



**Submission to the Senate Standing Committee on  
Economics.**

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

**August 2008**

**Council of Social Service of NSW (NCOSS)**

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## **About NCOSS**

The Council of Social Service of NSW (NCOSS) is an independent non-government organisation (NGO) and the peak body for the non-government human services sector in NSW.

NCOSS has a vision of a society where there is social and economic equity, based on cooperation, participation, sustainability and respect. NCOSS works with its members on behalf of disadvantaged people and communities towards achieving social justice in New South Wales. Established in 1935, NCOSS is part of a national network of Councils of Social Service, which operate in each State and Territory and at the national level.

NCOSS membership is composed of community organisations and interested individuals. Through current membership forums, NCOSS represents more than 7,000 community organisations and over 100,000 consumers and individuals. Member organisations are diverse; including unfunded self-help groups, children's services, registered training authorities, emergency relief agencies, chronic illness and community care organisations, family support agencies, housing and homeless services, mental health, alcohol and other drug organisations, local indigenous community organisations, church groups, peak organisations and a range of population-specific consumer advocacy agencies.

### **Sector Development at NCOSS**

The NCOSS Sector Development Unit works to comprehensively support the sector to effectively operationalise its social justice objectives and values. We aim to proactively enable and resource the development of a high quality and effective community sector through industry services, advocacy, research and policy development.

The major goals of the Sector Development Unit are to:

- 1: Support and resource the ongoing development of a high quality and effective community sector.
- 2: Positively influence key government policies that impact on the sustainability, capacity and vitality of the community sector.

Given our direct role in improving the sustainability and vitality of the non government human services sector, NCOSS has a significant investment in this inquiry. An effective and supportive regulatory framework is essential to these organisations; one that is aligned to the needs of contemporary NGOs and the critical role of many of them in delivering essential services on behalf of Governments and promoting social inclusion at the community, regional and state levels.

## Recommendations

NCOSS recommends:

1. That the recommendations of the *Inquiry into the Definition of Charities and Related Organisations* (2001) be implemented.
2. That the distinctions between charities and other not for profit organisations (NFP), and the implications of these distinctions, are clear and factored into any proposed changes.
3. That the existing criteria and eligibility for 'charitable' tax concessions be reviewed to reflect the contemporary functions and value of NFP organisations and support the financial viability of the sector .
4. That a single national Act to regulate the whole (NFP) sector be introduced and administered by a single national regulatory body.
5. That this framework takes account of the differing needs and resources (such as income, assets and number of staff members) of NFP organisations.
6. That this inquiry co-operate with the Henry review of the taxation system with a view to simplifying, clarifying and updating the taxation system as it impacts on NFP organisations.
7. That any changes to the regulation and governance of NFP organisations be accompanied by an extensive education program, funded by the Federal government.

## **Introduction**

The focus of this submission is the regulatory and disclosure regimes affecting NFP *community service* organisations (NFP) in New South Wales—a critical subset of the broader network of the NFP organisations operating across the country.

These organisations form a critical social services delivery network, providing essential services on behalf on Governments, as well playing a significant role in policy, industry development, research and advocacy on behalf of disadvantaged people and communities.

## **Terms of Reference of the Inquiry**

1. The relevance and appropriateness of current disclosure regimes for charities and all other not-for-profit organisations.
2. Models of regulation that would improve governance and management of charities and not-for-profit organisations and cater for emerging social enterprises.
3. 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.

This submission addresses five key issues:

- The definition of charities
- The complexity of regulatory regimes
- Taxation issues
- Transparency and the compliance regimes
- Accountability

## **Context of Inquiry**

This review is taking place in the context of significant changes in the Federal Government's approach to social inclusion and the role of the NFP sector. Both Deputy Prime Minister Julia Gillard<sup>1</sup> and Senator Ursula Stephens<sup>2</sup>, (the

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<sup>1</sup> Speech given at Centre for Social Impact, University of NSW, 28<sup>th</sup> February 2008

<sup>2</sup> Speech given at ACOSS Conference, Sebel, Albert Park, Melbourne, 9<sup>th</sup> April 2008,

Parliamentary Secretary for Social Inclusion) have emphasised the critical role of the NFP sector in delivering a national social inclusion agenda. National consultations have also begun in relation to a compact between the Federal Government and this sector.

It has also been widely accepted that there is a need for a better balance between accountability requirements and the regulatory and administrative burden placed on NFP organisations. Further, the importance of the advocacy role of NFP organisations has been acknowledged and needs to be included in any future definitions used to determine the types of tax concessions that currently apply to 'charities'.

The Government has also stated its commitment to working with the sector to find the best way to structure the relationship between Government and the NFP sector and find ways of easing the compliance burden on community organisations.

## **Disclosure and Regulation: Key Issues Affecting Charities and NFP Organisations**

### 1. Definition of Charities

For hundreds of years charitable law has been based on judicial decisions, made on a case-by case basis, using outmoded definitions of charity. As a result, definitions of what constitutes a charity are confusing and contradictory and do not reflect the realities of contemporary service provision.

In 2001 the Federal Government conducted an inquiry into the definition of charities and related organisations. The draft report made 27 recommendations<sup>3</sup> but the recommendations were not implemented. These recommendations relate to principles underpinning the definition of charities, defining a charitable purpose and how the principles would be applied. The NCOSS submission to this inquiry<sup>4</sup> identified problems with current classifications, the confusing status of self-help organisations, the restriction on advocacy and policy development imposed by common law definitions of charities and the fact that some core human services, such as child care, are denied charitable status for taxation purposes.

This submission identified a 'need to make consistent approaches by all levels of Government and their agencies to the classification of charity in contemporary Australia'. This submission concluded: 'NCOSS believes the case exists to:

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<sup>3</sup> Charities Definition Inquiry <http://www.cdi.gov.au/html/report.htm>

<sup>4</sup> Inquiry into the Definition of Charities and Related Organisations, NCOSS submission, January 2001.

develop a new definition of charitable organisation based upon the dominant purpose of a non profit community organisation being the relief of poverty, or the promotion or improvement of social, environmental, spiritual or cultural well-being or other similar purpose beneficial to the community. Such organisations would be automatically eligible for income tax and consumption tax exemptions and exemptions from State taxes and charges.

The above classification would apply to all non profit community organisations falling within these categories, whether they are providers of direct services, facilitators of community development, or organisations concerned with policy and non profit sector development and /or advocacy.'

It is essential that the definition of a charity is revised to ensure it addresses the contemporary realities of the operating environment and roles of NFP organisations, as well as the expectations of key stakeholders.

## **2. Registration as a Charity - Complexity of Regulatory Regimes**

### 2.1 Which organisations are charities and how are they defined?

There is considerable confusion surrounding the definition of charities, as well as some often erroneous common underlying public assumptions. For example, large sections of the public conflate 'charities' with religious organisations only, and the criteria used to assess eligibility often has its origins in the language of 'pastoral care'. This is understandable from an historical perspective but of limited use to the majority of Australian NFP organisations in the 21<sup>st</sup> century. In general, definitions of 'charities' refers to definitions under taxation law. However, there are many additional levels of regulation that NFPs are required to address.

### 2.2 Becoming a registered organisation.

There is no single standard regulatory regime for NFP organisations in Australia; no uniform regime under which an organisation becomes incorporated. NFP organisations in NSW may be incorporated under the following legislation:

#### *State legislation*

- Incorporated Associations, under the Associations Incorporation Act 1984.
- Co-operatives under the *Co-operatives Act 1992* and those registered under the *Co-operative Housing & Starr-Bowkett Societies Act 1998*.

#### *Federal Legislation*

- Companies Limited by Guarantee under the Corporations Act 2001
- Aboriginal Corporation under the Corporations (Aboriginal and Torres Strait Islander) Act 2006 (CATSI Act).

Those with a corporate structure under Federal legislation come under the Australian Securities and Investments Commission (ASIC) and have the same reporting requirements as for-profit organisations; Associations and Cooperatives are accountable to the Registrar in the Department of Fair Trading while Indigenous organisations report to the Officer of the Registrar of Indigenous Corporations – each with its own requirements.

### 2.3 Authority to fundraise – State Law and donors’ understanding of what constitutes a charity

Once they are incorporated in some form, those organisations that wish to raise money from the public also require an authority to raise funds. The authority to fundraise does not define an organisation under federal law, but members of the community, who contribute funds to such an organisation in possession of this authority, would have no way of knowing the difference, nor the implications.

In NSW this authority is issued under the Charitable Fundraising Act, (1991) by the Office of Charities, Department of Gaming and Racing. Disclosure regimes for the receipt of these funds vary depending on the amount raised (annual audited statements are required for amounts greater than \$50 000; for smaller amounts, audited returns are required at the end of the period for which the authority is granted, generally two years).

### 2.4 Exemptions from State taxes and charges

Further, organisations defined as charities are exempt from certain State taxes and duties including land tax and payroll tax that may vary from state to state.

### 2.5 Regulation as a charity under Federal Taxation Law

The distinction between charities and other NFP organisations is confusing and differ markedly with regard to determining and managing their tax exempt status. It is often difficult to determine which organisations may self assess their Income tax exemption and those that are required to seek endorsement as an Income Tax Exempt Charity. Charities require endorsement from the Australian Taxation Office to be exempt from Federal tax and they may also be able to claim GST rebates and Fringe Benefits Tax exemptions. An additional endorsement is required to become a Deductible Gift Recipient (DGR) and also a Tax Concessions Charity which enables donors to claim donations as a tax deduction. However the basis for granting DGR status is archaic and inconsistent.

This can have serious financial implications for NFP organisations without DGR status, as many philanthropic foundations and other donors do not provide funding to organisations without this status.

#### 2.6 Receipt of government funds and accountability

In addition, NFP organisations may or may not receive government funding from local, State or Federal Government sources – each of which require separate acquittals. With respect to accountability for receipt and expenditure of government funds, each department has its own regime and there is no ‘whole of government’ approach to funding accountability and acquittal, either horizontally, at State or Federal levels, nor vertically, between State and Federal agencies. As most funded NFPs receive funding from more than one Government agency, this has created an unnecessary and unacceptable compliance burden for many NFP social service organisations. This burden also impacts disproportionately on small organisations.<sup>5</sup>

#### 2.7 Compliance and regulatory burden

This results in a costly and complex compliance burden that is neither efficient nor effective in ensuring a transparent and accountable sector. This situation can have serious implications because it often makes it more difficult for organisations to fulfil their governance responsibilities. Given that NFP organisations are governed by voluntary Boards of Management, they often lack the required skills to negotiate this complex maze of regulation.

#### 2.8 The problems and prospects of a single national regime

A standard national regime, if it does not make the required distinctions, could unfairly disadvantage small NFP organisations which may not have the human resources or expertise to comply with requirements geared to larger NFPs. Any regulatory or disclosure regime needs to take account of the needs of organisations currently incorporated under the various State legislation and be mindful of the voluntary governance structure and capacities of small NFP organisations.

#### 2.9 Simultaneous State based Reviews and the need for a whole of government approach

Disclosure regimes for Incorporated Associations are currently under review in NSW; it is anticipated that the NSW Associations Incorporation Bill 2008 will be introduced into the NSW Parliament later this year. In addition the CATSI Act will become fully operational in 2009 and a review of NFP regulation was conducted in Victoria in 2007.

It is very difficult for NFP organisations, particularly smaller ones, to continuously implement changes as they are enacted at State and Federal level. A whole of government approach is needed to provide a holistic approach to any envisaged regulatory changes. There is a compelling case for a national regulatory framework based on sound public policy,

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<sup>5</sup> Small= less than 15 FTE staff



rather than disclosure requirements that vary according to jurisdiction and the nature of the organisations legal structure<sup>6</sup>.

#### 2.10 Need for alternative regulatory framework

The above issues highlight the need for an alternative regulatory framework such as a NFP Commission that takes account of the needs of the NFP sector as a whole. This framework goes far beyond the taxation system and needs to sit outside the Australian Taxation Office. It would be responsible for registering and monitoring NFP organisations with a view to reducing the regulation and compliance burden, improving transparency, ensuring clarity and equity in relation to taxation and concessions, as well as providing support and education on good governance.

### 3 Taxation issues

#### 3.1 Tiered taxation benefits for NFP Organisations.

Australia has a two-tiered federal tax system in which charities are eligible for tax exemptions. As a result of this confusing regime and the lack of definitional clarity, there is inequitable eligibility to various tax concessions and other benefits. The result can be significant in terms of the costs of goods and services to the organisation, its capacity to raise revenue and salary package, its perception in the broader community and its relationships with government and business. Those that are designated as Public Benevolent Institutions are eligible to receive tax deductible donations or Deductible Gift Recipient (DGR) status and Fringe Benefits Tax exemptions.

#### 3.2 Concerns with the current classification system

Classification for DGR status were developed nearly 90 years ago to enable NFPs that assist disadvantaged people to obtain specific further tax concessions, principally gift deductibility. Concerns about the current classification include:

- It is focused in a restrictive manner only on the provision of direct services to individuals, not broader community development, advocacy, policy development or sector support activities. This is an archaic view of the current functions and roles of the NFP sector.
- Inconsistencies exist between definitions of charities and public benevolent institutions.
- Application of this classification has not kept pace with nature and breadth service and sector development over the past few decades.

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<sup>6</sup> National Roundtable of Nonprofit Organisations Limited, National Reform Agenda, [http://www.nonprofitroundtable.org.au/AM/Template.cfm?Section=National\\_Reform\\_Agenda&Template=/CM/HTMLDisplay.cfm&ContentID=3503](http://www.nonprofitroundtable.org.au/AM/Template.cfm?Section=National_Reform_Agenda&Template=/CM/HTMLDisplay.cfm&ContentID=3503)

- This has led to inequalities between different non-profit human services organisations with negative impacts on capacities of organisations not receiving PBI benefits. There are inconsistencies in that some political parties, cultural agencies and others serving a general population have been able to obtain PBI status while other organizations working with disadvantaged people miss out. In one community in NSW, three neighbourhood centres have PBI status while the other two do not.
- Current restrictions on PBI status exclude organisations working in the areas of prevention, promotion, policy development, research and advocacy.
- There is confusion about the legitimacy of lobbying and advocacy activities for organisations that have DGR status.
- The Australian Taxation Office decides which organisations are granted charitable status and the taxation benefits that accrue. However, issues pertaining to 'charitable' status extend far beyond the reach and expertise of a revenue collection agency. This highlights the need for a separate regulatory body for the NFP sector.

## **4 Transparency and the Compliance burden**

### **4.1 Perceived Lack of Transparency**

The background paper that informs this inquiry has identified a perceived lack of transparency in the way public or donated funds are spent and acquitted. This is not valid in relation to the accountability and acquittal of government funds – detailed acquittals are required from Government funding agencies, even for small project grants. In fact, the level of accountability for funding is often seriously disproportionate to the level of the grant received.

### **4.2 Accounting for expenditure**

Further there is no common method of accounting for expenditure across Government departments. This places a significant compliance burden on organisations.

### **4.3 Lack of transparency for donors**

It may be true that there can be a lack of transparency for money received from the public (donations, bequests). For example, it is often unclear what proportion of each donation reaches their chosen charity's beneficiaries and there is often great variation and inconsistency in the way some charities communicate information to donors.

### **4.4 No uniform accounting or reporting standards**

Part of the reason for this is that there is no uniform accounting or reporting standards for NFPs with charity status. This can make

comparison very difficult even when accounts are published. There is no legal requirement to report to donors, service recipients or an independent audit body.

#### 4.5 Value of Tax Concessions

With respect to transparency and taxation matters, the value of tax concessions is unknown, there is no set of uniform guidelines underpinning the principles under which such concessions are granted, and there is no clear link between concessions granted and public disclosure requirements.

### 5. **Accountability**

#### 5.1 Accountability for Government funds

The inquiry has identified a perceived need for greater accountability in terms of better measures of impact as well as better processes for application and expenditure of funds.

Accountability measures include the organisation's mission, purpose, grant to earned income ratios, governance, alliances and partnerships, codes of conduct, policies, statement of internal operations, sustainability strategies, performance indicators, program activities, impact and effectiveness of projects and programs, reporting etc. The majority of Government funding is tied to the implementation of quality measurement and improvement processes.

NCOSS would argue that what is required is greater consistency in both the policy and application of funding submissions and acquittal processes across Government funding agencies. The pronounced trend towards short-term project funding (as opposed to longer term core funding) has generated highly inefficient levels of transaction and compliance costs for both the NFP sector and Government funding agencies.

### 6. **The need for change**

#### 6.1. Need to review current regime

It is clear that there is a need for changes to the regulatory and disclosure regimes for NFP organisations and the current eligibility criteria for various tax and other concessions. The current regime involves duplication, and is burdensome. NCOSS endorses the position of the Nonprofit Regulation Reform Program of the Nonprofit Roundtable which 'proposes a fundamental

review of regulations with the goal of ensuring a strong, vibrant, adaptable and accountable non-profit sector.<sup>7</sup>

#### 6.2. Single regulatory authority

There could be significant advantages to having a single national regulatory body for the NFP sector. Such an approach has the potential to reduce compliance costs, facilitate much improved data collection, reduce confusion and thus assist with levels of regulatory compliance and streamline access to affordable and appropriate advice.

#### 6.3. Different requirements of small and large organisations

Any new model of regulation needs to take account of the differing requirements and capacities of small and large organisations with respect to governance, management, standards and accountability.

#### 6.4. Education Program

Any changes should be accompanied by a comprehensive education program, particularly aimed at small NFPs.

#### 6.5. Regulatory environment to take account of voluntary boards

NFP organisations are governed by voluntary Boards. This requires a regulatory environment with an emphasis on education rather than excessive penalties.

#### 6.6. Principles for Regulatory Reform

The Nonprofit Roundtable has developed principles<sup>8</sup> on which to base regulatory reform. These include understanding the factors that set the NFP sector apart from the commercial sector: it needs to allow the sector to evolve in accordance with changing circumstances, provide appropriate protection for stakeholders (members, funders, donors, the broader community) ; regulation

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<sup>7</sup> National Roundtable of Nonprofit Organisations Limited, National Reform Agenda, [http://www.nonprofitroundtable.org.au/AM/Template.cfm?Section=National\\_Reform\\_Agenda&Template=/CM/HTMLDisplay.cfm&ContentID=3503](http://www.nonprofitroundtable.org.au/AM/Template.cfm?Section=National_Reform_Agenda&Template=/CM/HTMLDisplay.cfm&ContentID=3503)

<sup>8</sup> National Roundtable of Nonprofit Organisations Limited, National Reform Agenda, 5 – 7 [http://www.nonprofitroundtable.org.au/AM/Template.cfm?Section=National\\_Reform\\_Agenda&Template=/CM/HTMLDisplay.cfm&ContentID=3503](http://www.nonprofitroundtable.org.au/AM/Template.cfm?Section=National_Reform_Agenda&Template=/CM/HTMLDisplay.cfm&ContentID=3503)

should take into account the different between small and large organisations and also between more and less sophisticated stakeholders; there needs to be transparency in information and cost effectiveness; organisations need to comply with the highest standards of ethics and organisations need access to competent professional (including legal and financial) advice at an affordable rate.