Introduction

Myles McGregor-Lowndes

This volume about modernising charity law results from a conference held at the Australian Centre for Philanthropy and Nonprofit Studies at the Queensland University of Technology in April 2009. It came at a pivotal moment in Australian charity law reform, as the first term federal Labor government began a number of overlapping inquiries touching upon charity reform. Many hoped that this government would eventually lay down a blueprint for charity law reform in Australia and perhaps even Third Sector reform, which had generated only glimmers of interest under the previous 13 years of conservative administration.

A previous conference was held at the Centre in 2001 – the impetus being the recommendations of the Charity Definition Inquiry,¹ which held much promise – and it resulted in a collection of papers being published in a special issue of *Third Sector Review*.² That conference brought together scholars and regulators from across the globe, including United Kingdom and Canadian policy makers who were at that time tasked with providing options to reform charity law and regulation in their respective countries. The Australian legislative outcome of the Charity Definition Inquiry was meagre when compared with reform in the UK, New Zealand and Singapore: a very short Act applying only to the federal jurisdiction and addressing just three issues.³ The draft bill was much more ambitious, but attracted significant opposition from the sector and legal practitioners as it departed from the carefully crafted inquiry recommendations.

The 2009 conference again brought together scholars and regulators from around the globe, but also included Australian politicians, their advisors, research staff involved in the various inquiries touching on charity law issues, the leadership of sector bodies and legal practitioners. The first two days of the conference focused on the jurisdictional charity reform process that had developed since 2001 and an assessment of how those reforms were now faring. What were the drivers for public policy choices during the process? What were the lessons to be learnt from other jurisdictions? Will the changes to the public benefit test actually work in the field? The third day was given over to examining the strategies to increase

philanthropic behaviour by reviewing recent initiatives in a number of jurisdictions. Is there a magic gold bullet to fire at the hearts of increasing numbers of high net worth individuals and mega-corporations? Or is it a case of silver buckshot?

Although the conference presentations are available as streamed video from the Centre's web site, it was believed worthwhile to publish a more scholarly record of parts of the conference.⁴ The conference papers and this publication stand as a record across the charity law jurisdictions of the series of reforms that rival the Statute of Elizabeth in their breadth and effect. Whether Australia follows such a course remains to be seen.

OVERVIEW

Chapter 1 conflates a number of conference papers into a broad overview of the legislative and judicial activity in relation to charities since 2001 in the UK, Canada, New Zealand, Singapore and Australia. It provides a necessary background to the rest of the chapters, which deal with specific issues of modernising charity law. Clearly the UK jurisdictions have led the way with a series of reforms which, on any measure, are significant and bold. While there are differences in the detail between the UK jurisdictions there is enough commonality to discern broad areas of agreement such as: additional charitable purpose heads; review of the public benefit test; greater disclosure; new hybrid legal structures; an appeals tribunal and a streamlined regulatory framework with an independent charities regulator at its centre.

Singapore is a fascinating example of a small nation with big ambitions and the political will to encourage charity to play a more significant role in its developing civil society. New Zealand has had less ambitious vision, but still made some significant progress in reforming the regulatory framework for charities with the establishment of a commission and register. At the other end of the scale are Canada and Australia.

The Canadian Voluntary Sector Initiative delivered a report with 75 recommendations, of which 69 were adopted. However, most of these reforms do not go anywhere near the more adventurous policy agenda of the UK jurisdictions. A change in federal government and the federal structure have dulled any appetite for further reform at present, apart from hybrid social enterprise legal forms. Australia, another federation, has moved little since 2001. There have been the minor reforms introduced in the federal jurisdiction by the Extension of Charitable Purpose Act 2004, the introduction of a new form of tax effective private foundation, and some other minor tax incentives. The major driver has been taxation regulator activism which has seen an ongoing review of the register

of charities and tax deductible entities; publishing of formal rulings on a range of charity tax issues, including its definition; and after a drought of over three decades, several High Court decisions arising from charity taxation disputes.

In some jurisdictions, such as the UK, the reform outcomes are now starting to bite and regret may surface. For others the journey is just beginning and some even have the luxury of learning from the experience of others.

PEMSEL PLUS

Chapter 2 by Lindsay Driscoll and Chapter 3 by Oonagh Breen examine in detail the modernising reforms in England and Ireland respectively. Lindsay Driscoll, who has been a constant player in UK charity law reform, in the role of sector representative, charity commissioner or legal practitioner, gives a measured account of the critical issues. Her view of the streamlined administration framework of the Charity Commission and Tribunal is instructive and represents what is probably the current model in comparison to some other charity law jurisdictions. While the statutory definition and the new heads of charity appear radical to an external observer, she makes the argument that the guidances of the Charity Commission in recent years had all but paved the way for such formal recognition of the new heads. However, as she notes, the new charity law tribunal and courts are yet to have the final word on whether this statutory formalisation of incremental policy development might allow some adventuresome judicial decision making. It is here that there may be some future regrets.

In Chapter 3, Oonagh Breen examines the reforms in Ireland, which, although not as advanced in implementation as in England and Wales, represent a significant stride in charity law and regulation modernisation. While it has many similarities to English reforms, the emerging charity law framework in Ireland has a number of interesting features such as: the separation of the previous strong tax exemption–charitable status nexus; exclusion of amateur sport, human rights and peace related organisations; retention of the public benefit presumption solely for religious purposes; and a mandatory five-year review of the statute.

PUBLIC BENEFIT

Chapters 4 and 5 address the issue of public benefit in the formulation of the definition of charity from two different perspectives. Debra Morris

examines the reformulation issues in England and Karla Simon examines developments in Japan and China. It is one of the most controversial issues on the modernising charity law agenda. At common law there was a long-held presumption that purposes within the first three heads of charity were for the public benefit. The effect of the presumption was that, when the charitable status of an organisation established for the relief of poverty, the advancement of education, or the advancement of religion was being considered, the organisation's purpose was presumed to be for the public benefit, unless there was evidence that it was not. By contrast, organisations established for all other purposes, which did not benefit from that presumption, were required, at the time that their status was being considered, to provide evidence that their purpose was for the public benefit. Tampering with this state of affairs by reversing the presumption is a significant reform, with implications for many long-established charitable entities (for example, fee-paying schools).

The general inclination to an audit society where all are called upon to justify their existence and actions when public funds, concessions or privileges are involved does not auger well for charities. There is little public support for relieving organisations claiming to be for the public benefit from having to show good evidence to support their claim. Clearly we have a major deficit in tools to measure such claims, many of which involve intangible notions and go to the heart of our difficulties in understanding what is public and private, what is a benefit, how direct a benefit must be and how much of the public must benefit. The first three heads of charitable purposes all have organisations on the margins which, if called upon, are going to have measurement and evidence difficulties in demonstrating their public benefit. Religion probably represents the most contentious area.

Debra Morris details the background, statutory provisions and regulatory implementation of the reformed public benefit test in the English jurisdiction. This could perhaps be the single most probable cause for migraine among charity lawyers, regulators and trustees in England. The Charity Commission has expended considerable resources trying to chart a practical course through waters full of sharp rocks, whirlpools of public prejudice, the sharks of the popular press and unspoken political compromises. Her well-argued but surprising conclusion that the journey may return from whence it began can only give those who are about to start the journey reason to pause and reflect.

In Chapter 5, Karla Simon provides an update on the progress made in two significant Asian jurisdictions. Japan and China are two civil law countries that are seeking to develop nonprofit organisations that pursue Anglo-American public benefit purposes. Japan has made significant

strides since the Kobe earthquake and China is following its own winding path on controlling and facilitating public benefit organisations.

BUSINESS

The boundary between charity and business has been relatively clear with the bright line of the non-distribution constraint combined with a core purposes test. In the past, contentions have revolved around the amount of unrelated trading income, application of tax neutrality principles between sectors and risk to donor funds from charity business ventures. However, new areas of contention are being hotly debated across most jurisdictions. They come in the form of social enterprises, social entrepreneurs and venture philanthropy which use the MBA toolkit to bludgeon wicked problems such as unemployment, poverty, homelessness, and global environmental abuse out of existence. Preoccupied with outcomes and the impacts of market activity, they are unrestrained by pure charitable purposes and non-profit restraints.

Various practitioner-concocted hybrids and boutique statutory vehicles have appeared in the US and UK jurisdictions. There are also legally adventurous partnerships between business and nonprofit organisations, seeking to maximize access either to market capital or to government-donor funds denied to an orthodox business or nonprofit vehicle. The community interest companies (CICs) and low-profit, limited liability companies (L3Cs) are experimental structures between market and State that challenge many of the central tenets of charity law.

Such schemes in Australia have been aided by the judiciary. The Australian High Court decision in *Word Investments*⁵ (much to the revenue authority's dismay) entrenched the 'destination of income' test into charity tax law. This test simply means that once it is shown that earned income is for charitable purposes, the manner in which the income is raised does not detract from the otherwise charitable objects. This goes against the trend of other comparable jurisdictions and opens the gate for some adventurous boundary blurring.

Oonagh Breen, an Irish legal academic, recently spent time at Harvard University considering all these boundary issues in different jurisdictions. As a consequence, Chapter 6 tracks both the traditional issues of separation of business and charity, alleged unfair competition and the emergence of hybrid forms between market, state and nonprofit. The detailed examination of the laws and regulations in each jurisdiction exposes the challenges for all participants seeking to shift formerly well-accepted bright lines.

GOVERNMENT

Governments have an interest in the performance of charities providing public goods to the community, which it might otherwise have to provide or reap the consequences of a dissatisfied community. When governments believe that they should provide all public goods, then charity is often left to its own devices or in some instances actively suppressed. One can loosely draw parallels between the state as it was at the time of the 1601 Preamble and the modern UK state. The fear of general revolution in the days of the Preamble driving state intervention has been replaced by the loss of political power for public goods not delivered at the right cost to taxpayers. The changing shape of modern government has impacted on the boundaries of charity. The Preamble's list of schools, universities, hospitals, roads, bridges, jetties and prisons once provided by charity are now regularly provided by consortia in which big business and international financiers play a leading role; and charity plays little, if any, in many jurisdictions. This is particularly the case in the UK, where government experimentation with public-private finance initiatives has brought the finances, skills, competitiveness and profit motive of the business world to bear on areas of utility and service provision that were once the heartland of charity.

This trend has not meant that charity has a lesser overall relationship with government, as the new public management strategy for the rollback of the welfare state has driven the use of the nonprofit sector as a delivery mechanism for community and welfare services. Recently, the growth of the non-profit sector in many jurisdictions has been due to contractual arrangements for specific programs and services, rather than general grants to aid the purposes of organisations. The position of government as the largest financier in such semi-markets allows considerable coercive power over those in such a market space, leading to one-sided contracts, shifting of risk to others who are not the most able to finance it, and underfunding.

Is the modernisation of charity law about a state agenda seeking to harness the resources of charity for the 'cheaper, better and faster' delivery of community services, or lofty notions of partnership and facilitation of a vibrant independent sector for democratic enhancement?

In Chapter 7, Kerry O'Halloran traces the developments in this area from the initial charity-government boundary in the Preamble to the more recent legal developments in the various UK jurisdictions. The '*Pemsel* plus' formulation and the new regulatory mechanisms indicate where the new boundaries are to be found and how they are shaping the relationship between the state, charities and the community.

RELIGION

There is no part of the law of charities more replete with paradox than the third head, the advancement of religion. It was missing in the Preamble, apart from ‘the repair of churches’, but within a few years had been recognised by the judiciary as extending to an exceptionally wide array of purposes. The initial omission is more confounding, considering that religion formed the core of the misty beginnings of pious uses and the legal notion of an equitable trust. To cause complete confusion much of this was developed in the ecclesiastical courts! The paradox does not stop there as religion has been present consistently in the base motivation of the creation and sustaining of significant charitable activities across all the heads and the ages. Evidence is now overwhelming that adherence to a faith and more importantly worship attendance is the best predictor of high and regular giving and volunteering to any cause, not just to those which are religious.⁶ Yet this force for public good is riven with infamous examples of religion motivating, justifying or being associated with human genocide, unspeakable inhumanity across nations, races and families often lasting for generations. How can something which has produced so much public benefit also produce so much public harm?

One could continue identifying the paradoxes, puzzles and inconsistencies in this head of charity, but just one more will probably reduce readers (other than hardened charity lawyers) to despair, when a prominent English charity law text claims, ‘The rationale for treating the advancement of religion as charitable has not been discussed in the English cases’.⁷ Clearly the unique position of the formal church in western history – from once being a state unto itself to being a state-established institution, and more latterly finding itself in a more level legal playing field of multiple faiths – combined with fluctuating but mostly declining membership, resources, political and moral influence, is part of the explanation of what we see now as paradoxes.

The Australian inquiries into charity or nonprofit regulation have all had submissions from those who, with a fervour and dogmatism worthy of a religious fanatic, rail against the concessions given to religious organisations.⁸ The rising glare of sunlight driven by an increasing public appetite for transparency and accountability and tabloid stories about fallen saints has cast a deep shadow over all things religious. The sexual abuse of children in religious institutions across continents and ages, the worldly excesses of some high-profile religious leaders and various sectarian-associated mass violence have taken their toll and as a consequence religion’s assumed position as a public good, an anchor sustaining law and

social behaviour, and worthy of concessional treatment is open for discussion and justification.

In Chapter 8, Anne Robinson, a practising lawyer retained by many religious bodies, and Father Brian Lucas, lawyer and General Secretary of the Australian Catholic Bishops Conference, examine the issue of religion as a head of charity. As the old assumptions of religious public benefit have already been largely stripped away in the court of tabloid opinion, what are the new rationales which will suffice to persuade politicians and the public that all things religious should remain charitable and worthy of state concessions?

THE FUTURE

Two lawyers from opposite sides of the globe, but with similar concerns about the future shape of the law and regulation of charities, were invited to challenge the incremental model of charity law reform. They have both recently completed doctoral theses proposing radical reform agendas involving not just charities but all civil society organisations. The result is two different but equally challenging examinations of the future of charity law.

In Chapter 9, Jonathan Garton, a UK legal academic, identifies the justification for the state expanding its attention from its preoccupation with charity to the wider view of organised civil society. He applies five justifications for state regulation of all civil society organisations, rather than just charities. In doing so, he identifies what issues are important for the regulation of civil society organisations in comparison with for-profit enterprise, which indicates the shape and extent of such regulation.

In Chapter 10, Matthew Turnour, a charity lawyer, sketches a different architecture for charity law which could be a jurisprudence for all civil society organisations. He proposes a new framework for the common law, rather than incremental statutory intervention. From a reconceptualisation of the heart of charitable purpose, he builds to a multi-dimensional model of the space for civil society organisations which allows for flexible boundaries.

What sets these two contributions apart is that they challenge our legal notions of charity by exploring the rapid advances of other disciplines in understanding charities as nonprofit organisations and then as civil society organisations. A robust challenge is in the making of a legally conceived framework based on the essence of charity, as economics, sociology, administration, psychology and other disciplines make significant strides towards constructing a coherent framework about altruism, philanthropy and volunteerism in modern society.

NOTES

1. Australia, Inquiry into the Definition of Charities and Related Organisations (2001), *Report of the Inquiry into the Definition of Charities and Related Organisations*, Canberra: Treasury.
2. 'Charity Law in the Pacific Rim' (2002), *Third Sector Review*, 8(1) (special issue).
3. Extension of Charitable Purpose Act 2004 (Cth).
4. Available at <http://www.bus.qut.edu.au/research/cpns/seminarevent/ModernisingCharityLawConference.jsp>
5. *Commissioner of Taxation of the Commonwealth of Australia v Word Investments Ltd* (2008) 236 CLR 204.
6. For an overview see Bekkers, R. and P. Wiepking (2009), *Generosity and Philanthropy: A Literature Review*, SSRN Working Paper Series No. 1015507, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1015507 (accessed 24 December 2009).
7. Picarda, H. (1999), *The Law and Practice Relating to Charities*, 3rd edn, London: Butterworths, 84.
8. Refer to Chapter 8.