



Catholic Social Services
Australia

Response to
Exposure Draft *Australian Charities and Not-*
for-profits Commission Bill 2012
and
the Treasury Consultation Paper:
“Review of Not-for-profit Governance
Arrangements”, December 2011

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Index

	Page
Introduction	3
Object of the Bill	4
Increased red tape	5
Uniform governance requirements	6
ACNC powers	7
Education and information	8
Conclusion	8

1. Introduction

Catholic Social Services Australia (CSSA) is the Catholic Church's peak national body for social services. For over 50 years it has assisted its member agencies to promote a fairer, more inclusive society that reflects and supports the dignity, equality and participation of all people. Its network of 69 member agencies employs around 10,000 people and many thousands of volunteers contribute to this work.

These agencies provide more than 100 community service programs to over one million Australians a year. CSSA partners with a range of government and non-government organisations to pursue its mission and contributes to social policy development based on the experience of its member network.

CSSA welcomes the Government's commitment to the Not-For-Profit (NFP) reform agenda. For many years, CSSA has been an advocate for national reform to enhance the capacity of NFP agencies to focus on their core mission. We have contributed to successive NFP regulatory reviews and supported reform efforts designed to reduce red tape, streamline reporting requirements and simplify contracting arrangements. We also contributed to the development of the two submissions lodged by the Australian Catholic Bishops Conference: a) on the Review of NFP Governance requirements and b) on the Exposure Draft of the ACNC Bill.

The 2010 Productivity Commission Report on the NFP sector summarised the nature of our concerns well when it said that:

"The current regulatory framework for the sector is complex, lacks coherence, sufficient transparency, and is costly to NFPs"¹.

While supporting the thrust of the Government's reform agenda, we are concerned that the current Consultation Paper and the Exposure Draft of the Bill represent a significant change in emphasis from the Government's commitments to the NFP sector in 2009². Further, that the significant reforms being proposed in the Consultation Paper and in the Exposure Draft of the Bill seem somewhat at odds with outcomes and recommendations that have been offered as part of consultative processes with the NFP Sector over several years.

Due to the presentation of the ACNC Bill and two, related consultative papers immediately prior to the summer leave period, none of the Boards of the CSSA member network have had an opportunity to consider this Bill in the timeframe allowed. Given the pre-eminent governance role which these Boards play, the key role of governance requirements in the Bill and our desire to assist government in addressing significant issues through constructive dialogue, CSSA requests that a further period of consultation be provided before the Bill is finalised.

¹ Productivity Commission 2010: Research Report on the Contribution of the Not-for Profit Sector, Overview

² See section 2 below for details

2. Object of the Bill

As with any Bill, the Objects of an Act are critically important. In this case, the primary object should be amended to reflect a more appropriate balance between enhancing and supporting the diverse NFP sector and compliance and enforcement. The reference to promotion of 'public trust and confidence' should be the secondary object.

This proposed change would also better reflect:

- the 2010 Productivity Commission's findings on community confidence and trust in NFP agencies³ and the steady upward trend in Australia's rate of volunteering, making Australia one of the leading OECD countries in volunteering to NFPs.⁴
- the Prime Minister's pre-election speech entitled "Strengthening the Non-Profit Sector", in which a commitment was given that a Gillard Labor Government would significantly streamline tendering and contracting processes for government funded not-for-profit organisations. These actions "will cut red tape" and "allow organisations in the sector to spend more time and money focusing on what they do best". The Statement also referred to achieving greater harmonisation and simplification between Commonwealth, State and Territory Governments.
- the National Compact priorities (3, 5 and 6) recognising NFP sector diversity in consultation processes and sector development initiatives; reducing red tape and simplifying financial arrangements including across state and federal jurisdictions.
- the design principles for a new regulator identified in Treasury's "Final Report - Scoping Study for a National Not-For Profit regulator", none of which identified the promotion of public trust and confidence as a principal object⁵.
- the foreword of the Consultation Paper, which re-iterated the primary object in setting up an ACNC as we had understood it from earlier processes:

*"By streamlining and centralising governance arrangements into one framework, and reducing red tape, NFPs will be able to spend less time complying with duplicative or burdensome arrangements and more time helping the community."*⁶

³ Ibid p 83

⁴ Ibid p 69

⁵ Australian Government: The Treasury, "Final Report – Scoping Study for a National Not-for-Profit Regulator", April 2011

⁶ "Review of not-for-profit governance arrangements", Consultation Paper, December 2011. P.vii

No explanation is given for the shift to ‘the promotion of trust and confidence’ as the principal object of this Act. Yet, the Bill’s principal object conveys a distinct message to the Australian community about trustworthiness and accountability in the sector. This is notably different from the previous political and official-level statements about the NFP reform agenda. While ‘promotion of trust and confidence’ has a place as a secondary element within this section of the Bill, CSSA believes it should be replaced as the primary Object to avoid inevitably negative interpretations of the ACNC’s principal purpose.

To improve the statement of primary Object, CSSA suggests that the statement of primary object in the *Australian Securities and Investments Commission Act 2001* be considered as a reference. This refers to “*providing for ASIC, which will administer such laws... as confer functions and powers*”⁷. Significantly, this includes a reference to the need for efficiency by ASIC itself in setting and meeting expectations.

3. Increased red tape

As identified above, the dominant theme throughout NFP reform discussions since the ALP pre-election commitment and including in the final report of the Treasury’s Scoping Study last year⁸, has been about measures to enhance the sector’s capacity. This has especially focussed on reducing red tape and duplication of administrative processes. Therefore, the Consultation Paper’s acknowledgement that additional red-tape will result from the current process represents a major change. The Consultation Paper refers to:

*“duplication during a transitional period might result while Australia moves towards a truly national NFP regulation, however the governance arrangements are likely to be similar and not pose a large burden on NFPs”*⁹.

We are not surprised at this acknowledgement, given that:

- It is not possible for officials or NFP managers to assess the extent or scale of increase in compliance demands once the ACNC comes into being, especially taking account of the significant diversity or organisational circumstances across the sector.
- In the absence of measures in the Bill requiring the transfer of governance reporting requirements from Commonwealth departments to the ACNC means that NFP agencies registered with the Australian Tax Office will inevitably have an additional layer of compliance placed on them. This is

⁷ *Corporations Act 2001* Section 435 A

⁸ Australian Government: The Treasury, “Final Report – Scoping Study for a National Not-for-Profit Regulator”, April 2011.

⁹ “Review of not-for-profit governance arrangements”, Consultation Paper, December 2011. p3

likely to be more onerous for those agencies with complex governance structures.

- The absence of a framework agreement for harmonisation with State and Territory governments points to an extended transition to achieve the goal of a harmonised national regulatory framework.

On the last point, there is a significant discrepancy between the Consultation Paper statement about “*hoping to work with the states and territories to ensure that the ACNC will be a national regulator*”¹⁰ and the Final Report of the Scoping Study for a National Regulator, which stressed the importance of achieving COAG agreement on key aspects of regulatory reform:

- *Through the COAG process, the Australian Government should work with state and territory authorities with the aim of ensuring that the regulator’s registration applies throughout Australia, and be accepted by every government agency. (Recommendation 9)*
- *The options for reform in areas which require the cooperation of the Commonwealth, states and territories should be progressed through the COAG agenda, including the areas of incorporated associations and charitable trusts. (Recommendation 6)*
- *Entities should apply to have their status determined by the regulator on a voluntary basis. However, to access support provided by the Australian Government, and any state and territory governments that agree following conclusion of the COAG process, a NFP entity would need to be registered and regulated by the NFP regulator. (Recommendation 10)*

4. Uniform governance requirements

The proposed governance requirements in the Bill are a major concern to the CSSA network, not least because there is insufficient detail in the Bill and associated consultation papers to make an informed assessment. The Bill’s strong emphasis on standardisation and uniform governance requirements for NFPs contradicts the statements made by senior government figures, as reflected in the documents mentioned above, about their respect for, and valuation of, the diversity of the sector. It raises questions for CSSA’s member boards about whether the diversity of highly effective and accountable organisational arrangements will be respected and the extent of adverse consequences of their implementation for agencies.

The CSSA network includes agencies with a range of complex structures and governance arrangements. All fully meet existing Commonwealth and State/Territory governance and accountability requirements.

¹⁰ Ibid. p3

In addition to the concern at lack of recognition of the needs of more complex organisational structures in the Bill, CSSA members are concerned at the potential impact on them of both increased compliance demands arising as this Bill becomes legislation and uncertainty in relation to aspects of State and Territory compliance requirements

The Bill needs to more adequately reflect the legitimate nature of such diverse arrangements, rather than requiring significant organisational change to meet the purposes of this Bill. It should include as a secondary object that the ACNC would ensure that its own procedures are efficient.

In terms of uniform reporting arrangements, the Productivity Commission emphasised the difficulties and potential problems associated with adopting a 'one size fits all' approach to NFP agencies given their diversity¹¹. An example of this relates to the Standard Chart of Accounts (SCOA). Despite the best intentions of those involved in designing the SCOA, a recent survey of CSSA members about the SCOA found that many members found SCOA to be an unsatisfactory reporting and accounting framework because it did not take account of the complex structures of their agencies. This was because the accounting and financial systems of many medium size and larger agencies are not suited to the MYOB-based SCOA. In this case, CSSA members recommend that a number of accounting options be made available to reflect the various and complex requirements of their financial systems.

In relation to the complexity of reporting requirements, initial feedback from the CSSA network is that, in contrast to the proposed lean ACNC staffing, it would almost certainly need to hire specialist knowledge to cover a very diverse set of governance and contractual compliance measures from a wide range of portfolios. This includes expertise related to the prudential reporting requirements for aged care services, reporting requirements for the recently developed mental health standards, responsibilities to State Guardians in the reporting and compliance regimes surrounding the provision of out-of-home care, the national disability service standards and dozens of similar compliance arrangements.

5. ACNC powers

CSSA is concerned that the Bill provides sweeping powers to the ACNC with respect to investigations and deregistration. Due to the lack of harmonisation of Commonwealth, State and Territory regimes currently impacting on the NFP Sector, the powers as proposed have the potential to impact on investigative functions already covered under other Commonwealth, State and Territory Acts. Not to mention investigative powers which appear to overlap with what is otherwise the proper role of police.

¹¹ Productivity Commission 2010: "Research Report on the Contribution of the Not-for Profit Sector", p. 107.

On deregistration, the concept of public trust and confidence should be amended. The Bill enables agency deregistration to occur “*where public trust and confidence is, or **may be**, undermined*”¹² and where an NFP “***may cause** harm to, or jeopardises the public trust and confidence in the whole sector*”¹³. Explaining what public trust and confidence mean for this purpose is fraught. Moreover, we are not aware of precedents in Australia where demonstrable wrong-doing by a single NFP agency has damaged public trust and confidence in the whole sector. The references to what “may” occur reflect a further dimension of subjectivity for decision-makers and should not be included in the Bill.

6. Education and information

CSSA endorses the Bill’s references to an ACNC role on governance education and information and believes that this function will be of critical importance in achieving the medium to long term changes highlighted in the Productivity Commission Report on the NFP sector in Treasury’s Final Report of the Scoping Study for National Regulator (Recommendations 15-16).

In order to be effective in this key area of work, CSSA recommends that those functions be well resourced. Ongoing collaboration with sector representatives could be used to develop an optimal framework and the sector would be able to provide best practice examples relevant to different types and sizes of NFP agency.

7. Conclusion

CSSA has supported the Government’s efforts to improve the NFP regulatory environment and enhance the sector’s capacity to focus on its core role. However, by proceeding to legislate without adequate consultation on this Bill, we believe that there will be detrimental impacts on the way in which the CSSA network serves the Australian community. Problems associated with uniform governance requirements, the inevitability of additional red-tape and certain ACNC powers are of particular concern. We would welcome a further consultation process to assist in improving the Bill.

¹² Para 4-1 (2) b

¹³ Para 10-55 (2) e