Introduction

Charity law is the body of law that invokes a legally understood concept of 'charity'. Through it, the state marks out for special legal treatment a range of purposes that stand to generate public benefit. Thus described, charity law is complex. In part, this is because the legal understanding of 'charity' diverges significantly from the non-legal meaning of that concept as having to do with alleviating human suffering; as we will see in this book, in addition to helping the disadvantaged, the legal understanding of 'charity' takes in a large range of public benefit purposes as diverse as founding a school, beautifying a town, or staging an opera. In part, charity law is complex because a legal understanding of 'charity' is deployed in a range of legal settings, in ascertaining the validity of trusts for purposes, in determining the availability of legal – and especially tax – privileges, and in generating a legal status that opens the door to a variety of regulatory consequences. In part, the complexity of charity law is a product of its history, as its sources may be found in hundreds of years of largely incremental, sometimes fitful, judicial activity, punctuated by occasional legislative interventions that at times have purported to restate judge-made law, at times have tinkered at the edges, and at times have effected radical change. Given the complexity of charity law, it is unsurprising that textbooks on the subject typically run to many hundreds of pages of detailed analysis;[1] nor, perhaps, is it surprising that one of the greatest charity lawyers of the twentieth century, Lord Simonds, thought that 'few, if any, subjects have more frequently occupied the time of the court'.[2]

[1] See, e.g., Gino Dal Pont, *Law of Charity* (LexisNexis Butterworths, Chatswood, 2010); Peter Luxton, *The Law of Charities* (Oxford University Press, 2001); Hubert Picarda, *The Law and Practice Relating to Charities* (4th edn, Bloomsbury Professional, Haywards Heath, West Sussex, 2010); Jean Warburton, Debra Morris and N.F. Riddle (eds), *Tudor on Charities* (9th edn, Sweet and Maxwell, London, 2003); Jonathan Garton, *Public Benefit in Charity Law* (Oxford University Press, 2013).

[2] *Gilmour* v. *Coats* [1949] AC 426 (House of Lords), 443.

If it is unsurprising that lawyers have spilt much ink over the complexities of charity law, it is perhaps more surprising that political philosophers have not done the same. Charity law, like all law, raises themes that are of interest to political philosophers – themes like the relationship of citizen and state, the distinction between public and private, the demands of social justice and the moral basis and outworkings of individual rights, to name just a few. And yet the considerable recent interest in philosophical foundations and aspects of various bodies of law, from the law of property, to the law of torts, to contract law, to the law of unjust enrichment, has not been replicated in the case of charity law. More surprising still is the lack of interest in charity law from political philosophers working in the liberal tradition,[3] for charity law raises some of the core questions in that tradition. For example, many liberals are committed to the proposition that, in some sense, the state must remain neutral with respect to contested conceptions of the good, and yet in charity law we find the state marking out certain purposes as 'charitable' according to contested conceptions of the good and then extending legal privileges to the citizens who pursue those purposes. Can this practice be justified in a way that is consistent with liberal commitments? How? To take another example, the tax privileges of charity law have distributive consequences which ought to be of interest to liberals who worry over the demands of distributive justice. When, via charity law, the state permits a rich person to deduct from her assessable income a million-dollar donation to an art gallery, is liberal distributive justice engaged? How? With what consequences? Or yet another example: one key liberal preoccupation is with the special value of political expression in light of the demands of democratic government; when the state declares that political purposes cannot be charitable in law, as is the case in a number of jurisdictions, does this interfere with political expression in a way that ought to be of liberal concern? If so, why? And what should be done about it?

The aim of this book is to contribute to rectifying the lack of liberal interest in charity law. The book will consider some questions about state action and public discourse that are raised by charity law, from a perspective informed by liberal philosophical commitments. The aim

[3] One notable exception is Nick Martin, 'Liberal Neutrality and Charitable Purposes' (2012) 60 *Political Studies* 936. And we should note also the important work of Rob Atkinson in the tradition of republican political philosophy: Rob Atkinson, 'Keeping Republics Republican' (2011) 88 *Texas Law Review* 235.

will not be to provide a detailed examination of every aspect of charity law; the complexity of charity law is such that any aspiration to exhaustive coverage of the legal materials must be abandoned. Nor will the aim be to provide a liberal theory of charity law that addresses every question about state action and public discourse that charity law might raise. Again, such an aim is too ambitious for one book. Rather, the book will aim to develop a theoretical framework, informed by liberal commitments, for the fruitful study of questions about state action and public discourse that are raised by charity law; it will then apply that framework in thinking about some, but not all, such questions. The selection of questions on which to focus has been guided by a sense of what liberals might find most perplexing or difficult about charity law as well as a sense of what has generated most debate and controversy among charity lawyers. To the extent that the book leaves questions about state action and public discourse in the charity law setting unaddressed, the hope is that it will at least equip readers with evaluative tools for approaching those questions themselves.

In Chapter 1, we will begin our inquiry into charity law and the liberal state by gaining an overview of the content of charity law with reference to a number of jurisdictions in which charity law may be found. In Chapter 2, we will turn to the task of selecting a liberal perspective from which to consider questions about state action and public discourse that are raised by charity law. Having selected a perspective, we will ask in Chapter 3 why the state might choose to pursue the aims of charity law via charity law and not in some other way, and we will also examine why the boundaries of that body of law might be set where they are set. Chapter 4 will focus on important questions of distributive justice that come into view once we reflect on the distributive implications of charity law, including the distributive implications of those rules of charity law extending tax privileges to citizens who pursue charitable purposes. In Chapter 5, we will take up the question of the state's use of charity law to promote religion – perhaps, from a liberal perspective, the most puzzling of charity law's dimensions. Chapter 6 will weigh up the reasons for and against charity law's longstanding rule disqualifying political purposes from being charitable, and Chapter 7 will explore the proper liberal response to discrimination, on grounds like race, sex and religion, in the pursuit of charitable purposes.

What will emerge from the various chapters is an argument for charity law in something like its current form. This argument embraces two more specific claims: first, that charity law, for all its complexity and even

incoherence,[4] is broadly comprehensible and useful in light of the state aims that underpin it; and second, that the aims underpinning charity law are broadly defensible having regard to liberal commitments. These claims might strike some readers as surprising, given what others have said and thought about charity law. For example, Gino Dal Pont has argued that various state aims that are presently pursued via charity law might be better pursued by legal rules that eschew a legally understood concept of charity; Dal Pont thus calls into question the claim that charity law is useful in light of its aims.[5] Others have argued that the aims of charity law are aims that the state should not have in the first place. For instance, there is a long history of doubting the justification of the aims underpinning the state's extension of legal privileges to those who pursue charitable purposes; perhaps the most famous chapter in this history is William Gladstone's failed attempt in 1863 to impose income tax on charities.[6] Such instances of scepticism about the comprehensibility, usefulness and justification of charity law are, in large part, at odds with the conclusions of this book – conclusions suggesting that charity law makes sense and is worth having in a liberal state. That said, the book is not an uncritical apologia for modern charity law; to the extent that the content or consequences of charity law cannot be defended in light of liberal commitments, we will notice this and draw the necessary conclusions.

Before we turn to the substance of our inquiry, we should reflect for a moment on the scope of this book; doing so should clarify further the aim underpinning it. The scope of the book might be thought to be too narrow: first, in the sense that it purports to be a book about 'charity law' and yet touches on only some of the jurisdictions in which charity law may be found, viz, Australia, Canada, England and Wales, Ireland, New Zealand, Northern Ireland, Scotland and the United States; and second, in the sense that as a book about 'charity law' it chooses not to focus on bodies of law that do not invoke a legally understood concept of

[4] 'No-one who has been versed . . . in this difficult and very artificial branch of the law can be unaware of its illogicalities': *Oppenheim* v. *Tobacco Securities Trust Co Ltd* [1951] AC 297 (House of Lords), 307 (Lord Simonds).

[5] Gino Dal Pont, 'Why Define "Charity"? Is the Search for Meaning Worth the Effort?' (2002) 8 *Third Sector Review* 5.

[6] See the account in David Owen, *English Philanthropy 1660–1960* (Belknap Press, Cambridge, MA, 1964), 330–332. For a more recent instance of scepticism about the tax privileges of charity law: Michael Chesterman, 'Foundations of Charity Law in the New Welfare State' (1999) 62 *Modern Law Review* 333.

'charity', but nonetheless serve a function of marking out for special legal treatment purposes that stand to produce public benefit, and to that extent are analogous to charity law. Such bodies of law may be found in a range of jurisdictions beyond what is typically called the common law world, in continental Europe, Asia and South America, for example.[7]

These concerns over the scope of the book should disappear once its aim is properly understood. This is a book about questions of state action and public discourse that are raised by charity law; thus, the law of particular jurisdictions is of interest to us only to the extent that it shows some of the ways in which such questions arise. That said, the charity law of jurisdictions not included in this book is in many respects similar to the charity law of jurisdictions that are included and therefore raises the questions about state action and public discourse that are addressed in the book. A similar claim may be made about jurisdictions that do not have a 'charity law' but instead mark out public benefit purposes for special treatment via a law of 'public benefit organisations' or the like. There should be much in this book of interest to readers in any jurisdiction where public benefit purposes are marked out for special legal treatment, whether via 'charity law' or in some other way. Nonetheless, in confining its inquiries to the 'charity law' of the common law world, the book aims to be sensitive to one important consideration. As we will see in what follows, one of the more noteworthy dimensions of charity law is what might be called its expressive dimension; via charity law, the state associates the pursuit of charitable purposes with a variety of public meanings, some of which are of interest from a liberal philosophical perspective. Some of these public meanings may be informed by the non-legal meaning of the concept 'charity' and, to the extent that they are, 'charity law' may have expressive effects that are absent from analogous bodies of law organised around different concepts. With these possible expressive effects in view, there are reasons to confine a study of charity law and the liberal state to jurisdictions that have 'charity law', even if many of the conclusions of such a study are applicable in jurisdictions where analogous bodies of law serve analogous state aims but are organised around different concepts.

[7] For overviews of many such jurisdictions, see David Moore, Katerina Hadzi-Miceva and Nilda Bullain, 'A Comparative Overview of Public Benefit Status in Europe' (2008) 11 *International Journal of Not-for-Profit Law* 5; Anne-Marie Piper (ed.), *Charity Law: Jurisdictional Comparisons* (Thomson Reuters, London, 2012).

1

Charity law in overview

1. Introduction

As we saw in the Introduction, this book will address questions about state action and public discourse that are raised by charity law. In order to set the stage for such inquiries, we should begin by looking at our subject in overview, seeking to identify key features that tend to characterise charity law wherever it is found, and in light of which questions about state action and public discourse may be framed. That is the aim of this chapter. When looked at in overview, charity law may be divided into two broad parts: that which addresses the question whether or not a purpose is charitable in law[1] and that which addresses the question of what legal consequences flow from the pursuit of charitable purposes. The first part of charity law itself breaks down into two further components: the first of these further components consists of a set of criteria by which decision-makers determine the charitable or non-charitable character of purposes and the second consists of a number of rules according to which certain purposes are disqualified from being charitable. The second broad part of charity law consists of rules spelling out the legal consequences for those who carry out charitable purposes; the most significant of those consequences – at least in the context of a study of charity law and the liberal state – are the legal privileges that charity law extends to those with charitable purposes. With these preliminary taxonomical observations in mind, our overview of charity law in this chapter will begin with an examination of the criteria of charity law; we will then turn to

[1] In most jurisdictions, charity law takes an interest in the character of purposes, rather than in the activities that are carried out in the pursuit of purposes. The boundary between purposes and activities is not always kept distinct, however, and in Scotland, charity law takes an overt interest in activities. For an overview of the treatment of activities in charity law: Jonathan Garton, *Public Benefit in Charity Law* (Oxford University Press, 2013), [3.36]–[3.42].

some of charity law's key disqualifying rules, and we will conclude with a brief discussion of the legal privileges of charity.

2. The criteria of charity law

The criteria of charity law are the primary means by which decision-makers – whether they be judges, regulators of the charity sector or tax officials – determine whether or not some purpose should be regarded as charitable in law. These criteria emerged gradually over time from judicial decisions in the law of trusts, the traditional home of charity law, but in modern charity law they are applied in many cases by a range of decision-makers outside the law of trusts where the question whether or not a purpose is charitable arises for consideration. For example, the criteria of charity law might be invoked by a charity regulator in deciding whether to register some entity as a charity, or by a tax official in determining whether the income of an entity is exempt from income tax. The criteria of charity law are twofold: first, in order to be charitable in law, a purpose must fall within at least one of a set of legally prescribed general descriptions of charitable purpose; and second, in order to be charitable in law, a purpose must be of public benefit. As we will see, in at least one respect the first of these criteria is best understood in light of the second, and in this sense it might be said that the only true criterion of charity law is a public benefit test. Nonetheless, for present purposes it will suffice to adhere to orthodoxy and describe the two criteria of charity law separately, even though it may in fact be possible and desirable to think of them reductively as outworkings of a single, more fundamental, concern.

A. General descriptions of charitable purpose

One of the criteria of charity law takes the form of a requirement that, in order to be considered charitable, a purpose must fall within at least one of a set of legally prescribed general descriptions of charitable purpose. As we will see, the descriptions that make up this set vary from jurisdiction to jurisdiction, but the set is typically designed so as to incorporate two features. First, the set is usually open-ended, including a 'catch-all' description that facilitates the recognition of new types of purpose as charitable; and second, the set is usually subject to some constraint so as to ensure that the recognition of new types of purpose as charitable occurs in a controlled and (in theory at least) predictable

manner.[2] General descriptions of charitable purpose typically form a starting point for analysis when the question whether or not a particular purpose is charitable is before a decision-maker. Thus, a decision-maker will typically seek to establish whether or not the purpose before her falls within one or more of the descriptions that figure in the set of descriptions in the charity law of her jurisdiction, before asking any other questions about the purpose with a view to determining whether or not it is charitable.

The best-known set of general descriptions of charitable purpose in charity law made its first appearance in counsel's argument in *Morice* v. *Bishop of Durham*,[3] but has come to be associated with the judgment of Lord Macnaghten in the celebrated case of *Commissioners for Special Purposes of Income Tax* v. *Pemsel*.[4] Until quite recently, this set – which, for convenience, we may refer to as the '*Pemsel* set' – figured in the charity law of a wide range of jurisdictions, and one consequence of this is that nearly all of the judicial decisions constituting sources of charity law since the late nineteenth century (when *Pemsel* was decided) have been decided against a legal backdrop incorporating the *Pemsel* set. As we will see shortly, in several jurisdictions the *Pemsel* set has been modified or replaced, but in Canada and New Zealand it persists,[5] and in Australia it has been replaced only for the purposes of federal law.[6] The *Pemsel* set is composed of four descriptions, also known in the distinctive terminology of charity law as the four 'heads' of charity: 'relief of poverty'; 'advancement of education'; 'advancement of religion'; and 'other purposes beneficial to the community, not falling under any of the preceding heads'.[7] The fourth 'head' of the *Pemsel* set is an open-ended 'catch-all' description, and the history of charity law shows that many new types of

[2] In Ireland, there would seem to be some uncertainty about whether or not the set of descriptions in section 3 of the Charities Act of 2009 is open-ended and, if it is, what constraint applies to it: Oonagh B. Breen, 'Ireland: *Pemsel* Plus' in Myles McGregor-Lowndes and Kerry O'Halloran (eds), *Modernising Charity Law: Recent Developments and Future Directions* (Edward Elgar, Cheltenham, 2010) 74.

[3] (1804) 9 Ves Jun 399; 32 ER 656 (Sir William Grant MR); (1805) 10 Ves Jun 522; 32 ER 947 (Lord Eldon LC).

[4] [1891] AC 531 (House of Lords).

[5] For the Canadian position, see *Vancouver Society of Immigrant and Visible Minority Women* v. *Minister of National Revenue* [1999] 1 SCR 10 (Supreme Court of Canada). In New Zealand, the Charities Act 2005 (NZ) s 5 'defines' charity but the 'definition' refers to judge-made law, which remains the source of the *Pemsel* set in that jurisdiction.

[6] Charities Act 2013 (Australia) s 12.

[7] [1891] AC 531 (House of Lords), 583 (Lord Macnaghten).

purpose have been found to be charitable within this 'head'. At the same time, decision-makers have often interpreted the fourth 'head' of the *Pemsel* set as subject to a constraint in the form of a requirement that a purpose within that 'catch-all' description be either listed in or analogous to a purpose listed in the preamble to a late Tudor statute, the Statute of Charitable Uses of 1601, also known as the Statute of Elizabeth.

The preamble to the Statute of Elizabeth, rendered in modern English, refers to the following purposes:

> the relief of the aged, impotent and poor people; the maintenance of sick and maimed soldiers and mariners, schools of learning, free schools and scholars in universities; the repair of bridges, ports, havens, causeways, churches, sea-banks and highways; the education and preferment of orphans; the relief, stock or maintenance of houses of correction; the marriages of poor maids, the supportation, aid and help of young tradesmen, handicraftsmen and persons decayed; the relief or redemption of prisoners or captives, and the aid or ease of any poor inhabitants concerning payment of fifteens, setting out of soldiers and other taxes.

Exactly how and why this preamble came to operate as a constraint on the admission of new types of purpose to the *Pemsel* set is not well understood. The Statute of Elizabeth was enacted in order to establish a regulatory structure for the supervision of charitable trusts, against a backdrop of fraud and neglect on the part of charity trustees. The preamble was intended less as a definition of charitable purposes than as a statement of types of purposes that, to the late Tudor mind, were regarded as charitable.[8] Nonetheless, by the time of *Pemsel*, the preamble was entrenched in judge-made charity law as a sort of index to be consulted when a question was raised as to whether or not some purpose was charitable[9] and, later, reference to the 'spirit and intendment' of the preamble came to constrain the growth of the fourth 'head'.[10] That said, it must be acknowledged that there has also been a tradition of ignoring or downplaying the preamble when new types of purpose have fallen for consideration under the fourth 'head'.[11] Today, in jurisdictions whose

[8] On the background to the Statute of Elizabeth, see Gareth Jones, *History of the Law of Charity 1532–1827* (Cambridge University Press, 1969), ch 3.

[9] See, e.g., *Morice* v. *Bishop of Durham* (1804) 9 Ves Jun 399; 32 ER 656 (Sir William Grant MR); (1805) 10 Ves Jun 522; 32 ER 947 (Lord Eldon LC).

[10] See, e.g., *Scottish Burial Reform and Cremation Society Limited* v. *Glasgow Corporation* [1968] AC 138 (House of Lords).

[11] See, e.g., cases on purposes relating to animal welfare: *In re Wedgwood* [1915] 1 Ch 113 (Court of Appeal); *In re Grove-Grady* [1929] 1 Ch 557 (Court of Appeal); *National Anti-Vivisection Society* v. *Inland Revenue Commissioners* [1948] AC 31 (House of Lords).

charity law continues to incorporate the *Pemsel* set, the link to the preamble persists – especially in the setting of the fourth 'head'[12] – but so does the tradition of ignoring or downplaying it when the occasion suits.[13]

In the United States of America, the *Pemsel* set continues to figure in charity law, although it has been modified in certain ways. The United States Restatement (Third) of Trusts states that charitable purposes 'include' the following: 'relief of poverty'; 'advancement of knowledge or education'; 'advancement of religion'; 'promotion of health'; 'governmental or municipal purposes'; and 'other purposes beneficial to the community'.[14] This set of purposes clearly resembles, but is not identical to, the *Pemsel* set;[15] to that extent it may be viewed fairly as an American interpretation of the *Pemsel* set. As well as appearing in the Restatement, the American interpretation of the *Pemsel* set informs the authoritative treatise *Scott on Trusts*, where it is used to frame a discussion of general descriptions of charitable purpose.[16] Whether or not decision-makers in the United States follow a consistent practice of turning to the American interpretation of the *Pemsel* set when determining the charitable or non-charitable character of purposes is not easily ascertained, given the difficulty of identifying case law trends in various state courts, and the possibility must remain open that in the United States the *Pemsel* set functions more as a taxonomical tool for scholars than as a guide to the practical reasoning of decision-makers.[17] Moreover, the Restatement also states that the 'definition of charity' that will be applied in cases raising questions about the validity of trusts for purposes may not be the same as the 'definition of charity' that will be applied in cases raising questions about eligibility for tax

[12] See, e.g., *Vancouver Regional Freenet Association* v. *Minister of National Revenue* (1996) 137 DLR 4th 406 (Canadian Federal Court of Appeal), in which an analogy was drawn between the purpose of offering free Internet access and the 'repair of ... highways' mentioned in the preamble.

[13] See, e.g., *Aid/Watch Incorporated* v. *Federal Commissioner of Taxation* (2010) 241 CLR 539 (High Court of Australia).

[14] US Restatement (3rd) of Trusts, § 28.

[15] It also has affinities with the general descriptions of charitable purpose given by Gray J in *Jackson* v. *Phillips* (1867) 96 Mass 539 (Massachusetts Supreme Judicial Court), 556.

[16] Austin Wakeman Scott and William Franklin Fratcher, *The Law of Trusts* (4th Edn., Little, Brown and Co, Boston, 1989) Volume IVA, §368 to §374.

[17] See John D. Colombo and Mark A. Hall, *The Charitable Tax Exemption* (Westview Press, Boulder CO, 1995), 36–38.