Introduction

The roles of religion and charity in society have probably always given rise to controversy. In recent years this has centred on doubts regarding their capacity – separately or jointly – to promote equity, equality and pluralism, to deliver public benefit rather than satisfy the needs of a selected few and to further social cohesion instead of fostering social division. Indeed, there is an argument that both are fundamentally discriminatory (each differentiates between their beneficiaries and all others) and, consequently, it is inevitable that in a modern human rights context their functioning will generate serious issues for a democratic society.

It is also apparent that religious organisations, which almost always have charitable status, are now growing in number and are acquiring a more visible social profile. This is something of a paradox, given the well-documented rise in secularism, but the increased variety of 'religions', the volume of faith-based service providers and the more conspicuous presence of some religions – such as Islam – in the developed common law nations would seem irrefutable. Certainly, the secular arm of religion is extending its reach: always a significant contributor to hospital provision, to general health and social care facilities and to education, in recent years the growth in faith-based schooling has been particularly noticeable. It may be that the more general need for all nonprofits to develop new funding streams is resulting in religious organisations also becoming more entrepreneurial and consequently more visible. Whatever the reason, it is clear that as such bodies further develop the secular outworkings of their religious beliefs, so they are inevitably drawn more into the complex web of civil law which, in all developed common law jurisdictions, is giving rise to issues such as those relating to: charitable tax exemption; government funding; discretion not to appoint clergy on grounds of gender or sexual orientation; and to exemption privileges regarding employment laws and the general requirements of equality legislation. For such reasons the debate about the future social role of

religion and charity is set to become an acute and pressing concern for governments, academics and others on a national and international basis. The need to prepare the ground for that debate, and contribute some thoughts and data that may help inform it, provides the rationale for this book.

Charity law brings together and governs the relationship between charity and religion. That for the first time in 400 years a number of leading common law nations should, fairly simultaneously, embark on processes of charity law reform – processes which involve defining 'religion' and 'charity' – is both curious, in terms of timing, and clearly important in terms of how process outcomes may affect the future of that relationship. For present purposes, the working hypothesis is that a primary impetus for reform came from the pressing need to square a circle – to bring the principles of charity and religion into alignment with those of human rights. Possibly, however, such an objective is fatally flawed – a basic category error. Matters of faith and equality may be irreconcilable.

Supporting evidence for this view can be found in the jurisdictional logjams caused by what might be termed an agenda of 'moral imperatives' – including abortion, genetic engineering, DNA patenting and gay marriage – which have come to symbolise the modern conflict between faith and equality. These morally driven issues, the number and potency of which would seem to be on the increase, are indicative of an eagerness in all jurisdictions to bring the same type of matters to court, often repeatedly. It is undoubtedly in the public interest that such matters be debated, though there must be some doubt as to the degree to which they are justiciable, but it is clear that the outcome is going to be unacceptable to a large proportion of those who care deeply – altruistically, on behalf of public morality – about the resulting implications for society. The long and embittered confrontation between the pro-life and pro-choice camps in relation to abortion is a case in point and one which demonstrates that while matters of belief may remain impervious to argument they are only too capable of generating a strident and often virulent moralism that itself can have a corrosive effect on public benefit. The nature of the items on this agenda, their common origins and the varied jurisdictional response to them, constitute an important theme throughout this book.

The six jurisdictions chosen to represent the common law jurisdictions are those that have recently completed or continue to undergo processes of charity law reform. In all six, the legal issues relating to matters such as 'religious belief' and 'religious discrimination', to the

tax privileges of religious organisations and to government funding of faith-based service providers are not dissimilar: the statutory exemptions provided in all jurisdictions, enabling those of religious belief to behave in ways that would be discriminatory for ordinary citizens, is contentious in public benefit terms. In four, the presence of an Indigenous population with its own separate and distinct set of beliefs has provided a counterpoint to Christianity and an incentive for a policy of religious pluralism; while in the United States, Canada and Australia the subdued social profile of such populations has meant that for generations their beliefs have largely been denied formal State recognition, in New Zealand it was acquired by the Māori because of their relatively strong and coherent culture. In two, the shadow of a Church–State relationship embodied in constitutional arrangements of an earlier age continues to loom over the law governing the social role of religion: in England and Wales the 'established' Church of England enjoys a unique locus standi in relation to the State; in the United States the First Amendment erects a 'wall of separation' between the affairs of Church and State. In one, the role of religion in the social infrastructure of schools and health care is all pervasive: the influence of the Catholic Church in Ireland has no equivalent among the religions of the other jurisdictions being considered. All have had to wrestle, in recent years, with the impact of human rights and equality legislation and the ever-broadening scope of related case law developments upon the traditional religions, particularly upon the Scripturally based doctrines of Christianity.

Religion, as it is now legally understood, neither requires a God nor (at least in the UK jurisdictions) is it necessarily a 'good thing'. These fundamental changes have emerged from the charity law reform processes. The latter, in particular, have set the United Kingdom apart from other common law jurisdictions and apart from its own developmental history. For all religions and religious organisations seeking charitable status in the United Kingdom, the new statutory requirement – to demonstrate how they are adding to the quotient of public benefit and how that contribution outweighs any possible detraction from it – is a challenge. It is one that faces not only all religious entities seeking charitable status in the future, but also all that have already acquired that status and, by virtue of establishing new case law precedents, it has the potential to fundamentally alter the future relationship between charity and religion within the United Kingdom and beyond.

Developments in human rights case law have also effected real changes in that relationship. Perhaps the most significant of these has been the focus

on an individual's subjective interpretation as the determining test of what constitutes 'religious belief' in any particular circumstance. This test would seem to be relied upon by judiciary and regulators as a means of coping with the proliferation of New Age religions, of evangelical versions of Christianity and the many and varied forms of faith that are beginning to crowd out the more traditional and institutional religions. Their response to this wave of new and mutating forms of belief systems, all seeking recognition as coming within the definition of 'religion' and therefore within the eligibility criteria for tax exemption, has been to examine the cogency and authenticity of that belief. In terms of 'religion', the existence of a body of doctrines and tenets, the fact or mode of worship and the belief or not in a god or gods have become matters of peripheral importance in determining whether the definition is satisfied.[1] In terms of 'religious belief', it is not the fact of being an adherent of a specific religion that is important, but rather the nature and the subjective understanding of beliefs and the appropriateness of an individual's actions as a manifestation of those beliefs. When taken together with the public benefit test, this exercise in revisionism has added greatly to the current general unease about the role of religion in society: an uncertainty as to when private piety constitutes religious belief and the extent to which a 'religion' necessarily defines the beliefs of its adherents. Needless to say, such uncertainty has not been helped by the revelations of child abuse perpetrated over several generations and continents by some members of religious organisations.

If the competition between the different variants of religion and other forms of belief is accelerating, that is as nothing compared to the increasing mutual antipathy between those with and those without religious faith. Secularists would seem to be growing numerically and in assertiveness in all the jurisdictions considered, and indeed it is this more than anything that now gives added potency to many items on the moral imperatives agenda. A strong secularist lobby is now demanding to know what it is about religious beliefs – as opposed, for example, to Marxism – that confers an entitlement to exemption from human rights principles. While the traditional secular functions of religious organisations have to some extent been impacted by human rights, they have also benefited from specific statutory exemption privileges. In some instances compliance has been enforced by direct legal action: courts have ordered

[1] There remains, admittedly, a good deal of jurisdictional variation in the weight given to these factors as determinants of charitable status.

religious hospitals and personnel to offer services that breach their religious beliefs; regulators have forced the closure of religious facilities due to their inability to meet legislative non-discrimination requirements; and legislation has been introduced specifically to override the capacity of medical personnel to exercise a religious veto regarding the availability of abortion. In other areas, the difficulties involved are proving difficult to resolve: the restrictions, for example, within religious organisations on the appointment of clergy to certain posts being dependant upon their satisfying criteria of gender and sexual orientation. Indeed, the exemption privileges in equality legislation, permitting tax-exempt religious organisations to restrict employment opportunities to those that share their religious beliefs, have been condemned by some as statutorily licensing religious discrimination by religious bodies, leading secularists to protest that there is no good reason why taxpayers should be left to subsidise the discriminatory practices (religious, sexual and gender) of religious organisations.

Religion, Charity and Human Rights sets out to examine the relationship between these three subjects. It does so from the perspective of a charity law academic who acknowledges that, while he has a working knowledge of related human rights case law developments, his grasp of Christian theology and 'Natural law' will disappoint some (moreover, that perspective has probably been influenced by the experience of many decades of living in Northern Ireland). Its central axis rests on the relationship between religion and charity law, a relationship originating in the early years of the Protestant Reformation in England and one that transferred with the forces of the Crown to all parts of the British Empire. Since the last half of the twentieth century, both have interfaced with an ever-expanding equality and human rights jurisprudence, thereby setting the scene for the current conflict between canon law, charity law and human rights law. It's a conflict that underpins the spreading 'culture wars'.

This necessarily means that the book is exclusively concerned with Christianity and charity law as practised in the common law jurisdictions. It consists of 11 chapters arranged in three parts under the headings 'Background', 'Contemporary international perspectives' and 'Future directions'. Because of the considerable similarity in the national and international legislative provisions that give effect to this law, the book draws in the main from the cases to compare and contrast jurisdictional differences in relation to certain key issues.

Part I begins with a background section of four chapters. The first two explain core concepts, principles, precepts and legal definitions, provide

a historical overview of the developing relationship between religion and charity in a common law context and outline some of the more influential parameters. The second two chapters address the domestic frames of reference that compete with religion and then, in an international context, consider the impact of human rights case law and charity law reform on religion. The objective of this section is to broadly sketch the common law heritage shared by the six jurisdictions that are the subject of detailed study in Part II. Of particular interest is the specific religion-related changes to that heritage recently introduced by developments in charity law and human rights.

Part II, which comprises the bulk of the book, deals with contemporary international perspectives and in six chapters focuses in turn on England and Wales, Ireland, the United States, Canada, Australia and New Zealand. Of these, the first is necessarily the longest as so much of the foundations for the contemporary law governing charity, the advancement of religion as a charitable purpose, the Church–State relationship and the social role of religion, were laid in England. The objective of this section is to examine the inter-relationship between canon law, charity law and human rights law as illustrated in the cases generated within each jurisdiction. In order to facilitate the systematic gathering of information and allow for ease of cross-referencing and comparative analysis, a loosely designed template is utilised but with some elasticity as, particularly in relation to the United States, there is often a need to take account of singular, jurisdiction-specific, material.

Part III, the final section of one chapter, draws from material in the jurisdiction-specific chapters to examine the nature of the present legal impasse confronting 'religion', to consider the implications of the current agenda of 'moral imperatives' and to assess possible future directions.