Law Council
OF AUSTRALIA

Legal Practice Section

20 December 2023

BERG Not-for-Profit Consultation
c/- Community Cohesion Branch
Department of Social Services
GPO Box 9820
Canberra ACT 2601

By email: BERGSecretariat@dss.gov.au

Dear Sir/Madam

Submission in relation to the NFP Sector Development Blueprint Issues Paper

1. This submission has been prepared by the Charities and Not-for-profits Committee of the Law Council of Australia's Legal Practice Section (the **Committee**). The Committee welcomes the opportunity to make this submission in relation to the NFP Sector Development Blueprint Issues Paper (**Issues Paper**).

2. Our submission is brief, but we have specifically referred to detailed and considered submissions that the Committee has already made to various inquiries over the past years, in relation to which there remain many live issues.

3. As the Reference Group is aware, there have been numerous inquiries into the charities and NFP sector over the past decades. We specifically refer the Reference Group to the work of Emeritus Professor Myles McGregor-Lowndes (who is also a Committee member), who has synthesised these reviews and the recommendations that may yet be worth implementing.[1] We also refer the Reference Group to Recommendation 10 in the LCA submission to the Productivity Commission on the Review of Philanthropy (**LCA Philanthropy Review Submission**).[2]

4. As a general comment, in our view, the focus of the terms of reference and the Issues Paper on charities is limiting. Charities comprise only 10 per cent of not-for-profits based on existing data. In our view a comprehensive and fit-for-purpose blueprint for the NFP Sector cannot be extrapolated from considerations relevant to charities alone. We appreciate the challenge of sourcing data for the broader NFP sector and therefore the practicality of focussing on registered charities. However, care should be taken when extrapolating from charities to NFPs more broadly, unless and until

[1] M. McGregor-Lowndes, *Are any more recommendations worth implementing from nearly 30 years of Commonwealth nonprofit reform reports?* (ACPNS), QUT (2023). Available at https://eprints.qut.edu.au/237821/

[2] See < https://lawcouncil.au/publicassets/eb2c6743-d7f9-ed11-9482-005056be13b5/4360%20-%20S%20-%20Review%20of%20Philanthropy.pdf> (accessed November 2023)

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the Australian Bureau of Statistics is funded to return to its provision of information about the whole of the 'Third Sector' including non-charities.

5. Our responses to the specific questions raised in the Issues Paper are set out below under the excerpted questions.

Responses to Questions

> ***Questions***
>
> *2.1.1. What is your vision or aspiration for the NFP sector over the next 10 years?*
>
> *2.1.2. What core values and considerations should guide a 10-year vision for Australia's NFP sector?*
>
> *2.1.3. What core themes for action should be prioritised in realising this vision? What will be the consequences of no action on these?*

6. In response to these questions, we refer the Reference Group to:

   (a) the LCA Philanthropy Review Submission; and

   (b) the LCA submission to the Treasury on the Review of the Australian Charities and Not-for-profits Commission Legislation (February 2018).[3]

7. More broadly, we reiterate that NFPs 'make a highly valued contribution to community wellbeing'[4] and concessions for NFPs underpin good tax policy. Income tax exemption specifically was supported in both the Henry review[5] and the Productivity Commission's Contribution of the Not-for-Profit Sector: Research Report (2010).[6]

8. As clearly articulated in The Case For Change[7] by The Tax Institute, supporting NFPs through tax concessions helps to sustain the sector, and facilitates NFP entities in successfully undertaking their philanthropic activities, which ultimately should benefit the broader community. However, while a compelling enough reason alone, this is not the only justification for tax concessions for charities and NFPs.

9. Specifically in relation to charities, they are of course for-purpose organisations, and are legally prohibited from distributing surpluses for private gain—any surplus must be applied to furthering the charity's purpose. If individuals are the appropriate unit upon which to impose income taxes, then there is simply no appropriate individual, in a charity, who has income to tax. In addition, where a charity performs work which would otherwise need to be performed by or funded by government, adding a tax or compliance burden can also result in increased costs to government.

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[3] See <https://lawcouncil.au/publicassets/9ed64173-9651-e811-93fb-005056be13b5/3413%20-%20Review%20of%20Australian%20Charities%20and%20Not-for-Profits%20Commission%20Legislation.pdf> (accessed, November 2023).
[4] Australia's Future Tax System Review Panel (Dr Ken Henry, Chair), Australia's future tax system: report to the Treasurer, 23 December 2009, Part 2, 205.
[5] Ibid, 88.
[6] See https://www.pc.gov.au/inquiries/completed/not-for-profit/report/not-for-profit-report.pdf.
[7] The Case for Change, The Tax Institute (2021), 82.

10. Finally, if a successful and vibrant NFP sector is one that strengthens social capital and increases volunteerism, the measure to demonstrate this success cannot be a fiscal bottom line.

11. We commend to the Reference Group the following worthwhile references:

    (a) Mcgregor-Lowndes, M (2023) *Deductible gift recipients: What is your number?* The Australian Centre for Philanthropy and Nonprofit Studies (ACPNS), QUT, Brisbane, Qld. [Working Paper]; and

    (b) McGregor-Lowndes, Myles, Turnour, Matthew D., & Turnour, Elizabeth (2011) 'Not for profit income tax exemption : is there a hole in the bucket, dear Henry?' 26 (4) *Australian Tax Forum* 601–631.

Questions

5.1.1. What policy and regulatory reforms would help increase giving to charities?

5.1.2. How can the NFP sector further mobilise and access philanthropy in support of its work?

12. We reiterate the Law Council's recommendations in the LCA Philanthropy Review Submission.

Questions

6.1.1. What might a regulatory framework for the sector that overcomes the complexity of our federation look like?

6.1.2. Are currently available legal structures, governance standards and tax concessions fit for future purpose? How might these be improved or changed

13. We reiterate the Law Council's recommendations in the LCA Philanthropy Review Submission. In relation to the complexities of federation, we particularly refer to Recommendation 5.

Questions

8.1.1 How should government improve the way it funds and contracts charities?

8.1.2 How could government funding, tendering and contracting drive a good balance of collaboration and competition to support innovation in the NFP sector?

14. Government Departments, possibly driven by risk aversion, may unilaterally impose conditions that would not be tolerated in a commercial market, or even in other government service procurement contracts. However, in doing so, they do themselves and the community no good, in the Committee's respectful view.

15. In 2010, the Productivity Commission examined the NFP sector. One of its recommendations was that the Department of Finance and Deregulation 'should develop core principles to underpin all government service agreements and contracts in the human services area'.[8] In its discussion leading up to this recommendation the Productivity Commission noted that:

> Government [is] often perceived to be imposing 'unfair' terms and conditions that would not be considered appropriate or acceptable in dealing with for-profit providers. Of particular concern to many NFPs is the extent to which contracts allow governments to unilaterally vary or terminate contracts and service agreements with very little notice and which limit the ability of service providers to seek compensation.[9]

16. The Productivity Commission's proposed response to the issue was that:

> Agency independence must be respected, and contractual requirements limited to those needed to ensure the funded service is delivered appropriately and agreed outcomes are met.[10]

and:

> A common set of core principles should be developed to underpin all government contracts in human services.[11]

17. The Committee acknowledges that the Department of Finance has developed whole of government template grant agreements.[12] In the Committee's view, there are now simpler and shorter form agreements available. However, these are not being used on a whole-of-government basis. The Committee recommends that further work can be done to streamline contracting, and that core principles, as recommended by the Productivity Commission, could be drawn from the Australian Consumer Law (**ACL**),[13] which was enacted in part to remedy the use of onerous standard form contracts by businesses contracting with consumers.

18. Where contractual terms go beyond what is necessary for meaningful public accountability and proportionate default rectification, NFP organisations' ability to engage appropriately in social innovation and deliver the best service possible is hampered. This ultimately affects the end user or client of the service. For the government, it conflicts with the spirit of mutual trust, respect and collaboration, and renders its 'partnership' rhetoric rather hollow. Trust is undermined and the relationship suffers.

[8] Productivity Commission, Contribution of the Not-for-Profit Sector: Research Report, Productivity Commission, Melbourne, 2010, Recommendation 12.8, pp LII, 340–344.
[9] Ibid, 341.
[10] Ibid, LX.
[11] Ibid, LII.
[12] See https://www.finance.gov.au/government/commonwealth-grants/tools-and-templates.
[13] The ACL was enacted as Schedule 2 of the Trade Practices Act 1974 (Cth) in April 2010. The Act was also renamed the Competition and Consumer Act 2010 (Cth).

19. Further, where contractual terms are so complex, and, as is often the case, located in multiple cross-referencing documents, the administrative burden on NFPs is overwhelming. Without legal support (which is a burden for either the NFP or the pro bono legal system), many NFPs are likely entering contracts they do not properly understand. The need for contract terms to be reviewed and put on a better footing for both the government, the sector and those that are intended to benefit from the contracted services, is well overdue.

20. We commend to the Reference Group:

    (a) McBratney, Amanda & McGregor-Lowndes, Myles (2012) 'Fair' government contracts for community service provision: Time to curb unfettered executive freedom?' 19(1) *Australian Journal of Administrative Law* 19–33

21. We would welcome the opportunity to discuss this submission with the Blueprint Expert Reference Group. In the first instance, please contact the Charities and Not-for-profits Committee Chair, Bridgid Cowling, on bcowling@abl.com.au.

Yours sincerely



Geoff Provis
Section Chair