

12 June 2009

Mr Robert Fitzgerald
Not for Profit Sector
Productivity Commission
GPO Box 1428
Canberra City ACT 2601
Submitted by email: nfp@pc.gov.au

Dear Mr Fitzgerald

Contribution of the Not for Profit Sector

Thank you for the opportunity to provide a submission to the Productivity Commission's study into the Contribution of the Not For Profit Sector. The Australian Council for International Development (ACFID) is pleased to provide a response from its perspective as a peak body within the not-for-profit (NFP) sector and in the spirit of ongoing improvement of efficiency and effectiveness aimed at benefiting the end recipients of our activities.

About ACFID and Non-Government Development Organisations

ACFID is an independent national association of Australian non-government organisations working in the field of international aid and development. Its membership includes 72 organisations, most of which are registered as charities and as Deductible Gift Recipients (DGRs) under the Overseas Aid Gift Deduction Scheme. A full list of ACFID member organisations is attached as Appendix 1.

The common purpose of ACFID and its members is to promote conditions of sustainable human development in which people are able to enjoy a full range of human rights, fulfill their needs free from poverty and live in dignity. ACFID assists the work of member organisations by fostering cooperation and coordination in aid programs, promoting best practice and self-regulation through the ACFID Code of Conduct and by providing training and representing the views of our members to Government on a wide spectrum of relevant policy issues.

The Australian Government recognises that Australian Non-Government Development Organisations (NGDOs) have expertise and experience in different forms of aid and development service delivery and advocacy. NGDOs are able to build and utilise their strong links and partnerships in developing countries to effectively engage local communities and make a practical contribution to quality aid and development outcomes.

Currently, 41 NGDOs are accredited with AusAID as partners eligible for Government funding as they are explicitly accepted as professional, well-managed, community-based organisations that are capable of delivering quality development outcomes. These NGDOs collectively received \$45.8 million of Australian Commonwealth funds through various mechanisms for international aid and development programs in 2008-2009.

The Australian public donated \$779.85 million to aid and development work through Australian NGDOs in 2007. This figure makes up around 81% of the total funds raised by agencies and includes funds raised from donations, fundraisers, bequests and company donations.

ACFID research indicates that 1.23 million Australians were donors to regular supporter programs (child sponsorship or regular donor programs) in 2007. In all, 1.6 million people were involved in supporting NGDOs – either as a regular supporter, by supporting a fundraiser or event or giving a one-off donation. More than 20,800 Australians volunteered their time and skills to the work of overseas aid organisations during the year.

ACFID Submission

This submission has been prepared by ACFID, in consultation with its member agencies, to provide a sector perspective on issues related to the contribution of the NFP sector, particularly for those organisations in the aid and development sector. It seeks to provide conclusions and recommendations for consideration in line with the Commission's terms of reference.

Yours sincerely

Kelly Bruce
Acting Executive Director

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Terms of Reference

In its issues paper, the Productivity Commission states the objectives of the study are to:

- assess the extent to which the not-for-profit sector's contributions to Australian society are currently measured, the utility of such measurements and the possible uses of such measurements in helping shape government policy and programs;
- consider alternatives for, or improvements in, such measurements, or further quantitative and/or qualitative means of capturing the not-for-profit sector's full contribution to society;
- identify unnecessary burdens or impediments to the efficient and effective operation of community organisations generally, including unnecessary or ineffective regulatory requirements and governance arrangements, while having regard to the need to maintain transparency and accountability;
- consider options for improving the efficient and effective delivery of government-funded services by community organisations, including improved funding, contractual and reporting arrangements with government, while having regard to the need for transparency and accountability;
- examine the changing nature of relationships between government, business and community organisations in recent times, their general impacts, and opportunities to enhance such relationships to optimise outcomes by the sector and its contribution to society;
- examine the extent to which tax deductibility influences both decisions to donate and the overall pool of philanthropic funds;
- examine the extent to which tax exemptions accessed by the commercial operations of not-for-profit organisations may affect the competitive neutrality of the market.

In line with the structure of the issues paper, this submission will address the Terms of Reference through the following areas:

1. The Approach of this Study
2. Measuring the contribution of the not for profit sector
3. Ways of enhancing the efficiency and effectiveness of the sector
4. The sector's provision of government-funded services

1. The approach of this study

The Australian Council for International Development (ACFID) welcomes this new study into the contribution of the not-for-profit (NFP) sector. ACFID has contributed substantial resources and energy to previous Government inquiries into the NFP sector including the Industry Commission Inquiry of 1995, the 2001 Inquiry into the Definition of Charities and Related Organisations, the 2008 Senate Economics Inquiry into Disclosure Regimes for Charities and Not-For-Profit Organisations and the 2009 Review of Australia's Future Tax System.

Regrettably, little has yet resulted from these inquiry processes. Whilst the United Kingdom has taken an innovative approach to this field of policy-making, the Australian environment has only grown more complex over time.

The international aid and development sector seeks a commitment from the Government to use the outcomes of the Commission's study to improve both the regulatory and delivery environments for the NFP sector in a comprehensive and long-lasting way.

In particular, ACFID urges the Commission to consider the following recommendations from the Senate Economics Committee Inquiry into Disclosure regimes for charities and not-for-profit organisations (December 2008)ⁱ.

- That a single independent national regulator for NFP organisations be created which should have similar functions to regulators overseas, particularly the UK, including an educative and advisory role;
- That the voluntary codes of conduct developed by ACFID and FIA respectively should be considered by the Regulator when implementing its own code of conduct.
- That a National Fundraising Act be developed which also clearly regulates contemporary fundraising activities such as internet fundraising.
- That the Commonwealth Government work with the Sector to implement a standard chart of accounts for use by all departments and NFP organisations.
- That a new disclosure regime be developed which contains elements of narrative and numeric reporting as well as financial, in acknowledgement that the stakeholders of the Sector want different information to that of shareholders in the Business Sector;

ⁱ The Senate Standing Committee on Economics, *Disclosure regimes for charities and not-for-profit organisations*, December 2008. Available at: http://www.aph.gov.au/Senate/committee/economics_ctte/charities_08/report/b01.htm

- That the national regulator investigate the cost vs benefit of a GuideStar-type system (a website portal that publishes information on the aims and activities of NFP organisations) in Australia to encompass all NFP organisations.
- That a Taskforce be established for the purposes of implementing the recommendations of the Senate Economics Committee report. The Taskforce should include a number of representatives from the peak bodies of NFP organisations and should actively seek to ensure that the measures of reform that it implements do not impose an unreasonable reporting burden on small and micro NFP organisations.

ACFID would also like to reiterate the following recommendations from our previous submission to the Ken Henry Review, Australia's Future Tax System.

- Tax concessions and exemptions should provide support to Australia's NFP sector rather than create a barrier by continuing to institute a complex and inconsistent framework;
- Any changes to the tax regime must give consideration to those small and emerging NFPs that are administered by very few staff and/or volunteers. The response needs to include educative and supportive improvements to the tax system that will assist such organisations to meet their obligations without an onerous administrative burden or the requirement for specialist legal advice;
- Access to the FBT exemption for Public Benevolent Institutions must be retained under any changes to the tax system;
- The present FBT exemption under PBI status should be indexed to average weekly earnings and the indexation should be backdated to the original year when the capped threshold was set at \$30,000 per employee (2001);
- An additional category for Non Government Development Organisations be created within the Section 57A of the *Fringe Benefits Tax Assessment Act 1986* (FBTAA) alongside other categories under S57A;
- Precise criteria for eligibility for the proposed new category be specified within the Section 57A of the *Fringe Benefits Tax Assessment Act 1986* (FBTAA);
- Reforms to the regulatory environment for NFPs should be underpinned by a contemporary definition of a charity which recognises that charities contribute to policy development and that there is a range of strategies, including advocacy that charities use to achieve their dominant purpose;
- Guidelines on advocacy and political activity, similar to those provided by the Charity Commission for England and Wales, must be developed for the Australian context;

- An independent Federal regulatory body, similar to the Charity Commission for England and Wales, should be established to administer the NFP sector and to take on the responsibility for determining charitable status and for registering and supervising charities.

2. Measuring the contribution of the not for profit sector

The Commission's proposed framework for measuring the contribution of the NFP sector seeks to both quantify and qualify the contribution of the sector in terms of inputs, outputs, outcomes and impacts.

Whilst the proposed framework will lead to a more accurate approach to measurement of the contribution of the NFPs, there are limitations for its application to the NFP sector and for the international aid and development sector in particular.

ACFID, on behalf of the aid and development sector and AusAID, conducts a detailed annual statistical survey of both its Members and the Signatories to its ACFID Code of Conduct. The information gathered provides an up-to-date overview of the Australian aid and development sector, with regard to finances, personnel and the countries and sectors to which organisations are directing their support. AusAID also uses this data for its internal and external reporting requirements.

As such, the aid and development NGO sector has very strong mechanisms to measure the "inputs" and the "outputs" of its activities. The inputs being the amount of funding received from the Government, the general public (including in-kind donations) as well as other forms of income such as investment income. We can also measure the number of people employed by the sector and the contribution of volunteers to the sector. The outputs described by the data include where and on what types of projects the funds are spent in each geographical region. The ACFID website provides a comprehensive overview of this data.

Measuring outcomes and impact

Challenges arise, however, when trying to "measure" the "outcomes" and "impacts" of the work of the aid and development sector. Being able to measure the outcomes or impact - the results and effectiveness of the work that aid and development agencies do - is essential. It is vital not only for donors and for the agencies, but primarily for the beneficiaries of the aid whose participation in the planning, implementation and evaluation is a key factor in ensuring the effectiveness of any program.

It can be hard to measure the results beyond outputs, such as more children being educated, fewer infants and mothers dying, and more people being lifted out of poverty. The outcome is measured by the change of behaviour in the shorter term, some years, whereas the impact reflects long-term change, some decades.

At a project level, the majority of Australian NGDOs utilise a range of tools in the design, implementation and management of projects that identify objectives, activities, inputs, outputs and outcomes that incorporate specific indicators and are regularly monitored and periodically evaluated. These tools and processes include the establishment of baseline data and seek to identify both quantitative and qualitative outcomes. Tools and processes to identify the likelihood of longer term impact are also utilised by Australian NGDOs.

It should also be noted that Australian NGDOs operate in countries where reliable data needed to measure effectiveness of their programs is often absent. Nevertheless, Australian NGDOs seek to establish processes whereby outcomes of project activities can be verifiable.

Development context

The direct links between better outputs, outcomes and impact through aid and development interventions are seldom crystal clear, not least because the work of Australian NGDOs is only one part of the development equation. Events in developing countries themselves are the main drivers of sustainable change, along with external factors, policies and actions such as global economic conditions and political changeⁱⁱ.

Also, it is important to understand that Australian NGDOs do not work in a vacuum. Often they work in partnership or alongside other aid and development providers. That makes it difficult, and often impossible, to determine exactly how changes were brought about, which project or agencies led to what outcome and what the exact impact of these outcomes has been. The question of contribution to change and impact versus attribution to a particular agency or initiative is part of an ongoing global discussion on the effectiveness of aid.

Evaluating NGO performance

In recognition of the challenges of measuring the outcomes, impacts and effectiveness of the work of the aid and development sector, the Australian NGDOs have worked to research these issues and to develop tools to assess the effectiveness of their work.

The **NGO Effectiveness Framework**, for example, was developed following a series of discussions among Australian NGDOs between 2001 and 2003. This led to the development of an NGO Effectiveness Framework comprising the standards of engagement applied to program work, program strategies, policies and principles.

Since 2004, the Framework has been included in the ACFID Code of Conduct which formally guides all signatories in developing their own monitoring and evaluation processes and tools.

ⁱⁱ http://www.ode.usaid.gov.au/publications/pdf/arde_report-2007.pdf

The Framework is used to inform and shape agency processes and tools by providing a sector benchmark as a guiding instrument to assist them with defining and enhancing their effectiveness in addressing the symptoms and causes of poverty.

Other measures that are taken into account in the NGO Effectiveness Framework include high quality relationships, long-term engagement, learning, adaptation, working together, risk taking, quality of staff and volunteers.

In addition to the NGO Effectiveness Framework, all NGDOs that are accredited by AusAID to receive Commonwealth funding must meet a range of standards with respect to design, monitoring, evaluation and reporting of project activities.

As well as the NGO Effectiveness Framework, the ACFID website was identified as a suitable conduit for sharing Quality and Effectiveness (Q&E) resources and expertise, and so the **Development Effectiveness Forum** was created to facilitate an open and valuable learning environment. It has been developed to promote quality and effectiveness through the sharing of agency and individual experience and lessons learnt. The forum is unique in its focus on Australian NGDO resources and provides some documents unavailable elsewhere.

After considerable consultation with members, the website was launched in February 2007. The site has had significant use since its launch and is continually expanding in both users and resources.

The framework proposed by the Productivity Commission does not allow for the difficulties in understanding the complexities of the delivery and measurement of aid and development. Development effectiveness emphasises the necessary diversity and complementarity of instruments, policies and actors required to achieve development impact, improving the lives of the poor and marginalised. It is change that reduces poverty, that empowers citizens and builds capacity within communities, civil society and government to address their own development priorities.

The Australian aid and development sector continues to develop new research and tools for implementation and participates in international conversations to enhance the measurement and understanding of the contribution.

3. Ways of enhancing the efficiency and effectiveness of the sector

The efficiency and effectiveness of NFP organisations in the aid and development sector could be enhanced by some relatively simple changes to the regulatory environment. In this submission to the Commission, we would like to describe the following areas where the efficiency and effectiveness of the sector has been compromised and to make recommendations to improve the regulatory structure:

- NFP Regulation
- Self Regulation
- Advocacy and the Definition of a Charity
- Decoupling Charitable Tax Exemption from Charitable Status
- Public Benevolent Institutions

NFP Regulation

ACFID's views on the current regulatory environment have been explained in detail in its submission to the 2008 Senate Economics Inquiry into Disclosure Regimes for Charity and Not-For-Profit Organisationsⁱⁱⁱ. ACFID would like to reiterate those recommendations as stated in the submission.

However, the regulatory environment for the NFP sector, and particularly for NGOs, remains complex. Both NFP organisations and the Government would benefit from a regime that provided clarity and consistency in its application and interpretation.

Particular issues that need to be addressed include the complex and sometimes conflicting regulatory frameworks between different states and territories. This is most evident, for example, in fundraising legislation and the lack of a national, coherent approach to regulation for the NFP sector.

Further, a regulatory regime that fosters integrity, accountability and transparency would contribute significantly to the efficiency and effectiveness of the NFP sector. This would also build a platform for public and government trust in the NFP sector. Trust is of utmost importance for the NFP sector and for charities in particular who seek not only to attract donations from the Australian public, but also to encourage volunteer participation in pursuing their causes.

It is also important to recognise and enhance the contribution and influence of professional networks and codes of conduct within the NFP sector that can have significant impact on sectoral behaviour.

Australia's international aid and development sector is a national leader in the promotion and practice of accountability and transparency. Most recently, PricewaterhouseCoopers (PwC) together with the Institute of Chartered Accountants in Australia and the Centre for Social Impact announced two of ACFID's members, Oxfam Australia and World Vision Australia, as winner and runner up respectively of the second annual Australian PwC Transparency Awards. The Awards recognise and encourage the improvement of quality and transparency of reporting within the NFP sector.^{iv}

ⁱⁱⁱ ACFID Submission Senate Economics Inquiry into Disclosure Regimes for Charity and Not-For-Profit Organisation: Available at:

http://www.acfid.asn.au/resources/docs_resources/docs_submissions/ACFID%20Senate%20Submission.pdf

^{iv} PriceWaterhouseCoopers website: Available at:

<http://www.pwc.com/Extweb/ncpressrelease.nsf/docid/A97067A651ABF940CA2575A10020D4F8>

Self Regulation

The ACFID Code of Conduct^v ('the Code') was developed over ten years ago in order to strengthen the governance of the organisations in the NGDO sector and to enhance the confidence of the Australian public upon whom the sector relies for the greater portion of its funding.

Industry self regulation regimes such as the Code can have a significant impact through establishing best practice financial reporting standards as well as expectations of integrity, accountability and transparency.

The Code is a voluntary, self-regulatory industry vehicle for the international aid and development sector. It represents the active commitment of signatories to the Code to conduct their activities with integrity and in an accountable and transparent manner.

The Code defines standards of ethics, organisational integrity, governance, communications with the public, financial control and reporting, and personnel management that signatories to the Code are required to comply with. Importantly, the Code identifies mechanisms to ensure accountability in NGDO use of public monies. The Code aims to maintain and enhance standards throughout the NGDO community, ensuring public confidence in the integrity of individuals and organisations comprising the NGDO community and the quality and effectiveness of NGDO programs.

The Code is a compliance and complaints-based Code that offers the public an assurance that signatories to the Code are appropriately monitored and regulated. The Code provides members of the public with:

- a set of standards against which they can measure and assess the management and activities of the organisations that they wish to support;
- the assurance that signatories to the Code seek to meet high standards of accountability and transparency; and
- a confidential and fair mechanism to address concerns about the conduct of signatories to the Code.

Among the requirements of the Code, signatories are required to:

- Produce an audited annual report and to make it available to the organisation's own members and supporters and to members of the public upon request;
- Ensure that funds and other resources designated for the purposes of aid and development will be used only for those purposes and will not be used to promote a particular religious adherence or to support a political party, or to promote a candidate or organisation affiliated to a political party;

^v Available at: <http://www.acfid.asn.au/code-of-conduct>

- Ensure that the organisation's governing instrument (constitution, articles of association, rules, bylaws or similar documents) be consistent with legislative requirements and set forth the organisation's basic goals and purposes, define membership, governance structure of the organisation including the frequency of meetings (at least two a year) and the size of a quorum.
- Ensure fundraising representations will be truthful, will accurately describe the organisation's identity, purpose, programs, and needs and will only make claims which the organisation can fulfil.
- Has a compliance monitoring process and a complaints-handling process.

The scope and implementation of the Code is regularly reviewed by the Code of Conduct Committee and the international development community through ACFID. Seminars and workshops are conducted every year to train and inform personnel of the requirements of the Code and how the standards are applied to everyday practice.

Internally, signatory agencies can use the Code to measure and improve their operations, systems and guiding principles. The Code identifies standards which when, adhered to, enhance the integrity, accountability and transparency of organisations and their activities.

As a self-regulatory and sector wide Code, the commitment by international development organisations is voluntary, although it is a requirement of ACFID membership. Compliance to the standards is tested predominantly through compliance monitoring of annual and financial reporting requirements and the investigation of complaints. From 1 July 2009, the Code will introduce an additional compliance checking process, a compliance self-assessment process, which will be a tool to assist signatories to self-assess their levels of compliance with all "other" Code requirements (other than Annual Report and financial reporting requirements, which will continue to be assessed on an annual basis by the Code of Conduct Committee)

The Code of Conduct Committee has a comprehensive regime of compliance checking processes in place to ensure that signatories' compliance levels can be effectively monitored and managed. Many of these processes are conducted by the Code Management Team staff on behalf of the Code of Conduct Committee. Code Management Team staff are paid staff whose salaries are drawn largely from signatories' fees and, therefore, from the donor public. Several of the Code's compliance checking processes are dependent on the involvement of Code of Conduct Committee members, who volunteer their time and particular areas of expertise to the compliance checking processes. The collective commitment of Code of Conduct Committee members to volunteering their time and expertise to the Code's compliance checking processes on an annual basis would be measured in many hundreds of hours.

Another example of self-regulation employed by the aid and development sector includes the Fundraising Institute Australia's (FIA) code of self-regulation for professional fundraisers.

The FIA's Principles and Standards of Fundraising Practice^{vi} are the fundraiser's guide to ethical, accountable and transparent fundraising. The Principles and Standards are critical to how the fundraising profession is viewed by donors, government and the community, and indeed by fundraisers themselves.

In the absence of a coherent regulatory regime that fosters integrity, accountability, transparency, efficiency and effectiveness of the NFP sector, organisations such as ACFID and FIA have developed their own self-regulatory frameworks.

Advocacy and the Definition of a Charity

Australian charities perform vital functions, both domestically and overseas. ACFID member organisations are charities working in the international aid and development field contributing to, among many other activities, the relief of poverty, provision of education, environmental protection, defending human rights, improvement of health and the provision of emergency relief.

As such, ACFID members are engaged in assisting and supporting some of the world's poorest and most disadvantaged people and communities. The sector also makes a central contribution to promoting the effective operation of democratic political systems, particularly in assisting the empowerment of citizens to express their views and to influence public policy and service delivery matters.

Advocacy is a crucial element in the relief of poverty and the promotion of development because it raises public awareness of the issues and enables civil society organisations to participate in the formation of Government policy towards the goal of long-term, sustainable human development. It is, therefore, not only acceptable, but essential, that international aid and development organisations also seek to engage in advocacy to further the relief of poverty and to assist its overseas partner organisations. Advocacy activities should not detract from their status as 'charities', but rather reinforce it.

One of the ways in which a government can encourage and sustain a strong aid and development sector is to ensure that there are laws and regulatory arrangements that are supportive of its work and role^{vii}. However, in the past, the regulatory and political environment has made it difficult for charities to engage in advocacy and has, therefore, inhibited the effectiveness and efficiency of those organisations.

^{vi} The Fundraising Institute of Australia, Principles and Standards of Fundraising Practice. Available at: http://www.fia.org.au/AM/Template.cfm?Section=Principles_and_Standards_of_Fundraising_Practice

^{vii} Lyons M (2003) 'The Legal and Regulatory Environment of the Third Sector', Asian Journal of Public Administration, Vol 25, No. 1 June 2003.

The Charity Commission for England and Wales has permitted charities – including human rights charities – to lobby and to engage in political campaigning when these activities could be said to be an ancillary means for the achievement of the bodies’ greater charitable objectives^{viii}.

In fact, according to the Commission’s publication, CC9 “Speaking Out - Guidance on Campaigning and Political Activity by Charities”, charities can campaign for a change in the law, policy or decisions where such change would support the charity’s purposes. Charities can also campaign to ensure that existing laws are observed^{ix}.

Furthermore, CC9 supports the idea that campaigning, advocacy and political activities are all legitimate and valuable activities for charities to undertake:

“Many charities have strong links to their beneficiaries, and more generally to their local communities, commanding high levels of public trust and confidence and representing a myriad of diverse causes. Because of this, they are uniquely placed to campaign and advocate on behalf of their beneficiaries”^x.

The Commission’s summary of the matter^{xi} is that a charity can engage in political activity (i.e. advocacy) if:

- There is a reasonable expectation that the activity concerned will further the stated purposes of the charity, and so benefit its beneficiaries, to an extent justified by the resources devoted to the activity;
- The activity is within the trustees’ powers available to achieve those purposes;
- The activity is consistent with the guidelines (i.e. it serves and is subordinate to the charity’s purpose);
- The views expressed are based on a well-founded and reasoned case and are expressed in a responsible way.

In Australia, there have been significant improvements to the way in which the Government engages with the NFP sector in general, including the elimination of gagging clauses from service delivery contracts. Also, the exploration of a Compact between the Government and the sector as well as an enhanced focus on social inclusion has added to the improvements. An ATO ruling in 2005 allowed charities to undertake political activities that are in aid of charitable purposes^{xii} and has contributed to freedoms in this regard.

^{viii} The Charity Commission for England and Wales, Speaking Out - Guidance on Campaigning and Political Activity by Charities, CC9, Available at: <http://www.charity-commission.gov.uk/publications/cc9.asp>

^{ix} The Charity Commission for England and Wales, C Speaking Out - Guidance on Campaigning and Political Activity by Charities, CC9, Available at: <http://www.charity-commission.gov.uk/publications/cc9.asp>

^x The Charity Commission for England and Wales, C Speaking Out - Guidance on Campaigning and Political Activity by Charities, CC9, Available at: <http://www.charity-commission.gov.uk/publications/cc9.asp>

^{xi} CC9 – at paragraph 14.

^{xii} Australian Taxation Office, 2005, Taxation Ruling TR 2005/21

However, how much political lobbying is considered appropriate and exactly what a charitable purpose is remains a grey area.

The outcome is that there is little or no guidance on the issue of advocacy and there is inadequate case law that deals directly with the issue. As such, charities lack guidance on what kind of political activities they can undertake without risking their charitable status. Similarly, the ATO is forced to become an arbitrator in this arena and to seek clarity through test cases.

Recommendations

ACFID, therefore, urges the Commission to consider the particular needs of charities in the aid and development sector when making recommendations about the effectiveness and efficiency of the regulatory system.

It is essential that reforms to the regulatory environment for NFPs are underpinned by a contemporary definition of a charity. Such a definition needs to recognise that charities contribute to policy development and that there is a range of strategies that charities use to achieve their principal purpose. This range of activities should permit advocacy activities and allow for the development of new strategies into the future to deal with emerging poverty reduction and development challenges.

ACFID also urges that guidelines similar to those provided by the Charity Commission for England and Wales be developed for the Australian context.

Decoupling Charitable Tax Exemption from Charitable Status

Consistency of regulation for NFPs could also be improved by developing an independent federal regulatory body for the NFP sector, similar to that recommended by the 2001 *Inquiry into the Definition of Charities and Related Organisations*^{xiii} for charities.

Such a body could operate in a similar manner to the Charity Commission for England and Wales^{xiv} and could take on the responsibility for determining charitable status and for registering and supervising charities.

Effectively this could also achieve the decoupling of charitable tax exemption from charitable status and free the tax-collecting agency (the ATO) from its obligation to interpret charitable purpose and determine whether or not an organisation's objectives and activities can be construed as charitable^{xv}.

ACFID recommends that the means employed by the proposed regulatory body for NFPs to determine charitable status be objective, consistent, simple to administer and flexible in response to changing social demands on charities.

^{xiii} Report of the Inquiry into the Definition of Charities and Related Organisations, June 2001.

^{xiv} The Charity Commission for England and Wales, Available at: <http://www.charity-commission.gov.uk>

^{xv} O'Halloran, K. 2009 "Overview and Themes of Modernising Charity Law Since 2001 in Europe (mainly, England & Wales, Ireland, Northern Ireland and Scotland): the Critical Drivers, Barriers and Outcomes of Charity Law Reform; some Unresolved Issues and Future Challenges, presented at Modernising Charity Law Conference, QUT, 16th April 2009.

Recommendations

- ACFID urges the development of a contemporary definition of a charity;
- ACFID urges that the unique needs of charities in the aid and development sector be specifically recognised within the proposed national regulatory body for NFP entities;
- ACFID proposes that means employed by the proposed regulatory body for NFPs to determine charitable status are objective, consistent, simple to administer and flexible in response to changing social demands on charities.

Public Benevolent Institutions

The area of greatest uncertainty and inconsistency for ACFID's member agencies has been the application of Public Benevolent Institution (PBI) status within the sector.

An organisation that qualifies for PBI status is entitled to a number of concessions under the various tax laws, including exemption from Fringe Benefits Tax (FBT).

It is this exemption from FBT that makes PBI endorsement so important to the sector as it provides an exemption from FBT on the first \$30,000 grossed up fringe benefits of salary provided to an employee of a PBI.

Salary packaging through the provision of fringe benefits is considered highly crucial to the successful recruitment and retention of quality staff to the NGDO sector. This enables NGDOs to compete against the often higher incomes that are offered by Government and private development organisations.

Without the FBT exemption, many NGDOs would face acute financial difficulty, would have difficulty retaining staff and would ultimately need to reduce program activity or increase reliance on Government funding.

Similarly, the removal of PBI status for NGDOs, or changes to the PBI regime without a FBT exemption, would impose an ongoing and severe financial burden on the sector.

PBI and its Application in the Aid and Development Sector

In ACFID's^{xvi} submission to the 2001 Charities Definition Inquiry, a principal concern expressed was the inconsistent application and interpretation of the terms *charity* and *public benevolent institution* for different legal and administrative purposes. In the intervening eight years, the need for consistency of treatment of bona fide NGDOs has further increased.

^{xvi} In 2001, ACFID was registered as Australian Council for Overseas Aid (ACFOA)

For example, under current ATO interpretations of taxation law, after having been accepted as an “approved organisation” by AusAID, an NGDO applicant for Public Benevolent Institution (PBI) status may be refused on the grounds that it is not strictly delivering benevolence to people in need.

The ATO recognises that the work of certain NGDOs “arouses compassion in the community” as required in the PBI definition. However, its decision-making in relation to PBI status has focused on a narrow interpretation and understanding of benevolence and providing “relief” to people in need. The ATO’s recent approach has been to define “development” activities and programs as ineligible because they are perceived not to be principally providing such “relief”.

In these recent rulings, the ATO has adopted a more strictly literal interpretation of the term “benevolent relief”. The ATO definition of “benevolent relief” is the same as the AusAID definition of “welfare”, that is, activities that provide direct assistance to individuals because of need, rather than to address the root causes of those needs. This puts it at odds with the meaning of “development” as used in the overseas aid and development sector. AusAID (and all professional development organisations) define development as working with local communities to address the causes of poverty and to improve conditions in a sustainable way.

The ATO approach runs directly counter to the strong internationally accepted evidence based around “what works” in terms of achieving sustainable social and economic development in poor communities. It negates a range of development activities that AusAID and the sector regard as both pivotal and fundamental to Australia’s poverty reduction efforts in developing countries.

In fact, an organisation undertaking what the ATO defines as “benevolent relief” may not pass the AusAID NGDO accreditation process. They may also not be eligible for AusAID funding for those activities and may fail the process for obtaining tax deductibility for community donations.

Despite the long practice of the ATO providing PBI status to a number of NGDOs, the application of Section 57 of the FBT Act 1986 with respect to a wider group of these agencies has continued to generate confusion and has led to unintended discriminatory results. For this reason, ACFID strongly recommends that a statutory provision be made to specifically include eligible NGDOs within Section 57.

Such a statutory change would address the anomaly whereby a range of NDGOs are excluded from PBI status despite often having virtually identical organisational features to those which are granted that status. It would also ensure that there is an alignment across Government in terms the nature of development work and the objectives of Australia’s aid program.

In 2001, ACFID expressed serious concern at the difficulty experienced by its member agencies in interpreting the ATO's application of Tax Determination 93/11^{xvii}. We note that, since 2003, Tax Ruling 2003/5 has superseded TD 93/11. Notwithstanding this change, the pattern of variable application of the eligibility criteria has continued. Tax Ruling 2003/5 has not provided a definitive statement of governing principles that could rectify the weakness. As a result, the intent of this part of the FBT Act has not been fulfilled and dissatisfaction across the sector about the lack of guideline clarity has increased.

The application of the criteria in Tax Ruling 2003/5 again generated concern across the sector between 2005-2009. A restrictive interpretation of the "direct" relief criterion was identified as unusual in two respects:

- That the main features of at least one agency deemed to lose PBI status were not dissimilar from many other PBI holders with respect to the "relief" criterion; and
- That the restrictive definition was seen within Government to be at odds with the statement of purpose for its own overseas aid and development program, as identified by both the Government^{xviii} and AusAID's Executive^{xix}.

Recommendations

In terms of eligibility for Section 57A of the FBT Act, ACFID believes that these distortions could be readily overcome by the following steps:

- An additional category for Non Government Development Organisations be created within the Section 57A of the *Fringe Benefits Tax Assessment Act 1986* (FBTAA) alongside other categories under S57A;
- Precise criteria for eligibility for the proposed new category be specified within the Section 57A of the *Fringe Benefits Tax Assessment Act 1986* (FBTAA).

^{xvii} This TD 93/11 has been superseded by TR2003/5 and the current the eligibility criteria for a PBI applicant organization are:

- is set up for needs that require benevolent relief
- relieves those needs by directly providing services to people suffering them
- is carried on for the public benefit
- is non-profit
- is an institution, and
- its dominant purpose is providing benevolent relief.

^{xviii} McMullan, The Hon B, Letter to the Treasurer, The Hon Wayne Swan MP, 2008

^{xix} Based on several discussions with AusAID's Assistant Director General for Community and Business Partnerships during February and March 2008.

4. The sector's provision of government-funded services

The aid and development sector does not rely substantially on, and is not maintained primarily by, direct government funding to deliver its programs. In fact, some ACFID members receive no direct government funding. In 2007, the Australian public donated \$779.85 million to aid and development work through Australian NGDOs. This figure made up around 81% of the total funds raised by agencies and includes funds raised from donations, fundraisers, bequests and company donations.

Despite the terms of reference of the Productivity Commission specifically including the work of the international aid and development sector, the focus on the delivery of government-funded services effectively excludes the vast majority of the work done by NFP organisations in this sector.

Where government funding is provided to NGDOs, the major government funding partner is the Australian Agency for International Development (AusAID) which states on its website that NGDOs maximise the impact and reach of Australian aid and are an essential part of the Australian aid program^{xx}. AusAID refers to NGDOs as 'Partners' in the delivery of aid.

In 2008, the Labor Government articulated a policy commitment to expand and enhance the pattern of its engagement with the Australian NGDO sector. This was reflected in the initiative of the Parliamentary Secretary for Development Assistance to establish a Partnership Agreement with ACFID which was signed in March 2009.

The Partnership Agreement reflects an intention by Government to work more closely with the Australian non-profit development sector and to foster a more valuable organisational relationship and to increase Australia's impact in promoting sustainable development in which people are able to enjoy a full range of human rights free from poverty^{xxi}.

The Partnership Agreement is intended to foster effective and innovative approaches which harness the capacities and networks of federal government agencies and NGDOs to maximise Australia's contribution to international development. It also seeks to strengthen cooperation between other federal agencies engaged in development-related work and the NGDO sector.

The Partnership Agreement identifies, as shared principles, the promotion of international best practice, development effectiveness, reducing poverty, building capacity, sustainability, participation and good governance.

This Partnership Agreement is not tied to funding arrangements with ACFID or with other NGDOs. It reflects a commitment to working together to relieve poverty and to work towards achieving the Millennium Development Goals.

^{xx} AusAID Website, Available at: <http://www.ausaid.gov.au/partner/default.cfm>

^{xxi} A full copy of the Partnership Agreement is available at: http://www.acfid.asn.au/what-we-do/docs_what-we-do/docs_govt-ngo-relations/partnership%20agreement%202009.pdf

Whilst the aid and development sector does not rely substantially on direct government funding, the effectiveness of the sector would be significantly impacted by a contraction of indirect government funding. Most ACFID members receive indirect government funding through the ability to offer tax deductibility to those who make donations to them, and through various concessions and exemptions that have been designed to assist them to deliver aid and relief to those in greatest need.

A move towards direct funding, in preference to indirect funding, would require a significant increase in Government financial support of the aid and development sector, but would also expose the sector to greater unpredictability and insecurity of funding. This would ultimately impact on program delivery to those most in need.

Appendices

Appendix 1: List of ACFID Members

Current members

All ACFID members are also signatories to the [ACFID Code of Conduct](#)

Full members as at 30 April 2009.

act for peace - NCCA
Action Aid Australia (For Those Who Have Less)
Adventist Development and Relief Agency
Afghan Australian Development Organisation
Anglican Board of Mission - Australia Limited
AngliCORD
Archbishop of Sydney's Overseas Relief & Aid Fund
Assisi Aid Projects
Austcare
Australasian Society for HIV Medicine
Australia for UNHCR*
Australian Business Volunteers
Australian Conservation Foundation
Australian Doctors International Inc
Australian Federation of AIDS Organisations
Australian Foundation for the Peoples of Asia and the Pacific
Australian Lutheran World Service
Australian Medical Aid Foundation*
Australian Relief and Mercy Services
Australian Reproductive Health Alliance
Australian Respiratory Council
Australian Volunteers International
Baptist World Aid Australia
Burnet Institute
CARE Australia
Caritas Australia
ChildFund Australia
CBM Australia
Credit Union Foundation Australia
Foresight (Overseas Aid and Prevention of Blindness)
Friends of the Earth (Australia)
Habitat for Humanity Australia
HealthServe Australia*
International Centre for Eyecare Education
International Christian Aid Relief Enterprises Limited
International Help Fund Australia Ltd
International Nepal Fellowship (Aust) Ltd
International Women's Development Agency
Interplast Australia, Royal Australasian College of Surgeons

Lasallian Foundation*
Live & Learn Environmental Education
Marist Mission Centre
Marist Solidarity Australia
Mercy Works Inc.
Mission World Aid Inc.
Muslim Aid Australia
Nusatenggara Association Inc.
Opportunity International Australia
Oxfam Australia
Oz GREEN - Global Rivers Environmental Education Network Australia Inc.
Partners Relief and Development Australia*
PLAN International Australia
Project Vietnam
Quaker Service Australia
RedR Australia
RESULTS Australia
Salesian Society Incorporated
Save the Children Australia
Sexual Health & Family Planning Australia
The Fred Hollows Foundation
The Hunger Project Australia
The Leprosy Mission Australia
The Spastic Centre
TEAR Australia
Transparency International Australia
Union Aid Abroad - APHEDA
UnitingWorld
WaterAid Australia
World Education Australia Limited
World Vision Australia
WWF-Australia

Consulting Affiliates

Australian Red Cross (also a signatory to the ACFID Code of Conduct)
Refugee Council of Australia

* denotes ACFID provisional full member