

AUSTRALIAN COMMISSION PROPOSES OVERHAUL OF CHARITY AND NOT-FOR-PROFIT REGULATION IN AUSTRALIA

*By Terrance S. Carter**

A. INTRODUCTION

On October 14, 2009, the Productivity Commission for the Government of Australia (“the Commission”) released a draft report entitled *Contribution of the Not-for-profit Sector* (“the Report”).¹ The Commission was asked by the Australian government to measure the contribution of the not-for-profit sector in Australia, as well as to: examine ways to improve the efficiency and effectiveness of the sector, including the delivery of state sponsored services; review changes in the nature of the relationship between the government, business and the not-for-profit sector; and lastly, consider the issues related to effect of tax concessions available to not-for-profits on philanthropic and competitive neutrality.² The Report notes that there is “considerable scope for measurement to assist the sector and its supporters in improving understanding of the effectiveness of NFP (not-for-profit) activities in achieving their objectives and the contribution these outcomes make to community wellbeing.”³ The overview of issues facing the not-for-profit sector in Australia, as outlined in this *Charity Law Bulletin*, will be relevant for Canadian charities, whether it be advocating for change in the sector or operating a registered charity, since many of these issues are similar to those affecting Canadian charities.

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¹ Australian Government, Productivity Commission, “Contribution of the Not-for-profit Sector” (October 2009) online: <http://www.pc.gov.au/projects/study/not-for-profit/draft>.

² *Ibid.*, at p. XXV

³ *Ibid.*, at p. XXVIII

B. OVERVIEW OF THE REPORT

1. Overview of the Australian Not-for-Profit Sector

In measuring the impact of the not-for-profit sector, the Report recognizes that the not-for-profit sector in Australia includes a diverse range of organizations and estimates the number of not-for-profit organizations to be around 600,000. Although this number seems high, especially given the number of charities and not-for-profit organizations in Canada is approximately 164,000,⁴ this number includes 440,000 small and unincorporated organizations, like card clubs and neighbourhood tennis associations.⁵

The Report states that the Australian Bureau of Statistics classifies 58,779 of these not-for-profits as having an active tax role, meaning they either employ staff or have access to one of the various types of tax concessions available to not-for-profit organizations in Australia.⁶ It is these “economically significant” not-for-profits, accounting for roughly 8 percent of Australia’s employment, which contributed \$43 billion to the country’s GDP in 2006-2007.⁷

The ratio of the contribution of the not-for-profit sector to the GDP in Australia has also increased from 3.3 to 4.1% between 1999-2000 and 2006-2007, which reflects significant growth in Australia’s not-for-profit sector. In addition, over 4.6 million Australians volunteered in 2006-2007, which the Report gives an imputed value of \$14.6 billion dollars to Australia’s GDP.⁸

The Report admits, however, that measurement of the contribution of the not-for-profit sector is inherently difficult, given the complexity in quantifying the intangibles involved. While measurement of inputs, like dollars donated or volunteer hours is simple, taking measure of the outputs, like connections, influence, and community endowments which also contribute to the community is far

⁴ Canada Revenue Agency, *Small and Rural Charities: Making a Difference for Canadians*, (2008) available online at: <http://www.cra-arc.gc.ca/E/pub/tg/rc4457/rc4457-e.html>. See also Michael Hall et al., *Caring Canadians, Involved Canadians: Highlights from the 2007 Canada Survey of Giving, Volunteering and Participating* (Ottawa: Statistics Canada, 2009). Available at http://www.givingandvolunteering.ca/files/giving/en/csgvp_highlights_2007.pdf.

⁵ *Supra.*, note 1 at p. XXVI

⁶ A variety of different tax concessions are available in Australia, including income tax exemptions, fringe benefits tax exemptions, and GST concessions. In addition, charities in Australia include various categories, such as public benevolence institutions and non-charitable gift deductible recipients which require endorsement from that Australian Tax Office to access these concessions. For more information, see Appendix F of the Report regarding tax concessions at http://www.pc.gov.au/data/assets/pdf_file/0008/91952/24-appendixf.pdf.

⁷ *Supra.*, note 1 at p. XXVI.

⁸ *Ibid.*

more difficult. The Commission recognizes that, “it is these social capital outcomes that underpin the operating environment of the economy and society.”⁹ The Report also contrasts sources of funding and reliance on volunteers within the not-for-profit sector, noting that while education and research not for-profits employ staff and add value to the community, those focusing on recreation and social services attract the most volunteers.¹⁰

2. Drivers of Efficiency and Effectiveness Distinguished from Government and Business

The Report also analyzes the motivations of the not-for-profit sector in Australia in order to establish what can be done to improve the efficiency and effectiveness of the sector. There is a recognition that as not-for-profits are established to serve the community and are controlled by its members, this can have negative consequences in terms of long-term resource allocation being constrained by member preference or attachment to historical approaches. The Report also identifies that the way in which not-for-profits govern themselves, make decision and deliver their services can be in and of itself valued; for example, by being participatory and inclusive.¹¹

The not-for-profit sector is also distinguished from government and business sectors in that many of the activities not-for-profits embark upon would not be taken up by either sector. These include self-help groups like Alcoholics Anonymous or in providing services where trust in government or business is very low from clients. In this way, a not-for-profit can engender more trust than either business or government provided services because the not-for-profit is seen as independent.¹²

However, a negative difference between the not-for-profit and business sectors is the fact that overhead is viewed as “bad” by donors, resulting in underinvestment and low funding for administrative activities that charities require to be effective.

Lastly, the Report raises the concern that where not-for-profits do compete with for-profit businesses, issues may arise in terms of whether the playing field is truly level, given the access to tax concessions

⁹ *Ibid.*

¹⁰ *Supra.*, note 1 at p. XXVIII.

¹¹ *Ibid.*, at p. XXIX.

¹² *Ibid.*, at p. XXX.

and gaming revenue not available to for-profit business, such as medical providers or hotel operators.¹³

3. Current Issues Faced by the Not-for-Profit Sector

One problem facing the not-for-profit sector in Australia is the greater demand from both business and government for more accountability from not-for-profits. Both businesses and large donors prefer to invest in a not-for-profit that can persuade them from a financial perspective to provide an investment. However, this is often costly for a not-for-profit to provide and the same businesses and donors are often unwilling to provide the resources to obtain such information. Additionally, the Report recognizes that the call for measuring the contribution of the sector is a combination of a push from the government and donors wanting better understanding of the not-for-profit sector, as well as the sector seeking better recognition for the work that it does.¹⁴

Another problem which may be familiar to Canadian charities and not-for-profits is what the Report characterizes as the “command and control” model adopted in the relationship between the Australian government and not-for-profit’s providing services funded by the government. While it is noted that the move to competitive tendering and contracting has brought the benefit of greater transparency and efficiency in the provision of these services, not-for-profits have been negatively impacted by a deluge of contractual regulation, reporting requirements, micro management, and heavy compliance burdens. This has had the result of reducing trust between the two sectors, and unnecessarily restricting innovation. The partial funding scheme used by governments necessitates not-for-profit service providers to find other revenue sources, resulting in lower wages, which leads to difficulty in retaining employees. The Report points out that as the aging population requires more services, all providers will be affected. The higher reporting requirements have also lead to governments occasionally exerting undue influence on other activities carried on by the not-for-profit.¹⁵

The Commission also examined the tax arrangements for philanthropy in Australia, noting that while there may be many concessions available to not-for-profits, there are still many restrictions within the regime. One difficulty is highlighted as the failure to introduce a statutory definition for charities, which other Commonwealth countries like England and Wales have recently undertaken. Given the

¹³ *Ibid.*, see Box 1 at p. XXXI for a discussion of the concerns regarding competitive neutrality.

¹⁴ *Ibid.*, at p. XXXIII.

¹⁵ *Ibid.*, at p. XXXV.

greater understanding society now has regarding the causes of those ailments to society which the not-for-profit sector tries to alleviate, the Report comments that the eligibility criteria for some of these tax arrangements may now appear outdated. That is to say, for example, that it is not only the relief of poverty which needs to be addressed, but its prevention as well. The Report does admit, however, that tax deductions do induce additional giving from donors, particularly among the wealthy.¹⁶

The Report highlights that regulatory reforms for businesses in Australia have allowed business to operate across multiple jurisdictions easily, regardless of their size or area of commerce. These same options are not available for not-for-profits who are hampered by differences across jurisdictions in terms of fundraising and incorporation legislation, causing multiple reporting requirements, which are at times disproportionate to the size and scope of some not-for-profits.

4. Recommendations of the Report

The Commission believes that the future of the not-for-profit sector rests in its own hands, requiring the trust of its members, donors and the public to fulfil their needed role in society.¹⁷ However, the Commission also note that in order to do so, not-for-profits will need a supportive and consistent regulatory regime, access to labour and capital as wells as good relations with their stakeholders. The Report points out that too much attention is paid to the management of not-for-profits and not enough on the assessment of their effectiveness.

The recommendations of the Report rest on five main elements, those being:

- ◆ A knowledge system to better understand what measures will facilitate the sector;
- ◆ A consolidated regulatory framework;
- ◆ More effective sector development;
- ◆ Stimulus for social innovation and;
- ◆ Strengthened collaboration on the delivery of government funded services.¹⁸

Of these elements, the most relevant for the Canadian not-for-profit sector is the streamlining of the regulatory framework for the sector in Australia. The Report proposes the creation of a “one-stop shop” via a new Registrar of Community and Charitable Purpose Organizations, which would either be

¹⁶ *Ibid.*, at p. XXXVI.

¹⁷ *Ibid.*

¹⁸ *Ibid.*, at p. XXXVII.

a new organization or a division of the Australian Securities and Investments Commission. This new body would be responsible for the registration and endorsement of organizations for tax concessions, the registration of not-for-profits for cross-jurisdictional fundraising, a single portal for the accessing of the public records of corporate and financial information for not-for-profits, investigation of complaints and the provision of education to not-for-profits on governance issues. These changes would provide for more accessibility to information and better complaints handling, which would engender greater trust in the sector.¹⁹

A single Registrar, which would endorse not-for-profits for tax concessions based on a statutorily defined definition of charitable purposes, would also transfer responsibility from the Australian Tax Office and provide for more consistent tax treatment. A single portal for not-for-profit financial information would also allow for improved comparability to better allow donors and funders to make informed decisions. The different jurisdictional requirements on fundraising would also be harmonized between state and territory legislation to reduce fundraising costs. Lastly, the disparate reporting requirements that negatively harm smaller not-for-profits would be eliminated, resulting in lower compliance costs for these smaller organizations.²⁰ Coincidentally, a study on whether something similar could be done in Canada was prepared by the C.D. Howe Institute in November of this year,²¹ which is reported on further in the November 2009 *Charity Law Update*.

The Report also comments that full funding of not-for-profit service providers may be needed to address the work force imbalance between not-for-profits and business.²² Furthermore, the Commission notes that there are areas in which the Australian government can take the lead in the development of the sector, particularly in loan financing and the development of intermediaries to provide financial support to not-for-profits. These financial intermediaries would be able to assist in the developing of options to attract philanthropic investments from foundations and trusts, improving accountability and transparency to support these investments.²³ Social enterprise activities, which use a business model, are also not well understood in financial markets, and having such assistance and

¹⁹ *Ibid.*, at p. LIX.

²⁰ *Ibid.*, at p. LX.

²¹ Adam Aptowitz, C.D. Howe Institute, "Bringing the Provinces Back In: Creating a Federated Canadian Charity Council" (November, 2009) online: http://www.cdhowe.org/pdf/commentary_300.pdf.

²² *Ibid.*, at p. XLI

²³ *Ibid.*, at p. LXI

access to capital can help not-for-profits in the creation of a business plan. The government can also stimulate social innovation in the field, by either expanding on existing programs to encompass social innovation, or provide matching funds for not-for-profits that bring together collaborators to develop new approaches in addressing the problems of concern to their program.

In terms of barriers to encouraging more philanthropy and giving, the Report believes the “deductible gift recipient” status is too restrictive, and should be expanded to all charitable institutions to be endorsed by the proposed Registrar. The Report also highlights that Australia’s giving is low relative to other countries, and that increased promotion of planned giving by raising awareness of tax benefits and financial assistance to smaller organizations may stimulate donations.²⁴

C. CONCLUSION

The Report concludes that while the recommended changes will necessitate the use of additional resources, in the long run the efficiency and effectiveness of the not-for-profit sector would be improved. While reform of the not-for-profit sector in Australia may be late coming compared to other Commonwealth countries, such as England and Wales, Scotland and Northern Ireland, should the recommendations of the Commission actually bring about change, it will be important to monitor those changes from a Canadian context to see what is adopted in the way of reform that could be applied in Canada as well.

²⁴ *Ibid.*