



Manager
Philanthropy and Exemptions Unit
Personal and Retirement Income Division
The Treasury
Langton Crescent
PARKES ACT 2600

Changemakers Australia
GPO Box 4875
Melbourne
Victoria 3001

24 February 2011

Dear Sir / Madam,

Please find attached the submission from Changemakers Australia in response to the *Scoping study for a national not-for-profit regulator*.

We appreciate the opportunity to be involved in this very significant process and look forward to seeing the initiative being progressed.

Yours sincerely

Jill Reichstein
Chair
Changemakers Australia

Changemakers Australia
Submission to the scoping study for a national not-for-profit regulator
24 February 2011

1. Introduction

The Commonwealth Treasury has called for submissions in response to a consultation paper scoping a national not-for-profit regulator. Changemakers welcomes this initiative and provides the following response to the scoping study.

1.1 Introduction to Changemakers

Changemakers Australia (Changemakers) is an incorporated national organization which aims to support the growth of social change philanthropy in Australia.

Our mission is to encourage and resource people and organisations in the philanthropic world and beyond to focus on social and economic justice, equality for all, and environmental sustainability.

Social change philanthropy directs its support to activities that address the underlying causes of social ills, such as poverty, inequality, abuse of human rights and environmental degradation.

For Changemakers, real and lasting social change occurs when the activity that has been funded contributes towards, or results in, concrete and identifiable change in the policies, laws, institutions or culture in a particular area that impacts on a whole group of people who have been disadvantaged or discriminated against by the previous arrangements, structures or attitudes. That is, it achieves change more broadly than at the level of improving circumstances for an individual, although the need for change may have been identified because of the assistance that an organization has been providing to individuals.

1.2 Approach to the consultation process

Changemakers supports the submissions made to the consultation process by ACOSS and the Melbourne Community Foundation. We have tried to focus our submission on the main issues we have a view on, in particular where our recent work is relevant to the issues under consideration.

1.3 Charity Law Reform Project and the Regulator Proposal

Changemakers is currently finalising a project on charity law and the barriers to advocacy for public policy reform. The project involved interviews with 18 people working in the Not for Profit (NFP) sector, both “doing” charities and “funding” charities. A number of the interviews

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considered regulation and whether regulation could help to remove barriers to advocacy specifically and build the sector more generally.

It should be noted that there was a high level of support for the establishment of an independent regulator for the sector. Indeed, it is Changemakers view that a wide range of essential NFP sector reforms will only be possible if there is an independent national regulator in place.

1.4 The role of the regulator in relation to advocacy

This consultation process is taking place during a time when charity law is in a state of flux, particularly in relation to how the law has restricted the ability of charities to undertake “political activities”, including advocacy for public policy reform. At the end of December 2010 the High Court brought down its decision in the *Aid/Watch v Commissioner of Taxation* case. The High Court found in Aid/Watch’s favour, but most importantly made a decision which overturns the conventional view that political activity is not charitable.

Changemakers considers the 2010 High Court decision on Aid/Watch to have removed a substantial legal barrier to advocacy. As a result charities should have to comply with nothing more than the responsibility to ensure that their activities are directed to furthering their objects. Political activities, in particular advocacy for public policy reform, should not be singled out for special attention.

This will impact upon the national regulator as there will be no need to direct resources to monitoring the advocacy which charities undertake (except perhaps for those contrary to public policy, such as cults). However, the regulator should be open to working with the NFP sector on ways that the sector find useful and which lead to improved communication between the sector and government.

The main barriers to advocacy which remain relate to tax laws. Changemakers sees a future review of the tax concession framework as an important job for a national regulator.

Please see attachment 1 for the results of survey questions which are relevant to the regulator proposal.

2. The consultation paper

This submission addresses the key questions in the consultation paper where Changemakers has a view.

2.1 The goals of NFP regulation

Changemakers agrees that the goals listed in the paper are appropriate. There may well be other important goals as well. In principle we see the need to ensure that the way in which Changemakers Australia submission to Scoping study for a national not-for-profit regulator, February 2011

regulation occurs is compatible with the very unique qualities of the NFP sector. Changemakers supports ACOSS's view that the form of regulation is central to the effectiveness of the reforms and so regulatory processes must work with the sector.

2.2 Scope of national regulation

This submission supports the principle of an "all inclusive" regulator, covering all entity types, including charitable trusts. However, Changemakers does not support the proposal at Clause 57 to use the Private Ancillary Fund guidelines as a model for reforming other types of charitable trusts. We recommend more consultation with the philanthropic sector to determine what type of regulation is required to strengthen the philanthropic sector and improve transparency for the public.

The Charity Law Reform project research noted that a number of the philanthropic organisations interviewed were unaware of the role of the Attorney-General in regulating trusts. The AG appears to only play a role with trusts in a limited number of specific circumstances. Outside of those circumstances a trust may well have no contact with the AG.

2.3 Functions the national regulator may undertake

Assessment of charitable status

As identified in the consultation paper, the current circumstances regarding the assessment and granting of charitable and other tax concession status is suboptimal. Charitable status plays a very important role in determining whether NFPs can access a range of tax concessions and this status is assessed by a number of government organisations.

The Charity Law Reform project interviewed one organisation which had charitable status at a Commonwealth level, but was denied this status by a State Government. To overturn this decision the organisation had to take the government to an administrative appeals tribunal and no doubt incurred costs in the process. The NFP regulator should be the sole entity determining charitable status.

Linked to this issue is the complexity of charity law itself, meaning that there are instances where determining charitable status is not a straightforward matter. In the absence of a statutory definition of charity, it is essential that a national regulator have a thorough understanding of the law and experience in applying it consistently. At the end of last year the High Court of Australia made a decision on *Aid/Watch v Tax Commissioner 2010* that effectively expands the types of organisations which could be considered charities. A national regulator would need to provide clarity to the Australian community about how it interprets the *Aid/Watch* decision and any limitations it considers to remain in relation to political activities.

Monitoring charities

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The other important function is monitoring, with the possibility that NFPs may lose their charitable status if they are no longer considered to be a charity. As described above, Changemakers considers the High Court decision on Aid/Watch to remove the legal basis for restricting charities' political activities, including advocacy for public policy reform. It should no longer be possible for charity to lose its charitable status because it undertook political activities.

Changemakers is also concerned to see improvements in accountability for particular philanthropic trusts whose affairs are currently non-transparent. The Melbourne Community Foundation describes how certain philanthropic organisations are not required to be open and transparent in their reporting, or may not even have a requirement to register with a public body, or to be audited. The regulator will have an important role to play in rectifying this situation and monitoring activities of charitable trusts.

Tax concession review

Regarding tax concessions in general, the regulator needs to go beyond streamlining the application process if objectives of reducing complexity are to be achieved. The tax concession framework is complicated overall, and lacks consistency and fairness. The Charity Law Reform project found that there are many charities in the human welfare and human rights arena which cannot access Deductible Gift Recipient (DGR) status. In particular, those that focus on advocacy rather than direct relief have difficulties achieving DGR. Without DGR, a charity is limited in its ability to fundraise from its own membership, private donors and from most philanthropic trusts. Private Ancillary Funds and Public Ancillary Funds can only grant to organisations (predominantly charities) with DGR status, so this situation will worsen over time.

Changemakers see an important role for the national regulator in revising the tax concession framework. Our view is that more charities must be able to access to DGR.

The Charity Law Reform project also identified the additional restrictions placed on Public Benevolent Institutions (PBIs) as a barrier to advocacy. Most PBIs have to be predominantly concerned with the provision of direct relief and advocacy is not considered to be direct relief. This puts PBIs (particularly small ones) at risk of jeopardising their PBI status if they do more than just 'minor' levels of advocacy. Conversely, some PBIs have less restriction on their advocacy because they have achieved PBI status as a peak body under the ACFOA ruling. This highlights how inconsistent the rules are currently around tax concession status.

Regulation and supervision

Educational and compliance initiatives will be a very important component of the national regulator's work. The nature of the NFP sector, made up of a diverse range of organisations, many with very limited funds and staffed and governed by volunteers, requires the regulator to

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take a facilitative approach to regulation. Organisations will want to comply with regulation, but will need support to adopt new measures as they arise.

2.4 The form of a national regulator

Changemakers supports the principles of independent regulation as described in the ACOSS submission to this consultation process. Regarding the location of the regulator, Changemaker's preference is for it to be an independent entity in the same way that the Charity Commission of England and Wales is. Changemakers concurs with ACOSS that the Australian Tax Office is not an appropriate location for a regulator for the NFP sector.

Changemakers also notes the importance of the regulator establishing mechanisms to consult with the sector, and the need to ensure such mechanisms are reflective of the diversity of the sector.

Changemakers supports the idea of establishing a statutory definition of charity, on the basis that a new statutory definition is a key component of the modernisation process. A key weakness of the current approach is the infrequency of court consideration of the law around charities, which stifles change. However, Changemakers would not support a statutory definition of charity if this was used to narrow the definition of "charitable" to the exclusion of advocacy for public policy reform. Any statutory definition should reflect the High Court decision on Aid/Watch.

Attachment 1 – responses to interview questions that relate to regulation

Community organisation survey – 9 respondents

Do you have any ideas about how to remove barriers to public policy reform work by charities?

In general, the organisations were interested in “bigger picture” approaches to removing barriers to public policy reform work by charities.

Independent regulator

Six of the organisations were strongly in favour of the establishment of an independent regulator for the sector which would take over the ATO’s role in determining charity status and overseeing the sector.

One organisation was less in favour of an independent regulator, on the basis that they were unsure that an intermediary between the ATO and individual charities was a good thing and concern that the UK system is onerous for small charities. One organisation not in favour of a new regulator stated that their concern might be overcome if the body was independent from government.

Other regulations

One organisation noted that reducing red tape was an important issue for the sector generally. Inconsistent fundraising laws across Australia was noted by one organisation as more of a problem than charity laws. Another organisation noted the importance of enhancing the accountability of the sector more broadly. It reflects badly upon the whole sector when one organisation does something questionable in the mind of donors. Currently the only option open to charities concerned about this is self regulation; appropriate levels of regulation are required.

Philanthropic survey – 9 respondents

What is your accountability to Government, including the Tax Office and Attorney Generals office?

One respondent had no fiduciary role, only providing pro bono advice to clients who are themselves accountable to government.

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Tax Office – 3 reported that they had no accountability, 5 that they had limited accountability. One Private Ancillary Fund provides a return to the ATO to account that donations have been made to applicable charities, but not on how the money was spent. All of the respondents replied that they had no (3) or limited (5) accountability to the Tax Office.

Another reported that the ATO seeks returns on PAF and PPF structures which included the names of the organisations to which grants have been made so they can check DGR status. They reported that the main purpose of this was to ensure that organisations which have been set up to donate income are doing so and to eligible activities.

The other two respondents noting limited accountability stated that this was limited to “standard financial reporting” and to “ordinary business activities like GST”.

Other areas of government were seen to be more important in terms of accountability to a number of the respondents. Four reported that they had to make annual returns to ASIC including things like Trustee changes and financial statements. Two noted the Attorney General; one stated that this was the main accountability in each state and involved both annual returns and ongoing contact throughout the year, the other that they made a Pains and Troubles report to the Attorney General.