

Charity begins at the politically correct home? The *Family First* case

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I Introduction

Is advancing the traditional or nuclear family uncharitable? Is it “controversial” and impermissibly political “propaganda” in the 21st century to advocate the two-parent, opposite-sex, married couple as the optimal domestic configuration in which to have and raise children? The Charities Registration Board (NZ) thought so and deregistered the organisation that had the temerity to advance it: Family First New Zealand.

It is not as though deregistration is an infrequent occurrence. There are a huge number of charities in New Zealand: 27,072, that have a combined income of \$16.41 billion.¹ But just as some charities bloom, others are scythed down if they fail to bear fruit. In 2013 the Inland Revenue reported that 3,902 charities had been deregistered since the Charities Register had been opened in February 2007.² This means around 15 per cent, or some one in six, of the then around 26,000 charities were axed.³

Back to the case at hand: it needed an expensive appeal to the High Court for Family First,⁴ an outspoken conservative entity, to ensure that its deregistration as a charity was revisited. This article examines the Family First deregistration decision and, although it is hardly a landmark case, its significance, I suggest, lies as a particularly clear example of official institutional antipathy towards the conservative political and religious understanding of domestic personal relations.

II Background to the Family First New Zealand Appeal

The Family First New Zealand Trust (FF) was created in 2006 and FF was also incorporated under the Charitable Trusts Act 1957 in that same year. FF’s purposes include “to promote and advance research and policy supporting marriage and family as foundational to a strong and enduring society.”⁵ The next year it was registered under the Charities Act 2005.⁶

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¹ Charities Services (located within the Department of Internal Affairs) website: <<https://charities.govt.nz/>> (as at 14 October 2015).

² Susan Barker, “Deregistered charities” [2014] NZLJ 87 at 87.

³ At 87.

⁴ *Re Family First New Zealand Ltd* [2015] NZHC 1493, (2015) 27 NZTC 22-017 (HC) (“Family First”).

⁵ At [3].

⁶ Number CC 10094, registered on 21 March 2007.

The Charities Commission in 2009 reviewed FF's operations to determine if it still warranted its charitable status and a year later concluded it did.⁷ A restructuring of charity regulation in 2012 saw the Charities Registration Board (Charities Board) and the Department of Internal Affairs replace the Commission. The Charities Board comprises three persons who "must act independently in exercising [their] professional judgement".⁸

In September 2012, the Department recommended to the Charities Board that FF be removed from the Charities Register. In the Department's view, FF had succumbed to advocating a political viewpoint. On 15 April 2013, the Board resolved to deregister FF.⁹ Family First duly appealed and the High Court, on 17 June 2013, granted an interim order under s 60 of the Charities Act allowing FF to stay registered pending the outcome of a Supreme Court judgment in the *Greenpeace* case. This important decision was delivered on 6 August 2014.¹⁰ The Supreme Court decision – on, in my opinion, any reasonable and non-tortured reading – called for a prompt reconsideration of the FF deregistration and, equally I suggest, FF's eventual reinstatement. But this did not happen.¹¹

The Charities Board recognised the Supreme Court's judgment in *Greenpeace* introduced changes to the law concerning the charitable status of entities that have a political purpose. However, the Charities Board believed it could not reconsider its decision concerning Family First unless Family First's appeal was allowed and the Charities Board directed to reconsider its decision.

So, and this bears emphasis, despite having the benefit of the Supreme Court's unusually clear ruling, the Charities Board put FF to the expense¹² and stress of seeing through the appeal to the High Court lodged a year earlier, winning its case and only then – once the Board had been ordered to do so by the Court – would it reconsider its original deregistration decision. The Board, *ex abuntanti cautela*, might have thought that it had no power to reconsider FF's eligibility for registration without first

⁷ *Family First*, above n 4, at [6]–[7].

⁸ Charities Act 2005, s 8(4)(a). The Chairman, Mr Roger Holmes Miller, is a Wellington lawyer and Registered Trustee, whose specialisations include trust law and governance. Ms Caren Rangī is a chartered accountant and audit specialist from Napier. Mr Simon Karipa is currently General Counsel for Te Ohu Kaimoana (the Māori Fisheries Trust): <<https://www.charities.govt.nz/about-charities-services/charities-registration-board/>>.

⁹ *Deregistration decision: Family First New Zealand*, Charities Board (CC 42358), Decision No D2013-1, 15 April 2013 ("Board"): <<https://charities.govt.nz/charities-in-new-zealand/legal-decisions/view-the-decisions/view/family-first-new-zealand>>.

¹⁰ *Re Greenpeace of New Zealand Inc* [2014] NZSC 105, [2015] 1 NZLR 169.

¹¹ *Family First*, above n 4, at [74].

¹² The legal cost for the Board to take the Family First case to court was \$32,894 (not including GST): letter from Charities Services, Internal Affairs (on file with author).

receiving a green light in the form of a court ruling. The appeal against deregistration having already been lodged, the Board might have believed it was best to see the matter run its course.

The Act, on my reading, is simply silent on when, how, and under what circumstances, a reconsideration takes place. There is brief mention of the Board's duties in respect of assessing a *new* application for registration from a deregistered charity.¹³ But there is no express provision permitting the Board to reconsider a yet-to-be-implemented decision to deregister a charitable entity. By the same token, neither is there any provision preventing it from doing so. There is a hint that unnecessary formalities are not to be generated: s 19(3) states that "the Board is not required to follow a formal process" when it evaluates an originating application for registration as a charity. Logic would suggest the same approach be followed for reconsideration of determinations to expunge existing charities and, for that matter, fresh applications by a deregistered entity.

To return to the legislative scheme more generally, under the Charities Act 2005 a trust qualifies for registration if it derives income for charitable purposes (s 13) and the Act adopts the venerable statement of Lord Macnaghten in *Pemsel*:¹⁴

5. Meaning of charitable purpose and effect of ancillary non-charitable purpose

- (1) In this Act, unless the context otherwise requires, charitable purpose includes every charitable purpose, whether it relates to the relief of poverty, the advancement of education or religion, or any other matter beneficial to the community.

The section goes on to provide that any non-charitable purpose that is merely ancillary to the charitable one is not fatal.

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

¹³ Charities Act 2005, s 31(4).

¹⁴ *Commissioners for Special Purposes of the Income Tax v Pemsel* [1891] AC 531 at 583.

In determining an entity's purposes, its activities must also be taken into account, to the extent that the latter assists in evaluating:¹⁵

- (1) the meaning of a stated purpose where the stated purpose is capable of bearing more than one meaning;
- (2) whether the entity is undertaking an unstated non-charitable purpose;
- (3) whether the entity's purposes provide a benefit to the public; and
- (4) whether a non-charitable purpose falls within the saving provisions of s 5(3) of the Charities Act.¹⁶

The deregistration of a body cannot occur unless the Board is satisfied that it is "in the public interest" to do so.¹⁷

The Board, in concluding that FF was a candidate for deregistration (primarily on the basis that it was engaged in political advocacy) was "heavily influenced"¹⁸ by the Court of Appeal judgment¹⁹ in *Greenpeace*.

III The Charities Board Decision

Deregistration was, according to the Board's analysis, justified on three bases.

First, it held that FF's main purpose was to "promote points of view about family life" and this was a non-charitable political purpose lacking a self-evident public benefit.²⁰ Second, FF had an independent purpose to procure government action consistent with FF's stance, and this purpose was a non-charitable, political one that was not ancillary to any valid charitable purpose. Third, FF's purpose to advance its views about family life was not a charitable purpose of an educational or religious nature, nor was it beneficial to the public within the fourth category of charity.

*A Political purposes that are not self-evidently beneficial to the public*²¹

The Board suggested that there are three types of political purposes excluded from the notion of a charity:²² furthering the interests of a particular political party; purposes to procure governmental actions (including through legislation); and, thirdly, purposes "to promote a point of view, the public benefit of which is not self evident as a matter of law."²³

¹⁵ Charities Act 2005, s 18(3)(a)(i)(ii).

¹⁶ *Family First*, above n 4, at [24].

¹⁷ Charities Act 2005, s 35(1).

¹⁸ *Family First*, above n 4, at [39].

¹⁹ *Re Greenpeace of New Zealand Inc* [2012] NZCA 533, [2013] 1 NZLR 339.

²⁰ *Board*, above n 9, at [32].

²¹ See generally Juliet Chevalier-Watts *Law of Charity* (Thompson Reuters, Wellington, 2014) at § 7.5.

²² *Board*, above n 9, at [38], citing *Re Collier (Deceased)* [1988] 1 NZLR 81 at 89–90.

²³ Above.

The Board focused upon the third kind of excluded political purpose. Careful parsing of the FAQ section of FF's website on what it meant by "family" revealed that this organisation strongly supported the "natural family", that is:²⁴

... the union of a man and a woman through marriage for the purposes of sharing love and joy, raising children, providing their moral education, building a vital home economy, offering security in times of trouble, and binding the generations.

FF affirmed "the marital union to be the authentic sexual bond", "the sanctity of human life from conception to death", "the complementarity of the sexes is a source of strength" amongst other propositions in an 11 item list. FF's stance on families was, said the Board, "an opinion or value judgment."²⁵ In a key passage we learn that:²⁶

The Board also considers that the Trust's perspective on family is one that is *controversial* in the relevant sense, ie that its benefit to the public is not self-evident as a matter of law. The Board considers it can be *taken as a given* that there is no relevant self-evident benefit to specific positions on conscience issues such as procreation outside of marriage (point 6), the definition of marriage as a union between a man and woman (point 2), the sanctity of life from conception to death (point 7). Moreover, the Board considers that the Trust's [ie, FF's] opinion that the government must shelter and encourage the "natural family" (point 8); its opinions regarding the consequences of the demise of the "natural family" [viz "moral and political failure" resulting in "poverty, starvation and environmental decay"] (points 5 and 9); its prescription for the role of men and women in family life (point 10) and its advocacy against an individual rights perspective [viz "the natural family, not the individual, is the fundamental social unit"] (point 1) are fairly described as *controversial in contemporary New Zealand society*.

Further careful website investigation revealed "the controversial nature of the Trust's advocacy for 'the natural family'"²⁷ – this position being starkly apparent from another long list of policies it promoted to politicians. These policies included those to: "protect marriage in law as one man-one woman", "end discrimination against stay-home parents", "amend section 59 [of the Crimes Act 1961] to decriminalise parents who use light smacking for correction of children", "promote married couple adoption", "oppose euthanasia", "criminalise the act of pimping and brothel keeping", "reduce the availability of pornography" and so on.²⁸

The Board rejected the submission that FF's agenda accorded with the international and domestic law concerning family life and children's rights. "Neither New Zealand's international law obligations nor New

²⁴ Point No 2 in FF's lengthy 11-fold answer to the FAQ "What do you mean by family?": at [44].

²⁵ Board, above n 9, at [45].

²⁶ At [46] (emphasis added).

²⁷ At [47].

²⁸ At [47].

Zealand's domestic law", it maintained, "favour 'the natural family' over other forms of family."²⁹

The Charities Board was incorrect, at least with respect to the international position. Beginning with the Universal Declaration of Human Rights 1948, the UN has consistently assumed the traditional or natural family in its conventions that mention the "family".³⁰ Article 1(3) of the Declaration states that "the family is the natural and fundamental group unit of society and is entitled to protection by society and the State." And as for what is a family, art 16(1) strongly implies that it is the traditional nuclear one. That article reads: "Men and women of full age ... have the right to marry and to found a family." It could hardly be clearer. The International Covenant on Civil and Political Rights 1966 reiterates these propositions.³¹ Later Resolutions (not, be it noted, Conventions) have admittedly proffered more inclusive and broader concepts of the "family in its various forms".³²

This year, on 3 July 2015, the UN Human Rights Council in Geneva passed a resolution on the Protection of the Family.³³ The Resolution:³⁴

Reaffirms that the family is the natural and fundamental group unit of society and is entitled to protection by society and the State,

Notes with concern that the contribution of the family in society and in the achievement of development goals continues to be largely overlooked and underemphasized, and recognizing the potential of the family to contribute to national development and to the achievement of major goals of every society... including the eradication of poverty and the creation of just, stable and secure societies.

The resolution was passed by 29 votes to 14, with 4 abstentions. Those nations in the minority include Western countries, such as the US, France,

²⁹ At [48].

³⁰ This phrase was used by the UN in the International Conference on Population and Development, Cairo (1994), UN Doc A/CONF 171/13 (1994) at ¶5.1. See Maria S Aguirre and Ann Wolfgram "United Nations Policy and the Family: Redefining the Ties that Bind" (2002) 16 BYU J Public Law 113.

³¹ ICCPR 1966, art 23: "(1) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State. (2) The right of men and women of marriageable age to marry and to found a family shall be recognized."

³² See Aguirre and Wolfgram, above n 30, at 116 ff.

³³ A/HRC/29/L.25.

³⁴ Above (original emphasis).

Germany and the UK, with “liberal” or “progressive”³⁵ (for want of more accurate epithets) agendas to advance, inter alia, wider notions of the family and the promotion of reproductive and LGBT rights.³⁶

On the domestic front, however, the Charities Board was on firmer ground. The recognition of other forms of family beyond the traditional nuclear one is a well documented phenomenon. As Professor Mark Hengahan summarises:³⁷

current legal policy on the concept of the family is moving from a primarily moral [traditional married nuclear family] view to a much greater recognition of a wide variety of family relationships. This means a significantly wider variety of relationships have been given legal status and recognition by family law legislation in recent times. The primary driving force behind this change is the idea of equality as expressed in anti-discrimination law. This concept of equality assumes that personal relationship are essential the same, and for that reason should be treated the same...

B Independent purpose to procure government action

FF had the purpose to procure governmental action reflecting its views.³⁸ Propaganda directed to *private* individuals and corporations to advance charitable objects is permissible, whereas that directed to political actors, such as Members of Parliament, is not.³⁹ The Board considered that FF’s stated purposes and activities pointed towards an independent or stand-alone purpose to procure political actions. The calls for governmental action were “pervasive through the Trust’s overall endeavour.”⁴⁰

C Purposes that were not religious, educational or beneficial to the public

1 Advancement of religion

FF failed under this category of charitable purpose. The fact that only religious persons could be trustees and that the Trust stated on its website

³⁵ On the definition of “liberal” see eg Roger Scruton *The Palgrave Macmillan Dictionary of Political Thought* (3rd ed, Palgrave MacMillan, New York, 2007) at 394: “In US popular usage, ‘liberal’ means left-liberal, and is expressly contrasted with ‘conservative’. In this usage a liberal is one who leans consciously towards the under-privileged, supports the causes of minorities and socially excluded groups, believes in the use of state power to achieve social justice, usually in the form of welfare programmes, and in all probability shares the egalitarian and secular values of the modern, and maybe those of the postmodern world-view.” On the meaning of “progressive”, see Scruton *ibid* at 561.

³⁶ “A new global force is fighting liberal social mores”, *The Economist*, 11 July 2015.

³⁷ “Legally defining the family” in Mark Hengahan and Bill Atkin (eds) *Family Law Policy in New Zealand* (4 th ed, LexisNexis NZ, Wellington, 2013) 1 at 5.

³⁸ *Board*, above n 9, at [95]–[96] and [100].

³⁹ At [93].

⁴⁰ At [100].

that it spoke “from a family friendly perspective with an emphasis on the Judeo-Christian values which have benefited New Zealand for generations” were not sufficient.⁴¹ These factors demonstrated the Trust may have “a connection with, be motivated by or be conducive to [religion]”⁴², but that is not enough. On that reasoning, the Society for the Protection of the Unborn Child (now renamed Voice for Life) has failed to meet the criteria for this head of charity.⁴³ (FF did not challenge this conclusion on appeal.)

2 *Advancement of education*

FF is very active in publishing and disseminating its opinion through its website and media releases. It hosts an annual “New Zealand Forum on the Family” and commissions polls on issues and solicits research on subject dear to its heart.⁴⁴ The Board considered that FF’s website publications were “predominantly opinion pieces”⁴⁵. FF’s commissioned research papers constituted “propaganda for the points of view promoted by the Trust.”⁴⁶ The reports did not, for instance, present original research nor provide a balanced and rigorous literature review.⁴⁷

3 *Other purposes beneficial to the community*

Within this broad category FF argued its work aimed to improve the moral and spiritual welfare of the community. But having found that FF’s purpose was a political one (“to promote a specific model of family life”⁴⁸) this, according to the Board, ruled out it being charitable under the moral and spiritual improvement category.⁴⁹

Could FF bring itself under the promotion of good citizenship umbrella? Again, the Board said no. FF’s purpose and activities were “to promote a controversial point of view rather than to facilitate balanced and informed debate of public issues.”⁵⁰ In another passage it chided that where an entity’s contributions to public debate “simply reflect a specific position and do not advance education or reflect rigorous standards of objective analysis and factual research”⁵¹ it would not pass muster.

IV The High Court Appeal

We have seen that the gravamen of the Board’s deregistration decision was that FF’s purposes and activities were political. The Board had duly

⁴¹ At [57].

⁴² *Liberty Trust v Charities Commission* [2011] NZHC 577, [2011] 3 NZLR 68 at [94].

⁴³ *Molloy v CIR* [1981] 1 NZLR 668 (CA).

⁴⁴ *Board*, above n 9, at [71].

⁴⁵ At [74].

⁴⁶ At [75].

⁴⁷ At [75].

⁴⁸ At [83].

⁴⁹ At [82]–[83].

⁵⁰ At [84].

⁵¹ At [89].

followed the Court of Appeal in *Greenpeace* which, it will be recalled, had held that, inter alia, political activities and controversial objects were fatal to charitable status. To be fair then, the Board was adhering to the law as it was.

A *Political purpose and controversial views*

The majority of the Supreme Court in *Greenpeace* reversed the Court of Appeal's stance on matters political. It stated: "charitable and political 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."⁵² Accordingly, Collins J in *Family First* held:⁵³

The Charities Board's decision was based upon a fundamental legal proposition that has subsequently been found to be incorrect. The Charities Board's view that political purposes could not be charitable underpinned its decision. In view of the Supreme Court's explanation that political purposes are not irreconcilable with charitable purposes, it is appropriate for the Charities Board to reconsider the position of *Family First* in light of the Supreme Court's judgment.

The Supreme Court majority in *Greenpeace* was also adamant that the so-called controversial nature of the views or purposes espoused by the entity was not, as the Court of Appeal had held, a bar to the law's recognition of it as a charity.⁵⁴

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. In *Molloy* the existence of public controversy over abortion helped explain why maintaining the legal status quo on abortion could not be assumed to serve the public benefit in the way the law regards as charitable. But the more general emphasis on controversy taken from it may be misplaced. It is reminiscent of the suggestion by Lord Wright in *National Anti-Vivisection Society* that "intangible benefit" which is charitable is that "approv[ed] by the common understanding of enlightened opinion for the time being". Such thinking would effectively exclude much promotion of change while favouring charitable status on the basis of majoritarian assessment and the status quo. Just as *unpopularity of causes otherwise charitable should not affect their charitable status*, we do not think that lack of controversy could be determinative. We consider that the Court of Appeal was wrong to place such emphasis in the present case on the acceptance in New Zealand legislation and society

⁵² *Greenpeace*, above n 10, at [3] and [74] per Elias CJ, McGrath and Glazebrook JJ. William Young and Arnold JJ dissented. At [127] they state: "the position that political advocacy is not charitable is reasonably defensible not only on the basis of the authorities but also as a matter of policy and practicality."

⁵³ *Family First*, above n 4, at [84].

⁵⁴ *Greenpeace*, above n 10, at [75] (emphasis added). The Lord Wright quotation is from *National Anti-Vivisection Society v Inland Revenue Commissioners* [1948] AC 31 at 39.

of the ultimate goal of nuclear disarmament and popular support in New Zealand for the elimination of weapons of mass destruction.

In *Greenpeace* the appellant organisation had signalled it would change its objects from “the promotion of peace and disarmament” – which had fallen foul of the political purpose exclusion before both the Charities Commission (the predecessor to the Charities Board) and the High Court – to “the promotion of nuclear disarmament and the elimination of all weapons of mass destruction”.⁵⁵ This amendment satisfied the Court of Appeal since, in its view, the object was now sufficiently non-controversial. But the Supreme Court, as we have seen, said this was the wrong litmus test:

Instead, assessment of whether advocacy or promotion of a cause or law reform is a charitable purpose depends on consideration of the *end* that is advocated, the *means* promoted to achieve that end and the *manner* in which the cause is promoted in order to assess whether the purpose can be said to be of public benefit within the spirit and intendment of the 1601 Statute.⁵⁶

The trouble with a controversy criterion is, one would have thought, fairly obvious. Jonathan Garton, with perhaps a hint of hyperbole, contends: “Controversy alone simply cannot be an appropriate barometer for determining whether a particular purpose is political: if it were, there would be little, if anything, that could ever be charitable.”⁵⁷ Returning to the actual objects in dispute in *Greenpeace*, the Supreme Court explained:⁵⁸

[T]he court would have *no adequate means of judging* the public benefit of such promotion of nuclear disarmament and elimination of all weapons of mass destruction, taking into account all the consequences, local and international. Whether promotion of these ideas is beneficial is *a matter of opinion* in which public benefit is not self-evident and which seems *unlikely to be capable of demonstration by evidence*.

In their dissenting judgment, William Young and Arnold JJ held that political advocacy *did* debar an entity from being registered as a charity. Their reasoning, nonetheless, echoes that of the majority on the competency and desirability of judges evaluating the merits of a cause, whether controversial or otherwise:⁵⁹

[J]udges are usually not well-placed to determine whether the success of a particular cause would be in the public interest. This may be for reasons of *institutional competence*. By way of example, a dispute between *Greenpeace* and the chief executive of the Department of Internal Affairs under the Charities Act does not provide an ideal forum for determining the appropriate policies for New Zealand to adopt towards other states in relation to nuclear weapons and weapons of mass destruction.

⁵⁵ See *Greenpeace*, above n 10, at [4]–[7].

⁵⁶ *Greenpeace*, above n 10, at [76] (emphasis added).

⁵⁷ *Public Benefit in Charity Law* (Oxford University Press, Oxford, 2013) at 206.

⁵⁸ Above n 10 at [101] (emphasis added).

⁵⁹ At [125] (emphasis added).

Similar considerations may apply in relation to Greenpeace's purpose of protecting the environment, a purpose which is closely intertwined with the advocacy of causes (for instance against genetic engineering) the worth of which are not easily determined by the courts. As well, and leaving aside the *practical difficulties of forming a judgment* on such issues, a judge may feel that entering into such an inquiry *lies outside the proper scope of the judicial role*.

On Greenpeace's refashioning of its objects to make them less controversial in order to regain its charitable status, the Supreme Court in polite but terse fashion scolded: "It is not clear why the change in Greenpeace's objects was treated by the Court of Appeal as being so decisive in the result"⁶⁰ and "the substitution of one abstract end for another does not provide sufficient answer."⁶¹

B Benefit to the public head of charity

Collins J saw the force of FF's argument that advocacy "for its conception of the traditional family was analogous to organisations that have advocated for the 'mental and moral improvement' of society."⁶² When it reconsidered FF's eligibility, he emphasised that the Board must be scrupulously objective when undertaking the analogical exercise of comparing FF's activities with entities that *had* been accepted as charitable under this head. With more than a hint of disapproval he added:⁶³

This exercise should not be conflated with a *subjective assessment* of the merits of Family First's views. Members of the Charities Board may *personally disagree* with the views of Family First, but at the same time recognise there is a legitimate analogy between its role and those organisations that have been recognised as charities. Such an approach would be consistent with the obligation on members of the Charities Board to act with honesty, integrity and in good faith.

C Advancement of education

Counsel for the Board insisted that FF's publications were of "a tenacious and polemical character" marked by "indoctrination or dissemination of propaganda."⁶⁴ Yet the Board was forced to concede that at least one commissioned report – that by the New Zealand Institute of Economic Research ("The Value of Family: Fiscal Benefits of Marriage and Reducing Family Breakdown in New Zealand") – contained significant original

⁶⁰ At [99].

⁶¹ At [100].

⁶² *Family First*, above n 4, at [87].

⁶³ At [89] (emphasis added).

⁶⁴ At [92]. The Board had used these pejorative expressions in its deregistration decision: *Board* at [66], [67] (by implication), [75].

research.⁶⁵ The Board, said the High Court, must reconsider its decision in light of this report.⁶⁶

V Reflections on the *Family First* case

A The “traditional” or “nuclear” family

In my introduction I suggested that the Charities Board decision in *Family First* represented an expression of contemporary state antipathy to the “nuclear” family. The nuclear family is a relatively modern construct, for broader or extended forms of family structure have been common throughout recorded human history.

In twenty-first century liberal democracies, the principal flag bearers for the traditional family are conservative religious communities. Among theists and the three global religions of the Book – Judaism, Christianity and Islam – the family has an elevated and foundational status.⁶⁷ This is shared by the political philosophy of conservatism. Roger Scruton cautions:⁶⁸

It hardly needs saying . . . that the support and protection of this institution [viz, the family] must be central to the conservative outlook, and that changes in the law which are calculated to loosen or abolish the obligations of family life, or which in other ways facilitate the channeling of libidinal impulse away from that particular form of union, will be accepted by conservatives only under the pressure of necessity. . . The family is the origin of self-respect, being the first institution through which the social world is perceived. It is also autonomous: a form of life which has no aim besides itself.

The common elements of the major Semitic faith traditions’ conception of the family are heterosexual parents and the procreation and nurture

⁶⁵ *Family First*, above n 4, at [93].

⁶⁶ The author has written a report for FF, subsequent to the Board decision. Rex Ahdar, *Killing Me Softly: Should Euthanasia Be Legalised?* (Family First NZ, 2014) was published in early 2014, <https://www.familyfirst.org.nz/research/killing-me-softly/>.

⁶⁷ See generally Peggy Morgan and Clive Lawton (eds) *Ethical Issues in Six Religious Traditions* (Edinburgh University Press, Edinburgh, 1996) at 143–144 (Judaism); at 185–186 (Christianity) and 232–236 (Islam); Don S Browning, M Christian Green and John Witte Jr *Sex, Marriage and Family in World Religions* (Columbia University Press, New York, 2006). *The Catechism of the Catholic Church [Liberia Editrice Vaticana]* (Vatican, 1994) at para 2202 states: “A man and woman united in marriage together with children, form a family... It should be considered the normal reference point by which the different forms of family relationship are to be evaluated.”

⁶⁸ *The Meaning of Conservatism* (revised 3rd ed, St Augustine’s Press, South Bend, Indiana, 2002) at 129–130.

of the offspring of such lifelong opposite-sex unions. In Catholicism, for example:⁶⁹

It is in the family that the mutual giving of self on the part of man and woman united in marriage creates an environment of life in which children ‘develop their potentialities, become aware of their dignity and prepare to face their unique and individual destiny.’ ... it proceeds [sic] in importance and value the functions that society and the State are called to perform. The family possesses inviolable rights and finds its legitimization in human nature and not in being recognized by the State. The family, then, does not exist for society or the State, but society and the State exist for the family.

The “nuclear” nature of the family (father, mother and dependent children) is not as central as the emphasis upon the family as timeless or, the preferred label, “traditional”. Many within Christianity, even conservative Protestantism,⁷⁰ acknowledge that the nuclear family is neither as traditional nor biblical as conservative Christians maintain.⁷¹ Certainly, the recognition of grandparents and other close kin (uncles, aunts, cousins) within the notion of “family” is widely accepted in other sectors of theism, most notably Islam.

Broader understandings of the family are common in non-Western communities. In Māori society, “the primary meaning of ‘whanau’—the one that springs first to mind for native speakers of Māori—is a group of relatives defined by reference to a recent ancestor, comprising several generations, several nuclear families and several households”.⁷² Indeed, the very breadth of the whanau has proved potentially problematic for Māori in the charitable context. Māori may jeopardise their eligibility for charitable status by reason that the beneficiaries of the charity are connected by blood ties (and other familial bonds) and thereby prima

⁶⁹ Pontifical Council for Justice and Peace *Compendium of the Social Doctrine of the Church* (United States Catholic Conference of Bishops, Washington DC, 2004) at §§ 212 and 214 (original italics omitted). The quoted sentence is from the Encyclical letter from John Paul II, *Centesimus Annus* (1 May 1991).

⁷⁰ See W Bradford Wilcox, Mark Chaves and David Franz “Focused on the Family? Religious Traditions, Family Discourse, and Pastoral Practice” (2004) 43 *Journal for the Scientific Study of Religion* 491 at 493. The non-Evangelical reader may not perceive the pun in the title. James Dobson’s Focus on the Family organisation is one of the largest and longest running Evangelical Christian organisations in the United States.

⁷¹ See eg Carolyn Osiek “The New Testament and the Family” in Lisa Cahill and Dietmar Mieth (eds) *The Family Concilium* 1995/4] (Orbis, Mary Knoll, NY, 1995) at 1–9. On conservative Christianity generally see Rex Ahdar *Conservative Christians and the Law* (Ashgate, Aldershot, 2001).

⁷² Jacinta Ruru “Kua tut te puehu, kia mau: Māori aspirations and family law policy” in Henaghan and Atkin, above n 37, 57 at 59.

facie fail the “public benefit” test (which contemplates benefits being general and indiscriminate in nature).⁷³

B Is the promotion of the traditional family too controversial to be the focus of charitable endeavour?

In one sense those who support and promote the traditional family and who adhere to conservative understandings of sex roles and parenting will never be deterred by the rulings of a governmental agency. But organisations that do wish to contribute to public debate and the shaping of public policy are vulnerable to legal determinations that curtail their activities in this kind of endeavour. The loss of charitable status and the financial and other benefits it brings is significant. Susan Barker comments:⁷⁴

Most charities that are denied registration struggle to survive: they struggle to challenge decisions of the regulator . . . ; they struggle to gain funding as busy funders rightly or wrongly restrict funding to registered charities only; they struggle with issues of confidence and credibility, as the reasons for having been rejected by their own regulator are difficult to communicate to their stakeholders.

One suspects Family First NZ is in this category: it is heavily dependent on giving, with “almost all of its income being derived from donations.”⁷⁵

It is salutary to see the Supreme Court firmly declaring that the controversial criterion is irrelevant. A brief look at the plethora of registered charities reveal many that have objects that are “controversial” in so far as 21st century “liberal” or “progressive” political and social sensibilities are concerned. Take, for example:

- Family Life International NZ
- Destiny Church Auckland Trust
- Pregnancy Counselling Services
- Society for the Promotion of Community Standards⁷⁶
- Maxim Institute⁷⁷

⁷³ Susan Barker, Michael Gousmett and Ken Lord *The Law and Practice of Charities in New Zealand* (Lexis Nexis NZ, Wellington, 2013) at 406–407; Kerry O’Halloran *Charity Law and Social Inclusion: An International Study* (Routledge, London, 2007) at 288. Fortunately, the Charities Act 2005, s 5(2)(a) meets this concern: “However,— (a) the purpose of a trust, society, or institution is a charitable purpose under this Act if the purpose would satisfy the public benefit requirement apart from the fact that the beneficiaries of the trust, or the members of the society or institution, are related by blood”.

⁷⁴ Barker, above n 2, at 87.

⁷⁵ *Family First*, above n 4, at [16]. In the 2013 financial year, donations to it came to \$371,138.

⁷⁶ CC20268, registered 17 December 2007.

⁷⁷ CC24446, registered 16 May 2008.

Family Life International is a Roman Catholic organisation whose aim is “to promote the full dignity and wonder of human life (from the moment of natural conception to the moment of natural death), of human sexuality, of marriage and family, and to inform and protect kiwi women and their babies from the harm of abortion.”⁷⁸ Aside from the notorious extravagance of the Destiny Church’s⁷⁹ leadership, this indigenous Pentecostal church has been an outspoken opponent of gay rights.⁸⁰ Pregnancy Counselling Services⁸¹ is listed on the Pro-Life NZ website and is primarily tasked with counselling women to think seriously about options other than abortion should they want to discontinue their pregnancy.⁸² The Society for the Promotion of Community Standards, founded by Patricia Bartlett in 1970, and claiming a membership of 21,000 by 1975,⁸³ has been relatively quiet in recent years, but a generation ago it was a regular and vocal critic of the “permissive society” (as it would term it) viz, public nudity and pornography, films and television programmes that portrayed too much violence and sex, the legalisation of prostitution and so on.⁸⁴ Despite a massive sea change in cultural terms, it still fights the good fight today: “Our ‘fight’ is with those who are perpetually engaged in forcing back the moral boundaries”⁸⁵. The Maxim Institute is a conservative think tank that champions neo-liberal economic measures (such as combatting welfare dependency), defending parental rights and so on.⁸⁶

C “Political correctness” at work?

A great deal of the analysis of . . . family problems is couched in terms of the ‘decline’ or ‘collapse’ of ‘The Family’. It is only by grasping that “The Family” does not exist, that the ideological nature of such analyses can be recognized. . . . ‘The Nuclear Family’ does not exist except as a powerful image in the minds of most people. . . . traditional views of ‘The Family’ have been conservative, racist, classist, and heterosexist. In developing new forms of theorizing and a new postmodern sociology of family living, a key strategy is that of exploring a wide range of values.⁸⁷

⁷⁸ From its website: <<http://www.fli.org.nz/about>>.

⁷⁹ CC22039, registered 30 June 2008. That Church’s other “branches” at Wellington, Hamilton, Christchurch and so on were also registered on that same date.

⁸⁰ See eg “Protesters hold up Destiny Church march” New Zealand Herald, 7 March 2005. For a (rare) academic analysis see Peter Lineham *Destiny: The Life and Times of a Self-Made Apostle* (Penguin, Auckland, 2013).

⁸¹ CC2976, registered 30 June 2008.

⁸² See the Pro-Life NZ website: <<http://prolife.org.nz/pregnancysupport/>>
⁸³ Laurie Guy, *Shaping Godzone: Public Issues and Church Voices in New Zealand 1840–2000* (Victoria University Press, Wellington, 2001) at 368.

⁸⁴ Its early years (1970–1995) are recounted in Carolyn Moynihan *A Stand for Decency* (SPCS, 1995) and Guy, *ibid*, ch 18.

⁸⁵ From its website: <<http://www.spcs.org.nz/about/>>.

⁸⁶ See its website <http://www.maxim.org.nz/about_us/overview3.aspx>.

⁸⁷ Jon Benards, “We Must Not Define ‘The Family!’” in Barbara Settles et al (ed) *Concepts and Definitions of the Family for the 21st Century* (Howarth Press, Binghamton, NY, 1991) 21 at 22, 23 and 33.

Political correctness is a much used and abused term and I invoke it here with some trepidation, acknowledging that it “is a complex, discontinuous, and protean phenomenon which has changed radically, even over the past two decades.”⁸⁸ Nonetheless, I will take as a starting point Geoffrey Hughes’ broad elucidation that: “Political correctness is based on various idealistic assumptions on how society should be run and how people should behave towards each other.”⁸⁹ Similarly, Erich Kolig explains:⁹⁰

Political correctness is the self-cleansing mechanism of hegemony, a palliative of conscience, the practical arm of self-righteousness. Practically, it means conforming with meaning-makers and opinion-manufacturers who enjoy popular currency at the moment. . . . In a pluralistic and democratic form of society such as exists in New Zealand, there is at any time a plethora of opinions and view, ethical points of view and the like abound. This fact should neither surprise nor overwhelm. The interesting question is why, in this multitudinous mix, do some meaning-makers and some opinions rise to prominence and, what is more, to social dominance, while others fail.

A “primary idealistic assumption” of political correctness, contends Hughes, “is that of equality.”⁹¹ This is manifested in myriad ways, but, for present purposes, it leads ineluctably to pluriform conceptions of the family. To preserve the equal status and dignity of persons of different genders, sexual orientations and so on – who come together to form this entity – one needs “families”, plural. As Henaghan notes:⁹²

Based on ideas of equality, non-discrimination and a political assumption of social expectations, a wide variety of family structure are being accepted into the mainstream definition of the legal family, whether they want to be or not. Such a policy change, as with all policy changes, is likely to create winners and losers.

In contrast, a single definition that presupposes there is something called *the* family is exclusive not inclusive, monolithic not diverse, oppressive not facilitative. To promote *a* concept of the family as *the* optimal model is dangerously narrow and judgmental, if not downright anti-social.

Modern liberalism’s stance toward the family concurs: the nuclear family unit of married heterosexual husband and wife and dependent children cannot be an exhaustive definition. Invoking liberal philosopher Joseph Raz’s notion of “value pluralism”, Andrew Bainham, for example, argues that this “implies that all those intimate and family relationships

⁸⁸ Geoffrey Hughes *Political Correctness: A History of Semantics and Culture* (Wiley-Blackwell, Chichester, UK, 2010) at 3.

⁸⁹ At 21.

⁹⁰ “Of Condoms, Biculturalism and Political Correctness: The Maori Renaissance and Cultural Politics in New Zealand” (2000) 46 *Paiduma* 231 at 246.

⁹¹ Hughes, above n 88, at 21.

⁹² Henaghan, above n 37, at 24.

which can be considered valuable should be supported by the state in an even-handed way. No particular form of relationship or family arrangement should be officially promoted.⁹³ So, for example, same-sex partners (married or unmarried, with or without children) ought to be considered, in law, a family.⁹⁴ As Baroness Hale of Richmond, writing extra-judicially, observed: “Non-traditional families of so many kinds are so common that it is difficult to argue that a proper way to protect the traditional family is to deny all recognition to other kinds of relationship.”⁹⁵ Increasingly, legal theorists question the continued right of the state “to regulate families *qua* families, and to encourage or discourage certain kinds of familial relationships.”⁹⁶ In this vein, Alice Ristroph and Melissa Murray, for example, mounted a tentative case for familial “disestablishment”: in the same way the American state is constrained under the First Amendment from establishing a religion, it ought to also be curtailed from endorsing and supporting a specific vision or model of the family, such as the “marital, nuclear family”.⁹⁷

To refer to the family, as Family First do, with loaded epithets such as “nuclear”, “traditional” and “natural” is to provoke irritation, if not anger. Is not “tradition” associated with Victorian, patriarchal, hierarchical and thus oppressive forms? The word “nuclear” even carries an air of odium since – although clearly not used here in a scientific, industrial or military sense – it jars in the ears of enlightened New Zealand citizens wedded to a nuclear-free society. The word “natural” could, in other contemporary contexts, be a “virtue” word.⁹⁸ It resonates with a clean, green and unpolluted environment and foods or products produced therefrom are usually unhesitatingly prized. But in the context of domestic and familial structures, it is a “vice” or taboo word, for it implies that forms other than the natural model are perforce “unnatural”. To describe a family form as unnatural is to pass judgment based on outdated and bigoted views on just what marriage, procreation and parenting are all about.

VI Conclusion

Promoting the traditional nuclear family is not an uncharitable exercise. That is the way it should be. Furthermore, after the Supreme Court’s ruling in *Greenpeace*, the controversial nature of a charity’s aims is not a bar ipso facto to its legal recognition. Again, this is a correct conclusion. This is an even more sound position given the vulnerability

⁹³ “Family Rights in the Next Millennium” (2000) 53 *Current Legal Problems* 471 at 475.

⁹⁴ See eg Ruthann Robson “Resisting the Family: Repositioning Lesbians in Legal Theory” (1994) 19 *Signs: Journal of Women in Culture and Society* 975 at 975.

⁹⁵ “Homosexual Rights” [2004] *Child & Family LQ* 125 at 130.

⁹⁶ “Disestablishing the Family” (2010) 119 *Yale LJ* 1236 at 1240.

⁹⁷ *Ibid.*

⁹⁸ Peter Westen “‘Freedom’ and ‘Coercion’ – Virtue Words and Vice Words” [1985] *Duke LJ* 541.

of charities whose objectives appear, to liberal minds, to be antiquated and antediluvian. Conservative organisations overseas have been wont to cry that they are the target of officialdom. For example, in the United States, the Tea Party and other avowedly conservative non-profit groups, were, it seems, singled out for scrutiny from the Internal Revenue Service and subjected to an auditing to ascertain whether they still merited tax-exempt status.⁹⁹ Family First might feel similarly victimised here. However, this case alone is flimsy evidence to pronounce any such sweeping charge. Moreover, one only has to note that the leading case, *Greenpeace*, involved a quintessential “progressive” entity, one situated at the other end of the political spectrum.

Interestingly, the Charities Board in deregistering *Family First* cited *Re Collier (Deceased)* several times.¹⁰⁰ It is a shame it did not also quote this passage from Hammond J.¹⁰¹

All would surely agree that a bequest for bringing about revolution, or outright disobedience of the law must be illegal; and hence it could not be charitable. But once Courts are beyond those concerns, the debate becomes much more difficult . . . in making decisions in an area like this, [ie, ‘charitable trusts [being] those for the advocacy of a particular point of view or ‘propaganda’ trusts as they are sometimes pejoratively termed’] Judges are, in reality, making decisions about the ‘worth’ of a particular bequest. The argument is that judges’ views on (say) temperance, or birth control, or euthanasia, do reflect an assumption as to ‘worth’ and that that affects outcomes. . . .

I have to say that I have considerable sympathy for that viewpoint which holds that a Court does not have to enter into the debate at all. . . . Rather, the function of the Court ought to be to sieve out debates which are for improper purposes: and to then *leave the public debate to lie where it falls, in the public arena.*

Family First NZ was put to considerable expense to preserve its charitable status. “Charities are reluctant litigants” as Barker, Gousmett and Lord note, for litigation will typically draw from the precious donated funds that have been earmarked for the beneficial tasks these entities have set themselves.¹⁰² At the time of writing, FF still had not received the benefit of the reassessment by the Charities Board that the High Court mandated,¹⁰³ although for now its registration is intact.

⁹⁹ Juliet Eilpern “IRS targeted groups critical of government, documents from agency probe show”, *Washington Post*, 12 May 2013; Jackie Calmes “Senate Report cites IRS Mismanagement in Targeting of Tea Party Groups” *New York Times*, 5 August 2015.

¹⁰⁰ *Re Collier* [1998] 1 NZLR 91 was cited in the Board decision, above n 9, at footnotes 33, 39, 40, 43, 80 and 107.

¹⁰¹ *Re Collier*, *ibid*, at 90 (italics supplied). The excerpt I have inserted in the square brackets is from the preceding paragraph at the same page.

¹⁰² Barker et al, above n 73, at 701.

¹⁰³ Email by Bob McCoskrie, National Director of Family First New Zealand, to author (14 October 2015) (on file with author).

A final point. In *Aid/Watch* the majority of the High Court of Australia approved the notion that “the generation of lawful means of public debate” on a particular subject (in that instance, the effectiveness of foreign aid in the relief of poverty) was “itself a purpose beneficial to the community within the fourth head [of charity] in *Pemsel*.”¹⁰⁴ In this vein Professor Matthew Harding observes:¹⁰⁵

If the pursuit of political purposes tends to produce a culture of free political expression and therefore tends to sustain and augment conditions under which democratic government can flourish, there are reasons to think that the pursuit of such purposes by ‘not for profit’ organisations tends to make a distinctive contribution to such a culture.

The question whether the promotion of the traditional family is worthwhile should be a matter, as Hammond J said, of public debate to be left where it falls, in the public arena. To effectively silence voices in public debate that are controversial or unfashionable by deregistering them as a charity is regrettable, a loss for democratic discourse – and, in the end, a loss for us all.

¹⁰⁴ *Aid/Watch Inc v Commissioner of Taxation* [2010] HCA 42 at [47]. This passage was quoted without comment by the majority of the Supreme Court in *Greenpeace*, above n 10, at [67].

¹⁰⁵ *Charity Law and the Liberal State* (Cambridge University Press, Cambridge, 2014) at 191.

