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RESEARCH ARTICLE

Charities and politics: where did we go wrong?

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Abstract

This paper examines a long-standing doctrine in charities law – that if an organisation's main purpose is political then it cannot be charitable. This doctrine is not without controversy because it has the potential to exclude many worthwhile organisations from charitable status, and fetter worthwhile advocacy by those that do have status. While no jurisdiction remains unwaveringly committed to the orthodox political purpose doctrine, we argue that none so far have confronted the public benefit – and detriment – of political advocacy adequately. This paper proposes a way of assessing the public benefit of political advocacy in liberal democratic societies. It argues that political advocacy can give rise to clear public benefit: this is an indirect or process benefit associated with advocacy itself regardless of the end advocated for. However, recognising political advocacy purposes as charitable should still be subject to two constraints: the altruism requirement (reflected in the 'public' aspect of public benefit); and consistency with liberal democratic values (as part of the 'benefit' aspect). These constraints are needed because, while political advocacy can generate benefit, detriments may also be associated with political advocacy.

Keywords: charity law; political purposes; advocacy; public benefit; liberal democracy

1. The problem

Charity and politics, according to a long-accepted principle of common law, should not mix.

This principle – the 'political purpose doctrine' – says that if an organisation's main purpose is political then the organisation cannot be charitable. What constitutes a political purpose can be hard to pin down. While an organisation to promote a particular political ideology, party or candidate is obviously political,[1] the political purpose doctrine has also excluded organisations that advocate for a change in law or policy from being charitable.[2] Advocacy has been framed widely to include seeking change in law, governmental policy, or administrative decision-making in any country.[3] This doctrine does not mean, however, that all political activity by charities is prohibited. Political activity is permitted as a means of pursuing a charitable purpose if the political activity itself does not amount to a main purpose of the organisation.[4] Indeed, the Chair of the Charity Commission for

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[1]*Bonar Law Memorial Trust v IRC* (1933) 49 TLR 220; *Re Ogden* [1933] Ch 678; *Re Hopkinson* [1949] 1 All ER 346.

[2]*Bowman v Secular Society Ltd* [1917] AC 406, at 442.

[3]*McGovern v Attorney-General* [1982] Ch 321, at 340.

[4]See Charity Commission for England and Wales *Campaigning and Political Activity Guidance for Charities* (CC9, November 2022), https://www.gov.uk/government/publications/speaking-out-guidance-on-campaigning-and-political-activity-by-charities-cc9/speaking-out-guidance-on-campaigning-and-political-activity-by-charities.

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England and Wales recently emphasised that 'charities are free to campaign robustly' if this furthers their purposes.[5] Nonetheless, while an organisation may focus all its resources on political activity for a period – for example, during a general election – such activity cannot be the reason for its existence.[6]

The orthodox political purpose doctrine has meant that, although many might see protecting the environment, securing the release of prisoners of conscience, procuring the abolition of torture and inhuman or degrading treatment or punishment, promoting the family, or preventing cruelty against animals as undoubtedly good things, an organisation whose main purpose is *advocating* for these causes cannot be charitable. This is because advocating will often mean arguing for changes in law or policies to achieve these purposes. Such advocacy is political and therefore disqualified from being charitable by virtue of the political purpose doctrine. A further problem with advocacy purposes is that it can be hard to identify what benefit to the public – a requirement of charitable status – advocacy alone generates. An advocacy organisation is usually not performing the charitable act itself; it is asking others (most often the government) to do it.[7] Even identifying the benefit of what is advocated for, as opposed to the advocacy itself, can be challenging, as that benefit is often something that is contested in public debate.[8]

It was inevitable that the political purpose doctrine would come under challenge at some point. This is because the nature of charity is changing. This shift is not entirely new. In fact, in the nineteenth century political advocacy by charities was not uncommon,[9] and Chesterman suggests that there was no clear divide between political and charitable purposes until relatively recently.[10] In the mid to late twentieth century, however, advocacy by charities came into its own. A confluence of factors contributed to this development, most significantly government withdrawal from providing welfare services directly and instead contracting outside agencies (both private commercial and charitable) to do so.[11] This has increased the funding available to charities, which in turn has increased their size and organisation. Bigger and better organised charities now exist that are keenly interested and invested in legal and policy developments in their area. They are also expected – by their donors but also by government through law reform consultation processes – to contribute to public debate. New forms of communication – especially social media – make political advocacy and activism much easier and more accessible.

This modern climate of advocacy has presented challenges for charity law's orthodox approach to political purposes. Jurisdictions across the common law world have responded in different ways. This paper examines, in Parts 2–5 below, how differing approaches to political purposes have developed across the common law world. It observes that while no jurisdiction remains unwaveringly committed to the orthodox doctrine, jurisdictions have varied in both the manner and degree to which they are prepared to depart from it. England and Wales adheres most closely to the doctrine (or at least has not openly disavowed it), with some adjustments around the edges. New Zealand has purported to abandon it but retains it largely in substance. And Canada and Australia have come to positions in between adherence and abandonment.

This paper argues that, despite this range of approaches, no jurisdiction has confronted the public benefit – and detriment – of political advocacy adequately. This is concerning because the central question in charity law is whether a proposed purpose will generate public benefit. The paper further

[5]Charity Commission for England and Wales 'Orlando Fraser's speech at Charity Law Association Conference 2023', https://www.gov.uk/government/speeches/orlando-frasers-speech-at-charity-law-association-conference-2023.

[6]*Campaigning and Political Activity Guidance for Charities*, above n 4.

[7]As observed in *Better Public Media Trust v Attorney-General* [2020] NZHC 350, para 54 (*Better Public Media Trust (HC)*). See also *Attorney-General v Family First New Zealand* [2022] 1 NZLR 175, para 164 (per Williams J).

[8]See for example, *Attorney-General v Family First New Zealand*, above n 7, para 142.

[9]*Farewell v Farewell* (1892) 22 OR 573; *Re Scowcroft* [1898] 2 Ch 638 (discussed in *Aid/Watch Inc v Federal Commissioner of Taxation* [2010] HCA 42, para 32).

[10]M Chesterman 'Foundations of charity law in the new welfare state' (1999) 62 Modern Law Review 333, at 343 (referring to *McGovern*, above n 3).

[11]Chesterman, above n 10, at 335.

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argues, in Part 6, that political advocacy can give rise to clear public benefit in liberal democratic societies: an indirect or process benefit associated with advocacy itself regardless of the end advocated for. At the same time, however, political advocacy by charities should be subject to constraints. Working within charity law's existing internal viewpoint and normative commitments, we argue that recognising political advocacy purposes as charitable is constrained by the idea of altruism (reflected in the 'public' aspect of public benefit). Moreover, in the context of liberal democratic societies, the public benefit of political advocacy purposes should be assessed with reference to liberal democratic values (as part of the 'benefit' aspect). These constraints are needed because, while political advocacy can generate benefit, clear public detriments may also be associated with political advocacy – at least within a political community committed to liberalism – where the end advocated for is inconsistent with liberal democratic values.

2. The origin of the political purpose doctrine: England and Wales

The orthodox, or traditional, approach to political purposes can be traced back to the origin of the Commonwealth's charities law: England and Wales. While the exact source of the political purpose doctrine is murky,[12] it appears to have arisen most clearly from the English decision in *Bowman v Secular Society*.[13] It was then confirmed in *National Anti-Vivisection Society v Inland Revenue Commissioners*[14] and significantly expanded in *McGovern v Attorney-General*.[15] In *McGovern*, the court did not confine the political purpose prohibition to those purposes seeking or requiring change in domestic legislation, as it had previously in *National Anti-Vivisection Society*.[16] The court extended the prohibition to purposes seeking change in governmental policy or administrative decision-making – and therefore potentially any effort aimed at social (and not just legal) reform – and not only in the UK but in any country.[17] Here, two purposes of a trust established by Amnesty International – securing the release of prisoners of conscience and procuring the abolition of torture and inhuman or degrading treatment or punishment – were held not to be charitable because of their political nature. *McGovern* is still the leading case on the political purpose doctrine.[18] However, with its expansive view of 'political', *McGovern* is considered the high water mark of the doctrine and sets the scene for some of the challenges English charity law now faces when dealing with advocacy by charities.

A range of justifications has been offered for why political purposes cannot be charitable. These have been discussed extensively elsewhere.[19] Two main reasons emerge from the case law. First, some courts have said that they are not qualified to answer whether a political cause is for the public benefit – such questions go beyond the expertise of, or evidentiary material available to, the court.[20]

[12] *National Anti-Vivisection Society v Inland Revenue Commissioners* [1948] AC 31, at 63, 54; *Aid/Watch Incorporated v Federal Commissioner of Taxation*, above n 9, paras 30–31.

[13] Above n 2. Some have suggested that prior to *Bowman* '[t]here was no bright line between charity and politics' given that anti-slavery, penal reform, and temperance charities existed: S Kós 'Murky waters, muddled thinking: charities and politics' (Opening Address, Charity Law Association of Australia and New Zealand Conference, 4 November 2020) para [5].

[14] Above n 12.

[15] Above n 3.

[16] *National Anti-Vivisection Society*, above n 12, at 49–51. See also *Re Greenpeace of New Zealand Inc* [2014] NZSC 105, paras 36, 60–61.

[17] Above n 3, at 340.

[18] *McGovern* was applied to deny charitable status in *Southwood v Attorney General* [2000] EWCA Civ 204, para 17 (education 'in the subject of militarism and disarmament') and *Hatchett-Stamford v Attorney General* [2008] EWHC 330 (Ch); [2009] Ch 173, para 16 (purpose to ban animals from performing). For further discussion of *McGovern* see F Weiss 'Quot homines tot sententiae or universal human rights: a propos *McGovern v. The Attorney-General*' (1984) 46 Modern Law Review 385; R Noble 'Politics, public benefit and charity' (1982) 45 Modern Law Review 704.

[19] For an overview see S Glazebrook 'A charity in all but law: the political purpose exception and the charitable aector' (2019) 42 Melbourne University Law Review 632.

[20] *Bowman*, above n 2, at 442; *McGovern*, above n 3, at 336–337; *Southwood*, above n 18, para 29 ('the court [has] no material on which to make that choice [as to which view is for the public benefit]').

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Lacking such expertise or evidence, a court would have 'no means of judging' whether the proposed change in the law is for the public benefit.[21] In relation to objects that seek legislative change in other countries, the problem of assessing public benefit is seen to be compounded given that 'the inhabitants of the country … would doubtless have a history and social structure quite different from that of the United Kingdom'.[22]

Secondly, it has also been argued that determining whether a political purpose is publicly beneficial can take a court beyond its constitutional role. A court's role in a system based on parliamentary sovereignty is, the argument goes, to apply the law on the basis that it is right as it stands.[23] Where a purpose is to bring about a change in the law, determining whether such change is beneficial has been seen as 'usurp[ing] the functions of the legislature'.[24] While this argument may be less relevant to purposes directed at governmental policy or administrative decision-making – which are encompassed by the more expansive view of 'political' in *McGovern* – a clear advantage of such reasoning is that it allows courts and regulators to avoid making determinations on (often highly contested) political questions. A court may lack not only the expertise on such questions but the democratic legitimacy and accountability to address them. In relation to purposes that seek change in other countries, as the court in *McGovern* noted, a judicial finding of public benefit could risk prejudicing relations with the country concerned, and assessing such a risk would require political rather than legal judgement.[25]

These justifications, and others, were canvassed and rejected by the New Zealand Supreme Court in *Greenpeace*.[26] They have also been criticised by academics.[27] Nonetheless, English courts still rely on them as reasons for retaining the prohibition on political purposes.

Perhaps because the doctrine is seen as unduly constraining, some courts appear to have interpreted the purposes of an organisation in such a way as to circumvent the prohibition on political purposes. This has been successful where the purposes are educational. For example, in *Re Scowcroft*[28] 'the furtherance of Conservative principles and religious and mental improvement' was found to be charitable. However, for a purpose to be regarded as educational rather than political, there must be a genuine desire 'to educate the public so that they could choose for themselves' amongst competing views.[29] This would include 'starting with neutral information' rather than promoting one theory or viewpoint by propaganda.[30] Education *about* a cause can therefore be charitable whereas *advocating for* that particular cause may not be.[31] Educating the public about different means of achieving peace and avoiding war might be charitable, for example, but 'a trust to educate the public to an acceptance that peace is best secured by "demilitarisation"' would not be.[32] This is because the latter is promoting one point of view and a court is not in a position to determine whether the promotion of that particular view, as opposed to another, is for the public benefit.[33] As will be discussed below, a similar

[21] *National Anti-Vivisection Society*, above n 12, at 62.

[22] McGovern, above n 3, at 338.

[23] *National Anti-Vivisection Society*, above n 12, at 50; *Hanchett-Stamford*, above n 18, para 16.

[24] Slade LJ in *McGovern*, above n 3, at 337.

[25] Ibid, at 338–339. See also JC Norton 'Controversial charities and public benefit' (2018) 2 New Zealand Law Journal 64 at 66.

[26] *Re Greenpeace of New Zealand Inc* [2014] NZSC 105, paras 59–70. See also *Re Collier (deceased)* [1998] 1 NZLR 81 at 89–90 (HC) and Kiefel J in *Aid/Watch*, above n 9, paras 71–73.

[27] A Parachin 'Distinguishing charity and politics: the judicial thinking behind the doctrine of political purposes' (2008) 45 Alberta Law Review 871; J Chia et al 'Navigating the politics of charity: reflections on *Aid/Watch Inc v Federal Commissioner of Taxation*' (2011) 35 Melbourne University Law Review 353, at 362–368. But see also Norton, above n 25.

[28] [1898] 2 Ch 638.

[29] *Re Bushnell* [1975] 1 WLR 1596, at 1605.

[30] Ibid. See also *Re Hopkinson* [1949] 1 All ER 346.

[31] See *Re Bushnell*, above n 29, where 'the advancement and propagation of the teaching of *socialised* medicine' was found to be political (emphasis added).

[32] *Southwood*, above n 18, para 29.

[33] Ibid.

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approach was recently taken by the New Zealand Supreme Court in finding that seeking to persuade people to a particular point of view was not education.[34]

This line between political propaganda which is non-charitable, and education that addresses political matters but is nonetheless charitable, can be hard to draw. It would seem that seeking to *change* laws or government policies is political propaganda. The promotion of demilitarisation in *Southwood v AG*, for example, was a challenge to the policies of Western governments and therefore non-charitable. In *Re Bushnell*, 'socialised medicine' necessarily required legislative change such that it was political.[35] By contrast, in *Re Koeppler's Will Trusts*,[36] the provision of conferences to promote greater cooperation in Europe and the West – which involved the exchange of views on political, economic and social questions of common interest – was held to be charitable even though the conferences concerned political matters. This was because the activities were not designed to procure changes in the laws or governmental policy. Moreover, approaching any political matters objectively appears to be crucial. Slade LJ noted that even where the conferences touched on political matters, they were 'no more than genuine attempts in an objective manner to ascertain and disseminate the truth'.[37]

Nonetheless, drawing a distinction based on whether the purpose is to change law or policy is not without its own difficulties. It is not always a clear and easy way of determining charitable status, and instead can result in artificial and contorted reasoning. This was illustrated in *Human Dignity Trust v Charity Commission for England and Wales*.[38] As a Tribunal decision, it shows the challenges that the orthodox political purpose doctrine, and the expansive approach taken in *McGovern v AG*, pose for those at the coalface of charity law when faced with a worthwhile organisation seeking charitable status. The Human Dignity Trust was established to support people whose human rights are violated by the criminalisation of private, adult, consensual homosexual conduct. It assisted people in bringing and defending legal cases both domestically and internationally. The Charity Commission found that the Trust's purposes violated the political purpose doctrine – as developed by *McGovern* – because they sought to change the law of foreign states where those laws criminalised homosexual conduct. On appeal, however, the Tribunal said the Trust was engaged in *upholding* the law, not changing it. The Trust's purpose was promoting human rights and it furthered this purpose by seeking to establish whether particular laws were valid through a process of constitutional interpretation. As such, the Trust was not seeking to change the laws of the relevant jurisdiction but rather to enforce and uphold the superior human rights and constitutional law. The Tribunal emphasised that the Trust only brought constitutional challenges in states where the Universal Declaration on Human Rights (UDHR) applied and there was a constitutional court competent to hear such challenges. Such constitutional litigation, said the Tribunal, was 'fundamentally different in nature' from activity held to be political (and thus not charitable) in *McGovern* and therefore the rationale for the doctrine did not apply.[39]

It is not at all clear, however, that a purpose that seeks to uphold (human rights) law – specifically, the UDHR – is in fact fundamentally different in nature from one that seeks to change the law, given the rationale for the political purposes doctrine. For example, the Tribunal stated that a process of constitutional litigation did not offend the separation of powers – one of the concerns behind the political purpose doctrine – in a constitutional (as opposed to Parliamentary) democracy. This is because interpreting law to enforce human rights (seen as different from changing the law) is part of the court's constitutional role even if it means that legislation is invalidated. Constitutional supremacy is a 'markedly different context', according to the Tribunal, from *McGovern* where there was a parliamentary supremacy.[40] While it is true

[34] *Attorney-General v Family First New Zealand*, above n 7, paras 66a, 91, 107a.

[35] This is despite the will making no direct reference to legislative change: R Cotterrell 'Charity and politics' (1975) 38 Modern Law Review 471, at 473.

[36] *Re Koeppler's Will Trusts* [1986] Ch 423.

[37] Ibid, at 437.

[38] *Human Dignity Trust v Charity Commission for England and Wales* (First-tier Tribunal (Charity), General Regulatory Chamber, Judge McKenna and Member Elizabeth, 9 July 2014).

[39] Ibid, para 65.

[40] Ibid, para 96.

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that a constitutional court will typically have the final say on interpreting the constitution in such democracies, this does not mean that all constitutional interpretation stays neatly within the bounds of legal (as opposed to political) questions. After all, the content of the separation of powers doctrine itself is fluid, with the edges of each branch of government regularly contested. A constitutional court will often decide the very boundaries of its own jurisdiction, the limitations on the powers of the legislature and executive, and the extent to which it is going to defer to the executive. What is political and what is legal is itself a highly charged political question. Moreover, seeking to have laws declared unconstitutional by a court – particularly those laws enacted by a democratically elected legislature – is not always different in nature from seeking to change the law. In fact, one could argue that constitutional litigation is potentially more problematic politically than seeking to change the law through advocacy and lobbying the legislature directly.[41] Similarly, an organisation that uses litigation to reverse decisions or policies of the executive, on the grounds that they are unlawful because they are inconsistent with human rights, is not fundamentally different from an organisation that seeks to change government decision-making or policy directly. Finally, the concern in *McGovern* to avoid prejudicing the UK's international relations does not seem to be assuaged by distinguishing between litigating to upholding human rights law against foreign governments and seeking to change their laws or policies.

A distinction between upholding and changing the law might be justified on a natural law view that recognises the validity of posited law as a function of its moral content among other things. Under such a view, ordinary laws that are at odds with the moral commitments animating the legal order are not valid laws and therefore can be disapplied or repealed. This view of the law helps to explain why the Tribunal in *Human Dignity Trust* reasoned that enforcing the UDHR – itself not a legally binding instrument – was *upholding* the law, not changing it, even where it ran counter to a country's ordinary laws.[42] However, a natural law view of the role of morality in adjudicating the validity of posited law is, as is well known, contested in general jurisprudence. For the legal positivist, agitating to have a validly created Act of Parliament declared unconstitutional because it offends the moral and political commitments of the state would clearly be seeking to *change* the law, not to uphold it.[43]

Good reasons may, of course, exist for granting charitable status to organisations that seek to uphold human rights. Indeed, the advancement of human rights is now recognised as a charitable purpose in legislation.[44] Nonetheless, *Human Dignity Trust* highlights the difficulties with the orthodox political purpose doctrine. To avoid its application (and to ensure that a worthwhile organisation was granted charitable status), an artificial distinction needed to be drawn between upholding the law and changing the law. This distinction does not reflect the reality of constitutional interpretation, nor does it avoid the concerns underpinning the political purpose doctrine. Moreover, by focusing on the anterior conceptual question of whether the Trust's purpose was political advocacy – and resolving that question the way it did – the Tribunal was able to implicitly recognise the moral status of human rights while avoiding addressing the public benefit of such advocacy which would have made difficult value judgments explicit.

In short, the approach in England and Wales to political purposes is problematic because, in its desire to avoid 'passing judgement' on the benefits and detriments associated with such purposes, it risks rendering charity law's public benefit requirement emptied or distorted. The process benefits associated with political purposes – discussed below in relation to the Australian approach – are also not recognised. At the same time, the English approach avoids addressing normative questions concerning public benefit – which can only be resolved by identifying the values underpinning the concept of benefit – by framing them as conceptual questions. In doing so, a contestable jurisprudential view risks being imposed by stealth.

[41]J Waldron 'The core of the case against judicial review' (2006) 115 Yale Law Journal 1346.

[42]*Human Dignity Trust*, above n 38, para 88.

[43]In this regard, note *Molloy v Commissioner of Inland Revenue* [1981] 1 NZLR 688 (CA), where advocating *not* to change abortion law was seen as indistinguishable from advocating to change the law, and therefore regarded as non-charitable (at 697).

[44]Charities Act 2011 (UK), s 3(1)(h).

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3. Canada

The approach in Canada is also problematic. This is in large part because Canada has gone beyond the orthodox political purpose doctrine and focused on activities, but also because it does not consider the process benefits associated with advocacy. Following English jurisprudence, Canada recognises the orthodox rule that an organisation whose main purpose is political advocacy cannot be a charity.[45] This is just the starting point, however, because until recently Canadian charities were subject to a further restriction on the extent to which they were permitted to engage in political advocacy in furtherance of their charitable purposes. To be clear, this restriction was unusual because under the orthodox rule charities can engage in political advocacy provided it is not their main purpose.

This additional restriction was the result of tax legislation, as interpreted by the Canada Revenue Agency (CRA). Under the law at the time,[46] an organisation with charitable purposes engaged in ancillary non-partisan political activities in furtherance of those charitable purposes was required to devote 'substantially all' of its resources to 'charitable activities' as opposed to its political activities. The CRA issued a policy statement declaring that, according to its interpretation of the legislation, it would usually take 'substantially all' to mean 90%. In effect, then, the law in Canada was that charities seeking income tax exemption were permitted to expend only up to 10% of their resources on political activities, even if their purposes were charitable and those political activities were ancillary to the charitable purposes. This took Canadian law well beyond the *Bowman* rule, and well beyond orthodox charity law. Usually, charity law is interested in purposes, not activities.[47] The Canadian approach took an interest in activities quite apart from purposes.[48]

The statutory provision, with its distinction between charitable and political activities, and the CRA interpretation, were challenged in *Canada without Poverty v Attorney General*[49] by an organisation formed for the charitable purpose of relieving poverty. Canada without Poverty sought to further its purpose by expending more than 10% of its resources on political activities. The Ontario Superior Court of Justice declared unconstitutional both the CRA's policy statement and the distinction between 'political activities' and 'charitable activities' drawn in section 149.1(6.2). It did so on the basis that the policy statement and the legislative provision violated the guarantee of freedom of expression, including political expression, in section 2(b) of the Canadian Charter of Rights and Freedoms (Charter).[50] The unconstitutional provision and policy statement have now been removed as a result of the decision in *Canada without Poverty*, and charities are no longer restricted in how much of their resources they may apply to political advocacy in support of their charitable purposes.

This concern for freedom of expression nonetheless left the *Bowman* rule untouched. The state remains free to decide whether or not to extend the privileges of charity to an organisation with political purposes. If it decides not to do so, there is no interference with free political expression. The organisation may engage in as much political expression as it likes. It is just unable to access the privileges of charity. Matters are different, however, once the state has recognised an organisation as a charity. Then, reasoned EM Morgan J, it is not open to the state, in light of protections in the Charter, to restrict that organisation's pursuit of political activities in furtherance of its charitable purpose. Having provided a subsidy to the organisation by recognising it as charitable, the state may not then wind back the subsidy because the organisation engages in political activities to what is perceived to be an impermissible extent. Winding the subsidy back in this way would constitute a suppression of constitutionally protected political expression.[51] This reasoning makes *Canada without Poverty* an

[45] *Human Life International in Canada v Canada (Minister of National Revenue)* [1998] 3 FC 202, para 12.

[46] Income Tax Act RSC 1985 c I (5th Supp) s 149.1(6.2) (Canada).

[47] Although the New Zealand position is different: *Attorney-General v Family First New Zealand*, above n 7, para 26.

[48] This was consistent with the overall approach to charitable status in the Canadian Income Tax Act: K Chan 'Constitutionalising the registered charity regime: reflections on *Canada without Poverty*' (2020) 6 Canadian Journal of Comparative and Contemporary Law 151, at 156–157.

[49] [2018] ONSC 4147.

[50] Ibid, paras 70–72.

[51] Ibid, paras 47–48.

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interesting case from a public law perspective. While the traditional view is that withholding a state subsidy does not violate freedom of expression,[52] a question remains around the constitutionality of conditioning such subsidy on limiting political expression.[53]

Although *Canada without Poverty* left the *Bowman* rule untouched, the difficulties in that case would not have occurred at all if an orthodox charity law position had been maintained. As we have explained, political advocacy in furtherance of a charitable purpose – an activity – is of little concern to the state under the *Bowman* rule. As such, the 10% rule would not have been adopted under the orthodox position and the case would not have got off the ground. Whatever approach to political purposes is adopted, it should be an approach that is concerned with purposes, not activities. Moreover, like the approach in England and Wales, Canada does not consider the process benefits associated with advocacy and has sought to address the question of political advocacy through an approach unwilling to tackle the difficult and threshold question of the public benefits and detriments associated with such advocacy.

4. New Zealand

New Zealand has had a complicated relationship with the political purpose doctrine. It has moved from accepting it, to rejecting it, to retreating to a position almost indistinguishable from the orthodox rule. Like Canada, New Zealand overly focuses on activities (rather than purposes) and has largely neglected the process benefits of political advocacy.

Until recently, the political purpose doctrine was accepted law in New Zealand in a range of cases starting most notably with *Molloy v Commissioner of Inland Revenue*, which explicitly adopted the *Bowman* rule.[54] However, in *Re Greenpeace* the Supreme Court questioned the authority for the political purpose doctrine and said that the doctrine had not been either 'necessary or beneficial'.[55] The court found that 'charitable and political purposes [were] not mutually exclusive' and this opened up the possibility that political advocacy could be a charitable purpose.[56] The 'proper focus', said the court, should be on 'whether a purpose is charitable within the sense used by the law'.[57] For political advocacy purposes – which will typically fall under the fourth head of charity (any other matter beneficial to the community) – this includes examining whether the purpose advances the public benefit.[58] The subsequent Supreme Court decision – *Attorney-General v Family First New Zealand* – expanded on this notion that the charitable status of political advocacy purposes – or, more specifically, advocacy for particular causes – should be approached through a public benefit analysis.[59]

While lauded by many, we have previously criticised the decision in *Greenpeace*.[60] This criticism has stemmed from how the court envisaged assessing the charitable status of political advocacy. Its public benefit assessment covers the *end* that is advocated for, in addition to the *means* promoted

[52]*Regan v Taxation without Representation* (1983) 461 US 540. See the discussion in M Harding *Charity Law and the Liberal State* (Cambridge: Cambridge University Press, 2014) p 186. This position was adopted by the New Zealand Supreme Court in *Attorney-General v Family First New Zealand*, above n 7, paras 156–160.

[53]*Citizens United v Federal Electoral Commission* (2010) 558 US 310 suggests that regulating the means and structures used for political expression can constitute an impermissible burden on free speech, although the implications of this decision for charities (particularly those outside the US) remain to be seen: JC Norton 'Charities and freedom of expression' (2019) New Zealand Law Journal 174, at 176.

[54][1981] 1 NZLR 688 (CA). See also *Re Collier (deceased)* [1998] 1 NZLR 81; *Re Draco Foundation (New Zealand) Charitable Trust* (HC Wellington CIV-2010-485-1275, 15 February 2011) and the earlier cases of *Re Wilkinson* [1941] NZLR 1065 and *Knowles v Commissioner of Stamp Duties* [1945] NZLR 522.

[55]*Re Greenpeace of New Zealand Inc* [2014] NZSC 105, para 59.

[56]Ibid, para 74.

[57]Ibid, para 69.

[58]Ibid, para 72.

[59]*Attorney-General v Family First New Zealand*, above n 7, paras 126, 138.

[60]M Harding 'An antipodean view of political purposes and charity law' (2015) 131 Law Quarterly Review 181; Norton, above n 25.

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to achieve that end and the *manner* in which the cause is promoted.[61] The difficulty is, as the court acknowledges, that the decision-maker may not be in a position to say whether the ends sought are beneficial in a way that the law recognises as charitable. While lack of controversy should not be determinative of charitable status, the court also thought that a decision-maker may struggle to determine whether the promotion of matters of opinion itself is beneficial, quite apart from the achievement of ends.[62]

The approach in *Greenpeace* risks being the worst of both worlds. First, without the political purpose doctrine, the court and regulator must pass value judgement on the ends sought by an organisation's advocacy purposes, which has led to contorted efforts to avoid such assessment. Secondly, the court in *Greenpeace* overemphasises the ends sought while underemphasising the process (means and manner) benefits of political advocacy.

In terms of assessing the ends sought, since *Greenpeace*, the challenges inherent in a value-based assessment – which gave rise to the doctrine in the first place – have seen New Zealand courts avoiding a full-throttled public benefit assessment of ends. This played out in the *Family First* litigation. In the Court of Appeal, the majority avoided assessing the benefit (and detriment) of the ends sought by finding that supporting the role and importance of families and marriage was 'self-evidently beneficial … as a public good'.[63] This was despite Family First supporting just one conception of family – the traditional family – to the exclusion of other forms. Of course, there is deep societal disagreement over the value of promoting this singular form of the family and the evidentiary basis for its desirability is contested. The court avoided acknowledging this disagreement – and the potential for Family First's purpose to cause harm if achieved – by saying the benefit was self-evident.

The Supreme Court reversed the Court of Appeal but again obscured the value judgements inherent in its decision. It found that the end advocated by Family First – which it said was the promotion of the *traditional* family (not just the family as the Court of Appeal had found) and the moral framework of a just and democratic society – did not disclose a charitable purpose even though advocating for human rights or protection of the environment did disclose such a purpose.[64] Human rights are, of course, heavily imbued with conceptions of morality and yet their promotion is now unquestioningly accepted as charitable. In terms of advocacy on free-standing political issues, the court concluded that this will usually not be charitable because of 'the lack of any means available to the Court to judge [its] public benefit'.[65] This looks remarkably like the traditional political purpose doctrine. The Supreme Court did, however, attempt to tackle a full public benefit analysis – what Lord Wright called 'the whole complex of resulting circumstances'[66] – by recognising the detrimental effects of discriminatory purposes.[67]

At the same time as requiring this difficult value judgement, the decision in *Greenpeace* – and its subsequent application in *Family First* – places little weight on the arguably more easily identifiable process benefits of political advocacy. Process benefits are those that arise from the act of advocacy itself rather than the ends sought to be achieved by it. An approach that focuses on the public benefit of means and manner irrespective of ends sought – as is taken in Australia, discussed below – may have allowed the court to engage in a public benefit analysis without the challenges of assessing the benefit of the ends sought. While *Greenpeace* recognised the process benefits associated with political purposes, it did not articulate this recognition clearly. The Court of Appeal in *Family First* went some way to recognising process benefits – at least where advocacy is connected to promoting a charitable purpose[68] – but the Supreme Court abandoned this path almost entirely.

[61] *Re Greenpeace of New Zealand Inc*, above n 55, para 76.
[62] Ibid, para 73.
[63] *Family First New Zealand v Attorney-General* [2020] NZCA 366, para 138.
[64] *Attorney-General v Family First New Zealand*, above n 7, para 131.
[65] Ibid, para 153. But see the concurring judgment of Williams J, para 180.
[66] *National Anti-Vivisection Society*, above n 12, at 47.
[67] *Attorney-General v Family First New Zealand*, above n 7, para 138.
[68] See *Family First New Zealand v Attorney-General*, above n 63, paras 109, 153.

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The result of the *Family First* litigation seems to be that New Zealand has retreated to the traditional political purpose doctrine in all but name. In addition to recognising political advocacy purposes in only very limited circumstances, the approach now seems focused on activities and operational matters, much like the Canadian position prior to *Canada without Poverty*. This approach also incentivises organisations that wish to engage in issue advocacy to state their purpose in general and abstract terms – 'promotion of the family'; 'protection of the environment' – and then argue that any issue advocacy is merely an ancillary means of furthering this abstract charitable end. Since the *Family First* litigation, however, the Court of Appeal in *Better Public Media* has recognised advocacy for the provision of public media as a charitable purpose.[69] While the Supreme Court decision in *Family First* remains the leading authority on New Zealand law, for reasons discussed below, the focus, in *Better Public Media*, on the manner and means of advocacy – and in particular the connection between civil society and liberal democracy – is encouraging.

5. Australia

The approach in Australia is more promising. The courts there recognised earlier than most that 'the case law dealing with the distinction between charitable purposes and political objects is in an unsatisfactory condition'.[70] The English law in *McGovern*, in particular, received full-frontal criticism from Australian courts and academics.[71] But it was the High Court decision in *Aid/Watch v Federal Commissioner of Taxation* that dealt the final death blow to the orthodox political purpose rule in that jurisdiction.[72]

The reasoning in *Aid/Watch* differs from those jurisdictions considered so far because it focuses on the public benefit associated with advocacy irrespective of the ends sought by the advocacy. In *Aid/Watch*, a majority of the High Court accepted that wider benefits – including process benefits – may flow from advocacy itself. Although heavily influenced by the freedom of political communication implied in the Australian Constitution, debate is seen to generate a public benefit because of the contribution it makes to political culture.[73] Political expression contributes to the vibrant political culture on which a representative and responsible system of government depends. That being said, under *Aid/Watch* the public benefit must still be linked to an extant charitable purpose.[74]

The strength of the Australian approach is that it can acknowledge the benefits of political advocacy – and the contingencies of the space in which modern charities are operating – while avoiding the concerns underpinning the orthodox *Bowman* rule. The approach potentially insulates decision-makers from having to pass judgement on matters outside their constitutional role, such as the merits of any particular course of legislative or executive action sought by the advocacy.[75] This approach means that, unlike the New Zealand position, value judgements do not need to be made about the (potentially controversial and political) ends sought by an organisation's advocacy.

Two difficulties remain, however, with the Australian position. First, there is no reasoned basis for recognising as charitable only those advocacy purposes that relate to an extant head of charity. If public benefit attaches to political advocacy irrespective of the end sought, then surely this should be so regardless of whether the end relates to an extant charitable head. Secondly, where an organisation is promoting a singular point of view or one side of a debate, it is unclear whether the High Court's emphasis on wider or indirect benefits associated with political advocacy still holds. The majority appeared to view the main purpose of Aid/Watch as promoting public debate about foreign aid delivery. However, as Heydon and Kiefel JJ pointed out in their dissenting judgments, this interpretation of

[69]*Better Public Media Trust v Attorney-General* [2023] NZCA 553 (*Better Public Media Trust (CA)*).

[70]*Royal North Shore Hospital of Sydney v Attorney-General (NSW)* (1938) 60 CLR 396, at 426 (cited in *Public Trustee v A-G (NSW)* (1997) 42 NSWLR 600, at 602).

[71]See eg *Public Trustee v A-G (NSW)* (1997) 42 NSWLR 600, 607. Also discussed in Chia et al, above n 27, at 358–359.

[72]*Aid/Watch Inc v Federal Commissioner of Taxation*, above n 9.

[73]Ibid, para 45.

[74]This is now also recognised in legislation: Australian Charities Act 2013, s 12.

[75]*Aid/Watch Inc v Federal Commissioner of Taxation*, above n 9, para 45.

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Aid/Watch's purpose is not unproblematic. According to these judges, Aid/Watch existed to promote a *particular* point of view on foreign aid delivery, not to promote debate generally. Then the question for charity law is whether this one-sided advocacy can be charitable. The majority in *Aid/Watch* seemed to recognise that such advocacy can nonetheless be charitable because it entails wider or indirect public benefits for a political culture that supports representative and responsible government under Australia's Constitution. However, if these wider or indirect public benefits are recognised independently (and regardless) of the ends sought, there might be dramatic consequences for charity law. Many non-charitable purposes might have wider or indirect benefits in public culture; is it now possible to argue that all these non-charitable purposes should be recognised as charitable because of their propensity to generate wider or indirect cultural benefits?[76]

These concerns are addressed to an extent by the High Court's articulation of a different limitation on the extent to which political advocacy is publicly beneficial. This limitation is drawn with reference to representative and responsible government within the constitutional order of the Commonwealth of Australia. Accordingly, political advocacy that does not further that governmental order is not of public benefit. In the following section, we argue that this approach is correct and aligns political advocacy with liberal democratic values.

In our view, of all the recent approaches to political purposes articulated in different jurisdictions, the approach in *Aid/Watch* has the most potential. It recognises the benefits of advocacy while avoiding the concerns underpinning the orthodox political purpose doctrine.

6. A way forward

While no jurisdiction remains unwaveringly committed to the orthodox rule, we have explained how none so far has approached the issue of political advocacy by charities adequately. In particular, no jurisdiction has properly confronted the public benefit – and detriment – of such advocacy.

Adopting a perspective that is internal to charity law in liberal democratic societies, this section of the paper proposes a way of assessing the public benefit of political advocacy. It argues that political advocacy can give rise to clear public benefit: the benefit is an indirect or process benefit associated with advocacy itself, regardless of the end advocated for. We also argue, however, that despite this benefit, recognising political advocacy purposes as charitable should still be subject to two main constraints. The first constraint is that recognising political advocacy purposes as charitable should be underpinned by the idea of altruism. Altruism is a constraint because it is the central organising idea of charity law.[77] In other words, an organisation that is not promoting altruism does not fit within the legal conception of charity. The second constraint is that assessing the public benefit of political advocacy should entail considering any detriments that may arise from that advocacy, including where the end advocated for offends liberal democratic values.

(a) The public benefit of political advocacy

It is difficult to argue that there is no public benefit associated with political advocacy. While an advocacy organisation is typically not providing services or other benefits directly to the public, it can provide *indirect* benefits. These benefits are distinct from any benefit that might arise from the ends sought by the advocacy.

The courts have long recognised indirect or wider benefits in charity law. Charities for the advancement of religion, for example, are seen to benefit the public indirectly. In *Neville Estates v Madden*, the court said that 'some benefit accrues to the public from attendance at places of worship of persons who

[76]A further difficulty is that the relationship between *Aid/Watch*, above n 9, and s 6 of the Australian Charities Act 2013 remains unclear – s 6 requires regard to be had to benefits and detriments to determine public benefit, but *Aid/Watch* seems to rule as a matter of law that political advocacy enhancing representative and responsible government within the Australian constitutional order is of public benefit. How does this ruling fit with the balancing exercise required by s 6?

[77]Harding, above n 52, pp 88–92.

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… mix with their fellow citizens'.[78] In *R (Independent Schools Council) v Charity Commission for England and Wales* the Tribunal recognised the possibility of wider benefits to the community from the activities of independent schools in England and Wales.[79] In *Royal Choral Society v IRC* the public benefit of a musical charity was considered to be 'raising the artistic taste of the country'.[80]

Political advocacy, it could be argued, provides indirect 'process' benefits – irrespective of any political objectives sought – by contributing to the thriving, diverse political culture necessary to sustain democracy. This argument aligns with that accepted by the High Court of Australia in the *Aid/Watch* decision when it found that the purpose of generating public debate about the efficiency of foreign aid was of public benefit quite separate from the merits of any particular course of legislative or executive action.[81] Political advocacy can provide different perspectives on, for example, laws and policies and this 'enriches public discourse' and helps to support the democratic and representative nature of institutions.[82] Such advocacy can also provide information to the public on proposed legislative and policy reforms and this may inform and encourage wider participation in any government consultation process; as well as assisting citizens in holding government to account in respect of law and policy. In this way, political advocacy can be seen as supporting a culture of free political expression and 'therefore tend[ing] to sustain and augment conditions under which democratic government can flourish'.[83] The importance for democracy of free political expression – including by a controversial charity whose views were being challenged – was recognised recently in *Mermaids v Charity Commission for England and Wales & LGB Alliance*:[84]

> The free communication of information, opinions and argument about the laws which a state should enact and the policies its government at all levels should pursue is an essential condition of truly democratic government … the fundamental rationale of the democratic process upon which our society is founded is that when competing views, opinions and policies are publicly debated and exposed to public scrutiny, the good will over time drive out the bad and the true will prevail over the false. Only when differing views are expressed, contradicted, answered and debated will the legislature be able to obtain the fullest picture of the views held by those they represent in order to create laws that are reflective of and required by society as a whole.

These differing perspectives advanced by political advocacy might include those of people or groups that are under-represented, marginalised or otherwise lacking in power – children, poor or disabled people, or refugees – who may struggle to have their voices heard without an organisation engaging in advocacy on their behalf.[85] Advocacy by charities can therefore 'mitigate those inequalities' in political speech and facilitate political participation.[86] In addition to providing different political ideas and perspectives, advocacy can make other contributions to democratic government, including by holding government to account and improving the quality of decision-making.[87]

Some have also gone so far as to argue that campaigning to change law and government policies is not only beneficial to democracy but integral.[88] Chesterman has pointed out that in the context of other areas of law, such as defamation, public discussion of matters of public interest to the

[78][1962] 1 Ch 832, at 853.
[79][2012] 2 WLR 100 (UT), para 37.
[80][1943] 2 All ER 101, at 105.
[81]*Aid/Watch Inc v Federal Commissioner of Taxation*, above n 9, paras 45–47.
[82]Chia et al, above n 27, at 385. Other commentators have also made this point, eg E Clark 'The limitation on political activities: a discordant note in the law of charities (1960) Virginia Law Review 439; GFK Santow 'Charity in its political voice – a tinkling cymbal or a sounding brass?' (1999) 18 Australian Bar Review 225. See also Harding, above n 52, p 189.
[83]Harding, above n 52, p 191.
[84]*Mermaids v Charity Commission for England and Wales & LGB Alliance* [2023] UKFTT 563 (GRC), para 68.
[85]Harding, above n 52, p 191.
[86]Chia et al, above n 27, at 366.
[87]Harding, above n 52, pp 190–191. See also Chia et al, above n 27, at 385.
[88]Chesterman, above n 10, at 344.

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community (including politics and governance) is seen as 'positively beneficial to the community'.[89] He then goes further and argues that any putative distinction between the value of information flow or public discussion (in the context of defamation law) and putative trusts to *change* law or government policy (in charity law) is arguably 'illusory'.[90] After all, the trustees of political advocacy trusts cannot change the law themselves. The most these trusts can do, continues Chesterman, is 'communicate to relevant government authorities, and to the electorate, arguments in favour of changing the law'. In other words, they convey information to the government and to the public.[91]

If, as claimed by Chesterman, this is all that advocacy by charities is – conveying information – the approach adopted in New Zealand (where the benefit of the ends sought must be assessed when determining charitable status) seems wrongheaded. It could also mean that advocating for discrimination in the provision of goods and services is unproblematic even though discriminating in their actual provision would be unlawful in most jurisdictions. If the ends sought are irrelevant, what value does advocacy really have? However, Chesterman may have overstated his case. While advocacy for change in law or policy can provide information to support democratic deliberation and decision-making, it also seeks to secure or advance a particular end. In this way, charities are different from the institutions that Chesterman analogises them with – news media – which, if they are to support democracy, must not advocate for particular political outcomes.[92] While Chesterman argues for the public benefit of advocacy by charities, he does not go so far as to argue the other way – that news media should be granted charitable status because they are publicly beneficial. After all, benefit to the community alone is not sufficient to confer charitable status – the organisation must also be pursuing charitable objectives. As we have explained, the courts have also long drawn a distinction between educational purposes (which are charitable) and campaigning purposes (which are not).[93]

In short, political advocacy must still have an overall public benefit. While there can be indirect or wider public benefits to democracy from political advocacy – including from the advocacy itself (irrespective of the ends sought) – these benefits will ordinarily not be sufficient in themselves to constitute public benefit for the purposes of charity law.[94] This is particularly the case where the indirect benefit is accompanied by detriment. And while advocacy for a change in law or policy *can* provide information to support democratic deliberation and decision-making, it does not always. This leads to the difficult question about where to draw the line regarding indirect benefits. In the next sections, we propose two limits on political advocacy. The first limit is that the organisation must be altruistic. The second limit is that – at least in a political community committed to liberal democracy – the organisation must be consistent with fundamental liberal democratic principles.

(b) Altruism

Charity law is committed to altruism (sometimes termed selflessness). As explained by Williams J in *Family First*, 'mere giving, even to deserving causes, is not charitable, if the way it is done is self-regarding'.[95] Moreover, 'selfless giving can operate as a touchstone or organising theory to assist in dealing with difficult cases'.[96] As this paper has shown, political advocacy cases are difficult.

Charity law's commitment to altruism is manifested in the public benefit requirement – in particular, the 'public' aspect of that requirement. Charity law is suspicious of gifts to private classes, member benefit arrangements and self-help groups.[97] This suggests a desire to reserve the preferments of

[89]Ibid, at 346.
[90]Ibid, at 348.
[91]Ibid.
[92]Recognised in New Zealand in the Court of Appeal decision *Better Public Media Trust (CA)*, above n 69.
[93]Eg *Re Koeppler's Will Trusts*, above n 36.
[94]Indeed, in New Zealand, the end sought also must be charitable, not just the means and manner.
[95]*Family First*, above n 7, para 168.
[96]Ibid, para 172 (Williams J).
[97]*Oppenheim v Tobacco Securities Trust Co Ltd* [1951] AC 297.

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charity only for those who organise to help 'others', or 'the stranger', rather than those to whom ties of loyalty or special obligation might be felt. While these elements of public benefit are an imperfect mechanism for ensuring that charity is reserved only for altruists,[98] they are nonetheless directed at that end. Equally, the requirement that charities must be organised on a not-for-profit basis is designed to ensure that charitable organisations are structured altruistically; this is no guarantee of altruistic motivations on the part of charity founders and workers, but charity law does create conditions in which people can express their desire to organise to help others with no expectation of return to themselves, which is part of altruism.

One of the difficulties with organisations that engage in political advocacy is that they may be promoting certain interests in a way that is not orientated towards helping those who do not share the same interests (or who may have conflicting interests). This may explain why an organisation whose purpose is to promote a political party cannot be charitable. While political parties do pursue public goods, in some instances they may be seen as 'animated [by] a self-interested desire for political power or a partisan desire to promote the interests of one or another group in society'.[99] That said, as explained elsewhere, politics itself is not inconsistent with altruism. Indeed, some of the political purpose trusts discussed so far – those for the promotion of human rights or protection of the environment – could be seen as examples of altruism.[100] Without a blanket prohibition on political purposes, the challenge may be distinguishing altruistic political purposes from self-regarding ones in individual cases.

Generally speaking, whether a political purpose is altruistic may depend on whether it is aimed at producing a public good or a private advantage. It could be argued that political objectives orientated towards changing law or policy – where they aim to produce public goods – are likely to be altruistic.[101] By contrast, political purposes aimed at securing a private advantage or interest (such as a government subsidy or other financially favourable outcome) without regard for the public impact or common good are unlikely to be altruistic.[102] Indeed, they risk 'corrupt[ing] political processes and undermin[ing] democratic government'.[103] The distinction may turn on 'the degree of objectivity surrounding the endeavour to influence'.[104]

While this distinction may be challenging in some cases, should political advocacy for particular perspectives and interests be recognised as a charitable purpose, this commitment to altruism would help to ensure that political purposes are indeed for the *public* benefit and that public trust and confidence in the charitable sector is maintained.

(c) Liberal democratic values

The charity law that we are concerned with arises in the context of political orders that are committed to liberal democratic values. These shared values form the basis of our system of government. While the values are often couched in terms of human rights – and a commitment to non-discrimination and other human rights are now generally accepted as a fundamental requirement of any liberal democratic state – they extend beyond rights given to individuals and include concepts such as equality, participation, representation, accountability and transparency. Therefore, we refer to liberal democratic values, rather than human rights, as the second constraint on political advocacy as charity.

The difficulty with human rights language in the context of charities is not, however, just one of under-inclusivity. Human rights also only takes us to so far when thinking about charity law in

[98]See the difficulties discussed in the various judgments in *Oppenheim* ibid.

[99]Harding, above n 52, p 200.

[100]Ibid, p 198.

[101]Ibid, p 199.

[102]Ibid, pp 200-201. But note also J E Penner 'Autonomy, religion and politics: reflections on Matthew Harding's *Charity Law and the Liberal State*' (2016) 41 Australian Journal of Legal Philosophy 126, at 136–138.

[103]Harding, above n 52, p 200.

[104]*Public Trustee v A-G (NSW)* (1997) 42 NSWLR 600, at 608.

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particular. This is partly because the foundations of charity law have developed from 'centuries of incremental common law reasoning … not against a backdrop of human rights'.[105] But it is also because human rights in law could be seen as simply rules constraining or prescribing state behaviour.[106] As such, the values (or foundations) underpinning these rights – and there are many of them – are often obscured and how they ought to be realised highly contested.[107] In contrast, the central question of charity law – the question of public benefit – is *inherently* about values and therefore cannot be answered simply by appealing to the legal recognition of human rights. This question demands direct recourse to our political order's underlying liberal democratic values, unmediated by rights claims. This means that, in the context of charity law and political advocacy, the state has a rare opportunity to articulate not only what is and is not to be tolerated, but also what is and is not to be encouraged, celebrated and held up as especially worthy within a liberal democratic order. It is these worthy purposes that will be found to have public benefit for the purposes of charity law.

We suggest, therefore, and without attempting to provide a comprehensive account, that an appeal to these underlying liberal democratic values can help determine which political advocacy organisations ought to be recognised as charitable.[108] The question of public benefit, in a liberal democracy, is necessarily informed by these values. Charity plays a 'key role … in sustaining our liberal democracy and society [and this] logically require[s] basic coherence between core political norms and charitable objects'.[109] While we have explained how political advocacy can generate benefit (including for the realisation of liberal democratic values such as freedom of expression), it may also lack public benefit for the purposes of charity law because either the *ends* sought or the *manner* in which they are pursued is inconsistent with liberal democratic values. In this way, liberal democratic values can help identify those purposes that are beneficial to the public and at the same time inform judgements about those that are not.

We will look first at the ends sought. Some political advocacy could be seen as entailing detriment because the end advocated for is inconsistent with liberal democratic values (at least, in a political order that is committed to these values). This would include political advocacy that stands to erode or undermine liberal democracy or the institutions and values that sustain it – such as equality, non-discrimination, free political expression, public participation and so on.[110] The case of *Family First* in New Zealand could be seen as an example of this. Here the organisation was not just promoting a *particular* or *singular* version of the family but seeking to disadvantage others through law reform that would remove (rather than secure) recognition and support from non-traditional families.[111] In other words, Family First was promoting discriminatory, anti-liberal ends. Such ends are viewed, by a political order committed to liberal values, as producing a detriment.[112] This reasoning would also explain why the *Human Dignity Trust* decision is justified, given that the Trust's purpose was concerned with the promotion (rather than the removal) of human rights. An object to remove racial discrimination in legislation – while political advocacy under the orthodox rule – could be considered

[105]Norton, above n 53, at 177.

[106]J Raz 'Human rights without foundations' in S Besson and J Tasioulas (eds) *The Philosophy of International Law* (Oxford: Oxford University Press, 2010).

[107]J Tasioulas 'On the foundations of human rights' in R Cruft et al (eds) *Philosophical Foundations of Human Rights* (Oxford: Oxford University Press, 2015); J Tasioulas 'On the nature of human rights' in G Ernst and J Heilinger *The Philosophy of Human Rights* (De Gruyter, 2012); J Griffin *On Human Rights* (Oxford: Oxford University Press, 2008); and J Nickel *Making Sense of Human Rights* (Oxford: Wiley-Blackwell, 2nd edn, 2007).

[108]For a fuller exploration of how liberal philosophical commitments can underpin charity law see Harding, above n 52.

[109]Chia et al, above n 27, at 391.

[110]Harding, above n 52, p 193; M Turnour and E Turnour 'Archimedes, Aid/Watch, constitutional levers and where we now stand' in M Harding et al (eds) *Not-for-Profit Law: Theoretical and Comparative Perspectives* (Cambridge: Cambridge University Press, 2014) p 37, at p 56.

[111]*Family First*, above n 7, para 137.

[112]*Catholic Care* [2010] EWHC 520 (HC), paras 97–99.

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charitable for similar reasons.[113] Outside the discrimination context, advocacy relating to the quality and accessibility of public media – now recognised as advancing a charitable purpose in New Zealand – can be seen as enhancing democratic institutions and consistent with liberal democratic values such as free political expression and public participation.[114]

An approach that considers the ends sought by the advocacy is not free from objection. As we have seen in New Zealand, such an approach can be problematic in practice because the decision-maker may struggle to determine the public benefit of ends, especially where those ends are abstract and intangible. This difficulty is heightened where the benefit of the ends sought is controversial or contested. As the Tribunal in the UK observed, it is not its (nor the Charity Commission's) function to tell people what to think, or to regulate public debate in a context where there are deeply held, sincere, beliefs on all sides of the discussion'.[115]

Where a requirement is imposed that ends must be consistent with liberal democratic values, a further objection arises. It could be argued that this requirement would unjustifiably limit freedom of expression which is, after all, central to any liberal democracy.[116] The state, the argument goes, ought not to favour (or condemn) one conception of the good and therefore should be neutral as to the content and viewpoint of expression. Indeed, there are good reasons to be suspicious of any government attempts to restrict political speech and extensive literature is devoted to this topic.[117] However, this argument from neutrality may be misguided, or at least overstated, in the context of charity law. It transplants principles and reasoning from constitutional law (specifically First Amendment jurisprudence from the US) – which themselves are contested – to charity law. The principle of toleration could be said to be concerned with the limits of coercive state action (such as criminalisation) aimed at prohibiting speech.[118] That principle supports freedom of expression – we ought to tolerate expression (and conceptions of the good) that we disagree with – except in the most egregious of circumstances. It is not concerned with advancing some conception of the good life. By contrast, charity law is not based on the principle of toleration or concerned with coercive state action. Instead, it 'operates via non-coercive strategies' to actively promote (rather than merely tolerate) particular conceptions of the good.[119] As such, it is not simply tolerating purposes and activities that are undertaken by charities – which implies disagreement with, or 'adverse judgment' of, them[120] – but it is actively supporting them through granting them certain (most notably fiscal) privileges. This support is withheld where a purpose – such as one that promotes discrimination – 'would tend to undermine a liberal culture characterised by empathy, trust and respect'.[121]

This all means that, in charity law, the decision-maker *cannot* be neutral as to whether a charity is for the public benefit. If a court has to determine charitable status, it is unavoidable that it must also

[113]*Public Trustee v AG (NSW)* (1997) 42 NSWLR 600. Santow J's point here, however, was not about the value of non-discrimination but rather that there may be no violation of the orthodox political purpose rule at all in such cases because the advocacy is consistent with the trend in law and policy towards anti-discrimination. See also Santow, above n 82, at 234.

[114]*Better Public Media Trust (CA)*, above n 69, paras 84, 89, 99.

[115]*Mermaids v Charity Commission for England and Wales and LGB Alliance* [2023] UKFTT 563 (GRC) para 66.

[116]Some authors have also criticised the prioritising of discrimination and other public law norms over a charity's autonomy and other competing considerations. See K Chan *The Public-Private Nature of Charity Law* (Oxford: Hart Publishing, 2016) p 66; A Parachin 'Public benefit, discrimination and the definition of charity' in K Barker and D Jensen (eds) *Private Law: Key Encounters with Public Law* (Cambridge: Cambridge University Press, 2013) pp 204–205.

[117]Eg N Strossen *Free Speech: What Everyone Needs to Know* (Oxford: Oxford University Press, 2023); A Meiklejohn *Free Speech and Its Relation to Self-Government* (Lawbook, 2011); E Barendt *Freedom of Speech* (Oxford: Oxford University Press, 2nd edn, 2005); F Schauer *Free Speech: A Philosophical Inquiry* (Cambridge: Cambridge University Press, 1982).

[118]J Raz 'Autonomy, toleration, and the harm principle' in S Mendus (ed) *Justifying Toleration. Conceptual and Historical Perspectives* (Cambridge: Cambridge University Press, 1988).

[119]Harding, above n 52, p 237.

[120]L Green 'On being tolerated' in M Kramer et al (eds) *The Legacy of HLA Hart* (Oxford: Oxford University Press, 2008) pp 284–285.

[121]Harding, above n 52, p 237.

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consider whether the purpose is beneficial to the public.[122] The state may decide not to support certain expression through charitable status because that expression seeks to undermine democratic institutions or is otherwise inconsistent with the values the state wishes to promote (such as non-discrimination) even if it would be illegitimate for the state to suppress the expression entirely.[123] A political advocacy organisation whose purposes are inconsistent with liberal democratic principles will likely not be for the public benefit regardless of any indirect benefits that may result from its advocacy.[124]

We turn now to cases in which the *manner* in which political purposes are pursued is inconsistent with liberal democratic values. While advocacy may provide process benefits, these benefits may also be lacking where the advocacy is undertaken in a *manner* that does not support these underlying values. Put another way, while 'a culture of free political expression' could be seen as 'a public good because of the special contribution [it] makes to democratic government',[125] advocacy that does not contribute to this culture (and by extension democratic government) lacks this benefit. It is not valuable for the purposes of democracy (although it may be seen as valuable in other respects). The state then has little reason to support it by granting it charitable status. This argument is consistent with the reasoning in *Aid/Watch* and would explain why the New Zealand courts could deny charitable status in *Family First* yet grant it in *Better Public Media*.

This distinction – between advocacy that contributes to a democratic culture and that which does not – has received some judicial recognition. While promoting controversial causes was not disqualifying in itself, in his concurring judgment in *Family First*, Williams J saw the lack of fairness, balance and respect in the organisation's advocacy as being inconsistent with the principle of selflessness (what we have called altruism) underpinning charity law.[126] In addition to reflecting altruism, such qualities, he observed, can also contribute to social cohesion, empower individuals to make up their own minds, and help communities 'to navigate … through difficult issues'.[127] Family First's advocacy was 'plainly too one-sided and therefore too self-referential' to provide this benefit.[128] In fact, according to Williams J, Family First's one-sided and self-referential advocacy possibly 'produc[es] social disbenefit' because it is 'not about community; it is about self'.[129] Heydon J took a similar approach in his dissent in *Aid/Watch* where he would have declined Aid/Watch's charitable status noting that its 'views were not put in a manner inviting a response, but in a manner seeking compliance … the appellant wanted its views to be implemented, not debated. It wanted obedience, not conversation'.[130] By contrast, the advocacy in *Better Public Media* was seen as beneficial because it was undertaken in a 'balanced and measured manner'[131] and was 'respectful and professional'; it 'air[ed] opposing viewpoints and encourag[ed] informed discussion'[132] and it 'genuinely endeavour[ed] to present a range of viewpoints and to assist in informing viewers and readers of the issues associated with public media'.[133] Such advocacy could be said to be consistent with democratic values and the process benefits of advocacy that we identified earlier.

The argument that *how* one advocates (and not just *what* one advocates for) should be a factor in determining charitable status is open to criticism. How can one-sided speech not be valuable to

[122] *National Anti-Vivisection Society*, above n 12.

[123] Harding, above n 52, p 194. See also C Brettschneider *When the State Speaks, What Should It Say?: How Democracies Can Protect Expression and Promote Equality* (Princeton: Princeton University Press, 2012) where the author distinguishes between expressive and coercive state action.

[124] For discussion of discrimination by charities outside of the advocacy context see Harding, above n 52, ch 7.

[125] Ibid, p 190.

[126] *Family First*, above n 7, para 181.

[127] Ibid, para 180.

[128] Ibid, para 177.

[129] Ibid, para 175.

[130] *Aid/Watch Inc v Federal Commissioner of Taxation*, above n 9, para 58.

[131] *Better Public Media Trust (CA)*, above n 69, para 93.

[132] Ibid, para 96.

[133] Ibid, para 104.

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democracy when that is typically the very sort of speech that politicians engage in on the campaign trail and in the debating chamber? Indeed, advocacy could be said to necessarily require one-sidedness and to expect neutrality could empty it of its value and utility. Criticising Heydon J's dissent in *Aid/Watch*, some noted that an approach that requires impartiality means more value, or public benefit, is placed on subscribing to *no* position than 'stand[ing] for something and seek[ing] to convince others of it'.[134] Moreover, we should be wary of basing the recognition of valuable political expression on an idealisation of how public debate should operate divorced from political reality.[135] Preferring certain political expression based on manner of delivery could also further entrench power by deeming only some 'acceptable' voices beneficial to the political conversation rather than those that seek to challenge the status quo. There may be a case for 'unreasoned, intemperate, and emotive acts of political expression' in a democracy if they motivate the government to be more responsive to marginalised voices and groups.[136]

The courts seem to acknowledge this criticism (at least in New Zealand) when they say that advocacy for a viewpoint, or one side in a debate, is not disqualifying in itself. However, as we have seen, the limitations they have then placed around charitable advocacy – such as objectivity, balance, and universal acceptance – make it difficult for organisations that engage in viewpoint advocacy for controversial (in other words, not universally accepted) causes to obtain charitable status. As seen with *Family First*, this difficulty is heightened when the way the advocacy is conducted is seen as inconsistent with democratic values. Nonetheless, we argue that this approach is defensible because the role of charities is different from that of politicians and party politics. The values underpinning charity law also differ from principles such as toleration that underpin rights protection more generally. As we have explained, charity law is concerned with the notion of public benefit. This means that advocacy must be for the *public* which, as Williams J explained, may be lacking where the advocacy is self-referential rather than altruistic. Moreover, the *benefit* of advocacy is that it has the potential to advance democratic values. Therefore, advocacy that undermines – or at least does not support – democracy, for example, by depriving the listener of the information needed to make an informed decision, lacks benefit and may even produce a social detriment.

Conclusion

We have argued that political advocacy by charities has not been adequately addressed across the common law world. Crucially, no jurisdiction has properly confronted the public benefit – and detriment – of political advocacy. This is disappointing given that the nature of charity is changing and an increasing number of organisations are engaging in advocacy.

The approach in England and Wales does not recognise the process benefits associated with political purposes, instead seeking to turn normative questions into conceptual questions. The Canadian approach also does not recognise the process benefits associated with political purposes and, counter to charity law orthodoxy, has been distracted by questions relating to activities rather than purposes until recently. The New Zealand approach does little to recognise the process benefits associated with political purposes (at least at the Supreme Court level) and, due to its requirement that ends sought by advocacy must be assessed for public benefit, has almost retreated to the orthodox position in all but name. The Australian approach recognises process benefits most clearly and – at least more than any other approach – articulates their basis (and limitations) in liberal democratic commitments; however more could be done to spell out the values animating the benefits and the limitations, and the case of political parties suggests that there is more thinking to be done on the implications of charity law's commitment to altruism when it comes to political purposes.

The way forward likely lies in further elaboration and reflection on the Australian approach. However, embedded in that approach is a potential threat to the coherence and plausibility of charity

[134]Chia et al, above n 27, at 376.
[135]Ibid, at 381.
[136]Harding, above n 52, p 195.

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law as a whole. This is the recognition that indirect or wider benefits might suffice for a finding of public benefit in relation to some class of purposes. If this is to continue, lawmakers will have to articulate clear and cogent limits on the circumstances in which such benefits will be recognised, or there will be an explosion of new purposes being recognised as charitable on the back of arguments about indirect or wider benefits. This paper has suggested a place to start when determining those limits, by appealing to the principle of altruism and the values underpinning liberal democracy.

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