



A national not-for-profit regulator
ACOSS response to Treasury Scoping Study
Consultation Paper, January 2011

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This submission was prepared by the Australian Council of Social Service on behalf of the network of Councils of Social Service:

- Australian Council of Social Service (ACOSS)
- Australian Capital Territory Council of Social Service (ACTCOSS)
- Council of Social Service of New South Wales (NCOSS)
- Northern Territory Council of Social Service (NTCOSS)
- Queensland Council of Social Service (QCOSS)
- South Australian Council of Social Service (SACOSS)
- Tasmanian Council of Social Service (TasCOSS)
- Victorian Council of Social Service (VCOSS)
- Western Australian Council of Social Service (WACOSS)

The Councils of Social Service (COSS) are the peak bodies representing the needs and interests of service providers and their clients in the non-profit social service sector in Australia. Our members comprise community service providers, professional associations and advocacy organisations.

This submission is endorsed by the following organisations:

- Australian Community Support Organisation
- Australian Institute of Welfare and Community Workers (ACOSS national member)
- Australian Red Cross (ACOSS national member)
- Australian Youth Affairs Coalition (ACOSS national member)
- Homelessness Australia (ACOSS national member)
- YWCA Australia (ACOSS national member)

About this submission

This submission is prepared in response to a Consultation Paper entitled 'Scoping study for a national not-for-profit regulator', released by the Commonwealth Department of Treasury in January 2011. The Consultation Paper seeks initial views in relation to the design of a national regulator for not-for-profit organisations in Australia. The Consultation Paper requires responses by 25 February 2011.

This submission involves policy analysis developed through consultation with our members and policy advisors in the states, territories and federally; from our experience working with people with disability, carers, the community sector and governments; and from our ongoing policy and advocacy work towards achieving social security for all Australians.

This submission relates specifically to the experience and needs of community organisations and social services operating as not-for-profit organisations.

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Scoping a national regulator for the not-for-profit sector in Australia

Executive Summary

This submission argues strongly for a national, independent regulator of not-for-profit organisations. The success and independence of the regulator depend upon a statutory authority outside of the existing agencies in which some aspects of regulation are currently placed.

i. The form and location of the regulator

There is widespread support for a national, independent regulator. Run as a one-stop-shop, this should enable a single process of reporting with multiple uses, including across government departments and jurisdictions, as well as with non-government funders.

There is no support within our membership for locating a not-for-profit regulator within the ATO. There is some support within our membership for locating it within ASIC, but the majority of our members support an independent, stand-alone structure.

ii. The principles and objectives that should underpin a not-for-profit regulator

The central principles of the regulator should be national, independent, fit-for-purpose and applying to the entire sector. It should have a tiered structure applying varying levels of reporting according to the size, numbers of employees and financial turnover of not-for-profit organisations.

iii. The functions the regulator should perform

Priority functions include ensuring that the definition of charity reflects contemporary practice; establishing consistent, national processes for legal status (ie corporations and associations regulation) and for fundraising legislation; and administering the application of charitable status. Additional functions should include the establishment of national standards such as governance and accounting.

iv. Transitioning to national regulation

There is considerable variance across the community sector on the steps necessary to get us to the point of national regulation. There is support for a range of models, from harmonisation to mutual recognition to wholesale national legislation. Above all, there is a strong commitment to learning from the lessons of current good practice and incorporating into the new structure the elements of existing models that work well.

v. Financing the regulator

Considerable savings for existing bodies at the state, territory and federal levels should be re-directed to cover the cost of the regulator.

Conclusion

The processes of development, establishment and implementation will be absolutely critical to the success of a national regulator for not-for-profit organisations. In order to build on the extensive work on these reforms to date, we now need the Government to set out its staged process for securing the passage of legislation to create the independent regulator.

The next step in this process must be the development of a clear model on which community organisations can be consulted and provide comment, as part of a legislative process.

Introduction

This consultation follows a long line of inquiries, submission processes and consultations regarding improving the regulation of not-for-profit organisations in Australia. Most recently, the [Productivity Commission's Inquiry into the contribution of the not-for-profit sector](#) (2010) built upon many earlier opportunities to hear from the sector about the challenges that not-for-profit organisations face in relation to regulation; and avenues for reform.

We re-affirm as the COSS network's priorities for reform a national regulator, which in turn would lead to a process for modernising the definition of charity; and improvements to the administration of taxation rules and contracting arrangements for community organisations. These priorities are set out in greater detail in our [response to the Productivity Commission's 2010 report](#). While the Consultation Paper goes beyond these specific areas, our submission focuses on the national regulator as our foremost priority for reform.

We support the establishment of a national, independent regulator for the not-for-profit sector. The establishment of a national regulator has been a major platform of community sector advocacy for more than a decade and it remains an absolute priority for ensuring effective regulation of the sector. Operating as a 'one-stop shop' for regulation, we re-affirm the following as core functions of the regulator: reviewing or reforming the definition of charity to ensure it reflects contemporary practice; endorsement and registration of organisations for tax concessions; receiving and reviewing corporate and financial information; and registration for national and/or inter-jurisdictional fundraising activities.

The not-for-profit sector

- There are around 600 000 not-for-profit organisations (NFPs) in Australia.
 - The bulk of these are small, non-employing organisations that rely on the voluntary contributions of members (and others).
 - In 2006-07 there were approximately 59 000 'economically significant' NFPs which have an active tax role (this includes all employing NFPs).
- The sector makes a significant contribution to the Australian economy. In 2006-07, it accounted for 4.1 per cent of GDP (which does not include the contribution of volunteers), employed close to 890 000 people and utilised the services of some 4.6 million volunteers. Three-quarters of volunteers across all NFPs contribute to culture and recreation activities or to social services.
- The sector experienced strong growth from 1999-2000 to 2006-07 (PC 2010:53).

Not-for-profit organisations are heterogeneous, ranging from small unincorporated groups with no paid staff and minimal income, to large organisations with multi-million dollar budgets and hundreds of employees. To suggest that there is a single, not-for-profit sector belies this fact. While this submission focuses specifically on the experience and needs of community organisations and social services operating as not-for-profits, even the nature of the work undertaken by community organisations varies significantly. Some organisations provide direct assistance; some work to achieve systemic change. Organisations can work nationally but employ relatively few staff; or be based in a local area and employ many. Some organisations receive government grants; many do not. Some organisations are eligible for concessions related to holding Public Benevolent Institution or Deductible Gift Recipient status, others are not.

Not-for-profit organisations in Australia operate in highly complex regulatory environments. Yet regulatory changes have not kept pace with how sector organisations operate, nor with the increased diversity of the sector.

As ACOSS argued before the 2008 Senate Economics Committee Inquiry ('Disclosure Regimes for Charities and NFP Organisations'), the lack of simple, consistent and equitable regulation has a direct and negative impact on the sector, resulting in higher compliance costs for no greater protection for stakeholders, including volunteers, donors and the broader community. By consequence, resources that would best be used serving the community, including providing assistance provided to low income and disadvantaged people, are instead diverted to overly onerous administration and compliance costs.

Existing, poorly coordinated regulation constrains the development of the sector, particularly smaller organisations, and fails to acknowledge the high standards of professionalism in the sector. The lack of clear and simple regulation also increases the risk that members of non-profit organisations may inadvertently break the law. Therefore a substantial reform is needed to address both the complexity and the unmet need in terms of regulation for not-for-profit organisations.

We address the following key points in this submission:

- The form and location of the regulator.
- The principles and objectives that should underpin a not-for-profit regulator.
- The functions the regulator should perform.
- Transitioning to a national regulator.
- Financing the regulator.

i. The form and location of the regulator

The form of regulation, not just its mere existence, is absolutely central to the effectiveness of a national not-for-profit regulator. Not-for-profit community organisations support the objectives of accountability and transparency that can be achieved through effective regulation. But models that go against the purpose and objectives of not-for-profit organisations or the long-term nature of community services, such as existing models of business regulation, serve in no-one's interests. Regulatory processes must work with the sector, not against it or in a way that is overly burdensome.

We support and reaffirm the recommendations of the 2001 Definitions of Charity Inquiry that a national regulator must be located independently from the Australian Taxation Office. We note the ATO's own words to that Inquiry to the same effect:

It is also our view that administration would be better served by a single, independent common point of decision making on definitions leading to conclusions about whether organisations are charitable or non-profit, such as occurs with the Charities Commission in the UK for example (Submission of the ATO to the *Inquiry into the Definition of Charities and Related Organisations*, 19 January 2001).

We acknowledge the clear indications in the Consultation Paper that the core principles and ideal objectives of a national regulator will be balanced against pragmatic considerations such as affordability of a new structure and harmony with existing structures. The effectiveness of a national regulator depends upon it being purpose built to improve not-for-

profit regulation, including reducing overly onerous requirements. It also depends upon independence from government and existing regulatory processes that often hinder rather than help not-for-profit organisations. To forego these principles would be to undermine the potential of the regulator before it is even established.

We recognise that the Government has expressed interest in the possibility of locating a not-for-profit regulator within the Australian Taxation Office for pragmatic reasons (achievability) or financial reasons (cost of a new institution). We understand the Treasury's interest in gauging the level of support for this option either as an interim step or the ultimate structure. We state categorically that there is **no support for this option** within our membership. On the contrary, there is and would continue to be vehement opposition to any such model.

Given the extensive social and economic significance of the not-for-profit sector, and the degree of change that is required to reduce the existing regulatory burden and support the sector's activities, we should be looking to the speediest way for the most effective change. However we should not let short-term achievability divert us from the reforms that are truly needed or the form they must take to have the best chance at success.

We note also that the suitability of the ATO as an institutional setting for the regulator is an issue that was dealt with in detail and at length by the Productivity Commission (2010). The PC concluded that this would not be a suitable location for the regulator, and cited a sample of the many submissions that went to this point, all unanimous in their opposition to the establishment of a national regulator within the ATO. There has been no change to this position in relation to the ATO amongst our membership since the PC report was released.

The vociferous opposition of community sector organisations to this proposal should be acknowledged; opposition that has been voiced loudly, clearly and succinctly since at least the *Definition of Charities Inquiry* in 2001.

The competing interests between administering taxation and regulation of the not-for-profit sector should also be acknowledged. These competing interests include the collection of tax revenue; the administration of charitable status; and nationally establishing and enforcing standards of regulation across not-for-profit organisations.

ii. The principles and objectives that should underpin a not-for-profit regulator

- *National in scope and application.*

A key driver of this national application would be the use of a report-once-use-often model, meaning that information lodged with the national regulator could be used in all jurisdictions and for all interactions between governments and the sector. This would reduce the overly burdensome processes that currently exist and their duplication across the country.

- *Independent from ministerial intervention and from central bureaucratic and administrative functions.*

The size and scope of the not-for-profit sector and the scale of its economic contribution warrants the establishment of a stand-alone, statutory authority.

The significant differences between a range of functions currently undertaken by the ATO and the functions of a national not-for-profit regulator undermine the justification of using these existing structures as an interim or permanent location for the regulator. For example,

there are contradictory objectives between the collection of tax revenue, the administration of the tax concession, determining the status of an organisation as charitable or not, and setting standards such as fundraising legislation or accounting processes. These contradictions are central to the argument for a stand-alone body. For many of our members these concerns extend to ASIC also, although this model has some support.

- *Fit for purpose*, established in consultation with and responding to the needs of not-for-profit organisations; and of the communities that support, sustain and rely upon them.
- *Encompassing the entire not-for-profit sector*, incorporating different levels of reporting and regulatory burden according to organisational size.

Factors to determine tiers of reporting include the number of paid and unpaid staff, income and expenditure of an organisation. This would allow for organisations to remain in the same system as they evolve.

In terms of legal form, the scope of the regulator should be restricted to incorporated not-for-profit organisations, irrespective of their legal form (therefore encompassing associations, companies and cooperatives) and subject to the same regulations. The regulatory administration and oversight of charitable trusts should be moved to the national regulator, as should be regulations regarding associations.

- *Supporting the transparency and accountability* of not-for-profit organisations, through a central repository for financial and operational information and an educative function for public information.
- *Simplifying standards and processes* currently duplicated or contradicted across the country, particularly between jurisdictions. For example, national governance and accounting standards.
- *Supporting the reduction of 'red tape'*, or overly onerous processes associated with many of the operations of not-for-profit organisations, through advice on legislation and policy reform to improve the effectiveness of regulation. Examples here again include national governance and accounting standards.

iii. The functions the regulator should perform.

- *Modernising the definition of charity.*

As the National Roundtable of Nonprofit Organisations has identified,

there are more than twenty different ways to incorporate a nonprofit organisation in Australia; the rules covering fundraising differ across each State and Territory; and the definition of 'charity' urgently needs to be reformed. Perhaps the most complex area, however, relates to the taxation rules for non-profit organisations (cited in ACOSS 2010, p 28).

Reform is necessary to streamline regulation and implement the definitions recommended by the 2001 *Inquiry into the Definitions of Charity*, including simple clear points on advocacy before undertaking any review of taxation. The overarching framework needs to be set before taxation matters are considered. Given the complexity and importance of taxation treatment for this sector, any future taxation review would need to include considerable expertise from specialist lawyers and not-for-profit sector experts. It should also build on the positions put by the review of 'Australia's Future Tax System' (Henry Review) in the interests of a fair, sustainable tax system.

- *Bringing current areas of regulation into the one, national model. Important starting points will be as follows.*
 - Overhauling regulation related to incorporation and association laws and the reporting that relevant forms of legal status entail, including through the removal of duplication relating to jurisdictional differences.
 - Contributing to the development of national fundraising legislation.
 - Reviewing the taxation and concessionary treatment of not-for-profit organisations, following a review of the legislative and policy framework within which charitable status is obtained.
- *Education, both of and about not-for-profit organisations.*

The educative function should have two key areas of focus. The first is internal to the sector, providing information and advice about a range of regulatory processes. This is an essential area of capacity building for the sector. Examples here include conditions to attain charitable status and requirements for fundraising.

The second function is focused on the public. Streamlining reporting and reducing duplication do not enhance accountability to the public automatically. The regulator's educative function will be crucial in this respect, translating the information collected by the regulator into public education material that will seek to improve the knowledge about and confidence in the sector's operations. At the same time, caution is required to ensure that the breadth of information already generated by the sector is leveraged and not duplicated. Drawing on existing work for dissemination, including at the state and territory level, will be an important starting point in determining the full extent of the regulator's educative role.

- *Contributing advice on the agenda to reduce the 'red tape' associated with government funding contracts and reporting requirements.*

While this might see the regulator take on a potential role as a conduit for information on reporting requirements between governments and the sector, it should not be at the expense of specific departmental relationships.

- *Setting governance, accounting and other standards across the not-for-profit sector.*

iv. Transitioning to national regulation

There is a degree of ambivalence across the community sector about the steps that will be necessary to take towards a national regulator. While there is widespread support for a national regulator throughout our membership, there is some anxiety about what this will look like in practice. Key questions on which community organisations seek clarity from government include:

- How will a national regulator replace existing regulatory requirements, rather than increase or duplicate them?
- How will the differences within the sector and across jurisdictions be taken account of, for example between those largely reliant on government funding compared with those who are not; and those operating within one jurisdiction compared with multiple.
- How will simplifying the burden on large organisations be balanced with the needs of small and medium organisations, including those working in a single jurisdiction or local area? For example, while many larger organisations constituted as a company limited by

guarantee might be able to move easily to a national system, state-based Incorporations Acts tend to work better for the small organisations that constitute the vast majority of not-for-profits in Australia.

Three options to address the transitional process have been discussed within our membership.

Harmonisation has been discussed as a way of establishing standards that apply to different parts of the sector and across jurisdictional boundaries. For some, harmonisation is seen as one of the important steps towards the establishment of a truly national regulator, ensuring that the process is gradual, incremental, and brings the various parts of the sector with it through the process of change. It has also been argued as necessary in order to realize the benefits of a 'report once, use often' model, ensuring common benchmarks and terminology for various tiers of reporting, both to the regulator and to governments.

Mutual recognition is another way of reducing the compliance burden imposed by grants from more than one funding body, and likewise the processes of submitting for funding to more than one body (a common occurrence for community organisations). Mutual recognition of the generic requirements of the various government funding agencies has been proposed as a way to simplify burdens such as financial audits and quality assurance frameworks.

For others, there is strong opposition to either harmonisation or mutual recognition, based on concern that they will simply create another hurdle that will not deliver simplified regulations in a timely way. Much is often made of the differences between the way the business sector is supported and sustained through processes vastly preferable to those applied to the not-for-profit sector. Business licensing provides a cautionary tale here, wherein the establishment of a national Act and a process of implementation delivered significant improvement to the business sector, following some 30 years of unsuccessful efforts at harmonisation.

The Productivity Commission also does not support harmonisation of legislation or intergovernmental agreement, advising that this option would inevitably take longer, be more expensive and bureaucratic, all of which would undermine the proposed goals of the regulator.

National legislation that codifies the regulatory function from the outset is advocated strongly by those who do not see that there are gains to be made through processes such as harmonisation or mutual recognition. This would entail (or build upon) a referral of powers from the states to the Commonwealth.

Importantly, there is widespread support for institutionalising the elements of good practice that have been developed already in particular sectors and jurisdictions, ensuring that they are valued and learned from, not abandoned in the interests of a national agenda. For example, those who support national legislation suggest that it should be developed out of the most effective elements of regulation already in place, as well as comprising the relevant sections of existing legislation, such as Corporations and Incorporations law.

There remain important and outstanding questions that relate to significant risks if not addressed appropriately, and must be the subject of effective consultation. These include:

- How would a national regulator report on its responsibilities and to the public?
- What governance model would underpin a national regulator?
- To what extent and through what mechanisms would a regulator be sector-led?

v. Financing the regulator

Irrespective of where the regulator is located, it should produce significant savings from existing areas of government that do some of these regulatory or related functions already, such as those undertaken by the ATO or ASIC. These savings should be re-directed to support the operational costs of the national regulator. There are also likely to be considerable savings in transaction costs, at state, territory and federal government levels. Beyond a fee structure that should be kept reasonable (in terms of capacity to pay by sector organisations), there should be little if any need for not-for-profit organisations to contribute to the cost of the establishment of the regulator.

Next steps

The Councils of Social Service, along with many of our members, have long engaged with the question of how to improve the regulation and reduce the over-burdening of not-for-profit organisations. We acknowledge the extensive body of work contributed by community organisations across the country in this respect.

Notwithstanding the extensive work already undertaken in this area, we re-iterate our long-standing advice to governments that effective consultation with community organisations requires appropriate amounts of time and adequate opportunities for meaningful engagement. The current Consultation Paper is a case in point: less than two months is insufficient time for many organisations to engage adequately with the issues raised in the Paper, particularly given the traditional period of closure through January for many community organisations.

The potential gains from the establishment of a national regulator are major. Improving the regulation and requirements on not-for-profit organisations across the country, reducing overly burdensome procedures and duplication while ensuring simplified processes of reporting, would impact significantly on the capacity of not-for-profit organisations. A regulator that was able to convert that information into public education materials would considerably increase the confidence placed in the activities of not-for-profits by the public, governments and other funders. Confidence of funding bodies in the sector's operations would enhance the availability and application of funding to the work of not-for-profit organisations, so expanding the social and economic contributions of the sector.

All these aims are achievable if the sector remains engaged in the process and is given the opportunity to contribute to the design and implementation of a regulator. This requires discussion of detailed proposals, adequate timeframes to comment, appropriate consultation processes, and a genuine willingness to hear and adapt options according to the sector's input. Without these central principles of consultation, the significant gains to be made from the establishment of a national regulator will be lost.

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