

# Review of the Australian Charities and Not-for-profits Commission legislation

February 2018

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## Acknowledgements

We acknowledge the Law Council of Australia (**LCA**) and its submission to this Review (“the LCA submission”).

We acknowledge that Sue Woodward (A/g CEO Justice Connect) is a member of the Charities and Not for Profit Committee (Committee) of the Legal Practice Section of the Law Council of Australia and has actively contributed to the LCA submission.

We also acknowledge:

- Sue Woodward has presented to the ACNC Review Panel on behalf of the LCA Committee and also in her capacity as acting CEO of Justice Connect and Director Not-for-profit Law.
- Justice Connect’s former Chief Executive Officer (Fiona McLeay) was a member of the ACNC Advisory Board.
- Not-for-profit Law is a member of the ACNC’s Professional Users Group and Services Users Group.

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### Not-for-profit Law

Not-for-profit Law is an Australia-wide program of the charity Justice Connect. Not-for-profit Law provides free and low cost legal assistance to not-for-profit (NFP) community organisations and social enterprises. Not-for-profit Law provides services directly (in the form of legal information, advice and training) and brokers referrals for pro bono assistance from its member law firms and barristers. By helping those involved in running NFPs to navigate the full range of legal issues that arise during the lifecycle of their organisation, Not-for-profit Law saves them time and resources. This allows them to focus on achieving their mission, whether that is helping vulnerable people, environmental conservation, or working towards social cohesion. Not-for-profit Law advocates for an improved legal and regulatory framework for the NFP and social enterprise sector, and to ensure law reform considers the impacts of regulation on small to medium-sized organisations. Effective and appropriate regulation supports efficient and well-run NFPs and social enterprises. A thriving sector benefits all Australians.

Over the period since the establishment of the Australian Charities and Not-for-profits Commission (ACNC) (December 2012 to 12 December 2017), we have:

- taken 7 170 legal enquiries, with the majority of these related to governance matters (1 607, or 22.4%) or starting a not-for-profit organisation (1 199, or 16.7%)
- assisted more than 50 organisations with legal advice specifically on charity registration either by one of our in-house lawyers providing telephone advice, and/or referral to one of our member law firms. The referrals have been for advice on the merits of an application to the ACNC, or assistance with making an application where the organisation has been refused charity registration or withdrawn following information from the ACNC (including through the making of an application)
- assisted more than 125 organisations with legal advice specifically on charity tax concessions, including endorsement as a deductible gift recipient
- developed legal education resources that explain charity law (e.g. Introduction to Charities Law) and charity tax concessions and tax endorsements, along with other relevant matters including governing charities (e.g. legal duties guide). Our numerous resources also cover common issues in running a charity (e.g. reporting to government, insurance and risk, managing volunteers, raising funds and working with other organisations), and
- launched our national Information Hub, [www.nfplaw.org.au](http://www.nfplaw.org.au), and significantly, 17.85% of traffic to our Information Hub is referred from the ACNC.

### Endorsement

We endorse the Law Council of Australia's submission made by the Charities and Not for Profit Committee (Committee) of the Legal Practice Section. We have two points of minor difference (we are of the view special resolutions be defined in the *Corporations Act 2001* (Cth) not the ACNC legislation, and we are also of the view that 'government entity' be defined in ACNC legislation).

We endorse the majority of recommendations made by the ACNC in its own submission to the Review (see below and Attachment A). We have considered and responded to the ACNC Advisory Board's submission.

We note the Community Council of Australia's submission and the strong alignment with the views we have expressed in our submission.

# 1. Executive Summary

We are pleased to be providing this submission into the review of the Australian Charities and Not-for-profit Commission (ACNC) legislation (**the Review**).

Not-for-profit Law at Justice Connect (formerly PILCH) has, for the decade of the existence of our specialist service, campaigned for a single, independent, specialist national regulator for charities and other not-for-profits (NFPs). It remains our view that such a regulator is ‘critical’<sup>1</sup> infrastructure to support a healthy NFP sector; a sector that is the heart of our civil society. We supported the formation of the ACNC, provided input to its development and were fervent in our support for its continuation when legislation tabled in the Parliament would have led to its abolishment.

It is with this backdrop, and our commitment to ensuring the ACNC is best placed to continue as a world class charities regulator for the next decade and beyond, that we have spent considerable time on our submission (and contributing to the Law Council of Australia’s submission), including analysing the submission of the ACNC and its Advisory Board.

In short, we believe the ACNC has been a success story for the sector. Its ability to deliver on red tape reduction has been slower than hoped, due in a large part to matters outside its control (such as attempts to abolish it and the consequent reluctance to engage by state and territory governments). But on all other measures, the ACNC has been effective against its objects, with the establishment of a verified public register and its client-focussed registration and advice service, being quite extraordinary.

The Review (which the sector advocated for at the time of the ACNC’s establishment) is an opportunity to tweak and improve, but not for wholesale change. It is also an opportunity for mapping a path for significant new opportunities such as fundraising law reform.

Our submission is set out in three Parts. The first part (**Part A**) deals with our response to the ACNC’s own submission to the Review and the ACNC Advisory Board’s submission to the Review. The second part (**Part B**) sets out our key recommendations with a particular focus on the ACNC’s objects, its regulatory approach including discussion on the governance standards, the extension of the ACNC to NFPs, and fundraising. The final part (**Part C**) addresses our response to the ‘focusing’ questions (where we have not otherwise answered them) accompanying the Terms of Reference to the Review.

We make **six recommendations** to the Review Panel, one of which includes the removal of s205.35 - the category of basic religious charity - from the ACNC legislation. The category is problematic for a number of reasons and there appears to be a lack of clear policy rationale for the existence of the category.

- Firstly, there is no valid reason why charitable organisations that are established for one charitable purpose (i.e. advancing religion) should be exempt from certain reporting obligations. It is not clear what special attributes such organisations have which justifies a lower level of regulatory oversight.
- Secondly, there is no size requirement in the definition of basic religious charity. Some entities that are basic religious charities may in fact be ‘large registered entities’. Under the ACNC legislation the fact that larger charities have more robust reporting requirements recognises that greater regulatory oversight, and greater financial accountability and responsibility, is justified where more money is involved. This principle is undermined by the basic religious charity category since a large charity that qualifies as a basic religious charity is excused from financial reporting obligations and has less regulatory oversight than a small charity with a different charitable purpose.

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<sup>1</sup> See our Policy and Law Reform submissions to 2013 in particular our *Submission to Treasury’s consultation paper as part of the scoping study for a national not-for-profit regulator*, 2011 at: <https://www.nfplaw.org.au/law-reform-submissions-2013>

- Thirdly, some charities registered under this category may enjoy the benefits of legal status (they are incorporated by Acts of Parliament).
- Finally, an exemption from income tax on the basis of charitable status is also a benefit funded by the public (through tax forgone) that warrants public accountability. If organisations do not want to be subject to the ACNC regulatory framework, they can choose not to register with the ACNC, and forgo the tax benefits that registration provided.

We also note that community expectations concerning the level of transparency and accountability that religious organisations should adhere to and be subject to, has likely changed over the last 5 years.

Our **six recommendations** are as follows:

1. The review panel agree (in part, in principle, with limitation or qualification) to the recommendations by the ACNC in its submission except for Recommendations 2 and 28 (as set out in our Attachment A)
2. The risk-based and proportionate approach adopted by the ACNC in its first five years as reflected in its Regulatory Approach Statement be continued
3. The ACNC be funded in a manner that enables it to undertake activities necessary to achieve all three of its objects
4. The ACNC be preserved with only minor changes as outlined in this submission, including the removal of the concept of 'basic religious charity' under the ACNC legislation and be subject to further review in five years
5. The Panel accept the recommendations made by the Law Council of Australia in its submission to the Review, noting we endorse the submission (with only two minor points of difference at outlined above in Endorsements)
6. The ACNC progress its removal of red tape agenda, by promoting the resolution of the most significant regulatory burden, the fundraising regime, by forming an Advisory Committee of all States and Territories to give urgent consideration to *#fixfundraising*.

## Part 1 – Our response to other submissions to the Review

### 1.1 Response to the ACNC submission

We have considered the ACNC submission in some detail and

- **agree with 29** recommendations,
- **agree in-principle with 4** recommendations,
- **agree in-part with 4** recommendations,
- **agree with qualification with 1** recommendations,
- **agree with limitation with 2** recommendations, and
- **disagree with 2** recommendations.

We are **strongly opposed to Recommendation 2** that the objectives in the *Australian Charities and Not-for-Profit Act 2012* (Cth) (the **ACNC Act**) be amended to include:

- (a) to promote the effective use of the resources of not-for-profit entities; and
- (b) to enhance the accountability of not-for-profit entities to donors, beneficiaries and the public.

**In relation to object a),** we acknowledge it is appropriate that resources of a charity be used effectively, however, the use of resources is a matter for the governing body of that charity.

We note most charities will formalise this requirement in their constituent document (e.g. clause 43.1 of the ACNC template constitution).

We also note the difficulty a regulator would have in deciding what constitutes an effective use of resources. For example, a charity may want to undertake broad consultation with its members, key stakeholders and the community about delivering a new service. The time taken to consult in this way may mean the service is not delivered as quickly as it could have been. Some may suggest this consultation was not effective or efficient, while others may argue it is best practice community development that gives a greater chance of the service being designed to meet the community's needs. There are inherent difficulties in the concept of 'effective use of resources' aside from the broader issue, which is simply that it is not the role of the regulator.

**In relation to object b),** we also acknowledge that charities should be accountable to donors, beneficiaries and the public. However, as above we are of the view that accountability is the responsibility of the governing body.

It is the role of donors, members, the stakeholders and other funders to determine (through the accountability mechanisms put in place by the governing body) to decide if the charity is using its resources effectively and if they want to continue to support (fund) the charity or not.

Also new object (b) is already expressly dealt within in the Act by section 15-10 (b) which requires "in performing his or her functions and exercising his or her powers, the Commissioner must have regard to the following ... (b) The need for transparency and accountability of the not-for-profit sector to the public (including donors, members and volunteers of registered entities) by ensuring the public has access to information about not-for-profit entities".

Relevant to the discussion of both objects a) and b), we note that under the Act the Commissioner is explicitly tasked with having regard to principle of regulatory necessity, reflecting risk and proportionate regulation (section 15-10 (e)).

We also note that any addition to the objects would require consideration of additional resourcing as the ACNC "has been funded only to undertake operations directly related to the first object" (ACNC submission, pg 20- 21).

We endorse the LCA submission on this issue and refer to their discussion on this matter. If there is any change to the current objects it should, as the LCA submission suggests, be limited to making the current object b) (to support and sustain a robust, vibrant, independent and innovative Australian not-for-profit sector) the primary object with the addition of the words “because of its contribution to public benefit” with the other existing objects becoming ancillary sub-objects.

We are also in **disagreement with Recommendation 28** which suggests amendment to the accounting standards in the ACNC Regulations. We strongly support the development of a tailored standard financial reporting framework for charities and do not agree with amendment to financial reporting provisions until a standard is implemented.

**Attachment A** outlines each of the recommendations and our response to them, including commentary where we have qualified our agreement or to explain why we have not agreed.

## Recommendation

1. The review panel agree (in part, in principle, with limitation or qualification) to the recommendations by the ACNC in its submission except for Recommendations 2 and 28 (as set out in our Attachment A)

## 1.2 Response to ACNC Advisory Board submission

We provide the following in response to the ACNC Advisory Board (**the Board**) submission to the Review:

- We expressly support the comment that the ACNC’s ‘*enabling legislation was and remains widely supported by the sector*’. We generally agree that the Review Panel should adopt a high threshold to substantiate any recommendations for legislative amendment other than remedying some of the problems caused in particular by the overlap with the Corporations Act and the other recommendations we have made in this submission.
- We agree with the overall approach of the second principle contemplated by the Board, the “prioritisation and resourcing of the ACNC’s legislated objectives”. We agree that the objects of the Act need to be retained (or subject only to minor amendment as set out in the LCA submission).
- We acknowledge the discussion in the Board’s submission on the object to ‘*support and sustain a robust, vibrant, independent and innovative Australian not-for-profit sector*’. However, we consider that considerable further thought and discussion would be necessary if this object were to be construed in the way suggested by the Board (both in terms of the ‘drivers’ and the ‘ACNC role’).
- We note the Board’s recommendation that the Charities Passport be used by all relevant bodies and that the ACNC has made a similar recommendation (Recommendation 20). **It is our view that the use of the Charities Passport should be mandated in the *Commonwealth Grants Rules and Guidelines 2017*.**

We support the ACNC’s charity register being promoted as the ‘single source of truth’ in relation to charitable organisations; this will in turn ensure that all governments use the same base data in relation to a charity when making decisions in regard to that charity. **There are significant red tape reduction initiatives to be made by this simple, cost saving step.**

- We are broadly in support of the concept of a ‘one stop’ Australian regulator for all NFPs not just charities. We endorse the Law Council of Australia’s submission (**LCA submission**) and the important points it makes including:
  - there is benefit in adopting one regulatory framework for all not-for-profit organisations, particularly those with similar tax concessions and in protecting the existing framework,
  - but any extension should be attempted gradually, with consideration of issues including, organisational size, Commonwealth tax exemptions, legal structures, referral of State powers and other regulatory schemes, and

- any scheme should be voluntary and consistent with the objective of reducing red tape.

In relation to the Board's submission on 'other relevant matters':

- **Interaction with the Corporations Act**

We agree there are number of technical difficulties that arise through application of both Acts to registered companies limited by guarantee. Many of the matters that cause inconsistency, uncertainty, or which by amendment would result in improved outcomes, are dealt with both by the ACNC in its submission (most of which we support - refer **Attachment A**), and the LCA submission.

- **Suitability of responsible persons**

The ACNC has made two recommendations in relation to this matter (Recommendations 8 and 9). We agree with both but in-part only. We oppose any new power to obtain information from a person other than the responsible person information about a responsible person in unlawful activity (recommendation 8(b)).

Similarly, we oppose any new power to exclude a person from being a responsible person that has a 'disqualifying conviction' for 'relevant offence, being an offence that is relevant to the operation of a charity' (recommendation 9(b)). The proposed powers are vague and the need for them is not entirely clear.

- **Communication constraints on ACNC investigations**

The ACNC has made two recommendations in relation to this matter. We support Recommendation 11 and more broadly the ACNC's position on the need to publish reasons for revocation of registration (promotion of public confidence in the Commissioner's decisions and promotion of compliance by illustrating the standards required of charities).

In relation to Recommendation 12 (that the ACNC be authorised to disclose information), we only provide agreement on the basis that the power to disclose is far more limited than what is proposed, and is accompanied with significant safeguards and conditions on the power (we are concerned disclosure could be highly damaging or even fatal to a charity).

- **Constraints on what can be published on the register**

We note the LCA in its submission has considered this in detail. We endorse their comments including the level of transparency required of a charity be proportional to its size. Importantly, before additional information is added, consideration should be given to the need for such information, particularly where this would place a burden on small charities (refer to our response to Recommendation 4 – at Attachment A).

We also note the ACNC has proposed publication of additional information provided voluntarily by a charity. However, we are concerned that this proposal, which is considerably broad in terms of the information that could be provided by a charity and then published, may:

- confuse the public who are not likely to appreciate why information is shown for some charities and not others, or be able to distinguish the difference between what information is legally required and what is not,
- be additional and unnecessary red tape for charities, many of which will feel pressure to add more, and
- incur considerable additional costs to Government by collecting and publishing what could be a considerable volume of information. In addition to data storage expenses, staff time and data processing systems would be needed to ensure the information published was not contrary to other laws (racial vilification or defamation, for example). In our view this public money could be better spent, for example on changes to the website to improve its speed.

- **Enhance the contribution of the Advisory Board**

There is merit in increased geographical reach of the Board, although we caution against making this a requirement over expertise and merit; it should not become a Board with de facto state-based representation.

An alternative way to achieve greater geographical reach is to extend the ex-officio membership of the Board to include more state regulators. We expand on this in Part 2 (2.3 Fundraising) below.

We do not see the need for a specific amendment to provide a role for the Advisory Board to give advice to the Minister. We are not aware of any prohibition on the Advisory Board giving the same advice to the Minister as it gives to the Commissioner or on any other matter.

- **Extend the reach of the basic religious charity**

**We strongly oppose the Board's recommendation that the Review Panel affirm the operation of s205.35 (basic religious charity).**

Under the *Charities Act 2013* (Cth), the advancement of religion is but one of twelve purposes defined as charitable. We see no valid reason why charitable organisations established for one charitable purpose (i.e. advancing religion) should be exempt from certain obligations, particularly Governance Standards and financial reporting.

We also see no valid reason why charities should not be treated in the same way when it comes to minimum standards of transparency and good governance. That is, all charities should be subject to all of the provisions in the ACNC legislation no matter what their charitable purpose is, especially as there are size tiers for reporting. We also note that community expectations concerning the level of transparency and accountability that religious organisations should adhere to and be subject to, have likely changed over the last 5 years.

We take this strong position in the context of our decade of working to support small (often entirely volunteer-run) charities. We think good governance – in the sense of stewardship and fiduciary obligations for funds given for a charitable purpose – can and must be expected of all charities regardless of size. This is not an issue of 'paperwork' or red tape, or imposing a level of sophistication that is not appropriate for small groups. Our experience from responding to thousands of enquiries and training many hundreds of people from a myriad of diverse, small, and even newly-forming micro groups bears this out. They can understand what acting in good faith and for their charitable purpose means, by way of just one example. The governance standards are easy to explain and adherence with them promotes best practice and well run charities.

We note the Board has stated that the concept arose to avoid unreasonable regulatory burden on small and unincorporated communities. As discussed below, the current definition of Basic Religious Charity is not confined to 'small' charities, and may include certain incorporated charities. We also note that there is no suggestion of an unreasonable regulatory burden upon other small, unincorporated charities that do not qualify as a Basic Religious Charity because they have a different charitable purpose.

We recommend that the category of Basic Religious Charity be removed from the ACNC legislation, and once that has been achieved it may be useful to consider if there is a better approach to the regulation of all small and micro organisations (see below, 2.2.4 Basic Religious Charities and 2.2.5 ACNC extension to NFPs).

- **Requirement to notify of breach**

**We do not agree with the Board's approach on this issue.**

Registered charities should continue to notify the ACNC if they are in breach, so they can discuss rectification of such a breach (in keeping with the ACNC's Regulatory Approach Statement and Commissioner's statement: Compliance and enforcement). We also consider this requirement to be important with regard to the winding up of registered charities and the need for measures to protect charities income and assets after registration has been revoked (see our comments on Recommendation 1 of the ACNC's submission – at Attachment A).

## Part 2. Our key recommendations to the review panel

### 2.1 Introduction: the past five years and the ACNC in 2018

We note the ACNC was established as a response to the comprehensive Productivity Commission report, *Contribution of the not-for-profit sector (2010)*, which identified the then regulatory environment for charities and NFPs as “complex, lacks coherence, sufficient transparency, and is costly to NFPs”. The establishment of the ACNC was based not only on the Productivity’s Commission’s recommendation but also 15 years’ worth of reports calling for an independent, tailored regulator for the sector. Not-for-profit Law has long advocated for an independent, specialist, national regulator of charities and other not-for-profits.<sup>2</sup> We have supported the entity as established under the ACNC Act and its work over the past five years.

We make the following comments on its performance to assist the Review:

- In our experience, organisations speak highly of their interactions with the ACNC. The feedback from community organisations we work with is that they find ACNC staff to be helpful and responsive to their queries. While some may be disappointed that their application for charity status was unsuccessful, they have been able to concede the process was clear, the response was timely and the decision was communicated to them in a manner they could understand.
  - *I had a long chat with [Name at Registration Team] at the ACNC ... throughout the conversation [Name] was pleasant and understanding, but made the point ... constrained by Federal law regarding charities*
  - *I was initially quite anxious when considering applying to register as a charity with ACNC. I was expecting the process to be tedious, frustrating and wrapped tightly in red tape. My first contact with ACNC staff dispelled all my concerns. They were extremely knowledgeable and supportive. They were also able to direct me to various on-line publications that helped with the application process.*
  - *Staff returned my calls promptly when I required additional information and I felt they understood what it might be like for a group of volunteers with limited administration experience to be taking the steps to register as a charity.*
  - *Always the staff were polite and a pleasure to work with.*
- We welcome the efforts of the ACNC to undertake extensive and meaningful consultation with the charity sector by way of face-to-face forums and briefings, active social media and other timely updates.
- We want to highlight that the ACNC has acted quickly when issues impacting the sector have arisen, for example, its guidance on working with fundraisers and advocacy during an election period. We also note that in doing so the ACNC has partnered with other sector bodies with specialist knowledge (i.e. the Public Fundraising Regulation Authority and the Fundraising Institute of Australia).
- The work of the ACNC in the development of the register has been impressive. It is most useful for charities – to quickly prove their legal status, to promote their work and to avoid having to report or update the same information often to different government agencies, funders or donors; the charity tick was also welcome. The register helps promote trust and confidence in the sector, and can be used by the public, funders and governments, if they are making decisions about supporting an organisation with their time or money.
- The ACNC has done a considerable amount of work in reducing duplicative regulation of charities resulting in substantially decreased regulation for charities incorporated in Tasmania, the ACT and South Australia.
- The ACNC has produced an impressive range of detailed, tailored guidance for charities, for example, the template constitution for charitable companies limited by guarantee. In our experience these publications have been extremely helpful, particularly for small groups with limited resources. This work demonstrates the ACNC’s capacity to genuinely support and promote good governance and improve compliance in the charitable sector in Australia.

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<sup>2</sup> Refer to <https://www.nfplaw.org.au/law-reform-submissions-2013>

- The ACNC has published numerous reports (including the Annual Charity reports and sub-sets of data) which are heavily relied upon by those within and outside of the sector - a significant benefit for a sector that is regularly required to give data to government but is rarely given overall (useful) data back.
- Our interaction with the ACNC has always been helpful and productive, including our participation in the Professional Users Group, which is a highly engaged and constructive forum. We appreciate having the ability to communicate with ACNC staff in a variety of other forums, or in response to formal consultative processes, such as that on the Commissioner's Interpretation Statement on PBLs. We welcome the clarity and detail that these statements provide and recommend they continue to be developed and updated.

## 2.2 Objects and Regulatory approach

### 2.2.1 Objects

We have outlined above (Part A, 1.1 Response to the ACNC submission) our concerns with the ACNC's own proposal to amend the objects to the ACNC Act. We are of the view that each of the three objects appropriately address the role of the ACNC and its legislation. We are not convinced of any policy basis for a significant change to the objects. We agree with the LCA submission that if any changes are to be made, they be minor and only for the purpose of strengthening and clarifying the aims of the ACNC.

### 2.2.2 Regulatory Approach

We agree with the ACNC's regulatory approach as set out in its Regulatory Approach Statement.

The risk based and proportionate approach means charities can continue to do what they do, without unnecessary burden, while the public can continue to have trust and confidence in the sector. As noted above, under the ACNC Act, the Commissioner must have regard in exercising his or her powers and functions to the principles of regulatory necessity, reflecting risk and proportional regulation. We would be concerned if there were substantial changes to the current regulatory approach of the ACNC, noting also the ACNC has not suggested in its submission that there is any need to change this approach.

We do consider though a further review of the ACNC legislation would be appropriate way to consider if other amendments were needed at that point in time. We recommend that the ACNC legislation be subject to a further review in five years' time.

### 2.2.3 Governance standards

Governance of charities (and other not-for-profits) is the highest area of legal enquiries made to Not-for-profit Law. Our legal education resources on governance are also within the top three resources most downloaded from our free Information Hub ([www.nfplaw.org.au](http://www.nfplaw.org.au)). Most of the training we provide as part of our social enterprise (Not-for-profit Law Training) is in relation to governance matters. We note the ACNC, in commenting on its compliance cases found that governance issues arose in each of those cases, and usually through a charity board's inexperience or understanding of good governance.<sup>3</sup>

We acknowledge the inherent difficulties with the constitutional limitations on the ACNC, and as such the limitations it has in relation to the Governance Standards, including that:

- the obligation is placed on the entity, not the responsible person
- they do not extend to others in the organisation (i.e. other officers or employees with influence),
- place a lower obligation than the general law (in some instances)
- there is limited compliance measures, particularly for non-federally regulated entities (e.g. de-registration of the charity)

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<sup>3</sup> Australian Charities and Not-for-Profits Commission, Media Release, Good governance a priority for new charities – regulator, 17 April 2014, [http://www.acnc.gov.au/ACNC/Comms/Med\\_R/MR\\_076.aspx](http://www.acnc.gov.au/ACNC/Comms/Med_R/MR_076.aspx)

The clearest solution, of course, would be a referral of powers from the States and Territories and we have recommended this be considered as part of further work on the extension of the ACNC legislation to not-for-profit organisations. This could also lead to the same statutory duties applying to charities regardless of how or where they are incorporated.

**Given that this is unlikely in the short term, our recommendation is for the provisions relating to duties of directors in the Corporations Act be switched back on (s180-183).** This at least provides statutory obligations on charitable corporations (and charitable Registered Australian bodies). This is also the view taken in the LCA submissions, which we endorse. The ACNC already works under a [Memoranda of Understanding](#) with ASIC (ORIC, the ATO and the ABR), so there is no reason to think there would be duplicative regulatory action. Another benefit of this approach is it gives members of charities structured in this way access to the statutory derivative action remedy (introduced to overcome the barriers under the common law).

#### 2.2.4. Basic Religious charities

**We recommend abolishing s205.35 – the concept of basic religious charity– from the ACNC legislation.**

The category of basic religious charity is problematic for a number of reasons and there appears to be a lack of clear policy rationale for the existence of the category.

First, there is no valid reason why charitable organisations established for one charitable purpose (i.e. advancing religion) should be exempt from certain reporting obligations, importantly the Governance Standards and financial reporting. It is not clear what special attributes such organisations have which justifies a lower level of regulatory oversight.

Secondly, there is no size requirement in the definition of basic religious charity. The ACNC [website](#) notes that basic religious charities do not need to submit financial reports 'regardless of its size'. Consequently, some entities that are basic religious charities may in fact be 'large registered entities'. These entities would have fewer reporting obligations than a small, unincorporated charity that, for example, promoted mental health awareness. Under the ACNC Act, the fact that larger charities have more robust reporting requirements recognises that greater regulatory oversight, and greater financial accountability and responsibility, is justified where more money is involved. This principle is undermined by the fact that a large charity that qualifies as a basic religious charity is excused from financial reporting obligations and has less regulatory oversight than a small charity with a different charitable purpose. As noted above, there is no clear policy rationale for this disproportionate approach.

Thirdly, historically speaking, some religious organisations were established under specific State legislation (for example, the *Roman Catholic Church Communities' Land Act 1942* (NSW)). These organisations may still fall within the definition of basic religious charity even though they have the benefits of a corporate form, hold significant assets and may have a high annual revenue.

We note that the definition of Basic Religious Charity excludes deductible gift recipients and entities that receive more than \$100,000 in government grants. This may be a recognition that entities enjoying these benefits which are ultimately funded by public money via government grants and tax deductions, should maintain a level of public accountability. Arguably, an exemption from income tax on the basis of charitable status is also a benefit funded by the public (through tax forgone) that warrants public accountability. If organisations do not want to be subject to the reporting obligations of the ACNC or the governance standards, they can choose not to register with the ACNC, and forgo the tax benefits that registration provides.

In addition, community expectations concerning the level of transparency and accountability that religious organisations should adhere to and be subject to, are likely to have changed over the last 5 years.

We support the comments of Professor Ann O'Connell (University of Melbourne), which address the points made above:

*In terms of accountability, main churches were able to get a concession from the government when it enacted the Australian Charities and Not-for-profit Commission Act so that it's subject to much less reporting, if the entity qualifies as a basic religious charity"*

*"I think in terms of both the royal commission and now the exposure of how much wealth the Catholic Church has got, I think there might be grounds for reviewing that exemption as well."*

*"It would be open to the review panel to find that exemption for basic religious charities no longer can be justified," she said.*

*"It also tends to discriminate against newer religions, because they become incorporated and then can't take advantage of it."<sup>4</sup>*

## 2.2.5 ACNC extension to NFPs

We agree with the need to give further consideration to the extension of the ACNC legislation to not-for-profit organisations. We have addressed this above (Part A) in response to the ACNC and Advisory Board submissions.

We make one further point. If the extension were to be contemplated (and appropriately is undertaken as a step-by-step process) then a best first step could be to register those entities that receive tax concessions from the Commonwealth Government, but are not otherwise regulated to the same extent as registered charities. We are referring to Division 50 entities, and any of those organisations specifically listed in the tax legislation as being entitled to DGR endorsement, but that are not currently regulated by the ACNC. This in our view, is appropriate, given that these entities receive a benefit from Government and, like registered charities, there should be sufficient regulation to deliver confidence that those benefits are being appropriately exercised, along with transparency (the tax benefits are, in fact, public money).

### Recommendations

2. **The risk-based and proportionate approach adopted by the ACNC in its first five years as reflected in its Regulatory Approach Statement be continued**
3. **The ACNC be funded in a manner that enables it to undertake activities necessary to achieve all three of its objects**
4. **The ACNC be preserved with only minor changes as outlined in this submission, including the removal of the concept of 'basic religious charity' under the ACNC legislation and be subject to further review in five years**
5. **The Panel accept the recommendations made by the Law Council of Australia in its submission to the Review, noting we endorse the submission (with only two minor points of difference at outlined above in Endorsements)**

## 2.3 Fundraising

In relation to registered charities, the remaining regulatory burden which the ACNC and its legislation has not been able to effectively address is fundraising.

**Overwhelming, fundraising is the source of the greatest amount of regulatory burden for charitable organisations.** The waste caused by the regime is more than \$15 million per year for charities.<sup>5</sup> It is waste because laws are outdated: they do not effectively support fundraising across State and Territory borders or through digital platforms. Up to seven different permissions may be needed to collect funds from donors, all with variations from: if and when a licence is needed; how long it is valid

<sup>4</sup> ABC News "Catholic Church national wealth estimated to be \$30 billion, investigation finds", 12 Feb 2018, [http://www.abc.net.au/news/2018-02-12/catholic-church-worth-\\$30-billion-investigation-finds/9422246](http://www.abc.net.au/news/2018-02-12/catholic-church-worth-$30-billion-investigation-finds/9422246)

<sup>5</sup> Deloitte Access Economics, ACNC: Cutting Red Tape: Options to align State, Territory and Commonwealth charity regulation, Final Report, 23 February 2016)

for; what must be reported; and how and when it is reported. The regime is so complicated that it results in both accidental and deliberate non-compliance, with minimal resources directed to its enforcement. It creates risk for donors: they may not have a right of action, or remedy, where mischief occurs.

Not-for-profit Law has been working in collaboration with some of Australia's leading professional and peak bodies to improve the state of fundraising regulation in Australia, under the banner of *#fixfundraising* which has been increasingly supported by both charities and not-for-profits.<sup>6</sup> The campaign proposes the Australian Consumer Law (ACL) be used to regulate fundraising, supported by necessary guidance (including codes of conduct for all fundraisers and fundraising activities) and the repeal of State and Territory fundraising laws. The campaign led to confirmation by Consumer Affairs Australia and New Zealand (CAANZ) that *'in many cases the activities of fundraisers in seeking donations are captured by general provisions of the ACL'* (despite the lack of guidance on its application). In December 2017, guidance was issued, and there is agreement by CAANZ to a project in 2018-2019 to "consider the effectiveness of the guidance".

To achieve significant red tape reduction in fundraising more work needs to be done; we haven't yet *#fixedfundraising*. It would be appropriate (as contemplated by the objects of the Act) that the ACNC progress this work in collaboration with ACL regulators, namely the ACCC and the relevant State and Territory authorities (being the same bodies that regulate charitable incorporated associations). This is no different than the ACNC working with other regulators responsible for legislation that applies to charities (both at the State and Federal level).

We recommend the formation of a specialist Advisory Committee, with a secretariat and terms of reference about reporting back to CAANZ before the end of 2018. This Committee should include CAANZ representatives, sector representatives and the ACNC. The Committee could consider, and where agreed upon, progress the implementation of the following:

- Referral of any necessary or desirable legislative powers to the Commonwealth to ensure there is a robust national regime for regulating fundraising.
- The creation of a short, simple mandatory fundraising code to be contained within the ACL, which would supplement existing core provisions in the ACL, in exchange for States and Territories repealing their existing legislation and regulations on fundraising. It would need to address fundraising via face-to-face and telephone/text means, as this appears to be where most complaints derive from.
- Repeal of all licensing requirements. Reporting can be achieved through information in the AIS, and the questions in the AIS could be tailored to cover a broader range of issues, such as third-party fundraising, face-to-face fundraising and telephone fundraising.

The LCA submission makes the points we have made above. It also suggests other ways in which the ACNC could progress fundraising reform which we endorse.

We also consider that the Committee, once formed, and having addressed fundraising as a priority could then actively progress other opportunities to harmonise ACNC regulatory requirements with the numerous other State and Territory laws which cover charities and NFPs (refer above also, 2.2.5 ACNC extension to NFPs).

## Recommendation

- 6. The ACNC progress its removal of red tape agenda, by promoting the resolution of the most significant regulatory burden, the fundraising regime, by forming an Advisory Committee of all States and Territories to give urgent consideration to *#fixfundraising***

<sup>6</sup> See [www.nfpplaw.org.au/fundraisingreform](http://www.nfpplaw.org.au/fundraisingreform)

## Part 3. Our response to ‘focusing’ questions

### 3.1 Focusing questions accompanying the TOR to the Review

This part details our response to the ‘focusing’ questions (where we have not otherwise answered them) accompanying the Terms of Reference to the Review

#### **1. Are the objects of the ACNC Act still contemporary?**

Part A (1.1 Response to the ACNC submission) of our submission deals with our views on the current objects of the ACNC Act.

#### **2. Are there gaps in the current regulatory framework that prevent the objects of the Act being met?**

There are a number of issues that arise from the interaction of the ACNC legislation and the Corporations Act. In Part A of this submission we have also addressed the issues raised by the ACNC and the Board (also refer to the Attachment A).

Part B of this submission sets out the other issues that we think would be beneficial to the full achievement of the objects of the ACNC legislation.

#### **3. Should the regulatory framework be extended beyond just registered charities to cover other classes of not-for-profits?**

Part B (2.2.5 ACNC extension to NFPs) of our submission deals with our views on the regulatory framework of the ACNC Act.

#### **4. What activities or behaviours by charities and not-for-profits have the greatest ability to erode public trust and confidence in the sector?**

We note the high level of confidence in the sector. We refer to the ACNC’s most recent two-year Public Trust and Confidence report (of 2017) that 86% of Australians trusted charities, and 91% currently support them by volunteering or donating. Whilst this was a small decrease from previous reports in 2013 and 2015 (89% and 90% respectively), the then Acting Commissioner stated that it as the likely that recent media reports alleging misconduct by charities was likely to have negatively impacted on the reputation of the sector in general. We also note that decline is consistent with an overall fall in trust of Australian institutions and is a global trend<sup>7</sup>.

In our view, it is the media reporting of charity mismanagement, or alleged mismanagement that has a significant impact on the erosion of public trust and confidence in the sector (which we have highlighted in our response to Recommendation 6 of the ACNC submission). In some instances, these reports are later found to be correct (for example, the inquiry into the RSL NSW Branch and related entities, which concerned considerable issues with governance and use of RSL charities’ funds). In other instances, inquiries have not led to the substantiation of misbehaviour.

In summary, it is our view that similar to government expenditure, the public are generally most concerned with mismanagement of funds, where funds have not been used as the charity said they would be (i.e. there is misleading and deceptive conduct), or where they have been redirected for private use (again in the charity sense, to secure pecuniary benefit for its members or owners).

#### **5. Is there sufficient transparency to inform the ACNC and the public more broadly that funds are being used for the purpose they are being given?**

To respond to this question, it is necessary to consider how charities receive funds, the circumstances in which those funds are given and how they are accountable to the provider of those funds.

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<sup>7</sup> Australian Institute of Company Directors “Trust in Australian institutions has hit a five year low, according to the latest Edelman Trust Barometer”, 7 February 2018, <http://aicd.companydirectors.com.au/membership/the-boardroom-report/volume-16-issue-2/latest-edelman-trust-barometer-shows-deepening-trust-crisis-in-australia>

We have set this out below, and in our view addressed the issue that is contemplated by this question, being that charities are not effectively using their funds. We have also addressed this question in response to the ACNC suggesting its objects be extended to include the promotion of the effective use of the resources of not-for-profit entities. We strongly oppose this proposal (see Part A above).

- **Public funds**, i.e. donations in response to a fundraising campaign: the Register provides information on a charity, if a donor wants to review a charity before giving money.
- **Philanthropic funding**, e.g. a grant from a charitable trust: funds provided to a charity in this way are usually made be in response to an application from the charity (or an invitation to submit an application), which would have information on the charity, including financial information along with a proposal about how the funds being sought will be spent. A grant agreement would be entered into between the funder and the charity. It would almost certainly be a requirement to acquit the spending of those funds to the funder in the form of a report.
- **Government**, i.e. such as to provide a service: funds provided to the charity would usually be in response to a procurement, in which the charity would provide substantial information on the charity, including financial information and a detailed proposal on how the charity would deliver the service. A service agreement would then be entered into between the Government and the charity. It would almost certainly be a requirement to report to Government in line with the Service Agreement.
- **Government grants**, i.e. funding agreements. The same would apply as per the example above only by way of a funding agreement rather than Service Agreement, and similar to a Service Agreement, would have the force of contract law.
- **Members**, i.e. membership fees or fee income from providing member services: the accountability measures required by the charity to meet its Governance Standard (e.g. Governance Standard 2), along with the obligations of other regulators (e.g. a Victorian incorporated body is required to provide its members with certain information and hold Annual General Meetings at which financial information must be put to members).
- **Beneficiaries**: beneficiaries receiving services provided by a charity may have transparency over the level of quality required of those services by way of accreditation standards and where they were concerned these standards were not met they could complain to the charity or the appropriate accreditor, or regulator, or potentially the funder of the service.
- **Self-generated**, i.e. fee for service (noting *Commissioner of Taxation of the Commonwealth of Australia v Word Investments Ltd* [2008] HCA 55)) it is quite unlikely that a charity could generate its own funds if it were not providing goods or services that were in demand by consumers, and these consumers are provided with necessary protections in relation to goods and services by way of the Australian Consumer Law.

**6. Have the risks of misconduct by charities and not-for-profits, or those that work with them, been appropriately addressed by the ACNC legislation and the establishment of the ACNC?**

In our view, the risks of misconduct have been appropriately addressed by the ACNC and its legislation (subject to some minor changes as outlined in our submission and through the Review).

We note levels of detected misconduct are low (26 of about 55 000 charities had their registration revoked in 2017, being 0.04 per cent of all charities) and the ACNC by its own acknowledgement say the majority of charities are compliant.<sup>8</sup> We also note the ACNC was established to deliver transparency and accountability, and at the request of charities (to demonstrate and help deliver public trust and confidence), rather than as a consequence of overriding concerns of misconduct.

One area that still requires further change is fundraising. Where charities are alleged to have engaged in ‘misconduct’ it is often in relation to raising funds or engaging others to raise funds on their behalf. Whether that conduct be in relation to misleading behaviour, coercion or unconscionable conduct (both of which could breach the Australian Consumer Law).

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<sup>8</sup> “There are over 55,000 registered charities in Australia, and the overwhelming majority operate capably and professionally, and improve the lives of countless people”, ACNC Media Release, 19 January 2018, [http://www.acnc.gov.au/ACNC/Comms/Med\\_R/MR\\_231.aspx](http://www.acnc.gov.au/ACNC/Comms/Med_R/MR_231.aspx). Over two year period (1 Jan 2015 to 31 Dec 2016, there were 1872 concerns raised with the ACNC and led to 28% compliance revocations. [http://www.acnc.gov.au/ACNC/Publications/Reports/ComplianceRPT2015\\_Foreword.aspx](http://www.acnc.gov.au/ACNC/Publications/Reports/ComplianceRPT2015_Foreword.aspx)

Several cases have received prominence in the media, including recent reports of disgraceful fundraising practices of the NSW branch of the RSL, charities using third-party fundraising agencies, and investigations into the Shane Warne Foundation over its low proportion of funds raised being distributed to beneficiaries. The common themes in these narratives are a perceived lack of transparency in fundraising practices and poor governance. Despite this, fundraising misconduct is also generally low.<sup>9</sup>

We note the recent findings of serious misconduct into the NSW Branch of the RSL (and related entities), which has led to the recommendation that “consideration be given to the introduction of a single unified Australian statutory regime for the regulation of charitable fundraising.”<sup>10</sup> This recommendation has been made by numerous reports for more than two decades, and it is the one remaining issue that is must be addressed by governments. Any fundraising scandal has the potential to damage the sector as a whole; donations are discretionary funds.

We are not suggesting that fundraising be addressed by ACNC legislation (given that the ACL, with some amendment is the appropriate regime), however, we are suggesting the ACNC has a role to play in addressing the establishing of one national fit for purpose fundraising regime (as per Part B above).

**7. Are the powers of the ACNC Commissioner the right powers to address the risk of misconduct by charities and not-for-profits, or those that work with them, so as to maintain the public's trust and confidence? Is greater transparency required and would additional powers be appropriate?**

We have agreed with many of the additional (or amended) powers proposed by the ACNC, or have agreed with in principle or part (refer to our response to the ACNC submission at Attachment A). Aside from these, we do not believe there is a need for any other additional (or amended) powers. However, as we have explained above (Part B, 2.2.3 Governance Standards) the clearest solution would see the ACNC being able to fully regulate charities, including those currently regulated by State Attorney-Generals as regulator(s) of charitable trusts.

**8. Has the ACNC legislation been successful in reducing any duplicative reporting burden on charities? What opportunities exist to further reduce regulatory burden?**

We note the ACNC has been successful in reducing some duplicative reporting requirements, particularly in relation to charitable entities incorporated in the A.C.T, South Australia, and Tasmania. We understand discussions are also taking place with the Northern Territory, Victoria, Queensland and Western Australia to reduce duplication. This is despite the challenges presented by the uncertainty of the future of the ACNC for a considerable period of time.

As outlined above (Part B, 2.3 Fundraising) the most obvious, and necessary remaining regulatory burden for charities is the fundraising regime. We have outlined above the current issues, the work that we have been doing to *#fixfundraising* and suggested how reform could be achieved. This includes the appointment of a specialist Advisory Committee, formed by representatives from both State and Territory regulatory bodies, the ACNC and the sector.

The other opportunity we consider would substantially reduce regulatory burden is mandating the use of the charity passport by all Commonwealth Government departments. (The ACNC and the Board have as suggested the charity passport should be promoted, but we consider its use should instead be mandated for all Commonwealth agencies).

The charity passport could also be promoted to State and Territories via the Advisory Committee referred to above.

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<sup>9</sup> The New South Wales Government has stated that it does not undertake enforcement activities because “such an allocation of resources appears unjustified because there is no evidence of a particular problem in the sector. New South Wales has few complaints from persons donating to these appeals” and the majority of breaches are found to be minor and unintentional mistakes and where non-compliance has occurred it has been the result of complexity and different requirements of the Acts. Furthermore, of complaints made, over a certain period, none were found to have caused public detriment”, New South Wales Government, *Charitable Fundraising Review, Discussion Paper*, 2016.

[https://www.finance.nsw.gov.au/sites/default/files/inquiry\\_report\\_cfa.pdf](https://www.finance.nsw.gov.au/sites/default/files/inquiry_report_cfa.pdf)

<sup>10</sup> Ibid.

**9. *Has the ACNC legislation and efforts of the ACNC over the first five years struck the right balance between supporting charities to do the right thing and deterring or dealing with misconduct?***

In our experience, including from information provided to us from our clients, the ACNC has struck an appropriate balance in this regard.

We note many NFPs and charities are referred to us from the ACNC; 17.85% of traffic to the Not-for-profit Law website comes from the ACNC. This traffic is largely derived from one of the ACNC's fact sheet-style guidance pages. This suggests that there is a strong need for information about the registration and management of NFPs and charities – and the importance of the ACNC's role in assisting registered entities in complying with, and understanding the ACNC Act, by providing them with guidance and education (s.15-5(2)(b)(iii) of the Act). Guidance and education is necessary to assist organisations understand and comply with their obligations and it can also act as a deterrent (they realise their obligations and are then keen to avoid any breach).

We agree with the ACNC recommendation that the legislation be amended to allow the ACNC Register to include the grounds on which a decision to revoke a charity is based, and a summary of the reasons for the revocation. We think this will both help promote public confidence in the ACNC decisions and promote compliance by others (through illustrating the standards required by charities) and encourage greater trust and confidence in the sector.

Publication of such information will also assist in helping to form an overall picture of charity misconduct, for example, whether misconduct is largely limited to failure of administrative matters (such as failure to submit certain reports) or more substantive matters such as non-entitlement due to a disqualifying purpose or failure to meet other registration requirements such as the Governance Standards, or no longer meeting requirements such as being for public benefit.

## Attachment A: Response to recommendations in ACNC Submission

### Recommendation 1

Consider whether measures could be introduced at the Commonwealth level to protect a charity's accumulated charitable income and assets after its ACNC registration has been revoked

### Agree

We support amendment to the *Australian Charities and Not-for-profits Commission Act 2012* ("the Act") to protect a charity's accumulated charitable income and assets after its ACNC registration has been revoked.

We note that other jurisdictions, such as New Zealand have recently dealt with this concern. It amended its *Income Tax Act 2007 (NZ)*, to address issues with the transfer and management of assets following deregistration of a charity, through the *Taxation (Annual Rates, Employee Allowances, and Remedial Matters) Act 2014* to give effect to the following policy objectives:

- ensuring that if an entity has claimed tax exemptions as a charity and has accumulated assets and income, these assets and income should always be destined for a charitable purpose;
- providing charities who have acted in good faith and tried to meet their registration requirements with certainty about their tax obligations on deregistration; and
- for the minority of charities that have wilfully refused to meet their registration requirements, the imposition of onerous (including retrospective) tax liabilities.

We endorse the Law Council of Australia ("the LCA submission") submission to this review. We refer to the discussion in the LCA submission on this matter, and point to the recommendations made by the LCA:

1. The ACNC is tasked with a function of making recommendations to the Minister on changes that ought to be made to the Act, or an agenda for state law harmonisation or referral of powers, that would enable protection of charitable assets while ensuring the nature of the ACNC as a voluntary regime continues.
2. The ACNC is conferred with the ability to bring an action in Court seeking any appropriate equitable remedy, if sanctioned by the Attorney General of a State, or in the case of a charity being in a Territory, of its own motion.

### Recommendation 2

Consider adding the following objects in s15-5 of the ACNC Act:

- (a) to promote the effective use of the resources of not-for-profit entities; and
- (b) to enhance the accountability of not-for-profit entities to donors, beneficiaries and the public

### Strongly Disagree

**In relation to object a),** we acknowledge that it is appropriate that resources of a not-for-profit be used effectively, however, the use of resources is a matter for the governing body of that charity.

We note most charities will formalise this requirement in their constituent document (e.g. clause 43.1 of the ACNC template constitution).

We also note the difficulty a regulator would have in deciding what constitutes an effective use of resources. For example, a not-for-profit may want to undertake broad consultation with its members, key stakeholders and the community about delivering a new service. The time taken to consult in this way may mean the service is not delivered

as quickly as it could have been. Some may suggest this consultation was not effective or efficient, while others may argue it is best practice community development that gives a greater chance of the service being designed to meet the community's needs. There are inherent difficulties in the concept of 'effective use of resources' aside from the broader issue, which is simply that it is not the role of the regulator.

**In relation to object b),** we also acknowledge that not-for-profit entities should be accountable to donors, beneficiaries and the public. However, as above we are of the view that accountability is the responsibility of the governing body.

It is the role of donors, members, the stakeholders and other funders to determine (through the accountability mechanisms put in place by the governing body) to decide if the organisation is using its resources effectively and if they want to continue to support (fund) the charity or not.

Also new object (b) is already expressly dealt within in the Act by section 15-10 (b) which requires "*in performing his or her functions and exercising his or her powers, the Commissioner must have regard to the following ... (b) The need for transparency and accountability of the not-for-profit sector to the public (including donors, members and volunteers of registered entities) by ensuring the public has access to information about not-for-profit entities*".

**Relevant to the discussion of both objects a) and b),** we note that under the Act the Commissioner is explicitly tasked with having regard to principle of regulatory necessity, reflecting risk and proportionate regulation (section 15-10 (e)).

We also note that any addition to the objects would require consideration of additional resourcing as the ACNC "has been funded only to undertake operations directly related to the first object" (ACNC submission, pg 20- 21).

We endorse the LCA submission on this issue and refer to their discussion on this matter. If there is any change to the current objects it should, as the LCA submission suggests, be limited to making the current object b) (to support and sustain a robust, vibrant, independent and innovative Australian not-for-profit sector) the primary object with the addition of the words "because of its contribution to public benefit" with the other existing objects becoming ancillary sub-objects.

### **Recommendation 3**

Consider whether a statutory definition of 'not-for-profit' should be introduced for the purposes of the ACNC Act and the Charities Act.

### **Agree in principle**

We agree there is value in a statutory definition of 'not-for-profit' within the Act, but we caution this is not a simple task that requires close consultation with charity law experts.

We endorse the LCA submission and its discussion of this matter.

#### Recommendation 4

Amend s 40-5 of the ACNC Act and s 40.1 of the ACNC Regulation (as appropriate) to include the additional data items described in paragraph 4.5.

- Dates AIS and AFR lodged
- Information withheld and explanation
- Names and start and end dates
- Backdating registration
- Retain info about former charities
- Grounds for revocation
- Legal structure
- Charitable purpose
- Compliance agreement information
- DGR status

#### Agree in principle

In general we agree with this recommendation because the matters listed in paragraph 4.5 of the ACNC submission is information that the ACNC already has (i.e. the charity would not need to provide additional information) and because the information is useful and would overcome issues such as the need to search through two databases to determine a charity's DGR status.

We also make the following comments about additions to what can appear on the public register:

- we caution that publication of late documentation (Annual Information Statement and Annual Financial Report, if any) would provide transparency to the public in relation to the charity meeting its obligations, however, there may be a legitimate reason for lateness, and if the dates are published (along with a statement on the Register noting that it was late), this may unfairly reflect badly on the charity.
- we draw attention to the LCA discussion on this matter, particularly the comments that the level of transparency required of a charity should be proportional to its size. Importantly, before any additional information is collected consideration should be given to the need for such information, especially where this would place a burden on small charities.
- we are also concerned about increasing calls for information for the purpose of being able to 'compare' charitable entities (we expand on this in our comments directly below in Recommendation 5).

#### Recommendation 5

Amend s 40-5 of the ACNC Act to give the Commissioner a discretion to:

- extract information from a registered charity's AIS and display it on the face of the Register entry for the charity; and
- display information on the Register in text or in a graphical format.

#### Agree with qualifications

We endorse the LCA submission and its discussion of this matter. In particular, we are concerned that simple visuals about sources of income, fundraising costs etc. could promote misleading comparisons between registered charities thereby undermining public trust and confidence. This is because there is no common accounting standard for charitable entities (see our comments in Recommendations 21 and 28), with a mandated taxonomy such as the Standard Chart of Accounts developed by Queensland University of Technology. This work needs to be done first.

Once this work is done, we agree with this recommendation if it is **only** extracting and displaying information that is **already** provided by a charity to the ACNC as part of its annual reporting obligations.

#### Recommendation 6

Consider amending the ACNC Act to authorise the Commissioner to collect and display on the Register information provided voluntarily by a registered charity for that purpose where the information would assist the public to understand the structure, operations or impact of the registered charity.

#### Agree in part

We agree with the collection and display of a link to information on a charity where that link has been provided voluntarily by an organisation (i.e. a link to the charity's website).

However, we are concerned that this proposal, which is considerably broad in terms of the information that could be provided by a charity and then published, may:

- confuse the public who are not likely to appreciate why information is shown for some charities and not others, or be able to distinguish the difference between what information is legally required and what is not
- be additional and unnecessary red tape for charities, many of which will competitively feel pressure to add more

	<ul style="list-style-type: none"> <li>incur considerable additional costs to Government by collecting and publishing what could be a considerable volume of information. In addition to data storage expenses, staff time and data processing systems would be needed to ensure the information published was not contrary to other laws (racial vilification or defamation, for example). In our view this public money could be better spent, for example on changes to the website to improve its speed.</li> </ul>
<p><b>Recommendation 7</b></p> <p>Consider whether the ACNC Act should be amended to require registered charities, other than trusts and BRCs, to have a minimum number of three responsible persons, and at least two responsible persons who ordinarily reside in Australia, with the Commissioner having the power to exempt entities should there be special circumstances where different governance arrangements are appropriate.</p>	<p><b>Agree</b></p> <p>We support this recommendation <b>only</b> if it is agreed to in full - that the Commissioner be given the power to exempt entities should there be special circumstances where different governance arrangements are appropriate. We note this approach (a minimum of 3 persons governing a charitable entity is consistent with guidance we provide on best practice governance (see <a href="http://www.nfplaw.org.au/governance">www.nfplaw.org.au/governance</a>).</p>
<p><b>Recommendation 8</b></p> <p>Amend the ACNC Act to expressly authorise the Commissioner to collect:</p> <ol style="list-style-type: none"> <li>the personal details (as defined in the Corporations Act) of responsible persons at the point of registration and to require registered charities to provide the personal details of a person who becomes a responsible person after registration; and</li> <li>information about the involvement of a responsible person in <b>unlawful activity</b> (including that a responsible person has been convicted of a criminal offence) <b>from a person other than the responsible person</b> where the collection of the information is reasonably necessary for the purposes of determining whether an entity is entitled to be registered as a charity or for the purposes of determining whether a registered charity has contravened the Act or failed to comply with the governance standards or the external conduct standards</li> </ol>	<p><b>Agree in part</b></p> <p><b>In relation to a) we agree.</b> We note that this would require additional details (former names and date and place of birth) to that already required (name and address).</p> <p><b>In relation to b) we disagree.</b> We consider that the <i>Privacy Act 1988</i> (Cth) contains clear safeguards to protect private and particularly sensitive information of individuals. The ACNC has not explained the policy rationale for a power that goes beyond what the Privacy Act allows. If the ACNC is concerned about whether a responsible person meets the suitability requirements in Governance Standard 4, it should require the charity to provide sufficient information to alleviate its concerns. The power that the ACNC is suggesting may go beyond specific concerns and allow it to conduct general checks, which is not proportionate or reasonable in comparison to the perceived harm.</p> <p>We also note that 'unlawful activity' is not limited to a conviction, while the matters that disqualify a person from being a responsible person are offences. The power suggested by the ACNC is therefore too broad.</p> <p>We note the Community Council of Australia has also raised objections to b) in its submission to the review.</p>

### Recommendation 9

Amend s 45.20(3) of the ACNC Regulation to include the following suitability conditions to be a responsible person:

- a) that the person does not have a 'disqualifying conviction' for a terrorism, terrorism financing or money laundering offence under Commonwealth, State or Territory law; and
- b) that the person does not have a 'disqualifying conviction' for 'relevant offence, being an offence that is relevant to the operation of a charity'

### Agree in part

**In relation to a) we agree** given that the proposed power requires a person to have been convicted of an offence.

We note that money laundering and terrorism financing are also identified areas of concern for all not-for-profits. We refer to the Commonwealth Government Report (*Australia Non-Profit Organisations Sector Money Laundering/Terrorism Financing, 2017*) and note that, while the report identifies that not-for-profit entities are targeted and are particularly susceptible to terrorism financing attempts, they only represent a small number of suspicious matter reports to AUSTRAC (pg 12). Given that there is not currently a robust or consistent framework for monitoring and regulating this risk, and the Federal anti-money laundering and counter terrorism financing scheme applies to a very limited number of entities (pg 49-50), we agree this new power is warranted.

**In relation to b) we disagree.** This recommendation adds an additional level of regulation, the necessity of which is not entirely clear. The wording is too vague - 'relevant to the charity', for example.

We have had groups where having the conviction is relevant to an organisation they participate in. For example, organisations that support former sex workers (including those with convictions); drug and alcohol support groups and convictions for drug and alcohol violence related offences. As the new power is currently proposed, such offences automatically disqualify a person.

While the ACNC believes the ability of the Commissioner to over-ride automatic disqualification would address this concern, it is only a discretion. There would need to be grounds governing the exercise of Commissioner's discretion and an ability to appeal.

The ACNC state that similar changes have been made in Canada and the United Kingdom, and its proposed changes are consistent with those reforms (ACNC submission, pg 35). Further detail is needed on how those powers have worked in practice, what is different between our system and those jurisdictions, as well as evidence of how the ACNC has been curtailed in its work by not having this power now.

We note the Community Council of Australia has also raised objections to b) in its submission to the review.

### Recommendation 10

Amend the ACNC Act to give the Commissioner a discretion to publish the reasons for decision on an application for registration where the Commissioner considers that it would be in the public interest to do so.

### Agree in part

We agree with the recommendation to publish reasons where the reasons are de-identified, or where the charity provides clear and specific permission for the reasons to be published. (Note: clear and specific permission should not be taken to be given just because of a provision about the possible publication in a privacy policy that the charity is taken to have read and agree with when making their application for charity registration, or when submitting its Annual Information Statement.)

<p><b>Recommendation 11</b></p> <p>Amend s 40-5 of the ACNC Act to provide that the ACNC Register is to include the grounds under s 35-10(1) on which a decision to revoke a charity is based, and a summary of the reasons for revocation</p>	<p><b>Agree</b></p> <p>We support this recommendation and the ACNC’s reasoning for publishing reasons for revocation of registration, being promotion of public confidence in the ACNC decisions and promotion of compliance by illustrating the standards required by charities.</p>
<p><b>Recommendation 12</b></p> <p>Amend Subdivision 150-C of the ACNC Act to provide that ACNC officers are authorised to disclose protected ACNC information for the purpose of making a public comment or publishing information about the Commissioner’s regulatory activities when it is in the public interest to do so. Specifically, this may include confirming that an investigation has been commenced, disclosing action that the ACNC has taken or is proposing to take in relation to a registered charity or a responsible person and disclosing a regulatory outcome (e.g. that the ACNC and a registered charity have entered into a compliance agreement or that the ACNC has provided regulatory guidance to a registered charity)</p>	<p><b>Agree in principle</b></p> <p>We have some concerns with the proposal for such a broad power and only provide agreement on the basis that the power to disclose is far more limited than is currently proposed and is accompanied by safeguards and conditions on the exercise of the power.</p> <p>We appreciate that it is hard to find the balance between the benefits of disclosure and the harm it can cause. We make the following comments:</p> <ul style="list-style-type: none"> <li>• the consequences of disclosure of an investigation could be highly damaging. Some argue that whenever a charity is under investigation it is in the public interest to know this. However, the investigation may determine that there has not been a breach of the Act (or the breach is fairly minor), yet the reputational damage to the charity could be catastrophic and even lead to its closure. We note there is no ability for the charity to appeal the decision to disclose, or to obtain any remedy if, for example, the regulatory activity was found to be unwarranted or even in breach of the Commissioner’s powers (and it would be difficult to contemplate what remedy would be suitable)</li> <li>• there are inherent difficulties in determining what is in the ‘public interest’. As above, some will argue it would <i>always</i> be in the public interest to release information about compliance action on the basis that transparency of organisations operating in the public (and with public monies) is in the public good. In addition to the consequences for the charity (above), for individuals involved in the charity there are legitimate privacy considerations. We query how this power compares to those afforded to other regulators (e.g., ASIC) and if they are able to release information about investigations into alleged misconduct of an entity or its director and when they can do so (e.g. when court action is taken). Other tests may be more appropriate, such as only disclosing the fact of an investigation, or proposed compliance action in very limited circumstances against a benchmark of real likelihood of harm (or similar).</li> </ul>
<p><b>Recommendation 13</b></p> <p>Amend subdivision 150-C – Authorised Disclosures of the ACNC Act to include a provision that expressly authorises ACNC officers to disclose protected ACNC information in bulk to an Australian government agency if the disclosure is reasonably necessary:</p> <p>a) to enable data-matching, analysis or research for the purpose of assisting that agency or another</p>	<p><b>Agree</b></p>

<p>Australian government agency to carry out its law enforcement or investigatory functions or activities or for the purpose of assisting the ACNC to carry out its functions; or</p> <p>b) to enable the implementation of arrangements between the ACNC and other government agencies for the purpose of reducing regulatory duplication.</p>	
<p><b>Recommendation 14</b> Amend s 150-30 of the ACNC Act by replacing 'under this Act' with 'in the performance of his or her duties as an ACNC officer'.</p>	<p><b>Agree</b></p>
<p><b>Recommendation 15</b> Amend s 150-50 of the ACNC by removing the requirement that the disclosure be for the purposes of the ACNC Act</p>	<p><b>Agree</b></p>
<p><b>Recommendation 16</b> Consider options for addressing the issues arising from the inability to check the names of current directors and company secretaries of charitable companies by searching the ASIC register.</p>	<p><b>Agree</b> We note that this issue (inability to check names of current directors and company secretaries of charitable companies by searching the ASIC register) does present practical difficulties, for example in circumstances such as opening and changing bank account details, or verifying information provided in funding applications or funding agreements.</p>
<p><b>Recommendation 17</b> Turn off s 195 of the Corporations Act for charitable companies and amend governance standard 4 to restrict participation in decision making with respect to the governance or management of a registered charity by a responsible person with a material conflict of interest</p>	<p><b>Agree in part</b> We agree with the recommendation to amend Governance Standard 5 to include a duty to manage conflicts of interest. Our comments at Recommendation 38 are relevant here: we query whether 'appropriate management' is sufficiently clear and whether it is better to be explicit, for example, 'material conflicts of interest of the responsible entity be disclosed, managed and recorded'. The concept of 'management' could be further explained in ACNC guidance on the Governance Standards. We also endorse the LCA submission and its discussion, which proposes</p> <ul style="list-style-type: none"> <li>• rather than switching off s195 of the <i>Corporations Act 2001</i> (the other related conflicts of interest provision) s191 be switched back on, and</li> <li>• the word 'perceived' be deleted from Governance Standard 5. In particular the LCA's position that using a 'term whose meaning is not established in law and which is capable of varied interpretation' should be avoided.</li> </ul>

<p><b>Recommendation 18</b></p> <p>Amend the Corporations Act to provide clarity for charitable companies as to the requirements for a special resolution</p>	<p><b>Agree</b></p> <p>We note the LCA submission suggests the ACNC Act be amended to include a definition, however, it is our view the Corporations Act should be amended as the ACNC has suggested (given other provisions in the Corporations Act that are relevant to charitable companies rely on the definition of special resolution).</p>
<p><b>Recommendation 19</b></p> <p>Amend the Corporations Act to turn off the requirement to appoint an auditor in ss 327A and 327B for charitable companies, or at least for charitable companies that are small or medium registered companies</p>	<p><b>Agree</b></p> <p>We endorse the LCA submission on its discussion this matter (the Corporations Act be amended to make clear which ACNC registered entities, i.e. large charities, are required to appoint an auditor).</p>
<p><b>Recommendation 20</b></p> <p>That the Commonwealth government promote the use of the ACNC's charity passport by Commonwealth, State and Territory agencies so as to reduce the regulatory burden on charities</p>	<p><b>Agree but require the charity passport to be mandated not just recommended</b></p> <p>We strongly support the policy behind this recommendation. But rather than simply 'promote' the use of the ACNC's charity passport we recommend its use be mandated in the <i>Commonwealth Grants Rules and Guidelines 2017</i>. Its mandated use is consistent with the Act's objective of reducing red tape, and was the case for a brief period of time before the ACNC's existence was put in doubt after a change of Government.</p> <p>We also support the ACNC's charity register being promoted as the 'single source of truth' in relation to charitable organisations, to help ensure that all governments use the same base data in relation to a charity when making decisions about that charity.</p>
<p><b>Recommendation 21</b></p> <p>Further work to be undertaken by the ACNC and AASB in consultation with the sector to develop a suitable reporting framework for registered charities.</p>	<p><b>Agree</b></p> <p>We strongly support the need for a tailored financial reporting framework for charities. We note comments within the Executive Summary to the AASB's Discussion paper "Improved Financial reporting for Australian Charities", November 2017, page 4,</p> <p><i>"The current financial reporting framework for charities has been the subject of criticism from a number of reviews in recent years. Charities complain of unnecessary complexity, inconsistent and uncertain requirements, and financial reports that are not focused on the needs of their stakeholders. There is no 'level playing field' for charities: similar entities may have very different reporting, driven by their geographic location, entity type or self-assessment of reporting obligations"</i></p> <p>Also see our comment above (Recommendation 5) and the current difficulties with presenting information about charities where that information is not comparable (e.g. different approaches are being used by charities for certain line items - such as fundraising expenses - all of which comply with current AABS requirements).</p>

<p><b>Recommendation 22</b></p> <p>Consider whether registered charities should be able to self-assess their size for reporting purposes in a particular reporting period taking into account the immediately previous reporting period, or in the case of newly established charities, the projected revenue for the following reporting period</p>	<p><b>Agree</b></p>
<p><b>Recommendation 23</b></p> <p>Amend the ACNC Act by including an ongoing provision in Division 60 of the ACNC Act based on item 10(1)-(3) of Part 4 in Schedule 1 to the ACNC (C&amp;T) Act.</p>	<p><b>Agree</b></p>
<p><b>Recommendation 24</b></p> <p>Amend the ACNC Act by including in Subdivision 60-C a provision imposing a duty on an auditor to report to the ACNC if, in the conduct of an audit of a registered charity, the auditor is aware of circumstances that:</p> <ul style="list-style-type: none"> <li>a) they have reasonable grounds to suspect amount to a significant contravention of the ACNC Act or a contravention of the ACNC Act that has not been or will not be adequately dealt with by commenting on it in the auditor's report or bringing it to the attention of the registered charity's responsible persons;</li> <li>b) amount to an attempt, in relation to the audit, by any person to unduly influence, coerce, manipulate or mislead a person involved in the conduct of the audit; or</li> <li>c) amount to an attempt, by any person, to otherwise interfere with the proper conduct of the audit.</li> </ul>	<p><b>Agree</b></p>
<p><b>Recommendation 25</b></p> <p>Amend the ACNC Act to give the Commissioner a discretion to permit a person who is taken to be a registered company auditor under s 324BE(1) of the Corporations Act to undertake an audit of a large registered charity if the Commissioner reasonably</p>	<p><b>Agree</b></p>

believes that the requirement to have the audit undertaken by an entity specified in s 60-30 (1) will impose an unreasonable burden on that charity	
<b>Recommendation 26</b> Amend ss 60-45(3)(b) and 60-50(3)(b) of the ACNC Act by confining the requirement to 'material' deficiencies, failures or shortcomings	<b>Agree</b>
<b>Recommendation 27</b> Repeal s 60-95(2) of the ACNC Act so as to remove the Commissioner's power to allow collective reporting	<b>Agree</b>
<b>Recommendation 28</b> Subject to the implications of the adoption by the AASB of the IASB Conceptual Framework for Financial Reporting in Australia, amend the table in s 60.30 of the ACNC Regulation by adding AASB 124 – Related Party Disclosures	<b>Disagree</b> It is our view that only when the implications of the IASB Conceptual Framework for Financial Reporting in Australia are known should consideration be given to the accounting standards for entities (e.g. registered entities not required to provide general purpose financial standards). We strongly support the need for a tailored standard financial reporting framework for charities (also see comments above at Recommendations 20 and 21).
<b>Recommendation 29</b> Amend s 35-10(1) of the ACNC Act to include as a ground upon which the Commissioner may revoke a charity's registration that the registered charity has ceased to operate.	<b>Agree</b>
<b>Recommendation 30</b> Amend s 70-5 of the ACNC Act to enable the Commissioner to require an entity to provide information or documents necessary to determine whether a registered entity is a 'federally regulated entity'.	<b>Agree with limitation</b> We recommend this amendment be limited to circumstances in which the Commissioner needs the information in order to make a determination about the type of enforcement action he/she can take under other provisions of the Act (i.e. the Commissioner has already determined the charity has not complied with a provision subject to monitoring under Division 75 of the Act and is then seeking to exercise an enforcement power).

<p><b>Recommendation 31</b></p> <p>Amend the note to s 75-5(1) of the ACNC Act by removing the reference to s 35-10.</p>	<p><b>Agree</b></p>
<p><b>Recommendation 32</b></p> <p>Consider amending the ACNC Act to require a show cause notice to be given to the relevant responsible person as well as to the registered charity before suspending or removing the responsible person and to give notice of the decision to suspend or remove a responsible person to the registered charity as well as to the responsible person.</p>	<p><b>Agree</b></p> <p>We endorse the LCA submission and its discussion this matter (we consider it necessary that a right to judicial review is included in Subdivision 100-C to enable a charity to challenge a decision of the ACNC Commissioner to appoint a responsible entity).</p>
<p><b>Recommendation 33</b></p> <p>Amend s 115-55 of the ACNC Act:</p> <p>(a) to enable:</p> <ul style="list-style-type: none"> <li>(i) the Commissioner to delegate any function or power to any member of the staff assisting the Commissioner; and</li> <li>(ii) SES employees assisting the Commissioner to sub-delegate any function or power to any other member of the staff assisting the Commissioner who has the expertise to exercise the function or power being delegated; and</li> </ul> <p>(b) to provide that in exercising a delegated or sub-delegated function or power, the delegate or sub-delegate must comply with any directions given by the delegator or sub-delegator.</p>	<p><b>Agree with limitation</b></p> <p>We recommend that this proposed delegation be limited to those holding the position of a Senior Executive Service or Executive Level 2 positions with the Australian Public Service, rather than 'any member of staff'. Appointment at this level requires the ability to undertake sensitive and complex work.</p> <p>We are also of the view that the proposal that "in exercising a delegated or sub-delegated function or power, the delegate or sub-delegate must comply with any directions given by the delegator or sub-delegator" the compliance should be limited to "reasonable directions" rather than "any directions".</p>
<p><b>Recommendation 34</b></p> <p>Amend the ACNC Act to provide that late submission of an annual financial report or an additional report attracts an administrative penalty under s 175-35 of the Act.</p>	<p><b>Agree in part</b></p> <p>We agree with a power to impose an administration penalty <b>only</b> where the power is discretionary rather than by automatic operation of law.</p>

<p><b>Recommendation 35</b></p> <p>Amend the definition of 'Australian government agency' in s 300-5 of the ACNC Act to clarify whether it includes or excludes local government authorities or amend s 205-35(5)(a) of the ACNC Act to clarify whether grants from local government authorities are to be taken into account in determining whether an entity is in receipt of government grants.</p>	<p><b>Agree</b></p>
<p><b>Recommendation 36</b></p> <p>Either</p> <p>a) Amend the ACNC Act by introducing a provision of the kind referred to in s 38(1)(b)(ii) of the FOI Act; or</p> <p>b) Specify Division 150 of the ACNC Act in Schedule 3 to the FOI Act.</p>	<p><b>Agree</b></p>
<p><b>Recommendation 37</b></p> <p>Amend s 45.25(3) of the ACNC Regulation to provide that if a registered entity is a trust with more than one responsible entity, then each responsible entity must disclose any conflicts of that responsible entity to all the other responsible entities.</p>	<p><b>Agree</b></p>
<p><b>Recommendation 38</b></p> <p>Amend s 45.25(2)(e) of the ACNC Regulation to add a requirement that conflicts of interest are managed appropriately.</p>	<p><b>Agree</b></p> <p>We support the extension of the provision from disclosing a conflict of interest to also requiring the appropriate management of that conflict. We query whether 'appropriate management' is sufficiently clear and whether it may be better to be explicit for example that 'material conflicts of interest of the responsible entity be disclosed, managed and recorded'. The concept of 'management' voting could be further explained in guidance on the Governance Standards. Also see our discussion at Recommendation 17 in relation to the provision of disclosing 'perceived' material conflicts of interest.</p>

**Recommendation 39**

Amend s 45.150 of the ACNC Regulation to require the date of birth of the responsible person to be added to the Disqualified Persons Register.

**Agree****Recommendation 40**

Consider whether the definition of 'government entity' in the Charities Act should be amended to increase clarity, certainty and internal consistency.

**Agree**

We agree and acknowledge that the intention of having a definition of 'government entity' in the Act was to create a clear test or distinction between charity and government, given that the common law was not always clear, and the Regulator had limited guidance in applying the law.

However, there are clear problems and inconsistencies with the statutory definition. For example, there are different tests applied depending upon whether the entity has a Commonwealth or State Government connection. Further, far from simplifying the test, the inclusion of concepts such as 'office of profit under the Crown' and 'privileges and immunities of the Crown' has created additional complexity. We note that the ACNC had to produce a 57 page document to attempt to provide some clarity on the definition, and give guidance on how it would apply the definition.

We agree with the LCA submission that the current definition is obscure and there is difficulty in determining when an organisation is part of government and when it is not. We agree that the current definition should be repealed. However, we differ from the LCA position that the term should be left to develop under the common law. We think that this is an opportunity, with close consultation with charity law experts, to develop a statutory definition which finally provides some clarity, as was the original intention.

Given the complexity inherent in the charity/government divide, we consider that the best option would be to establish a working group to explore the issues and recommend a workable statutory definition.