Universities: a question of charity

Article

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…the 'law of charity is very particular and complex and requires more judgment [sic] on the part of those who apply it than most other parts of our law'

Lord Phillips[1]

Rather like the law of equity from which it derives, the law of charity has a rich and plentiful supply of intriguing and formidable questions that not only keep lawyers occupied, but also have far-reaching significance and impact in the real world. 'What is a charity?' may be the most fundamental and long-standing of these and our search for a coherent and rational answer to the questions of where, how and why we should draw the boundaries of charity is no less pressing now than it has always been. In tackling this issue and many others – from the structures and processes of internal governance to the nature and efficacy of external regulation – it is often the whole charity sector, or at least a whole 'head of charity', that we have in our sights.

A different approach is taken here. Our starting point is one particular type of institution – the university - that appears, on the face of it, to be a legal charity, but which also appears to sit rather uneasily, and almost unnoticed, in the charity sector. In view of the growing interest in charity and charity governance, however, it seems entirely appropriate that this institution should receive our attention. Universities are large, complex organisations of enormous social and economic significance, which have undergone significant transformation in recent years. As charities, they might have much to teach us.

By scrutinising the university through a charity law lens, the aim of this paper is to identify some of the questions that arise when seeking to apply charity law - with all its particularities and complexities - to it.[2] Part I focuses on the questions that arise in respect of that most fundamental issue: are universities really charities? On the basis that all or some universities are, or might be, the implications of that status are then addressed: in Part II, in terms of the way universities operate and, in Part III, in terms of their relations with the State. (The focus is on English universities, but one suspects that many of the issues will be recognisable in other jurisdictions also.) It will be seen that the project throws up questions that are both numerous and difficult. Unusual though it may be, the intention is not to provide answers here, nor even to engage in substantive analysis. That is a task undertaken elsewhere.[3] If this brief glance through a novel lens stimulates interest, reflection and debate, however, the paper will have achieved something worthwhile.

I Are universities charities?

To ask whether universities are charities might seem unduly provocative, or even impertinent; dismissive or ignorant, perhaps, of the inclusion of 'scholars in universities' in the all-important

[1] HL Deb 28 June 2010, vol 719, col 1629 (Lord Phillips).

[2] Of course, whether universities *should be* charities and whether the public interest is best served by their *being* (or possibly being) charities are very different questions (and not addressed here).

[3] Mary Synge, *The University-Charity: challenging perceptions in higher education*, forthcoming.

Preamble to the Statute of Elizabeth,[4] or the unequivocal statement from the House of Lords, that 'the establishment of a college or university is beyond doubt a charity'.[5] Certainly, there is ample authority to support the proposition that universities *are* charities,[6] and the fact that they tend not to be commonly perceived as such is neither here nor there, since charitable status is a 'technical' matter of law and not determined according to popular understanding.[7] Similarly, the designation of English universities as 'exempt charities' is nothing more than a categorisation for registration purposes.[8] The accompanying statutory caveat, however, that most universities are exempt charities 'in so far as they are charities' would appear to justify – or even demand – that the question be asked.[9]

The question might also be ripe for fresh consideration, given the age of the judicial authority in support of charitable status and the proliferation in the number and range of universities that have been established since those pronouncements were made. The number of universities almost doubled when 'polytechnics' – designated in the 1960s as public sector institutions – were given autonomy (from local authority control) and renamed 'universities' in 1992.[10] The criteria that must be met in order to use the title 'university' have also been relaxed significantly in recent years and the government has actively sought to attract new entrants to a sector, in which there is very little distinction between universities and other 'higher education providers', or between charitable and non-charitable institutions.[11] More broadly, the trends towards 'marketisation', 'consumerisation' and 'commodification' of the higher education sector might all be seen as justification for asking whether universities are, or remain, charitable institutions in law.[12]

Once one accepts the premise that the question is worth asking, the difficulties in answering it loom large. The boundary between charity and business is not always easy to draw and the reconfiguration of the university as a highly commercialised enterprise might be seen to test its delineation.[13] Even greater difficulty tends to surround the boundary between charity and government, where the same purposes are often pursued in both sectors, for the benefit of the public and without any profit element. Whether the line is to be drawn based on control, voluntarism or coercion remains a difficult area and no less so in respect of universities, particularly when established and largely funded by the

[4] Statute of Charitable Uses Act 43 Eliz 1 c 4 (1601), the purposes listed in the Preamble becoming the touchstone for defining charity (see, eg, *Morice v Bishop of Durham* (1805) 10 Ves Jr 522, *Special Commissioners of Income Tax v Pemsel* [1891] AC 531 (HL)).

[5] *Oppenheim v Tobacco Securities Trust Co Ltd* [1951] AC 297 (HL) 306 (Lord Simonds).

[6] Including various statutory provisions, universities' entries on the public register of charities and statements on their websites; see also *Oppenheim* (n 4), *IRC v McMullen* [1981] AC 1 (HL) and *St David's College, Lampeter v Ministry of Education* [1951] 1 All ER 559 (Ch).

[7] *Morice* (n 4); *Pemsel* (n 4) 581. Popular misconceptions are not unusual: 73% and 60%, respectively, believing (incorrectly) that Eton School (73%) and the Methodist Church were non-charitable, for example (*Report of findings of a survey of public trust and confidence in charities* (Opinion Leader Research (for the Commission) November 2005) 17).

[8] The overwhelming majority of charities are registered, excepted or exempt, the latter two not requiring registration: Charities Act 2011, s 30.

[9] Charities Act 2011, s 22(1), sch 3.

[10] In reforms made by the Education Reform Act 1988 and Further and Higher Education Act 1992, respectively.

[11] For current eligibility criteria, see Office for Students, *Regulatory Advice 13* (OfS 2019.08, April 2019).

[12] The term 'higher education provider' has replaced 'higher education institution'.

[13] The test being essentially whether a venture is a commercial enterprise or a charitable one: *IRC v Falkirk Temperance Café Trust* 1927 SC 261 (CSIH), but charitable status is not disqualified merely because the means of fulfilling charitable purposes is by running a business: *Incorporated Council of Law Reporting for England and Wales v AG* [1972] Ch 73 (CA).

State.[14] To what extent is an act of benefaction or generosity required, for example, or a surrendering of control, before a university can qualify as charitable in law and how significant, or meaningful, is a 'label of charity' that may be attached to it?[15] If the intention from the outset is that a university should be funded by taxation, subject to extensive regulatory oversight and an active participant in delivering a government's policy agenda, can it ever be sufficiently independent to be charitable?[16] The cases of *Construction Industry Training Board v Attorney General* (in England and Wales) and *Central Bayside General Practice Association Limited v Commissioner of State Revenu*e (in Australia) are useful authorities in considering the question, but neither provides an easy answer.[17]

Of course, charitable status is normally determined by reference to an institution's purposes, rather than its activities, and these must be identified and construed carefully in accordance with established legal principle.[18] If an institution's purposes are not *exclusively* charitable it cannot be a charity,[19] but whether some non-charitable purposes might be permissible as merely incidental or ancillary to the main (charitable) purpose pose some difficult questions of construction and law.[20] The issue is vital, however, in respect of some universities, particularly where their constitutional objects – which may first need to be ascertained from a list of 'powers'[21] - include the words 'in relation to', or 'in connection with', phrases that have proved fatal to some institutions' claims for charitable status.[22]

Other issues familiar to charity specialists may also be relevant to our scrutiny of universities through a charity law lens. There are differences of opinion, for example, as to whether certain arrangements for distribution of assets in the event of a charity's dissolution might disqualify it from being charitable,[23] and a fact-sensitive analysis is likely to be essential where transactions in a university's history cast doubt on the basis on which property has been held or transferred.[24] In considering the purposes for which a polytechnic-turned-university was 'established', is the relevant time the original foundation of one or more of its original parts, or the grant of its autonomy or university title? Is the law entirely clear as to the manner in which an institution can be passed between the charity and

[14] See, eg, Matthew Harding, 'Distinguishing Government from Charity in Australian Law' (2009) 31 Sydney Law Review 559, Darryn Jensen, 'Charitable purposes and political purposes (or voluntarism and coercion)', (2016) 18 Charity Law & Practice Review 57.

[15] Arguably none, where charity is a matter of law, in the same way that a lease does not become a licence merely by labelling it as such: *Street v Mountford* [1985] AC 809 (HL).

[16] Independence from government is commonly described as a hallmark of charity: Charity Commission, *The Hallmarks of an Effective Charity CC10* (Charity Commission, 2008) and *The Independence of Charities from the State* RR7 (Charity Commission, 2009); and see Part III below.

[17] *Construction Industry Training Board v AG* [1973] Ch 173 (CA); *Central Bayside General Practice Association Ltd v Commissioner of State Revenu*e (2006) 228 CLR 168 (High Ct Australia).

[18] *See, eg City of Glasgow Police Athletic Association* [1953] AC 380 (HL) 400*; AG v Ross* [1986] 1 WLR 252 (Ch).

[19] *Morice* (n 4); *Re Macduff* [1986] 2 Ch 451 (CA).

[20] See, eg, *IRC v Yorkshire Agricultural Society* [1928] 1 KB 611 (CA). The Charities Act 2011 makes no specific provision as to incidental purposes, unlike recent legislation in some other jurisdictions, leaving scope for argument whether the common law approach will continue to be applied: Mary Synge, 'Public benefit post-*Pemsel*' in Matthew Harding (ed), *Research Handbook on Not-for-profit Law* (Edward Elgar 2018) 363, 369.

[21] *Oxford Group v IRC* [1949] 2 All ER 537 (CA), neither 'objects' nor 'purposes' being identified in some governing documents.

[22] *Derby Teaching Hospitals NHS Foundation Trust v Derby City Council* [2019] EWHC 3436 (Ch), [2020] Ch 586; and see Education Reform Act 1988, s 123B (as amended).

[23] See, eg, *Yorkshire Agricultural* (n 20); *Gibson v South American Stores* [1950] Ch 177 (CA); cf *Girls' Public Day School Trust v Minister of Town and Country Planning* [1951] Ch 400 (Ch); *Liverpool and District Hospital for Diseases of the Heart v AG* [1981] Ch 193 (Ch).

[24] See, eg, *Densham v Charity Commission* [2018] UKUT 402 (TCC), [2019] WTLR 473, where a 'close textual analysis' was needed of numerous land transactions and legislative provisions in order to determine whether allotments were held on charitable trusts or not.

public sectors, in either or both directions? In respect of student fees, charity law may have appeared unequivocal, both in allowing charities to charge for services that are expensive to provide and in treating the destination of surpluses - rather than the level of fees or wealth of the potential beneficiaries - as the key determinant of charitable status.[25] Recent developments in England and Wales, however, have thrown up considerable doubt and confusion and these need to be addressed.[26] Is the system of student loans enough to remove any threat to a university's charitable status and, if not, what is the extent and consequence of that threat?

Once it is concluded that a university is a charity, it becomes imperative to ask whether there is any risk that it might become non-charitable at a later date: in what circumstances and with what consequences. This is an area of charity law that lacks clarity (especially, perhaps, in England and Wales) and, it is suggested, has not received the attention that it deserves.[27] Might policy and legislative developments be capable of removing the independence that is integral to a university's charitable status and, if so, does it then become part of the public sector, owned and controlled by the State, or does it remain a private, not-for-profit (but non-charitable) institution?[28] Perhaps more pressing is the question of whether a charitable university can be 'converted' to a for-profit institution. Do the recent transactions between the College of Law and Regent's University, on the one hand, and private equity, on the other, help us to understand this difficult area, where questions tend to arise over matters of (inter alia) valuation, conflicts of interest and regulatory oversight?[29] More fundamentally, is charity law satisfied in circumstances such as these, provided simply that any proceeds of sale are applied to new or revised charitable purposes? There may be much to be learned from the US case, *Manhattan Eye, Ear and Throat Hospital v Spitzer*.[30]

One might also go on to consider whether universities *should* be charities, and whether the fiscal advantages that accompany charitable status should be modified in relation to universities.

II Implications of charitable status, in terms of the way universities operate

The duties and powers of those who administer a charity can be summarised relatively easily, although it is important to remember that recourse to statute and the charity's governing documents must be supplemented by consideration of case law.[31] Of prime importance is the duty to exercise powers only in furtherance of the charity's purpose and to act 'in the best interests of the charity', foregoing one's own interests as much as any others.[32]

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[25] *Law Reporting* (above n 13).

[26] Again, an absence of specific legislative provision contrasts with other jurisdictions and is hugely problematic: 'Post-*Pemsel'* (above n 20); Mary Synge, *The 'New' Public Benefit Requirement: Making Sense of Charity Law?* (Hart Publishing 2015).

[27] The point was raised in anticipation of (and during) the passage of the Charities Act 2006, but to no avail: eg Joint Committee on the Draft Charities Bill, *The Draft Charities Bill* (2003-04, HL 167-1, HC 660-1) para 105; and see *Making Sense of Charity Law?* (above n 26) 48-56.

[28] And see Part III below.

[29] Something for which governments appear to have quite an appetite: see, eg, D Willetts, *A University Education* (OUP 2017) ch 11. Both charitable institutions sold their assets and undertakings to private equity in 2012 and 2020, respectively, the purposes of the original charities being altered to make them largely grant-making charities.

[30] *Manhattan Eye, Ear and Throat Hospital v Spitzer* 186 Misc 2d 126 (NY Sup Ct 1999).

[31] In England and Wales, applicable duties are codified in statute in relation to companies and charitable incorporated organisations, but not other legal forms of charity.

[32] See, eg, *Harries v Church Commissioners for England* [1992] 1 WLR 1241 (Ch); *Weth v AG* [2001] EWCA Civ 263, [2001] 2 WLUK 662 [55]; *Dewar v Sheffield City Council* [2019] WTLR 495 (Ch); *Lehtimaki v Cooper* [2020] UKSC 33, [2022] AC 155.

Looking at universities through a charity law lens, however, the matter of how that law is to be applied is considerably less straightforward. Fundamental questions arise immediately: who owes the 'best interests' duty, to whom do they owe it, and what exactly does 'best interests of the charity' mean? Acting in the 'best interests of the students' does not seem quite the same. And are we right to accept the premise that legal responsibility rests with, and legal duties are owed by, members of a university's governing body, or is that too narrow an explanation of the legal position? Especially in the case of an incorporated charity, it is tempting to view 'the charity' as the institution itself and to consider that its interests are best served by generating wealth, maximising competitive advantage and supressing anything that might damage its reputation. It is worth remembering, however, that the fulfilment of its charitable purpose is every charitable institution's raison-d'être. The case of *Lehtimaki v Cooper* - a recent and rare decision of the Supreme Court in England and Wales – offers valuable assistance in examining this duty against a backdrop of relatively scant authority.[33] It also highlights the critical importance of the purpose for which a charity was established, a purpose which is likely to bear little resemblance to – and receive considerably less publicity than - a university's 'mission'.

Universities' purposes will vary in their precise formulation, but let us assume the general charitable purposes of advancing education and research. *Are* these purposes at the heart of strategic and operational decision making in universities, so that both the internal decision-making arrangements and the decisions that are taken can be seen to (or are intended to) further those purposes for the public benefit? A growing university literature is increasingly critical of universities' practices, typically depicting a top-down managerial culture, where senior executives pursue prestige projects, often at great risk, receive high (or possibly excessive) remuneration with minimum accountability and where the quality of education and academic integrity are in a state of demise.[34] Asking whether charity law has any response to these criticisms, or anything to contribute to the literature, seems a highly valuable and warranted exercise.

Is it conceivable, for example, that a greater focus on the charitable purpose and 'best interests' duty would lead to different decision making on matters of education, or lead to a greater proportion of financial resources being directed to improving staff/student ratios and teaching facilities? Is there a danger that a focus on student satisfaction scores or maximising student fee income creates a distraction from, and detrimentally affects, the advancement of education? Similarly, in respect of research, it is interesting to consider whether the best interests of the charity might be served (more effectively), by resisting a metrics-driven strategy that prioritises and rewards certain outputs, the pursuit of external funding and the quest for (often short-term) 'impact' in order to demonstrate 'value for money'. Is it possible that a greater prominence given to a university's charitable purpose and context might reframe, or safeguard, the pursuit of knowledge and open-ended intellectual inquiry as a *public* good? One wonders whether it might also reshape financial priorities and efficiencies, and impact upon a university's working culture and ethos. These are difficult questions and the university literature prompts many more, but if universities are charities, there is every justification for endeavouring to answer them.

[33] *Lehtimaki* (above n 32). The case addresses the fiduciary duty to act in the best interests of the charity (which is described as being owed to the purposes) and makes clear that it is owed by a charity's members as well as its trustees.

[34] By way of example only: Andrew McGettigan, *The Great University Gamble* (Pluto Press 2013); Stefan Collini, *Speaking of Universities* (Verso 2017); Jefferson Frank, Norman Gowar and Michael Naef, *Universities in Crisis* (Bristol University Press 2019); Richard Watermeyer, *Competitive Accountability in Academic Life* (Edward Elgar 2019); Peter Fleming, *Dark Academia: How Universities Die* (Pluto Press 2021).

The issue of executive remuneration has excited widespread anger and frustration for many years and 'excessive remuneration' is given as an example of 'misconduct and mismanagement' in statute.[35] At the same time, however, it seems that there is little regulatory interest in confronting the issue by applying principles of charity law. The Charity Commission has insisted that it 'not a controller or enforcer of executive pay',[36] and the Office for Students appears to expect limited financial disclosures to equip staff and students to 'push for changes' where pay is 'out of step with stakeholders' expectations'.[37] The issue does not appear to have been addressed adequately: *does* charity law offer, or mandate, an effective framework for determining what is lawful? What precisely is that framework, is it coherent and is it both visible and applied in university practices?

There may be difficulties in reconciling the doctrine of private benefit with the range and extent of executive bonuses, for example. Should we be concerned if performance-related bonuses for members of senior management are measured according to targets on international recruitment, student satisfaction scores, improved league table positions or research income? And is it possible to reconcile the duty to act in the best interests of advancing education with a substantial extra payment to an outgoing Vice-Chancellor, in return for not offering his or her services to another university? One might also ask to what extent the charity context is relevant to levels of pay and whether it is appropriate for universities to benchmark the salaries of English Vice-Chancellors with those of their (generally higher paid) Australian counterparts or leaders of large companies. And, in what circumstances (if at all) is it appropriate – or expedient or morally justified – to expend part of a university's charitable funds on compensating an outgoing executive beyond the amounts required by contract or statute?

Good governance is key, or course, and it is worth considering whether a university's structures and processes promote, or are even capable of promoting, the purpose-based governance that charity law appears to demand. The apparent failure of governing bodies to 'rein in' executive pay might be instructive and highlight the inevitable difficulties that arise where members of the executive also sit on the governing body. The evident practice of Vice-Chancellors sitting on the Remuneration Committees that decide their remuneration also brings into sharp focus fundamental questions over information asymmetries, influence and conflicts of interest.[38] Each university will be different, but the 'business model' of governance - which Shattock and Horvath describe as increasingly prevalent in English universities and which is clearly reflected in the university literature – presents obvious challenges.[39] If one accepts the premise that academics are more likely to prioritise spend directly on advancing education and research - in preference to increased marketing and prestige projects, for example, or expanded senior management and generous executive remuneration - then a model in which their participation is greatly diminished and where the executive has considerable authority may well require a reset.

Especially in respect of governance and executive remuneration, a comparison between guidance issued for the charity sector and guidance for the university sector can be enlightening. It highlights

[35] Charities Act 2011, s 76(2).

[36] Charity Commission, **'**Charity regulator criticises international charity over CEO pay decision' (20 December, 2019): https://www.gov.uk/government/publications/charity-commission-criticises-international-charity-over-ceo-pay-decision/charity-regulator-criticises-international-charity-over-ceo-pay-decision accessed 9 May 2022.

[37] OfS, *Senior Staff Remuneration, Analysis of the 2017-18 disclosures* 2019.03 (OfS, 2019) para 25.

[38] Arguably, good governance generally and not solely in charity law terms: see UCU, *Transparency at the top: The fourth report of senior pay and perks in UK universities* (UCU, 2018) in which it was reported that 95% VCs were either members or attending the committees (just over half being members). The subsequent *fifth report* (May 2019) noted an improvement from 95% to 81%.

[39] Michael Shattock and Aniko Horvath, *The Governance of British Higher Education* (Bloomsbury 2020).

clear differences in emphasis and might go some way toward explaining – though not justifying – apparent neglect of charity law. Asking what is to be done about any failure to comply with that law is also a very taxing question. Leaving aside external regulation, for the moment, who is empowered to enforce charity law duties or demand that charity law principles be applied and how is performance of the 'best interests duty' to be assessed? Some thought needs to be given to whether it is realistic to expect university employees or students, or members of the public, to take steps and what those steps might be. One wonders whether the jurisdiction of the Attorney General and/or the University Visitor might be called upon.

III Implications of charitable status, in terms of the relations between universities and the State

As mentioned in Part I, an institution's independence from the State is an integral part of establishing its status as a charity. It is also seen as a necessary and ongoing criterion during a charity's administration. Fundamentally, a charity's trustees are required to act independently and in the best interests of the charity, not with a view to following government policy (although furtherance of such policy might be a legitimate consequence of a proper exercise of discretion). It follows that a failure to act independently is a breach of duty, but does an erosion of that independence by the State (or possibly a continuous breach) also remove charitable status and, if so, at what point and with what consequences? The first step is to explore authority for the proposition that a charity must be, and remain, independent of the State and also to clarify what is meant by 'independent'. This is not entirely straightforward, but the 'institutional autonomy' that receives some protection in legislation seems to fall some way short.[40]

Any claim that universities are independent institutions may be under considerable strain, as government adopts an increasingly hands-on approach to the higher education sector. Looking at universities through a charity law lens gives rise to some of the questions that have been debated in other parts of the charity sector, where funding grants have largely been replaced by contracts, sometimes won through competitive tendering and with stringent conditions attached.[41] The threat to independence is obvious and renewed consideration of the repercussions and threat of charities being 'co-opted' to the State's policy agenda may be needed.[42] Are universities influenced or – to all intents and purposes - compelled to follow government objectives and what is the significance of any such influence or compulsion for their charitable status and decision makers' liabilities?

Universities, like all charities, are subject to regulation, but it may be worth asking whether there is a point at which regulation becomes so onerous or invasive that it impacts upon the charity's independence and/or breaches the government's undertaking to uphold that independence.[43] Or is it more appropriate to conclude that a charitable university – in contrast to other non-charitable higher

[40] Higher Education Research Act 2017, s 2, essentially defined as freedom to conduct day to day management 'in an effective and competent way' and to determine certain matters relating to courses, staffing and admissions.

[41] See, eg, Debra Morris, 'Paying the Piper: The "Contract Culture" as Dependency Culture for Charities?' in Alison Dunn (ed), *The Voluntary Sector, the State and the Law* (Hart Publishing 2000); Alison Dunn, 'Demanding service or servicing demand? Charities, regulation and the policy process' (2008) 71 MLR 247; *Central Bayside* (above n 17).

[42] Kathryn Chan, *The Public-Private Nature of Charity Law* (Hart Publishing 2016) 127.

[43] Cabinet Office, *The Compact* (Cabinet Office, 2010), in which the first undertaking given by government was to respect and uphold charities' independence.

education providers – can be expected (or required) to respond differently to policy initiatives and incentives offered by the sector's regulatory framework, in order to preserve that independence?

In terms of students' tuition fees, for example, universities are entitled to access public funding in return for accepting restrictions on the level of fees that they may charge non-international undergraduate students.[44] Those levels are higher if the university also enters into arrangements that are approved by the higher education regulator and which, essentially, comply with government's policy objectives on improving access and participation by underrepresented groups. In practice, virtually all universities take the second option, charging the maximum level of fees (and substantially more to international students), resulting in a range and extent of cross-subsidisations that find no ready comparisons in case law. Ultimately, students' fees – paid in respect of their education – may also fund research, higher-cost courses, long-term capital projects and outreach in schools, for example. Do these practices challenge our understanding of how trustees' discretions should be exercised, how fees should be determined and how the best interests of the charity are identified and pursued?

Of course, interventions supported by statute are one thing, but to the extent that they are the result of executive action, can they be safely disregarded, or challenged, by a university that is also charitable? In a recent Canadian case, for example, a Minister's attempt to require universities to allow students to opt-out of 'non-essential ancillary fees' was ruled unlawful.[45] And what is the correct analysis that should be applied to instructions that are issued to universities by the Office for Students, such as prohibiting universities from making unconditional offers or requiring them to provide tutoring to school pupils? It is ostensibly an 'independent' regulator – an executive non-departmental public body that is sponsored by the Department of Education – but its founding statute provides that it is to receive guidance and even directions from the Secretary of State.[46] Again, should a charitable university be treated, and respond, differently from other non-charitable higher education providers?

It is interesting to note how universities have increasingly been subjected to areas of law that are more commonly associated with the public sector. They are likely to be 'public authorities', subject to the Freedom of Information Act 2000 and Equality Act 2010, for example, treated as 'bodies governed by public law' for the purposes of the Public Contracts Regulations 2015, and may be subject to judicial review and human rights norms, owing to their exercise of 'public functions'.[47] Does this have any bearing on their charitable status or context? Or is the real impact a change to public and government perception, so that the more aligned they are with other public bodies, the more likely they are to be seen as agents of government, or tools at its disposal to use in pursuit of its policy objectives?

Turning to the State's role in providing regulation of charitable universities, more questions arise. To what extent are universities subject to regulation *as charities* and is that regulation exercised and effective? Following reforms in the Charities Act 2006, some universities are now registered with the Charity Commission, which puts them on a par with other registered charities.[48] Others, however, continue to be 'exempt charities' and the Office for Students acts as their Principal Regulator and has a statutory duty to do all that it 'reasonably can … to promote compliance by the charity trustees with

[44] For the options and consequences of registration, see OfS, *Securing student success*: *Regulatory framework for higher education in England* 2018.01 (OfS, 2018).
[45] *Canadian Federation of Students v Ontario* (Colleges and Universities) 2021 ONCA 553 (Ct App, Ontario).
[46] Higher Education Research Act 2017, ss 2 and 77, respectively (and see s 76); *Office for Students Framework Document* (Department for Education and OfS, 2019).
[47] See, eg, *Evans v University of Cambridge* [2002] EWHC 1382 (Admin), [2003] ELR 8.
[48] In which case the normal questions over the effectiveness of regulation arise.

their legal obligations in exercising control and management of the administration of the charity'.[49] This inevitably raises the question as to what extent the two regulatory frameworks that apply to universities differ and whether the evident discrepancies are coherent and desirable. It might also be asked whether the higher education regulator has adequate expertise and interest in advising on, and promoting or enforcing compliance with, charity law: the signs are not encouraging.[50]

In respect of universities' operations and their relations with the State, the extent to which an apparent neglect of charity law persists might be explained by a neglect of that law in sector guidance and regulatory activity. That is not to excuse non-compliance, but it does suggest an obvious way forward for providing greater coherency between charitable status in theory and observance of charity law in practice. Are there further means of bringing greater coherency to charity law, at the same time as improvements in the university sector?

Conclusion

This paper has sought to identify some of the questions that arise when universities are viewed through a charity law lens, many of which give new context to familiar debates that have a broad application across the charity sector. It also offers a novel approach to many current criticisms of, and challenges facing, the university sector.

These questions challenge a common perception of universities and seek to fill a gap in a university literature that pays little attention to their charitable status. They also address a fundamental lack of coherency, where – on one level – the law readily identifies an institution as charitable and yet – on another level – seems to waver and possibly to sidestep the implications of that status. Does that matter? Yes. Might it receive the attention and reflection that it seems to deserve? Let us see.

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[49] Charities Act 2011, s 26.

[50] Mary Synge, 'Regulation of charities: one step forward, two steps back' (2021) 41 Legal Studies 214.