



Submission to Treasury consultation:

Exposure Draft – Australian Charities and Not-for-  
profits Commission Bill 2012

January 2012

Aged and Community Services Australia (ACSA) is the national peak body for aged and community care providers, representing over 1,100 faith based, charitable and community-based organisations that provide residential and community care services, housing and supported accommodation to almost 1 million older people, younger people with a disability, and their carers.

This submission should be read in conjunction with ACSA's separate submission to Treasury on the *Review of not-for-profit governance arrangements*.

### **Introductory comments**

While ACSA supports the establishment of a single national regulator for the not-for-profit (NFP) sector, we do not believe that some of the roles and powers that *the Australian Charities and Not-for-profits Commission Bill 2012* (the ACNC Bill) would ascribe to the proposed new Commission are necessary.

ACSA strongly supports the government's underlying intention in its announced package of NFP reforms to 'reduce red tape' and 'make it easier for the NFP sector to deliver ... services for the public benefit'. As acknowledged in the consultation paper on proposed governance arrangements, 'Most NFP entities will already have adequate governance procedures in place'. Moreover, there is no evidence presented in any of the government's public statements or elsewhere that there are any fundamental concerns with the performance or accountability of most of the NFP sector.

The main points listed under the *Summary of regulation impact* in the *Explanatory Materials* relating to the Bill are that:

- regulatory overlap, red tape and compliance costs for the (NFP) sector would be reduced;
- a new layer of bureaucracy needs to be avoided; and
- the regulatory framework for the NFP sector should be robust and streamlined; transparency, governance and accountability are important; and public information should be 'commensurate to the level of support provided to the sector by the public.'

ACSA has also understood that the government's announced program of reforms was aimed at addressing the 'duplicative, burdensome and unclear' arrangements applying to the NFP sector at present, while at the same time dealing with the few entities that might need improvement in governance and accountability.

It is disappointing therefore, that the government would believe it necessary to introduce new legislative powers and provisions, such as some of those contemplated in the ACNC Bill, to apply across all NFP organisations. The Bill focuses on regulatory and punitive functions and provides little in terms of the objects of promoting good governance.

As reflected by the views expressed in our submission on proposed governance arrangements (and elsewhere in various past reviews of the NFP sector), ACSA is of the opinion that to achieve the government's expressed aims for the NFP sector, the role of the ACNC should be:

- to serve as the single national regulator and sole registering body for NFPs;
- harmonising and simplifying the existing disparate legislative frameworks operating across the Commonwealth, States and Territories (if not eventually, establishing a single national legal framework applying across Australia);
- to act as the point of contact with government on matters of regulation of the sector;
- education and support of the NFP sector and encouragement of best practice; and
- providing the public with a readily accessible and searchable information portal.

The ACNC Bill stops short of delivering the above outcomes and instead, introduces new and ambiguous provisions which, in some cases, we consider unreasonable and unnecessary.

Furthermore, the timing of the release of the Exposure Draft and Explanatory Materials in December 2011 with a January 27, 2012 deadline for submissions was such that ACSA was unable to consult its members to any reasonable degree, or to seek any independent external advice. ACSA therefore wishes to acknowledge the assistance of Catholic Health Australia (CHA) in helping our understanding of the ACNC Bill.

Given the importance and complexity of the issues, ACSA agrees with CHA and sees no reason why the ACNC Bill need become law by 1 July 2012, particularly in view of the sector's overall high public standing and history of achievement.

ACSA recommends there be further opportunity for consultation on the Exposure Draft beyond January. In regard to this part of the process, ACSA's comments below are framed in terms of principles rather than attempting to present a section by section critique of the Bill.

### **Background to Exposure Draft**

ACSA prefers that the date of commencement of the Bill to become law be deferred to allow more detailed consultation with the NFP sector, including further consideration of the objects and functions. It is difficult enough for agencies such as ACSA to fully comprehend and comment on the implications of proposed new legislation, let alone the very many small sporting, cultural and similar organisations around the country.

ACSA has concerns over the potential implications of undefined terms or concepts such as 'public trust and confidence' and 'good governance, accountability and transparency' in relation to the proposed investigatory and enforcement powers of the ACNC.

ACSA's members are already highly regulated and scrutinised by virtue of receiving government funding for the provision of aged care, housing and disability services. There already exist well-established licensing, accreditation, monitoring and complaints systems governing such services. It is not clear therefore how the ACNC Bill might interact with such other legislative requirements.

However, we are pleased by the specific inclusion of an object of reducing regulatory duplication and simplifying interactions with government. In this context, we refer to the point in our introductory comments regarding the need to harmonise and simplify existing legislative frameworks. Consideration needs to be given to just how the performance of the Commission in this regard is to be measured and reported on.

Section 2-10(d) confers a function on the Commission of 'providing a point of contact with government ... to minimise regulatory duplication and simplify interactions with governments'. However, there are no supporting powers for the Commission to give effect to such a function. Similarly, there are no powers for the Commission to ensure the cooperation of other Australian government authorities (s2-10(h)). ACSA believes the Commission should have the necessary powers to fulfil the roles recommended in the above dot points.

As to funding sources for the NFP sector (Section 3-5), it is also important perhaps to acknowledge that ACSA members receive fees and charges from residents and clients in the form of means-tested fees for services and accommodation payments (bonds and charges). Revenue is also generated through various investment strategies that are significant in enabling growth and continuous improvement in delivering services to the community.

## Registration

Section 5-10(1A)(d) requires an entity not to previously have been a registered entity. Presumably the provision is referring to previous registration under the ACNC legislation as the government has stated publicly that existing NFPs will be eligible for automatic registration with the ACNC. The Bill should make this very clear.

The list of entities at Section 5-10 of the Bill that are entitled to be registered includes those described as being of a type for the 'Advancement of social and community welfare'. The list of charitable purposes in the *Report of the Charities Definition Inquiry 2001* also included 'advancement of social and community welfare' but went on to recommend that the term be taken to include the 'care, support and protection of the aged including the provision of residential and non-residential aged care'. ACSA assumes the ACNC Bill is intended to include, as eligible for registration, aged care (and retirement housing and disability services) but we would prefer to see these specifically listed, as is the case with health and education. Aged care could qualify under charitable/PBI, health and social and community welfare.

As referred to above, without definition or further explanation, the concepts of 'public trust and confidence' and of 'good governance ...' could prove problematic for the sector in cases involving, for example, a decision by the ACNC to invoke its powers of investigation and monitoring, which could lead to de-registration. While the ACNC's functions and powers have already been drafted, the review and appeal rights of NFP entities have yet to be articulated. We are therefore not in a position to gauge the adequacy of an entity's rights under the Bill.

As to revoking registration, Section 10-55 introduces another new concept, that of 'cause harm to, or jeopardise the public trust and confidence ...'. Again, the terms lack definition and could therefore give rise to legal challenges.

In a more general sense, there appears to be no explanation in the ACNC Bill or in the Explanatory Materials as to the relationship between the Bill and other relevant legislation. Specifically, there needs to be clarity about the application of the *Corporations Act 2001* and registration with the Australian Securities and Investment Commission (ASIC); and the various State and Territory associations' incorporation legislation.

## Reporting and auditing

ACSA supports the 'report-once use-often' approach outlined in the Explanatory Materials. The requirements seem reasonable and perhaps provide a minimum standard for NFPs that currently have limited reporting requirements. For some ACSA members the reporting formats might involve a little more detail around the breakdown of categories of assets.

## Regulatory powers of the ACNC

The proposed ACNC Register would provide an important source of publicly accessible information but ACSA has concerns in relation to the following provisions of s110-10(1):

- publishing the qualifications of each responsible individual; and
- detailing each warning issued to each registered entity.

With regard to an individual's qualifications, ACSA has argued in its submission on NFP governance arrangements that responsible individuals should not be required to have particular qualifications. Our position is that in small, relatively uncomplicated organisations for example, responsible

individuals may be perfectly capable of carrying out their duties in a responsible manner and unlikely to need particular qualifications to do so. Each organisation should be responsible for determining what experience and skills are required by each responsible individual. In certain circumstances they may require particular qualifications but this should be a matter for the organisation

As to the matter of warnings, the Register would need to include details of remedies applied by the entity in response to each warning. Once a matter has been remedied the original warning should be removed from the Register after a reasonable period of time.

ACSA does not support the intention, stated on p.43 of the Explanatory Materials, that the Register will include 'information on the registered entities' future activities and plans', at least not as it is currently framed. The information would need to be limited to very broad statements of intent, otherwise there would be the risk of jeopardising an organisation's legitimate business plans. Charities and other NFPs must conduct their businesses efficiently in order to have funds to meet the objects of the charity. Competition for funds is a major issue. The Productivity Commission has recently made wide-ranging recommendations to government for reform of the aged care sector in its report, *Caring for older Australians* (June 2011). Several of the recommendations are directly intended to introduce greater competition and a more market-based approach in the aged care sector.

Issues of market competition, pricing, growth and intellectual property will therefore assume even greater importance in the future. This section of the Bill warrants very careful re-consideration.

### **Investigation powers and Warnings**

The provisions of these sections fly in the face of any objective to harmonise and simplify regulation, reduce red tape, promote good governance and make it easier for the NFP sector to deliver services for the public benefit. The provisions are far reaching and beg the question as to why the government would contemplate having such powers.

Furthermore, it's not clear just how the proposed powers of investigation and warnings will relate to, for example, the *Aged Care Act 1997* and associated Accreditation and Compliance provisions, including the *Investigation Principles*.

In a case where an investigation leads to a warning but the entity subsequently provides evidence that a suspected breach of relevant law or misconduct or mismanagement did not occur, the warning should be officially withdrawn and removed from the ACNC Register and any other public record of the warning. The process would therefore need to include a reasonable period of time for an entity to respond to the results of an investigation and any warnings, both in terms of the facts and what remedies it might apply.

### **Power to give direction**

ACSA opposes the breadth of powers of direction that the Bill provides. No case for their inclusion has been advanced, no definitions of terms are provided and they are unprecedented in Australian law. As yet there are also no articulated rights of appeal. The powers could be used by the Commission to impose or alter an entity's objects unduly and potentially jeopardise its financial position. A particularly broad power is the ability to direct an entity to do 'anything else as to the way in which the affairs of the registered entity are to be conducted or not conducted'.

The powers of direction need re-drafting in light of existing laws governing the conduct of entities.

### **The ACNC, Commissioner and the Advisory Board**

ACSA will be making a separate submission on the *ACNC: Implementation design Discussion Paper*, which is due by 27 February 2012. However, the proposed power under s161-10 for the Commissioner to 'do all things necessary or convenient to be done ...' does offer the very positive potential for the Commissioner to promote and advocate on behalf of the NFP sector with all governments.

### **Secrecy and whistleblower protection; and Forms and regulations**

Subject to the final provisions of the Bill the proposed protections and administrative arrangements seem reasonable.

### **SUMMARY**

ACSA supports the establishment of a single national regulator for the not-for-profit (NFP) sector, provided it would result in the achievement of the stated aims of reduced red tape and making it easier for the NFP sector to deliver services for the public benefit.

In its current form, the ACNC Bill falls well short of these aims and indeed, introduces new, ambiguous and some unnecessary provisions for the aged care sector.

The Bill misses the opportunity to present to Parliament proposed law that would achieve all of the following:

- a single national regulator and sole registering body for NFPs;
- harmonisation and simplification of the existing disparate legislative frameworks operating across the Commonwealth, States and Territories (if not eventually, establishing a single national legal framework applying across Australia);
- establishing a single point of contact with government on matters of regulation of the sector;
- education and support of the NFP sector and encouragement of best practice; and
- providing the public with a meaningful information portal.

ACSA recommends that the Bill not be presented to Parliament in its present form and that Treasury conducts more extensive consultations with the aim of better reflecting the government's stated intentions for reform in the NFP sector.