THE UNIVERSITY OF QUEENSLAND
AUSTRALIA

CREATE CHANGE

The Journey of Charity Law: the impact of past problems today and into the future

Friday 29 September | Terrace Room, Level 6, Sir Llew Edwards Building (#14), UQ St Lucia Campus

Event Program

8:00-8:45am **Symposium Registration**
Tea and coffee served in The Terrace Room

9:00-9:05am **Welcome to Country,** Professor Rick Bigwood, Academic Dean, TC Beirne School of Law, The University of Queensland

9:05-9:35am **Keynote,** Justice Susan (Sue) Brown, Supreme Court of Queensland

Charity Governance and Regulation

9:40-10am **Restoring Public Trust in Charities – Reforming Governance and Enforcement**
Professor Rosemary Langford (Melbourne University) - Online

In this presentation Rosemary Langford will present a summary of key findings and recommendations from her detailed comparative and empirical research into governance and enforcement in the charitable sector in Australia. This research was undertaken as part of a three-year project, funded by the Australian Research Council, entitled 'Restoring Public Trust in Charities - Reforming Governance and Enforcement'. This has included aspects such as comprehensive investigation of the reasons for complexity and incoherence in the duties of those who govern charities (known as 'responsible persons'); comparative analysis involving jurisdictions such as Germany, England and Wales, Scotland, Northern Ireland; extensive empirical research in Australia and in England and Wales in relation to how charities deal with conflicts in a practical sense and how those who govern charities understand their obligations; critical evaluation of the enforcement powers, enforcement approach and enforcement activity of the Australian Charities and Not-for-Profits Commission (ACNC); and development of options for legislative and policy reforms to improve the effectiveness of regulation and enforcement by the ACNC.

10:00-10:20am **Mrs Jelleby, Victorian Values, and The Legal Framework of the Law of Charity in Nineteenth Century England**
Professor Warren Swain (University of Auckland)

Charles Dicken's amusingly satirised Victorian attitudes towards charity in the form of Mrs Jelleby who devotes her time to Africa whilst her own home falls into ruin. Older treatments of the subject had emphasised a move from individualism to collectivism as represented by the welfare state. In contrast more recent accounts of the history of charity have stressed the very pluralistic nature of philanthropy. Charity during this period involved a combination of public and private welfare. As before and since, charity was grounded in community practice and community values. Sometimes values were in conflict. Some evangelical Christians were advocates of individual assistance and the idea of self-help. But even within that group there were those who favoured greater state paternalism. It was just as possible in this period to view charity through a utilitarian lens as a means of increasing overall welfare. In short, the situation was complex and there is no single narrative.

Given the complex and pluralistic social setting of charity in the nineteenth century it is more than a little odd that the basic legal definition of charity should still be based on a statute of 1601. More broadly, Owen Davies Tudor the leading commentator on the law

relating to charities of the time, observed the law presents 'many anomalies'. Despite the huge historiography on charity and philanthropy in the nineteenth century, the subject barely receives a mention in the relevant Oxford History of the Laws of England. The leading legal historical treatment of the subject by Gareth Jones ends in 1827. This paper will examine how the law of the period tried to solve these anomalies and at the same time was shaped by broader social and legal developments of the era.

10:30-10:50am **Morning Tea**

International Insights

10:50-11:10am **The Continued Place of Religious Charities within the Charity Sector: The Relationship Between the Secular and the Religious Through An Economics Lens**
Dr Juliet Chevalier-Watts (The University of Waikato) - Online

Charity is an ancient concept, but it remains a vital construct filling social welfare gaps, and supporting the vulnerable and those in need. Within the construct of charity sits religion, and charity and religion have been closely linked throughout the centuries since charity was first recognised as a human endeavour. New Zealand, along with their common law counterparts, has long since confirmed the legal legitimacy of religious charities but the voices that criticise the continued place of religious charities within the third sector grow ever louder, both here in New Zealand and overseas, thus the social legitimacy of religious charities may be wavering. In light of the pressures facing religious charities to maintain their stronghold within the charity sector, this paper considers some of those pressures and how religious charities may continue to be justified not just through the legal lens, but also through a secular economics lens. In doing so, I demonstrate the continued value of religious charities not only to religious communities but also to society generally through religious charities' capacity to contribute widely to social and economic life, and thus confirm their legal legitimacy of religious charities as well as their social legitimacy.

11:10-11:30am **Discrimination as Detriment**
Dr Jane Calderwood Norton (University of Auckland) - Online

One way that public benefit is determined, predominately under the fourth head of charity, is by weighing the potential benefits of the putative charitable purpose against any potential detriments or harm. Charity decision-makers, however, often avoid explicitly engaging with what is considered to be a detriment in charity law. They do this either by either referring to harmful or detrimental purposes simply as purposes against public policy – thus side-stepping the public benefit balancing exercise entirely – or by finding an absence of benefit. Failure of the applicant to show how their purpose is beneficial then becomes the focus of the decision rather than the harm that might be caused by that purpose. This approach can enable the decision-maker to avoid passing value judgment on controversial purposes. This paper will unpack the concept of detriment in charity law. It will do so by looking at discrimination as a detriment. It will take the New Zealand Supreme Court recent decision in Family First as its starting point. Here the court said that the detriments of the organisation's purposes – which it says are discriminatory but not illegal – do not outweigh any benefits. However, it goes no further to explain why lawful discrimination is nonetheless seen as a detriment in charity law.

The political, sociocultural and material disadvantages associated with discrimination are well-known. While addressing these may be seen as the role of discrimination law, identifying the disadvantage caused by discrimination could also be seen as part of identifying the detriment associated with discriminatory purposes. It does not automatically follow, however, that no public benefit can be found whenever there is discrimination. Affirmative action measures, for example, can be considered to generate public benefit despite being formally discriminatory. Many religious charities also entail discrimination. Indeed, charity law is replete with examples of discriminatory charities. Moreover, cases where the sole purpose of the putative charity is to discriminate, without any benefit

generated, will be rare. The challenge then is how to identify discrimination that is considered harmful and then how to distinguish discriminatory purposes that will nonetheless generate net benefit from those where the detriment outweighs any benefit. Is there some discrimination that charity law ought to consider a detriment and some that it should not? And how should the court go about identifying these in a way that is coherent and avoids accusations of ideological bias? These questions will be raised by this paper and an attempt will be made to answer them.

11:30-11:50am **A Normative and Dimensional Analysis of the Chinese Legislative Framework for Charitable Organisations**
Dr Shaoming Zhu (University of College Cork (Ireland)

Charity Law of the People's Republic of China promulgated and implemented in 2016 provided a basic legal foundation for the activities of charitable organizations and established the beginnings of a legal system to regulate the development of charitable organizations together with the relevant supporting policies that followed. However, the growth rate of charitable organizations has been greatly limited over the past few years. Apparently, this is related to the limitations and deficiencies in the overall legislative system governing charitable organizations. Although the existing literature has incorporated various perspectives to address a scientific approach to the legislation, most of the writings are inseparable from the analysis approach of the traditional legal relationship theory of "subject-action-responsibility". As the due state of the legal system, the analysis of the legislations governing charitable organizations need to be more guiding and systematic. To this end, this article adopts the normative analysis methodology and proposes to consider using a set of four dimensions of "value-structure-rule-technique" to analyze and improve the legislative system on charitable organizations. In doing so, this article intends to provide a theoretical reference for the legislative activities on charitable organizations, and bring empowerment and growth for charitable organizations through the power of legislation, especially from the perspective of its relevant supporting legal policies.

12:00-1:00pm **Lunch**

The Complex Charity

1:00-1:20pm **Disability Injustices, Charities and Repair: Towards Reparative Charity Law,**
Associate Professor Linda Steele (University of Technology Sydney) - Online

People with disability have experienced decades of segregation, institutionalisation and violence (referred to collectively as disability injustices), including non-consensual sterilisation and abortion, use of restrictive practices, detention in locked accommodation, medical neglect, exclusion from mainstream schooling, subminimum wages in sheltered workshops, and state removal of their children. Long after they occur, these disability injustices continue to impact people with disability and their families and communities. The Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability has highlighted the contemporary role of charities in these disability injustices. Charities also played a key role in disability injustices perpetrated during twentieth century institutionalisation of people with disability. Decades of deinstitutionalisation and the more recent shift to 'choice and control' brought about by the National Disability Insurance Scheme has resulted in the empowerment rebranding of charities, and the erasure of their earlier histories. This presentation offers a preliminary exploration of the role of charity law in processes of accountability, individual redress and collective social repair of historical and contemporary disability injustices. This discussion focuses on five issues. The first is revocation of charitable status on the basis of complicity in disability injustices. The second is compelling charities to engage in individual redress and social repair for disability injustices through reform of ACNC Governance Standards. The third is restitution associated with financial gain to charities through historical and contemporary disability injustices. The fourth is connecting historical disability injustices to contemporary charities, where charities have changed their branding, names, constitutions or legal character over

time. The fifth is reforming the paternalistic construction of disability in charity legislation. Ultimately, this preliminary exploration proposes the need for deeper reflection – both practically and theoretically – on the possibility of a reparative charity law.

1:20-1:40pm **The Mythical and Fictional Value of Charites**
Dr Kim D Weinert (University of Queensland)

This presentation will critically examine and discuss how seminal legal scholarship best describes charity law as a myth. Using the term 'myth' to scaffold frustration and disappointment in numerous judicial determinations concerning the main doctrines of charity law. These frustrations reveal the unique ability of charity law to draw and redraw its principles on a case-by-case basis to determine what is charitable.

In arguing that despite steadfast efforts to locate an indeterminate methodology to set the contours of charity law doctrines, the task remains elusive, mainly owing to a Halo projected onto charities. The Halo effect projected on charities tends to frame a benevolent expectation of the law for an entity to achieve an altruistic purpose for those in need. It is this ideal, which this presentation will argue, which is the myth. In arguing that treating charitable purposes as a myth, it will elevate frustrations concerning the numerous inconsistencies in charity law, as well as go some way to explain notable Australian and English judicial determinations. This part of the chapter in acknowledging that the term 'myth' is seductive, and it is also divisive in legal scholarship. In addressing the more controversial aspect of mythology in law, it is a term that, nonetheless, is employed to illustrate a falsehood. In addressing the limitations of legal myths, the author, in a charity law context, proposes that we need to shift away from thinking about charities in a purely traditional way and consider charities as legal fiction. It is from here that this presentation will employ modern legal fiction philosophy to critically discuss and analyse the benefits of holding charities out to be legal fiction.

1:40-2:00pm **A Cornerstone of "A Complicated … Society …" or a Barrier to the "Organization of a Civilised Social Life"? Some Timely (or Long Overdue) Critical Reflections on the Place of Charity in 21st Century Society**
Dr Sarah Wilson (University of York)

This symposium provides an important space for reflecting on the role of charity in society, and the support given to this coexistence by law (e.g. English charity law). The title's 'borrowings' from E.L. Woodward's classic *Oxford History of England- The Age of Reform* help to frame the paper's interest in charity in society in Britain in the 21st century, and centrally to argue that far too little critical gaze is given to the place occupied by it. The institution of 'charity' is instead strongly couched in narratives of presumed societal importance and benefit, with this proposition bolstered by an extensive- and very longstanding- legal framework providing considerable support for 'worthy causes' recognised as being charitable. So strong is support for charity that reactions to cycles of ebbing public confidence in charity, and even very prominent scandals bringing charity into disrepute, largely manifest in calls for reform of law and wider regulatory frameworks rather than generating fundamental questions about the place of charity in society today.

The paper draws on key reference points which can be identified with a presumed desirability, and even perceived necessity, of charity in today's society, and the concomitant importance attached to law looking to support charity as much as possible. These relate to the reform movement leading to the *Charities Act 2006*, and include most recently the significance attached to changes pursuant to the Charities Act 2022 being designed to 'save time and money for charities by reducing unnecessary bureaucracy' (DAC Beechcroft). The critique offered focuses primarily on contributions made by charity to 'civilised social life' in 21st century Britain which illuminate the extensive partnering which can be found between the State and charitable organisations (as part of the third sector).

From this, and using examples drawn from health and social care spheres, the paper argues it is timely to reflect on whether the very considerable reliance which is placed on charity for delivering 'civility' can cause more harm than good. For this it suggests we should ask whether provision through charity can distort the distribution of societal resources as well as achieve this, and whether charity can also help to mask the true costs of 'civility' whilst undoubtedly helping to deliver civility in a complex and advanced society, and one where citizens' expectations are considerable. With the symposium's ambitions for engaging law reform to strengthen the role of charity, this paper considers these questions to be part of the (current) 'blunt edges' of charity law requiring scrutiny.

2:10-2:30pm **Afternoon Tea**

Domestic Insights

2:30-2:50pm **Public Benefit and Public Demands**
Sam Burnett (Partner, Prolegis) and Annabel Burnett (University of Cambridge) - Online

Recent public demands of charities are variations of themes deeply embedded in the history of charity law.1 The most recent round of public demand is that in order to maintain favourable tax treatment (or to be offered more generous tax treatment), charities should be required to evidence public benefit and that they deliver relief in an optimal way.

First, the common law position on public benefit has relied on a presumption of public benefit rather than becoming involved in an assessment of the efficacy of specific gifts or relief. Likewise, the jurisprudence on public benevolent institutions has progressed beyond a test of 'directness' of relief: *Commissioner of Taxation v Hunger Project Australia* (2014) 221 FCR 302. Even if a requirement to evidence public benefit was desirable, the position adopted by the judiciary on these issues is instructive of the difficulties that regulators would face in requiring charities to actively demonstrate public benefit and the efficacy of relief.

Secondly, the current regulatory framework in Australia is not well suited to monitoring and enforcing this type of requirement on registered charities. By way of illustration, we consider the expansion of the governance standards to achieve public policy goals. Although the specific public policy goal was admirable, the expansion of the governance standards sets a worrying precedent for expanding obligations on registered charities based on public demands. This type of expansion, if it has not gone beyond, may at least test the limit of the Commonwealth's taxation power (see Nicholas Aroney and Matthew Turnour, 'Charities Are the New Constitutional Law Frontier' (2017) 41(2) *Melbourne University Law Review* 446.

Thirdly, creating an environment where charities are encouraged to optimise will require reform based on creating incentives. Any reform based on optimal performance would ideally occur via contractual mechanisms such as competing for grants for specific projects or government funding agreements (See als Natalie Silver,'The Contractualisation of Philanthropy' (2023) 38 *Journal of Contract Law* 24. These mechanisms would be more coherent with the economic rationale for the requirement. Lastly, the idea of measuring public benefit alone warrants further interrogation – it is subjective, and the ends achieved by charities are not necessarily easy to measure.

Situation associated with financial gain to charities through historical and contemporary disability injustices. The fourth is connecting historical disability injustices to contemporary charities, where charities have changed their branding, names, constitutions or legal character over time. The fifth is reforming the paternalistic construction of disability in charity legislation. Ultimately, this preliminary exploration proposes the need for deeper reflection – both practically and theoretically – on the possibility of a reparative charity law.

2:50-3:10pm **Use of Cy-près and Administrative Schemes by Australian Universities to End Dead Hand Control of Charitable Assets**
Dr Natalie Silver (University of Sydney) and Professor Ian Murray (University of Western Australia) - Online

This presentation examines Australian universities as recipients of large charitable gifts. Many of these gifts take the legal form of perpetual charitable trusts, creating significant endowment portfolios for universities. However, charitable trusts often contain conditions or restrictions that the donor has placed on the use of the funds, presenting challenges for universities in utilising these assets, particularly when the trust conditions have become impracticable or impossible to perform because they no longer reflect contemporary society or institutional practices. As a result, Australian universities are increasingly seeking to amend or remove trust conditions using cy-près and administrative schemes.

By undertaking a survey of Australian cy-près and administrative scheme cases involving universities and examines judicial approaches towards scheme applications, including the extent to which the promotion of both testamentary intent and the public interest in the effective use of charitable assets is considered. The chapter also examines the process involved in making cy-près and administrative scheme applications. It considers whether, in Australia's current regulatory environment that seeks to balance public trust and confidence in the charitable sector with supporting an effective charitable sector, the ancient scheme jurisdiction provides a viable means of enabling universities to access funds controlled by donors from the grave.

3:10-3:30pm **Private Actors and Public Problems: examining the guardianship role of sports governing bodies**
Dr Annette Greenhow (Bond University) - Online

In Australia, sport is a regulatory domain reflecting a hybrid collection of interests organised and controlled through a network of actors primarily operating as not-for-profit corporations. This presentation examines the role of sports governing bodies (SGBs) and their guardianship in producing and delivering sport.

Though independent of the state, SGBs act as custodians of the sport in performing their executive, legislative and judicial functions within the Australian sports ecosystem. Framing sport as a public good — a commodity or service provided without profit to all members of society who should have equal rights of access and opportunities —SGBs operate as the conduit through which sport is accessible to consumers.

As guardians, SGBs exercise a monopoly over this important field of human activity and carry corresponding responsibilities. This presentation examines these responsibilities when faced with disruptive issues.

This presentation applies institutional theory to map the regulatory space. This theory identifies the actors, resources and relationships, providing a framework to understand how SGBs have dominated this domain. Using the contemporary issue of concussion in sports and the findings from the 2023 Australian Senate Committee Report that concussion warrants public health attention, this presentation examines challenges when private actors self-regulate public health concerns.

3:40-4:00pm **Closing Remarks**

4:15pm **Networking and Drinks**
The Terrace Room's Outdoor Space