

The Senate

Standing Committee on Economics

Disclosure regimes for charities and
not-for-profit organisations

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Senate Standing Committee on Economics

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Summary of Recommendations

Recommendation 1

The committee recommends that all Australian Governments agree on common terminology for referring to organisations within the Sector. Governments should also develop a common meaning for terms referring to the size of these organisations, including 'micro', 'small', 'medium' and 'large'. This standard terminology should be adopted by all government departments.

Recommendation 2

The committee recommends that the Government establish a unit within the Department of Prime Minister and Cabinet specifically to manage issues arising for Not-For-Profit Organisations. The unit should report to a Minister for the Third Sector.

Recommendation 3

The committee recommends that there be a single independent national regulator for Not-For-Profit Organisations.

Recommendation 4

The committee recommends that the Australian National Regulator for Not-For-Profit Organisations should have similar functions to regulators overseas, and particularly in the UK, including a Register for Not-For-Profit Organisations with a compulsory sign-up requirement. The committee recommends consultation with the Sector to formulate the duties of the National Regulator.

As a minimum, the Regulator should:

- a) Develop and maintain a Register of all Not-For-Profit Organisations in Australia. Once registered, the Commission should issue each organisation with a unique identifying number or allow organisations with an ABN to use that number as their Not-For-Profit identifier. This could be enabled using existing ASIC website resources.
- b) Develop and maintain an accessible, searchable public interface.
- c) Undertake either an annual descriptive analysis of the organisations that it regulates or provide the required information annually to the ABS for collation and analysis.
- d) Secure compliance with the relevant legislation.
- e) Develop best practice standards for the operation of Not-For-Profit Organisations.
- f) Educate / Advise Not-For-Profit Organisations on best practice standards.

g) Investigate complaints relating to the operations of the organisations.

h) Educate the public about the role of Not-For-Profit Organisations.

The voluntary codes of conduct developed by ACFID and FIA respectively should be considered by the Regulator when implementing its own code of conduct.

Recommendation 5

The committee recommends that the Commonwealth Government develop the legislation that will be required in order to establish a national regulator for Australia.

Recommendation 6

The committee recommends that, once a Register is established and populated, this information should be provided to the ABS, who should prepare and publish a comprehensive study to provide government with a clearer picture of the size and composition of the Third Sector.

Recommendation 7

The committee recommends that a single, mandatory, specialist legal structure be adopted for Not-For-Profit Organisations through a referral of state and territory powers. Given the degree of change such a legal structure would mean for some not-for-profit organisations, the legal structure must be developed in full consultation with these organisations.

Recommendation 8

The committee recommends that the Henry Review include an examination of taxation measures affecting Not-For-Profit Organisations with a view to simplifying these arrangements and reducing confusion and cost of compliance for these organisations.

Recommendation 9

The committee recommends that a National Fundraising Act be developed following a referral of powers from states and territories to the Commonwealth.

This Act should include the following minimum features:

- It should apply nationally.
- It should apply to all organisations.
- It should require accounts or records to be submitted following the fundraising period with the level of reporting commensurate with the size of the organisation or amount raised.
- It should include a provision for the granting of a license.

- It should clearly regulate contemporary fundraising activities such as internet fundraising.

Recommendation 10

The committee recommends that a tiered reporting system be established under the legislation for a specialist legal structure.

Recommendation 11

The committee recommends that the tiers be assigned to organisations based on total annual revenue.

Recommendation 12

The committee recommends that the Commonwealth Government work with the Sector to implement a standard chart of accounts for use by all departments and Not-For-Profit Organisations as a priority.

Recommendation 13

The committee recommends that a new disclosure regime contain elements of narrative and numeric reporting as well as financial, in acknowledgement that the stakeholders of the Sector want different information to that of shareholders in the Business Sector. The financial reporting should be transparent and facilitate comparison across charities.

Recommendation 14

The committee recommends that the national regulator investigate the cost vs benefit of a GuideStar-type system (a website portal that publishes information on the aims and activities of Not-For-Profit Organisations) in Australia to encompass all Not-For-Profit Organisations.

Recommendation 15

The committee recommends that a Taskforce be established for the purposes of implementing the recommendations of this report. The Taskforce should report to COAG. Its membership should include:

- a government representative from the Commonwealth;
- a COAG-elected representative to speak for states and territories;
- one or more qualified legal experts with expertise with the major pieces of legislation affecting Not-For-Profit organisations;
- a representative from an organisation which manages private charitable foundations;
- an accountant with not-for-profit expertise; and

- a number of representatives from the peak bodies of Not-For-Profit Organisations, including a representative from a peak body for social enterprises.

The Taskforce should actively seek to ensure that the measures of reform that it implements do not impose an unreasonable reporting burden on small and micro Not-For-Profit Organisations.

Chapter 1

Background

Referral of the inquiry

1.1 On 18 June 2008, the Senate referred 'Disclosure Regimes for Charities and Not-For-Profit Organisations' to the Senate Standing Committee on Economics for inquiry and report by 27 November 2008. The committee was later granted an extension until 4 December 2008.

Terms of reference

1.2 Under the terms of reference, the Committee undertook an examination into the not-for-profit sector within Australia, with particular reference to:

- (a) the relevance and appropriateness of current disclosure regimes for charities and all other not-for-profit organisations;
- (b) models of regulation and legal forms that would improve governance and management of charities and not-for-profit organisations and cater for emerging social enterprises; and
- (c) other measures that can be taken by government and the not-for-profit sector to assist the sector to improve governance, standards, accountability and transparency in its use of public and government funds.

Conduct of the inquiry

1.3 In accordance with its usual practice, the Committee advertised details of the inquiry in *The Australian*. The Committee also made direct contact with a range of organisations and individuals to invite submissions to the Inquiry. The Committee received written submissions from 183 individuals and organisations, as listed at Appendix 1.

1.4 To assist interested parties with making their submissions, the committee secretariat published a background paper on its website (Appendix 3). The paper provided a brief overview of the issues with respect to governance and disclosure regimes for the not-for-profit sector which were raised in reports or related literature. The paper noted that it was not the intention of the committee to limit the Inquiry to the issues and questions raised in the paper, and welcomed any submission that addressed the terms of reference of the Inquiry.

1.5 Public hearings of the Committee for this Inquiry were held in: Rockhampton on 18 July; Canberra on 28 and 29 October and 11 November; Melbourne on 30 October; and Sydney on 31 October 2008. Details of the hearings, including a list of

witnesses who gave evidence, are shown at Appendix 2. In addition, the committee held a roundtable discussion on this matter on 29 October in Canberra.

1.6 The committee thanks all those who contributed to its inquiry by preparing written submissions or appearing before the committee. Their work has been of considerable value to the committee.

Background to the inquiry

1.7 This Inquiry was initiated by then-Senators Allison and Murray of the Democrats prior to their departure from the Senate on 30 June 2008. On Senator Allison's motion, the Senate noted an online article published by Choice magazine on charities, and acknowledged that most of the 27 recommendations from the inquiry into the definition of charities and related organisations have not been implemented.¹ The historical involvement of charities and other not-for-profit organisations in social services in Australia may account for the strong public feeling on this issue.

Philanthropy in Australia

1.8 Australian charities and other Not-For-Profit Organisations have a long and proud tradition of supporting the less fortunate in society. Up until the Second World War, the majority of social services in Australia were delivered by such organisations, and many of these were religious institutions. Australia's first Not-For-Profit organisation, a charity named the NSW Society for Promoting Christian Knowledge and Benevolence in these Territories and the Neighbouring Islands (which has since been renamed the Benevolent Society), was established in 1813, and worked towards the relief of poverty and distress. Within a handful of years:

...district nursing services started (1820), asylums opened for the poor, blind, aged and infirm (1821), maternity hospitals (1866) and the first Women's Hospital in Australia commenced (1901). In 1862, Sydney City Mission, "an unsectarian Christian organisation" began to address poverty, and soon similar missions were in Brisbane (1859) and Adelaide (1867). Vincent de Paul started its services in Sydney in 1881. Homes of Peace were established to provide palliative care by charities such as the Little Company of Mary and Homes of Peace Hospitals (now Hope Health Care).²

1.9 The conclusion of the war saw the increasing prominence of governments in providing social services to their citizens. However, given that Not-For-Profit Organisations were already providing these services, the Australian States and Territories chose instead to subsidise, rather than replicate, the work of these organisations. Legislation relating to Not-For-Profit Organisations was developed and

1 Senator Lyn Allison, *Senate Hansard*, 18 June 2008, p. 2729.

2 Dr Stephen Judd and Ms Anne Robinson, National Forum on Australia's Christian Heritage, *Paper 7*, August 2006, pp 1-2.

enacted piecemeal, rather than as nationwide policy; as a result, charities and Not-For-Profit Organisations lack the transparency and accountability that could have derived from a coordinated approach.

Choice Online Magazine article

1.10 Choice is the largest consumer organisation in Australia and aims 'for new ways to encourage a fair society where consumers are treated honestly, equitably and with respect'.³ This frequently occurs through product tests and research. Choice, the trading name of the Australian Consumers' Association, is itself a not-for-profit company limited by guarantee, and does not receive ongoing funding from governments or commercial organisations. Choice provides only limited financial information in its Annual Report to members.

1.11 The Choice Online Magazine article noted in the Senate was published in March 2008⁴, and carries the tagline 'How much of your donation is gobbled up by fundraising fees and expenses?' The article followed a survey of Choice members in which 97 per cent of respondents said that it was very important or somewhat important to be informed about the effectiveness of the work that a charity they patronise does; and 94 per cent of respondents claimed that it was very important or somewhat important that they are informed about the charity's costs. The problems, according to Choice, are getting the information, which is sometimes not made publicly available, and comparing the information due to 'wide variability and inconsistency in the way they [charities] communicate key information to donors'.⁵

1.12 Choice compared financial information provided by nine charities to demonstrate the perceived lack of comparability across the sector. Fundraising ratios (simplistically, the number of cents spent in order to raise a dollar) are calculated inconsistently across the sector, taking different costs into account. This results from the fact that there is no obligation on charities to report in a consistent manner or a standard to guide them to do so.

1.13 Unlike countries such as the UK and New Zealand, Australia does not have a single, national body to regulate charities as legally defined; instead, there are numerous regulations and State/Territory and Commonwealth legislation with which charities must comply. This is discussed further in Chapters 5 and 6. Choice expresses

3 Choice., *Who we are – Social Responsibility Plan*, <http://www.Choice.com.au/viewArticle.aspx?id=101257&catId=100472&tid=100008&p=10&title=Who+we+are> (accessed 1 October 2008).

4 A paper version of this report appeared in the April 2008 issue of Choice magazine.

5 Choice Magazine, *Charities*, March 2008, <http://www.Choice.com.au/viewArticle.aspx?id=106240&catId=100268&tid=100008> (accessed 23 September 2008).

its support for such a national regulator if the result is 'improved transparency and disclosure for consumers'.⁶

Inquiry into the Definition of Charities and Related Organisations

1.14 On 18 September 2000, following a commitment made to the Australian Democrats, the then-Prime Minister announced an independent, public inquiry into definitional issues relating to charitable, religious and community service not-for-profit organisations. The inquiry, dubbed the Charities Definition Inquiry, was established in order to determine whether existing definitions were appropriate and to address issues of consistency for organisations within the sector. Under the terms of reference, the members of the Committee of the Inquiry sought submissions relating to:

- the implications of current social expectations and experience for defining charities and related organisations;
- existing definitions of charities and related organisations used in Australia;
- definitions used in overseas jurisdictions; and
- options for enhancing the existing definitions in Australia.

1.15 While the Inquiry considered definitions used in legislative and administrative practice, the terms of reference did not 'require the Committee to examine or provide options for the appropriate legislative and administrative treatment of charities and related organisations'.⁷ Consequently, it was outside the scope of the Inquiry to examine issues relating to the taxation or other legislative or administrative treatment of organisations within the sector.

1.16 References to 'charity' or related terms were found in 21 Commonwealth Acts and over 100 references were found in State and Territory Acts. The Committee of Inquiry succinctly defined the biggest problem in relation to definitions:

The terms [references to charity or related terms] appear in numerous Acts none of which attempts to define the terms, relying instead either on the common law or the definition of terms used by the legislature and given effect through judicial or administrative interpretation. Some Acts seek to clarify what is meant by the terms within the boundaries set by the common

6 CHOICE Magazine, *Charities*, March 2008, <http://www.Choice.com.au/viewArticle.aspx?id=106240&catId=100268&tid=100008> (accessed 23 September 2008).

7 Inquiry into the Definition of Charities and Related Organisations, *Issues Paper*, http://www.cdi.gov.au/html/issues_paper.htm#scope (accessed 16 October 2008).

law. Others seek to include or exclude particular entities without reference to the common law.⁸

1.17 The Inquiry considered over 300 submissions from the sector during the course of its investigations. The Final Report of the Inquiry was published in accordance with its terms of reference on 28 June 2001. It made 27 recommendations in the following categories: principles to define a charity; defining charitable purpose; application of the principles; other categories in the framework; and administering the definitions. The recommendations from the inquiry are at Appendix 4 and will be referred to from time to time within this report.

1.18 Only three of the recommendations of the 2001 report have been implemented to date. While the current Inquiry into Disclosure Regimes for Charities and Not-for-profit Organisations is not primarily focused on the definitions of charities and related organisations, the issue of disclosure regimes cannot be considered in isolation to the definitions used in the sector.

1.19 To avoid duplication in reporting, the committee commends the 2001 Final Report of the Inquiry into the Definition of Charities and Related Organisations to those who wish to gain an understanding of the history of charities.

Other reviews

1.20 Finally, in undertaking this Inquiry, the committee acknowledges that other reviews are underway that have the potential to affect Not-For-Profit Organisations (see Appendix 5). While the committee respects the expertise applied to those reviews, it remains aware of the fact that none are intended to encompass all aspects of the Sector.

8 Inquiry into the Definition of Charities and Related Organisations, *Chapter 8: Charity and Related Terms in Commonwealth and State Acts*, http://www.cdi.gov.au/report/cdi_chap8.htm (accessed 14 October 2008).

Chapter 2

Australia's Third Sector

2.1 This Chapter sets out the terminology that will be used throughout the report. The definitions of terms as they relate to tax concessions afforded the Sector are discussed in Chapter 8. In addition, this Chapter provides a descriptive statistical analysis of the Third Sector in Australia and provides insight into the Sector's value. It highlights the variability within the Sector in terms of differences of size relating to revenue, staffing and resources. It also highlights Australia's existing deficiencies in quantifying the contribution of the Sector.

What is the 'Third Sector'?

2.2 For analytical purposes the scholarly literature often divides society into four sectors:¹

- Business (First Sector)
- Government (Second Sector)
- Not-For-Profit, non-government, voluntary, intermediary (Third Sector)
- Family (Fourth Sector)

2.3 The Third Sector in Australia sits alongside the government and private sectors. Third Sector organisations may receive government funding to provide public services, but they are not part of government. Similarly, Third Sector organisations may charge for business services, but are not part of the business sector because their primary aim is not to generate profits for their owners.

2.4 Broadly, Third Sector organisations comprise charities, churches and religious organisations; sporting organisations and clubs; advocacy groups; community organisations; cooperatives; trade unions; trade and professional associations; chambers of commerce; welfare organisations; and service providers, which can be divided into three clear classes of organisations – Mutuals, Social Enterprises and Not-For-Profits.

1 For reference to the four sectors of society see Helmut Anheier, 'Dimensions of the Third Sector: Comparative Perspectives on Structure and Change', Paper presented at Centre for Civil Society, London School of Economics, August 2000 p. 16. That there should be any division at all is contested. See Simone Chambers and Will Kymlicka, *Alternative Conceptions of Civil Society*, The Ethikon Series in Comparative Ethics (2002), Eva Cox notes that Margaret Thatcher said, "There's no such thing as society". Eva Cox, 'Broadening the Views – A Truly Civil Society', paper presented at the 1995 Boyer Lectures, Broadcast: Tuesday 7th November 1995 at 0830 on Radio National, 11 November 1995.

2.5 In the past, the Third Sector has commonly been referred to as the 'Not-For-Profit Sector', used interchangeably with the term 'Non-Profit Sector'. In their submission to this Inquiry, the Fundraising Institute Australia (FIA) made the following statement:

Let's decide the name of the sector!

Currently nonprofit and not-for-profit, along with a number of other terms – NGO, INDGO, NPO, NFP, for social purpose, third sector organisations, voluntary organisations (VO)- are widely used.

The Federal Government has introduced voluntary sector and more recently third sector.²

2.6 The term 'Third Sector' is used in this report to highlight firstly the fact that the Third Sector can consist of technically more than 'traditional' Not-For-Profit Organisations, and secondly to follow the lead of countries which have already undertaken Third Sector reform with demonstrated results. The term 'Third Sector' is now widely used internationally, and the UK has an Office of the Third Sector (OTS) which sits within the Cabinet Office. It also avoids naming the Sector by saying what it is not.

2.7 The Third Sector in the UK has a broader definition than what may be commonly applied to the Sector in Australia. The Third Sector includes finance mutuals and trading cooperatives, and Not-For-Profit Organisations (distinct from the misnomer 'Not-For-Profit Sector').

2.8 The OTS regulates the organisations which share the following characteristics:

- non-governmental
- value-driven
- principally reinvest any financial surpluses to further social, environmental or cultural objectives.

The term encompasses voluntary and community organisations, charities, social enterprises, cooperatives and mutuals both large and small.³

Finance mutuals and trading cooperatives

2.9 Finance mutuals and trading cooperatives are sometimes excluded from consideration with other Third Sector organisations in Australia. According to the Australian Taxation Office (ATO):

The Tax Office accepts an organisation as Non-Profit where its constituent or governing documents prevent it from distributing profits or assets for the

2 Fundraising Institute Australia, *Submission 77*, p. 13.

3 Office of the Third Sector, *About Us*, http://www.cabinetoffice.gov.uk/third_sector/about_us.aspx (accessed 3 November 2008).

benefit of particular people – both while it is operating and when it winds up. These documents should contain acceptable clauses showing the organisation's Non-Profit character.⁴

2.10 However, Professor Mark Lyons argues that there is:

[A] group or class of third sector organisations that permits the distribution of net assets to members if the organisation is wound up, or taken over. The most numerous of these are in the finance and insurance industries: credit unions, (some) building societies and mutual insurers. They are known generally as finance mutuals. Others are known as trading cooperatives. These are established by their members to process or market the product of their labour or to strengthen their power as consumers in particular markets.⁵

2.11 Finance mutuals are currently regulated by the Australian Prudential Regulation Authority (APRA). While very similar to other cooperatives, such as those providing child or health care, or housing or hospitality services (such as clubs), the descriptor 'Not-For-Profit' does not sit perfectly with such organisations because of their winding-up clause. Neither do these organisations belong as part of the Government or Business Sectors. However, the purpose of finance mutuals and trading cooperatives aligns more closely with other Not-For-Profit Organisations, and the winding up value of finance mutuals and trading cooperatives does not have a bearing on their day to day operations. This reinforces the justification of the term 'Third Sector' as the best overarching name.

2.12 The committee received little evidence throughout the course of the inquiry about the disclosure regimes of finance mutuals, trading cooperatives or trade unions specifically. Therefore, the committee is unable to provide recommendations with respect to these organisations.

2.13 Discussions henceforth will focus on Not-For-Profit Organisations which do not completely comprise the Third Sector, but form a major subset within it.

Social Enterprises

2.14 The terms of reference set for the committee's Inquiry ask that contributors consider 'models of regulation and legal forms that would improve governance and management of charities and Not-For-Profit Organisations and cater for emerging social enterprises'. According to the Associations Forum:

We assume “social enterprises” to be either private companies that have been established to assist community causes or Not-For-Profit

4 Australian Taxation Office, *Is your organisation Non-Profit? – Tax basics for Non-Profit organisations*, <http://www.ato.gov.au/nonprofit/content.asp?doc=/content/33732.htm> (accessed 16 October 2008).

5 Lyons, M. and Hocking, S., *Dimensions of Australia's Third Sector*, pp 2-3, University of Technology, Sydney, 2000.

Organisations that have been recently set up, often by a person called a “social entrepreneur”.

It seems the term social enterprise is new language to describe what has been happening in Australia for many decades: Not-For-Profit Organisations are established for a cause.⁶

2.15 Social Enterprise Hubs Australia, an organisation established and run by Social Ventures Australia (SVA), describes the role of social enterprises:

Many individuals find themselves excluded from mainstream life and employment due to disability, illness or other disadvantage. Businesses that operate for the primary purpose of employing such individuals are known as social enterprises. These enterprises play an important role in overcoming social exclusion and providing real jobs to marginalised Australians.⁷

2.16 In its submission to the committee, SVA states that, in the US and the UK:

...specific legal structures have recently been created which allow for hybrid investment models and tax incentives for social investors. We believe this needs to be considered and developed for the Australian market to encourage investment in the not for profit sector.⁸

2.17 The committee notes that the majority of submissions received did not address the issue of social enterprises. On this basis, the committee is unable to specifically comment on issues relating to social enterprises in this report. However, it acknowledges that social enterprises form a part of the Third Sector, and believes that further research must be undertaken with respect to this category of organisations. This role should be undertaken by government.

Not-For-Profit Organisations

2.18 Not-For-Profit Organisations are a subset of the Third Sector. Recommendation 1 from the Charities Definition Inquiry advocated the replacement of the term 'Non-Profit' by the term 'Not-For-Profit'. That Inquiry heard that there was confusion among members of the community, some of who argued that a Non-Profit organisation should generate no surpluses at all, whereas, in reality, many of these organisations, including charities, 'carry on commercial activities or make investments in order to maximise the income available for it to carry on its charitable purpose'.⁹

6 Associations Forum, *Submission 107*, p. 14.

7 Social Enterprise Hubs Australia, 'Welcome' page, <http://www.socialenterprisehubs.org/>, (accessed 6 November 2008).

8 Social Ventures Australia, *Submission 139*, p. 3.

9 Inquiry into the Definition of Charities and Related Organisations, *Chapter 11: Not-For-Profit Entities*, http://www.cdi.gov.au/report/cdi_chap11.htm (accessed 16 October 2008).

2.19 However, the committee found that the use of 'Not-For-Profit' still attracts criticism within the sector. Organisations such as Philanthropy Australia have argued that the term Not-For-Profit is deceptive, because it creates 'the perception that profit is not necessary to these organisations'.¹⁰ Similarly Vittoria Borazio of Youth Off The Streets believes that the term is misleading for the general public, who may think that Not-For-Profit is another way of referring to a charity.¹¹ In adopting this term, the committee accepts that not all stakeholders will be satisfied.

Subgroups of Not-For-Profit Organisations

2.20 Not-For-Profit Organisations can be divided into further subgroups – those that are charities in the existing system, and those that are not. The committee recognises that there are other ways to break down Not-For-Profit Organisations, including dividing the Organisations according to whether they are Community Sector, Charities under the popular definition, Charities under the legal definition, Public-serving groups, member-serving groups or other.

Charity

2.21 There is currently no statutory definition of charity in existence in Australia. The common law meaning of charity applies¹², based on over 400 years of legal precedent. The Australian Macquarie Dictionary defines a charity as:

1. almsgiving; the private or public relief of unfortunate or needy persons; benevolence.
2. something given to a person or persons in need; alms.
3. a charitable act or work.
4. a charitable fund, foundation, or institution.
5. benevolent feeling, especially towards those in need.¹³

2.22 The Australian Taxation Office (ATO) has issued a ruling defining a 'charity' for tax purposes. A charity endorsed by the ATO may be eligible for tax concessions or exemptions that are unavailable to other Not-For-Profit Organisations. The ATO states that an organisation is a charity if:

- it is an entity which is also a trust fund or an institution

10 Philanthropy Australia, *Submission 42*, p. 1.

11 Ms Vittoria Borazio, Chief Operating Officer, Youth Off The Streets, *Proof Committee Hansard*, 31 October 2008, p. 86.

12 Extension of Charitable Purpose Bill 2004, *Explanatory Memorandum*, The Hon Peter Costello MP, p. 4.

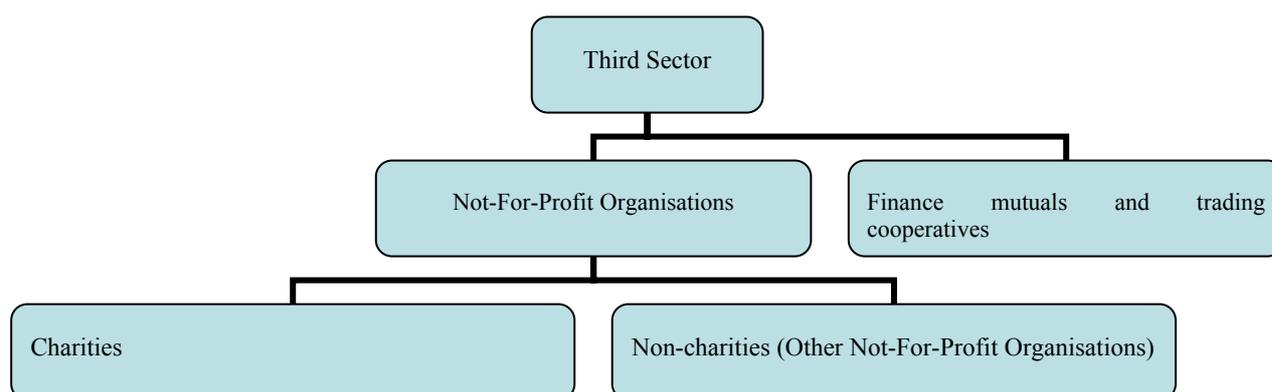
13 The Australian Online Macquarie Dictionary, "Charity", http://www.macquariedictionary.com.au/152.91.9.9@929FF929383487/-/p/thes/article_display.html?type=title&first=1&mid=3&last=3¤t=1&result=1&DatabaseList=dictbigmac&query=charity&searchType=findrank (accessed 17 November 2008).

- it exists for the public benefit or the relief of poverty
- its purposes are charitable within the legal sense of that term
- it is non-profit, and
- its sole purpose is charitable.¹⁴

Non-charity

2.23 Non-charities are those organisations generally run for and by their members, such as local sporting clubs or community associations. Unlike charities, non-charities may be purely informal, operating without incorporation.

2.24 Diagram 2.1 demonstrates the relationship between organisations within the Third Sector. The committee has provided this basic overview of the Third Sector, aware that the importance of definitions to the Sector lies in the ramifications that a given definition holds for an organisation in respect to its eligibility for tax concessions.



International standards

2.25 The Australian Bureau of Statistics utilises the International Classification of Non-Profit Organisation (ICNPO) in its classification of 'types' of not-for-profit organisation. The ICNPO is a statistical standard for the development of data on not-for-profit institution, developed by the United Nations for its Handbook on Non-Profit Institutions in the System of National Accounts. Under the ICNPO, Not-For-Profit Organisations are included in one of 12 groups, including:

1. Culture and Recreation

14 Australian Taxation Office, *Is your organisation a charity?*, <http://www.ato.gov.au/nonprofit/content.asp?doc=/content/24483.htm&page=2&H2> (accessed 24 November 2008).

2. Education and Research
3. Health
4. Social Services
5. Environment
6. Development and Housing
7. Law, Advocacy and Politics
8. Philanthropic Intermediaries and Voluntarism Promotion
9. International
10. Religion
11. Business and Professional Associations, Unions
12. Not Elsewhere Classified

2.26 Each of these groups are broken down into subgroups. For example, Group 3, Health, is divided into subgroups: Hospitals and rehabilitation; Nursing homes; Mental health and crisis intervention; and Other health services.¹⁵ The United Nations notes the advantages of this modular approach in classification:

ICNPO makes it possible to group and regroup organizations in order to shed light on components and dimensions of the non-profit sector that might be important for national or comparative purposes.¹⁶

2.27 However, the INCPO is limited in its use for comparative purposes in Australia due to the unavailability of some data (discussed later in this Chapter). The value of using INCPO as a system in Australia is also restricted given that it fails to differentiate between charities and other Not-For-Profit Organisations. The necessity of maintaining a notional divide between charities and other Not-For-Profit Organisations, which are subsets of the larger Third Sector, is important to this Inquiry given that disclosure regimes may differ according to the subset of origin.

Size and economic contribution of the Sector

2.28 According to the National Roundtable for Nonprofit Organisations (NRNO), in 1999-2000 the Sector 'made an economic contribution larger than the communications industry and about equal to that of the agriculture industry; a contribution almost twice as large as the entire economic contribution of the state of Tasmania'¹⁷.

15 United Nations, *Handbook on Non-Profit Institutions in the System of National Accounts*, p. 31, http://unstats.un.org/unsd/publication/SeriesF/SeriesF_91E.pdf (accessed 16 October 2008).

16 United Nations, *Handbook on Non-Profit Institutions in the System of National Accounts*, p. 32, http://unstats.un.org/unsd/publication/SeriesF/SeriesF_91E.pdf (accessed 16 October 2008).

17 Professor Mark Lyons, *Submission 67*, p. 4.

2.29 The NRNO estimates that there are as many as 700,000 Not-For-Profit Organisations in Australia today, 'most of which are small and entirely dependent on the voluntary commitment of members'.¹⁸

2.30 Despite this statistic, Australia has never undertaken a comprehensive survey of the Sector, including large and small, incorporated and unincorporated organisations. This is likely to be due to the lack of any central body or register which can track most of the Third Sector organisations in existence in Australia (or at least all Not-For-Profit Organisations) and their sheer number.

There are so many of the kitchen table operations. I have a holiday house down on the Gippsland Lake and there is a permanent population down there of 710 people, but they have got 73 little clubs and organisations.¹⁹

What do we know?

2.31 In 1995, the Industry Commission published a report entitled *Charitable Organisations in Australia* which was intended to strengthen the contribution which the charitable sector makes to Australia. Organisations such as those dedicated to the supply of health, education and religious services were not included in the Inquiry, being outside the given terms of reference. However, the authors encountered difficulties even in determining the size of that smaller part of the sector, noting that:

There are considerable difficulties in specifying the structure and size of the community social welfare sector; let alone the various sub-sectors. The sector is comprised of many diverse organisations that provide different combinations of services and derive income from various sources.

Because no public authority imposes uniform standards of financial reporting on CSWOs, there is a lack of statistical data on the sector. Comparable data is therefore difficult to obtain. Previous studies of the sector have adopted different classification systems or defined the sector differently.²⁰

2.32 Despite difficulties in determining the size of that sector (labelled as Community Social Welfare Organisation (CSWOs)), the Inquiry determined that its combined total annual expenditure was \$4.8 billion in 1993-94 (equivalent to 1 per cent of GDP), of which \$2.7 billion was from government funding. The report indicated that the sector employed approximately 100,000 people.²¹

18 Professor Mark Lyons, *Submission 67*, p. 4.

19 Mr Garry Bartlett, Chair, Voluntary and Honorary Work Subcommittee, CPA Australia Third Age Network, *Proof Committee Hansard*, 30 October 2008, p. 84.

20 Industry Commission, *Charitable Organisations in Australia*, Report No. 45, 16 June 1995, p. 18.

21 Industry Commission, *Charitable Organisations in Australia*, Report No. 45, 16 June 1995, p. XVII.

2.33 In 2002, the ABS published the *Non-Profit Institutions Satellite Account* for the year 1999-2000. According to the *Satellite Account*, total income from Not-For-Profit Organisations in that year was \$33.5 billion (equivalent to 5 per cent of GDP), most of which was generated through the sale of goods and services. The sector employed 604,000 persons in 1999–2000, representing 6.8% of total employed people in Australia. The number of volunteers working in the sector was not recorded; however volunteers worked 558 million hours, the equivalent of 285,000 equivalent full time employees.²²

2.34 However, the *Satellite Account* warns that it 'does not attempt to measure the universe of entities that could be legally defined to be NPIs'. The report excludes organisations that are mainly controlled by the government, such as universities and hospitals that are run by religious orders but funded by the government. Units operating in the finance and insurance industry and other trading cooperatives are not included in this satellite account as they are in the commercial sphere and are primarily guided by commercial goals and considerations. The ABS concludes the discussion on the validity of inclusions within the definition by saying that 'the scope of NPIs to be included in a NPI satellite account is worthy of further consideration'.²³

2.35 The ATO has registered approximately 190,000 Not-For-Profit Organisations.²⁴ In a recently released statistical study, the ABS found that there were 40,976 Not-For-Profit Organisations registered for an Australian Business number in June 2007, employing 884,476 people with another 2,434,815 people volunteering in the sector. It also found that the sector received \$74.5 billion in income in the 2006-07 financial year.²⁵ These figures exclude Not-For-Profit Organisations with an annual turnover of less than \$150,000 which are not required to register for an ABN, although some may have chosen to do so. There are also an additional 147,000 incorporated associations and co-operatives registered with state regulators. Statistics relating to income and employment are not available for these organisations using a registered incorporated structure.²⁶ Mr A.D. Lang, representing the Law Council of Australia warns that:

If you look at those figures superficially...you will get a completely misleading picture of the sector. What is not made explicit in the data that has been released is that they only include a sample selected by the ABS of

22 Australian Bureau of Statistics, *Non-Profit Institutions Satellite Account*, Australian National Accounts, Cat. No. 5256.0, pp. 8-9.

23 Australian Bureau of Statistics, *Non-Profit Institutions Satellite Account*, Australian National Accounts, Cat. No. 5256.0, p. 24.

24 Australian Taxation Office, *Compliance Program 2008-09: Not-for-profit organisations*, <http://www.ato.gov.au/corporate/content.asp?doc=/content/00155156.htm&page=61&H61&mu=45855&mfp=001> (accessed 2 December 2008).

25 Australian Bureau of Statistics, *Not-For-Profit Organisations, Australia, 2006-07*, Cat. No. 8106.0.

26 Department of the Treasury, *Submission 169*, p. 1.

those organisations that are registered under the Australian Business Register. The picture that those statistics gives is quite misleading, and that is a real issue in terms of trying to have a proper debate about the sector...²⁷

How big are Not-For-Profit Organisations?

2.36 Organisations may have differing reporting requirements according to their size and legal structure. The most common descriptor used by respondents to this inquiry was to characterise Not-For-Profit Organisations as 'small', 'medium' and 'large'. The *Corporations Act 2001* (Cth), to which some Not-For-Profit Organisations are subject, describes a small company as one which satisfies two of the three following conditions:

- (a) the consolidated revenue for the financial year of the company and the entities it controls (if any) is less than \$25 million, or any other amount prescribed by the regulations for the purposes of this paragraph;
- (b) the value of the consolidated gross assets at the end of the financial year of the company and the entities it controls (if any) is less than \$12.5 million, or any other amount prescribed by the regulations for the purposes of this paragraph;
- (c) the company and the entities it controls (if any) have fewer than 50, or any other number prescribed by the regulations for the purposes of this paragraph, employees at the end of the financial year.²⁸

2.37 In a 2004 report detailing the findings of national survey of not-for-profit companies limited by guarantee, Woodward and Marshall noted that, using the definitions within the Act, 88% of their respondents would be classified as 'small' for the previous financial year.²⁹

2.38 Within the third sector itself, the authors concluded that:

Just under a third of NFP organisations surveyed (30%) had an income of less than \$100,000 in the last financial year, and just over a half (53%) had an income of less than \$500,000. These proportions give an indication of what might be a useful figure when distinguishing between large and small organisations for regulatory purposes. Only 36% of organisations surveyed had \$1 million or more gross income in the last financial year.³⁰

27 Mr A. D. Lang, Representative, Law Council of Australia, *Proof Committee Hansard*, 28 October 2008, p. 58.

28 *Corporations Act 2001* (Cth), s 45A.

29 Woodward, Susan and Marshall, Shelley D., *A Better Framework: Reforming Not-for-Profit Regulation* (2003) p. 21, University of Melbourne, Public Law Research Paper No. 70; Centre for Corporate Law and Securities Regulation Working Paper.

30 Woodward, Susan and Marshall, Shelley D., *A Better Framework: Reforming Not-for-Profit Regulation* (2003) p. 40, University of Melbourne, Public Law Research Paper No. 70; Centre for Corporate Law and Securities Regulation Working Paper.

2.39 Other submissions to the current Inquiry suggested alternative descriptors and definitions. For example, the CPA Third Age Network Committee recommends that associations that are not prescribed associations in line with the Victorian *Associations Incorporation Act 1991* (organisations with a gross annual revenue under \$200,000 and gross assets under \$500,000³¹) be labelled as 'Micro' Not-For-Profit Organisations.³²

'Reach' of Not-For-Profit Organisations

2.40 Not-For-Profit Organisations can also be defined in terms of their 'reach'. The majority of Not-For-Profit Organisations in Australia are 'micro' organisations, operating within a local area and run by local volunteers. However, Not-For-Profit Organisations in Australia are probably now less likely to be based purely within a single state, and more likely to operate at a national level. A number of Australian Not-For-Profit Organisations (mainly charities, such as Oxfam Australia and the Australian Red Cross) also participate in overseas as well as domestic operations.

Who represents Not-For-Profit Organisations?

2.41 A number of peak bodies operate in Australia for Not-For-Profit Organisations. Notably, these include: the Australian Council for International Development (ACFID), which is 'an independent national association of Australian non-government organisations working in the field of international aid and development' with a membership of 68 organisations³³; the Australian Council of Social Service, which is the peak council of the community and welfare sector, and Fundraising Institute Australia (FIA), the peak body for fundraising in Australia. According to FIA:

Our members are both individual – some 1,700 individual members working in around one thousand charities and nonprofit organisations – and organisational – more than 80 organisational members with a combined turnover in excess of \$1.1 billion and thousands of staff.³⁴

2.42 However, given the 700,000 Not-For-Profit Organisations estimated to be operating in Australia, the vast majority of not-for-profits are not members of a peak body. The CPA Third Age Network Committee claims that it is unaware of any peak body representing small Not-For-Profit Organisations. It attributes this to 'the extraordinary diversity of purposes, huge number of entities, national geographic spread and very small size'³⁵ of Not-For-Profit Organisations. If this is the case, large

31 *Associations Incorporation Act 1981* (Vic), s 3.

32 CPA Third Age Network Committee, *Submission 39*, p. 3.

33 Australian Council for International Development, *Submission 164*, p. i.

34 Fundraising Institute Australia, *Submission 77*, p. 3.

35 CPA Third Age Network Committee, *Submission 39*, p. 3.

Not-For-Profit Organisations have a vehicle which can defend their interests; but smaller organisations are unlikely to receive the same level of advocacy.

Funding

2.43 Although the Committee heard that the Sector is funded largely by the government through contracts and grants to carry out a variety of tasks within the local community, Professor Lyons estimates government funding is only a third of the overall income of the Sector.³⁶ 'Government funding' in this context does not include the indirect support that Not-For-Profit Organisations receive through their eligibility for tax concessions and exemptions. The committee heard that, excluding GST concessions, tax forgone by Not-For-Profit Organisations in 2007-08 is 'expected to cost [the Government] \$890 million'.³⁷ In utilising the available concessions and exemptions, these organisations may not have the same operating costs as businesses.

2.44 Other funding for the Sector comes through the sale of goods and services, donations, bequests, fundraising and corporate sponsorship. From research on philanthropy in Australia, it was found that:

- In 2005, Australians donated \$5.7 billion to non-profit organisations
- A further \$2 billion was provided by Australians who bought raffle tickets, or attended charity auctions and similar events
- ...
- Over half a million Australian businesses provided \$3 billion to non-profit organisations as gifts of money, goods and services and sponsorship³⁸

2.45 Not all donations made to Not-For-Profit Organisations can be claimed as tax deductions. In 2004/05, \$1.47 billion was claimed, which seems to indicate that Australians do not donate to Not-For-Profit Organisations primarily to receive tax concessions. Indeed, the *Giving Australia Report 2005* concludes that, based on an estimate of donations by individuals, only one in four of these donations is ever claimed as a tax deduction.³⁹

36 Professor Mark Lyons, *Proof Committee Hansard*, 29 October 2008, p. 64.

37 Mr Christopher Leggett, Senior Adviser, Personal and Retirement Income Division, Department of the Treasury, *Proof Committee Hansard*; 29 October 2008, p. 21.

38 Queensland University of Technology, Centre for Philanthropy and Nonprofit Studies, *Current Issues Information Sheet 2007/2: Tax Deductible Giving in 2005-05*, p. 1.

39 Australian Government, *Giving Australia: Research on Philanthropy in Australia*, <http://www.philanthropy.org.au/community/transcripts/Giving%20Australia%20Summary.pdf> p. 36 (accessed 2 December 2008).

Volunteering

2.46 Submitters to this Inquiry highlighted the value of the contribution made by volunteers within the Sector:

- During 2004, 6.3 million Australians, 41% of adults, volunteered a total of 750 million hours of labour for non-profit organisations of all sizes
- This voluntary contribution was equivalent to an additional \$13.3 billion donated to the non-profit sector
- In 1999-2000, when the contribution of volunteers (then estimated at \$8.9 billion) is added to the financial data, Australia's non-profit sector contributed \$42 billion to the national economy. This was equivalent to the contribution of the mining industry
- The latest ABS Voluntary Work, Australia Survey (2006) has shown that volunteering figures have decreased. In 2006 5.4 million people (34% of the adult population) volunteered 713 million hours of time.⁴⁰

2.47 Despite figures indicating a recent drop in volunteering hours, volunteering remains a significant way in which Australians support Not-For-Profit Organisations. The committee heard that volunteering figures have the potential to increase, as a toughening economic climate means that people may volunteer more in lieu of providing financial donations.⁴¹

2.48 The committee notes that the figures describing volunteering hours may not be precise, since the value of volunteering to micro organisations cannot be effectively captured. Evidence provided to the committee suggests that even large organisations have no processes in place to actively quantify the contribution of volunteers.

Committee View

2.49 The committee notes the estimates provided of the size of the Third Sector in Australia but also notes that the data is incomplete and fractured. The committee notes that to maximise the effectiveness of government policy in relation to social inclusion, it would be useful to gain an accurate picture of the Third Sector in Australia through improved data collection.

2.50 However, the committee declines to make a specific recommendation in relation to this issue at this time. In the current environment, the committee believes that an accurate descriptive analysis of the Sector is impossible to achieve. However,

40 Keating, K., *The National Governance of the Non-Profit Sector*, 2007, p. 5. sourced from the National Roundtable for Non-Profit Organisations.

41 Senator Rachel Siewert and Ms Vittoria Borazio, Chief Operating Officer, Youth Off The Streets, *Proof Committee Hansard*, 31 October 2008, p. 89.

Chapter 6 contains a recommendation which may allow for the capture of information relating to all of these organisations.

Recommendation 1

2.51 The committee recommends that all Australian Governments agree on common terminology for referring to organisations within the Sector. Governments should also develop a common meaning for terms referring to the size of these organisations, including 'micro', 'small', 'medium' and 'large'. This standard terminology should be adopted by all government departments.

Chapter 3

Reforming the Sector

3.1 This chapter explores the call for reform within the Third Sector, which will increase transparency and accountability, and analyses the terms 'transparency' and 'accountability' as they relate to the legal structures used by Not-For-Profit Organisations in Australia.

3.2 The Choice article, as discussed in Chapter 1, raised several issues surrounding the operation of charities in Australia, including: a lack of transparency in the way in which public or donated funds are spent; and lack of accountability, despite the fact that Not-For-Profit Organisations are major providers of services to the public.

3.3 The survey conducted by Choice found that 81 per cent of respondents did not know what proportion of their charitable donation reached their favoured charity's beneficiaries, yet 94 per cent considered it important to have access to that information. The survey found wide variability and inconsistency in the way that charities communicate key information to donors. In some cases, such information was not publicly available at all, as some charities did not publish their annual reports or financial accounts.¹

3.4 The Choice report also found that there was no uniform accounting or reporting standards for charities, so even when charities did make available information about how donations were distributed, this information did not necessarily allow a comparison to be made across different entities, because different approaches and definitions may be used. As one respondent put it:

Charities pluck numbers out of the air for their fundraising costs. There's no agreement about what constitutes administration costs. Some will say it's only the people in your fundraising department. Others might include IT, HR, marketing departments...there's no consistency.²

3.5 The majority of submitters to this inquiry chose to comment on the transparency and accountability of Not-For-Profit Organisations as highlighted by the Choice article, and on other reforms to the Sector itself which would increase transparency and accountability.

1 Choice Magazine, *Charities*, March 2008, <http://www.choice.com.au/viewArticle.aspx?id=106240&catId=100268&tid=100008> (accessed 23 September 2008).

2 Choice Magazine, *Charities*, March 2008, p. 3. <http://www.choice.com.au/viewArticle.aspx?id=106240&catId=100268&tid=100008> (accessed 23 September 2008).

Transparency and accountability

Transparency

3.6 Transparency and accountability requirements are the same for all companies limited by guarantee under the *Corporations Act 2001*, and these requirements are administered by the Australian Securities and Investments Commission (ASIC).³ (Further discussion on the issue of organisations' legal structures is found in Chapter 7.) No differentiation is made as to whether those organisations are for-profit or not-for-profit. This Inquiry heard that transparency and accountability should be defined separately for for-profits and not-for-profits given their different objectives. Whereas the aim of businesses is to maximise profits for distribution to shareholders, for Not-For-Profit Organisations:

Their *raison d'être* is cause related rather than profit incentive with their two main functions being operational (providing services) and advocacy (giving voice to the cause).⁴

3.7 A traditional definition of 'transparency' is something easily understood; open; frank; or candid.⁵ This is achieved for the business sector under legislation in Australia through the provision of open and detailed financial records provided to the regulator. However, the committee received a number of submissions which indicated that 'transparency' should be defined more broadly for Not-For-Profit Organisations:

The starting point is transparency of purpose, clarifying why the organisation exists, what its objectives are and what the measures of achievement are. It also means transparency of process so that all stakeholders understand how things are done as well as why.⁶

Accountability

3.8 The majority of submitters believe that accountability is important for Not-For-Profit Organisations. Chartered Secretaries Australia believes that accountability:

...means asking the questions: Who is responsible and to whom? What are they responsible for? What are the consequences if the rules are violated? It is a normal part of the exercise of responsibility. It is a reporting mechanism enabling those conferring responsibility to monitor its exercise.

3 Many ASIC registered Not-For-Profit companies are companies limited by guarantee, which are public companies. Public companies are held to higher levels of regulation than private companies such as PTY LTD family and/or small business ventures. Among other regulatory provisions, public companies must hold an Annual General Meeting, deal with certain disclosures in their annual report and have more restrictive regulation of directors' financial benefits. Large stock market listed corporations are also classified as public companies.

4 Wesley Mission Sydney, *Submission 41*, p. 3.

5 *The Macquarie Dictionary*, 2nd Revised Edition, 1987.

6 Chartered Secretaries Australia, *Submission 17*, p. 1.

3.9 For the Sector as a whole to achieve accountability as defined by CSA, a regulator would be required. While some Not-For-Profit Organisations are regulated by ASIC or a state or territory government, Mr Andrew Murray notes that 'currently many NFPs are not legally obliged to report to donors, service recipients or to an independent auditing body'.⁷

Donor opinion

3.10 The committee received several submissions to this inquiry from donors wishing to make comments in relation to those issues expressed within the Inquiry's terms of reference. Mr Richard Stradwick, a regular donor to a number of charities and related organisations, believes that donors should have access to the following information:

1. What are the objectives of the organisation?
2. How does the organisation intend to achieve these objectives?
3. Who are the people responsible for the governance of the organisation?
4. Where do the organisation's funds come from?
5. Where are the funds used?⁸

3.11 According to Mr Stradwick:

The fact that donors may choose not to seek the information is not significant. At least it is available and anyone who wants to see it should be able to do so. Moreover if this information is available, the organisation can be held to account for its achievements and failures.⁹

Committee View

3.12 The committee believes that the terms 'transparency' and 'accountability' merit different interpretation by Not-For-Profit Organisations - particularly in relation to smaller organisations - than by the Business Sector. However, the committee is aware that the issue of proper transparency and accountability is comprised of many overlapping issues, all relating to the regulation of the Sector as a whole.

Is reform necessary?

3.13 In responding to a question about whether regulatory reform was needed, the Australian Evangelical Alliance replied:

In our view the answer is YES – and it should apply right across the third sector. All parties involved – the NFP sector itself, the state and federal

7 Murray, Andrew, *One Regulator One System One Law - The Case for Introducing a New Regulatory System for the Not for Profit Sector*, July 2006, p. 31.

8 Mr Richard Stradwick, *Submission 138*, p. 3.

9 Mr Richard Stradwick, *Submission 138*, p. 3.

governments as well as representatives of the community and business – should work together in consultation to bring necessary reforms to the sector which would continue to grow the confidence and trust of the stakeholders in the future of this vital sector within our community here in Australia.¹⁰

3.14 The Heart Foundation also believes that there is an urgent case for reform:

There is a pressing case for rationalising the many hundreds of laws and regulations that apply to operation and activities of charities and non-for-profit organisations, many of them making for unnecessary complexity and sometimes deterring charities from undertaking certain legitimate fundraising activities, denying them access to important sources of funding.¹¹

3.15 Professor Mark Lyons agrees that the current arrangements are a problem because, in the eyes of the public, the current system:

- Reinforces the low level of public understanding of the sector and reduces the movement to informed giving;
- Makes it almost impossible to obtain information of a comparative kind, to allow donors or grant makers to make informed choices about their giving;
- Makes it impossible to discover who the backers of think tanks/advocacy orgs are or to test claims by advocacy organisations about their representativeness.¹²

3.16 The committee notes that there is a precedent within the business sector for reform. The goals of the current COAG Reform Agenda are to 'address the challenges of boosting productivity, increasing workforce participation and mobility and delivering better services for the community. This reform agenda will contribute to the broader goals of social inclusion, closing the gap on Indigenous disadvantage and environmental sustainability'.¹³ Despite reform being undertaken that will mainly benefit the business sector, the committee heard that 'multiplicity of NFP regulation and regulators causes inconsistencies' resulting in a far more complex regulatory system than is in existence for business.¹⁴

3.17 Submitters to the inquiry saw no reason why the business sector should receive preferential treatment:

10 Australian Evangelical Alliance, *Submission 37*, p. 6.

11 The Heart Foundation, *Submission 165*, p. 3.

12 Professor Mark Lyons, *Submission 67*, p. 8.

13 Council of Australian Governments, *Meeting 3 July 2008*, http://www.coag.gov.au/coag_meeting_outcomes/2008-07-03/index.cfm (accessed 6 November 2008).

14 PilchConnect, *Submission 129*, p. 3.

Reform is urgently needed. As successive governments have committed to reducing the regulatory burden on business, so it needs to give equal priority to working with the Non Profit Sector to reform its operating environment.¹⁵

Committee View

3.18 The committee agrees that the size of the Sector and the current complexity of legislation and regulations mean that the regulatory system for Not-For-Profit Organisations should be immediately reviewed. The committee believes that the complexity inherent in the current regulatory system forms a significant barrier to transparency.

15 Australian Council of Social Service, *Submission 109*, p. 2.

Chapter 4

Meeting the Needs of the Third Sector

4.1 This Chapter examines the position of Australia's Third Sector in relation to the Government and Business Sectors.

4.2 Chapter 2 highlighted the lack of available information about the Sector, despite estimates clearly placing the Third Sector as an important social and economic force. Despite this, there has been no major attempt by governments to define the Sector – which organisations are included and which are not; harmonising legislation across states and territories to reduce confusion and costs for the Sector; and measuring the contribution made by the entire Sector (not just incorporated organisations or companies limited by guarantee).

4.3 The committee notes that there has been no concerted attempt to implement most of the recommendations made by any of the numerous reviews of Not-For-Profit Organisations undertaken in the previous thirteen years or so. Reforms to date have been piecemeal and have had a narrow focus.

4.4 For example, the *Extension of Charitable Purpose Act 2004* provides a statutory extension to the common law meaning of 'charity' for the purposes of all Commonwealth legislation.¹ The bill was proposed following one of the 27 recommendations made in the 2001 Definition of Charities Inquiry. No attempt was made in this bill to create a statutory definition for 'charity', which would have aligned over 100 pieces of legislation referring to charities.

4.5 State governments have tried to enact legislation to assist the Sector. In October 2006 following royal assent, the Victoria Government enacted the *Charities Amendment Act 2006* which gives trustees of Victorian trusts the legal power to make grants to those entities which are deductible gift recipients, but which are not considered charities in law only because of their link to government. Philanthropy Australia warns its members that they:

...must also ensure compliance with Commonwealth tax law. The Act does not affect the definition of a charity or confirm that government-linked DGRs are charitable at law, because it has no power to do so.²

4.6 Currently, it is Not-For-Profit Organisations such as Philanthropy Australia and other peak bodies which are forced, at their own expense, to monitor legislation relating to the Third Sector and inform their members in the absence of a government or independent body to do so.

1 Extension of Charitable Purpose Bill 2004, *Explanatory Memorandum*, p. 1.

2 Philanthropy Australia, *Legislation Monitor*, <http://www.philanthropy.org.au/representation/legislation.html> (accessed 7 November 2008).

4.7 The committee considers that it is vital to have a strong Third Sector operating within Australia. Reforms are necessary to ensure that this happens. According to Mr David Thompson, Chair of the National Roundtable of Nonprofit Organisations, the object of reform should be:

To promote nonprofit organisations in their activities that lead to important social and economic outcomes, including increasing employment, engagement of Australian citizens in volunteering, capacity building of communities and organisations, enhanced efficiency and effectiveness in delivery of services, and enhanced integrity and donor and general public confidence.³

4.8 The committee believes that the first step towards the necessary reforms is ensuring that a body is created for pursuing the objectives of reform.

UK – Office of the Third Sector

4.9 According to Gordon Brown, Prime Minister of Great Britain:

I believe that a successful modern democracy needs at its heart a thriving and diverse third sector...[W]e must create the space and opportunity for it to flourish, we must be good partners when we work together and we must listen and respond.⁴

4.10 In 2006, in recognition of the important role of the Third Sector in both social and economic terms, the UK Government established the Office of the Third Sector (OTS) within the Cabinet Office and assigned a Minister to be responsible for the Sector. The OTS leads work:

across government to support the environment for a thriving third sector (voluntary and community groups, social enterprises, charities, cooperatives and mutuals), enabling the sector to campaign for change, deliver public services, promote social enterprise and strengthen communities.⁵

4.11 It does this through its role of overseeing the *Charities Act 2006*, alongside the independent Charities Commission.⁶ One of the first tasks of the OTS was to undertake a review of the Third Sector to establish a long term vision and promote a

3 Mr David Thompson, Chair, National Roundtable of Nonprofit Organisations, *Proof Committee Hansard*, 29 October 2008, p. 35.

4 Mr Gordon Brown, *The future role of the third sector in social and economic regeneration: final report* (Foreward by the Prime Minister – the Third Sector at the Heart of Society), July 2004, http://www.cabinetoffice.gov.uk/~/-/media/assets/www.cabinetoffice.gov.uk/third_sector/the_future_role_of_the_third_sector_in_economic_and_social_regeneration%20pdf.ashx (accessed 7 November 2008).

5 Office of the Third Sector, *About Us*, http://www.cabinetoffice.gov.uk/third_sector/about_us.aspx (accessed 7 November 2008).

6 The UK Charities Commission is discussed in further detail in Chapter 6.

partnership between the Government and the Third Sector. Specifically, the OTS is responsible for:

- the reform of charity law, including the *Charities Act 2006*;
- monitoring new legislation and changes to existing legislation to ensure that charities are not disadvantaged in any way;
- laws governing public charitable collections;
- driving forward the Government's support of the development of a confident and independent sector through funding, finance and support;
- providing support to community based activity;
- driving cross-government action to improve partnership working and ensure better terms of engagement between central and local government and the third sector;
- supporting voluntary activity where all individuals and communities are enabled to play a full part in civil society;
- fostering a culture of planned regular and tax effective giving;
- working across government to create an environment in the UK for social enterprises to thrive;
- reduce the barriers to the third sector's involvement in designing, delivering and improving public services;
- providing government led and sponsored research into volunteering, charitable giving, citizenship and social enterprise; and
- consulting with stakeholders.⁷

4.12 This assistance from the Government has resulted in more efficient regulation, political engagement and financial support for the Sector. Ms Katherine Keating, an advocate for charities in Australia, believes that 'Australia can learn many lessons from the United Kingdom's example'. She goes on to recommend that Australia follow the UK example by creating a Federal Minister and a Department for the Sector:

Put simply, when the non-profit sector has a turnover of more than \$33.5 billion, why don't we have a Minister responsible for it? As the non-profit sector in Australia continues to grow, the demand for a governmental leader is evident. With a champion for collaboration between the non-profit sector and the government in place, all of Australia would benefit from the industry's growth and development.⁸

7 Office of the Third Sector, *Various pages*, http://www.cabinetoffice.gov.uk/third_sector.aspx (accessed 7 November 2008).

8 Keating, Katherine, *The National Governance of the Non-Profit Sector*, 2007, p. 25.

Social Inclusion

4.13 The committee notes that the Government has made progress in giving a voice to the Third Sector. Following the 2007 election, The Hon Julia Gillard MP was named the Minister for Social Inclusion and Senator the Hon Ursula Stephens was named Parliamentary Secretary for Social Inclusion and the Voluntary Sector. In May 2008, a newly-established Social Inclusion Board met for the first time, with secretariat support provided by the Department of Prime Minister and Cabinet. The terms of reference of the Social Inclusion Board are very broad:

- (a) Provide advice and information to the Minister for Social Inclusion on how to improve social inclusion across the country.
- (b) Consult widely and provide views and input on various aspects of social inclusion including how to measure disadvantage and social exclusion, how to increase economic and social participation, and how communities can be engaged with social inclusion matters.
- (c) Report annually on progress on social inclusion to the Minister for Social Inclusion.
- (d) Provide advice on specific matters referred to it by the Minister for Social Inclusion.⁹

4.14 The Government's social inclusion policies are currently being progressed through a number of Departments, including Prime Minister and Cabinet (PM & C), Treasury, the Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA), and the Department of Education, Employment and Workplace Relations (DEEWR).

4.15 In addition to establishing the Board, the Australian Government announced work on a National Compact, to be led by FaHCSIA, which is:

...an agreement between the Australian Government and the not-for-profit sector outlining how the two will work together to improve and strengthen their relationship, now and into the future.

A National Compact could also provide a platform for discussion and agreement between the Australian Government and the sector about how to achieve objectives that will benefit the community.¹⁰

4.16 Currently, both the UK and Canada have National Compacts in place with the Third Sector. The UK Compact consists of an Agreement and five Codes of Practice, relating to Volunteering, Funding and Procurement, Consultation and Policy Appraisal, Community Groups, and Black and Minority Ethnic Groups. The Codes of

9 Social Inclusion, *The Australian Social Inclusion Board*, http://www.socialinclusion.gov.au/aus_inclusion_board/ (accessed 7 November 2008).

10 Australian Government, Social Inclusion, *A National Compact*, http://www.socialinclusion.gov.au/A_National_Compact.htm (accessed 10 November 2008).

Practice sets out shared principles and commitments between the government and the sector, and establishes guidelines about how the two groups should work together.¹¹

4.17 The committee heard positive feedback during its Inquiry about the development of a National Compact, and some indicated that a compact would be an appropriate vehicle through which reforms to the Sector could be guided:

As to what a charities commission would look like, we believe that this should be the subject of an ongoing dialogue. I mentioned earlier that the proposed national compact could be an ideal vehicle for that dialogue to occur to arrive at a charities commission, if that be the path we decide to go down as a nation.¹²

4.18 A round of consultations has so far been undertaken within the Sector, and the second and final round of consultations is expected to take place early in 2009. Ms Kim Peake of PM & C updated the committee on the first round of consultations on the Compact:

...the first stage of consultations is now finalised. Those consultations were managed by ACOSS, the Australian Council of Social Service, and public forums were held in each state and territory capital city as well as Alice Springs and Townsville. Additional forums were also held to seek the views of people with an intellectual disability and people from culturally and linguistically diverse backgrounds and organisations working with people who experience homelessness. The purpose of that first stage was to gauge whether there was support for the development of a compact before committing either the government or the sector to a more resource intensive process to develop a compact.¹³

4.19 The committee, found, however, that there was a suggestion that the consultation process was not ideal:

[T]he discussion on the compact has also been fairly truncated. It has been led by ACOSS, which is clearly an organisation working at the community level, but ACOSS does not represent the complexities of the sector.¹⁴

Committee View

4.20 The Committee understands the frustration of the Third Sector in Australia that may be attributed to a lack of action by previous governments in implementing

11 Compact, *About Us*, http://www.thecomcompact.org.uk/information/100018/about_us/, (accessed 10 November 2008).

12 Dr John Falzon, Chief Executive Officer, St Vincent de Paul Society National Council of Australia, *Proof Committee Hansard*, 28 October 2008, p. 21.

13 Ms Kim Peake, Executive Coordinator (Productivity), Department of Prime Minister and Cabinet, *Proof Committee Hansard*, 29 October 2008, p. 15.

14 Dr Sue-Anne Wallace, Chief Executive Officer, Fundraising Institute Australia, *Proof Committee Hansard*, 31 October 2008, p. 5.

recommendations from a number of reviews. The committee notes, however, that the current Commonwealth Government has moved to address the neglect of the Sector through its social inclusion policies such as the development of a National Compact and through the appointment of a Minister and Parliamentary Secretary for Social Inclusion.

4.21 The committee notes the establishment of the OTS in the UK and the positioning of this department within the Cabinet Office. It believes that the creation of a unit specifically for the Sector is necessary in Australia. The committee sees the benefits to be gained for both the sector and government through the development of such a unit within PM & C which will manage the challenges facing Not-For-Profit Organisations. The committee believes that the strength of the Sector in Australia also warrants the appointment of a Minister who would have responsibility for the Sector.

Recommendation 2

4.22 The committee recommends that the Government establish a unit within the Department of Prime Minister and Cabinet specifically to manage issues arising for Not-For-Profit Organisations. The unit should report to a Minister for the Third Sector.

Chapter 5

Regulation of the Sector

5.1 This Chapter identifies the arguments provided by contributors to the inquiry as to how the Sector should be regulated. It examines the advantages and disadvantages of a Commission, as currently exists in England and Wales and New Zealand, and weighs these against the advantages of the sector regulating itself through voluntary codes or standards. The Chapter also discusses the related topic of who should be subject to regulation: charities only, or all Not-For-Profit Organisations. The issue of whether a Commission should be independent or managed by government is also discussed, as is the potential funding source of such a regulator.

5.2 The committee notes that during the course of the Inquiry there was overwhelming support for the Sector to be better regulated in some way. Chapter 7 discusses the disadvantages of the current structures in which Not-For-Profit organisations operate, which includes an absence of regulation, or regulation inappropriate for the Sector.

Self-regulation

5.3 In addressing the issue of self-regulation of the Sector, the committee acknowledges the efforts of the Australian Council for International Development (ACFID) and the Fundraising Institute Australia (FIA), who have produced a Code of Conduct and Principles and Standards of Fundraising Practice respectively.

5.4 The Associations Forum, which describes ACFID's and FIA's codes as 'excellent', supports the use of codes to ensure Sector compliance:

One of the special features of the not-for-profit sector is its capacity for self-regulation, which has worked well in many professional and industry associations. Self-regulation can be democratic, effective and economical. Greater effort by the not-for-profit mutual sector to self regulate would be an excellent way forward, backed by government encouragement and minimal assistance and expenditure.¹

ACFID Code of Conduct

5.5 ACFID works in the field of international aid and development and is a national association of Australian non-government organisations. ACFID's Code of Conduct is a voluntary industry code for the overseas aid and development sector and has been in place for more than 10 years. It was implemented 'in order to strengthen

1 Associations Forum, *Submission 107*, p. 6.

the governance of the organisations in the sector and to enhance the confidence of the Australian public upon whom the sector relies for the greater portion of its funding'.²

5.6 ACFID has 86 member organisations, most of which are charities or Deductible Gift Recipients. ACFID signatories are required to comply with the Code, which:

...defines standards of governance, management, financial control, communications with the public and reporting with which NGDOs should comply. It identifies mechanisms to ensure accountability in NGDO use of public monies. The Code aims to maintain and enhance standards throughout the NGDO community, ensuring public confidence in the integrity of individuals and organisations comprising the NGDO community and the quality and effectiveness of NGDO programs.³

5.7 The advantage of the ACFID Code for members is that it can be used by organisations to measure and improve their operations, systems and guiding principles. ACFID has established a Code of Conduct Committee which regularly reviews the scope of the Code. The Committee also conducts seminars and workshops to educate members about the requirements of the Code, and how these are applied to the everyday activities of their operation.⁴

FIA Principles and Standards of Fundraising Practice

5.8 FIA is Australia's peak fundraising body. Its membership comprises both individuals and organisations. As with ACFID's Code, members of FIA are required to comply with the Principles and Standards, which were developed 'in response to FIA's perception of an urgent need to establish standards for professional fundraising in order to improve public trust and confidence in accountability for and transparency in the use of publicly donated funds'.⁵

5.9 The Principles are overarching codes that apply to all fundraisers, while the Standards address specific discipline of fundraising practice:

Principles of Fundraising Practice:

Code of Ethics and Professional Conduct

Fundraiser's Promise to Donors

Code of Acceptance and Refusal of Donations

FIA Complaints Process

2 Australian Council for International Development, *Submission 164*, p. 1.

3 Australian Council for International Development, *Submission 164*, p. 10.

4 Australian Council for International Development, *About the Code*, <http://www.acfid.asn.au/code-of-conduct/about-the-code> (accessed 7 November 2008).

5 Fundraising Institute Australia, *Submission 77*, p. 3.

Standards of Fundraising Practice:

Standard of Face to Face Fundraising

Standard of Charitable Telemarketing

Standard of Bequest Fundraising

Standard of Raffles, Lotteries and Games of Chance

Standard of Workplace Giving

Standard of Events

Standard of Fundraising from Grant Making Trusts and Foundations

Standard of Fundraising in Schools

Standard of Direct Mail

Standard of e-Fundraising

Standard of Diaspora Fundraising⁶

5.10 The role of the FIA Ethics Committee is to oversee complaints and enforce compliance among members. As with the ACFID Code of Conduct Committee, FIA is currently developing a national curriculum to ‘facilitate training on fundraising ethics and best practice’.⁷ FIA observes that the Victorian Government has endorsed its work in this area, and recommends that the codes be applied nationally.

5.11 Despite having their own respective codes, both ACFID and FIA indicate that that there is a place for a statutory regulatory body:

FIA sees closing this gap between statutory and non-statutory regulation as critical to maintaining public trust and confidence...⁸

ACFID recommends that...the proposed regulatory body should focus on supporting and educating small and emerging NFP entities to implement adequate governance structures and on providing education and support to its Directors and board members.⁹

6 Fundraising Institute Australia, *Overview of the FIA Codes Project Principles and Standards of Fundraising Practice*, http://www.fia.org.au/AM/Template.cfm?Section=Principles_and_Standards_of_Fundraising_Practice (accessed 7 November 2008).

7 Fundraising Institute Australia, *Overview of the FIA Codes Project Principles and Standards of Fundraising Practice*, http://www.fia.org.au/AM/Template.cfm?Section=Principles_and_Standards_of_Fundraising_Practice (accessed 7 November 2008).

8 Fundraising Institute Australia, *Submission 77*, p. 10.

9 Australian Council for International Development, *Submission 164*, p. 11.

Committee View

5.12 The committee congratulates ACFID and FIA on the comprehensive voluntary codes of conduct that they have developed. The codes are an indication that Not-For-Profit Organisations are aware that transparency is an issue within the Sector and many organisations in the sector take this responsibility seriously, determined to maintain their high reputation among the Australian public. This is evidenced by sector participation in the Australasian Reporting Awards¹⁰, the PricewaterhouseCoopers Transparency Awards that 'recognise the quality and transparency of reporting in the not-for-profit sector,'¹¹ and by the ACFID and FIA codes. The committee believes that there is a place for the ACFID and FIA codes within a new system of regulation.

Single National Regulator

5.13 Recommendation 25 of the 2001 Definition of Charities Inquiry recommended that 'Government seek the agreement of all State and Territory Governments to establish an independent administrative body for charities and related entities, and to the legislative changes necessary for its establishment'.¹² This recommendation has not been implemented to date, despite the successful implementation of Charities Commissions in countries comparable to Australia – England and Wales, and New Zealand.

5.14 One of the major advantages of having a single national regulator was that it would be a specialist body designed to meet the unique needs of Not-For-Profit Organisations in Australia. The committee was advised of the ramifications of failing to act in this respect:

Without national regulation of the sector our state based system will continue to create complexity that makes it difficult for not-for-profits to function efficiently and effectively.¹³

In the absence of a purpose built register populated with appropriate and regularly updated reports from all economically significant nonprofits, government departments seeking to contract or in other ways work with

10 Australasian Reporting Awards, *Welcome to the Australasian Reporting Awards*, <http://www.arawards.com.au/> (accessed 2 December 2008).

11 PricewaterhouseCoopers, *About the PwC Transparency Awards*, <http://www.pwc.com/extweb/aboutus.nsf/docid/B7895E8C1C53CC94CA2573330005A220> (accessed 26 November 2008).

12 Inquiry into the Definition of Charities and Related Organisations, *Summary of Recommendations*, http://www.cdi.gov.au/report/cdi_summaryofrecs.htm (accessed 7 November 2008).

13 Ms Katherine Keating, *Proof Committee Hansard*, 31 October 2008, p. 44.

nonprofits are forced to collect a great deal of information themselves, generating higher than necessary program management costs...¹⁴

5.15 This Inquiry has found that there is widespread support among stakeholders for a single national regulator, although many contributors provided some qualifications:

In principle our sector supports having a separate, independent regulator.¹⁵

Everybody is arguing for an independent regulator. How you define it, how you achieve that and how you guarantee it is another matter, but no-one is arguing for a captive regulator. Everybody wants an independent regulator because it is in our interests to have one.¹⁶

I think we are in favour of there being a central place where this is taken care of. However, the one caveat we would put is that we would love to see it being done in an efficient and effective way. Just to add another body for the sake of adding another body is really one more place these people have to go to and it is really far more complicating if it is yet another place that is totally unrelated to everything else.¹⁷

5.16 However, some contributors felt that other measures should be adopted before a national regulator is established. Dr Greg Ogle of The Wilderness Society and Ms Gina Anderson of Philanthropy Australia shared the opinion that a national regulator should not be the starting point of reform.

Following on from wanting to allow the sector to flourish and be free of unnecessary regulation or overregulation, if the direction is to create a UK style charities commission, we are not against that. But maybe the first step is just to try to harmonise more of the existing laws.¹⁸

[W]e could spend a lot of time worrying about designing some wonderful big all-purpose vehicle that without the accounting standards, standard charter of accounts and some basic-level stuff that enhances transparency could be a waste of time.¹⁹

5.17 Also of concern to contributors was the related issues of the expense of a new regulator, and the implications of this:

14 Professor Mark Lyons, *Submission 67*, p. 8.

15 Ms Karen Mackay, Project Manager, Association of Neighbourhood Houses and Learning Centres, *Proof Committee Hansard*, 29 October 2008, p. 4.

16 Mr Michael Raper, Director of Services and International Operations, Australian Red Cross, *Proof Committee Hansard*, 30 October 2008, p. 49.

17 Ms Kathy Keele, Chief Executive Officer, Australia Council for the Arts, *Proof Committee Hansard*, 31 October 2008, p. 73.

18 Dr Greg Ogle, National Legal Coordinator, The Wilderness Society, *Proof Committee Hansard*, 28 October 2008, p. 11.

19 Ms Gina Anderson, Chief Executive Officer, Philanthropy Australia, *Proof Committee Hansard*, 29 October 2008, p. 45.

In a perfect environment this might be addressed by a having a single national regulator for the sector. Realistically, however, as we have indicated elsewhere in this submission, Australia's federal structure makes this difficult, and there would be a significant risk that a national regulator would become simply one more body to which a sometimes heavily regulated sector would be required to report, adding another layer of cost and technical complexity to organisations which typically find their resources badly stretched as it is.²⁰

[E]very time there is little bit more regulation, there is a bit less service I can provide for financially disadvantaged people. There will be a cost to any additional regulation that is required.²¹

5.18 Despite these very real concerns, Professor Mark Lyons describes the danger to governments in not having a single national regulator:

- In the absence of a single regulator, governments lack data and knowledge of Australia's nonprofit organisations and are therefore unable to develop appropriate policies to better regulate them and encourage their formation; it is also unable to recognise when parts of the sector will be negatively, though unintentionally affected by other legislation;

...

- The absence of a single comprehensive and competent regulator encourages greater use of concessions available to nonprofit organisations for personal enrichment or to use these organisations for money laundering or to hide other criminal activities than would otherwise be the case;
- In a similar way the absence of a single register reduces the likelihood that the public will inform authorities of possible instances of abuse.²²

Who should be subject to the regulator?

5.19 An issue which divided contributors was the issue of whether a single national regulator should oversee only charities or all Not-For-Profit Organisations. There was general agreement that charities, which rely on public donations for much of their funding, should be more accountable and transparent than other Not-For-Profit Organisations, which are responsible only to their members:

[D]isclosure regimes should be separated for charities and not-for-profits as there is a much greater need for charities to be answerable to donors, where not-for-profits like us are answerable only to their members.²³

20 The Smith Family, *Submission 112*, p. 7.

21 Mr Bruce McKenzie, Aged Care Association of Australia, *Proof Committee Hansard*, 28 October 2008, p. 27.

22 Professor Mark Lyons, *Submission 67*, p. 8.

[W]e would be concerned to ensure that, if there is any such regulator, specific attention is paid to the charitable sector.²⁴

5.20 Within the subset of charities, charities with deductible gift recipient status were thought to warrant even higher regulation:

Charities that receive donations from the public and effectively receive donations from government by having a deductible gift recipient status have greater accountability to the public.²⁵

5.21 Overall, the committee heard that ‘a national regulator for the entire not-for-profit sector is preferred’²⁶ which ‘will ensure the boundaries between charities and other NFPs are well understood’.²⁷ The committee notes that a body which has the authority to make clear the distinction between charities and other Not-For-Profit Organisations in the minds of the general public would go a long way towards addressing the fears of some organisations, as stated in Chapter 2, that the public believes that all Not-For-Profit Organisations are charities.

5.22 Contributors made a link between a single national regulator and the role of a regulator in monitoring the financials of Not-For-Profit Organisations that have, to date, avoided regulation because of their small size.

Mr Sheehy—We are of the view that every not-for-profit should be subjected to minimum governance reporting requirements. In fact, Ms Fox and I were discussing it on the way over and I said, ‘You mean even the Balmain Tigers football club for my 12-year-old?’ and the answer is yes.

Ms Fox—We are not wanting to make it a hugely onerous compliance obligation, but even the local little sporting club should be able to say to the mums and dads: ‘These are the people who sit on the management committee. We raised \$6,000 through sausage sizzles and a chook raffle. We spent \$5,000 on some new soccer balls and some netting.’ It would be really important to know if any money was lent to anyone on that management committee, so any related-party transactions should be known. All of this could be on one page. It is just so that anyone dealing with any not-for-profit, regardless of size, has some basic information about who is the governing body; in other words, those making the decisions, and money

23 Mrs Noela MacLeod, Immediate Past President, Country Women's Association, *Proof Committee Hansard*, 30 October 2008, p. 65.

24 Mr Simon Miller, Special Projects Advisor, Legal, Risk and Governance, World Vision Australia, *Proof Committee Hansard*, 30 October 2008, p. 28.

25 Ms Regina Fickers, Partner, Pricewaterhouse Coopers, *Proof Committee Hansard*, 31 October 2008, p. 35.

26 CPA Australia, *Submission 98*, p. 5.

27 Pricewaterhouse Coopers, *Submission 61*, p. 8.

coming in and money going out. It would not be a detailed profit and loss statement, just some basic information...²⁸

5.23 The CPA Third Age Network Committee warned about capacity issues if all Not-For-Profit Organisations were required to provide financial accounts:

I suppose when you look across this 600,000-odd micro NFPs, the number of accountants that are going to be doing that is very small indeed. The total membership available from ICA and CPAA is likely to be 40,000, stretched full pelt, if they all went in and did this work.²⁹

The regulator

5.24 Those contributors in support of a single national regulator suggested that the regulator be either located in the Australian Securities and Investment Commission (ASIC), sit within the Australian Taxation Office (ATO), or be a body independent from government.

Australian Securities and Investments Commission (ASIC)

5.25 ASIC is an independent Australian Commonwealth body, established under the *Australian Securities and Investments Commission Act 2001* (ASIC Act). It administers both the ASIC Act and the *Corporations Act 2001*. ASIC is Australia's corporate, markets and financial services regulator, which contributes:

...to Australia's economic reputation and wellbeing by ensuring that Australia's financial markets are fair and transparent, supported by confident and informed investors and consumers.³⁰

5.26 All Not-For-Profit Organisations that are companies limited by guarantee are currently subject to regulation by ASIC and familiar with ASIC's requirements. Among the advantages of having a Not-For-Profit Regulator located within ASIC would be that the regulator could then:

...share existing infrastructure and avoid duplication of knowledge resources such as directors' registers. The body should however have its own resources dedicated only to the NFP sector.³¹

5.27 Mr Peter Callaghan, of Community Employment Options Inc. agrees that ASIC is an appropriate body:

28 *Proof Committee Hansard*, 31 October 2008, p. 14

29 Mr Garry Bartlett, Chair, Voluntary and Honorary Work Subcommittee, CPA Australia Third Age Network, *Proof Committee Hansard*, 30 October 2008, p. 84.

30 Australian Securities and Investments Commission, *What we do*, <http://www.asic.gov.au/asic/asic.nsf/byheadline/Our+role?openDocument> (accessed 7 November 2008).

31 Pricewaterhouse Coopers, *Submission 61*, p. 9.

ASIC is the regulatory organisation for the country and so it seems to me that a unit within ASIC is probably more appropriate than establishing another regulatory environment in the community that adds to all the regulation that already exists.³²

5.28 However, the committee was informed by contributors that ASIC's focus was for-profit organisations, and would remain so.

[W]hen you talk about regulation, my experience, and the experience of my colleagues in the Law Council, is that neither ASIC nor the state and territory regulators have had the slightest interest in regulating the activities of not-for-profit organisations. If you look at the reported cases in this area, there is only one case of which I am aware where ASIC has taken a not-for-profit to court in relation to regulatory issues. It almost never happens in the case of the state and territory regulators.³³

It [ASIC] is unlikely to ever give the attention to the sector that the sector deserves and warrants, because it would always only be, if not a minor, certainly a subset of its main game, and the role that we seek for the independent regulator, independent commission or not-for-profit commission or whatever is one that does much more than simply help with the definition and the regulation, but that does provide the support, encouragement, back-up and education for the sector that has the needs across the country. I think that needs to come from an organisation that is dedicated to, and knows, the sector inside out, as business would seek for itself.³⁴

5.29 Professor Myles McGregor-Lowndes, Director of the Australian Centre for Philanthropy and Nonprofit Studies at the Queensland University of Technology argues that there is merit in the regulator being located within ASIC 'if a stand alone regulator was not an option'. He notes that:

ASIC already has significant computing and agency infrastructure to receive, process and retrieve for public consumption significant amounts of entity returns, efficiently and effectively. Consideration would have to be given to ensure ASIC's focus on its core functions did not lead to a neglect of its nonprofit regulatory function through a combination of alteration of its legal mandate and appropriate cultural management.³⁵

32 Mr Peter Callaghan, Chief Executive Officer, Community Employment Options Inc., *Proof Committee Hansard*, 18 July 2008, p. 5.

33 Mr A.D. Lang, Representative, Law Council of Australia, *Proof Committee Hansard*, 29 October 2008, p. 37.

34 Mr Michael Raper, Director of Services and International Operations, Australian Red Cross, *Proof Committee Hansard*, 30 October 2008, pp 49-50.

35 *Submission 27*, Attachment A, p. 1.

Australian Taxation Office (ATO)

5.30 The ATO is ‘the Government’s principal revenue collection agency, and is part of the Treasurer’s portfolio’.³⁶ Given that the ATO currently makes rulings about the eligibility of Not-For-Profit Organisations for tax deductions³⁷, the majority of contributors considered that the ATO was unsuitable to house a regulatory body because it would be considered a ‘conflict of interest’.³⁸

5.31 The committee notes that the role of the regulator would logically extend beyond taxation considerations, and agrees that the ATO is not well-positioned to undertake the role of a regulator.

Independent regulator

5.32 The majority of submitters who discussed a national regulator were in favour of a body that is independent from Government. The committee heard that:

Location within an existing institution is one solution, such as the ASIC or perhaps more suitably the ATO. However, such a situation would cause some concern about the independence of the body. Charities have a role in openly criticising government policy where it impacts on marginalised Australians. The Society is a strong advocate for marginalised Australians. The National Regulator should preferably be independent of government and subject to judicial review to avoid any conflict of interest or undue political interference.³⁹

Legislative issues

5.33 As discussed in Chapter 4, many Not-For-Profit Organisations are incorporated associations, and are, therefore, subject to state and territory legislation administered by the relevant state or territory government. (Further information on incorporated associations can be found in Chapter 7.) State and territory governments also have the responsibility of administering state and territory fundraising legislation. Professor Mark Lyons believes that the current system is inadequate because:

...we are now a century beyond six colonies and because there is no particular reason why states would want to continue in this field. It does not generate revenue for them. They commit almost no resources to it, so there

36 Australian Taxation Office, *About us*, http://www.ato.gov.au/corporate/pathway.asp?pc=001/001/002&mfp=001&mnu=39512#001_01_002 (accessed 7 November 2008).

37 Murray Baird in Debate, Issue 3, September 2008, also writes that ‘there are implicit conflicts in putting the Commissioner of Taxation at the gateway to charitable concessions’.

38 Ms Karen Mackay, Project Manager, Association of Neighbourhood Housing and Learning Centres, *Proof Committee Hansard*, 29 October 2008, p. 5.

39 St Vincent de Paul Society, *Submission 90*, p. 19.

is little public benefit from what they do. I argue that it should be standalone.⁴⁰

5.34 For a single national regulator to regulate Not-For-Profit Organisations, it must first have the power under law to do so. Chapters 7 and 9 examine the current state of Australian legislation relating to the legal structures and fundraising activities of Not-For-Profit Organisations. In those Chapters, the committee discusses the advantages and disadvantages of having legislative power vested in the states and territories versus vested in the Commonwealth Government.

Funding for a national regulator

5.35 The majority of contributors to this Inquiry did not address the issue of funding of a national regulator. The Charity Commission in England and Wales is funded by the government – this was at a cost of £33.5 million (about 0.002 per cent of UK GDP; the same proportion of Australian GDP would represent around \$25 million) in the year 2007/08.⁴¹ Mr John Peacock, of the Association Forum Ltd, believes that there are advantages associated with asking organisations to pay a fee to be registered:

One of the issues that the Senate economics committee should consider is whether we impose some sort of a charge for people if they are on it. That might help efficiencies. Organisations might say, ‘We have to pay this fee of a couple of thousand dollars to maintain our independence. Maybe we should merge with another two or three organisations instead of each having to pay these fees.’⁴²

The committee believes that very small or micro Not-For-Profit Organisations should be exempt from these fees.

5.36 PilchConnect suggested that the expense and ongoing resourcing of a new national regulator could be minimised by:

- exploring the use of the significant experience and resources of ASIC in on-line data collection, storage and searching, possibly in conjunction with a sector-managed resource...
- cost sharing with the States because of savings achieved by no longer needing separate regulators in each State and Territory
- cost savings achieved by fewer staff required in the ATO (their role will be to apply the revenue laws rather than having to determine eligibility), and

40 Professor Mark Lyons, *Proof Committee Hansard*, 29 October 2008, p. 61.

41 Charity Commission, *Annual Report 2007-08*, p. 14, <http://www.charitycommission.gov.uk/Library/spr/pdfs/annrep2008pt1.pdf> (accessed 8 November 2008).

42 Mr John Peacock, General Manager, Associations Forum Pty Ltd, *Proof Committee Hansard*, 31 October 2008, p. 59.

- cost savings to the NFP sector by a reduction in red tape and, therefore, greater capacity and efficiencies in delivery by NFPs of government / public funded services.⁴³

Committee View

5.37 The committee notes that the 2001 Inquiry concluded that:

The Committee's recommendations throughout this Report seek to provide options for enhancing the clarity and consistency of definitions within Commonwealth law and administrative practice. In our view, while the adoption of a new framework within Commonwealth areas of responsibility would produce worthwhile improvements, clarity and consistency could be further significantly improved by adopting a similar approach to definitions across all jurisdictions.

If the States continued to operate according to a different definitional regime, there would be added confusion within the sector and the community, and the administrative burden on charities and related entities could conceivably worsen.

The Committee therefore believes it is important that the Commonwealth seek the agreement of all State and Territory Governments to adopt a common framework for the definition of charities and related entities for use in all relevant legislation and administrative practice.⁴⁴

5.38 The committee agrees that the current environment for Not-For-Profit Organisations with multiple regulators is a concern and may put at risk the efficiency and effectiveness of the work of these organisations. Similarly, the committee is aware that transparency and accountability may be compromised by a complex regulatory system. The codes of conduct for self-regulation developed by ACFID and FIA are excellent starting points; however, as only members of the organisations are required to comply, there is still scope for abuse of the system or unintentional mismanagement by the other 700,000-odd Not-For-Profit Organisations operating in Australia.

5.39 The committee therefore endorses the recommendation that there be a single national regulator in Australia. The regulator should regulate both charities and other Not-For-Profit Organisations from its establishment. If the Sector is divided for the purpose of regulation, it risks losing its emerging status as a Sector in its own right, thereby weakening its force and bargaining power in its common goals of improved transparency and accountability.

5.40 All Not-For-Profit Organisations should be subject to the regulator regardless of size. In Chapter 10 the committee discusses ways to ensure that smaller Not-For-

43 PilchConnect, *Submission 129*, p. 6.

44 Inquiry into the Definition of Charities and Related Organisations, Summary of Recommendations, http://www.cdi.gov.au/report/cdi_summaryofrecs.htm (accessed 7 November 2008).

Profit Organisations are transparent through appropriate disclosure regimes and yet still accountable, without placing an unreasonable burden on them.

5.41 The committee notes the difficulties that will be associated with forming a national regulator, when much of the current legislation is administered through states and territories. Potential solutions to this issue are provided in upcoming Chapters.

5.42 There will continue to be debate over whose purview a national regulator should sit under. The committee is comfortable in rejecting the notion of the ATO as an appropriate body given that it was not established to have a regulatory function. Effectively, submitters to this Inquiry have called for a not-for-profit version of ASIC to govern the Sector. It may be argued that many Not-For-Profit Organisations already report to ASIC under the *Corporations Act 2001* and therefore there will be less disruption to the system if ASIC were to set up a Not-For-Profit unit to regulate the entire sector. After all, ASIC has expertise in regulating a vast number of organisations and has comprehensive systems in place to ensure its effectiveness.

5.43 However, ASIC's main role is in the regulation of the Business Sector, whose objectives and aims are vastly removed from those of Not-For-Profit Organisations. To take on the entirety of the Sector would require a culture change within the organisation. This would be aided by changing its name to reflect a broader role.

5.44 The committee prefers that the national regulator should be a new body. This will reinforce to the public the importance of the Sector to Australia's economy and social health and will be a visible reminder that the public can have confidence that the Sector is being well managed. The committee acknowledges that establishing a body independent from the established systems that are in place at ASIC will create additional expense. It is hoped that secondees from ASIC could assist in its establishment.

5.45 The committee is unable to make a firm recommendation as to how the system will be funded, but firstly believes that the suggestions provided by PichConnect should be explored. Secondly, the committee notes that ASIC's budget for 2008-09 is \$726 million.⁴⁵ Given the size of the Sector, it is not unreasonable to expect the Government to also support a Not-For-Profit regulator. As suggested by Mr Peacock of the Associations Forum Pty Ltd, charging a fee registering with the regulator may also be a way to share the cost of the body. However, very small and micro Not-For-Profit Organisations should be provided with an exemption to ensure their stability and on-going viability.

Recommendation 3

5.46 The committee recommends that there be a single independent national regulator for Not-For-Profit Organisations.

45 Budget, *Portfolio Budget Statements 2008-09*, no. 1.17, Treasury Portfolio, p. 130.

Chapter 6

Models of regulation

6.1 The previous Chapter determined that a single national regulator should be established for Not-For-Profit Organisations in Australia. This chapter determines the functions of such a regulator, based on the functions of established regulatory bodies for non-for-profit organisations in England and Wales and New Zealand.

The Regulator for Charity in England and Wales

6.2 A large number of submitters to this Inquiry commended the Charity Commission in England and Wales (also colloquially referred to as the UK Charity Commission) to the committee as an example of a regulator which is working well in a number of areas and could be modified for adoption in Australia:

The Charity Commission in the UK is the best practice model. It has as its focus the sustainability of the whole sector. It is the face of the nonprofit sector and focuses on more than disclosure regimes.¹

CSA points to the UK Charity Commission as one possible model for such a specialist regulator.²

Australian regulation does not differentiate between social enterprises and charities, failing to address the differences in their operations. FIA recommends the consideration of a model of regulation that recognises the difference between charities and social enterprises similar to the UK model.³

Mission Australia recommends the establishment of a national body that would regulate the charity sector, with a structure similar to the regulatory bodies established in the UK and New Zealand.⁴

6.3 The Charity Commission for England and Wales was established by law as both a regulator and a registrar for Charities. The aim of the Commission is 'to provide the best possible regulation of these charities in order to increase charities' efficiency and effectiveness and public confidence and trust in them'.⁵ The Commission notes that it fulfils the role by:

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- 1 Professor Myles McGregor-Lowndes, Australian Centre for Philanthropy and Nonprofit Studies, QUT, *Submission 27*, p. 7.
 - 2 Chartered Secretaries Australia, *Submission 17*, p. 12.
 - 3 Fundraising Institute Australia, *Submission 77*, p. 9.
 - 4 Mission Australia, *Submission 174*, p. 5.
 - 5 Charity Commission, *About Us*, <http://www.charitycommission.gov.uk/tcc/ccabout.asp> (accessed 10 November 2008).

- securing compliance with charity law, and dealing with abuse and poor practice;
- enabling charities to work better within an effective legal, accounting and governance framework, keeping pace with developments in society, the economy and the law; and
- promoting sound governance and accountability.⁶

6.4 To achieve these aims, the Commission works in four ways. These include:

- (a) Using information and advice to influence behaviour – the Commission is responsible for gathering information on charities individually and collectively, and making this information public.
- (b) Equipping charities to work better – this is done through providing guidance and advice, visiting charities, requiring the modernisation of the constitutions of existing charities and by registration processes (which may include recognising new charitable purposes).
- (c) Promoting legal compliance through publications and casework.
- (d) Intervention and enforcement – the Commission evaluates complaints of mismanagement or misconduct or investigates other evidence of possible causes for concern. The Commission has powers to intervene in charities to protect charity assets, which can be used if formal investigation establishes serious mismanagement or abuse.⁷

6.5 In undertaking its work, the Commission follow seven principles, which include: accountability; independence; proportionality; fairness; consistency; diversity and equality; and transparency.

Register of Charities

6.6 In its role as Registrar of Charities, the Commission is responsible for maintaining a Register of Charities. The Register records details of organisations that:

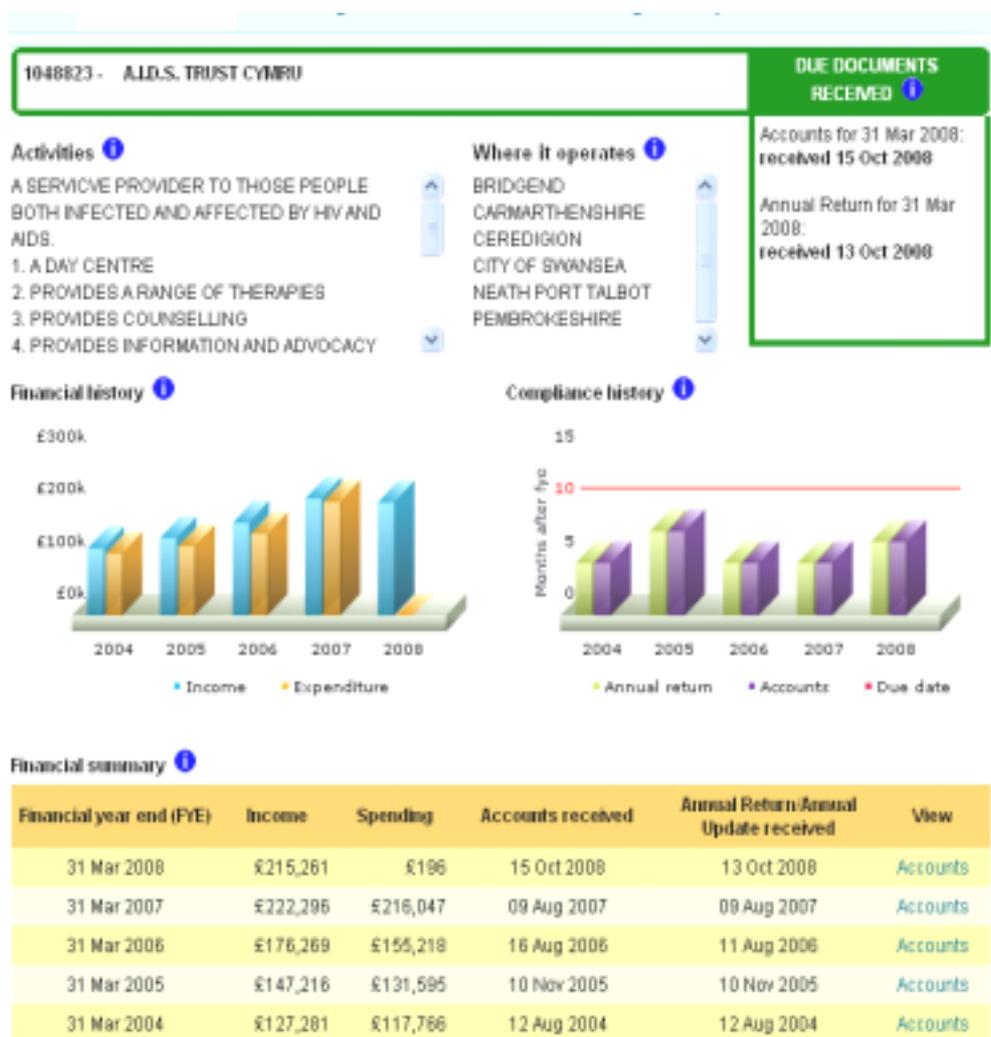
- have been recognised as charitable in law;
- hold most of their assets in England and/or Wales;
- have all or the majority of their trustees normally resident in England and/or Wales, or
- are companies incorporated in England or Wales.⁸

6 Charity Commission, *The Charity Commission and Regulation*, <http://www.charitycommission.gov.uk/spr/regstance.asp> (accessed 10 November 2008).

7 Charity Commission, *The Charity Commission and Regulation*, <http://www.charitycommission.gov.uk/spr/regstance.asp> (accessed 10 November 2008).

8 Charity Commission, *Welcome to the Register of Charities*, <http://www.charity-commission.gov.uk/Showcharity/RegisterOfCharities/RegisterHomePage.aspx?Language=English> (accessed 10 November 2008).

6.7 The Register is maintained online and is a searchable register that provides a range of key facts and figures about the work and finances of each charity. It records details about who is responsible for running the charity and records whether they have complied with their reporting and accounting responsibilities. Larger entities with an income in excess of £500,000 must also include a financial profile. Information for the Register is collected from Annual Returns provided by Charities.



6.8 The above was retrieved from the Register. The search term 'AIDS' was used which revealed that the Regulator monitors 13 AIDS-related charities in England and Wales. The register of the first entry on the list, A.I.D.S. Trust Cymru, is pictured. Each entry shows the registered number of the charity, its activities, where it operates, a financial history, a compliance history and a financial summary, with additional links to view the accounts of the organisation.

9 Register of Charities, *A.I.D.S. Trust Cymru*, <http://www.charitycommission.gov.uk/ShowCharity/RegisterOfCharities/CharityWithoutPartB.aspx?RegisteredCharityNumber=1048823&SubsidiaryNumber=0> (accessed 15 November 2008).

6.9 The Register also serves a purpose for those wishing to find out more about a charity in England or Wales, potentially to donate or offer volunteer services. For example, a person living in Bridgend who wished to donate to a local HIV charity could use the Register to locate A.I.D.S. Trust Cymru. It is likely that this function could be expanded to include all Not-For-Profit Organisations should a similar register operate in Australia.

New Zealand Charities Commission

6.10 The New Zealand Charities Commission was established by the *Charities Act 2005* and commenced operation on 1 July 2005. The Commission is an Autonomous Crown Entity, which is a body that has been established by, or under, an Act and is independent of Government, but which must have regard to government policy when directed by the responsible Minister.¹⁰

6.11 In announcing its intention to establish a charities commission, the New Zealand Government indicated that:

One of the key drivers for the Commission's establishment is the desire to uphold public trust and confidence in the charitable sector by increasing its accountability to donors, the public and the Government.¹¹

6.12 The *Charities Act 2005*, which was passed by the New Zealand Parliament in April 2005, specifies the functions of the Commission, which include:

- promoting public trust and confidence in the charitable sector;
- encouraging and promoting the effective use of charitable resources;
- educating and assisting charities in relation to matters of good governance and management though, for example, providing information to charities about their rights, duties and obligations under the Act, issuing guidelines or recommendations, and issuing model rules;
- establishing and maintaining a registration and monitoring system for charitable organisations;
- monitoring and promoting compliance with the Act;
- stimulating and promoting research about the charitable sector; and
- reporting and making recommendations to Government about charitable sector matters.¹²

10 Charities Commission (undated), *Statement of Intent 2007-2010*, Wellington, New Zealand.

11 Ministry of Economic Development, *Overview of Key Decisions. Regulatory and Competition Policy Branch*, online at www.med.govt.nz/templates/MultipageDocumentPage_7469.aspx (accessed 30 September 2008).

12 Clause 10, *Charities Act 2005* (New Zealand).

Registration and Monitoring

6.13 One of the Commission's primary functions is the registration and monitoring of charities. The Charities Register commenced registrations on 1 February 2007 and charities had until 1 July 2008 to register.

6.14 Registering with the Charities Commission is voluntary and has no bearing on the legal status of a charitable organisation. For example, registration with the Charities Commission does not replace incorporation under the *Incorporated Societies Act 1908*. Incorporated societies must, however, still register with the Charities Commission if they want to gain or maintain tax exempt status.

6.15 A charity that chooses not to register with the Commission may still call itself a charity and solicit funds from the public, however unregistered charities do not qualify for tax exempt status. Such organisations are also not entitled to refer to themselves as a 'registered charitable entity'.¹³

Monitoring

6.16 All charities registered with the Charities Commission are required to file an annual return, along with a copy of their financial accounts (audited or unaudited). The Annual Return Form collects information about the:

- sector and region in which the charity operates;
- activities undertaken by the charity and who benefits from those activities; and
- people involved in the charity, including number of employees and volunteers.

6.17 The return also requires financial information relating to income and expenditure, assets and liabilities, and equity, broken down into a number of categories, including: membership fees; donations; grants; salaries and wages; and investments. In addition to the annual return, registered organisations are required to notify the Commission of changes to a charity's name, address for service, balance date, rules, purposes or officers, within specified timeframes.

6.18 Financial penalties may be applied to charities that do not file Annual Returns in a timely fashion, and to organisations that fail to notify the Commission of changes to the organisation.

Costs

6.19 Registration is provided free of charge, however organisations are required to pay a fee for filing their annual return. In July 2008 the fee was \$50 if the return was

13 Charities Commission, *About Registration*, www.charities.govt.nz/guidance/about_registration.html (accessed 24 October 2008).

filed electronically online and \$75 if the annual return was filed in paper form. Organisations would also face compliance costs in ensuring that annual returns were correctly completed and filed on time.

An Australian Model

6.20 In addition to the endorsements for existing registers, the Committee heard numerous suggestions for the functions of an Australian register:

Its primary role shall be that of an enforcement authority with supportive advisory role.¹⁴

Such a body would:

- set the format for the way that information is reported;
- monitor organisational compliance, and
- act when organisations fail to comply with the regime (ie by failing to supply information, or by supplying inadequate information).¹⁵

[W]e believe such a body should take on more of an advisory role providing assistance and a level of accreditation of such organisations. These could involve:

- a. setting parameters and guidelines for best practice;
- b. approving exemptions from reporting requirements as referred to above;
- c. assisting in the establishment of training programs; and
- d. promoting the principals of good corporate governance.¹⁶

An Australian body should have a role to support charities to understand and comply with their obligations in the first instance, as well as enforcing standards and investigating breaches and complaints where they occur.¹⁷

6.21 In considering the possible functions of a national regulator in Australia, the committee examined the functions of the existing regulator for indigenous corporations operating in Australia.

Office of the Registrar of Indigenous Corporations – An Australian Case Study

6.22 The Registrar of Indigenous Corporations is an independent statutory office holder who is responsible for the administration of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (CATSI Act). The Registrar has 'powers to intervene

14 CPA Australia, *Submission 98*, p. 5.

15 Wesley Mission Melbourne, *Submission 58*, p. 3.

16 Moore Stephens, *Submission 115*, p. 3.

17 Oxfam Australia, *Submission 116*, p. 12.

that are similar to those exercised by the Australian Securities and Investments Commission (ASIC).¹⁸ The role of ORIC is to support the Registrar.

6.23 ORIC is an agency of the Department of Families and Housing, Community Services and Indigenous Affairs. It is responsible for regulating approximately 2,600 Indigenous corporations, including charities and Not-For-Profit Organisations.

6.24 The key functions of the Registrar and ORIC are to:

- administer the CATSI Act and maintain the register of Aboriginal and Torres Strait Islander Corporations
- regulate corporations which are registered under the CATSI Act
- monitor the legislative compliance of corporations and assisting corporations to maintain compliance
- appoint special administrators when required
- provide training for directors, members and key staff in good corporate governance
- advise individuals and groups on the registration process
- register new corporations
- assist corporations to transition from the ACA Act to the CATSI Act
- provide advice and information to corporations
- assist with the resolution of disputes within and between corporations.¹⁹

6.25 Like the Charity Commission in England and Wales, ORIC has an enforcement function:

Under the CATSI Act the Registrar has the power to investigate alleged corporate offences, to identify cases that are appropriate for referral as a prosecution, and to refer these matters to the appropriate prosecution agency. These investigation and referral powers enable the Registrar to respond when alleged corporate offences come to light, further increasing the transparency and security of Indigenous corporations for funding bodies and the broader business sector.²⁰

6.26 ORIC's system of regulation has not been comprehensively evaluated to date. However, in its recent publication *Overcoming Indigenous Disadvantage: Key Indicators 2007*, the Productivity Commission designated ORIC's training program,

18 Office of the Registrar of Indigenous Corporations, *About the Registrar and ORIC*, http://www.orac.gov.au/about_ORIC/default.aspx (accessed 10 November 2008).

19 Office of the Registrar of Indigenous Corporations, *Submission 161*, p. 2.

20 Office of the Registrar of Indigenous Corporations, *Submission 161*, p 13.

and ORICs training partnership with the Victorian state government and Swinburne University, as 'Things that work' in the field of increasing governance capacity and skills.²¹

Committee View

6.27 The committee notes the aims, objectives and functions of the national regulators in the UK and New Zealand. The committee is also aware that neither system of regulation can be copied and implemented without change into Australia. The two fundamental differences between an Australian regulator and the overseas model are that:

- Australia's Commission should regulate both charities and other Not-For-Profit Organisations; and
- All Not-For-Profit Organisations should be subject to the regulator, regardless of size (appropriate disclosure regimes for organisations based on size are discussed in Chapter 10).

6.28 However, the committee believes there is sufficient comparability between the Australian and UK environment to propose certain functions of the Australian national regulator. The committee has also had regard to the role of ORIC, which is already operating successfully in Australia, in recommending the following functions:

- (a) Develop and maintain a Register of all Not-For-Profit Organisations in Australia. Once registered, the Commission should issue each organisation with a unique identifying number or allow organisations with an ABN to use that number as their Not-For-Profit identifier. This could be enabled using existing ASIC website resources.
- (b) Undertake either an annual descriptive analysis of the organisations that it regulates or provide the required information annually to the ABS for collation and analysis. (Chapter 2 provides additional justification for this function.)
- (c) Secure compliance with the relevant legislation.
- (d) Develop best practice standards for the operation of Not-For-Profit Organisations.
- (e) Educate / Advise Not-For-Profit Organisations on best practice standards.
- (f) Investigate complaints relating to the operations of the organisations.
- (g) Educate the public about the role of Not-For-Profit Organisations.

21 Productivity Commission, *Overcoming Indigenous Advantage: Key Indicators 2007*, http://www.pc.gov.au/data/assets/pdf_file/0003/69276/keyindicators2007.pdf, p. 646, (accessed 27 November 2008).

6.29 Under a single, national regulator, ORIC would cease to operate as an entity. The new regulator would assume the responsibility of regulating indigenous Not-For-Profit Organisations, allowing these organisations the same access to the benefits that other Not-For-Profit Organisations are expected to gain from the introduction of the national regulator (as identified in Chapters 7, 9 and 10).

6.30 The committee notes that requiring all Not-For-Profit Organisations to register will have the added advantage of allowing for the first time a comprehensive descriptive analysis of the Sector.

6.31 The committee also believes that the introduction of a single national regulator will have extensive benefits for those operating Not-For-Profit Organisations. It is anticipated that an Australian National regulator would have an educative function, providing training courses, advice, basic IT spreadsheet systems and help for those establishing Not-For-Profit Organisations with a 'starter kit'. The regulator would also offer free help and advice for organisations wishing to amalgamate with similar organisations.

6.32 The regulator would also assist organisations with sharing part time staff, and providing details of pro bono lawyers and accountants if required. This function would be especially helpful for Not-For-Profit Organisations operating in rural and regional areas.

6.33 A national regulator would also give the general public a role in monitoring the Sector. Any person could check that an organisation that fundraises or doorknocks is a genuine, well regulated Not-For-Profit Organisation simply by looking up that organisation on the Register. If an organisation does not appear on the Register's website, indicating that it is not registered as required, it could be reported to the regulator for further investigation and possible prosecution.

6.34 To offset the cost of operations, larger Not-For-Profit Organisations should pay a fee, as with the New Zealand Regulator. The committee believes that micro Not-For-Profit Organisations should be exempt from this fee. The payment of an annual fee may also serve as a reminder to organisations with minimal reporting requirements under the regulator to ensure that their details are current.

Recommendation 4

6.35 The committee recommends that the Australian National Regulator for Not-For-Profit Organisations should have similar functions to regulators overseas, and particularly in the UK, including a Register for Not-For-Profit Organisations with a compulsory sign-up requirement. The committee recommends consultation with the Sector to formulate the duties of the National Regulator.

6.36 **As a minimum, the Regulator should:**

- (a) **Develop and maintain a Register of all Not-For-Profit Organisations in Australia. Once registered, the Commission should issue each**

organisation with a unique identifying number or allow organisations with an ABN to use that number as their Not-For-Profit identifier. This could be enabled using existing ASIC website resources.

- (b) **Develop and maintain an accessible, searchable public interface.**
- (c) **Undertake either an annual descriptive analysis of the organisations that it regulates or provide the required information annually to the ABS for collation and analysis. (Chapter 2 provides additional justification for this function.)**
- (d) **Secure compliance with the relevant legislation.**
- (e) **Develop best practice standards for the operation of Not-For-Profit Organisations.**
- (f) **Educate / Advise Not-For-Profit Organisations on best practice standards.**
- (g) **Investigate complaints relating to the operations of the organisations.**
- (h) **Educate the public about the role of Not-For-Profit Organisations.**

6.37 The voluntary codes of conduct developed by ACFID and FIA respectively should be considered by the Regulator when implementing its own code of conduct.

Recommendation 5

6.38 The committee recommends that the Commonwealth Government develops the legislation that will be required in order to establish a national regulator for Australia.

Recommendation 6

6.39 The committee recommends that, once a Register is established and populated, this information should be provided to the ABS, who should prepare and publish a comprehensive study to provide government with a clearer picture of the size and composition of the Third Sector.

Chapter 7

Legal Structures

7.1 This Chapter describes the most common legal structures under which Not-For-Profit Organisations can be constituted currently and weighs the advantages and disadvantages of each form with regards to the suitability of its application for all Not-For-Profit Organisations.

7.2 In a background paper made available to all submitters (Appendix 3), the committee questioned whether a specialist legal structure for all Not-For-Profit Organisations might benefit the sector. This Chapter investigates the suitability of a specialist legal structure for the entire Sector and the potential forms of such a structure. The involvement of states and territories in any legal structure reform is explored.

Existing legal structures

7.3 There are a range of legal structures available to anyone wishing to establish a not-for-profit organisation. The most numerically common legal structure is the unincorporated association governed by common law principles. The most common corporate status is Company Limited by Guarantee or Incorporated Associations under relevant state or territory acts. There are numerous other structures under which not-for-profit organisations can be formed, including, but not limited to: trusts; cooperatives; Aboriginal corporations; unincorporated associations; religious organisations that may or may not be statutory corporations; Royal Charter; and special Act of Parliament. These legal structures impose a statutory obligation on the not-for-profit organisation with the exception of the unincorporated association, discussed below. Woodward and Marshall commented that:

...the current myriad of legal structures leads to confusion and inefficiencies in regulation. Consideration should be given to combining the best aspects of corporations law and the incorporated associations regimes.¹

7.4 The following discussion will be limited to the most common forms of legal structures for Not-For-Profit Organisations due to the number of different ways in which an organisation can operate. However, the current legislative environment is described by the Alliance (Community and Residential Care Providers) as being 'complex, inconsistent and confusing across Australia'.² Professor Mark Lyons elaborates:

1 Woodward, S. and Marshall, S., *A Better Framework: Reforming Not-For-Profit Regulation*, University of Melbourne, 2004, Chapter 3.

2 The Alliance, *Submission 28*, p. 4.

One way of illustrating this is to look at the decisions faced by persons wishing to start or incorporate a previously unincorporated nonprofit association. In any state or territory they are faced with at least three possible ways of proceeding: as a company limited by guarantee (a form of public company), as an association or as a cooperative. If they were an aboriginal group they could look at incorporating as an aboriginal corporation. But in some states, if they were an association of government school parents they would be required to incorporate under the education act. If it was a trade union they formed, another different route to incorporation would be required. Alternatively, if they were faith-based they might avoid incorporation while apparently obtaining its advantages through their standing with their sponsoring denomination, itself incorporated by a special act of parliament.³

Unincorporated Associations

7.5 Unincorporated not-for-profit associations are generally not required to be registered. They are not legal entities and therefore impose few legal obligations on members; however, unincorporated associations are considered to be both an entity and a company for income tax purposes.⁴ Large political parties and their branches, and large religious organisations are often combinations of unincorporated associations of members and corporate property trusts subject to the direction of the unincorporated association members. These organisations have the resources to choose other legal forms but have decided that this arrangement best suits their purposes.

7.6 In effect, an unincorporated association is a group of members that have come together for a common purpose. By number, unincorporated associations are the most common legal structure used by Not-For-Profit Organisations and are generally presumed to be small operators. The committee heard that, while it is the preferred legal structure of many organisations, 'an unincorporated association is a very dangerous creature. There are lots of cases that I could take you to that would fully illustrate that'.⁵

7.7 There are no reporting requirements for unincorporated associations, although these organisations are required to comply with any relevant legislation (ie. an unincorporated association that undertakes a fundraising appeal is required to follow the directives laid out in the relevant state fundraising act.

7.8 The committee heard that stakeholders were concerned that small organisations not be subject to burdensome reporting and disclosure regimes under any reform to the Third Sector. (Chapter 10 discusses this issue further.)

3 Professor Mark Lyons, *Submission 67*, p. 5.

4 *Income Tax Assessment Act 1997*, Division 995-1.

5 Mr A.D. Lang, Representative, Law Council of Australia, *Proof Committee Hansard*, 29 October 2008, p. 43.

7.9 The committee is aware of the risk that the establishment of any formal disclosure regime for unincorporated associations may be seen to be onerous, and, in the worse case scenario, may provide a disincentive for the continuation of these (often) small organisations. However, it is the role of the committee to balance this possibility with what it believes is a public expectation that even small organisations are answerable to the government and the community in the event of fraud, mismanagement, or concerns for public safety.

Companies Limited by Guarantee

7.10 A company limited by guarantee 'means a company formed on the principle of having the liability of its members limited to the respective amounts that the members undertake to contribute to the property of the company if it is wound up'.⁶ According to the Treasury:

There are approximately 11,000 companies limited by guarantee registered under the Corporations Act 2001. This figure has been growing at 6 per cent per annum in recent years.⁷

7.11 Not all companies limited by guarantee are not-for-profit although the reporting requirements are the same for all. Companies limited by guarantee are subject to the *Corporations Act 2001*, which is administered by the Australian Securities and Investments Commission (ASIC). It is a requirement that these companies:

- Have at least 3 directors and 1 secretary;
- Have at least 1 member;
- Have a registered office address and principal place of business located in Australia;
- Have its registered office open and accessible to the public;
- Be internally managed by a Constitution or Replaceable rules;
- Maintain a register of its members;
- Keep a record of all directors' and members' meeting minutes and resolutions;
- Appoint a registered company auditor within 1 month of its registration;
- Keep proper financial records;
- Prepare, have audited and lodge financial statements and reports at the end of every financial year;

6 *Corporations Act 2001*, s. 9.

7 Australian Treasury, *Submission 169*, p. 18.

- Send to its members a copy of its financial statements and reports, unless the member has a standing arrangement with the company not to receive them;
- Hold an Annual General Meeting once every calendar year within 5 months of the end of its financial year;
- Receive and review an annual company statement and pay an annual review fee; and
- Lodge notices whenever changes to its officeholders, office addresses, constitution and its name occur within specified timeframes as determined by the Corporations Act 2001.⁸

7.12 In their 2004 survey of Not-For-Profit companies, Woodward and Marshall found that:

[M]ore than half (52%) of respondents indicated ‘public perception and status’ was an important factor in the decision to use a company structure rather than an incorporated association. This supported anecdotal evidence that ‘serious’ or ‘more sophisticated’ NFP organisations use the Corporations Act 2001 (Cth) rather than incorporated associations’ legislation.⁹

7.13 In compiling their final report, the authors also found that a significant percentage of organisations chose a company limited by guarantee to be their structure because it was a requirement of grant makers. Woodward and Marshall go on to hypothesise that:

Whilst we are unaware of any government funding agreements that require the company limited by guarantee structure, many funding agreements specify that an organisation must be ‘incorporated’ before receiving funds. This general requirement, combined with the results for ‘public perception and status’, may mean that government funding agreements are being interpreted as requiring a company limited by guarantee structure.¹⁰

7.14 The committee heard a range of different views about the suitability of the company limited by guarantee structure for Not-For-Profit Organisations. Mr David Sharpe, of the Australia Council for the Arts informed the committee that as a grant-making body, they ‘ask for a particular standard of financial reporting and that standard is in line with the *Corporations Act*’.¹¹

8 Australian Securities and Investments Commission, *Registering not-for-profit or charitable organisations*, <http://www.asic.gov.au/asic/asic.nsf/byheadline/Registering+not-for-profit+or+charitable+organisations?openDocument> (accessed 3 November 2008).

9 Woodward, S. and Marshall, S., *A Better Framework: Reforming Not-For-Profit Regulation*, University of Melbourne, 2004, p. 58.

10 Woodward, S. and Marshall, S., *A Better Framework: Reforming Not-For-Profit Regulation*, University of Melbourne, 2004, p. 59.

11 Mr David Sharpe, Program Manager, Business Capacity Building, Australia Council for the

7.15 The committee notes that support for a specialist legal structure for Not-For-Profit Organisations was not absolute. Ms Catherine Brown, a lawyer, consultant and director, told the committee that, while she supported a single legal structure, 'we would suggest that this should be a company limited by guarantee with public reporting obligations'¹².

7.16 In a document submitted to the committee (Tabled documents, Appendix 1), Mr A.D. Lang, a barrister, summarises the advantages he perceives with the company limited by guarantee structure, including:

- No restrictions on trading.
- Can carry on business in every state and territory with a single registration.
- Can have only 1 member, ie. be a subsidiary.
- ASIC doesn't scrutinise constitutions or amendments to constitutions.¹³

7.17 Similarly, he notes the perceived disadvantages of the structure for Not-For-Profit Organisations:

- The Corporations Act was never intended to regulate not-for-profit organisations:

Its purpose is to regulate profit-making companies.

It is so long and convoluted as to be virtually incomprehensible, even to lawyers.

The provisions that apply to companies limited by guarantee are scattered, almost at random, throughout the Act.

In practical terms it will be difficult for a company limited by guarantee to comply with all the requirements of the Corporations Act without a qualified company secretary.

- All companies limited by guarantee are necessarily public companies:

As such, they must allow proxies.

They cannot prevent non-members from being appointed proxies, and thereby participating in its general meetings.

A small number of disgruntled members (5% or 100, whichever is fewer) can requisition a general meeting whenever and as often as they like.

Arts, *Proof Committee Hansard*, 31 October 2008, p. 70.

12 Ms Catherine Brown of Catherine Brown and Associates, *Proof Committee Hansard*, 30 October 2008, p. 2.

13 Mr A.D. Lang, *Pros and Cons of Companies Limited by Guarantee versus Incorporated Associations*, Appendix 1, p. 1.

Directors can be sacked by a simple majority at a general meeting even without cause.

- The statutory duties and potential liability of board members are more onerous (although the common law duties and liability are probably the same).
- The administrative overheads are much more significant:
 - The annual fee is \$1,000, rather than \$39.70 (unless the company limited by guarantee is a charity).
 - All changes of directors and company secretaries and their personal details must be notified to ASIC within 28 days.
 - There are hefty penalties for late filing.
- There is no provision for amalgamation. Mergers will require at least 1 entity to be wound up, with consequent potential termination of employment.
- An incorporated association cannot become a company limited by guarantee unless every member agrees.¹⁴

7.18 The committee notes the transparency of reporting that is required under the company limited by guarantee structure. It is aware that a public company structure has served Australian enterprises well. However, it is aware that companies limited by guarantee must report to ASIC, a body that the committee has heard 'has not the slightest interest in regulating the activities of not-for-profit organisations'.¹⁵ The committee also finds the list of disadvantages in the document tabled by Mr A.D. Lang to be compelling, particularly when consideration is given to the administrative overheads of the structure and the more onerous statutory duties of board members on the operation of micro and small Not-For-Profit Organisations.

Incorporated Associations

7.19 Associations are incorporated under State and Territory Associations Incorporation legislation which is administered by the various state authorities. An incorporated association is a legal entity which protects its members from the debts and liabilities of the association. Unlike a company limited by guarantee, all incorporated associations should be Not-For-Profit Organisations.

7.20 Incorporated associations may only undertake business in their state jurisdiction. Due to different legislation in each state and territory, the reporting

14 Mr A.D. Lang, *Pros and Cons of Companies Limited by Guarantee versus Incorporated Associations*, Appendix 1, p. 1. Note: The final point is in relation to an Incorporated Association incorporated in Victoria and may not be true of those incorporated in other states or territories.

15 Mr A.D. Lang, Representative, Law Council of Australia, *Proof Committee Hansard*, 29 October 2008, p. 37.

requirements of incorporated associations are not aligned.¹⁶ ASIC states that an incorporated association may need to:

- Have a committee, responsible for managing the association;
- Have a public officer and notify any changes in that position;
- Have a registered office in its state of incorporation;
- Act in accordance with its objects and rules;
- Hold an Annual General Meeting once every calendar year;
- Lodge an Annual Statement every year;
- Keep proper accounting records and, in some states prepare, have audited and lodge financial statements;
- Keep minutes of all committee and general meetings.
- Keep registers of members and all committee members
- Have a common seal¹⁷

7.21 Mr Lang summarises the perceived advantages and disadvantages of incorporated associations in Victoria, where he is based:

Advantages of Incorporated Associations

- The Associations Incorporation Act is specifically designed to provide a simple and inexpensive means of incorporating not-for-profit organisations.
- The Associations Incorporation Act is more flexible than the Corporations Act, and does not contain any of the limitations that the Corporations Act places on public companies (which includes all companies limited by guarantee).
- The statutory duties and potential liability of board members are less onerous (although the common law duties and liability are probably the same).
- The annual fee is \$37.60 rather than \$1,000. It is not necessary to lodge the names of committee members, changes in committee members or their personal details. There are no late fees.
- Two or more incorporated associations can amalgamate “seamlessly”, so that all their assets, liabilities and staff are automatically transferred across to the amalgamated association, without any need for winding up or termination of employment.

16 Appendix 1 lists the legislation and regulation that states and territories must comply with according to the state in which they are registered.

17 Australian Securities and Investments Commission, *Registering not-for-profit or charitable organisations*, <http://www.asic.gov.au/asic/asic.nsf/byheadline/Registering+not-for-profit+or+charitable+organisations?openDocument> (accessed 3 November 2008).

Disadvantages of Incorporated Associations

- Trading prohibited. However, not if trading is only ancillary to the principal purpose, the transactions are with members, or the association is a charity.
- If the association carries on business outside Victoria, it will need to register as a “registrable Australian body” under the Corporations Act, obtain and use an ARBN, and notify ASIC of changes in its committee members and their personal details.
- Must have at least 5 members.
- Consumer Affairs Victoria nitpicks all constitutions and amendments to constitutions that contain provisions different from the model rules.¹⁸

7.22 While the committee heard that there was support for the incorporated associations legal structure among Not-For-Profit Organisations, the Law Council of Australia believes that the current Associations Acts are out of date:

[A]t present, each of the state Associations Incorporation Acts contains restriction in various forms on trading by incorporated associations. These provisions are generally poorly expressed and difficult to understand. The trading restrictions appear out of step with the increasingly entrepreneurial role expected of the NFP sector by both state and federal governments.¹⁹

7.23 The Country Women's Association's concerns lay in the comparability of the Acts across states and territories and they believe that it would be much better if the rules of incorporation were the same Australia-wide for everybody'.²⁰

7.24 The committee notes that advantages of an incorporated associations structure, particularly with regard to smaller organisations. However, to adopt this structure nationally, all states and territories would need to agree to refer their powers in this respect to the Commonwealth, or agree to harmonise the legislation at the state level. Mr Lindsay Doig of the CPA Third Age Network Committee warned the committee that:

In the event that there was some level of harmonisation rather than a national body, we would probably argue that there should be some mechanisms which would enable us to retain harmonisation. Too often we find that two years down the track we have got an unharmonised

18 Mr A.D. Lang, *Pros and Cons of Companies Limited by Guarantee versus Incorporated Associations*, Appendix 1, p. 1

19 Law Council of Australia, *Submission 128*, p. 10.

20 Ms Noela MacLeod, Immediate Past President, Country Women's Association, *Proof Committee Hansard*, 30 October 2008, p. 67.

harmonised regime. We would argue that whatever regime is applied it should be uniform and remain uniform across Australia.²¹

Statutory corporations

7.25 A statutory corporation is an organisation established by an Act of state or commonwealth parliament. The most common statutory corporations in the Third Sector are religious bodies, whose regulatory conditions may differ from that of other Not-For-Profit Organisations.

7.26 Reporting requirements of statutory corporations vary, but the committee notes that an Act of Parliament outlining the disclosure regimes for Not-For-Profit Organisations may be an effective method of aligning requirements across the sector.

Co-operatives

7.27 A co-operatives model could technically be applied to any activity, however traditionally co-operatives exist in economic sectors such as agriculture and irrigation, fisheries, consumer and financial services, housing, and production (workers' co-operatives). Co-operatives are also popular models for promoting arts and culture. Co-operatives form a legal entity, and, in Australia, the co-operative model is most common in Victoria. The International Co-operative Alliance (ICA) defines a co-operative as:

...an autonomous association of persons united voluntarily to meet their common economic, social, and cultural needs and aspirations through a jointly-owned and democratically-controlled enterprise.²²

7.28 The Ministerial Council of Consumer Affairs (MCCA) has been working for almost a decade on harmonising cooperative legislation across Australia. At its 2 September 2005 meeting, MCCA gave its approval for the drafting of template legislation to be underpinned by a Ministerial Agreement between the states and territories, which will accelerate adoption of amendments to the cooperatives legislation in all jurisdictions.

7.29 As with incorporated associations, co-operatives are administered under state and territory legislation. They differ from incorporated associations primarily because they can be formed to establish a business that makes a profit for its members. Not-For-Profit co-operatives are generally referred to as 'non-trading' where its rules prohibit it from giving returns or distributions on surplus or share capital to members.

21 Mr Lindsay Doig, Member, Voluntary and Honorary Work Subcommittee, CPA Australia Third Age Network, CPA Third Age Network Committee, *Proof Committee Hansard*, 30 October 2008, p. 81.

22 International Co-operative Alliance, *What is a co-operative?*, <http://www.ica.coop/coop/index.html> (accessed 5 November 2008).

7.30 Audit and financial reporting requirements vary from state to state, but may include a requirement to:

- Appoint an auditor.
- Send audited accounts and required reports to members prior to AGM.
- Lodge audited accounts and required reports with the registering body.
- Notify changes in directors, registered office, co-operative name, rules, auditor, charges, and debentures.
- Provide a declaration of interest by directors.

7.31 Some different rules may apply to non-trading entities depending on whether the co-operative was started with or without share capital, and in some states small co-operatives may be exempt from certain reporting.

7.32 The committee heard limited evidence from witnesses regarding the viability or suitability of the co-operative legal structure for Not-For-Profit Organisations. The committee notes that co-operatives may be for- or not-for-profit organisations. While the co-operative reporting requirement may be suitable for Not-For-Profit Organisations generally, the definition of 'co-operative' would not apply to many organisations operating within Australia.

Committee View

7.33 The committee agrees that it is impossible to find one existing legal structure currently used by Not-For-Profit Organisations that would be suitable for all. The variability between Not-For-Profits means that complying with the requirements of the *Corporations Act*, for example, would be extremely burdensome to micro organisations. The perception that those organisations regulated by ASIC have a greater status than association incorporations could discourage companies limited by guarantee from wanting to change structure. Similarly, the Association Acts are considered to be poorly regulated and differ from state to state, raising difficulties for national organisations if they were forced to migrate to a state or territory Associations Act.

A specialist legal structure

7.34 The previous section examined the current legal structures available for use by Not-For-Profit Organisations where it was found that one of these structures as they stand is suitable for use across the entire sector:

It is important to note that the legal and regulatory framework currently in place is devised for 'for-profit' companies and does not assist the information needs of stakeholders in the NFP sector. The members of NFPs (and their stakeholders) want to know the financial position of the organisation, that the organisation is being managed prudently, and that the

allocation of resources is aligned with the values and objectives of the organisation as set out in its constitution. The current legal and regulatory framework is designed to facilitate shareholder management and to assist investors to examine the accounts to ascertain the deployment of and return on their investment.²³

7.35 Professor Mark Lyons argues that a new system must be purpose-built for Not-For-Profit Organisations:

Existing legal and regulatory arrangements are so complex and muddled that only a completely new, purpose built system will achieve the goal of a simple and appropriately designed system. Tacking nonprofits onto corporations and requiring ASIC to regulate them is certainly not appropriate. Because nonprofit organisations differ in some fundamental ways from business, the new act and regulator must be purpose built, based on a clear understanding of the behavioural dynamics of nonprofit organisations and recognise that most nonprofits are very small and rely entirely on volunteer labour.²⁴

7.36 The committee found that a high level of support exists among contributors to the Inquiry for such a legal structure. Mackillop Family Services believes that:

The goals of such purpose-built legislation would be:

- To create a regulatory environment that encourages nonprofit organizing and the nonprofit contribution to the nation's social, economic and cultural life.
- ...
- To propose regulation commensurate with the level of risk (for example organisations with employees, government contracts, a certain level of capital and income should have more rigorous compliance and reporting requirements; others below such benchmarks may not be required to report.)²⁵

7.37 A purpose-built specialist legal structure need not be entirely original. Long-established wording from the *Corporations Act* directly relevant to Not-For-Profit Organisations could be retained should it be deemed not to interfere with the objectives laid out in the development of a specialist structure.

7.38 The committee acknowledges that some organisations hold reservations about the introduction of a specialist structure which may create an additional burden for organisations. Mr Dan Romanis of the Royal District Nursing Service indicated that:

Whilst we want a standardised approach to disclosure regimes for charities and not-for-profits, we are also cautious about potential new administrative

23 Chartered Secretaries Australia, *Submission 17*, p. 2.

24 Professor Mark Lyons, *Submission 67*, p. 3.

25 Mackillop Family Services, *Submission 43*, p. 5.

burdens. Our submission refers to the risks and the costs that we see in the current complex environment, including diversion of resources from our core charitable functions.²⁶

7.39 Similarly, the Skyline Education Foundation Australia stated that, while they support the need for standardisation:

...any changes must deliver a simpler, easier and more accessible regime. Changes which create additional red tape, bureaucracy or a complex reporting regime are prohibitive for small not-for-profits and will cause fatal damage to the sector, leading to the closure of many grass roots programs which deliver significant benefits to both individuals and communities.²⁷

Compulsory or voluntary?

7.40 Professor Myles McGregor-Lowndes expressed the view that a specialist legal structure should attract Not-For-Profit Organisations rather than 'forcing them in because you have closed down the other legal vehicles' and argued for an appropriate transition period. He added that:

It is short-sighted to close off other legal forms and the ability of people to exploit those forms for productive purposes rather than to fit them into a constricted legal form that they must take or not be nonprofit. I would prefer that, yes, we have a national regime of incorporated associations, but that it attract people and organisations by being efficient, effective and attractive to them.²⁸

7.41 Father Brian Lucas of the Australian Catholic Bishops Conference went further and stated that small Not-For Profit Organisations should not be required to sign up to any new legal structure:

I am prepared to say quite unequivocally that the micro-organisations do not belong in a regulatory framework, nor should they be required to incorporate. They are of minimal risk. We have lived for many years with unincorporated associations. Incorporation is late on the scene. There were fears and anxieties about litigation, and we handle that in a different way. We should be encouraging and enthusiastic about groups of people, be it a dart club or any other group, coming together to do good things for themselves and for the community. Unless there is risk, they ought not be in the regulatory framework. We need to assess the risk...You have a proportionality between regulation and risk.²⁹

26 Mr Dan Romanis, Chief Executive Officer, Royal District Nursing Service, *Proof Committee Hansard*, 28 October 2008, p. 3.

27 Skyline Education Foundation Australia, *Submission 32*, p. 2.

28 Professor Myles McGregor-Lowndes, *Proof Committee Hansard*, 29 October 2008, p. 44.

29 Father Brian Lucas, General Secretary, Australian Catholic Bishops Conference, *Proof Committee Hansard*, 29 October 2008, p. 42.

7.42 In contrast to Professor McGregor-Lowndes, the committee heard from Mr Lang of the Law Council of Australia that Not-For-Profit Organisations should not be given a choice – that once a specialist legal structure is legislated, all existing Not-For-Profit Organisations should be automatically migrated to the new structure. He added that:

...it will be possible to transfer across all of the existing incorporated associations and companies limited by guarantee without those organisations needing to change their constituent documents at all and with no practical change to the way in which those organisations operate.³⁰

7.43 Ms Susan Woodward of PilchConnect agreed with Mr Lang on the issue of migration, suggesting that a 'deeming provision' could be included in the new legislation. She noted that this had occurred successfully in the past during a changeover in the Indigenous corporations area, and similarly in 2001 when the Corporations Act changed memoranda and articles of association.³¹

7.44 The committee heard suggestions that if all Not-For-Profit Organisations moved to a single legal structure, there will be increased liabilities in the future for 'directors' (or equivalent) of organisations that are currently unincorporated. However, the committee is aware that the 'directors' of unincorporated associations are currently faced with potentially *more* liability than directors whose organisation is incorporated or limited by guarantee:

If you're the honorary treasurer of an unregistered [unincorporated] non-profit organisation called Better Community, for example, and you're renting premises for your organisation, you will have to make the lease in your own name (acting as a trustee for Better Community)....

The extra disadvantage is that if anything goes wrong -- if the Better Community office burns down, or if people fall over the mat and injure themselves and sue - it's possible that as the lessee and as a committee member you may be held personally liable. In that case, if there isn't enough money in the Better Community cashbox to cover the payout you may have to pay for it yourself.

There can also be difficulties with opening bank accounts, problems with insurance, and confusions about who owns what property. If you stop being a member of Better Community but your name is still on the contracts there may be difficulties transferring your responsibilities to the new Treasurer.³²

30 Mr A.D. Lang, Representative, Law Council of Australia, *Proof Committee Hansard*, 29 October 2008, p. 84.

31 Ms Susan Woodward, Manager, PilchConnect, *Proof Committee Hansard*, 11 November 2008, pp 5-6.

32 Australian Institute of Community Practice and Governance, *Help Sheet*, http://www.ourcommunity.com.au/management/view_help_sheet.do?articleid=733 (accessed 27 November 2008).

Harmonisation or referral of powers?

7.45 Contributors to the inquiry were divided as to how a single structure should be achieved. The committee heard support for the harmonisation process, by which states and territories would retain their power of legislation, but would amend their current legislation so that it was the same as in other states.

In making this recommendation [to harmonise legislation], the Institute acknowledges that there would be significant implementation and transitional issues to be resolved if a single harmonised regime were to be adopted. This is inevitable given the current plethora of arrangements. However, our experience and expertise tell us that this would be the most effective and sustainable solution.³³

7.46 Others took the opposing view, advocating that states and territories refer their power to the Commonwealth in order to achieve a single piece of legislation. Professor Lyons stated definitively that 'we should have a national incorporated associations statute. That certainly would be a marvellous benefit to the sector, the economy and Australia generally.'³⁴ The Alliance (Community and Residential Care Providers) agreed that 'it may be preferable for states and territories to refer their powers to the Commonwealth, so that a single national legislative regime can be established, managed by a single national regulator'.³⁵

7.47 The committee heard that a specialist legal structure, defined in an Incorporated Associations Act would not necessarily require a great deal of practical change for the Sector:

What would happen is simply very much what happened with the corporate affairs offices that the states used to run prior to the Commonwealth companies scheme coming into operation. Those offices simply became regional offices of ASIC. Nothing changed at a practical level. The staff, in fact, remained the same. No-one sent documents to Canberra. They sent the documents to their regional office and there was no practical change for the companies concerned. What we would see happening with the Incorporated Associations Act is the same thing. There would be no practical change for those organisations at all. The documents would be lodged as they currently are in the relevant capital city and there would be a devolution of authority to regional offices of the regulator.³⁶

33 Institute of Chartered Accountants, *Submission 108*, p. 7.

34 Professor Mark Lyons, *Proof Committee Hansard*, 29 October 2008, p. 88.

35 The Alliance, *Submission 28*, p. 7.

36 Mr A.D. Lang, Representative, Law Council of Australia, *Proof Committee Hansard*, 29 October 2008, p. 84.

Disclosure regimes

7.48 One of the main tasks of the committee has been to examine the transparency inherent in the disclosure regimes of charities and other Not-For-Profit Organisations. What a Not-For-Profit Organisation is required to disclose is largely a result of their legal structure – companies limited by guarantee, for example, are required to comply with the reporting requirements of the *Corporations Act 2001*.

7.49 However, the committee recognises that a legal structure and what it requires in terms of disclosure cannot be developed in isolation from each other. This Chapter will discuss disclosure in broad terms. A more detailed discussion of elements of disclosure will be addressed in Chapter 10.

7.50 Submitters provided the committee with suggestions as to what features a specialist legal structure should contain. More than any other issue, the committee heard concerns that any specialist legal structure for the Sector should avoid a one-size-fit-all approach. The CPA Third Age Network Committee requested that a distinction be made according to whether organisations are charities or not.

Central to our submission is an appeal to the Senate Committee to resist the introduction of governance and reporting regimes with application, without distinction, to all charities and NFPs. We suggest that a 'one size fits all' approach is against the public interest.³⁷

7.51 The Australian Evangelical Alliance was concerned that a distinction be made between large and small organisations:

We urge your Committee to take account of smaller organisations when making proposals to reform the sector. In particular we are concerned that the end result should include differentiation between the scale and nature of the spectrum of NFPs – ranging from say World Vision to a church parent-run playgroup that has to incorporate solely to be able to get association liability insurance cover.³⁸

7.52 Dr Ted Flack identified another way of differentiating Not-For-Profit Organisations based on their 'publicness':

The extent to which the organisation is a public organisation is also important. It is argued that it is appropriate for charities and other not-for-profit organisations that are publicly funded (either by way of extensive public fundraising or by a significant level of government funding) to be required to produce comprehensive publicly available information about their activities and the financial position. In this case, high standards of narrative and statistical information and full general purpose financial statements might be expected.

37 CPA Third Age Network Committee, *Submission 39*, p. 2.

38 Australian Evangelical Alliance, *Submission 37*, p. 4.

However, charities and other not-for-profit organisations that are essentially the private affair of the participants should not be required to make comprehensive public disclosures of their activities or finances. The regulation of these private associations (including charitable associations) could reasonably be left to the participants.³⁹

7.53 Ms Woodward seconded Dr Flack's differentiation, saying that reporting obligations should be linked to the level of concessional taxation treatment. Ms Woodward warned, however, that 'it would be important to make sure that having that combination does not make it too complex'.⁴⁰

7.54 The majority of contributors were of the belief that annual revenue should determine the disclosure regimes of Not-For-Profit Organisations:

Different regimes or reporting requirements may be based on the annual financial turnover. Turnover or revenue is the most objective and relevant indicator for the not-for-profit sector.⁴¹

7.55 Many felt that small Not-For-Profit Organisations should be exempt from reporting at all, or at least should receive the same exemptions as small proprietary companies.⁴² However, many other contributors felt that a specialist legal structure should require some form of reporting:

CSA does not support an exemption of any NFPs from a minimum level of financial accountability. The majority of NFPs are tax-exempt and therefore not required to lodge a taxation return. Proper financial statements are essential to ensuring good governance and an understanding of risk management, and without any statutory obligation to lodge annual financial reports, the risk of NFPs (particularly those that do not receive external funding) not preparing such statements is high.⁴³

I do not particularly care what form it is in... But if it happens to be the bank balance written by the treasurer on the back of an envelope then I would like to see a scanned copy of that submitted to the regulator. At least it would tell you something about the organisation and how it is running or not running. Without that sort of information you know nothing about the organisation at all.⁴⁴

39 Dr Ted Flack, *Submission 12*, p. 3.

40 Ms Susan Woodward, Manager, PilchConnect, *Proof Committee Hansard*, 11 November 2008, p. 3.

41 CPA Australia, *Submission 98*, p. 4.

42 Pricewaterhouse Coopers, *Submission 61*, p. 2.

43 Chartered Secretaries Australia, *Submission 17*, p. 6.

44 Mr A.D. Lang, Representative, Law Council of Australia, *Proof Committee Hansard*, 29 October 2008, p. 69.

Committee View

7.56 The committee received persuasive evidence in the submissions it received and through the public hearing process. The committee believes that a single specialist legal structure, designed specifically for Not-For-Profit Organisations, will result in the most effective and efficient regulation of the Sector.

7.57 The committee appreciates that judgement will need to be exercised in determining the disclosure regimes of organisations under the legal structure. Of the distinctions drawn by submitters, the committee notes that the annual revenue of an organisation may be the best way of determining what standard an organisation should report to. However, the committee agrees that all organisations should be required to report under the specialist structure to the national regulator, even if that reporting is basic.

7.58 The committee believes that it is preferable that all Not-For-Profit Organisations use the same legal structure, in order to ensure more solid regulation of the Sector. For this reason, the committee recommends requiring all existing organisations to migrate to the new structure when it has been developed.

Recommendation 7

7.59 The committee recommends that a single, mandatory, specialist legal structure be adopted for Not-For-Profit Organisations through a referral of state and territory powers. Given the degree of change such a legal structure would mean for some not-for-profit organisations, the legal structure must be developed in full consultation with these organisations.

Chapter 8

Tax concessions

8.1 This chapter examines the tax concessions available to Not-For-Profit Organisations from Commonwealth and state and territory government and proposes taxation reform based on evidence provided to the committee.

8.2 The committee heard that:

Tax law for the non-profit sector in Australia is complex and confusing. There are a variety of concessions given at both a state and federal level, each to a variety of nonprofits. It is impossible to find any set of principles underpinning the different pieces of legislation that designates these concessions and there are no links between the concessions provided and public disclosure requirements.¹

Definitions for tax purposes

8.3 The 2001 Inquiry into the Definition of Charities and Related Organisations was undertaken, as described in Chapter 1, to examine existing definitions of charities and related organisations used in Australia and to provide options for enhancing the existing definitions in Australia. The Final Report highlighted the issues associated with the current definitions, such as an outdated one-size-fits-all approach, complex interaction with taxation legislation and the reliance on a common law definition for 'charity'.² For the history of the present definitions in use, the 2001 Final Report is an excellent source. The recommendations made by the Inquiry to overcome the existing difficulties have not been implemented. As a result, the criticisms levelled by submitters to the 2001 Inquiry have been reinforced by submitters to the current Inquiry.

8.4 Currently, charities can be identified according to legal, administrative and taxation benefits that they receive. These benefits are related to the primary purpose of the organisation itself. To qualify for the benefits, organisations must fit certain criteria.

8.5 The ATO, which can confer charitable status on organisations in Australia, considers that the characteristics of a charity are that:

- it is an entity that is also a trust fund or an institution
- it exists for the public benefit or the relief of poverty

1 Keating, K., *The National Governance of the Non-Profit Sector*, 2007, p. 32.

2 Inquiry into the Definition of Charities and Related Organisations, *Chapter 2: The Need for Clear and More Consistent Definitions*, http://www.cdi.gov.au/report/cdi_chap4.htm (accessed 17 October 2008).

- its purposes are charitable within the legal sense of that term
- it is Non-Profit, and
- its sole purpose is charitable.³

8.6 The ATO goes on to state that a charitable purpose is one that benefits the community through certain activities, including:

- The relief of poverty or sickness or the needs of the aged
- The advancement of education
- The advancement of religion
- Other purposes beneficial to the community, including:
 - o promoting health – for example, through educating the public about a particular disease
 - o providing community facilities – for example, museums, libraries, halls, botanical gardens, migrant resource centres, neighbourhood centres and community radio stations
 - o promoting art and culture through means such as music and drama
 - o helping to maintain defence and public order and providing emergency services
 - o relieving distress due to natural disasters such as floods or bushfires
 - o providing social welfare through activities such as counselling, child care, and family or marriage support services
 - o helping people cope with the problems of unemployment
 - o promoting scientific research
 - o advancing commerce, agriculture and industry through activities such as research and resource development
 - o protecting animals, and
 - o preserving historic buildings.

The ATO does not consider this list to be exhaustive but it also provides examples of institutions and funds whose purpose is not charitable.⁴

3 Australian Taxation Office, *Types of Non-Profit organisations - Tax basics for Non-Profit organisations (Charities)*, http://www.ato.gov.au/nonprofit/content.asp?doc=/content/00100254.htm&page=2#P18_307 (accessed 17 October 2008).

8.7 Four subsets of charity are identified by the ATO for taxation purposes. These include public benevolent institutions (PBI), health promotion charities (HPC), charitable institutions and charitable funds. Briefly, these subgroups have been defined in the following way:⁵

PBI - A public benevolent institution (PBI) is a Non-Profit institution organised for the direct relief of poverty, sickness, suffering, distress, misfortune, disability or helplessness.

HPC - A health promotion charity is a Non-Profit charitable institution whose principal activity is promoting the prevention or control of diseases in human beings.

Charitable institution - A charitable institution is an institution that is established and run solely to advance or promote a charitable purpose.

Charitable fund - A charitable fund is a fund established under an instrument of trust or a will for a charitable purpose. Charitable funds mainly manage trust property, and/or hold trust property to make distributions to other entities or people.⁶

8.8 The committee heard that:

The above definitions provided by the Australian Taxation Office indicate the inconsistency and contradictory nature of the sector. Specifically, a charity has a sole purpose that is charitable, thereby excluding advocacy and commercial activities. Whereas a Public Benevolent Institution has a dominant purpose in providing relief, which it allows it to carry on advocacy and undertake commercial activities that are inconsequential to the operations of the relief activities.⁷

PBI and DGR

8.9 Of particular concern to contributors to the inquiry was the award of PBI and Deductible Gift Recipient (DGR) status by the ATO. In order to be a PBI, the ATO requires that the organisation's dominant purpose is providing benevolent relief. DGRs are organisations that can receive income tax deductible gifts. DGRs are PBIs that are either endorsed by the ATO or named specifically in the tax law, including prescribed private funds. In order to qualify for endorsement as a DGR, organisations or funds

4 Australian Taxation Office, *Types of Non-Profit organisations - Tax basics for Non-Profit organisations (Charities)*, http://www.ato.gov.au/nonprofit/content.asp?doc=/content/00100254.htm&page=2#P18_307 (accessed 17 October 2008).

5 Australian Taxation Office, *Types of Non-Profit organisations - Tax basics for Non-Profit organisations (Charities)*, <http://www.ato.gov.au/nonprofit/content.asp?doc=/content/33609.htm> (accessed 17 October 2008).

6 Nearly all funds are charitable trusts such as Prescribed Private Funds, although they may have a corporate trustee.

7 Name withheld, *Submission 65*, p. 1.

must fall within one of the 40 general categories specified in the *Income Tax Assessment Act 1997*. An organisation may be endorsed for 'the operation of a fund, authority or institution that it owns or includes'.⁸

8.10 The committee heard that the value of having DGR status:

...is not so much in terms of the donations. People tell us that it is much more about the ability to access many of the philanthropic sources of funding that are there that many organisations are keen to access. With fringe benefits there is a big issue around wages. That was the issue I was alluding to in terms of the treatment of family tax benefit and family payments.⁹

8.11 The issue of anomalies in DGR rules was the subject of concern for some submitters:

The inconsistency is mind shattering. You can be a private school, a building fund and get DGR, yet you can be a neighbourhood house beavering away in the most disadvantaged area and you cannot get it.¹⁰

8.12 In addition to this issue, Ms Kelly Bruce, of the Australian Council for International Development believes that the focus on 'relief' means that organisations which also provide sustainable development education, resources and training are unable to qualify. She states that this 'seems to be at odds with government priorities and policy on what constitutes good development practice'¹¹ in implying that prevention is inferior to cure.

8.13 Ms Karen Mackay of the Association of Neighbourhood Houses and Learning Centres agrees, suggesting the addition of 'prevention' into the definition of PBI:

...where in other words organisations still have to meet the PBI test and all the other criteria there but will be allowed to also adopt preventive approaches to welfare which brings us in line with international charity law thinking.¹²

8 Australian Taxation Office, *Guide for deductible gift recipients and donors*, p. 6., <http://www.ato.gov.au/content/downloads/SME18699nat3132.pdf> (accessed 13 November 2008).

9 Mr Gregor Macfie, Policy Manager, Australian Council of Social Service, *Proof Committee Hansard*, 29 October 2008, p. 75.

10 Ms Karen Mackay, Project Manager, Association of Neighbourhood Houses and Learning Centres, *Proof Committee Hansard*, 29 October 2008, p. 7.

11 Ms Kelly Bruce, Business manager, Australian Council for International Development, *Proof Committee Hansard*, 29 October 2008, p. 75.

12 Ms Karen Mackay, Project Manager, Association of Neighbourhood Houses and Learning Centres, *Proof Committee Hansard*, 29 October 2008, p. 2.

Updating definitions

8.14 Contributors to the current inquiry have found these and other definitions to be inadequate. As the definitions are not enshrined in law, but are based on definitions in the preamble of the *Charitable Uses Act 1601*, there is a lack of clarity as to where some modern Third Sector Organisations sit within the definitional framework. Perpetual states that:

There is confusion in the use of terminology describing the participants in the sector. The following descriptions need to be defined and the relationship between them clarified – Not-For-Profits, charities, social enterprises, charitable, trust, foundations and the like.

...

Where does a trustee corporation such as Perpetual fit in? Perpetual is neither a charity nor Not-For-Profit organisation but...still plays a significant role in the philanthropic environment.¹³

8.15 The Law Council of Australia believes that the well-established principles of the Act of 1601 which exclude some Not-For-Profit Organisations 'do not adequately reflect the nature of charity or charitable organisations in modern society'. In particular, the Law Council concludes that, as well as laws of taxation, the following should be clarified as part of any codification process:

- confirmation of the extent to which a charity may engage in advocacy activities, and details of the types of advocacy activities that charities may engage in without jeopardising their charitable status;
- confirmation of whether, and the extent to which, the advancement of a charitable purpose can constitute charitable conduct;
- confirmation that a charity can run any sort of business, whether those activities themselves are charitable or not, in order to raise funds for its charitable purpose; and
- codification of the principle of mutuality in relation to the membership income of NFPs.¹⁴

Religion as 'charity'

8.16 Several submitters to the Inquiry indicated dissatisfaction that activities such as 'advancement of religion' (especially promoting conversion from one religion to another) were described as a charitable purpose by the ATO for tax purposes.

I submit that religious instruction and practice, prayers and proselytisation should be paid for by the faithful and not be subsidised by the state or non-believers. Therefore, I submit that religions should not be afforded preferential tax treatment. I conclude by asking you to exclude the

13 Perpetual, *Submission 166*, p. 3.

14 Law Council of Australia, *Submission 128*, pp 14-15.

advancement of religion and the offering of prayers by contemplative orders from the list of charitable purposes.¹⁵

Australians enjoy religious freedom. Approximately 16% of the population classified themselves as having 'no religion', according to the 2001 Census. This is the third largest group after Catholic (27%) and Church of England (21%). The 'no religion' percentage is considered a conservative estimate by many respected commentators due to the wording of the question in the census form. I submit that "Advancement of Religion" should be removed from the scope of tax exemption.¹⁶

8.14 The 2001 Charities Definition Inquiry explored this subject and noted the controversy that continued to surround the inclusion of religion as being a charitable purpose. That Inquiry found that:

The Committee affirms that 'the advancement of religion' should continue as a head of charity. It is clear that a large proportion of the population have a need for spiritual sustenance. Organisations that have as their dominant purpose the advancement of religion are for the public benefit because they aim to satisfy the spiritual needs of the community. Religious organisations satisfy these needs by providing systems of beliefs and the means for learning about these beliefs and for putting them into practice.¹⁷

8.15 Given that the inclusion of religious organisations as charities to qualify for tax concessions was unexplored by the majority of submitters, the committee is unable to comment further.

Political advocacy

8.16 The committee heard that from a number of submitters that charities and Not-For-Profit Organisations consider political advocacy to be an important part of what they do and integral to achieving their purposes:

From the perspective of the St Vincent de Paul Society, we would see advocacy as absolutely non-negotiable. It is integral to our charitable purpose. This is not something we have invented in recent years; it goes to the heart of our founding. In Paris in 1833, our founder made very explicit the principle that we were not simply to give assistance to the poor but to seek out and understand the structures that give rise to poverty and inequality, and to actively advocate to change those structures.¹⁸

15 Mr John Goldbaum, *Submission 6*, p. 1.

16 Mr Peter Robinson, *Submission 44*, p. 1.

17 Inquiry into the Definition of Charities and Related Organisations, *Chapter 20: The Advancement of Religion*, http://www.cdi.gov.au/report/cdi_chap20.htm, (accessed 14 October 2008).

18 Dr John Falzon, Chief Executive Officer, St Vincent de Paul Society National Council of Australia, *Proof Committee Hansard*, 28 October 2008, p. 48.

8.17 In 2005, the ATO released a ruling in relation to taxation benefits afforded charities. As a part of this ruling, what is or is not considered to be a charitable purpose was defined more clearly than it had been in the past:

Political and lobbying purposes are not charitable. While such purposes may use educational means, this is not sufficient to show a charitable purpose. However, political or lobbying purposes and activities that are merely incidental to a purpose that is otherwise charitable do not by themselves prevent that purpose being charitable.¹⁹

8.18 However, the committee heard that that many organisations supported the broadening of this definition for a number of reasons:

If you go back to what is the charitable purpose—it is actually something that is not for private benefit but for public purpose—then philosophically and personally I would say that political debate, in the way we have it in a democratic country, is of public benefit, and the evidence for that is in all the countries that do not have it. In that sense, I would probably prefer a broader approach. However, focusing again on environmental stuff, if planting trees is for public benefit and therefore is a charitable purpose, then surely stopping them from being knocked down is a public benefit. It just does not make sense otherwise.²⁰

[I]n broadening that definition we should be able to allow not-for-profit organisations, and philanthropic organisations which fund them, to more effectively address discrimination and disadvantage and work towards greater equity through undertaking a range of activities which assist them to fulfil their charitable purpose.²¹

8.19 Concerns were raised about the difficulty in drawing the line between political advocacy and partisan political advocacy where an organisation consistently supports one political party and is still eligible to receive taxation concessions for those activities. In response to questioning by the committee, Ms Trudy Wyse of the Melbourne Community Foundation agreed that the situation surrounding political advocacy was not black and white, but also stated that:

There is a grey line there about advocating for achievement of your charitable purpose in a particular area and advocating for a position that is actually supported by one political party and not the other, but that is reality. That is real life. I think where a particular political party has a policy that is consistent with the policy and the principles of a community organisation, the community organisation has to somehow separate itself

19 Australian Taxation Office, *Taxation Ruling TR 2005/21*, <http://law.ato.gov.au/atolaw/view.htm?docid=TXR/TR200521/NAT/ATO/00001> (accessed 10 November 2008).

20 Dr Greg Ogle, National Legal Coordinator, The Wilderness Society Inc., *Proof Committee Hansard*, 28 October 2008, p. 18.

21 Ms Sarah Davies, Chief Executive Officer, Melbourne Community Foundations, *Proof Committee Hansard*, 30 October 2008, p. 10.

from a political party and be persuasive and convincing around the value of that position in terms of achieving its charitable purpose separately from whether there is a political party that also supports it. I think to put a blanket denial to say that you cannot undertake those activities, that sort of advocacy role, is really undermining the community's capacity to get real and needed change within the community because everything can be defined as political, which I think is what has happened. It is too easy to say a thing is a political activity when in fact it is robust debate within a democracy about policy and program.²²

In conclusion

8.20 Many contributors to the inquiry indicated general support for the implementation of the recommendations of the 2001 Inquiry in order to clarify eligibility for taxation status.

In broad terms, PilchConnect endorses the recommendations made by Inquiry into the Definition of Charity 2001...²³

8.21 However, the committee heard that Mr Don D'Cruz of Charity Matters opposed broadening and/or modifying definitions who stated that such a request was 'code for: 'We want to be able to do whatever we feel like''.

Committee View

8.22 The committee is mindful of the fact that its terms of reference for this Inquiry do not specifically direct it to define terms relating to the Third Sector. While the committee has heard evidence that confusion exists within the sector in relation to definitions, it has lacked the time to give appropriate consideration to every issue raised. However, the committee notes the call for the implementation of statutory definitions and agrees that there needs to be an ongoing clarification of these terms for the Sector.

Concessions - Commonwealth Government

8.23 The Commonwealth Government offers a range of tax concessions to eligible not-for-profit organisations, including income tax, GST and Fringe Benefits Tax exemptions. There are very few tax concessions that apply to all not-for-profit organisations, with some only applying to particular organisations. Professor Mark Lyons describes the current situation in saying that:

Charities are nonprofit organisations. However, in practice and in government policy, there is little that distinguishes them from many other nonprofit organisations. Charities are provided with tax exemption, but so are many other nonprofits; some charities are deductible gift recipients

22 Ms Trudy Wyse, Manager, Donor and Community Services, Melbourne Community Foundation, *Proof Committee Hansard*, 30 October 2008, p. 15.

23 PilchConnect, *Submission 129*, p. 41.

(DGRs), but others are not and many non-charities are DGRs. Some charities are subject to charitable fundraising laws, but so too are many non-charities while many charities are exempt.²⁴

8.24 In order to access the range of tax concessions available to Not-For-Profit Organisations, organisations must first register for an Australian Business Number (ABN). An ABN allows not-for-profit organisations to:

- register for GST and claim GST credits
- register for PAYG withholding
- deal with investment bodies
- apply to the Tax Office for endorsement as a deductible gift recipient, tax concession charity or income tax exempt fund
- interact with other government departments, agencies and authorities, and
- interact with the Tax Office on other taxes, such as FBT.²⁵

8.25 Not all Not-For-Profit Organisations are required to have an ABN. However, Not-For-Profit Organisations with an annual turnover of \$150,000 must register for the Goods and Services Tax (GST), and in order to register, organisations must have an ABN. To be eligible for an ABN, the ATO requires that an organisation be:

- a company registered under the Corporations Act 2001
- an entity carrying on an enterprise in Australia
- an entity that, in the course or furtherance of carrying on an enterprise, makes supplies that are connected with Australia
- a government entity
- a non-profit sub-entity (for GST purposes), or
- a superannuation fund.

Entities can include charities, non-profit clubs, societies and associations.²⁶

Income Tax

8.26 In order to be exempt from income tax, organisations must fall within one of the 30 types of exempt entity. Organisations may self-assess their eligibility for exemption from income tax, with the exception of charities and non-charitable funds

24 Professor Mark Lyons, *Submission 67*, p. 4.

25 Australian Taxation Office, *Tax basics for non-profit organisations*, http://www.ato.gov.au/content/downloads/NAT7966_05_2007.pdf (p. 6), (accessed 27 October 2008).

26 Australian Taxation Office, *Tax basics for non-profit organisations*, http://www.ato.gov.au/content/downloads/NAT7966_05_2007.pdf (p. 6), (accessed 27 October 2008).

that distribute solely to DGRs that are income tax exempt. These organisations **must** be endorsed by the tax office in order to be exempt. Organisations whose activities fall in both a charity and non-charity exempt fund must still be endorsed by the ATO.

8.27 According to the ATO:

Non-profit organisations that are not exempt are taxable and are generally treated as companies for income tax purposes whether they are incorporated or not. Non-profit companies may have special rules for lodging income tax returns and special rates of income tax.²⁷

8.28 The assessable income and deductions of taxable organisations may be affected by the principle of mutuality, which provides that 'where a number of persons contribute to a common fund created and controlled by them for a common purpose, any surplus arising from the use of that fund for the common purpose is not income'.²⁸ This principle typically applies to clubs, professional organisations and friendly societies, where activities between the club and its members are included (such as membership subscriptions), but not activities with outsiders.

8.29 Types of exempt entities are:

- Charities (subcategories- charitable institutions; and charitable funds)
- Community service organisations (subcategory- community service)
- Cultural organisations (subcategories- art; literature; music; and musical purposes)
- Educational organisations (subcategory- public educational institution)
- Employment organisations (subcategories- employee association; employer association; and trade union)
- Health organisations (subcategories- public hospital; non-profit hospital; health benefits; hospital benefits; and medical benefits)
- Income tax exempt fund (subcategory- income tax exempt fund)
- Religious organisations (subcategory- religious institution)
- Resource development organisations (subcategories- agricultural resources; aquacultural resources; aviation; fishing resources;

27 Australian Taxation Office, *Income tax guide for non-profit organisations*, http://www.ato.gov.au/content/downloads/Nat7967_3_2007.pdf (p. 7), (accessed 27 October 2008).

28 Australian Taxation Office, *Principle of mutuality*, http://www.ato.gov.au/nonprofit/content.asp?doc=/content/17832.htm#P24_1633 (accessed 27 October 2008).

horticultural resources; industrial resources; manufacturing resources; pastoral resources; tourism; viticultural resources; and information and communications technology resources)

- Scientific organisations (subcategory- scientific institution; science association; and scientific research fund)
- Sporting organisations (subcategories- animal racing; and game or sport).

8.30 People wishing to determine if their organisation is income exempt are required to apply further self-assessment tests to confirm their exemption status. In addition, some organisations must pass one of three self assessment tests:

- (i) Physical presence in Australia test (organisation must be wholly in Australia or have a division, branch or sub-division in Australia);
- (ii) Deductible gift recipient test (your organisation is a DGR); and
- (iii) Prescribed by law test (your organisation is prescribed by name in income tax regulations).

8.31 An organisation that is income tax exempt does not need to pay Capital Gains Tax or lodge an income tax return, (unless specifically asked to) and does not need to get confirmation of its exemption from the ATO. The ATO recommends completing a worksheet on income tax status for an organisation's records, and carrying out a yearly review to check if the organisation is still exempt. Major changes within an organisation's structure or activities should also prompt a review.²⁹

GST

8.32 Goods and Services Tax (GST) is a tax of 10 per cent on the sale of most goods and services within Australia. The ATO applies an annual turnover threshold of \$150,000 over which not-for-profit organisations must register for GST. Not-For-Profit Organisations with an annual turnover under this amount are not required to register for GST, but may choose to do so as they may then receive a benefit in the form of GST credits (also known as input tax credits).

Fringe Benefits Tax (FBT)

8.33 The FBT is payable by organisations who provide fringe benefits to their employees or associates of their employees. Some Not-For-Profit Organisations are entitled to FBT concessions, including both the FBT exemption and the FBT rebate.

29 Australian Taxation Office, *Income tax guide for non-profit organisations*, http://www.ato.gov.au/content/downloads/Nat7967_3_2007.pdf (p. 27) (accessed 27 October 2008).

FBT exemption

8.34 Eligible organisations are exempt from FBT where the total value of benefits for each employee during the financial year is equal to, or less than, the capping threshold. Public Benevolent Institutions (other than hospitals) and Health Promotion Charities are eligible for an FBT exemption at the capping threshold of \$30,000 per employee. The organisation needs to be endorsed by the ATO in order to access the exemption. Public and not-for-profit hospitals and public ambulance services are also exempt, with a threshold of \$17,000 per employee. The organisation does not require endorsement.³⁰

FBT rebate

8.35 An FBT rebate is a rebate equal to 48 per cent of the gross FBT payable, subject to capping. Charities must be endorsed by the ATO to be eligible for the rebate. Other Not-For-Profit Organisations may self-assess their eligibility. The ATO states that those organisations eligible for the rebate:

...are certain non-government, non-profit organisations. Organisations that qualify for the FBT rebate include:

- certain religious, educational, charitable, scientific or public educational institutions
- trade unions and employer associations
- non-profit organisations established to encourage music, art, literature or science
- non-profit organisations established to encourage or promote a game, sport or animal races
- non-profit organisations established for community service purposes
- non-profit organisations established to promote the development of aviation or tourism
- non-profit organisations established to promote the development of Australian information and communications technology resources, and
- non-profit organisations established to promote the development of the agricultural, pastoral, horticultural, viticultural, aquacultural, fishing, manufacturing or industrial resources of Australia.³¹

30 Australian Taxation Office, Tax Basics for Non-profit Organisations, http://www.ato.gov.au/content/downloads/NAT7966_05_2007.pdf (pp 25-26) (accessed 10 November 2008).

31 Australian Taxation Office, Tax Basics for Non-profit Organisations, http://www.ato.gov.au/content/downloads/NAT7966_05_2007.pdf (p. 26) (accessed 10 November 2008).

8.36 Religious institutions are also eligible for FBT concessions subject to certain restrictions.

8.37 The committee heard that FBT is wrong in theory because:

[I]t is the employee who should be paying it. Why the tax office decided the employer was going to pay it, when they brought in FBT, was because they could regulate it, it cut compliance costs, and so on, and they could collect the tax. That is where nonprofits come in. If they are exempt and they do not pay income tax they cannot get the deduction that otherwise the for-profit employer gets. That is why it has become a distortion in the tax system.³²

Refunds of franking credits

8.38 Under Australia's imputation system, some Not-For-Profit Organisations such as endorsed income tax exempt charities and DGRs may be entitled to a refund of franking credits providing that they comply with prescribed criteria.

Reporting

8.39 Organisations are required to complete an activity statement or GST return at the end of each reporting period, which may be monthly, quarterly or annually.

State and Territory Governments

8.40 Not-For-Profit Organisations may qualify for tax concessions or exemptions for taxes payable to state and territory governments. Organisations with a multi-state or national presence should be aware that compliance requirements may differ. Concessions or exemptions may be available to Not-For-Profit Organisations with regard to Stamp Duty, Payroll Tax and Land Tax.

Tax reform

8.41 The committee heard that contributors to the Inquiry were overwhelmingly in favour of tax reform for Not-For-Profit Organisations. Ms Kelly Bruce, Business Manager at ACFID shared her experiences with organisations dealing with the ATO.

I can share some of the experiences that our members encounter on a day-to-day basis in trying to interpret tax concession eligibility for their own organisations and also, from a compliance perspective, trying to comply with the various expectations of the ATO as well.

There is hardly a day that goes by at ACFID in my role where I do not get a call from either a member saying, 'Can you help me talk to the tax office? Can you help me understand what they are asking me?', or from a small organisation or a group of people wanting to start up a charity saying, 'The ATO has given me a piece of paper but we still do not understand what we

32 Professor Myles McGregor-Lowndes, *Proof Committee Hansard*, 29 October 2008, pp 79-80.

have to do. Can you please help us to understand the range of tax requirements and legislation?’

We are discussing today some various failures of the regulatory system to deliver simple, clear, concise policies for the not-for-profit sector and in the tax area it is particularly a problem. I read the submission from the ATO to this committee, and I am just going to quote their summary statement, which states:

... the range of taxation concessions, recognition of a wide variety of legal forms, interplay between State, Territory and Commonwealth legislation, limited disclosure of information and different expectations of what information is disclosed dependent upon a particular taxation concession granted; make the nonprofit sector challenging to administer and challenging for the public to understand.

I sympathise with them, but if they have problems administering the not-for-profit tax requirements, then it is understandable that so many organisations, particularly the very small organisations, in the not-for-profit sector have trouble understanding how to comply, how to apply and how to register...³³

8.42 The committee is aware of the Australia's Future Tax System Review (Henry Review), which will examine the current tax system and make recommendations to ensure that Australia's system is able to meet the challenges of the 21st Century. (This review is discussed in further detail in Appendix 5). With regards to the tax system for Not-For-Profit Organisations, the committee received evidence that:

Any taxation reform should be underpinned by a rational policy basis for charity and NFP taxation exemptions and other incentives. The current system no longer has this underpinning.³⁴

8.43 Dr Ted Flack urged a deeper examination of concessions available to the Sector:

Is the tax deduction actually economically efficient? Does it produce more donations than the cost of the exemption? We do not have good data on that in Australia.³⁵

8.44 Professor Mark Lyons, however, suggested that:

...we leave the complexity of tax to one side and sort out incorporation, fundraising and public transparency in the first instance. Then, hopefully on the basis of having better data sets and better knowledge of the sector amongst public servants and others, we could start to move towards thinking about the really complicated tax mess.³⁶

³³ Ms Kelly Bruce, Business Manager, Australian Council for International Development, *Proof Committee Hansard*, 29 October 2008, pp 73-74.

³⁴ PilchConnect, *Submission 129*, p. 8.

³⁵ Dr Ted Flack, *Proof Committee Hansard*, 29 October 2008, p. 81.

³⁶ Professor Mark Lyons, *Proof Committee Hansard*, 29 October 2008, p. 61.

Committee View

8.45 The committee agrees that Australia's taxation system is confusing for Not-For-Profit Organisations and difficult for the general public to understand. Tax concessions for the Sector seem to represent historical accidents rather than any rational plan. However, in light of the complexity of the subject matter and the Australia's Future Tax System Review (the Henry Review), the committee chooses to link its recommendation to the Review, and urge Dr Henry to give careful consideration to the tax system as it applies to Not-For-Profit Organisations.

Recommendation 8

8.46 The committee recommends that the Henry Review include an examination of taxation measures affecting Not-For-Profit Organisations with a view to simplifying these arrangements and reducing confusion and cost of compliance for these organisations.

Chapter 9

Fundraising legislation

9.1 This Chapter examines fundraising legislation and investigates how fundraising activities should sit with a revised regulatory framework.

Fundraising legislation

9.2 Currently, the Commonwealth Government has limited power to regulate the fundraising activities of Not-For-Profit Organisations.¹ In a system which the committee heard described as part of a 'colonial legacy'², each state and territory is responsible for administering its own legislation. Local governments may also have some fundraising legislation. Professor Mark Lyons describes the situation for Not-For-Profit Organisations wishing to undertake a fundraising activity:

A similar variety of laws would confront them [Not-For-Profit Organisations] if they wished to seek donations from the public. If they wanted to raise funds in several states they would need permission in each jurisdiction and confront different and contradictory reporting requirements. And if they wished to engage in fundraising raffles or bingo they might need permission from yet another authority. But they may be able to ignore all this if they qualified for one of the many exemptions provided by these laws.³

State and Territory Governments

9.3 The States and Territories have independent legislation governing fundraising activities and may have different Acts regulating different activities. There may also be more than one regulating authority within the state. Some of the laws relate solely to charities, while others deal with fundraising in a broader context. Typically, activities regulated by these laws can include lotteries, doorknock appeals, raffles and bingo.

9.4 According to the state in which an organisation wishes to fundraise, the following differences may be encountered:

-
- 1 Under the Corporations Act, the Commonwealth wields some powers with relation to seeking loans from the public. The ACCC also has power under the Trade Practices Act for false and misleading fundraising. Organisations subject to regulation by the Australian Securities and Investment Commission, an independent Commonwealth Government body established under the ASIC Act, may be required to provide additional fundraising disclosure documents to ASIC.
 - 2 Mr A.D. Lang, Representative, Law Council of Australia, *Proof Committee Hansard*, 29 October 2008, p. 36.
 - 3 Professor Mark Lyons, *Submission 67*, p. 5.

- It may or may not need a license;
- It may or may not need to be incorporated;
- If it is a religious organisation, it may have to comply with different legislation than other non-religious organisations;
- It may be required to lodge accounts of the fundraising exercise or it may not.

9.5 Mr A.D. Lang, representing the Law Council, gave an example of the inefficiency of the multiple pieces of legislation:

Sue-Anne Wallace from the Fundraising Institute is not here, but she has what I am sure is her standard story about the Red Cross Tsunami Appeal. You would have thought that it was in everyone's interest to get that appeal launched promptly. There were eight different applications, eight different registrars, eight different approval processes, before the thing could get off the ground. What is the possible justification for that? Why should the requirements for fundraising in the Northern Territory be different to the requirements for charitable fundraising in Victoria?⁴

Local Governments

9.6 Not-For-Profit Organisations undertaking fundraising activities in a public place may require the approval of their local government. According to the ATO:

Requirements vary from council to council, but generally can include:

- ensuring that the proposed activity is permissible under the relevant planning policy, planning scheme or local environment plan
- providing evidence of public liability insurance cover for the event, sufficient security and adequate toilet facilities
- obtaining permits for preparing and selling food on site, operating electrical equipment, closing streets and selling alcohol, and
- providing evidence that any rides (for example, jumping castles or merry-go-rounds) comply with relevant Australian standards, especially occupational health and safety laws.⁵

National Fundraising Act

9.7 In assessing the effectiveness and efficiency of the current fundraising legislation, the committee did not receive any submissions supporting the status quo.

4 Mr A.D. Lang, Representative, Law Council of Australia, *Proof Committee Hansard*, 29 October 2008, p. 49.

5 Australian Taxation Office, Guide for non-profit organisations, *Fundraising*, <http://www.ato.gov.au/content/downloads/NPO56536.pdf> (accessed 24 October 2008).

The committee heard that congruence of fundraising legislation would reduce much of the complexity for Not-For-Profit Organisations.⁶ As with the discussion surrounding the potential for a single legal structure for the Sector, congruence could be achieved either through harmonisation of the existing state and territory legislation, or through the referral of powers from the states and territories to the Commonwealth Government, allowing for the development of a National Fundraising Act.

9.8 As with the witnesses' response to the issue of harmonisation or referral of laws relating to legal structure, opinion was divided on the preferred approach. Dr Greg Ogle of The Wilderness Society informed the committee that:

...maybe the first step is just to try to harmonise more of the existing laws. The difference in laws across states for an organisation like ours, in fundraising particularly, is a problem.⁷

9.9 However, a national regime 'achieved via a referral of powers by the States to the Commonwealth'⁸ was also heavily supported, with a National Fundraising Act seen as the most preferable option.⁹

9.10 Modern fundraising methods raise questions of jurisdiction. With a cake stall, the transaction has a clear location, but it is not so clear 'where' a donation on the internet to a charity in another state is occurring.

Committee View

9.11 The committee is aware that the complexity of current fundraising legislation is a result of historical factors. Organisations which fundraise nationally have particularly been disadvantaged in the past, with the same fundraising activity potentially regulated in different ways in each state and territory. It is the committee's opinion that a change to current fundraising legislation is required.

9.12 The committee considers that, as with the numerous legal structures available for use, Not-For-Profit Organisations would be best served by the single national piece of legislation. This would have the following advantages:

- Legislation could be drafted with contemporary fundraising methods clearly regulated (eg. internet fundraising);

6 See, for example, Ms Kelly Bruce, Business Manager, Australian Council for International Development, *Proof Committee Hansard*, 29 October 2008, p. 48.

7 Dr Greg Ogle, National Legal Coordinator, The Wilderness Society, *Proof Committee Hansard*, 28 October 2008, p. 11.

8 PilchConnect, *Submission 129*, p. 6.

9 See, for example, Mr A.D. Lang, Representative, Law Council of Australia, *Proof Committee Hansard*, 29 October 2008, p. 83.

- Multi-state fundraising campaigns would be subject to a single piece of legislation;
- Increased public confidence that donations will be used as intended through better regulation; and
- Reduced expense for Not-For-Profit Organisations seeking advice on compliance with legislation.

9.13 As the Commonwealth Government currently has no powers to legislate fundraising activities, states and territories will need to agree hand over their powers to legislate in this area. In the event that states and territories refuse to agree to a referral of powers within a reasonable timeframe, the committee believes that the development and implementation of legislation should proceed alongside the negotiation process.

Recommendation 9

9.14 **The committee recommends that a National Fundraising Act be developed following a referral of powers from states and territories to the Commonwealth.**

9.15 **This Act should include the following minimum features:**

- **It should apply nationally.**
- **It should apply to all organisations.**
- **It should require accounts or records to be submitted following the fundraising period with the level of reporting commensurate with the size of the organisation or amount raised.**
- **It should include a provision for the granting of a license.**
- **It should clearly regulate contemporary fundraising activities such as internet fundraising.**

Chapter 10

Disclosure regimes

10.1 This chapter reviews the current disclosure regimes of Not-For-Profit Organisations and discusses issues associated with those regimes. In addition, this Chapter considers proposed modifications to the current system in line with the recommendations in previous chapters, to make disclosure regimes as relevant as possible to Not-For-Profit Organisations, government and the public.

Current disclosure requirements

10.2 The Choice article, published in early 2008, emphasised examples of a lack of accountability of Not-For-Profit Organisations in disclosing information to the public about how their donations are being spent. This inquiry heard that:

Previous inquiries highlight the significant reporting burden that many NFPs face, largely because they have multiple funders, multiple regulators, and multiple stakeholders (not just shareholders).¹

10.3 The Choice article ran with the tagline 'How much of your donation is gobbled up by fundraising fees and expenses?' Professor Myles McGregor-Lowndes explains the paradox inherent in such a point of view:

There is a paradox at work here that we ought to recognise. Transparency is not a frictionless or costless exercise and in some cases it can be very expensive. What I see out there is that some donors—and they are very few—want everybody to be extraordinarily transparent so they can pick and choose what they want. They want low administration costs and low fundraising costs, which is one of the reasons for more transparency. The paradox comes that they are not willing to pay for the cost of transparency—not at all. In fact, they want transparency to make sure they are not paying for fundraising costs or administration costs.²

10.4 The committee also heard from other submitters that this perceived lack of transparency and accountability from the Sector may be a result of a lack of understanding about how these organisations operate:

It is assumed that any funds raised that are not spent on service delivery are somehow wasted on 'administration' and 'marketing' as if these activities did not contribute to the goals of the charity. Administration and marketing support both the fundraising effort and the disbursement of funds received. Would those who mount such critiques really prefer that charities did not

1 PilchConnect, *Submission 129*, p. 33.

2 Professor Myles McGregor-Lowndes, *Proof Committee Hansard*, 29 October 2008, p. 50.

train their staff, did not seek to raise funds from as wide an audience as possible and did not speak up for those they seek to serve?³

Fundraising ratios

10.5 The Choice article notes that there should be a simple system available to donors who wish to examine how their chosen charity compares with others. The article believes that fundraising ratios is a method with which to accomplish this. Choice also notes that:

The problem, as this article identifies, is that charities' ratios are calculated in different ways, taking different costs and revenues into account, so they can't be compared on a like-for-like basis.⁴

10.6 However, as noted in the article, there is currently no uniform accounting standard or reporting standards available for use by Not-For-Profit Organisations. However, contributors informed the inquiry that the average donor wanting this and other financial information from charities and other Not-For-Profit Organisations is in the minority. Dr Ted Flack explains that:

One of the beauties of internet giving is that, with the technologies that are available, you can actually track what people look at and what they do not look at. The interesting stats are when people go to a website after a television ad comes on to support a breast cancer appeal or something like that—ring 13 19 12 or something. Or go to breastcancer.com.au, and you can actually see where they go. Nobody goes anywhere near the financials. They are going to the stories. They are going to the experience of breast cancer. They are going to the anecdotes about the survivor. They are going to the human aspects of those things. They do not go anywhere near the financials.⁵

10.7 Professor Lyons, however, supports the idea of transparency through making comparable information available to the public.

As the public becomes more educated, it is sensible to assume that giving will become for more people a rational activity where they want to see relevant data and want to run comparisons between organisations in a particular field supporting a cause that they want to support. As public policy that should be encouraged. In part, this would help resolve Professor McGregor-Lowndes's dilemma, which is a very real one at the moment. A better educated public will understand how these organisations work. There will be less fuss about nonsense like, 'I want all of my gift to go to that poor person over there', which some big nonprofit organisations unfortunately

3 Aged & Community Service Australia, *Submission 131*, pp 2-3.

4 Choice Magazine, *Charities*, March 2008, <http://www.Choice.com.au/viewArticle.aspx?id=106240&catId=100268&tid=100008> (accessed 23 September 2008).

5 Dr Ted Flack, *Proof Committee Hansard*, 29 October 2008, p. 49.

cater to in a piece of economic nonsense. We need to encourage a rational approach to philanthropy, and we can best do that by ensuring that appropriate comparable data is available in a free accessible public source.⁶

10.8 Youth Off The Streets believe that the first step in achieving this transparency through availability of public information is the education of the public:

Develop a campaign in consultation with the sector to educate the public on how the sector functions and how funding and donations are spent.

Transparency is helpful only if the public understands the information being provided and has the framework for appropriately assessing and judging the sector. The public needs to be educated to understand that the sector cannot run services, provide programs, advocate and contribute to the national research agenda if it does not have adequate infrastructure and support staff. Public expectations that the sector spend all its funding and donations on “front-line” services is unrealistic and should be challenged.⁷

10.9 The committee heard that, in the absence of any regulation specific to the sector, many Not-For-Profit Organisations report at levels far beyond their legal requirements. For example, Mr Dan Romanis of the Royal District Nursing Service told the committee that:

...at least an annual basis we put out a newsletter to our donors in which we also give facts as to exactly how donations have been used and what our costs have been against those donations.⁸

Government

10.10 While criticisms were directed at Not-For-Profit Organisations in relation to financial transparency in reporting, Not-For-Profit Organisations in receipt of government funding complained of the excessive and disparate reporting required by government and different departments:

[W]e have estimated that we utilised 46 per cent of that grant in accounting for that grant.⁹

The level of compliance that we have to go through is comparable with big companies who are on a for-profit basis.¹⁰

...our compliance and disclosure obligation has become a complex, inefficient burden requiring additional staff, taking much of the time of

6 Professor Mark Lyons, *Proof Committee Hansard*, 29 October 2008, p. 53.

7 Youth Off The Streets, *Submission 110*, p. 6.

8 Mr Dan Romanis, Chief Executive Officer, Royal District Nursing Service, *Proof Committee Hansard*, 28 October 2008, p. 7.

9 Ms Kasy Chambers, Executive Director, Anglicare Australia, *Proof Committee Hansard*, 28 October 2008, p. 34.

10 Mrs Margaret Horngold, Darumbal Community Youth Service, *Proof Committee Hansard*, 18 July 2008, p. 24.

existing administrative and management staff, and moving our focus from support to report.¹¹

...there is no common method of accounting for expenditure across Government departments. This places a significant compliance burden on organisations.¹²

10.11 One of the criticisms of the reporting requirements of government related to the fact that the reporting is not necessarily proportionate to the value of the grant:

Often, the same reporting requirements are placed on organisations whether it is a grant of \$5,000 or a grant of \$50,000. Part of the difficulty, too, with funding is that we potentially have funding from one government agency but in five buckets, so that each has its own reporting schedule and key performance indicators that need to be addressed.

Part of the job that we have to do inside the organisation is to do the financial tap dance to keep those things in their own little silos, because you have to report back that way. But then you have to look at the overall picture for the organisation with regard to what it is doing and producing and whether it is addressing all its compliance requirements.¹³

10.12 In addition, the committee heard that the reporting required by governments indicated a lack of sensitivity to the nature of Not-For-Profit Organisations by having an excessive focus on outputs achieved through government funding.

In relation to non profit organisations' use of government funding, ACOSS rejects the suggestion that there is a lack of accountability. Community service and welfare organisations hold themselves to strict contractual and reporting requirements for funding they receive from governments and other sources of funding. The real challenge for improving the use of Government funding is changing current Government practice. The imposition by Government of poorly formulated reporting and accountability frameworks limit the capacity of non profit organisations to innovate and introduce best practice. For example, organisations are offered contracts that focus rigidly on outputs, instead of outcomes, and include performance indicators that bear little or no relationship to the nature of the work undertaken by the organisation.¹⁴

Other accountabilities

10.13 The committee received evidence of the numerous requirements that Not-For-Profit Organisations may need to comply with in order to operate and commends the

11 Valmar Support Service Ltd., *Submission 14*, p. 1.

12 Council of Social Services NSW, *Submission 134*, p. 10.

13 Mrs Margaret Hornagold, Darumbal Community Youth Service, *Proof Committee Hansard*, 18 July 2008, p. 17.

14 Australian Council of Social Services, *Submission 109*, p. 5.

submissions of Mackillop Family Services and Clubs Australia¹⁵ for a demonstration of the legislation and regulations with which these two different Not-For-Profit Organisations must abide.

Committee View

10.14 The committee concludes from the evidence that it has received that the financial information of an organisation should be available to the public in a standard form to promote comparability across other Not-For-Profit Organisations. However, the committee also notes the flaws of exclusively using fundraising ratios as an indicator of the performance of an organisation and that other ways of measuring outcomes, such as social return on investment, warrant further investigation.

10.15 The committee found that Not-For-Profit Organisations are highly transparent in acquitting grant funds from the government. The committee also acknowledges the expense that Not-For-Profit Organisations can incur when fulfilling the reporting obligations to government. One goal of reform advocated in this report is to reduce these expenses. The committee notes the development of a single service contract by the Department of Health and Ageing for services provided by Indigenous organisations provides a useful model.

10.16 The committee also believes that, in providing annual reports and revenue statements to a national regulator, Not-For-Profit Organisations should clearly identify the source and amount of their revenue (such as how much revenue has been obtained through government grants versus public donations).

Characteristics of a New Disclosure Regime

10.17 Of the 183 submissions to this Inquiry, the vast majority of Not-For-Profit Organisations noted that they supported transparent disclosure; however the current system of reporting to the public (where this was undertaken), the appropriate regulator and the government was difficult to manage.

10.18 In its consideration of a specialist legal structure for the Not-For-Profit Sector, the issues of a standardised disclosure regime under that structure was briefly discussed. The committee was warned of the dangers to small and micro organisations of a one-size-fits-all approach to reporting, with many submitters fearing that onerous reporting requirements could cause organisations to collapse. Witnesses also suggested that the committee should use other criteria to determine reporting requirements, according to whether the organisation is a charity or not and its 'publicness'.

10.19 In order to achieve flexibility in disclosure requirements while having all Not-For-Profit organisations under a single specialist legal structure, a number of

15 Mackillop Family Services, *Submission 43*, Attachment 1. Clubs Australia, *Submission 54*, pp 6-9.

contributors supported a tiered reporting system, such as the system which operates in the UK.

You would surely be able to operate a tiered reporting system which would not make it overly onerous for the organisations at the lower end of the scale, particularly if there were a single structure that they operated under to provide that consistency across the sector.¹⁶

10.20 Dr Ted Flack makes the following recommendation:

New, differential reporting regime for all not-for-profit organisations, including charities, linked to tax status - that new mandatory, differential reporting standards be developed for four classes of organisations - small private not-for-profit organisations, large private not-for-profit organisations, small public not-for-profit organisations and large public not-for-profit organisations. That compliance with these national standards is linked to continued endorsement of tax status...¹⁷

10.21 Some witnesses, when questioned by the committee about a tiered approach, favoured a UK-type model, where the tier on which an organisation sits is dependent on its income.

There do need to be scales. We need to have a different approach for an organisation that is funded for one position which is a volunteer coordinator and that is its only salaried position. That would have a turnover of, say, \$50,000, \$60,000 or maybe \$75,000, with all overheads included. I think we do need a different standard that applies to those which are small than that which applies to the \$200 million or \$300 million organisations, for which a much higher level is appropriate.¹⁸

We are one of the larger charities in Australia, but there are many charitable organisations that are significantly smaller, have a smaller remit and are smaller in terms of their income. Whatever regulator eventuates—and hopefully one does from this inquiry—it has to have a nuanced approach, a tiered approach to what is legitimate to expect of different sized organisations and organisations with varying range and scope.¹⁹

Committee View

10.22 The committee finds that there is merit in all of the suggestions about tiered reporting regimes given over the course of the inquiry. The committee believes that reporting under a specialist legal structure should be tiered, but also believes that it is

16 Mr Paul Prindable, National Manager, Risk and Compliance, Perpetual Ltd., *Proof Committee Hansard*, 31 October 2008, p. 31.

17 Dr Ted Flack, *Submission 12*, p. 1.

18 Mr Gregory Mundy, Aged and Community Services Australia, *Proof Committee Hansard*, 28 October 2008, p. 29.

19 Mr Andrew Hewett, Executive Director, Oxfam Australia, *Proof Committee Hansard*, 30 October 2008, p. 29.

not in the best interests of the Sector to create additional complexity by requiring those tiers to be based on charitable status or tax concessions/exemptions or public/private operations. Any of these options has the potential to create additional confusion, not just for Not-For-Profit Organisations, but also for members of the public who are seeking comparability between organisations (and it is the intention of the committee that the information be publicly available). The general public may find it difficult to understand how two similar organisations with similar revenue, for example, could be on two different tiers depending on the organisations' charitable status. A straightforward method of assigning tiers is on total annual revenue.

10.23 The committee believes that, below a certain annual revenue threshold (to be determined), Not-For-Profit Organisations should not be required to submit audited financial records. The committee recognises that revenue is only one metric of size, but using a multidimensional approach would introduce excessive complexity. To balance this concession, the committee supports the inclusion of a penalty clause stating that it is an offence to deliberately submit misleading information.

Recommendation 10

10.24 The committee recommends that a tiered reporting system be established under the legislation for a specialist legal structure.

Recommendation 11

10.25 The committee recommends that the tiers be assigned to organisations based on total annual revenue.

10.26 The committee received numerous suggestions from contributors as to what features should be contained in any new disclosure regime.

Accounting standards

10.27 The Australian Evangelical Alliance summarises the issue of a lack of sector-specific accounting standards:

To date there are no specific or consolidated accounting standards published by the AASB to which not-for-profit organisations or their auditors may refer in preparing accounts. Deficiencies in this approach have been well documented. The Industry Commission outlined several in 1995: “Current standards, for example, give inadequate guidance in relation to the classification and recording of: valuation of donated goods; depreciation of gifted assets; treatment of bequests; capital grant funding; capital replacement provisions; and maintenance reserves.”²⁰

10.28 Mr Don D'Cruz commented to the committee of the value of accounts without a proper accounting standard:

20 Australian Evangelical Alliance, *Submission 37*, p. 5.

[T]here is a lack of common accounting standards, which means that one charity might look very good in terms of its accounts as opposed to another charity that does not bother to put them up, but the accounts are not worth the paper they are written on.²¹

10.29 The committee notes that the Government's Standard Business Reporting (SBR) initiative is currently developing a reporting taxonomy for for-profit organisations. SBR is

...a multi-agency initiative that will simplify business-to-government reporting by:

- making forms easier to understand
- using accounting/record keeping software to automatically pre-fill government forms and
- introducing a single secure way to interact on-line with participating agencies.
- As a result, businesses and their intermediaries will have a faster, more efficient reporting mechanism.

...

SBR is expected to save Australian businesses \$795 million per year on an ongoing basis, freeing up resources for more profitable activities. In addition, accountants, bookkeepers, tax professionals and software developers will have access to a powerful system for improving service delivery and productivity.²²

10.30 As a result of the initiative, which is being undertaken in four separate phases to allow feedback from users, 'business and government agencies will map their internal systems to this common language resulting in a more efficient and more reliable exchange of financial data'.²³

10.31 Ms Kerry Hicks noted that 'Not-for-profits are included in that [initiative] but quite indirectly'.²⁴ Professor Mark Lyons commented that 'I find it extraordinary that the government is embarking upon this but has not sought to put nonprofit organisations essentially through this process as they are putting for-profit entities'.²⁵

21 Mr Don D'Cruz, *Proof Committee Hansard*, 30 October 2008, p. 40.

22 Standard Business Reporting, What is SBR?, <http://www.xbrl.org/au/SBRProgram/> (accessed 12 November 2008).

23 Standard Business Reporting, *Taxonomy*, http://www.sbr.gov.au/content/information_for_software_developers_taxonomy.htm (accessed 12 November 2008).

24 Mrs Kerry Hicks, Head of Reporting, Institute of Chartered Accountants, *Proof Committee Hansard*, 29 October 2008, p. 65.

25 Professor Mark Lyons, *Proof Committee Hansard*, 29 October 2008, p. 65.

10.32 The Centre for Philanthropy and Nonprofit studies included some information about a similar project specific to Not-For-Profit Organisations:

In 2002, researchers in the School of Accountancy and CPNS believed that a standardisation of accounting terms agreed to by government and the sector would provide a solution to the problem. The development of agreed standard reporting definitions or a "data dictionary" which government funders only use in their transactions with the sector (grant applications, acquittals and reporting) would radically streamline administrative process and slash compliance costs.²⁶

10.33 Mr Kimberly Smith of the Australian Evangelical Alliance agrees that financial definitions are required, but noted that 'I would hope that could come through the Australian Accounting Standards Board, AASB, because you would need one authority to coordinate all of that'.²⁷

10.34 Professor David Boymal of the AASB states that the role of the Board is to adopt the International Financial Reporting Standards for application in Australia, and 'modify them where needed'.²⁸ This would indicate that the AASB would not be inclined to look at standards specific to Not-For-Profit Organisations without first having an international precedent.

Standard Chart of Accounts

10.35 Throughout its inquiry, the committee heard that many contributors support the implementation of the Standard Chart of Accounts (SCOA), developed by the Australian Centre for Philanthropy and Nonprofit Studies:

The work of the Standard Chart of Accounts project (Queensland University of Technology, The Australian Centre for Philanthropy and Nonprofit Studies) should be introduced for all Commonwealth and State government grant submissions and acquittals to cut paperwork compliance costs and increase the usability of information. This is an excellent initiative that is particularly important in the absence of a NFP-specific accounting standard.²⁹

10.36 The aim of the SCOA is to streamline financial accounting, and reduce costs for both Not-For-Profit Organisations and governments. Professor McGregor-Lowndes from the Centre summarised the process of developing the SCOA:

26 Centre for Philanthropy and Nonprofit Studies, *Submission 27*, p. 2.

27 Mr Kimberly Smith, Member, Compliance Committee, Australian Evangelical Alliance, *Proof Committee Hansard*, 30 October 2008, p. 61.

28 Professor David Boymal, Chairman, Australian Accounting Standards Board, *Proof Committee Hansard*, 30 October 2008, p. 74.

29 PilchConnect, *Submission 129*, p. 8.

We asked every government department and unit within each government department to give us every submission form and acquittal form with a budget. We took all of the ways that they defined the terms that they wanted nonprofits to report in. We put it all on a huge spreadsheet. It was so big we could not print it out, and not even our QUT cartography department could do it. It ran to many thousands of lines across all the departments; 113 different ways to define wages and salaries, 25 for postage and ‘petties’ and everything in between.

The chances were that a nonprofit organisation that received more than one grant from any unit in government would have different definitions. They could not rely on their chart of accounts. They had to go back to their vouchers and add salary, protective clothing, telephone—all of these things. It made no sense. Is it any wonder that nonprofits often made a guess at it rather than to go back to the actual data?

We got that data. We had a look at it and analysed the issues. There were quite a number of issues that came from that. Apart from all the different descriptions, we discovered inconsistency in the treatment of revenue in advance. The accounting standards have one view. Government departments wanted to force people to have another view about what happens with surpluses at the end of the period—were they carried over, clawed back, and how you reported them.

We got all of the government bureaucrats from the five major funding departments around a table and talked to them. We went through line by line, until they fell asleep, trying to get them to justify why they needed this information. Why were sausage sizzles taken out of hospitality for education grants? A story comes out that one day there was a ministerial brief that came down questioning sausage sizzle expenses so they decided to put it in there and it remained there for years afterwards. Why are things different? We just do it that way.

We were able to bring to them some rationality and collapse and agree on some of the definitions after a lot of talking. Some of the major drivers about why they wanted reporting on material that you would not normally expect were, firstly, the Commonwealth and state agreements required them to report on various things. They said, ‘We’ve got to collect it from the nonprofits because we have to report it back to the federal government.’ Secondly, ‘We believe that this information is necessary for us to keep tabs on what nonprofits do, how they spend money and what they are achieving.’ This is an issue of whether you are looking at throughputs, outputs or outcomes. Clearly as funders become more sophisticated and if they can move to outcomes, the reliance upon this trail of what people spent money on becomes less and less important.

What we got to was a product such that if government limited itself to only asking nonprofits for these financial definitions, then if a nonprofit adopted the chart of accounts they would be able to satisfy any budget or acquittal the government could ask. It was much longer because places like disability and housing required all sorts of sinking funds and other things. The

standard chart of account was much longer than we wanted, but it would meet all the government requests.³⁰

10.37 The committee is aware that a SCOA has now been adopted by Departments in Queensland, New South Wales and Western Australia, while a project plan is awaiting sign off only in Victoria. Following an initial discussion with representatives of Federal Commonwealth Departments in late 2007, the Department of Treasury appointed the Department of Families, Housing, Community Services and Indigenous Affairs to take the role of the lead Commonwealth agency in investigating the feasibility of implementing a SCOA.

Other methods of reporting

10.38 A number of contributors felt that there was merit in supplementing financial reporting with a narrative, arguing that in many cases this is a more appropriate form of reporting to donors than financial information or fundraising ratios.³¹ Professor McGregor-Lowndes agrees that:

I would like to see more emphasis placed on the narrative, because it is not what money you have left over at the year end—sometimes that is important—it is whether they have achieved their mission and how they are going. The storytelling and strategy of how they are going to do their mission is at the heart of what needs to be communicated to the public and to stakeholders.³²

10.39 In seeking information from witnesses, the committee found that there is little information within the sector that measures the efforts of volunteers. Professor Mark Lyons thought that this is information that should be collected:

In addition to financial there would be numeric reporting like the numerical data on estimates of volunteer contributions, which the accountants do not like. If we could develop a standard for reporting on that, then that would be tremendously important because the volunteer contribution is a really important part of what is unique and the resources that are used by these organisations.³³

10.40 In addition to these suggestions, the committee received detailed input as to what information should be included in a disclosure regime. Moore Stephens provided the committee with a list of basic information that should be required of all Not-For-Profit Organisations:

a. Mission;

30 Professor Myles McGregor-Lowndes, *Proof Committee Hansard*, 29 October 2008, pp 89-90.

31 See, for example, Mr Gregory Mundy, Chief Executive Officer, Aged & Community Services Australia, *Proof Committee Hansard*, 28 October 2008.

32 Professor Myles McGregor-Lowndes, *Proof Committee Hansard*, 29 October 2008, p. 57.

33 Professor Mark Lyons, *Proof Committee Hansard*, 29 October 2008, pp 63-64.

- b. Source of funding;
- c. Board and Committee members;
- d. Contact details;
- e. Tax status; and
- f. Commercial activities undertaken and their contribution to the mission of the entity.³⁴

10.41 The committee also received a list of required information from donor Mr Richard Stradwick:

Donors need to know the answers to five questions

1. What are the objectives of the organisation?
2. How does the organisation intend to achieve these objectives?
3. Who are the people responsible for the governance of the organisation?
4. Where do the organisation's funds come from?
5. Where are the funds used?

Donors also need to know that the organisation has supplied accounts set out in a specified form to the Government within a designated period and that the accounts have been audited by a qualified auditor; but they do not need the fine detail of the accounts.³⁵

Accessibility of reports

10.42 The committee considers that the way in which the general public is able to access the information of Not-For-Profit Organisations may assist in the perceived transparency of the Sector. The Bohlevale Community Centre asked:

Would it not be better and more open if annual reports and audited accounts were to be lodged on line, and then be available to the public (as in the UK)? Anyone seeking more in-depth analysis of reports could request them (for a standard fee) from the respective organisation.³⁶

10.43 The ability for the public to find information on a charity through a website is not a new one. GuideStar International (GSI) is a UK-registered charity which is building a global network of websites with detailed reports on countries' charities to make them more visible to those who wish to support their work. GuideStar websites publish the aims, activities, accomplishments, structure and finances of Not-For-Profit Organisations to achieve transparency. GuideStar websites:

- make CSOs [charities] more visible, accountable and effective;

34 Moore Stephens, *Submission 115*, p. 2.

35 Mr Richard Stradwick, *Submission 138*, p. 3.

36 Bohlevale Community Centre, *Submission 3*, p. 1.

- enable more confident and effective philanthropy; and
- promote vibrant and well governed civil societies.³⁷

10.44 Professor Lyons also described the benefit of GuideStar:

The GuideStar organisation in the UK draws data from the Charity Commission [Register] but it also electronically scans and summarises annual reports to provide more information than is provided even to the charity commission and then enables organisations within certain limits to add or to modify the data that is there.³⁸

Committee View

10.45 The committee commends the Australian Centre for Philanthropy and Nonprofit Studies for its work in developing a standard chart of accounts and notes the urgent need for uniform accounting standards. The committee believes that there should be elements of financial, numeric and narrative reporting in the disclosure requirements of Not-For-Profit Organisations, regardless of the tier to which an organisation is assigned. All information required under the disclosure scheme would then be forwarded to the national regulator.

10.46 However, the committee also acknowledges the concern from some members of the sector that standardising reporting requirements through a standard chart of accounts will create additional expense for Not-For-Profit Organisations. It is the committee's understanding that the standard chart of accounts, while lengthy, is intended to capture all possible reporting categories, and therefore may not be applicable to all organisations. Where this is the case, organisations would only be required to report against categories that are relevant to them.

10.47 The committee is also conscious of the perceived value of fundraising ratios to the general public, as evidenced in the Choice article. In particular, charities which employ the services of professional fundraisers to solicit donations by face-to-face contact or by telephone should be required to publish the fundraising ratios associated with the campaign conducted on their behalf by professional fundraisers.

10.48 Currently, a number of issues prevent the committee from recommending the immediate inclusion of a fundraising ratio as a reporting requirement for Not-For-Profit Organisations:

- Fundraising costs vary according to the lifecycle of the organisation (a new organisation will have considerably greater expenses - eg. advertising expenses associated with gathering more donors - than a long established one).

37 GuideStar International, *GuideStar International*, <http://www.guidestarinternational.org/> (accessed 13 November 2008).

38 Professor Mark Lyons, *Proof Committee Hansard*, 29 October 2008, p. 63.

- Fundraising cycles are not necessarily annual – eg. cycle for bequests may be 20 years, fundraising campaigns may be two to seven years.
- There is the issue of what to include in the ratio:
 - Do you count the expenses of measuring costs as a fundraising cost?
 - What is a fundraising cost – does it include electricity/light/floorspace, for example?
 - What should the ratio measure – income/turnover?
 - How do you measure the contribution of volunteers?

10.49 The committee notes that the Australian Centre for Philanthropy and Nonprofit Studies is currently investigating the issues associated with implementing a meaningful fundraising ratio for Not-For-Profit Organisations, and that this is a long term project. The committee endorses the work of the Centre, and believes that, should the project succeed in its aim, the fundraising ratio methodology should be adopted and enforced by the national regulator.

10.50 The committee agrees that a public website where information on all Not-For-Profit Organisations would be available to the public would assist in increasing the transparency and accountability of the Sector. Such a website would complement the Register of Australian Not-For-Profit Organisations and could include links to each organisation to assist donors or interested parties in finding an organisation that they would like to support.

Recommendation 12

10.51 The committee recommends that the Commonwealth Government work with the Sector to implement a standard chart of accounts for use by all departments and Not-For-Profit Organisations as a priority.

Recommendation 13

10.52 The committee recommends that a new disclosure regime contain elements of narrative and numeric reporting as well as financial, in acknowledgement that the stakeholders of the Sector want different information to that of shareholders in the Business Sector. The financial reporting should be transparent and facilitate comparison across charities.

Recommendation 14

10.53 The committee recommends that the national regulator investigate the cost vs benefit of a GuideStar-type system (a website portal that publishes information on the aims and activities of Not-For-Profit Organisations) in Australia to encompass all Not-For-Profit Organisations.

Chapter 11

Implementing the Recommendations

Committee View

11.1 The committee has recommended some significant changes in order to improve the regulation of Not-For-Profit Organisations and increase transparency and accountability. Most significantly for the Sector, the committee has recommended the establishment of a national regulator; development of a specialist legal structure for mandatory use; and a national fundraising act.

11.2 The committee acknowledges that its recommendations do not contain the fine detail that will be needed in order to introduce the new systems with as little impact as possible on the day to day functioning of organisations as they carry out their business, but maximum impact on the transparency of the sector. Further guidance will need to be provided to governments on the implementation of the recommendations.

11.3 In addition, the committee wishes to ensure that organisations such as social enterprises (of which the committee received minimal evidence) are not neglected in the reform process.

11.4 Several contributors suggested that the committee recommend in its report the establishment of a Taskforce in order to progress reform for Not-For-Profit Organisations.¹ Jesuit Social Services commented that:

Our organisation is action oriented and often we are critical of governments for establishing reviews and inquiries when clear solutions are apparent and what is needed is action, not further inquiry.

However, in this instance, given the complexity of the issues involved, the range of different types and sizes of organisations within the sector and the lack of clear basic data about the sector to inform policy making, it seems that a partnership based Taskforce approach would be most appropriate.²

11.5 The committee agrees that a Taskforce that includes people of appropriate expertise will assist in driving the reform process and implementing this committee's recommendations. The Taskforce should comprise: a government representative from the Commonwealth and a COAG-elected representative to speak for states and territories; one or more qualified legal experts with expertise with the major pieces of legislation affecting Not-For-Profit organisations; a representative from an

1 See, for example: PilchConnect, *Submission 129*, p. 44.; Mackillop Family Services, *Submission 43*, p. 4.; Australian Council of Social Services, *Submission 109*, p. 7.

2 Jesuit Social Services, *Submission 83*, pp 2-3.

organisation which manages private charitable foundations; an accountant with not-for-profit expertise; and a number of representatives from the peak bodies of Not-For-Profit Organisations, including a representative from a peak body for social enterprises. The committee also believes that micro and small organisations should be represented on the Taskforce; in the absence of a peak body, consideration should be given to including a representative of an organisation such as the CPA Third Age Network Committee which has advocated well for micro organisations during this Inquiry.

11.6 Ideally, this group should report to COAG on a quarterly basis, and should continue to meet until such time as all of the report's recommendations are implemented.

Recommendation 15

11.7 **The committee recommends that a Taskforce be established for the purposes of implementing the recommendations of this report. The Taskforce should report to COAG. Its membership should include:**

- **a government representative from the Commonwealth;**
- **a COAG-elected representative to speak for states and territories;**
- **one or more qualified legal experts with expertise with the major pieces of legislation affecting Not-For-Profit organisations;**
- **a representative from an organisation which manages private charitable foundations;**
- **an accountant with not-for-profit expertise; and**
- **a number of representatives from the peak bodies of Not-For-Profit Organisations, including a representative from a peak body for social enterprises.**

The Taskforce should actively seek to ensure that the measures of reform that it implements do not impose an unreasonable reporting burden on small and micro Not-For-Profit Organisations.

Senator Annette Hurley

Chair

APPENDIX 1

Submissions Received

Submission

Number

Submitter

1	Mr Raymond F Smith
2	Sydney Maccabi Tennis Club Ltd
3	Bohlevale Community Centre
4	Mr Colin Singer
5	Association of Children's Welfare Agencies (ACWA)
6	Mr John Goldbaum
7	Name Withheld
8	Melbourne Community Foundation
9	Group Training Australia Ltd
10	Fairholme Disability Support Group Inc [WA]
11	Alcohol & other Drugs Council of Australia (ADCA)
12	Dr Ted Flack, PhD, FFIA, CFRE
13	Community Information Strategies Australia Inc. (CISA)
14	Valmar Support Service Ltd
15	Dr John M Green
16	Scouts Australia
17	Chartered Secretaries Australia (CSA)
18	Volunteering Wingecarribee Inc.
19	Dr Nicholas Beaumont
20	Agricultural Societies Council of NSW Inc
21	Ms Vikki Wilkes
22	MND Australia
23	Complementary Healthcare Council of Australia
24	Mr Scott Bradley
25	The Australian Institute
26	Our Community
27	Australian Centre for Philanthropy & Non-profit Studies, Queensland University of Technology (QUT)
28	Royal District Nursing Service
29	Australian Christian Churches
30	Ms Sue Woodward
31	Federal Council of Agricultural Societies (FCAS)
32	Skyline Education Foundation Australia
33	Southern Youth and Family Services (SYFS)
34	Association of Neighbourhood Houses & Learning Centres (ANHLC)
35	South Pacific Division of the Seventh-day Adventist Church
36	Mater Foundation
37	Australian Evangelical Alliance
38	World Wildlife Fund (WWF) Australia
39	CPA Third Age Network Committee
40	Loddon Murray Community Leadership Program (LMCLP)
41	Wesley Mission, Sydney

- 42 Philanthropy Australia
- 43 Mackillop Family Services
- 44 Mr Peter Robinson
- 45 The Salvation Army, Australian Eastern Territory
- 46 Women's Health Victoria
- 47 Cerebral Palsy League of Queensland
- 48 Mr Michael Gousmett
- 49 Mr Clive Deverall AM
- 50 Mid Mountains Neighbourhood Centre
- 51 Artful Fundraising Pty Ltd
- 52 Asthma Foundations of Australia
- 53 Youth Insearch
- 54 Clubs Australia
- 55 Mr Barhas Losolsuren & Associate Professor Ken Coghill
- 56 UnitingCare NSW.ACT
- 57 Independent Schools Council of Australia (ISCA)
- 58 Wesley Mission Melbourne
- 59 Juvenile Diabetes Research Foundation (JDRF)
- 60 Community Resource Network (CRN) Inc.
- 61 PricewaterhouseCoopers Australia
- 62 Epilepsy Foundation of Victoria
- 63 Philanthropy Australia
- 64 Ms Muriel Dawson
- 65 Name Withheld
- 66 Ms Margaret Conley
- 67 Mr Mark Lyons
- 68 Catherine Brown & Associates P/L
- 69 North Shore Heart Research Foundation
- 70 Western Sydney Community Forum
- 71 RSPCA Australia
- 72 Leukaemia Foundation of Australia
- 73 Australian Centre for Democracy & Justice
- 74 Australian Catholic Bishops Conference (ACBC)
- 75 Illawarra Forum Inc.
- 76 BDO Kendall
- 77 Fundraising Institute of Australia
- 78 National Pro Bono Resources Centre
- 79 Uniting Church in Australia Assembly
- 80 Blackbaud Pacific Pty Ltd
- 81 Grant Thornton
- 82 Australasian Society for HIV Medicine (ASHM)
- 83 Jesuit Social Services
- 84 Coronet City Cricket Club
- 85 Anglicare Australia
- 86 The Institute of Internal Auditors-Australia
- 87 Secular Party of Australia
- 88 Network of Alcohol and Other Drug Agencies (NADA)
- 89 World Vision Australia
- 90 St Vincent de Paul Society National Council of Australia
- 91 Medecins Sans Frontieres Australia
- 92 Mr Ken Crofts

-
- 93 Children's Cancer Institute Australia (CCIA)
 - 94 Australian Business Arts Foundation (ABAF)
 - 95 Auburn Small Community Organisation Network
 - 96 Murrumbidgee General Practice Network
 - 97 National Breast Cancer Foundation
 - 98 CPA Australia
 - 99 International Fund for Animal Welfare (IFAW) Asia Pacific
 - 100 UnitingCare Australia
 - 101 CONFIDENTIAL
 - 102 The Wilderness Society
 - 103 ACL Pty Ltd
 - 104 Association of Independent Schools of Victoria
 - 105 Institute of Public Affairs
 - 106 The Benevolent Society
 - 107 Associations Forum Pty Ltd
 - 108 The Institute of Chartered Accountants in Australia
 - 109 Australian Council of Social Service (ACOSS)
 - 110 Youth Off The Streets
 - 111 Rationalist Society of Australia (RSA)
 - 112 The Smith Family
 - 113 Camp Quality
 - 114 Mental Health Council of Australia
 - 115 Moore Stephens Sydney Pty Ltd
 - 116 Oxfam Australia
 - 117 Resthaven Inc.
 - 118 Anglican Church Diocese of Sydney
 - 119 Royal Flying Doctor Service (RFDS) of Australia
 - 120 Neumann & Turnour Lawyers
 - 121 Thorr's Shield & Forge
 - 122 Mr Rob Clough
 - 123 Mr Anwar Benjamin
 - 124 Mr Ian Bryce
 - 125 Governance Culture
 - 126 Ballarat Grammar
 - 127 Australian Major Performing Arts Groups (AMPAG)
 - 128 Law Council of Australia
 - 129 PilchConnect (PILCH)
 - 130 Australian Council for the Arts
 - 131 Aged and Community Services Australia (ACSA)
 - 132 Liberty Victoria
 - 133 Human Rights Arts and Film Festival Inc. (HRAFF)
 - 134 Council of Social Service of NSW (NCOSS)
 - 135 Catholic Health Australia
 - 136 Psychiatric Disability Services of Victoria (VICSERV)
 - 137 YMCA Australia
 - 138 Mr Richard Stradwick
 - 139 Social Ventures Australia Ltd
 - 140 Master Builders Association (MBA)
 - 141 Family Relationship Service Australia (FRSA)
 - 142 Trustee Corporations Associations of Australia (TCA)
 - 143 Australian Tax Office (ATO)

- 144 Mr Kerry Graham, Dr Andrew Young, Mr Mike Wilson & Mr Martin Laverty
- 145 ING Foundation Australia
- 146 Australian Refugee Association Inc
- 147 Public Interest Advocacy Centre
- 148 Katoomba Neighbourhood Centre Inc
- 149 Villa Maria - Disability, Aged Care & Education
- 150 Mountains Youth Services Team Inc (MYST)
- 151 Valmar Support Services Ltd
- 152 Mental Illness Fellowship of Australia Inc
- 153 Arts Access Australia
- 154 Mrs R MacKinnon
- 155 Mountains Community Resource Network (MCRN)
- 156 Australian Christian Lobby (ACL)
- 157 Union Aid Abroad - APHEDA
- 158 Australian Council for the Defence of Government Schools (DOGS)
- 159 Australian National Secular Association
- 160 Mr Harold Wallace
- 161 Office of the Registrar of Indigenous Corporations (ORIC)
- 162 Australian Red Cross
- 163 Timber Communities Australia (TCA)
- 164 Australian Council for International Development (ACFID)
- 165 Heart Foundation
- 166 Perpetual
- 167 Catholic Social Services Australia (CSSA)
- 168 Cancer Council Australia
- 169 Treasury
- 170 National Roundtable of Non profit Organisations
- 171 Australian Institute of Company Directors (AICD)
- 172 Wintringham
- 173 Department of Culture and the Arts
- 174 Mission Australia
- 175 CONFIDENTIAL
- 176 Mr Steve Henderson
- 177 R.S Dartnall
- 178 Abacus - Australian Mutuals
- 179 Ms Katy Gallagher MLA
- 180 Anglican Church of Australia, General Synod
- 181 Anonymous
- 182 Mr Paul Geyer
- 183 Tourism & Transport Forum (TTF) Australia

Additional Information Received

- Received on 30 October 2008, by Mr Keith Benson, Australia Evangelical Alliance Inc/Missions Interlink. Response to question asked on 30 October 2008 in Melbourne and '*Accountability and Transparency*' publication;
- Received on 13 November 2008, by Fundraising Institute of Australia (FIA). Background Information.

TABLED DOCUMENTS

- 23 October 2008, CANBERRA ACT:
 - Mr Tony Lang, '*Pros and Cons of Companies Limited by Guarantee versus Incorporated Associations*';
 - Association of Neighbourhood Houses & Learning Centres (ANHLC), '*Useful Deductible Gift Reciprocity (DGR) Information*';
- 31 October 2008, SYDNEY NSW:
 - Perpetual, '*Perpetual's Funding Round Acquittal Report*'.

APPENDIX 2

Public Hearing and Witnesses

ROCKHAMPTON, QLD, 18 JULY 2008

- CALLAGHAN, Mr Peter, Chief Executive Officer, Community Employment Options Inc
- HORNAGOLD, Mrs Margaret, Manager, Darumbal Community Youth Service
- JAMES, Ms Lavenia, President, Central Queensland Multicultural Association

CANBERRA, ACT, 28 OCTOBER 2008

- BECSI, Mr Stephen, Alternate Director WA, Aged Care Association Australia
- CAMPTON, Mr Jonathan, Researcher, St Vincent de Paul Society National Council of Australia
- CHAMBERS, Ms Kasy, Executive Director, Anglicare Australia
- FALZON, Dr John, Chief Executive Officer, St Vincent de Paul Society National Council of Australia
- FRASER, Mr Bede, Manager, Corporate Reporting and Accountability Unit, Corporations and Financial Services Division, Treasury
- HACKETT, Mr Greg, Adviser, Governance and Insolvency Unit, Corporations and Financial Services Division, Treasury
- LONG, Mrs Vicki, Manager, Executive Services, Royal District Nursing Service
- McKENZIE, Mr Bruce, Aged Care Association Australia
- MILLER, Mr Geoff, General Manager, Corporations and Financial Services Division, Treasury
- MOOR, Mr David, President, Agricultural Societies Council of New South Wales
- MUNDY, Mr Gregory Philip, CEO, Aged and Community Services Australia

- OGLE, Dr Greg, National Legal Coordinator, The Wilderness Society Inc.
- PRESTON, Ms Kate, Manager, Governance and Insolvency Unit, Corporations and Financial Services Division, Treasury
- RAM, Ms Ronita, Policy analyst, Corporations and Financial Services Division, Treasury
- REGAN, Dr Sean, National Policy Adviser, Anglicare Australia
- ROMANIS, Mr Daniel, Chief Executive Officer, Royal District Nursing Service

CANBERRA ACT, 29 OCTOBER 2008

- ANDERSON, Ms Gina, Chief Executive Officer, Philanthropy Australia
- BEVEN, Mr Anthony, Registrar of Indigenous Corporations, Office of the Registrar of Indigenous Corporations
- BOYLE, Mr Nathan, Branch Manager, Office of the Registrar of Indigenous Corporations
- BRUCE, Ms Kelly, Business Manager, Australian Council for International Development
- CLARK, Ms Merial, Executive Officer, Association of Neighbourhood Houses and Learning Centres
- FLACK, Dr Edmund Douglas, Private capacity
- HARDY, Mr Michael, Assistant Commissioner, Australian Taxation Office
- HICKS, Mrs Kerry Ann, Head of Reporting, Institute of Chartered Accountants
- KONZA, Mr Mark, Deputy Commissioner, Australian Taxation Office
- LANG, Mr Anthony David, Representative, Law Council of Australia
- LEGGETT, Mr Christopher Murray, Senior Adviser, Philanthropy and Exemptions Unit, Personal and Retirement Income Division, Department of the Treasury

- LUCAS, Father Brian, General Secretary,
Australian Catholic Bishops Conference
- LYONS, Professor Mark,
Private capacity
- MACFIE, Mr Gregor, Policy Manager,
Australian Council of Social Service
- MACKAY, Ms Karen Marler, Project Manager,
Association of Neighbourhood Houses and Learning Centres
- McGREGOR-LOWNDES, Professor Myles, Director,
Centre for Philanthropy and Nonprofit Studies, Queensland University of
Technology
- O'CONNOR, Mr Mark John, Principal Adviser,
Personal and Retirement Income Division, Department of the Treasury
- PEAKE, Ms Kym, Executive Coordinator (Productivity),
Department of Prime Minister and Cabinet
- THOMPSON, Mr David, Chair,
National Roundtable of Nonprofit Organisations

MELBOURNE VIC, 30 OCTOBER 2008

- BARTLETT, Mr Garry William, Chair,
Voluntary and Honorary Work Subcommittee, CPA Australia Third Age
Network
- BENSON, Mr Keith Edwin, Acting Chairman,
Missions Interlink, Australian Evangelical Alliance Inc
- BOYMAL, Professor David Gary, Chairman,
Australian Accounting Standards Board
- BREEZE, Ms Nicole, Executive Manager,
Oxfam Australia
- BROWN, Ms Catherine Janet, Director,
Catherine Brown and Associates Pty Ltd
- CALDER, Mr Peter, Member,
Voluntary and Honorary Work Subcommittee, CPA Australia Third Age
Network
- D'CRUZ, Mr Don,
Private capacity
- DAVIES, Ms Sarah, Chief Executive Officer,
Melbourne Community Foundation

- DOIG, Mr Lindsay, Member,
Voluntary and Honorary Work Subcommittee, CPA Australia Third Age
Network
- HEWETT, Mr Andrew, Executive Director,
Oxfam Australia
- MacDOUGALL, Mrs Alice,
Special Counsel, Freehills
- MacLEOD, Mrs Noela Helen, Immediate Past President,
Country Women's Association of Victoria Inc.
- MILLER, Mr Simon, Special Projects Advisor,
Legal, Risk and Governance, World Vision Australia
- RAPER, Mr Michael, Director of Services and International Operations,
Australian Red Cross
- SHEEHAN, Ms Caroline, National Coordinator Submissions,
Australian Red Cross
- SHYING, Dr Mark, Senior Policy Adviser,
Financial Reporting and Governance, CPA Australia
- SLATER, Mr Thomas Geoffrey, National Director,
Australian Evangelical Alliance Inc
- SMITH, Mr Kimberly, Member,
Compliance Committee, Australian Evangelical Alliance Inc
- SQUIRRELL, Mr Maurice, Member,
Voluntary and Honorary Work Subcommittee, CPA Australia Third Age
Network
- STRADWICK, Mr Richard Charles,
Private capacity
- THOMSON, Mr Angus, Technical Director,
Australian Accounting Standards Board
- WALL, Mrs Helen Jean, State President,
Country Women's Association of Victoria Inc.
- WEBSTER, Ms Marion, Chair of the Board,
Melbourne Community Foundation
- WYSE, Ms Trudy, Manager,
Donor and Community Services, Melbourne Community Foundation

SYDNEY NSW, 31 OCTOBER 2008

- BORAZIO, Ms Vittoria, Chief Operating Officer
Youth Off the Streets
- CUFFE, Mr Christopher, Executive Director,
Social Ventures Australia
- FIKKERS, Mrs Regina, Partner,
PricewaterhouseCoopers
- FOX, Ms Judith, Director, Policy,
Chartered Secretaries Australia
- JIRASEK, Ms Ivana, Artsupport Australia,
Australia Council for the Arts
- KEATING, Ms Katherine,
Private capacity
- KEELE, Ms Kathy, Chief Executive Officer,
Australia Council for the Arts
- PARAMANATHAN, Mr Raj, Development Coordinator - Government,
Youth Off the Streets
- PEACOCK, Mr John, General Manager,
Associations Forum Pty Ltd
- PRINDABLE, Mr Paul Matthew, National Manager,
Risk and Compliance, Perpetual Ltd
- RENOUF, Mr Gordon Philip, Director,
Policy and Campaigns, CHOICE
- SHARPE, Mr David, Program Manager,
Business Capacity Building, Australia Council for the Arts
- SHEEHY, Mr Tim, Chief Executive,
Chartered Secretaries Australia
- SIMONS, Dr Robert, Head of Research and Evaluation,
The Smith Family
- THOMAS, Mr Andrew Douglas, General Manager,
Philanthropy, Perpetual Ltd
- TRAILL, Mr Michael, Chief Executive,
Social Ventures Australia
- TREVASKIS, Ms Elaine, Chief Executive Officer,
Australian Sonographers Association Ltd; Member, Associations Forum Pty Ltd

- WALLACE, Dr Sue-Anne, Chief Executive Officer, Fundraising Institute Australia
- WATKINSON, Mr Ben, Company Secretary, The Smith Family
- WATSON, Mr Andrew, Chief Financial Officer, Wesley Mission New South Wales
- WONG, Miss Stephanie, Policy Officer, Fundraising Institute Australia

CANBERRA ACT, 11 NOVEMBER 2008

- WOODWARD, Ms Susan, Manager, PilchConnect

APPENDIX 3

SENATE STANDING COMMITTEE ON ECONOMICS

INQUIRY INTO THE DISCLOSURE REGIMES FOR CHARITIES AND NOT-FOR-PROFIT ORGANISATIONS

BACKGROUND PAPER

Introduction

1. On 18 June 2008, the Senate referred to the Senate Standing Committee on Economics, an inquiry into the disclosure regimes for charities and not-for-profit organisations, for report by the last sitting day of November 2008.

Terms of Reference

2. The inquiry will examine:
- (a) the relevance and appropriateness of current disclosure regimes for charities and all other not-for-profit organisations;
 - (b) models of regulation and legal forms that would improve governance and management of charities and not-for-profit organisations and cater for emerging social enterprises; and
 - (c) other measures that can be taken by government and the not-for-profit sector to assist the sector to improve governance, standards, accountability and transparency in its use of public and government funds.
3. In referring this matter to the Economics Committee the Senate:
- noted the report by *Choice*¹ on charities, which was published online in March 2008, that highlights the wide variability and inconsistency in the way that charities disclose information to the public; and
 - acknowledged that the 27 recommendations from the inquiry into the definition of charities and related organisations², which reported in 2001, have not been implemented.

¹ A preview of this report is available online at <http://www.choice.com.au/viewArticle.aspx?id=106240&catId=100268&tid=100008> . The full report is a 'members access only' article.

Important note to readers

4. As demonstrated above, the terms of reference for this inquiry are reasonably broad. This paper has been developed by the Committee's Secretariat to provide a brief overview of some of the issues, in respect to governance and disclosure regimes for the not-for-profit sector, which have been raised in the above mentioned reports and in related literature. It is not intended to reflect the views of the Committee on any of the issues raised, but rather to provide guidance to individuals or organisations considering making a submission to the inquiry on the types of questions and issues that the inquiry is likely to grapple with.

5. It is also important to note that it is **not** the intention of the Committee to limit the inquiry to the issues and questions raised in this paper. The Committee welcomes any submission that addresses the terms of reference for the inquiry, regardless of whether or not it addresses the issues canvassed in this background document.

The not-for-profit sector in Australia

6. The not-for-profit sector in Australia, which includes charities along with a range of other entities, such as churches, sporting organisations, advocacy groups, community organisations, co-operatives, trade unions, trade and professional associations, chambers of commerce, welfare organisations and service providers, is a significant sector of the Australian economy and makes a marked contribution to civil society.

7. According to the National Roundtable of Nonprofit Organisations³, there are as many as 700,000 not-for-profit organisations in Australia, most of which are very small and dependent on the voluntary commitment of members. Around 380,000 of these are incorporated in some form or another (ie. they have a legal identity independent from their members). In 1999-2000 the not-for-profit sector accounted for approximately 6.8% of Australians in employment and contributed 3.3% of Australia's GDP (4.7% when the value of volunteer labour is included). In 2003, 86% of adults belonged to at least one not-for-profit association, with 48% belonging to three or more.

8. Despite the size of this sector, and its centrality to the well-being of society, its contribution often goes unrecognised and it remains largely unregulated.

Current regulatory regimes

9. There is no single regulatory regime for not-for-profit organisations in Australia. According to the Nonprofit Roundtable:

At present there are more than twenty different ways to incorporate a nonprofit organisation. This variety is a product of both a variety of specialist forms of incorporation (eg for trade unions, parent associations), and the existence of a dual state/federal regime. There are eight forms for incorporating as an association and six as a cooperative.

10. Some (generally larger) not-for-profit organisations, because of their corporate structure, come under the purview of the Australian Securities and Investments Commission and, as such,

² The recommendations from this report are listed at Appendix A. The full report can be accessed online at <http://www.cdi.gov.au/html/report.htm>

³ National Roundtable of Nonprofit Organisations, *The Nonprofit Sector in Australia: A Fact Sheet*, Downloaded on 2 July 2008 from www.nonprofitroundtable.org.au

are subject to the same reporting and auditing requirements that apply to for-profit companies.⁴ Other not-for-profit organisations are incorporated associations or trusts. Incorporated associations are governed by state and territory based legislation which differs from one jurisdiction to another, ‘both in nature and enforcement.’⁵ According to Murray, such associations ‘are lightly regulated with few reporting requirements.’⁶

11. A number of not-for-profit organisations may also have been established by statute, for example the Cancer Council Victoria was established by the *Cancer Act 1958* (Vic). In these cases, the operation of the organisation, including reporting requirements, is determined by the Act.

12. Not-for-profit organisations who undertake fundraising activities are also subject to state and territory fundraising legislation⁷, which may specify a variety of reporting and disclosure requirements. This adds an additional level of complexity for organisations undertaking fundraising in more than one jurisdiction.

Concerns about the not-for-profit sector

13. A number of concerns have been expressed about the way in which the not-for-profit sector operates in Australia. These include:

- a lack of transparency about the way in which public or donated funds are spent; and
- lack of accountability, despite the fact that the not-for-profit sector is a major provider of services to the public.

Lack of transparency

14. A survey conducted by *Choice* found that 81% of respondents did not know what proportion of their charitable donation reached their favoured charity’s beneficiaries, yet 94% considered it important to have access to that information. The survey found wide variability and inconsistency in the way that charities communicate key information to donors. In some cases, such information was not publicly available at all, as some charities did not publish their annual reports or financial accounts.⁸

15. The *Choice* report, which also included a survey of charities, also found that there was no uniform accounting or reporting standards for charities, so even when charities did make available information about how donations were distributed, this information did not necessarily allow a comparison to be made across different entities, because different approaches and definitions may be used. As one respondent put it:

Charities pluck numbers out of the air for their fundraising costs. There’s no agreement about what constitutes administration costs. Some will say it’s only the people in your

⁴ Murray, A., *One Regulator One System One Law – The Case for Introducing a New Regulatory System for the Not for Profit Sector*, July 2006, p.11.

⁵ Murray, A., (2006). p. 48.

⁶ Murray, A., (2006). p. 48.

⁷ See the following Acts for details: *Collections Act 1966 (Qld)*; *Charitable Fundraising Act 1991 (NSW)*; *Charitable Collections Act 2003 (ACT)*; *Fundraising Appeals Act 1998 (Vic)*; *Collections for Charities Act 2001 (Tas)*; *Public Collections Act (WA)*; and the *Collections for Charitable Purposes Act 1939 (SA)*.

⁸ Choice, *Charities*, downloaded from www.choice.com.au on 2 July 2008, pp. 1-13.

*fundraising department. Others might include IT, HR, marketing departments... there's no consistency.*⁹

16. According to Murray:

*Currently many NFPs are not legally obliged to report to donors, service recipients or to an independent auditing body. There is no prospectus-type or financial report obligation to give a detailed breakdown to donors of how their money is or was going to be used – how much will be used for administration or marketing and how much will be given directly to the cause that the donor wants to be supported. Some NFPs do provide this information to maintain good relations with donors. However there is no legal obligation to do so.*¹⁰

17. This assertion is supported by a survey of 448 charities undertaken by *Givewell*, which found that only 54% of these charities publicly disclosed their fundraising costs.¹¹

18. It is not only disclosure of fundraising dollars that is at issue. It is also argued that it is in the public interest for not-for-profit organisations to be more transparent and accountable, as they attract significant public funds through tax concessions. While the extent of these tax concessions is unknown, the Treasury estimates that, in 2006-07, total concessions, benefits and incentives provided through the tax system to taxpayers and beneficiaries amounted to approximately \$50.12 billion.¹² It is unclear what proportion of this \$50.12 billion worth of concessions, benefits, and incentives relate to charities or other not-for-profit organisations, as the *Statement* does not provide a breakdown into these categories.

19. According to the Nonprofit Roundtable:

There are a great variety of concessions given by different levels of government, each to a variety of nonprofit organisations. It is impossible to find any set of principles underpinning the legislation that designates these concessions. There are no clear links between the concessions provided and public disclosure requirements. Not surprisingly, in such an environment regulation is confusing, contradictory and often unfair.

20. Concerns about current disclosure regimes by not-for-profits have resulted in calls for not-for-profit organisations, particularly charities, to be subject to standardised accounting and reporting requirements, thus ensuring that stakeholders can make some assessment of their effectiveness and efficiency in achieving their stated goals.¹³

21. It has been argued that improved disclosure regimes may serve to increase confidence in, and funding to, the sector. For example, in 1995 the Industry Commission found that:

Accountability is an important operational issue for all Community Social Welfare Organisations (CSWOs). Their supporters and the general public expect, and are entitled to, information about the finances and operations of CSWOs in return for their donations, voluntary activities and taxation exemptions and concessions. Improved

⁹ Choice, *Charities*, p. 3.

¹⁰ Murray, A., (2006)., pp. 31-32.

¹¹ cited in Choice, *Charities*, p. 7.

¹² Commonwealth of Australia, *Tax Expenditures Statement 2007*, released 25 January 2008, p. 8.

¹³ See for example, Choice, *Charities*; Pro Bono Australia, *Not For Profit News Service*, Issue – 2007-06-04; Murray (2006).

confidence that funds are being used appropriately by CSWOs can potentially increase the overall fundraising resources available to the sector.¹⁴

22. The preliminary findings in February 2005 of *Giving Australia* also found that:

businesses wanted non-profits to be more accountable and transparent for funds received: there had been an erosion of trust... that money given would be used for its stated purpose.¹⁵

23. Others have argued, however, that changes to disclosure regimes, requiring all not-for-profit organisations to be subject to standardised accounting and reporting requirements, would seriously disadvantage small organisations, who may not have the human resources and knowledge base to comply with such requirements. In addition, a study by the Social Economy Executive Education Network, while supportive of improved transparency and accountability in the not-for-profit sector, notes that:

...transparency alone is not enough. The sector's stakeholders need to become more sophisticated in their understanding of the sector to ensure that any increased transparency doesn't result in negative backlash. For example, there is no point encouraging organisations to disclose their overhead costs or to argue for the need for their greater investment in capacity if naïve funders will view this negatively and reduce their financial support.¹⁶

¹⁴ Charitable Organisations in Australia, Industry Commission, Report No. 45, June 1995, cited in Murray, (2006), p. 13.

¹⁵ *Giving Australia: Research on Philanthropy in Australia*, Summary of Preliminary Qualitative Findings, 2005, cited in Murray, (2006). p. 14.

¹⁶ Social Economy Executive Education Network, *Contrary and Congruent Views on Leadership and Management in the Australian Social Economy*, November 2007, p. 5.

Questions for consideration

- i. Are current disclosure regimes for not-for-profit organisation adequate?
 - If so, why (taking into account concerns such as those expressed by *Choice*)?
 - If not, why not?
- ii. What would be the potential advantages and disadvantages for not-for-profit organisations of moving towards a single national disclosure regime? How might any disadvantages be minimised?
- iii. Would a standardised disclosure regime assist not-for-profit organisations who undertake fundraising activities, and who operate nationally, to reduce their compliance costs if it meant that they would only have to report on fundraising to a single entity (rather than reporting to each state and territory)?
- iv. If there was to be a nationally consistent disclosure regime, should it apply across all not-for-profit organisations or should different regimes apply to different parts of the sector? For example, should charities be treated differently than other not-for-profit entities?
- v. If different regimes were to apply to different parts of the sector, how would this be determined and why? For example, would it be based on classifications – ie., as a charity or deductible gift recipient – or would different regimes apply to different organisations based on their annual financial turnover or staffing levels (or some other proxy for size and/or capacity)?

Lack of accountability

24. Linked to concerns expressed about lack of transparency of some not-for-profit groups is a broader concern about poor accountability within the sector.

25. This was a recurrent theme in the study conducted by the Social Economy Executive Education Network into views on leadership and management in the ‘social economy’¹⁷:

Innovative leaders in the focus groups and thought leadership forums repeatedly expressed the view that there was increasing accountability required of the sector. They spoke of the need for better measures of impact. And participants from foundations commented on the need for better processes for application and disbursement of funds that predicted greater social impact. Recent discussions within the Social Economy speak about the “rating of organisations and benchmarking within (and perhaps across) the sector.”¹⁸

26. They argue for a ‘holistic’ approach to accountability that might include:

¹⁷ Note: this study looked at the ‘social economy’ rather than just the not-for-profit sector. The social economy was defined as: “the production of goods and services not solely provided by the non-profit sector, but also, in some cases by private enterprises with shareholder agreements that force the majority of shareholders to agree to social objectives undertaken by the firm... the ‘Social Economy’ is a broader concept than the non-profit sector”.

¹⁸ Social Economy Executive Education Network, (2007), p. 39.

- *Statements of an organization's mission, its purpose, its design (grant to earned income ratios) and governance, alliances and partnership, codes of conduct and policies.*
- *Statements of internal operations, employment and "discounted" wage structures, remuneration of directors and managers, sustainability strategies, performance indicators, program activities etc: and*
- *Statements about impact and the effectiveness of projects and programs, public policy, reporting, representation and advocacy, etc.*

All these three areas contribute in a systematic way to greater transparency in the sector.

Calls for regulatory reform

27. Concerns about lack of transparency and accountability have led to calls for fundamental reform of the regulation of the not-for-profit sector in Australia. This has largely taken the form of calls for the establishment of a single regulatory entity at the national level, such as those established in the United Kingdom¹⁹ and New Zealand.²⁰

28. For example, the *Inquiry into the Definition of Charities and Related Organisations* recommended that the Australian Government 'seek the agreement of all State and Territory Governments to establish an independent administrative body for charities and related entities, and to the legislative changes necessary for its establishment.'²¹

29. Similarly, former Democrat Senator Andrew Murray has proposed that consideration be given to establishing a simplified regulatory framework to apply to both not-for-profit entities, including charities, and small for-profit businesses, with the regime to be administered by a Registrar of Incorporated Organisations.²²

30. Calls for changes to the regulatory regime applying to the not-for-profit sector are also coming from within the sector itself. The Nonprofit Roundtable argues that:

The precarious scaffold of regulation provided by a mixture of common law, state, federal and local government laws is not a robust framework of nonprofit organisation regulation that can easily accommodate changes in our social and economic environment.

A fundamental review is necessary, as the complexity and rigidity of Australia's current nonprofit laws place a costly compliance burden while failing to adequately protect funders and donors and other stakeholders such as volunteers and beneficiaries. The evidence suggests that the current scaffold constrains small nonprofit organisations while failing to take account of the complexity, but also the professionalism and national focus of many large nonprofit enterprises. The imposition of unnecessary costs inhibits the formation of nonprofit organisations and increases costs to the community, governments and consumers.

¹⁹ Information on the role and function of the Charity Commission for England and Wales is available from <http://www.charity-commission.gov.uk/>

²⁰ Information on the role and function of the New Zealand Charities Commission - Komihana Kaupapa Atawhai is available from <http://www.charities.govt.nz/>

²¹ *Report of the Inquiry into the Definition of Charities and Related Organisations*, June 2001.

²² Murray, A., *A proposal for simplifying the legal form and regulation of small for-profit businesses and not-for-profit entities*, April 2008. Downloaded on 2 July 2008 from <http://www.andrewmurray.org.au/documents/539/FPNFP-IO%200408.pdf>

The regulatory framework must enable the nonprofit sector to grow and adjust to rapid change. For example, nonprofit regulation needs to be able to adapt to such developments as electronic commerce, social entrepreneurship, funding innovations and an aging population.

31. However, as was noted in the discussion about the need for increased transparency, not all in the not-for-profit sector are supportive of regulatory reform, with some arguing that small organisations would be hampered by any additional regulatory or administrative burden.²³

32. While there have been consistent calls for a National regulator, there is some question about where such a regulator might be located. Possibilities that have been canvassed include:

- within the Australian Tax Office, although Murray argues that it ‘is a good administrative principle that the tax collector should not be burdened with non-tax regulation... there is a great deal of merit in having a separate independent entity which regulates the NFP sector which is unrelated to the ATO or the sector itself’²⁴;
- as a separately resourced division of the Australian Securities and Investment Commission (ASIC), which already has a role to play in regulating not-for-profit organisations that are companies limited by guarantee. This would lead to economies of scale but concerns have been expressed that ASIC is not particularly user friendly to the not-for-profit sector²⁵; and
- a stand alone regulatory body, which would be independent of government.

²³ Murray, A (2006), p. 47.

²⁴ Murray, A (2006), p. 35.

²⁵ Murray, A (2006), pp. 49 and 58.

Questions for consideration

i. Does there need to be regulatory reform of the not-for-profit sector?

If not:

- Why not?
- Are there alternative (non regulatory) measures that might be taken by government and the not-for-profit sector to address some of the concerns raised by groups such as *Choice* about the governance, standards, accountability and transparency of not-for-profit organisations who use public and/or government funds?
- Who should be responsible for progressing and/or funding these measures?
- How might the uptake of any such measures be monitored?

If so:

- What should be the objectives of reform?
- Are their minimum requirements that must be met in order for a national regulatory system to be worthwhile?
- Should regulatory reform apply to the whole not-for-profit sector, or only to segments of the sector? For example, to charities; to bodies receiving public funds, whether through grants or tax concessions; to bodies with a financial turnover about a specified threshold etc?
- Where should the impetus for reform come from? Who should drive reform?
- What sort of consultation should be conducted on the nature of any regulatory reform? How could input be facilitated from across the broad range of organisations who comprise the not-for-profit sector?
- Are their particular models of regulation and/or legislative forms that would be useful, in the Australian context, in improving governance and management of charities and not-for-profit organisations and in catering for emerging social enterprises? What are the perceived advantages and/or disadvantages of these models?

ii. Should there be a single national regulator for the not-for-profit sector?

If not,

- Why not? What would be the disadvantages in having a single national regulator?

If so:

- Should a national regulator be responsible for the entire not-for-profit sector or only the charitable sector?
- Should the regulator be independent of government?

- Where would the regulator be best located? For example, as a stand alone agency or located within an existing institution, such as the Australian Securities and Investment Commission.
- What would be the role of a national regulator? For example, should it have an:
 - educative/advisory role?
 - enforcement role?
 - mediation/dispute resolution role?
- Should a national regulator be responsible for making decisions about charitable status?
- How should any national regulator be funded? For example, by the federal government, by federal, state and territory governments, on a cost recovery basis?

iii. Should there be a single, specialist, legal structure for the not-for-profit sector?

If not,

- Why not? What would be the disadvantages in having a single, specialist, legal structure for the not-for-profit sector?

If so, would this be best achieved through:

- A national legislation scheme, whereby current national and state and territory laws relating to the not-for-profit sector are harmonised into uniform law?; or
- The referral of powers from the states and territories to the Commonwealth, allowing for incorporation of current laws relating to the regulation of the not-for-profit sector, for example, incorporations Acts and fundraising Acts, into Commonwealth legislation?

What should be the minimum features of any legal structure?

APPENDIX 4

Summary of Recommendations of 2001 Inquiry

Principles to define a charity

Recommendation 1 (Chapter 11)

That the term `not-for-profit' be adopted in place of the term `non-profit' for the purposes of defining a charity.

Recommendation 2 (Chapter 11)

That the term `entity' be adopted to describe charities, and that the definition of `entity' include: a body corporate; a corporation sole; any association or body of persons whether incorporated or not; and a trust;

and exclude: an individual; a political party; a partnership; a superannuation fund; and the Commonwealth, a State, or a body controlled by the Commonwealth or a State.

Recommendation 3 (Chapter 12)

That a charity must have a dominant purpose or purposes that are charitable, altruistic and for the public benefit. If the entity has other purposes, those purposes must further, or be in aid of, the dominant purpose or purposes, or be ancillary or incidental to the dominant purpose or purposes.

Recommendation 4 (Chapter 12)

That an entity be denied charitable status if it has purposes that are illegal, are contrary to public policy, or promote a political party or a candidate for political office.

Recommendation 5 (Chapter 12)

That the activities of a charity must further, or be in aid of, its charitable purpose or purposes. Activities must not be illegal, contrary to public policy, or promote a political party or a candidate for political office.

Recommendation 6 (Chapter 13)

That the public benefit test, as currently applied under the common law, continue to be applied; that is, to be of public benefit a purpose must:

- be aimed at achieving a universal or common good;
- have practical utility; and
- be directed to the benefit of the general community or a `sufficient section of the community'.

Recommendation 7 (Chapter 13)

That the public benefit test be strengthened by requiring that the dominant purpose of a charitable entity must be altruistic.

Recommendation 8 (Chapter 13)

That self-help groups which have open and non-discriminatory membership be regarded as having met the public benefit test.

Recommendation 9 (Chapter 13)

That where closed or contemplative religious orders regularly undertake prayerful intervention at the request of the public, their purposes be held to have met the public benefit test.

Recommendation 10 (Chapter 13)

That public benefit does not exist where there is a relationship between the beneficiaries and the donor (including a family or employment relationship); and that this principle extend to purposes for the relief of poverty, which the common law currently regards as being exempt from the need to demonstrate public benefit.

Defining charitable purpose

Recommendation 11 (Chapter 14)

That there be no requirement that charitable purposes fall either within the 'spirit and intendment' of the Preamble to the Statute of Elizabeth or be analogous to one or more of its purposes.

Recommendation 12 (Chapter 16)

That the principles enabling charitable purposes to be identified be set out in legislation.

Recommendation 13 (Chapter 16)

The Committee has considered five options for defining charitable purpose as set out in Chapter 16. It concludes that three options are viable, but recommends the following preferred option (Option 5):

Charitable purposes shall be:

- the advancement* of health, which without limitation includes:
 - the prevention and relief of sickness, disease or of human suffering;
- the advancement* of education;
- the advancement* of social and community welfare, which without limitation includes:
 - the prevention and relief of poverty, distress or disadvantage of individuals or families;
 - the care, support and protection of the aged and people with a disability;
 - the care, support and protection of children and young people;

- the promotion of community development to enhance social and economic participation; and
- the care and support of members or former members of the armed forces and the civil defence forces and their families;
- the advancement* of religion;
- the advancement* of culture, which without limitation includes:
 - the promotion and fostering of culture; and
 - the care, preservation and protection of the Australian heritage;
- the advancement* of the natural environment; and
- other purposes beneficial to the community, which without limitation include:
 - the promotion and protection of civil and human rights; and
 - the prevention and relief of suffering of animals.

(* Advancement is taken to include protection, maintenance, support, research, improvement or enhancement.)

Recommendation 14 (Chapter 20)

That the definition of religion be based on the principles established in the *Scientology* case, namely:

- belief in a supernatural Being, Thing or Principle; and
- acceptance and observance of canons of conduct in order to give effect to that belief.

Application of the principles

Recommendation 15 (Chapter 24)

That the encouragement of sport and recreation for purposes of amusement or competition not be a charitable purpose, it being noted that the advancement of health, education, social and community welfare, religion, culture or the natural environment through the encouragement of sport and recreation would be considered a charitable purpose.

Recommendation 16 (Chapter 25)

That the care, support and protection of children and young people, including the provision of child care services, be considered a charitable purpose.

Recommendation 17 (Chapter 26)

That charities be permitted neither to have purposes that promote a political party or a candidate for political office, nor to undertake activities that promote a political party or a candidate for political office.

Recommendation 18 (Chapter 27)

That commercial purposes should not deny charitable status where such purposes further, or are in aid of, the dominant charitable purposes or where they are incidental or ancillary to the dominant charitable purposes.

Recommendation 19 (Chapter 28)

That the current approach of denying charitable status to government bodies be maintained. The Committee agrees with the principles set out in the *Fire Brigades* case and the *Mines Rescue* case for determining whether an entity is a government body, namely that the entity is constituted, funded and controlled by government.

Other categories in the framework

Recommendation 20 (Chapter 29)

That there be a definitional framework to distinguish altruistic entities from other not-for-profit entities.

Recommendation 21 (Chapter 29)

That in the recommended definitional framework, the category of public benevolent institution be replaced by a subset of charity to be known as Benevolent Charity, that is a charity whose dominant purpose is to benefit, directly or indirectly, those whose disadvantage prevents them from meeting their needs.

Recommendation 22 (Chapter 30)

That the framework recommended in this Report should not include the terms 'religious institution', 'scientific institution' and 'public educational institution', as altruistic entities with religious, scientific or public educational purposes and that are for the public benefit are covered by the categories in the recommended framework.

Recommendation 23 (Chapter 31)

That there be a category, known as 'Altruistic Community Organisations', that are entities that are not-for-profit and have a main purpose that is altruistic. That is, they can have secondary purposes that are not altruistic, and that do not further, or are not in aid of, or are not incidental or ancillary to, their main altruistic purpose.

Administering the definitions

Recommendation 24 (Chapter 32)

That the Government seek the agreement of all State and Territory Governments to the adoption nationally of the definitional framework for charities and related entities recommended in this Report.

Recommendation 25 (Chapter 32)

That the Government seek the agreement of all State and Territory Governments to establish an independent administrative body for charities and related entities, and to the legislative changes necessary for its establishment.

Recommendation 26 (Chapter 32)

If an independent administrative body is not established:

- that the Government set up a permanent advisory panel, including members from the charitable and related sector, to advise the Australian Taxation Office on the administration of the definitions relating to charities and related entities, and to advise the Government on the definitions of charity and related terms; and
- that the endorsement processes currently undertaken by the Australian Taxation Office be extended to include the endorsement of charities and related entities in order to access all the taxation concessions to which they are variously entitled.

Recommendation 27 (Chapter 32)

That the Government commit to a comprehensive public information and education campaign to inform the charitable and related sector of any changes arising from its consideration of this Report.

APPENDIX 5

Current Reviews

Australia's Future Tax System (The Henry Review)^{1, 2}

On 13 May 2008 the Australian Government announced the review of Australia's tax system. The review will look at the current tax system and make recommendations to position Australia to deal with the demographic, social, economic and environmental challenges of the 21st century.

The review will encompass Australian Government and State taxes, except the GST, and interactions with the transfer system.

The review is being conducted in several stages:

- 6 August – first discussion paper released - Architecture of Australia's tax and transfer system
- 19 August – review panel releases framing questions and calls for submissions
- 19 August to 17 October – first round of public submissions
- December – consultation paper to outline emerging issues from the public submissions process and provide the basis for further submissions, public meetings and direct consultations.

The comprehensive review of Australia's tax system will examine and make recommendations to create a tax structure that will position Australia to deal with the demographic, social, economic and environmental challenges of the 21st century and enhance Australia's economic and social outcomes. The review will consider:

- The appropriate balance between taxation of the returns from work, investment and savings, consumption (excluding the GST) and the role to be played by environmental taxes;
- Improvements to the tax and transfer payment system for individuals and working families, including those for retirees;

1 Australia's Future Tax System, *Timeline for the review*, <http://taxreview.treasury.gov.au/content/Content.aspx?doc=html/timeline.htm> (accessed 19 November 2008).

2 Australia's Future Tax System, *Terms of reference*, <http://taxreview.treasury.gov.au/content/Content.aspx?doc=html/reference.htm> (accessed 19 November 2008).

- Enhancing the taxation of savings, assets and investments, including the role and structure of company taxation;
- Enhancing the taxation arrangements on consumption (including excise taxes), property (including housing), and other forms of taxation collected primarily by the States;
- Simplifying the tax system, including consideration of appropriate administrative arrangements across the Australian Federation; and
- The interrelationships between these systems as well as the proposed emissions trading system.

The review should make coherent recommendations to enhance overall economic, social and environmental wellbeing, with a particular focus on ensuring there are appropriate incentives for:

- workforce participation and skill formation;
- individuals to save and provide for their future, including access to affordable housing;
- investment and the promotion of efficient resource allocation to enhance productivity and international competitiveness; and
- reducing tax system complexity and compliance costs.

In 2009 the review panel will invite further submissions and hold public meetings to inform its recommendations for reform. The final review report will be delivered to the Treasurer at the end of 2009.

Treasury Review of Financial Reporting for Unlisted Companies^{3, 4}

On 6 June 2007, the Parliamentary Secretary to the Treasurer released a discussion paper on financial reporting by unlisted public companies which had been prepared by the Treasury.

The discussion paper analyses the current financial reporting requirements of unlisted public companies under the Corporations Act 2001. The paper aims to promote public

3 The Treasury, *Financial Reporting by Unlisted Public Companies – Discussion Paper*, <http://www.treasury.gov.au/contentitem.asp?ContentID=1269&NavId=037> (accessed 19 November 2008).

4 The Treasury, *Financial Reporting by Unlisted Public Companies – Discussion Paper*, http://www.treasury.gov.au/documents/1269/PDF/Discussion_paper_Financial_Reporting_by_Unlisted_Public_Companies.pdf (accessed 19 November 2008).

debate on the appropriate financial reporting requirements for these companies given their unique nature.

The paper seeks comments on the financial reporting requirements for unlisted public companies in the Corporations Act 2001. Currently, these companies are subject to similar annual reporting requirements as listed public companies. The paper examines the issue of whether some type of differential reporting framework should be introduced for these companies based on the existing differential requirements for proprietary companies.

The paper highlights the unique nature of many unlisted public companies due to their not-for-profit focus. This differentiates these companies from both proprietary companies and listed public companies. In general, members in these companies are not seeking a direct financial return on their investment in the company. This changes the demand from members for comprehensive financial statements. However, these companies are also likely to have a broader range of stakeholders interested in their operations relative to for-profit companies. In addition, financial reporting assists in promoting transparency and good governance in these companies. These issues must be taken into account when determining the appropriate financial reporting requirements.

Submissions on the Discussion Paper closed on 3 August 2007.

National Compact⁵

The Australian Government, as part of its social inclusion agenda, is exploring ways to develop a new and stronger relationship with the not-for-profit sector, based on partnership and respect.

One way to do this is through a National Compact - an agreement between the Australian Government and the not-for-profit sector outlining how the two will work together to improve and strengthen their relationship, now and into the future.

A National Compact could also provide a platform for discussion and agreement between the Australian Government and the sector about how to achieve objectives that will benefit the community.

Similar agreements are in place in many Australian states and territories and have been used overseas.

The Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA) consulted widely seeking the initial views of community organisations and users of community services about the value of developing a compact and

5 Australian Government Social Inclusion, *A National Compact*, http://www.socialinclusion.gov.au/A_National_Compact.htm (accessed 19 November 2008).

whether it could improve the lives of Australians. Submissions closed on 24 September 2008.

The Australian Council of Social Service (ACOSS) was also commissioned to consult and canvass initial views and principles with its members and other organisations. ACOSS distributed a discussion paper on the Compact and held a series of public fora across Australia.

Senator Ursula Stephens, Parliamentary Secretary for Social Inclusion and the Voluntary Sector attended many of these fora and wrote to a range of peak bodies, state and territory governments and not-for-profit organisations seeking their comments.

FaHCSIA is currently reviewing all submissions and comments received as part of the initial phase of consultation.

Election Commitment - Productivity Commission Review⁶

Labor will...commission the Productivity Commission to construct a new tool to measure the contribution of third-sector organisations to our economy as the starting point for maximising the sector's contribution to social inclusion, employment and economic growth.

6 Australian Labor Party, *An Australian Social Inclusion agenda*, p. 11, http://www.alp.org.au/download/now/071122_social_inclusion.pdf (accessed 19 November 2008).

APPENDIX 6

Legislation and Regulation for Incorporated Associations

The following is a list of the legislation and regulations that incorporated associations must comply with according to the state in which they are incorporated¹:

QUEENSLAND	Associations Incorporation Act 1981 Associations Incorporation Regulation 1999
NEW SOUTH WALES	Associations Incorporation Act 1984 Associations Incorporation Regulation 1999
ACT	Associations Incorporation Act 1991 Associations Incorporation Regulation 1991
VICTORIA	Associations Incorporation Act 1981 Associations Incorporation Regulations 1993 Associations Incorporation Regulations 1998
TASMANIA	Associations Incorporation Act 1964 Associations Incorporation Regulations 2007 Associations Incorporation (Model Rules) Regulations 2007
SOUTH AUSTRALIA	Associations Incorporation Act 1985 Associations Incorporation Regulations 2008
WESTERN AUSTRALIA	Associations Incorporation Act 1987 Associations Incorporation Regulations 1988
NORTHERN TERRITORY	Associations Act 2003 Associations Regulation Associations (Model Constitution) Regulation

1 Australian Centre for Philanthropy and Nonprofit Studies, State and Territory Legislation for Incorporated Associations, <https://wiki.qut.edu.au/display/CPNS/State+and+territory+legislation+for+Incorporated+Associations> (accessed 4 November 2008).

APPENDIX 7

State and Territory Fundraising Legislation

Australian Capital Territory

In the ACT, the *Lotteries Act 1964*, overseen by the ACT Gambling and Racing Commission, regulates lotteries including raffles, bingo, trade promotions and calcuttas (sweeps). Licenses are required under the legislation. However exceptions are made for lotteries where the total value of the prizes does not exceed a set amount (in this case, \$500) and the organisation is a charity, and for private lotteries where the lottery is restricted to members of an association and no advertising is undertaken.¹ All licensees under the Act are required to comply with the ACT Gambling Code of Practice. If required in writing, licensees must produce all records associated with the lottery.

The *Charitable Collections Act 2003* regulates door-to-door collections, as well as other collections for charities, including, but not limited to, art unions, clothing collection bins, op-shops, walkathons and telethons. Charities are required to have a license to make collections under this act, and are obliged to comply with certain reporting requirements. Both incorporated and unincorporated organisations may apply for a license. However, the Act specifies that the individual named in the application for the license for an unincorporated association is the licensee, not the body itself.² A license will not be approved if 'if the nominated person does not have the consent of the body to hold the licence'³. Some collections undertaken by charities are exempted under the Act, including:

- An approved lottery
- A bequest under a will
- Payment of a membership fee
- A collection taken during a church service
- Fundraising for a person to attend a sporting event
- Organisations that raise less than \$15 000 per annum
- Churches – raising funds on the premises (collection plates)
- Schools – voluntary contributions or other activities that raise funds from parents, friends P&C and Alumni for

1 *Lotteries Act 1964 (ACT)*, s. 6.

2 *Charitable Collections Act 2003 (ACT)*, Part 4, Division 4.2, s. 30.

3 ACT Department of Justice and Community Safety, Office of Regulatory Services, *Applying for a Charitable Collection License*, <http://www.ors.act.gov.au/licensing/CharCollects/charitable1.html> (accessed 24 October 2008).

- Educational activities
- Membership fees for clubs and associations
- Workmates, clubs or meetings raising funds from the people for the benefit of others within the group.⁴

Queensland

To conduct fundraising activities, organisations must meet the definition of 'charitable purpose' as defined in the *Collections Act 1966*. They must then apply to the Department of Justice and Attorney-General for registration as a charity. Once a charity is registered, it may continue to fundraise unless directed otherwise. 'Community purpose' organisations can apply for a sanction to fundraise under the Act. The Act requires organisations to keep appropriate records and lodge financial statements annually. Fundraising activities regulated under this Act include door-to-door appeals, street collections and fundraising appeals (such as disaster relief).

The Queensland Office of Gaming Regulation regulates Queensland's charitable and non-profit gaming through the *Charitable and Non-Profit Gaming Act 1999* and provides for:

the conduct of a variety of games including art unions, raffles, bingo, lucky envelopes, calcutta sweeps and promotional games. Under the Act these different games are broken into four categories titled category 1, 2, 3 and 4 games. Category 1, 2 and 3 games may only be conducted by non profit associations. The estimated gross proceeds (ticket sales) of the game determines whether the game is a Category 1, 2 or 3 game. An association intending to sell more than \$20,000 worth of tickets must apply for a Category 3 Gaming licence.⁵

Category 4 games are free entry draws to promote goods and services. A license is not required for Categories 1,2 or 4 games; however, the prizes offered under these categories are regulated. A license is required for a Category 3 game and only incorporated associations may apply (only incorporated associations can run Category 2 games also). If the game being conducted is an art union, accounting and general gaming records of the game must be kept for a period of five years and a return must

4 Office of Regulatory Services, *Charitable Collections Practice Manual*, (1.2.2 Collection) http://www.ors.act.gov.au/pdfs/Licensing/Char_Collect_Practice_Manual-2007Nov.pdf (accessed 24 October 2008)

5 Queensland Government, Office of Liquor, Gaming and Racing, *Competitions and Raffles*, <http://www.olgr.qld.gov.au/licensing/gamingLicensing/competition/index.shtml> (accessed 24 October 2008).

be lodged within two months of the drawing. Further regulation applies if the game is a Calcutta sweep⁶.

South Australia

The Collections for Charitable Purposes Act 1939 regulates fundraising activities for certain charitable purposes, including:

- Doorknock appeals
- Telemarketing
- Donations to clothing bins
- Sales of goods at second-hand shops
- Seeking bequests
- Badge days
- Public appeals
- Film nights.

Licenses are required to undertake the activities above, except if the charitable organisation is not raising funds for a charitable purpose – such as religious organisations, environmental groups and educational institutions (as defined in the legislation and accompanying Code of Conduct)⁷. Charities are required to lodge annual income and financial statements.

Fundraising for not-for-profit associations is regulated by the Lottery and Gaming Act 1939 and the associated regulations. All associations are eligible for a license under the Act, whether incorporated or not, providing that certain conditions are met. Regulations cover minor lotteries, major lotteries, instant lotteries and eyes down bingo. New regulations under the Act came into force on 1 September 2008.

New South Wales

The NSW Office of Liquor, Gaming and Racing administers the *Charitable Fundraising Act 1991*, which regulates fundraising for a charitable purpose. The definition of 'charitable purpose' is broad. Under his Act, fundraising refers to:

...donations, sponsorship, telethons, lotteries and competitions, supply of food, supply of entertainment, supply of other goods or services, in connection with any commercial undertaking.

6 Queensland Government, *Your Guide to Category 3 Games*, <http://www.olgr.qld.gov.au/resources/gamDocs/CNPCat3GamesGrossProceedsMore20000.pdf> (accessed 24 October 2008).

7 Government of South Australia, Office of the Liquor and Gambling Commissioner, *Charities*, <http://www.charities.sa.gov.au/> (accessed 24 October 2008).

A membership drive undertaken by an organisation is a fundraising appeal if one of the objects of the organisation is a charitable object.⁸

Any person or organisation wishing to fundraise must hold an authority to do so, unless that organisation was established under an Act, in which case it is exempt. An authorised organisation must keep records including a cash book, a register of assets and a minute book, and an annual audited financial statement must be provided. While incorporated associations are not required to lodge returns, unincorporated associations must do so if their income from fundraising is greater than \$25,000. The Act does not apply to religious organisations.

Tasmania

'Minor gaming' in Tasmania, such as bingo, raffles, lucky envelopes and Tassie's best punter, is defined as 'gaming where the proceeds are used for a not-for-profit organisation or for charitable reasons (such as education, welfare, sport and recreation)⁹. Minor gaming is subject to the provisions of the *Gaming Control Act 1993*. Permits (costing \$90) are only required when the prize value exceeds \$5,000; however, the appropriate conditions for minor gaming under the Act must still be adhered to. In addition, permit holders are required to 'keep such accounting records as necessary to correctly record and explain transactions arising from the conduct of gaming'¹⁰ and retain them for seven years.

Any person who solicits money for a charitable purpose from the public in Tasmania is subject to regulation by Consumer Affairs and Fair Trading through the *Collections for Charities Act 2001*. This includes incorporated bodies, individuals, unincorporated bodies and religious organisations. According to the Act:

Soliciting for donations means any request for donation however communicated, and includes solicitation by telephone, email, door-to-door, and standing with a donations tin in public. It also includes the giving of pins, badges and stickers where this is in response to a donation rather than an actual sale of the item. Donations will usually be money but can be anything of value including land and goods.¹¹

8 NSW Office of Liquor, Gaming and Racing, *Charitable Fundraising Fact Sheet*, http://www.olgr.nsw.gov.au/pdfs/fundraising_general_info.pdf (accessed 24 October 2008).

9 Tasmanian Department of Treasury and Finance, *Minor Gaming*, <http://www.treasury.tas.gov.au/domino/dtf/dtf.nsf/v-liq-and-gaming/FB99F4B68E442441CA2573460010F5AF> (accessed 24 October 2008).

10 Tasmanian Gaming Commission, Application for Minor Gaming Permit, [http://www.treasury.tas.gov.au/domino/dtf/dtf.nsf/LookupFiles/Minor-Gaming-Permit-Application.pdf/\\$file/Minor-Gaming-Permit-Application.pdf](http://www.treasury.tas.gov.au/domino/dtf/dtf.nsf/LookupFiles/Minor-Gaming-Permit-Application.pdf/$file/Minor-Gaming-Permit-Application.pdf) (accessed 24 October 2008).

11 Consumer Affairs and Fair Trading, *Charities*, http://www.consumer.tas.gov.au/business_affairs/charities (accessed 24 October 2008).

Permission to solicit for charitable donations must be gained unless the organisation is only incorporated in Tasmania or the organisation's principal office is located in Tasmania.

Northern Territory

In the Northern Territory, the Community Gaming Guidelines support the *Gaming Control Act* which regulates raffles, lotteries, calcuttas, sweepstakes, bingo, tipping competitions and other games. Permits are not required in order for an approved association to operate these if total ticket sales are under \$5 000. Where the prize is greater than \$5 000, a permit must be acquired. An association does not have to be incorporated in order to gain approval, but it must have a suitable constitution, identifiable office holders and a nominated person to be responsible for conducting lotteries¹².

Western Australia

Any organisation that collects money or goods from the public for charitable purposes in Western Australia must apply for a license under the *Charitable Collections Act 1946*. Licenses are not required for an organisation that collects money for non-charitable purposes, such as sporting clubs, conservation, environmental, animal welfare and schools or kindergartens that operate their own fund raising events. An organisation wishing to conduct a street collection in the Perth metropolitan area must have a separate street collection permit, regardless of whether it is licensed or not. All charities that are licensed under the Act must submit an annual audited financial statement.

The Western Australian Department of Racing, Gaming and Liquor regulates fundraising activities such as bingo, calcutta, lotteries (including raffles) and football tipping competitions through the *Gaming and Wagering Commission Act 1987*. Charitable groups, community-based organisations and sporting bodies can use the above games to raise funds. Organisation must produce a copy of the constitution or a certificate of incorporation in order to be considered for a permit. All gaming activity requires an organisation to have a license and gain approval except for minor raffles where the raffle is conducted and drawn within eight days and the value of the prize is under \$1 000¹³.

Victoria

The Fundraising Appeals Act 1998 regulates fundraising in Victoria. Fundraising occurs when ' any person or organisation, including a business, collects money for a

12 Northern Territory Government, Community Gaming in the Northern Territory, http://www.nt.gov.au/justice/licenreg/documents/RGL_Fact_Sheets/gaming_control_regs_2.pdf (accessed 24 October 2008).

13 WA Department of Racing, Gaming and Liquor, *Forms and Applications*, <http://www.rgl.wa.gov.au/Default.aspx?cat=GamingForms> (accessed 24 October 2008).

beneficiary, cause or thing, rather than solely for profit', and includes such activities as:

- doorknock appeals
- telemarketing
- dinner dances & balls
- trivia nights & auctions
- golf days & movie nights
- traffic intersection/highway collections
- donations to clothing bins
- sale of goods at opportunity shops
- appeals run by commercial fundraisers
- public appeals to support a club or association or an environmental or community cause
- public appeals to support a cause, person, or group of persons, or
- the selling of goods where portions of the sale price are donated to a charitable organisation or cause.¹⁴

Anyone wishing to conduct a fundraising appeal is required to register unless they are an exempt organisation, including schools, religious bodies, registered political parties, trade unions, the Anti Cancer Council and not-for-profit organisations that receive less than \$10 000 gross in a financial year from fundraising, and uses only unpaid volunteers. Fundraisers must maintain financial records.

14 Consumer Affairs Victoria, *Fundraising Appeals*, <http://www.consumer.vic.gov.au/CA256EB5000644CE/page/Associations+Clubs+%26+Fundraising-Fundraising-Fundraising+appeals?OpenDocument&1=05-Associations+Clubs+%26+Fundraising~&2=30-Fundraising~&3=10-Fundraising+appeals~> (accessed 24 October 2008).