Please find submission to Not For Profit Reform from Physical Disability Australia Ltd.

Contact the writer, Sue Egan for further information.

Sue Egan
02 6567 1500
SUBMISSION

TO

SCOPING STUDY FOR A NOT FOR PROFIT REGULATOR

FEBRUARY 2011.
Physical Disability Australia Ltd (PDA) is the national disability peak organisation representing the interests and views of people with physical disability in Australia. As a national peak, PDA is funded by the Australian Government through the Department of Families and Housing, Community Services, Indigenous Affairs (FaHCSIA).

PDA has been established for over 15 years and during this time has been registered as a Not for Profit Organisation with Australian Securities and Investment Commission (ASIC).

"Australia has 600,000 not-for-profit organisations which contributed $43 billion to Australia’s GDP, growing at an annual rate of 7.7 per cent since 2000. If you count the contribution of 4.6 million volunteers, with an imputed value of $15 billion, this would make it a similar contribution to the retail industry."

PDA believes therefore it is significant timing to consider whether a Not for Profit Regulating body should be set up to monitor and regulate these organisations or whether to maintain the status quo and therefore fail to recognise the significant input into Australian society that Not for Profit organisation contribute.

The current regulatory framework for the sector is complex, lacks coherence, sufficient transparency, and is costly to NFPs.

Our overall recommendation is supported in the document Contribution of the Not for Profit Sector, which says:

A national registrar for NFPs should be established to consolidate Commonwealth regulation; register and endorse NFPs for concessional tax status; register cross-jurisdictional fundraising organisations; and provide a single portal for corporate and financial reporting.

Currently in Australia nationally based charitable organisations can register as an Incorporated Association in a particular state or territory, or as a national body with Australian Securities Investment Commission (ASIC).

ASIC as regulators are focussed on monitoring registered business organisations and compliance, whereas charities or Not For Profit Organisations, we believe, need their own regulator, separate to ASIC, whose main focus is on compliance and regulation of Not for Profit Organisations or Charities.

A Charities or Not for Profit Commission’s task should be to monitor NFP organisations in Australia, with less focus on the business side, and more focus on compliance with charitable status requirements, maintaining minimal costs for compliance, streamlining requirements and be a simple, transparent and flexible, one stop shop for all charities.

At the time that Physical Disability Australia Ltd (formerly Physical Disability Council of Australia Ltd) was set up, ASIC was the only government body that was available for registration of a nationally based organisation, and special permission was sought to use the word “council” in the name. This resulted in many weeks of delay in being registered as a legal entity, whereas a new regulator specifically for NFP’s would alleviate unnecessary times and issues such as these.

PDA particularly supports the following statement from this consultation paper:

“NFP regulation should promote a strong and sustainable NFP sector through good governance, transparency and accountability to underpin strong philanthropic engagement in

Contribution of the Not-for-Profit Sector. February 2010.
Contribution of the Not-for-Profit Sector. February 2010.
the community. Regulation which achieves these goals is essential to underpin public confidence in the sector and to assist the public and government in the effective and efficient allocation of resources to meet community needs.”

Q1 Are these goals appropriate and adequate for national regulation? Which of these are most important?

PDA Believes all of the goals stipulated in the consultation paper are appropriate and adequate for national regulation. We also believe that these goals should be developed to include world best practice and encourage training and education of NFP Boards and committee members on a regular basis to keep improving these same organisations.

Q2 Are there any other goals for national regulation?

The goals of any NFP regulator should be simplified and ‘easy to follow’ allowing all not for profits to understand and comply with all regulations.

PDA endorses any system that means compliance will be met, by regularly reporting both financial and other administrative items once or at most, twice per annum.

Q3 What should the scope of a national NFP regulator be? What types of entities should be regulated by a national NFP regulator?

PDA supports the statement that “Effective regulation of NFPs must apply broadly across the sector, notwithstanding that the NFP sector encompasses a diverse group of entities which have a variety of legal forms.”

However, we would urge that regulation and compliance should be streamlined and required at most, once yearly at Annual General Meeting times (read Annual Audit), in order to minimise time completing forms and compliance matters.

Types of entities regulated should include:

- Any NFP receiving public monies

- NFP’s who receive government funds, either on a regular basis or from time to time;

PDA also supports the consultation paper in the statement that these regulations “could also be proportional to the level of benefits and support received as well as taking into account the varying size and complexity of organisations in the NFP sector.”

Q4 Should some legal forms be treated differently? If so why?

PDA believes that the following should be included and covered by any NFP regulatory authority:

- Trustees of charitable trusts. These are mainly related to funds set aside for vulnerable people or sectors of people and should be strictly monitored in order to meet the reasons they were initiated in the first instance.
• The approximate 75 per cent of organisations in the sector (in the order of 440,000 organisations) who are small unincorporated NFPs, and fall largely outside the current regulatory system, although many access taxation concessions.

These organisations raise funds, apply for funds and spend funding in the same way that incorporated or ASIC registered organisations do, and therefore should be held more accountable for the funds received and spent, and the organisation managed.

• This should apply to all cooperatives or Indigenous corporations.

• Also churches and religious organisations, or branches of international organisations, which access government funds and raise funds. These organisations should comply and be regulated in the same way as other not for profit organisations.

PDA supports the comment that:

"National regulation could address the problems posed by inconsistent regulation, which partially results from different legal forms available for NFPs, by providing a consistent regulatory framework covering all entity types."

**Q5. Should the supervision of charitable trusts be moved from the state Attorney-General's to a national regulator?**

PDA believes that all charitable trusts should be administered and regulated under the one national regulator, without exception.

**Q6. Should regulation of incorporated associations (including reporting and governance) be moved to a national regulator? Should there be a residual role of the states in regulating incorporated associations?**

PDA believes that in order for a new regulating body to be effective, it must be national, and therefore include all incorporated associations.

PDA also supports the role of the states in regulating incorporated associations in much the same way as ASIC is located in each state and territory.

**Q7. What impacts would simplifying and streamlining mechanisms for the assessment, granting and monitoring of concessional tax treatment have on the NFP sector? In particular, what impacts would this have on small and new NFP entities?**

PDA Believes that in simplifying and streamlining the taxation and other treatments of NFP’s would ensure a consistency across all organisations, and would assist greatly in all boards and staff knowing what is needed and meant by national compliance requirements. Currently this is a mixed bag and quite complicated at best.

**Q8. What are the likely compliance cost savings from improvements to taxation arrangements?**

PDA believes that many NFP’s, particularly small organisations with minimal staff, may not be aware of tax incentives or savings available to them, particularly if the organisation does not have administration staff who are experienced with such compliances. Therefore we believe this would benefit organisations, by having one central Information Centre as well as compliance and control.
Q9. Does the current complexity of the taxation framework discourage entities from applying to access tax concessions? If so, what elements of the framework are most problematic?

PDA suggests an emphatic Yes to question 9, in that the taxation framework discourages entities applying for tax concessions.

Most particularly understanding the taxation system as it applies to Not for Profits and also the benefits of applying for concessions and what is available. Organisations with small numbers of staff would particularly benefit from clear, concise, one stop shop advice regarding the tax concessions and availability.

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

PDA believes that a new regulator for NFP entities would benefit many organisations including our own, especially in light of the statement in this consultation: “A new national NFP regulator could take over the role of educating the sector about governance and reporting standards and encouraging understanding and compliance with new regulatory arrangements.

Educating the sector on governance and reporting, compliance and understanding regulatory arrangements, from one central body would mean consistency of information available and training of a standard that would mean compliance is always understood. Currently there is expensive governance training offered by the private sector in a “one size fits all model.” We believe therefore that a new regulatory body offering training would result in consistency of information being taught and learnt, across Australia.

And:
“A national regulator could engage with the NFP sector to assist organisations to understand their regulatory requirements and thus better facilitate philanthropy and voluntary compliance.”

As well as:
“Educational initiatives could include a centralised portal of information for NFP entities, web-based training, new guidance materials, phone assistance, referral services for organisations requiring external advice, and ongoing consultation with the sector.”

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

Not for Profit organisations are usually established to support or assist the community in some way. For small staffed organisations, governance and compliance takes the focus away from the important work that needs to be done.

The ‘report-once, use-often’ model would eliminate the unnecessary time spent on documents that repeat themselves, and are required by differing bodies. For instance, in PDA’s case, we are required by law to have an Annual Audit. The resulting papers from this audit are then required to be sent to ASIC, FaHCSIA, Members and others as well as any other funding bodies involved in the organisation. One system would assist in streamlining this process, thus shortening time spent on repetitive administration.

Q12. What information do NFP entities currently provide to government agencies? Do these include general purpose financial reports and fundraising reports? What other reports are currently required? What do the reporting requirements involve? What information is required for the purposes of grant acquittals?

Currently we are required to provide the following to government agencies:
1. Differing contracts for each funding body
2. Differing reporting mechanisms for each funding body
3. Reports on core work – FaHCSIA
4. Annual Directors Report - FaHCSIA
5. Directors involved throughout year - FaHCSIA
6. Annual Audit Report – FaHCSIA
7. Separate Acquittal for each amount of funding - FaHCSIA
8. Annual Directors Report – ASIC
9. Annual Audit Report – ASIC
10. Directors involved throughout year – ASIC
11. Differing Audits (financial) for other government departments.
12. BAS statements to ATO each 3 months

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

The listed responses in the previous question, takes considerable time away from the core work of the organisation (which is funded to do the core work) most especially in a small office with little administration assistance.

This could certainly be simplified by having one set of documents, plus annual audit for each of the departments or funding bodies.

**Q14. What benefits would the establishment of a NFP sector information portal have for the public, the sector and governments? What information should be available on the portal?**

Any public portal should have the same compliance opportunity offered by ASIC (with less focus on security but still some user security) for submitting information on board members who come and go, annual audit documents, annual reports, and other documents required.

All government reports should be streamlined and similar in their reporting requirements to facilitate benefits in time saving and information flow.

**Q15. What information might need to be provided to a national regulator but not made public through a NFP information portal?**

PDA believes that the private information (contact details) of Directors of a board should not be made public, and likewise any information of a sensitive nature.

**Q16. What benefits would be provided by the application of SBR to the NFP sector, following the implementation of the SCOA so as to minimise any additional compliance costs?**
PDA would welcome the introduction of The Australian Government’s Standard Business Reporting (SBR) initiative and also a national standard chart of accounts (SCOA)

Benefits could include the following:
• Savings at annual audit because of streamlined reporting requirements
• A greater understanding by both financial and administration staff
• Greater understanding by Departmental staff of what has been reported
• Greater understanding by Boards of Management and Members over time
• Simpler system applying to all funds received and reportable.

Q17. Given its voluntary nature, are many NFP entities likely to use SBR? What barriers, such as preferences for providing reports in paper form or reluctance to upgrade accounting software, might reduce usage of SBR by NFP entities?

PDA does not believe there would be barriers, once the system was set up, especially if there is consistent reporting forms, accountancy practices that could be used by all current accounting software, and would reduce the necessity for paper transactions if able to be stored online and on a computer back-up of records.

Q18. Are the suggested core rules and regulatory framework adequate?

While recent trends have seen higher levels of governance and accountability required of both the commercial and government sectors in Australia, the NFP sector has largely been ignored

or worse:

Small NFP’s are expected to comply with these same accountability measures for multi-million dollar businesses or organisations when they are small in practice and nature and have an annual budget of less than $200,000.

PDA therefore believes that the proposed rules in this document would adequately cover the reporting and accountability requirements:

• Cover duties of responsible individuals (such as directors, trustees and office bearers). Cover a duty of compliance which would require responsible individuals to comply with relevant laws, regulations and governing documents. Also include a duty of prudence which would require responsible individuals to exercise prudence with regards to the entity’s finances and any financial decisions and a ‘fit and proper person’ test to ensure that suitable and competent persons are managing NFPs. The rules could comprise a general duty of care, which would require a responsible individual to act with a standard of care reasonably expected of a reasonably competent responsible individual. In Victoria, the Associations Incorporation Amendment Act 2010 proposes to mandate additional duties on office holders, including former office holders. This extension could feature as part of the best practice framework.
The second core rule could comprise a model decision making framework, which would set out the processes and requirements for decision making by the NFP’s responsible individuals. This framework would be tailored to an entity’s size, so that the more complex the organisation, the more sophisticated the decision making framework.

109. The final core rule could comprise an accountability framework, which would set out the kind of documents needed to be disclosed and to whom. The framework could include auditing requirements which would be tiered and tailored to an entity’s size, so that the larger or more risk-prone an entity, the more demanding the accountability, auditing and reporting measures. In addition, the framework could cover investment rules, responsible fund management obligations, and limitations on related party transactions these would include rules to prevent private benefits flowing to members or associates of members of a NFP.

Q19. What powers does the regulator require to improve governance and regulatory oversight?

PDA supports all of the following actions to enable the regulator to improve governance and regulatory oversight:

- Asset protection, which would enable the regulator to protect an NFP’s assets if malfeasance were detected;
- Suspension and/or replacement of responsible individuals in the case of any breach of core duties; powers to register and deregister any NFP;
- The power to enforce governance rules;
- The power to commence investigative processes to uncover actual or potential malfeasance;
- The power to issue warnings and penalties to non-compliant NFPs;
- and the power to undertake dispute resolution processes, which would permit the regulator to intervene in any dispute of which an NFP is party, both within the NFP and between the NFP and another entity.

Q20. What role should a national regulator play with respect to fundraising?

The Ministerial Council on Consumer Affairs (MCCA) is now undertaking a project to harmonise fundraising legislation under the oversight of COAG’s Business Regulation and Competition Working Group.

PDA believes that fundraising should be subject to all governance and regulatory rules that apply to all NFP organisations and will make further comment on this matter when the intended consultation on this matter commences. However we do support the following statement:

“There is scope for the national regulator to play a role in administering harmonised fundraising legislation. Alternatively, this legislation could be managed at state and territory level. A
national regulator administering such laws may better reflect the increasing cross-border nature of fundraising, particularly through centralised and internet public appeals”

Q21. What problems arise from the complex interrelationship between Commonwealth, state and territory responsibilities in this area?

Australia would need a National Regulator to encompass issues such as taxation laws, Corporations Law and many others, therefore PDA supports the following:

Under a referral of powers, the states would refer certain powers to the Commonwealth, and the Commonwealth could use those powers to regulate NFPs. This option is the simplest option.

Q22. What might be the implications of the different approaches of referral of powers or harmonisation of legislation?

PDA believes that a national regulator is the way to proceed in order to avoid the different approaches to referral of power.

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

See response in Question 21.

Q24. Would a Commonwealth only regulator provide sufficient benefits to the sector?

PDA being a national organisation, naturally would look to the Commonwealth to provide these regulations, and in considering the fullness of this question, believes that one regulator would be sufficient to monitor and administrate NDP’s across Australia.

We do not need a regulatory body in each state or territory, to further complicate compliance.

Q25. Are there benefits from establishing an interim regulator through an existing Commonwealth regulator, to undertake immediate reform?

PDA does not support the use of an existing Commonwealth regulator. ASIC is primarily for businesses and should remain so, whilst an entity specifically for NFP’s should be set up to monitor compliance and regulations including financial compliance.

Existing regulators have allowed the system to become very complex and relatively unworkable and requires significant expertise to work through the confusion that is ASIC and the ATO, with Government Departments developing their own compliance mechanisms.

Q26. What would be the advantages and disadvantages of incorporating the functions of ORIC and the proposed housing regulator into a national regulator? What alternative approaches are available to avoid duplication?

PDA believes that all organisations set up to provide not for profit activity should all be regulated in the same way, to avoid confusion, complexity of systems and a mire of differing regulations.

Q27. What benefits could flow from a national regulator maintaining a dedicated subsection focusing on Indigenous corporations and/or housing?
As in the answer to Q 26, we do not support separating out organisations with a different community focus. We support a system where regulations, accountability and compliance, reporting and monitoring, is the same, through a national system of compliance, regardless of the focus or purpose of the organisation.

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

An annual fee to meet some of the administration costs, and taking some of the funds currently spent through ASIC on NFP’s to assist with the setting up and costs of such a body.

Q29. Should there be a differential cost for smaller NFP entities?

PDA believes there should definitely be a differential cost for smaller NFP organisations to avoid hardship for these same organisations.

Q30. Would a statutory definition of charity achieve the goals of greater certainty and administrative efficiency in relation to the determination of charitable purpose, particularly in relation to determining access to taxation concessions and across different jurisdictions and laws?

Certainly the ATO who currently define whether a body is eligible for PBI status. PDA believes that the ATO is not qualified to know whether an organisation is actually providing services to the community whether it is in verbal form or in practical help.

This is an urgent part of this consultation we believe, because so many organisations spend endless hours trying to obtain Public Benevolent Institution status in order to save funds and spend more on their individual causes.

Q31. Is Parliament a more appropriate body to define charitable status than the courts, given its ability to be more responsive to changing community needs and expectations?

PDA believes that Parliament, in conjunction with a Reference Committee is more appropriate than the courts, which have little knowledge on the purposes and workings of charitable organisations within changing communities.

PDA would therefore support this move away from the courts and to an independent body specifically for the purpose of regulating and monitoring Not For Profit Organisations.

Contact:
Sue Egan
Executive Officer
Physical Disability Australia Ltd.
02 6567 1500
pda@pda.org.au

23rd February, 2011.