Ian Murray*

Charities & Discrimination: Is Charity Law Always a Better Solution than Public Policy?

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Abstract: Discrimination by charities raises questions about the appropriate extent of equality regulation and has implications for government outsourcing through charities and for the provision of tax concessions. Professor Parachin has recently provided a justification for denying the application of public equality norms to charities through the public policy test of charity law. This paper builds on that work by considering whether liberal societies might, however, have good grounds to apply public equality norms to charities in circumstances such as the provision of outsourced government services, state enforcement of egoistic giving, or where doing so is a proportionate means to prevent harm.

Keywords: discrimination, public policy, charities, charity law, equality, civil rights

1 Introduction

'Charity law', being the law of charitable purpose trusts and of charitable status, is not very effective in jurisdictions such as the US, Canada, Australia, New Zealand and the UK at dealing with discrimination. By and large, charity law is enabling and permissive of discrimination. Occasionally, however, courts apply public policy principles (a purpose contrary to public policy is not a valid charitable purpose) to invalidate discriminatory requirements such as race (*Bob Jones University v United States* [1983] 461 US 574 ['*Bob Jones*']) or race/religion/ethnicity/sex (*Canada Trust Co v Ontario Human Rights Commission* [1990] 69 DLR [4th] 321 ['*Canada Trust Co*']). Relying on public policy in this way is problematic as it usually involves sleight of hand in applying a test that is formally based on a charitable purpose to a set of discriminatory activities and because the typically vague references to public policy by courts do not articulate clear guiding principles for future disputes (Parachin 2020b).

***Corresponding author: Ian Murray**, Law School, University of Western Australia, Crawley, Australia, E-mail: ian.murray@uwa.edu.au. https://orcid.org/0000-0001-7896-3550

This poses problems for policy makers who may need to explain why tax concessions continue to be provided to discriminatory charities or why the government is permitting outsourced services to be provided in a discriminatory fashion. In a recent article, Professor Parachin (2020b) attempts to formulate a response from within the confines of charity law itself. Parachin's response is that charity law can be developed by way of legislative amendment or judicial precedent to reflect a benefaction of strangers requirement that does not permit 'stigmatizing rejection'. This approach expressly avoids looking to public norms from outside charity law. However, this article asks whether liberal societies might sometimes have good reasons to do just that. That is, to look beyond charity law and to apply public norms to discrimination by charities.

In answering this question, the article is structured as follows. Section 2 of this article outlines charity law's deficiencies in addressing discrimination and Parachin's proposed response. Section 3 considers justifications for applying public norms to charities. First, whether the outsourcing of government functions to charities renders charities an organ of the state in those circumstances (Section 3.1). Second, this article considers in Section 3.2 whether the pursuit of a public purpose, coupled with tax concessions or with perpetual enforcement of charitable projects, justifies the imposition of public norms. Third, Section 3.3 examines whether charities, viewed as private actors, ought to be subject to equality norms in the same way as other private actors, where doing so is a proportionate means to prevent harm. Section 4 concludes that equality norms can be justified in particular circumstances (such as outsourcing or for true tax concessions) and also more broadly based on perpetual enforcement and avoidance of harm, but that any such imposition must be done in a way that broadly respects the independence of charity decision-makers.

The discussion is based on the law as at 1 January 2022.

2 Charity Law's Deficiencies

Putting certain disqualifying factors – such as the requirement that purposes not be against public policy – to one side,[1] charities are 'entities'[2] that satisfy two key

1 For instance, an entity's purpose cannot be against public policy, including because it is unlawful: *Bob Jones*; *Royal North Shore Hospital of Sydney v A-G (NSW)* (1938) 60 CLR 396, 426 (Dixon J); *National Anti-Vivisection Society v IRC* [1948] AC 31; *Charities Act 2013* (Cth) ss5(c), 11(a); *Charities Act 2005* (NZ) s13(1)(b)(ii).

2 By 'entity', it is meant that the charity is sufficiently formally organised that it can be differentiated from the household sector. Thus the term is used to cover legal relationships, such as trusts and unincorporated association, as well as legal persons.

positive requirements. First, the entity's purposes must all be 'charitable'. Under the technical legal meaning accepted at common law,[3] this means the purposes must be for the 'relief of poverty', the 'advancement of education', the 'advancement of religion' or 'other purposes beneficial to the community'.[4] These purposes are typically referred to as the four 'heads' of charity. The fourth limb is a general category determined by analogy with the authorities and the *Charitable Uses Act 1601*, 43 Eliz 1, c 4. Some jurisdictions, such as Australia and England and Wales have enacted statutory definitions of charity for certain purposes, which reword the charitable purposes under a larger number of 'heads of charity' that broadly reflect the scope of the common law heads (Dal Pont 2017, [2.29]). The reworded heads include, amongst others, advancing health, advancing education, advancing social or public welfare, advancing citizenship or community development, advancing religion and advancing culture.[5]

Second, the entity must be for the public benefit. This means that the entity's purposes must result in a net benefit,[6] and must do so in relation to the public or a section of the public rather than a private class of individuals.[7] The second part of this requirement, described by Garton as 'cross-sectional public benefit' (2013, 48), does not apply so strictly to charities for the relief of poverty, such that it is possible to have a charity for the relief of private groups such as poor relatives or employees.[8]

This definition contains elements that, at first glance, seem apt to deal with the discriminatory activities of charities. In particular, charitable purposes must be of net benefit and must provide that benefit in relation to a section of the public. Further, purposes that are against public policy are not valid charitable purposes. However, charity law is ineffective at dealing with discrimination for several reasons. Primarily, it focuses on purposes not activities (Murray 2020b; Parachin 2020a). Hence, purposes that entail discriminatory activities but that do not

3 References to the 'common law' are to case law as opposed to legislation, unless the context requires otherwise.

4 *Commissioners for Special Purposes of the Income Tax v Pemsel* [1891] AC 530, 573 (Lord Herschell), 583 (Lord Macnaghten); *Aid/Watch Incorporated v FCT* (2010) 241 CLR 539, [18] (French CJ, Gummow, Hayne, Crennan, Bell JJ). See also American Law Institute (2021, §1.01), Waters, Gillen, and Smith (2021), §14.IV, and *Charities Act 2005* (NZ) s 5(1).

5 *Charities Act 2013* (Cth) s12(1); *Charities Act 2011* (UK) ss1–3.

6 *Re Pinion* [1965] Ch 85, 107 (Harman LJ), 107–8 (Davies LJ), 10911 (Russell LJ); *Gilmour v Coats* [1949] AC 426, 446 (Lord Simonds); *Charities Act 2013* (Cth) ss5(b), 6; *Charities Act 2011* (UK) s4(1); Bogert, Bogert, and Hess (2021, §362).

7 *Thompson v FCT* (1959) 102 CLR 315, 321–3 (Dixon CJ, Fullagar and Kitto JJ in agreement); *Charities Act 2013* (Cth) ss5(b), 6; *Charities Act 2011* (UK) s4(1); Bogert, Bogert, and Hess (2021, §363).

8 *Re Scarisbrick* [1951] 1 Ch 622 (Court of Appeal); *Dingle v Turner* [1972] AC 601 (House of Lords). Cf *Charities Act 2013* (Cth) s8.

explicitly seek to promote discrimination, as opposed to a purpose of *reducing* acceptance of equality in the community, will typically be assessed at the high-level purpose. For instance, a purpose of providing health treatment to white babies only (*Kay v South Eastern Sydney Area Health Service [2003] NSWSC 292* ['*Kay*']) or providing a retirement home for old Christian Scientists (*City of Hawthorn v Victoria Welfare Association* [1970] VR 205), will typically be assessed at the purpose level that focuses on relief of sickness, or relief of the aged.

Further, in applying the 'section of the public' part of the public benefit test, courts are applying a 'no-insider-benefit' rule rather than seeking to enunciate rules of 'publicness'. When it comes to the matter of 'net benefit', whilst this permits the weighing of benefits and detriments,[9] *Kay* demonstrates that courts are not often ready to give much weight to the broad societal impacts of discrimination. In that case, the potential detriment from the state – through the courts – being perceived to endorse racial discrimination by enforcing a racially discriminatory trust. The public policy test has seen more success in North America in addressing discriminatory activities (Parachin 2020b),[10] but is rightly criticised as giving insufficient guidance to judges or regulators to be relied on as the primary means of addressing discrimination (Brennan 2002, 803–5; Murray 2020b; Parachin 2020b). In addition, the public policy test is at least partially hobbled in many jurisdictions due to the existence of exceptions for charities in equality legislation (see, e.g. Dal Pont 2017, [7.20]; du Toit 2018, 245–6; *Equality Act 2010* (UK) s 193; *Equal Opportunity Act 1984* (WA) ss 70–72; *Human Rights Act 1993* (NZ) s 150).[11] In the US, where there are material gaps in the coverage of equality legislation (Mirkay 2007, 82–83), equality legislation exemptions for charities occur in a much more patchwork fashion (e.g. for private clubs in some areas: Bodensteiner and Levinson 2021, §4.8; Smolla 2021, §7.11; and religious organisations in others: Minow 2007), but are also allied with constitutional rights protections for expressive association (*Boy Scouts of America v Dale* 530 US 640 [2000]) and freedom of religion (Minow 2007; Volokh 2006, 1944–62).[12]

Parachin attempts to deal with charity law's deficiencies by drawing on the 'no-insider-benefit' rule – what Parachin calls the 'stranger requirement' – contained within the public benefit test. His aim is to identify principles internal to

9 *National Anti-Vivisection Society v Inland Revenue Commissioners* [1948] AC 31.

10 For a recent Australian example of the weakness of the public policy test in a discrimination setting, see *Re Nesbitt* [2018] NSWSC 1456, [42] (Leeming JA, albeit judicial creativity still permitted partial access to a cy-près scheme on other grounds).

11 More limited exemptions are provided in Canada, e.g. for the provision of services and facilities by charities with limited membership (Human Rights Code RSO, 1990, c H19, ss18, 24; Human Rights Code RSBC, 1996 c 210, s41(1)).

12 See generally American Law Institute (2021, §5.03) rep note cmt d.

charity law that can be used by courts or legislatures in developing charity law to more coherently deal with discrimination. Thus, Parachin argues that the stranger requirement evidences a principle of focussing on the benefit of strangers 'notwithstanding their emotional and obligational distance' and that '[i]mplicit in this is an equality ideal of sorts' (Parachin 2020b, 340). Parachin notes that charity law permits settlors to direct benefits at groups smaller than the whole community, such that the equality ideal must permit some choice about which strangers benefit. In setting bounds on this choice, Parachin proposes that charity law could be developed to incorporate the equality principle by precluding 'stigmatizing rejection' which contradicts "the 'equal worth' ethic implicit in the stranger requirement" (2020b, 338–41). This approach is broadly consistent with assertions by other writers that charity law is concerned with altruism (Dees 2012, 322; Harding 2014, 88–108), albeit it acknowledges that charity law does not currently comprehensively incorporate a stranger benefit/equality requirement and seeks to develop charity law beyond its current rules to arrive at this result.

Parachin appears to suggest this because he views charity law as a body of private law rules and considers that it would better maintain coherence in charity law, and private law more generally, for charity law to develop in accordance with its underlying principles than to draw on public norms inherent in human rights legislation and constitutional law (Parachin 2020b, 338). However, I ask in this article whether it is really appropriate to deny in all circumstances the relevance of such public norms to a body of law such as charity law that is a hybrid of public and private law (Chan 2016). Alternatively, there may be good reasons to apply public norms in some circumstances to all actors in the private sphere and so public norms might thus be expected to shape the rules that apply to private actors such as charities.

3 Circumstances in Which we Might Apply Public Norms to Charities

It is understandable that legal academics may point to the private law rules facilitating the creation of trusts to claim that charity law is private law to which public norms are foreign (for a discussion, see Murray 2021, 39–41). However, such an approach obscures the true picture. As noted by Chan, charity law – as it developed in the UK and then in Canada, the United States and Australia – is and has always been, a hybrid of private and public law (2016). It is not purely a matter of private ordering. After all, charity law comprises a framework of rights and obligations that a donor/creator selects when creating a charity and that

framework reflects a tension between respecting donor and charity controller intent and the public interest in overriding or selectively enforcing donor/charity controller intent to achieve a greater or fairer public benefit (Chan 2016, 2, 12–14). Notably, common law and statutory cy-près rules, while respecting donor intent to a greater or lesser extent in different jurisdictions, all involve some incursions in the public interest (Mulheron 2006, 87–9, 309; Simon 1987, 645). In some, but not all, jurisdictions, this is expressly reflected in the objectives of the charity regulator or of the legislative scheme applying to charities (section 14 *Charities Act 2011* [UK]; section 3(b) *Charities Act* 2005 [NZ]).

Additionally, often when courts look at the meaning of 'charity', it is in a tax context to determine whether tax concessions apply and the tax context influences the common law notion of charity that tax law frequently adopts (e.g. *Bob Jones*; Parachin 2014). While not all charities wish to register for tax concessions, where they do, tax law pertaining to charities is public law, not private law, meaning that public norms are brought into play when considering the application of tax rules to those charities.

The above discussion also reflects a Rawlsian perspective that treats notions of justice (including equality) as primarily being concerned with the rules for society's basic structure rather than being directly used as guiding tools for the individual decisions of people controlling charities (Rawls 2001, 10–12). The basic structure being the way that the 'main political and social institutions of society fit together into one system of social cooperation, and the way they assign basic rights and duties and regulate the division of advantages that arises from social cooperation over time' (Rawls 2001, 10). Thus, public equality norms would be expected to operate largely in the public but not private sphere and arguably be of most relevance to public not private law.

In Sections 3.1 and 3.2 below, this article examines whether, due to their hybrid nature, charities are better viewed as public rather than private bodies in certain circumstances. In Section 3.1, this is in the circumstance of outsourcing of government functions. Section 3.2 examines the pursuit of public purposes coupled with either the benefit of tax concessions or of state enforcement of those purposes. I seek to show that both grounds raise circumstances in which it may be appropriate to apply public equality norms to charities, albeit tax concessions do so only within a narrow ambit. I do not mandate how those norms must be applied, though the discussion of equality/civil rights legislation and of tax legislation demonstrates several bodies of public law that could be used. To the extent that trusts or corporations law could be amended instead, there may be some controversy about the application of equality norms to these areas of private law. However, as discussed above, charity law has always been a hybrid

rather than pure private law[13] and in any event there are strong arguments for the sensitive application of public norms to shape private law viewed as part of the basic structure (Kordana and Tabachnick 2008, 298; Scheffler 2015).

Section 3.3 abandons the view of charities as public bodies and considers the limited circumstances in which liberal societies shape their basic structure to generally apply public norms to private actors. In particular, as proportionate means to prevent harm. I suggest that charity discrimination potentially enlivens these grounds and that equality legislation exemptions for charities (identified in Section 2) that are 'blanket' in nature are therefore problematic (e.g. New Zealand and many parts of Australia), whereas those that are more nuanced potentially represent a better approach (e.g. section 193 *Equality Act 2010* [UK]).

3.1 Outsourcing Government Functions to Charities

One circumstance in which we might focus on the public dimension of charities is when a charity is delivering a function of government. Outsourcing, or contracting out government service delivery arises most obviously where government funds a non-governmental entity, such as a charity, to deliver services previously provided by the government (Morris 2020, 232–3). However, outsourcing can also refer to situations where the government decides to fund services previously delivered by non-governmental entities of their own accord, thereby assuming a degree of responsibility for the provision of the service (Aronson 1997, 41). Very often, arrangements are marked by detailed contractual articulation of the means and ends to be pursued and with a degree of operational oversight for government (Chan 2016, 126–58; Cordelli 2012, 148–50). This can include contractual application of anti-discrimination norms or their indirect application by the threat of withholding future funding (see, e.g. Morris 2012, 329–30).

Arguably, where charities are delivering government functions as a result of government outsourcing, the charity should be treated at least partly in the same way as an organ of the state. That is, the charity should be subjected to public equality norms to ensure equality of opportunity for people to access the goods and services that it provides (including employment opportunities) (Chan 2016, 126–33; Cordelli 2012; Morris 2012, 328–30). This is not necessarily inconsistent with the Rawlsian perspective outlined above. That is due to either of two bases. First, because government outsourcing can be seen – to some extent – as co-option of charities' voluntarily selected and pursued ends (Chan 2016), such that charities delivering outsourced services are not seen as truly voluntary associations and

13 A similar comment could be made about corporations law (Moore 2013; Sjåfjell 2017, 145–7).

hence the application of public norms would not be an interference with independent decision-making (Cordelli 2012, 147–51). This is not to deny that charities (or their directors or trustees) independently decide whether to enter into service agreements, but reflects the difference in bargaining power between governments and charities. That power imbalance often results in very material government influence over ends and even over the means to achieve those ends (Chan 2016, 147–57; *Central Bayside General Practice Association Ltd v Commissioner of State Revenue* [2006] HCA 43).

Second, because the public/private blurring caused by outsourcing is a good reason to shape the institutional settings for charities (viewed as part of the basic structure) to impose equality norms in a way that is still sensitive to what remains of charities' voluntarism (compare Cordelli 2012, 145–7).[14]

Thus, for example, if a charity receives material government funding to provide adoption services, substantial limits could be justified on charities' ability to discriminate against same-sex couples (see, e.g. *Catholic Care [Diocese of Leeds] v Charity Commission for England and Wales* [2012] UKUT 395 ['*Catholic Care*']), Cordelli 2012). Likewise, for charity schools or universities in receipt of material government funding (for instance, most Australian universities and not-for-profit schools: Murray (2020a, 149–52) there should be limited ability to discriminate against the admission of students, for instance on religious grounds on issues such as sexual preference or gender identity. If charities are major employers, such as in the education space, then constraints might also be justified to ensure adequate provision of employment opportunities, for instance for teachers (see, e.g. Cordelli 2012, 144).

Defining when government support is sufficiently material so as to warrant the imposition of public norms is likely to be difficult. In the US, much federal equality legislation applies only to charities that receive 'federal financial assistance', which is defined in different ways, but essentially means 'funds received directly or indirectly from the [US] federal government', which could be, but is not normally, construed as including tax concessions (Bodensteiner and Levinson 2021, §10.13; Brennan 2001, 172–4; Mirkay 2007, 75–83).[15] Australia largely relies on drawing a government/charity boundary that excludes sufficiently governmental entities from being charities, but this still permits very material outsourcing

14 For a South African case in which the publicly funded nature of a university was relevant to the shaping of charity law by public equality norms in relation to a discriminatory education fund, see *Curators Ad Litem to Certain Beneficiaries of Emma Smith Educational Fund v University of Kwazulu-Natal* [2010] ZASCA 136.

15 Additional constraints, especially constitutional restraints of due process and equal protection, apply to state actors and so the US also has a body of cases that seek to distinguish between charities as private actors and as instrumentalities of the state (Brody and Tyler 2010, 589–96).

(Murray and Wesson 2020). The UK's approach may be more promising in that it applies certain equality legislation that contains no charities exemption, the *Human Rights Act 1998* (UK), to 'public authorities' and other bodies performing 'public functions'. This has, for instance, been held to apply to charities that provide social housing (*Poplar Housing & Regeneration Community Association Ltd v Donoghue* [2002] QB 48).

Thus, where charities are delivering a function of government, there appear to be good grounds for imposing equality norms on the delivery of those functions. However, this justification clearly only applies to some charities in the limited circumstances of outsourcing. It would not apply in circumstances such as those of the *Bob Jones* case (the main case criticised by Parachin as applying [foreign] public norms through the public policy test in charity law), where the charity does not receive government funding (see, e.g. Beezer 1984). That is, unless charity tax concessions are viewed in the same way as government grants, a matter examined in Section 3.2 below. Outsourcing would also not justify application of equality norms in relation to charitable bequests such as the educational scholarship trust at issue in *Canada Trust Co*.[16] It would also typically have little relevance for religious charities that self-fund core religious activities (compare Parachin 2013, 183). Attempting to impose equality norms would also raise tricky definitional issues, although guidance can be obtained from existing approaches, such as the application of equality/civil rights legislation to charities receiving federal financial assistance (US), or that can be characterised as 'public authorities' or other bodies performing 'public functions' (UK).

3.2 Pursuit of Public Purposes

Some writers have gone further and suggested that organisations that pursue public purposes (such as charities) ought to be subject to public norms on that broader basis, regardless of whether they are undertaking an outsourced function of government (Benson 2001, 227, 229–237; Brody and Tyler 2010; du Toit 2018, 233–5; Harding 2014, 213–16; Swanson 1986, 156–7).[17] As noted by Harding (2014, 214–15) and du Toit (2018, 233), this approach is potentially reflected in Tarnopolsky JA's judgement in *Canada Trust Co*, where Tarnopolsky JA refers (at [107]) to the historically special treatment of charitable trusts on the basis they are dedicated to the benefit of the community and that it is 'this public nature of

16 Although if the body that would administering the fund as trustee is publicly funded, this may require the body to decline the gift in the first place.

17 See also Mirkay (2007, 84–86).

charitable trusts which attracts the requirement that they conform to the public policy against discrimination'.

Typically, the imposition of public norms is justified on the basis that the state provides incentivising privileges to charities in their pursuit of public purposes (such as tax concessions or enforcement of the charitable project in perpetuity) and that the price of those privileges is compliance with public norms (Benson 2001, 230–1, 235–7; Brennan 2001; Weinrib and Weinrib 2001, 67–8).[18] In a sense, this is an expanded notion of the outsourcing category discussed above, in that a public purpose is being pursued with some form of government support; justifying the imposition of public equality norms. Indeed, as noted by Brennan, there is a whole branch of tax policy – tax expenditure theory – that seeks to distinguish tax concessions from the mere definition of the normal tax base and to analyse the former in a similar way to direct government grants (2001, 208–11; see also Surrey 1973, pt 6.2.2).

However, it is not so clear that all tax treatment is a privilege. For instance, non-taxation of social welfare charities may actually reflect the average tax rate of benefit recipients (Krever 1991, 3–5). Tax treatment is more likely to be a true concession where the privileges are provided to charities that benefit middle and high income-earners such as private schools, private hospitals or opera companies. Though even here, the situation is likely to be nuanced with many such bodies subsidising benefits to socio-economically disadvantaged people. It is likely that a tax-based rationale applies to some, but by no means all, charities. Further, this approach also ignores the fact that tax concessions are routinely provided in many countries to vast segments of the marketplace without similar calls for extra oversight (see, e.g. Brody and Tyler 2010, 605–7).

A rationale that potentially applies to a broader range of charities is the benefit of perpetual public enforcement of the charitable project.[19] Attorneys-General and regulators such as charity commissions or tax authorities, as well as courts, typically have responsibilities and powers to enforce the terms of a charitable project forever, albeit these bodies often also have limited abilities to reform projects in the public interest (Chan 2016, ch 2; Picton 2020; Swanson 1986, 186). Andreoni has identified that most charitable giving is not purely altruistic, it often involves at least some egoistic giving (1990). Discriminatory conditions, in particular, appear to place greater emphasis on the egoistic projection of a donor's

18 See also Brody and Tyler (2010), Caster (2012, 410–11), and Sigafoos (2020, 127). As to more general discussion of a 'bargain' or 'contract' or more complex exchange struck by donors with the state (and others) when giving to or creating charities, see also: Johnson (1999, 387), Picton (2020, 62–8), and Eisenstein (2003, 1758–68).

19 This rationale is not one of those debunked by Brody and Tyler (2010), who do not consider the costs of perpetual enforcement.

values than on the benefits received by charity recipients (Eisenstein 2003, 1759; Picton 2020, 69–72). For instance, the very restrictive and discriminatory scholarship conditions in *Canada Trust Co* (based on race, religion, gender) would have meant that some students who could have benefited the most from a scholarship, missed out. Babies of colour with urgent medical needs are omitted by the gift for health treatment of white babies in *Kay*.

As noted by Picton (2020, 69–72), Swanson (1986, 186), and Eisenstein (2003, 1759), an egoistic drive to project values and ideas into the future involves a cost in terms of the resources spent in state enforcement of this projection into the future.[20] This may help explain (frequently inadequately articulated) judicial reluctance to enforce some classes of discriminatory trusts (as identified by Colliton 2003). To this could be added a social cost arising from the loss of decision-making freedom of future generations (Fleischer 2018, 440; Murray 2021, 43–6). The cy-près doctrine, identified at the outset of Section 3, has been described as a type of social contract between past donors and present members of society that seeks to address this loss of decision-making freedom (Atkinson 1993, 1116–18). However, cy-près grounds are not explicitly directed at discrimination and the literature shows that accessing the current grounds is too costly and complicated (Mulheron 2006, 139–141; O'Halloran 2007, 46–49). Thus, there is a potential imbalance in decision-making power that can impede intergenerational social cooperation by undermining the regard had by future generations for the institutions and intergenerational goods passed down to them (Thompson 2009, 123–6).

The perpetual enforcement of discriminatory conditions thus raises particular social costs and justifies a broader application of public norms, which goes some way toward answering Harding's question about why the state should insist on public norms for this support and not other support (Harding 2014, 223). This is consistent with Robert Reich's call for the regulation of philanthropy to constrain actions that undermine democratic institutions (Reich 2018).[21]

Accordingly, while the provision of tax concessions to pursue public purposes only appears to justify equality norms in limited circumstances, state enforcement – potentially perpetual – of charitable projects seems to offer a much more broadly applicable ground. However, to the extent that public norms are imposed on charities, this would need to be done in a way that is mindful of the fact that charities receiving indirect state support are not instrumentalities of the state.

20 See also Chan (2016, 60–1).

21 There are some parallels here also with concerns about state enforcement of private law rights where that might be seen as state action that breaches constitutional equality requirements (Collins 2018, 4–6; Harding 2014, 218–19; Swanson 1986, 175–85).

There needs to be some sensitivity to the general Rawlsian division of labour that seeks to leave individual choices free from state interference, to the extent possible. Imposing public values on charities risks displacing the different way (from government) that they operate and displacing the diversity of the sector, converting charities into another arm of government (Jensen 2018, 169).

3.3 General Application of Public Norms to Private Actors

A third alternative is that rather than trying to view charities as hybrids and hence to apply public norms on the basis of their 'publicness' we might consider the extent to which public norms ought generally to apply to charities as private actors (see, e.g. du Toit 2018, 235).[22] This approach could involve shaping equality law, viewed as part of the basic structure, by requiring decision-makers within private bodies, such as charities, to incorporate equality norms to some degree, whilst being mindful of not unduly interfering with their decisions. State intervention to apply public norms in the private sphere to restrict one set of rights or interests to prioritise others is typically justified by reference two factors (Australian Law Reform Commission 2015, [2.63]; Gardner 1989, 1; Harding 2014, 226–33).[23] First, John Stuart Mill's harm principle: that is, does the public benefit from advancing one set of rights or interests outweigh the harm caused by limiting the other rights or interests (as state coercion is justified to prevent harm)? Second, proportionality: does a law have a legitimate objective (e.g. prevention of harm) and implement measures that are suitable and necessary to achieve that objective?

In a charity discrimination context, the contest may be between a right or interest in freely disposing of one's property or religious freedom on the one hand and then a right or interest in equal access to goods or services or opportunities for employment without discrimination based on factors such as race or sexuality. Account would need to be taken in this process of the risk of a reduction in charitable giving if property, religious or associational rights are affected (du Toit 2018, 242–3). These were the types of contests at issue in *Bob Jones*, *Catholic Care* and *Kay*. A broad view of the harm principle could potentially also take account of historical disadvantage experienced by groups and could justify state action to coerce or encourage action to improve the life options of those who have historically suffered discrimination. In other words, to create an environment that actively encourages positive discrimination (see, e.g. Gardner 1989, 17–19).

22 See also Barak (1996).

23 Commenting in the context of constitutional (human) rights, see also Barak (2012, ch 6).

This approach would again not justify application of public equality norms to charities in all circumstances. The breadth of application would depend on the extent to which equality norms are also applied to other private actors. However, the discussion does suggest that equality norms are insufficiently applied to charities due to the express charity exemptions from equality legislation identified in Section 2. In some jurisdictions, especially Australia and New Zealand, those exemptions are broad, blanket exemptions for charities from equality legislation that otherwise applies to private bodies. Australia may potentially see an increase in such exemptions for religious charities if proposed religious freedom legislation is enacted (Attorney-General's Department 2021).

Rather than denying the relevance of public equality norms to charities and seeking principles from within charity law as Parachin does, it may be more productive to explore whether and to what extent charities ought to be excused from equality legislation that applies to other private actors. For instance, in jurisdictions with broad blanket exemptions, if a single exemption provision is still preferred, guidance can potentially be taken from the UK where blanket exemptions for charities have been replaced with a far more balanced provision: section 193 of the *Equality Act 2010 c 15* (UK), the first part of which is set out below:

(1) A person does not contravene this Act only by restricting the provision of benefits to persons who share a protected characteristic if—
  (a) the person acts in pursuance of a charitable instrument, and
  (b) the provision of the benefits is within subsection (2).
(2) The provision of benefits is within this subsection if it is—
  (a) a proportionate means of achieving a legitimate aim, or
  (b) for the purpose of preventing or compensating for a disadvantage linked to the protected characteristic.

Three UK cases demonstrate how such a provision might achieve more balance than blanket exemptions. *R v Hackney London Borough Council* [2020] UKSC 40 is a Supreme Court case that concerned whether the Agudas Israel Housing Association ('*AIHA*') could rely on section 193 to provide social housing in preference to members of the Orthodox Jewish community. Under an arrangement with Hackney London Borough Council, AIHA provided social housing to applicants nominated by the Council. The Council's practice was to generally only nominate Orthodox Jewish applicants and this accorded with the objects in AIHA's constitution which required it to provide social housing first to members of the Orthodox Jewish community. The case arose because a non-Jewish single mother of four was identified by the Council as having the highest level of housing need in the Council area. A one and a half year wait ensued for the mother and her children, during

which time AIHA placed several lower-need applicants in housing. The applicant argued that AIHA (and the Council) had breached the *Equality Act 2010* (UK) and AIHA relied on the section 193 exception for charities.

The Supreme Court held that AIHA came within both of sections 193(2)(a) and (b) and found that AIHA's housing policy was proportionate and aimed at a legitimate end for several key reasons. First the Orthodox Jewish community experienced high-levels of poverty and corresponding low levels of home ownership. This was connected to ongoing prejudice against Orthodox Jewish people in various areas of life, including rental of housing. Second, the Supreme Court balanced the benefits of AIHA's policy to Orthodox Jewish people as a group against the disadvantages experienced by other groups in society and noted that the housing stock held by AIHA amounted to only about 1% of the social housing stock in the Council area.

The other cases are *Catholic Care* and *R (Cornerstone (North East) Adoption and Fostering Services Ltd) v Ofsted* [2021] EWCA Civ 1390 (*Cornerstone*). In *Catholic Care*, the Catholic Care organisation sought to amend its rules in order to be able to provide adoption services only to heterosexual couples within section 193. The Charity Commission for England and Wales refused to approve the amendment and Catholic Care appealed. The case applied section 193 to the proposed discriminatory activity in considering whether such an amendment should be permitted. Catholic Care argued that the legitimate aim was the adoption of more children and that its rule was a proportionate means because, without it, donors would not provide funds, it would close down and children would not be adopted. The Upper Tribunal did not accept this was a legitimate aim as the funding for adoption was provided by the state and there were a surplus of adoptive parents, such that other services were likely to step in if Catholic Care closed. Further, even if it had been a legitimate aim, then the balancing required by proportionality would have taken account of the harms to society from permitting discrimination. Thus, section 193 did not permit the discrimination. *Cornerstone* was a factually similar case relating to an evangelical Christian fostering and adoption service. The Court of Appeal held that Cornerstone's rejection of same-sex couples as foster parents or adoptive parents was not a proportionate means under section 193.

In some jurisdictions (such as the US), constitutional protections for expressive association or religious freedoms might mean that it is not possible to broadly apply equality legislation to charities. However, non-coercive, but incentivising measures might be an alternative and constitutionally valid means of applying similar public equality norms to charities (see, e.g. Mirkay 2007, 89–94). For instance, limiting tax concessions would not prevent charities from discriminating, but could encourage them to abstain from doing so. This sort of scheme has been suggested in relation to charities by writers such as Mirkay, who have

proposed amending IRC §501(c)(3) to incorporate equality rules (2007, 83–105). However, if justified on the basis of the broader application of public norms to all private actors, any tax changes should seek to match equality norms applied under equality legislation to for-profit entities.

4 Conclusion

This article has demonstrated that public equality norms are relevant to charities where the government has outsourced functions to charities; to some charities that are truly in receipt of tax concessions and, more generally, to all charities on the basis of state involvement in enforcing the pursuit of public purposes. Additionally, in circumstances where private actors are generally subject to anti-discrimination rules, there may be good reason to extend this general approach to charities also.

Thus, in preference to seeking guiding principles from charity law as Parachin does, it is potentially more productive to think about how to explicitly apply public equality norms and how to balance these norms against competing rights and interests in matters such as freedom of disposition of property, expressive association and religious freedom. One way to achieve this is to impose anti-discrimination conditions under government funding agreements. However, as noted in Section 3.1, there are likely to be difficulties in determining when government outsourcing is sufficiently material to justify the imposition of contractual constraints. Funding agreements also have some drawbacks as regulatory tools when compared with more generally applicable legislation, most particularly because they can undermine charity independence. For instance because they formalise the one-on-one power imbalance between a charity and government, they typically permit more extensive and specific regulation, they typically lack transparency and they can be easily changed for the next round of funding (see, e.g. Garton 2009, 215–16; Morris 2019; Productivity Commission 2010, 306–10).

A more fundamental problem with relying solely on contractual application of equality norms is that this would only apply to charities in receipt of government funding, yet we have identified two reasons for broad application of equality norms to charities: state involvement in enforcing the pursuit of public purposes and the broad application of anti-discrimination rules to private actors. Thus, an alternative approach is to amend equality or civil rights legislation to apply to charities when they are carrying out outsourced government functions and also to apply to charities (potentially with other private actors) more generally, but mindful of the need to maintain material independence of charity decision-making. Section 193 of the *Equality Act 2010* (UK) provides an example

of a provision which might fulfil the latter requirement. If constitutional impediments arise, then tax legislation could also be used as an alternative way of imposing equality rules.

Applying equality norms under clear legislative rules in either of these ways would avoid many of the problems with relying on government funding agreements. Equality legislation has advantages (over tax legislation) in that it can apply to all charities, not just those for whom tax concessions are material and that it provides a framework for balancing competing rights. On the other hand, tax legislation has the advantage that it is an incentivising regulatory tool, rather than mandating compliance, which means that it less directly interferes with charity independence.

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