

Further submission to Productivity Commission Draft
Research Report, Oct 2009
‘Contribution of the Not-for-Profit Sector’

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1 EXECUTIVE SUMMARY

- 1.1 We are extremely pleased that, in line with our earlier submissions (and those of many others), the Productivity Commission has recommended the establishment of a national, independent regulator for charities and community purpose organisations. It will assist all types of not-for-profits (small or large, locally based or national) if this regulator becomes a 'one-stop shop' for:
 - filing 'public record' corporate and financial information (the requirements for which are calibrated to organisational size and functions);
 - registration and endorsement for Commonwealth tax concession status (rather than the Australian Taxation Office); and
 - registration for fundraising purposes.
- 1.2 We also endorse the recommendation for the creation a new, national not-for-profit legal structure if it is one that existing incorporated associations are required, or can chose to migrate to.
- 1.3 We support the recommendation that all Australian governments adopt the Standard Chart of Accounts (QUT) for reporting by not-for-profits in receipt of government grants. However, compliance costs for all not-for-profits could be reduced further if work on a not-for-profit specific accounting standard is expedited. We submit that the Commission should recommend this.
- 1.4 We are pleased that (in line with our submission and the 2008 Senate Inquiry) the Commission has recommended that a statutory definition of charitable purposes be adopted as proposed by the 2001 Charity Definition Inquiry. However, the impact of this reform (positive or negative) will depend to a large extent on how the new definitions are linked to taxation concessions (if any).
- 1.5 Overall, the recommendations referred to above represent a comprehensive road map for reform which PilchConnect strongly endorses. If all Australian governments co-operate to ensure prompt implementation, these reforms will achieve significant reductions in red tape and complexity for all not-for-profits, no matter their size, activities or location. If this does not occur, there is likely to be considerable sector disquiet as, yet again, no progress is achieved on these long standing problems.
- 1.6 As requested, we have commented on several critical implementation issues including: limits to the Commonwealth's powers under the constitution (which will determine how a new legal structure and nationally consistent fundraising laws can be achieved); the related issue of mandatory migration to the new legal structure vs an opt-in scheme; possible forum shopping; and whether the new Registrar should be a separate regulator or part of ASIC.
- 1.7 If the States are not willing to refer specific powers over existing incorporated associations and fundraising regimes to the Commonwealth, we agree that, as a fall-back position, a national legal framework should be achieved by creating an 'opt-in', best practice Commonwealth model for legal structure and fundraising that is overseen by an independent, specialist regulator.
- 1.8 For an 'opt-in' system to succeed and not exacerbate current complexity, significant practical incentives need to be provided to encourage organisations to migrate to it. These incentives should, as a minimum, include: a 'one-stop shop' for registration for fundraising, annual financial and corporate reporting purposes; endorsement of tax concession status; on-line filing; tiered reporting with appropriate fees and penalties; and a specialist regulator that offers a helpful and

efficient service (for example, an on-line and telephone information service, sample constitutions, guides etc).

- 1.9 In terms of priorities for implementation, we believe the highest is the establishment of the new, independent, specialist regulator that is properly resourced and with power to endorse charities and other related bodies. We support the establishment of the Office for the Not-for-Profit Sector in the Department of Prime Minister and Cabinet, however, establishing this Office without a new regulator is not sufficient. Only a policy leader within government combined with an independent regulator will be able to roll out this reform package.
- 1.10 We have commented in brief on some of the other recommendations.
- 1.11 In particular, we are pleased that the Commission has recognised the value of sector-based support services (described generally as 'intermediaries'). We urge that these comments be elevated to a recommendation that these services receive recurrent core government funding. These services will play a crucial role in supporting the implementation of this reform program by providing assistance that governments and the new regulator will not.
- 1.12 By embracing the Commission's road map for reform, we believe the Australian governments can have an enduring impact on the effectiveness of the regulatory regime for not-for-profits which, in turn, will maximise the sector's contribution to Australian society.

2 SCOPE OF THIS SUBMISSION

- 2.1 PilchConnect appreciates this opportunity to respond to the Productivity Commission's draft research report, 'Contribution of Not-for-Profit Sector', October 2009 (**the Draft Report**). We wish to acknowledge the Commission's open process of consultation, and its thorough and holistic report. We hope that our further submission, particularly on issues of how best to implement the recommendations on regulatory reform, will help to inform the Commission's final report.
- 2.2 In this further submission we have, in line with our legal expertise, focussed in detail on the regulatory issues covered in Chapter 6 of the Draft Report (see this submission paras. 3.1 to 3.75) and the taxation law reform proposals contained in Chapter 7 of the Draft Report (see this submission paras. 4.1 to 4.7).
- 2.3 As an innovative, new sector-based support service (an 'intermediary'), we have also discussed some of the sector development issues raised in Chapters 4,6 and 13 of the Draft Report (see this submission heading 6).
- 2.4 We have considered other parts of the Draft Report and have commented on some of the recommendations and questions in summary table form (see page 21).
- 2.5 Although PilchConnect's resources are very limited (a small team of 3 eft lawyers who deliver legal training and advice services), we have devoted considerable time and effort to responding to the Commission's Issues Paper and Draft Report (and prior to this, the 2008 Senate Inquiry). We have done this because we believe regulatory reform on issues such as fundraising, legal structure, reporting obligations and tax concession categories will, particularly if overseen by a specialist and properly resourced regulator, prevent many of the legal problems that not-for-profit community organisations (**NFPs**) come to us about.
- 2.6 Further, at the most strategic level, the proposed reforms are vital to ensuring a proper underpinning of Australia's not-for-profit (**NFP**) sector; a sector that it is the mission of our service to support.
- 2.7 We are available to discuss any part of this and our earlier submission. We are also keen to be involved in further work on the details of regulatory reform and its implementation. From our experience of dealing with a diverse range of NFPs (but particularly the small-to-medium sized groups), we believe our service can add value to crafting the details of the reforms, as well as helping to disseminate information about them to the sector.

3 REGULATION OF NFP SECTOR

(Chapter 6, Draft Report)

Overall points of agreement on draft recommendations

- 3.1 We have considered carefully the Commission's recommendations and reasoning. We are extremely pleased that the Commission has recommended that:
- a new, national, independent regulator be established (draft recommendation 6.4)
 - this regulator's remit should be broader than charities – it is also to cover community purpose organisations (draft recommendation 6.4)
 - this regulator should serve as the single reporting portal (draft recommendation 6.4)
 - for public record corporate and financial information (the requirements for which are calibrated to NFP size and scope of functions),
 - for registration and endorsement of NFPs for Commonwealth tax concession status (rather than the ATO, see further discussion at para.3.47);
 - a new, national NFP legal structure be created (draft recommendation 6.1);
 - nationally consistent fundraising legislation be implemented (draft recommendation 6.2);
 - all Australian governments adopt the Standard Chart of Accounts (QUT) for reporting by NFPs in receipt of government grants or service contracts (draft recommendation 6.2); and
 - a statutory definition of charitable purposes be adopted in accordance with the recommendations of the 2001 *Inquiry into Charities and Related Organisations* (draft recommendation 6.3, see further in this submission 'Taxation of NFP Sector' at para. 4.6).
- 3.2 This set of recommendations represents a comprehensive road map for reform which PilchConnect strongly endorses and encourages all Australian governments to implement.
- 3.3 The Commission's findings on the size and role of the NFP sector provide up-to-date justification as to why, despite the time and money that will be required, attention now needs to focus on the best way to implement this road map as soon as possible. The main focus of our submission is on how best to ensure prompt and effective implementation of these recommendations, without increasing the burden particularly on small-to-medium sized NFP organisations.

Implementation issues

- 3.4 If all Australian governments cooperate to establish a 'one stop shop' for registration with a specialist regulator, including (if necessary) by referring powers to the Commonwealth, it will be possible to achieve major reductions in red tape and complexity. If, yet again, this is not achieved, there is likely to be a considerable backlash from the NFP sector.
- 3.5 If the States are not willing (at least in a timely fashion) to refer any necessary powers over incorporated associations and fundraising to the Commonwealth, we agree with the overall thrust of the Commission's Draft Report that national reform should be achieved by creating a 'best practice' Commonwealth model (see paras 3.58 to 3.61), but we urge the Commission to extend this model to include fundraising rules (see paras. 3.51 to 3.57).

- 3.6 This approach - the Commonwealth leading with a best practice model – has been successful in other areas that have recently undergone significant reform: for example, defamation law reform (where the Commonwealth released model rules), national harmonisation of various professional and trade practising / licensing regimes, occupational health and safety law reform, and (most pertinently) company law reform.
- 3.7 There are a range of implementation issues to be considered. We have discussed some of the more significant issues below under the following headings:
- constitutional law issues – including two possible approaches to overcoming constitutional limits for legal structure and fundraising;
 - mandatory migration versus 'opt-in' scheme – including whether a size limit should be placed on those that can remain under State and Territory-based registration schemes;
 - possible forum shopping between Commonwealth, State and Territory regimes;
 - new body versus specialist division in ASIC;
 - unincorporated groups – the need for a new model; and
 - accounting and business reporting initiatives.

Constitutional law issues (draft recommendations 6.1, 6.2 and 6.3)

- 3.8 There are important constitutional law issues to resolve before:
- a 'best practice' Commonwealth incorporated associations regime can be adopted (draft recommendation 6.1); and
 - a national fundraising regime can be developed for those that use this new legal structure and for companies limited by guarantee (see our suggested change to draft recommendation 6.2, discussed in para. 3.54).
- 3.9 Our earlier submission to the Commission raised these issues,¹ as did our submission to the 2008 Senate Inquiry (including pros and cons of each implementation method).² We note, however, that the Commission's Draft Report does not raise any potential constitutional limitations. We have again, via recent telephone discussions with officers at the Commission, highlighted the need to obtain constitutional law advice and we understand this is now being sought.
- 3.10 To assist the Commission, the following is a summary of the potential constitutional obstacles to implementation of Draft Recommendation 6.1 and the fundraising part of Draft Recommendation 6.2, together with a brief discussion of two approaches for how these obstacles might be overcome.

Does the Commonwealth of itself have sufficient power to establish a national incorporated association legal structure and fundraising rules for these bodies?

¹ See PilchConnect's earlier submission to Productivity Commission, pages 11-12, available on-line at www.pilch.org.au/submissions.

² See PilchConnect's submission to 2008 Senate Inquiry into Disclosure Regimes for Not-for-Profit Organisations, pages 28-30, available on-line at www.pilch.org.au/submissions

3.11 At first glance, the most obvious authority for the Commonwealth to rely on is the 'corporations power' (s.51(xx) of the Constitution) as it relates to the making of laws with respect to:

'foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth'.

3.12 Although this head of power would cover fundraising by any such (NFP) 'corporations', the High Court's position has been that this power does not extend to making laws about the process of incorporation. Namely, it only applies to corporations that are already formed.³

3.13 Further, it is not settled law⁴ that the corporations power is broad enough to cover NFP corporations. Although incorporated NFP bodies may conduct activities and provide services that earn 'revenue' (for example, membership fees, fee-for-service income, grant income etc), it is unclear whether this amounts to 'trading' for the purposes of the corporations power. In particular, it should be queried whether the 'not-for-profit' (or more accurately, 'not-for-distribution') motive is relevant to the types of organisations intended to be regulated by the corporations power. However, we note the recent broad interpretation of the power in the High Court's decision to uphold the validity of the *WorkChoices Act*.⁵

Preferred approach: implementation of new legislation through a referral of powers

3.14 As outlined in our submission to the Commission (and the 2008 Senate Inquiry), our preferred approach for the establishment of a national NFP legal structure and nationally consistent fundraising laws is via a referral of powers from the States to the Commonwealth.

3.15 Although in its sector consultations the Commission has suggested that a referral of powers is not likely,⁶ we note that the Labor Party National Platform and Constitution 2009 specifically envisages this (emphasis added):

“Labor supports the development of a national regulatory framework based on the 2008 report of the Senate Standing Committee on Economics Disclosure regimes for charities and not-for-profit organisations, and supports the examination of:

- A single national Associations Act providing for the registration and regulation of not for profit organisations, including all current non-profit companies and incorporated associations, by a referral of powers from the states through COAG...
- A single national Fundraising Act to regulate fundraising by not for profit organisations....⁷

3.16 A referral of powers would provide constitutional certainty through a single Commonwealth Act; a model with proven success for the business sector. The constitutional validity of national law implemented pursuant to a referral of State powers was confirmed in *R v Duncan* where Chief Justice Gibbs held that there is:

“no principle of constitutional law that would prevent the Commonwealth and the States acting in cooperation so that each, acting in its own field, supplies the

³ See *New South Wales v Commonwealth* (1990) 169 CLR 482.

⁴ See obiter comments Deane J, *New South Wales v Commonwealth* (1990) 169 CLR 482. *NSW v Commonwealth of Australia*; *Western Australia v Commonwealth of Australia* (2006) 231 ALR 1

⁵ *NSW v Commonwealth of Australia*; *Western Australia v Commonwealth of Australia* (2006) 231 ALR 1

⁶ Comments by Robert Fitzgerald at forum hosted VCOSS, Melbourne, 24 November 2009.

⁷ See ALP National Platform attached (Chapter 7, paras 86 & 87). The complete platform is available at <http://www.alp.org.au/platform/index.php>

deficiencies in the power of the other, and so that together they may achieve ... a uniform and complete legislative scheme.”⁸

- 3.17 While we appreciate this referral of powers option requires high level cooperation (ideally from all States), corporate law development shows that the States can quickly be harnessed into action when necessary - in that instance, because of a series of cases threatening the co-operative State and Territory based legislative scheme.⁹ The NFP sector is worthy of similar, prompt cooperation and there is likely to be considerable sector disquiet if, yet again, no progress is achieved.
- 3.18 Even if not all States are prepared at this stage to refer powers, it would still be significant if a 'lead' State referred its powers, with others to follow over time. We note that, to date, the Victorian government has shown interest in this area, having amassed strong evidence about the shortcomings of the current system (the need to reduce red tape and stream regulation) in the reports it has commissioned from Allens Consulting (2007)¹⁰ and the State Services Authority (2008).¹¹
- 3.19 We urge the Commission to recommend that all State governments, if necessary, refer powers over incorporated associations and fundraising to the Commonwealth.

Alternative approach: amending the Corporations Law using the existing referral of powers

- 3.20 If some or all of the States are not prepared to refer their powers over associations and/or fundraising, the *Corporations Act* could be amended to include provisions for a new national legal structure as well as provisions to cover fundraising by these bodies.
- 3.21 This alternative method for implementing a new NFP national legal structure would involve either a modernisation of the existing 'company limited by guarantee' structure¹² or the creation of an additional NFP corporate structure within the *Corporations Act*. Each of these approaches may be covered by the existing referral of powers.¹³ Again, we hope the Commission will seek specialist legal advice on this issue.¹⁴
- 3.22 As our earlier submission indicates, this amendment method is not the preferred option. However we urge the Commission to recommend it as a second preference rather than abandoning the recommendation for a new legal structure. If the States and Territories grant exemptions from

⁸ (1983) 158 CLR 535 at 552

⁹ The scheme also relied on cross-vesting legislation under which State jurisdiction to hear corporate law matters had been conferred on federal courts – this cross vesting legislation was held to be unconstitutional in *Re Wakim: ex parte McNally* (1999) 1198 CLR 511.

¹⁰ 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)

¹¹ State Services Authority, *Review of Not-for-Profit Regulation* (2007)

<http://www.ssa.vic.gov.au/CA2571410025903D/0/1A9077908607CF41CA257426000D3FCB?OpenDocument>

¹² We note that the *Corporations Act 2001* currently provides for the establishment and regulation of companies limited by guarantee and, although there is no prohibition on companies limited by guarantee distributing their profits to members, in practice virtually none of them do so as they operate as NFP organisations

¹³ As contained in the Corporations Agreement 2002 (as amended 16 November 2005) available at:

<http://www.treasury.gov.au/contentitem.asp?pagelid=035&ContentID=495>

¹⁴ Note that such amendments to the *Corporations Act* would require prior consultation with the Ministerial Council for Corporations and approval of the majority of members of that Council: See Division 2, Part 5 Corporations Agreement 2002 (as amended 16 November 2005) available at:

<http://www.treasury.gov.au/contentitem.asp?pagelid=035&ContentID=495>

Conclusion – constitutional law issues

3.23 Specialist legal advice on constitutional law issues needs to be obtained as it may limit the range of possible implementation methods for the recommended new Commonwealth associations legal structure. However, we do not believe these issues should prevent implementation of Draft Recommendation 6.1. A referral of power from the States would overcome any constitutional limitations (as it has done for the business sector) and would also allow a nationally consistent fundraising regime. Alternatively, amendment of the *Corporations Act 2001*, combined with State and Territory fundraising exemptions, could achieve substantially the same result.

Mandatory migration vs opt-in scheme (draft recommendation 6.1)

3.24 Recommendation 6.1 outlines a model where, in addition to new NFPs, existing incorporated NFPs will be able to 'opt-in' for registration with the new Commonwealth Registrar of Community and Charitable Purpose Organisations (**the Registrar**). This means:

- the existing 136,000 incorporated associations will be able to chose to migrate to either a company limited by guarantee or new Commonwealth incorporated association;
- the Registrar would take over responsibility for 11,700 companies limited by guarantee; and
- the Registrar may take over responsibility for 2,500 NFP and some 'for-profit' indigenous corporations.¹⁵

3.25 In terms of companies limited by guarantee, the Draft Report assumes they are all NFPs, but this will need to be investigated further as ASIC does not routinely collect this data. Presumably any companies limited by guarantee that do allow distributions to members will remain with ASIC, but this issue needs to be clarified.

3.26 Our earlier submission outlined arguments for and against mandatory migration of existing incorporated associations.¹⁶ For the reasons outlined in that submission, we remain of the view that mandatory migration is preferable. However, we understand from the Commission¹⁷ that the States may not agree to transfer their incorporated associations and, therefore, mandatory migration may not be a feasible option. As a second preference (that is, rather than no reform), we support an 'opt-in' scheme.

3.27 However, we sound a note of caution. If the creation of a new Commonwealth legal structure and registration process does not attract significant numbers, it will exacerbate the current complexity by increasing the multiplicity of legal structures and regulators. Therefore, it is essential that as many practical incentives as possible are provided to encourage organisations to migrate to the Commonwealth regime. We set out below (paras 3.58 to 3.61, 'Best Practice Commonwealth model') the main incentives that we believe will attractive to all NFPs regardless of size or locale.

¹⁵ See Draft report p 4.5.

¹⁶ We are not suggesting that all types of NFPs migrate – for example, not cooperatives, church bodies, those set up under Royal Charter etc. See PilchConnect submission on Commission's Issues Paper, para 3.29, p11, www.pilch.org.au/submissions

¹⁷ Consultation hosted by VCOSS and presented by Mr Robert Fitzgerald, in Melbourne, 24 November, 2009

Restrict State and Territory schemes to small NFPs? (draft recommendation 6.1)

- 3.28 The Commission has asked for further comment on whether State/Territory based incorporation of associations should be restricted to NFPs with income of less than \$150 000 per annum.
- 3.29 We note that, based on recent Victorian figures,¹⁸ this would mean about 90% of existing incorporated associations could remain under the Victorian system. It is likely that there is a similar pattern in other States and Territories.
- 3.30 If this size criterion were to be implemented it is likely that, by inaction alone, the vast majority of incorporated associations would (by default) remain under a State or Territory regime. This would mean the Commonwealth scheme was ineffective because, as discussed above, without significant uptake it will simply exacerbate the existing multiplicity of legal structures and regulators.
- 3.31 Underlying this suggested size criterion is the Commission's observation that:
"For the majority of NFPs — principally small, incorporated associations ... and those who operate entirely within one state or territory — the regulatory regime generally works well."¹⁹
- 3.32 We believe this is a simplistic and, for many organisations, erroneous statement. There are two main points to note.
- 3.33 First, small organisations (for example, those with less than \$150,000 per annum income) do not necessarily operate on a local basis. ASIC figures on the number of incorporated associations registered as Registered Australian Bodies significantly under-report the number of groups operating in more than one jurisdiction; many incorporated associations are unaware that they need to register with ASIC if they 'carry on business' in more than one jurisdiction.²⁰ A better approach is to have a tiered reporting regime at the Commonwealth level so even small organisations do not find it onerous, especially when combined with one-stop registration for taxation and (ideally) fundraising purposes.
- 3.34 Second, as stated in our earlier submission,²¹ recent amendments to the Victorian incorporation associations legislation have meant that significant 'chunks' of the *Corporations Act* have been incorporated by reference into the associations' regime. This means it does not work smoothly for even small, locally based groups because it requires those involved in running the group to be familiar with two separate governing Acts. We are able to provide cases studies for the Commission on this point.
- 3.35 We also note inconsistencies within the Draft Report on this issue. For example, "the requirements of the legal form are inappropriate" is acknowledged as being one of three main concerns by participants,²² yet it is suggested elsewhere that "others" have argued that "the current [legal] forms are adequate, it is the administration that is the problem".²³ In our

¹⁸ Consumer Affairs Victoria, *Associations Incorporation Amendment (Fees and Other Matters) 2009 - Regulatory Impact Statement*, September 2009, p.8, www.consumer.vic.gov.au

¹⁹ See p. 6.3 of the Draft Report.

²⁰ See PilchConnect submission on Commission's Issues Paper, para 3.13, p 9 www.pilch.org.au/submissions

²¹ See PilchConnect submission on Commission's Issues Paper, para 3.6, p 9 www.pilch.org.au/submissions

²² See p 6.10 Draft Report

²³ See p 6.9 Draft Report

experience of helping a diverse range of NFPs with their legal issues, there are problems with both the current legal forms and the administration. The case studies provided in our submission to the 2008 Senate Inquiry highlight this.²⁴

- 3.36 With the incentives outlined below (para 3.60), all existing incorporated associations and any new groups should be encouraged to register under the new Commonwealth system. Small, medium and large groups as well as local and multi-state organisations – all will benefit from a 'one-stop shop' for reporting and registration with a specialist, independent regulator. We believe they should be given the opportunity to 'vote with their feet'.
- 3.37 The setting of a monetary limit is likely to create the impression that the Commonwealth scheme is not suitable for smaller groups. Therefore, we do not support such a restriction.

Possible forum shopping between jurisdictions (draft recommendation 6.1)

- 3.38 The Commission has asked for further comment on how governments can free up the ability of organisations to migrate between legal forms and jurisdictions, while guarding against any undesirable consequences from forum shopping.
- 3.39 If State and Territory Acts allow easy transfer to the Commonwealth regime but do not provide for transfer to other States and Territories, then forum shopping will not be a concern.
- 3.40 It will only become a concern if groups can 'shop' between States and Territories to find a jurisdiction that has, for example, a very low standard of reporting or committee member duties and, then, by relying on mutual recognition of that registration, the group is able to operate nationally or in multiple jurisdictions.

New body or specialist division in ASIC? (draft recommendation 6.4)

- 3.41 The Commission seeks comments on whether the proposed national Registrar should be a separate agency under the *Financial Management and Accountability Act 1997*, or whether it should be an additional function and separate division of ASIC.
- 3.42 We have consistently argued that a new national regulator should be:
- a specialist regulator for the NFP sector;
 - independent of government; and
 - properly resourced.
- 3.43 In this regard, we agree with the Commission's comments on the need for an "independent body".²⁵
- 3.44 We believe that the attributes outlined above are best achieved by the proposed national Registrar being a separate agency under the *Financial Management and Accountability Act 1997*, rather than a separate division within ASIC.
- 3.45 We have considered other agencies created under the *Financial Management and Accountability Act 1997* (including ASIC, ACC, APRA, ATO) and, drawing on these examples and overseas

²⁴ Available on-line at www.pilch.org.au/submissions

²⁵ See page 5.25 of the Draft report.

models, we believe the Registrar should have the following independence and accountability features:

- be appointed and removed by the Governor-General;
- have a fixed term (5 – 7 year) appointment;
- report to a Minister for the Not-for-profit Sector or the Prime Minister;
- be required to table an annual report to each House of Parliament; and
- have funding allocated by Parliament.

3.46 We are opposed to the Registrar being a separate division within ASIC because it:

- will not provide the necessary incentive for NFPs to opt-in to the proposed Commonwealth associations regime – existing incorporated associations will be reluctant to move to a regulator that is clearly (and rightly) perceived as one that understands business but not NFPs;²⁶
- will perpetuate NFPs (and the NFP sector) as being the 'poor cousin' of the business sector – namely, only a division of business-sector regulator;
- create a battle for resource allocation within ASIC – the number of registrations and consequent fees received from NFP regulation²⁷ will pale compared to those collected from the business sector and, therefore, there will be pressure to allocate resources accordingly; and
- will continue the separation of the 'corporate' oversight role from the determination of tax concession status.

3.47 With regard to this last point, a significant role for the Registrar is the endorsement of NFPs for Commonwealth tax concessions. ASIC is clearly not suited to (nor would want) this role. To divide the legal structure oversight from the determination of tax concession status would undermine one of the main benefits of the reforms outlined by the Commission – the 'one-stop shop' and 'report once, use often' concepts.

3.48 While arguing for a separate body to ASIC, we suggest efficiencies and savings may be possible by 'piggy-backing' on the recent ASIC database upgrade. Local presence could be maintained via existing State / local government offices, or possibly via post offices.

3.49 The Commission's findings on the growth and contribution of the NFP sector yet again support the case for a properly resourced and independent, specialist regulator.

3.50 For the reasons set out above we submit that, in its final Report, the Commission should recommend that the proposed national Registrar should be a separate agency under the *Financial Management and Accountability Act 1997*, rather than a separate division within ASIC.

²⁶ See findings that 70% of respondents to a national survey of companies limited by guarantee (n =1,577) thought that the Corporations Act and how it is implemented by ASIC is more appropriate for those companies that are 'for profit' than those that are 'not-for-profit': Woodward & Marshall, *A Better Framework: Reforming Not-for-Profit Regulation*, University Of Melbourne (2004), Ch. 4, para 4.5.

²⁷ For example, the annual fee revenue from Victorian incorporated associations is estimated at \$1.52M which will pale to fees collected by ASIC: see Consumer Affairs Victoria, *Associations Incorporation Amendment (Fees and Other Matters) 2009 - Regulatory Impact Statement*, September 2009, p.58, www.consumer.vic.gov.au

Fundraising laws (draft recommendation 6.2)

- 3.51 We are pleased that the Draft Report has highlighted the need for nationally consistent fundraising laws. This need has also been recognised by COAG. It is no longer a question of if there should be national consistency, but of how it can best be achieved.
- 3.52 However, we do not agree with the Commission's proposed implementation method for achieving this national consistency. There is no timeline given for the three stage implementation approach (p 6.31, Draft Report) and, as evidenced by the cooperatives experience, it will undoubtedly involve "years to implement across all jurisdictions" (see Box 6.4, Draft Report). This is too slow.
- 3.53 The corporations law and cooperatives experience demonstrate that harmonisation and mutual recognition is a long and not always successful approach, as evidenced by the corporations law example. It is even more difficult in the fundraising context because, compared with cooperatives, the existing laws are considerably more divergent and many more groups are involved.
- 3.54 We submit that the Commission should expand its draft recommendation 6.1 to include rules on fundraising by Commonwealth incorporated NFP bodies, in the same way that the *Corporations Act* 2001 has provisions which regulate fundraising activities of 'for-profit' companies.
- 3.55 We note that the registration of "cross jurisdictional fundraising organisations" (see draft recommendation 6.4) will only help reduce the regulatory burden if registration by the Registrar relieves an organisation from registration at State and Territory levels. The Commission should strongly recommend to all governments that they agree to this measure in the interests of the NFP sector and its contribution to the Australian economy.
- 3.56 In terms of the content of fundraising laws, to at least in some way 'future proof' for technology, we suggest the focus should be on developing core principles rather than being overly prescriptive. For example, describing what information must be provided to donors rather than the method by which the information is delivered.
- 3.57 We have suggested (paras 3.14 to 3.23) two possible ways that the Commonwealth could introduce a best practice fundraising law model for those groups incorporated under the new Commonwealth associations legal structure. If the States refer powers or compliance with Commonwealth fundraising provisions were then recognised by the States, Territories and local government as exempting an organisation from further registration, this would be welcomed by the sector because it would:
- significantly reduce the regulatory burden for NFPs;
 - most likely increase the funds NFPs raise from the public by making it easier for NFPs to fundraise nationally, thereby also increasing their financial viability and the services they are able to deliver ;
 - serve as a major incentive for existing and new NFPs to migrate to the Commonwealth associations regime (which is important for the success of the opt-in scheme proposed in the draft report); and
 - support and accelerate the three stage process of harmonisation, mutual recognition and referral of powers (draft recommendation 6.2).

Best practice Commonwealth model

3.58 As mentioned earlier, even without a referral of powers by the States, we believe the Commonwealth government can, largely of its own initiative, have an enduring impact on the effectiveness of the regulatory regime for NFPs by establishing a 'best practice' model.

3.59 If an opt-in scheme is pursued then, to attract sufficient numbers, there needs to be significant, practical incentives for both existing NFPs and newly forming NFPs to opt-in.

3.60 The main incentives should be:

- one-stop registration for
 - fundraising purposes - registration that will enable an organisation to conduct (non-gaming) fundraising across Australia without further registration or reporting to State and Territory based regulators; and
 - annual financial and corporate reporting;
- endorsement of concessional status for taxation purposes - ideally this registration will be accepted for State, Territory and local government purposes;²⁸
- an independent and properly resourced specialist regulator with interest and understanding of the NFP sector that offers a helpful and efficient service (telephone and on-line information);
- for those existing associations migrating from a State or Territory regime, no additional cost and very straight forward transfer procedures (for example, can retain their current constitution, at least for a transition period);
- on-line filing;
- tiered reporting regime based on organisational size with appropriate fees and penalties;
- useful, free resources such as
 - plain language guide for small NFPs (as exists for small business under the *Corporations Act 2001*)
 - sample, annotated constitutions which can be adapted by groups;
- free mediation service for internal disputes;²⁹ and
- free, on-line, publicly searchable database.

3.61 It is of note that virtually all of the things listed above have been available to the business sector on a national basis for more than a decade.

Implementation phases (further comment sought, draft recommendation 13.2)

3.62 In terms of how this best practice model should be implemented, we suggested:

- as phase 1, the Registrar can oversee the transition to a new national incorporated associations and fundraising regime and take over the role of assessing charitable status from the ATO; and

²⁸ See also paras 4.1 to 4.7 of this submission

²⁹ For example, as is available in Victoria at the government funded Victorian Disputes Resolution Centre

- as phase 2, the Registrar can oversee the introduction of a new statutory definition of charity and related bodies.

3.63 The creation of an Office for the Not-for-profit Sector within Prime Minister and Cabinet would ideally be part of phase 1, but is not essential to it.

Unincorporated groups – need for a new model (draft recommendation 6.1)

3.64 The Commission seeks comment on whether there is a need for a new legal form for small unincorporated associations, similar to the Australian Business Name registration, providing limited legal rights.

3.65 From the enquiries we receive, PilchConnect believes there is a need for a new legal form for very small unincorporated associations. In our experience, the regulatory burden on very small (micro) volunteer-run community organisations with minimal 'risk' would be reduced significantly by a new legal form for micro unincorporated associations.

3.66 Currently there is a push by different levels of government (local, State, and Federal) as well as philanthropics, to require small NFPs to incorporate simply to be able to give them minor funding. This means voluntary run groups such as small, local, African refugee support groups need to incorporate merely to receive a grant of \$500 per year, and in doing so get caught up in increasingly complex incorporated association regime and reporting requirements.

3.67 There is a need for a very basic system that provides limited legal rights in exchange for the most minimal filing requirements (for example an annual 'postcard' as mentioned in the article referred at para. 3.69 below). It may be that such a system will serve as a useful stepping stone for those groups to 'mature' into fully incorporated bodies. Alternatively, those groups which find even this limited compliance too much, or where the need / interest fades, will just come and go rather than being recorded as failing to comply and sapping regulatory resources.

3.68 This new option will also improve the accuracy of data collected on the sector³⁰ because the size, geographical location and general activities of groups that would otherwise not appear on the ABS (or other) radar, will be quantifiable.

3.69 In this regard, we agree with the conclusions of the (forthcoming) article by Professor Myles McGregor-Lowndes and Frances Hannah, '*Unincorporated associations as entities: a matter of balance between regulation and facilitation?*'.

Accounting & business reporting initiatives (draft recommendation 6.2)

3.70 We agree with the Commission's recommendation for all Australian governments to adopt the Standard Chart of Accounts for reporting by NFPs in receipt of government grants or service contracts. Importantly this work underpins the development of an NFP-specific accounting standard.

3.71 Compliance costs for all NFPs could be further reduced by the introduction of an NFP-specific accounting standard. Such an accounting standard will also make it easier for those using the database created by the new Registrar to make meaningful comparisons between NFPs.

³⁰ As discussed in Chapter 5, Draft Report

3.72 We submit that the Commission should recommend that the creation of a NFP-specific accounting standard be expedited.

3.73 In relation to the Commission's recommendation to expand COAG's Standard Business Reporting initiative to NFPs, we note p. 6.23 Draft Report [emphasis added]:

"over time it may be possible to add other agencies such as state Fair Trading Departments to the system..."

If the State regulators remain, as envisaged by the Commission's 'opt-in' system for the new Commonwealth legal structure, this 'possibility' must be a definite! Also, the Commission needs to ensure a range of NFPs are consulted in this process, not just business.

Role of the Registrar (draft recommendation 6.4)

3.74 The Commission has asked for comment on the Registrar's proposed functions. We believe that the most critical function is for it to become an efficient and user-friendly 'one-stop shop' for registration and enforcement of requirements about:

- legal form;
- financial and corporate reporting; and
- endorsement of taxation concession; and
- fundraising status.

3.75 While the Registrar should support good governance practices, it is our experience that advice and training are best undertaken by 'intermediaries' such as:

- peak bodies that can tailor the information to their members (for example, to domestic violence, child care or neighbourhood house services), and
- sector-based initiatives such as PilchConnect (see further at paras. 5.1 to 5.12 of this submission).

4 TAXATION OF NFP SECTOR (Chapter 7, Draft Report)

- 4.1 In Draft Recommendation 7.1, the Commission has recommended that Australian governments should recognise the tax concession status endorsement of NFPs at the Commonwealth level, and explore the scope for a single national application process for organisations for tax status endorsement, or mutual recognition of endorsement, across all jurisdictions.
- 4.2 We strongly endorse this recommendation and suggest it be extended to include local governments.
- 4.3 If implemented, this recommendation could significantly reduce the complexity and red tape for NFPs as currently there are 15 Commonwealth and 163 State and Territory Acts which confer a benefit on the basis of the charitable purpose or charitable status of an organisation.³¹ The Commission should urge governments to take this on as part of their various programs for reducing 'the cost of doing business' and red tape reduction.
- 4.4 The Commission has, subject to considerations of affordability, recommended that the Australian Government should widen the scope for gift deductibility to include all charitable institutions and charitable funds as endorsed by the proposed national Registrar (draft recommendation 7.2). While we agree in principle with this proposal, in relation to the 'affordability' point, we submit that the Commission's final report should provide the sector with further information about whether something is to be 'taken away' in exchange for this broader application of DGR. Further, it would be useful for the final report to clarify if this means widening the scope of DGR to those defined by the 2001 Charity Definition Inquiry as 'charities' and 'benevolent charities'.
- 4.5 The Commission seeks comments on whether the range of NFPs requiring formal endorsement for Commonwealth tax concessions (as distinct from self assessment) should be expanded. We are unaware of any reason to support this approach. Given that it would increase the burden on NFPs, we would not recommend it without significant evidence of a problem.
- 4.6 We are pleased that the Commission has recommended that the Commonwealth should adopt a statutory definition of charitable purposes in accordance with the recommendations of the 2001 'Inquiry into the Definition of Charities and Related Organisations' (draft recommendation 6.3). In our experience, the current, archaic common law definition of 'charitable purposes' confuses the sector and the sector spends hundreds of hours and incalculable funds (including on legal advice) trying to understand whether they fit into certain categories and in some instances inappropriately skewing their activities to do so.
- 4.7 While a modernised statutory definition is recommended, we note that the impact of this change will depend to a large extent on how it is linked with actual taxation concession, in particular DGR and FBT.

³¹ See National Roundtable of NonProfit Organisations submission to 2008 Senate Inquiry, Appendix C, http://www.aph.gov.au/Senate/committee/economics_ctte/charities_08/submissions/sub170c.pdf

5 SUPPORT SERVICES FOR NFPs (Chapters 4, 6 & 13 Draft Report)

- 5.1 PilchConnect welcomes the Commission's emphasis throughout the Draft Report on the importance of (service support) 'intermediaries'— that is, organisations which assist NFPs pursue their purpose and mission. In particular, PilchConnect supports the Commission's finding that governments have a strategic interest in supporting those intermediaries that 'help the helpers'.

Need for intermediaries

- 5.2 The role of intermediaries with legal and compliance expertise is discussed in Chapter 6 where the Commission notes that NFPs it consulted highlighted :

...a problem with the adequacy of advice available to NFPs on an appropriate initial legal structure. In part the problem derives from a tendency of regulators to provide common rather than tailored advice. Especially for small NFPs, such general advice can confuse rather than enlighten decisions. Participants at the Commission's roundtable on regulation argued that better advice when NFPs are contemplating what legal form to take would relieve many of the problems.

...There is evidence that better advice is emerging from initiatives within the sector itself, from either NFP peak bodies or purpose specific entities. For example, PilchConnect...

Overall, a clear message from the consultations is the importance of targeted, accurate and timely advice to assist both existing and new NFPs. The sector is so diverse — both in size and function — that there is limited scope for common advice, even if a 'one stop shop' provides the best conduit for advice.³²

- 5.3 Despite the recognised role for these intermediaries, the Commission states (emphasis added):

...there remains a shortage of intermediaries that specialise in providing support services to NFPs. Government agencies that use NFPs to provide services have a strategic interest in fostering NFP capabilities as part of their overall program management responsibilities³³

- 5.4 These findings are supported by the research undertaken by PILCH that lead to the establishment of PilchConnect.³⁴

Importance of intermediaries

- 5.5 As noted above, regulators and government departments cannot provide tailored advice on issues such as legal structure.

- 5.6 Further, we note the Commission's observations about NFP service providers being more trusted by users than government or business providers.³⁵ From our experience this is particularly so in relation to compliance and regulatory issues – NFPs will not want to discuss possible breaches or general concerns with these bodies, but will be willing to seek advice from peak bodies and sector-based services such as PilchConnect. Because we are 'of the sector' our NFP clients appreciate that we understand what it is like to have limited resources and rely on volunteers. While we promote the highest standard of governance, our advice is given in a practical and

³² See pages 6.10 – 6.11 and also page 13.20, Draft Report.

³³ Overview page XLI, Draft Report, 'Contribution of the NFP sector'

³⁴ See ' Establishment of Not-for-Profit Legal Service Report, 2007' <http://www.pilch.org.au/Page.aspx?ID=180>

³⁵ See, for example, General Social Survey for 2006 (ABS), Box 4.6, Draft Report

NFP-specific framework. For example, our legal information web portal is tailored around the 'lifecycle' of an NFP rather than a list of legal topics.³⁶

Funding for sector-based intermediaries

- 5.7 There is always going to be demand for 'for-profit' intermediaries and paid (rather than pro bono) professional advice. It would be ludicrous to suggest sector-based support services could (or should) meet all the needs of the NFP sector.
- 5.8 However, the particular needs of small, volunteer-run NFPs should be considered. As highlighted by the Commission, providing access to early and tailored legal advice can help prevent many other legal issues for these groups.
- 5.9 In our first two years of operation PilchConnect has, with pilot philanthropic funding, been able to leverage \$3 million worth of pro bono of legal assistance for Victorian NFPs, as well as delivering significant on-line resources, face-to-face training and telephone advice.³⁷ With core recurrent funding from government, PilchConnect could continue to generate \$75 worth of free advice from the private legal profession for every \$10 of funding it receives. However, PilchConnect's funding is not secure beyond mid 2010, when its current pilot philanthropic funding will be exhausted.
- 5.10 The VCOSS Training and Development Clearinghouse³⁸ (who we work with closely) faces similar funding uncertainty despite a newly released independent evaluation confirming that it has leveraged a 3:1 ratio value delivered to dollars invested.
- 5.11 Given the amount of money governments invest into the sector to provide services to the public,³⁹ it makes sense for the Commission to recommend that governments (which rely heavily on NFPs to deliver services) should invest in sector-based 'intermediary support services' such as those that provide NFPs with low cost legal, governance, financial, IT, management and training support.
- 5.12 Noting the numerous references to the importance of intermediaries throughout the Draft Report, PilchConnect urges the Productivity Commission to elevate its comments about government support for intermediaries to a recommendation. That is, we urge the Commission to include in Chapter 13 a recommendation that Australian governments that should look strategically invest in those sector-based services that provide quality and low cost legal, governance and other support services to the NFP sector.

³⁶ See page 27, this submission and http://www.pilch.org.au/legal_info/

³⁷ Over the last two years the PilchConnect pilot service has: brokered pro bono legal assistance for 253 Victorian NFPs to assist them with their legal and regulatory compliance issues; regularly referred NFP matters to over 35 major law firms; developed a major legal Guide for Victorian incorporated associations which had 503 unique views in its first 2 weeks of being on our website; had 1027 people (representing 749 Victorian NFPs) attend our practical legal information seminars, which are aimed at building capacity and regulatory compliance in NFP sector; and made 10 major law reform submissions to significant State and Federal inquires and reviews.

³⁸ Highlighted on page 10.26 of the Draft Report

³⁹ For example, the Commission note that NFPs account for 75% or more of the value of government funded services delivered by external organisations See page 12.5, Draft Report

6 COMMENTS ON OTHER RECOMMENDATIONS

Notes:

- We have not repeated in this table our comments on recommendations discussed in earlier parts of this submission (for example, recommendations 6.1 - 6.4 are covered under 'Regulation of NFP Sector' above but are not in the table).
- We have abbreviated some of the recommendations.

Chapter 5
Draft recommendation 5.1: The Australian Government should initiate an Information Development Plan (IDP) for the not-for-profit sector...
PilchConnect response: Agree. However, we would add the following to the specific issues for the IDP to consider: <ul style="list-style-type: none"> • initiatives to reduce the burden placed on the NFP sector from any additional data collection, especially on small-to-medium organisations or those that are primarily volunteer run, and • how 'spill over' and non-economic benefits can be measured.
Draft recommendation 5.3: To minimise compliance costs and maximise the value of data collected, Australian governments should agree to implement a reform agenda for reporting and evaluation requirements for not-for-profit organisations involved in the delivery of government funded services. This should...
PilchConnect response: Agree. This is an area where the 'report once, use often' mantra needs to be implemented. Compliance costs will be reduced if work on NFP-specific accounting standard is expedited. We submit that the Commission should make a specific recommendation that work on the AASB NFP-specific standard be expedited.
Draft recommendation 5.4: The Australian Government should provide funding for the establishment of a Centre for Community Service Effectiveness to promote 'best practice' approaches to evaluation...
PilchConnect response: Agree. This body could be a useful initiative, but to the extent that not all recommendations can be funded in the first stage of the implementation process, we would submit that this initiative is of a much lower priority than the national regulator for NFPs (see draft recommendation 6.4, new Commonwealth one-stop shop for registration).
Chapter 8
Further comment sought (p 8.12, Draft report) on what is the extent to which NFPs are competing with NFP businesses and in what activities. What is the financial advantage conferred to NFPs from their access to tax concessions? How dependant are NFPs on these concessions as an indirect source of funding?...
PilchConnect response: We urge the Productivity Commission not to equate the competitive neutrality issues that may be apparent in the health and clubs (gaming) sector, with the rest of the sector. In this regard we agree with the statement that "The great majority of NFPs operate outside the market sector – where there is insufficient potential revenue for-profit-making businesses to operate. These NFPs provide services – some community-wide, some member-based – that are not normally provided by business." (see pages 8.4, 8.6).

PilchConnect has provided legal assistance to NFPs who have been threatened with loss of their DGR status and who have indicated that they would not be able to continue to operate without the benefit (mainly on the basis of them not being able to retain key staff without FBT concessions).

One NFP housing organisation (that provided emergency accommodation to women fleeing domestic violence situations and women recently released from prison) approached us for assistance. Due to changes in laws regulating housing providers made by the State, the organisation was forced to adopt wording in its constitution which the ATO indicated was not acceptable for it to retain its DGR status. The NFP faced the dilemma that without the constitutional wording required by the State, they would not be allowed to manage housing properties, but without the tax concessions, they would not be able to retain staff, and would close. If we had not been able to secure pro bono legal assistance for this NFP to negotiate a wording acceptable to both the State Government and the ATO so as to retain its FBT concessions, the NFP was likely to have folded. We note it is unlikely that any 'for profits' would enter the low cost and emergency accommodation 'market' (we note that some private rooming house operators in Victoria are the subject of much scrutiny in recent times over standards of service provision, non-compliance with regulations and breaches of human rights against the most vulnerable in society.)

We note from PILCH's own experience that community legal centres (CLCs) are another sector where salaries are significantly lower than the private profession. Even with FBT concessions, staff in CLC sectors still earn wages significantly lower than the private profession and struggle to attract and retain staff. Loss of FBT concessions for this sector would see staff retention rates drop significantly, and centres would close. These services would not be replaced by the private profession (i.e. there are no competitive neutrality issues). Nor would these services be replaced by the government which already provides inadequate public legal funding. The real costs (of removing FBT) would ultimately be borne by those marginalised and disadvantaged people that NFPs set up to help. In the case of the CLC sector, removing FBT would further entrench the inability of such groups to gain access to the justice system.

We are wary of unspecified promises to 'compensate' the sector for the loss of FBT benefits. Further details of any new tax arrangements need to be thoroughly canvassed. In particular, the negative 'spill-over' effects on marginalised and disadvantaged communities - via loss of essential services that are not provided by the private sector - would need to be thoroughly researched.

Further comment sought (see p 8.13, Draft report) on whether the procurement guidelines should explicitly require that tax expenditures should be considered in Commonwealth Government procurement decisions.

PilchConnect response: We disagree with a scheme that would see tax expenditures considered in Commonwealth procurement decisions. If tax expenditure is to be considered then this needs to be weighed against 'spill over benefits'. This assessment on a case by case basis adds unwarranted complexity.

By way of a better (but contra) example, we draw the Commission's attention to the significant benefits that have flowed from the Victorian government's legal panel service provider requirements. Under these procurement requirements, in order to be eligible for government contracts, legal service providers are required to demonstrate a commitment to pro bono work and, if they are awarded work, must provide a percentage of all fees earned in pro-bono hours. The success of this model has been recognised in a recent evaluation (see Victorian Government Legal Services Annual Report 08-09 available from www.justice.vic.gov.au). This pro bono requirement has now been adopted as a recommended target for Commonwealth government legal service providers. Indeed, given the success of the Victorian model, we argue that it could be expanded to a wider range of providers seeking to be engaged by the government. For example, it could cover ICT, financial, communications, marketing and project management organisations. (We would be happy to provide the Commission with more detail about this model).

<p>Draft recommendation 8.4: The Australian Government should establish a joint working party made up of representatives of the not-for-profit sector, business, philanthropic and other government to explore obstacles to not-for-profits raising capital and evaluate appropriate options to enhance access to capital by the sector.</p> <p>Further comment sought on ...the role of different types of intermediaries in facilitating NFPs access to capital;whether there is a need for a new legal form of incorporation for not-for-profits allowing equity investment similar to the UK Community Interest Companies.</p>
<p>PilchConnect response: In order to support the development of a sustainable source of capital for Australia's fledgling social enterprise sector, PilchConnect has brokered pro bono legal advice for Social Ventures Australia about the establishment of a 'Social Enterprise Investment Fund'. That work is not yet complete, but several legal barriers have been identified. SVA will be putting in a separate submission on this and related issues.</p>
<p>Chapter 9</p>
<p>Draft recommendation 9.2: State and territory government programs aimed at building the capacity of not-for-profits for service delivery or community development should include specific guidance and training on undertaking evaluations.</p>
<p>PilchConnect response: While guidance and training might be helpful for some groups, the main issue for NFPs is <u>funding</u> for evaluations. We urge the Commission to recommend that evaluation costs be included in government funding contracts. Also, robust evaluations can be risky for NFPs if done in the context of losing funding, rather than being used to inform improved (funded) service delivery. Evaluations need to include the 'spill over' (non-economic) benefits identified in the Draft Report. Time spent on evaluation should be proportionate to the likely benefit. Evaluation 'on the run' (more informal, continuous feedback and improvement) should be valued.</p>
<p>Draft recommendation 9.3: Australian governments should explore options to expand the business support programs they provide for small and medium sized enterprises to not-for-profits engaging in social enterprise activities.</p>
<p>PilchConnect response: While we agree with this recommendation in principle, we note that the needs of NFPs are different from the business sector. We have seen many examples of 'business' ideas being used for the NFP sector which have been unsuccessful as the advice or services were not tailored to the size, resources or complexity of NFPs. However, there are some examples, such as some of the tools available from the Business Victoria website (http://www.business.vic.gov.au/homepage) which could be usefully extended to NFPs - in particular, the ability to easily find out what government licences and permits they need to comply with if delivering particular services or holding an event etc.</p>
<p>Draft recommendation 9.4: Programs that may be suitable include the Australian Government's Business Enterprise Centre, state and territory governments' small to medium enterprise business assistance programs, and local governments' business incubators or infrastructure hubs.</p>
<p>PilchConnect response: Agree, but in conjunction with sector-based support services. See heading 'Support Services for NFPs' at paras. 5.1 to 5.12 of this submission.</p>

Chapter 10
<p>Draft recommendation 10.1: Australian governments should explore the feasibility of establishing a system of 'Working with Vulnerable People Checks' similar to that proposed by the ACT. These checks should be portable between organisations for a designated time period.</p>
<p>PilchConnect response: From enquiries PilchConnect receives, it is clear that the current system of 'working with children' and police checks is very confusing in Victoria.</p> <p>In Victoria 'working with children (WWC) check' legislation has been introduced but only applies to certain kinds of work, only reveals certain offences and only applies to one group of vulnerable clients (children). NFPs in Victoria still need to procure Police Checks to establish if there is any other relevant criminal record. This double checking requirement wastes time, and is costly. There is confusion about whether Police and WWC checks cover offences committed in all States/Territories. There is also confusion around who 'owns' a police check - creating issues with portability when employees or volunteers change employment</p> <p>Any new 'police check' system should be a single, national system that checks offences across Australia. The application process should be easy and cheap (free when checking volunteers) and allow an NFP organisation to indicate the kind of work the person will be engaged in. The government authority (ie Police) should then have a tiered system of reporting that indicates offences that may be relevant to that kind of work. The necessary safeguards should be in place to protect the human rights of the person on whom the check is being performed (including privacy protections and legislative protection against discrimination on the basis of irrelevant criminal record).</p> <p>The check should belong to the person on whom it is being performed (or they should have a right to an authorised copy) so that they can provide it to new employees.</p>
<p>Further comment sought:</p> <ul style="list-style-type: none"> • While it is up to individual NFPs to decide on the appropriateness of meeting any out-of-pocket expenses for volunteers, views are sought on whether there is scope to reduce these costs, and the effectiveness of volunteer grant programs in assisting NFPs that rely heavily on volunteers to provide community services and how they can be improved. • Views are sought on the adequacy of the sectors own responses to the cost of insurance for volunteers, including volunteer boards. Should government be playing a greater role in facilitating insurance? If so, what is the best approach?
<p>PilchConnect response: We recommend that volunteer grant programs also be used to fund training for committee members and volunteer coordinators. This training would help improve the quality and safety of the volunteer experience, and, in turn, the recruitment and retention of volunteers. Feedback from an over-subscribed PilchConnect seminar on 'Legal issues for volunteers', suggests that: (1) these issues are not often canvassed (particularly in the NFP context compared with general HR training); and (2) there is very little low-cost training for volunteer coordinators (who are themselves often volunteers).</p> <p>From our experience the cost of insurance for volunteers is a major issue for many small-to-medium sized groups. Governments could really assist with this issue, for example, by extending the cover already given to government funded services to all registered organisations. (Note, for example, Victorian Department of Human Services insurance coverage for their funded services: http://www.vmia.vic.gov.au/). See also comments below on draft recommendations 12.5 – 12.7.</p>
Draft recommendation 10.4: Australian governments should provide support to develop and promote

training for not-for-profit management and boards in governance and related areas. They should explore the options for improving access to and quality of such training in these areas with peak bodies and appropriate training providers.

PilchConnect response: Agree. We note ABS findings (p 4.26, Box 4.6 Draft Report) that NFPs are “generally identified as valued service providers within the community”. Government funding of NFP service providers to deliver these training services not only promotes empowerment of the sector (that is, the sector helping itself), but are services that are more likely to be relevant to the sector, used by the sector and trusted by those who most need them. See further discussion under ‘Support services for NFPs’ at para. 5.1 of this submission.

Chapter 12

Draft recommendation 12.5: Service agreements and contracts should

Draft Recommendation 12.6: When entering into service agreements and contracts for the delivery of services, government agencies should develop an explicit risk management framework in consultation with providers and through the use of appropriately trained staff....

Draft Recommendation 12.7: Australian governments should urgently review and streamline their tendering, contracting, reporting and acquittal requirements in the provision of services to reduce compliance costs.....

Further comment sought on how these proposals could be achieved without increasing the complexity of the engagement processes or agreements and contracts.

Pilch Connect response: PilchConnect agree that there is a need to calibrate length and complexity of agreement to financial value of the contract, the size of the organisation and the risk profile of the activity (for example, services to vulnerable clients).

We are often approached by NFP clients who need legal assistance to understand the provisions of long government contracts or service agreements. We have seen many examples of indemnity and insurance clauses that are completely out of proportion to the services that are being purchased by government. Many NFPs who are providing a limited service on behalf of government are presented with the type of procurement contract that the government would use to purchase major goods or services from large commercial organisations.

It is inappropriate for government to include provisions in the Agreement that expose NFPs to liabilities of a commercial nature. NFPs have limited resources and are usually set up for a public interest or community purpose. They are not established as a commercial endeavour and should not be made to take on the same risks as a profit- making venture.

Further, government is often contracting NFPs to provide social services which it would otherwise be the responsibility of government to provide. In these circumstances, government should not require NFPs to take out their own insurances but should ensure that the NFP is covered via a government-arranged insurance scheme (ie like VMIA in Victoria)

Chapter 13
<p>Draft recommendation 13.1: Compacts between Australian governments and the sector must be supported by well documented plans of action, including at agency level, if appropriate, and supported by practical measures including monitoring and evaluative processes that give concrete expression to the proposed relationship</p>
<p>Pilch Connect response: Agree. The regulatory reform program set out in the Draft Report should inform the first work plan under the National Compact.</p>
<p>Draft recommendation 13.2: The Australian Government should establish an Office for Not-For-Profit Sector Engagement within the Prime Minister's portfolio, for an initial term of five years. The Office would...</p>
<p>Further comment sought on these and other strategies for implementation of the reform agenda proposed</p>
<p>Pilch Connect response: Agree but:</p> <ul style="list-style-type: none">• needs to be backed by a Minister for the Not-for-Profit Sector, ideally as a Cabinet level position• needs to report annually on progress• is a lower priority than the new Commonwealth regulator (that is, if it is not possible to fund both, then the new regulator is the highest priority). <p>Overall, we suggested a phased approach to implementation with a new Commonwealth one-stop shop regulator (recommendation 6.4) as the highest priority. The creation of an Office for the Not-for-profit Sector within Prime Minister and Cabinet would ideally be part of phase 1, but is not essential to it (see paras. 3.1 to 3.75).</p>

7 ABOUT PILCH AND PILCHCONNECT

- 7.1 PilchConnect is a specialist NFP community legal centre based in Victoria and one of the six services operating under the umbrella of the Public Interest Law Clearing House (Vic) Inc. (**PILCH**). PILCH was established in 1994 and the largest provider of pro bono services in the Asia Pacific region.⁴⁰ Since its inception, PILCH has brokered pro bono assistance for NFPs as part of its work of promoting law in the public interest and its commitment to access to justice.
- 7.2 PilchConnect was formally launched as a separate PILCH service in November 2008. It provides free or low cost legal information, advice and training to NFP community organisations, and conducts policy and law reform work on issues of importance to the sector. Our service is unique within Australia.⁴¹
- 7.3 By developing as a sector-based hub of NFP legal expertise, PilchConnect is working to achieve excellent standards of governance and regulatory compliance by NFP community organisations so their economic and social contribution to Victoria and Australia is maximised.
- 7.4 In effect, we are 'helping the helpers' by supporting the establishment and the effective running of well-governed community organisations. In turn, these NFPs provide crucial support and assistance to the local communities in which they operate, including services to clients and members, promoting volunteering and community well being.
- 7.5 PilchConnect works in partnership with the Australian Centre for Philanthropy and NonProfit Studies at Queensland University of Technology and with peak bodies such as Volunteering Victoria, Volunteering Australia and VCOSS. The service currently receives no government funding and relies on pilot funding from The William Buckland Foundation and the Victorian Legal Services Board . Our services include:
- **referrals to law firms for pro bono work** - matching eligible, public interest NFPs, who have complex legal issues with PILCH member law firms to provide free legal assistance;
 - **telephone advice service** – staffed by in-house lawyers to address 'quick' common queries raised by eligible NFPs;
 - **legal information** - a specialist NFP web portal that maps and links existing free legal information and resources, as well as providing plain-English fact sheets, FAQs, case studies, guides etc under the framework of the 'lifecycle' of an organisation⁴²;
 - **legal training** - a monthly seminar program for NFPs on relevant legal issues (e.g., incorporation, governance, volunteers, tax concessions, fundraising laws, regulatory compliance) and piloting outer metro and regional training; and
 - law reform and policy work - significant work on regulatory reform issues of importance to the NFP sector has already been undertaken by PilchConnect (for example, submissions to 2008 Senate Inquiry and the Henry Inquiry).⁴³

⁴⁰ See <http://www.pilch.org.au/about/>

⁴¹ Note The Arts Law Centre of Australia provides advice, information and training to individual artist and also NFP arts organisations: see <http://www.artslaw.com.au>

⁴² See www.pilch.org.au/legal_info/

⁴³ See <http://www.pilch.org.au/submissions/> for copies of all PilchConnect submissions