

Submission on the Scoping Study for a National Not-for-Profit Regulator

The Benevolent Society
February 2011



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1 Introduction

Thank you for the opportunity to make a submission on the Scoping Study for a National Not-for-Profit Regulator. The Benevolent Society supports the establishment of a regulator to promote a strong and sustainable not for profit (NFP) sector through good governance, transparency and accountability and to underpin strong philanthropic engagement in the community.

An independent regulator with the power and the mandate to support the NFP sector would make an important contribution to a strong and sustainable NFP sector.

1.1 About The Benevolent Society

The Benevolent Society is Australia's first charity. We are a non-religious, not-for-profit organisation working to bring about positive social change in response to community needs. Since 1813, we have identified major social challenges and worked to meet them head on.

Our purpose is to create caring and inclusive communities and a just society. We deliver leading edge programs and services, find innovative solutions to complex social issues and advocate for a more just society. We help the most vulnerable people in society, and support people from all backgrounds including Indigenous Australians and people from culturally and linguistically diverse communities.

The largest area of our work is with children and families. Other services we provide include aged care, carer respite, mental health, domestic violence, post-adoption services, community leadership and community development.

A Snapshot of The Benevolent Society

- The Benevolent Society is a company limited by guarantee with an independent Board.
- Over 800 staff and 700 volunteers support more than 31,000 children and adults each year, primarily in New South Wales and Queensland.
- We deliver 122 programs in 55 locations with support from local, state and federal government, businesses, community partners, trusts and foundations.
- Our revenue in 2010 was \$65 million. Approximately 85% is spent directly on our services. A further 8% is spent on our leadership programs, social initiatives and research.
- In 2010, 76% of our income came from government sources. Private fundraising, trust and foundation grants provided another 4%, client fees generated 9% and investment income contributed 6%.

1.2 The regulatory framework in which we operate

The Benevolent Society is a company limited by guarantee, incorporated and domiciled in Australia. The regulatory framework in which the Society operates is complex, duplicative and carries with it significant administrative burden.

As a registered non-profit organisation and a company limited by guarantee operating primarily in NSW and Queensland, The Benevolent Society must comply with the:

- *Corporations Act 2001* as a public Australian company limited by guarantee – regulated by ASIC
- *Charitable Fundraising Act 1991 (NSW)* to fundraise in NSW – regulated by the NSW Office of Liquor, Gaming and Racing
- *Collections Act 1966 (QLD)* to fundraise by QLD – regulated by the QLD Office of Fair Trading
- *Income Tax Assessment Act 1997* as a Public Benevolent Institution and endorsed for exemption from income tax – regulated by ATO
- *A New Tax System (Goods and Services) Act 1999* for GST concessions – regulated by ATO
- *Income Tax Assessment Act 1997* as a Public Benevolent Institution endorsed as a Deductible Gift Recipient status – regulated by ATO
- *Fringe Benefits Tax Assessment Act 1986* for FBT exemption – regulated by ATO

Additionally, The Benevolent Society must comply with other legislation typically required of mid-sized to large organisations including legislation pertaining to, without limitation, employment, finance and accounting, facilities and property, information technology and management, privacy, document retention and intellectual property.

Additionally, as part of The Benevolent Society's diverse service delivery, The Society must comply with various service-specific legislation and regulatory standards ranging from children-specific legislation to ageing-specific legislation. Legislation such as the:

- *Aged Care Act 1997 (Cwlth)*
- *Retirement Villages Act 1999 (NSW)*
- *Adoption Act 2000 (NSW)*

- Children (Care and Protection) Act 1987 (NSW)
- Adoption Act 2009 (QLD)
- Children and Young Person (Care and Protection) Act 1998 (NSW)
- Child Protection Act 1999 (QLD)
- Child Protection (Offenders Registration) Act 2000 (NSW)
- Child Welfare (Commonwealth Agreement Ratification) Act 1941 (NSW)
- Child Welfare (Commonwealth Agreement Ratification) Act 1962 (NSW)
- Commission for Children and Young People Act 1998 (NSW)
- Community Services Act 2007 (QLD)
- Community Services (Complaints, Reviews and Monitoring) Act 1993 (NSW)
- Community Welfare Act 1987 (NSW)
- Juvenile Justice Act 1992 (QLD)
- Mental Health Act 2000 (QLD)
- Mental Health Act 2007 (NSW)
- Ombudsman Act 1974 (NSW)
- Ombudsman (Child Protection and Community Services) Act 1998

are just a few to mention. There is also, of course, the consideration of regulations which often accompany each piece of legislation.

Lastly an important consideration to this discussion is the impact of government funding contracts on The Benevolent Society. The Benevolent Society receives around three-quarters of its income from federal, state and local government agencies or authorities. Each federal, state and local agency or authority issues its own range of funding or grant agreements. In addition, each funding program within an agency or authority may issue its own funding or grant agreement. Each government funding contract sets up a separate regulatory framework. Currently, The Benevolent Society has approximately 100 different contracts on-foot with federal, state and local government agencies.

2 General comments

The Benevolent Society commends this first formal step by Treasury towards establishing a NFP regulator and, further, in establishing greater national uniformity in the regulation of the NFP sector. The Benevolent Society welcomes a focus on simplification and uniformity of the current regulatory framework and believes that a one-stop-shop regulator and a consolidated, simplified regulatory framework go hand-in-hand.

Concerns about the current regulatory framework within which a NFP operates are well documented in present and past literature. The issues the NFP sector faces in complying with this burdensome framework are widely acknowledged and accepted by all stakeholders in the sector. Evidently, this reform has been long overdue.

Now is the time to act and The Benevolent Society looks forward to the next steps of this reform.

Whilst there is much The Benevolent Society could comment on, the Society has chosen to only address some of the questions due to the tight timeframe given and with a focus on those areas The Benevolent Society feels most qualified/experienced to comment on.

3 The goals of NFP regulation

Q2. Are there any other goals for national regulation?

The Benevolent Society believes the goals listed in the consultation paper are appropriate. There are, however, additional goals to be considered as follows:

- The regulator establishes and maintains a meaningful relationship with other bodies and agencies involved in the regulation of NFP entities and activities.

The plethora of legislation a NFP entity may face is overwhelming. The consultation paper has identified more than 178 pieces of Commonwealth, state or territory legislation which involve separate government agencies regularly determining the charitable purpose or status of an organisation. In fact, depending on the area of activity of an organisation, a NFP entity may face much, much more.

The Benevolent Society, being a multi-service provider operating in many areas of human services, faces multiple legislation relevant to any given area of service delivery, subject to and monitored by various separate agencies and bodies regulating these service-specific legislation. We acknowledge that some pieces of legislation apply to commercial as well as not for profit entities e.g. retirement village, aged care and child care operators, and to this end, it is inappropriate for the proposed national regulator to regulate these pieces of legislation.

However, in the interests of maintaining the one-stop-shop purpose of the national regulator and reducing unnecessary administrative burden, it is important that the national regulator establishes and maintains a meaningful relationship with other agencies and bodies responsible for regulation of government-funded human services.

- The regulator adopts best practice national regulation drawing from experiences in other industry/sector regulators as well as international developments

The consultation already refers to international developments. However, equally important is looking closer to home where lessons may be learnt from the establishment of other industry and sector regulators.

4 Functions the national regulator may undertake

Q10 What value would educational and compliance initiatives managed by a national NFP regulator provide to NFP entities?

The Benevolent Society strongly supports the view that the regulator assume an educational role as the NFP sector is generally less well supported to comply with legislation and regulatory standards compared to some other sectors and industries.

Regulatory requirements for NFP organisations change frequently and The Benevolent Society submits that it should be part of the regulator's role to provide low cost or no cost training when regulations change, covering the changed obligations and suggestions for how compliance can best be monitored.

Q11 What benefits would a 'report-once, use-often' model of reporting offer?

It is encouraging to see a genuine attempt to reduce duplicate reporting requirements and to provide a meaningful direction to appropriate governance arrangements.

The Benevolent Society understands that accountability and transparency is vital in the delivery of human services. Funding bodies require an increasingly complex array of data on service provision. Alongside this, NFP entities are developing a range of strategies to more effectively measure the impact of their work. As a result, often the minimum data sets which funding bodies require would be collected regardless.

The challenges lie in, as the consultation paper identifies to a degree, the replication of data collection and reporting, the subsequent lack of access to data collected, and the focus of the reporting on outputs rather than outcomes.

The Benevolent Society encourages the development of specific financial and non-financial reporting guidance, the application of which would be mandatory, and would include:

- a standard reporting format for all government funded acquittals
- removal of the not for profit entity exclusion in AASB120 Accounting for Government Grants and Disclosure of Government Assistance, to allow for consistent recognition of revenue across all reporting entities
- accounting for capital grants from government and non-government entities to allow expenditure to be expensed against the grant rather than capitalized and deferred expenditure (depreciation) charged in future periods with no corresponding revenue offsets
- an accounting standard on the disclosure of fundraising costs to allow consistent disclosure.

A national regulator that could work with government departments and agencies to standardise data collection requirements and use the same data for several purposes is supported by The Benevolent Society.

Q13 How significant is the compliance burden imposed by requirements for acquittal of grants? Where could these be simplified?

The compliance burden is significant.

The challenges relating to acquittal of grants are well known and widely-acknowledged in the NFP sector. The process of acquittal of grants is costly, time intensive, resource-heavy and can thus reduce the funds available to be spent on services for clients.

The acquittal process and the often-complex funding contract which stipulates the process is mismatched against the very objective of providing human services.

Typically, acquittals must be in a format specified by each funding body. For example, treatment of capital grants by different funders is inconsistent.

The Benevolent Society is funded by a range of government bodies including, without limitation:

- NSW Area Health Services
- NSW Department of Human Services – Ageing, Disability and Home Care

- NSW Department of Human Services – Community Services
- Queensland Department of Communities
- Department of Families, Housing, Community Services and Indigenous Affairs
- Department of Health & Ageing
- Family Assistance Office

Audited acquittals add another layer of complexity and are costly, sometimes out of all proportion to the amount of the funding concerned. The Benevolent Society is already subject to an annual audit by a qualified auditor as part of its Corporations Act and Australian Accounting Standards requirements/obligations. The compliance burden could be reduced if there is a way of enabling an audit of this nature to address the various auditable income streams and/or funding bodies only required audits if funding is significant.

5 The form of the national regulator

Q23. What form of the national regulator best meets the objectives of simple, effective and efficient regulation of the NFP sector?

The Benevolent Society recommends a new national body to act as a national regulator. Further, The Benevolent Society recommends that the regulator be an independent body with the authority to challenge government itself.

The consultation paper acknowledges that effective regulation should improve the confidence that government agencies can have in the NFP sector, particularly where agencies provide grants and contracts to NFPs. This would reduce the need for agencies to apply their own separate regulatory framework in order to ensure their programs are delivered appropriately.

The current state of affairs is such that each contract issued by a separate government body or agency carries with it its own regulatory and compliance framework. The national regulator must assume some level of authority to influence and challenge the government bodies on the appropriateness of such agreements especially if a standardised, simplified, consolidated legislative framework is in place which is regulated by the national regulator.

The issues with the contracts which government agencies provide to NFP entities as prerequisite to receipt of funding are widely known. They include, without limitation:

- inappropriateness of a contract pertaining to the delivery of human services, for instance many current forms of agreement operate as a provider/purchaser agreement similar to outsourcing or service agreements and do not have regard to the actual service environment within which a NFP entity delivers services.
- inappropriateness of standard forms of contract which attempt to amalgamate elements of a funding agreement (e.g. obligation to pay is subject to allocation of funding by the government and the requirement to return unexpended funds) with elements of a fee-for-service agreement (e.g. the NFP entity gets paid \$X to provide the services, and the risk that it actually costs more is borne by the NFP entity), all in a way that is favourable to the funding government agency.
- contracts lacking the 'partnering' spirit and collaborative working relationship which government agencies often advocate they are in with NFP entities. Risk is disproportionately allocated to a NFP entity and an imbalance of fair and reasonable terms is common.
- inequality of bargaining power is common in contract negotiations and in the practice of contracts. Due to the nature of the funding relationship, NFPs are commonly reluctant to raise issues about contracts or particular clauses of contracts or to exercise their rights (such as powers of enforcement or termination) for fear such action will jeopardise current or future funding. NFPs seldom have the internal resources to properly understand or negotiate what can be quite legalistic and complex agreements nor the resources to engage external assistance. Arguably, government bodies take advantage of the commitment and passion of human services NFPs to assist their client group.
- the unfair and unequal playing field a NFP entity may find itself in when a government funding agency assumes a dual role of both funder as well as a participant/provider of services.
- the consequential implications on service delivery and outcomes for clients.

The Benevolent Society acknowledges that the Government has committed to a review across all Commonwealth agencies, with the aim of reducing red tape for government funded NFP entities by developing a common form contract or 'master agreement', and reviewing tendering, contracting and acquittal arrangements between the Australian Government and NFP entities to streamline and reduce compliance burden commensurate with risk.

There is a role for the regulator here to ensure, amongst other things, that NFP entities can have a more balanced working relationship with government. Perhaps one way a regulator could achieve this would be to develop a model funder type policy against which government practice could be measured and reported upon. Something similar exists with the model litigants policy to which entities like the Australian Competition and Consumer Commission subscribe. It sets out some standards of behaviour to which relevant bodies exercising powers subscribe.

Numerous previous reviews have supported an independent regulator, including, without limitation:

- 2010 Productivity Commission Report on the *Contribution of the Not-for-Profit Sector*
- 2010 Henry Review Report
- 2001 Treasury *Report on the Inquiry into the Definition of Charities and Related Organisations*
- Submission by the Australian Taxation Office into the Inquiry into Charities and Related Organisations dated January 2001 which stated:

“Additionally, administration would be better served by a single, independent common point of decision making on definitions leading to conclusions about whether organizations are charitable or non-profit, such as occurs with the Charities Commission in the UK for example.”

- 2008 Senate Inquiry on Disclosure Regimes for Charities and Not-for-Profit Organisations
- 1995 Industry Commission *Report of the Inquiry into the Definition of Charities and Related Organisations*

Further, we propose the regulator report annually on progress towards the more efficient regulation of the sector, and on areas where different governments have done well or have fallen short along the lines, for example, of the reports that the National Competition Council used to give in areas such as competitive neutrality. If the new regulatory body is to be a force for change for bringing governments into line with uniform ways of working with the NFP sector, then regular reporting, naming and shaming, may be a very useful tool.

We submit that an independent regulator which can play a role in setting the standards and then encouraging different governments to meet those standards and perhaps pointing out where they fail, is the ideal option.

6 Funding implications

Q28. What level of contribution should NFP entities make to the cost of the national NFP regulator?

The Benevolent Society supports the proposal that a regulatory contribution to a NFP regulator could replace the current fees and charges paid by NFPs to various agencies, such as annual ASIC fees and annual state regulatory fees. The Benevolent Society supports having only one fee to one body under a national NFP regulator based on this formula.

7 Other Comments

Sector has not had fair opportunity to address all issues.

The consultation poses important issues and asks *big* questions, for example, posing a statutory definition of a charity and considering the appropriate body to define charitable status. Some would argue that this question itself is worthy of a consultation paper of its own. Given the short time period for consultation with stakeholders, The Benevolent Society submits that stakeholders have not been provided with a fair and reasonable opportunity to consider all the questions and consequential impact/issues presented in the paper.

The Benevolent Society welcomes a further opportunity to be consulted on the topic of a national NFP regulator.

8. Summary

In establishing a national one-stop regulator, it is essential that:

- the regulatory framework is standardised, simplified and consolidated
- the regulator establishes and maintains a meaningful relationship with other bodies and agencies involved in the regulation of NFP entities.
- the regulator adopts a best practice national regulation drawing from experiences in other industry/sector regulators as well as international developments
- the regulator assumes an ongoing educational role
- the regulator has a focus on reducing the compliance burden on reporting and funding acquittals
- the regulator is independent and has the ability to challenge government

- NFP entities pay a fee to the national regulator which equates to no more than the collective fees they pay currently to various regulatory bodies.

8. Concluding comments

The test of the success of any new regulator is that it would lead to greater transparency and accountability in the sector without further reporting and red tape. There is definitely a place for an independent regulatory body for NFP entities. Such a body could assist with reducing and standardising reporting, minimising red tape and supporting best practice in governance. However, any additional body which requires further reporting and red tape would be unwelcome. Regulation focusing on outcomes rather than control over process is ideal.