



REVIEW OF
THE ACNC
LEGISLATION



NATIONAL
**CATHOLIC
EDUCATION**
COMMISSION

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Introduction

The National Catholic Education Commission (NCEC) welcomes the opportunity to make a submission in the context of the Australian Charities and Not-for-profits Commission (ACNC) legislation review. The NCEC submission responds to the terms of reference for the review.

The mission of Catholic education, since its inception, has been to serve students from a range of socioeconomic backgrounds, particularly the disadvantaged and marginalised. Almost 40 per cent of Catholic schools are outside major metropolitan areas and in a number of remote Indigenous communities, a Catholic school is the only local school. Catholic schools and systems see themselves as partners with families, with government, with the broader community and with other schools in providing excellence in educational choice in almost every part of the country. For decades, Catholic schools have been a high-quality and affordable option for Australian families who deeply value and regularly exercise that choice. This submission is consistent with these aspirations.

The extent to which the objects of the ACNC legislation continue to be relevant.

The objects of the *Australian Charities and Not-for-profits Commission Act 2012* (the Act) are:

- to maintain, protect and enhance public trust and confidence in the Australian not-for-profit sector;
- to support and sustain a robust, vibrant, independent and innovative Australian not-for-profit sector;
- to promote the reduction of unnecessary regulatory obligations on the Australian not-for-profit sector.

To achieve these objectives, the Act establishes the ACNC and authorises it to conduct a range of activities and functions, including the registration and deregistration of charities, the collection of financial and non-financial information and the reporting of such information.

While the objects of the Act are supported in general terms, their practical achievement in relation to non-government schools has been hampered by a number of factors during the five years of the ACNC's operation. The NCEC has consistently raised concerns with the Commonwealth Government and the ACNC Commissioner about the differentiation between charity types and the duplication in reporting arising from the ACNC legislation. These concerns are canvassed in the next two sections of the NCEC submission.

Effectiveness of the regulatory framework established by the ACNC legislation

The NCEC believes that all schools should transparently account for their use of government funding in support of educational outcomes. However, accountability and transparency measures should be reasonable, should not require duplication of reporting and should be geared towards minimising red tape. Catholic schools are subject to the same reporting requirements as government schools, including *My School*, annual reports, state accountability mechanisms and federal accountability mechanisms such as the Financial Questionnaire.

In principle, the reporting requirements and accountability regime applying to both government and non-government schools should be equivalent. The legislative and regulatory mandate of the ACNC creates an unwelcome divergence between the reporting requirements applying to government schools and those applying to non-government schools by imposing additional reporting obligations on non-government schools only. The consistent position of Catholic education has been and is that Catholic schools and education authorities should not be subjected to the significant and unnecessary reporting burden created by the ACNC regulatory

regime. Schools, hospitals and aged care providers all currently operate in highly-regulated environments. Catholic schools were highly accountable before the advent of the ACNC and would remain so without the added regulatory burden of the ACNC legislation.

According to the latest ACNC *Australian Charities Report*, a total of 52,166 charities are registered in Australia. The vast majority of these charities are small entities, with over one-third (39.8%) having an annual revenue less than \$50,000, and four in every five charities (82.8%) having revenue under \$1 million. On the other hand, there are charity sectors that differ in nature and circumstances from small charities. These are principally primary and secondary education (9.1%), aged care (2.7%), higher education (1.2%) and hospitals (0.7%).

These charities are characterised by their role in providing services to the community, with relatively large operational size and revenue. They are also highly regulated sectors that are accountable to both state and federal governments. Therefore, they are subject to extensive reporting and accountability requirements that existed before the inception of the ACNC. While many organisations in the broader charity sector actively lobbied for the establishment of the ACNC and its legislative regime so that they could secure the certainty of registration and recognition within a legal framework, education, health and aged care charities had already been subject to extensive regulation and registration requirements over a number of decades.

From a non-government school sector perspective, it is logical that its main government oversight and accrediting relationship will be with the respective state and federal education departments. This relationship between the non-government school sector and these departments, which covers registration and financial reporting, as well as other aspects such as curriculum, assessment, qualifications and student welfare, will continue into the foreseeable future. Similar situations exist in the sectors of aged care, hospitals and higher education. For these sectors, the ACNC will always be a secondary—if not tertiary—regulator and registrar, rather than the primary one. This reality needs to be adequately acknowledged as, to date, it has worked against the ACNC fulfilling the object “to support and sustain” those charities already situated within highly regulated sectors.

Rather than viewing all charities as the same, a more nuanced understanding and appreciation of the different regulatory and reporting environments within which certain highly regulated charities are operating needs to inform the ACNC legislation and practice. This can particularly be seen in relation to the duplication of reporting requirements and increased administrative burdens that have been placed on charities that are already highly regulated.

Duplication in reporting

Division 60 of the Act requires that all charities provide annual information statements to the ACNC, and that medium and large charities also provide financial data and reports. Non-government schools have been providing extensive financial reporting on all aspects of their operation to the Commonwealth Department of Education and Training (DET), as a requirement under the *Australian Education Act 2013* and preceding education legislation for decades. The ACNC legislation created reporting requirements that do not add value to this pre-existing reporting. It merely duplicates the requirements and adds an additional layer of administrative and data checking work upon schools.

Upon the commencement of the ACNC, repeated guarantees were given to the non-government school sector that there would only be one reporting point to government by schools and that

genuine red tape reduction would occur. Five years later, these guarantees have not been met. The ACNC legislation imposed duplicative reporting on non-government schools that will continue indefinitely. To address the situation of schools having to report the same data to DET and the ACNC (as well as the state/territory department of education), arrangements were put in place whereby the financial reporting to DET would then be accessed by the ACNC, following a data item mapping exercise so that the financial data could conform to the different format required by the ACNC. Accompanying financial reports have also been requested by DET and are then provided to the ACNC.

These complex arrangements to address reporting duplication result in a situation that is not ideal. Misleading financial information has been published by the ACNC for Catholic schools following double counting of amounts as part of the conversion process of DET data to the ACNC format. Although the publication of misleading information was unintended, the production of such misinformation calls into question the appropriateness and sustainability of the duplicate and complex financial reporting arrangements. Moreover, as well as using the transition arrangements processes, schools may also report their financial data directly to the ACNC in its required format. Some schools have chosen to do this, resulting in the uncertainty of different schools reporting in different ways in order to meet the same legislative requirements. It would be far better for the requirement to be that schools report financial data in one format to DET and that this also satisfies the reporting obligation to the ACNC.

Powers and the functions of the ACNC

Although section 45-10 (6) of the Act permits a charity to advocate for a change to a law or a policy, the advocacy must align with the purpose of the charity and be lawful. Moreover, according to section 11 of the *Charities Act 2013*, a charity may lose its charitable status if it promotes or opposes a political party or a candidate for political office.

In the past, the ACNC has taken action against various charities, including revocation, requiring a charity to agree to undertakings and providing regulatory guidance to charities. A number of cases remain under active investigation.

A major concern for the NCEC and other charities is the secrecy provisions governing ACNC investigations of the conduct of charities. Under division 150 of the Act, the ACNC is not required to be transparent in how it investigates the conduct of charities, nor provide reasons for the decisions it makes in relation to the political advocacy of a charity. The NCEC believes these secrecy provisions need to be examined closely. The ACNC must be publicly accountable for such decisions and its investigations must be the subject of oversight, appeal and review. As they currently stand, these provisions undermine basic principles of natural justice.

An additional concern has emerged from the ACNC submission to this review process. The ACNC submission has called for two new objects to be inserted into the ACNC legislation:

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

There is concern in the charities sector that the new objects could come with additional powers, functions and resources. The matter of compliance burden also arises. It is unclear how the ACNC would measure the effective use of resources and it is concerning that the ACNC would seek to regulate how a charity uses its resources.

Amendments to the ACNC legislation to enable the achievement of the objects

A legislative change to address the issues of differentiation between charity types and duplication in reporting would involve the introduction into the Act of a more sophisticated mechanism for differentiating between various types of charitable entities. Currently, section 205-25 of the Act classifies entities according to their annual revenue levels as small, medium and large. This is an overly simplistic methodology for the classification of charities, especially given the vast differences between the legislative and regulatory environments different charities operate in. Moreover, this methodology does not differentiate between primary schools and secondary schools, which have varying levels of capacity to manage the regulatory impost of the ACNC.

A better methodology would ensure the ACNC takes the specific circumstances of charities into account, differentiating between those charities that are primarily and comprehensively regulated by, and report to, government departments relevant to their field of operation and those of the general charity sector whose central regulator is ACNC. This would lead to a more coherent and coordinated approach to the regulation and reporting framework for charities. The circumstances of already highly regulated charities would be fully acknowledged and their reporting obligations to the ACNC adjusted accordingly. This legislative change could also address the issue of duplication in reporting. As part of this differentiation between charity types, the ACNC legislation should be amended so that the requirement that schools report financial data in one format to DET also satisfies their reporting obligations to the ACNC.

Recommendations

The NCEC recommends that:

1. The ACNC legislation appropriately differentiates between certain charity types with respect to the legislation and compliance requirements that attach to them. This would have the benefit of reducing the duplication of reporting without any compromise to standards of conduct.
2. The ACNC legislation be amended so that the requirement that schools report financial data in one format to DET also satisfies their reporting obligations to the ACNC.
3. The secrecy provisions in the Act be reviewed and amended such that the ACNC is publicly accountable for its investigations of the political advocacy of charities. These investigations should be subject to oversight, appeal and review.
4. If the two new objects sought by the ACNC Commissioner in the ACNC submission to the review of the ACNC legislation confer additional powers, functions and resources on the ACNC, they should not be granted. Aside from the compliance burden these new objects might create, the ACNC should not determine how charities use their resources.