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SC DECISION GARNERS PROBLEMS AND PROSPECTS FOR CHARITIES

By Matthew Lark

Viewpoints differ on a recent Supreme Court pronouncement regarding charitable status. One party with an interest in the case, Bunny McDiarmid, executive director of the appellant, has called it "a legal marathon" in which "New Zealand has taken out the gold". Stephen Franks, Principal of Franks & Ogilvie, who represents at least one aspiring but as yet unregistered charity which may be affected by the decision, has said that it "says much about what the law is not, and too little about what it is".

Yes, they are talking about the same Supreme Court decision: *Re Greenpeace of New Zealand Inc* [2014] NZSC 105, delivered with a majority of three and a minority of two, on 6 August 2014.

A history of hearings

The 118 paragraphs of the majority decision of Elias CJ, McGrath and Glazebrook JJ, form the complex culmination of six years of principled non-government protest. It started when Greenpeace applied for charitable status under Part 2 of the *Charities Act 2005* (Act) to the Charities Commission (Commission), now the Charities Board, in June 2008.

In April 2010, the Commission declined the application, stating that two of Greenpeace's objects were not charitable. These were the promotion of disarmament and peace and the promotion of "legislation, policies, rules, regulations and plans which further [Greenpeace's other objects] and support their enforcement or implementation through political or judicial processes as necessary".

The Commission concluded that the direct action which it found to be "central" to the activities carried on by Greenpeace could entail illegal activity, which also could not be said to be in the public interest and charitable.

By May 2011, Greenpeace sustained another setback, as the High Court concluded it could not be registered as a charity because its disarmament purposes were independent "political" purposes, and not ancillary ones. Such independent purposes would exclude it from being treated as truly charitable.

By November 2012, the Court of Appeal had heard that Greenpeace intended to amend its original objects.

The promotion of "disarmament" would be restricted to the promotion of "nuclear disarmament and the elimination of all weapons of mass destruction" (on the basis that these purposes accorded with New Zealand's international obligations and domestic law and were not controversial).

The advocacy object would be changed to make it clear that it was truly "ancillary" to Greenpeace's charitable objects.

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ADLSI hosted the annual RAMs "Meet the Judiciary" evening on Wednesday 24 September 2014 at Chancery Chambers. This booked-out event gave RAMs the chance to meet with some of New Zealand's leading judges in a relaxed and social environment. Pictured here are Anna Holland, the Hon Justice Susan Thomas of the High Court, Kate von Biel and Frances Iggulden. For more pictures from this event please turn to page 7.

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In terms of the first proposed amendment of objects, the Court of Appeal affirmed the exclusion of political purpose, finding that it is codified by section 5(3) of the Act. However, it held that the foreshadowed amendments to Greenpeace's objects avoided the exclusion.

In terms of the second proposed amendment, the Court of Appeal considered that the advocacy actually carried out by Greenpeace could well be beyond a level merely "ancillary" to its charitable purposes. If so, Greenpeace would not exist exclusively for charitable purposes.

The Court of Appeal accordingly referred the application for registration for reconsideration by the Chief Executive of the Department of Internal Affairs and the Charities Board.

Greenpeace took the case to the Supreme Court in May 2013. It argued that restrictions should not be put on political advocacy, and questioned whether the Court of Appeal was able to judge where public benefit lies around political advocacy.

Supreme Court's conclusions

The conclusions of the Supreme Court are succinctly expressed in paragraph 3 of its judgment and state, inter alia, that:

"A 'political purpose' exclusion should no longer be applied in New Zealand: political and charitable purposes are not mutually exclusive in all cases; a blanket exclusion is unnecessary and distracts from the underlying inquiry whether a purpose is of public benefit within the sense the law recognises as charitable.

"Section 5 of the *Charities Act* does not enact a political purpose exclusion with an exemption if political activities are no more than 'ancillary' but rather provides an exemption for non-charitable activities if ancillary.

"The Court of Appeal applied an incorrect approach to assessment of charitable purposes when it concluded that an object 'to promote nuclear disarmament and the elimination of weapons of mass destruction' was charitable."

Further useful guidance on acceptability of charitable purpose comes in paragraph 75:

"We are unable to agree with the Court of Appeal suggestion that views generally acceptable may be charitable, while those which are highly controversial are not."

"A 'political purpose' exclusion should no longer be applied in New Zealand: political and charitable purposes are not mutually exclusive in all cases; a blanket exclusion is unnecessary and distracts from the underlying inquiry whether a purpose is of public benefit within the sense the law recognises as charitable."

(From the Supreme Court judgment in the Greenpeace *case)*

The following paragraph goes on to assert:

"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 ..."

Paragraph 103 of the Supreme Court judgment gives the clearest notion that the promotion or manner of achievement of charitable ends deserves more attention in a wider social context and states:

"... when considering charitable purpose, we consider that the promotion ... must itself be an object of public benefit or utility within the sense used in the authorities to qualify as a charitable purpose ... [S]uch 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."

Viewpoints differ on the impact of the *Greenpeace* decision

Law News was bemused to find that very few capable commentators had read this decision in any detail, though nearly two months have elapsed since it was delivered.

Duncan Currie, who was one of three counsel acting for Greenpeace at the Supreme Court level, thankfully, had read it carefully and he is definite about the success of eliminating the political exclusion.

"We would argue consistently that the political exception is bad law, is unnecessary in a modern democracy and that it has no part in the *Charities Act* as passed," he says.

"The test is far more simple, effectively along the lines of Chief Justice Elias' decision – that there is one test which is about whether purposes are in the public interest."

Citing paragraphs 101-104 of the judgment, Mr Currie asserts that the decision has allowed courts to assess charitable purposes and charitable status in a modern context, very different from the piecemeal and heavily case law-oriented frameworks of past judgments.

"I think [paragraph] 103 is a very interesting, insightful paragraph because the Court has

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recognised the potential benefit and utility of public participation in advocacy and other expressive contexts," he remarked.

"They're talking about a much more holistic view than just about advocacy, of how a charity will obtain its aims. There can no longer be a binary test of whether you are achieving something for a public good and something tangible or whether you're engaging simply in advocacy."

Sue Barker has acted for the National Council of Women (NCW) since 2012. She is currently managing a challenge in the High Court, which seeks to have NCW's charitable status backdated to include a period between 2010 and early 2012, when it was not considered to be a charity. Political activities were, as in Greenpeace's case, the centre of the Charities Commission's objections when it declined the NCW's application for charitable status in 2010.

"The burden falls on individual charities to push the law forward," Ms Barker believes. "If Greenpeace hadn't done that, we'd have been stuck with the approach which the charities regulator had relating to advocacy."

But as much as Ms Barker endorses the messages conveyed by the decision in general, she is concerned about what she sees as a flaw in the premises on which final determinations on charitable purpose and activities were made by the Supreme Court.

"There is a presumption of charitability in New Zealand law," she says. "You're supposed to approach the question of whether a purpose is charitable with a benevolent mind – that is, we're going to find [that there is a] charity unless there's a good reason why not. There was no need for the Supreme Court to get rid of a presumption of charitability."

Without wanting to openly criticise the Supreme Court's methodology or assessment of that employed by the lower courts, Ms Barker asserts that use of determination, by analogy, of a charity's purposes and objects with material in the 1601 *Statute of Charitable Uses* is anachronistic. She insists that modern, more pragmatic norms may be of more use.

"There are so many analogies now that this analogical approach isn't working," she says. "What we need to do is look at whether it is for the public benefit. If it's for the public benefit then we want it. We should find charity unless there's a good reason why not, not unless there's an analogy why not."

Stephen Franks is more cautious about the positive consequences of this decision. His firm has acted for the Sensible Sentencing Trust (SST), which was declined charitable status in 2010, largely because of its advocacy of changes to sentencing and penal laws. In a statement to *Law News*, Mr Franks remarked:

"We think the *Greenpeace* decision is strangely unhelpful law-making at the technical level. No doubt officials and applicants will find ways to purport to apply it as if it had clarified the law. But it is hard to know what policy it pursues."

Clearly contemplating paragraph 75 (quoted earlier), Mr Franks commented:

"The decision says controversy over a point of view should no longer be relevant to charitable status. But how and when is that to be distinguished from differences of opinion over what is of 'public benefit'? SST's lobbying for law change is bound to be controversial, with a wide gap between views on the public benefit of the policies urged."

The Department of Internal Affairs was unable to provide much by way of substantive comment, except to say that it is drafting and improving practice guidelines for the better instruction of the Chief Executive of the Department and the Charities Board.

Such guidelines will incorporate readily useable material in respect of the interpretation of this decision, which will in turn inform the Charities Board's decisions on future applications by organisations seeking charitable status.

Watch this space. LN