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Department of the Senate
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Australia

INQUIRY INTO THE DISCLOSURE REGIMES FOR CHARITIES AND NOT-FOR-PROFIT ORGANISATIONS

SUGGESTIONS FOR A THEORETICAL FRAMEWORK FOR THE LAW APPLYING TO GIVING AND VOLUNTARY PARTICIPATION IN AUSTRALIA IN THE TWENTY-FIRST CENTURY

Some thoughts developed by Matthew Turnour[1]

The closing date for submissions is Friday 29 August 2008

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Executive summary

Australia needs one body of law applicable to all of the third sector. A major obstacle to achieving that has been the difficulty with defining the organisations that make up civil society. This submission begins with a definition. An adequate definition is critical to any reform agenda as there is needs to state with precision exactly which organisations are within the scope of any proposed law and which are not. I propose that the following definition of civil society organisation and civil purpose be adopted to define these organisations, which I call civil society organisations.

> *Civil society organisations are the organisations that pursue civil society purposes. Civil Society purposes are purposes that are pursued voluntarily, altruistically and for public benefit. Civil society organisations are distinguished from government organisations by their voluntariness, from businesses by participation being for altruistic purposes and from family gatherings and other private groups by the purposes being public.*

Having set out a definition of civil society organisations the submission turns to the underlying challenge of how to create a framework in which the diverse opinions that will be presented to the Senate Economics Committee can contest and be evaluated. The principles set out in the *Universal Declaration of Human Rights* are taken as a basis for the proposition that the purpose of the law for civil society organisations is to enable and advance voluntary association with the minimum restraint necessary to meet the just requirements of morality, public order and general welfare. It is concluded that regulation is appropriate when it will enable and perhaps encourage voluntary association and contributions and this will arise where a civil society organisation pursues purposes warranting further regulation:

a. through activities warranting further regulation; and
b. the protection of the welfare of others is not achieved through self-regulation nor a general law applying to other organisations that should be extended to the organisations.

Third, the particular issues raised in the Terms of Reference are considered in the light of this overarching framework. The issue of legal form is approached first and then the question of a framework for regulation. It is suggested that purpose not form should determine the extent of regulation of civil society organisations. Insights from the United States and Europe are touched upon to question whether unincorporated association should be recognised. A very simple model for regulation is proffered and it is suggested that this model could operate from within federal regime. A model form for regulation is sketched.

This submission concludes with comments on the implications of the framework for the discussion regarding a Charities Commission, and the place of political parties and their disclosure regimes in the discussion.

Table of contents

The context and defining the organisations in question

The Context

There have been more than twenty inquires examining aspects of the law of charities over the last sixty years in common-law countries such as Australia.[2] This *Inquiry into Disclosure Regimes for Charities and Not-for-profit Organisations* forms a part of this broader body of inquiry. The Terms of Reference include not only the disclosure regimes but invite submissions in relation to the legal forms of incorporation and the way in which these organisations are regulated generally. It is taken as given that the encouragement of voluntary contributions of time and money are a good thing to be encouraged and supported. This paper sets out a broader framework for discussing all of the issues involved in regulating the voluntary sector before addressing the specific issues raised in the Terms of Reference.

Society is complex and so, for analytical purposes, we usually think of society as divided into four sectors:[3]

1. Business (the first sector);
2. Government (the second sector);
3. Not-for-profit, non-government, voluntary, intermediary, (the third sector); and
4. Family (the fourth sector).

Charities are a part of the third sector. That sector, to use the language of the United Kingdom Prime Minister's Strategy Unit, is the sector 'dedicated to community benefit or social purposes'.[4] It is identified as the sector of voluntary participation[5] and its inhabitants colourfully described as 'congeries of tribes who acknowledged fealty to neither Caesar nor the Invisible Hand, who were accountable in neither the arena of politics nor the marketplace of economics.'[6] All of these diverse 'tribes', pursuing social or community benefiting purposes, called civil society organisations, in this submission, are the object of the operation of this body of law (since law cannot act upon sectors only juridic persons), not just charities. Consequently a definition is needed that will apply to all such organisations and the definition here proposed applies to include all of them.

This submission begins with definition. An adequate definition is critical to any reform agenda as there is a need to state with precision exactly which organisations are within the scope of any proposed law and which are not. Having set out a definition of civil society organisations the submission turns to the underlying challenge of how to create a framework in which the diverse opinions that will be presented to the Senate economics committee can contest and be evaluated. That is an architecture for framing the debate is offered and reasons for adopting the framework are presented. Third the particular issues raised in the Terms of Reference are considered. The issue of legal form is approached first and then the question of a framework for regulation. The submission concludes with comments on the discussion regarding a Charities Commission, the place of political parties in the discussion and their disclosure regimes in the discussion and the link between access to preferences and regulation.

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2 See Annexure A for list.

3 For reference to the four sections of society see Helmut Anheier, 'Dimensions of the Third Sector: Comparative Perspectives on Structure and Change' (Paper presented at Centre for Civil Society, London School of Economics, August 2000) 16. The black market arguably amounts to a fifth sector to be considered.

4 UK Government, 'Private Action, Public Benefit' (Strategy Unit, Cabinet Office, UK Government, 2002) para 2.12.

5 See John Keane, Civil Society - Old Images, New Visions (1998).

6 Rob Atkinson, 'Altruism in Nonprofit Organisations' (1990) 31 Boston College Law Review 501, 501.

Defining the organisations in questions

The title of the most recent Australian inquiry, the *Charities Definition Inquiry* highlights in its title a threshold challenge for all such inquiries: how to define the organisations that are the object the inquiry. The background paper describes the organisations that make up civil society as the non-profit sector and its states that it:

> ... includes charities along with a range of other entities, such as churches, sporting organisations, advocacy groups, community organisations, co-operatives, trade unions, trade and professional associations, chambers of commerce, welfare organisations and service providers, is a significant sector of the Australian economy and makes a marked contribution to civil society.

If a definition is stated to *include* something rather than *define* it completely, there is a conceptual in- adequacy. The first challenge is to define completely by reference to essence and differentia the subject of the inquiry. Only when the organisations are precisely defined will it be possible to say with precision that a law applies or does not apply to a particular organisation. This is critical for clarity and consequently justice.

I propose that the following definition of civil society organisation and civil purpose be adopted to define these organisations which I call civil society organisations.

> *Civil society organisations are the organisations that are characterised by civil society purposes. Civil society purposes are purposes that are pursued voluntarily, altruistically and for public benefit. Civil society organisations are distinguished from government organisations by their voluntariness, from businesses by participation being for altruistic purposes and from family gatherings and other private groups by the purposes being public.*

I propose this definition because charities are but a subclass of civil society organisations and civil society organisations are but a part of a broader class of organisations that include businesses, non-government bodies and private groupings. It follows that the beginning of a classical definition must be, I suggest, with the way that society as a whole is considered.

This definition is offered for the purposes of *determining the scope of* the regulatory regime. Civil society purposes are in *essence* purposes which are:

a. **A**ltruistic as suggested by the Charities Definition Inquiry,
b. For public **B**enefit as has always been accepted as foundational to charities law, and,
c. Performed without **C**oercion, that is distinct from government as the Briefing Paper notes.

The purposes *differentiate* civil society organisations from the three other organisational purposes: namely

A. Business, which is manifest by the pursuit of self-interest; that is lack of altruism;
B. Government, which is characterised by coercion; that is a lack of voluntariness or freedom; and
C. Family which is characterised by being private not public.

When discussing the regulation of civil society organisations I suggest that Senators are considering organisations with these characteristics.

If this definition is accepted there is a definition of *all* of the organisations which are within the scope of the inquiry and yet which excludes businesses, government organisations and private gatherings. This is, I suggest, the proper scope of the inquiry.

The relevance and appropriateness of current disclosure regimes

There is clearly disquiet over the regulation of civil society organisations and in my view that disquiet is justified in many regards. The problem is what to do about it. When we come to consider the relevance and appropriateness of the law for civil society organisations what we notice is that it is, by-and-large, an *ad hoc* bundle of exemptions and exceptions to the law applying to other sectors. The income tax exemptions, the corporations law exceptions and the copyright exemptions are three examples.[7] At the threshold level of a suitable framework for discussing the law there is then, an initial hurdle. All that is there to consider once we move past the law of charities, is a collection of exceptions. In legal theory the divisions follow the divisions of the first sector (business), the second sector (government) and the fourth sector (family) at distinct heads of law for those sectors are readily identifiable. At the beginning of the third millennium there is not, though, a clearly identifiable body of law for the third sector. Legal theory regarding the law applicable to civil society organisations has not development in a way similar to the law applying to the other sectors. Third sector legal theory has lagged. The law for the third sector is scattered through the law for the other sectors. What is needed is a framework for considering the law that applies to the whole of civil society.

I suggest that once that challenge is confronted and the quest for an appropriate architecture for the debate pursued such an alternative framework can be seen scattered through these many laws that regulate civil society albeit in an *ad hoc* way. Civil society law reform needs a theoretical framework to underpin its development in a way not dissimilar to the way privity of contract underpins the business sector's laws and the way that freedom from arbitrary coercion underpins the law for the government sector.

As the law of charities is the only unified jurisprudence applying to the third sector I begin there. Functionally, the law of charities performs two purposes at its most basic level. First, it enables the transfer and application of goods for purposes of public benefit – particularly cross generationally. Second, it creates a regime for granting preferences to certain organisations.

Moving beyond charities to other civil society organisations there are related purposes. First, there are a plethora of forms enabling associations of persons to hold and transfer property. Second, these organisations enjoyed a raft of preferences not usually available to organisations from other sectors.

If the characteristics just set out in relation to charities and other civil society organisations is accepted I submit that it follows that the law applying to civil society organisations has two dimensions. These dimensions are, first, determining the scope of a jurisdiction for the application of laws that enable voluntary participation and contribution. Second, the setting out of a basis for entitlement to preference. For convenience I suggest these two dimensions to the body of law applying to civil society organisations be called Association law and Benefit law. In this submission, when discussing the forms of organisation and their regulation I am discussing Association law. When discussing entitlement to preferences I am discussing Benefit law. Association law together with Benefit law, I suggest, encompasses all of the laws unique to civil society.

Association law is the body of law that enables and regulates association in civil society. The definition of civil society organisation sets the scope of the jurisprudence. It is therefore the subject area for discussion of models of regulation and legal forms. It follows from the definition that all laws that touch upon freedom of association through civil society organisations for purposes other than business, government and family are within the scope of this regulatory regime.

[7] Eg. *Income Tax Assessment Act 1997* (Cth) Divisions 30 and 50, *Corporations Act 2001* (Cth) s. 150 and *Copyright Act 1968* s.1061)(b)

The next step is to set out a framework for enabling and with that limiting or regulating freedom of association. To begin that discussion it is necessary to begin with a widely accepted statement of values. The *Universal Declaration of Human Rights* sets out across 30 Articles a consensus of value statements three of which are important for this discussion. They are:

Article 18. which provides

> Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

Article 20(1) which provides:

> Everyone has the right to freedom of peaceful assembly and association.

Article 27 (1) which provides:

> Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.

These freedoms are stated to be exercised subject to certain limitations. The limitations are set out in Article 29(2) as follows:

> In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

Adopting these statements as summaries of the principles to govern the scope of regulation to apply to a civil society organisation Senators might ask two key questions:

A. How can free and voluntary association best be enabled and perhaps encouraged? (the 'maximum freedom principle') and

B. What are the minimum restraints necessary? (the 'minimum restraint principle').

These are very broad questions and I suggest it is helpful to ground them in five assessment criteria:

1. The law must enable. The purpose of the law is to enabling freedom of association. Freedom of association finds expression principally through civil society organisations. The parliament must therefore enable freedom of association by passing or not passing (as the case may be) laws that enable the formation, conduct and winding up of civil society organisations and courts must affirm the right at common-law to associate through civil society organisations.

2. The law must not constrain unnecessarily. Laws that enable the formation, conduct and winding up of civil society organisations must only extend so far as is necessary to preserve morality, public order and the general welfare in a democratic society.

3. The law must not constrain on the basis of form but rather purpose. The scope of law necessary to preserve morality, public order and the general welfare in a democratic society will vary from context to context but in each case regulation must be linked to the purposes pursued and not the form of incorporation. Thus it is appropriate to regulate more onerously civil society organisations pursuing purposes that involve high levels of trust, such as care for vulnerable persons or delivery of dangerous goods or services such as occurs in the provision of health care.

4. It is not reasonable to limit by law if there are voluntary observed limits. Even when engaged in purposes that involve high levels of trust or when engaged in purposes that are dangerous if

there is an history of trust, self governance or other relevant characteristics; less regulation can be justified. This explains why sometimes churches and other organisations which enjoy high levels of social esteem are sometimes allowed to self-regulate when other civil society organisations are not.[8] The reason is because the freedom does not need legislative limitation because the civil society organisation can be relied upon to be self or community regulated.

5. It is not reasonable to limit civil society more than business. The regulation of association must never be greater than (though it could be equal to) that imposed on businesses, family or government organisations. This is because by definition civil society organisations will be more public, altruistic and voluntary than businesses, family or government organisations and the reason law is needed is to regulate the pursuit of private self-interested and coercive purposes.

To these five assessment criteria I suggest that a 'proportionality test' suggested by the English academic Jonathan Garton be applied. He proposed all regulations of civil society should not be more in number nor more in complexity than is necessary stating that: '[i]t is clearly in the interest of proportionality and targeting that a particular regulatory goal is achieved through rules that are no more complex or greater in number, than is necessary'.[9] A similar suggestion comes from across the Atlantic. The US academic Karla Simon proposes that the regulation of civil society organisations should be 'no heavier, nor cut more deeply, than is necessary'.[10]

Garton identified six overlapping grounds for regulation of civil society organisations and they were:

1. Preventing anti-competitive practices;
2. Controlling campaigning;
3. Ensuring accountability;
4. Coordinating the sector;
5. Rectifying philanthropic failures; and,
6. Preventing challenges to organisational quiddity. [11]

In the next two sections I suggest how these broad principles could be used to segment forms of regulation or assess the need for regulation.

Models of regulation and legal forms

Introduction

Seen in the light the *Universal Declaration of Human Rights* models of regulation and legal forms can be assessed according to their overall purpose. I suggested then, foundationally that any legislation with respect to civil society organisations exists to provide space for people to gather and pursue civil society purposes. The regulation of disclosure regimes are, in such a context a tool to encourage voluntary contributions of money and time through civil society organisations. If the proposed regulation will increase such contributions then such regulation should be encouraged. If the proposed regulation will have the effect of diminishing such contributions it should be discouraged. The same principle applies to legal forms. All proposed legislation regarding legal forms can be assessed according to their usefulness as a vehicle for the participation by Australians in the "social and cultural rights indispensable for [their] dignity and the free development of his personality" envisaged in Article 22.

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[8] Eg Exemption from town planning regulations of consecrated lands of the Church of England. G H Newsom, *Faculty Jursidiction of the Church of England* (1988) 251.

[9] Jonathan Edward Garton, *The Regulation of Charities and Civil Society* (Doctor of Philosophy Thesis, University of London, 2005) 150.

[10] Karla W Simon, 'Principles of Regulation for the Not-for-Profit Sector' (International Centre for Not-for-Profit Law, 1998) 246.

[11] Jonathan Edward Garton, *The Regulation of Charities and Civil Society* (Doctor of Philosophy Thesis, University of London, 2005)37b, Chapter 4 generally and 151.

In the remainder of this section I illustrate how these general principles could be applied to specific issues. My purpose is to illustrate. I acknowledge that others could apply the principles differently. I begin with the issues of legal forms as issues addressed there provide a background to issues of regulation discussed subsequently.

Legal forms

The Background Paper cites the Nonprofit Roundtable as observing that:

> At present there are more than twenty different ways to incorporate a nonprofit organisation. This variety is a product of both a variety of specialist forms of incorporation (eg for trade unions, parent associations), and the existence of a dual state/federal regime. There are eight forms for incorporating as an association and six as a cooperative.

If one regime for regulation can be established then the concern expressed in the Background Paper that there is no single regulatory regime for not-for-profit organisations in Australia can be confronted. Where though, to begin? In light of the theory set out above a minimalist approach is appropriate. Each step of regulation from that point then must be justified as a necessary regulation. The burden of limitations must be demonstrated as worth the benefit.

A minimalist approach divides at the source into two options. The first recognises only incorporated organisations. The second recognises unincorporated organisations. At present the law in Australia recognises only incorporated associations as capable of holding property, suing and being sued. Twelve states in the United States[12] have moved to recognise unincorporated associations and the European Court of Justice has recognised unincorporated associations as capable of carrying on litigation.[13] There is an important theoretical foundation here. Should, or should not, a group of people be dependent upon the government for their identity through incorporation? There are difficulties with recognising unincorporated associations but the fact that other jurisdictions are endeavouring to recognise them should encourage Australia to consider the issue also. Most of the major churches in Australia remain unincorporated associations and have property holding trusts or organisations to support their ministries for the purposes of legal identity. These movements, in Australia, thus remain independent of the state for their identity and cannot be wound up by it.

The next set of issues to consider relate to the minimum content and disclosure requirements of a civil society organisation for recognition (if unincorporated) or registration (if incorporated). In this there are models. For centuries common law countries such as Australia have enabled civil society organisations to be incorporated by Letters Patent and Royal Charter. The Queensland Government returned to this minimalist approach in 1994 with the *Roman Catholic Church (Incorporation of Church Entities) Act* 1994. Under that Act the Roman Catholic Church was given power to incorporate certain entities and only the most basic notifications to government were required.[14] Taking this as a model of the bare minimum it might be necessary to disclose by lodgement with the Chief Executive of the Office of Fair Trading or in a public register such as Australian Securities and Investment Commission (or perhaps with a separate Civil Society Commission if one is established) a statement of the office bearers and address for service – perhaps with a copy of the Constitution. Beyond this such an organisation could be required only to comply with the general law unless the purposes pursued warranted further regulation. These basic obligations might be all that is required for a vast number of clubs and associations that do not raise funds from the public and do not enjoy any Benefit law privileges such as tax deductibility. Following this model it should be possible to create a very simple corporate form which further enables voluntary participation with minimum regulation. Other submissions will no

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[12] Council to the Members of The American Law Institute, 'Principles of the Law of Nonprofit Organisations: Discussion Draft' (American Law Institute, 2006) xxx.

[13] See, eg, *The United Communist Party of Turkey v* Turkey [1998] Eur Court HR 1 where the formal structure of the association was dissolved by the state even before it was able to commence activities.

[14] A similar approach can be evident in the *Churches of Christ, Scientist, Incorporation Act* 1964 (Qld)

doubt point to the models from the United Kingdom. In my view these are helpful. There is already a basis for development of the charity company under section 150 of the *Corporations Act 2001 (Cth)*. In principle it might be possible to develop a national form of registration and/or incorporation within the present Corporations law regime which is founded only on minimum requirements.

If all civil society organisations can be:

a. defined, and
b. recognised and/or registered (perhaps according to their choice) in one place such as by a Commonwealth Government body, such as the Australian Securities and Investment Commission,

then one regulatory regime is theoretically possible. Importantly for a Federal Inquiry, incorporation and regulation could be at a Federal level. The Corporations power and so the Corporations Law regime seem the logical place to house the regime if there is not a separate Commission. This happens at a Commonwealth level.

If all civil society organisations were recognised and/or registered with minimal requirements the next issue is what forms of regulation should apply beyond the minimal and when should those additional regulations apply. This is an issue because the 22 different forms of organisation all have different regulatory regimes. Those regulatory regimes are centred on the *form* of organisation.

I submit, based on the discussion above, that regulation of civil society organisations should be based on the *purposes* pursued not on the *form* taken. I submit this because it is the *purposes* not the *form* of the association that is critical. For example, associations that adopt the form of a company limited by guarantee even if their purposes are member or community benefiting, not commercial trading, have to comply with the same rules as a public company that is in business. This is because the law presently focuses on *form*. I suggest that so long as civil society organisations are regulated with reference to the twenty or so forms identified, one regulatory framework will be very difficult. I suggest though, that once form is abandoned as the principal organising idea and purpose is adopted as the criterion for regulation, clarity follows. Seen against this background the comments in *Choice* magazine that there is 'wide variability and inconsistency in the way the charities disclose information to the public' is to be expected because, at present, it is form not purpose that regulates disclosure.

In summary, then, I submit that a very primitive form of registration on incorporations could be available to all who wished to associate. This could be facilitated at a Federal level. That further regulation of association is appropriate but should be based on purposes pursued not the form taken.

If purpose not form was to be the organising concept what might the regulatory framework look like? That topic is taken up in the next section.

A model for regulation

It will be recalled from the discussion in the second section of this submission that Senators, in determining the scope of regulation to apply to a civil society organisation, might ask two key questions:

A. How can free and voluntary association best be enabled and perhaps encouraged? (the 'maximum freedom principle') and

B. What are the minimum restraints necessary? (the 'minimum restraint principle').

To illustrate how these principles might be applied through the five assessment criteria to the Background Paper issue of disclosure of donations a process similar to the following could be adopted.

1. What was the purpose of the donation? If it was a gift given to an organisation for a civil society purpose then it is within the scope of the Inquiry and possible regulation as it is a donation to a civil society organisation. Only donations to organisations that are not civil society organisations would be outside of the scope of the Inquiry according to this criterion. Donations outside of the scope of this inquiry would include a donation given to a business such as to a tip at a restaurant, a donation to government such as of a piece of equipment to a public hospital, or private donations to families and friends perhaps when experiencing hardship. All other gifts, I suggest, fall within the scope of consideration for reform as all other donations are donations to civil society organisations.

2. If the donation is for a civil society purpose will regulation enhance freedom and possibly improve giving to civil society organisations pursuing that purpose? If the answer to that is no then arguably there should not be any further regulation. This is because the function of the law applying to civil society is to enable free participation in and through civil society organisations. If the answer is no then the proposal possibly could be saved if it can be limited in accordance with below. If the answer is yes then it satisfies the first criterion and progression with regulation to 3 below is warranted.

3. Does the proposed disclosure regime constrain giving unnecessarily? Laws setting out 'disclosure regimes for charities and all other not-for-profit organisations' must only extend so far as is necessary to preserve morality, public order and the general welfare in a democratic society. One of the most significant difficulties confronting regulatory reform is to ensure that any proposed amendments do not harm philanthropic giving and participation. The challenge in this context is to precisely identify the ill to be cured and to treat that ill with only the limited dosage of regulation necessary to restore health or further encourage giving. A fear within the sector is that a regulatory overdose could kill the pursuit of civil society purposes rather than enable and encourage philanthropy. The scope of law necessary to preserve morality, public order and the general welfare in a democratic society will vary from context to context but in each case regulation must be linked to the purposes pursued and not go beyond this.

4. The disclosure regime should apply to all civil society organisations pursuing comparable purposes and not differentiate between organisations on the basis of the form chosen. Thus it is appropriate to regulate more onerously civil society organisations pursuing purposes that involve high levels of trust, such as raising funds from persons who are not members of the civil society organisation, or from vulnerable persons and who could be easily misled or deceived. It is not appropriate to regulate more onerously civil society organisations incorporated as companies limited by guarantee under Commonwealth legislation than those incorporated under state Associations Incorporations Acts just because of the form taken. It follows that it is also not appropriate to regulate simply on the basis of size. A very small organisation is capable of unmanaged, high risk fundraising from a vulnerable section of the public and a very large organisation might confine its fund-raising to a well informed membership.

5. It is not reasonable to limit by law if there are voluntary observed limits. Even when engaged in purposes that involve high levels of trust or when engaged in purposes that are dangerous if there is an history of trust, self governance or other relevant characteristics auditing processes; less regulation can be justified. Put differently, there has to be an illness to be treated not just a fear of catching an illness. This may explain why governments have consistently excluded giving as a part of a worship service from the net of collections regulations.[15] The concept can be applied beyond religious organisations to civil society organisations pursuing other purposes which enjoy high levels of social esteem. The principle is that the protection of the

[15] E.g. the *Collections Act 1966* (Qld) 6(2) and (3) which provides:

> (2) This Act shall not apply to any appeal for support solely for the advancement of religion by or on behalf of any religious denomination.
>
> (3) Unless herein otherwise expressly provided, this Act shall not apply to any appeal for support for any purpose to which part 3 applies, made by or on behalf of any religious denomination.

freedom does not need legislative limitation because the civil society organisations pursuing that purpose can be relied upon to be self or community regulated.

6. It is not reasonable to limit civil society more than business. The regulation of association must never be greater than (though it could be equal to) that imposed on businesses, family or government organisations.

This is because to be a civil society organisation, such an organisation must, by definition, be more public, altruistic and voluntary than business, family or government organisations and the reason law is needed is to regulate the pursuit of private, self-interested and coercive purposes. Following this approach a Senator might ask what regulations currently apply to business and ask whether these regulations ought to be extended to civil society organisations pursuing particular purposes if they do not apply already. An example is whether section 52(1) of the *Trade Practices Act 1974* (Cth) might be extended to apply to civil society organisations whether or not engaged in trade or commerce in certain circumstances. That section provides 'A corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive'. If so in what circumstances should the section be so extended?

Flowing from the mix in freedom and minimum resistant principles developed through the process set out above it is possible to draw a general conclusion: Regulation is appropriate when it will enable and perhaps encourage voluntary association and contributions and this will arise where an organisation pursues purposes warranting further regulation;

a. through activities warranting further regulation; and
b. the protection of the welfare of others is not achieved through self-regulation nor a general law applying to other organisations that should be extended to the organisations.

There is a vast array of possible forms regulation could take. Requirements for public accountability associated with taking funds from the public could include:

a. having a majority of the board as public persons;

b. having a person approved by the Federal Attorney General or other regulator as a Visitor review and account and account to the public;

c. publishing audited accounts according to a prescriptive format such as is required in the United States in some contexts; and

d. any of the many combinations set out in the table below.

I am not advocating a particular form of regulation in this section. My point is to show that it is necessary to inquire first into the purpose, then second to inquire into the activity by which the purpose is to be carried into effect, and, then third to design a very specific prescription for the ill which to be cured. It might be that 'wide variability and inconsistency in the way the charities disclose information to the public' cannot be avoided as there is a great diversity of purposes and activities by which they are carried into effect. What can be avoided is injustice in the application of the principles. If there is a need for 'improved transparency and disclosure for consumers' it is necessary to identify exactly when and what level of transparency required. The table below is, then, nothing more than a model that may help to illustrate the way legislation could be formulated in a more precise way.

If a civil society organisation, for the purposes of pursuing a purpose listed in column 1, pursues an activity listed in column 2, then it must comply with the procedures set out in column 3.

Column 1 Charitable purpose pursued	Column 2 Activity	Column 3 Regulated procedure
Religion and any other purpose recognised as exempt under the *Income Tax Assessment Act 1997* (Cth).	Collection from members or adherents as a part of religious worship attended by the donors or other fundraiser from members.	None.
Religion and any other purpose recognised as exempt under the *Income Tax Assessment Act 1997* (Cth)	Collection from members or adherents as a part of a televised or otherwise broadcast program including religious worship not physically attended by the donors.	Must not engage in conduct that is misleading or deceptive or likely to mislead or deceive in relation to the purpose to which funds are solicited or to be applied.
Poverty relief by way of deductible overseas aid or any other purpose enjoying deductibility.	Donations from members.	None provided members have reasonable access to audited financial statements..
Poverty relief by way of deductible overseas Aid or any other purpose enjoying deductibility.	Donations solicited to their general funds from the public.	None provided the accounts related to the public funds are audited financial statements.
Poverty relief by way of deductible overseas Aid or any other purpose enjoying deductibility.	Donations solicited from the public for particular purposes such as tsunami relief or for relief of the poverty of a particular child.	Must not engage in conduct that is misleading or deceptive or likely to mislead or deceive in relation to the purpose to which funds are to be applied and the accounts related to the public funds must be audited and made available to the public in such a way as to show the amounts of funds overall applied to fundraising fees and expenses.
Trade associations and any other purposes where income is taxed.	Collection from members, participants or the general public by any method of fundraising.	None beyond that applying generally including to business.
Political parties.	Facilitating democracy by involvement in the political process.	Current forms of regulation and preferential treatment.

It follows from the above that there could be stringent regulation of civil society organisations. They may well be required to comply with significant legal obligations but if civil society organisations are to be so regulated then the criterion set out in this section could provide a framework for justifying such regulation and debating the proper scope of the relevant law. As a general proposition, though, it arguably should be possible for an Association that takes no advantage of Benefit laws and wider subsidy from members to avoid regulation provided the purpose is not put at risk. This is discussed briefly in the next section.

Other measures

The third stated subject area for the Inquiries examination was to consider 'other measures that can be taken by government and the not-for-profit sector to assist the sector to improve governance, standards, accountability and transparency in its use of public and government funds.

In this section I comment briefly on two other measures and the consequences of adopting the theory set out above in relation them. They are the introduction of 'Charities Commission' and second the place of political parties in the mix of regulation.

Not a Charities Commission but a Commission for all of civil society

New Zealand has recently established a Charities Commission following the concept of the Charities Commission in England and Wales and the subject of a Charities Commission for Australia has become topical. Building on the discussion above I submit that any body set up should be for the whole sector and should not be centred on charities. It is not charities that require regulation. As a legal term charity has four principal divisions and focusing on these divisions for the purpose of regulation is unhelpful. Arguably the principal divisions of charities are already more than adequately regulated. Poverty relief, health and welfare in general tends to be heavily regulated through contracts associated with government. Education is already well regulated. The regulation of religion is problematic – particularly for the Commonwealth government. It is therefore necessary to decide exactly which dimensions of civil society truly require further regulation. If there is a gap which must be addressed to enable greater participation and philanthropy the focussing on charities is only perpetuating confusion. If there is to be one overarching Commission it is likely to be most effective if it oversees all civil society organisations. The purpose of such a Commission following from the above should be to maximise free participation with the minimum constraints necessary. It should not be to regulate one form of organization – charities. It is the gap focussed on purposes that needs attention not the form – charities.

Recognition of political parties as being civil society organisations

This broader classification of civil society organisations includes political parties. This approach I have taken is different from both the Charities Definition Inquiry and the antiquated position under the common law. In my view there is not an adequate theoretical justification for the exclusion of political parties from the class of charities. Quite to the contrary. In my view political parties and other organisations that provide the foundations of democracy, join with religious organisations in providing the very backbone of the sector in Australia and other common-law countries.

Conclusion

Once a comprehensive definition of the organisations to be regulated is achieved it is possible to develop a unified theoretical framework for regulation of civil society organisations based on widely accepted principles stated in the *Universal Declaration of Human Rights.* The principles there stated can be mapped into quite detailed framework to guide in the formation of disclosure regimes for civil society organisations. Central to the formation of that framework is the purpose being pursued and not the form a civil society organisations takes. It follows that there should be a basic form of recognition and/or incorporation with further regulation only if it can be justified according to the principles that civil society organisation should enjoy the maximum freedom possible limited only by the minimum restraint is necessary to preserve morality, public order and the general welfare in a democratic society. If there is to be a body overseeing civil society organisations it should not be focused on charities but oversee civil society organisations. Political parties belong as a subset of civil society organisations.

Appendix A

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