A submission to the Senate Standing Committee on Economics

Inquiry into the disclosure regimes for charities and not-for-profit organisations

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1. Introduction

Anglicare Australia welcomes the opportunity to make a submission to this important inquiry, especially in the light of its implications for the Commonwealth Government's social inclusion agenda. Anglicare network agencies provide a range of charitable services including emergency relief, accommodation, employment support and social enterprises, along with research on numerous forms of disadvantage and opportunities for social and economic participation.[1] In this capacity, the network is fully aware of the complexity and controversial nature of the not-for-profit (NFP) sector and the need for reform; above all, in clarifying what the sector *is*, and what rights and responsibilities attend its constituent parts.

This submission concentrates on two aspects of the general question being considered by the Inquiry:

- Amplification and analysis of the conceptual issues involved in the formulation of effective policy in this area.

- Specific practical proposals, with particular reference to the recommendations made in the 2001 report into the definition of charities and related organisations.

2. The not-for profit sector and charities

As extensively noted elsewhere, the NFP sector is immense, diverse and subject to inconsistent regulation. While estimated to account for some eight per cent of GDP — or about $80 billion — and employing about seven per cent of the workforce, much of its management and even activity remains unclear to the public, with the disclosure regimes uncertain. Reform is obviously needed.[2] Anglicare Australia is inclined to agree with the sentiments of World Vision head Tim Costello, who said:

[1] See Appendix.

[2] A very persuasive case has been made by former Senator Andrew Murray and Mary O'Donovan, *One Regulator, One System, One Law: the case for introducing a new regulatory system for the not-for-profit sector,* Canberra, July 2006. This document also explains why any figures for the size and economic value of the sector are inevitably 'rubbery'.

> We don't have a single regulatory system or uniform accounting standards and so it makes it confusing for the public to know who to trust or who is efficient. There are 7000,000 not-for-profit organisations and the latest fad is under-30s wanting to start their own not-for-profit equivalent of what in my day was starting a rock band. There are also a lot of celebrities and sports stars setting up charities in their own name or naming it after their child. There are a lot of overheads and it isn't fair on the ATO to have to regulate this.[3]

The first, and perhaps most important, issue for the sector lies in its very identity. When churches, sporting bodies, chambers of commerce, trade unions and community groups — among very many others — share a single designation, we have a clear case of 'conceptual stretching'. The only thing these bodies have in common, it would seem, is that they are not — or claim not to be — 'for profit'. They are neither fully in the private sector, nor in the public sector. While in itself unremarkable, such a definition-by-omission can be extremely misleading.[4] This is particularly so when it is proposed (as in the first recommendation of the 2001 report) that the 'the term "not-for-profit" be adopted in place of the term "non-profit" for the purposes of defining a charity'.[5]

To state the obvious: while all charities may be not-for-profit, not all not-for-profit organisations are charities. To conflate the two is not only conceptually disingenuous but has the practical potential to undermine the work of genuine charities. Instead, it seems rational

[3] Quoted in Adele Ferguson, 'Charities and churches stand to lose billions in tax review', *Australian,* 28 July 2008.

[4] There is an admittedly not exact parallel here with the concept of 'disability'. What unites the several groups who come under this rubric is that they are not, in some sense, fully 'able'. But this can cover not only those who are self-evidently disabled, like paraplegics or the blind, but also those who can claim some form of relatively mild impairment, like those who use hearing aids. It is on the basis of a generous interpretation of 'disability' that governments have attested that about one in five Australians has a disability. As the Australian Bureau of Statistics defines it, disability 'denotes the negative aspects of the interaction between an individual (with a health condition) and that individual's contextual factors (environmental and personal factors)'. ABS, 'Themes — Disability, Ageing and Carers, at www.abs.gov.au/websitedbs/c311215.nsf/20564c23f3183fdaca25672100813ef1/29ac3ed8564fe715ca256943002c4e3c!OpenDocument

[5] Senate Standing Committee on Economics, Inquiry into the Disclosure Regimes for Charities and Not-for-Profit Organisations', Background Paper, Appendix A, from which all subsequent reference to recommendations of the 2001 report are taken.

when identifying charities to focus on an organisation's *purpose* rather than its *reasons* for promoting that purpose. (This applies a fortiori where the organisation is multi-faceted and has several different purposes. Its charitable works may thereby be distinguished from its other operations; and the claims for charitable concessions checked accordingly.)

Similarly, as argued in recommendation 13 of the report, charitable purpose in turn should be identified in terms of specific outcomes or activities such as the prevention or relief of sickness and suffering or the prevention of poverty.

Anglicare Australia therefore recommends that:

> *A clear distinction be made between not-for-profit organisations in general and charities as a sub-set of this broader group; with the taxation rights and responsibilities of the former covering the latter, but the rights and responsibilities of the latter not necessarily accruing to the former.*
>
> *Charities as discrete entities be defined in terms of agreed charitable purpose — itself identified by way of agreed outcomes or activities; and that charitable works as part of an organisation's overall operations be defined likewise.*

With regard to the 2001 recommendations, this would entail removing the reference to 'a charity' in recommendation 1; and revisiting the specific denotations of 'charitable purpose' in recommendation 13.

A related concern is the *denial* of charitable status where all other facilitating conditions have been met. This was one of the most contentious issues surrounding the 2001 report. There is no argument but that charities should be politically non-partisan, but this is not the same as saying that they should refrain from advocacy on behalf of their charitable purpose. Indeed, it is difficult to see how one could represent any group on altruistic grounds (see recommendation 7) without being an advocate on their behalf. Unfortunately, recommendation 4 of the 2001 report extends the prohibition on partisanship to activities that

are ‘contrary to public policy’. This is so amorphous a phrase as potentially to cover even the most innocuous proposal for change (such as for an increase in carers’ allowance). As much as been recognised by the current federal government’s removal of ‘gag clauses’ in service agreements; and the Deputy Prime Minister has consistently stressed that dialogue, not obeisance, is the objective of relations with the sector.[6]

We therefore recommend a modification to the 2001 recommendations such that:

> *An organisation be denied charitable status if it has purposes that are illegal or promote a particular partisan political party or candidate for office.*

3. Levels of concessional treatment

Consistent with this, in determining the different levels of concession to be granted the various types of organisation within the not-for-profit sector, it makes sense to focus on purpose. While we agree that, for instance, sport and cultural organizations contribute greatly to the social fabric of the nation, the part played by charitable organizations is of a different order.

The relevant division is between those organisations only with Deductible Gift Recipient (GDR) and those with full Public Benevolent Institution (PBI) status. This, again, takes us to definitions and questions of principle. The 2001 report (recommendations 6 & 7) relies on but strengthens the public benefit test under the common law in suggesting that the purpose be:

- aimed at achieving a universal or common good;
- have practical utility; and be
- be directed to the benefit of the general community or a ‘sufficient section of the community’.

[6] ‘We’re creating a whole new climate with this approach. We are saying to the voluntary sector — to those great not-for-profit agencies that work with the disadvantaged and provide services — that we want to hear what you’ve got to say.’ Julia Gillard, Media conference, 9 January 2008.

Further, the dominant purpose of a *charitable* entity must be 'altruistic'.

Again, it is difficult both to argue against these broad brush definitions and to determine how they might be given practical effect in terms more precise enough to be uncontestable (legally or otherwise) in any given case. This is all but conceded in recommendation 12, that 'the principles enabling charitable purposes to be identified be set out in legislation'. It is no surprise that governments have not to date seen fit to respond to these recommendations with instrumental action, let alone legislation.[7]

Having said which, Anglicare Australia is confident these central ideas and terms *can* be given serious application, though probably not through the usual legislative process — certainly not by statute law. 'Social capital' and 'altruism' are every bit as real as, say, 'shareholder value', even though, as concepts or practice, they are less amenable to quantitative expression. What this suggests is the need for an independent body to deal with the minutiae of the pertinent definitions, classifications and individual determinations. Though the status of such a body is open to discussion, it should, ideally, be separate from the ATO, the NFP sector (i.e. it should not be a self-regulating body) and the federal executive. This would avoid conflict of interest and increase public confidence in the sector's activity overall.

4. Governance and regulation

Anglicare Australia takes it as given that all organisations should be transparent and accountable, especially when they are reliant directly or indirectly on the public purse. There may be several reasons that the sector 'has been flying under the radar of substantial regulation, transparency and accountability'[8] but there is none to justify further procrastination.

[7] One of the main reasons Murray and O'Donovan give for reluctance — this applies equally to the recommendations of the 1995 Productivity Commission Report into Charitable Organisations — is that the necessary reform is simply 'too hard'. Instead, there has only been tinkering, primarily about what the ATO treats as DGRs.

[8] Murray and O'Donovan, op. cit.

This is all the more important when the appeal for taxation concessions rests on non-quantifiable moral notions like charitable purpose and altruism.

There are several problems with the current system. Of these the most significant are:

- The variety of organisational structures of NFP agencies themselves. These include defined corporate structures, small incorporated associations, trusts and loose alliances of individuals. Supervision ranges from regulation under the Australian Securities and Investments Commission to no effective regulation at all.

- The general and related problem of overlapping federal and state/territory jurisdictions — with 93 state, territory and Commonwealth bodies able to make a determination about an organisation's charitable status. This is particularly onerous in the matter of compliance duties and costs.

- The absence of overall standards for reporting — one result being that many NFPs are simply not regulated.

- The often great discrepancy in administrative, financial and other resources among NFP agencies themselves. This has several consequences, particularly (for smaller agencies) in what constitute realistic compliance and other regulatory responsibilities.

The upshot is an ad hoc, inconsistent and inequitable system which encourages public scepticism and undermines the beneficial work of the sector overall. This is exacerbated by occasional instances of blatant abuse.[9]

There are two requirements for any institutional attempt to improve matters. First, there should be simplification and regularity in matters of governance and regulation, such that all

[9] This need not be deliberate. Murray and O'Donovan give the example of hospitals which began as genuinely charitable institutions run by orders of nuns whose work was voluntary and 'seen as part of their vocation'. They relied entirely on donations for their survival. Today, they are essentially business operations. 'Ministering to the sick and destitute is a substantially different thing from providing high quality health care for those able to afford it.'

NFPs are subject to comparable conditions and expectations. But secondly, there should be sufficient flexibility to take account of the considerable differences of purpose and capacity within the sector, such that agencies are not burdened with directives they cannot easily be expected to meet.

Evidently there is a tension between the two requirements, given the sector's heterogeneity. Standardised reporting processes (which would have to include requirements appropriate for the largest agency) would, for instance, have an unfair impact on smaller organisations. By contrast, what might be acceptable as accountability in a tiny community group — relying on personal contact and trust — would be totally inappropriate to the management of a large corporate structure.

The pertinent notion here is that conditions and expectations should be 'comparable'. A parallel is that of the comparable conditions and expectations of individual taxpayers, small, medium and large business. The required details clearly differ widely, but the underlying principles are similar, if not exactly the same.

In any case, the introduction of a system that sought consistency throughout the sector is eminently preferable to the confusion of current arrangements. In line with the proposals of sections 2 and 3, we therefore recommend that

> *A nationally consistent set of guidelines covering governance and regulation be introduced to replace the current variegated rules of federal, state and territory jurisdictions.*

5. A national commission

The above proposals imply the desirability of a national body to cover all matters related to the status, rights, responsibilities and registration of the not-for-profit sector. Though the proliferation of government and quasi-government institutions may not, all other things being equal, be desirable, in this case it is clear all other things are far from equal. As noted, such a body — though it undoubtedly would have representatives from all affected entities — should

be strictly independent of the executive, ATO and the sector. A statutory authority would appear to be the only serious option. As with all such bodies there should be a process of review and appeal. It has been estimated that such an initiative would save charities more than $100 million a year.[10]

6. Concluding observations

Anglicare Australia has not sought to advance particular suggestions about the detail of a reformed disclosure regime as we believe this should result from an extensive consultative process leading to the establishment of an independent body to oversee reform. The time for specific recommendations — as on the precise purpose or purposes of a charity — will be after the establishment of that body has been agreed. We stress, however, the need for reform and for the principles outlined above to be taken seriously and put into effect. As Murray and O'Donovan noted in their review, there are four requirements for any new system: clarity, consistency, accountability and ability to adapt to social change. Anglicare Australia endorses all four without hesitation.

[10] National Roundtable of Nonprofit Organisations, Media Release, 29 August 2008.

APPENDIX

About Anglicare Australia

Anglicare Australia is a nationwide network of locally based Anglican organisations serving the needs of their communities.

From Groote Eylandt, NT to Kingston, Tasmania, from Bondi to Bunbury, Anglicare member agencies are committed to caring for people in need and seeking social justice for all.

Anglicare agencies work in close cooperation with other community organisations and some receive funding from Federal, State and Local Governments to provide a wide range of services including:

- residential and community aged care
- foster care, Out-of-Home Care, adoption and child care
- family relationship support programs
- support for people with disabilities
- financial counselling and low/no interest loans
- family support and relationship counselling
- treatment for drug and alcohol dependence
- family violence
- youth programs
- emergency relief
- employment services
- community housing and emergency accommodation for homeless people
- community development through building communities of hope
- working with Aboriginal and Islander Australians
- assistance to refugees and migrants
- social research and advocacy