

Independent Review of the NSW Regulatory Policy Framework: NCOSS Submission

15 December 2016

About NCOSS

The NSW Council of Social Service (NCOSS) works with and for people experiencing poverty and disadvantage to see positive change in our communities.

When rates of poverty and inequality are low, everyone in NSW benefits. With 80 years of knowledge and experience informing our vision, NCOSS is uniquely placed to bring together civil society to work with government and business to ensure communities in NSW are strong for everyone.

As the peak body for health and community services in NSW we support the sector to deliver innovative services that grow and evolve as needs and circumstances evolve.

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Introduction

NCOSS welcomes the opportunity to provide input into the Independent Review of the NSW Regulatory Policy Framework.

NCOSS represents the interests of vulnerable people living with disadvantage in NSW. As such, we are keenly aware of how onerous and repetitive red tape obligations can impact on the human services sector and take valuable organisation resources away from the provision of services to those people and communities.

However, we are also aware of the importance of our sector being both accountable and transparent. This is primarily because of the nature of our work; but also because of our reliance on government funding or fundraising.



NCOSS has spoken to communities and services across the state – hearing from over 200 community organisations and nearly 30 different communities, as well as key stakeholders. What we heard was that across the state the sector wants A Fair Deal for Our Community Services. The sector is seeking regulation that is fair and reasonable, not onerous or repetitive, and is consistent with the level of risk. Ideally the types and forms of regulatory requirements would be standardised within and across government departments and agencies to ensure consistency in approach.

Where appropriate the data should be publically available, taking into account privacy issues and commercial in confidence data. The information would be securely stored and not open to any form of cyber-attack or re-identification.

These requirements would be consistent and transparent and not biased towards certain types of organisations. Their value would be clear and their purpose transparent, holding organisations accountable for the well-being of their clients and the effective governance and management of the organisation.

By working with the NSW Government towards better regulation we look forward to ensuring a fair deal for services and importantly the people and communities they support.

Recommendations

NCOSS recommends that:

1. Principle 5 of the NSW Guide to Better Regulation be strengthened and reworded to *Consultation with a broad range of stakeholders, both business and the community, should inform regulatory development.*
2. The NSW Regulatory Framework is:
 - Properly resourced and staffed enabling effective and consistent oversight, recognising and rewarding regulatory compliance but able to act on non-compliance.
 - Able to trigger the need for a review having identified significant changes or developments within the regulatory environment and/or damaging unintended consequences of current legislation or systemic issues that require investigation.
3. Self-regulated models:
 - Only be used where there is a strong commitment by all parties to ensure accountable and transparent processes, and the provision of access for public scrutiny and feedback.
 - Automatically trigger a review where there is a significant change in the regulatory environment or where systemic or other significant issues arise.
 - Ensure all documents relating to reviews of regulations or guidelines be publically available, including issues papers, proposed amendments, final reports and recommendations.
4. The regulatory oversight of NSW Incorporated Associations and Cooperatives classified as charities be transferred from the NSW Fair Trading to the Australian Charities and Not-for-profits Commission.
5. That the NSW Government harmonise its fundraising legislation in line with the South Australian [Statutes Amendment \(Commonwealth Registered Entities\) Act](#).
6. That standardise approach to contracting, procurement, benchmarking, outcomes and performance measurement as developed by the Social Innovation Council be adopted by all government departments/agencies in NSW that procure services from the Human Services Sector.

Response to Issues Paper

Legislation Review Act 1987 & Subordinate Legislation Act 1989

The staged review process recognises and reflects that legislation operates in a changing environment. The reassessment process allows for the identification of regulations that are outdated or no longer relevant and those which require revision or need to be simplified or updated. It also allows for new regulation as required to reflect changing community standards and needs, new technologies and other changes within their operating environment.

In relation to the Associations Incorporation legislation, the update of the regulations was timely. Changes and uptake in technology meant that some of the regulations that were valid in 2010 were irrelevant and /or unnecessarily cumbersome. NCOSS believes the five year period is reasonable. More frequent repeals could create their own difficulties in terms of organisations keeping abreast of the changes; less frequent could leave organisations struggling with outdated requirements and irrelevant processes. However in some situations it may be useful to have a process that identifies circumstances where an earlier or later review would be more appropriate.

NSW Guide to Better Regulation

The principles are sound, however Principle 5: Consultation with business and the community should inform regulatory development could be strengthened. In its current form it could easily be a tick-in-the-box exercise with the potential to limit the consultation to a small number of or specific stakeholders.

RECOMMENDATION 1:

That Principle 5 of the NSW Guide to Better Regulation be strengthened and reworded to *Consultation with a broad range of stakeholders, both business and the community, should inform regulatory development.*

Institutional arrangements

Irrespective of the approach adopted, regulatory oversight needs to be properly resourced and staffed and able to promote effective regulation. The approach would need to include the capacity to oversee processes able to address major changes within the regulatory environment, respond to unintended consequences of specific regulations and where appropriate have the capacity to penalise non-compliance.

The model used by the Australian Charities and Not-for-profits Commission (ACNC) has worked very effectively with charities across Australia over the past four years. The model requires the regulator to take appropriate and proportionate action to address issues, working with organisations to help them meet their obligations. Where obligations are being met it aims to educate or advise. However, more serious cases may lead to penalties, and the most serious can result in revoking registration and

the organisation losing their charitable tax status. All responses are based on published policies and procedures to ensure consistency and enable organisations to understand what to expect.

RECOMMENDATION 2:

That the NSW Regulatory Framework is:

- Properly resourced and staffed enabling effective and consistent oversight, recognising and rewarding regulatory compliance but able to act on non-compliance.
- Able to trigger the need for a review having identified significant changes or developments within the regulatory environment and/or damaging unintended consequences of current legislation or systemic issues that require investigation.

Regulatory Impact Assessments (RIA)

RIAs can provide valuable information when assessing the impact of proposed changes to regulation. NCOSS' recent experience with the review of the Associations Incorporations Regulations found the RIA tended to be prescriptive and limited in what it explored. This may reflect the scope of consultation when preparing the RIA being limited or time constrained. It potentially constrained feedback by not encouraging discussion on issues or alternative approaches beyond those raised in the document.

Self-Regulation

Self-regulation can be a cost-effective and appropriate approach to managing regulatory compliance. Problems can arise however where the accountability processes lack transparency and oversight is negligible. The ClubGrants scheme is an example where self-regulation has had mixed results, with some programs well-regarded by the Grants Committee and the community and others which raise concerns.

Public scrutiny is essential if self-regulation is to be trusted and viewed as a valid model. It requires access to information and/or guidelines on its obligations and whether it has been complied with. It should also include a complaints mechanism where the outcomes are publically recorded and if the issues raised are considered systemic, could trigger a program review. In the case of ClubGrants this could include a publically accessible list of participating clubs, total number of grants, name of successful organisations (including a list of their board members and if relevant, their auspicing body), the amount per grant, type of program and reference to any grants received in the previous five years.

Reviews of regulations or guidelines also need to be in the public arena. The review of the ClubGrants Scheme Guidelines in April 2016 was by invitation only; there was no public announcement. Neither the submissions nor the final report and recommendations have been made public. In no part has the process been transparent or accountable.

RECOMMENDATION 3:

That self-regulated models:

- Only be used where there is a strong commitment by all parties to ensure accountable and transparent processes, and the provision of access for public scrutiny and feedback.
- Automatically trigger a review where there is a significant change in the regulatory environment or where systemic or other significant issues arise.
- Ensure all documents relating to reviews of regulations or guidelines be publically available, including issues papers, proposed amendments, final reports and recommendations.

Regulatory overlap

Legal Structure

Fair Trading currently has oversight of the regulatory requirements of all Incorporated Associations and Cooperatives in NSW including those classified as charities under Federal legislation.

It requires organisations to submit governance and financial documents (for a fee) and ensure that the information is updated as necessary. The financial requirements and associated costs reflect the perceived level of risk (ie financial reporting requirements and associated costs reflect the size of the organisation).

Unfortunately there appears to be little if any oversight regarding non-compliance and there does not appear to be a public record of deregistered organisations on grounds covered by the NSW Incorporated Associations' or Cooperatives' legislation.

In addition NCOSS understands that there is no process within Fair Trading to ensure that when an organisation's constitution is lodged it is assessed for compliance with the relevant legislation. NCOSS has made the assumption this is due to a lack of staff and resources able to provide oversight for the enormous number of associations, and to lesser degree cooperatives, in NSW.

In terms of regulatory overlap, NSW Incorporated Associations and Cooperatives classified as charities are currently required to also report to the ACNC. Unlike Fair Trading, there are no costs attached to lodging documents with the ACNC and whilst it has agreed to accept reports reflecting State requirements, the result is an increase in red tape and additional costs in terms of staff time and resources.

If NSW Incorporated Associations and Cooperatives were regulated by the ACNC, it would reduce reporting requirements and remove costs. As noted above, the ACNC has the capacity and is actively involved in governance and regulatory compliance education. It has a well-documented record of working with individual organisations to ensure compliance but where issues escalate will, where necessary, deregister non-compliant organisations.

RECOMMENDATION 4:

That the regulatory oversight of NSW Incorporated Associations and Cooperatives classified as charities be transferred from the NSW Fair Trading to the Australian Charities and Not-for-profits Commission.

Fundraising

Currently charities fundraising across state borders or fundraising online are required to comply with a range of legislation with at time conflicting requirements¹. Repealing or harmonising NSW charitable fundraising legislation in line with other state and federal legislation would significantly reduce red tape for these organisations. Ideally however as part of the registration or licensing of fundraising organisations, there would be an opportunity to check the bona fides of the charity and/or operation and any changes would include a code of conduct regulating such things as the hours for door-knocking or calling; requirements to wear ID; provision of certain information; issuing of receipts; and use of children in fundraising.

NSW could model the recently passed South Australian legislation Statutes Amendment (Commonwealth Registered Entities) Act which exempts charities registered with the ACNC from reporting separately to the state government and holding a South Australian fundraising licence.

RECOMMENDATION 5:

That the NSW Government harmonise its fundraising legislation in line with the South Australian Statutes Amendment (Commonwealth Registered Entities) Act.

NSW government agency compliance requirements

Currently each NSW government agency has their own contract system, tendering processes, accreditation requirements and performance management approaches. In some cases different programs within a particular agency will have different requirements. An organisation receiving funding from multiple sources will be expected to comply with the individual requirements of each funding source. In many cases the differences in real terms are minimal but sufficiently different to create onerous reporting demands. The Social Innovation Council within the Department of Finance, Services and Innovation has been working with the agencies that procure services from the Human Service Sector to break down the silos and develop standardised approaches to contracting, procurement, benchmarking, outcomes and performance measurement. This approach would significantly decrease the Sector's red tape burden releasing staff time and resources to provide services.

¹ Regressive Fundraising Regulations – Time for Change

RECOMMENDATION 6:

That a standardised approach to contracting, procurement, benchmarking, outcomes and performance measurement, as developed by the Social Innovation Council, be adopted by all government departments/agencies in NSW that procure services from the Human Services Sector.