

## Land-Pejoska, Amy

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**Sent:** Monday, 21 February 2011 3:59 PM  
**To:** NFP Reform Consultation  
**Subject:** Submission of Dr Matthew Turnour on Scoping study for a national not-for-profit regulator  
**Attachments:** Dr Turnour's Scoping Study Submission for a National Not-for-Profit Regulator submission 20100221.pdf



I am pleased to attach my submission.

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Submission

of

**Dr Matthew Turnour**

on the

Scoping study for a national  
not-for-profit regulator

Consultation Paper  
January 2011

Submitted on

Monday, 21 February 2011

## 1. INTRODUCTION AND OVERVIEW OF THE SUBMISSION

This paper steps progressively into the issues. The first page is a summary of the Policy response: Opportunity and Threats.

The questions asked by the Consultation Paper are then answered briefly.

In the third section issues raised in the paper are discussed in further detail.

Comment is made on the role of Treasury in the Process before some concluding comments are offered.

A paragraph Biography is set out at the end.

## 2. POLICY RESPONSE: OPPORTUNITIES AND THREATS IN REGULATING THE THIRD SECTOR

The third sector welcomes the real interest of government and the new partnership clearly evidenced by the 'Compact' signed last year. There are real threats to this partnership though in the approach being taken by Treasury in the development of regulation for the industry. This is demonstrated by the narrowness of the Treasury Consultation Paper for example:

- It makes no reference to the Compact or the *Henry Review* which provided advice to the government on taxation of the not-for-profit sector (among its other recommendations).
- It does not reference any of the theory or empirical research that does not support the proposition that concessions should be the basis for regulation;
- It is written in such a way that the sector is described, not as a partner with government in building a better society, but rather as an adversary wrestling concessions;
- Concessions are provided as a justification for regulation. They are not.

The theory and research demonstrate that concessions are a completely separate issue from regulation and should be debated in a tax context. This argument, flawed as it is, is important to the Consultation Paper, though, because the argument inherent in the paper is that the Australian Taxation Office (ATO) should be made the regulator for the sector -- at least on an interim basis. I have made a submission to Treasury. In summary the policy implications of what I suggest are:

1. The ATO should *not* become the Regulator for the third sector on an interim or on any other basis. The ATO should continue to look after income tax exemption and deductibility matters for the not-for-profit sector in the short to medium term.
2. The government should establish a small Charities Commission. The primary function of that Commission should be to give tangible effect to the ideals expressed as the shared vision of the National Compact. The paper offers a framework for this. It suggests that rather than begin with an agenda of regulating the whole sector a beginning could be made by targeting say two or a few key areas such as (1) fundraising, (2) abuses by organisations such as Scientology, and (3) any concerns that public funds are being applied to private purposes. The paper sets out a rationale for this approach with some of the key policy advantages being:
  - Establishing a Commission with objectives in line with the National Compact is likely to be well received by the sector and the broader community;
  - Making the ATO the regulator is likely to be contested — this postpones that contest and possibly completely avoids it;
  - In focusing on delivering outcomes quickly in key targeted areas the government, the sector and the wider community could celebrate some early success; and
  - A limited beginning provides the government with options for future development of the Commission but does not commit it immediately to a particular fixed course. This is important because there are a plethora of complex issues, multiple, powerful stakeholders and much useful research which should be carefully considered. A small Charities Commission, along the lines proposed in this paper, could be a vehicle for that discussion which might include third sector issues raised in the *Henry Review*.

### 3. ANSWERS TO THE QUESTIONS ASKED IN THE CONSULTATION PAPER

In this section answers to the consultation questions are provided. Not all questions are answered. It is clear from the outset that I take a fundamentally different approach from the Consultation Paper. There are also questions that I am not skilled to answer. The questions are presented in groups and answers are offered as groups.

#### Consultation questions

- Q1 Are these goals appropriate and adequate for national regulation? Which of these are most important?
- Q2 Are there any other goals for national regulation?

The goals are not appropriately framed. The issues need to be recast in the context of the National Compact agenda. This paper sets out an alternative framework and reframes the goals in a manner compatible with the National Compact.

#### Consultation questions

- Q3 What should the scope of a national NFP regulator be? What types of entities should be regulated by a national NFP regulator?
- Q4 Should some legal forms be treated differently? If so why?

The scope should be the whole of the sector but it does not follow that the whole of the sector should be regulated. The paper sets out definitions that enable the concept of charity and civil society organisation that enable regulation to encompass the whole of the sector. I suggest that the Commission should have the powers of the Attorney-General. These are not powers that should be located in the ATO.

#### Consultation question

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

The Charities Commission might have contemporaneous powers only. This is a matter in need of careful thought. I do not have a concluded view as to whether the powers should be shifted.

#### Consultation question

- 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?

In principle there should be only one Commission or Regulator. The for profit company model should be the paradigm with variations only if the variations are needed to achieve the overall goals. At this

point I am not aware of any issue that compels State supervision for conceptual reasons. All of the reasons are historical and legal.

#### Consultation questions

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

Any regulation discourages voluntary engagement. All regulation must therefore pass a cost/benefit analysis as to its impact on participation and giving.

Improvement to taxation arrangements are needed. These issues should be debated in a tax forum following the discussion begun in the *Henry Review* not this context. The ATO have still not updated rulings following a 2008 High Court decision on critical issues. There is need for reform in the ATO before any extensions to its role are considered. The causes of complexity in the tax system are a separate issue, although a related issue from the need for a Commission for the sector.

#### Consultation question

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

The value would depend upon the initiative. The broader issue is whether a Commission dedicated to actualizing the aspirations of the National Compact would be of value. There seems to be broad consensus that it would – provided it is not the ATO. There seems to me to also be universal agreement that the ATO is culturally suited to recovering tax but not facilitating voluntary engagement and philanthropy. The Paper sets out other concerns regarding the ATO.

### Consultation questions

- Q11 What benefits would a 'report-once, use-often' model of reporting offer?
- 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?
- Q13 How significant is the compliance burden imposed by requirements for acquittal of grants? Where could these be simplified?
- 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?
- Q15 What information might need to be provided to a national regulator but not made public through a NFP information portal?
- 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?
- 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?

These questions are not addressed in the paper. The reasons are because they presuppose an approach I would not recommend.

### Consultation questions

- Q18 Are the suggested core rules and regulatory framework adequate?
- Q19 What powers does the regulator require to improve governance and regulatory oversight?

The core rules and regulatory framework are inadequate. I suggest a slow evolution of powers progressively developed not a plunge to extensive governance and regulatory oversight. I suggest a beginning by targeting key issues not wide-ranging wholesale regulation. The regulatory framework can be developed slowly and carefully once a beginning is made.

### Consultation question

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

There is arguably wide-ranging support for fundraising to be streamlined at a national level and this would be an ideal issue for a Commission to begin regulating. It is a relatively discrete area where regulation is confused and there are seemingly high levels of commitment to resolve the issues across stakeholders. The Commission should regulate this. There may be considerable savings across various levels of government by one national regulator. This is not an area where the ATO has expertise.

### Consultation questions

- Q21 What problems arise from the complex interrelationship between Commonwealth, state and territory responsibilities in this area?
- Q22 What might be the implications of the different approaches of referral of powers or harmonisation of legislation?

The Consultation paper puts forward the ATO to take over regulation because it 'has appropriate systems and technical knowledge of the sector' but it does not. ASIC has Australia's best registration system, already registers companies limited by guarantee and works in a federated model. It is also arguably culturally better suited than the ATO which has a very narrow purpose – collection of revenue.

### Consultation questions

- Q23 What form of the national regulator best meets the objectives of simple, effective and efficient regulation of the NFP sector?
- Q24 Would a Commonwealth only regulator provide sufficient benefits to the sector?
- Q25 Are there benefits from establishing an interim regulator through an existing Commonwealth regulator, to undertake immediate reform?

The form of regulator needed is one that is independent of the ATO in particular and the Government in general. The New Zealand Charities Commission provides a good model for beginning regulation in Australia but It applies only to charities. I suggest the scope in Australia extend beyond charities to the whole sector. I suggest that Australia not move immediately to full regulation of either charities or the whole sector but that regulation begin on an issues basis.

### Consultation questions

- 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?
- Q27 What benefits could flow from a national regulator maintaining a dedicated subsection focusing on Indigenous corporations and/or housing?

This could be considered as a second phase issue. Conceptually there is a logic in the blending of ORIC into this commission. Careful attention to cultural issues must be given. This is best achieved slowly. The ATO is not the best place to locate the ORIC in the short medium or longer term.



### Consultation questions

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

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

At the time of this submission:

The Treasury is also seeking an additional \$16.5 million in administered expenses through Appropriation Bill (No. 3) 2010-11. This relates to an additional \$9.9 million for the banking reform education and awareness campaign and \$6.6 million for the education tax refund information campaign.<sup>1</sup>

Many in the sector and the wider community would ask why, if the Government can find \$16.5 million for 'the banking reform education and awareness' and 'tax refund information', it cannot find money for a basic commission to facilitate voluntary engagement and philanthropy? Working from first principles the costs should come from Consolidated Revenue as the nation as a whole reaps the benefit of such a Commission. There would also be an irony embedded in the Government declaring in the National Compact that it is committed to development of the Sector and then requiring the sector to pay for that development. Making the sector pay would not evidence that commitment.

I do not rule out voluntary contributions to the work of the Commission. I believe there are over 17,000 people who voluntarily help others with Tax returns. If people will voluntarily do this for a tax regulator the idea that, This is too general a question to answer with precision. I do not rule out voluntary contributions to the work of the Commission. I believe there are over 17,000 people who voluntarily help others with Tax returns. If people will voluntarily do this for a tax regulator the idea that, properly managed, some of the functions of the Commission might not be able to be assisted by volunteers and donations should not be quickly passed over. In any case the cost of a Commission will be relatively small as proposed on the financial landscape. properly managed, some of the functions of the Commission might not be able to be assisted by volunteers and donations should not be quickly passed over. In any case the cost of a Commission will be relatively small as proposed on the financial landscape.

### Consultation questions

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?

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?

I believe the common law could be developed and set out within the steps in my PhD, *Beyond Charity: Outlines of a Jurisprudence for Civil Society*, and in a recently published chapter in the text

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<sup>1</sup> See <http://www.treasury.gov.au/contentitem.asp?NavId=012&ContentID=1965>

*Modernising Charity Law.* A part of the remit of the Commission might be to bring test cases with a view to developing the common law. Having said that I offer also definitions suitable for Statutory implementation as this may be the preferred route and is almost certainly necessary to establish the jurisdiction of the proposed Commission in accordance with the wide scope I propose.

I turn now to discuss the broader principles behind the views expressed so far under the four headings set out in the Consultation Paper. Again the approach taken is not to be comprehensive but to make observations where I might be able to be helpful.

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<sup>2</sup> Available at [http://eprints.qut.edu.au/31742/1/Matthew\\_Turnour\\_Thesis.pdf](http://eprints.qut.edu.au/31742/1/Matthew_Turnour_Thesis.pdf) and the text is available online or through the Australian Centre for Philanthropy and Nonprofit Studies ph 07 31381020.

## 4. DISCUSSION OF THE BROADER CONCEPTS IN THE CONSULTATION PAPER

### 4.1 THE GOALS OF REGULATION AND THEIR JUSTIFICATION

The goals of regulation must be informed by the National Compact. It is foundational to the discussion. At the foundation of this discussion is the justification for regulation. There has been considerable work undertaken in recent years on justification for regulation. I mention just one; the most recent work in this context, that of Jonathan Garton.<sup>3</sup> Garton has undertaken an extensive 'bottom-up' review of justifications for regulation of NFPs. Garton identified only six overlapping grounds justifying regulation of NFPs. They were:

1. Preventing anti-competitive practices;
2. Controlling campaigning;
3. Ensuring trustworthiness;
4. Coordinating the sector;
5. Rectifying philanthropic favours; and
6. Preventing challenges to organisational quiddity.<sup>4</sup>

My point here is not to undertake a complete review of the justification for regulation of NFP's but to suggest that there are soundly reasoned foundations justifying regulation of not-for-profit organisations. My hope is that the goals for regulation will be informed by this wider debate and not be drawn as the Consultation Paper invites, into a debate over concessions. Conversely my hope is also that the tax debate will be properly conducted in a tax related forum and will not be developed within the strictures of regulation of the not-for-profit debate.

As the Consultation Paper puts weight on tax concession as a justification for regulation I address this now. Not-for-profit organisations in general and charities in particular have enjoyed favourable treatment by societies from time immemorial.<sup>5</sup> Elaine Abery has observed that the favouring of charities is at least as old as Ezra's return of the exiled Jews.<sup>6</sup> Colombo and Hall pointed to evidence of tax favour for charities in ancient Greece, ancient Rome and in ancient Egypt.<sup>7</sup> They began their work with the words: 'Exempting charities from various forms of taxation is a practice that appears as old as western civilization itself'.<sup>8</sup> The exemption has applied in the United Kingdom since William Pitt introduced income taxation.<sup>9</sup> The debate over how that favourable treatment was to be categorised for taxation purposes emerged as a significant topic for debate in the latter half of the 20th century and is traceable to at least the mid-1970s in the United States.<sup>10</sup> These debates identified the contentious issues in the scope of the tax expenditure and ultimately these contentious issues were decided by the vote of a self-appointed panel rather than by recourse to

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<sup>3</sup> Jonathan Edward Garton, *The Regulation of Charities and Civil Society* (D Phil Thesis, University of London, 2005).

<sup>4</sup> *ibid* 37b, Chapter 4 generally and 151.

<sup>5</sup> Peter Luxton, *The Law of Charities*, The Law of Charities (Oxford University Press, first published 2001, 2001) 4.

<sup>6</sup> Elaine Abery, 'Charities: A Target for Ralph' (2000) 29 (December) *Australian Tax Review* 224, 224 referencing *The Holy Bible New International Version* (Zondervan, 1984) Ezra 7:24 .

<sup>7</sup> John Colombo and Mark Hall, *The Charitable Tax Exemption* (Westview Press, Inc., 1995) 1, 14.

<sup>8</sup> *ibid* 3.

<sup>9</sup> Jean Warburton, Debra Morris and N F Riddle, *Tudor on Charities* (Sweet & Maxwell, 2003) 305.

<sup>10</sup> Boris Bittker and George Rahdert, 'The Exemption of Nonprofit Organizations from Federal Income Taxation' (1976) 85(3) (January 1976) *The Yale Law Journal* 301, 301.

principle.<sup>11</sup> In lay terms, the idea that it 'was simply inappropriate to describe the activities of nonprofit organizations' as 'profit-making' was abandoned.<sup>12</sup> If this understanding is correct and concessions are treated as such because it was arbitrarily decided to do so then justifying regulation of the not-for-profit sector in Australia based on concessions will rest upon a ballot of international tax academics in the United States! That is all. This issue was canvassed in the Henry Review but this also was not mentioned in the Consultation Paper. What did the Henry Review say about this assumption? The Henry Review acknowledged the arbitrariness of deciding what is in and out of the tax expenditure category declaring:

Not all concessional elements of the tax system are classified as tax expenditures. This is because some concessions are considered to be structural elements of the tax system and are incorporated in the benchmark. For example, the personal income tax system includes a progressive marginal tax rate scale, which results in individuals on lower incomes paying a lower marginal rate of income tax than those on higher incomes. This arrangement is a structural design feature of the Australian tax system and is therefore not identified as a tax expenditure. There may be different views on which structural elements to include in the benchmark. These benchmarks can vary over time and can sometimes be perceived as arbitrary.<sup>13</sup>

The issue was considered in 1995 when the Industry Commission raised it briefly, noted the contest, but declined to challenge the status quo.<sup>14</sup> In 2010, the Productivity Commission took a similar approach.<sup>15</sup> These assumptions need to be revisited in an Australian context. It may be the case that the issue of treating concessions as tax expenditures will be abandoned. Either way, though, I suggest that it not be adopted as a rationale for regulation.

Pressing a little deeper into the foundations of the Consultation Paper, the concessions argument reads as embedded in a deeper conceptual framework that government is making concessions to another sector rather than people working together for a better society – sometimes voluntarily and sometimes through their governments. Many, if not all, Australians arguably see government and voluntary responses as working together for the common good but in different ways. The way Australians view the sector should be discussed in this context and as an alternative to the paradigm inherent in the Consultation Paper. One of the leading writers on this \_\_\_\_\_ response approach is famous Yale Professor Lester Salamon. Salamon argued that the transaction costs of mobilising a government, as against mobilising a 'handful of volunteers', means that 'the private, nonprofit sector will typically provide the first line of response to perceived "market failures", and the government will be called upon only as the voluntary response proves insufficient.'<sup>16</sup> Salamon integrated this idea with his criticism of theories of the welfare state, noting that when the sector is viewed in this way, 'it becomes clear that government involvement is less a substitute for, than a supplement to private

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<sup>11</sup> Ole Gjems-Onstad, 'Tax Expenditure: A Criticism of the Concept as Applied to Nongovernmental Organizations' (1990) 19 *Nonprofit and Voluntary Sector Quarterly* 279 283

<sup>12</sup> Susan M Sanders, 'The "Common Sense" of the Nonprofit Hospital Tax Exemption: A Policy Analysis' (2007) 14 *Journal of Policy Analysis and Management* 446 449.

<sup>13</sup> AFTS Secretariat, *Australia's Future Tax System: Report to the Treasurer* (The Treasury, Commonwealth of Australia, 2009) 731.

<sup>14</sup> Australian Industry Commission, *Charitable Organisations in Australia*, Report No 45 (Australian Government Publishing Service, 1995) 268.

<sup>15</sup> Productivity Commission, *Contribution of the Not-for-Profit Sector: Research Report* (Australian Government, 2010) Box E.1.

<sup>16</sup> Lester Salamon, 'Voluntary Failure Theory Correctly Viewed' in Helmut Anheier and Avner Ben-Ner (eds), *The Study of the Nonprofit Enterprise - Theories and Approaches* (Kluwer Academic / Plenum Publishers, 2003) 183, 185 quoting Lester Salamon, 'Of Market Failure, Voluntary Failure, and Third Party Government: Toward a Theory of Government-Nonprofit Relations in the Modern Welfare State' (1987) 16 *Journal of Voluntary Action Research* 35, 39.

non-profit action.<sup>17</sup> There are, according to Salamon, four failures of the voluntary sector that lead to government involvement. They are:

1. 'Philanthropic insufficiency', by which Salamon means the sector's inability to generate resources 'on a scale that is both adequate enough and reliable enough to cope with the human-service problems of an advanced industrial society.'<sup>18</sup>
2. 'Philanthropic particularism', by which he means the predisposition of (some) charities to be selective and also favour those of their own class, race, religion or other basis for social segmentation.<sup>19</sup>
3. 'Philanthropic paternalism', is the phrase used by Salamon to declare that it is those who have control of the most resources who control resource allocation. The consequence is not only that there may be a flow of funds to charities 'enjoyed also by the rich such as fine arts and opera but also a sense of dependence can be cultivated among the poor.'<sup>20</sup>
4. 'Philanthropic amateurism', flows frequently from voluntary participation in the sector. Salamon points out that many of the social problems addressed by the sector require a professional response.<sup>21</sup> This may call for government involvement.

As, in Salamon's view, these four weaknesses of the voluntary sector, 'correspond well with government's strengths', and vice versa, a framework at both a theoretical and practical level exists for 'government-non-profit cooperation'<sup>22</sup> and should be preserved and strengthened. This model suggests that the role of regulation would be to enhance the partnership of volunteers and their organisations with the government. The parties are seen as working together not giving and receiving concessions. It is a different way of looking at regulation as it identifies four specific areas of weakness that Australians could focus upon when developing a regulatory regime.<sup>23</sup> Again it is not tax but social objectives that drive the discussion.

I turn now to some practical research. The most recent research on the effects of accountability and transparency is the just published paper in *Voluntas* by Rebecca Szper and Aseem Prakash. Their 'key finding is that across models, changes in *ratings* [of organisations as good managers] are not associated with changes in *primary revenue ... or contributions ...*'<sup>24</sup> Put simply the proposition this research poses for Australia is that increasing transparency and accountability might have no impact on the income or giving to not-for-profits. If that is so then accountability and transparency cannot be justifications for regulation if the reason for regulation is to improve revenue and participation by giving. Now the paper also reviews other research and sets out its presuppositions. It is also based on samples from the state of Washington in the United States. My point in raising this is to lift the

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<sup>17</sup> Salamon, *previously cited*: remove this citation and make cross-reference, 39.

<sup>18</sup> *ibid*, 39.

<sup>19</sup> *ibid*, 40.

<sup>20</sup> *ibid*, 41.

<sup>21</sup> *ibid*, 42.

<sup>22</sup> *ibid*, 43.

<sup>23</sup> I do not explore the work of Henry Hansmann or Burton Weisbrod but their different approaches to thinking about the sector and consequent different approaches to regulation could also significantly assist in development of the goals. See particularly Henry Hansmann, 'Reforming Nonprofit Corporation Law' (1981) 129 (January 1981) *University of Pennsylvania Law Review* 500 and Burton A Weisbrod, 'Toward a Theory of the Voluntary Nonprofit Sector in a Three-Sector Economy' in Burton A Weisbrod (ed), *The Voluntary Nonprofit Sector* (Lexington Books, 1977) 51 although there is a vast literature developing and discussing their models.

<sup>24</sup> Rebecca Szper and Aseem Prakash, 'Charity Watchdogs and the Limits of Information-Based Regulation' (2011) 22 *Voluntas* 112, 128.

debate to exploration of just what is being achieved by this regulation and to question whether it is supported by empirical research.

We need to be carefully considering as a nation both the basis for regulation and what it is endeavouring to achieve. In asking the question what is the goal of regulation? I am questioning:

1. Whether regulation should have anything to do with concessions; and
2. Whether accountability and transparency will improve either revenue or contributions to the sector.

Before leaving the discussion of goals I mention my own view. My view is that there are two and only two overarching goals of national regulation:

1. the enabling of voluntary association; and
2. encouraging voluntary contributions of time and money for public benefit.

I suggest that regulation is not an end in itself and can only be justified if it facilitates one of these two goals.

I premise these overarching goals on the role of parliaments to protect the fundamental freedoms of citizens to voluntarily associate. In countries like Australia those rights find a variety of expressions but one widely recognised expression is affirmed in the Universal Declaration of Human Rights. The Universal Declaration of Human Rights sets out across 30 Articles a consensus of value statements, three of which are important for this discussion of regulation. They are:

Article 18, which provides:

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

Article 20(1), which provides:

Everyone has the right to freedom of peaceful assembly and association.

and Article 27(1), which provides:

Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.

These freedoms are stated to be exercised subject to certain limitations. The limitations are set out in Article 29(2) as follows:

In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

Adopting these statements as summaries of the principles Australians wishing to determine the goal of a national regulation would ask two key questions:

1. How can free and voluntary association best be enabled, and perhaps encouraged? (the 'maximum freedom principle') and
2. What are the minimum restraints necessary? (the 'minimum restraint principle').

These are very broad questions. Simply stated as broad reciprocal premises of maximum freedom and minimum restraint they are useful for framing the detailed discussion regarding goals of regulation. Principles such as those proposed by Jonathan Garton mentioned above dovetail into this and provide a critical bridge from foundational goals to detailed regulation. Each time a regulation is proposed I suggest that these two questions be asked. In summary I suggest the goal of regulation is the advancement of fundamental freedoms and rights. The justification of regulation is that it advances those freedoms and rights. So, if for example fundraising regulation is to be passed its goal will be to provide confidence to citizens that they are being approached for donations in a way that is trustworthy and thus the regulations build confidence in the sector.

## 4.2 THE SCOPE OF NATIONAL REGULATION

The second issue raised is the scope of national regulation. In this section it is argued that the scope of regulation begin conceptually at the whole of the not-for-profit sector. The suggestion is made in the Consultation paper that Australia follows the Northern Hemisphere into extensive additions by statute to the number of heads of charity. It is my view that this is a piecemeal approach that falls short of the best practice. I suggest that if the concept of charity is to remain central to the definition of the sector then the definition of charitable purpose must extend to include all purposes pursued within the sector. Below I offer a definition of both 'charitable purpose' which would enable regulation of all not-for-profit purposes and 'civil society organisation' which would enable regulation of all not-for-profit organisations. I suggest this would avoid the problems of statutory extension of existing heads of charitable purpose and would more effectively cover the entire regulatory space. I hasten to add that these definitions would not act as a gateway to all favours enjoyed by charities today in Australia. Favours extended to organisations such as income tax deductibility and exemption can continue to be regulated under separate legislation such as the *Income Tax Assessment Acts* which may need amendment if this broad definition is adopted.

Although I suggest that the jurisdiction of the national regulator should apply to the whole of the not-for-profit sector it does not follow that all organisations in the sector must be regulated. Just as all citizens are subject to the jurisdiction of the criminal courts but they only come within the purview of those courts when pursuing certain purposes or undertaking certain activities so it is possible for regulation to only apply when certain purposes are pursued or activities undertaken by NFP organisations.

If, instead of trying to regulate the whole sector, the government began by only regulating certain purposes or activities the cost of a commission would be significantly reduced. Further, legitimate debates over how intrusive government should be into civil society could be properly ventilated in relation to particular forms of regulation.

Taking this approach also leaves open the possibility of regulatory functions remaining with agencies already regulating aspects of the sector such as the ATO. I will develop this idea further in the next sections.

I suggest then that a Commission, which could still be called a Charities Commission, has jurisdiction for the whole not for profit sector. It would have this scope if the government passed legislation defining charitable purpose as extended to the whole sector.

I suggest that charitable purpose (for the purposes of defining the scope of the regulator's jurisdiction) be defined as follows:

*A charitable purpose is a purpose pursued voluntarily, altruistically and for public benefit. A business, government or family purpose is not a charitable purpose.*

Defining charitable purpose is not, however, enough. The threshold central puzzle is how to define the *relevant organisations* that make up the sector for it is these organisations that will be the object of regulation. Rather than refer to these organisations as not-for-profit I suggest they should be called civil society organisations. Such a definition, formulated having regard to the definition of charitable purpose, might be as follows:

*A civil society organisation is an organisation that pursues purposes voluntarily, altruistically and for public benefit. Civil society organisations are distinguished from government organisations by their voluntariness, from businesses by participation being for altruistic purposes, and from family and other private groups by the purposes being public.*

Redefined as altruistic, public benefiting, voluntary associations, the legal space defined by reference to charitable purpose could become coterminous with the definition of the not-for-profit sector as a whole. Charitable purpose has been identified as the essence of the sector for centuries. Charities are recognised as central to the NFP sector and the NFP sector is the whole third sector – there is not anything left over that does not belong to another sector using this analysis. The NFP sector is, then, differentiated from three other sectors. Those three others are: business (the first sector); government (the second sector); and family (the fourth sector). Charities and related organisations are included in the third sector and a four sector model of society is adopted.

Would the scope include unincorporated associations and if so how? One of the difficulties identified by the Consultation Paper is that over 400,000 of the not for profit organisations in Australia are unincorporated associations. There are significant difficulties with the recognition of unincorporated associations under the common law and yet wrongdoing is as likely to occur in an unincorporated association as any other form of association. If regulation is to apply to all organisations within the sector then a way is needed for addressing the challenges presented by unincorporation. It is my view that the scope of operation of the Commission has to include unincorporated associations. It is also my view that it is possible to develop the law to include them. Three observations on international developments are now made that might be helpful and then I close with some historical reflections.

First, many states in the United States of America have now passed legislation recognising unincorporated associations.<sup>25</sup> This is primarily to enable voluntary association, consistent with the maximum freedom principle stated above, not to regulate. Second, the Charities Commission for England and Wales recognises unincorporated associations for the purpose of registration. Third, the European Court of Human Rights recognises associations irrespective of incorporation for the purposes of affirming free assembly in civil society.<sup>27</sup> There is not a reason, in principle, why

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<sup>25</sup> I use 'family' in this submission in the way that the consultation paper uses household.

<sup>26</sup> The following states have adopted *Revised Uniform Unincorporated Nonprofit Association Act (2008)* or variations on this model legislation: Alabama, Kansas, Colorado, Delaware, The District of Columbia, Hawaii, Idaho, North Carolina, Texas, West Virginia, Wisconsin, Wyoming. See also Council to the Members of The American Law Institute, 'Principles of the Law of Nonprofit Organisations: Discussion Draft' (American Law Institute, 6 April 2006) xxx.

<sup>27</sup> See eg, *The United Communist Party of Turkey v Turkey* [1998] Eur Court HR 1, where the formal structure of the association was dissolved by the state even before it was able to commence activities.



Australian courts and parliaments could not recognise associations even if unincorporated. That this possibility remains open is affirmed by the Australian academic Keith Fletcher, who identifies that '[n]o parliament has attempted to destroy the private autonomy of associations'.<sup>28</sup> It is my understanding that the common law recognised unincorporated associations until the Tudor Period. Henry VIII developed the prohibition on associations without royal consent to a broad array of associations 'made by common assent without any corporation.'<sup>29</sup> To migrate these organisations that had not been incorporated in a manner issuing from the sovereign, common law judges adopted 'the fiction of a lost grant' to enable their recognition by courts of law.<sup>30</sup> My point in setting this out is that there is not any reason in principle preventing recognition of unincorporated associations. The law could be developed to recognize them. If this is done then all organisations within the section could be recognised as within the scope of the Commission's jurisdiction – howsoever constituted.

I therefore argue for an extensive scope of jurisdiction (so that there are no gaps) but limited intrusion without justification into purposes pursued and activities undertaken.

### 4.3 THE FUNCTIONS OF A NATIONAL REGULATOR

The function of a National body would be to facilitate voluntary involvement and encourage philanthropy. Regulation would be a secondary role, integral to achieving these ends. Regulation in such a context is a *tool* not a *goal*. The Commission would not exist to regulate - but regulation would be a part of what it did.

One of the more important functions to consider is the function of the Attorney General as overseer of charities. This function could be transferred to a Charities Commission or exercised concurrently by it. My preliminary opinion is that concurrent powers might be best but I would like to hear more on this. This is likely to be more palatable to the states. Giving the Commission this power might enable it to pursue in the Courts some of the concerns raised for example in the Senate regarding Scientology. Separating this function from government may assist in its more aggressive pursuit of recalcitrant charities.

In New Zealand the Charities Commission maintains a register of charities but not all not-for-profit organisations. There are sound arguments for registration of some organisations. The registration function would logically fall to this organisation but the possibility that registration could be managed – perhaps in a back office way by ASIC should not be immediately dismissed. ASIC is arguably the most capable entity managing registration in Australia and those skills need not be duplicated. I am not recommending that ASIC become the regulator but rather that it is a better option than the ATO. If there was a Charities Commission set up and if was ultimately to register entities then the interplay of the charities commission and ASIC at least in relation to registration of companies limited by guarantee would need to be clarified.

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<sup>28</sup> Keith L Fletcher, *The Law Relating to Non-Profit Associations in Australia and New Zealand* (The Law Book Company Ltd, 1986) 6, although Fletcher confined his analysis to the applicable law in the United Kingdom, Australia and New Zealand.

<sup>29</sup> *Chantries Act 1531* 23 Hen VIII c 10; cited in *ibid* 11; Fletcher notes that it was not repealed until 1960.

<sup>30</sup> *ibid* 12.

The function of administering taxation exemptions and deductibility for the sector might pass to this Commission in due course but the case for moving it from the ATO would need to be made. In the short to medium term I am inclined to leave this function where it is, in the ATO, but not to increase ATO powers.

There has been a tendency for the debate in Australia to focus on regulating the whole sector just because some within the sector are misbehaving and so the function of the Regulator is presumed to be to regulate the whole sector. I, therefore, comment briefly on that agenda now. It does not follow that because some misbehave all must be regulated. We do not take that approach with criminal law. An alternative, flowing from the discussion above, is to patrol the borders rather than endeavour to regulate the whole. What this means in practical terms is that governments can look to regulate the unacceptable activities as it does with criminal law and leave the rest of the community alone. Regulation can focus, for example, on assets of civil society organisations being utilized for private benefits, or private inurement, as the US tends to describe this. When such a concern came to the attention of the Commission there would be investigation as occurs with criminal matters but the vast majority of the sector would be able to be free to do as it pleased without regulation. This would of course reduce costs considerably and be much more politically palatable – particularly as a beginning.

The function of regulation in such a context is to identify risk and address it not to simply regulate. When applying this approach in the context of fundraising the function of the Commission would be to ensure that funds raised for public purposes are applied to those purposes. This would mean DGRs are regulated not because they have tax concessions but because they raise funds from the public that must not be applied to private purposes. This justification is arguably better than regulating DGRs because they enjoy concession status. To which organisations society extends concessions is, from first principles, a separate question from which organisations should be regulated. There is not an immediately apparent nexus between concessions and regulation. Concessions may be linked to something else which might justify regulation but then the steps need to be spelt out. It is because DGRs raise funds from the public that this activity can legitimately be regulated to strengthen confidence in the sector. Where DGRs raise funds from the public on the basis of representations and those purposes will be applied to particular purposes and there is reason to believe that the funds are being applied to business, family or government purposes then clearly there is a basis for inquiry and accountability.

If the function of the commission is limited and it does not set out to immediately regulate the whole sector but takes a strategic approach red tape will be reduced as most organisations will not be required to do anything beyond that which they already do with the same regulators they are already dealing with. It follows that a relatively small Commission could be set up with a primary purpose of facilitating civil society engagement and philanthropy. It could focus on prosecuting recalcitrants, perhaps using only the attorney general power, identifying and addressing risks, resolving some of the more complex legal issues and making recommendations to government. These functions could develop over time. Time can be taken to draw upon world leading ideas from other jurisdictions to develop the Commission's functions. The sector wants action but it does not need finalization of the commission's function as a first step.

#### 4.4 THE FORM OF A NATIONAL REGULATOR

The sector is a very important sector of society. It should have its own Commission. The Commission should be independent of government. It should have its own charter and board. Logically this would mean the commission would be a creature of federal statute. Charity Commissions in other

jurisdictions are independent entities and not government departments nor part of government departments.

Independence is critical to the role the Commission would play as a vehicle for encouraging civil society. This is a function that sits better outside of than inside government. The independence is likely to also better suit the discharge of the oversight and prosecutorial role that has not tended to sit well within government.

How should the Commission be funded? It should be funded by government. Whether it might also be funded – at least in relation to some of its educative and other charitable functions - by philanthropy might be explored.

As to the regulatory functions, these do not have to be fully formed at the time of establishment. There is a growing awareness of the incredible diversity of factors that can affect the success (or otherwise) of regulation.<sup>31</sup> If the Commission is given time to develop its form and with that, its forms of regulation, the long term effectiveness might be enhanced.

There is an inherent pressure on the Consultation Paper towards the ATO as regulator. I oppose this although, in the short to medium term, I consider it may be prudent to leave the present tax functions with the ATO whilst a new small Commission is established. Some of the reasons will be obvious from the above but there is one other important reason.

Above all else the function of a National Regulator must be to uphold and perform the law. In this regard the ATO, given its Charter, should be above reproach. Instead it is a ground that arguably should disqualify it. There is increasing evidence, which has reached the point of judicial findings, that the Australian Taxation Office considers itself above the law. Treasury might not be aware – in recommending the ATO as an interim regulator - of the comments by Justice Alsup in the *Indooroopilly case*.<sup>32</sup> Referring to the attitude of the ATO to the law, Justice Alsup stated:

From the material that was put to the Full Court, it was open to conclude that the [ATO] was administering the relevant revenue statute in a way **known to be contrary to how this Court had declared the meaning of that statute**. Thus, taxpayers appeared to be in the position of seeing a superior court of record in the exercise of federal jurisdiction declaring the meaning and proper content of a law of the Parliament, but the executive branch of the government, in the form of the Australian Taxation Office, administering the statute in a manner contrary to the meaning and content as declared by the Court; **that is, seeing the executive branch of government ignoring the views of the judicial branch of government in the administration of a law of the Parliament** by the former. **This should not have occurred.**

These concerns have only recently begun to be ventilated by citizens generally and particularly those associated with the voluntary sector. The catalyst for discussion of the propriety of the ATO's conduct in relation to the voluntary sector has been its lack of response to the decision in *Word Investments*.<sup>33</sup> That decision was handed down in December 2008. It has now been over two years and still the ATO has not updated the relevant Rulings. Worse, when people in the general community and tax practitioners call the ATO, staff at the ATO say that they have been directed to

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<sup>31</sup> Arie Freiberg, *The Tools of Regulation* (The Federation Press, 1<sup>st</sup> ed, 2010).

<sup>32</sup> *FCT v Indooroopilly* (2007) 158 FCR 325.

<sup>33</sup> *Commissioner of Taxation v Word Investments Ltd* (2008) 236 CLR 204.

follow the relevant Ruling even though they know the law is different. This is happening three years after the decision in *Indooroopilly!*

The ATO is losing the respect of the public generally and this lack of confidence is finding expression in the not for profit sector's response. As Treasury might expect this has led to the Commissioner being legitimately parodied. As one of the more humorous examples take the comments of Jennifer Batrouney SC at last year's Australian Charity Law Conference (which Michael Hardy of the ATO heard as he was in the session).

...the senior officers [of the ATO] were administering the law, not in accordance with the High Court's decision in *Word* but in accordance with the recommendation of a 1934 Royal Commission!

For Treasury to recommend to the government that it extend the powers of an Agency that is increasingly perceived as unwilling to follow the rule of law, and is consequently a proper object of public ridicule, sends the wrong message to the philanthropic community. People need to have confidence that government agencies will obey the law! By leaving tax regulation with the ATO in the short term but setting up a Charities Commission, the government creates options for itself. It could leave tax issues for the sector with the ATO if it recovers society's confidence or it could move all regulation including tax to the Charities Commission over time.

## 5. THE ROLE OF TREASURY

I raise for debate the role of Treasury in this process. There is a vast amount of literature on the topic that could have been referenced in this consultation paper that has not been included. It did not even touch upon the Henry Review discussion of the regulation of the sector. None of the ideas I mention here have been touched upon. The extensive economic theory work of Henry Hansmann and Burton Weisbrod that has been so influential on non-profit law reform in the United States has not been mentioned. Did Treasury have an obligation to bring that information forward in informing this debate? I have touched upon only snippets in this short note. The question must be asked whether Treasury can and should be the independent assessor providing the government with the relevant information, and filtering these submissions into a report, or whether it should be free to itself be a participant in the process advocating a particular outcome – such as (only) greater regulatory power for the ATO.

It is important that all of the relevant material on regulation of the not-for-profit sector be before the government when it makes these important decisions and that the government not be constrained by the limited information brought forth by Treasury and the vicissitudes of voluntary assistance such as submissions like this.

## 6. A CONCLUDING COMMENT

It is important to the government that it fulfils its election promise to implement sector reform. Treasury reported to the government in the Red Book that 'the sector will be expecting genuine

reform'.<sup>34</sup> A Charities Commission, even if of limited size is genuine reform. It is my belief that there is support for a Commission for the sector but not that the ATO be the regulator. The government could fulfil its election commitment by establishing a small Commission focussed on enabling and empowering civic participation and philanthropy. This could focus on key current issues such as fundraising. It could begin inquiring into public funds being used for private purposes if it had the Attorney-General's powers and could pursue cases in the courts. The regulatory functions performed by the ATO could remain with the ATO in the short to medium term. The sector is likely to accept this. This slower considered approach would enable sound steady progress towards an ideal outcome. A Commission with an initial focus on enabling participation, social cohesion and philanthropy is likely to build the sector's confidence. Regulation is secondary and should be based on well informed principles not access to concessions. There is a vast body of resources that can inform this discussion. This paper has only touched upon a few!

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<sup>34</sup> 2010 Treasury Incoming Government Briefs, Part 2 (Revised) Election Commitments at p 6, available at <http://www.treasury.gov.au/contentitem.asp?ContentID=1875&NavID=> last accessed 18 February 2010.

## 7. BIOGRAPHY OF DR MATTHEW TURNOUR

Dr Matthew Turnour is an expert in not-for profit law and regulation. He is a Senior Research Fellow attached to the Model Laws Project at the Australian Centre for Philanthropy and Nonprofit Studies where he also lectures. He was awarded the Warren Tapp Prize for his thesis, *Beyond Charities Outlines of a Jurisprudence for Civil Society* and has published various chapters and papers on not-for-profit law reform. He is a regular conference speaker both nationally and internationally on issues pertaining to the not-for-profit sector.



He is also the Managing Director of Neumann & Turnour Lawyers where he leads the not-for-profit sections of the practice. With over 25 years in private practice he has experience in most areas of law affecting clubs, charities and other not for profit organisations. Having worked as a transaction lawyer and litigator his principal areas of practice now are corporations law, governance, transactions and exemptions from tax. He advises directors and boards on ethical as well as legal issues.

He is a director of the Australian Charity Law Association.

He has a long history of involvement in the voluntary sector both as a participant, legal advisor and academic. A summary of academic qualifications, memberships and awards is available on line at <http://qut.academia.edu/MatthewTurnour/CurriculumVitae>.