



Public Health Association
AUSTRALIA

Public Health Association of Australia submission on the Review of the ACNC Acts

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Preamble

The Public Health Association of Australia

The Public Health Association of Australia (PHAA) is recognised as the principal non-government organisation for public health in Australia working to promote the health and well-being of all Australians. It is the pre-eminent voice for the public's health in Australia. The PHAA works to ensure that the public's health is improved through sustained and determined efforts of the Board, the National Office, the State and Territory Branches, the Special Interest Groups and members.

The efforts of the PHAA are enhanced by our vision for a healthy Australia and by engaging with like-minded stakeholders in order to build coalitions of interest that influence public opinion, the media, political parties and governments.

Health is a human right, a vital resource for everyday life, and key factor in sustainability. Health equity and inequity do not exist in isolation from the conditions that underpin people's health. The health status of all people is impacted by the social, cultural, political, environmental and economic determinants of health. Specific focus on these determinants is necessary to reduce the unfair and unjust effects of conditions of living that cause poor health and disease. These determinants underpin the strategic direction of the Association.

All members of the Association are committed to better health outcomes based on these principles.

Vision for a healthy population

A healthy region, a healthy nation, healthy people: living in an equitable society underpinned by a well-functioning ecosystem and a healthy environment, improving and promoting health for all. For a healthier community, the PHAA supports the Global Charter for the Public's Health identifying protection, prevention and health promotion as key elements supported by the four enablers of good governance, accurate information, capacity building and advocacy.

Mission for the Public Health Association of Australia

As the leading national peak body for public health representation and advocacy, to drive better health outcomes through increased knowledge, better access and equity, evidence informed policy and effective population-based practice in public health.

The reduction of social and health inequities should be an overarching goal of national policy and recognised as a key measure of our progress as a society. The Australian Government, in collaboration with the States/Territories, should provide a comprehensive national cross-government framework on promoting a healthy ecosystem and reducing social and health inequities. All public health activities and related government policy should be directed towards reducing social and health inequity nationally and, where possible, internationally.

Introduction

PHAA welcomes the opportunity to provide input to the Treasury's Review of the Australian Charities and Not-for-profits Commission Act 2012 and the Australian Charities and Not-for-profits Commission (Consequential and Transitional) Act 2012 (the "ACNC Acts").

The legislation and the Commission have now been in operation for over 5 years, and in general they provide a satisfactory regime for regulating the sector. In relation to financial and other aspects of the administration of charities PHAA supports simple, efficient legislation which enables charities to meet high standards of administration and probity.

PHAA has not found the regime difficult to work with. (PHAA notes without comment that the ACNC Commission submission to this Review proposes some apparently technical alterations to the legislation.)

However it is clear that, taken together with proposed amendments to the Commonwealth Electoral Act, the climate in which this Review is being undertaken is not simply one of making useful adjustments to the legislation. A significant public debate has broken out over the issue of advocacy work and – as some observers view it – 'political campaigning' by organisations which may be registered as charities.

PHAA is an incorporated body and is also registered as a charity under the legislation. PHAA is an issues-based public interest entity which continually engages in issue advocacy *to parliaments and governments*. PHAA does not, however, engage in 'campaigning' *to voters* in the ordinary sense of that expression.

PHAA is concerned that this Review does not become a vehicle for additional inappropriate regulation of the legitimate advocacy work of public interest charities. With this in mind, we note with concern that items 4 through 7 of the 'focusing questions' provided with the Review terms of reference appear to insinuate some form of misconduct by current charities:

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

These focusing questions imply the existence of significant current misconduct and therefore a need for further regulatory measures. PHAA acknowledges the task of the Commission in maintaining compliance with the law. However in the circumstances of what has now become a controversial public debate, it would assist greatly if the Commission could publish any relevant data about the extent and nature of current misconduct.

The suggestion of a need for greater regulatory burdens conflicts with the overall policy of the Government (and the Opposition) towards 'red tape', and is actually contradicted by the final focusing question:

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

PHAA notes that there are linkages between the regulations imposed by the ACNC Acts and those imposed by the Commonwealth Electoral Act and in particular regulations which would be imposed by Government-proposed amendments to the electoral law that are currently before Parliament – the *Electoral Legislation Amendment (Electoral Funding and Disclosure) Bill 2017* (the "Electoral Bill") – regarding political donations

and their disclosure. The Australian Charities and Not-for-profits Commission recognised this linkage in its submission to Parliament's Joint Standing Committee on Electoral Matters on this matter.¹

In this submission it is therefore relevant for PHAA to comment both on the current ACNC laws and on the potential impact of the mooted amendments to the electoral law.²

PHAA Response to the Review Terms of Reference

Questions 4 to 7: insinuated misconduct by charities

As cited above, the guidance material for this Review insinuates that charities are engaging in some form of 'misconduct', and that the 'risk' of that misconduct are not being 'appropriately addressed by the current legislation. There is no clear indication as to exactly what form of misconduct that might be. The unstated misconduct might also be being undertaken by 'those that work with' charities – whoever that may be. There is apparently not 'sufficient transparency' about the activities of charities, and a suggestion that 'funds are [not] being used for the purposes they are being given' – which is, it must be said, a generalised allegation of fraud. All these 'activities and behaviours by charities and not-for-profits' allegedly have an 'ability to erode public trust and confidence in the sector'.

The framing of these questions is loaded, emotive, and based on insinuations of a current problem of misconduct for which no evidence is provided.

There is, of course, a known political context for the Review being framed in these terms. The Government has indicated – through repeated public statements and through the terms of proposed legislative amendments – that it wishes many charities would change the content, and/or reduce the scope, of the policy advocacy work which they undertake.

The Government appears to perceive such issue advocacy as if it were inherently politically partisan. The apparent 'misconduct' of at least some charities is simply to speak upon public issues which have political significance.

This is a fundamental misreading of the proper and legitimate role of charities in the realm of public policy making. Charities by their nature advocate for public policy responses to social and economic issues and problems. The reality is that many charities use advocacy in seeking to address the "cause of the cause" of an issue.

Political parties, by contrast, have the role of responding to all voices in the community which are advocating for various actions. It is inherent in the role of political parties that they consider, set, alter and maintain policies in response to the voices of issue advocates.

To argue that public interest organisations should constrain their advocacy because the political interests of political parties are in some way threatened is to invert the proper political process.

Moreover, to attempt to do so by legislation would quite likely be beyond the powers of Parliament, which may not burden the freedom of political communication of any person or entity without a legitimate purpose and through a proportionate response.

Separate to the conclusion that there is no basis to support this insinuation of advocacy misconduct, there is also no evidence provided to suggest that there is any systemic misconduct by charities against their ordinary existing statutory obligations under the Acts.

Focus 4: Appropriate activities of charities

The current legislation deals quite sensibly with the notion that some of the advocacy work of charities by necessity enters the ‘political’ realm.

The current law prevents the issuing of regulations which would inhibit the freedom of political communication. Section 45-10 of the Australian Charities and Not-for-profits Act 2006, “Governance Standards”, currently reads as follows:

Political advocacy

(6) The regulations must not require an entity not to comment on, or advocate support for, a change to any matter established by law, policy or practice in the Commonwealth, a State, a Territory or another country, if:

(a) the comment or advocacy furthers, or is in aid of, the purpose of the entity; and

(b) the comment or advocacy is lawful.

Thus the current law recognises that there is a legitimate place for advocacy on political matters, which is distinct from the quest for political office itself. Such advocacy has been constitutionally protected by the High Court as legitimate ‘political communication’. The provision cited above protects organisations from improper interference in their freedom of political communication.

In response to declining trust in institutions including parliaments and governments, efforts by public interest organisations to engage in policy debates should be encouraged, not burdened.

PHAA is also concerned with the approach to the conduct of advocacy activity demonstrated by the government in presenting the Electoral Amendment Bill to Parliament in late 2017. In the course of attempting a tighter regulatory regime for political donations and expenditure, this Bill proposes to label all advocacy work under the term ‘political campaigning’.

Given the regrettable but undeniable approach of the community to ‘political’ activity, such labelling would have the effect of associating advocacy groups with partisan political behaviours which the community strongly dislikes. This may well have the effect of delegitimizing the advocacy work of public interests organisations in the eyes of the public – especially when “comment or advocacy furthers, or is in aid of, the purpose of the entity”.

The direction of the Electoral amendment legislation blurs the very distinct roles of political parties – which directly seek office and power – as opposed to advocacy groups – which simply offer into the public domain evidence and arguments relating to issues.

In summary, we strongly advise against the current Review being lead down the path towards using the regulation of the charitable sector as a means of inappropriately – even unconstitutionally – inhibiting charitable organisations from advocating in the public benefit in their areas of expertise.

Focus 5: Transparency about use of charity funds

It is not clear what failure of ‘transparency’ is being suggested here. Charities have annual reporting obligations under the ACNC and other Acts. The PHAA is incorporated in the ACT, and therefore provides an annual report on its activities along with audited financial statements.

PHAA views the additional requirements related to registration as a charity to be reasonable and not especially burdensome.

The Commissioner has current powers to encourage, support and ultimately enforce compliance and penalise non-compliance should it occur. Our understanding is that non-compliance is not widespread or common. If there is a problem with compliance at the general level, PHAA is unaware of it.

Focus 6: Risks of misconduct by charities

Again, it is not clear what might constitute ‘misconduct’ by charities.

If all that is intended by the term ‘misconduct’ is any actions or omissions of charities in complying with the regulatory scheme of the Act in the ordinary sense, then it does not appear that any part of the current requirements, nor the provisions for enforcement of these requirements, requires any major change. We note that the Commission’s submission to the Review suggested a range of technical amendments.

If on the other hand the Review questions are intended to promote the notion that advocacy work by charities is in itself a form of ‘misconduct’, then PHAA would strongly disagree, as outlined above.

Focus 7: Powers of the SCNC Commissioner

The powers of the Commissioner seem to be adequate to their current statutory tasks.

Summary

PHAA considers that the ACNC Acts are fit for purpose for regulating the charitable sector in Australia in their current form. The existing regulatory structure is adequate and that no amendments are not required.

PHAA also considers that the powers and functions of the ACNC Commissioner within the existing legislation are sufficient.

Put simply, there appears to be nothing of major significance in the Acts or operations of the ACNC that obviously needs changing.

Excessive regulatory burdens

Focus 8: Reducing the regulatory burden on charities

PHAA does not believe that the regulatory strictures of the current legislation are unreasonably burdensome. At PHAA complying with ACNC regulatory requirements is incorporated within our ordinary office operations without difficulty.

Curiously, we note that the legislative changes outlined in the Electoral Bill 2017 would actually add to the regulatory burden on charities. Since the philosophy behind the ‘red tape repeal’ approach is that regulatory measures should only be imposed to address a real mischief, these proposals would actually seem to be contrary to the Governments’ stated philosophy on regulatory excess.

PHAA would caution against making the regulatory burden on the charitable sector more onerous than it is, which would distract charities from pursuing their adopted purposes.

The original legislation stipulated the current Review after 5 years of operation of the ACNC Acts. Since they now appear to be functioning appropriately, and since needless reviews should be avoided, we would recommend that any future review not be scheduled for at least a further 10 years.

Conclusion

PHAA supports the current legislative regime.

PHAA believes that the advocacy role of charities, and the distinction between the pursuit of charitable purposes and partisan political activity, is appropriately managed by the current ACNC Acts and electoral law.

PHAA believes that the ACNC Acts continue to be fit for the purpose of regulating the charitable sector and for guiding the ACNC Commission its responsibilities.

PHAA strongly recommends against any legislative changes that would interfere in the legitimate advocacy work of charities, or needlessly add to red tape.

The PHAA appreciates the opportunity to make this submission. Please do not hesitate to contact me should you require additional information or have any queries in relation to this submission.



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28 February 2018

References

¹ ACNC [Submission](#) to the Inquiry into the *Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017*, 24 January 2018.

² PHAA made a submission to the inquiry of Parliament's Joint Standing Committee on Electoral Matters into the Government's *Electoral Legislation Amendment Bill (Finding and Disclosure) Bill 2017*.