in law or administrative policies.’<sup>73</sup> To state that promotion of change in law is not charitable because courts must accept the status quo of the law is irreconcilable with various authorities, ‘which make it clear that the law of charities changes in response to change in social conditions.’<sup>74</sup>

Indeed, concluding that a purpose is ‘political’ or ‘advocacy’ actually ‘obscures proper focus on whether a purpose is charitable within the sense used by the law.’<sup>75</sup> As a result, new social circumstances ‘may throw up new need for philanthropy which is properly to be treated as charitable.’<sup>76</sup> An example of this can be found in the case of *Latimer*, as discussed earlier. Clearly public benefit was to be found in a contemporary situation not envisaged by the English courts. In reality, many issues that are deemed in the public interest, for instance, the protection of the environment and promotion of humans rights, and historically, the ending of slavery, have required ‘broad based support and effort, including through the participatory processes set up by legislation’<sup>77</sup> in order to enable the assessment of public interest. Therefore, participating in political and legal processes may be charitable<sup>78</sup> because the public benefit may be grounded in such processes.

The better approach therefore, in the opinion of the majority, is not to have a doctrine of exclusion of political purposes, but a recognition that a purpose that entails advocacy for change in the law is ‘simply one facet of whether a purpose advances the public benefit in a way that is within the spirit and intendment of the statute of Elizabeth I.’<sup>79</sup>

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72        *ibid.*

73        *ibid* [64] (Elias CJ).

74        *ibid*, referring to *Jackson v Phillips* (1867) 96 Mass 539, 14 Allen 539 (Mass SC) and Charities Act 2006 (UK), s 2(2)(h). The 2006 Act to which the majority refers has been replaced by the consolidating Charities Act 2011.

75        *Greenpeace* (n 15) [70] (Elias CJ).

76        *ibid.*

77        *ibid* [71] (Elias CJ).

78        *ibid.*

79        *ibid* [72] (Elias CJ) citing LA Sheridan, ‘Charitable Causes, Political Purposes and Involvement’ (1980) 2 *The Philanthropist* 5, 16.

Of course, not all advancement of causes will be charitable, because it will not be possible to ascertain the public benefit from the views being promoted, but this does not justify 'a rule that all non-ancillary advocacy is properly characterised as non-charitable.'<sup>80</sup> Therefore the majority agreed with the dissenting view of Keifel J in *Aid/Watch* that charitable and political purposes are not mutually exclusive,<sup>81</sup> because the public benefit may be found in such political purposes, and societal changes and needs may require certain political activities to be undertaken to ensure that the law is fit for purpose. This means therefore that the majority of the Supreme Court departed from the Court of Appeal's view regarding the codification of the political purpose doctrine in section 5 of the Charities Act 2005. In other words, the majority confirmed that section 5 does not enact a political purpose exclusion with the exemption if political purposes are no more than ancillary. Instead, it provides an exemption for non-charitable activities that are ancillary. In other words, section 5(3) is generally applicable to all ancillary purposes, and 'advocacy' is given only as an illustration.<sup>82</sup>

What this means therefore for New Zealand jurisprudence, in relation to the political purpose doctrine, is very important. New Zealand has stepped away from the English approach and is now more closely aligned with its Tasman cousin, Australia, in its approach, as we saw from the *Aid/Watch* decision. New Zealand has removed the previous blanket rule against political purposes as being charitable and further, has stated that political purposes and charitable purposes are not mutually exclusive, therefore, non-ancillary political purposes may be charitable. However, this is not at the expense of public benefit. There is still a continued requirement for organisations to show that the political purposes meet the requisite public benefit requirement. Some political purposes will have tangible public benefit, and those might include environmental or human rights purposes, thus it is likely that such political purposes will meet the public benefit test. Equally so, this does of course mean however that it may be difficult to find the public benefit in, for instance, partisan views or promoting specific beliefs. As a result, those purposes will not be charitable. Of course, a political purpose that is not in the public benefit that is ancillary to a charitable purpose will not immediately negate the charitable purpose, because section 5(3) permits ancillary non-charitable objects.

So the Supreme Court case of *Greenpeace* decision has had a twofold effect. Firstly, it has enabled the public benefit to be recognised in political activities, where appropriate, which reflects the ability of charity law to respond to

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80        *ibid* [74] (Elias CJ).

81        *ibid*.

82        *ibid* [57-58] (Elias CJ).

contemporary society needs, as has always been recognised. Thus charity law's innate flexibility is fully illustrated in this decision. Secondly, this decision will not lead to an influx of entities suddenly being able to take advantage of the blanket ruling being extinguished. New Zealand is still very clear that public benefit is a well-established rule and it must be met, according to charity law requirements.<sup>83</sup> The *Greenpeace* case therefore reflects both a sea change in the concept of political purposes and public benefit, and an entrenchment of the requirement of public benefit, making it a very important decision within the field of charity law. It will provide some much needed clarity regarding political purposes whilst ensuring that the public benefit requirement is still at the forefront of entities' thoughts when engaging in political activities for hoped-for charitable purposes.

However, the notion of public benefit within political purposes may not always be relatively straightforward to ascertain because a Court may not always be able to determine the benefit of campaigning for a change. Similarly, the finding of public benefit within the head of advancement of religion can also be said to be fraught with difficulties. This is because such benefits will, inevitably, be nebulous and intangible. This has not, however, precluded the New Zealand courts from tackling such challenging matters, and indeed, one recent decision, that of *Liberty Trust v Charities Commission*,<sup>84</sup> reflects some unique approaches to public benefit in this area of charity law.

### ***Public Benefit and Advancement of Religion***

Prior to considering the approach of the Court in *Liberty Trust*, it is worthwhile just taking some time to consider the earlier case of *Presbyterian Church of New Zealand Beneficiary Fund v Commissioner of Inland Revenue*.<sup>85</sup> This is because the Court carefully considered the issue of public benefit and religion, and it was later asserted that the findings were at 'the outermost limits of the existing doctrine.'<sup>86</sup> *Liberty Trust* appears to have extended that doctrine of public benefit and the advancement of religion 'beyond the realms envisioned',<sup>87</sup> thus reflecting

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83 Ian Gault and Rebecca Rose 'Supreme Court declares charities can be 'political' but no watershed decision' Bell Gully August 2014: [www.bellgully.com/resources/resource.03812.asp](http://www.bellgully.com/resources/resource.03812.asp)

84 *Liberty Trust v Charities Commission* [2011] 3 NZLR 68.

85 *Presbyterian Church of New Zealand Beneficiary Fund v Commissioner of Inland Revenue* [1994] 3 NZLR 363 (HC).

86 *Hester v Commissioner of Inland Revenue* [2005] 2 NZLR 172 (CA) [11] (Hammond J).

87 Juliet Chevalier-Watts, 'Charitable Trusts and the Advancement of Religion: On a Whim and a Prayer?' (2012) 43 Victoria University of Wellington Law Review 403, 419.

New Zealand's, arguably, progressive approach to addressing contemporary charity law issues.

In the case of *Presbyterian Church of New Zealand Beneficiary Fund*, the question for the Court was whether there was sufficient public benefit in a beneficiary fund for retired ministers of the Church; the fund fell within the category of superannuation funds. In answer to this question, the Court asserted that retired ministers were in fact an integral part of the structure and workings of a church, and in fact, without their presence, churches would cease to exist. Thus without the lifetime financial benefit and security offered as part of this fund, then ministers would not have been induced to take up their calling.<sup>88</sup> Therefore it was evident to the Court that the fund 'has as its object the overall financial protection of the clergy'<sup>89</sup> of this church, which reflects the public benefit of this fund. It was argued that the private benefit of this fund outweighed any possible public benefit, but the Court responded to this by stating:<sup>90</sup>

The cohesive quality of a retirement fund for persons undertaking a lifetime commitment in circumstances of financial sacrifice for the advancement of religion deprive this Fund of a predominantly private or individual nature.

In other words, the overall public benefit defeated any notion of private benefit to the ministers being more than ancillary because of the overarching purpose of the fund. The important point, *inter alia*, which can be taken from this case is the purpose of the financial benefit. So in recognising that ministers were a fundamental part of the functioning and structure of the church, without which the church would likely cease those functions, and that the financial benefits were an incentive to take up their ministerial duties, thus enabling the church to function, the public benefit was not rebutted. However, as will be recalled, the Court of Appeal in *Hester v Commissioner of Inland Revenue* asserted that this case was 'very much at the outer limits of the existing doctrine'<sup>91</sup> and was found to be charitable because of the primary purpose of the fund. It was apparent that such an assertion was indeed in the contemplation of Mallon J in *Liberty Trust*, where, again, financial benefit was at issue in relation to advancement of religion. However, whilst her Honour noted the cautions in *Hester* against extending the bounds of doctrine and public policy in relation to charity law and the advancement of religion, it might be said that such cautions were set to one side.

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88 *Presbyterian Church* (n 85) 372 (Heron J).

89 *ibid* 375 (Heron J).

90 *ibid* 376 (Heron J).

91 *Hester* (n 86) [11] (Hammond J).

Liberty Trust was a registered entity under the Charities Act 2005, and its main activity was the provision of a mortgage lending scheme, which was funded largely by donations, which then provided interest free loans to donors and others. The Charities Commission, as it was then, reviewed its charitable status, and decided to remove the Trust from the register. The Trust appealed that decision. The Commission asserted, *inter alia*, that the main purpose of the Trust, via its lending scheme, was to provide private benefits for its members, therefore it was not exclusively charitable. The starting point is that the presumption of the public benefit under this head of charity, which:<sup>92</sup>

... reflects the court's reluctance to enter into questions concerning the comparative worth of different religions, and also the view that religion itself commonly generates benefit to the public.

However, whilst that is the starting point, 'it remains for the court to be satisfied that the gift satisfies the public benefit requirement.'<sup>93</sup> The presumption will be rebutted, and the public benefit will have to be expressly shown if:<sup>94</sup>

... there is evidence that the purpose is subversive of all morality, or it is a new belief system, or if there has been public concern expressed about the organisation carrying out the particular purpose, or if it is focused too narrowly on its adherents.

Mallon J found that the scheme itself did advance religion, so therefore the starting point was the presumption of public benefit, in other words, whether the purpose of the lending scheme conferred a public benefit. There was no question that the scheme breached public policy, or that it was contrary to Christian or biblical principles, rather the issue was whether it conferred a private benefit, as opposed to a public benefit. If one returns for a moment to that very issue, as expressed earlier, in the *Presbyterian Church* case, it can be seen that the private benefit received by the ministers as a result of the fund was 'so deeply ingrained in the overall context of the Church that the public benefit could not exist without the private benefit.'<sup>95</sup> Conversely, in the *Liberty Trust* case, the purpose of the lending scheme was to alleviate financial hardship, with the hope that Christianity would be expounded as a result of the relief of such hardships. New Zealand case law has already established that purposes must be more than hopeful, no matter how laudable. In other words, the public benefit must not be too remote. In this context, those that benefit from the lending scheme in *Liberty Trust* are unburdened of financial worries, and it is hoped that they will then be of greater

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92 *Liberty Trust* (n 84) [99] (Mallon J) citing *Gino Dal Pont* (n 1) 166.

93 *ibid* [100] (Mallon J).

94 *ibid*.

95 *Chevalier-Watts* (n 87) 420.

service to God. Mallon J asserted that such private benefits are ‘seen as part of living as a Christian’,<sup>96</sup> thus the public benefit was not too remote. It is respectfully submitted however that this was a very generous interpretation of the ethos of public benefit, and contrary to the notion that public benefit should be more than a hopeful outcome. Indeed, as Mallon J pointed out, the presumption of public benefit will be rebutted if ‘it is focused too narrowly on its adherents.’<sup>97</sup> It is not explained how those who obtain a loan will then propagate the Will of God, or sustain and increase religious beliefs when the loan is repaid. Further, it is not clear that all loans are in fact repaid, as only a limited survey has been undertaken by the Trust. As it stands, on the evidence, it is not clear that the private benefits are indeed an incidental part of the purpose of the Trust.

It is further submitted that that the relationship between the church and those receiving the benefits from the Liberty Trust can be distinguished from the ministers in the *Presbyterian Church* case because the two churches closely associated with the Liberty Trust would not fail as a result of the Liberty Trust no longer making available its lending scheme. The churches are independent of the Trust, which is a further indication that the private benefit is not negated. Whilst it is acknowledged that *Presbyterian Church* was not discussed in *Liberty Trust*, it is submitted that the principles espoused in that case are entirely pertinent to the arguments set out in this article in relation to public benefit. Regardless however of the arguments against this scheme being of public benefit, Mallon J was clear that the mortgage lending scheme was a public example of ‘what is intended to be a Christian approach to money and part of propagating the Christian faith’<sup>98</sup> and that the private benefit was ‘part and parcel of Christian living.’<sup>99</sup>

This case therefore reflects the New Zealand courts’ ability to address challenging contemporary charity law issues. Whilst ‘a mass in a church may have more ready acceptance as being of a religious nature and for religious purposes’<sup>100</sup> than a mortgage lending scheme, the reasoning of the Court in *Liberty Trust* are logical and detailed as to why such a scheme does have public benefit, albeit in a controversial context.

What this case may also reflect is the implicit recognition of the doctrine of benignant construction, which may derive from jurisprudence relating to the validity of charitable bequests, although it is argued that it is equally applicable in

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96 *Liberty Trust* (n 84) [113] (Mallon J).

97 *ibid* [99] (Mallon J) citing Gino Dal Pont (n 1) 166; see also Chevalier-Watts (n 87) 413.

98 *ibid* [122] (Mallon J).

99 *ibid* [121] (Mallon J).

100 *ibid* [122] (Mallon J).

charity law generally<sup>101</sup>. The notion being that where it is not necessarily clear as to whether purposes of an entity are charitable from the constituting documents, then reference may be made not only to the expressed objects, but also to the activities. As a result, it is argued that construction of constituting documents should be carried out benignly. In applying this doctrine to the *Liberty Trust* case, it could be argued that the objects and documents of the Trust may not express clearly the exact methods of spreading the religious method, but in looking at their activities and objects overall, the Court has looked benignly at the intentions, thus recognising the charitable purpose in them. Therefore, wherein there is doubt as to the balance of the private and public benefit, the Court has found that the overriding public benefit was intended, thus finding the purposes to be exclusively charitable.

## **Conclusion**

This article began with the assertion that New Zealand does not shy away from addressing fully, and answering, challenging charity law questions as a response to changing societal needs, and it ends with declaring that the cases and arguments that are set out in this article affirm that assertion. The case of *Latimer* reflects the Court's ability to recognise the validity of indigenous peoples' needs with regard to resolving historical grievances, which benefits all of New Zealand. This case therefore firmly stepped aside from colonial ties that were no longer appropriate in this contemporary context as the finding of public benefit was of fundamental importance to Aotearoa in the context of the Waitangi Tribunal, thus ensuring that bygone disputes be given an opportunity to be settled. The cases of *Greenpeace* and *Liberty Trust* equally apply historical doctrines in contemporary contexts. Firstly, in *Greenpeace*, the realities of the benefits of political activities in a charitable context were fully recognised, illustrating New Zealand's capacity to identify some of the inherent values of political activities and thus ensuring that such activities can be beneficial to charity, which also ensured that the doctrine of public benefit was fully acknowledged. Secondly, biblical financial issues in *Liberty Trust* are given a modern day interpretation, which can be seen as relevant in today's world by acknowledging how public benefit can be recognised in a contemporary manner.

Therefore the operation of the doctrine of public benefit in New Zealand illustrates how charity law is fit for purpose, even with the pressures of current day issues, and whilst some decisions may be controversial, or, *prima facie*, difficult to reconcile, this does not detract from their importance in the jurisprudence of public

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<sup>101</sup> Susan Barker, 'The Myth of Charitable Activities'[2014] New Zealand Law Journal September 307.

benefit. Public benefit is a living doctrine and it is evident that New Zealand courts recognise its value in determining contemporary challenges to charity law.