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A regulatory approach for the Australian  
Charities and Not-for-profit Commission:

A Discussion Paper

Valerie Braithwaite

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***A regulatory approach for the Australian Charities and Not-for-profit Commission: A Discussion Paper***

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**Executive Summary**

1. Regulation refers to the steps taken to steer the flow of events and necessarily involves contributions from many sectors including government, charities, not-for-profits, business and individuals. All of these groups constitute a regulatory community. This paper is written for the Australian Charities and Not-for-profits Commission (ACNC) to discuss and develop with the regulatory community. It is a framework that integrates the commitments and hopes that have been articulated so far with a proposal for future regulatory practice.
2. The framework is developed within the context of the needs of the NFP (not-for-profit) sector and the values and principles espoused by the regulator.
3. The needs that are considered as most important from a regulatory perspective are threefold. First, the regulatory framework must accommodate the diversity of the sector and monitor the impact of regulation diligently. Second, in the process of regulating NFPs, steps must be taken to ensure that trust building with the public can take place. Third, regulatory reform must be undertaken with the intention of supporting, not undermining the sustainability, effectiveness and morale of the sector.
4. The ACNC Taskforce has promoted the values of (a) Independence; (b) Integrity; (c) Respect; (d) Fairness; and (e) Accountability in its operations. The proposed principles to guide the ACNC's regulatory approach are: (a) Transparency; (b) Fairness; (c) Timeliness; (d) Proportionality; and (e) Consistency.

5. The expectation shared by the regulatory community is that regulatory reform will give NFPs a corporate and financial health check that will be known to the public. In so doing, NFPs will benefit from a lower reporting burden in the long term. They should also benefit from a raised public profile that will contribute to building trust with the Australian community and strengthen networks of practical help and support.
6. The benefits that are to be delivered to the sector are expected to come about through compliance with regulatory purposes defined within the legislation. Government's intent for the ACNC is to deliver registration, education, reporting and maintaining a public register. Registration and reporting will provide data for the accessible, searchable register on the public portal.
7. The regulatory framework encompasses purposes expressed in the legislation and the meanings that are attached to these purposes in the minds of the regulatory community. Legitimacy for a regulatory framework comes about through anchoring legislated purposes to desirable and highly valued practices in the charities and not-for-profit sector. The regulatory community as a whole has come together to ascribe meaningfulness to the legislation through talk of reducing red tape, harmonizing laws and rules, and creating opportunities for social innovation. When legislated purposes lock in with the vision for change shared within the regulatory community, commitment from regulated actors to the regulation emerges. This only occurs, however, when everyone is assured of the authenticity of the other. Commitment requires dialogue, communication and contestation of ideas, and willingness to be responsive to evidence of unexpected and undesirable effects.
8. The purpose of investment by all parties in communication and dialogue is to prevent a descent into game playing. Game playing finds its way into regulatory activity when authenticity and goodwill are depleted. Game playing wastes everyone's resources because its purpose is simply to dominate and win against the other.
9. Responsive regulation is proposed as a framework that will allow the simultaneous achievement of regulatory purposes and a shared vision for the sector, while respecting the needs of the sector and being true to the regulator's values and principles.

10. Responsive regulation means regulation that is responsive to the context, the environment and the compliance behaviour of the regulated entity. It is particularly suited to regulatory reform in a sector where diversity means that capacity to comply and capacity to mainstream compliance activities vary enormously.
11. Practicing responsive regulation involves two mutually reinforcing sets of activities: a pyramid of escalating sanctions for dealing with non-compliance and a pyramid of supports that rewards entities that are making positive contributions to raising the corporate and financial health of the sector.
12. Common to both the sanctions and supports pyramids is respect for the contribution that NFP entities make to the public good. A pyramid of escalating sanctions gently puts pressure on an organization to comply, with awareness that non-compliance may reflect lack of capacity and can be readily turned into compliance with advice and assistance. When lack of capacity is ruled out as an explanation of non-compliance, gently increasing sanctioning signals the seriousness of non-compliance and the intent of the regulator to follow through on regulatory interventions until compliance is forthcoming or the entity is de-registered.
13. A pyramid of escalating rewards respects the contribution that NFP entities make to ensuring that a high bar is set for the health of the sector and for assisting and guiding other entities in achieving high standards of governance and financial management. A pyramid of supports provides recognition of entities that are leaders in the regulatory reform process and sets benchmarks that others in the sector should strive for.
14. Sanctions and supports are not opposite or competing regulatory activities. An entity that disagrees with the reporting framework might initially express defiance through not complying. The same entity may be working on a reporting process that could lighten the burden of everyone in the sector. In times of regulatory reform, contributions from all parts of the regulatory community are valuable and may come from the most unlikely of sources. For these reasons, the regulatory framework presented in this report asks the regulatory community to be open to the best that can be put forward by all parties to make regulatory reform work, while putting in place safeguards for the protection of the community.

15. Regulatory frameworks must provide protection from the minority who wish to exploit others, perpetrate harm, or otherwise abuse the system. In a bid to prevent damage, however, a regulatory framework that concentrates on enforcement rather than on building strengths exposes a regulator to considerable risks. The regulator risks destroying the goodwill and cooperation that has converged around the reform agenda for NFPs.

## 1. Introduction

This discussion paper provides the basis for dialogue about a suitable regulatory framework for the not-for-profit sector (NFP).<sup>1</sup> The purpose of regulation is to steer the flow of events.<sup>2</sup> Effective steering is best accomplished through regulatory frameworks that are shared and discussed with stakeholders. This is particularly so when change is afoot and the right balance needs to be struck between preventing actions that cause harm and encouraging actions that contribute to the public good. Getting the balance right requires cooperation among regulators and stakeholders, and most importantly, the knowledge and experience each brings to the discussion table. Regulation that is not developed in this way has higher risk of unintended and undesirable consequences that are counterproductive to achieving the goals of the sector and the regulators.<sup>3</sup>

For this reason, regulatory detail is not the concern of this paper. Detail is left for the regulatory community to provide. In the discussion that follows, regulatory community refers not only to the regulator, charities, and not-for-profits. It also includes governments, business and individuals. The term community is not used to suggest oneness or cohesion. Instead it underlines the importance of all members being included in conversations about regulatory purposes, how they are to be achieved and how much progress is being made toward their attainment.

With this in mind, the term 'regulatory framework' identifies sets of related elements that need to be heeded for an effective, fair and enabling regulatory system. The elements serve two functions. First there are those that assist a regulator with the task of regulating effectively and fairly. Second there are elements that assist regulated actors engage in a meaningful and constructive way with the regulator. Diagram 1 identifies both kinds of elements that are considered important for regulating charities

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<sup>1</sup> NFPs or not-for-profits is used as a generic term in this paper for charities and not-for-profits in the sector.

<sup>2</sup> C Parker & J Braithwaite, 'Regulation' in *The Oxford Handbook of Legal Studies*, P Cane and M Tushnet (eds), Oxford University Press, Oxford, 2003, pp. 119-145.

<sup>3</sup> P Grabosky, 'Counterproductive regulation,' *International Journal of the Sociology of Law*, vol. 23, no. 4, 1995a, pp. 347-369.

and the not-for-profit sector in a manner that advances legislative intent.<sup>4</sup> A brief overview of Diagram 1 is provided below before dealing with the elements in more detail.

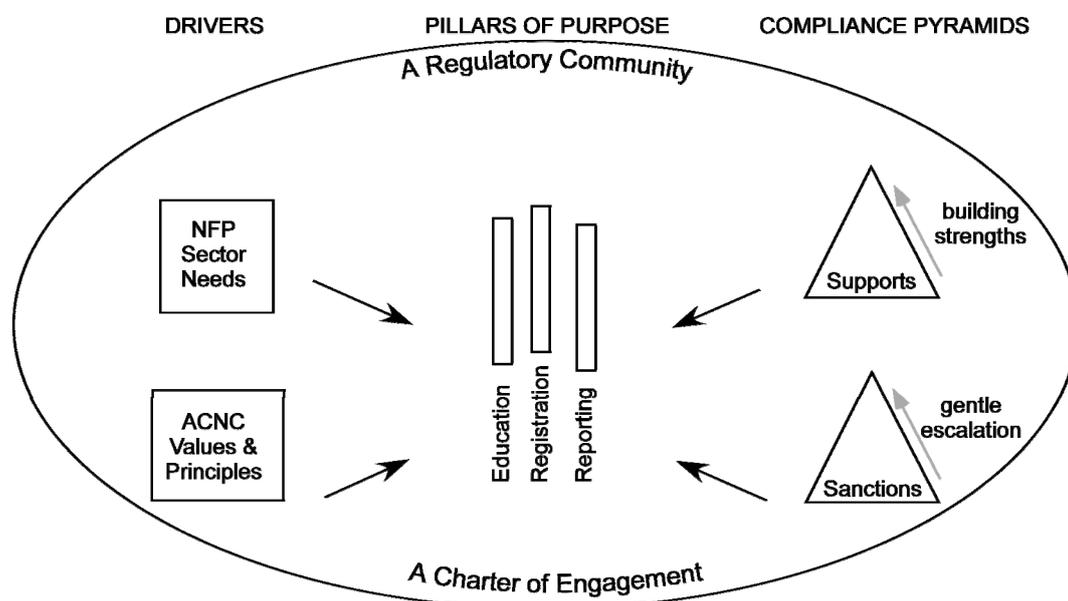


Diagram 1: A responsive regulatory community focusing on proposed legislation

On the left hand side of Diagram 1 are boxes that represent the needs of the sector and the values proposed as a code of conduct for the ACNC regulator. These drivers frame what is practicable and desirable in sector reform. For example, the diverse nature of the sector limits the degree to which the regulator can impose a one-size-fits-all template for reporting on finances and governance. The proposed values of the regulator preclude acting punitively against the sector without regard for finding a constructive way forward to achieve legislated purposes. Sector needs and regulator values therefore lessen some of the uncertainty in the reform process – agreement emerges from discussions that certain courses of action are impractical or counterproductive and therefore out of bounds.

In the centre of the diagram are three pillars representing the purposes of the legislation. The three pillars are expected to produce benefits that meet the needs of the NFP sector. The pillars of purpose also are expected to be operationalized in a

<sup>4</sup> V Braithwaite, N Harris & M Ivec, 'Seeking to clarify child protection's regulatory principles', *Communities, Children and Families Australia*, vol. 41, no. 1, 2009, pp. 5-21 & N Harris, V Braithwaite & M Ivec, 'Rejoinder: A responsive approach to child protection', *Communities, Children and Families Australia*, vol. 41, no. 1, 2009, pp. 69-75.

way that is consistent with the ACNC's values and code of conduct. Consultation reinforces understandings of how the reform process will unfold to respect sector needs and honour regulator values. The overarching purpose of the legislation – to promote trust and confidence in the sector provides a touchstone for resolving differences and moving the reform process forward.

On the right hand side of Diagram 1 are triangles that represent the approach of the regulator to eliciting compliance and changing the behavior of regulated actors. One is a pyramid of supports, the other a pyramid of sanctions.<sup>5</sup> The main aim is to achieve regulatory purposes across the community through providing education, guidance and general advice. If this is not effective, poor performing NFPs are nudged into compliance, high performing NFPs are rewarded for their contributions, and some persistent non-compliers face sanctions.

A compliance pyramid of sanctions allows the regulator to use its powers judiciously to deliver the outcomes required by the legislation. Equally importantly, the introduction of a pyramid to recognize strengths empowers regulated actors to devise their own improvements through the regulatory framework and be leaders in the reform process.

All of these elements – NFP sector needs, ACNC values and principles, pillars of purpose and compliance pyramids are to be shared and understood within the regulatory community depicted by the oval in Diagram 1. Engagement and communication are fundamental to ensuring that the elements of the framework operate in support of each other and build a regulatory system that is regarded as having legitimacy and integrity. The charter of engagement at the bottom of Diagram 1 captures the importance of respect and honesty in the dealings that take place within the regulatory community. This helps define the culture of the regulatory community – whether it is constructive and cooperative or destructive and cynical.

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<sup>5</sup> J Healy, *Improving Health Care Safety and Quality. Reluctant Regulators*, Ashgate, Surrey, UK & Burlington, USA, 2011; J Braithwaite, T Makkai & V Braithwaite, *Regulating Aged Care: Ritualism and the New Pyramid*, Edward Elgar, Cheltenham UK & Northampton MA, US, 2007.

The regulatory community in Diagram 1 comprises governments, charities, not-for-profits, citizens and individuals engaged as workers, volunteers, donors, directors or leaders. The proposed framework conceives of regulation as involving more than the lead regulatory agency (ACNC). Regulation is the business of the whole regulatory community.<sup>6</sup> If a desirable regulatory outcome is a register of high quality with an excellent coverage of the sector, everyone needs to put their best foot forward and lend a hand to others where necessary.

A regulator needs to attend to all members of the regulatory community because all potentially can hinder or help the regulator's effectiveness or fairness; and all of them, for better or worse, can be affected by the legislation. The vision for change that has built up around the legislation requires continuing cooperation among many parties. The regulatory community becomes the "minder" of the vision and the cooperation required to achieve it. Within this community, the regulator is a key source of influence for progressing the vision, but cannot carry it alone.

The following sections of this paper consider each of the elements in Diagram 1 in detail and their role in creating an effective, fair and sustainable regulatory system. The latter part of the paper recommends a responsive regulatory approach as one that attends to all of these elements and provides a meaningful way of integrating them into regulatory practice.

*Regulation is the business of the whole regulatory community. This community may disagree vehemently on means-ends options, but they share collective hope for a vibrant, innovative and productive NFP sector and each must be enabled to play a part in realizing this vision.*

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<sup>6</sup> E Meidinger 'Regulatory Culture: a theoretical outline', *Law & Policy*, vol. 9, no. 4, 1987, pp. 355-86. Although not explicitly mentioned in these terms, Robert Fitzgerald's (2010) Contribution of the Not-for-Profit Sector presentation emphasized the importance of building relationships between business, charities and NFPs, and government, each enabling the other and adding value to the other's operations. <<http://www.unitingcare.org.au/policies-a-publications/resources/622-industry-issuespresentations.html>>

## **2. Proposed NFP Needs: Diversity, Trust, Morale**

The reason that it is important to understand needs is that they impinge on an organization's capacity and willingness to comply and cooperate with a regulator. They also inform the regulator of systemic problems preventing or undermining compliance. Compliance with law and rules is most likely to be offered voluntarily when what is being asked for by the regulator is easy and compatible with an organization's normal practices. The best way of gaining compliance is to mainstream. This means that the regulator asks for actions that would be desirable for the organization to undertake to strengthen its business. Mainstreaming requires understanding the sector that is being regulated and its various needs.

The box labeled NFP sector needs in Diagram 1 recognizes this point. It is also a reminder that through ignoring needs the effectiveness and sustainability of the regulatory system is put under unnecessary pressure. In short, the legitimacy of the proposed legislation and the regulatory apparatus set up to administer the legislation depend on the reform process being responsive to the needs of the sector. History is replete with examples of laws and rules failing to connect with people's lives. The more dramatic case studies are associated with rebellions and revolutions, the Boston Tea Party being such an example. Less dramatic but equally illustrative are the high numbers of Australians who fail to claim their superannuation entitlements. Governments may act with good intentions to benefit the public, but people may lack the capacity or time or resources to cooperate and reap these benefits.

At least three NFP sector characteristics and needs are raised with such consistency that they should be accommodated within a regulatory framework: (a) the diversity of the sector and red tape reduction; (b) accountability and trust building; and (c) the sustainability, effectiveness and morale of the sector. The list is not intended to be exhaustive, but these characteristics appear with some regularity in submissions and reports about the sector and have serious implications for the kind of regulatory approach that will prove most productive and the kind that will not.

*Diversity and red tape reduction*

The sector comprises some 600,000 organizations, contributes \$43 billion to Australia's GDP, provides around 8% of employment, and draws on the services of 4.6 million volunteers (equivalent of \$15 billion in wages).<sup>7</sup> Its contribution extends across a range of fields: culture and recreation, education and research, hospitals, health, social services, environment, and religion. Importantly from a regulatory perspective, the sector is growing quickly in the contribution it makes to Australian society.<sup>8</sup> Diversity in purpose, size and modes of operation is at the heart of the sector. Recognition and respect for this diversity has been at the forefront of discussions of regulatory reform of NFPs, and should be at the forefront of how the change process is administered. Failing to appreciate the impact of regulation on all of the very different contributors to the NFP sector will compromise their effectiveness and potential for further growth. This is the first premise on which this discussion paper is based.

The diversity and growth of the sector enables the delivery of many different services and public goods in different contexts. Yet diversity and growth also have brought into focus some of the difficulties facing the sector.<sup>9</sup> Among them are: (1) Attracting and retaining qualified staff; (2) Containing costs incurred through an avalanche of reporting requirements to multiple government agencies; (3) Managing insecurities over funding such that undue risks are avoided and resources are utilized in the most productive way possible; (4) Understanding and meeting different legislative requirements across jurisdictions at the state and federal level; and (5) Ensuring legislation reflects the contemporary reality of the NFP sector (for example, definition of a charity). The importance of the NFP sector maximizing resources devoted to the public good is beyond dispute. The Productivity Commission therefore has underlined the importance of reducing unnecessary regulatory burden for NFPs.<sup>10</sup> The regulatory framework must take account of the fact that this will involve a learning process by the regulatory community as the essential reporting requirements are identified and

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<sup>7</sup> Productivity Commission, *Contribution of the Not-for-Profit Sector*, Research Report, Canberra, 2010.

<sup>8</sup> Productivity Commission, 2010; S Pascoe, Australian Charities and Not-for-Profit Commission (ACNC) Community Consultation, 2012, <<http://acnctaskforce.treasury.gov.au/content/communityengagement/downloads/commconsult2012.pdf>>

<sup>9</sup> Productivity Commission, 2010.

<sup>10</sup> Productivity Commission, 2010.

NFPs themselves experiment with efficient ways of providing this information to the regulator.

### *Accountability and trust*

At the same time, growth and diversity in the sector has raised questions of public accountability. The question is not unique to Australia. Overseas reviews have recommended regulatory reforms for the NFP sector in a number of countries.<sup>11</sup> A common theme has been greater clarity around the criteria for gaining charitable status.<sup>12</sup> A second theme has been to ensure that organizations operating in the sector are genuine in their purpose to contribute to the public good and have the capability to do so.

As the NFP sector grows larger in Australia, questions of accountability and sustainability become more pressing. Apart from benefiting from tax concessions, the sector receives around \$26 billion (34% of its income) from government.<sup>13</sup>

Governments at state and federal level are well positioned to appreciate the ways in which NFPs use taxpayers' money to benefit the community. But public perceptions are another thing (see Box 1). If regulatory reform brings with it accountability measures that are more transparent and accessible to the public, trust building in the NFP sector should be given a boost, which in turn should assist the flow of donations from private individuals and businesses. This discussion paper starts from the premise that ways of building local knowledge and trust for organizations and actors in the NFP sector is as desirable an outcome of the new regulatory framework as reducing the costs incurred by complexity and duplication in current reporting and legislative requirements.<sup>14</sup>

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<sup>11</sup> See for example, Charity Council, Ministry of Community Development, Youth and Sports, Singapore, 2011, *Code of Governance for Charities and Institutions of a Public Character*; Office of the Scottish Charity Regulator, 2011, *Scottish Charity Accounts: An Updated Guide to 2006 Regulations*; Voluntary Sector Initiative (Canada), 2003, *Strengthening Canada's Charitable Sector: Regulatory Reform, Joint Regulatory Table*.

<sup>12</sup> See the Office of the Scottish Charity Regulator, 2008, *The Charity test: A Brief Guide* for a specific example.

<sup>13</sup> Productivity Commission, 2010.

<sup>14</sup> The objects of the ACNC Act are to 'promote public trust and confidence in not-for-profit entities that provide public benefits.' Australian Government, The Parliament of the Commonwealth of Australia, House of Representatives Exposure Draft, Australian Charities and Not-for-profits Commission Bill 2012, p.4.

Box 1: National surveys conducted from 2000-2005 suggest that the relationship between the NFP sector and the public is mixed. In 2005, “charities” were trusted a fair amount or a lot by only 57 % of the public. Charities were only slightly above the tax office. Schools and hospitals fared much better with endorsements close to 80%, as did local community groups.

	% Australians trusting the institution ‘a lot’ or ‘a fair bit’ in surveys between 2000 and 2005				
	Social capital	Tax survey	Hopes survey	Tax survey	Democracy survey
How much do you trust ...					
Local public schools	82	84		79	78
Local hospitals	80	84		79	77
Charities		68		60	57
Consumer/Community Advisory Services			61		59
Local community groups		82		81	
Australian Taxation Office	54	60	47	46	52
Law courts		58		50	48
Banks		30	29	34	36
Insurance companies		25	13	20	22

One explanation for these differences is that the public feels that they have a better understanding of schools and hospitals operating locally than they do of more distant charities. Local knowledge of sound purpose, process and contributions builds trust. Absence of such knowledge brings ambivalence at best, and at worst cynicism. Ambivalence is the breeding ground for the contagion of cynicism when scandal embroils an NFP entity.

*Sustainability, effectiveness and morale*

The third need identified in this paper is that the sustainability, effectiveness and morale of the NFP sector be enhanced, not damaged through the process of regulatory reform. More specifically, it is important that the human and social capital of leaders, employees and volunteers be strengthened, not weakened by regulation. The sector grapples with staffing problems that in no small part stem from relatively low wages and short-term contracts. A shortage of economic capital is offset by reserves of good will that bring human and social capital into the sector. Human capital is evident in the commitment and dedication of staff and in the skills that are volunteered – from tradespersons assisting with building construction and maintenance, to accountants and lawyers assisting with finances, insurance, tax and the like. The worth of social capital is evident in NFP entities where cooperation and trust within is high, work is shared across staff performing multiple roles, and networks of volunteers are called upon to lend a hand. Any regulatory framework needs to be cognizant of the forms of capital that allow many NFP entities to survive – particularly social and human capital, and take care not to deplete or be dismissive of these most valuable resources.

*The regulatory framework must appreciate:  
The diversity of the sector in terms of purpose, size and operations, the need to reduce red tape and monitor the impact of regulation on contributors;  
The desirability of using regulation to improve public knowledge of NFPs and enhance the trustworthiness of organizations in the sector;  
The need to enhance and not damage the sustainability, effectiveness and morale of the sector through regulatory reform.*

### 3. Proposed ACNC Values and Principles

It is important to work toward agreement on legislative purpose and the vision for the future of the NFP sector. But even without agreement, progress can be made, albeit more slowly. Research shows that one of the most important determinants of regulatory effectiveness in a democracy after legislation has been passed is not whether or not everyone is getting the outcome they want but rather how the regulator engages with regulated actors (people and organizations).<sup>15</sup> The elements for ensuring that the regulator regulates with respect for citizens and regulated actors is contained in proposals for a values framework (captured in Diagram 1 in the box labeled ACNC values and principles).

In the introduction to this paper the point was made that regulation in practice falls on the shoulders of many different parties.<sup>16</sup> However, the most consistent leadership role in the NFP sector will reside in the national regulator, the Australian Charities and Not-for-profits Commission (ACNC). The Commission is responsible for administering legislation and ensuring compliance with the law.<sup>17</sup> These tasks need to be accomplished without undermining the health of the sector, being mindful of the benefits of safeguarding the sector's diversity, trustworthiness and morale (outlined above). To guide their operations, the ACNC Taskforce has proposed a set of values that communicate intent to regulate with the purpose of strengthening the sector through building relationships of mutual respect, trust and cooperation.<sup>18</sup>

#### *Values of the Regulator*

The proposed values to guide the ACNC's operations are:<sup>19</sup>

- (a) Independence

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<sup>15</sup> TR Tyler, *Why People Obey the Law*, Princeton University Press, 1990 & TR Tyler, *Why People Cooperate: The Role of Social Motivations*, Princeton University Press, 2011.

<sup>16</sup> Regulatory functions are dispersed across society, carried out through the operational protocols of organizations and institutions without recourse to law or the courts (D Levi-Faur, 'The global diffusion of regulatory capitalism', *Annals of the American Academy of Political and Social Science*, Issue 598, 2005, pp. 12-32; J Braithwaite, *Regulatory capitalism: how it works, ideas for making it work better*, Edward Elgar, Cheltenham, UK, 2008.)

<sup>17</sup> S Pascoe, Powerpoint Presentation to Community Consultations 2012.

<sup>18</sup> S Pascoe, *ibid.*

<sup>19</sup> S Pascoe, *ibid.*

- (b) Integrity
- (c) Respect
- (d) Fairness
- (e) Accountability

These values have been proposed as the basis for the ACNC to engage with key stakeholders to determine its regulatory approach. Independence and integrity are overarching in signaling the sector's hopes that the ACNC will accept responsibility for its decisions and practices, operate diligently in pursuing ACNC purposes, thoughtfully balance competing goals when necessary, and treat all stakeholders fairly and with respect. It is proposed that these values guide the operation of the ACNC internally, in their relationships with other governments (state and local), other federal government departments and agencies, charities and not-for-profits, and last but not least, citizens and taxpayers.

#### *Principles for regulating*

The principles the ACNC Taskforce proposed in its regulatory approach are:<sup>20</sup>

- (a) transparency
- (b) fairness
- (c) timeliness
- (d) proportionality
- (e) consistency

These principles would commit the ACNC to ensuring that its regulatory processes are fit for the purpose of honoring stated values. Transparency is a principle that opens the Commission up for review and ensures on-going *accountability* for its actions and decisions. Through regulating with transparent processes the ACNC is able to demonstrate in the longer term to the regulatory community the extent to which it acts with *integrity* and *independence*. In the short term transparency enables the regulator to learn from feedback on its performance.

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<sup>20</sup> Australian Charities and Not-for-Profits Commission Discussion Paper, December 2011  
[http://acnctaskforce.treasury.gov.au/content/communityengagement/downloads/Discussion\\_Paper.pdf](http://acnctaskforce.treasury.gov.au/content/communityengagement/downloads/Discussion_Paper.pdf)

The principles of consistency and proportionality are considered useful for strengthening claims to a regulatory agency's *integrity* and *independence*. These principles provide protection against an agency succumbing to slapdash, inconsistent processes at one end of the spectrum and the arbitrary use of power at the other. Inconsistency can arise when regulators are unclear about their own procedures, rules and roles, creating in stakeholders a perception that the agency lacks coherence or competence or capability. For example, inconsistent advice may be given on the same matter; services may be good on some occasions, bad on others, good for some segments of the sector, bad for others; and decisions may be justified in inconsistent ways, creating confusion in stakeholders as to what they should do to meet the approval of the regulator. Consistency in the sense of reliability and predictability is an important standard for an agency that is looking to establish itself as having high integrity (see Box 2).

Similarly, proportionality is an important principle in so far as it signals that a regulator will not use its powers in an arbitrary fashion: There is good reason for intervening in different ways in different cases. There will be consistency in the way this reasoning is applied, and when combined with transparency, will provide clear signals as to how seriously the regulator regards a breach of the law or its rules. Seriousness will be related to whether or not a regulatory intervention is required.

Consistency and proportionality are principles that regulators commonly use but that always need to be tempered by the values of *respect* and *fairness*. There are occasions when help rather than judgment is called for, compassion rather than punishment. In such situations, high integrity agencies resist rigidity in the application of the principles of consistency and proportionality – that is, they resist the practice of treating every case in exactly the same way regardless of circumstance. The variation in the needs of the sector is so great that rigid adherence to a rulebook that dictates same treatment for the same breach is not going to advance the goals of NFPs or improve their effectiveness. Indeed such action would breed a sense of injustice and resentment. High integrity regulatory agencies operate through ensuring they have a full understanding of why certain goals have not been achieved and apply principles of consistency, proportionality, and fairness in a manner that is responsive to context and circumstance. Above all, their decisions and actions can be explained to the

regulatory community. Explanation and reasonableness of argument ease concerns that a distant bureaucracy might be acting with bias or dismissiveness.

The remaining principles of fairness and timeliness in providing information and making regulatory decisions speak directly to the ACNC value of treating others in the regulatory community with *respect* and to the value of *integrity*. Fair and timely treatment from a regulator sends a signal that the organization is well run and is a responsive and trustworthy authority (*integrity*). At the same time, it communicates to the regulated party that what that party is doing matters and that the regulator is keen to do what is necessary to ensure the regulated party can make a valuable contribution (*respect*). In practice this might mean that if a NFP is not meeting its obligations under the law, it should be informed in a timely fashion, asked for an explanation, and given opportunity to meet the standards expected. Should a NFP question the decision of the regulator, a timely explanation of processes of review and of the reasons for why the decision stands or is changed exemplifies the principles of fairness and timeliness in action.

Box 2: For an organization to have integrity it must have soundness of purpose. It also must have processes in place that are easily understood and that treat people decently – with respect, impartially, being prepared to listen, and genuinely try to respond to needs. Integrity paves the way for cooperation and productive problem solving relationships (Braithwaite 2009). Tom Tyler (1990, 2012) has spent more than two decades showing how people are more likely to obey the law, support authorities and cooperate with them when they are treated with respect and decency. How we are treated is far more important in determining our cooperation and law abidingness than whether or not authorities make decisions in our favour. Tyler would regard the values and principles of the ACNC as showing a commitment to what he calls procedural justice.

#### **4. Charter of Engagement**

In keeping with the proposed values framework, specific interactions between a regulated actor and regulator should be respectful, fair and honest. A Charter of Engagement represents what the regulator and the regulated actor can expect from each other (as an example, see Box 3).

The Charter of Engagement, mentioned at the bottom of the oval in Diagram 1, should be extended to all members of the regulatory community. The cooperation required to progress the sector’s vision for its future can be furthered through respectful, fair and honest engagement among members. Many regulatory and service agencies have developed charters of rights and obligations to remind individuals and groups within the regulatory community to be cognizant of the perspective of others and the obligations they have to each other. A Charter of Engagement serves as a reminder to people of how they should behave as they debate and contest means-ends pathways in pursuit of regulatory purposes.

Box 3: A Charter of Engagement for regulatory reform in the NFP sector can be modeled on service charters that are in widespread use. Service charters are used by government agencies to build trust with stakeholders. The Commonwealth Government Service Charters paper is a useful starting point ([http://parlinfo.aph.gov.au/parlInfo/download/library/prspub/PP446/upload\\_binary/pp4465.pdf;fileType=application%2Fpdf#search=%22library/prspub/PP446%22](http://parlinfo.aph.gov.au/parlInfo/download/library/prspub/PP446/upload_binary/pp4465.pdf;fileType=application%2Fpdf#search=%22library/prspub/PP446%22)). A Charter of Engagement for NFPs might look something like this (adapted from the Taxpayers’ Charter (see <http://www.ato.gov.au/content/25824.htm>)).

Government commits to:	NFPs commit to:
1. Treat you fairly and reasonably	11. Be truthful
2. Help you to get things right	12. Be reasonable and fair minded
3. Make it easy for you to comply	13. Keep the required records
4. Be accountable	14. Take reasonable care
5. Value your feedback	15. Report by the due date
6. Respect your right to a review	16. Notify us of changes
7. Treat you as being honest unless you act otherwise	
8. Offer you professional service and assistance	
9. Explain the decisions that are made about you	
10. Accept you can be represented by a person of your choice and get advice	

## 5. Pillars of Purpose

The pillars represent the core purposes of the regulator:<sup>21</sup> (a) education – providing information, guidance and general advice on how to meet regulatory requirements; (b) registration – assessing eligibility for charitable status; and (c) reporting – coordinating the reporting by NFPs on their corporate and financial status for inclusion in a searchable public database.

### *Education*

Transferring knowledge about regulatory reform is well underway with the Productivity Commission, The Treasury, and the Charities and Not-for-Profit Taskforce taking a leading role. The transfer of knowledge has involved government, the not-for-profit sector, private business interests and interested individuals as both providers and recipients of information. Exchanges of experiences, information and knowledge have occurred through written discussion papers and submissions, face-to-face meetings, roundtables on key topics, public community consultations, social networking (Facebook), and websites.<sup>22</sup>

Future plans for education should be responsive to the needs of the sector and the NFP sector should seek opportunities to develop their own learning networks. As the reform progress unfolds and legislative changes are implemented, educating about facts gives way to learning from the experiences of each other. A task force drawn from the regulatory community that can meet at regular intervals to identify problems and fix them may prove valuable at this point<sup>23</sup>. The flow of knowledge to and from the NFP sector is important for the health of the regulatory system and the regulatory community.

So too is knowledge exchange within the NFP sector. Those for whom change is not too disruptive can act as role models and mentors for those who need more assistance.

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<sup>21</sup> S Pascoe, Powerpoint Presentation to Community Consultations 2012.

<sup>22</sup> S Pascoe, Powerpoint Presentation to Community Consultations 2012.

<sup>23</sup> M Sparrow, *The Regulatory Craft: Controlling Risks, Managing Problems and Managing Compliance*, The Brookings Institution, Washington DC, 2000.

Establishing cross-cutting communication networks – networks that don't necessarily involve the regulator enable members of the regulatory community to provide for and draw on emotional support and practical help for managing their change programs.

Social inclusion becomes a particularly challenging goal in times of change and is one that requires management from the whole regulatory community. All regulatory communities have some members who are closer to centres of power, influence and being “in the know” than others. In the NFP sector where there are so many geographically distant, small, and boutique entities, many of which have little involvement with government or business,<sup>24</sup> it is inevitable that some will feel socially excluded in the reform process. Connecting isolated entities with others that have similar concerns and face similar problems is a particularly important priority in the early stages of regulatory reform. NFP tailored advice infrastructure hubs<sup>25</sup> could be more firmly rooted in the sector if NFPs saw advantage in pooling resources and applying for funding to support such an initiative.

Regulatory reform provides opportunities for the sector to reconfigure itself in ways that bring benefits. Specifically, strengthening NFP communication networks does not have to be done under the auspices of government or the regulator. Such networks, while formed in the wake of the reform process, may offer benefits beyond the immediate regulatory agenda. They may connect NFPs that can take socially innovative steps in building new partnerships and enterprises.

### *Registration*

NFP regulators' first priority after legislation is passed is to ensure that applicants know what they need to do if they are to register successfully. Given the needs of the sector, the goal of containing costs around the registration process is important. Pre-registration advisory panels may have a role to play in ensuring applications pass a basic quality test before they go before the formal panel for registration.

Where registration is denied, but the reasons are contested, a review process is required to ensure that justice has been done. Expert review satisfies the requirement

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<sup>24</sup> R Fitzgerald, 2010.

<sup>25</sup> R Fitzgerald, 2010.

that the decision is in accordance with the law. A community review panel would provide a forum for discussing the meaning of the decision and whether it is in accord with the community's understanding of who should qualify for the benefits associated with having a charitable status. For the NFP sector to gain the trust of the community, approval of registration in legal terms must match the community's perception of who is a legitimate recipient of the benefits associated with registration. The community must be convinced that the NFP works to advance the public good.

### *Reporting*

Three regulatory guidelines have been proposed for the development of the reporting requirements for the NFP sector:<sup>26</sup> (a) To respect agency independence and limit requirements to only those essential to meeting agreed outcomes; (b) To always return information requested in a value added form back to providers; and (c) To mainstream reporting so that what is required by government matches the data that NFPs collect for their own purposes. Ideally, the material required by the government would be the same as that collected by NFPs for their annual reports and for their briefings to staff, volunteers and boards when they report on their achievements, future hopes, and the corporate and economic health of the organization.

Presently the reporting requirements for different Tiers of the NFP sector are being discussed within the regulatory community – as they should be. From these discussions the important outcome to emerge is a shared understanding of the standards required for reporting on NFPs, an appreciation of their purpose and of the benefits that flow from dedicating resources to the task of collecting and analyzing the data.

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<sup>26</sup> (a) and (b) appear in R Fitzgerald 2010; (c) appears in S Pascoe 2012.

Box 4: In “The Audit Society” written in 1997, Michael Power describes a world wide explosion in audits and monitoring activity with the intent of improving accountability and exercising greater controls over organizations’ activities. The record keeping associated with this movement, however, has not always been beneficial for organizations. Internal record keeping processes can consume precious resources, reduce an organization’s nimbleness and capacity to innovate, and result in the collection of data that is never actually used for any practical purpose. When record keeping serves no practical purpose it can be thought of as a ritual of comfort – something that is done routinely to give the appearance of accountability and orderliness without serving any useful outcome.

*Following the proposed legislation, the regulator is expected to pursue three pillars of purpose – education, registration and reporting. Registration and reporting will provide data for the accessible, searchable register on the public portal. These pillars are intended to advance the regulatory community’s shared objective of promoting public trust and confidence in the NFP sector.*

## **6. A Responsive Regulatory Approach**

The elements outlined so far make many demands on the regulator: Be aware of the needs of the sector and of the individual circumstances of NFPs; Stand by principles of fair and reasonable treatment of others in the regulatory community; Stand up for the purposes of the legislation and enforce compliance if necessary; Provide education, guidance and advice to enable NFPS to comply voluntarily. How can a regulator balance all these considerations? Regulators can and do.<sup>27</sup> Some don’t and opt for a rulebook approach.

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<sup>27</sup> C Wood, M Ivec, J Job & V Braithwaite, *Applications of responsive regulatory theory in Australia and overseas*, Regulatory Institutions Network, Occasional Paper 15, Australian National University, 2010.

This paper argues against a rulebook approach, although there may be circumstances where obligations are so straightforward that an automatic penalty for non-compliance is an acceptable, efficient way to proceed. But in general this will not be the case. Regulation will disturb the way in which many NFPs go about their business and achieving compliance will be a learning process. This is the context where responsive regulation proves useful with its pyramids of sanctions and pyramids of supports. The remainder of the paper explains this approach and how it integrates the elements of the regulatory framework discussed earlier in the paper. First a little more explanation of compliance and how we might think about it is in order.

### *Compliance*

Compliance has two meanings. Both are useful, depending on context. Compliance can refer to a snapshot of an outcome at a particular point in time, for example, a particular NFP has entered information on the register by the due date and therefore receives a tick for taking action that brings the NFP into compliance. There is no knowledge or interest from the regulator in whether the NFP staff know or understand the information entered on the system or whether they use it as a benchmark for their day-to-day operations. In other words, there is no concern with whether or not the compliance outcome is an integral part of organizational processes on a day-to-day basis. In many cases it will serve only as a ritualistic accountability measure and not a substantive measure of compliance.<sup>28</sup>

Compliance can also take on a broader meaning when it is paired with process. A compliance process refers to the actions an organization takes to deliver a compliance outcome. A compliance process encompasses means and ends. When compliance is used in this sense, an important question is the degree to which the compliance process is mainstreamed and integrated with the main business of the organization. For example, the regulator may work with the NFP to establish a routine so that information can be placed on the website in a timely manner and in such a way that it helps the business, is easy for the NFP to do, and satisfactorily meets the regulator's needs. When a new regulatory system is being introduced and when routines of compliance are not generally in place, the obligation to comply requires a degree of

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28 J Braithwaite, 2008.

effort and thoughtfulness. These are the situations where compliance as process needs to take centre stage.

Box 5: Thinking of the compliance process and not just compliance as outcome is important in the field of occupational health and safety. A compliance outcome that is valued and monitored on a construction site is the wearing of protective equipment – the right boots, hard hats and so on. But if workers find it difficult or uncomfortable to do their jobs while complying with the rules they will avoid them at the first opportunity. Greater surveillance may be one answer. Another may be to better understand the reasons for not complying and redesign equipment or work routines so that it is easier to work safely. Thinking of the compliance process does not deny the importance of outcomes, nor does it imply imposing process on organizations. Compliance process recognizes that a partnership is required between regulators and those being regulated to understand the drivers of non-compliance, and then to get the contextual settings right so that compliance outcomes will follow. John Alford (2009) refers to policy outcomes that involve government-citizen collaboration as co-production.

Strengthening compliance processes requires understanding of entities that are being regulated. When a regulatory community is large and diverse, the task of developing compliance processes is best delegated to organizations themselves who can seek assistance from nodes of expertise where knowledge of regulation and of the sector coalesce. For some organizations this may mean employing consultants to assist with this process. For organizations that lack the financial capacity to pay consultants, compliance processes may be modeled on best practice by the “early starters”. The ACNC will provide a central website with guidance on educational tools that will be available to all and stories of successfully mainstreaming and routinizing compliance processes can be exchanged by members of the regulatory community (see Box 6 for an example of the importance of story telling in complex learning situations).

Box 6: Clifford Shearing and Richard Ericson (1991) in their study on police culture showed how police learn how to handle difficult situations by hearing stories of how competent officers handled similar situations or by themselves experiencing and retelling such stories. Stories instruct the participants how to ‘read’ the layers of meaning in a situation. They concluded that complex learning is best accomplished through story telling, not through books of rules.

### *The idea of regulating responsively*

It is against the backdrop of establishing compliance processes for NFPs that the idea of responsive regulation and its associated compliance pyramids of sanctions and supports becomes particularly useful. Responsive regulation is not simply about regulators doing things to those being regulated to make them comply (commonly thought of as enforcement). Regulation is about persuading, encouraging, supporting, partnering, sometimes sanctioning, and sometimes even negotiating a power sharing arrangement. “Responsive” enters our thinking when we ask which mix of options might fruitfully be applied to nudge the regulated actor into compliance.

The answer depends on a complex set of factors. Probably the first thing that springs to mind are the actions of the regulated party – in other words, how harmful are the actions, what risks do they pose to the general community, and what are the costs they are imposing on others within the regulatory community. This is the first parameter of regulatory responsiveness; and often appears in government reports using the nomenclature of “risk-based” regulation. It makes sense that a regulator would spring into action if a NFP was on the verge of financial collapse, but might adopt a hands-off approach if that NFP had the backing of a larger financially strong institution.

The essential and unique feature of responsive regulation, however, concerns the second parameter: A regulator should be willing to persevere to achieve a compliant outcome with a non-compliant entity, starting with “opportunity for self-correction,”<sup>29</sup> and then incrementally increasing pressure on the entity to take the necessary action to comply. Increased pressure means that the regulator uses its powers to become increasingly intrusive, ultimately having the power to de-license or otherwise incapacitate the entity. But the graduated steps that are used to nudge the non-compliant into compliance are neither arbitrary nor vindictive. They are known and have the support of the regulatory community. In this way, actions taken to deal with non-compliance come to be seen as fair and reasonable. When an entity is sanctioned, the regulatory community has confidence that such an entity has had opportunity to be

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<sup>29</sup> S Pascoe, 2012.

heard and helped, and more than likely is deliberately refusing to meet their obligations under the law.

It is a universal feature of regulatory enforcement that it is difficult for regulators at first sight to untangle failure to comply through lack of know-how and failure to comply through well thought out defiance. The reason has to do with the psychology of people. Where regulation is seen as an unnecessary burden, people turn away and don't want to know anything about it. "Won't do" and "can't do" become one because people place themselves at a social distance from either being persuaded of the benefits or learning what is required for compliance. Social distance prevents them from moving to the more compliant-ready states of "want to" and "can do".<sup>30</sup>

The task of the good regulator is to reduce this social distance, to turn the situation around to one where the regulated party is willing to give it a go. Heavy-handed enforcement is often counterproductive to winning over the non-compliant.<sup>31</sup> A good long chat, on the other hand, can prove effective.<sup>32</sup> The regulator may persuade the regulated party to comply and demonstrate what is needed to comply. It is also possible that the regulated party will take the opportunity to persuade the regulator that the regulation is unreasonable and needs to be changed. Under such circumstances of knowing that their criticisms and grievances are being taken seriously, most law-abiding individuals will comply. They opt for deference with dissent.<sup>33</sup> Either way, a light touch to achieve compliance is superior to heavy handed approaches that more often than not will ratchet-up tensions and defiance and increase the likelihood of protracted contestation. At the heart of these battles is the law, what it requires of a regulated actor and how it should be interpreted. Also at stake are prospects for building trust and cooperation in the future as each party smarts from the disrespect shown by the other.

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<sup>30</sup> V Braithwaite, *Defiance in Taxation and Governance. Resisting and Dismissing Authority in a Democracy*. Edward Elgar, Cheltenham, UK & Northampton, MA, USA, 2009

<sup>31</sup> T Makkai & J Braithwaite, 'The Dialectics of Corporate Deterrence', *Journal of Research in Crime and Delinquency*, vol. 31, 1994, pp. 347-373; J Braithwaite & T Makkai, 'Testing an Expected Utility Model of Corporate Deterrence', *Law and Society Review*, vol. 25, 1991, pp. 7-40. (Reprinted in C. Coglianese & R. Kagan (eds), *Regulation and Regulatory Process*, Aldershot, Ashgate Publishing, 2007.)

<sup>32</sup> E Bardach & R.A Kagan, *Going by the Book: The Problem of Regulatory Unreasonableness*, Temple University Press, Philadelphia, PA, 1982.

<sup>33</sup> V Braithwaite, *Compliance with Immigration Law*. Report to the Department of Immigration and Citizenship 2010. <[http://vab.anu.edu.au/pubs/IMMI\\_FINALJuly23.pdf](http://vab.anu.edu.au/pubs/IMMI_FINALJuly23.pdf)>

The ACNC Interim Commissioner has proposed a light-touch, risk-based, evidence-based approach to regulation.<sup>34</sup> How this can be achieved in ways that are consistent with the needs of the sector, the values and principles of the ACNC and its regulatory purposes is explained below through the concepts of pyramids of supports and pyramids of sanctions.

### *Pyramids of supports*

The prime regulatory purpose of the ACNC is to promote and enhance public trust and confidence in the sector. One of the ways it will do this is through a corporate and financial health check for each charity through registration and reporting. Much of the data from these processes will be put on a searchable public register on the ACNC portal. The by-product of having charities on a register that is available to the public is to promote trust through transparency.

It therefore makes sense for the regulator to give attention to good things happening in the regulatory community and be open to the prospects of better things happening with a bit of support. Regulatory activity around recognizing strengths and promoting good news stories for the sector can be organized around a supports pyramid (sometimes called a strengths-based pyramid).<sup>35</sup>

Recognition of strengths by the regulator can be given in a variety of ways, but importantly, the ways must be valued and meaningful to the sector. Therefore what is outlined here is but an example (see Diagram 2). In practice such a pyramid needs to be developed in consultation with the regulatory community, and in particular, the NFP sector.

It makes sense that a regulator will be naturally inclined to focus most attention on non-compliance. Yet, it is surprising how few regulators say thank you to those being regulated for delivering in a timely fashion on tasks that require time and effort. Even in dealing with entities that have been non-compliant, let us say they have not reported on time, the regulator may see positives. While chasing up late reports, the

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<sup>34</sup> S Pascoe, 2012.

<sup>35</sup> J Healy, 2011; J Braithwaite, T Makkai & V Braithwaite, 2007.

regulator may witness some interesting changes that are happening in the sector. Change that is bubbling up and meets with the approval of the regulator (perhaps a good compliance process is being put in place) needs to be recognized and encouraged. One response that is low key and non-interventionist is praise. There are no limits to the amount of praise that can be given and it costs the regulator very little. Praise works: Regulators should use it more (see Box 7).

Box 7: In a study of 410 Australian nursing homes, inspectors who made greater use of praise accomplished higher compliance rates two years after their inspection (Makkai and Braithwaite 1993)

Many organizations will be worthy of praise with regard to some part of their operation. A smaller number, however, may be involved in activities that are quite special from a regulatory perspective. Some may want to test some new ideas for how the sector might function (e.g. mainstream reporting, develop better compliance processes). They may wish to organize a workshop and a guest speaker. A strengths based approach to regulation would encourage valued initiatives in the sector. The regulator might make some of its resources available and offer to post a report of the successful initiative on their website for others to access. An even smaller group may impress through the work they do with others in the sector. Recognition of these contributions might be made through service awards within the sector, with perhaps free subscriptions being offered for products that improve the capacity of the organization to build out from its strengths. An even higher honour might be bestowed on those who have achieved excellence in implementing new systems of governance and financial management. The idea of a supports pyramid is that it recognizes and rewards virtue, each step representing a higher achievement than the one below and each step conferring more status than the one below. The recognition offered through a supports pyramid to those doing the right thing plus the incentive structure provided through rewards and awards have the effect of motivating high performers to strive for excellence and average performers to do better. A supports

pyramid not only raises the bar in response to what the best NFPs are doing, but it supports organizations as they try to get over that bar.<sup>36</sup>

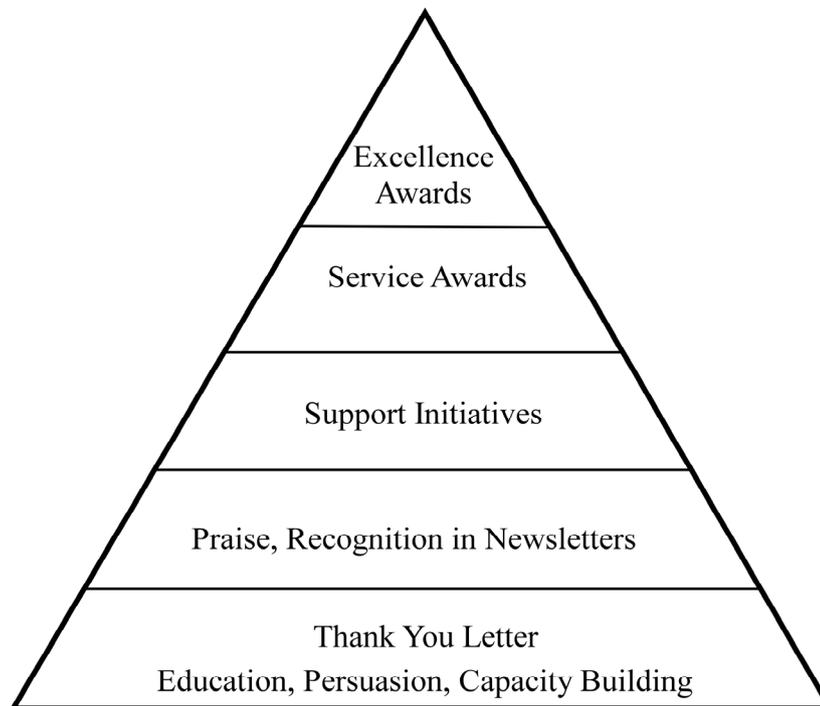


Diagram 2: An example of a hypothetical pyramid of supports (strengths-based pyramid) to recognize and encourage entities as they respond to sector reform

### *Pyramids of sanctions*

Importantly, a pyramid of supports is not incompatible with the more traditional enforcement pyramid (see Diagram 3). NFPs (like people) are never entirely good nor entirely bad. So what is to be done in the face of non-compliance? Responsive regulation is an approach that shies away from using force when it is unnecessary, but recognizes that firm enforcement is required in certain situations to protect the community. Because the NFP sector relies heavily on trust – trust from donors, trust among staff, trust between volunteers and staff, trust from beneficiaries, it is also a sector where unscrupulous individuals can perpetrate acts of fraud and exploitation without ready detection. An enforcement framework that has the confidence and support of the regulatory community will go a considerable way to safeguarding the community and the reputation of the sector.

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<sup>36</sup> J Braithwaite, 2008, pp. 115-126.

A pyramid of sanctions, or what is sometimes called an enforcement pyramid, works in the following way. An organization may fail to report by the required date to the ACNC on its financial status and corporate arrangements. What should the regulator do? A reminder letter asking for the information to be forwarded to the regulator is a good place to start. Imposing a fine is not. Why? Incompetence and forgetfulness are common reasons for non-compliance particularly in a world that is burdened with administrative work. Unintentional errors occur on both sides of the regulatory fence; and on both sides, little comfort can be found in accusing the other of a deliberate breach of conduct when the reason for non-compliance is far more innocent.

That said, in a minority of cases, failure to meet reporting obligations will be a sign of deliberate avoidance and more serious problems. Following up the initial enquiry with a somewhat more intrusive intervention, such as a phone call, not only signals the importance of the reporting obligation to the regulator, but also the interest of the regulator in that particular entity – usually not looked upon with pleasure and not regarded as a positive development by that entity. Ratcheting up the stakes further in the event of no-response might be a visit to the offices of the NFP for a meeting with staff to uncover the source of the problem. If a satisfactory resolution cannot be reached in this forum, a second try with formal mediation in the presence of board members and volunteers might unveil some of the problems that the organization has been unable to face or deal with.

So far, the sanctions pyramid has escalated through stages that rely on dialogue and explanation that is restricted to the NFP's close community and the regulator. The idea is that within the NFP's close community there will be the human and social capital that can be tapped to move the entity toward compliance. But what if this is not the case? What if there is now clear evidence that there is no intention to comply. May be there are problems of mismanagement and deceit right up the organizational chain.

At such a point deterrence measures may come into play including audits and fines to underline the importance of compliance and to make the costs more tangible. Depending on the nature of the problem, other regulatory bodies may be brought into

the investigation. As more facts are brought to light, a second ultimatum may be issued. The NFP is given an opportunity to put its house in order, or face a restorative justice conference.

A restorative justice conference addresses the problems that have brought the organization into non-compliance. In attendance would be all those affected and those who support the individuals who are in the firing line. The idea is to use the strengths of individuals in the group, including the non-compliant individual/non-compliant entity, to make amends. In a business context, relevant participants would be representatives of the board, the auditor, the public, regulators, those harmed by the inappropriate actions of the entity, and anyone who can provide support to any of the parties that need to be brought into the solution of the problem. Peak bodies may be involved in this capacity. If earlier efforts at restorative justice conferencing have been hijacked by teams of lawyers, a further conference with no lawyers but with the CEO might prove effective.<sup>37</sup>

At the peak of the pyramid is coercion. The entity loses control of its future. Refusing to comply leads to the entity being put out of business or losing its license to practice. The peak of the pyramid is rarely used. Knowing that it is there and could be used provides the pressure to settle differences further down the pyramid before problem resolution becomes too expensive for both regulator and the regulated party.

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<sup>37</sup> J Braithwaite, 2008.



Diagram 3: An example of a hypothetical pyramid of sanctions (enforcement pyramid) to impose costs for non-compliance in graduated steps with the expectation that entities will reach a point where costs are too high and they choose to comply and move to the bottom of the pyramid

The reason that pyramids work is that most entities and people want to stay within the law and do the right thing. Law abidingness, sometimes greatly undervalued in our society, is actually what keeps the system working. Pyramids are developed in discussion with the regulatory community so that they are familiar and fair. They are above all respectful of people and their situation, placing emphasis on listening and being helpful, and acknowledging success while maintaining the position that entities need to comply with government requests. Only if the entity does not put its best foot forward and try to comply does the regulator ratchet up the sanctions to enforce compliance. The sentiment of the regulatory approach is captured by the phrase “firm but fair.”

A problem that all regulators face and that can be particularly confrontational for regulators trying to regulate responsively is game playing. Often regulators in these situations despair and look to punitive measures to regain control. The response is understandable. When game playing sets in, law loses its moral authority as a

standard of what is the right thing to do and becomes an instrument in a game where one party tries to dominate the other. The purpose of game playing is winning against the other. Thus, it is little wonder that regulators are threatened by it. Doreen McBarnet has argued that the only way this situation will be resolved is through a change in attitude to law such that laws become standards that the regulatory community holds in high regard and respects.<sup>38</sup> Changing attitudes to law in populations that are cynical and dismissive of government and regulatory authorities is no small undertaking.<sup>39</sup> With patience and perseverance, however, responsive regulation with its pyramids and opportunities for listening, responding to injustices and demonstrating authenticity provides an institutional means of slowly reducing the appeal of game playing. Once a regulator proves its integrity and earns legitimacy, the need for game playing recedes.

## **7. Conclusion**

The intention of the regulatory framework set out in this paper is to integrate and give cohesion to the deliberations that have taken place and the commitments that have been made within the regulatory community of not-for-profits. Members of this community are government, charities and not-for-profits, businesses and interested individuals and citizens. Discussion papers and submissions to date have produced a complex array of data, experiences, predictions, fears and hopes. It is hoped that this discussion paper is responsive to the issues and concerns that have been foremost in the minds of members of the regulatory community as they have discussed the regulatory reform process.

The paper quite deliberately provides a skeleton framework. The flesh or details to be attached to this framework are yet to be decided by the regulatory community. Where details have been presented, they are for illustrative purposes only. The expertise and experience within the community is needed to mould the regulatory infrastructure so that it is best able to meet the purposes intended.

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<sup>38</sup> D McBarnet and C Whelan, *Creative Accounting and the Cross-Eyed Javelin Thrower*, Chichester: John Wiley, 1999.

<sup>39</sup> V Braithwaite, *Defiance in Taxation and Governance. Resisting and Dismissing Authority in a Democracy*. Edward Elgar, Cheltenham, UK & Northampton, MA, USA, 2009.

The approach that is recommended in this discussion paper is highly collaborative and discursive in keeping with the way the reform process has been conducted to date. While the actions that are required from the not-for-profit sector could be read by the minimalist regulated actor as “tick and flick” activities, the discussion papers and submissions surrounding the reform process suggest that for the most part more is hoped for. Some desire a more authentic form of accountability for its own sake, others want a credible system operating so as to relieve the burden of constant reporting on essentially the same performance standards. Either way, the nub of the matter is that government, stakeholders and the public need to see the system as legitimate and one in which they can have confidence. In order for this to occur, a more careful crafting of the regulatory process is required; one that can at regular intervals connect with sector needs, shared values, principles of engagement and regulatory purposes, and where every person willingly accepts responsibility for aiming to achieve the best possible outcome for the financial and corporate health of the sector.

*The importance of legal standards is more in setting the framework and focus for storytelling, less as words that utter explicit guidance. To be good at framework-setting and focusing dialogue, standards must be simple and few in number. Like good poetry, they must engage us by being replete with silences, leaving us to make of them what we can: “For in leaving to us the talk of making sense of what is before us, this silence forces our continuous and attentive engagement with the poem itself”. White 1984:27 (cited in J Braithwaite et al, 2007).*

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