Introduction: theoretical and comparative perspectives on not-for-profit law

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Not-for-profit[1] law is currently very much on the political and legal agendas across the English-speaking world. In England and Wales, major reform to the law of charity was undertaken in 2006;[2] since then, specific topics in not-for-profit law, for example, the charitable status of independent schools and religious groups, the proper role of the charity regulator, and the availability of tax privileges to those who donate to charity, have been the subject of intense and often bitter public debate. In Australia, Hong Kong, Ireland, New Zealand, Northern Ireland and Scotland, not-for-profit law – especially charity law – has either been reformed in substantial ways in the past ten years or reform is currently in train.[3] Changes to the tax treatment of charities in the United

[1] At the outset we should note that the definition and classification of the not-for-profit sector, also called the 'non-profit', 'voluntary', 'community' or 'third' sectors, and the relationships of the not-for-profit sector with the state, the market and civil society, have long been a matter for academic and policy debate: see, e.g., Burton A Weisbrod, 'Toward a Theory of the Voluntary Non-Profit Sector in a Three-Sector Economy', in Edmund S Phelps (ed.), *Altruism, Morality and Economic Theory* (Russell Sage Foundation, 1975), 17 and Lester M Salamon and Helmut K Anheier, 'In Search of the Non-Profit Sector. I: The Question of Definitions' (1992) 3(2) *Voluntas: International Journal of Voluntary and Nonprofit Organizations* 125. Charities form one part of the not-for-profit sector, but the law of charity has a particular history and resonance in common law jurisdictions, raising further questions about what distinguishes the charity sector from the rest of the not-for-profit sector and about the meaning of the basic terms 'charity' and 'philanthropy'. We have adopted the general term 'not-for-profit' in the title of this book and this term is also used by many of the contributors. However, other contributors invoke concepts like 'non-profit', 'charity' and 'philanthropy'.

[2] See Charities Act 2006 (UK) c. 50, now replaced by Charities Act 2011 (UK) c. 25.

[3] See Charities Act 2013 (Cth) and Australian Charities and Not-for-Profits Commission Act 2012 (Cth) (Australia); Law Reform Commission of Hong Kong, Report: Charities

Kingdom and the possibility of tax reform for not-for-profits in Australia have provoked strong reactions. In Australia, Canada, New Zealand and the United States, the proper legal response to political advocacy on the part of not-for-profits continues to be the subject of judicial scrutiny and lively public discussion,[4] and in Australia the High Court has recently considered that question, as well as the legal distinction between charities and state-controlled entities and the proper tax treatment of the commercial activity of not-for-profits.[5] All of this suggests that in many countries not-for-profit law is a matter of public concern and importance in an unprecedented way at the present time.

While at the present time there would seem to be an unprecedented public policy focus on the not-for-profit sector, recent reforms to not-for-profit law can scarcely be presented as a narrative of uninterrupted progress. The regulatory activities of the Charity Commission for England and Wales since the enactment of the Charities Act 2006 have been severely criticised and there is now talk of winding back the powers of the Commission and some of the demands of the law of charity in that jurisdiction.[6] In Australia, in 2013, the Commonwealth Parliament enacted a landmark statute defining charity, but since then a new government has been elected that, at the time of writing, has vowed to repeal the act and clip the wings of the nascent regulator of not-for-profit activity in that country, the Australian Charities and Not-for-Profits

(December 2013) at www.hkreform.gov.hk (Hong Kong); Charities Act 2009 (Ireland); Charities Act 2005 (NZ); Charities Act (Northern Ireland) 2008 (Northern Ireland); Charities and Trustee Investment (Scotland) Act 2005 (Scotland).

[4] In Canada, the 2012 federal budget contained measures designed to subject charities engaging in political advocacy to closer scrutiny: for discussion, see www.theglobeandmail.com/news/politics/new-rules-in-budget-create-more-fear-among-politically-active-charities/article4102573; in New Zealand, see *In re. Greenpeace of New Zealand Incorporated* [2013] 1 NZLR 339 (NZ) (on appeal in the Supreme Court of New Zealand at the time of writing); for a sense of the issues in the United States, see the chapter in this collection by Nina Crimm and Larry Winer.

[5] *Aid/Watch Incorporated* v. *Federal Commissioner of Taxation* (2010) 241 CLR 539 (response to political advocacy); *Central Bayside General Practice Association Ltd* v. *Commissioner of State Revenue* (2006) 228 CLR 168 (distinction between charity and state-controlled entities); *Federal Commission of Taxation* v. *Word Investments Ltd* (2008) 236 CLR 204 (charity, tax and commercial activities).

[6] House of Commons Public Administration Select Committee, 'The Role of the Charity Commission and "Public Benefit": Post-Legislative Scrutiny of the Charities Act 2006', House of Commons Paper no. 76 (incorporating 574-i-vi), session 2012–13 (2013), esp. [92]–[93].

Commission.[7] In New Zealand a charity regulator was established in 2005, only to be 'disestablished' in 2012 (and absorbed within the Department of Internal Affairs), but not before making a series of registration decisions that continue to be tested in New Zealand's courts.[8] If the past decade has been a time of unusually copious law reform relating to not-for-profits, it has also been a time of much disagreement about that reform.

The recent history of interest in, but disagreement about, not-for-profit law should hardly be surprising to anyone with an academic interest in the field. Much academic literature dealing with the not-for-profit sector has sought to establish that this is a sector that we all have powerful reasons to take an interest in, whether because it performs functions that other sectors of society fail to perform,[9] or because of the contribution that it makes to pluralism or freedom,[10] or because it is a site of human flourishing in all its forms.[11] Moreover, empirical studies have established that the not-for-profit sector is important in light of the sorts of measures relied on in formulating public policy: contribution to national employment, percentage of gross domestic product, and so forth.[12]

But while academic literature on the not-for-profit sector has done much to establish why we should take an interest in that sector, it has also raised a number of fundamental questions about the sector that are little-understood or the subject of scholarly debate. Some of those questions are

[7] Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 17 June 2013, 5877 (Kevin Andrews MP).

[8] See, e.g., *Re. the Grand Lodge of Ancient Free and Accepted Masons of New Zealand* [2011] 1 NZLR 277; *In re. Draco Foundation (NZ) Charitable Trust* [2011] 25 NZTC ¶ 20-032; *Liberty Trust* v. *Charity Commission* [2011] 3 NZLR 68; *In re. Greenpeace of New Zealand Incorporated* [2013] 1 NZLR 339.

[9] This is the gist of the literature setting out various 'failure' theories of the not-for-profit sector. For an overview, see Jonathan Garton, *The Regulation of Organised Civil Society* (Hart Publishing, 2009), ch. 3.

[10] See, e.g., Rob Reich, 'Toward a Political Theory of Philanthropy', in Patricia Illingworth, Thomas Pogge and Leif Wenar (eds), *Giving Well: The Ethics of Philanthropy* (Oxford University Press, 2011), 177 (pluralism); Matthew Harding, 'What is the Point of Charity Law?', in Darryn Jensen and Kit Barker (eds), *Private Law: Key Encounters with Public Law* (Cambridge University Press, 2013), 147 (freedom).

[11] See Ontario Law Reform Commission, *Report on the Law of Charities*, vol. 1 (1996), easily the most scholarly of the many reports on charity law produced by law reform agencies over the years.

[12] In Australia, for example, two important studies are: Mark Lyons, *The Third Sector: The Contribution of Nonprofit and Cooperative Enterprise in Australia* (Allen and Unwin, 2001) and Productivity Commission, 'Contribution of the Not-for-Profit Sector: Research Report' (2010).

taxonomical, concerned with how to define or classify the not-for-profit sector or parts of it.[13] Such questions about formal classification lead quickly to deeper normative questions concerning the value and proper role of not-for-profit activity. Should we consider the not-for-profit sector as a desirable, perhaps even an essential, element of our society? Why? Does the legal definition of charity mark out distinctive types of purposes that are worthy of special legal treatment? Why? These sorts of questions about normative underpinnings deserve greater attention from diverse and new perspectives. On the one hand, economic analyses of the role of the not-for-profit sector have dominated the field, especially in the United States, exerting a powerful influence on new theoretical writing about the sector. On the other hand, charity lawyers steeped in Chancery traditions and the almost bewildering intricacies of the judge-made law of charity have often eschewed normative inquiries for more traditional doctrinal ones.

Once we start to think about normative underpinnings, a range of new questions comes into view. Many of them are about the relationship between the not-for-profit sector and the state and in particular about the tax treatment of the not-for-profit sector. When and why should the state make tax privileges available to the not-for-profit sector? What sorts of tax privileges should the state make available? Under what circumstances should the state withdraw such tax privileges? What are the distributive effects of the tax privileges extended to the not-for-profit sector, and in what circumstances do those effects become intolerable? These questions have received surprisingly little academic analysis, and yet their importance cannot be doubted. Other questions that emerge from reflection on the normative underpinnings of not-for-profit law relate to regulation of the not-for-profit sector and the differences between that sector and government. When may not-for-profit law be used by the state to exert control over those of its citizens who pursue not-for-profit purposes? What are the proper aims of state control of not-for-profits? Are there fields of not-for-profit activity that should be beyond the reach of the regulatory state? Yet further questions relate to restrictions. Why is the legal definition of charity, and the special legal treatment that attends charitable status, confined to only some purposes that stand to benefit the public? What is the relationship between the market and the activities of not-for-profits and should there be restrictions, or boundaries, placed around the engagement of not-for-profits in the market? When and why

[13] See above, n. 1.

are governmental purposes to be treated differently from purposes pursued in the voluntary sector?

The chapters in this book, many of which originated in papers delivered at an international conference on not-for-profit law held at the University of Melbourne in July 2012, address fundamental normative questions about not-for-profit law from a range of theoretical and comparative perspectives. As a collection, these chapters aim to reinforce the significance of the not-for-profit sector and not-for-profit law as subjects of academic study and public policy; they also aim to deepen our understanding of fundamental questions about not-for-profit law and possible responses to such questions. Thinking through questions of public policy, law reform and institutional design is always assisted by theoretical and comparative analysis: indeed, producing just such analysis is one of the most important and valuable functions that academics in the social sciences – including, for present purposes, legal academics – perform. Moreover, it seems particularly important at the present juncture of legal change and controversy to broaden the range of theoretical perspectives brought to bear on the study of not-for-profit law. And in light of the tendency across the English-speaking world to look to one jurisdiction for guidance in how to reform not-for-profit law in another, comparative perspectives are also especially desirable. In light of these considerations, it is our hope that this book will contribute to the literature on not-for-profit law by broadening our understanding of the sorts of theoretical perspectives that can usefully be brought to bear on not-for-profit law, and by assisting in the task of evaluating law reforms in various jurisdictions, law reforms that might potentially be transplanted from one jurisdiction to another.

The numerous questions about taxonomy, normative underpinnings and the design of law and policy for the not-for-profit sector are vexing partly because they are interrelated. Thus, it is not possible to dwell on any one question – say, about the justification of some tax rule as it relates to the not-for-profit sector – without immediately facing a multitude of other questions, relating to the definition of the not-for-profit sector, its social value, distributive justice, and so on. That said, we have chosen to arrange the chapters in this book according to four themes. The first theme is 'politics', understood both in an elevated sense to refer to the moral dimensions of living as a community, and in a more popular sense to refer to the seeking, wielding and fettering of political power. The second theme is 'charity', the key concept in the not-for-profit law of many jurisdictions, and undoubtedly the one that has received the most attention from decision-makers and academics. The third theme

is 'taxation', the driving force behind much public policy interest in the not-for-profit sector. The last theme is 'regulation', a theme of increasing significance to the study of not-for-profit law as regulatory responses to not-for-profit activity grow both more popular and more complex.

The four themes selected for the organisation of this book are not mutually exclusive; any one of the chapters in this book, by virtue of its interest in the interrelated questions to which we referred above, might be identified with more than one theme. Thus, our hope is that the selection of these themes will encourage those who are accustomed to thinking, for example, in terms of politics, tax or regulation to join those who think in terms of charity in taking an interest in not-for-profit law, and will encourage all such thinkers to explore the interrelated nature of questions about the not-for-profit sector. That said, we leave it to the reader to discern the ways in which each of the chapters in this book addresses the themes of politics, charity, tax and regulation. For present purposes, in the remainder of this introduction, we wish to present the chapters in this collection in a slightly different way, so as to illuminate further the range of theoretical and comparative perspectives that the collection encompasses. We wish to pose four questions about not-for-profit law, and consider briefly some of the ways in which the various authors handle those questions.

First, what, if anything, is special about the not-for-profit sector and in particular that component of the not-for-profit sector that is the charitable sector? In the first chapter of the collection ('Philanthropy's function: a neoclassical reconsideration'), Rob Atkinson argues that in order to understand what is special about charity – what he calls 'philanthropy' – we must develop what philosophers sometimes call a 'conception of the good'. Atkinson follows the Greeks in identifying the 'good' with excellence or virtue, and he says that it is through the various purposes carried out in the charitable sector itself that we come to recognise and learn how to value the good thus understood. Along similar lines, in Chapter 8 ('The history and future of the definition of charity in Australia'), Joyce Chia suggests that we cannot understand the charity law concept of 'public benefit' except with reference to some philosophical understanding of value; for Chia, this understanding promises to tell us why the charitable sector is special. That said, Chia notes that considerations of distributive justice might also underpin the public benefit test, and she suggests that in understanding the normative foundations of that test we should think about the ways in which the pursuit of the good and the pursuit of justice can coincide.

Taking a different approach to the same question, David G Duff (Chapter 9, 'The tax treatment of charitable contributions in a personal income tax: lessons from theory and the Canadian experience') lays out the various arguments supporting favourable tax treatment of charitable giving. Duff expresses doubts about arguments appealing to the scope of the income tax base or to some concept of reward for altruism. Instead, he points to arguments that highlight the various public goods generated by the pursuit of charitable purposes and the pluralism that is promoted in circumstances where the state incentivises the charitable giving that supports the production of public goods. However, he reminds us in the second part of his chapter that making a general case for the state to promote charitable giving via the tax system does not, by itself, tell us what sort of tax privileges should be extended to charitable donors. Duff argues that providing support to donors via deductions and exemptions from capital gains tax leads to political power being concentrated in the hands of the rich. With reference to empirical evidence drawn from his home country Canada, he demonstrates how replacing deductions with tax credits and taxing gifts of appreciated property to charities can ensure that the law can respond appropriately to that which is special about charity, but not at the cost of unacceptable political inequality.

In Chapter 5 ('The role of fiscal considerations in the judicial interpretation of charity'), Adam Parachin defends the proposition that there may be something distinct and special about 'charity' such that, when considering the legal definition of charity, decision-makers ought to be mindful of what he calls an 'ideal conception' of charity. Parachin warns against defining charity by asking questions about which purposes deserve tax privileges and which do not; he points to the distorting effects of the mortmain legislation of the eighteenth century as an example of what can go wrong in charity law when the consequences of charitable status are allowed to influence the definition of charity. On the other hand, in Chapter 13 ('The fault line of charity'), Jonathan Garton insists that asking what is special about the charity sector and then applying legal consequences in light of the answer to that question is to get things the wrong way round. For Garton, we must ask what regulatory aims the state pursues via the law that defines a charity sector, and then consider the extent to which we need to define a charity sector in the way the law defines it in order to achieve those aims.

Secondly, how should not-for-profit law respond to the pursuit of not-for-profit activity in a liberal democratic constitutional order? Two

chapters in particular engage with this theme. In Chapter 2 ('Archimedes, *Aid/Watch*, constitutional levers and where we now stand'), Matthew Turnour and Elizabeth Turnour reflect on the recent landmark decision of the High Court of Australia in *Aid/Watch Incorporated* v. *Federal Commissioner of Taxation*;[14] there the Court, pointing to implied constitutional freedoms, overturned the rule against political purposes that has traditionally characterised charity law in Australia as elsewhere. For Turnour and Turnour, the constitutional dimensions of the *Aid/Watch* decision lay the foundation for substantial changes to not-for-profit law in Australia; having made this point they explore some resulting legal puzzles. If Turnour and Turnour emphasise the liberalising possibilities of *Aid/Watch*, the chapter by Nina J Crimm and Laurence H Winer (Chapter 3, 'Dilemmas in regulating electoral speech of non-profit organisations') sounds a note of caution in respect of those possibilities. Crimm and Winer compare the regulation of electoral speech of not-for-profits in Australia and the United States. The US experience shows how difficult it can be to manage a distinction between acceptable or beneficial electoral speech by not-for-profits on the one hand, and cynical manipulation of the electoral process by vested interests utilising not-for-profits on the other; it also shows how striving to achieve such a balancing act is apt to generate legal complexity.

Thirdly, how should not-for-profit law, and especially the legal definition of charity, respond to social and economic change? In Chapter 4 ('Charity law: "no magic in words"?'), G E Dal Pont takes us on a tour of the history of the legal definition of charity over the past fifty years, and he shows that that history is one of relentless expansion: many more purposes are regarded as charitable today than was the case fifty years ago. Dal Pont argues that this history of expansion has been the product of social and economic factors, from shifting understandings of education and religion, to the changing role of government and its relationship with the charitable sector. How the state should deal with the implications for the revenue of the expansionist tendency of the legal definition of charity is an interesting question, and in their contribution (Chapter 12, 'Not-for-profit tax reform in Australia: opportunities and challenges'), Ann O'Connell and John Emerson discuss the possibility of designing the tax privileges of charity – and other not-for-profit activity – so that those privileges are more nuanced and layered than they are at present.

[14] (2010) 241 CLR 539.

Two further chapters dealing with the implications of social and economic factors for charity law are Fiona Martin's and Miranda Stewart's. In Chapter 7 ('Convergence and divergence with the common law: the public benefit test and charities for indigenous peoples'), Martin considers the impact of the public benefit test of charity law on indigenous groups with kinship connections. In New Zealand the public benefit test is not applied in full to such groups, and in Australia the law has recently been changed along similar lines.[15] Martin looks at the New Zealand experience and considers what lessons Australia may take away as it moves to a new way of treating indigenous groups in charity law. Her chapter reminds us that the demands of the public benefit test rightly change as they are applied in one or other social setting. In particular, the altruism that is so strongly associated with the public benefit test in its usual guise may not be relevant to the moral lives of communities whose identity cannot be separated from kin and the land. Stewart's chapter (Chapter 10, 'The boundaries of charity and tax') looks at two social and economic phenomena that are bound to play a significant role in the charity law of the future: commercialisation and globalisation. Stewart suggests that our traditional, state-based frame of reference is inadequate to decide the normative question of how tax law should draw the boundaries of charity, the state and the market in light of increased commercialisation and globalisation of charities. Stewart supports a liberal approach to tax law, enabling commercial and global activities of charity to benefit from national tax privileges; but cautions that we must be mindful of the challenge that a more liberal view of the boundaries of charity poses for the liberal democratic fiscal state, which remains constrained by national political and tax boundaries at the present time.

Finally, what lessons can we learn from the recent history of not-for-profit law reform around the world? The experience of reform in the United Kingdom is of particular interest for other common law countries and a number of chapters ponder the question of lessons to be learned from a British perspective. Hubert Picarda (Chapter 6, 'Charities Act 2011: dog's breakfast or dream come true? a case for further reform') and Debra Morris (Chapter 11, 'Recent developments in charity taxation in the United Kingdom: the law gives and the law takes away') each discuss some of the ways in which not-for-profit law has been held hostage to politics in the United Kingdom. For Picarda, the ambitious reforms to charity law begun in England and Wales in 2006 have drawn

[15] See Charities Act 2005 (NZ) s. 5(2)(a); Charities Act 2013 (Cth) s. 9.

the Charity Commission into an unseemly political dispute over the place of independent schools in British society,[16] and have landed the Commission in murky waters in its dealings with religious groups. Morris traces some of the ways in which tax policy relating to charities in the United Kingdom has been driven by political expediency and the influence of European law, with results that in part are confusing and at odds with the British government's recent rhetoric about the role of charities in the 'Big Society'.[17]

Christopher Decker and Matthew Harding (Chapter 14, 'Three challenges in charity regulation: the case of England and Wales') also focus on the experience of England and Wales, arguing that in several ways the activities of the Charity Commission in that jurisdiction are of concern in light of sound principles of regulation; for Decker and Harding, regulatory shortcomings in England and Wales are in part to be attributed to the Charity Commission itself but in part are the product of conflicting policy goals and insufficiencies in the legal framework within which the Commission operates. As the principal judge of the First-tier Tribunal (Charity) in England and Wales, Alison McKenna is uniquely placed to reflect on the experience of that institution since its inception. In Chapter 15 ('Appealing the regulator: experience from the Charity Tribunal for England and Wales'), she finds that the tribunal has been successful in many ways but could be improved in others, and her chapter, like the chapter by Decker and Harding, serves to remind us of the importance of institutions to the achievement of public policy goals relating to the not-for-profit sector.

The recent and ongoing experience of not-for-profit law reform in Australia is the subject of several of the chapters. In June 2013, a new statute defining charity for the purposes of Commonwealth law was introduced;[18] in her contribution, Joyce Chia looks at the history of attempts to achieve that statutory reform and contemplates what might have been, as well as what the future holds. Fundamental reform of tax laws relating to not-for-profits is under consideration in Australia at the time of writing, and Ann O'Connell and John Emerson discuss the unique political circumstances that may enable such reform in Australia, and spell out a number of considerations that should be taken into account in designing

[16] See *R. (Independent Schools Council)* v. *Charity Commission for England and Wales* [2012] Ch 214.
[17] Cabinet Office (UK), 'Building the Big Society' (2010).
[18] Charities Act 2013 (Cth).