



Regulating religion: Four factors for reflection

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Four factors

1. Constitutional constraints
2. The comparative regulatory environment - charities should be less regulated all other things being equal
3. The difference between regulating the provider of religious charity and regulating the delivery of religious charity (supply v demand)
4. The factors driving regulation are not (ir)religious but societal changes



1. Constitutional constraints

- Constitution s116 and freedom of religion
- Unjust as between BRC and other religious charities
- Unjust as between religious and other charities

Constitution s. 116 Commonwealth not to legislate in respect of religion

The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.



2. The comparative regulatory environment

The charity sector should be regulated more lightly than the for-profit sector all other things being equal because motive is *charitable intent not self-interested*

Basis for regulation

- *Risk not tax concessions*



Powers



- Powers of ACNC exceed all other agencies
- The role of law/regulation for the NFP sector is to enable and encourage civic participation, and
- There is an inherent tension between being regulator and friend





3. Provision is different from delivery

- There may be greater justification for regulating the provision of religious charity than regulating the delivery of religious charity (supply v demand) because the public has an interest (a public interest) in the delivery of services *different from its* interest if any in the religious institution that provides the service



4. The factors driving regulation

1. Twin towers (terrorism)
2. Global Financial Crisis (financial pressures retreat of government from provision of public benefits and public goods)
3. Big data (we can and want to know)



4. The factors driving regulation

A Terrorism financing

ACNC states:

“Why charities are at risk

The factors that allow charities to achieve outcomes and earn respect from the public also make them vulnerable to being misused to fund terrorism.”



4. The factors driving regulation

B Global Financial Crisis

The global financial crisis escalated interest in Civil Society, as the public sector found it ‘electorally popular’ to ‘persuade the Third Sector to shoulder the burden of providing welfare and other services’. Richard Hull et al (eds), *The Third Sector* (2011) xv; xiv.



4. Factors driving regulation

C. The impact of big data

“The data held by Australian Government agencies has been recognised as a government and national asset. The amount of data held by government is likely to grow as new technologies are adopted and an increasing amount of both structured and unstructured data become available from outside ... Departments are now able to ask questions that were previously unanswerable, because the data wasn't available or the processing methods were not feasible. The application of big data and big data analytics to this growing resource can increase the value of this asset to government and the Australian people.

Government policy development and service delivery will benefit from the effective and judicious use of big data analytics.”



Factors driving regulation

- Leads to two conflicting agendas
 - Enabling and encouraging charity *and* implicitly generally less regulation (a vibrant independent sector with red tape reduced)
 - Regulation to ensure accountability and transparency implicitly to see assets applied (where the government wishes) and not misapplied
- This applies to all charities but religious charities are caught in this



Concluding comments

1. The Constitution frames the discourse
2. All other things being equal (religious) charities should be less regulated than for-profits
3. There may be a subtle but important distinction to be drawn between regulating the delivery of charity as distinct from the provider of (religious) charity
4. The factors driving regulation are not (ir)religious but societal changes

REPORTING BACK

