

28 August 2012

The Australian Council of Social Service is the peak body of the community services and welfare sector and the national voice for people affected by poverty and inequality. Our membership represents over 3000 organisations plus additional individuals through the combined network of the Councils of Social Service. ACOSS' vision is for a fair, inclusive and sustainable Australia where all individuals and communities can participate in and benefit from social and economic life.

The establishment of a national regulator for the community sector has long been championed by ACOSS. We welcomed the Government's commitment to this reform in 2011 and have worked closely with the Government and our members towards its establishment. There have been significant improvements to the Bill over that time. Our recommendations in this submission relate to further improvements to strengthen the ACNC Bill.

We strongly support the ACNC opening on 1 October. We acknowledge there is still significant work to be done, not least in relation to the governance standards, but we see that work as best undertaken once the ACNC is fully enabled. We do not support recommendations for further delay.

1. Key improvements

We acknowledge in particular significant improvements to the legislative drafting of the ACNC Bill since the first exposure draft in November 2011. In this submission we identify those improvements and point to the remaining areas where we would like to see further improvement before these bills are passed.

i. Reducing red tape as a central objective

ACOSS welcomes and strongly supports the inclusion of a new Object in the Bill following the House of Representatives Economics Committee report, identifying the reduction of red tape as a central objective. ACOSS support for the creation of a national regulator has been driven by our desire to improve the effectiveness of the regulation of the sector, and to remove unnecessary regulatory burdens, of which there are currently many. The removal of red tape needs to be a core objective of the Act to ensure that it is a key driver of action taken by the ACNC right across the exercise of its powers and functions.

ii. Inclusion of stated mechanisms to ensure procedural fairness

The inclusion of specified mechanisms to ensure procedural fairness for organisations in relation to the exercise of the ACNC's powers is extremely welcome. This is another area of long-standing concern for ACOSS and our members and we welcome the inclusion of requirements, including:

- that the Commissioner show cause for actions on charities;
- the provision of written notices of decisions;
- allowing 14 days for an entity to respond following the ACNC's statement of a problem within an organisation (except in cases where the public interest dictates otherwise);
- the time lag between enforcement action and hearings being listed on the ACN register; and
- the removal of information on the ACNC register after 5 years (except in cases where the public interest dictates otherwise).

iii. Mandatory review

We welcome the inclusion of a mandatory review of the Bill after five years.

2. Areas of ongoing concern

i. Giving effect to the principle of Independence of the NFP sector

Independence is a core principle of the NFP sector. Independence of the sector is acknowledged both in the objects of the ACNC Bill and in the Assistant Treasurer, David Bradbury's second reading of the Bill[1], in which he states that:

The government is dedicated to supporting a strong, vibrant, diverse and independent NFP sector.

We believe that a new national regulator must protect this independence, which allows NFP entities to make their own decisions on how to best meet their mission without undue influence and control from the Commonwealth Government and its agencies. This principle must be applied in terms preserving the sector's diversity of structure, governance arrangements and activities, in particular public advocacy.

Preserving the independence of NFP entities can be challenging where, typically, a Government monopsony exists. The Government monopsony in social service delivery limits the capacity of NFP entities to conduct genuine contract negotiations with the Government. This has led to both an increase in the reporting and administrative

obligations placed on NFP entities as well as terms and conditions which have limited the capacity of entities to undertake advocacy (commonly referred to as a “gag” clauses).

One of the first NFP reforms introduced by the Labor Government in 2008 was the removal of “gag” clauses from Commonwealth Government funding agreements. We believe that this Bill should be strengthened to ensure that future Governments are restricted in their capacity to limit or undermine the independence of the NFP sector through the re-introduction “gag’ clauses.

Recommendation: To better protect the independence of the NFP sector we suggest an amendment to the ACNC Bill with wording to the following effect:

Subdivision 205-C – Other concepts

Insert 205-45 Independence of the NFP Sector: Independence of the sector means that NFP entities are autonomous entities subject to the direction and control of their Boards or Governance body(ies). The independence of an NFP entity, including in relation to advocacy, cannot be set aside, limited or controlled by condition of direct or indirect Government funding.

ii. Exemptions from reporting requirements

In our submission to the House of Representatives Economics Committee we noted concern at the proposal for express exemptions in relation to basic religious charities and private ancillary funds (PAF). We note that the introduction of the Bill includes regulation-making powers that aim to protect the privacy of individual donors particularly in relation to PAFs. We further understand that the Government intends to make a regulation to ensure the privacy of donors and to ensure that the ACN Commissioner cannot override it.

This would effectively remove a key area of the Commissioner’s discretion without a clear policy context, particularly given the existing discretion on the Commissioner not to disclose information under particular circumstances. We are concerned by a provision that removes the Commissioner’s discretion; and at the lack of a clear statement of policy intent to justify this provision.

Given a year of policy development towards this reform in the interests of improved accountability in this sector, and recognising the Commissioner’s discretion over what information is released on the public register, the sudden exclusion of this particular area of philanthropy seems unnecessary and unjustified.

Recommendation: We reiterate our recommendation to the House of Representatives Economics Committee that the Bill include a requirement of a published purpose of any exemptions as a matter of good policy.

iii. Development of the governance standards from which the ACNC's powers flow

The establishment of the ACNC has taken the focus of our policy and advocacy attention to date, but it is the governance standards upon which the regulators powers will turn that are one of the most important elements of this reform. The lack of certainty and clarity of safeguards in relation to their establishment and implementation remains the area of greatest concern among ACOSS members. Ideally we would have liked to see the inclusion of the governance standards within the legislative framework that establishes the ACNC. However, the release of the first exposure draft revealed a significant gulf between the policy intent as drafted and the sector's expectations of a principles-based, minimum standards model on good governance. Given the short timeframe to the establishment of the ACNC, we agreed with the decision to remove the governance standards from the Bill. Consequently, as the policy framework to establish the ACNC itself has remained a priority in our work, we have not had the opportunity to work with our networks in the sector to develop the models that we would propose to inform this critical area.

We note the inclusion in the current Explanatory Materials of the expectation 'to make the standards principle-based, specifying the outcome to be achieved, rather than detailing how an entity must meet the standards in its particular situation'. Further improvements in this area would set requirements for adequate consultation with the sector in defining governance standards; and provide safeguards to protect those standards once established. In line with our recommendations on this issue in previous submissions on the ACNC Bill, we again set out the elements we regard as central to establishing and safeguarding governance standards for charities and NFP organisations.

The governance standards:

- need to be set through adequate consultation with the sector and protected against change without similarly adequate consultation with the sector;
- must not impose unfair or burdensome provisions on sector organisations;
- must not impose provisions which would undermine the advocacy abilities of charities, noting that advocacy is a legitimate charitable purpose as defined by the High Court's decision in *Aidwatch*; and
- must support and sustain the independence of charities and NFP organisations, in line with the recognition of the independence of the sector as one of the Bill's core objects.

Enshrining the governance and external conduct standards in regulation means that, as disallowable instruments, they are still susceptible to being disallowed by *either* house of parliament in the future. There are several options that would give greater certainty for the sector and safeguards the value of a good consultative process in setting the governance standards initially.

Option 1: Put Governance Standards in a Schedule rather than in regulations

There is precedent for having substantial Codes as Schedules in an Act. The National Consumer Credit Protection Act 2009 has the National Credit Code as a schedule, and the Competition and Consumer Act 2010 has the Australian Consumer Law (including the Competition Code). The Codes in both these Acts are formed by both the Schedule and the regulations under the Act. Therefore we argue that the governance standards should exist either in the schedule only or in both a schedule and regulation. However, the requirement that an amendment to governance standards in a schedule must be made by parliament may safeguard the eventual governance standards at the cost of flexibility, given that this evolving system may warrant changes to governance standards over time. Accordingly, Option 2 may be preferable.

Option 2: Specify certain content of governance standards

We reiterate our position that it is appropriate to set high level directions about the form and process for establishing the governance standards. We recommended to the House of Representatives Economics Committee:

That the Bill include a requirement on the regulation-making power to conduct a certain amount of negotiations in good faith with the sector with the aim of producing a mutually agreed set of governance standards; and

That the Bill require governance standards to preserve the independence of charities and not-for-profit organisations to decide how to run themselves, so long as those decisions do not infringe the ACNC's capacity to operate and fulfil its functions.¹

In that submission we cited the example of Consumer Affairs Victoria, which allows for the establishment of a rule that deals with a particular issue, but leaves it up to the not-for-profit organisation how that is done.

A further specification in relation to this recommendation would be to add a clause to the Bill, at provision 45-10, along the following lines:

¹ ACOSS Submission to House of Representatives Economics Committee Inquiry into the Australian Charities and Not-for-profits Commission Exposure Draft Bills, July 2012 at p. 4.

(6) However, the governance standards must deal only with the minimum standards required to meet the objects of the Act and must:

- (a) Be principle-based, specifying the outcome to be achieved, rather than detailing how an entity must meet the standards, in its particular situation;
- (b) be in proportion to the size of the organisation and the level of financial, organisational and reputational risk;
- (c) preserve the independence of charities and not-for-profit organisations to decide how to run themselves, so long as those decisions do not infringe the ACNC's capacity to operate and fulfill its functions;
- (d) not prevent or constrain not-for-profit organisations from carrying out advocacy functions in pursuit of their purpose; and
- (e) where possible, not duplicate any regulatory requirement already in place.

iv. Sector Codes of Conduct

Finally, we note the Explanatory Memorandum at s5.38 and 5.39 talks about the ACNC's ability to endorse other sector-developed codes of conduct. We welcome this intention and would support a more explicit empowerment of sector codes within the Bill, such as the following:

The ACNC Commissioner can endorse codes of conduct, for entities who are members of certain bodies, as meeting the requirements of the governance standards and a breach of that code would be a breach of the governance standards of the ACNC Bill.

For further information about this submission, please contact