

## Australian Refugee Association Inc.

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

### Concerns about the not-for-profit sector

The disclosure regime needs to set within a realistic national framework, a set of regulations and standards that provides consistency and security of operations throughout Australia. The framework should set out clear definitions for the various descriptive terms used in the sector, not-for-profit, charity, PBI, etc. A single comprehensive framework would make it possible to compare types of organisations and set out clearly the eligibility conditions for tax exemption, requirements in relation to fundraising, transparency, accountability, etc.

### Questions for Consideration

#### **1. Are current disclosure regimes for not-for-profit organisations adequate?**

**If so, why (taking into account concerns such as those expressed by *Choice*)?**

No. The regulatory framework within which not-for-profits operate is very unclear and unsure. The degree of uncertainty with which they have to operate is intolerable and unacceptable.

Current regimes do not match the reality of the environment in which not-for-profit organisations operate or the purposes and activities of the not-for-profit organisations themselves. There is a lack of clarity regarding various kinds of not-for profit organisations, their taxation status and reporting requirements. Confusion around what is a charity, not-for profit, PBI etc. Reporting requirements are at cross purposes or unrelated to organisational goals.

#### **2. What would be the potential advantages and disadvantages for not-for-profit organisations of moving towards a single national disclosure regime? How might any disadvantages be minimised?**

Standardised and clear statement of the regulations governing the sector.

Standardised reporting across all states

National accountability and reporting standards.

Clarity regarding eligibility for tax concessions / exemptions

With modern technology communication should not be a problem.

Smaller organisations should be subject to less stringent reporting requirement than larger organisations.

#### **3. Would a standardised disclosure regime assist not-for-profit organisations who undertake fundraising activities, and who operate nationally, to reduce their compliance costs if it meant that they would only have to report on fundraising to a single entity (rather than reporting to each state and territory)?**

Of course. It should also clarify which fundraising activities are tax exempt and set out the relevant compliance requirements.

**4. If there was to be a nationally consistent disclosure regime, should it apply across all not-for-profit organisations or should different regimes apply to different parts of the sector? For example, should charities be treated differently than other not-for-profit entities?**

A national regime should apply to all not-for profits. Within that framework, charities eg., St Vincent de Paul Society, should be treated differently to other not-for profits, eg. sports clubs and social clubs. This should be determined by status definition. For example, St Vincent de Paul is a charity while a football club is not.

**5. If different regimes were to apply to different parts of the sector, how would this be determined and why? For example, would it be based on classifications? i.e., as a charity or deductible gift recipient. or would different regimes apply to different organisations based on their annual financial turnover or staffing levels (or some other proxy for size and/or capacity)?**

Clearly, the different treatments for various parts of the sector should be determined by the activities of the organisation eg.

- A. for the mutual benefit of members
- B. for the relief of poverty, social or economic disadvantage, etc
- C. for the upkeep of historic movements, etc

Reporting requirements should vary between, for example an organisation with annual revenue of \$10,000 and one with annual revenue of \$10,000,000. The way in which this question is phrased illustrates some of the current problem, comparing a charity with a deductible gift recipient. These are clarifications used by the ATO but one refers to the activity while the other refers to tax status. The concession of gift deductibility should follow from the determination of type of organisation eg. charity.

## **Regulatory reform**

### **1. Does there need to be regulatory reform of the not-for-profit sector?**

Yes.

### **Are there alternative (non regulatory) measures that might be taken by government and the not-for-profit sector to address some of the concerns raised by groups such as *Choice* about the governance, standards, accountability and transparency of not-for-profit organisations who use public and/or government funds?**

The sector should not be self-regulating. The bigger players would quickly dominate. A statutory body such as ASIC should be established with a clear mandate (charter) and adequate resources to provide an appropriate regulatory and disclosure (reporting) framework for the sector.

### **Who should be responsible for progressing and/or funding these measures?**

The Australian government.

### **How might the uptake of any such measures be monitored?**

The regulatory body should report regularly to the Australian Government.

### **If so, What should be the objectives of reform?**

To provide clear legal parameters for the effective and successful operation of the sector.  
To facilitate the work of charitable and benevolent organisations.

To maximise the benefits of tax exemption and charity status for organisations working for the relief of poverty and disadvantage, the promotion of education, health, welfare, religion, etc.

**Are there minimum requirements that must be met in order for a national regulatory system to be worthwhile?**

**Should regulatory reform apply to the whole not-for-profit sector, or only to segments of the sector? For example, to charities; to bodies receiving public funds, whether through grants or tax concessions; to bodies with a financial turnover about a specified threshold etc?**

The whole sector. However, regulatory requirements should be different for differing segments. The effect of revenue streams such as public funds, government grants, service agreements, trade with the public, fee-based services, etc. needs to be considered.

**Where should the impetus for reform come from? Who should drive reform?**

It should be collaboration between the sector, the Australian government, state and territory and local government and peak bodies (ACOSS etc).

**What sort of consultation should be conducted on the nature of any regulatory reform? How could input be facilitated from across the broad range of organisations that comprise the not-for-profit sector?**

1. A properly researched Discussion Paper canvassing the issues and proposing options.
2. Consultations involving all interested parties
3. Draft outline of a probable regulatory structure for further consultation or submissions

**Are there particular models of regulation and/or legislative forms that would be useful, in the Australian context, in improving governance and management of charities and not-for-profit organisations and in catering for emerging social enterprises? What are the perceived advantages and/or disadvantages of these models?**

Other countries have probably explored options in this regard.

**2. Should there be a single national regulator for the not-for-profit sector?**

Yes

**What would be the disadvantages in having a single national regulator?**

Potentially, a perception of regulatory remoteness from local organisations but this can be overcome by good communication systems.

**Should a national regulator be responsible for the entire not-for-profit sector or only the charitable sector?**

Yes - As above

**Should the regulator be independent of government?**

It should be a statutory body with a clear charter to act independently.

**Where would the regulator be best located? For example, as a stand alone agency or located within an existing institution, such as the Australian Securities and Investment Commission.**

Stand alone. ASIC deals with businesses established and operated for the profit of shareholders. The regulatory framework for organisations that do not yield financial benefits for owners/ shareholders should be separate as the central purposes and outcomes of the organisations are different.

**What would be the role of a national regulator? For example, should it have an:**

- **educative/advisory role?**
- **enforcement role?**
- **mediation/dispute resolution role?**

All three

**Should a national regulator be responsible for making decisions about charitable status?**

It should set out the criteria for charitable and tax exempt status. These should be agreed by the ATO, either by reference to the criteria themselves or as part of a registration process so that there is no discrepancy between the requirements set out by the two agencies.

**How should any national regulator be funded? For example, by the federal government, by federal, state and territory governments, on a cost recovery basis?**

By the federal government. It should not be on a cost recovery basis.

**3. Should there be a single, specialist, legal structure for the not-for-profit sector?**

Yes.

**Would this be best achieved through:**

**A national legislation scheme, whereby current national and state and territory laws relating to the not-for-profit sector are harmonised into uniform law?**

A harmonisation of state laws is not enough – legislation by the Commonwealth Parliament is required.

**The referral of powers from the states and territories to the Commonwealth, allowing for incorporation of current laws relating to the regulation of the not-for-profit sector, for example, incorporations Acts and fundraising Acts, into Commonwealth legislation?**

Yes – so long as the referral of powers is complete and irrevocable.

This is paramount for the sector

**What should be the minimum features of any legal structure?**

The establishment of a regulatory authority with clear statement of how it is to operate, which organisations come under its scope and the outcomes it will be required to deliver.

**Comments on the Recommendations of the  
REPORT OF THE INQUIRY INTO THE DEFINITION OF CHARITIES AND  
RELATED ORGANISATIONS JUNE 2001**

**Recommendation 1**

**That the term “not-for-profit” be adopted in place of the term “non-profit” for the purposes of defining a charity.**

This appears to be a purely semantic question. The basic requirement is for a standard set of definitions within a single framework that minimises the potential for confusion.

Every organisation has to make regular financial surpluses in order to stay viable. In a not-for-profit, surpluses are retained within the organisation for use for the purposes of the organisation. In a “for-profit” surpluses are distributed to shareholders or owners.

The requirement is for a term that encompasses the purposes and activities of the organisation

**Recommendation 2**

**That the term “entity” be adopted to describe charities, and that the definition of ‘entity’ include: a body corporate; a corporation sole; any association or body of persons whether incorporated or not; and a trust; and exclude: an individual; a political party; a partnership; a superannuation fund; and the Commonwealth, a State, or a body controlled by the Commonwealth or a State.**

Include Local Government and its agencies among the exclusions. It is not clear why an unincorporated body of persons should be described as an entity. It has no legal standing and so should have no relevance to this inquiry.

**Recommendation 3**

**That a charity must have a dominant purpose or purposes that are charitable, altruistic and for the public benefit. If the entity has other purposes, those purposes must further, or be in aid of, the dominant purpose or purposes, or be ancillary or incidental to the dominant purpose or purposes.**

Agreed

**Recommendation 4**

**That an entity be denied charitable status if it has purposes that are illegal, are contrary to public policy, or promote a political party or a candidate for political office.**

Agreed

**Recommendation 5**

**That the activities of a charity must further, or be in aid of, its charitable purpose or purposes. Activities must not be illegal, contrary to public policy, or promote a political party or a candidate for political office.**

Agreed

**Recommendation 6**

**That the public benefit test, as currently applied under the common law, continues to be applied; that is, to be of public benefit a purpose must:**

**be aimed at achieving a universal or common good;**

**have practical utility; and**

**be directed to the benefit of the general community or a “sufficient section of the community”.**

The “sufficient section of the community” may be relatively small as for example, a group suffering a specific health condition or former immigration detainees suffering disadvantage as a result of health issues arising from the detention.

**Recommendation 7**

**That the public benefit test be strengthened by requiring that the dominant purpose of a charitable entity must be altruistic.**

Agreed

Again the term altruistic needs to be defined in this context.

**Recommendation 8**

**That self-help groups which have open and non-discriminatory membership be regarded as having met the public benefit test.**

Agreed

**Recommendation 9**

**That where closed or contemplative religious orders regularly undertake prayerful intervention at the request of the public, their purposes be held to have met the public benefit test.**

Agreed

**Recommendation 10**

**That public benefit does not exist where there is a relationship between the beneficiaries and the donor (including a family or employment relationship); and that this principle extend to purposes for the relief of poverty, which the common law currently regards as being exempt from the need to demonstrate public benefit.**

Agreed

**Recommendation 11**

**That there be no requirement that charitable purposes fall either within the spirit and intendment of the Preamble to the Statute of Elizabeth or be analogous to one or more of its purposes.**

The Statute of Elizabeth was drafted in relation to conditions and circumstances in England over 400 years ago. Legislation to establish the new framework should determine and define its own spirit and intentions, terms and operations.

**Recommendation 12**

**That the principles enabling charitable purposes to be identified be set out in legislation.**

Agreed

### **Recommendation 13**

**The Committee has considered five options for defining charitable purpose as set out in Chapter 16. It concludes that three options are viable, but recommends the following preferred option (Option 5):**

**Charitable purposes shall be:**

**the advancement\* of health, which without limitation includes:**

- the prevention and relief of sickness, disease or of human suffering;

**the advancement\* of education;**

**the advancement\* of social and community welfare, which without limitation includes:**

- the prevention and relief of poverty, distress or disadvantage of individuals or families;
- the care, support and protection of aged and people with a disability;
- the care, support and protection of children and young people;
- the promotion of community development to enhance social and economic participation; and
- the care and support of members or former members of the armed forces and the civil defence forces and their families;

**the advancement\* of religion;**

**the advancement\* of culture, which without limitation includes:**

- the promotion and fostering of culture; and
- the care, preservation and protection of the Australian heritage;

**the advancement\* of the natural environment; and**

**other purposes beneficial to the community, which without limitation include:**

- the promotion and protection of civil and human rights; and
- the prevention and relief of suffering of animals.

**\* Advancement is taken to include protection, maintenance, support, research, improvement or enhancement.**

Agreed

### **Recommendation 14**

**That the definition of religion be based on the principles established in the Scientology case, namely:**

- belief in a supernatural Being, Thing or Principle; and**
- acceptance and observance of canons of conduct in order to give effect to that belief.**

Agreed

### **Recommendation 15**

**That the encouragement of sport and recreation for purposes of amusement or competition not be a charitable purpose, it being noted that the advancement of health, education, social and community welfare, religion, culture or the natural environment through the encouragement of sport and recreation would be considered a charitable purpose.**

This should be more nuanced. While the AFL or NRL are clearly not charities, little athletic clubs do benefit the community and should have PBI status.

**Recommendation 16**

**That the care, support and protection of children and young people, including the provision of child care services, be considered a charitable purpose.**

Agreed

**Recommendation 17**

**That charities be permitted neither to have purposes that promote a political party or a candidate for political office, nor to undertake activities that promote a political party or a candidate for political office.**

Agreed

It should be noted that charities should be free to promote public policy options that may coincidentally agree with the policy position of a particular political party or candidate.

**Recommendation 18**

**That commercial purposes should not deny charitable status where such purposes further, or are in aid of, the dominant charitable purposes or where they are incidental or ancillary to the dominant charitable purposes.**

Agreed

**Recommendation 19**

**That the current approach of denying charitable status to government bodies be maintained. The Committee agrees with the principles set out in the Fire Brigades case and the Mines Rescue case for determining whether an entity is a government body, namely that the entity is constituted, funded and controlled by government.**

Agreed

**Recommendation 20**

**That there be a definitional framework to distinguish altruistic entities from other not-for-profit entities.**

Agreed

This would be part of the regulatory system proposed above.

**Recommendation 21**

**That in the recommended definitional framework, the category of public benevolent institution be replaced by a subset of charity to be known as Benevolent Charity, that is a charity whose dominant purpose is to benefit, directly or indirectly, those whose disadvantage prevents them from meeting their needs.**

Further discussion required.

**Recommendation 22**

**That the framework recommended in this Report should not include the terms “religious institution”, “scientific institution” and “public educational institution”, as altruistic entities with religious, scientific or public educational purposes and that are for the public benefit are covered by the categories in the recommended framework.**



Further discussion required.

**Recommendation 23**

**That there be a category, known as “Altruistic Community Organisations”, that are entities that are not-for-profit and have a main purpose that is altruistic. That is, they can have secondary purposes that are not altruistic, and that do not further, or are not in aid of, or are not incidental or ancillary to, their main altruistic purpose.**

Agreed

**Recommendation 24**

**That the Government seek the agreement of all State and Territory Governments to the adoption nationally of the definitional framework for charities and related entities recommended in this Report.**

Agreed

**Recommendation 25**

**That the Government seek the agreement of all State and Territory Governments to establish an independent administrative body for charities and related entities, and to the legislative changes necessary for its establishment.**

Agreed

**Recommendation 26**

**If an independent administrative body is not established:**

- that the Government set up a permanent advisory panel, including members from the charitable and related sector, to advise the Australian Taxation Office on the administration of the definitions relating to charities and related entities, and to advise the Government on the definitions of charity and related terms; and**
- that the endorsement processes currently undertaken by the Australian Taxation Office be extended to include the endorsement of charities and related entities in order to access all the taxation concessions to which they are variously entitled.**

Not agreed. The regulatory system proposed above is required in its fullness. Tinkering with the present system will not resolve the issues.

**Recommendation 27**

**That the Government commit to a comprehensive public information and education campaign to inform the charitable and related sector of any changes arising from its consideration of this Report.**

Agreed.

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