



public interest
ADVOCACY CENTRE LTD

Not-for-profit Accountability:

Submission to the Inquiry into the disclosure regimes for charities and not-for-profit organisations

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Introduction

The Public Interest Advocacy Centre

The Public Interest Advocacy Centre (PIAC) is an independent, non-profit law and policy organisation that seeks to promote a just and democratic society by making strategic interventions on public interest issues.

PIAC identifies public interest issues and, where possible and appropriate, works co-operatively with other organisations to advocate for individuals and groups affected.

In making strategic interventions on public interest issues PIAC seeks to:

- expose unjust or unsafe practices, deficient laws or policies;
- promote accountable, transparent and responsive government;
- encourage, influence and inform public debate;
- promote the development of law—both statutory and common—that reflects the public interest; and
- develop community organisations to pursue the interests of the communities they represent.

Established in July 1982 as an initiative of the Law Foundation of New South Wales, with support from the NSW Legal Aid Commission, PIAC was the first, and remains the only, broadly based public interest legal centre in Australia. Financial support for PIAC comes primarily from the NSW Public Purpose Fund and the Commonwealth and State Community Legal Centre Funding Program. PIAC also receives funding from the NSW Government Department of Energy and Water for its work on utilities, and from Allens Arthur Robinson for its Indigenous Justice Program. PIAC also generates income from project and case grants, seminars, consultancy fees, donations and recovery of costs in legal actions.

Background

PIAC welcomes the current Senate Inquiry, and the commitment of the current Federal Government to reform charity law, as outlined by the Assistant Treasurer, the Hon Chris Bowen, in a speech to the House of Representatives in May this year:

I particularly thank the honourable member for Lindsay ... He has correctly identified many of the issues that go to the complexity of getting status under the tax act for charities and benevolent institutions in this country whether it be deductible gift recipient status or PBI status or the other capacities to be recognised under the tax act. He has correctly identified the difficulties in operating under the Statute of Elizabeth which has been in operation some 400 years, and charities have changed just a little in those 400 years. It is something that is exercising the mind of the government and something the government will be turning its mind to in a more detailed way during this term.¹

The current Federal Government, through its focus on social inclusion, has acknowledged the important role of charities and not-for-profit organisations. The Hon Senator Ursula Stephens, the Parliamentary Secretary for Social Inclusion and the Voluntary Sector, noted:

¹ Commonwealth, Parliamentary Debates, House of Representatives, 14 May 2008, 2656 (Chris Bowen, Minister for Competition Policy and Consumer Affairs, and Assistant Treasurer).

Few organisations are better placed ... to foster solutions to exclusion, promote the value of inclusion and empower communities. The sector is already at the forefront of changing lives and tackling disadvantage. Not only does the not-for-profit sector deliver services at the pointy end, it has a very important role to play in strengthening and connecting local communities.²

It is in this context, that the Public Interest Advocacy Centre contributes to this inquiry, as a part of the Third Sector, and as a provider of support to community organisations to ensure their viability and contribution to the community.

PIAC's work on disclosure regimes for charities and not-for-profit organisations

PIAC has taken an active role in supporting the Third Sector with the aim of:

- Enhancing the capacity of individuals and non-profit organisations to undertake advocacy and related activities on public interest issues.
- Enhancing community awareness of and engagement in government.
- Promoting and enhancing transparency and accountability in the exercise of government power.

In making this submission, PIAC draws on its experience in realising these goals through:

- Support to organisations working in the public interest through ongoing promotion and referral to *pro bono* legal services of legal issues confronting non-profit organisations working in the public interest.
- As an industry partner with the Centre for Community Management (CACOM) at the University of Technology, Sydney in a research project funded by the Australian Research Council (ARC) Linkage Program. The research involved an in-depth study on trends in advocacy within the Australian community sector in the context of recent state government partnership agreements.
- Recent experience defending its own claims for charitable and Public Benevolent Institute (PBI) status with the Australian Tax Office.
- Representing the clients of services provided by the not-for-profit sector.

PIAC believes strongly in the need for all not-for-profit organisations to be accountable to the government and the community.

² The Hon Senator Ursula Stephens, 'Address to ACROSS Conference' (Speech delivered to the ACROSS National Conference 2008, Melbourne 9 April 2008).

Summary of recommendations

1. *That there be mandatory application by Federal, state and territory government funding bodies of an agreed set of national definitions and a standard chart of accounts.*
2. *That the compliance costs involved in reform, including transitional costs, are acknowledged and provided for in funding agreements.*
3. *Taking into account the diversity of the sector and the need for reform to be proportional to size and risk, that a new consistent national framework for governing not-for-profit organisations be implemented.*
4. *That the recommendations of the 2001 Inquiry into the Definition of Charities and Related Organisations be implemented.*
5. *That the reforms be developed and implemented by a national body, in consultation with a body representing the diversity of the not-for-profit sector.*
6. *That care be taken to ensure that reforms do not disadvantage organisations that wholly or in part focus on community development functions, community education, advocacy or service development to support the sector.*
7. *That new disclosure regimes or standards-review processes be designed to encourage and resource organisations to build in ongoing capacity to effectively evaluate their own performance and use such evaluation to improve the quality of their services and better achieve desired outcomes.*
8. *That reporting systems be designed to improve accountability to all stakeholders—internal, governmental and local community or population group—and incorporate non-financial information.*
9. *That reforms intended to improve reporting balance the level of risk to the community or individual from underperformance, the cost to the organisation, and likelihood that the changes will result in the intended outcomes of improving governance and access to information.*
10. *That any agreement or compact between government and the not-for-profit set out principles and practices for both parties and is adequately resourced and backed up by a firm commitment to its implementation, including government reporting, across all relevant areas of government and funding for its implementation.*

Response to terms of reference

a. Relevance and appropriateness of current disclosure regimes

The not-for-profit sector in Australia is large and diverse, and is increasingly important to both governments and communities as providers of community services, sporting activity and representation of collective interests. In June 2007, there were 40,976 not-for-profit organisations in Australia. They employed 884,476 people, received support from 2,434,815 volunteers and received \$74.5 billion in income, just over one third of which was from governments.³

Governing legislation reflects the diversity and historical development of the sector. In its 2007 *Assessment of Charitable Status in Australia*, the National Roundtable of Non-profit Organisations identified 15 Commonwealth Acts and 163 State and Territory Acts 'under which entitlement to a benefit or some other legal outcome turns on the charitable purpose or status of an organisation'.

It also found:

- 19 Commonwealth, State and Territory governmental entities are regularly involved in determining the charitable status of organisations, and a further 74 entities may be called on to make such determinations from time to time.
- The processes for determining the charitable status of organisations vary significantly between government agencies, with little coordination among agencies within and among jurisdictions, and a high degree of inconsistency and duplication.
- These processes impose substantial unnecessary administrative burdens on charities and the relevant regulators.⁴

Complexity of non-regulatory reporting requirements

It is a mistake to think of 'disclosure regimes' for not-for-profit organisations as only comprising the regulations governing the rules and requirements for associations, companies limited by guarantee, taxation regulations or fund-raising activities. The most onerous reporting requirements are those of government funding bodies. Studies have shown that the level and detail of information required does not correlate with improved accountability or the provision of information that is useful for stakeholders.⁵

Flack and Ryan⁶ studied government program reporting requirements in Queensland. They found inconsistencies in the data collected between government agencies, as well as within different funding

³ Australian Bureau of Statistics, *Not-for-profit Organisations, Australia, 2006-07*, Cat. No. 8106.0 <<http://www.abs.gov.au/AUSSTATS/abs@.nsf/Latestproducts/8106.0Main%20Features12006-07?opendocument&tabname=Summary&prodno=8106.0&issue=2006-07&num=&view=>> at 5 August 2008.

⁴ National Roundtable of Nonprofit Organisations, *Assessment of Charitable Status in Australia*, 2007, quoted in Leslie Falkiner-Rose, *The State of Play ... Charitable Law Issues in Australia* (2008) 18.

⁵ See, for example, Ted Flack and Christine Ryan, 'Financial Reporting by Australian nonprofit organisations: Dilemmas posed by Government funders' (2005) 64 (3) *Australian Journal of Public Administration* 69-77; and Christine Ryan, Cameron Newton and Myles McGregor-Lowndes, *How Long is a Piece of red Tape? The Paperwork Reporting Cost of Government Grants*, QUT Working Paper No CPNS 39 (2008).

⁶ Flack and Ryan, above n5.

programs in one agency. They give an example of one not-for-profit organisation, which received \$4 million under 37 separate funding contracts, which needed a different accounting treatment for each contract. For one contract, the organisation was expected to manage funds in a way that was in conflict with Australian Taxation Office rules.

Flack and Ryan found that, faced with high compliance costs, organisations focused their efforts on just meeting their contractual requirements. This restricted their ability to move to the 'next stage of a more thorough performance assessment'. The lack of reliable and consistent data also hampered government efforts to develop performance measures and to develop relevant public policy.⁷

The lack of a consistent approach, and the absence of clear, agreed definitions are at the heart of the problems with disclosure regimes for charities and not-for profit organisations. The diversity of the sector, and the wide range in size, purpose and activity means that there is no 'one size fits all' solution. An accountability framework needs to be tailored and proportionate to risk. This will result in a reduced compliance burden and will promote the provision of information that allows stakeholders to assess the extent to which an organisation is achieving its purpose. Not-for-profit organisations need to be partners in the development of options, assisted through the transitional process with funding and advice.

Recommendations

- 1. That there be mandatory application by Federal, state and territory government funding bodies of an agreed set of national definitions and a standard chart of accounts.*
- 2. That the compliance costs involved in reform, including transitional costs, are acknowledged and provided for in funding agreements.*

⁷ Ibid.

b. Improved models of regulation and legal forms

The need for reform

At the same time as promoting transparency and accountability to the community, any change to government policy and regulation should reduce the compliance burden for not-for-profit organisations. Priority should be given to improving consistency and clarity, both in regulation and in the terms used in reporting and describing charities. In 2001 the Federal Government commissioned a major review, the Inquiry into the Definition of Charities and Related Organisations. The final report provided a detailed description of the compliance issues underlying the governance and management of charities and not-for-profit organisations and recommended a new framework for regulation.⁸

The National Roundtable of Non-profit Organisations supported the reforms identified in 2001. In May 2004, in its *Nonprofit Regulation Reform Program*, the Roundtable set out the need and principles for reform of the sector. It concluded:

Ensuring the effectiveness of Australia's non-profit organisations in delivering the social and economic benefits of their missions is of vital importance. Driving non-profit organisation growth and facilitating social economic development are national priorities.

Significant reform and streamlining of Australia's non-profit law and regulation is required. Developing a regulatory framework to replace a shaky scaffold will make a major contribution to achieving Australia's economic and social goals.⁹

Disclosure models

The risk in separating definitions and reporting requirements for taxation purposes and accountability for government funds is to ignore the responsibility of not-for-profits to account to those who make decisions about donations and to those who benefit from their services. It will also continue the current contradictions not-for-profits face when reporting to various bodies.

The United Kingdom provides a model for balancing these competing needs by requesting a 'Summary Information Return' (SIR).¹⁰ The UK Charities commission describes the purpose of the SIR as being to provide:

... a snapshot of a charity's aims, activities and achievements and to enable charities to give an indication of factors that have affected their performance during the year. The SIR provides an introduction to a charity; more detailed information is then available from other sources, for example the Trustees Annual Report and Accounts, which are available elsewhere ... The SIR forms part of the Annual Return form (Part C) that larger charities, with an income exceeding £1 million, have to complete and submit to the Commission.

⁸ Inquiry into the Definition of Charities and Related Organisations, 2001. <http://www.cdi.gov.au/html/report.htm> at 8 September 2008.

⁹ Nonprofit Roundtable, *Nonprofit Regulation Reform Program*, (2004) <http://www.nonprofitroundtable.org.au/Content/NavigationMenu2/PolicyRegulatoryReform/documents2/Reg_Statement.pdf> at 31 August 2008.

¹⁰ Charities Commission UK short-form report <<http://www.charity-commission.gov.uk/registeredcharities/SIRs.asp>> at 26 August 2008.

The SIR was introduced in 2005 following an inquiry about the not-for-profit sector similar to that currently being conducted in Australia.¹¹ The review in the UK concluded that there was a lack of accessible and relevant information about charities.

A similar approach in Australia would provide donors with the ability to compare the role of charities and the contribution a charity makes to the community or field of interest. Members of the public donate to organisations based on a belief that the money will be used for the stated purpose. Donors should be able to access information that allows them to make informed decisions. Consistency in definitions and the type of service information reported become important for this purpose.

Consumers who receive support from organisations should have input into development and evaluation processes. Participation is assisted if consumers or their representative organisations can access information about what and how services are provided.

Legislation reflecting scope of sector

The size and management structures of organisations in the not-for-profit sector differ dramatically. Reform will need to reflect the complexity of the sector. A national commission for the sector that consulted on the best approach could ensure, for example, that low-cost registrations for small organisations would continue to exist. Whether this is done through ensuring national uniformity of state- and territory-based legislation or introducing a national scheme would need further consideration. The cost of transitioning from one structure to another needs to be taken into account, and support will need to be provided.

Whatever form reform takes, there is scope for a national body to set minimum requirements for public reporting and accountability to the community and regulatory bodies, regardless of the form of registration. If the not-for-profit sector is to build on this growth and continue to build capacity to meet the needs of the community from which they are drawn, legislative frameworks must reflect the environment in which they operate.

Recommendations

3. *Taking into account the diversity of the sector and the need for reform to be proportional to size and risk, that a new consistent national framework for governing not-for-profit organisations be implemented.*
4. *That the recommendations of the 2001 Inquiry into the Definition of Charities and Related Organisations be implemented.*
5. *That the reforms be developed and implemented by a national body, in consultation with a body representing the diversity of the not-for-profit sector.*
6. *That care be taken to ensure that reforms do not disadvantage organisations that wholly or in part focus on community development functions, community education, advocacy or service development to support the sector.*

¹¹ UK Prime Minister's Strategy Unit, *Private Action, Public Benefit* (2002) <http://www.cabinetoffice.gov.uk/strategy/news/press_releases/2002/020925_vs.aspx> at 8 September 2008.

c. Other measures to improve governance, standards, accountability and transparency

Standards and sector development

A reliance on self-regulatory reform will not result in increased accountability and transparency.

Codes of practice and standards are important tools but should not be used in isolation. Modern standard development tools are used as part of governance and service-improvement models, rather than for policing or reporting. Professional bodies and inspection services in high-risk services need to continue to be in place to protect consumers.

A focus on standards and/or accreditation of services moves funding to compliance and away from service development and delivery. Setting standards means very little to organisations that are not going to be closed because they can't be replaced (because, for example, of large capital investment or location in a remote community). The risk is very real that closure will do more damage to the community they serve than would keeping them open with appropriate supports.

A more appropriate focus is on sector development models rather than threats to funding or closure. This also allows community organisations more scope to identify and develop new service types to meet community needs.

Imposition of standard reporting tools that are inappropriate to the type or size of an organisation can be time consuming and costly. Review processes linked to standards need to be specific to the service type, appropriately funded and independent from the funding body.

There should be minimum standards against which not-for-profit services should report, and a mechanism for deciding what level of detail is needed to achieve accountability to their community and to funding bodies and donors. For example, complaint mechanisms are often referred to by the sector as the means by which consumers have input and seek improvements in service. Such mechanisms are necessary, but do not acknowledge the vulnerability of many people who use community services and the difficulty of making complaints. Independent complaint processes will still be necessary regardless of the disclosure regime or standards imposed.

The role of peak organisations is important in maintaining standards within the sector. Adequate funding needs to be provided to enable them to provide ongoing support, training and resources for members. This will be an essential part of any reform process.

Recommendations

7. *That new disclosure regimes or standards-review processes be designed to encourage and resource organisations to build in ongoing capacity to effectively evaluate their own performance and use such evaluation to improve the quality of their services and better achieve desired outcomes.*
8. *That reporting systems be designed to improve accountability to all stakeholders—internal, governmental and local community or population group—and incorporate non-financial information.*

9. *That reforms intended to improve reporting balance the level of risk to the community or individual from underperformance, the cost to the organisation, and likelihood that the changes will result in the intended outcomes of improving governance and access to information.*

A national compact

PIAC notes the recently announced intention of the Commonwealth Government to develop a compact with the not-for-profit sector as a first step towards building 'a new and stronger relationship with the not-for-profit sector'.¹²

While a compact has the potential to be of benefit both to the Government and to the sector, PIAC's experience in NSW indicates that this is not necessarily the case. For a compact to be effective it needs ongoing commitment from all parties, and to be central to all aspects of the relationship between the parties, and to be part of a whole-of-government commitment to working in partnership with not-for-profits, not just contracting them to provide delivery of government services.

Recommendation

10. *That any agreement or compact between government and the not-for-profit set out principles and practices for both parties and is adequately resourced and backed up by a firm commitment to its implementation, including government reporting, across all relevant areas of government and funding for its implementation.*

Conclusion

Over the past 15 years there have been four major Commonwealth inquiries into charities and not-for-profit organisations.¹³ There have also been numerous academic research papers, journal articles and books and major reports by the state governments.

Very few of the recommendations of these inquiries and reports have been implemented. They represent a valuable body of knowledge and a considerable commitment of resources, both from government and the not-for-profit sector.

PIAC recommends that this Inquiry build on the findings and recommendations of these reports, rather than investing further resources in conducting additional research.

It is PIAC's view that thorough reform of the disclosure regimes for charities and not-for-profit organisations is needed, but that the focus needs to be on reducing the regulatory burden through better and more targeted regulation.

¹² Federal Department of Families, Housing, Community Services and Indigenous Affairs, *An Australian Compact* (2008) <http://www.socialinclusion.gov.au/A_National_Compact.htm> at 8 September 2008.

¹³ The Industry Commission inquiry into Charitable Organisations in Australia (1995) <<http://www.pc.gov.au/ic/inquiry/45charit>>; the Charities Definition Inquiry (2001), above n8; the Board of Taxation consultation on the draft Charities Bill 2003 (2003) <<http://www.taxboard.gov.au/content/charities.asp>>; and the Treasury consultation on Financial Reporting by Unlisted Public Companies (2007) <<http://www.treasury.gov.au/contentitem.asp?NavId=037&ContentID=1269>>.