

Purpose and Public Benefit

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C8.1 Introduction

Requirements of public benefit and charitable purpose are key elements of charity regulation and core distinctive features of charities. A question arises as to the relationship between these core elements. In her chapter on the application of the public benefit test in New Zealand law, Sue Barker examines the relationship between public benefit and purpose, arguing that a refocus on purpose would simplify day-to-day decision-making by charities and that '[b]y asking charity governors to focus on the charity's *charitable purposes*, they would by definition be furthering public benefit, albeit potentially intangibly, indirectly, and immeasurably'.²

This comment examines and endorses these assertions. It commences by setting the scene in terms of the complex accountability foci and mandates to which charities are subject. It then briefly comments on the hybrid public-private nature of charities, of which the requirement of public benefit, and corollary proscription of inappropriate private benefit, are important components. In the next section, it examines the fundamental role that purpose plays in charitable governance and, indeed, in charitable accountability and legitimacy, before considering Barker's assertion of the subordination of public benefit to purposes.

C8.2 Complex Accountability

Charities comprise a distinctive part of the not-for-profit sector due to their specific character as organisations that produce public benefit that the state has decided is especially worthy and due to the voluntary and altruistic way in which

1 Professor, Melbourne Law School, University of Melbourne. This research is funded by the Australian Government through the Australian Research Council. My thanks to Ian Murray, Sue Barker, and Matthew Harding for their comments.

2 See Sue Barker's chapter, 278. Consistently with Barker's chapter, this comment will use the term 'charity governors' to describe those who govern charities, although different terms are used in different jurisdictions. For example, the term 'responsible persons' is used in Australia and the term 'charity trustees' in England and Wales.

these public benefits are produced. Like other not-for-profit entities, charities are subject to multiple and complex accountability foci.³ For example, Harding has identified constitutive accountability, stakeholder accountability, and governance accountability.⁴ To this could be added legal or organisational accountability. Charities are subject to a number of accountability metrics⁵ and accountable to a number of stakeholders in different ways,⁶ which in turn gives rise to challenges in terms of balancing stakeholder interests.⁷ As commented by the NCVO:

For almost all voluntary organisations, there is a need to be accountable to many parties. Many will need to account to statutory enablers, funders, donors, users, volunteers, staff, members and regulators etc. Many will have multiple funders or donors, occasionally with conflicting expectations. Voluntary organisations must therefore recognise and cope with multiple accountability. Those with whom voluntary organisations work must recognise that this requirement of accountability is due to others as well as themselves.⁸

In light of these inherent complexities and also due to the altruistic and voluntary nature of much participation in charities, regulation of charities must strike a delicate balance between ‘disproportionate focus on legal and financial accountability’⁹ and sufficient accountability. Heavy compliance burdens (combined with complex regulatory requirements) can serve to dissuade volunteers and distract from charities’ core mission of pursuing their charitable purposes.

3 See, e.g., Susan Woodward and Shelley Marshall, *A Better Framework: Reforming Not-for-Profit Regulation* (Centre for Corporate Law and Securities Regulation, The University of Melbourne 2004) 16; Matthew Harding, ‘Independence and Accountability in the Charity Sector’ in John Picton and Jennifer Sigafoos (eds), *Debates in Charity Law* (Hart 2020) ch 2; James J Fishman, ‘Improving Charitable Accountability’ (2003) 62 Maryland Law Review 218.

4 Harding (n 3).

5 See Joseph Mead and Michael Pollack, ‘Courts, Constituencies, and the Enforcement of Fiduciary Duties in the Nonprofit Sector’ (2016) 77 University of Pittsburgh Law Review 281.

6 See, e.g., Richard Tacon, Geoff Walters and Chris Cornforth, ‘Accountability in Nonprofit Governance: A Process-Based Study’ (2017) 46 Nonprofit and Voluntary Sector Quarterly 685; Kathleen M Boozang, ‘Does an Independent Board Improve Nonprofit Corporate Governance?’ (2007) 75 Tennessee Law Review 83; Noel Hyndman and Danielle McConville, ‘Trust and Accountability in UK Charities: Exploring the Virtuous Circle’ (2018) 50 British Academy Review 227.

7 See John Chelliah, Martin Boersma and Alice Klettner, ‘Governance Challenges for Not-for-Profit Organisations: Empirical Evidence in Support of a Contingency Approach’ (2016) 12 Contemporary Management Research 31; Boozang (n 6).

8 National Council of Voluntary Organisations, ‘Meeting the Challenge of Change: Voluntary Action into the 21st Century: The Report of the Commission on the Future of the Voluntary Sector’ (1996) 108 [4.5.6].

9 Boozang (n 6) 86, who also states that ‘[b]ureaucracy driven by oversight concerns threatens to stifle the volunteerism and democratic experimentation that have been the hallmarks of charity since their inception’.

Adding to these considerations is the fact that charities (as a subset of not-for-profit entities) are of a hybrid public-private nature in their stewardship of assets for charitable purposes. Connelly has observed that in for-profit organisations ‘assets are privately owned ... and decisions are made privately’;¹⁰ in government organisations ‘assets are publicly owned ... and decisions are made publicly’;¹¹ whereas in not-for-profit entities ‘assets are committed to benefiting the community, but the decisions on how to use those assets are made privately by the ... board within the context of the organization’s stated legal purpose’.¹² At the same time commentators have noted that private models of accountability are less applicable in the charities context.¹³ There are, of course, a number of senses in which charities are of a hybrid public-private nature. For example, Chan critically analyses the hybrid public law-private law dimensions and equilibria of charity law.¹⁴

The public benefit requirement that forms part of charitable status in many jurisdictions embodies the public aspect of charities. As pointed out by Harding and Halliday, public benefit was originally implicit, rather than explicit, in charity law.¹⁵ However, over time the requirement of public benefit has taken on more significance in charity law, particularly with the rise of charity law statutes. As noted by Synge, jurisdictions vary as to requirements in relation to, and definitions and presumptions of, public benefit.¹⁶

A central corollary of the public benefit requirement is the proscription on inappropriate private benefit,¹⁷ although it is difficult to draw a clear line between the two.¹⁸ In particular, the non-distribution constraint bars charities from distributing surplus income to any controller, office holder, employee, or member.¹⁹ The difficulties of monitoring and enforcing this constraint are well

10 Michael D Connelly, ‘The Sea Change in Nonprofit Governance: A New Universe of Opportunities and Responsibilities’ (2004) 41 *Inquiry* 6, 8.

11 *ibid.*

12 *ibid.*

13 See, e.g., Harding (n 3) 13; Vivienne Brand, Jeff Fitzpatrick and Sulette Lombard, ‘Governance and Not-for-Profits: Regulatory Reform’ (2013) 15 *Flinders Law Journal* 381; Henry B Hansmann, ‘Reforming Nonprofit Corporation Law’ (1981) 129 *University of Pennsylvania Law Review* 497; cf Boozang (n 5); Woodward and Marshall (n 3) 186.

14 Kathryn Chan, ‘The Law of Charities and the Public Law-Private Law Divide’ in Kathryn Chan, *The Public-Private Nature of Charity Law* (Hart 2016) ch 1.

15 See Introduction by Daniel Halliday and Matthew Harding.

16 See Mary Synge’s chapter, 159.

17 For discussion, See Debra Morris’ chapter, 62–3, 1–2; Adam Parachin, ‘Why and When Discrimination Is Discordant with Charitable Status: The Problem with “Public Policy”, the Possibility of a Better Solution’ (2020) 6 *Canadian Association of Comparative and Contemporary Law* 306, 334.

18 See Debra Morris’ chapter, 62, and Jennifer Batrouney’s chapter, 86.

19 For discussion, see Myles McGregor-Lowndes, ‘An Overview of the Not-for-Profit Sector’ in Matthew Harding (ed), *Research Handbook on Not-for-Profit Law* (Edward Elgar 2018) ch 5. See also Andrew J Lind, ‘The Non-Distribution Constraint and Social Enterprise: Can Share Capital Fund Non-Profit Organisations?’ (2019) 25 *Third Sector Review* 233.

documented,²⁰ but effective monitoring and enforcing of this constraint should form part of a well-designed legal framework, particularly as concerns breaches in the form of misuse and misappropriation of charitable assets and resources.

These distinctive features highlight the importance of ensuring an appropriate legal framework for charities, as highlighted by Barker in her chapter.²¹ This is a challenge which is presently facing New Zealand but to which other jurisdictions should pay continued close attention. This is particularly challenging in federal jurisdictions. Indeed, the Australian charities regime, which was reformed in 2012 to introduce a new federal charities regulator, has been criticised due to excessive red tape and compliance burdens. Although there is not scope within this comment to propound the details of an appropriate legal framework for charities, a key feature is arguably the existence (and emphasis) of core principles underlying such framework and to which multiple layers and requirements can be connected and derived.²² Fiduciary principles are arguably the appropriate underlying principles in this regard, with fidelity to purpose as the overarching fiduciary paradigm.²³ The importance of purpose is drawn out further in the next section of this comment.

C8.3 The Importance of Purpose

A further distinctive feature of charities is the requirement that charities pursue charitable purposes in order to be registered (and to remain registered) as charities. Purpose is at the core of charitable entities – for example it determines charitable status and registration, as well as tax exemptions. The centrality and importance of purpose in the charities sphere cannot be understated. In particular, purpose plays a fundamental role in the governance of charities.²⁴ In previous work I have propounded a model of purpose-based governance, which sees an entity's purposes as central to the governance duties of charity governors – purpose is the guiding requirement, with other requirements supporting furtherance of purpose.²⁵ Indeed, on one view, duties of those who govern

20 See, e.g., Hansmann (n 13).

21 Sue Barker's chapter, 278.

22 Simplification and harmonisation of regulation are important, as well as clarity, consistency, and transparency – see, e.g., Cabinet Office Strategy Unit Report, *Private Action, Public Benefit: A Review of Charities and the Wider Not-for-Profit Sector* (September 2002) ch 3.

23 For discussion, see Evan Fox-Decent, 'The Nature of State Legal Authority' (2005) 31 *Queen's Law Journal* 259; Paul B Miller and Andrew S Gold, 'Fiduciary Governance' (2015) 57 *William and Mary Law Review* 513. See also Andrew S Gold and Paul B Miller, 'Fiduciary Duties in Social Enterprise' in Benjamin Means and Joseph W Yockey (eds), *The Cambridge Handbook of Social Enterprise Law* (Cambridge University Press 2018) ch 8.

24 Rosemary Teele Langford, 'Purpose-Based Governance: A New Paradigm' (2020) 43 *University of New South Wales Law Journal* 954.

25 *ibid.* The interests of a charitable entity are equated with its purposes, with the identity and nature of the entity shaping its purposes: see Ian Murray and Rosemary Teele Langford, 'The Best Interests Duty and Corporate Charities' (2021) 15 *Journal of Equity* 92.

charitable entities are owed to the purposes.²⁶ The core duty of charity governors could be rephrased as a duty to act in good faith in what the charity governor considers would further the charity's purposes,²⁷ although there are a number of other potential formulations.²⁸ Purpose also has the potential to revitalise the corporate sphere.²⁹ Indeed purpose has become a key theme within corporate jurisprudence, and there are a number of proposals to give purpose more of a role in the corporate sphere.³⁰

C8.4 Public Benefit as Subordinate to Purpose

Barker raises the issue of the relationship between public benefit and purpose, arguing for a restatement of a focus on purpose and noting that 'everything that a charity does must be done in furtherance of their charitable purpose, which must by definition operate for the public benefit'.³¹ This argument is consistent with Synge's view that public benefit

[I]s best understood as a shorthand description of the two tests that determined 'charity' at common law: first, the purposes must be beneficial in a

26 *Lehtimäki v Cooper* [2020] 3 WLR 461; [2020] UKSC 33 [50], [200] reported as *Children's Investment Fund Foundation (UK) v Attorney General* [2022] AC 155.

27 Langford, 'Purpose-Based Governance' (n 23). As to the sort of accountability requirements this approach might involve see Murray and Langford (n 25).

28 The optimal formulation of the core duty is still being debated, with options including a duty to exercise powers in the way that the charity governor decides, in good faith, would be most likely to further the purposes of the entity (adapted from *Charities Act 2011* (UK) s 221); a duty to consider what would be in the best interests of the charity and would further its purposes (as set out in the charity's rules document) when making decisions (see Department of Internal Affairs (New Zealand), 'Role of Officers' (Policy Paper, 22 June 2021)); a duty, in exercising functions, to act in the interests of the charity and, in particular, to seek, in good faith, to ensure that the charity acts in a manner which is consistent with its purposes (adapted from *Charities and Trustee Investment (Scotland) Act 2005* (asp10) ss 51, 66(1) (a)); and a duty to act in good faith in the charity's best interests and to further the purposes of the charity (*Australian Charities and Not-for-Profits Commission Regulation 2013* (Cth) reg 45.25(2)). Smith argues that 'fiduciaries are obliged to act in a manner that would be most likely to advance the purposes specified in their mandates': Lionel Smith, 'Fiduciary Relationships: Ensuring the Loyal Exercise of Judgment on Behalf of Another' (2014) 130 *Law Quarterly Review* 606.

29 See Rosemary Teele Langford, 'Use of the Corporate Form for Public Benefit: Revitalisation of Australian Corporations Law' (2020) 43 *University of New South Wales Law Journal* 977.

30 See, e.g., Asaf Raz, 'A Purpose-Based Theory of Corporate Law' (2020) 65 *Villanova Law Review* 523; The British Academy, *Reforming Business for the 21st Century: A Framework for the Future of the Corporation* (Report 2018); Lyman Johnson, 'Managerial Duties in Social Enterprise: The Public Benefit Corporation' in Benjamin Means and Joseph W Yockey (eds), *The Cambridge Handbook of Social Enterprise Law* (Cambridge University Press 2018) ch 19.

31 Sue Barker's chapter, 278.

way the law regards as charitable; second, the purposes must be directed at the public or a section of the public.³²

Synge argues that the law's mechanisms of denying charitable status based on purposes (for example that purposes are not within specific categories or not sufficiently public, or that one or more disqualifying factors apply) are sufficient.³³ Barker's argument is also consistent with points made by Parachin and Murray that charity law largely tests purposes not activities – once a charity's purposes have been found to be charitable, the issue of public benefit recedes and the key question is therefore whether the charity's activities are in pursuit of the charity's purposes.³⁴

Barker's advocacy of a refocus on purpose (which would simplify practical day-to-day decision-making and support duties of fidelity to purpose) is apposite at least in the context of governance paradigms. Rather than purpose and public benefit being conceptualised as separate requirements and therefore addressed separately, it is arguably preferable for public benefit to be seen as qualifying purpose. In this sense purpose (in the sense of a qualifying charitable purpose) is central to decision-making and accountability, with public benefit essential to qualifying the relevant purpose (or purposes) as charitable. Addressing or pursuing the purpose (or purposes) also therefore addresses public benefit. In other words, charitable purposes are necessarily public benefit purposes, meaning that a focus on purpose is necessarily a focus on public benefit. As Ian Murray and I have argued:³⁵

As charitable purposes must be for the benefit of the public or a section thereof (or in the case of relief of poverty, a narrower class of persons),³⁶ there is typically a link between purposes and the provision of benefits to a class of people.³⁷

This can also be seen by the fact that providing benefits to the section of the public intended to be benefitted, but not so as to advance the charitable purpose,

32 Mary Synge's chapter, 162.

33 *ibid* 21.

34 See, e.g., Adam Parachin, 'Regulating Charitable Activities through the Requirement for Charitable Purposes: Square Peg Meets Round Hole' in John Picton and Jennifer Sigafoos (eds), *Debates in Charity Law* (Hart 2020) ch 7; Ian Murray, 'How Do We Regulate Activities within a Charity Law Framework Focussed on Purposes?' (2020) 26 *Third Sector Review* 65. Regulators are, nevertheless, often interested in the particular activities employed – for example, from the perspective of discrimination or efficiency. In this respect a refocus on purpose could in fact serve to re-establish boundaries in terms of regulatory intervention: see John Tyler, 'Myles McGregor-Lowndes Bob Wyatt: Regulating Charities: The Inside Story' (Book Review) (2018) *Nonprofit Policy Forum*, 3.

35 Murray and Langford (n 25) 114.

36 Citing *Charities Act 2013* (Cth) ss 5, 6(3), 8.

37 Citing Gino Dal Pont, *Law of Charity* (2nd edn, LexisNexis Butterworths 2017) [3.32]. See also *Flynn v Mamarika* (1996) 130 FCR 218 (NTSC) 223–4 (Martin CJ).

will be a breach of duty.³⁸ How this is worked out in practical terms may vary; however Barker's questioning of the helpfulness of asking volunteer governors to focus on public benefit when making practical decisions in the running of the charity has merit.

C8.5 Conclusion

The views expressed in this comment are preliminary views which will be refined in due course. However, there is much to be said for the view that public benefit is secondary and complementary to (or intertwined with) purpose at least in the context of the governance duties and practical focus of charity governors.

38 Murray and Langford (n 25) 115. As noted by Harding, 'charities are purpose-oriented arrangements and only ever stand to benefit a charitable class indirectly' – see Matthew Harding's Comment on Lloyd Hitoshi Mayer's chapter, 119. see also Mary Synge's chapter, 163. Murray and I also note that '[r]elegating the general public interest highlights that it is the specific purposes of the particular charity to which the responsible persons must have regard, not the general 'charitable' purposes'. see Murray and Langford (n 25) 118.



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