

19th February 2018

Principal Adviser
Individuals and Indirect Tax Division
The Treasury
Langton Crescent
PARKES ACT 2600

By email: ACNCReview@treasury.gov.au

Dear Mr Crowe

Review of Australian Charities and Not-for-profits Commission (ACNC) legislation

Thank you for the opportunity to provide comment on the Australian Charities and Not-for-profits Commission (ACNC) legislation.

Suicide Prevention Australia (SPA) is a Health Promotion Charity and approved Deductible Gift Recipient. As such it is governed under the ACNC legislation.

SPA is the peak body for the suicide prevention sector in Australia. Our purpose is to deliver national leadership for the meaningful reduction of suicide in Australia. We are a registered charity under the ACNC.

The [Review webpage](#) outlines general questions regarding the ACNC Acts to assist the ACNC in determining potential reforms in order to ensure the currency and relevance of the ACNC and ensure the ACNC Commissioner's work in delivering against the objects of the Act are not impaired. Specific comment on the Review Questions is appended to this letter.

Yours sincerely



Kim Borrowdale

Acting Chief Executive Officer

SPA's position, rationale & background

Suicide Prevention Australia (SPA) is the peak body providing leadership in the Australian suicide prevention sector. We have more than 80 Organisational Members, of whom 73% are registered with the ACNC.

Our Members inform us that they have a number of challenges in optimal delivery in meeting their goals, several of which are within the scope of the ACNC:

- Red tape: multiple reports to multiple Government agencies
- Compliance silos: various legislative instruments, for example those pertaining to fundraising, differ from state to state and require significant administrative and governance oversight to ensure compliance
- Data silos: Government agencies don't "talk to" one another regarding reporting
- Poor understanding of the sector: pervasive incorrect belief in the general public that administration cost ratio is inversely proportional to effectiveness and/or efficiency

Suicide Prevention Australia is an enthusiastic supporter of the ACNC. The work that the ACNC has done to support the sector and the methods of doing so are to be commended. While there will always be outliers who do not comply (for many reasons) with good governance requirements, the ACNC's educational, "softly, softly" approach has improved knowledge and skills within the not-for-profit sector, enabling organisations to improve, rather than close, in cases of governance challenges.

SPA expresses concern that the focus of this Review (specifically the Focus Questions in the Terms of Reference) emphasise minimising misconduct and reducing risk, rather than supporting charities to do well. While risk reduction is important, this emphasis undermines public confidence by implying that misconduct is widely prevalent.

SPA supports recommendations that are designed to simplify the ACNC Act so that applicable legislation is accessible to relevant parties, helping charities to comply and increasing public confidence.

There is certainly a need for greater governance support within the Aboriginal and Torres Strait Islander not-for-profit organisations. Many have been stigmatised by the misconduct label and the ACNC support to change this would be innovative.

Suitability and Effectiveness of the ACNC Acts: Consultation questions

Examine the extent to which the objects of the ACNC Acts continue to be relevant.

In SPA's view and experience the objects of the ACNC Act as set out in section 15-5(1) of the ACNC Act are adequate and do not require amendment, though as noted below a change to the order of the objects would be welcomed.

The ACNC has the responsibility for administering the Act, and of course one of the three existing objects of the ACNC Act is promoting 'the reduction of unnecessary regulatory obligations on the Australian not-for-profit sector'. SPA supports this object and believes that avoiding unnecessary red tape will be a key way the ACNC Act can contribute to the

effectiveness of the not-for-profit sector. There is no need to add additional objects to the Act which more explicitly speak to the effectiveness of not-for-profit organisations. Effectiveness is subjective and contextual, and inextricably linked with organisation type, target group, jurisdiction and operating environment, among other things. Definitions of effectiveness are therefore highly dependent on these factors and differ from organisation to organisation. SPA disputes suggestions that the ACNC Act should be amended to give the ACNC an additional role in enforcing or otherwise managing the organisational effectiveness of registered entities. The ACNC's role in effectiveness under s15-10(d) of the ACNC Act is to 'have regard to ... the maintenance and promotion of the effectiveness and sustainability of the not-for-profit sector' and this encompasses supporting charities in increasing their effectiveness and impact. Under s15-10(e) that role is to be balanced against the principles of regulatory necessity, risk reflection and proportionate regulation, which support organisational effectiveness through minimising unnecessary red tape and duplication of tasks.

- a) to maintain, protect and enhance public trust and confidence in the Australian not-for-profit sector

Evidence indicates that the first of the current objects (to maintain, protect and enhance public trust and confidence in the Australian not-for-profit sector) is unnecessary because there is already a high level of public trust and confidence in the Australian not-for-profit sector and this trust is higher than confidence in the corporate sector¹ (AMR, 2017) and Government². Having this as the first object implies that this confidence may be misplaced.

The Australian Institute of Company Directors 2017 NFP Governance and Performance Study (AICD Study) states that “despite the manifold challenges involved in NFP governance – in achieving mission success with limited funding and facing a complex operational environment – NFP boards have performed with distinction, belying any belief that governance is lagging the for-profit sector.”³

While trust may have reduced by four points over the last two years⁴, the ACNC has stated that this “is similar to the experience of other jurisdictions where a dedicated charity

¹ AMR, 2017: http://www.amr-australia.com/asset/cms/AMR_Reputation_Institute_Charity_Reputation_Index_December_2017.pdf; http://www.amr-australia.com/asset/cms/AMR_Corporate_Reputation_Australia_-_2017_results_26.04.2017.pdf, accessed 5 January 2018

² Media release 22 November 2017, http://www.acnc.gov.au/ACNC/Pblctns/Media_centre/Med_Rel/ACNC/Comms/Med_R/MR_229.aspx, accessed 5 January 2018

³ <https://aicd.companymen.com.au/~media/cd2/resources/advocacy/research/pdf/06017-5-nfp-governance-and-performance-study-2017-amended-web.ashx>, accessed 8 January 2018

⁴ <http://www.acnc.gov.au/CMDownload.aspx?ContentKey=fb9be8d0-01ff-4125-bc45-fb6260704f8b&ContentItemKey=46ba1f33-8ef2-4010-88fb-fc25eabd02b0>, accessed 5 January 2018

regulator was established over the past decade”⁵. The drop may be due to an ACNC and media focus on a very small number of poorly-managed charities skewing perception.

The Giving Australia 2016 report⁶ supported this high level of trust, showing that people are giving more to charities and volunteering more hours compared with 10 years ago. Those who were no longer giving cited personal financial circumstances as the reason for not doing so.

For those who did have confidence concerns, these centred around charitable efficiency myths: how their money would be used, proportion spent on charity administration, and amount reaching those in need. A major part of enhancing public confidence in the Australian not-for-profit sector is overturning this administration proportion myth that organisations with the lowest administrative and overheads costs are the most effective and are doing the most good. The AICD Study notes the sector’s active investment in improving governance (ie part of administration costs) in the face of compliance pressure from funding and regulatory bodies [such as the ACNC]. Reduced administration and overhead may well result in poor governance.

On the one hand, charities are expected to perform in a professional, businesslike manner which must by its very nature include typical business overheads and qualified personnel. However doing so (and growing the service in professionalism and effectiveness) results in negative public perception, reduction in support and increase in financial and governance pressures within the charity. At the same time, diversification of income to correct these financial pressures can result in an increase in (and duplication of) reporting requirements, further reducing effectiveness. The assumption that volunteers can and should maintain high level administrative and governance commitments fails to acknowledge the transitional nature of volunteerism and assumes a consistent supply of highly qualified individuals available to volunteer their time and skills.

Particularly through social media, this myth is perpetuating rapidly and damaging the reputation of effective, professional organisations which are achieving positive outcomes. This attitude is supported by many sponsors, grantmakers and government funding bodies which cap administration costs or explicitly exclude wages from consideration for funding.

Recommendation

Support the sector in overturning the administration proportion myth as a measure of organisational effectiveness.

⁵ Media release 22 November 2017,
http://www.acnc.gov.au/ACNC/Pblctns/Media_centre/Med_Rel/ACNC/Comms/Med_R/MR_229.aspx,
accessed 5 January 2018

⁶ Australian Centre for Philanthropy and Nonprofit Studies (ACPNS), Centre for Social Impact (CSI) Swinburne and the Centre for Corporate Public Affairs,
https://www.communitybusinesspartnership.gov.au/wp-content/uploads/2016/11/giving_australia_2016_background_paper.pdf, accessed 5 January 2018

- b) to support and sustain a robust, vibrant, independent and innovative Australian not-for-profit sector

The current stance of the ACNC that there are not “too many” charities arguably encourages the creation of new charities without sufficient due diligence to ensure that work is not being duplicated. A multitude of charities working in the same field is inefficient and sets up newer charities for failure due to competition for funds, resource and community attention. Opportunities to collaborate or partner with existing charities should be adequately explored by potential charities prior to establishment. There should therefore be greater controls over the number of organisations given charitable status (and therefore overseen by the ACNC).

Recommendations

Incorporate into the application process a requirement to conduct a basic environmental scan to ascertain other charities with similar aims and explore opportunities for partnership, auspicing or collaboration prior to proceeding with the application.

Include in the application process a simple, broad point of difference statement⁷, so that new charities fill service gaps rather than promulgate more of the same.

Examine duplication, particularly in the area of Aboriginal and Torres Strait Islander service provision: many mainstream organisations ostensibly provide services to Aboriginal and Torres Strait Islander individuals and/or communities without conducting or maintaining relationships within these communities to deliver truly culturally appropriate services with their target populations.

The grantmaking methods of the majority of Governments and philanthropic entities continue to impede the robustness, vibrancy, independence and innovation of funded organisations in a number of ways. It is extremely common for funding to be limited to work which is:

- project based, rather than supporting essential overheads such as governance, administration, compliance, rents etc (robustness). It also means that organisations constantly have to develop “new” projects: while this may support innovation, it can mean that tried, trusted and effective work is left unfunded.
- a maximum of one year in duration (or in some Governments and larger philanthropic grants, three years). This impairs an organisation’s capacity to be bold in finding solutions, especially to wicked problems (innovation). It also makes planning and implementing long-term solutions difficult due to the substantial risk that there will not be ongoing funding (robustness and sustainability)
- in strict compliance with funders’ expectations. These can be narrow or unintentionally biased for a particular viewpoint (vibrancy; innovation)

⁷ The ACNC should not be in the position to determine whether the point of difference is “enough”, but this statement ensures that the group has considered it. This will also help the group in future marketing, fundraising etc.

- in line with the funders' policies on a particular issue. In some cases this can limit an organisation's capacity to speak out (independence)
- conducted in collaboration with another organisation in the sector (independence)
- evidence-based. Work will often only be funded if it has already been demonstrated as effective (innovation).

Recommendation

Incorporate into the ACNC's powers the ability to advocate for changed funding terms and conditions in order to better support sector robustness, sustainability, vibrancy, independence and innovation.

- c) to promote the reduction of unnecessary regulatory obligations on the Australian not-for-profit sector.

The ACNC has had mixed success in regulatory burden reduction. In some cases, such as the Annual Information Statement, information may now be provided to the ACNC and not other agencies such as ASIC. In other cases, such as fundraising legislative instruments, regulatory obligations are more piecemeal and may depend on organisational location.

The concept of the "report once, use often" Charity Passport is a good one, however in practice Government agencies still regularly request the information it contains directly from the charity, rather than accessing it via the Charity Passport. This conflicts with the 2017 Commonwealth Grants Rules and Guidelines point 8.4 which states that "Officials should seek to minimise red-tape and duplication. In particular, they should not seek information from potential grantees and/or grantees that is collected by other parts of the entity or other Commonwealth entities [59] and is available to them" with note 59 being "Including the Australian Charities and Not-for-profits Commission"⁸.

Recommendation

Prioritise promotion of reduction of unnecessary regulatory obligations, including but not limited to:

- Compliance
- Grant reporting / acquittals
- Fundraising authorities

⁸ Commonwealth Grants Rules and Guidelines 2017

<https://www.legislation.gov.au/Details/F2017L01097> accessed 14 January 2018

Assess the effectiveness of the provisions and the regulatory framework established by the ACNC Acts to achieve the objects.

SPA believes that the operation of the ACNC over the last five years has been effective in achieving the objects.

However, ACNC interaction with Aboriginal and Torres Strait Islander not-for-profits needs to be examined in detail to ensure genuine engagement.

Consider whether the powers and the functions of the ACNC Commissioner are sufficient to enable these objects to be met.

The powers of the Commissioner within the Act are specific to registered organisations under suspicion of noncompliance or misconduct:

- Information Gathering
- Monitoring
- Warnings
- Directions
- Enforceable Undertakings
- Injunctions
- Suspension and Removal of Responsible Entities

The Act does not seem to explicitly provide the Commissioner with the power to implement new sector-wide data collection or compliance requirements.

Recommendation

Clarify the powers of the Commissioner as they relate to all registered organisations.

The Act does not speak to the functions of the ACNC Commissioner, but only to the functions of an ACNC Officer. While this implies that all functions of an Officer are the functions of the Commissioner, this could be clearer.

Recommendation

State the functions of the ACNC Commissioner in the ACNC Act.

Consider whether any amendments to the ACNC Acts are required to enable the achievement of the objects and to equip the ACNC Commissioner to respond to both known and emerging issues.

Focusing questions

Are the objects of the ACNC Act still contemporary?

The objects of the ACNC Act are still contemporary, however the ordering places undue emphasis on public trust, implying that there is reason for concern and thereby undermining existing trust. The greatest value of the ACNC to the Australian public is the reduced red

tape, which increases efficiency of existing charities. Emphasising and expanding this support of charities would be beneficial.

Recommendation

Amend the objects to read as follows:

- a) to support quality improvement of Australian charities and not-for-profit organisations
- b) to promote the reduction of unnecessary regulatory obligations on the Australian not-for-profit sector
- c) to support and sustain a robust, sustainable, vibrant, independent, diverse and innovative Australian not-for-profit sector
- d) to maintain, protect and enhance public trust and confidence in the Australian not-for-profit sector

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

SPA is not aware of gaps in the current regulatory framework that prevent the objects of the Act from being met, however as indicated elsewhere in this submission, we provide recommendations that will further support delivery of the objects.

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

As its name implies, it was always the intention that the ACNC include not-for-profits as well as charities. If the goal of the ACNC remains to support and improve its registered institutions, then other classes of not-for-profits should be included, provided the regulatory burden is decreased rather than increased in all cases.

The ACNC should be fully resourced to enable it to completely exercise its powers and responsibilities across all classes of not-for-profit organisations, rather than being limited to managing charities.

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

Ongoing promotion of low administrative costs undermines an understanding of the importance of investing in good governance. This can lead to charities emphasising their low overheads at the expense of good outcomes.

Creation of a new charity is not an uncommon response to personal or community tragedy⁹ and there is now one charity per 459 people¹⁰. Many of these new charities duplicate work being done by established entities. In addition, a disproportionate amount of governance is required for their size and their work so their outcomes are reduced and those who create a charity end up governing an organisation and managing red tape, rather than achieving their intended change and societal benefit. The high level of acceptance of new charities without effort to match them to existing charities has contributed to this duplication. Although diversity can promote innovation, duplication can also be inefficient and may promote a competitive rather than collaborative sectoral approach. It can create conditions where the Responsible Persons of new smaller charities have limited governance expertise and the charities may struggle to succeed.

SPA does not support the blanket PBI status for any class of entity and calls for the abolition of lower compliance requirements for, and special treatment of, basic religious charities. This lower level of scrutiny undermines the role of the ACNC, and especially in the context of the Royal Commission into Institutional Responses to Child Sexual Abuse, the Australian public may have limited tolerance for this “blind eye” approach to religious institutions. Of relevance to the work of SPA is the clear evidence that childhood trauma plays a role in suicidal behaviour later in life.

Recommendation

Remove the lower compliance requirements for, and special treatment of, basic religious charities.

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?

Transparency could be improved by amending the AIS fields to more accurately reflect common charitable expense items, as well as the range of income sources that a charity might access. SPA commends the ACNC for consulting with the sector on data collection via the 2017 AIS.

Recommendation

The Annual Information Statement pro forma should be tested biennially with a sample of organisations for improvements, prior to being consulted with the sector to identify data and other emerging trends which can improve data collection and usage.

⁹ The first of the “I want to” links on the ACNC homepage (www.acnc.gov.au, accessed 8 January 2018) is “I want to Start a charity”.

¹⁰ ABC Population Clock (<http://www.abs.gov.au/ausstats/abs@.nsf/0/1647509ef7e25faaca2568a900154b63?OpenDocument>, accessed 8 January 2018 3:2819pm Canberra time); ACNC

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?

Yes. ACNC's educational approach and minimum standards for Directors have significantly reduced the risks of misconduct by helping ensure that Responsible Persons for charities have the skills and knowledge to avoid error.

It is not possible to eradicate misconduct, however the educational work of the ACNC has empowered other stakeholders to better identify, report and ameliorate these occurrences.

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?

The current level and amount of interface with state / territory Governments is not clear. While the ACNC has an object of reducing red tape, the ability to do so appears dependent on cooperation of state and territory Governments. SPA advocates for the ACNC Act to provide for stronger links to these Governments, increasing cooperation between the ACNC, state / territory Governments and other regulatory authorities and agencies.

Recommendation

Include in the ACNC Act provision requiring the ACNC to have stronger links to state and territory Governments and agencies for the purpose of reducing red tape and enabling charities to focus on their work rather than expend unnecessary resources on duplicative reporting and compliance.

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

Duplicative reporting burden still exists for many charities with a diversity of fundraising regulations in the various Australian jurisdictions.

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?

Yes. The focus on education has been effective to support charities to do the right thing and the penalties and the threat of deregistration provide a strong deterrence against misconduct.

Other commentary relevant to the ACNC

SPA supports endorsed organisations being registered charities and being subject to regulation under the Australian Charities and Not-for-profits Commission Act 2012 and associated instruments.

Australian charities should continue to be allowed to undertake advocacy to further their objectives, for example in approaches to governments on policy proposals and decisions, and in monitoring and reporting on the respective policies of political parties on topics of concern to the charity. This is an essential part of their work. In 2010 The High Court in the *Aid/Watch*¹¹ case held that charities engaging in political debate is an essential part of advocacy work and very much in the public interest.

The Annual Information Statement should recognise the diversity and uniqueness of the sector, and more accurately reflect charitable organisation accounting practices. The 2017 (and all previous) Annual Information Statements include many financial fields which are irrelevant to the vast majority of registered charities. It also lacks fields which would more accurately and helpfully identify information useful for both the sector and the general public. Income fields excluding even the most common income sources are not helpful for donors interested in income diversity, and limited expenditure fields are not helpful for donors interested in areas of focus within the organisation.

Recommendation

Include in the Annual Information Statement the following income fields:

- Non-government grants
- Partnerships
- Sponsorships
- Memberships

and expenditure fields more relevant to the not-for-profit sector.

In principle SPA does not support activity audits beyond normal compliance with charity law and ACNC requirements. Charities and their Boards are best equipped themselves to determine how monies are allocated, consistent with their objectives and/or Constitution.

SPA does not support a formal rolling review program such as requiring charities with Deductible Gift Recipient status to make annual certifications. The AIS already includes a question regarding significant activity change in the previous / coming year. Monitoring and review of this answer with the AIS can yield a list of potential organisations which may be eligible for recertification. Additional review and reporting will add to the administrative burden on charities (contrary to the current object c), and while SPA recognises the need for accountability and transparency, the use of additional reviews should only be considered where there is evidence of abuse of Deductible Gift Recipient status by the entity.

¹¹ <https://www.aidwatch.org.au/stories/high-court-decision-a-win-for-charitiesao-freedom-of-speech/>