



Australian Charities and Not-for-profits Bill 2012

Submission by UnitingCare Australia

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1. Introduction

UnitingCare Australia is the Uniting Church's national body supporting community services and advocacy for children, young people, families, people with disabilities and older people. The Uniting Church's commitment to community services is an expression of the Christian vision of inclusion and equality of opportunity for all people and communities regardless of age, gender, sexuality, ability, class, colour, creed or cultural origin.

UnitingCare Australia takes up community service issues within the theological framework of the Uniting Church, particularly the Church's social justice perspectives. We develop and reflect on the policies and practices of the Uniting Church in community services. We pursue appropriate issues within the Uniting Church, with Government and the community sector, with the Australian community and with other parts of the church.

UnitingCare Australia represents the network of UnitingCare community services operating nationally across more than 1300 sites. The UnitingCare network is one of the largest providers of community services in Australia providing services to 2 million Australians each year, with annual turnover in excess of \$2 billion a year, employing 35,000 staff and 24,000 volunteers nationally.

UnitingCare provides services to children, young people and families, people dealing with deprivation and hardship, people with disabilities, Indigenous and older Australians living in urban, rural and remote communities. Services delivered by these agencies employ a holistic approach to supporting individuals and communities to access the resources, supports and opportunities needed to live a decent life, the building blocks of which are being able to access appropriate food, clothing and healthcare; safe and secure housing; meaningful work, education, rest and enjoyment; and the opportunity to participate in and contribute to communities. UnitingCare agencies, through their community linkages are also able to provide people of goodwill – either as individuals or as organisations – a vehicle to make their own contribution to improving the wellbeing of people and communities that are disadvantaged and vulnerable. We partner with governments, other organisations, communities and people of goodwill to ensure all people have access to the means and opportunity for a decent life.

UnitingCare Australia welcomes the opportunity to comment on the exposure draft of the Australian Charities and Not-for-profit Bill 2012 (ACNC Bill). This submission sets out our key concerns with the draft Bill, with specific reference to certain clauses which we believe reflect these concerns. The absence of comment on specific clauses should not be read as an endorsement of them.

2. Principles

The community services sector works within a regulatory environment which is often complex, fragmented and resource intense. It requires not-for-profit entities to navigate and comply with a plethora of regulations from all levels of government with differing reporting requirements. UnitingCare Australia believes that a national regulator needs to improve the current regulatory environment.

UnitingCare Australia has been very supportive of the Government's not-for-profit reform agenda however our support is based on the premise that the reforms acknowledge and support the diversity of this sector. Reforms that undermine the diversity of the sector or

which seek to create a new homogenous but artificial NFP sector for the purposes of simpler government administration or regulation is inconsistent with the principles and ideals set out under the National Compact and would undo the momentum and benefits of the reform agenda.

In this regard consideration of the ACNC Bill has been done against the following parameters:

- Will the implementation of the draft Bill negatively impact on the current diversity of the sector?
- Will the Uniting Church and/or its entities be required to change their structure or operations in order to meet the new compliance and/or reporting requirements? and
- Will the implementation of the draft Bill bring additional costs both in terms of immediate compliance and longer term administration?

It is our assessment that the draft Bill, if implemented, is likely to impact negatively on the current diversity of the sector and will bring additional costs both in terms of immediate compliance and longer term administration. We also have serious concerns that the Uniting Church and/or its entities will be required to change their structure or operations in order to meet the Bill's new compliance and reporting requirements. Such an outcome is unacceptable.

3. The Object of the Act and consequences

In our submission¹ to the Treasury on the Scoping study for a national not-for-profit regulator we stated that "the regulation of the not-for-profit sector must enhance and support the reputation and capacity of the organisations operating within it". As such we supported the position adopted in the scoping paper² that not-for-profit regulation should:

- place minimal costs on not-for-profits in order to allow better direction of not-for-profit resources to philanthropic objectives;
- remove current regulatory duplication;
- streamline requirements, including reporting, so as to provide consistency and minimise compliance costs;
- be simple, transparent and flexible;
- provide not-for-profit entities with certainty as to their rights and responsibilities; and
- be proportional to the size and complexity of not-for-profit entities, and to the public monies and risks associated with not-for-profit entities.

Accordingly we expected the current exposure draft of the ACNC Bill to reflect these agreed principles. In our assessment the Bill does not reflect the principles outlined in the Government's scoping paper on the introduction of a national NFP regulator, indeed the Bill in many ways retreats from the original position.

Our concern with the Bill commences with its very Object. The Object is critical in setting the context in which the provisions of an Act are applied. While we recognise that the promotion of public trust and confidence in not-for-profit entities is fundamental to the role of an NFP regulator, the current Object when read in conjunction with the extensive investigative and enforcement powers of the regulator leads one to conclude that there is currently little public

¹ UnitingCare Australia 2011, *Submission the Scoping study for a national not-for-profit regulator*, Canberra, p. 4

² The Treasury 2011, *Scoping study for a national not-for-profit regulator*, Consultation Paper, p. 7

confidence and trust in the NFP sector. Not only is this incorrect, it is inconsistent with the available evidence.

There have been many reviews of and surveys undertaken on the NFP sector and most have found that the community has great respect for the work done by NFPs, in particular those that provide support to the vulnerable and disadvantaged in our society. In fact the Productivity Commission in its report³ on the contribution of the not for profit sector stated that:

NFPs are generally viewed as more trustworthy than government or business, and hence, worthy of support

The sector recognises the importance in maintaining public trust and confidence and indeed supports activities which assist in this process. That said, we see no benefit in developing a new regulatory environment which assumes that the NFP sector has little regard for public trust and confidence; doing so will only invite the development of further unnecessary and administratively burdensome regulation on a sector which is already complying with a plethora of service specific and cross jurisdictional regulation.

Therefore the current Object of the ACNC Bill should be amended. We believe there is merit in considering both the form and content of the Object of the *Australian Securities and Investments Commission Act 2001* in the development of the new Object.

While the Object of the *Australian Securities and Investments Commission Act 2001* has been developed in the context of Corporations law, there are a number of elements which are readily transferable to the ACNC Bill. We think the Object of the Bill should cover the creation of the ACNC as well as stipulating the ACNC's functions and powers in a manner similar to that in the Object of the *Australian Securities and Investments Commission Act 2001*.

4 Governance and Reporting

One of the difficulties in assessing the merits or otherwise of the Bill is the absence of important details both within the Bill itself and with regard to other NFP related legislation. While we recognise that all current charities will be migrated to the new register the implications of: the statutory definition of Charities; any new governance arrangements for the NFP sector; the better targeting of concessions initiative and changes to "in Australia special conditions test"; may be significant and require detailed consideration and planning on the part of the Church and its entities. That said the nature and wording of the provisions in the Bill does give some insight into the underpinning assumptions of the Bill's operations and it is on these assumptions we wish to make the following comments.

Reading the Bill in conjunction with the ACNC Interim Taskforce's discussion paper (*Australian Charities and Not-for-profit: Implementation and design*) it becomes clear that the context of the Bill's development is founded on an idea that most of the NFP entities subject to the new regulatory framework have simple (standard) governance structures and a narrow or single purpose. While this assumption may be correct for many NFP entities, it is not the case for a large number of Church based entities. The implications of such an assumption on agencies within the Uniting Church would be significant both in terms regulatory compliance and reporting obligations.

³ Productivity Commission 2010, *Contribution of the Not-for-profit Sector*, Research Report, Canberra, p. 2

Fundamental to the Uniting Church's identity is its connectedness to its agencies and the community at large. This connectedness underscores the governance structure and philosophy of the Church. In the Church's foundation document *The Basis of Union* it states that:

The Uniting Church therefore so organises its life that locally, regionally and nationally government will be entrusted to representatives, men and women, bearing the gifts and graces with which God has endowed them for the building up of the Church. The Uniting Church is governed by a series of inter-related councils, each of which has its tasks and responsibilities in relation both to the Church and the world

In essence the governance arrangements in the Church and many of its entities are different in structure (rather than purpose) than that which may apply to organisations that are Companies Limited by Guarantee. This difference does not imply that the governance arrangements within and across the Uniting Church and its agencies are any better or worse than would apply elsewhere in the sector but rather have a form which may not lend themselves to the enforcement and reporting requirements as reflected in the Bill.

The key requirement we have in relation to this issue is that the governance and reporting requirements in the Bill need to cater to, rather than replace, those which apply across the Church and its entities.

If through the passing of this Bill the Uniting Church and its agencies are required to fundamentally change their governance and operational structures so as to comply with the proposed regulatory and reporting requirements we would argue that the Bill has failed in its purpose to regulate in a manner which recognises the diversity of the NFP sector. Such an outcome would be inconsistent with the principles and ideals set out under the National Compact.

A specific concern which may arise through this Bill is the potential for a significant increase in reporting requirements of a registered entity that may have a range of unincorporated entities within its legal structure. Again this issue may be particular to the Churches however there is concern about the capability and cost associated with the development of reporting processes particularly if the composite value of the various entities result in the registered entity meeting the definition of a large entity (ie for entities with revenue in excess of a \$1 million).

Linked to both the structure and governance arrangements of the Church and its entities is the potential for the loss of a particular concession because an entity has registered more than one subtype. According to the explanatory memorandum the *Income Tax Assessment Act* may in certain circumstances require an entity to be registered in only one category in order to receive a particular tax concession. There is no guidance in the explanatory memorandum on when a second subtype must be registered. The absence of this detail in the Bill and the fact that the Definition of Charity is yet to be finalised creates uncertainty particularly if the Definition of Charity legislation impacts on the concept of dominant purpose.

5. Reducing Duplication

There are two important elements in relation to the reduction of duplications which we believe needs more attention in the Bill. The first is requiring Commonwealth agencies to accept, both the content and form, of the corporate and governance information provided to the ACNC. The second relates to the efficient and effective operations of the ACNC itself.

While Section 2-10 references reducing duplication we believe the Bill should also include more detail on the obligation and responsibility of the Commonwealth and its agencies to harmonise and simplify the plethora of reporting requirements imposed upon the NFP sector. Binding Commonwealth agencies in this way is within the control of the Government and would be seen as an important signal to the sector as the Government continues a national push toward harmonisation of reporting and registration requirements applicable to NFPs.

In regards to the second element some guidance can be taken from the Object of the *Australian Securities and Investments Commission Act 2001*. In this Act the Object recognises the importance of ASIC's role in reducing business costs, and the efficiency and development of the economy. The Act places an obligation on ASIC to administer the laws effectively, with minimal procedural requirements. It also requires ASIC to receive, process and store, efficiently and quickly, the information given to it. The legislative obligation on ASIC to ensure that its own operations are efficient is important in shaping how it conducts its activities, particularly in respect to regulation it may develop. We see merit in having a similar provision for the ACNC in this Bill.

6 Other Issues

6.1 Powers of the ACNC

We are concerned with the extent of the powers available to the ACNC in relation to investigations. While we understand the need for the ACNC to be able to conduct investigations we are not convinced that powers are proportionate to its registration and de-registration function. We would assume that any complaint of serious misconduct (which is criminal in nature) would be investigated and prosecuted by the relevant police authority. Similarly, where breaches of tax laws occur we would expect that this would fall within the investigative powers of the ATO and police as appropriate. Further, in cases where breaches of workplace or service specific regulation (e.g Aged Care) occur, it is our expectation that the relevant Government authority would undertake the appropriate investigation of that matter.

In this regard it would be prudent to be more explicit about the relationship between the ACNC and other investigative authorities, particularly in circumstances where more than one entity may have grounds to conduct an investigation.

6.2 Revoking Registration

Section 10-55 (1) (d) identifies insolvency or the likelihood of becoming insolvent at some future time as a reason to revoke an entity's registration. Some further shaping of this power needs to be undertaken particularly in relation to the definition of "likelihood".

6.3 Show Cause

Section 10-62 enables the Commissioner to issue a **show cause** notice in writing. We believe that providing the entity with only 10 days to respond is insufficient and as such recommend that at least 28 days be provided.

6.4 Staff and Consultants

Section 163-5 states that staff assisting the Commissioner are made available for the purpose by the Commissioner of Taxation. The Government is well aware of the Sector's concerns about the ongoing link between the ACNC and the ATO. While we understand that the ATO's operational relationship to the ACNC is to provide it "back of house" support, we

would encourage, if legally allowable, the removal of the reference to the ATO from this provision.

7. The way forward

UnitingCare Australia acknowledges and appreciates the Government's commitment to the NFP reform agenda. Indeed we regard effort of the Treasury in trying to meet the 1 July start date for the ACNC as a demonstration of this commitment. However, there are a number of significant gaps in the Bill particularly in relation to the governance arrangements and these gaps, coupled with other still outstanding NFP related legislation means that we are not in a position to fully understand consequences, intended or otherwise, of this Bill on UnitingCare agencies.

We believe the priority now is for the Government and its relevant agencies (Treasury and the ACNC Taskforce) to begin working directly with us and the other affected Churches to identify how best to develop appropriate regulatory and reporting requirements which cater to the structures and governance arrangements within Churches and their various entities. The timeline to work through these issues is in our view incompatible with launching the ACNC on 1 July 2012. Accordingly we recommend that the introduction of the Bill be delayed until there is resolution of the reporting and governance arrangements as they apply to the Churches and their various entities. Any delay in the commencement of the ACNC should be minimised and should be limited to no more than one year.

Finally, while we believe that delaying the implementation of the ACNC is prudent, it is important to recognise that the final governance and reporting arrangements may still require a significant period of transition for the Churches and their entities. The transition period will very much be dependent upon what, if any, changes are needed to our structures and reporting arrangements.

8. Conclusion

In previous correspondence, discussions and submissions we have made clear that our support for a NFP Regulator was based on the regulator acting in a manner which enhances the sector by reducing the red tape and administrative burden on the sector while ensuring that the sector operates in a transparent and accountable manner for the benefit of the community. It is our assessment that the draft Bill does not achieve this. If implemented the Bill will likely have a negative impact on the current diversity of the sector and impose additional costs, both in terms of immediate compliance and longer term administration. We also have serious concerns that the Uniting Church and/or its entities will be required to change their structures or operations in order to meet the Bill's new compliance and reporting requirements.

This Bill needs significant work and as such we recommend that the introduction of the Bill be delayed. We fully expect this to result in a delay in the commencement of the ACNC but we believe that the delay should be limited to no more than one year.