



**ACOSS Submission to House of Representatives Economics Committee Inquiry into  
the Australian Charities and Not-for-profits Commission  
Exposure Draft Bills**

**Supplementary submission to oral hearing, Thursday 26 July 2012**

**This oral submission is made by ACOSS on behalf of the national COSS network:**

- Australian Council of Social Service (ACOSS)
- ACT Council of Social Service (ACTCOSS)
- Council of Social Service of NSW (NCOSS)
- Northern Territory Council of Social Service (NTCOSS)
- South Australian Council of Social Service (SACOSS)
- Queensland Council of Social Service (QCOSS)
- Tasmanian Council of Social Service (TasCOSS)
- Victorian Council of Social Service (VCOSS)
- Western Australia Council of Social Service (WACOSS)

The Councils of Social Service (COSSes) are the peak bodies representing the needs and interests of service providers and their clients in the non-profit social service sector in Australia. Our members comprise community service providers, professional associations and advocacy organisations.

We provide independent and informed policy development, advice, advocacy and representation about issues facing the community services sector; a voice for all people in Australia affected by poverty and inequality; and a key coordinating and leadership role for non-profit social services across the country.

We work with our members, clients and service users, the non-profit sector, governments, departments and other relevant agencies on current, emerging and ongoing social, systemic and operational issues.

### **Key positions**

The establishment of a national regulator for community services has long been championed by ACOSS. We welcomed the Government's commitment to this reform in 2011 and have worked closely with Government and our members towards its establishment.

Throughout this reform ACOSS has assessed the merits of the ACNC Bill on the basis of three principles:

- i. The ACNC's independence
- ii. The appropriateness of the ACNC legislation's scope; and
- iii. Proportionality, both in terms of the charitable sector and in comparison to other regulatory frameworks.

While there have been some improvements in a number of these areas since the Exposure Draft, the following are the key issues that, from our perspective, require amendment in the legislation before the ACNC opens its doors on 1 October. That said, we do **not** support recommendations that the start date for the ACNC be extended further (beyond 1 October).

## I. Role of the ACNC in reducing unnecessary red tape

In the current legislative drafting, the Objects of this Act set out at section 15-5 are as follows:

(1) The objects of this Act are:

- (a) to maintain, protect and enhance public trust and confidence in the Australian not-for-profit sector; and
- (b) to support and sustain a robust, vibrant, independent and innovative Australian not-for-profit sector.

(2) This Act achieves those objects by:

- (a) establishing a national regulatory framework for not-for-profit entities that reflects the unique structures, funding arrangements and goals of such entities; and
- (b) establishing the Commissioner of the Australian Charities and Not-for-profits Commission, who will:
  - (i) be responsible for registering entities as not-for-profit entities according to their type and subtypes; and
  - (ii) administer the national regulatory framework; and
  - (iii) assist registered entities in complying with and understanding this Act, by providing them with guidance and education.

We note the broad consensus across the sector, including in submissions to this Committee, calling for express acknowledgment of the reduction red tape within the Objects of this Bill. This has been a guiding intention of the Government's reform to establish the ACNC and is a key test of the legislation for the sector. Just as it is critical that the powers of the ACNC are exercised with that Object in scope, so too it is essential that the Bill state this Object as one of its primary drivers.

**We recommend an addition to the Objects set out under (1) above, to ensure that the reduction of red tape and establishment effective regulation be explicitly stated within the Objects of the Bill. This could occur for example through the insertion of a clause as follows:**

**(1) (c) to improve the effectiveness of regulation through streamlined and coordinated reporting functions.**

Another alternative is to expressly acknowledge improved efficiency and reduced business costs for not-for-profits as an Object of this legislation, as proposed by the Not-for-profit project at University of Melbourne law school in its submission on the original exposure draft:

[Section 1 of the ASIC Act](#) also takes a broad approach, including for example the objects of: maintain[ing], facilitat[ing] and improv[ing] the performance of the financial system and the entities within that system in the interests of commercial certainty, in order to reduce business costs and in order to ensure efficiency and development of the economy<sup>1</sup>.

## 2. Drafting of the legislation

The drafting in this legislation is very far from plain English and virtually inaccessible for organisations without legal expertise. While this is a persistent problem, including in the definitions included within the Bill, the clearest example of how confusing the terminology can be is the repeated use of the word 'entity' for different meanings, see for example chapter 8, clauses 205-2 (4) and also 205-15 through -30. Improvements would be made by the following amendments:

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<sup>1</sup> Submission to the Treasury, Exposure Draft, Australian Charities and Not-for-profit Commissions Bill 2012, 5 January 2012, by the Not-for-profit Project, University of Melbourne Law School, p. 15

- i. **Replace the word ‘entity’ with ‘governing body’ where it is used to apply to an organisation’s governing body (such as a Board).**
- ii. **Replace the word ‘entity’ with the term ‘director’ when referring to a member of a governing body. We agree with PilchConnect that the term ‘director’ should refer to a member of a management committee where that is the organisation’s governing body, as well as to the director of a company.**

One area where there has been marked improvement in the drafting of the legislation is in recognising that the sector currently holds public trust and confidence. To further the Bill’s recognition of this, we recommend:

- iii. **replacing ‘improve’ with ‘support’ in Section 10-5 (Guide to this Act), such that the clause reads as follows: The Commissioner of the ACNC will provide information to help the public understand the work of the not-for-profit sector and to support the transparency and accountability of the sector.**

### **3. Governance standards (section 45-10)**

In section 45-10, ‘Regulations establishing governance standards’, the following provisions are made:

- (1) The regulations may specify the governance standards.
- (2) Without limiting the scope of subsection (1), those standards may require a registered entity to:
  - (a) ensure that its governing rules provide for a specified matter; or
  - (b) act, or not act, in a specified manner; or
  - (c) establish and maintain processes for the purpose of ensuring specified matters.
- (3) Without limiting the scope of subsection (1), those standards may provide that specified requirements do not apply to specified kinds of registered entity.
- (4) Without limiting the scope of subsection (1), those standards may provide that different requirements apply to different kinds of registered entity.
- (5) The regulations must not require a registered entity to do a thing (including the things mentioned in subsection (2)) if the registered entity is a basic religious charity.

In the absence of the governance standards upon which this Bill is based, it is essential that the Bill establish a framework within which the sector can have confidence about the direction those standards will take, and the process with which they will be introduced. In particular, this framework should ensure the independence and diversity of the organisations within the charities and not-for-profit sector, as set out within section 15-5, part 1.b) of the Bill’s Objects.

Therefore we recommend an express statement in the Bill to this effect. Examples of where this has been done include Consumer Affairs Victoria, which allows for the establishment of a rule that deals with a particular issue, but leaves it up to the not-for-profit organisation how that is done.

**This could be achieved via the insertion of an additional point that reads:**

- (6) The regulations must preserve the independence of charities and not-for-profit organisations, so long as those decisions do not infringe the Commission’s capacity to fulfil its functions.**

#### 4. Enforcement powers

The Bill needs to contain more adequate safeguards in the use of enforcement powers. *The sector needs to know the basis for the scope of these powers and to be assured that these powers will be exercised appropriately.*

Given the extent and potentially severe implications of these powers in the Bill, a high threshold should be required for exercising them appropriately. A key example here is the test of 'likely' in relation to non-compliance or contravention, see for example chapter 2 at 35-10, where the power to revoke an organisation's status applies where a registered entity has contravened or is 'likely' to contravene the relevant provisions. Without knowing what non-compliance with or contravention of the Bill might look like, we are concerned by the lack of a strong threshold consistently applied to the test of 'likely'. It is essential that the legislative framework is clear about the thresholds for compliance and the consequences of non-compliance. The capacity for decisions to be made on the basis of reasonable grounds to believe something has occurred should be sufficient.

**We recommend the removal of the test of 'likely' in the exercise of enforcement powers throughout the Bill.**

#### 5. Proportionality and appropriateness of sanctions

ACOSS recognises the need to promote a culture of compliance with obligations set out in the national regulator and supports the need for appropriate consequences to flow from non-compliance. However, any consequences need to be proportionate to the act of non-compliance. We are concerned that such balance is not evident in the Bill as it currently stands. While we acknowledge improvements in the drafting of the current Bill, these improvements have focused only on the criminal penalties already in the Bill. The administrative penalties have remained unaltered from previous drafts. Consequently, **the administrative penalties are now skewed in the Bill by carrying a disproportionately greater severity than the criminal penalties.** The penalties proposed are neither reasonable nor proportionate; nor do we believe that the administrative processes they will require are workable. In their current form, the Bill significantly increases penalties imposed for what are often fairly trivial or unintended offences.

- i. **We recommend reducing the degree of the administrative penalties contained within the Bill to reflect proportionality both with other regulatory regimes and with the nature the activities undertaken by this sector and reflecting better the low level of risk presented by the vast majority of these activities.**

Moreover, if the ACNC makes an adverse decision against a charity that results in the charity losing its tax concessions, the Bill requires those charity concessions to be suspended immediately without discretion. This means that, in the event of a successful appeal, an organisation will have suffered lost benefits even if they were unwarranted. This could be quite significant, especially where charities have difficulties operating without their tax concessions. It also raises significant problems in terms of workability, because the penalties have to be meted out at the time of a decision, which will bring significant anxiety and uncertainty for charities and NFP and will further require remittance in face of a successful appeal.

- ii. **We recommend that the Bill contain a provision that a decision of the ACNC may be stayed pending the outcome of a review or appeal.**
- iii. In keeping with the principles of administrative law providing the standards for these provisions, we further recommend: **that the provisions in the current Bill that modify normal provisions of administrative law be removed, leaving a discretion to the AAT or Court to decide whether to stay processes or not.**

Finally, we endorse the recommendation of PilchConnect, that the ACNC be given a level of discretion when application administrative penalties consistent with the Bill's stated object of assisting registered entities in complying with and understanding obligations.<sup>2</sup>

## 6. Procedural fairness

*The Bill contains no requirement on the ACNC to inform or hear an organisation before it makes an adverse decision against that organisation. While common law obligations apply in these circumstances, this sets the ACNC Bill apart from other regulatory frameworks which specifically set out the requirements in relation to notice and procedural fairness (who can be heard and how).<sup>3</sup> This gives no certainty as to what processes will be followed now and into the future and undermines the sector's trust and confidence in the ACNC's processes.*

We refer the Committee to the extensive submissions from the University of Melbourne Not-for-profit Project on this point. These submissions set out the need of express provisions, the comparators in other areas of regulatory law from which such expectations are set, and proposals about how to address the absence of procedural fairness within the current Bill. While the submissions are far more detailed, the following list from the January 2012 submission provides an indication of our recommended directions on this point.

1. The notice requirements should be amplified to require all relevant details for compliance, reasons for the decisions, manner and time of compliance, consequences of non-compliance and the entitlement to review. This should apply to refusals of registration, the issue of warning notices or directions, the suspension or removal of responsible individuals, and the revocation of registration.
2. The Bill should require that there is an opportunity to be heard prior to the decision being made in respect of: refusals of registration, the issue of warning notices or directions, the suspension or removal of responsible individuals, and the revocation of registration. The time for representations should be at least 14 days, unless there are reasons that justify an urgent decision.
3. The issue of directions should first require notice advising of the intention to issue, with an opportunity to take remedial action.
4. The opportunity to be heard in respect of the suspension or removal of responsible individuals should be more extensive and should involve a court.
5. There should be a requirement of notice and an opportunity to be heard in relation to all grounds for revoking registration, not merely on the basis of ineligibility. The clause enabling the Commissioner to revoke without issuing a show cause notice should be removed. The opportunity to respond should be extended to at least 14 days.
6. The Bill should include an express power to publish an investigation report, together with a power to direct non-publication of part of a report, and a power to distribute the report to law enforcement agencies and other stakeholders where appropriate. The clause should require the report to set out evidence or other material upon which the findings are based, a requirement to give upon request (and a discretion to give upon its own motion) a copy of the report to those

<sup>22</sup> 'Submission to the House standing Committee on economics, Enquiry into the Australian Charities and Not-for-profits Commission Exposure Draft Bills', PilchConnect, 20 July 2012, at p. 6.

<sup>3</sup> See for example submissions on ACNC by the University of Melbourne Not-for-profit Project.

whose conduct is examined in the report, and a requirement to include any responses to adverse findings, or a fair summary of them.

7. Consideration should be given to enlarging the period of 60 days before a decision is determined during the transitional period, or providing some limited flexibility for the ACNC to extend the period.
8. The power to issue warning notices should extend to circumstances in which the entity may no longer be entitled to registration.
9. The requirement to review directions after 12 months should be replaced by a shorter period of validity followed by a power to extend upon application to a court.
10. The power to accept enforceable undertakings should be limited, either by legislation or in guidelines, to circumstances in which such undertakings bear a clear or direct relationship with the alleged breach; are proportionate to the breach; do not require payment other than in compensation for those affected or to recover costs otherwise recoverable at law; and stipulate a time period for compliance.<sup>4</sup>

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<sup>4</sup> *Ibid* at p. 32.



## **Appendix I: Committee's request for further evidence of the benefits that would flow in relation to the reduction of red tape via the ACNC.**

*The following is taken from ACOSS' submission to the study into the contribution of the not-for-profit sector, submitted in June 2009.*

### **Streamline and Modernise Regulation**

As stated by The National Roundtable of Nonprofit Organisations in 2004,

the community values the contribution of the sector and expects State, Territory and Commonwealth governments to help non profits to flourish through appropriate regulation and concessional treatment. This is reflected in current legislation and regulations, which aim to assist non profit organisations by reducing costs, providing protection for members and directors, and by increasing the confidence of the public to make donations.

The Not for Profit sector in Australia operates in a highly complex regulatory environment. The National Roundtable of Nonprofit Organisations has identified that

there are more than twenty different ways to incorporate a non profit organisation in Australia; the rules covering fundraising differ across each State and Territory; and the definition of 'charity' urgently needs to be reformed. Perhaps the most complex area, however, relates to the taxation rules for non-profit organisations".

ACOSS reiterates the following from the submission to the Senate Inquiry in 2008:

The lack of simple, consistent and equitable regulation has a direct, negative impact on the sector, resulting in higher compliance costs for no greater protection for stakeholders, including volunteers, donors and the broader community. As a consequence, resources that would have been best used to serve the community, including assistance provided to low income and disadvantaged people, are drawn into unnecessary administration and compliance costs.

Existing poorly coordinated regulation constrains the development of the sector, particularly smaller organisations, and fails to acknowledge the high standards of professionalism in the sector. The lack of clear and simple regulation also increases the risk that members of non profit organisations may inadvertently break the law.

Reform is urgently needed. As successive governments have committed to reducing the regulatory burden on business, so it needs to give equal priority to working with the Non Profit Sector to reform its operating environment.

A substantial reform project is needed to address those issues raised above: the definition of charity; the overhaul of regulation related to incorporation and reporting; and the taxation and concessional treatment of non profit organisations.

The 2008 Senate Inquiry followed a significant inquiry conducted into the Definitions of Charity which reported in 2001. ACOSS and many of its members made extensive written and verbal contributions to this Inquiry and there was broad support for its recommendations. ACOSS particularly supports the recommended clarification around advocacy and charity which stated that

advocating on behalf of those the charity seeks to assist, or lobbying for changes in law and policy that have direct effects on the charity's dominant purpose, are consistent with furthering a charity's dominant purpose. We therefore recommend that such purposes should not deny charitable status provided they do not promote a political party or a candidate for political office .

Since that time the need for streamlined regulation has become even more urgent and this is reiterated in the National Roundtable of Nonprofit Organisations submission to this Inquiry. Work undertaken as part of

the Victorian Government's initiative Strengthening Our Community Organisations included a study by Allens Consulting Group that estimated approximately \$12 million could be saved in Victoria each year by the reforms to incorporation, fundraising and regulatory support from the State Government alone. At a recent consultation for this submission, a member raised the prospect that excessive cost and complexity could be inhibiting the establishment of new Not for Profit organisations.

The following example from one of ACOSS' members, The Community Housing Federation of Australia, demonstrates the sometimes perverse outcomes arising from outdated definitions of charities:

Since the introduction of the GST and the requirement that the ATO endorse organisations' charitable status, most community housing providers were endorsed based on their stated purpose of the alleviation of poverty. The ATO has accepted providers' use of existing low income benchmarks to articulate their compliance with the test for alleviation of poverty, i.e. providing accommodation for low income people is an allowable charitable activity. More recently, however, the ATO had taken a harder-line approach to what constitutes the relief of poverty. Rather than being primarily concerned with an organisation's purpose, the ATO has instead begun to focus more on individual activities that are conducted by organisations.

A critical issue threatening the ongoing participation of the community housing sector in schemes such as the National Rental Affordability Scheme and other affordable housing programs, (including developing, owning, or managing stock funded through the Nation Building and Jobs Plan or the National Affordable Housing Agreement, stock transferred from State Housing Authorities, or being involved in more entrepreneurial activities), is the risk that they will lose their charitable tax status if these activities are deemed by the ATO to be inconsistent with the relief of poverty. This is the head of charity under which most community housing organisations derive their charitable status from. Central to this issue is the approach that the ATO takes in defining what constitutes incidental activity. At this stage, this is not clear.

The Community Housing Federation of Australia, in its submission to the Henry Tax Review, has outlined a solution to these problems. This would require deeming the not-for-profit provision of affordable housing as a charitable purpose under tax law. There is already a precedent set for this in the area of childcare, and such a legislative solution is necessary to provide the assurance to the community housing sector to continue its active and expanding role in the provision of affordable rental accommodation for low and moderate income households in Australia.

### **Recommendations:**

- Appointing an Independent Commission for the Not for Profit Sector – this would include a national regulatory role and a common chart of accounts, national fundraising legislation, reduction in red tape and capacity building for the sector. It could also have a role as a conduit between governments and the broader Not for Profit Sector but not at the expense of specific departmental relationships). It should cover the entire Not for Profit Sector but with different levels of reporting depending on size of turnover, staff etc. This would allow for organisations to remain in the same system as they evolve. The Commission must be located independently from the Australian Taxation Office, as was recommended by the 2001 Definitions of Charity Inquiry.

ACOSS submits the following caveat on the Senate Inquiry Recommendations:

- Reform is necessary to streamline regulation and implement the definitions recommended by the 2001 Inquiry into the Definitions of Charity, including simple clear points on advocacy before undertaking any review of taxation. ACOSS believes the overarching framework needs to be set before taxation matters are considered. Given the complexity and importance of taxation treatment for this sector, any future taxation review would need to include considerable expertise from specialist lawyers and Not for Profit Sector experts.