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**Myles McGregor-Lowndes & Kerry O'Halloran (eds),
*Modernising Charity Law: recent developments and future
directions***

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It has long been anomalous that the modern law of charity across the common law world operates from the Preamble to an Act of 1601. Whereas many areas of law have their antecedents in earlier centuries, few can be said to still operate in a primary sense on the basis of an Act created during the Elizabethan era. As a popularly perceived 'golden age' there are, of course, worse periods in history for charity to take as its modern anchor. It was a propitious time in terms of geographical and scientific expansion and exploration, of renaissance and political stability; it was a forward-looking age. Yet from a regulatory perspective, what was in 1601 a useful, contemporary, progressive list of charitable purposes now seems dated, obscure and restrictive, especially in terms of finding a charitable purpose by reference to analogy. The forward-looking promise of the 1601 Preamble now provides an essentially rear view perspective to charity: looking backwards to an historical construct. It is somewhat trite to say that modernisation in this area of law has long been overdue. To that end in the last decade a process of reform has slowly taken shape across a number of common law jurisdictions. This modernisation has been challenging, particularly in determining how to take the past into the present without compromising the flexibility or

integrity of the regulatory framework, or the independence of organisations within the charity sector.

The essays in Myles McGregor-Lowndes and Kerry O'Halloran's edited collection provide a fascinating insight into this process of charity law reform post 2001. The primary focus of such reform is upon selected common law jurisdictions (Australia, Canada, England and Wales, Ireland, New Zealand, Singapore), complemented by an overview of reform in China and Japan. Written by well-respected academics and practitioners in the charity law field, the essays cover some of the key regulatory challenges facing law reformers; from the definition of charity and public benefit, to the position of religious organisations, and to the boundary between charity, for-profit business and government. In so doing this collection combines analysis of various legal frameworks alongside longer range interpretations of the policy and regulatory context including, more broadly, the future of regulation for charities and other civil society organisations. Within that analysis there is a genuine concern to get to heart of reform, not just in terms of the specifics or the detailed rules, but more substantively in terms of the law's purpose.

A number of common themes are evident in the essays. They highlight, for example, the modern challenges for regulation of charities, in particular the arbitrariness of the policy climate and context within which charities and the regulatory framework operate. The modern policy context is one in which a concern with more efficient regulation of charities has come to the fore, both as a result of a broader regulatory context driving accountability, transparency and governance, and as part of a wider political agenda for contracting out state activities to other providers. In England and Wales, for example, it is no coincidence that, following decades of state retrenchment in welfare provision under the Conservative administration, it was the juncture of an incoming Labour government with its partnership agenda which made the time for modernisation of charity law politically propitious. Tied in with reform was an accountability agenda to protect the charity 'brand' and so to build and maintain public confidence and enable organisations to partner government and provide public services. In this political context reform became a priority and it was supported by the experience of positive political partnerships between the sector and government that helped define change. By contrast, modernisation of charity law has been a much slower process in other jurisdictions where the drivers for change have been weaker or nonexistent. There are those jurisdictions, such as Australia and Canada, where the timing has not been conducive for reform either because the political will has been weak or the sector itself unable to cohesively act together to demand or champion such regulatory change. The variable pace of reform across the different jurisdictions examined in this book underlines how dependent law reform in this field is upon external and internal drivers for change, and upon a certain serendipity in timing (for example, the UN Security Council push for counter-terrorism provisions driving charity law reform in Ireland, or a natural disaster such as the Kobe earthquake driving reform in Japan are both identified).

In examining the modernisation agenda, the essays in this collection also bring out the institutional and systemic barriers or challenges to reform that have operated in some jurisdictions. In Canada for example, we see the difficulties created by the existence of multiple provinces and the resulting lack of coherence between different operating definitions of charity and different government ministries. In Ireland we see the effect upon the development of the law in circumstances where regulatory authorities do not publicise decisions. In almost all the jurisdictions covered in the essays we see the effect resource barriers within organisations can have in stultifying development of the law. Charity law is

well known for its many anomalous and out of date common law rules, but with a paucity of cases reaching the courts there has been little opportunity for the judiciary to adapt charity law to changing social or legal circumstances. Without the will of an Executive body to update the law, the regulation of charities essentially becomes a by-product of its recipients and their inability to afford the costs of bringing an appeal against decisions of regulators or challenging application of the law.

The intersection of governance and independence at an organisational level is a further theme evident in some of the essays in this collection. In particular there is a neat juxtaposition of the discussion of governance between the practice of placing retired or ex-government officials on the boards of organisations in Japan with all its attendant implications upon independence, and concerns in other jurisdictions over the independence from for-profit activities and boundaries between charity and business and overall the need for tighter regulatory oversight in a more global age than the one that existed in 1601. Taking governance more broadly, the role and structure of the regulatory framework features greatly through the essays, which collectively identify the function and importance of a progressive regulator. The Charity Commission of England and Wales is often seen as the benchmark in this regard and recent reforms across a number of jurisdictions to introduce such a Commission are identified, such as in Ireland, New Zealand and Singapore. Whilst concerns arise as to combining guidance and monitoring roles within the one charity regulator, the role of the regulator as a gatekeeper remains a significant one in terms of promoting the health and progression of the sector and charities within it. Having a regulator whose sole focus is upon the charity sector allows a degree of expertise, knowledge, and importantly understanding and sensitivity to underlie the monitoring of activities of organisations. We see ample evidence in this book of the difficulties encountered in jurisdictions where other regulators have responsibility for determining regulatory issues relating to charities (such as the Australian Taxation Office). In this context valid concerns are raised about the ability, capacity and propriety of non-sector specific regulators to determine broader questions relating to charities such as issues of public benefit (though in regard to public benefit those concerns do not appear to have been removed by the Charity Commission in England and Wales).

Also threading through the essays in this collection is an implicit political theme. This is not just a prosaic one as to timing and the political will to change, but a broader theme about the choices that are made concerning the nature and extent of the type of organisations or purposes that can be charitable, and what activities charities can or should undertake. We see evidence for this, for example, in the political policy choices informed by cultural and social history in Ireland where religious charities have been permitted to retain the presumption of public benefit and so define their validity on their own terms (and compare in this respect the presumption for religious charities in Australia). This theme is also evident in the choices made about the independence of charities; compare, for example the retention of an advocacy and lobbying role for charities as an arbiter of organisational independence in jurisdictions like England and Wales and Ireland, against the fear of unleashing the power of the sector to challenge the organs of the state or state policy in China, or indeed in Japan where permission from government is a requirement to set up a public benefit organisation. We see it too in the sense of a movement away from a conventional altruistic focus in the concept of charity to a more tightly pragmatic focus upon service provision, raising a tension between traditionally accepted charitable purposes and future trends for government-charity relations which appear to be driving charitable purposes into a public service delivery mode. This implicit and explicit political context is not simply a product of the modern age, but was also behind the

1601 Preamble. This provides an excellent parallel for the current crop of reforms, particularly in terms of the Executive control that comes with the new statutory lists of charitable purposes.

One of the main strengths of this book comes from its central theme, which focuses upon the importance of the *role* of law not just the rule of law in regulating charities. Weaving throughout this collection are some broader questions about the purpose of charity law and the complexities of what law should be seeking to do in this field. In amongst the discussion of how reform or the process of reform has taken place is a broader more implicit question about taking the past into the future and whether, given charity law's starting point, the reform that is desired can in fact be attained. This leads to at least one view that the common law concept of charity might be modernised more radically by a move away from its technical definition. Evident within this broader debate are competing concerns about what different societies might want charities to be and how they should be encouraged or monitored through regulation. Should charities be independent entities, or more closely integrated in to the state? How can regulation be developed in a way that accommodates more modern legal concepts such as human rights, governance and transparency, regulator obligations and responsibilities, appropriate legal forms and vehicles and the broader move from private to public law? What aspects of charity characteristics are essential to determining status and what is the value charities provide which justifies legal privileges? What is special about altruism that the law should protect? What would be the consequences if charity becomes more synonymous with for-profit activity? This edited collection does not raise nor does it seek to answer all of these questions systematically (though the final section of the book takes a more explicitly theoretical approach), but it raises awareness of the broader agenda that underlies charity regulation and which has come to the fore in the spotlight of reform. Whilst readers may disagree with the exact shape of reform proposed or implied in this collection of essays, they hopefully cannot fail to agree that a defined space in jurisprudence for charity law is both necessary and long overdue.

A second strength of this collection of essays is one that is left to the reader to draw out in placing the jurisdictions side by side. Comparisons across the essays reveal insights into the differences in jurisdictions and how charity law in the common law world has diverged and developed from the same central starting point. In developing charitable purposes into a statutory framework, for example, we see express inclusion or exclusion of human rights and the express inclusion or exclusion of the role of analogy as an updating mechanism (England and Wales compared with Ireland). We also see the difficulties that can occur where jurisdictions are federal and provincial or where regulation has split the definition of charity for status purposes as against taxation purposes (Canada and Ireland). There is a good comparison too between fears in a majority of the common law jurisdictions over the impact of the state and its organs threatening the independence for charities, and in China and Japan where it is the state that fears the impact of an independent civil society on its status and legitimacy.

In this jurisdictional comparison there is an obvious imbalance in the book overall in terms of the fact that that not all of the jurisdictions are covered in the same context or the same depth. Some of the essays are more substantively analytical than others. Similarly, some of the themes are implicit rather than explicit and the questions raised as to the role of charity law, its regulatory framework and the reform agenda are sometimes only partially answered. Nonetheless what the book lacks in that regard it more than makes up for in the range of perspectives in the individual essays. This edited collection is a timely, thought provoking

and important contribution to the burgeoning international literature on charity. It is made all the more significant by its focus upon charity law and regulation and the overarching legal framework. Both are essential to the proper functioning of the sector but have often been overlooked in the context of the broader political, economic, sociological and managerial focus evident in much of the literature in this field. In sum, this book is about law, but it is not just for lawyers. It deserves to be read widely.