

18 May 2007

By email

Ms Susan Pascoe
Commissioner
State Services Authority
1 Treasury Place,
Melbourne, VIC 3000

Dear Ms Pascoe

Submission – Review of Not-for-Profit Regulation

Thank you for the opportunity to make a submission on this issue and for including the Public Interest Law Clearing House (**PILCH**) in your consultation process. We commend the Premier and Treasurer for initiating the review with a view to reducing the regulatory burden for the not-for-profit (**NFP**) sector. The Victorian government is leading the way nationally in this important area.

1. *PILCH Research Report*

Attached is a copy of our 'Establishment of Not-for-Profit Legal Service - Research Report' (**Report**). The Report has not yet been released publicly, but will be before your report needs to be finalised. We are happy for you to quote from it and to provide any additional information you may need.

The Report gives an overview of PILCH; reviews existing PILCH services; provides information on the complex regulatory environment in which NFPs operate; looks at the need for new services and documents feedback from NFPs, members of PILCH and other stakeholders; considers other service models (Australian and overseas); proposes a new PILCH service delivery model; and looks at funding options.

The Report underpins our submission, and this letter aims to draw your attention to some of its key points, with reference to the issues outlined in your call for submissions.

2. *Regulatory burden*

In a typical year, about 100 NFPs are referred by PILCH for free legal advice. These NFPs vary greatly in size and type. Many are very small and not well-known. The range of legal issues is also diverse, although there are common requests that are NFP-specific (eg, legal structure, eligibility for concessional tax status). Aside from those matters that lead to a referral, help is given by PILCH to more than 200 other organisations/groups each year: eg, defining the nature of their issue and connecting them to other services.

In this way, PILCH has been providing assistance to NFPs since its inception in 1994. It is clear from more than a decade of experience that NFPs, particularly smaller groups that are reliant on volunteers, find the NFP regulatory framework confusing and complex. Further, as part of our research into possible new services, we held a focus group of NFPs (see Report heading 9.2) and the issue of regulatory complexity and fragmentation between federal and state regimes were raised as common concerns. Some of the specific regulatory concerns of NFPs are set out in below under parts 3 - 5. Affirmation of PILCH's

experience can be found in a range of independent reviews and research (see Report heading 6.5). In summary, it is fair to say that the issues are more complex than for small business, yet less support (or reform attention) has been given to the NFP sector.

3. Service and grant processes

PILCH regularly receives requests from NFPs for assistance with the review of government funding contracts. It seems that in many instances the length and language used in the contracts is unduly complex and not scaled to the amount of funding being provided.

NFPs also advise that there are many varied reporting and accountability mechanisms in government contracts. If a NFP receives funding from several government funding programs, they may have multiple and diverse reporting obligations, each of which require reporting in different forms, at different times of the year, using different configurations of data. This is very inefficient for NFPs who have limited resources and have to divert them to meeting different reporting regimes, without achieving any greater accountability and quality control over service delivery.

In looking at what NFPs need, we have considered a range of pro-active and preventative services such as reviewing standard form funding agreements and NFP organisational 'legal health checks'. (The survey of NFPs we conducted referred to both of these as possible new services: see Report attachments 2A and 2C.) In particular, we believe the specialist NFP legal service could play a role in providing or brokering independent, high quality legal advice to peak bodies about standard form government funding contracts that apply in their particular part of the sector. This service would reduce the need for, and expense of, each NFP obtaining separate advice.

PILCH supports the following as possible solutions to concerns about grant processes:

- a. the development of a memorandum of common provisions for government funding contracts so that 'boiler-plate' provisions become standard form across departments, with project specific details being contained in key provisions and schedules. The length and detail of the contract should also be scaled in proportion to the amount of funding being granted;
- b. a government database where NFPs could register their key organisational details and current financial statements, in order to avoid the need for these to be resubmitted with every government funding application;
- c. the development of a standard chart of accounts acceptable for all government departments by building on the work undertaken in Queensland. In conjunction with this, we support work on a new NFP-specific accounting standard.

4. Legal structures

Given the range of possible legal structures and the different regulators involved, the decision about which is the best legal structure for a new group (including how best to cover future needs, for example, national operation) is one that requires careful consideration. It is also one on which there are differing views within the legal profession itself, often involving a consideration of the administrative approaches taken by, and the efficiency of, the respective regulators. Thus, it is more complex than for a new business and it seems clear that both of the most common legal structures (incorporated association and company limited by guarantee) need reform in order to be better suited to the modern day needs of the sector. Further, neither of the bodies that regulate these entities has a sharp focus on how best to support the NFP sector.

Thus, it is not surprising that incorporation is the most common enquiry that PILCH receives from the sector (see Report heading 4.4). It is not intuitive for people to think of CAV or ASIC as a source of information on this issue. The proposed web-portal (see below and Report heading 13.2) will provide an easy-to-understand and navigate interface to these bodies, as well as information and advice about the pro and cons of each

incorporation option, considerations before incorporating etc. In turn, the seminars and PILCH pro bono referral service will, via a 'one-stop-shop', support this information hub.

It is also important to note that the specialist NFP service will play a key role in developing training for lawyers and other advisors about the NFP sector and common issues for NFPs (see part 6(g) below). It is unfortunate that the complex regulatory system is combined with a dearth of expertise in the legal (and other professions) on NFP-specific issues such as tax concessions, fundraising and incorporated associations. Many lawyers may be willing to help (eg, on a pro bono or reduced fee basis) but, because it is not their main area of practice and there are almost no undergraduate or professional development opportunities on such issues, they inadvertently give inappropriate advice. By undertaking this educative role, and with the use of student volunteers and secondee solicitors, the service will, over time, become a hub of NFP legal and legally-related expertise. It will promote NFP issues as a recognised area of speciality, thereby improving the quality of the information provided to the NFP sector, government, and the legal and finance professions.

5. Taxation arrangements

Taxation enquiries are the second most common enquiry that PILCH receives (Report heading 6.4). Again, it is a very complex area in which not many advisors have expertise. We believe that many groups are unaware of their entitlements to concessions from Victorian taxes, or how to apply for them. The new service will provide assistance with this issue by advising NFPs, explaining and directing them to existing government resources, and up-skilling NFP advisors (see 6(b) and (g) below).

6. Recommended specialist NFP advice service

Your call for submissions specifically requests 'solutions to identified problems'. We submit that a new, independent, specialist NFP legal advice service will help particularly the small to medium NFP groups (ie, the vast majority of the sector in terms of number) to better understand and comply with their obligations. Further, as reforms are introduced to the regulatory framework, the service would play an important role in both advising government on the implications for the sector (based on its experience from service delivery), and disseminating and explaining the changes to NFPs and their advisors. It will become a specialist hub of NFP legal and legally-related knowledge and experience for the professions and the NFP sector.

As outlined under Report heading 13, we propose the following services:

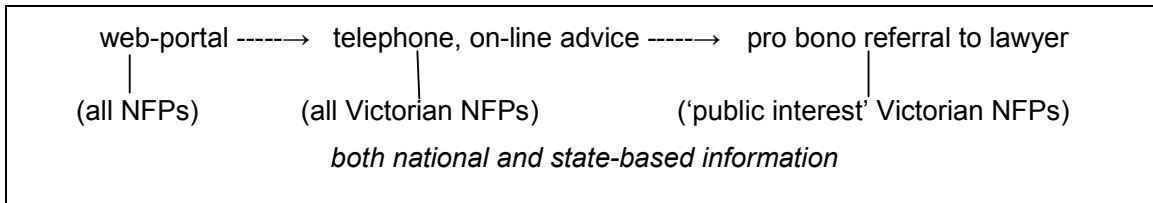
- a. as an immediate priority, development of a **comprehensive web-portal** that:
 - maps and links the relevant existing legal and legally-related resources and services for NFPs (both state-based and relevant national ones); and
 - provides a NFP-specific guide to existing resources and services that is user-friendly and easy-to-understand and navigate, with assistance from new interface summaries and introductory information.
- b. when the web-portal is fully operational, introduction of a **basic telephone and/or on-line inquiry** service:
 - in the way that PILCH currently operates, use law student volunteers to take the inquiries, ascertain the basic nature of the inquiry and, where appropriate (eg, if is not a legal query easily answered by material on the website), direct it to in-house NFP lawyers;
 - use in-house NFP lawyers (trained in or recruited for their experience in common NFP issues such as taxation, incorporation issues, governance and fundraising) to call back and give basic advice (possibly only on limited common issues), or obtain more information such that the a pro bono referral can be considered;

- investigate using retired ATO officers for assistance with general guidance about eligibility for concessional tax status; and
 - have a panel of PILCH members to act as expert support for the in-house lawyers by way of training, telephone back up etc.
- c. further development of the NFP seminar program by linking and co-branding with both a PILCH member and a NFP peak body so that sessions can be tailored to meet the particular needs of different groups within the sector. Also, holding some 'outreach' seminars for NFPs (eg, at outer metropolitan community centres and in regional areas);
 - d. on an on-going basis, identification of gaps in existing resources and the development of NFP-specific, easy-to-understand new resources such as: '100 most commonly asked' legal and legally-related questions that arise during the 'life' of an NFP; fact sheets and checklists on how to establish and run an NFP; a list and explanation of reporting and compliance obligations; sample constitutions, board protocols and sample minutes; regulatory reporting forms; and (with expert assistance from PILCH members) key precedents (eg, a constitution suitable for application for DGR status);
 - e. establishment of an email notification system for legislative changes and as a two-way link in relation to law reform proposals (ie, to link NFP groups that are working on proposals requesting reform or those seeking to make submissions about proposed reforms);
 - f. development and trialling of an organisational 'legal health check'. Experience gained from this pilot will inform both the development of resources for the website and for the 'legal health check' service itself. The longer term aim will be to develop a 'train-the-trainer' model that could be offered via peak bodies, with assistance from PILCH for those organisations who identify the need for assistance as a result of a self-check;
 - g. development of training for lawyers and advisors about the NFP sector and the common issues for NFPs - eg, a unit on common issues for NFPs/considerations when advising a NFP that attracts Continuing Professional Development points;
 - h. investigation of the student clinic model in conjunction with PILCH's academic members (based on the experience of the administrative law clinic offer by PILCH-QLD in conjunction with Bond University and, ideally, information gained from visiting student clinics that operate in the USA);
 - i. consideration of more specialised services for target groups such as indigenous organisations, and multi-cultural groups (eg, *Artists in Black* project by Arts Law Centre); and
 - j. investigation of other related services so that the service can, by drawing on the expertise and resources of PILCH's corporate members, its collaborative partners and government bodies, offer pro bono assistance with issues such as: guidance with undertaking an audit of key (legal and non-legal) risks to the organisation; financial management; review of personnel procedures and policies etc.

A two-stage implementation process is proposed:

Stage 1 centres on the development of the specialist NFP legal and legally-related services web-portal with a range of other integrated services, including e-bulletin updates, fact sheets, frequently asked questions and precedents. An expanded seminar program will become part of the new service, including delivery in regional centres.

Stage 2 involves the addition of a telephone/on-line basic advice service staffed by in-house lawyers with back up from PILCH members (via referrals, staff training and an expert panel).



PILCH's commitment to the new service

In March 2007, PILCH's Board approved the establishment of this new service and convened a sub-committee of the PILCH Board to assist with funding and governance issues. It is one of PILCH's top priorities in terms of its 2006-2009 Strategic Plan.

Sector and other support

As is evident from the Report (see Report attachment 1 and headings 9, 10 and 11), we have consulted widely within the sector, our members (ie, legal service providers) and other key stakeholders. We have received widespread support for the new services and, in particular, the National Roundtable of Nonprofit Organisations, the Law Institute of Victoria, the Victorian Bar Council and VCOSS have expressed their in principle support.

National significance

We have begun discussions with Volunteering Australia (see attached letter of support), Volunteering Victoria and Volunteering NSW which, between them, have well established local, state and national networks within the NFP sector. This collaboration combined with support from our interstate PILCH counterparts (PILCH-NSW and PILCH-QLD) will ensure expertise, integrity, and awareness even among very small, informal NFPs. As it is clear that the need for NFP-specific legal information and advice also exists in other states (see Report heading 9.3), with the assistance of this strong organisational network and support from government, there is real scope for the Victorian pilot of the service to be rolled-out on a national basis.

7. Issues covered by the service

The new PILCH service would take a broad view of what is a 'legal' issue. Many of those in the NFP sector do not think they have any 'legal issues' because they only think of legal matters as those involving courts, judges and potential prosecution. However, the broad definition used by the new service will encompass legal issues such as risk management processes aligned to good governance. Often legal issues are intertwined with the lack of proper policies and procedures, and inexperience in financial management. These legally-related issues will also be covered. PILCH is, with assistance from its corporate and law firm members, already running seminars on these types of issues (eg, fraud prevention and financial literacy). We are also expanding the reach of these seminars and our pro bono referral service to regional Victoria.

By combining the wide expertise of PILCH members (eg, corporates such as NAB, Goldman Sachs and others) and alliances with peak professional groups such as CPA Australia (who have expressed interest in supporting the service), there is an excellent opportunity for a range of legally and financially-related issues to be covered by the new service. While the greatest area of unmet needs appears to be access to specialist NFP legal services (and this will be the core expertise of the new service), we believe that in order to provide a holistic legal service it is important to include a range of pro-active and 'preventative' services such as assistance with governance, financial and management issues.

8. Funding

Given the innovative nature of the service model proposed, 3 year start-up funding is required so that robust evidence of the benefits can be obtained, thus enabling a more

diversified funding base to be developed over time. We are seeking a mix of funding from corporate, philanthropic and government sources. For liability and other reasons, a separate entity will be established, but administrative and management expenses will be minimised by co-location with PILCH.

The activities of NFPs, and the client-base that many of them serve, cross nearly all government departments: eg, health, housing, aged care, education. Further, the Department of Justice, Consumer Affairs Victoria (as the Registrar of incorporated associations) and the Department for Victorian Communities (**DVC**) all have a keen interest in the compliance by, and good governance of, the NFP (community) sector. It is both an advantage and a difficulty that there are a range of departments that can be considered for funding of a specialist service for NFPs. Possibly DVC is the department with the most relevant overall mandate. As the Victorian government aims to deliver 'joined up government' (a major reason for the creation of DVC), we consider that the new service could serve as a showcase for both delivery of this pledge and government support of the community/NFP sector.

In order to ensure the long-term viability of a specialist NFP advisory service, a mix of funding sources will be developed. The Report (heading 14) considers some of the options including the development of a membership fee for certain services/certain NFPs and fee-for-service income. The fee-for-service income could also include income from training and resources for NFP service providers (eg, the legal and financial professions). While we see an on-going role for part government funding (eg, as a specialist community legal centre), the service has a range of other options to support its work post the 3-year trial.

9. Conclusion

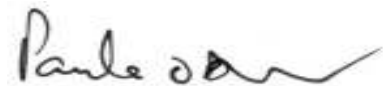
PILCH's proposal in relation to a new specialist NFP legal and legally-related service represents an evidence-based initiative that is uniquely placed to garner support from the private legal profession (and, possibly, the accounting profession) to assist and build the capacity of the community/NFP sector. It is a service that, with a contribution from government, could become a best practice model of tri-sector collaboration, consistent with the Victorian government's support of the Agora Think Tank. As NFPs deliver services and receive funding from so many departments, the nature of the funding from government could also model a whole of (Victorian) government approach, with potential for future state-federal collaboration.

The new specialist NFP service will, by a direct linkage with the existing PILCH pro bono referral service, provide integrated assistance to NFPs, initially in Victoria but with a easy path to a national roll-out via support from partner organisations.

We seek the State Services Authority's support for our new specialist NFP service, together with a recommendation to the Treasurer for 3-year part funding to pilot the service in Victoria.

If you would like any further information or would like to discuss our submission, please do not hesitate to contact Ms Sue Woodward or Ms Tabitha Lovett.

Yours sincerely,



Ms Paula O'Brien
Executive Director



Ms Sue Woodward
Policy Officer

Attachments:

1. Establishment of Not-for-Profit Legal Service Research Report
2. Letters of Support from Mr Ian Rentsch, President, Volunteering Australia and Ms Dianne Embry CEO Volunteering Victoria