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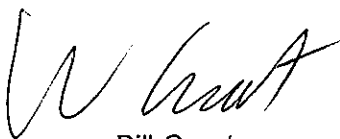
Dear Mr Hawkins,

**Inquiry into the Disclosure Regimes for Charities and Not-for-Profit Organisations**

I have pleasure in enclosing a submission to the Senate Economics Committee's Inquiry into the Disclosure Regimes for Charities and Not-for-Profit Organisations.

The submission has been prepared by representatives of the Victorian Bar, the Law Institute of Victoria and members of the Corporations Committee of the Business Law Section of the Law Council on behalf of the Law Council of Australia.

Yours sincerely,



Bill Grant  
**Secretary-General**

29 August 2008

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Law Council  
OF AUSTRALIA

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# **Inquiry into the Disclosure Regimes for Charities and Not-For-Profit Organisations**

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Senate Standing Committee on Economics

29 August 2008

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## Introduction

### Who we are

1. This submission is made on behalf of the Law Council of Australia. The Law Council was established in 1933, and is the peak national representative body of the Australian legal profession. It is the federal organisation representing approximately 50,000 Australian lawyers, through their representative bar associations and law societies (the “constituent bodies” of the Law Council). The constituent bodies of the Law Council are listed in Attachment A.

### What we do

2. The Law Council speaks for the Australian legal profession on the legal aspects of national and international issues, on federal law and on the operation of federal courts and tribunals. It works for the improvement of the law and of the administration of justice. The Law Council is the most inclusive, on both geographical and professional bases, of all Australian legal professional organisations. Through its specialist sections and committees, the Law Council is able to communicate the views of the leading legal practitioners in each field.

### Why we are making this submission

3. The Law Council believes there is an urgent need for national regulatory reform of the not-for-profit (NFP) sector. A cogent case for that reform has already been made by the National Roundtable of Nonprofit Organisations in its *Statement on a Nonprofit Regulation Reform Program*, May 2004, [http://www.nonprofitroundtable.org.au/AM/Template.cfm?Section=National\\_Reform\\_Agenda&Template=/CM/HTMLDisplay.cfm&ContentID=3656](http://www.nonprofitroundtable.org.au/AM/Template.cfm?Section=National_Reform_Agenda&Template=/CM/HTMLDisplay.cfm&ContentID=3656). The case is supported by a number of major reports that will be referred to in this submission. The Law Council agrees with the Roundtable’s Statement, subject to the specific views expressed in this submission.

### 5 key areas for reform

4. The Law Council recommends five key areas for NFP reform in Australia:
  - A single national Associations Act, achieved by referral of power rather than harmonisation of laws. This is an urgent item for the COAG agenda.
  - A single national Fundraising Act. That Act should cover all forms of fundraising by NFPs, including charitable gaming, but excluding poker machines. This is also a matter for COAG.
  - Codification of the law relating to the taxation of charities and NFPs.
  - A specific NFP accounting standard.
  - A specialist regulatory body.

Given the size of the NFP sector and its importance to the social and economic wellbeing of Australia, these issues must be addressed now. The rest of our submission sets out the background to these recommendations and expands on them.

## Background

### The economic and social importance of the NFP sector

5. According to figures released by the Australian Bureau of Statistics (ABS) on 5 August 2008:

- At the end of June 2007, there were 40,976 not-for-profit organisations (NFPs) in Australia registered with the Australian Taxation Office (ATO) for an Australian Business Number (ABN).
- During the 2006–07 financial year, those organisations received income of \$74.5 billion and incurred \$68.3 billion in expenses.
- At the same date, those organisations employed more than 880,000 people.
- During the same period, they had 2,434,815 volunteers.

The ABS's full figures are available at <http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/8106.0Main+Features32006-07>. It is important to note that the ABS's figures relate only to a proportion of those NFPs registered with the ATO for an ABN. From other data available from the ATO and discussions with the ABS, it appears the ABS selected only a relatively small sample of NFPs registered with the ATO, essentially those that had employees or that it considered were economically significant.

6. The Nonprofit Roundtable estimates that there are as many as 700,000 NFPs in Australia in total, approximately 300,000 of which are incorporated in some form or another. According to figures for 1999/2000 given by the Nonprofit Roundtable, NFPs in Australia that employed staff:

- employed 604,000 people, 6.8% of Australians in employment;
- had an income of \$33.5 billion;
- contributed \$21 billion, or 3.3%, to GDP; and
- made an economic contribution larger than the communications industry and about equal to that of the agriculture industry; a contribution almost twice as large as the entire economic contribution of the state of Tasmania.

The Nonprofit Roundtable's full NFP sector Fact Sheet is available at [http://www.nonprofitroundtable.org.au/AM/Template.cfm?Section=About\\_the\\_NFP\\_Sector&Template=/CM/HTMLDisplay.cfm&ContentID=3501](http://www.nonprofitroundtable.org.au/AM/Template.cfm?Section=About_the_NFP_Sector&Template=/CM/HTMLDisplay.cfm&ContentID=3501).

7. The Nonprofit Roundtable notes that, in terms of its contribution to employment, Australia's NFP sector:

- is of a similar size to that of the United States of America; and
- is larger than that in the United Kingdom and most other European countries.

8. The data we have referred to are the best currently available. As will be apparent, those data are neither complete, nor up-to-date. We note in passing the urgent

need for the compilation by the ABS of accurate and meaningful data on the NFP sector and its contribution to the Australian economy, if properly informed decisions about the sector are to be made by government and more generally.

9. In addition to its economic contribution, the NFP sector makes a vital social contribution to our community. As one leading academic commentator puts it:

“Nonprofit organisations make an even more important contribution to society through their demonstration of, and thus encouragement for, collective action. They play a central role in the regeneration of social capital. Nonprofit organisations also sustain and shape a democratic political system. They are the ‘elementary schools of democracy’. While the vast number of nonprofit organisations that do not employ people may not contribute greatly to the economy, they contribute greatly to the nonprofit sector’s social and economic impact.”

Professor Mark Lyons, *Third Sector: the contribution of nonprofit and cooperative enterprises in Australia* (Allen & Unwin, 2001)

## Previous inquiries, consultations and reports

10. In the last 15 years, the NFP sector (including charities) has been the subject of four major Commonwealth Government inquiries and consultations:
- The 1993–1995 Industry Commission inquiry into Charitable Organisations in Australia, the report of which is available at <http://www.pc.gov.au/ic/inquiry/45charit>;
  - The 2000–2001 Charities Definition Inquiry, the report of which is available at <http://www.cdi.gov.au/>;
  - The 2003 Board of Taxation consultation on the draft Charities Bill 2003, the report of which is available at <http://www.taxboard.gov.au/content/charities.asp>; and
  - The 2007 Treasury consultation on Financial Reporting by Unlisted Public Companies, the discussion paper for which is available at <http://www.treasury.gov.au/contentitem.asp?NavId=037&ContentID=1269>.
11. The Law Council notes that the Commonwealth Government has never released a final response to the first report, has implemented only a small part of the second report, has not implemented the third report, and that no report has been released in relation to the fourth consultation. Given the importance of the NFP sector to the Australian economy and our society, we find it both surprising and disappointing that the Commonwealth Government has thus far taken so little action in relation to NFP reform.
12. In addition, there are two recent national non-government reports of particular relevance to the present inquiry:
- The 2004 report by Susan Woodward & Shelley Marshall of the Centre for Corporate Law and Securities Regulation at The University of Melbourne, *A Better Framework: Reforming Not-for-Profit Regulation* (“the Woodward

Report"), which is available at <http://cclsr.law.unimelb.edu.au/go/centre-activities/research/reforming-not-for-profit-regulation-project/>; and

- The 2006 report by the Institute of Chartered Accountants in Australia, *Not-for-profit sector reporting: a research project*, which is available at <http://www.charteredaccountants.com.au/A118424100>.
13. We are not aware of any response by the Commonwealth Government to these reports either.
  14. The Victorian Government has also recently conducted three major reviews in relation to NFP regulation:
    - The 2005 review by the Allen Consulting Group, which led to the options paper *Improving Not-For-Profit Law and Regulation*, available at <http://www.allenconsult.com.au/publications/view.php?id=314>;
    - The 2007 Stronger Community Organisations project, the report of which is available at <http://www.dvc.vic.gov.au/Web14/dvc/dvcmain.nsf/allDocs/RWP5FCB0E3A722237C7CA25727C00059BFB?OpenDocument>; and
    - The 2007 Review of Not-for-Profit Regulation conducted by the State Services Authority, the report of which is available at <http://www.dvc.vic.gov.au/Web14/dvc/dvcmain.nsf/allDocs/RWP5FCB0E3A722237C7CA25727C00059BFB?OpenDocument>.
  15. The Victorian Government's 2008 "Action Plan" in response to the latter two reviews is available at <http://www.dvc.vic.gov.au/Web14/dvc/dvcmain.nsf/allDocs/RWP5FCB0E3A722237C7CA25727C00059BFB?OpenDocument>.
  16. As can be seen, there is already a substantial body of work that has been undertaken in recent years in the area of NFP reform. In each case, detailed and expert research and analysis has been conducted by the body or individuals responsible.
  17. In addition to the reports and other papers produced by these inquiries and consultations, in the case of the government reviews a large number of submissions were made by those organisations (principally NFPs) with an interest in the issues under consideration. Many of these submissions are publicly available. Based on the experience and informed views of those involved in the NFP sector, they, too, are a potentially valuable resource.
  18. Given the amount of work that has previously been done in Australia, particularly in relation to the present inquiry's second and third terms of reference, and the considerable resources that have already been devoted by government and the NFP sector to addressing these issues, we would urge the standing committee to build on the findings and recommendations of the reports referred to, rather than conducting substantial new research.
  19. In that context, the Law Council submits that the five key issues at present for NFP reform in Australia are:
    - a single national Associations Act
    - a single national Fundraising Act



- codification of the law relating to the taxation of charities and NFPs
- a specific NFP accounting standard
- a specialist regulatory body

We shall address each issue in turn.

## The 5 Key Issues for Reform

### 1. A single national Associations Act

20. As the National Roundtable points out in its Statement, there are at present more than 20 different ways to incorporate an NFP in Australia. These include registration under:
  - the Commonwealth *Corporations Act 2001* as a company limited by guarantee (guarantee company),
  - the *Associations Incorporation Acts* of each of the states and territories (states) as an incorporated association, and
  - the *Co-operatives Acts* (or equivalent) of each of the states as a co-operative.
21. The present dichotomy between federal and state legislative regimes in Australia creates a fundamental issue for the vast majority of NFPs that wish to adopt an associations, rather than co-operative, structure. Should they register as a guarantee company under the Corporations Act or as an incorporated association under one of the state Associations Incorporation Acts? This is the first, and perhaps most difficult, question that in our experience NFPs ask their legal advisers. At present, it is not capable of easy answer.
22. There are significant disadvantages in incorporation as a guarantee company. The Corporations Act is not intended to regulate NFPs, but primarily for-profit companies. It is an immensely long, complicated and inaccessible piece of legislation, the overwhelming majority of whose provisions are irrelevant to NFPs.
23. Many of the requirements of the Corporations Act are unduly restrictive for some NFPs. For example:
  - There must be directors of the company separate from its members (even if the members and directors are the same persons).
  - A small number of disgruntled members (5% or 100, whichever is fewer) can requisition a general meeting whenever and as often as they like.
  - As public companies, all guarantee companies must permit voting at general meetings by proxy.
  - Further, non-members must be permitted to be appointed as proxies, and thereby allowed to participate in general meetings.
  - Directors can be removed by a simple majority at a general meeting without regard necessarily to the rules of procedural fairness.
  - Formal merger with another guarantee company requires a scheme of arrangement, which must be approved by a court.

24. Further, in our experience the Australian Securities and Investments Commission (ASIC) has little interest in the regulation of guarantee companies and devotes as limited resources as possible to it. The only case of which we are aware in which ASIC or its predecessor bodies has taken action in relation to a guarantee company is *Australian Securities Commission v Multiple Sclerosis Society of Tasmania* (1993) 10 ACSR 489; 11 ACLC 461.
25. Equally, there are potential disadvantages in incorporating as an incorporated association under one of the state Associations Incorporation Acts.
26. First, those incorporated associations that carry on business (albeit on a not-for-profit basis) outside the state in which they are incorporated must nonetheless register under the Corporations Act as registered Australian bodies. As such, they are required to use an ARBN on documents and to lodge changes of their committee members (and their addresses) with ASIC. Those committee members will also be liable to the duties of directors under ss 180–184 of the Corporations Act in relation to acts or omissions outside the state of incorporation.
27. The provisions of the Corporations Act in relation to registrable Australian bodies referred to in the previous paragraph apply equally to co-operatives. We note that many incorporated associations and co-operatives that carry on business outside their “home” state appear to be unaware of these provisions. Equally, some NFPs and even their legal advisers seem to believe that incorporated associations and co-operatives do not have legal capacity to operate outside their state of incorporation. Finally, we understand some NFPs have incorporated under the *ACT Associations Incorporation Act 1991* because they believe this will confer “national” status on them. All of this reflects the confusion created by the current complex federal/state arrangements.
28. Secondly, at present each of the state Associations Incorporation Acts contains restrictions in various forms on trading by incorporated associations. These provisions are generally poorly expressed and difficult to understand. The trading restrictions appear out of step with the increasingly entrepreneurial role expected of the NFP sector by both state and federal governments. More fundamentally, while these provisions seek to limit commercial activity by incorporated associations, they do not effectively prohibit the distribution of profit to members, which is one of the essential attributes of an NFP. We note that the Victorian Government has recently announced that it intends amending the *Victorian Associations Incorporation Act 1981* “to provide greater operational flexibility” in relation to trading: see 2008 Action Plan at p 11.
29. Thirdly, there are both significant and subtle differences between the various state Associations Incorporation Acts. This makes it very difficult (and, therefore, time-consuming and expensive) for lawyers acting for NFPs to provide accurate advice on a national basis. In addition, for national NFPs with state branches, the different legislative requirements in each jurisdiction make compliance a considerable administrative and financial burden. Finally, at a practical level, those members of an NFP who are familiar with the Associations Incorporation Act in one state often find it difficult to adjust when they become involved in an NFP registered in another.
30. These are not new issues. As long ago as 1972, the leading constitutional lawyer Geoffrey Sawer commented

"[T]he topic [of the difficulties of associations with branches in different states and territories] is on the agendum of the Committee of Attorneys-General, and it is to be hoped that a uniform Australia-wide associations law will be adopted which, *inter alia*, simplifies the problem of interstate organization."

Geoffrey Sawer, *The Australian and the Law* (Penguin, revised edition, 1972)

31. For these reasons, the 1995 Industry Commission report recommended the creation of a specialist national form of incorporation for NFPs as follows:

**Recommendation 8.2**

The Commonwealth and State/territory governments should establish a form of incorporation under the Corporations Law for Community Social Welfare Organisations. Such organisations would be required to report using the accounting standards proposed in Recommendation 8.1.

32. More recently, the primary recommendation of the 2004 Woodward Report is similarly as follows:

**Recommendation 1: Single regulatory regime**

A single Commonwealth statutory regime should be introduced for all corporate bodies (that is, 'for-profit' companies, NFP companies and incorporated associations) by referrals of power from the States to the Commonwealth, along the lines of what has been achieved for company regulation. Such a referral would enable a national approach to NFP regulation, with responsibility for registration and ongoing regulation being conferred on ASIC.

33. The Law Council strongly supports the introduction of a single national Associations Act. In our view, the current patchwork of federal guarantee companies and state incorporated associations is economically and socially unsustainable. It is inefficient, unproductive and wasteful.
34. Under the national scheme we envisage, all current guarantee companies and state incorporated associations would become national incorporated associations. There would also be provision for those co-operatives that wished to, to migrate to the new national Associations Act.
35. In supporting a single national scheme, we do not advocate a "one size fits all" model. We suggest instead that there should be tiered structure, with at least two tiers, so that the reporting requirements are proportionate to the size of the organisation. The lowest tier of the structure should have:
- a basic annual reporting requirement, which consists primarily of filing a copy of the association's financial statements for the last financial year; and

- nominal registration and annual fees, so that smaller current state incorporated associations are not disadvantaged by the scheme, and those remaining unincorporated associations are encouraged to participate.

Correspondingly, we envisage that the highest tier of the structure would have similar reporting requirements to those that currently apply to guarantee companies.

36. However, in relation to the duties of committee members, we do not support there being any reduction in the level of responsibility (and consequent potential liability) from that currently applying to the directors of guarantee companies under the Corporations Act. In our view, the duties of good faith, proper use of position and proper use of information under ss 181–183 of the Corporations Act effectively codify the common law and should apply to the committee members of all NFPs. In relation to the duty of care and diligence under s 180 of the Corporations Act, that provision is already framed in a way that takes into account the particular circumstances of the company and director concerned. In our view, a similar duty should also apply to the committee members of all NFPs. Equally, the same defences available to directors under the Corporations Act should be available to committee members of incorporated associations.
37. The creation of a single national Associations Act would require the enactment of major new legislation by the Commonwealth Government and associated referrals of power by each of the state governments. The vehicle for this reform will presumably be through the Council of Australian Governments (COAG). We note that the inclusion of this item on the COAG national reform agenda would be entirely consistent with the commitments to regulatory reform made at the last COAG meeting on 3 July 2008.
38. In supporting the creation of a single national legislative scheme, we wish to make clear our preference for this model for reform over harmonisation by way of uniform state legislation. In our view, harmonisation of the existing state Associations Incorporation Acts would be of marginal utility in addressing the current problems of NFP regulation identified in this submission. In particular, it would leave in place the complications and inefficiencies of the present bifurcated structure of federally registered guarantee companies and state registered incorporated associations. Additionally, harmonisation would not address the deficiencies of the Corporations Act in regulating guarantee companies.
39. However, in our view the best argument against harmonisation is by examining the history of regulatory reform of for-profit companies in Australia. That process began in the early 1960s with the so-called uniform Companies Acts in each state, progressed to the Companies Codes of each of the states under the cooperative scheme in place from 1982 to 1990, which in turn developed into the Corporations Law of each of the states under the first national scheme in effect from 1991 to 2001, and finally culminated in the current national scheme under the Commonwealth Corporations Act. It is in our view earnestly to be hoped that the lessons of history can be learned, and that the process of national NFP reform will from the outset be based on the model of the present Corporations Act.

## 2. A single national Fundraising Act

40. The Law Council similarly supports the introduction of a single national Fundraising Act, as advocated by the Nonprofit Roundtable. The scope of that Act should cover all forms of fundraising by NFPs, including charitable gaming, but excluding poker machines.
41. At present, an NFP that wishes to conduct a national fundraising appeal, for example over the internet, must apply for government approval in every state. The regulatory requirements vary enormously between states. There appears to be no common underlying policy in relation to the regulation of fundraising by government, and, to the extent that there is any policy at all, it is largely based on simplistic and easily manipulated measures. Even the more fully developed Acts fail adequately to take into account the disparate nature of those organisations conducting fundraising and the means by which they do it.
42. We can see no good argument in favour of different fundraising requirements in different jurisdictions. On the contrary, in our view the current legislative regime for the regulation of fundraising in Australia is highly inefficient. The resources that are currently expended by NFPs in dealing with the plethora of state Acts and bureaucracies would be much better devoted to the purposes for which those funds are raised. Again, in our submission this issue needs to be taken up as a matter of priority through the COAG national reform agenda.

## 3. Codification of the law relating to the taxation of charities and NFPs

43. The law currently applying in Australia in defining charity is still largely based on the list of charitable purposes in the preamble to the *Charitable Uses Act 1601* (commonly known as the Statute of Elizabeth), as interpreted by the House of Lords in *Commissioners for Special Purposes of Income Tax v Pemsel* [1891] AC 531; [1891-94] All ER Rep 28 (see, for example, Taxation Ruling TR 2005/21, paras 35–39). The definition of charity for the purposes of the Statute of Elizabeth is entrenched in our common law, as are a series of well-established principles that exclude certain NFPs (such as those primarily engaged in advocacy or commercial operations) from being considered as charities. These exclusions have been challenged in recent cases such as *Commissioner of Taxation v Word Investments Ltd* [2007] FCAFC 171 and *Victorian Women Lawyers' Association Inc v Commissioner of Taxation* [2008] FCA 983, and, in our view, do not adequately reflect the nature of charity or charitable organisations in modern society.
44. In 2000, the then Commonwealth Government established an independent inquiry into the definition of charities and related organisations. The Charities Definition Inquiry conducted a lengthy and detailed review. It received some 373 submissions, mainly from NFPs. The inquiry handed down its report, containing 27 recommendations, in June 2001. The Government released the report in August 2001, and its initial response 12 months later was to state that it would adopt a majority of the inquiry's recommendations. However, following further consultation through the Board of Taxation over a draft Charities Bill, in May 2004 the Government announced it would make only minor legislative amendments, and that the report as a whole would not be implemented.

45. The reasons given by the Government for not implementing the recommendations of the Charities Definition Inquiry through the draft Charities Bill are as follows:

"The Government has taken advice from the Board of Taxation that the draft legislation does not achieve the level of clarity and certainty that was intended to be brought to the charitable sector.

Therefore, rather than introducing a legislative definition of a 'charity', the common law meaning will continue to apply."

Media release from the Treasurer, the Hon. Peter Costello MP, 11 May 2004

46. The Law Council supports in general terms the recommendations of the Charities Definition Inquiry. While we accept the validity of many of the criticisms of the draft Bill contained in the Board of Taxation's report to the Treasurer (available at <http://www.taxboard.gov.au/content/charities.asp>), in our view there remains a pressing need for statutory codification of the law in this area. That reform should not be abandoned because of the difficulties experienced in preparing an appropriate Bill. Further, it may now be possible for these difficulties to be resolved or mitigated (to some extent) through looking at the manner in which similar reforms have been made in the United Kingdom through the UK *Charities Act 2006* and the creation of the UK Charity Commission.
47. Our support for codification of the law relating to the taxation of charities and other NFPs is conditional on the following:
- The legislation accurately reflects the common law as it currently stands.
  - There is no reduction in the tax concessions and other taxation advantages currently available to charities and NFPs.
  - The legislation expressly provides that it is to be interpreted in light of the common law at the time of enactment.
  - The legislation is framed in a way that will continue to allow judicial development of the definition of charity, within prescribed categories based on the current common law.
48. We do not consider that the introduction of a new NFP Tax Act would simplify matters relating to the law of taxation. Issues relating to NFPs (including both charities and NFPs that are not charities) are dealt with in significant depth in the current Commonwealth *Income Tax Assessment Act 1997* (ITAA). To attempt to extract these provisions from the ITAA is likely in our view to complicate, rather than simplify, the tax position of NFPs.
49. Rather, we suggest that the new Associations Act should refer to the ITAA to clarify that NFPs are (and will remain) subject to tax under latter Act, even if they are formed in accordance with the structure or entity types set out in the new Associations Act. This will clarify the tax position of NFPs, and should ensure that NFPs that change their form of incorporation or structure as a result of the new Associations Act receive consistent treatment and retain their tax endorsements, despite any changes to their corporate structure.

50. In light of recent case law developments, there are four further issues that should in our view be clarified as part of the codification process. These are:
- confirmation of the extent to which a charity may engage in advocacy activities, and details of the types of advocacy activities that charities may engage in without jeopardising their charitable status;
  - confirmation of whether, and the extent to which, the advancement of a charitable purpose can constitute charitable conduct;
  - confirmation that a charity can run any sort of business, whether those activities are themselves charitable or not, in order to raise funds for its charitable purpose; and
  - codification of the principle of mutuality in relation to the membership income of NFPs.

#### **4. A specific NFP accounting standard**

51. The Institute of Chartered Accountants in Australia has recently published two reports dealing specifically with financial reporting by NFPs, the 2006 report *Not-for-profit sector reporting: a research project*, and the 2007 report *Enhancing not-for-profit annual and financial reporting*. Both reports are available at <http://www.charteredaccountants.com.au/A118424100>. The second report essentially sets out guidelines implementing the first.
52. The Law Council strongly supports the following recommendation from the first report, which in our view speaks for itself:

##### **4.2 The need for NFP specific financial reporting standards**

Figures 3, 4 and 5 provide an overview of the decisions NFPs must make when determining the form and content of their financial reports. NFPs are faced with a complex framework of legislation and accounting guidance.

In its 2003 *Review of Not-for-Profit Financial and Annual Reporting*, the Institute concluded:

'NFPs would benefit from the development of a financial reporting framework that meets their specific requirements. This framework could be based on the requirements of the Concise Financial Reporting provisions of the Corporations Law and Accounting Standard AASB 1039, Concise Financial Reports.'

The need for such a framework has been the subject of discussion for some time. It is now more than 10 years since the Industry Commission recommended:



'The Commonwealth Government should provide funds to the Australian Accounting Standards Board and Public Sector Accounting Standards Board to develop within two years suitable accounting standards for Community Social Welfare Organisations (CSWO).

The development of specific accounting standards for the sector would improve accountability of CSWOs. It would help donors and the public generally to compare the performance of CSWOs; governments to assess the effectiveness of CSWOs in providing the services for which they are funded; and CSWOs to minimise the costs of accounting and reporting.'

The complexity of the existing framework as demonstrated in Figures 3, 4 and 5, the introduction of AIFRS, the exceptions that have been made to the application of AIFRS to NFPs, the resources that are expended in meeting the existing reporting requirements, the need for different financial information to show what the NFP is achieving and the size and importance of the NFP sector to the Australian economy, all combine to indicate a need for a 'non-government NFP' financial reporting framework.

This framework would:

- Require agreement between the states and the Commonwealth to mandate its application to NFPs incorporated under the Corporations Law and the various incorporated associations legislation
- Need to reflect the reporting requirements of fundraising legislation that operates in each state
- Need to recognise that NFPs range from the very large to the very small and therefore allow for differential reporting based on size, perhaps by adopting criteria similar to that specified in the Corporations Act to differentiate between large and small proprietary companies.

We believe that private sector NFPs would benefit from the development of a financial reporting framework that meets their specific requirements. We recommend that the AASB be assigned the task of developing this private sector NFP specific financial reporting framework, using the UK Charity Commission's *Accounting & Reporting by Charities: Statement of Recommended Practice* as a precedent.

The development of this NFP specific approach to stakeholder reporting should overcome the financial reporting complexity resulting from the combination of the *Corporations Act*, incorporated associations and fundraising legislation, and sector neutral Accounting Standards.

53. We note that the task of developing and implementing a specific NFP accounting standard would be simplified considerably if the other reforms proposed in this submission were adopted.
54. The Law Council also supports the adoption nationally, including by the Commonwealth and all state governments, of the Standard Chart of Accounts (SCOA) developed by the Queensland University of Technology, a full description of which is available at <https://wiki.qut.edu.au/display/CPNS/Standard+Chart+of+Accounts>. In our view, the adoption of a standardised reporting framework such as the SCOA will lead to clear benefits in terms of transparency and accountability for government, the NFP sector as a whole, and individual NFPs. We note that the SCOA has already been implemented, or is in the process of implementation, by government departments in Queensland, New South Wales and Western Australia, and is being examined in Victoria.
55. In addition to financial reporting as proposed by the Institute of Chartered Accountants in its two reports, we recommend that all NFPs be required to include in their annual report a review of their performance against objectives, along the lines required by the UK Charity Commission in its Statement of Recommended Practice, the full text of which is available at <http://www.charitycommission.gov.uk/investigations/sorp/sorp05docs.asp>. While a for-profit entity's performance may possibly be assessed in purely financial terms, the performance of an NFP can, in our view, only meaningfully be judged by looking at its achievements, measured against its mission.
56. As a final measure in relation to enhanced reporting, we recommend that a public website be established (either by the regulator or separately), through which the annual reports (including financial statements) of all NFPs can be freely accessed. In addition to encouraging greater transparency and accountability within the NFP sector generally, the adoption of this recommendation would, in our submission, go a long way towards encouraging public confidence in the charities to which they donate.

## **5. A specialist regulatory body**

57. The Law Council does not believe ASIC is the appropriate body to administer the new Associations Act we have proposed. Instead, we support the creation of a new, specialist statutory body that would be responsible both for the registration and regulation of national incorporated associations, and for providing those organisations with the necessary support and training (along the lines proposed recommendation 3 of the Woodward Report).
58. As noted above in paragraph 24, ASIC has historically shown little interest in the regulation of guarantee companies. We are concerned that, if ASIC were made responsible for administration of the new Associations Act, insufficient resources, both in terms of funding and personnel, would be devoted to what would almost inevitably be regarded by ASIC and its officers as a non-core activity.
59. There are also important differences between the nature of ASIC's current compliance responsibilities in relation to for-profit companies, and the likely nature of compliance issues that will arise in relation to NFPs, certainly if the sort of cases our members are currently involved in is any indication. Based on our experience, we do not believe it likely that ASIC will have the appropriate expertise to regulate NFPs appropriately.

## Conclusion

60. We understand that there will be considered submissions to the inquiry from other professional organisations, industry bodies, sector peaks and NFPs that contain very similar views and recommendations to ours. We urge the standing committee to analyse those submissions, and produce a report that makes a compelling case to government for the reform of regulation of the NFP sector in Australia. That reform, in our respectful submission, is not only long overdue, it is now urgent in order to enable the NFP sector in Australia to make its full contribution to our civil society.

## **Attachment A**

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### Constituent Bodies of the Law Council of Australia

The constituent bodies of the Law Council are, in alphabetical order:

- Australian Capital Territory Bar Association
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society of the Australian Capital Territory
- Law Society of the Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar Association
- The Victorian Bar Inc
- Western Australian Bar Association
- LLFG Limited (a corporation with large law firm members)