

Inquiry: Budget Estimates 2011-  
12Date/Time: 8:30pm, 23/5/11Witness Name: Sen. FifieldOrganisation: PM&C.

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## ***Establishing a regulator for the not-for-profit sector***

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### **Background**

1.1 Australia's not-for-profit (NFP) sector consists of organisations which seek to achieve a community, altruistic or philanthropic purpose, and who are involved in the supply of goods and services that have a social value greater than the price that a consumer could or would otherwise pay.

1.2 NFPs contribute to community wellbeing through the provision of welfare, education, sports, arts, religious, culture and community services.

1.3 Australian governments provide the NFP sector with support in the form of direct funding and access to a range of taxation concessions.

- Total quantifiable Commonwealth taxation expenditures provided to the NFP sector in the 2010-11 financial year is estimated to be around \$3.3 billion (*Tax Expenditures Statement 2010*). Unquantifiable tax expenditures to the sector are likely to be of a similar magnitude, and consist mainly of income tax exemptions.
- Direct government funding to the sector in 2006-07 was estimated to be \$25.5 billion; see the 2010 Productivity Commission's *Contribution of the Not-for-Profit sector* (Productivity Commission 2010 p 300). This funding was provided to pay for the sector's delivery of programs and services on behalf of the Government, such as the Family Relationship Services Program.

1.4 The general public provides the sector with resources in the form of donations and volunteer time.

- Total public donations to the sector were estimated to be \$7.2 billion in 2006-07, with an estimated value of \$14.6 billion provided in volunteer time (Productivity Commission 2010 p 64)

### **Problem**

1.5 The NFP sector's regulatory framework is not meeting the needs of the NFP sector, Australian governments and the Australian public more broadly. The regulatory framework under which NFP entities operate is:

- fragmented and inconsistent;
- uncoordinated with regulatory responsibilities spread across a range of government agencies;
- producing complex reporting requirements which are, in certain situations, overlapping; and
- not adequately addressing the informational needs of the Australian public.

1.6 These shortcomings have left some NFP entities, particularly those operating across multiple jurisdictions, with an inappropriately high regulatory and compliance burden. It has also allowed other NFP entities, particularly small unincorporated associations, to operate under no regulatory oversight.

1.7 A typical large NFP would currently be required to provide general reporting (including financial reporting) to multiple Commonwealth agencies. For example, a large NFP entity which is a company limited by guarantee would be required to provide general financial reports to the Australian Securities and Investments Commission (ASIC). To receive grants and contracts for the delivery of Commonwealth Government services from various Government agencies such as the Department of Health and Ageing, the Department of Education, Employment and Workplace Relations (DEEWR) and the Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA), the NFP entity would be required to provide additional general and specific financial reports to these agencies, resulting in a duplication of reporting.

1.8 Additionally, the NFP entity would need to meet governance requirements from each agency with respect to grants and would be generally required to get each report audited separately, which the sector has indicated costs, on average, \$1,000 per audit.

1.9 If the entity was an incorporated association operating across jurisdictions, it would need to provide general financial reports to different state and territory regulators resulting in further duplication of reporting.

1.10 A medium sized NFP would typically be provided a smaller number of Government grants and enter into a smaller number of contracts for Australian Government service delivery. This would reduce possible reporting and compliance burdens. However, unnecessary duplication would remain.

1.11 A typical small NFP entity with charitable status would have a small number or no Government grants and enter into a limited number or no Australian Government service delivery contracts. A typical example would be a private ancillary fund. These funds are required to submit a

private ancillary fund return form on an annual basis which includes audited general purpose financial reports.

1.12 The regulatory burden faced by NFP entities operating with a high regulatory and compliance burden may be diverting scarce NFP resources away from intended targets toward administration and compliance expenses. Additionally, fragmented and inconsistent information coupled with a lack of publicly available information may be deterring philanthropic engagement.

1.13 Over the past decade there have five reviews into the regulation and taxation of the NFP sector in Australia, including the:

- 2001 Report of the inquiry into the Definition of Charities and Related Organisations;
- 2008 Senate Economics Committee inquiry into Disclosure Regimes for Charities and NFP Organisations;
- 2009 Australia's Future Tax System report (AFTS report);
- 2010 Productivity Commission report on Contribution of the Not-for-Profit sector; and
- 2010 Senate Economic Legislation Committee inquiry into the Tax Laws Amendment (Public Benefit Test) Bill 2010.

1.14 These reviews have consistently concluded that the NFP sector's regulatory framework tends to add complexity and costs, especially for organisations operating in more than one jurisdiction, and recommended that the regulation of the NFP sector should be significantly improved by establishing a national NFP regulator and harmonising and simplifying regulatory and taxation arrangements.

1.15 The NFP sector has largely supported the recommendations made by these reviews.

1.16 *The NFP regulatory framework is fragmented, inconsistent and based on entity type rather than activities or outcomes.* The sector consists of 600,000 NFP entities. The majority (around 440,000) of these entities are unincorporated organisations that fall largely outside of the sector's regulatory framework.

- These entities do not have reporting obligations, Australian Business Numbers (ABNs) and cannot be endorsed as charities or DGRs. However, they are able to self-assess income tax exemptions.

1.17 Around 136,000 are incorporated associations under relevant state and territory Acts, and around 11,700 are companies limited by guarantee, who are registered with ASIC. Relevant state and territory government agencies regulate incorporated associations with ASIC regulating companies limited by guarantee.

1.18 The sector is also comprised of charitable trusts and private and public ancillary funds. These organisations manage and distribute funds to individuals and organisations for a charitable purpose. Charitable trusts and private and public ancillary funds tend to be endorsed as deductible gift recipients (DGRs) and charities. Charitable trusts are generally not required to comprehensively report to any regulator (they are required to be endorsed by the Australian Taxation Office (ATO)), as such, little is known about the number and total value of the asset managed by charitable trusts. Based on confidential data the Government estimates that there are around 1,000 charitable trusts that access tax concessions.

1.19 The Crown, represented by state Attorneys-General, protects the property of charitable trusts. Attorneys-General are required for enforcement of the charitable trust. Anecdotal evidence suggests that Attorneys-General interventions are costly and thus infrequent.

1.20 The majority of NFP entities operate outside the sector's regulatory framework. This produces a lack of appropriate oversight over the activities and performance of the sector; ensures that there is insufficient data and information on the operations of the NFP sector; and may encourage organisations with improper or even illegal activities to exploit this significant gap in the sector's regulatory regime.

1.21 Occasional reports of improper practices by unregulated NFP entities have the potential to undermine the public's confidence in, and support of the sector. Without a systematic approach to accountability and transparency, regulators and governments more generally may find it difficult to counter suggestions of compliance and integrity issues.

1.22 The regulatory regime faced by NFP entities that are incorporated associations operating in a *single* jurisdiction have weaknesses detracting from the sector's effectiveness. The sector has expressed concerns related to information for selecting the best form of incorporation and compliance costs associated with reporting and other obligations, including to state government agencies that are not proportionate to scope of activity (PC report 2010 pp 113-135). Other concerns include passive oversight of the operation and activities of incorporated associations by state regulators.

1.23 Incorporated associations operating across multiple jurisdictions face an unnecessarily complex and costly regulatory environment. These entities are required to meet different reporting requirements that are imposed across different jurisdictions.

1.24 Regulatory overlap between Commonwealth, States and Territories can result in a high regulatory and compliance burden, but a poor level of regulatory oversight. Inconsistencies in the sector's regulatory framework and an increasing compliance burden are a matter of increasing concern to both the sector and governments. In their submission to the PC report, the Institute of Chartered Accountants stated:

- ‘The paper [on Improving Corporate Reporting and Accountability] published by Treasury in 2007 specifically asked respondents a question ‘Do you consider there is a need to harmonise the financial reporting requirements of companies limited by guarantee and incorporated associations to provide a consistent reporting framework for not for profit entities in Australia?’ The submissions that are publicly available overwhelmingly support harmonisation.’ (Institute of Chartered Accountants 2010 p 6)

1.25 To illustrate the level of complexity faced by the sector, there are currently more than 178 pieces of Commonwealth, state or territory legislation that involve 19 separate agencies regularly determining the charitable purpose or status of an NFP entity.

1.26 The sector has expressed concerns in relation to this complexity. For example, in their submission to the PC report, the Institute of Chartered Accountants stated:

- ‘... the legislation governing these various structures is both inconsistent between the types of legal structures and inconsistent within the structures. For example, incorporated associations are controlled by individual state legislation, much of which is inconsistent when compared state to state. NFPs using this incorporated association structure now increasingly find themselves operating across state boundaries and therefore their managers and advisers need to be familiar with a number of differing regulatory regimes.’ (Institute of Chartered Accountants 2010 p 5)

1.27 *At the Commonwealth level regulatory oversight is spread across multiple Government agencies which increases compliance costs and complexity.* The ATO, ASIC, the Office of the Registrar of Indigenous Corporations (ORIC), the national housing regulator for the NFP sector, and a range of government agencies that provide the sector with grants and contracts for service delivery (such as the FaHCSIA) oversee specific aspects of the sectors operations.

1.28 This structure has led to a number of shortcomings. For example, there is no agency overseeing the totality of the sector’s performance and activities; there is no agency collecting required information for the sector as a whole which could be used to develop policy and coordinate structural reforms; it produces unnecessary compliance costs with entities having to interact and engage with a number of agencies; and may be affecting public confidence and engagement with the sector.

1.29 Similar sentiments have been expressed by stakeholders. For example, Lyons, appearing before a Senate inquiry argued:

- ‘In the absence of a single regulator, governments lack data and knowledge of Australia’s not-for-profit organisations and are therefore unable to develop appropriate policies to better regulate them and encourage their formation ...’ (PC report 2010 p 116. Extracted from SSCE 2008, p 42)

1.30 In their submission to the PC report, Gilbert+Tobin stated:

- ‘... there is an urgent need to bring together the multiplicity of governance, taxation and fundraising regulatory arrangements, especially at the Commonwealth level ...’ (Gilbert+Tobin 2010 p 1)

1.31 *Existing reporting arrangements for NFP entities are uncoordinated and complex, and do not take into account the differing size, risks and access to public monies of NFP entities.*

1.32 The reporting obligation of a specific NFP entity depends on the entity’s legal form and activities. NFP entities may have a large, and in some instances, duplicative reporting burden. Other NFP entities that are unincorporated and receive no government funding have no reporting requirements.

1.33 There are four main types of reporting undertaken by NFP entities. They include:

- corporate and financial reporting associated with the legal structure under which entities are incorporated;
- financial, governance and performance information required for obtaining or acquitting government funding, or government funded service delivery contracts;
- information required for endorsement for concessional tax treatment; and
- information required for fundraising.

1.34 Corporate and financial reporting for companies limited by guarantee is determined by the *Corporations Act 2001*, with corporate and financial reporting by incorporated organisations determined by the relevant Associations Incorporation Act.

1.35 Under the *Corporations Act 2001*, companies are generally required to prepare a public financial report and directors’ report consisting of financial statements, notes to the financial statements, and directors’ declaration about the statement and notes.

1.36 In June 2010, the Government simplified the reporting framework for companies limited by guarantee. Under the new regime, a three-tiered differential reporting framework for companies was established.

- The first tier comprises companies with annual revenue less than \$250,000 which do not have deductible gift recipient (DGR) status. Companies falling in the first tier are exempt from preparing a financial report and a directors' report.
- The second tier comprises companies with annual revenue of less than \$250,000 that are a DGRs and companies with annual revenue of \$250,000 or more but less than \$1 million, irrespective of whether the company is a DGR. These companies prepare a financial report which they can elect to have reviewed rather than audited, a streamlined directors' report, and are subject to a streamlined process for distributing annual reports to members.
- The third tier comprises companies limited by guarantee with an annual revenue of \$1 million or more, irrespective of whether the company is a DGR. These companies are required to prepare an audited financial report, a streamlined directors' report, and are subject to a streamlined process for distributing the annual report to members.

1.37 Corporate and financial reporting requirements for incorporated organisations have in the past been less onerous than requirements of companies limited by guarantee. However, given the reforms outlined above, requirements have become more onerous. For example, while unincorporated associations operate under a tiered reporting framework, the relevant threshold for the highest tier are lower when compared against Commonwealth level thresholds which means more companies fit into the top tier.

1.38 Additionally, reporting requirements for incorporated associations generally vary between states and territories adding to complexity and compliance costs faced by entities operating across multiple jurisdictions.

1.39 Reporting requirements associated with funding arrangements for the delivery of government services generally involve complex reporting obligations and result in the duplication of reporting requirements. The sector has indicated that this is particularly evident with acquittal of grants.

1.40 NFP entities entering service delivery contracts with the Government are required to provide information on financial health and performance, general capabilities and governance structures. This information is also required to be provided to regulatory agencies such as ASIC.

1.41 Public submissions received by the Government on the scope and functions of any NFP regulator as part of the scoping study for a national NFP regulator suggest that the sector's compliance costs are

significant and that there is scope to streamline and remove reporting duplication. For example, Rotary Australian World Community Service Limited stated that:

- ‘The ‘report-once, use-often’ model of reporting offers a streamlining of compliance requirements and a huge potential saving by reducing the duplication of reports for various users. This is particularly so where an entity is in receipt of grants from various governments or government agencies.’ (Rotary Australian World Community Service Limited 2011 pp 4-5)
- In a similar vein UnitingCare Australia submitted: ‘There would be enormous benefit in all governments committing to a policy of ‘report-once, use-often’, especially in relation to organisational and compliance data requests. A commitment from at least State and Commonwealth leaders that they will move quickly toward adopting a ‘report-once, use-often’ policy would be welcomed by the sector. While we acknowledge that getting action from all levels of government to this principle will take time, we strongly encourage agencies within each level of government to start this process as soon as possible. Whilst this process would be best driven by an independent regulator this work could be initiated by other bodies such as COAG.’ (UnitingCare Australia 2011 p 9)
- Consumers Health Forum of Australia submitted: ‘CHF welcomes the proposal in the Consultation Paper for a “report-once, use-often” model of reporting, supported by a national regulator. This has the potential to substantially reduce the administrative burden of organisations that are currently required to provide similar reports to a range of entities.’ (Consumers Health Forum of Australia 2011 p 2)

1.42 When referring to the acquittal of government grants the North Queensland Land Council stated that:

- ‘There is a significant cost with complying with contractual reporting requirements for NTRB’s. For example, auditing costs are in the order of twenty to thirty thousand dollars per annum and we have to employ in-house a Certified Practising Accountant (CPA). We understand the need for proper compliance and it seems that one area where the compliance burden could be reduced would be the number of interim reports required throughout the financial year.’ (North Queensland Land Council 2011 p 4)
- The Association of Independent Schools of Western Australia, UnitingCare NSW and the ACT, UnitingCare



Australia and the Chamber of Commerce and Industry WA made similar comments and quantified acquittal costs in a similar method.

1.43 Compliance costs associated with reporting obligations are difficult to accurately estimate and quantify for any sector operating in the Australian economy. These problems are particularly pronounced in the NFP sector. NFP entities do not report on the totality of activities, rather, on specific aspects of their operations. Furthermore, the sector is extremely diverse and a generalised number would be unhelpful and particularly misleading. *Given informational gaps, it is impossible to estimate current compliance costs faced by the sector and changes in compliance costs that would arise due to the implementation of options considered in this regulatory impact statement (RIS). The PC report reached a similar conclusion.*

1.44 *Public transparency over the activities of charities and other concessionally taxed entities is lacking.*

1.45 Some information is currently available in relation to tax concessions on the Australian Business Register (ABR), with financial reports also available at a charge from ASIC and from some state and territory agencies in relation to incorporated associations.

1.46 The lack of a single source of public information makes it difficult for members of the community seeking to access reliable information on charities and DGRs. The lack of public transparency could reduce public confidence in the sector, restricts informed choices and philanthropy more generally, and discourages appropriate levels of sector accountability and governance. For example, Whitelion Inc. submitted:

- ‘Whitelion believes that a NFP sector information portal would have a range of benefits to stakeholders across the community. Through listing all registered charities, the public would be better able to find information on a given charity, and indeed confirm the validity of a charity should there be doubts as to a charity appeal. Further, for Government agencies and philanthropic funders, the centralised provision of general purpose financials on an information portal provides scope for greater efficiency and rigour in risk assessments. Whitelion believes that a NFP information portal has the potential to increase transparency in the sector, and thus build public trust in the NFP sector.’ (Whitelion Inc. 2011 pp 2-3)

1.47 Overall, the sector’s regulatory framework has failed to keep up with modern tax and regulatory system developments and public expectations. Over the last decade, five reviews have recommended taxation and regulatory reform, and there has been significant reform

internationally, including in the UK, US, Canada, New Zealand and Ireland. Yet Australia has achieved only incremental changes.

1.48 Weaknesses in the NFP sector's regulatory framework have created an environment where large and medium sized NFP entities, particularly those operating across multiple jurisdictions, are subject to excessive regulation, while smaller NFP entities, particularly small unincorporated associations and small charities, have remained unregulated despite their access to public monies in the form of donations, access to tax concessions and Government grants.

1.49 This is hindering the ongoing growth of the sector and its ability to properly function and fully contribute in modern Australia.

## **Objectives of Government action**

1.50 The Government recognises the important role played by the NFP sector in establishing an inclusive and productive Australia. The Government has committed to deliver smarter regulation, reduce red tape, and improve transparency and accountability of the sector. The Government also committed to consulting with stakeholders throughout the reform process.

1.51 The Australian governments, the NFP sector and the public recognise that it is important the sector is well regulated so that it remains accountable to the communities it serves and that fund its diverse operations. For example, the Australian Council of Social Services (ACOSS) submitted to the 2010 Productivity Commission's report, *Contribution of the Not-for-Profit sector* (PC report):

- '... the community values the contribution of the sector and expects State, Territory and Commonwealth governments to help not-for-profits to flourish through appropriate regulation and concessional treatment. This is reflected in current legislation and regulations, which aim to assist non profit organisations by reducing costs, providing protection for members and directors, and by increasing the confidence of the public to make donations.' (PC Report 2010 p 114. Citing ACOSS 2010 p 28)

1.52 Specifically, objectives of the Government include:

- establishing a robust and streamlined regulatory framework for the sector while removing unnecessary duplication in regulatory and reporting arrangements; and
- strengthening the NFP sector's transparency, governance and accountability.

1.53 Comparable jurisdictions have recently reformed their regulation of the NFP sector. Oversight of charities and tax concessional NFP entities in the United Kingdom, Canada, New Zealand and the United States is now undertaken by a single national regulator who requires regularly report on activities and financial performance. Improved reporting has been driven by the need to strengthen transparency, governance and accountability in a growing and dynamic sector.

### **Options that may achieve objective(s)**

1.54 To promote transparency, governance and accountability and limit the number of NFP entities that are operating under no regulatory oversight, the Government will look at options to ensure NFP entities and charities receiving Government support fall within the sector's regulatory framework and undertake periodic and proportional financial reporting.

1.55 The Government will also explore measures to reduce compliance burdens for NFP entities that face unnecessary high and inefficient level of regulatory and compliance burden. Options that centralise the Government's interaction with the NFP sector could help reduce compliance burdens. For example, a 'report-once, use-often' approach to reporting could be adopted in relation to financial reporting.

#### **Option 1: Retain existing policy.**

1.56 Under this option, regulatory responsibilities would remain scattered across different governments and government departments both within jurisdictions, and between jurisdictions. Government departments and agencies would continue to oversee the operation of NFP entities for different and sometimes overlapping purposes. This would result in continued unnecessary red tape and a high regulatory burden for the NFP sector.

1.57 Incremental changes to the regulatory framework could be implemented to reduce red tape and regulatory burden. However, these undertakings would largely be at the discretion of individual governments and government agencies.

1.58 Additionally, under this option there would be no body specifically established to oversee the operation and performance of the NFP sector. Therefore, NFP entities would continue to interact with several government agencies and departments for different purposes.

#### **Option 2: Pursue the establishment of a national regulatory framework.**

1.59 Under this option the Government would pursue the establishment of a national regulatory approach. At the centre of this approach the Government could establish a NFP regulator that would undertake and centralise a broad range of regulatory functions; coordinate

and oversee the simplification of regulatory arrangements; and ultimately provide a 'one-stop shop' for the NFP sector.

1.60 Any regulator could perform the following functions (the final list of activities would be determined in close consultation with sector stakeholders):

- assess and determine eligibility for charity and NFP status;
- educate the NFP sector about sector-specific issues and ensure compliance with relevant laws;
- establish a single general reporting framework;
- establish and enforce a national governance and disclosure framework for NFP entities;
- administer an administrative penalty regime for NFP entities which fail to comply with governance requirements;
- suspend or remove trustees/directors/responsible individuals or NFP entities that fail to comply with the law;
- take action to protect assets of NFP entities;
- assist with dispute management between members of NFP entities;
- establish a public information portal relating to NFP entities;
- replace the supervisory role of state and territory attorneys-general in respect of charitable trusts;
- administer a national incorporated associations legislative scheme; and
- administer a national fundraising legislative scheme.

1.61 The Commonwealth does not have the necessary constitutional power to establish a national regulatory approach without the support of the States and Territories. The Government could pursue the establishment of a national regulatory approach through the Council of Australian Governments (COAG).

1.62 There are three alternatives for the establishment of a national NFP regulatory framework. Alternatives include a referral of powers by the states to the Commonwealth, a cooperative legislative regime based on model Commonwealth legislation or a cooperative legislative regime based on model state legislation. The form of the agreement would be determined following negotiations with the States and Territories.

1.63 A national regulatory approach could be conducive to harmonisation of criteria for tax concessions across jurisdictions, standard reporting arrangements for grants and other government funding, and a

‘report-once, use-often’ model. A national approach would maximise the reduction in red tape and regulatory burden faced by the sector.

1.64 The Government could pursue the establishment of a national regulatory approach through the establishment of a NFP working group which would report to COAG through the Standing Council for Federal Financial Relations (CFFR).

**Option 3: Establish the Australian NFP Administrator within the ATO.**

1.65 The Government could establish the Australian NFP Administrator (ANA) within the ATO. The ANA would sit within the ATO but would be structurally separated and branded.

1.66 The ANA could progress Commonwealth level regulatory reform while the Government pursues a national NFP regulatory approach through COAG. This would help address time lags required to obtain agreement between Commonwealth, state and territories governments.

1.67 The ANA would determine the *status* of an organisation, for example charitable or NFP, and *register* entities as charities or PBIs only. To determine the status of a *NFP* entity, the ANA would use definitions and principles endorsed by the Australian Government. This could mean applying the current common law definition of charity or any statutory definition of charity which the Government is pursuing in its NFP reform package.

1.68 NFP entities that do not agree with the status provided by the ANA have various channels available to appeal. They are largely the same as what is currently available to entities that do not agree with the ATO’s ruling over charitable status and access to tax concessions. They include: request for internal reviews; appeal through the administrative appeals tribunal; appeal through the Federal Court; appeal through the Full Federal Court; and appeal through the High Court of Australia.

- Requests for internal reviews would be undertaken free of charge. Costs associated with the other channels would be the same as is currently the case.

1.69 Registration for charities and PBIs would be voluntary. However, only registered entities would be eligible for tax and other concessions or benefits provided by the Commonwealth, such as exemptions from certain Commonwealth laws.

1.70 There would be no change to regulation for the remaining NFP entities, including those that currently self-assess. Later, the Government may decide that it is appropriate for these entities to be included into the sector’s regulatory framework, requiring periodic reporting and formal registering. Any decision would be undertaken in consultation with the sector.

1.71 Under this option, existing regulators would retain their existing functions. For example, ASIC would retain its corporate governance functions and the ATO would continue to endorse entities for access to tax concessions as well as undertake compliance activity in relation to those concessions. The ANA would only be responsible for compliance of charities and NFP entities with respect to their NFP status and registration as charities.

1.72 Other activities which the ANA would undertake include:

- develop and maintain public information portal; and
- establish an Advisory Board made up of experts in the NFP sector, for example lawyers and accountants. The Advisory Board would be established to advise the ANA on a range of NFP issues.

1.73 Similar nations with significant NFP sectors, such as the United Kingdom, United States of America and New Zealand, have developed NFP information portals. Over the long term, jurisdictions that have introduced NFP information portals have seen improvements in public confidence and in philanthropy.

1.74 Public submissions received by the Government indicate that the sector is supportive of a public information portal which would provide information to the public on the goals and activities of the sector. For example, St John Ambulance Australia stated that a:

- ‘NFP sector information portal could have many benefits to the public by making the activities of NFPs more transparent. This could have the benefit of improving accountability as well as increasing public knowledge about the diversity and importance of activities offered by NFPs.’ (St John Ambulance Australia 2011 p 3)

1.75 The ANA would not increase and strengthen its educative role nor would it provide any governance support.

1.76 The ANA would be set up to begin its operations on 1 July 2011. From 1 July 2013, reporting by registered entities would commence and the information portal would go online. Reporting would be based on activity from the 2012-13 financial year.

1.77 The ANA would be established and fully funded from the Australian Government’s general revenue.

**Option 4: Establish an independent statutory office regulator called the Australian Charities and NFP Commission.**

1.78 Regulatory reform at the Commonwealth level could be progressed by a structurally separated office supported by the ATO which would turn into a statutory office. The statutory office would take over

the role and responsibilities of the structurally separated office *supported* by the ATO, and be given additional responsibilities.

1.79 Under this Option, the ATO would structurally separate the role of determining entities' charitable status (a role to pass to the new statutory body once it is in place) from the ATO's ongoing revenue role of assessing access to tax concessions with respect to the not-for-profit sector.

1.80 The statutory office would be called the Australian Charities and NFP Commission (ACNC) and headed by a newly appointed Australian NFP Commissioner. The ACNC would be required to separately report to Parliament and administer a legislative regime, including with remedial or penalty powers such as to obtain enforceable undertakings. ACNC's powers of enquiry would either be ATO powers or comparable powers which would be legislated.

1.81 The statutory office would determine entities' NFP status and register charities and PBIs; develop and maintain a public information portal; and provide secretariat services for the NFP Advisory Board.

- The public information portal would provide information for the public, the sector and government on each registered charity and PBI; and the sector with an avenue for online interaction with the regulator and guidance material. The portal will interact with existing government databases and agencies, such as the ATO, the ABR, and ASIC's companies register.

1.82 The process of registering charities and PBIs would be based on the existing process used by the ATO in determining whether an entity is charitable. This is based on a common law definition of charity and charitable purpose. This would not have any effect on charities and PBIs compliance costs.

1.83 The statutory office would provide the sector with educative material and governance support, and would establish itself as a 'one-stop shop' body. More specifically, the statutory office would develop a reporting form that registered entities would use to access a range of government services and concessions.

1.84 Submitted reports would be used by the ACNC to provide a seamless approach for applications for Australian Business Numbers (ABNs), charitable status and endorsement for tax concessions. The ABR and ATO respectively would be required to formally endorse entities on ACNC's advice. Therefore, a seamless process would be created, reducing compliance costs and red tape faced by the sector.

1.85 NFP entities that are not registered by the ACNC would continue to go through the same endorsement processes. This would

therefore require continued interaction with the ATO or self-assessment of eligibility for tax concessions.

1.86 The ACNC would also be expected to establish and run education programs and provide governance support to the sector, including through 'how to guides' and educative and guidance materials.

1.87 The ACNC would be responsible for consultation with the public, sector and government on the form and content of reporting requirements. This would be facilitated by the creation of an NFP reform implementation taskforce which would be headed by an interim independent Commissioner. The taskforce would begin operation on 1 July 2011.

1.88 The Implementation Taskforce will reside within Treasury and would work to ensure the ACNC is ready for operation by 1 July 2012. The taskforce would be expected to:

- engage with state agencies to negotiate use of the public information portal as a 'one-stop shop' for reporting to state agencies;
- engage with the ATO on infrastructure requirements and the transition of ATO staff and recruitment of new staff for the ACNC;
- provide input into the development of the legislation for the ACNC;
- consult with the public, the sector and government agencies, for the new NFP general reporting framework and the details of a public information portal; and
- work on developing the public information portal.

1.89 The ACNC would be set up to begin its operations on 1 July 2012. From 1 July 2013, reporting by registered entities would commence and the information portal would go online. Reporting would be based on activity from the 2012-13 financial year.

1.90 The ACNC would be established and fully funded from the Australian Government's general revenue. The NFP sector would not be required to pay cost recovery fees.

#### **Option 5: Establish an independent Financial Management and Accountability Act regulator called the Australian Charities and NFP Commission.**

1.91 The Government would progress Commonwealth level regulatory reform through a structurally separated NFP regulator supported by ATO. This regulator would evolve into a new *Financial Management and Accountability Act 1997* (FMA Act) independent



regulator for the sector and would be called the ACNC to be headed by a newly appointed Australian NFP Commissioner.

1.92 As is the case under Option 4, the ACNC would determine the status of NFP entities and register charities and PBIs; develop and maintain a public information portal which would be more user friendly than the portal envisaged in Option 3; establish a NFP Advisory Board; consult with the sector on appropriate reporting requirements and structure for the information portal; and provide education programs and governance support to the sector.

- The appeals process and definition of charity and charitable purposes which the ACNC would use are the same as outlined under Option 3.

1.93 The structurally separated regulator would be required to undertake initial recruitment for the regulator. The key difference between this Option and Option 4 is that the ACNC would be a completely separate entity by virtue of its FMA Act status. This would delay commencement of reporting and the launch of the public information portal.

1.94 The structurally separated office within the ATO would be created on 1 July 2011 with the ACNC to be established by 1 July 2012. Reporting would commence from 1 July 2014, based on activity undertaken during the 2013-14 financial year. At this stage, the information portal would also be developed with public access to coincide with the receipt of the first batch of reports.

1.95 The ACNC would be established and fully funded from the Australian Government's general revenue. The NFP sector would not be required to pay cost recovery fees.

## **Impact analysis**

1.96 The Government has developed and will implement a reform package to strengthen the performance of the NFP sector and ensure it is effectively meeting the needs of the Australian public. Overall, the Government's reform package would reduce compliance costs and red tape faced by the sector, while also improving the sector's accountability and transparency.

1.97 The options which were considered to address the problems outlined above would:

- produce a consistent and coordinated regulatory framework for the sector;
- centralise regulatory responsibilities within a single government agency;

- lead to streamlined and simplified reporting requirements for the majority of NFP entities;
- ensure all NFP entities receiving substantial amounts of public monies (most notably charities, PBIs and charitable trusts) fall within the sector's regulatory framework;
- support and strengthen the sector by providing educative material; and
- ensure there is information available to the Government and public on the performance and activities of the sector by introducing public information portal.

1.98 The NFP regulator would work to ensure that small charities, including charitable trusts, do not experience large and significant increases in compliance burden resulting from new reporting obligations. Reporting obligations would be proportional to size and risk posed by NFP entities and would therefore be significantly less for smaller charities.

1.99 All charities are currently required to be endorsed, as such, there would be no change to the compliance burden relating to endorsement for charitable status.

1.100 *Given the lack of data, it is not possible for the Government to accurately estimate the number of charities that would fit into various segments of the sector (for example, small charities). This makes it extremely difficult to estimate the overall implication on compliance costs for the sector as a whole.*

1.101 However, overall the Government considers, given information available and through discussion with the sector, that compliance burden would be reduced under all options considered (besides the option where the status quo would be maintained).

### **Option 1: Retain existing policy.**

#### *Affect on the sector*

1.102 Under this option, a segment of the NFP sector, primarily comprised of large NFP entities that undertake a range of activities such as the delivery of government services funded by a range of government agencies, would continue to face unnecessarily high and inefficient level of regulatory and compliance burden. These NFP entities would continue to be regulated, interact and report to different government agencies both across and between jurisdictions for different and overlapping purposes.

1.103 On the other hand, a segment of the NFP sector, mainly comprised of charitable trusts and small charities, would continue to operate under no regulatory oversight.

1.104 To reduce regulatory and compliance burden where appropriate, under the Government's direction individual government departments and agencies could endeavour to reduce regulatory burden and red tape faced by the sector. However, it is likely that such a disjointed, uncoordinated approach would be counterproductive and unlikely to deliver significant benefits to the sector.

1.105 This view was expressed by stakeholders during recent consultation conducted by the Government. For example Australasian Society for HIV Medicine submitted:

- 'A standard set of accounts would be great. AusAID and ACFID tried to do this but in fact, without a national regulator all they have done is impose another set of reporting to meet ACFID Code requirements and this inappropriate for organisations which have a development arm, but for whom overseas aid program activities are only a part of the whole organisation.' (Australasian Society for HIV Medicine 2011 p 4)

***Affect on Government***

1.106 This option would amount to a continuation of current Government policy. Therefore, it will have no implication for the Government's Budget over the forward estimates.

***Affect on the public***

1.107 This option would not deliver improved accountability and transparency, and a substantial number of NFP entities that account for a small number of the sector's activity would continue to operate outside the sector's regulatory framework.

1.108 The public would not have access to reliable and useful information on the activities of charities and PBIs and a point of contact for issues related to charities. Therefore, this option could reduce public confidence in the sector and restrict informed choices and philanthropy more generally.

1.109 Additionally, the regulatory burden faced by NFP entities operating with a high compliance burden could continue to divert scarce NFP resources away from core activities leading to a reduction in public confidence in the ability of NFP entities to fulfil their objectives.

**Option 2: Pursue the establishment of a national regulatory framework.**

***Affect on the sector***

1.110 This option has the potential for greatest decline in compliance burden faced by the sector, and has the potential to ensure all NFP entities accessing public monies operate within the sector's regulatory framework.

However, pursuing the establishment of a national regulatory framework would take time to implement and require state and territory cooperation.

1.111 A national regulatory system for the NFP sector has the potential to reduce red tape and compliance costs, remove unnecessary duplication of required information across jurisdictions, improve transparency, increase philanthropy (through increased donations and volunteerism), and provide Australia with a system that will allow NFPs to focus on core activities.

1.112 The costs and benefits associated with this option, particularly in relation to regulatory and compliance burden will depend on the final scope of reforms which are agreed with the states and territories. Given informational gaps which do not allow for accurate quantification of compliance costs, we would not be able to estimate potential reductions in compliance costs resulting from this Option.

1.113 Achieving state and territory agreement may be difficult, however, it would provide significant benefits in terms of harmonisation and simplification. A national approach to NFP regulation will allow for the removal of the complex, inequitable and duplicative regulatory requirements which are currently in place for the NFP sector. It would also provide scope to expand regulatory oversight across the totality of NFP entities receiving public monies.

1.114 Mission Australia recently submitted in response to the Government's consultation paper on a NFP regulator that:

- 'Mission Australia supports the referral of powers from the states to the Commonwealth to establish a national NFP regulator. It is acknowledged that without state support and further progress through COAG, a less than optimal national regime would result with ongoing duplication and inconsistencies in regulatory treatment across jurisdictions.' (Mission Australia 2011 p 4)

GAAP Consulting submitted: 'The status quo is not an option for the reasons stated in the scoping study. Anything less than a national regulator for all not-for-profit entities would be a sub-optimal outcome; and a significant opportunity missed for generations.' (GAAP Consulting 2011 p 2)

#### ***Affect on Government***

1.115 The impacts on the Government would ultimately depend on the final set of reform proposals agreed to by Australia, state and territory governments. At this stage, it is impossible to quantify any budgetary or related impacts on the Government.

*Affect on the public*

1.116 Ensuring that appropriate governance, accountability and transparency exists within the NFP sector through smarter regulation is expected to improve public confidence in the sector, promote informed choices and ultimately help secure the long term sustainability of the sector.

1.117 National regulatory frameworks characterised by independent charities regulators have been established in many comparable overseas jurisdictions, including New Zealand, the United Kingdom and Ireland. Canada has established a charity regulator (the Charities Directorate) within its relevant tax authority while in the United States, the Internal Revenue Service is responsible for regulating charities. These jurisdictions have experienced increased public engagement following implementation of reforms.

**Option 3: Establish the Australian NFP Administrator within the ATO.**

*Affect on the sector*

1.118 Under this option, the Government would establish a structurally separate regulator for the NFP sector within the ATO. The regulator would register charities and PBIs, oversee the performance of the sector including by collecting financial reports from all registered charities and PBIs on an annual basis, and develop and maintain a NFP information portal.

1.119 Existing regulators would retain their existing functions. Required reporting would be provided by the ANA to these regulators to allow them to carry out functions. However, this sharing of information would not be a seamless process.

1.120 Required information and reports would not be tailored to address the totality of reporting requirements and could therefore still warranted interaction with other regulators. Therefore, there would a move towards a 'report-once, use-often' approach, which would result in a reduction in compliance burden faced by NFP entities.

1.121 The criteria for endorsement and registration as a charity or PBI would be consistent with current definitions and principles. Therefore, charities or PBIs would not need to be re-endorsed by the new regulator.

- These criteria are currently expressed in common law. The Government is likely to provide the sector with a statutory definition of charity and PBI. A statutory definition would retain current principles and criteria and would therefore leave unchanged entities and activities eligible to be endorsed as charities and PBIs.

1.122 Compliance costs associated with regulatory obligations are difficult to accurately estimate for any sector operating in the Australian economy. For example, in a sector where regular reporting of financial performance is required it would be difficult to separate reporting and accounting expenses related to regulatory obligations and, reporting requested by owners or shareholders.

1.123 These problems are particularly pronounced in the NFP sector. NFP entities do not report on the totality of activities rather on specific aspects of their operations. *Given informational gaps, it is impossible to estimate current compliance costs faced by the sector and changes in compliance costs that would arise due to the implementation of options considered in this RIS. The PC report reached a similar conclusion.*

1.124 We are able to qualitatively describe the average impacts of options on certain segments of the NFP sector. In turn, this qualitative analysis would allow us to gauge whether options considered would increase or decrease compliance burden faced by a typical NFP entity in specific segments of the NFP sector.

1.125 Incorporated associations and companies limited by guarantee that undertake a range of activities are required to interact with a range of government agencies and therefore generally have onerous reporting requirements. These organisations tend to be large and medium sized NFP entities.

1.126 Under the new reporting arrangements, large and medium sized NFP entities would be required to report to the regulator on a regular basis. The information collected by the regulator would be shared with relevant Commonwealth agencies allowing charities and PBIs to meet a range of their reporting obligation with the one form. This form is not expected to cover the totality of charities and PBI information requirements; therefore, to the extent that there are informational gaps, charities and PBIs may still be required to interact with a range of government agencies, only to the extent necessary to meet specific information requirements of those agencies.

1.127 Charitable trusts and small charities with limited government interaction (such as the delivery of government services) currently have limited reporting obligations. This option would bring these NFP entities that access public monies into the sector's regulatory framework by ensuring they register with the regulator on a voluntary basis if they wish to maintain their charitable status.

1.128 The level of reporting detail required would be tiered based on factors such as size, risks and access to public monies. The actual requirements would be established in consultation with the sector but requirements for smaller entities are expected to consist of basic financial data such as total revenue, total costs, estimates of net worth and contact details.

1.129 There is currently no data on the number of small charities operating in Australia. However, it is likely that most small charities are incorporated associations. Currently, there are around 136,000 incorporated associations operating in Australia. Incorporated associations are required to maintain up-to-date financial and operational information to meet requirements imposed by stakeholders such as current regulators and donors, and are required to report to regulators such as relevant state authorities.

1.130 Regular reporting to the NFP regulator may result in minor additional compliance burdens on small charities and would amount to inserting information already collected information into a standard forms. A conservative estimate would be that it would costs half of one working day in staff time for these entities to meet reporting obligations under this option.

- If all the reporting requirements of small charities that are incorporated associations were covered by the one form in the event of agreement with the States, these entities may experience a reduction in compliance burden resulting from the new reporting requirements (see 'Impact' section for Option 4).
- To the extent that reporting is still required for current regulators this option would lead to an increase in compliance burden. The upper bound estimate of increased compliance burden is half of one working day in staff time per annum.

1.131 Small charities, such as incorporated associations, that do not have the in-house capacity to collect up-to-date financial information engage professional service providers such as accountants. The sector has indicated that professional services are generally provided free of charge or at highly subsidised rates. Reporting requirements under this option would not be more onerous than current requirements, would be satisfied by information already collected to meet current requirements, and would therefore have minor or no addition compliance costs for small charities such as incorporated associations.

- As part of the scoping study on a national NFP regulator the Government undertook targeted consultation with key stakeholders in the NFP sector. Stakeholders consulted were of the view that new reporting requirements would lead to minor increases in compliance costs faced by small charities.

1.132 We estimate that there are around 2,500 private ancillary funds. Private ancillary funds are also required to maintain up-to-date financial and operational information to meet requirements imposed by stakeholders and report periodically to the ATO. There would be no

change in compliance burden faced by private ancillary funds as they would be required to report to the NFP regulator instead of the ATO.

1.133 In addition, we estimate that there are around 1,000 charitable trusts. Charitable trusts do not report to stakeholders, however, for internal purposes are required to maintain up-to-date financial information. Information needed to meet reporting obligations under this option would already be collected by charitable trusts. Therefore, regular reporting to the NFP regulator would have minor compliance costs for these entities and would amount to inserting already collected information into a standard form. A conservative estimate would be that it cost half of one working day in staff time for these entities to meet reporting obligations under this option.

1.134 This option would give rise to some sensitivities where the sector would see this as ‘interim regulation by the ATO’ of the sector, and where this would increase the reporting burden for a small number of charities.

1.135 Structural separation and branding would help to address the risk of a perceived conflict of interest between the Commissioner of Taxation’s revenue collection focus and the role as default NFP Commissioner.

- The establishment of an advisory board would mitigate concerns about sector engagement and help underpin the NFP sector’s confidence in the regulator’s decision making processes.

#### ***Affect on Government***

1.136 The sector was of the view that education function would be required to ensure NFP entities are complying with regulatory objections and would facilitate any adjustment to a new regulatory environment. For example, Wesley Mission submitted:

- ‘It should also have, as a core activity an education and training support function in addition to its regulatory responsibilities. This will go a long way to reducing the level of confusion currently within the sector.’ (Wesley Mission 2011 p 9)

1.137 Under this option, the ANA would not have any additional education role. The sector may therefore criticise the Government for not providing an education role.

1.138 The costs of structurally separating the role of determining NFP status and registering charities and PBIs from the ATO’s role of administering tax concessions; implementing general reporting; establishing and maintaining the NFP public information portal and



undertaking related activities is estimated to cost \$14.3 million the forward estimates.

*Affect on the public*

1.139 The public would have access to more information on the activities of charities, a clear point of contact for issues related to charities. Therefore changes should generate confidence in the activities of charities.

**Option 4: Establish an independent statutory office regulator called the Australian Charities and NFP Commission.**

1.140 Under this option the Government would progress reform through a structurally separated area supported by the ATO which would turn into the ACNC from 1 July 2012. The statutory office would take over the role and responsibilities of the structurally separated office, and be given additional responsibilities.

*Affect on the sector*

1.141 The ACNC would provide the sector with a 'one-stop shop' for registration, tax concessions, and accessing other Australian Government services and concessions. Incorporated associations and companies limited by guarantee that are involved in a range of activities would only have to report to the ACNC. These NFP entities tend to be large and medium sized NFP entities.

1.142 This information would then be used to fulfil other Commonwealth level reporting obligations required for access to tax concessions and government service delivery contracts.

1.143 Incorporated associations that are charities would only report to the ACNC that would pass on required information to relevant agencies. The Implementation Taskforce would negotiate with state authorities to develop the public information portal as an 'one-stop shop' for reporting to state agencies. Therefore, incorporated associations would only be required to report to these regulators if there are informational gaps.

1.144 The Government expects that the move to the 'report-once, use-often' approach would reduce compliance burden associated with reporting for these large and medium sized NFP entities.

1.145 A large NFP would no longer be required to report to meet the numerous reporting requirements associated with legal form and, access to Government grants and contracts for service delivery. Instead of interacting with numerous Government agencies on numerous occasions (if, for example, two grants were acquired from a particular agency), the NFP entity would be required to report on one occasion to the NFP regulator. This would reduce auditing expenses that the sector has indicated costs, on average, \$1,000 per audit.

1.146 Charitable trusts and small charities with limited government interaction (such as the delivery of government services) currently have limited reporting obligations. This option would bring these NFP entities that access public monies into the sector's regulatory framework by ensuring they register with the regulator on a voluntary basis if they wish to maintain their charitable status.

1.147 The level of reporting detail required would be tiered based on factors such as size, risks and access to public monies. The actual requirements would be established in consultation with the sector but requirements for smaller entities are expected to consist of basic financial data such as total revenue, total costs, estimates of net worth and contact details.

1.148 There is currently no data on the number of small charities operating in Australia. However, it is likely that most small charities are incorporated associations. Currently, there are around 136,000 incorporated associations operating in Australia. Incorporated associations are required to maintain financial and operational information to meet requirements imposed by stakeholders such as current regulators and donors, and are required to report to regulators such as relevant state authorities.

1.149 Once agreement is reached with the state authorities, regular reporting to the NFP regulator as opposed to current regulators may result in a reduction in compliance burden associated with reporting. Incorporated associations would no longer be required to report to state authorities but instead to the NFP regulator. It is possible that the NFP regulator would require streamline reporting which could result in a marginal reduction in compliance costs (see paragraph 1.37 for further details).

1.150 More significant compliance savings would be achieved from the use of 'report-once, use-often' approach where entities could meet the totality of reporting obligations associated with grants and government service delivery contracts with the one form. The above assumes however that agreement with the States is obtained in regards to the method of interaction between the NFP regulator and existing State agencies. In the interim, it is expected that small charities may be faced with an increased reporting burden given the different reporting requirements of various States. However, as reporting requirements to the NFP regulator are very likely to be satisfied by information already produced, this impact would be mitigated.

1.151 Small charities, such as incorporated associations, that do not have the in-house capacity to collect up -to-date financial information engage professional service providers such as accountants. The sector has indicated that professional services are generally provided free of charge or at highly subsidised rates. Reporting requirements under this option

would not be more onerous than current requirements, would be satisfied by information already collected to meet current requirements, and would therefore have minor or no additional compliance costs for small charities such as incorporated associations.

- As part of the scoping study on a national NFP regulator the Government undertook targeted consultation with key stakeholders in the NFP sector. Stakeholders consulted were of the view that new reporting requirements would lead to minor increases in compliance costs faced by small charities.

1.152 We estimate that there are around 2,500 private ancillary funds. Private ancillary funds are required to report periodically to the ATO and therefore maintain up -to-date financial and operational information. There would be no change in compliance burden faced by private ancillary funds as they would be required to report to the NFP regulator instead of the ATO.

1.153 In addition, we estimate that there are around 1,000 charitable trusts. Charitable trusts do not report to stakeholders, however, for internal purposes are required to maintain up -to-date financial information. Information needed to meet reporting obligations under this option would already be collected by charitable trusts. Therefore, regular reporting to the NFP regulator would have a minor compliance cost for these entities and would amount to inserting already collected information into a standard form. A conservative estimate would be that it would cost half of one working day in staff time for these entities to meet reporting obligations under this option.

1.154 In general, the Government considers that this option has the potential to reduce compliance and administrative costs faced by the sector and in particular reduce costs once agreement with state authorities has been obtained. In other words, the reduction in compliance expenses associated with the 'report-once, use-often' approach, once fully implemented, would offset any additional costs resulting from reporting. However, small charities may see an increase in compliance costs in the initial stage of this option.

1.155 Compliance and administrative savings are hard to quantify particularly for this sector which has limited data on financial performance. It is noted, however, that during Government consultation with the sector, stakeholders indicated that a move toward a 'report-once, use-often' approach would lead to 'huge' savings in administrative and compliance costs (see paragraph 1.12 above for further information).

1.156 The sector would also benefit from the other services offered by the ACNC including the provision of education programs and governance support, and an information portal which is user-friendly. These services are likely to be more important for smaller entities that tend to be

unincorporated organisations and charities. Larger charities have more resources to market their services and provide information to the public.

1.157 This option would provide the sector with an independent regulator who would leverage off ATO resources to conduct back office tasks on a more cost efficient scale. The regulator would be required to report to the Australian Parliament.

***Affect on Government***

1.158 Structurally separating the role of determining NFP status and registering charities and PBIs from the ATO's role of administering tax concessions; providing education programs and governance support; implementing general reporting; establishing and maintaining the NFP public information portal and undertaking related activities is estimated to cost \$53.6 million over the forward estimates.

***Affect on the public***

1.159 The public information portal and regular reporting by NFP entities are likely to boost the sector's transparency and accountability, leading to increased public confidence and engagement.

**Option 5: Establish an independent Financial Management and Accountability Act regulator called the Australian Charities and NFP Commission.**

1.160 The impacts of this option are identical to those specified under Option 4. The key difference between Option 4 and 5 is that the NFP regulator would be an entirely new entity under Option 5 by virtue of its FMA Act status.

1.161 This option would result in a completely separate entity unable to leverage off the knowledge and support of the ATO. Therefore, this option would cost significantly more than Option 4.

1.162 There are high implementation risks associated with this option, resulting from delays caused by the two pass Cabinet process, as well as the legislative risks brought about by the need to legislate to introduce a new FMA Act agency.

1.163 This option is likely to be supported by the sector which has called for a new and independent regulator to deliver compliance, transparency and education gains. However, the practical implications for the sector and public would be identical under both Options 4 and 5.

1.164 Structurally separating the role of determining NFP status and registering charities and PBIs from the ATO's role of administering tax concessions; providing education programs and governance support; implementing general reporting; establishing and maintaining the NFP public information portal and undertaking related activities is estimated to cost around \$170 million over the forward estimates.

## **Consultation**

1.165 Consistent with the direction provided by the Government during the 2010 election campaign, the Government plans to consult on design and implementation options for policy proposals. Consultation and public views would be elicited through the issuance of public discussion papers and other more focused consultation could occur through the NFP Sector Reform Council.

1.166 At this stage it is envisaged that the Government will release a public consultation paper on:

- reporting requirements of NFP entities, including consideration of appropriate thresholds to underpin a tiered reporting framework; and
- layout and content of the NFP public information portal.

1.167 Following the 2012 Commonwealth Budget, public consultation papers would invite public submissions, with targeted consultation (with key stakeholders including the NFP Reform Council, the ATO's Charities Consultative Committee, and state and territory authorities) would also occur once the public consultation papers are in the public domain.

1.168 The Government would also consult through the issuance of legislative exposure drafts.

## **Recent reviews of the NFP sector**

1.169 The AFTS report and the PC report, both examined the appropriateness of the NFP sector's regulatory framework. The analysis and recommendations in both reports were informed by extensive public consultation.

1.170 The AFTS report found that 'The regulatory framework for NFP organisations is inconsistent and opaque' (AFTS 2009, Volume 1, p 208).

1.171 The PC report found that:

- 'The current regulatory framework for NFPs is characterised by uncoordinated regimes at the Commonwealth and state/territory levels. Disparate reporting and other requirements add complexity and costs, especially for organisations operating in more than one jurisdiction ... (Productivity Commission 2010 p 113)'
- It recommended the development of a national NFP regulator to bring together Australian Government regulatory functions and the encouragement of self regulation instruments, such as voluntary codes of conduct, to enhance public trust and confidence.

1.172 Other recent reviews into the regulation and taxation of the NFP sector in Australia have taken place including the 2001 Report of the inquiry into the Definition of Charities and Related Organisations, the 2008 Senate Economics Committee inquiry into Disclosure Regimes for Charities and NFP Organisations, and the 2010 Senate Economic Legislation Committee inquiry into the Tax Laws Amendment (Public Benefit Test) Bill 2010.

1.173 The analysis and recommendations in these recent reviews of the NFP sector were also largely informed by extensive public consultation.

1.174 A consistent theme that has emerged from these reviews is that the regulation of the NFP sector would be significantly improved by establishing a national regulator, and harmonising and simplifying regulatory and taxation arrangements.

### **Government consultation on a NFP regulator**

1.175 The Government consulted on the goals and form of a regulator, and the scope and functions of regulation for the NFP sector as part of the scoping study for a national NFP regulator. Over 160 submissions were received. Feedback from submissions will be incorporated into the Final Report of the Scoping Study which is expected to be finalised around May 2011.

1.176 There was widespread support for a national and independent NFP regulator to reduce the red tape and regulatory burden faced by the sector. A consistent message emerged that a significant reduction in red tape and regulatory burden could only be achieved through a national NFP regulator.

1.177 Stakeholders expressed concerns in relation to the ability of an interim Commonwealth regulator to reduce red tape and the regulatory burden. These concerns mainly relate to the option that the Government only pursue regulatory reform at the Commonwealth level. The establishment of a Commonwealth regulator is likely to be perceived as an important step in the broader reform process where it is pursued parallel to a COAG reform agenda.

1.178 There was also widespread support for:

- streamlined and consistent reporting requirements; and
- a public information portal to provide a single, easily accessible source of detailed information about NFP entities and charities in Australia.

## **Conclusion and recommended option**

1.179 A truly national NFP regulator would provide the greatest benefits in terms of reducing regulatory overlap, red tape and compliance costs for the sector. However, achieving state and territory agreement may be difficult and take time. In this light, a structurally separated regulator within the ATO or a new FMA Act agency could provide significant benefits for the NFP sector in a much shorter timeframe although there will be distributional issues in the transitional stage with net benefits mainly accruing to larger NFPs while smaller NFPs could face a small increase in compliance costs.

1.180 A balance needs to be struck between providing the sector with a fully separate and independent NFP regulator, with the cost of such a regulator, the need to avoid a new layer of bureaucracy and the need to avoid pre-empting any model that COAG may agree to.

1.181 Whilst Option 3 involves structural separation and branding, the benefits of this option are limited and are unlikely to meet the sector's expectations for regulatory reform. Under this option, the ANA would offer no additional educational support to the sector and therefore offer limited compliance and governance gains.

1.182 Except for the provision of a basic information portal with limited functionality and an Advisory Board, this option is consistent with what the ATO is currently providing the sector.

1.183 Importantly, this option would offer minor compliance costs savings from the 'one-stop shop' reporting.

1.184 Option 5 would meet the sector's desire for a new and independent regulator and deliver compliance, transparency and education gains. The option would come at a high cost caused by its resourcing demands. There are high implementation risks associated with this model given loss of access to knowledge and skills that exist in the ATO, as well as the legislative risks brought about by the need to legislate to introduce a new FMA Act agency, which would not be equipped with the knowledge or support of the ATO. Moreover, this option may pre-empt COAG consideration of NFP national regulatory reform, and would add another layer of bureaucracy.

1.185 In contrast, Option 4 would come at a lower cost than Option 3 and pose fewer implementation and legislative risks. Under this option, the ACNC could leverage off existing ATO resources, including staff, infrastructure and expertise. This option would deliver similar benefits as Option 5 including seamless regulation of the sector and education, transparency and compliance gains.

1.186 This model will provide an independent regulator for the sector and will therefore help to address the sector's concerns in relation to the ATO's perceived conflict of interest between its regulatory and revenue

collection roles. This option will therefore provide timelier benefits to the sector without pre-empting COAG consideration of NFP national regulatory reform. For these reasons, Option 4 is the preferred model.

1.187 The Government would also pursue the Option 2. The interim NFP regulator would implement a voluntary registration scheme; develop a tiered mandatory reporting scheme; and create a public information portal.

1.188 The final form and structure of reporting requirements and the public information portal would be developed in close consultation with the sector and relevant government agencies and departments.

1.189 The combination of these options would help the Government establish a robust and streamlined regulatory framework for the NFP sector; strengthen the sector's transparency, governance and accountability; and provide the public with information on the sector commensurate to the level of support provided to the sector by the public.

1.190 The Government favours the adoption of Options 1, 3 and 5. These options would allow the government to implement long-term and short-term reform at the Commonwealth level.

1.191 The combination of Option 2 and 4 would allow the Government to implement immediate reform for the NFP sector at the Commonwealth level, while pursuing a national regulatory approach through the COAG process.

## **Implementation and review**

### **Implementation**

1.192 During its 2010 election campaign the Government committed to reform the NFP sector and consult widely on options for reform and strategies for implementation.

1.193 Consultation with the sector would occur prior to finalisation and implementation of preferred option.

### **Ongoing review**

1.194 The performance of the recommended options will be assessed qualitatively by ongoing monitoring of stakeholders' attitudes. Stakeholder views on changes implemented, including the final form and structure of reporting requirements, and the public information portal would be received primarily through the NFP Reform Council and the ATO's Charities Consultative Committee.

1.195 However, reporting is required for any regulator to effectively oversee the performance of the sector and costs are expected to be minor



compared to funding and support the sector receives from the Government and the public.