Australian Catholic Bishops Conference

Response to Exposure Draft

Australian Charities and Not-for-profits Commission Bill 2012

January 2012

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EXECUTIVE SUMMARY

The Australian Catholic Bishops Conference (ACBC) is supportive of proper accountability to government and donors.

The short time available for this submission has precluded a more thorough study of the impact of public reporting, especially of financial information and further representations may be made later.

The ACBC urges the Government to reconsider all aspects of the Australian Charities and Not-for-profits Commission (ACNC) Bill by immediately announcing a delay in implementation until 1 July 2013 to enable further detailed consultation with the sector and with the States and Territories so that there is a true commitment to national and uniform regulation.

Excessive regulation

The proposed ACNC reaches far beyond the original policy intention, which was to establish a single regulatory body to streamline the interface between the charitable sector and government, in order to reduce "red tape". The excessive regulation proposed by the ACNC Bill risks jeopardising acceptance of the ACNC by the sector.

An underlying theme of the ACNC Bill seems to be that many (if not most) charities are not compliant with the law, and hence, interventionist and prescriptive new laws are required to enforce compliance. This is plainly wrong.

There is no regulatory impact statement that identifies where there is currently a lack of public trust and confidence. There is no indication how the provisions of the Exposure Draft (ED) will affect or improve public trust and confidence. The tenor of the ED is that there is a problem of lack of trust and confidence. The ACBC challenges that assumption.

If there are cases of non-compliance by charitable entities, no evidence is presented in the ED and Explanatory Memorandum (EM) of the problems (actual or perceived) and how the ACNC legislation would address them.

The emphasis in the legislative drafting to date is on regulation, compliance and enforcement rather than support and capacity building for the diverse entities in the not-for-profit (NFP) sector.

Harmonisation

The ACNC legislation should be much more restricted and targeted in its objectives. There should be a concerted effort by government to identify areas of duplication and unnecessary regulation. The current exposure draft does not remove anything that currently exists and in many areas adds a whole new layer of red tape.

The ACBC is concerned that there has not yet been any commitment by state and territory governments to co-operate with this process in order to achieve harmonisation of the myriad regulations that currently exist and impact on the NFP sector.

Reporting Burden

The proposed levels of financial and other reporting impose a disproportionate burden on NFPs in general and many Catholic Church bodies in particular, the additional costs of which will substantially reduce capacity for service delivery.

The ACBC contends that reporting to the ACNC without including certain information on a web portal will be sufficient to achieve the government's aims. Alternative models should be explored. The values of accountability and transparency that the ACNC is seeking to promote might equally be achieved if the ACNC has access to relevant information without it being published on the internet.

It may be preferable for certain information to be required to be displayed on an entity's own website. This would enable those genuinely interested in the entity to have access to that information while avoiding the unintentional generation of comparative tables across entities.

ACNC Powers

The **EM p 21** distinguishes cases where the entity "is not engaged in illegal activities or contravenes this Act but the entity's actions have put at risk the public's trust and confidence in the sector". While the EM purports to refer to a fact - "have put at risk", the ED refers to a possibility -"may cause". It is simply impossible to envisage how any actions of one entity can undermine public trust and confidence in the NFP sector.

It is untenable that the Commissioner should have power to act against an entity that has acted not illegally, or is in breach of any provision of the Act, based on such vague criteria. Deregistration should only follow where there is some objective failure in compliance.

The reference to "any other information relating to each registered entity that the Commissioner considers reasonably necessary for the purposes of administering this Act" in **ED 100-10(1)(q)** is far too broad a power and will generate uncertainty for years to come among the sector as to how broadly the Commissioner will interpret this power.

The investigative powers in **ED 120-100(b)(i)** appear to overlap with what is otherwise the proper role of the police. This entire section needs to be recast to limit the ACNC investigative role to issues relating to the registration of entities and compliance with the ACNC legislation.

The inspection powers of ACNC officers ED 120-415 are too widely cast and such powers should be restricted to material that is relevant to the investigation and the investigation should be limited to breaches of the ACNC legislation.

There needs to be careful consideration of the nature and size of penalties set out in a number of places in the Bill. In our view they often appear harsh and not in step with the spirit of the initial Government policy underpinning the Bill or an appropriate presumption that most entities in the sector owe their existence to someone's vision of making a contribution to the Australian community.

The proposed penalty under ED 120-20 of 30 penalty points for failure to comply would be the highest in the country when compared to comparable legislation in State and Territory jurisdictions.

Specific Comments

The distinction between a Deductible Gift Recipient (DGR) and a tax concession charity is confused where there are claims (**EM 2.9 p 13**) that a tax concession involves using public monies. There are many examples in the community of revenue that is not taxed and there is no suggestion in those cases that the recipients of such revenue (bequests, gifts, gambling winnings) are using public monies.

The definition of 'not-for-profit entity' is fundamentally flawed and should allow for distributions to the entities owner/members where they are all themselves not-for-profit entities. This is consistent with the previous policy intent, as reflected in the former Tax Ruling (TR) 2005/21 TR 2011/4 and TR2005/22 including the addendum. The ACBC suggests that the provisions of paragraphs 47 and 48 of TR 2011/4 should inform this definition of 'not-for-profit entity'.

The ACBC notes that one category of NFP that is tax exempt, religious institution, is omitted from the table in **ED 5-10(3)**. This should be expressly included unless there is a clear statement in the new definition that all religious institutions will meet the definition of charity "for the advancement of religion".

Entities should be able to choose their own accounting period**.** There is no need for all bodies to have the same accounting period and the ACNC should make any adjustment rather than expect NFPs to modify their existing arrangements.

The legislation should explicitly exclude members of advisory bodies from the definition of 'responsible individual' in the same way that it proposes to exclude professional advisers.

Organisations should have the option of nominating (and then being bound by) a person or office as the 'responsible individual'.

Transition

There is little information on transitional provisions. The needs of transition may vary across the sector due to its diversity. The ACBC requests that the Commonwealth gives sufficient time for the sector to be consulted in full on transition issues.

INTRODUCTION

The Australian Catholic Bishops Conference (ACBC) is a permanent institution and the instrumentality used by the Australian Catholic Bishops to act nationally and address issues of national significance.

The role of the Catholic Church in Australia and its agencies (the Church) is well known. The Church contributes in a wide variety of ways across the spectrum of Australian society.

As an integral part of its core mission, the Church seeks to assist people experience the fullness of life. It is concerned with all that impacts on human wellbeing. It comprises many thousands of different entities which have different purposes, modes of governance, and are subject to varying types and levels of government regulation.

The ACBC notes that the Australian Charities and Not-for-profits Commission Bill 2012 (ACNC Bill) Exposure Draft (ED) and Explanatory Memorandum (EM) were issued on 9 December 2011 with replies due on 27 January 2012.

The ACBC is very willing to engage in the consultation process and is committed to assisting in the process for formulating good regulation for the not-for-profit (NFP) sector.

This submission will make some preliminary and general comments but the ACBC would want an opportunity to make further comments after receiving drafts of those provisions not currently included in the ED and in particular the proposed transitional arrangements, and during further stages of the consultation process.

This submission should also be read in conjunction with the submission the ACBC will make with respect to the Treasury Consultation Paper "Review of not-for-profit Governance Arrangements".

Two other Church Bodies, Catholic Health Australia (CHA) and Catholic Social Services Australia (CSSA) are making sector specific submissions highlighting particular issues that are relevant to their constituencies and the ACBC endorses their submissions.

After noting certain strategic issues the submission will then refer to specific parts of the ED.

STRATEGIC ISSUES

Before dealing with the detailed issues raised in the Exposure Draft the ACBC notes the following general principles and concerns:

Excessive regulation

The proposed ACNC reaches far beyond the original policy intention, which was to establish a single regulatory body to streamline the interface between the charitable sector and government, in order to reduce "red tape". The excessive regulation proposed by the ACNC Bill risks jeopardising acceptance of the ACNC by the sector.

The ACNC legislation should be much more restrictive and targeted in its objectives. There should be a concerted effort by government to identify areas of duplication and unnecessary regulation. The current exposure draft does not remove anything that currently exists and in many areas adds a whole new layer of red tape.

An underlying theme of the ACNC Bill seems to be that many (if not most) charities are not compliant with the law, and hence, interventionist and prescriptive new laws are required to enforce compliance. This is plainly wrong. Government has stated in the past (e.g. the National Compact) that it supports the charitable sector as a positive contributor to society, whose members are compliant with the law. If this is the case, then what is the necessity for interventionist and prescriptive regulation? If there are cases of non-compliance by charitable entities, no evidence is presented in the Exposure Draft and Explanatory Memorandum of the problems (actual or perceived) and how the ACNC legislation would address them.

The emphasis in the legislative drafting to date is on regulation, compliance and enforcement rather than support and capacity building for the diverse entities in the NFP sector. The ACBC proposes that the Object be redrafted to reflect the balance intended, and reflect a different order of priority throughout **ED Part 1-1** of the Bill. The ACBC is of the view that the main object for the legislation (**ED 2-5 (1)**) should be to support NFPs and enable them to flourish. Following this a further object is to promote the performance of NFPs in further developing public trust, good governance, transparency and accountability. Only then should the emphasis be on compliance and regulation.

Harmonisation

The aim of the ACNC legislation is to establish the ACNC to become a national regulator. There is a reference (EM p 7) to the 2010 Productivity Commission *Report on the Contribution of the Not-for-profit* Sector which recommended the establishment of a "one-stop shop". The ACNC is being presented as a response to that recommendation. The EM contains numerous references to this concept (pp. 7, 8, 27, 66, 71, 74).

The ACBC is concerned, however, that there has not yet been any commitment by state and territory governments to co-operate with this process in order to achieve harmonisation of the myriad regulations that currently exist and impact on the NFP sector. The ACBC

understands that the Council of Australian Governments (COAG) has had no discussion and nor did the Commonwealth engage in any negotiations on legislative harmonisation with State and Territory Governments before the 2011-12 Budget. While recognising the important work undertaken by COAG in relation to fund-raising and the adoption of a Standard Chart of Accounts, these developments are noted for their targeted focus in contrast to the broad nature of powers proposed for the ACNC in this Bill and the plethora of new obligations to be placed on charities and not-for-profits. Without such a commitment between Commonwealth, State and Territory Governments, there is a substantial risk that the introduction of the ACNC will only add to the already heavy, cumbersome and complex regulatory burden on NFP entities.

Without harmonisation, and if the ACNC Bill is enacted as currently drafted, the Catholic Church will have some of its entities regulated under state and territory law, some under the commonwealth law and most with a mix of multiple jurisdictions. This will only add to the regulatory burden and add to the already confused regulatory regime.

The ACBC is concerned that the proposed start date for the ACNC of 1 July 2012 is likely not to be achievable and proposes that there be a delay of one year to enable further discussions with the states, territories and the NFP sector so that there is a true commitment to national regulation and harmonisation of NFP regulation.

Constitutional Limits

Having regard to the number and diversity of unincorporated entities within the Catholic Church, there is also a lack of constitutional clarity about how the powers of the ACNC are to apply to those entities as well as those incorporated entities which are not constitutional corporations.

Reporting Burden

The proposed levels of financial and other reporting impose a disproportionate burden on NFPs in general and many Catholic Church bodies in particular, the additional costs of which will substantially reduce capacity for service delivery.

While para 1.4 of the EM notes the diversity of the NFP sector, this is not reflected sufficiently in the drafting of the bill. Consideration should be given, for instance, to potential for grouping of like entities, such as parishes of the Catholic Church, where governance and reporting protocols are intertwined. Such drafting would flow more logically if this diversity of the sector was reflected in the primary object of the bill and reporting obligations were modified accordingly.

As it stands the ED introduces new levels of reporting and other regulation that do not currently apply to some entities. In accordance with the Australian Government's National Compact with the NFP sector,[1] all the proposals for reform of the regulation of NFPs should aim to reduce administrative burden and promote clarity and certainty. The EM notes (p 7) that "a consistent theme" of various inquiries and reviews is that, "the regulation of the NFP sector should be significantly improved by establishing a national regulator and harmonising and simplifying regulatory and taxation arrangements". Contrary to the stated terms of the National Compact and this comment in the EM, there is little evidence that the ED has

[1] Australian Government, National Compact: Working Together, 2011. http://www.nationalcompact.gov.au/compact

removed any currently existing burden. There is no harmonisation and little simplification. Rather than promote clarity and certainty the ED has, as will be discussed in detail below, introduced new concepts and provisions that are unclear and far from certain both as to meaning and application.

One matter that is of particular significance to the ACBC and many Church entities is the question of public reporting, including of financial data. In the time available for a response on the ED it has not been possible to investigate the impact of this new requirement on various dioceses, parishes and religious orders. Some further representations will be made in the light of the internal consultation that is presently underway. The ED (100-20) acknowledges that there may be instances relating to commercial sensitivity and possible detriment involved in including information on the register. Initial indications from many Catholic Church entities are that this is a matter of real concern.

The proposed disclosure and public access regime do not serve any legitimate public purpose and risks causing more harm than good through encouraging ill-informed "league tables" which focus organisations on counter-productive objectives to satisfy artificial measures of performance.

Other than access to basic information about an entity, there is no existing rights of public access to detailed information (indeed, it contravenes strict secrecy obligations in the existing tax law) and no detail of the problems that such a measure is intended to overcome.

Need for Further Targeted Consultation

The EM (p 8) refers to the Final Report of the *Scoping Study for a National Not-for-profit Regulator* and that regulation should be proportional and tailored to address the specific needs and size of NFPs. As will be illustrated in the comments below, the size, diversity and scope of activity of the major religious organisations justifies tailoring regulation to their specific needs.

For the above reasons, the ACBC urges the Government to reconsider all aspects of the ACBC Bill by immediately announcing a delay in implementation until 1 July 2013 to enable further detailed consultation with the sector and with the States and Territories so that there is a true commitment to national and uniform regulation.

With so many issues to be resolved, many of which will remain topical after the establishment of the ACNC, the ACBC welcomes the proposed establishment of an Advisory Board. Moreover, the ACBC is willing to offer names of people of good reputation and strong experience in the NFP sector for the Government's consideration of appointments to the Advisory Board.

SPECIFIC COMMENTS ON THE EXPOSURE DRAFT AND EXPLANATORY MEMORANDUM

Objects and Functions

The ACBC has a fundamental concern with the overwhelming impression that the balance in the legislative drafting to date is on compliance and enforcement rather than support for the charities and not-for-profit sector in all its diversity. The ACBC requests that the Object be redrafted to reflect the balance intended, and to cascade this down throughout **ED 1-1** of the Bill. The ACBC is of the view that:

- the primary object for the Act (**ED 2-5.(1)**) should be to support and promote innovation and performance in the charities and not-for-profit sector in all its diversity; and
- in support of the above primary object, the secondary object (**ED 2-5(2)**) could include promotion of public trust, good governance, transparent reporting, accountability and so on.

While para 1.4 of the EM notes the diversity of the NFP sector, this is not reflected sufficiently in the drafting of the bill. Consideration should be given, for instance, to the potential for grouping of like entities, such as parishes of the Church, where governance and reporting protocols are intertwined. Such drafting would flow more logically if this diversity of the sector was reflected in the primary object of the bill. **ED 2-5** and **EM (p 5-6)** proposes that public trust and confidence is essential to the ongoing sustainability of the sector. A regulatory system is intended to promote good governance, accountability and transparency in order to underpin trust and confidence in the sector. The object of the Act is "promote public trust and confidence". There is no analysis in the regulatory impact statement that identifies where there is currently a lack of public trust and confidence. There is no indication how the provisions of the ED will affect or improve public trust and confidence. The tenor of the ED is that there is a problem of lack of trust and confidence. The ACBC challenges that assumption.

There is a reference in ED **2-5(1)** to entities that provide "public benefits" but that term is not defined in ED Chapter 8, does not reflect the diversity of the NFP sector and lacks clarity. Clarity is essential because the term is a reference point for a number of later provisions (see **ED 2-10(a), 4-1(1), 140-10(1) (d), 140-15(1) (a) (ii) and 143-125(1) and (6)**).

ED 2-5(2)(a)(i) refers to accountability to donors, to governments and the public generally. The ACBC acknowledges that entities that receive donations are certainly accountable to the donors. Likewise if entities receive government grants they are accountable to government. All human services agencies, and educational bodies, already account in minute detail to the federal and state government agencies that currently monitor or have some responsibility for their activities. Further reporting by these already heavily regulated entities to the ACNC are unlikely to achieve any additional improvement in trust or confidence but only add another layer of red tape.

The notion of accountability to the public generally is vague and undefined. Accountability presupposes some relationship. The relationship of a donor to a Deductible Gift Recipient (DGR) is different to the relationship of a parishioner who donates to a non-DGR parish. The taxpayer has an interest in the former due to the revenue implications. This does not apply to the latter where there is no broader public interest that is relevant. The distinction between a DGR and a tax concession charity is confused where there are claims (**EM 2.9 p 13**) that a tax concession involves using public monies. There are many examples in the community of revenue that is not taxed and there is no suggestion in those cases that the recipients of such revenue (bequests, gifts, gambling winnings) are using public monies.

The aim of promoting transparency by providing information to the public must be weighed against other values, of religious freedom, commercial confidentiality, privacy and risk of misuse of information. The ACBC contends that reporting to the ACNC without including certain information on a web portal will be sufficient to achieve these aims. Those who have a legitimate interest in accessing information from an NFP can make a direct approach and all NFP entities would be conscious of the consequences of failing to respond to reasonable requests.

Registration

ED 4 -1 provides for registration and deregistration of entities. As noted before, registration and regulatory oversight make more sense stated in the functions of the ACNC and should be separate from the objects of the Act. The criterion in **4-1(2)(b)** "where public trust and confidence in the entities is or may be undermined" is broad, lacks clarity and establishes no objective criteria for determining when the criterion will be applied. The concepts of public trust and confidence are unknown in the law, impossible to define and impossible to measure. Furthermore there is no basis for assessing and speculating on when it "may be" undermined. This provision is restated in **10-55(1)(e)** with slightly different but equally vague criteria: "may cause harm to, or jeopardise, the public trust and confidence". The **EM p 21** seeks to justify this by distinguishing cases where the entity "is not engaged in illegal activities or contravenes this Act but the entity's actions have put at risk the public's trust and confidence in the sector". While the EM purports to refer to a fact - "have put at risk", the ED refers to a possibility -"may cause".

What is at stake is not a loss of confidence in the entity, but a loss of confidence in the sector, that is all NFP entities. It is simply impossible to envisage how any actions of one entity can undermine public trust and confidence in the NFP sector. There is no definition of what behaviour would amount to "harm to, or jeopardise the public trust and confidence". There is no set of criteria by which the impact of behaviour, even if capable of definition, would be assessed and no indication of how it could be measured in any quantitative sense that would excuse the trivial and act on the serious. It is untenable that the Commissioner should have power to act against an entity that has acted not illegally, nor is in breach of any provision of the Act, based on such vague criteria.

Retaining such criteria will require the ACNC Commissioner to apply a test that is subjective, incapable of any objective assessment, and likely to be at risk of influence by orchestrated campaigns. Deregistration should only follow where there is some objective failure in compliance.

These comments also are relevant to **ED 143-125(1)** and the suspension of trustees.

5-10(1A)(a) refers to the entity being a not-for-profit entity. The ACBC notes that the already discredited proposed definition of "not-for-profit" which was presented in the exposure draft *Tax Laws Amendment (2011 Miscellaneous Measures) Bill (No. 1) 2011* is retained in the EM p 18. The definition is fundamentally flawed and should allow for distributions to the entities owner/members where they are all themselves not-for-profit entities. This is consistent with the previous policy intent, as reflected in the former TR 2005/21, TR 2011/4 and TR2005/22 including the addendum. The ACBC understands, from informal advice from Treasury officials, that this will be corrected.

Furthermore the policy intent of the proposed reform in relation to the taxation of unrelated business income itself envisages remittance of surpluses to the purposes of the entity that is carrying out the activity. The ED and EM will need to accommodate changes which may be required to reflect these developments (if they proceed).

The ACBC suggests that the provisions of paragraphs 47 and 48 of TR 2011/4[2] should inform this definition of 'not-for-profit entity'.

While this is about public benefit, the ruling overcomes the problem of a group of charities setting up a charitable institution to do something and then when it is finished and wound up the funds are remitted to them. There are many examples where the statutory trust corporation of a religious organisation is the sole member of a charitable institution that is separately incorporated (sometimes for management purposes, or accounting convenience, or to satisfy other governmental requirements, or to meet the test for a public benevolent institution (PBI) or DGR). Naturally the PBI and DGR rules would in every case prohibit a distribution back to an owner that did not meet these specific criteria. Those rules would override a general rule that a not-for-profit can distribute to its NFP member(s).

Not-for-profit should be seen as not for the profit of private individuals (personal or corporate) that are not themselves not-for-profits. In these circumstances, a distribution of surplus to the owners or members of the institution who were themselves not-for-profits would not result in a private benefit to them.

It is unfair that an entity that was previously a registered entity but that registration has been terminated is prevented from making an application at a later time for re-registration and is currently unable to do so as per ED 5-10(1A)(d).The ACBC notes that the table in **ED 5-10(3)** is to be redrafted in the light of consultation on the statutory definition of charity. The

[2] 47. An institution that carries out its activities for the private profit or benefit of its owners or members is not charitable as it cannot satisfy the public benefit requirement. This will be the case even if charitable consequences flow from the institution's activities, or the motivation of the institution has some social value.

48. However, where the objects of an institution are charitable, the fact that it can distribute surpluses to its owners or members in furtherance of those objects does not as a matter of course preclude the institution from satisfying the public benefit requirement. An institution that can distribute surpluses to its owners or members can still satisfy the public benefit requirement if:

- its sole purpose is charitable;
- its constituent documents allow it to distribute its surplus or profit to another entity or entities in order to effect that sole charitable purpose; and
- the owners or members who can receive distributions (in accordance with the terms of the constituent documents) are themselves charitable entities that have a similar charitable purpose to the institution itself.

ACBC notes that one category of NFP that is tax exempt, religious institution, is omitted from the table as presented. This should be expressly included unless there is a clear statement in the new definition that all religious institutions will meet the definition of charity "for the advancement of religion".

The ability of the Commissioner to revoke the registration of a registered entity in the circumstances set out in ED 10-55 (1) (c) and (e) sets too low a threshold. ED 10-55 (1) (c) should be amended to require consistent or significant failure. ED 10-55 (1) (e) because of its breadth and vagueness should be deleted.

Duties of Registered Entities

The ACBC notes the comments in the **EM (p 23 – 24)** relating to the different reporting regimes that currently operate. Some harmonisation of this between Commonwealth, State and Territory governments is necessary, but there is no indication that this is likely.

The ACBC is concerned at the proposal that some entities that do not currently prepare general financial reports may be required to do so. Within large religious organisations most entities that are not currently required to lodge general purpose reports with ASIC or a state regulator, prepare special purpose reports. The reason for this is twofold. In many instances the cost of preparing general purpose reports is unnecessarily prohibitive. In many cases it is simply impractical due, for example, to the need to redesign internal systems including computer configuration and associated training of staff, to produce accurate data to meet the regulator's requirements.

To test this proposition the ACBC asked the financial controller for the Archdiocese of Sydney to document the impact on that Archdiocese and on one of its parishes. It offers the following information to inform Treasury of the significant impact this change in reporting will involve:

> There are 143 discrete unincorporated geographical parishes and migrant communities in the Catholic Archdiocese of Sydney. A summary of Sydney Parishes by proposed categories and reporting requirements is included in Table 1 below. By way of example a typical parish in the Archdiocese in the year ended 30 June 2011 had revenue of $137,000 generated from parish planned giving ($55,000 in tax deductible donations to the parish ancillary fund and school building fund), $47,000 in other collections (i.e. non-tax deductible donations) and $35,000 in other income (including property rental income, fundraising events and interest received). This Parish directly employs two part-time employees to work in parish administration and pastoral activities. This parish owns a separately registered & endorsed tax concession charity, 50 bed residential aged care facility with an annual turnover of $2.808 million, which is regulated by the Department of Health & Ageing and this facility already prepares an annual audited special purpose financial report.
>
> Under the draft ACNC legislation this parish & its residential aged care facility would be considered to be a Large Registered Entity and be required to provide consolidated comprehensive general purpose financial report with a similar level of detail required of large publicly listed conglomerates such as BHP or Qantas. The parish would need to prepare a new separate & discrete consolidated financial report combining each of the financial data from the separately audited parish and

residential aged care facility financial reports. The cost of additional audit & accounting requirements to comply with the new legislative demands would be crippling to this parish and provide no incremental benefit to parishioners, government and the community. Some parishes would also require costly upgrading of internal systems, computer configuration and staff training. The additional costs incurred for parishes will limit funds for maintenance of churches and ancillary buildings and other parish needs and commitments.

Table 1 Sydney Parish Categories	No. of Parishes & Migrant Communities	Consolidate Aged Care & ILU	Reclassify Small Parishes with DGRs	Adjusted Total	Audit & Reporting Requirements
Small Registered Entity < $250k annual revenue & not a DGR	93	(3)	(84)	6	No annual audit required. Short form financial information required to be provided.
Medium Registered Entity up to $1m if a DGR or revenue between $250k - $1m	44	(2)	84	126	Annual audit review by registered company auditor. Audited financial report required to be lodged in accordance with accounting standards.
Large Registered Entity > $1m annual revenue	6	5	-	11	Full annual audit required by registered company auditor. Audited financial report required to be lodged in accordance with accounting standards Annual information statement required to be provided which describes the entities objectives, activities including fundraising, beneficiaries, staffing and volunteers.
Total Parishes & Migrant Communities	143	-	-	143	

Costs associated with adopting Australian accounting standards for general purpose financial reports

Catholic Church parishes, diocesan entities, religious order entities and other Catholic Church bodies prepare financial reports consistent with the requirements of

Canon Law and their constituent documents. In the main, the current financial reports are in a form that is not as complex and detailed as a "general purpose financial report" that would be required under the proposed ACNC Bill. Initial estimates of the cost of general purpose financial reports for a parish is $10,000 per parish per year. Even a review of second tier entities, as proposed, will involve significant cost especially given the fact that auditors will have legal obligations to the ACNC. The costs for the agencies of a Diocese will be much higher. Against this background, it is difficult to understand which additional benefits may accrue from the preparation of general purpose financial reports to justify the costs for each of the entities.

By way of example in the Catholic Archdiocese of Sydney there are approximately 30 diocesan agencies or entities. The Catholic Education Office, every one of the 147 Archdiocesan schools, CatholicCare and five Parish Residential Aged Care Facilities each prepare separate annual audited special purpose financial reports for various Federal Government Departments and stakeholders. Each of the 143 parishes in the Archdiocese prepares a separate annual special purpose financial report "Parish Financial Report", which is audited by a qualified accountant (most of whom are volunteers and are not registered company auditors).

Reporting to stakeholders regularly occurs and rigorous and detailed reporting to Government of our education, welfare and health activities is in place. The practice of reporting to donors and parishioners about how funds have been used is also well established across the Church. Anyone with a legitimate and reasonable interest is open to making a direct approach to a Church entity to request a better understanding of the entity's finances.

At the very least, the Government should consider a relaxation of the proposed financial reporting requirements if an entity is under an existing legal obligation to produce a financial report for a government body (e.g. to a government body in relation to education or health/aged care). In this case, the entity should be able to produce that same report to the ACNC to discharge any financial reporting obligation. This would be more consistent with the objective of simplifying compliance and easing the burden on NFPs.

Treasury's NFP Implementation design paper has three attachments relating to the reporting information that will be required of Tiers 1, 2 and 3 charities under the new Act/regulations. The reporting obligations for Tier 3 charities (annual or consolidated revenue over $1 million) cover detailed asset information such as the value of land, buildings, long-term investments, "all other" current and non-current assets and also information about surpluses.

If this reporting framework were to be applied to church buildings and schools serious problems would emerge. The most obvious is the methodology for valuation. While many churches and ancillary buildings are valued at replacement value for insurance purposes, heritage status often means that these valuations do not reflect the value of plausible alternative uses for such properties other than for worship and the practice of religious. The land on which they are located is usually zoned for church/school/special purposes but could have dramatically different valuations if zoning was otherwise. There are limited markets for churches and schools so valuation as a "going concern" is problematic. The Department of Education, Employment and Workplace Relation's (DEEWR's) Financial

Questionnaire and *My School* require all non-government schools to provide relevant financial information including income and expenditure. Throughout 2011, the Australian Curriculum, Assessment and Reporting Authority's (ACARA) Finance Data Working Group has been debating the issue of public reporting of schools assets (for government and non-government schools). Expert independent advice received by ACARA on asset reporting by schools states that school asset valuing and reporting is neither comparable nor feasible, or useful for any practical purposes at this present time.The ACBC suggests that this is a matter that requires much more detailed investigation.

ED 50-5(2) requires NFPs to "correctly record and explain its operations and acts" with failure to do so incurring a penalty of 30 penalty units. In many NFPs and charities in particular the raison d'etre is well understood among clients, responsible individuals and financial supporters and communicated through annual reports, newsletters and the like. **ED 50-5(2)** appears to task NFPs with a whole new set of records which will take time to generate and involve resources in keeping up-to-date. The non-specificity of this requirement is of concern, as indeed is the severity of the penalty proposed which would indicate a presumption that something is lacking. An alternative approach taking into account the spirit of the promotion and support for the sector would place the onus first on the ACNC to advise and educate the sector on data requirements for registration purposes and only, in a last resort, under malicious activity by a NFP, impose a penalty – and then one commensurate with the extent of any offence. The ACBC notes that penalties in the States of New South Wales and Victoria for some breaches of their acts regulating charities are set at 5 penalty points.

ED 55-5 (2) requires the entity to provide information by 31 October. The Commissioner has a discretionary power to vary the accounting period **55-90(1).** The **EM (p 26)** refers to the possibility of another accounting period if "the entity demonstrates a genuine need to adopt an alternative accounting period". This is unacceptable**.** Entities should be able to choose their own accounting period**.** There is no need for all bodies to have the same accounting period and ACNC should make any adjustment rather than expect NFPs to modify their existing arrangements. Most schools and church bodies adopt a calendar year for their financial accounts. They use the financial year for receipts for their DGR and PBI entities. This enables donors to have a receipt for their own tax purposes for the financial year but it allows the work of accounting and audit to be spread throughout the year, thereby maximising the efficiency of audit services. This provision should be amended to enable registered entities to nominate to the Commissioner their own financial year. Reports should be provided within, at the very minimum, six months of the nominated year end. The proposed period of four months is far too short.

ED 55-15(c) and **55-25** refers to "responsible individuals' declaration". This is in the plural and suggests that every responsible individual has to sign or authorise the signing. In many instances this will be impractical. The concept of a responsible individual in **ED 210-15** and what may be required of such a person requires further consideration. As the definition stands it is unworkable and fails to take into account the specific needs of complex religious organisations.

To avoid the unnecessary and wasteful multiplication of notifications of changes, consideration should be given to allowing a person holding a nominated office to be deemed a "responsible individual" rather than by individual name. For example, a Catholic parish is governed by a parish priest who would be a responsible individual. Perhaps

through illness or other circumstances a number of short term temporary appointments to that parish might be made before a permanent appointment. It would be unworkable each week perhaps to notify a new "responsible individual". The nomination of that office should be sufficient.

While it might be accurate to consider directors of companies as responsible individuals, to extend the definition to an individual "who participates in making decisions" will create problems for those entities that rely heavily on advisory bodies. It could be argued that the members of an advisory body will be responsible individuals since they "participate in making a decision". This is an addition to the first part of the definition which is a reference to the one who "makes a decision". Even though the actual decision is reserved to another individual or group, those who give advice will be included. A definition that is this wide is unworkable for the Catholic Church and most other religious organisations.

For example, in a Catholic parish the obvious responsible individual will be the parish priest. Church law requires him to have a finance council. The members assist him in making decisions. Yet the membership of unpaid volunteers will change from time to time and some may be absent from some meetings. How will it be determined who will be responsible individuals in that context? For many serious decisions there be might be a parish assembly. All who attend, "participate in making" the decision. Some religious organisations have forms of governance by way of a Synod or Assembly that may have several hundred members. Are they all to be regarded as responsible individuals? Some religious organisations only act when there is a consensus of members. The concept that every member is also a responsible individual is obviously not what is intended in the definition which should be amended accordingly.

Many charities, and especially those conducted by the major religious organisations, are privileged to have the volunteer services of professionals who give of their time and expertise to assist those responsible for governing the entity. If these volunteers are to be regarded as responsible individuals and thereby incur some form of potential legal liability this entails, it could be a significant deterrent to their participation and a great loss to the charity.

The legislation should explicitly exclude members of advisory bodies from the definition of responsible individual in the same way that it proposes to exclude professional advisers.

Organisations should have the option of nominating (and then being bound by) a person or office as the responsible individual.

ED 55-40 introduces new duties for auditors. The ACBC has preliminary advice from auditors who act for Catholic Church entities that these new obligations will certainly add to the cost of audits. There is now, in practice, an obligation to report on compliance with the Act as set out in **55-70(1)(a)(i).**

The auditor is required to be "independent" **ED 55-55**. Would the mere fact that an auditor was a member of the Catholic Church disqualify him or her from auditing entities of the Church?

Regulatory Powers

ED 100-10(3) proposes that there be a register available on the internet. The concept of a web-based portal requires some further consideration. While the internet is a very useful tool for cost-effective dissemination of information, it is also open to misuse and manipulation. The experience with other government sponsored web-based portals, such as *My School* has been mixed. Complex data, such as financial information, or statements about effectiveness of programmes or their outcomes, or "operational performance" **EM (p 39)** does not lend itself to simple tabulation. There is a serious risk that ill-informed "league tables" might be created that can be irreparably damaging to particular entities. There is no evidence that "a lack of a single source of information" reduces transparency of the sector, creates a barrier to public confidence, restricts informed choices about philanthropy or hinders appropriate levels of sector accountability and governance **EM (p 38).**

Further, there is no such right currently for the public to access this information. Indeed it is wholly at odds with the very strict confidentiality obligations that exist under the tax law. There is also no evidence of how the interests of the public would be served by this degree of open accessibility. As it stands, any person with a legitimate and reasonable interest in accessing information about an entity currently can make a direct request. How the entity responds to that request will be a matter that might influence the person's attitude to that entity and whether, for example, the person is willing to contribute to that entity. That is where the matter should stay.

The **EM (p 39**) suggests the section might be utilised to require entities to publish "future activities and plans." The reason for such a suggestion is unclear. It would be highly problematic to require entities to disclose their "future activities and plans" as proposed in **EM (p 39**). Commercial sensitivity needs to be understood. If a school authority flagged an intention to purchase land to open a new school in a particular area the effect on price would be serious. Likewise, asking not-for-profit health and aged care services to disclose future plans would result in market impacts.

Similarly, not-for-profit hospitals and aged care services may face greater regulation than for-profit hospitals and aged care operators if not-for-profit operators were required to publish details of their future activities and plans in circumstances where no such obligation was placed on for-profit providers. ACBC notes that ED s100-10 does not explicitly suggest future business plans would need to be published, but the suggestion in the Explanatory Memorandum that publication of plans be considered has not been sufficiently argued so as to warrant ED **100-10(1)(p) and (q)** giving that authority to the ACNC.

In relation to this section it is not clear what benefit is served by retaining on the proposed register the details of each formerly registered entity in perpetuity.

As mentioned above in the preliminary comments, while the ACBC is supportive of proper accountability to government and donors, the short time available for this submission has precluded a more thorough study of the impact of public reporting, especially of financial information and further representations may be made later.

The inclusion of items **(l)** and **(m)** in **ED 100-10(1)** are particularly problematic. Comments above have already highlighted the difficulty with the current definition of "responsible person".

There are many entities that do not have governing rules (for example, dioceses, parishes and other juridical bodies in the Catholic Church operate according to the Church's own internal law, *The Code of Canon Law*) so item **100-10(1)(m)** ought to be optional if it is necessary at all. A further problem arises from the publication of an entity's governing rules. There may be issues of intellectual property and confidentiality involved and it is hard to see a justification for every entity's rules (if they have them) being available on the internet. It should be sufficient to know that an organisation possesses such rules and can provide the ACNC with access to them if a regulatory issue warrants it.

It is unfair and unreasonable that the Register also contains the details of each warning issued by the Commissioner as provided in **ED 100-10(1) (n)**.

The reference to "any other information relating to each registered entity that the Commissioner considers reasonably necessary for the purposes of administering this Act" in **ED 100-10(1)(q)** is far too broad a power and will generate uncertainty for years to come among the sector as to how broadly the Commissioner will interpret this power.

The grounds on which the Commissioner may withhold information as set out in **ED 100-20** are too vague to be any value. It is theoretically possible that almost all information "is likely to mislead the public" if it is subsequently misrepresented, for example, in the media. There are no references to any prohibition of subsequent use of the material published on the internet nor are there any proposed sanctions on those who might misinterpret it.

The concept of "public interest in the Register" ED 100-20(2) requires further definition. There is a distinction between public interest and public curiosity. While it is important that the public has access to some information about NFPs, it is also important that NFPs have the ability to conduct their affairs in a way that protects their intellectual property and commercially sensitive decision making.

Alternative models should be explored. The values of accountability and transparency that the ACNC is seeking to promote might equally be achieved if the ACNC has access to relevant information without it being published on the internet.

It may be preferable for certain information to be required to be displayed on an entity's own website. This would enable those genuinely interested in the entity to have access to that information while avoiding the unintentional generation of comparative tables across entities.

This is such a radical, new and potentially intrusive imposition on NFPs, that more detailed and targeted public investigation is warranted.

The proposed investigative powers are extremely broad and appear to be taken from other jurisdictions and regulatory regimes.

There is no justification for the ACNC investigators to have jurisdiction with respect to "any Australian law...that concerns the affairs of a registered entity" **ED 120-100(b)(i).** This is a particular example of excessive regulation and over-reaching of the reforms. It is remarkable for an entity like the proposed ACNC to have such sweeping powers and it risks overlap with other agencies. The ACBC is concerned that the ACNC officials will not have the training or competence to investigate matters that are already highly regulated by other specialised government agencies, for example in the areas of health and aged care. The investigative

powers appear to overlap with what is otherwise the proper role of the police and this entire section needs to be recast to limit the ACNC's investigative role to issues relating to the registration of entities and compliance with the ACNC legislation. Competent authorities already exist with powers to investigate matters of fraud, taxation compliance or contraventions of other laws.

The inspection powers of ACNC officers **ED 120-415** are too widely cast. Phrases such as "any document" or "any activity" are far too broad and such powers should be restricted to material that is relevant to the investigation and the investigation should be limited to breaches of the ACNC legislation. These comments also apply to the provisions of **ED Subdivision 140-A.**

The proposed penalty under ED 120-20 of 30 penalty points for failure to comply would be the highest in the country when compared to comparable legislation in State and Territory jurisdictions. It is not obvious to what benchmark the Commonwealth is intending to harmonise here. In line with our suggestion of a primary object of promotion for and support of the sector, a lower rather than higher penalty would be more appropriate. The highest penalty among the eastern seaboard States is 5 penalty points and the Commonwealth could in the first instance investigate whether this level has proved appropriate in regulation by NSW and Victoria. We would also recommend the deletion of clause 120-20(2). More generally, there needs to be careful consideration of the nature and size of penalties set out in a number of places in the Bill. In our view they often appear harsh and not in step with the spirit of the initial Government policy underpinning the Bill or an appropriate presumption that most entities in the sector owe their existence to someone's vision of making a contribution to the Australian community.

As noted the general nature of powers vested in the ACNC will lead to uncertainty among NFPs as to the onus that will be placed on them. We have a number of concerns relating to Division 140 relating to the Commissioner's power to give directions:

- **ED 140-10(1)**: the circumstances in which the Commissioner has power to give a direction in **ED 140-10(1) (a) (ii)** and **(b)** are too broad and vague.

- The kind of direction contained in **ED 140-15(1) (a) (ii)** and **(f)** are similarly too broad.

- **ED 140-25** would allow the Commissioner 12 months to vary a direction following request by a NFP. In our view this is far too long and will generate uncertainty not only for the NFP, but also other NFPs concerned about a precedent. It would be far better for the legislation to put the onus on the ACNC to consult with individual NFPs and the sector more broadly before issuing any direction to minimise the incidence of variations sought – The time limit for the ACNC to vary the direction should be limited to 3 or 6 months so as to limit sector uncertainty.

- **ED 141-5** on enforceable undertakings is a clear example in the drafting of a tone of compliance and enforcement, more applicable in a taxation act than to an act establishing a regulatory body to promote and support the NFP sector. As discussed elsewhere in this submission, the penalties consistent with the current emphasis on enforcement in the Bill are too harsh and not in keeping with the spirit of the reform.

- **ED 143-125 (1)** and **(6)** provide the Commissioner with sweeping powers to suspend or remove trustees of a registered entity where "public trust or confidence" is jeopardised or harmed. This power is too strong – and should the primary object be rephrased in terms of sector promotion and support for the NFP sector, a lesser power might be more appropriate. It would normally occur that such trustees would be removed from office by forces within the NFP before the ACNC would need to intervene. Indeed, more conditions should be placed in the bill on the role of the ACNC to advise and support NFPs and only intervene directly as a last resort.

Interpretation

The ACBC fully supports the retention of the definition of "entity" **ED 210-5** which is consistent with the taxation law.

The tiers that are set out in **ED 210-10** are taken from the recently amended reporting requirements for companies limited by guarantee but some further consideration should be given to their suitability for unincorporated entities, especially the various discrete parts of the large religious organisations.

Reference is made to table 1 set out above which shows the impact of this definition on smaller parishes which almost all move into tier two because they conduct a DGR (a school building fund) even though it may be quite small and its nature presents little risk. As has already been suggested there should be some modification of these definitions to suit the particular circumstances of large complex religious organisations.

This submission has already dealt in some detail with the problems arising from the definition of "responsible individual" in **ED 210-15**. The definition seems to be attempting to import into this regime concepts from corporation's law relating to "shadow" or "de facto" directors, which may have relevance there but are quite inappropriate to how unincorporated entities operate. Within the hierarchical structure of some religious organisations, and the congregational structure of others, there will be any number of people who might be said to: "make"; "participate in making"; "have a capacity to affect"; "give instructions" or "express wishes". The simple solution in these cases is to allow such entities to nominate their own "responsible individual".

Additional Comments

As has often been noted, there have been many reviews and inquiries of the NFP sector. The ACBC supports good regulation and remains committed to working with government to achieve a good outcome. The Exposure Draft, regrettably, fails to meet basic standards for clarity and good law. As noted above, there are too many terms that are simply impossible to define.

The ACNC legislation should be much more restricted and targeted in its objectives. There should be a concerted effort by government to identify areas of duplication and unnecessary regulation. The current exposure draft does not remove anything that currently exists and in many areas adds a whole new layer of red tape.

It is of considerable concern that there is little information on transitional provisions covering such matters as the retention of concessional taxation status for charities in existence prior to the commencement of the Act's operation, the extent of data sharing

between Commonwealth authorities and between Commonwealth and State authorities, the support that the ACNC and the Commonwealth will provide the sector in adjusting to new reporting and record-keeping requirements, and recognition that the needs of transition may vary across the sector due to its diversity. The ACBC requests that the Commonwealth gives sufficient time for the sector to be consulted in full on transition issues.

The regulation of the NFP sector, and even charities as a beginning, should respect the diversity of the sector and the specific needs of those which comprise it. Apart from the three tiers of reporting, based on a crude formula of revenue, the exposure draft is very much a “one size fits all”. There is little scope for entities that are capable of self-regulation to do so. There does not appear to be any recognition of the extraordinarily detailed regulations that already apply in the areas of heath, aged care, education, child care, children’s services, and overseas development. It would be helpful for those responsible for the legislation to continue to engage with stakeholders to acquire a better understanding of the sector so that policy advice can more readily respond to specific, identifiable issues.

The ACBC proposes that the process of implementing the ACNC be delayed for a year to allow better consultation on the specific detail of the legislation, to enable proper research to support the assertions that these measures will improve accountability and public confidence, and to allow the states and territories to make a commitment to proper harmonisation of regulation.