IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA574/2018
[2020] NZCA 366

	BETWEEN	FAMILY FIRST NEW ZEALAND Appellant
	AND	ATTORNEY-GENERAL Respondent

Hearing:	22-23 October 2019 (further submissions 12 March 2020)
Court:	Clifford, Gilbert and Stevens JJ
Counsel:	P D McKenzie QC and I C Bassett for Appellant P J Gunn and A P Lawson for Respondent J J Batrouney QC and K G Davenport QC for Charity Law Association of Australia and New Zealand as Intervenor
Judgment:	27 August 2020 at 9.30 am

JUDGMENT OF THE COURT

A The appeal is allowed.

B The decision of the Charities Registration Board dated 21 August 2017 to remove Family First New Zealand from the Charities Register is set aside.

C There is a declaration that Family First New Zealand qualifies for registration under the Charities Act 2005.

REASONS

CLIFFORD AND STEVENS JJ

Table of Contents

Introduction

[1] Family First New Zealand (Family First) appeals against a judgment of Simon France J dismissing its appeal from a decision of the Charities Registration Board (the Board) to deregister it as a charity.[1] The High Court confirmed the Board's determination that Family First did not qualify for registration. This was because

1 *Re Family First New Zealand* [2018] NZHC 2273 [High Court judgment].

Family First's core purpose was said to be to promote its conception of the "traditional family" and that purpose could not be shown to be in the public benefit in the charitable sense under the Charities Act 2005 (the Act). Further, Family First was found to have other non-charitable advocacy purposes which would disqualify it from registration.[2]

[2] Family First says the High Court was wrong to conclude that what it perceived to be Family First's support of traditional views on marriage and family issues meant its purposes were not charitable. It says that its objects are:

(a) presumptively charitable, to the extent they involve education relating to the role and importance of marriage and family life in New Zealand today; and

(b) charitable to the extent they involve the purpose of promotion of, and advocacy for, the public good that the institutions of the family and marriage comprise in New Zealand society today.

[3] To the extent that any of Family First's associated activities may be non-charitable — in that they promote specific legislative steps that cannot be said to constitute a public good or benefit in the charitable sense, those activities are merely ancillary to its charitable purposes and do not disqualify it from registration as a charitable trust.

[4] The Attorney-General endorses the High Court's approach.

[5] The Charity Law Association of Australia and New Zealand (CLAANZ) intervenes with leave of the Court to address two issues of principle:

(a) In determining whether a political advocacy organisation exists for a charitable purpose of public benefit, whether wider benefits flowing from the means and manner of its political advocacy, including from the fact of that advocacy itself, should be taken into account;

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2 At [74].

(b) Whether the removal of a tax subsidy to a previously registered charitable organisation engaged in political advocacy could be viewed as an unreasonable limit on its right to freedom of expression.

Background

Charitable purposes

[6] To qualify for registration as a charity, an organisation must be established and maintained exclusively for charitable purposes.[3] "Charitable purpose" has no clear, set meaning. It is broadly defined in s 5(1) of the Act:

> **5 Meaning of charitable purpose and effect of ancillary non-charitable purpose**
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> (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.

These four categories (relief of poverty, advancement of education or religion, or any other matter beneficial to the community) are commonly referred to as the four "heads" of charity. Implicit within the concept is that of "selfless", for the other, activities.

[7] A trust, society or institution with charitable purposes, but which also has non-charitable purposes and hence is not exclusively charitable, may not be registered. However, a non-charitable purpose that is merely ancillary to a charitable purpose is not of itself disqualifying. Section 5(3) and (4) provide:

> (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.
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> (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—

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3 Charities Act 2005, s 13(1)(b)(i).

(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.

[8] Section 18(3) of the Act directs the Chief Executive of the Department of Internal Affairs to consider the activities of an entity, actual and proposed, when considering its entitlement to registration upon receiving an application for registration. Such consideration will similarly be relevant for ongoing registration.

Family First's purposes

[9] Family First was formed by a deed of trust dated 26 March 2006. Its objects are set out in its trust deed as follows:

A. To promote and advance research and policy supporting marriage and family as foundational to a strong and enduring society

B. To educate the public in their understanding of the institutional, legal and moral framework that makes a just and democratic society possible

C. To participate in social analysis and debate surrounding issues relating to and affecting the family being promoted by academics, policy makers, social service organisations and media, and to network with other like-minded groups and academics

D. To produce and publish relevant and stimulating material in newspapers, magazines, and other media relating to issues affecting families

E. To be a voice for the family in the media speaking up about issues relating to families that are in the public domain

F. To carry out such other charitable purposes within New Zealand as the Trust shall determine.

[10] Family First encapsulates its views on the significance of family and marriage in two statements of principles which appear on its website:

PRINCIPLES ON FAMILY

1. We affirm the intergenerational family as fundamental to society.

2. We affirm the natural family to be the union of a man and a woman through marriage for the purposes of sharing love and joy, raising children, providing their moral education, building a vital home

economy, offering security in times of trouble, and binding the generations,

3. The natural family cannot change into some new shape; nor can it be re-defined by social engineering.

4. We affirm that the natural family is the foundational family system, but we acknowledge varied living situations caused by circumstance or dysfunction.

5. We acknowledge the tremendous contribution made by single, adoptive and step-parents and extended whānau in society. We wish to ensure they receive appropriate levels of assistance, without denying the clear empirical evidence that the best environment in which to raise children is the biological two-parent, husband-wife family.

6. We affirm the marital union to be the authentic sexual bond, the only one open to the natural and responsible creation of new life.

7. We affirm the sanctity of human life from conception to death; each newly conceived person holds rights to live, to grow, to be born, and to share a home with his or her natural parents bound by marriage.

8. We affirm that the natural family is prior to the state and that the task of government is to shelter and encourage the natural family.

9. We affirm that the world is abundant in resources. The breakdown of the natural family and the consequential moral and political failure, not human "overpopulation," account for poverty, starvation, and environmental decay.

10. We affirm that the complementarity of the sexes is a source of strength. Men and women exhibit profound biological and psychological differences. When united in marriage, the whole becomes greater than the sum of the parts.

PRINCIPLES ON MARRIAGE

1. Marriage is a union of husband and wife, intended to be permanent.

2. Marriage protects and promotes the wellbeing of children.

3. When marriage weakens, children suffer from the disadvantages (economic, emotional, educational, social, spiritual) of growing up in homes without committed mothers and fathers.

4. Marriage elevates and protects our sexual nature.

5. Marriage sustains civil society and promotes the common good.

6. Marriage is a wealth-creating institution

7. The laws that govern marriage should reflect the principles above[4]

[11] Family First promotes those views, and seeks to generate public debate and social analysis to contribute to the deliberations of the community, through the development and dissemination of various forms of research on a wide range of issues of general concern relating to families and marriage, such as family economics, sex education and excessive screen time. It also engages from time to time in community discussion and debate (including through the media) on what it sees as related, specific, legal issues. Since its establishment in 2006 these have included issues such as divorce, prostitution, pornography, broadcasting standards and censorship, availability of alcohol and tobacco, gambling, abortion, euthanasia, embryonic cell research and the "anti-smacking" legislation.

[12] As seen in its statements of principles, Family First takes a relatively traditional approach to the importance of families and marriage. It takes a similar approach on the related more specific issues on which it also engages in public discourse. Thus, and for example, it seeks to discourage divorce, is opposed to the liberalisation of laws relating to prostitution and the availability of abortion, sought an exemption for "light smacking" from the anti-smacking legislation and currently opposes the law changes which would or might follow "yes" votes in the forthcoming referenda on cannabis and euthanasia.

First deregistration decision

[13] Family First was incorporated under the Charitable Trusts Act 1957 on 6 April 2006 under the name Family First Lobby. It changed its name to Family First New Zealand in November 2006 and was registered on the Charities Register with effect from 21 March 2007.

[14] The Board is responsible for ensuring that all entities on the Charities Register meet the criteria for registration. On 15 April 2013, following an investigation,

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[4] Those statements of principle are said to be adaptions, respectively, of material from:
(a) World Congress of Families "The Natural Family: A Manifesto"; and
(b) Witherspoon Institute "Ten Principles on Marriage and the Public Good".

the Board resolved to deregister Family First as a charity.[5] The Board described Family First's main purpose as being:[6]

> … to promote the view that the "natural family" (defined by the Trust as the union of a man and a woman through marriage) is the fundamental social unit, and should be supported as such to the exclusion of other family forms (described by the Trust as "incomplete or fabrications of the state").
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> (Footnote omitted.)

[15] On that basis, the Board determined Family First did not qualify for continued registration as a charity. The Board considered that Family First's main purpose of promoting its views about family was a non-charitable "political" purpose without any self-evident public benefit. Central to that decision was the Board's assessment that Family First promoted a specific point of view about what is best for family and civil society. Referring to Family First's Principles on Family, its adaptation of the World Congress of Families' "The Natural Family: A Manifesto", the Board concluded that the Trust's "perspective on family can be fairly described as an opinion on what is best for families and civil society. Each of the propositions affirmed by the Trust [in that adaptation] is a matter of opinion or value-judgment".[7] Moreover, that perspective was one which was controversial in the relevant sense: that is, its benefit to the public was not self-evident as a matter of law.[8] Similarly "controversial" were Family First's views on the various specific legislative issues it focussed on over time.

[16] The Board was also not persuaded that Family First's promotion of its views about family and marriage qualified, as Family First had claimed, as the advancement of religion or education.[9]

[17] To the extent Family First had an independent purpose to procure governmental actions, that was a non-charitable political purpose that was not ancillary to any charitable purpose.[10]

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5 *Family First New Zealand (CC42358)* Charities Board Decision 2013-1, 15 April 2013 [First deregistration decision].
6 At [3].
7 At [45].
8 At [46].
9 At [57] and [77].
10 At [100].

[18] The Board summarised those reasons as follows:[11]

> First, the Trust's main purpose is to promote points of view about family life, the promotion of which is a political purpose because the points of view do not have a public benefit that is self-evident as a matter of law. The Board's view on the Trust's main purpose is [as quoted in [14] above]. Secondly, the Board considers that the Trust's purpose to promote points of view about family life is not a charitable purpose to advance religion or education, nor a purpose beneficial to the public within the fourth category of charity at general law. Thirdly, the Board considers that the Trust has an independent purpose to procure governmental actions (including legislation, policies and governmental decisions) consonant with the Trust's point of view. This purpose to procure governmental actions is a political purpose that is not charitable, and is not ancillary to any valid charitable purpose of the Trust.

Appeal against first deregistration decision

[19] The Board's decision was made in accordance with this Court's judgment, *Re Greenpeace of New Zealand Inc*, which held that an entity established for contentious political purposes could not be said to be established principally for charitable purposes.[12] Greenpeace was granted leave to appeal the correctness of that decision to the Supreme Court. Given the Board's identification of Family First's political purpose as disentitling it to registration, Family First's appeal to the High Court against the first deregistration decision was deferred until after Greenpeace's appeal to the Supreme Court had been determined.

[20] The Supreme Court allowed the *Greenpeace* appeal.[13] Significantly, for present purposes, the Court held by a majority, contrary to earlier authority and this Court's appealed judgment, that the Act does not create a general exclusion of advocacy from charitable purposes, even where it is more than an ancillary purpose.[14] Further, the majority held there is no standalone doctrine of exclusion of political purposes.[15] It held that a charitable purpose and a political purpose were not mutually exclusive. This was a departure from previous domestic and international case law

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11 At [2].
12 *Re Greenpeace of New Zealand Inc* [2012] NZCA 533, [2013] 1 NZLR 339 at [60].
13 *Re Greenpeace of New Zealand Inc* [2014] NZSC 105, [2015] 1 NZLR 169.
14 At [57]–[58] per Elias CJ, McGrath and Glazebrook JJ.
15 At [59], [72] and [114]–[115].

which had consistently held that, if an entity had a main purpose that was political in nature, it would automatically be denied charitable status.[16] The majority concluded:

> [115] Section 5(3) of the Charities Act does not enact a political purpose exclusion, codifying the common law. It provides that non-charitable purposes do not affect charitable status if no more than ancillary and includes "advocacy" as an example of such ancillary non-charitable purpose. It does not deal with the case where promotion of views is properly regarded as charitable in itself. Such cases are likely to be unusual.

[21] In reaching those conclusions the majority were unable to agree with this Court's suggestion that advocacy of generally accepted views may be charitable, while advocacy of highly controversial views was not.[17]

[22] The Supreme Court emphasised, however, that it is not sufficient for the objects to be of benefit to the community. Rather, the benefit must also be charitable in the sense used by the common law.[18] The majority considered the advancement of causes "will often, perhaps most often, be non-charitable" because it will not be "possible to say whether the views promoted are of benefit in the way the law recognises as charitable".[19]

[23] At the same time it said:

> [74] It may be accepted that the circumstances in which advocacy of particular views is shown to be charitable will not be common, but that does not justify a rule that all non-ancillary advocacy is properly characterised as non-charitable. …
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> …
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> [76] Instead, assessment of whether advocacy or promotion of a cause or law reform is a charitable purpose depends on consideration of the end that is advocated, the means promoted to achieve that end and the manner in which the cause is promoted in order to assess whether the purpose can be said to be of public benefit within the spirit and intendment of the 1601 Statute. These principles are discussed further below in the course of considering Greenpeace's purposes.

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16 For example, see *Re Wilkinson* [1941] NZLR 1065 (SC) at 1077; *Knowles v Commissioner of Stamp Duties* [1945] NZLR 522 (SC) at 528; and *Molloy v Commissioner of Inland Revenue* [1981] 1 NZLR 688 (CA) at 695, referring to *Bowman v Secular Society Ltd* [1917] AC 406 (HL) at 442.

17 *Re Greenpeace of New Zealand Inc*, above n 13, at [75].

18 At [113].

19 At [73].

[24] In allowing Family First's appeal to the High Court against the Board's first deregistration decision, and referring the question of its entitlement to registration back to the Board, Collins J, having noted the significance of the Board's conclusion that Family First was engaged in political activity for its deregistration decision, observed:[20]

> However, the Charities Board proceeded on the basis that Family First's political purposes could not be classified as a charitable purpose. This approach dominated and affected many features of the decision of the Charities Board, including its reasoning that Family First's purposes fell within the Charities Board's second category of political purpose, in part, because Family First's views were "controversial". …

[25] The Judge then concluded that the Board's fundamental proposition, that Family First's political objectives could never be charitable, could not be reconciled with the approach taken by the majority of the Supreme Court in *Greenpeace*. The Board's decision was based, therefore, upon a fundamental legal proposition that had subsequently been found to be incorrect.[21]

[26] Likewise, the Board's characterisation of Family First's advocacy as "controversial" required reconsideration.[22]

[27] Turning to the question of possible charitable purpose under the fourth head, benefit to the public, Collins J observed:

> [89] I am saying, however, that the analogical analysis which the Charities Board must undertake should be informed by examining whether Family First's activities are objectively directed at promoting the moral improvement of society. This exercise should not be conflated with a subjective assessment of the merits of Family First's views. Members of the Charities Board may personally disagree with the views of Family First, but at the same time recognise there is a legitimate analogy between its role and those organisations that have been recognised as charities. Such an approach would be consistent with the obligation on members of the Charities Board to act with honesty, integrity and in good faith.
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> (Footnote omitted.)

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20 *Re Family First New Zealand* [2015] NZHC 1493 at [83].
21 At [84].
22 At [85].

[28] The Judge also commented on Family First's submission that it had the charitable purpose of advancing education, and the Board's assessment, rejecting that submission, that Family First "advanced its polemic points of view under the guise of research and that it was not genuinely involved in the advancement of education".[23] As the Judge correctly summarised the position:

> [91] To be a charitable education activity, the entity must, in addition to conferring a public benefit, promote learning which may be undertaken through a variety of means such as training programmes, conferences or by carrying out or disseminating research that improves knowledge about a particular issue.
>
> (Footnote omitted.)

[29] In that context, the Judge commented on one particular piece of research that, at the hearing before him, the Board had acknowledged was "a legitimate piece of research":[24] namely the report entitled "The Value of Family: Fiscal Benefits of Marriage and Reducing Family Breakdown in New Zealand" commissioned by Family First from the New Zealand Institute of Economic Research (NZIER).[25] The Judge said the Board would need to "carefully examine" that report and determine whether it was sufficient to qualify Family First's activities as including the advancement of education for the public benefit.[26] The Board was therefore directed to reconsider the question of Family First's registration in light of this.

Second deregistration decision

[30] Following its successful appeal, Family First filed further submissions and provided further information regarding its activities to assist the Board in its reconsideration of the question of deregistration. Family First did not pursue the proposition that it was a trust for religious purposes. Rather, Family First claimed (relying on the fourth head) its purposes were either analogous to purposes the courts have previously accepted as being charitable — the promotion of moral and mental improvement — or, again and relying on the second head, involved the advancement of education.

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23 At [90].
24 At [93].
25 NZIER "The Value of Family" (Family First New Zealand, October 2008).
26 *Re Family First New* Zealand, above n 20, at [94].

[31] On 21 August 2017, the Board confirmed its earlier decision that Family First should be deregistered.[27] The Board accepted Family First's submission that an object of promoting moral and mental improvement could be regarded as a charitable purpose under the fourth head of charity.[28] However, the Board found that Family First's main activity involved advocacy for the advancement of its "Family Policy Priorities", described on its website as follows:[29]

> a. "Promoting marriage and families" (which includes advocacy on a wide range of issues in relation to marriage, divorce, child abuse, the availability of alcohol, tobacco and gambling, taxation of families, aged care and sex education).
>
> b. "Promoting life" (which includes advocacy against abortion, to maintain the status quo on euthanasia and against embryonic cell research).
>
> c. "Promoting community values and standards" (which includes advocacy to change prostitution laws, reducing the availability of pornography and for stricter broadcasting standards and censorship).

[32] The Board found Family First advocates its Family Policy Priorities in various ways using a range of media. It publishes media releases, articles and other opinions supporting its views on its website. It sends pamphlets to families and churches. It provides columns for the Christian Life Magazine, emails newsletters to supporters and hosts an online television channel. It also conducts opinion polls, commissions reports, and makes submissions on legislation. In addition, Family First holds annual conferences and church leader events.[30]

[33] Ultimately, the Board was not satisfied Family First's advocacy could be regarded as being for the benefit of the public:[31]

> Most of the advocacy of Family First concerns advocacy on issues where there are two sides to an argument on a topical social issue, neither of which has been determined to be for the benefit of the public.

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27 *Family First New Zealand (CC10094)* Charities Board Decision 2017-1, 21 August 2017 [Second deregistration decision]. The Board followed a three-step process proposed by Ellis J in *Re The Foundation for Anti-Aging Research* [2016] NZHC 2328, (2016) 23 PRNZ 726 at [88].

28 Second deregistration decision, above n 27, at [17].

29 At [25].

30 At [26].

31 At [33].

[34] The Board then addressed whether Family First had a charitable purpose to advance education. The Board considered an organisation advancing a cause through the dissemination of research promoting a particular point of view cannot claim an educational purpose.[32] Rather than seeking to advance education through its reports, the Board considered Family First sought to persuade readers and decision-makers to its point of view.[33] With one exception — the NZIER report — the reports relied on by Family First to substantiate this ground were categorised by the Board as "propaganda or cause [advocacy] under the guise of research", adopting the description used by Hammond J in *Re Collier*.[34] The Board considered these reports lacked an independent and objective starting point in the analysis and merely sought to persuade the reader to a particular point of view consistent with Family First's Policy Priorities.[35]

[35] Whilst the NZIER report was capable of advancing education, the Board did not accept Family First advanced education through that report. That was because in the Board's assessment the media release accompanying the report did not present the results objectively and instead used them in a manner that advanced Family First's views.[36]

[36] Family First appealed to the High Court against the second deregistration decision.

High Court judgment

[37] Simon France J observed that the NZIER report commissioned by Family First in 2008 confirmed the significant fiscal cost to society of family breakdown and decreasing marriage rates. The Judge also noted the societal cost, seen in areas such as the criminal justice sector, of children and young persons not being raised in a supportive environment. The Judge considered that if Family First's purposes were

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32 At [41].
33 At [45].
34 At [47], citing *Re Collier* [1998] 1 NZLR 81 (HC) at 91.
35 At [52].
36 At [50].

solely to promote the role of the family, it would have a strong claim to charitable status.[37]

[38] But, the Judge held, the evidence did not establish that the achievement of Family First's object of promoting the traditional family would be a benefit to the community in the sense required by charity, particularly if it came at the expense of other forms of family.[38] With regard to the fourth head of charity submission the Judge stated:

> [65] I accept that some or many may agree with aspects of Family First's position, but just as controversy is not a block, nor is the fact that a significant number agree with its position a pathway to charitable status. The narrow issue in these advocacy cases is whether a body whose main or indeed sole function is to promote a viewpoint is a charity. The advocacy cases where charitable status has been acknowledged are scarce, and seem increasingly limited to purposes of almost universal acceptance. Here, it cannot be shown that Family First's promotion of the traditional family unit, though no doubt supported by a section of the community, if achieved would be a public benefit. If it is achieved at a cost to other family models, it could affirmatively be said not to be in the public interest.

[39] The Judge also considered that one of Family First's major purposes — to promote life by reducing access to abortion and opposing legislation enabling assisted death — was a further obstacle to its charitable status. He considered this was a non-charitable purpose that disqualified Family First from achieving charitable status regardless of whether its main purpose could be said to be charitable.[39] The Judge relied on this Court's decision in *Molloy v Commissioner of Inland Revenue*,[40] and its subsequent approval in the Supreme Court's judgment in *Greenpeace*,[41] to support his conclusion that a purpose of reducing access to abortion and opposing assisted death legislation was not charitable in the required sense.[42] In *Molloy*, this Court had held the public good in restricting abortion was not so self-evident as a matter of law that such charitable prerequisite could be achieved.[43] The Judge considered the same analysis applied to other law changes sought by

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37 High Court judgment, above n 1, at [57].
38 At [64].
39 At [68].
40 *Molloy v Commissioner of Inland Revenue*, above n 16.
41 *Re Greenpeace of New Zealand Inc*, above n 13, at [73].
42 High Court judgment, above n 1, at [66].
43 *Molloy v Commissioner of Inland Revenue*, above n 16, at 697.

Family First, including repeal of laws relating to anti-smacking, prostitution reform and censorship.[44]

[40] Finally, the Judge agreed with the Board's assessment that, even if there were an educative aspect to Family First's activities, this was not its only purpose. Its other purposes and activities could not be regarded as ancillary to any educative purpose.[45]

This appeal

Family First's submissions

[41] Mr McKenzie QC, for Family First, addressing the fourth head of charity point, submits the Judge misinterpreted the Supreme Court's judgment in *Greenpeace*. He says there is a presumption of public benefit in each of the first three heads of charity in s 5(1) of the Act unless the contrary is shown. The need to demonstrate public benefit is only required under the fourth head of charity, where the purpose is analogous to existing cases within the spirit and intendment of the Statute of Charitable Uses 1601 (Eng) 43 Eliz I c 4 (the Statute of Elizabeth). It is therefore sufficient for Family First to show it has a purpose of advancing education or a purpose within the fourth head of charity which is also for the public benefit, provided that any other purposes are ancillary to these charitable purposes.

[42] Mr McKenzie submits the Judge erred by looking beyond Family First's objects as set out in its trust deed and having regard to policies published on its website. Mr McKenzie relies on Ellis J's observations in *Re The Foundation for Anti-Aging Research* that an entity's activities will only be relevant where its constituent documents do not disclose its purpose or where there is evidence of activities that displace or bely its stated charitable purpose.[46] In any event, he says Family First's activities directed towards promoting life are closely related to the welfare of the family and should be understood as being merely ancillary to its charitable purpose of promoting the family. Similarly, Mr McKenzie argues Family First's opposition to anti-smacking laws and prostitution and its views on

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44 High Court judgment, above n 1, at [68].
45 At [70]–[73].
46 *Re The Foundation for Anti-Aging Research*, above n 27, at [85].

censorship are also ancillary to its primary object of promoting the family. He says none of these are primary objects.

[43] Mr McKenzie contends the Board was required to consider whether the causes or viewpoints promoted by Family First are of public benefit and was in error in declining to embark on this assessment on the basis that Family First seeks to promote a particular viewpoint. He relies particularly on the following passage from Lord Wright's judgment in *National Anti-Vivisection Society v Inland Revenue Commissioners*:[47]

> Later in his judgment, [the Judge below] said that the intention is to benefit the community: whether if they achieved their object, the community would, in fact, be benefitted is a question on which the court is not required to express an opinion. Whatever else is clear, it is, I think, clear that the question he is proposing involves the balancing of utilities. I cannot understand how the judge could avoid deciding the very question necessary for his decision, viz., whether the society satisfies the fourth head, as being beneficial to the community. That I think is the test he proposes. He questions if the infliction of pain is necessarily cruelty. It may be justifiable he concedes, but that, he thinks, is a question of morals on which men's minds may differ.

[44] Mr McKenzie refers to the evidence provided to the Board regarding Family First's current activities. He contends these activities serve to strengthen family life, encourage stability and promote positive values in society, arguing all purposes are of benefit to the community and should be regarded as charitable by analogy to the mental and moral improvement cases. Mr McKenzie summarises these activities as follows:

(a) Advocacy to relevant authorities on strengthening marriage, parenting, child youth and family services, child abuse, family economics, aged care and sex education.

(b) Promoting life, including advocacy against abortion, euthanasia and embryonic cell research.

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[47] *National Anti-Vivisection Society v Inland Revenue Commissioners* [1948] AC 31 (HL) at 43 (footnote omitted).

(c) Promoting community values, including advocacy in the areas of prostitution, pornography and censorship.

(d) Commissioning research papers on euthanasia and the impact of anti-smacking law changes.

[45] Mr Bassett, junior counsel for Family First, provided supplementary submissions on two topics. First, he addressed the Judge's concern that the promotion of the traditional family is discriminatory. Secondly, he developed the argument pursued before the Board and in the High Court that one of Family First's primary objects is the advancement of education, an established charitable purpose.

[46] Mr Bassett submits the Judge was wrong to regard Family First's promotion of the traditional family unit as discriminatory and contrary to human rights law. He says the Human Rights Act 1993 is not engaged in the present context because Family First is not supplying goods and services, nor is it providing employment. Further, s 19 of the New Zealand Bill of Rights Act 1990 (NZBORA) is not relevant because Family First is neither performing any public function nor discriminating in the relevant sense. He argues there is nothing discriminatory about Family First's objects as set out in its trust deed. In any case its support of the traditional family is not discriminatory but rather an entirely reasonable point of view which it is entitled to express in a free and democratic society, a right protected by s 14 of NZBORA.

[47] Mr Bassett submits it is self-evident that supporting families, including the traditional family, is a charitable purpose of public benefit. This is reinforced by various international treaties, declarations and other instruments, including those referred to by the Judge, which affirm the fundamental importance accorded to families in society and the responsibility of states to afford them protection and assistance.[48] Mr Bassett contends that Family First's objects in its trust deed are of benefit to all families, not just the traditional family. For example, he says all families may need to grapple with such issues as family economics, aged care, gambling, excessive screen time, alcohol abuse, sex education and pornography. Mr Bassett contends that Family First's promotion of debate on smacking, abortion, censorship

[48] High Court judgment, above n 1, at [53]–[55].

and prostitution should be characterised as ancillary, rather than a main purpose, and hence not disqualifying in terms of s 5(3) of the Act.

[48] Mr Bassett submits the Judge was wrong to find that Family First's objects did not include the charitable purpose of advancement of education. He says the trust deed objects include an educational purpose and public benefit can therefore be presumed. Mr Bassett argues that it is not necessary or desirable to "micro-analyse" the research and each viewpoint advocated in assessing the wider public benefit. Any such approach would be inherently subjective, unworkable and unjustifiable. He suggests the better approach is to accept that public benefit flows from the generation of public debate and contribution to public discourse.

[49] In summary, while Mr Bassett acknowledges that the exercise of the right to freedom of expression may not of itself qualify as being for the public benefit, Family First's objects of supporting families and the advancement of education both qualify as charitable objects and its activities contribute to informed public discourse and are for the wider public benefit.

The Attorney-General's submissions

[50] Mr Gunn and Ms Lawson, for the Attorney-General support the High Court judgment. Mr Gunn argues that Family First's contention that its activities benefit all forms of families cannot be sustained on the evidence. He submits that Family First has not established that its principal purpose, advocacy on behalf of the traditional family, is of public benefit or is sufficiently analogous to any purpose previously accepted as charitable.

[51] Mr Gunn supports the Judge's conclusion that law changes favouring the traditional family, one of Family First's goals, would be contrary to human rights law which prohibits discrimination on such bases unless shown to be a reasonable limit. Accordingly, he argues the Judge was right to identify this as an obstacle to charitable status.

[52] Mr Gunn also supports the Judge's conclusion that Family First's activities do not constitute an educational purpose, not because some of its research is not useful or

of educational benefit, but because it is used to promote the views of Family First rather than to educate in the way the law has traditionally viewed as charitable.

CLAANZ's submissions

[53] Ms Batrouney QC and Ms Davenport QC for CLAANZ submit that, where an organisation's purpose does not entail a service provision, the public benefit test will depend on the existence of wider benefits to the community. If the political advocacy is in furtherance of some unquestionably beneficial law or policy change, then such wider benefits might be demonstrated directly from the end advocated. However, incidental wider benefits might be demonstrated in light of the means and manner in which the political advocacy is carried out. CLAANZ submits that the possibility of incidental wider benefits arising from the fact of political advocacy itself should be considered, irrespective of the end advocated. CLAANZ relies on the following passage from the majority judgment in the High Court of Australia's decision in *Aid/Watch Inc v Commissioner of Taxation*:[49]

> Rather, it is the operation of these constitutional processes which contributes to the public welfare. A court administering a charitable trust for that purpose is not called upon to adjudicate the merits of any particular course of legislative or executive action or inaction which is the subject of advocacy or disputation within those processes.

[54] While acknowledging that New Zealand's constitutional arrangements are not the same as those in Australia, CLAANZ submits it is beyond argument that a culture of free political expression is a significant public benefit given New Zealand's political and legal commitments. CLAANZ points to commentary by notable political philosophers and constitutional scholars who argue powerfully for the recognition of the public benefit of a culture of free political expression in any liberal and democratic system of government.

[55] CLAANZ does not contend there is any positive obligation to preserve freedom of expression through tax subsidies. However, it argues that removal of a subsidy to a previously registered charitable entity could result in an unreasonable limitation on that party's right to freedom of expression. CLAANZ suggests this

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[49] *Aid/Watch Inc v Commissioner of Taxation* [2010] HCA 42, (2010) 241 CLR 539 at [45] per French CJ, Gummow, Hayne, Crennan and Bell JJ.

would be the case if an organisation would be unable to carry out its functions and engage in its political purpose if the benefit of tax credits available through charitable registration were withdrawn.

Additional evidence

[56] As Mr Gunn acknowledged, the appeal proceeds by way of rehearing.[50] This Court must therefore come to its own view on the merits, taking into account the relevant facts, any new evidence admitted, and the applicable law.[51] At the hearing of this appeal agreement was reached as to certain additional material that was to be provided to us. That agreement was recorded in a minute of the Court of 29 October 2019, a copy of which appears as Appendix One to this judgment.[52] We note that we duly received the requested materials from the Attorney-General and Family First, including an affidavit from Mr McCoskrie (National Director of Family First) of 13 November 2019, and have relied on them in preparing this judgment. They are, therefore, properly part of the record.

[57] In a second minute, of 17 December 2019, we requested further materials from Family First (as recorded at [3] of that minute), relating to what Family First had suggested were advocacy activities of other charitable trusts which, in distinction to its own position, had been accepted as charitable.[53] We subsequently received extensive submissions from counsel and an extended affidavit from Mr McCoskrie relating to those matters. We also received submissions from the Attorney-General. Whilst the Attorney-General did not oppose the introduction of the material, he submitted it did not assist the Court to determine the issues before us. Family First then filed submissions in reply. As matters have transpired, we agree with the Attorney-General that the materials were of no material assistance to us. While they too are part of the record, we have however not relied upon them.

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50 High Court Rules 2016, r 20.18.

51 *Austin Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141 at [16].

52 *Family First New Zealand v Attorney-General* CA574/2018, 29 October 2019 (Minute of the Court).

53 *Family First New Zealand v Attorney-General* CA574/2018, 17 December 2019 (Minute of the Court).

[58] We note finally that we received a further, unsolicited, memorandum of counsel, accompanied by another affidavit from Mr McCoskrie, relating to advocacy activities in connection with the cannabis referendum which will take place contemporaneously with this year's general election. The Attorney-General did oppose the receipt of those documents. Whilst we did not reply formally to those further materials, we record that we have not relied on nor referred to them in this judgment. To take a formal position, as is appropriate for the purposes of clarity, we did not accept those further, June, materials. Accordingly they are not part of the record.

Our analysis

Overview

[59] This appeal raises three broad questions:

(a) Was the High Court wrong to conclude that Family First is not a trust for, presumptively charitable, educational purposes?

(b) Was the High Court wrong to conclude that Family First was not a trust for a fourth head charitable purpose, namely that of promoting families and marriage as of benefit and good to society?

(c) If the answer to either of those questions is yes, does Family First have non-charitable purposes of more than an ancillary nature which, notwithstanding, disqualify it from registration as a charity?

[60] We structure our analysis accordingly. But first, and by way of context, we summarise our understanding of the well-established general principles and their more recent development in New Zealand through the enactment of the Act and cases which have followed, and in particular that of *Greenpeace* in the Supreme Court.

General principles

[61] The starting point is the Statute of Elizabeth, enacted to correct abuses in the administration of charitable trusts (including the misuse, loss or neglect of charity

property), not with any intent to clarify or define the meaning of charitable purpose.[54] The preamble listed miscellaneous examples of charitable objects which reflected a desire to encourage private philanthropy to relieve the burden that would otherwise fall on parish ratepayers.[55] The preamble read:

> … some for relief of aged, impotent, and poor people, some for maintenance of sick and maimed soldiers and mariners; schools of learning, free schools, and scholars in universities; some for repair of bridges, ports, havens, causeways, churches, sea banks, and high ways; some for education and preferment of orphans; some for or towards relief, stock or maintenance for houses of correction; some for marriages of poor maids; some for supportation, aid and help of young tradesmen, handicrafts men and persons decayed and others for relief or redemption of prisoners or captives, and for aid or ease of any poor inhabitants concerning payments of fifteens, setting out of soldiers, and other taxes.

[62] These examples were not intended to comprise an exhaustive or fixed list.[56] Over the 400 years since the Statute of Elizabeth, purposes regarded as charitable have continued to develop as the courts have considered whether particular purposes fall within the "spirit and intendment" of the preamble by analogy with existing cases. This incremental common law process of reasoning has allowed the law of charity to respond to changing social values and needs. In this way, new charitable objects have been recognised by the courts over time, while others have become obsolete and fallen away.[57]

[63] In 1891 Lord Macnaghten identified four classes of charitable purposes in his seminal judgment in *Commissioners for Special Purposes of the Income Tax v Pemsel*:[58]

> "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.

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54 See Gareth Jones *History of the Law of Charity* (Cambridge University Press, Cambridge, 1969) at ch 3.

55 *Chichester Diocesan Fund and Board of Finance (Inc) v Simpson* [1944] AC 341 (HL) at 354 per Lord Wright.

56 *Vancouver Society of Immigrant and Visible Minority Women v Minister of National Revenue* [1999] 1 SCR 10 at [35].

57 *National Anti-Vivisection Society v Inland Revenue Commissioners*, above n 47, at 69–70 per Lord Simonds.

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

[64] These broad classifications have endured and form the basis of the four categories now found in s 5 of the Act — "the relief of poverty, the advancement of education or religion, or any other matter beneficial to the community".

[65] In *Barby v Perpetual Trustee Co (Ltd)*, Dixon J noted the wide breadth of objects that could conceivably come within the fourth category:[59]

> In this now familiar classification of charitable gifts, the fourth class, as has often been pointed out, does not attempt to define a charitable object. It is no more than a final class into which various objects fall that are not comprised in the first three classes, but are nevertheless charitable. It has been found impossible to give an exhaustive definition of what amounts to a charitable purpose, but the authorities indicate the attributes that are to be looked for. The gift must proceed from altruistic motives or from benevolent or philanthropic motives. It must be directed to purposes that are for the benefit of the community or a considerable section or class of the community. The purposes must tend to the improvement of society from some point of view which may reasonably be adopted by the donor. The manner in which this tendency may be manifested is not defined by any closed category. It is capable of great, if not infinite, variation. It may be by the relief of misfortune; by raising moral standards or outlook ; by arousing intellectual or aesthetic interests ; by general or special education ; by promoting religion; or by aiming at some betterment of the community. The purposes must be lawful and must be consonant with the received notions of morality and propriety.

[66] The word "charitable" in this context means charitable in the legal sense, not according to its ordinary meaning. To qualify under the fourth head requires both public benefit and a charitable object in the same sense as the other purposes recited in the preamble to the Statute of Elizabeth.[60] There are two aspects to the public benefit test. The purposes must be such as to confer a benefit on the public or a section of the public (the benefit component) and the class of persons eligible to benefit must constitute the public or a sufficient section of the public (the public component).[61] In relation to cases under the fourth head, objects of public benefit are not automatically presumed to be charitable. The benefit must be charitable in the sense of coming within the spirit and intendment of the preamble, to be determined by analogy to the decided cases.[62] It is accepted that the common law should develop

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59 *Barby v Perpetual Trustee Co (Ltd)* (1937) 58 CLR 316 at 324.

60 *Re Greenpeace of New Zealand Inc*, above n 13, at [29].

61 *Travis Trust v Charities Commission* (2009) 24 NZTC 23,273 (HC) at [54]; and *Plumbers, Gasfitters and Drainlayers Board v Charities Registration Board* [2013] NZHC 1986, [2014] 2 NZLR 489 at [20].

62 *National Anti-Vivisection Society v Inland Revenue Commissioners*, above n 47, at 41–42 per Lord Wright.

cautiously, given the significant tax implications of materially widening the qualifying class of cases.[63] While public benefit may be assumed (unless the contrary is proven) where the object in question falls within any of the first three heads of charity, this is not so for the fourth category. Unless the public benefit is self-evident, it must be proved by evidence.[64]

[67] As the Supreme Court acknowledged in *Greenpeace*, plainly Parliament did not intend to displace the common law meaning of "charitable purpose" when enacting the Act.[65] Section 5 states "charitable purpose *includes* every charitable purpose" (emphasis added). The fourth category — "any other matter beneficial to the community" — reinforces Parliament's intention to leave the question of what qualifies as a charitable purpose to continue to be worked out over time employing the common law method and adapting to changing social needs and circumstances. The select committee which considered the Charities Bill endorsed the *Pemsel* classifications in the definition of charitable purpose, observing that "amending this definition would be interpreted by the Courts as an attempt to widen or narrow the scope of charitable purposes, or change the law in this area, which was not the intent of the bill".[66]

[68] The courts continue the process of recognising analogously charitable purposes, especially under the fourth, public benefit, head.[67]

[69] Since the passage of the Act, the following purposes have been recognised as being charitable:

(a) Providing mortgage lending on terms according with financial principles derived from the Bible (under the third, religious, head);[68]

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63 *D V Bryant Trust Board v Hamilton City Council* [1997] 3 NZLR 342 (HC) at 348. See also *Re Greenpeace of New Zealand Inc*, above n 13, at [30].

64 *National Anti-Vivisection Society v Inland Revenue Commissioners*, above n 47, at 42 per Lord Wright; and *D V Bryant Trust Board v Hamilton City Council*, above n 63, at 350.

65 *Re Greenpeace of New Zealand Inc*, above n 13, at [16].

66 Charities Bill 2004 (108–2) (select committee report) at 3.

67 For example in *Re Tennant* [1996] 2 NZLR 633 (HC) the High Court recognised as charitable the provision — pursuant to a 1920s trust — of a creamery to assist a small rural community become economically viable.

68 *Liberty Trust v Charities Commission* [2011] 3 NZLR 68 (HC).

(b) Funding and disseminating research into cryonics (under the second, educational, head);[69]

(c) Establishing and monitoring competency standards applicable to plumbers, gasfitters and similar trades (under the fourth, public benefit, head);[70] and

(d) Campaigning for the protection of the environment, including avoiding climate change, over-fishing and polluted waterways (under the second and fourth heads).[71]

[70] Section 3(1) of the Charities Act 2011 (UK) now provides the following list of charitable purposes:

(a) the prevention or relief of poverty;
(b) the advancement of education;
(c) the advancement of religion;
(d) the advancement of health or the saving of lives;
(e) the advancement of citizenship or community development;
(f) the advancement of the arts, culture, heritage or science;
(g) the advancement of amateur sport;
(h) the advancement of human rights, conflict resolution or reconciliation or the promotion of religious or racial harmony or equality and diversity;
(i) the advancement of environmental protection or improvement;
(j) the relief of those in need because of youth, age, ill-health, disability, financial hardship or other disadvantage;
(k) the advancement of animal welfare;
(l) the promotion of the efficiency of the armed forces of the Crown or of the efficiency of the police, fire and rescue services or ambulance services;
(m) any other purposes—
  (i) that are not within paragraphs (a) to (l) but are recognised as charitable purposes by virtue of section 5 (recreational and similar trusts, etc.) or under the old law,
  (ii) that may reasonably be regarded as analogous to, or within the spirit of, any purposes falling within any of paragraphs (a) to (l) or sub-paragraph (i), or

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69 *Re The Foundation for Anti-Aging Research*, above n 27.
70 *Plumbers, Gasfitters and Drainlayers Board v Charities Registration Board*, above n 61.
71 *Greenpeace of New Zealand v Charities Registration Board* [2020] NZHC 1999.

> (iii) that may reasonably be regarded as analogous to, or within the spirit of, any purposes which have been recognised, under the law relating to charities in England and Wales, as falling within sub-paragraph (ii) or this sub-paragraph.

[71] It would appear to be accepted that that codification generally reflected the position the common law had reached by that point in time in the United Kingdom. That said, the effect of the wording of s 3(1)(m) remains to be seen.[72]

[72] In *Greenpeace*, the Supreme Court commented on the development over time of the concept of a charity in the following terms:[73]

> [71] Just as promotion of the abolition of slavery has been regarded as charitable, today advocacy for such ends as human rights or protection of the environment and promotion of amenities that make communities pleasant may have come to be regarded as charitable purposes in themselves, depending on the nature of the advocacy, even if not ancillary to more tangible charity. That result was looked to as one that might well come about in relation to protection of the environment by Somers J in *Molloy*. In the present case the Board has accepted that Greenpeace's object to "promote the protection and preservation of nature and the environment" is charitable. Protection of the environment may require broad-based support and effort, including through the participatory processes set up by legislation, to enable the public interest to be assessed. In the same way, the promotion of human rights (a purpose of the New Zealand Bill of Rights Act 1990, as its long title indicates) may depend on similar broad-based support so that advocacy, including through participation in political and legal processes, may well be charitable.

[73] As we discuss later, and as recognised by Simon France J in the High Court, the Universal Declaration of Human Rights, and other similar instruments, affirm a right to family life.[74] That provides considerable support for the proposition that Family First's support of, education about, and advocacy for, the family and its related institution of marriage may, other things being equal, be charitable.

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72 See, for example, the commentary in William Henderson and Jonathan Fowles *Tudor on Charities* (10th ed, Sweet and Maxwell, London, 2015) at [1-008].

73 *Re Greenpeace of New Zealand Inc*, above n 13 (footnotes omitted).

74 Universal Declaration of Human Rights GA Res 217A (1948), art 16.

Presumptively charitable under the second head of the advancement of education?

[74] Because Family First contends its objects fall within the second head of charity, advancement of education by the promotion and dissemination of research, we now describe the applicable principles for this category.

[75] There is no doubt the courts have come to accept advancement of education as comprising a broad category extending beyond formal teaching to include research. The weight of modern authority allows for the commission and dissemination of bona fide research as a form of educational charity. That is, direct instruction, courses of learning or similarly tangible educational good works are not required.

[76] The position has not always been so. For example, Mr Gunn refers to *Re Shaw* for the proposition that if the purpose is merely to increase the stock of knowledge that is not itself a charitable purpose unless combined with teaching or education.[75] In *Shaw*, the testator left the residue of his estate on trust to ascertain how much time and money could be saved by adding 14 letters to the English alphabet. He saw research being undertaken as to the benefits of additional characters and provided for advertisements explaining the expanded alphabet to be published in newspapers throughout the anglophone world. In finding this purpose was not charitable under the second head, Harman J remarked:[76]

> The research and propaganda enjoined by the testator seem to me merely to tend to the increase of public knowledge in a certain respect, namely, the saving of time and money by the use of the proposed alphabet. There is no element of teaching or education combined with this, nor does the propaganda element in the trusts tend to more than to persuade the public that the adoption of the new script would be "a good thing," and that, in my view, is not education.

[77] This rather strict or narrow approach to research as a form of charity can be traced to 19th-century cases such as *Whicker v Hume* which distinguished "'learning' in the sense of imparting knowledge by instruction or teaching", which was educational and charitable,[77] from "the promotion of abstract learning", which was

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75 *Re Shaw* [1957] 1 WLR 729 (Ch).
76 At 738.
77 *Whicker v Hume* (1858) 7 HLC 124 at 154, 11 ER 50 (HL) at 62.

not.[78] Thus, the commission and limited dissemination of research, standing alone, generally amounted to "merely the increase of knowledge" and fell short of what was required for charity.[79]

[78] A similarly confined definition of "education" was adopted by Iacobucci J in *Vancouver Society of Immigrant and Visible Minority Women v Minister of National Revenue*, in comments subsequently endorsed by Ronald Young J in *Re Draco Foundation*:[80]

> To my mind, the threshold criterion for an educational activity must be some legitimate, targeted attempt at educating others, whether through formal or informal instruction, training, plans of self-study, or otherwise. Simply providing an opportunity for people to educate themselves, such as by making available materials with which this might be accomplished but need not be, is not enough. Neither is "educating" people about a particular point of view in a manner that might more aptly be described as persuasion or indoctrination. On the other hand, formal or traditional classroom instruction should not be a prerequisite, either. The point to be emphasized is that, in appropriate circumstances, an informal workshop or seminar on a certain practical topic or skill can be just as informative and educational as a course of classroom instruction in a traditional academic subject. The law ought to accommodate any legitimate form of education.

[79] On the other hand, Harman J's comments in *Re Shaw* were subsequently qualified by Wilberforce J in a widely-cited passage of *Re Hopkins' Will Trusts*:[81]

> [*Whicker v Hume*] certainly seems to place some limits upon the extent to which a gift for research may be regarded as charitable. … I should be unwilling to treat [*Whicker*] as meaning that the promotion of academic research is not a charitable purpose unless the researcher were engaged in teaching or education in the conventional meaning
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> …

[80] Wilberforce J was considering whether a gift to the Francis Bacon Society Inc to be earmarked and applied towards finding the supposed "Bacon–Shakespeare manuscripts" was charitable. The Judge found the bequest was within the law's conception of charitable purpose either as being for the advancement of education or

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78 *Re Macduff* [1896] 2 Ch 451 (CA) at 473.

79 *Re Shaw*, above n 75, at 737.

80 *Vancouver Society of Immigrant and Visible Minority Women v Minister of National Revenue*, above n 56, at [171]; partially quoted in *Re Draco Foundation (NZ) Charitable Trust* (2011) 25 NZTC 20-032 (HC) at [75].

81 *Re Hopkins' Will Trusts* [1965] Ch 669 (Ch) at 680.

as being for other purposes beneficial to the community within the classification in *Pemsel* — it was a gift for improving the country's literary heritage.[82] The observations of Wilberforce J describing the breadth of this category of advancement of education are instructive:[83]

> … the word "education" as used by Harman J in *In Re Shaw* must be used in a wide sense, certainly extending beyond teaching, and that the requirement is that, in order to be charitable, research must either be of educational value to the researcher or must be so directed as to lead to something which will pass into the store of educational material, or so as to improve the sum of communicable knowledge in an area which education may cover …

[81] *The Law and Practice Relating to Charities* refers to the oral judgment of Slade J in *Re Besterman's Will Trusts* for the following useful summary:[84]

> A trust for research will ordinarily qualify as a charitable trust if, but only if
>
> (a) the subject-matter of the proposed research is a useful subject of study; and
>
> (b) it is contemplated that knowledge acquired as a result of the research will be disseminated to others; and
>
> (c) the trust is for the benefit of the public, or a sufficiently important section of the public.

[82] The above approach to advancement of education was applied in the High Court by Hammond J in *Re Collier*, although an additional requirement of the work meeting a minimum standard was included.[85] A succinct and helpful description of this second head of charity which we endorse is contained in *Law of Charity* as follows:[86]

> Overall, the advancement of education may be taken to mean the "advancement of education for its own sake in order that the mind may be trained" or that it assists in the training of the mind or advances research, which can include obtaining a commercial education. It is also evident that "this branch of law is not confined to teaching in the conventional sense.

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82 At 682.

83 At 680 (footnotes omitted).

84 *Re Besterman's Will Trusts*, noted "Bequest of £300,000 to library 'a valid trust'" *The Times* (London, 22 January 1980) at 5; quoted in Hubert Picarda *The Law and Practice Relating to Charities* (4th ed, Bloomsbury Professional, Haywards Heath, 2010) at 66–67. See also *McGovern v Attorney-General* [1982] Ch 321 (Ch) at 352–353

85 *Re Collier*, above n 34, at 91–92;. referring to *Re Elmore* [1968] VR 390 (VSC) and *Re Pinion* [1965] 1 Ch 85 (Ch and CA).

86 Juliet Chevalier-Watts *Law of Charity* (2nd ed, Thomson Reuters, Wellington, 2020) at 141 (footnotes omitted).

> It extends to all branches of human knowledge and its dissemination". This reflects the notion that "education", and its advancement is a broad concept.

[83] It follows that the advancement of education head should be interpreted "very widely".[87] The activities or purposes included will extend to those providing for "the improvement of a useful branch of human knowledge and its public dissemination".[88]

[84] This Court in *Latimer v Commissioner of Inland Revenue* accepted that research may "fulfil an educational role".[89] The research in question was historical in nature and had an assistance purpose in providing the Waitangi Tribunal with additional material which would help it to produce more informed recommendations.[90] Accordingly we accept that useful and publicly disseminated research may constitute a possible form of educational charity, notwithstanding the absence of tangible good works in the nature of teaching or instruction.

[85] Finally, we record the settled law that under the first three heads of charity, public benefit is presumed unless the contrary is proven.[91]

Family First's objects

[86] Whether or not an organisation is entitled to charitable status will generally depend on an examination of its purposes expressed in its constitutive document. The objects should be construed as a whole in the context of the relevant background.[92] Because the organisation must be established and maintained exclusively for charitable purposes, this requires identification of all the main objects and any that are merely ancillary to the main charitable objects. It is important to distinguish between the purposes or objects and the activities or means by which they are sought to be achieved or advanced. The purposes of an organisation may in some circumstances

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87 *Re South Place Ethical Society* [1980] 1 WLR 1565 (Ch) at 1576.

88 *Incorporated Council of Law Reporting for England and Wales v Attorney-General* [1972] Ch 73 (CA) at 102.

89 *Latimer v Commissioner of Inland Revenue* [2002] 3 NZLR 195 (CA) at [41].

90 At [40].

91 *Re Greenpeace of New Zealand Inc*, above n 13, at [27]; and *National Anti-Vivisection Society v Inland Revenue Commissioners*, above n 47, at 42.

92 GE Dal Pont *Law of Charity* (2nd ed, LexisNexis Butterworths, Chatswood, NSW, 2017) at [13.17]–[13.18].

be inferred from its activities. This point was discussed by Ellis J in *Re The Foundation for Anti-Aging Research*, where she observed "an entity's activities were regarded as relevant only to the extent that the entity's constituent documents were unclear as to its purpose or where there was evidence of activities by an entity that displaced or belied its stated charitable purpose".[93]

[87] Mr McKenzie was critical of the Judge for having placed too much reliance on Family First's activities to determine its purposes, to the virtual exclusion of the objects as expressed in the trust deed. We accept it is important to distinguish between activities and purposes. Charitable status depends principally on purposes, not activities. In principle, this can be seen as accepting that the "bounds" of a trust are determined by the settlor. If the trustees of a charitable trust act outside its charitable purposes, they may in breach of their duties. But that should not necessarily involve the settlor's charitable purpose and gift failing.

[88] Traditionally, this meant the courts were reluctant to determine charitable status other than by reference to a trust's stated purposes. *The Law and Practice Relating to Charities* comments on this issue in the following way:[94]

> A question which arises with increased frequency is whether the court and the Commissioners are entitled to interpret declared purposes by reference to proposed or supposed activities of the organisation claiming charitable status.
>
> The orthodox view, reflecting the extrinsic evidence rule, is that, as a rule, if stated purposes are clearly charitable that is the end of the matter: in such a case an activities test is not in order. That was the view enunciated by the Charity Commissioners in 1966, who added that it would be otherwise if the governing documents are obscurely drafted. But in recent years there has been a shift in their approach and now when considering whether the purposes of the organisation are charitable in law they consider themselves as necessarily involved in looking at both its objects and its activities.

[89] The position is similar in New Zealand. As Elias CJ (for the majority) noted in *Greenpeace*, the "purposes of an entity may be expressed in its statement of objects or may be inferred from the activities it undertakes, as s 18(3) of the Charities Act now

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93 *Re The Foundation for Anti-Aging Research*, above n 27, at [85]; referring to *Institution of Professional Engineers New Zealand Inc v Commissioner of Inland Revenue* [1992] 1 NZLR 570 (HC) at 572.

94 Picarda, above n 84, at 27 (footnotes omitted).

makes clear".[95] We begin by referring to the objects in Family First's trust deed, set out in full at [9] above.

[90] First, there is a common thread of advancement of education and research running through the first four objects — to "promote and advance research and policy" (object A), to "educate the public" (object B), to "participate in social analysis and debate" and to "network with other like-minded groups and academics" (object C), and to "produce and publish relevant and stimulating material" (object D). While object B is expressed as being to "educate", the target group ("the public") and the topic ("the institutional, legal and moral framework that makes a just and democratic society possible") illustrate the breadth of the intended dissemination of any research output. This is reinforced in object E which illustrates the purpose of giving families a voice on "issues relating to families". The scope of the dissemination of research and discussion papers on such matters may also extend to doing so through the media.

[91] Second, the objects have a central theme which is expressed in the first object — of giving support to "marriage and family" — the underlying premise of which is that marriage and family are the foundation of a strong and enduring society. Four of the six objects (objects A, C, D and E) refer specifically to "the family", "family" or "families" and specify the various means by which Family First aims to support families. The only other specific object, of potential relevance to the second head of charity (albeit wider than just marriage and families), is "[t]o educate the public on the institutional, legal and moral framework that makes a just and democratic society possible" (object B). The final object (object F) is a general provision authorising Family First to carry out such other charitable purposes within New Zealand as it may determine.

[92] In summary, objects A to D, and particularly A and B, on their face promote the advancement of education: that is, education by facilitating research on, and public understanding of, the importance of the roles of marriage and the family in our society. Properly construed the objects seek to improve public awareness of the notion of

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95 *Re Greenpeace of New Zealand Inc*, above n 13, at [14] (footnote omitted).

family and enhance the quality of societal and public discourse on that issue. The fact there may be a political element to the promulgation and public dissemination of the research cannot be said to negative its utility. On the contrary, as Paul Rishworth QC has observed: "Our political systems depend upon our deliberating as a community. Our understanding of the world comes by seeking information and transmitting it to others."[96]

[93] Lord Simonds said in *National Anti-Vivisection Society v Inland Revenue Commissioners* if a purpose appears broadly to fall within the familiar categories of charity, "the court will assume it to be for the benefit of the community and, therefore, charitable, unless the contrary is shown".[97] Importantly for present purposes he added: "the court will not be astute in such a case to defeat on doubtful evidence the avowed benevolent intention of a donor".[98] Here of course the intent is that of the settlors of the Family First trust deed.

[94] Our review of the second deregistration of the Board, summarised at [30]–[35] above, suggests very little attention was paid to the meaning and interpretation of the Family First objects as expressed in the trust deed. Rather than focus on the precise nature and scope of the objects (and start its analysis by interpreting the trust deed), the decision spends considerable time assessing the detail of a range of Family First reports placed before the Board.[99] The High Court judgment likewise, perhaps because that was the way the appeal was run by counsel, touched only briefly on the advancement of education category.[100] Simon France J stated he agreed with the conclusion of the Board, "although not with all of its reasoning".[101]

[95] In the course of his analysis Simon France J said this:

> [57] Leaving to one side any attempt to limit the definition of family, I consider a purpose of promoting the benefits of a stable family unit for society would likely be charitable. One of the research pieces commissioned

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96 Paul Rishworth "Freedom of thought, conscience, expression and belief" in *Human Rights Law — New Frontiers* (NZLS CLE Ltd, May 2019) 115 at 115.

97 *National Anti-Vivisection Society v Inland Revenue Commissioners*, above n 4747, at 65.

98 At 65.

99 Second deregistration decision, above n 2727, at 45–51.

100 High Court judgment, above n 1, at [69]–[73].

101 At [72]. The Judge considered "the Board's analysis delved too much into an assessment of the merits of the publications".

> by Family First was a study by NZIER into the fiscal cost to society of family breakdown and decreasing marriage rates. It is independent, peer reviewed research that makes a case to say the cost may be upwards of $1 billion a year. The report notes that its conclusions are necessarily based on a number of assumptions but it is an item of evidence supporting a public benefit claim. Many working in areas such as the criminal justice sector would also no doubt attest to the obvious societal cost when children and young people are not raised in a supportive environment. Indeed, the statements cited from the various international documents appear to come from an unarticulated recognition of that cost to society when the family unit breaks down. It follows therefore that if Family First's purposes were solely to promote the role of the family, there would be considerable strength to its claim for charitable status.
>
> (Footnote omitted.)

[96] That conclusion is reflected in the universal recognition of the family as the fundamental group unit of society, which is entitled to protection and assistance, as found in many instruments of international law, for example, in art 16(3) of the Universal Declaration of Human Rights.[102]

[97] We develop that analysis more fully in considering whether Family First is also a fourth head, public benefit, charity. But, for the purpose of considering whether Family First is a second head, educational purposes, charity, we are satisfied the answer to the fundamental question — whether the charitable purposes of promoting and disseminating research about the family are "for a public good"— is yes.

Implementation and advancement of the objects

[98] Having analysed and construed the objects, we now examine how Family First has gone about implementing the objects. We consider it is important to contextualise the activities undertaken by Family First, bearing in mind the permitted assumption of benefit to the public. The "Principles on Family" (quoted in full at [10] above) were developed and released in around July 2006. The principles highlighted the meaning and significance of the family. The "Principles on Marriage" were released the same month.

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[102] Universal Declaration of Human Rights, above n 74.

[99] The development of the "Principles on Family" was accompanied by a press release referring to their source, namely the World Congress of Families, and emphasising that such principles were intended to "bring us back to the core values of the family".[103]

[100] In terms of such research, we have considered three questions:

(a) How does Family First commission reports?

(b) What is the character and content of Family First's reports?

(c) How does Family First distribute and promote its reports?

[101] The analysis which follows is drawn from the Family First materials contained in the case on appeal and in part from the affidavit evidence provided by Mr McCoskrie.

[102] With respect to the commissioning of reports or research papers, the process generally involved Mr McCoskrie approaching the authors to inquire whether they might produce a "New Zealand version" of a report written by a similar "family values" organisation based overseas. In one instance Mr McCoskrie presented the authors with an open-ended thesis inviting them to write a report, and in another the author approached Mr McCoskrie with an unsolicited proposal.

[103] The background of the authors varied considerably. Some, such as Professor Rex Ahdar and NZIER, were employed academics or researchers working in a professional capacity. Another group comprised qualified professionals who work as self-employed researchers. A third group could be classed as articulate laypersons without any formal qualification relevant to the reports they authored. Mr McCoskrie deposed that all authors were identified based on the fact "they have already written similar reports internationally or have demonstrated expertise in the field", though some of whom were approached by Mr McCoskrie because he was on friendly terms with them.

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[103] Family First New Zealand "Family First releases 'Principles of Family'" (press release, July 2006)

[104] Mr McCoskrie deposed Family First and the author would first seek to establish their mutual interest and then the paper would generally be formalised with a telephone or email confirmation. Family First's practice appears to have been to obtain a short proposal or research plan from the authors, quoting a price for the report or paper and detailing the proposed research process, chapters and structure, and the main hypotheses to be tested.

[105] Family First gave authors significant latitude to complete the research as they saw fit. Mr McCoskrie offered guidance to some authors in terms of the broad themes and hypotheses they were to focus on and, as already noted, in some cases Family First sought to "replicate" overseas research in the New Zealand context, implying similar oversight. Notwithstanding, the emails exhibited support the proposition that editorial control for published work remained in the hands of the authors. Unsurprisingly, some exchanges acknowledge the wider political context and social debate to which each report contributes.

[106] With regard to the character and content of the materials produced, papers authored by working academics or professionals largely resemble, in content, tone and style, that of a journal article in the relevant field. By way of general comment only, and without seeking to engage in a detailed academic analysis or response, we make the following observations:

(a) Professor Ahdar's paper on euthanasia summarises and critiques the law in the style of law review article. It contains a review of previous legislative amendments, a summary table of sentencing notes for assisting suicide and discussion of how the courts have treated s 8 of NZBORA.

(b) The NZIER review of the cost of family and marital breakdowns provides an uncontroversial summary of the literature before embarking on a simple economic analysis which multiplies the estimated fiscal cost of poverty with the estimated proportion of

poverty caused by marital breakdown.[104] This research paper was critiqued in the judgment of Simon France J.[105]

(c) An analysis of the mental and physical risks of abortion for women by Dr Gregory Pike (a bioethicist) comprises a literature review which argues in favour of a strong link between abortions and negative health outcomes for the women who receive them.[106]

[107] The remaining reports appear to be authored by laypeople or professionals who seem to be commentators engaged in various topics of social or public interest from the academic to the more polemic in style. For instance:

(a) Lindsay Mitchell's three reports on family structure and social outcomes synthesise a range of census data and previous research by government departments and academics to argue that marriage correlates with, and causes, lower rates of (i) child poverty; (ii) child abuse; and (iii) imprisonment.[107]

(b) Glenn Stanton's two reports on parenting ("Why Mothers Matter" and "Why Fathers Matter") and a third on gender identity, are written in a chatty, colloquial style.[108]

[108] A broader outline of Family First's educational activities was included in a summary provided to the Board which reviewed its work during 2015 as follows:[109]

- research reports on Screentime and Gender Identity, sent to every school in NZ …
- our annual conference *Forum on the Family* and church leaders event …

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104 NZIER, above n 25.

105 High Court judgment, above n 1, at [57].

106 Gregory Pike "Abortion and the Physical & Mental Health of Women" (Family First New Zealand, 2018).

107 Lindsay Mitchell "Child Poverty & Family Structure" (Family First New Zealand, 2016); Lindsay Mitchell "Child Abuse & Family Structure" (Family First New Zealand, 2016); and Lindsay Mitchell "Imprisonment & Family Structure" (Family First New Zealand, 2018).

108 Glenn Stanton "Why Mothers Matter" (Family First New Zealand, 2018); Glenn Stanton "Why Fathers Matter" (Family First New Zealand, 2018); and Glenn Stanton "Boys Girls Other" (Family First New Zealand, 2015).

109 This was the last full year preceding the review of the First deregistration decision.

- *PROTECT* education resource on euthanasia (including 50,000 pamphlets sent throughout NZ to families & churches)… and involvement with the *Care Alliance* as a partner organisation

- production of our *Family Matters* episodes on various issues [hosted on its website]

- legal action defending our charitable status

- representing NZ and showcasing our work at the World Congress of Families in Utah, US …

- speaking up on family issues in the media including *Into the River*, parental notification laws, paid parental leave, Easter trading, paedophile register, CYF issues, marijuana, marriage, and many other issues in the public spotlight.

- submissions to select committees on paid parental leave, paedophile register, Easter trading, and to the 'Investigation into ending one's life in New Zealand' inquiry.

- search to find NZ's longest married couple

[109] An examination of this material, set in the context of advancement of education and research, shows Family First's clear purpose of stimulating a public debate and participating in public discourse on important social issues relevant to families.

[110] A good illustration of such participation is "We Need to Talk: Screentime in New Zealand", commissioned by Family First from Dr Aric Sigman, who works independently in health education.[110] Dr Sigman's report discusses the well-publicised problems caused by excessive screen time by children. The report provides "an overview of some of the evidence which has led health authorities to issue precautionary discretionary screen time guidelines".[111] The recommendations include parental rules limiting screen time, such as imposing time limits and forbidding screens in bedrooms and at mealtimes, encouraging parents to be good role models through their own viewing habits, and suggesting that the amount of time children spend in front of a screen at school should be limited. This report has some educative value and its author has considerable status, as Simon France J acknowledged,[112] and copies of the report were sent to schools around the country.

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110 Aric Sigman "We need to talk: Screen time in New Zealand" (Family First New Zealand, 2015).
111 At 2.
112 High Court judgment, above n 1, at [29].

[111] More generally, it appears that for each report or paper, Family First prepared a media release which often generated a considerable amount of media attention. For instance, a report on child poverty and family structure led to nine stories discussing the paper in mainstream media outlets and the NZIER paper on the economic cost of family breakdown generated reports in four major newspapers. Some reports received less, or no, media coverage.

[112] Family First also refers to the reports it commissions on its website. Content from the Family First website, included in the case on appeal, showed several examples of the report being promoted alongside the prepared media release. The evidence supports wider dissemination to members of the public at least to the extent that some of the reports published by Family First were also subsequently distributed in bulk to schools and churches.

[113] We have referred to some of the research materials, not necessarily to assess the merits of the analysis, their originality or arguments put forward, but rather to illustrate that the activities of Family First are broadly consistent with the objects in the trust deed. We agree with Simon France J that the Board erred in its approach in the second deregistration decision by seeking to engage too much with the detail of the research.[113] The correct approach is to cross-check the activities of Family First, particularly in the implementation or furtherance of the research objects, to ensure alignment with the primary objects.

[114] We agree with the approach of Hammond J in *Re Collier* when, in relation to research he suggested the courts should not readily be drawn into the fray:[114]

> I have to say that I have considerable sympathy for that viewpoint which holds that a Court does not have to enter into the debate at all; hence the inability of the Court to resolve the merits is irrelevant. Rather, the function of the Court ought to be to sieve out debates which are for improper purposes; and to then leave the public debate to lie where it falls, in the public arena. As I will note later in this judgment, this is in fact what Courts do in charity cases with respect to book publication.

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113 At [72].

114 *Re Collier*, above n 34, at 90.

[115] Hammond J also emphasised the question to be considered on the topic of educational research is whether the relevant work "has at least *some* educative value or public utility to enable recognition of it".[115] In this context we consider the minimum threshold has been reached in the case of the research commissioned by Family First. What is also relevant is that public benefit (under the education head) is presumed and we do not consider that the Board could properly have found the presumption rebutted by evidence to the contrary. The evidence we have discussed (much of which was not of course before the Board) illustrates why we have reached this conclusion.

[116] We therefore agree with Mr Bassett's submission that the emphasis should be on Family First's predominant purpose of supporting families, including by education and research, and not on conducting a micro-analysis of sub-purposes or particular research papers.

[117] We also refer to the judgment of Kiefel J in *Aid/Watch Inc* in which, as well as making observations about advocacy cases (later endorsed by the Supreme Court in *Greenpeace*), she referred to the principles applicable to the advancement of education head of charity.[116] The Judge emphasised the importance and value of public discussion in the following terms:

> [71] It should not be seen as inconsistent with a court's maintenance of the existing law that it also recognises the importance and value of public discussion, education and debate about aspects of the law and changes which might be made to it. The same may be said of government policy. Tha recognition reflects the reality of the greater involvement, nowadays, of citizens and organisations in the shaping of law and policy. Nevertheless, it remains necessary that benefits of this kind flow from the pursuit of change before an organisation can qualify as charitable.

[118] Kiefel J also opined about the role of organisations engaged in "agitation for reform" stating:

> [73] It should not be assumed that the courts will be unable to discern a public benefit in trusts concerned with agitation for reform, at least where they encourage public debate or education, by way of disseminating knowledge or information, upon legitimate topics. The decision in *National Anti-Vivisection Society* shows that, at the least, the courts may be able to

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115 At 92.

116 *Aid/Watch Inc v Commissioner of Taxation*, above n 49, at [71].

> determine that a public benefit is *not* evident in a trust. Lord Parker's statement in *Bowman* may be understood as recognising the practical difficulties which will be presented in some cases involving trusts for political purposes. Their public benefit may not be evident if they do not principally involve public debate or other educative purposes.

[119] In the High Court Simon France J accepted Family First had a "strong case for saying that promoting the role of family in society would be charitable".[117] The Judge also accepted, we think correctly, that:[118]

> … 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.

[120] However, the Judge found against Family First largely because its activities in implementing its research objects were not educational in that they involved:

(a) promotion of causes;[119]

(b) activities that were effectively ancillary to non-charitable purposes;[120] and

(c) activities not all of which were for the public benefit.[121]

[121] We have already addressed the third point, which requires no further elaboration. As to promotion of causes, we consider the Judge, like the Board in the second registration decision, failed to undertake a detailed analysis of the objects of the trust deed or construe their true meaning. He also gave too much weight to the perceived activities of Family First. Moreover, unlike this Court, the Judge did not have the benefit of the further evidence of Mr McCoskrie summarised above at [101]–[107].

[122] The evidence we have reviewed establishes Family First recognised the importance of its objects and purposes to commission research on, and educate

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117 High Court judgment, above n 1, at [52].
118 At [52].
119 At [71].
120 At [70].
121 At [70].

the public about, the importance of marriage and family life (including core family values) in New Zealand society. Such research is valuable in promoting public knowledge about marriage and families and the many issues that affect the family. Public discussion and debate about such important issues is desirable to encourage the development of related policies and laws. The NZIER report is but one of many examples showing how Family First went about fulfilling its education and research objects.

Charitable under the fourth head of public benefit?

[123] Family First also asserts it is a trust established to promote and support (that is, to advocate for) self-evident public goods, the institutions of the family and marriage. Consequently, it submits it is a fourth head charitable trust established for matters which are beneficial to the community in the relevant sense. For Family First, Mr Bassett articulated that proposition in the submissions summarised above at [47].

[124] It is with reference to such fourth head trusts where we see most clearly the courts' development over time, by analogy with purposes already recognised as charitable, of the concept of a charitable purpose.

[125] In our view one of the challenges for the courts in undertaking that task are ongoing changes in the conceptual underpinning of what does or does not constitute a presumptively charitable purpose (the relief of need and the advancement of religion and education) or a self-evidently charitable public good. The relatively recent, and continuing, move away from Judeo-Christian beliefs as a formal source of values to the more secular and humanistic principles that underpin our civil rights-based society is of particular significance in this context. An earlier example of a similar development, regarding the conceptual foundation of religious purposes, is reflected in Lord Reid's statement in *Gilmour v Coats* that:[122]

> The law of England has always shown favour to gifts for religious purposes. It does not now in this matter prefer one religion to another. It assumes that it is good for man to have and to practise a religion but where a particular belief is accepted by one religion and rejected by another the law can neither accept nor reject it. The law must accept the position that it is right that different

[122] *Gilmour v Coats* [1949] AC 426 (HL) at 458–459: Lord Normand and Lord Morton agreed with Lord Reid.

> religions should each be supported irrespective of whether or not all its beliefs are true. A religion can be regarded as beneficial without it being necessary to assume that all its beliefs are true, and a religious service can be regarded as beneficial to all those who attend it without it being necessary to determine the spiritual efficacy of that service or to accept any particular belief about it.

[126] That *Greenpeace* reflects, at least in part, an engagement with those issues is evidenced in the following passages from the majority judgment on the issue of cause, including political, advocacy:[123]

> [69] A conclusion that a purpose is "political" or "advocacy" obscures proper focus on whether a purpose is charitable within the sense used by law. It is difficult to construct any adequate or principled theory to support blanket exclusion. A political purpose or advocacy exclusion would be an impediment to charitable status for organisations which, although campaigning for charitable ends, do not themselves directly undertake tangible good works of the type recognised as charitable.
>
> [70] As well, a strict exclusion risks rigidity in an area of law which should be responsive to the way society works. It is likely to hinder the responsiveness of this area of law to the changing circumstances of society. Just as the law of charities recognised the public benefit of philanthropy in easing the burden on parishes of alleviating poverty, keeping utilities in repair, and educating the poor in post-Reformation Elizabethan England, the circumstances of the modern outsourced and perhaps contracting state may throw up new need for philanthropy which is properly to be treated as charitable. So, for example, charity has been found in purposes which support the machinery or harmony of civil society, such as is illustrated by the decisions in England and Australia holding law reporting to be a charitable purpose and in New Zealand by the decision of the Court of Appeal in *Latimer v Commissioner of Inland Revenue* holding the assistance of Māori in the preparation, presentation and negotiating of claims before the Waitangi Tribunal to be a charitable purpose.

[127] The context for those observations was twofold:

(a) First, Greenpeace's challenge to this Court's endorsement of the political purpose exclusion. That is although this Court concluded Greenpeace could have a fourth head charitable purpose, it would nevertheless cease to be entitled to registration if the point was reached where its political purposes became more than ancillary.

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123 *Re Greenpeace of New Zealand*, above n 13 (footnotes omitted).

(b) Second, the Supreme Court's disapproval of the conceptual approach taken by this Court in recognising Greenpeace's purposes, as to be amended, as charitable under the fourth head.

[128] The relevance of that analysis here is, at a high level, reflected in the express terms of the separate reasons given by the Board for its two disqualification decisions. In the first of those decisions the Board regarded Family First's purposes and activities, being in its assessment principally advocacy of controversial political causes, as disentitling Family First from charitable status. But, as Collins J observed, that approach was inconsistent with the Supreme Court's conclusions in *Greenpeace*.[124] Then, in its second decision, the Board re-categorised the same purposes and activities as constituting advocacy by Family First of its own, conservative and controversial, views on family and marriage, with the same disentitling effect.

[129] The real question here is whether that recharacterisation reflects the substance of the Supreme Court's reasoning in *Greenpeace*, both on the question of advocacy charities generally and the significance of political advocacy more particularly, as well as its understanding of public benefit in the context of fourth head charities. Put another way, is the change of characterisation of Family First's disqualifying purposes and activities merely a change of label, with no effect on the substantive issue Collins J identified? Or does that recharacterisation properly respond to the Supreme Court's substantive analysis and therefore correctly identify the reasons to disqualify Family First as a charity?

[130] We therefore turn to the concept of public benefit which qualifies as a charitable, fourth head purpose and, in turn, the position following *Greenpeace* of advocacy trusts, including political advocacy trusts.

[131] The concept of public good for fourth head purposes is captured by the Act in the phrase "or any other matter beneficial to the community", where beneficial is understood in the relevant analogously charitable sense.[125]

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124 *Re Family First New Zealand*, above n 20, at [84].
125 Charities Act, s 5(1)

[132] The place of advocacy in the legal scheme for charities is reflected in s 5(3) of the Act, which provides:

> (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.

[133] If from that expression it could be inferred advocacy was never a charitable purpose, the Supreme Court's decision in *Greenpeace* makes it clear that is not the case.

[134] Following *Greenpeace*, an entity that provides no or limited tangible public benefit and is primarily engaged in cause advocacy may qualify under the fourth head of charity, depending on the circumstances. Whether such purposes are for the public benefit in the sense the law regards as charitable will depend on the end sought to be achieved and the means and manner of its promotion:[126]

> [76] Instead, assessment of whether advocacy or promotion of a cause or law reform is a charitable purpose depends on consideration of the end that is advocated, the means promoted to achieve that end and the manner in which the cause is promoted in order to assess whether the purpose can be said to be of public benefit within the spirit and intendment of the 1601 Statute.

[135] Thus, *Greenpeace* opened the door to cause advocacy as a potentially charitable purpose in New Zealand (or found it never to have been properly closed). Examples mentioned by the Supreme Court were the promotion of law reform of the type undertaken by law commissions to keep laws fit for purpose, purposes which support the machinery or harmony of civil society such as law reporting, assisting Māori to advance claims before the Waitangi Tribunal, advocacy for human rights or for the protection of the environment.[127] However, these cases were cited as examples not in any attempt to define the define the metes and bounds of the fourth head. That falls to be done by analogy.

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126 *Re Greenpeace of New Zealand Inc*, above n 13.
127 At [62] and [70]–[71].

[136] The end promoted by Family First is the support of marriage and family or core family values. This is an abstraction not dissimilar to the examples given in *Greenpeace* of world peace or nuclear disarmament. As already analysed, Family First seeks to educate and conduct research. As relevant for fourth head purposes, it also seeks to promote ideas and participate in the democratic process to advance the interests of families. The assessment of whether there is public benefit in a charitable sense therefore requires consideration of the end promoted and the means and manner of that promotion.

[137] While the expressed objects in the trust deed do not clarify exactly what Family First means by the terms "marriage" and "family", as already noted, the statements of principle on its website make its position clear. We have already referred to the origins of these principles at [98]–[99] above.

[138] We consider few would argue that an overall objective of supporting, in a selfless way, the role and importance of families and marriage would not be self-evidently beneficial, in an analogously charitable sense, as a public good. As Simon France J observed, New Zealand is a signatory to various international treaties, declarations and other instruments, affirming the fundamental importance of families in society and the obligation on states to protect them in the scheme of human rights more generally.[128]

[139] The Judge referred to art 16 of the Universal Declaration of Human Rights:[129]

> 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. 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.

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128 High Court judgment, above n 1, at [53].
129 At [53]; citing Universal Declaration of Human Rights, above n 74.

[140] Together with art 10 of the International Covenant on Economic, Social and Cultural Rights:[130]

> The States Parties to the present Covenant recognize that:
>
> 1. The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children. Marriage must be entered into with the free consent of the intending spouses.

[141] And the preamble of the Convention on the Rights of the Child:[131]

> The States Parties to the present Convention,
>
> …
>
> Convinced that the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community …

[142] Examples of equivalent affirmations can be found in other international instruments that highlight fundamental principles of human rights.[132]

[143] Reflecting those affirmations of the role of the family and of marriage as a foundation for family life, society has long recognised the negative consequences of the absence of stable family life for children and their parents. There are any number of ways in which that recognition is reflected in New Zealand today. For example, and of significance in terms of contemporary moves to reimage and transform New Zealand's criminal justice system, is the seventh recommendation of the second report of Te Uepū Hāpai i te Ora/the Safe and Effective Justice Advisory Group: *Turuki! Turuki! Move Together!* which states:[133]

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130 At [53]; citing International Covenant on Economic, Social and Cultural Rights 993 UNTS 3 (opened for signature on 19 December 1966, entered into force 3 January 1976).

131 At [54]; citing Convention on the Rights of the Child 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990), preamble.

132 See, for example, European Social Charter 529 UNTS 89 (opened for signature 18 October 1961, entered into force 26 February 1965), art 16; and African Charter of Human and Peoples' Rights 1520 UNTS 217 (opened for signature 1 June 1981, entry into force 21 October 1986), art 18(1).

133 Te Uepū Hāpai i te Ora/Safe and Effective Justice Advisory Group: *Turuki! Turuki! Move Together!* (December 2019) at 9.

> … that together we address poverty and social deprivation, increase support for parents and families and challenge attitudes and behaviour that support family violence.

[144] Simon France J was well aware of such matters. We venture to observe that no-one familiar with the association of crime and social disadvantage in contemporary New Zealand could be otherwise.

[145] Notwithstanding, the Judge was of the view that Family First's focus on what the Board had called, and the Judge accepted as, the "traditional family" was a bar to charitable status. We disagree with that conclusion for the following reasons.

[146] Most basically, the fact that Family First favours, to use the Board's phrase, the "traditional family" does not in our view mean that its advocacy for family and marriage as important and valuable institutions loses the necessary advancement of a public, charitable, benefit. We acknowledge there is in New Zealand, consistent with our tradition of pragmatic and progressive social theory and legislation, a recognition and acceptance of alternative forms of family, including as based on de facto relationships, civil unions and same-sex marriages. Nevertheless we can take judicial notice of the fact that by far the larger part of the social groups constituting families in contemporary New Zealand, at least in the nuclear family sense, are those based on civil or religious marriages between men and women.

[147] It would be curious if promotion of what the Board called the "traditional family" would cease to be of public benefit because there is a growing acceptance of other forms of stable family life, including within whānau and hapū relationships.

[148] And to be fair, Family First recognised the contribution non-traditional forms of family life can make. As it says in its Statement of Principles:

> We acknowledge the tremendous contribution made by single, adoptive and step-parents and extended whānau in society. We wish to ensure they receive appropriate levels of assistance, without denying the clear empirical evidence that the best environment in which to raise children is the biological two-parent, husband-wife family.

[149] Thus far, and recognising the possible significance of Family First's advocacy of specific legal recognition of certain forms of family and marriage over others, we

are satisfied that Family First's purposes and principles are ones which promote a public benefit in a manner analogous with public charitable benefits as recognised in New Zealand over time.

[150] We think that conclusion is consistent with what has been described as a "progressive" approach the courts of New Zealand have taken to the question of charitable benefits under the fourth head of charity. This was recently recognised by Juliet Chevalier-Watts in her text *Charity Law: International Perspective* where she writes, speaking of the recent decisions in *Liberty Trust*, *Re The Foundation For Anti-Aging Research* and *Greenpeace* itself:[134]

> Thus, this foray into contemporary public benefit reveals that New Zealand appears, generally, to be progressive in its approach, even when faced with novel circumstances that might otherwise call for a more conservative approach. This may then be a reflection of its socially progressive outlook as a nation generally. For instance, in matters such as personal rights and freedoms; schooling and tertiary education; and tolerance and inclusion of minority groups, and charity law underpins this outlook, due to the close correlation between societal progression, requirements, and charity.

[151] We also think that conclusion, thus far, is consistent analogously with the "moral and mental improvement" cases on which Family First relied in its submissions. Whilst we acknowledge the terminology of "moral and mental improvement" has something of an earlier age quality to it (as discussed at [65] above, Dixon J in *Barby* referred to "raising moral standards or outlook"), that in itself reflects our earlier observation that the conceptual basis of public benefit and charitable purpose has developed over time. By analogy, there is little to distinguish Family First's objects and purposes, especially as encapsulated in Object B, from those of trusts recognised as charitable in those earlier cases. For Family First, Mr McKenzie pointed to examples of charitable purposes being recognised in circumstances where:

(a) A trust for advancing temperance provided a "dry" public house (including a free reading room) where the inhabitants of town could gather.[135]

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134 Juliet Chevalier-Watts *Charity Law: International Perspectives* (Routledge, Oxfordshire, 2018) at 171 (footnote omitted).

135 *Commissioners of Inland Revenue v Falkirk Temperance Café Trust* 1927 SC 261 (IH).

(b) A bequest was made for the purposes of spreading Christian principles and aiding all active steps to minimise and extinguish "the drink traffic".[136]

(c) A vicar provided, in his will, for the gift of a building used as a village club and reading room to be maintained for the furtherance of religious and mental improvement and to be kept free from intoxicants and dancing.[137]

(d) A society was established for the study and dissemination of ethical principles and the cultivation of rational religious sentiment.[138]

(e) A bequest for carrying on the teachings of Dr Rudolf Steiner directed to the extension of knowledge of the spiritual in man and in the universe generally and of the interaction of the spiritual and the physical.[139]

[152] In summary, Object B, which is to promoted the understanding of (amongst other things) the moral framework of a just and democratic society, has a clear common character with the tangible public benefits broadly classified under the banner of "moral and mental improvement". We accept that in determining whether the stated purposes are for the public benefit in the required sense, it is not sufficient to show "[a] mere connection … [to] the charitable purposes of others" directed to the same end.[140] Thus alleged intangible benefits require clear proof of public benefit.[141] Here, Family First was established and has consistently sought to fulfil that purpose and to support families by engaging in issues relevant to the self-evidently important role of families in society and core family values.

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136 *Re Hood* [1931] Ch 240 (CA).
137 *Re Scowcroft* [1898] 2 Ch 638 (Ch).
138 *Re South Place Ethical Society*, above n 87.
139 *Re Price* [1943] 1 Ch 422 (Ch).
140 *Aid/Watch Inc v Commissioner of Taxation*, above n 49, at [69].
141 Gino Dal Pont *Charity Law in Australia and New Zealand* (Oxford University Press, Melbourne, 2000) at 175.

[153] Finally, we recognise the point made by CLAANZ, of the public benefit associated with free speech and associated political discourse in a rule of law, liberal and democratic society such as New Zealand. That is an aspect of public benefit that activities of organisations such as Family First, albeit from a traditional point of view, and other organisations expressing more liberal views, can contribute to. After all, the societal values associated with family life and marriage — both in Family First's more traditional approach and in more contemporary liberal approaches — with sustaining stable and supportive environments for both children and adults to live, grow and develop in, remain ideals to be strived for, but not always achieved.

[154] We are, for all those reasons, satisfied that with reference to its objects and purposes and taking account of the ways in which Family First seeks to advance those objects and purposes, it is advancing a public benefit, and hence is entitled to charitable status.

[155] We turn, therefore, to the final question: does Family First nevertheless have purposes (including as reflected in its activities) of a non-charitable nature that are more than merely ancillary?

Non-charitable and non-ancillary advocacy for specific political/legislative responses?

[156] Given their conclusion that the "traditional family" focus of Family First disentitled it to charitable status, the Board and Simon France J did not consider in any detail the possibility that Family First's activities which were properly to be characterised as non-charitable were no more than ancillary to the charitable purposes we have recognised. For that reason, we considered referring the question back to the Board but concluded, given the long history of this matter, that would not be a sensible outcome. We accept that if there are competing views as to how a generally accepted public good should be reflected in law, it will be difficult to call advocacy for any of those specific responses charitable, in the sense of providing a public benefit. In that context, and on the material before us, it is therefore necessary to consider whether Family First's advocacy for specific, in particular legislative, outcomes in areas of concern to it constitutes non-ancillary, non-charitable purpose. It is proper to acknowledge that, notwithstanding the implication for the Board of Family First's

"traditional family" focus, another way to understand the Board's decision is that the view it reached was that Family First did indeed have such non-ancillary, non-charitable purposes.

[157] Having said that, the starting point for an analysis of whether potentially non-charitable purposes are ancillary must be the context provided by what we have recognised as the charitable purposes of Family First.

[158] The Board only considered the ancillary test in the reverse way: that is, it asked whether Family First's advocacy purpose was ancillary to another charitable purpose.[142] Given the Board's conclusion that the bulk of Family First's purposes and activities were non-charitable, it concluded that any advocacy that was capable of advancing a public benefit was a very small part of Family First's overall endeavour. Accordingly, the promotion of its point of view on marriage and the traditional family could not be considered secondary or incidental to another charitable purpose.[143]

[159] We think the issue here is whether, to the extent that Family First has advocated for positions on specific issues where views differ, Family First has a non-charitable purpose that is more than ancillary.

[160] On this issue the approach of the majority in *Greenpeace* is important. We have already referred (at [72] and [126] above) to the comments of Elias CJ, writing for the majority, that as a policy matter the exclusion of political purpose or cause advocacy is unnecessary. Having so held the Chief Justice opined that the advancement of causes will often, perhaps most often, be non-charitable.[144] She went on to endorse the minority view of Kiefel J in *Aid/Watch* that "reaching a conclusion of public benefit may be difficult where the activities of an organisation largely involve the assertion of its views".[145] The Chief Justice also referred to the decision of this Court in *Molloy*, commenting that it "seems correct".[146]

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142 Second deregistration decision, above n 2727, at [36].
143 At [36].
144 *Re Greenpeace of New Zealand Inc*, above n 13, at [73].
145 At [73]; quoting *Aid/Watch Inc v Commissioner of Taxation*, above n 49, at [69].
146 At [73]; referring to *Molloy v Commissioner of Inland Revenue*, above n 16.

[161] For our analysis the following observations of the majority in *Greenpeace* are instructive:

> [74] It may be accepted that the circumstances in which advocacy of particular views is shown to be charitable will not be common, but that does not justify a rule that all non-ancillary advocacy is properly characterised as non-charitable. As Professor Sheridan observed in 1972, in relation to promotion of legislation, the true rule is that advocacy is "charitable in some circumstances and not in others". We agree with the view expressed by Kiefel J in *Aid/Watch* that charitable and political purposes are not mutually exclusive. As a result, we depart from the approach taken in the Court of Appeal. If it was correct to find that the promotion of nuclear disarmament and the elimination of all weapons of mass destruction are charitable (the matter we next address), we do not think it should have found "political" activity properly connected with those purposes to exclude such charitable status unless shown to be ancillary only.(Footnotes omitted.)

[162] We also include reference to the Chief Justice's concluding comments on this topic:

> [76] Instead, assessment of whether advocacy or promotion of a cause or law reform is a charitable purpose depends on consideration of the end that is advocated, the means promoted to achieve that end and the manner in which the cause is promoted in order to assess whether the purpose can be said to be of public benefit within the spirit and intendment of the 1601 Statute.

[163] Finally we refer to the Chief Justice's conclusions (for the majority):

> [103] Since the educational objects of Greenpeace are conducted through a separate charitable trust, any educational element in promoting the ends of nuclear disarmament and the elimination of weapons of mass destruction seems unlikely to be central to the promotional effort. The emphasis on direct action and advocacy on the Greenpeace website may indicate the principal means of promotion. Although, for the reasons given, a political purpose exclusion is inappropriately conclusive when considering charitable purpose, we consider that the promotion itself, if a standalone object not merely ancillary, must itself be an object of public benefit or utility within the sense used in the authorities to qualify as a charitable purpose. As indicated above at [59]–[71], such public benefit or utility may sometimes be found in advocacy or other expressive conduct. But such finding depends on the wider context (including the context of public participation in processes and human rights values), which requires closer consideration than has been brought to bear in the present case.

[164] We consider Family First's engagement in the deliberations of the community on issues such as abortion, assisted death, anti-smacking laws, prostitution reform and censorship is properly characterised as part of its broader purpose of supporting marriage and family as being foundational to a strong and enduring society.

[165] Any attempt to label such engagement generally as cause advocacy of a political nature is not helpful. To repeat the words of Kiefel J (as quoted by the Chief Justice in *Greenpeace*), "charitable and political purposes are not mutually exclusive."[147]

[166] The manner and means in which Family First engages on specific issues and in overtly political processes (such as elections) was summarised by Family First itself in what it described as its "policy priorities". As published on its website, and referred to by the Board in its second deregistration decision, those matters were:[148]

> a. "Promoting marriage and families" (which includes advocacy on a wide range of issues in relation to marriage, divorce, child abuse, the availability of alcohol, tobacco and gambling, taxation of families, aged care and sex education).
>
> b. "Promoting life" (which includes advocacy against abortion, to maintain the status quo on euthanasia and against embryonic cell research).
>
> c. "Promoting community values and standards" (which includes advocacy to change prostitution laws, [reduce] the availability of pornography and for stricter broadcasting standards and censorship).

[167] An earlier example of a similar publication was the following "Policy Check List" published at the time of the 2008 general election:[149]

> Family First NZ says the upcoming election is not just about taxation, and have released family policies which they are encouraging voters and families to check against the policies of each political party.
>
> "Many commentators seem to think that this election is all about tax cuts and the economy," says Bob McCoskrie, National Director of Family First NZ. "Economical issues are important, but far more important than what we get is the type of society and values we are building (or destroying) for our future generations — our respect for life — the strengthening of families — the safety and wellbeing of our children — and laws that protect our families."
>
> "It is interesting to observe media coverage of politician 'walkabouts' where voters seemed more interested in talking about the anti-smacking legislation and education than they were tax cuts. Families deserve laws that strengthen and protect them — not ones that redefine and undermine them according to politically correct ideology."

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147 At [74]; citing *Aid/Watch Inc v Commissioner of Taxation*, above n 49, at [68]–[69].

148 Second deregistration decision, above n 27, at [25]; referring to Family First New Zealand "Family Policy Priorities" <www.familyfirst.org.nz>.

149 Family First "It's Not Just About Tax Cuts — Family First Releases Policy Check List" (press release, 13 October 2008).

> The policy check list can be viewed on Family First's website … and covers three broad areas; promoting marriage and families, promoting life, and promoting community values and standards.
>
> "Family First is not a political party. Our role is to be a voice for families in the public domain, and to research and advocate for family and marriage issues," says Mr McCoskrie.
>
> Some of the policies that Family First are promoting for all political parties to adopt include:
>
> – amending the welfare and tax systems to eliminate disincentives to marriage and marriage penalties
>
> – recognise that parents have primary responsibility for nurture, raising and educating of children, and governments should respect and support the exercise of parental responsibilities
>
> – replace the offices of Children's Commissioner and Families Commission with a Ministry of Families
>
> – Establish an independent CYF complaints authority so parents have an avenue to appeal the intervention of CYF and to safeguard against abuse of state power
>
> – Develop and enforce higher standards for TV, film, radio and advertising content including levels of violence, sexual content and objectionable language.
>
> and others in the areas of child abuse, euthanasia, family economics, aged care, abortion, street prostitution, parental notification for teen pregnancy, and pornography.
>
> "Strong families make a strong nation. We are encouraging voters to look beyond just the economical issues to the type of society and values we want to build for our children and future generations," says Mr McCoskrie.

[168] We do not consider that type of activity, in the context of Family First's overall charitable educational and advocacy purposes, to be non-charitable activity of a more than ancillary nature. Rather, taken together, those public statements reflect the broad range of Family First's activities, including advancement of their charitable objects, such as the promulgation of ideas and issues the subject of commissioned research papers.

[169] The more difficult issue is the extent to which Family First has advocated over time for very specific approaches on issues of the day. As already noted above at [12], it seeks to discourage divorce, opposed the liberalisation of laws relating to prostitution and the availability of abortion, sought an exemption for "light parental

smacking" from the anti-smacking legislation and is currently seeking to preserve the status quo in the forthcoming referenda on cannabis and euthanasia.

[170] We accept that those specific issues are very clear examples where reasonable and informed views may differ, so that no one position or outcome advocated could be said to be self-evidently in the public interest in terms of the approach taken prior to the Supreme Court's *Greenpeace* decision. Nor are such issues easily assessable on some evidential basis.[150] By the same token, neither could support for or advocacy of opposing points of view on the same issues be advocacy of self-evident public benefits.

[171] But *Greenpeace* has signalled a change in that approach. As Mallon J observed of the Board's understanding of the post-*Greenpeace* position:[151]

> The Board took [the Supreme Court's qualification that the charitable status of cause, including political, advocacy would depend on the nature of that advocacy] as meaning that if the advocacy involved advancing particular views, on which there were competing views and interests, then Greenpeace NZ needed to demonstrate that its views were of public benefit and it could not do so. I agree with Greenpeace NZ that this approach is incorrect. Protecting the environment will often come at the cost of competing interests, but advocating for its protection, in opposition to competing interests, is no less in the public benefit because of that. The Supreme Court cannot have meant that the nature of the advocacy will be disqualifying if an organisation advocates for environmental protection of a kind for which there will be opposition.

[172] In other words, the approach following *Greenpeace* would appear to recognise the courts' role in contemporary society — as regards fourth head charities — as being one of recognising goals and objectives of general public benefit. Having done so, the Court will not seek to reach a concluded view on self-evident public benefit on specific issues where views may differ. Nor will advocacy in support of one or other of the competing viewpoints necessarily disqualify an organisation from charitable status. The relevant question will be, as Mallon J grapples with in her decision, the extent to which the penumbra of the relevant public, general, good.

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150 The authors of *Tudor on Charities*, above n 7272, at [1-074] suggest the courts in England engage in some form of balancing exercise of perceived benefits, and refer to cases evidencing that approach, including *National Anti-Vivisection Society v Inland Revenue Commissioners*, above n 47. It was not suggested to us that either the Board, or the courts in New Zealand, take a similar approach.

151 *Greenpeace of New Zealand v Charities Registration Board*, above n 71, at [85].

Implicitly, the less direct connection there is between the specific and the general, the more likely will be a negative answer to that question.

[173] That development can be seen as analogous to that which has occurred as regards the third head, the advancement of religion. That is, belief in religion is seen as a good thing: and so the courts do not distinguish between particular religions, or consider advocacy of specific beliefs and practices which one group believes in but not another as a bar to charitable status.

[174] So, advocacy for a specific position on a matter, such as on the very difficult question of euthanasia, would not preclude an assessment as to charitable status.

[175] In the case of Family First, whilst at any one time advocacy of a specific outcome may be of particular significance, the issues of that nature which Family First focuses on would appear to change and develop in response to particular issues of the day. By contrast, Family First's educational and advocacy charitable purposes as regards the institutions of family and marriage have been generally constant over time, evidencing that its advocacy on specific issues can properly be seen as ancillary to those general charitable purposes discussed above: (a) education and research purposes or (b) fourth head charitable advancement of marriage and family values.

[176] Having said that, there are issues on which Family First advocates for particular positions which, whilst consistent with the values which underpin its support of the institutions of marriage and family, are ones that may fall outside the penumbra of the advocacy of the public goods of family and marriage as currently recognised. Issues such as divorce, alternative forms of marriage and, as the Supreme Court recognised when acknowledging the apparent correctness of the decision in *Molloy v Commissioner of Inland Revenue*, abortion, may fall within that category.[152] Family First will need to bear that in mind as it determines its priorities and activities for the future.

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[152] *Molloy v Commissioner of Inland Revenue*, above n 16.

Human rights law considerations

[177] In the High Court Simon France J was attracted to an argument against public benefit based on the discriminating effect of the activities of Family First. The Judge said this:[153]

> In relation to marriage, Family First's model, to the extent it involves law change favouring the traditional family unit, would on its face run counter to human rights law which prohibits discrimination on such bases. Unless able to be shown to be a reasonable limit, the position advocated for would be unlawful, an obstacle to charitable status.

[178] Mr Bassett submits the Judge was wrong to apply the concept of discrimination in the area of charities law. He argues that the Human Rights Act is not engaged as Family First is not supplying goods or services, nor providing employment. He suggests the Act does not apply to the activities of Family First relevant to the question of whether the second deregistration decision ought to have been made by the Board. The Human Rights Act would, of course, apply to prevent Family First from discriminating in relation to its internal employment policies, for example by only employing married women or heterosexual persons.[154]

[179] In response, Mr Gunn submits that this misunderstood Simon France J's point. He did not suggest that Family First was engaged in unlawful discrimination. Rather, the point was that the law changes it promoted would favour a particular marital status and would, on their face, conflict with the prohibition of discrimination in human rights law.

[180] It is well established that an illegal purpose is disqualifying, and illegal activities may in turn indicate an illegal purpose.[155] However, our assessment is that, whether or not the law changes advocated by Family First are in tension with human rights law, its purpose in advancing them cannot be considered to be *illegal* in the relevant sense. Proposing and enacting legislative amendments is not unlawful, even if what is proposed conflicts with the Human Rights Act or NZBORA, and we do not consider illegality in this context extends to the more abstract judgment whether the

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153 High Court judgment, above n 1, at [64] (footnotes omitted).
154 Human Rights Act 1993, s 22.
155 *Re Greenpeace of New Zealand Inc,* above n 13, at [111].

desired end conflicts with NZBORA. Nor is there any suggestion that Family First engages in unlawful activities, such as the types of non-violent direct action at issue in *Greenpeace*. We therefore do not consider Family First's positions create an obstacle to their charitable status in the manner the Judge suggested.

CLAANZ's submissions

[181] As recorded above at [56]–[58], CLAANZ suggests that removal of a tax subsidy to a previously registered charitable entity could be an unreasonable limitation on its right to freedom of expression, particularly if this meant it could not continue to engage in its political purposes. We accept, of course, that removal of registration will have an effect on Family First financially. However, CLAANZ did not provide any evidence to suggest that its activities could not continue without the tax benefits it currently enjoys. Moreover, Family First did not advance this point as one of its 20 grounds of appeal. The issue was raised neither before the Board nor in the High Court. In these circumstances, we do not consider it is necessary to address this issue further.

Result

[182] The appeal is allowed.

[183] The decision of the Charities Registration Board dated 21 August 2017 to remove Family First New Zealand from the Charities Register is set aside.

[184] There is a declaration that Family First New Zealand qualifies for registration under the Act.

GILBERT J

[185] The question whether Family First qualifies for charitable status has been subjected to intense scrutiny ever since the Board carried out its initial investigation leading to the first deregistration decision in April 2013. That was over seven years ago. This is now the fifth decision dealing with the issue.

[186] The majority's judgment stands alone in concluding that Family First is an organisation primarily established and maintained for the advancement of education.[156] Having found that presumptively charitable purpose, the majority also find a second purpose, namely "to promote and support (that is, to advocate for) self-evident public goods, the institutions of the family and marriage".[157] This purpose is said to qualify as a public benefit in the charitable sense under the fourth head of charity.[158] Thus, Family First qualifies for registration under the Act.[159]

[187] The majority then address areas of potential vulnerability in Family First's claim to charitable status.[160] In particular, "whether, to the extent Family First has advocated for positions on specific issues where views differ, Family First has a non-charitable purpose that is more than ancillary".[161] The majority conclude that Family First's advocacy on these specific issues can properly be seen as ancillary to its charitable purposes of "education and research" or the "advancement of marriage and family values".[162]

[188] Despite finding Family First's purposes are charitable and its advocacy on specific issues is no more than ancillary to those charitable purposes, the majority considered referring the question of registration back to the Board. This was because neither the Board nor Simon France J had considered "in any detail the possibility that Family First's activities which were properly to be characterised as non-charitable were no more than ancillary to the charitable purposes we have recognised".[163] Here, the majority refer to "issues on which Family First advocates for particular positions which, whilst consistent with the values which underpin its support of the institutions of marriage and family, are ones that may fall outside the penumbra of the advocacy of the public goods of family and marriage as currently recognised".[164] I strongly support the majority's decision not to remit the matter back to the Board for further consideration of this topic.

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156 Above at [74]–[122] and particularly [90]–[92].
157 At [91] and [123].
158 At [154].
159 At [184].
160 At [156]–[176].
161 At [159].
162 At [175].
163 At [156].
164 At [176].

[189] I am otherwise unable to subscribe to the majority judgment. I would dismiss the appeal. I consider Simon France J was correct to dismiss Family First's appeal from the second deregistration decision. I also agree with his reasons.

[190] In consequence of the various hearings and the appropriately liberal approach adopted to the receipt of further evidence and submissions, this Court has received a comprehensive suite of information about Family First's purposes and its activities over the last 10 years, far more information than would normally be available on a charity registration decision. The comprehensive nature of the evidence leaves little room for doubt about Family First's purposes or its activities.

[191] As its original name suggests — "Family First Lobby" — Family First is essentially a lobby group which promotes its particular viewpoint on family and marriage. It opposes law reform on issues such as abortion, euthanasia, divorce, same-sex marriage, prostitution, pornography, censorship and child smacking. The promotion of these views is in furtherance of its objects, for example, "to promote … policy" (object A), "to participate in social analysis and debate" (object C), "to produce and publish relevant and stimulating materials in newspapers, magazines, and other media" (object D) and "to be a voice for the family in the media speaking up about issues relating to families" (object E).

[192] Although object B uses the word "educate" — to "educate the public in their understanding of the institutional, legal and moral framework that makes a just and democratic society possible" — this also involves Family First promoting its particular viewpoints, including that the "traditional family" is *the* fundamental social unit (the union of a man and a woman through marriage and their biological children). Family First holds to the view that the "natural family cannot change into some new shape" or "be re-defined by social engineering". Family First describes other family forms as "incomplete or fabrications of the state". This interpretation of what is meant by "to educate the public" in object B (namely, promotion of its particular viewpoints) is supported by object C — "to network with other like-minded groups and academics".

[193] I do not consider these objects fit comfortably with the advancement of education. Simon France J found that Family First's "primary activity is advocacy for a specific viewpoint".[165] The Judge said he understood this was conceded.[166] I consider it to be beyond argument.

[194] The majority criticise Simon France J's judgment because it "touched only briefly on the advancement of education category".[167] I consider the Judge was correct to do so. Unless Family First's purpose of promoting/advocating its particular views is of public benefit in the way the law regards as charitable (thus qualifying under the fourth head), it is not entitled to registration irrespective of whether it has an additional charitable purpose of advancing education. Family First did not shrink from the task of attempting to demonstrate that its advocacy purpose is charitable under the fourth head. It confronted the issue head-on, leading off with this as its primary argument on appeal. As the majority observe, it appears from Simon France J's judgment that this is how the argument was run in the High Court as well.[168]

[195] To put this in perspective, in December 2015, Charities Services asked Mr McCoskrie of Family First to provide a description of its "advocacy" on any "causes" and the proportion of its total time devoted to such advocacy. Mr McCoskrie replied in February 2016 that he estimated Family First spent 75 per cent of its time on advocacy for the following causes:

> (i) Promoting marriage and families (including advocacy in the areas of strengthening marriage, parenting, the Child Youth and Family Services, child abuse, family economics, aged care and sex education);
>
> (ii) Promoting life (including advocacy against abortion, to maintain the status quo in relation to euthanasia and against embryonic cell research); and
>
> (iii) Promoting community values and standards (including advocacy in the areas of prostitution, pornography and standards and censorship).

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165 High Court judgment, above n 1, at [48].
166 At [60].
167 Above at [94].
168 At [94].

Mr McCoskrie said the balance of 25 per cent of Family First's time was spent on "administration, fundraising and supporter/database management". Education was not mentioned. To give further perspective on the relative importance of this aspect of Family First's purposes and activities, in the 14 years since Family First was formed it has published a total of 21 reports on its website.

[196] The critical issue in the case has always been whether Family First's acknowledged non-ancillary advocacy purpose as described qualifies under the fourth head.[169] On the current state of the law, based on the Supreme Court's guidance in *Greenpeace*, I agree with Simon France J that the answer must be "no".

[197] The majority consider that "the institutions of the family and marriage" are self-evidently beneficial as a "public good".[170] I assume "public good" in this context is a reference to the public benefit test required under the fourth head of charity.[171] Assuming that to be so, it is questionable whether the "traditional family" or "family" is a public benefit in the sense the law regards as charitable, rather than a section of society on whom charitable benefits may be conferred. The majority's analysis appears to conflate the two limbs of the public benefit test. The purpose must be such as to confer a benefit on the public or a section of the public (the benefit component) and the class of persons eligible to benefit must constitute the public or a sufficient section of the public (the public component). The traditional family (or family generally) is the public component, not the benefit component. The family is not a benefit fitting within the spirit or intendment of the preamble to the Statute of Elizabeth with the object of relieving the burden that would otherwise fall on parish ratepayers — such as relief of aged and poor people, repair of bridges etc. The parish ratepayers (the public component) would typically be families fitting Family First's conception of the traditional family. I consider the focus on "family" as a "self-evident public good" is misplaced and does not satisfy the benefit component.

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169 This is why the appeal against the first deregistration decision was held up to await the Supreme Court's judgment in *Greenpeace*: see *Re Family First New Zealand*, above n 20, at [14]. It is also why CLAANZ was given leave to address the Court on the topic of "determining whether a political advocacy organisation exists for a charitable purpose of public benefit, wider benefits flowing from the means and manner of its political advocacy, including from the fact of that advocacy itself, should be taken into account". These were mis-steps if none of Family First's objects fit within this category.

170 Above at [123] and [138].

171 At [131].

[198] The question is whether Family First provides a benefit to the community, or a section of it, that the law regards as charitable. Family First's advocacy provides no tangible public benefit to families. It is therefore necessary to consider whether in promoting or advocating its specific viewpoints or causes, the ends promoted, or the means and manner of promotion, are of a public benefit in the charitable sense.[172]

[199] It is helpful to revisit what Elias CJ said in *Greenpeace* about whether advancement of causes is likely to qualify as charitable under the fourth head:[173]

> [73] Advancement of causes will often, perhaps most often, be non-charitable. That is for the reasons given in the authorities — it is not possible to say whether the views promoted are of benefit in the way the law recognises as charitable. Matters of opinion may be impossible to characterise as of public benefit either in achievement or in the promotion itself. … Furthermore, the ends promoted may be outside the scope of the cases which have built on the spirit of the preamble, so that there is no sound analogy on which the law might be developed within the sense of what has been recognised to be charitable. Even without a political purpose exclusion, the conclusion in *Molloy* (that the purpose of the Society for the Protection of the Unborn Child was not charitable) seems correct. The particular viewpoint there being promoted could not be shown to be in the public benefit in the sense treated as charitable.

[200] The reference to *Molloy* is instructive.[174] It is the most closely analogous case in New Zealand. It concerned the charitable status of the Society for the Protection of the Unborn Child which opposed the liberalisation of the law relating to abortion, the same position taken by Family First on that topic. Family First's objects are in many respects similar to the objects of the Society in *Molloy*. For example, the Society's objects included "to encourage and promote study and research and the collection and dissemination of information on the moral, medical, legal, political and social implications of pregnancy" and "to inform and educate the public on the need for legal and other safeguards for protecting and preserving the rights of unborn children".[175] This Court found that the Society did not qualify for charitable status.[176] As can be seen from the passage quoted above, Elias CJ, writing for the majority, expressed the view that the outcome in *Molloy* appeared to be correct even though the "political purpose" exclusion was no longer good law.

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172 *Re Greenpeace of New Zealand Inc*, above n 13, at [76] and [102].
173 *Re Greenpeace of New Zealand Inc*, above n 13.
174 *Molloy v Commissioner of Inland Revenue*, above n 16.
175 At 692.
176 At 697.

[201] If the Society in *Molloy* would not qualify under the fourth head even after *Greenpeace*, it is hard to see how Family First could do so. The parallels between the objects of the Society and those of Family First are obvious. The majority recognise this but consider Family First's advocacy on these types of issues is not disqualifying because of the "ancillary" carve-out.[177] The majority say Family First's "engagement in the deliberations of the community on issues such as abortion, assisted death, anti-smacking laws, prostitution reform and censorship is properly characterised as part of its broader purpose of supporting marriage and family".[178] They say it is not "non-charitable activity of a more than ancillary nature" viewed "in the context of Family First's overall charitable educational and advocacy purposes".[179]

[202] Three points should be noted about this. First, the majority appear to accept that Family First's advocacy on these issues is non-charitable (non-charitable but not more than ancillary in nature). I agree with the non-charitable conclusion. Based on *Greenpeace* and *Molloy*, such advocacy does not qualify under the fourth head. Secondly, the majority do not explain how they arrive at their conclusion that this activity is no more than merely ancillary. Their conclusion seems to me to be seriously at odds with the evidence, including Mr McCoskrie's advice to Charities Services referred to at [195] above. Thirdly, I am unclear how advocacy on particular issues could be said to be ancillary to an advocacy purpose.

[203] The "more difficult issue" identified by the majority concerning "the extent to which Family First has advocated over time for very specific issues of the day" is also said to be embraced by the "ancillary" exception. Examples given of these "issues of the day" are Family First's opposition to the liberalisation of laws relating to divorce, prostitution, abortion, child-smacking, cannabis and euthanasia.[180] It is not immediately apparent how these "issues of the day", leading the majority to issue a cautionary warning to Family First,[181] are distinguishable from those referred to

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177 Above at [176].
178 At [164].
179 At [168].
180 At [169] and [175].
181 At [176].

above at [201]. Indeed, some of these "very specific issues of the day" feature in both lists — abortion, euthanasia, anti-smacking and prostitution.

[204] In summary, Family First's cause advocacy (promotion of its specific viewpoints) is not of self-evident or established public benefit such that it qualifies under the fourth head of charity. The majority appear to recognise this. In disagreement with the majority, I do not consider that Family First's advocacy on these issues can be categorised as merely ancillary to some other charitable object. Rather, the evidence demonstrates that this forms an important part of its core purpose.

Solicitors:
Brace Legal, Porirua for Appellant
Crown Law Office, Wellington for Respondent
Sue Barker Charities Law, Wellington for Charity Law Association of Australia and New Zealand as Intervenor

APPENDIX ONE:

IN THE COURT OF APPEAL OF NEW ZEALAND
I TE KŌTI PĪRA O AOTEAROA

CA574/2018

BETWEEN	FAMILY FIRST NEW ZEALAND Appellant
AND	ATTORNEY-GENERAL Respondent
AND	CHARITY LAW ASSOCIATION OF AUSTRALIA AND NEW ZEALAND Intervenor

Counsel:	P D McKenzie QC and I C Bassett for Appellant P J Gunn and A P Lawson for Respondent J J Batrouney QC and K G Davenport QC for Intervenor
Minute:	29 October 2019

MINUTE OF THE COURT

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[1] The purpose of this minute is to record the steps which are to be taken following the hearing of this appeal:

(a) The Attorney-General, in consultation with Family First, will prepare a timeline of the consideration by the Charities Commission and the Courts of the question as to whether or not Family First qualifies for registration as a charity. That timeline will cross-reference the relevant decisions already in the bundle, and add any that are not. The timeline will also include the delivery by Charities Services to the Commission from time to time of the substantive reports that are already in the bundle, and any that are not.

(b) Family First agreed to provide the letters of instruction (to use our own phrase) that resulted in the preparation of the reports found in volume 8

> of the case that were not before the Charities Commission or the High Court in terms of the most recent decision. On reflection, we consider that it would be appropriate that those documents be provided as annexures to an affidavit sworn on behalf of Family First, to be provided as updating evidence confirming the arrangements that resulted in the production of those reports, and the "true copy" status of those commissioning documents. Family First will liaise with the Attorney-General before that affidavit is filed in Court. We note, by way of background, our understanding is those reports were both commissioned by, and paid for by, Family First. If that is not the case, the affidavit will no doubt reflect that.

[2] In the circumstances, we do not think it is necessary to set a date by which those materials are to be provided. The parties will, we are sure, do so in a timely fashion.

[3] We also record our understanding that the material before us, not before the Commission or the Court below, may be treated as updating evidence admitted in this appeal by consent, and may be relied on by us as such in reaching our substantive decision.

Clifford J
For the Court