

## **APPENDIX A: PilchConnect submission to the 2008 Senate Inquiry**

### ***Time for proper underpinning***

A national regulatory approach for the not-for-profit sector

#### **Submission by:**

PilchConnect: *a specialist legal service for community organisations*

#### **To:**

Senate Standing Committee on Economics Inquiry into the Disclosure Regimes for Charities and Not-for-Profit Organisations

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## 1. Executive Summary

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- 1.1 **PilchConnect** is a specialist legal service established to provide free legal information, training and advice to not-for-profit (**NFP**) community organisations. Being itself a NFP, the PilchConnect service is a sector-based response that promotes good governance among NFPs and assists them to understand and deal with their regulatory obligations. Our experience is that many NFPs find the current regulatory and disclosure regimes for their organisations to be confusing and burdensome.
- 1.2 The NFP sector contributes 4.9% of Australia's GDP and touches every Australian in some way – as a recipient and/or as a donor (of time or money). A fairer and more efficient NFP sector, therefore, will provide significant economic and social benefits.
- 1.3 Numerous Federal and State reviews of the NFP sector over the past decade have failed to establish workable solutions for NFPs. For example:
- (a) multiplicity of NFP regulation and regulators causes inconsistencies, duplication and confusion and is far more complex than the regulatory framework for business
  - (b) existing disclosure regimes do not provide information that is of real interest to NFP stakeholders – information such as the number of members and volunteers, financial position including sources of funding and fundraising expenses, any remuneration of directors and narrative information about the NFP's objectives and activities – which is exacerbated by the lack of an NFP-specific accounting standard,
  - (c) to incorporate, an NFP currently has to choose between an incorporated association – which limits the NFP's activity to one State – or a public company limited by guarantee – which carries with it the often prohibitive expense of a full annual audit, and
  - (d) the current tax treatment of NFPs is overly complex, and the recommendations of the Charity Definition Report (2001) have been ignored.
- 1.4 With proper underpinning the NFP sector would operate far more efficiently. Proper underpinning would take the form of:
- an independent national regulator for the NFP sector
  - improved NFP specific legal structure(s) that allows the benefits of incorporation with minimum expense and flexibility to met the needs of the diverse range of organisations within the sector, and
  - uniform fundraising and disclosure requirements based on a sliding scale, where disclosure obligations are proportionate NFP size.

- 1.5 The NFP sector needs the support and guidance of a ministerial portfolio; and to progress these vital reforms, a Not-for-Profit Regulatory Reform Taskforce should be established to report by no later than February 2010.
- 1.6 Without these long overdue reforms, Australia is in danger of lagging behind other nations in its support for the NFP sector.

## 2. Summary of PilchConnect recommendations

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### **Recommendation One** (see heading 5)

Previous Federal governments have made regulatory reform a priority in the 'for profit' sector, particularly small business. Given its economic and social significance, the NFP sector is similarly entitled to benefit from efficiencies that arise from harmonising regulation in the overall (COAG) pursuit of a 'seamless national economy' NFP sector reform is long overdue, yet it is vitally important and should be expressly included in COAG's current work plan.

### **Recommendation Two** (see heading 5)

With a political environment that encourages greater Federal–State cooperation, there is a unique window of opportunity for the introduction of a national regulatory NFP framework for the NFP sector that would ensure consistent fundraising, incorporation, data collection and disclosure requirements.

### **Recommendation Three** (see heading 5)

Other more contentious issues should be dealt with separately, for example by a specialist committee within the Henry Inquiry into taxation. Piecemeal reforms (such as separate State-based fundraising and incorporated associations reforms) will only exacerbate the problem.

### **Recommendation Four** (see heading 5)

We recommend that all NFP organisations should be considered in regulatory reform – not just charities and/or community welfare organisations. Regulation should not be based merely on legal forms, tax status or activity alone, but focus on the essential characteristics of NFP organisations. At the margins the definitions of NFP organisation/third sector organisations will be contested, but there is significant agreement on the core as demonstrated by the ABS Satellite Accounts project.

### **Recommendation Five** (see heading 6)

ABS figures show that the NFP sector contributes more to GDP than the communications industry and, if an imputation is made for the value of services provided by volunteers, its adjusted gross value of 4.9% of GDP is greater than that for government administration and defence (4.1%) and mining (4.6%). These figures do not take into account the qualitative contribution the NFP sector – for example, the role it plays in social inclusion and delivery of government services. PilchConnect submits that the NFP sector (not just the small sub-set of charities) justifies the expense that it will take to establish a new, independent, national, specialist NFP regulator.

### **Recommendation Six** (see heading 6)

The expense involved in establishing, and then providing on-going funding to properly resource a new regulator can be minimised by:

- exploring the use of the significant experience and resources of ASIC in on-line data collection, storage and searching, possibly in conjunction with a sector-managed resource such as Guidestar
- cost sharing with the States because of savings achieved by no longer needing separate regulators in each State and Territory

- cost savings achieved by fewer staff required in the ATO (their role will be to apply the revenue laws rather than having to determine eligibility), and
- cost savings to the NFP sector by a reduction in red tape and, therefore, greater capacity and efficiencies in delivery by NFPs of government / public funded services.

**Recommendation Seven** (see heading 6)

A national, NFP-specific regulator will serve:

- as the lynchpin for the introduction of national regulatory reform that encompasses fundraising, incorporation, data collection, and disclosure requirements
- more difficult and contentious issues such as charitable status for tax concessions to be handled in a measured and properly researched way
- will also bring Australia in line with other jurisdictions and, by being a broader model than a 'charity' commission, will show leadership to English, Scottish and NZ counterparts.

**Recommendation Eight** (see heading 7)

A national NFP regulatory framework must include fundraising laws. These laws need to be overseen by an independent national NFP regulator (see Recommendation 4). Without this legislative consistency and related regulatory oversight, the accountability and transparency that governments and the public are calling for will not be achieved.

**Recommendation Nine** (see heading 7)

NFP licensing issues (eg, fundraising regulation, charitable status and charitable gaming, excluding poker machines) should be included in the COAG's work towards mutual recognition of licensing standards<sup>1</sup> but this should only be an interim step to a truly national regime.

**Recommendation Ten** (see heading 8)

Existing NFP legal structures are confusing and none of them is entirely satisfactory. A new specialist NFP legal structure that allows an organisation to easily operate across all States and has a sliding scale of reporting obligations based on size is required. Flexibility can be given via electing in or out of various 'default' provisions. Migration from existing legal forms should be free or low cost and involve no, or only minimal, filing (eg, deeming provisions can be used). New legislation should be written in plain English and include a plain English guide for small NFP's (such as the one that exists for small business under the Corporations Act).

This is best way to implement a new NFP specific Act is by way of a referral of powers from the States. There is currently a window of opportunity to achieve this systemic reform thereby ensuring NFPs benefit in the same way business has since 2001.

**Recommendation Eleven** (see heading 8)

A sector-based support service such as PilchConnect has a role to play in providing free/low cost information, training and advice on issues such as the legal structure and consequent compliance obligations. Government need to support these sector-based initiatives especially in the absence of a pro active, NFP-specific regulator whose role includes providing these services.

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<sup>1</sup> For example, for mutual recognition of a certificate entitled a 'Certificate of Charitable Status' as suggested by NRT as a means of avoiding the need for multiple applications in each State and within different departments.

**Recommendation Twelve** (see heading 9)

A minimum standard of disclosure that is simplified and tailored to the NFP situation should be required of all NFPs because:

- it promotes good internal governance and risk management practices
- there is a strong public interest in the activities of NFP organisations and public disclosure provides a basis for information gathering by current and prospective stakeholders (eg, members, clients, donors, other funders and policy makers), and
- ‘hands on’ experience of PilchConnect (and others practitioners we have consulted) is that internal mechanisms of ensuring good governance (eg, relying on members) are, of themselves, often inadequate.

**Recommendation Thirteen** (see heading 9)

A tiered regime of reporting obligations based on size should be introduced. Full, audited accounts should only be required from larger NFPs. Those NFP’s with annual revenue of, say, less than \$500,000, should only be required to report in accordance with a standard that is simplified and tailored to the needs of NFP stakeholders (ie, a standard that is much less onerous than the current full accounting standards or proposed SME regime): see also Recommendation 18.

Filing fees should be modest and again, a sliding scale based on size should be introduced. NFPs with annual income of less than, say, \$100,000 should not be required to pay any fee.

However, more work needs to be done to test what are the most appropriate thresholds in the light of the size of those organisations currently on the ASIC and State-based incorporated associations’ registers.

**Recommendation Fourteen** (see heading 9)

Even if the requirements under the Corporations Act and the State-based incorporated associations Acts are improved (ie, simplified more appropriate information is filed by small NFPs and full accounts are lodged by larger NFPs), this reform will be effectively negated if government (or other) funding agreements are not changed to mirror this approach (ie, they continue to place more onerous financial reporting obligation on small NFPs). PilchConnect, therefore, urges the Senate Inquiry to ensure this issue is:

- pursued across all Federal government departments, and
- included in COAG’s Standard Business Reporting Agenda.<sup>2</sup>

**Recommendation Fifteen** (see heading 9)

The work of the Standard Chart of Accounts project (Queensland University of Technology, The Australian Centre for Philanthropy and Nonprofit Studies) should be introduced for all Commonwealth and State government grant submissions and acquittals to cut paperwork compliance costs and increase the usability of information. This is an excellent initiative that is particularly important in the absence of a NFP-specific accounting standard.

**Recommendation Sixteen** (see heading 9)

Given that NFPs and the information needs of their stakeholders are so different to business (small and large), the need for a NFP-specific accounting standard is great.

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<sup>2</sup> COAG [http://www.coag.gov.au/coag\\_meeting\\_outcomes/2008-07-03/index.cfm#fragment-3](http://www.coag.gov.au/coag_meeting_outcomes/2008-07-03/index.cfm#fragment-3)

Such a standard would underpin greater accountability and transparency, and many issues related to comparison of, for example, fundraising expenses would be addressed. It is also a necessary first step in improving disclosure via sector-based initiatives such as Guidestar. The Senate Inquiry is, therefore, urged to support the development by the Australian Accounting Standards Board of an NFP industry-specific standard. An NFP specific standard needs to mesh with broad industry standards and place more emphasis on the narrative account of how organisations are achieving their stated objects.

**Recommendation Seventeen** (see heading 9)

In relation to the interface between data submitted to the regulator and access by the public, we recommend the Not-for-Profit Regulatory Reform Taskforce (Recommendation 27) should consider whether the new regulator (Recommendation 4) should have sole responsibility for this role, or if ASIC's database collection and searching systems can be utilised and/or the Guidestar model should be supported and funded.

**Recommendation Eighteen** (see heading 9)

PilchConnect urges that any reform suggestions about reporting obligations be assessed against the over-arching principle that the cost of compliance should not exceed the benefit. There is a need to strike an appropriate balance between legitimate public and stakeholder interest in disclosure, on the one hand, and the relative cost (based on the size of the organisation) on the other. For example, very small membership-serving organisations should have the most minimal annual reporting obligations such as the regulator sending them a pre-completed return (based on details that currently appear on the register) with the only requirement being for these details to be checked, some very basic information added (eg, number of members and volunteers, brief description of activities undertaken in last year, total income) and the return lodged on-line or by post with no fee payable.

**Recommendation Nineteen** (see heading 10)

Any taxation reform should be underpinned by a rational policy basis for charity and NFP taxation exemption and other fiscal incentives. The current system no longer has this underpinning.

**Recommendation Twenty** (see heading 10)

In broad terms, PilchConnect endorses the recommendations made by *Inquiry into the Definition of Charity* 2001 and urges the Senate Inquiry to refer the recommendations of the *Inquiry into the Definition of Charity* to a specialist committee for implementation.

**Recommendation Twenty One** (see heading 11)

The ABS should receive long term funding to compile and update baseline data on the whole of the NFP sector. This provides an essential part of the evidence base for policy making and public understanding of the size, social and economic value of the sector.

**Recommendation Twenty Two** (see heading 11)

In recognition of the time and resources involved and the need to consult widely within the NFP sector, government should provide funding to peak bodies such as the NRT, so there is capacity to engage in the reform process as meaningful partners and stakeholders.

**Recommendation Twenty Three** (see heading 11)

Sector-run support services (such as PilchConnect) that assist NFPs to identify, understand and implement better governance and accountability practices should receive core government support and funding.

**Recommendation Twenty Four** (see heading 11)

In order to have a focal point within government to promote the needs of the NFP sector, the existing position of 'Parliamentary Secretary for Social Inclusion and the Community Sector' should be recast to encompass the broader NFP sector and also elevated to a ministerial position. Given the NFP sector contributes, with imputation for volunteer time, more to GDP than the mining sector<sup>3</sup>, this recommendation is not unreasonable.

**Recommendation Twenty Five** (see heading 12)

The Senate Inquiry provides an opportunity to spearhead those reforms that are largely non-contentious (fundraising, incorporation, data collection processes, and disclosure requirements).

If these reforms are supported by oversight from a new, independent NFP regulator, they will be of significant and lasting benefit to the NFP sector as a whole. We ask the Senate Inquiry recommend these reforms in its report to Parliament.

**Recommendation Twenty Six** (see heading 12)

The Senate Inquiry is urged to progress the recommendations made by PilchConnect (and no doubt others) by recommending in its report to parliament that a 'Not-for-Profit Regulatory Reform Taskforce' be established and properly resourced. In particular, the work of Taskforce should include:

- working with COAG to ensure the issue of a 'seamless national' regulatory system is introduced for the NFP sector for issues of incorporation, fundraising, recognition of charitable status, and a standard chart of accounts for funding and service agreements
- scoping savings and costs for the creation of new independent regulator, including investigating possible ways of using ASIC's experience and office network to create a central, freely accessible, on-line NFP database
- consider new models for a flexible legal structure(s) for NFPs together with the most appropriate reporting obligations based on a sliding scale according to organisational size, and
- consider ways in which a central point can be created within the Federal government with responsibility for the NFP sector.

This taskforce should report to an experienced and knowledgeable reference group comprised of people with NFP expertise from government, academia and NFP spheres. The Taskforce should be required to report back to the Senate by 1 February 2010.

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<sup>3</sup> ABS 2001, <http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/8106.0Main+Features32006-07>

### 3. Introduction

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- 3.1 This submission is made by the Public Interest Law Clearing House's specialist legal service for not-for-profit community organisations, **PilchConnect**. We welcome the opportunity to comment on the Senate Standing Committee on Economics' Inquiry into the Disclosure Regimes for Charities and Not-for-Profit Organisations (the **Senate Inquiry**). Given our experience on the issues raised by the terms of reference (from the legal profession, academic and grassroots perspectives), we look forward to an opportunity to present at the Senate Inquiry's Melbourne hearings.
- 3.2 While there have been previous inquiries and research into many of the discrete issues affecting the sector (eg, definition of charity 2001) or into discrete parts of the sector (eg, community welfare organisations 1995), the Senate Inquiry represents the first opportunity for an overarching consideration of the regulatory issues that have an impact on the efficiency and accountability of the not-for-profit sector (**NFP**) as a whole. This consideration is long overdue. PilchConnect hopes that the convening of the Senate Inquiry reflects strong parliamentary support for the NFP sector – a sector that makes a significant contribution to Australia's economy and forms the bedrock of our civil society.
- 3.3 In this submission PilchConnect draws on:
- (a) the significant body of existing work undertaken by a range of academic, government and other inquiries (to assist the Senate Inquiry these are documented in Appendix 1 together with a brief chronology)
  - (b) PILCH's experience of over 14 years of brokering pro bono legal assistance for a wide variety of NFP organisations on a broad range of regulatory and governance issues, and
  - (c) PILCH's recent research into the needs of NFPs for legal and legally related information (relevant extracts from our Research Report, which include references to research conducted by Volunteering NSW, are contained in Appendix 2).<sup>4</sup> This research informed the recent establishment within PILCH of PilchConnect, as a specialist legal service for NFP's (see headings 4.4 - 4.6).
- 3.4 This submission covers each of the three areas outlined in the Senate Inquiry's terms of reference (and many of the questions outlined in the background paper). We offer comment under the following headings:

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<sup>4</sup> For copy of full PILCH Research Report into the Establishment of a Not-for-Profit Legal Service, May 2007 see [http://www.pilch.org.au/html/s02\\_article/article\\_view.asp?id=429&nav\\_cat\\_id=255&nav\\_top\\_id=66](http://www.pilch.org.au/html/s02_article/article_view.asp?id=429&nav_cat_id=255&nav_top_id=66)

- national regulatory framework for NFPs (see heading 5) – most of the following points flow from this overarching issue
- national, independent, specialist NFP regulator (see heading 6)
- nationally consistent fundraising laws (see heading 7)
- improved specialist NFP legal structure (see heading 8)
- improved reporting and disclosure (see heading 9)
- simplification and reform of taxation concessions (see heading 10), and
- support necessary to promote best practice governance and accountability (see heading 11).

Under each heading we outline key issues, summarise relevant data/research (including our case work experience), and make recommendations for the Senate Inquiry to consider.

- 3.5 Consultations within the NFP sector suggest there is a considerable support for our recommendations, in particular, the need for a national regulatory framework.

## 4. About PILCH and PilchConnect

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4.1 The Public Interest Law Clearing House (Vic) Inc (PILCH) is a leading independent, Victorian, not-for-profit organisation that is committed to furthering the public interest by improving access to justice and protecting human rights. It does this by facilitating the provision of pro bono legal services and undertaking law reform, policy work and legal education. PILCH's current annual budget is \$1.7M and we have a staff of 20 eft.

4.2 PILCH was founded in 1994 and is now Australia's largest provider of pro bono legal services. This assistance is provided to marginalised and disadvantaged individuals and to NFP organisations. PILCH provides its clients with a unique 'one-stop shop' by co-ordinating five assistance schemes and services:

- the Public Interest Law Scheme (funded by the members of PILCH)
- the Victorian Bar Legal Assistance Scheme
- the Law Institute of Victoria Legal Assistance Scheme
- PilchConnect (for NFPs – see heading 4.4)
- Seniors Rights Victoria (in partnership with other NFP organisations), and
- the Homeless Persons' Legal Clinic (an outreach service offered at 11 locations).

PILCH is also a co-founder (and is co-located with) the Human Rights Law Resource Centre.

4.3 While PILCH's activities are focused in Victoria, much of our law reform work has national application and some of the services developed by PILCH have been replicated by our counterparts in other States (eg, the Homeless Persons' Legal Clinic model).

4.4 PilchConnect is a new specialist legal service for NFP community organisations established by PILCH in November 2007. It is being piloted in Victoria with a view to a national rollout. PilchConnect's mission is to promote and support the highest possible standards of governance by NFP organisations so that their economic and social contribution to Australian society is maximised.

4.5 PILCH is itself an NFP and the **PilchConnect service represents a sector-based response to increasing demand by NFPs for legal assistance**. The service provides free or low cost assistance to NFPs on a wide range of legal and legally-related issues. PilchConnect's services include:

- a monthly seminar program for NFPs on legal issues relevant to NFPs, such as incorporation, governance, volunteers, tax status and concessions, fundraising and regulatory compliance
- a specialist NFP legal web portal (to be launched in September 2008) that maps and links existing, up-to-date and reliable legal information, as well as providing a range of new plain language resources under the framework of the 'life cycle' of an NFP
- a telephone advice service (forthcoming 2008-2009), and
- a legal referral service, whereby eligible 'public interest' NFPs that have complex legal issues are matched with PILCH member law firms who are willing to provide pro bono legal assistance.

4.6 Our NFP service delivery experience informs PilchConnect's law reform work on issues of importance to the NFP sector (eg, submission to the Federal Treasury Discussion Paper on 'Financial Reporting of Unlisted Public Companies' 2007<sup>5</sup> and submissions to both Victorian government reviews, 2007).<sup>6</sup>

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<sup>5</sup> PILCH submission to Federal Treasury Discussion Paper on 'Financial Reporting of Unlisted Public Companies' (2007)

[http://www.pilch.org.au/html/s02\\_article/article\\_view.asp?id=436&nav\\_cat\\_id=232&nav\\_top\\_id=79](http://www.pilch.org.au/html/s02_article/article_view.asp?id=436&nav_cat_id=232&nav_top_id=79)

<sup>6</sup> PILCH submissions to State Services Authority Review into Not-for-Profit Regulation (2007) see [http://www.pilch.org.au/html/s02\\_article/article\\_view.asp?id=430&nav\\_cat\\_id=232&nav\\_top\\_id=79](http://www.pilch.org.au/html/s02_article/article_view.asp?id=430&nav_cat_id=232&nav_top_id=79) and PILCH submission to the Strengthening Communities Organisations Project (2007) see [http://www.pilch.org.au/html/s02\\_article/article\\_view.asp?id=434&nav\\_cat\\_id=232&nav\\_top\\_id=79](http://www.pilch.org.au/html/s02_article/article_view.asp?id=434&nav_cat_id=232&nav_top_id=79)

## 5. National regulatory framework for NFPs

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### A. Key points

- 5.1 Official statistics show that the NFP sector plays a significant role in Australia's economic well being (see ABS 2001, ABS 2008 and '*Giving Australia Report*' 2005).<sup>7</sup> The sector also makes a vital social contribution (see Lyons 2001).<sup>8</sup> The NFP sector touches every Australian – whether as a 'recipient' (walking in a park with plantings by a local land care group) or as a 'giver' (donating money or time).<sup>9</sup>
- 5.2 There is overwhelming evidence from multiple government, independent and academic inquiries and research,<sup>10</sup> that:
- the current regulatory framework for NFPs is more complex than for business<sup>11</sup> and not tailored to properly support and oversee the sector, and
  - the current mix of Federal and State regulation is piecemeal, confusing and inconsistent.
- Consequently the NFP sector's regulatory underpinning is precarious – a risk both for government and the sector, each of which rely on public confidence.
- 5.3 Even with the best intentions, the combination of regulatory complexity, limited support services and the absence of a pro-active regulator, means that many small to medium NFPs cannot even readily ascertain (and therefore understand) their compliance obligations: see cases study, headings 5.18 and 5.19.
- 5.4 There is no free, single, reliable and searchable on-line NFP database that contains at least the most basic information (eg, contact details, activities and size): see heading 9.5.
- 5.5 Aside from fragmented State-based reforms to fundraising and incorporated associations legalisation, reform for the NFP sector has either been overlooked or put in the 'too hard' basket because certain aspects touch on politically

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<sup>7</sup> For ABS figures: <http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/8106.0Main+Features32006-07> It is important to note that the ABS figures relate only to NFPs that have registered with the ATO for an ABN; *Giving Australia Report*, a major research report commissioned by the (then) Department of Family and Community Services, on behalf of the Prime Minister's Community Business Partnership, released 10 October 2005: [http://www.partnerships.gov.au/philanthropy/philanthropy\\_research.shtml](http://www.partnerships.gov.au/philanthropy/philanthropy_research.shtml)

<sup>8</sup> Lyons, Mark *Third Sector: The contribution of nonprofit and cooperative enterprises in Australia*, Allen & Unwin, Sydney, 2001, pp 5 - 11. *Note*: This book is the leading Australian text on the NFP sector but the data should be read in light of more recent ABS figures.

<sup>9</sup> See *Giving Australia Report* see [http://www.partnerships.gov.au/philanthropy/philanthropy\\_research.shtml](http://www.partnerships.gov.au/philanthropy/philanthropy_research.shtml); Latest ABS figures (2008) - 2.4 million Australians volunteered in the NFP sector in 2006/07.

<sup>10</sup> See Appendix 1 to this submission.

<sup>11</sup> Eg, there are more 20 different ways to incorporate as NFP: see Nonprofit Regulation Reform Program: *An initial statement by the National Roundtable of Nonprofit Organisations*, Released May 2004: <http://www.nonprofitroundtable.org.au>.

sensitive issues. Worse still, some regulatory reform has unintentionally made matters worse.<sup>12</sup>

- 5.6 While over the last decade, Australia has gradually fallen behind globally converging regulatory standards for NFPs, the Rudd government has made commitments both pre-<sup>13</sup> and post- election to improving the regulatory environment for NFPs:

*“The Australian Government wants a strong and vibrant community sector because this sector is vital to the delivery of our ambitious Social Inclusion agenda. ... This reveals two priorities for reform: strengthening public confidence in the not-for-profit sector and celebrating its achievements through strengthening accountability mechanisms and reducing the burden imposed on the sector of unnecessary red tape.”*

*“Regulatory reform programs to date have generally ignored the sector. .... Inconsistencies exist across jurisdictions, making it a difficult maze for community organisations to navigate.”<sup>14</sup>*

- 5.7 The overall regulatory issue is not specifically mentioned in the Council of Australian Governments’ (COAG’s) national economic reform agenda but, given the significance of the sector, it clearly should be. We note that Senator Ursula Stephens has stated that it will be part of COAG’s economic reform agenda, but this must be formalised.<sup>15</sup> Inclusion in COAG’s work plan for 2008-2009 would be entirely consistent with the commitments COAG has already made to national regulatory reform.<sup>16</sup>
- 5.8 As Federal-State cooperation is key to introducing a national framework, it is of note that the Victorian government made a 2006 election promise “to cut red tape and simplify regulation for the NFP sector”<sup>17</sup> and, with more recent Victorian government reports,<sup>18</sup> has indicated an appetite for continuing to champion this issue.
- 5.9 The particular NFP regulatory reforms that require a national approach are:

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<sup>12</sup> Eg, changes to the Corporations Act that abolished objects clauses (see Woodward, S “Ultra Vires” Over Simplified - Changes to Company Powers Under the Second Corporate Law Simplification Bill – May 1997, Companies & Securities Law Journal, LBC ) and recent fringe benefit tax proposals that had to be amended at the last minute because of the unintended but significant impact on the NFP sector.

<sup>13</sup> “Given the sector’s critical role in combat disadvantage, a better balance needs to be achieved between accountability and the regulatory and administrative burden.”

[http://www.alp.org.au/download/now/071122\\_social\\_inclusion.pdf](http://www.alp.org.au/download/now/071122_social_inclusion.pdf)

<sup>14</sup> Extracts from speeches by Senator Ursula Stephens, Parliamentary Secretary for Social Inclusion and the Community Sector, Fundraising Institute Conference and ACOSS Congress 2008

<sup>15</sup> Senator Stephens’ speech to the ACOSS NFP compact consultations in Melbourne on 22 July 2008.

<sup>16</sup> See COAG communiqué from its 3 July 2008 meeting.

<sup>17</sup> “To date the regulatory framework has not kept pace with the importance of the sector and the need for modern, flexible governance while maintaining accountability. Not-for-profit associations fall between the complexities and costs associated with the Corporations Act and an out of date Incorporated Associations Act. Labor will lead a national charge to work with not-for-profit and community organisations to cut red tape and streamline legislation. We will develop model legislation which helps rather than hinders community and not-for-profit organisations.” See (5) <http://www.alpvictoria.com.au/media/docs/Stronger-Communities-dd6143db-16b2-4e7a-83e3-765d15d37103.pdf>

<sup>18</sup> See State Services Authority *Review into Not-for-Profit Regulation* (2007); *Strengthening Communities Organisations Project* (2007); Victorian Government’s *Strengthening Community Organisations Action Plan* (2008) – referenced in Appendix 1.

- fundraising and charity gaming (excluding poker machines)
- incorporation
- disclosure and reporting regimes and related data collection, and
- endorsement as a 'charity' for the purposes of Federal and State concessions.

To oversee this national regulatory framework, a new independent NFP-specific regulator is needed. Each of these specific areas is covered in more detail later in our submission.

## **B. Relevant data / research**

5.10 Attached as Appendix 1 (together with a brief chronology) are a list of the numerous independent reports, government-initiated inquiries and academic research into aspects of NFP regulation. These materials provide evidence of the comprehensive research demonstrating that reform of the NFP sector is required. Set out below are excerpts that highlight the main issues with current NFP regulation.

5.11 (1995) The Industry Commission report on *Charitable Organisations in Australia* (the **Industry Commission Report**) states:

*"The sector generally affirmed its commitment to account to the community for its use of resources. However, it stressed the difficulties it faces because of inadequate resourcing for this task. Participants also cited inconsistent and overlapping reporting requirements of governments which add to costs and inefficiencies, and are a source of great frustration to them.*

*Public accountability requirements of CSWOs across Australia are currently varied and ill-defined. This is partly due to the diverse legal structure of CSWOs; the lack of specific accounting standards for the sector...."<sup>19</sup>*

Unfortunately, this statement is still relevant 13 years after it was published.

5.12 (February 2004) The Manager of PilchConnect, Ms Susan Woodward, conducted a major Australian Research Council funded project while a member of the Centre for Corporate Law and Securities Regulation, University of Melbourne. Philanthropy Australia was an industry partner and the research involved a national survey of all NFPs incorporated as companies limited by guarantee, with over 1,700 replies. In the final report titled "*A Better Framework: reforming not-for-profit regulation*" Woodward S & Marshall S (**Woodward & Marshall Report**), the authors state:

*"The existing two-tiered regulatory system (State/ Territory-based incorporated associations and a Federal company law regime) is inefficient, costly and does not meet the needs of small or large NFPs. The special needs of NFPs that are incorporated as companies limited by guarantee have been overlooked in changes to the Corporations Act. Their particular needs have sometimes been*

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<sup>19</sup> See Industry Commission 1995, *Charitable Organisations in Australia*, Report No. 45, AGPS, 1995, p XLII,

*prejudiced by changes made at the behest of, or for the benefit of, business. Improvements in the legislative regime are long overdue.*<sup>20</sup>

- 5.13 (May 2004) The National Roundtable for Nonprofit Organisations (**NRT**), the peak national forum for the full gamut of NFPs in Australia, states:

*“One thing that is certain is that the existing legal framework and regulatory environment of the nonprofit sector is in need of fundamental overhaul. It is time to provide a clear, consistent and coherent framework based on sound public policy considerations....*

*Significant reform and streamlining of Australia’s nonprofit 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.*<sup>21</sup>

- 5.14 (2005) The Allens Consulting Group report, *Improving Not-for-Profit Law and Regulation* (the **Allens Report**), August, commissioned by the (then) Department for Victorian Communities states:

*“The complexities, inconsistencies and unsuitabilities of the current regulatory framework mean that it represents more of a barrier to the relationship between the not-for-profit sector and the community than a support.”<sup>22</sup>*

- 5.15 (2007) In relation to Australia’s international standing, Professor Myles McGregor-Lowndes (Australian Centre for Philanthropy and Nonprofit Studies, Queensland University of Technology) states that:

*“In comparison to England, Wales, Ireland, Canada, New Zealand and Singapore, Australia is now lagging in its nonprofit regulatory environment. The direct result is that in the global market for philanthropic funds, Australian organisations are at a competitive disadvantage because of the confusing and ineffective regulatory framework.*

*The current regulatory framework constrains the ability of nonprofit organisations to provide an effective and efficient alternative to government or for-profit organisations. The current regulatory environment also hinders the ability of nonprofit organisations to provide goods and services, create social capital and contribute to civil society.*

*In addition, Australia’s recent history of failure to act in any meaningful way to reforms as suggested by the failure to act on the recommendations of the Charities Definition Inquiry, compound the problems as others move rapidly ahead.”<sup>23</sup>*

- 5.16 (2007-2008) The confusing nature of the regulatory burden generally in Australia (both for NFPs and for-profit organisations) was also acknowledged in the communiqué from the recent COAG meeting:

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<sup>20</sup> See Woodward, S & Marshall, S ‘A Better Framework: reforming not-for-profit regulation’, The University of Melbourne, Centre for Corporate Law and Securities Regulation, 2004, p3t: <http://cclsr.law.unimelb.edu.au/go/centre-activities/research/reforming-not-for-profit-regulation-project/> p 3.

<sup>21</sup> See Nonprofit Regulation Reform Program: *An initial statement by the National Roundtable of Nonprofit Organisations*, Released May 2004, p 2 and 8: <http://www.nonprofitroundtable.org.au>

<sup>22</sup> See Executive Summary, [http://www.dvc.vic.gov.au/Web14/dvc/rwpgslib.nsf/GraphicFiles/Allen+Consulting+Report+DVC/\\$file/Allen+Consulting+Report+for+DVC.pdf](http://www.dvc.vic.gov.au/Web14/dvc/rwpgslib.nsf/GraphicFiles/Allen+Consulting+Report+DVC/$file/Allen+Consulting+Report+for+DVC.pdf)

<sup>23</sup> See ‘Driving forward whilst looking into the rear vision mirror’ Professor Myles McGregor-Lowndes, *Philanthropy Australia Journal* Summer 2007, Issue 67.

*“COAG acknowledged that Australia’s overlapping and inconsistent regulations impede productivity growth...By moving towards a seamless national economy through the reform of business and other regulation, COAG’s reforms...will make life simpler for businesses [we would add NFP’s] and consumers, while continuing to provide the necessary protections and access for consumers and the community.”<sup>24</sup>*

- 5.17 (2008) Recent Australian Taxation Office (ATO) comments echo the general willingness of NFPs to comply, but they lack of knowledge about what their obligations are:

*“Non-profit organisations show a strong desire to get it right, but often have a low level of knowledge about how the tax and superannuation systems work. Where compliance issues arise, they are mainly due to mistakes or a lack of knowledge.*

*Many non-profit organisations have limited resources for managing their tax and superannuation affairs and rely heavily on volunteers (who traditionally have a high turnover rate). Only around half of non-profit organisations have their income tax returns prepared by tax agents, which is low compared with other taxpayer segments.”<sup>25</sup>*

- 5.18 From our 14 years of experience of brokering pro bono legal assistance for NFPs, it is apparent that many NFPs find the regulatory framework confusing and burdensome. This is especially so for smaller groups that rely heavily or exclusively on volunteers. The following case highlights how this complexity and confusion can work as a barrier to engaging volunteers and supporting their contribution.

(Case study on following page)

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<sup>24</sup> Council of Australian Governments’ Meeting ‘Communiqué’ Commonwealth of Australia, 3 July 2008. [http://www.coag.gov.au/coag\\_meeting\\_outcomes/2008-07-03/docs/communiqué20080703.pdf](http://www.coag.gov.au/coag_meeting_outcomes/2008-07-03/docs/communiqué20080703.pdf)

<sup>25</sup> See ATO 2008/2009 Compliance Program, Not-for-Profit organisations <http://www.ato.gov.au/corporate/content.asp?doc=/content/00155156.htm&page=63&H63>

**CASE STUDY ONE:**

Over the past 18 years I have been a paid worker in a not-for-profit. The whole sector has become far more professional in its approach to volunteer management. Where possible and practicable, our practices, policies and procedures mirror those for employees. Managers of volunteers are in many ways parallel human resource managers, particular in larger NFPs. However, unlike HR managers, managers of volunteers do not have access to the same level of resources to guide our work, nor do we have access to the range of supports and up-to-date information.

The legal aspect of volunteer engagement is an emerging dimension to our role, and one which is increasingly confusing. To give the most basic example, managers of volunteers are confused when it comes to dismissing volunteers - are volunteers subject to the same laws in relation to dismissal as employees? Can we or our NFPs be sued for unfair dismissal of a volunteer? Do discrimination laws apply?

Volunteer insurance has also been highlighted in the media in the last decade, with a significant rise in the cost of public liability insurance pushing many smaller NFPs and sporting clubs to the edge. For many, it was simply not financially viable to continue. Personal accident insurance coverage for volunteers is still a confusing area for many, mainly due to variations in the definition of a volunteer and who is covered by insurance. One charity I was involved with identified that it had 'volunteers', 'supporters' and 'event participants', depending on the level of risk and the control that the charity could exert over the risk.

Screening volunteers is a relatively recent development for many NFPs. In Victoria, there is now a confusing set of requirements around police checks and the new 'Working with Children Checks' (WCC). In some cases these checks (one or both) are mandatory; sometimes it is a question of what is best practice given the role the volunteer performs. It can be an expensive exercise for some NFPs, with a standard police check costing about \$14, although WCCs are free for volunteers. There are other differences between the two. WCCs are issued to individuals rather than agencies and 'belong' to the individual involved, so are transferable if the individual volunteers for more than one agency. However, police checks are generally not transferable unless the individual volunteer has applied and paid for his/her own. Normally the NFP applies and pays for police checks, so if an individual is volunteering for more than one agency (which is common), then each agency bears the expense of a police check for that one individual. This confusion and duplication is senseless and costly and could be avoided.

*Ms Hazel Maynard, experienced volunteer co-ordinator and Board Member, Volunteering Victoria*

- 5.19 The following example highlights the serious problems fragmentation between Federal and State regimes can cause (name withheld on request).

**CASE STUDY TWO:**

PilchConnect was approached by **XYZ**, a not-for-profit community organisation (company limited by guarantee) that specialises in providing transitional and other low cost rental housing services in Victoria.

As a charitable organisation, XYZ had applied to the Australian Tax Office (**ATO**) pursuant to the *Income Tax Assessment Act 1997* (ITAA) and had received endorsement as a public benevolent institution (**PBI**) (with access to GST concession, FBT exemptions and income tax exemptions) and since 2000 had received endorsement as a deductible gift recipient (**DGR**).

In 2004 the Victorian Parliament passed amendments to the *Housing Act 1983* (Vic) in relation to housing agencies. The new Schedule 7 of the *Housing Act* required housing agencies to adopt specific wording in their constitution (objects and powers) if they wanted to be registered as a "registered housing association" or "registered housing provider".

As XYZ's core business is housing and it wanted to keep its rental housing stock, it sought *pro bono* legal assistance (via PilchConnect) to make the necessary amendments to its constitution, so that it could register as a "registered housing provider" under the amended *Housing Act*.

PILCH assisted XYZ by brokering pro-bono legal assistance to make the amendments. When the law firm re-drafted XYZ's constitution to comply with the *Housing Act*, it submitted the draft constitution to the ATO. The ATO advised that the amended constitution would not meet the tax Act requirements and threatened to revoke XYZ's status as a PBI, as well as its endorsement as a DGR. This news was alarming to XYZ, who were unsure whether their organisation would be viable if they lost their tax concessional status.

The law firm then worked with XYZ to navigate the difficult path of drafting constitution clauses that would comply with both state (housing) and federal (taxation) laws. After many hours of work, XYZ was ultimately successful in drafting clauses acceptable to both jurisdictions.

5.20 As illustrated by this case example, the lack of coherent and appropriately 'meshed' State-Federal regulation can jeopardise the work (and possibly the entire existence) of NFP community organisations that provide essential services to marginalised and disadvantaged members of the community. It also shows the complex legal needs of NFP organisations, which – unless they are able to access free legal assistance – could result in them spending considerable amounts of their scarce resources on legal fees, just to ensure regulatory compliance. This can, in turn, rebound against them in the public arena as 'high administrative costs'.<sup>26</sup>

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<sup>26</sup> As the *Choice* (2008) article (referred to in the Discussion Paper) shows.

### **C. *PilchConnect recommendations***

#### **Recommendation One**

Previous Federal governments have made regulatory reform a priority in the 'for profit' sector, particularly small business. Given its economic and social significance, the NFP sector is similarly entitled to benefit from efficiencies that arise from harmonising regulation in the overall (COAG) pursuit of a 'seamless national economy' NFP sector reform is long overdue, yet it is vitally important and should be expressly included in COAG's current work plan.

#### **Recommendation Two**

With a political environment that encourages greater Federal–State cooperation, there is a unique window of opportunity for the introduction of a national regulatory NFP framework for the NFP sector that would ensure consistent fundraising, incorporation, data collection and disclosure requirements.

#### **Recommendation Three**

Other more contentious issues should be dealt with separately, for example by a specialist committee within the Henry Inquiry into taxation. Piecemeal reforms (such as separate State-based fundraising and incorporated associations reforms) will only exacerbate the problem.

#### **Recommendation Four**

We recommend that all NFP organisations should be considered in regulatory reform – not just charities and/or community welfare organisations. Regulation should not be based merely on legal forms, tax status or activity alone, but focus on the essential characteristics of NFP organisations. At the margins the definitions of NFP organisation/third sector organisations will be contested, but there is significant agreement on the core as demonstrated by the ABS Satellite Accounts project.

## 6. National, independent, specialist NFP regulator

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### A. Key issues

- 6.1 ABS figures<sup>27</sup> show that the NFP sector contributes more to GDP than the communications industry and, if an imputation is made for the value of services provided by volunteers, its adjusted gross value of 4.9% of GDP is greater than that for government administration and defence (4.1%) and mining (4.6%). Despite this there is currently there is no single regulator for the NFP sector. We submit that this is a major hurdle to initiating and implementing the national regulatory framework needed for the sustainability, innovation and accountability of Australia's NFP sector.<sup>28</sup>
- 6.2 Currently there is, in effect, de facto regulation of the sector by the ATO because it determines an organisation's charitable or other eligibility for various taxation concessions. This is combined with regulation by a mix of State regulators and the Australian Securities and Investments Commission (**ASIC**), depending on the organisation's legal structure.
- 6.3 This mix of regulators is unsatisfactory. The ATO have repeatedly stated that they do not want this role.<sup>29</sup> We agree that their role should be limited to applying the tax concessions to those organisations that are *independently* determined as falling within the relevant NFP categories. In our view, any suggestion that the ATO's current role of determining charitable status, or (worse still) that its role should be expanded to act as a regulator of the sector, is not sound. The broader role of building the public's trust by ensuring the fidelity of NFP organisations should not be constrained by the ATO's primary mission of protecting Australia's revenue base.
- 6.4 Similarly, we contend that expanding the role of ASIC is not desirable. Locating regulation of the NFP sector within ASIC will be constrained by a regulatory environment specifically devised 'for-profit' (business) organisations. ASIC have shown no appetite for any NFP regulatory role. If this role was conferred on ASIC, it would need to develop new expertise and would required significant additional resources. Therefore, this may not make it a significantly cheaper option than establishing a specialist regulator.

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<sup>27</sup> ABS Satellite Account 2001

<http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/8106.0Main+Features32006-07>

<sup>28</sup> See heading 5, National regulatory framework.

<sup>29</sup> See ATO submission to *Inquiry into the Definition of Charities and Related Organisations*, 2001. Final report and all public submissions available at: <http://www.cdi.gov.au>

- 6.5 We submit that a new, independent, national, specialist NFP regulator is required. We acknowledge that such a regulator will need significant resources – an under-resourced body would make the present situation even worse.
- 6.6 There will, however, be some savings in a transition from multiple State-based regulators and extra ATO staff. It may be possible to limit expenditure by utilising the on-line data collection, management and search expertise that ASIC has developed (and recently upgraded) together with their regional office network. This data may be able to feed into a NFP-specific database, such as the Guidestar model: see also heading 9.5.
- 6.7 We further submit that, in keeping with recognition of the diversity of the sector, an independent regulator should take a broad perspective of what an NFP does and how it is constituted by moving away from the strict ‘charity commission’ model.

## **B. Relevant data /research**

- 6.8 The *Inquiry into the Definition of Charity* 2001 (the **CDI Report**) recommended the establishment of a new administrative body to oversee ‘charities and related entities’. The following quotes from the CDI Report encapsulate the issues (our emphasis added)

*“A large number of submissions expressed support for the establishment of an independent body to take on a variety of roles including: the registration of charitable organisations; ongoing monitoring and regulation of their activities; responsibility for official interpretation and development of the common law definition of charity; and provision of advice and guidance as required to the sector and administrators. Some have also suggested there is a need for an independent body to have overall policy responsibility for the balanced development and effectiveness of the sector generally.” ...*

*“The Committee acknowledges that establishing a body with wider functions would imply the adoption of a significantly stronger public policy interest in the operation and public accountability of the charitable and related sector in Australia than is currently the case. Nevertheless, the Committee considers that, having regard to the growing significance of the sector in Australia’s social and economic life, and governments’ recognition of the sector’s importance, it is timely for governments to consider such a step.” ...*

*“Given the significant expansion of the sector’s role in Australian society, it is important that the role of the sector be more clearly enunciated and understood. The establishment of an independent administrative body would help provide the basis for development of a national policy framework. This approach could be extended to encompass the whole of the not-for-profit sector.”<sup>30</sup>*

- 6.9 In relation to the experience of the ATO as the de facto regulator, the CDI Report confirms:

*“A strong theme among submissions was that it is inappropriate for revenue agencies at both the Commonwealth and State levels to be responsible for*

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<sup>30</sup> *Inquiry into the Definition of Charities and Related Organisations*, 200, Chp 25: <http://www.cdi.gov.au>

*determining the charitable status of individual organisations. Many argued that this can result in a conflict of interest, in that the agencies' concern for their primary responsibility (to protect the revenue) would tend to outweigh their interest in granting an organisation charitable status, and therefore eligibility for taxation concessions.*<sup>31</sup>

6.10 Survey results from Woodward & Marshall (2004) affirm the CDI Report's observation about sector support. These results are of particular relevance given that the survey participants were those NFPs with experience of ASIC as a regulator:

- 54% were in favour of implementing the CDI Inquiry recommendation about the establishment of a new administrative body for charities and related entities and this figure rose to 74% when the 'not sure' group (36%) were excluded,<sup>32</sup> and
- 70% believed "that the *Corporations Act 2001* (Cth) and the way it is implemented by ASIC is more appropriate to 'for-profit' than NFP companies" and 54% that "ASIC was inaccessible to non-business people".<sup>33</sup>

6.11 NFP sector support for a specialist regulator is also reflected in the NRT Reform Statement:

*"Proposals for a national regulator and regulatory frameworks will facilitate capital raising and support for nonprofit organisations and improve trust in and facilitation of nonprofit enterprise."*<sup>34</sup>

6.12 Australia's leading NFP academics (Lyons and McGregor-Lowndes) are in favour of the creation of a new specialist regulator.<sup>35</sup>

6.13 At the 20/20 Summit, the final '*Report of the Strengthening Communities, Supporting Families and Social Inclusion Group*' tabled an 'Idea' to create a single national office for what they termed the 'first sector' being a regulatory regime with a single entry point for all organisations encompassing ASIC, the Office of Fair Trading and a peak body for the sector.<sup>36</sup>

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<sup>31</sup> *Inquiry into the Definition of Charities and Related Organisations*, 200, Chp 25, pp 280 - 281: <http://www.cdi.gov.au>

<sup>32</sup> See Woodward & Marshall Chp 4, pp 82 – 87. Note: the Woodward & Marshall Report made recommendations for how ASIC could become more NFP-friendly but this was stated to be for "as long as ASIC continues to regulate companies limited by guarantee" (Recommendation 2). As the principal researcher and lead author of that report, it is now Ms Woodward's strong personal view that a specialist NFP regulator (not ASIC) is necessary in order to ensure proper regulatory oversight and support for the NFP sector.

<sup>33</sup> See Woodward & Marshall Chp 4, pp 80-81.

<sup>34</sup> Nonprofit Regulation Reform Program: *An initial statement by the National Roundtable of Nonprofit Organisations*, Released May 2004, P. 7: <http://www.nonprofitroundtable.org.au>

<sup>35</sup> We have had the benefit of speaking to both before writing our submission and they have each published multiple articles on this point.

<sup>36</sup> See Australia 20/20 Summit – Final Report *Strengthening Communities, Supporting Families and Social Inclusion* May 2008.

### **C. PilchConnect recommendations**

#### **Recommendation Five**

ABS figures show that the NFP sector contributes more to GDP than the communications industry and, if an imputation is made for the value of services provided by volunteers, its adjusted gross value of 4.9% of GDP is greater than that for government administration and defence (4.1%) and mining (4.6%). These figures do not take into account the qualitative contribution the NFP sector – for example, the role it plays in social inclusion and delivery of government services. PilchConnect submits that the NFP sector (not just the small sub-set of charities) justifies the expense that it will take to establish a new, independent, national, specialist NFP regulator.

#### **Recommendation Six**

The expense involved in establishing, and then providing on-going funding to properly resource a new regulator can be minimised by:

- exploring the use of the significant experience and resources of ASIC in on-line data collection, storage and searching, possibly in conjunction with a sector-managed resource such as Guidestar
- cost sharing with the States because of savings achieved by no longer needing separate regulators in each State and Territory
- cost savings achieved by fewer staff required in the ATO (their role will be to apply the revenue laws rather than having to determine eligibility), and
- cost savings to the NFP sector by a reduction in red tape and, therefore, greater capacity and efficiencies in delivery by NFPs of government / public funded services.

#### **Recommendation Seven**

A national, NFP-specific regulator will serve:

- as the lynchpin for the introduction of national regulatory reform that encompasses fundraising, incorporation, data collection, and disclosure requirements
- more difficult and contentious issues such as charitable status for tax concessions to be handled in a measured and properly researched way
- will also bring Australia in line with other jurisdictions and, by being a broader model than a 'charity' commission, will show leadership to English, Scottish and NZ counterparts.

## 7. Nationally consistent fundraising laws

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### A. Key points

7.1 Numerous inquiries<sup>37</sup> and consultations with NFPs<sup>38</sup> have consistently reported that the current variation between State-based fundraising laws has resulted in duplication and significant expense, as well as being enormously frustrating and confusing. This impinges on a NFP's ability to raise much needed funding in an efficient and effective way. We submit that the introduction of a nationally consistent fundraising law will:

- reduce red tape and, therefore, compliance costs
- reduce the administrative costs on government in regulating fundraising, and
- result in greater public transparency around the cost of fundraising.

7.2 The current national regime for companies came about after 50 plus years of experimenting with co-operative and mutual recognition schemes. National reform was finally achieved largely because business would no longer tolerate the situation as it was affecting their ability to raise funds. We need to learn from this experience when reforming the NFP fundraising laws.

### B. Relevant data /research

7.3 At PilchConnect we regularly receive requests for assistance on fundraising compliance issues. It is also an area where few lawyers have expertise so even if an NFP has some capacity to pay for advice it can be hard to obtain.

7.4 The following is feedback we received after informing our NFP client database of the Senate Inquiry (name withheld on request).

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<sup>37</sup> In particular, The Allens Consulting Group, *Improving Not-for-Profit Law and Regulation*, August 2005, [http://www.dvc.vic.gov.au/Web14/dvc/rwpgslib.nsf/GraphicFiles/Allen+Consulting+Report+DVC/\\$file/Allen+Consulting+Report+for+DVC.pdf](http://www.dvc.vic.gov.au/Web14/dvc/rwpgslib.nsf/GraphicFiles/Allen+Consulting+Report+DVC/$file/Allen+Consulting+Report+for+DVC.pdf)

<sup>38</sup> See, for example, Fundraising Institute of Australia submissions to the various inquiries referenced in Appendix 1.

### **CASE STUDY THREE**

As a mid size organisation trying to operate according to best practice, that is, paying serious attention to external and internal audit functions, risk management and strategic planning, we find the cost burden significant.

Secondly, as an organisation receiving very little government funding due to the limited attention being paid by State and Commonwealth governments to our particular segment of the health sector, we are forced to go to the public to raise nearly 100% of our funds. To disclose to the public that it costs between 60 and 70 cents to raise a dollar through one of our fundraising programs would, in the current environment, would mean the demise of the program and the loss of half of our staff.

Demands by commentators that not for profits be more transparent and accountable because they derive funds from the public is in conflict with the opaque nature of most of the suppliers of services to our organisation. The argument that they are private business and therefore do not have to be transparent is in conflict with the fact that we are using funds derived from the public to pay for their services. Here I can list: telemarketing firms, cleaners, printers, IT services, various consultancies, various tradespeople.

We would argue that there are high costs to doing things properly and limits to the extent to which pro bono services can be used. The costs of our external audit with a negotiated discount currently stand at 0.4% of turnover. This is in stark contrast to my experience of the costs of the external auditor of a statutory body with turnover 30 times the turnover of our organisation, where the external audit costs are 0.014% of turnover.

## **C. PilchConnect recommendations**

### **Recommendation Eight**

A national NFP regulatory framework must include fundraising laws. These laws need to be overseen by an independent national NFP regulator (see Recommendation 4).

Without this legislative consistency and related regulatory oversight, the accountability and transparency that governments and the public are calling for will not be achieved.

### **Recommendation Nine**

NFP licensing issues (eg, fundraising regulation, charitable status and charitable gaming, excluding poker machines) should be included in the COAG's work towards mutual recognition of licensing standards<sup>39</sup> but this should only be an interim step to a truly national regime.

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<sup>39</sup> For example, for mutual recognition of a certificate entitled a 'Certificate of Charitable Status' as suggested by NRT as a means of avoiding the need for multiple applications in each State and within different departments.

## 8. Improved specialist NFP legal structure

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### A. Key points

- 8.1 According to the NRT<sup>40</sup> there are, at present, more than 20 different ways to incorporate a NFP organisation in Australia including incorporated associations, companies limited by guarantee, proprietary companies, trusts, co-operatives and aboriginal corporations. Some large, well-established NFPs are formed by Royal Charter and separate Acts of Parliament. The multiplicity of available structures is a product of both the Federal/State duopoly and the existence of a variety of specialist forms of incorporation (eg, trade unions and parent associations). It is often a complex question as to which legal structure should be adopted – not a dilemma faced by business. On the other hand, new models that cater for emerging forms of social enterprise have been adopted in England (eg, Community Interest Company model), but have not been considered in Australia.
- 8.2 The myriad of different legal structures in the NFP sector results in different levels of reporting, regulation and compliance which, as Senator Murray notes, is at odds with the twin goals of rationalisation and consistency both of which are desirable from a governance and accountability perspective.<sup>41</sup>
- 8.3 A specialist NFP legal structure that allows an organisation to operate across all States and has a sliding scale of reporting obligations based on size is desperately needed. Deciding between structures, changing structures as an organisation grows etc wastes a lot of time and resources for many NFPs – this is illustrated by the case study under heading 8.10. We also note the compelling example given in the submission to the Senate Inquiry by Human Rights Film Festival Inc. (an NFP that has attended PilchConnect training).
- 8.4 There are three main ways that an improved national, specialist NFP legal structure can be implemented. The first (but least preferred option) is for the Federal government to amend the existing company limited by guarantee provisions of the Corporations Act to make it attractive for even small NFPs (eg, by removing the audit requirement for small NFPs and making transfers from incorporated associations regimes very easy). However, for so long as State-based incorporated associations' regimes remain, the problems associated with multiple regulators and multiple structures will continue such that the goals of reduced complexity and better accountability will not be achieved. Further, if

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<sup>40</sup> Nonprofit Regulation Reform Program: *An initial statement by the National Roundtable of Nonprofit Organisations*, Released May 2004: <http://www.nonprofitroundtable.org.au>

<sup>41</sup> Murray, Senator Andrew 'One Regulator, One System, One Law – the case for Introducing a New Regulatory System for the Not for Profit Sector' Discussion Paper, July 2006. [http://www.andrewmurray.org.au/documents/463/NFP1R1S1L%200706\\_v2.pdf](http://www.andrewmurray.org.au/documents/463/NFP1R1S1L%200706_v2.pdf)

these amendments are made without, at the same time, giving their enforcement to a specialist NFP regulator, it is unlikely that many NFPs will migrate as ASIC is not seen as an appropriate regulator for NFPs (see headings 6.4 and 6.10).

- 8.5 The second option is for a new specialist NFP legal structure to be established under a separate Act passed by the Commonwealth. This would have the advantage of allowing the best aspects of the existing incorporated associations and companies limited by guarantee models to be combined, and new forms of legal structure (eg, Community Interest Company) to be melded into one, or possibly, two NFP specialist structure(s) with sufficient flexibility to cater for all types and sizes. If responsibility for this new Act came under a specialist NFP regulator (such as occurs for indigenous corporations with the Registrar of Indigenous Corporations),<sup>42</sup> and migration from other regimes (ie, incorporated associations and co-operative regimes) was easy and free or low cost then, over time, there would be a big incentive for all NFPs to migrate to this scheme. This would reduce the current dilemma NFPs face about which structure to chose, improve accountability and reduce compliance costs.

The problem with this course of action is that it is unclear if such an Act would survive a constitutional challenge – specialist advice is needed. It maybe that the High Court’s decision to uphold the validity of the Work Choices Act<sup>43</sup> means that the corporations power under s. 51 (xx) of the Constitution is broad enough to cover corporations that conduct activities/provide services that earn ‘revenue’ (eg, membership fees, fee-for service income, grant income etc), notwithstanding that these ‘trading activities’ are undertaken with ‘not-for-profit’ (or more accurately, ‘not-for-distribution’) motives. However, this question is still open as the High Court in the Work Choices case declined to clarify the meaning of constitutional corporations (ie, ‘trading’ and ‘financial’ corporations).

- 8.6 The third and preferable option is for a referral of powers by the States as has occurred under the Corporations Law model. This would mean that any new NFP-specific Act (or even a completely new NFP-specific part of the Corporations Act), is constitutionally sound. While this might seem an ambitious suggestion, we submit that:
- the size and the importance of the sector warrants whatever is necessary to achieve a truly national regulatory system
  - it has been undertaken for the business sector and it is now time for a level playing field

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<sup>42</sup> The Registrar is an independent statutory office holder who administers the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (CATSI Act). This Act guides how Indigenous corporations are run. The CATSI Act started on 1 July 2007: <http://www.oratsic.gov.au/>

<sup>43</sup> *NSW v Commonwealth of Australia*; *Western Australia v Commonwealth of Australia* (2006) 231 ALR 1

- we should learn from the tortured 50 year history of achieving a truly national corporations law regime, and
- there is currently a unique political opportunity for this to occur more easily than before.

The other alternative is for the Federal government to seek constitutional change.

## **B. Relevant data /research**

8.7 Allens Report summarises the problems well:

*“Neither the Corporations Act nor the Association Incorporation Acts — the two most applicable mechanisms — offer a means of incorporation that meets all the needs of the not-for-profit sector. In some senses, there is a ‘misfit’ between the nature of not-for-profit organisations and the incorporation vehicles available to them. The Corporations Act can be costly, complex and inappropriate in parts, and there are few tools to assist organisations with the practicalities of establishing under it; the Association Incorporation Acts are insulated, inconsistent and not mutually recognised and, while there are ways of overcoming this for multi-State bodies, they involve additional fees and reporting requirements.”<sup>44</sup>*

8.8 Woodward & Marshall note that this issue underpins the disclosure and reporting:

*“The related goals of improved accountability and good corporate governance must be supported by the underlying legal structure(s) adopted by NFPs. If the legal structure meets the needs of the organisation, then it will be easier to build consistent and appropriate reporting obligations. In turn, these are the cornerstone of accountability.”<sup>45</sup>*

They also note:

*“It is not simply a matter of thinking that small NFPs should be incorporated as associations and large ones should be required to register as companies. If a national regulatory scheme were introduced for all NFP organisations, then it would be possible to bring together the best aspects of the company structure with those of the associations’ regime (and possibly some new features) to introduce a single, specialist NFP legal structure.”<sup>46</sup>*

8.9 PilchConnect’s case work experience shows that the choice of legal structure is an important one and it can cause an organisation multiple problems if it is not ‘right’. Sometimes it can mean planning for success (eg, a national roll out) although if success is not achieved fairly quickly, it can mean unnecessary expense via annual auditing fees.<sup>47</sup> The best aspects of the incorporated associations and companies limited by guarantee regimes together with new forms of legal structure (for social enterprise such as the UK, Community Interest

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<sup>44</sup> The Allens Consulting Group, *Improving Not-for-Profit Law and Regulation*, August 2005, Executive Summary [http://www.dvc.vic.gov.au/Web14/dvc/rwpgslib.nsf/GraphicFiles/Allen+Consulting+Report+DVC/\\$file/Allen+Consulting+Report+for+DVC.pdf](http://www.dvc.vic.gov.au/Web14/dvc/rwpgslib.nsf/GraphicFiles/Allen+Consulting+Report+DVC/$file/Allen+Consulting+Report+for+DVC.pdf)

<sup>45</sup> See Woodward & Marshall p iii

<sup>46</sup> See Woodward & Marshall, Chp 3, p 76.

<sup>47</sup> Most incorporated associations are not required to file audited accounts although there is inconsistency on this point between the States. In Victoria, larger ‘prescribed associations’ are required to file audited accounts.

Company) need to be melded into one, but possibly two, NFP specialist structure(s) with sufficient flexibility to cater for all types and sizes.

- 8.10 The following example (name withheld on request) illustrates that getting the 'right' legal structure to suit future growth can be difficult and the process involved in changing legal structures can be complicated and prohibitive.

#### **CASE STUDY FOUR**

Technical Aid to the Disabled (TADVIC) is a not-for-profit organisation which designs, makes and modifies equipment for people with a disability whose needs cannot be met by commercial suppliers. TADVIC has over 200 volunteers at 10 branches that operate throughout Victoria. As a co-operative, TADVIC requires each of its volunteers to become a shareholder. This legal structure was what TADVIC was advised several years ago would best suit their needs. However, as the organisation has grown, the requirement of having volunteers as shareholders has created a considerable amount of administrative work for TADVIC and made getting a quorum at the AGM quite difficult. Also, in order to expand its fundraising efforts, TADVIC wants to create a 'Friends of TADVIC' category (ie, an annual fee, non-voting), but its co-operative structure does not allow for this type of membership. Because of these problems, T sought a referral for legal advice via PilchConnect.

The advice subsequently provided to TADVIC nominated five different structures as viable options for the organisation. TADVIC ultimately concluded that their structure as a co-operative did not best suit their current operations and that a different legal structure, such as an incorporated association, might offer more flexibility in managing TADVIC's volunteers and supporters through different classes of membership.

### **C. *PilchConnect* recommendations**

#### **Recommendation Ten**

Existing NFP legal structures are confusing and none of them is entirely satisfactory. A new specialist NFP legal structure that allows an organisation to easily operate across all States and has a sliding scale of reporting obligations based on size is required.

Flexibility can be given via electing in or out of various 'default' provisions. Migration from existing legal forms should be free or low cost and involve no, or only minimal, filing (eg, deeming provisions can be used). New legislation should be written in plain English and include a plain English guide for small NFP's (such as the one that exists for small business under the Corporations Act).

This is best way to implement a new NFP specific Act is by way of a referral of powers from the States. There is currently a window of opportunity to achieve this systemic reform thereby ensuring NFPs benefit in the same way business has since 2001.

**Recommendation Eleven**

A sector-based support service such as PilchConnect has a role to play in providing free/low cost information, training and advice on issues such as the legal structure and consequent compliance obligations. Government need to support these sector-based initiatives especially in the absence of a pro active, NFP-specific regulator whose role includes providing these services.

## 9. Improved reporting and disclosure

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### A. Key points

- 9.1 Previous inquiries highlight the significant reporting burden that many NFPs face, largely because of they have multiple funders, multiple regulators, and multiple stakeholders (not just shareholders). We note this point is raised in submissions already lodged with the Senate Inquiry (eg, Valmar Support Service).<sup>48</sup>
- 9.2 For most NFPs it is not that any one of its reporting obligations is unreasonable or burdensome, rather it is that:
- the cumulative effect of the multiple and differing requirements results in duplication thereby wasting precious time and resources
    - corporate obligations under the Corporations Law and<sup>49</sup> /or State-based incorporated associations requirements, *plus*
    - ATO and licensing filings, *plus*
    - usual 'business' filings (eg, superannuation), *plus*
    - funding agreement requirements (possibly from each level of government under fee-for-service agreements and/or project grants, and/or philanthropic grants and/or corporate sponsorship)
  - there is no sliding scale based on size – eg, a small peak body that, because it operates nationally, is required to be incorporated under the Corporations Law, must have full audited accounts even if its revenue is as small as say, \$200,000<sup>50</sup> (see the case study under heading 9.11)
  - the data submitted to government departments is rarely fed back to NFPs to assist them with benchmarking or to inform their service delivery,<sup>51</sup> and
  - the data is not collated centrally to map the size and nature of the NFP sector or to inform government policy about supporting the NFP sector.
- 9.3 The existing disclosure requirements under Corporations Law and State-based incorporated associations laws do not provide the type of information that NFP stakeholders (eg, donors, volunteers, clients, members) are looking for. For example, volunteers and potential donors should be able to freely and easily

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<sup>48</sup> Available at [http://www.aph.gov.au/Senate/Committee/economics\\_cte/charities\\_08/submissions/sub14.pdf](http://www.aph.gov.au/Senate/Committee/economics_cte/charities_08/submissions/sub14.pdf)

<sup>49</sup> A body incorporated as an association in one State that expands its operations so that it 'carries on business' in another State, will be also required to register (and file returns) under by the *Corporations Act 2001*.

<sup>50</sup> Often peak bodies can be quite small see Woodward & Marshall Report, Chp 2  
<http://cclsr.law.unimelb.edu.au/go/centre-activities/research/reforming-not-for-profit-regulation-project/>

<sup>51</sup> Eg, We understand that the Annual Statement forms (which have to be lodged in hard copy) are simply scanned by Consumer Affairs Victorian and is not used or analysed: see SSA Review p 26, see n 1. Also limited solvency checks are made on larger prescribed associations who are required to file audited accounts.

check information about the annual revenue, sources of funding, type of activities undertaken, fundraising expenses, board members and their remuneration (if any) etc, so that they can make an appropriate judgment about investing their time. At the moment there is no, or at least very little, required by way of a description of activities.

- 9.4 This issue is exacerbated by the lack of a NFP-specific accounting standard. The Australian Accounting Standards Board (**AASB**) have no prescribed NFP accounting standard and require NFPs to apply the same accounting standards as for-profit entities, with some modifications on discrete issues. The AASB have recently amended their own standards to incorporate International Accounting Standards which in turn has serious flow on consequences for NFPs (eg, for NFPs that are incorporated as companies limited by guarantee, see Federal Treasury Discussion Paper on 'Financial Reporting of Unlisted Public Companies' 2007).<sup>52</sup>
- 9.5 There are overseas models of sector-based responses that improve easy access to relevant data on NFPs. In particular, the **Guidestar** organisations that operate in the USA and UK are independent (but government supported) NFP organisations that have developed sophisticated electronic databases that are freely available and readily searchable: eg, by searching on Guidestar a prospective donor can obtain the latest reports on any particular NFP, or obtain a list of all NFPs providing certain services in a particular region. More detailed reports can be obtained for a fee. The Guidestar databases are so comprehensive, and therefore useful, because they have direct feeds from the respective regulators (in the USA from the Form 990 Reports filed with the Internal Revenue Service and in the UK from the Charity Commission). We understand from Prof Mark Lyons that Guidestar is working with Canada, Ireland and Germany to develop similar arrangements in those countries.<sup>53</sup>
- 9.6 PilchConnect is another sector-based initiative to improve the access of NFPs to relevant and up-to-date legal and legally related information to support the highest possible standards of governance by NFP organisations: see headings 4.3 - 4.6.

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<sup>52</sup> See *Financial Reporting by Unlisted Public Companies Discussion Paper*, The Treasury June 2007: <http://www.treasury.gov.au/contentitem.asp?NavId=037&ContentID=1269>

<sup>53</sup> A recent article on the value of rating type bodies for charities concludes that their evaluation criteria are inconsistent and, therefore, they are not as reliable a source of info as the public might hope. We submit that it is preferable for an independent NFP specific regulator to be established first. [http://www.nassembly.org/nassembly/documents/Rating\\_the\\_Raters\\_Final\\_3%20.pdf](http://www.nassembly.org/nassembly/documents/Rating_the_Raters_Final_3%20.pdf)

## **B. Relevant data /research**

- 9.7 The reports of the Victorian government initiated State Services Authority *Review of Not-for-Profit Regulation (2007) (SSA Report)*<sup>54</sup> and the *Stronger Community Organisations Project (2007) (SCOP Report)*<sup>55</sup> provide recent documentation of the issue of multiple and differing funding agreements. The point is also identified in the Australian Centre for Philanthropy and Nonprofit Studies (Queensland University of Technology) research paper ‘*How Long Is a Piece of Red Tape? The Paperwork Reporting Costs of Government Grants*’ (March 2008).<sup>56</sup>
- 9.8 Woodward & Marshall are also of the view that more than purely financial material ought be provided and suggest that, for example, the main activities of the NFP for the year are listed with a short narrative about how they are linked to the NFPs objectives. Their survey indicated 89% of NFP respondents agreed that ‘description of activities’ should be available to the public.<sup>57</sup> Finally, Woodward & Marshall argue director’s remuneration (if any) should be disclosed.<sup>58</sup>
- 9.9 An NFP-specific accounting standard has been recommended by virtually every inquiry and report<sup>59</sup> as well as by leading NFP academics.<sup>60</sup> To give a succinct summary:
- “Accounting treatments in the sector frequently differ because there is little guidance about how to apply generic standards in a not-for-profit context. As a result, compliance costs are high and consistent and relevant financial information on the sector is scarce.” Allens Report 2006*<sup>61</sup>
- 9.10 The NRT has long advocated the need for consistent standards to be achieved across the sector :
- ‘Non profit organisations have different accounting users with vastly different levels of sophistication than commercial entities. The present patchwork of generic accounting standards and isolated specific standards do not serve information transparency or assist in effectively maintaining, enhancing or effectively monitoring the trustworthiness of not profit organisations’.*<sup>62</sup>

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<sup>54</sup> State Services Authority Review of Not-for-Profit Regulation, 2007 see: <http://www.dvc.vic.gov.au/Web14/dvc/dvcmain.nsf/allDocs/RWP5FCB0E3A722237C7CA25727C00059BFB?OpenDocument>

<sup>55</sup> See Strengthening Community Organisations Project (SCOP) (2007) <http://www.dvc.vic.gov.au/Web14/dvc/dvcmain.nsf/allDocs/RWP5FCB0E3A722237C7CA25727C00059BFB?OpenDocument>.

<sup>56</sup> Available at

[http://www.bus.qut.edu.au/research/cpns/documents/2008\\_4PaperworkReportingCostsofGovtGrants.pdf](http://www.bus.qut.edu.au/research/cpns/documents/2008_4PaperworkReportingCostsofGovtGrants.pdf)

<sup>57</sup> See Woodward & Marshall at p. 203

<sup>58</sup> See Woodward & Marshall at p. 190

<sup>59</sup> See 1995 Industry Commission Report, Charity Definition Report 2001, Chartered Accountants of Australia, *Review of Not-for-Profit Financial and Annual Reporting* (2006) , Woodward & Marshall, Allens Consulting Report, SSA Report – refer Appendix 1.

<sup>60</sup> Numerous articles by Lyons and McGregor-Lowndes

<sup>61</sup> See Allens Report , Executive Summary

[http://www.dvc.vic.gov.au/Web14/dvc/rwpgslib.nsf/GraphicFiles/Allen+Consulting+Report+DVC/\\$file/Allen+Consulting+Report+for+DVC.pdf](http://www.dvc.vic.gov.au/Web14/dvc/rwpgslib.nsf/GraphicFiles/Allen+Consulting+Report+DVC/$file/Allen+Consulting+Report+for+DVC.pdf)

<sup>62</sup> Nonprofit Regulation Reform Program: *An initial statement by the National Roundtable of Nonprofit Organisations*, Released May 2004, p 8: <http://www.nonprofitroundtable.org.au>

- 9.11 The following case study (name withheld on request) is a good example of the burden that currently exists for small but national organisations:

**CASE STUDY FIVE:**

We are a small environmental non-profit organisation, supporting a national network of community-based incorporated associations. We have 1.4 staff and an annual budget of \$240,000. Due to our national reach, we were set up as a company limited by guarantee. This brings with it the burden of governance requirements associated with large corporations. We are subjected to an annual financial audit, consuming approximately 2 weeks of precious staff resources and costs just under \$2,500. Due to our corporate structure, we are also required to comply with accounting standards that have limited relevance to the sector within which we operate, adding to the complexity of governing a small non-profit organisation. Similarly, our Company Secretary is required to understand and be across the many ASIC reporting requirements to ensure we are compliant and don't incur costs for late or missed filings; an expense we can least afford.

In supporting our members, we are required to understand the basics of 8 sets of Association rules, which is burdensome for a small resourced organisation such as ours. A simplified and nationally consistent framework for non-profit organisations would streamline the operation and direct the resources to further the objects for which organisations are formed.

- 9.12 We refer to our submission to the Federal Treasury Discussion Paper on 'Financial Reporting of Unlisted Public Companies' 2007.<sup>63</sup> To inform that submission, we organised an informal think-tank of NFPs and practitioners (legal and accounting) with expertise in the area.
- 9.13 Two key guiding principles received strong support from the think-tank group namely that:
- all NFP organisations should continue to be required to maintain proper financial records and accounts; and
  - all NFP organisations should be required to report to an external regulator because of the public nature of their purpose.
- 9.14 It was agreed by the majority of the group and is endorsed by PilchConnect that it would not be good public policy to exempt any NFPs from a minimum level of accountability, especially given that the ATO does not provide effective regulation of NFP organisations. It was noted that if an NFP is income tax exempt (as the majority are), it is not required to lodge a taxation return.<sup>64</sup> Without any statutory

<sup>63</sup> See [http://www.pilch.org.au/html/s02\\_article/article\\_view.asp?id=436&nav\\_cat\\_id=232&nav\\_top\\_id=79](http://www.pilch.org.au/html/s02_article/article_view.asp?id=436&nav_cat_id=232&nav_top_id=79)

<sup>64</sup> "Research suggests there are around 700,000 non-profit organisations in Australia. Most are not required to register in the revenue system because their turnover is below the minimum threshold level or they are non-taxable." See ATO 2008/2009 Compliance Program <http://www.ato.gov.au/corporate/content.asp?doc=/content/00155156.htm&page=61&H61>

obligation to lodge annual financial reports, NFPs (particularly those that do not receive external funding, for example, from government) could easily slip into the practice of not preparing proper financial statements. This, in turn, has important implications for the good governance and risk management of those organisations, and for the reputation of (and confidence in) the NFP sector as a whole.

### **C. *PilchConnect recommendations***

#### **Recommendation Twelve**

A minimum standard of disclosure that is simplified and tailored to the NFP situation should be required of all NFPs because:

- it promotes good internal governance and risk management practices
- there is a strong public interest in the activities of NFP organisations and public disclosure provides a basis for information gathering by current and prospective stakeholders (eg, members, clients, donors, other funders and policy makers), and
- 'hands on' experience of PilchConnect (and others practitioners we have consulted) is that internal mechanisms of ensuring good governance (eg, relying on members) are, of themselves, often inadequate.

#### **Recommendation Thirteen**

A tiered regime of reporting obligations based on size should be introduced. Full, audited accounts should only be required from larger NFPs. Those NFP's with annual revenue of, say, less than \$500,000, should only be required to report in accordance with a standard that is simplified and tailored to the needs of NFP stakeholders (ie, a standard that is much less onerous than the current full accounting standards or proposed SME regime): see also Recommendation 18.

Filing fees should be modest and again, a sliding scale based on size should be introduced. NFPs with annual income of less than, say, \$100,000 should not be required to pay any fee.

However, more work needs to be done to test what are the most appropriate thresholds in the light of the size of those organisations currently on the ASIC and State-based incorporated associations registers.

#### **Recommendation Fourteen**

Even if the requirements under the Corporations Act and the State-based incorporated associations Acts are improved (ie, simplified more appropriate information is filed by small NFPs and full accounts are lodged by larger NFPs), this reform will be effectively negated if government (or other) funding agreements are not changed to mirror this approach (ie, they continue to place more onerous financial reporting obligation on small NFPs). PilchConnect, therefore, urges the Senate Inquiry to ensure this issue is:

- pursued across all Federal government departments, and
- included in COAG's Standard Business Reporting Agenda.<sup>65</sup>

#### **Recommendation Fifteen**

The work of the Standard Chart of Accounts project (Queensland University of Technology, The Australian Centre for Philanthropy and Nonprofit Studies) should be introduced for all Commonwealth and State government grant submissions and acquittals to cut paperwork compliance costs and increase the usability of information. This is an excellent initiative that is particularly important in the absence of a NFP-specific accounting standard.

#### **Recommendation Sixteen**

Given that NFPs and the information needs of their stakeholders are so different to business (small and large), the need for a NFP-specific accounting standard is great. Such a standard would underpin greater accountability and transparency, and many issues related to comparison of, for example, fundraising expenses would be addressed. It is also a necessary first step in improving disclosure via sector-based initiatives such as Guidestar. The Senate Inquiry is, therefore, urged to support the development by the Australian Accounting Standards Board of an NFP industry-specific standard. An NFP specific standard needs to mesh with broad industry standards and place more emphasis on the narrative account of how organisations are achieving their stated objects.

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<sup>65</sup> COAG [http://www.coag.gov.au/coag\\_meeting\\_outcomes/2008-07-03/index.cfm#fragment-3](http://www.coag.gov.au/coag_meeting_outcomes/2008-07-03/index.cfm#fragment-3)

### **Recommendation Seventeen**

In relation to the interface between data submitted to the regulator and access by the public, we recommend the Not-for-Profit Regulatory Reform Taskforce (Recommendation 27) should consider whether the new regulator (Recommendation 4) should have sole responsibility for this role, or if ASIC's database collection and searching systems can be utilised and/or the Guidestar model should be supported and funded.

### **Recommendation Eighteen**

PilchConnect urges that any reform suggestions about reporting obligations be assessed against the over-arching principle that the cost of compliance should not exceed the benefit. There is a need to strike an appropriate balance between legitimate public and stakeholder interest in disclosure, on the one hand, and the relative cost (based on the size of the organisation) on the other. For example, very small membership-serving organisations should have the most minimal annual reporting obligations such as the regulator sending them a pre-completed return (based on details that currently appear on the register) with the only requirement being for these details to be checked, some very basic information added (eg, number of members and volunteers, brief description of activities undertaken in last year, total income) and the return lodged on-line or by post with no fee payable.

## 10. Simplification and reform of taxation concessions

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### A. Key points

10.1 It is widely agreed that the existing provisions for concessional taxation treatment of charities and some NFPs are confusing and complicated. As the NRT state:

*“But it is in tax law that the greatest confusion is to be found. There are a great variety of concessions given by different levels of government, each to a variety of nonprofit organisations. It is impossible to find any set of principles underpinning the legislation that designates these concessions. There are no clear links between the concessions provided and public disclosure requirements. Not surprisingly, in such an environment regulation is confusing, contradictory and often unfair.”*<sup>66</sup>

Considerable inconsistencies and anomalies have grown up over time.<sup>67</sup>

10.2 The independent CDI Report (2001) was a thorough and thoughtful report with numerous recommendations that have never been implemented, largely because the draft Bill (prepared under the previous government) sought to restrict the advocacy and lobbying role of charities. There was such opposition to this aspect of the Bill that the Board of Taxation ultimately recommended to the Treasurer that the Bill not proceed. While there was validity to many of the criticisms of the draft Bill, this is not a sufficient reason for abandoning the drafting of legislation to implement the CDI Report recommendations. Greater clarity and simplicity in this area is essential.

10.3 Any systemic review of the existing provisions will be contentious with some ‘winners’ and some ‘losers’. It will bring up highly charged and old debates<sup>68</sup> about commercial business arms run by charities and the related competitive neutrality argument. If the issue of charity/NFP taxation reform is taken up by the Senate Inquiry it could subsume other less contentious, but possibly more important regulatory reforms.

### B. Relevant data /research

10.4 The unnecessarily complicated taxation regime for charities and the broader group of NFPs is explained succinctly by Melbourne University academic, Ms Ann O’Connell, in her article *‘The tax position of charities in Australia - why does*

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<sup>66</sup> See Nonprofit Regulation Reform Program: *An initial statement by the National Roundtable of Nonprofit Organisations*, Released May 2004, p 1, <http://www.nonprofitroundtable.org.au>

<sup>67</sup> Other pertinent references include McGregor-Lowndes, M. (2008) chapter on ‘Australia’ in *‘Charity Law & Social Policy: National and International Perspectives on the Functions of the Law relating to Charities’*, K. O’Halloran, M. McGregor-Lowndes, and S. Karla (eds.) <http://www.springer.com/law/book/978-1-4020-8413-3>; and Changemakers Australia *‘The State of Play - Charitable Law Issues’* Changemakers Australia, 15 June 2008.

<sup>68</sup> See Industry Commission *Charitable Organisations in Australia*, Report No 45, 16 June 1995, Appendix J ‘Tax deductibility of donations’ and Appendix K ‘CSWOs and competitive neutrality’

*it have to be so complicated?* (2008).<sup>69</sup> This article also summarises CDI Report findings.

10.5 At PilchConnect about 40% of the requests we receive for assistance from NFPs relate to eligibility, and the process for obtaining or disputing, tax concessions – in particular, DGR status. Nearly all applicants are confused about the terminology and the categories that exist. Some within the same ‘group’ of organisations have different success in obtaining DGR or TCC status depending on which local ATO office they have applied to. See also the case study under heading 5.19.

### **C. PILCH recommendations**

#### **Recommendation Nineteen**

Any taxation reform should be underpinned by a rational policy basis for charity and NFP taxation exemption and other fiscal incentives. The current system no longer has this underpinning.

#### **Recommendation Twenty**

In broad terms, PilchConnect endorses the recommendations made by *Inquiry into the Definition of Charity* 2001 and urges the Senate Inquiry to refer the recommendations of the *Inquiry into the Definition of Charity* to a specialist committee for implementation.

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<sup>69</sup> (2008) 37 Australian Tax Review 17-37

## **11. Support required to promote best practice governance and accountability**

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### **A. Key issues**

- 11.1 While there are a number of NFPs who provide best practice examples of good governance and accountability, there is widespread acknowledgment that many NFPs require additional support and expertise to entrench concepts of good governance into their organisations.
- 11.2 Policy making at departmental, government and sector levels needs to be informed by up-to-date, comprehensive and reliable data. There is no central registry and the ABS Satellite Account is now 7 years old.
- 11.3 NFPs rely heavily on volunteers and are often financially under resourced. There have been several major government inquiries that have received record numbers of submissions – the writing of submissions themselves sap time and limited resources. If useful reforms are to be made and implemented, all parts of the NFP sector need to be consulted and heard.
- 11.4 The NFP sector has a role in helping itself. These initiatives can be cost-effective and highly productive. Guidestar is an international example. On a local level, PilchConnect is a model with potential national rollout (see headings 4.4 and 4.6).
- 11.5 Based on overseas experience (particularly in the UK), it will be difficult to take advantage of the current window of Federal-State co-operation in order to achieve significant NFP regulatory reform without a strong political champion who can operate across whole of government and provide leadership to somewhat uninterested government departments and State governments. The absence of a reference to NFPs in COAG's economic reform agenda is a recent example of this problem. In the UK, the Office of the Third Sector was established in 2006 and is overseen by a Minister for the Third Sector, which is a Cabinet level position.<sup>70</sup>

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<sup>70</sup> See Katherine Keating, 2006 Churchill Fellow, *The National Governance of the Non-Profit Sector* pp 19 -22.

## **B. PilchConnect recommendations**

### **Recommendation Twenty One**

The ABS should receive long term funding to compile and update baseline data on the whole of the NFP sector. This provides an essential part of the evidence base for policy making and public understanding of the size, social and economic value of the sector.

### **Recommendation Twenty Two**

In recognition of the time and resources involved and the need to consult widely within the NFP sector, government should provide funding to peak bodies such as the NRT, so there is capacity to engage in the reform process as meaningful partners and stakeholders.

### **Recommendation Twenty Three**

Sector-run support services (such as PilchConnect) that assist NFPs to identify, understand and implement better governance and accountability practices should receive core government support and funding.

### **Recommendation Twenty Four**

In order to have a focal point within government to promote the needs of the NFP sector, the existing position of 'Parliamentary Secretary for Social Inclusion and the Community Sector' should be recast to encompass the broader NFP sector and also elevated to a ministerial position. Given the NFP sector contributes, with imputation for volunteer time, more to GDP than the mining sector<sup>71</sup>, this recommendation is not unreasonable.

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<sup>71</sup> ABS 2001, <http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/8106.0Main+Features32006-07>

## 12. NEXT STEPS

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### **Recommendation Twenty Five**

The Senate Inquiry provides an opportunity to spearhead those reforms that are largely non-contentious (fundraising, incorporation, data collection processes, and disclosure requirements).

If these reforms are supported by oversight from a new, independent NFP regulator, they will be of significant and lasting benefit to the NFP sector as a whole. We ask the Senate Inquiry recommend these reforms in its report to Parliament.

### **Recommendation Twenty Six**

The Senate Inquiry is urged to progress the recommendations made by PilchConnect (and no doubt others) by recommending in its report to parliament that a 'Not-for-Profit Regulatory Reform Taskforce' be established and properly resourced. In particular, the work of Taskforce should include:

- working with COAG to ensure the issue of a 'seamless national' regulatory system is introduced for the NFP sector for issues of incorporation, fundraising, recognition of charitable status, and a standard chart of accounts for funding and service agreements
- scoping savings and costs for the creation of new independent regulator, including investigating possible ways of using ASIC's experience and office network to create a central, freely accessible, on-line NFP database
- consider new models for a flexible legal structure(s) for NFPs together with the most appropriate reporting obligations based on a sliding scale according to organisational size, and
- consider ways in which a central point can be created within the Federal government with responsibility for the NFP sector.

This taskforce should report to an experienced and knowledgeable reference group comprised of people with NFP expertise from government, academia and NFP spheres. The Taskforce should be required to report back to the Senate by 1 February 2010.

## APPENDIX 1

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### Appendix 1.1 Brief Chronology

#### 1995

June – Industry Commission Report

#### 2000

October – Australian Democrats Charity Briefing

#### 2001

June – Charity Definition Inquiry Report

#### 2002

June – formation of National Not-for-Profit Round Table (now known as National Roundtable of Nonprofit Organisations)

August – Federal government response to Charity Definition Report Press Release with draft legislative definition of charity attached.

November – release of first Australian Bureau of Statistics, *Non-Profit Institutions Satellite Account* (1999-2000)

#### 2003

April – Review of the *Associations Incorporations Act 1984* (NSW) by Office of Fair Trading, NSW

July – Federal Treasurer announced that the Board of Taxation would consult on a draft Charities Bill and Exposure Draft Memorandum

August – Board of Taxation website adds more material on consultations and FAQs

Senator Cherry asks a question of Senator Coonan in the Senate about the Charities Bill, PBIs and consequential amendments.

#### 2004

February – Woodward & Marshall Report

May – National Roundtable statement identifying reform of the legal and regulatory environment of NFPs as its first priority area

June – Extension of Charitable Purpose Bill passed

Budget Night – Treasurer announces that Government will not proceed with draft charity bill. It will legislate for a statutory extension in respect of child care, closed religious orders and self help groups

#### 2005

April – *Review of Associations Incorporation Act 1981 Interim Report*, Consumer Affairs Victoria

August – Allens Consulting Group, *Improving Not-for-Profit Law and Regulation*, commissioned by the (then) Department for Victorian Communities

October – *Giving Australia 2005*: major research report commissioned by the (then) Department of Family and Community Services, on behalf of the Prime Minister's Community Business Partnership

December – ATO released finalised Taxation Ruling on charities. [TR 2005/21](#).

#### 2007

February – Department for Victorian Communities (DVC) announces a new project - *The Stronger Community Organisations Project* (SCOP review)

March – the (then) Victorian Treasurer, Mr John Brumby, announces a review by the State Services Authority of regulation of the NFP sector as part of the Victorian government's commitment to reducing 'red tape' (SSA Review).

June – Federal Treasury releases *Financial Reporting by Unlisted Public Companies Discussion Paper* (Treasury review)

September-October – SSA and SCOP Review Reports submitted to the Victorian government (not released publicly). Submissions to Treasury review closed.

## 2008

April – Victorian Government releases the SSA and SCOP reports together with *The Victorian Government's Action Plan: Strengthening Community Organisations*.

## Appendix 1.2 Research Materials (chronological order)

National Roundtable of Nonprofit Organisations 'Nonprofit Regulation Reform Program' National Roundtable, May 2004. <http://www.nonprofitroundtable.org.au>

Woodward, Susan & Marshall, Shelley 'A Better Framework: reforming not for profit regulation' University of Melbourne, Centre for Corporate Law and Securities Regulation, 2004. <http://cclsr.law.unimelb.edu.au/index.cfm?objectId=017B1CA1-B0D0-AB80-E29B8B41F029F841>

Lyons, Mark 'Need Public Policy Ignore the Third Sector? Government Policy in Australia and the United Kingdom' *Australian Journal of Public Administration* 65 (3) September 2006.

Murray, Senator Andrew 'One Regulator, One System, One Law – the case for Introducing a New Regulatory System for the Not for Profit Sector' Discussion Paper, July 2006.

[http://www.andrewmurray.org.au/documents/463/NFP1R1S1L%200706\\_v2.pdf](http://www.andrewmurray.org.au/documents/463/NFP1R1S1L%200706_v2.pdf)

Keating, Katherine 'The National Governance of the Non-Profit Sector', Winston Churchill Memorial Trust Report, Churchill Trust, 27 September 2007.

[http://www.churchilltrust.com.au/res/File/Fellow\\_Reports/Keating%20Katherine%202006.pdf](http://www.churchilltrust.com.au/res/File/Fellow_Reports/Keating%20Katherine%202006.pdf)

Lyons, Mark 'A National Nonprofits Act and Regulator' Presentation to Associations Forum National Conference, 29-30 August 2007.

State Services Authority, Review of Not-for-Profit Regulation (2007)

<http://www.dvc.vic.gov.au/Web14/dvc/dvcmain.nsf/allDocs/RWP5FCB0E3A722237C7CA25727C00059BFB?OpenDocument>

Strengthening Community Organisations Project (SCOP), Final Report of the Steering Committee, 2007.

<http://www.dvc.vic.gov.au/Web14/dvc/dvcmain.nsf/allDocs/RWP5FCB0E3A722237C7CA25727C00059BFB?OpenDocument>

Victorian Government 'Action Plan: Strengthening Community Organisations' Victorian Government, April 2008.

<http://www.dvc.vic.gov.au/Web14/dvc/dvcmain.nsf/allDocs/RWP5FCB0E3A722237C7CA25727C00059BFB?OpenDocument>

Stephens, Senator Ursula, Speech given at PriceWaterhouse Transparency Awards, 17 April 2008.

Murray, Senator Andrew 'A proposal for simplifying the legal form and regulation of small for-profit businesses and not-for-profit entities' Discussion Paper, April 2008.

<http://www.andrewmurray.org.au/documents/539/FPNFP-IO%200408.pdf>

Joint Committee on Corporations and Financial Services Report 'Better shareholders - Better company' Report, Commonwealth of Australia, June 2008.

[http://www.aph.gov.au/senate/committee/corporations\\_ctte/sharehold/report/index.htm](http://www.aph.gov.au/senate/committee/corporations_ctte/sharehold/report/index.htm)

Changemakers Australia 'The State of Play - Charitable Law Issues' Changemakers Australia, 15 June 2008.

Council of Australian Governments' Meeting 'Business Regulation and Competition Working Group' Commonwealth of Australia, 3 July 2008.

[http://www.coag.gov.au/coag\\_meeting\\_outcomes/2008-07-03/docs/business\\_regulation\\_competition\\_working\\_group.pdf](http://www.coag.gov.au/coag_meeting_outcomes/2008-07-03/docs/business_regulation_competition_working_group.pdf)

Council of Australian Governments' Meeting 'Communiqué' Commonwealth of Australia, 3 July 2008.

[http://www.coag.gov.au/coag\\_meeting\\_outcomes/2008-07-03/docs/communique20080703.pdf](http://www.coag.gov.au/coag_meeting_outcomes/2008-07-03/docs/communique20080703.pdf)

## APPENDIX 2

### Extracts from PILCH Research Report into the Establishment of a Not-for-Profit Legal Service, May 2007

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...

#### 6. NEED

##### 6.1 Existing legal services for NFPs

Other than PILCH's existing service (and the more limited service offered by some of our interstate counterparts<sup>72</sup>), there is no discrete, specialist pro bono legal advice service in Australia for NFPs. While legal aid is provided for individuals who meet a means test and other eligibility criteria, there is no similar government legal assistance for NFPs.

In Victoria, community legal centres act only for individuals and refer NFPs to PILCH for assistance.<sup>73</sup>

There is Federal government arts funding for the Arts Law Centre which provides free/low-cost assistance to individual artists and arts NFPs, but this only services a small part of the overall NFP sector.

There are also some 'issues-based' services that NFPs can access such as the Environment Defenders Office<sup>74</sup> and the Communications Law Centre<sup>75</sup>. This latter service has a limited capacity to provide pro bono assistance and no longer receives community legal centre funding. These services do not deal exclusively with NFPs and are obviously only of assistance in relation to a limited number of issues that NFPs face. Where appropriate, PILCH refers NFPs to these services and will continue to do so, thus ensuring that new PILCH services will not duplicate these existing niche services.

There is information (eg, fact sheets) and resources (on-line and hard copy) from various government departments and agencies (eg, ATO, Consumer Affairs Victoria) and also from many of the peak organisations (eg, VCOSS<sup>76</sup>) that can help with many issues relevant for NFPs, including some legal issues. Again, where appropriate, PILCH will refer NFPs to these resources. There is considerable variability in the accessibility, cost and quality of these services. There is no comprehensive web-based portal to direct NFPs to these existing resources, and they are not well mapped or linked. ...6.2 not extracted

##### 6.3 Direct pro bono relationships

There are some NFPs that have established direct pro bono or reduced fee arrangements with law firms and/or receive research assistance from academics. Often these arrangements are a highly valuable (and a highly valued) source of legal advice and assistance for NFPs. In some cases, the arrangement is limited to certain types of legal work and/or a certain number of hours. Thus, even those NFPs that enjoy such an arrangement may need other assistance with legal issues, including general information by way of seminars etc. ...

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<sup>72</sup> For example, PILCH (Qld)'s website states that they only take on a matter for a NFP if the *matter* itself raises an issue that involves the 'public interest'. This is more limited than the PILCH (Vic) test where, once the *organisation* is eligible (ie, by considering the aims, objectives and services of the NFP to determine if the organisation serves the disadvantaged, benefits low income clients or has public interest aims and objectives), pro bono assistance will be brokered for the full range of legal issues. In 2005-06, PILCH NSW referred 61 matters for NFPs and its eligibility criteria are similar to PILCH (Vic).

<sup>73</sup> We understand that in NSW some community legal centres will provide advice to NFPs, but that the availability of advice is somewhat ad hoc as it depends on the expertise of the volunteer solicitor on duty (Centre for Volunteering NSW).

<sup>74</sup> See <http://www.edo.org.au/>.

<sup>75</sup> See <http://www.comslaw.org.au/>. They are a research unit within the law school of Victoria University.

<sup>76</sup> Victorian Council of Social Services: see <http://www.vcooss.org.au/>.

For many NFPs, particularly the smaller ones and those with less popular or 'fashionable' causes, these arrangements are out of reach. Even for those NFPs that have established an ongoing relationship with a law firm or lawyer, this may not be sustainable in the long term (eg, if the person who is the main contact at the firm leaves or the firm's pro bono priorities or capacity changes).<sup>77</sup> ...

#### 6.4 Pro bono and low-cost

The cost of services is a critical issue for the sector, especially given the data which shows that the majority of NFPs are small and have limited financial resources. There is a need to ensure that these financial resources are not diverted from core service delivery. In particular, if resources are spent on legal advice - 'admin' - the public are less likely to donate.<sup>78</sup>

#### 6.5 Complex regulatory environment

PILCH's experience over the last decade is that many NFPs, are struggling to operate under a complex regulatory framework. For example, to keep abreast of amended employment and other legislation, determine their eligibility for tax exemptions and meet their state and federal reporting requirements. This anecdotal evidence is confirmed by others. ...

In summary, the difficulties associated with the complex NFP regulatory environment combined with limited financial resources and the heavy reliance on volunteers, means that access to timely and accessible legal information is a pressing concern for NFPs.

There is an important role for PILCH in supporting the moves that have begun (at least in Victoria) for legislative reform so that this complexity etc is reduced. However, it is clear that a comprehensive overhaul (both within and across states, and on national issues) is not close at hand, and that the need for specialist, low-cost legal advice for NFPs is great and on-going.

...(next extract)

### 9. CONSULTATIONS WITH NFPs

PILCH obtained feedback about its existing services and ideas for new services from a range of NFPs by:

- a survey of NFPs, both those that have used PILCH in the past and those that have not;
- meetings with several NFPs; and
- a focus group held at PILCH on 6 February 2007.

A summary of the meetings and other discussions is contained in Attachment 1. For a copy of the survey form see Attachment 2A. For details of where the survey and focus group was advertised see Attachment 2B. Some of the key results of the survey are set out below. A fuller table is contained in Attachment 2C.

#### 6.1 NFP survey results

The survey was intended to provide quick and simple feedback from NFPs. It is not, and was never intended to be, a representative sample etc; merely a bit of a 'snapshot'. Importantly, the survey which was available on-line on PILCH's website, provided NFP organisations outside the Melbourne metropolitan area with an opportunity to provide feedback. It was deliberately kept to a double sided page and largely 'tick the box' responses in order to limit the effort and time required for completion and, therefore, to maximise the number of responses. It was advertised widely via peak body newsletters, sector e-bulletins and via the

<sup>77</sup> A member told us that they had had a direct pro bono relationship with a women's agency 'We had previously assisted [them] and one of our lawyers had served on the board - but moved overseas. This severed the main link between the firm and the organisation. The link was revived through a recent PILCH referral where we have assisted the organisation with workplace relations advice. This is an example where PILCH has been able to breathe new life into a dormant relationship.'

<sup>78</sup> There has been considerable debate and concern expressed in the media about the percentage of donations that go towards an organisation's 'administrative costs' eg, the Red Cross post-Bali bombings and for many overseas aid organisations regarding use of the tsunami donations.

PILCH database, website and newsletter. PILCH members were also asked to distribute it to any NFPs that they advise in order to reach those NFPs that have a direct pro bono relationship with a lawyer or firm and as a result may not use PILCH's referral service.

As of 16 March 2007, PILCH has received 101 completed surveys. While the surveys have been de-identified, it can be seen from the covering emails and letters that there is a wide range of respondents: very large organisations to very small; metropolitan, regional and rural; and variety of activity/service areas. In total, the organisations that responded have between them approximately<sup>79</sup>:

- \$46,819,750 annual income;
- 2,488 employed staff; and
- 2,935 volunteers.

The following shows the number of survey respondents that had already used PILCH and if they received pro bono legal assistance via a referral from PILCH and/or from another source.

*Table 4 – Survey results (2007) for existing PILCH services*

Question	Yes	No	Don't Know	No answer
Has contacted PILCH	50	38	12	1
Received pro-bono legal assistance through PILCH	37	15	9	39
And/or received pro-bono legal assistance from other source	36	21	9	35

Comments about the assistance provided by PILCH were extremely positive, with many organisations full of praise regarding how helpful and informative PILCH's current services are, eg:

The service from PILCH is professional, and accurate, and easy to obtain, high quality appropriate, saved us going down a blind alley.

Other feedback revolved around the length of time that pro bono can take and the difficulty of getting answers to small and easy questions over the phone. One respondent stated that while they feel 'comfortable that no matter what the inquiry PILCH...assists', they would not contact PILCH unless 'completely necessary'.

The assistance received from pro bono referrals was seen to be highly efficient and competent. One respondent commented that if a matter become too 'hard' then a firm might not be willing to provide on-going assistance to see that matter to completion.

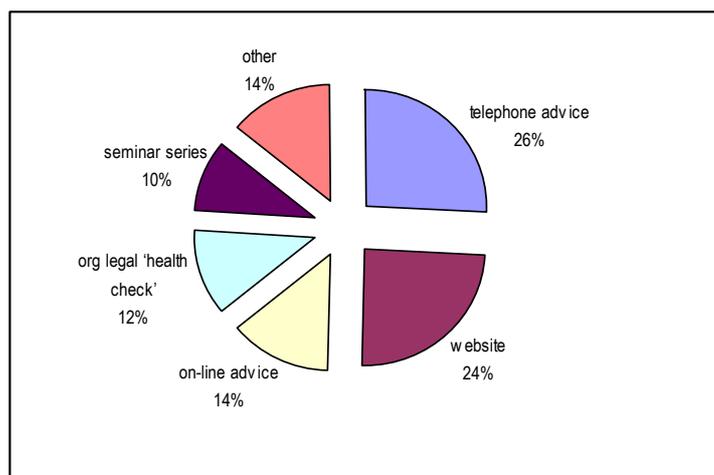
The type of sources of pro bono assistance received other than that provided by PILCH were mainly because of a direct relationship with a law firm (established via a board member or CEO of the NFP) or via a member firm's own contacts.

The following chart highlights the responses to the range of possible new services mentioned. The respondents were also asked to rank them in order of priority and the chart is based on how many times the particular service ranked in the top 3 (out of 10).<sup>80</sup>

*Chart 1 – NFP survey results for new services*

<sup>79</sup> These calculations are based on a median average sum of the survey ranges eg, the median of 6 categories for income with a total range of under \$500 – over \$1M (see survey form, Attachment 2A).

<sup>80</sup> The pie chart shows how many responses (for the top 5, with the other 5 services grouped together under 'other') ranked that service as 1, 2 or 3 in their priorities (out of the aggregate number of responses of 239). See Attachment 2C for the results for all 10 options.



For the purpose of this chart, the option of 'on-line advice' (ie, where an NFP would register a query via the website and then receive a reply by email) was not included as part of the 'website' category. On this basis, the preference for a new website ranked slightly behind the telephone advice line (ie, 58 vs 62 organisations ranking it in their top 3 priorities). If the website is taken to include on-line advice and precedents, the overall demand for a website would be 42.3%, making the preference/priority much stronger. In either case, the telephone advice service is a clear priority for respondents (62). Apart from the website and telephone service as the highest priorities, the next three were an on-line legal advice (33), organisational 'legal health checks' (28) and seminars (24).<sup>81</sup>

Overall, most respondents indicated that all of the suggested services would be appreciated - 54 respondents stated that they would use them 'regularly', 39 'occasionally' and only 1 said they would not use any of the resources (this respondent had an existing direct pro bono relationship with a large private law firm). ...

## 6.6 NFP focus group

The focus group provided an opportunity to receive more detailed feedback on the limits of existing services, barriers to accessing legal advice and demand for potential new services. Attachment 2D lists the 17 diverse organisations that attended.

Feedback from the group was consistent with the survey data, in particular regarding prioritising new services. The discussion fleshed out the different types of legal advice that NFPs need. Three main areas of legal difficulty for NFPs were identified:

- 'client focus' – legal advice about direct service provision issues;
- 'structural and systemic issues' – affecting a class of people, advice on legal aspects of systemic advocacy and assistance with law reform (eg, possible impact of new legislation on clients or, in the case of a peak body, impact on its members); and
- 'organisational/governance' – eg, risk management strategies, awareness raising, assistance with conditions of funding, employment, etc.

There was keen interest in pro-active assistance through an organisational 'legal health check'.<sup>82</sup> The need for NFP regulatory reform emerged, especially for legal structures and governance requirements.

The group raised the potential problem of generating significant demand on PILCH and the need, therefore, to make sure that provision of any new services took this into account. Some other general points that emerged were:

- the need to raise awareness about legal obligations of NFPs without deterring volunteers;

<sup>81</sup> Although it is interesting to note that the seminars were either ranked very high or very low, also coming in the bottom three in terms of priorities.

<sup>82</sup> One organisation has since been in touch say their board would like to go ahead with such a check – jumping ahead, but at least demonstrating the likely demand!

- that many groups were not aware of existing PILCH services or the breadth of service provided;
- the need to raise awareness of existing resources such as those offered by peak bodies and some government departments;
- the importance to NFPs of creating on-going relationships and building their own capacity;
- the need to tailor information and services to the scale, activity and issue of the particular NFP being assisted (eg, what is appropriate for a small group meeting in someone's home compared with a group receiving government funding to provide services);
- the need for a pro-active approach to engage organisations that are most 'disadvantaged' - eg, providing a 'clinic' based in a community centre or via a peak body;
- the need for a central point for brokering legal 'community partnerships'; and
- that the services provided need to be a two-way learning process – ie, there is a need to educate the legal profession about NFPs as well as the lawyers assisting NFPs with understanding the legal system;

In relation to this last point, it is also important to note there is an unfortunate combination of a complex regulatory system (see Heading 6.5) and a dearth of expertise in the legal profession on certain NFP-specific issues such as tax concessions, fundraising and incorporated associations. Many lawyers may be willing to help (eg, on a pro bono or reduced fee basis) but, because it is not their main area of practice and there are almost no undergraduate or professional development opportunities on such issues, they inadvertently give inappropriate advice.

The survey and focus group indicate that a comprehensive web-based service is the first priority, but that it is important for this service to be supported by other 'direct contact' services, in particular, a telephone helpline (to answer quick, basic queries and to point them in the right direction). There is demand for pro-active legal assistance: eg, organisational 'legal health checks', assistance with law reform and brokering on-going pro bono partnerships. Collaboration with peak bodies is also important in ensuring effective delivery of new services.

## 6.7 Other data – NSW

There is a large body of data (telephone interviews of 283 NSW 'volunteering organisations') that supports and enhances our findings: see *'It's a bit of a minefield: Findings from the Legal Issues and Resources Survey of NSW Volunteering Organisations'* (April 2007).

The Centre for Volunteering NSW (the state-based body for Volunteering Australia) has conducted research about the legal needs of the NSW volunteering sector and how best to meet them. Part of the research also involved an audit of the legal resources available for volunteer organisations in NSW (the findings are contained in an accompanying report titled *'Making the Law Accessible: Legal Issues and Resources for NSW Volunteering Organisations'* 2007). The vast majority of NFPs in the sample had volunteers (even if it is only as unpaid Board members) and, therefore, the findings are highly relevant to the Project. PILCH and Volunteering NSW have shared research findings and PILCH is grateful to Dr Anton Mischewski (Research and Policy Manager at Volunteering NSW) for providing copies of the reports prior to their formal launch.

The following are some of the key findings taken from the Volunteering NSW reports, together with some comments in the light of the Project.

- Their review of Australian legal literature for the volunteering sector highlighted the lack of comprehensive data and legislative uniformity across all states and territories, concerning key issues such as insurance, civil liability, and volunteer protection. The legal issues faced by volunteering organisations are becoming 'increasingly complex' and they believe this 'negatively impacts all volunteering organisations, especially small-to-medium ones'.  
*Comment – this is further affirmation of our observations about the complex regulatory environment in which NFPs operate.*

- Their audit of resources found an extensive range of on-line and print legal resources and services 'but there is no one comprehensive and interactive on-line legal resource specifically addressing volunteers and volunteering that provides easy access to them.' Also, some of the resources that are available are 'sometimes too specialised for volunteering organisations in general'.  
*Comment – this is consistent with the Project's findings that indicate NFPs want access to a range of new services ie, their needs are not currently being met.*
- Small-to-medium organisations<sup>83</sup> and those in rural NSW are more likely to use pro bono lawyers and websites for legal information. However, more of these organisations pay for legal services and are less likely to use community legal centres.  
*Comment - in NSW, some community legal centres give free advice to NFPs but this is not the case in Victoria where the centres refer NFPs to PILCH.*
- Regional organisations mainly use websites and non-legal sources such as colleagues; pro bono lawyers are relatively under-utilised.  
*Comment - : this affirms the Project findings about the need for a specialised NFP web-portal and PILCH's roll-out of seminars and pro-bono referrals to regional centres.*
- Existing NSW resources such as LawAccess<sup>84</sup> are used infrequently as legal resources by any volunteering organisation irrespective of its size and location.  
*Comment - LawAccess does not have any resources specifically aimed at NFPs among the large number of topics covered on its website and is aimed at individuals not organisations.*
- There was a lack of consensus or understanding about what is a 'legal issue'. Many respondents did not believe their organisation had any 'legal issues' because they only thought of matters that involve courts, judges and potential prosecution. However, the researchers intended a broad definition and the interviewers were instructed to emphasise the broader definition – ie, seeking information on a legal matter, seeking legal advice of any nature or taking legal action in a dispute. The broad definition would encompass legal issues as a risk management process aligned to good governance and management.  
*Comment - this is an important finding. It confirms the need to improve awareness within the sector about the role of legal advice and information and when it is appropriate to seek this assistance (eg, in order to prevent a legal issue arising in the narrow sense ie, courts and prosecution for non-compliance).*
- Barriers to accessing existing resources and services
  - '...lack of specialised volunteering legal services and lack of knowledge of services are major barriers identified by all organisations.'  
*Comment - this is consistent with the Project findings about existing resources not being well-tailored to NFPs.*
  - 'Costs were more likely to be noted by small-to-medium sized organisations in regional and rural organisations.'
- Future services
  - The most preferred options were for 'a freely accessible on-line legal resource to assist them to understand and comply with current legislation.'  
*Comment – this is consistent with the Project findings.*
  - A close second preference was the need for a free 1800 'volunteering hotline'.  
*Comment – again this is consistent with the Project findings although we have not considered offering advice to individual volunteers, only NFP organisations.*
  - Rural organisations expressed more interest in having access to courses, workshops and seminars.

In summary, the large scale and recent NSW research supports very strongly the information gathered by PILCH both over time (via PILCH's existing services for NFPs) and more recently as part of this Project.

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<sup>83</sup> For the purposes of the Volunteering NSW research, small organisations are those with less than 100 paid employees and large are those with more than 100 paid employees.

<sup>84</sup> A free NSW government telephone service that provides basic legal information, advice and referrals for people who have a legal problem in NSW plus web-based information: see <http://www.lawaccess.nsw.gov.au/>