



**Australian Charities and Not-for-profits
Commission Bill 2012**

&

Review of not-for-profit governance arrangements

**SUBMISSION FROM THE SALVATION ARMY
AUSTRALIA**

27 January 2012

The Salvation Army

The Salvation Army is the most recognised charity in Australia. The Salvation Army's services are open to all, without discrimination. The foundation of The Salvation Army and its current ethos affirm its religious commitment and its social commitment as equal and indivisible. The Salvation Army describes this as a "holistic mission".

The Salvation Army is an evangelical part of the universal Christian Church. Its message is based on the Bible and its ministry is motivated by love of God. Its Mission is both spiritual and practical, encompassing the preaching of the Gospel of Jesus Christ and alleviating human suffering and distress without discrimination.

Opportunity to contribute

The Salvation Army supports reform being undertaken in relation to the not-for-profit sector to the extent reforms achieve the Federal Government's stated outcomes of red tape reduction. The Salvation Army supports reform that reduces regulation, reporting and compliance costs for the sector.

The Salvation Army is pleased to have the opportunity to contribute in the consultation process on the Exposure Draft for the Australian Charities and Not-for-profits Commission Bill 2012 and the Review of not-for-profit governance arrangements Consultation Paper.

The Salvation Army's Submission

Discussion

The Salvation Army observes the rapid speed of the current reform proposals and is concerned that the processes that are being consulted on can result in unforeseen and unplanned negative outcomes for the not-for-profit (NFP) sector.

The Salvation Army is concerned that due to the simultaneous release of the Exposure Draft for the Australian Charities and Not-for-profits Commission Bill 2012 (the Bill) and the Review of not-for-profit governance arrangements Consultation Paper (the Governance Paper) The Salvation Army is not able to accurately determine the impacts they may have on The Salvation Army. The Salvation Army feels somewhat compromised in attempting to determine if there are any unintended consequences that may arise as a result of the papers. The fact the Bill is not complete, as it relies on the outcome of the Governance Paper (and other not released inclusions), provides further concern to The Salvation Army.

Notwithstanding, The Salvation Army wishes to make a positive contribution to the consultation process. This submission outlines some of the areas of the respective papers where The Salvation Army suggests additional attention and consideration is required.

The first part of this submission will discuss governance issues and relevant sections of the Governance Paper.

The second part of the submission will provide a discussion on aspects of the Bill.

Governance

The Salvation Army is conscious of its profile within Australia and the respect it has earned from members of the Australian public over the 132 years it has been operating in Australia. The Salvation Army takes its 'corporate' responsibility seriously and devotes considerable time and attention to governance matters in order that members of the Australian public can continue to place their trust in The Salvation Army.

The Salvation Army in Australia comprises two Territories:

The Salvation Army Australia Eastern Territory, covering NSW, QLD and ACT

The Salvation Army Australia Southern Territory, covering VIC, TAS, SA, WA and NT

Within each Territory numerous 'entities' exist and these are governed and managed prudently and professionally.

Both Territories include in their Annual Reports a section devoted to governance and both include the following statement:

The Salvation Army, being a not-for-profit organisation, is not required to include a statement of the main corporate governance practices, which is required of listed corporations. However, it is considered appropriate to ensure best practice in reporting by including corporate governance practices in this Trustees' report.

Across the Territories there are 13 separate governance boards. These boards ensure the following areas of operation are managed appropriately: general governance, mission and policy, audit and risk, operations, investment, finance and property.

In addition to these governance boards, The Salvation Army operates Advisory Boards across Australia utilising the expertise of members of the general public to assist in the strategic direction, planning and development of the organisation.

Both Territories also undertake formal risk assessment and risk management programmes.

In response to issues raised in the Governance Paper The Salvation Army comments as follows.

- The Salvation Army recommends only high level concept based principles of governance are included in the Bill.

- The Salvation Army recommends regulations and guidance materials are developed in addition to, and outside of, the Bill to provide more specific and detailed information relating to NFP governance and duties of responsible individuals of a NFP.
- In the development of the high level concept based principles of governance that are to be included in the Bill, The Salvation Army supports the development and inclusion of a conflict of interest principle. The Salvation Army recommends that further work and consultation on proposed Regulations and guidance materials from the ACNC is required prior to finalisation of more detailed requirements.
- The Salvation Army does not support the development of different standards of care on the basis of employee versus volunteer or professional versus lay persons.
- The Salvation Army does not support the development of rules or standards relating to responsible persons that require particular qualifications, experience or skill.
- Based on the proposed responsible individual definition contained in the Bill, The Salvation Army does support the notion that if minimum standards of care are to be developed via regulations or guidelines by the ACNC, these should only apply to responsible individuals such as trustees or directors (or the equivalent in an incorporated or unincorporated association).
- The Salvation Army does not support the inclusion of the requirement to disclose specific remuneration details of responsible individuals. The Salvation Army is concerned with the potential development of 'score card' reporting that can arise when sensitive information such as remuneration is made public. Currently, The Salvation Army reports publicly on the totality of remuneration made available to Trustees of The Salvation Army. If remuneration reporting is to be developed, The Salvation Army recommends this is the maximum reporting obligation that is to be required.

The Salvation Army believes that any requirement to publicly list the remuneration paid to senior management personnel working in NFP organisations may have unintended consequences. To ensure the effective management and oversight of the activities of NFP organisations requires these organisations to compete in a competitive job market that remunerates those with specialized skills through market linked remuneration packages. Effective governance means that requirements for these skills, qualifications and experience cannot be compromised. Balancing senior management remuneration packages with other sectors inherently creates a situation where these positions are paid more than staff who are working in equally stressful and demanding frontline service positions.

The public disclosure of these salaries has the potential to create disharmony and disunity within an NFP about the perceived inequality of remuneration for roles

performed. All NFP's value and recognise the work of their frontline staff who serve in difficult circumstances with clients affected by homelessness, mental health, domestic violence etc, and would not want these staff to feel undervalued or to become demotivated because other employees with highly specialist skills that the marketplace determines the value of, are paid at higher rates. The Salvation Army therefore believes that specific levels of remuneration paid to individual staff should remain confidential information.

- The Salvation Army does not recommend the development of mandated internal review procedures. The development of such procedures would likely result in increased red tape for the NFP sector and the cost of monitoring and enforcement of compliance by the ACNC would likely outweigh any benefits. Instead, if there are best practices that can be identified, these should be published by the ACNC as guidance material for the NFP sector to adopt as required.
- The development of core minimum requirements for governing rules is potentially problematic for organisations such as The Salvation Army due to its long established history and inter-relationship with Acts of Parliament that established entities such as Property Trusts. The Salvation Army does not recommend minimum governing rules being included in the Bill. The Salvation Army does recognise the importance of governing rules and documents and accordingly supports the development of a regime that provides flexibility for the Commissioner of the ACNC to determine that an organisation such as The Salvation Army is adequately and appropriately 'constituted' to enable its purposes to be fulfilled.

Exposure Draft – Australian Charities and Not-for-profits Commission Bill 2012

As previously stated, The Salvation Army is concerned at the rapid speed in which consultations that affect the NFP sector are occurring and the tight timeframes being imposed by the Federal Government's reform agenda for the sector.

The Salvation Army supports reform and the development of the ACNC. What The Salvation Army does not support is the timeframe in which the reform is occurring that in turn leads to inadequate and piece meal legislation.

The concern of The Salvation Army is validated by the inclusion of obvious drafting mistakes that have occurred in the Bill¹, the fact that the exposure draft for the Bill is not complete and that previously consulted NFP announced reforms are not either finalised or progressed².

¹ An example of a basic drafting error is found in section 120-460 (3) which indicates that an ACNC officer can issue a warrant, when in fact it is the magistrate that issues a warrant.

² Both the Better targeting of not-for-profit tax concessions and the 'In Australia' consultations have stalled and no progress has been made for a significant length of time.

This reform for the NFP sector of establishing the ACNC is significant and transformational and accordingly The Salvation Army recommends the start date for the ACNC is deferred for a period of at least six months to ensure appropriate drafting and consultation on complete legislation can occur.

In respect of the Bill as released, The Salvation Army wishes to make the following comments.

- The Salvation Army recommends the object of the Bill as contained in section 2-5 is significantly revised. The current drafting of the Bills' object indicates to a reader of the Bill the NFP sector is untrustworthy, lacks total accountability and is not competent of being able to operate without intense regulation and monitoring. The drafting promotes a negative view of the NFP sector.

The object clause is a significant departure to the true purpose of the proposed reform, being the establishment of a not-for-profit regulator tasked as follows:

The ACNC is being established to act as the regulator for the NFP sector; to establish and maintain a publicly searchable database of charities; to provide a one-stop-shop for NFPs in their interactions across levels of government; and to oversight their financial and governance practice.³

Accordingly, the object of the Bill must be redrafted to clearly show the true purpose of the Bill.

In redrafting the object of the Bill it is possible to construct the object to clearly show how the reforms being undertaken will lead to a strengthening and betterment of the NFP sector. Failure to correctly identify the true object of the Bill is a catalyst for undermining the current trust and integrity of NFP sector as held by the Australian public and this needs to be avoided at all costs.

A further comment in relation to the object clause relates to the use of the phrase 'not-for-profit entities that provide public benefits'. The inclusion of the words 'that provide public benefits' indicates an imposition of a 'public benefit test' as consulted on in the consultation paper titled A Definition of Charity, dated October 2011. The Salvation Army is concerned with this drafting and believes it is not necessary to include or reference these words as ultimately the only entities affected by the Bill are those identified in Division 5 of the Bill.

- With respect to Division 5 of the Bill The Salvation Army observes the following:
 - There is no ability for an entity that was once registered with the ACNC to be reregistered if registration is revoked. It is recommended consideration is given to permitting the Commissioner to revoke a previous deregistration of

³ Source: <http://acnctaskforce.treasury.gov.au/content/Content.aspx?doc=reform.htm>, extracted 18/01/12. See also the Joint Media Release No.77 from The Hon. Bill Shorten MP and The Hon. Tanya Plibersek MP

an entity to permit the entity to be reregistered if they later become entitled again.

- The table in clause three (p10) does not include the statutory extension of charitable purpose that included non-profit child care and closed and contemplative religious orders. It is recommended this list is reviewed for completeness to ensure all sub-categories of relevant entity types are encapsulated.
- The Bill permits an entity to be registered under a number of subtypes, however in the Explanatory Materials it is stated:

*'However, tax concessions may require entities to only be registered for one type of subtype.'*⁴

Given the nature of the ACNC becoming a one-stop shop for the registration of an entity and this registration will automatically be accepted by the ATO, it will be necessary for the ACNC to take a pro-active role in advising and/or warning applicants of the implications of specific applications.

- With respect to Division 10 of the Bill, The Salvation Army submits the 10 business day requirement for an organisation to respond to a Show Cause Notice as to why their registration should not be revoked is clearly insufficient. At a minimum, the amount of time available to respond needs to be at least 28 days from receipt of the Show Cause Notice.
- The Salvation Army is concerned with the imposition of strict liability penalties in the Bill. An example of concern is in relation to the record keeping requirements in Division 50 and should an organisation have a fire or other natural disaster that destroys some of their physical papers, the organisation will be automatically subject to a 30 penalty unit fine with no ability to object or show no negligence was undertaken on their behalf. The Salvation Army recommends the strict penalty regime is removed and where power is given to the Commissioner of the ACNC to impose appropriate fines/penalties where necessary and with the ability to take into consideration mitigating circumstances.
- With respect to Division 55 of the Bill (p22), The Salvation Army submits the 4 month time frame to report to the ACNC after the end of a financial reporting period is too short. This requirement should be amended to a minimum the length of time of 5 months, and a maximum time of 6 months for reporting to the ACNC.

In addition subsection 55-25(2) is practically unachievable for large NFPs given the current drafting of the responsible individual definition. Accordingly this subsection should be redrafted to enable the relevant declaration to be signed by a nominated responsible individual.

⁴ Paragraph 1.9 of the Explanatory Materials of the Bill

- The Salvation Army accepts that from a Tier based classification process (p23), it is likely to be classified as 'large' regardless of the criteria used. However, The Salvation Army wishes to comment on the basis on which the tiers are being proposed. The Salvation Army is not of the view the only criteria that should be used to determine tier classification is dollar value of annual turnover and Deductible Gift Recipient status. There are other factors that are relevant, for example, does an organisation receive Government funding. This view was also included in the Final Report – Scoping Study for a National Not-For-Profit Regulator, April 2011.
- With respect to audit requirements, The Salvation Army is already subject to both internal and external audits. The Salvation Army is concerned however about the extremely prescriptive auditor requirements/obligations and the potential impact this will have on NFP organisations that are significantly smaller than The Salvation Army. The Salvation Army is concerned that in the future only large accounting firms will offer auditing services to NFPs and this will result in significantly higher administration costs for these organisations for little perceived benefit.
- With respect to Division 100 and the ACNC Register, The Salvation Army recommends the requirement to 'register' each and every responsible individual of an organisation is amended and one responsible individual is nominated in a manner similar to a Public Officer for income tax purposes and companies.
- The Salvation Army is concerned with the basis from which a 'warning' can be issued. Subsection 120-200 (p40) permits the Commissioner to issue a warning if he/she has reasonable grounds to believe there has been misconduct or mismanagement in the administration of a registered entity. The Salvation Army recommends this warning should only be able to be issued if the misconduct or mismanagement is 'serious', 'significant' or 'material'.
- It is noted in Part 7-1 (p79) of the Bill, Secrecy and whistleblower protection, the whistleblower protection rules have not been released. The Salvation Army recommends that if these provisions are included, protection for the organisation is also covered to ensure these provisions do not become avenues for frivolous and vexatious claims.
- It is noted that other parts of Chapter 7 are missing from the Bill. The Salvation Army is concerned with the omission of these components due to the imposed time constraints on this consultation process.
- Division 198 (p.94) permits regulations to be made by the Governor-General. The Salvation Army recommends the power to create regulations is also extended to the statutory office holder of Commissioner of the ACNC. This will enable the

Commissioner to move swiftly and flexibly in the fulfilment of the ACNC's purpose. It will also mean more of the ACNC functions can be moved from legislation to regulation which will enhance the ability for the ACNC to maintain relevance and flexibility.

- The Salvation Army, as previously discussed, is concerned the Bill does not contain the governance component that is proposed to commence from 1 July 2012. In the Governance Paper, it is stated that the ACNC will take over all ASIC governance arrangements relating to companies limited by guarantee (CLG). Effectively this will reduce ASIC to purely registering and deregistering a CLG. For this to occur, it is assumed the Bill will need to be substantially enlarged to encompass this information. This assumption seems at odds with Introduction to the Governance Paper which indicates 'high-level principles based mandatory requirements' will be created. It is the absence of this detail The Salvation Army is concerned with the Bill and ultimately its impact on the NFP sector.

If you have any questions in relation to this submission or would like any further clarification, please do not hesitate to contact us.

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