

In the Supreme Court of New Zealand
I Te Kōti Mana Nui

SC 79/2020

BETWEEN

Attorney-General

Applicant

AND

Family First New Zealand

Respondent

**Written submission of Jennifer Batrouney QC following her oral
submission to the Supreme Court on Friday (Charity Law
Association of Australia and New Zealand)**

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Education and Advocacy

1. In determining whether or not advocacy is within the description ‘advancement of education’, the cases have drawn a distinction between education and propaganda or the polemical assertion of a point of view. This distinction has been drawn against a backdrop of the doctrine laid down in *Bowman v Secular Society Ltd*, according to which a non-ancillary political advocacy purpose could not be charitable in law.¹ Since this Court’s decision in *Re Greenpeace of New Zealand Inc (Greenpeace)*, that doctrine has no place in New Zealand law.² It is therefore unclear what work a distinction between education and propaganda continues to do in the charity law of New Zealand.

2. Specifically, after *Greenpeace*, if political advocacy is the end or purpose of an entity, then that advocacy does not need to be educational in order to be a charitable purpose of public benefit. In *Greenpeace*, this Court stated that:³

Just as the promotion of the abolition of slavery has been regarded as charitable, today advocacy for such ends as human rights or protection of the environment and promotion of amenities that make communities pleasant may have come to be regarded as charitable purposes in themselves, depending on the nature of the advocacy, even if not ancillary to more tangible charity.

¹ *Bowman v Secular Society Ltd* [1917] AC 406 at 442 (per Lord Parker).

² *Re Greenpeace of New Zealand Inc* [2015] 1 NZLR 169, [72].

³ *Greenpeace*, above n 2, [71].

In cases where advocacy for such ends is regarded as charitable in itself, this will be so irrespective of any educational quality that the advocacy possesses.

3. The distinction between education and propaganda was drawn in New Zealand in *Re Collier*, where Hammond J stated that '*propaganda or cause under the guise of education will not suffice*'.⁴ This statement that was referred to with approval by Ellis J in *The Foundation for Anti-Aging Research and The Foundation of Solid State Hypothermia (FAAR)*.⁵
4. *Re Collier* involved a bequest '*to promote the idea that people suffering from terminal illness, whether sickness or age, be able to die in dignity in their own homes*'. Justice Hammond said of this clause:⁶

But the clause simply advocates the promotion of an idea. It does not actually provide for assistance to any persons, in any way. The clause merely enunciates an objective which, though thoroughly admirable, is surely commonly accepted today. To put it another way, it is an attempt to persuade people into a particular frame of mind. There is no instruction directed; nor is there to be any systematic accumulation of knowledge. ... [T]o fall within the charitable purpose of education, advocacy must be undertaken with a view to educating rather than inculcating.

5. In *Re Draco Foundation (NZ) Charitable Trust (Draco)*, Ronald Young J considered a trust whose stated purpose was '*the protection and promotion of democracy and natural justice in New Zealand*'.⁷ The appellant in the case argued that the trust educated the public in 'forms

⁴ *Re Collier* [1998] 1 NZLR 81 at 91-92.

⁵ *The Foundation for Anti-Aging Research and The Foundation of Solid State Hypothermia* (2016) PRNZ 726 at [56].

⁶ *Re Collier*, above n 4, 93.

⁷ *Re Draco Foundation (NZ) Charitable Trust* (2011) 25 NZTC 20-032 at [22].

of government’ and sought to ‘encourage political awareness’.⁸ Justice Ronald Young found that much of the material at a website maintained by the trust aimed to influence thinking on matters relating to government in New Zealand. To that extent, his Honour considered that the trust did not have a purpose of advancing education and instead had a purpose in the nature of propaganda.⁹

6. In *Draco*, Ronald Young J referred to the decision of the Supreme Court of Canada in *Vancouver Society of Immigrant and Visible Minority Women v Minister of National Revenue (Vancouver Society)*, in which the Court distinguished the advancement of education from ‘information or training ... provided ... solely to promote a particular point of view or political orientation.’¹⁰
7. In Australian law, a distinction between education and propaganda emerges from the judgment of Young CJ in Eq in the case of *Attorney-General for NSW v The NSW Henry George Foundation Ltd (Henry George)*.¹¹ The trust in question was ‘for the purpose of promulgating and spreading knowledge of the teachings and economic principles elaborated by Henry George’, a nineteenth century political economist.¹² Chief Justice Young in Eq cited the following passage from a journal article authored by Professor LA Sheridan:¹³

⁸ *Draco*, above n 7, [36].

⁹ *Draco*, above n 7, [55]-[71] and [75].

¹⁰ *Vancouver Society of Immigrant and Visible Minority Women v Minister of National Revenue* [1999] 1 SCR 10 at [169] per Iacobucci J. See also Gonthier J at [77].

¹¹ *Attorney-General for NSW v The NSW Henry George Foundation Ltd* [2002] NSWSC 1128.

¹² *Henry George*, above n 11, [2].

¹³ *Henry George*, above n 11, [52], quoting LA Sheridan, ‘The Political Muddle – A Charitable View?’ (1977) 19 *Malaya Law Review* 42 at 70.

There is a thin line, difficult to discern and possibly without great legal significance, but there all the same, between trying to convert people to a point of view and informing them of its existence and of the reasons for it – between propaganda and education.

8. Chief Justice Young in *Eq* further cited Professor Sheridan as follows:¹⁴

Nevertheless there is a valid distinction between a trust whose funds are to be spent on converting people to a specified political objective and one whose funds are to be used to make knowledge of the arguments [about] the specified political objective more readily available.

9. With this distinction in mind, Young CJ in *Eq* found that the trust before him was ‘one whose dominant purpose is education with the object of persuading the general population around to the views of Henry George, though the ultimate purpose of this education may only fully be realised by legislation’.¹⁵ In this connection, it is worth noting that expert evidence was received in the case as to the intellectual value of Henry George’s work.¹⁶

10. More recently, members of the High Court of Australia considered the parameters of the ‘advancement of education’ head of charity in *Aid/Watch Inc v Federal Commissioner of Taxation (Aid/Watch)*.¹⁷ Justice Kiefel (in dissent) appeared in at least two passages to distinguish between education and propaganda, even though she did not use the word ‘propaganda’:¹⁸

It should not be assumed that the courts will be unable to discern a public benefit in trusts concerned with agitation for reform, at least where they encourage public debate

¹⁴ *Henry George*, above n 11, [71], quoting Sheridan, above n 13, at 72

¹⁵ *Henry George*, above n 11, [85]. The trust was upheld as charitable at [86].

¹⁶ *Henry George*, above n 11, [14]-[17].

¹⁷ *Aid/Watch Incorporated v Federal Commissioner of Taxation* (2010) 241 CLR 539.

¹⁸ *Aid/Watch*, above n 17, [73] and [86].

or education, by way of disseminating knowledge or information, upon legitimate topics.

...

If [its activities] were directed to the generation of public debate about the provision of aid, rather than the acceptance by the Government and its agencies of its views on the matter, the appellant might be said to be promoting education in that area. But it is not.

11. In addition, Heydon J (also in dissent) stated that:¹⁹

the function of the appellant is not educative, but polemical. ... The appellant's publications take a polemical stand in relation to climate change issues: its stand may be virtuous, it may even be right, but it is not educational. As noted earlier, the Tribunal found that the "whole object of [the appellant] is to influence public opinion by making the results of its research available, with the further goals of influencing public opinion and ultimately government agencies and government itself" (emphasis added). Influencing public opinion is not by itself educational, even if information has been collected for the purpose of attempting to achieve that influence.

12. The fact that courts have drawn a distinction between education and propaganda does not mean that the advancement of education is limited to the promulgation or dissemination of 'neutral' or 'value-free' propositions or views. Indeed, much academic research, especially in the humanities and social sciences, is based on methods that are designed to persuade and convince and rests on contestable judgments about value. If a line is to be drawn between 'non-neutral' education and propaganda, perhaps it should be drawn along the lines suggested in the Explanatory Memorandum to the Australian Charities Bill 2013:²⁰

Education does not have to be value free but the information presented should be based on evidence and reasonable analysis.

¹⁹ *Aid/Watch*, above n 17, [62].

²⁰ The Parliament of the Commonwealth of Australia, Charities Bill 2013: Explanatory Memorandum, [1.122].

This would include, but would not be limited to, scholarship within accepted academic disciplines.²¹

13. It is worth noting that the distinction between education and the polemical assertion of a point of view that courts have drawn repeatedly across common law jurisdictions is not drawn in the case of religion and propaganda. As Professor Gino Dal Pont says in his seminal text:²²

As the courts have upheld objects directed to propagating a faith, and indeed have premised the 'advancement' of religion on a missionary element, it would be inconsistent to then deny charitable status because of the inherent bias in the views presented.

14. At the same time as courts have drawn a distinction between education and propaganda, they have also drawn a distinction between education and the mere provision of information. In *Draco*, Ronald Young J drew a distinction between the advancement of education and the 'provision of material for self-study'.²³ In support of this proposition Ronald Young J cited the decision of the Supreme Court of Canada in *Vancouver Society*, although it is worth noting that in that case the Court acknowledged that in Canada "advancement of education" has been given a fairly restricted meaning'.²⁴



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²¹ *FAAR*, above n 5, [55]-[62].

²² GE Dal Pont, *Law of Charity* (LexisLexis, Chatswood, 2010) at [9.29].

²³ *Draco*, above n 7, [43]. See also [41] and [51].

²⁴ *Vancouver Society*, above n 10, [161], [168]-[170] (per Iacobucci J), Gonthier J agreeing at [77].